**Trinity Term**

[2016] UKPC 19

**Privy Council Appeal No 0056 of 2013**

**JUDGMENT**

**Cassell and another ( Appellants ) v The Queen ( Respondent ) (Montserrat)**

**From the Court of Appeal of the Eastern Caribbean Supreme Court (Montserrat)**

**before**

**Lord Mance**

**Lord Kerr**

**Lord Reed**

**Lord Hughes**

**Lord Toulson**

**JUDGMENT GIVEN ON**

**4 July 2016**

**Heard on 8 June 2016**

| Appellants | Respondent |
|---|---|
| Thomas Roe QC | Peter Knox QC |
| David Dorsett PhD | Oris Sullivan Director of Public Prosecutions |
| (Instructed by Collyer Bristow LLP) | (Instructed by Charles Russell Speechlys LLP) |

**LORD HUGHES:**

1.
The first appellant, Warren Cassell ("Cassell"), was at all material times practising as a lawyer in Montserrat. He was convicted, together with the second appellant, a company owned and controlled by him, of counts of conspiracy to defraud, procuring the execution of valuable securities by deception, and money laundering. In the Court of Appeal, the appeals were dismissed except for that relating to money laundering, where the charge had been laid under the wrong statute. Both appellants appeal further against the other convictions. The grounds argued on their behalf by Mr Thomas Roe QC differ radically from those advanced before the Court of Appeal. The Court of Appeal had no opportunity to consider the case as now put to the Board.

2.

In about 2007 Cassell became interested in development land in Montserrat which belonged to a company called Providence Estate Ltd ("PEL"). PEL was a close company wholly owned by two American developers, Messrs Wood (60%) and Rooney (40%), neither of whom lived in Montserrat. Those two gentlemen were the sole directors and shareholders. The land had been acquired by PEL some years previously, before the volcano disaster of 1995, after which it had lain undeveloped and the company had become dormant. Cassell set about acquiring control and selling off the plots of land. He formed the close company which was the second appellant ("C&L Inc") as a vehicle to do so. The indictment alleged that he and, through him, C&L Inc, had gone about this plan dishonestly in two principal ways:

(i)
Cassell had dealt only with Wood, and, with the dishonest object of cutting out Rooney, or at least of depriving him of any participation and of presenting him with a fait accompli, had proceeded to act as if he had the legal right to deal with PEL's land; this allegation gave rise to two counts of conspiracy to defraud Rooney;

(ii)
he had purported to sell plots of land, in the name of PEL, to innocent purchasers when he had no lawful authority to act for PEL and could not, in consequence, give them the title which they thought they were getting; the proceeds of sale were at his request paid to C&L Inc; this allegation gave rise to a series of counts of procuring the execution of valuable securities (chiefly deposits and balances of the purchase price) by deception.

The case at trial

3.
The Crown evidence was uncontradicted and indeed very largely unchallenged at the trial. Cassell did not give evidence and neither defendant called any. Cassell made a relatively brief unsworn statement from the dock. The following essential facts were therefore not disputed.

4.
Cassell's interest in the development land was afoot by at least January 2007. On 28 January 2007 he made an attempt to contact Rooney, and spoke to the latter's brother, who lived in Fairfax, Virginia. He told the brother that he wanted to discuss buying land from Rooney. The brother promised to put Rooney in touch with Cassell. Either when he heard of the enquiry or a little later in the year when he learned that the PEL land was being offered for sale, Rooney, then living in California, made contact with Cassell via his own Montserrat lawyer, Mr Sergeant.

5.
In or before July 2007 Cassell arranged to offer the PEL land for sale through a local estate agent. On 24 July he arranged for C&L Inc to be formed. On 30 July, in a transaction with Wood alone, C&L Inc received the transfer of Wood's shares in PEL, for the sum of EC $810,000. By then the first sale of a parcel of the land must have been well advanced, because a formal agreement for it was made two days later on 1 August 2007. That sale, like others to follow, purported to be made by PEL and Cassell signed the agreement purporting to be its director.

