

**(1) Ludwis Allen Wheatley
(2) Wesley Penn**

Appellants

v.

**The Commissioner of Police
of the British Virgin Islands**

Respondent

FROM

**THE COURT OF APPEAL OF
THE BRITISH VIRGIN ISLANDS**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 4th May 2006

Present at the hearing:-

Lord Bingham of Cornhill
Lord Steyn
Lord Clyde
Lord Carswell
Lord Mance

[Delivered by Lord Bingham of Cornhill]

1. The appellants were tried in the Magistrate's Court on four charges of theft contrary to section 209(a) of the Criminal Code (Act No 1 of 1997) of the Laws of the British Virgin Islands, four charges of conflict of interest on the part of a public officer contrary to section 82 of the Criminal Code and two charges of fraud and breach of trust. The Magistrate found no case to answer on the fraud and breach of trust charges, which give rise to no issue in this appeal. She acquitted the

appellants on the theft charges but convicted them both on the charges under section 82. On their appeal against those convictions and the prosecution's appeal against the acquittals on the theft charges, the Court of Appeal of the British Virgin Islands (Redhead, Saunders and Alleyne JJA), in a judgment delivered by Saunders JA, upheld the section 82 convictions and entered convictions on the theft counts also. The appellants now challenge both those decisions. In argument before the Board a point was raised on the admissibility of evidence of entries in a banker's books which the Magistrate admitted but the Court of Appeal rejected.

2. By a written contract dated 7 July 1998 the first appellant, Mr Wheatley, was employed by the Government of the BVI as Financial Secretary. It was a full-time appointment and he was bound by all the orders and regulations applicable to the conduct of public officers. These orders and regulations forbade an officer from engaging in any private activity which might conflict with his official duties or responsibilities, or which might place him or give the appearance of placing him in a position to use his official position for his private benefit. An officer who formed the opinion that any private activity in which he was engaged or in which he had a private pecuniary interest was likely to offend against this prohibition was obliged to declare it fully to the Governor and either discontinue the activity or divest himself of the interest or undertake not to pursue the activity save on conditions laid down by the Governor. No government contract was to be let to a public officer in the contracting department or to any partnership or company of which he was a member or director unless the interest had been disclosed and permission given to proceed. If an officer considered that he was being required to act illegally, improperly or unethically he was obliged to report the matter. One of the duties of the first appellant was to administer, and act as accounting officer for, certain public works projects.

3. After a detailed review of the evidence the Magistrate found that the first appellant had a direct interest and played a very prominent role in, and acted as a management consultant to, two business enterprises known as P&W Heavy Equipment and Accurate Construction. It is not clear whether these were partnerships or limited companies, but they were largely owned by Mr Penn, the second appellant. The Court of Appeal, in paragraph 25 of its judgment, upheld the Magistrate's decision on these points, referring to the "staggering amount of evidence" which supported them. There has been, and could have been, no challenge to these conclusions on this appeal. On 10 January 2002, when renewal of his

employment contract was under consideration, the first appellant disclosed a number of his private interests to the Deputy Governor, but he did not then or at any time disclose his interest in P & W and Accurate.

4. In about December 2000 the second appellant built a substantial wall at Long Look, Tortola, to protect the property of Alice Thomas against erosion which might undermine the foundations and imperil the stability of the building. A year later, on 15-16 December 2001, there was heavy rain and this wall fell over “more or less in one piece”. There was a need for urgent action to protect the building and the safety of the occupants. On 17 December 2001 Dr Pickering, the Legislative Council representative for the district, spoke to the Minister for Finance and Chief Minister, in the presence of the first appellant, and the Minister agreed that the wall should be replaced subject to a quotation being submitted and approved. Under cover of a letter dated 18 December Dr Pickering forwarded estimates for replacing the wall from P & W and Accurate. On 19 December 2001 two contracts were made, described in official parlance as “petty contracts” because the consideration was less than \$60,000. The first contract, No 43/2001, was between the Government and Accurate, in the sum of \$58,073.12, for the construction of a retaining wall of specified dimensions. The second, No 44/2001, was between the Government and P&W, in the sum of \$14,247.44, for “Heavy Equipment and Trucking” for a retaining wall of different dimensions. In each case the first appellant signed the contract on behalf of the Government and the second appellant on behalf of the contractor. Thereafter the first appellant and his staff acting at his direction signed the requisite purchase orders and payment vouchers and approvals to give effect to the carrying out and completion of the contracts. The wall was built and the contractors were paid. There was clear evidence, derived from the records of Accurate, that cheques totalling \$9,400 were paid by Accurate to the first appellant’s wholly-owned consulting business in relation to this transaction.

