



Neutral Citation Number: [2024] EWCR 4

Case No: T20210075; T20210076; T20210077

**IN THE [CROWN COURT AT READING**

Date: 2 February 2024

**Before :**

**Her Honour Judge Nott**

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**Between :**

**REX**

**- and -**

**ESE GROUP LTD**

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Mr Rees KC and Miss Murphy instructed by for the Crown  
Mr Lawrence KC (instructed by Brabners Solicitors for the Defendant

Hearing dates: 1-2 February 2024  
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**Approved Judgment**

This judgment was handed down by release to The National Archives on 23 August 2024 at  
2pm.

## **Her Honour Judge Nott**

### **Introduction**

1. This is an extempore ruling on an application made on behalf of ESE Group Ltd, hereafter ESE, to vacate its guilty plea to engaging in an unfair commercial practice, in relation to its selling or mis-selling of solar panel maintenance contracts and green energy equipment, between the 11<sup>th</sup> of November 2017 and the 28<sup>th</sup> of February 2021, contrary to sections 3 and 8 of the Consumer Protection from Unfair Trading Regulations 2008, hereafter The Regulations.
2. The guilty plea was entered on the 26<sup>th</sup> of August 2022. This application to vacate plea was lodged and made yesterday, on the 1<sup>st</sup> of February, some 17 months later, and I have been hearing argument yesterday afternoon and this morning.
3. The facts are set out in an 89-page case summary dated the 16<sup>th</sup> of September 2021, prepared for the plea and trial preparation hearing, that document amending an earlier case summary prepared for an initial hearing in March 2021.
4. Putting it shortly, the company has pleaded guilty to a course of conduct where, over a three-year period, and despite the interventions of various regulatory bodies, it continuously misled customers, including by mis-selling them goods and services that were both unnecessary, and sold at over-inflated prices, in any event.
5. The application is presented by Nigel Lawrence KC, instructed by Mr Nisbet of Brabners Solicitors. Mr Nisbet and Brabners have been acting throughout proceedings on behalf of both ESE and its founding director, Gary Fredson.
6. Mr Lawrence KC did not act for the company at the time the plea was entered. At that time, counsel advising and representing the company were Julian King and Jonathan Kirk KC.
7. The application to vacate plea is made on the basis that it would be unjust for me to allow the plea to stand. It is an application made in breach of rule 25.5.(2), since it is not made as soon as practicable after becoming aware of the grounds for so doing. It is unclear to me whether the defence accept that their application is made late, since Mr Lawrence KC has referred me to a bundle of what seems to be increasingly aggressive and testy correspondence from Mr Nisbet of Brabners Solicitors to Trading Standards, repeatedly asking for answers to questions, and for material that had, in fact been, in large part, provided to Brabners prior to the plea hearing.
8. Doing the best I can, I infer that the defence submission is first that whether or not the application has been made as soon as practicable, it is made prior to sentence, and second, that since the submission is predicated on an alleged lack of jurisdiction to issue the summonses, or one of them, in respect of which the ultimate charge was put, the conviction cannot stand as a matter of law, and so I should exercise my inherent discretion pursuant to the overriding objective to vacate the plea.
9. In a nutshell, the substantive application is put on the following basis: that the proceedings to which count 1 relates:

- 1) were issued out of time;
- 2) should never have been accepted and issued by the magistrates' court; and
- 3) that even if in time and correctly issued by the court, they are a nullity as result of the prosecution's failure to comply with various of the provisions contained in the criminal procedure rules.

Criminal Procedure Rule 7

10. The specific criminal procedure rule that the prosecution is said to have breached is rule 7.2.(3)(b)(i):  
"An application for the issue of a summons or warrant must—
  - (a) set out the allegation or allegations made by the applicant in terms that comply with rule 7.3(1) (Allegation of offence in application or charge); and
  - (b) demonstrate—
    - (i) that the application is made in time, if legislation imposes a time limit"

Regulation 14 CPUTR 2008

11. Reg 14 of the 2008 Regulations sets the time limit for issue of summons:  
"14.—(1) No proceedings for an offence under these Regulations shall be commenced after—
  - (a) the end of the period of three years beginning with the date of the commission of the offence, or
  - (b) the end of the period of one year beginning with the date of discovery of the offence by the prosecutor,whichever is earlier.  
  - (2) For the purposes of paragraph (1)(b) a certificate signed by or on behalf of the prosecutor and stating the date on which the offence was discovered by him shall be conclusive evidence of that fact and a certificate stating that matter and purporting to be so signed shall be treated as so signed unless the contrary is proved."

12. The prosecution, represented by Mr Rees KC and Miss Murphy, invite me to dismiss the application as out of time, as representing a long-standing and cynical attempt to manipulate the court's process, and as meritless.

Background and Chronology

13. I now turn to the chronology insofar as it is relevant for the purposes of this application. During 2017, Trading Standard became aware of complaints by a number of ESE customers, most of whom were elderly, some of whom were suffering from dementia,

relating to the sale of goods and services to them by ESE. Investigation in to individual complaints began, and soon became a wider investigation in to the commercial practices of ESE.

