Neutral Citation Number: [2023] EWCA Crim 1189

Case Nos: 202201578 B5 and 202201583 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
THE CROWN COURT AT SOUTHWARK
His Honour Judge Perrins

Date: 17 October 2023

Before :

LORD JUSTICE SINGH
MR JUSTICE LAVENDER
and
MR JUSTICE JOHNSON

- -

Between :

REX	**Respondent**
- and -	
FLORIAN PIERINI	**Applicant**
JEFFREY RAZAQ	**Appellant**

- -
- -

Tom Wainwright (instructed by **ITN Solicitors**) for the **Applicant (Florian Pierini)**
Will Martin (instructed by **Shearman Bowen & Co**) for the **Appellant (Jeffrey Razaq)**
Paul Sharkey (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 15 September 2023

- -

Approved Judgment

This judgment was handed down remotely at 10 a.m. on 17 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE SINGH

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Lord Justice Singh:

Introduction

1. On 22 April 2022 Florian Pierini and Jeffrey Razaq were convicted by a jury at the Crown Court at Southwark of offences under the Proceeds of Crime Act 2002 ("the 2002 Act").

2. Florian Pierini ("the applicant") was convicted (in his absence) of conspiracy to launder the proceeds of crime, contrary to section 1(1) of the Criminal Law Act 1977 ("the 1977 Act") and section 327(1) of the 2002 Act. He was sentenced (in his absence) to 5 years' imprisonment and was disqualified from being a company director for 5 years. He renews an application for leave to appeal following the single judge's refusal of his application for leave. His complaint is that the judge, HHJ Perrins, wrongly refused his application to participate in the trial from Brazil.

3. Jeffrey Razaq ("the appellant") was convicted of acquiring criminal property, contrary to section 329(1) of the 2002 Act. He was sentenced to a suspended sentence order comprising 12 months' imprisonment, suspended for 12 months, with a requirement that he complete 200 hours unpaid work. He has completed the unpaid work and the sentence has now expired. He appeals against conviction with the leave of the single judge. His complaint is that the judge wrongly permitted the prosecution to adduce bad character evidence.

The facts

4. The prosecution case centred on the activities of Essex and London Properties Limited ("ELP"). In support of its central case against the appellant it also relied on events involving two other companies: MH Carbon Limited ("MH Carbon") and Montana Leon SA ("Montana Leon"), a company registered in Peru.

MH Carbon Limited

5. MH Carbon was incorporated in 2010. The appellant took over MH Carbon, and was appointed as sole director, on 24 October 2012. Prior to that date, Gavin Manerowski had been a director of MH Carbon. On 31 May 2013 MH Carbon entered voluntary liquidation. The Department of Business Innovation and Skills conducted an investigation into MH Carbon. The appellant cooperated with the investigation. On 15 May 2014, the High Court wound up MH Carbon, following the Secretary of State's petition for a winding up order on the basis that:

   (1) It purchased Voluntary Emissions Reductions ("carbon credits") from EcoSynergies Limited, a company that had been incorporated by Gavin Manerowski.

   (2) It then sold carbon credits to members of the public as investments.

(3) It gave the impression that carbon credits were suitable for investment at favourable rates, and had the potential to offer significant returns.

(4) In fact, the carbon credits sold by MH Carbon were not suitable as investments for individuals, and particularly not for unsophisticated investors.

(5) There was not a readily accessible marketplace to enable investors to sell their carbon credits.

6. MH Carbon had liabilities of £22.6m when it was wound up.

7. It was not alleged that the appellant had been involved in fraud, but it was alleged that he was unfit to be a company director because MH Carbon had become insolvent, and his conduct as a director of the company made him unfit to be concerned in the management of a company.

8. On 10 June 2015, the appellant signed a Disqualification Undertaking under the Company Directors Disqualification Act 1986 in respect of his conduct with MH Carbon.

Montana Leon

9. The appellant had a close association with Mohammed Tanveer. Mohammed Tanveer worked for Montana Leon. It traded in gold. The appellant introduced an escrow service to Montana Leon. Ultimately, Montana Leon was wound up.

Essex and London Properties Limited

10. ELP advertised an investment bond which offered an 8% return on investments with a promise of the return of the investment at the end of three years. The investments would be used to purchase distressed residential properties in the London and Essex area, which would be developed or refurbished and re-sold at a profit.

11. Potential investors were sent newsletters and brochures which gave the impression of a successful and bona fide company. They were told that the risk was low because of the stake that they would hold in the properties purchased by the fund. The brochure used to advertise the bond included details of properties which were said to have been bought by the fund. In fact, they had not been bought by the fund. The details were lifted from estate agents' websites. This was all backed up with documents that were said to be Land Registry documents showing that the fund owned the properties. Those documents were forged. Investors were encouraged to invest a minimum of £5,000.

12. Between January 2016 and mid-2017 approximately 800 investors paid funds totalling approximately £13.7m to ELP. Some invested multiple amounts and some more than £100,000. Some of the investors were elderly and particularly vulnerable to the high-pressure sales techniques used. Some investors were paid interest, but this was paid from the funds provided by other investors: a classic Ponzi fraud.

13. Initially, investors paid their investment monies into bank accounts in the name of ELP. Later, they were instructed to pay monies to two escrow agents who were then instructed to pay the money to ELP accounts in the United Kingdom or Dubai. The escrow agents were Escrow Custodian Services and Jade State Wealth. Each of these escrow agents was introduced to ELP by the appellant. The appellant worked on the basis that he would receive 1% commission on the funds paid by investors into the two escrow accounts. Between January 2016 and July 2017, the appellant received over £110,000 from ELP.

Police interviews

14. During his first interview on 10 October 2017, the appellant provided a prepared statement which denied involvement in the fraud. He said that at no time did he know or suspect that any funds he received from ELP were from criminal conduct. The monies received from ELP to his company, "Raz Solutions", represented escrow commission payments which were due and represented legitimate trade. He had issued invoices to ELP. Thereafter, he exercised his right to silence.

15. During a police interview on 7 March 2018 the appellant stated that his role was to introduce the companies to the escrow agents, who conducted their own due diligence checks on the business, and there were no issues with ELP. He negotiated fees of about 1% of the funds paid by investors into two escrow accounts, which he legitimately invoiced. He did not know or suspect that ELP was a fraud or that the monies he received were the proceeds of crime.

16. During his police interview on 27 April 2018, the applicant exercised his right to silence and did not answer any questions.

The prosecution

17. The appellant and applicant were prosecuted on an indictment containing three counts.

18. Count 1 did not concern either the appellant or the applicant. It alleged that Mohammed Tanveer, Mitchell Mallin and Abdul Mukith had conspired to commit fraud.

19. Count 2 alleged that the applicant, together with Mohammed Tanveer, Mitchell Mallin, Abdul Mukith, Anthony Whymark and Mohammed Hussain had conspired to launder the proceeds of the fraud, contrary to section 1(1) of the 1977 Act read with section 327(1) of the 2002 Act. It was alleged that he had been part of an agreement to transfer funds through his own accounts and that he had known or intended that the funds represented the benefit from criminal conduct. The applicant did not dispute that there had been a fraud. He denied that he had been party to the conspiracy to launder money or that he knew that the funds had been fraudulently obtained.

