

Criminalising corruption

Fraud and white collar crime update



Legislative update

This update reviews a number of recent developments in the law of fraud and white collar crime.

26 October 2016

Criminal Justice (Corruption) Bill (the "2016 Bill")

The government first published the general scheme of an anti-corruption bill in 2012 (the "**2012 Scheme**"). It has now been announced the 2016 Bill is listed as priority legislation to be published by the Government in Autumn 2016.

The general aim of the 2016 Bill will be to consolidate existing legislation and to update, strengthen and reform the law criminalising corruption.

The 'Legislative Programme Autumn Session' published on 27 September 2016 notes that the purpose of the 2016 Bill is:

'to replace outdated legislation, meet international commitments to the Council of Europe, the OECD and the UN, and to give effect to some Mahon Tribunal recommendations'.

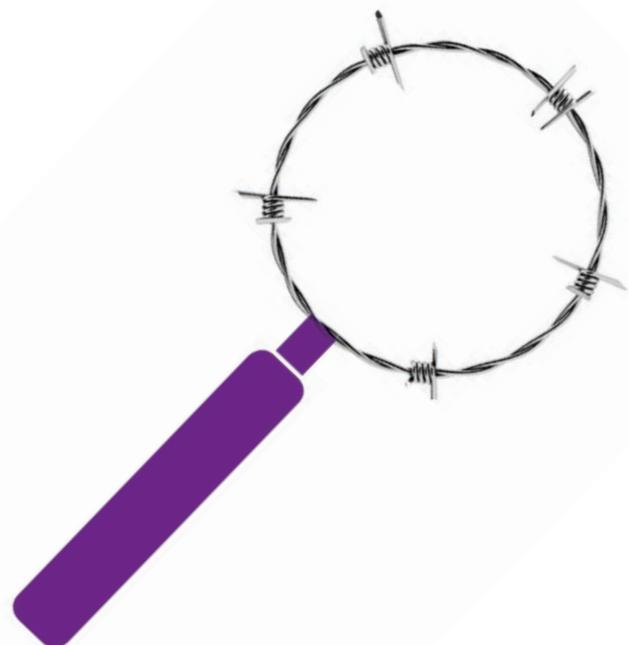
The 2012 Scheme provided for a consolidated corruption statute to replace and reform the provisions of the current legislation which includes numerous outdated Acts, for example the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.

It is not yet known if the 2016 Bill will differ significantly from the 2012 Scheme.

The 2012 Scheme proposed the introduction of significant new white collar crime offences, to include:

- **Offences by Bodies Corporate:** where a director/ manager/ employee of a company commits an offence, the company shall also be guilty of an offence.
- **Making Reckless Payments:** any person who provides a gift to another person while knowing (or being reckless as to whether) such a gift would constitute a bribe, shall be guilty of an offence.
- **Presumption of Corrupt Enrichment:** there will be a rebuttable presumption of corruption where a public official maintains a standard of living *'above that which is commensurate with his/her official emoluments and interests'* or is in control of property of a value disproportionate to his/her official remuneration. This means it will be up to the public official to prove that he/ she has not engaged in corruption. This offence may give rise to Constitutional considerations and it remains to be seen whether this offence will remain in the revised Bill.

We will provide a further update once the 2016 Bill has been published.



Recent case law

A. The People (At the Suit of the Director of Public Prosecutions) v Fred Forsey¹

On 29 July 2016, the Court of Appeal delivered judgment and dismissed the appeal.

Background

Mr Fred Forsey ("FF") was an elected member of Dungarvan Urban District in County Waterford who was convicted on six counts of corruption by jury verdict at Waterford Circuit Criminal Court on 18 May 2012. It was held that FF corruptly received a series of three payments totalling €80,000² from Mr Michael Ryan, a developer interested in developing land at Ballygagin, County Waterford (the "**Development Area**"). Despite the Development Area not being within FF's jurisdiction, it was held that FF behaved corruptly in trying to persuade officials and councillors of Waterford County Council to grant permission for the Development Area and when this was refused, to attempt to alter the zoning.

