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IN THE CROWN COURT IN NORTHERN IRELAND
SITTING AT LAGANSIDE COURTHOUSE

THE KING

v

JAMES BRYSON, THOMAS O'HARA
AND DAITHI McKAY

HIS HONOUR JUDGE KERR

Introduction

[1] The defendants were charged on this Indictment on Count 1 with a conspiracy involving all three to have Mr McKay commit the offence of misconduct in public office. On Count 2, McKay was solely charged with the substantive offence of misconduct in public office.

[2] The trial was designated as a trial by a judge alone. As is proper procedure a judge was designated by the LCJ to deal with preliminary matters including disclosure. I did not have any access to or sight of any materials in the case until the trial date. All materials that I received were by consent of all parties to ensure I did not receive materials which may compromise the fairness of the trial.

[3] The prosecution were represented by Mr Hedworth KC and Mr Murphy of Counsel. Mr Bryson by Mr Larkin KC and Mr O'Keefe KC, Mr O'Hara by Mr Fahy KC and Mr McKenna of Counsel and Mr McKay by Mr O'Rourke KC and Mr Halleron of Counsel.

[4] The factual background to the case is that it examines the circumstances which led to Mr Bryson attending a meeting of the NI Assembly Committee of Finance and Personnel on 23 September 2015 as a witness and during the meeting held in open session naming five persons previously designated by the letters A to E inclusive who he claimed were beneficiaries of the proceeds of an off shore account containing a payment arising from the sale of the Northern Ireland property portfolio held by NAMA.

[5] Mr Bryson at the time was described as a Loyalist Blogger who had a deep interest in this subject and had previously blogged details similar to those he repeated at the meeting. Mr McKay was a sitting MLA and at the time Chairman of the committee which was holding an enquiry into matters connected to NAMA. Mr O'Hara was a party worker for Sinn Fein who was known to Mr McKay and as will appear was in apparent communication with Mr Bryson on the issue of his attendance before the committee.

NAMA

[6] NAMA is an acronym for the National Asset Management Agency. This is an institution in the Republic of Ireland. It was established in December 2009 by the government in the Republic to manage the serious issues that arose in the banking sector as a result of excessive property lending. Its responsibility was to recover the value of problematic loans made by the constituent banks.

[7] Some of the loans made by them related to property in the North of Ireland. NAMA paid approximately 1.1 billion to Irish banks for loans that had a book value of £4.5bn.

[8] Project Eagle was the name given to NAMA's sale of the NI portfolio of property loans. Bidders were sought and about nine came forward. The successful bidder was Cerberus Capital Management. This was a New York Investment forum. It appears to have bought the NI portfolio for 1.3bn. After this an independent TD in the Dail claimed a Belfast law firm had a 7 million account "ear marked" for a NI politician after the NAMA deal.

[9] The Law Society NI commenced an investigation into the allegations which they referred to the PSNI.

[10] It was in those circumstances that the committee (CFP) before whom Mr Bryson appeared were considering the issues arising. The PSNI's investigation was led by the National Crime Agency (NCA). The NCA met with members of the CFP on 15 July 2015 and it was agreed the CFP would set up terms of reference to avoid the risk of prejudicing the NCA investigation or risk undermining any resultant court proceedings.

[11] It is not necessary for me to set out the terms of reference in full. The rationale was stated to be "In terms of context the Committee points out that the circumstances of this review differ from those of parliamentary enquiries normally. The review was conducted amid ongoing criminal and other investigations and legal proceedings relating to aspects of the Project Eagle sale. Rather than interpreting and drawing inferences from the evidence conclusively at this stage, this progress report focuses on the committee's fact finding on issues within the remit of the DFP specifically, as set out in the review's terms of reference. The report also outlines lessons to be learnt, as

identified in the evidence to date; further steps to be taken; particular areas requiring scrutiny; and, proposed next steps.

The trial

[12] At the commencement of the trial and before the opening. Mr O'Rourke KC on behalf of Mr McKay challenged the Indictment. He submitted that it was considered as bad practice to allow his defendant to face both a substantive count of misconduct in public office and a conspiracy charge to commit the offence. I asked for Mr Herdman's submissions and in particular if he could point to any evidential prejudice he would suffer from electing to proceed on one or the other.

[13] Having considered the submissions I directed the prosecution to elect which count should proceed. They elected to proceed on the substantive count and amended the conspiracy count accordingly.

[14] In terms of evidence the vast bulk of evidence was in written or recorded form. A timeline had been produced setting out in chronological form all the relevant documentation which related to the alleged offending. It was agreed that this was not evidential but there was an accompanying set of documents to be read in conjunction with the timeline which subject to some authentication disputes was largely accepted as admissible evidence. There was some oral evidence which I shall shortly refer to. There were a number of sets of agreed facts which largely related to the provenance of or examination of seized items such as phones.

