IN THE CROWN COURT IN CARDIFF T20137190

Cardiff Crown Court
King Edward VII Avenue
Cathays Park
Cardiff CF10 3PG

Date: 18/02/2014

Before:

MR JUSTICE HICKINBOTTOM

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v

(1) ERIC EVANS
(2) DAVID ALAN WHITELEY
(3) FRANCES BODMAN
(4) STEPHEN DAVIES
(5) RICHARD WALTERS
(6) LEIGHTON HUMPHREYS

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Michael Parroy QC, David Forsdick and **Allison Clare**
(instructed by **the Serious Fraud Office**) for **the Crown**
Patrick Harrington QC, John de Waal QC and **Benjamin Douglas-Jones**
(instructed by **Blackfords LLP**) for **Eric Evans**
David Hackett QC and **David Hassall**
(instructed by **Morgans Criminal Law**) for **David Alan Whiteley**
Henry Blaxland QC and **Neil Davis** (instructed by **Glaisyers**) for **Frances Bodman**
Tim Barnes QC, Timothy Morshead QC and **Guy Ladenburg**
(instructed by **Speechley Bircham**) for **Stephen Davies**
Jonathan Barnard (instructed by **Hugh James**) for **Richard Walters**
John Charles Rees QC and **Jonathan Rees**
(instructed by **De Maids**) for **Leighton Humphreys**

Hearing dates: 16-19 December 2013, and 10 February 2014

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Approved Ruling

Mr Justice Hickinbottom:

Introduction

1. Each of the Defendants faces a single charge of conspiracy to defraud contrary to common law, which each now seeks to dismiss.

2. The common law offence of conspiracy to defraud has been described in Parliament as "repellent" (Hansard HC, 12 June 2006, col 561); and the Law Commission has proffered the opinion that it is "indefensible" and "so wide that it offers little guidance on the difference between fraudulent and lawful conduct", and has recommended its abolition (see Law Commission: Fraud (Law Com No 276) (2002) Cm 5560 ("the Law Commission 2002 Report")), at paragraphs 1.4, 1.6 and 9.6). These applications raise important issues concerning the scope of the offence, which require peering into its darkest corners. May I at the outset thank Counsel and those instructing them for their diligent and much appreciated efforts in attempting to provide some light.

3. The particulars of offence on which the Crown wishes to proceed are in the following terms:

> "Eric Evans, David Alan Whiteley, Frances Bodman, Stephen Davies, Richard Walters, Leighton Humphreys, between the 1st of January 2010 and the 31st December 2010, conspired together to defraud Neath Port Talbot County Borough Council, Bridgend County Borough Council and Powys County Council ("the Mineral Planning Authorities") and the Coal Authority by deliberately and dishonestly prejudicing their ability effectively to enforce restoration obligations relating to open cast mining at sites known as East Pit, Nant Helen (Nant Gyrlais), Selar and Margam (Park Slip West and Kenfig) situated in South Wales by:
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> (i) establishing companies registered in the British Virgin Islands, in the ultimate beneficial ownership of Eric Evans and David Alan Whiteley; and
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> (ii) transferring the freehold title in the land containing and surrounding the open case coal mining sites known as East Pit, Nant Helen (Nant Gyrlais), Selar and Margam (Park Slip West and Kenfig) situated in South Wales from Celtic Energy to those companies registered in the British Virgin Islands;
>
> thereby intending that the financial liability to restore those open cast coal mining sites to open countryside and/or agricultural use would pass from Celtic Energy Ltd to those companies in the British Virgin Islands, thereby releasing some of the money set aside in Celtic Energy Ltd's annual accounts to restore those open cast coal mining sites, and allowing some of that money to benefit the Defendants personally."

These differ, slightly, from the particulars upon which the Defendants were originally charged and sent to this court: for example, dates of the conspiracy have been added, as have the words "… and dishonestly…" and the final phrase, "… and allowing some of that money to benefit the Defendants personally". The particulars of the charge are required to set out clearly and unambiguously the case the Defendants have to meet (see R v K [2004] EWCA Crim 2685; and R v Goldshield Group plc [2008] UKHL 17; [2009] 1 WLR 458 at [18]); and in an application to dismiss the charge such as this, they are of especial importance. However, there is no material difference between the original particulars upon which the Defendants were charged, and those upon which the Crown now wishes to proceed. If this prosecution were to go ahead, I would allow it to proceed on the basis of particulars drafted by Mr Michael Parroy QC for the Crown; and those are therefore the relevant particulars for the purposes of these applications.

4. These applications to dismiss the charge are made, prior to arraignment, under the provisions of paragraph 2(1) of Schedule 3 to the Crime and Disorder Act 1998. By paragraph 2(2), the court must dismiss the charge against any defendant "if it appears to the court that the evidence against the applicant would not be sufficient for him to be properly convicted". In that respect, this is therefore akin to an application of no case to answer, and the criteria to be applied are broadly similar (see R v X [1989] Crim LR 726).

Factual Background

5. The charge arose in the following circumstances.

6. The main business of Celtic Energy Limited ("Celtic") is the winning and working of coal by open cast mining. It is the leading coal mining company in Wales, producing over 1m tonnes of coal a year. Its ultimate parent company is Celtic Mining Group Limited, of which Richard Walters is the sole beneficial owner. At all material times, Mr Walters was the Managing Director of Celtic. Leighton Humphreys was its Finance Director. There was a third director, DHM Consultancy Limited, which, as I understand it, is owned and controlled by friends and family of Mr Walters but which the prosecution does not seek to implicate in the conspiracy.

7. Celtic was incorporated on 28 November 1994 as South Wales Regional Coal Company Limited, changing to its current name on 3 January 1995. It was formed with the purpose of entering into a restructuring scheme with the Secretary of State as part of the programme of reprivatisation of the coal industry which took place at the end of 1994. On 31 December 1994, under such a scheme, the freehold title of a number of sites in South Wales was transferred to the company, for a price of about £100m; some sites with current licenses and mining operations, and some with neither. The sites included the four sites relevant to these proceedings, namely East Pit, Nant Helen (Nant Gyrlais), Selar and Margam (Park Slip West and Kenfig). East Pit and Selar fall within the local authority boundaries of Neath Port Talbot County Borough Council ("NPT"), Margam across NPT and the area covered by Bridgend County Borough Council, and Nant Helen falls within the boundaries of Powys County Council.

8. Celtic owned the freehold of the sites; but, under the relevant statutory provisions – which I shall need to consider later in this ruling – mining took place under various

leases and licences from the freehold owner of the coal (i.e. the Coal Authority), typically lasting 99 years; and under various planning permissions granted by the relevant local authorities as mining planning authorities ("MPAs"), which grants were time limited and much shorter than the terms of the leases and licences. Those arrangements required Celtic to restore the land to countryside and agricultural use, once the mining was complete. As I understand it, Celtic have mined the sites purchased in 1994, and restored them, save for the four specific sites I have identified.

9. The exercise of restoring those four sites is potentially enormous, involving tens of millions of tons of infill – including a substantial proportion from offsite – as well as soil topping, finishing and aftercare, at a cost of tens of millions of pounds.

10. By its very nature, restoration generally cannot be made until after mining of the relevant part of an open cast mine is complete. Some of the liabilities to which I have referred were secured by sums of money required to be paid into escrow accounts that could, if required, be used to fund restoration works. However, the escrow moneys were nowhere near sufficient to pay for all of the works at all of the remaining sites. For example, for East Pit, the estimated costs of restoration are £115m, whereas the amount held in the fully paid-up escrow account is only £2m-2.5m. For Margam, the restoration costs are £57m, but the money held in the escrow account is only £5.5m. I shall consider the reasons for such a short-fall in due course; but, as a result of it, provision was made in Celtic's annual accounts for its future contingent liability for restoration costs. The relevant operating provision for the year ended 31 March 2010 was £136m, note 16 to those accounts stating that that sum "include[d] provisions for restoration and rehabilitation of open cast sites…" and covered the cash flows necessary for the "reinstatement of soil excavation and of surface restoration".

11. As mining progressed, the potential future benefits of the licences and permissions dwindled – particularly as national policy changed with the result that open cast mining was not generally encouraged – and the liability for restoration costs became more imminent. With a view to mitigating the cost of those obligations, Celtic investigated other possible uses for the sites, such as land fill and deep mining, but without success.

12. They also sought planning permission to extend the open cast operations at various mines. In respect of Margam, under the provisions of the planning permission, coaling was to cease in 2008. In May 2007, Celtic applied for planning permission to extend the site, but the application was refused by the relevant MPA and, on appeal, by the Welsh Ministers. A challenge to that refusal by way of judicial review was dismissed in July 2010. Coaling in fact ceased at Margam on 31 August 2008. The other three sites were in operation in 2010, and indeed are still operative.

13. By early 2010, the financial position of Celtic was not good. In the year to March 2010, on a turnover of £67.6m, it made a loss of £7.3m. It had failed to identify other uses to which the sites could be put that might mitigate the potential restoration costs; and the failure of the application for planning permission to extend Margam meant that it could not rely on working such an extended site to fund the costs of restoration as and when the obligation to restore became due. There is evidence that Celtic met NPT on 3 March 2010, when NPT's Head of Environment appears to have recognised the need to investigate "innovative restoration strategies" because it was open to

Celtic to "go bust and walk away from the restoration task" (Celtic Board Minutes 5 March 2010, page 1).

14. Celtic's legal advisers were M & A Solicitors. Eric Evans was the partner principally responsible for their work. David Whiteley was the senior partner. Frances Bodman was an assistant solicitor, who worked for Mr Evans.

15. Mr Evans brought his mind to bear on Celtic's problem. As he saw it, the restoration obligations largely – and, possibly, wholly – ran with the freehold. In late 2009 and early 2010, he devised a scheme (referred to as "the Big Picture") whereby Celtic, whilst retaining control of the sites and coal mining activity on them (including the leases and licences), would transfer the freeholds of the mining sites to a third party, and, with them, the obligations to restore. If and insofar as those obligations on Celtic were transferred, there would be no need for the provision which Celtic had made, which could consequently be reduced, releasing money in the company for, amongst other things, effective distribution. The whole purpose of the proposed scheme was to transfer the restoration obligations away from Celtic; and it seems that all involved in advising and implementing the scheme knew that its object was to enable Celtic to avoid, or at least substantially reduce, the costs of complying with the restoration obligations under the grants of planning permission, leases and licences under which the mining had taken place.

16. In the course of this ruling, I will need to deal in some detail as to how the Crown puts its case – including the critical elements of the charge which the Defendants now seek to dismiss – but it will be helpful to deal with two matters now which, the Crown insists, were in practice essential for the scheme to succeed.

17. First, the prosecution say that it was a vital element in the conspiracy that British Virgin Islands ("BVI") companies were used to purchase the freeholds. Given the prospective liabilities attaching to the freeholds and the inability of Celtic to find a profitable future use for the sites, no one would have wished to purchase the freeholds except with an enormous reverse premium which Celtic would be unwilling and possibly unable to pay, and which would in any event have defeated the whole purpose of the scheme. Therefore, it was proposed to use BVI companies, owned and controlled by those who controlled Celtic and advisers on their behalf, to buy the sites. The financial worth of the BVI companies would be nil or, at most, only any money that the conspirators chose to put into it. It was never intended that the transactions be at arms-length, or on normal commercial terms. However, those involved in the conspiracy wished to create the impression that the buyer of the sites and attendant restoration obligations was an arms-length purchaser for commercial value, and that the sale was done in the normal course of commercial business. That was the impression they wished to give the commercial world at large, including the MPAs and the Coal Authority. The company laws of the BVI prize confidentiality, privacy and indeed secrecy. Using BVI companies would make it difficult for anyone to investigate the dealings, true ownership and real financial worth of the purchasing company.

18. In due course, a BVI company called Oak Regeneration Inc ("Oak") was incorporated and, with its various BVI subsidiaries also incorporated for the purpose, identified as the purchasing vehicle. The registered agent, sole director and sole shareholder of Oak was a BVI service company called Fidelity Management Services Limited

("Fidelity"). Oak was created by Mr Evans; and, by a Declaration of Trust dated 6 September 2010, Fidelity acknowledged that it held the shares of Oak as nominee for Mr Evans and Mr Whiteley jointly, although there is evidence that they were in fact operating under the direction of Mr Walters and Mr Humphreys. In the course of this ruling, unless it is necessary to distinguish between Oak and its various subsidiaries, I shall use the term "Oak" to cover them all.

19. The Crown says that all four men, and Ms Bodman, knew full well that the sale to Oak was a transaction neither at arms-length nor in the normal course of business nor on normal commercial terms, Oak taking on land worth perhaps £10m after restoration but with prospective restoration obligations estimated at over £100m, at a reverse premium of only £1.25m. Indeed, the Crown relies on evidence of documents being produced by the solicitor Defendants for use in the BVI which, falsely, indicated that the BVI company was truly independent of Celtic and was buying the sites at proper value with a view to developing them with alternative uses in the future. The evidence is that the conspirators entered into a confidentiality agreement on 16 June 2010, thereafter going to great lengths of subterfuge to keep the true nature of the transaction secret, and leave a paper trail for those who might later investigate it indicating the transaction was a normal arms-length commercial transaction with an independent company; and putting distance between themselves (notably Mr Walters and Mr Humphreys, and their company Celtic) and the BVI company. For example:

    i) Starting with a letter dated 17 June 2010, a paper trail was set up which suggested a company called Celtic Environmental Developments Limited ("CED") was instrumental in arranging the introduction of Celtic to Oak; but CED was in fact owned by Mr Walters (80%) and Mr Humphreys (20%) and, of course, no introduction was necessary because Oak was their creation. The initial letter purportedly from CED to Celtic referred to a percentage finders' fee; and CED was to be one of the vehicles by which the conspirators were directly to derive profit from the scheme.

    ii) A letter on Oak notepaper dated 18 June 2010, and signed by an anonymous director, making a purported initial approach to Celtic expressing interest in purchasing the sites. The evidence is that this was drafted by Ms Bodman, who appears to have sent a draft of it to Mr Humphreys on 17 June.

    iii) Celtic were not legally restrained from selling the freeholds, nor were they under any legal obligation to obtain the authorities' consent to (or even notify the authorities of) any such sale. In the event, at the time the MPAs and the Coal Authority were entirely unaware of the sale of the freeholds to Oak. However, after the sale, the conspirators were concerned that the MPAs would find out the true nature of the transaction, and seek to set it aside as a sham. In November 2010 – of course, some weeks after the sale of the freeholds to Oak had taken effect – Ms Bodman wrote a document entitled "Strategy Paper Oak Regeneration", which urged that Oak be seen to be doing something, as:

        > "If Oak sits back and does nothing this will simply bring forward the day when people (particularly the local authorities) begin to scrutinise the transaction.

> In the event that [NPT] try to communicate with Oak and receive no response they are more likely to seek external advice which simply increases the chances of a legal challenge sooner rather than later….
>
> In order to establish the two companies as separate entities and avoid unnecessary confusion the directors of [Celtic] need to step back from any dealings with the land and not give the impression to the [MPAs] or anyone else that they are at liberty to make decisions in relation to the land (particularly Margam).
>
> If Celtic continues to deal with Margam as if the transaction had not happened this heightens the risk of the transaction being challenged as a sham. The opinion from [Mr Davies] is on the basis of an arms-length transaction and this must be maintained."

