Neutral Citation Number: [2025] EWCA Crim 17

Case Nos: 202202005 B4
202202008 B4
202202196 B4
202202215 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
His Honour Judge Pegden KC
T20197097
T20190229
T20197306

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 January 2025

Before:

LORD JUSTICE STUART-SMITH
MRS JUSTICE McGOWAN
and
MR JUSTICE GARNHAM

- -

Between:

REX

Respondent

- and -

(1) ANDREW NATHANIEL SKEENE
(2) JUNIE CONRAD OMARI BOWERS

Appellants

- -
- -

Adrian Darbishire KC and **Tom Phillips** (instructed by **Birds Solicitors**) for the **First Appellant**
Andrew Trollope KC and **Senghin Kong** (instructed by **Bark & Co Solicitors**) for the **Second Appellant**
Amanda Pinto KC, Jennifer Newcomb and Nichola Higgins (instructed by **Serious Fraud Office)** for the **Crown**

Hearing dates: 8 February 2024 and 7 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 January 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Stuart-Smith:

Introduction

1. The applicants, Mr Skeene and Mr Bowers, renew their applications for permission to appeal their convictions by the jury and the sentences passed by HHJ Pegden KC after a trial in the Crown Court at Southwark. They were convicted on 31 May and sentenced on 15 June 2022. In renewing their applications for permission to appeal, the applicants also apply to vary the grounds on which the application is made.

The convictions and sentences imposed by the Crown Court

2. The applicants were convicted on all four counts of the indictment, and were sentenced as follows:

    i) On Count 1, which was a count of conspiracy to defraud between 1 August 2010 and 31 December 2015 relating to a scheme known as the Belem Sky Scheme, they were sentenced to 8 years' imprisonment;

    ii) On Count 2, which was a further count of conspiracy to defraud, this time between 1 July 2012 and 31 December 2015 relating to a scheme known as the Para Sky Scheme, they were sentenced to 8 years' imprisonment concurrent;

    iii) On Count 3, which was a further count of conspiracy to defraud, this time between 1 December 2012 and 31 December 2015 relating to a scheme known as the Para Grosso Scheme, they were sentenced to 3 years' imprisonment consecutive; and

    iv) On Count 4, which was a count of misconduct in the course of winding up, on or after 3 March 2014, they were sentenced to 12 months' imprisonment concurrent.

    The total sentence for each applicant was therefore 11 years' imprisonment.

Representation

3. At trial the Prosecution was represented by Ms Amanda Pinto KC, Ms Nichola Higgins and Ms Jennifer Newcomb who appears before us on these applications. Mr Skeene was represented by leading and junior counsel at trial and is now represented by Mr Darbishire KC and Mr Phillips. Mr Bowers was represented at trial by Mr Trollope KC, Mr Kong and Ms Lefi Siatta, who have represented him before us acting pro bono, for which we are grateful.

The factual background

4. The prosecution case was that the applicants, working very closely together, devised, operated and controlled three investment frauds in relation to Brazilian teak plantations between August 2010 and December 2015. These were frauds on members of the public who thought that they were signing up for a steady income and a safe, ethical investment. The schemes were called Belem Sky (count 1), Para Sky (count 2) and Para Grosso (count 3) and they received from investors, respectively, £23.6 million, £3.8 million and £9.4 million. When the funds were received by the applicants from

investors they were passed through complex layers of companies and accounts. Later the applicants used nominees or straw directors and signatories, concealing the fact that they themselves were the beneficiaries. They said or wrote things about the schemes and the investments which were false or misleading. They deployed false documents to give the appearance that the schemes were working when they were not – that in itself enabled the frauds to be prolonged and more investors' money to be obtained. After their own company, GFI Consultants Ltd, went into liquidation they deliberately assisted in misleading the liquidator in relation to proving a false debt of £1 million (count 4) so that close colleagues of theirs, with whom they shared a bank account, would be able to appoint their liquidator of choice and receive a far greater pro rata return than they were entitled to.

5. Much of the prosecution evidence was either agreed or not challenged. On the basis of that evidence, the Prosecution relied upon conduct which, it said, was designed to prolong the schemes when or after they became non-viable including that: (a) they repeatedly told lies to those who were innocently promoting the schemes about the progress of the investment, when returns would be paid and the source of those returns; (b) they falsified or concealed the true identity and ownership of two of the plantation forestry management companies; (c) they used aliases and e-mail addresses in false names; (d) they used "dirty" phones and messaging systems that vanished after sending; (e) when they were made bankrupt they used nominee or straw directors and signatories on bank accounts to conceal their control of companies; (f) they created similarly named companies, businesses and bank accounts in order to mislead; and (g) they moved monies across borders through multiple companies and accounts to conceal their sources.

6. The applicants made no comment when interviewed, did not provide anything in the way of a prepared statement, and chose not to give evidence at trial. The challenges to the prosecution evidence, such as they were, were limited to putting questions in cross-examination. Their case on Counts 1-3 was denial of the existence of any criminal conspiracy or of their part in it. They called an expert, whose evidence was challenged by the prosecution, to give projected forward values of the land in the schemes. In support of their denial of participating in any of the alleged criminal conspiracies, they pointed to evidence that they had engaged a reputable trustee and escrow agents (Hutchinson) and lawyers in Brazil; that the failure to pay returns was or could have been because of their straitened circumstances, culminating in their being declared bankrupt on 29 July 2014; and they submitted that their failure to pay the purchase price for the land the subject of Count 3 was an honest omission due to their general financial difficulties.

The procedural background

The summing up and legal directions

7. The Judge's summing up was delivered between 16 and 26 May 2022, with counsel's speeches interposed between parts 1 and 2. In addition, the Judge provided the jury with written legal directions during part 1 of his summing up, to which we shall return. We understand that drafts of the legal directions were offered in draft to counsel. It appears that the Judge made some adjustments in the light of submissions by counsel then acting for the applicants. We set out the parts of the Legal Directions and Route to Verdict that have been criticised in these applications later.

The appeals against conviction

8. The applicants originally advanced their proposed appeals against conviction jointly on the basis set out in a Perfected Advice and Grounds of Appeal Against Conviction for both of them signed by Mr Trollope and Mr Kong and dated 22 September 2022. The prosecution responded to that Advice and those Grounds and served detailed Grounds of Opposition dated 19 October 2022. The Single Judge (Wall J) refused each applicant permission to appeal by separate orders made on 9 December 2022. After notices of renewal had been served by each applicant, Mr Skeene lodged a document entitled "Renewed Application for Permission to Appeal Against Conviction and Application to Vary Grounds" dated 7 September 2023, that document being signed by Mr Skeene's new counsel, Mr Darbishire and Mr Phillips. The prosecution responded to Mr Skeene's Renewed Application Document by an Amended Respondent's Notice and a document entitled "Respondent's Varied Grounds of Opposition", which was dated 20 October 2023.

9. Mr Bowers was slower to react, but on 1 November 2023 he applied to vary his grounds of appeal against conviction, abandoning two of his original grounds and seeking to adopt the additional arguments that had been raised by Mr Skeene.

The appeals against sentence

10. The applicants appealed against sentence on the basis of a Joint Advice and Grounds dated 12 July 2022. The Single Judge refused each applicant leave by separate orders dated 9 December 2022. When the applicants renewed their application, the prosecution served a response opposing the applications dated 12 January 2023.

Hearing the appeals

11. The appeals against conviction and sentence were listed on 8 February 2024. In advance of that hearing, Mr Skeene submitted a skeleton argument dated 31 January 2024, which addressed conviction issues. Mr Bowers relied upon the documents he had already submitted. The appeal was adjourned part-heard because the Court required further documentation relevant to issues that had been raised about the form of the indictment. So it was that the adjourned appeal came to be re-listed on 7 November 2024. In advance of that adjourned hearing, Mr Bowers submitted a further skeleton argument dated 12 April 2024 and a speaking note dated 23 October 2024. Mr Skeene submitted a speaking note dated 4 November 2024. The prosecution submitted a response to both notes dated 5 November 2024.

12. At the conclusion of the hearing we reserved our judgment. This is our reserved judgment on conviction and sentence. Rather than becoming bogged down by disputes about whether the applicants should be allowed to vary their grounds, we have decided to address the substance of the issues as the applicants now wish to frame them, dealing with the issues raised on the proposed appeals against conviction first.

Conviction – Mr Skeene's Ground 1: Conspiracy to Defraud

13. There are two strands to this proposed ground of appeal. First, it is submitted that the indictment was defective in that Counts 1-3 failed adequately to define the conspiracy with which the applicants were charged It is submitted that the numbered particulars

acted as "a menu of options laid out in the particulars, some of which might properly have been regarded as the substance of the agreement, *most* of which appeared to be simply acts done, at some stage and by someone, in pursuance of some agreement which had already been made". Second, and as a consequence of the first deficiency, it is submitted that, when the Judge came to direct the jury and to sum up the essential elements of the offences of conspiracy to defraud that the applicants faced, he fell into material error.

