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Case Nos: 201902748 B4, 201801617 B4, 201802011 B4, 201902628 B4, 201901357 C4, 201901359 C4, 201903414 B2, 201904652 B2 & 202001364 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT SOUTHWARK
HHJ KORNER QC
T20167166 & T20147595
ON APPEAL FROM CROWN COURT BLACKFRIARS
HHJ RICHARDSON
T20167555 & T20187018
ON APPEAL FROM CROWN COURT SOUTHWARK
HHJ EADY
T20177014
ON APPEAL FROM CROWN COURT MAIDSTONE
HHJ GRIFFITH-JONES QC
T20157340

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2021

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE HOLGATE
and
SIR RODERICK EVANS

- -

Between:

James Francis BYRNE — **Appellants**
Dylan CREAVEN
Andrew Stephen ROWE
Sami RAJA
Paul MOORE
Michael MOORE
Haydon DRISCOLL

- and -

REGINA **Respondent**

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Ms Narita Bahra QC & Mr John Townsend (instructed by **Murray Partnership Solicitors**) for the **1st Appellant**
Mr Jonathan Rose (instructed by **Birds Solicitors**) for the **2nd Appellant**
Ms Anita Davies (instructed by **Cartwright King Solicitors**) for the **3rd Appellant**
Ms Narita Bahra QC & Mr Nicholas James (instructed by **Cartwright King Solicitors**) for the **4th Appellant**
Mr Colin Aylott QC (instructed by **Sonn Macmillan Walker Solicitors**) for the **5th Appellant**
Ms Katy Thorne QC (instructed by **Hodge, Jones & Allen Solicitors**) for the **6th Appellant**
Mr Nicholas James (instructed by **Cartwright King Solicitors**) for the **7th Appellant**
Mr Mark Bryant-Heron QC, Ms Jane Osborne QC, Mr Angus Bunyan & Mr Edmund Fowler (instructed by **Crown Prosecution Service, Specialist Fraud Division**) for the **Respondent**

Hearing dates: 1st, 2nd & 3rd December 2020

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Approved Judgment

This is the judgment of the court to which all members contributed.

Introduction

1. Given there is a single issue which links these conjoined appeals, it is useful to provide at the outset a brief overview of the circumstances of each case, together with a summary of the discrete factor that has led to them being listed together.

Byrne

2. On 10 April 2016 in the Crown Court at Southwark, James Francis Byrne was convicted of two counts of conspiracy to defraud, contrary to common law (Operation Penco) (counts 1 and 2). On 29 July 2016, before the same court, he pleaded guilty to a single count of conspiracy to defraud, contrary to common law (Operation Soma – Paramount). He was sentenced on 1 August 2016 to a total term of 11 years' imprisonment. His application for leave to appeal against conviction has been referred to the full court by the Registrar. We grant leave to appeal against conviction.

3. The prosecution allegation in Operation Penco was that the appellant together with his co-accused was involved, first, in defrauding investors in London Carbon Credit Company Limited ("LCCC") by dishonestly selling carbon credits and, second, in purportedly investing the capital held in Self Invested Personal Pension Schemes ("SIPPS") in carbon credits, via Henderson International Associates ("HIA"). It was alleged in count 1 (LCCC) that the conspirators dishonestly misrepresented that the return on sales of carbon credits to investors would lead to substantial gains, that carbon credits were available to sell and that the monies provided by the investors would be used exclusively, or mainly, for the purpose of such credits. It was alleged in count 2 (HIA) that the conspirators dishonestly failed to disclose that 45% would be taken by way of commission. They misrepresented that the SIPP investments in carbon credits provided a return that outachieved other investment options and would lead to substantial capital gains. They falsely suggested that the investment was appropriate and that the entirety of the transferred pension fund, minus agreed fees, would be invested in carbon credits.

Creaven and Rowe

4. On 15 March 2018 in the Crown Court at Blackfriars, Dylan Creaven and Andrew Rowe were convicted of two counts of conspiracy to defraud, contrary to common law (count 1 (relating to carbon credits) and count 3 (relating to diamonds)), and a

single count of a conspiracy to transfer criminal property (count 2: money laundering). They were sentenced to 13 years' imprisonment. Creaven appeals against conviction on all counts by leave of the single judge, limited to the ground relating to a bad character application. We grant leave to appeal on Creaven's other grounds of appeal against conviction. Rowe's application for leave to appeal against conviction has been referred to the full Court by the Registrar, along with an application for an extension of time (458 days). Creaven renews an application for leave to appeal against sentence following refusal by the single judge. We grant Rowe leave to appeal against conviction, along with his application for an extension of time of 458 days.

5. The prosecution alleged that between 2012 and 2013 the appellants, together with their co-accused, operated a company called Agon Energy Ltd ("Agon"), which purported to sell carbon credits as representing a highly profitable investment to members of the public (count 1). Furthermore, from 2013 to 2014 they were involved in running Lanyard Capital Ltd ("Lanyard"), which it was claimed dealt in diamonds as an investment which they falsely represented as yielding high returns (count 3). Both enterprises were said to have been a vehicle for fraud. The carbon credits were alleged to be completely worthless and the diamonds were either non-existent or of very inferior quality.

Raja

6. On 8 January 2019 in the Crown Court at Southwark, Sami Raja was convicted in his absence of two counts of conspiracy to defraud, contrary to common law, and five counts contrary to the Proceeds of Crime Act 2002 relating to the proceeds of the frauds. His applications for leave to appeal against conviction and sentence, and an extension of time of 52 days, have been referred to the full Court by the Registrar. The application for leave to appeal against sentence was abandoned during the hearing. We grant the extension of time and leave to appeal against conviction.

7. The prosecution alleged that the appellant, together with his co-accused, was involved in defrauding investors of Harmon Royce Limited and Kendrick Zale Limited by setting up these companies in order dishonestly to sell carbon credits, by misrepresenting the trading price of those units and by falsely claiming that they were a profitable investment and that there was a secondary market.

Moore, Moore and Driscoll

8. On 7 December 2016 in the Crown Court at Maidstone Paul Moore, Michael Moore and Haydon Driscoll were convicted of fraudulently trading, contrary to section 993(1) Companies Act 2006. Their applications for leave to appeal against conviction have been referred to the full Court by the Registrar. We grant leave to appeal against conviction.

9. The prosecution alleged that the appellants fraudulently persuaded individuals, via a company called Burbank of London Ltd, to invest in the carbon credit market. It was alleged that they misrepresented to the investors that they had a realistic prospect of re-selling the carbon credits in the future at a significant profit.

The Principal Issue in the Case

10. Central to the four cases are two types of carbon credits: Voluntary or Verified Emission Reductions ("VERS") and Certified Emission Reductions ("CERS"). Put broadly, a carbon credit is a certificate, or a permit, which represents the right to emit a tonne of carbon dioxide into the environment. Carbon Credits are created by environmental projects, such as wind farms, hydro plants and solar energy projects. These entities can issue credits that can then be purchased by those who wish to offset their own emissions.

11. Focussing on the position at the relevant time, the Crown's case, in essence, was that VERS were carbon offset units sold on the voluntary or the over-the-counter market for carbon credits. They were not subject to regulation and no certificate was issued giving any right or entitlement to the holder. They were, therefore, a method by which a corporation could offset its carbon footprint by contributing towards a carbon-reducing initiative elsewhere in the world. There were many different types of VER and there was no industry standard. The contribution was acknowledged by the relevant scheme that issued and recorded the carbon credit. Trading volumes in the voluntary market were small, given the nature of the credit, the lack of regulation and the absence of any kind of Investment Exchange. There was said to be no credible secondary market for the onward sale of VERs and instead they were offered for purchase on a number of databases, and buyers contacted the seller (usually the project that produced the emission credits).

12. CERs – again focussing particularly on the relevant time – were units created through a regulatory framework with the similar purpose of offsetting emissions. They could be traded on the stock market, like company shares. This was a regulated "*Cap and Trade*" market (*viz.* a progressively strict cap on the emission of greenhouse gases is combined with a market for companies to buy and sell

allowances in order to enable them to emit controlled and decreasing amounts of carbon). A finite number of permits were issued and allocated to businesses each year, and the price was intended to move relative to demand. However, a market of this kind would inevitably collapse if supply markedly exceeded demand. By 2013 more CERs were being produced than the predicted demand for them, leading to a substantial oversupply. Indeed, by 2013 CERs were trading at an all-time market low, and that downward trend continued thereafter.

13. In each of the present cases, the Crown instructed Andrew Ager to provide expert evidence about VERs and CERs (as relevant to the circumstances of the particular case) including i) their price; ii) the viability of carbon credits as an investment, both generally and in the context of Self Invested Personal Pension Schemes (SIPPS) (*e.g.* Byrne's case); iii) the absence of a secondary market; and iv) whether the particular brokerages operating in this market were legitimate. His evidence in each of the trials is summarised to the extent relevant below.

14. Ager gave evidence in 14 criminal trials between 2012 and 2019.

15. In a later trial at Southwark Crown Court (Operation Balaban – *R v Stephen Sulley & Ors*) in May 2019, Ager was discredited during a *voir dire* and he was subsequently abandoned as a witness by the prosecution on the grounds that it was accepted that he was not an expert of suitable calibre. On 23 and 24 May 2019 Ager had been cross-examined by defence counsel (notably by Ms Bahra Q.C.). The following matters were established:

    (i) He had received no training in the duties of being an expert. He had failed to sign the expert's statement of understanding and the declaration of truth as required by Criminal Procedure Rule 19.4 (j) and (k) at the outset of the case.

    (ii) He considered it was appropriate to withhold important concessions from the defence that, *inter alia*, qualified his evidence, most particularly in respect of the existence of possible secondary markets for carbon credits.

    (iii) He seemingly held no relevant academic qualifications (he sat 3 A levels but could not recall if he passed any of them). He had no qualifications relevant to carbon credits and pension schemes. He had not conducted an independent review of or analysed the carbon credits market.

(iv) He had been involved in "*copying and pasting*" from witness statements to give the false impression that questions had been asked of him by police officers when he had formulated the questions himself.

(v) He had made no attempt to comply with his other obligations as an expert witness, which included his failure to retain records and to reveal material as required, *inter alia*, by Part 19 of the Criminal Procedure Rules and the Criminal Practice Direction 19A.5 (a) and (f). This included an absence of any details of the relevant meetings he attended and his working materials. He had not retained the documentation which he was provided by the police, some of which he claimed had been destroyed by a leak.

16. It emerged, furthermore, that Ager had improperly tried to dissuade Dr Marius Frunza, an expert instructed for one of the defendants in that case, from giving evidence. He made a number of false or misleading assertions to Dr Frunza during joint conferences. The judge concluded that it was likely Ager was seeking to avoid any challenge to his evidence by a more competent witness.

