

A

Court of Appeal

Regina v Valujevs and another

[2014] EWCA Crim 2888

2014 Nov 18

Fulford LJ, Hamblen J, Judge Wait

B

Crime — Fraud — Fraud by abuse of position — Defendants acting as unlicensed gangmasters — Whether defendants “expected” to safeguard or not to act against financial interests of workers — Whether gangmasters without licence falling outside ambit of offence — Whether case to answer — Fraud Act 2006 (c 35), s 4

C

The defendants were charged on indictment with, inter alia, fraud by abuse of position, contrary to sections 1 and 4 of the Fraud Act 2006¹. The prosecution alleged that the defendants had, dishonestly and intending thereby to make a gain for themselves or to cause loss to another, abused their position as unlicensed gangmasters by making unwarranted deductions from workers’ legitimate earnings, charging excessive rental payments and imposing unwarranted fines. After the prosecution had closed its case the defendants submitted that there was no case to answer. The judge upheld their submission, finding that as a matter of law a person in the position of gangmaster was not expected to safeguard, or not to act against, the financial interests of the workers to whom he supplied work, and that therefore the requirements of section 4(1)(a) of the 2006 Act were not satisfied.

D

On appeal by the prosecution—

E

Held, allowing the appeal, that the operation of section 4 of the Fraud Act 2006 was not restricted to those situations in which the defendant owed a fiduciary duty to the alleged victim, but in order to establish an abuse of position for the purposes of section 4(1)(b) it would be necessary to show a breach of a fiduciary duty or of an obligation which was akin to a fiduciary duty; that the question whether a defendant was “expected” to safeguard, or not to act against, the financial interests of another person, within section 4(1)(a), was to be determined objectively, based on the position of the reasonable person rather than that of the victim or of the defendant; that if a person had assumed responsibility for collecting a worker’s wages, or exercised control over the wages which a worker would receive, he occupied a position in which he would be expected to safeguard, or not to act against, the financial interests of that worker, within section 4(1)(a), in that there would be a clear expectation that the worker would receive his wages without a reduction in the form of unwarranted financial penalties or reductions, unlawful demands for the repayment of fines or artificially inflated rental payments; that the fact that a defendant had acted as a gangmaster without a licence did not mean that no such expectation existed but merely provided the context for the application of section 4; and that, accordingly, since there was evidence that the defendants had arguably assumed control of, and responsibility for, collecting workers’ wages, or had controlled those wages at the moment when they had been paid over, the judge had erred in acceding to the submission that there was no case to answer (post, paras 34, 37–38, 41–44, 46).

F

G

No cases are referred to in the judgment or were cited in argument.

H

The following case, although not cited, was referred to in the skeleton arguments:

R v Ghosh [1982] QB 1053; [1982] 3 WLR 110; [1982] 2 All ER 689; 75 Cr App R 154, CA

¹ Fraud Act 2006, s 1: see post, para 11.

S 4: see post, para 12.

APPLICATION for permission to appeal

From 13 October 2014 in the Crown Court at Blackfriars, before Judge Richardson and a jury, the defendants, Juris Valujevs and Ivars Mezals, were tried on an indictment charging that they had (1) acted as gangmasters other than under the authority of a licence, contrary to section 12(1) of the Gangmasters (Licensing) Act 2004; (2) committed fraud by abuse of position, contrary to sections 1 and 4 of the Fraud Act 2006; and (3) conspired to facilitate the commission of breaches of immigration law. On 12 November 2014 the trial judge rejected defence submissions that there was no case to answer in relation to counts 1 and 3, but acceded to the submission that there was no case to answer in relation to count 2.

The prosecution sought permission to appeal against the judge's ruling on count 2 pursuant to section 58 of the Criminal Justice Act 2003. The Registrar of Criminal Appeals referred the application to the full court. An order was made to expedite the appeal pursuant to section 59 of the Criminal Justice Act 2003.

The facts are stated in the judgment of the court.

