

**WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.**

**This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.**

[2022] EWCA Crim 1095

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202200355/A4



Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Tuesday 26 July 2022

Before:

LADY JUSTICE CARR DBE  
MRS JUSTICE CUTTS DBE  
THE RECORDER OF LEEDS  
HIS HONOUR JUDGE KEARL QC  
(Sitting as a Judge of the CACD)

REGINA  
V  
NICHOLAS GRAY

---

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

---

MR S REIZ QC appeared on behalf of the Appellant

---

**J U D G M E N T**

LADY JUSTICE CARR:

Introduction

1. This is an appeal against sentence brought partly as of right under section 13 of the Administration of Justice Act 1960 and partly with leave of the single judge.
2. Having changed his plea to guilty in June 2021 the appellant, now 42 years of age, was sentenced on 16 January 2022 on a single count of fraud contrary to section 1 of the Fraud Act 2006 by His Honour Judge Taylor QC sitting in the Crown Court at Swindon to 56 months' imprisonment (that is to say, four years and eight months' imprisonment). The fraud related to the use of company credit cards at a company where the appellant had been Head of Finance over a period of some three-and-a-half years, between March 2014 and December 2017.
3. The appellant failed to attend his first sentencing hearing on 10 September 2021. For that failure the judge sentenced him to an additional one month's imprisonment, to run consecutively to the term of 56 months.
4. On this appeal the appellant has had the benefit of representation by Mr Reiz QC who has advanced the appellant's case effectively. We are grateful to him for his assistance.

The facts

5. The appellant had been employed as Head of Finance at a digital media company known as Equimedia Limited ("Equimedia") founded by Andrew and Louise Burgess in 1999. The company had offices in the United Kingdom and in America and by 2017 had a turnover of £20 million.
6. At the time of the offending the appellant had worked at the company for some 13 years and had access to and the authority to use the company's five main credit cards. Monitoring the use of these cards was one of his responsibilities and he was aware that it was policy that the company auditors would not audit credit card expenditure below £100,000.
7. His offending came to light in November 2017 when serious accounting anomalies were spotted during a meeting between Mr Burgess and his bank manager. A new financial team was appointed and insurers appointed a bookkeeper to investigate matters. It became clear that the appellant had been making a number of substantial purchases on company credit cards for his own benefit. The transactions included payments for items of clothing, watches, cash withdrawals and family hotel accommodation.

8. The appellant had deliberately hidden his fraudulent use of the cards within internal accounting systems using "banners and button" and trafficking account codes. The accounts that he had prepared for the company had been completely fictitious and wholly misleading. Additionally, large sums had gone uncollected from clients and the appellant had failed to chase bills - to such an extent that at one stage the company was placed under a seven-day threat of winding-up.
9. What has been described as the direct loss to the company from the appellant's fraudulent use of the credit cards was £53,600, but it was Equimedia's case that there were further significant additional losses to the company arising out of the appellant's offending.
10. Initially, the appellant had denied any guilt and sought to blame the Burgesses. But on the first day of trial, having indicated his intention to do so a week earlier, he pleaded guilty. As already indicated, he failed to attend court for sentencing on 10 September 2021 and a warrant for his arrest was issued. He was arrested at his home address three days later.
11. He was of previous good character and the judge had before him a number of character references. He was said to be someone devoted to his wife and young children. A pre-sentence report recommended a community disposal with an unpaid work requirement.
12. The judge also had before him victim personal statements from Andrew and Louise Burgess. They spoke of their deep shock, distress and confusion upon discovery of what was a profound abuse of trust. Mrs Burgess spoke of the untold stress that had been caused to them as the evidence became pieced together.
13. The Burgesses referred not only to the direct loss of £53,600 but also to an additional £143,000 in terms of additional costs said to flow from the fraud, including payment of an insurance excess, additional insurance premium costs, £70,000 paid in wages to an individual employed to fill the appellant's role whilst on garden leave and £21,000 in relation to the costs of engaging someone to resolve issues with HMRC. Those costs, in particular the additional insurance premium and wage costs, were the subject of challenge by the appellant. By the time of sentence Mr Burgess had provided further statements increasing the loss alleged to have been suffered by the company in terms of costs to just under £690,000, later reduced to a sum of just over £678,000. That sum included some £368,000 written off as inaccurate in monthly management accounts that the appellant had prepared, and also a sum of £85,000 claimed by way of compensation for Mr Burgess' time spent on a daily basis dedicated to the internal investigation into the appellant's wrongdoing.

