Neutral Citation Number: [2019] EWCA Crim 1318

Case No: 201801927 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM the Crown Court at Southwark
Sir Roderick Evans
T20147445

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/07/2019

Before :

LORD JUSTICE GROSS
MRS JUSTICE MCGOWAN
and
MR JUSTICE BUTCHER

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Between :

Regina	**Respondent**
- and -	
Alstom Network UK Limited	**Appellant**

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- -

Mr Simon Farrell QC, Ms Rachel Scott & Mr Will Hays (instructed by **Serious Fraud Office**) for the **Respondent**
Mr Alexander Cameron QC, Miss Nichola Higgins, Mr Quinton Newcomb & Mr Shiv Haria-Shah (instructed by **Fulchrum Chambers Limited**) for the **Appellant**

Hearing dates : 4th July 2019

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Approved Judgment

Lord Justice Gross :

INTRODUCTION

1. Can there be a fair trial of corporate defendant X for conspiracy where its guilt depends on the guilt of individual Y – its directing mind and will ("DMW") – in circumstances where Y is neither indicted as a co-conspirator nor otherwise available to give evidence at the trial? The Applicant ("AIL") submits that, at least on the facts of this case, the answer is "no". The Respondent ("the SFO") submits that the answer is and must be "yes". That question comprises Ground 1 of AIL's grounds of appeal and forms the principal issue before us on this application ("Issue I: Trial in the absence of the DMWs").

2. Grounds 2 and 3 of AIL's grounds of appeal raise subsidiary issues. Ground 2 goes to the adequacy of the Judge's directions to the jury in the summing-up in seeking to address the consequences of the AIL trial taking place in the absence of its DMWs ("Issue II: The adequacy of the Judge's directions"). Ground 3 criticises the structure of the summing-up, which is said to have exacerbated the unfairness complained of under Issues I and II ("Issue III: The structure of the summing-up").

3. On 10 April 2018, in the Crown Court at Southwark, before HHJ Pegden QC, AIL was convicted of conspiracy to corrupt, contrary to s.1 of the *Criminal Law Act 1977* ("the CLA 1977") (count 3). Count 3 concerned a consultancy agreement ("CA") in relation to a contract with the Transport Corporation in Tunisia, i.e., Societe des Transports de Tunis ("Transtu" and "the Tunisian contract" respectively). AIL was acquitted on counts 1 and 2, concerning CAs relating to Indian and Polish contracts.

4. AIL renews its application for leave to appeal conviction, following refusal by the Single Judge (Sir Roderick Evans), to whose observations we shall return in due course.

THE FACTS

5. AIL is a UK subsidiary of the French multi-national engineering conglomerate Alstom SA ("Alstom") which, at all material times, operated in the power generation and transport sectors. During the indictment period, AIL's directors included Mr Graham Hill, Mr Bruno Kaelin and Mr Jean-Daniel Lainé, all of whom were based in Paris. Between 2000 and 2006, AIL administered payments to consultants for the transport sector of Alstom SA's business. The consultants, i.e., third party contractors or agents, were engaged in relation to a project by way of CAs to provide services relating to the project in question.

6. Count 1 concerned two CAs in relation to a contract with the Delhi Metro Rail Corporation Ltd in India ("the Indian contract").

7. Count 2 concerned two CAs in relation to a contract with Tramwaje Wasrszawskie in Poland ("the Polish contract").

8. As already indicated, Count 3, with which we are concerned, pertained to a CA, relating to the Tunisian contract.

9. As set out in the Indictment, Count 3 is in these terms:

"STATEMENT OF OFFENCE

Conspiracy to Corrupt, contrary to section 1 of the Criminal Law Act 1977

PARTICULARS OF OFFENCE

ALSTOM NETWORK UK LIMITED (formerly Alstom International Limited) between the 1st day of April 2003 and the 30th day of November 2006 conspired with Bruno Kaelin, Jean-Daniel Lainé and others to give a corrupt payment or payments to public officials of the Republic of Tunisia or to other agents, namely monies comprised within the sum of €2,363,778 disguised as payments in respect of a Consultancy Agreement with Construction et Gestion NEVCO Inc dated 11th May 2004 as an inducement or reward for showing favour to the Alstom Group in relation to the award or performance of a contract between Alstom Transport SA and Societe des Transports de Tunis ('Transtu') for 30 trams."

10. The Tunisian contract CA, signed by Mr Kaelin, was made with a Canadian Company, Construction et Gestion Nevco Inc ("Nevco") in May 2004. Mr Kaelin retired in December 2005 and was replaced by Mr Lainé.

11. The prosecution alleged that Nevco was a front for a company, Roc Finance ("Roc"), incorporated in the Lebanon and linked to or controlled by a Mr Belhassen Trabelsi ("Mr Trabelsi"), the brother in law of the then President of Tunisia. Mr Trabelsi's company, Toucan, had the same address as Nevco.

