

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA Criminal 2/16

G49/15A

C4172/15



Her Majesty The Queen

Respondent

And

Canover Norbert Watson

Appellant

Before:

**The Rt Hon Sir John Goldring, President
The Hon Sir George Newman, Justice of Appeal
The Hon Dennis Morrison, Justice of Appeal**

Appearances: Tom Price QC instructed by Amelia Fosuhene of Brady Law for the appellant and Patrick Moran and Toyin Salako for the **Crown**.

Hearing and Judgment: 14 September 2017

Transcript of oral judgment approved and released: 6 December 2017

JUDGMENT

GOLDRING President:

The convictions:

1. Between 18th November 2015 and 4th February 2016, the applicant stood trial on six counts. The jury convicted him in respect of Counts 1, 2, 3, 4 and 6. On 5th February 2016, the trial judge, the Honourable Justice Mettyear, sentenced him to 7 years' imprisonment concurrent in respect of Counts 1 and 2, and 3 years concurrent in respect of the remaining counts. He now seeks leave to appeal against conviction.

The allegations



2. We can take the evidence reasonably shortly. For, as the defence at trial accepted, and the judge observed, much of it was not substantially in dispute. The interpretation of it was, however.

3. The Cayman Islands Health Authority (the "Health Authority") and the Cayman Islands National Insurance Company ("the Insurance Company") had financial problems in respect of the healthcare system in Cayman. The Health Authority was running a substantial deficit. A computer payment system called CarePay was thought to be a way of solving the problems. The Health Authority and the Insurance Company were not going to run CarePay themselves. They had to let the contract to a company to do so.

4. The applicant was a 46-year-old businessman of previous good character. He was a certified accountant. From 2008 he was a member of the board of the Health Authority. He soon became chairman of its finance committee. In July 2009, he became chairman of the whole Authority. He was too chairman of what was called the EVS Committee, which had some responsibility for the CarePay scheme.

5. Advanced Integrated Systems (Cayman) Limited ("AISC") was a company incorporated in 2010. The Crown's case was that AISC was a creature of the applicant and a man called Jeffrey Webb. The applicant registered AISC at the time that the EVS Committee was discussing CarePay: in other words, as part of a plan for AISC to benefit from the CarePay contract, it was alleged. The applicant and Webb were never registered as directors. Those who were, it was alleged, were merely sham. The applicant's and Webb's involvement with AISC were never disclosed.

6. On 21st December 2010, the applicant having, alleged the Crown, overridden objections and pressed for it, a contract between AISC and the Health Authority/Insurance Company was signed. It was a contract for five years.

7. In October 2011, a second five-year contract between AISC and the Health Authority/Insurance Company was agreed. It was called the Pharmacy Contract and concerned pharmacy services. It is not necessary to go into details of it.

8. Substantial sums of public money were paid to AISC over a course of years. AISC paid large sums to the applicant. In a nutshell, the Crown's case was that the applicant, as a public official, failed to disclose his involvement with AISC as he should have done, substantial contracts which he knew were fraudulent were agreed, and he benefited financially to a very considerable extent. During the three-year period from late 2010 to late 2013, in excess of US\$3 million was paid out to AISC. The applicant's case was that the sums paid out by AISC to him were nothing to do with any contractual payments. They were made for quite innocent reasons. They were repayment of loans or other bona fide investment payments.

9. Jeffrey Webb was said to be a close friend and associate. He could not stand trial with the applicant because, as the jury knew, he was in the United States where he pleaded guilty to FIFA-related offences of dishonesty. We shall return to this topic when considering the grounds of appeal.

10. Another person said to be involved was a woman called Miriam Rodriguez. She was a co-defendant of the applicant on Count 5. She was found not guilty on the judge's direction at the close of the Crown's case. We can put her alleged involvement to one side for present purposes.

11. We can shortly summarise the essence of the Crown's case by reference to the indictment. As the judge said, the indictment was largely concerned with CarePay.

What the counts referred to

12. Count 1 alleged conspiracy to defraud contrary to Common Law. The allegation, in broad terms, was that between August 2010 and December 2010, the applicant, with Jeffrey Webb and others, "conspired to defraud such entities as may enter into contracts with, or provide funding to, Advanced Integrated Systems (Cayman) Limited, in that they dishonestly:

(i) set up AIS (Cayman) Ltd. in a manner which disguised the involvement of Canover Watson and Jeffrey Webb as controllers and beneficiaries of that company.

(ii) adjusted a cost proposal in relation to the RTA-EVS (CarePay) contract to increase by US\$500,000 the implementation costs, and to increase from 3% to 4% the total ongoing transaction fees payable by the Cayman Islands Health Services Authority and the Cayman Islands National Insurance Company Ltd.; and

(iii) provided false documents to Fidelity Bank to obtain a bank account for AIS (Cayman) Ltd."