Gregory Perrins (instructed by *Crown Prosecution Service, Appeals Unit*) for the Crown.

The Fraud Act 2006 provides little assistance as to the meaning of a person who “occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person” in section 4 of that Act. In particular there is no guidance as to by whose expectation the position is to be judged. In the circumstances it ought to be a reasonable member of the public as personified by the jury and the words in section 4 ought to be given their natural and ordinary meaning. Whether a gangmaster (licensed or unlicensed) who falls within the definition of a gangmaster contained in section 4 of the Gangmasters (Licensing) Act 2004 can be said to occupy a position in which he is expected to safeguard, or not to act against, the financial interests of another person is a question of fact for the jury. Where the relationship between the defendants and the workers to whom they supplied work was in reality a gangmaster-worker relationship and the defendants exercised a degree of control over the workers' wages by withholding and/or taking such wages, it was a relationship capable of being caught by the terms of section 4 of the Fraud Act 2006. Accordingly it was for the jury to consider whether it was such a relationship and whether the defendants' conduct constituted an abuse of their position. The judge was wrong to withdraw the case from the jury.

Di Middleton and *Michael Goold* (instructed by *Credence Law Group, King's Lynn*) for the second defendant.

The question is not whether the defendants were abusing their position, but whether theirs is a position of trust sufficient to bring the relationship within section 4 of the Fraud Act 2006. The judge was right to conclude as a matter of law that the relationship did not fall within the section.

The Crown is wrong to put its case on the basis of a relationship of gangmaster and worker for the purposes of section 4 of the 2006 Act. To impose that kind of responsibility on the relationship stretches the provisions of section 4 too far: it is wrong to stretch the regulatory

A framework which bites on a licensed relationship between gangmaster and worker to the unlicensed activity which is being prosecuted.

In order to qualify as fraud an abuse of position has to be dishonest and secret: see para 7.40 of the Law Commission's Report, *Fraud: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965* (2002) (Law Com No 276) (Cm 5560), which led to the enactment of the 2006 Act.

B Each of the matters relied on by the Crown with regard to acts of abuse was a matter of discretion between the second defendant and the witnesses: although there were disputes as to whether money was owed, they were out in the open with no secrecy surrounding them.

Although the acts carried out by the defendants were akin to acts of licensed gangmasters, they had no license and so were not operating within the strictures of such a licence. Unless the offence contrary to section 12(1) of the Gangmasters (Licensing) Act 2004 is established, the relationship between the defendants and the workers cannot be a fiduciary relationship falling within section 4 of the 2006 Act.

C If the judge were to be overruled it would open the door to any economic relationship where a person has power over another falling within section 4 of the 2006 Act. That was not the intention of the Law Commission as expressed in its report or of Parliament.

D *Mark McDonald* and *Shivani Jegarajah* (instructed by *Credence Law Group, King's Lynn*) for the first defendant.

The submissions of the second defendant are adopted. The evidence is in any event insufficient to establish the offence as against the first defendant.

Perrins replied.

E 18 November 2014. FULFORD LJ delivered the following judgment of the court.

Introduction

1 These proceedings may be reported anonymously otherwise there should be no reporting until the conclusion of the trial.

F 2 Juris Valujevs and Ivars Mezals are charged on an indictment containing three counts. Count 1 alleges that they both acted as gangmasters other than under the authority of a licence, contrary to section 12(1) of the Gangmasters (Licensing) Act 2004. On count 2, the count with which this court is concerned, it is suggested that they both committed fraud by abuse of position, contrary to sections 1 and 4 of the Fraud Act 2006. Count 3 alleges conspiracy, together with two other defendants, to facilitate the commission of breaches of immigration law. It is the prosecution's case that the defendants abused their position as gangmasters by exploiting members of the migrant workforce from Latvia and Lithuania who had come to Cambridgeshire to look for work. Given our decision in this case, it is necessary to emphasise that there is evidence that the defendants took on responsibility for paying the wages of the workers or they controlled the amounts that were paid to the workers.