Thus, at a meeting with NPT on 13 December 2010, Mr Evans stated that he acted as solicitor for Oak, but maintained the fiction that the sale was at arms-length.

20. The Crown says that all of this was a charade: the sale was an entirely dishonest and covert device by which Celtic transferred the freeholds of the sites to another company, established for the purpose, which they owned and controlled – but which was financially worth neither powder nor shot, and which was in any event difficult in practice to pursue – with the sole purpose of avoiding the restoration obligations upon Celtic whilst leading those outside the conspiracy to believe that Oak was an independent company purchasing the freehold sites in the normal course of business. Although the MPAs and the Coal Authority knew nothing of the sale of the freeholds to Oak before the deal was completed, after the event they were positively misled as to the nature of the deal which, they were led to believe, was at arms-length and in the normal course of business.

21. In the minds of Mr Walters, Mr Humphreys and their solicitors, the effectiveness of the sale in transferring the restoration obligations away from Celtic was less than certain. Consequently, a second requirement of the scheme, says the Crown, was a suitable legal advice, from someone whose opinion would be taken as having sufficient authority, that the restoration obligations would indeed be transferred. In particular, it was thought that that would be required by Celtic's auditors, before they would agree to reduce the provision against the future restoration obligations and still certify the accounts, which was essential to enable moneys to be released from that provision for effective distribution.

22. M & A Solicitors first approached Ian Winter QC. However, he advised that the scheme would not work, in that the restoration liabilities would remain with Celtic.

23. In April 2010, Mr Evans approached Stephen Davies QC for an advice; but, following a conference, in a written opinion dated 24 June 2010, Mr Davies too concluded (at paragraph 40 of the opinion):

> "Whilst the freehold titles in the Sites could be transferred pursuant to the Proposal, Celtic would remain liable under the Leases to fulfil all of its covenants, quite apart from the remediation requirements under the Town and Country Planning Act 1990…".

In other words, even if the freeholds were transferred to Oak, Celtic would remain liable for all the restoration obligations. Mr Davies consequently concluded that the proposal was not viable (paragraph 41).

24. However, later and after an up-front fee of £250,000 had been agreed with Mr Davies and indeed paid to him at the end of June, he produced a second advice. On its face, that opinion was written on the basis that the transfer to Oak was an arms-length transaction (see paragraph 40), the opinion indicating that Mr Davies' instructions were that Oak intended to pursue the undoubtedly high-risk but genuinely commercial strategy of seeking alternative uses for the sites, including wind farms and further coal mining activities (paragraphs 3-4). I should emphasise that Mr Davies denies knowing that the transactions were not arms-length, and says he was surprised when, after the event, he found out that they were not. In any event, his second advice, provided on 31 August 2010 and making no reference to the first opinion, concluded that, following the transfer of the freeholds to Oak, Celtic would be left with no restoration obligations at all. The Crown say (i) that there is evidence upon which a jury could conclude that Mr Davies too knew that the transactions were neither at arms-length nor for value, and that they were designed solely to enable Celtic to avoid its restoration obligations; and (ii) that this opinion was wrong as a matter of law, and obviously so; indeed, it was bogus, in the sense that Mr Davies well knew it was legally wrong, providing it simply because he was paid a very substantial fee to do so. The Crown relies upon a statement from Mr Davies' clerk who, upon being told of the size of the fee for the second opinion negotiated by Mr Davies personally: "Fuck me, that's a serious amount of money". That, it is said, is the clearest evidence that the fee was much more than anything that could be described as commercial,

25. In terms of the conspiracy, say the prosecution, that opinion was just what was required. A couple of days later, on 2 September 2010, the freehold of each site was transferred to Oak for £1 each and a reverse premium of £1.25m; and, as envisaged, on the basis of Mr Davies' second advice, in due course Celtic's auditors agreed that a substantial reduction in the provision in the accounts was appropriate. Celtic's 2011 accounts showed a provision of just £63.8m, a reduction of £72.2m.

26. There is evidence that the alleged conspirators each obtained immediate benefit from the scheme, although again, say the prosecution, much of this was done covertly. Purportedly for effecting the sham introduction to Oak, Celtic paid CED a £14.6m "consultancy fee" – £5.7m of which was paid as soon as 22 September 2010. Over time, CED paid Mr Walters and Mr Humphreys each a "bonus" of £6.9m and £1.7m respectively. The lawyers benefited too. Using the reverse premium, Oak paid £650,000 to another BVI company called Sapling Regeneration Limited ("Sapling"), which was owned by Mr Evans. In due course, Sapling "loaned" Mr Evans and Ms Bodman £160,000 each. Oak also paid £450,000 to yet another BVI company, Elder Regeneration Limited ("Elder"), owned by Mr Whiteley who received £250,000 of that sum. Mr Davies benefited to the extent of his fee, £250,000, paid in the circumstances I have described.

27. Thus, the Crown says, each of the conspirators agreed dishonestly to set up Oak and to transfer the freeholds of the four mines to Oak, intending that the financial liability to restore the sites would actually or apparently pass with the freeholds, thereby prejudicing the ability of the MPAs and the Coal Authorities effectively to enforce those obligations and enabling the release of at least some of the provision in respect of those obligations in Celtic's accounts for their personal benefit.

Scope of Conspiracy to Defraud

28. I now turn to the scope of the common law offence of conspiracy to defraud, which is crucial in these applications.

29. Conspiracy was a common law misdemeanour, classically defined by Lord Denman in R v Jones (1832) 4 B & Ad 345 at page 349 as "an agreement to do an unlawful act or a lawful act by unlawful means". "Unlawful" here extends beyond the criminal to include all types of unlawfulness.

30. Following consideration by the Law Commission (Law Commission: Conspiracy and Criminal Law Reform (Law Com No 76) (1976)), the Criminal Law Act 1977 generally abolished common law conspiracy (section 5(1)) in favour of a new statutory offence of conspiracy, defined in terms of an agreement to commit any offence (section 1(1)). However, the common law offence of conspiracy to defraud was expressly preserved (section 5(2)). Reversing R v Ayres [1984] AC 442, section 12 of the Criminal Justice Act 1987 provided that a charge of conspiracy to defraud can be brought even where the course of conduct agreed to be pursued will or may itself amount to the commission of a statutory offence. However, unless there is good reason for doing otherwise, the courts have emphasised that, where conduct falls within the terms of a statutory offence, then that offence should be charged, and not a common law offence, such as conspiracy to defraud, that might also be committed on the facts (R v Rimmington and Goldstein [2005] UKHL 63; [2006] 1 AC 459 ("Rimmington") at [30], per Lord Bingham).

31. As I have already indicated (paragraph 2 above), the Law Commission 2002 Report recommended the abolition of the offence. In the wake of that report, the Fraud Act 2006 replaced deception offences under the Theft Acts with a statutory offence of fraud, capable of being committed in three ways (fraud by false representation, fraud by failing to disclose information and fraud by abuse of position); but nevertheless it preserved the common law offence of conspiracy to defraud on the basis that (i) some conduct could still only be prosecuted as conspiracy to defraud, and (ii) some conduct could be more effectively prosecuted as conspiracy to defraud. With regard to the former, reflecting earlier Law Commission Reports (e.g. Law Commission: Conspiracy to Defraud (Law Com No 228) (1994), at Part IV), Part IV of the Law Commission 2002 Report set out various types of conduct that, prior to the Fraud Bill, might only be prosecuted as conspiracy to defraud. Professor John Smith was unimpressed by the 1994 attempt, referring to some of the examples at "scraping the barrel" and bemoaning "the striking absence of case law demonstrating the need for the offence" (J C Smith, Conspiracy to Defraud: Some Comments on the Law Commission's Report [1995] Crim LR 209). Mr John Charles Rees QC for Mr Humphreys led those appearing for the Defendants before me in contending that the examples in the later, 2002 Report all appear to involve unlawful, if not necessarily criminal, acts; and that does indeed seem to be the case. The real driver behind the

retention of the common law offence appears to have been the practicalities with regard to the effective prosecution of multiple offending and the largest and most serious cases of fraud (see Ormerod and Williams, Smith's Law of Theft, 9th Edition (2007) ("Smith"), at paragraph 5.68).

32. The relationship between the common law offence and statutory offences is now governed by the Attorney General's Guidance to Prosecutors on the Use of the Common Law Offence of Conspiracy to Defraud, first published in 2007 and last updated on 29 November 2012. The guidance, chiming with the comments in Rimmington (see paragraph 30 above), requires prosecutors to consider whether the conduct could be prosecuted under statute, and whether the available statutory charges would adequately reflect the gravity of the offence (paragraph 6); and, in effect, only to charge the common law offence if there is good reason for doing so, e.g. where prosecution of a number of substantive offences may not present a proper view of the overall criminality involved or there is evidence of a wider dishonest objective than could be encapsulated in a particular statutory offence or even a statutory conspiracy (paragraphs 7 and following).

33. Where does that leave the common law offence of conspiracy to defraud now?

34. I have already described how the Law Commission has said that the offence is "so wide that it offers little guidance on the difference between fraudulent and lawful conduct" (the Law Commission 2002 Report, at paragraph 1.6; quoted at paragraph 2 above). As the learned authors of Smith note (at paragraph 5.02), in the Parliamentary debates on the Fraud Bill, Lord Lloyd of Berwick said this:

> "I have an instinctive dislike, and I think that many judges have, of these catch-all offences such as conspiracy to defraud" (Hansard, HL, 22 June 2005, col 1665).

In similar vein, the learned authors of Ormerod and Montgomery, Fraud: Criminal Practice and Procedure (2008) ("Ormerod & Montgomery") – who provide an excellent analysis of the offence, which I commend – say (at paragraph D7.24):

> "The offence is therefore exceptionally broad. It seems that any dishonest act, even when it involves no deception nor the more general falsification of a transaction, which has the effect of depriving a person of anything or, indeed, prejudicing him economically in any other way will suffice…".

35. However, whilst no one would demur from the proposition that the offence is "exceptionally broad", that is not the same thing as an offence without boundaries. It is not literally a "catch-all". Indeed, the common law has imposed firm limits on the conceptually wide offence; and, whilst of course the common law is always capable of evolution, the courts have repeatedly stressed that the criminalisation of conduct which has not in the past been found by the common law to be criminal is a matter for Parliament and not them. Subject to Parliamentary intervention, the boundaries are thus fixed.

36. The standard texts reflect the authorities in identifying discrete ways in which the offence can be committed. As it is put in Smith (at paragraph 5.12):

> "There are two versions of the offence of conspiracy to defraud:
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> (i) agreeing dishonestly to prejudice another's economic interests; or
>
> (ii) agreeing to mislead a person with intent to cause him to act contrary to his duty."

Although limbs of the same offence, these are conceptually quite distinct.

37. With regard to the former, of course most agreements dishonestly to prejudice another's economic interests involve deception: the conspirators dishonestly mislead the victim into believing a state of affairs exists, which is false but which prompts the victim to hand over to them money or moneys worth. Thus, early authorities incorporated deceit into the definition of fraud: in Re London and Globe Finance Corporation Limited [1903] Ch 728 at page 732, Buckley J said that "to defraud is by deceit to induce a course of action".

38. However, the leading authority now, Scott v Metropolitan Police Commissioner [1975] AC 819, makes clear that deceit in not a necessary element in this limb of the offence. Scott followed in time R v Sinclair [1968] 1 WLR 1246, in which James J giving the judgment of the Court of Appeal (Criminal Division) said (at page 1250D):

> "To cheat and defraud is to act with deliberate dishonesty to the prejudice of another person's proprietary right."

39. Sinclair went no further; but, in Scott, a point of law was certified that concerned the very question of whether the offence required deprivation of property by deception, to which the House of Lords gave the answer, "No". Viscount Dilhorne, with whom the rest of the Appellate Committee agreed, said:

> "… [I]t is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."

40. Therefore, in respect this manner of committing the offence, there is no need for deceit; but, this passage indicates that there is nevertheless a possible limit, namely a requirement for some proprietary right of the victim to be (adopting the terminology of Viscount Dilhorne) "injured". Mr Parroy does not accept that as a proposition, and I will return to that issue when I deal with the Crown's case in relation to the Defendants (paragraphs 169 and following below).

41. Whilst the first way in which the offence can be committed therefore concerns injury to the rights of the victim sometimes referred to as "economic prejudice" (see, e.g., Smith at paragraph 5.41), the alternative limb is not concerned with that sort of injury at all. It is concerned with agreements to mislead the victim into acting contrary to

his duty – or at least acting differently from how he would in fact act if he were aware of the true position.

42. It derives from a line of authorities beginning with Board of Trade v Owen [1957] AC 602, which concerned a conspiracy to defraud the Export Control Department of the Federal Republic of Germany, by fraudulently representing to the department that metal supplied by way of export from West Germany would be used in Ireland rather than their true destination, Eastern European Communist bloc countries. The German department was obliged to prevent licensed metals being supplied to those countries. Lord Tucker said (at page 622):

> "It is a conspiracy by unlawful means, viz by making representations known to be false, to procure from a department of government an export licence which, but for the representations, could not have been lawfully obtained. It is an example of a conspiracy by unlawful means to achieve an object in itself lawful…".

43. That was followed in Welham v Director of Public Prosecutions [1961] AC 103, upon which the Crown rely with some weight in these applications. Mr Welham managed a car dealership in Brighton, which obtained money from finance companies to assist customers in their purchases of cars. He submitted documents to those companies that related to fictitious transactions involving cars, because, he said, a director of the dealers told him that the dealership wished to borrow money for their business and the finance companies were restricted by Board of Control regulations to lend only on hire purchase agreements. Mr Welham said he was told that the finance companies knew that the documents were bogus, but were willing to go along with the scheme as the only way in which they could lend the money to the dealership and avoid Board of Trade investigation and censure. He was charged with conspiracy to defraud and uttering forged documents with intent to defraud. The jury found him not guilty of the conspiracy, but guilty of the other offence.

44. This case, therefore, had nothing directly to do with the scope of conspiracy to defraud, but rather the scope of intent to defraud in the context of uttering forged documents. In relation to that, Lord Radcliffe said this (at page 124):

> "… [T]he economic explanation is sufficient. But in that special line of cases where the person deceived is a public authority or a person holding a public office, deceit may secure an advantage for the deceiver without causing anything that can fairly be called either a pecuniary or economic injury to the person deceived.".

Lord Denning put it thus (at pages 132-4):

> "What is the common element in all these cases? It is, I think, best expressed in the definition given by East in his Pleas of the Crown, vol 2, page 822. He treats the subject, I think, better than any writer before or since: 'To *forge* (a metaphorical expression borrowed from the occupation of the smith) means, properly speaking, no more than to *make* or *form*: but in our

> law it is always taken in an evil sense; and therefore Forgery at common law denotes a *false* making (which includes every alteration of or addition to a true instrument), a making malo animo, of any written instrument for the purpose of fraud and deceit. This definition results from all the authorities ancient and modern taken together'.
>
> That was written in 1803, but it has always been accepted as authoritative. It seems to me to provide the key to the cases decided since it was written, as well as those before. The important thing about this definition is that it is not limited to the idea of economic loss, nor to the idea of depriving someone of something of value. It extends generally to *the purpose of fraud and deceit.* Put shortly, 'with intent to defraud' means 'with intent to practise fraud' on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough….
>
> … The intent to defraud [in the Forgery Act 1913] is the same intent as was required by the common law….
>
> Applying this meaning to the present case, it appears that Welham on his own evidence had an intent to defraud, because he uttered the hire-purchase documents for the purpose of fraud and deceit. He intended to practise a fraud on whomsoever might be called upon to investigate the loans made by the finance companies to the motor dealers. Such a person might be prejudiced in his investigation by the fraud. That is enough to show an intent to defraud…".