20. Count 3 alleged that the appellant had acquired criminal property, contrary to section 329(1) of the 2002 Act. The allegation was that he had acquired £110,407.38 from

ELP knowing or suspecting that it wholly or partly represented the proceeds of crime. The appellant accepted that the funds were the proceeds of the fraud but denied that he had known or suspected that at the time.

21. Mohammed Tanveer pleaded guilty to counts 1 and 2. The applicant, the appellant and the other defendants pleaded not guilty.

22. The appellant: As against the appellant, the prosecution relied on:

(1) Evidence from Vincent Bull and Graham Arnott, who were the directors of the escrow companies which were introduced to ELP by the appellant and which, on ELP's instructions, released funds to accounts controlled by the appellant.

(2) Monies received by the applicant from ELP between 1 December 2015 and 31 January 2018 amounting to £110,407.38. As the business was fraudulent, this money was criminal property.

(3) The appellant's police interview, in which he misled the police about the amount of money he had received.

(4) The appellant's involvement with MH Carbon. The prosecution case was that in the light of that involvement he should have been alive to the need to check the legitimacy of investment schemes.

(5) Admissions made by the appellant in interview that he knew that things had "gone wrong" with one of Mohammed Tanveer's previous companies, Montana Leon, which sold investments in gold, which was ultimately wound up and to which the appellant had introduced an escrow agent.

23. The prosecution case was that, because of the appellant's involvement with MH Carbon and his involvement with Mohammed Tanveer, he ought to have been aware of the risk that ELP was operating a fraud. It was said that he should have been especially careful about becoming involved in ventures involving Mohammed Tanveer. His previous involvement in investment schemes should have led him to undertake careful due diligence. His failure to make enquiries to ensure that the ELP investment was genuine suggested, said the prosecution, that he was not acting as an honest businessman and he either knew or suspected that the scheme was fraudulent. He failed to disclose most of the income that he received to HMRC. This was said to support the prosecution's case that he knew or suspected the funds to have been obtained from criminal conduct.

24. The appellant did not give evidence. He relied on the answers provided in his police interview. His case was that he did not know or suspect that ELP was acting fraudulently and he did not know or suspect that any of the monies he received were the proceeds of crime. He accepted that there had been previous and legitimate dealings with Mohammed Tanveer and he said that the monies received from ELP represented a commission of 1% (or less), invoiced to ELP, for his role as an introducer. He was not responsible for conducting due diligence on the company introduced to the escrow agents. His role in relation to ELP had been different to his role as a director of MH Carbon. He was an "introducer" and it was the responsibility of the escrow agents to carry out due diligence, not him. He had not lied or misled the

police in interview, but instead he had estimated the value of the fraud based on the 1% commission he had received and the figures that had been disclosed to him during the interview. He denied that the failure to declare receipts to HMRC was evidence of fraudulent activity.

25. The key issue for the jury was to decide was whether the appellant knew or suspected that the £110,407.38 derived from fraud.

26. The applicant: As against the applicant, the prosecution relied on:

    (1) Evidence of Ms Sarah Campbell of his attendance at ELP's offices on occasions whilst the fraud was operating.

    (2) Evidence from a financial investigator that £409,624.75 was received from ELP either into accounts held in the applicant's name or into accounts of companies under his control, which were then distributed between the applicant's personal account and three company accounts of which he was the sole director/shareholder. Two of those companies were incorporated, and their accounts opened, at a time when the fraud had already started, which suggested that they had been set up, and the accounts opened, solely for the purpose of laundering money from the fraud.

    (3) Evidence that the applicant had not disclosed any of the income to HMRC for the relevant tax years, that he had instead declared modest incomes from self-employment and that none of his companies filed corporation tax returns.

27. As explained below, the applicant did not attend the trial. He was represented throughout. His case, presented by counsel, was that he did not know that the money passing through his accounts was the proceeds of crime.

28. The issue for the jury was whether the applicant was a party to a conspiracy to launder money and whether he knew that the monies being deposited in, and moved between, his personal and company accounts had been fraudulently obtained.

29. The applicant and the appellant were each convicted by the jury.

The applicant's renewed application for leave to appeal against conviction

Application to participate in the criminal proceedings from Brazil

30. On 14 September 2020 the applicant was charged by postal requisition. The requisition was deemed to be served on 16 September 2020: rules 4.4(2)(a) and 4.11(2)(b) of the Criminal Procedure Rules. This imposed an obligation on the applicant to appear before the magistrates' court to answer the written charge: section 29(2A) Criminal Justice Act 2003.

31. The first hearing took place in the South Essex Magistrates' Court on 22 October 2020. The applicant had legal representation. There was no suggestion that the proceedings had not been validly commenced against the applicant. The case was sent

to the Crown Court for a hearing on 19 November 2020. The applicant was granted bail.

32. A plea and trial preparation hearing took place on 19 November 2020. The applicant did not attend the hearing. His counsel told the judge that he was in Dubai and was "on a travel bond because he has not met the bond in Dubai [and that the] Authorities have his documentation until [a] debt is paid." Arrangements were made for the applicant to attend by video link. He did so, was arraigned and entered a not guilty plea. The applicant was granted bail subject to a residence condition at an address in Dubai. The judge told the applicant that if he did not attend trial he risked being tried in his absence.

33. The trial was listed for 7 February 2022. A further directions hearing was listed on 4 May 2021 (subsequently changed to 14 June 2021), with a direction that the applicant would attend remotely via video link from Dubai. The applicant did not attend the hearing on 14 June 2021 and the court log indicates that he had not been expected to attend. It was indicated that he had agreed a payment plan for the debt and that, in any event, he would be able to (and would) return to the United Kingdom by the end of the year and in time for the trial.

34. At a further hearing on 10 January 2022 the court was not informed that the applicant had not returned to the United Kingdom or that there was any difficulty in the applicant attending trial. On that date, the prosecution sought and received an assurance from the applicant's legal team that, as far as counsel were aware, he would be in the United Kingdom in time for his trial.

35. On 28 January 2022 the prosecution was informed that the applicant had not returned to the United Kingdom. On 31 January 2022 the applicant made a written application seeking a direction to permit him to attend the trial by live link. The application was supported by a statement dated 23 January 2022. In that statement he said that he had been unable to leave Dubai because of a civil debt. It subsequently became clear to him that he would not be able to raise the money in Dubai to repay the debt, so he decided to fly to Brazil to sell his wife's property there to raise the necessary funds. He was able to secure the release of the travel embargo and he flew from Dubai to Brazil in September 2021. He was unable to sell the property, he had no money to pay for a flight and so he was (he said) unable to return.

36. A hearing took place on 1 February 2022. The applicant attended by video link from Brazil. His counsel told the judge that he had been advised of the consequences if he did not attend the trial, but that he was unable to travel to the United Kingdom because "he has no money." The judge addressed the applicant directly and told him that he should "get on a plane now" and attend his trial, and indicated that otherwise he might be tried in his absence. The applicant apologised and said he had "no money and nowhere to stay."

37. On the first day of the trial, 7 February 2022, five of the six defendants attended court. The applicant did not. He had still not returned to the United Kingdom. The applicant sought a ruling to permit him to participate in the proceedings by live link. On 8 February 2022 the judge refused that application. He was not satisfied that it would be lawful to grant the application, because there had been no international letter of request to the authorities in Brazil. It was not therefore known whether linking

remotely to the applicant in Brazil would be in breach of the law in Brazil. In any event, the judge did not accept that the appellant had been unable to return to the United Kingdom and he was satisfied that the appellant had deliberately absented himself from the proceedings. That was because:

(1) He had known about the trial for nearly 15 months.

