[2012] CA (Bda) 6 Crim

The Court of Appeal for Bermuda

CRIMINAL APPEALS No. 12 & 13 of 2011

Between:

DAVID TED BOLDEN
ANTOINETTE ARIAN BOLDEN

Appellants

-v-

THE QUEEN

Respondent

Before: Zacca, E. President
Evans, Anthony, JA
Baker, Scott, JA

Appearances: Mr Andrew Martin and Mr Shawn Crockwell for the Appellant
Mr Rory Field and Ms Susan Mulligan for the Respondent

Date of Hearing: **12 & 13 March 2012**
Date of Judgment: **12 & 13 March 2012**
Date of Reasons: **22 March 2012**

REASONS FOR DECISION

BAKER, JA

1. On 14 June 2011 the appellants were convicted in the Supreme Court before the Chief Justice and a jury of one offence of issuing or supplying false documents or information contrary to section 82(1)(a) of the Investment Business Act 2003 (the Act) and subsequently sentenced to 200 hours of community service. They were acquitted of a number of other offences that are of no relevance to the present appeals. On 12 March 2012 we dismissed their appeals against conviction and we now give our reasons.

2. The essential facts are these. David Bolden is 49 and Antoinette Bolden is 48. They live in Hamilton. David Bolden is a Canadian national and naturalized Bermudian. Antoinette Bolden is Bermudian. At the material time the appellants owned and operated a number of investment businesses in Bermuda. Those directly relevant to this appeal were three companies licensed under the Act and therefore regulated by the Bermuda Monetary Authority (the BMA), Emerald Financial Limited, Emerald Investment Management Limited, and Directrade Limited ("the Emerald Group"). The appellants also held a minority shareholding in Emerald Capital International Limited. This company was not part of the Emerald Group and was exempt from licensing and regulation under the Act. The appellants' two Canadian partners Jason Bagg and John Wright were the majority shareholders in Emerald Capital International Limited.

3. By the summer of 2008 the BMA had concerns about the financial viability about the Emerald Group. No financial statements had been filed since 2005 as should have been done within four months of each company's year end. An onsite inspection of the Emerald Group was conducted by the BMA on 4 & 5 June 2008. This was followed by a letter from the BMA to the appellants dated 25 July 2008 in which it said it was appointing an investigator under section 49 of the Act. The inspection was duly conducted by Pricewaterhouse Cooper (PwC). There was then a meeting between the appellants and Mr Dargie of the BMA on 3 September 2008 because of concerns about the discrepancy between the liquidity estimates provided by PwC and those claimed by the appellants. This was followed the next day by a letter from Mr Dargie setting out:

> *"What we consider to be the main issues that need to be addressed and the actions we propose for dealing with them."*

Foremost among these was the financial condition of the three companies in the Emerald Group. The relevant passage in the letter reads as follows:

> "*Financial Condition*
>
> *We are concerned about the large discrepancies between the estimates of liquidity and profitability as provided by you in the quarterly returns submitted the Authority and those provided by PwC. Even allowing for the fact that PwC estimates are based on unaudited financial reporting and may not be wholly accurate, the differences are so large that they require urgent investigation. The rapid increase in borrowing in recent months added to our concern that the licensed entities may be in financial difficulty and may not meet the minimum requirements relating to liquidity and net assets.*
>
> *You have said that the financial position is not as bad as indicated by the PwC estimates but the fact remains that we have no up-to-date, independently verified accounts that would serve to clarify the position.*
>
> *You have provided management accounts as at end June which you say present a reasonably accurate picture of the financial condition of the 3 entities at that point (although I believe you also said you were still working on re-allocating costs within the Emerald Group and that this may impact the accounts, but in a way that would be favourable to the licensed entities). As mentioned during our meeting, we shall want to do some work ourselves to verify the numbers you have provided and will be in touch shortly to arrange a convenient time to do this. Should we conclude that there is a deficit in any of the licensed entities, we shall require you to take immediate remedial action to remedy it. You have indicated that funds would be available should that be necessary."*

