Neutral Citation Number: [2020] EWCA Crim 957
Cas Nos. 2019/01673/C5 & 2019/01420/C5

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL
12 th june 2020

B e f o r e :

Lord Justice Coulson
Mrs Justice Whipple DBE
and
Mr Justice Griffiths

Regina

v

Asad Bashir Malik

Epiq Europe Ltd
Lower Ground, 18–22 Furnival Street, London
EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

HTML VERSION OF JUDGMENT

Lord Justice Coulson:

1. The applicant is now 39 years of age. On 8th April 2019, following a six week trial in the Crown Court at Lewes (sitting in Brighton), before His Honour Judge Tain and a jury, the applicant was convicted of one count of engaging in unfair commercial practice, contrary to Regulations 3, 8 and 15 of the Consumer Protection from Unfair Trading Regulations 2008 ("the Regulations") (count 3), and of two counts of engaging in misleading commercial practice, contrary to Regulations 9 and 15 (counts 2 and 8). The following day he was sentenced to a term of 14 months' imprisonment.

2. The applicant renews his applications for leave to appeal against both conviction and sentence, following refusal by the single judge.

3. The applicant was the director of two companies, London Parking Gatwick Limited ("LPG") and Easy Meet and Greet Limited. This latter company was dissolved before charges were preferred and was not a defendant to the proceedings. Although LPG was a named defendant, it was not represented during the proceedings or at the trial. The period covered by the indictment ran from 20th October 2014 to 17th August 2016. During that period, LPG received in excess of £1.5 million for providing a secure parking service for users of Gatwick Airport.

4. The service operated in this way. Members of the public who were using Gatwick Airport would make a reservation by telephone or online for secure parking. They would be met on arrival at the airport and would hand over their car to a driver. The car would be driven to a car park or a site away from the airport. On their return, the customer would be met by the driver and their car returned to them.

5. A good number of complaints were received from the public about the service provided by LPG and the applicant. In particular, members of the public complained about the condition in which their vehicles were returned. Accordingly, a test purchase operation was carried out on 13th June 2016. The test vehicle was found parked in a muddy field with no secure boundary. On subsequent visits to both this field and another field used by the applicant, the test purchase operation found that many of the cars had been parked in mud and bushes; many were left unlocked and insecure and on occasions they had been parked so close together that the vehicles were physically touching. The sites used by the applicant included the car park of a mosque, Brooklyn Farm at Bonnets Lane in Ifield (described as "an area of mud and grass"), New Barn Farm in Rusper, and a field at Keepers Knight, an area of woodland and fields without any lighting or CCTV.

6. Count 3, relating to unfair commercial practice, reflected the customer's experience of the service provided. It was the most significant of the charges. Allegations included that the cars were not kept secure; that sometimes windows would be open, doors unlocked and keys visible and available; that the cars were driven further than was necessary for the sole purpose of parking, and used to ferry company staff around and, in some cases, to tow other vehicles; that sometimes, the customers discovered that they had incurred parking tickets; and that the cars were not returned undamaged and clean, as demonstrated by a number of the complaints made and, indeed, the photographic evidence.

7. Counts 2 and 8, relating to the misleading nature of the applicant's service, reflected the claims made on LPG's website, which described the parking facilities, the level of security and protection which would present, the use of the vehicles, and the level of care that would 3be taken.

8. In support of the case that there were misleading statements and that the applicant had acted unfairly, the prosecution relied on: the test purchase evidence noted above; the evidence of a Miss Jones, a Trading Standards Officer at West Sussex County Council, who found cars in the care of LPG in a sports centre at Ifield Green with no security measures in place; evidence from PC Smyth, who visited Brooklyn Farm and saw vehicles parked in a field to which access was gained by an open gate and noted the absence of CCTV or any fencing; and a schedule of 31 pages itemising the customers' complaints (rehearsed above) abstracted from over 100,000 emails in the company's possession. We will refer to that schedule again a little later.