45. So, there was here an intent to mislead the Board of Trade, which had a duty to enforce the regulation of lending, and a consequent duty to investigate the circumstances in which lending was made. By producing the false lending documents in this case, Mr Welham intended to defraud by subverting that duty.

46. The Crown also rely on Wai Yu-Tsang v R [1991] 1 AC 269, in which the defendant chief bank accountant failed to record $124m of cheques in the bank's computerised ledgers, but recorded them only in private books which gave the false impression that they had been recorded in the bank's ledgers.

47. Lord Goff, giving the judgment of the Board, reviewed the authorities, including the parts of the passages from Welham quoted above, before continuing (at page 276):

> "This authority [i.e. Welham] establishes that the expression 'intent to defraud' is not to be given a narrow meaning, involving an intention to cause economic loss to another. In broad terms, it means simply an intention to practise a fraud on another, or an intention to act to the prejudice of another man's right."

Having referred to Lord Diplock's judgment in Welham (which suggested that non-economic prejudice was relevant only where the purpose of the fraud was to cause the victim to act contrary to his public duty), he continued (at page 277):

> "With the greatest respect to Lord Diplock, their Lordships consider this categorisation to be too narrow. In their opinion, in agreement with the approach of Lord Radcliffe in [Welham], the cases concerned with persons performing public duties are not to be regarded as a special category in the manner described by Lord Diplock, but rather as exemplifying the general principle that conspiracies to defraud are not restricted to cases of intention to cause the victim economic loss. On the contrary, they are to be understood in the broad sense described by Lord Radcliffe and Lord Denning in [Welham] – the view which Viscount Dilhorne favoured in [Scott], as apparently did the other members of the Appellate Committee who agreed with him in that case (apart from, it seems, Lord Diplock)."

Although the only alleged victims in the case before me are public bodies – the MPAs and the Coal Authority – after conflicting dicta in Welham (and other cases such as R v Withers [1975] AC 842), Lord Goff thus made clear that the duty that it is agreed to subvert need not be a public one.

48. Therefore, in respect of this second method by which the offence can be committed, whilst the fact that the victim's proprietorial rights and interests need not be prejudiced – indeed, he need not have any such rights and interests – there is a requirement for the victim to be deceived and, as a result of that deceit, act in a different way from that in which he would have acted if he had know the true position. Again, I shall return to that requirement when I deal with the Crown's case against the Defendants (see paragraphs 132 and following below).

The Prosecution Case against the Defendants: Uncontroversial Requirements of the Offence

49. To clear the decks, it would be helpful at this stage to consider two elements of the offence – namely, dishonesty and the need for a victim or victims – because, whilst of course there is a dispute as to whether these requirements are satisfied on the evidence in this case, it is at least common ground that each is a requirement of the offence.

50. It has been said that dishonesty is "the crucial constituent of the offence" (Norris v Government of the United States of America [2007] EWHC 71 (Admin); [2007] 1 WLR 1730 at [64] per Auld LJ), or "a defining element" (the Law Commission 2002 Report, at paragraph 5.1). It is common ground before me and uncontroversial that, in a conspiracy to defraud, the prosecution must prove that the particular conspirator defendant was dishonest.

51. The Crown says that, in this case, there is clear evidence that, in creating Oak and transferring the site freeholds from Celtic to it, intending that the restoration obligations would pass to Oak, each of the conspirators was clearly acting dishonestly. By way of example:

i) As I have already indicated (paragraph 19 above), on 16 June 2010, all of the conspirators except Mr Davies signed a confidentiality agreement under which they agreed severely to restrict disclosure of information in relation to the transaction to advisers, bankers etc.

ii) Meetings involving some of the conspirators were held in the BVI with regard to the importance of confidentiality for the deal and the conspirators' part in it.

iii) There was correspondence with regard to the deed of trust in respect of the shares in Oak, in which Mr Evans indicated that Mr Walters ought not to be mentioned in the deed to ensure there was no link in the documents to him.

iv) Save for Mr Davies, the conspirators used personal emails and addresses to communicate, with Mr Evans at one stage advising Mr Whiteley that it was inadvisable to use work email addresses to which the latter responded, "Point taken".

v) Records in relation to the deal were not maintained on the internal M & A systems.

vi) Considerable numbers of false and misleading documents were generated, to which I have already alluded (paragraph 19 above), including correspondence purportedly from Oak indicating that Oak was an arms-length company interested in purchasing the sites on a commercial basis, a Celtic Board minute suggesting that Celtic had been negotiating for some time with regard to the sale, and the recital in Celtic/Oak sale agreement that Oak had done its own due diligence

vii) The written instructions from Mr Evans to Mr Davies (which, the prosecution say, Mr Davies himself had a hand in settling) did not reveal the true status of Oak, presenting the deal as one at arms-length, which was duly recorded in Mr Davies' second advice.

viii) On 7 December 2010, after the sale, Mr Walters wrote to the Coal Authority to tell them that Celtic had sold the sites, but, despite pressure, he refused to say to whom, Mr Evans later suggesting to the Coal Authority that it was indeed an arms-length transaction.

52. Those are mere examples of the evidence upon which the prosecution rely. The Crown says, with some force, that it has a substantial body of evidence that prima facie shows dishonesty. Whilst none of the Defendants concedes that he or she was dishonest in any of the relevant conduct, for the purposes of this application all but Mr Davies accept that the prosecution may have enough evidence to enable a jury properly to conclude that they were dishonest; and they do not bring an application to dismiss at this stage on the basis that the prosecution do not that sufficiency. For Mr Davies, Mr Timothy Barnes QC submits that there is insufficient evidence for the Crown to overcome even that very modest hurdle in Mr Davies' case; and he alone applies for dismissal on the basis that the Crown have insufficient evidence against him for a jury properly to conclude that he was dishonest. In brief, as I understand it,

he submits that there is no evidence that Mr Davies was aware that the sale to Oak was not at arms-length and not commercial; his second opinion was genuine, and indeed correct; and Mr Davies has put forward an explanation for why his fee appears so high. However, that part of Mr Davies' application has been adjourned pending the outcome of the application to dismiss by all Defendants on the ground that, even if the Crown were able to prove dishonesty, on the basis of the prosecution case and evidence in support as it stands, as a matter of law a jury could not properly convict; and thus I should dismiss the charge against each and every Defendant.

53. Therefore, whilst noting the strong assertion made on behalf of each Defendant that nothing they agreed or did was dishonest, for the purposes of the applications now before me I will assume, against the Defendants, that, in coming to the agreement alleged by the prosecution, each was dishonest. For the sake of completeness, I should say that I will return to dishonesty briefly after I have considered the more contentious elements of the offence (see paragraphs 159 below); but otherwise that element in the offence plays no part in these applications.

54. It is also correctly common ground that a fraud requires a person as its object victim (see, e.g., Welham at page 123 per Lord Radcliffe, and page 133 per Lord Denning). In the charge, the victims of the fraud to which the Defendants allegedly conspired are clearly identified by the Crown as the MPAs and the Coal Authority, and as exclusively them. Whilst the possibility of commission of statutory offences of fraud by the Defendants against Oak and Celtic has been recently introduced (see paragraphs 162 and following below), the MPAs and Coal Authority have remained throughout the only alleged victims of the conspiracy to defraud, and the only "prejudice" potentially resulting from the conspiracy alleged by the Crown is in respect of the rights, interests and obligations of those authorities. The ambit of these rights, interests and obligations is vital to these applications; such that the Crown, in its Case Statement dated 30 May 2013 (at paragraph 2), said that it would "invite the trial judge… to make a ruling in law as to the nature of the rights and obligations" of the MPAs and Coal Authority as established by the relevant statutory schemes that apply to each. There was certainly much debate before me as to their scope.

55. Therefore, before proceeding to consider the controversial elements of the offence in the context of the Crown's case against the Defendants, including the terms of the charge brought (paragraph 93 and following below), I shall deal first with the rights, interests and obligations of the Coal Authority (paragraphs 56-71) and the MPAs (paragraphs 72-82) generally in the statutory schemes under which they operate; and their rights as against Celtic and Oak in respect of the four sites (paragraphs 83-92).

The Rights, Interests and Obligations of the Coal Authority

56. Until the 1930s, energy resources in the United Kingdom were in private ownership. However, foreign competition and the threat of hostilities in Europe caused the United Kingdom Government to consider if that should remain the case. By the Petroleum (Production) Act 1934, oil in its natural state was vested in the Crown. As the likelihood of war increased, the Coal (Registration of Ownership) Act 1937 required registration of both title and valuation of proprietary interests in unworked coal, as a precursor to the Coal Act 1938 which effectively nationalised coal resources. The 1938 Act set up the Coal Commission, which, in return for compensation payments, acquired coal mines and coal in the following terms (section 3(1) and (3)):

> "(1) The Commission shall acquire in accordance with this Part of this Act the fee simple in all coal and mines of coal, together with such property and rights annexed thereto and such rights to withdraw support as are hereinafter mentioned, subject to such servitudes, restrictive covenants and other matters adversely affecting any of the said coal or mines as are hereinafter mentioned…
>
> …
>
> (3) On the vesting date [i.e. 1 July 1942] all coal and mines of coal as existing at that date shall vest in the Commission for a title comprising all interests the subsisting in any such coal or mine…".

57. "Coal" was defined in section 3(4) to include various grades of coal, but was restricted to:

> "… coal that is unworked, that is to say, not so severed as to have become a chattel".

58. "Mine of coal" was defined in section 44(1) as:

> "… a space which is occupied by coal or which has been excavated underground for a coal mining purpose, and includes a shaft and an adit made for a coal mining purpose".

59. The 1938 Act therefore conveyed, and conveyed only, the fee simple or corporeal interest in (i) unworked coal itself, (ii) the space occupied by that coal and (iii) the space underground already created by coal mining.

60. By conveying the fee simple in unworked coal, the Act enabled the Coal Commission to grant "mining leases". "Mining lease" is defined by section 205(1) of the Law of Property Act 1925 as a lease for mining purposes, i.e. the searching for, winning, working, getting, making merchantable, carrying away or disposing of mines and minerals, or connected purposes, and including a licence for mining purposes. Section 15 of the 1938 Act gave the Commission the power to grant a licence to any person to "enter upon, remove, execute works in, pass through and occupy any [land not vested in the Commission] and to do all such other acts in relation to any such land as are requisite or convenient for the purposes of any such operations", on various conditions.

61. The 1938 Act nationalised coal resources, but not mining activities. The Coal Industry Nationalisation Act 1946 established the National Coal Board, not only to hold coal resources but also to carry on all coal mining operations. On 1 January 1947, section 5 of the 1946 Act transferred to the Board, "without option", all of the assets listed in Part 1 of Schedule 1 to the Act. Those included (at paragraph 1):

> "Interests in unworked coal, and in mines of coal, of colliery concerns and of the Coal Commission…".

62. "Coal" had materially the same meaning as in the 1938 Act (section 63(1)). "Mine of coal" too had a similar definition, but now, because of the transfer of coal operations, it expressly included open cast mines, as follows:

> "… a space occupied by unworked coal or excavated underground for the purposes of colliery activities, and includes a shaft or adit made for the purposes, a coal quarry and open cast workings of coal".

63. As a prelude to returning the coal industry to private ownership, on 5 March 1987, section 1(1) of the Coal Industry Act 1987 renamed the National Coal Board as the British Coal Corporation ("the BCC").

64. The Coal Industry Act 1994 effected reprivatisation of coal mining activities, but retained coal resources in state hands. Unwinding the 1946 Act, the BCC's assets were divided, broadly as they were by the 1938 Act in the period 1942 to 1946. A new body corporate (the Coal Authority) was created, with the purpose of holding, managing and disposing of interests in unworked coal, and carrying on functions with respect to licensing of coal mining operations and "other matters incidental to the carrying on of any open cast or other coal mining operations" (section 1(1)). To that purpose, by section 7(3):

> "On the restructuring date [the BCC's] interests in unworked coal and coal mines, including its interests in any coal that, notwithstanding having been worked at some time, is so attached to or incorporated in any coal mine as to be, in law, part of it, shall vest without further assurance in the [Coal] Authority".

The restructuring date was 31 October 1994 (section 7(1) and Coal Industry (Restructuring Date) Order 1994 (SI 1994 No 2553)). The BCC's other assets (i.e. the whole of its operations undertaking) were vested in a number of private, successor companies, including of course Celtic who purchased sites and operations as I have already described (see paragraph 7 above).

65. Section 65(1) deals with interpretation of terms. "Coal" retains its meaning from earlier Acts. "Coal mine", it says:

> "… includes
>
> (a) any space excavated underground for the purpose of coal mining operations and any shaft or adit made for those purposes;
>
> (b) any space occupied by unworked coal; and
>
> (c) a coal quarry and open cast workings of coal".

66. Like the Coal Commission under the 1938 Act, the Coal Authority does not itself carry out mining activities. However, "coal mining operations" as particularly defined in section 25(2) cannot be carried out except "under and in accordance with"

a licence issued by the Coal Authority under Part II of the Act (sections 25(1) and 26(1)). However, by section 26(2):

> "An application for a licence under [Part II] may be made by any person who has acquired, or is proposing to acquire, (from the Authority or some other person):
>
> (a) such an interest in land comprised in the area with respect to which the application is made, or
>
> (b) such rights in relation to coal in that area,
>
> as, apart from the need for a licence, would entitle him to carry on the coal mining operations to which the application relates".

In other words, only a person who has a relevant interest in the coal to be mined (e.g. by virtue of a mining lease) can apply for a licence to mine.

67. Section 2(1)(b) imposes upon the Coal Authority a duty to carry out its licensing functions:

> "in the manner it considers is best calculated to secure, so far as practicable… that [licensed] persons are able to finance both the proper carrying on of the coal mining operations that they are authorised to carry on and the discharge of liabilities arising from the carrying on of those operations;…".

68. Sections 26(5) and 28 provide that a licence may contain any conditions "as the Authority… may think fit…"; and section 29 specifically enables conditions to be imposed:

> "… to provide such security as may be so determined for his performance of any of the obligations to which he is or may become subject, either in accordance with the licence itself or otherwise by virtue of his being at any time the holder of that licence;…".

69. Those are the relevant provisions of the 1994 Act. Importantly for the purposes of these applications:

i) As a result of sections 25 and 26, to enable it to mine, a coal mining operator needs both (a) an interest in the coal sufficient to enable him to mine it (usually by way of a coal mining lease from the Coal Authority) and (b) a licence to mine.

ii) The statutory scheme does not impose a duty on the Coal Authority to restore land which has been mined.

iii) However, section 2(1)(b) imposes a duty on the Coal Authority to carry out its licensing functions in the manner it considers is best calculated to secure, so far as practicable, that licensees are able to finance coal operations including restoration of land. The terms of the statutory

> provision make clear that it has a very wide discretion in respect of the steps that it takes, but these may include obtaining security for contingent liabilities and/or a condition that the licensee remains liable for all restoration liabilities and costs irrespective of any transfers of legal or other interests in the relevant coal or land. Of course, any such conditions must be considered by the Coal Authority, and imposed on the licence at the time of grant, as part of the Coal Authority's licensing function.

