SUPREME COURT OF QUEENSLAND

CITATION:	*R v Henderson* [2014] QCA 12
PARTIES:	**R** **v** **HENDERSON, Mark David Jon** (appellant/applicant)
FILE NO/S:	CA No 55 of 2012 CA No 11 of 2013 DC No 898 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	14 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2013
JUDGES:	Margaret McMurdo P and Mullins and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Application to extend time refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant pleaded not guilty to fraud with a circumstance of aggravation – where the jury found the appellant guilty – whether the verdict of guilty was reasonably open on the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – where the appellant stood trial alone, his co-accused's legal representatives having indicated his co-accused would plead guilty – whether absence of co-accused at time of arraignment caused a miscarriage of justice CRIMINAL LAW – PROCEDURE – WITNESSES – HOSTILE AND UNFAVOURABLE WITNESSES – whether witness was unreliable and the testimony of said witness was prejudicial to the appellant – whether the trial judge issued the correct direction in relation to the testimony of the witness

CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – PARITY BETWEEN CO-OFFENDERS – GROUNDS FOR DISCRIMINATION BETWEEN CO-OFFENDERS – GENERAL – where the appellant was sentenced to nine years imprisonment with a parole eligibility date set after the service of four years – where conviction appealed and extension of time sought to appeal sentence – whether sentence imposed was manifestly excessive – whether cooperation at trial is grounds for reduced sentence – whether sentence should be consistent with co-offender's sentence

Criminal Code 1899 (Qld), s 568(3), s 597B, s 604, s 668E
Evidence Act 1977 (Qld), s 21A

Bromley v The Queen (1986) 161 CLR 315; [1986] HCA 49, cited
Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, followed
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, considered
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, considered
R v Gadaloff [1999] QCA 286, distinguished
R v Heiser & Cook; ex parte A-G (Qld) [1997] QCA 14, distinguished
R v Hinterdorfer [1997] QCA 199, distinguished
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, considered

COUNSEL: The appellant appeared on his own behalf
S J Hamlyn-Harris for the applicant
S P Vasta for the respondent

SOLICITORS: The appellant appeared on his own behalf
Fisher Dore Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Henry J's reasons for dismissing this appeal against conviction. Unlike Henry J, I have not read the complete cross-examination of all prosecution witnesses.[1] The appellant, however, has not referred this Court to any instance where his trial counsel's cross-examination of prosecution witnesses, or his failure to cross-examine them, has resulted in a miscarriage of justice.

[2] I also agree with Henry J's reasons for refusing the appellant's application for an extension of time within which to seek leave to appeal against his sentence.

[3] The appeal against conviction should be dismissed and the application to extend time refused.

[4] **MULLINS J:** I agree with Henry J.

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[1] See Henry J's reasons at [83].

[5] **HENRY J:** The appellant and Michael John O'Hara were charged in an indictment before the Brisbane District Court with one count of fraud alleging:

> "that on divers dates between the twenty-first day of June, 2005 and the twenty-third day of September, 2006 at Bundall in the State of Queensland, MARK DAVID JON HENDERSON and MICHAEL JOHN O'HARA dishonestly induced PATRICIA JEAN COATES and OTHERS to deliver money and bank credits to SPORTS INTERNATIONAL INVESTMENT CORPORATION LIMITED.
>
> And the property was of a value of more than $30 000."

[6] The appellant pleaded not guilty and stood trial alone, Mr O'Hara's legal representatives having indicated that Mr O'Hara would plead guilty. A jury found the appellant guilty after a 13 day trial. He was sentenced to nine years imprisonment with a parole eligibility date set after the service of four years.

[7] He appeals his conviction and seeks an extension of time within which to seek leave to appeal his sentence.

Conviction

[8] The appellant's grounds of appeal, after amendment by leave at the outset of the hearing of his appeal, are:

> "a. The Crown called a witness they knew to be unreliable and whose testimony was prejudicial to the applicant.
> b. The learned Judge erred in not issuing the correct direction to the jury in respect of the testimony of this witness.
> c. The counsel for the applicant was incompetent in all respect (sic) in the conduct of the trial and to the instructions given by the applicant and failed to present evidence or call witnesses in his defence.
> d. Failure to have the applicants (sic) co-accused present at the trial was a miscarriage of justice.
> e. The verdict of guilty was not reasonably open on the evidence."

[9] The last of these grounds requires this court to independently assess the sufficiency and quality of the evidence and thereby determine whether on the whole of the evidence it was open to the jury to be satisfied beyond a reasonable doubt that the appellant was guilty.[2] It is therefore convenient to consider that ground at the outset.

Ground (e): Verdict of guilty not reasonably open on the evidence

The prosecution case

[10] The prosecution case was that the appellant and Mr O'Hara were participants in a fraudulent scheme in which members of the public were telephoned and conned into paying money to invest in supposedly high return interests and ventures. It was alleged the appellant and Mr O'Hara had the common unlawful purpose of defrauding the unwitting targets of their scam ("the complainants")[3] by inducing payments with the lure of significant returns, when in truth, it was not intended there would be any return of money.[4]

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2 *Criminal Code* 1899 (Qld) s 668E; *M v The Queen* (1994) 181 CLR 487; *SKA v The Queen* (2011) 243 CLR 400.

3 The victims of the fraudulent scheme did not all initiate complaints to police. Many only complained of being defrauded after police investigators approached them.

4 R249 L19.

[11] The appellant did not make the telephone calls and dishonest inducements that caused the payments to be made - that was Mr O'Hara's role. Rather, the prosecution contended, the appellant was involved in the management of the scheme. The prosecution relied upon s 8 of the *Criminal Code* as deeming the appellant to have committed the frauds in the carrying out of the scheme's fraudulent purpose.[5]

[12] While the prosecution's case was of multiple frauds being committed, s 568(3) of the *Criminal Code* permitted the case to be advanced as a single count of fraud. Analysis of the evidence reveals there were 173 payments made to Sports International Investment Corporation Ltd ("SIIC"), by a total of 59 sets of complainants.[6] The total of those payments was $1,832,991, which substantially exceeds the circumstance of aggravation charged that the property was of a value of more than $30,000.[7]

[13] The case lends itself to analysis by first considering whether a fraud was committed, that is, whether the complainants were dishonestly induced to make payments to SIIC, and then considering whether the appellant was a party to the fraud.

Was a fraud committed?

[14] All of the many members of the public who made payments to SIIC's account did so after being telephoned by a person purporting to be a representative of SIIC or an entity described as "the Armitage" or both.

[15] The maker of the initial telephone call generally identified himself as Peter Smith. Repeated follow up calls would ensue. In most instances Mr Smith also made those calls. Occasionally persons identifying themselves by other names, such as Peter Armitage or James Abercrombie, made calls to complainants.