14. The first summons against the company was issued by the Berkshire Magistrates on the 1<sup>st</sup> of May 2019. It alleged various charges under the 2008 regulations, including under section 3(3) and section 8, which it said were committed in or around the 26<sup>th</sup> of March 2018.
15. The summons related to victims Mr and Mrs Bishop, who had each made witness statements and produced exhibits to Trading Standards – Mrs Bishop, on the 27<sup>th</sup> of June 2018, and Mr Bishop on the 25<sup>th</sup> of July 2018. The Bishops are two of the victims in count 1. As part of the plea process, ESE has agreed to compensate them, and has paid that compensation in to an Escrow account held by Trading Standards.
16. A second summons was issued on the 28<sup>th</sup> of July 2020, alleging that ESE acted in breach of section 3(3) of the 2008 regulations, by selling, on the 15<sup>th</sup> of November 2018, a product for £7,110 to Robert Wilson, knowing that Mr Wilson had dementia, and that his daughter had power of attorney.
17. Investigation in to that offence had started in September 2019, when Linda Wilson, Mr Wilson’s daughter, discovered the fact of the sale, and contacted Trading Standards. Mr Wilson is one of the victims in count 1. He has, I believe, subsequently died, and so cannot now be compensated, but ESE has agreed, as part of the plea process, to compensate his estate, and has paid compensation in to an Escrow account held by Trading Standards.
18. A further summons, the disputed summons, was issued on the 13<sup>th</sup> of November 2020, consequent on application made by Trading Standards on the 11<sup>th</sup> of November 2020. That summons set out six charges, with each charge alleging a breach of regulation 3(3) of the 2008 regulations, namely engaging in an unfair commercial practice relating to the sale or marketing of solar panel maintenance products or equipment to customers between the 11<sup>th</sup> of November 2017 and the 15<sup>th</sup> of October 2020.
19. The offending was ongoing at the time of the issue of the summons, and indeed, continued after it, as the company accepted on the 26<sup>th</sup> of August 2022, when it pleaded to count 1 on the indictment, which single count reflected all of the offending alleged in the three summonses I have just described, but which extended the offending period to the 21<sup>st</sup> of February 2021, which date obviously post-dates the issue of the summons.
20. The directors of ESE at the time, including Gary Fredson, and a number of ESE salesmen were also summonsed to appear before the magistrates, facing various charges including engaging in unfair practices, fraudulent trading, and fraud by false representation.
21. On the 19<sup>th</sup> of January 2021, Mr Nisbet wrote to Trading Standards on behalf of his two clients, ESE and one of its directors, Gary Fredson. He sought a case summary, ahead of hearing in the magistrates, and also requested “certificates satisfying regulation 14.2, Consumer Protection from Unfair Trading Regulations 2008 as soon as possible, please.” I have seen that letter in the bundle provided by the prosecution, at page 70.

22. The response to that letter is at page 72 of that prosecution bundle. On the 29<sup>th</sup> of January 2021, Beth Varcoe, a solicitor for Trading Standards replied, referring Mr Nisbet to an email she had sent him on the 15<sup>th</sup> of January 2021, to which a case summary had been attached. She stated in that letter, “The informations and summons were emailed to the court on 11 November 2020, and we are satisfied that we are within the time limit for commencing a prosecution pursuant to regulation 14 of the Consumer Protection from Unfair Trading Regulations 2008.”
23. On the 1<sup>st</sup> of February 2021, Mr Nisbet again asked for the regulation 14 certificates. In his letter, he stated, “Some of the evidence in the case, principally that which appears to underpin the charges other than those mirrored against Mr Fredson, is quite old. I think, therefore, that it is a legitimate query on my client’s part to seek to understand the chronology so as to ensure the court have jurisdiction to deal with the matters.” And that is within the prosecution bundle at page 74.
24. It is clear, then, that the defence for Mr Fredson and for ESE were alive to the jurisdiction point from this very early stage – indeed, when this matter had yet to be sent up from the magistrates’ court.
25. On the 11<sup>th</sup> of February 2021, as evidenced at page 76 of the bundle, Trading Standards replied, “It isn’t the case that we are not letting you have sight of the certificate or certificates. Those documents do not exist.”
26. So again, ESE and its representative solicitor were aware that there were no such certificates, even before the case left the magistrates’ court.
27. There is no further correspondence on the jurisdiction point in 2021, or if there is, there is no correspondence that either party has pointed me to, or on which they seek to rely.
28. No point as to the validity of any of the summonses was apparently taken at any stage in the magistrates’ court. Certainly, the case in respect of ESE was sent to the Crown Court on the 12<sup>th</sup> of February, without any issue concerning the validity of the summonses being raised on sending.
29. Nor was any such issue raised at the first plea and trial preparation hearing on the 21<sup>st</sup> of March 2021. That hearing was conducted by the resident judge here at Reading Crown Court, Her Honour Judge Norton, whose note records that the indictment was not put, that there would, in due course, be not guilty pleas from all defendants (with the possible exception of William Lowther, who may have some fitness issues and be seeking a Goodyear indication in due course) and that it was “confirmed that no applications to dismiss in this case.” There is no mention in her note of any preliminary jurisdiction point. Had it been raised, she would have noted it and made directions consequent on it; that is her invariable practice.
30. On the 13<sup>th</sup> of May 2022, Mr Nisbet wrote to Beth Varcoe. He appeared to have lost her correspondence dated the 11<sup>th</sup> of February 2021; his letter is at page 78 of the prosecution bundle. In it, he stated, “We are considering the jurisdiction of your client to bring these proceedings, and to that end, please a) provide a formal record of the decision to prosecute this matter, b) confirm whether any separate consideration was

given to the application of section 222 of the Local Government Act 1972 or paragraph 6 of the Consumer Rights Act 2015, c) provide the postcode for each of the complainants.”

