



Neutral Citation Number: [2023] EWCA Crim 1463

Case No: 202202665 B1& 202203146 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
HIS HONOUR JUDGE HEHIR
T20170213

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 15 December 2023

Before :

THE LADY CARR OF WALTON-ON-THE-HILL
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE BRYAN
and
MR JUSTICE HILLIARD

Between :

DAVID AMES

Appellant

- and -

REX
(Serious Fraud Office)

Respondent

Neil Hawes KC, David Miller and David Claxton
(instructed by Blackfords LLP) for the Appellant
Andrew Wheeler KC and Benjamin Isaacs
(instructed by The Serious Fraud Office) for the Respondent

Hearing date: 29 November 2023

Approved Judgment

This judgment was handed down at 10am on Friday 15 December 2023 in Court 4, and circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Carr of Walton-on-the-Hill, LCJ:

A. Introduction

1. On 3 August 2022 in the Crown Court at Southwark (before HHJ Hehir (the Judge) and a jury) the appellant was convicted unanimously of two counts of fraud by abuse of position (counts 1 and 3). Count 2, an alternative count of fraud to count 1, was ordered to lie on file.
2. On 30 September 2022 the appellant was sentenced by the Judge to 9 years' imprisonment on count 1, and 3 years' imprisonment on count 3, to run consecutively, making a total sentence of 12 years' imprisonment. The appellant was also disqualified from acting as a director for a period of 15 years pursuant to section 2 of the Company Directors Disqualification Act 1986.
3. This is his appeal against conviction and sentence by leave of the full court. On granting leave to appeal against conviction the full court stated that:

“The question that arises on this application may be expressed quite shortly: what is the necessary ingredient or ingredients of an offence under section 4(1) of the Fraud Act [2006] that one finds in section 4(1)(c)?”

4. Section 4 of the Fraud Act 2006 (section 4) provides as follows:-

“4 Fraud by abuse of position

(1) A person is in breach of this section if he—

(a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,

(b) dishonestly abuses that position, and

(c) intends, by means of the abuse of that position—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.”

5. The appellant's position is that subsections 4(1)(c)(i) and 4(1)(c)(ii) each constitutes a separate legal ingredient of the offence; where more than one intent is alleged, the jury must be directed that they need to be unanimous on at least one intention before finding the defendant guilty (a *Brown* direction, named after the decision in *R v Brown* (1984) 79 Cr App R 115 (*Brown*)). It is said that in failing to give such a direction, the Judge materially misdirected the jury.

6. The respondent's position is that a defendant's intention for the purpose of section 4(1)(c) is properly to be regarded as a single overarching ingredient of a section 4 offence. Subsections 4(1)(c)(i) and 4(1)(c)(ii) set out the different ways in which the essential element of intent is made out. There was no misdirection by the Judge.
7. The grounds of appeal against sentence are that the sentence passed was manifestly excessive in that it was i) too long and the result of an impermissible and deliberate decision to use consecutive sentences to evade the statutory maximum; and/or ii) there was no or no sufficient reduction for the fact that the scheme was not fraudulent at the outset; and/or iii) there was no or no sufficient reduction for delay; and/or iv) there was no or no sufficient reduction in the overall sentence to reflect the appellant's age and poor physical and mental health.

B. Background Facts in summary

8. The appellant controlled a company called Harlequin Management Services (South East) Ltd ("HMSSE"). HMSSE was a UK company, incorporated on 25 April 2001. The appellant controlled HMSSE; he was a shadow director, the primary authority and decision-maker in the affairs of the company. He was also the sole director of a number of offshore companies. Together these companies formed the Harlequin Group.
9. HMSSE went into administration in May 2013, and subsequently into liquidation. From the start of trading in 2005 until its liquidation, HMSSE sold in excess of 9,000 "properties" off-plan to investors who made in excess of 8,200 deposits. The properties in question were located principally in the Caribbean. The total sale price was £1.4bn.
10. HMSSE primarily marketed the resorts to UK Independent Financial Advisors ("IFAs") and Self Invested Personal Pension ("SIPP") providers (collectively referred to as "Agents") who in turn attracted potential UK investors/ purchasers. The resorts were owned by offshore companies collectively known as the Resort Development Companies ("RDCs"). The RDCs were controlled and beneficially owned by the appellant, who was sole director and shareholder.
11. The Harlequin Business Model operated as follows:
 - i) The transaction started either with an introduction of an investor by an external sales agent such as an IFA, or by direct telephone contact from the investor to Harlequin;
 - ii) Investors reserved a property by paying a deposit of £1,000 into a Barclays UK bank account controlled by HMSSE (the client account);
 - iii) If the investor wished to continue with the purchase, they would sign a purchase agreement with the RDCs, and pay into the HMSSE client account a sum equal to 30% of the purchase price of the property (including the £1,000 already paid);
 - iv) Under the terms of its agreement with the RDCs, HMSSE was entitled to approximately 15% (14.2%) of the overall purchase price of the property i.e. nearly half of the sum paid by the investor at that stage. Such sum was withdrawn from the client account, and used to pay commission to the agents