14. Mr Bowers adopts Mr Skeene's Ground 1 for essentially the same reasons as advanced by Mr Skeene. He submits that the Judge failed to identify a single object in each of the three main conspiracies upon which the jury should all agree. In what follows we do not differentiate between them as to who says what.

The form of the indictment

15. Much of the argument before us has focused on the form of Counts 1-3 of the indictment. Count 1 of the indictment was:

"**COUNT 1**

Statement of Offence

Conspiracy to defraud contrary to Common Law

Particulars of Offence

ANDREW NATHANIEL SKEENE and JUNIE CONRAD OMARI BOWERS, between 1 August 2010 and 31 December 2015, conspired together and with others to defraud such investors as would buy beneficial interests in teak plantations in a scheme known as the Belem Sky Plantation Project ("Belem Sky") by dishonestly:

1. Devising and carrying on a scheme that would not generate the stated returns for investors and/or

2. Representing or failing to correct the false impression that:

2.1 Investors' plots were individually demarcated and/or trees were individually identifiable as belonging to an individual investor; and/or

2.2 Maos Seguras, Brazil Property Group Management ("BPGM") and Terra Forte Servicos de Terraplanagem LTDA - EPP ("Terra Forte") were experienced forestry management companies; and/or

2.3 Maos Seguras and BPGM were unrelated, independent businesses; and/or

2.4 Annual returns due from rental and proceeds from thinning of trees on their plot, would be or were paid to the investor by their chosen Brazilian management company; and/or

2.5 The land in which the investor held a beneficial interest was or would be insured by Allianz; and/or

2.6 If the investor exercised the option to sell, GFI Consultants Ltd would buy back an investor's interest in the land after 3 years, for the purchase price plus 5%, and/or

2.7 The Belem Sky scheme was working with the government/government backed; and/or

2.8 The Belem Sky scheme was involved in local community projects; And/or

3. Representing or failing to correct the false impression in documents provided to Title Trustees International Ltd that:

3.1 There were contracts for the supply and/or export of timber derived from the Belem Sky plantation; and/or

3.2 Management companies had banking facilities in Brazil, with sufficient funds available to pay investor returns; and/or

4. Paying monies due to Belem Sky investors with funds derived from other investors' investments,

thereby intending to prejudice the economic interests of others."

16. Counts 2 and 3 were in similar form to Count 1. The first (unnumbered) paragraph of the Particulars was suitably adjusted to identify the scheme in question and the dates between which the conspiracy was alleged to have been carried out. Each count had the same numbered paragraph 1 after the words "by dishonestly". Each then had other particulars that were similar in kind to those set out at numbered paragraph 2 for Count 1 but which were specific to the count in question. Count 2 did not but Count 3 did include a paragraph asserting the payment of monies due to investors with funds derived from other investors' investments similar to numbered paragraph 4 for Count 1. The differences in detail do not matter for the purposes of these applications.

17. Count 4 alleged as Particulars that the applicants, "on or after 3 March 2014, knowing of believing that a false debt had been proved in the winding up of GFI Consultants Ltd, namely an outstanding debt of £1,000.000 owed by GFI Consultants Ltd to Investment Alternatives Ltd, failed to inform the liquidator as soon as practicable."

18. We shall have to examine the format and content of Counts 1-3 of the indictment in detail below. Two episodes are relevant and may conveniently be mentioned now.

First, an earlier version of the indictment included four substantive counts of forgery, the relevant documents being banking and timber supply documents supplied to Hutchinson. On 16 December 2021, long before trial, the Crown applied to add two further counts reflecting two more allegedly forged documents. It was submitted by Mr Jafferjee KC, then acting for Mr Skeene, and by Mr Trollope on behalf of Mr Bowers that these proposed counts should not appear on the trial indictment and that the alleged acts of forgery were, on the prosecution case, committed during the course and in furtherance of the alleged conspiracy to defraud. The defendants submitted that the allegations of forgery could be included in the list of particulars as they were overt acts manifesting and evidencing the existence of the conspiracies. The Crown initially maintained that it wished to add the two additional counts to the four that were already on the indictment. However, after the Judge had expressed the view that the acts alleged in the existing counts of forgery (and the proposed two additional counts) were admissible and capable of proof within the three conspiracy to defraud counts, the prosecution (a) applied to remove the existing counts alleging forgery, and (b) dropped its application to add the two additional counts that it had been proposing, and (c) applied to add a further particular to the conspiracy alleged in respect of Belem Sky. This application was unopposed and was granted.

19. Second, at the close of the evidence, the defence submitted that the prosecution should be required to amend the indictment on Count 1 to incorporate the first numbered particular into the criminal agreement that was alleged. This was opposed by the Crown on the basis that it would restrict the Crown's case on Count 1 so that it had to prove fraudulent intent from the outset of the investment scheme, which was not and had not been the Crown's case. The defence submission was rejected and no appeal from that decision was attempted.

The applicable principles

20. Section 3 of the Indictments Act 1915 provides:

> "(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.
>
> (2) Notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act."

21. Rule 10.2(1) of the Criminal Procedure Rules 2020 lays down general rules governing the form of an indictment:

> "The indictment on which the defendant is arraigned … must be in writing and must contain, in a paragraph called a 'count'—
>
> (a) a statement of the offence charged that—
>
> (i) describes the offence in ordinary language, and

> (ii) identifies any legislation that creates it; and
>
> (b) such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant.

22. The provisions of the 2020 Rules were preceded by the Indictment Rules 1971, rules 5 and 6 of which stated:

> "5. Subject only to the provisions of Rule 6 of these Rules, every indictment shall be sufficient if it contains a statement of the specific offence with which the accused person is charged describing the offence shortly, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.
>
> 6. Where the specific offence with which an accused person is charged in an indictment is one created by or under an enactment, then (without prejudice to the generality of Rule 5 of these Rules)
>
> (a) . . .
>
> (b) the particulars shall disclose the essential elements of the offence
>
> . . .."

23. Pursuant to the statute, therefore, the indictment is required to contain two discrete things. First, a statement of the specific offence or offences with which the person is charged; and, second, such particulars as may be necessary "for giving reasonable information as to the nature of the charge". That distinction was maintained by the Indictment Rules when in force and is maintained by the CPR. Under the CPR: (a) the statement of the offence must describe the offence "in ordinary language" and must identify any legislation that creates it; and (b) the count must provide "such particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor alleges against the defendant." Reflecting that distinction, objections to an indictment may typically involve a submission that the statement of the offence is inadequate because, for example, it omits an essential element of the offence; or that the count does not provide sufficient particulars as to make clear what the prosecutor alleges against the defendant. It is possible that the statement of the offence will itself provide sufficient particulars as to make clear what the prosecutor alleges against the defendant; but sometimes it will not do so and it will be necessary to provide further particulars, not already explicit or implicit in the statement of the offence, so that it is clear what case the prosecution advances and what case the defendant has to meet. As will be seen below, the terms of the Count are intended to act for the defendant's protection by defining and limiting the scope of the case that the prosecution may pursue at trial.

24. What then constitutes a statement of the specific offence where a defendant is charged with an offence of conspiracy to defraud? Put in other words: what are the essential

elements of an offence of conspiracy to defraud that must be included in a count, bearing in mind that the offence must be described in ordinary language? It is conventional to start with *Scott v Metropolitan Police Commissioner* [1975] AC 819. At 839A-D, Viscount Dilhorne (with whom the other members of the House agreed) drew the distinction between the object of a conspiracy and the means by which it is intended to be carried out and concluded that dishonesty was implicit in the meaning of the words "to defraud":

> "One must not confuse the object of a conspiracy with the means by which it is intended to be carried out. In the light of the cases to which I have referred, I have come to the conclusion that Mr Blom-Cooper's main contention must be rejected. I have not the temerity to attempt an exhaustive definition of the meaning of "defraud." As I have said, words take colour from the context in which they are used, but the words "fraudulently" and "defraud" must ordinarily have a very similar meaning. If, as I think, and as the Criminal Law Revision Committee appears to have thought, "fraudulently" means "dishonestly", then "to defraud" ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled."

25. There were two certified questions. In answer to the first, the decision of the House of Lords was that deceit was not an essential element of the offence of conspiracy to defraud. Turning to the second certified question, namely "whether on a charge of conspiracy to defraud … it is sufficient to prove an agreement to prejudice the rights of another or others without lawful justification and in circumstances of dishonesty", Viscount Dilhorne said at 840E-F:

> "I am not very happy about the way in which the second question is phrased although the word "prejudice" has been not infrequently used in this connection. If by "prejudice" is meant "injure," then I think the answer to that question is yes, for in my opinion it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."

