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COURT OF APPEAL

24th September, 1987

Before: Sir Godfray Le Quesne, Q.C., (President)
The Deputy Bailiff
Robert Donald Harman, Esq., Q.C.

Appeal of Samuel Henry Alfred Lapidus
against his conviction by the Royal Court
(en Police Correctionnelle) on the 5th May, 1987.

Advocate C. E. Whelan on behalf of the Attorney General
Advocate F. C. Hamon for the Appellant.

JUDGMENT

The President: The appellant in this case, Mr Lapidus, was the Chairman of a company called Channel Hotels and Properties Limited, generally known as "CHAP". He was also the Director of another company called Consolidated Hotels (Channel Islands) Limited, which we shall call "Consolidated". All the shares of this latter company were owned by the trustees of a settlement which Mr Lapidus had made for the benefit of his children.

During 1983 a gentleman named Mr Kirch began to buy CHAP shares until he had accumulated a large holding. Early in 1984 discussions took place between Mr Lapidus and Mr Kirch about the future ownership and control of CHAP. The discussions appear not to have been easy, but there did

eventually issue an agreement. It was a complicated agreement but the principal features of it, to which it is necessary to refer for the purposes of this case were the following:

a) Certain assets of CHAP were to be transferred to Consolidated.
b) Consolidated was to assume all liabilities of CHAP except an overdraft of £600,000 and a sum of £100,000 which was to be paid to Mr Lapidus as compensation for loss of office in CHAP.
c) Mr Kirch was to make an offer to all the shareholders of CHAP to buy their shares at the price of 55p each.

A document was prepared putting this offer to the shareholders. Included in the document was a letter to the shareholders from Mr Lapidus dated 12th April, 1984. In the course of that letter Mr Lapidus wrote: "Each of the present directors of CHAP has a personal interest in the transactions. I am a director of Consolidated which is to purchase inter alia the company which owns and operates the Grand Hotel in St Helier, Jersey, and it is proposed that I should receive the sum of £100,000 on my resignation as a director of CHAP following implementation of the transactions". Particulars of the transactions were set out in the first appendix to the document. It is necessary to refer to two passages of that appendix. It sets out the assets of CHAP which Consolidated was to acquire and then went on:

"The consideration for the sale will be the assumption by Consolidated of the responsibility for the discharge of all the liabilities of CHAP and the Retained Subsidiaries as at the close of business on 30th April, 1984, excluding £600,000 of overdraft and the £100,000 referred to in paragraph D) below".
Paragraph D) read as follows:

"Mr S. H. A. Lapidus will relinquish his office as Executive Chairman of CHAP. It is proposed that the sum of £100,000 be paid by CHAP to Mr S. H. A. Lapidus as compensation for loss of office and the termination of his Service Agreement with CHAP which by its term may not be terminated by CHAP prior to the 30th April, 1986, and Mr S. H. A. Lapidus will thereafter have no entitlement to any remuneration or pension in respect of his

employment with CHAP".

The sixth appendix to the document was headed: "General Information" and of that appendix one paragraph read as follows:

"Save as disclosed herein there is no agreement, arrangement, or understanding between Mr Kirch or any person acting in concert with Mr Kirch for the purposes of this offer and any Director or recent Director, or shareholder, or recent shareholder of CHAP having any connection with or which is dependent or conditional on the Offer".

It should also be noted that the first paragraph of appendix six set out the following declaration:

"Each of the directors of CHAP and Mr Kirch (either by taking part himself in supervising the preparation of this document, or by delegating that task to persons reasonably believed by him to be competent to carry it out and by disclosing to such persons any relevant facts known to him and any relevant opinions held by him), have taken reasonable care to ensure that all statements of fact and expressions of opinion concerning, in the case of the directors of CHAP, CHAP and its subsidiaries and themselves and in the case of Mr Kirch, ENIP, the Kirch companies and himself contained in this document are fair and accurate and that no material facts have been omitted. Each of the directors of CHAP and Mr Kirch accepts responsibility accordingly".

It is thus to be observed that it was twice stated in that document that Mr Lapidus was to receive the sum of £100,000 as compensation for loss of his office in CHAP. It was further stated that there was no other agreement or arrangement between Mr Kirch and any director of CHAP having any connection with the offer.

This statement was not true; there was another agreement between Mr Kirch and Mr Lapidus under which Mr Kirch was to pay to Mr Lapidus £350,000. The circumstances of the making of this agreement were set out in this way in a statement made by Mr Lapidus to the police and produced in the course

of the trial. "Part of the complex arrangements with Mr Kirch included an additional payment to me of £350,000 which now with hindsight I appreciate should have been disclosed in the letter of offer. I accept this was an omission on my part but there was no intention to mislead anyone and it was certainly not done for any dishonest purpose".

