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Case No: CA-202201208-B4
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SNARESBROOK CROWN COURT
His Honour Judge del Fabbro
T20207892
T20207894

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2023

Before :

LADY JUSTICE MACUR DBE
MR JUSTICE MORRIS
and
HER HONOUR JUDGE ANGELA MORRIS

Between :

ATHEER AL RAWI and CLIVE ELLIS
- and -
REX

Appellant

Respondent

Miss Leila Gaskin, Miss Sonal Dashani instructed by Birds Solicitors and Edward Fail
Bradshaw & Waterson for the **Appellants**
Mr Robin Shellard for the **Respondent**

Hearing date: 23 June 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 Jul. 23 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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We make an order under s.4(2) of the Contempt of Court Act 1981, restricting reporting of the proceedings until after the conclusion of the retrial to preserve the integrity of the retrial.

Lady Justice Macur :

1. Atheer Al Rawe (“AR”) and Clive Ellis (“E”) were convicted after trial of conspiracy to commit fraud by false representation, contrary to ss1 and 2 Fraud Act 2006 and s1(1) Criminal Law Act 1977 and Conspiracy to conceal criminal property, contrary to s327(1) Proceeds of Crime Act 2002 and s1(1) Criminal Law Act 1977. Both offences are alleged to have occurred between 1 June 2013 and 1 December 2014.
2. On 13 May 2022 they were both sentenced to a total of 5 years’ imprisonment. Both were disqualified for 7 years pursuant to s2 Company Directors Disqualification Act 1986.
3. They appeal against conviction with leave of the single judge based upon the single ground that they did not receive a fair trial due to the frequency and nature of judicial interventions during AR’s evidence. That is, the judge impermissibly descended into the arena.
4. E also renews his application for permission to appeal against conviction on the basis that the judge refused to either adjourn the proceedings, or ultimately to discharge the jury from returning a verdict in his regard, despite his absence during trial due to legitimate health issues. He has also renewed his application for leave to appeal sentence but, as will become apparent from this reserved judgment, we allow the appeals against conviction and in that we accede to the prosecution application for a retrial we consider that our views upon any resultant sentencing exercise would be unhelpful.

The prosecution case

5. The conspiracy to commit fraud alleged that the appellants and co-accused agreed to commit fraud by making false representations to members of the public, encouraging them to believe that their money would be invested in property when in fact no such investment was made or intended and the conspirators’ true intention was to make a gain for themselves. The conspiracy to conceal criminal property, reflected the resultant financial benefit.
6. Two companies were incorporated for the scheme: London and London Bond Limited (LLB) was set up to receive and manage the investor funds and London and London Developments Limited (LLD) was set up to manage the business expenses and, in due course, the building costs of the various projects.
7. The scheme was the brainchild of AR and was fraudulent from the beginning; a number of features demonstrated this to be the case, including that AR: i. Did not become a director or shareholder of the company but ran the business under the guise of a consultancy in order to hide his involvement; ii. Created a brochure that would be used to lure investors into thinking the scheme was legitimate; iii. Deliberately used email addresses that were not in his name when conducting company business on behalf of the director; iv. Used the initials of Gary Grosvenor and/ or Michael Gay on the Bond Certificates as opposed to getting them to sign the documents; v. Used the services of Woodside as a receiving agent to encourage investors at an early stage of the operation of the scheme; vi. Did not engage accountants to act for the company and did not register the company with HMRC; vii Decided to sell the company to Michael Gay in February 2014 as a means of

hiding his involvement and; viii. Continued to use the company bank accounts after the sale of the company in February 2014. Further, the company did not purchase any property from its incorporation to sale and during the period thereafter.

8. E was key to the fraud; he was in close contact with AR, who confided in him and sought his advice, and was present whenever any important event in relation to the business occurred. He recruited his brother-in-law, Grosvenor, as a director, to “front the scheme” in order to obtain approval under section 21 of the Financial Services and Markets Act; Grosvenor was someone who was trustworthy, did not ask too many questions, and was not very good at reading or accounts or computers and could be trusted not to reveal that the scheme was a fraud. Michael Gay replaced him upon his retirement in February 2014.
9. Sonny Milton, who was also convicted was alleged to have, headed the sales team.
10. The conspirators went to significant lengths to make the scheme look attractive and legitimate and obtained the services of a City solicitor to lend credibility to it. An FCA-approved agent considered the scheme and gave further approval for them to raise the necessary funds. Glossy brochures were presented to would-be investors. Sales staff were employed to do the hard sell and seek investors by cold calling them. In those cold calls, staff members would read from a script prepared by AR, encouraging them to invest their money into this scheme. Good returns were promised. Once the investment monies had been transferred into the account of LLB, those monies, in the investors’ minds, were going to be invested in properties, development of those properties, rendering considerable returns. What they did not know was that there were no concrete plans to buy any property, let alone invest in such properties. There were no development plans. There were no projects. There were no contractors engaged to consider the prospect of developing those properties. There was, in short, no substance at all to the claims that were being made to these potential investors their monies entrusted in the scheme would render attractive returns. Some £992,000 was defrauded from the investors and siphoned off overseas, and none of the money was recovered. Complaints from members of the public resulted in City One Securities withdrawing their approval and eventually, in October 2014, reporting the matter to the Financial Conduct Authority and the Serious Fraud Office.

The defence case

11. The appellants’ case was that this scheme was set up with the intention of it being a legitimate investment vehicle. There was no agreement at any stage to commit fraud. This was a scheme whereby investors would benefit by way of a return which was to be derived from the ultimate purchase and development of properties. It was a viable business proposition, which only failed as a result of unintended consequences once the business was sold in February 2014. Any actions taken were on the advice of Gary Withey, a City solicitor now deceased, who advised on all aspects of the scheme. The movement of funds outside the jurisdiction only occurred after 4 February 2014 and as such was consistent with a change of directorship and control.