12. A memorandum of agreement existed between Nevco and Roc, which stated that "in executing the contract [with Alstom] Nevco is acting for and on behalf of Roc Finance who shall assume all of the obligations and be entitled to all of the rights of Nevco arising from the contract". A copy of the CA together with partially completed share transfer forms for Roc was later found in a safety deposit box in Geneva, leased by Mr Trabelsi.

13. In December 2005, someone referred to as "Mr T" telephoned International Network, a department within Alstom SA, seeking to be paid. The request was forwarded to Mr Lainé. Payments were subsequently made to Nevco. It may be noted:

    i) When Nevco requested their first payment in December 2005, no invoice was submitted and Nevco had to be sent a template invoice.

    ii) The total paid to Nevco was €2,363,778 (€2,159,730 and $250,000). There was an issue between the parties as to the extent of services performed by Nevco, if any, but in any event, the level of remuneration exceeded AIL's limits.

    iii) In April 2006, after the first invoice was submitted by Nevco and pursuant to the terms of the CA, a payment of €1,199,850 and $250,000 was made to Nevco. Two weeks later, Nevco sent the majority of the funds to Roc.

    iv) A similar pattern followed the second payment of €959,880 in November 2006.

14. In July 2006, the sum of €1 million was paid into Mr Trabelsi's account in Switzerland. According to the payment details contained in the banking document, the funds were "received from the Lebanese Canadian Bank S.A.L. Beirut on order from Mr Belhassan Traboulsi…to his own account". The Lebanese Canadian Bank was also the bank used by Roc. No further details as to the payer were recorded and there was no evidence of the flow of funds beyond that.

15. A third payment due under the CA was never made because a due diligence report commissioned by Jean-Daniel Lainé revealed the link between Nevco and Mr Trabelsi; shortly thereafter, Mr Lainé stopped all further payments to Nevco.

16. In 2012, Mr Trabelsi's mobile phone was recovered from an address in Canada. It contained contact details for Mr Etienne De, to whom both Messrs Kaelin and Lainé reported and other employees of Alstom – but not those of either Mr Kaelin or Mr Lainé - together with the contact details of the individual who held the office of Minister for Transport in Tunisia between 1997-2002 and 2004-2011.

17. The prosecution case in relation to all Counts was that each CA was a sham and simply a cover for the payment of a bribe paid as an inducement or reward for awarding the relevant transport contract to Alstom. In each Count, AIL was guilty by way of the "identification" (or "attribution") principle, via two directing minds: Mr Hill and Mr Kaelin in respect of Counts 1 and 2 and Mr Kaelin and Mr Lainé in respect of Count 3.

18. As to Count 3, the prosecution case was that the contract for the supply of 30 metro trains to Transtu was obtained corruptly. Almost all of the monies paid by AIL went to Roc and Mr Trabelsi. Nevco had no dealings at all with Transtu.

19. As a matter of inference, the evidence already recounted was said to support the prosecution case that the Tunisian contract had been obtained corruptly by AIL, through the corruption of Messrs Kaelin and Lainé.

20. The Defence case in relation to Count 3 was that other than the fact of the payment and that the recipient of the payment (Nevco) was, via Roc and Roc's connection to Mr Trabelsi, indirectly connected to the (then) President of Tunisia, there was no evidence that the payment was made for corrupt purposes. Whatever the monies were paid for, they were not paid as a bribe for the award of the Tunisian contract.

21. Neither Mr Kaelin nor Mr Lainé was party to any conspiracy (if conspiracy there was); both were of impeccable character. They neither worked in Tunisia, nor for the transport division of Alstom. The company was too big to know what everyone was doing. It was Mr De who had approved the CAs and he (rather than Mr Kaelin or Mr Lainé) was in touch with compliance and those on the ground. Moreover, Messrs Kaelin and Lainé both played a part in systems designed to combat corruption. It was the transport division which had contact with Nevco; Mr Kaelin and (for that matter) Mr Hill had simply signed the CAs; Mr Lainé had signed nothing.

22. In the absence of Mr Kaelin and Mr Lainé, it was extremely difficult to judge them and, therefore, to judge AIL.

23. The issue for the jury in relation to Count 3 was whether there was a conspiracy to pay monies by way of a bribe to officials in Tunisia and, if so, whether Mr Kaelin or Mr Lainé, as the DMWs of AIL, were parties to that conspiracy.

24. Highlighting the matter at the heart of the appeal, the DMWs of AIL in respect of Counts 1 and 2 were said by the prosecution to be a Mr Graham Hill and Mr Kaelin. The AIL DMWs for the Tunisian contract, Count 3, were alleged by the prosecution to be Mr Kaelin and Mr Lainé. Mr Hill was a defendant to Counts 1 and 2 and gave evidence at the trial. Mr Kaelin and Mr Lainé were absent.