(typically 9-10% of the purchase price), leaving 5% to represent HMSSE's costs and profit;

- v) The remaining 15.8% was then either transferred to the RDC, or used to make payments to suppliers on the RDC's behalf;
 - vi) The investors' funds were not ring fenced at any stage, and thus HMSSE used deposits received in relation to one resort to pay RDCs or suppliers involved in the construction/development of another resort;
 - vii) The RDCs also agreed to meet the finance obligations of those investors who took out mortgages or loans to fund the 30% payment. This was part of the inducement for entering into the contracts, and it was intended that these sums were to be added to the final purchase price. The effect of such a commitment was to add £900,000 per month to the outlay of the RDCs. By November 2012, in excess of £38 million was paid out to investors in this way - representing nearly 3% of the £1.4 billion of total purchase prices;
 - viii) The contracts between the RDCs and the investors required the investors to pay the remaining 70% of the purchase price in stages - determined by the build and stage of completion of the property. Such payments could, however, be deferred to the completion of the unit, subject to an interest charge on those sums deferred; "Deferred Stage Payments" and the "100% finance scheme";
 - ix) It was stated by HMSSE that the monies required to be paid upon completion could be raised by the investor by means of a mortgage. The purchase price was deemed by HMSSE to be below market value, so that an advance of 70% loan against market value would be ample funds to pay the completion funds due and to also pay off any loans obtained regarding the original 30% deposit;
 - x) It was intended (and sold on the basis) that in return for their financial investment, investors would receive: a freehold property (which was up to 50% below market value), 30 days personal use, 10% rental guarantee per annum for the first two years, and then 50:50 net room share thereafter. The owner was required to allow the property to be used by the hotel for a period of 25 years. The investors generally comprised individuals or joint investors, and many investments were made through SIPPs.
12. Under the Harlequin Business Model and the structuring of the staged payments by investors, HMSSE received approximately £398m from investors (net of refunds and resale proceeds). Despite the size of the total stage payments made by the investors, only approximately 200 properties in one project in St Vincent were ever constructed, representing less than 2% of the total contracted to be built. During the same period, alleged the respondent, the appellant made a profit for himself and his immediate family by taking £6.2 million from those investor monies.
13. The respondent's case was that the appellant induced investors to enter into contracts for the purchase of these off-plan properties when the true state of affairs in relation to those properties was such as to expose those investors to loss or a risk of loss.

14. The three counts on the indictment related to differing points along the trading timeline, commencing in 2010. It was not alleged that the operation was fraudulent from the outset. Rather, count 1 alleged that the appellant's conduct in relation to HMSSE was fraudulent from 2010 onwards (by which time the lack of external funding had become obvious and it was discovered that HMSSE had itself been the victim of fraud) with an alleged loss to investors of approximately £196 million. Count 2 alleged an alternative time frame, namely that the appellant's conduct became fraudulent from February 2011 onwards, with an alleged loss to investors of approximately £112 million. Count 3 alleged dishonesty relating to a successor company to HMSSE, namely Harlequin Hotels and Resorts (Cayman) Ltd ("HHR"). This was from the middle of 2012 onwards, with an alleged additional loss to investors of approximately £30 million.
15. The respondent's case was that the Harlequin Business Model, even if theoretically possible, was wholly flawed in its operation. Throughout the entire process the appellant failed to exercise any proper business controls, which substantially increased the risk of loss to investors and the Harlequin Business Model exposed investors both to the risk of loss and substantial actual loss.
16. It was also alleged that the appellant provably lied to investors from the outset about a number of matters which were central to the viability of the Harlequin Business Model, including:
 - i) The availability of mortgages, which he represented were "guaranteed";
 - ii) The "ring-fencing" of funds allocated to each resort;
 - iii) The availability of external development funding; and
 - iv) His ownership of the land on which the proposed resorts were to be developed.
17. In addition, it was said that the appellant lied to his investors regarding his allegedly successful business background. In reality, he had twice been made bankrupt previously. Additionally, he was said to have ignored repeatedly advice given to him (regarding the level of risk/difficulties with the Harlequin Business Model) from a series of professionals throughout the timeline of the trading of the Harlequin enterprise, both before and during the indictment period.
18. The appellant was interviewed under caution on two occasions, initially in 2013, and then subsequently in December 2015. He denied that he had in any way acted dishonestly and stated that he had continued to promote the Harlequin business model as a viable enterprise in which he believed. He maintained that he had always put the interests of his investors first.
19. He also maintained that he had relied throughout upon advice provided to him by the professionals that he employed, and that he had been let down by a number of such persons, most notably Martin MacDonald of Wilkins Kennedy (an accountancy firm). He alleged that they had failed not only to protect the business in financial and other terms, but had actively allowed or encouraged another man called Pdraig O'Halloran to misappropriate company funds for his own purposes.