The Trial

12. AR gave evidence over six days. He said that the appellants and Milton were old friends and associates and had been in business together previously. At the end of 2012 AR had had the idea to start an investment company whereby properties would be refurbished and sold on at a profit. He provided the set-up costs by way of a loan

to the company via the director Grosvenor. The investment monies were initially to come from UK investors and then from wealthy associates in Saudi Arabia. It was understood that AR would be managing the investment side of the enterprise and dealing with the day to day running of the company. The legitimate scheme he had set up was bought by Gay who then exploited it to obtain funds that he then sent abroad. Following the sale of the company, AR stated that he had nothing more to do with it.

13. He said he had put £70,000 of his own money into this scheme. He had lined up some potential wealthy backers who, if things went to plan, would step in. Unfortunately, all that effort came to an end when, due to unforeseen circumstances, the business was sold for £1. He stayed on for a short while thereafter to ensure the handover to the new owner. He transferred some funds on the instructions of the new owner but was having a very difficult time communicating with the new owner who was Michael Gay. He walked away from this business eventually – he had made an effort to keep it going – with a considerable loss to him personally in terms of money; something in the region of £50,000. He accepted that he was the controlling mind behind the company and its operations. He acted with the best of intentions, wishing it to succeed. He acted in consultation with E, and the day-to-day running of the office was with Milton who was overseeing the sales team.
14. He denied that he set up this legal structure to lure and defraud investors. It was a real investment scheme which he had spent a considerable amount of effort to set up. He did not hide behind Grosvenor or Gay as a shadow director. He did not substitute Mr Gay for Mr Grosvenor. Mr Gay took over this company and it was under Mr Gay's directorship that monies were sent abroad. None of that had anything to do with him. His intentions were always for the benefit of the company and the success of the company and, with that, the success of the investors' trust in that company. He denied being involved in siphoning funds out of the company bank accounts after the business was sold.
15. E's case tailgated that of AR to a great extent, but was essentially that his role in the business was limited, and only began in month 4-5 of the scheme once initial funds had been invested. He was not involved in any of the drafting of the section 21 documents or in the drafting of the brochures.
16. On 23 February 2022 counsel for E, who suffered from high blood pressure, asked for a short adjournment so that he could go to hospital as he was unwell. AR was giving evidence. The judge excused E but continued the trial in his absence.
17. On 25 February 2022 counsel for E explained that he was at home and was still very unwell. An adjournment was again sought. The application was refused. The judge requested a CVP link to be arranged to enable E to attend the trial remotely from home.
18. On 2 March 2022 counsel for E explained that he had neurological and mobility issues which meant that he would not be able to travel to court. He was awaiting a medical appointment. He would continue to appear by video link. Counsel confirmed that he would not be giving evidence.
19. On 7 March 2022 the judge ruled against an application by E to discharge the jury from returning verdicts in his regard. By that stage, there was a medical report which suggested that E's condition was such that it would have been difficult for him to engage in the trial by whatever means. However, the judge concluded that he would not be prejudiced since the evidence was concluded, and there were only speeches and summing up to follow.

The appeal

20. From the limited transcripts available to him, the single judge nevertheless considered that it was arguable that the judge “entered the arena” and thereby compromised the fairness of AR’s trial. The “nature of the Judge’s interventions arguably suggest he had formed a negative view of your answers (and indeed your broad overall defence); and at some points ...might read as if he is expressing some incredulity as to your case.” Granting permission to appeal he also directed that full transcript of AR’s evidence should be obtained.
21. Unfortunately, despite best endeavours, the court session on 25 February 2022 was omitted from subsequent transcription. However, an agreed note of the evidence given during that time is before us. We were content to proceed on the basis that it was an accurate representation of events and are satisfied that there is nothing which may have been inadvertently omitted from this note that would cause us to alter our overall view about the court sessions that have been transcribed.
22. In her perfected grounds of appeal, Ms Gaskin identified the key features upon which the prosecution relied to establish the case against AR. She referred us to several and relevant parts of the transcript which, she said, demonstrated that the judge had unfairly intervened in each of these areas, and otherwise in the general presentation of AR’s evidence.
23. Ms Dashani, who appears on behalf of E, seconds Ms Gaskin’s submissions, and points specifically to those interventions of AR’s evidence that could have impacted upon the jury’s perception of E’s case. Seeking to renew the application regarding E’s unavoidable absence from trial, she submits that the trial judge failed to have adequate regard to E’s obvious wish to engage in the trial process, citing the example of how he had returned to court against medical advice, only for his health to deteriorate necessitating him to depart before the short adjournment. That he was represented, and had given instructions, was not an adequate substitute for his presence. The question was not solely “what could he add” but should he be deprived of his right to attend his trial for reasons manifestly beyond his control.
24. Mr Shellard, who appears on behalf of the respondent, did not seek to defend every judicial intervention, but did seek to put them into such context which undermined any challenge to the fairness of proceedings. In so doing, he directed us to those parts of the transcript in which the interventions were neutral or even potentially favourable to AR.
25. Further, regardless of the strength of AR’s appeal, Mr Shellard submits that E’s trial was not compromised by the judicial interventions. The prosecution case against him was mainly based on documents and his counsel had the opportunity to cross-examine all prosecution witnesses and the co-accused who gave evidence. He did not answer questions in his police interview and had not intended to give evidence. He was afforded the opportunity to attend the trial by video link from his home. The single judge had correctly determined that the “Judge fairly sought to balance the applicant’s fair trial rights and the public interest in a case where very little of the prosecution evidence from witnesses called at trial touched on Mr Ellis’s case and where it did he was present. ... Mr Ellis’s interests were fully protected by defence counsel. ... There was no arguable error in the Judge’s three rulings on this topic.”