26. Lord Diplock, as well as agreeing with Viscount Dilhorne, provided his own summary of the essential elements of the offence which, while slightly differently expressed, is materially the same. Viscount Dilhorne's summary has been repeated constantly in subsequent cases. It has never, so far as we are aware, been either doubted or materially qualified. Different statements have paraphrased the requirements in similar terms which do not add materially to Viscount Dilhorne's formulation. We only refer in addition to the similar but not identical (and rather more convoluted) approach adopted by the House of Lords in *R v Goldshield Group plc and others* [2008] UKHL 17, [2009] 1 WLR 458 at [11]:

> "…[T]here is no dispute between the parties as to the meaning of conspiracy to defraud. For present purposes it is sufficient to

> refer to the definition formulated by Lord Goff of Chieveley in the Privy Council appeal of *Wai Yu-tsang v The Queen* [1992] 1AC 269, 280, that the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk. It hardly needs to be said that while the subsequent actions of conspirators may be cogent evidence of the content of their agreement, the actus reus is the original reaching of the agreement and the focus of the court trying a conspiracy case has to be on the content of the agreement and the contemplation of the parties when it was made."

27. In *R v Landy* [1981] 1WLR 355 the appellants were charged with conspiring together to defraud customers of a bank by using banking irregularities and malpractices in siphoning money from the bank. The appellants' defence was that they had been honest but careless. The judge did not direct the jury that they had to be sure that each appellant had agreed to act dishonestly. Their appeal was allowed because dishonesty (which was described as the all-important ingredient in an offence of conspiracy to defraud) had to be stressed in the court's directions to the jury and that, since the jury had not been clearly and correctly been directed about the meaning of "defraud" (i.e. as incorporating the requirement of dishonesty), each had lost the chance of having their defence put fully and fairly to the jury.

28. The case was complicated with a number of different strands being relied upon by the prosecution as the basis of their case. The indictment was in what at that time was common form, and it provided no details of the case the defendants had to meet. As set out at 361E, Count 1 charged that the defendants:

> "on divers days between September 30, 1968, and July 12, 1974, conspired together and with the [named others] to defraud such corporations, companies, partnerships, firms and persons as might lend funds to or deposit funds with Israel British Bank (London) Ltd. by falsely representing that the business of Israel British Bank (London) Ltd. was being conducted in an honest and proper manner, by knowingly employing such funds to the prejudice of the said lenders and depositors and contrary to the best interests of the Israel British Bank (London) Ltd., by fraudulently concealing that the said funds were being so supplied, and by divers other false and fraudulent devices."

29. This form of indictment was deprecated by the Court of Appeal: "in simple cases it may be adequate but in a complicated case it is not because it lacks particularity". When defence counsel had asked for further particulars at the beginning of committal proceedings and thereafter, they were told that they would get all the information they needed from the Crown's opening speech. This too was unacceptable: see 362A-B, where the Court said:

> "In our judgment particulars should have been given and for these reasons: first, to enable the defendants and the trial judge to know precisely and on the face of the indictment itself the

> nature of the prosecution's case, and secondly, to stop the prosecution shifting their ground during the course of the case without the leave of the trial judge and the making of an amendment."

30. Having condemned the use of the phrase "and by divers other false and fraudulent devices" as "a relic of the past", the Court continued at 362B-H:

> "In criticising the form of indictment used in this case, we should not be taken to be adjudging that particulars of conspiracies to defraud should be set out in the same kind of detail as would be required in a statement of claim in an action for damages for conspiracy to defraud. What is wanted is conciseness and clarity.
>
> In our opinion the particulars of the count charging conspiracy to defraud should have been in some such terms as these:
>
> *Particulars of Offence*
>
> Harry Landy, Arthur Malcolm White, Charles Kaye and Peter Lynn on diverse days between the 30th day of September 1968 and the 12th day of July 1974 conspired together and with the [named others] to defraud such corporations, companies, partnerships, firms and persons as might lend funds to or deposit funds with Israel British Bank (London) Ltd. ("the bank") by dishonestly
>
> (i) causing and permitting the bank to make excessive advances to insubstantial and speculative trading companies incorporated in Liechtenstein and Switzerland, such advances being inadequately secured, inadequately guaranteed and without proper provision for payment of interest
>
> (ii) causing and permitting the bank to make excessive advances to its parent company in Tel Aviv, such advances being inadequately secured, inadequately guaranteed and without proper provision for payment of interest
>
> (iii) causing and permitting the bank to make excessive advances to individuals and companies connected with the said Walter Nathan Williams and his family, such advances being inadequately secured, inadequately guaranteed and without proper provision for payment of interest
>
> (iv) causing and permitting the bank's accounts and Bank of England returns to be prepared in such a way as (a) to conceal the nature, constitution and extent of the bank's lending and (b) to show a false and misleading financial situation as at the ends of the bank's accounting years

> (v) causing and permitting the bank to discount commercial bills when (a) there was no underlying commercial transaction (b) the documents evidencing the supposed underlying transactions were false and (c) the transactions were effected in order to transfer funds to the bank's parent company in Tel Aviv.
>
> Such particulars would have avoided such terms as "falsely representing" and "to the prejudice" which are imprecise and likely to confuse juries and would have made everyone aware of what the prosecution were alleging."

31. We interpose here that in *R v K* [2005] 1 Cr App R 25, [2004] EWCA Crim 2685, to which we will return, Thomas LJ giving the judgment of the court, said that indictments had in general followed the form understood to have been suggested by Lawton LJ in that they gave more detailed particulars. In the present case we were told that the form of the indictment was settled with reference to that in *Landy*.

32. In *Attorney-General's Reference (No 1 of 1982)* [1983] QB 751 the indictment charged the defendants with conspiracy to defraud by conspiring in England with others to defraud companies and persons, including in particular X company, as might be caused loss by the unlawful labelling, sale, supply or marketing of whisky purporting to be that of X label products. The prosecution case was that labels purporting to be those of the X company passed through London on their way to Frankfurt where they were fixed to non-X-company whisky. In a passage on part of which the applicants rely, Lord Lane LCJ said at 757F-G:

> "The real question must in each case be what was the true object of the agreement entered into by the conspirators? In our judgment, the object here was to obtain money from prospective purchasers of whisky in the Lebanon by falsely representing that it was the X company's whisky. It may well be that if the plan had been carried out, some damage could have resulted to the X company. But that would have been a side effect or incidental consequence of the conspiracy, and not its object. There may be many conspiracies aimed at particular victims which in their execution result in loss or damage to third parties. It would be contrary to principle, as well as being impracticable for the courts to attribute to defendants constructive intentions to defraud third parties based on what the defendants should have foreseen as probable or possible consequences. In each case to determine the object of the conspiracy, the court must see what the defendants actually agreed to do. *Had it not been for the jurisdictional problem, we have no doubt the charge against these conspirators would have been conspiracy to defraud potential purchasers of the whisky, for that was the true object of the agreement.*" (Emphasis added)

33. In *R v Hancock* [1996] 2 Cr App R. 554 the appellants attempted to build a national network of agencies for the sale and fitting of satellite dishes across the country. They provided brochures and arranged presentations. People who went further paid £15,000;

and, in all, something over £705,000 was paid by people who became agents. The company collapsed and the appellants were charged with conspiracy to defraud. Count 1 of the indictment was in the following form:

> "*Statement of offence*
> Conspiracy to defraud
> *Particulars of offence*
> [The named defendants] on diverse days between January 1, 1990 and February 19, 1991, conspired together to defraud such people who were or became agents of the Satellite Television Company Limited (the agents) by dishonestly,
>
> (i) and falsely misrepresenting that the Satellite Television Company Limited was a successful company, was sound financially, had no bank overdraft, and was "cash rich";
>
> (ii) and falsely representing that since January 1 1989 Satellite Television Centre had sold and installed over 4,000 satellite television systems in the Peterborough area;
>
> (iii) [There followed eight more sub-paragraphs numbered (iii) to (x) making similar types of allegations]"

34. The sole ground of appeal was that the Judge had erred in not directing the jury that they should reach unanimity or an acceptable majority upon at least one of the particulars set out in the count. The judgment of the court was given by Stuart-Smith LJ. Having referred to *R v Mitchell* [1994] Crim LR 66 and noted that "dishonesty is an ingredient in many offences; it is something upon which the jury must be satisfied upon all the evidence in the case and each juror may be satisfied by accepting different pieces of evidence" so that a *Brown* direction need not be given, he turned to *Landy* at 559:

> "The question therefore is whether each of the particulars in the count constitute an essential ingredient of the offence charged, such that if any one of the particulars was proved the accused is guilty of the offence. Or as Mr Farrer Q.C. put it: is there a real risk of different jurors convicting of different offences encompassed within the single count? The answer in our judgment is plainly "No". *The essential ingredients of the offence of conspiracy to defraud, or what the Crown had to prove to establish the actus reus of the offence is that each of the accused has entered into an agreement to defraud the agents. It was necessary to prove that there was an agreement to act dishonestly to prejudice the agents and that each of the accused was party to that agreement.*
>
> Since the case of *Landy* …, in a case where conspiracy to defraud is alleged, *the Crown are required to set out sufficient particulars of the offence to enable the defence and the judge to know precisely, and on the face of the indictment itself, the nature of the prosecution case and to stop the prosecution*

> *shifting their ground during the course of the case.* But simply because particulars of an offence are given does not mean that those particulars are an essential ingredient of the offence. *In a case such as this the particulars do no more than specify the nature of the case the prosecution seek to prove and the principal overt acts upon which they rely to invite the jury to infer that there was a dishonest agreement and that a particular defendant was a party to it.*
>
> We do not accept the submission that the agreement alleged was to represent STVC as a successful company, financially sound with no bank overdraft and cash rich, and/or that since January 1 1989 STVC had sold and installed over 4000 satellite television systems in the Peterborough area and so on, each particular being in effect a different agreement.
>
> We are fortified in our view that this was not a case where a *Brown* direction was required, because that was the view of all the experienced counsel in the case at trial. … *In our judgment the learned judge correctly identified the ingredients of the offence as we have done earlier in this judgment*. There was nothing in what he subsequently said that did or could elevate each of these particulars into a necessary or sufficient *actus reus* of this offence." [Emphasis added.]

35. Although subsequently criticised by Sir John Smith, *Hancock* has not been overruled and was endorsed by a later constitution of the Court of Appeal Criminal division in *R v K*. It remains good law. That being so, the following points may be noted at this stage:

    i) As set out in the first highlighted passage above, the essential elements of the offence that had to be proved were narrowly drawn: the Crown had to prove that "each of the accused has entered into an agreement to defraud the agents. It was necessary to prove that there was an agreement to act dishonestly to prejudice the agents and that each of the accused was party to that agreement." These two sentences were two ways of saying the same thing and the first sentence was an example of the usual use of the word "defraud" importing dishonesty. The court's formulation, lean as it is, is consistent with Viscount Dilhorne's in *Scott*: see above;

    ii) The reference in the second highlighted passage to enabling the judge and the defence to know the case they have to meet and to stop the prosecution shifting their ground derives from an almost identical statement in *Landy*, which we have set out at [29] above;

    iii) The third highlighted reference could, with the greatest of respect, be thought to be an incomplete statement of what the particulars did, since the text under the heading "Particulars of offence" in fact served the dual purposes of providing the essential elements of the offence, as identified by the Court of Appeal, and providing sufficient particulars so that the judge and the defendants knew the case that they had to meet. But the Court was drawing the well-understood

distinction by which the words after "by dishonestly" were treated as particulars in a broader sense rather than as being part of the essential elements of these offences. That structural approach is a feature that the indictment in *Hancock* had in common with the model indictment in *Landy* and, subsequently, the indictments in *R v K* and other cases including the present. That structural feature did not prevent the court in *Landy*, *Hancock* or elsewhere from being able to identify what were essential elements and what were, in a broader sense, "particulars" setting out the nature of the case that the prosecution was bringing in order to persuade the jury of the defendants' guilt. What mattered in *Landy* and *Hancock* was that the terms of the indictment taken as a whole should identify the essential elements of the alleged offence of conspiracy to defraud and the nature of the case that the defendants had to face;

iv) It was the ability to differentiate between the essential elements and those matters that were not essential elements but were setting out the nature of the case that led to the conclusion that no *Brown* direction was required. It was not and is not in dispute that the jury must be unanimous about the essential elements of the offence;

v) In both the model form in *Landy* and the actual indictment in *Hancock*, the words "by dishonestly" serve as a pivot-point, with the words coming after them being recognised as particulars that were sufficient to enable the defendant and the court to know precisely, and on the face of the indictment itself, the nature of the prosecution case and to stop the prosecution shifting their ground during the course of the case. That did not mean that the particulars were essential ingredients of the offence. The essential elements of the offence were to be found in the words before the words "by dishonestly", though those words might serve the dual purpose of incorporating an allegation of dishonesty in the essential elements of the offence as well as acting as a syntactical bridge to the particulars that followed.

36. It is also convenient to mention at this point that there is inconsistency in the authorities in the use of the phrases "particulars" and "voluntary particulars". Rather than try to unravel esoteric questions such as whether "particulars" that set out the nature of the prosecution case can properly be called "voluntary", we prefer to base ourselves on the framework provided by the Indictments Act and the CPR and concentrate on the distinction between what are the essential elements of the offence and what are the particulars that are required to set out the nature of the case, whenever and under whatever rubric or heading they may be provided.

37. In *R v K*, as set out at [9]:

> "The indictment on which the appellants were charged alleged that the appellants had between June 1 1995 and December 31 1997 conspired with Ferguson, Collinge and others unknown:
>
> ''to defraud shareholders of a company known as Hemmingway plc and Hemmingway International plc by falsely representing:
>
> (a.) that the said company owned the rights to a product known as Coval;

(b.) that the said company was formed to develop the product;

(c.) that the said company would market and develop the product;

(d.) that licences to market the product would be sold;

(e.) that the said company was to be imminently launched on the Alternative Investment market;

(f.) that the said company was oversubscribed before the launch on the Alternative Investment Market;

(g.) that after the launch the share value would be many times the price;

(h.) that the said company was solvent;

(i.) that the shareholders' purchase money would be used for the benefit of the company;

(j.) that the said company was supported by reputable advisers;

(k.) the extent of their shareholding;

(l.) the nature of their personal investment''

38. During the trial the defendants had submitted that the jury were not entitled to convict any of the appellants unless they were unanimous not only that that defendant was a party to the conspiracy to defraud the shareholders but also unanimous that the defendant had been party to an agreement to make at least one of the specific representations set out in the particulars at (a) to (l). The Judge rejected those submissions, holding that "the particulars are not meant to be regarded as essential ingredients to be proved by the prosecution … the essence of this case is the alleged agreements and not the precise details in (a) to (l)"; that "the agreement the prosecution have to prove is to defraud shareholders …". Consistently with that approach, when summing up the case to the jury, the Judge distinguished between (a) the essential agreement namely "a dishonest agreement … entered into by these three defendants … to defraud the shareholders of Hemmingway plc and/or Hemmingway International plc" and (b) the way they did it, namely "by falsely representing that a certain state of affairs about the company existed which in truth it did not." The twelve representations were said to be set out "so that the court, the defendants and you the jury can see from the start of the trial the area, as it were the ball park, in which the alleged agreement is set. It is the agreement itself dishonestly to persuade potential shareholders to part with their money with the intention of carrying it out which must be proved rather than any precise particular set out in paragraphs (a) to (l)."

39. On appeal, the defendants' convictions were upheld, the judgment of the Court being given by Thomas LJ. His starting point at [13] was that "it is well established that a jury cannot convict a defendant of an offence unless they are unanimous on each ingredient of that offence." He then referred to *R v Brown* (1984) 79 Cr App R 115,

where the defendant had been charged with the statutory offence created by s. 13(1) of the Prevention of Fraud (Investments) Act 1958, namely fraudulently inducing investments by inducing persons to enter into agreements to buy shares by making misleading statements about the company. With that statutory offence, the Court of Appeal had held that the making of the false or misleading statement was an essential element of the offence. Consequently, it was necessary for the jury to be satisfied that a particular false statement was made and that it had induced the person to enter into an agreement to buy shares, since these were essential elements of the statutory offence. That distinguished the offence alleged in *Brown* from a case of conspiracy to defraud such as was in issue in *R v K*, *Hancock*, or the present case.

40. Having referred at [17]-[18] to the passages from the speech of Viscount Dilhorne in *Scott* that we have set out above, Thomas LJ turned to the practice in relation to indictments for conspiracy to defraud at [19] ff. Two issues were raised: (1) what degree of specificity of an agreement must the prosecution allege in the indictment and prove? (2) What was the agreement which the indictment in *R v K* specified and which therefore had to be proved to the unanimous satisfaction of the jury (or the requisite majority)? As a preface to his consideration of these issues, Thomas LJ set out the main passages from *Landy*: see [27] above. He then addressed the first issue. At [24] he said:

> "However, the essential ingredients of the offence of conspiracy are the agreement to defraud a person of something, as we have set out at paras 17 and 18. The offence is quite different from the offence considered in *Brown* where the ingredient of the offence comprises the making of a specific statement; the appellants were not charged with the offence charged in *Brown*, but the wider charge of conspiracy to defraud."

