



March 2019

Supreme Court confirms that “officially induced error” can halt a criminal trial

Background

Mr. Denis Casey, the former Chief Executive of Irish Life and Permanent plc, was convicted on 9 June 2016 of conspiracy to defraud by the Dublin Circuit Criminal Court and received a custodial sentence. The conviction related to accounts of Anglo Irish Bank plc and the misstatement of seven transactions as showing a positive balance of €7.2 billion as a deposit.

Mr. Casey appealed his conviction on multiple grounds to the Court of Appeal but that appeal was unsuccessful. Mr. Casey then appealed to the Supreme Court which certified that it was a point of general public importance to consider whether the defence of “officially induced error” or “entrapment by estoppel” is available in this jurisdiction, and if so, what its parameters were. They also agreed to consider whether it was open to the Mr. Casey to argue officially induced error in his case.

Can officially induced error be pleaded in Ireland?

The Supreme Court confirmed that “officially induced error” can be pleaded before the Irish Courts. It explained that “officially induced error” was an exception to the general rule that ignorance of the law or mistake as to the law cannot excuse criminal conduct. It said that it is not a substantive defence - it is an application to end the criminal process, which is based on justice and due process.

In order for officially induced error to be accepted as a bar to the

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continuation of a criminal prosecution, an accused must prove the following:

- ▣ that he/she in good faith sought legal advice from an authority that a reasonable person would see as possessing ostensible authority to advise on whether a proposed course of conduct was lawful or not. The proposal about which the legal advice is sought must be specific, describing accurately the conduct which is the subject matter of the later criminal charge;
- ▣ the official's advice must be specific and must amount to legal advice, or advice of mixed law or fact, which clearly and unequivocally authorises the conduct as a matter of law – it must cover the situation in issue. It is not enough for the advice to be such as to put the accused on notice to make further enquiries;
- ▣ the advice must be accepted honestly by the accused and must be such that a reasonable person would be likely to act on it. In the commission of the offence there must be no deviation from the apparently authorised conduct.

The Supreme Court said that the proof of unfairness leading to the trial judge staying a prosecution on the basis of officially induced error must be established by the accused on the balance of probabilities.

Not applicable in Mr. Casey's circumstances

The Supreme Court noted that Mr. Casey's point of view, as asserted at trial, was that Mr. Casey could regard the lack of challenge by the Financial Regulator to the impugned transactions, after they had occurred, as being equivalent to approval.

Mr. Casey referred to meetings with the Financial Regulator on 28 October and 3 December 2008 (which occurred after the impugned transactions had taken place), which involved no protest as to the accounting practice, and Mr. Casey argued that this provided evidence after the fact, that before the fact, the transaction could be regarded in the mind of a reasonable person as subsequently condoned by the Financial Regulator. The Supreme Court also referred to other evidence put forward by Mr. Casey to support his argument of officially induced error.

The Supreme Court noted that the trial judge found that there was no evidence of prior official advice that the relevant transactions accorded with the law. The Court of Appeal similarly concluded that nothing adduced in evidence by Mr. Casey's legal team could amount to any form of officially induced error. This was ultimately endorsed by the Supreme Court.

Comment

The clarification by the Supreme Court that officially induced error can be pleaded in Ireland to stop a criminal trial is welcome. It would be contrary to the basic principles of fairness if a person could be prosecuted for a matter where his/her conduct had been sanctioned by an authority which was in a position to advise on whether the proposed conduct was lawful or not. However, this plea will only succeed in stopping a trial in the clearest of circumstances, as described above.

Contact information

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March 2019

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