[16] The evidence of the multitude of complainants occupied a very significant proportion of the trial's 12 days of evidence. However, their evidence was very repetitive, with each describing a sales technique so similar as to render occasional minor variations in methodology inconsequential to the present exercise.

[17] In the first instance, Mr Smith told potential customers of an investment scheme variously described as involving the conduct of sports betting or sporting events that generated guaranteed high returns. There would then be follow up telephone calls in which Mr Smith gradually persuaded complainants to make payments towards that scheme.

[18] The amounts paid would vary, apparently commensurate with the persuasive capacity of Mr Smith as against the financial acumen and capacity of the potential customer.

[19] Complainants were induced not only by the representations of Mr Smith as to the assured prospect of high returns but also by similar representations in various written materials forwarded from SIIC and the entity being described as the Armitage. The materials forwarded suggested the existence of a commercial relationship between SIIC and the Armitage. They included purported past records of significant financial gains made out of sports investments. Website addresses for

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5 R250 L1.

6 The learned Crown prosecutor counted a total of 167 transactions – see Ex 174, R2286; SR3 L18.

7 The learned Crown prosecutor arrived at a total of $1,865,521 – see Ex 174, R2286.

SIIC and the Armitage were also supplied. In some instances the materials supplied included purported guarantees of the security of the principal invested. Such guarantees included representations that the scheme was underwritten by Lloyds of London to secure the purchaser from loss. It was admitted at the trial that, in fact, Lloyds of London had no association whatsoever with SIIC or the Armitage.[8]

[20] Some correspondence forwarded to the complainants by Mr Smith represented that he held tertiary qualifications from King's College London. It was admitted at trial that Mr Smith had never been a student of that institution. Mr Smith was in fact Mr O'Hara, the other defendant.

[21] Complainants would be forwarded a contract to complete and return. Under such a contract the buyer would agree to purchase the service of SIIC for a substantial price in addition to paying a proportionally smaller amount to SIIC for trading purposes. The contract purported to prevent the buyer from withdrawing any funds from the SIIC investment account for a period of 12 months. Early in the charged period the contracts would typically be between SIIC and the potential customer. As time wore on they increasingly came to be between SIIC and the Armitage and the potential customer and sometimes simply between the Armitage and the potential customer.

[22] Despite those variations, it was SIIC to whom the complainants' payments were made. That is, even where investments were apparently being made with the Armitage, complainants were still requested to pay their money to an account with the BSB and account number of SIIC's bank account with Westpac at its Bundall branch on the Gold Coast.[9] Further, where payments were to be made by cheque in respect of contracts with the Armitage, investors were asked to name the payee on the cheque as SIIC.[10]

[23] Customers were provided with a username and password to log on to the Armitage website and observe their investments grow. The website recorded apparently astronomical growth in the value of the customers' investments until both websites vanished from operation during the latter half of 2006. While the websites were still running, those investors who checked the sites believed their investments were growing as rapidly as Peter Smith had forecast they would. Thus, while those complainants understood they could not access their investment for 12 months, they were in the meantime more readily tempted by Mr Smith to make further additional investments through SIIC or the Armitage.

[24] Some complainants had already been customers of another company, Reliance Investment Services Pty Ltd ("Reliance"), a telemarketing business that sold software products relating to the thoroughbred horseracing industry. Those who were inveigled into investing in SIIC's investment venture were asked to sign an indemnity form acknowledging that SIIC would "provide and be legally liable by undertaking all responsibilities, services, investments and trading previously provided on behalf of the client by Reliance Investment Services".[11] The form also included a client acknowledgement that any funds paid to Reliance would be forwarded to SIIC.

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8 Ex 169 Admissions, R2136.
9 Eg, Ex 33, R1254.
10 Eg, Ex 88, R1564.
11 Ex 31, R1248.

[25] In a similar vein, particularly in the latter part of the period charged in the indictment, indemnity forms purportedly passing responsibility from SIIC to the Armitage were also provided to existing clients. In the ultimate police investigation the police found no evidence that the Armitage ever actually existed as a legitimate corporate entity.

[26] The Armitage was likely introduced for mixed purposes. It may have been seen as a means of diverting investor suspicion away from SIIC. Also, its apparent involvement in conjunction with SIIC may have made the investment scheme appear more elaborate and thus more credible to the novice investor. It also provided a platform for Mr Smith to press complainants who had already invested in SIIC to make further investments. Those investments included supposed investments in mineral exploration and iron ore mining in China and a pipeline in Saudi Arabia. Some purported investments were said to be structured as loans involving HSBC Bank. It was admitted at trial that HSBC Bank had no association whatsoever with SIIC or the Armitage.[12] The contracts in respect of Chinese mineral exploration nominated the People's Republic of China as a party to the contracts. It was admitted at trial that the People's Republic of China had no association whatsoever with the Armitage or SIIC.[13]

[27] The evidence that the complainants' payments were made to SIIC, as the charge effectively alleges, was overwhelming. The payments took the form of payments by cheque, credit card and more commonly deposit by electronic transfer. All of the payments made by the complainants were to SIIC's account with Westpac's Bundall branch on the Gold Coast.

[28] Evidence was led at trial of the flow of money in connection with that account, particularly through the use of tracing schedules prepared by an investigative accountant.[14] It was apparent from the operation of that bank account that the amounts paid by complainants were not invested in the interests and ventures they were intended for.

[29] The schedules incorporated analysis of the periods before and after 8 November 2005, when there was a change in the authorised signatories of the account. In the first period the subtotals of withdrawals were:

(i)	ATM withdrawals	$48,850.00
(ii)	Payment to appellant's account	$2,000.00
(iii)	EFTPOS purchases	$1,435.84
(iv)	Cash withdrawals	$40,629.00
(v)	Bank staff assisted withdrawals	$16,100.00
(vi)	Withdrawals where the payee is unknown	$182,036.05

[30] The relevant subtotals of withdrawals during the second period were:

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12 Ex 169, R2136.
13 Ex 169, R2136.
14 Ex 2, 2A, R981-1024.

(i)	ATM withdrawals	$9,020.00
(ii)	Payment to appellant's account	$143,700.60
(iii)	Cash cheques for P Smith	$211,225.30
(iv)	Cash cheques for P Armitage	$1,069,309.50
(v)	Cash cheques for Matthews	$14,885.50
(vi)	Payments to Voitin and Voitin	$65,202.75
(vii)	Payments to Sports Investment Services	$50,634.50
(viii)	Payments to Vanuatu	$66,771.00
(ix)	Business expenses to unknown payee	$139,040.92
(x)	Payment to Darwin All Sports	$93,339.00

[31] No evidence was discovered to suggest that any of the withdrawals occurred in order to make the investments promised to the complainants. A total of $100,819 was transferred from the SIIC bank account to corporate bookmakers and in turn $93,597.15 was received back from the corporate bookmakers into SIIC's account. Those transactions might arguably come under the banner of investment activity but they bore no relationship to the investments that were supposed to be made on behalf of the complainants.