6.
The transfer of Wood's shares to C&L Inc was contrary to article 14(b) of the Articles of Association of PEL, which provided that other shareholder(s), here Rooney, had a right of pre-emption. The same article proscribed the holding of shares in PEL by any person engaged in business in competition with

it. There had been a change of company legislation in 2000, and the new Act contained transitional provisions for companies to lodge a certificate continuing in effect the existing articles of association. In the absence of such a certificate, and there had been none in the case of PEL since it was dormant, the Act provided for continuance on the basis of specimen articles. Those specimen articles did not contain the right of pre-emption which PEL had had in article 14(b). But a separate provision of the new statute preserved rights attached to issued shares, which plainly included the right of pre-emption. Thus Rooney's right of pre-emption survived and was ignored by Wood and Cassell in effecting the transfer of Wood's shares to C&L Inc. The judge correctly so ruled.

7.
Rooney's Montserrat lawyer, Mr Sergeant, contacted Cassell at the latest in July 2007. He explained that Rooney owned a 40% interest, and was a director, and that he wanted to know why PEL's land was being offered for sale. He was told that Wood had transferred his shares. After this meeting, Cassell contacted Mr Sergeant with a series of offers to buy Rooney's interest. Some of those offers were made in writing in a letter of 7 September 2007. In that letter, Cassell asserted that when "I" (sic) had bought Wood's shares the latter had said that Rooney was either dead or avoiding him, although that assertion was scarcely consistent with Cassell's having opened contact with Rooney via his brother some eight months earlier in January. A further letter of open offer was written by Cassell on 14 September 2007. Rooney did not accept any of these offers. On 19 September 2007, acting through a different firm of Montserrat lawyers, Cassell made a claim on Rooney in the name of PEL for money which he alleged was owing from dealings between Wood and Rooney in or about 1990. That also did not induce Rooney to sell his interest.

8.
As a matter of law PEL, which had been dormant for years, no longer existed. It had been struck off the companies register as long ago as 4 September 2001. Plainly, at some stage this became apparent to Cassell and in some haste he made an application to the registrar on 9 August 2007 for administrative restoration to the register. In that application he stated that he was the sole director of PEL, although in fact the directors remained Wood and Rooney, and Cassell had not, even if it had been possible, taken any steps to become one. That initial application to the registrar was followed by a further one, made to the court on 4 September 2007, also as a matter of urgency and during the vacation. It was accompanied by his affidavit, in which he swore that he was "the de facto applicant" and an intended director of PEL. The affidavit disclosed the existence of Wood as "a former director, founder and CEO" of PEL, and it recited the transfer of his shares to C&L Inc. But it made no reference at all to the existence of Rooney nor did it disclose that there was any other shareholder. It went on to assert that PEL had urgent business to attend to and that it was in the process of dealing with real properties which it owned. In due course, on 21 September Cassell filed a further affidavit in support from Wood. That described Wood as a director, founder and former shareholder in PEL and recited the transfer of his shares to C&L Inc. That also made no reference at all to Rooney or to the existence of any other shareholder. The statutory basis for that application was section 483(6) of the Companies Act 1998, which permitted it to be made by the company, or any member or creditor.

9.
The application to restore PEL to the register was successful on 21 September. On that same date, three further transfers from PEL to buyers of plots of the development land were executed, all signed by Cassell purporting to do so as a director of PEL. Two more similar transfers to buyers followed in October, and three further ones in the first five months of 2008, all of them similarly signed. The various transfers were registered with the Land Registry from time to time, beginning on 30 October

2007. Rooney was not told of any of these sales, still less did he take part in them, although later he learned of all or some of them. In every case, Cassell arranged for the purchase monies to be paid to C&L Inc.

10.
Until 21 September, the day of restoration of PEL to the companies register, there was no question of Cassell having an even colourable claim to be a director of that company. Three days after restoration, on 24 September, he filed at the Registry a notice of change of directors. This form of notice was a bare pro forma indicating that Wood and Rooney had both ceased to be directors and that Cassell had been appointed such. The date given for these changes was 21 September.