H 3 The trial began on 13 October 2014 and it is expected to conclude by 19 December. The prosecution closed its case on 10 November. Submissions of no case to answer were made by all defendants on all counts at the conclusion of the prosecution's case and in a reserved judgment, the

judge rejected the submissions of no case to answer made in respect of counts 1 and 3. However, he upheld the submission of no case to answer in relation to count 2. The prosecution indicated its intention to appeal against that ruling pursuant to section 58 of the Criminal Justice Act 2003. An order was made to expedite the appeal pursuant to section 59 of the 2003 Act.

4 The trial is expected to recommence tomorrow with the defence evidence.

The indictment

5 The particulars of count 2 as originally drafted read as follows:

“Juris Valujevs and Ivars Mezals, between 1 January 2009 and 19 October 2013, dishonestly and intending thereby to make a gain for themselves or loss to another, abused their position as suppliers of employment, transport and accommodation to migrant workers in which they were expected not to act against the financial interests of such workers, by withholding earnings, charging inflated rental payments and imposing unwarranted financial penalties, contrary to section 4 of the Fraud Act 2006.”

6 The prosecution has indicated that, at an early stage in the proceedings, the judge expressed his concerns as to the way in which the particulars of count 2 were phrased. In response to these concerns, the prosecution prepared a note on the indictment dated 24 October 2013 in which it made clear that the position it was alleged the defendants abused for the purposes of section 4 of the 2006 Act was that of gangmaster. By agreement of all the parties consideration of any amendment to the indictment was postponed to the conclusion of the prosecution’s case. If permitted, the prosecution proposes an amendment in the following terms:

“Juris Valujevs and Ivars Mezals, between 1 January 2009 and 19 October 2013, dishonestly and intending thereby to make a gain for themselves or loss to another, abused their position as gangmasters, a position in which they were expected to safeguard, or not to act against, the financial interests of the workers they supplied by making unwarranted deductions from workers’ legitimate earnings, charging excessive rental payments and imposing unwarranted fines.”

7 The prosecution case is that the defendants were gangmasters and we proceed on that basis, given the judge’s decision as regards the submissions on count 1. It is contended that this is a position which the jury—properly directed—could find was one in which they were expected to safeguard, or not to act against, the financial interests of the workers they supplied, within the meaning of section 4 of the 2006 Act.

8 The judge rejected the prosecution’s submission and ruled that as a matter of law a gangmaster is not a position which comes within the ambit of section 4 of the 2006 Act. It is that decision against which the prosecution now appeals.

The statutory and regulatory provisions

9 A gangmaster is defined by section 4 of the 2004 Act as follows:

A “(1) This section defines what is meant in this Act by a person acting as a gangmaster.

“(2) A person (‘A’) acts as a gangmaster if he supplies a worker to do work to which this Act applies for another person (‘B’).

B “(3) For the purposes of subsection (2) it does not matter— (a) whether the worker works under a contract with A or is supplied to him by another person, (b) whether the worker is supplied directly under arrangements between A and B or indirectly under arrangements involving one or more intermediaries, (c) whether A supplies the worker himself or procures that the worker is supplied, (d) whether the work is done under the control of A, B or an intermediary, (e) whether the work done for B is for the purposes of a business carried on by him or in connection with services provided by him to another person.

C “(4) A person (‘A’) acts as a gangmaster if he uses a worker to do work to which this Act applies in connection with services provided by him to another person.

D “(5) A person (‘A’) acts as a gangmaster if he uses a worker to do any of the following work to which this Act applies for the purposes of a business carried on by him— (a) harvesting or otherwise gathering agricultural produce following— (i) a sale, assignment or lease of produce to A, or (ii) the making of any other agreement with A, where the sale, assignment, lease or other agreement was entered into for the purpose of enabling the harvesting or gathering to take place; (b) gathering shellfish; (c) processing or packaging agricultural produce harvested or gathered as mentioned in paragraph (a). In this subsection ‘agricultural produce’ means any produce derived from agriculture.

