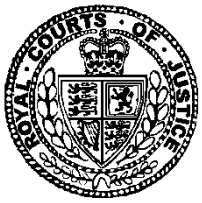

Case No:201703906 C2
201704083 C2

[2021] EWCA Crim 520

IN THE COURT OF APPEAL CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT CHELMSFORD
His Honour Judge Morgan
T20160061

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:13/04/2021

Before :

LADY JUSTICE SIMLER
MR JUSTICE SPENCER
and
HIS HONOUR JUDGE FIELD QC
(sitting as a Judge of the Court of Appeal (Criminal Division))

- -

Between :

The Queen **Respondent**

- and –

Darren Terrence Say **Appellant**

Richard Furlong (instructed by the Registrar) for the **Appellant**
James Waddington QC (instructed by the Crown Prosecution Service)
for the **Respondent**

Hearing date: 26th March 2021

Approved Judgment

Covid-19 protocol: This judgment will be handed down by the Court remotely, by circulation to the parties' representatives by email and, if appropriate, by publishing on www.judiciary.uk and/or release to Bailii. The date and time for hand down will be deemed to be Tuesday 13th April 2021 at 10.30 am. The Court Order will be provided to Chelmsford Crown Court for entry onto the record.

Mr Justice Spencer:

Overview and procedural history

1. Darren Say (now aged 50) appeals by leave of the Single Judge against conviction and sentence.

2. On 20th July 2017 in the Crown Court at Chelmsford he was convicted by the jury of fraud by abuse of position, contrary to ss.1 and 4 of the Fraud Act 2006 (count 1), and fraudulent trading, contrary to s. 993(1) of the Companies Act 2006 (count 2). On 17th August 2017 he was sentenced by His Honour Judge Morgan to a term of 6 years imprisonment on count 1, and a concurrent term of 2 years on count 2. He was disqualified under s.2 of the Company Directors' Disqualification Act 1986 for a period of 8 years.

3. The offences arose from the appellant's involvement in the running of his company Noisnep Ltd and a scheme of pensions investment. The name of the company is the word "pension" spelt backwards. The appellant was an independent financial adviser (IFA) with considerable experience and expertise in the field of pensions and in particular Self Invested Personal Pensions (SIPPS). In a nutshell the prosecution case was that the appellant introduced clients to an ingenious scheme in which they paid money into their SIPP which, on paper, was loaned to them by Noisnep. This contribution to their SIPP entitled them to basic rate tax relief of 20% at source ("RAS"). The tax relief was paid by HMRC to the administrator of the pension, Stadia Trustees Ltd, who in turn paid it over to Noisnep for investment in the client's SIPP, believing that Noisnep intended to invest the money on the client's behalf. Some £900,000 of RAS was paid over to Noisnep in this way. It provided the appellant with almost the only liquidity for the scheme. The prosecution case was that the appellant dishonestly abused his position by spending on himself the money his clients had in their SIPPS, generated by that tax relief. Some of the investors had also put money of their own into their SIPP. The appellant spent that on himself too. The prosecution case was that the total loss was over £1 million.

4. The appellant was convicted after a trial lasting some 5 weeks. It was a retrial. At the first trial in 2016 the jury had been unable to agree.

5. It is necessary to say little about the procedural history of the appeal, and the extensions of time which are required.

6. The appellant was represented at both trials by very experienced counsel, Mr Peter Guest, and his junior Mr Greg Unwin. They advised on and settled the grounds of appeal. Perfected grounds were lodged on 30th October 2017. On 14th February 2018 the Single Judge (Edis J) granted leave to appeal against conviction on one ground only (Ground 3). He refused leave on the other three grounds. There was no renewal of the other grounds within the prescribed time. On 20th March 2018 Mr Guest informed the Registrar (we assume on instructions) that the other grounds would not be renewed.

7. In accordance with the Single Judge's directions, skeleton arguments were lodged in May/June 2018 by Mr Guest and his junior on behalf of the appellant and by Mr Waddington QC who had appeared for the prosecution at both trials. An agreed appeal bundle was lodged. The Registrar made preparations for the appeal to be listed for hearing in December 2018. The case had to be taken out of the list because the appellant then dispensed with the services of his trial counsel. Fresh counsel was instructed, but in February 2019 he too had to withdraw. The new hearing date in March 2019 had to be vacated. Fresh counsel was again instructed. She appeared for the appellant at a directions hearing before the Full Court on 9th May 2019.

8. At that directions hearing it was still unclear, following the change of counsel, whether there was to be an application to renew any of the grounds on which the Single Judge had refused leave. The court directed that any such application must be filed and served, with a consolidated skeleton argument, by 6th June 2019. Further transcripts were also directed. Regrettably new counsel had to withdraw for health reasons. In her place, on 21st October 2019 Mr Richard Furlong, who has represented the appellant before us, was instructed by the Registrar. He is therefore the appellant's fourth counsel.

9. On 13th December 2019 Mr Furlong lodged consolidated grounds of appeal against conviction and sentence. That was the first formal indication of the appellant's intention to apply for an extension of time and leave to renew a ground on which the single judge had refused leave, ground 2 (rejection of submission of no case to answer). The consolidated grounds also sought an extension of time and leave to advance an entirely new ground of appeal based on non-disclosure. These applications require an extension of time of some 21 months.

10. Independently of Mr Furlong, the appellant himself lodged further grounds of appeal on 5th November 2019 in the form of an "additional statement" running to 47 pages, with voluminous appendices. Mr Furlong incorporated in his consolidated grounds a helpful summary of the appellant's own grounds. In order to advance any of the appellant's own grounds an extension of time of some 20 months is required.

11. In ***R v James*** [2018] EWCA Crim 285; [2018] 1 Cr. App. R. 33 this Court gave clear guidance that on any renewal application following refusal of permission by the Single Judge, leave will not be given out of time unless the defendant can persuade the court that very good reason exists. If the application to renew out of time is accompanied by an application to vary the grounds, the hurdle is higher. The court will take into account, inter alia, the extent and reasons for the delay in advancing new grounds, the overriding objective in the Criminal Procedure Rules (Crim PR r.1.1), and the interests of justice.

