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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2

Monday, 4 November 2002

B E F O R E:

LORD JUSTICE LONGMORE

MR JUSTICE POOLE

HIS HONOUR JUDGE FINDLAY BAKER QC
(Sitting as a Judge of the CACD)

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R E G I N A

-v-

JOHN PALMER

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MR P KELSON QC, DR THOMAS, MR A DOS SANTOS AND MISS C PATTERSON
appeared on behalf of the APPELLANT
MR D FARRER QC [MISS J CARTER-MANNING] appeared on behalf of the
CROWN

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J U D G M E N T
(As approved by the Court)

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1. JUDGE FINDLAY BAKER: On 18th May 2001 at the Central Criminal Court, following a retrial before His Honour Judge Gordon and a jury, John Palmer was convicted of two counts of conspiracy to defraud. On 23rd May he was sentenced on count 1 to seven years' imprisonment and on count 2 to one year's imprisonment to run consecutively. He was in addition ordered to pay compensation in the total sum of £2,039,899.14 with 18 months to pay and contribute £266,367 towards the costs of the prosecution. A confiscation order was subsequently made in the total sum of £33,243,800 with a total of 11 years' imprisonment consecutive to his eight year sentence in default of payment. This has been the subject of separate appellate proceedings which led to a decision on 31st July this year that it should be quashed on the ground that the original initiating procedure was invalid and later attempts to remedy the defect were too late.
2. The application for leave to appeal against the eight year sentence was renewed following refusal by the single judge. Last Thursday we received further grounds augmenting those upon which leave had been refused and adding a further ground to appeal a certain part of the compensation order. That was not however pursued before us. In the course of the hearing on Thursday leave to appeal against sentence was granted and the proceedings have been treated as the substantive appeal against the eight year sentence.
3. It is material to this appeal that when judgment in the confiscation appeal was handed down on 11th October the Crown made no application either for leave to appeal or for the certification of a point of general public importance. However very recently they have notified the defence that it is their intention to do so and a hearing has been fixed for later this month to determine the immediate issues that arise from their belated decision. It is also relevant that if the appellant had been unsuccessful in quashing the confiscation order he would have continued to appeal against it on its merits. Its status therefore was never more than a first instance decision made having regard to the civil standard of proof and subject to challenge on its merits by the appellant.
4. The indictment upon which the appellant was tried alleged in count 1 that he, together with Christina Ketley and Andrew Palmer, between 1st of September 1989 and 31st of July 1996 in the United Kingdom and in Spain, conspired together with others to defraud the owners and/or purchasers of timeshare interests by inducing them to purchase timeshare interests, to make payment on account of such purchases and to pay registration fees to Timeshare Retail and Rental Companies by various false representations which were itemised in the indictment. Count 2 was expressed in the same terms. The period was later and shorter, between 1st January 1996 and 15th July 1997.
5. On 2nd July 2001 Christina Ketey, having been convicted of both counts, was sentenced on count 1 to two years' imprisonment suspended for two years and on count 2 to nine months' suspended for two years. She was ordered to pay £50,000 towards the prosecution costs. The jury were unable to agree a verdict in relation to

Andrew Palmer who was subsequently formally found not guilty under section 17 of the Criminal Justice Act 1967. The convictions all followed a retrial. The earlier trial had included a further co-accused Brendan Hannon. After the first trial but before the start of the second one he pleaded guilty to count 1 and was sentenced to 52 months' imprisonment. It will be appropriate to say little more about the length of his sentence and how it was arrived at later in this judgment.