13. The second count similarly alleged conspiracy to defraud. The period covered was between 1st August 2010 and 21st July 2013. The specific particulars were that the applicant, with Jeffrey Webb and others:

"(i) represented to the Ministry of Health and members of the Cayman Islands Health Services Authority that the use of public funds awarded for the 'National Rollout' of the CarePay system had been authorised by the award of the CarePay contract to AIS (Cayman) Ltd. in December 2010; and

(ii) represented to the Ministry of Health and members of the Cayman Islands Health Services Authority that all public funding granted for the purposes of the 'National Rollout' of the CarePay scheme would be properly used for such purposes."

14. Count 3 alleged conflict of interest, contrary to section 19(2) and 19(3) of the Anti-Corruption Law 2008. The allegation was that the applicant "as a Public Officer, whilst participating in the decision of a government entity, failed to disclose in writing:

(i) his own personal interest in AIS (Cayman) Ltd.;

(ii) the interest of W Group Ltd, a corporation of which Mr. Watson was a director and shareholder."

15. Count 4 alleged Fraud on the Government, contrary to section 11(1)(c) of the Anti-Corruption Law (2008 Revision). The allegation was that the applicant, whilst a public officer, accepted rewards from AIS (Cayman) Ltd. either by himself or through a member of his family, to a value of at least US\$348,051.60, without the consent of a Chief Officer of the Cayman Islands Health Services Authority.

16. Count 6 alleged breach of trust, contrary to section 13 of the Anti-Corruption Law (2008 Revision). It alleged that the applicant, with Jeffrey Webb, committed a breach of trust "in connection with Canover Watson's duties as a Public Officer, namely as a Chairman of the Cayman Islands Health Services Authority and the Chairman of the EVS Committee, in a manner which breached the standards of responsibility and conduct demanded of Canover Watson by the nature of the office and the duty imposed on him, in that Canover Watson:
 - (i) failed to disclose, during the course of his chairmanship of the EVS Committee and his participation in the evaluation of bids for the RTA-EVS (CarePay) contract, that he and Jeffrey Webb had been assisting one of the bidders in relation to the preparation of their bid;

 - (ii) failed to disclose that he and Jeffrey Webb were controllers and beneficiaries of AIS (Cayman) Ltd., a company which received public funding of over US\$3 million in relation to contracts involving the Cayman Islands Health Services Authority.

 - (iii) failed to disclose that he and Jeffrey Webb were directors and shareholders of the W Group Ltd., a company intended to benefit from funds paid by the Cayman Islands Health Services Authority to AIS (Cayman) Ltd.

 - (iv) failed to disclose that he, Jeffrey Webb and others intended to go into business together in relation to the setting up of a pharmacy in the Cayman Islands, in circumstances where they were likely to benefit from the National Rollout of the 'CarePay' initiative;

(v) failed to disclose that he was a director and shareholder of AIS Consulting Ltd., a company registered in the British Virgin Islands, which was intended to benefit from the National Rollout of the 'CarePay' initiative.

(vi) failed to disclose that he was a director of CRW Holdings Ltd., a company doing business with AIS (Cayman) Ltd. which arose directly from public contracts awarded to AIS (Cayman) Ltd.

Jeffrey Webb, at the same time and place did aid, abet, counsel and procure Canover Watson to commit the said offence."

17. We return to Count 1. The allegation in sub-paragraph 1 spoke for itself. The allegation in sub-paragraph 2 revolved around the bid for the CarePay contract, initially by another company called AIS Jamaica. It was, submitted the Crown, falsely inflated. The applicant did not demur from that false inflation. In the event, the contract was awarded to AISC. It, therefore, benefited from the falsely uplifted bid. Sub-paragraph 3 was self-explanatory. AISC, alleged the Crown, urgently needed a bank account. An initial payment of some \$686,000 was to be paid into it. False documents were used to open it. The applicant himself made the first deposit. The only signatory to the account was Jeffrey Webb. From that deposit, US\$100,000 was paid to a company connected to the applicant, submitted the Crown. \$50,000 was withdrawn in cash.
18. The total loss suffered by the Health Authority and Insurance Company as a result of Count 1 was said to be \$1,362,681. The total loss intended, had the contract run its course, would have been a further US\$2,767,500: a grand total of \$3,267,500.
19. Count 2, as it recounts, related to the national rollout of CarePay. The allegation was that the plan was to deceive officials at the Ministry of Health and the Health Authority as to what would be done with funds paid to AISC.

20. The actual loss on Count 2 in respect of the rollout was described by the judge as more speculative. It was said to be \$1.792 million: the intended loss \$2.4 million.

