In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2015 No: 2

(Magistrates' Court No. 14CR00324)

BETWEEN:-

CADILLY CONSULTANTS LIMITED

Appellant

-and-

THE QUEEN

Respondent

JUDGMENT

(In Court)

Date of Hearing: 16th April 2015
Date of Judgment: 7th May 2015

Mr Michael J Scott, Browne Scott & Associates, for the Appellant
Mr Alan Richards, Chambers of the Director of Public Prosecutions, for the Respondent

Introduction

1. On 15th October 2014 in the Magistrates' Court (Wor. Khamisi Tokunbo, magistrate) the Appellant company ("the Company") was convicted of failing between 24th April 2014 and 5th June 2014 ("the requested period") to provide information ("the requested information") as required by section 6(1) of the International Cooperation (Tax Information Exchange Agreements) Act 2005 ("the 2005 Act"), contrary to section 9(1)(a) of the 2005 Act. The Company was sentenced to a fine of $6,000. It appeals against both conviction and sentence.

The legislative scheme

2. Section 3(2) of the 2005 Act provides that the Minister may provide assistance to any requesting party under a tax information exchange agreement according to the terms of the agreement with that party.

3. Section 5(1) of the 2005 Act provides that where the Minister has received a request in respect of which information from a person in Bermuda is required, the Financial Secretary, including an Assistant Financial Secretary, may apply to the Supreme Court for a production order to be served upon the person referred to in the request directing him to deliver to the Minister the information referred to in the request.

4. Section 5(2) of the 2005 Act provides that the Supreme Court may, if it is satisfied that the conditions of the applicable agreement relating to a request are fulfilled, or satisfied with the Minister's request to honour a request in the interest of Bermuda, make a production order requiring the person referred to in the request to deliver to the Minister the information referred to in the request within 21 days or, by reason of section 5(3), within such other period of time as the Court may specify.

5. Section 6(1) of the 2005 Act provides that a person on whom a production order has been served under section 5 shall provide the information specified in the production order to the Minister, within the period specified in it. However section 6(2) provides that a person is not

required to comply with a request for information if the information is not in the person's possession or control.

6. "*Information*" is defined in section 2 of the 2005 Act to mean any fact, statement or record in any form whatever that is relevant or material to tax administration or enforcement.

7. Section 9(1) of the 2005 Act provides that, where a person contravenes a production order without a reasonable excuse, that person is guilty of an offence. Section 9(4) provides that such a person may be proceeded against summarily, and is liable on conviction to a fine not exceeding $10,000, or to imprisonment for a term not exceeding six months, or to both imprisonment and a fine.

8. Although this was not argued before me, I shall assume in favour of the Company (without deciding the point) that sections 6(1) and 9(1) merely impose an evidential rather than a legal burden on the defendant. Ie it is for the defendant to adduce evidence fit for consideration by the court that he did not have the relevant information in his possession or control or that he had a reasonable excuse for not producing it. The legal burden of proving that the defendant did have the relevant information in his possession or control or that he did not have a reasonable excuse for not producing it then falls on the prosecution. Whether the Company bears an evidential or alternatively a legal burden with respect to these provisions will not affect the outcome of this appeal.

Case history

9. On 24th April 2014 the Court made a production order ("the Production Order" or "the Order") requiring the Company to produce the following information to the Minister within 28 days of the making of the Order, ie on or before 22nd May 2014.

(1) The supporting documents explaining why two named individuals transferred Canadian $299,491.17 to the Company in August 2005 as shown in the appendix attached to the Order.

(2) Any other supporting documents created before or during the taxable period under investigation of 2005 up to and including December 31st 2009, such as a copy of consulting agreements, contracts, invoices, corporate minutes, etc.

10. The Company was required to swear to all the documents requested by the Production Order, using a form of affidavit which complied with the domestic evidential requirements of the requesting party.