(2) A brief internet search showed that flights were available for as little as £360.

(3) There had been sufficient time for him to put aside his air fare and reasonable living costs for the duration of the trial.

(4) He had sufficient funds to leave Dubai and resettle in Brazil.

(5) His evidence that he was impecunious was unsupported by any documentation (for example as to the alleged civil debt in Dubai). So too was his assertion that he was trying to sell a house in Brazil.

(6) His previous address was an apartment in a luxury resort at the Fairmont Palm in Dubai.

(7) He had misled his own legal team, whom he had repeatedly assured that he would return in good time, only telling them that was not the case shortly before the trial.

38. Having found that the applicant had deliberately absented himself from the trial, the judge concluded that it was not in the interests of justice to allow him to attend by video link. He did not accept that this meant that the applicant was being denied a fair trial: he was represented by two experienced counsel who were fully instructed and who were in regular contact with him in Brazil. His case could therefore be properly presented, he could be informed of its progress and he could give daily instructions. If he wished to give evidence, then all he needed to do was book a flight to the United Kingdom in time for the defence case.

39. The judge then issued a warrant for the applicant's arrest, with a direction that he be brought before the Crown Court at Southwark to surrender into custody. He acceded to an application that the defendant be tried in his absence.

The legislative framework

7 December 2007 – 24 March 2020

40. Section 51 of the Criminal Justice Act 2003 came into force on 7 December 2007. It made provision for live links in criminal proceedings. As originally enacted, it stated:

> "**51 Live links in criminal proceedings**
>
> (1) A witness (other than the defendant) may, if the court so directs, give evidence through a live link in the following criminal proceedings.

> (2) They are—
>
> …
>
> (c) a trial on indictment,
>
> …
>
> …
>
> (4) But a direction may not be given under this section unless—
>
> (a) the court is satisfied that it is in the interests of the efficient or effective administration of justice for the person concerned to give evidence in the proceedings through a live link,
>
> …
>
> …
>
> (6) In deciding whether to give a direction under this section the court must consider all the circumstances of the case.
>
> (7) Those circumstances include in particular—
>
> (a) the availability of the witness,
>
> (b) the need for the witness to attend in person,
>
> (c) the importance of the witness's evidence to the proceedings,
>
> (d) the views of the witness,
>
> (e) the suitability of the facilities at the place where the witness would give evidence through a live link,
>
> (f) whether a direction might tend to inhibit any party to the proceedings from effectively testing the witness's evidence.
>
> …"

41. As originally enacted, section 51 did not permit a defendant to give evidence by live link. That was explicitly excluded from the ambit of section 51(1) ("other than the defendant"). Aside from section 51 of the 2003 Act, there was (prior to March 2020) no other provision which would have enabled a court to permit the applicant to give

evidence by live link. Section 33A of the Youth Justice and Criminal Evidence Act 1999 permits the court, in certain circumstances, to allow a defendant who is under the age of 18, or who suffers from a mental impairment, to give evidence by live link. That did not apply here.

25 March 2020 to 27 June 2022

42. The Coronavirus Act 2020 was a legislative response to the covid-19 pandemic. Its purpose was to enable the Government to respond to an emergency situation and manage the effects of a covid-19 pandemic: see paragraph 1 of the explanatory notes. It was passed, and (with certain exceptions) it came into force, on 25 March 2020. Sections 53-57 made provision for the use of video and audio technology in courts and tribunals. The policy reasons for these provisions were explained at paragraphs 92-93 of the explanatory notes:

> "92 The efficiency and timeliness of court and tribunal hearings will suffer during a covid-19 outbreak. Restrictions on travel will make it difficult for parties to attend court and without action a significant number of hearings and trials are likely to be adjourned. In criminal proceedings, the courts have a duty to deal with cases effectively and expeditiously and that includes making use of technology such as live video links, telephone or email where this is lawful and appropriate. Video link technology is increasingly being used across the court estate enabling greater participation in proceedings from remote locations. The courts currently have various statutory and inherent powers which enable them to make use of technology.
>
> 93 The Bill amends existing legislation so as to enable the use of technology either in video/audio-enabled hearings in which one or more participants appear before the court using a live video or audio link, or by a wholly video/audio hearing where there is no physical courtroom and all participants take part in the hearing using telephone or video conferencing facilities."

43. Section 53, read with schedule 23, made temporary modifications to the Criminal Justice Act 2003 ("the 2003 Act"), including section 51 of that Act.

44. Section 51 of the 2003 Act, as in force at the time of the judge's ruling on 8 February 2022, provided:

> "**51 Live links in criminal proceedings**
>
> (1) A person may, if the court so directs, take part in eligible criminal proceedings through—
>
> …
>
> (b) a live video link.

…

(2) In this Part "eligible criminal proceedings" means—

…

(c) a trial on indictment…

…

…

(4) But the court may not give a direction for a person to take part in eligible criminal proceedings through a live audio link or a live video link unless—

(a) the court is satisfied that it is in the interests of justice for the person concerned to take part in the proceedings in accordance with the direction through… the live video link,

(4A) The power conferred by this section includes power to give—

(a) a direction that is applicable to several, or all, of the persons taking part in particular eligible criminal proceedings;

(b) a direction that is applicable to a particular person in respect of only some aspects of particular eligible criminal proceedings (such as giving evidence or attending the proceedings when not giving evidence);

(c) a direction for a person who is outside England and Wales (whether in the United Kingdom or elsewhere) to take part in eligible criminal proceedings through… a live video link.

…

(6) In deciding whether to give… a direction under this section the court must consider all the circumstances of the case.

(7) Those circumstances include in particular—

(a) in the case of a direction relating to a witness—

(i) the importance of the witness's evidence to the proceedings;

(ii) whether a direction might tend to inhibit any party to the proceedings from effectively testing the witness's evidence;

(b) in the case of a direction relating to any participant in the proceedings—

(i) the availability of the person;

(ii) the need for the person to attend in person;

(iii) the views of the person;

(iv) the suitability of the facilities at the place where the person would take part in the proceedings in accordance with the direction;

(v) whether the person will be able to take part in the proceedings effectively if he or she takes part in accordance with the direction.

…"

28 June 2022 onwards

45. The provisions of the Coronavirus Act which temporarily modified section 51 of the 2003 Act were repealed with effect from 28 June 2022. From that date, the Police, Crime, Sentencing and Courts Act 2022 substituted a new version of section 51 of the 2003 Act. It introduced a requirement for a judge, when considering whether to make a live link direction, to take account of any guidance given by the Lord Chief Justice.

46. The Lord Chief Justice issued guidance shortly after the new provision came into force. This included the following:

"**Application of statutory criteria**

…

8. Defendants: It may be in the interests of justice to allow or require a defendant to attend hearings (particularly preliminary hearings) by live link so as to avoid delays and disruption... Pre and post court conferences between advocate and defendant may not be able to take place effectively by live link: where such conferences are desirable a live link is less likely to be in the interests of justice.

