Neutral Citation Number: [2019] EWCA 29 (Crim)

Case No: 201804901 C1
201804902 C1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT SITTING AT SOUTHWARK
SIR JOHN ROYCE
T201606538

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2019

Before:

LADY JUSTICE HALLETT DBE
VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
MRS JUSTICE ANDREWS DBE
and
MRS JUSTICE COCKERILL DBE

- -

Between:

REGINA	**Applicant**
- and -	
(1) BUSH	**Respondents**
(2) SCOULER	

(Transcript of the Handed Down Judgment.
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Official Shorthand Writers to the Court)

S Wass QC, E Schutzer-Weissmann & V Scully (instructed by **SFO**) for the **Applicant**
A Darbishire QC & T Doble (instructed by **Hickman & Rose Solicitors**) for the **First Respondent**
I Winter QC & J Ledward (instructed by **BCL Solicitors**) for the **Second Respondent**

Hearing dates: Wednesday 5 December 2018

Judgment
As Approved by the Court

The Vice President:

Introduction

1. This is a judgment of the court to which all three members have contributed.

2. Between September 2017 and February 2018, the Respondents, former employees of Tesco Stores Limited ("Ltd"), were tried with another former employee, Carl Rogberg, on counts of fraud and false accounting before the Honorary Recorder of Westminster, Her Honour Judge Deborah Taylor. She discharged the jury as a result of Mr Rogberg's ill health.

3. The re-trial of Mr Bush and Mr Scouler began before Sir John Royce in October 2018. Mr Rogberg was still too unwell to stand trial. At the close of the Prosecution case, Sir John upheld a submission of no case to answer in a ruling dated 26 November 2018. The Prosecution applies for leave to appeal that ruling, pursuant to section 58 of the Criminal Justice Act 2003. The trial judge refused to grant leave but ordered that the appeal be expedited and adjourned the trial pending our decision. He asked the jury to return to court on 6 December 2018.

4. We heard the application on 5 December 2018. We gave our decision at the end of the day because it was required as a matter of urgency. We decided that the judge rightly decided there was no case to answer. These are our reasons. They are also required as a matter of urgency because a decision must be taken in relation to the continued prosecution of Mr Rogberg. We have done our best in the time available to address all the significant issues raised and arguments advanced in what is a complex case. The jury heard detailed evidence from thirty witnesses. The Prosecution and Defence jury bundles together run to more than 400 documents and over 3,000 pages.

The Law
Submission of no case

5. The submissions of no case to answer were based on the second limb of *R v Galbraith 73 Cr App R 124.* It provides that a judge may withdraw a case from the jury where a reasonable jury properly directed could not properly convict. A very helpful analysis of a similar power is to be found in the judgment of the Divisional Court in *R (on the application of the Inland Revenue Commissioners) v Crown Court at Kingston [2001] EWHC Admin 581.* The Divisional Court rejected an application to review judicially a trial judge's decision to dismiss charges of conspiracy to defraud pursuant to s 6 of the Criminal Justice Act 1987. The defendant, an accountant, played a major role in advising on, and implementing, a tax-saving scheme for one of the firm's clients. If operated legitimately, the scheme would have been tax-effective. However, the Revenue alleged that various transactions supposedly carried out under the scheme were fictitious, existing only on paper and manufactured for the purpose of defrauding it.

6. The provisions of section 6 require a judge to dismiss a charge 'if it appears to him' that the evidence against the applicant would not be sufficient for a jury properly to convict him. Although the Commissioners did not allege that the Judge's decision was perverse, they argued he applied the wrong test in assessing the documentation, gave insufficient reasons and usurped the function of the jury.

7. The Divisional Court held at [16] of the judgment that section 6 required the trial judge to take into account the whole of the evidence against a defendant and to decide whether he was satisfied that it was sufficient for a jury properly to convict the defendant. It was not appropriate for the judge to view any evidence in isolation from its context and other evidence, any more than it was appropriate to derive a meaning from a single document or the other connected documents before the court. Moreover, the judge was not bound to deal with the application under section 6 by assuming that a jury might make every possible adverse inference capable of being drawn from a document. Section 6 expressly provided that the judge would decide not only whether there was any evidence to go to a jury, but whether that evidence was sufficient as a whole for a jury properly to convict. That exercise required the judge to assess the weight of the evidence but in doing so the judge is not entitled to substitute himself for the jury.

Section 67 of the Criminal Justice Act 2003

8. Section 67 of the Criminal Justice Act 2003 provides that the Court of Appeal may not reverse a ruling on appeal by the Prosecution unless it is satisfied that the ruling was wrong in law, involved an error of law or principle; or was a ruling that it was not reasonable for the judge to have made.

9. Sir Igor Judge P provided the following guidance on the exercise of those powers in *R v B [2008] EWCA Crim 1144* at [19]:

> "When the judge has exercised his discretion or made his judgment for the purposes of and in the course of a criminal trial, the very fact that he has had carefully to balance conflicting considerations will almost inevitably mean that he might reasonably have reached a different, or the opposite conclusion to the one he did reach. Leave to appeal under section 67 of the 2003 Act will not be given by this court unless it is seriously arguable, not that the discretionary jurisdiction might have been exercised differently, but that it was unreasonable for it to have been exercised in the way that it was. No trial judge should exercise his discretion in a way which he personally believes may be unreasonable. That is not to say that he will necessarily find every such decision easy. But the mere fact that the judge could reasonably have reached the opposite conclusion to the one he reached, and that he acknowledges that there were valid arguments which might have caused him to do so, does not begin to provide a basis for a successful appeal, whether, as in the circumstances here, by the Prosecution or, when it arises, by the defendant."

10. This Court will always acknowledge and respect the position of the trial judge, who is usually much better placed to make an assessment of the evidence (for which see *R v M and T [2009] EWCA Crim 2848*, per Moses LJ at [25]:

> "As we have said, this is an application by the Prosecution in which it seeks leave to appeal against a terminating ruling of the trial judge. The position of a trial judge, particularly one as experienced as His Honour Judge Moss QC, in cases of this sort, a shooting in which a gang is said to have participated, must be acknowledged and respected. That acknowledgement finds its expression in the principle that this court will not interfere with such a terminating ruling unless the conclusion of the judge, refusing to let the case go before the jury, is outwith the range of reasonable conclusion. That high hurdle, which a Prosecution must overcome is because this court is so much worse placed to make the sort of assessments and judgments this judge had to make when he was asked to stop the case against the defendants…"

11. We were invited to bear in mind the observations of Sir Brian Leveson P in *R v Rudling [2016] EWCA Crim 741*, at [33]: to the effect that "the judge in this case had the great advantage over us in seeing and hearing the evidence given, and being able to assess its tone, nuance and emphasis, none of which can be reproduced in a transcript".

12. However, we were also provided with examples of where this Court has decided it must intervene, for example in *R v A [2008] EWCA Crim 1706*. A was charged with supplying drugs. The only evidence against him was that he drove a dealer to the scene of a supply of drugs. A provided an innocent explanation for his actions that he admitted were suspicious but denied knowing of the drugs deal. The trial judge ruled there was no case to answer on the basis that there was no direct evidence that A had any knowledge that his passenger was a drug dealer; and even if he did think that the situation was suspicious, he was in a compromising situation. It was, therefore, unsafe to leave the case to the jury. The Court of Appeal ruled that there was sufficient evidence on which the jury could properly convict.

13. Another example arose in *R v C [2011] EWCA Crim 3272*. The Court of Appeal reversed a ruling that there was insufficient evidence to infer that C (who was charged with gross negligence manslaughter) knew about the fatal injuries sustained by a two-year-old child living in his house. The Court found that the trial judge had erred in focusing overly on C's statement that he had been working hard and was away from home for long hours. Applying *R v Storey [1968] 52 Cr App R 334* the Court held that self-serving or exculpatory statements were not evidence that a judge was entitled to take into account for the purposes of considering whether there was sufficient evidence to go before a jury.

The Fraud Act 2006

14. Section 4 of the Fraud Act 2006, so far as material, reads as follows:

> "(1) A person is in breach of this section if he–
> (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,

(b) dishonestly abuses that position, and
(c) intends, by means of the abuse of that position–
(i) to make a gain for himself or another, or
(ii) to cause loss to another or to expose another to a risk of loss."

False Accounting

15. Section 17 of the Theft Act 1968, so far as material, reads:

> "(1) Where a person dishonestly, with a view to gain for himself or another or with intent to cause loss to another-
>
> (d) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or
> (e) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular;
>
> he shall, on conviction on indictment, be liable to imprisonment for a term not exceeding seven years."