11.
Later, in November, the Registrar notified Cassell that he ought to have filed a copy of the resolution of the company by which these changes had been effected. In response, Cassell sent to the Registry in the first week of December a document purporting to be a PEL company resolution dated 21 September. This document was central to the case against the appellants. It had a number of important features:

(i)
it was signed by Meredith Lynch, who was a young lady known to Cassell and acting at his direction; she described herself as the "interim" company secretary;

(ii) it recorded that the only persons present had been Cassell and Ms Lynch;

(iii) it recorded a recital in these terms:

"The requirement for Notice of the meeting was waived for the purposes of an extraordinary general meeting and for the purpose of the agenda item relating to the removal of the Director Owen Martin Rooney and Walter A Wood, the former refusing to return to Montserrat and not having made any contact with the members of the company for several years";

(iv) it recorded that Rooney and Wood had been removed as directors; and

(v) it recorded that Cassell had been appointed director, and that his appointment had been backdated to 1 July 2007.

12.
Rooney was given no notice of this event, whether before or after whatever occurred, nor did he in any manner consent to it. The assertion that he had had no contact with members of the company for several years was made despite the active negotiations which were going on between Cassell and Rooney. The resolution bore a date two days after Cassell's lawyers had written to Rooney on Cassell's instructions demanding repayment of the suggested old 1990 debt, and only a few days after the written and oral offers made by Cassell to Rooney to buy him out. The purported backdating of Cassell's appointment as a director (which had not appeared on the pro forma of 24 September) was to a date before the first sale of any of the land.

13.
When he discovered the sales, Rooney began an action in Virginia, USA against both appellants and Wood claiming, amongst other relief, a declaration that the transfer of Wood's shares in PEL to C&L Inc was null and void for breach of the right of pre-emption, and damages amounting to about US$6m. The action bears a court number showing that it was begun in 2007 but it was amended in 2008,

apparently to include complaint of further sales which had by then taken place. The Amended Complaint disclosed Rooney's complaint that he had been deprived of his right of pre-emption and had had no knowledge of or participation in the sales. (He added a complaint that some of the parcels of land sold had belonged to him exclusively rather than to PEL.) These proceedings were undoubtedly served on Cassell at the latest in the summer of 2008, because he swore an affidavit for the Virginia court on 26 August. In it he disputed the jurisdiction of that court. He said that he was well aware of the complaints, but he did not respond to them or assert facts relating to them. Rooney gave evidence at the trial that he understood that the original proceedings had been served on Cassell in December 2007, and whilst this must have rested to an extent upon hearsay it received neither objection to admission nor challenge in cross examination. On 3 October 2008 the Virginia court gave judgment for Rooney in default of appearance and defence against the two appellants (though not then against Wood) for, inter alia, the declaration and damages claimed.

14.
At some stage in 2008 the Montserrat Attorney General intervened by requesting the Land Registry to defer registering further transfers of parcels of the disputed land. Cassell began a High Court action challenging that intervention, but it was overtaken by his arrest on 4 November 2008.

15.
Neither on arrest nor at trial did Cassell either dispute, or offer any significant explanation for, the core facts set out above. At trial in his short unsworn statement from the dock he asserted that there had been no agreement to defraud Rooney, nor any intention to do so. Nor had there been any false representation. He said that he had at no time deceived any government agency. He said that the application to restore PEL to the register had initially been adjourned for the affidavit from Wood to be filed. He asserted that the Land Registry must have been satisfied that he was a director of PEL and he said that "based on our understanding of the law" he was indeed such.

The summing up

16.
Given that the essential facts were not in dispute, it was apparent that the issue for the jury was whether they did or did not prove the commission of the offences of conspiracy to defraud and (in effect) obtaining the purchase monies by deception. The only real issue was the intention of Cassell and, through him, the company. With that went the core issue of dishonesty. The essential elements of the charges of conspiring to defraud Rooney were agreement between the appellants and Wood to cause him loss by unlawful means, together with dishonest intention to do so. If the intention was present, dishonesty in effect went with it. The actions of the appellants in selling the land were undoubtedly such as to lead to at least potential loss on the part of Rooney; the issue was the state of mind of the alleged conspirators. Likewise, the sales to the purchasers were undoubtedly made on the basis of express or implied representations that Cassell had authority to act on behalf of PEL in the sales and that good title would result. Whether he was lawfully constituted a director of PEL was a matter of law, but if he was not (as the judge directed the jury), the issue which mattered was whether he was dishonest, and that meant whether he knew that he was not. The Board does not doubt that there were other issues which needed to be covered by the summing up, and it is a truism to say that by the time of appeal the issues may appear considerably more distilled than they seemed at trial. But it was nevertheless essential that the jury was presented with the core issue of dishonesty and made to understand that the case depended on it. That issue was, it goes without saying, for the jury and not for the judge. The closing submissions of counsel for the Crown and for the defence were essentially structured around this issue. The central part of Mr Roe's argument for the appellants

