Neutral Citation Number: [2021] EWCA Crim 1785

Case No: 202000948/B3 & 202000949/B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Crown Court at Leeds
His Honour Judge Khokhar
T20180784

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2021

Before :

LADY JUSTICE MACUR
LORD JUSTICE GREEN
and
MRS JUSTICE CHEEMA-GRUBB

- -

Between :

REGINA
- v -
Peter HUNTER
David Thomas SMITH

(Transcript of the Handed Down Judgment.
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Ben Douglas-Jones QC & Rhodri James (instructed by **Tuckers Solicitors**) for the **Appellants**
Jonathan Sandiford QC & Danielle Graham (instructed by **City of York Council Trading Standards**) for the **Respondent**

Hearing date: Thursday 7th October 2021

- -

Approved Judgment

Lord Justice Green:

A. Introduction and context

1. There are before the Court appeals by Peter Hunter and David Smith against their convictions on 13th February 2020 at Leeds Crown Court for fraudulent trading contrary to Section 993(1) Companies Act 2006 ("CA 2006") and for possession or control of an article for use in fraud contrary to Section 6(1) Fraud Act 2006 ("*FA 2006*").

2. On 24th February 2020 Hunter was sentenced to a term of imprisonment of 4 years. Smith was sentenced to a term of imprisonment of 2 years and 6 months. Both were disqualified under Section 1 Company Directors Disqualification Act 1986 for 10 years.

3. The appeals raise novel points concerning the legality of what, in common parlance, is referred to as "*ticket touting*", namely the practice whereby individuals or companies acquire tickets for popular sporting and cultural events and then seek to resell them, usually at a substantial premium, on secondary ticketing websites.

4. We understand from the evidence that a substantial number of other businesses operated in a manner very similar to that run and managed by the appellants.

5. To understand the case, we should set out the acronyms that are routinely used: (ii) primary ticket sellers - "*PTS*": (ii) primary ticketing websites – "*PTW*"; (iii) secondary ticketing websites – "*STW*".

6. The *modus operandi* of such businesses is relatively simple. Organisers of popular sporting and entertainment events (i.e. PTS) routinely impose restrictions on the tickets they sell limiting the number of tickets that any one individual can purchase and prohibiting resale. They often also make plain that if these restrictions are breached, they reserve the right to cancel the ticket and refuse the ticket holder entry to the event. Some event organisers sell the tickets themselves, but it is common for organisers to use agents to sell the tickets for them. In particular they use PTW. As agents the PTW are required to respect the restrictions which their principals (the event organisers) have imposed, and which attach to the tickets sold via their websites.

7. The object behind the restrictions is to prevent the very activity that the appellants in this case were engaged in, namely the bulk purchase of tickets for an event with a view to resale at a substantial profit, usually amounting to multiples of the ticket face value, on STW to the detriment of consumers both as to price and risk.

8. Ticket touts circumvent these restrictions by the systematic use of "*bots*" and other software designed to make multiple applications to PTS and PTW when tickets become available. These systems operate to represent falsely to the ticket vendor that these business purchasers are individual consumers who intend to use the tickets for their personal use. The bots perform multiple simultaneous applications using false names and addresses and in so doing dupe the vendor into thinking that the sale is a genuine one by a consumer who will respect the restrictions set out in the terms and conditions of sale. This process is known as "*ticket harvesting*".

9. Tickets acquired in this manner are then sold on STW invariably at a substantial mark-up on the ticket face value. STW act only as markets or platforms for ticket touts to sell, as principals, the tickets they have acquired. They do not act as vendors themselves; they are a platform and nothing more. They are rewarded in a variety of ways and normally take their cut out of the amount paid by the consumer for the ticket before remitting the balance to the tout. There is some evidence that the cut might be as much as 25% of the ticket price.

10. The evidence at trial established that touts using relatively inexpensive bots and software, some obtainable from the dark web, could make huge profits from acquiring and reselling tickets. Evidence the prosecution gleaned from the appellants (based on PayPal sales and bank records) suggested that during the indictment period (of 30 months from June 2015 – December 2017) the appellants made an outlay of about £4m on acquiring tickets and obtained returns exceeding £10.8m. Hunter in his oral evidence during the trial suggested that there were about 120 other businesses such as his.

11. Evidence before the jury also highlighted the significant practical difficulties confronting event organisers seeking to enforce these contractual resale restrictions. They are concerned that allowing touts to sell tickets at hyper inflated prices causes them reputational harm but also that it is, simply put, deeply unfair on fans. Some organisers go to considerable efforts to enforce the restrictions, and do so successfully. It follows that there is a real risk, albeit not a certainty, that a consumer who acquires a ticket on a STW and who presents it to obtain admission to an event will have the ticket cancelled and entry refused.

12. One feature of the case is that neither the STW used by the appellants to sell tickets, nor the appellants themselves, ever made clear to consumers the risk attaching to the purchase of a ticket, namely that consumers were acquiring at inflated prices tickets that the event organiser might treat as null and void. Had this been transparent then it can properly be inferred that purchasers might have been reluctant to spend large sums on tickets that might turn out not to permit entry to the event in question. This lack of transparency is unlawful. In this connection, Regulations 5 – 6 of the Consumer Protection from Unfair Trading Regulations 2008 impose a duty on sellers of tickets not to present information about the existence or main characteristics of a ticket in a way that deceives or is likely to deceive a consumer. The Regulations define, in effect, the main characteristics of a ticket as including the benefits and risks attaching to it. Regulation 6 imposes a duty not to omit information as to the main characteristics of the tickets that an average consumer needs in order to take an informed decision whether to buy or not. It is the Prosecution case – which seems to us incontrovertible - that the appellants breached these statutory duties when selling though STW with no warning that the tickets were at risk of cancellation because of the manner in which they had been acquired by the appellants and because of the contractual restrictions attaching to them. Indeed, it was a deliberate part of their business methodology that they kept this information quiet.

13. Counsel for the appellants in written submissions has described the issues arising on this appeal as "*landmark"*. The appellants are charged with offences under Section 993(1) CA 2006 which, in summary, makes it an offence to carry on any business "… *for any fraudulent purpose*".

14. The Prosecution alleges that the appellants set up a business system which was designed to deceive tickets vendors into selling them tickets when, had they known the true identity of the purchaser and their intended use of the tickets, they would have refused to make the sale. The Prosecution also alleges that in failing to warn consumers buying tickets on STW of the risk of cancellation, they were deceiving those consumers into believing that they were purchasing valid tickets. It was alleged that the central "*purpose*" behind the way in which the appellants carried on their business was dishonest and fraudulent. The prosecution also charged the appellants with possession or control of articles for use in fraud contrary to Section 6(1) FA 2006, namely the software which was the engine room of the business, and which was central to the appellants ability to "*harvest*" tickets in bulk.

15. This was the basic system as the Prosecution described it to the jury. During the trial an important part of the defence of Hunter was that at least some PTS/PTW were not only aware that the appellants were purchasing tickets in order to sell them in bulk on STW, but actively encouraged such purchases and resale, for example by providing financial incentives to encourage bulk dealing. The appellants' skeleton for this appeal put the issue in the following way:

> "This case is the landmark case brought by National Trading Standards (NTS) against the directors of BZZ Ltd (formerly Ticket Wiz Ltd) ('BZZ') through which it was alleged that the practice of secondary ticket seller (STS) businesses – buying tickets from primary ticket sellers (PTSs) and selling them on secondary ticket websites (STWs) - was fraudulent. The commercial sale of tickets by commercial STSs via the "big four" STWs - Stubhub, Seatwave, GetMeIn! and Viagogo – had been not merely tolerated, but encouraged, for many years, notwithstanding those most PTSs' tickets were sold with purported restrictions ostensibly limiting the number of tickets that could be bought by one individual or household. Three of the big four were owned by, or operated in partnership with, PTSs. The STWs classified traders like BZZ as "trusted", and it was acknowledged that they would circumvent the purported restrictions. One STW gave BZZ and other traders a bar code scanner so that they could resell digital tickets with a unique trader-STS-generated barcode. The Prosecution chose to indict "fraudulent purpose" fraudulent trading. It expressly contended that it was not alleging "deception" fraudulent trading and did not need to allege deception. The alleged fraud was predicated on the averment that the Ts and Cs restricting multiple purchases, which purported to govern the sale and use of the tickets, were lawful and effective."

16. Before us the appellants identified five grounds of appeal. Some of these contain a significant number of sub-issues. Shortly before the appeal was to be heard the appellants lodged an application to adduce fresh evidence under Section 23(2)(c) and (d) Criminal Appeal Act 1968 ("CAA 1968"). This evidence focused upon the corporate relationship between PTW and STW and the extent to which they agreed with

touts to acquire tickets in breach of event organisers restrictions and then resell them on STW.

17. We have taken the five grounds and the application to adduce fresh evidence, and the sub-issues that are raised, and re-ordered them in order to enable us to address them in a sensible manner. Issues 1 – 2 concerns admissibility of evidence. Issues 3 – 4 concern the components of the statutory offence under section 993 CA 2006. Issues 5 – 7 concern issues relating to the validity and enforceability of the restrictions attaching to tickets. Issues 8 and 9 concern how a judge should direct juries in a case such as this. The individual issues are as follows:

    Issue 1: The application under section 23 CAA 1968 to adduce fresh evidence of the arrangements between touts and primary and secondary ticketing sites to encourage and facilitate the purchase and resale of tickets at a premium.

    Issue 2: The application of Section 78 PACE to the admissibility of emotive and prejudicial evidence about the Ed Sheeran charity concert and the Ariana Grande memorial concert.

    Issue 3: The relationship between the statutory offence under Section 993 CA 2006 and the common law offence of conspiracy to defraud.

    Issue 4: The components of the offence under Section 993 CA 2006: (i) whether there has to be deception or an intention to deceive; (ii) whether there has to be a victim who suffers actual or intended harm?

    Issue 5: The "*fairness*" and hence enforceability under the CRA 2015 of the event organisers terms and conditions of sale which impose restrictions on the purchase and resale of tickets and the risk of ticket nullity.

    Issue 6: The status in law of a "*ticket*".

    Issue 7: The scope effect and operation of the doctrine of "e*quities darling"*.

    Issue 8: The duty of the judge to direct the jury in an objective and dispassionate manner.

    Issue 9: The duty on judges to direct juries on complex common and civil law matters such as: (i) the scope and effect of the restrictions contained in vendor's terms and conditions of sale; (ii) the distinction between void and voidable; (iii) the operation of the fairness test under the CRA 2015; and (iv), the doctrine of "equities darling".

18. We should state at the outset that we dismiss the appeals. We also dismiss the application to adduce new evidence. We are clear that the convictions were entirely safe.

19. We would add this. If the appellants are correct and there are potentially hundreds of other operators all running businesses like theirs; and if they are also correct and there is connivance and collusion between ticket touts and the PTW and STW, then the ticketing market is one which appears to be characterised by a high degree of criminal fraud. The evidence we have seen certainly suggests this possibility. This appeal

however focuses more narrowly upon the conduct of the appellants as buyers and resellers of tickets, and not on the possibility that fraud is also being perpetrated by others. It will be for the prosecutorial authorities to consider whether other and broader enforcement action is necessary.

20. We heard argument on 8th October 2021. We received additional written submission following the hearing from both parties on issues which arose during argument. Given the significance and novelty of the issues arising we reserved judgment. We are grateful to all counsel for their helpful written and oral submissions.

B. The facts

The appellants

21. The appellants were officers of a company called BZZ limited ("*BZZ*"). The company had initially been incorporated in 2004 under the name Ticket Wiz Limited ("*TW*") but was renamed in late 2016/early 2017. The business of the company was to acquire and then resell tickets for music and other popular cultural and sporting events. It was alleged that Hunter was the driving force behind the business and ran the company on a day to day basis. Smith, for his part, was a co-director and Company Secretary and was also involved in the running of the company. It was alleged that from time to time he used the multiple identities to purchase tickets and was aware of the use of software and "*bots"* which would enhance the success of their fraudulent activity. There has been no appeal as to these descriptions of the roles of Hunter and Smith.

The prosecution case as to the system used by the appellants: Counts on the indictment

22. There was a four-count indictment before the jury. Counts 1, 3 and 4 focused upon different aspects of the offence of carrying on a business with a fraudulent purpose under section 993 CA 2006. Count 2 focused upon the possession of the equipment needed to carry on such a business, which was a separate offence under section 6(1) FA 2006. We summarise the counts as follows.

23. Count 1: The Prosecution case was that the appellants set up a system designed to circumvent the restrictions imposed by ticket vendors. By using this system BZZ and TW deliberately deceived ticket vendors (PTS/PTW) into believing that the purchaser was an ordinary consumer, not a ticket tout. They set out, using this system, to breach the terms and conditions of the vendor, such as the prohibition on commercial or non-personal use and the restrictions on quantities of tickers permitted to be purchased. It was the Prosecution case that had the appellants been honest about who they were and what they intended to do with the tickets that the vendors would not have sold to them.

24. Count 3: The Prosecution also alleged that the appellants were involved in fraud when they sold tickets via STW where they represented falsely to end-consumers that the tickets they acquired (from BZZ or TW) at inflated prices were in every respect valid and would guarantee entry to the event in question. It was said that the appellants knew that by virtue of the initial terms and conditions, tickets they resold were at risk of being cancelled and the ticket holders being refused entry to the event. Although it was difficult for genuine event organisers, promotors and venues to enforce the terms and conditions, consumers were nonetheless exposed to the risk that consumers purchasing from BZZ or TW would have their tickets cancelled or be refused entry to the event.

There was evidence before the Court that this was a real and material risk and that some vendors did seek to enforce resale restrictions, successfully.

25. Count 4: The Crown alleged yet further that the appellants were involved in speculative or "*spec*" selling where they listed tickets for sale on STWs when they had not yet purchased the tickets. That listing for sale was in breach of the published terms and conditions of secondary sites which stated that secondary sellers must guarantee that they owned the tickets for sale. On the facts, the Prosecution alleged that there were proven instances where after securing a sale at an inflated price, the appellants would only then try to source the tickets. There was some, albeit limited, evidence of the appellants selling tickets which they were then unable to source. In such cases the appellants operated upon the assumption that the secondary ticking website had to step in order to supply the purchaser with a ticket or pay compensation.

26. Count 2: Finally, the prosecution alleged that the possession of relevant software designed and intended to deceive ticket vendors into believing that the appellants were genuine end users was an offence under the FA 2006. The indictment gave as examples of this kit: an Insomniac Browser computer programme, copies of computer software referred to as Spinner Bot used in the acquisition of tickets from See Tickets.com, AXS.com, Eventim.com and Royal Albert Hall; and debit and credit payment cards held in the names of persons other than the company.