6. The facts material to this appeal are as follows. In 1985 the appellant began a development of the first of a number of holiday resorts in Tenerife. Through a series of companies corresponding to the different resorts he sold timeshare interests in apartments to a very large number of customers from several European countries, the largest national group being from the United Kingdom. Developments and sales were still proceeding in 1997. From about 1990, when sales slackened and recession led many timeshare owners to seek sale of their interests, timeshare interests at the appellant's various resorts were sold by systematic fraud on a very large scale, based on false and dishonest promises as to the resale value of customers' existing timeshare interests, the corresponding speed with which they would be resold and the rent that could be expected from newly acquired timeshares when not used by the owner.
7. The most prominent fraudulent inducements were those involved in a technique known as Buy/Sell. Timeshare owners were told that their existing interests would be sold promptly and at highly attractive prices provided they bought fresh interests in the applicant's resorts, to be financed by such sales. Such transactions were presented as offering improved accommodation, coupled with large profits and no financial risk. The finance that covered short-term outlay before the proceeds of the resale were realised was to be made available from companies represented as being independent both of the resort and of the appellant's companies.
8. A variation of Buy/Sell, known as Buy/Rent was practiced on a similar scale. It involved corresponding representations as to the rental value of the timeshare to be purchased, or of the one already owned. A common inducement to buy was a discount from the purchase price upon its first year's rental to be achieved by a corresponding uplift in their price. The timeshare then became available in the resort to rent out for the first 12 months.
9. Purchasers were induced to buy on the spot without any pause for reflection. It was represented to them that the resale or rental of their timeshare would be undertaken by a named independent company with a good reselling record. They paid for registration with such a company regardless of resale.
10. It was the Crown's case that the reality was, to the knowledge of the appellant, very different from what was represented. The market for resold timeshares was at best slack. They routinely remained unsold for a very long time, if not indefinitely. Their market values were likely to be far below the original purchase prices. Prices in rental forecasts quoted to customers and the promised speed of sale were known by the appellant to be unreal. The "independent" companies who were to provide

the finance and arrange the resales were not independent at all, but part of the appellant's family of companies. Customers risked being left with two or more unsold timeshares rather than one. Many defaulted on payments for the new timeshares when their existing timeshare remained unsold and a number lost their purchase and all the money paid over prior to default.

11. The operation of the appellant's companies was part of the overall fraud under his control and influence. Those who managed the companies knew that the promises made were dishonest. Common to all these transactions was a promise that if resale was not achieved within nine months the customer's liability would be extinguished and previous payments refunded and to this end a misleading standard form letter, known as the nine month letter, was issued together with a good deal of other written material to all Buy/Sell and Buy/Rental Customers.
12. The appellant controlled the business of all the resorts from Tenerife. Brendan Hannon was his right-hand man in the management of the resorts. Hannon was responsible for introducing and conducting the Buy/Sell fraud. Christina Ketley who had worked with the appellant in Tenerife in the early stages, ran the administrative side of the business from Brentwood in Essex during the years of the indicted conspiracies. Mr Hannon left Tenerife in 1996. The appellant then took more direct control and Buy/Sell and Buy/ Rental techniques continued to be used. After Mr Hannon's departure a greater concern does appear to have been shown to customers. The Crown claimed that this was simply a reaction to adverse publicity which by then had been widespread in the media. It was the appellant's case that he believed that he had put a stop to the frauds. The verdict of the jury on count 2 refuted that.
13. In the appeal the scale and extent of the fraud and more particularly the extent of the losses caused to individual customers was a matter of contention. At the trial the prosecution called 48 customers to give evidence of the operation of the fraud and to an extent its effect upon them. These customers were selected not to demonstrate worst cases but to represent the different companies and resorts involved, and other different aspects of the fraud and to cover the full period spanned by the indictment. The appellant also called a number of witnesses, indeed a greater number than the Crown, in an attempt to demonstrate that many customers were satisfied with their purchases. It was in the end common ground that a significant number of customers were so satisfied, though the Crown maintained, and to an extent demonstrated, that even so they had been duped. The number of customers who gave evidence was necessarily a small proportion of the people whose custom had been obtained by the appellant's organisation over the years. The Crown put before the jury a summary of a large schedule of documentation known as the IFS master schedule. The large schedule listed documents found during two searches of two companies in 1994 and 1997. The companies, Island Financial Services (IFS) and Caldon had acted as debt-collecting agencies for the operation. The purpose of the IFS master schedule was to identify transactions where Buy/Sell and Buy/Rental techniques had been practised on customers. It dealt with 16,600 customers in all. The status of the IFS master schedule was the

