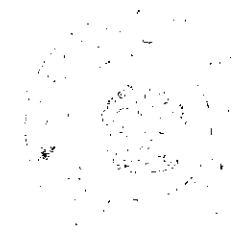


18/7/02



1 THE GRAND COURT OF THE CAYMAN ISLANDS  
2  
3 CRIMINAL SIDE  
4  
5 INDICTMENT 6 OF 2001  
6

7  
8 THE QUEEN

9  
10 V

11  
12 DONALD STEWART  
13 BRIAN CUNHA  
14 IVAN BURGES  
15 JUDITH DONEGAN  
16  
17

18 **Appearances:**

19 Mr. Andrew Mitchell Q.C. and Mr. Kennedy Talbot instructed by Miss Cheryl Richards  
20 Crown Counsel on behalf of the Crown.  
21 Mr. Michael Hill Q.C. instructed by Mr. Marcus Thompson of Walkers for the defendant  
22 Stewart.  
23 Mr. Geoffrey Cox instructed by Mr. Lee Freeman of Campbells for defendant Cunha  
24 Mr. Trevor Burke Q.C. instructed by Mr. David McGrath of Quin & Hampson for the  
25 defendant Burges.  
26 Mr. Neil Sharkey Q.C. instructed by Mr. John Furniss for the defendant Donegan.  
27

28  
29 **Before:** Hon. Chief Justice Anthony Smellie  
30

31 Date: 18.7.2002  
32  
33  
34

35 REASONS FOR DECISION  
36 (GIVEN IN THE ABSENCE OF THE JURY)  
37

38 As the result of a ruling I made only last week in the course of a voir dire enquiry about  
39 the testimony of the first prosecution witness, Mr. Michael Pilling; there has been late  
40 disclosure of material which has been shown to have some bearing upon the proper  
41 presentation of this case to the jury. Mr. Pilling is one of the two official liquidators of  
42 Eurobank and is called by the prosecution to testify to a wide ranging number of issues.

1 These relate to the systems, practices and apparent "due diligence" failings within the  
2 bank as found by the liquidators and their staff when they took over the bank in May  
3 1999.

4 The late disclosure may be described as being of two types of material:

5 (i) drafts of Mr. Pilling's statement of which there was a number (at least 8) leading  
6 up to his final statement upon which he testified.

7  
8 (ii) related correspondence generated as between the legal advisors and employees of  
9 his liquidation staff, during the course of the drafting of his statement.

10

11 A third category of material which is no longer available and about the unavailability of  
12 which there is strong complaint, are the underlying working papers which would have  
13 been generated by those involved in compiling the drafts. It is important to note that this  
14 category, it has been ascertained, would not have included official documents of the bank  
15 not used by the prosecution. Those, the defence acknowledge, are to be all still intact and  
16 available, albeit impracticable for the defence to examine on an individual basis.

17 There are several hundreds of thousands such documents described as "prosecution  
18 unused material" which, although ordered to be and made available to the defence at least  
19 since January of this year, could not all have been examined by the defence because, I am  
20 told, they neither have had the time nor resources to do so. No actual prejudice is said or  
21 specified to have arisen from those circumstances.

22 The concern is that the underlying working papers for the draft statements are not to be  
23 available at all.

24 This ultimately, as I understand it, is the real basis of complaint of prejudice which is  
25 advanced by the defence (i.e. Mr. Hill, Mr. Cox and Mr. Sharkey on behalf of their  
26 respective clients).

1 It proceeds on the now clearly established footing that Mr. Pilling was in no real manner  
2 primarily responsible for the drafting of his statement or the compilation of the  
3 underlying working material upon which his statement was based. That was primarily  
4 the work of those others - the legal adviser and liquidation staff - already identified such  
5 that there is very little if anything of fact asserted in his statement about which Mr.  
6 Pilling can properly testify of his own knowledge.

7 There were nonetheless, from a review of his evidence some 26 - 30 specific areas of  
8 factual assertions in his evidence in chief. I will return to deal with these.

9 The position, as it has been acknowledged by the prosecution, is that because others did  
10 the underlying preparatory work for his statement, Mr. Pilling must now properly be  
11 regarded and is now to be presented by the prosecution as being primarily the custodian  
12 of the records of the bank in his capacity as one of the liquidators of the bank.