[32] In the upshot, no complainant recovered any part of, let alone any return on, their purported investment. Nor was any attempt made to account for their investment. During the latter part of 2006 the complainants gradually discovered they could no longer establish meaningful contact with anyone associated with SIIC or the Armitage and their money was lost.

[33] In summary, there was an abundance of credible evidence establishing that a fraud was committed and no competing evidence was given or led by the appellant.

Was the appellant a party to the fraud?

[34] There was a variety of circumstantial and direct evidence connecting the appellant with the fraud.

[35] As already mentioned, some money was transferred from SIIC's account to the appellant. However, his connection with SIIC's account was more damning than that. The appellant opened SIIC's bank account, into which the fraudulently induced payments were made, in May 2005. The persons initially authorised to operate the account were the appellant and Mrunal Parekh.[15] However, from 8 November 2005 the only person authorised to operate the account was the appellant.[16]

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[15] R47 L17; R58 L25.
[16] R61 L52; Ex 9, R1144-1146.

[36] In addition to being a signatory to the account, the appellant was seen to attend the Bundall Westpac branch on a regular basis, conducting transactions on and making enquiries in respect of SIIC's account. He would draw large amounts of cash on the account, cash cheques for large amounts, transfer funds between accounts and send transfers from the account to other banks.[17] That activity alone raises an inference that he must have had an awareness of why there were such large amounts of money entering the account he operated.

[37] Further, the bank's Notice of Authority in respect of the account was endorsed with the appellant's representation that he was a director of SIIC. The fact he held or claimed to hold such a position further supports the inference he would have known why the complainants' payments were being made to his company's account.

[38] No company records or evidentiary certificates were produced to prove the incorporation of SIIC or prove that the appellant was a director of SIIC. However, there was a variety of circumstantial evidence of SIIC's corporate existence and the appellant's controlling role in its governance. Much of that evidence also established the appellant's connection with suite 19/100 Bundall Road, Bundall, the address from which the fraudulent scheme was carried out. For example, that address was the registered office of Sports Investment Services Pty Ltd, another company of which the appellant was an officer.[18]

[39] In addition to the appellant operating the Westpac account as a director of SIIC, documents found during a police search of the appellant's home included a letter by the appellant seeking financial advice. He therein listed his interests as including SIIC, describing it as an overseas or offshore company and using an abbreviation to indicate that it was incorporated in Vanuatu.[19]

[40] The evidence of the investigative accountant who traced the flow of money in and out of SIIC's Westpac account detected transfers between that account and SIIC in Port Vila in Vanuatu.[20]

[41] SIIC also held an account with Sports Bet, a corporate bookmaker. Sports Bet's records for SIIC showed its address was in Port Vila, Vanuatu, and recorded the names of both the appellant and Mrunal Parekh in connection with the account.[21] Further, the telephone business AAPT held a telephone account for which the appellant was the contact person in the name of Australian Currency Traders Pty Ltd trading as Sports International Investment with an address provided as 19/100 Bundall Road, Bundall.[22]

[42] The appellant described the address of 19/100 Bundall Road as "my address" and "my premises" in correspondence by him upon SIIC's letterhead of 15 August 2006 to a virtual office service business operated by Regus Business Centre Pty Ltd ("Regus").[23]

[43] Regus provided a nominal office address and a virtual office service for entities to use as their business address. Regus had a so-called virtual office agreement with

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17 R58.
18 Ex 16, R1183-1188.
19 Ex 5, R1135-1136.
20 Eg, R89 L43; Ex 2, R995.
21 Ex 171, R2145.
22 R880 L35-50.
23 Ex 14, R1181.

the Armitage. Under that agreement, which commenced on 5 November 2005,[24] Regus provided a virtual office address of Level 20, Tower 2/201 Sussex Street, Sydney and it would direct telephone calls to a nominated mobile number, forward messages by email to service@thearmitage.org and forward facsimiles to a nominated number.[25] The facsimile number nominated in the agreement appears to be the same facsimile number the complainants were given to forward documents to.[26] The contact name for the service was Peter Armitage, an apparently non-existent person,[27] and a nom de plume occasionally adopted in the calls to complainants.

[44] Tax invoices for the provision of the service by Regus were directed to 19/100 Bundall Road, Bundall. The address held by Regus in respect of the Armitage was Lini Highway, Port Vila, Vanuatu. The appellant's letter to Regus of 15 August 2006 was on SIIC letterhead and nominated its address as 2039 Lini Highway, Port Vila, Vanuatu.

[45] The appellant signed that letter in his capacity as director of SIIC. The letter purported to withdraw the appellant's authority for communications to the Armitage to be redirected to the Bundall Road address from 21 August 2006. It said, "The Armitage has recently purchased the business of Sports International Investment Corporation limited but not the company and we cannot accept correspondence after that date".[28]

[46] During the police search a 2006 diary was found. Its entries included reference to "P Smith", "Armitage", and, on 14 June 2006, "Letters to SIIC clients who transferred to Armitage".[29] The latter entry is consistent with the fact mentioned above that various complainants had been asked to sign indemnity forms purportedly passing responsibility for their investment from SIIC to the Armitage.

[47] The appellant was actively involved in purporting to divest SIIC's connection with the investment scheme to the Armitage. He arranged for a solicitor, John Voiten, to prepare a business sale contract between SIIC and someone named in the contract as Peter Armitage. The contract described the business as "the business developed by the Vendor relating to the development of an income stream for investors in the sports and entertainment industry".[30] The contract's completion date was 26 July 2006. The purchase price was $18,000. Funds in that amount were exchanged on the day of settlement but an amount of $41,000, allegedly being trust monies, remained held by the solicitor pending Mr Armitage establishing a trust.[31] It is not critical to proof of the prosecution case but this sale arrangement appears to have been calculated at distancing SIIC from investor suspicion. However, even after the date of sale, deposits continued to be made by complainants to SIIC's bank account.

[48] Some complainants who signed indemnity forms purportedly passing responsibility for their investment from SIIC to the Armitage received correspondence from the appellant. For example, the appellant, in a letter dated 14 June 2006, written by him in his capacity as director on SIIC letterhead, advised complainant Barry Beecroft:

> "We are in receipt of a copy of your Armitage contract.

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24 Ex 12, R1167.
25 R119.
26 The final number (probably 9) is obscured in the record produced by Regus – R119 L31; Ex 12 R1167.
27 R41 L30.
28 Ex 14, R1181.
29 Ex 6-7, R1137-1142.
30 Ex 173, R2270.
31 R885 L50-R886 L2; It is unclear whether this $41,000 will be returned to the complainants.