## The sentence

14. The judge placed the appellant's offending in Category A2 of the Sentencing Council Guideline for Fraud Offences. The sum of £53,000 would place the harm in Category 3 but, said the judge, that would not provide a true or accurate picture. The actual and what he described as indirect loss came closer to £700,000 which would place the harm in Category 1. But the judge said he would be cautious as to how that figure had been calculated, and that placing harm in Category 2 was the "fairest way" to approach the situation. Then he moved up the category to reflect what he described as "at the very least" medium impact. Arguably, he said, this was high victim impact. In terms of mitigation the judge recorded that the appellant had no previous convictions, that there were elements of remorse - although they were more to do with the position in which the appellant found himself than any regret for the Burgesses. Indeed, said the judge, the appellant had on occasion sought to minimise or justify his actions. The judge said that he took on board the character references for the appellant and the impact of custody on the appellant's family. After trial the judge said that he would place the custodial term at five-and-a-half years. With credit of 15% for a guilty plea, a term of 56 months' imprisonment was arrived at. As for the failure to surrender at the sentencing hearing, the judge said that this had added to the listing difficulties caused by the pandemic. It was a deliberate attempt to delay or evade justice and one which had a substantial effect on the timing of sentencing. Placing the offending in Category A1 of the relevant part of the Sentencing Council Guideline for Breach Offences, the judge sentenced the appellant to a consecutive term of one month's custody.

## Grounds of appeal

15. Mr Reiz advances essentially two grounds of appeal. First, he submits that the judge was wrong in principle to include in his evaluation of harm what Mr Reiz describes as "indirect losses". It is said that the judge erred in sentencing on the basis that the loss from the fraud was in excess of £500,000. The actual loss was only £53,608. The starting point chosen by the judge of 66 months was too high as a result. Mr Reiz emphasises that the indictment facing the appellant and to which the appellant had pleaded guilty was specific and limited to fraud. The appellant was not charged with, and did not admit, false accounting. The loss from that fraud and its value was only the £53,000-odd. The additional costs claimed by the company might be said to be relevant to costs and/or a compensation order, but it was wrong as a matter of principle to increase the category of harm as a consequence of them. Mr Reiz informs us that compensation proceedings are ongoing. The matters there to be taken into account should not have been used against the appellant for the purpose of determining the custodial term. The appellant, submits Mr Reiz, was being punished for costs over which the appellant had no control. The offence of fraud was complete before and independently of any additional investigative costs. Further, Mr Reiz points to the evidential lack of clarity as to the precise losses caused as a result of the fraud on the one hand and costs incurred as a result of wider mismanagement issues. Having correctly concluded that the judge could not be sure that the appellant was trying to sabotage the

company, he submits that the judge erred in taking account of such alleged additional criminality in reaching the sentence that he did. In terms of specifics, Mr Reiz points to the sum of £368,000-odd written off as a correction to the management accounts. That was simply an accounting exercise and could not conceivably form part of the harm related to the fraud.

16. As for victim impact, Mr Reiz takes issue with the judge's categorisation of the victim impact as medium. This was a company operating as a substantial international business. All but £5,000 was reimbursed by insurers, so far as the loss from the fraud was concerned. This was not a case, submits Mr Reiz, where a considerable detrimental effect was made out.
17. Separately and briefly, Mr Reiz also submits that the judge was wrong to impose a consecutive sentence of one month's imprisonment for the appellant's failure to surrender. The judge was wrong to conclude that there was a substantial delay and/or interference with the administration of justice. The appellant was arrested only three days later and thereafter remanded in custody. Whilst there may have been further delay due to listing difficulties in the pandemic, that was not the fault of the appellant.

### Discussion

18. This was a sophisticated fraud with cunning steps taken by the appellant to cover his tracks. He fraudulently used an elaborate accounting methodology to conceal the fact that cash was missing, inflating costs on numerous transactions. It was a calculated methodology used pro-actively to hide his deceit. The appellant was on a good salary of over £65,000 a year as at 2017. His offending was driven by pure greed.
19. As indicated, the focus of this appeal is the judge's categorisation by reference to harm. There is no, nor could there be any, complaint about placing the offending in high culpability. Indeed, there were multiple high culpability factors, namely abuse of position of power, trust and responsibility, sophisticated offending with significant planning, fraudulent activity over a sustained period of time.
20. Under the Sentencing Council Guideline for Fraud Offences, harm is initially assessed by reference to the actual intended or risked loss. The values in the table are for actual or intended loss only, risk of loss being treated less seriously. Having identified value, the court should then take into account the level of harm caused to the victim to determine whether it warrants the sentence being moved up to the corresponding point in the next category or further up the range of the initial category. Three levels of impact are identified: high, medium and lesser.