13 The prejudice arising from all this, say the defence, is two-fold.

14 First the jury have heard the 26 - 30 assertions of fact on the basis that Mr. Pilling had  
15 verified and had satisfied himself that they were true, but, as it has unfolded, that is not  
16 the case.

17 Second, because the working papers used for the preparation of his statement have been  
18 shredded and so are no longer available, the audit trail which could have been followed  
19 back to see how the material for his statement was identified and selected has also been  
20 lost, the result being that the defence are unable either to verify or refute the accuracy of  
21 the many factual conclusions in his statement about which he testified.

22 The defence say they were entitled to rely upon the factual assertions in Mr. Pilling's  
23 statement and had agreed that his evidence could be marshalled on the basis that they

1 were true. Mr. Cox in particular, submitted that had they reason to doubt the veracity of  
2 Mr. Pilling's factual assertions, they would have approached the defence differently.  
3 By this I understand him to mean that assertions of fact against the interests of their  
4 clients, accepted as true coming from Mr. Pilling because he was assumed to have  
5 verified his statement, would not have been so accepted. Instead, they would have put  
6 the prosecution, to the extent the prosecution needed them, to strict proof of those facts;  
7 presumably by adducing evidence from someone from Mr. Pilling's liquidation team  
8 having full knowledge of the facts.

9 Mr. Hill described this shortcoming - the unavailability of working papers - as the real  
10 vice in these terms:

11 "It goes back to whether in fact we should have had all this material going back at  
12 the end of 2000, the beginning of 2001, and there is no argument to the contrary  
13 in our respectful submission, and whether in all the circumstances if we didn't  
14 have them, we have suffered prejudice as a result. The prejudice manifests itself  
15 in various ways. One of them is that as a result of it, throughout 2001 and into  
16 2002, as late as May 2002, we were saying in effect, we want the underlying  
17 documentation. Now that I know, I was almost whistling in the wind because this  
18 underlying documentation is long long gone, there is a clear prejudice.  
19 How do we correct that in cross-examination --  
20 These were the working papers of the persons, who were going through the  
21 banking records, which they then had and those working papers were for the  
22 purpose of producing reports to Mr. Pilling to write his statement. But that would  
23 have told us things we have been asking for. What did you select your documents  
24 from? Where did you get them from?"

25  
26 Mr. Hill went on to explain, in terms which expanded upon what Mr. Sharkey and Mr.  
27 Cox also said; that the point of that kind of disclosure would have been to follow the  
28 audit trail of the development of Mr. Pilling's statement; to cover the same ground as  
29 those who did the ground work for the statement. That, Mr. Hill emphasised, is the  
30 whole point of this kind of disclosure. Mr. Hill describes this as the "lost window of  
31 opportunity" through which the defence was entitled to look to see whether material

1 helpful to them existed: citing Regina v Melvin (unreported) 20 December 1993 per  
2 Jowitt  
3 (later cited with approval by the English Court of Appeal in Keane [1994] 1 W.L.R. 746.

4 Justice Jowitt said:

5 "I would judge to be material in the realm of disclosure that which can be seen on  
6 a sensible appraisal by the prosecution:

- 7 (1) To be relevant or possibly relevant to an issue in the case  
8 (2) To raise or possibly raise a new issue whose existence is not apparent  
9 from the evidence the prosecution proposes to use;  
10 (3) To hold out a real (as opposed to fanciful) prospect of providing a lead  
11 on evidence which goes to (1) or (2)"  
12

13 (See also ruling delivered in related liquidation proceedings in G.C. Cause 379/99 on 22  
14 January 2002).

15 This then, is the fundamental issue with which I have had to grapple: Just what is the  
16 nature of the window of opportunity for inquiry which has been lost to the defence? Just  
17 what is the nature of the irremediable prejudice suffered?

18 The answer to this can only be found in the context of the factual assertions made by Mr.  
19 Pilling in his evidence. Only in that regard can it be said that the lost audit trail for the  
20 preparation of this statement is relevant. It can only be to the extent that he has asserted  
21 matters of fact which the defence are to be hampered from disproving that might it be  
22 said that they have been prejudiced.