9. There was also specific evidence as to the condition of the cars on their return: from a Mrs Donnelly, who found scratches on the doors and the car covered in mud; from another customer who found his clutch had been burned out in a specific incident to which the judge referred during his sentencing remarks; from a Mr Ross Newman, who found mud and signs of damage on the right wheel and dents at the front of his car; and from a Mr Gary Chamberlain, who said that his vehicle had a tow rope attached when he went to collect it.

10. The applicant's defence was that the customers were not misled and that the vast majority of cars had been parked at Peaks Brook which held a Safer Parking validation. It was argued on behalf of the applicant that the percentage of complaints received was small when measured against the business as a whole and did not amount to misleading or unfair practice. The applicant relied on testimonials from what he claimed were satisfied customers, although it does appear that there was some debate about the validity of some of those testimonials.

11. The issues for the jury were whether the claims made on the website were likely to cause the average consumer to take a transactional decision which they would not otherwise have taken, and whether the applicant connived or consented to the company's failure. As noted above, the jury convicted the applicant on counts 2, 3 and 8.

12. Before embarking on a consideration of the various points raised on these renewed applications, it is necessary to say a word about the documentation before the court. In our view, it is unhelpfully prolix. The perfected Grounds of Appeal ran to 30 pages, with an additional seven pages in relation to the application for leave to appeal against sentence. A further document, the Addendum Grounds of Appeal, was produced as late as yesterday, again with voluminous attachments. Not to be outdone, the respondent has served a 39 page skeleton argument on conviction and a further document in relation to sentence. We do not consider that this is the best use of the parties' time and efforts and we have not found the endless repetition in the material of assistance. On a proper analysis, we consider that these issues are short and they are capable of succinct disposition. We do not consider it appropriate to re-argue in this court the entire trial, which, as we have said, lasted six weeks.

13. We deal with the points that have been raised, reminding ourselves that these are renewed applications which have already been rejected in clear terms by the single judge. We will endeavour to summarise our views in a slightly different sequence to those in which they were presented in the Grounds of Appeal. We consider it appropriate to start with the points that are said to go to the lawfulness of the prosecution itself, then the points arising out of the hearing, and then to turn to consider the criticisms of the directions to the jury, the summing-up and the sentence.

Ground 2: Time Bar

14. Towards the end of the trial, the defence asserted, for the very first time, that counts 2 and 8 were time-barred. The argument was that the relevant facts were discovered between 23rd October 2015 and 10th May 2016, and that information's were not laid in this case until 23rd and 26th June 2017. It was therefore said that, because more than 12 months had elapsed between the discovery of the relevant facts and the laying of the information, these two counts were time-barred.

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

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

Ground 4: The Schedule of Evidence from LPG's Hard Drives

17. The complaint evidence was summarised in a schedule abstracted from LPG's computers. As already noted, there were over 100,000 emails. So the prosecution prepared a schedule which was designed to summarise this material, limited to those emails which referred just to "complaint" or "damage". That appears to have been a sensible and proportionate approach.

18. Despite that, however, it was argued both at the trial and in the renewed applications before us that the material was incapable of being reduced at all without prejudice to the applicant. There is a flavour of that in yesterday's addendum grounds, where it is said at paragraph 31 that "there is a difference

between 1,500 and 150,000". It was on that basis that the applicant asked the judge to rule that the schedule was inadmissible, pursuant to section 78 of the Police and Criminal Evidence Act 1984.