25. In the event, as already noted, AIL was acquitted on Counts 1 and 2 where a DMW had given evidence. AIL was convicted on Count 3, where no DMW was present or had given (oral) evidence.

26. It should not, however, be thought that there was no evidence at the trial from Messrs Kaelin and Lainé. Hearsay evidence was admitted, in the form of Mr Kaelin's interviews with the Swiss Police and evidence given by Mr Lainé in other proceedings to which we shall come.

OTHER RULINGS AND PROCEEDINGS

27. *(1) Ruling of 11 May 2016 ("the 11 May Ruling"):* The issue of the anticipated absence of Messrs Kaelin and Lainé from the trial has been consistently canvassed by those representing AIL. In circumstances where AIL was to be prosecuted under Count 3 with no DMWs present, AIL applied to HHJ Pegden QC pursuant to s.78 of the *Police and Criminal Evidence Act 1984* ("PACE") to exclude the acts and declarations of Messrs Kaelin and Lainé in furtherance of the (alleged) conspiracy. Neither Mr Kaelin nor Mr Lainé was under any duty to assist with the trial. Mr Kaelin lived in Switzerland, could not be extradited and had declined to attend. The prosecution had not charged Mr Lainé for, essentially, case management reasons; no question of abuse of process arose in connection with that prosecution decision. There was, however, an overlap between the AIL application under s.78 and an application to stay the proceedings as an abuse of process given the absence of both DMWs. The Judge chose to deal with the matter under s.78, thus avoiding the need for AIL to satisfy the civil burden of proof applicable to a stay application. Nonetheless, he refused the AIL application, holding that any unfairness arising as a result of the absent DMWs must and should be dealt with as part of the trial process. Accordingly, the acts and declarations of Mr Kaelin and Mr Lainé in furtherance of the alleged conspiracy were admissible to prove the conspiracy and the guilt of others, in accordance with the applicable principles relating to conspiracy.

28. *(2) The CACD Ruling of 28 July 2016 ("the 28 July Ruling"):* In *R v A Ltd., X and Y* [2016] EWCA Crim 1469, a different constitution of this Court entertained an appeal by the SFO under s.58 of the *Criminal Justice Act 2003*, from a further Ruling by the Judge ("the 8 June Ruling"), holding that various notebook entries of Mr Kaelin and AIL emails were inadmissible. The SFO appeal was successful and both the notebook entries and the emails were held admissible. The Court's detailed reasoning on those issues, comprising the *ratio* of the 28 July Ruling, is irrelevant for the purposes of this appeal – save to note the central importance of the "identification" principle to the prosecution case against AIL.

29. Three matters are, however, of significance for the present appeal arising from the 28 July Ruling. First, as there recorded, there was no dispute that Mr Kaelin was a DMW of AIL. Likewise, there is and has been no dispute that Mr Lainé was also a DMW of AIL.

30. Secondly, the 28 July Ruling contains, with respect, a concise and helpful summary of the "identification" principle and the reliance placed on it by the prosecution. Giving the judgment of the Court, Sir Brian Leveson P said this (at [26]):

> "The 'identification' principle is a well-established principle of law whereby corporate bodies are deemed to act and acquire knowledge through those individuals who can be identified as 'the directing mind and will of the corporation' *per* Viscount Haldane LC in *Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited* [1915] AC 705, at page 713; and see *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 in which Viscount Dilhorne stated the test at page 187:
>
> '…a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders…."

After consideration of other authority, Sir Brian underlined (at [27]) that the test for determining those individuals whose actions and state of mind are to be attributed to a corporate body remains that established in *Tesco v Nattrass*.

31. As to the prosecution's deployment of the "identification" principle, Sir Brian went on to say this (at [28]):

> "The prosecution deployed the 'identification' principle to prove the guilt of A Ltd. It alleged that BK (a director of A Ltd) was a (or the) 'directing mind and will' of A Ltd and pointed to the guilty acts and knowledge both of BK and X (both directors of A Ltd) to prove the company's guilt: in that regard, it is not in issue that each is properly to be regarded as 'the directing mind and will' of A Ltd. Thus, the prosecution sought to rely on BK's diary or notebook entries to prove BK's guilty state of mind and, *ergo*, the company's guilty state of mind. In this regard, the prosecution's approach was entirely orthodox and unobjectionable."

