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The Court has quashed the convictions in this case and directed a retrial. A reporting restriction has been imposed in respect of the full judgment on this Reference and on the full judgment on the appeal under the Contempt of Court Act 1981. This anonymised judgment can be published now and the order is varied to permit that.

Neutral Citation Number: [2021] EWCA Crim 1959

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2021

Before :

LORD JUSTICE EDIS
MR JUSTICE HILLIARD
HIS HONOUR JUDGE DEAN QC
(sitting as a judge of the Court of Appeal Criminal Division)

- -

Between :

A REFERENCE BY HER MAJESTY'S SOLICITOR GENERAL UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

AB, CD, EF, AND GH

Respondents

Ben Lloyd for **HM Solicitor General**
John Hipkin QC (assigned by the Registrar) for **AB**
Paul Hobson (assigned by the Registrar) for **CD**
Nicola Powell (assigned by the Registrar) for **EF**
Lee Davies (assigned by the Registrar) for **GH**

Hearing date: 10/12/21

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Approved Anonymised Judgment

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Lord Justice Edis :

Introduction

1. This is an application by HM Solicitor General for leave to refer sentences imposed on these four respondents on 15 October 2021 as unduly lenient. We give leave.

2. The case involves an indication as to sentence ("the indication") given by the judge on 10 September 2021 after which the respondents changed their pleas to the Indictment to guilty. The investigation started in 2013, charges were brought in 2019 and until 10 September 2021 no respondent had ever suggested that they might be guilty of any of the offences, and all had denied them. How that change of heart came about is a matter of importance on this Reference. The events of 10 September 2021 included a conversation in the judge's chambers between him, prosecuting counsel (not Mr. Lloyd who appeared before us), and Mr. John Hipkin QC. It was during that conversation that the judge made an explicit promise that if the respondents pleaded guilty, the sentences would be suspended. They then pleaded guilty. The conversation was not recorded, was not in public, and was not in the presence of the respondents, or even of all their counsel. In effect, the Solicitor General invites the court to uphold the public interest in accurate and consistent in sentencing by reviewing and increasing the sentences, even though there is an unfairness in inducing guilty pleas by offering unduly lenient sentences and then increasing them after the event.

3. Since the hearing of this Reference all respondents have served applications for leave to appeal against conviction on the ground that their pleas were a nullity because they were the result of improper pressure from the judge. Those applications are listed before us today and we will deal with them after we have dealt with the Reference. This is the correct order because the appeal process is the better forum for addressing the unfairness just identified which is primarily relevant to the safety of the convictions. The extent of the unfairness is best assessed on the basis of a determination as to the correct sentence. If the convictions are quashed and there are convictions following a retrial it would be absurd if the sentencing judge were constrained by section 11(3) of the Criminal Appeal Act 1968 by the unduly lenient sentence now before us. *R. v AB* [2021] EWCA Crim 692, may offer another answer to this problem, but sentencing after a re-trial at a proper level in this case would be an extension of the actual scope of that decision, if not of the principle it articulates. If the convictions are quashed and in due course there are convictions following a retrial, it will be a matter for the sentencing judge to assess the extent to which, if at all, the unfairness should be reflected in the sentences then to be imposed.

4. Mr. Lloyd made helpful and sensible submissions to us about this situation, which acknowledged the sense of injustice which this course might create. He submits that we may give effect to that sense of injustice, if necessary, at the end of the process at the stage where, having decided that the sentences were unduly lenient, the court considers whether to quash them and replace them with a higher, or at any rate immediate sentence. That involves a discretion which can readily accommodate the court's sense of fairness.

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5. In this judgment we shall first set out the sentences, the counts on the Indictment and the facts on which they were based. The facts relevant to the time which elapsed between the start of the investigation in 2013 and the date of conviction on 10 September 2021 will be set out in a little more detail than usual because it was that delay which was the principal reason why the judge imposed the sentences he did. The offences were committed quite a long time before 2013, but this is less of a mitigating factor because it simply means that the offenders successfully evaded detection for that period of time. Then we will analyse the aggravating and mitigating features and follow the guideline on Fraud, Bribery and Corruption as the court is required to do. That will enable a decision to be made about whether the sentences imposed by the judge were unduly lenient. We will set out in this judgment all the facts relevant to sentence and to the appeal against conviction so that when we come to deal with the appeal we can do so in a short *ex tempore* judgment. We directed on 10 December 2021, after hearing this Reference that if applications were made for leave to appeal against conviction, these would be listed today and we would deal with the appeals in the event that leave is granted at the same hearing. This judgment is handed down in advance of hearing the arguments on those applications.

The Indictment and the sentences

6. The Indictment contained 15 counts. Count 1 alleged conspiracy to commit fraud by false representation against all four respondents.

7. The rest of the counts were mortgage frauds alleged against different respondents and charged as obtaining a money transfer by deception contrary to section 15A of the Theft Act 1968, or fraud contrary to section 1 of the Fraud Act 2006 in respect of conduct which occurred after that Act came into force.

8. Counts 2, 3 and 4 alleged offences against AB. Count 5 alleged a joint offence against him and CD who is the mother of the other three respondents. Counts 6, 7, and 8 alleged offences against her alone.