20. The appellant did not give evidence or call any evidence in his defence, save for playing a 3 minute promotional video in respect of Buccament Bay, the only development on which building commenced.

C. Legal Directions

21. In his legal directions the Judge directed the jury, amongst other things, as follows:

“In order to find DA Guilty of any of the three indictment counts, you must be sure of five matters:

(i) That DA, as a person who was controlling Harlequin Management Services South East Limited [HMSSE] (counts 1 & 2) or Harlequin Hotels and Resorts (Cayman) Ltd [HHR], (count 3), occupied a position within that company where he was expected to safeguard, or not to act against, the interests of Harlequin investors, in other words those persons who paid money to HMSSE or HHR for the purchase of overseas properties: and

(ii) That at any point during the time period covered by the count you are considering, DA abused his position within the relevant company by continuing to accept monies from Harlequin investors in respect of overseas properties, when he knew or believed that the true state of affairs in relation to those properties was such as to expose those investors to loss or a risk of loss: and

(iii) That continuing to accept monies from Harlequin investors in those circumstances did expose those investors to loss or a risk of loss: and

(iv) That by continuing to accept monies from Harlequin investors in those circumstances, DA acted dishonestly by the standards of ordinary decent people: and

(v) That DA intended by continuing to accept monies from Harlequin investors **to make a gain for himself and / or members of his family, and / or to cause loss to those investors or expose them to a risk that they would lose some or all of the monies they were paying.**

It is only if you are sure of all five of matters (i)-(v) above that you will find DA Guilty of the particular indictment count you are considering. If you are not sure of any one or more of these five matters, you will find him Not Guilty of that count.”

(underlining in original, emphasis added)

D. Verdict and Sentencing Remarks

22. The jury returned guilty verdicts on counts 1 and 3. In his sentencing remarks the Judge noted that these verdicts showed that the prosecution case had been made out to its full extent in terms of the duration (January 2010 to June 2015). He said that the appellant had transacted his business through a bewildering array of (some 16) companies, deliberately opaquely, with a view to concealing the true nature and extent of his operations, and with a view to saving his own skin in terms of financial liability.
23. The Judge identified the biggest flaw in the Harlequin Business Model as the total absence of external funding. There were also real issues with land ownership. Whilst care had been taken to ensure that the term was not used before the jury, the plain truth was that by January 2010 the appellant was operating a gigantic “Ponzi” scheme.
24. The Judge found that the losses suffered by investors during the indictment period could not have been less than £196 million during the count 1 period, and £30 million during the count 3 period.
25. The result was that the losses caused by the appellant’s fraudulent activity were far in excess of the levels generally encountered even in serious fraud cases, as illustrated by the definitive Sentencing Council Guideline for Fraud Offences. The highest category of harm (category 1) was based on losses of £500,000 or more, with a starting point of £1 million. This was also category A offending in terms of culpability. The appellant’s offending had been protracted, sophisticated, and claimed a large number of victims.
26. Aggravating features were identified as follows: the appellant had ignored repeated warnings from others that his business model was seriously flawed and doomed to failure without radical revision; he had ignored the advice of others; and sought to blame others.
27. In terms of mitigation, the Judge bore in mind that the appellant was 70 years of age and the contents of medical reports from his GP and a psychiatrist. The appellant was of previous good character, although this had to be set against the scale of the appellant’s offending. There had been a number of unusual and exceptional delays in bringing the case to trial, although the fundamental reason for the overall delay was the appellant’s continued denial of guilt. The Judge took into account that the Harlequin business operation was not to be treated as fraudulent from the outset. He also bore in mind the various character references he had received. He did not consider that the activities of Martin MacDonald or Pdraig O’Halloran provided any mitigation.
28. Given the scale of losses, the Judge stated that he needed to consider whether it was necessary for him to impose consecutive sentences so as to arrive at a total sentence higher than the statutory maximum for a single offence of fraud. After referring to the competing submissions, and making express reference to the overarching Sentencing Council Guideline on Totality, the Judge concluded that the extent of the losses caused by the appellant’s criminality was so great that a total sentence in excess of the statutory maximum was called for.
29. The Judge went on to pass a sentence of 9 years’ imprisonment on count 1, and a consecutive sentence of 3 years’ imprisonment on count 2.
30. He also disqualified the appellant from acting as a company director for the maximum period of fifteen years, identifying that the appellant was a thrice-bankrupt fraudster,