41. He then set out the main passages from *Hancock* to which we have already referred and to criticism of the approach in *Hancock* by Sir John Smith, at [28] Thomas LJ resolved the first issue as follows:

> "The judge directed the jury, …, that they had to be sure that there was an agreement dishonestly to persuade potential shareholders to part with their money by falsely representing that a certain state of affairs about the company existed which in truth did not. Was that a sufficient agreement to establish a conspiracy? We consider that it was on the facts of this case. One way of approaching the question is to ask was there sufficient certainty for there to be an agreement? We consider that there was sufficient certainty; if the conspirators agreed to make dishonest representations about the company to induce investors to buy shares, that was sufficient to constitute a certain agreement; it was not necessary that the conspirators agreed more specifically on the misrepresentations that were to be made; the precise nature of the representations to be made or made do not, in contrast to the statutory offence considered in *Brown*, constitute ingredients of the offence of conspiracy to defraud."

42. It will immediately be noted that the formulation of the agreement in [29] of *R v K* by Thomas LJ differs from that of the Judge below in the case he was considering. As we have set out at [38] above, the Judge below had treated the essential agreement as being a dishonest agreement entered into by the three defendants to defraud the shareholders of Hemmingway plc and/or Hemmingway International plc, with the particulars set out at (a) to (l) being the area in which the alleged agreement was set. That was how Thomas LJ characterised it in [24], as set out above. However, in contrast, at [28] Thomas LJ went further and characterised the essential agreement as incorporating an agreement to make dishonest representations about the company to induce investors to buy shares. Even so, it was not necessary to show that the conspirators agreed more specifically on the representations that were to be made. As in *Hancock* (and the model provided by *Landy*) the words after "by falsely representing" served the important purpose of setting out the case that the defendants had to meet but were not essential elements of the offence of conspiracy to defraud. Despite the more extensive description of the essential agreement in [28], the Court upheld the trial judge's more restrictive approach and dismissed the appeals.

43. On the second issue, the appellants submitted that, whether or not it had been necessary to do so, the indictment set out a more specific agreement incorporating the particulars listed in (a) to (l) and that, once the more specific agreement had been alleged, it had to be proved in all respects. That submission was rejected having referred again to *Landy* and *Hancock* and "bearing in mind the clear distinction that must be drawn between the ingredients of the offence and the particulars." The appeals were therefore dismissed; the criticism of *Hancock* by Sir John Smith was rejected; and the Court "saw no reason to question the approach taken in *Hancock* nor, given the way in which this form of indictment has developed, to treat the particulars in any other way."

44. Almost by way of a postscript, Thomas LJ said at [36]:

> "However, for the future, we agree with the editors of *Archbold* that much greater care needs to be taken in framing the indictment and especially in the definition of the agreement alleged. There must be a clear distinction between the agreement alleged and the reasonable information given in respect of it. If the form of the indictment set out by Lawton L.J. is carefully considered it does not provide a precedent for the form of indictment used in Hancock or this case. In our view therefore, the indictment should identify the agreement alleged with the specificity necessary in the circumstances of each case; if the agreement alleged is complex, then details of that may be needed and those details will as in *Bennett* form part of what must be proved. If this course is followed, it should then be clear what the prosecution must prove and the matters on which the jury must be unanimous: see *Bennett*. Further particulars should be given where it is necessary for the defendants to have further general information as to the nature of the charge and for the other purposes identified by Lawton L.J. in *Landy*. Such further particulars form no part of the ingredients of the offence and on these the jury do not have to be unanimous, as this court correctly decided in *Hancock*."

45. Although the dicta in [36] are entitled to the greatest of respect, they form no part of the ratio of *R v K*. Furthermore, any suggestion that *R v K* represents a material shift in the law as previously understood becomes impossible to maintain in the light of the previous paragraph where, in a passage that is entirely consistent with *Landy* and *Hancock*, Thomas LJ said:

> "The rationale for the retention of the offence of conspiracy to defraud is that the criminality aimed at is the agreement, not the carrying out of the agreement; if a sufficiently certain agreement is made to defraud, that is the criminal conduct encompassed within the offence and no more need to be proved; provided there is that certainty in the agreement, it matters not how the participants individually intended to go about or actually went about defrauding the intended victims of their money."

46. Building on these authorities, the Court in *R v SA and others* [2019] EWCA Crim 144 at [69]-[72] provided a broad summary of relevant principles, including:

i) (after referring to *Stott*) "The emphasis, it may be seen, is on an agreement on the part of the conspirators dishonestly to deprive the victim of some proprietary right. Such an agreement need not involve fraudulent misrepresentation; it follows that if fraudulent misrepresentation is to be relied upon, it would need to be specifically pleaded."

ii) (before citing [36] of *R v K*) "An indictment for conspiracy to defraud "should not lack particularity and should enable the defence and the judge to know precisely the nature of the prosecution's case". This "prevents the prosecution from shifting their ground during the trial, unless they obtain leave of the judge and amend the indictment itself."

iii) "… The indictment must define the conspiracy."

iv) (Citing Hickinbottom J in *R. v Evans* [2014] 1 WLR 2817 at [35]) Although the offence is exceptionally broad, "that is not the same thing as an offence without boundaries. It is not literally a 'catch-all'. Indeed, the common law has imposed firm limits on the conceptually wide offence; and … the courts have repeatedly stressed that the criminalisation of conduct which has not in the past been found by the common law to be criminal is a matter for Parliament and not them."

47. Finally for this review, in *R v Barton* [2020] EWCA Crim 575; [2020] 2 Cr. App. R. 7, a rather different form of indictment was adopted, which we set out for comparative purposes, as follows:

> "Count 1
> **STATEMENT OF OFFENCE**
> CONSPIRACY TO DEFRAUD contrary to common law.
> **PARTICULARS OF OFFENCE**
> DAVID BARTON on days between the 7th September 1997 and the 10th January 2008 conspired together and with Thomas Mills and Lucinda Barton to defraud Patricia Anderson-Scott by dishonestly exploiting their position to control or obtain money

> or proprietary rights belonging to Patricia Anderson-Scott, for the benefit of David Barton, Lucinda Barton and/or their businesses, to which David Barton, Lucinda Barton and/or their businesses were not entitled.
> Voluntary Particulars
> (i) placing David Barton in a position of influence over Patricia Anderson-Scott's personal, legal and financial affairs;
> (ii) taking money and/or credit balances and/or cheques from Patricia Anderson-Scott in excess of any sums legitimately owed by her for care or associated services;
> (iii) receiving money and/or credit balances and/or cheques from Patricia Anderson-Scott in excess of any sums legitimately owed by her for care or associated services;
> (iv) selling a Rolls Royce motor vehicle registration 3RR to Patricia Anderson-Scott at a price far exceeding its value;
> (v) obtaining money from Patricia Anderson-Scott to settle payment for finance on Rolls Royce motor vehicle registration 3RR;
> (vi) taking furniture that was the property of Patricia Anderson-Scott."

48. Unsurprisingly, the Court at [124] held that the defendants would have been able readily to identify the case they had to meet.

Discussion and resolution

49. It is plain that there is a tension between some of the observations in the authorities that we have summarised above. Specifically, there are dicta that support the applicants' submission that it is inadequate to allege in an indictment simply that there is a conspiracy to defraud, even though the reference to defrauding carries the clear implication of dishonesty. The nub of the argument as advanced by the applicants is that it was necessary for the prosecution to set out in the indictment and to prove an agreement that went beyond the assertion of an agreement to defraud so that one or more of the means of carrying out that agreement (e.g. the use of misrepresentations or the devising and carrying on of a scheme that would not generate the stated returns for investors) should be regarded as an essential element of the offence, proof of which to the Jury's satisfaction was accordingly required. In advancing this submission the applicants understandably rely heavily upon [36] of *R v K*, and Thomas LJ's formulation of the essential elements of the offence in that case; and upon the observation by Hickinbottom J in *R v Evans* (subsequently approved and which we respectfully endorse) that the offence of conspiracy to defraud is not a "catch-all".