[15] The documentary evidence included:

(a) transcripts and recordings of committee meetings;

(b) correspondence to and from the committee appearing to be from Mr Bryson.

(c) Screenshots of messages between Mr Bryson and Mr McKay. The authenticity of these was not accepted by Mr Bryson.

(d) retrieved messages purporting to be between Mr Bryson and Mr O'Hara.

[16] It is not necessary for me to attempt to describe or cite from all of these. I will refer to such as are necessary to understand the case made and the reasons for my decisions.

[17] Oral evidence was given by Mr Morrison. He had been a PA to Mr Allister MLA and MP. He was asked about certain contact with Mr Bryson and pointed out the time he was being asked about was many years before. He thinks 2016. He recalls being asked hypothetical questions about the code of conduct for MLA's and what the effect of a breach might be. He recalls reference to the CFP. Mr Bryson referred to a story breaking on Nolan and the Irish News as to his evidence to the Committee. He

referred to messages between him and Mr McKay the chairman of the Committee. Shortly after he recalls being sent copies of messages between Mr Bryson and Mr McKay. He read them and forwarded them to his employer. There was Facebook contact and a meeting arranged in the Stormont hotel between him and Mr Bryson 5 and 6 September 2016

[18] In cross-examination by Mr Larkin QC, he stated he has been with Mr Allister for 19 years and well experienced in the Assembly's working practices. It was often good to co-ordinate with witnesses before they gave evidence to a committee. There were recent examples indeed the First Minister was spoken to by a chairman before giving evidence and that was kept private. During 2015 there were many meetings with Mr Bryson discussing NAMA. Mr Bryson had a widely known clear view about Mr Robinson. It was clear he positively believed it.

[19] D/C Fox gave evidence of attending Stormont and retrieving emails apparently from Mr Bryson onto a UV Drive.

[20] Lord Morrow gave evidence. He gave his experience and his position at the time as Chairman of the DUP. He became aware of the allegations made by Mr Bryson. He arranged for the matters raised to be referred to the Chief Constable. In cross-examination he agreed that committees did not always act formally.

[21] Mr Pateman gave evidence. He was an assistant Assembly clerk giving assistance to the CFP. He proved a number of letters and messages sent to Mr Bryson on the committees behalf and exhibited them.

[22] Mr Tweed solicitor gave evidence of being present when an apology on behalf of Mr McKay was made accepting the allegations made by Mr Bryson were unfounded. He declined to answer any questions as to instructions he may have received or advice he had given to clients about commencing proceedings against Mr Bryson for defamation.

[23] Mr Paul Gill the Clerk of the Assembly gave evidence. He referred to the committees terms of reference. He stated in terms of their business the committee were only accountable to themselves. He set out the basis on which a closed or open session might take place. He explained the procedure for using the "red button" to cut off reporting. He stated that evidence given in open session to the committee attracted absolute privilege. He accepted meeting witnesses in advance and suggesting an approach to them was standard.

[24] The main case against the defendants came from the documents. These include; letters and emails between Mr Bryson and the CFP in relation to his attendance as a witness and the terms attached thereto, social media and email correspondence between Mr Bryson and Mr McKay, and social media and messages purporting to be between Mr Bryson and Mr McCann. The extent of this material can be assessed as follows. Commencing on 5 August 2015 when Mr Bryson emailed the

CFP offering to give evidence and ending with his evidence before the Committee on 23 September 2015 there were nine communications between him and the Committee, there were 28 messages between Mr Bryson and Mr McKay, which ended on 17 September 2015, starting on 18 September 2015 there were 103 messages between Mr Bryson and Mr O'Hara, 41 of which were on the 22 and 23 September, the day of his evidence.

[25] It is not necessary to set out every communication made but it is necessary to highlight a number of them to show the apparent issues dealt with and the tone displayed between the parties involved.

The messages contacts

[26] On 5 August Mr Bryson wrote to the CFP. The letter was addressed to the Chair, Mr McKay. His obvious determination to appear before the Committee was obvious:

> "I am in possession of information that will bring to light much that is being hidden in relation to NAMA and I would find it extremely concerning if the committee refused to hear this irrefutable evidence. The onus is on the committee to show that this investigation is not just a sham fight but that there is a real and genuine desire to uncover the truth about this entire scandal."

[27] On 2 September 2015 a series of emails between Mr Bryson and Mr McKay commence. They are formal in nature with innocent queries about the formalities of attending/times etc. As the contacts continued they became less formal and more detailed. After Bryson had been invited to give evidence the messages became more focused. On 17 September 2014, Mr McKay messaged Mr Bryson:

> "What should tick the box for the committee for public session in terms of your response and I will be saying it to other witnesses is; a direct link you have with anyone in NAMA, dfp or advisory committee re this issue. Primary material, documents related to NAMA DFP or advisory committee & other issues such as millmount that are within dfp minutes. A document could also been seen as a direct link."

