Neutral Citation Number: [2014] EWCA Crim 1863

Case No: 201403151 B4 & 201403338 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Southwark Crown Court
His Honour Judge Goymer
T20117602

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/09/2014

Before :

LORD JUSTICE FULFORD
MR JUSTICE MACDUFF
and
MRS JUSTICE ELISABETH LAING DBE

- -

Between :

Serious Fraud Office
- and -
Miltiades Papachristos and Dennis Kerrison

- -
- -

Mr P Hackett QC and Mr G Brodie QC (instructed by **BCL Burton Copeland**) for **Miltiades Papachristos and Mr A Shaw QC and Miss S Hales QC (**instructed by **TV Edwards LLP) for Dennis Kerrison**
A Mitchell QC and Mr C Foulkes (instructed by **the Serious Fraud Office**) for the Respondent

Hearing date: 9 September 2014

- -

Approved Judgment

Lord Justice Fulford :

Introduction

1. On 18 June 2014 in the Southwark Crown Court (Judge Goymer and a jury) the applicants, Miltiades Papachristos (aged 51) and Dennis Kerrison (aged 70), were convicted unanimously following a trial lasting some 15 weeks of conspiracy to corrupt, contrary to section 1(1) Criminal Law Act 1977 (count 2).

2. On 4 August 2014 Papachristos was sentenced to 18 months' imprisonment and Kerrison was sentenced to 4 years' imprisonment.

3. In the present proceedings, the single judge referred Papachristos's application for leave to appeal against conviction to the full court, and he refused bail and directed an expedited hearing.

4. Thereafter, the Registrar referred Kerrison's application for leave to appeal against conviction and sentence to the full court.

The Central Issue on the Appeal

5. The central issue on this application is whether the evidence revealed:

   i) a broad conspiracy to give corrupt payments as an inducement to secure contracts relating to two or more of Innospec's products (which included TEL), together with a sub-conspiracy that involved securing contracts for TEL alone which, as a matter of law, should have been charged as a separate offence, or

   ii) a broad conspiracy to give corrupt payments as an inducement to secure contracts relating to two or more of Innospec's products (which included TEL) of which an individual would be guilty if he had agreed corruptly to secure contracts for TEL alone and he was unaware that his involvement was a part of the wider agreement corruptly to procure contracts for other Innospec products.

The Background

6. The applicants worked for a company called Associated Octel Company Limited. In July 2006 Octel became known as Innospec Limited. It is located at Innospec's Manufacturing Park in Ellesmere Port, Cheshire and it is a subsidiary of Innospec Inc, a NASDAQ listed, non-trading holding company based in Delaware, USA (for convenience, this chemical manufacturing company will simply be referred to as Innospec throughout the remainder of this judgment).

7. The principal activities of Innospec and its subsidiaries are to manufacture and distribute fuel additives and other specialty chemicals to industrial and consumer markets worldwide. The business is divided into three sections: fuel specialties, active chemicals and octane additives. Tetraethyl Lead ("TEL") is an anti-knock fuel (octane) additive for use in motor gasoline. TEL raises the octane level of the gasoline

used in motorcars which do not have a catalytic converter, as well as in piston engine light aircraft.

8. Due to health and environmental concerns, steps to phase out the use of TEL in motorcar gasoline began in the 1970s, first in the USA, and then in the 1990s in Europe. By 2000, the use of TEL in motor gasoline had mostly ceased in the USA and Europe. From approximately the year 2000 the four principal customers for TEL were Iran, South Africa, Venezuela and Indonesia and by 2001 Innospec was the only major manufacturer.

9. The manufacture and sale of TEL was very profitable for Innospec and it was the prosecution's case that it was in its interests to prolong its use. It was, however, a "sunset industry" with (other than for piston-engine light aircraft, for which there is no alternative) a limited future.

10. The applicant Kerrison joined Octel as Managing Director in 1996. Additionally, he was appointed chief executive officer of Octel Corp. He remained in this role until his resignation in 2005 (for reasons unrelated to this case). He also held the role of business director of TEL from about May 1998 until March 2004 except for an 8 month period from June 2002 until April 2003.

11. Soon after joining the company, he decided to split the sales responsibilities for lead and transport fuel additives. In 1996, he appointed Dr David Turner, a man of considerable importance in this case, as sales and marketing director for the petroleum specialities business.

12. The applicant Papachristos was originally a technical employee at Octel's Fuels Technology Centre in Bletchley. Thereafter, he joined the sales group and he was sent out to Singapore as a fuel additives representative. He did not have direct responsibility for the TEL element of Innospec's business. Instead, he worked on the technical and sales side in developing and promoting PLUTOcen, a lead-free alternative to TEL. This was a product of the petroleum specialities business (the Petroleum Specialities Division) with which Papachristos was closely connected, as opposed to the Lead Alkyls Business Unit which was concerned with TEL and in which he had no role.

13. In order to conduct its business abroad Innospec appointed agents to act on its behalf. On 19 March 1982, Innospec entered into an agency agreement with a company called PT Soegih Interjaya ("PTSI"), which was renewed in 1999. PTSI was Innospec's principal agent in Indonesia in respect of TEL and other products. These other products included:

    i) Stadis, AO37 and AO80 which are anti-static fuel additives. They were sold from approximately 2000 to June 2003. The Crown alleged the sales were corrupt.

    ii) PLUTOcen which is, a benign iron-based alternative octane-enhancing additive with a comparatively low octane-enhancing capability compared with TEL. It was tested in Indonesia to obtain authorisation for use, but none was sold.

    iii) *MMT which is a manganese-based alternative octane-enhancing additive*.