50. On the other hand, it is conceptually possible to have an agreement between all conspirators to defraud their victims without there being either necessarily or probably agreement between all conspirators about the means by which that agreement to defraud their victims will be carried into effect. Self-evidently, developing the means by which the fraud is carried into effect may post-date the essential agreement between the conspirators that they intend to defraud their victims. We do not consider it to be accidental that Lord Lane LCJ characterised what would have been the substance of a domestic criminal conspiracy to defraud in *Attorney-General's Reference (No 1 of 1982)* as being: "Had it not been for the jurisdictional problem, *we have no doubt the*

charge against these conspirators would have been conspiracy to defraud potential purchasers of the whisky, for that was the true object of the agreement." Furthermore, it formed part of the ratio in *Hancock* that "[t]he essential ingredients of the offence of conspiracy to defraud, or what the Crown had to prove to establish the *actus reus* of the offence, is that each of the accused has entered into an agreement to defraud the agents."

51. We acknowledge immediately that individual cases will be fact-sensitive such that the form of an indictment and the necessary content of the summing up should be tailored to the facts of the given case. That is important when considering the applicant's submissions on this issue in the present case. Also, in considering those submissions it is not just important but essential to bear in mind the statutory framework that we have set out above. So the questions to be asked are whether the indictment contains a statement of the specific offence with which the applicants were charged and whether sufficient particulars of the conduct constituting the commission of the offence as to make clear what the prosecutor was alleging against the applicants (alternatively described as giving reasonable information as to the nature of the charge).

52. In answering those questions in the factual circumstances of the present case, we are bound to take into account the following features:

    i) Although the means of defrauding their investors as set out in the numbered paragraphs following "by dishonestly" are numerous, the central agreement alleged is relatively straightforward – the investors in the three schemes were to be defrauded. By necessary implication this means that they were to be defrauded of their investments;

    ii) Although numbered paragraph 1 referred to "devising and carrying out a scheme" that did not mean that the offence was not committed if the prosecution was not able to prove that the schemes were fraudulent from the time of their devising any more than the reference to "between 1 August 2010 and 21 December 2015" meant that the offence was not committed if the prosecution was not able to prove that the agreement to defraud was in being on 1 August 2010;

    iii) Even without being told, it is self-evident that the indictment in the present case was based on and closely followed the model provided by *Landy* and the actual indictment upheld in *Hancock.*

53. In our judgment, there was no ambiguity in the form of the indictment in the present case. The fact that the form adopted in *Barton* may be said to be cleaner or even clearer does not suggest or establish that the form used in the present case was deficient. What is plain is that the form of the indictment in the present case is materially the same as that endorsed in *Landy* and, subsequently, in *Hancock*. Following the approach in *Hancock* it is plain that the numbered paragraphs were intended to be particulars of the means by which the conspiracy to defraud investors were to be carried out. Their purpose (and what they achieved) was to give reasonable information as to the nature of the charge, to make clear what the prosecutor was alleging against the applicants, and to stop the prosecution shifting their ground during the course of the case without the leave of the trial Judge and the making of an amendment. They served the additional purpose of identifying the acts upon which the prosecution would (and did) rely to

invite the jury to infer that there was a dishonest agreement and that a particular defendant was a party to it.

54. Not only do we consider that the meaning of the indictment is clear on its face, it is apparent that this was well understood on all sides at trial. That understanding explains why the applicants submitted in December 2021 that the allegations of forgery that the prosecution sought to introduce should not give rise to additional substantive counts but could be treated as further particulars (joining the numbered paragraphs) of overt acts manifesting and evidencing the existence of the alleged conspiracies. That submission was correct. It reflected the understanding of all concerned at trial (properly conceded by Mr Skeene's new counsel in the present appeal) that "the totality of the 12 or so particulars were not properly to be regarded as the essential elements of Counts 1 to 3". For these reasons, the Judge was also right to refuse the later defence submission that the indictment should be amended so that numbered paragraph 1 should be incorporated into the essential criminal agreement that was alleged.

55. On a fair reading of this indictment, the numbered particulars were all particulars of the means adopted by the applicants in furtherance of their conspiracy: they were not essential elements of the conspiracy that was alleged against the applicants. It was therefore not necessary for the jury to be unanimous in finding any specific numbered particular proved.

56. We therefore turn to the criticism of the Judge's legal directions and Route to Verdict.

57. The relevant part of the legal directions on this issue were as follows:

> "Each defendant is charged with three counts of conspiracy.
>
> The conspiracies alleged are conspiracies to defraud such investors as would buy beneficial interests in teak plantations in schemes known as Belem Sky, Para Sky and Para Grosso. The prosecution allege the conspiracies were effected by means of one or more of the numbered particulars in each count, which they allege were carried out dishonestly.
>
> Each defendant denies being a party to the conspiracies alleged and denies that such conspiracies existed.
>
> …
>
> To defraud or to act fraudulently is dishonestly to prejudice another's right, knowing that you have no right to do so. Prejudicing another's right includes causing economic loss or exposing another to the risk of economic loss
>
> In this case the prosecution allege the intended crime was the dishonest defrauding of investors in the teak plantations, effected by one or more of the means set out in the numbered particulars in each count. The prosecution allege that each defendant was a party to a conspiracy to commit that crime.

> The burden of proving a defendant's guilt remains throughout on the prosecution and the standard of proof the prosecution must achieve is to make you sure of the guilt of the defendant you are considering. Nothing less than that will do. If you are sure you must convict. If you are not sure you must acquit.
>
> For each of these three charges, the prosecution must prove that:
>
> 1. There was in fact an agreement to do what is set out in the particulars of the count AND
>
> 2. The defendant you are considering was a knowing and willing party to that specific agreement and at the time of agreeing he intended that the specific agreement be carried out and the crime be committed.
>
> You must consider each of the counts separately and the case of each defendant separately. The evidence is different in respect of the counts and your verdicts need not be the same. …"

58. Consistently with that direction, the Routes to Verdict said (adjusted for each of Counts 1-3 as appropriate):

> "Are you sure in respect of the defendant you are considering:
>
> (1) that there was an agreement between 1st August 2010 and 31st December 2015 to defraud such investors as would buy beneficial interests in teak plantations in a scheme known as Belem Sky by doing or representing at least one of the things set out in the numbered particulars AND
>
> (2) that the defendant you are considering joined that agreement with his co-defendant or another conspirator AND
>
> (3) that, when he did so, he intended to defraud investors by at least one of the means alleged in the numbered particulars AND
>
> (4) that he intended to prejudice the economic interests of others AND
>
> (5) that he was acting dishonestly
>
> If you answer YES to all of the above questions, the defendant you are considering is Guilty
>
> If you answer NO to any of the above questions, that defendant is Not Guilty"

59. When the Judge came to sum up orally he expanded on the distinction between the essential elements of the conspiracies alleged in counts 1-3 and the means by which they were put into effect, as follows:

> "… in each of the first three counts, Mr Skeene and Mr Bowers are charged with conspiracy, with others, to defraud such investors who would buy beneficial interests in teak plantations in three separate schemes. Those schemes being, of course, Belem Sky, Para Sky and Para Grosso.
>
> So the offence that they are charged with, ladies and gentlemen, in each of those three first counts is conspiracy to defraud investors in those teak plantations. Each of the charges then, by numbered particulars, sets out the means that each defendant was said to put into effect their criminal agreement. In other words, the means by which they were to effect their criminal conspiracy.
>
> So, if you take count one as an example, the conspiracy, or the criminal agreement, is to defraud investors, as is set out in the first three lines of the particulars. … There is the allegation of the offence in those first lines, ladies and gentlemen, of the particulars of the charge.
>
> Thereafter, in the four numbered particulars, are the dishonest means, the prosecution say, by which the defendants gave effect to their criminal agreement. So, again, glancing at count one by way of example, you will see in count one that there are four numbered particulars. …
>
> So there are the four numbered particulars in count one by which, the prosecution say, the defendants gave effect to their criminal agreement. …"

60. The Judge then went on to emphasise that the Defendants' case was that there was no conspiracy at all; and he set out the competing positions on whether or not there was a conspiracy as alleged by the prosecution.

61. The criticism that is levelled against these directions is that they failed to direct the jury that they had to be unanimous in agreeing that any one (or more) of the acts alleged in the numbered particulars was proved. It follows from our reasons as set out above that we reject that criticism because it would have had the effect of elevating the numbered particulars to be essential elements of the conspiracy to defraud. As it was, the Judge's legal direction taken as a whole adequately distinguished between the relatively simple nature of the conspiracy and the multi-faceted means by which it was alleged that the conspiracy was to be worked out (or, as the prosecution submitted, how it was to be "manifested"). The written direction provided protection for the applicants because it directed the jury that they should confine their assessment of the means by which the conspiracy was proved to have been carried out and they could not go outside the particulars in search of a case that the prosecution was not making. The particulars set out clearly and unambiguously the case that the prosecution was bringing and the applicants had to meet. That did not convert them into essential elements of the conspiracy that the prosecution set out to prove.