9. Counts 9, 10, 11, 12, and 13 alleged offences against EF.

10. Counts 14 and 15 alleged offences against GH.

11. Each respondent received a sentence of 2 years' imprisonment on each of the counts they faced suspended for 12 months. The sentences were ordered to run concurrently. In AB's case there were requirements for rehabilitation activity and alcohol treatment and unpaid work of 200 hours. In CD's and EF's cases there was only a requirement for rehabilitation activity. In GH's case there was a requirement for rehabilitation activity, and an order for mental health treatment. A timetable for Proceeds of Crime Act proceedings was set.

The Facts

12. [omitted]

13. [omitted]

14. [omitted]

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15. [omitted]

16. [omitted]

17. [omitted]

18. [omitted]

19. [omitted]

20. [omitted]

21. [omitted]

22. [omitted]

23. [omitted]

24. [omitted]

25. [omitted]

26. [omitted]

27. [omitted]

28. [omitted]

29. [omitted]

30. [omitted]

31. [omitted]

32. [omitted]

33. [omitted]

34. [omitted]

35. [omitted]

36. [omitted]

37. [omitted]

38. [omitted]

39. [omitted]

40. [omitted]

41. [omitted]

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42. [omitted]

43. [omitted]

44. [omitted]

45. [omitted]

46. [omitted]

47. [omitted]

48. [omitted]

49. [omitted]

50. [omitted]

51. [omitted]

52. [omitted]

53. [omitted]

The loss caused

54. The prosecution had been directed by the judge to supply a document for the hearing of 10 September and did so by uploading it on 8 September. It is entitled "Calculation of Loss and Preliminary Summary Re: Sentencing Guidelines". The trial had just been adjourned for the third time, this time because of CD's health. It was, nevertheless, still a trial. The judge directed the hearing on 10 September so that the parties could consider the position in view of the fact that there would now be another long delay before that trial could take place and directed the document, which closely resembles a sentencing note. It sets out a calculation of the losses caused by each respondent. No issue was taken with it at the sentencing hearing.

55. Count 1: Investor losses were shown as the victims' investment of £307,975. There were nine investors, including two married couples. This was treated as seven investments or investment streams. For some reason which is not obvious "relevant project expenditures" were deducted from this figure. The fact that some of the investment was spent on genuine expenditure on the project may reduce the benefit enjoyed by the respondents, but it does not reduce the loss to the investors. This implausible reduction gave a figure for total losses of £210,785.28. It seems to us that we should use the loss figure rather than the benefit figure when assessing harm, and we therefore use the figure of £307,975. Because it was a joint count this loss is attributable to all for sentencing purposes, but it is right to observe that different respondents played very different parts in causing it. ……. The figures we use here should not be used in any confiscation proceedings but will have to do for our purposes.

56. On this basis, the harm for each respondent can be stated as follows:-

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	A: Count 1	B: Other Counts: Total Advanced	Total Harm caused/risked A+B	C: Loss after security realised	Total actual loss A+C
AB	307,975.00	560,705.63	868,680.63	220,119.21	528,094.21
CD	307,975.00	999,675.00	1,307,650.00	555,449.00	863,424.00
EF	307,975.00	1,007,025.00	1,315,000.00	227,292.32	535,267.32
GH	307,975.00	364,149.00	672,124.00	215,779.71	523,754.71

57. In the Reference document placed before the court the Solicitor General calculates a figure called "Global Loss" of £1,429,425.52. Mr. Lloyd submits that this has a relevance to the overall sentencing exercise. We reject that submission. If the prosecution wished each respondent to be sentenced for making a contribution to causing all the loss resulting from the mortgage frauds a single count against all of them alleging conspiracy to commit mortgage fraud (or perhaps two counts reflecting the change in the law caused by the Fraud Act 2006 coming into force during the offending period) would have enabled that to be done. The deliberate choice to indict different respondents with different mortgage frauds means that they can only be sentenced for those offences. The "Global Loss" figure is, we think, irrelevant.

58. The prosecution document before the judge suggested that count 1 was a culpability A or B offence depending on how the court viewed the culpability factors present and said, wrongly, that the figure for harm was the "adjusted" figure rather than the amount the investors had actually lost. Either figure, whether £307,000 or £210,785.28 is within the category 2 range for harm of £100,000-£500,000 with a starting point based on a figure of £300,000 of 5 years for culpability A and 3 years for culpability B. The document reminded the judge about the need to consider the impact of the harm on the victims. There were two victim personal statements only, and they showed detrimental impact. The court had to assess whether that detrimental impact was "some", "considerable" or "high". No doubt also in a case where impact was shown in the case of some only of the victims, an adjustment should be made to reflect the fact that not all of the harm impact caused could be assessed. On the other hand, these were individual investors who had lost considerable sums and it would be reasonable to infer that at least considerable detrimental impact must have occurred, which would justify increasing the sentence within the category range. The 2A range goes up to 6 years and the 2B range goes up to 4 years.

59. In addressing the mortgage frauds the prosecution said that they were culpability B offences and made some suggestions as to how harm might be assessed. We have dealt with our approach to that above. It is the loss to the lender caused by the transaction. There is no basis on which any uplift for victim impact could be made.

60. The prosecution accepted in its document that the previous convictions of AB and EF did not aggravate the offending because they were quite different. We accept that.

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The proceedings prior to 10 September 2021

61. The respondents first appeared in the magistrates' court on 22 September 2019. Their cases were sent to the Crown Court. Each of them then entered not guilty pleas in the Crown Court on 23 December 2019. The case was adjourned for trial in the summer of 2020, and Defence statements were served denying the offences. That trial was then taken out of the list twice until it was then listed to take place in September 2021. Shortly before that trial date CD became unwell and the trial was vacated. Following receipt of medical evidence, [the trial judge] listed the matter for mention on 10 September 2021.