who had caused losses of over £200 million by his fraudulent conduct, and was a menace to anybody unfortunate enough to do business with him.

E. Section 4 of the Fraud Act 2006

E.1 The issue

31. As set out above, the appeal raises the question of what is/are the necessary ingredient/s of an offence under section 4(1) so far as the question of intent in section 4(1)(c) is concerned.

E.2 The terms of sections 4 and 5

32. For ease of reference we repeat section 4:

“4 Fraud by abuse of position

(1) A person is in breach of this section if he—

(a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,

(b) dishonestly abuses that position, and

(c) intends, by means of the abuse of that position—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.”

33. Section 5 of the Fraud Act 2006 goes on to define “gain” and “loss” as follows:

“5 “Gain” and “loss”

(1) The references to gain and loss in sections 2 to 4 are to be read in accordance with this section.

(2) “Gain” and “loss”—

(a) extend only to gain or loss in money or other property;

(b) include any such gain or loss whether temporary or permanent;

and “property” means any property whether real or personal (including things in action and other intangible property).

(3) “Gain” includes a gain by keeping what one has, as well as a gain by getting what one does not have.

(4) “Loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has.”

E.3 The parties’ respective submissions

34. The appellant’s position is that subsections 4(1)(c)(i) and 4(1)(c)(ii) are each a separate identifiable legal element of the offence and that where more than one intent is pleaded the jury must be directed that they need to be unanimous on at least one of the intentions before conviction, i.e. a *Brown* direction, and that the Judge misdirected the jury as to the ingredients of the offence.
35. The submission is said to give rise to the following questions:-
- (1) Does each intention listed in subsections 4(1)(c)(i) and (ii) of the Fraud Act 2006 form part of the “*essential ingredient(s)*” of the offence which, where more than one intention is alleged in a count, it would require a *Brown* direction to be given to the jury requiring them to be unanimous about at least one of those intentions before they could convict (assuming all other ingredients of the offence were proved)? The appellant says that it does.
 - (2) Did the Judge materially misdirect the jury on subsections 4(1)(c)(i) and (ii) by stating that the jury could consider the four intentions disjunctively **and** cumulatively, where the direction put the word ‘**and/or**’ between each intention, where (a) the word ‘**and**’ is not found in the Act, (b) it was not pleaded in the particulars of the offences and, (c) by reason of its use in the direction, no *Brown* direction could be sought or was given? The appellant says that the Judge did.
 - (3) And alternatively, was it sufficient for the jury to be directed that the necessary intent for the offence is capable of being fulfilled by any one or more than one of those intentions in the sub-sections, such that a *Brown* direction on unanimity about *which* intent was present was not necessary? The appellant says that it was not.
36. We record that the appellant also sought to argue that, even if the appeal failed on the issue of interpretation of section 4(1)(c), the Judge nevertheless misdirected the jury by adding in the word “and” in his directions when such word does not appear in section 4(1)(c). In oral submission, the point was all but abandoned by Mr Hawes KC, who fairly acknowledged that the use of the word “and” may in fact have been helpful to the appellant on the facts of the case. We are satisfied that there was no material misdirection by the Judge in this regard and say no more about it.
37. The respondent’s position is that a defendant’s intention to make a gain for himself or another or cause loss to another or expose another to a risk of loss is properly to be regarded as one overarching ingredient of the section 4 offence, rather than two separate ingredients (or indeed four separate ingredients). It is submitted that that conclusion is supported by the statutory drafting. The essential ingredients of the offence are sections 4(1)(a), 4(1)(b) and 4(1)(c). Subsections 4(1)(c)(i) and 4(1)(c)(ii) constitute different ways in which the essential element (c) may be proven. In other words, they are the

mechanisms through which the jury may be satisfied of the ingredient of section 4(1)(c). They are not separate ingredients.

