

Court of Appeal

4th December, 1991.

180.

Before: Sir Godfray Le Quesne, Q.C., (President),
J. M. Chadwick, Esq., Q.C., and
A. C. Hamilton, Esq., Q.C.

**Attorney General's Reference No. 1 of 1990, under Article
42A of the Court of Appeal (Jersey) Law, 1961, as amended.**

Points of Law referred for the opinion of the Court:

1. Whether offences under Article 14(1)(c) and (d) of the Housing (Jersey) Law, 1949, are offences of strict liability, or whether they require mens rea.
2. If offences under Article 14(1)(c) and (d) are not offences of strict liability, whether they are offences of general or of specific intent.
3. If they are offences of specific intent, what is the specific intent required.

The Attorney General.
Advocate W.J. Bailhache for one of the Respondents.

The Opinion of the Court delivered by the President.

IN THE COURT OF APPEAL OF JERSEY

ATTORNEY GENERAL'S REFERENCE NO 1 of 1990

OPINION OF THE COURT

Article 42A of the Court of Appeal (Jersey) Law 1961 was enacted by the Court of Appeal (Amendment No 4) (Jersey) Law 1989. Sub-article (1) is in these terms

..."(1) Where a person tried in the Royal Court on indictment or otherwise has been acquitted (whether in respect of the whole or part of the indictment or charge) the Attorney-General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to that Court, and that Court shall, in accordance with this Article consider the point and give its opinion on it"...

The reference which is now before us has been made by the Attorney General in respect of points of law said to have arisen in a case decided in the Royal Court (Samedi Division) on 14 November 1989. In that case five defendants were charged with having, between 24 August and 29 September 1978 or thereabouts, contravened Article 14 (1) (d) of the Housing (Jersey) Law 1949, as amended, by being parties to a device, plan or scheme for a transaction or arrangement that was inconsistent with Application No.59829 made to the Housing Committee on 24 August 1978.

The Housing Law (Jersey) Law 1949 was adopted by the States of Jersey on

2 December 1948. Its purpose was described in the long title in these terms:-

..."A Law to provide for the constitution of a Committee of the States to administer matters relating to the housing of the population, to empower the States to acquire land by compulsory purchase for the purposes of housing, and to control sales and leases of land in order to prevent further aggravation of the housing shortage"...

The mischief at which the Law was directed is fully discussed in the various contemporary reports and articles in the press to which our attention was drawn by the Attorney General. Conditions in the Island in the years immediately following the 1939-45 war had led to great pressure on the local housing stock, and to the need to preserve the availability of affordable houses for local residents in the face of competition from would-be immigrants.

Part I of the Law contains definitions (Article 1) and provides for the constitution of the Housing Committee (Article 2). Part II confers on the States power to acquire land by compulsory purchase for housing purposes. Part III, of which Article 14 forms part, is entitled "Control of Sales and Leases of Land". Article 6 specifies those transactions to which Part III applies; they include every transaction being:-

..."(a) a registered contract for the sale or transfer of any land in perpetuity, or for a term expiring on the happening of a specified event, or

for the unexpired portion of any such term as aforesaid; or

(b) a lease of any land, whether parol or in writing, including a registered contract of lease",

but do not include any lease, not being a registered contract of lease, where the land demised by the lease does not comprise a dwelling house or any part of a dwelling house - see Article 6 (2) (d). For these purposes "registered contract" means a contract passed before the Royal Court and registered in the Public Registry of Contracts - see Article 5.

Article 7 provides that no person shall as vendor, purchaser, lessor, lessee or any other party, and whether as principal or agent, enter into any transaction to which Part III applies without the consent of the Housing Committee; and that no person shall procure or induce any other person to enter into any transaction in contravention of Part III of the Law. Article 8 empowers the Court, if satisfied that a transaction to which Part III applies has been entered into without the consent of the Housing Committee, to declare the transaction void. Article 9 requires that every application for the consent of the Housing Committee to any transaction shall contain or be accompanied by such particulars, information and documents as the Committee may require. Article 10 is in these terms, so far as material

..."(1) The Committee shall grant consent, either unconditionally or subject to such conditions as the Committee thinks fit, to the sale, transfer or lease of any land of a class for the time being specified by the States by regulations made under this Part of this Law and shall refuse consent to any sale or transfer or lease not so specified"...