…

> 15. Witnesses: A live link may be used as a special measure under section 24 of the Youth Justice and Criminal Evidence Act 1999. Even when not used as a special measure, the court may allow a witness to give evidence by live link where that is in the interests of justice (for example to save a witness from a long journey to court where all parties agree the evidence can be given remotely, or to allow a medical expert witness (or any other witness) to give evidence without having to take the entire day off work). Where a live link direction is given for a witness, the witness must give evidence by the live link unless the live link direction is revoked (section 52(2), (4)).
>
> …
>
> **Live link to connect participant outside the United Kingdom**
>
> 18. Where the participant is abroad, then (depending on the country concerned) the court will wish to consider whether a live link would risk damaging international relations so as to be contrary to the public interest. The factors to consider, and the checks that can be made, are set out in *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 00286 (IAC).
>
> **Risks of live links**
>
> 19. The court does not have the same level of control over those participating in court proceedings remotely that it does over those who are physically present in the courtroom. It follows that a live link potentially gives rise to risks that will need to be considered. This is not likely to be an issue for professional participants, but in some cases it may be an issue for others. Defendants or witnesses might misuse the remote access that is provided by a live link so as (for example) to record the proceedings or take screen shots that depict the jury or a witness. A witness giving evidence by live link, from premises other than the court, might be subject to off-screen pressures that will not be evident to the court. If the participant is outside the jurisdiction then these risks may be greater. For the purpose of section 1 of the Perjury Act 1911, evidence from outside the United Kingdom by live link is treated as being made in the proceedings (section 52A(5)). It is unlikely that sanctions for contempt (eg putting screenshots on social media / breaching reporting restrictions) could in practice be imposed."

47. In *R v Kadir* [2022] EWCA Crim 1244; [2023] 1 WLR 532 the trial judge refused the defendant's application for a live link for a witness to give evidence from Bangladesh. His appeal against conviction was dismissed. At [33] Holroyde LJ said:

"In relation to an application for a live link for a witness who is in another country, it is necessary also to bear in mind the principle that one state should not seek to exercise the powers of its courts within the territory of another state without the permission (on an individual or a general basis) of that other state. It cannot be presumed that all foreign governments are willing to allow their nationals, or others within their jurisdiction, to give evidence before a court in England and Wales via a live link. In some states, it may be necessary for the UK to be asked to issue an international letter of request ("ILOR") to the state concerned. The guidance recently issued by the Lord Chief Justice, at para 18, explains this important point…

The judgment in *Secretary of State for the Home Department v Agbabiaka* [2022] INLR 304 explains that a request can be made to the Taking of Evidence Unit at the Foreign and Commonwealth Office to enquire whether it is aware of any diplomatic or other objection from the country concerned to the providing of evidence by a live link.

34. Although that recent guidance had not been issued at the time of the trial, the judge specifically drew the attention of the parties to this issue and provided them with a copy of guidance issued by the Crown Prosecution Service ("CPS"). That guidance, whilst obviously directed to prosecutors, included the following passage which was also relevant to defence representatives:

> 'Some countries will allow requests to be arranged and conducted through informal channels, through a police to police basis, or even via direct contact with the witness from the UK. However, in many countries, a direct approach to a voluntary witness is not permitted and an ILOR will be required to establish a live link at trial.
>
> Many countries will rarely, if ever, make use of live link in criminal proceedings and will not have the necessary equipment. In these cases, it is vital that the prosecutor considers these issues at an early stage as it is probable that the request to set up a live link in such cases will take many months of planning. In some countries a live link will not be technically possible, although is possible that the requested state will allow the UK to supply the necessary equipment and expertise.'

…

36. In addition to the potential for diplomatic objections, it is necessary in this context to bear in mind both the administrative

> burden on court staff which is likely to arise if a witness is to give evidence from another country via a live link, and the risks which may arise [as explained at paragraph 19 of the Lord Chief Justice's guidance]."

48. No steps had been taken to establish whether Bangladesh was willing to permit a live link of the kind sought. There had been no request or inquiry of any relevant authority in Bangladesh. This meant that the judge lacked vital information in deciding whether, in the light of the factors identified in the Lord Chief Justice's guidance, it was in the interests of justice for a live link direction to be made. As a result, the judge was right to refuse the application: see [45]-[49]:

> "45. These failures left the judge in a most difficult position. She was confronted in mid-trial with an issue of which no sufficient notice had been given, and for which no adequate or timely preparations had been made, and was asked to permit the giving of evidence from abroad via a medium which was not commonly used in criminal courts at the time.
>
> 46. As we have said, the judge did have the power to make a live link direction… even if she had been fully informed as to her power, she had no sufficient basis on which she could possibly exercise it in the defendant's favour…. we [cannot] accept the submission that the judge was able to, and did, make a proper assessment of all the factors listed in section 51 of CJA 2003. She had no information about the attitude of the Bangladeshi authorities…
>
> 47. Finally, there was a dearth of information to enable the judge to assess the risks which might be involved in Samad giving evidence from Bangladesh, including any risk that he would be under any form of pressure from any other person. It does not appear there was even any clarity as to where precisely he would be when giving his evidence.
>
> 48. In those circumstances, the judge could not properly have concluded that the preconditions of a grant of leave under section 51(4) of CJA 2003 —that it would be in the interests of justice to make a live link direction, and that the Crown had had a sufficient opportunity to make representations—had been satisfied. Her decision to refuse the application for a live link was therefore correct. We accordingly reject the defendant's first submission.
>
> 49. Before leaving this first ground of appeal, we emphasise the need for early consideration and preparation of any applications —whether by the Crown or by the defence—for witnesses to testify from another country via a live link. The relevant statutory provisions and Crim PR must be complied with;

> appropriate steps must be taken to ascertain whether the foreign state concerned has any objection to a person within its territory giving evidence as proposed to a court in England and Wales; and the technical and practical arrangements must be tested in good time, so that alternative ways of adducing the evidence can be considered if necessary."

Submissions

49. Mr Wainwright, on behalf of the applicant, said that permitting a live link may, at first sight, seem an "unattractive proposition", but that that was not a reason for refusing the application. In *Polanski v Condé Nast Publications Limited* [2005] 1 WLR 637 the House of Lords had held that a claimant who was a fugitive from criminal proceedings in the United States of America was entitled to bring civil proceedings in the United Kingdom and to give evidence from abroad, even though his reason for doing so was to avoid extradition. In *Deutsche Bank AG v Sebastian Holdings Inc* [2023] EWHC 2234 (Comm), the decision in *Polanski* was applied to committal proceedings, so as to allow a respondent to participate in such proceedings from abroad. The position in criminal proceedings should not be different. The judge in the present case should have applied *Polanski* and *Deutsche Bank* so as to permit the applicant to attend by live link.

50. Mr Wainwright submits that the point of principle is that, by failing to attend the proceedings, a litigant does not thereby lose all of his fair trial rights. Where it is still possible to preserve some fair trial rights, they should be afforded. This would not provide an incentive to other defendants to flee abroad before a criminal trial and to take part by live link. That is because there are disadvantages in a defendant taking that course which mean that it would be unlikely to happen in practice:

    (1) The jury could be told that the defendant is abroad and has decided not to attend in person and that this can be held against him.

    (2) Giving evidence by live link rather than in court might affect the quality of the evidence.

51. Even if the applicant was not permitted to give evidence by live link, he should at least have been able to observe the proceedings. That would have enabled him to give full instructions to his legal representatives, without in any way causing an affront to the interests of justice.