Later in the statement Mr Lapidus said: "It genuinely never occurred to me that it was necessary to disclose to anyone the payment of £350,000 and I had no personal motive in failing to do so. As I mentioned above it was part of Mr Kirch's offer that I should be responsible for meeting the liabilities of CHAP as at 30th April, 1984, with the exception of £600,000 of the overdraft which was to be met by Mr Kirch. If I had not assumed these liabilities I am certain Mr Kirch would not have made the offer of 55p to all shareholders. I had hoped that Mr Kirch would agree to meet a larger part of the liabilities and although he was reluctant so to do he finally offered to pay a further £350,000 direct to me to help in this respect. It was suggested to Mr Sherrin" (Mr Sherrin, I should say, was an adviser of Mr Lapidus) "that the simple way to do this would be to increase the £600,000 to £950,000, but he said that Mr Kirch did not wish to deal with it in that way. I could not understand why he wanted to pay me direct rather than simply making a higher contribution towards the company's liabilities but according to Mr Sherrin he wanted to make a direct payment to me from monies he held in Switzerland and I was assured by Mr Sherrin that such a payment was perfectly proper".

It will be noted that in that statement Mr Lapidus said that it was part of the arrangement that, and I quote: "I should be responsible for meeting the liabilities of CHAP". It will be clear from the summary of the situation which I have already given that in fact the liabilities were to be assumed not by Mr Lapidus personally but by Consolidated and the language used by Mr Lapidus in the statement is presumably to be explained by the fact that he looked upon Consolidated Hotels and I quote his description of that company from an earlier passage in the statement as: "my private company which held all my shares in CHAP".

Another explanation of the payment of £350,000 was given by Mr Birt who appeared at the trial for Mr Kirch and I refer to this because the passage was used by Mr Hamon in addressing us on behalf of Mr Lapidus at the hearing of the appeal. "As the matter progressed Mr Lapidus became more and more concerned that in fact he was going to do less well than the minority shareholders. The reason for this being that Mr Lapidus and Consolidated were taking on all the liabilities of CHAP in excess of a fixed sum of £600,000. These were to be liabilities as at the end of the financial year of 1984, which was the end of April, so that clearly during the period when the agreement in principle was reached in January through until the offer period of course it was becoming more and more clear what the exact level of these liabilities might be. It was becoming clear that they were greater than it was at first thought so it was at this stage that the discussion of the payment came up because it became clear that if the transaction was to proceed it could only proceed if Mr Lapidus agreed to settle. If the transaction was to proceed Mr Lapidus had to feel that he was not going to get substantially less than the other shareholders and Mr Kirch accepted that this was not unreasonable". And later Mr Birt said: "Mr Kirch did not have liquid funds of that level available to him immediately in Jersey because he was borrowing quite heavily in order to acquire CHAP, but he has a close friend who is a Swiss National who had money in Switzerland which he made clear was available to Mr Kirch whenever he needed it. And so the suggestion was made that simply this money, the £350,000 should be made available to Mr Lapidus in order to try and put him back broadly speaking in the same position as the other shareholders".

It is obvious that this was an arrangement between Mr Kirch and Mr Lapidus who was a director of CHAP and an arrangement closely connected with the offer. It therefore fell within the description of the statements to which the offer document referred in the paragraph which I read stating that there was no agreement, arrangement, or understanding between Mr Kirch or any person acting in concert with Mr Kirch and any director of CHAP having any connection with the offer. And it follows therefore that that statement in the offer document was untrue.

When these matters had all come to light Mr Lapidus and Mr Kirch were charged under Article 12 of the Depositors and Investors (Prevention of Fraud) (Jersey) Law, 1967. The relevant part of that Article reads as follows:

"Any person who by any statement, promise, or forecast which he knows to be misleading, false, or deceptive, or by any dishonest concealment of material facts, or by the reckless making (dishonestly or otherwise) of any statement, promise, or forecast which is misleading, false, or deceptive, induces or attempts to induce, another person to enter into or offer to enter into any agreement for or with a view to acquiring, disposing of, subscribing or underwriting securities shall be liable to a fine or to imprisonment".

The charge against Mr Lapidus was in the following terms:
"That by a statement which he knew to be false he attempted to induce persons to enter severally into agreements for disposing of securities, to wit that part of the issued share capital of Channel Hotels and Properties Limited not already owned by ~~him," I interject that the word 'him' is an obvious mistake there for~~ Mr Kirch, in that the offer to acquire the said shares contained the statement that save as disclosed herein there is no agreement, arrangement, or understanding between Mr Kirch or any person acting in concert with Mr Kirch for the purposes of this offer and any director or recent director or shareholder or recent shareholder of CHAP having any connection with or which is dependent or conditional on the offer".