subject of an interlocutory appeal to this Court in 1998. The Court held (see paragraph 25 of the judgment of 23rd July 1998) that if the jury were satisfied that a false representation made to any significantly large number of customers was an integral part of the business as it was carried on, and in the absence of further contradictory evidence, they could infer it was carried out in the same way in other cases where the transaction was the same. It was the Crown's case that even the 16,600 names eventually in the IFS did not identify all who had been subjected to the fraudulent techniques.

14. We are satisfied that the IFS schedule and the nine month letters provide a useful indicator of the extent to which the appellant's business was conducted fraudulently. The schedule does not however provide useful guidance as to the extent of customers' losses or of the appellant's profits arising from the business.
15. Some assistance on the losses suffered by customers may be gleaned from the compensation orders which total in excess of £2 million. The print out of the court record shows that orders were made in favour of approximately 400 named losers. The confiscation order, presently quashed, cannot however properly give assistance to determine the extent of the appellant's benefit from this fraud, substantial though it obviously must have been.

Sentence

16. When passing sentence on the appellant Judge Gordon drew attention to the scale of the fraud and the length of time it had lasted. He concluded that the appellant's motive was financial and he observed that as well as the benefits that accrued to the appellant from increased sales, the fraud had led to him acquiring and retaining the most forceful and successful sales teams who were attracted by the commissions, earned in significant part from the fraud itself. He recognised that the Buy/Sell fraud was not the appellant's idea and he noted that not all the customers ended up dissatisfied. However, some, in the main elderly ones, had been put through periods of extreme anxiety and had their retirements ruined. He concluded that although the appellant was Mr Hannon's superior, it would be right to treat the two of them as in the judge's words "jointly liable". Count 2 covered a shorter period but it could not be ignored because it was a deliberate revival of the fraud with variations.
17. Mr Hannon himself had been sentenced, as stated earlier, to 52 months' imprisonment on count one alone. When sentencing him Judge Gordon said that the proper sentence taking account of his plea of guilty would have been five-and-a-half years, but he discounted it by a further 14 months to take account of seven months which he had spent in custody abroad. It is reasonable to infer from Judge Gordon's sentencing remarks that he took the same starting point with Mr Hannon as he did with the appellant, seven years on count 1, and that he deducted 18 months from that sentence to take account of his plea of guilty and any other mitigation before making the further discount for the time spent in custody.

18. We now move to the seven grounds upon which the appellant challenged his sentence of imprisonment.

Ground 2: consecutive sentence

19. It is convenient to consider the second ground of appeal first. It was contended that the sentences on counts 1 and 2 should not have been consecutive. The appellant's ground 2 asserted that it was a well-established and familiar principle of sentencing that consecutive sentences should not be passed for offences which in essence represent a single transaction. The facts alleged against the appellant represented essentially a continuing transaction. The sentence on count 2 should therefore, it was argued, have been made to run concurrently with count 1. In support of this argument two cases were appended to the grounds of appeal. They are Noble [2002] EWCA Crim. 1713 and Perry Wacker [2002] EWCA Crim. 1994. Both were cases concerning a single incident. The former was an incident of driving and was charged as death by dangerous driving. The latter involved the driving of an inadequately ventilated lorry into this country pursuant to a conspiracy to facilitate the entry of illegal immigrants. That was charged as conspiracy and manslaughter.
20. We accept of course, as is stated at paragraph 15 of the Noble decision, that consecutive sentences should not normally be imposed for offences arising out of the same single incident and we accept also that that is partly as stated in the Wacker decision at paragraph 52 because of the danger of punishing the underlying criminality twice. However, in our judgment that principle simply does not apply in the present case. Here the judge described count 2 as a new and deliberate revival of the fraud with variations. In our judgment he was right to do so. Mr Hannon, the co-accused, had left Tenerife in 1996. The appellant took over responsibility for the sales side of the operation. He did not stop the fraud, as he could have done. It is true that he introduced innovations and modifications, principally in an attempt to meet the difficulties which by then had confronted the operation largely as a result of persistent media attention. But he carried the fraud on nonetheless. He brought in a new resale company but the fraudulent Buy/Sell technique and Buy/Rent technique continued and was practised, albeit with more modest but still dishonest claims being made.
21. In these circumstances a consecutive sentence on count 2 was appropriate. It properly reflected the new criminality attaching to the appellant's actions and it enabled Judge Gordon to draw a modest but important distinction between the appellant on the one hand and his co-accused Mr Hannon on the other.