11. The Company supplied an affidavit to the Minister sworn by one Christine Hoskins. It was the Company's position both at trial and on appeal that this affidavit was sufficient to discharge the Company's duty under the Production Order. Ms Hoskins stated in the affidavit:

> "*1. I am employed by Watford Services Limited located at [address]. I am employed as an attorney to Watford Services Limited a company that provides corporate services to a number of local and exempt companies incorporated in Bermuda.*
>
> *2. By virtue of that employment have (sic) knowledge of the matters hereinafter set out.*
>
> *3. Watford Services Limited commenced providing full corporate administrative services, including those of registered office to Cadilly Consultants Limited on or around January 4th, 2011.*
>
> *4. I have reviewed all documents that comprise the records of Cadilly Consultants Limited that were delivered to the offices of Watford Services Limited on, and received since January 4th, 2011. There are no records within those documents referring to a transfer of $299,491.17 CAD on the 15th August 2005, nor are there any records referring to [the two individuals named in the Production Order] at our offices of any nature between any period.*
>
> *5. Watford Services Limited's records retention policy for bank statements, invoices and general business correspondence for all client companies is 7 years.*
>
> *6. I also confirm that as the Production Order was served upon me personally I did advise the company's principal, Nigel P.B. Freeman, that information had been requested. He instructed me to co-operate fully, but he did advise that he had no recollection of these persons or the transaction specifically. Mr Freeman is currently residing in Athens, Greece and can be contacted on [email address].*"

12. The affidavit was unsatisfactory in several respects. First, it begged the question as to whether the records delivered to Watford Services Limited ("Watford") were complete, and if they were not, whether any relevant documents had been retained by the Company elsewhere. That was not on the face of the affidavit a matter within the knowledge of Ms Hoskins. This shortcoming was compounded by the fact that as Ms Hoskins swore the affidavit in her capacity as an employee of Watford and not in any other capacity she did not purport to speak for the Company.

13. Thus the affidavit was consistent with the position that the Company had delivered all its relevant books and records to Watford, and that in accordance with its document retention policy any relevant documents had been destroyed seven years after their creation and were therefore no longer in the possession of the Company. But it was also consistent with the position that the Company had or may have retained relevant books and records elsewhere.

14. Further, the affidavit did not address the question of whether there were any relevant documents which, while not in the Company's possession, were within its control. Eg whether the Company's bank held any record of the relevant transaction and how the monies paid to the Company were disbursed. One would have expected Ms Hoskins, an attorney specialising in corporate services, to contact the Company's bank to ascertain whether it held any relevant information, but the natural inference from the affidavit is that this was not done.

15. By an email dated 29th May 2014, Wayne Browne, an Assistant Financial Secretary, contacted Ms Hoskins and pointed out the unsatisfactory nature of her affidavit, although in fairness to Ms Hoskins I should note that he did not specifically identify the issue of banking records. He invited the Company to respond properly to the Production Order within seven days, ie on or before 5th June 2014. However the Company did not at that time avail itself of the opportunity to take corrective action.

16. That was the state of the documentary evidence which came before Mr Tokunbo. He heard oral evidence from both Mr Browne and Ms Hoskins. It was common ground that, although not stated in the affidavit

or known to the Minister when the affidavit was served, Watford was the Secretary for the Company. Ms Hoskins said in evidence that she had assumed that the Minister was aware of this. She stated that in January 2011 Mr Freeman had delivered approximately seventy to eighty bankers boxes to her offices. The background to this was that Mr Freeman was moving to Greece to take up a position as Treasurer to the World Chess Federation, FIDE. Ms Hoskins said that she believed from conversations with him that he did not wish to take any documents with him that he did not need.

17. Ms Hoskins said that she told Mr Freeman that she could not take all the boxes and that he would have to get rid of anything older than seven years. Thus she would have taken any documents relating to the transaction which was the subject of the Production Order, as this took place in 2005. She stated that she did not believe that there were any documents relating to the two men identified in the Order that were in the possession or control of either the Company or Mr Freeman.

18. Ms Hoskins said that she had tried to get Mr Freeman to confirm the contents of her affidavit, although that did not happen as he was travelling for work throughout Europe that summer. She added that Mr Freeman had made an appointment with the British Council to get an affidavit sworn, but that when he went there he was told that they no longer did that sort of thing, and that he would have to go before a notary with a certified translation of the affidavit that he was going to sign. As at the date of the trial he had not yet done so.

19. The learned magistrate was unimpressed. Giving judgment, he stated:

"*Having regard to Exhibit #1, the Production Order, Exhibit #2, the Affidavit provided by Ms Hoskins, in particular, I am satisfied so that I feel sure that the Affidavit itself was insufficient in establishing either that the company Cadilly was not in possession of the documents for the relevant period, or failed to provide any reasonable excuse as to why the company would not comply with the requirement of the Production Order. ...*

In my view the matter is a straightforward matter of compliance. And as the representative Ms Hoskins concedes during her evidence at one point, the Affidavit

could have been clearer. In my view had it been clearer, all of this could have been avoided. But it was not."