The case came before the Inferior Number of the Royal Court and of the evidence which was given it is only necessary at this point to say that the Crown called three former shareholders of CHAP to give evidence and to explain what they would have done if they had known when they received the offer of the agreement for the payment of the additional £350,000 to Mr Lapidus. It will be necessary to revert later to the answers which they gave when asked about this.

At the conclusion of the case for the Crown Mr Hamon who was appearing for Mr Lapidus submitted that there was no case for his client to answer. This he did on the ground that there was, he submitted, not sufficient evidence that the appellant, when he omitted any mention of the £350,000 from the offer document, intended by that omission to induce the shareholders to sell their shares.

The Attorney General in reply put the matter thus: "In my submission once the false statement is proved the inducement to shareholders follows from the issue of the offer document containing the statement as a matter of strict liability and it doesn't matter whether the defendant intended that the false statement should operate on the minds of the shareholders, the mere fact that the offer document containing a statement which the defendant knew to be false was issued is sufficient evidence of an inducement to a shareholder to sell shares".

The learnèd Bailiff rejected the submission and held that there was a case to answer. Mr Lapidus then elected not to give evidence and before the addresses to the Court began Mr Hamon addressed the Court as follows:

"As I now understand the learnèd Attorney's argument there is a dispute between the learnèd Attorney and me on the law. The learnèd Attorney says that this is a strict liability statute and I say that it is not. It has to have an element of mens rea".

To which the Bailiff replied: "Well, if it will assist you I am prepared to tell the Jurats that in my opinion it should have an element of mens rea".

Addresses were delivered and the Court then retired. They returned and convicted Mr Lapidus. I should say that in the course of the trial Mr Hamon had asked the Bailiff to direct the Jurats in open Court to which the Bailiff had replied that the law did not permit him to do this. This must have been a momentary slip because when the Court is sitting as it was on this occasion "en Police Correctionnelle", there is no obligation upon the Bailiff to direct the Jurats in open Court, nor is it usual for him to do so. The law, however, does permit this to be done if in the particular circumstances of any case the

Bailiff thinks that desirable. This view of the law was stated by this Court some years ago in the case of Paisnel.

Our knowledge of what the Bailiff in fact said to the Jurats in this case is derived from his report. This is a document which is not generally addressed to the parties, but in this case, because of the importance of the direction, an Order was made that the Bailiff's report be communicated both to the Crown and to Mr Lapidus. It contains the following passage:

"I retired with the Jurats as is customary and directed them as to 1) the burden of proof; 2) the standard of proof; 3) in this case I said that they had to be satisfied beyond reasonable doubt that the appellant intended the omission to act on the minds of the minority shareholders before they could properly convict". Mr Hamon has submitted to us that this was a very inadequate direction because it contained no explanation of the word 'intended', nor any reference to the recent English cases in which there has been much discussion of the meaning of this word in certain contexts. In order to consider this argument it is desirable to start by turning back to the words to be interpreted: "Any person who by any statement which he knows to be false induces or attempts to induce another person to enter into any agreement for disposing of securities". It is to be observed that in this definition of the offence the legislature has made no mention of intention. The words used which have to be satisfied if the offence is to be established are first, 'any person who by any statement which he knows to be false'. It has not been suggested to us on this appeal that that part of the definition was not satisfied. The article goes on: "induces or attempts to induce another person". The learned Bailiff accepted that these words imported some mental element into the offence, some requirement of mens rea. Exactly what he regarded that requirement as being he explained in what he said to the Jurats. They had to be satisfied beyond reasonable doubt that the appellant intended the omission to act on the minds of the minority shareholders. By that expression the learned Bailiff clearly meant they had to be satisfied that the appellant intended the offer document with the omission of any mention of £350,000 to act on the minds of the minority shareholders. This is the direction which in Mr Hamon's submission was wholly inadequate and in need of much explanation.

It is impossible to know exactly what discussion may have taken place but it is permissible to doubt whether the Jurats when they heard these words fall from the lips of the Bailiff turned to him and said: "Now, you have used a very difficult word. Please explain to us what it means". The word 'intended' is a word commonly used in conversation and well understood. It is difficult to define all the circumstances in which an intention may be said to arise, but it is not difficult to judge whether in a particular set of defined circumstances intention is present. That was what the Jurats had to do in this case; they had to decide whether in the circumstances as they found them to be established by the evidence the necessary intention on the part of Mr Lapidus was established.

In our judgment the learnèd Bailiff was quite right in directing them that that was the question which they had to answer and we do not think he is to be criticised for having added no further elaboration.

It is quite true that there has been much elaboration of this word, not to say obfuscation in a number of recent English cases. There was no need it seems to us to discuss them in this case because the discussion in those English cases was directed to the particular problem of what is the meaning of the word 'intention' when it is specifically used by Parliament in the definition of an offence. When the word is used in a context of that kind it may be necessary to consider many authorities and the presumptions which are applied in the interpretation of statutes. These things are not relevant when the legislature itself has not used the word but a judge simply resorts to the word in explaining the question which has to be decided in a particular case.