14. PTSI's principal was Willy Sebastian and he was assisted by Mohammed Syakir. Innospec paid PTSI general commission fees. From these fees, the prosecution contended, PTSI paid bribes to officials at Pertamina, Indonesia's state-owned oil company, and to public officials who were in a position to favour Innospec by buying or agreeing to buy TEL. The commission varied from contract to contract. Typically, in Indonesia the agents were paid between 5% and 8% but this increased for TEL from 6% to 10% in 2005. During the relevant period, the sales of TEL to Indonesia were just over US$170 million with commissions paid amounting to just over US$11.7 million, an unknown proportion of which was used for bribery.

15. Following an investigation, Innospec accepted that corruption of public officials had taken place. On 18 March 2010, it pleaded guilty at Southwark Crown Court to one count of corruption of public officials between 14 February 2002 and 31 December 2006 in Indonesia in relation to the sale of TEL. It was fined the equivalent of US$12.7 million.

16. Dr David Turner was subsequently indicted. He entered into a plea agreement with the Serious Fraud Office and on 17 January 2012 he admitted three counts of conspiracy to corrupt. The allegation against Dr Turner (and a further defendant called Paul Jennings) was put on a broader basis than the charge against Innospec, and the case against them reflected count 1 of the indictment against the present applicants, to which we turn in the next section of this judgment. Turner gave evidence against the applicants and was the prosecution's main witness.

The Trial Indictment

17. Given the central issue raised on this application ([5] above), it is necessary to consider the evolution of the indictment. At the outset of the trial, the applicants faced a single count:

> *"STATEMENT OF OFFENCE*
>
> *Conspiracy to corrupt, contrary to section 1 of the Criminal Law Act 1977*
>
> *PARTICULARS OF OFFENCE*
>
> *Dennis Graham John Kerrison and Miltos Papachristos between the 14th February 2002 and 31st January 2008 conspired with David Peter Turner, Paul Willis Jennings, John Walker, Willy Sebastian Lim, Mohammed Syakir and others to give or agree to give corrupt payments contrary to section 1 of the Prevention of Corruption Act 1906 to public officials and other agents of the Government of Indonesia as inducements to secure or as rewards for having secured contracts from the Government of Indonesia for the supply of its products including Tetraethyl Lead to the said Government of Indonesia by Innospec Ltd* (our emphasis)*."*

The Prosecution Case

18. The prosecution case against the applicants was based mainly on Dr Turner's evidence, a number of contemporaneous emails and documents, various admissions and the applicants' interviews. The picture painted was of a general "sweetening" of particular individuals who were of influence, both at the level of the Indonesian state-owned oil company (Pertamina) and later at the regulatory and political level, with the overall intention of encouraging further orders and in order to prolong the use of TEL. The prosecution maintained there was evidence that the conspirators did not keep a written record of all their agents' activities and their dealings with them, and instead matters were discussed on the telephone or in face-to-face meetings. Additionally, euphemisms for bribery were used, which included references to "*extraordinary costs*", "*promotional/approval costs*" and "*local promotional activities*".

19. It was the prosecution's case that on the available documentation it was clear that Kerrison, given his position, was both aware of and complicit in the corrupt activities, particularly as regards TEL. He was not a remote business director. Instead, he was kept informed by his executives and managers and he played an active role in Innospec's attempts to maintain its business in Indonesia. Although various departments within Innospec had different and potentially competing objectives, the theme running through the documents and the evidence of Dr Turner was that the principal aim was to extend the use of TEL, and that the promotion of Innospec's alternative products was only permitted to the extent that this was necessary to ensure that Innospec was not "*left behind*" when TEL's use eventually ceased.

20. The documents, on the prosecution's contention, demonstrated Papachristos's knowledge of and participation in this strategy, and more generally his direct involvement with PTSI in ensuring that funds were available for the promotion of Innospec's products in Indonesia by corrupt methods. The case was put in the prosecution's draft case statement on the basis that Innospec "*and its agents did not only use corrupt methods for the promotion of TEL sales"* but that *"the company also continued its corrupt approach to the promotion of other products".* Specifically, as against Papachristos it was alleged that he anticipated using the same techniques with PLUTOcen and that some of the relevant funds would be used for bribery. It was suggested that payments in respect of "promotional costs" in 2001 and 2003 to PTSI were no more than disguised corrupt payments to secure contracts for the sale of PLUTOcen. The prosecution submitted that Papachristos should not be convicted unless the jury were sure that he had knowledge of, and facilitated, the corruption that included TEL.

21. In opening the case to the jury for the Crown Mr Mitchell Q.C. observed:

> *"We suggest that this demonstrates that Innospec's agents were seeking funds from time to time to make payments to officials at Pertamina. It wasn't dependent, plainly, on specific orders for TEL; it was simply to continue to maintain relationships which had previously developed […] general sweeteners […] Octel was going, we suggest, to try to develop PLUTOcen as the replacement for TEL, not just simply by competing as a quality product alternative but by using, we suggest, corruption to achieve that purpose."*

22. In summary, therefore, it was alleged that although the principal aim was to use corruption in order to extend the life of TEL for as long as possible, the future was also under consideration, and, additionally, it was alleged that the corruption extended to other products, and particularly those that would in due course replace TEL, such as PLUTOcen.

The Defence Case

23. The applicants, both of good character, gave evidence and denied any wrongdoing. Although Kerrison accepted that the evidence revealed that corrupt payments were made in respect of TEL, he said he knew nothing about them at the relevant time. Additionally, he challenged the Crown's case as regards various aspects of the alleged corruption. For instance, during the trial he contended this had not extended to PLUTOcen, and it is suggested the defence significantly undermined the prosecution's contentions in this regard as the evidence unfolded.