The events of 10 September 2021

62. After the case was called on and the defendants had been identified, the following exchange took place between the judge and prosecuting counsel:-

> **The Judge:** Yes, Mr Evans this case came before me on 27 August. The trial had to be vacated from last, last Monday I think, 6 August.
>
> **Mr Evans**: Yes.
>
> **The Judge:** And it was thought possibly beneficial for everybody to attend today.
>
> **Mr Evans**: Yes.
>
> **The Judge:** If you can just sit down in the dock, thank you very much, I'm sorry. Is there anything that you want to bring to my attention in particular?
>
> **Mr Evans:** No simply that Your Honour of course properly asked the Prosecution on the last occasion if by today's hearing we could identify with a little more clarity --
>
> **The Judge**: Yes.
>
> **Mr Evans:** What the losses are and obviously from the point of view of everybody understanding where that would take Defendants in this particular case and I, I hope Your Honour has seen a note that I uploaded to the system. I know my learned friends have.

63. After a further short exchange and a pause while the judge read the prosecution note, this exchange occurred:-

> **The Judge:** Mr John Hipkin, can I turn to you?
>
> **Mr Hipkin**: Yes.
>
> **The Judge:** That note is a very useful document.

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Mr Hipkin: It's an extremely useful document and can I say the Defence don't take issue with the document. We, we can add two other features to what, what I would propose tentatively as mitigation which is, of course, the age of the case.

The Judge: (indicates understanding)

Mr Hipkin: And secondly delay in the case. These Defendants were interviewed in 2015. The, the position is I, I, I make it clear I don't yet have a formal application for a *Goodyear* indication, but it is highly likely that there will be one, but it needs some, I think fine tuning between Defendants to make sure that it's either that it seems me, a joint application or, or not an application at all.

The Judge: Well hence the purpose of today's hearing.

Mr Hipkin: Absolutely, absolutely. We, we received this yesterday and I then am able to discern in conference this morning attitude to such an application.

The Judge: (indicates understanding)

Mr Hipkin: And the attitude of AB is favourable for such an application.

The Judge: Has this trial been refixed?

Mr Hipkin: No.

The Judge: No, I, I --

Mr Hipkin: No, no.

The Judge: But we face a position where there will be further delay, substantial further delay.

Mr Hipkin: Absolutely. One imagines well into next year and in these difficult times it's a benefit that all parties are here today in order to see if matters can be advanced in another direction.

The Judge: There comes a point when the word exceptionality has a bearing --

Mr Hipkin: Yes.

The Judge: And has a bearing which is particular to this case.

Mr Hipkin: Yes, thank you.

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The Judge: And the Prosecution wouldn't dissent from that general opposition that there are exceptional features here of delay.

Mr Evans: There are. I can't dispute that. That's a matter of chronology. There's no doubt about that. This was, well the offences themselves, the alleged offences themselves are, are old in themselves. They came about because of one investigation. Then looking back through the finances it took a long time to put it all together. One thing I think I can properly say is this as well, and I've, I've got no observations to make about sentence other than what's in that document. I'm not going to say anything else.

The Judge: I understand that. Yes.

Mr Evans: I'm not suggesting Your Honour was trying to get me to say it, but I, I'm just not going to for the record. What I can say is this. That even at the time of the trial being adjourned till September there were some witnesses in this case, I, I won't say who were losing interest, but who were extremely frustrated --

The Judge: Yes.

Mr Evans: About the fact that this is many years later and they're being asked to come forward --

The Judge: Yes.

Mr Evans: And if it goes off again, well it's had to go off again that adds, that adds --

The Judge: Well time, time effects people in different ways.

Mr Evans: That adds to their frustration and I think some of them do want to draw a line to an extent --

The Judge: Yes.

Mr Evans: I have to say that.

The Judge: Yes, thank you very much. Mr Hipkin I turn to you --

Mr Hipkin: Yes.

The Judge: As a matter of courtesy, but also to address other Defence representatives. Is it best if I just allow this case to remain in the list?

Mr Hipkin: Yes please.

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> **The Judge:** And for whatever discussions that can take place can take place during the morning or during the day as far as I'm concerned.
>
> **Mr Hipkin**: Yes, yes.
>
> **The Judge:** I'll just, the Defendant's bail is obviously enlarged. It's not limited to the building, but they should stay within earshot of counsel in order to have discussions and I think it's best if I leave this to the Defence.

64. Soon after this, the judge rose. As he did so, he appears to have asked the court clerk to invite Mr. Evans and Mr. Hipkin into his chambers. They went. There is no transcript of what followed. Recollections differ somewhat. Prosecuting counsel says:-

> [The judge] obviously wanted to make it clear to experienced Leading Counsel for the Defence that what he meant was that if there were pleas he was minded exceptionally to pass non-custodial sentences due to the age of offending and delay. In his Chambers he did indicate that to Defence Counsel. Prosecution Counsel cannot recollect the precise words he used but has a very brief handwritten note made afterwards which reads "HH made clear to JH he would not send down if pleas. Except.". That was not a surprise given his comments in open court.
>
> There was no discussion or debate about acceptability of particular pleas or bases, or about applicability of Guidelines.