38. Ultimately the issue is an issue of statutory interpretation. Before embarking on that exercise, however, it is convenient first to identify the principles in *Brown*, as addressed and developed in subsequent authorities.

E.4 *Brown* and subsequent authorities

39. *Brown* (at [119]) is authority for the proposition that the jury must agree on every ingredient of the offence for it to be proved. Equally the jury must be directed that they need to be agreed on each ingredient of the offence.
40. The authorities following *Brown* have established a clear distinction to be drawn between a matter which is i) an ingredient of the offence and ii) a merely evidential – or ancillary – issue. It is common ground that on the latter there is no need for jury unanimity (or a *Brown* direction).
41. This key difference is illustrated in subsequent cases, including the following:

- i) *R v Smith (Owen)* [2014] EWCA Crim 2163; [2015] 1 W.L.R. 937 (an offence of possession of a firearm with intent to endanger life). The essential ingredient of the offence under section 16 of the Firearms Act 1968 was an intent to endanger life, not the manner in which life would be endangered, (whether directly by the defendant or by another). At [35] and [36] Davis LJ stated:

“35....while accepting that the defendant’s state of mind as possessor is critical, we consider it to be entirely an ancillary matter as to whether the possessing with intent involved the defendant intending himself to endanger life, or whether the possessing with intent involved the defendant intending to enable another to endanger life. There are not two separate offences under section 16 appropriately charged as two different counts. There is in substance one offence, albeit capable of being satisfied on two different scenarios: the central unifying factor for each limb being possession with intent that life be endangered.

36. The gravamen of the section...is possession of a firearm with intent to endanger life. By whom the life is to be endangered...is thus in practical terms a matter extending to the mechanism which might be involved in life being endangered...this is not a “relevant difference.””;

- ii) *R v Dunleavy* [2021] EWCA Crim 39 (see in particular at [53] to [62]). There Fulford LJ held (at [57]) that the “essence” of the crime under section 5(1) of the Terrorism Act 2006 was an intention that an act of terrorism would be committed and the defendant engaged in conduct in preparation for carrying out that intention. The particular means or mechanism by which the offence was committed was an ancillary issue in respect of which the jury did not need to be unanimous. Such an approach caused no prejudice to the applicant, whose

defence to the count was the same under either relevant scenario. The position in *Dunleavy* was to be contrasted with the position in *R v Leslie Joseph Carr*; [2000] 2 CR App R 149, where the absence of a *Brown* direction was fatal to the safety of the conviction. In that case, whether the fatal blow was a kick (to which the appellant's defence was identification) or a punch (to which the appellant's defence was self-defence) mattered: the jury needed to be directed that it needed to reach a unanimous decision on the basis of conviction;

- iii) *R v Philips* [2019] EWCA Crim 577 (see in particular [69] and [70], a case concerning an offence under section 4(2)(b) Misuse of Drugs Act 1971). It was held that the jury had needed only to agree whether the applicant had been concerned in the production of drugs, not precisely where the drugs had been produced;
- iv) *R v Chilvers* [2021] EWCA Crim 1311; [2022] 1 WLR 1089 (see in particular [63] and [64], [71] and [72]), a case concerning the offence of controlling and coercive behaviour contrary to section 76 of the Serious Crime Act 2015. Multiple separate acts of such behaviour were pleaded in the indictment counts. The court found that the essential ingredient of the offence was controlling and coercive behaviour, not the particular acts relied upon to support the allegation. The jury did not have to agree on the "mechanism" (to use the language of *Smith*) or the "kind" of controlling and coercive behaviour that had taken place (to use the language of *Chilvers*). The court emphasised that there were not two or more different means of committing the offences which may have given rise to different defences. Fulford LJ also stated (at [63]) that a *Brown* direction is only necessary in relatively rare situations, the requirement being confined to those situations where i) there is an appreciable danger that, when the jury is deciding whether they are agreed on the matter that constitutes the relevant ingredient of the offence, some may convict having found a particular matter proved as constituting the ingredient whilst others may find a wholly different matter or different matters proved as constituting the ingredient or ii) when two distinct events or incidents are alleged, either of which constitutes the ingredient of the offence charged or iii) when two different means of committing the offence may give rise to different defences.

E.5 The proper interpretation of Section 4 of the Fraud Act 2006

- 42. As already noted, ultimately the issue is one of statutory interpretation. Applying normal principles, the words of the statute have primacy and are to be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the legislative purpose, an objective concept.
- 43. We consider that both as a matter of structure and language it is clear that there are only three essential ingredients of the offence in section 4: section 4(1)(a) ("occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person"); section 4(1)(b) ("dishonestly abuses his position"); and section 4(1)(c) ("intends, by means of the abuse of that position- (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss").