E “(6) For the purposes of subsection (4) or (5) A shall be treated as using a worker to do work to which this Act applies if he makes arrangements under which the worker does the work— (a) whether the worker works for A (or for another) or on his own account, and (b) whether or not he works under a contract (with A or another).”

F 10 Section 12(1) of the 2004 Act makes it an offence to act as a gangmaster except under the authority of a licence issued by the Gangmasters Licensing Authority.

11 Section 1 of the 2006 Act states:

“(1) A person is guilty of fraud if he is in breach of any of the sections listed in subsection (2) . . .

G “(2) The sections are— . . . (c) section 4 (fraud by abuse of position).”

12 Fraud by abuse of position is defined in section 4 in the following terms:

H “(1) A person is in breach of this section if he— (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, (b) dishonestly abuses that position, and (c) intends, by means of the abuse of that position— (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss.

“(2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.”

13 The prosecution highlights that the Gangmasters Licensing Authority's Licensing Standards 2012 to which a gangmaster has to adhere as a condition of their licence are before the jury in evidence. It is suggested that they illustrate the range and nature of the obligations and responsibilities that a gangmaster owes to the workers that he supplies. These cover, inter alia the following requirements:

1. The worker must be paid at least the national minimum wage or, if applicable, in accordance with the appropriate agricultural wages order;

2. The worker must not have his or her wages withheld because the licence holder had not received payment from the labour user, the worker has failed to prove he or she worked during a particular period, the worker has not worked during any period other than that to which the payment relates, or because of any matter within the control of the licence holder;

3. The worker must be provided with itemised payslips;

4. The worker must not be subjected to physical and mental mistreatment;

5. The freedom of movement and the freedom to find other employment of the worker are not to be restricted;

6. There are restrictions on what is called debt bondage in the sense that if the worker is lent money to meet his or her travel and other expenses in order to take up the position, the sum to be repaid cannot be greater than that loaned and the employee must be provided in writing with full details of any repayment terms of the loan;

7. The licence holder is not permitted to withhold identity documents;

8. Any accommodation must be in a good state of repair and must match certain specified standards;

9. When transport is provided it must meet certain criteria;

10. The worker is entitled to proper working conditions (these provisions are directed at hours of work and health and safety at work).

The evidence

14 We have not been provided, unsurprisingly, with a transcript of the extensive evidence that the jury has heard and we work on the basis of a summary of the relevant parts of the evidence provided by the prosecution which is said to support the following central contentions:

1. The defendants provided the workers with accommodation as a condition of being given work.

2. They charged grossly excessive rent as a means of inflating the indebtedness of the workers.

3. They withheld work until a worker had accrued a significant debt.

4. They withheld earnings from the workers by not passing on moneys they had legitimately earned or they deducted moneys either before the wages were handed over or at the point at which they were handed over, purportedly in order to recoup for a worker's suggested indebtedness.

5. They imposed unwarranted financial penalties as a means of inflating the indebtedness of the worker, thereby enabling them to justify withholding earnings or in order simply to take a worker's money.

15 The defendants, it is suggested, stood to gain from these alleged activities.

16 It is submitted by the prosecution that there is clear evidence that either deductions were applied to the wages before the defendants passed

A them over to the workers or the defendants were present at the moment that the wages were handed over, and they made deductions at that stage, thereby controlling the wages that the workers were to receive. This is described in the written submissions of the Crown as: “There is a significant quantity of evidence tending to show that both defendants deliberately and dishonestly withheld earnings . . .”

B 17 There is a dispute as to the extent to which this was borne out by the evidence, but it is conceded that at the very least there was some evidence to this effect. We have, therefore, approached this case on that basis. A more fundamental disagreement, to which we return at the end of the judgment, is whether the prosecution indicated that it did not seek a conviction on count 2 on the basis of “withheld wages”.