Discussion:

26. There is no issue as to the long since recognised legal principles engaged in the primary point of this appeal. In the unreported case of *Hamilton*, decided by Parker

CJ in 1969 and referenced by Lawton LJ in *R v Hulusi, R v Purvis* (1974) 58 Cr. App. R 378, it was expressed that:

“... Of course it has been recognised always that it is wrong for a judge to descend into the arena and give the impression of acting as advocate. Not only is it wrong but very often a judge can do more harm than leaving it to experienced counsel. Whether his interventions in any case give ground for quashing a conviction is not only a matter of degree, but depends to what the interventions are directed and what their effect may be. Interventions to clear up ambiguities, interventions to enable the judge to make certain that he is making an accurate note, are of course perfectly justified. But the interventions which give rise to a quashing of a conviction are really threefold; those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury ... The second ...where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way.”

27. Toulson LJ (as he then was) in *R v Perren* [2009] EWCA Crim 348 @ [24] reflected that subsequent authorities had provided “illustrations of the application of this approach” but had not changed the principles. However, he highlighted the manner in which Purchas LJ had summarised the point in *R v Matthews and Matthews* (1984) 78 Cr App R 23 at page 32:

“... In analysing the overall effect of the interventions, quantity and quality cannot be considered in isolation but will react the one upon the other; but the question which is posed ultimately for this court is: ‘ Might the case for the defendant as presented to the jury over the trial as a whole, including the adducing and testing of evidence, the submissions of counsel and the summing-up of the judge, be such that the jury's verdict might be unsafe?’

He continued:

“We add that if the court is driven to the conclusion that the defendant has not had a fair trial, when the matter is looked at in the round, the natural conclusion will be that the verdict is unsafe because our system of criminal justice is dependent upon the fundamental principle of the provision of a fair trial. To allow an appeal in such circumstances, even though the evidence for the prosecution may have been exceedingly strong, is not to allow an appeal on a technicality, but to allow it upon a fundamental principle which underlines our criminal justice system.”

He went on in [34] of his judgment to express particular concern about the judicial interventions which had occurred in examination in chief, indicating that:

“ It is not a sufficient answer in our judgment to say that because questions were likely to be put in cross-examination, there was no harm in them being put by the judge in the course of the appellant's evidence in-chief. We do not suggest that any intervention in the course of evidence in-chief, other than by way of clarification, must render a conviction unsafe. However, there are good reasons why a judge should be particularly careful about refraining from intervening during a witness' evidence in-chief, except insofar as it is necessary to clarify, to keep the evidence moving on and, if necessary, to avoid prolixity or irrelevancies. The first is that it is for the prosecution to cross-examine, not for the judge. The second is that the right

time for the prosecution to cross-examine is after a witness has given his evidence in-chief. It would be unthinkable for prosecuting counsel to jump up in the middle of a witness' evidence in-chief and seek to conduct some hostile cross-examination. This is not merely in order to preserve an orderly trial. There is a more important, fundamental reason. A jury will inevitably form a view of each witness as the case goes along. As the witness is giving his or her evidence in-chief, so the jury will be absorbing that account and forming their own impression of the witness."

28. We see no need to reformulate or repackage the principles expounded by these authorities.
29. An application of these principles has meant that in many of the cases in which criticism is levelled against the judge in such terms, this Court has concluded that the intervention was not indicative of judicial animus against the defendant, nor could it realistically and reasonably have been perceived in such a fashion by the jury; that is, it has not undermined the fairness of the trial. In this case, Ms Gaskin has readily conceded that there are judicial interventions that are incapable of any adverse interpretation. They can be described as interventions in accordance with the overriding objective of Part 1 of the Criminal Procedure Rules; see *R v Berry*[2010] EWCA Crim 313 @[9]. However, in contradistinction to those interventions, and upon which Mr Shellard relies, she has conscientiously and in moderate terms directed our attention to a significant number of judicial interventions made during examination in chief, cross examination on behalf of Gay and cross examination on behalf of the prosecution by Mr Shellard which she submits demonstrably contravene all three 'Hamilton limbs'.
30. We are in no doubt that her obvious industry in marshalling documentation to cross reference the numerous and dispersed untoward judicial interventions was not conducted as a fishing expedition after the event to provide ballast for an appeal, but rather reflected her sense of injustice on the appellant's behalf and which she said had led her to self-reproach for she had not 'challenged' the trial judge save on a few occasions, two of which are referred to at paras 40 and 47 below.
31. We have selected extracts from the transcripts (or agreed note of the evidence) to demonstrate our conclusion. However, for us to reproduce in this judgment every part of the transcript upon which Ms Gaskin relies would render what will necessarily be an already long judgment unwieldy and will serve no purpose, since it became clear to us during the hearing, which lasted one full court day, that a line had been undoubtedly transgressed on the basis of some of the more egregious interventions, to render further examples of unwarranted questioning or comment superfluous.
32. However, we make plain that, in view of what amounts to a serious charge of unfairness against the judge, we have scrupulously interrogated all criticisms in context, both proximate to the topic and in the context of the whole of AR's evidence. We do detect that on some occasions the interventions are 'double edged' and may well have benefited AR. Mr Shellard has taken us to these parts of the transcript. However, in amongst them there are some that, whilst, seen in isolation, raise no anxiety, in fact initiate and base subsequent further comment which, as Ms Gaskin submits, becomes increasingly 'hostile' to AR's case.
33. The following extracts demonstrate of the point and relate to AR's examination in chief unless indicated to the contrary. We consider that the extracts speak for themselves, but in summary we are satisfied that the judge on occasion provided 'expert evidence', hijacked examination in chief, and also interfered with the flow of co-accused and prosecution counsel cross examination and effectively revealed

his own cynical view of AR's evidence. We note that on two occasions, two of the counsel who were cross examining AR at the relevant time, indicated during the judicial intervention that AR was either going to answer the question posed, or the topic was not going to be advanced. We are satisfied that the judge's interventions were so egregious to render AR's convictions unsafe.