21. Count 3 spoke for itself. It related to the process that led to the award of the CarePay contract. The judge indicated that the real issue in Count 3 was whether the applicant or W Group Ltd. had an interest in the decision that the Health Authority took to award the CarePay contract to AISC. The jury plainly concluded they did.

22. W Group was a company jointly owned by the applicant and Jeffrey Webb. It was to receive "transaction fees" according to an AISC spreadsheet. The applicant said that W Group had nothing to do with CarePay. The reference to transaction fees to W Group was a form of "electronic doodling".

23. As to Count 4, again the allegation was self-explanatory. The sum there set out, namely US\$348,051.60, was said to be the amount paid by AISC via Jeffrey Webb to the applicant. As a result of evidence heard during the case, the sum was recalculated to a sum of US\$417,000. The Crown alleged this was a reward for the applicant's help. The defence case was that these were repayments by Jeffrey Webb for shares in a company called P&W.

24. Count 6 again spoke for itself.

25. There was an agreed transaction schedule. We have it and have read it. It sets out the very substantial sums of money paid by these two public bodies into the account of AISC, and their onward movement.

26. In short, the Crown's case was that for several years the applicant was a central figure in a sophisticated and dishonest scheme to defraud the public of large sums of money. He benefited personally. He abused his role as a public official. It was the applicant's case that he was never dishonest. There were innocent explanations for the funds, on the face of it, received by him or Jeffrey Webb or others. He gave the evidence to that effect. It is clear the jury did not believe him.

27. As part of his summing up the judge gave the jury written directions. As will become apparent, they seem to us clear, helpful and correct. For the most part, they were agreed by the defence.

The grounds of appeal against conviction

28. The grounds of appeal now advanced on the applicant's behalf by his fresh legal advisers are dated 14th August 2017. As it is put in those grounds, the applicant submits that, "significant errors in the course of the trial, relating to each count, renders his convictions on those counts unsafe." Points are taken which were not taken below by his very experienced defence team. Criticism is now advanced in respect of directions which, as we have indicated, were not at the time challenged. It is submitted that the directions on Counts 1 and 2 were flawed, that the judge made errors of law and fact, and that the applicant did not receive a fair trial due to the prosecution's lack of disclosure and adverse publicity. We shall take each aspect in turn.

Ground 1

Errors in the directions to the jury

Count 1

29. In his written directions to the jury, the learned judge, as relevant to Ground One, said that:

"To defraud or to act fraudulently is to dishonestly prejudice or take the risk of prejudicing another's right, knowing that you have no right to do so. Before you can convict the defendant of this offence, the Crown must make you sure of the following matters:

1. That there existed a conspiracy to defraud of the nature set out in the particulars.
2. That the defendant was a member of that conspiracy.
3. That the defendant acted dishonestly.
4. That he acted in the way alleged in at least one of the subparagraphs. You must all agree on the same paragraph."

30. In the skeleton argument, the submission came to this. A conspiracy to defraud must prejudice the rights of another. The other or others alleged in Count 1 to have been prejudiced were the government entities which may enter into contracts or provide funding. Only the allegation in sub-paragraph 2 could be said to prejudice those rights. The allegations in sub-paragraphs 1 and 3 could not. If, therefore, the jury was only sure in respect of either or both of those sub-paragraphs, the offence could not be made out. For example, it is said, on the basis of the judge's direction, the jury could have convicted on Count 1 if sure only in respect of the opening of the bank account. The submission is that the sub-paragraphs had to be proved in combination if the applicant was safely to be convicted.

31. In his well put and able submissions, Mr. Price QC, on behalf of the applicant, put this aspect of the ground of appeal in a rather simpler way. He submitted that the jury may have been confused by the judge's direction in respect of Count 1. There was an absence of clarity. The judge should have repeated the ingredient of dishonesty in respect of each of those sub-paragraphs. Mr. Price took us to what the judge actually said to the jury. It is not necessary to repeat the words from the transcript to which he took us.

32. The original submission does not, in our judgment, bear scrutiny. The conspiracy alleged was a conspiracy to defraud: that is to say, a dishonest agreement that the government entity should be, or run the risk of being, prejudiced by entering into contracts with, and paying money over to, AISC. To facilitate that agreement, it was alleged the applicant disguised or hid his involvement

in AISC. If the jury was sure that did happen, it would be entitled to convict him of Count 1 on the basis of sub-paragraph 1, irrespective of the allegation in sub-paragraph 2. Similarly, dishonestly agreeing to set up a false bank account in order to facilitate the placing of funds so obtained from those entities as part of the dishonest agreement, would alone be sufficient to convict on Count 1. No doubt the absence of merit in those submissions is why the defence below was content for the jury to have the written directions in the form that they did.