19. In his ruling of 27th February 2019, the judge refused to accede to that request. He noted that the defence had access to all of the original documents. He said this at page 3D-G:

> "Now, the defence argue that the prosecution were duty-bound to serve their schedule in a particular format and in a particular way so that they could then return to the data and see whether arising from the data they could extract anything which might, for example, challenge that or, indeed, prove the opposite of it. And they say that they have been disadvantaged both by the procedure that the prosecution have adopted, and by the decision made by the learned judge, and by the lapse of time, and that the rules forbid, for example, the prosecution taking advantage of an adjournment to achieve this position. Well, the simple truth is 5this. The defence are wrong. They have all of the documents. They have all of the original documents. They have always been able to access them in any way that they want to access them. They can have and, for all I know, may have created a whole range of schedules of their own. Those schedules, for example, being, put simply, lists of complaints against the defendant, lists of examples of his compliance with requests to deal with topics, a whole range of things. And it must have been entirely predictable from the word go that this data would be mined by the prosecution in the way that they have and with a view to demonstrating the point that they wish to demonstrate."

20. In our view, the judge was right to take that approach. The schedule was plainly of assistance. It was an admissible document, being based on the documents taken from LPG's own computers. A method was plainly needed to corral and present in a digestible form the emails which LPG had received that contained complaints about the service they provided. A schedule of some sort was inevitable. It is impossible to see how the schedule that was produced could be the subject of any sustainable complaint. The applicant's concern that this was only a small part of the total number of emails received was expressly made to the jury and was, in any event, obvious. Moreover, at no time did the applicant suggest any workable alternative to the schedule which the prosecution provided.

21. For those reasons, therefore, the argument about the admissibility of the schedule is rejected.

Ground 3: No Case to Answer

22. The applicant submitted at the close of the prosecution case on 25th March 2019 that there was no case to answer. The principal basis of this application was that the number of complaints, when seen against the context of the business generally, did not cross the criminal threshold. In our view, the submission of no case to answer was a very optimistic submission. Given the contents of the schedule and the live evidence, which we have already outlined, there was, on any view, a case for the applicant to meet. He could, of course, make his points, as he did, as to the percentage of emails that contained a complaint, but that could not somehow prevent the charges from even being considered by the jury. The judge ruled to that effect, and the single judge said that the submission of no case to answer had been "rightly rejected".

23. There is nothing we can usefully add to that. We therefore reject ground 3.

Ground 1: Direction in Respect of Due Diligence

24. We therefore come sequentially to the end of the evidence and the judge's directions to the jury. The complaint is that the judge should have but failed to direct the jury as to the applicant's defence of due diligence. The single judge rejected that submission. For the reasons that we give, we agree with the single judge.

25. The first point to make is that the defence of due diligence could not in law be available in relation to the offence under count 3. By operation of Regulation 17, the defence of due diligence is not available for an offence of unfair practice, contrary to Regulation 8 (which was the source of count 3). That is accepted by Mr Monteith QC in the addendum grounds. So it must be remembered that this point does not address the most important count of which the applicant was convicted.

26. That leaves counts 2 and 8. It is certainly right that a defence of due diligence may, in 6theory, have been open to somebody in the applicant's position. But such a defence would have need to have been asserted and then subsequently supported by evidence before it could properly be the subject of a direction from the judge. In the present case neither of these events occurred.

27. There was a lengthy Defence Case Statement which ran in all to 61 paragraphs. It set out in detail the defences to each count. It made no mention of the defence of due diligence in relation to either count 2 or count 8. Instead, the points raised in the Defence Case Statement were specific matters of fact which were challenged. Those disputes doubtless gave rise to the long trial. In addition, when he gave evidence, the applicant made no mention of any due diligence on his part or any due diligence system that LPG had in place. By reference to the evidence recorded in the summing-up, it seems to us that there was, indeed, no significant part of the applicant's evidence that could possibly be said to go to a due diligence defence. Accordingly, we find that such a defence had not been identified, was not the subject of any significant evidence, and was therefore not properly made the subject of any direction by the judge.

28. However, there is a further point on this part of the renewed application. Mr Heller, who appears on behalf of the prosecution, referred to the decision of this court in **R v Wilson** [2013] EWCA Crim 1780. In that case a similar complaint about the absence of a direction on this potential defence was rejected. It appears clear that Mr Heller raised this point both during his exchanges with Mr Monteith QC at the end of the case and also in the skeleton argument supporting the Respondent's Notice.