12. Mr Furlong explained in his oral submissions that, once he was instructed, it was incumbent on him to review the grounds on which leave had been refused. He had concluded that it was appropriate to apply for leave to renew Ground 2 because it raised the same issues as Ground 3, on which the appellant had leave. The basis for the new ground arising from non-disclosure had only emerged after the trial. It had been considered by the second fresh counsel who had had to withdraw for health reasons. We were given no explanation for the late application to advance the appellant's own grounds.

13. The delay of 20 to 21 months in applying for leave to renew Ground 2 and to advance fresh grounds is quite unacceptable and has not been satisfactorily explained. Plainly it arises from the appellant's decision to dispense with the services of trial counsel, who was ready and willing to argue the appeal within the confines of the Single Judge's leave as long ago as the end of 2018, when the appeal was first listed for hearing. Nevertheless, as will become clear, we have considered all the material and all the grounds which the appellant seeks to advance.

14. We are grateful to Mr Furlong, and to Mr Waddington QC, for their very thorough written and oral submissions. We heard the appeal on Friday 26th March 2021 and reserved our decision.

The factual background

15. Section 4 of the Fraud Act 2006 provides as follows:

4 (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 expose another to a risk of loss.

The indictment

16. Count 1 of the indictment alleged:

Statement of offence

Fraud, contrary to section 1 of the Fraud Act 2006.

Particulars of offence

Darren Say, between 1st April 2010 and 20th January 2016, dishonestly and intending thereby to make a gain for himself or expose another to a risk of loss, abused his position as a Financial Advisor, in that he acted against the financial interests of Noisnep SIPP holders by using money allocated to self invested personal pensions (SIPPS) in their names for his personal use, in breach of section 4 of the Fraud Act 2006.

17. Count 2 of the indictment alleged:

Statement of offence

Fraudulent Trading, contrary to section 993(1) of the Companies Act 2006

Particulars of offence

Darren Say, between 1st April 2010 and 20th January 2016, carried on the business of Noisnep Ltd. for a fraudulent purpose, namely, the application of money allocated to self invested personal pensions (SIPPS) in the names of Noisnep SIPP holders to his own use, by concealing from the holders of the pensions and the administrator of the pensions, Stadia Trustees Ltd., that he was spending this money on himself rather than investing it for the clients.

The Noisnep scheme

18. The applicant had an extensive background in the financial services industry. In 2006/2007 he set up a company called Rodinia Global Property Ltd ("RGP") with a view to developing two plots of land in the Bahamas which were purchased. The plots were part of proposed developments known as Sunset View and Sunset Hill, in the Stella Maris area of Long Island. The development potential of these two plots largely depended upon the prospect of a third party developing an adjoining resort, Port St. George, which was beyond the appellant's control.

19. In seeking investors for his project of developing the plots in the Bahamas the appellant first recruited investors in an unconnected failed project in Nevada, USA promoted by a company called World Capital Partners Ltd (WCP). In effect he offered these disappointed investors a rescue package by transferring their investment into his Bahamas project through Noisnep. It is unnecessary to detail the history of this first investment scheme, but the upshot was that it generated, for Noisnep, some £200,000 liquid capital representing tax relief from HMRC claimed on behalf of these investors.

20. The appellant then recruited further investors into what he described as the "Noisnep scheme". He made the scheme appear very attractive to any potential investor as essentially "risk free". The investors needed to be higher rate taxpayers wanting to invest in Noisnep for their SIPP. Under the scheme no cash contribution to the SIPP had to be provided by the investor. Instead the investor was loaned the amount of his contribution, repayable at the end of the 20 year term of the investment, and a "loan note" was drawn up. The loan note provided for a return to the investor of 2.5% per annum simple interest (compounded at 10 years and 15 years) on his initial contribution represented by the amount of the loan. If that return was not achieved at the end of the 20 year term, the investor was not required to repay the loan.

21. The independent pension administrator (a requirement of the relevant pensions legislation) was Stadia Trustees Ltd ("Stadia") whose managing director was Mr Anthony Hales. The investor's contribution to his SIPP entitled him to basic rate tax relief (20%) at source (RAS). Stadia claimed the RAS on the SIPP holder's behalf. HMRC paid the tax relief to Stadia to be added to the SIPP fund. For example, a net contribution to the SIPP of £40,000 was converted to a gross contribution of £50,000 after tax relief of £10,000. Stadia would pay over to Noisnep the tax relief which had been received. Mr Hales assumed and intended that the tax relief, and the amount of the contribution which had earned the tax relief, would be invested by Noisnep on the investor's behalf to increase the value of his SIPP.

22. In the early days of the scheme the appellant led Mr Hales and others to believe that the capital sum loaned to the investor (which was his contribution to the SIPP) was being provided by one of the major banks. The names NatWest and Barclays were mentioned. In fact, however, there was never any such underwriting of the loans. Instead Noisnep provided the capital from the fund of £200,000 generated in tax relief of the WCP investors. By transfers in and out of the Noisnep accounts, this same fund was used time after time, as "revolving finance". It was conceded by the prosecution that this was not illegal in itself, in the light of the decision of this Court in *R v Quillan* [2015] EWCA Crim 538; [2015] 2 Cr App R 3. The judge was at pains in the summing up to underline that for the jury. However, the prosecution case was that neither the investors nor Mr Hales of Stadia knew or understood this to be the position. The appellant himself told Mr Hales that "…Noisnep's commercial approach baffles many of the brightest minds in UK financial services". Mr Hales told the jury that it was very hard to understand the concept: " …It was like peeling an onion."

23. Over the period covered by the indictment, the total sum of RAS received by Noisnep was, in round figures, £900,000.

24. The documentation provided to investors was far from clear in explaining the terms of the scheme, or the options by which the fees and charges of Noisnep were to be paid. It is this lack of clarity, disputed by the appellant, which gives rise to the single ground of appeal on which the single judge granted leave.

25. The appellant's case was that the investor, as part of his contract with Noisnep in joining the scheme, agreed that fees would be deducted from the tax relief (RAS) paid over to Noisnep by Stadia. The prosecution case was that the investors did not understand this to be the position, and it was not made clear in the documentation. It was common ground, however, that there was in any event a separate obligation on the investor to claim higher rate tax relief ("HRTR") on the contribution made to his SIPP via the loan from Noisnep, out of which tax relief the investor was required to pay a fee to Noisnep called the "offset premium". The HRTR was not paid to Stadia. It was entirely separate and distinct from the RAS, and consequently formed no part of the £900,000 which was paid over to Noisnep by Stadia on account of RAS.