17. It is observed that in Operation Balaban, Ager failed to reveal that in the Byrne case he had called into question the reliability and authenticity of an article published on the Financial Conduct Authority website dated 2012. As rehearsed below (at [32]), this document contained some potential support for the existence of a secondary market to VERs and its authenticity was established during the course of the hearing. Additionally, it was elicited that Ager failed to reveal in advance of being questioned in the Operation Balaban *voir dire* that during his evidence in Bristol Crown Court in 2018 in R v David Henley, he had made what was described as a significant concession when the contents of an article published by Bloomberg on 17 June 2013 was put to him ("*United Nations Carbon Credit Prices May Rise by 42%, Barclays Says*" by Dinakar Sethuraman). We interpolate to note, however, that the concession was simply that there could be an intermediary or broker between the party producing the credit and the party who buys the credit in order to use or offset it. The concession did not go as far as to accept that there was a market for private investors to become involved in.

18. As a result of this cross-examination, Judge Loraine-Smith directed that Ager was an entirely unsuitable witness and should not be relied upon in any subsequent proceedings. On 29 May 2019, the judge, when discharging the jury, explained:

> "In *R v Alex Pabon* (2018) EWCA Crim 420 Lord Justice Goss said this by way of a postscript: 'This case stands as a stark reminder of the need for those instructing expert witnesses to satisfy themselves as to a witness' expertise and to engage (difficult though it sometimes may be) an expert of a suitable calibre'. Time was to show that Andrew Ager is not an expert of a suitable calibre. I have no doubt that he knows a lot about the carbon credit market and from that angle alone his evidence could be seen to be reliable. In fact, in this case, it certainly looked for a time as though there would be little challenge to what he had to say. But an expert's duties go far beyond that and it became glaringly apparent in the hearing in the jury's absence that he had little or no understanding of what those duties were or why they were important".

19. Thereafter, a CPS spokesperson made the following statement:

> "We are considering past cases to identify any in which Andrew Ager appeared as an expert witness and will consider any action necessary once these have been fully reviewed. Mr Ager will not be used as an expert witness in any future cases".

20. The joint submission of the appellants, in outline, is that Ager's conduct and his failure to adhere to the principles and behaviours which govern the conduct of expert witnesses has undermined his evidence on the operation of the carbon market in the individual trials, to the extent that the convictions as regards each of the appellants are unsafe. This argument is resisted by the Crown, save that in written submissions by the prosecution it was conceded at an earlier stage in these proceedings that convictions of Creaven and Rowe on counts 1 and 2 are unsafe. In oral argument, however, Mr Bryant-Heron Q.C. for the prosecution indicated that the Crown resiled from that concession. Whatever the Crown's position, we emphasise that the safety of convictions is always a matter for this court alone to determine.

21. We now turn to each of the cases in greater detail.

The Individual Cases

Byrne

22. Between August 2011 and August 2012, LCCC, a registered company, was involved in selling VER carbon credits to the public by way of telephone sales (count 1). In August 2012 some of the investors became suspicious about their investments as they

had received no returns. They attempted to communicate their concerns but LCCC had become uncontactable.

23. In August 2012 HIA was formed by those who had earlier been involved with LCCC (count 2). HIA advertised itself as a company that facilitated introductions and put those who held personal pensions in contact with a company called Carbon Advice Group ("CAG"). The latter was said to be able to provide a pension structure by way of investment in CER credits. HIA operated until January 2013.

24. The appellant was linked to these companies. Police executed search warrants at the various suspects' addresses. On 26 March 2013 the appellant attended Belgravia Police Station by arrangement. He was arrested and exercised his right to silence during interview. A judge issued a restraint order. He. On 12 June 2013 the police conducted a second interview. The appellant predominantly answered "*no comment*" to the questions put to him.

25. The prosecution case is that the LCCC and HIA were fraudulent enterprises. The appellant was the principal proponent of each of the allegedly dishonest schemes, as well as the principal beneficiary.

26. As regards count 1, the prosecution case was that LCCC sold carbon credits, at best, at grossly inflated prices (in that they were never going to achieve the value for which they were sold) and, at worst, they had no value. Furthermore, LCCC bought very few carbon credits with the money transferred to them and, in some cases, the funds from investors were channelled directly into the appellant's personal bank account.

27. 47 investors were identified by the police. The total loss they sustained was in excess of £1.8 million. None of the investors' funds were returned by LCCC, and, although some carbon credits had been bought by the company, they were incapable of being identified and were, in any event, of low or nil value.

28. For count 2, the prosecution case was that HIA took commission payments from the investors' pension funds that were extortionate and had not been agreed by the investors. The funds were transferred – via a number of different companies – to CAG at which point 45% of the total was transferred back to HIA by way of commission. Although some carbon credits were bought, this involved only a relatively small percentage of the overall investment, particularly once the commission payments had been deducted. The credits that had been purchased were eventually deemed to be worthless.

29. The investors were not told about either the level of the commission extracted by HIA or the diminishing value of the carbon credits until after the demise of HIA. HIA operated between the summer of 2012 and January 2013. Over that period, they persuaded 11 individuals to transfer funds worth a total of just in excess of £450,000.

30. Ager gave evidence about the carbon credit market. The judge during the summing up described him as someone who had been involved in the financial and commodity markets since 1987 and in the carbon credit market since 2006. Ager maintained there was no secondary market in VERs. Once purchased, they were effectively removed from the system because there was no resale value. Ager expressed the view that the prices LCCC charged for these products reflected an "*oversale*" of the order 2200%, given the price for which they had been bought. Ager produced a schedule in evidence which set out proposed oversales for each transaction, albeit he did not provide the underlying evidence or data underpinning the schedule.

31. At some stage after 2005, the price of both CERs and VERs reached the point of almost terminal decline. Indeed, from 2010 the price of both types of carbon credit collapsed, and the products lost almost 98% of their value. Ager testified that, overall, it was one of the worst performing markets. CERs, once valued at £16 – £17, by 2012 – 2013 were worth 16 pence. VERs took their pricing range from CERs and in 2012 a typical VER traded for 20 to 50 pence.

32. He was asked to comment on an article from the website of the Financial Services Authority ("FSA") dated 25 May 2012 which indicated that investing in carbon credits came with great risks and was generally only suitable for the most experienced and knowledgeable investors. However, the article went on to suggest that VERs were increasingly being promoted to investors, albeit the authors of the article counselled "[…] *you should make your own checks to find out whether there is demand for carbon credits of this type on the indirect, secondary market, as we are concerned there is not".* Ager queried whether the article was genuine, but it was established it had been published on the FSA website. Ager did not agree that they were being promoted as suggested. Similarly, as regards a small number of articles which tended to indicate optimism vis-à-vis the carbon credit market, he said they were written at a time when it was not realised the extent of the impending market collapse.

33. He described the brochures produced by LCCC and HIA as misleading, in that they misapplied information that was, in any event, largely out of date. He emphasised that the carbon credit market was difficult to access and liquidate. He suggested

that although there was a secondary market in CERs, a high level of paperwork was required, and any investment needed to be accompanied by a warning of the risks involved. He emphasised that the FCA suggested that investment in this field was inappropriate for private individuals. He indicated he would be surprised if there was a pension scheme that could be linked to VERs, albeit he accepted he was not a pension expert. HIA was acting, in his view, as an independent financial advisor, seemingly offering appropriate knowledge and understanding. They acted as the primary driver in this process.

34. The judge observed to the jury that:

> "No one, for example, has sought to dispute Mr Ager's evidence about the two types of markets in carbon credits, that is to say the CERs, the regulated ones and the voluntary credits, the VERs. Nor have they sought to dispute his evidence of what they actually cost at the relevant time. But what is disputed is whether during the period of the indictment there was agreement amongst experts in this area of the potential rewards from investment in carbon credits, and as you know various articles were produced by the defence […]."

35. The judge emphasised that there was no dispute that VERs had no resale value.

36. Evidence was given by some of those who invested in LCCC as to the hard sale techniques utilised by the company, with telephone calls being made on a daily basis to overcome any hesitation to invest. They were told a variety of different things about pricing, the availability of the credits and the potential for profit. None of these individuals received any returns on their investments and they all lost the entirety of their money.

37. The certificates issued to the investors were untraceable. An analysis of paperwork seized from the home address of Young Erumuse, one of the accused, demonstrated that the certificates created by LCCC were a fiction.

38. Those who invested in HIA similarly testified as to the high-pressure sales tactics utilised by the salesmen. Potential investors were not provided with any information on the commission charges to be applied and they would not have transferred their pensions had they known the real position. By the time HIA ceased to trade, the pension funds were almost worthless.

39. Four employees of LCCC gave evidence who worked at LCCC as "*openers*". Their task was to send out the brochures and to sell carbon credits. They were told to use

a different name when speaking with potential clients and they were provided with a script. They said that Byrne was the "*boss*" of the company and he gave motivational talks to the employees. Similarly, two junior brokers at HIA testified that their role was to send out brochures and sell carbon credits. They also worked from a script and they informed individuals who held private pensions that the product they were offering (*viz.* SIPPs that were invested in carbon credits) performed better than the relevant pension schemes that the investors then had in place. Byrne owned the business and drove an impressive motorcar, and he encouraged the employees to aspire to his lifestyle.

40. The appellant signed the lease for a number of properties leased by LCCC and HIA. Both LCCC and HIA made unexpected departures from some of these premises prior to the end of the tenancies.

41. The LCCC bank accounts showed that a total of £1,623,730 was received from those allegedly deceived. Only £76,038.88 was spent on the purchase of carbon credits. Instead, a very considerable part of the sums the company received was dissipated on personal spending, including travel. As examples of the misuse the funds, on 2 November 2011 £95,862 was received from Mr Evans which, instead of being invested, was simply transferred to the appellant the following day. Payments were made on the appellant's behalf out of investors' funds of £24,000 to an estate agent and £9,000 to Virgin Holidays. Similarly, bank accounts linked to HIA showed that a total of £214,910 was paid in commission. Again, as regards this company there were large sums spent to fund the appellant's travel and shopping.

42. The appellant, who was a salesman or sales consultant by background, served a defence statement in which he suggested that he had a genuine belief that there was a viable secondary market for the units. He testified that his involvement in the two companies came about originally only through his wish to assist his co-accused, Erumuse (LCCC) and Henriot (HIA) who wished to run these businesses. The appellant maintained he was an experienced businessman who was able to provide the benefit of his business acumen and his contacts, and he could secure members of staff. In return, it was agreed he would receive the total profits for two years, and thereafter each company was to be the sole property, respectively, of Erumuse and Henriot. As far as the appellant understood the position, carbon credits were a sound investment. He was wholly unaware of any fraudulent activity. He provided a suggested explanation for the various monies he received from both companies. Against the background of that evidence from the appellant, the judge stressed that Byrne's defence was essentially that he was wholly unaware of any fraud or frauds that may have been perpetrated.