31. He then asked, again, for the regulation 14 certificates, notwithstanding that Trading Standards had confirmed already that there were none, and indicated that he raised these issues pursuant to the decision in “*Food Standards Agency v Bakers of Nailsea Limited* [2020] EWHC 3632 (Admin).”
32. Page 83 of the bundle evidences the reply, which went to Mr Nisbet on the 27<sup>th</sup> of May 2022. In that reply, Miss Varcoe reattached her correspondence of the 29<sup>th</sup> of January and the 11<sup>th</sup> of February 2022, and stated “The informations, summonses and applications for summons were laid with the court on the 11<sup>th</sup> of November 2020. We set out the court the time limit applicable for the offences, and confirmed we were satisfied the prosecution were within the time limit. The informations and summonses were duly returned, signed by the court.”
33. A case summary had been prepared for the PTPH, first dated and served on the 11<sup>th</sup> of March 2021, later updated on the 16<sup>th</sup> of September 2021. The case summaries reflect and describe an indictment against firstly, ESE, secondly, the three directors, Gary Fredson, Leighton McArdle, and Jonathan Walsh – that’s to say the three directors during the indictment period – and thirdly, six salesmen, Azis Ghanchi, Shaun Gill, Ian Fredson, William Lowther, Andy Fredson, and Jack Lawrenson.
34. There were 25 counts on the PTPH indictment, and the case summary sets out the scale of the dishonest and unfair practices alleged at that time by the prosecution to have been committed by the company through its directors and its salesmen. It is an 89-page document, but of course, is only a precis and overview of the very large number of witness statements and exhibits served.
35. There was no further correspondence between solicitors on the jurisdiction point in 2022. On the 9<sup>th</sup> of June 2022, the defence served a joint defence statement on behalf of ESE and Gary Fredson. In the section dealing with and headed “Points of law, Admissibility, and Abuse of Process,” it set out legal submissions the defence intended to make, including “In relation to counts 1 and 3, the prosecution has failed to comply with Criminal Procedure Rules 7.2 (demonstration that the application was in time), and therefore, those counts and the indictment generally are a nullity, following the decision of the High Court in *Food Standards Agency v Bakers of Nailsea Limited* [2020] EWHC 3632 (Admin).” The reference to count 3 is simply that Gary Fredson was charged by count 3, in person, with the matters alleged against the company in count 1.
36. On the 15<sup>th</sup> of August 2022, Charlotte McRae wrote to Trading Standards on behalf of ESE and Gary Fredson. She is another solicitor, who works at Brabners. That letter is at page 87 of the prosecution bundle. It sets out, I’m told following discussions between the parties, a plea offer and invites the prosecuting authority to consider the following:  
  
“1) Plea, ESE Group, will plead guilty to count 1 on the indictment, subject to a basis of plea, which is to be agreed, but which specifically excludes any element of dishonesty or fraud.

- 3) No evidence will be offered against Gary Fredson.
- 3) Gary Fredson will provide undertakings to West Berkshire Borough Council under Part 8 of the Enterprise Act 2002, not to engage in unfair commercial practices under the Consumer Protection from Unfair Trading Regulations 2008.”
37. There was a paragraph dealing with compensation, agreeing in principle that compensation was payable to some of the consumer complainant group in this matter but asserting that further work would be needed to determine who should and who shouldn't receive compensation, and how much. Nonetheless, there was an offer to pay a sum of £301,000, pretty much straight away, into an Escrow account, in order to progress matters swiftly and to show good faith, and payments were to be recorded in an agreed schedule of compensation. There were certain other specifications.
38. On the 16<sup>th</sup> of August, that letter was responded to in the following terms, “Your offer is not accepted in its terms. Our proposal is set out as follows:  
ESE Group Limited will plead guilty to count 1 on the indictment. No basis of plea will be agreed.” There are then paragraphs which deal with the issues of compensation and costs, and the undertakings that Gary Fredson would make to West Berkshire District Council.
39. Once the compensation had been paid voluntarily, and once ESE's guilty plea had been entered, the prosecution indicated it would offer no evidence in relation to Gary Fredson, and would not seek any further financial or ancillary orders such as confiscation, nor make application for a director's disqualification in respect of Gary Fredson.
40. There is then a letter in which the defence ask the local authority to make checks regarding seven of the victims to be compensated. I am informed that, ultimately, the schedule of compensation that was agreed between the parties amounts to compensating 79 victims, and it includes all of the people in the indictment that the jury has just determined in respect of three of ESE's salesmen.
41. Of the 79 consumers named in that schedule of compensation, each was a victim of ESE's unfair practices within the three-year period leading up to the application for the summons.
42. The next important piece of correspondence was sent by West Berkshire Council on the 17<sup>th</sup> of August 2022, and it makes a slightly tweaked proposal. The important part is the very first paragraph of that proposal: “ESE Group will plead guilty to count 1 on the indictment. No basis of plea will be agreed.”
43. There is then a letter that is sent on the 23<sup>rd</sup> of August, which indicates that Trading Standards have indeed considered certain representations made by the defendant company in relation to those seven named customers, and have adjusted the schedule in line with those considerations.