before the Board is that sadly the summing up was not, and moreover that when it did deal with that issue the judge effectively told the jury what its conclusions should be.

17.
After proper preliminary directions, the judge turned to the counts of conspiracy to defraud Rooney. He directed the jury that a conspiracy is an agreement to do something unlawful. That is of course correct so far as it goes, but this was not a conspiracy to commit an identified crime, such as to steal or to assault; it was a conspiracy to defraud. That meant not merely the commission of unlawful acts, but an intention thereby to cause loss to Rooney, and thus dishonesty. The judge did not tell the jury that this was an essential element. Instead, he proceeded to itemise acts which the appellants had performed which were unlawful. The first of those which he identified was the application to restore PEL to the register; this he said was unlawful because Cassell did not have the standing to make it. The second was the transfer of Wood's shares in breach of article 14(b) of the Articles of Association, that is to say the right of pre-emption. The third was infringement of the other part of article 14(b) preventing transfer of shares to a person in competition with PEL. C&L Inc had as one of its objects the acquisition of and dealing in real and personal property, and the judge told the jury that he was sure that it would have little difficulty in finding that in consequence it was in competition with PEL. The fourth was the purported resolution of PEL to remove Rooney as a director and to appoint Cassell, which was done without the required notice to Rooney. It followed, the judge told the jury, that the purported sales by PEL were also unlawful.

18.
Law was for the judge not the jury, and as to some of these, the judge was perfectly entitled to tell the jury that the acts were unlawful. That was true of the purported appointment of Cassell as director and the concomitant removal of Rooney as such. It was also true of the infringement of the right of pre-emption. It was not true of the competing shareholder point. The objects clause in C&L Inc's articles was a standard clause. The mere fact that both PEL and C&L Inc had the power to own real property could not mean that they were in competition with one another, and in fact they were not; what was purportedly done was for one to sell to the other, which may or may not have been proper, but was not competition. It was also only doubtfully true of the application to restore PEL to the register. By the time that application was considered by the court it was made by Cassell describing himself as an intended, rather than an actual, director, and it was supported by Wood who certainly was a director.

19.
The fundamental flaw in this direction lay in treating it as sufficient to establish conspiracy to defraud if it was shown that acts which were unlawful had been performed. It is perfectly true that later, after a break in the proceedings, the judge delivered a textbook definition of defrauding, that is to say to deprive by deceit, together with a textbook definition of deceit. But this was after the earlier long directions on unlawful acts, and in any event there was no alleged deceit of Rooney, as distinct from deceit of the purchasers. The jury was not at any stage told in relation to the conspiracy counts that it was not enough that the acts were unlawful unless the appellants knew that they were. Moreover, in relation to the deception counts, the test for deceit was suggested to be whether the purchasers would have bought if they had known that Cassell had no authority to sell PEL land. That was no doubt a proper question, but the answer was not capable of dispute and to answer it did not decide the question of guilt. What mattered was whether the appellants dishonestly intended to deceive.

20.