Creaven and Rowe

43. The case concerned two alleged frauds, namely the dishonest sales from a call centre of questionable or non-existent investments. The dishonesty allegedly involved two companies, Agon (counts 1 and 2) and Lanyard (count 3). By count 1, it was alleged that between November 2011 and June 2013 the appellants conspired with others to defraud investors in Agon by dishonestly causing and permitting false information to be provided to investors about the value and marketability of carbon credits. By count 2, it was alleged that between February 2012 and June 2013, they conspired with others to transfer criminal property, namely the funds obtained from the conduct in count 1. As set out in the introduction, it was the prosecution's case that both enterprises were vehicles for fraud. The carbon credits offered and sold by Agon were completely worthless, whilst the diamonds offered and sold by Lanyard were either non-existent or of very inferior quality to those for which the investors had paid.

44. Creaven was said to have been the prime mover, establishing the companies and financing the enterprise. Rowe was the sole director of both companies and a signatory to the various bank accounts into which the investors transferred their money. There were in excess of 100 complaints to the police, trading standards and other agencies by individuals who had lost money. It became apparent that a large number of individuals, many retired in their 70s and 80s, had been deceived out of considerable amounts of money, to a total of well in excess of £3 million. Between 2012 and 2013 Creaven, Rowe and Mansell operated Agon, which sold carbon credits as investments to members of the public. From 2013 to 2014, the same three men, together with Navin, were involved in running Lanyard, which dealt in diamonds as investments.

45. The appellants said they knew nothing at the time of any dishonest agreements of the kind the prosecution alleged and maintained that if there were such agreements, they were not party to them. They denied they were dishonest. As to their co-accused, Mansell was a close friend of Creaven. He managed the day-to-day business. Navin was a broker with Lanyard who sold diamonds to investors.

46. Agon was originally incorporated on 21 April 2011 as Green Energy Markets Ltd and changed its name on 16 April 2012. A related company was established in Denmark called Agon Energy ApS. Matthew Mansell and Andrew Rowe travelled to Denmark in February of 2012 to establish this company with the assistance of a Danish company formation agent. Andrew Rowe was the

registered founder, owner and director, as well as signatory to the company's Danish bank account.

47. Focussing on Agon, the company only traded for around a year. The first receipt from a customer was on 21 June 2012 and the last on 26 June 2013. Nonetheless, the company accounts showed that during that period in excess of £1m was generated through sales. There was no evidence that Agon purchased any carbon credits.

48. Allowing for some slight variations, there was a common modus operandi to the operation of this aspect of the fraudulent activity. An individual would be "*cold called*", usually on their home landline, by a representative of Agon, which they portrayed as a brokerage firm operating in the carbon credit market. The representative would introduce carbon credits as an investment opportunity, quoting markedly favourable returns when compared to Individual Savings Accounts ("ISAs") and other products that were suggested to be performing less well than investments in carbon credits. The representative would be plausible, polished and initially friendly but also persistent and occasionally aggressive if challenged. Agon appeared an outwardly legitimate company, despatching glossy and professional-looking brochures, utilising an address in London's St. James' and operating via a sophisticated website. Once an individual agreed to invest, they were provided with bank details to which to transfer funds. After payment was made, the individual would receive various documents to complete and return and a payment advice. Many individuals made repeat investments with Agon, often for increasingly large amounts and always with a promise of significant profit. The relationship was carefully cultivated, with clients being sent Christmas and birthday cards. When individuals wanted to sell their holdings, they were told to wait or were generally "*fobbed off*". By the summer of 2013, Agon had effectively disappeared, in that the telephones were unanswered and the web page was left blank. The investors' money entirely disappeared.

49. Agon was concerned only with VERs, and, as set out above, it was the prosecution case that there was no real market in which these carbon credits could be sold by or on behalf of private investors. Accordingly, they were not a true investment. Such VERs as Agon sold to the investors (if any) were, therefore, worth far less than Agon had implied.

50. The prosecution alleged in these circumstances that there was a dishonest agreement to persuade customers that the VERs had a value that did not reflect reality and that there was a market in which they could be sold.

51. The prosecution relied on evidence from Ager, who had provided a report dated 24 May 2016 in which he set out, *inter alia*, his qualifications as an expert, the background to and an explanation of the carbon market and his opinion on the bona fides of the investments offered by Agon (based on his review of the evidence gathered by the police investigation). He testified that the claims made by Agon as regards their role within the energy and carbon market did not stand up to scrutiny. He suggested Agon's business plan was not credible; indeed, he averred it was a fabrication designed to persuade would-be investors that there could be a profitable sale of credits in the future. He maintained there was no secondary market for VERs and that once purchased by a private individual there was no possibility for re-sale for any meaningful economic value. The credits had been sold to the investors, in his view, at hyper-inflated prices. They could have been purchased for £0.40 – £1.00 in the market at the time they were sold as investments for between £6.00 and £11.00. His view was that what occurred was on a par with boiler room frauds.

52. Turning to Lanyard, the company was formed on 25 July 2012. It traded from the same office as Agon, and like Agon it was operational for just over a year, with the first payment being made by a customer on 14 June 2013 (just as Agon was closing its operations) and the last on the 15 July 2014. The company bank accounts showed receipts in that period of around £2.45 million from eighty-three customers. Lanyard purchased circa £288,000 worth of diamonds from a wholesaler.

53. The mechanics of this fraud operated in a similar fashion as with Agon. Individuals, almost all of whom were retired, were "*cold called*" on their landline telephones by a representative of Lanyard (often Navin), who would introduce the concept of diamonds as an investment opportunity. Once again, a professional, glossy brochure was despatched, and the victim would thereafter be recontacted. The representative was credible, friendly ("*nicer than my best friend*") and persuasive. Those contacted believed that Lanyard was a genuine financial investment company with a website and an address in St. James. The consistent promise was of very good returns on investment (up to 40%), that "*you could never lose*" and that "*I could get the money back when it suited me*". Those inveigled to invest transferred very considerable sums (up to £57,000 per diamond). In return, they received account opening documents and related items, and some were sent a diamond by post in a packet (which they were told not to open) together with a Gemological Institute of America ("GIA") assessment and a magnifying glass. Others did not receive the gemstone. Customers were sent monthly reports and investment strategies which provided reassurance as to the bona fides of Lanyard. As with Agon, some received Christmas cards. Many investors made repeat purchases from Lanyard, always on the promise of further

profit. Lanyard representatives sometimes behaved in an aggressive manner if investors declined to purchase additional diamonds. Telephone calls were made to some victims on a daily basis, thereby adding to the pressure and making refusal to invest difficult. Any customers who raised queries were frequently told that the representative they had been dealing with had been sacked or had left the firm. The diamonds, when they were despatched, were worth a fraction of what the individuals had paid, and Lanyard and its representatives vanished once customers began to realise they had been deceived.

54. The prosecution relied on the evidence of Peter Buckie, an expert diamond valuer, who provided valuations of the diamonds purchased by Lanyard investors. There was no dispute as to his estimates which were expressed as a range of possible values. He was not called at the trial.

55. Creaven, who was of previous good character, was arrested on 6 September 2015. In his first police interview, he said that Rowe had approached him to act on a consultancy basis to set up the office, the IT system and generally to ensure things were run smoothly. He suggested that he was not involved in the trading side of the business and maintained that his knowledge of what Agon did was sketchy. He averred that he had had "*zero*" input into the setting up of Agon. He indicated that he had "*heard the name*" Lanyard but he had been uninvolved with the company. He believed it dealt in diamonds.

56. He submitted a prepared statement in his second interview, in which he set out he had lost about £100,000 he had invested in Agon. He said he was a victim of any criminal misconduct that had occurred. Rowe ran the business while he (Creaven) ensured office efficiency. He had been informed that Rowe was trading in diamonds. He had been sent some paperwork, but he denied any active role with Lanyard. He denied creating any of the Lanyard documents.

57. His evidence at trial was broadly consistent with this account.

58. Rowe was arrested on 25 February 2015. In interview, he said he had previously worked for a company called Hildon Green Energy Markets Ltd which sold carbon credits. He had established various carbon credit processes and he had dealt with the administration. His case was that Creaven had asked him to open a carbon credit company and related bank accounts, and to introduce him to a carbon credit provider he had previously used. He said that he went to the office once a week to authorise payments but was not involved in selling the product or the work of the brokers. He

said that Creaven had set up the Danish company and had made him a director. He indicated he had transferred money to the Danish account but had not withdrawn any funds.

59. Rowe suggested in interview that Creaven had asked him to set up a company and bank accounts for Lanyard which he believed was for alternative investments, but he later discovered it sold diamonds. He had become suspicious of the enterprise and discovered that Creaven had been involved in a VAT carousel fraud. He confronted Creaven who told him it was a misunderstanding. He said he was unaware that elderly individuals had been targeted, saying that he thought the customers were corporate entities. He did not give evidence.

60. It follows that neither appellant disputed the existence of a fraud involving the suggested sales of carbon credits (count 1). Creaven suggested he was a victim of criminality in his involvement with Agon, and Rowe sought to allocate blame to others, including Creaven, for any wrongdoing.

Raja

61. This appellant was convicted of six counts in his absence on 18 January 2018. On count 1, Raja was charged with conspiracy to defraud contrary to common law, namely that between 31 January 2012 and 31 October 2012 together with Sandeep Dosanjh, Charanjit Sandhu, James Lanston and others he conspired to defraud individuals who were persuaded to invest in carbon credits (VERs) through Harman Royce. Count 2 was a similar count, the relevant time period being 1 March 2003 until 17 September 2013. This count involved the same co-accused, who were said to have conspired to defraud those persuaded to invest in carbon credits (CERs) through Kendrick Zale. Count 3 charged Raja with entering into or becoming concerned in a money laundering arrangement contrary to section 328(1) Proceeds of Crime Act 2002, namely that Raja allowed the transfer of £29,055.63 from a bank account of Harman Royce Limited to the bank account of Pettitpeds LLC (controlled by Michael Nascimento). Count 4 was an identical count concerning the same accounts, with a transfer on or about 16 October 2012 in the sum of £230,000. Count 5 charged Raja with transferring criminal property contrary to section 327(1)(d) Proceeds of Crime Act 2002, namely that he transferred £60,956.68 from a bank account of Harman Royce Limited to a Barclays bank account in the name of Michael Nascimento. Count 6 charged Raja with entering into or becoming concerned in a money laundering arrangement, contrary to section 328(1) Proceeds of Crime Act 2002, in that on or about 7 April 2013 he opened bank accounts in the name of Kendrick Zale Limited

knowing or suspecting this arrangement would facilitate the retention, use or control of criminal property by others.

62. Focussing on Counts 1 and 2, prior to Raja's trial, his co-defendants Sandeep Dosanjh, Charanjit Sandhu and James Lanston pleaded guilty to counts 1 and 2 (the conspiracies to defraud). Evidence of these convictions was admitted in Raja's trial. The issue in the case, therefore, was whether Raja was party to each of the conspiracies.