Plea Hearing

44. Well that then brings us, in the chronology, to the plea hearing. Agreement having been reached on the 26<sup>th</sup> of August 2022, the defendant company entered its guilty plea to count 1. I'm told that Mr Julian King appeared on behalf of the company and entered that plea. The company was also, at that time, represented by Mr Kirk KC. Through Mr King, the company confirmed that it would plead to count 1, and it did so. There was no basis of plea served, there was no mention of any basis of plea to follow. I'm satisfied of that, firstly because prosecuting counsel, Mr Rees KC, whose junior was present, tells me that that is the position. Secondly, there were no directions made by the court about the filing of any basis of plea, or for the service of better and further particulars from the prosecution, which directions would have been made had there been any indication that the defendant company either a) did not accept the full facts as alleged by the Crown, or b) was in any doubt as to what those facts were.
45. The court then adjourned the case against the directors until the voluntary compensation and costs were paid; the court exceeded to an application on behalf of ESE to lift a restraint order, so that monies could be accessed and paid, as per the voluntary compensation agreement.
46. The judge set a timetable for the defendant company to pay the costs and compensation, and I stress that wasn't an order of the court, it was a timetable for the voluntary payments to be made, and completed in full before the Crown would offer no evidence against the company directors.
47. On the 9<sup>th</sup> of February 2023, the full agreed sum having been paid, no evidence was offered by the Crown against Gary Fredson, Leighton McArdle, and Jonathan Walsh, and not guilty verdicts were duly returned in respect of each of them.

Jurisdiction Point Post Plea

48. I can be satisfied, on the basis of the chronology so far, that the jurisdiction point was fully considered by the defendant company, from an early stage. It was never taken, either in the magistrates or in the Crown Court, and having been thoroughly considered, including by eminent counsel, and solicitors who remain instructed, it was clearly abandoned before plea.
49. It was raised in correspondence, six months later, on the 6<sup>th</sup> of March 2023.
50. Application to vacate plea, so that the issue could be taken and determined, was made a further 10 months later, on the 1<sup>st</sup> of February 2024.
51. Privilege has not been waived in this application. While leading counsel has changed, with Mr Lawrence KC now appearing instead of Mr Kirk KC, who acted in respect of the plea, ESE's solicitors remain the same.
52. Mr Rees KC invites me to conclude that the defence is playing games. The contemporary correspondence, and the defence change of position regarding jurisdiction could certainly support an inference that the defence has cynically chosen not to take an arguable point on jurisdiction prior to plea and trial preparation hearing, in order to achieve a not guilty verdict for ESE's company director, only to seek to



resurrect the argument once that director has irrevocably been found not guilty, and once the co-defendants' trial is underway.

53. However, I cannot conclude that the defence team has acted in such a way. Had Mr Nisbet and leading and junior counsel considered that the court may not have jurisdiction, either to take the guilty plea, in respect of count 1, or to direct a not guilty verdict in respect of count 3, then their overriding duty as officers of the court would have prevented them from allowing the court to take the plea, or enter the not guilty verdict.
54. Their duty as participants in the case includes at rule 1.2.1.(a), preparing and conducting the case in accordance with the overriding objective; at rule 1.2.1.(b), complying with the rules, practice directions, and directions made by the court; and at rule 1.2.1.(c), at once informing the court and all parties of any significant failure, whether or not that participant is responsible for that failure, to take any procedural step required by these rules, any practice direction, or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.
55. I can therefore be satisfied, particularly where malfeasance or negligence of previous highly experienced counsel is not alleged, that the point was fully considered, and the view was taken that there was nothing in it, and the court had jurisdiction.
56. The letter, at page 99 of the prosecution bundle, dated the 6<sup>th</sup> of March 2023, must, therefore, represent a change of mind by Mr Nisbet of Brabners. He spoke, in that letter, about a threatened application for wasted costs in respect of Gary Fredson. He again raised his previous request to see the regulation 14 certificates, which he wrongly states was refused.
57. He says that if he doesn't receive a satisfactory answer to this and other matters by the 4<sup>th</sup> of May 2023, he will need to visit the matter with the court. No court listing was requested. If the jurisdiction issue was revived at this point, and it seems that it was, then pursuant to rules 1.1, 1.2, and 25.5, there was an active duty on the defence to alert the court and seek directions as soon as practicable, i.e. no later than the 4<sup>th</sup> of May 2023.
58. The response from Trading Standards is met with a letter dated the 11<sup>th</sup> of May, signed by Mr Nisbet, alleging possible malfeasance and malicious prosecution of Gary Fredson. That's at page 102. At page 104, Trading Standards respond, inviting Brabners Solicitors to list the matter before the judge if they have any further application.
59. There was still no court listing. Instead, there is ongoing aggressive correspondence from Brabners, through May and June, albeit none makes any further reference to the jurisdiction point, it now concerns compensation.
60. The jurisdiction point is next revisited in a letter dated the 27<sup>th</sup> of September 2023, which is at page 110 of the prosecution bundle:

“Dear Beth, further to my email yesterday, I logged on to your email system again this morning to see that the email I read just last night, which I think was sent on the 30<sup>th</sup> of

June, has now also disappeared. You will recall that in the past to exchange correspondence relating to the CPU TR reg 14 and Crim PR 7.2(3)(b)(i).

You helpfully confirmed previously that no certificates pursuant to regulation 14.2 were or are in existence I take, although please confirm that in view of this, Crim PR 7.2(3)(b)(i) was not complied with either. To that end, can you please provide copies of all correspondence with the court concerned, with the laying of all informations in this matter. I await hearing from you as soon as possible.”