52. Mr Sharkey, on behalf of the Crown, submits that the judge was right to conclude that it was contrary to the interests of justice to permit the applicant to participate in the proceedings by way of a live link. *Polanski* and *Deutsche Bank* can be distinguished, as they were civil, not criminal, in nature and in neither case did the court have the power to compel the party's attendance, nor were they cases where a party would have been in breach of orders of the court by failing to attend to give evidence in person.

Discussion

53. There is no challenge to the judge's conclusion that the applicant had deliberately absented himself from the proceedings. The sole challenge is to the judge's conclusion that it would be contrary to the interests of justice to permit the applicant to participate in the proceedings by way of a live link.

54. In *Polanski* the claimant pleaded guilty in a California court to unlawful sexual intercourse with a 13-year-old girl. He fled from the United States of America to France before sentence was passed. He could not be extradited to the United States of America from France. In 2002 he brought an action in the United Kingdom for libel. He applied to give his evidence by live link from France, because he feared that if he came to the United Kingdom he would be extradited to the USA. Eady J granted the application, because, although the reason underlying the application was "unattractive", this did not justify depriving Mr Polanski of his right to have his case heard at trial. The Court of Appeal allowed the defendant's appeal and held that the claimant should not be permitted to give evidence by live link. That was because (see the summary by Lord Nicholls at [9]): "[t]he general policy of the courts should be to discourage litigants from escaping the normal processes of the law rather than to facilitate this." The House of Lords, by a majority, allowed the defendant's appeal and restored the judge's order.

55. Lord Nicholls' reasoning was that:

(1) Whilst the claimant's criminal conduct did not take place in this country, the public interest in furthering criminal proceedings in respect of offences that had taken place in the United Kingdom applies equally to extradition proceedings for offences committed in a country with which the United Kingdom has a relevant extradition treaty: [24].

(2) "A fugitive from justice is not as such precluded from enforcing his rights through the courts of this country": [25]. Although that might seem unattractive, the contrary approach would lead to wholly unacceptable consequences. It would mean that a fugitive's property and other rights could be breached with impunity: [26].

(3) There was a power to allow evidence to be given by live link, and the exercise of that power is not a grant of an "indulgence": [27].

(4) The grant of a live link direction would not assist the claimant's evasion of justice because, irrespective of the direction, the claimant would not come to this country and put himself at risk of arrest: [28].

(5) The practical consequence of granting a live link direction was that the claimant would be relieved of a disadvantage of his fugitive status. The practical consequence of refusing a live link direction was that the claimant would not be able to pursue his civil proceedings unless he surrendered his fugitive status: [29].

56. At [31] – [33] Lord Nicholls said:

> "31. …Despite his fugitive status, a fugitive from justice is entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He can bring or defend proceedings even though he is, and remains, a fugitive. If the administration of justice is not brought into disrepute by a fugitive's ability to have recourse to the court to protect his civil rights even though he is and remains a fugitive, it is difficult to see why the administration of justice should be regarded as brought into disrepute by permitting the fugitive to have recourse to one of the court's current procedures which will enable him in a particular case to pursue his proceedings while remaining a fugitive. To regard the one as acceptable and the other as not smacks of inconsistency. If a fugitive is entitled to bring his proceedings in this country there can be little rhyme or reason in withholding from him a procedural facility flowing from a modern technological development which is now readily available to all litigants. For obvious reasons, it is not a facility claimants normally seek to use, but it is available to them. To withhold this facility from a fugitive would be to penalise him because of his status.
>
> 32. That would lack coherence. It would be to give with one hand and take away with the other: a fugitive may bring proceedings here, but his position as a fugitive will tell against him when the court is exercising its discretionary powers. It would also be arbitrary in its practical effect today. A fugitive may bring proceedings here but not if it should chance that his own oral evidence is needed. Then, despite the current availability of VCF, he cannot use that facility and a civil wrong suffered by him will pass unremedied.
>
> 33. …No doubt special cases may arise. But the general rule should be that in respect of proceedings properly brought in this country, a claimant's unwillingness to come to this country because he is a fugitive from justice is a valid reason, and can be a sufficient reason, for making a VCF order. I respectfully consider the Court of Appeal fell into error by having insufficient regard to Mr Polanski's right to bring these proceedings in this country even though he is and will continue to be a fugitive from justice."

57. Lord Hope and Baroness Hale agreed with Lord Nicholls. Lord Hope considered that the critical factor was that the grant of a live link would not assist the claimant to remain a fugitive (cf paragraph 55(4) above): [65]. Baroness Hale said, at [69]:

> "(1) as between the parties to this action, there is no doubt that this order was correctly made. The defendants will suffer no prejudice from the claimant's evidence being given in this way; it is common ground that any prejudice will be suffered by the

> claimant, not least because the jury will be forcibly reminded of the reasons why he is not present in person and will be obliged to take them into account where they are relevant. (2) As between the competing public interest arguments, there is a strong public interest in allowing a claim which has properly been made in this country to be properly and fairly litigated here. (3) Against that, there is also a strong public interest in not assisting a fugitive from justice to escape his just deserts. But the claimant will escape those deserts whether or not the order is made. He will continue to be outside the reach of the United States authorities in any event. All the refusal to allow his evidence to be given by VCF will do is effectively to deprive him of his right to take action to vindicate his civil rights in the courts of this country. (4) If this were almost any other cause of action, I venture to think that the outcome would not be in doubt. Suppose, for example, that the claimant had suffered personal injuries while in transit from the US to France and his evidence was necessary to prove either the circumstances of the accident or the extent of his injuries: would we hesitate to allow it to be given by VCF? Suppose, perhaps more plausibly, that there were a dispute about whether the claimant had intellectual property rights in one of his films which is distributed or marketed here: would we hesitate to allow his evidence to be given by VCF? It should not make a difference that the right in question is the right to such reputation as he has, rather than a right to bodily integrity or a right to property. That reputation was attacked in an English language publication and is most appropriately defended in an English language jurisdiction. (5) Generally, therefore, I agree that this should be an acceptable reason for seeking a VCF order, although there may be cases in which the affront to the public conscience is so great that it will not be a sufficient reason. This is not such a case."

58. It follows from *Polanski* that the general rule is that a litigant who is a fugitive from justice should be permitted to give evidence in civil proceedings by way of live link from abroad in order to pursue or defend a claim and thereby vindicate his civil rights.

59. In *Deutsche Bank*, the decision in *Polanski* was applied to contempt proceedings. A respondent to an application for committal for contempt of court was granted permission to attend the hearing by video link from France if he chose to give evidence. The respondent was outside the jurisdiction, the court did not have the power to compel him to attend the hearing and it would be wrong to place the respondent in a position where, in order to give evidence in his defence, he was forced to come into the jurisdiction.

60. Much of the reasoning in *Polanski* reads across not just to contempt proceedings, but also to criminal proceedings. Thus:

(1) It should not, in principle, make a difference that the applicant's criminal conduct took place in this country, because the public interest in pursuing domestic criminal proceedings is equivalent to the public interest in extradition proceedings, cf paragraph 55(1) above.

(2) The fact that the applicant is a fugitive from justice does not, as such, preclude him from enforcing his rights, including his right to defend criminal proceedings that are brought against him, cf paragraph 55(2) above.

(3) There was (possibly subject to the acquiescence of the authorities in Brazil and compliance with any procedural requirements under the law of Brazil) power to allow the applicant to give evidence from Brazil, cf paragraph 55(3) above.