34. As regards the prosecution case that AR deliberately avoided becoming a director:

JUDGE: Anyway, the answer to the question as to why you were not suitable as a director is because you were under the impression that the management had to have significant experience in building, the building industry.

WITNESS: Correct.

JUDGE: Of course, you can have as many directors as you want for a company, you know that do you not?

WITNESS: Yes.

JUDGE: So you do not all have to have experience. Some people, some companies have directors who are experienced in business, some in management, some in finance.

WITNESS: But the sign off specifically, Gary Withey said[?] –

JUDGE: What sign off?

WITNESS: The section 21 sign off.

JUDGE: But you can have as many directors as you want, surely.

WITNESS: For the sign off, it needed to be – so in front of John Newlands, it needed to be somebody who had significant experience in building.

MISS GASKIN: Right, so if we can just at this stage –

JUDGE: That is your understanding anyway.

35. Subsequently, that afternoon when AR explained that the professional advice of his solicitor was for him to be a 'consultant' for two years before taking on the role as director, the judge returned to the point.:

JUDGE: That was a very strange bit of advice, do you not agree, Mr Al-Rawe, because as we have already established and you understand, you can have endless numbers of directors.

WITNESS: I didn't have any experience.

JUDGE: You may not have but one of your colleagues would have.

WITNESS: Yeah, but he was specific to –

JUDGE: Why was it necessary to have all of the directors with building experience?

WITNESS: That's how Gary [legal adviser] put it to me.

JUDGE: Yes, but with hindsight, do you think that that was a bit strange, because this company, although it was dealing with building, its main activity was raising finance.

36. As regards creating the business brochures, the judge intervened in terms that may arguably be described as for the purpose of clarification. However, subsequently he asked:

JUDGE: Did you ask any of these people whether you could use – have their permission to use in your brochure?

WITNESS: I was referencing them from –

JUDGE: There is no reference in the brochure to Knight or anybody like that. Did it not cross your mind that perhaps you should seek their permission to use this material?

WITNESS: It was available onl – I mean, freely available by the tools. It was –

JUDGE: There is a big difference between reading something online and using it in your own brochure. Did it not cross your mind?

WITNESS: It didn't, no.

JUDGE: And did Mr Withey not advise you of copyright issues?

WITNESS: No.

JUDGE: This is a city solicitor.

WITNESS: Yes.

JUDGE: Alright.

37. Subsequently, during questions regarding the issue of bonds to customers, the judge again gave evidence and indicated his scepticism:

MISS GASKIN: Before the sale of the company, we see the name Gary Grosvenor on the certificates as they are sent. Who signed those certificates before those documents were sent?

A. So, nobody was meant to sign them. They were – what was meant to happen, what happened was the staff or Vicky King would call.

Q. Would call who?

A. Would call me. They'd need to get permission for Gary to approve his initials to be put on the document.

Q. Stop there. We need to break that down.

JUDGE: Yes, we have to break that down. Nobody was meant to sign them. What do you mean by that?

WITNESS: So, the bottom of the certificate was only meant to have GG initials printed on.

JUDGE: We are looking at the bond, are we not?

[Narrative regarding where the exhibit was to be found]

JUDGE: You see, this is a deed. I do not know if you know what a deed is. A deed needs to be signed and sealed.

WITNESS: Right.

JUDGE: In order to be valid, otherwise, it is not worth the paper it is written on. So, what is this that you said were not meant to be signed?

WITNESS: They were not meant to be signed until – so Gary Grosvenor would give permission for his initials to go on to the document and the applications would be later signed, but as and when Gary went to the office to sign them, but that never happened.

Following questions from Ms Gaskin the judge intervened again:

JUDGE: I may be the only one in the room, but I do not understand what this evidence is. I do not think he is talking about the bond certificate. A bond certificate needs to be signed. It is a deed and it says there, signed by, executed as a deed by the London bond company with a director's signature, so what are these initials? What are we talking about initials?

38. The Judge intervened again during the same court session albeit on a different topic, that is the return of funds to a client:

WITNESS. Yeah, we agreed to return the funds.

JUDGE: Do you know the reason why?

WITNESS: So, I believe the gentleman invested in December and he needed access to his funds or he'd changed his mind, if you like. So, you just naturally just agree to it. You just return the funds. We didn't have a hard and fast rule, so the investment memorandum locked clients in for five years, but if somebody wanted their money back, you'd give them their money back, provided there was liquidity to do so.

JUDGE: Bit worrying, is it not?

WITNESS: What is that, sorry?

JUDGE: It is a bit worrying that in your discretion, you can repay funds. When I am investing in your company, I am assuming that everybody else is investing for five years. It gives me security.

WITNESS: Right.

JUDGE: But you are now saying that at your discretion, you can repay somebody. It undermines the security. Do you understand?

39. In questions regarding company financing:

JUDGE: And just pausing there, and the basis of doing that? Reaching into your own pocket to pay for a company's expenditure.

WITNESS: But it was an expense as the consultant. I mean, I could put in expenses.

JUDGE: As a consultant, you were earning £2,000 a month.

WITNESS: Correct.

JUDGE: Why were you content to pay into the company additional expenditures?

WITNESS: Because I was invested in the company, both emotionally and financially.

JUDGE: Did you get shares for the company? Did you get shares for it?