61. In its response, Trading Standards make it plain that its position has not changed, that there’s nothing further to disclose, that they don’t intend to make any further disclosure. Still, the defence fail to have the matter listed, whether for application, whether for directions, whether for application for further disclosure.
62. At page 114 is a letter from Mr Nisbet, dated the 26<sup>th</sup> of October 2023, stating “Pursuant to case law, a failure to comply with CPR 7.2(3)(b)(i) has the effect of rendering the relevant proceedings a nullity. In these circumstances, a court would have no ability to remedy the procedural defect and no jurisdiction to deal with the allegations themselves.” Whether or not that assertion is right or wrong, there was no listing or application for a court to determine it or set directions in respect of it.
63. At page 121 is a letter dated the 9<sup>th</sup> of November 2023, in which Mr Nisbet indicates that he will be proceeding on the basis that the prosecution did not comply with CPR 7.2(3)(b)(i), and he said that he would be applying to the court within a fortnight, and seek costs. He did neither.
64. The first time that the defendant company’s solicitors purported to inform the court of any jurisdictional issue post-conviction is by letter marked for my attention, dated the 9<sup>th</sup> of January 2024, which was sent after the jury in the trial was sworn, and which still failed to make any application.
65. A note was sent, dated the 30<sup>th</sup> of January, from Mr Lawrence KC, still not making any application, but asserting that after the trial, the matter would need to be listed for directions upon an anticipated but not submitted application. It was only when, on receipt of that note, that this court ordered application, if it were going to be made, to be made the following day, that the application to vacate was indeed served.

*Argument on Vacation of Plea*

66. Mr Rees KC has submitted that my starting point is not whether the defence has an argument on the jurisdiction point. It is whether the defence application meets the test for vacation of plea. And so I look at that as the first issue, the vacation of plea.
67. The defence position on this issue is set out at paragraphs 5, 6 and 7 of Mr Lawrence KC’s helpful written argument dated 1 February 2023:

“5. The question for vacating a guilty plea is simple: is it unjust for the guilty plea to stand? The basis of an application to vacate a guilty plea is to demonstrate that it would be unjust to allow the guilty plea to stand. This is very similar to the basis of

an appeal against conviction, where the intention is to demonstrate that the conviction is unsafe.

6. There are a number of circumstances in which an appeal against conviction, following a plea of guilty, can be made. These fall principally into one of the three categories identified in the case of *R v Tredget* [2022] EWCA Crim 108 (although this is not a closed or exhaustive list):

- (i) Defective Guilty Pleas - where the guilty plea was vitiated (i.e. the guilty plea is considered defective due to the circumstances existing at the time it was entered).
- (ii) Unlawfulness - when it would have been an abuse of process to prosecute the defendant (for example because the case should have been stayed on the grounds that it was offensive to justice to bring him to trial) or there was some other legal obstacle that should have prevented the case proceeding;
- (iii) Innocence - Where it is established that the defendant did not commit the offence and therefore the plea of guilty is false.

This case falls primarily into category (ii) above, but also arguably into category (i) above too.

7. If sentence had been passed, in this case, an appeal against the conviction to the Court of Criminal Appeal would have to be made as the Crown Court would then have had no jurisdiction to vacate the plea under CPR Part 25. By way of completeness, and analysis, the courts have identified several circumstances when, notwithstanding an admission of guilt, an appellant was entitled to submit that their conviction was unsafe. Again, most fell into the same three broad categories as set out above in paragraph 6 (although, again, those categories were not closed): (i) cases where the guilty plea was vitiated; (ii) a category of "abuse of process" cases, which arose when there was a legal obstacle to the accused being tried for the offence; (iii) the category of innocence (i.e. where it was established that the defendant had not committed the offence) meaning that the admission made by the plea was false. Similarly, if sentence had been passed in this case, we clearly, again primarily, fall into category (ii) above and arguably also into category (i) above too."

68 I queried yesterday whether the fact that mine is a jurisdiction of first instance, as opposed to a jurisdiction of appeal, makes a difference in the exercise of my undoubted discretion to vacate a plea pursuant to rule 25.5, and so overnight, again very helpfully, Mr Lawrence prepared and served a separate note, in which having reminded me that by Criminal Procedure Rule 25.5(3)(a) the application must explain why it would be unjust for the guilty plea to remain unchanged, he submits, "the basis of any application to vacate a guilty plea is simply to demonstrate that it would be unjust to allow the guilty plea to stand. That's the test, there's no closed category when it comes to the same. Whilst the Crown Court may, perhaps more often than not, come across applications to vacate a guilty plea on the basis that it was equivocal, or was as a result of poor legal advice, the ultimate question for the court is whether it would be unjust for the plea to stand... The three scenarios identified in *Tredget* are examples of scenarios where it would be unjust to allow the plea to stand. Unjust is simply something that is contrary to justice or, depending on the circumstances, unfair. The application in this case is made on the basis that it would be unjust for the guilty plea to stand and falls squarely into scenario (ii) in *Tredget* (which is a scenario that the

Court of Appeal has determined as being one where it would be unjust for the plea to stand). For the sake of completeness unlawful is plainly unjust.”