32. Thirdly, and as is undisputed, *obiter* (or strictly *obiter*, it matters not), the Court had this to say (at [36]) about the absence of the DMWs from the trial:

> "…we ought to address what was Mr Cameron's underlying argument namely that it was unfair for A Ltd to have to address allegations of its criminality when its controlling mind whose behaviour was relied upon as proving its guilt was not also charged with crime and had been unwilling to assist in the preparation of its defence. These facts were at the forefront of

> the argument that evidence relating to BK should be ruled inadmissible pursuant to section 78 of PACE. In reality, however, a corporation can only operate through its directing mind or minds and their knowledge is, and must remain, the knowledge of the corporation. The presence or otherwise of a directing mind at the trial is irrelevant. Were it otherwise, as the judge observed, had the directing mind died, become incapacitated (as well as one whose attendance at trial could not be secured, perhaps because he had deliberately absented himself), it would not be possible to prosecute the relevant corporation however egregious the conduct. The description of BK's diary entries as 'musings' which may or may not be difficult to interpret could indeed be correct; that, however, should be a matter for the jury after careful direction by the judge."

33. *(3) The Rulings of 2 May and 17 October 2017 (*"the 2 May 2017 Ruling" and "the 17 October 2017 Ruling"*):* For completeness if no more, reference should be made to the 2 May 2017 and 17 October 2017 Rulings. It appears that AIL made further applications to the Judge (HHJ Pegden QC) seeking to exclude evidence relating to Mr Kaelin and Mr Lainé pursuant to s.78 PACE, alternatively that the proceedings should be stayed as an abuse of process by reason of the absence from the trial of Messrs Kaelin and Lainé. Suffice to say that neither application succeeded; all concerned felt themselves inhibited by this Court's 28 July Ruling; while Mr Cameron QC, for AIL, was realistically economical in pursuing the matter, it is plain that AIL's objections were not abandoned and were left open for further challenge – now indeed forming the subject of this appeal.

34. *(4) The "Phase 3 trial" and re-trial*: Between 23 May and 27 July 2017, AIL was tried on a different indictment (the "Phase 3 trial"), concerning a CA in Hungary, in which the prosecution alleged that AIL was guilty via Mr Lainé as its DMW. Mr Lainé was a defendant in that trial and gave evidence. In the event, the jury was unable to reach verdicts on any defendant and was discharged.

35. On 28 November 2018, following a re-trial of the Phase 3 trial, AIL and Mr Lainé were both acquitted.

36. As a matter of chronology, it may be noted that the trial from which this is a renewed application for leave to appeal took place between January and April 2018, thus post-dating the Phase 3 trial but prior to the Phase 3 retrial.

THE RIVAL CASES

37. We were most grateful to Mr Cameron QC, for AIL and his team, together with Mr Farrell QC, for the SFO and his team, for their most helpful written and oral submissions. We also repeat what we said at the hearing as to our gratitude for the quality and economy of the Bundles. In brief outline, the rival cases before us were as follows.

38. Mr Cameron QC advanced his submissions under three headings. First, that the trial of AIL in the absence of its DMWs was unfair; that problem was insoluble. His remaining submissions were, in effect, "without prejudice" to that first and principal submission.

Secondly, the summing-up had failed to direct the jury adequately as to the absence of the DMWs. Thirdly, the structure of the summing-up exacerbated the unfairness to which the first two submissions were addressed.

39. Developing his first submission, Mr Cameron contended that the trial of a corporate defendant for conspiracy in the absence of any DMW had not happened before. It was noteworthy that on all Counts (including the Phase 3 trial), AIL was acquitted when a DMW was present and gave evidence but was convicted on the one Count (Count 3) when no DMW was present. No individual defendant would be tried when he was involuntarily absent; a corporate defendant was entitled to the same protections as any other defendant. Corporate prosecutions were now heading in a different direction, as epitomised by s.7 of the *Bribery Act 2010.* The *obiter* views expressed by this Court in the 28 July Ruling (at [36]) on the irrelevance of the attendance of the DMWs at trial were simply wrong and should not be followed.

40. The submission was *not* that a corporate defendant could *never* be tried if no DMW was present. There was thus no "floodgates" danger in the AIL argument. Here the prosecution case was based on inference not direct evidence, such as an admissible tape recording of a "cartel" meeting. There were a variety of matters with which only Mr Kaelin and/or Mr Lainé could have dealt – but they were not there to do so. Further difficulties arose, given that Mr Kaelin and Mr Lainé were not (directly) involved in the operation of the contracts; that was the responsibility of the transport division of Alstom. Still further, both Mr Kaelin and Mr Lainé were absent involuntarily; AIL had wanted them to be present at the trial. Mr Kaelin's attendance could not be secured given his Swiss residency. Mr Lainé's absence was attributable to the prosecution's own case management decision. In these circumstances and on these specific facts it was unfair to proceed against AIL in the absence of Messrs Kaelin and Lainé. Crucially, AIL's corporate liability hinged on the personal liability of Mr Kaelin and/or Mr Lainé. Their absence gave rise to an insoluble problem; a fair trial of AIL could not take place – and it mattered not in what legal pigeonhole this submission was placed, whether that of abuse of process or any other. This case was different from the familiar authorities concerned with abuse of process; none of those authorities involved (the absent) Y's guilt comprising X's guilt.