> This as per the contract this (sic) Armitage contract supersedes any and all previous Sports International Investment Corporation Ltd contract or contracts.
>
> In keeping with your authority, namely the signed agreement, and the Armitage requests we have transferred the required files and trading account balances to the Armitage.
>
> Any further information and or correspondence can be addressed to The Armitage.
>
> We thank you for your past participation."[32]

[49] The appellant forwarded a similar letter to complainants Robyn Delaney,[33] Dennis Stojanovic[34] and Ivan Kumerich.[35] Such correspondence provides strong support for the inference that the appellant was aware of SIIC's involvement in contracting to provide investments to paying customers.

[50] The above letters were not the only instances of apparent contact between complainants and the person who identified himself as the appellant. In November 2005 complainant Terrie-Anne Walters sought to double check that Mr Smith was genuine and spoke by telephone to a person identifying himself as the appellant. She indicated she wanted to make sure that Mr Smith was who he said he was and that either the Armitage or SIIC was actually a real place. The person identifying himself as the appellant said he had worked with Mr Smith and that he was a legitimate person and the company was also legitimate.[36]

[51] The evidence that the appellant was conducting the business of SIIC at the Bundall Road address was corroborated by a number of witnesses who actually worked there with him.

[52] The appellant moved to the Bundall Road premises after having worked for some time with Reliance.[37] The appellant had managed the telemarketing team at Reliance.[38] That business appears to have been conducted by Mrunal Parekh and Rod Fakhri. In the course of 2005 a number of employees at Reliance were informed that they would be transferred to work for another business called SIIC, which would be managed by the appellant.[39] SIIC operated briefly out of premises adjoining Reliance's at Ashmore before moving to 19/100 Bundall Road.[40] The extent of any ongoing role played by Mrunal Parekh and Rod Fakhri in SIIC was less clear than the role played by a number of the other players, including the appellant.

[53] Nicole Williams, formerly an administrative assistant with Reliance, transferred to SIIC where she also worked as an administrative assistant. She assisted the appellant to conduct administration at the business and observed him manage the

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32 Ex 41, R1292.
33 Ex 100, R1637.
34 Ex 136, R1937.
35 Ex 136, R1398.
36 R547 L55-R548 L40.
37 R792 L33.
38 R762 L2; R793 L2; R848 L43; R841 L55.
39 R762 L24; R793 L53; R848 L51.
40 R842 L5.

staff there.[41] She also observed the appellant conducting the banking of the business[42] and paying the workers in the office.[43]

[54] Dinesh Rajah, James Whitelaw-Rix and Mr O'Hara also transferred from Reliance to SIIC. Mr Rajah was originally a telemarketer for SIIC and would telephone people offering free information about a sports investment package.[44] He later became a telephone salesperson for SIIC, a role that required a higher level of persuasion.

[55] Mr Whitelaw-Rix and Mr O'Hara worked as sales persons for SIIC. Rajah and Whitelaw-Rix each testified that the appellant supervised SIIC's staff and managed the business.[45] The most prolific of the salespersons was Mr O'Hara, who was known to office staff as Peter Smith and "Ghost".[46]

[56] SIIC's salespersons were given databases, also known as lead sheets, from which they would "call" potential customers.[47] Mr Whitelaw-Rix testified that while direction to sell was coming from the appellant, it was Mr O'Hara who mentored him in how to conduct telephone sales.[48]

[57] The direct evidence of the appellant's management of staff, administration and money at the SIIC premises from which the calls and facsimile letters to complainants was emanating, coupled with the circumstantial evidence of his connection with the conduct of the business, gave rise to a powerful case against him. The appellant did not give or call evidence.

[58] The evidence revealed a well orchestrated fraudulent scheme that Mr O'Hara obviously did not pursue in isolation and with which the appellant was connected in a multiplicity of ways. Mr O'Hara was provided with logistical support and supervised in a workplace controlled by the appellant. He was paid to perform his work by the appellant. He procured payments into a bank account controlled by the appellant. The two men had different roles. However, the only rational inference is that both men shared the common unlawful purpose of defrauding the unwitting targets of their scam by inducing payments with the lure of significant returns.

[59] This was a strong case. There was no competing defence evidence. It was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt that the appellant was guilty.

Ground (a): Calling of an unreliable witness

Ground (b): Failure to correctly direct jury in respect of the unreliable witness

[60] Grounds (a) and (b) each relate to the witness James Whitelaw-Rix. Ground (a) complains that the Crown called a witness they knew to be unreliable and whose testimony was prejudicial to the appellant. Ground (b) complains that the "learned

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41 R763 L19-43.
42 R783 L29.
43 R785 L3.
44 R797 L28.
45 R799 L22-55; R804 L20; R850 L3-R851 L58.
46 R783 L55; R851 L40; R852 L40.
47 R852 L25-40.
48 R852 L39.

Judge erred in not issuing the correct direction to the jury in respect of the testimony of this witness".

[61] At the outset of day 11 of the trial[49] the prosecution made an application for Mr Whitelaw-Rix to give evidence via audio visual link or, alternatively, that he be declared a special witness pursuant to s 21A of the *Evidence Act* 1977 (Qld). The premise of those alternative applications was Mr Whitelaw-Rix would be disadvantaged if he gave evidence in a conventional way because he had a mental illness.

[62] The Crown prosecutor provided the trial judge with an outline of argument which annexed a letter by Dr Richard Wilson, Senior Medical Officer of Psychiatry at Gold Coast Hospital, dated 30 January 2012, in which he said:

> "I wish to notify your department that Mr Whitelaw-Rix is possessed of a diagnosis of bipolar affective disorder and, although he is currently being treated and followed up as an out patient with Ashmore Mental Health Services, he continues to suffer a level of disturbance that would render him an unreliable witness to the facts of those matters."[50]

[63] The submission also annexed a letter by Carolyn Bradley, psychologist, of 17 February 2012 in which she referred to Dr Wilson's letter of 30 January 2012 and said:

> "According to our computer files, James has been a client of this service since May 2009. However, records also indicate that James was initially diagnosed with Bipolar Affective Disorder in 2007 whilst in Coffs Harbour.
>
> James has a diagnosis of Bipolar Affective Disorder and as a consequence will often experience symptoms of a psychotic nature. Many of James' delusions are associated with gang-related themes which he often incorporates into his real-life events. This, therefore, renders him an unreliable witness due to his inability to distinguish between delusions and reality."