24. Papachristos said he was entirely unaware of any corruption in the business throughout his time in Indonesia. He worked for Innospec's petroleum specialties business in the Asia Pacific region, which was not concerned with the sale of TEL. He accepted (with the benefit of hindsight) that there had been corruption in relation to TEL, but as with Kerrison he suggested there had never been corruption involving PLUTOcen, which had not been sold commercially to Pertamina in Indonesia. The two specific payments had been made to PTSI in respect of PLUTOcen in 2001 and 2003.As to the first in 2001, Papachristos alleged that no payment had been made to PTSI in 2001 and that any funds earmarked for the intended legitimate promotion of PLUTOcen were never provided to the Petroleum Specialities division. In respect of the 2003 payment, it was accepted that funds had been paid to PTSI but that these had been used for legitimate promotional activities, and in particular product testing (a requirement to secure the approval of PLUTOcen for sale in Indonesia).

Additional count 2

25. At the close of the evidence and in advance of speeches and the summing up, counsel addressed the judge on various matters of law. Mr Shaw Q.C. for Kerrison, in written and oral submissions, raised the issue of the ambit of count 1, as follows:

> *"An agreement to supply TEL alone is a subset of the wider agreement which is indicted to supply Octel products generally. Unlike the Innospec count, the count before the jury is not limited to TEL. Accordingly, any person who entered into an agreement limited to the procurement of TEL contracts, cannot be guilty of the wider agreement, unless the Crown can also at least prove that that conspirator was aware that the TEL agreement was a sub-set of and part of the wider agreement indicted. That, it is submitted, is the effect of R v Coughlan and Young, 63 Cr.App.R. 33 and R v Ali (Abdulla Ahmed) [2011] 2 Cr. App. R. 22, CA and is supported by the reasoning in the recent cases of Mehta unreported, December 31, 2012, CA*

> *([2012] EWCA Crim 2824) and Shillam (Wayne Lee) [2013] Crim. L.R. 592, CA."*

26. For reasons that are developed hereafter, we consider that this submission was misconceived.

27. In response to Kerrison's submission, the prosecution applied to add count 2, the terms of which we set out below. In submissions before this court it is suggested that this was "*to cure the potential injustice*".

28. The judge, in his ruling on this issue, on 21 May 2014, observed that the focal point of the entire case had been TEL. He noted the distinction between the cases of the two applicants. For Kerrison, the evidence suggested that although he was at the heart of the TEL payments, his involvement with the other products was far less clear. As regards Papachristos, his involvement was principally with PLUTOcen, which was said to be a route to TEL.

29. The judge went on to observe:

> *"All this raises the possibility of an alternative conspiracy limited to TEL alone and one that is said to be a separate conspiracy from the main conspiracy that is the subject of the indictment and that the evidence on one construction could show involvement in an entirely separate conspiracy limited to TEL rather than that TEL was evidence of the involvement by the defendants in the wider conspiracy which extends to all Innospec products.*
>
> *For myself I am inclined to regard this distinction as unimportant because my view is that the reality is that if the jury are sure in the case of either defendant that he knew of the corrupt payments being made in respect of TEL and that he intended to be part of it and evidenced that intention by some action on his part, that that would inevitably lead the jury to conclude that his involvement in TEL, so long as the jury are sure that he was aware of and intended to be part of a wider conspiracy, would be sufficient."*

30. Therefore, notwithstanding his hesitation, the judge accepted there was a possibility of an alternative conspiracy limited to TEL alone, separate from the main conspiracy.

31. He addressed the issue of whether allowing the prosecution to introduce count 2 would be unfair to the defendants, and he considered the suggestion that if this additional count had been added earlier it might have resulted in a different presentation of the defence cases. He observed that the evidence was the same for both counts, save that count 2 was narrower in its ambit. The case against Kerrison focussed on his involvement with TEL, which had been fully explored during the

trial. The case against Papachristos depended *"also on proof of his knowledge of the corrupt payments in respect of TEL and his intention to be part of them, and that his involvement in PLUTOcen is an adjunct to it and it is, in a sense, the vehicle by which he became involved in it."* The judge concluded that Papachristos had had an opportunity to deal with the more limited count 2, but in any event he intended to cure any unfairness in his case by an appropriate direction to the jury: Papachristos should only be convicted on count 2 if the jury also convicted him of count 1.

32. Count 2, which was added to the indictment before counsel's speeches, was in the following terms:

> *"STATEMENT OF OFFENCE*
>
> *Conspiracy to corrupt, contrary to section 1 of the Criminal Law Act 1977*
>
> *PARTICULARS OF OFFENCE*
>
> *Dennis Graham John Kerrison and Miltos Papachristos between the 14th February 2002 and 31st January 2008 conspired with David Peter Turner, Paul Willis Jennings, John Walker, Willy Sebastian Lim, Mohammed Syakir and others to give or agree to give corrupt payments contrary to section 1 of the Prevention of Corruption Act 1906 to public officials and other agents of the Government of Indonesia as inducements to secure or as rewards for having secured contracts from the Government of Indonesia for the supply of Tetraethyl Lead to the said Government of Indonesia by Innospec Ltd. (*emphasis added*)"*

33. The waters were somewhat muddied by the fact that Mr Mitchell Q.C. addressed the jury on behalf of the prosecution, contrary to the judge's clearly expressed approach, on the basis that both defendants could be acquitted on count 1 and convicted on count 2.

34. In directing the jury on the law, the judge set out, at the commencement of the summing up, that if the jury were sure that the defendant they were considering was part of a conspiracy as regards TEL, but they were unsure it was part of a wider conspiracy covering other Innospec products, then he would be guilty of count 2 and not guilty of count 1. It was only significantly later that day when dealing with the position of the individual defendants, that the judge explained that although Kerrison could be convicted on either count, different considerations related to Papachristos. The jury were reminded that the prosecution's case was that the context of any payments made as regards PLUTOcen was that it was an adjunct to TEL. The key question, therefore, was whether Papachristos knew of the corrupt payments as regards TEL: if he did not have that knowledge he was not guilty of both counts. The judge concluded this section of the summing up as follows:

> *"The reality is, members of the jury, that if you find Dr Papachristos not guilty on count 1, you would have to find him not guilty on count 2 also because the evidence in his case does*