The trial

26. At trial the prosecution called 22 Noisnep investors to give evidence. They described their understanding of the scheme and the arrangements by which fees were paid. Several of the investors were themselves financial advisers. Some of the investors had previously transferred their investment from WCP into the Noisnep scheme. It was the £200,000 of tax relief on their contributions that provided the initial liquidity for the scheme. In addition, the prosecution called three independent financial advisers who had worked for the appellant in administering the Noisnep scheme and who, between them, had put some £200,000 of their own money into the scheme. The prosecution called Mr Anthony Hales (of Stadia). They called the HMRC officer, Ms Sarbjit Sidhu, who had dealt with Stadia and subsequently with the appellant. They called two chartered accountants in relation to their dealings with the appellant and the financial arrangements surrounding the developments. They called a witness from Barclays Bank who confirmed that the appellant had initially approached the bank for finance which was not granted.

27. The jury were provided with extensive documentation, in separate prosecution and defence bundles, of which we have been shown only a fraction, but sufficient to understand the issues. The documentation showed how the appellant had spent all the liquid capital in the scheme, that is to say the £900,000 RAS, the £200,000 initially contributed by the WCP investors, and the monies put into the scheme by the three IFAs who worked for him. None of the money had been used to develop the land in the Bahamas.

28. As the perfected grounds of appeal confirm, over the period of the indictment some £488,000 was spent on transfers to the appellant's personal bank account, payments of his NatWest credit card, spending by his then partner, Ms Misa, and other spending which was plainly personal rather than for the business. The defence case was that a substantial proportion of this expenditure was or could have been legitimately treated as company expenditure; a further substantial proportion was or could have been legitimately treated as "Director's Loans" from the company.

29. In addition to this, out of the RAS and other contributions to the Noisnep scheme the appellant spent very substantial sums on UK property projects. One was the purchase of an acre of land near

Goff's Oak in Broxbourne, Hertfordshire. This was purchased in the appellant's name in 2012 and was accounted for as a director's loan. The prosecution case was the appellant intended this to be his family home. That is certainly how he described it to the local authority in seeking planning permission for an eco-house with visitor centre. Planning permission was refused. The appellant spent £315,000 on this development.

30. The other UK project was a failed attempt to purchase a property on Hainault Road, Chigwell, Essex, where the appellant was working at the time and where his office was based. The expenditure on this project was £236,000. The prosecution case was that the property was intended for the appellant's own benefit. His case was that he planned to demolish the existing structure and build additional residences as a company investment project.

31. The appellant gave evidence himself at considerable length. He called witnesses in support of his case, including a chartered accountant, a chartered financial planner, a real estate appraiser (Mr Moorcroft) in relation to the viability of the development in the Bahamas, and a local real estate broker and appraiser in the Bahamas who gave evidence of the potential valuation of the land in question held by the appellant.

32. At the close of the prosecution case, there was a submission of no case to answer. It was submitted that the higher rate tax relief was never "money allocated to SIPPS" (adopting the wording of the indictment) and could not form the subject matter of either count. The judge accepted that proposition, which was in any event uncontroversial. It was accepted by the defence that the appellant occupied a position in which he was expected to safeguard, or not to act against, the financial interests of Noisnep SIPP holders. However, it was contended that the extent of the appellant's obligations to investors should be defined by reference to the nature of the commercial agreements he (as Noisnep) entered into with the SIPP investors, and that the terms of the documents overrode any "understanding" or "expectation" that the investors may have had. In short, it was up to them to read the documentation carefully. It was submitted that, properly construed, the contractual terms placed no restriction on the appellant's entitlement to spend the RAS and other money in the Noisnep scheme as he saw fit, because the interests of the investors were protected by the security of his land holding in the Bahamas (said to be valued at £4.7 million).

33. The judge rejected the submission of no case to answer. That decision was challenged by Ground 2 of the perfected grounds of appeal settled by trial counsel. The Single Judge refused leave on that ground. As we have explained, there is a late application to renew Ground 2.

The judge's summing up

34. The judge summed up the case fully and carefully. There is no criticism of the overall fairness of his summing up of the prosecution and defence evidence. The judge provided the jury with a helpful "Route to Verdict" document, on which he expanded in his oral directions of law. Significantly, the terms of the Route to Verdict document were agreed by both prosecution and defence counsel at the trial. It is necessary to set out the document in full:

Route to verdict

Please follow the order of the questions below.

Count 1

Question 1
Are we sure that DS occupied a position in which he was expected to safeguard, or not act against, the financial interests of investor clients of Noisnep Ltd?

Not in dispute. Go to question 2.

Question 2.
Are we sure he abused that position, intending to make a gain for himself or expose the investor members to the risk of loss?

If you are sure he abused his position go to question 3. If you conclude that he did not or may not have abused his position, then your verdict would be Not Guilty.

Question 3.
Are we sure that DS was acting dishonestly?

If you are sure, then your verdict would be Guilty of Count 1. If you conclude he was not acting dishonestly or may not have been then your verdict would be Not Guilty.

NOTE.

1. To answer question 2, you will need to examine (a) whether money obtained from the RAS remained that of the investor and (b) whether the D spent monies belonging to investors on himself. Abuse is not defined by the FA but is an everyday word understood by you all. To spend money belonging to another may amount to an abuse depending on the circumstances as you find them to be. Gain does not mean profit. Loss need not be an actual loss, all that is required is an intent to expose another to the risk of loss. In respect of the RAS the prosecution does not have to prove that every pound belonged to the investor whose case you are considering, only a part thereof.

2. The above Note is there to guide you it is not an exhaustive list of questions. Facts are for you as are relevant questions.

Count 2

Question 1

Are we sure that DS carried on the business trading as Noisnep Ltd?

Not in dispute. Go to question 2.

Question 2

Are we sure that investor money put into the Noisnep SIPP for investment was applied for his own use?

If you are sure go to question 3. If you conclude he did not or may not have applied investor money for his own use your verdict would be Not Guilty.

Question 3

Are we sure that he concealed from SIPP members and Stadia that he was spending the money for investment on himself?

If you are sure go to question 4. If you conclude he did not or may not have conceal that fact your verdict would be Not Guilty.

Question 4.

Are we sure that this was fraudulent in the sense of being dishonest?

If you are sure that DS was dishonest your verdict would be Guilty. If you conclude that he was not or may not have been acting dishonestly your verdict would be Not Guilty.