WITNESS: I would have eventually had a role in that company, more of a role in that company.

JUDGE: But did you get shares for your investment?

WITNESS: Eventually I would have, I believe I would've, yes.

JUDGE: You will agree with me it is a rather risky venture here. You are putting money out of your own pocket into a company with no security.

...

JUDGE: .. You are putting money into a company, a limited liability company, and it has only got £100 share capital which you would have known about.

WITNESS: Yes.

JUDGE: So you could have lost all this money?

WITNESS: I understood that when I was making that investment.

40. This was a subject that arose again later, when AR was cross-examined on behalf of the co-accused Michael Gay,

DEFENCE COUNSEL FOR MICHAEL GAY: So there was nothing stopping you being a shareholder?

AL RAWI: At the start it did not matter, it was just about raising funds.

JUDGE: I am assuming you are knowledgeable about business and a lawyer by training so you do understand.

MISS GASKIN: Your honour, he is not a lawyer by training and had limited experience in business.

JUDGE: Just let me get this sorted! I am concerned the witness may be misunderstanding where we are going. You know how the company works if you have 100 shares and they are in the hands of the individual then that individual can do what they want!

AL RAWI: They can.

JUDGE: He can give them to someone down the road! So when you say it is not important, whoever holds the shares is critically important, do you agree?!

AL RAWI: I do.

JUDGE: It's your company, even you are saying it does not matter, why not put them in your name?!

41. 'Subsequently, when referring to the decision to sell the company:

WITNESS: So, I said to Clive that I think we should – at that point, I think we'd raised about £100,000. I thought we'd put the business into administration, just put the company down.

Q. Pause there. And why was that your initial reaction?

A. Because Sunny was the office manager. I didn't have anybody else to run the office or be in charge of the office.

JUDGE: There was nobody to run an office?

WITNESS: Certainly not to do Sunny's role that would oversee every element in the office. I didn't know the staff.

JUDGE: Did you not think if recruiting somebody?

WITNESS: Sunny was the individual that was doing the recruiting.

JUDGE: So what? You have got a vested interest in this company. Did you not think that you should try and find a replacement for Sunny?

WITNESS: I couldn't find anybody.

JUDGE: What do you mean you could not find anybody?

WITNESS: Sunny was the only –

JUDGE: Did you try and find somebody? Did you put out a recruitment draft?

WITNESS: We considered the people that were in the office at the time and nobody we felt was suitable.

JUDGE: You would rather collapse the company than find a recruit to fill in the role? Was that your attitude at the time?

WITNESS: It wasn't so much an attitude. It was, I didn't feel like we had any other option.

JUDGE: So be it.

42. The following day, an intervention described by Miss Gaskin as the “worst example of the judge’s cross examination”, covers several pages of transcript and ended the morning session. The topic being explored by Miss Gaskin was the use of bank accounts:

MISS GASKIN: So, the Metro account, you had transferred what you thought was going to be the final amount to Santander to pay fees. It later transpired that clients had still been paying money into that Metro account. Is that right?

A. Yes.

Q. Was that with your knowledge?

A. No.

JUDGE: But it did not surprise you because this was an ongoing concern that you had sold.

WITNESS: No, because Gary Withey in the meeting told –

JUDGE: No. What did you understand? You have sold the business as a going concern, right?

WITNESS: Correct.

JUDGE: So, you have handed it over to new management.

WITNESS: Correct.

JUDGE: It includes the bank accounts.

WITNESS: Absolutely.

JUDGE: Yes, so payments were going into the Metro account because there were investors still investing.

WITNESS: There was an understanding that – I'm trying to word this correctly. So, there was an understanding –

JUDGE: What did you understand? What did you understand?

WITNESS: That he would need to – Michael Gay would need to engage City 1 because the business could not – Gary –

JUDGE: Well, it was his choice now because he was the new director and sole shareholder so if he chose to go via that, fine. If not, he would run into trouble, would he not?

WITNESS: Correct.

JUDGE: So, it was not your concern any more. You had told him.

WITNESS: I just assumed that he wouldn't be using the account.

JUDGE: Whoever is a signatory on it can be changed and if I am the signatory on a business that I have sold, the first thing I would do, I would say to the bank, 'I'm no longer a signatory.' End of story.

After four further questions by Ms Gaskin:

JUDGE: I am just puzzled. If the company has been sold, signed, done, deal done, the company takes over the running of the business, including the bank accounts. The obligation then is on the previous signatories to take themselves off, otherwise they remain responsible.

WITNESS: Exactly. The accounts would have had to be closed immediately.

JUDGE: No.

WITNESS: They had no other option.

JUDGE: Change of signatory.

WITNESS: But Michael Gay wasn't coming to any meetings. There was no dialogue.

JUDGE: Did it matter to you?

WITNESS: Well, yes, because the requests were coming to me.

JUDGE: Yes, but as far as you were concerned, the business had been sold. You had cut your ties with it. That is the point I cannot quite get around. Why are you still involved with the bank accounts? I do not understand it. Maybe there was a good reason.

42. Subsequently, regarding taxation:

JUDGE: As far as you are aware, Mr Al-Rawe, had the companies appointed accountants,

WITNESS: They hadn't, no.

JUDGE: They had not?

WITNESS: No.

JUDGE: So, no accounts were ever prepared?

WITNESS: No.

JUDGE: So you were running these companies blind effectively?

WITNESS: Well, we hadn't got to the point where taxes or any –

JUDGE: I am not talking about taxes. I am talking about accounting records. Knowing how much money is in, how much money is out. You know how important those records are.

43. When cross-examined on behalf of Gay:

COUNSEL: Was it the case that you had no intention of ever developing anything and that is why nobody bothered to do any research to try and find –

A: We absolutely did.