23 Defence Counsel have not suggested that they were hoping to rely on Mr. Pilling to prove  
24 issues of fact which the defence need for the presentation of their cases. That is not  
25 surprising for, after all, Mr. Pilling is a chief prosecution witness.

1 Viewed in that way, the very finite and already identified areas of factual assertions are,  
2 in my view, quite amenable to being disproved – if disproof of them is in the interest of  
3 the defence – by way of cross-examination.

4 If in respect of any of them Mr. Pilling is put to strict proof and is unable to substantiate  
5 because he did not do the ground work himself and because the audit trail for it is no  
6 longer available, that assertion would be thus undermined.

7 Indeed, as it is now quite clear that he testifies in the capacity of little more than as  
8 custodian of the records, that is likely to be the outcome in respect of many of the  
9 assertions.

10 Similarly, the approach which might be taken to any other witness of fact speaking to  
11 what the records of the bank may or may not have revealed and giving testimony without  
12 the benefit of the underlying working papers which would have led to such conclusions.

13 This is likely to be the case with any other witness who was involved with the ground  
14 work upon which Mr. Pilling's statement was based.

15 Viewed in that way, the loss of the working papers is to be regarded not as necessarily  
16 prejudicial to the defence, but as a possible advantage to the defence and disadvantage to  
17 the prosecution.

18 It has been suggested that as one of, albeit the least acceptable of the four possible  
19 remedies to the perceived prejudice to the defence, I should direct the jury in terms to be  
20 carefully couched; to disregard Mr. Pilling's evidence to the extent of those factual  
21 assertions. In effect such a direction would be that the jury might not rely upon Mr.  
22 Pilling in any way as to the facts said to be discovered within the bank when he took  
23 over.

1 While I do not conclude that the prejudice apprehended by the defence is likely to result,  
2 I have given this option some consideration and have decided not to adopt it.  
3 My reason is that if I were to do so, that would shut any remaining window of  
4 opportunity for the defence to explore, through the cross-examination of Mr. Pilling,  
5 matters of fact which may be helpful to the defence.

6 An obvious generic example of this would be the admission of this witness in cross-  
7 examination, that there may be records of instructions from defendants to staff of the  
8 bank in exculpatory terms on due diligence matters; which may have been overlooked for  
9 the purpose of the compilation of his statement.

10 Any general direction to the jury that the witness is not to be relied upon at all for the  
11 purpose of establishing the factual matrix would, it seems to me, invalidate even such an  
12 admission. And whether or not at the end of the day the full and accurate position is ever  
13 put before the jury, the raising of doubts of that sort are within the entitlement of the  
14 defence, consistent with where the burden of proof lies in a criminal case.

15 The other proposed remedies, it would be axiomatic, do not arise for consideration at all  
16 in the light of my finding of no potential prejudice to the defence.

17 Those were, for the sake of context:

- 18 (i) the complete stay of the proceedings (as per Mr. Sharkey for Donegan)
- 19 (ii) the discharge of the jury as having been tainted by hearing the testimony of  
20 factual assertions by Pilling which we now know are not to be substantiated or  
21 verified of his own knowledge (per Mr. Hill)
- 22 (iii) the stay of Count 1, the conspiracy count, on the basis that the factual matrix of  
23 the bank and the extent Pilling's evidence goes to it, is relevant only to that count  
24 (per Mr. Hill)

25  
26 Those are all extreme recourses which, even in the circumstances of a real showing of  
27 prejudice or potential prejudice, are to be taken only as a matter of last resort. The case

1 law even suggests that there must be a showing of serious fault on the part of the Crown  
2 and the likelihood that the defendant as a result might not receive a fair trial: R v Stallard,  
3 2000 E.W.J. No. 2347 (C.A.) 1 WLR 1295 and R v Swingler [1998] E.W.J. No. 1477  
4 C.A.. The most recent case - R v Feltham Magistrate's Court (ex parte Ebrahim) [2001]  
5 1293, goes as far as to suggest that a fair trial must be impossible.

6 The same view must be taken of the late disclosure of material which does exist; i.e.:  
7 categories (i) and (ii) first above mentioned.