16. In *R v Lancaster [2010] EWCA Crim 310* the Court analysed the requirements of section 17 and explained that the requirement for the account to be false in a material particular means that it must be in a way that makes the document liable to mislead in a significant way, or in a way that "matters". It applies generally to the falsification of accounting documents for the purpose of obtaining financial gain or causing financial loss. It does not require that such gain or loss should in fact result. A defendant's view about the propriety of recording something in accounts is not relevant to the falsity of the entry, only to the question of whether he was dishonest.

Facts

17. We shall summarise the Prosecution case relatively briefly and include relevant parts of the evidence upon which reliance is placed when considering the arguments advanced.

18. From about April 2013, Tesco Plc operated in a very challenging market; their share of the market was declining. To encourage productivity, targets were set by the Group Executive Committee and approved by the Board. As a Public Limited Company, Tesco Plc (together with its subsidiary Tesco Stores Limited) was required by the Companies Act 2006 to prepare and publish financial statements for each financial year and interim results at the half-year end ("H1"). Accounts and financial statements published in May 2014 indicated UK revenue of £43 billion and a trading profit of £2.19 billion.

19. The alleged fraud and false accounting occurred between 21 February 2014 and 23 September 2104. For most of this period Philip Clarke was Chief Executive Officer ("CEO") of Tesco Plc. He was succeeded on 1 September 2104 by Mr Dave Lewis.

Mr Bush was, throughout this period, Managing Director of Tesco Stores Ltd (UK) and sat on the Executive Committee. Mr Scouler was the Commercial Director of Food at Tesco Stores Ltd. Carl Rogberg was the Financial Director of Tesco Stores Ltd. On 29 August 2014, Tesco Plc issued 'Statement 1' to the Stock Market disclosing the financial position for H1 and giving a prediction of its expected operating profit for that half year as in the region of £1.1 billion. That prediction involved giving the market a profit warning.

20. On 22 September 2014, Tesco Plc issued 'Statement 2' in which it identified an overstatement of approximately £250 million in 'Statement 1' of the expected profit for the half year. This was based on what were said to be "preliminary investigations" and was said to be "principally due to the accelerated recognition of commercial income and delayed accrual of costs". The price of Tesco shares dropped dramatically.

21. The Prosecution case is that the overstatement of expected profit resulted from the practice of meeting impossibly high targets by unlawfully recognizing income in an accounting period prior to that in which it was earned and ought to have been recognized. This not only distorted the financial picture of the company's or group's profits in the year in question, but resulted in targets for ensuing years being set on the false premise that the income for the preceding accounting period was higher than it actually was, or (possibly) on the false premise that some of the income recorded in the earlier period was in fact due to be earned and recognized in the current accounting period when it had been recognized already, and could not be double-counted. It therefore turned into a self-perpetuating problem which was sought to be cured by the further illegitimate early recognition of income.

22. There were a variety of ways in which the recognition of income for accounting purposes might be accelerated or "pulled forward" into an earlier accounting period, and some of these would be perfectly legitimate. The question when the economic benefit of a particular transaction accrues to one of the parties so as to entitle that party to treat the income as "earned" and book it in his accounts, is often a matter of accounting judgment on which it is possible to have more than one view. There will be scenarios where different accountants might take a different view about whether pulling forward the income was technically correct, or at least in accordance with generally accepted accounting practice. At some point, however, the early recognition of income would become contrary to generally accepted accounting practice; and in a case where the deliberate recognition of income before it could legitimately be regarded as earned, led to a material misrepresentation of the company's financial situation, by making it look much healthier than it actually was, it would be unlawful. The evidence of Mr Soni (the head of the Commercial Finance Department of Tesco) was that, in his view, the 'pulling forward' of income might be legitimate where a promotional activity was brought forward from the month in which it was planned to an earlier period; but that this was the only type of legitimate pull forward.

23. In this case, matters were further complicated by the fact that some of the bringing forward of income was supported by false documentation presented to the Commercial Finance Department by the buyers (the 'underlying fraud and false accounting').

24. The prosecution case was that the overstatement to the Market was made as a result of fraud and false accounting by the Respondents. The Respondents may not have been aware of the underlying fraud and false accounting, but it is said that they did become aware of the "Legacy issues" and that income had been 'improperly recognised' in the sense that the accounting treatment of that income was wrong. It is said that armed with that knowledge, they had ample opportunity to correct the figures, but they took no steps to do so. On the contrary, they insisted on targets set by the Executive Committee being met even if it meant continuing the practice of improperly recognising income. In particular, they allowed the H1 statement to be issued to the Stock Market based on the inflated figures which they must have known painted a false picture of the company's profits. The Market, those senior to them in the company, the shareholders, and the auditors were thereby misled.

25. As a result of the Respondents' alleged fraud and false accounting, shareholders who invested in part on the basis of profit forecasts lost money when the share price fell. At the very least, it was said the practice caused a risk of such loss to them and to the company generally. Each of Messrs Bush, Scouler and Rogberg was said to have had a personal interest in maintaining a high share price, keeping their jobs and earning substantial pay and bonus packages.

26. The Respondents were not accused of participation in the original underlying fraud and false accounting alleged against the buyers. None of the documentation relating to that alleged fraud was produced for the jury, no independent expert evidence was called, and none of the buyers testified.

27. To prove fraud against the Respondents, the Prosecution relied on:

    i) An alleged company culture of bringing income forward into the "wrong" year;

    ii) The identification of the large 'hole' in the figures when the alleged underlying fraud of the buyers came to light;

    iii) Evidence of one form of pull forward - multi-year deals. Under these, a supplier might pay Tesco a volume-based rebate for achieving sales targets. Witnesses gave evidence that the lump sum rebate payable under the contract was spread over the life of the contract, but the entire lump sums would be recognised as income earned by Tesco in year 1, when at least some of the income ought to have been apportioned over the lifespan of the contract. This practice would artificially inflate the profits recognized in year 1, whilst at the same time leaving a "hole" in the accounts of the following years of the contract and influencing the setting of targets for the following years. Evidence of only one specific contract dated November 2013 was adduced, namely the Hilton Meats Contract.

28. The bringing forward of income operated in this way: Tesco's main source of income was from till sales. This was called "front margin" income. Tesco's size and market share meant that suppliers were keen to secure Tesco business. They would enter into arrangements, for example, whereby they offered money back by way of discounts and rebates according to the quantity of goods bought and sold or their goods were

promoted in stores. This second type of income was called the "back margin" and there were twenty four different types of back margin arrangements.

29. 'Back margin' was recorded in Tesco's accounts by either raising an invoice once the contract was completed; or by recording a partially completed contract as an accrual. The auditors identified that the level of the "back margin" income was increasing. They acknowledged that this followed from the judgmental nature of the agreements (eg determining when they started and finished) and that there was a risk that commercial income might not be recognised in the correct period.

30. The key witness for the Prosecution was Mr Soni. He was presented by the Prosecution as a witness of truth. His department worked closely with the Commercial Food Department. Mr Soni was not involved in the day to day approval of the hundreds and thousands of invoices or accruals generated by Tesco Stores but oversaw the department. Mr Soni was the agreed "gatekeeper" in so far as his department was responsible for checking the authenticity of the supporting documents; but he was not responsible for their commercial content, terms, quantity, discount agreements and confirmation of compliance with the terms of the contracts. The Commercial Food Department made the deals, overseen by John Scouler.

31. In June 2014 Mr Soni's department produced a period review. It showed that one of the reasons for the difficulty in meeting targets was that £38.2 million had been pulled forward from the current period into the accounts for 2013/14. Mr Soni did not know at that time that the income had been improperly pulled forward. The pulling forward of £38.2 million was brought to the attention of the Respondents. They later claimed in interview that they did not approve of or like the practice, but according to Mr Scouler it was the "established way of doing things". Mr Bush said he assumed that the bringing forward of income was not legitimate. However, neither was pressed on whether they disapproved of the practice on the basis it was commercially unwise, not in accordance with good accountancy practice, or actually unlawful.

32. There was a meeting on 17 June 2014 between the Commercial Directors and Mr Bush about meeting the targets. Mr George Wright, who had recently been appointed a Commercial Director, expressed his concern about the pulling forward, and in particular, about the practice of recording up-front payments for multi-year deals in year one. Mr Wright said he knew pull forward was wrong because his finance partner had told him so, but he explained that his focus was on the 'tactical' difficulties it created. In his view, the way in which income was treated was for the accountants. Despite the difficulty pulling forward caused in meeting targets, Mr Bush and Mr Scouler insisted that targets should be met. This message was repeated by Mr Scouler at a meeting with Mr Wright two days later. A paper was prepared later that month by Mr Scouler and Matt Simister (Group Food Sourcing) for the CEO, Mr Clarke, showing that income had been recognised in a period before the activity to which the income related occurred. The paper was sent to Mr Bush and Mr Rogberg.