[64] In the course of argument on the prosecution's application his Honour noted there was no application by the defence to exclude Mr Whitelaw-Rix's evidence or to examine him before he gave evidence.[51] The defence submitted that the information before the court only suggested Mr Whitelaw-Rix's evidence might be unreliable and not that he would be disadvantaged in giving evidence.[52] The defence submission that Mr Whitelaw-Rix should give evidence in person and that the application should be refused[53] was successful. The learned trial judge refused the prosecution's application.[54]

[65] Mr Whitelaw-Rix was called in person as a witness at the trial later on day 11.[55] He was cross-examined about his mental condition.[56] He acknowledged that in 2007 he had been diagnosed with bipolar disorder and treated as an in-patient for it. He

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49 R818.
50 R820 L42; Annexure B2 of the Outline of Submissions on Behalf of the Appellant.
51 R824 L56.
52 R825 L57.
53 R826 L22.
54 R828 L13.
55 R848.
56 R855-857.

explained that he had been admitted in 2007 against a background where he was "stressed out" because he had entered bankruptcy in connection with his business. He acknowledged that in 2011 he had been an involuntary patient at the Gold Coast Hospital. He explained that since then the Ashmore Community Mental Health Service would make contact with him from time to time to make sure that he did not "fall into a dark place". He confirmed he was taking lithium as the only medication in respect of the disorder. He denied having had a psychotic issue in connection with the disorder, explaining that he would "just get racing thoughts". In re-examination[57] he explained that his memory was not affected by his bipolar disorder.

[66] Perusal of Mr Whitelaw-Rix's evidence demonstrates that he gave evidence in a coherent and responsive way. He recalled information about the operation of Reliance and SIIC and its personnel, including the appellant and Mr O'Hara, which was consistent with information of the kind given by other witnesses who had worked at Reliance or SIIC. There was no indication of unreliability in the content of the answers he gave about events relevant to the charge.

[67] The appellant submitted Mr Whitelaw-Rix's evidence "provided crucial, perhaps the only, evidence that goes to the proof that Henderson was at the 'boiler room of the scam'". However, the majority of Whitelaw-Rix's evidence contained information also given by other witnesses in the case. As the above analysis of the case indicates, there was an abundance of evidence connecting the appellant with the day to day operations of SIIC and the Armitage. The evidence of Mr Whitelaw-Rix was not critical in proof of the case.

[68] The appellant makes particular complaint about the evidence of Mr Whitelaw-Rix that he had been told to use the nom de plume of Trevor Knox by the appellant. Mr Whitelaw-Rix's evidence in chief on this topic was as follows:

> "MS CUPINA: Did you use a name other than your own name while you worked at SIIC?-- Yes I did.
>
> What name was that?-- Trevor Knox.
>
> Where did you get that name from?-- I was given that name. I was told to use that name.
>
> Who gave you that name?-- Mark.
>
> And when did Mark give you that name?-- When I first started.
>
> Was this actually at the SIIC office or-----?-- In the office at SIIC, yeah.
>
> What did he tell you?--We all got issued names as salespeople, and we were told that it was best not to use our original name, and that was all we were told. It was simple as that. And I was told to use Trevor Knox, and also Ghost said, "You run by that, Jimmy." That's how what he called me.…"You run by that name, Jimmy. You're Trevor Knox." That's it, I just was Trevor Knox."

[69] In cross-examination the topic was revisited as follows:

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[57] R863.

> "Now, during your employment period you said you used the name Trevor Knox. Did you use any other names?-- No, that's all.
>
> And it was actually Peter Smith that told you – or Ghost who told you to use that name?-- Both, yeah.
>
> And he told you that Trevor Knox was a name of a stockbroker in America?-- Yep, New York, or something, Stock Exchange."

[70] This evidence, which was hardly critical to proof of the charge, was ambiguous. On the one hand, in evidence in chief the witness had indicated that both the appellant and Mr O'Hara, who also went by the nickname "Ghost", had told Mr Whitelaw-Rix to use the nom de plume of Trevor Knox. The evidence on the topic in cross-examination was unclear in that the response "both" may have been a reference to Mr O'Hara only, that is, to Mr O'Hara's use of both the name Peter Smith and Ghost. Alternatively, it may have been a reference to Mr O'Hara and the appellant.

[71] The police statement of Mr Whitelaw-Rix[58] states that it was the individual he referred to as "Ghost", that is Mr O'Hara (or Peter Smith as he was also called), who told him he had to use the name Trevor Knox. This aspect of his statement to police was not raised in cross-examination of Mr Whitelaw-Rix but it does not in any event suggest that Mr Whitelaw-Rix was unreliable in the course of his evidence about the above quoted matters. There was not a clear inconsistency between the relevant content of the police statement of Mr Whitelaw-Rix and his evidence given in cross-examination. It is understandable, given the ambiguous answer defence counsel received on this topic in cross-examination that he did not attempt to bring out the content of Mr Whitelaw-Rix's police statement on the issue. To have done so would have been to expose a clear contest with the risk that Mr Whitelaw-Rix would clarify that which had been rendered ambiguous in the course of cross-examination, to the potential disadvantage of the appellant. The appellant's criticism of defence counsel for not taking that course is therefore misconceived.

[72] The appellant's argument on ground (a) appears to be premised, at least in part, upon the guideline to prosecutors of the Director of Public Prosecutions (Qld) that a prosecutor should not call "a witness who the prosecutor believes on reasonable grounds to be unreliable". The appellant complains that the prosecutor should not have called Mr Whitelaw-Rix because she believed him to be unreliable. However, the learned Crown prosecutor expressed no such belief. Moreover, she observed, in implied support of him being reliable, there was other evidence corroborating a "vast aspect" of Mr Whitelaw-Rix's evidence.[59]

[73] The learned trial judge invited submissions as to whether a so-called *Bromley* direction should be given. That is a direction of the kind discussed by Gibbs CJ in *Bromley v The Queen*,[60] where his Honour said:

> "If it appears that a witness whose evidence is important has some mental disability which may affect his or her capacity to give reliable evidence, common sense clearly dictates that the jury should be given a warning, appropriate to the circumstances of the case, of the

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[58] Annexed to the prosecution's submissions below and the appellant's submissions to this court.
[59] R820 L26.
[60] (1986) 161 CLR 315.

> possible danger of basing a conviction on the testimony of that witness unless it is confirmed by other evidence. The warning should be clear and, in a case which a lay juror might not understand why the evidence of a witness was potentially unreliable, it should be explained to the jury why that is so. There is no particular formula that must be used; the words used must depend on the circumstances of the case."[61]

[74] Defence counsel submitted,[62] in effect, that the learned trial judge should give a direction reminding the jury of the fact that Mr Whitelaw-Rix had a serious mental illness, the significance of which they should weigh up in considering the reliability of his evidence.[63] The direction subsequently given on the topic was consistent with that request. His Honour told the jury, after referring to general comments relating to the assessment of the testimony of witnesses:

> "I should add to those general comments a comment regarding Mr Whitelaw-Rix. As you heard he has a diagnosis of bipolar disorder. Now, his evidence is important to the prosecution case because it includes an account of a meeting which he said the defendant attended where the witness was informed of this new planned venture or product, I think he called it, and he was part of a small team that comprised the SIIC workforce, so to some degree his evidence goes beyond the evidence of any other employees because he talked about being inside that planning meeting. Now, submissions have been made about the fact that he has the mental illness. There is no evidence that the mental illness he suffers affected his reliability as a witness, but nonetheless it is important for you, I suppose, to simply be aware that there is a witness with a diagnosis of a serious mental illness, so you should take care in assessing his evidence particularly in any respect where it is not supported by other evidence, because of course if there is other evidence consistent with his evidence you need not have the same care about examining it. I just thought it important to add that comment to my general comments about assessing witnesses."[64]

[75] The appellant submitted that nothing short of a warning that it was dangerous to convict on the uncorroborated evidence of Mr Whitelaw-Rix would have sufficed. Such a warning was not requested at trial and there was nothing before the jury to warrant such a warning.