41. Turning to his second submission, insofar as it had been suggested that fairness could be ensured by way of the trial process, the necessary levers had not been pulled. Thus, AIL's s.78 application to exclude evidence had failed. Moreover, the Judge's directions to the jury had not been sufficiently strong or specific.

42. Mr Cameron's third submission went essentially to the Judge's directions to the jury, following his own – successful – complaint that the Judge had not dealt at all or sufficiently with a variety of matters telling in favour of the Defence.

43. Mr Farrell QC submitted that AIL's core proposition, namely, that it could not have a fair trial in the absence of its DMWs, was "bold"; it had been rejected by this Court in the 28 July Ruling – that rejection, though *obiter*, was nonetheless persuasive and had been about this very case. He submitted forcefully that expressions of concern as to the trial and conviction were of no use; AIL needed (in effect) to make good a case of abuse of process to succeed. That AIL singularly failed to do. Even had a DMW been present at trial, he could not have been compelled to give evidence. There was nothing unfair about the trial and nothing unsafe about AIL's conviction. Given the expanding

territorial reach of serious corporate crime, it would not always be possible for prosecuting authorities to ensure that individual directors (and DMWs) would be tried alongside the relevant corporate defendant.

44. In answer to the question of why AIL (the company) had been prosecuted, Mr Farrell said that it had been strongly in the public interest to do so; AIL had been an essential cog in the corruption alleged, namely, paying public officials in Tunisia to obtain a large contract. A company set up to fight corruption had instead been used for it. The figures were significant; the contract was worth some €80 million and the bribe about €2.3 million. There had been no reason to think that AIL could not defend itself properly; abundant evidence had been available from sources other than the DMWs to permit it to do so.

45. As Mr Farrell put it, Mr Cameron's second submission had been "necessarily muted", given AIL's case that the problem raised by the absence of the DMWs was insoluble. In any event, the Judge's conduct of the trial and his summing-up had been scrupulously fair and the jury had been repeatedly warned not to hold the DMWs' absence against AIL.

46. In writing, as we did not call on him on this point, Mr Farrell submitted that there was nothing in Mr Cameron's third submission.

ISSUE I: TRIAL IN THE ABSENCE OF THE DMWs

47. *(1) Setting the scene:* It is convenient to begin with a number of introductory matters. First, given the importance the legislature has attached to combating corporate crime and corruption internationally, as evidenced (for example) by the *Bribery Act*, there was ample reason to prosecute AIL, provided only the evidential test for doing so was satisfied (which it clearly was, it being common ground that at the conclusion of the SFO case there was a case for AIL to answer). We agree with Mr Farrell's submissions in this regard, already outlined. In any event, unless the decision to prosecute AIL could be said to constitute an abuse, the question of whom to prosecute is one for the prosecutor, not the Court.

48. Secondly, the question for this Court in considering AIL's renewed application for leave to appeal conviction is not whether we would have reached the same decision as the jury on the evidence before it; the mere fact (even if it had been the fact) that we might not have done so, would be irrelevant. Nor is it material that it would no doubt have been preferable for the trial process had Messrs Kaelin and Lainé been present and given oral evidence.

49. Instead, the AIL application can only succeed if we are of the view that there is an arguable case that, absent the DMWs, a fair trial could not be conducted in respect of the Tunisian contract. We agree with Mr Farrell: effectively, the AIL case has to go so far as demonstrating unfairness, akin to an abuse of process, in order to succeed. As is too well-known to require citation of authority, there are two categories of case where the Court has power to order a stay of proceedings; namely: Category 1 - where the defendant cannot be fairly tried; Category 2 - where, although the defendant can receive a fair trial, it would be unfair to try him, i.e., where a stay is necessary to protect the integrity of the criminal justice system. We are here concerned with Category 1. Such a stay is a remedy of last resort and caters for, and only for, those cases which cannot

be accommodated with all their imperfections within the trial process: *Blackstone* (2019), at paras. D3.67, 3.68 and 3.87. That is a high hurdle.

50. Thirdly, there is no dispute that Messrs Kaelin and Lainé were AIL's DMWs for the purposes of the Tunisian contract and Count 3. It is thus unnecessary to take time exploring the identification principle, which is sufficiently set out (above) in the 28 July Ruling.