Part way through the summing up the judge did deliver a textbook direction on deception and dishonesty, which included, perhaps favourably to the appellants, a Ghosh direction (R v Ghosh [1982] QB 1053). It was couched in general terms, rather than related to the facts of the case as it needed to be, but by itself that would not be fatal. The trouble is that it was surrounded by a fundamental error in the manner in which the judge elected to deal with the state of mind of the appellants. He needed to make it clear that their knowledge and intention was a matter solely for the jury to determine. Instead, he made his own opinion on the topic only too explicit. In relation to the application to restore, with Cassell's and Wood's affidavits in support, he said that it was

"in my view … cleverly crafted and was meant to deceive anyone who should rely on it …"

He used the expression "cleverly crafted" more than once. It was indeed the Crown's case that the omission of any reference to Rooney in this application and in the affidavits was both deliberate and part of the scheme to gain control of PEL and thereby to defraud Rooney. This was undoubtedly powerful evidence of such a scheme. But it is not defensible for the judge to tell the jury in such uncompromising terms what his own opinion is on the central issue in the case, and the error is not cured by adding, as from time to time the judge did, that such questions were for the jury. The impact on the jury of the opinion of a senior and obviously experienced judge is not lessened by such formalistic directions. The judge returned to the topic a number of times. He suggested that the application might be thought an attempt to deceive the court. He went on to advise the jury more than once in adamant terms that he was confident that no court would have granted the application to restore if told the true position. This was a matter of fact, not of law. Quite apart from the impropriety of such a statement coming from the judge, it is questionable that he was even right. It may perhaps be that if the court had known that there was another director/shareholder of PEL, it would have insisted that he be given notice of the application to restore, although there was no evidence of this practice. But to tell the jury that the application would have been refused ignores the facts that (a) it was supported by one director (Wood) and (b) if the court had been aware that there was an active dispute between directors about assets of the company the one thing which had to happen was that the company was restored to legal existence.

21.

There were many similar observations. Probably the central event in the case was Cassell's purported self-appointment as director of PEL. The Crown's case on the document bearing the date 21 September was undoubtedly very powerful. The document contained what might easily be found to be a simple deliberate lie, that Rooney had not been in touch for years. Its assertion that notice could be, or had to be, waived, when Rooney was actually in current contact, could well be found to be part of a dishonest scheme to exclude him from PEL and to cause him loss thereby. To remove him as director when negotiations with him were ongoing might well indicate exactly such a scheme. The purported backdating of Cassell's appointment as director, which had not appeared in the first pro forma application to the registrar, raised the question whether the document really dated from 21 September. In those circumstances it was essential that the jury was presented with the issue whether Cassell acted deliberately unlawfully or might honestly have believed that he was entitled to do what he did, especially if he might have thought he had legitimately acquired (through C&L Inc) control of a majority shareholding. The judge told the jury that

"… Warren Cassell must have known that it was unlawful to appoint himself as sole director."

That was to remove from the jury the central issue in the case.

22.

Regrettably the deficiencies in the summing up do not end there. In dealing with the state of mind of the appellants, principally of Cassell, the judge repeatedly mingled references to what he was proved to have known, that is “must have known”, with what he “ought” to have known and, at not fewer than two points, with what he said he was “deemed to know”. Since part of the Crown’s case was that it was highly relevant that Cassell was a practising lawyer who would (they said) have acquainted himself with the Articles of Association and been aware that there was a right of pre-emption, the difference between “proved to have known” and “ought to have known” was central to the issue the jury had to decide. To mix them up as if either would do was a striking misdirection. This happened at repeated points in the summing up, including immediately after the direction on dishonesty.

23.
After these regrettably flawed directions, the judge embarked upon a very long recital of the evidence in the case, witness by witness. That is not a desirable way to sum up a criminal case, and risks causing the jury to lose sight of the wood for the trees, but by itself it would not afford grounds of appeal. Even, however, if this might to an extent have reduced the lasting impact of the several misdirections just set out, that impact was reinforced at the end of the summing up when the judge repeated many of them. In the last few minutes of the summing up, as well as a repetition of the textbook definitions of deceit and of dishonesty, the jury heard repeated (i) the fallibly limited definition of a conspiracy as an agreement to do something unlawful or wrongful to another person, (ii) the direction that Wood, in making his affidavit in support of the application to restore, acted unlawfully because he “would have known” that Cassell had no standing to make the application, (iii) the direction that Wood “would have known” that the sale of his shares to C&L Inc was a breach of the pre-emption right and that Cassell “must have known” this also, (iv) the direction that Cassell as a lawyer was “deemed to have known” that the purchase of Wood’s shares was unlawful for this same reason, and (v) the direction that Cassell “must have known or ought to have known” that he was not lawfully a director of PEL and that he “could not honestly have believed” that he was.