Ground 1: the sentence was too close to the maximum

Ground 3: the use of the IFS schedule.

22. Grounds 1 and 3 can sensibly be dealt with together, as they were argued together. They are both concerned with the scale and extent of the fraud. Mr Kelson argued that Judge Gordon was wrong to treat the IFS master schedule as an indication of

the scale on which the fraud was practised in view of the absence of any acceptable evidence that persons whose transactions were listed in the schedule were in fact deceived by any false representations made to them. In the absence of more cogent evidence he should have passed sentence only on the basis of the evidence of the complainants called at the trial. We do not accept that. The Crown was not concerned in the trial to establish the full extent of the losses to customers. They were concerned to establish the very widespread use of fraudulent selling techniques and the fact, which could be inferred from that, that the company was operated as a fraud. In this they succeeded, in part by the legitimate use of the IFS master schedule and the demonstration that the nine month letters were sent to all those named on it. Furthermore, the £2 million compensation letters give an indication of the now undisputable losses. The mere fact that the Crown confined itself to 48 witnesses does not mean that the court was limited to considering that only 48 people were affected. Plainly there were many more. The appellant's criminality is to be measured primarily by the widespread use of the fraudulent techniques. Mr Farrer QC, on behalf of the respondents said that the Crown were unaware of any fraud comparable in terms of the numbers of customers involved. Mr Kelson QC did not demur from that. What he challenged was any implication that all of them had suffered loss. In the end we have no doubt that the fraud in this case was very widespread indeed.

23. Mr Kelson moved on to argue that the total sentence of eight years' imprisonment and the sentence of seven years on count 1 brought the case too close to the statutory maximum of 10 years. This argument depended in part on the contention in ground 2 that consecutive sentences were inappropriate, which we have rejected, and in part on our assessment of the magnitude of the fraud. Nevertheless he contended that the statutory maximum for an offence should be reserved for the worst possible example of a case which is realistically imaginable. This is not, in our judgment, quite the proper test. It is to be found more accurately set out in Dr Thomas' Current Sentencing Practice section 1A-4A and in the cases there cited. The test is that the maximum penalty should be reserved for the worst examples of the offence likely to be encountered in practice. As an example of the deployment of a maximum sentence for conspiracy to defraud, the transcript of the unreported case of Gokal, arising out of the BCCI banking scandal, was put before us. Gokal was convicted of conspiracy to defraud and conspiracy to account falsely. He was sentenced to ten years' and four years' imprisonment to run consecutively. For present purposes the details of the criminal conduct do not matter. The scale of the fraud is what is important. Its scale was described by the Vice President as "by a very substantial margin the largest ever to have resulted in a conviction in this country. It had international consequences of great gravity to bankers, to the proper control of banking and to all those who rely on the integrity of bankers" (see the judgment of 11th March 1999-page 29). The present appellant's fraud was not of course of a comparable nature, nor did it have similar consequences. But then nor was his sentence similar. A total of eight years as opposed to a total of fourteen years in all and a sentence of seven years as opposed to ten years on one count. We are not in the end assisted by the case of Gokal.