33. We cannot, in spite of Mr. Price's advocacy, accept there was insufficient clarity in the direction that the judge gave. The agreed written direction, which we have just quoted, was crystal clear. It was quite plain that dishonesty had to be proved in respect of each of those sub-paragraphs.

34. In the original grounds of appeal, it was submitted that there was insufficient evidence of dishonesty by the applicant to found a conviction upon Count 1. It is said, as is plainly the case, that in order to found a conviction for conspiracy to defraud, it is necessary for the prosecution to prove more than a mere breach by the defendant of a fiduciary duty. Absent proof of dishonesty, the applicant's failure, it is said, to disclose his interest in AISC, when a board member of the Health Authority, may have amounted to no more than such a breach. It is submitted that on the facts that was so. The applicant, it is said, was not a director or owner of AISC. He did not influence the process by which competitive tenders were obtained and decided upon. AISC, it is said, was a legitimate trading company. It opened its bank account as such. In short, there was no dishonesty.

35. There was a further written submission which we have not found entirely easy to follow. It seems to come to this. At no time were any of the contracts with AISC rescinded or terminated by the Government. They were allowed to run to term and then not reviewed. The pharmacy contract was allowed to continue. As a result, none of the government entities have any legal interest in the money they paid to AISC. They have not lost money. In the result, they have not been prejudiced.

36. Again, these submissions are, in our judgment, without substance. Whether AISC was a legitimate company, the applicant's relationship with it, whether he was dishonest or merely in breach of a fiduciary duty, were all matters for the jury. The jury was perfectly entitled, as it plainly did, to reject the applicant's account. As to the contractual relationship between AISC and the different government entities, that seems to us irrelevant for present purposes. This is a topic to which we shall return.

37. In short, we see no error in respect of the conspiracy alleged in Count 1.

Count 2

38. Similar points are raised in respect of Count 2. The judge gave a similar direction as to the two sub-paragraphs in that count as he had in respect of Count 1. The submission that is made in the skeleton argument to the effect that that direction amounted to putting the allegation upon a new basis, does not bear scrutiny. There is therefore nothing in the point that in the light of that, the defence should have had the opportunity to make representations.

39. For the reasons we have given in respect of Count 1, we cannot accept the criticisms made, again ably, by Mr. Price, in respect of Count 2. The judge's direction was neither unfair, nor amounted to a new case. It did not lack clarity, but was, on the other hand, perfectly clear.

40. We need not deal with the jury points made in respect of Count 2.

Dishonesty

41. A further submission was made in the grounds of appeal that a direction in respect of dishonesty should have been made in accordance with *Ghosh* [1982] Q.B. 1053.

42. The judge did not give a discrete direction on dishonesty. He did not need to. The jury had a straightforward issue to resolve. If the applicant's explanations for what happened might be true, they were bound to acquit. If they were sure the Crown had made out its case, and rejected the applicant's explanations, he was guilty. The applicant never suggested that on the basis of the Crown's allegations, he could not have been dishonest.

The lies direction

43. In his directions to the jury, the judge gave a lies direction. He set out that direction in conventional terms. He said that the lies had to be deliberate, that the jury had to be sure about them, and that there had to be no explanation in respect of them which could be regarded as innocent.

44. The first submission is that a fuller direction should have been given. By that, we understand, is meant that the jury should have been warned, both in respect of lies told before the court hearing, (as they were), and those during the hearing. The case of *Burge* [1996] 1 Cr.App.R. 163 is relied on.

45. We do not agree. In giving the judgment of the Court of Appeal in *Burge*, Kennedy LJ said that a lies direction in respect of evidence given in court is only necessary if relied upon by the prosecution as going to guilt in respect of a separate and distinct issue. That is not this case.

46. It is further submitted that the direction was inadequate, in that it did not specifically state that the lie had to relate to a material issue. More should have been said, it is submitted, about possible innocent reasons for lying, such as bolstering a case, or shame for concealing disgraceful behaviour.

47. In our judgment, there is nothing in these criticisms. The judge told the jury they had to be sure the applicant did deliberately lie. He said a lie might be told for innocent reasons. He set out the lies relied upon by the Crown. Their potential materiality could not seriously be doubted. Moreover, a lies direction (if appropriate in the first place) does not have to follow a set formula. The direction here was plainly adequate in the circumstances.