70. However, although it would be open to the Coal Authority to impose its own conditions with regard to restoration obligations in a licence, the evidence is that it does not in practice do so. In his statement of 15 April 2013, Mr Ian Wilson (who was Licensing Manager for the Coal Authority from 1994 until his retirement in 2012) says that the Coal Authority would not specifically oblige the licensee operator to restore the land: it would simply require it "to comply with any planning conditions and obligations imposed by the relevant MPA which would normally include conditions relating to land restoration and aftercare as part of the planning permissions relating to surface mining activities" (paragraph 7).

71. It is to those that I now turn.

The Rights, Interests and Obligations of the Mineral Planning Authorities

72. By section 57(1) of the Town and Country Planning Act 1990 ("the 1990 Act"), planning permission is required for any "development", which is defined to include mining. Any application for planning permission must be made to the relevant planning authority, which, in Wales, is either the county council or county borough council (section 1(1B)). In Wales, the local planning authority is also the MPA, and so responsible for determining planning applications where the development consists of winning and working minerals including coal (section 1(4B)).

73. Planning applications are made in respect of a particular development, and the applicant need not have any interest in the relevant land. However, once granted, planning permission is attached to the land, and runs with it. "Land", in this context, is defined in section 336(1) of the 1990 Act as "any corporeal hereditament…".

74. An application for planning permission may be granted, unconditionally or with conditions attached, or refused (section 70(1)). Conditions may be imposed "for requiring… the carrying out of works required for the reinstatement of land…" (section 72(1)(b). Schedule 5 to the 1990 Act sets out provisions relating to conditions on a grant of permission for any development consisting of the winning and working of minerals. Paragraph 1 requires there to be a condition as to duration of the permission. Paragraph 2(1)(b) and (2) gives an MPA power to impose any conditions as it thinks fit, called "restoration conditions":

> "… requiring that such steps shall be taken as may be necessary to bring the land to the required standard for whichever of the following uses is specified in the condition, namely (i) use for agriculture, (ii) use for forestry, or (iii) use for amenity".

Furthermore, the authority may impose aftercare conditions requiring treatment of the restored land for a period of five years after the restoration conditions have been performed, or a period as otherwise fixed (paragraph 2(2) and following).

75. In addition to conditions, in return for giving permission, the authority may impose obligations on the applicant. Section 12(1) of the Planning and Compensation Act 1991 replaced an earlier power to enter into planning agreements with a power to make planning obligations set out in a new, substituted section 106 of the 1990 Act. Such an obligation may be imposed by agreement or unilaterally; but it can only be imposed if it is "necessary to make the development acceptable in planning terms" (regulation 122(2) of the Community Infrastructure Levy Regulations 2010 (SI 2010 No 948)). This means that planning permission is granted without a section 106 obligation only if the authority is satisfied that the development is acceptable in planning terms without such an obligation.

76. By section 106(3), a planning obligation runs with the land; but it continues also to be enforceable against the person entering into the obligation. However, section 106(4) provides:

> "The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land."

77. A section 106 planning obligation is enforceable by injunction (section 106(5)); or the planning authority may enter the land and carry out any relevant operations to fulfil the obligation, and:

> "… recover from the person or persons against whom the obligation is enforceable any expenses reasonably incurred by them in doing so" (section 106(6)).

Although a section 106 requirement can be enforced by injunction, if the person against whom the obligation is enforceable fails to comply, then the authority is left to fall back on its right to seek the costs of the relevant works from that person.

78. Where there is a breach of planning control (which includes a failure to comply with a planning condition: section 171A of the 1990 Act), the planning authority may issue an enforcement notice, which is required to be served on the owner and occupier of the land to which the notice relates, together with any other person having an interest in the land which (in the opinion of the authority) is affected by the notice (section 172(1) and (2)). The notice has to identify the breach (section 173(1)), and identify the steps required to be taken to remedy it (section 173(3) and (4)). There are provisions for an appeal to the Secretary of State (sections 174-176). Where there is non-compliance with a notice, then section 178(1) provides:

> "Where any steps required by an enforcement notice to be taken are not taken within the period for compliance with the notice, the local planning authority may:
>
> (a) enter the land and take the steps; and

> (b) recover from the person who is then owner of the land any expenses reasonably incurred by them in doing so."

79. Security for these obligations can be required as a separate section 106 obligation; and some of the supportive Local Acts require such security. Mr Geoffrey White is the Head of Planning at NPT, a position he has held since 1999. In his statement dated 27 February 2013, at paragraph 11, he explains that section 57 of the West Glamorgan Act 1987 requires that planning permission for the working and winning of coal in the area now covered by NPT "shall provide to the satisfaction of the [MPA], security relating to the landscaping or the preservation, restoration or reinstatement of the land forming the site of the development, including any restoration condition or aftercare condition". That security can be in the form of a bond, a guarantee or a payment to the MPA. In practice, he says, restoration is dealt with by way of section 106 obligations, supported by such security; but there was a policy exemption from this Local Act requirement for security for the BCC and, for a period of 10 years, its successors (Minerals Planning Policy (Wales) Minerals Technical Advice Note (Wales) 2: Coal (January 2009), paragraph 66). This national policy guidance appears to explain why NPT did not require Celtic to give security in respect of East Pit and Margam; although, as I have explained (see paragraph 75 above), NPT must have been satisfied that the mining operations were acceptable in planning terms without a condition requiring security for restoration obligations to be given.

80. Section 179 of the 1990 Act provides that, where the steps required to be taken by an enforcement notice are not taken in time, then the owner of the land is guilty of an offence, as is any person who has control of or an interest in the land who carries on or permits an activity required by the notice to cease, the sanction being restricted to a fine. However, there is no limit to the fine that may be imposed, and, in assessing the fine, the court must take into account the financial benefit the offender has accrued or is likely to accrue (section 179(8) and (9)).

81. "Owner" for these purposes is defined in section 336(1) as follows:

> " 'Owner', in relation to land, means a person, other than a mortgagee not in possession, who, whether in his own right or as trustee for another person, is entitled to receive the rack rent of the land or, where the land is not let at a rack rent, would be so entitled."

It is uncontroversial that "rack rent" here means simply the normal market rent.

82. Those are the relevant provisions of the 1990 Act. Importantly for the purposes of these applications:

i) As a result of section 57(1), to mine coal, an operator must have planning permission from the relevant MPA.

ii) By section 72(1)(b) and paragraph 2 of Schedule 5, an MPA has a very wide power to impose conditions requiring the land to be fully restored for subsequent use for (e.g.) agriculture. Furthermore, the MPA has power to impose section 106 obligations, including obligations relating to restoration. Such conditions and obligations must, of course, be imposed

at the time permission is granted. The evidence is that restoration obligations are in practice imposed by way of section 106.

iii) Where such conditions or obligations are imposed and breached, then there are statutory enforcement procedures, as follows. The MPA serves an enforcement notice and/or a breach of condition notice on the person or persons against whom the obligation or condition is enforceable, requiring them to fulfil the obligation or remedy the breach. If the person(s) fail to comply with the notice, then the MPA may enter the land and carry out operations to fulfil the obligation or remedy the breach, and recover the costs from the relevant person(s). In the case of a section 106 obligation, recovery can be made "from the person or persons against whom the obligation is enforceable" (section 106(6)), namely both the owner of the land at the time of enforcement and the person entering into the obligation (unless the MPA has formally released the latter under section 106(4)). In the case of breach of an enforcement notice, recovery can be made from "the person who is then owner of the land" (section 178(1)).

iv) However, recognising that such a procedure may be fraught with practical difficulties for the enforcing MPA, at the time planning permission is granted, the MPA can take steps to make future enforcement easier or more effective, e.g. by requiring security. It must impose a condition requiring security unless it considers the development acceptable in planning terms without such a condition.

v) If there is non-compliance with an enforcement notice, then criminal sanctions may apply, but the maximum penalty is a fine.

The Restoration Obligations in Respect of the Four Mining Sites

83. As can be seen from the above, for an operator to be able to mine on a site, he requires (i) a mining lease or the like, (ii) a licence and (iii) planning permission. In respect of the four sites relevant to these applications, the substance of those respective documents is essentially similar (although in respect of Nant Helen there was no Section 106 Agreement or obligations at the relevant time).

84. I will take, by way of illustration, the relevant documents relating to East Pit, a site covering 400 hectares located between the villages of Lower Brynamman, Gwaun Cae Gurwen, Tairgwaith and Cwmllynwell. Celtic acquired the site in 1994, and continued to extract coal under an existing planning permission granted in 1986.

85. In relation to East Pit, there is a single mining lease between the Coal Authority and Celtic, dated 21 October 2005. The demise is set out in paragraph 3:

> "The Authority hereby demises to the Tenant [i.e. Celtic] (so far as the Authority has power to do) the Mine TOGETHER WITH (so far as aforesaid) the right to carry away the Coal and the Minerals… TO HOLD the same for the term… YIELDING AND paying TO THE Authority on each anniversary of the date hereof the yearly rent of one peppercorn (if demanded) and at the time stipulated herein for the payment thereof any monies

> of any description payable by the Tenant to the Authority under this Lease."

86. The following provisions of the lease are also noteworthy:

i) By paragraph 1, "the Mine" is effectively defined in the Third Schedule as:

> "All the coal and (where relevant) coal mine situated within the areas edged red shown on the Plan down to a depth of thirty (30) metres below Ordnance Datum".

ii) "The Term" is 99 years from the date of the Lease (paragraph 1).

iii) "Satisfactory Condition" is defined (again in paragraph 1) as:

> "… at any time such state and condition as is required in all respects to ensure that the Authority does not have or incur any present or future liabilities or potential liabilities (including any liabilities that may revert to the Authority on the expiry or sooner determination of this Lease) as a result, directly or indirectly of:
>
> (i) the existence, state or condition of the Mine… or anything containing or occurring therein or passing through or emanating therefrom at any time; and/or
>
> (ii) any omission at any time to take steps which might reasonably be expected to be taken by a prudent mine operator or landowner".

iv) Celtic covenants are set out in the Sixth Schedule (paragraph 4). They include the following:

> Paragraph 4.1: "… [A]t all times throughout the Term to take all requisite steps at the Tenant's expense to keep the Mine… in Satisfactory Condition".
>
> Paragraph 4.2: "To carry out on or prior to any closure or part closure of the Mine (or immediately after such closure or part closure where the works in question can only be carried out at such a stage) all works necessary to ensure that the Mine (or any relevant part of it) is left and will (so far as is foreseeable) remain in Satisfactory Condition…".
>
> Paragraph 7.3: "To observe and perform all agreements, covenants, restrictions and stipulations of whatever nature affecting or relating to the Mine or the consequences of any activities carried out… in the Mine…, and to keep the Authority indemnified against all actions, claims, demands, costs, expenses, damages and liability in any way relating thereto".

> Paragraph 7.4: (Unless otherwise required by the Authority) to carry out before the determination of this Lease, howsoever determined, any works stipulated to be carried out to the Mine or any nearby land as a condition of any statutory consent or permission relating to the Mine… or otherwise binding on the Authority whether under any town and country planning legislation or otherwise or if the Authority so requires (in place of the carrying out of such works) to pay the Authority a sum equal to a reasonable estimate of the cost to the Authority of carrying out any such works thereafter…"
>
> Paragraph 16: "To keep indemnify and keep indemnified the Authority at all times from liability howsoever and whensoever incurred in respect of any… damage to property, court action, the infringement, disturbance or destruction of any rights, easements or other privileges or otherwise by reason of or arising, directly or indirectly, out of the state of repair, existence or condition of the Mine, anything in, occurring or passing through or emanating from it, any activity in the Mine or any failure or omission by the Tenant… in the implement and observance of the covenants on its part contained in this Lease and from all proceedings, costs, claims and demands of whatsoever nature in respect of any such liability or alleged liability."

v) The term of the lease being 99 years, Celtic is given a right to determine on three months' notice; but only if the date specified in that notice is earlier than:

> "… the fifth anniversary of the date on which the Tenant shall have apparently complied in all material respects with all of its obligations (including without prejudice completion of any relating to restoration and aftercare) relating to the leaving of the Mine in Satisfactory Condition as set out in this Lease".

vi) The Lease is expressed not to terminate by frustration, even if the subject of it is destroyed (paragraph 7).

87. East Pit is the subject of two mining licences, both dated 31 October 1994, and thus entered into by the BCC and Celtic. They relate to different geographical areas, but are in the same form. They permit "coal mining operations" as defined in the 1994 Act, in a licensed area defined on a Plan and expressly "down to a depth of 5 metres below the Amman Marine Band" (i.e. below a particular geological level), for a period of 99 years. They have provision for security to be given in relation to "subsidence damage" defined, in terms of section 1 of the Coal Mining Subsidence Act 1991, as any damage to land caused by the withdrawal of support in connection with coal mining operations, but not an alteration of land level that does not affect the

use for the purpose which (immediately before the alteration occurred) it was used (paragraph 5). There is provision for such security to be given during the course of the licence, where no or inadequate security has previously been given (paragraph 6); and, indeed, by a Security Deed dated 21 October 2005, Celtic gave security for subsidence damage in relation to this mine. The Coal Authority did not seek any other security. Paragraph 7 of the licence requires Celtic to provide copies of statutory accounts and reports, and any other financial information about itself that the Authority "may from time to time require". The licence does not itself impose any restoration obligations as such.

88. There are two relevant grants of planning permission, namely (i) permission dated 22 October 1986, time limited until 31 December 2006 (condition 2), for identified seams of coal over an identified geographical area (condition 3), to which I have already referred ("the First Permission"); and (ii) permission for an extension to the site granted 7 December 2004, following a decision by the planning authority to grant permission, call-in by the National Assembly for Wales, an inspector's inquiry and a determination of the Assembly that permission should be granted ("the Second Permission"). The Second Permission required cessation of coaling by 30 November 2012.

89. Both grants include planning conditions for detailed restoration and aftercare works. The First Permission requires restoration in accordance with its Schedule C (condition 22), that schedule requiring restoration to be performed in accordance with a plan to be approved by the planning authority, but including refill, ripping, subsoiling and topsoiling. Annex 3 indicates that the amount of soil available on site (1.1m m^3) would fall short by perhaps 0.6m m^3 that would have to be imported onto the site. Similarly, the Second Permission requires restoration in accordance with the principles of the restoration Strategy Proposals contained in Celtic's Environmental Statement lodged as part of its planning application, and in accordance with the grant's own Schedule B and aftercare in accordance with its Schedule C. Those schedules require detailed restoration and aftercare plans to be submitted for approval by the planning authority no later than five years after the commencement of coaling (paragraphs B2 and C1).