65. In a further Note prosecuting counsel said that there was a question from the judge about whether there would be trouble if suspended sentences were imposed. He says that he took the judge to be asking if there would be a large group of angry people. Prosecuting counsel has said it was an awkward question in some ways, but he did not consider the judge to be asking counsel to commit to a professional opinion about the appropriateness of any particular sentence. Prosecuting counsel responded not simply by saying 'no', as he had no control over how any individual person involved in the case would react. He replied in effect, 'No I don't think so', whilst prefacing that opinion by referring to that which he had already said in open court about some of the witnesses becoming more and more frustrated at the delays. The prosecutor has explained in his Note that in responding to the judge's question the level of any upset in the case if he did not send the respondents 'down', the prosecutor was not binding or intending to bind any victim or any other person in respect of any future processes.

66. Mr. Hipkin says this:-

> In Chambers, The judge asked prosecuting counsel, "will there be a hullabaloo if I do not pass sentences of immediate imprisonment upon these defendants?" .My recollection is that prosecuting counsel replied "no". Prosecuting counsel's recollection is that he replied "no, I don't think so." The difference for the purpose of later legal submissions is

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> immaterial. Prosecuting counsel then went on to reiterate that the prosecution faced problems with certain unnamed witnesses.
>
> The Judge, following the input of prosecuting counsel, gave an indication that were the defendants to plead guilty, a suspended sentence of imprisonment would be passed.
>
> The prosecution raised no dissent whatsoever at this indication.
>
> Upon leaving Chambers, I imparted what had happened to all defence counsel.

67. The judge kindly responded to a request for assistance from this court as to his recollection of what occurred, and he said that he agreed with prosecuting counsel's recollection and added:-

> Likewise, Mr Hipkin's recollection is correct: (although I cannot now remember the exact words used) that in a short meeting in chambers, I did ask the Prosecution if Suspended Sentence Orders were imposed whether this would cause difficulty for the Prosecution and I received the reply that it would not.
>
> In direct answer to the question how the discussion in chambers was initiated I would comment as follows. In the context of what had been discussed in court, and in the obvious circumstances of a "stale" case being further substantially delayed, I initiated the meeting to offer assistance to all parties by expressing the view that the "exceptionality" which had been referred to in court would mean the passing of suspended sentences of imprisonment. It was clear to me that the parties would be assisted in that way from the generality of the case and what had been said in court before the meeting. I took this course given the facts of this case: I usually and invariably do not see counsel in chambers informally or at all.
>
> Whereas no formal *Goodyear* application may have been made, the case proceeded on the bases that it had in all but name.
>
> I acknowledge that there may be a basis for criticism in the way this proceeded. If I had been asked "formally", I would have proceeded as I eventually did and indicated that on the facts of this particular case (age of the offences, delay to date and future, further delay) that suspended sentences would have been passed.

68. Mr. Hipkin informed counsel for the other three respondents, whom he did not represent, what had happened. After a period of time the case was called on again in court and this exchange took place:-

> **The Judge:** ... Yes, what's the position?
>
> **Mr Hipkin:** Your Honour there's an application by all the Defendants that they be rearraigned upon the indictment.

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The Judge: Yes."

69. The defendants were arraigned and pleaded guilty to the indictment. Afterwards the judge asked about the factual basis for sentence:

> **The Judge:** Can I ask Defence counsel first of all before I turn to the Prosecution whether any of these pleas are qualified in any way?
>
> **Mr Hipkin:** No.
>
> **The Judge:** No.
>
> **Mr Hipkin:** No.
>
> **…**……
>
> **Mr Evans:** I, I'll simply say this that I, there of course was a, a full, but that would've been a jury opening and there's a further document that Your Honour knows is uploaded too, a couple of days, I will distil the two of those down into a sentencing summary. Can, can I ask for 14 days to distribute that and upload it to the system?
>
> **The Judge:** Right. Yes, certainly. I don't demand it, but it would be useful.
>
> **Mr Evans:** I've. It'll be helpful to me –
>
> **The Judge:** If, if you're prepared to volunteer doing it --
>
> **Mr Evans:** No, I can do it.
>
> **The Judge:** I can certainly grant you 14 days.
>
> **Mr Evans:** Makes it easier.
>
> **The Judge:** To, to conjoin the documents for a sentencing hearing.
>
> **Mr Evans:** Yes, certainly.
>
> **The Judge:** The Prosecution sentencing opening in 14 days then. Thank you very much."

The sentencing remarks

70. The judge identified the very long delay which occurred in this case. The delay between interviews in 2014 and 2015 and the charges being brought in 2019 was in no way the fault of the respondents. The delays caused by adjournment of trial dates because of COVID were similarly not their fault. In fact, less than two years had elapsed between

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the date when the respondents were charged and the date when they entered their pleas on 10 September. The Judge also identified strong personal mitigation.

71. He explained his approach to sentencing in this way, omitting points of detail and emphasising in bold the words which seem to us to be of particular importance:-