[76] The appellant complains that the learned trial judge had knowledge of the opinions of Dr Wilson and Ms Bradley and even though those opinions were not before the jury his direction should in effect have reflected the existence of that evidence. Therefore, it was submitted, his Honour ought not have said there was no evidence that the mental illness suffered by Mr Whitelaw-Rix affected his reliability. His Honour was duty bound to direct the jury on the evidence that had been adduced before it. The opinions of Dr Wilson and Ms Bradley were not before the jury. Moreover, the opinions contained in their letters placed before the learned trial judge in the course of legal argument contained little foundational reasoning as to

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61 Ibid 319.
62 R909 L29.
63 R911 L20-42.
64 R914 L28-R915 L10.

why Mr Whitelaw-Rix could not give reliable evidence. Those opinions were not before the jury as sworn evidence and were not explored in cross-examination. Even accepting that his evidence was admissible, in combination with the evidence of Mr Whitelaw-Rix, it would not have required his Honour to direct the jury that Mr Whitelaw-Rix's testimony was unreliable.

[77] It is unremarkable that the defence did not elect to go into evidence, losing the forensic advantage of the right of last address, to call Dr Wilson and Ms Bradley. Firstly, the evidence was of doubtful admissibility as the question of the witness's reliability was not a question for Dr Wilson or Ms Bradley, but for the jury. Secondly these witnesses would invariably have conceded in cross-examination that Mr Whitelaw-Rix's bipolar affective disorder merely had the potential to render his evidence unreliable but did not necessarily do so. Whether it would in fact render his evidence unreliable would necessarily depend on a consideration of the evidence he gave.

[78] The direction ultimately given by the learned trial judge noted that by reason of a diagnosis of serious mental illness the jury should take care in assessing the evidence of Mr Whitelaw-Rix, particularly in any respect where it was not supported by other evidence. The direction was appropriate in the circumstances of this case.

[79] The appellant complains that the learned trial judge's direction should have specified the evidence of Mr Whitelaw-Rix which was not supported by other evidence. Such an exercise was unnecessary. This was not a case in which the jury were being warned it was dangerous to convict because testimony about specific matters was uncorroborated. More specifically, it would have been disadvantageous to the appellant's cause and would have highlighted how little of Mr Whitelaw-Rix's evidence was not supported by other evidence in the case.

[80] These grounds of appeal must fail.

Ground (c): Incompetency of counsel

[81] The appellant's submissions as to counsel's incompetence allege the following failings in particular:

(i) a failure to cross examine Mr Whitelaw-Rix in respect of the apparent inconsistency between his police statement and testimony as to who told him to use the name Trevor Knox;
(ii) a failure of defence counsel to call Dr Wilson and Ms Bradley;
(iii) supposedly numerous instances showing the incompetence of counsel and counsel not correctly examining Crown witnesses;
(iv) failing to make a no case submission;
(v) failure to take as full a proof of evidence as the appellant could provide; and
(vi) failure to go into evidence.

[82] As earlier explained, there is no substance to allegations (i) and (ii) above.

[83] Allegation (iii) is too vague to warrant other than general scrutiny. Having perused all cross-examination of the Crown witnesses I can detect no instance of apparent

incompetence. To the contrary, the cross-examination demonstrated an obvious awareness of the forensic need to highlight evidence having the tendency of distancing the appellant from the fraudulent scheme and highlighting limitations in the nature of the evidence led to incriminate him in his involvement in that scheme.

[84] As to the alleged failure to make a no case submission, it is sufficient to observe that such a submission would have failed. There was undoubtedly a prima facie case against the appellant.

[85] In respect of the decision not to go into evidence, the appellant submits the failure to present any defence at all was grossly negligent. Significantly, he does not suggest the ultimate decision that the defence would not go into evidence was not his or that it was anything other than a voluntary decision.

[86] The implication appears to be that in electing not to go into evidence he was acting on advice and that advice was grossly negligent in the circumstances of the case. In most cases there will be sensible arguments both for and against a defendant going into evidence.

[87] In the present matter the appellant faced a powerful circumstantial case. It is difficult to imagine what account the appellant could have given to explain away the various pieces of circumstantial evidence that implicated him and no serious attempt has been made to articulate it in this appeal.

[88] By not going into evidence the appellant at least left his counsel with the freedom to develop arguments about various hypotheses consistent with innocence. Had the appellant gone into evidence, in his counsel's closing address there would have been the forensic risk that the jury would be less open minded in considering any hypotheses consistent with innocence which were inconsistent with the defendant's explanations.

[89] In a case such as the present the inherent difficulty in the appellant giving evidence capable of explaining away the various pieces of incriminating circumstantial evidence against him meant the act of giving evidence was likely to make an already strong case stronger. It is easy to understand why it may have been decided the safer course was not to go into evidence and preserve defence counsel's right of last address. In any event, there was nothing in this case to demonstrate that trial counsel's advice to the appellant that he should not go into evidence has resulted in a miscarriage of justice.

[90] Finally, the allegation that there was a failure to take as full a proof of evidence as the appellant could provide falls for consideration in light of the decision he made not to go into evidence. There is no evidence before this court of what proof or written instructions were taken from the appellant. There is positive evidence that instructions were repeatedly taken from him in conferences prior to trial and in the course of trial. This allegation is without substance.

[91] Ground (c) must fail.

Ground (d): Failure to have co-accused present at trial

[92] The argument advanced in support of this ground appears to be premised on the presumption that because the indictment charged the appellant along with Mr O'Hara the appellant had a right to go to trial with Mr O'Hara.

[93] Such an argument appears to assume that where more than one person is charged with the same offence in the same indictment, unless all of those persons plead guilty, then all must plead not guilty and go to trial. However, even where all co-accused plead not guilty it does not follow that they will necessarily stand trial together. Section 597B of the *Criminal Code* specifically contemplates that the court may direct the trials of co-accused be held separately.

[94] Here, however, Mr O'Hara's legal representatives had previously indicated to the court that he would plead guilty.[65] They had successfully argued before the Chief Judge that his arraignment should be postponed until some issues relating to his mental health were tended to. Her Honour, the Chief Judge, had apparently acquiesced to that request but ruled that nonetheless the trial of the appellant should proceed in accordance with the earlier allocated trial listing.[66]

[95] It may be readily inferred that her Honour, the Chief Judge, in overviewing the listing of this matter, was sufficiently confident in the indication of Mr O'Hara's legal representatives that he would plead guilty that it was unnecessary to take that plea of guilty prior to the commencement of the trial of the appellant.