90. In addition to those planning conditions, Celtic entered into a section 106 Agreement with NPT on 2 March 2004, conditional upon planning permission being granted, as it was on 7 December 2004. The particular relevant obligations to which Celtic agreed were to "carry out reclamation and aftercare works on the "Reclamation Area" [as defined]" in accordance with clauses 4.2.1-4.2.8 of the Agreement (clause 4.2); to gift an identified area to the Council for recreational or community purposes (clause 4.3); and to use reasonable endeavours to re-open suspended footpaths (clause 4.4). Clauses 4.5 and 4.6 required the authority to set up an escrow account; required Celtic to pay into it £2 per tonne of coal produced from the site; and allowed the authority to withdraw sums from it on the happening of a "Trigger Event", defined in clause 1.1 as a breach of planning condition, service of an enforcement notice or a failure to comply with the terms of the Section 106 Agreement. This requirement for security from the end of 2004 appears to reflect the national policy guidance to which I have referred (paragraph 79 above), which exempted those who had taken over BCC operations in 1994 from such a requirement, but only for 10 years. Payments in were up to date as at the time of the Mr White's statement dated 27 February 2013, with an

aggregate of about £2m paid in. I pause to note again Mr White's estimate of the current costs of restoration of East Pit, namely £115m.

91. Taking advantage of section 106(4) (see paragraph 76 above), the MPA released Celtic from any liability for restoration obligations if it transferred the site. Clause 5.1 of the Section 106 Agreement provides the following ("the Developer" for these purposes of course being Celtic):

> "Neither the Developer not any successor in title to the developer shall be liable for breach of any covenant or obligation in this Agreement which occurs after the developer or its successor as the case may be has disposed of all interest in the Site or the part in respect of which such breach occurs but without prejudice to liability for any subsisting breach of covenant prior to parting with such interest."

92. In respect of these various documents relating to East Pit, the following points are of particular note for the purposes of these applications:

i) Under the lease, the obligation in paragraph 4.1 is restricted to keeping "the Mine… in Satisfactory Condition". "The Mine", is, unhelpfully, defined in terms of the coal and, "where relevant", coal mine. "Mine" for these latter purposes is presumably defined by section 61 of the 1994 Act to include coal and the space left by worked coal, but (at least arguably) to exclude the space left by the removal of overburden (including rock between coal seams) by open cast mining.

ii) Because of clause 5.1 of the Section 106 Agreement, upon Celtic disposing of the site, it ceases to be liable for a breach of section 106 obligations.

iii) Because the lease is at a peppercorn rent, once Celtic had disposed of the freehold, it ceased to be "owner" of the site for the purposes of enforcement under section 178 of the Town and Country Planning Act 1990 (see paragraphs 78 above), i.e. if and when it disposes of the freehold, the costs of restoration works cannot be recovered from it as a mere tenant.

The Prosecution Case

93. As I have described, the relevant events took place in 2010.

94. The investigation into these matters took some time. The prosecution was taken over by the Serious Fraud Office ("the SFO"), who instructed Mr Winter. He had, of course, been instructed by M & A Solicitors earlier to advise them on whether the scheme would result in the transfer of the restoration obligations to Oak, and had advised that it would not. On the face of it, he might be regarded as a somewhat curious choice as an adviser to the SFO – and, presumably, potential prosecuting counsel – in this case. I am told that, if the prosecution proceeds, his instruction by the SFO will be the subject of a separate abuse of process application; but that is not relevant for the purposes of the current applications.

95. The evidence was reviewed twice by Mr Winter, on each occasion with a full consideration of whether there was a proper basis for the prosecution and, if so, whether it was in the public interest to pursue it. On the basis that the case was of such complexity and seriousness that case management by way of a preparatory hearing would be beneficial and with a view to making an application under section 29 of the Criminal Procedure and Investigation Act 1996, following the second review – by when the investigation had been going on for two years – Mr Winter prepared a Prosecution Case Statement dated 30 May 2013 ("the Case Statement"). He hoped that the statement would in due course comply with the expected direction of the court under section 31(4)(a) of the 1996 Act that such a statement be produced. In the statement, he concluded that there was a proper evidential basis for the prosecution, and it was in the public interest, to proceed against the six defendants for conspiracy to defraud on particulars substantially the same as those set out above (see paragraph 3).

96. In a charge of conspiracy to defraud, the agreement entered into by the conspirators is, of course, crucial: and, in this regard, the particulars of charge are of particular importance. They must set out the agreement alleged with sufficient specificity so that the matters which the prosecution are setting out to prove (and upon which the jury must be unanimous) are clear (see R v K and R v Goldshield Group plc, both cited at paragraph 3 above: and also R v Landy (1982) 72 Cr App R 237, in which the Court of Appeal urged "conciseness and clarity" in particulars of an alleged conspiracy to defraud).

97. The particulars relied upon by Mr Winter were, in my view, concise and clear. They identified the object of the conspirators' agreement, namely to transfer the obligation to restore the sites to Oak, with the result that (i) the ability of the MPAs and the Coal Authority effectively to enforce restoration obligations would be prejudiced and (ii) moneys then held in Celtic by way of provision against the company's future contingent liability for the costs of restoration could be released to the conspirators. They also identified the means agreed to achieve that object, namely the establishment of Oak in the beneficial ownership of the conspirators and the transfer of the freehold title in the sites to Oak. There was no reference to dishonesty in the particulars; but Mr Winter may well have taken the view that, on the case as he saw it, dishonesty was necessarily implicit.

98. However, in such a case, over and above the particulars, the case statement may also be important. It sets out, not the elements of the offence which the Crown seeks to prove, but an outline of the facts and matters upon which it is proposed to rely, vital to enable the defendants to know precisely the case they face (see Ormerod and Montgomery, at paragraph 7.147). It was important in this case because Mr Winter had been asked to confirm that there was an evidential basis for the prosecution of the proposed defendants for conspiracy to defraud; and, in the Case Statement, he identified that evidential basis and found it to be sufficient.

99. Mr Winter indicated (in paragraph 6 of the Case Statement) that consideration had been given to whether conspiracy to defraud was the appropriate charge:

> "The Prosecution has complied with the Attorney General's Guidelines on the Use of the Common Law Offence of Conspiracy to Defraud. It considered whether there was an

> alternative statutory offence appropriate for the facts of this case. The Prosecution concluded that the interests of justice can only be satisfactorily served in this case by proceeding against the Defendants on an Indictment containing a single allegation of Conspiracy to Defraud contrary to Common Law."

100. He then proceeded to set out the planks upon which the Crown's case on conspiracy to defraud was to be made good. With regard to that offence, the statement is not entirely internally consistent, or at least there are parts of it which appear to be incongruous. I shall refer to some of those parts shortly. Furthermore, it does not seem to me to be entirely consistent with the particulars of the charge. Nevertheless, the crucial elements of the prosecution case, as set out in the Case Statement, appear clear. They are as follows.

101. The ultimate object of the conspiracy was to release the provision in Celtic's accounts in respect of the future restoration obligations. In Mr Winter's opinion, the transfer of the freehold of the sites to Oak transferred only the liability to restore the surface: the liabilities to restore the mine and void left by the mining remained with Celtic (paragraph 59). The costs involved in restoring the surface were very small compared with the costs of restoring the void (see paragraph 54). Few of the restoration obligation liabilities were therefore transferred. So, critical to the object of the conspiracy, was Mr Davies' opinion that, on the transfer of the freehold titles to Oak, *all* of the restoration obligations were also transferred. Without that opinion, the auditors would not agree to a reduction of the provision as representing a fair view of the company's overall financial position for accounting purposes. The true legal position was that the vast majority of the obligations were *not* transferred; and that was what Mr Davies said, correctly, in his first opinion. However, he was paid £250,000 to produce a second opinion, concluding that all the restoration obligations would be transferred with the freehold titles, which Mr Davies knew was wrong in law and thus bogus. The opinion did the trick. Following the transfer of the freeholds, the auditors were presented with the opinion and, deceived by it, agreed that the provision could be substantially reduced and the money effectively so released was distributed, with attempted concealment, to the conspirators. That prejudiced the ability of the MPAs and the Coal Authority effectively to enforce the restoration obligations.

102. In respect of that case, it is worthy of note that deceit lies at its heart. The case is based upon the premise that, with the exception of the restoration of the surface the costs of which were apparently not regarded by Mr Winter as very significant, the restoration obligations were *not* transferred to Oak; and the provision in the Celtic accounts was released, not because of actual transfer of obligations away from Celtic, but because of Mr Davies' bogus legal opinion that they had been. It was all illusion, driven by that opinion. That explains why Mr Winter emphasised the "critical" nature of Mr Davies' bogus opinion, "upon which the success of the scheme depended" (paragraph 12 of the Case Statement; see also paragraphs 19, 60, 64, 92 and 179 to similar effect). It explains why Mr Winter said that Mr Davies' opinions would be central at any trial (Case Statement, paragraphs 63-4):

> "63. … The issue in the trial in this regard is likely to be restricted to whether Mr Davies was correct in his first opinion

> when he concluded that the restoration liabilities could not be exported to the BVI [companies] or whether he was correct in his second opinion when he concluded that they could be.
>
> 64. This matters because it is the prosecution case that Mr Davies knew that he was wrong in law in his second opinion when he concluded that the restoration liabilities could be exported. He gave his second opinion because he had been paid £250,000 to join the conspiracy and provide the bogus legal opinion critical to its success."

If and insofar as the obligations were transferred, the opinion was irrelevant; because the reason for any prejudice to the authorities' ability to enforce the restoration obligations would then be as a result of the actual transfer of the obligations not Mr Davies' opinion. The opinion becomes crucial, however, if the transfer of obligations was in truth illusory.

103. This may also explain why Mr Winter did not include express reference to dishonesty in the particulars of charge; because a central – indeed, *the* central – feature of the Crown's case was the second opinion from Mr Davies, which he and all of the other conspirators were well aware was bogus, and which could therefore but be dishonest. The entire conspiracy turned on that. Dishonesty was thus inherent in the conspiracy.

104. I will come on to deal with the apparent incongruities within the Case Statement shortly. I said that the Case Statement was apparently inconsistent with the particulars of charge, because, on the case in the Case Statement, by the time Oak was established and the freeholds were transferred, the conspirators knew full well that the transfers were ineffective in transferring the restoration obligations, and the provision in the accounts was released only because of the illusion created by Mr Davies' opinion to the contrary; whereas the particulars refer only to an agreement to transfer the freeholds thereby (in fact) transferring the restoration obligations resulting in the release of the provision. At the very least, the particulars did not properly identify the crucial elements of the offence which, on the basis of the Case Statement, the Crown sought to prove. However, for reasons that will soon become apparent, any such defect in the case is not now material to these applications.

105. Consistent with the particulars of charge, the Case Statement was based upon the MPAs and the Coal Authority being the only victims. There is in my view poor focus on the nature of the prejudice to those authorities in the Case Statement. However, amongst other authorities, it refers to Owen, Welham, Scott and Wai Yu-Tsang; and (at paragraph 33) to the propositions that:

> "(i) conspiracy to defraud is not restricted to cases where an intention to cause or risk economic loss is present; and
>
> (ii) conspiracy to defraud extends to prejudicing the rights and obligations of other bodies"

106. The case on prejudice is thereafter put thus (paragraph 39):

> "It is the Prosecution case that the MPAs and the Coal Authority have a public duty to ensure that the mines are restored to open countryside or to agricultural use. That public duty was protected to a degree by Celtic maintaining the provisions for the restoration works in its accounts. It was also protected by the escrow accounts that were required to be maintained. The escrow accounts remain unaffected by the sale and thus are irrelevant for these purposes. The case focuses on the deliberate decision of the conspirators to sell the freeholds on the basis that the restoration provisions would be released. This plainly prejudiced the ability of the MPAs and the Coal Authority to ensure that the restoration works were performed."

107. Whether the prosecution case falls under the first or second limb of the offence, as I have described them, is a matter to which I shall return. But we need not be troubled here with any deficiencies in the Case Statement as to prejudice, as Mr Parroy has subsequently made clear the prejudice upon which the Crown now relies (see paragraph 116 below).

108. Mr Winter's instructions were, in due course, transferred to Mr Parroy. At a plea and case management hearing on 23 September 2013 before Saunders J, Mr Parroy undertook to review the Case Statement, which he did, producing a document headed "Review of the Crown's Case" dated 9 October 2013 ("the Review").

109. Mr Parroy considered the precise terms of the proposed indictment, and he proposed some minor amendments to the particulars of charge which, he said, did not alter the thrust of the case. As I have already indicated (paragraph 3 above), I agree.

110. As to the way in which the case was to be put, Mr Parroy said:

> "1.5 I have considered the Prosecution Case Statement dated 31.5.13 prepared by Ian Winter QC and whether the manner in which the case for the Crown is there put forward is in accordance with the evidence and should be the manner, broadly speaking, in which the case is presented at any trial."

111. He concluded that it did. He said:

> "16.1 I have considered the prosecution case as it is expressed in the Prosecution Statement….
>
> 16.2 As is inevitable in a document of this length I have identified a few minor factual errors such as wrong document references etc, but, those apart, I consider that it is, as it recites the evidence, a proper and accurate reflection of the case…
>
> …
>
> 16.4 In general terms, therefore, I consider that the [Prosecution Statement] is a proper reflection of the evidence,

> puts the Crown's case correctly and remains the approach which basically the case will take…".

In other words, he confirmed that the Crown would proceed on the basis of the case as set out in the Case Statement, which I have briefly summarised above (paragraph 101).

112. Mr Parroy confirmed the view of Mr Winter that, with the exception of the liability to restore the surface (to which I shall shortly return), the restoration obligations remained with Celtic. He also considered two questions vital to the prosecution case, namely: "Was the Opinion of [Mr Davies] correct in law? Was the Opinion one which a reasonably competent barrister of his seniority could have produced?" – both of which he answered, resoundingly, "No" (paragraph 6). Indeed, sharing Mr Winter's view, he said that Mr Davies' conclusion that the all restoration obligations were transferred to Oak was "plainly incorrect and unsustainable" (paragraph 4.9); and went as far as saying this (at paragraph 6.5):

> "The Crown will submit that no competent senior counsel, advising honestly and independently, would have come to the conclusions arrived at by [Mr Davies] in the Opinion nor would it have been expressed in these terms…. The Crown does not resile from the suggestion that the terms of the Opinion were tailored to meet the requirements of the conspiracy and were motivated by the payment of a very substantial fee."

Therefore, after the Review, Mr Davies' second opinion remained at the very core of the Crown's case.

113. That confirmation of the Crown's case was important, because, as the Crown knew, each Defendant was considering an application to dismiss, and wished to know the basis on which the prosecution was brought to enable such an application to be properly framed.

114. The Defendants proceeded to prepare their applications to dismiss the charge on that basis. As the Crown's case was dependent upon Mr Davies' second opinion being wrong – indeed, knowingly wrong – they sought to show that the opinion, far from being one that was plainly incorrect and legally unsustainable, was in fact correct as a matter of law. That meant, in addition to the members of the Criminal Bar retained, they deployed members of the Chancery Bar to advise and make submissions on a number of challenging issues including who owns the freehold of a void left by open cast mining and the equitable conundrum of whether one can own the freehold of free-standing air, a matter which has apparently exercised the finest professional and academic minds in Lincoln's Inn and beyond for many years. I wish to express my particular gratitude to Counsel who made submissions on those issues, some of whom I expect had not appeared in a criminal court for some time. They acquitted themselves with their usual skill and distinction. Their submissions were clear and erudite. They went to the heart of the Crown's case, as set out in the Case Statement and the Review.