> As a general principle of sentencing, the Court must have regard to the totality principle, and also of course, as always, must pass the least sentence it can according to law. Equally the Court must **have regard to the definitive guidelines of the Sentencing Council and, where the interest of justice requires it to be done, the Court may depart from guidelines or adjust a sentence, so that the sentence is just and proportionate** to the criminal liability involved, that is set out in statute under section 125 of The Coroners & Justice Act 2009.
>
> Had you as Defendants fallen to be sentenced in a more timely manner and more proximate to the date of the offending, the mitigation that I have just alluded to and mentioned would not have saved you from immediate sentences of imprisonment. But I am now sentencing four members of the same family, the mother and three sons, where two of you, the Second and Fourth Defendants are of good character, the two other Defendants of limited bad character. I am sentencing you in respect of serious fraudulent activity and I am doing so in the last quarter of 2021.
>
> **A close analysis of this indictment is required to form a view as to what is the just and proportionate sentence**.
>
> Each counsel and advocate makes this point about antiquity of offending forcefully, and quite rightly so. Without expressing any criticism of anybody at all, and accepting that these were complex matters to investigate and to present, **there has been an inordinate delay in prosecuting this case** to the point of reaching a convenient and workable trial date.
>
> Apart from the Sentencing Council's definitive guideline that I must consider in respect of the offending, there is another guideline to consider, that on the imposition of community and custodial sentences. There are factors indicating that it would not be appropriate to suspend a custodial sentence. They are three and they are these, that the respondent presents a risk of danger to the public, that appropriate punishment can only be achieved by immediate custody and there is a history of poor compliance with court orders. As far as each of you as Defendants are concerned none of those are present.
>
> Correspondingly, there are factors indicating that it may be appropriate to suspend a custodial sentence. There are three again and they are these, a realistic prospect of rehabilitation, a

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> strong personal mitigation and immediate custody will result in significant harmful impact upon others.
>
> One of those factors, namely strong personal mitigation, applies to each and every Defendant. Another factor, that immediate custody will result in significant harmful impact upon others, applies to the second Defendant, CD, and the last Defendant, GH.
>
> **In my judgment it is essential that exceptional delay, which is present in this case, should be met with a sentence which recognises such exceptionality. I make it clear that, on the special and particular overall facts of this case,** without in any way making any attempt to diminish the seriousness of what each of you has admitted, each sentence of imprisonment will be suspended.
>
> Turning to your pleas, the pleas tendered were tendered late in the day, save for being tendered on the first day of any actual refixed trial, they could not be later and, as the Prosecution rightly point out, the case had been approaching a trial date on two previous occasions.
>
> Each one of you will have a reduction in sentence of only 10%. Also, the requirements under a Suspended Sentence Order, because of the passage of time and a change in circumstances, may not be as extensive as ordinarily would be the case.
>
> It seems to me that the real punishment here is twofold. First, the loss of a good name in each case, even though two of you have some irrelevant and old convictions, and secondly, that the financial consequences of offending under the terms of orders sought for confiscation under the Proceeds of Crime Act will be effective.

The submissions of the Solicitor General

72. It is submitted that the offending in this case was sustained, planned, committed against a large number of victims. The financial losses overall were over 1 million pounds. The impact on the victims was high. Despite the delay identified, and the other mitigating features, sentences of 2 years imprisonment suspended for 12 months were unduly lenient.

73. Count 1 was itself a serious conspiracy to commit fraud. It should have been dealt with on the basis of category A: high culpability: the offending was sustained over a period of time; there were a large number of victims; and there was significant planning.

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74. As regards harm, whilst the precise figure loss figure on count 1 was calculated as £210,785.28, the judge also had to have regard to 'Harm B', - which, upon analysis of the victim personal statements, was 'high': there was a serious detrimental effect on the victims whether financial or otherwise. That meant that the harm ought to have been placed within category A harm.

75. On this basis, the appropriate starting point within category A1 should have been identified as 7 years. To this extent, the Solicitor General respectfully departs from the prosecution's analysis of the Guidelines as explained in the Note prepared for 10 September 20121. The nature of the offending justified it being placed within category A1.

76. Even on the basis of category A2, the starting point was 5 years. It is submitted that this was not a category B case.

77. Significantly, this analysis only represents the offending within count 1 (conspiracy to commit fraud). The starting point of 7 years (category A1), then fell to be adjusted upwards significantly to reflect the further offending reflected in the remaining substantive counts (2 to 15).

78. Whilst it was right to have regard to specific losses that were linked to an individual respondent , it is submitted that the judge ought to have sentenced the respondents against the total global loss of over £1million. Each respondent clearly played their partin the global offending and the principle of totality justified such an approach.

79. On any view, an initial starting point before consideration for any mitigation ought tohave been far in excess of 7 years imprisonment.

80. Of course, the judge was entitled to have particular regard to the delay identified in this case and the age of the offending by the time of sentence. There had been significant delay and the judge was entitled to reflect that in any final sentence. However, it should be noted that the judge did not express any fault with the investigation so far as the delay was concerned. Nevertheless, a reduction for delay was appropriate, together with additional reductions for the other mitigating features identified.

81. However, even allowing for such reductions, given the level of the initial starting points, properly adjusted upwards to reflect the multiple and sustained offending, the total sentences of 2 years imprisonment suspended for 12 months, were unduly lenient (even after 10% credit for the pleas of guilty). The nature and scale of this offending meant that the judge ought to have imposed a significant sentence of imprisonment that by its very length would not have been amenable to suspension.