[28] Mr Bryson replied:

> "I have a box of documents relating to Millmount. I can provide documents but I can't reveal my source."

In response to that Mr McKay stated:

> "That should be one of your points in your reply … source not relevant (in my view) if you have the documents.

[29] Significant is the next exchange from Mr Bryson:

> "There will also be all the financial accounts etc and showing how Cerberus favoured certain property developers."

Mr McKay replied:

> "So you have: Primary evidence of accounts relating to the sale of the NAMA property loan portfolio?"

Mr Bryson responded:

> "Yes I have accounts relating to companies and their refinancing of the Cerberus loans,

[30] At this point at 13:03 hrs, Mr McKay messaged "Follow @thomasgohara. At 13:06 hrs, Mr Bryson messaged back "Done." Chronologically the next message is from the O'Hara account the next day at 12:09 hrs. I set it out in full.

> "The behaviour of Cerberus after the sale isn't strictly in terms of reference. Would be better if you worded it that the accounts relate to the sale of the NAMA portfolio. Don't mention the 7.5 million and who stood to benefit. This is too close to the nca investigation and the dup will use it as an excuse to go into private session. Talk about it after we get you into public session. Also state that you have information relating to Fortress who were the failed bidder. Directly relevant to the sale. Keep the letter simple the dup may try to hang you on some of the details. Send me a draft of the letter you are sending and I will suggest changes. Keen to get you in public session."

[31] I shall return to this when discussing the case against Mr Bryson but it appears that the first message between Mr Bryson and the O'Hara account was a continuation of the conversation before Mr McKay suggested the change which showed knowledge of the relevant issues previously referred to between them. Mr Bryson categorised the message as containing errors which shows they couldn't have been from Mr McKay. I disagree.

[32] By way of background in this period the CFP were discussing whether evidence would be open or in closed session. Initially, it appeared that as long as the

evidence related to the TOR then prima facie it was open. However, the matter changed and instead of the single test a narrow vote of the Committee introduced a new gateway which was that the evidence would prima facie be in open session if the witness could show a direct link to persons etc who were within the terms of reference. This is referred to in messages building up to Mr Bryson's evidence.

[33] The messages continued with Mr Bryson receiving advice as to his presentation. On 18 September he received a message ending: "The tricky one is the 7.5 million as it is what the nca are looking at. Leave this to the very end. You may only get 10-15 seconds on this before Daithi as chair has to pull you on it so squeeze your best points on this into 1 or 2 lines and come straight to the point." In response Mr Bryson asked if there was an email address he could send his draft statement to: "What's your view of my correspondence. Enough to get it public?" Eight minutes later he was sent an email address with comments including: "The reference to documentation and Millmount should get you over the line. Play it cool and keep it factual."

[34] The detailed advice and directions continue on 18 September at 22:03 hrs: "Right ok I will just provide all evidence within my opening statement – will take me about 25/30 minutes and then at the end I will hand out the documents. Need to contrive how to get around to Robinson at the final pitch of my opening statement". The reply was "Keep it short if you can, when it's said it's said and it's privileged. Will be a great finisher." At 23:35 hrs: "Yea it will have to be one line that is out before DUP can't jump in. Can anyone besides Daithi shut it down." The reply came the next morning "Daithi the only one who can hit the button or tell the clerk to hit the button. But if it gets to the point that majority of members are pushing him for it, he may have to. You have to ensure it doesn't get to that point." In his response Mr Bryson acknowledged the advice and said, "will need the chair to ensure DUP can(t) keep interrupting opening statement in badness."

[35] The next message he received was as follows: "A wee suggestion for you closing paragraph. When talking about Robinson refer to him as person A. So say all you have to say about him referring to him as person A. Then in your final line say Person A is Robinson. Means that the committee cannot interrupt you and means that you don't have to say robbos name until the very last second. So then it's job done."

[36] As I have already stated I do not attempt to cover all messages but having set the context will only mention those that relate directly to the offending. On 21 September 2015 Mr Bryson is advised not to leave papers for Committee members until after his pitch. Then there was a discussion of committee members likely votes and how best to pitch to them.

[37] There is then a series of messages on 22 September at 23:07 hrs: "Spot on Jamie Hopefully this with media pressure gets you over the line. Good luck tomorrow, everyone wants to hear you get this out in the public domain." Later: "Keep an eye on the clerk at top table. He will start talking to Daithi when he thinks you're outside the

terms of reference. Read the top table and don't snap back at the DUP. Kill them with kindness. Be professional and courteous and you'll come out of it well."

[38] After his evidence at 23:56 hrs Mr Bryson messaged the O'Hara account: "Well what's the thoughts on how that went?"

Interviews

[39] Mr Bryson was interviewed by police on 1 February 2017. He replied "No comment" to the majority of the questions. He did however question the authenticity of screen shots of messages produced by the witness Mr Morrison which purported to be from or to him. He referred to them as "potentially doctored images on social media."