NOTES.

1. Your findings in respect of 'ownership of the SIPP money' (question 2, count1, Note 1) will assist you in answering this question.

2. Your findings in respect of dishonesty in respect of Count 1 will assist you in answering question 4.

3. I emphasise all matters of fact are for you to determine.

Ground 3: as originally advanced, with leave

35. Ground 3, as perfected by trial counsel and as considered by the Single Judge, complained in essence that the judge's directions ought to have narrowed for the jury the issues they had to decide and failed to restrict the extent of the monies the jury were permitted to consider as allegedly misappropriated by the appellant. Ground 3 alleged that the judge should have directed the jury to disregard:

(a) the higher rate tax relief which the investors paid over to Noisnep, amounting to some £435,000;

(b) the sum of £200,000 introduced into Noisnep by the investors from the failed WCP project;

(c) that part of the RAS paid over to Noisnep by Stadia which represented Noisnep's fees legitimately deducted in accordance with the terms of the agreement set out in the documentation provided to and accepted by the investors, said to amount to some 60% of the total RAS of £900,000.

36. In granting leave, the Single Judge rejected the argument in relation to items (a) and (b) above, but considered that (c) was arguable. He said:

> "Whether the defendant was entitled to claim fees from [the] RAS and in what amounts is arguably a matter of law to be determined by reference to the scheme documents and not necessarily a matter for the jury at all. I cannot clearly see from the material before me how this was addressed. It does appear to me that it is arguable that this issue was not addressed with the clarity it deserved and that given the amounts involved it might perhaps have made a difference to the outcome. For this reason I grant leave to argue the fees issue only, which involves three questions:
>
> 1. whether the judge correctly determined the legal position in relation to the [defendant's] entitlement to fees;
> 2. if so, whether he directed the jury correctly in relation to fees; and
> 3. if not, whether that renders the convictions unsafe."

The Single Judge had earlier referred to the appellant's submission in the grounds that the failure to withdraw from the jury the amount represented by the fees rendered the conviction unsafe, "… because the defendant may have been able to justify extracting that smaller sum on the basis of investments which were made, or at least on the basis that it was not dishonest."

37. We observe that the Single Judge gave leave only on this narrow basis. Although specifically adopting the argument in trial counsel's Ground 3, Mr Furlong has sought to widen the argument considerably in his consolidated grounds of appeal and to do so he also seeks leave out of time to renew the challenge to the judge's refusal of the submission of no case to answer (Ground 2). In refusing leave on Ground 2 the Single Judge said:

> "I refuse leave on the submission of no case. It was common ground that the applicant has used the money paid to his companies for the purposes of the scheme as if it were his own money. From that point onward it was a matter for the jury to decide whether, in so acting, he committed the offences charged."

38. Mr Furlong submits, in short, that the trial judge was fundamentally in error in:

(a) not deciding as a matter of law Noisnep's contractual entitlement to fees; and

(b) not deciding as a matter of law that there was no restriction on the appellant's entitlement to spend as he wished what remained of the RAS after deduction of the fees legitimately charged under his contracts with the investors.

Thus, Mr Furlong submits, the judge was also wrong to reject the submission of no case to answer. He submits that what was lacking was a proper analysis of the legal basis for the fees and charges levied by the appellant pursuant to both statute and the trust documents which underpinned the pension scheme. He submits that without that assistance the picture presented to the jury was incomplete, to the point that the appellant's convictions are plainly unsafe.

39. In the consolidated grounds Mr Furlong sets out in detail the statutory provisions in Part 4 of the Finance Act 2004, ss. 149-203, which govern SIPPS and tax relief at source. He challenges the concession made by the defence at trial, as confirmed in question 1 of the route to verdict for

count 1, that the appellant occupied a position in which he was expected to safeguard or at least not act against the financial interests of Noisnep SIPP holders. Mr Furlong submits that the contractual documentation which should have been considered at trial included, importantly, the "Master Trust Deed and Rules governing the Noisnep SIPP". This, he submits, would have been the central document defining the relationships between members, trustee and manager/promoter, and in particular the objects of the trust including the duties and responsibilities of the manager/promoter and his rights to remuneration.

40. Despite the erudition of Mr Furlong's analysis, there is a danger of losing sight of the wood for the trees. The first difficulty with this submission is that no-one at trial - least of all the appellant himself- considered that the Master Trust Deed had any relevance to the issues the jury had to decide. In this regard trial counsel's response to the fresh grounds of appeal (following waiver of privilege by the appellant) is particularly telling. It confirms that the appellant never instructed his counsel or suggested in his evidence that the absence of the Master Trust Deed hindered or prejudiced his defence. The appellant's express instructions to his counsel were that his obligations to Noisnep investors were comprehensively set out in the documents in the "Agreed in Principle" pack provided to all investors and the Loan Note agreements. The Master Trust Deed was mentioned in the evidence, but only in passing. It was referred to in the "Contribution Covenant" deed between the investor and Stadia which the investor was required to sign, evidencing his obligation to make the capital contribution to his Noisnep SIPP. Mr Hales of Stadia was cross-examined about this covenant, but no question was asked about the Master Trust Deed itself.

41. Despite this, Mr Furlong suggested in his oral submissions that the Master Trust Deed was the crucial document governing the appellant's rights and obligations under the scheme. He was unable to show us a copy of the Deed. He does not know what it says any more than we do. We cannot speculate about its terms, but we simply do not accept that the Deed would have had any significant bearing on the issues the jury had to decide.

42. In relation to the appellant's alleged contractual entitlement to take 60% of the RAS in fees, which is the sole point on which the Single Judge gave leave, Mr Furlong adopts trial counsel's argument in the perfected grounds. The investors were provided with documentation which set out the basis on which fees were charged and deducted from the investor's contribution to his SIPP, in what was described as "Your Noisnep 'Inclusive Fees and Charges' Deferral Option". It is submitted that the judge should have construed the various documents provided to the investor and spelt out for the jury their legal effect, namely (it is submitted) that the appellant (as Noisnep) was entitled to deduct those fees from the RAS, reducing the amount available in the SIPP for investment.