8 From them it appears that there were four areas in which Mr. Pilling's statement may  
9 have been materially changed during the course of drafting. Late though it certainly is,  
10 this is disclosure which can only assist, not prejudice the defence. It is immediate basis  
11 for cross-examination.

12 There remains the question whether the late disclosure was in breach of the prosecution's  
13 legal duty of disclosure.

14 Mr. Mitchell says it was not. He started off on this track on the basis that "the local  
15 practice and procedure, developed as he ventured to describe it, into "the local common  
16 law;" was not to disclose drafts and working papers for drafts of witness statements  
17 unless the defence requested them.

18 In other words, whatever may be the position in England and Wales as to a practice  
19 which is more favourable to the defence evolved there as being appropriate and fair, that  
20 is not the position here.

21 I felt at the time of the arguments and still feel absolutely no sympathy for such an  
22 argument. I then gave some reasons for rejecting it which I expand upon now.

1 I think that it lies ill indeed in the mouth of leading Counsel engaged no doubt to ensure  
2 the application of best practices to the presentation of the Crown's case, to say that any  
3 lesser standards should excuse his non-fulfilment of that obligation. It is apparent from  
4 the file note of a meeting which included Mr. Mitchell and the legal advisors to the  
5 liquidators and which took place as long ago as September 2000, that the availability of  
6 drafts of witness statements (and specifically Mr. Pilling's) was a potential issue. Mr.  
7 Akiwumi, then Crown Counsel, who was also present, is noted as having said that there is  
8 no practice of providing draft witness statements to the defence in this jurisdiction. Mr.  
9 Mitchell then advised that they should be kept, presumably so as to be available if they  
10 were requested. That advice would not have been given in a state of mind of anything  
11 but appreciation of an obligation of disclosure to the defence. It then became, in my  
12 view, but a nicety as to whether the drafts should be disclosed or not, dependent on  
13 whether or not they were specifically requested by the defence.  
14 Requested or not, their potential relevance would have upon careful reflection, been  
15 apparent to the prosecution and would not have dissipated with the passage of time. The  
16 drafts should therefore have been offered to the defence much sooner than they were  
17 produced.  
18 Further argument from Mr. Mitchell to the effect that his expressed view of the law and  
19 practice in this jurisdiction is shared by others including the Solicitor General is, with  
20 respect, besides the point. Apart from any issue as to the relevance of those views, it is  
21 quite apparent that those further views could have been expressed only after the meeting  
22 of September 14<sup>th</sup> at which the decision not to disclose was taken. As to whether they

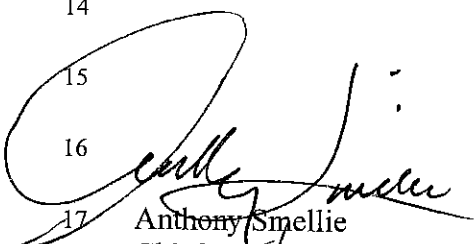
1 influenced any ongoing assessment of the duty subsequently to disclose would be a  
2 matter for further enquiry, if needs be.

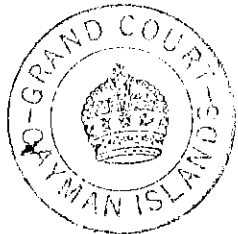
3 Be that as it may, I have no hesitation in concluding that the common law of England and  
4 Wales in that respect and as expressed in the cases which I have cited, is the law as it is  
5 applicable in this jurisdiction.

6 It follows that the prosecution was in breach of the duty to disclose the draft witness  
7 statements.

8 The failure to do so has resulted in avoidable delay and wasted costs in a manner which,  
9 therefore, could hardly be regarded as anything but unreasonable.

10 Hence the order I made for wasted costs - a consequence which, I might add, Mr.  
11 Mitchell intimated in the course of the arguments on this issue, he accepted as likely;  
12 when he urged the Court not to adopt any of the other recourses argued for by the  
13 defence.

14  
15  
16  




17 Anthony Smellie  
18 Chief Justice  
19 Dated 18<sup>th</sup> day of July 2002  
20 Amended 26<sup>th</sup> September 2002