51. Fourthly, it is both fair and right to underline the importance of the DMWs to the case before us. Simply put, the guilt of AIL turns on the guilt of one or both DMWs. That was in any event made clear in the Judge's "Notes on the Law" and "Steps to Verdict", documents which we understand were supplied to the jury.

52. Nonetheless, fifthly, and important though DMWs are, we cannot accept Mr Cameron's submission, seeking to equate AIL's position (in the absence of DMWs) with that of an individual defendant, involuntarily absent from his trial. Mr Cameron is of course right, so far as it goes, that a corporate defendant is as much entitled (under common law and the ECHR) to a fair trial as is an individual defendant. The argument breaks down at the point where it seeks to formulate the equation just described. The matter does not bear over-elaboration. An individual defendant has the right to be present at his trial and to defend himself in person or by instructing counsel to represent him: *R v Jones* [2002] UKHL 5; [2003] 1 AC 1, at [21], *per* Lord Hutton. If an individual defendant is *involuntarily* absent, *prima facie*, at the very least, his right to be present at and participate in his trial is infringed. However important the DMW, a company is and remains a separate legal entity from the person or persons constituting its DMW. As Mr Farrell put it, the fact that the DMW is absent from the trial does not mean that the company is absent. In the present case, AIL was very much present and enjoyed the benefit of powerful legal representation; there can be no doubt that AIL participated effectively in its trial. Decisions such as *Jones*, and the principles underlying them, are somewhat far removed from the present issue and do not advance AIL's argument.

53. *(2) Principle and policy:* Although Mr Cameron was at pains to distance himself from any suggestion that a corporate conspirator could never be tried in the absence of a DMW, it is plain that, if well-founded, his principal submission would have wide and untoward ramifications. As a matter of principle and policy, we are unable to accept his core proposition.

54. First, in our judgment, if the AIL submission is soundly based on the facts of the present case, it is not at all apparent when a prosecution of a corporate conspirator could proceed in the absence of a DMW. In writing, the closest Mr Cameron came to accepting that a trial could proceed in such circumstances was when there was "an unimpeachably admissible confession" by a DMW. However, as he himself recognised (*ibid*), in such a case there would be, in all likelihood, a plea rather than a trial. Orally, Mr Cameron realistically accepted that absence of the DMW as a result of collusion with the corporate defendant would be a very different matter – and so it would be; plainly, the corporate defendant could not complain of the trial proceeding in such circumstances. But it does not at all follow that a trial of a corporate defendant in the absence of the DMW can *only* proceed in such restricted circumstances. Any rule of law to that effect would be inimical to sound policy and "considerations of practical justice" (Lord Bingham, in *Jones*, at [12]).

55. Secondly, the mere fact that not all alleged conspirators are before the Court has not been, is not and cannot be a sound reason for the trial against one or some of them not proceeding. Even if there are only two alleged conspirators, the fact that one of them is absent without any fault on the part of the conspirator facing trial is not, without more, a good ground for the trial against the "present" conspirator not proceeding. If all this is good law in the case of individual co-conspirators, as we think it is, we are not at all persuaded that there is any justification for a different rule in the case of alleged corporate conspirators.

56. Thirdly, any such rule of law would give rise to perverse incentives. It would become necessary to investigate whether a DMW was conveniently absent; whether there had been any nod or wink, even without demonstrable collusion. A DMW might make himself unavailable, without collusion on the part of the company but in the hope of subsequent reward. An international dimension, as might be expected in cases of this nature, would add complexity. The scope for satellite litigation on such an issue would be as considerable as it would be unwelcome and unhealthy.

57. Fourthly, in general and of itself, the presence of a DMW does not resolve the difficulty of which AIL complains. The DMW, if indicted, cannot be compelled to give evidence. While any resulting adverse inference (from the DMW's silence) may be confined to the individual DMW (not the corporate defendant), it would certainly be of no assistance to the corporate defendant. Conversely, if the DMW does give evidence, there can be no assumption that he will emerge unscathed from cross-examination and that his evidence will ultimately assist the corporate defendant; it might but it might not.

58. Fifthly, for these reasons, we would, with one modification (below) respectfully adopt the *obiter* observations of Sir Brian Leveson P in the 28 July Ruling, at [36] set out above, with which we agree. We particularly emphasise that, were it otherwise and were AIL's submissions well-founded in principle, then:

> "…had the directing mind died, become incapacitated (as well as one whose attendance at trial could not be secured, perhaps because he had deliberately absented himself), it would not be possible to prosecute the relevant corporation however egregious the conduct."

We are wholly unable to accept that so unfortunate an outcome is suggested, still less required, by any rule of law, principle or policy. We modify Sir Brian's observations in one respect only; insofar as this Court then said (*ibid*) that the "…presence or otherwise of a directing mind at the trial is *irrelevant*" (emphasis added), we respectfully think that the Court went too far. The presence or absence of a DMW may well be *relevant*; but, without being at all prescriptive, it can only be in a very rare case that the absence of a DMW would itself be determinative of the question whether a corporate defendant could receive a fair trial.