33. On 5 August Mr Wright met Mr Scouler and told him he was not happy about the pulling forward of income both because it created problems for the future and because he had been told it was not correct accounting practice. Mr Scouler appeared to sympathise and understood the problem. He said that he knew that they had to get to a different position but told Mr Wright to leave the pull forward amounts in the

accounts until the new CEO arrived (expected then to be October 2014). Another meeting occurred between Mr Scouler and Mr Wright on 7 August and Mr Wright again expressed his concern about the pulling forward of income. On 21 August at a meeting with Mr Bush and Mr Soni, Mr Wright stated either he did not wish to go to jail (per Mr Soni) or he did not wish to be fired (per Mr Wright himself) if the pulling forward of income continued.

34. Although various meetings occurred, and emails were exchanged during the summer in which concern was expressed about recording income, Mr Soni said he was unaware of any improper recognition of commercial income until a decision was taken in late August 2014, following one of these meetings, to investigate the Legacy issues thoroughly. The product of the investigations was called the "Legacy Paper" which had three iterations. Meanwhile on 26 August Mr Scouler agreed with Mr Wright's suggestion that there may need to be a restatement of the accounts but for the time being the figures should remain as they were.

35. On 1 September Mr Soni suggested to Mr Scouler that the Legacy issues could be resolved over the next 6-9 months. Mr Scouler responded the next day that the problem should be 'bottomed out' over the next two weeks and then make a recommendation to Mr Bush and Mr Lewis. On a conference call with Mr Bush the same day a follow up meeting was set for two weeks' time.

36. On 2 September, Mr Soni was sent a schedule by one of his team, Andrew Burns ("the Burns Schedule") which suggested that £236 million of improperly recognised income had been recorded in the Tesco accounts. Mr Burns was not called at trial and his Schedule contained information from anonymous parties and referred to documents not produced at trial. The Schedule was admitted as part of the history but not as evidence of truth of its contents. By 12 September this had been worked up into what was called Legacy Paper 1. Mr Soni did not disclose Legacy Paper 1 and the Schedule to either Mr Bush or Mr Scouler, hoping that the company could trade out of the difficulty. He did however provide a "toned down" document, Legacy Paper 2 to Mr Scouler on 15 September 2014. One facet of this toning down was that a reference to a need to restate the published H1 income figures was removed.

37. Mr Scouler made his own changes to Legacy Paper 2 (thereby producing Legacy Paper 3) and sent it to Mr Bush the following morning. One change was said to be significant: Legacy Paper 2 stated that "our margin budgets for the current year are overstated" whereas Legacy Paper 3 stated that "our margin budgets for the year could be interpreted as being overstated".

38. A meeting took place on 16 September to discuss its findings. The meeting included Kevin Grace (Tesco Group Food), Mr Simister, Mr Soni, Mr Scouler, and Mr Bush (by telephone). None of those present at the meeting drew the contents of the Paper to the attention of the Tesco Board, the Tesco Legal Department, Group Internal Audit or the external auditors Price Waterhouse Cooper ("PwC"), who were present in the company offices at that time. Mr Rogberg was sent the Paper by email after the meeting.

39. On 18 September 2014, Mr Soni passed Legacy Paper 3 to the Tesco Legal Department; they forwarded it to the CEO, the Chairman, the Tesco Board, Group

Internal Audit and PwC, on 19 September. An immediate investigation followed involving the Group CEO, the Chairman, Group Internal Audit, PwC and Deloittes.

40. In Legacy Paper 3 it was stated that within the Commercial Food Department of Tesco Stores Limited, income had been improperly recognised in that it was recorded ahead of time. The paper itemised a variety of methods by which this was done:

    i) Cost Loading: this is where an agreement was made to accept a future cost price increase in return for invoicing income in the current period.
    ii) Debt to be repaid: this is where invoices were raised in one financial period that did not relate to income earned or that would be earned in a future period.
    iii) Pull forward: this is where invoices or accruals were raised for income that would in fact be earned over future financial periods.
    iv) Cost Deferral: this is where costs incurred in a period were not recognised within the accounts.

41. The Prosecution alleged that all the methods outlined in Legacy Paper 3 involved the improper recognition of income because income and activity did not occur in the same accounting period. This income had been recognised contrary to Tesco Group Accounting Policy ("TGAP"); International Financial Reporting Standards ("IFRS") and the International Accounting Standards ("IAS").

42. We shall now summarise the case presented as it relates to the Grounds of Appeal.

Count 1

43. The Prosecution acknowledged that they must prove against each Respondent the following elements of the alleged offence:

    i) They occupied a senior position in the company and were expected to safeguard or not act against the interests of Tesco PLC and or their shareholders, creditors, investors and potential investors.
    ii) They abused their position dishonestly and with intent to gain for themselves or cause loss to another or expose another to the risk of loss.
    iii) They concealed the fact that the accounts included improperly recognised income and or failed to correct the forecasts, margins and accounts.

44. Against both men the Prosecution relied on evidence of the following:

    i) The Respondents knew of about £38 million of improperly recognised income in June.
    ii) There was an acceleration of recognition of approximately £250 million of income.
    iii) By the end of August 2014, they were aware of a risk to the H2 figures of approximately £200 million yet did not inform the Board.
    iv) The practice of 'overstating income' was widely known in the Commercial Food and Commercial Finance Departments as the means by which aggressive targets could be met.
    v) The effect of the alleged fraud was to increase the apparent profitability of the company in its accounts.

vi) The share price fell at the time of the company's announcements to the market on 22 September and a second announcement on 23 October and investors lost money.
vii) The Respondents were well aware of the importance of making accurate statements to the Market, the risk of loss and of the possibility that if targets were not met, they may lose their jobs and substantial pay packages (including share schemes).
viii) Until the disclosure of the Legacy Paper both men held well paid positions in Tesco Stores Ltd and were suspended when its contents were revealed.
ix) They failed to act responsibly when they appreciated the extent of the "legacy issues" and did not react as others reacted when they were informed.

45. The additional evidence against Mr Bush was said to include:

i) He owed a fiduciary duty to the company as managing director of Tesco Stores Ltd.
ii) He told the Serious Fraud Office ("SFO") investigators in interview that he understood that recognising income in advance of it being earned had taken place, was recognised in the wrong period and was improper.
iii) On 3 June Mr Bush instructed his staff to meet the targets despite concerns being raised.
iv) An inference could be drawn from an email between Mr Bush and Mr Rogberg that Mr Bush was aware that recognising income before it was earned had led to a gap of over £35 million in the figures.
v) George Wright was present at meetings with Mr Bush at which it was said that income was being recognised before it was earned and that the accountants told Mr Wright it was not the correct accounting practice. Nonetheless he was told that targets must be met and on 21 August, Mr Bush told him the numbers should be left as they were.
vi) The Legacy Paper was read to Mr Bush on 16 September and he was provided with it the same day. Up until 21 September, despite opportunities to do so, he failed to disclose the information in it directly or indirectly.
vii) Mr Bush told the SFO that he had raised the fact that £38.2m had been recognised in the wrong period with Carl Rogberg, and the then Chief Executive, from which the Prosecution invited the inference that his failure to do the same thing in August and or September was because he wished to conceal it.

46. The additional evidence against Mr Scouler on Count 1 was said to include:

i) He was the person responsible for the performance of the Commercial Food Division where the alleged underlying fraud took place.
ii) George Wright said that Mr Scouler considered improper recognition of income could lead to a restatement of accounts, from which the Prosecution suggested it can be inferred that he was aware of the need for and effect of market announcements.
iii) Mr Scouler told the SFO in interview that he was aware income was being recognised before it was being earned.
iv) Mr Suddaby, a Tesco employee sent an email containing details of improper accounting in a list for Mr Scouler, which Mr Suddaby said were also in the

Legacy Paper. From this the Prosecution suggested it can be inferred that Mr Scouler was aware that recognising income before it was earned was continuing to have an effect.

v) George Wright gave evidence of meetings in August with Mr Scouler in which it was said that income was being recognised before it was earned and that the accountants were not happy. Mr Wright wanted to take the numbers out, but Mr Scouler told him to leave them in until October.

vi) Mr Scouler received a draft of the Legacy Paper on 15 September and amended it, then read it out to Mr Bush on 16 September. Up until 21 September, despite opportunities to do so, he failed to pass on the information directly or indirectly.