The Waterson Report 2015

27. In 2015, the Secretaries of State for Business, Innovation and Skills and for Culture, Media and Sport invited Professor Michael Waterson to lead an independent review into consumer protection relating to secondary ticketing facilities. This led to a reported dated May 2015 entitled "Independent Review of Consumer Protection Measures concerning Online Secondary Ticketing Facilities" ("*The Waterson Report*"). The report was presented to Parliament pursuant to section 94(3) of the Consumer Rights Act 2015. The Waterson Report was relied upon during the trial by the defence for a variety of reasons. It provides an overview of the ticketing market. It was not said by any party that it was in any relevant way inaccurate as an overview.

Restrictions imposed upon ticket sales to protect consumers

28. It is routine that significant restrictions are imposed upon the resale or use of tickets which have as their object and intent the protection of consumers from being exposed to secondary ticket sales.

29. In a careful and detailed ruling of 3rd November 2019, addressing various issues of contract law, the judge set out certain conclusions based upon the evidence before the court. The judge had been invited by the parties to express a view upon these issues since they could affect the way in which the respective parties presented their cases at trial. We would summarise the main findings made by the judge as follows. These central facts were not either during the trial or before us materially in dispute.

30. Event organisers and promotors set the price for the event, organise the venue and are responsible for the enforcement of terms and conditions attaching to the sale of tickets. There were 79 pages of terms and conditions placed before the jury. From these it was possible to identify the central restrictions imposed as standard upon the sale of tickets.

First, terms and conditions restricted the use of the vendor's website to personal and non–commercial users only. Secondly, terms and conditions imposed limits upon the number of tickets permitted to be purchased by any one person. Thirdly, terms and conditions imposed prohibitions upon the resale of tickets for commercial gain or profit. Fourthly, terms and conditions rendered tickets purchased or resold in breach of the vendor's terms void or liable to be cancelled and to this end many included an express provision permitting cancellation without notice and conferring a right to refuse entry or the right to eject a ticket holder if found to be in breach of the terms and conditions. Some PTS reserved a right of cancellation for breach without a refund.

31. It is relevant (to Issue 5 – see below) that the judge concluded that from the perspective of a lay person the terms and conditions were sufficiently clear and transparent and were capable of being understood.

32. The Waterson Report also summarised the sorts of restrictions that were commonly imposed:

> "Restrictions on Ticket Resale
>
> 9. Event organisers may restrict the resale market for tickets in a number of ways. Firstly, typical terms and conditions on ticket sales will prevent the purchaser reselling the ticket, by stating expressly that a ticket must not be resold. Breaching this term risks the ticket being cancelled if the organiser can identify the vendor or the ticket. How successful this policy is will depend on the effort the organiser is willing to make (including checking identities at the door of the venue). Adele's management, for example, made a big effort to restrict resales for her recent UK tour by cancelling purchases from duplicate web, IP or postal addresses on tickets they controlled.
>
> 10. Secondly, although event organisers may allow for "returns", offering to resell purchasers' tickets to other customers, there will be no guarantee of a sale and there may be an administrative charge. There are risks for the organisers that this will undermine total sales, because they may have other tickets unsold that are inferior to those being returned. This is not, therefore, commonly available.
>
> 11.Thirdly, organisers can restrict the volume of tickets that can be purchased. This might mean restricting sales to four or fewer tickets. However, it requires significant effort to identify and stop people buying multiple batches of four tickets and it is almost impossible if there is more than one primary agent.
>
> 12.The downside for the consumer facing these scenarios is that they may not be refunded by the event organiser in the event of a change of circumstances and may not be able to "transfer" the ticket to another individual, so they will therefore lose their money if the ticket can no longer be used. However, informal

> resale at ticket face value to an acquaintance may often be overlooked and accepted by event organisers."

The growth of secondary ticket markets

33. The growth of secondary tickets websites (STW) has provided a marketplace where buyers can resell tickets to consumers. Such sites can perform a valuable function in allowing genuine consumers who, for instance, are unable to attend a ticketed event an opportunity to resell their tickets.

34. However, they also provide a platform which enables ticket touts to acquire and then sell large quantities of tickets in breach of the terms and conditions imposed by event organisers. There was evidence before the court that some STW were aware that businesses, such as those operated by the appellants, were buying and selling tickets in large volumes and encouraged such sales.

35. The Waterson Report, in its description of the different types of participants in the market, described the role played by some STWs in financially incentivising bulk sales by touts:

> "Ticket Brokers ("traders")
>
> 5.13 Fifth, there are persons who act as ticket brokers, buying and selling tickets, and utilising the anonymity offered by the internet not to declare themselves as traders. The scale and motive behind their activity is different from individual purchasers selling tickets they can no longer use. They range from so called "bedroom touts" to sophisticated businesses. The secondary ticketing platforms make it easier for brokers to operate and may reward "power sellers" (those who sell tickets in large volumes with better terms, for example, early payment. UK consumer law requires that traders provide consumers with information about their identity, as well as certain other information as discussed in Chapter 2. This is because consumers have rights against traders that extend beyond the secondary ticketing provisions of the CRA e.g. under the CCRs and CPRs). The existence of the platform does not change this, but I found very little evidence of this information being supplied. This is in notable contrast with goods platforms such as Amazon and eBay. This makes it impossible for a consumer to avoid a reseller they have had a bad experience with and who may be offering tickets on a number of different platforms. In my view, the existence of guarantees on the platforms (see below) does not obviate the obligations on "traders" and the platforms should seek to display the details of volume sellers who it is reasonable to presume are acting as "traders" in the consumer law sense."

36. Various specimen sets of terms and conditions were in the evidence before the jury which shed further light on the role played by STWs. Such sites generally made clear that they were acting as no more than a marketplace where the vendor of the ticket and

the purchaser would be put together. The secondary site did not become the vendor itself. A sale on such a site would therefore be a sale as between the appellants (and their businesses) and the final consumer. This was, as we set out below (see paragraph [57]), also the conclusion of the judge on the evidence before the court.

The use of bots/ticket harvesting

37. It was the Prosecution case that the appellants and their staff used multiple names and identities of persons other than BZZ and TW to purchase tickets that were offered for sale to consumers via the website of primary ticket sellers such as AXS, Eventim and Ticketmaster. They used "*bots*" and other specialist software to enable them to access the websites of some of the primary ticket sellers and harvest tickets. A single bot could use multiple identities to buy a significant number of tickets. The appellants also used an internet browser called Insomniac which could create multiple tabs and mask the user's IP address. As a result, one person could use different identities to purchase multiple tickets. Although the browser in itself was not illegal, the Prosecution's case was that the appellants used it to buy tickets in breach of vendor's terms to the detriment of consumers. As a result, they could then re-sell the tickets at inflated prices on secondary websites such as Viagogo, Seatwave, Stubhub and GetMeIn.

38. Once again, the Waterson Report provides a useful explanation as to how bots are used to harvest tickets. And again, there is no dispute as to the basics of the system:

> "How do "Bots" and "Botnets" work?
>
> 2.17 A "bot" (derived from the word robot) is a computer programme that automates the process that a human would go through when buying a ticket, completing it much more quickly than a human. A bot can search for tickets, fill in identity details and payment information and select "purchase". Bots are not just confined to ticketing but they are, for instance, used in online gambling to make instantaneous and rational decisions. In stock market trading, automated technology processes transactions in microseconds relying on algorithmic trading programmes. Here I use the term "bot" to encompass electronic means of rapid purchase more generally, except where it is important to be specific.
>
> 2.18 Those seeking to buy a high volume of tickets for resale can be assisted by the use of bots or botnets which they use to apply for tickets from primary agents. The use of bots and botnets can (in theory at least) allow individuals to acquire large quantities of tickets in a short timeframe, by conducting multiple simultaneous transactions. The Independent Review of Consumer Protection Measures concerning Online Secondary Ticketing Facilities report from the Office of the New York State Attorney General (NYAG) suggests that to conceal large numbers of concurrent connections to a ticketing site, the perpetrator will purchase hundreds or even thousands of proxy IP addresses, with the "bot" then automatically rotating through their store of proxy IP addresses to bypass detection and

blocking. The bot user can also register a high volume of email addresses to conceal the fact that a single purchaser is responsible for many concurrent transactions.

2.19 The report from the NYAG describes bots as having four functions in relation to ticketing:

- to constantly monitor ticketing sites to detect the release, or "drop", of tickets
- to automate the search for and reservation of tickets
- to automate the process of purchasing tickets
- to defeat any anti-"Bot" security measures that are employed.

2.20 As a bot can accomplish a task far faster than a human and on behalf of multiple identities, they can have the effect of "crowding out" ordinary human purchasers. TicketingBots, tailored to particular ticketing internet sites are available for sale on the internet. For example, a "bot" that claims to access royalalberthall.com is available from TicketBots for around £530. The location in the world of those behind TicketBots is not advertised, but it has been suggested that the IP address is hosted in Panama.

2.21 A "botnet" is a number of connected computers using bots. While there can be justifiable reasons for having a botnet (such as running a computer programme at different sites) and they are not illegal per se, the reality is that the most common uses are perceived as harmful. These include using a "botnet" for a Distributed Denial-of-Service (DDoS) attack on a computer system, causing a loss of service to users and sending massive amounts of bulk email, known as spamming. Computers can be co-opted into a "botnet" and execute malicious software (malware). This malware then installs modules that allow the computer to be commanded and controlled without the owner's knowledge and become part of a network of infected computers. Hence the compromised machines are referred to as drones or zombies and the malware running on them as bot. A command and control server is then used to connect infected computers together to form a "botnet".

2.22 I found that 14% of respondents to the Call for Evidence commented on the need for action against ticketing bots and botnets. There was concern that technology was being used to acquire volumes of tickets in seconds for the purpose of resale, thereby depriving individual consumers of the chance to buy tickets from the primary sites. This is frequently described as persons "harvesting tickets."

The evidence relied upon by the Crown

39. We turn to summarise the evidence adduced by the Prosecution. It is unnecessary for us to rehearse it in any detail. It suffices to summarise the main types of evidence and to highlight some particular instances of it.

40. First, there was unchallenged evidence from Adam Webb, a PR company manager and campaign manager for the FanFair Alliance, a body which brings together individuals from the music and creative community to promote consumer protection and which seeks to enable fans to buy and exchange tickets at fair prices. He gave evidence about consumer protection concerns arising from secondary sales and as to the common terms and conditions imposed by ticket vendors designed to deter and prevent the use of bots to circumvent these restrictions. He also gave evidence as to the venues that did take active steps to cancel tickets acquired, invariably at inflated parties, on secondary markets.

41. Secondly, the Prosecution adduced evidence about the business system used by the appellants and its use of bots. Evidence was also given as to the knowledge of the appellants that their business activities were in breach of the terms and conditions of ticket vendors.

42. Thirdly, there was evidence arising from the search of the appellants' business premises on 12th December 2017 during which trading standards officers discovered 112 physical payment cards in various names issued by various card providers such as American Express, Barclaycard and Tesco Bank. The names on the cards included the appellants and 35 other individuals including present and former staff of BZZ and others who had allowed their names and card details to be used by the company. The Crown tendered schedules recording sales and correspondence as between the appellants and ticket sellers.

43. Fourthly, evidence was tendered concerning telephone calls made by Hunter and other employees to certain PTW to change the dispatch address for tickets that were purchased thus ensuring that the tickets were sent to their business premises, rather than to the false address used for the purpose of obtaining the tickets.

44. Fifthly, evidence was tendered that consumers who had acquired tickets from the appellants had been refused entry or had their tickets cancelled in relation to events including a Metallica concert, the Harry Potter and the Cursed Child theatre production, the Royal Edinburgh Military Tattoo, and an Ed Sheeran concert. In relation to the Ed Sheeran concert evidence was given by Stuart Galbraith, producer and co-promotor for Ed Sheeran and Chief Executive Officer for Kilimanjaro Live (a company which organised live concerts). He gave evidence in relation to the Ed Sheeran's 2018 Stadium tour and described the extensive efforts taken to regulate ticket sales which included the decision that tickets would be sold only to consumers with a strict limit of 4 per person, that no resales would be permitted save by consumers at face value plus fees through the Twickets website, and that any tickets otherwise resold would be void and entry would be refused. He also explained the practical steps taken to enforce such restrictions. Evidence was also given by Stuart Camp, Ed Sheeran's manager, focusing upon the adverse effect upon fans of having to acquire tickets at inflated prices. It was their aim to keep prices down to consumers. Both witnesses expressed their concern at seeing tickets for Ed Sheeran playing at the Teenage Cancer Trust charity event being

sold by touts for up to £490 per ticket. They wished to keep the prices as low as possible to ensure that fans could attend the shows. In 2018 Ed Sheeran played at 120 events to 9 million ticket buying fans.

45. Sixthly, in relation to consumer risk, evidence was adduced that save for Viagogo, none of the STWs offered a refund if a person was refused entry or ejected from a venue. Viagogo limited liability to £200 or the value of the ticket, whichever was the lesser of the two amounts. The Waterson Report (paragraphs 5.2 and 5.3) found that 2% of ticket holders were adversely affected in this manner.

46. Seventhly, evidence was tendered as to the STWs, their terms and conditions and the sales made by the appellants' business to such sites.

47. Eighthly, evidence was given by David Perry, Legal Director of the Competition and Markets Authority ("*CMA*"), in relation to the application of the statutory fairness test under the CRA 2015 and to the fact that it applied only to consumer contracts between traders and consumers. Accordingly, if a business purchased tickets, the Act would not apply as this was a trader/trader contract, not a consumer/trader contact. He also gave evidence as to CMA guidance that a prohibition on resale might be unfair to a consumer unless (i) the prohibition was brought to the attention of both the consumers and STW and (ii) assistance was given to consumers who had purchased a ticket from a STW so that they could obtain compensation if they were refused entry to an event. Various documents and letters containing guidance on the application of the legislation to the ticketing market authored by the CMA were also before the court.

48. Ninthly, evidence was given of Hunter's failure to mention facts in interview in particular his explanation for the use of multiple identities to acquire tickets, his explanation for the acquisition and sale of tickets in breach of the vendor's terms and conditions, and the nature of his relationship with those who worked for the PTW and STW.