[96] Even if the trial were postponed to a later date so that Mr O'Hara's legal representatives were ready to proceed and both accused persons could be arraigned at the outset of the listed trial that would not have delivered any advantage to the appellant. Mr O'Hara would have pleaded guilty, thus eliminating the requirement of s 604 of the *Criminal Code* that he be tried by jury. A jury would not have been empanelled to try him. Had he been arraigned in the presence of the jury, his sentence would have been adjourned pending the completion of the trial by jury of the appellant.[67] This would not only have provided no advantage to the appellant but it would have provided the positive disadvantage of the jury knowing that at least one of the alleged participants in the fraudulent scheme accepted that the fraud had been committed.

[97] This ground of appeal is entirely misconceived.

[98] There is no substance to any of the appellant's grounds of appeal. I would dismiss his appeal against conviction.

Sentence

[99] The application for the appeal against sentence was filed substantially out of time but no particular challenge was made to the bona fides of the explanation for that delay. It was common ground that the court ought consider the application for leave to appeal sentence on its merits in order to determine whether the extension of time should be given.

[100] The appellant's proposed ground of appeal against his sentence is that the sentence is manifestly excessive. There was also significant reliance placed in argument on a parity issue as between the appellant's sentence and Mr O'Hara's.

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65 R14 L13.

66 R13 L43.

67 The prosecution did not seek to call Mr O'Hara as a witness in its case so that is was unnecessary for him to be sentenced before the commencement of the appellant's trial.

Sentences sought by the parties below

[101] The prosecution submitted below that the then maximum sentence of 10 years should be imposed by way of head sentence and that a fixing of a parole eligibility date after four years would give adequate recognition to the appellant's cooperation during the trial by the making of admissions.[68]

[102] Defence counsel below emphasised that cooperation at trial extended beyond the making of admissions to consenting to the giving of telephone evidence by a significant proportion of the complainants.[69] Defence counsel submitted for a sentence of between seven to nine years with a parole eligibility date set somewhat less than half way.[70]

Matters highlighted by learned sentencing judge

[103] The learned sentencing judge characterised the offending as an exceptionally serious example of fraud involving a sophisticated scheme.

[104] His Honour highlighted a number of the scheme's cynical or cruel features in misleading investors. His Honour regarded the fraudulent scheme as predatory in nature, demonstrating a meanness not regularly seen in court. He inferred in addition to the significant adverse financial impact upon the complainants that many of them were angry, embarrassed and beaten as a result of falling prey to the scheme.

[105] His Honour noted the appellant's apparent past good character. He also noted there was no demonstration of remorse or acceptance of responsibility. His Honour considered general deterrence and denunciation of particular importance to his decision. He considered that the case "might well be in the category of the worst sort of case" but, principally because he was not persuaded the appellant was not the central architect of the scheme, he decided not to impose the maximum.

[106] His Honour sentenced the appellant to nine years imprisonment and fixed his parole eligibility date after the service of four years thereof.

[107] His Honour emphasised the size of the loss to investors was very significant, amounting to a total of $1,865,521 and involving 59 sets of complainants who were induced to make 167 transactions.[71] His Honour noted six of the complainants lost between $50,000 and $100,000 and five of the complainants lost more than $100,000. His Honour noted the appellant's gain was apparently significant, referring to his personal drawings from the SIIC account of $145,700. He noted it was impossible to say whether the appellant had received any other benefit from other cash drawings.

[108] His Honour was not prepared to conclude on the evidence that the appellant was the founder of the fraudulent scheme but noted the appellant was at least involved from early on.

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[68] SR10 L22-30.
[69] SR15 L47-SR16 L7.
[70] SR20 L1-5.
[71] These figures were drawn from Ex 174 and are very close to those I arrived at in my own analysis – see [8] above.

Mr O'Hara's sentence

[109] On 20 April 2012, Mr O'Hara was sentenced on his pleas of guilty to two charges of fraud.

[110] One was the same charge that the appellant was convicted of and sentenced for. On that charge O'Hara was sentenced to seven years imprisonment.

[111] The other charge of fraud related to a similar fraudulent scheme as that perpetrated with the appellant. This second scheme was set up subsequent to the SIIC fraud and in a three year period Mr O'Hara dishonestly induced 17 people to make payments totalling $460,000. That scheme ceased when the investigation into the SIIC fraud resulted in Mr O'Hara being charged and initially denied bail.

[112] Mr O'Hara was sentenced to three years imprisonment for the subsequent fraud, cumulative upon the seven years imprisonment in respect to the SIIC fraud, giving rise to a total of 10 years imprisonment. A parole eligibility date was set after the expiration of three years.

Parity

[113] The appellant submitted before this court that the sentence imposed on him, requiring him to serve a minimum of a year longer than Mr O'Hara in actual custody, is manifestly excessive and gives rise to a justifiable sense of grievance on the part of the appellant.

[114] In the present matter the learned sentencing judge was not concerned by issues of parity because Mr O'Hara had not been sentenced at the time of the appellant's sentence. It follows the learned sentencing judge could not have erred in regard to considerations of parity.

[115] Nonetheless, where a subsequent sentence imposed upon an accused is such as to give rise to a justifiable sense of grievance on the part of an earlier sentenced co-accused, courts of appeal may intervene to reduce the sentence. That might occur even where a sentence under appeal does not otherwise appear to be the product of error. Mason J explained why that is so in *Lowe v The Queen*:[72]

> "It is said that the proper method of correcting the discrepancy is to increase the penalty of the co-offender if it is inappropriate or inadequate. The difficulty with this approach is that a court of criminal appeal is from time to time unable to avoid that sense of grievance and the appearance of injustice by increasing an inadequate penalty imposed on the co-accused simply because there is no Crown appeal against that penalty. It has therefore generally been accepted that it is preferable to err on the side of leniency and eliminate or diminish the sense of grievance and appearance of injustice by reducing the more severe penalty in appropriate cases. So the courts have on many occasions reduced a sentence to bring it more into line with the co-offender's penalty, though it is well established that there is no principle of law that sentences must strictly compare." …

[72] (1984) 154 CLR 606, 612, 613-614.

> [A] Court of Appeal is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance, by reducing a sentence, which is not excessive or inappropriate considered apart from the discrepancy, to the point where it might be regarded as inadequate."

[116] Consideration of whether a lack of parity between the sentences imposed warrants intervention is not merely a matter of mathematical comparison of the sentences imposed. It requires consideration of the proportionality of the sentences imposed making due allowance for the different circumstances of the co-offenders in question and their different degrees of criminality.[73]

[117] An obviously significant difference between the positions of Mr O'Hara and the appellant on sentence is Mr O'Hara pleaded guilty and the appellant did not. For that reason alone it is to be expected that Mr O'Hara would have received a lesser sentence than the appellant. Mr O'Hara's head sentence of seven years for the SIIC fraud in comparison to the head sentence of nine years imposed upon the appellant is therefore unsurprising.