Count 2

47. The Prosecution acknowledged that they must prove against each Respondent the following elements of the alleged offence:

i) They dishonestly and with a view to gain for themselves or cause loss to another falsified or concurred in the falsification of the Tesco digital accounting record and the draft interim accounts.

ii) They inputted and or relied on commercial income figures that gave a false account of the income earned by Tesco Stores Ltd and of the financial position of Tesco PLC and or Tesco Stores Ltd.

48. Against both men the Prosecution relied on the following:

i) They accepted that accounting records for H1 did not reflect the true financial position of the company.

ii) It was agreed that the effect of bringing income forward was to increase the apparent profitability of the company in its accounts.

iii) When the new CEO, the Chairman, the Legal Department, PwC, and others were made aware of the Legacy Paper they realised immediately that the market should be informed. The Prosecution invited the inference that the fact neither Respondent reacted in the same way indicates their knowledge of the false accounting.

iv) The share price fell at the time of the company's announcements to the market on 22 September and a second announcement on 23 October and investors lost money.

v) Unchallenged evidence was called as to the strict rules and procedures to ensure accurate financial reporting, and the requirement to report any inaccuracy over £7 million to the Audit Committee. There was also evidence from Alistair Gayne and others that the market depended upon accurate information as to the company's profitability from which it can be inferred that inaccuracy was material.

vi) Both men held highly paid positions in Tesco Stores Ltd and as a result of the exposure of the Legacy Paper were suspended.

49. The evidence against Mr Bush on count 2 was said to include:

i) Evidence from Mr Bush's interview, George Wright and the email exchange with Carl Rogberg from which the Prosecution invited the inference that Mr

Bush was aware that the company accounts included improperly recognised income.

ii) Mr Bush was provided with a data pack showing the inflated figures that went into the interim results and given an opportunity to correct or comment but did not.

iii) Mr Bush told the SFO in interview that he had raised the fact that £38.2 million had been recognised in the wrong period with Carl Rogberg, and the then Chief Executive, from which the Prosecution suggest it can be inferred that his failure to do the same thing in August and / or September was because he wished to conceal it.

50. The evidence against Mr Scouler on Count 2 was said to include:

i) The contents of Mr Scouler's interview, evidence from George Wright and an email from Mr Suddaby that gave rise to the inference that he was aware that the company accounts included improperly recognised income.

ii) Evidence from George Wright of meetings in August at which he asked Mr Scouler's permission to take income out of the accounts indicate that Mr Scouler had power over what was and what was not in the accounts.

The Prosecution case on knowledge generally

51. Aware of the evidence called at the first trial, in particular that of Mr Soni, the Judge pressed Ms Wass QC several times to clarify the Prosecution case on knowledge. This was an important feature of the case because at one point it appeared that the Prosecution was contending that all they needed to prove was that each Respondent knew of the practice of "pulling forward", that practice turned out to be unlawful, therefore the Respondent knew of an unlawful practice. There is an obvious logical fallacy in that argument which the Judge attempted to eliminate.

52. We were taken to passages in the transcripts. At the outset of the trial on 28 September, the Judge highlighted what he considered to be a problem in the proposed Opening to the jury, given the concessions made by Mr Soni at the first trial and the fact he would not allow the Prosecution to impugn the credibility of their own witness. He invited the Prosecution to open in terms that, although Mr Soni did not appreciate (before the Legacy Paper) that any improper or unlawful pulling forward of income was occurring, their case was that the Respondents did know what was taking place was unlawful.

53. On 1 October 2018: Sir John again attempted to establish with Ms Wass the extent of the Prosecution case:

> "SIR JOHN ROYCE: It appears to me to be your case that notwithstanding Mr Soni's view, the defendants knew or ought to have known because of what he was telling them before the end of H1, that the practice was unlawful or amounted to false accounting.
>
> MS WASS: It is the case that the defendants knew or ought to have known but not because Mr Soni told them, but because they are experienced people working –

SIR JOHN ROYCE: I follow that. It seems to me that you should make that plain.

MS WASS: I will.

SIR JOHN ROYCE: What you are really saying is: well, I am using the expression "overstatement", but I am going to be saying to the jury at the end of the day actually you can conclude that the defendants knew that this was unlawful. That is really your case, isn't it?

MS WASS: It is our case, yes."

54. During oral submissions on the no case to answer application, the issue arose again. First, during defence submissions, Sir John pressed Ms Wass to explain the Prosecution's case on knowledge of the underlying fraud ie awareness of the false documentation. She declared that it was not necessary for the Prosecution to prove that the Respondents were aware of the "mechanism whereby false invoices were created to make it look as if the income should have been recognised in the correct quarter, as long as they were encouraging the improper recognition of income. That is the matter that needs to be proved, not that they knew the minutiae."

55. Second, during Ms Wass' submissions, Sir John returned to the issue of improper *and* unlawful recognition of income:

"SIR JOHN ROYCE: Do you still accept that you have to prove in relation to a particular defendant that he knew prior to the 15th or 16 September that improper recognition of income in the sense of unlawful had been taking place.

MS WASS: Yes.

SIR JOHN ROYCE: I mean, you don't resile from that position.

MS WASS: No, of course not."

Ruling on submissions of no case to answer

56. In his principal ruling dated 26 November 2018, the subject of this application, Sir John Royce first noted the submissions made to him by the two Respondents.

57. On behalf of Mr Bush, Mr Darbishire QC submitted that there was no evidence that:

i) he had been made aware of material inaccuracy or false accounting in the accounts prior to 16th September 2014;
ii) he breached his fiduciary duty to Tesco or that he falsified or concurred in falsifying any account;
iii) he did any relevant act with intent to gain for himself or cause loss, or risk of loss, to another.

58. On behalf of Mr Scouler, Mr Ian Winter QC submitted that there was no evidence that:

i) he was aware of any material inaccuracy or false accounting in the accounts prior to his receipt of the Legacy papers;
ii) he did any relevant act with intent to gain for himself or cause loss, or risk of loss, to another;
iii) as a matter of law, he owed a fiduciary duty to Tesco Stores Ltd or Tesco PLC, its shareholders or investors.

59. In the absence of independent expert evidence, neither of the Respondents accepted that the Prosecution could prove that any specific deals that contributed to the 'hole' in the accounts were illegitimate, or the extent of the alleged underlying fraud. At least some of the bringing forward of income was not based on false documentation.

60. Before addressing the various issues, the Judge also noted what he thought was an acceptance by the Prosecution that, on the facts of this case, they must prove that each Respondent knew, before seeing the Legacy Paper, that income was being improperly *and* unlawfully recognised.

61. Although the Prosecution had called no independent accountancy expert evidence, Sir John accepted there was evidence on which a jury could conclude that there had been an underlying fraud which had involved falsification of documents and the inclusion of too high a figure in the interim accounts. However, having noted that the recording of income was far from straightforward and required judgment and accountancy expertise, he gave the example of the Hilton Meats Contract. The contract provided for the payment of £6 million up front and the sum was included in the Burns schedule. However, Ms Majid, the legal officer, agreed that what was bookable was a matter for accountants. The Judge noted that at the time, "everyone was happy" that the £6 million was booked up front. The Judge found that this demonstrated that different accountants "may form a different view of what can be properly booked".

62. Having decided he must approach the issue on the basis the Prosecution accepted that improperly recognised meant "unlawfully" recognised, he rejected the Prosecution submission that the evidence called supported their case of knowledge of the underlying fraud. He stated that evidence from Prosecution witnesses Messrs Soni, Suddaby, Wright and Ms Majid had been to the effect that they had been totally unaware of any improper recognition of income prior to September 2014 and had therefore never discussed it with the Respondents. Mr Wright was not aware of any unlawful practice. Mr Soni and Ms Majid had understood the practice of pulling forward income had been entirely lawful. Mr Soni believed it was a commercial problem with a commercial solution. Mr Suddaby had described using "unpalatable methods" in an email to a Mr Linnane but insisted that by unpalatable he did not mean unlawful; he meant commercially unpalatable. The witnesses Nadiri and Parsons said they were unhappy with the ethics of the accounting but did not communicate this to the Respondents.