82. The Solicitor General acknowledges that the correct procedure pursuant to *Goodyear* [2005] EWCA Crim 888, [2005] 1 WLR 2532, was not followed at the hearing of 10 September 2021. In particular, any discussions as to plea ought to have taken place in open court and with all counsel present. Only in exceptional circumstances should discussions be held in chambers, and if so, a full note should be kept. However, it is submitted that no unfairness has arisen. The procedure was not initiated by the judge, rather defence counsel for AB had first indicated in open court that whilst he did not yet have a 'formal' application for a *Goodyear*

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indication, it was highly likely that there would be one. It needed some 'fine tuning' between respondents to make sure either it was a joint application or there would be no application. Thereafter, no doubt experienced defence counsel had the necessary instructions, and defence counsel had properly advised their clients that pleas should only be entered where a defendant is guilty and, following any indication, the Solicitor General was nevertheless entitled to refer any sentence to the Court of Appeal. The prosecutor had in open court made it clear that he was not making any comment as to the appropriate sentence. Whilst the prosecutor did not make explicit reference to the possibility of a future Reference, it is submitted that the prosecutor did nothing in open court or in chambers to indicate that any sentencing indication had the support or approval of the prosecution. It is submitted that no expectation was created that there would be no later referral. No counsel objected to the procedures followed and, as submitted, the Court is entitled to presume (unless informed to the contrary) that each Offender was properly advised.

83. The Court has held previously that any failure of prosecution counsel to remind the sentencing judge of the Attorney General's power to refer did not, itself, preclude the Court of Appeal from hearing such a reference (see, for example, *Attorney General's Reference (No.48 of 2006) (Farrow)* [2007] 1 Cr App R (S) 90, at §§19 - 23). In *Attorney General's Reference (No 32 of 2015) (Salisbury)* [2015] EWCA Crim 1110, the Court of Appeal increased a sentence where a prosecutor had informed the Offender that he would not refer the case to the Attorney General if a suspended sentence was imposed. The Court is of course entitled to have regard to the events of 10 September 2021 in the Offender's favour if the Court considers that necessary and appropriate.

The respondents' submissions

84. We heard helpful submissions on behalf of all four respondents which dealt with the major common points and then with the individual respondents. The major common points related to the delay in the proceedings and the indication. Particular individual points were made about the health of CD and the role of GH in relation to count 1, and his personal mitigation which was noted by the judge. We have not been able to identify precisely what the prosecution case was against GH on count 1, but for present purposes at least his plea means that his involvement in it is not in dispute.

85. Counsel for each of the respondents told us, and we accept, that they were not advised that any sentence might be referred to this court if it was unduly lenient and might be increased. Each counsel took responsibility for that failure. We find it surprising that such a thing could happen in the circumstances which prevailed on 10 September 2021, but we proceed on the basis that it did.

86. It is submitted that the sentences were not unduly lenient and, even if they were, they should now be increased in the circumstances of this case.

Discussion and decisions

87. [omitted].

88. The conditions in the criminal courts in 2021 cause real difficulty for all concerned. The pandemic has exacerbated the backlog of cases very substantially and judges all

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over the country have been working very hard to try and deal with cases which are awaiting trial. It is known that a significant number of these cases will eventually be resolved without a trial, because that is what the statistics show and always have shown. It is understandable that judges may decide to be proactive in helping the parties to achieve such resolutions. In this case, the last offence was committed over a decade before the 10 September 2021 and efforts to bring the matter for trial had still not succeeded. There was to be another long delay while this trial waited behind other more urgent work. The judge wanted to try and see it resolved, if it could be. That was not only in the interests of these defendants but also of all the victims, witnesses, and defendants whose cases would be dealt with during the time which the resolution of this trial would make available. Some of those would be young or vulnerable people, and some of the offences very serious. All of this is very understandable, but it is very important that judges, when managing cases and backlogs, should never forget that they are bound by the law. We have some sympathy with [the trial judge], battling with all these considerations, but must be clear that his chosen course was not appropriate.

89. The law in this area is definitively stated in *R v. Goodyear* [2005] 2 Cr. App. R. 20. Its essence is captured in CrimPD VII Sentencing C. This is binding on this court, and most certainly binding on judges sitting in the Crown Court. We do not intend to add confusion by paraphrasing the decision of the court or the Practice Direction which is itself a competent summary of it. There are eight paragraphs in the summary, seven of which contain at least one requirement which the procedure in the present case violated. The other, paragraph C.7, which deals with dangerous offenders, does not apply.

90. Paragraph C.1 requires the defence to notify the court and the prosecution of any intention to seek an indication of the maximum sentence which would be imposed if guilty pleas were to be tendered at that stage in the proceedings. That notification is required to be given in advance of the hearing. This did not happen. It appears that the hearing of 10 September was listed at the request of the judge who at the same time directed the prosecution to serve a "Sentencing Note" on the court and all parties.

91. Paragraph C.2 provides that the judge can, in an appropriate case, remind the defence advocate of the defendant's entitlement to seek an indication of sentence. The indication can only be given after a request is made. In this case, the indication was given after leading counsel for one (and only one) defendant had informed the court that he was *not* asking for an indication, but that he may do so later. The other three defendants had said nothing at all.

92. Paragraph C.3 requires the facts on which sentence will be passed to be made clear before any indication is given. This did not happen. In the result, it appears that the court was not primarily interested in the factual basis for sentencing, since each respondent received the same sentence despite their very different levels of involvement. It seems fair to approach the case of GH on the basis that his role in the fraud on investors, count 1, was substantially less than that of the other three respondents, whose relevant activities are identified above. This was the most serious offence because of its harm impact on the personal financial situation of individual victims. After the pleas were entered, but not before, the judge asked whether the pleas were "qualified in any way" and that was the extent of any examination of the factual basis of sentence by the court on that day.