68. He also cites *Sheik & Ors v R* [2004] EWCA Crim 492, per Lord Justice Mantell, “It is well accepted that quite apart from cases where the plea of guilty is equivocal or ambiguous, the court retains a residual discretion to allow the withdrawal of a guilty plea where not to do so might work an injustice. It’s not possible to attempt a comprehensive catalogue of the circumstances in which the discretion might be exercised.”
69. Mr Rees KC broadly agrees, but he points me to *Crown and Walsh* [2016] 4 WLR, which deals with an out of time application to quash convictions in the Court of Appeal where, had the application been made timeously, the proceedings would have been quashed as a nullity, but because it was made out of time, the Court of Appeal refused to extend time for appeal, and refused to interfere with the convictions in the absence of substantial injustice, and that case has been discussed in oral argument.
70. I’m not going to go over all of the passages that were cited to me, but there are two particular points that I derive from this case: first, the principle; but second, the reminder that the Court of Appeal operates under a different statutory regime when considering quashing a conviction than I do when considering vacating one, even if our approach is necessarily similar.
71. The Crown also pointed me to *R v Drew* [1985] 2 All England Reports at 1062, as having features reminiscent of those in this case. Particularly, I was taken to the ratio at page 1068, paragraph F, “Only rarely would it be appropriate for the trial judge to exercise his undoubted discretion in favour of an accused person wishing to change an equivocal plea of guilty to one of not guilty. Particularly this is so in cases where as here, the accused has, throughout, been advised by experienced counsel, and where, after full consultation with his counsel, he has already changed his plea to one of guilty at an earlier stage in proceedings.” Mr Rees makes the point that in this case the defendant company benefitted from the most eminent counsel, King’s Counsel, who wrote the book on this area of law.
72. The Court of Appeal was also unimpressed in that case of *Drew*, that the application to vacate meant that the defendant would have achieved that which he had sought and failed to achieve through an earlier unsuccessful severance application, separate trial from his co-accused, and I note here that the late application was made not only after the jury had been sworn in this case, but after they had retired to deliberate on their verdicts.
73. I have also been referred to and read *R v Brahmhatt* [2014] EWCA Crim 573, in which a defence of duress was abandoned after conference with the defendant’s silk and junior, and the Court again emphasised that a defendant who enters an unequivocal plea faces a high hurdle in persuading the court to intervene.
74. In my view, in respect to the jurisdiction issue, the defendant company has behaved inconsistently at best, and cynically at worst. I am satisfied from the chronology and the correspondence between the parties, and for the reasons I have already set out, that at the time the defendant company entered its plea, it had been advised and was satisfied

that the applications for the various summonses were in time, and that the summonses were valid.

75. Putting it shortly, the defendant company, with its very experienced team of legal advisors, had fully considered the possible point to be taken, in line with the authorities, and determined there was nothing in it.
76. The plea was entered, therefore, unequivocally, and without pressure. It was entered in full knowledge of the case against the company. It was entered with the benefit of the most expert legal advice. However, if that expert legal advice were wrong, and the effect of Mr Lawrence KC's submissions to me is that it was, and if the summons were, as a matter of fact, out of time, then this court would arguably not have jurisdiction. Notwithstanding the Court of Appeal observations in *Walsh* [2016] above, there would be a very real risk that I would impose a sentence that would be ultra vires, and therefore unlawful.
77. Therefore, in accordance with overriding objective, I must determine the merits of the jurisdiction point, in order properly to determine the application to vacate, even though, as I find, it is made woefully out of time.

Argument on Jurisdiction Point

78. On the merits, Mr Lawrence KC, for ESE, relies on four authorities which he submits have the effect that firstly, the summons issued on the 13<sup>th</sup> of November 2020 was issued out of time, in breach of regulation 14, which is fatal and removes jurisdiction. He conceded during oral argument that the summonses dated the 1<sup>st</sup> of May 2019 and the 28<sup>th</sup> of July 2020, were in time.
79. Secondly, he says that these four authorities will satisfy me that even if the summons was, as a matter of fact, in time, the magistrates could not have known that it was in time, because in breach of CPR 7.2(3), the prosecution did not contemporaneously demonstrate to the magistrates that the summons was issued in time, or was applied for in time.
80. The first of the four authorities cited is *Tesco Stores Ltd v London Borough of Harrow* [2003] EWHC 2919 (Admin). In this case, as a matter of fact, complaint about the single instance of selling a sandwich unfit for human consumption was made to the Borough Council a year and two days before the summons was issued, and so the summons was out of time. The High Court found that that was so because a year and two days prior to the issue of the summons, all facts material to found the relevant charge had been disclosed to the investigator. The Administrative Court reminded itself of the legislative aims in connection with the time limit: the setting on time limits for the prosecution of offences is designed to achieve two important consequences; the first to provide protection to the citizen who may have committed a criminal offence, the second is to bring about, in the authority having responsibility for the prosecution, an efficient and timely investigation of the offence.
81. This is the only authority cited to me by Mr Lawrence KC on the first point, that the summonses were, as a matter of fact, out of time. Orally, he developed the submission, stating that regulation 14 is clear that "the date of the commission of the offence," and "the date of the discovery of the offence by the prosecutor," mean that where the offence

is an ongoing offence, the date of discovery of the offence by the prosecutor must be the start date of that ongoing offence. I asked him if he could provide me with any authority to that effect, and he indicated that he could find no authority, either way, on the point.