[118] The appellant emphasises Mr O'Hara was sentenced for another fraud yet the combined effect of his sentences was more lenient than the sentence imposed upon the appellant. In fact, the combined head sentence of seven years plus a cumulative term of three years gave rise to a total head sentence longer than that imposed upon the appellant. This underscores the difficulty confronting the appellant in demonstrating the requisite manifest discrepancy.

[119] The appellant stresses, however, that while Mr O'Hara's overall head sentence was longer than the appellant's, as may reasonably be expected given he was sentenced for an additional fraud, his parole eligibility date on the overall sentences imposed was only three years after sentence, that is one year less than the period the appellant must serve before becoming eligible for parole. Application of the parity principle requires comparison of all components of the sentences imposed, not merely the head sentence.[74] However, that does not render the respective head sentences irrelevant to the exercise. The very fact that Mr O'Hara received a higher total head sentence but a more generous parole eligibility date than the appellant demonstrates an obvious difference in circumstances on sentence. On the one hand Mr O'Hara was being sentenced for more offending than the appellant and had a prior conviction for fraud but on the other hand he was entitled to a proportionately more generous discount by way of an earlier parole eligibility date because he pleaded guilty.

[120] There were a variety of other relevant variations in the circumstances of the appellant and Mr O'Hara on sentence. They were each sentenced on a different basis in respect of the SIIC fraud. Mr O'Hara was sentenced on the basis that he did not have as high a level of responsibility for the SIIC fraud as the appellant did. No such distinction was made on the sentence of the appellant and the sentencing judge specifically refrained from treating him as if he was the central architect of the scheme.

[121] The fact that Mr O'Hara had a previous conviction for fraud placed him in a less favourable position on sentence compared to the appellant who had no previous

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[73] *Postiglione v The Queen* (1997) 189 CLR 295, 301-302.
[74] Ibid 302.

convictions. On the other hand, Mr O'Hara suffered from a delusional disorder with grandiose features that his sentencing judge accepted impaired his judgment and moral reasoning in respect of his second fraud.

[122] It was submitted before this court that Mr O'Hara may have benefited to a much more significant extent than the appellant did from the SIIC fraud. That submission appeared to be premised on the fact that a number of significant amounts of money withdrawn from the SIIC Westpac account went to P Smith and P Armitage. However, neither the appellant nor Mr O'Hara was sentenced on the basis that Mr O'Hara received those sums of money. That is unsurprising. It is impossible on the known evidence to ascertain what proportion of the amounts paid by the complainants ultimately wound up in the hands of the appellant as compared to Mr O'Hara. Mr O'Hara appears to have been sentenced on the basis that he drew a wage rather than that he received a particular share of the proceeds. That is, he was sentenced on the basis that he earned an income from the fraud rather than deriving a share of the proceeds of it. It remains a significant comparable consideration against the appellant that, unlike Mr O'Hara, it was he who had control of the bank account utilised to perpetrate the fraudulent scheme.

[123] Any sense of grievance held on the part of the appellant is not justified. There is no manifest discrepancy when proper consideration is given to the quite different circumstances upon which Mr O'Hara and the appellant fell to be sentenced.

Manifestly excessive

[124] The appellant's counsel submits the range within which the sentence should have been imposed was seven to eight years imprisonment and submits for a sentence of seven years imprisonment with parole eligibility after three years.

[125] Reliance was placed on *R v Heiser & Cook; ex parte A-G (Qld)*[75] where the accountant of a family security friendly society was involved with the chairperson of that society in a prolonged series of misappropriations of about $3,000,000 of which Heiser received about $300,000. Like the appellant, Heiser went to trial. On an Attorney's appeal his sentence was increased to seven years imprisonment. Cook, the chairperson and major orchestrator of the misappropriations, had his effective sentence increased on an Attorney's appeal to 12 years imprisonment. In increasing his effective sentence the Court of Appeal noted that where a course of fraudulent offending is charged as multiple offences it is permissible via cumulative sentencing to exceed the maximum permissible sentence that could be imposed for a single offence.

[126] Because the appellant was only charged with one offence, notwithstanding the significant duration of the offending and the multitude of individual frauds committed, it is unnecessary to consider whether a different sentence could have been imposed had his offending been encapsulated in more than one charge. However, his offending was objectively more serious than that of Heiser.

[127] This is not a case of an employee succumbing to the temptation of misappropriating funds from the organisation in which he or she is employed. This offending was particularly wicked in that it involved the deliberate setting up of an entirely fraudulent scheme in order to dupe members of the public into parting with their

[75] [1997] QCA 14.

money in circumstances where there was no intention whatsoever of ever repaying it.

[128] For that reason the appellant's circumstances were also different from those in *R v Gadaloff*[76] where an employee of Brisbane City Council misappropriated $1,900,000 from his employer and on his plea of guilty was sentenced to eight years imprisonment.

[129] The appellant also referred to *R v Hinterdorfer*.[77] There, an employee of the Port of Brisbane Corporation who misappropriated $4,500,000 from his employer was sentenced to 10 years imprisonment with a recommendation that he be eligible for parole after serving four years and three months. The Court of Appeal did not interfere with the sentence, accepting that the case fell into the worst category of this sort of offending. Unlike the appellant, Hinterdorfer pleaded guilty.

[130] In the present matter the learned sentencing judge considered that while the offending "might" be in the category of the worst sort of offending, it was not appropriate to impose the maximum sentence of 10 years because he was not persuaded that the appellant was the central architect of the scheme. However, this did not mean the appellant fell to be sentenced as if he was a minor player in the fraud. He was the manager of the office from which the fraud was perpetrated and he was the operator of the bank account into which the dishonestly induced payments were made. He must, at least, have been one of the principal participants in the fraud, even if he was not its central architect.

[131] When the significance of his role is considered in conjunction with the sophistication of the fraudulent scheme and its calculated targeting of members of the public, the head sentence of nine years imprisonment was comfortably within the appropriate exercise of the sentencing discretion.

[132] It was to the appellant's credit that he did at least make some admissions with the consequence that the trial was shortened and that he consented to the giving of evidence by telephone by a significant number of the complainants, resulting in less inconvenience to those persons and reduced costs to the public. Nonetheless, a 13 day trial was still necessary and the appellant was not entitled to the mitigation of sentence which a plea of guilty may have occasioned. The moderation of the sentence imposed by the imposition of a parole eligibility date six months earlier than the half way point of the head sentence demonstrates ample allowance was made for this feature of the matter.

[133] The sentence imposed was not manifestly excessive.

[134] There being no prospect of leave to appeal being granted, I would refuse the application to extend time within which to apply for leave to appeal the sentence.

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[76] [1999] QCA 286.
[77] [1997] QCA 199.