115. However, late on, the Crown abandoned its primary case as set out in those documents, harbingers appearing in Mr Parroy's skeleton argument of 9 December

2013 but the sword not completely falling until the hearing itself. And the Crown's new case, unfortunately for those who had been instructed to make submissions on the land law issues before me and no doubt to the grave disappointment of those who wished to have a judicial answer – no matter how modest – to the conundrum to which I have alluded, rendered it unnecessary to determine, of the mining sites, who owned what and when.

116. Following receipt of his skeleton argument, and upon my invitation, at the beginning of the hearing Mr Parroy set out the case which the Crown now wishes to pursue, as follows. Some of Celtic's restoration obligations (including, at least, the obligations relating to the surface and overburden down to the first seam of coal) were transferred to Oak with the freeholds. It does not matter precisely the extent of the obligations that have been transferred, only that some significant obligations were. With regard to the transferred obligations, the authorities have been prejudiced. On the nature of this prejudice, Mr Parroy was clear, precise and firm: the right of the authorities which was to be prejudiced by the conspirators' dishonest agreement was their right to recover the costs of restoring the sites, if they exercise their statutory power to do the restoration works themselves and seek to recover the costs thereof. Pre-transfer, if the authorities had had to do the restoration works themselves, in respect of the costs of those works they had recourse to Celtic, an on-shore company with substantial assets. Post-transfer, they have recourse only against Oak, an off-shore company with negligible assets. They have been prejudiced by the transfer because, "commercially and practically" (Mr Parroy's words), it will be far more difficult to obtain their money, if they are required to take these enforcement steps. The Crown do not rely upon any prejudice to the authorities in respect of any restoration obligations that remain with Celtic. As Mr Parroy put it in his skeleton argument:

> "The prejudice to the MPAs and the [Coal Authority] by the transfer to Oak is not, as suggested,… the way in which the restoration reserves are treated in the Celtic accounts but rather the difference between attempting to enforce against an on-shore company with substantial liquid funds and other assets and against an off-shore company with neither."

117. During the course of his submissions, Mr Parroy denied that this amounted to a material change to the prosecution case. He referred to sections of the Case Statement which, he said, reflected this case, notably paragraphs 38-9:

> "38. It is the prosecution case that the Defendants agreed to export the restoration liabilities to the BVI [companies] for the deliberate purpose of releasing the provisions that had been made in Celtic's annual accounts to enable the restoration works to be paid for. They did so knowing that there was at least the risk that the restoration works would not be paid for as a result of the transfer of the freeholds in the sites to Oak and its subsidiaries. They did so knowing that the ability of the MPAs and the Coal Authority to ensure that Celtic performed the restoration works would be prejudiced as a result. This was an intention to practise fraud on the MPAs and the Coal Authority. It was an intention to act to the prejudice of the

> rights of the MPAs and the Coal Authority. It was as a result a conspiracy to defraud contrary to Common Law.
>
> 39. It is the prosecution case that the MPAs and the Coal Authority have a public duty to ensure that the mines are restored to open countryside or to agricultural use. That public duty was protected to a degree by Celtic maintaining the provisions for the restoration works in its accounts. It was also protected by the escrow accounts that were required to be maintained. The escrow accounts remained unaffected by the sale and thus are irrelevant for these purposes. The case focuses on the deliberate decision of the conspirators to sell the freeholds on the basis that the restoration provisions would be released. This plainly prejudiced the ability of the MPAs and Coal Authority to ensure that the restoration works were performed."

118. There were other references too, e.g. in paragraph 284 of the Case Statement, where, in dealing with the reduction in the provision in the Celtic accounts, it is said:

> "*As a result of the sale of the sites* it was released and was no longer secured for that purpose" (emphasis added).

119. These are, Mr Parroy submitted, all references in the Case Statement to the actual transfer of liability for restoration obligations, not an illusion of transfer.

120. Furthermore, in the Review, Mr Parroy himself considered the position of the liabilities to restore the sites that were, he accepts, transferred to Oak, namely the liabilities in respect of the restoration of the surface. Of these, he said (at paragraph 4.3):

> "Thus *the effect of the sale to Oak* has been to significantly reduce the ability of the MPAs to enforce surface restoration, under either the original planning permission or the section 106 agreements and, if such restoration is to occur, transfer the liability and cost to the MPAs" (emphasis added).

121. I accept that these parts of the Case Statement and Review are not entirely in keeping with the Crown case as set out in those documents. However, despite these passages, it seems to me that there is no doubt as to what that case was. It was concerned with the prejudice to the MPAs and the Coal Authority resulting from the *retention* of restoration obligations by Celtic with a substantially reduced provision in respect of the future contingent liability in respect of them; and the deceit of Mr Davies' second opinion in opining that, in law, they had been transferred. The case put forward by Mr Parroy at the hearing rather concerned the prejudice resulting from the *transfer* of restoration obligations from Celtic (an on-shore company with significant assets) to Oak (an off-shore company with no significant assets). Indeed, he expressly and firmly confirmed that, to the extent that the obligations had been retained, they were irrelevant to the Crown's case: "They can", he said, "be ignored".

122. Those representing the Defendants, each in his own way, submitted that the case Mr Parroy now sought to pursue was substantially different from that set out in the Case Statement and the Review, upon which they had prepared their applications to dismiss. On behalf of Mr Davies, Mr Barnes, a model of temperance, felt obliged to call this a volte face. Others were less temperate, expressing courteous but frank outrage at this very late and substantial change in the basis of the prosecution case.

123. Suffice it to say that, despite the eloquence, boldness and skilful legerdemain of Mr Parroy, there can be no doubt that this represented a very substantial change to the basis of the prosecution case, which was now focused, not on the restoration obligations retained, but, exclusively, on the restoration obligations successfully transferred to Oak. Despite the passages I have quoted (paragraphs 117-120), in my view it cannot be contended that the new case was sensibly set out as even an alternative in the Case Statement. It was that change that meant, amongst other things, the question of ownership of various parts of the site following the transfer of the freeholds became irrelevant; because the Defendants of course accept, as they have always accepted, that at least some of the obligations were transferred. It was the Crown who had been contending that, in substance, they had not.

124. It is, of course, not for me to speculate as to why the case set out in the Case Statement and the Review was abandoned. Those who appeared for the Defendants said, powerfully, that it could be no coincidence that it had been abandoned only after the Crown had seen the applications to dismiss and submissions in support, which pointed out inherent weaknesses in the case as set out in the Case Statement, for example (i) the difficulty – they said, impossibility – of maintaining that Mr Davies' opinion (that liability for all the restoration obligations was transferred to Oak with the freeholds) was "plainly incorrect and unsustainable", and bogus, in the face of submissions by eminent Chancery Leading Counsel to the effect that it was, in law, correct; and (ii) the absence of any nexus between the deceit of Celtic's auditors by the "bogus" opinion, and any prejudice to the MPAs and the Coal Authority.

125. Given that the Crown no longer pursue that case, I need say nothing further about it; save to say that one can understand why Mr Parroy might have had real concerns about it.

126. Turning to the case that the Crown do now wish to pursue, submissions were made on the behalf of the Defendants – again, powerful – that the case as set out in the Case Statement having been abandoned, I ought simply to dismiss the charge. For reasons I have given (see paragraphs 3 and 96 above), the case statement and similar documents are important in a prosecution for conspiracy to defraud, to enable the defendants to know precisely the case they face and to have a proper opportunity to meet it; and also to prevent the prosecution case drifting around in this nebulous offence, for example to counter defences that are made.

127. However, important as the case statement is, in these applications we are concerned primarily with the charge and its particulars. Mr Parroy has made no application to amend those, nor has he suggested that the Crown might in the future wish to do so. He submits that those particulars are still good, and the "new case" is entirely consistent with them. Indeed, he might have said – but for obvious reasons he refrained from doing so – that the new case was more consistent with the particulars of charge than the old.

128. In those circumstances, although the Case Statement would of course need amending if the case were to proceed, I propose dealing with the applications on the basis of the case that the Crown now wishes to pursue. I hasten to add that the Defendants, despite their pleas that a change of case ought not to be allowed at this stage, were all fully prepared to meet the new case and did meet it with force. They each submitted that, even on the new case and the evidence upon which the Crown seeks in support of it, a prosecution on the basis of this charge and these particulars could not succeed.

129. Therefore, after a grim and lengthy trek through the foothills, we at last have in sight the issue that will determine these applications: on the basis of the facts and matters upon which the Crown now wish to pursue against the Defendants as set out by Mr Parroy, could a jury properly convict the Defendants on the basis of the particulars of charge now relied upon and set out in paragraph 3 above?

Prosecution Case: Discussion

130. The Crown have not approached this case with particular analytical precision; but there appear to be three possible bases on which it now being be put:

i) An agreement to deceive the MPAs and/or the Coal Authority and, as a result of the deception, to cause them to act differently from the way in which they would have acted if they had know the true position.

ii) An agreement whereby the economic interests of the MPAs and/or the Coal Authority are prejudiced by lawful means.

iii) An agreement whereby the economic interests of the MPAs and/or the Coal Authority are prejudiced by unlawful means.

(i) falls within the second way in which the offence may be committed, as described above; (ii) and (iii) fall within the first way (see paragraphs 36 and following above).

131. I will deal with these three bases in turn.

The First Basis

132. Whilst for the second limb to apply, the duty compromised need not be a public one (see paragraph 47 above), the only alleged object victims of the alleged conspiracy to defraud are, of course, public bodies, namely the MPAs and the Coal Authority; and the Case Statement, Review and skeleton arguments for the Crown are redolent with references to "prejudice to public rights and duties" (see, e.g. Mr Parroy's Skeleton Argument of 9 December 2013, paragraph 23).

133. However, this case cannot fall within the second limb of the common law offence as I have described it. That is based on an object victim being deceived into acting in a way in which he would not otherwise have acted but for the deceit. There is no such deceit here. The Crown do not suggest that either the MPAs or the Coal Authority knew of the establishment of Oak or the transfer of the freeholds to it, prior to the event; and Mr Parroy conceded that, had they known, they could not have taken any steps to prevent it, e.g. by seeking an injunction. They knew of the true position – the sale to Oak was not at arms-length and was not on a normal commercial basis – only

after the event. But even since then, they have taken no steps to set aside any transaction, and it is indeed common ground that the transactions cannot be set aside. Mr Parroy concedes that:

> "It is not disputed that the sale of the freeholds of the sites was effective in the sense that it passed some legal title to Oak and its subsidiaries. In so doing the restoration liabilities, which ran with the land, also passed to Oak" (Skeleton Argument of 9 December 2013, paragraph 77)

134. There is no evidence that, had the authorities known the true position earlier, they would have acted in any way differently. Even if they had been alerted, and had instigated an investigation, this case is very different from Welham where the Board of Trade had a duty to investigate secondary to their regulatory function. It is not suggested here that any investigation by the authorities would have resulted in any action being taken by them that was in the event not taken, or in them refraining from doing something they in fact did. Furthermore, although discussions about restoration of the sites have continued between Oak, Celtic and the MPAs, there is no evidence that, due to the conspirators' concealment of the true nature of the transaction, the MPAs have acted in those negotiations in any different way than had they known the true position from the outset.

135. In reality, this is clearly not a case concerning the deception of someone causing that person to deflect from the proper performance of his duties and obligations. Neither the MPAs nor the Coal Authority have a duty to restore the sites. Whilst, by virtue of section 2(1)(b) of the Coal Industry Act 1994 (see paragraph 67 above), the Coal Authority has a statutory obligation to carry out its licensing functions in the manner it considers is best calculated to secure, so far as practicable, that licensees are able to finance coal operations including restoration of land – and a similar obligation may well be implicit in the Town and Country Planning Acts, so far as restoration following development and the MPAs are concerned – that obligation bites when that function is exercised, i.e. at the time of the grant, when the terms and parameters of the licence or permission are fixed by Coal Authority and the MPAs respectively. It is not suggested that the conspirators had come to – or even begun considering the possibility of – a dishonest agreement at the time of grant of any relevant licence or planning permission. Even if the authorities had failed in their duty to carry out these licensing and planning functions in accordance with the relevant statutory scheme – and one can only note the width of the discretion they have in exercising those functions – nothing the conspirators did caused or materially contributed to that failure.

136. There is, in short, a complete lack of nexus – of causal connection – between the conspirators' agreement including steps they took in pursuance of that agreement, and the conduct of the public authorities involved.

The Second Basis

137. As I have already identified (paragraph 116 above), the Crown's case is in substance based upon the proposition that the authorities suffered some financial prejudice. As Mr Parroy put it, the right of the authorities which was to be prejudiced by the conspirators' dishonest agreement was their right to recover the costs of restoring the

sites, if they exercise their statutory power to do the restoration works themselves and seek to recover the costs thereof. If they do take that course, recovery against Oak (an off-shore company with limited assets) will be "commercially and practically" more difficult and, he submits with force, probably impossible. In other words, the concern is about the contingent financial liability owed to the authorities in respect of the costs of restoration if the authorities perform those works themselves. The fact that the victims happen to be public bodies is merely coincident.

138. In respect of that case, it is well-established that a conspiracy to defraud need not involve an unlawful object; it can comprise an agreement to obtain a lawful object by unlawful means (see paragraph 29 above). Mr Parroy relies upon that very proposition in paragraph 50(a) of his 9 December 2013 Skeleton Argument. He has never contended that the object of this fraud was unlawful in itself – he concedes that the relevant restoration liabilities were lawfully transferred to Oak – and his primary case now relies upon the adoption of unlawful means towards that object, to which I shall shortly come.

139. However, given that the only means set out in the particulars of charge – the establishment of Oak in the beneficial ownership of the conspirators, and the transfer of the freehold title in the sites to Oak – are, on their face, not unlawful, I raised the question of whether, if I am unpersuaded that there were unlawful means here, it is the Crown's case that a conspiracy to defraud can comprise an agreement to obtain a lawful end by lawful means.

140. In his Skeleton Argument of 6 February 2014, Mr Parroy submitted that it can (paragraph 57). He submitted that recent authorities have not suggested that the object or means of a conspiracy to defraud have to be unlawful; and he relied on R v Hollinshead [1985] AC 975 which, he contends, approved the existence of a conspiracy to defraud with a lawful object by lawful means. He also relied upon Law Commission reports and academic commentaries which, he submitted, at least admitted the possibility.

141. The Crown's change of case during the hearing at least potentially gave rise to the issue of whether a criminal conspiracy to defraud comprising an agreement to achieve a lawful object by lawful means is recognised by the common law. However, having heard argument, I am entirely unpersuaded by Mr Parroy's contention that it is.

142. Consistent with article 7(1) of the European Convention on Human Rights (cross-headed, "No punishment without law"), in Rimmington at [33], Lord Bingham, after reviewing the relevant authorities, said this:

> "There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law offence is to be enlarged, it 'must be done step by step on a case by case basis and not with one large leap' (R v Clark (Mark) [2003] 2 Cr App R (S) 363 at [13])."

143. In R v Jones (Margaret) [2006] UKHL 16; [2007] 1 AC 136 at [29], Lord Bingham expanded upon that final proposition, identifying:

> "… what has become an important democratic principle in this country: that it is for Parliament representing the people of the country in parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle."