Section 82 of the Criminal Code

5. Section 82 of the Criminal Code provides:

“Any person who, being employed in the public service, and being charged by virtue of his employment with any judicial or administrative duties respecting property of a special character, or respecting the carrying on of any manufacture, trade or business of a special character, and having acquired or holding, directly or indirectly, a private interest in such

property, manufacture, trade or business, discharges any such duties with respect to the property, manufacture, trade, or business in which he has such interest or with respect to the conduct of any person in relation thereto, commits an offence and is liable on conviction to imprisonment for a term not exceeding one year.”

In the Table of Offences and Penalties in Schedule 1 to the Code, the nature of the section 82 offence is summarised as “Public officer exercising powers in respect of matter in which he has private interest”. The object of the section is plainly to penalise public servants who discharge public duties when subject to a private interest of their own in relation to the subject matter of their public duties. As Lindley LJ said of an earlier English enactment to like effect (*Nutton v Wilson* (1889) 22 QBD 744, 748), “The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise”. It is not an ingredient of the offence that the public should have suffered detriment as a result of the conflict. Nor is it an ingredient of the offence that the public servant should have acted dishonestly, fraudulently or maliciously. It will be enough that he acted knowingly. He need not be shown to have profited directly or indirectly from the transaction because of his private interest, but in most cases (as in this) he is no doubt likely to have done so. The Code provides no defence to a charge under the section when the existence of the conflict is proved. The English authorities illustrate the strictness with which comparable provisions have been applied: see *Nutton v Wilson*, above; *England v Inglis* [1920] 2 KB 636; *Rands v Oldroyd* [1959] 1 QB 204. Such strictness is necessary to ensure that public powers are exercised to serve exclusively public purposes.

6. The first charge against the appellants under section 82 was to this effect:

“Statement of Offence

Exercising Power in Respect of a Matter in which he has a Private Interest, contrary to section 82 of the Criminal Code (Act No 1 of 1997) of the Laws of the Virgin Islands.

Particulars of Offence

Ludwis Allen Wheatley on 19th December, 2001 being a person employed in the public service of the Government of the Virgin Islands, namely Financial Secretary, and charged by virtue thereof with administrative duties regarding

property of a special character namely public funds for public infrastructure construction and/or business of a special character, namely public infrastructure construction, to wit: contract number 43 of 2001 between the Ministry of Finance and Accurate Construction, for the construction of a retaining wall at Long Look, Tortola and holding a direct or indirect private interest in the said property or business by way of his interest in Accurate Construction, discharged in his public duties with respect to the said property or business or with respect to the conduct of a person in relation thereto in that he

- (i) signed a purchase order for payment of the sum of fifty eight thousand and seventy three dollars and twelve cents (58,073.12) in favour of Accurate Construction under the said contract.
- (ii) Signed a payment approval form and voucher authorizing payment of the sum of twenty nine thousand and thirty six dollars and fifty six cents representing part payment of the entire sum due to Accurate Construction under the said contract.

And Wesley Penn aided and abetted the commission of the said offence.”

The second charge was to the same effect, save that it omitted reference to the purchase order and related only to a different part payment on a later date. The third and fourth charges referred in similar terms to the payments made in respect of contract No 44 of 2001 with P & W.

7. Before the Board, as before the Magistrate and the Court of Appeal, the appellants criticised the wording of the charges under section 82 and in particular complained that “Exercising Power” in the Statement of Offence did not reflect the language of the section. The courts below rejected this argument, and were right to do so. It is unnecessary to consider whether the wording of the count could with advantage have been refined or improved, since it is clear, in the Board’s opinion, that the appellants and their representatives could have entertained no doubt about the gravamen of the accusation made against them, which was on the evidence abundantly proved. The conclusion reached by the Magistrate and the Court of Appeal is unassailable, for the reasons which they clearly gave.

Theft

8. Sections 203-208 of the Criminal Code are closely modelled on sections 1-6 of the Theft Act 1968 (England and Wales) and were accepted in argument as having the same meaning. So far as relevant to this appeal, sections 203-208 provide:

“203.(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it, and ‘thief’ and ‘steal’ shall be construed accordingly.

(2) It is immaterial whether or not the appropriation is made with a view to gain, or is made for the thief’s own benefit.

(3) Sections 204 to 208 shall have effect as regards the interpretation and operation of this section and (except as otherwise provided by this Part) shall apply only for the purposes of this section.

204.(1) A person’s appropriation of property belonging to another is not to be regarded as dishonest,

(a) if he appropriates the property in the belief that he has in law the right to deprive the other of it on behalf of himself or of a third person;

(b) if he appropriates the property in the belief that he would have the other’s consent if the other knew of the appropriation and the circumstances of it; or

(c) (except where the property came to him as a trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

- (2) A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

205.(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by dealing with it as its owner ...