> *not warrant the suggestion that he was a party to a separate conspiracy. TEL is the common feature of both these conspiracies. So you cannot convict Dr Papachristos of having been involved in some conspiracy that involved PLUTOcen alone and in which TEL had no part. So be very clear about that. "*

35. The jury ignored that direction and acquitted Papachristos of count 1, whilst they convicted him on count 2.

Grounds of Appeal Against Conviction

36. For Kerrison, Mr Shaw Q.C. argues that the late addition of count 2 was unfair and, additionally, the summing up on this issue rendered the conviction unsafe. The court is reminded that the power to amend an indictment is contained in section 5(1) Indictments Act 1915:

> *"Orders for amendment of indictment, separate trial and postponement of trial.*
>
> *(1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice.*
>
> *[…]"*

37. It is argued that the amendment permitted the prosecution to recast its case once some of the evidence and arguments on which it relied had been exposed as being unreliable. The central proposition advanced is that "*use of the power to amend should not be invoked and permitted to allow a case which has been weakened to be recast in a different form".* In development of this contention it is argued that:

> *"Wherever a broad conspiracy is deliberately alleged, the prosecution should not as a matter of principle be permitted to seek to amend the indictment […] at the close of all the evidence to allege a sub-plot (or indeed substantive offences) not on the basis of any technical error, defect or misjoinder, but because it is realised that the defence may have made some headway against their case as originally stated."*

38. It is submitted that the defence is entitled to meet the allegation as encapsulated in the indictment and that it should not have to anticipate a case that is put on a different, even if narrower, basis. Furthermore, Mr Shaw argues amendments of this kind

conflict with the CPR and the prevailing approach that the parties must define and explain their respective cases well in advance of the trial.

39. On behalf of Kerrison it is accepted that i) an amendment pursuant to section 5 can include the addition of a count, ii) an indictment may be defective if it fails to include a count that is "*possible on the depositions"* (*R v Radley* (1974) 58 Cr App R 394 at 403); and iii) an amendment can take place at almost any stage, and including after the beginning of the summing up. However, it is emphasised that "*[t]he longer the interval between arraignment and amendment the more likely is it that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby."* (*R v Johal and Ram* (1972) 56 Cr App R 348 at page 354). Furthermore, it is submitted that the court must always consider whether the amendment works injustice on the defendant because of the time at which it was made (see, for instance, *R v O'Connor* 1997 Criminal Law Review, page 516). Mr Shaw argues that the changes in case management and the various burdens now imposed on the prosecution and the defence (*e.g.* the obligation on the accused to serve a defence statement) render it less acceptable than hitherto to introduce significant late amendments to the indictment.

40. Against that background, Kerrison submits that the prosecution deliberately elected to charge the applicants with a count that did not relate to TEL alone, with the result that for a conviction it was necessary for the prosecution to prove, *inter alia*, that the corruption formed part of a broad conspiracy which included TEL. We have been reminded that Mr Mitchell closed the prosecution's case on the basis that the corruption within the company in Indonesia was "endemic" and that it had become "a way of life". In these circumstances it is argued that this was not a defective indictment, and instead the prosecution throughout sought a verdict on a basis of awareness of corruption that extended beyond TEL.

41. Mr Shaw suggests that once the judge had decided – at least in the case of Papachristos – that there was a risk of unfairness the amendment should not have been made because unfairness cannot be cured by a suitably crafted direction to the jury.

42. It is argued that whether or not there had been an opportunity to deal with the discrete matters covered by count 2 during the trial, there had been no need to do so. The evidence in the case had focussed on corruption generally, and the defendants had not addressed the possibility of a conviction based on a case which was exclusively concerned with TEL. In support of this latter contention, Mr Shaw suggests that if Kerrison had had advance warning of count 2 he would have ensured that the corrupt payments relied on were more precisely "*clarified or categorised*". It is said that there are a number of allegedly corrupt payments referred to by the Crown which were clearly admissible as evidence tending to demonstrate general corruption (count 1) but the defence had not sought to establish whether they specifically related to TEL (count 2). By way of example Mr Shaw relies on the sum of $75,000 paid to Pertamina purportedly to allow Innospec's 29 ton containers to be used at a refinery. Moreover, it is argued that given the terms of count 1, Kerrison chose not to explore during the evidence the explanation given by Papachristos as regards the special commission payments to PTSI (as authorised and paid by Papachristos) in respect of Stadis and AO37 sales, and the monies spent allegedly on promoting and testing PLUTOcen. It is contended that with the narrower count 2, it would have been open

to Kerrison to investigate the extent to which these payments could properly be said to represent corruption relating to TEL.

43. Mr Shaw has taken the court on an extensive tour of the matters that the prosecution needed to prove as regards the two counts on the indictment. We have been referred to the length of time over which the conspiracy was said to have lasted, and the court has been afforded a significant description of the evidence called in support of the prosecution's case, along with arguments as to the admissibility of some of this evidence. However, we do not consider that those submissions have any material impact on the central issues on this application, as described and discussed below.

44. The court, during submissions, queried whether Mr Shaw's original submission to the judge weas sustainable, namely if Kerrison had entered into a corrupt agreement that was limited to the procurement of TEL contracts, in order to be convicted on count 1 it was necessary for the Crown to prove that he was aware that the agreement relating to TEL was a "sub-set" of and part of a wider agreement that included other Innospec products. Mr Shaw's short response was that the prosecution was bound by the charge as set out in the Particulars of the Offence, namely it needed to prove an agreement for the supply of **Innospec's products including TEL** to the Government of Indonesia. Mr Shaw argues that a conspirator who only contemplated corruption in relation to TEL could not properly be convicted of that count.

45. On behalf of Papachristos, Mr Hackett Q.C. submits that the judge erred in permitting the prosecution to amend the indictment to include count 2, only thereafter to rule that he would direct the jury that if they acquitted the applicant on count 1 they must acquit on count 2. It is argued that in those circumstances, the judge should only have taken a verdict on count 1 as regards Papachristos and once he was acquitted on that count, the judge should not have taken a verdict on count 2.