Ground 2

Error in law and fact

Counts 3, 4 and 6

The "public officer" issue

48. This is a matter upon which Mr. Price did make submissions to us.

49. At the close of the prosecution case there was a submission that the evidence that the applicant was a "*public officer*" for the purposes of the Anti-Corruption Law 2008 was insufficient. As we have said, Count 3 alleged conflict of interest contrary to section 19(2) and (3) of that law. That required proof that he was. Count 4, which alleged fraud on the Government, contrary to section 11(1)(c), similarly required proof he was. So too did Count 6, which alleged breach of trust by a public officer contrary to section 13. The judge's written directions in respect of each of those counts clearly set out the necessity to prove that the defendant was a public officer.

50. Before turning to the judges' ruling on this issue, we should set out the nature of the applicant's appointment as Chairman of the Health Authority.

51. Section 3 of the Health Services Authority Law (2010 Revision) set up the Cayman Islands Health Services Authority. By section 8(1), the Authority is required to have a board of directors. The Board is responsible for the policy, general administration and affairs and business of the

Authority. By section 8(4), the Authority is to have seven directors appointed by the Governor in Cabinet. By section 8(5)(a), a person cannot be a director if he is a public employee as defined by the Constitution. By section 8(6), there is to be a chairman and deputy chairman, similarly appointed. By section 8(9), they are to be paid "*such remuneration as the Governor in Cabinet may determine.*"

52. Section 2 of the Anti-Corruption Law states that:

"In this Law, unless the context otherwise requires ... public office means, subject to the next following definition, an office of emolument in the public service;

Public officer means --

(a) a person holding public office by appointment ...

(d) a member of any statutory body

Public service means the service of the Crown in a civil capacity in respect of the Government of the Islands ..."

53. As we have said, the submission was of insufficient evidence to leave to the jury that the applicant was a person holding public office. It was agreed between the Crown and the defence that to be a public officer within the terms of section 2 of the Anti-Corruption Act required "*an office of emolument.*" The judge concluded there was sufficient evidence of that. He referred to the evidence of Ms. Wanda Ebanks. He said (*see the summing-up at 1/6/2-7/2*):

"An able and careful witness, the attorney Wanda Ebanks used the word 'stipend' to describe the payment which she believed each board director received for attending board meetings, namely \$100 per meeting. Although from the defendant's interview, it seems apparent he was paid a good deal more than this, possibly as his counsel described, because he went to more and different meetings than board meetings".

54. The judge said that Ms. Ebanks' description of the payment as a stipend was, in his view, accurate. He said (*at line 19*):

"Emolument, in my judgment, is easily wide enough to comfortably encompass a stipend. Indeed, it is difficult to see what the payment was if it wasn't an emolument. Mr. Burke [defence counsel] suggested to Wanda Ebanks that it was to cover 'incidentals,' but this was not accepted by her. The reply she gave was, 'It did not cover anything really, you would be there all day for a \$100.'"

55. The judge also referred to section 8(9) of the Health Service Authority Law. He said he was entitled to work on the basis that the Governor had complied with her duty to pay remuneration. He said too that whether or not she had, such a requirement would not mean that the applicant's was not an office of emolument. It was an office entitling him to payment.

56. The applicant makes several points.

57. Firstly, it is said the applicant only received expenses. Expenses do not amount to an emolument. He was, in effect, a volunteer and outside the legislation and not, therefore, the holder of a public office.

58. Secondly, it is submitted that being a director of a board is different from holding public office. As a director of the board, the applicant fell outside the provisions of the Anti-Corruption Law. Moreover, by section 8(5)(a), a person could not be both a director and a public employee.

59. Thirdly, it is submitted that he could not be said to have been in the service of the Crown, as set out under section 2 of the Law. The Health Authority, as a public body, is a separate legal entity and distinct from the Crown. People who were previously public servants employed in health

care, became employees of the Authority under section 16 of the Health Services Law. The applicant could not, therefore, be said to be in the service of the Crown.

60. Fourthly, it is said the applicant was charged under the wrong act. Section 10(1) and section 10(2) of the Health Services Law make it an offence to fail to make proper disclosure as a director. He should have been indicted under that section.

61. Fifthly, it is said that the applicant could not have been a member of any statutory body. A member is not defined in the Anti-Corruption Law. The definition of it should be taken, it is said, from section 38 of the Companies Law (2013 Revision). That provides that the subscribers of a company's memorandum of association shall be members.

62. Mr. Price concentrated on the topic of "*emolument*." His submission is that it is a narrow term. It should be interpreted narrowly. He accepts that the applicant received what he did in connection with the performance of his office, but submits that such payment fell short of an emolument.

63. We cannot accept any of the submissions made in respect of this aspect.

64. First, there is no dispute that the applicant received payment in connection with the performance of his office. A stipend is self-evidently a form of emolument. It is payment on a set basis. It is not payment by way of reimbursement. That is what the evidence came to. Assuming, therefore, as a board member, the applicant was a public officer, the judge was right to conclude the applicant's was an office of emolument.