C *The ruling*

D 18 The judge interpreted the verb “expect” in the dictionary sense of “look for as due from another”. Although it undoubtedly encompasses a legal duty, the judge concluded it is clear Parliament did not mean to limit the phrase to a legal duty, fiduciary or otherwise, because that would have been easy to express in the statute. However, the judge concluded that Parliament could not have meant for this provision to cover anything less than “a pressing moral and social obligation to another, recognised by all reasonable people”. That is similar to a breach of a position of trust. The judge determined that section 4 should not apply in “the general commercial area where individuals and businesses compete in markets of one kind or another, including labour markets, and are entitled and expected to look after their own interests”.

E 19 Against that background, the judge summarised the position as follows:

F “In my judgment it is not remotely arguable that the positions listed in [the draft count 2] are positions in which the occupant is expected to safeguard or not act against the financial interests of the objects of his business for the purposes of section 4. Providers of accommodation and transport are selling commodities on the open market. They are not expected to safeguard or not act against the financial interests of those who may purchase their commodities. The term ‘labour providers’ could cover a number of types of business, of which the most prevalent would be employment agencies and job centres (which used to be called employment exchanges). As a general rule these organisations are not expected to safeguard, or not act against the financial interests of the putative employees or employers. They are commercial or governmental organisations, effectively acting as a kind of broker in an open market, aiming to negotiate terms which will be acceptable to the clients while making as much profit for themselves as they can acquire. So all these positions are far removed from what I consider to be the ambit of section 4.”

H 20 The judge rejected the contention that an unlicensed gangmaster is expected by virtue of his position to safeguard or not act against the interests of the worker. He concluded that no such expectation is found in the 2004 Act and whilst he accepted that some of the standard licence conditions imposed by the 2004 Act are directed towards safeguarding the

financial interests of workers (e.g. the provisions concerning the payment of wages, including the minimum wage), these broadly reflected the position that exists within general employment law. Otherwise, when negotiating rates of pay and the cost of travel and accommodation, the judge considered the gangmaster is free to pursue his own commercial interests. Therefore the regulatory scheme imposed minimum standards whilst recognising that generally a gangmaster is able to concentrate on his own concerns.

21 The judge noted that the standard licence conditions of the 2004 Act do not impose a duty to charge a reasonable or fair rent. Instead non-financial issues such as the safety of accommodation are addressed. The judge concluded that the requirement to pay the minimum wage (which has wide application) does not create a general obligation on gangmasters to safeguard the financial interests of his workers. The judge was fortified in this view by reference to the position that applies with consumer credit. As he observed, licence conditions are often imposed to protect the interests of borrowers, but it does not follow that the lender is expected to protect the financial interests of the consumer. Instead the licence conditions are imposed because it is recognised that the institutions have commercial interests which cut across those of the consumer, leading to the need for precise regulation.

22 In summary, the judge considered that the position of a gangmaster is far removed from the position of trust which is the true target of section 4.

23 The judge observed that even if section 4 applied to licensed gangmasters, “it would stretch the language yet further to find that an unlicensed supplier of workers was subject to a similar expectation”.

24 At the end of his judgment, the judge turned to the position of deductions from wages as follows:

“There is, however, evidence that Mr Mezals received the wages of some workers at some institutions for some of the time, and that he deducted what he considered to be owed for accommodation and transport from wage packets before handing the wages over to the workers concerned.

“It might be said that by accepting the wages of workers for the purpose of delivering them to the workers concerned he placed himself in a position where he was expected to safeguard and not act against the interests of the workers as regards those wages, and that if he deducted money before handing the wages over he abused that position. This might be thought to be a straightforward case of a person in a fiduciary position where the law would recognise an obligation on him. The question would then be whether he acted dishonestly.

“This is, however, a much narrower way of putting the case than the prosecution has adopted. There was some discussion at an earlier stage in the hearing as to whether the prosecution might put the case this way, or even charge theft. It has not done so. I record that this is the case, but I should not be thought of as disproving the prosecution’s course. On the contrary, the evidence of the workers was for the most part that Mr Mezals deducted only that which was owed for accommodation and transport. The residue that was left would have been a comparatively small part of the prosecution case.”