63. For count 1, there was evidence of misrepresentations being made to investors, namely inconsistent information being provided to different individuals about the same products. None of the victims had their monies returned, despite having been told during telephone calls that the value of their investment was rising and that there was no danger of any loss. Banking evidence demonstrated that a large percentage of the funds received from investors were not used to buy carbon credits. Only £477,807 was spent in this way, out of the almost £1,500,000 transferred by investors to Harman Royce. Investors were not told the truth about the commission payments; indeed, funds received directly from investors was the only source of income for the company. Sami Raja received £115,734 during the indictment period. Harman Royce sought to sell VERs to private individuals giving the impression that VERs were an asset that had appreciated in value between 2007 and 2012. The value, however, had not increased and instead had markedly declined.

64. In October 2012, Harman Royce essentially became uncontactable. Those who had bought VERs through Harman Royce had been told that the VERs were now held by a company called CNI. Investors who made enquiries with CNI received confirmation that this was the case. In 2013 the investors received a letter telling them that the credits had been transferred to Genmax Solutions.

65. For count 2, none of the 28 investors were reimbursed any of their monies (in the order of £900,000). CER carbon credits were sold to investors for an average of £2.99 per credit whilst they were being bought by Kendrick Zale for between 67p and 83p. In addition, investors were not told the truth about the commission payments. As a result, only £241,130.08 (*viz.* 26% of the total received) was used to purchase credits. Investors were provided with documentation purporting to show historic and predicted pricings for CERs that were untrue. These graphs were credited to Reuters, but the latter attested that they were not genuine as they had been altered. The brochures produced for Kendrick Zale contained information which suggested that the conspirators were aware the VERs were worthless. Furthermore, publications seized from the offices contained genuine pricing information for CER carbon credits,

along with future market trends, which tended to demonstrate that those involved were aware that this enterprise was dishonest. The price of CERs during the operational period of Kendrick Zale was €0.37 per credit and no increases in prices were predicted.

66. Predominantly the same primary players were involved in count 2, namely the appellant, Dosanjh, Lanston and Sandhu. Unlike the position with the VERs sold by Harman Royce, there was a secondary market for CERs. However, by the end of 2012, this was in serious decline, heading towards collapse. The carbon credits were worth little, with prices dropping considerably. The sales procedure was very similar to that used by Harman Royce, and the initial information provided to investors was by way of the marketing information which included a convincing but thoroughly misleading brochure.

67. There were at the time two different types of CER, both of which could be traded by way of regulated exchanges or via the over-the-counter market. It was widely anticipated that the credits sold by Kendrick Zale, CP1 CERs (as opposed to CP2 CERs), would have no economic value after March 2015. As it transpired, they were effectively worthless by late 2014. Customers of Kendrick Zale were grossly overcharged for the carbon allowances sold to them, paying in the order of 10 times more than the credits were worth.

68. There were two separate ways by which both companies made misrepresentations and defrauded the public. First, the carbon credits that were being sold were not suitable products for investment, certainly in the way that they were marketed. Second, although some carbon credits had been bought by each brokerage, these were sold to the investors at heavily inflated prices, namely more than double their original purchase price and therefore considerably in excess of their actual worth. None of the investors recovered any of the monies that were transferred either to Harman Royce or Kendrick Zale. Even when the carbon credits existed, these were in reality inaccessible to the investor and were, in any event, worthless. It was the prosecution's case that the conspirators failed to mention the problems with secondary markets for carbon credits.

69. Those contacted, almost always by way of a "*cold call*", were often older people, along with others, who had available money to invest. They were led to believe that the two companies were genuine and were motivated by the best interests of the potential investors. The initial telephone call was made by one of the "*openers*" or junior brokers, and any potential investor who agreed received the company's marketing

information, including usually a brochure. Within the literature, Harman Royce (count 1) was marketed as a boutique investment consultancy with skilled consultants who would advise as to where the best profits in various markets could be made. In relation to the market in carbon credits, and VERs in particular, the relevant brochure asserted that the price of VERs was relatively low but was expected to rise with the arrival of India and China in the market which would bring about consequent significant growth. Investors were told that the returns, if they kept the investment for 18 to 24 months, could be as much as 25 to 30%. Similarly, it was maintained that the CERs (count 2) might double in value within a year and could be sold in 6 to 9 months. It was suggested to those approached that this would be a short-term investment with good returns. There was anticipated legislation which would force corporations to buy these credits and lead to an increase in price.

70. As regards the money laundering offences (counts 3 – 5), the appellant passed the criminal proceeds of the Harman Royce fraud through two different bank accounts connected to a man called Michael Nascimento. On 9 July 2012, £29,055.63 was transferred into the bank account of a company called Pettitpeds LLC. A further £230,000 was transferred on 16 October 2012 (counts 3 and 4). This bank account was based in Madeira. The appellant also assisted in the arrangement for the transfer of monies from the Harman Royce bank account into Nascimento's personal bank account. These payments were said to be "*consultation fees*" and amounted to £60,956.68 in total over a number of different transfers between 31 July 2012 and 19 October 2012 (count 5). There was no evidence of Nascimento having provided services to Harman Royce or of his company, Pettitpeds, having done anything to warrant transfer of the sums of money.

71. Raja absconded and was tried in his absence. Prior to the commencement of the trial, Raja's legal representatives withdrew on the basis that they were professionally embarrassed.

72. The prosecution called Ager to give evidence on two principal issues. First, he provided factual background concerning the relevant markets, including descriptions of the various products and their pricing structure. Second, he provided opinion evidence as to the optimism (or otherwise) of the market at the time, the predicted future trading within the market and the viability of carbon credits as investment products. He gave a summary of the history of the environmental trading market and in particular the various carbon credit markets. As regards VER and CER carbon credits, he explained how they were created and used. He set out the possible

price range of VER carbon credits and explained that, unlike CERs, there is no regulated trading platform. The difference between CP1 and CP2 CERs was described (*viz.* that they were different types of credits which had particular limitations on their trading periods), along with pricings for the different types of CERs over the period of the indictment. Ager produced a FCA warning from 2015 in relation to carbon credit trading, advising individuals against investing in carbon credits as they were likely to be a financial scam.

73. He suggested that the representations made within the Harman Royce marketing material contained false, misleading and inaccurate information and that some of the prices quoted for VERs in the literature were in fact prices for either CERs or EU Allowances ("EUAs") (the latter was a further type of carbon credit). He testified that there was no secondary market allowing for the resale of VERs for any economic value. Similarly, he suggested that Kendrick Zale was persuading individuals to invest in CER carbon credits when the market was in terminal decline, as was common knowledge within the industry.

74. In his Defence Statement, which was not before the jury, Raja denied that he had conspired with others to act dishonestly. He stated that he held a genuine and honest belief that the VERs and CERs that had been sold had value in a buoyant and international market and that there was a secondary market by which purchasers could realise their investments. However, although he requested that Ager should attend to give evidence, he did not indicate in detail or even in outline the nature of any challenges to the conclusions of Ager as to the lack of viability of carbon credits as a vehicle for investment. Instead, he suggested his role in Harman Royce was limited to managing the website and dealing with marketing material and other administrative matters. At the time of drafting the Defence Statement, there was no intention to call defence witnesses.

Moore, Moore and Driscoll

75. The appellants operated through a company called Burbank of London Ltd which was alleged to have been a vehicle for fraud. Individuals were allegedly persuaded to invest in VERs via Burbank, having been offered the false incentive that the carbon credit market was expanding. They were promised that there would be returns of the order of 30% over periods as short as 6 months and, generally, there was a prospect of high-level returns on resale. The Crown maintained that the appellants knowingly made extravagant and dishonest misrepresentations to their clients, as part of a joint enterprise. The VERs were said to have been sold to the investors at grossly inflated prices.

76. Burbank Ltd received a total of £747,247 from individual investors. Only £257,068 was used to buy VERs, the difference being just short of £500,000. As a result, in many instances VERs were not purchased on behalf of individual investors despite the receipt of their funds for that purpose. Instead, the monies were simply dissipated and there was abundant evidence to demonstrate extravagant expenditure from the company bank accounts. A prime example of the wholesale misuse of an investor's funds was demonstrated by Mr Littlewood. He was persuaded to part with the entirety of his £70,000 pension. He was advised that it would be invested in VERs. None were purchased and on the same day Mr Littlewood transferred the funds, £70,000 was withdrawn in cash from the company bank account. It disappeared and was never recovered.

77. Individual clients of Burbank gave evidence that they were sold VERs as an investment with the prospect of future profit. Although they were told that VERs would be allocated, investors either received only a partial or no allocation. There was evidence that the appellants had a negligible basis for making the representations on which the sales were based. In the event, the VERs were being sold at grossly inflated prices.

78. It was the Crown's case that Paul Moore, because of his earlier involvement in a company called Manor Rose Ltd, knew that VERs were not a legitimate investment. Paul Moore, having persuaded Mr. Filmer of Semicom to buy VERs at an inflated price, convinced him to offer to buy VERs from other investors at a premium to the price they had paid thereby giving the false impression that there was a genuinely rising market. He was thereby seeking to hoodwink investors into the belief that there was a secondary market (namely, a tradeable market of people buying and selling carbon credits as a commodity) thereby creating the illusion of the potential for profit. It was the prosecution case that dishonest representations were made to investors and potential investors by both Michael Moore and Haydon Driscoll. Burbank was said to have been a fraudulent enterprise from the outset, with Haydon Driscoll acting as the sole director and shareholder, as well as being the signatory to the bank account. The company employed high pressure sale tactics and misrepresented the potential profits that could be made by investors.

79. Michael Moore declined to answer questions during his police interview. In contrast, Paul Moore answered all the questions put to him and stated that his role with Burbank was both minor and limited in nature. He suggested he was a consultant to

Burbank, a company owned by his co-accused, Hayden Driscoll. He maintained he was not involved in the sale of VERs, but nonetheless believed they were a genuine investment. At the time of his involvement with Manor Rose, he had no prior experience of selling carbon credits and he had intended to find companies which wanted to buy VERs to offset emissions. Whilst at Manor Rose, he introduced Semicom to the possibility of offsetting emissions by purchasing carbon credits. He could not recall the price at which they were offered and he denied that he had inflated the worth of the VERs in the secondary market. Although with hindsight he understood there was no secondary market, he was influenced at the time of the relevant events by the considerable enthusiasm concerning the voluntary market and the suggested emergence of individuals prepared to buy credits. This led him to believe there was a genuine secondary market. Hayden Driscoll provided a written statement in which he said he set up Burbank at Michael Moore's request in the spring of 2012 but his involvement ceased during the summer. He was unaware of any fraudulent activity.

