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Conspiring to redefine conspiracy to defraud

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Company directors who design and pursue a lawful transaction designed to remove from the company hefty future obligations do not conspire to defraud those who might be financially affected by their doing so.

Furthermore, the High Court will not allow the exceptional procedure for preferring voluntary bills of indictment to be used when a prosecuting authority repeatedly changes the way it puts its case.

Those were the conclusions of Lord Justice Fulford sitting as a High Court judge in Serious Fraud Office v Evans and others following an application by the SFO for a voluntary bill of indictment after Mr Justice Hickinbottom dismissed a charge of conspiracy to defraud in February 2014 at the Crown Court at Cardiff.

Fulford LJ found that Hickinbottom J had made no material error of law in Evans and Others [2014] in dismissing charges brought by the SFO against two company directors, three of their solicitors and Queen's Counsel. The particular transaction involved Wales' biggest opencast mining company, Celtic Energy Ltd, selling freehold open cast mining sites to a British Virgin Islands company ('Oak'). The aim of the transaction was to transfer away from Celtic responsibility for the £170m cost of restoring the opencast sites, for which provision in excess of £70m had been made in Celtic's accounts.

The SFO failed in an attempt to argue that the sale of the freeholds did not actually transfer the restoration liabilities away from Celtic. It further failed to establish that the defendants had sought to defraud the enforcing authorities into believing that the transfer had removed the restoration liabilities.

The SFO then 'very substantially' changed its case. The core argument advanced by the SFO was that those who dishonestly agree to act to the prejudice of others enter into a conspiracy to defraud, even if both the object of the agreement and the means by which they act pursuant to it are entirely lawful.

Before Fulford LJ the SFO again very significantly changed its case, prompting the Court to say:

This has not involved a simple and understandable change of heart by the prosecution. Instead, it reveals, as Hickinbottom J mildly expressed the position, that the Crown has not approached this case with "particular analytical precision". I am unpersuaded that it would be in the interests of justice to permit the prosecution to use this exceptional procedure to reformulate the legal basis of the charge or charges when the case should have been presented on the current proposed legal foundations at the time the case was sent for trial. I am reinforced in that conclusion by the repeat nature of the shifts in the prosecution's stance in this regard, which have operated to the real prejudice of the accused. One of the consequences of seeking a voluntary bill of indictment is that nearly a year after the submissions on the dismissal application concluded, the court is being asked to decide whether the prosecution can conduct a trial against the accused on a wholly new legal basis.

It is unsurprising that Lord Justice Fulford found that Mr Justice Hickinbottom had made no material error of law. That the pursuit of financial advantage through lawful means might amount to a criminal conspiracy is naturally counter-intuitive. Beyond that, commerce depends on such behaviour and the fiduciary obligations of directors require it. What is more, it is difficult to comprehend how one can act dishonestly whilst conducting oneself lawfully. As the Hickinbottom J noted, one cannot act dishonestly by doing that which one is entitled to do.

That was not, however, the only flaw in the SFO's case. The SFO alleged that the right of the authorities to recover the costs of any restoration had been prejudiced. The difficulty with that as a basis for the prosecution case, the Judge found, was that a dishonest agreement is only criminalised where there is at least the potential to interfere with a victim's proprietary rights. On the facts of this case, the rights of the enforcing authorities were contingent and unsecured. No proprietary interest therefore existed. None could be affected by the defendants' agreement.

What should not be overlooked is that the directors were able to make commercial decisions, and to benefit their company, in the way that they did by virtue of decisions made by the enforcing authorities when Celtic was granted its licence to undertake the work.

As the Crown Court set out, it would have been open to the authorities to have imposed conditions on Celtic's licences. Conditions could have caused Celtic to retain the restoration liabilities after any sale of the freeholds. They could also have prevented Celtic from selling the sites without the authorities' approval. The SFO's attempt to prosecute was, in essence, an attempt to evade the consequences of the 'important commercial decision' made by the authorities.

Lord Justice Fulford's analysis of when a voluntary bill might properly be preferred is a welcome reinforcement of the fact that the procedure is exceptional.

Patrick Harrington QC and Ben Douglas-Jones, instructed by Philip Williams and Emma Harris of Blackfords, represented the first defendant with John de Waal QC. Andrew Johnson is a barrister specialising in white collar fraud and regulatory law.

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