43. But as Mr Waddington points out in his skeleton argument in response to the perfected grounds, and in the respondent's consolidated notice in reply to Mr Furlong's consolidated grounds of appeal, no clear picture emerged in the evidence of the documentation that was actually provided and signed. Having examined examples of the documentation for ourselves, we agree with Mr Waddington's submission that the documents provided to the investors were strikingly unclear in their terms, and even lacked the appearance of formal contractual documents. Various different options were given for fees. Before and after subscribing to the scheme, the investors were routinely provided with information inconsistent with the initial documentation. Most of the investors gave evidence that they had been told by those acting on behalf of Noisenep that all of their RAS was to be invested. Mr Hales of Stadia was told by the appellant that all of the RAS was to be invested in the development of property in the Bahamas. His evidence was that had he not

believed this to be the case, he would not have released the funds to the appellant. It is clear to us that a great deal of the contentious evidence at trial was taken up with examination of these issues.

44. That no doubt explains why the defence did not invite the judge at trial to rule as a matter of law, on the basis of the documentation, that the appellant was entitled to take 60% of the RAS in fees for himself (or Noisnep). In the circumstances of this case that was a question of fact for the jury on all the evidence, and not on the documentation alone. The principle confirmed in ***R v Spens*** (1991) 93 Cr App R 194 is that the construction of documents is in the general sense a matter of fact for determination by the jury, with the exception of binding agreements between one party and another. Here there was no agreement between prosecution and defence that the documentation did constitute a binding agreement. Far from it. Moreover, the evidence did not support such a conclusion. It was therefore a matter for the jury to decide.

45. This was correctly reflected in the judge's directions of law in the summing up, augmenting the Note in the Route to Verdict for count 1 (quoted above). Mr Waddington confirmed that the 60% fees issue was highlighted in the defence closing speech, and was squarely before the jury. At page 12 D-F the judge said:

> "In respect of the relief at source, the prosecution does not have to prove that every pound belonged to the investor … whose case you are considering and that is so because, as you know, the defendant's contention is that these investors, when they read the paperwork or not, understood that at least 60 per cent of the relief at source would go towards some fees; and he says, 'in those circumstances, the fees are mine. I am the company, so I can do with them what I want.' Well, that is a matter that you will have to look at; but there is, of course, the remaining 40 per cent, which the defendant concedes would remain the investors' but he says they were invested onto the face value of the loan notes; so a loan for £40,000 would, in fact, be reflected on the loan note issued at the point of investment in specie contribution as £43,750."

46. We are quite satisfied that the judge was correct to deal with the issue in the way he did. It is significant that the defence took no issue with the judge's approach at the time. It would not have been possible or appropriate for the judge to rule on the documentation alone. The documentation was only part of the contractual matrix as the evidence emerged.

47. The Single Judge considered the narrow point in Ground 3 to be arguable. After full argument our conclusion is that on careful analysis we are satisfied that the trial judge's approach was entirely correct and that Ground 3, as originally advanced in the perfected grounds, must fail.

Ground 3 (expanded) and Ground 2 (application to renew)

48. As we have explained, however, Mr Furlong has sought to expand the ambit of Ground 3 and to revive Ground 2. He takes issue fundamentally with the proposition that the appellant was abusing his position by spending the RAS, obtained from HMRC on behalf of the SIPP members or investors, for his own purposes. Again, Mr Furlong submits that the appellant's rights and obligations were, or must have been, defined by the contractual documents (including the Master Trust Deed, whose terms are unknown). He submits that the RAS in no sense "belonged to" the

investors. It belonged to the Noisnep SIPP scheme and the appellant was entitled to use it as he saw fit.

49. In the course of argument we invited Mr Furlong to formulate the direction he says the judge should have given to the jury in relation to the appellant's entitlement to spend the RAS, based upon the premise that the documentation fully spelt out the contractual position. Mr Furlong submitted that the direction should have been along these lines:

> "The defendant's duty was no more than to use his best endeavours to secure the advertised return on the loan note over the period of the pension scheme by the use of the assets which the defendant had put into the pension scheme and any other assets he chose to put into the scheme subsequently."

50. We observe first that this formulation is very similar to the way in which the defence was advanced at trial. As it was put in the perfected grounds, at paragraph 57:

> "The principal defence relied upon by the defendant was that, once a Fixed Return Loan was issued, he did not manage investors' money (as would be the case, for example, in a managed fund), but they were nevertheless entitled to expect him to pursue a strategy likely to realise the promised long-term returns. So long as he had sufficient asset backing, he was in a position to do this."

51. In the summing up the judge put this defence squarely before the jury. For example, at page 34 B-E:

> "…And that relief at source, as you can see, provided the liquidity for the company throughout the whole of this period of time; it was the only generation of income on the papers that we have seen. And liquid or cash in a bank account is as much an asset of the company as any other asset, physical or otherwise. Well you can do that exercise and it means that, subject to any arguments in relation to fees and what was understood by the clients, you will always come down to a figure which is the proportion left of the RAS after fees, which is about 40 per cent of any RAS claim. And that, ladies and gentlemen, is one of the issues as to who that belongs to. Well, on the face of it, it belongs for investment to the investor. The Crown say, in short, the defendant knew that, he had no right to spend it on himself and also, by way of supplementary argument, it could only be invested in what the investor understood and was told was to be the investment. The defendant says, 'No, that's not right; and even where I have spent it in that way, I've not done so dishonestly. As we shall see, he says that, 'Had I not stopped trading, I could have met all liabilities. However, I spent the money.' "

52. In the Route to Verdict, and the Notes thereto, the judge used various different phrases to describe the status of the RAS. In the Note to count 1, he posed the question whether money obtained from the RAS remained "*that of the investor"* and whether the defendant spent on himself monies *"belonging to investors".* In relation to count 2, he posed the question whether the defendant

applied for his own use "*money put into the Noisnep SIPP for investment*" or "*investor money*" (question 2) and "*the money for investment*" (question 3).

53. We cannot accept Mr Furlong's submission that the RAS invested in the SIPP belonged in any sense to the appellant himself, entitling him to spend it as he wished. The RAS represented the investor's tax relief, albeit the claim for tax relief was made by Stadia (as scheme administrator) on the investor's behalf. The RAS was paid into the investor's SIPP to augment his own contribution. The investor must undoubtedly have retained a beneficial interest in the RAS.