20. The learned magistrate was therefore satisfied that the Company had committed the offence with which it was charged. In sentencing the Company to a fine of $6,000, he stated:

"*This is a serious offence committed by the Defendants under that Act which is designed to ensure international cooperation. Failure to comply puts Bermuda's reputation at risk of appearing non-cooperative. The sentence must deter other companies from not complying fully so as to avoid creating this kind of national/international blot on the country's reputation.*

I note this is a first offence but there is no credit for a guilty plea."

Appeal

21. The appeal is governed by the Criminal Appeal Act 1952 ("the 1952 Act"). Section 3(1) provides that a person convicted of an offence by a court of summary jurisdiction shall have a right of appeal to the Supreme Court against his conviction or sentence. Section 16 provides that the appeal shall be by way of argument upon the record of the proceedings before the court of summary jurisdiction prepared by that court, but subject to the right of the Supreme Court to admit fresh evidence if it appears to that Court that in the interest of justice it is reasonable to do so.

22. Section 18(1) of the 1952 Act provides that, subject to certain exceptions that do not apply in this case, the Court shall allow an appeal against conviction if it appears to the Court (a) that the conviction should be set aside on the ground that, upon weighing up all of the evidence, it ought not to be supported; or (b) that the conviction should be set aside on the ground of a wrong decision in law; or (c) that on any ground there was a miscarriage of justice; and in any other case shall dismiss the appeal.

23. However section 18(1) goes on to provide that the Court, notwithstanding that it is of opinion that any point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it appears to the Court

that no substantial miscarriage of justice in fact occurred before the court of summary jurisdiction.

24. Section 18(3) of the 1952 Act provides in material part that, subject to various qualifications which do not apply in this case, if it appears to the Court that a different sentence should have been imposed, the Court may quash the sentence imposed by the court of summary jurisdiction and may impose such other sentence allowed by law as the Court thinks just.

25. Section 21(1) of the 1952 Act provides that upon the determination of an appeal under that Act, the Court, if it appears equitable in the circumstances to do so, may make an order requiring either party to pay all or any part of the costs of the appeal.

Conviction

26. Mr Scott, who appeared for the Company, made a number of submissions challenging the reasoning of the learned magistrate. I need not address them in detail. As the Company had not produced the documents required by the Production Order, the questions for the learned magistrate were: (i) whether the documents were in the Company's possession or control at any time during the requested period, and (ii) if they were, whether the Company had a reasonable excuse for not complying with the Production Order. That question fell to be determined on the basis of all the evidence that was before the Magistrates' Court, including the oral evidence, and not just the material that was produced by the Company during the relevant period, ie not just Ms Hoskins' affidavit. It is not clear to me whether the learned magistrate appreciated that this was the correct approach, although assuming for the sake of argument that he did, I cannot fault his finding as to guilt.

27. Therefore, if this appeal had been decided solely on the record of the proceedings before the Magistrates' Court, and even if the learned magistrate had erred in law, I should have dismissed the appeal against conviction as I am satisfied that no substantial miscarriage of justice occurred in connection with the proceedings before the Magistrates' Court.

28. However events have moved on and in consequence this appeal has not been decided solely on the record of the proceedings before the Magistrates' Court. The Minister brought committal proceedings in this Court against the Company. These overlapped with the trial but were not concluded until January 2015. In the course of those proceedings and further proceedings in relation to the Production Order (collectively, "the Supreme Court proceedings"), the Company filed four further affidavits from Ms Hoskins and one from Mr Freeman, and produced documentation from its bank. The Court and the Minister were satisfied that the Production Order had – eventually – been complied with, and with leave of the Court the committal proceedings were withdrawn.

29. I have admitted those documents in evidence on this appeal, together with the various orders made by this Court in connection with the Production Order, as in my judgment in the interest of justice it is reasonable to do so. They assist the Court in determining whether there was non-compliance with the Production Order during the relevant period, and, if so, whether there was a reasonable excuse for it. They will also be relevant, if the conviction is upheld, to mitigating and exacerbating factors in relation to sentencing.

30. I am satisfied from the affidavit evidence filed in the Supreme Court proceedings that any extant records in the possession of the Company relating to the requested information were most likely transferred by Mr Freeman to Watford in January 2011 and, pursuant to Watford's document retention policy, were destroyed by Watford once seven years from their creation had elapsed. I am therefore satisfied that by the start of the requested period the Company no longer had the requested information in its possession. I should emphasise that the evidence which leads me to this conclusion was not before the learned magistrate.