44. First, section 4 is broken down into only three subsections, not four (let alone six, which would be necessary if, as the appellant suggested, each of the two options in subsections 4(1)(c)(i) and (ii) required separate treatment).
45. As to section 4(1)(c) itself, the ingredient is (a single) intention by means of the abuse of that position to make a gain (for himself or another) or to cause loss to another (or to expose another to a risk of loss), in other words to have some sort of financial impact. As section 5 makes clear, “gain” and “loss” are limited to gain or loss in money or other property, but are otherwise widely defined. They do not have to be permanent. Gain can include keeping what one has, and loss includes not getting what one might get.
46. Neither the use of the word “or” internally in each of (i) and (ii) nor the use of the word “or” externally between (i) and (ii) supports the argument that each is an alternative and independent ingredient of the offence. In the statutory context, the word “or” is more often used in a manner which includes “and”: see *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition, 2020):

“Section 17.11: Use of ‘or’ and ‘and’

17.11 The words ‘or’ and ‘and’ can be used in different senses and this can occasionally give rise to difficulty where it is not clear from the context what sense is intended:

(a) the word ‘or’ is normally used in an inclusive (that ‘A or B’ means A or B or both), although it can also be used in an exclusive sense (so that ‘A or B’ means A or B but not both);

(b) the word ‘and’ can be used in a joint sense (so that ‘A and B’ means A and B together) or a joint and several sense (so that ‘A and B’ means A and B together or either of them).

In most contexts the sense in which ‘and’ or ‘or’ are used will be apparent from the context and the application of basic common sense but they can occasionally give rise to doubt. It has sometimes been suggested that in legislation the word ‘or’ is more often used in an inclusive sense and that ‘and’ is more often used in a joint and several sense. This is a useful starting point, but it may be displaced by the context.”

47. The better interpretation here is that the word “or” at the end of subsection 4(1)(c)(i) (and within each of (i) and (ii)) is used in an inclusive, rather than an exclusive sense. In other words, it is to be interpreted as meaning subsection 4(1)(c)(i) or subsection 4(1)(c)(ii), or both, rather than merely either subsection 4(1)(c)(i) or subsection 4(1)(c)(ii).
48. This inclusive interpretation is entirely consistent with common sense. Those who commit fraud will often, if not usually, intend both to make a gain (for someone) and/or to cause loss to another (or expose another to a risk of loss). Far from being mutually exclusive alternatives, those elements are generally co-occurring and overlapping aspects of most frauds. Subject to any special features that a case may present, proof of either element ought to be sufficient to satisfy the ingredient of intent.

49. Indeed, it may be difficult to say precisely whether a defendant’s intention was to make a gain for himself or to cause a loss to another, or both. Section 4 is, as the respondent put it, “offender-focussed”. The offence is complete when the defendant carries out the act (or omission) with the necessary intent. It is immaterial whether or not he is successful in his enterprise. So much is clear from section 4 itself and the Explanatory Notes accompanying the Fraud Act 2006 (note 11):

“Subsection (1)(b) requires that the person must make the representation **with the intention of making a gain or causing loss or risk of loss to another**. The gain or loss does not actually have to take place. The same requirement applies to conduct criminalised by clauses 3 and 4.” (emphasis added)

50. An approach which requires the jury to consider each possible relevant intention as a separate ingredient of the offence risks impermissible speculation on the part of the jury, for example as to what would have happened to the proceeds of the fraud, had the fraud been successful.
51. Finally, further support for our interpretation can be found in the Law Commission Report No 276 (on which the drafting of the 2006 Act was heavily based). Its starting point was the classic definition of fraud espoused by Stephen’s *History of Criminal Law* (1883), Volume 2. The relevant passage reads:

“...two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury **or an intent to expose some person either to actual injury or to a risk of possible injury** by means of that deceit or secrecy’. (emphasis added)

52. Again, the reference is to a single intent.
53. In the above circumstances, and before consideration of authority, we consider that section 4(1)(c) contains a single overarching ingredient of intent for the purpose of a section 4 offence. The ingredient is intention by means of the abuse of position to make a gain (for himself or another) or to cause loss to another (or to expose another to a risk of loss) – in other words, to have a financial impact, whether by way of gain or loss (actual or potential).