24.
Cumulatively, these were very serious misdirections. On behalf of the Crown, Mr Knox QC has realistically accepted that he cannot contend otherwise. It remains unexplained why no complaint was made about them, if not at the time, then on appeal to the Court of Appeal, but none was. There were no less than 23 grounds advanced before the Court of Appeal but, as that court recorded, some were abandoned during the hearing. A ground had been advanced relating to judicial behaviour, but it was a quite different complaint. It asserted that the judge had intervened excessively and frustrated cross-examination by defence counsel. There is very little sign of that in the transcript and the complaint seems not to have been pursued. The substantive grounds pursued included complaint about the deferred, but not unfair, amendment of the indictment from a seriously defective form into a proper one, and the fact that the money laundering count had been charged under the wrong statute. It is apparent from the judgment of the Court of Appeal that counsel did contend that the judge had insufficiently directed the jury as to the mens rea required for the conspiracy counts. However, that related only to the conspiracy counts, and even in relation to those there is no sign that that court was taken to the positive misdirections and improper comments which are set out above. It was in that context that the Court of Appeal held that, although the conspiracy direction was conceded by the Crown to be faulty, the proviso ought to be applied. It is therefore necessary for the Board to apply itself de novo to the grounds now advanced. There can only be one conclusion. Subject to the question of the proviso (below) the convictions can only be regarded as unsafe and unsatisfactory.

25.

Mr Roe had two other grounds. First, he contended that the judge had failed to draw attention to features of the evidence which might be taken by the jury in the appellants' favour. Principally, his submission was that the judge ought to have put squarely before the jury Cassell's claim, albeit made only by way of unsworn statement, that he believed himself a lawfully appointed director of PEL. The Board agrees that it was incumbent on the judge to lay this assertion before the jury, and that that would have involved asking them whether Cassell might have believed (a) that he had effectively acquired a 60% shareholding in PEL and (b) that having done so he was entitled to proceed as he did to remove Rooney without notice and to appoint himself. That, however, is part and parcel of the failure to put such case as the appellants had before the jury, and to identify dishonesty as the central issue. It therefore does not add to what has thus far been set out. To the extent that Mr Roe submitted that the judge was duty bound to remind the jury that Cassell had acted openly in relation to the court (in applying to restore PEL) and to the various Montserrat state agencies such as the Land Registry, the Board takes the view that nothing significant can be made of this. Both the application to restore and the registration of the sales were essential if control of PEL was to yield the proceeds of sale. Not all frauds are entirely secretive; some are comparatively blatant. What was charged here was the latter. It avails the appellants little to say that they were not defrauding the local agencies when the issues were whether they were intentionally defrauding Rooney and taking a deliberate or reckless risk with the purchasers' titles.

26.
Secondly, Mr Roe contended that the Virginia judgment was wrongly admitted. The Board does not agree. True it is that the judgment was not binding on the appellants since they were not within the jurisdiction of the court and had not submitted to it. But at the very least these proceedings were admissible to show that from (apparently) late 2007 the appellants were on notice that Rooney was protesting the illegality of the sales which they were making, and that in due course they knew that a court had taken the view that they were in the wrong. It was relevant for the Crown to prove this knowledge and that the appellants' behaviour was unaffected by it. It went to rebut any possibility that they were doing their best to preserve Rooney's interests unless and until he could be persuaded to settle. The judge ought to have explained to the jury that this was the relevance of the proceedings, which he did not. Rather, he used it to illustrate his strongly expressed view that the sales were unlawful, and he failed to tell the jury that the judgment was not directly binding or enforceable on the appellants. The evidence was not, however, inadmissible.

The proviso

27.
By section 39 of the Montserrat Supreme Court Act (ch 2.01) an appeal against conviction is to be allowed if the Court of Appeal thinks that the verdict of the jury should be set aside on the ground (inter alia) that it is unsafe or unsatisfactory, but subject to the proviso:

"Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred."