A 25 As we have already indicated, we shall return to the issue addressed in those paragraphs at the conclusion of this judgment.

The submissions of the defendants

B 26 It is submitted that the judge was correct in finding that the defendants did not occupy positions in which they were expected to safeguard nor to act against the financial interests of the workers. In any event it is submitted that there is insufficient evidence of abuse of such a position for the count to go before the jury. It is accepted that the handling of wages may give rise to an abuse of position in this context, but it is contended that the instances when there was a failure to pay the due wages were few and far between.

C 27 It is suggested that instead on a frequent basis debts were paid after the wages had been received. It is additionally argued that the prosecution chose not to put its case on the basis of withheld wages.

D 28 The defendants accept that the wording of section 4 of the 2006 Act is deliberately broad. It is further accepted that it is not to be limited to cases where a fiduciary duty exists between the offender and victim, albeit it is anticipated that a charge under section 4 will often be based on an alleged breach of a fiduciary duty.

29 Where no fiduciary duty exists it is submitted that the wording of section 4 and public policy considerations provide restrictions as to the types of “position” that will suffice.

E 30 It is emphasised that the offender is expected to safeguard or not to act against the *financial* interests of the victim. It is submitted that the relevant expectation is that of a reasonable person and that it will only be positions that involve a substantial degree of trust between the victim and offender that will breach section 4. It is submitted that the judge’s formulation of “a pressing moral and social obligation . . . often equated with a position of trust” is correct.

F 31 It is argued that public policy considerations require that section 4 should not be interpreted so broadly that it impinges on ordinary day-to-day commercial and financial transactions. Further, it is suggested that the gangmasters did not hold a relevant position of responsibility as regards the financial interests of the workers when providing transport and accommodation, as opposed to the quality of these services, and that there was a lack of evidence that the alleged victims were vulnerable or that any suggested vulnerability on their part created potential criminal liability under section 4 of the 2006 Act as regards the alleged gangmasters.

G 32 Finally, it is contended that whatever obligations may exist under the licensing standards, as regards licensed gangmasters, they cannot apply to unlicensed gangmasters because the obligation only arises by virtue of the licence.
H

The submissions of the prosecution

33 We have not repeated the submissions of the prosecution because they largely accord with the conclusions we have reached.

Discussion

34 The 2006 Act provides no definition of the person who “occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person”. It is clear from the wording that Parliament did not intend to restrict the operation of the section to those situations in which the defendant owes a fiduciary duty to the alleged victim, not least because this result could readily have been secured by appropriate drafting.

35 The Explanatory Notes to the statute support this interpretation, albeit they otherwise only provide limited assistance:

“20. Section 4 makes it an offence to commit a fraud by dishonestly abusing one’s position. It applies in situations where the defendant has been put in a privileged position, and by virtue of this position is expected to safeguard another’s financial interests or not act against those interests. The Law Commission explain the meaning of ‘position’ at para 7.38: ‘The necessary relationship will be present between trustee and beneficiary, director and company, professional person and client, agent and principal, employee and employer, or between partners. It may arise otherwise, for example within a family, or in the context of voluntary work, or in any context where the parties are not at arm’s length. In nearly all cases where it arises, it will be recognised by the civil law as importing fiduciary duties, and any relationship that is so recognised will suffice. We see no reason, however, why the existence of such duties should be essential. This does not of course mean that it would be entirely a matter for the fact finders whether the necessary relationship exists. The question whether the particular facts alleged can properly be described as giving rise to that relationship will be an issue capable of being ruled on by the judge and, if the case goes to the jury, of being the subject of directions.’

“21. The term ‘abuse’ is not limited by a definition, because it is intended to cover a wide range of conduct. Moreover subsection (2) makes clear that the offence can be committed by omission as well as by positive action. For example, an employee who fails to take up the chance of a crucial contract in order that an associate or rival company may take it up instead at the expense of the employer, commits an offence under this section.