80. In essence, the appellants averred that they were unaware that the representations about the profitability of VERs were false and they maintained they had not acted dishonestly. In support of this contention, the appellants relied on the evidence of another prosecution witness, Michael King, from whose wholesale company, Carbon Coactive, brokers such as Burbank sourced their VERs. He testified that he believed there was a secondary market for VERs, albeit he did not sell VERs to individuals as an investment. His company sourced VERs wholesale from the developers and sold them to brokers, aware that they were selling them on as an investment to private clients. He did not, therefore, promote VERs as an investment prospect, nor did he give investment advice. He testified that the anticipated lucrative market in VER's did not materialise, however, and demand dropped in late 2012 leading to market collapse.

81. The evidence of Michael King was used, therefore, as a basis for suggesting that it would have been reasonable to believe that there was a secondary market in VERs, that they could be traded for a profit and that they were a suitable investment for private investors. On this issue the judge observed in the summing up to the jury:

> "Well, in so far as Mr King's evidence suggested that from his perspective as a wholesaler he believed that there was a secondary market for VERs, you may think that given Mr Ager's undisputed expert evidence he, Mr King, and others who may have thought the same were simply wrong or misguided in those thoughts."

82. The appellants did not give evidence during their trial.

83. Ager's testimony at trial was unchallenged to the effect that there was a legal market in CERs, of which a finite number were released each year, with the price depending on demand and supply. VERs were similar in nature, save they were set up by voluntary bodies as a tool to encourage businesses to reduce their emissions, outside the CER compliance framework. The price was driven by the quality of the project in respect of which they were issued. Once a VER was purchased there was no secondary market, and it had no value. Prior to 2009 it had been thought that VERs might develop in the same way as CERs, which retained their value until surrendered. However, after 2009, with the international failure to agree a follow-on protocol to Kyoto, the carbon market started to decline in relation to CERs and VERs. Ager gave evidence that to suggest that the VER market was the fastest growing sector of the carbon credit market was simply untrue. VERs did not appreciate in value and their supply outstripped demand. The judge summarised his evidence during the summing up as follows:

> "No other expert was called to contradict Mr Ager's evidence, and insofar as he was cross-examined on behalf of the two Moore brothers, you may think that the questions asked were calculated to clarify his evidence rather than to challenge (the) substance of what he was saying. In particular, he wasn't challenged when he said that there was no secondary market for VERs, which, once bought, were in reality valueless. Having said that, you don't have to accept all that, he said, if, after considering all the evidence, you are not persuaded by it."

84. The defence asserted, therefore, that Agar's analysis of the market, whilst not inaccurate, was not what was understood at the time, even by those involved in the market. It was suggested that if the appellants had been mistaken, they had not acted dishonestly because they were unaware that the representations were in fact untrue. The defence case, therefore, relying to an extent on the evidence given by Mr King, was that they believed there was a clearly functioning market that made VERs a promising investment.

Other Expert Evidence

85. It is of note that none of the appellants in any of these trials served a statement from a defence expert disputing or undermining the evidence of Andrew Ager and no

application was made as part of these appeals to introduce evidence that contradicted his testimony.

The Grounds of Appeal Against Conviction

The Ager Ground of Appeal: Submissions

86. Unsurprisingly, there is considerable commonality between the various grounds of appeal. It is observed that in each of the present four cases Ager's evidence was an important element of the evidence against the accused, forming what is said to have been a crucial part of the process in proving the suggested criminality. They each apply to the court to admit the relevant part of the transcript of the proceedings in Operation Balaban (in particular the evidence of Ager on the *voir dire* and the explanation by the judge as to why the jury were to be discharged) and any relevant linked documents. We granted this application, which was unopposed.

87. Considerable stress is placed on the wholesale failure demonstrated by Ager in the Operation Balaban trial to comply with the requirements expected of an expert witness. These obligations are described in *R v Alex Pabon* [2018] EWCA Crim 420; [2018] Crim LR 662 and they are encapsulated in Part 19 Criminal Procedure Rules and in the corresponding section of the Criminal Practice Directions. Additionally, guidance is given in the Crown Prosecution Service Guidance for Experts on Disclosure, Unused Material and Case Management (updated 30 September 2019) and the Crown Prosecution Legal Guidance entitled Expert Evidence (updated 9 October 2019), which both draw substantially on the Criminal Procedures Rules and the Criminal Practice Directions, along with other sources. It is unnecessary to rehearse the details of these requirements because in Operation Balaban the Crown accepted, *inter alia*, that he was unfit to give evidence as an expert and would not be relied on in the future. Following that concession and the terms in which Judge Loraine-Smith described his failings, it is submitted he should not have been called as an expert in the present cases. As a consequence, it is argued that the convictions of the appellants are unsafe.

88. Each of the appellants, therefore, submits that the evidence given by Ager in the respective trials lacked its true context, namely that he was an unqualified witness in that he did not have the necessary standing to be called as an expert witness, and he was prepared to breach the obligations that are imposed on experts. As just indicated, they rely substantively on the adverse observations by Judge Loraine-Smith in Operation Balaban.

89. Furthermore, it is suggested that the prosecution failed in their disclosure obligations in that they neglected to undertake any proper enquiries as to whether Ager had complied with his duties as an expert witness. It is argued that the Crown failed to disclose suggested concessions made by Ager during his evidence in some of the trials in which he was called.

90. On behalf of Byrne, Ms Bahra additionally emphasises that this was not an area in which there was a pool of accepted experts. She emphasises that Ager was not a witness giving background evidence, but instead he testified on one of the critical issues in the case, namely whether there was a market for carbon credits and the extent to which this was widely known. During a recorded telephone call between Dr Frunza and Ager, the latter seemed at one stage to accept there was a secondary market in the voluntary and regulated carbon credit markets, albeit there were only scant details of this apparent concession and it was unclear whether it related to private investors. The acceptance by Ager of his failure to store and handle the relevant materials adequately was underscored in Ms Bahra's submissions. This was submitted to have had the consequence, *inter alia*, that it was impossible to analyse the source data which was used to create the schedule which he produced to demonstrate the mark up applied to the credits after they had been purchased by the companies.

91. Ms Bahra also represented Raja. In addition to the generic submissions, it was emphasised on his behalf that Ager's evidence was directly relevant to whether Raja had participated in a dishonest enterprise. In his case it was urged particularly on the court that there had been a failure by the prosecution to identify the extent to which this witness failed to discharge his obligations as an expert witness. It was submitted that the Crown owed an enhanced duty of disclosure as regards Raja (given he was tried in his absence), which the Crown failed to discharge.

92. Mr Rose, on behalf of Creaven, emphasises the Crown's original position that this appeal was unopposed. He highlights that Judge Loraine-Smith made trenchant observations as to the failings of Ager. He suggested that Ager was a witness who tended to alter his evidence depending on who was asking questions. The concessions that Ager had made when confronted with articles such as the Bloomberg report were highlighted (see [17] above). It is submitted that in the result the jury were provided with a wholly unbalanced summary of the position as regards secondary investment markets.

93. On behalf of Rowe, Ms Davies highlighted that Ager misled the court into treating him as a bona fide expert, he was central to the case against Rowe and his evidence

was intrinsically flawed. As with Creaven, it is emphasised that Ager was particularly dogmatic in his evidence to the effect that there was no legitimate secondary market for VERs (essentially, he indicated that the concept was only encountered in the context of boiler room frauds). The judge emphasised in the summing up, based on this evidence, that there was no available investment market.

94. Mr James on behalf of Driscoll suggests that Ager was a dishonest and partisan witness who was attempting to pervert the course of public justice, and that his testimony tainted all the other evidence in the case. If the defence had been in possession of the materials from the Operation Balaban *voire dire*, they would have applied to exclude his evidence.

95. Ms Thorne Q.C. on behalf of Michael Moore, urges this court to the view that if these convictions are upheld on the basis of evidence given by a witness such as Ager, this would undermine the rule of law. He did not act with probity and the prosecution failed to ensure that they were calling an appropriate witness. She emphasises that the combination of Mr King's evidence, together with some of the literature, tends to demonstrate there may have been a secondary market for VERs and that the position was more nuanced than that presented by Ager.

96. Mr Aylott Q.C. on behalf of Paul Moore highlighted that Ager, as in other proceedings, stressed somewhat dramatically during his evidence that the concept of a secondary investment market for VERs was only advanced in the context of boiler room frauds. Furthermore, he suggests that the judge excessively downplayed the proper potential impact of the evidence of Mr King.

97. The Crown emphasised that Ager's evidence was essentially unchallenged. This applied particularly as regards the carbon credit markets and the extent to which there was a secondary market, whether they could be resold and the prices at which they were purchased by individual investors. The prosecution accepted there were some limitations as to the extent of his expertise; for instance, in the case of Byrne the judge made it clear to the jury that Ager had no expertise as regards SIPPs and pension arrangements. Furthermore, it was emphasised that the articles such as that published by Bloomberg dated 20 June 2013 were available on the internet for use by the advocates following their publication.

<u>The Ager Ground of Appeal: Discussion</u>

98. The first issue to be considered is whether Ager could properly be considered to be an expert in these four trials. We adopt the approach summarised in *R v Pabon*, as based on earlier authorities:

> "55. English law is "characteristically pragmatic" as to the test for establishing expertise: Bingham LJ (as he then was), in *R v Robb [1991] 93 Cr App R 161*, at p.164, immediately before citing Lord Russell of Killowen CJ's observations in *Silverlock [1894] 2 QB 766*, at 771:
>
> > " ....It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be *peritus* ; he must be skilled in doing so; but we cannot say that he must have become *peritus* in the way of his business or in any definite way. The question is, is he *peritus*? Is he skilled? Has he an adequate knowledge? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence. There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business....."
>
> 56. That said, however the expertise is acquired, the expert must be confined to matters within his area/s of expertise. In *Robb*, Bingham LJ went on to express the risk otherwise (at p.166):
>
> > " ...We are alive to the risk that if, in a criminal case, the Crown are permitted to call an expert witness of some but tenuous qualifications the burden of proof may imperceptibly shift and a burden be cast on the defendant to rebut a case which should never have been before the jury at all. A defendant cannot fairly be asked to meet evidence of opinion given by a quack, a charlatan or an enthusiastic amateur...."" "

99. Although Ager's lack of formal qualifications should have been made clear – it undoubtedly is a factor properly to be considered – it is not determinative of whether he was entitled to give expert opinion evidence. There does not seem to be any doubt that Ager had some considerable experience in the financial, commodity and carbon credit markets, and it has not been suggested by the appellants that there are any particular formal qualifications that a witness should hold before being entitled to give expert evidence in this field. As with the expert witness in *Pabon*, "*general expertise*" as regards the area in issue may suffice (see [59]),

depending always, we would add, on a consideration of the particular circumstances. As it seems to us, absent the arguments concerning the failings on the part of Ager as regards the discharge of his duties that were revealed in Operation Balaban, he was a witness who was competent to provide the court with information likely to be outside the court's own knowledge and experience, given his experience and professional background (see Criminal Practice Direction V Evidence 19A.1). It follows that we reject Ms Bahra's submission that Ager should not have been treated as an expert on the basis of his experience alone.