(4) The grant of a live link direction would not assist the applicant's evasion of justice because, irrespective of the direction, the applicant would not come to this country and put himself at risk of arrest, cf paragraph 55(4) above.

(5) The practical consequence of granting a live link direction would be that the applicant would be relieved of a disadvantage of his fugitive status. The practical consequence of refusing a live link direction would be that the applicant would not be able to exercise his right to give evidence unless he surrendered his fugitive status, cf paragraph 55(5) above.

61. Thus, the fact that the applicant is a fugitive from criminal proceedings in this jurisdiction is not, in itself, a sufficient basis for distinguishing the decision in *Polanski*.

62. There are, however, significant and important distinctions between the position of the claimant in *Polanski* (and the respondent in *Deutche Bank*) and the applicant in these proceedings.

63. The applicant was required to attend court by the postal requisition (the service of which has not been challenged). He was granted bail by the Magistrates' Court on 22 October 2020. That was subject to his obligation to surrender to custody for the hearing at the Crown Court on 19 November 2020: section 3(1) Bail Act 1976. The applicant was in breach of that obligation. He thereby committed an offence (unless he had reasonable cause not to surrender to custody): section 6(1) of the Bail Act 1976. Even if he did have reasonable cause not to surrender to custody, he committed an offence by failing to surrender to custody as soon as was practicable thereafter: section 6(2) of the Bail Act 1976. On the judge's unchallenged finding that the applicant had deliberately absented himself, it was practicable for him to attend the proceedings and he was committing a criminal offence by not surrendering to custody.

64. We did not hear any argument as to the power of the Crown Court to grant bail to a defendant who appears by live link from abroad or to impose a residence condition abroad. We do not express any view on those questions. It is not necessary to do so. The orders for bail and the arrest warrant have never been challenged by the applicant. They had legal effect, and the appellant was under a legal duty to comply with them, unless or until they were set aside: *R (Majera) v Secretary of State for the*

Home Department [2021] UKSC 46; [2022] AC 461 *per* Lord Reed at [44] – [56]. The applicant was in continuing breach of his legal obligation to surrender to custody.

65. The Criminal Practice Direction states, at section 14B:

> "The failure of defendants to comply with the terms of their bail by not surrendering, or not doing so at the appointed time, undermines the administration of justice and disrupts proceedings. The resulting delays impact on victims, witnesses and other court users and also waste costs. A defendant's failure to surrender affects not only the case with which he … is concerned, but also the court's ability to administer justice more generally, by damaging the confidence of victims, witnesses and the public in the effectiveness of the court system and the judiciary. It is, therefore, most important that defendants who are granted bail appreciate the significance of the obligation to surrender to custody in accordance with the terms of their bail and that courts take appropriate action, if they fail to do so."

66. *Polanski* makes it clear that there is no material distinction between a litigant who is a fugitive from justice in respect of criminal proceedings in another country and a litigant who is a fugitive in respect of criminal proceedings for an offence committed in the United Kingdom. Here, however, the applicant was not just a fugitive in respect of an offence committed in the United Kingdom, he was a fugitive from the very proceedings in which he was seeking to participate from abroad. He was thereby in breach of a statutory obligation to surrender to custody and a court order. He was committing a criminal offence. If his application to participate by live link, instead of attending in person, had been granted, then that would amount to the court condoning the applicant's continued offending under the Bail Act. It would have permitted the applicant to give evidence on his own terms, flagrantly flouting his obligation to surrender to custody. It would mean that the applicant would stand to gain the potential advantage of participating as a defendant in criminal proceedings and seeking an acquittal, without being in any immediate jeopardy of punishment in the event of conviction.

67. For these reasons, granting the application would have diminished the court's authority to require compliance with the law. It would have been an affront to the legal integrity of the proceedings and would undermine public confidence in the criminal justice system, bringing it into disrepute. It would have been contrary to the interests of justice. The judge was right to conclude that it was not in the interests of justice to grant the application.

68. We do not consider that there is merit in Mr Wainwright's subsidiary submission that the applicant should have at least been permitted to view the proceedings by live link, even if he was not permitted to give evidence. The same objections apply. It would have been contrary to the interests of justice to allow such an application for the same reason. There was no unfairness to the applicant. It was his choice to commit a

criminal offence, and to challenge the court's authority, by failing to surrender to custody: *R v Jones* [2002] UKHL 5; [2003] 1 AC 1 *per* Lord Bingham at [11]:

> "one who voluntarily chooses not to exercise a right cannot be heard to complain that he has lost the benefits which he might have expected to enjoy had he exercised it. If a defendant rejects an offer of legal aid and insists on defending himself, he cannot impugn the fairness of his trial on the ground that he was defended with less skill than a professional lawyer would have shown. If, after full professional advice, he chooses not to exercise his right to give sworn evidence at the trial, he cannot impugn the fairness of his trial on the ground that the jury never heard his account of the facts. If he voluntarily chooses not to exercise his right to appear, he cannot impugn the fairness of the trial on the ground that it followed a course different from that which it would have followed had he been present and represented."

There was, anyway, nothing to stop the applicant from communicating with his legal representatives, receiving updates as to the course of proceedings and providing instructions.

69. That is sufficient to dispose of the renewed application. There are, however, further reasons why it was not in the interests of justice to accede to the application that had been made. As the Lord Chief Justice's guidance (which post-dates the judge's decision) makes clear, particular issues arise and must be confronted where a witness gives evidence from abroad. The judge recognised that it would be necessary to consider the need for an international letter of request to the authorities in Brazil. No steps had been taken in that regard, because of the very late stage at which the applicant made it clear that (contrary to his previous protestations) he would not be returning to the United Kingdom.

70. In the present case the judge correctly recognised that, in the light of his conclusion that it was not in the interests of justice for the applicant to give evidence by a live link, the application failed irrespective of the need to consider the potential for damage to the United Kingdom's international relations. *Kadir* (which, again, post-dates the judge's decision) shows that lateness of the application, and the failure of the applicant to have made the checks required by *Agbabiaka*, were in themselves a sufficient basis to refuse the application.

71. There is no challenge to the judge's decision to proceed with a trial in the applicant's absence. That is hardly surprising given the unchallenged finding that the applicant had deliberately absented himself and that he was represented by counsel who were fully instructed and who could conduct his defence on his behalf.

72. It follows that we dismiss the applicant's renewed application for leave to appeal against conviction.

The appellant's appeal against conviction

Application to adduce bad character evidence

73. The prosecution sought to adduce evidence as to the appellant's involvement in MH Carbon. The prosecution contended that the evidence was relevant to the appellant's state of mind, and his knowledge about investment schemes promising high returns to investors, including the risks of, and the need to conduct proper due diligence on such schemes.

74. It was submitted on behalf of the prosecution that the appellant's explanation in interview as to his involvement in MH Carbon (to the effect that he was not aware of any fraudulent activity) did not amount to bad character evidence. Even if it was evidence of bad character, it was admissible under section 101(1)(c) of the 2003 Act because it was important explanatory evidence. Alternatively, it was admissible under section 101(1)(d) because it demonstrated a propensity to act to the detriment of retail investors for his own financial gain and/or to fail to undertake proper due diligence in relation to investment products.