63. Thus, in any conversations between Mr Soni and Mr Bush, and Mr Wright and Mr Bush that led to instruction to hit the targets, no one raised any issue of improperly i.e. unlawfully recognised income. In the Judge's view the Prosecution had equated instructions to hit the targets with instructions to carry out unlawful acts. In the

course of this section of the Ruling the Judge dealt with each piece of evidence listed in the relevant part of the Prosecution's written Response to the submission of no case to answer as justifying a conclusion that the Respondents had the requisite knowledge.

64. On the issue of alleged concealment, here again, the Judge considered that the lack of evidence establishing knowledge of the unlawful recognition of evidence created a hurdle for the Prosecution. The Respondents could only *dishonestly* conceal something about which they had knowledge. Furthermore, he was far from satisfied of any evidence of concealment itself; on the contrary, he concluded that the response to solving the "legacy issues" indicated the opposite. The chronology of how the Legacy papers came into being, and the evidence of those who then corresponded or met on the issue demonstrated what he called a collaborative approach and the fact that the Respondents were not attempting to conceal anything. Far from showing concealment of the Legacy Paper the evidence indicated the Respondents' support for it. Mr Soni said Mr Scouler commissioned it and he was told to "get to the bottom of" the legacy issues so that he could take it to Mr Bush. They both intended to take it to the new CEO Mr Lewis.

65. The Judge considered the fact that others (Mr Grace, the Group Commercial Director and Mr Simister, the Group Food Commercial Director) did not report the issue to the CEO to be a flaw in the Prosecution argument that the Respondents' failure to do so was evidence of concealment, particularly when it was agreed with the Respondents that the issue should be taken to Mr Lewis. It was hoped that if Mr Lewis reduced the targets, they could trade out of the problem.

66. The Judge acknowledged the Prosecution's reliance on the interviews of the Respondents but on his analysis, taken as a whole, they did not assist the Prosecution to any significant extent. The fact that the Respondents were aware of pull forward (for example of £38.2 million) and profit issues did not equate with knowledge of unlawful recognition of income carried out with the use of false documentation. Other witnesses confirmed the pulling forward was not thought to be the result of illegality or false accounting. It was considered a commercial problem. Thus, although the interviews may have shown an awareness of "Legacy issues", the proper recognition of income was for the accountants. Furthermore, he considered the evidence of intention was weak but recognised dishonesty was a matter for the jury.

67. He then analysed correctly the legal principles and repeated the Prosecution's acceptance that they must prove that the Respondents knew "prior to the Legacy Paper that there was income being improperly (i.e. unlawfully) recognised". He described Mr Soni as a pivotal witness and noted that as the accountancy "gatekeeper" he did not know of any illegality, nor did other witnesses. Mr Suddaby was closer to the buyers than anyone and he did not know until after 22 September. PwC knew of the potential for fraud and carried out sample testing, but they did not discover the underlying fraud.

68. He reached the firm conclusion that no reasonable jury, properly directed could be sure that either Respondent knew, prior to the Legacy Paper, that income had been improperly recognised. There was therefore no case to answer on either count.

69. He added a "few further matters". First, this was a re-trial caused by Mr Rogberg's ill health and the fact of the re-trial was not the fault of the Respondents. Second, if there was a perception that acquittal of the Respondents meant that Tesco had "got away with it", Tesco Plc entered into a Deferred Prosecution Agreement and paid a very large financial penalty. Third, the Respondents were men of good character and high work ethic about whom witnesses had spoken in complimentary terms. It was irrelevant to his decision, but he noted nothing in their character supported the Prosecution case.

The Supplementary Ruling

70. On 28 November 2018 Sir John gave a supplementary ruling at the request of the Prosecution. He was asked to rule on three further matters: the admissibility of the Burns Schedule as to the truth of its contents, the existence of any fiduciary duty and the issue of intention.

71. In relation to the admissibility of the Burns Schedule he referred to his earlier ruling in which he admitted the Schedule as part of the history but not as truth of the contents. He informed the Prosecution at that stage they could return to the issue later in the trial and obtain a further ruling, but they never did so. Accordingly, it was only evidence as part of the history.

72. He concluded that the Respondents did owe a fiduciary duty to Tesco Stores Limited and Tesco Plc but not to others. He agreed with defence submissions that the evidence of abuse of position was weak and described the evidence of intention to gain, cause loss or risk loss as also weak. Taken together the weaknesses were "borderline" in relation to his decision to withdraw the case from the jury but served to reinforce the decision he made

73. We do not need to return to this supplementary ruling because ultimately it did not feature in the application before us.

Grounds of Appeal

74. Although the Prosecution set out five proposed grounds of appeal the Prosecution based their proposed appeal on two principal factors: (i) the Judge's reliance throughout his ruling on the Prosecution's alleged acceptance that they must prove that the Respondents knew that income was being improperly and unlawfully recognised and (ii) his analysis of the sufficiency of the evidence to meet the test set out in the second limb of *R v Galbraith 73 Cr App R 124.*

Ground 1

75. Ground 1 was the principal ground on which Ms Wass QC relied and our decision on it is arguably determinative of the application. Ms Wass disputed the judge's reliance on what he said was the agreed requirement for the Prosecution to prove the income was "improperly and unlawfully recognised". It was said that properly analysed there was no requirement for the Prosecution to prove that the Respondents were aware that the accounting for a particular amount of income amounted to a criminal offence. This is because in principle, it is not a defence to a criminal offence that a defendant did not know what he was doing was unlawful and it is not an element of the offences

to be proved. The burden on the Prosecution was to prove the elements of the offences including dishonesty and intention. The question of whether the Respondents acted unlawfully is a question which involves an assessment of their honesty and therefore the Judge should have left it as a matter for the jury to consider having assessed the totality of the evidence.

76. It was in this context that she invited us to assess the passages in the transcript in which she is said to have made a concession that the Prosecution must prove the improper recognition was unlawful. She insisted that she only ever conceded that the Prosecution must prove all the elements of the offences including dishonesty and intention and that the Respondents' conduct thereby became unlawful.

77. Ms Wass criticised the Judge for placing any reliance on the fact that Prosecution witnesses put forward as honest were unaware of any illegality, describing that fact as irrelevant, because in a circumstantial case the Prosecution need only prove that the defendant was provided with information from which a fact can be inferred. It was submitted that the Judge conflated the evidence requisite for an inference of knowledge and the question of dishonesty.

78. Ms Wass sought to persuade us that a proper inference could be drawn from the facts that:

    i) The Respondents knew that the forecasts, margins and/or figures included in the accounts were based upon improperly recognised income, in the sense of income being booked in advance of it being earned (by any of the means outlined in the Legacy Paper) and that targets could not be met save by improper means.

    ii) The fact they did not react as others did when given the Legacy Paper and by what they told the SFO in interview.

Ground 2

79. In Ground 2 Ms Wass claimed the Judge placed too much emphasis on the evidence of concealment, as opposed to a failure to correct the figures. The relevant particulars of Count 1 on the indictment read that the Respondents "concealed the fact that the financial accounts of Tesco PLC and / or Tesco Stores Ltd included improperly recognized income and / or failed to correct the fact that the forecasts, margins and accounts did not reflect the true financial position of Tesco PLC and Tesco Stores Ltd".

80. The Indictment pleaded in that way did not require the Prosecution to prove as a matter of fact that the Respondents concealed anything. The use of the words "and/or" show that there two disjunctive factual ways in which the Prosecution could prove the case. Yet, in the eyes of the Prosecution, the Judge appeared to focus solely on the evidence of concealment and he did not address their failure to correct the figures.

Ground 3

81. In Ground 3 Ms Wass criticised the Judge for addressing the issue of the sufficiency of the evidence of intention on the basis the Prosecution had to prove the

Respondents' intention to gain for themselves and claimed he ignored the fact that it is sufficient in law for the Prosecution to prove (on the fraud count) that they intended to expose another to risk of loss.

82. She submitted that, contrary to what the Judge stated, the Prosecution case on intention went further than simply a desire to keep their jobs. The Prosecution case was that the alleged fraud in fact had the effect of making an illusory gain for the company on its records that represented a corresponding loss to the shareholders. There was evidence read by agreement as to the negative impact of the fraud on investors and the awareness of business leaders about the importance of the Market being given accurate information. There was also evidence from the Chairman of the company and others that there was a risk that a further profit warning could cause a loss in that it would become more expensive for Tesco Plc to borrow money.

83. She insisted there was therefore ample evidence from which gain or loss could be inferred over and above their keeping their jobs.