82. On the second point, the consequences of a failure to demonstrate to the magistrates' court that the summons was within the time limit, I was referred to three authorities. First, *Food Standards Agency v Bakers of Nailsea Limited* [2020] EWHC 3632 (Admin). This is a case I don't analyse here in any depth, it was very much on its own facts, and parts of it were subsequently disavowed by Edis LJ.
83. In the second of the three authorities relied on, *London Borough of Barking and Dagenham v Argos Limited; R (Argos Limited) v Romford Magistrates' Court* [2022] EWHC 1398 (Admin) Edis LJ summarised Carr LJ's ratio, and also elements of her judgment that were not ratio, at length and in detail at his paragraphs 25 and 26. At paragraph 26, he says that "it is perhaps unfortunate that the court did not address the consequence questions, which of two questions before the court is by far the more important."
84. Before he went on to examine the consequence question, at paragraph 38 of the judgment he looked at the time limit in respect of prosecutions brought under section 127 of the Magistrates Court Act. He stated:

"The rule requires that the information must demonstrate that the application is made in time, if the legislation imposes a time limit. Legislation in this case does impose a time limit: one of six months, which cannot be extended and doesn't depend on any factual question, except the date of the offence, which must be stated. If the reader knows the offence is a summary only offence, knows the date when it was alleged to have occurred and knows the effect of section 127, the reader knows whether the information is in time or not. Quod erat demonstrandum. QED."
85. Dealing with the consequence question, at paragraph 43, he said: "I evince an intention to establish a binding rule that a failure to comply with Criminal Procedure Rule 7.2(3)(b)(i) does not necessarily render the summons subsequently issued a nullity. It will never do so in a standard case of a summary only offence governed by section 127 of the Magistrates Court Act 1980. Even if the rule requires a reference to section 127 in all cases where a summary only offence is alleged, it's impossible to regard such a breach of a rule as going to the jurisdiction to try the case."
86. He left open for decision, if the point should arise again, the case of more complex time limits. He says at paragraphs 46 and 47, "If there was non-compliance, does this render these proceedings a nullity? No. The purpose of the rule is clear. [That's rule 7.2(3)(b)(i)] It's to assist courts in deciding whether a summons, if issued, will be in time. It is designed to avoid summonses being issued which shouldn't be issued, and to enable the court to function efficiently by having all the necessary material before it in easily accessible form. This summons was properly issued. Treating it as a nullity because of a rule breach, if there was one, is a course which has nothing to commend it at all."

87. He then densely analyses the rule making power and case law related to it at his paragraphs 48, 49, which he summarises at his paragraph 54:

“In other words, the rule is a procedural rule ... designed to assist the court in performing its common law duty. It would be very surprising if such a thing were capable of depriving the court of its jurisdiction. In my judgment this would undermine the process rather than assist it, even if it were possible to achieve this result by a rule of this kind as a matter of law.”

88. The final case on this point is *R (on the Application of) Chopstix Trading Limited v Luton Magistrates' Court* [2022] EWHC 3141 (Admin). Paragraph 15, “strictly it’s unnecessary for us to consider the consequence of a failure to comply with the rule. Nonetheless, we’ve heard full argument, and we evince an intention to create binding authority in relation to consequence, even where the time limits are not as straightforward as they were in *Argos*. As with the issue of non-compliance, Edis LJ in *Argos* left open the question of whether failure to comply with the rule in cases of more complex time limits would render the summons subsequently issued a nullity. He said it would never do so in cases governed by section 127 of the 1980 Act. In our judgment, the same reasoning should apply mutatis mutandis, in the circumstances which applied here. Any application made within a year, in relation to a regulation 19 offence, inevitably will have been made in time. There’s no reason to distinguish those circumstances from a case in which section 127 of the 1980 Act applies.”

89. At paragraphs 18 and 19, the Court looks again at the difference between a rule in the context of jurisdiction and a statute. It points out at paragraph 19, “Rules are made with a view to securing a criminal justice system which is accessible, fair and efficient. That is the purpose of CPR 7.2(3). It is intended to ensure efficiency in the process of issuing a summons. In our judgment, on no sensible reading can it be said to create a jurisdictional requirement. And therefore the rule which is procedural cannot be used to deprive the court of jurisdiction.”

90. Mr Rees KC on the primary issue – was the summons issued in November 2020 out of time – relies on *R v London Parking Gatwick & Malik* [2020] EWCA Crim 957, which he served overnight. *Malik* concerned the prosecution for engaging in unfair commercial practice under regulations 3, 8 and 15 of the 2008 regulations and also, engaging in misleading commercial practice under regulations 9 and 15.

91. The defendant was a director of London Gatwick Parking Limited. He provided secure, or in his case insecure, parking for customers using Gatwick Airport. His engagement in unfair and misleading commercial practices was said to have taken place between October 2014 and August 2017. The time bar point was taken in that case late, and towards the end of trial, but at least prior to conviction. It was looked at again by the Court of Appeal, and is dealt with at paragraphs 14 to 16 of their judgment:

Paragraph 14, “Towards the end of the trial, the defence asserted for the very first time that counts 2 and 8 were time barred. The argument was that the relevant facts were discovered between the 23<sup>rd</sup> of October ’15 and the 10<sup>th</sup> of May ’16, and that informations were not laid in this case until the 23<sup>rd</sup> and 26<sup>th</sup> of June 2017. It’s therefore said that because more than 12 months had elapsed between the discovery of the relevant facts and the laying of the information, these two counts were time barred.”