65. Second, Section 8(9) of the Health Service Authority Law makes it plain that as a board member the applicant was entitled to payment. Again, assuming as a board member, the applicant was a public officer, that too would suffice to make it an office of emolument, whether or not he was in the event paid. In short, it seems to us, unanswerably to be the case, that somebody receiving or promised payment in connection with the performance of his office, holds an office of emolument.
66. Third, there is nothing inconsistent with being both a director of what is a public board and a public officer. Moreover, as a director of the Health Services Authority, the applicant was too a member of a statutory body, under section 2(d) of the Anti-Corruption Law.
67. Fourth, section 8(5)(a) merely means no one who is already a public servant can be a director of the Board. That does not mean that being a director of the Board means you are not a public servant.
68. Fifth, the applicant plainly had an office in the public service. He was appointed by the Governor, the Crown's representative. The Health Authority received and spent public money. The fact he was a director of an independent statutory body does not mean he could not also be holding an office in the public service.
69. Sixth, the definition of a board member for the purposes of the company law is neither here nor there.
70. In his directions to the jury, the judge stated that as a matter of law they could conclude that the applicant was a public officer. Given the state of the evidence and the applicant's entitlement to payment under section 8(9) of the Health Services Authority Law, the judge was entitled to direct the jury as he did. Whether or not he was, the evidence that the applicant was a public servant is

overwhelming. The judge's direction could not conceivably be said to affect the safety of his conviction.

Count 4

71. In the skeleton argument, it is submitted that the judge erred by treating Count 4 as an alternative to Counts 1 and 3. In our view, he did not (*see the summing-up at 1/1/9*).

Count 6

72. Two points are made in the skeleton argument in respect of Count 6.

73. First, it is said that the sub-paragraphs there set out cannot amount to a breach of trust under section 13 of the Anti-Corruption Law. Section 19 deals with conflict of interest. It cannot also amount to a breach of trust. Section 19, unlike section 13, deals with how to avoid a conflict.

74. While we may question whether it was necessary to add a breach of section 13 to the indictment, we cannot accept the submission. Something can amount both to a breach of trust and a conflict. Moreover, if a conflict is declared in accordance with section 19, it will not amount to a breach of trust for the purposes of section 13.

75. The second submission is that not all the sub-paragraphs alleged in Count 6 can amount to a breach of trust. We do not agree. These are essentially matters for the jury. They appear to have had little difficulty in resolving them.

Ground 3

Fair trial
Disclosure

The 20 boxes

76. The applicant submits that his trial was unfair due to late or inadequate disclosure in respect of 20 boxes of material. Put shortly, the submission is that what was substantial and significant evidence was only disclosed a day before the trial began. It consisted of about 20 boxes of paper seized from his home and business premises on the 28th of August 2014. The boxes were taken ultimately to his lawyer's office. He was, it is submitted, only allowed three hours to sift through them in the presence of an investigator.

77. Mr. Moran on behalf of the Respondent, who, unlike those now representing the applicant, was trial counsel, has helpfully set out the accurate position. In short:

On 8th July 2015, the search logs concerning this material were served on the defence. On 10th November 2015, the defence lawyers were informed they could inspect the material at the Anti-Corruption Commission and ask for copies. On 12th November, junior defence counsel did so. On 18th November, the material was taken to junior counsel's office for the appellant to inspect. There was no time limit. It was agreed an investigator would be present, no doubt because this was original material, the integrity of which was important. On 19th November 2015, the defence asked for copies of 21 items. They were scanned and served on 27th November. On 23rd November, the material was taken to, and kept throughout, at court. The defence was told they could review the material at any stage. On 19th November the trial began. The case was opened between the 23rd and the 27th November. Evidence first called on 30th November. At no time during this lengthy trial did the applicant request time to search or look at the material.

78. In the light of that timetable and those events, there is plainly nothing in the complaint of unfairness due to late disclosure of this material. Moreover, this was material seized from the

applicant's premises. He would have had some idea of what it obtained. He knew the allegations he faced and he knew whether any of it could conceivably be of value to his defence.

79. There is too another complaint without substance. As we have indicated, by agreement, an investigator was present at the offices of junior defence counsel, when the applicant was looking at the original material in the boxes. The grounds of appeal submit that the presence of the investigator was unfair and amounted to a breach of Article 6 of the European Convention on Human Rights. Reference is made to the case of *Brennan* (2002) 34 EHRR 18. That was a case, wholly different on its facts from the present, in which the European Court of Human Rights held that the presence of a police officer, within the hearing of the accused's first consultation with his solicitor, when in custody as a terrorist suspect, amounted to a breach of Article 6. The presence of an investigator by agreement in the circumstances we have set out, could not conceivably do so. The integrity of the documents, as we have indicated, had to be protected, not least in the applicant's interest. Any document could be requested, copied and discussed privately with the applicant's lawyers.