4. Mr Dargie wrote further on 17 September 2008 pointing out that recently provided 30 June 2008 management accounts appeared to confirm a liquidity shortfall and the BMA's best estimate was that there was a liquidity shortfall totalling about $500,000 for the three licensed entities. He drew attention to section 5(4) of the second schedule to the Act which provides that an institution in not to be regarded as conducting a business in a prudent manner unless it maintains adequate liquidity and said the Emerald Group's liquidity shortfall would need to be rectified as a matter of urgency. He went on:

> *"You have indicated that you have the financial resources necessary to re-capitalize Emerald and this can be accomplished within a matter of weeks. I should accordingly be grateful for your confirmation by 19 September 2008, that:*
>
> *"(a) you acknowledge that there is a liquidity shortfall of at least $500,000 in the three licensed entities;*
>
> *(b) you have the financial resources necessary to remedy this deficiency and you are willing to do so; and*
>
> *(c) by 25 September, you will provide details of the cash injection including the timetable and amounts to be provided and also evidence of the source of the funding."*

5. On 19 September 2008 Antoinette Bolden emailed: "*attached our letter that been sent to your attention today.*" This letter, which was signed by Antoinette Bolden as managing director, acknowledged that there was a liquidity shortfall in Emerald and that they would on 25 September 2008 provide their plan to address that shortfall.

6. On 29 September 2008 a letter was sent on behalf of the Emerald Group to Mr Dargie signed by David Bolden as president and Antoinette Bolden as managing director. It said that they had been actively involved in the implementation of a capital restructuring with a goal of enhancing their capital base, reducing operating costs and focussing business efforts on higher margin business lines. Towards that end they had currently raised for the Group in excess of $500,000. They estimated the restructuring would be completed in the next four to six months with the first tranche of capital, $80,000, being received in October. The reference to $500,000 was supported by two bank statements showing credit balances for Emerald Capital Financial Limited which, as we have said was not part of the Emerald Group, totalling $774,396.14.

7. Mr Dargie replied on 16 October 2008 saying the Boldens' response was inadequate. The proposals lacked detail and the timetable was far too long. He wanted evidence of the source of the funds, that they were unencumbered and available. This provoked a response by letter of 24 October 2008 stating that the Emerald's management had been actively involved in a realignment of Emerald's business focus. It went on:

> *"Towards that end, we had been previously engaged in a capital raising program for the group of companies and the statement(s)*

provided reflect this. In regards to $500,000 + indicated on the statements, they are unencumbered, and are available for our allocation to our companies. This is a statement of fact and we have no intent of misleading the Authority on this or any other issue."

8. Although it was an issue at the trial whether the appellants supplied information that was false or misleading in a material respect, the jury concluded that they did and that issue is not open to the appellants on this appeal. The issue on this appeal is whether that false or misleading information was supplied for any purpose of the Act. The false or misleading information is to be found in the letters of 29 September 2008 and 24 October 2008. In essence the appellants were telling the authority that Emerald Capital International Limited which had a credit balance of some $774,000 in its account was part of the Emerald Group and that they had access to $500,000 of those funds to cure the liquidity problem of the three companies. Emerald Capital International Limited, although a Bermuda company was not part of the Emerald Group and the appellants were mere minority shareholders and did not have access to its funds.

9. The Act regulates investment business in Bermuda. The BMA is the regulator whose purpose is *inter alia* to supervise those carrying on investment business. The Act creates a licensing regime which the BMA administers; it is an offence to carry on an unlicensed investment business in Bermuda. The BMA has wide powers to impose conditions on a license for the protection of the investment provider's clients or potential clients and it is an offence to break such conditions.