62. Taken on its own, paragraph (1) of the Route to Verdict could be criticised as tending to elide the essential agreement and the means. However, the Route to Verdict did not

stand on its own but was presented and was to be read in the context and with the understanding provided by the fuller legal directions, written and oral. When read in that context and with that understanding, we do not accept that there was real scope for material misunderstanding on the part of the Jury.

63. For these reasons, though we consider that the submissions of the applicants were arguable such that leave should be given, we reject ground 1 and dismiss the appeal on that ground.

Conviction – Mr Skeene's Ground 2: failure to sum up the Defence Case

64. Ground 2 is a new ground and was therefore not considered by the Single Judge. It is summarised by Mr Skeene in his Renewed Application as follows:

> "The judge did not provide the jury with any coherent summary of the defence case during the course of the summing up. The summing up went no further than to remind the jury that the Applicant denied being party to any criminal conspiracy. Thereafter, the judge repeated the fact of that denial, and referred to the fact that the jury had heard argument from counsel about various issues. At no stage during the summing up did the judge give the jury any reminder or summary of what the defence case was on the issues which they were required to determine. Given the way in which the factual basis of the agreement was left to the jury, almost all factual issues went directly to an element of the offence, and a careful reminder of the defence case on each was required."

These submissions were amplified in writing but barely developed in oral submissions.

65. At the outset a distinction needs to be made between the central allegation of conspiracy (which, as we have said, was relatively straightforward) and the more detailed evidence that was relied upon to show how the fraud was implemented. It is also to be remembered that (a) large swathes of the prosecution's evidence was either agreed or, at best for the applicants, not contradicted and (b) having given no comment interviews, and not provided a prepared statement, neither applicant chose to give evidence. None of that reduces the need for a defendant's case to be fairly summed up to the jury, though it inevitably imposes limitations on what the Judge can and should say in the absence of evidence to support assertions that may have been made on a defendant's behalf without the benefit of supporting evidence.

66. We are satisfied that there is no substance in this proposed ground of appeal. We have read the summing up and checked the references provided by each side on this ground. What follows is a very brief and partial summary. At the outset of the summing up the Judge concisely but clearly identified for the Jury the central issue in the case, expanding on the foundations laid by the written legal directions. Throughout the summing up he was consistently astute to refer to relevant evidence whether supportive of the prosecution's case or that of the defendants. He dealt in suitable detail with the central planks of the applicants' defence, including the projected commercial viability of the scheme, the engaging of a reputable trustee and employment of professional staff, the suggestion that the applicants were not aware of representations made by others,

and the suggested reasons for delays in making payments to investors. He provided a suitable summary of evidence given in cross-examination of prosecution witnesses. On numerous occasions he referred to issues arising from particular strands or pieces of evidence. When asked to do so by the defence he summarised agreed evidence. When directing the jury (fully and correctly) about the applicant's decision not to give evidence, he reminded the jury of their explanation that "everything had been laid bare" in the detailed evidence adduced by the prosecution and their submission that the jury should not draw any adverse inference from their decision. He summed up the evidence of the expert called on behalf of the defence fully and fairly.

67. No criticism is made of the legal directions other than those we have rejected under Ground 1. In our judgment, and viewed overall, the summing up was full and fair and in a number of respects could be considered generous in putting forward matters for the jury's consideration that were possibly favourable to the applicants' case. It is plain from the transcript of the summing up that the Judge on three occasions was asked to amplify, correct or clarify points that he had covered and that he did so. We are told and accept that the Judge invited counsel to raise matters that should be incorporated and which they thought he had omitted. It is to be noted that neither of the very experienced counsel teams for the applicants at trial requested the Judge to make material additions to his summing up; nor did they submit at the time that he had failed to sum up important issues as they surely should and would have done if, as now alleged, there were gaping holes in his summary.

68. The case against the applicants was very powerful, based on the evidence that was not either challenged or explained. We have provided a broad outline of the heads of evidence upon which the prosecution relied. It is not necessary to provide further detail for the purposes of this renewed/new application. We accept the submission of the Crown on this application that the Judge presented the evidence even-handedly: the applicants do not submit otherwise.

69. We have set out above the absolutist summary of the applicants' case on this ground. We have no hesitation in rejecting that absolutist approach. The applicants have not identified areas of evidence that were inadequately summed up (as opposed to not being summed up at all, as the applicants allege). In our judgment there is no sound basis for giving permission for this ground. Permission is refused.

Skeene Ground 3 – the lack of a dishonesty direction.

70. This is a new ground that was not considered by the Single Judge. It is summarised by Mr Skeene in his varied application as follows:

> "The jury were not given any direction on dishonesty. Generally, any assessment of dishonesty must begin with a close analysis of defendant's [sic] state of mind as to the relevant facts (Barton). Here, the range of potentially relevant facts was very broad and encompassed conduct which might have formed part of the agreement (which must be entered into dishonestly) and incidental misconduct thereafter. The jury were given no guidance as to how to approach the two, and no specific direction as to the need for unanimity that the defendant entered that

> agreement dishonestly, as opposed to simply having acted dishonestly at some stage thereafter."

71. We have set out the terms of the written legal directions and the Route to Verdict above. The need to prove dishonesty was clearly stated, as it was in the oral summing up. The detailed criticism that is made is that the Judge should have given a full direction on how to approach the question of dishonesty, adopting the test set out in *Barton* [2020] EWCA Cr App R 7.

72. Before the approach to dishonesty based on *R v Ghosh* [1982] QB 1053 was superseded in *Ivey v Genting Casinos (UK) (trading as Crockfords Club)* [2017] UKSC 67, [2018] AC 391, it was rare for a full direction on the approach to the question of a defendant's dishonesty to be given. On one influential view, a full *Ghosh* direction "only needed to be given in those rarest of cases where the defendant's defence was that he did not realise that others would see his conduct as dishonest": see Ormerod and Laird, *Ivery v Genting Casinos – Much Ado About Nothing*, (2018) UK Supreme Court Yearbook Vol. 9, 382-403, 386. At least in the context of offences of conspiracy to defraud, that represented the general experience of the Court; and it was not contradicted by applicants. Nothing in the reassessment represented by *Ivey* requires or implies that a full direction should be given either commonly or routinely in cases of conspiracy to defraud.

73. Although it was the applicants' case at trial that there was no dishonest conspiracy to defraud investors, it was not their case that (for example) the forging of a document should not be treated as dishonest because of some feature of the approach to dishonesty as set out in *Ivey* or *Barton*. Here, no evidence was given about the applicants' state of mind; and the issue was not raised by the defendants at any stage before being formulated by those now acting for Mr Skeene as a new ground after refusal of permission by the Single Judge.

74. We are not remotely persuaded that an *Ivey/Barton* direction even arguably needed to be given on the facts of this case. Although not determinative we are encouraged in our view by the fact that neither the extremely experienced and highly competent team who represented Mr Bowers at trial and on these applications nor the similarly experienced and highly competent teams who represented Mr Skeene below and who represent him now considered that the issue needed to be raised until after refusal by the Single Judge.

75. Nor, in our judgment is there any substance in the complaint that the jury "ought to have been directed that they had to consider the issue of dishonesty by reference to the specific agreement of which they were (individually) sure". The written directions that the Judge gave, which we have set out above, were clear in identifying the role of dishonesty in the offence; and the Route to Verdict, which we have also set out above, by its successive use of the word "and" made clear that the question whether the defendant was acting dishonestly was to be asked by reference to the agreement that the jury found by applying his directions, i.e. the essential agreement as we have discussed above.

76. For these reasons, Ground 3 is unarguable. Permission is refused.

Conviction – the evidence of Mr Phillips

77. Mr Phillips was a prosecution witness who had qualifications and experience in forestry. In March 2014 he had travelled to Brazil to carry out a survey of the Belem Sky and Para Sky plantations. The survey took about two weeks to carry out.

78. In April 2017 the prosecution served a witness statement from Mr Phillips which included the standard section 9 declaration of truth for a lay witness. About a month before the trial was due to start, at the end of January 2022, the prosecution served a witness statement from Mr Phillips which included a form of expert's declaration.

79. At the start of the trial, on 21 February 2022, the Judge heard an application by the defence to exclude Mr Phillips' evidence on the basis (broadly) that his evidence included opinion evidence that should not be admissible except from a suitably independent and impartial expert witness and that Mr Phillips was neither suitably independent nor impartial.

80. There is a limited transcript of the Judge's remarks, the thrust of which was that Mr Phillips had not been instructed as an expert from the outset and that the role of an expert was materially different from that of a consultant to a particular party. According to the transcript "he is a factual part of the history of this case. That is his status and he cannot be converted into an expert retrospectively to comply with the rule that permits an expert to give opinion evidence".