24. Our conclusion on these matters is that the appellant was, as Judge Gordon found, committing a fraud on a substantial scale, properly measured as envisaged by the Court of Appeal in its interlocutory judgment by reference to the IFS master schedule and one causing significant, though not as yet fully quantified losses. The total sentence of eight years and the sentence of seven years on count 1 were not in our judgment excessive.
25. That leaves the remaining grounds which involve matters of mitigation personal to the appellant.

Ground 4: the psychiatric report

26. We have been shown reports of Dr Gwilym Hayes dated 25th July and 10th October this year. The latter refers to the applicant's distress at being lodged in the prison where his brother died. Dr Hayes describes his symptoms, including chronic low mood, lack of reactive pleasure, difficulty with concentration and poor memory. In an earlier report he made a diagnosis of major depressive disorder, but in a mild to moderate form. The appellant does not have, according to Dr Hayes, the most severe of depressive symptoms and he has no psychotic symptoms. He does not entertain thoughts of self-harm. Dr Hayes is hopeful that the appellant's condition will improve when the proceedings are complete and when he is moved to a less rigorous prison regime than the one to which he is presently subjected. We do not wish to minimise the effects of the appellant's ill-health, especially in the regime to which he has been and still is exposed, but we do not consider that the rigours of the regime can properly be taken into account, or that the appellant's ill-health, or the other matter mentioned, attain a degree of severity which warrant any reduction in the length of his sentence.

Ground 5: recent developments in the confiscation proceedings

27. The confiscation order was successfully appealed by the appellant on 31st July. Reasons were deferred by the court until 11th October. It is apparent from the transcript that the Crown's application for leave to appeal was adjourned on 31st July so that such an application, together with any point of law which the Crown might wish to ask the court to certify, could be considered at the time the judgment was handed down. The Crown made no application, however, on 11th October when the reasons for allowing the appeal were given. The appellant was therefore told by his lawyers that that was the end of the matter and no doubt he rejoiced. However, on 22nd October notice was received by the defence that the Crown intended to seek certification of a point of law from the Court of Appeal after all. A date has now been fixed later this month for the Crown to seek to persuade the court that they may do so. This has had an impact on the appellant, it is argued, which should be reflected in a diminution of his sentence. Mr Kelson has told us that one consequence of the Crown not seeking on 11th October to challenge the quashing of the confiscation order was the reconsideration of the appellant's prison status. The Crown's notification that it now does intend to mount a challenge has affected that reconsideration. The impact on the appellant of their

change of heart has been, he said, devastating. He perceives the proceedings against him as "being tainted with the colour of persecution rather than mere prosecution."

28. No doubt it is the case that the appellant received comfort from the decision in July and from the Crown's silence on 11th October. No doubt too he is again anxious and discomforted at the huge confiscation order and perhaps more particularly the eleven year default sentence which is again hanging over his head. This may be accentuated by his presently vulnerable medical condition. All that is a matter of regret. But is it a matter which ought properly to be reflected in a diminution of his sentence? In our judgment it is not. Looked at in the overall context of the appellant's criminality and the inevitably complex proceedings which it has generated, the events concerning confiscation proceedings to which our attention has been drawn, regrettable though they may be, are simply the vicissitudes of criminal procedure to which a person in the appellant's position may expect to be exposed in consequence of his criminal activity and subsequent conviction. Even if, contrary to our belief that the appellant's sense that he is being persecuted either by the attempt at a revival of the confiscation proceedings or by the attitude of the prison authorities to his prisoner category, has some solid foundation, his remedy does not lie in a reduction in his sentence.

Ground 6: the strain of the trials and the restriction they imposed on the appellant's liberty