59. *(3) The particular facts:* We turn to the particular facts of this case to explore whether they suggest, even arguably, that in the absence of the DMWs AIL could not and did not receive a fair trial.

60. In writing, Mr Cameron advanced a substantial list of matters, said to be only within the knowledge either of Mr Kaelin or Mr Lainé, such that in their absence AIL could not explain them. These matters included questions as to Mr Kaelin's knowledge of Nevco's links to Mr Trabelsi and the justification for Nevco's relatively high remuneration. As to Mr Lainé, they included his understanding of the email referring to a "Mr T…of Tunisia" and why he intervened to provide the information he did concerning the payment of consultants outside the project country to an Alstom Transport SA employee hitherto apparently reluctant to authorise the second invoice. The short answer, however, is that, as made clear by the Respondent's Notice, there were other Alstom employees who could have given evidence – as to the relationship with and knowledge of Nevco, the identity and significance of the reference to "Mr T" in the email in question and the authorisation of the second payment to Nevco. Further, at least on the question of the second Nevco payment, there was a documentary record available for the jury to consider.

61. In any event, it should not be supposed that there was no evidence before the trial Court from Mr Kaelin and Mr Lainé; albeit by way of hearsay, evidence was admitted from each of them. In the case of Mr Kaelin, there was a summary of the interviews conducted by the Swiss police. Suffice to say, they contained a robust defence of his position and honesty, together with an explanation of his role and that of AIL for the jury to consider. As to Mr Lainé, extracts of his evidence in the Phase 3 trial were made available to the Court at the trial. Likewise, these extracts contained a clear denial of any wrongdoing and details of Mr Lainé's efforts to improve compliance generally. By its nature, hearsay evidence suffers from disadvantages compared to first-hand oral evidence but, of course, the maker of the hearsay statement is not exposed to cross-examination with its attendant risks.

62. We do keep well in mind that, on those Counts where a DMW was present and did give evidence, AIL was acquitted. That is a point in AIL's favour and was understandably emphasised by Mr Cameron. We cannot of course say what *would* have happened in respect of Count 3 had Mr Kaelin and/or Mr Lainé given evidence. But, even assuming that the presence of one or both of Messrs Kaelin and Lainé would have been helpful to AIL, it falls a long way short of demonstrating, even arguably, that the trial was unfair and the conviction unsafe.

63. In dealing with Issue I, the Single Judge said this:

> "There is no rule of law or practice which requires the directing mind of a corporation to be indicted with the corporation or in some other way to be available at the trial of the corporation to give evidence. A case can be proved against a corporation in the same way as a human defendant, i.e., by any form of admissible evidence. This might be evidence from the directing mind or about the directing mind but the directing mind need not be present at trial. Although you seek to make the point specific to this case….underlying your application is the general submission that a trial of a corporation in the absence of the company's directing mind is unfair. This is an untenable proposition and, in any event, was dealt with by the Court of Appeal in *R v A Ltd, X and Y*. It was not unfair to try the corporation in this case in the absence of its directing minds.

> Moreover, the judge admitted evidence from Kaelin and Lainé which was exculpatory of the corporation and there were other sources of evidence available to the corporation about the Tunisian contracts and the conduct of the directing minds had it wished to rely on them."

Suffice to say that we respectfully agree with and adopt these succinct observations of the Single Judge which entirely accord with the reasons we have already given. We are, accordingly, unable to accept Mr Cameron's submissions on Issue I. With no real hesitation, we answer the question posed at the very beginning of the judgment "yes".

ISSUE II: THE ADEQUACY OF THE JUDGE'S DIRECTIONS

64. We can take this Issue shortly.

65. It is here convenient to begin with the observations of the Single Judge:

> "The absence of the directing minds of the corporation was a recurring topic at trial and one which had been brought to the attention of the jury on repeated occasions. In his summing-up the judge gave the jury clear, detailed and emphatic directions on how they should address the absence of Kaelin and Lainé. He emphasised the need to guard against allowing their absence, together with the absence of documents and non-conspirator witnesses, to work injustice against the corporation. His directions were fair and comprehensive and I am unable to identify any direction which he has omitted or which he could have added."

Again, we agree and only brief elaboration is required; it is unnecessary to re-trace the summing-up at any length.

66. There is no suggestion that the Judge did not make every effort to be even-handed. There is nothing in the renewed complaint, if such it was, as to the failure of the s.78, PACE application – a point which, had it any force, belonged more appropriately under Issue I. The essence of the AIL argument turns, in reality, on the submission that the Judge's directions were not sufficiently strong or specific.