The flash drives

80. On 4th January 2016, during the course of the trial, for reasons we need not go into, flash drives containing electronic material were unexpectedly discovered. It was significant and important material. Mr. Moran has helpfully set out what then happened:

The prosecution were informed of the existence of this material as soon as the police were informed. The defence were immediately informed, and two complete copies were made of the material on the evening of 04.01.2016. On the morning of 05.01.2016 the prosecution and the defence were provided with a copy, and the Court was informed of its discovery. Disclosure counsel began a review of this material, and assisted the appellant's attorneys to familiarise themselves with the material for the purposes of their own review.

On the morning of 06.01.2016, the prosecution provided the defence and the Court with an indexed bundle of relevant extracts from the flash drive material. The Learned Judge agreed that the documents were both relevant and admissible. At the request of the defence, he gave

leave for the [applicant]...to be absent from Court for the remainder of the prosecution case and the "half-time" legal arguments, to enable him to study the flash drive material.

The [applicant]...gave evidence-in-chief from Wednesday 13.01.2016 to Monday 18.01.2016. He was cross-examined from Tuesday 19.01.2016 to Friday 22.01.2016. In the course of his cross-examination he gave evidence about the contents of the flash drive material. He was re-examined on Tuesday 26.01.2016 (after a public holiday), and he gave further evidence about the flash drive material. At no stage did he suggest ... there may be [any] further material on the flash drives which might assist him, or that he [might have] had insufficient time to review it.

The assertion now made ... to the effect that [the applicant] only had 3 days to review this material, is inaccurate. By the close of the defence case, he had been in possession of the flash drive material for 3 weeks. Prosecution disclosure counsel had completed his review of this material by the night of the 05.01.2016 (the same day that it was received by the prosecution).

81. Mr. Price drew our attention to the comments made by the judge concerning the flash drive material, underlining its significance to the allegations made by the Crown (*see summing-up, 5/4/22/14* and particularly at *23/1*):

"What...[when opening the case, the prosecution] didn't know...was... to emerge after Christmas. That is, what was hidden on those flash drives, which, as far as they knew, had disappeared forever from Watson's desk drawer at Admiral. Thanks to Mr. Leonard taking copies, we have seen some of the many documents stored there. I have referred to them already".

82. The judge then drew the jury's attention to a particularly damaging document. He went through it in some detail, underlining the Crown's submissions. The taking of the jury through that material took a little time. Among other things, the judge said (*see 24/11*):

"The addition of all those figures is 250,000. Quarter of a million dollars. Exactly half of the 'bump up' figure. And so there, they say, there's ... what was going on. That's what was happening in his mind in March 2011: I'm going to get a quarter of a million dollars, and I'm going to get -- his calculation -- 25,000 thereafter each date from the transaction fees".

83. Given the importance of this material, Mr. Price submits that its very late disclosure was unfair to the applicant and impugns the safety of his convictions.

84. It was unfortunate that the material came to light when it did. However, having regard to Mr. Moran's summary of events, it does not seem to us to begin to amount to unfairness impugning the safety of the convictions. As Mr. Moran submits, the material on the flash drives was the applicant's. He was in the best position to know what was on it and to review it. He was, in the event, given sufficient time to do so before the close of the evidence. He would have been given more time if he had asked for it.

The non-disclosure of the AISC contractual arrangement: the pharmacy contract

85. Mr. Price, while only lightly pursuing this aspect, indicated that the applicant himself thought it of importance.

86. As we have said, the pharmacy contract was agreed in October 2011. It was for five years, that is to say, until October 2016. On 4th May 2016 (some three months after the end of the trial), a question was raised about the contract in the Legislative Assembly. The Premier, The Honourable Alden McLaughlin, said this:

"The AIS programmes comprise the CarePay Real-time Adjudication Programme and the Suvarna pharmacy system which will be discontinued on the 30th of November 2016. A transition period is required for the transfer from the Suvarna system. There are patient refills

that currently reside in the Suvarna system. It is anticipated that it will take an estimated nine months for these refills to be completely removed from that system."