49. Finally, evidence was given by a senior digital forensic analyst at North Yorkshire County Council Trading Standards, in relation to the examination of the computers and laptop seized from the appellants' business address and the fact that an Insomniac browser was installed on the devices which allowed multiple tabs to be used on one computer to simulate multiple distinct sessions thus giving the appearance that each tab was a completely distinct computer. He explained that Roboform Software had been installed on the devices allowing the secure storage of multiple login, identity and credit card details for a variety of websites and which also allowed for multiple login details for installed software applications which enabled a user to fill out website forms in a single click as details were taken from this stored information. The software contained 105 identities including credit card details and physical addresses. He also explained that internet bookmarks to a website called OmniChecker were found on each device. This website could be used to keep track of specific events on ticketing websites in order immediately to alert the user when tickets were on sale. He also explained that they located on the seized software the remnants of software packages relating to spinner bots for Eventim, SeeTickets, and the Royal Albert Hall. The search also discovered a dark web browser i.e., the part of the internet not searchable by a common tool such as Google or Yahoo and was often accessed via the Tor network. This browser was found to be installed on two of the appellants' computers.

The appellants' case at trial

50. Only Hunter gave evidence at trial.

51. There was no material dispute as to the facts concerning the basic *modus operandi* and the appellant's method of working. The defence focused upon whether this business system was dishonest and fraudulent and as to this no one was deceived and no one was harmed - there were no victims. Hunter accepted that he had adopted the practice of using different identities to gain more than the permitted number of tickets per individual but stated that this was not fraudulent as the PTS/PTW were aware of the practice and approved of it. The business had used friends and family's credit card to purchase tickets with their permission. The tickets had been resold in the knowledge that the terms and conditions were never enforced, and he had relied upon guidance from the CMA which stated that the term prohibiting the resale of tickets was unfair. There was no real "risk" attached to sales to consumers over STW. There was no dishonesty in acting in the way that he did. He accepted that speculative selling did on occasion occur, but he always acted in good faith and with the intention that he would be able to fulfil the order. In any event only 1 – 2% of the business operated on this basis. If he failed to acquire tickets to meet the order, then he knew that the secondary ticketing websites would step in to assist and there was no dishonesty involved in this practice.

52. He had frequent contact with the STW who encouraged him to sell as many tickets through them as possible. They offered incentives and he had a scanner which could be used to generate new barcodes for tickets so that the end consumer received a valid ticket. He used the Insomniac Browser manually to search for tickets and not automatically to purchase tickets. He was listed with Seatwave as a "*white list seller*" which status was afforded to large sellers only who had a good history of fulfilling orders. He had never experienced anyone being refused entry to an event. He was not exposing anyone to a risk of being refused entry. He denied that he was greedy. He had not answered questions in interview on the advice of his solicitor.

53. In the light of all of this and as a matter of law the Prosecution had to prove fraud and dishonesty which included: (i) that there was an actual intention to deceive; and (ii), that there was actual or intended prejudice to the proprietary interest of a victim. On the facts there was no intention to deceive and/or no harm to any proprietary interest of any victim. It was also argued that when the jury considered dishonesty and fraud they would have to take into account that the restrictions sought to be imposed by event organisers and promoters and PTW, and which were at the heart of the Prosecution case, were ineffective either because they were invalid (for instance because of the operation of the fairness test in the CRA 2015) or because under common law and equity the restrictions became ineffective upon transfer of a ticket from the appellants to a consumer.

54. As for Smith he gave a prepared statement in which he stated that he denied falsely claiming or creating the impression that he was not acting for purposes relating to his business. He did not act dishonestly. He did not give evidence at trial. Hunter said that Smith did not work within the company all of the time. He helped out as when required. He knew how the business operated and played a part in purchasing and listing the tickets.

The judge's ruling of 3rd November 2019 on issues of fact relating to the system used by the appellants.

55. We have already referred to the judge's ruling of 3rd November 2019 (see paragraph [29] above). Before the Prosecution case was opened the parties sought guidance from the judge on a number of issues of law. Some of the conclusions on law arrived at by the Judge are now subject to criticism. We return to these later. As part of his ruling the Judge set out some conclusions on issues of fact relevant to his rulings on the law.

56. In relation to restrictions in the terms and conditions attaching to tickets the Judge summarised the key restrictions and then said:

> "Before I consider these terms, I like to mention what the Waterson Review had to say at Paragraph 4.11:
>
> > "I suspect a personal revocable licence is not the public's understanding of a ticket and so it is therefore incumbent on those who consider "tickets" to have this status to make this clear when issuing them, including in what circumstances the licence is revocable. Fairness to the consumer is important here, as I suspect that the public's understanding is that ticket, whether paper or electronic, is something that guarantees the holder (not necessarily the original purchaser) of the ticket entrance to the event in question"
>
> Having gone through those terms, they appear to be clear and to the point, and any reader in my judgment would, subject to a few terms, be capable of understanding them on the basis that if he is capable of finding the website to see the terms and to buy a ticket online, he would be literate enough. He would certainly get the loud and clear message which they send out. Of course, he may not be able to understand the legal position but what is there, is easy enough to understand.

57. In relation to the contracts which underpinned the sales of tickets the defence had submitted that there were three contracts: (i) between the primary ticket sellers and the appellants; (ii) between the secondary ticketing websites and the appellants; and (iii) between the secondary ticketing websites and the ultimate purchasers. The defence did not accept that there was any contract between the appellants' company and the ultimate purchaser of a ticket through a STW. The judge disagreed:

> "What is the contractual position between a seller and a STW and between a buyer and the STW through whom a ticket is purchased? Having regard to the terms and conditions of the STWs, other than the "User Agreement" referred to above, there is no contract between a seller and a STW under which the title to the goods passes from D company to a STW. Similarly, in so far as a buyer is concerned, there is no such contract for the purchase of a ticket between him and a STW. STWs are marketplaces or platforms facilitating sales and purchases between the users of the websites. STWs never own the property

that is being sold through them—that much is explicit in their terms and conditions, and also the RFU case (see below)"

58. The judge also made findings about (i) the falsity of the representations made by the appellants to STW; (ii) the gain made by the appellants; and (iii), the absence of a requirement in law for there to be a victim:

> "…I shall now consider whether or not there were any breaches of the Ts &Cs which affects the contract to purchase tickets.
>
> It is accepted that the Ds and the employees of the D company were using credit / debit cards in their possession, in the names of family and friends and their own, to purchase event tickets. They also used spider bots and Insomniac Browser for the purposes of acquiring tickets. The D company deliberately used these cards and names to acquire these tickets to overcome the difficulty of not being able to buy more than the maximum number permitted per credit card, per individual or per household. It is also the case that at no time, it was indicated to any of the PTSs that these tickets were being purchased on behalf of the D company, nor that the intention was to re-sell these tickets immediately for profit. Clear it is, had that been the case, some if not all the promoters / PTSs would have refused to sell these tickets to the D company. Common sense dictates that they would have not permitted it because promoters could, had that been their intention, have sold those tickets themselves at the higher price rather than setting a lower face value, and make a profit for themselves. We know in the case of Ed Sheeran tickets, that the same were being resold by the Ds within hours of the same coming into the market.
>
> The prosecution case is that these tickets were fraudulently obtained by the D company. The question arises was there a fraud, or fraudulent representation made in the acquisition of the tickets. The requirements of the offence of fraud pursuant to section 2 of the Fraud Act 2006 are: i) Dishonestly, making a false representation, ii) Intending, by making the representation to make gain for himself or another iii) And representation is false if it is untrue or misleading and the person making it knows it is or might be untrue or misleading iv) Representation may be express or implied.
>
> In this case the prosecution rely upon the following false representation made on behalf the D company, having regard to the Ts &Cs: a) Purchasing tickets with the intention to resell b) Purchasing tickets in excess of the maximum permitted per individual per event by use of multiple credit cards in different names and thereby concealing the identity of the D company as the purchaser c) Making use of the bots and other automatic devices to process the tickets acquisition.

> It is clear that, that these representations arise from the acceptance of the Ts &Cs of the PTSs upon the purchase of the tickets. It is also clear that these implied representations were plainly false.
>
> The "gain", prosecution say is the obtaining of the tickets which were going to be sold at a price far above the face value of the tickets at which they were bought.
>
> This was clearly a systematic and well thought out plan pursuant to which tickets were purchased and re-sold on an industrial scale to make large profits. This, as mentioned at the outset, was the only business the D company conducted through the other two Ds and its employees. Subject to proof of dishonesty, which is a matter for the jury, it fulfils the requirement of the offence of fraud. It may be said, that thus far in this narrative, no one is actually losing out or that there is no victim. However, there are many frauds where there may be no obvious victims; the best example I can think of is the "mortgage fraud". In most of the cases, the false representation relates to mortgagee's ability to discharge the mortgage— where he exaggerates his income. He pays the mortgage as and when the instalments fall due and he might have even discharged the mortgage, with the financial institution suffering no loss, and yet, in law, he has committed a fraud."

59. Later in the judgment, in a passage addressing the distinction between void and voidable contracts under the CRA 2015, the judge encapsulated the gravamen of the Prosecution case which distinguished as between the falsity of the representations that were made, on the one hand, and dishonesty: "*It may well be the case that the jury decides that there was no dishonesty, in which case notwithstanding the false representations, there will not be a finding of fraudulent representations having been made*".

C. Issue 1: The application to adduce fresh evidence of the arrangements between touts and primary and secondary ticketing sites to encourage and facilitate the purchase and resale of tickets at a premium.

60. The appellants argue that fresh evidence has come to light which shows that there were corporate links as between PTW's and STW. It is said that this has emerged from a statement given by Mr Adam Webb in the context of a statement he has provided as part of evidence prepared for a trial which has yet to be heard. It is argued that this evidence paints a very different picture to that which he presented in his evidence at trial and, assuming his latest evidence to be true, it creates a new factual matrix in which the appellants' conduct was consented to by PTW and STW. If, as this new evidence shows, the PTW and STW were supportive of the appellants' business activity then their conduct cannot be dishonest because the PTW were not deceived, which is the Prosecution's primary case. In these circumstances it is proper to admit this new evidence under section 23 CAA 1968 and, upon it being admitted, either to allow the appeal or to adjourn to allow further cross examination of Mr Webb upon the issue.

61. We disagree. The evidence said to be "*fresh*" is not new; it is, at its highest, a gloss or embellishment upon evidence that was known about and available at trial. This is shown by a variety of pieces of evidence including an article in the Guardian dated 17th July 2017 in which the journalist raises queries about corporate links between Ticketmaster and STW it owns, and which casts doubt upon Ticketmaster's claims that they faithfully set out to enforce restrictions imposed by event organisers. The article states that the owners of Ticketmaster own several STW which took about 25% of the value of the ticket sold on their platform as commission. Hunter knew about this article because he engaged in a colourful WhatsApp exchange with the operator of a STW (who we refer to as "*MM*"), about the article during which they agreed that their business system enabled them to earn "*fucking loads*."

62. The article also refers to the FanFair Alliance Group, organised by Mr Adam Webb, which had published a guide called "*Help to beat touts".* MM said "*Nice!! Another boring article*" to which Hunter replied "*Yes"*.

63. The article also refers to the fact that one "Elsie Marshall" seemed to be applying for a substantial number of tickets but enquiries that had been made suggested that Ms Marshall did not exist. "Elsie Marshall" is in fact a pseudonym for MM. The WhatsApp exchange discusses the article and, in the light of the revelations made in the article, the desirability of MM using new fictitious names by which to apply for tickets. MM says, "*May change my name again then"* to which Hunter responds, "*good idea*".

64. The fact that some PTW/STW assist touts is also referred to in the Waterson Report at paragraph [5.13] set out at paragraphs [35] above. And, of course, it was central to Hunter's case at trial (see paragraph [52] above) that PTW/STW were aware of the bulk sale from and through them and facilitated and encouraged such practices, for instance by offering financial incentives, such that in the circumstances, it could not be said that they were deceived, suffered harm of any type or therefore that there was dishonesty and fraud.

65. It is, in addition, evident from the written legal directions and from the summing up on the evidence that the judge brought Hunter's defence squarely to the attention of the jury. When the jury convicted, they did so in the knowledge of the evidence that PTW and STW had corporate links between them, and that Hunter had given evidence that he was financially incentivised to buy and sell tickets in bulk. Even had they accepted this evidence they could in our view still quite properly have come to the conclusion that the offences were committed. There was no evidence that <u>all</u> PTS and PTW were conniving with touts and to the contrary there was evidence that some took significant steps to preclude touts and enforce the contractual restrictions. The jury might in any event have simply concluded that even if Hunter's evidence was true it served only to deepen the dishonesty, not expunge it.

66. Mr Douglas-Jones QC, for the appellants, was asked by the court why he had chosen not to examine Adam Webb at trial and had allowed his evidence to be read or indeed why he had not cross-examined anyone else with potentially relevant knowledge on links between the PTW and the STS. He told us that, upon the basis of the evidence that there was before the court, he would have been negligent to do so. We have some difficulty in understanding this but at the least it indicates that the decision not to seek to expand this evidence at trial was a deliberate judgment call made by counsel, no doubt for a good forensic reason. Nonetheless, the evidence now sought to be adduced

cannot be said to be fresh. For these reasons it does not meet the elementary threshold of admissibility under section 23 CAA 1968.

67. The Prosecution has argued that there are other reasons, relating to the intrinsic lack of quality of the evidence, that also means that it fails the test for admission upon the appeal. Given our clear view that this is not fresh evidence we do not need to address these other arguments.

68. We dismiss the application to adduce fresh evidence.

D. Issue 2: The application of section 78 PACE to emotive evidence/admissibility of evidence about the Ed Sheeran charity concert and the Ariana Grande memorial concert.

69. It is next argued that the Judge erred in refusing to exclude under section 78 PACE, evidence of the purchase and resale of tickets for certain highly emotive events. The evidence in question concerned tickets for (1) the Ariana Grande One Love concert in memoriam of those who had been killed in the Manchester Arena terror bombing and (2) the 2017 Ed Sheeran Teenage Cancer Trust concert. The evidence was given by Messrs Camp and Galbraith (see paragraph [44] above) who described these events and the efforts made by the organisers to curb secondary ticket sales by touts.

70. The appellants describe this evidence variously as "*contentious*", "*fervently anti-broker*", and, "*unusually partisan*" and its probative value as "*nil*". It was adduced specifically to evoke a negative reaction, including disgust, in the minds of the jury making it very difficult for them to consider the evidence dispassionately. The appellants did not therefore have a fair trial. The unfairness arising through admitting the evidence was compounded by the giving of unfair directions to the jury by the Judge (which is the basis of the challenge under Issue 3).

71. We do not accept these criticisms.

72. We start by putting this ground into context. There is no challenge to the essential accuracy of this evidence. It is *prima facie* relevant as indicating the manner in which the appellants carried on their business. This therefore amounts to a challenge to the exercise of judgment by a judge with conduct of a trial spanning about three months and involving a great deal of complex evidence, including about the impact of the appellants' business activities upon consumers and whether this was dishonest.