“22. An employee of a software company who uses his position to clone software products with the intention of selling the products on would commit an offence under this section.

“23. Another example covered by this section is where a person who is employed to care for an elderly or disabled person has access to that person’s bank account and abuses his position by transferring funds to invest in a high-risk business venture of his own.”

36 Therefore, although the Explanatory Notes suggest various potential situations when an individual may occupy a relevant position, none assist as regards the position of gangmasters and none help to describe the parameters of this element of the offence. Therefore, it will be for the court to decide if section 4 applies in the absence of a legal duty of a fiduciary nature.

- A 37 In this case, the relevant acts of the gangmasters that are relied on by the prosecution have been set out in the draft amended count, namely that the defendants allegedly “withheld earnings, charged inflated rental payments and imposed unwarranted financial penalties”. As described above, it is prohibited in the licensing standards to withhold or to threaten to withhold the whole or part of any payment due to a worker for any work
- B they have done on account of “any matter within the control of the licence holder”. In our view, at the very least, it is open to the jury on the evidence to decide that these defendants had gone beyond merely supplying workers and instead they had assumed control of and/or responsibility for collecting the wages of the workers or they controlled the amounts that the workers would be allowed to retain at the moment the wages were handed over. On either
- C basis, the prosecution are able to contend that the defendants had taken on the obligation of paying the wages of the workers, and it is inherent in that commitment that the wages received by the workers will not be reduced by unwarranted financial penalties or deductions, unlawful demands for the repayment of suggested fines, or artificially inflated rental payments. (The prosecution does not rely on any other statutory/regulatory provision or any contractual term to establish an obligation by these defendants to pay the workers’ wages without reductions.)
- D 38 The duty not to withhold payment due to a worker has been imposed as part of an enforceable scheme to regulate the activities of gangmasters who provide labour, and in our judgment the prosecution is entitled to suggest that on this basis the relevant defendant “occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person” for the purposes of section 4. Put otherwise,
- E having assumed responsibility for collecting the wages for a worker, or by exercising control over the wages that would be received by a worker at the point they are received, there is a clear expectation that the worker will receive them without a reduction in the form of (i) unwarranted financial penalties or deductions, (ii) unlawful demands for the repayment of suggested fines, or (iii) artificially inflated rental payments.
- F 39 Whether or not it is appropriate to leave the case to the jury on this basis is an issue to which we return in a moment. If the count should be left in this way, the particulars of count 2 will need to be amended in light of these conclusions, and the three alternatives ought to be listed as separate particulars within the count as examples of how the defendants breached the obligation not to withhold wages. The jury will need to be directed that they can only convict if they all agree on at least one of the particulars.
- G 40 We stress, we have focused on the regulatory scheme that applies to gangmasters and whether or not the approach taken on this appeal will apply in future cases as regards others who, in different roles, take on the responsibility for collecting the wages of a worker, employed or self-employed, is not for this court to determine.
- H 41 Although the statute does not provide any assistance on the issue, in our view the “expectation” in section 4 of the 2006 Act is an objective one. It is for the judge to assess whether the position held by the individual is capable of being one “in which he is expected to safeguard, or not to act against, the financial interests of another person”. If it is so capable, it will be for the jury thereafter to determine whether or not they are sure that was the case. It would be untenable to suggest that the expectation should be

that of either the potential victim (the test would, in all likelihood, be too low) or the defendant (the test is likely to be set too high). Therefore, this is an objective test based on the position of the reasonable person.

42 We are unpersuaded by the defendants' contentions that unlicensed gangmasters are not caught by this "expectation". In this regard we accept the submission of the prosecution that, although the defendants were allegedly acting as gangmasters without a licence, they do not fall outside the ambit of section 4. If they are guilty of count 1 then the expectation potentially applies with as much force as if they had been operating under a licence. There is plainly a strong link between the two alleged offences. The facts that underpin count 1 are equally relevant to the jury's assessment of count 2. We would suggest that the jury should be directed to consider count 1 first and that count 2 is dependent on a conviction on count 1, albeit the jury would then have to go on to consider the various additional elements of count 2.