JUDGE: You did?

WITNESS: We absolutely did. We did some searches online, but we didn't have the funds to buy anything.

JUDGE: I think what Miss Moonan is asking you about is buying property.

WITNESS: Yes.

JUDGE: You have got this vision, big vision.

WITNESS: Yes.

JUDGE: The months are ticking by, money is coming in.

WITNESS: Yeah.

JUDGE: Did anybody do anything about finding or identifying potential properties?

WITNESS: We were doing searches, but we didn't have the funds to buy.

JUDGE: Searches?

WITNESS: Searches online.

JUDGE: Online?

WITNESS: Yeah.

JUDGE: There were some major developments that you were planning to do. Did you get in touch with any professional agents or people like that who might have on their books properties that are available, as an investor would?

WITNESS: We were just looking for sort of rundown flats that needed work.

JUDGE: But you do not do that on online, do you?

WITNESS: You search for things that are available that need modernisation or the need for refurbishment.

JUDGE: It was not done because you were not ready yet. That is your answer.

44. Questioned as to the use of Gary Grosvenor's e mail account:

JUDGE: And why did you not tell them that you were handling it as an intermediary for Mr Grosvenor? Why were you not open about it?

WITNESS: The emails were just so that we could clearly show that there was an instruction from Mr Gay.

JUDGE: You want to show an audit trail.

WITNESS: Yeah, absolutely.

JUDGE: I accept that and so, it is important, as you know, an audit trail has to be accurate so that people can see who is corresponding with whom? What was the problem with telling these others, 'It's Al-Rawe here. I will take instructions from Mr. Grosvenor and report back to you.' That would have been open, transparent.

WITNESS: Yeah.

JUDGE: Auditable because if any problem arose, they would come and say, ‘Mr Al-Rawe, do you remember this?’ Why was that not being done?

WITNESS: Look, I mean, I was writing the email. So I mean, I don't – there's no reason –

JUDGE: You were not telling them.

WITNESS: No, I wasn't telling him.

JUDGE: Why?

WITNESS: Again, it didn't dawn on me that I needed to –

JUDGE: You have been asked this question several times today.

MISS MOONAN: I think he was just about to give an answer to your Honour's question. Thank you.

JUDGE: Yes. So, what was the problem?

WITNESS: It didn't dawn on me that I needed to send the email. It was always because it had to be – prior, it was always the officer and then because Gary had sold it, it had to be through Gary.

45. Later in reference to foreign exchange:

JUDGE: You had been involved in international work for years by this stage.

WITNESS: But all I had was CS – sorry, your Honour.

JUDGE: Please, just think about it. For years you have been operating internationally. Dollars, no doubt Japanese, Chinese currency. You name it.

WITNESS: Yeah.

JUDGE: Are you seriously saying that you did not recognize that this was an account involving foreign exchange?

WITNESS: No, because all I had was CSX and then a sort code and an account number.

...

JUDGE: We hear what you say.

46. During cross examination by Mr Shellard regarding company finances:

JUDGE: It is just I do not think we finished off the explanation as to why, by this stage, you had actual figures you have just told us about and you have listed them, so you were checking them and making sure the money is in. Why were those not incorporated on this document which was obviously an important document. It was only for you but you would have known exactly how much money was coming in and you would have been able to compare that against the assumptions that you had made almost a year before.

WITNESS: So, I always believed that we would raise those funds –

JUDGE: Never mind that. Never mind what you believed. I just want to know – we can finish this topic and then we can move on. Why was it that in December and January, when you had several months' worth of income, you did not actually use those figures as against your assumptions that you had made a year ago because if

you had done so, Mr Al-Rawe, dare I say, you would have noticed that there was a major deficit.

WITNESS: Yes.

JUDGE: There was a major difference between what you had assumed was going to come in and what you were actually getting in at which point, no doubt, the good businessman that you are, you would have had alarm bells ringing. You are not doing enough. You have got get more money. You have got all these commitments going out. Do you agree?

WITNESS: Yes, no I agree with that.

JUDGE: So, why did you not use figures that you were keeping on this document?

WITNESS: When I went to this document, it was to change the figures of overheads. Again, if it's an oversight on my part – I know I keep saying I believe – because I believed these figures were going to come in and it was –

MR SHELLARD: Your Honour, I have been through that. I do not think I can get anywhere else with my question.

JUDGE: It is what it is.

47. Cross examining AR regarding a previous company in which he had been involved with E and an application to open a bank account relevant to that company with the Bank of Dubai, and in the absence of E:

JUDGE: Just looking at this, and I appreciate and this is not you, but just standing back, looking at what is written, this was misleading at the best, was it not?

MISS GASKIN: I am sorry, your Honour, I think it is unfair to ask Mr Al-Rawe to comment on a document that –

JUDGE: No, I am asking him, as somebody intimately involved in First Swiss what his view is of the content of this document?

MISS GASKIN: But how can he know (a) what was in Mr Ellis' mind when he was giving his answers –

JUDGE: I am not asking what is in Mr Ellis' mind.

MISS GASKIN: And secondly, how does he know what the person transcribing what Mr Ellis was saying on this document.

JUDGE: I am not asking him any of those questions. I am asking him a very simple question just looking at this. This is not your document.

WITNESS: No. So –

JUDGE: Just looking at this, what do you think?

WITNESS: What I think has happened is he has given the name for First Swiss and what it does and he's given the domain name of Quandro. That's what I think has happened.

JUDGE: Yes, but what about the line there about his employer. He was not employed, was he, by First Swiss?

WITNESS: First Swiss, I can't recall. I'm not entirely certain if he was an answer but he was definitely down as a shareholder.

JUDGE: Was he employed? Anyway, it is just –

WITNESS: I can't, honestly, it was such a long time ago.