29. The first trial ran from 16th September 1999 to 26 April 2000. The second ran from 8th September 2000 to 18th 2001. By calculation they occupied in all some 15 months and 20 days. The applicant conducted his own defence. It is argued that the requirements of the trial process and the preparation before and during the trial imposed a severe restriction on his liberty. This was characterised by counsel in the grounds of appeal as "comparable to a period of detention in a category D prison". It is submitted that this should have led to a reduction in the sentence. It is however conceded that the applicant was in fact at all times on bail and indeed free to leave the country at weekends.
30. Some of the strain and restriction doubtless arose because the appellant conducted his own defence. It was his right to conduct his own defence. It was a right, however, which he was free either to exercise or not to exercise. He chose to conduct his own defence and to the extent that that has added to his burdens, or indeed extended the time to prepare for or conduct the trial, we consider that that must be disregarded.
31. It is undoubtedly true, as the appellant contends, that when the judge came to pass sentence on his co-accused Miss Ketley, he was influenced by the fact that the case had been hanging over her for four years. Indeed, he said: "I accept that what you have been through over that period amounts to a major punishment." He reflected that in her lenient sentence. The appellant's claim is that he too should have received the same sympathetic treatment. However, this claim disregards the

difference between his position and that of Miss Ketley. Miss Ketley was found by the judge to have been under the influence of the appellant's dominating and forceful personality by virtue of her employment and personal relationship with him. She was, in his words, caught up in the situation and under obvious constraint which prevented her from pleading guilty. The appellant, however, was the man in charge. Although we reject as fanciful the claim that the trial process operated upon the appellant as the equivalent of a prison sentence, we do acknowledge that it must have been very burdensome to him as opposed to the others who were in it, especially having regard to the fact that the first trial was aborted through no fault of any of the defendants. In his case, however, the decision to deny the allegations was a matter of free choice. Although he is of course not to be penalised for exercising that choice by having his sentence increased, he is not, in our judgment, entitled to put himself on a par with Miss Ketley and have his sentence reduced just because he has been put to inconvenience and toil and loss of time. Those who enter into complex widescale long-lasting international conspiracies should not expect sympathy when the process of being called to account turns out to be uncomfortable, time consuming and burdensome.

Ground 7: remorse

32. It was finally argued that the appellant has not been given credit for his remorse demonstrated, it was alleged, by the fact that he immediately started to make refunds when he discovered that clients had suffered losses and hardship but he was stopped from so doing by Judge Gordon. We were told by Mr Farrer on behalf of the Crown, however, that refunds were only made to witnesses who gave evidence at the trial and we can well understand that in the later part of the conspiracy and the period leading up to the trial there may have been motivation to offer refunds which was not, or not exclusively, motivated by remorse. Indeed Mr Kelson conceded as much.
33. It is sufficient for us to observe, first, that the trial judge was in the best position to decide whether this should warrant a reduction in the sentence and from his silence on the matter it would appear that he did not; and second, that true remorse incorporates an acknowledgment of guilt which had been conspicuously absent from the appellant up to and beyond the point of his sentence.
34. It follows from all that has been said that we see no merit in the points raised by this appellant and his appeal against sentence will therefore be dismissed.
35. DR THOMAS: Can I deal with one matter which your Lordships will recall was raised at a previous hearing and this was the question of prosecution costs on the conviction appeal.
36. LORD JUSTICE LONGMORE: We received a note to the effect that that was dealt with by agreement.

37. DR THOMAS: That has been dealt with by agreement and whether the court wishes to make an order-- I simply say that the defence does not now resist any such order.
38. LORD JUSTICE LONGMORE: Yes. Perhaps we should make an order since an application was made, but since you say that it is not resisted we will just make an order for prosecution costs in respect of the conviction appeal in the sum of £7,050 was it?
39. DR THOMAS: That was the figure, my Lord.
40. LORD JUSTICE LONGMORE: There was also notification by the prosecution of an intention to raise matters connecting with the costs of this appeal if the appeal was dismissed, which it now has been.
41. DR THOMAS: I think that is a matter for the prosecution.
42. MISS CARTER-MANNING: My Lords, there is such an application. The specified sum is £2,500.
43. LORD JUSTICE LONGMORE: Is it resisted?
44. DR THOMAS: My Lord, I do not think it is resisted.
45. LORD JUSTICE LONGMORE: Thank you very much. We will make an order then for the prosecution costs of the sentence appeal in the sum of £2,500. We would like to record our thanks to counsel for their assistance in this matter.