73. On a fair reading of the transcript of the judge's admissibility ruling he did not overlook any relevant factor. He acknowledged that the disputed material could have a prejudicial effect upon the appellant's case, but he balanced this against the probative value of the evidence. He observed that other touts and PTW had not exploited these particular events, and that the conduct of the appellants had to be seen in that *relative* light. The judge adopted a rounded and balanced approach weighing pros and cons. This is not a ruling we should interfere with, absent compelling reason. In our judgment there are no such reasons here.

74. First, the mere fact that evidence might exert a significant adverse impact upon a jury is not a reason to exclude it under section 78 PACE. Were it otherwise a great deal of inculpatory evidence would never be admitted. It is hence no answer to say that it is prejudicial simpliciter. It is quite possible that the purchase and resale by the appellants

of these tickets at inflated prices would be viewed with disquiet by many people, including the jurors; nonetheless, these were the hard facts of the case and attempts to acquire and resell such tickets were part of the appellant's business system. It is hard to see why a judge should exclude this evidence simply because jurors might find it distasteful.

75. Secondly, the evidence was relied upon by the Prosecution in relation to whether Hunter placed personal greed over and above the welfare of his customers and was prepared to behave in an unscrupulous fashion in relation to events such as these in order to make a profit. It went to rebut Hunter's case that he was an honest businessman running a legitimate business conducted within the accepted bounds of the market in which he operated. The evidence was therefore germane to the application of the legal test of dishonesty.

76. Thirdly, an attack upon the characters of Camp and Galbraith arose for the first time during the closing speech of Counsel for Hunter when it was suggested that the evidence of both was improperly motivated by a desire to make more money and/or by a vendetta against Viagogo. By necessary implication the jury was invited to conclude that both witnesses had been untruthful and/or biased in their evidence when they explained their reasons for taking action against ticket touts. The evidence was therefore also relevant to addressing this attack.

77. In these circumstances we reject this ground of appeal.

E. Issue 3: The relationship between the statutory offence under section 993 Companies Act 2006 and the common law offence of conspiracy to defraud

The appellants' submissions

78. The appellants next argue that the statutory offence must be read subject to the limitations in the common law offence of conspiracy to defraud which has been expressly preserved by Parliament in section 5(2) of the Criminal Law Act 1977. Under the common law offence an "*essential*" component was proof of an intent to defraud and as to this there were only three possibilities: (i) an intent to defraud a non-creditor by deception; or (ii), an intent to defraud another by deceiving him/her into acting contrary to public duty; or (iii), the deliberate putting of another person's property interests in jeopardy.

79. The Judge erred in leaving a generalised definition of dishonesty to the jury. In the legal directions the Judge explained that "… "*fraudulent purpose' in this context connotes an intention to go beyond the bounds of what ordinary decent people engaged in business would regard as honest, or involving, according to the current notions of fair trading among commercial men/women, real moral blame* …". As we explain below (see paragraph [119]) the judge's formulation was taken directly from classic case law. The appellants however argue that leaving a general dishonesty case to the jury in such terms was insufficient. Because of facts now known to be true (namely that PTS/PTW were not deceived) the only way in which the Section 933 CA 2006 offence could be established was by the Prosecution proving that the appellants deliberately put another person's proprietary right in jeopardy. A "*proprietary right*" in this context

meant a right over or in respect of property that could be asserted against others, that was not personal to a given individual and which existed by reason of and as an incident to ownership of other property.

80. The appellants contend in relation to Count 1 that possibility (i) above (intent to defraud a non-creditor by deception) did not apply because the PTS were not deceived since they were fully aware of and supported the appellants' business operations and objectives. This being so the Prosecution had to prove one of the other heads of intent and as to these only possibility (iii) (harm to a proprietary interest) was even potentially relevant. The appellant's case on this was that the PTS/PTW were not harmed since they sold all the tickets they owned; and, consumers were not harmed because no proprietary interest of theirs was harmed and in practical terms there was no sensible risk of ticket holders being denied entry to events.

81. The requirement to prove a risk to a proprietary interest in a non-deception case is said to flow from the judgment in *R v Evans* [2014] 1 WLR 2817 (Crown Court Cardiff) at paragraph [40] and *R v Evans* [2014] EWHC 3803 (QB) at paragraphs [49] and [60] et seq. In *R v Evans* (Crown Court) Hickinbottom J suggested (paragraph [40]) that upon the basis of decided case law there was *"... a possible limit, namely a requirement for some proprietary right of the victim to be ... injured*". Later (paragraph [173]) the judge rejected a suggestion that all that had to be established was "*economic prejudice*" which included an interest less than proprietorial. He concluded that authority *"... points, with some firmness and clarity, in favour of the proposition that, for a conspiracy to defraud based on economic injury to the object victim, the right or interest of the victim that is compromised must be proprietary*." He considered (paragraph [174]) that there were good reasons of principle and policy why that should be so; the law had to set boundaries of behaviour in commerce, and in the management of everyday life. The upshot was that the judge dismissed a single charge upon which the Serious Fraud Office ("*SFO*") had sought the trial of the six defendants. In the light of this ruling, there followed an application to the High Court by the SFO for a voluntary bill of indictment (*R v Evans* (QB)). There the principal criticism of Hickinbottom J was that he erred in law by adopting an overly narrow test when he ruled that agreement in the case could only amount to a conspiracy to defraud if it was proven that the defendants agreed dishonestly to prejudice another's proprietary right or interests. The judge dismissed the SFO's application, but he did not deal at any length with the issue.

82. The appellants also rely upon an observation set out in paragraph [10.17] of a Law Commission Working Paper (1987) entitled "*Conspiracy to Defraud*". It is helpful to set out the entirety of the relevant paragraphs:

> "(b) Fraudulent trading "for any fraudulent purpose"
>
> 10.17 There are no reported cases on the meaning of the phrase "or for any fraudulent purpose". It seems likely that the courts would interpret this phrase as requiring dishonesty, but again unlikely that the presence or otherwise of a deception would be relevant except in so far as it may be evidence of dishonesty. *It may be that, by analogy with cases of conspiracy to defraud, fraudulent trading under this limb is trading with intent to injure, by dishonesty, some proprietary right of another.* Further, it is arguable that, despite the obvious concern in section 458 with financial loss, fraudulent trading "for any fraudulent purpose" need not necessarily involve financial loss, and thus may cover the type of case at present

> caught by conspiracy to defraud a person performing public duties, for example, where the fraudulent purpose is to deceive a public official to grant an export licence to a company when it is not entitled to one.
>
> 10.18 There are dicta which suggest that a director of a company dealing in second-hand motor-cars who wilfully misrepresents the age and capabilities of a vehicle to a customer is not carrying on the business for a fraudulent purpose. However, where such a director tells lies every time he sells motor-cars, it must be doubtful whether these dicta would be followed. It has been suggested that an intent to avoid satisfying a person with a claim for an unliquidated sum (who is not strictly speaking a creditor) could constitute a "fraudulent purpose".
>
> (Italicisation of text added)

The three issues arising

83. Three issues now arise: (i) whether section 993 CA 2006 is to be construed as subject to the common law limitations on the offence of conspiracy to defraud; (ii) whether the appellants are correct and that *even if* the common law limitations apply the facts of the case do not fall within the category of an "*intent to defraud a non-creditor by deception*"; and (iii), again assuming the common law limitations apply, whether section 933 requires that the appellants deliberately put *"another person's propriety interests in jeopardy*" or whether that formulation is too narrow and strict.

Do the common law limitations apply?

84. In our judgment such limitations as exist under the common law do not apply to the statutory offence under section 993 CA 2006.

85. First, the submission proceeds upon the false premise that the limitations imposed by the courts on the common law offence have been incorporated into section 933, even though nothing in the language that Parliament used in that section refers to the three limitations or indeed to any limitations, but qualifies "*purpose*" only with the condition that it must be "*fraudulent*".

86. To succeed the appellants must therefore argue that Parliament <u>implicitly</u> intended to incorporate the common law limitations in order to govern the true construction of the statutory offence. This approach to statutory construction is however inconsistent with settled law. In *R v Rimmington* [2005] UKHL 63 the House of Lords addressed the policy that should be applied to the charging of offences where the choice was as between a common law offence and a later statutory offence. There the common law offence was the causing of a public nuisance, and the later statutory offences took a variety of different guises. Lord Bingham, under the heading "*The current standing of public nuisance",* identified three governing contentions that had been advanced by the appellants:

> "28. The appellants contended (1) that conduct formerly chargeable as the crime of public nuisance had now become the subject of express statutory provision, (2) that where conduct

> was the subject of express statutory provision it should be charged under the appropriate statutory provision and not as public nuisance, and (3) that accordingly the crime of public nuisance had ceased to have any practical application or legal existence."

87. He expressed substantial approval of the first two propositions. In relation to the first (at paragraphs [29]) he listed a series of specific statutory interventions in the field of the environment which created specific offences of nuisance. He referred, for instance, to Section 79(1) of the Environmental Protection Act 1990, Section 85 of the Water Resources Act 1991, Section 137 of the Highways Act 1980, Section 1 of the Protection from Harassment Act 1997, Section 32 of the Crime and Disorder Act 1998, and Section 63 of the Criminal Justice and Public Order Act 1994. He then observed that whilst there was not a complete overlap between the common law and the statutory offence nonetheless most of the conduct which could be objected to was covered by statute: "*While it cannot be confidently asserted that there is no conduct which might formerly have been properly prosecuted as public nuisance which is not now the subject of express statutory provision, the appellants are in my opinion correct that the most typical and obvious causes of public nuisance are now the subject of express statutory prohibition*."

88. In relation to the second proposition, he said:

> "30. There is in my opinion considerable force in the appellants' second contention under this head. Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited. … It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty. It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the protection of the public reasonably demanded. I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise."

89. In relation to the third proposition his approval was more qualified:

> "31 It follows from the conclusions already expressed in paras 29 to 30 above that the circumstances in which, in future, there can properly be resort to the common law crime of public nuisance will be relatively rare. It may very well be, as suggested

> by JR Spencer in his article cited in para 6 above, at p 83, that "There is surely a strong case for abolishing the crime of public nuisance". But as the courts have no power to create new offences (see para 33 below), so they have no power to abolish existing offences. That is a task for Parliament, following careful consideration (perhaps undertaken, in the first instance, by the Law Commission) whether there are aspects of the public interest which the crime of public nuisance has a continuing role to protect. It is not in my view open to the House in resolving these appeals to conclude that the common law crime of causing a public nuisance no longer exists."

90. Lord Bingham also cited (paragraph [33]) the "*famous polemic*" of the legal philosopher Jeremy Bentham in "*Truth versus Ashurst",* written in 1792 and published in 1823, where Bentham made a "*searing criticism of judge-made criminal law*" which he denigrated as "*dog-law*":

> "It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do* - they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it."

Lord Bingham then added that the domestic law of England and Wales had set its face firmly against "*dog-law*".

91. How does this apply to the present appeal? Here the appellants use the common law tail to wag the Parliamentary dog in a way that is inconsistent with the reasoning underlying *Rimmington*. The reasoning of Lord Bingham when considering the relationship between common law and Parliament was focused upon two policy considerations. First, the considerable caution and reticence that the courts applied to the incremental development of the common law; and secondly (and related), the primacy of Parliament when enacting and defining statutory offences. It was for these reasons that ordinarily the courts should, in cases of overlap, charge the statutory offence rather than its common law counterpart. It is for the same reasons that in any clash as between the common law and Parliament it is the latter that takes precedence. It accordingly runs counter to judicial policy for, as the appellants would have it here, the common law to drive and limit otherwise broad statutory language. That is the wrong way around.

92. Moreover, the offence under section 993 and the common law offence are not identical which also militates against one being used rigidly to define the other. Notably, section 993 focuses upon the conduct of the individuals in their business dealings and is an offence focused upon a fraudulent carrying on of a business purpose. It is different in nature to the common law which concerns conspiracies and is not an offence which statutorily lifts the corporate veil to focus upon the carrying on of a business by those who manage and run it.

93. In relation to the Law Commission Working Paper this was only a call for evidence, not a final report and, as such, it did not reflect the final views of the Commissioners which are only expressed when, collectively, they approve a final report. It is routine in calls for evidence for the Commission to posit ideas and suggestions with a view to stimulating debate amongst consultees so that the Commissioners are better informed when they come to agree a final report. The Working Paper does not therefore have the same persuasive value as a final Law Commission report. Nonetheless, even as it stands the Working Paper is expressed with considerable circumspection. It starts with the tentative position that it seemed "*... likely that the courts would interpret this phrase as requiring dishonesty, but again unlikely that the presence or otherwise of a deception would be relevant except in so far as it may be evidence of dishonesty*". In relation to the possibility that the common law requirement for proof of harm to a proprietary interest be read across it is equally diffident and postulates this only as a possibility: "*It may be that, by analogy with cases of conspiracy to defraud, fraudulent trading under this limb is trading with intent to injure, by dishonesty, some proprietary right of another*." It then says that it was "*arguable*" that fraudulent trading "f*or any fraudulent purpose*" "need not "*necessarily involve financial loss*". There is in our view little which supports the appellants arguments to be derived from this Working Paper. We take the same view of the literature cited to us by the appellants.

94. In our judgment the words in section 993 must be given their ordinary and natural meaning - "*a fraudulent purpose*" does not mean *only* those limited purposes enumerated under the common law.

Is this a case of "intent to defraud a non-creditor by deception"?

95. Furthermore, the appellant's arguments assume that *even if* the common law limitations apply, the facts of their case did not fall within the category of an "*intent to defraud a non-creditor by deception*". As to this we have explained elsewhere (paragraphs [65], [132]-[135]) that on the facts the jury was left by the judge to determine whether the PTS/PTW were deceived by dishonest means and they found that they were. The jury therefore rejected Hunter's defence that there was no deception which is the premise behind the present argument. Even on the appellant's (incorrect) analysis, the first of the *Evans* categories of intent was therefore met.

Does section 933 require that the appellants deliberately put "another person's property or financial interests in jeopardy", and what this actually means?

96. Finally, the appellants case also assumes that, all other matters having been decided in their favour, section 933 requires that their conduct involve "*deliberately putting another person's property in jeopardy*" and that this cannot be proven in this case (see paragraphs [51]-[53] above). The appellants place great store on the judgments in *Evans* and what they say is the narrow definition of property or propriety interests referred to therein and the concomitant exclusion of harm to a purely financial interest.