100. Turning next to the consequences of what emerged in Operation Balaban, as already set out, we granted the appellants leave to introduce the relevant materials from that case. As with the expert witness criticised in *Pabon*, Ager in the course of the *voir dire* indicated a clear preparedness to disregard his basic duties as an expert. Although it is difficult to establish the extent to which his egregious behaviour in Operation Balaban was replicated in any of the four cases before this court, it is nonetheless useful to consider his failings as identified in this later trial. He demonstrated little or no apparent understanding of his duties as an expert; he failed to sign the expert's statement of understanding and the declaration of truth; he omitted to conduct an independent review or analysis of the carbon credits market; he misrepresented that he had been asked questions by the police officers when he had asked the questions of himself; he failed to retain relevant materials as regards his work on the case; he brought inappropriate pressure to bear on Dr Frunza, a defence expert; and he failed to bring to the court's attention material that might undermine aspects of his evidence (*viz*. a concession he had made in other proceedings, together with some articles that were potentially contradictory to elements of this testimony). Echoing the concerns expressed by Judge Loraine-Smith, we take a grave view of these failings on Ager's part. In this later case, he adopted a cavalier approach to his duties, and he ignored an expert's obligation to give an objective and unbiased opinion. It is critical that the party calling an expert witness is confident that the witness understands and, to the extent it is practical for the party to check, is discharging his or her obligations to the court.

101. We interpolate to observe that the Crown must take all necessary steps to ensure that inappropriate expert witnesses are not called in criminal trials in the future. Proper adherence to the two sets of Crown Prosecution Guidance set out in [87] above, together with the Criminal Procedure Rules and the Criminal Practice Directions, should ensure that this regrettable lapse will not be repeated. The failure to detect the underlying problems with Ager as an expert witness was a notable error on the part of those with conduct of these cases.

102. Notwithstanding our deprecation of the failings by Ager, the critical question for this court was described by Lord Brown of Eaton-under-Heywood (for the majority) in *Dial v Trinidad and Tobago* [2005] UKPC 4; [2005] 1 WLR 1660:

> "31. ... the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the court itself and is not what effect the fresh evidence would have on the mind of the jury. That said, if the court regards the case as a difficult one, it may find it helpful to test its view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the jury to convict ..."

103. Lord Brown thereafter approved the formulation of Judge LJ in *R v Hakala* [2002] EWCA Crim 730 at [11], "*However the safety of the appellant's conviction is examined, the essential question, and ultimately the only question for this court, is whether, in the light of the fresh evidence, the convictions are unsafe*" (at [32]).

104. In the present cases there was no dispute as to Ager's evidence during the various trials. Furthermore, even following the revelations about him in Operation Balaban, there has been no application by any appellant to call expert evidence, for instance from Dr Frunza, in order to suggest that Ager's testimony was materially incorrect. The appellants' position at their trials was that they had not participated in the alleged frauds, either because they were uninvolved in any of the relevant activities or because they had participated in the schemes but believed carbon credits were viable investments and had behaved honestly. Particularly in the latter scenario, some of them either referred to the evidence of Michael King (Moore, Moore and Driscoll) or to the various articles in the relevant internet publications that potentially supported the proposition that they were justified in believing that the investors were not being misled. We repeat and emphasise, however, that none of the appellants challenged Ager's expert view that the claims that were made as to the investment potential of carbon credits and the suggested value of the product were misleading or unrealistic.

105. We are not insensible to the somewhat dramatic revelations during Operation Balaban, following the effective cross-examination by Ms Bahra of Ager in the *voir*

dire. The particular events in that case, however, do not provide a proper basis for assuming that the same outcome would have been replicated in any of the instant trials. For the sake of this analysis, we notionally reverse the order of events. If the fresh evidence from the later trial had been available in any of these four cases, the most likely result is that either the prosecution would have ensured that Ager had complied with his duties as an expert in advance of the respective trials or a different witness would have been called. Furthermore, in our view it would be untenable to conclude that the present convictions are unsafe because evidence that was – indeed remains – undisputed was given by an expert witness who, in later proceedings, was demonstrated to have behaved unprofessionally in the context of that subsequent case. We acknowledge, however, that the position may have been different if the appellants, in addition to establishing a preparedness on the part of Ager to breach his professional obligations in a later case, had applied for and been granted leave to call persuasive expert evidence that Ager had given flawed expert testimony in the four trials.

106. The evidence of Michael King and the various press articles relied on by some of the appellants were not, in reality, directed at the accuracy of Ager's central analysis regarding the lack of viability of carbon credits as an investment for individual investors. Instead, this material was relevant to the suggestion that, at the relevant time, Ager's conclusions were not necessarily the subject of universal or widespread acceptance or understanding. It was available, therefore, for any relevant appellant as part of a submission that he believed carbon credits were a viable investment. Ager tended to be dismissive of this material, suggesting that his conclusions were widely known at the time. Again, we stress that no contradictory evidence has been called on this aspect of the case as part of these appeals and, in any event, the internet material was available to be deployed and assessed by the juries. Furthermore, we do not consider it has been established that there has been material non-disclosure by the prosecution. For instance, the evidence in the Byrne trial concerning the article on the FSA website (see [32] below) was not substantively supportive of the cases of the other appellants, given the advice concerning carbon credits was heavily guarded. As we have already observed at [97], the various articles were available following publication on the internet.

107. Although it is only a mechanism to be used in a difficult case (which is not, in our view, the position here), we have, as a precaution, additionally asked ourselves the "jury impact" question (see *Burridge v R* [2010] EWCA Crim 2847 at [101]), to test our view. If the new material had been available at the individual trials and if the juries had been given proper directions as to the real issues in the present cases, we do not consider that it might reasonably have affected the decisions to convict.

These were not difficult cases because the additional materials, such as from Bloomberg, do not appear to contain any significant evidence of a secondary market for private investors. As we have noted, no expert evidence has been called to show that at the material time it would have been reasonable to believe that there was such a market. Additionally, as our analysis of the facts of these cases demonstrates, there was abundant other evidence that all of these schemes were fraudulent.

108. It follows that we are not persuaded by the Ager ground of appeal.

The Submission of No Case to Answer (Michael Moore)

109. This is based on the suggested contradiction between the evidence of Ager and Mr King. The latter had indicated there was or appeared to be a secondary market. Ms Thorne submitted there was an irresolvable conflict between the two witnesses which rendered it impossible for the jury to decide that they were sure that there was no secondary market for VERs as an investment. This argument is untenable. Mr King was called as someone who dealt with the wholesale market in carbon credits, selling to brokers such as Burbank. His company did not give investment advice, albeit he was aware the market was being talked up and there were rumours the government was considering compelling all heavy polluters to offset their emissions. He anticipated a lucrative market but by late 2012 it was clear that the higher prices were never going to be realised.

110. As the judge directed the jury, they would have wanted to consider Mr King's evidence in the context of the defendant's argument that they had a reason to believe VERs were a viable investment product, but he was not giving expert evidence. Cases are rarely halted because there is a suggested tension between the evidence of two or more witnesses, given it is part of the jury's role to resolve such differences. In any event, Ager's evidence as an expert was undisputed.

111. Despite Ms Thorne's helpful submissions, we reject this ground of appeal.

Bad Character Application by Creaven

112. By an application dated 8 January 2018, the prosecution applied to adduce bad character evidence against Andrew Rowe pursuant to section 101(1)(d) of the Criminal Justice Act 2003. This concerned the fact and content of a disqualification undertaking (Company Directors Disqualification Act 1986) given by Rowe, following an investigation into the demise of HGEM (see [58] above) that also

marketed carbon credits, and Rowe's role in it, by the Insolvency Service ("IS"). Rowe's involvement with HGEM immediately preceded his involvement with Agon.

113. The prosecution's application summarised Rowe's case in relation to counts 1 and 2. Rowe had said that Creaven and another co-defendant, Mansell, had been the prime movers behind Agon. He sought to minimise his own involvement. Although he was the director, he did not run the company from day to day. He said that he did not know what a VER unit would cost or what returns were being offered to purchasers. He understood that Agon was making 20%. Accordingly, the prosecution said that a principal issue would be the extent of Rowe's understanding of Agon's business and its legitimacy.

114. The prosecution's application stated that during 2011, not long before Agon began to trade, Rowe had been involved in HGEM which had operated the same business model as Agon. It was said that Rowe had held himself out as the CEO of HGEM, had day to day control of its affairs, received substantial renumeration and had been authorised to deal in carbon credits for the company.

115. The prosecution sought to rely upon a disqualification undertaking by Rowe dated 25 April 2016 under the Company Director Disqualification Act 1986 arising from misconduct in relation to HGEM. Under the heading "*Matters of Unfitness*", Rowe accepted the following:

> "SCHEDULE OF UNFIT CONDUCT TO THE DISQUALIFICATION UNDERTAKING GIVEN BY ANDREW STEPHEN ROWE
>
> Solely for the purposes of the CCDA and for any other purposes consequential to the giving of a disqualification undertaking, I do not dispute the following matters:
>
> - I was a director of Hildon Green Energy Markets Limited
> - Which went into liquidation on 10 May 2013
> - With assets of Nil
> - Liabilities of £4,729,864
> - A deficiency as regards creditors of £4,729,864
> - And share capital of £1
> - Making a total deficiency of £4,729,865

MATTERS OF UNFITNESS

Whilst acting as a de facto director of Hildon Green Energy Markets Limited ("HGEM"), I caused and/or allowed HGEM to market and sell carbon creditors (sic), being Voluntary Emission Reductions ("VERs"), to its customers between June 2011 and 01 November 2011 as an investment opportunity on the basis that the value of the VERs will increase in value and be sold for a profit in the future, which is highly unlikely. Specifically:

- HGEM bought the VERS from its suppliers at an average of £2.52 per carbon credit.
- HGEM knew that its suppliers had purchased the VERs at an average cost of £1.44 per carbon credit.
- HGEM charged its customers an average of £6.85 per carbon credit representing a mark up of 376% on what its supplier paid for the carbon credit.
- HMEM made sales of 92,929 carbon credits totalling £570,804.
- The Official Receiver, the Financial Conduct Authority and HM Revenue & Customs, have been unable to identify a genuine secondary market for VERs. As a result investors are unlikely to be able to see their VERs and will make a loss."

116. The prosecution submitted that this evidence was highly probative on a principal issue in the trial, namely Rowe's knowledge of the business model operated by Agon and its legitimacy. It was thus said to be relevant to a matter of substantial importance in the context of the case as a whole which was in issue between the prosecution and Rowe (sections 101(1)(d) and 112 CJA 2003).

117. These sections, as relevant, provide:

"101 Defendant's bad character

(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—

[…]

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

[…]

(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.

[…]"

and

"Assumption of truth in assessment of relevance or probative value

"(1) Subject to subsection (2), a reference in this Chapter to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true.