E. 6 Authorities on the Fraud Act

54. This conclusion is entirely consistent with the relevant authorities, including the following:
- i) *R v Harrison* [2017] EWCA Crim 296. This was a case dealing with an offence of fraud by false representation under section 2 of the Fraud Act 2006. Section 2(1)(b) sets out the ingredients of intent in materially identical structure and words to those used in section 4(1)(c). The court identified the ingredient of the section 2 offence as follows:

“37. ..the ingredients of the offence under the Act...are that (1) there was a false representation, (2) which the Applicant knew was or might be untrue or misleading, (3) which the Applicant made dishonestly, **and (4) that by making the representation, the Applicant intended to make a gain for himself or cause a loss to another or expose another to the risk of loss.** There is no separate requirement that the Applicant actually makes a gain or that HMRC actually suffers a loss.” (emphasis added);

See also *R v Varley & others* [2019] EWCA Crim 1074, another case dealing with section 2 of the Fraud Act 2006 to similar effect;

- ii) *R v Pennock* [2014] EWCA Crim 598; [2014] 2 Cr. App. R. 10 a case dealing with section 4 itself. The court stated as follows:

“6. Thus, in general terms, in respect of an offence charged under section 4 of the Fraud Act 2006, the prosecution has to prove four matters:

(1) That the defendant at the relevant time occupied a position in which he is expected to safeguard or, at least, not act against the financial interests of another. The current edition of Archbold, at 21–385, suggests that the “expectation” in section 4(1)(a) is that of the reasonable member of the public as personified by the jury. For present purposes we would accept that definition.

(2) That the defendant “abuses” that position, i.e. he uses that position incorrectly or he puts it to improper use contrary to the expectation resulting from the position held.

(3) That the defendant's abuse of that position is dishonest.

(4) **That the defendant intends, by means of his dishonest abuse of that position either to make a gain for himself or another person; or that he intends to cause loss to another or to expose another person to a risk of loss.** As is clear from section 5 of the Act, the gain or loss must relate to money or any other property, but it can be a temporary gain or loss or a permanent one. But there does not have to be an actual gain or an actual loss.” (emphasis added);

- iii) *R v Say* [2021] EWCA Crim 520, another case addressing the ingredients of a section 4 offence. Convictions were upheld in circumstances where no *Brown* direction was given in respect of the alternatives set out in section 4(1)(c).

55. *R v Valujevs & Another* [2014] EWCA Crim 2888, [2015] QB 745 at [37]-[39], relied upon by the appellant, does not point to a contrary conclusion. There the court stated that three alternatives needed to be listed as separate particulars within the count as examples of how the defendants breached the obligation not to withhold wages issue,

accompanied by a *Brown* direction. The alternatives being referred to were clear alternatives as to the facts of the offences alleged giving rise to the alleged breach of duty for the purpose of section 4(1)(a). The decision provides no support for the contention that the different options in subsections 4(1)(c)(i) and (ii) are to be treated as separate ingredients of a section 4 offence.

E.7 Conclusion on Section 4(1)(c) of the Fraud Act 2006 and the absence of a *Brown* direction

56. For the reasons we have given, as a matter of statutory interpretation, consistent with the authorities referred to above, section 4(1)(c) is properly to be regarded as containing a single ingredient of the offence, namely intention (by means of (dishonest) abuse of position) to cause financial gain or loss (or exposure to risk of loss), in other words to have a financial impact. Whether the financial impact intended is gain, loss, or both, does not matter. Subsections 4(1)(c)(i) and 4(1)(c)(ii) are merely the mechanisms through which the jury may be satisfied of the single ingredient of intention in section 4(1)(c).
57. On this basis, there was no need for a *Brown* direction as a matter of legal principle without more. There may be factual scenarios (albeit likely to be rare) in which the precise mechanism for intent under section 4(1)(c) is relevant and where a *Brown* direction may be appropriate. However, this is not such a case. Neither subsection (i) or (ii) gave rise to a different defence and this was not a case where distinct events or incidents were alleged for the purpose of either subsection. No prejudice arose to the appellant as a result of the absence of a *Brown* direction.
58. The jury was thus directed properly.
59. Finally, we would only add that even if, contrary to our interpretation of section 4(1)(c) and conclusion that no *Brown* direction was required, we would not have been persuaded in any event that the convictions were unsafe. The fact that the appellant intended to make a gain was not only not in dispute, it was agreed evidence. The Harlequin business was operated for gain, including for the appellant's own personal gain. This was also confirmed in the defence statement, the live evidence adduced by both parties at trial, and counsel's submissions to the jury. All members of the jury must therefore have been sure that the appellant intended, by means of the abuse of position, (at least) to make a gain for himself or another. Furthermore we do not consider that it could be sensibly argued that the appellant did not also intend to cause loss (or exposure to risk of loss). The Harlequin business, being operated in order to make money for the appellant, was an investment business which relied on money being transferred in from investors in reliance on the representation that they would receive a return. Both the intention to make a gain and cause loss or expose investors to loss were inherent in the very structure of the scheme.
60. Accordingly, the appeal against conviction is dismissed.