206.(1) 'Property' includes money, defined, whether in the form of cash, cheque, credit card, bank draft, money order or otherwise, and all other property, real or personal, including things in action and other intangible property ...

207.(1) Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest). ...

- (3) Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.

- (4) Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds ...

208.(1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if the intention is to treat the thing as his own to dispose of regardless of the other's rights, and a borrowing or lending of it may amount to so treating it if the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal ...”

Section 209(a) prescribes the maximum penalty on summary conviction.

9. The Magistrate acquitted the appellants of theft because she found that the wall had been built and was not, on the evidence, over-priced. Therefore the appellants' dishonest acts had not affected the Government adversely, as had to be established if they were to be convicted. The Court of Appeal took a different view. Directing itself in accordance with *R v Lawrence (Alan)* [1972] AC 626, *R v Morris (David)* [1984] AC 320, *R v Gomez* [1993] AC 442 and *R v Hinks* [2001] 2 AC 241, it concluded (para 37) that considerations of gain and loss were irrelevant to the decision whether there had been an appropriation. In paragraphs 39-40 of its judgment the Court of Appeal said:

“39. To return to the factual situation here, as Financial Secretary, Mr Wheatley was subject to the provisions of the Public Service Commission Regulations, General Orders, Public Service Code, Financial Regulations and such other regulations as the Government introduced for the conduct of officers and the dispatch of Government business. He was the accounting officer to the Chief Minister. He was an agent of the Government of the BVI entrusted with the property of the Government. As such he was almost always appropriating the property of the Government in one way or another. Notwithstanding the fact that they were rooted in contract, the disbursements to Accurate and to P&W constituted appropriations of Government's property. So long as Wheatley acted honestly and within the scope of his authority however, he could incur no liability of any kind.

40. The issue is, so far as the counts of theft are concerned, whether those appropriations were made and

received dishonestly. The test or definition of dishonesty was set out in *R v Ghosh* [1982] QB 1053. Dishonesty describes the state of mind and not the conduct of the accused. The test is subjective but the standard of honesty to be applied is objective, the standard of reasonable and honest persons. One first applies the standard and then, having so done, one determines whether the accused must have realized that what was being done was, by those standards, dishonest. To this end if Wheatley, knowingly, acted outside the scope of his authority, then that might provide some evidence of dishonesty. If, further, he personally derived any benefit from these contracts, then a finding of dishonesty would be almost inescapable. See: *AG of Hong Kong v Nai-Keung* [1987] 1 WLR 1339.”

10. In the light of the House of Lords authorities already mentioned, Mr Dingemans QC for the appellants felt constrained to concede that they had appropriated property belonging to the Government. The Board considers that that concession was rightly made: “appropriation” has been given a very wide meaning and the disbursement of funds held to the order of the Government fell within it. Mr Dingemans accordingly concentrated his argument on the requirement of dishonesty. Founding on the dissenting opinion of Lord Hutton in *R v Hinks*, ~~above~~, at pp [2001] 2 AC 241, 255-260, and supporting the reasoning of the Magistrate, he submitted that there could be no dishonesty within the meaning of the Code where a contract had been made and services rendered for an appropriate price. He contrasted the present case with *R v Lawrence*, *R v Morris*, *R v Gomez* and *R v Hinks* in which the student, the supermarket, the shop and the account-holder respectively had suffered loss. So had the company whose export quotas were sold at a gross under-value in *Attorney-General of Hong Kong v Nai-Keung* 1987 1 WLR 1339, cited by the Court of Appeal.

11. It is certainly true that in most cases of theft there will be an original owner of money or goods who will be poorer because of the defendant’s conduct. But in one of the two cases in *R v Morris* the defendant was arrested before paying the reduced price for the goods, so that the supermarket suffered no loss, and in *R (on the application of A) v Snaresbrook Crown Court* [2001] All-ER (D) 123, para 25, it was accepted that the alleged theft was carried out for a purpose which could financially benefit the company. In providing that an appropriation may be dishonest even where there is a willingness to pay, section 204(2) shows that the prospect of loss is not determinative of dishonesty. So the