[40] Mr O'Hara was interviewed on 18 January 2017. He stated that he was an unpaid volunteer for Sinn Fein. He gave his social media emails accounts. He had known Mr McKay for years as a friend and Sinn Fein colleague. He had dyslexia. He knew Mr Bryson only through the media and his blog.

[41] He claimed the messages between him and Mr Bryson came after Mr McKay had contacted him by phone and asked him to send messages from him (McKay) to Mr Bryson and vice versa. He was unhappy about that and thought it a bad idea but was assured by Mr McKay that it was all right. He agreed to do this, Mr McKay said they would keep the matter to themselves.

[42] He described sending the messages back and forth, he described cutting and pasting them. He did not write them. He read some but not all of them. He accepted that sometimes Mr McKay was referred to in the third person but stated that was the way they were written. His view was that Mr Bryson was aware the messages were from Mr McKay. He declined to answer when asked if he had been made a scapegoat. He said he would check if there were any more messages in case there were gaps in them.

[43] Mr McKay was interviewed on 26 January 2017. He made no response to any questions.

[44] At the close of the prosecution case application for a direction of no case to answer were made on behalf of Mr Bryson and Mr McKay. Counsel provided detailed written submissions and there were oral arguments in supplement. I refused the applications and said I would give my reasons in my final judgment.

[45] I considered all the evidence in relation to the communications between the three defendants. I considered the clear common purpose of the two defendants making the applications and the basic elements of the offence charged as against each. As the factfinder in the case the test I had to apply was whether I was convinced that

there were no circumstances in which I could convict the defendants. I was not so convinced and I refused the direction applications.

The defence case(s)

[46] The trial followed the normal rules and the first case to be presented was that of Mr Bryson. For the purposes of this judgment, I do not intend deal with his case first but rather the second defendant Mr O'Hara.

[47] Mr O'Hara gave evidence. He was assisted by a registered intermediary. He is 40. A self-employed plasterer, single and lives with his mother. He went to his local primary and secondary schools in Claudy. He gained no qualifications. He was and is dyslexic and has problems reading. He also has asthma and epilepsy.

[48] He met Mr McKay in 2006 they were in the same SF bainn. He thought of him as a friend as well as his MLA. In 2015 had his number would do wee jobs for the party. Occasionally would have a drink with him. In 2015 Mr McKay rang him. He asked him to do him a favour and send messages to Mr Bryson. He was wary. Was assured nothing to worry about and nothing criminal. All he knew was that Mr Bryson was a loyalist Blogger.

[49] Had never spoken to him and still has not to this day. He never made any agreement with Mr Bryson or with Mr McKay.

[50] On the 17 September 2015 a message was sent to him but he did not receive it until the 18th. He copied it and pasted it and forwarded it to Mr Bryson. Mr McKay asked him to send Mr Bryson his [O'Hara's] email address so enclosures could be sent. He then was taken through the messages and denied being the author of any. It was pointed out that Mr McKay was referred to in some in the third person. He replied that's the way it came to me.

[51] Both Mr Bryson and Mr McKay's counsel indicated they had no cross-examination for the witness.

[52] Mr Hedworth did cross-examine briefly. The only matter of significance was that Mr McKay told him the communication was "to see what info Bryson had."

[53] The defence then called Mr Dwyer an educational psychologist. He adopted his report dated 12 May 2025 and answered supplementary questions. I note that this was a report very properly disclosed by the prosecution who requested it. They had access to two previous reports from Ms Bratten dated 28 March 2021 and Ms Tizzard dated 4 September 2024.

[54] At consultation Mr O'Hara was initially very anxious and was accompanied by his sister. I note that I granted a request that his sister could be beside him in the dock during the trial.

[55] Psychometric testing showed that Mr O'Hara had a verbal IQ of 68 described as very low. A performance IQ of 78, borderline, and a full scale IQ of 70, extremely low. Mr Dwyer described Mr O'Hara as having a moderate learning disability. The results on this test were lower than the previous tests but were considered fairly consistent.

[56] In terms of word reading he was at an equivalence to an 8.04 yr old, for spelling 7.04.

[57] Dealing with the evidence in this case the witness when testing spellings included a number of words which came from the messages he was purported to have written. He also checked whether spell check might have corrected mistakes. A limited number were corrected but not all. The witness's view was that "It would seem very likely, therefore that Thomas could not have typed the messages himself." Further he referred to a message which included the following "I suggest you structure your approach" and that this was simply not language he would use.

[58] The witness's conclusion was that "He would not have the ability to structure these messages himself. In addition he does not have a level of literacy which could have enabled him to read and understand the content of the messages."

[59] The only other evidence relevant to Mr O'Hara is that of Mr Bryson. He made the case that he had been fobbed off by Mr McKay to some lowly adviser. He said he was not in touch with Mr McKay so how could he conspire with him and pointed out the Mr McKay was referred to in the third party in the text. He rejected in cross-examination that he was at all times communicating with Mr McKay.