75. It was submitted on behalf of the appellant that the evidence in relation to MH Carbon was bad character evidence, involving as it did his subsequent disqualification from being a company director on the basis that he was an unfit person. Further, the defence submitted that the case against him was weak and the evidence sought to be admitted was intended to bolster a weak case. It was not part of the appellant's role to conduct due diligence on ELP: that was the responsibility of the escrow companies. It was not explanatory evidence and it did not demonstrate any propensity as alleged by the prosecution.

Judge's ruling

76. The Judge ruled that the evidence in relation to MH Carbon amounted to bad character evidence. That was because the appellant had accepted making serious failures in his role as director which led to the mis-selling of investments. The evidence could therefore only be adduced if it satisfied one of the gateways in section 101(1) of the 2003 Act. The judge considered that the bad character evidence was important explanatory evidence which was admissible under section 101(1)(c) of the 2003 Act:

> "21. …JR's defence is that he did not know or suspect that money coming from ELP was criminal property. It is difficult to see how a jury could properly evaluate that defence without knowledge of JR's previous business dealings and his experience in dealing with investments in this way. Otherwise, they will be making an assessment in an artificial vacuum. It is significant that JR signed his disqualification undertaking only a matter of months before he made the introduction of Escrow Custodian Services to ELP.

> 22. I do not accept the defence argument about due diligence. The issue is not whether JR was under an obligation to conduct due diligence in the strict sense. It is whether the circumstances surrounding his business dealings with ELP together with his previous experience of similar investments were such as to give rise to an inference that he must have known or suspected that the money in question was criminal property. I agree with the prosecution analysis that to exclude such material would give the jury a wholly misleading impression of JRs business experience and prevent them from being able to properly evaluate his state of mind."

77. The judge therefore permitted the prosecution to adduce the bad character evidence under section 101(1)(c). The judge did not explicitly rule on the prosecution application to adduce the evidence under section 101(1)(d) as evidence of propensity. We were told that the judge subsequently made it clear that he was only permitting the evidence to be adduced under section 101(1)(c), and not section 101(1)(d).

Judge's direction to the jury

78. Following the conclusion of the evidence, and before counsel's speeches, the judge gave the jury written legal directions, which he also read to the jury. These included an explanation of the relevance of the MH Carbon evidence:

> "45. The reason why you have heard evidence about JR's disqualification and the subsequent undertakings that he signed is because it would have been extremely difficult for you to properly understand JR's case without knowing about his previous business involvement in selling investments.
>
> 46. There are, however, limits upon the extent to which you can rely upon this evidence. Firstly, the matters set out in the schedule of unfitness are not clear admissions of wrongdoing. They are instead matters that JR did not dispute for the purposes of disqualification proceedings. Secondly, JR's previous involvement with MH Carbon does not make it more likely that he committed the offence of acquiring criminal property. As such it provides no further support for the prosecution case that he knew or suspected the money received to be criminal property."

79. Following counsel's speeches, the judge gave the second part of his summing up, in which he summarised the evidence. At the start, he repeated a legal direction that he had previously provided, to the effect that the assessment of the evidence was for the jury not the judge, so that, if he appeared to express a view about the evidence the

jury did not have to agree with him, or if he failed to mention something that the jury considered was important, then they should take it into account. Similarly, he reminded the jury that they were not bound to accept the arguments of counsel (which he indicated he would summarise), because it was the jury's judgment, and theirs alone, that counted.

80. During his summing up the judge addressed the appellant's interview, and said:

> "He also referred in his interview to the other company we have heard named, MH Carbon. Now he was the director of that company and when he was dealing with it in interview, he described that company catching a cold. Now, again, you have got full details about that in your agreed facts at paragraphs 138 onwards and I have given you already a legal direction about how to approach it.
>
> You know that Mr Razaq was disqualified as a director as a result of issues with MH Carbon and the prosecution argument was that given he was somebody who, in the words of Mr Sharkey, had been burned, might be expected to look very carefully into the legitimacy and the viability of any further business ventures. If he did, he would have seen that Essex and London was not what it presented itself to be.
>
> Now, again, this is a key argument you are going to have to focus on so what is the other side of the argument? Well, the other side of the argument put forward by the defence is that whereas in the case of MH Carbon, Mr Razaq was a director, his role in relation to Essex and London was very different. It was that of an introducer and it was the people he worked for, in this case, the Escrow providers, who were responsible for carrying out due diligence, not him, so there is an important distinction there the defence say is relevant. Again, you will have to consider that for yourself."

81. In the course of summarising counsel's speeches, the judge said:

> "Finally, the prosecution ask you to consider Mr Razaq's actions in the context of what you know about his previous business experience and experiences with the companies Montana Leon and MH Carbon and they suggest he was somebody who would have taken extra special care to ensure that all due diligence was carried out on Essex and London before becoming involved in the way that he did and they say that when you put those pieces together, they establish a case that at the very least, he suspected that what he was doing, what he was handling, was fraudulently obtained money, if not actually knowing it outright.

> The counterargument for that, as you know, is that the defence for Mr Razaq point out that he is in a very different position to the other defendants because he is not said to be part of the conspiracy as alleged in count 1 and count 2 because it cannot be proved, they say, that he knew about the fraud. They say if the prosecution thought they could prove that, he would have been charged on the earlier counts.
>
> And so, they begin by asking what is it that makes Mr Razaq different from all the other professional witnesses who were taken in by Essex and London. The same point was made elsewhere. If they were fooled, so if the Escrow companies, the barristers, the accountants were all fooled, why is that the prosecution say Mr Razaq was not? Surely, say the defence, he is in the same position as those people who have been called by the prosecution who were taken in by what was a sophisticated fraud."

Legal framework

82. Section 98 of the 2003 Act defines "bad character" as:

> "…evidence of, or of a disposition towards, misconduct on his part, other than evidence which-
>
> (a) has to do with the alleged facts of the offence with which the defendant is charged, or
>
> (b) is evidence of misconduct in connection with the investigation or prosecution of that offence."

83. Section 101 states:

> "**101 Defendant's bad character**
>
> (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
>
> …
>
> (c) it is important explanatory evidence,
>
> (d) it is relevant to an important matter in issue between the defendant and the prosecution,
>
> …

> (f) it is evidence to correct a false impression given by the defendant, …
>
> …
>
> (2) Sections 102 to 106 contain provision supplementing subsection (1).
>
> (3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."

84. Section 102 states:

> "**102 Important explanatory evidence**
>
> For the purposes of section 101(1)(c) evidence is important explanatory evidence if—
>
> (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
>
> (b) its value for understanding the case as a whole is substantial."

Submissions

85. Mr Martin, on behalf of the appellant, advanced a single ground of appeal. That is that the judge erred in permitting the prosecution to rely on the MH Carbon evidence. He said that it did not amount to "important explanatory evidence" within the meaning of section 101(1)(c) of the 2003 Act, as explained in section 102. Its purpose was to establish that the applicant had a propensity to become involved in fraudulent businesses. It should therefore have been considered under s101(1)(d) of the Act, with the appropriate safeguards. It was wrong in principle to admit propensity evidence under section 101(1)(c) and thereby avoid the safeguards that operate in respect of propensity evidence: *R v Davies* [2008] EWCA Crim 1156. The evidence was highly prejudicial and none of the appropriate directions for propensity evidence were given because it was admitted under a different gateway.