46. It is suggested that the judge gave inadequate, contradictory and confusing directions on this matter in his summing up, and that he failed to define the ambit of count 2.

47. Mr Hackett argues that the judge failed in his stated objective of protecting the applicant against the prejudice of a count being added after the evidence had closed that alleged a narrow conspiracy that had never been canvassed by any of the parties in the course of the trial.

48. Papachristos suggests the jury's verdict was unsafe, given it was in clear violation of the judge's prohibition against convicting Papachristos on count 2 if he was acquitted on count 1.

49. As regards the evidence, Mr Hackett draws attention to the way the prosecution put the case against Papachristos:

> *"Dr Miltos Papachristos was the senior sales and marketing director for the Asia Pacific region, which included Indonesia; his main responsibility was the promotion of alternative TEL products such as PLUTOcen, but armed with that responsibility he did not allow PLUTOcen to compete with TEL and played a role in ensuring the longevity of the supply of TEL before allowing PLUTOcen to be regarded as the future alternative."*

50. It is argued that it is difficult to see how this allegation could constitute participation in, or an overt act in pursuance of, a corrupt agreement to pay public officials to extend the life of TEL alone.

Discussion

51. It is our view that this case, as opened and presented to the jury, did not involve more than one conspiracy. Instead, it concerned a single contention that the applicants, together with certain other named individuals, had conspired (as set out in count 1) "*to give corrupt payments to public officials and other agents of the Government of Indonesia in order to obtain contracts, or as a reward for past contracts, from the Indonesian Government for the supply of Innospec Ltd's products that included Tetraethyl Lead".* In count 2 the prosecution did no more than limit the ambit of the conspiracy to the supply of TEL alone; that limitation did not involve alleging a different or separate conspiracy. This was the same conspiracy, put on a more restricted basis. Accordingly, this was not a situation in which there was a wide agreement or conspiracy that included sub-agreements or sub-conspiracies that needed to be charged as separate offences.

52. It goes without saying that there are some cases, exemplified by *R v Coughlan and Young* (1976) 63 Cr. App. R. 33, when the evidence reveals two or more conspiracies, for instance in the form of plots and sub-plots, which necessitate the allegations being separated into a number of counts. The question is whether there were distinct agreements or, alternatively, whether the facts concern the same conspiracy in which there may have been greater and lesser levels of knowledge as to the means by which it is to be carried out. Coughlan (along with others) had been convicted at Manchester Crown Court on 27 February 1975 of a conspiracy to cause explosions in the United Kingdom, the prosecution having relied solely by way of overt acts on explosions in Manchester. On 2 May 1975 Coughlan and Young were convicted at Birmingham Crown Court of conspiracy to cause explosions in the United Kingdom, the prosecution having limited the allegation to explosions in Birmingham and its neighbourhood. As described by Lawton LJ, the prosecution's answer to the suggested ground of appeal based on *autrefois convict* (following the Manchester conviction) was:

> *"[…] that though the indictment in each case alleged a conspiracy to cause explosions in the United Kingdom, in deciding whether there was one conspiracy or two, it was permissible to have regard to the nature of the overt acts relied on by the Crown, and if necessary to the individuals named as parties to the conspiracy, and that as in the one case the overt acts were limited to Manchester and in the other to Birmingham, and that as the persons named as conspirators in the Manchester case were, with two exceptions, different from those named in the Birmingham case, the jury could and should infer that the Birmingham indictment alleged a different conspiracy from that of which Coughlan had been convicted at Manchester."*

53. Against that background, the court determined:

> *"There is no difficulty in law about alleging a separate conspiracy to cause explosions in Manchester and another to cause explosions in Birmingham, even though some, or it may be all of the conspirators, may have been parties to a wider agreement to cause explosions throughout the United Kingdom, including Birmingham and Manchester. The wider agreement or conspiracy would not preclude the existence of sub-agreements or sub-conspiracies to cause explosions in particular places, and as a matter of law these sub-conspiracies or agreements could properly be charged as separate offences. Acquittal or conviction on a charge of one such offence would be no bar to the trial of the same accused on another."*

54. It is clear, therefore, that the issue that arose in *Coughlan* is at far remove from the present circumstances. In *Coughlan* there were different factual scenarios (the Manchester/Birmingham explosions) whereas in the instant case the facts underlying the charges are identical, save that in count 1 the particulars of offence conclude with the words "*the supply of its products including Tetraethyl Lead to the said Government of Indonesia by Innospec Ltd"* and in count 2 they are "*the supply of Tetraethyl Lead to the said Government of Indonesia by Innospec Ltd".*

55. *R v Subhash Metha* ([2012] EWCA Crim) is another case in which this court emphasised that there may be an overarching agreement, leading to further agreements that may have, for instance, different participants. Toulson LJ summarised central legal principles in this context, as follows:

> *"36. The authorities establish the following propositions:*
>
> *1. A conspiracy requires that the parties to it have a common unlawful purpose or design.*
>
> *2. A common design means a shared design. It is not the same as similar but separate designs.*
>
> *3. In criminal law (as in civil law) there may be an umbrella agreement pursuant to which the parties enter into further agreements which may include parties who are not parties to the umbrella agreement. So, A and B may enter into an umbrella agreement pursuant to which they enter into a further agreement between A, B and C, and a further agreement between A, B and D, and so on. In that example, C and D will not be conspirators with each other.*
>
> *37. These principles are illustrated by the well known lime fraud case of Griffiths ([1966] 1 QB 589). A supplier of lime to farmers, acting in concert with an employee, entered into agreements with several farmers to defraud the government by making false subsidy claims. There was no evidence that any of*