[60] Mr O'Hara is charged with conspiracy. It is alleged he conspired with Mr Bryson and Mr McKay that Mr McKay would commit the offence of misconduct in office.

[61] In the prosecution's final submissions relating to Mr McKay the following appears at para [7]:

> "The messages have been referred to by the prosecution during the course of this trial on several occasions. Neutral nomenclature was adopted to reflect some uncertainty as to the authorship of the messages from the "O'Hara account", in cognisance of what Mr O'Hara had stated in police interview. The court is now invited to re-consider the messages through the prism of what has now been stated and not contested; that Mr McKay composed all of them. The court is entitled to conclude that Mr O'Hara was in respect of these matters, at all times, Mr McKay's puppet."

[62] Later commencing at para [43] the prosecution set out their break down and analysis of the offence and comment on each. Element (i) states: Did Mr O'Hara agree with Mr McKay and/or Mr Bryson that Mr McKay would perform conduct that would amount to misconduct in public office, intending him to do so?

[63] The submission they make is that he knew right from wrong. That although he may not have fully grasped the intricacies of what was to occur on 23 September "he had sufficient appreciation that he was facilitating illicit communications between McKay and Bryson and those established a plot whereby Mr McKay would misconduct himself during the committee proceedings on the 23rd by manipulating the way in which Mr Bryson would give evidence."

[64] A later element (iv) assessed as necessary by the prosecution "in the circumstances of which Mr O'Hara was aware was Mr McKay's misconduct so serious as to amount to an abuse of the public's trust in him as the holder of a public office and for which he had no reasonable excuse or justification."

[65] The prosecution answer the question by saying Mr O'Hara described the contact as made, and that there was a discussion as to whether it was criminal. The prosecution invite the court to infer that he had sufficient appreciation of the situation to realise that Mr McKay's misconduct in misleading fellow committee members and prejudicing a live police investigation was serious enough as to amount to an abuse of the public's trust in him.

Discussion

[66] Under the statute "if a person agrees with any other person or persons, that a course of conduct will be pursued, which, if the agreement is carried out in accordance with their intentions, either:

(a) will necessarily amount to involve the commission of an offence or offences by one or more of the parties to the agreement."

[67] The evidence in this case is that Mr O'Hara has never spoken to Mr Bryson. At the time of the offending he knew who he was and thought Mr McKay was mad to get involved with him. He knew he was sending messages to him and forwarding messages from him but was unaware of the exact content or purpose. I mention in passing that at no stage in the messages, even had he read them, did Mr McKay set out what he intended to do on 23 Septemberrd. I have considered the proposition that Mr O'Hara conspired with Mr Bryson by agreeing a course of conduct which would necessarily lead to Mr McKay committing the specified offence. In my view the evidence does not justify such a finding.

[68] In the case of Mr McKay the unchallenged evidence is that Mr McKay who at the time was a senior party figure and a friend. Despite him warning Mr McKay that

he thought contact with Mr Bryson was "mad" he was assured that there was nothing criminal and that he (McKay) was trying to find out what Mr Bryson knew. That is the unchallenged basis for his involvement.

[69] In order to convict Mr O'Hara in this case, I have to be sure or firmly convinced of his guilt. In my view the evidence falls well short of that standard. I find him not guilty of the charge he faces.

Bryson

[70] The defendant gave evidence. At the outset he made clear his belief his evidence to the CFP was proper. There was no agreement Mr McKay would do anything. He understood Mr McKay was only subject to a statutory code as an MLA, it did not apply to chairmen.

[71] In 2015 he was 24. He obtained info as to NAMA on 6 July 2015. He named Robinson as a beneficiary of the money in the secret account. He stands over it. He will not name him sources. He became aware of the CFP starting an enquiry and a call for evidence from Eamonn Malley. He offered to give evidence and he was taken through the documentation about this. The DUP did not want him to give evidence as they knew the truth of what he was saying. He was taken through the votes as to the terms under which the CFP would sit.

[72] When he gave his evidence nobody objected, they wanted to hear it. Mr O'Muilleoir (Finance Minister) wanted the truth out. After the evidence he published his material. Nobody ever sued for libel.

[73] In 2016 the NCA spoke to him and took a witness statement. He was referred to the time line and messages in there. The were no calls or direct contact. He felt with Mr O'Hara he was being fobbed off with some minor party worker. Not the first time it happened. It is politics. It was not a back channel.

[74] In cross examination, he accepted the authenticity of the messages that he had challenged in interview. He said he was entitled to do so. He was asked about who he sent messages to and why he kept some. He stated it was the cut and thrust of politics.

[75] He was taken through a number of messages but denied he was aware he was directly speaking to Mr McKay. He denied any criminal activity.