43 The prosecution has relied on other forms of questionable financial behaviour on the part of the defendants as part of its reliance on section 4 of the 2006 Act, such as the general device of charging excessive sums for rent, withholding work in order to ensure that the worker in question was indebted to the gangmaster, or lending money to workers for which claims are later made for repayment (as opposed to deducting sums from wages). In our judgment, potentially reprehensible behaviour of this kind falls outside the financial interests of a person the gangmaster could properly be expected to safeguard or not to act against. Individuals do not commit a criminal offence under section 4 of the 2006 Act if they seek rental payments in excess of the market rate and gangmasters are not under an obligation to provide employment for those seeking work. Gangmasters are entitled to ask for repayment of moneys that they have lent to workers. Although we recognise that these can be difficult situations, the individual is able to look for accommodation or employment elsewhere and we are unpersuaded that this suggested behaviour on the part of the defendants arguably provides the basis for inclusion as particulars of a section 4 of the 2006 Act offence. In this critical sense we agree with the judge in the court below that to establish an abuse of position for the purposes of section 4 of the 2006 Act it is necessary for the prosecution to demonstrate a breach of a fiduciary duty, or a breach of an obligation that is akin to a fiduciary duty. This can conveniently be described, for instance, as a breach of trust or a breach of a privileged position in relation to the financial interests of another person. Section 4 does not apply to those who simply supply accommodation, goods, services or labour, whether on favourable or unfavourable terms and whether or not they have a stronger bargaining position. Therefore, the fact that an individual is a gangmaster who offers work or accommodation on particular terms, or lawfully requests the repayments of debts incurred by workers, does not ipso facto involve the abuse of a relevant position as regards the financial interests of another person.

44 We therefore concur with the conclusion of the judge that section 4 should not apply in "the general commercial area where individuals and businesses compete in markets of one kind or another, including labour markets, and are entitled to and expected to look after their own interests". We repeat, the critical factor in this case is that there is evidence that the defendants arguably assumed control of, and responsibility for, collecting

A the wages of the workers, or they controlled the wages at the moment that they were paid over, and the fact that they were acting as gangmasters merely provided the vital context relied on by the prosecution in which that role was assumed.

B 45 What we are unable to resolve is whether the prosecution decided not to pursue count 2 on this basis. It is not entirely clear from the judge's concluding remarks as to whether this possibility had been abandoned by the prosecution and we are not in a position to gauge whether it would be unfair on the defendants for the case to be put on this basis.

Conclusion

C 46 Under section 61(1) of the 2003 Act, we propose to reverse the ruling of the judge on count 2. We are satisfied that the ruling was not a reasonable one for the judge to have made for the purposes of section 67 of the 2003 Act, in the sense that the case can properly be put on the basis that we have identified. We order that the proceedings for count 2 are resumed in the Crown Court. We have provided guidance as to how the particulars in count 2 are to be framed and we have made some observations as to the relationship between count 1 and count 2. That is our order. However, D these latter matters are not set in stone and they may be subject to any variation depending on the developments in the trial, the submissions of counsel and the decision of the trial judge.

E 47 Furthermore, when the case returns to the court below, it is clear that there is an outstanding question of whether it would be fair for the prosecution to rely on count 2 on the basis that we have described. The defendants submit that this has never been the prosecution's case and that it would be unfair to allow this new approach to be introduced. That is a matter for the judge to determine, in part in light of the concluding three paragraphs of the judge's judgment which we have set out above.

F 48 As a matter of law, it is open to the prosecution to put its case in the way we have described. Whether it is fair for this to happen is another matter entirely, about which we do not express an opinion. It will be for counsel to develop submissions before the judge on this issue, if they choose to do so.

Application granted.

Appeal allowed.

Judge's ruling reversed.

Proceedings in Crown Court to be resumed.

GEORGINA ORDE, Barrister

H