97. However, insofar as this judgment is said to imply a narrow formulation of a proprietary interest its correctness has been doubted subsequently by the Court of Appeal in *R v Hayes* [2015] EWCA Crim 46. There the proceedings related to "LIBOR fixing". What was alleged was that the applicant, along with others, conspired dishonestly at common law to manipulate and abuse the Japanese yen LIBOR rate between January 2006 and December 2010 when employed first at UBS and then at Citigroup. The motivation

asserted was enhanced profits for his respective employing banks from such activities and thereby increased bonuses for himself. One of the arguments advanced to the trial judge and raised on appeal was that in a case of common law conspiracy to defraud of the particular kind alleged, the prosecution had to show actual prejudice, or a risk of actual prejudice, to a proprietary right or interest of another and that the prosecution could not do so on the agreed evidence. There was no evidence that any counterparty had been deceived or acted to its detriment in reliance on what was allegedly going on. The counterparties interest in their own funds was not put at risk and such contractual rights as the counterparties possessed were not proprietary rights, properly defined, that stood to be injured by the alleged combinations asserted by the Crown. Finally, such contractual rights as counterparties did have were also not put at risk. Instead, it was the performance of such contracts that gave rise to any risk arising to the counterparties. The Court of Appeal rejected these arguments giving them short shrift. They approved of the trial judge's robust rejection of the defence proposition that there was no financial risk to counterparties. They then turned to the necessity of establishing injury to a proprietary interest and expressed considerable doubt that the narrow formulation in *R v Evans* was correct (see paragraph [39] below). The Court concluded that causing a third party to sustain a financial loss was sufficient and that including causing injury to the "*value of contractual rights*" (see paragraph [35] below):

> "30. The asserted need for there to be a proprietary right in this particular context seems to found itself on the propositions of Viscount Dilhorne in R v Scott [1975] AC 819 at 840, a case in which, so it would appear, no one was in fact actually deceived. What Viscount Dilhorne said in the relevant passage was this:
>
> > "… it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."
>
> 31. It may be noted, however, that matters were put on an altogether wider basis in cases such as Welham v DPP [1961] AC 103, and in particular in the speech Lord Denning; and in Wai Yu-Tsang v The Queen [1992] 1 AC 269. In the latter case, reference is made by Lord Goff at page 276 to "an intention to act to the prejudice of another man's rights". At page 277 he went on to refer to "the general principle that conspiracies to defraud are not restricted to cases of intention to cause the victim economic loss". Those broad comments were, it seems to be the case, said in the context of cases where there was intention to deceive an individual into acting differently from how otherwise he would have done.
>
> 32. Mr Convey, who argued this part of the case on behalf of the applicant, submits that that is not so in the present proceedings: because no deceit was alleged to be practised on the counter-parties as such to which they acted to their detriment. That is perhaps true in one sense. But we are not at all sure that, looking

at matters more broadly, that accurately reflects the whole picture. Maybe no deceit practised on the actual counter-parties is alleged: but what is clearly alleged is that the submissions made via Thomson Reuters to the BBA for the purposes of the setting of the rate were false and misleading. That connotes that those ultimately setting the rate were being deceived, and that in turn would have an impact on those conducting their transactions by reference to the rate as set.

33. But be that as it may, and assuming that a proprietary right or proprietary interest of the kind connoted by Viscount Dilhorne is required, one still has to consider what that phrase was intended to mean. It is a phrase constructed by judges for the purposes of setting the common law. There is no applicable statutory definition. If, at all events, one were to refer by analogy to section 4 of the Theft Act 1968 or section 5 of the Fraud Act 2006, the notion of "property" for those statutory purposes can be very broad indeed. As we see it, there at all events can be no reason whatsoever to confine Viscount Dilhorne's reference to "proprietary right" to the notion of beneficial or equitable interests or, for example, the kinds of interests needed to be shown to be able to launch a claim for an equitable tracing remedy. No right in rem as such needs to be shown for these purposes. There is no principled reason why it should be.

34. As Cooke J pointed out, the property losses (potential, if not actual) to the counter-parties were obvious: they, whether or not they themselves had been directly deceived, stood to lose money, their money. It is said, indeed, by reference to the evidence that these ultimately were "zero-sum" transactions: the counter-parties' potential loss in essence would be the bank's potential gain. That, indeed, on the Crown's case was the whole intention behind the asserted conspiracy.

35. Self-evidently, the rights and interests of the counter-parties — potential losers — were "proprietary" in nature for the purposes of what Viscount Dilhorne had in mind. That suffices. But in any event, the counter-parties' rights under the relevant trading contracts constituted a chose in action: a form of property. Those rights again self-evidently stood to be injured: in that the value of the contractual rights during the period of the contract, and therefore the value of the chose in action which they represented, stood to be diminished to the counter-party by reason of the consequences of the alleged dishonest conspiracy. It seems to us, therefore, that the judge was right to rule as he did.

36. We only add on this aspect of the case that, as we see it, the applicant can obtain no support from the decision of Hickinbottom J, or the subsequent ruling of Fulford LJ, sitting as a High Court judge, in Evans. That case was decided on its

> own, and very unusual, facts. Moreover, it was decided by reference to the very particular way in which the Crown had chosen to frame the indictment, as Fulford LJ emphasised in his ruling. We should add, however, that our own view is that it is by no means to be assumed that, properly framed, the factual scenario arising in Evans was not capable of constituting a common law conspiracy to defraud. Indeed, we were rather surprised to note that it was apparently accepted before Hickinbottom J that no unlawful object arose in that case and that no unlawful means could be identified. One only has to consider the facts of that case, as alleged, in some detail to see how debatable those apparent concessions were. But as we say, the point ultimately was decided by reference to the particular way in which the indictment had been framed.
>
> 37. Moreover, it may be noted that in paragraph 169 of his judgment, Hickinbottom J, amongst other things, said this, dealing with the question of proprietary rights and economic prejudice: "The term appears to have survived as a result of two things: legal habit, and the fact that in most cases it is not in issue that the targeted right or interest is proprietary – the conspirators intend to relieve the victim of his money or such other property that he owns – and the only issue is dishonesty."
>
> 38. So relieving a victim of money is plainly accepted by Hickinbottom J as falling within the ambit of a "proprietary right".
>
> 39. We should add, however, that in so far as Hickinbottom J went on to make some further observations with regard to what was connoted by the phrase "proprietary right", we think that may require further analysis; and we should not be taken as necessarily agreeing with the relatively narrow view of the meaning of that phrase as (perhaps) indicated by Hickinbottom J. But for the purposes of this case, we need not say more. We add also that a further clear distinguishing factor from the Evans case is that in that case the rights of the relevant public bodies were to a very pronounced degree more contingent than was the case here."

98. We also share the doubts expressed by the Court of Appeal in *Hayes* as to the correctness of the analysis in *R v Evans*. We do not however need to express a definitive view on this because the present case has not been charged as a common law offence involving harm to a proprietary interest. We would add only that <u>if</u> the common law were as narrow as is submitted, and as is set out in *R v Evans,* then we would consider this to be a yet further reason why it should not be capable of influencing the scope of section 993 which on its terms is not so limited. In our view the present case is a good illustration of just the sort of dishonestly fraudulent conduct that section 993 should apply to. The ingenuity of business fraudsters knows few bound. As business is increasingly conducted using digital assets (e.g. cryptocurrencies), which may or may

not in law be classified as "*property*"[1], if section 933 was hidebound by an outdated requirement to show harm to harm to an identified "*proprietary*" interest it would risk become rapidly outdated.

99. For all the above reasons, we reject the submissions that the statutory offence is to be curtailed by limitations in the common law offence.

F. Issue 4: The components of the offence under Section 993 CA 2006: (i) whether there has to be deception or an intention to deceive; (ii) whether there has to be a victim who suffers actual or intended harm?

The appellant's arguments

100. The Judge ruled that there was no requirement for the jury to be directed that: (i) there had to be deception or an intention to deceive either the ticket vendor (PTS/PTW) or consumers; or (ii), there had to be a victim who suffered actual or intended harm.

101. He rejected the suggestion that harm to an identified proprietary interest had to be proven and directed the jury that fraud was acting to the prejudice of the rights of another person or exposing that person to the *risk* of their economic interests being prejudiced.

102. The appellants submit that the judge erred: (i) in finding that an intention to deceive was not a condition of the offence; (ii) in concluding that there did not have to be victim or intended victim: and (iii), in his direction that all that had to be proven was actual or intended harm to a third person's economic interests.

103. In his ruling of 22nd January 2020, the Judge set out his reasoning as follows.

104. First, the language of the two limbs of section 933 were different. Whilst there was an express requirement in relation to the first limb (focusing upon creditors) that there had to be an intent to defraud a creditor, there was no equivalent language in relation to the second limb. The judge inferred from this that Parliament was using the second and broader limb as a device to criminalise fraudulent conduct which was not limited to an intent to defraud a victim.

105. Secondly, the judge referred to *R v Kemp* [1988] Q.B. 645 where the Court held that the mischief the legislation (in its earlier incarnation) was aimed at was fraudulent trading generally and not only fraudulent trading vis-à-vis creditors. It would suffice if the person defrauded was a potential creditor of the company which included the company's customers. The judge construed this as indicating that there was no requirement for proof of an intent to defraud actual persons.

106. Thirdly, the judge also cited *R v Philippou* [1989] 89 Cr App R 290 concerning the fraudulent purpose of a travel company which lay in (i) concealing from the Civil Aviation Authority the true financial position of the company for which an ATOL licence was sought; and (ii) the transfer of funds beyond the reach of the company's creditors and/or liquidators. The Court of Appeal held that being in possession of a

[1] On 30th April 2021 the Law Commision issued a call for evidence on the ways that digital assets were used, treated and dealt with in markets and as to the potential consequences of classifying such digital assets as "*possessable*" in law.

licence was a prerequisite to the ability of the company to trade so that the process of applying for such a licence amounted to carrying on business and concealing relevant information from the regulator was fraudulently dishonest. In relation to the transfer of funds out of the jurisdiction, just two months prior to the liquidation, the Court held that it was a proper inference to draw that this was a transaction with a fraudulent purpose. The Judge in the present case concluded that in *Philippou* at the time the transfer of funds occurred there was no deception on, or of, any actual person; it was simply a removal of funds from one account to another, but it nonetheless still had a "*purpose*" that was fraudulent.

107. The appellants nonetheless argue that an intention to deceive must at the least be proven. The scope of the allegation of fraudulent trading in Count 1 was too broad and nebulous for the conviction to be safe. The conviction on Count 2 was unsafe in that the articles for use in fraud only acquired that status if the jury convicted on Count 1 and/or 3 The conviction on Counts 3 and 4 were unsafe because the jury's findings on Counts 1 and 2 would have tainted their approach to Counts 3 and 4. The judge should have directed the jury that they had to be sure that the defendants caried on the business dishonestly and with intent to defraud a non-creditor by deception.

108. The Judge produced for the jury a detailed document entitled "*Directions of Law and Route to Verdict"* which set out the law with a higher degree of specificity than is contained in his earlier rulings. We concentrate upon this document. In our judgment the Judge's analysis of the law was essentially correct. But more to the point in the event his legal directions were closely tailored to the facts and were favourable to the appellants. They did not frame the offence at its lowest possible legal threshold but set out extensively the evidential issues that the jury needed to address, and these included a detailed exposition of the different ways in which it was said that there had been *actual* deception. In our view the appellants are wrong both as to the law but also in their criticisms of the directions that the judge gave to the jury.

Section 993 CA 2006: The three components

109. We start with the law. To decide this ground of appeal it is necessary to set out the relevant statutory offence and to summarise the law that relates to it. The offence of fraudulent trading has been long established in legislative form. The present incarnation is set out in section 993(1) CA 2006, which is in the following terms:

> "(1) If any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner commits an offence."

110. The section applies whether or not the company has been, or is in the course of being, wound up (subsection 2). A person guilty of an offence under this section is liable on conviction on indictment, to imprisonment for a term not exceeding ten years or a fine (or both) (subsection 3).

111. Section 993, by its terms, creates two offences: *Inman* [1967] 1 QB 140 at page [148]. The first limb relates to businesses carried on with an intention to defraud creditors.

The second limb, which is the relevant offence in this appeal, arises from the following statutory language:

> "If any business of a company is carried on … for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner commits an offence."

112. The cumulative ingredients of the offence are threefold: (i) That any business is being carried on; (ii) for a fraudulent purpose; and (iii), the defendant is knowingly party to that carrying on for a fraudulent purpose. Unlike in respect of the first limb offence there is no reference to an intention to deceive in the second limb offence.

113. We turn now to each of the three components of the offence and the appellant's arguments. Given the overlap between the two limbs of section 993 case law on the first limb can cast light on the scope and effect of the second limb offence.

First component: "… any business of a company is carried on".

114. In practice it will be unlikely that there will be any significant dispute about the expression "*any business*". This will always be fact sensitive. In this case it could be articulated in a variety of ways such as: the use of a business system designed to make a profit by the purchasing and reselling of tickets; or the use of a business system designed to mislead ticket vendors into believing that the purchasers are genuine consumers; or the use of a business system designed to mislead ticket vendors into believing that the purchasers are genuine consumers in order to enable those purchasers to then make a profit by reselling the tickets to end consumers, etc. The real issue is not how "*the business*" is described or articulated but whether the defendants in question were *"carrying on"* that business. Some degree of attribution is needed. A receptionist of a business that is being carried on for a fraudulent purpose will not, by the simple fact of sitting at reception, be carrying on the business. There has to be a consideration of the acts of the defendants said to amount to "*carrying on"* and whether they were in connection with the business.

115. In relation to Count 1 the Judge identified the acts of attribution as controlling, managing, or running the business of purchasing and selling tickets and conducting ancillary acts associated with running the business. In this case Hunter was a Director and Smith was the Company Secretary. The Judge made clear that "*it matters not if one Director played a lesser role than the other"*. We agree with this analysis. In relation to Counts 3 and 4 the Judge applied this same analysis of Count 1 save for the difference that the carrying on of the business involved selling tickets. Again, we agree.

Second component: "... for any fraudulent purpose"

116. There will rarely be a dispute about "*purpose*". In this case, for instance in relation to Count 1, the Judge told the jury that the "*object of this enterprise .... was to purchase event tickets for resale and because of the terms and conditions ... of the PTSs / promoters which restricted any cardholder, individual or entity to a maximum number of tickets (varying 2 to 6) the company adopted methods to overcome these restrictions".* Again, there are numerous ways in which the object or purpose could have been articulated. In our judgment the language chosen by the Judge was perfectly fair and accurate.

117. The real issue was whether the acts taken by the appellants with this purpose in mind were *fraudulent*. We start with the law on this concept.