McKay

[76] The defendant indicated through his counsel Mr O'Rourke KC that he did not intend to give evidence. I asked Mr O'Rourke if he had advised his client that the time had now been reached when the defendant could give evidence on his own behalf and

that if he declined and failed to do so the court could draw such inferences from his failure as appeared proper. Mr O'Rourke confirmed that he had done so.

[77] Mr O'Rourke placed in evidence a folder containing a number of findings as to complaints against MLA's for the court's consideration

[78] Although not part of the defence case the prosecution invited me to consider as part of the evidence the fact that Mr McKay resigned the next day. What I am to infer from this is not clear. During the trial they attempted to introduce a press report as to his resignation. When this was challenged they withdrew the hearsay application. Just before then end of their case they sought and received time to produce a copy of the resignation letter from the files of Sinn Fein's advisers. They did not pursue this. Accordingly, I have no details of the stated reason for the resignation and in my view the fact of the resignation could not lead to a proper inference that he was guilty of the offence charged as opposed to general behaviour disapproved of by his party.

Observations on the evidence

[79] I have considered Mr Bryson's evidence. Although given in evidence for the first time, I do not consider an inference from his previous failure to mention it is justified.

[80] I consider as a witness he presented as someone determined to answer the matters he wished to answer. He was prone to throwing in phrases such as "it's politics" as if that was an answer to the questions he was being asked.

[81] When it came to his evidence as to the communications after the Mr O'Hara account came into play, I am satisfied he lied on oath. Firstly, I accept the evidence of Mr O'Hara on this issue based on my observations of the witness. They were supported by the psychological evidence given. His evidence was also supported by the content of the conversations, the language used and the directions as given. A number of things stand out. In terms of contact, Bryson actually specifically asks for Mr McKay's guidance which he gets in reply. I was specifically drawn to his request after he had given his evidence as to how it had gone. That request makes sense only if he was speaking to Mr McKay, why would he care about the view of some party worker he had been palmed off with.

[82] Mr Bryson may have his reasons for lying. He has lived with this for 10 years, the investigation and charges for five. He has moved on and is seeking a new career. It may be that he felt by distancing himself from Mr McKay it would help him. He himself at one stage suggested how could he conspire with Mr McKay when he was dealing with some lesser party adviser.

[83] Just as with Mr McKay's failure to give evidence, I do not think the issues in this case will be assisted in reaching verdicts by drawing adverse inferences from what I consider to be his lies on oath, rather I intend to consider what if any agreement the

evidence establishes was made between the parties and if the behaviour of Mr McKay amounted to the offence charged.

[84] I have had the benefit of detailed submission by all counsel both at the stage of the applications of no case to answer and final submissions on both the facts and the law. I am very grateful to all counsel for their industry and completeness. It is with no disrespect if I fail to mention or refer to any particular point raised by them. What I intend to do is analyse the evidence in two respects in order to decide if I consider it established to the criminal standard that there was a criminal conspiracy between the two defendants that Mr McKay would commit the offence of misconduct in public officer, and secondly whether the conduct as alleged by the prosecution amounted to such conduct.

Agreement

[85] There is no doubt that the messages between the two defendants show they agreed about a number of matters. They agreed that Mr Bryson should give evidence before the Committee. They agreed that the desirable way for him to give evidence was in open session. As Mr Bryson made clear these were not new allegations, he himself had placed them on his blog but they had not received the public traction he hoped for no doubt because if reported those news organisations might be sued. Evidence in public session at the committee would be privileged and thereby were more likely to receive widespread coverage.

[86] The initial exchanges directly between the two were general in nature. The change to the O'Hara account came when Mr McKay became aware that Mr Bryson had accounts which related to Cerberus and the distribution of funds.

[87] From that point on and with increasing frequency and intensity the correspondence between them explored the criteria for giving evidence, the development of not only the terms of reference test but the direct link test.

[88] There were discussions of the content of Committee meetings and discussions and analyses of what way Committee members might vote, what would influence their vote and who might be under pressure as to how they would vote.

[89] The discussions were about committee management by Mr Bryson and advice as to what he should include in correspondence, what evidence or statements he would give, documents he would produce, and the timing of his evidence.

[90] The prosecution have suggested that one of the serious matters arising was the potential/prejudice to the NCA enquiry. The messages reveal that Mr McKay warned Bryson off those areas because that would make the Committee more likely to request a closed session which was not what either of them wished to happen.

[91] The one thing that does not appear in the messages is any request to, or offer from, Mr McKay that he would stage manage the meeting in order to achieve their agreed goal. The interventions which did take place are alleged to be the evidence that proves misconduct.

[92] They are set out in para 13 of the final prosecution submissions they are:

(i) In the introductory meeting "it's going to be difficult to try and control this [questioning Mr Bryson as to direct link] but I will do it to the best of my ability."

(ii) "when Mrs Cochrane urged him to stop Mr Bryson going on about people and that she assumed Mr McKay would stop him giving that type of information he replied "He would have the same flexibility as Martin McGuinness and Mr Graham. He may say some things we do not agree with, but I expect members to carry out their scrutiny role as well."