31. That leaves the question of documents in the Company's control. On 13th November 2014 in the Supreme Court proceedings I ordered Ms Hoskins to contact the Company's bank to obtain any relevant documents in its possession. The bank supplied her with a one page statement showing that a payment of US $249,994, which it may reasonably be inferred represented the Canadian $299,491.17 payment, was credited to the

Company's US $ account in August 2005. The statement also showed various debits from the account within the next few days, including one for US $10,000 and another for US $150,000. The statement was accompanied by an email from the bank stating that it had not retained any supporting documentation with regard to the underlying transaction as it was not required to retain client information for more than seven years and that period was well past.

32. The Company could and should have obtained the bank statement within the relevant period and supplied it to the Minister as this was a relevant document within its control. It had no reasonable excuse for not doing so. As a result of the Company's failure to produce this document within the relevant period it was guilty of failing to provide the requested information contrary to section 9(1)(a) of the 2005 Act. Therefore it does not appear to me that the conviction should be set aside on the ground that, upon weighing up all the evidence, it ought not to be supported.

33. In the circumstances I am satisfied that there was no miscarriage of justice. The appeal against conviction is therefore dismissed.

Sentence

34. The extent of the Company's non-compliance with the Production Order was less extensive than would have appeared to the Magistrates' Court. But the offence was not trivial. As the learned magistrate rightly stated, Bermuda risks incurring reputational damage in the international community if requests made under the 2005 Act are not complied with in a timely manner. I agree with him that it is legitimate to impose a sentence which is intended to deter other companies from non-compliance with their duties under the 2005 Act. However, given that the maximum fine for the offence is only $10,000, I am sceptical as to whether any financial penalty which may properly be imposed in this case will do that. Even a fine of $10,000, which would not be appropriate here, would be no more than a slap on the wrist to a successful financial services provider, such as might in future be served with a production order under the 2005 Act.

35. By way of comparison, $10,000 is also the maximum fine for failure to comply with a production order under section 38 of the Proceeds of Crime Act 1997. However under section 70G of the Criminal Code Act 1907 ("the 1907 Act"), a company that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law, not exceeding $20,000 where the offence is a summary offence, and an amount in the discretion of the court where the offence is indictable.

36. The Legislature may wish to consider increasing the maximum fine under the 2005 Act to a level which is more likely to have a real deterrent effect. On the other hand, it is important to keep a sense of proportion. The recipients of production orders do generally comply with them. There is not an epidemic of non-compliance needing to be stamped out.

37. There is an anomaly under the 2005 Act in that an individual who commits an offence under section 9 can be both fined and imprisoned but a company can only be fined. There is no provision analogous to section 352 of the 1907 Act, which allows for the prosecution of a director, manager, secretary or other similar officer of a company for certain specified offences committed by that company. Thus an individual convicted of a really serious instance of an offence under the 2005 Act would be liable to imprisonment as well as or instead of a fine. This suggests that in the case of an individual a sentence limited to a fine of $10,000 is not necessarily reserved for the most serious offending. It would be inconsistent to adopt a different policy towards fining a company. I shall bear that in mind when assessing an appropriate fine in relation to the statutory maximum.

38. As to the particular facts of the case, I find that non-compliance was not deliberate and calculated but was rather due to a combination of obtuseness and obstinacy on the part of Ms Hoskins, although I accept that even down to the date of trial she genuinely believed that her affidavit was sufficient to comply with the Production Order, and insouciance on the part of Mr Freeman. I do not accept that his business activities in Europe left him unable to fax a letter or send an email stating

whether he had retained any of the requested information. This could then have been exhibited by Ms Hoskins to her affidavit.

39. Although I accept that the Production Order was fully complied with eventually, I regard the fact that it took the Company nine months to do so as an exacerbating feature. It is true that, as the learned magistrate noted, this was a first offence. But that is of limited significance given that there was no material before me to suggest that the Company had previously been served with any production orders and hence that it had had any previous opportunity to commit the same or a similar offence.

40. The learned magistrate cannot be faulted for the sentence which he passed. But in all the circumstances as they have emerged since the trial I am satisfied that the sentence merits a modest reduction. I therefore quash the fine of $6,000 and impose a fine of $5,000 instead.

41. It is the practice of the Court to award costs on criminal appeals only in exceptional cases. My provisional view is that this is not such a case. However if either party wishes to persuade me otherwise they may attempt to do so, provided that they give written notice to the Registry within seven days of the date of this judgment.

Dated this 7th day of May, 2015 ______________________________

Hellman J