144. Even if that were not binding upon me, I strongly agree with it; and would respectfully follow and adopt it. The reasons for that principle, and why the courts should eschew "dog-law", are set out with overwhelming persuasiveness in Rimmington at [33].

145. Unsurprisingly, those principles have been consistently applied since, particularly in relation to cartels and price fixing. In Norris v Government of the United States of America [2008] UKHL 16; [2008] 1 AC 920, the House of Lords approved the passages I have quoted from Rimmington, and applied them. Their Lordships observed that no one had ever regarded secret cartel behaviour as constituting a conspiracy to defraud or any other form of criminal offence; and held that, absent aggravating circumstances (such as material fraud, misrepresentation, violence, intimidation or inducement of breach of contract), it was not actionable or indictable. To find that such conduct fell within the offence of conspiracy to defraud now would, it was held, contravene the principles articulated in Rimmington.

146. Instinctively, I would be reluctant to find that an agreement to engage in entirely lawful conduct might, as a matter of law, amount to a criminal conspiracy to defraud at common law. Given these words of caution, in the clearest and strongest terms and from the highest court in the land, I would only find that to be the case if driven to do so by principle or authority.

147. On this issue, the Law Commission reports do not significantly assist Mr Parroy. As I have already indicated, the Commission, despite its diligence, could apparently come up with no case in which the proposition has been applied; and, as I have already said, even the hypothetical examples it contemplated do not appear to include any of lawful object by lawful means (see paragraph 31 above). In paragraph 63 of his Skeleton Argument of 6 February 2014, Mr Parroy relied upon the following sentence from paragraph 5.12 in the Law Commission 2002 Report:

> "In some cases, such as conspiracy to defraud, the other elements of the offence are not prima facie unlawful, so dishonesty renders criminal otherwise lawful conduct."

But, as Mr Rees pointed out in argument, that is at best ambiguous; and the reference to "lawful conduct" could refer to object alone, and not means. Indeed, when read in its full context, it seems to me that it probably does mean that: it is said in the context of a comparison of offences in which unlawfulness is inherent in the elements of the offence, and those in which otherwise lawful conduct is rendered unlawful by the means. In any event, I do not consider that that gives any significant support to the

proposition that an agreement to act dishonestly, without more, is liable to be prosecuted as a conspiracy to defraud.

148. On the other hand, paragraph 4.53 of the 2002 Report suggests that unlawfulness *is* required in either object or means:

> "Dishonest breach of a contractual obligation is not in itself an offence, though there will be a deception offence if the defendant intends to break the contract from the start".

In this case, of course, there is no suggestion that the conspirators, or any of them, intended from the outset or at any relevant time before 2010 that Celtic should seek to avoid any liability for the restoration obligations.

149. However, I do accept that some passages from the Law Commission reports suggest, at least at a conceptual level, the offence is extremely wide; e.g. paragraphs 3.6-3.9 of the 2002 Report, which conclude:

> "In effect, conspiracy to defraud is a 'general dishonesty offence', subject to the irrational requirement of conspiracy".

150. Mr Parroy gets no more assistance from the academic writers. He refers to passages from Smith (paragraph 19-08) and Smith & Hogan's Criminal Law, 13th Edition (2011) ("Smith & Hogan") (paragraph 13.3.5.1); but these two texts, both authored or co-authored by David Ormerod, merely say that a conspiracy to defraud can be committed although the acts are neither criminal nor tortuous; but they do not suggest that it is sufficient if the acts are not unlawful at all. They do not assist the argument. Mr Parroy's best academic support comes perhaps from Ormerod and Montgomery. I have already quoted the passage upon which he relies (see paragraph 34 above); but that passage needs to seen in context. The learned authors say (at paragraphs D7.24 and 7.32):

> "The offence is therefore exceptionally broad. It seems that any dishonest act, even when it involves no deception nor the more general falsification of a transaction, which has the effect of depriving a person of anything or, indeed, prejudicing him economically in any other way will suffice…
>
> However, where possible economic loss is concerned there must exist some right or interest in the victim which is capable of being prejudiced, whether by actual loss or by being put at risk.
>
> [The offence] embraces not only 'every offence of which the ingredients include dishonesty and either some injury to private proprietary rights or some fraud upon the public' but also every dishonest act, not amounting to an offence, which injures or risks some 'proprietary right or amounts to a fraud upon the public."

That again suggests that, on a conceptual basis, the offence may be very wide, even potentially covering lawful objects by lawful acts; but it is to be noted that the authors acknowledge there are limits to its ambit. They consider there to be an important restriction on the offence if based on "economic prejudice", namely in the need for some injury or risk to the proprietary rights of the victim, which I deal with below.

151. Conspiracy to defraud is a common law offence; and, despite the faint encouragement Mr Parroy receives from academic writings as to its conceptual ambit, if the common law, with its long and varied history, has not found an agreement to achieve a lawful object by lawful means to be unlawful hitherto, I consider it would be wrong in principle for the judiciary to extend the offence now – particularly as Parliament has considered the scope of fraud recently, and not chosen to make it a statutory offence in the Fraud Act 2006. It is not suggested that the conspirators committed any statutory offence against the MPAs or the Coal Authority.

152. That leads me to Hollinshead, the only authority upon which Mr Parroy relies in which, he contends, the proposition has been applied or recognised. Mr Hollinshead and his two entrepreneurial co-defendants manufactured devices whose only possible use was fraudulently to alter electricity meters to give a falsely low reading. They sold the devices to an individual who (they thought) intended to re-sell them to electricity customers, and who did not intend to use one himself. That individual, however, was not a fellow entrepreneur. He was a policeman. The three men were found guilty of a conspiracy to defraud the Electricity Board. The issue for the House of Lords was whether they could be guilty of that offence in those circumstances.

153. On the face of it, the three men had not done anything unlawful, because it was not unlawful to make and sell the devices to a man who was not himself going to use them to defraud the Electricity Board. However, that man was going to sell them on to individuals who, as found in the case, certainly would. Lord Roskill, in the leading judgment (at page 997), found that an agreement to manufacture and put into circulation "dishonest devices", the sole purpose of which was to cause loss to electricity companies, was a conspiracy to defraud those companies.

154. For the purist, this case is not without its analytical difficulties – the apparent proposition that inanimate objects might be dishonest (or, presumably, honest) defies rigorous legal analysis. However, some things are clear from the case.

155. First, the case proceeded on the basis that the Electricity Board would certainly be defrauded by the use of the devices which the defendants manufactured and sold, because of the inevitable consequence of the devices, once put into circulation by the defendants, being used to harm the proprietary rights of the Board in the electricity it owned. When Lord Roskill referred to "dishonest devices", he was referring to devices that not only had no other purpose than that of dishonestly defrauding the Electricity Board; but also, on the evidence, were inevitably and certainly going to be used for that purpose. As persuasively put by Mr Henry Blaxland QC for Ms Bodman, the real issue in the case was not the scope of the offence in terms of lawfulness of objects and means, but *who* could properly be found to be within the conspiracy: could the offending be taken back to those who manufactured and put the devices into public circulation? Lord Roskill clearly had no difficulty in answering that question affirmatively: "… [N]o one", he said, "save for the most enthusiastic lawyer would willingly hold otherwise".

156. Second and importantly, Lord Roskill made very plain that he was not expanding the principles or authorities of the common law in relation to the offence. Given that there is no suggestion of any authority before this in which it was held that a conspiracy to defraud could comprise lawful means to a lawful object, it is quite clear that this case does not support that as a proposition.

157. Consequently, I find no support in authority for Mr Parroy's submission, and the thinnest support in academic writings and that at only a conceptual level. I find none of this persuasive.

158. Two final points. First, the dishonesty of the conspirators which I have assumed for the purposes of these applications cannot assist Mr Parroy. Even if the conspirators misled the auditors of Celtic, or Celtic itself or Oak as a separate legal entities, or the MPAs and/or the Coal Authority after the event and in a manner that did not deflect the authorities from the course they would otherwise have followed, that would not change lawful means into unlawful means. There is simply no nexus between that deceit and the object of the conspiracy. In Norris, the House of Lords said of the price-fixing cartel that, even if the agreement was void and unenforceable as being in restraint of trade:

> "In the absence of any aggravating feature such as misrepresentation, compulsion, intimidation, violence, molestation or inducement of breach of contract, the defendants' conduct would not have been unlawful if done by a single independent party and was not rendered unlawful by their combination."

In other words, even if an agreement to fix prices is unlawful in the limited sense of being void and unenforceable, in the absence of aggravating features it is not criminal. Such material aggravating features may make the means unlawful. The aggravating features to be material have to be aimed at the victim. In the case before me, there is no evidence of material aggravating features.

159. Second, I said that I would briefly return to dishonesty (see paragraph 53 above), and I do so now. Mr Rees submitted that, if the object and means agreed upon were lawful, the Crown could not prove dishonesty: because, after R v Ghosh [1982] QB 1053, in theft, if the defendant has the right to do the act in question (or believes he has that right), he is not dishonest – and the same test must apply in conspiracy to defraud (see Smith at paragraph 5.25; Smith & Hogan at page 453). This is a compelling argument, giving further principled support for the proposition that a conspiracy to defraud cannot comprise a lawful object by lawful means.

160. For those reasons, on the basis of principle and authority, I consider that a conspiracy to defraud must incorporate some unlawfulness, either in its object or in its means. It cannot comprise an agreement to achieve a lawful object by lawful means.

The Third Basis

161. In this case, in the reconvened hearing, Mr Parroy made clear that it was the Crown's primary case that the conspiracy *did* involve unlawful means. In the Review, he conceded that nothing prevented Celtic selling the freeholds and nothing obliged them

to sell to a company capable of discharging the restoration costs. Before me, he conceded that the means set out in the particulars of charge – namely the establishment of Oak in the beneficial ownership of the conspirators, and the transfer of the freehold title in the sites to Oak – were both perfectly lawful. The conspirators had the right to establish Oak, and Celtic had the right to sell the freeholds to Oak. That is precisely what prompted my raising the possibility of a lawful object/lawful means conspiracy to defraud.

162. In paragraph 9 of his Skeleton Argument of 6 February 2014, Mr Parroy confirmed that the means relied upon by the Crown were the establishment of Oak in the beneficial ownership of the conspirators, and the transfer of the freehold title in the sites (and the attendant restoration liabilities) to Oak for minimal or no value. He purported to add a third, namely: "The concealment of the true ownership/control of Oak from those outside the conspiracy". However (i) that does not feature in the particulars of charge, (ii) in so far as it relates to concealment from persons other than the MPAs and the Coal Authority, it cannot be material to the conspiracy to defraud those authorities; and (iii) in so far as does relate to concealment from the MPAs and the Coal Authority, for the reasons given above (paragraph 135-6), there is a lack of nexus between any agreement by the conspirators to conceal and the conduct of the public authorities involved. Therefore, Mr Parroy was properly restricted to the two means set out in the particulars.

163. However, from paragraphs 21 in that skeleton argument, he submitted that those steps necessarily involved the conspirators committing offences under sections 1, 2, 3 and 4 of the Fraud Act 2006, and obtaining secret profits at the expense of Celtic, the details of which are set out in paragraph 26 and following. The victims of the conduct which it is alleged amounts to various statutory offences and obtaining secret profits are Oak and Celtic; in none is the victim either an MPA or the Coal Authority.

164. I have to say that I did not expect this development in the Crown's case. So far as I am aware, it had never before been suggested that statutory offences would be pursued against the conspirators – indeed, Mr Winter appeared to have ruled that out – or that they had committed any offences against Celtic or Oak or anyone but the MPAs and the Coal Authority.

165. Neither, clearly, did those representing the Defendants expect this turn of events. Mr Barnes was reluctantly moved to describe this too as a volte face, and also as the production of a rabbit out of a hat; whilst others, with continuing politeness but compounded outrage, put the matter somewhat more brusquely. None was given a sensible opportunity to respond to this new basis of case; although Mr Rees, in the limited time available, managed submissions which suggested that, if this basis were pursued, it might have some difficulties.

166. However, I do not have to rule on that. I have to rule on the legal integrity of the particulars of charge as relied upon by the Crown. There has been no application to change the particulars. Mr Parroy accepts – rightly – that the objects of the conspiracy were lawful. He accepts – again, rightly – that the only means relied upon in the particulars were also lawful. I have concluded that a conspiracy to defraud in which both the object and the means are lawful is unknown to the common law.

167. I pause to mark that, whilst I do not say that it is conceptually impossible, a charge of conspiracy to defraud various public authorities and only them, reliant for its illegality only on conduct amounting to statutory offences against two private companies, both apparently owned and controlled by the conspirators, would be strange creature. The Defendants do not accept that they were guilty of any statutory offences against anyone. They have not of course been charged with any. Of one thing I am sure; if a case of conspiracy to defraud an individual is, in terms of means, based entirely upon conduct that amounts to statutory offences by those defendants against others – or, for that matter, the taking of secret profits at the expense of others – then that needs to be made plain in the particulars of charge to enable the defendants properly to prepare their case, and to enable the jury to consider whether that specific criminal conduct has been made out. They are not in the particulars of charge here, and there is no application to amend to include them. I do not know whether, in reformulating the means as he has done, Mr Parroy has specifically applied the Attorney General's Guideline; and, if so, why it is thought that this charge would in any event be appropriate; rather than charges of statutory offences or a conspiracy to defraud the two companies. But that is by way of observation; not by way criticism, and certainly not by way of invitation.

168. That is sufficient to determine these applications, by dismissing the charge as it is brought. However, that is not the only reason why the charge must be dismissed.

169. As I have explained, this prosecution relies upon "economic prejudice" caused to the MPAs and the Coal Authority. In Scott (at page 840E-F), Viscount Dilhorne indicated that he did not consider that term the most apposite. I respectfully agree. Viscount Dilhorne preferred "injury"; and, after a careful review of the relevant authorities (all of which appear to involve proprietary rights), indicated that what was required was some injury to a proprietary right of the object victim (see paragraph 40-41 above). If such a right is put at risk, it is, for these purposes, "injured" (see, e.g., R v Adams [1995] 1 WLR 52 per Lord Jauncey at page 64E-F); but that proposition concerns the nature of the injury, not the nature of the right the victim must have to be injured. The use of the term "economic prejudice", although often used in this context, in my respectful view, has the potential for obfuscating the true requirement; which explains Viscount Dilhorne's reluctance to adopt it. The term appears to have survived as a result of two things: legal habit, and the fact that in most cases it is not in issue that the targeted right or interest is proprietary – the conspirators intend to relieve the victim of his money or such other property that he owns – and the only issue is dishonesty.

170. Mr Parroy submitted that, on consideration of the authorities, there was no requirement for the victim's jeopardised right or interest to be proprietary. He relied upon a number of authorities, including the passage from the judgment of Lord Denning in Welham, quoted above (at paragraph 44), and particularly the following:

> "Put shortly, "with intent to defraud" means "with intent to practise fraud" on someone or other. It need not be anyone in particular. Someone in general will suffice. *If anyone may be prejudiced in any way by the fraud, that is enough*…." (emphasis added).