67. Some criticism can, with respect, be advanced of the Judge's treatment of the hearsay nature of the evidence of Mr Kaelin and Mr Lainé. Given the particular facts of this case, it may have been unnecessary for the Judge to focus as he did on the weight to be given to hearsay evidence (Bundle B/15B/p.385). But that only goes so far. However, and more significantly, the Judge repeatedly made it plain that the absence of Mr Kaelin and Mr Lainé was not to be held against AIL. Thus, following very closely on the passage as to the weight to be given to hearsay evidence, the Judge said this (Bundle B/15B/pp. 386-7):

> "And again, you must certainly beware of any unfairness to the defendants, and do not hold…absence of these witnesses against the defendants in any way at all. You may consider, quite to the contrary, and it is for you to say, that their absence, through no

> fault of these men, has put the defendants at a considerable disadvantage."

68. It is, with respect, difficult to see what more the Judge could realistically have said on this topic. Notably, he emphasised the good character of Mr Kaelin, Mr Lainé and AIL itself. Furthermore, the Judge warned the jury against holding the absence of documents against AIL. In the circumstances, we are not at all persuaded by the AIL submissions under Issue II. In any event, had we entertained any doubts on this Issue, they would have been comprehensively put to rest by the Judge's directions to the jury, dealt with under Issue III, to which we next turn.

ISSUE III: THE STRUCTURE OF THE SUMMING-UP

69. At the conclusion of the summing-up, the AIL legal representatives were concerned that the defence case had been inadequately summarised. As the jury had only been deliberating for a short time before the end of the Court day, a written submission was prepared overnight. Very courteously, the submission set out the AIL concerns with clarity and brevity. Very fairly, the submission acknowledged that the Court's "…determination to seek to be even-handed in its summing-up is manifest". If we may say so, the submission gained in force by reason of its courtesy and fairness – while, in terms, preserving Alstom's principal submission that the absence of the DMWs gave rise to an insoluble difficulty.

70. We should make it clear at once that Mr Cameron was entirely right – and duty bound - to draw the Judge's attention to the perceived omission/s in the summing-up. We can state emphatically that where a legal representative is of the view that there is a significant omission in a summing-up, we would deprecate a course of saying nothing and preserving the point for an appeal. That would be conduct, in our judgment, falling at least well below professional best practice.

71. In the event and in large measure, when the jury came back into Court on the morning of 5 April 2018, the Judge acceded to the AIL submission. He indicated to the jury that there were facts which Mr Cameron would have liked him to have mentioned and he proceeded to do so. Those facts included the following reminders to the jury, of relevance to Count 3, that:

    i) Mr Lainé had only been in post for a matter of days and with no previous involvement in the transaction, when the "Mr T" email arrived. Moreover, the Judge corrected his earlier remarks and reminded the jury that the email only referred to "Mr T"; it did not identify him as Mr Trabelsi.

    ii) It was Mr Lainé who had stopped further payments being made to Nevco.

    iii) The Tunisian funds could not be traced beyond the Lebanon.

    iv) On the defence case, there were documents dealing with the provision of services by Nevco and that anyone looking at those documents might well have believed that they were completely genuine.

v) In respect of what was known as the "blocking my deal" email, there was an innocent and understandable explanation for the consultant in question refusing to do more work on other deals until the latest invoice had been paid.

vi) Mr Kaelin's and Mr Lainé's accounts had each contained firm denials of any wrongdoing whatsoever.

72. The Judge's pithy summary may not have given Mr Cameron everything he wanted but it highlighted many (at least) of AIL's essential factual submissions on Count 3.

73. Against this background, the essence of Mr Cameron's complaint under Issue III is reduced to the jury being unprepared for the further direction when it was given; jurors did not have notebooks and pens with them to note the directions including page references. Moreover, the impact of this further direction was weakened by the Judge's reference to Mr Cameron having prompted it.

74. With respect, there is nothing in this ground of complaint and we did not call on Mr Farrell orally to answer it. The direction was given at an important time, when the jury was starting its first full day of deliberations. It stood out, as it was the only matter of substance dealt with by the Judge that morning. Accordingly, it was bound to strike the jury with force. Its essence could easily be recollected and there is no reason to doubt, if any juror/s had wanted page references, that these would have been requested. If anything, far from exacerbating any unfairness under Issues I and II, this direction could only have been of assistance to AIL. We dismiss AIL's complaint under Issue III.

OVERALL DISPOSAL

75. Despite the inherently interesting nature of Issue I and the skill with which the AIL submissions have been advanced, we agree with the Single Judge that there is nothing casting doubt on the safety of AIL's conviction on Count 3. Accordingly, we refuse this renewed application for leave to appeal. However, as we have dealt with the matter in detail, this judgment can be reported.