10. It is necessary to look at various provisions of the Act. The appellants were charged under section 82 which is headed *"False documents or information"*. Section 82(1) provides:

"Any person who, for any purposes of this Act—

"(a) issues a document, or supplies information, which is false or misleading in a material respect; or

(b) signs a document which is false or misleading in a material respect; or

(c) takes part in the preparation or issue of a document, or the supplying of information, which is false in a material respect is guilty of an offence…"

Subsection (2) makes it a defence if the defendant did not know of the falsity or misleading character of the document or information and took every reasonable precaution to ensure its accuracy.

11. The main ground of appeal is that the conduct complained of was not "for the purposes of the Act" because the BMA was not at the relevant time exercising any power under the Act. In considering this it is necessary to consider section 82 in the context of certain other provisions of the Act.

12. Part II describes the functions and duties of the BMA and section 8(1) provides that:

"*The Authority shall have the powers conferred on it by this Act and the duty generally to supervise persons carrying on investment business including investment exchanges and clearinghouses."*

13. Section 9 requires the Authority to publish a statement of principles in accordance with which it is acting or proposing to act *for exercising the power to grant, revoke or restrict a license and obtain information or reports or to require production of documents."*

14. Section 45 is headed "*Power to obtain information and reports*". The material part of section 45 provides:

"*(1)The Authority may by notice in writing served on an investment provider—*
(a) require the investment provider to provide the Authority…. with such information as the Authority may reasonably require for the performance of its functions under this Act…".

15. Section 46 is headed "*Power to obtain production of documents*." The material part of section 46 provides:

"(1) The Authority may—

(a) by notice in writing served on an investment provider require it to produce….. such document or documents of such description as may be so specified;

(b) .....

being such documents as the Authority may reasonably require for its functions under this Act."

Subsection (6) of section 46 makes is an offence without reasonable excuse to fail to comply with a requirement imposed under the section. There is no similar provision in section 45. The offence making provision in that case is section 82.

16. Section 49 gives the Authority power to appoint a competent person or persons to investigate an investment provider's business and report. That power was exercised by the appointment of PwC in the present case.

17. The main thrust of the argument of Mr Martin for the appellants is that section 82, at any rate for the purposes of this case, is limited by sections 45 and 46. Information supplied by the appellants was not, he submits, supplied for the purposes of the Act until the BMA was exercising its power, the starting point for the exercise of that power being the service of a notice in writing. Up until that point, the situation was one of informality with the appellants being asked to provide information on a voluntary basis. It is not, submits Mr Martin, an offence to try and buy time and keep the BMA at bay from exercising its power under section 45 to issue a written notice, even if done dishonestly. The position was not very different, Mr Martin submitted, from the appellants pretending that they were going abroad on holiday and that they would deal with the issues when they returned.

18. It is necessary, I think, to stand back and keep in mind that the purpose of the Act is to protect clients of investment providers such as the Emerald Group by ensuring that the business is conducted in a prudent manner (see paragraph 5 of the 2nd schedule to the Act).

19. Mr Martin's submission in my view fails for two reasons. In the first place section 82 is in wide terms and I can see no reason to construe it other than in accordance with the

purpose of the Act. This is not a case in which a penal provision is ambiguous and should therefore be construed as Mr Martin argues narrowly. The second reason is that there was a written notice that brought section 45 into play.

20. Were Mr Martin's submission correct it would lead to a surprising result. The PwC investigation was under section 49 of the Act. Section 49(7) makes it in an offence to obstruct that investigation. If the appellants provided false information to that investigation (which it is not suggested that they did) and thereby obstructed it they would be committing an offence under that subsection. There would then be a gap between the conclusion of the PwC investigation and the formal issue of a notice under section 45 during which, absent an offence under section 82, it would not be an offence to supply false or misleading information.