> *the farmers was aware of the arrangements being made between the principal defendant and any of the other farmers, but they were all charged with a single count of conspiracy. The Court of Criminal Appeal held that there was no evidence of a conspiracy between all those convicted, as opposed to a number of different conspiracies, and the convictions were quashed. Paull J gave an illustration which has been quoted in later cases:*
>
> > *"I employ an accountant to make out my tax return. He and his clerk are both present when I am asked to sign the return. I notice an item in my expenses of £100 and say: "I don't remember incurring this expense". The clerk says: "Well, actually I put it in. You didn't incur it, but I didn't think you would object to a few pounds being saved." The accountant indicates his agreement to this attitude. After some hesitation I agree to let it stand. On those bare facts I cannot be charged with 50 others in a conspiracy to defraud the Exchequer of £100,000 on the basis that this accountant and his clerk have persuaded 500 other clients to make false returns, some being false in one way, some in another, or even all in the same way. I have not knowingly attached myself to a general agreement to defraud.""*

56. Although it does not encompass every eventuality, it is often helpful to consider the approach set out in *R v Meyrick and Ribuffi* ([1930) 21 Cr App R 94) by the Lord Chief Justice (Lord Hewart) when he observed [at page 102] that it is:

> *"[…] necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other, or directly consulting together, but that they entered into an agreement with a common design. Such agreements may be made in various ways. There may be one person, to adopt the metaphor of counsel, round whom the rest revolve. The metaphor is the metaphor of the centre of a circle and the circumference. There may be a conspiracy of another kind, where the metaphor would be rather that of a chain; A communicates with B, B with C, C with D, and so on to the end of the list of conspirators. What has to be ascertained is always the same matter: is it true to say, in the words already quoted, that the acts of the accused were done in pursuance of a criminal purpose held in common between them?"*

57. Critically in the present context, "[i]*t is possible* […] *that the evidence may prove the existence of a conspiracy of narrower scope and involving fewer people than the prosecution originally alleged, in which case it is not intrinsically wrong for the jury to return guilty verdicts accordingly, but it is always necessary that for two or more persons to be convicted of a single conspiracy each of them must be proved to have shared a common purpose or design*": *R v Shillam* [2013] EWCA Crim 160, paragraph 19. In our view that approach exactly reflects the present case – the prosecution were entitled to prove the single conspiracy either on the wider basis that

the conspirators supplied products including TEL or on the narrower basis that that they supplied TEL alone (excluding other products such as PLUTOcen and MMT) and that particular conspirators were unaware of the wider agreement that included other Innospec products.

58. We note in passing that against the present applicants the prosecution had broadened its case beyond the allegation originally made against Innospec (concerning TEL alone) to which it pleaded guilty in 2010. However, that was simply part of the relevant context in which the present offending occurred, as the judge directed the jury:

> "*The company, Innospec, has pleaded guilty to corruption, in criminal courts both here in England and in the United States. It is just part of the background. It does not prove anything against either of these defendants. In particular, it does not prove that either of them was involved in the conspiracies in this indictment on which he is standing trial."*

59. It is an inevitable conclusion from the analysis set out above that we reject the submission made to the trial judge by Mr Shaw that if the jury concluded that the corrupt payments related to TEL alone, for a conviction on count 1 the prosecution additionally needed to prove that Kerrison was aware that this was part of a wider corrupt agreement to supply a range of Innospec's products above and beyond TEL. In our view, it would have been sufficient for the jury to be sure that the applicant had agreed with at least one other named person during the relevant period to give corrupt payments to public officials and other agents of the Government of Indonesia as inducements to secure – or as rewards for having secured – contracts from the Government of Indonesia for the supply of one of Innospec's products (whether or not this extended to other Innospec products). It was not a material averment that the corruption involved more than one of Innospec products. The criminality at which the charge was directed was corruption concerning materials produced by Innospec, and it was irrelevant for the offence (as opposed to sentence) whether a particular conspirator knew that more than one type of Innospec's product was involved. On the evidence, however, Mr Mitchell accepted that the Crown's case depended on the jury concluding that the corruption included TEL.

60. As Thomas LJ said in *R v Ali* [2011] EWCA Crim 1260; [2011] 2 Cr App R 22:

> *"36.* […] *what cannot be done is to put two different counts into the indictment to enable the jury to determine a factual issue where the difference in the facts does not make the offence in each count different. There can only be different counts where the there are different offences.* […]
>
> *37. In the light of those authorities and the argument before us,* […] *it would be unlawful to charge the same offence in different counts in the indictment even though the factual basis differed. It is not permissible to put into an indictment an alternative factual basis which makes no difference to the offence committed whether or not it is for the purpose of enabling a jury to decide an issue of fact or for any other purpose.* […]*"*

61. In *Ali*, this court accepted that a defendant who was alleged to have conspired with others to murder by the specific method of detonating bombs on transatlantic aircraft could properly be tried and convicted on a count that simply alleged conspiracy to murder, when some of the conspirators may have agreed to murder in ways other than placing explosive devices on aircraft. Thomas LJ summarised the position in that case as follows:

> *61.* […] *it seems to us that, looking at the evidence in the case, it is clear that there was the possibility of two distinct agreements on the evidence advanced by the prosecution: an agreement by all to murder and an agreement by some (or all on the prosecution's case) to murder not simply by detonating a device before an iconic object but by detonating IEDs on transatlantic aircraft. Although the object was to commit the same underlying offence of murder, they are distinct and different agreements as the latter involved an infinitely more serious and sophisticated agreement to do so by detonating IEDs on aircraft.*