81. According to the applicant's note, the Judge went on to say that "he can however … be a factual witness who can give evidence of his actual observations, his own personal observations as part of his role instructed as a consultant, simply giving evidence of fact as part of his role in the case. … To spell it out, there can be no consequential expert opinions."

82. It is evident that differences remained between the prosecution and the defence about what evidence Mr Phillips could properly give in the light of the Judge's ruling. There was therefore a further hearing on 21 March 2022 where Mr Jafferjee QC went through the evidence and the Judge ruled on whether particular passages were to be admitted or not. The Judge's touchstone was clearly identified. According to a partial note prepared by the prosecution, the Judge said, evidently harking back to his earlier ruling:

> "This is so simple, he is entitled to say what he saw, for example, whether or not there were fire breaks, if there were, if not so be it. In that, because he is a consultant, he is obviously entitled to say what a firebreak it. That is not him becoming a retrospective expert witness. … He is entitled to say that as he looked at the plantation, whether or not there was evidence of active management. Perfectly admissible as part of his observations, and so if that appears again, my ruling is that he may say that from what he saw and observed, no evidence of active management, if that is in fact what he observed."

83. Mr Bowers renews his application for leave to appeal on the basis that evidence about the extent to which the plantations were properly managed "whether by thinning, pruning, demarcation, weeding, maintenance of fire breaks or otherwise", which the Judge allowed Mr Phillips to give as evidence of what he saw, all "involved both expert knowledge of the professional standards to be expected in plantation management and

[his] expert opinion as to whether those standards had been met." Accordingly it was evidence that should not have been adduced other than from an expert.

84. In refusing leave the Single Judge recognised that the line is not always clear between (a) expert evidence and (b) evidence that a person can give from their own observations because they have training that enables them to recognise features that a person who has no experience of forests would not recognise. But he held that it was not arguable that the Judge was not entitled to draw the line as he did. In any event, the Single Judge took the view that there was copious other evidence (as set out in the Respondent's Notice) which went to the same issue. Accordingly, even if errors were made in relation to Mr Phillips, the convictions were not rendered unsafe as a result.

85. We agree entirely with the Single Judge. In our judgment the Judge was undoubtedly right to place the dividing line where he did and to apply the touchstone that we have identified above. The fact that one or more members of the jury may not have the experience that would allow them to recognise (for example) a firebreak does not begin to justify a submission that direct evidence of what Mr Phillips saw (i.e. the presence or absence of a firebreak) was somehow converted into opinion evidence. We note that the renewed application is left at an entirely general level, with no attempt to identify particular passages of evidence that are said to stray over the line. In the absence of any attempt to justify the criticism by reference to the actual evidence that Mr Phillips gave, the applicant's submission must rest on the overarching proposition that his identified touchstone was wrong. It was not.

86. We do not have a transcript of Mr Phillips' evidence. We do, however, have the Judge's thorough summing up of what he said: see pages 108H to 118A. Nowhere, in our judgment, does that summary indicate that Mr Phillips had been allowed to stray from the permissible path of an experienced forester into the tangled thickets of expert evidence.

87. This renewed ground is unarguable. Leave is refused.

Conviction – conclusion

88. On Ground 1 we give leave but dismiss the appeal. On grounds 2 and 3 and the ground based upon Mr Phillips' evidence we refuse leave. The renewed applications on those grounds are therefore dismissed. The other grounds on which leave to appeal was refused by the Single Judge were not renewed by the applicants. For completeness, we have also reviewed those grounds too. We agree with and endorse the decision of the Single Judge to refuse leave for the reasons he gave.

Sentence – Mr Skeene and Mr Bowers

89. We have set out the sentences imposed by the Judge on each applicant at [2] above. The sole ground of a proposed appeal against sentence for each applicant is that the Judge failed to have any or any sufficient regard to the value of teak trees on land purchased by the applicants in Brazil as a mitigating factor. There is otherwise no complaint about the approach adopted by the Judge or the sentences he imposed: nor could there be.

90. The Judge outlined the nature of the frauds and the determined efforts of the applicants to prolong the frauds and gain more investors' money and avoid detection. He concluded that "having heard the evidence in this case over many, many weeks, [he had] no doubt that [the] schemes were fraudulent from mid-2012 at the latest." It will immediately be remembered that the Belem Sky Scheme operated from September 2010 to March 2013 and netted over £23 million from investors; the Para Sky Scheme operated from July 2012 to January 2013 and netted over £3.8 million from investors; and the Para Grosso Scheme operated from December 2012 to April 2015 and netted just under £9.5 million from investors; and the total taken from investors was some £37 million. On the Judge's finding, which he was clearly entitled to make, it follows that the Para Sky Scheme was fraudulent either from the outset or immediately thereafter; and that the Para Grosso Scheme was fraudulent from the outset.

91. The Judge found that the applicants' culpability was high, for multiple reasons. Turning to harm, he said:

> "In terms of harm, which I must consider pursuant to the guideline, your case is plainly a Category 1 case as the actual loss to investors over the three schemes was in the region of £35 million. I do not accept that that figure, that loss, can be mitigated to any really significant degree by the value of any trees that may be on the land seven years after the end of the frauds when there has been no effective management of the plantations at all. And I do not accept that any sale of the land by the liquidator will produce significant funds to investors, bearing in mind there are disputes about title certainly in respect of some of the Para Sky land and there are labour law suits in respect of some of the land that was purchased. Of course for the Para Grosso scheme no land was purchased at all."

92. The Judge correctly identified that for a high culpability Category 1 case the starting point for a million pound fraud was 7 years with a range of 5-8 years. He referred to the fact that the Para Grosso Scheme continued to be operated and netted some £10 million after they had been made bankrupt and their company put into liquidation, which he regarded as relevant to totality. He then identified as aggravating features (a) their taking steps to prolong the fraud and prevent detection and (b) the fact that they continued to operate after their company had been put into liquidation and they had been made bankrupt, which he regarded as "significant warnings" after which they had reinvented themselves dishonestly and continued to take investors' money. As mitigation he identified their previous good character and the entering into a settlement of approximately £6 million, which was about 1/5 of the sums lost by investors and of which only a relatively small proportion was ever paid.

93. In the light of these features, the judge concluded that the correct sentence on each of Counts 1-3 individually would be 8 years; but he also concluded that passing concurrent sentences would not adequately reflect the level of criminality represented by the three counts viewed overall. Hence the reduced sentence of 3 years on Count 3 that was ordered to run consecutively. Finally, he imposed the sentence of 1 year on Count 4 which he made concurrent on the basis of totality, despite recognising "a very strong argument" that it should be consecutive.

94. By their applications for leave to appeal, the applicants recognise that the sentences imposed would be unimpeachable but for their arguments about the value of teak trees on the land that the applicants had purchased. They submit that trees to the value of tens of millions of pounds remain available for the benefit of investors who bought plots of land and that this value should be taken into account and lead to a reduction in the overall sentence of 11 years that the Judge imposed. They blame the liquidator for not realising that value, it being common ground that no effective steps have yet been taken to realise any significant funds. On this basis they submit that the sentences imposed by the judge were manifestly excessive.

95. There is no merit in this application for permission to appeal sentence. While we accept that some evidence was given at trial that trees on the plantations may have had value, there is no sound evidence to suggest that that value is or will be available to investors. To the contrary, the experience thus far (including the applicants' criticisms of the ineffectiveness of any attempts by the liquidator to realise value) strongly suggests that there is no ground for any optimism that substantial sums will be forthcoming in future.

96. Even if we were to indulge in the speculation that some value might become available in the future, there is no basis for any reliable estimate of how much may be forthcoming or when. We remind ourselves that each of Counts 1 to 3 involved investors being defrauded of sums that were orders of magnitude higher than the indicative £1 million that would justify a starting point of 7 years with a category range of 5-8 years. There is no basis for even the wildest speculation that there might be recovery that could reduce the sums lost (let alone the sums put at risk of loss) to anything near £1 million on any of the counts. So, on any view (including making the wildest assumptions), the Judge would have had to sentence the applicants for 3 very serious offences with a starting point of 7 years per offence and the very serious aggravating features to which the Judge referred. In addition, the Judge was right to say that there was a very strong argument that the sentence of 1 year on Count 4 should be made consecutive. That argument weighs in the balance despite the fact that the Judge decided to make that sentence concurrent.

97. In our judgment, there is no properly conceivable outcome (however speculative) that could justify a conclusion that an aggregate sentence of 11 years was manifestly excessive. The Judge made no error of principle and reached an aggregate sentence that was well within the range of what he could properly have ordered. The Single Judge was right to refuse permission, which he refused for essentially the same reasons that we have just given.

Sentence - conclusion

98. These renewed applications to appeal against sentence are refused.