Ground 4

84. In Ground 4, Ms Wass submitted that the Judge's analysis of the evidence adduced by the Prosecution usurped the function of the jury in that he substituted his own interpretation of each piece of circumstantial evidence for that of the jury. Although he purported to adopt the approach set out in *R v Galbraith,* he failed to do so. *R* v *Galbraith* established that on a submission of no case to answer the trial judge must take the Prosecution evidence at its highest. It is not the function of the judge to determine the facts.

85. The error was said to be particularly acute in a circumstantial case such as the present. Had the trial proceeded the jury would have been asked to consider different strands of evidence, each insufficient in itself to prove that the Respondents committed either offence to the necessary standard, but which when woven together are capable of making the jury sure of guilt. Each strand of evidence can be viewed in different ways, some of which are potentially exculpatory, others inculpatory. Ms Wass accused Sir John Royce of making findings of fact choosing an exculpatory interpretation as being the only possible interpretation and of being selective in the evidence he considered significant. In doing so, she submitted that he fell into the error of not taking the evidence "at its highest".

86. Overall it was said that the Judge failed to give sufficient weight to the evidence we have summarised under the heading Counts 1 and 2 at paragraphs 43 to 50. In particular, she argued that he failed to factor in the implications of what the Respondents told the SFO in interview and Mr Wright's repeatedly expressed unhappiness and warnings as to his understanding of the proper accounting treatment of these matters. The Respondents were told about improper recognition of income during the relevant period and yet insisted that the targets be met regardless. The jury could form a view that they understood that further pull forward of income was a real possibility as a result of insistence on hitting the targets.

87. The Prosecution submitted that the clearest example of the Judge's flawed approach was found at paragraphs 23 to 32 of the Judge's ruling, where he dealt with the core evidence relied on by the Prosecution.

Ground 5

88. Ground 5 is headed "Failure to take into account significant Prosecution evidence". Some of the material upon which reliance is placed has already been rehearsed. However, this ground was based predominantly on a complaint that the ruling gave no particulars of why the Respondents' interviews with the SFO do not assist the Prosecution. This suggested to Ms Wass that insufficient weight has been given to what she called critical evidence.

89. The Prosecution pointed in particular to Mr Bush's interview to which reference has already been made. They noted that this is dealt with in passing at only one place in the Judge's ruling.

90. The Prosecution took issue with what they saw as the wrong emphasis the Judge placed upon Mr Soni's evidence that the document discussed at the meeting of 3 June was not "to do with illegality or false accounting or wrong sums or holes in accounts". They submit that the fact that Mr Soni was unaware of what was happening does not change the fact that, on his own admission, Mr Bush was aware. Ms Wass claimed it is therefore unreasonable for the Judge to have reached the conclusion that "a fair and proper analysis of the Bush interviews, read as a whole and put in context of the other evidence, does not assist the Prosecution".

91. In relation to Mr Scouler, Ms Wass claimed the Judge ignored his admission in his interview with the SFO that he knew income was being recognised before it was earned and that Mr Scouler caused Legacy Paper 2 to be changed.

92. She criticised the Judge for placing no reliance on the reaction of several witnesses to the content of the Legacy Papers comparing it with the lack of a reaction from the Respondents indicating that they must have known about it and deliberately set about concealing the Papers.

93. Ms Wass also disagreed with the Judge's analysis of the Hilton Meats Contract. The Prosecution complain that the Judge's factual findings misconstrued the evidence on this issue in three ways.

94. He stated that: firstly "at the time the money was booked up front and everyone was happy about it"; secondly, "it demonstrates that different accountants may form a different view of what can properly be booked"; and thirdly "it would be surprising if the accountant in the finance department was not provided with the contract".

95. The first is a suggestion with which Ms Majid agreed in cross-examination, but Ms Wass claims it fails to reflect the totality of the Prosecution case. She submits that the other evidence in the case from accountants who resigned from Tesco as a result of what they saw as improperly recognising income is not that they were "happy" about it.

96. The second conclusion related to evidence that accountants who checked the facts and were given different information about the deals reached a different conclusion on how the income should be recorded. Ms Wass therefore claimed the judge misinterpreted the evidence called.

97. In his third conclusion the judge was accused of failing to understand the evidence of Mr Soni who said rather than going back to a head contract his team would focus on the documentation generated in pursuance of the head contract.

98. The next subheading under Ground 5 repeated the complaint that the Judge gave undue weight to evidence from Mr Soni and others that they did not know about the improper recognition of income prior to the Legacy Paper process.

99. It was submitted that the knowledge of Mr Soni, or Mr Suddaby or Mr Wright was irrelevant to the question of the Respondents' knowledge, as was PwC's failure to find the fraud.

100. Ms Wass also criticised the Judge for taking into account irrelevant considerations. These included the reaction of others like Mr Grace to the Legacy Paper and the fact that there were only two days between the meeting of Mr Wright and Mr Scouler on 26th August and the profit warning days later.

101. Finally, Ms Wass was also critical of the Judge's mentioning three irrelevant matters at the end of the ruling because they had no bearing on the issue that fell to be decided. She invited us to find that that they must have played a part in the Judge's determination.

Response

102. For the Respondents, Mr Darbishire QC and Mr Winter QC argued in joint written submissions, supplemented by individual oral submissions, that the Prosecution comprehensively failed to adduce any evidence upon which a reasonable jury properly directed could convict either defendant, and comprehensively failed to deal with the submissions of no case to answer advanced by the Respondents. Furthermore, they contended that the Judge made no error in law and proceeded in accordance with the legal position agreed by the Prosecution.

103. They invited us to find that the Prosecution has been unable to identify any fact wrongly relied on by the Judge or wrongly overlooked by him. They claimed the Applicant's complaints do not begin to establish that the approach taken by the judge was "unreasonable" and therefore they invited us to find all the grounds unarguable.

104. We were urged not to entertain what have been described as lengthy often erroneous assertions of fact not advanced at trial and which amount to a departure from the way the case was put at trial.

Response to Ground 1

105. For the Respondents it was contended that approaching the case on the basis that he did the Judge simply reflected the position which had been understood and agreed from the outset of the trial and upon which the entire case had been conducted. Further, at no point during the trial had the Prosecution ever suggested that this approach was wrong. The Judge had rightly attempted to identify the real issues in a complex case at an early stage so that the parties and the jury could focus upon them.

106. Both relied on the passages in the transcripts rehearsed above in paragraphs 51 to 55 from which they derived support for the Judge's approach. They suggested the

Applicant cannot criticise the Judge for proceeding on an analysis of the Prosecution case which was agreed by the Prosecution to be accurate and correct in law throughout the case, including in the course of the submissions which are now at issue. As the Court of Appeal held in *R v R (Practice Note) [2016] 1 WLR 1872* (at §53-54):

> "Save very exceptionally, a party is not permitted to acquiesce in an approach to the case before the judge at first instance and then renounce its agreement and advance a fundamentally different approach on appeal. Parties must get it right first time."

Response to Ground 2

107. In relation to Ground 2 Mr Darbishire and Mr Winter insisted that contrary to what is asserted by the Applicant, the Judge did not require the Prosecution to prove concealment and nothing in the ruling gives the appearance that he did. The Judge noted that in respect of concealment, the "problem facing the Prosecution is their lack of evidence that the defendants knew that income was being unlawfully recognised". It follows that the Respondents cannot have concealed that fact, but it also follows that they cannot have culpably "failed to correct" anything on the same basis. In each case, the first matter for the Prosecution to prove was the Respondent's knowledge that the accounts were "based upon" unlawfully recognised income. This they failed to do.

108. Both Mr Darbishire and Mr Winter accepted the Judge did place emphasis on the allegation of concealment as opposed to failure to correct, but insisted this was because concealment was the basis of how the case was put. They point to the Prosecution written response to the submissions of no case to answer contained a section entitled: "Concealment/Failure to Correct" in which they referred only to concealment. They say that the Judge also understandably placed emphasis on this point because the allegation of concealment was relied upon by the Applicant as being capable of leading to an inference of prior requisite knowledge.

Response to Ground 3

109. In their response to Ground 3 the Respondents rejected the claim that the Judge ruled that the Applicant had to prove the Respondents "intended to cause gain or loss". He was well aware of the fact that an intention to cause a risk of loss would suffice for Count 1, but the Prosecution had not advanced the case that the Respondents intended to expose someone to the risk of loss. The case was opened on the basis the evidence of intention could be properly inferred in their wish to keep their jobs. Yet despite Defence calls for the Prosecution to identify the evidence of intention upon which they relied for the purpose of the submission of no case, they failed to do so. The Judge did not therefore need to deal with the issue of intent to expose others to the risk of loss expressly. He was entitled to assume the Prosecution case remained as opened and no evidence had been called on this issue at all. In any event his determination of the submission was not based on what he called the weak evidence of intention, as the ruling and supplementary ruling make clear.