62. Notwithstanding those differences, the court concluded that:

> *62. It would, in our judgment, be possible in law to have charged one single conspiracy to murder, even though there was a distinct conspiracy to murder by detonating IEDs on transatlantic aircraft. It would have been open to the Crown to prove a conspiracy to murder; that would have been sufficient for the jury to convict and for the judge to have taken upon himself, as he would do in the ordinary case, the burden of deciding the role each played in the furtherance of the conspiracy and the importance of that role. In the usual case, experience has shown that this is the better course where the agreement is to commit the same substantive offence. The position in the case of agreements to commit different substantive offences was considered in R. v Roberts; R. v Taylor [1998] 1 Cr. App. R. 441 at 449–450; it is for the Crown to determine whether to charge one conspiracy or more than one (cf. R. v Wells [2010] EWCA Crim 1564 where the court expressed the view it was fairer to charge more than one conspiracy where different substantive offences (robbery and theft) were involved).*

63. It follows that those charged with a conspiracy may have sought to achieve the common aim by different means, and it is not necessary to prove that all of the conspirators were aware of the full range of ways in which the agreement was to be executed. For some, the conspiracy may have had a narrower scope or it may have involved fewer people than the prosecution's case as put at its widest. What matters is that there is a shared common purpose or design in conformity with the charge.

64. We repeat that when the prosecution described in the particulars for count 1 that the corrupt payments related to Innospec's products (including TEL), that did not impose the obligation that they had to prove that the defendant under consideration was aware that the corruption related to more than one product: the reference to "products" was not a material averment. Therefore, it is unrealistic to suggest that there were, potentially, two distinct conspiracies. The more limited approach reflected in count 2 did not create, or reveal, a separate conspiracy that needed to be charged as an additional count. Instead, the conspiracy alleged in count 1 could legitimately have been proved on the basis of a scope that was narrower than that reflected in the wording of the Particulars of the Offence – it was sufficient the applicant knew there

was a corrupt agreement to supply TEL alone, as opposed to TEL and other Innospec products.

65. Although viewed in isolation count 2 was a lawful count, adding it to the indictment prior to counsel's speeches was an entirely unnecessary step. It constituted a substantial diversion at the end of the trial. Given the applicants were acquitted on count 1, questions of *autrefois convict* do not arise and the sole question is whether it resulted in any unfairness to either applicant. In reality, it simply meant that the case against them on that count was restricted to TEL, although the evidence relied on by the prosecution remained unchanged since corruption relating to other products was clearly admissible by way of background on count 2 and they continued to face count 1 (in relation to which it was accepted the evidence was admissible). It follows that this was not a late amendment that offended the principles relating to alterations to the indictment during the trial as described in *R v Johal and Ram* and the other authorities set out above. We consider the suggestion advanced by Mr Shaw that Kerrison was unaware that it would be to his advantage during the trial to explore whether the corruption related to TEL alone or to other Innospec products to be unrealistic, given any illegality on the part of Innospec in this context would have been highly damaging to his case bearing in mind the position he held within the company and the charges he faced. His concern was to demonstrate that the payments did not involve corruption as regards any Innospec products (apart from TEL, since he accepted, with hindsight, that there had been corruption relating to that product). To have approached the case in any other way would have increased the risk in his case of a conviction on count 1 as opposed to count 2, and in any event the evidence of corruption as regards other Innospec products would have supported the case against him on count 2 (on the basis that it was part of the relevant background revealing a culture of corruption). There was no unfairness to Kerrison.

66. Turning to Papachristos, it is undoubtedly a notable event in this case that the jury did not follow the judge's direction that a conviction on count 2 was dependent on a conviction on count 1. However, in our judgment, the approach they took was entirely explicable in that it reflected the jury's certainty that Papachristos was aware of and involved in the corruption relating to TEL, but they were in doubt as to whether there was corruption relating to other products (especially PLUTOcen). With great respect to this highly experienced judge, the approach he adopted lacked logic: count 2 was designed to enable a conviction on a narrower, TEL-only basis and his approach vitiated this justification by making a conviction for this applicant on count 2 dependent on his conviction on the wider count 1. But, that said, this history does not reveal any unfairness vis-à-vis Papachristos, bearing in mind the way in which the case against him had crystallised by the end of the trial: that he was a party to the corruption concerning TEL, and his involvement in PLUTOcen was an adjunct to or an element of that corruption. It was not in any sense fatal to the prosecution's case that there was no evidence that Papachristos had been personally involved in making the corrupt payments in relation to TEL. Indeed, Mr Hackett spent a part of his closing speech addressing the suggestion that there was a lack of evidence as regards his involvement with, or knowledge of, the corruption concerning TEL.

67. Furthermore, given that count 2 was the same offence charged in count 1 (albeit put on a narrower basis) we do not accept that Papachristos was denied the opportunity to address relevant matters during the trial or during his closing speech, notwithstanding

the judge's suggestion to Mr Hackett that it was unnecessary for him to do so in his address to the jury because it would constitute "tilting at windmills". As we have already observed, the evidence in relation to corruption concerning products other than TEL was admissible in the trial as regards count 1, and the jury self-evidently acquitted both applicants on that count because they were uncertain that the prosecution had established that they were aware of a wider corrupt agreement which included those other products. Furthermore, it would have been wholly artificial to attempt to delineate the evidence that was admissible as between the two counts, particularly since a great deal of the history and background had general relevance.

68. We are unpersuaded by the argument that the Crown failed to identify the role ascribed to Papachristos in the conspiracy under count 2. As the judge clearly directed the jury, the difference between the counts was straightforward:

> "*If you are sure that the defendant was part of the conspiracy as far as TEL was concerned but you are not sure that this was part of a wider conspiracy covering other Innospec products, then he could not be guilty of Count 1. He would be guilty of a different conspiracy, limited to TEL alone. This is contained in Count 2."*

69. For understandable reasons the jury failed to follow the judge's direction not to convict on count 2 if they acquitted Papachristos on count 1. For the reasons set out above, in this respect the jury were right and the judge was wrong. The jury applied the distinction the judge drew between the two counts when giving his directions on the law at the beginning of the summing up, and their refusal to apply the direction given much later that day concerning the "reality" of the case ([34] above) does not render his conviction on count 2 unsafe.