54. In any event, in order to establish a breach of s.4 of the Fraud Act 2006 in count 1, the prosecution were not required to prove strict concepts of property law but merely to prove (i) that the appellant dishonestly abused the position he occupied intending thereby to make a gain for himself, and to prove (ii) that the position he occupied was one in which he was expected to safeguard, or not to act against, the financial interests of the Noisnep SIPP holders. Proposition (ii) was admitted at trial, hence the terms of question 1 in the Route to Verdict. In the perfected grounds of appeal, settled by trial counsel, it was conceded at paragraph 64:

> "The defendant was the directing mind of the RGP and Noisnep companies, with primary responsibility for the Noisnep investment strategy and for issuing the Loan Notes. By virtue of this… it is accepted that he occupied a position in which he was expected to safeguard, or not to act against, the financial interests of Noisnep SIPP holders."

55. In the summing up, when dealing with the concession in question 1, the judge explained, at page 11F-G:

> "The reason it is not in dispute is that the defendant accepts that he stood in a professional capacity as an IFA [independent financial adviser] and, indeed, as head of Noisnep Limited, and he also had a connection with Wealth Connection Management, did he not, and the IFAs who were operating from there, giving advice and seeking the investment from clients."

56. The appellant's case at trial was run on this basis, with this fundamental concession. This Court will not entertain an appeal which now seeks to re-argue the case on a wholly different basis.

57. There was abundant evidence that the appellant intended investors to believe that their contribution to their Noisnep SIPP (including the RAS which that contribution generated) would be invested on their behalf and not spent elsewhere. In the early days some of the documentation specifically stated that the investment would be in the Bahamas project. Later the documentation referred to investment "in our investment Strategy".

58. The Loan Note was never part of the documentation disclosed to the investor, although one of the investors (Gracey) later obtained a copy. Recital E of his Loan Note stated:

> "The funds raised through the issue of the Note are to be used to facilitate long term investments by the Company to achieve the key objectives of the Strategy. The Company must secure long term asset commitment from its investments which continue to support the risk free capital made available to investors of the Strategy."

59. The documentation supplied to the investor to explain the 'Inclusive Fees and Charges Deferral Option' referred to the "Net investment amount" and the "Actual Investment", confirming in the investor's mind the impression that the contribution and the RAS were to be invested on the investor's behalf, and would not be used for any other purpose.

60. The oral evidence of most of the investors was generally to the effect that they had been told that all the RAS would be invested in the development of property in the Bahamas and the UK. That was also the belief of Mr Hales of Stadia, on the strength of what the appellant had told him.

61. It was for the jury to decide, as a question of fact, whether they were sure that the elements of each offence, as set out in the Route to Verdict, had been proved. In order to have convicted the appellant on count 2 (fraudulent trading) the jury must have been:

(a) sure that investor money put into the Noisnep SIPP was applied for the appellant's own use (question 2);

(b) sure that the appellant concealed from SIPP members and Stadia that he was spending the money for investment on himself (question 3);

(c) sure that this was fraudulent in the sense of being dishonest (question 4).

62. In the light of those factual conclusions the jury would inevitably also have concluded on count 1, whatever the subtleties of the arguments in relation to fees and the minutiae of the scheme, that they were:

(a) sure that what the appellant had done amounted to an abuse of his position (question 2);

(b) sure that he intended to make a gain for himself or expose the investor members to the risk of loss (question 3);

(c) sure that he was acting dishonestly (question 4).

63. We therefore also reject the expanded Ground 3. We are satisfied too that ground 2 remains unarguable. We agree with the Single Judge's analysis. In those circumstances, we refuse the application for an extension of time in which to renew Ground 2.

New ground: non- disclosure (application for leave)

64. To advance this proposed ground of appeal the appellant requires an extension of time of some 21 months. We have already indicated that there is no good reason to extend time, having regard to the principles in *R v James* which we have highlighted. We shall therefore deal with this ground only briefly.

65. It is contended that at some stage after the conclusion of the trial (the date is not specified) the appellant obtained from one of the IFAs who had worked for him, the prosecution witness Wayne Griffith, a tranche of emails which, it is said, had not been disclosed prior to the trial. One of the

emails, dated 22nd August 2013, was to Mr Griffith from the appellant himself. It set out, for consideration by Mr Griffith, a very lengthy draft letter from the appellant to the Noisnep investors apologising for "the lack of formal updates over the past few years", and providing information designed to reassure them that their investment was secure. We note that the appellant was suggesting in this draft letter that he was "now proceeding to get Sunset Hill underway", a reference to the Bahamas development. Nothing in fact ever came of that.

66. It is submitted that this email would have provided substantial support for the defence case at trial, and that through non-disclosure the appellant was wrongly deprived of that opportunity.

67. We cannot accept that proposition. As trial counsel makes clear in his waiver statement, the defence team relied on the appellant to provide them with such documentation as he considered relevant. He did supply them with other emails he had sent and received. Mr Waddington confirmed that although the appellant's computer had been seized by the police it had been returned to him by the date of trial. This was the appellant's own email. There is no reason why he could not have found it himself and deployed it, if relevant. Accordingly this proposed ground of appeal is totally without merit in any event. We refuse leave to advance this ground and we refuse the extension of time.

The appellant's own grounds of appeal

68. In his undated 47 page "additional statement" received by the Registrar on 5th November 2019, the appellant lists his many complaints about the trial and almost everyone associated with it. There are voluminous appendices. This material was submitted at a time when the appellant was in receipt of a representation order for counsel. It is quite unacceptable for an appellant in such circumstances to deluge the Court with further material of his own devising, for which no leave or extension of time was sought.

69. In his consolidated grounds of appeal, dated 9th December 2019, Mr Furlong helpfully summarised the appellant's own "key" grounds, suggesting that "…insofar as these are not covered in the existing or proposed grounds, it is submitted that the court should permit him to advance them and thereafter rule on them." At the start of the hearing of the appeal we made it clear that as counsel was instructed to present the appeal we were not prepared to hear oral submissions from the appellant himself.

70. Again, there is no good reason for the long delay in seeking to present these new grounds of the appellant's own making, and no good reason to extend time. We shall therefore address the grounds only very briefly.

Abuse of proces

71. It is said that the investigating officer, Detective Constable Bloomfield, manipulated the witness statements of SIPP investors to assert personal losses in circumstances where in fact they had suffered no such loss.

72. This complaint is without substance. As trial counsel explains in his waiver response, there was disclosure of the "question set" used to record statements from the investors. The defence explored at trial the fact that the police showed the investors a statement of the SIPP current account history obtained from Stadia, and the potentially misleading impression that the statements of account

may have given. This "question set" was used because some of the witness statements were taken by officers who had no first-hand experience of the investigation.