Court of Appeal was right, having found there to be appropriations, to consider whether on the evidence they had been made dishonestly. It noted that the first appellant was disqualified by his personal interest in Accurate and P&W from making a contract with them, as he must have known. Yet he made such contracts and disclosed no personal interest, although disclosing other interests while the contracts were still running. He placed the contracts with a contractor whose previous wall had just collapsed. He artificially split the work into two contracts to enable each to be treated as a petty contract, but did not even then follow or obtain a dispensation from the ordinary tendering procedure for petty contracts. He supplied bills of quantities which the Court of Appeal (para 42) described as “wholly inappropriate and grossly misleading”, which appeared to relate to different works, which gave no realistic picture of what was to be built or was built and which were identical to bills of quantities supplied by the second appellant to the Government on other projects. Although both contracts named a supervising officer, there was no technical supervision of the work as it proceeded or when interim payments were made. The Court of Appeal asked itself whether all these facts, taken together, established dishonesty and concluded that they did. That is a conclusion the court was not only entitled but bound to reach. In this instance, there is no dissonance between the criminal and the civil law, since the contracts made by the first appellant, contrary to his authority and with the connivance of the second appellant, were plainly voidable at the suit of the Government: see *Bowstead & Reynolds on Agency*, 17th ed, 2001, art 75, p 332. No separate argument was advanced for the second appellant, and the Board is satisfied that both appellants were rightly convicted.

Banker's Books (Evidence) Act

12. At the trial before the Magistrate the prosecution sought to adduce affidavit evidence of an officer of the bank where Accurate and P&W had accounts, exhibiting copies of cheques drawn by those customers and recorded on microfilm. Admission of this evidence was resisted by the defence but allowed by the Magistrate, who paid some attention to it. On appeal, the Court of Appeal held that the evidence should not have been admitted since no order had been obtained under section 7 of the Banker's Books (Evidence) Act, but it rejected a submission that the charges should on that ground be dismissed, finding it possible to review the case without regard to that evidence. The Board shares the Court of Appeal's view that the prosecution case in no way depended on the microfilm cheques, but cannot accept the Court of Appeal's interpretation of the Act.

13. The BVI Banker's Books (Evidence) Act was enacted in 1881 and is closely modelled on the Bankers' Books Evidence Act 1879 (England and Wales). So far as relevant to this appeal, the Act provides:

“2. In this Act—

‘bank’ or ‘banker’ means any person, persons, partnership, or company carrying on the business of bankers;

‘banker’s books’ includes ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank;

‘the Court’ means the Court, Judge, arbitrator, person, or persons before whom a legal proceeding is held or taken;

‘legal proceeding’ means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration.”

3. Subject to the provisions of this Act, a copy of any entry in a banker’s book shall, in all legal proceedings, be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.

4. A copy of an entry in a banker’s book shall not be received in evidence under this Act unless it be first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the banker.

Such proof may be given by a partner or officer of the bank, and may be given orally, or by an affidavit sworn before any Commissioner or person authorised to take affidavits.

5. A copy of an entry in a banker's book shall not be received in evidence under this Act, unless it be further proved that the copy has been examined with the original entry and is correct.

Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally, or by an affidavit sworn before any Commissioner or person authorised to take affidavits.

6. A banker or officer of a bank, shall not, in any legal proceeding to which the banker is not a party, be compellable to produce any banker's book, the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a Judge made for special cause.
7. On the application of any party to a legal proceeding, a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding. An order under this section may be made either with, or without, summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or Judge otherwise directs."

It was not contended below, or before the Board, that the microfilm records of cheques kept by the bank in this case did not fall within the definition of "banker's books", an argument which would have been unlikely to succeed: *Barker v Wilson* [1980] 1 WLR 884; *Williams v Williams* [1988] QB 161.

14. The purposes of the Act were threefold: to enable a banker's books to be inspected and copied despite the duty of confidentiality owed by banker to customer; to relieve the banker of the need to produce his books in court; and to provide that duly authenticated entries in such books should be received as prima facie evidence not only of the entries but of the transactions recorded. The obtaining of an order under section 7 is directed to the first of these purposes, but an order would clearly be unnecessary if, for instance, the customer waived his right to

confidentiality and the bank agreed to inspection and copying of its books.

15. The Board cannot, therefore, accept that an order under section 7 is a precondition of adducing the evidence under section 3. It has, however, emerged, at a very late stage, that an order was made for inspection and copying of the bank's books, although the application was made under section 36 of the Proceeds of Criminal Conduct Act 1997 and not under section 7 of the Banker's Books (Evidence) Act. By this means copies of the cheques were obtained which the bank officer compared with the original microfilm copies, verified and exhibited to his affidavit. It is very unfortunate that these facts did not become known until two years after the Court of Appeal gave judgment, but the Board is of opinion that the evidence, although providing little more than corroboration of other evidence, was rightly admitted.

16. The appeal will be dismissed. If either party seeks to make any submission as to costs, it should be made in writing within 28 days.