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93. C.4 and C.5 govern the role of the prosecutor. In this case, prosecuting counsel did not breach his obligations except in one respect, not covered in *Goodyear* or the Practice Direction for obvious reasons. He is not to be blamed for this, because the situation which arose was not of his making. As soon as he realised that he had been called into the judge's room with only one defence counsel present for the purpose of a private discussion about sentence he should have told the judge that this should not be happening. Instead, he answered a question from the judge about whether there would be a "hullabaloo" if the sentences were suspended by saying that there would not. There may have been a misunderstanding about what this question and answer meant, and the precise words may not have been as we have set them out here. This is part of the problem with informal, private and unrecorded conversations of this kind. The recollections of those present are set out above. However, it appears to us that this exchange created the impression that the Crown believed that suspended sentences would not cause trouble. In this context, this seems to us to carry the meaning, even if unintended, that they would not be referred as unduly lenient to this court. In this case, the prosecuting team did *not* draw the case to the attention of the Law Officers for this purpose. The matter came to them following a complaint from a member of the public.

94. The first few words of C.8 are worth setting out in full. They should be (and are) known almost by rote by all Crown Court judges. We set them out adding numbers to emphasise that they contain two fundamental requirements of the process:-

> "A *Goodyear* indication should be given (1) in open court (2) in the presence of the defendant…."

95. *Goodyear* represented a change in practice. The court had been convened to consider, in its words at the start of the judgment:-

> "…the practice promulgated in *R. v Turner* (1970) 54 Cr. App. R. 72, [1970] 2 Q.B. 321, as underlined and applied in subsequent cases, which, save in the most exceptional circumstances, effectively prohibited the judge from giving any indication of sentence in advance of a guilty plea by the defendant."

96. The practice in *Turner* reflected the concern that any defendant may be pressurised into pleading guilty by an inducement from the judge as to sentence which only applied if there was a guilty plea. In fact, *Turner* permitted only one exception to this general rule. That exception continues to be lawful, as we will show, but is now very rarely used. The change in practice in *Goodyear* did not involve any reduced concern about the dangers inherent in the courts giving indications of sentence in advance of plea. On the contrary, those concerns were firmly re-stated. The change was to permit such indications to be conditional on a guilty plea being entered at that stage in the proceedings, but that permission was subject to a mandatory and strictly defined procedure.

97. The court in *Goodyear* explained part of the reasoning in *Turner* as follows:-

> "The only exception to the rule that an indication of sentence should not be given is:

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> '. . . that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or a fine, or a custodial sentence.'"

98. The reasoning in *Goodyear* culminates in this passage:-

> "50. We cannot, and do not seek to water down the essential principle that the defendant's plea must always be made voluntarily and free from any improper pressure. On closer analysis, however, we cannot discern any clash between this principle, and a process by which the defendant personally may instruct his counsel to seek an indication from the judge of his current view of the maximum sentence which would be imposed on the defendant. In effect, this simply substitutes the defendant's legitimate reliance on counsel's assessment of the likely sentence with the more accurate indication provided by the judge himself. In such circumstances, the prohibition against the judge giving an unsolicited sentence indication would not be contravened, and any subsequent plea, whether guilty or not guilty, would be voluntary. Accordingly it would not constitute inappropriate judicial pressure on the defendant for the judge to respond to such a request if one were made.
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> 51. We have further reflected whether there should continue to be an absolute prohibition against the judge making any observations at all which may trigger this process. The judge is expected to check whether the defendant has been advised about the advantages which would follow an early guilty plea. Equally he is required to ascertain whether appropriate steps have been taken by both sides to enable the case to be disposed of without a trial. Following this present judgment he will know that counsel is entitled to advise the defendant that an advance indication of sentence may be sought from him. In these circumstances, we do not believe that it would be logical, and it would run contrary to the modern views of the judge's obligation to manage the case from the outset, to maintain as a matter of absolute prohibition that the judge is always and invariably precluded from reminding counsel in open court, in the presence of the defendant, of the defendant's entitlement to seek an advance indication of sentence."

99. That passage ends with this observation, which is not reflected in the CrimPD:-

> "If notwithstanding any observations by the judge, the defendant does not seek an indication of sentence, then, at any rate for the time being, it would not be appropriate for the judge to give or insist on giving an indication of sentence, unless in any event he would be prepared to give the indication permitted by *Turner*

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> (see para.35) that the sentence will or will not take a particular form."

100. This confirms that the decision in *Goodyear* extended the power to give an indication as to sentence to include an indication as to what the sentence will be if a guilty plea is entered at that stage of the proceedings. That was done on strict conditions, for the reasons stated in the judgment. The then existing power, to give an indication in the form permitted by *Turner,* see paragraph [95] above, continues to exist. If a judge wishes to be pro-active there may be some cases where a *Turner* indication will be useful, but it is not lawful to give any other kind of indication otherwise than in accordance with *Goodyear* and the CrimPD.

101. It is apparent from a full reading of the judgment and of the Report, Review and White Paper which influenced it that the cardinal factor which renders such an indication lawful is that it comes in answer to a request from the defendant. Later in the judgment the court sets out the obligations of the defence advocate in this regard, which are also worth setting out:-

> "64. Whether or not the judge has given an appropriate reminder, the defendant's advocate should not seek an indication without written authority, signed by his client, that he, the client wishes to seek an indication.
>
> "65. The advocate is personally responsible for ensuring that his client fully appreciates that:
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> (a) he should not plead guilty unless he is guilty;
>
> (b) any sentence indication given by the judge remains subject to the entitlement of the Attorney-General (where it arises) to refer an unduly lenient sentence to the Court of Appeal;
>
> (c) any indication given by the judge reflects the situation at the time when it is given, and that if a ''guilty plea'' is not tendered in the light of that indication the indication ceases to have effect;
>
> (d) any indication which may be given relates only to the matters about which an indication is sought. Thus, certain steps, like confiscation proceedings, follow automatically, and the judge cannot dispense with them, nor, by giving an indication of sentence, create an expectation that they will be dispensed with."