86. Further, the evidence was not relevant to any issue in the case. It was common ground that the appellant had not committed any criminal offence in relation to MH Carbon

and, in particular, was not involved in any fraud. So far as ELP was concerned, it was no part of the prosecution case that the appellant had been a party to the conspiracy: otherwise, he would have been charged on count 1. Nor did he have any due diligence role – that was the responsibility of the escrow agents. Further, there was no correlation between MH Carbon and ELP. The investments offered by MH Carbon, i.e. carbon credits, were genuine investments. Any awareness that the appellant had gained about the unsuitability of carbon credits as a form of investment could not have put him on notice that ELP was being operated in a fraudulent manner. The fact was that Mohammed Tanveer was operating a Ponzi scheme, taking in the investors' funds, and running away with them. That was completely different from what had happened at MH Carbon. The risk to which the prosecution said the appellant should have been alive in respect of ELP was the risk that investments might not produce the elaborate returns that were offered. But knowledge of that risk could not be derived from anything that had happened at MH Carbon. The appellant had not learned anything at MH Carbon that could have put him on notice that ELP might be a fraud.

87. These were not submissions that Mr Martin made to the jury. He candidly accepted that he had made a strategic decision not to spend time on MH Carbon, given the way in which the judge had directed the jury. However, it necessarily followed from the above analysis, he said, that the evidence should not have been admitted under either section 101(1)(c) or section 101(1)(d). The jury were influenced by its improper inclusion and that renders the conviction unsafe.

88. Mr Martin also suggested that the summing up was internally contradictory. That was because in the course of his legal directions the judge said that the bad character evidence could not provide support for the prosecution case. Yet in his summary of the police interviews, and of the prosecution closing speech, he suggested that the jury could take it into account when assessing the prosecution case on the appellant's state of mind.

89. Mr Sharkey, for the prosecution, submits that the judge was right to permit the prosecution to adduce the material, for the reasons he gave. If the defendant had no business experience, then that would have been highly relevant to his state of mind and to the possibility that he had not appreciated that the monies were criminal property. It followed, conversely, that the fact that he had recent experience of a failed investment scheme in which he had been "burned", and that he had signed a statement of unfitness, was likewise highly relevant to his state of mind. If the evidence were excluded, and if the appellant had chosen to give evidence, then there could have been no cross-examination of his understanding of investment schemes and the need for due diligence. It would be wholly artificial and wrong for the court to have to completely disregard a significant part of the appellant's business experience, but that would be the result of excluding the MH Carbon evidence. The judge was right to recognise that the evidence was relevant and to permit it to be adduced under section 101(1)(c).

Discussion

90. The different gateways for the admission of bad character evidence under section 101(1) are not mutually exclusive silos. There is a degree of overlap, and bad

character evidence may be admissible under more than one gateway. Further, once bad character evidence is admissible by virtue of one or other of the section 101(1) gateways, it becomes part of the general evidence in the case; leaving aside propensity evidence, its permissible use is not circumscribed by the ambit of the gateway through which it was admitted, but instead by the matters to which it is relevant: *R v Highton* [2005] EWCA Crim 1985; [2006] 1 Cr App R 7 *per* Lord Woolf CJ at [10].

91. The ambit of section 101(1)(c), read with section 102, has been considered in many authorities. These show that bad character evidence may be admitted under section 101(1)(c) where it is background evidence that has substantial importance to enable the jury to assess other important evidence in the case.

92. In *R v Pronick* [2006] EWCA Crim 2517 the judge's decision to allow the prosecution to adduce evidence of the defendant's previous acts of violence and rape against the complainant under both section 101(1)(c) and 101(1)(d) was upheld because it enabled the jury "to make a proper assessment of the respective evidence of the two protagonists": *per* Latham LJ at [8].

93. In *R v Haigh* [2010] EWCA Crim 90, Dyson LJ explained at [23], by reference to authority, that at common law, prior to the 2003 Act, evidence was admissible:

> "where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

94. At [24] Dyson LJ said "section 101(1)(c) closely reflects the pre-existing common law." He added that that is so, notwithstanding the oft-repeated warning that section 101(1)(c) should not readily be used to admit evidence of propensity which would not satisfy the test under section 101(1)(d): [25].

95. In the present case, we can discern no error in the judge's ruling. The critical issue in the case was the appellant's state of mind and, specifically, whether he knew or suspected that the monies paid into his account were criminal property. The appellant sought to rely on his prepared statement of 10 October 2017 where he had denied knowing or suspecting that the funds were the proceeds of criminal conduct. He also sought to rely on his answers in interview on 7 March 2018 when he maintained that denial. The jury could not fully assess those denials without knowing background evidence that was relevant to the appellant's state of mind. The MH Carbon material was relevant to the appellant's state of mind. As the judge observed, "to exclude such material would give the jury a wholly misleading impression of [the appellant's] business experience and prevent them from being able to properly evaluate his state of mind."

96. The judge was correct that the bad character evidence was not evidence of propensity. The reason for admitting the evidence was not because the applicant had behaved in a particular way during his stewardship of MH Carbon, and was therefore likely to have behaved in a similar way in respect of ELP. Nor was the evidence admitted to rebut the possibility of a coincidence. It was admitted because it was relevant to the appellant's state of mind. The prosecution application to adduce the material under section 101(1)(d), on the grounds of propensity, was therefore correctly rejected by the judge.

97. However, even if the judge was wrong to admit the evidence under section 101(1)(c), we consider it was properly admissible under section 101(1)(d), albeit not on the grounds of it being relevant to an issue as to the appellant's propensity to a particular form of conduct. Rather, it was admissible because it was relevant to an important matter in issue between the prosecution and the appellant. That matter was not propensity, but the appellant's state of mind.

98. The appellant's argument that he was not responsible for carrying out due diligence, because this was the role of the escrow companies, was for the jury to assess. The argument that this was a reason to refuse to admit the evidence misses the central point of the bad character evidence, which was to elucidate the appellant's state of mind. The arguments over the responsibility for carrying out due diligence are not a reason for refusing to allow the jury to consider the bad character evidence.

99. We do not consider that the judge's directions to the jury caused any unfairness or that they render the conviction unsafe. The judge accurately explained the purpose for which the evidence was relevant, namely as to the appellant's state of mind. His direction that the evidence "does not make it more likely that he committed the offence of acquiring criminal property. As such it provides no further support for the prosecution case that he knew or suspected the money received to be criminal property" was, on one reading, arguably generous to the applicant. The evidence was capable of supporting the prosecution case as to the appellant's state of mind – that was the whole purpose of it being adduced. The point the judge was making was that the "bad character" sting that underlay the evidence – that the appellant had been disqualified as being unfit – did not itself make it more likely that he had committed this offence. In that sense, it did not support the prosecution case. The direction is likely to have been understood in that sense. If it was taken by the jury literally, narrowly, and in isolation as meaning that the MH Carbon evidence could not provide any support for the prosecution case, then that hardly provides a basis for complaint by the appellant.

100. Nor did the judge's later summary of the prosecution closing speech cause any unfairness. He accurately set out the prosecution's argument as to the relevance of the evidence, which reflected the basis upon which the judge had permitted it to be adduced – namely, that it was relevant to the appellant's state of mind. He then balanced that section of his summing up by immediately reminding the jury of the defence case.

101. It follows that the appellant has not identified any material error in the judge's approach and has not shown that his conviction is unsafe. We dismiss the appeal.

Outcome

102. We refuse Florian Pierini's renewed application for leave to appeal against conviction.

103. We dismiss Jeffrey Razaq's appeal against conviction.