(2) In assessing the relevance or probative value of an item of evidence for any purpose of this Chapter, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true."

and

"**112 Interpretation of Chapter 1**

(1) In this Chapter—
"bad character" is to be read in accordance with section 98;

[…]

"important matter" means a matter of substantial importance in the context of the case as a whole;

[…]"

118. For completeness, section 98 provides:

> "**98 "Bad character"**
>
> References in this Chapter to evidence of a person's "bad character" are to 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."

119. Rowe's legal team made submissions in opposition to the prosecution's application. They objected to the lateness of the bad character application and said that the prosecution had wrongly read the undertaking as an admission by Rowe that he knew in 2011/12 about the matters stated, whereas, properly read, the document was "*neutral*" about the timing of his knowledge. They relied upon an exchange of emails immediately prior to the signing of the undertaking in which, on 19 April 2016, Rowe's solicitors had stated to the solicitors acting for the Official Receiver that Rowe "*looking back, did not think he was doing wrong at the time*". When he became involved in HGEM he saw the selling of carbon credits as a genuine business opportunity in what had appeared to be a proper market. Nonetheless, the email explained that Rowe wished to avoid a lengthy disqualification hearing.

120. We note in passing that the email dated 19 April 2006 was seeking to dislodge the Official Receiver from his position that a disqualification period of 6 years would be too low. Nonetheless, a few days later Rowe agreed to a disqualification period of 11 years and the undertaking was signed.

121. At all events, Rowe submitted that in the trial the prosecution would have to prove to the criminal standard his knowledge in 2011/12 of the matters set out in the undertaking, that would be strongly disputed and so it was likely that there would

be extensive satellite litigation. Rowe also made submissions as to why, even if the prosecution could satisfy gateway (d), the material should be excluded under section 101(3) because of the adverse effect it would have on the fairness of the proceedings.

122. The prosecution decided to withdraw their application to adduce the evidence of Rowe's disqualification undertaking. On 14 February 2018 they gave their reasons in open court for taking that decision. In summary, they indicated that on one view the contemporaneous documentation showed that Rowe had agreed to give the undertaking on a "*pragmatic*" basis, and that he had only appreciated the misconduct at HGEM after he ceased to be involved with that company. Rowe would be able to argue that the drafting of the undertaking reflected his lack of knowledge that HGEM's business model had been fake when he was involved in the company. If the jury accepted that that might have been the case, the undertaking would not assist them as to Rowe's knowledge during the period the subject of count 1. Furthermore, although the prosecution had access to some documents on the Insolvency Service investigation, it was uncertain as to what other material might be relevant and disclosable.

123. The next day, 15 February 2018, Creaven who, despite his earlier retention of counsel and solicitors, represented himself at the trial, made an application for the same evidence on the disqualification undertaking to be admitted, but in his case under s. 101(1)(e) of the CJA 2003. He relied upon substantially the same arguments as the prosecution had previously advanced.

124. The prosecution took a neutral stance on Creaven's application.

125. Rowe, however, strongly opposed the application. In written submissions, also dated 15 February 2018, his counsel suggested that the real issue between Creaven and Rowe was whether Agon was set up and run by Rowe with Creaven being only an investor, or whether Creaven had been the driving force behind the company and the principal decision-maker. Rowe accepted that he had previously been involved in a company trading carbon credits and that he set up the carbon-trading process for Agon. He submitted that the disqualification undertaking did not relate to the issue between Creaven and Rowe about the respective roles and seniority in the business. Rowe also submitted that that material did not have "*substantial probative value*" in relation to any issue between these two co-defendants, particularly whether in

2011/12 Rowe had known about the matters he accepted in April 2016. In so far as Creaven wished to say that Rowe knew all about trading in carbon credits, Rowe's admissions in interview sufficed for that purpose. In reality the material would be used by Creaven to suggest a propensity to fraudulent conduct on Rowe's part. But the material could not support any such conclusion. Rowe also submitted that to admit the evidence would result in an unbalanced and misleading picture being presented to the jury, to correct which Rowe would apply to have bad character evidence admitted about Creaven, such as Creaven's involvement in a company called Berkeley Warbeck Limited, which had been dissolved for lack of commercial probity, and his acquittal in relation to a large fraud in 2006 followed by a settlement under which he agreed to pay £18m to the Asset Recovery Agency.

126. In his ruling, the judge noted that there was an obvious similarity between what had happened at HGEM as recorded in the undertaking and what was alleged to have happened subsequently at Agon. He then went on to consider an issue he had raised in oral argument, namely whether the undertaking was excluded from being treated as bad character evidence because under section 98(a) it was "*to do with the alleged facts of the offence(s)*" with which he was charged. The judge concluded that it did not. The judge then identified two main matters in issue between Creaven and Rowe: (1) the extent of Rowe's involvement in Agon and (2) the extent of Rowe's knowledge about the pricing of carbon credits. He concluded that these were "*important*" matters in issue between them for the purposes of s. 101(1)(e).

127. The judge then considered whether the undertaking was of substantial probative value in relation to these matters. He concluded that it was not. The judge put it in this way:

> "I have reached the conclusion that this undertaking in itself is not of substantial probative value. It would simply open up more issues, satellite to this case, which the jury would be in no position to determine without a great deal of other evidence about HGEM. The undertaking provides no conclusive answers to any of the issues relating to HGEM which might bear upon the separate question of Mr Rowe's involvement and knowledge in relation to Agon. The undertaking is not a conviction for fraud or anything else. It is not a determination by the court. It does not admit knowledge by Mr Rowe, and Mr Rowe, I would add, was in any event an actual director of Agon and there is plentiful material upon which the jury can reach a conclusion about Mr Rowe's involvement in Agon."

128. The judge made it plain that the tests he had to apply were those set out in s. 101(1)(e) and not those contained in s. 101(1)(d) and (3). He expressly stated that the issue of fairness in s. 101(3) did not apply.

129. Bearing in mind that Creaven was acting in person, the judge thought it appropriate to explain to him the implications of the Court's decision. Creaven was told that he had to abide by the ruling and there could be serious consequences for him if he sought to introduce bad character evidence against Mr Rowe before the jury. But in addition, the judge went on to say that Creaven was entitled to the same even-handed treatment in relation to allegations about his own involvement in earlier fraudulent activities. Those matters could not be mentioned before the jury without a bad character application being made by Rowe and granted by the Court.

130. In summary, Mr Rose in support of this ground of appeal submitted on behalf of Creaven that:

i) The judge ought to have dealt with "*Matters of Unfitness*" in the Undertaking describing HGEM's business model as evidence to do with the facts alleged in respect of count 1 and therefore admissible in any event, without having to be admitted as bad character evidence;

ii) In relation to s. 101(1)(e), the judge had erred in treating the undertaking as not having substantial probative value. The fact that the evidence did not provide conclusive answers on Rowe's involvement in HGEM did not make it inadmissible under gateway (e). Likewise, the conclusion that the material would open up satellite issues which could not be resolved by the jury without a good deal more evidence about HGEM, was not a proper basis for refusing the application under that gateway.

iii) The judge's error in refusing to admit the evidence of the undertaking rendered the conviction on count 1 unsafe. Rowe's case at the trial had been that Creaven was entirely to blame for the wrongdoing at Agon, being the person responsible for the business and with expertise in trading carbon credits. Creaven had been seriously prejudiced by being prevented from undermining that case by relying upon the undertaking about trading by

HGEM. The other evidence in the trial against Creaven is insufficient to conclude that the conviction is otherwise safe. The convictions under count 2 and 3 are tainted by this flaw in the trial.

Discussion

131. The case law on section 98(a) is helpfully summarised in Blackstone's Criminal Practice at paragraphs F13.10 to F13.11. In *R v NcNeill* [2007] EWCA Crim 2927 this Court stated at [14] that although the words "*has to do with*" appear to have a broad application, the phrase must be construed in the overall context of the bad character provisions in the CJA 2003 and the restrictions or protections they contain. Thus, the apparent breadth of that language is limited by, for example, the provisions for dealing with "*important explanatory evidence*" in s. 101(1)(c), or an "*important matter in issue*" in s. 101(1)(d) which (read together with s. 103) covers propensity issues.

132. In *R v Tirnaveanu* [2007] EWCA Crim 1239; [2007] 2 Cr App R 23 the Court held at [23] that for evidence of misconduct to fall within section 98(a), it must generally have some nexus with the offence charged, although that nexus does not have to be temporal (see *R v Sule* [2012] EWCA Crim 1130; [2013] 1 Cr. App. R. 3). Accordingly, the evidence in *Tirnaveanu* of earlier misconduct through the provision of services to different clients did not fall within section 98(a). Instead, it had to be considered under one of the gateways in s. 101(1). Likewise, in *R v Sullivan* [2015] EWCA Crim 1565 the previous conduct of the defendant relied upon by the prosecution to show propensity, fell to be considered under section 101(1)(d), and not section 98(a) ([49] to [51]).

133. In the present case, the relevant context for the application of section 98(a) was the gateway in section 101(1)(e). That gateway is intended to provide an appropriate level of protection for a person against whom bad character evidence is sought to be adduced by a co-accused. The evidence must have substantial probative value in relation to an important issue between the co-defendants.

134. The judge concluded that the undertaking was to do with a different company and a different period of time and so the subject matter did not have a sufficient nexus with the matter charged to be admissible under section 98(a). The knowledge which Creaven sought to impute to Rowe from the disqualification undertaking was no more admissible under section 98(a) in relation to count 1 than, for example, the

previously acquired knowledge in *Sullivan* about growing cannabis. The judge's decision on that aspect is not open to criticism.

135. We turn to consider section 101(1)(e). Mr Rose relied upon *R v Apabhai* [2011] EWCA Crim 917 where this Court stated that the word "*substantial*" means that the evidence concerned "*has more than trivial probative value*" ([38]). It also confirmed that there is no discretion, whether under CJA 2003, or section 78 of the Police and Criminal Evidence Act 1984, or at common law, to exclude relevant material as between co-defendants ([27]) and see *R v Randall* [2003] UKHL 69; [2004] 1 Cr App R 26 at [18] and *R v Platt* [2016] EWCA Crim 4; [2016] 1 Cr App R 22 at [24]).

136. The Court accepted in *Apabhai* that there might sometimes be a danger that evidence of the kind with which that case was concerned might give rise to satellite litigation and distract the jury from the main issue, but the legislation did not allow evidence which satisfied the requirements of gateway (e) to be excluded for that reason ([40]). The court was referring to the appellant's allegation about having been blackmailed by a co-defendant who had said that he would give evidence for the prosecution against the appellant unless he was paid £125,000 ([20]). That allegation was not the subject of a conviction, but the appellant had been willing to give evidence about the incident and said that there were witnesses to it ([36]). The incident had happened only a month before the trial. The Court of Appeal held that it was relevant to the reliability of the co-defendant and showed a motive for telling lies. The evidence was admissible under s. 98(b) of CJA 2003 in any event. But in the alternative, it would have been admissible under s. 101(1)(e). (See also *Regina v Umo & another* [2020] EWCA Crim 284 at [36]).