Response to Ground 4

110. On Ground 4 the Respondents rejected the assertion the Judge usurped the function of the jury. In his ruling he considered the evidence put forward in the Prosecution Response to the defence submissions. He dealt with each sub-paragraph in turn. In each case, the Judge relied upon the unchallenged positive evidence of the Prosecution witnesses involved, that the meetings or emails relied upon did not concern unlawful or improper accounting practices.

111. They also rejected the assertion that the Judge sought to resolve disputed evidential issues. In reality, they say that the Prosecution complaint is that the Judge gave due weight to the Prosecution's own witnesses (in particular, Amit Soni, George Wright and Mark Suddaby), who repeatedly asserted that they were not aware that income had been unlawfully and improperly recorded at the relevant time. A judge is not bound in "taking the evidence at its highest" to ignore important evidence, called by the Prosecution, that is fatal to their case.

112. They submitted that the Prosecution's failure to adduce a prima facie case against the Respondents has resulted from their seeking to define words such as 'pull forward' and 'legacy' with definitions they did not bear at any time prior to September 2014. As Messrs. Soni, Wright and Suddaby made absolutely clear, those concepts did not mean 'unlawful' or 'false' or improper in an unlawful sense at any time prior to the discovery in early September that documentation had been falsified.

Response to Ground 5

113. On this Ground the Respondents reminded the court that the threshold for the Applicant's establishing that the Judge's approach was "unreasonable" is a high one and the Respondents contended that no clear basis exists here in law or fact. The Judge was astute to bear the evidence on which the Prosecution relied in mind and balance it with the evidence that contradicted their case. The Judge stated that he had considered all the matters relied upon even if he did not mention them expressly.

114. They rejected the assertion that contradictory evidence was given undue prominence in the ruling so for example, they claimed it was significant that, during the relevant period, the accountant responsible for the preparation and presentation of the accounts believed them to be accurate.

115. Mr Darbishire claimed it was wrong to suggest that Mr Bush said in his interview under caution that he was aware of the improper (i.e. unlawful) recognition of income. This bare assertion was not made in the court below and the Prosecution should not complain that the judge's conclusion was unreasonable.

116. Similarly, Mr Winter did not accept that Mr Scouler admitted that he knew that income was being recognised improperly. From 21 September 2014, when he was first asked about it, Mr Scouler consistently and repeatedly maintained that he believed that the aggressive accounting policy adopted by Tesco, whilst commercially unwise, was lawful. Mr Winter described the Applicant's attempt to rely now on what Mr Scouler said as something that "could amount to an admission of the actus reus of both offences" as unacceptable.

117. Both Mr Darbishire and Mr Winter explained that much of the evidence upon which the Prosecution now place reliance was not used by the Prosecution in the course of their response to the submissions of no case to answer. If so, they suggest it is wrong and unfair for the Applicant to complain that such "critical evidence" has not been mentioned in the ruling.

Conclusions

118. We are indebted to all parties for putting this application before us with considerable speed and efficiency. They had only days to prepare for the hearing on 5 December, yet as a result of their very considerable efforts we felt able to give our decision that same day with these reasons to follow.

119. The Prosecution face a high hurdle in challenging the ruling of no case. Our powers are limited by statute. We can only intervene if the judge erred in law or principle or reached an unreasonable conclusion. The test for us is not whether the individual members of the court would have reached a different conclusion. Furthermore, we bear very much in mind that, as an appellate court we do not have the advantage the trial judge had of seeing and hearing the witnesses.

120. Similarly, the fact that a previous trial judge found a case to answer does not assist the Prosecution. The proper response to a submission of no case to answer is one on which two judges may differ, particularly where the evidence called before them is different. The fact of a different result does not import a mistake by one or the other.

Conclusion on Ground 1

121. This application for leave to appeal depends predominantly on Ground 1 and Sir John Royce's understanding of the Prosecution's 'concession'. The concession arose from his attempts to narrow the issues. Sir John had a duty to ensure the proper management of the trial. This was a potentially long and complex re-trial, it was essential that he, the parties and the jury understood clearly the issues to be determined. The Judge was aware of the case and evidence presented at the original trial. He rightly refused to allow the Prosecution to impugn their own witnesses (in particular Mr Soni). He recognised at an early stage that this would cause problems for the Prosecution. Hence, he made repeated requests for the Prosecution to give as much detail of their case as possible. He understood from the explanations offered that the Prosecution accepted the burden of proving that each Respondent knew that income was being improperly *and* unlawfully recognised. This apparent concession underpinned his ruling on the submission of no case to answer. To determine whether he was justified in reaching the conclusion that a very significant concession had been made we must first analyse the context.

122. It is important to note two things. First the Respondents were not accused in these proceedings of misconduct associated with running a public limited company or negligently misleading the Market. They were charged with offences of dishonesty or, as it was put during argument, 'cooking the books'. Second, the Prosecution did not allege that the Respondents were a party to the underlying fraud and false accounting by the buyers. The Respondents were charged with a different fraud and false accounting: fraud by an abuse of their position and false accounting by concealing the *improperly* recognised income or failing to correct the figures.

123. We understand that, on one view, the underlying fraud and false accounting were but a part of the history and knowledge of them was not an essential element of the fraud and false accounting alleged against the Respondents. The difficulties arose because of the use of the word "improper" and the reliance placed on the underlying false documentation.

124. The issue of pulling income forward is far from straightforward. It can be done lawfully and properly (for example where the activity linked to the income is brought forward), it can be done lawfully but be unwise commercially; or it may be done unlawfully or via the use of false accounting. In many cases how one characterises a particular transaction or accrual may depend very much on the judgment of the person booking the income. Booking income in complex deals requires accountancy expertise. In this case although some of the 'improperly recognised income' was said to be based on the false documentation presented by the buyers, some of the 'improperly recognised income' was a 'legacy issue' resulting from booking legitimate income in the wrong period and some appears to have been based on accountancy judgements about which different practitioners may have different views.

125. In the absence of independent accounting expertise, the Prosecution were unable to differentiate between the different kinds of improperly recognised income and did not set out to prove the extent of the alleged underlying fraud or the underlying breaches of accountancy practice. Aside from the evidence on the one multi year deal (Hilton Meats) they essentially relied on the large 'hole' in the accounts. Thus, some of the income may have been 'improperly recognised' on the basis that it was commercially unwise, was not in accordance with best accounting practice or failed to meet company policy but was not necessarily unlawfully recognised. This is reflected in the facts that many of the witnesses called by the Prosecution were aware of 'legacy issues' of a general kind and some had greater or lesser levels of discomfort about where on the scale of good accountancy practice various techniques lay. But, importantly, all were clear that they were not aware of any unlawfully booked income or the use of false documentation at the relevant time. The difficulty for the Prosecution lay in the fact they were obliged to rely upon the Respondents' former work colleagues as witnesses of truth (particularly Mr Soni) and could not rebut their evidence.

126. Given that Mr Soni, the chief Prosecution witness, was put forward as an honest witness, the question would necessarily arise as to how the Prosecution could accept he was honest but allege the Respondents were dishonest. While it is correct that in a circumstantial case the Prosecution need only prove that the defendant was provided with information from which a fact can be inferred, that is somewhat unrealistic when the information relied on is provided by a person who, with that same information, is not said to have the necessary knowledge. The only sensible answer to this dilemma was by establishing, by some means, greater knowledge on the Respondents' part. Given the extent of Mr Soni's knowledge, that greater knowledge could only be knowledge of unlawfulness or false accounting.

127. In the light of this, on 28 September the Judge pressed Ms Wass to be more explicit in her opening to the jury than the written opening suggested. He was of the view that if the Prosecution was to deal with the evidence of Mr Soni fairly, they had to make clear that (a) Mr Soni did not warn the Respondents that the unwise commercial practice of pulling income forward was unlawful and amounted to false accounting;

(b) Mr Soni did not appreciate that it was unlawful or involved false accounting until he received the Burns Schedule in September and (c) notwithstanding Mr Soni's view, the Respondents knew before the reporting of the H1 results that the practice was unlawful or amounted to false accounting. Ms Wass appeared to acknowledge more than once, in clear terms, that this was her case and for good reason.