21. It is clear to us that the judge did not sentence the appellant on the basis that the loss from the fraud was in excess of £500,000. He recognised the need for caution in relation to the suggestion that the loss might be that high. That is why he placed the offending initially in Category A2. He then increased his starting point to reflect what he found to be medium impact.
22. It is right that if one just considers the £53,000, harm would be placed in Category 3. It is also important to remember, as Mr Reiz emphasised repeatedly, that the relevant loss is loss limited to that caused by the appellant's fraudulent use of the credit cards, not the wider issue of potentially seeking to sabotage the business. But it does seem to us, as it did to the judge, unrealistic to ignore directly consequential additional financial losses when considering harm. We do not consider that the judge was wrong to do so as a matter of principle. On the facts, he was entitled to be sure that there was at least additional direct financial loss caused to the Burgesses such as to bring harm at least to the top of the range for Category 3 or the bottom of the range for Category 2 harm. There is overlap there at the level of £100,000.
23. The question of victim impact then fell to be considered. Having placed harm in Category 2, the judge considered victim impact to be medium. That was in our judgment arguably generous to the appellant. Had the judge not taken the additional direct losses into account and placed harm in Category 3, then he would have been entitled to assess victim impact as high, which in itself would have justified moving up a category for harm. This would have been a different way of achieving a similar result.
24. In this context and in response to Mr Reiz's submissions as to the level of victim impact, we remind ourselves of Mr Burgess' indications of the complexity of the cover-up, something which caused the Burgesses more time and grief as they unpicked the appellant's activities. The distractions led to poor business decisions and they left Mr Burgess regularly questioning his own competency. These events placed (understandably) an enormous strain on the Burgess' marriage. They had championed the appellant's career. They had placed so much trust in him. They lost their belief in trusting people. As the judge put it, the intricacy of the appellant's cover up and the level of breach of trust had had real and salutary consequences for them.
25. For Category A2 offending the starting point of five years is based on harm in the sum of £300,000. Taking all of the above into account, namely the number of high culpability factors, the combination of financial loss and victim impact, we could find no fault with a term of around five years' imprisonment, before then considering aggravating and mitigating factors.
26. In terms of aggravation not already taken into account in the categorisation process, there was the fact that the appellant initially wrongly placed blame on the Burgesses, something

which the judge overlooked. By way of mitigation, there was the appellant's previous good character, some remorse and the effect of custody on his young family.

27. Balancing these factors out, in our judgment an appropriate custodial term before credit for guilty plea, would have been around 54 months (that is to say four-and-a-half years) before applying credit for guilty plea of 15%, resulting in an eventual term of 46 months' custody.
28. In our judgment, therefore, the term of five-and-a-half years before credit for guilty plea taken by the judge was too high and did result in a sentence that was manifestly excessive. As we have said, it must be remembered that five years was the starting point for Category 2 harm based on loss at £300,000. The judge could not be sure on the evidence that the relevant financial loss suffered was that high. The judge must then have gone to the very top of the range because of victim impact, before coming down to five-and-a-half years to reflect the availability mitigation. Even taking into account the number of high culpability factors and victim impact and the aggravation in the form of blaming others, it is difficult to see how a term of around six years before reduction for mitigation and then credit for guilty plea was justified.
29. We move next to the sentence imposed for the failure to surrender. There can in our judgment be no justifiable complaint about the imposition of a consecutive sentence of one month for the appellant's failure to surrender. The judge was entitled to take the view that this was a deliberate attempt to delay or evade justice and one which had a substantial effect on the timing of sentencing. It inconvenienced counsel. We would not interfere with the judge's categorisation at A1 for this offending. Six weeks' custody with credit for guilty plea resulted in a sentence of one month. It was a different type of offending to the fraud offending and it fell to be marked separately. The imposition of a consecutive sentence of one month did not result in an overall sentence that was disproportionate to the appellant's overall offending.

### Conclusion

30. For these reasons we allow the appeal. We quash the sentence on the count of fraud and replace it with a sentence of 46 months' imprisonment. The consecutive sentence imposed for failure to surrender will stand undisturbed, as will all other aspects of the sentence.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS  
Tel No: 020 7404 1400  
Email: rcj@epiqglobal.co.uk