JUDGE: I accept that but just looking at it, it does not seem quite accurate, does it?

48. During re-examination Miss Gaskin intended to introduce certain documents that had been located by AR in relation to points raised in cross examination. The judge agreed with this course of action and then is demonstrated, as Ms Gaskin describes it, to ask the questions that she may have wished to pose, and then provide the answers that AR may have provided. However, thereafter in re-examination, when AR was dealing with his understanding of corporation tax matters, the judge intervened:

JUDGE: Do you understand the point that was being put to you on behalf of the prosecution? WITNESS: Yes.

JUDGE: That by not having a presence with HMRC, you were running this business, as it was put to you directly, under the radar. In other words, you did not want the attention of anyone like the HMRC to be focused on what you were doing. That is what under the radar means, running under the radar and I think you answered that question saying certainly not. You were just trying to establish the business and then when the time came, by the time you had appointed accountants eventually, then that would be taken up.

WITNESS: Yes.

JUDGE: That was the point of putting it. It was not because he had not paid tax. Tax can be paid years ahead.

49. And, at the very end of re examination

JUDGE: I have just one generic question, alright? It may not be easy to answer simply. You spent a lot of time, as you have told us, preparing for the launch of this product that you were trying to get out there and for investors to invest and I have looked and we have seen the kind of research you did, showing the kind of returns that were available and so on and so forth. What, if any, research and investigation did you undertake on the risks attached to all this?

WITNESS: So, we – I keep saying we. I'm referring to my company but it was always me. So, I looked at some of the major estate agents that provide –

JUDGE: I am talking about the risks to investors.

WITNESS: The risk was real. It was in the IM that it was a new company and there was no guarantee of a return, so I always understood that there would've been a real risk to anybody investing, but there would've always been a realisable value or residual value of any property because it has an intrinsic value.

JUDGE: Why did you identify that there was a risk to this business?

WITNESS: Because there's a risk in everything when you invest. That's just a natural part of any business.

JUDGE: What was that risk as far as you could tell?

WITNESS: The failure of the business and inability to get planning or an inability to create a real margin between, you know, what you buy, what you spend and what you sell, so that was –

JUDGE: What about holding investors' money. They were paying into a £100 company.

WITNESS: Yeah.

JUDGE: £100. That's all this company was worth. What did you think about that in terms of mitigating that risk?

WITNESS: So, when the company was incorporated, it was only worth £100 because it was just a piece of paper company so as money went into the business, whether it was from me or whether it was from investors, actually, the value of the company – really, the value of the company wouldn't increase until it acquired an asset –

JUDGE: I would be worried as an investor, perhaps others were not, but I am paying over this money, some of it was quite substantial, to a £100 company. What did you do to protect this money if you could?

WITNESS: It would've been a registered debt on the company. It wouldn't have added value to it. I suppose you could put it on the ledger but it's a liability of the company as opposed to an asset of the company.

JUDGE: Because I do not think you considered insurance or any kind of policies that would protect the investor.

WITNESS: No, we didn't. We couldn't take them out because it was an unregulated vehicle ultimately.

JUDGE: That is all. Because it is one thing we have not spoken about in your evidence. We have spoken about the returns for investors, but thank you for your explanation. Right, that is all. Anything arising out of that?

50. We acknowledge that the trial took place at a time when Covid restrictions had created practical difficulties in the daily court listing, that multi handed case management was made more difficult in light of E's indisposition and absence, and that there was apparently cogent evidence of the three main defendants involvement in the offences charged. Indeed, the questions posed by the Judge were finely tuned and demonstrated great skill in adversarial cross examination. Mr Shellard would no doubt have intended to explore the same areas. However, we are driven to accept Ms Gaskin's submission that impermissible judicial interventions commenced from day 1 and continued throughout the lengthy time that AR was in the witness box; the judge effectively having the last word before he completed his evidence and returned to the dock.
51. As we have indicated, E tailgates upon AR's sole ground of appeal. We have already indicated one part of the evidence, in the extract in [47] above, which directly refers to E, and during which the judge makes adverse comment about the integrity of what was 'his' document; Ms Dashani also relies upon a further extract of judicial intervention during Mr Shellard's (wrongly identified as Mr Shalah) cross examination of AR which directly implicates E:

MR SHALAH: Yes, but tell me about the contact, the personal contact, the relationships you'd built up with Knight Frank and Savills, and companies like that, about looking for properties.

THE DEFENDANT: I didn't ever claim that I'd had made contact with them.

MR SHALAH: What about – had you made any contact with the Crown Estates, for example, or Duke of Westminster, Grosvenor Estates, I don't think any relation, but Grosvenor Estates who own most of the West End? Had you made any contact with them at all?

THE DEFENDANT: No, but, again, I never made that assertion or claim.

JUDGE: This was all going to happen within four or five months –

THE DEFENDANT: Yeah, absolutely.

JUDGE: – buying up property.

THE DEFENDANT: But it was to buy –

JUDGE: And you know, Mr Al-Rawe, –

THE DEFENDANT: Yes.

JUDGE: – buying a property, or even getting involved in property –

THE DEFENDANT: Yeah.

JUDGE: – takes an extraordinary amount of time and effort.

THE DEFENDANT: So Clive was always going to buy them via the auctions, so – and there was –

JUDGE: He wasn't – okay, that may well have been his intention –

THE DEFENDANT: Yeah.

JUDGE: – the questions are: what contact had you made? This was crucial.

THE DEFENDANT: Clive had already used these auction companies in the past, in the nineties, so he was –

JUDGE: Nineties?

THE DEFENDANT: In the nineties, and they still existed today, and so he was just going to continue to go back to those that he'd used.