FF appealed the conviction on two grounds:

1. the Development Area was not within his jurisdiction or administrative zone; and
2. the trial judge had misdirected the jury as to the burden of proof that arose under section 4 of the Prevention of Corruption (Amendment) Act 2001 (the "**2001 Act**").

Court of Appeal Judgment

The Court held that section 4 of the 2001 Act was 'clear and explicit' in that it imposes a legal burden on the accused in the case of corruption when the necessary statutory elements have been proved beyond reasonable doubt. The Court referred to the provision as an "*exceptional measure*" and held that it is not unconstitutional. The Court rejected both grounds and dismissed the appeal.

Significance of Judgment

This decision will be of major significance in future corruption prosecutions. Prior to this judgment, there had been doubt as to whether section 4 of the 2001 Act imposed a reverse legal or evidential burden of proof. The judgment is authority for section 4 of the 2001 Act imposing a reverse legal burden of proof (rather than a mere evidential burden). While the Court acknowledged that the presumption of innocence is a constitutional right under Article 38.1 of the Constitution, it was held that it is not an absolute right and the legislature is entitled to interfere with the right in exceptional circumstances. The Court of Appeal therefore ruled that the provision is not unconstitutional and does not interfere with the presumption of innocence.

This judgment may also have an impact on the Criminal Justice (Corruption) Bill in terms of allaying concerns regarding the interference of offences with constitutional rights. As outlined above, the previous draft scheme suggested a reverse burden of proof in certain circumstances and this judgment may assist in defending any potential challenges on constitutional grounds.

Reverse Burden of Proof – Legal v Evidential Burden of Proof

In summary, section 4 of the 2001 Act provides that if a public official receives a gift from a person who has an interest in a function to be performed by that public official, the burden of proof will transfer to the public official to prove that the gift was not a bribe. This is known as the **reverse burden of proof**.

In the initial trial, the judge had directed the jury that there was a reverse legal burden of proof on FF to discharge. On appeal, FF argued that section 4 of the 2001 Act should have only placed an evidential burden of proof on him (the accused) to disprove, rather than a legal burden of proof. This was the more significant ground of appeal.

Burden of proof

In a criminal case, the legal burden of proof usually rests with the prosecution i.e. the prosecution must establish the guilt of the accused 'beyond reasonable doubt'.

Usually, when an accused bears the legal burden of proof in a criminal trial, this burden will be '**on the balance of probabilities**'.

FF argued that the reverse burden of proof under section 4 of the 2001 Act should impose a **bare evidential burden** on the accused.

An evidential burden would be easier to disprove as it would require the accused to raise a reasonable doubt only, rather than proving the legal burden 'on the balance of probabilities'.

1. [2016] IECA 233.

2. Pursuant to section 1 of the Prevention of Corruption Act 1906, as inserted by section 2 of the Prevention of Corruption Act 2001, an agent or any other person who corruptly accepts any gift consideration or advantages as an inducement to doing any act in relation to his office or position shall be guilty of an offence.

B. Hill v Wall & Others³

Mr Justice Barrett recently delivered judgment in which he reviewed and developed the test for fraud previously established by case law.

Background

The Plaintiff purchased an apartment with attic space from the Fourth and Fifth Named Defendants and subsequently sought to rent out the apartment to a local authority tenant. On vetting the premises, the fire authority found that the apartment had been constructed in breach of fire safety measures. The authority directed that the stairs to the attic space be removed, thereby removing any possibility of it being used as a habitable room.

The Plaintiff claimed that the effect of this finding was to make the apartment unsalable and the attic space uninhabitable, thereby causing loss to the Plaintiff.

The Plaintiff maintained that the fourth and fifth named defendants knew that the apartment was an unauthorised development built in breach of fire safety and, in selling the apartment to the Plaintiff, each committed the tort of deceit (fraud).

Judgment

The Court held that the Fourth and Fifth Named Defendants were not guilty of fraud. It was held by the Court that in order to prove fraud, the Plaintiff must show the Defendants had:

- (i) knowingly made a representation which was acted upon by the Plaintiff; and
- (i) caused loss to the Plaintiff.