The judge is not to be supposed nor is he required when using the word in that way to use it with all the overlay which may surround it when it occurs in an Act of Parliament. Indeed, it is interesting to observe that even the discussion in England at its latest stage has come to very much this position. I refer to the case of R. -v- Purcell reported in 83 Cr. App. R. p.45. That case came before the Court of Appeal in England last year. It was a case of a charge of causing grievious bodily harm with intent and the Lord Chief Justice in his judgment said that in such a case a direction in the following

or very similar terms ought to be given to the jury: "You must feel sure that the defendant intended to cause serious bodily harm to the victim. You can only decide what his intention was by considering all the relevant circumstances and in particular what he did and what he said about it". That according to the latest English authority is all that it is necessary to say.

The Jurats having been as in our judgment they were, correctly directed as to the question which they had to answer, it remains only to consider whether there was evidence put forward from which they could properly come to the conclusion that Mr Lapidus did have this intention. We consider that there was. The statement was made in the offer document. This was a document sent to the shareholders of CHAP in order to put before them an offer to buy their shares. It contained a letter from Messrs Coopers & Lybrand, Chartered Accountants, who had been instructed to give advice on behalf of the independent shareholders and their advice was that they considered that the terms of the offer were fair and reasonable. When a man makes a statement and includes it in a document of that kind, that is strong evidence, not conclusive perhaps, but strong evidence that he intends by the statement to induce the recipients of the document to enter into agreements for the sale of their shares. It was that evidence before the Jurats on which they were not, indeed, bound, but in our judgment entitled to think that the necessary intention existed.

I refer also to one other feature of the evidence which is also significant though in a more negative way. Mr Hamon in addressing us conceded that on a charge of attempting to induce it was unnecessary to prove that anyone was induced, but, he added, if in fact no one was induced that was relevant in order to show that there had been a lack of the necessary intent. It is for this purpose that it is significant to see that the three shareholders in CHAP who were called on behalf of the Crown all testified that they had not been aware at the time when they received the offer of the agreement to pay £350,000 and if they had been aware of it they would have made certain enquiries of their advisers or of other people as to the reasons for the agreement. In other words, the result of the omission from the document of any reference to the agreement for £350,000 was that these shareholders accepted the offer without the consideration which they would have given to

it, if they had known the truth.

This case was presented to the Royal Court by the Attorney General and has also in the alternative been presented to us by Mr Whelan upon the basis that Article 12 of the Law in fact creates an offence of strict liability and leaves it unnecessary to establish any mens rea or particular intention on the part of the defendant. It is not necessary for the disposal of this case to decide this point and we do not do so.

It is apparent from the language used by the Royal Court when passing sentence, that they considered that the facts of this case provided some mitigation of the offences which had been considered. We do not intend in any way to dissent from that view. We do wish, however, to express our complete concurrence in another observation made by the Bailiff in passing sentence. "It is of the utmost importance", he said, "that the highest standards be maintained in this Island in our financial business and transactions because otherwise the good name of the Island will suffer". Jersey is now an important financial centre. It offers many advantages and many opportunities for the operations of business and commercial men, operations by which many people, not themselves in business or commerce, may be affected. It is indeed of the highest importance that Jersey should maintain the highest standards of commercial conduct and the complete reliability of commercial documents. For these reasons the appeal against conviction must be dismissed.

COURT OF APPEAL

23rd September, 1987

S.H.A. Lapidus appeal against conviction

Cases referred to in the Judgment:

R. -v- Purcell: 83 Cr. App. R. 45.

Cases referred to:

R. -v- Bates (1952) 2 All E.R. 842.
R. -v- Russell (1953) 1 W.L.R. 77.
R. -v- Mohan (1975) 2 All E.R. 192.
Duncan (1981) 73 Cr. App. R. 359.
Hamand (1986) 82 Cr. App. R. 65.
A.G. -v- Bale & Fosse: Jersey Unreported Judgment : 2nd Feburary, 1984.
R. -v- Maloney: (1985) 1 All E.R. 1025 at 1036 after letter 'j' and at 1038, letter 'h'.
Leung Kam Kwok -v- The Queen (1985) Crim. L.R. 227.

Texts cited:

Archbold paras 17-18, 19, 20, at pages 1170-1171.
Archbold: Chapter 17 : Specific requirements as to State of Mind paras 17-26 to 31.
Smith and Hogan : Criminal Law (5th Edition): pp.47-52 at 50, pp.255-258, pp.91-93.
Archbold (42nd Edition; 5th Cumulative Supplement) paras 17-13 to 18-10.