Inadequacy of trial counsel and solicitors

73. The appellant now complains that trial counsel did not have specific expertise in the pensions industry and failed to understand the nature of his defence, which was therefore not properly advanced to the jury. This complaint is both unfounded and unfair.

74. We note that the appellant was content to retain the services of the same team of counsel after the first trial, although he changed solicitors. It is clear from counsel's waiver response that during the second trial the appellant regularly expressed his satisfaction with counsel's performance. The appellant held himself out as a pensions industry expert. He would surely have detected in the first trial (which lasted six weeks) any shortcoming in counsel's grasp of the issues in the case and the appellant's defence. It is also apparent from counsel's waiver response that the parting of the ways between the appellant and his trial counsel, after leave had been granted, arose principally because counsel were not prepared to pursue points on appeal which were not properly arguable.

75. Trial counsel have responded in detail, paragraph by paragraph, to the appellant's complaints about their failures. One such response is particularly revealing. The appellant complains that he was concerned at the decision not to exhibit "…intra-group undertakings which confirm that a net investment target of only £1.54 million exists at maturity for my company." Trial counsel explain that a tactical decision was made not to exhibit the documents in question, and the appellant accepted that advice. The documents in question had been drafted by the appellant himself and signed by the appellant alone with no third party witness to any signatures. Trial counsel considered that to put these documents before the jury would present "…an open goal for the prosecution to pierce the corporate veil and suggest the documents were not worth the paper they were written on."

76. We observe that from all the material we have read, including the transcripts of the evidence, the summing up and rulings, and the perfected grounds and subsequent skeleton argument for the appeal, it is clear that the appellant was very well and effectively represented by trial counsel. That assessment was endorsed by Mr Waddington, who appeared for the prosecution at both trials.

Other non-disclosure and failures to investigate

77. The appellant complains that HMRC and the police investigation failed to consider that he had proper security on his development projects; it is said that he had transferred funds into his lawyers' client account to the value of $5.5 million. He had independent evidence that his property portfolio was already worth in excess of £100 million, and he was therefore well able to meet the potential liability to Noisnep SIPP holders at the end of the 20 year term.

78. There is no substance to this complaint. If the assertion in relation to the $5.5 million were true it would have featured in the appellant's evidence. The issues as to the value of the land were fully explored trial. The appellant called evidence on the topic.

79. The appellant also complains that DC Bloomfield failed to produce over 5,000 pages of documents signed by members of the pension scheme and further documentation internal to

Noisnep to which the appellant did not have access after his arrest. It is said that these failings were so serious as to render the trial unfair.

80. In the respondent's consolidated notice Mr Waddington points out that, contrary to these assertions, the appellant in fact had all his documents. The prosecution arranged for HMRC to accommodate the appellant's request for full disclosure of all documents lodged with HMRC. We have no doubt that if there were any substance in these general assertions, the appellant would have been pressing his counsel at trial to raise the complaint at the time.

Fresh evidence of subsequent HMRC and FSCS assessments

81. The appellant seeks to argue that his convictions are unsafe because the evidence given at trial by Ms Sidhu, the HMRC officer, was incorrect. He suggests that she said that because the loan note investments were *in specie* rather than cash contributions, no RAS should have been paid by HMRC. He suggests that HMRC have since accepted that in fact the RAS was properly paid, evidenced by letters to the Noisnep SIPP holders in 2018, an anonymised example of which is exhibited as appendix 1 to his additional statement. We note that the letter is dated 16th October 2018, some 13 months before this ground was first advanced.

82. As the respondent's consolidated notice points out, the exhibited letter merely states that HMRC is not seeking to recoup any money from the investor. The letter gives no reason for this, but it may well be that the reason is (a) that HMRC have sought the repayment of the entire £900,000 from Stadia (putting Mr Hales out of business), and/or (b) in the light of the verdicts at trial, the investors were themselves the victims of fraud by the appellant.

83. In a similar way, the appellant seeks to argue that in a test claim the Financial Services Compensation Scheme ("FSCS") refused to compensate a pension member who made a claim against Stadia, on the basis that the pension member had suffered no loss. He exhibits an anonymised copy of a letter dated 5th September 2018 as appendix 2 to his additional statement. We note that the date of the letter is 14 months before this ground was first advanced. We do not see the relevance of this decision by the FSCS which was in relation to a claim against Stadia. The basis of the decision appears to be that Stadia did not provide advice in relation to the investment, and that although "it is evident that the investments made have resulted in a loss" their investigation has shown that the claimant for compensation did not "transfer previous pensions into the SIPP or make personal contributions", and had not therefore "incurred a financial loss due to the actions or inactions of the firm as you did not invest any money into the SIPP"; there was no evidence that Stadia had been negligent in allowing the contribution from RGP and subsequent investments in RGP loan notes to be made within the SIPP. This decision of the FSCS relates only to Stadia and in no way undermines the appellant's convictions.

84. We are satisfied that the appellant's own points, advanced tortuously in his 47 page additional statement, do not afford any arguable ground of appeal. We therefore refuse the application for leave to advance these grounds and we refuse the extension of time.

Conclusion on appeal against conviction

85. It follows that the appeal against conviction is dismissed. We are entirely satisfied that the convictions are safe and that the appellant's trial was fair.

Appeal against sentence

86. The appellant has leave from the single judge to appeal against sentence. It is said that the sentence of 6 years imprisonment was manifestly excessive. First, is submitted that it was based on an incorrect figure of loss and failed to reflect that this was a case of risked rather than actual loss. Second, it is submitted that the sentence failed to reflect the mitigating factors of the appellant's good character, and the evidence of pensions experts who spoke in glowing terms of the appellant's commitment to his investors and his probity. It is also submitted that the period of disqualification, 8 years, was too long on a true analysis of the appellant's criminality.

87. The judge adjourned sentence for the preparation of a pre-sentence report. The appellant maintained his innocence. The report outlined his domestic circumstances. Following his divorce he had formed a very strong and happy relationship with a new partner, and they had two young children. She had taken the children back to live with her in her native Philippines, to the appellant's great distress. The appellant told the probation officer that he never took a salary from the company but survived on "director's loans". The appellant had no previous convictions, and there was positive evidence of his good character.