128. This was then reflected in the way the case was opened to the jury. On Day 7 page 23 it was said (in the context of reaction to the Legacy Paper):

"The [defendants] already knew by the time they read the Legacy Paper of the fraudulent falsification of deals by buyer and supplier that was spelled out in that document…"

129. In the light of the difficulties for the Prosecution in presenting any other case, their emphasis placed on the underlying fraud and false accounting and the explanation of the Prosecution case in the passages in the transcripts to which we have been taken, the Judge's understanding was, in our view, entirely reasonable and justifiable.

130. Even if we had accepted that the Judge was wrong to insist on proof of knowledge of unlawfulness, we question the extent to which Ms Wass's task would have been made any easier, absent any independent expert evidence. The Prosecution did not establish how much income was pulled forward unlawfully or in breach of accountancy standards, whether it would have been material to declare the unlawfully/wrongly recognised sums emerging from the investigations and if so when they became material, given the huge size of Tesco's business. When an arguably material figure of over £200 million did emerge, it was far from clear how much of that was improperly recognised income in the sense of being unlawfully recognised or recognised in the wrong period in breach of accountancy standards. The figures first produced to Mr Soni were not the same as the figures identified by later and fuller investigation and none of them were agreed or proved.

131. Thus, on these facts and with this evidence available to her, we are satisfied that Ms Wass had no choice but to accept the burden the Judge placed upon her and then to present the case on the basis of knowledge of unlawfulness or false accounting. It was undoubtedly the basis upon which the witnesses were cross-examined. It was the basis on which the Judge ruled. It is not seriously arguable that the judge committed any error or acted unreasonably. We reject Ground 1 and, to the limited extent that it is not determinative of the application, it is in that context we consider the other grounds.

Conclusion on Ground 2

132. We also reject the contention that the Judge placed too much emphasis on the sufficiency of the evidence of concealment. The Judge focussed on the evidence of concealment, as opposed to failure to correct, for good reason – that was the way in which the case had been presented. He did not ignore the alternative route to verdict. However, on the basis of his conclusions on knowledge, failure to correct logically could not arise.

133. Furthermore, the 'collaborative effort' he described to resolve the legacy issues in his view pointed away from an attempt to conceal the true figures or a failure to correct them. As appeared from the Legacy Chronology, which was not seriously in issue, Mr Scouler may have instigated the original Legacy Paper and clearly wished to get to the 'bottom of the legacy issues". Mr Bush then supported the process, and both imposed a tight timetable on Mr Soni and intended to take the issues to the new CEO Mr Lewis – with a view to getting any problems corrected. This was evidence the Judge was very much entitled to bear in mind and his approach displayed no unreasonableness or error.

Conclusion on Ground 3

134. In relation to Ground 3, we acknowledge that, as a general rule, it is sufficient in law for the Prosecution to establish that the Respondents intended to expose another to the risk of loss on the fraud count. However, to the extent that the Prosecution addressed the issue, they presented the case predominantly, and in the context of the submission of no case, on the basis the Respondents intended to gain for themselves by keeping their jobs (possibly, and entirely sensibly, because of the difficulties which intent would offer in the context of the risk of loss case). The case was opened on the basis that the Respondent had a motive to inflate the figures in order to keep the share price high which would assist their remuneration package. The submission of no case was answered on the same basis. The judge focused on the evidence of that intention; he did not ignore the alternative possibility of exposure to risk of loss. In any event his finding on the issue of intention was clearly not determinative of the submission. He found the evidence weak and, as he later added, the weakness on this element and the element of abuse of position supported his ruling on knowledge.

Conclusion on Ground 4

135. In relation to Ground 4 we endorse the approach of the Divisional Court in *R (on the application of the Inland Revenue Commissioners) v Crown Court at Kingston*. We acknowledge, as the Divisional Court acknowledged, that it is important that a trial judge in dismissing charges or upholding a submission of no case does not usurp the function of the jury. But, where evidence is capable of more than one reasonable interpretation, a trial judge is not obliged to proceed on the basis that every possible adverse inference must be drawn against a defendant, especially where he considers the totality of the evidence points in the opposite direction. There may be a fine balance between withdrawing a case from a jury and thereby usurping their function and leaving a case to the jury where the evidence is barely sufficient. Hence the margin of judgment that this Court allows to a trial judge who has heard the evidence and seen the witnesses.

136. In this case the trial judge analysed the evidence called with obvious care. Having decided the Prosecution must prove the Respondents knew that income was improperly and unlawfully recognised, he considered whether there was any evidence to suggest the Respondents had any greater knowledge than Mr Soni and other prosecution witnesses. There was not. All the prosecution witnesses claimed they did not know of the unlawful recognition of income until, late in the day, the underlying fraud came to light.

137. The high water mark of the Prosecution case on the issue of knowledge was therefore the Respondents' interviews. On our reading of the ruling the Judge plainly did not ignore or give insufficient weight to those interviews. On the contrary he considered them carefully. We endorse the Judge's approach that the interviews had to be viewed in their totality. On a fair reading, neither Respondent went further than to admit a knowledge that income was being improperly recognised and that it was not a good commercial practice. It was 'illegitimate' or unacceptable in that sense, not in the sense of being unlawful.

138. As to the other strand on which heavy reliance was placed, namely, the evidence of Mr Wright, we do not consider that the Judge ignored this or gave it improper weight. Again, we endorse the Judge's view that in the light of Mr Wright's agreement that he was unaware of any unlawfulness at the material times, his evidence does not take matters further. Even moving beyond unlawfulness, Mr Wright was not himself an accountant, he was relaying informally his concerns about the way that one accountant saw some of the pull forward (at the time in the context of an immaterial figure) for reporting purposes. We fail to see how this could even arguably bridge the knowledge gap.

Conclusion on Ground 5

139. In our judgment Ground 5 had slightly more substance but only on the basis that, in his ruling, the Judge did not consider every piece of the evidence upon which Ms Wass placed reliance before us. Having said that, first, he was not obliged to do so provided overall, he ensured he considered all the arguments and evidence advanced and second, he can only operate on the basis of the case as presented to him. Sir John Royce did consider carefully the specific evidence on which the Prosecution relied in relation to knowledge. He also expressed in clear terms that he had considered the totality of the material put before him and the jury by the Prosecution. He is one of the most experienced criminal judges in the country. We are entirely satisfied that even if he did not mention a specific item of evidence upon which the Prosecution relied, he bore all relevant matters in mind.

140. In any event, the additional evidence upon which Ms Wass relied did not in our judgment advance the application for leave to appeal to any significant extent. We have dealt above with the question of Mr Soni's knowledge, and the significance or otherwise of the SFO interviews and Mr Wright's evidence. As for the reactions of others once the Legacy Paper was circulated, this could hardly be a piece of evidence which would justify any inference. It is plain that different people reacted differently; and inevitably their reactions were dependent both on their professional background and their other background knowledge. The comparison therefore carries little weight and the Judge was in our judgment entirely correct to find that it was not significant. In the passage complained of as taking irrelevant matters into account as regards reactions, the Judge was in fact simply making this point: different people reacted differently.

141. Similarly, as regards the Hilton Meats contract: we do not see the criticisms of the Judge's reasoning as having any real force given the background to the contract, which was that it was deliberately structured with legal input to be capable of being booked up front entirely properly and it was signed off on that basis by Tesco's senior lawyer. That was then (unsurprisingly) reflected in the evidence of Kay Majid as

regards her being happy with that contract. That is evidence which is entirely properly taken into account in the context of the Prosecution case that the Hilton Meats contract was evidence of improperly recognised income. The Judge did not err in failing to bring into account in this connection the evidence of the other accountants in relation to unspecified deals. The criticism as to the second conclusion is purely semantic. As to the third, the Judge's comment may have been incorrect, but the question of whether Mr Soni had the contract was hardly material to the determination.

142. Finally, we reject the assertion that the Judge took into account irrelevant matters. When a judge adds a footnote to his ruling it may well be directed at those reading or hearing the ruling. It does not mean that he took into account matters he himself expressed as irrelevant.

143. For those reasons we refused the application for leave to appeal and we directed the acquittal of the Respondents.

144. We make two final observations:

i) It is not for us to comment on the SFO's decision to prosecute Mr Bush and Mr Scouler, but there can be no doubt their decision to investigate the alleged frauds and false accounting at Tesco Plc was entirely justified. The SFO investigation was wide ranging (conducted with the full co-operation of Tesco Plc) and led ultimately to the Deferred Prosecution Agreement between Tesco Stores Limited and the SFO, approved by the President of the Queen's Bench Division, Sir Brian Leveson, in April 2017.

ii) We express our hope that any decision as to Mr Rogberg's continued prosecution will be made swiftly.