Paragraph 15, “In his ruling on the 25<sup>th</sup> of March 2019, the judge rejected that submission. He said it took no account of the fact that counts 2 and 8 were ongoing, continuing offences. He took count 2 as an example. The period of time over which that offence took place was said to be between the 20<sup>th</sup> of October 2014 and the 17<sup>th</sup> of August 2016. The informations were laid in June 2017, less than 12 months after the end date of the specified period of offending. He held that the charges were, therefore, brought in time.”

Paragraph 16, “The single judge found that the judge was entitled and indeed right to rule as he did, we respectfully agree. In circumstances where there is an ongoing, continuing offence, the 12-month time limit is not triggered by the first time that the offence occurred, but the last. *Thames Water Utilities Ltd v London Borough of Bromley* [2004] EWHC Admin 301 is clear Divisional Court authority for that proposition. On behalf of the applicant, Mr Monteith QC sought to distinguish *Thames Water Utilities* on the basis that it concerned a case where there was a need for remedial action. But in the case of a continuing offence, there is the need for remedial action. In this case, there was the need, for example, to cease parking cars in muddy, insecure fields. In our view, therefore, the attempt to distinguish *Thames Water Utilities* is unsustainable. Accordingly, the time bar point was fundamentally flawed because of the failure to recognise the applicant’s ongoing offending; counts 2 and 8 were not time barred.”

92. Mr Lawrence KC says that there is a difference between a course of conduct and continuing offending. He submits that rule 7.3(2), which says “more than one incident of the commission of the offence may be included in the allegation if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of commission,” must mean that since the words “course of conduct” were not explicit in the words of each charge in the summons, the Crown was not alleging a course of conduct, and so it must have been, in each of the six charges, alleging a single instance of engaging in an unfair practice.
93. He submits that the Crown has later wrapped the six charges up in a single count on the indictment, which does use the word “course of conduct,” and it is unclear, therefore, whether the allegation is of continuing offending, or of a course of conduct comprising six specific incidents.
94. I confess I have difficulty understanding that submission. On their face, each of the six charges in the summons alleges that ESE, over a period of three years leading up to the issue of the summons, engaged in a particular unfair practice.
95. In charge 1, the unfair practice is sending out marketing letters to customers, plural, who were not customers of the business, designed to create an impression that there was a pre-existing relationship. In charge 2, the unfair practice is claiming to offer a free health check, when the actual purpose in attending the customers’, again plural, homes, was to attempt to sell goods and services.
96. In charge 3, the unfair practice alleged is claiming to be accredited by NAPIT. In charge 4, it is by selling products and services, plural, that were unnecessary and/or falsely described. Charge 5 alleges engagement in unfair practice through overcharging consumers, plural, for equipment and/or its installation. And finally, the unfair practice



alleged in charge 6 is failing to provide consumers, again plural, with any or adequate cancellation rights.

97. Those six obviously continuing offences relating to customers generally over the three year period specified, can be neatly contrasted with the earlier summonses, which make specific instance allegations - one a specific instance of selling a named customer, Robert Wilson, a product unfairly, notwithstanding the company's corporate knowledge that Mr Wilson suffered from dementia, and four similarly specific charges relating to Mr and Mrs Bishop.
98. The rolling up of the six different unfair practices alleged in the separate charges on the summons in to a single count on the indictment, alleging a course of conduct including those matters, does no more than is permitted by and is entirely in line with rule 10.2, which essentially is the corresponding Crown Court rule to 7.2: "More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to time, place or purpose of commission."

#### Ruling on the Merits

99. So I turn then to my ruling on the merits.
100. First, the submission that the summons of November 2020 was out of time is untenable. *R v London Parking Gatwick & Malik* [2020] EWCA Crim 957 provides a complete answer to the point, which is presumably why it wasn't taken in the magistrates' court prior to sending, or at this court prior to plea.
101. The offending here was continuing offending, and only complete when the last act is committed. I have heard evidence in the trial which demonstrates that very many of the instances of unfair practice were committed in the 12 months prior to the 11<sup>th</sup> of November 2020, when the information was laid, in addition to the sample placed by the Crown in its application bundle at pages 204 to 210.
102. It is the last offence in a continuing act that counts, not the first. And this principle upon which the defence told me they could find no authority, is set out at chapter 5, paragraph 51 of Archbold Magistrates' Courts Criminal Practice 2024, and in chapter 4 at paragraphs 33 and 38 of the Consumer and Trading Standards Law and Practice – the "Pink Book," which is edited by Mr Kirk KC, who acted for ESE at the time that it entered its plea.
103. The Crown, in its bundle, has produced the summons. The summons shows and reflects the unfair practices alleged in the six charges. The period of the offending alleged starts three years before the date of the application and ends one month before it. On its face, the application demonstrated to the magistrates' court that it was in time. There was no breach of rule 7 of the CPR.
104. Further, even if they had not so demonstrated that the applications were timeous, even if there had been a breach of rule 7, the applications were, as a matter of fact and law, in time. This court, as the magistrates' court before it, would retain jurisdiction in any event.

105. It follows that there being no merit in any of the grounds of the application, it is not unjust to refuse this application to vacate plea, a plea that was made unequivocally and after expert legal advice to a valid indictment, alleging a fully evidenced and fully described course of continuing offending, involving some 79 complainants. There's no injustice, substantial or insubstantial, in the convictions standing. It would be unjust were the defendant company to be allowed to abuse the court's process in the manner in which, in my view, it has tried to do. Accordingly the application is dismissed.