The Court found that documents in relation to objections and requisitions on title of the apartment made it clear that the issue of fire safety was referred to pre-sale and the attic space had been found not suitable for any other purpose except storage.

The Court held that the plaintiff was well aware of the fire safety issue as she had been informed by her agent/solicitor before signing the documents and therefore it could not be said that the Defendants committed fraud against her.



3. [2016] IEHC 367

Test for Deceit/Fraud

Justice Barrett agreed with the various elements of the tort of deceit (fraud), which had previously been set down by the High Court⁴:

Established elements of the tort of deceit (fraud)		Observations of Justice Barrett
i.	The making of a representation as to a past or existing fact by the Defendant.	1. The representation of fact is usually by spoken or written word, although a gesture or deed may suffice.
		2. Silence and inaction will not usually suffice, but there are exceptions e.g. where there is a duty not to be silent, such as insurance contracts.
		3. A promise may be actionable in deceit (fraud). For example, where a person makes a promise they do not intend to keep.
		4. There is a difference drawn between representations of fact and opinion. Liability in fraud does not attach to opinion.
		5. A representation of law can be a representation of fact. For example, a bigamist who says they are free to marry.
ii.	The representation was made knowingly, or without belief in its truth or recklessly, careless whether it be true or false;	6. Honest mistake and careless statements do not place a liability in fraud.
		7. A Plaintiff must prove that the Defendant: (a) knew that what he was representing was false; or (b) was reckless as to whether it was true or not.
		8. In making a false representation, the Defendant must intend that it is actually acted upon.
iii.	That it was intended by the Defendant that the representation should be acted upon by the plaintiff;	9. The false representation does not have to be made directly by the Defendant to the Plaintiff.
		10. Reliance by the Plaintiff is essential.
iv.	That the Plaintiff did act on foot of the representation; and	11. The Plaintiff must prove some form of damage either financial, personal injury or injury to property.
v.	Suffered damages as a result.	12. Damages are calculated by the actual damage flowing from the fraudulent inducement, together with consequential damages representing what was reasonably and necessarily expended as a result of acting on the inducement.
		13. Rescission of a contract induced by a fraudulent misrepresentation may be an alternative to an award of damages.

4. Forshall and Fine Arts Collections Limited v Walsh

Extradition update

You can run but you can't hide

Brazilian Court approves Michael Lynn's extradition to Ireland

The Brazilian Supreme Court made a ruling on 13 September 2016 that the former Solicitor, Michael Lynn's extradition to Ireland could proceed. Mr Lynn's extradition had initially been cleared to take place in December 2014. However, Mr Lynn issued an appeal which delayed the process for one year. Mr Lynn then issued a second appeal, again seeking clarification on certain aspects of the ruling, which has now been rejected by a panel of judges.

In the second appeal, Mr Lynn had argued that, as one of his lawyers left his legal team during the proceedings, his defence had been impaired. All five judges of the Supreme Court rejected the argument. While the grounds of the second appeal seemingly had no prospect of amending the initial judgment, it delayed the extradition again by several months.

This decision has been delivered nine years after Mr Lynn's departure from Ireland and three years following his arrest. If there are no further delays, Brazil's Ministry of Justice will inform the Irish authorities of the date for extradition and the logistics will be negotiated with Brazil's federal police.

There is no extradition treaty in place between Ireland and Brazil. Michael Lynn was arrested in Brazil as a result of diplomatic negotiations between the Department of Justice and its Brazilian counterparts. A legal mechanism was put in place whereby Ireland and Brazil agreed to commence negotiations on a treaty. In the meantime, they have agreed that both countries will treat extradition requests from each other on the basis of reciprocity. This was, by any measure, a skilful diplomatic resolution to a thorny legal issue.

Mr Lynn faces 33 charges in the High Court in Dublin relating to an alleged €80 million mortgage fraud. Some of the charges are expected to be withdrawn as part of the extradition deal. In order for an individual to be extradited, a similar offence must exist in both countries. This can lead to delays in extradition and also causes difficulties for enforcement authorities in formulating and bringing charges against an accused before they are extradited.



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This briefing is correct as at 26 October 2016.

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