70. To summarise, count 2 was an unnecessary distraction in this case and the jury should have been invited to consider count 1 alone, which encompassed the broader and the narrower bases discussed above. However, no injustice has resulted following the acquittal of both applicants on count 1 and their conviction on count 2, and in consequence the application for leave to appeal against conviction fails as regards both applicants.

Grounds of Appeal against Sentence

71. In passing sentence, the judge observed that Kerrison, as CEO from 1996 until 2005, had to accept major responsibility for the corruption. The judge acknowledged that he did not instigate this illegal activity but he was aware of it and allowed it to continue for a period of approximately 4 years.

72. The judge took into account the applicant's good character and his, and his wife's, ill health (she may be suffering from dementia whilst he experiences heart difficulties and has displayed some of the early signs of Parkinsons' disease). He was permitted to visit South Africa and France prior to sentence in order to enable him to settle his business and family affairs. The judge took account of the various references and he acknowledged the applicant's good work in South Africa where he had provided employment, decent accommodation, sanitation, healthcare and education for members of the black community on a farm the Kerrisons have restored.

73. The judge's starting point was five years', which he reduced to 4 years' to reflect Kerrison's personal mitigation. The maximum sentence is seven years' imprisonment.

74. In support of Kerrison's application for leave to appeal his sentence, it is argued that the sentence was manifestly excessive, given the circumstances of the case and the applicant's mitigating circumstances. It is suggested that the judge failed to reflect the applicant's acquittal on count 1, and that in describing the corruption as ingrained, institutionalised and endemic he appeared to be sentencing the applicant on a wider basis than the facts encompassed by count 2. The applicant relies on the monopoly that Innospec enjoyed as regards TEL and it is suggested that the corruption in this case to a large extent was a reflection of Indonesia's inability to upgrade its refineries to produce higher grade petroleum. The court is reminded that the applicant did not create but instead inherited this corrupt way of working, and that he was not personally enriched by this illegal operation. It is said that the prices of TEL were not increased to fund the corruption.

75. Additionally, it is contended there is material disparity between the sentence imposed on Kerrison and the sentences imposed on Paul Jennings, his successor as CEO, and Dr David Turner. Paul Jennings was sentenced to 2 years' imprisonment and Dr Turner was sentenced to 16 months' imprisonment suspended for 2 years with a requirement to perform 300 hours' unpaid work. The judge identified a starting point of 4 years' for both men. Therefore, the applicant and Jennings both occupied the position of CEO of the company, and neither of them initiated this corruption. We note that given Turner's role, the judge concluded that his culpability was equal to that of Jennings.

76. At the heart of the disparity argument there are two complaints. First, it is suggested the judge should have treated the Iraqi element of the corruption in which Jennings was involved as meriting a longer overall sentence than that imposed on Kerrison who was only involved in Indonesia. The events in Iraq largely occurred at a different time, they were in a different jurisdiction and were of equivalent seriousness to the Indonesian corruption. Second, it is suggested that there was no reason to identify a starting point of 4 years' for Jennings and a starting point of 5 years' for the applicant.

77. Finally, it is argued that the judge misunderstood the effect of the sentences he passed as regards when the applicant and Jennings would be released from custody.

78. This was prolonged, cynical and serious corruption of public officials in a foreign country. TEL provided the greater part of Innospec's income during the time when corruption was being used to prolong the use of a product that damages health and the environment. Whether or not Indonesia could afford to upgrade its refineries is essentially irrelevant: bribes were used to persuade public authorities artificially to extend the life of a product that was being phased out elsewhere in the world because of its adverse impact. Given the corruption concerning Kerrison was principally focussed on TEL, the difference in his case between a conviction on count 1 or count 2 was not substantial.

79. However, we are concerned that the judge identified the wrong starting point for Kerrison. As the judge observed, Jennings had succeeded Kerrison as CEO in April 2005 and he occupied that position for a number of years. As with Kerrison, he

allowed the corruption that he inherited to continue. He was involved in corruption in two countries. The judge distinguished between the two men as follows:

> *"By* [Jennings'] *pleas of guilty to conspiracy to corrupt, he accepts that not only did he know of it but he also intended to be part of it and as a chief executive officer in that position he must accept substantial responsibility for what happened, though I assess his responsibility as somewhat less than that of Dennis Kerrison."*

80. The judge did not explain why he distinguished between the two men in this way save that he referred to the fact that he was in post for a shorter period of time than Kerrison and there was a certain lack of "*direct contact*". The judge did not address substantively the significant additional corruption in the case of Jennings as regards the bribery in Iraq which involved millions of dollars; he simply observed it would be inappropriate to impose consecutive sentences.

81. As it seems to us, the judge identified the correct starting point – four years' imprisonment – for corruption at the level occupied by Jennings (a chief executive officer who condoned significant corruption for a substantial period of time), and we consider he fell into error when he suggested the starting point was five years for this applicant, who occupied the same role in, broadly speaking, the same circumstances. The judge was entitled to pass concurrent sentences on Jennings and Turner as regards the company's involvement in Iraq and Indonesia – presumably in order to ensure that the totality of the sentence was not excessive – albeit some judges might not have followed this merciful course.

82. As regards the other issues raised on this application for leave to appeal against Kerrison's sentence, the applicant fought the case and therefore lost the credit that was available to Jennings and Turner. The consequences of the sentence in terms of the release provisions were irrelevant at the stage of deciding on the right sentence, as they are on any appeal against it (*R v Dunn* [2012] EWCA Crim 419).

83. It follows that we consider the starting point for the sentence on Kerrison should have been four years', and we adopt the approach of the learned judge of deducting 12 months' in order to reflect his personal mitigation.

84. We grant leave to appeal against sentence in his case. We quash the sentence of four years' imprisonment and substitute a sentence of three years' imprisonment. To that limited extent this appeal against sentence is allowed.