118. The concept of "*fraud*" is well established. Dishonesty is an essential ingredient. One classic formulation of dishonesty is found in *Re Patrick & Lyon* [1933] 786 Ch per Maughan J at page [790]: as "…*involving, according to the current notions of fair trading amongst commercial men, real moral blame*". This was the formulation used by the Judge in his directions on law to the jury. Later, in *Grantham* [1984] 1 QB 675, the Court of Appeal, in a case concerning an intent to defraud creditors, approved of a passage from the summing up in the earlier case of *Welham v DPP* [1961] AC 103 where the House of Lords had approved of a description of dishonest fraud as "… *stepping beyond the bounds of what ordinary decent people engaged in business would regard as honest*." Many judges have, whilst seeking to encapsulate the test in understandable language, cautioned against any judicial attempt to set out a definitive, all encompassing, legal definition. There is nothing in the Judge's formulation of the test that can in our judgment be objected to.

119. The running of a business in a fraudulent manner will commonly involve acts of commission and omission. The deliberate concealment or suppression of true facts or information might be compelling evidence of fraud. Commissions and omissions can be two sides of the same dishonest coin. In *R v Philippou* (ibid) the Court of Appeal held that the concealment of transactions in order to maintain or renew licences issued by the Civil Aviation Authority was capable of amounting to fraud. However, whilst deception might be a prime example of fraudulent behaviour, conduct that is fraudulent might go beyond the perpetrating of deception. Deception and fraud are not synonymous.

120. The focus upon purpose means that the law is prophylactic. A fraudulent purpose might be proven before anyone is *actually* defrauded or becomes an *actual* victim of the fraud. In the present case if the Prosecution had charged the defendants after they had acquired the relevant bots and other software and the multiple credit cards and had set up a system for using an array of false identifies, but *before* the defendants had put that system into operation and used it to trick ticket vendors into selling them tickets and/or to place end consumers at risk, then the offence would *still* have been committed even though there was no actual fraud and no actual harm to end consumers and therefore no victims. A fraudulent purpose would still be in existence and business acts to achieve that purpose would have been carried out. Of course, evidence of implementation might afford powerful additional evidence of the fraudulent purpose, but implementation of a fraudulent purpose is not an essential ingredient of the offence.

121. The absence of any requirement to prove the existence of an actual victim was made clear by Anthony Elleray QC, sitting as a Deputy Judge of the High Court in *In The Matter of TMC Transport (UK) Ltd and others* (judgment 2 March 2001) [2001] 2 B.C.L.C. 1, a case on the defrauding of creditors (under s.213 of the Insolvency Act 1986). He observed:

> "94. It is not, in my judgment, a pre-condition of finding the relevant intent to defraud creditors or other fraudulent purpose, that there has been an incurring of credit. The relevant detriment, as in *Kemp*, may not involve the incurring of credit and indeed the relevant intent may not, in a given case,

> succeed. The obtaining of credit can be relevant intent to defraud or relevant fraudulent purpose but it would be wrong to elevate the obtaining of credit to arequirement of liability under s 213 [of the Insolvency Act 1986]."

122. It might be stating the obvious but where the offence of carrying on a business for any fraudulent purpose is charged (the second limb offence) it is unnecessary to establish the existence of creditors. In *R v Kemp* [1988] 1 QB 645 the Court of Appeal was concerned with section 332 Companies Act 1948 (a predecessor to section 933) the relevant part of which was in the following terms: "*If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose*…". The Court made clear that fraud on a customer fell within the purview of the offence and more broadly stated, having reviewed in detail the legislative history of the provision, "…*the mischief aimed at is fraudulent trading and not fraudulent trading just in so far as it affects creditors*" (ibid page [654E/F]).

123. In *R v Hollier and Booth* [2013] EWCA Crim 2041 the Court was concerned with fraudulent trading under 458 Companies Act 1985 (a predecessor to section 933). Count 3 was particularised to allege that the defendants "… *were knowingly a party to the carrying on of the business of [BGL] for a fraudulent purpose, namely to disguise [the Defendants'] role in the ownership and control of [the companies]*". It was argued that an actual intention to deceive was needed. Lady Justice Macur disagreed. She observed:

> "23. Second limb fraudulent trading does not necessarily incorporate intent to deceive or actual deception of creditors. Concealment of ownership to obtain business advantage that would otherwise be denied is sufficient if the jury were sure of dishonest intent. There is no obligation upon the Prosecution to identify those who were or may have been subject of the fraudulent purpose if it is inevitably to be inferred, as here, from the circumstances and evidenced by Hollier's own evidence, that the companies had already suffered in Guernsey trading by virtue of their association with him.
>
> 24. No doubt, if called upon to do so the Prosecution would now submit to the call for further particulars by adding the words "and so gain commercial advantage from individuals, bodies or corporations that would otherwise decline to do business with companies under the control of Hollier".

124. We therefore conclude that the judge was right to conclude that there was no requirement for the Prosecution to prove an intention to deceive third parties in order to prove a fraudulent purpose.

Third component: "... the defendant is knowingly party to that carrying on for a fraudulent purpose"

125. The third component of the offence concerns knowledge which on the wording of section 933 must relate to both the carrying on and the fraudulent purpose. In this case the basic facts, and the appellant's knowledge of them, are not materially in dispute. What was disputed was the appellant's knowledge that what they were doing was dishonest and hence fraudulent.

126. The Judge directed the jury only in terms of actual knowledge. Did the appellants know that what they were doing was dishonest? There can be no criticism of this formulation.

127. The Judge did not direct the jury in terms of blind eye knowledge. This was to the advantage of the appellants since it is a lower threshold. In the context of intention to defraud creditors knowledge is a relevant consideration and includes "*blind eye*" knowledge (sometime colloquially called "*Nelsonian knowledge*"). In *Re Bank of India Credit and Commerce Internationale SA v State of Bank of India* [2003] EWHC 1868 (Ch)) Patten J stated:

> "Knowledge includes deliberately shutting one's eyes to the obvious, provided that the fraudulent nature of the transactions did in fact appear obvious ... It is well established that it is no defence to say that one declined to ask questions, when the only reason for not doing so was an actual appreciation that the answers to those questions would be likely to disclose the existence of a fraud."

In *Manifest Shipping Company Limited v Uni-Polaris Company Limited* [2003] 1 AC 469, Lord Scott of Foscote said:

> "In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. ... the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe."

128. In *Morris & Ors v State Bank of India* (ibid) Patten J addressed the position of a secondary party and said that the words:

> "'intent to defraud' … obviously do connote actual dishonesty ... But in the case of a secondary party, sought to be made liable … all that is in terms required is that that party should have knowingly participated in the carrying on of the business with intent to defraud. It is difficult to see how, in practice, a conscious decision to participate in transactions which are known to be fraudulent does not constitute dishonesty …"

129. The notion of "*blind eye"* knowledge is not particular to an intention to defraud creditors and, on the language of section 993, applies equally to the alternate and broader second limb. A defendant that manages or controls or runs a business who turns a blind eye to the truth can be found by a jury to have the requisite knowledge.

130. We would add for the sake of completeness that when dishonesty is charged an "*Ivey*" direction must be given to the jury: *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67; and *DPP v Patterson* [2017] EWHC 2820 (Admin). This was set out in the judge's directions and there is no issue arising on this appeal about it.

Conclusion: An intention to deceive?

131. It follows from the case law set out above that there is no requirement for the Prosecution to prove an intention to deceive. In (very) many cases that is likely to be a key ingredient of the evidence which goes to prove a fraudulent purpose; but it is not strictly necessary.

132. This brings us to the way in which the judge directed the jury. As to this the Judge did direct the jury to consider acts of deception and determine whether they were dishonest and fraudulent.

133. In relation to Count 1 (acquisition of tickets from PTS/PTW) the acts and omissions relied upon by the Prosecution involved classic acts of deception and in particular the adopting of a method of business designed to overcome the restrictive terms and conditions imposed by ticket vendors which entailed failing to disclose to vendors the true identity of the purchaser and, in so doing, making false representations to ticket vendors as to the identity of the purchaser and as to the purpose behind the purchase (i.e. resale). The Judge explained that whether the false representations were express (an active lie) or implicit (a passive lack of candour) was irrelevant. In relation to Count 3 (sales via STW to consumers) the jury was focused upon the listing of tickets for sale on STW which as a matter of law were or might be at risk of being cancelled or refused, and the failure to warn the purchaser of this risk of invalidity. In relation to Count 4 (the spec sales) the deception lay in the appellants failing to inform consumers that in actual fact they did not own or possess the tickets they were purporting to sell.

134. The jury was therefore expressly directed as to acts of deception which were at the heart of the appellants' business model, and they were asked whether these were dishonest. The Judge adapted his directions to meet the facts of the case. He did not take the more pared back approach that once a business system had been set up which was then carried on by the defendants and which had a fraudulent purpose that the defendants were guilty even if the system had not been implemented in a way which led to actual deception or actual prejudice to consumers. On the contrary the Judge adopted a more cautious approach where he invited the jury to focus upon the facts and whether there was actual deception.

135. It follows from the above that: (i) we reject the argument that an intention to deceive is a necessary component of section 933; and (ii) we reject in any event the submission that there was any unfairness to the appellants in the manner in which the jury was directed.

Conclusion: Harm / prejudice

136. We turn next to harm and prejudice. We have already rejected the argument that the Prosecution had to prove injury to a narrow proprietary interest (see paragraphs [96] – [98] above) and we have also made clear that it is the "purpose" that matters not the actuality. On the facts of the present case the Judge (and the jury) clearly concluded that there was real prejudice to the rights and interests of third parties. The Judge explained to the jury that fraud meant having as a purpose acting to the prejudice of the rights of another person or exposing that person to the risk of their economic interests being prejudiced. He also explained that whether an end consumer had in real life been the subject of refusal of access to an event or cancellation did not make a difference because the prejudice lay in the *risk* not the actuality. He also pointed out that fact that some STW provided cover to consumers in the event that tickets were invalidated did

not matter since not all STW offered full compensation (see e.g. paragraph [45] above) but whatever compensation was paid it still did not cover disappointment, inconvenience and associated and ancillary costs and expenses. We agree with this analysis.

137. In our view on the facts of this case there were a variety of ways in which the purpose of the business prejudiced legitimate interests or rights. The most obvious was the placing of consumers at risk that the tickets they had paid for, at inflated prices, were cancelled. The interests of ticket vendors also cannot be ignored. The evidence demonstrated that some went to considerable effort and cost to curb tickets touts and to avoid the reputational and consumer damage that might flow from fans being overcharged or refused entry. The appellants set out to undermine the business models of the vendors an important part of which were the rights they possessed to enforce contractual restrictions on sale. This was an attack upon a key component of the business model of genuine ticket vendors. The vendors were systematically deceived in circumstances where, had they known the truth, they would not have made the sales.

138. There is also the conduct of the appellants themselves to bear in mind. The appellants individually (but also in the context of the many other touts operating in the same way) sought to prevent consumers being able to use honest ticket sites to acquire tickets at face value by the process of harvesting tickets which sucked large numbers of otherwise available tickets out of the system. Their conduct deliberately distorted and imbalanced supply and demand and created an artificially inflated demand which could be satisfied only by sales on STW at hyper inflated prices. The greed of the touts who forced consumers to pay for intrinsically risk laden tickets at high prices is, in our judgment, an important matter which also informs any decision about the nature of the prejudice arising out of the appellant's conduct.

139. We add one final caveat. The acid test for fraud is dishonesty. It is not evident to us that there is any requirement for the Prosecution to prove that, over and above sufficient evidence of dishonesty, there is an additional, incremental, requirement to prove that the rights or interests of a third party are harmed in a relevant manner. If the appellants had been correct and on the facts it had not been possible to demonstrate, as part of a relevant purpose, that there were any victims who might suffer prejudice of any sort, then that would not necessarily have been the end of the matter. We have not in this case had to address the situation of the so-called "victimless" fraud. It is possible to identify a variant of the facts of this case where defendants: (i) use duplicitous/deceptive conduct (which might amount to a breach of contract and/or breach of statutory duty); (ii) persuade counterparties to act in ways that they would not if they were informed of the truth; and (iii), thereby make significant profits that they would not otherwise have made had they acted in a candid, frank and lawful manner. We do not rule out the possibility that a jury so directed could find that such conduct was dishonest and hence fraudulent under section 933, even if there was no tangible prejudice to a third parties' interests behind the "purpose". Some support for this analysis is found in the judgment in *Hollier v Booth* (ibid) – see paragraph [123] above. At all events since the present case is one where, on the evidence, there was real and proven harm to the rights and interests of others, and this was inherent in the relevant purpose, we do not have to express a concluded view on the point.

Conclusion

140. In our judgment the Judge directed the judge correctly on the law. We dismiss this ground of appeal.

G. Issue 5: The "fairness" under the Consumer Rights Act 2015 ("CRA 2015") of the event organisers terms and conditions of sale which impose restrictions on the purchase and resale of tickets, and which create a risk of ticket nullity.

Appellant's submissions

141. The appellant's case on fairness and the CRA 2015 can be summarised as follows

i) Various sets of terms and conditions were placed before the jury and the Judge ruled that they were not unfair. In his view they were clear, lawful and effective. In this he erred. The defence was thereby deprived of the ability to assess the alleged fraudulent purpose of the allegations in the context of the correct status of the restrictions including the possibility that they were in law unfair and void or voidable.

ii) Notwithstanding that the appellants operated as traders, the Court should still have had careful regard to whether terms curtailing or prohibiting resale were unfair.

iii) The unfairness test under Part 2 CRA 2015 has two key elements. Section 62(4) provides that a term is unfair if: (1) it is contrary to the requirement of good faith; (2) it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. The overall requirement is a unitary one; the single question is whether a term is "*unfair*". The CJEU has commented that these criteria merely define in a general way the factors that render a contractual term unfair: see eg Case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* EU:C:2013:164.

iv) Schedule 2 CRA 2015, sets out an indicative, non-exhaustive, list of terms in consumer contracts that may be regarded as unfair, including: (a) a term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract; and (b), a term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.

v) Appropriate prominence must be given to terms which might operate disadvantageously to the consumer. Terms should not, whether deliberately or unconsciously, take advantage of the consumer's circumstances to their detriment: see the CMA Unfair Contract Terms Guidance.

vi) Both the CMA and the Waterson report considered resale restrictions of the type in issue to be problematic in terms of lack of transparency and their inaccessibility to consumers. Evidence given by Mr David Perry from the CMA to the Court was to the effect that courts would need to examine transparency when they came to determine fairness under the CRA 2015.

vii) Restrictions such as those imposed by ticket vendors were unlawful in the light of this material and this was highly relevant to whether the defendants conduct caused prejudice to any third person's interests and/or was dishonest.