(iii) His introduction of Mr Bryson "Mr Bryson you are very welcome, I will give you your opportunity to make your opening statement. We will then move to questions from members. At the start I will outline as I have to other witnesses that witnesses need to keep within the terms of reference and present their evidence within the terms of reference, mindful of the legal consequences of all that."

Misconduct in public office

[93] All sides agree that the elements of the offence are properly set out in the judgment of Pill LJ in the case of *Attorney General's Reference No.3 of (2003)*. They are:

(i) a public officer acting as such;

(ii) wilfully neglects to perform his duty and/or wilfully misconducts himself;

(iii) to such a degree as to amount to abuse of the public's trust in the office holder and

(iv) without reasonable excuse or justification.

[94] It appears accepted by all that an MLA is a public officer.

[95] The next issue is what his duty is. At the no case to answer submission the prosecution identified the duty as being contained in the Code of Conduct for Members of the Northern Ireland Assembly (12 October 2009). The prosecution relied in particular on "openness." In the final submissions at para 18 and 19 this is repeated and the standards are set out among those set out are "OPENNESS Members should be as open as possible about the decisions and actions they take. They should give

reasons for their decisions and restrict information only where the wider public interest clearly demand it. HONESTY Members should act honestly. They have a duty to declare any private interests relating to their public duties." Later "Further under the Rules of the Code of Conduct: Members shall at all times conduct themselves in a manner which will tend to maintain and strengthen the public's trust and confidence in the integrity of the Assembly and never take any action which would bring the Assembly into disrepute."

[96] The essence of the offence as alleged by the prosecution is that Mr McKay was well aware that Mr Bryson intended to name the persons and that he dishonestly assured the Committee members that Mr Bryson would stick to the agreed prepared evidence and that Mr McKay would exercise his powers to ensure he did so. The reality is that he knew Mr Bryson would not stick to the anticipated script nor had he any intention of trying to ensure he did.

[97] It is important to assess the Code and it's effect. The Code is a document made by the Assembly to regulate it's own affairs. It is non-statutory It does not create disciplinary offences or proscribe penalties. Its enforcement is by the Commissioner for Standards and Privileges appointed under the Assembly Members (Independent Financial Review and Standards) Act (NI) 2011. Under section 16 investigations of alleged Code breaches are undertaken by the Commissioner. Following investigation, reports are considered by the Committee on Standards and Privileges. It is this body that decides whether a breach has occurred and may recommend sanctions. Those sanctions can only be imposed by the Assembly in plenary session.

[98] On behalf of Mr McKay it is submitted that there is doubt whether the code applies to members in committee. I am referred to a report on complaints re Iris Robinson MLA which contained the advice from the Interim Commissioner for Standards "my understanding is that the committee on standards has no remit to consider the position of a member within another committee. Any concerns within a committee about a member's behaviour would be a matter for that committee to draw to the attention of the Assembly." A different view was taken later in complaints against Pat Ramsey.

[99] It is also submitted that as a Chairman of a Committee, the Code of Conduct did not apply to Mr McKay at the time of the alleged misconduct. I am referred to the decision of the Commissioner in the case of a complaint re Ms Bradshaw on 26 February 2025, after the Code had been reviewed "the Code does not apply to the conduct of a member … when acting exclusively in the capacity of any other political or public office which means complaints to her actions as a chair fall outside the scope of the code." The role of chairperson of a committee is clearly a political office; under section 29 of the Northern Ireland Act 1998, the chairperson of a statutory committee is appointed by the nominating officer of the political party to which he or she belongs and may be removed only if he or she resigns is dismissed or ceases to be a member of the Assembly.

[100] It is clear and common case that the offence of misconduct in public office is a common law offence. If one takes the common law area of the United Kingdom with Parliament, the NI, and Welsh Assemblies and the numerous councils all of which have codes of conduct and self-regulate their own affairs. One would expect some precedent of a misconduct case to exist. On enquiry to the prosecution and confirmed by the defence there is no case of a misconduct charge based on a breach of a code of conduct in the records.

[101] The third element of the test for the offence is that the breach must be to such a degree as to amount to the abuse of the public's trust in the office holder. As cited in the prosecution's final submissions para 21 "Pill LJ's judgment in *AG's Reference No.3 of 2003* included the requirement that the conduct in question must be "serious conduct" and cited the test formulated by Lord Widgery LCJ in *R v Dytham* "that the element of culpability must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment." At para 58, Pill LJ went on to state:

> "It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum"

[102] I consider it helpful to look at a number of decided cases and the consequences of the breach to help set a context for the submissions in this case. The AG's reference case to which we referred involved the death of an injured man in police custody. In *Dytham* the officer failed to intervene to prevent a fatal assault. Other examples are improper financial gain, a local registrar issuing false birth certificates to enable a benefit fraud, Aliy Al an immigration official falsifying information, Kadiri, an HMRC officer accessing and misusing personal information about an ex-partner.