171. The rest of the Appellate Committee agreed with Lord Denning; and that passage was specifically approved by Lord Goff in Wai Yu-Tsang (at page 276-7, quoted at paragraph 47 above). However, both of those cases were early cases under what I have described as the second way in which the offence might be committed, i.e. they did not involve agreements to injure the object victim's economic rights or interests at all, but rather agreements to mislead the victim into acting differently from how he would in fact have acted if he had been aware of the true position. Indeed, Lord Goff appears to have drawn a distinction between "an intention to act to the prejudice of another's right", and "an intention to practise fraud on another". In any event, the nature of right required to be prejudiced in an "economic prejudice" case was not in issue in these cases; and the comments of their Lordships as to the width of the offence were at most obiter, and in any event cannot in my view be interpreted to suggest that they intended to say that, in an economic prejudice case, anything less than actual or potential injury to a proprietary right of the victim will do.

172. Nor, in my view, does R v Allsop (1977) 64 Cr App R 29, relied upon by Mr Parroy, support his argument. Shaw LJ said (at page 31):

> "Economic loss may be ephemeral and not lasting, or potential and not actual; but even a threat of financial prejudice while it exists may be measured in terms of money."

But that was clearly intended merely to confirm that actual economic loss was not required; as I have indicated, it is well-established that a risk to a relevant right is sufficient.

173. In my view, none of these cases suggests that the requirement set out after a review of the authorities by Viscount Dilhorne in Scott – for the victim to have a proprietary right or interest – is not still needed. Whilst it is true that, in cases in which the nature of the right has not been in issue, the courts have expressed themselves in very wide terms, where the matter has been in issue then there has been insistence on the right or interest actually or potentially prejudiced being proprietary. Despite the diligent researches of Mr Parroy, those who sat with and behind him, and those representing the Defendants, I was not referred to a single case where reliance has been placed upon "economic prejudice" in which an interest less than proprietorial has been found to be sufficient. Authority thus points, with some firmness and clarity, in favour of the proposition that, for a conspiracy to defraud based on economic injury to the object victim, the right or interest of the victim that is compromised must be proprietary.

174. There are good reasons of principle and policy why that should be so. The law must set boundaries of behaviour in commerce, and in the management of everyday life. As I have indicated, where the line is drawn is now primarily a matter for Parliament to determine.

175. What is the nature of the right which the Crown say was jeopardised in this case? As I have indicated (paragraph 116 above), Mr Parroy was clear and firm in identifying the right of the MPAs and the Coal Authority which the conspirators' agreement prejudiced and upon which the Crown relies: it was their right to recover the costs of restoring the sites, if they exercise their statutory power to do the restoration works themselves and seek to recover the costs thereof. That is a contingent right in the

authorities, and a corresponding contingent obligation in those who would have a legal responsibility to pay those costs if the contingency occurred. As Lord Sumption recently said in Re Nortel [2013] UKSC 52; [2013] 3 WLR 504 at [132], such contingent rights and obligations need not arise by way of contract: they can, as in this case, arise in the context of statutory provisions which may facilitate, create and even mandate a legal relationship between a contingent creditor and a contingent debtor.

176. Such a contingent debt might be secured or unsecured. In this case, the contingent debt was secured, to an extent, by way of the moneys paid into the escrow accounts. The authorities (or at least those authorities for whom they were set up) have a proprietary interest in the escrow moneys. The evidence is that Celtic has made all required payments into such accounts, and the conspirators have done nothing to prejudice their rights to that security. Of course, as the authorities have a proprietary interest in the escrow funds, if the conspirators had sought to take those funds, or put them at risk, the authorities could have taken legal action to prevent them from doing so.

177. However, apart from the escrow moneys over which the authorities have security, the position is very different: the authorities were contingent and unsecured creditors of Celtic. Mr Parroy sought to argue that this was not a true characterisation of the relationship, because the authorities are public bodies; but that submission elides, if not confuses, the two entirely discrete ways in which the offence can be committed. We are not here talking of a body being misled into acting in a way it would, but for the deception, not have acted: the MPAs and the Coal Authority were not materially deceived. We are here concerned with economic injury, which requires the victim to have a proprietary interest to be jeopardised. It is trite law that, at common law, unsecured creditors have no property interest in the assets of the debtor company. Subject of course to express statutory provision, that is true whether the creditor is a public body or a private individual, and whether the debt is immediately due or only contingent.

178. That is why, since the fourteenth century, Parliament has intervened to make transactions which seek to defraud creditors unlawful, both in the sense of being capable of being set aside and in the sense of attracting criminal sanction. The Statute of 1371 (50 Edw 3 c 6) provided that: "Fraudulent assurances of land and goods to deceive creditors shall be void". The current provision is in the form of section 423 of the Insolvency Act 1986 with the cross heading "Transactions to defraud creditors", under which, in certain circumstances, Parliament has provided for the restoration of the victim to the financial position he would have been in had the transaction not taken place, e.g. by setting aside the relevant transaction. I need not consider section 423 in detail; but it has a number of limitations which Parliament has thought fit to impose. For example, section 423(3) provides that an order can only be made if the court is satisfied that it was entered into for the purpose of putting assets beyond the reach of a person who is making, or may in the future make, a claim against him; or otherwise prejudicing the interests of such a person in relation to such a claim. There is no criminal sanction in section 423; but the 1986 Act provides a range of criminal offences, including section 207 which makes transactions in fraud of creditors a criminal offence in specified circumstances. Thus Parliament has considered the position of unsecured creditors, including the possibility that they will be adversely affected by transactions intended to defraud them; and Parliament has

drawn a line in commercial and everyday life as to where such transactions should be void or voidable, and where they should be criminal.

179. This means that conduct that some may regard as morally reprehensible is not open to be set aside yet alone be the possible subject of criminal sanctions, because Parliament has determined that those sanctions should not apply in those circumstances. Mr Barnes referred me to Royscot Spa Leasing Limited v Lovett [1995] BCC 502, mainly for its facts. Mr Lovett, who was being pursued by an unsecured judgment creditor, transferred his house for no consideration into the names of his wife and stepson. The Court of Appeal were concerned with the issue of what was meant by "purpose" in section 423(3) – it was held that it meant the dominant subjective purpose of prejudicing the victim – but, as Mr Barnes submitted, that exercise might have been otiose if Mr Lovett, his wife and various other family members involved could have been prosecuted for conspiracy to defraud. It was not suggested for a moment that they might have been so prosecuted. Indeed, as I have already indicated, I was referred to no case in which unsecured rights have founded a conspiracy to defraud; and, it was submitted by Mr Barnes and others on behalf of the other Defendants that, for the courts now to make criminal transactions which seek to prefer or prejudice unsecured creditors, outside the statutory provisions which govern the same, would not only fly in the face of Parliamentary will but also lead to uncertainty in this area of the law where certainty is important. I agree. We are dealing here will lines that are essentially matters of policy, which must be left to Parliament.

180. The Crown in the case before me does not suggest that anything the conspirators did is void or voidable – or that they committed any offence – under these provisions. Mr Parroy submitted that there is evidence – as there is – that the conspirators were concerned at the time that the scheme was unlawful, both in the sense that the sales to Oak might be set aside and the scheme might attract criminal liability. Indeed, they appear to have asked Mr Davies to give an opinion on both aspects. However, conduct is not rendered criminal simply because a participant believes that it is, or might be, criminal. Mr Parroy further submitted that what the conspirators had done was patently reprehensible. But the criminal courts do not judge commercial morality and acceptable commercial behaviour in itself; Parliament, and to an extent no doubt the market itself, does that. Nothing done by the conspirators in prejudicing the rights and interests of the MPAs and the Coal Authority amounted to a criminal offence in the enacted statutory provisions; and, if anything they have done adversely affects their standing in the commercial world, then that is not a matter for this court. In making those comments, I emphasise that the Defendants do not accept that they have done anything legally, commercially or morally wrong, the scheme adopted being described by one of them through Counsel as "just good business". For the reasons I have given, I express no view as to that.

181. Mr Barnes – who made especially compelling submissions on this issue - submitted that the nub of the Crown's case is that the Defendants intended to prejudice, not the ability of the victims to enforce against those whom under the statutory scheme provided they could enforce, but the economic *effectiveness* of their doing so (First Skeleton Argument of 2 December 2103, at paragraph 12). That is reflected directly in the particulars – which refer to a conspiracy to defraud the authorities by "prejudicing their ability *effectively* to enforce restoration obligations" (emphasis

added) – and in Mr Parroy's submission that the authorities have been prejudiced by the transfer of the freeholds to Oak because, "commercially and practically", it will be far more difficult to obtain their money, if they are required to take enforcement steps including seeking recovery of restoration costs they have expended themselves (see paragraph 116 above).

182. There is again force in this submission. Section 2(1)(b) of the Coal Industry Act 1994 imposes upon the Coal Authority a duty to carry out its licensing functions "in the manner it considers is best calculated to secure, so far as practicable… that [licensed] persons are able to finance both the proper carrying on of the coal mining operations that they are authorised to carry on and the discharge of liabilities arising from the carrying on of those operations;…", including of course restoration obligations (see paragraph 68 above). The Town and Country Planning Acts impose a general obligation on MPAs to ensure that there is appropriate restoration as part of any development. These obligations on the authorities are generally exercisable on the grant of a lease, licence or planning permission, as the case may be.

183. The statutory schemes enabled the MPAs or the Coal Authority, at the time of grant, to obtain security for the costs of the restoration obligations from Celtic by the imposition of conditions on the licence or planning permission (see paragraphs 67-8. 75 and 79 above). Guided by national policy, in the case of Celtic, the MPAs decided to restrict the security obtained. As I have indicated, the Coal Authority left issues of enforcement to the MPAs. In practice, the authorities were also able to determine at that stage who would be liable for restoration costs in the event that Celtic transferred their interests in the land or any of them. In the Coal Authority's case, it decided not to make Celtic liable for all of the restoration obligations in this eventuality. The MPAs made a positive decision under section 106(4) of the Town and Country Planning Act 1990 that, if and insofar as Celtic were to transfer the relevant site, the obligation would be transferred too and Celtic would be released from that obligation. Neither the MPAs nor the Coal Authority thought it appropriate to impose other conditions, e.g. to prevent Celtic from transferring any interest in the sites without their approval. Those were all important commercial decisions taken by the authorities at the time of grant. They vitally identified who would be liable for restoration costs if Celtic transferred any interest in the site; and vitally affected the effectiveness of their ability to seek the costs of restoration obligations, if they were required to perform the restoration works themselves. As Mr Barnes submitted, the transfer of the freeholds did not affect the legal rights held by the MPAs and the Coal Authority – they were fixed at the time of grant. At most, they affected the economic effectiveness of the statutory enforcement procedure; although even this effectiveness was, for the reasons I have given, to an extent determined and limited at the time of grant.

184. For those reasons, I have concluded that, on the basis of principle and authority, where the Crown rely on "economic prejudice", a dishonest agreement is not actionable as a crime at common law unless a proprietary right or interest of the victim is actually or potentially injured. That is a condition precedent. In this case, the MPAs and Coal Authority had no such right or interest. It was because they did not have such a right or interest that, as Mr Parroy conceded, the authorities could not have taken any steps to prevent the transfer of the freeholds to Oak, even if they had known of that proposal beforehand, and they cannot take any civil action now. In this

context, it is noteworthy that, even in the tort of acts causing loss to an individual by unlawful means, the unlawful means have to be actionable by that individual: OBG Limited v Allan [2008] 1 AC 1 at [49] per Lord Hoffman.

Conclusion

185. In respect of these applications, the question I have to answer is simple and discrete: could a jury properly convict the Defendants on the basis of the particulars of charge now relied upon?

186. I am well aware of the time and money that has been expended on the investigation and presentation of this case by the Crown; and that there is no challenge by way of appeal or judicial review from a ruling to dismiss a charge pre-arraignment. I have therefore considered the issues in these applications with particular scrutiny and care. Having done so, and for the reasons I have given, I have come to the firm conclusion that a jury could not properly convict the Defendants on the basis of the particulars of charge now relied upon; and, as a matter of law, the charge brought cannot properly proceed.

187. In those circumstances, I am bound to dismiss the charge against each Defendant, which I do.

Postscripts

188. I finish with two postscripts.

189. First, despite comments of the Law Commission and learned texts that the common law offence of criminal conspiracy is conceptually wide enough to include any dishonest agreement, the common law has in practice, in its usual way, placed boundaries on the offence. When such a conspiracy is charged, dishonesty is the usual focus; because the other elements are not in issue, and the question of dishonesty is determinative. However, dishonesty per se is not a crime; nor is a dishonest agreement. I have identified the limits of the offence of conspiracy to defraud relevant to this case in this ruling. Rimmington (and cases that follow it, such as Norris) make clear that those boundaries should be respected, and why. Article 7 of the European Convention on Human Rights merely underscores the essential importance of those principles. Any prosecution for such conspiracies must be based upon a proper analysis of way in which the offence was committed, which must be laid out clearly in the particulars of charge. That is not a new requirement: the Attorney General's Guidance effectively requires such an approach, and cases such as K and Goldshield Group expressly do so. It is a vital requirement. Amongst other things, it prevents the Crown from changing its core case against the Defendants, within the wide parameters of this offence; and ensures that the Defendants have a proper opportunity to respond to the charge. It also prevents the resources of the court – increasingly rare and precious – from being expended on a case put forward on a basis not ultimately pursued. Before being brought to this court, such cases need focused and rigorous analysis.

190. Second, these applications are, despite the length of this ruling, modest in their scope: they are concerned with the discrete question of whether a jury could properly convict the Defendants on the basis of the charge and particulars of charge set out in the draft

indictment. This case is not concerned about whether or not the open cast mines – described, graphically but not unfairly in the Case Statement (at paragraph 286) as "vast, unsightly [and] contaminated", and by Mr Parroy as scars on the landscape of West Wales – are restored. As I understand it, how restoration will or may take place is the subject of continuing negotiations between the MPAs, Celtic and Oak. The particulars of charge refer to four mines. In respect of two, there appears now to be no possibility of the mines not being restored; and indeed it seems that they will be restored at no public cost. Further planning permission has been granted in respect of the Selar mine, which allows coaling to 2015, with a section 106 obligation for the provision of a full escrow account. As at July 2013, that stood at £16.6m and, if it continues to be paid at the agreed rate (and there is no evidence to suggest that it will not), the MPA (i.e. NPT) considers it will be sufficient to cover the costs of full restoration. Similarly with the Nant Helen mine. A new planning permission was granted in March 2012, with a section 106 obligation to pay a total of £30m into an escrow account over 5 years. That too is up-to-date. The MPA (Powys County Council) considers it will be sufficient to cover all restoration costs. Whilst of course I well understand that the largest restoration liabilities lie in the other two mines – and that those potential liabilities are huge – those developments underscore the risks that would attend placing too much legal force on contingent liabilities.

191. In respect of those other two mines, as I say, as I understand it negotiations are continuing. In 2010, NPT as the relevant MPA recognised the need for "innovative restoration strategies" (see paragraph 13 above), a need which is no doubt continuing. If the negotiations fail, then there is a statutory machinery for enforcement. As it is, no MPA has yet even served an enforcement notice. We do not know whether they will ever be served. If they are, and those notices are not honoured, then the authorities will have recourse to recover the costs against those who, under the statutory scheme, are liable for those costs. But all of that lies in the field of civil enforcement, albeit under a statutory scheme. These criminal proceedings do not directly bear – and have never borne – upon the question of whether or not the mines are in fact restored, and at whose cost. Those are matters for a different forum, and a different day.