102. This indication ought not, therefore, to have been given. We will return to the consequences of this when hearing the applications for leave to appeal against conviction. It is not necessary to say any more now because there are appeals pending which will, if well-founded, provide a remedy for the undoubted sense of injustice which these respondents will feel if their sentences are increased to immediate terms of imprisonment having been promised by a judge that this would not happen. If the convictions stand, we shall have to consider what action is open to us in that regard.

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The Guideline and the proper sentencing level

103. It seems that the judge decided to depart from the Fraud Guideline because it would have been contrary to the interests of justice to follow it. Section 59 of the Sentencing Act 2020 provides for the duty of the court to follow guidelines except in that situation. The judge identified the factors leading to this conclusion as being the inordinate and exceptional delay in the proceedings We have emphasised the words in bold from the sentencing remarks which lead us to this conclusion. He used the word "exceptionality" in the discussion in open court which preceded the indication in his room. He did not attempt to analyse the offences against the guideline categories by reference to culpability and harm. He omitted the stage in imposing a suspended sentence order which requires the court to conclude that the custodial term is one of two years or less, and did not explain how this result could be achieved while following the guideline. It is not lawful to suspend a sentence unless that is the case. If he were in fact following the guideline he would have been obliged to do that.

104. There was never any issue that these offences were culpability A offences. Apart from GH, the other three respondents had a leading role in group activity. The fraudulent activity was conducted over a sustained period of time and there was a large number of victims. These included the nine people in seven households in count 1, and the lenders in counts 2-15. There was significant planning in the count 1 offence where evidence of a substantial scheme was concocted to tempt investors.

105. It appears to us that the best way of categorising the harm caused by these offences is to take the overall loss caused by all the offending of each individual respondent. That is the figure in the final column of the spreadsheet above except in the case of GH whose contribution to the count 1 harm is to be treated as lesser. His two mortgage frauds on successive days caused loss to lenders of £215,000. In the case of CD the loss caused was £863,000 and in the cases of AB and EF £530,000 in round figures. We are not entirely confident of the figures and will scale the sentences down to reflect that fact. Of that harm, £308,000, again in round figures, comes from count 1 where the level of harm should be regarded as medium overall.

106. A 1A fraud attracts a starting point of 7 years and a range of 5-8 years. AB and CD and EF are in that category, but in no case did the harm reach £1m which is the sum on which the starting point in the guideline is based. An increase within the range is required for the fact that some of the loss caused medium harm impact. The range for count 1, where that medium impact is found, had it stood alone would have been A2, based on £300,000. This attracts a starting point of 5 years and a range of 3-6 years.

107. It appears to us that a sentence of 6 years for AB and EF and 7 years for CD would have appropriately balanced the culpability and harm factors.

108. CD was entitled to consideration of her state of health which had caused the third trial date to be postponed. This was a significant factor in her case. The other matters of personal mitigation, which the judge called "strong", were of less importance, in our judgment. We would reduce the sentences for matters of personal mitigation to 5 years in each of these three cases.

109. There was undoubtedly a need to reflect the delay in investigating and charging this case. The judge described it as "inordinate" and "exceptional" and this was a finding

which he was very well placed to make. It is not, however, proper to regard delay as a factor which makes it appropriate to ignore the guideline: it is dealt with in the guideline. "Lapse of time since apprehension where this does not arise from the conduct of the offender" is identified as a factor reducing seriousness in the guideline. The guideline is not prescriptive as to how that is to be given effect, and this allows the court to pass a proper sentence while following the guideline. We consider that a reduction of 25% was justified for the delay between 2014 and 2019, which is the relevant period.

110. Allowing 10% credit for the late pleas, and rounding down, this means that the sentences in these three cases should have been 40 months' imprisonment. At this level, no question of suspension arises and the sentences should have been immediate.

111. The case of GH is more difficult because of the lack of information about his precise role in the count 1 conspiracy. We will treat him as having played a lesser role in that than the others. It was nonetheless a serious offence. The two mortgage counts caused substantial loss and were themselves serious offences. We consider that an appropriate course is to treat his offending as falling within category 1A. The starting point is 7 years, but his limited role enables a sentence at the bottom of the range to be imposed in his case of 5 years. He is entitled to a reduction for his personal mitigation, in particular the diagnosis which caused a mental health treatment requirement to be added to his suspended sentence order. This takes the sentence to 4 years from which we deduct 25% for delay and 10% for the plea to produce concurrent sentences in his case of 32 months on the three offences of which he was convicted.

Conclusion

112. The difference between these sentences and those imposed by the judge is such that we are driven to the conclusion that his sentences were unduly lenient and they must be quashed. In the case of the first three respondents we impose a sentence of 40 months in each case on count 1, and concurrent sentences of 30 months in the case of each of the substantive mortgage fraud offences of which they were convicted. In the case of the fourth respondent the sentences on the three counts concerned will be 32 months imprisonment concurrent.

113. It follows from this that, in the absence of a request from any defendant, the only indication the judge could properly have given would have been an indication complying with *Turner* namely that whether they pleaded guilty or not, any defendant convicted of all counts they faced would receive an immediate sentence of imprisonment.