137. *R v Phillips* [2011] EWCA Crim 2935; [2012] 1 Cr. App. R 332 was concerned with a conspiracy to cheat the Revenue. Two of the co-defendants accepted that the fraud had taken place, but each denied responsibility for it and, by implication, blamed the other. The appellant had applied under section 101(1)(e) to adduce evidence of allegations against the co-defendant of fraudulent behaviour in the past and of conduct post-dating the conspiracy which would be the subject of two forthcoming fraud trials. Applying the assumption of truth in section 109 CJA 2003, the judge accepted that the evidence would be of substantial probative value. However, he refused to admit it on the basis that it would create undesirable satellite litigation.

138. The Court of Appeal laid down a number of important principles at [38] to [40] and [42] to [44]:

i) It is necessary to distinguish between "*simple relevance*" and "*substantial value*". The term "*substantial probative value*" must mean that the evidence has an enhanced capability of proving or disproving a matter in issue;

ii) Under section 101(1)(e) (read together with section 112(1)), the court must consider whether the evidence has substantial probative value, not in isolation, but in relation to a matter which is in issue between the co-defendants *and* is of substantial importance in the context of the case as a whole. This is particularly so where the bad character evidence relates not to the bare fact of a conviction, but to detailed allegations of previous behaviour and where there are multiple factual issues between co-defendants;

iii) The phrase "*more than trivial probative value*" used, for example, in *Apabhai*, is capable of being misleading. If "*trivial probative value*" is taken as including evidence which is barely probative, the statutory term "substantial" may be deprived of its intended meaning, which requires evidence to be more than merely probative or relevant. It is important that this threshold for gateway (e) is not understated. It seeks to ensure as far as possible that the probative strength of the evidence removes the risk of unfair prejudice.

iv) Because section 101(1)(e) enables evidence to be led to prove bad character based on allegations, a jury may be required to make a multiplicity of judgments about a co-accused's behaviour on other occasions before reaching their conclusion about the guilt of either defendant of the offence charged. This increased scope for satellite litigation is not a ground for excluding evidence falling within gateway (e), but, "*for these reasons, it is important … that sight is not lost of the rigour of the statutory test of substantial probative value upon a matter in issue between the defendants which is of substantial importance in the context of the trial as a whole*" (at [40]).

v) This is a fact-sensitive issue to be addressed in the context of the trial as it appears at the time the application is determined. It may, for example, be appropriate to consider in some cases whether the evidence sought to be adduced under gateway (e) adds significantly to other, more probative evidence on the same issue.

139. The Court of Appeal took the same approach in *Platt* and at [26] reaffirmed the point that the word "substantial" is an ordinary word which should be given its ordinary meaning and not be glossed. For example, the gloss of "more than merely trivial" was potentially misleading.

140. It is well-established (see *e.g. R v Hanson* [2005] EWCA Crim 824; [2005] 2 Cr App R 21 at [15] and *R v Renda* [2005] EWCA Crim 2826; [2006] 1 Cr App R 24 at [3]) that this court will not interfere with a judge's decision on the admissibility of bad character evidence unless either (1) he or she made an error as to the legal principles to be applied, or (2) the judgment made in the application of those principles was plainly wrong or *Wednesbury* unreasonable.

141. In the present case we do not consider that the judge made any legal error regarding the principles to be applied on gateway (e). He correctly identified the test as being whether the disqualification undertaking had substantial probative value in relation to an important matter in issue between Creaven and Rowe. He decided that the issues between them as to the extent of Rowe's involvement in Agon and his knowledge about the pricing of carbon credits were important issues in the trial. He then went on to decide that the undertaking did not have substantial probative value.

142. The judge rightly pointed out that the undertaking was not akin to a conviction for fraud or a determination by the court. It had been drafted so as to reflect what both Rowe and the Official Receiver had been prepared to agree in order to avoid court proceedings. It did not amount to an admission of relevant knowledge at the time Rowe was involved in HGEM.

143. It was in this context that the judge said that the undertaking did not itself provide conclusive answers about any of the issues relating to HGEM that could bear upon the issue of Rowe's involvement and knowledge in relation to Agon's activities. He was simply saying that by itself the undertaking would not assist. Further

evidence would have been required. But it does not appear that any additional evidence of significance on Rowe's knowledge was identified to the judge. Certainly, none was shown to us. The situation is not analogous to *Apabhai*, where the appellant had been ready and able to give evidence about the incident in question and identified other witnesses. In that case, there was evidence going directly to the issue. It is not suggested that in the present case there was any other significant evidence dealing with the issue of Rowe's knowledge about HGEM's business model at the time when he was involved in the company. This was, therefore, a case in which the issue raised by the evidence which Creaven sought to adduce under gateway (e) would have been irresolvable (see *Umo* at [37]).

144. It was with these considerations in mind that the judge also said that the undertaking would open up more issues, "*satellite to this case*", and the jury would need a great deal of other evidence. But at the point that he was considering the application, it does not appear that Creaven had identified any such material, at least nothing of significance. This was a late application by Creaven in the middle of the trial which followed on from the prosecution's abandonment of its own application in relation to the same material. It was not an application which Creaven's legal team had made when preparing his case for trial. Plainly, the prosecution's explanation for withdrawing the application under s. 101(1)(d) suggests that they had no further material which could have advanced the issue of Rowe's knowledge significantly.

145. There is a difference between a court being asked to admit bad character evidence which itself has substantive probative value in relation to a matter of substantial importance, as opposed to evidence which, even taken as a whole, is equivocal or inadequate. In the former case the fact that evidence meeting the test for admissibility under gateway (e) may give rise to satellite litigation does not provide a basis for its exclusion. Instead, the potential problem of satellite litigation is a matter for case management so that the matter is dealt with proportionately, applying, for example, the guidance in *Phillips* at [59]. In the latter case, the CJA 2003 does not envisage that the lack of substantive probative value may be cured by satellite litigation.

146. Reading the judge's ruling fairly and in context, we conclude that his reasoning was not based on any improper legal test, requiring the evidence in question to meet a threshold of conclusiveness or excluding admissible evidence because it would give rise to satellite litigation. Nor can it be said that his judgment on the application of the principles governing gateway (e) was plainly wrong or *Wednesbury* unreasonable.

147. In any event, even if we had considered the judge's refusal to admit the disqualification undertaking to have been erroneous, we do not consider that any such error would have made the conviction of Creaven under count 1, or for that matter under counts 2 or 3, unsafe. There was in any event significant evidence before the jury about Rowe's involvement in the two companies and also HGEM from the admissions he made in his police interviews.

148. The case against Creaven in relation to the separate fraudulent conspiracies involving first Agon and second Lanyard was very strong. In his summing up the judge said that the jury would probably have little difficulty in concluding that Agon and Lanyard were vehicles for fraud. The key issue was whether each defendant had been involved in that fraud. Agon had received £990,000 from investors and had spent only £35,000 on buying carbon credits on their behalf. Lanyard had received over £2m from investors and spent £267,000 on buying diamonds. There was also evidence from investors and from former employees about Creaven's involvement in both companies and their mode of operation. The material on Creaven's computers was highly incriminating. It showed, for example, that he was the driving force and controlling mind of Agon. There was a document showing the buying and selling prices for the carbon credits. There was a document showing that the prices at which Lanyard had bought diamonds was only about 10% of the prices at which they were sold to investors. There was also evidence of Creaven's reaction in emails to press reports on investment scams concerning worthless carbon credits.

Conclusion on appeals against conviction

149. It follows that we dismiss the appeals against conviction in all appeals.

The Renewed Application by Creaven for Leave to Appeal Against Sentence

150. The judge imposed similar sentences on Creaven and Rowe: count 1 (conspiracy to defraud) 6 years imprisonment; count 2 (laundering of money obtained as a result of the fraud which was the subject of count 1) 4 years imprisonment concurrent; count 3 (conspiracy to defraud) 7 years imprisonment consecutive making a total sentence for each defendant of 13 years imprisonment.

151. Both defendants sought leave to appeal their sentences but their applications were refused by the single judge. Creaven alone renewed his application to the full court.

152. Having heard the evidence in the case, the judge was satisfied that both Creaven and Rowe played leading roles in the two fraudulent enterprises; their offending, he said, was sophisticated, had extended over a substantial period of time and while he accepted that they had not targeted people because they were vulnerable, rather they had targeted them because they had money, most of their victims were, in fact, vulnerable. He found, therefore, that each defendant fell into the high culpability category within the guidelines and an assessment of harm due to the losses caused by each conspiracy put both counts 1 and 3 into category 1A.

153. In respect of count 1, where the loss was just under a £1m, the starting point for sentence was 7 years custody with a range of 5 – 8 years custody. However, the judge concluded that sentence for that offence would move up from the starting point in the guidelines because of the high impact on a large number of victims.

154. As to count 3, where the loss was well over £2 million, the starting point for sentence and the range of sentences were the same as in count 1, but the judge concluded that the offence fell very high indeed in that category given the loss, the large number of victims and the high impact of the fraud on them.

155. The judge referred to Creaven's previous good character and his personal circumstances and then considered the way the defendants had moved from the offending in count 1 to that reflected in count 3. He said:

> "In my judgement consecutive sentences for counts 1 and 3 are appropriate. Nothing less will provide proper punishment for what were successive enterprises, both of great seriousness involving large sums of money. You could have stopped with Agon, you chose to go on and do even worse with Lanyard. I must and do take into account totality. The sentence is less than it would have been if I was passing individual sentences for each fraud."

156. The judge then imposed the sentences to which we have referred.

157. The ground of appeal, which was settled by the applicant when he was unrepresented, reads as follows: "*The sentence for count 3, i.e. money laundering was manifestly excessive for the offence. The sentence was seven years consecutive for the money laundering charge*."

158. The reference in the ground as settled erroneously refers to count 3 being a money laundering offence but the essence of the ground is that the consecutive sentence on count 3 has produced a manifestly excessive total sentence. That is the point on which Mr Rose concentrated in his oral submissions to the court. He conceded that the judge had correctly categorised the offending within the sentencing guidelines and accepted that, although one could view the offending in counts 1 and 3 as one course of conduct, the imposition of consecutive sentences on those counts was not objectionable. His short submission was that the overall sentence of thirteen years did not properly reflect the principle of totality.

159. The single judge in refusing leave said:

> "The Guideline would suggest starting points in excess of 7 years for both of the relevant counts, and a deduction for totality reduces the actual sentence to 13 years."

160. We agree with the single judge. The judge had the principle of totality well in mind and reduced the sentences which counts 1 and 3 would have merited if each had stood alone to reflect that principle. The total sentence is not manifestly excessive and the renewed application must be refused.