28.
The test for whether a miscarriage of justice has actually occurred is not simply whether the appellate court is itself persuaded of guilt. That would be to substitute trial by appeal judges for trial by jury. True it is that the responsibility for applying or rejecting the proviso is laid squarely on the appellate court. That the appellate court is satisfied of guilt is certainly necessary, but is not by itself sufficient.

The test is normally whether the appellate court is, further, satisfied that any jury acting properly must inevitably have convicted the defendant if the flaw(s) in the proceedings had not occurred: see Lundy v The Queen [2013] UKPC 28; [2014] 2 NZLR 273, paras 160-162, and the cases there reviewed.

29.
It may be that there can be imagined cases in which the trial process is so perverted that an appellate court would be driven to the view that there was a miscarriage of justice even if satisfied that any jury would inevitably have convicted the defendant if the trial had been properly conducted. It is not necessary to attempt to define such cases; plainly this question will be fact specific and a matter of degree. It is possible that an example might be the bribery of the jury, or a case in which the jury was dismissed and the court purported to record a verdict of guilty of its own motion. But cases of this sort will be very unusual. Ordinarily the whole point of the proviso is that it falls to be considered precisely because there has been some significant defect, which may include unfairness to the defendant, in the trial.

30.
However, short of such unusual cases of a wholly perverted trial process, it is plainly true that the more minor the error the easier it is likely to be for the appellate court to address and answer the question whether any jury must inevitably have convicted if the error had not occurred. Conversely the more extensive the error(s) at the trial, the more difficult it is likely to be to be sure that any jury must have convicted, and indeed there sometimes comes a point where the appellate court does not even embark on an analysis of the proviso question, the answer being obvious and/or the view being taken that it would plainly be a miscarriage of justice, because unfair, to sustain the conviction. Randall v The Queen [2002] UKPC 19; [2002] 1 WLR 2237, and Michel v The Queen [2009] UKPC 41; [2010] 1 WLR 879, where the defendant was unable properly to present his evidence because of continual unfair interruptions, in the former case from counsel for the Crown and in the latter from the judge, were two such cases.

31.
The present is not a case in which the trial process was so perverted that there would be a miscarriage of justice even if any jury in a proper trial must have convicted. This is a case of extensive misdirections allied with doubtless well-intentioned but quite improper judicial comment which was likely to influence the jury and lead to it not doing its job properly. It is not a case in which it is impossible to address the proviso question, but it is one where the errors are so pervasive that it is difficult to be satisfied that any properly directed jury must have convicted.

32.
The proviso question in this case boils down to this: must any jury, properly directed, have rejected the possibility that Cassell thought that he was entitled in law to act as director of PEL, sell the land, and settle with Rooney afterwards? The question for the jury would not have been whether Cassell's behaviour was morally or commercially acceptable, nor whether it was consistent with the proper professional standards of a practising lawyer acting for himself. It would have been whether he may have thought that he was legally entitled to do what he did, sharp practice or not.

33.
The Crown case on dishonesty was formidable. It rested not so much on the taking of the transfer of shares from Wood, as on the subsequent self-appointment as director of PEL. It was undoubtedly very unlikely that Cassell did not know of the right of pre-emption. He was indeed a lawyer in practice, but

even such people do not necessarily pause to read the small print, whether or not they should do so. What is unlikely is that a lawyer addressing the control of a company could fail to appreciate that in a close company there were almost certain to be restrictions on the transfer of shares, and, almost inevitably, a right of pre-emption. However, the unlikelihood of this would have been a matter for the jury. It is not possible to say that no jury could have given Cassell the benefit of the doubt about the right of pre-emption. If the jury had done that, then it could properly have concluded that from the transfer onwards he thought that he had control of the company, through a 60% shareholding via C&L Inc. The remaining question is whether, even then, any jury must inevitably have rejected the possibility that he thought he was entitled to appoint himself director without notice to Rooney.