The legal structure: Consumer Rights Act 2015

142. These grounds of appeal must be seen in the light of the legal structure of the CRA 2015. There are three questions to answer. First, when is a term unfair? Secondly, what are the consequences in law of a term being held to be unfair. Thirdly, who decides whether a term is unfair?

143. First, when is a term unfair? A term is unfair, under section 62 CRA 2015, if "*... contrary to the requirements of good faith, it causes a significant imbalance in the parties rights and obligations under the contract to the detriment of the consumer*". Various indicia are then set out in the Act, one of which is the requirement that consumers be aware of the terms in issue; transparency is important. The test however only applies to a "*consumer contract*". This is defined in section 61 as "*a contract between a trader and a consumer*". A "*trader*" is defined in section 2 as "*... a person acting for a purpose relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf*". A "*consumer*" is defined as "*... an individual acting for purposes that are wholly or mainly outside that individuals trade, business, craft or profession*". Various exclusions are provided for. For example, section 66(1)(b) excludes "… *any contract so far as it relates to the creation of transfer of an interest in land*".

144. Secondly, what are the consequences of a term being held to be unfair? If a term is unfair, in the statutory sense, it has the legal consequence of rendering the term voidable in civil law in the hands of the consumer under section 62 which confers upon the consumer the right not to be bound by the terms. Though, under section 62(3), a consumer has a choice whether or not to rely upon the terms in issue.

145. Thirdly, who decides that a term is unfair? Under section 71 CRA 2015 a free-standing duty is imposed upon "*courts*" to consider the fairness of contract terms in any proceedings which "*relate*" to the terms of a "*consumer contract*". This is a most unusual duty that arises irrespective of whether the parties raise the issue or indicate that they intend to raise it (see section 71(2)). The Act does not define "*court*" or say how this works in a criminal case. It seems to us that in a criminal case, the determination is one for the judge, not a jury. There are two main reasons for this.

146. The first is that the Act is concerned with consumer protection. The responsibility for enforcing the law lies with a range of specialist regulatory authorities (such as the CMA) and the courts. The object behind Parliament imposing a free-standing duty upon courts to rule on fairness is that a ruling and declaration of unfairness then triggers the civil law consequence of voidness. The courts, like the regulators, are hence given a civil law role in consumer protection. The task of the court might be quite complex and nuanced. The nature and scope of resultant voidness might, in theory at least, be limited to some but not all circumstances, but legal certainty is provided for because these limits will be set out in a judgment. That ruling will then guide the approach others (regulators and courts) take to enforcement of like terms. A jury for its part could never give a ruling on fairness. It is not a task that Parliament would have contemplated a jury would or could assume. All a jury can do is to arrive at a verdict of "guilty" or "not

guilty" on the matters indicted which will never include an issue of fairness under the CRA 2015. Even if (to test the proposition) a jury were to take fairness into account as a matter collateral to a criminal charge the jury's function would still not be to rule upon the issue as opposed to rendering a verdict on the charge. In short, the task imposed under the CRA is a civil law one designed to regulate the past but also the future contractual rights of consumers. Parliament intended this task to be carried out by a judge.

147. The second reason is that whether a term is unfair under the Act is an intertwined question of mixed fact and law. It might for instance turn upon the proper interpretation of the clause in dispute and as to the circumstances in which it applies or as to the adequacy of its accessibility in terms of transparency to consumers. The test laid down in the Act of fairness involves the balancing of a potentially wide range of legal and evidential considerations. This is reflected in section 71(3) which curtails the duty on a court to rule on fairness where "… *the court considers that it has before it insufficient legal and factual material to enable it to consider the fairness of the term*". It would be artificial and counterproductive to the purpose of consumer protection to have to split up the legal and evidential parts of the test with one part being decided by the judge and the other by the jury. And it is wholly unclear how a jury could ever form a view as to the adequacy of the legal and factual material that it needed to form a conclusion on fairness. This is a yet further reason why the task in its entirety is one for the judge and not the jury.

148. It follows that if and insofar as an issue arises of fairness under the CRA 2015 in criminal proceedings it is for the judge to determine the issue, and not an issue to be left to the jury. Any determination that the judge makes can then be placed before the jury as part of the directions of law if and in so far as it is germane to a jury issue. It necessarily follows that it was wrong of the judge to leave the question of fairness to the jury. Nonetheless, for reasons we explain below, this error worked to the appellant's favour, not to their disadvantage.

Application of principles to the facts of the case: the three possible scenarios

149. There was a considerable body of evidence before the court on fairness. First there were 79 pages of terms and conditions emanating from a variety of different ticket vendors. Secondly, the Waterson Report set out a detailed review of the issue of consumer protection including fairness. Thirdly, Mr David Perry a director from the CMA, gave evidence as to the approach that the CMA took towards the evaluation of terms and conditions of contract and as to the application of the law to the ticketing market. Various documents emanating from the CMA were also before the Court and included the CMA Guide to the application of the CRA 2015 and correspondence passing between the CMA and sellers of tickets about the application of the legislation to the sorts of terms in issue. The position of the CMA was summarised in a letter it sent on 17th January 2019 to event organisers seeking to provide guidance as to the circumstances in which restrictive terms and conditions might be unfair and as to the steps to be taken to obviate that risk. The CMA had already, at this time, written an open letter to secondary ticket website operators reminding them of their obligations under consumer protection law. In an annex to the letter, the CMA set out what it described as a "*prioritisation statement on terms and conditions that restrict event ticket resale*". The CMA observed that it was ultimately for the courts, not the CMA, to decide whether a term was fair or unfair. However, the CMA observed that terms and

conditions that restricted a resale by event organisers had the potential to cause consumer harm by preventing consumers from recouping the money "… *that they spent on tickets if they are no longer able to attend an event, or no longer wish to go"*. The CMA also identified as a potential problem "…*where end user consumers are prevented from entering an event for which they hold a resold ticket*". Nonetheless, the CMA acknowledged that the terms and conditions that restricted resale were not automatically unfair. In broad terms, in reviewing the fairness of a restriction, the CMA would consider whether there was a legitimate reason for the imposition of a term, whether its use was necessary and proportionate to achieve the legitimate reason, and whether the restriction had been communicated with sufficient transparency.

150. With regard to possible legitimate reasons for the use of restrictions, the CMA accepted that ensuring as many tickets as possible for an event were sold at a price affordable to the greatest number of consumers, was a legitimate objective where the alternative was: "*… being bought up by businesses to be resold at higher prices*".

151. In relation to both proportionality and transparency, the CMA emphasised that event organisers should provide a clear, upfront and consistent disclosure of the relevant restrictions to original ticket purchasers on all sale channels. They also considered that event organisers should either provide a full refund to original ticket buyers who were no longer able to attend the event or, alternatively, make arrangements which effectively permitted such purchasers to recoup or substantially reduce any direct financial loss.

152. It thus follows that whilst it is true that the CMA considered that, in theory, restrictive terms and conditions imposed by ticket vendors could fail the test of fairness, nonetheless they also recognised that restrictions designed to prevent secondary markets emerging could serve a legitimate and proportionate purpose.

153. There are three ways in which the CRA 2015 could/might be relevant to the issues at trial. First, in relation to the arrangements applying as between the appellants and ticket vendors (PTS/ PTW). Secondly, in relation to contracts as between the appellants and end-consumers occurring over STW. Thirdly, in a general sense if and in so far as the appellants advanced a systemic attack upon the fairness of <u>all</u> restrictions imposed by <u>all</u> ticket vendors and which therefore extended beyond the tickets that the appellants themselves acquired through their companies. In such a case <u>if</u> terms and conditions imposed by tickets vendors were systemically found to be unfair then the appellants might become collateral beneficiaries of such a finding.

154. We address each of these scenarios in turn.

Scenario one: purchases of tickets by the appellants and their businesses from ticket vendors (PTS/PTW)

155. As between ticket vendors and the appellants, the CRA 2015 has no application. This is because the contract is not a "*consumer contract*" as defined (see paragraph [143] above). The judge was therefore correct to so find in his ruling of 3rd November 2019.

156. The essential purpose of the appellant's business model was to deceive ticket sellers into believing that when they sold to the appellants' companies, they were in fact selling to consumers. Had this been true then a "*consumer contract*" would have come into

being and the CRA could, in principle, have applied. However, this is not what occurred. In his legal directions to the jury the judge expressed the conclusion that as between the defendants as traders and the vendors of tickets the contract was a business to business contract and not a business to consumer contract. The judge was correct. Before us counsel for the appellants did not dispute this conclusion. It follows that when the appellants purchased tickets from ticket vendors the CRA 2015 did not apply to the restrictions and it was incapable of liberating the appellants from the restrictions.

Scenario two: sales by the appellants to end consumers via STWs

157. Sales by the appellants to consumers via STW were consumer contracts within the meaning the CRA 2015. This was because the appellants were "*traders*" and purchasers were "*consumers*". Ironically, it was not the appellants' case at trial that sales by them, via STW, to consumers were "*consumer contracts*" and that any restrictions which applied were therefore unfair and voidable as between the appellants and the ultimate consumers. It was the appellants case that the sales were made by the STW as principals to consumers and were not direct sales by the appellants to consumers. The judge rejected this analysis holding that the STW's acted merely as selling platforms but not as principals: see the citation at paragraph [57] above. This was correct. The judge did however in his ruling make the following somewhat puzzling statement: "*I hope it is clear from what has been said already that the contract between the Ds and the end user was not subject to the consumer protection legislation"*. This suggests that a contract between the appellant's business and an end user was not a consumer contract even though the selling company (e.g. BZZ) was acting as trader and the purchaser was a consumer. The interjection of the STW as the selling platform does not alter this analysis. Insofar as the CRA does apply we set out our conclusions below.

Scenario three: a systemic attack upon all restrictions imposed by all ticket vendors

158. If it were possible to prove, systemically, that all restrictions imposed across the board were unfair and void, then the appellants could say that when they acquired the tickets they were unencumbered by such restrictions and that any subsequent consumer bearing such a ticket would therefore not be at risk of refusal of entry to the event. This might then influence the conclusion a jury might reach as to dishonesty because the risk of cancellation was reduced or even eliminated.

159. In the event the Judge did leave an issue of fairness to the jury. Moreover, he put the issue to the jury in broad and generic terms. He did not take the specific terms and conditions of a particular ticket vendor and test the legality of those terms only. In his summing up he summarised evidence that had been given at trial by Mr David Perry, of the CMA, both in chief and in cross examination and when recalled. He had explained about the need for transparency. The Judge also set out Hunter's evidence and argument on fairness. Towards the end of his summing up he said:

> "Providing those steps are taken, then the term may not be unfair. Generally speaking, even when one looks at the literature and the guidance from the CMA, it emphasises the point that it is a matter for courts, rather than for them to say whether it is unfair outright, or not.

> It all depends on the circumstances what the aim of the term is. In this context what you will need to consider, if you need to, is was it a legitimate term to impose when they are trying not to sell these tickets to secondary ticket sellers, but to consumers, and in order to ensure that consumers get the tickets at the face value they have imposed that term.
>
> Was that a legitimate aim in order to achieve the objective; in other words, keeping the price down for the ordinary consumer to use the ticket? That's what it depends on at the end of the day, whether the term is fair or unfair. The ultimate aim, what is the aim and what steps have been taken, and if it is right then it's fair, if it's not then it's unfair. It's as simple as that, all right. That is what he really confirmed in the course of his evidence, that it has to be fair to the consumer; they are only concerned about the consumer. They don't care how the consumer gets the ticket, if he has paid then he should get what he has paid for, that's what they are concerned about, the CMA."

160. The jury found the appellants guilty so that insofar as is it possible to infer anything from their verdicts, they did not consider that, even if the CRA 2015 applied, it served to alter any conclusion as to dishonesty.

161. Under the CRA the issue of fairness has been raised and we are required to address it (see paragraph [145] above). For our part we cannot see any argument for suggesting that there was any systemic unfairness in the restrictive terms imposed.

162. The judge (see paragraph [31] above) concluded that the terms were intelligible to the lay person. We have had before us the relevant terms and conditions and equally we accept that they are generally in language that a lay person would or should understand.

163. Next, the CMA has itself pointed out that restrictive terms designed to curb touting may serve a legitimate objective. In our judgment, the guidance given by the CMA is sensible and pragmatic. It recognises that the fairness of a particular term or terms will be context and fact sensitive. Nonetheless, and importantly, it adopts the *prima facie* position that restrictions designed to curb the emergence of secondary markets are legitimate. We agree. There are in this regard some important points to make.

164. First, the object behind the restrictions is consumer protection, namely, to prevent the very touting activity that the appellants were engaged in. Evidence at trial indicated touting and harvesting of tickets was widespread. Hunter said in evidence that at least 120 other companies did what his company did. The collective effect of this upon the availability to end consumers of tickets could be very substantial. Mass harvesting by touts using bots is capable of extracting from a vendor's system a very large number of tickets otherwise available to genuine consumers. These harvested tickets are then, in rapid succession, placed for sale on STW at inflated prices. The tout adds nothing whatsoever of value to the service. All that is achieved, to use the vernacular of Hunter and MM, was to make "*fucking loads*" for the touts (see paragraph [61] above).

165. The terms seek to address a reprehensible and widespread, and otherwise criminal, practice which operates significantly to the detriment of consumers. This is in our view

a compelling starting point. By the same token if the terms were unfair and unenforceable then it would create an environment whereby ticket touts could operate almost with impunity and ticket vendors could do nothing to prevent the practice.

166. Secondly, the most important restrictions (ban on resale save in limited personal circumstances, prohibition on purchase by traders, right of event organiser to cancel tickets, etc) are all terms which are directly related to the vice sought to be prevented, namely ticket harvesting and touting. Such terms are in our judgment intrinsically reasonable and proportionate.

167. Thirdly, the Judge found as a fact that the terms were intelligible and accessible to the lay person. There is no evidence to indicate that there is any widespread lack of transparency and in any event the transparency of any individual sets of terms and conditions is fact and context specific. It is not possible to generalise. The judge, as a question of fact, and knowing that transparency was an issue, saw nothing in the evidence which indicated to him any general lack of accessibility of the terms to the ordinary consumer.

168. Our judgment therefore is that the Judge was entitled to conclude on the evidence before the court that the terms were fair and valid. We would add that our conclusion does not preclude the courts or regulators in individual cases taking a different view. Our conclusion is one based upon the analysis of the evidence before the judge and his conclusion upon it.