87. The applicant's submission is that the answer revealed that the contractual relationship under the pharmacy contract between, in broad terms, the Government and AISC, was still subsisting at the time of the trial. That suggests, so runs the submission, that AISC was not a sham, but a genuine company. The Government would not continue a contractual relationship with a sham company. That should have been disclosed. Had it been, the prosecution would have been weakened. It would too, it is said, go to the issue of prejudice under Counts 1 and 2 (as we have indicated).
88. We cannot agree. This evidence, if adduced, would not have undermined the prosecution. The answer quoted indicates that the computer system under the contract was still in place at the time of the trial. Time was needed to discontinue it. There was evidence to that effect, as Mr. Moran submits, at the trial. Moreover, many of those with responsibility for this contract did not know of the allegations until the case was brought. On any view, we cannot see that what was set out by the Premier in that answer, could conceivably affect the safety of the convictions, or have relevance to the genuineness of AISC.

The Admiral emails

89. On 28th and 29th of August 2014, the police, by search warrant, extracted emails and other electronic evidence from a former employer of the applicant, namely Admiral Administration. They searched by reference to certain key words. That generated, it is said, some 10% of the applicant's emails. Those emails were heavily relied upon by the Crown. The submission is that the sample was too small. An email might have been taken out of context. There may have been other emails which would have assisted the defence. All the emails should have been produced or have been available for inspection.

90. That seems to us a wholly unrealistic submission. As Mr. Moran submits, investigators could not have been expected to seize and retain the whole of the applicant's work email account. Those emails seized were disclosed, subject to proper redaction. The applicant never requested further examination of the email account. He never applied for third party disclosure against Admiral Administration. He never suggested that emails had not been located which might have helped him. Mr. Moran also makes the point that it is "perhaps ironic" for the applicant now to make his complaint about missing emails when the evidence was he instructed the IT manager at Admiral to delete a great deal of material long before the investigators attempted to seize it.

Adverse publicity

91. The final submission made by the applicant, again, fairly lightly made by Mr. Price, is that his trial was unfair because of unfair publicity. It is said in the written submissions that the applicant was a high-profile figure, both locally and internationally. When arrested his name and picture appeared locally and internationally. The adverse publicity worsened when Jeffrey Webb was arrested in May 2015 in the United States for corruption, racketeering and money laundering concerning FIFA. Although the applicant was not charged in respect of that, Mr. Webb was arrested and charged jointly with the applicant in respect of the present case. All that was highly prejudicial, submits the applicant. As it is put in the submissions, the applicant was the victim of unremitting, extensive, sensational, inaccurate and misleading press coverage that effectively condemned him in the court of public opinion before he was tried.

92. The trial started on 18th November 2015. Mr. Webb pleaded guilty in the United States on 23rd November. The local media publicity, it is submitted, was unrestrained. The court was aware of the prejudice to the applicant. On 28th December 2015, it made an order restraining the local media from reporting proceedings in the United States in which it was asserted the applicant was involved in football corruption. By then, it is submitted, damage had been done.

93. We cannot accept that the applicant's trial was unfair due to adverse publicity.

94. Before the trial began, the jury was asked:

"Do you hold such strong views, for any reason, for or against [the applicant] ... and/or Miriam Rodriguez and/or Jeffrey ... Webb that it would prevent you from trying the defendants fairly on the basis of the evidence presented in Court."

95. On 3rd December 2015, the judge in terms told the jury to disregard any reports regarding Mr. Webb's pleas to the FIFA allegations. He said they would have no bearing on the applicant's trial. There was no reasonable basis upon which the judge could have restrained the reporting of those events concerning Mr. Webb. He subsequently restrained the media from reporting the applicant's suggested involvement in such or similar events.

96. In his summing up the judge told the jury to put, "... Any rumours, any gossip...out of your mind" (*see transcript part 1/7/1*).

97. As to the position of Mr. Webb, the judge said (*see summing-up 1/34/16*):

"Jeffrey Webb is not only named in the indictment, but he features in many, many parts of the evidence, as you know. He's not here, and you know why, because he's in America and he's pleaded guilty to offences of dishonesty in America. These offences are FIFA connected. They have nothing to do with CarePay or anything else that's featured in this case.

So, I repeat to you now what I said to you at the time we first heard about his guilty pleas to these offences, the fact that he's guilty of those offences doesn't go any way towards proving any of the allegations in this case."

98. It was never suggested to the judge that the jury should be discharged on the basis of prejudice. Mr. Moran further observes that the applicant appeared to have used the coverage in respect of Mr. Webb to attribute more blame to him that was apparent from defence counsel's opening speech.

99. As it seems to us, as is often the case with such submissions, they underestimate the ability of the jury to concentrate on the evidence in the case before them. That they did so here, is clear from their very careful, individual consideration of the counts. In short, there is in our judgment no question of adverse publicity having rendered the trial unfair or the convictions unsafe.

Conclusion

100. In the result, we reject all the grounds of appeal submitted by the applicant. They are, in our judgment, wholly without merit. In the circumstances, we see no reason to grant him leave to appeal.

Goldring, P

Newman, JA

Morrison, JA