34.
The case against the appellants on this question was the strongest part of the case. But a properly directed jury would have understood that the test of what was dishonest was for it alone. It could well have concluded that Cassell simply could not have thought that he was entitled to do what he did, and that he meant thereby to cause Rooney loss. It could well likewise have concluded that, knowing that he was not entitled to do what he did, he knew equally well that he was deceiving the purchasers into parting with money when they would not have done so if they had known that their title was dubious or non-existent. But equally the Board concludes that such a properly directed jury might have decided that these things were not proved, and that Cassell believed that, having acquired a controlling interest in PEL, he was entitled to press on with the sales and settle with Rooney later. The apparent lie in the purported company resolution of 21 September reinforced the case for dishonesty but the Board cannot exclude the possibility that a jury might have considered that Cassell thought this sharp practice and a way of forcing his (believed) control of PEL into effect, but that it was not dishonest, not meant to cause Rooney loss since it would be made good, and not taking a deliberate or reckless risk with the purchasers' money because they would receive good title in due course. That might or might not have been a likely outcome, but the misdirections, and the manner in which the issues were in effect taken out of the jury's hands, mean that it cannot properly be excluded.

35.
A separate consideration relating to the proviso emerged only during the oral hearing before the Board. The two conspiracy to defraud counts charged the two appellants with conspiring with Wood. They did not charge Cassell and C&L Inc with conspiring with each other, no doubt because although they were separate legal personalities there were not two separate minds - see the first instance ruling of Nield J many years ago in R v McDonnell [1966] 1 QB 233, which has generally governed good practice since. They did formally allege, for good measure, conspiracy with other person(s) unknown, but on the evidence there were no suggested unknown others, so the counts depended on proof of a dishonest agreement with Wood to defraud Rooney. Whatever may be the position in relation to the evidence that Cassell (and through him C&L Inc) were dishonest parties to such an agreement, the evidence (as against the appellants) that Wood was dishonest was, though clearly present, a good deal less weighty. It is not possible to postulate that any jury must inevitably have found that Wood was dishonest, and Mr Knox wisely disclaimed any such suggestion. The proviso could not, accordingly, be applied in any event to the conspiracy counts.

Particular counts

36.
Counts 9 and 13, which charged procuring the execution of a valuable security by deception, related to underlying transactions by which PEL transferred parcels of land to the appellants themselves, or to a relative of Cassell. These counts alleged that the victim of the deception was PEL. The parties

are, correctly, agreed that these counts could not properly have led to convictions in any event because there was never alleged to be any deception of PEL; the case against the appellants was that they had purported to deal with the land of PEL without any authority to do so. No such point was raised before the Court of Appeal.

37.
Count 10, again of procuring the execution of a valuable security, alleged that the security was a wire transfer. The parties are agreed that such a transfer was not within the relevant statutory definition in section 225 of the Penal Code (ch 4.02) (which required a document), so that that count was doomed to fail in any event. Again, no such point was raised before the Court of Appeal.

38.
Count 14 charged money laundering, but mistakenly laid the charge under the Proceeds of Crime Act 2010 which was not in force for most of the relevant time. The correct statute was the Proceeds of Crime Act 1999 and it was in relevantly different terms. This point **was** raised in the Court of Appeal, which court quashed the conviction on count 14 and ordered a re-trial. The parties are now agreed that an order for a re-trial is inappropriate since no trial can properly take place on a count laid under the 2010 Act, whereas the Crown is free to charge a count laid under the 1999 Act without the necessity for an order for re-trial. That point was not made before the Court of Appeal.

Conclusion

39.
It follows that the proviso ought not to be applied and that the several defects in the directions to the jury mean that the Board must humbly advise Her Majesty that these appeals against conviction must be allowed on grounds which were never before the Court of Appeal. In conformity with its usual practice the Board will advise remission to the Court of Appeal of the question whether there ought to be a re-trial on counts other than 9, 10 and 13. The local court is better acquainted with practice in the area and with the conditions in a small jurisdiction than is the Board. The Board says no more than that, although Cassell has served the sentence imposed, it does not from its limited perspective see any obstacle to re-trial and recognises that there may be good reason why the guilt or innocence of the appellants needs to be established.

40.
For the reasons explained in para 35, and as is agreed between the parties, the Board will humbly advise Her Majesty that the order for re-trial on count 14 (money laundering) ought to be quashed. The Board invites the parties to make written submissions as to costs within 14 days from the promulgation of the judgment.