169. We reject the ground of appeal relating to fairness under the CRA 2015.

H. Issue 6: The status in law of a ticket.

170. Issue 6 concerns the status of a ticket. There is a lack of clarity about the nature and effect of this argument. It seems that it amounted to a submission that if a ticket was "*property*" or a "*good*" then when it passed hands away from the appellants and into the possession of the consumer it contained imbedded within it in the full bundle of rights but not, seemingly, the burdens, that otherwise attached to entry to the venue. The Judge in his ruling of 3rd November 2019 described the appellants argument as follows:

> " … b) that the ticket is a "good" which converts into a licence upon entry when presented at the gate of a venue for admittance—so that the licence could not be revoked by the organisers / venue for breaches of the Ts & Cs by the Ds in the initial purchase…".

171. The Judge disagreed with this analysis. In paragraph [7.7] of his ruling of 3rd November 2019 the judge explained that a "*ticket*" was distinct from the licence and the terms of it. It followed that: "… *when a bona fide purchaser for value obtains the ticket through a STW, he obtains it with all the benefits and the burdens of the licence… Ts & Cs continue to apply*."

172. We agree with the judge. There are fundamental problems with the appellants' analysis. Even if a ticket was in some relevant way a "*property*" right or a "*good*" that fact alone does not sever it from the burdens attaching to the benefits. The fact that it is "*property*"

or a "*good*" tells one nothing about the attributes of the attached rights and obligations. In any event it is not correct to describe a ticket as "*property*" or a "*good*" save in the most limited sense that a slip of paper can belong to someone as their "*property*" and be a "*good*".

173. In law a ticket is evidence or proof of two things. First, a right to enter land as a licensee and not as a trespasser. Secondly, as proof of a right to receive a service, namely that to be performed or provided on the land. The Judge was correct to conclude that a ticket was a contractual licence issued on terms and therefore a chose in action rather than merely a good. Authority for these propositions is found in *RFU v Viagogo Limited* [2011] EWHC 764 QB at paragraphs [37] [43] as approved by the Court of Appeal [2011] EWCA Civ 1585 at paragraphs [18] and [19] which addressed the arguments upon the basis of an arguability threshold (to obtain injunctive relief) test but, as articulated in the judgments, were propositions expressed with considerable confidence. That conclusion is consistent with the judgment of the Court of Appeal in *R v Coombes, Eren and Marshall* [1998] 2 Cr App R 282 where, in the days before the digital verification of tickets and cards, the defendants were recorded on video obtaining tickets or travel cards for use on the London Underground and then, when the holder had passed through the ticket barrier, handing the ticket to a third party to be used again. They were charged under the Theft Act. The Court of Appeal started its judgment with the observation that the case had ramifications for all sorts of ticket touts. One argument advanced by the appellant was that the issuing of the ticket was analogous to the drawing of a cheque. In both cases a chose in action was created which in the first case belonged to the customer and in the second to the payee. By parity of reasoning with the analysis of Lord Goff in *R v Preddy & Others* (1996) 2 CLR 524 it was argued that the "*property*" acquired belonged to the customer and not London Underground and there can have been no intention on the part of the appellants to deprive London Underground of the ticket which would in due course (when surrendered at a ticket barrier) be returned into the possession of London Underground. The Court rejected the submission reinforcing the conclusion that when a ticket was transferred it did so retaining both contractual rights *and* restrictions:

> "A 'chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession." (See Talkington -v- Magee (1902) 2KB 427 per Channell at 230). On the issuing of an underground ticket a contract is created between London Underground and the purchaser. Under that contract each party has rights and obligations. Theoretically those rights are enforceable by action. Therefore it is arguable, we suppose, that by the transaction each party has acquired a chose in action. On the side of the purchaser it is represented by a right to use the ticket to the extent which it allows travel on the underground system. On the side of London Underground it encompasses the right to insist that the ticket is used by no one other than the purchaser. It is that right which is disregarded when the ticket is acquired by the appellant and sold on. But here the charges were in relation to the tickets and travel cards themselves and a ticket form or travel card and, dare we say, a cheque form is not a chose in action. The fact that the ticket form or travel card may find its way back into the possession of London Underground, albeit with its usefulness or 'virtue' exhausted, is nothing to the point."

174. In our judgment the Judge correctly analysed the legal status of tickets. When a ticket is handed from person to person it transfers any restrictions upon use. The Judge's analysis accords with the law but also with elementary common sense. We reject this ground of appeal.

I. Issue 7: The scope effect and operation of the doctrine of "equities darling"

175. It is next argued that the doctrine of "*equities darling*" also operated as a device to free the appellants from the shackles of the restrictions ostensibly imposed by event organisers and to ensure that when they sold tickets, via STW, to end concerns those consumers acquired the tickets free of restraints since they were *bona fide* purchasers for value acting in good faith. The judge erred in rejecting this argument. It was an argument which was material both to whether consumers suffered any economic prejudice when they purchased tickets from the appellants, and, whether there was dishonesty since if equity did intervene as described then this went directly to whether consumers were unwittingly deceived into buying tickets that placed their ability to attend the event at risk.

176. We disagree. Equity rarely deigns to grace the earthy confines of the criminal courts and it does not do so here to cleanse the hands of the appellants. There are numerous reasons why this doctrine cannot be relied upon.

177. First, the doctrine of equities darling is an explanation for the rationale behind the principle that a *bona fide* purchaser of real property for value can acquire good title to the property despite a prior fraudulent transaction in the conveyancing chain. The classic case where the doctrine applies is where a fraudster sells a property to a *bona fide* purchaser (B) for value where the property has *already* been sold to a third party (A). The law focuses on how to allocate rights as between A and B, the two innocent parties. To be such a *bona fide* purchaser the purchaser must have made "*such inspections as ought reasonably to have been made*": *Kingsworth Finance Trust v Tizad* [1986] 1 WLR 783. Where this doctrine applies it attaches to real property transactions. There is nothing in case law to suggest that it applies to a licence such as that reflected in a ticket to attend an event.

178. Secondly, the doctrine seeks to allocate risk as between the two innocent parties and is not a device to scrub out the reprehensible and dishonest intermediate conduct of the fraudster. That person's conduct remains dishonest – and criminal - even though equity has to resolve the allocation of property ownership rights as between the fraudster's innocent victims. By its nature it is not a doctrine that can avail the appellants.

179. Thirdly, insofar as the non-criminal law intervenes at all this is through Parliament in the form of the CRA 2015 and related consumer protection legislation. We would strongly resist any attempt to extend the equitable doctrine to the present case. There is of course a considerable irony in the defendants seeking to invoke equity as a charter to enable them to perpetuate what is otherwise a fraud.

180. There is one final observation we would make. This is an argument dreamt up after the event to justify the unjustifiable. It is inconceivable that when the alleged frauds were being committed that the appellants thought that equities darling would come to the rescue of duped consumers or that any steward in attendance at an event or in a box office who was querying the validity of the tickets presented by a consumer had notions

of equity at the forefront off their minds. The truth of the matter was that the defendants knew full well that there was a "*risk*" which attended the purchase of tickets from them. But they cared not and indeed their business model rested upon not highlighting that legal risk.

181. We dismiss this ground of appeal.

J. Issue 8: The duty of the judge to direct the jury in an objective and dispassionate manner.

182. It is said that the judge used unacceptably emotive and provocative language when describing the basic business model used by the appellants and its impact upon end consumers. The passage in the summing up objected to was as follows:

> "… if there are a multiple number of sellers doing the same thing, just imagine how many tickets are removed from circulation insofar as the consumer is concerned. This case is not simply about making money on tickets purchased from primary ticket sellers. Just imagine you want to celebrate an event with your family, perhaps your grandmother's birthday or a parent's birthday and you want to take her out to a concert or theatre, something like that, but you want to go there as a family, combine a meal with it. And you look forward to it, you choose an event which she would enjoy, or your parents would enjoy. You prepare yourself to get up in the morning when the tickets are going to go on sale; you are going to buy them. And you do, you sit at your desk, open your computer, log into the website at the right time. And then, whilst you are looking at which seats to buy and looking at prices, and by the time you get around, within say 20 minutes, to actually selecting the right sort of seats which are within your price range, as well as give a decent view of the performance, you realise that the tickets have gone, they are no longer there, you can't buy them. Then you say to yourself, being enterprising, I know what, I haven't got them here, but I'll pay slightly more, I'll go to the secondary website and buy them from there.
>
> And you do go to the secondary ticketing website and what do you find? The same tickets that you were trying to buy from the primary ticket website are now on sale on the secondary ticketing website, but out of your range. For four you could pay £80 times four, plus the administration fee, but if it's doubled in price, it's £160 times four plus the administration price, which you can't afford. And then you say, right, hard luck. But, then you read in the paper, or you hear from someone, that actually you know when you were on the website trying 3 to buy from the primary ticket seller, there were others whose business it is to buy these tickets in bulk and then sell them at profit. And, what's more, they might have used bots and other things to buy 10 tickets in one go in order to save time, so they can buy as much as they possibly can.

> So, just imagine. So, we are not simply concerned with a purchaser buying from a secondary ticketing website -- and the defence are absolutely right, a purchaser who buys from the secondary ticketing website, paying whatever price the ticket is listed for, to him that ticket is worth that price and he's prepared to pay for it. But, to someone, the example I have mentioned, it's not; they can't afford it, it has been taken away, that person can't buy it at face value. So, please bear that in mind when you are considering the respective arguments in this case."

183. It is argued that this this being an emotive case the jury was entitled to real assistance as to the relevance of the unusually partisan evidence it had heard. No members of the ticket industry were called by the Prosecution to give evidence to introduce evidential balance to the case. It was incumbent upon the Judge to direct the jury not to be influenced by emotion. Instead, the jury was told to work from a standpoint of emotional reaction and bias against the appellants. They did not have a fair trial and the convictions are unsafe by virtue of the direction.

184. We do not accept the criticisms of this direction.

185. First, the passage in question must be seen in context and as to this there are two sections of the summing up which preceded this passage which are relevant. At the outset of the summing up, in the normal way, the judge directed the jury both orally and in written form to approach the evidence dispassionately, to not allow any views they may have of ticket touts to cloud their judgment, and to focus upon the evidence. The judge's comments which have been singled out for criticism must be seen in this contextual starting point. Further, the passage must also be understood in light of the immediately preceding passage where the judge summarised the contents of Skype Chats where Hunter had referred to there being about 120 ticket sellers like him. The passage objected to concerns the judge's exposition to the jury of the cumulative effect of multiple touts harvesting and then reselling tickets. The passage is not specifically targeted at the appellants only. When asked, Counsel could not identify anything in the passage what was said to be inaccurate. The criticism was at base one of style and linguistic tone. In our judgment this was an entirely proper manner in which to direct the jury. Whether the conduct indicted is dishonest is determined by the jury collectively using their own experience of what is normal, moral and acceptable. To this extent the legal test requires the jury to stand in the shoes of ordinary people. It is true that the passage is crafted in somewhat rhetorical terms, but this is consistent with the test to be applied.

186. Secondly, we reject this argument because this is also an area where the discretion of the judge is called into question. It is the task of a judge addressing a jury, especially in relation to maters of some complexity, to endeavour to make the issues accessible whilst, simultaneously, ensuring that the directions are accurate in law. This can be a difficult task and, provided that no error of law is made, the appeal court will be slow to interfere. If the overall tenor of the passage complained of can be viewed as critical then this is in the nature of the facts of the case and not something which flows from any attempt by the judge unduly to sway the jury. The essence of the Prosecution case, and that placed before the jury for their consideration, was of a fraud directed towards the making of substantial gain from event goers by charging them inflated prices for tickets that had been improperly obtained from consumer facing websites. There was

no material dispute about any of the core facts. Jurors might well have formed an adverse view of such conduct just as they do in relation to other criminal cases which have far more unpleasant facts. But that is nothing to the point. We reject this ground of appeal.

K. Issue 9: The duty on judges to direct juries on complex common and civil law matters such as: (i) the network of relevant contracts and the scope and effect of the restrictions contained in vendor's terms and conditions of sale; (ii) the distinction between void and voidable; (iii) the operation of the fairness test under the CRA 2015; and (iv) the doctrine of "equities darling".

187. Finally, the Judge is criticised for adopting an overly simplistic approach to legal concepts which, it is said, the jury needed to understand fully if they were to comprehend and then apply the test of dishonesty. This duty was heightened because the defence rested upon certain key concepts of civil law which no jury could be expected to understand without being adequately directed by the judge. These civil law issues included: the scope and effect of the network of contracts which were in issue; the distinction between void and voidable; the operation of the unfairness test under the CRA 205, and the concept of equities darling.

188. We do not accept this submission. The starting point must be that it is the duty of a judge to direct a jury on matters of law correctly. But this does not imply that the judge must always provide a detailed elaboration of complex legal concepts to a jury. As with all other issues the judge should ensure that the jury focuses upon the *real* issues in the case. Here, on the facts, the real issues at the heart of dishonesty were whether tickets vendors were deceived into thinking that they were selling tickets to consumers and the risk that consumers who purchased from STWs would have their tickets cancelled. To make these matters plain to the jury did not require a detailed exposition of complex issues of civil law or equity. We give two examples.

189. First, (even assuming that fairness under the CRA 2015 was a jury issue) there was no need for the jury to grapple with the distinction between void and voidable when all that that issue went to was the *risk* that their tickets would be cancelled, and this risk was fully and adequately explained to the jury.

190. Secondly, there was no need for the judge to go through the substantial number of sets of terms and conditions and provide a commentary to the jury as to their substance and effect or to provide to the jury a detailed analysis of how they all fitted together. The relevance of these multifarious terms and conditions was to show that it was routine for tickets vendors to impose restriction which prevented sales to traders for resale, which limited the numbers of tickets that could be sold to one person, and which reserved the right to the event organiser to refuse entry to consumers having tickets purchased from touts. On our reading of the summing up the jury can have been in no doubt about these central matters. It would have been otiose for the judge to have gone into much greater detail.

191. We return to a point that we have already made which is that, at base, the Prosecution case is relatively simple. It involves defendants who institute systems of business the purpose of which is dishonest. On the facts the dishonesty lay in a system designed to deploy a deliberate and systemic lack of candour in dealings with sellers of tickets and

buyers of tickets, all of which was intended to enable the appellants to charge grossly inflated prices to consumers for risk laden tickets and earn substantial profits thereby.

192. We have reviewed the judge's directions on law and his summing up on the evidence very carefully. We cannot identify any areas where the jury would have been confused or where a more detailed exposition of the law would have provided any greater clarity as to the "*real*" issues in the case. The judge in our view acted sensibly in boiling down the legal issues for the jury and in so doing he made no errors. We reject this ground of appeal.

L. Conclusion

193. We commend the judge for his careful handling of this novel and complex trial. In our judgment he did not err. We dismiss the appeals.