F. The appeal against sentence

61. We turn to the appeal against sentence. It will be recalled that the Judge passed a sentence of 9 years' imprisonment on count 1, and a consecutive sentence of 3 years' imprisonment on count 2, making a total sentence of 12 years' imprisonment.

62. We remind ourselves at the outset that the ultimate issue is whether the total sentence passed was just and proportionate or not only excessive, but manifestly so. Totality was a key consideration before the Judge, and he rightly had it at the forefront of his considerations. The key submission for the appellant is that the Judge was wrong to impose consecutive sentences.
63. The Sentencing Council Definitive Guideline on Totality applicable at the time stated that concurrent sentences would ordinarily be appropriate where “a) offences arise out of the same incident or facts” or “b) there is a series of offences of the same or similar kind, especially when committed against the same person”.
64. Consecutive sentences will ordinarily be appropriate where “a) offences arise out of unrelated facts or incidents” or “b) offences are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences”. The Guideline states however, that “it is not permissible to impose consecutive sentences for offences committed **at the same time** in order to evade the statutory maximum penalty.” (emphasis added).
65. Examples of category b) situations include “where offences [are] committed against different people, such as repeated thefts involving attacks on several different shop assistants” and “where offences of domestic abuse or sexual offences are committed against the same individual”. This reflects the fact that offending against different individuals often justifies consecutive sentences, and the latter reflects the fact that serious offending even against the same individual may require consecutive sentences, the common theme being that, whilst the offences are of the same or similar kind in each case, the overall criminality will not sufficiently be reflected by concurrent sentences.
66. In the present case there was an evolution of the facts over time, the companies featuring in count 1 (HMSSE) and count 3 (HHR) were not the same, and the victims of the fraud were numerous and different. HHR needed to come on the scene – with a new bank account – in order for the appellant’s fraudulent activities to be able to continue, given that HMSSE was running into obvious difficulties by then. There was never any suggestion that the offences were not properly charged separately.
67. These features - different (even if overlapping) time periods, the use of different entities and different victims – all militated in favour of consecutive sentences without more. And in any event there was more, namely the seriousness of the offending and the appellant’s overall criminality.
68. This was, on any view, Category 1A offending of the utmost gravity for the purpose of the Sentencing Council Guideline for Fraud Offences. The losses suffered by investors were no less than £196 million during the count 1 period, and £30 million during the count 3 period. These were losses far in excess of the £1 million on which the starting point for category 1A offending (of 7 years’ imprisonment (range 5 to 8 years)) was based. The Fraud Guidelines expressly provide that, “Where the value is larger or smaller than the amount on which the starting point is based, this should lead to upward or downward adjustment as appropriate”. It is further provided that, “**Where the value greatly exceeds the amount of the starting point in category 1, it may be appropriate to move outside the identified range**” (in bold in the Fraud Guideline).

This was clearly such a case, and the amounts involved of themselves justified, indeed necessitated, a starting point outside the identified range.

69. As for culpability, the appellant's offending was sophisticated and carried out over a sustained period of time.
70. There were then a number of serious aggravating factors which had to be taken into account. The appellant ignored repeated warnings and advice from others that his business model was seriously flawed and doomed to failure without radical revision. He also readily blamed others.
71. The Judge took careful account of the available mitigation, including his age, physical ailments and mental health problems, the fact that the enterprise was not fraudulent from the outset, the appellant's previous good character and character references (which could not carry much weight in the circumstances), and the passage of time.
72. Standing back, we consider that the Judge was fully entitled to conclude that consecutive sentences were justified on the facts and that the imposition of concurrent sentences, giving a maximum custodial term of 10 years, would not sufficiently reflect the appellant's overall criminality. Thus, he was fully entitled to proceed, as a matter of principle, to impose consecutive sentences.
73. We can then find no legitimate complaint in the overall term of 12 years' imprisonment at which the Judge arrived. In particular, he made a very substantial reduction to arrive at the custodial term of only 3 years on count 3, no doubt to the available mitigation, delay, and totality.
74. For these reasons, it cannot be said that the overall sentence of 12 years' imprisonment was manifestly excessive. Accordingly, the appeal against sentence is also dismissed.