88. The judge was required to follow the Sentencing Council guideline for Fraud. It was common ground that there was Level A higher culpability in that no fewer than three of the requisite factors were present: abuse of a position of power, trust or responsibility; fraudulent activity conducted over sustained period of time; large number of victims. The judge considered it unnecessary to make a finding in relation to a fourth factor: sophisticated nature of offence/significant planning.

89. Under the guideline, harm is initially assessed by the "actual, intended or risked loss as may arise from the offence". For actual or intended loss the guideline sets out categories based upon the amount of the loss. The judge was satisfied that the loss caused or intended was in excess of £1million, which put the offence into Category 1. For a Category 1A offence the starting point under the guideline (based on a loss of £1 million) is 7 years' custody, with a range of 5 to 8 years. The judge reduced the starting point by one year to reflect the appellant's good character and the fact that the scheme had not been dishonest from the start. The sentence was therefore 6 years' imprisonment. We observe that the appellant has already been released on licence, having served half of the sentence.

90. Two principal points raised in the grounds of appeal were emphasised by Mr Furlong in his oral submissions. First, the judge took much too high a figure for loss; in particular he was wrong to treat the whole of the £900,000 RAS as the loss, bearing in mind that a significant proportion (some 60%) was legitimately taken from the RAS as fees. This, of course, relates back to the principal issue raised in the appeal against conviction, ground 3. Second, it is said that this was a case of "risked loss" rather than "actual or intended loss". The guideline provides that risk of loss is less serious than actual or intended loss; where the offence has caused risk of loss but no (or much less) actual loss, the normal approach is to move down to the corresponding point in the next category. This may not be appropriate if either the likelihood or extent of risked loss is particularly high. It is submitted that even if the judge was correct to place the offence in category 1A, he

should have moved down to Category 2A, with a starting point of 5 years and a range of 3 to 6 years.

91. The judge accepted in his sentencing remarks that when the appellant set up the concept of Noisnep, he did so "with honesty and integrity". The problem, the judge said, was the structure of the companies the appellant set up and the appellant's position as the dominant individual, acting alone without challenge and with no effective review of the company's investment proposals. The appellant's actions lacked openness and transparency.

92. The judge said that the fraud was very simple: the appellant abused his position of trust to investors by spending monies on himself. Some £900,000 was paid into the SIPP account and then taken out. The appellant wanted access to the investors' tax relief at source. Without it there was no cash flow for the appellant's companies. To achieve that he had to make the proposition attractive. He could not obtain the tax relief at source without advancing loans. To do so he circulated a pot of monies between £200,000 and £300,000 obtained from the WCP investors.

93. The judge said that many of the investors understood there would be fees, but not many of them understood that the fees would be taken from their tax relief at source, nor did many of them understand the level of the fees. The appellant's response, in his evidence, had been that they were intelligent, professional people and if they had not read or understood the terms of the scheme, that was their mistake not his. In any event, the fees taken from the RAS in their SIPPS should, the judge concluded, have been used to defray the costs of finance and investment on their behalf, as they understood would be the case. In fact there was no real cost in arranging the loans in view of the circulation of the money. The preponderance of the evidence was that the investors expected their RAS to be added to their pension pots, and to grow. The fees and charges the appellant took did not become his personal money. The appellant took advantage of his position as sole director. Despite the undoubted positive side of his character, the judge was satisfied that the appellant was a determined man who allowed his arrogance and his dominance to bully people into submission and to try to bully himself out of difficult positions.

94. In all the circumstances, the judge said, it was entirely proper to include as part of the harm caused by the offence the amount of the fees the appellant took out of the RAS. The appellant had made absolutely no investment in the Bahamas from the RAS. The judge noted that following his conviction the appellant had issued a lengthy document denying that he had done anything wrong and he continued to lay blame at the door of Mr Hales and HMRC. Instead of co-operating with the HMRC investigation into Stadia by explaining the circular source of the funding, he had chosen to bully Mr Hales and make life as difficult as possible for HMRC, trying to bluff his way out of it.

95. Accordingly the judge reached a figure of over £1 million for loss by adding to the £900,000 RAS, which the appellant had spent, the additional expenditure on the properties at Goff's Oak and Hainault Road. He was satisfied that it was all actual rather than risked loss.

96. We have considered carefully all the submissions advanced, in writing and orally, but we are not persuaded that this sentence of 6 years' imprisonment was manifestly excessive or in any way wrong in principle. The judge had presided over the trial and was best placed to assess culpability and harm. There were three separate factors indicating higher culpability. Furthermore, the dishonest way in which the appellant was running Noisnep Ltd, demonstrated by the separate conviction for fraudulent trading, was reflected in the total sentence of 6 years. The judge made clear his view of the way in which the appellant had abused his sole directorship of the company.

97. As to harm, the reality was that the appellant had spent not only the £900,000 of RAS, but also the £200,000 or so of RAS paid by HMRC in relation to the WCP investors, and in addition some £200,000 provided by investors from their own resources. If there was "double counting" of the spending on Goff's Oak and Hainault Road (as part of the £900,000 RAS) the overall loss nevertheless easily approximated to or exceeded the figure of £1 million on which the starting point of 7 years was based.

98. The judge was entitled to conclude that this was a case of actual loss rather than mere "risked" loss. We observe that whatever the position in relation to the individual investors, the fact remains that £900,000 of public money, paid into the investors' Noisnep SIPPS as tax relief at source, was spent by the appellant on himself and his own projects.

99. Accordingly, the appeal against the sentence of 6 years' imprisonment is dismissed.

100. There is also a challenge to the company directors' disqualification of 8 years, although this was not pressed in oral submissions. In his sentencing remarks the judge referred to and correctly applied the guidance in ***R v Millard*** (1994) 15 Cr Ap R (S) 445. This case plainly fell within the middle bracket of 6 to 10 years. It was more serious than the minimum bracket of 2 to 5 years, but less serious than the top bracket of 10 years plus.

101. Again, the judge was best placed to make the necessary assessment of seriousness. He said the appellant had perpetrated a fraud by his abuse of position which had impacted upon the financial affairs of individuals. The disqualification was intended to be punitive, and to reduce, as far as possible, the risk that the appellant would in future commit further offences when dealing with people's money.

102. We think the period of 8 years' disqualification was entirely appropriate and proportionate. It was neither manifestly excessive nor wrong in principle. Accordingly the appeal against the disqualification order is likewise dismissed.