JUDGE: But –

THE DEFENDANT: I mean, it was –

JUDGE: – this was –

THE DEFENDANT: If I –

JUDGE: – crucial to your business, Mr Al-Rawe,

THE DEFENDANT: The list that –

JUDGE: – are you seriously saying that you were going to go into month four or five, having done a superficial –

THE DEFENDANT: No.

JUDGE: – researches online, looking at auction sales?

THE DEFENDANT: It wasn't – so you'd have a list, you might have a list of a couple of hundred properties that were due, you know, for one month and then the following month and to auction, and we look at the guide price and then you'd look – you'd give your details as to the condition of the flat.

JUDGE: All right. –

53. However, Ms Dashani submits that we should not confine our attention upon just those interventions by the judge, since it would be impossible for the jury to disentangle the case of E from that of AR. The prosecution evidence of E's guilt was bound up with his association with AR and voluntary involvement in the scheme. AR frequently referred to "we" in his answers and must have been referring to E. E was described by one of the office staff as "top dog".
54. We are less confident in the merit of E's appeal on this issue, since the effective evisceration of AR's evidence in the witness box is far more damning of the actual victim in real time. However, we have come to conclude that we doubt the safety of the conviction in the particular circumstances of this case. E was absent, for reasons beyond his control. Whilst he was ably represented, and Ms Dashani readily concedes that she was given the opportunity to take instructions to the extent his ill health enabled E to engage, and that it had not been his intention to give evidence, we agree that his case did run in tandem with that of AR to such significant extent, that we cannot be sure that, particularly in his absence, the jury would necessarily disassociate the two.
55. In so far as his absence is concerned, and in view of the fact that we allow his appeal, we may deal briefly with the renewed application for permission to appeal. In refusing this draft ground of appeal the single judge said:

"Ill health The Judge fairly sought to balance the applicant's fair trial rights and the public interest in a case where very little of the prosecution evidence from witnesses called at trial touched on Mr Ellis's case and where it did he was present. The use of the CVP link in those circumstances was appropriate, was fully explained to the jury and indeed the jury had seen prosecution witnesses give evidence by that means. Mr Ellis's interests were fully protected by defence counsel. I note that most of the evidence him was foreshadowed in the exhibits and that it was the interpretation of those exhibits by the jury that consisted of the majority of the case against him. Further, the Judge did not err in exercising his discretion not to sever Mr. Ellis from the other defendants and considered the competing factors as set out in the governing case law. A trial judge has a discretion as to whether a trial should take place or continue in the absence of the accused and I agree with the Respondent that the judge exercised that discretion within lawful bounds, taking account of the submissions on Mr Ellis' behalf. There was no arguable error in the Judge's three rulings on the DCS (25 Feb, 2 March and 7 March)."
56. In summary, we conclude that, for the reasons given by the single judge, the trial judge was not unreasonable in his case management decisions relating to the first two applications to adjourn the trial. However, and certainly with the benefit of hindsight afforded to us by what transpired during the trial in relation to AR as indicated above, the application on 7 March 2022 immediately preceding jury deliberations takes on a different flavour. We agree with Ms Dashani that, for the reasons we give above, in effect the evidence against E was not confined to an interpretation of the documentary exhibits as they had appeared, but flavoured by

the judge's obvious disparagement. Obviously, E's mere presence was no counter to that point, but we agree that the question is not confined to "What might he add" to the proceedings still to follow, but what of his 'right' to be there, all other things considered.

57. So it is, we have been persuaded that in these fact specific circumstances, no sufficient weight was given to his personal circumstances, which had become increasingly apparent from late submitted medical reports, and in terms of severing his case from that of his co-accused. The prosecution case against the co-accused, and the conclusion of their trial, was not dependent upon him continuing as a defendant in that trial and the jury would be able to return verdicts in all other defendants' cases. Further, bearing in mind the argument used against him to justify continuing the trial in his absence was that the case against him depended upon the documents, the length of any trial against him would be measured in days not weeks.
58. We allow the appeals against conviction in each case and quash the convictions.
59. In the circumstances, we do not determine the renewed application for permission to appeal against sentence.
60. We had canvassed this prospective outcome with Counsel. The Prosecution seek a retrial. We agree that they have good reason to do so. We are reminded by Ms Gaskin and Ms Dashani, who oppose the application on behalf of their respective clients, that the alleged offending was more than a decade ago and that each appellant has served the equivalent of a 2-year 6-month sentence, and of E's continuing ill health. However, the offence alleged against them is serious, high worth targeting of private individuals. There is a public interest in this matter being retried before a different judge. Consequently, we give leave for retrial and make the following directions: We
 - (a) order a retrial on both counts;
 - (b) direct that a fresh indictment be served not more than 28 days after this order in accordance with Crim PR 10.8(2);
 - (c) direct that the appellants be re-arraigned on the fresh Indictment within 2 months.
 - (d) any bail application is to be made to the Crown Court.
 - (e) the Prosecution shall ensure that the transcript of the sentencing remarks is provided to the Crown Court judge conducting any sentence hearing following the re-trial. (R v. AB [2021] EWCA Crim 693)
 - (f) any broadcast of any part of the sentencing hearing/remarks be removed from You Tube or any other platform by the relevant court broadcaster and not to be broadcast again without permission from the Court of Appeal or the Crown Court.
 - (g) We make an order under s.4(2) of the Contempt of Court Act 1981, restricting reporting of the proceedings until after the conclusion of the retrial to preserve the integrity of the retrial.

We remind the appellants' representatives that the original Crown Court Legal Aid order does not cover a retrial. Their legal representatives should apply in writing to the Legal Aid Agency CAT.

The venue for retrial shall be determined by the relevant Presiding Judge for the SE Circuit.