[103] In this case the prosecution submission is that the behaviour is serious and calling for criminal sanction because see para [22] et seq of the prosecution submissions his actions could "prejudice the NCA investigation or undermine the fairness of any future court proceedings." This is expanded in para [23]:

> "Mr McKay simply could not have known the precise detail of the NCA investigation as it unfolded and therefore precisely what was capable of prejudicing it or undermining the fairness of any future court proceedings. He certainly knew enough to advise Mr Bryson in his messages at 1.40, 1.45, and 1.67 in the sequence of events. Any such deliberate prejudice or undermining in such a serious criminal investigation must, it is submitted, amount to serious conduct, worthy of condemnation and punishment. Mr McKay's immediate resignation as an

> MLA upon the revelation of his activities is, it is submitted cogent evidence of how seriously he himself regarded this conduct."

[104] The defence have submitted that there is no evidence from the prosecution to establish that any prejudice was caused to the NCA investigation. The information was already known prior to the meeting. The only change that the meeting effected was that the information given could now be widely published as privileged. No evidence from the prosecution contradicts that submission.

[105] Equally the prosecution did not produce the terms of Mr McKay's resignation although they made two efforts to do so. To call it in aid as an admission to this criminal charge is not a compelling argument. It may have been the reason why no complaint was ever made to the Commissioner for Standards in this case. No member of the committee was called by the prosecution to categorise the behaviour of Mr McKay at the meeting as being serious or gross, that again may be explicable because he immediately resigned but may be for another reason.

[106] There were other arguments advanced in submissions by the defence for example relating to the requirement for certainty in criminal charges. It is with no disrespect to their industry that I fail to deal with them but I do not consider them as necessary for me to consider in order to give my verdict in the case.

Conclusions

[107] I remind myself that the burden of proof is on the prosecution to satisfy me so that I am sure/firmly convinced of the guilt of either accused before I can convict.

[108] Mr Bryson faces a charge of conspiracy. I have acquitted Mr O'Hara of conspiring with him. I am sure that Mr Bryson was in agreement with Mr McKay and the intended result of the agreement was to enable Mr Bryson to give evidence in open session at the CFP which Mr McKay chaired.

[109] Despite his lies in court, I am sure that Mr Bryson at all times knew he was communicating with Mr McKay.

[110] I am sure that the communications were designed to give Mr Bryson the best advice and guidance to maximise his chances of giving his evidence in open hearing.

[111] My analysis of the messages to not show any occasion when Mr McKay undertook to say anything or do anything outside his duties as Chairman to ensure that Mr Bryson's evidence would be in open session. That may have been his intention and it may have corresponded with Mr Bryson's expectation but the evidence does not establish it was agreed between them.

[112] In the absence of an agreement the conspiracy charge must fail. I find Mr Bryson not guilty of the charge against him.

[113] Turning to Mr McKay. There is no doubt about what he said to the Committee he chaired prior to the meeting, it is recorded. There is no doubt given what the record of messages show that he knew and indeed had largely orchestrated what Mr Bryson would say and indeed the way he would present it. There is no doubt that he deliberately misled the Committee to ease the way for Mr Bryson's presentation.

[114] The issue is whether that behaviour amounts to the offence charged. I am not sure it does for three reasons.

[115] In the existing precedents for this offence the misconduct of the defendant relates to clear duty arising from statute or common law and discernible as such. The duty in this case is submitted by the prosecution to be based on a Code of Conduct created by the Assembly where breaches are investigated by a statutory commissioner who reports to the Assembly who determine both if there is a breach and if so what punishment should result. In other words by a code of self-regulation. On enquiry it is clear that there is no precedent for a prosecution in these circumstances. I do not consider it my role to expand the offence.

[116] In their final submissions the prosecution suggest the misconduct was so serious as to warrant criminal sanction because of the NCA investigation and potential risk to the fairness of future prosecutions. Earlier in the case they also suggested that the dishonesty may have manipulated how the Committee may have voted about the terms of reception of evidence. No evidence has been called by the prosecution as to either of these suggestions.

[117] If there was damage to the NCA investigation, evidence should be called to explain how. Even if the prosecution are only relying on the risk of interference with the serious investigation there should have been evidence of what the risk was. The same is true of the fairness to prosecutions.

[118] Finally, I previously read out examples of cases where this offence has been found to be established. I am not convinced that had the prosecution produced proof of interference as referred to above that it would have been serious enough to have passed the threshold for seriousness as there was no risk to the health or welfare of any person, nor was there corruption, fraud or deception for gain. I do not suggest these are required in every case but they do indicate a level of behaviour which is not present here

[119] For all those reasons, I am not sure the defendant committed the offence charged. I find Mr McKay not guilty of the charge he faces.