21. We were also referred to the Statement of Principles issued by the BMA under section 9 of the Act and in particular to Part 1 paragraph 1.1 which states that the BMA will, where appropriate, seek remedial action by persuasion and encouragement. Further, Part 6, paragraph 6.1 says that reports and information are routinely provided by investment providers on an entirely voluntary basis. Mr Martin argues that since the information provided by the appellants preceded any formal action by the BMA under section 45, the BMA was not exercising any statutory power under the Act. Accordingly the information was not being provided for any purpose of the Act. Mr Field for the respondent submitted that section 82 applied to information submitted for *any* purposes of the Act. It was not limited just to the supply of information for the purpose of section 45 or section 46. In my judgment there is force in this submission and the scope of section 82 is not limited as argued by Mr Martin. Furthermore, it could hardly be said that the information was supplied entirely voluntarily. The appellants were told on 4 September 2008 by the BMA that if they concluded there was a deficit in any of the licensed entities it would have to be remedied immediately.

22. The letter of 17 September 2008 referring to rectifying the liquidity shortfall in order to avoid breaching section 5 paragraph (4) of the second schedule brought the Act into play even if it wasn't already. The notice in writing required by section 45 is not

required to be in any particular form and the writer plainly told the appellants to acknowledge Emerald's liquidity shortfall and explain how it would be remedied.

23. There are many sections of the Act that make non-compliance a criminal offence. Section 82 is more general and applies to the supply of false documents or information throughout the Act where a person provides it for any purposes of the Act. It is in our view of note that section 8 imposes on the BMA a general duty to supervise persons carrying on investment business. Thus in my judgment when seeking information prior to the issue of a formal written notice under section 46(1) the BMA is exercising its supervisory powers and a person providing information in response is therefore doing so for a purpose of the Act.

24. I am unable to accept Mr Martin's argument as to the narrow ambit of section 82. Even were Mr Martin correct that section 82 only bites in the present case in relation to the BMA's section 45 powers, the BMA's letter of 17 September 2008 is in our view clear written notice to provide by 19 September 2008 information reasonably required for the performance of its function under the Act i.e. that the appellants had the financial resources to remedy the liquidity deficit. Accordingly, even a narrow construction of section 82 would be fatal on the facts of this case.

25. In our judgment the Chief Justice was right in ruling at the close of the prosecution's case that there was a case to go to the jury that the appellants' statements were made for the purposes of the Act. He referred to Mr Dargie's letter of 17 September 2008 saying Mr Dargie was rectifying the liquidity shortfall as meeting a statutory requirement, the tenor of the whole correspondence being that if the appellants did not meet the requirement the Authority would consider revoking the licenses. Mr Dargie was plainly purporting to act as a regulator to enforce the legislation. We agree with this analysis.

26. Mr Martin's other submission was that the judge did not direct the jury about Antoinette Bolden's involvement and that the case against her should be considered separately. The judge gave careful directions about the need to consider the case against

each defendant separately on each count of the indictment. However, the case as advanced throughout by both the Crown and the defence was that the appellants stood or fell together. No suggestion was made by counsel at the trial that the judge's summing up was defective in this regard. In the appellants' skeleton argument it is put in this way:

> *"The learned Chief Justice did not deal with Mrs Bolden's evidence on the letters, which was, in essence that her husband had written them and that she was not involved in preparing or sending them, although she knew they had been sent, and accepted that her name was attributed to them. There was no evidence that Mrs Bolden prepared or sent the letter containing the information said to be false, although her name was on the email letter and she accepted that the letter was sent with her knowledge."*

The reality was that Antoinette Bolden is a chartered accountant and holds a master's degree in business administration. The appellants owned and operated the licensed companies together. They both counter-signed agreeing the terms and conditions in Mr Dargie's letter of 25 July 2008. They both attended the meeting with Mr Dargie on 3 September 2008 to discuss the issues he addressed in his letter of the following day. She signed the letter of 19 September 2008 acknowledging a liquidity shortfall and she and her husband both signed the letter of 29 September 2008. Also, although neither she nor her husband signed the letter of 24 October 2008, which was an electronic transmission, it was sent under both names on the company letterhead. All the evidence indicated that they were acting jointly throughout and we are satisfied there is nothing in this point.

Signed

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Baker, JA

Signed

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Zacca, P

Signed

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Evans, JA