29. We consider this to be a significant point. In giving the judgment of the court in **Wilson**, Gross LJ referred to the complaint that this defence had not been left to the jury. He went on to say:

> "23. The learned judge expressly decided not to place this potential defence before the jury. The reasoning behind that decision is as follows. Before considering the defence, the jury would have had to be satisfied, to the criminal standard of proof, that the appellant had consented or connived in the commission of the offence by the company, or that the company's offence was attributable to his neglect. How, it may be asked, can the jury on the one hand be sure that there had been such consent, connivance or neglect and on the other hand consider that the appellant could prove that he had exercised that due diligence? This was a defence which was only available if and when the jury were sure that there had been consent, connivance or neglect. If they were sure of that, the issue of due diligence could not possibly arise. In our judgment the point is obvious and this ground fails."

30. We consider that precisely the same analysis would apply here. We do not accept that Wilson is distinguishable, as Mr Monteith QC argued. Indeed, we consider it to be of direct application.

31. In all those circumstances, we do not accept that the judge erred in not directing the jury as to the defence of due diligence.

Ground 5: Incomplete Legal Directions

32. Here the complaints are perhaps of a somewhat scattergun nature. We do not accept that there is anything in any of them.

33. First, it is suggested that the indictment was confused because of the inclusion of alternative counts, and that in some way the judge should have given further directions about them. We do not agree. The use of alternative counts in indictments of this kind in regulatory cases is entirely normal. There is no evidence that the jury in this case failed to understand the correct approach to alternative counts.

34. There was some debate before the judge as to whether a direction was required in accordance with **R v Brown** (1983) 79 Cr App R 115, namely, a direction about the proper treatment of the particulars of the offences set out in the indictment. The judge considered whether such a direction was required, but concluded that it was not. The single judge agreed with that approach. In our view, that was the right course. Any such direction in a case of this sort ran the risk of being an unnecessary complication. It

could have been potentially confusing. In our view, it was unnecessary. The jury would have had a good grasp of what the particulars were of each of the offences.

35. Finally, there is a catch-all complaint that there was insufficient time for the applicant's counsel to consider the judge's proposed legal directions. We do not accept that. They were properly provided in draft. We have been referred to some of the exchanges between counsel following their provision. Thereafter, the judge produced a final set of directions and summed up to the jury on that basis. There is, therefore, nothing in ground 5.

Ground 6: Inaccurate and Unbalanced Summing-up

36. Finally, there is a lengthy list of complaints about the second part of the judge's summing-up which dealt with the facts. We do not accept the criticism that, when taken as a whole, the summing-up was inaccurate or unbalanced. We accept, as does the prosecution, that the summing-up could have been better structured and therefore shorter. But that is not a complaint of substance and is, we apprehend, a by-product of the way in which the case was presented at trial by both sides. In addition, we do not consider that any of the matters identified under this ground, even if correct, could lead to a conclusion that the applicant's conviction was unsafe.

37. In those circumstances, given that this is a renewed application, we do not go through each complaint in any further detail.

Summary of the Application for Leave to Appeal against Conviction

38. For those reasons, we consider that there is nothing in any of the grounds advanced. Accordingly, we refuse the renewed application for leave to appeal against conviction.

The Application for Leave to Appeal against Sentence

39. As noted, the applicant was sentenced to 14 months' immediate imprisonment. It is said that, by reference to the relevant guidelines, the judge should not have imposed a sentence of immediate imprisonment and that, having regard to what is said to be the lack of harm, the applicant's low culpability and his exemplary good character, as well as his mitigation, the custody threshold had not even been crossed. It was said that if a custodial sentence was necessary, it should have been measured in weeks, rather than months.

40. There is also a separate complaint about the judge's decision to disqualify the applicant from being a company director for four years. It is said that that decision might have an impact on the applicant's immigration status. That is a point to which we will return.

41. In the light of those submissions, it is as well to remind ourselves of what the judge said in his sentencing remarks. He said:

> "… dealing with your position in relation to it, my view and interpretation of this case is that your level of culpability is high. We now characterise most cases by reference to culpability and harm.
>
> Why do I say it is high? Well, I say it is high because, self-evidently, you are not a one-man band exactly but you are the person who has the absolute control over everything that goes on. You have people who are driving motor vehicles, not uncommonly very badly. You have Ms Israh in the office. You almost certainly have a couple of other people who work in different roles. I think from time to time your brother, when he has been fit to work, has assisted you in your operation but the reality is that it is controlled entirely by you from start to finish.
>
> In my view, on the evidence, all relevant decisions were made by you and that in my view categorises your culpability level as high in relation to the offences which have been committed."

A little later on, the judge reiterated that and then went on:

> "So, in terms of culpability, as I said earlier on, it is high. In terms of the harm, in my view it is significant and I can put it another way as well. It undermines the expectations of other companies who are operating legitimately if a person such as you operates a company in this way and you did, and we should not forget that the law says that the jury had to decide that you either connived at what went on, consented to it, or it all happened as a result of your neglect."

42. The judge was obviously in the best place to make those assessments. Accordingly, we turn to the complaints about the sentencing exercise, having reminded ourselves that the judge considered that the applicant's culpability was high and that the harm from his offending was serious.

43. We deal first with whether or not a sentence of immediate imprisonment was justified. We are in no doubt that the judge was right to conclude that the custody threshold had indeed been crossed. The judge was again in the best position to assess the applicant's degree of culpability and the degree of harm caused by his activities. The single judge noted that his was "sustained, greedy, misleading of customers with a view to substantial financial gain".

44. As to the question of whether or not the sentence should have been suspended or whether immediate imprisonment was appropriate, that is par excellence a decision for the trial judge. In our view, the judge's decision in this case was unsurprising. That is particularly because of the applicant's failure to take any notice of the warnings which had been issued by Trading Standards. It seems to us that the continuation of many of these offences after those warnings 9had been given was a significant aggravating feature.

45. In those circumstances, we consider that it was open to the judge to conclude at the end of the trial that the sentence of imprisonment was to be immediate and not suspended.

46. In relation to the period of 14 months which was identified, the judge arrived at that period having taken into account all of the relevant facts. It is not suggested that the term was unlawful. No authorities have been identified to us which show that such a term in a case of this sort is manifestly excessive or even out of the norm. In our view, the term of 14 months, although stern, was a term that was plainly open to the trial judge.

47. We return, therefore, to the point flagged up earlier, namely the question of the applicant's immigration status. The fact that the applicant has already been sentenced to and has served a period of imprisonment in excess of 12 months has an impact on his immigration status and application. The sentence makes the applicant 'a foreign criminal' and liable to deportation, pursuant to section 117D(2)(c)(i) of the Nationality Immigration and Asylum Act 2002. It is now said, in an argument advanced for the first time in the document produced yesterday, that this has had a disproportionate impact on the applicant's family, because they, too, would have to leave if he left the United Kingdom.

48. The difficulty with all of that, in our view, is that not only is this argument not foreshadowed in the grounds of appeal, but it is not open to the applicant as a matter of principle. What matters in any sentencing exercise is what the appropriate term of imprisonment might be, with the judge always endeavouring to keep it as short as is appropriate. The judge came to a view and, as we have said, the term of 14 months he imposed is not open to criticism.

49. In those circumstances, it is not for the judge – and certainly not for this court – effectively to retro-fit or re-engineer the appropriate sentence by reference to the potential immigration consequence of the sentence. The question of the applicant's immigration status and the potential effect on his family was clearly something which the applicant ought to have had in mind throughout these events. It cannot, we fear, make any difference to the application for leave to appeal against sentence.

50. Accordingly, for those reasons both of these renewed applications are refused.