Article 11 gives power to the Housing Committee to revoke a consent which has been obtained by false or misleading statements made in connection with the application or where material facts were not disclosed. Article 12 gives a right of appeal against decisions of the Committee. Article 13 confers powers for the purpose of obtaining information in relation to suspected offences under the Law. Article 14, is entitled "Offences". Sub-article (1) is in the terms set out below:-

..."14(1) Any person who -

- (a) without lawful excuse acts in contravention of or fails to comply with any provision of this Part of this Law or with any condition made or imposed under this Part of this Law;
- (b) with intent to deceive makes any false or misleading statement or any material omission in any application to the Committee, or in any communication (whether in writing or otherwise) to the Committee or any other person, for the purposes of this Part of this Law;
- (c) whether as principal or agent and whether by himself or his agents, enters into, or offers to enter into, or procures or induces or attempts to procure or induce any other person to enter into, any transaction or arrangement that is or is intended to be inconsistent with an application made or to be made, or consent given or to be given, under this Part of this Law;
- (d) whether as principal or agent and whether by himself or his agent, and whether as vendor, purchaser, lessor, lessee or any other party, or otherwise howsoever, is party to any device, plan or scheme for any transaction or arrangement that is or is intended to be in contravention of this Part of this Law or inconsistent with any application made or to

be made, or consent given or to be given,
under this Part of this Law;

shall be liable to a fine."...

The regulations envisaged in Article 10 (1) were made under the power conferred by Article 15. At the relevant time they were contained in the Housing (General Provisions) (Jersey) Regulations, 1970. Regulation 1 (1) lists cases in which consent to the sales or transfers of land or registered contracts of lease shall be granted by the Housing Committee in accordance with Article 10 of the Law. For the purpose of this Opinion the following cases (as they were at the relevant time) are material.

- ..."
- (a) the intending purchaser, transferee or lessee is twenty years of age or over and was born in the Island and has been ordinarily resident in the Island for a period of at least ten years;
or...
 - (e) the intending purchaser, transferee or lessee has previously been granted consent under the Law to lease dwelling accommodation and has actually leased the accommodation, or has leased dwelling accommodation as a person exempt from the provisions of Part III of the Law, and has been ordinarily resident therein for the whole of the ten years immediately preceding his application for consent;
or...
 - (n) the intending purchaser, transferee or lessee...
is being joined in the purchase, transfer or lease with his or her spouse"...

Regulation 5 provides that the provisions of Part III of the Law shall not apply to a lease, not being a registered contract of lease, of a dwelling where the lessee has been resident in the Island continuously

for a period of at least ten years immediately preceding the date of the grant of the lease, such period of residence beginning on or before 1 January 1980, and where the dwelling is to be occupied by him and his immediate family. In such case the transaction is deemed to be a transaction exempted from the provisions of Part III of the Law.

The circumstances which the Royal Court had to consider in the case which has given rise to the Attorney-General's reference which is before us appear from the reasoned judgement which was handed down by that Court on 16 January 1990, and from certain documents in the case which were provided to us in the course of the hearing. It is convenient to set out the facts in this Opinion. In so doing we have regard to The Court of Appeal (Criminal) (Reference of Points of Law) (Jersey) Rules 1990, which require this Court to ensure that the identity of the acquitted person in whose case the point of law has arisen shall not be disclosed. We shall refer, in this Opinion, to the persons acquitted as the Respondents; and, individually, as R1 to R5 respectively.

In 1978 R1 was a resident of this Island who was qualified under the Housing Law and the associated Regulations to obtain consent to a transfer of land under Regulation 1 (1) (a). R2 was an employee of R1. R3 was the husband of R2. R3 had been resident in the Island for a period exceeding ten years; and so, by virtue of Regulation 5, a lease to him, not being a registered contract of lease, was an exempt transaction. In relation to such a lease, R2 was a person within Regulation 1 (1) (n).

R1 agreed to buy the relevant property and to install R2 and R3 as his tenants. Application No. 59829 was made and signed by R1 on 24 August 1978. The transaction for which consent was sought was described under paragraphs 15 and 16 of the application in these terms.

..." 15 Nature of intended transaction (eg sale in perpetuity, contract lease etc.)
Sale in perpetuity

16 Terms of intended transaction and the terms of any other transaction in any way related thereto. (Sale price, contents, etc).

Consideration of twenty five thousand eight hundred pounds (£25,800) - no contents"...

Under paragraph 10 of the application (full names of proposed occupiers) the names of R2 and R3 were given; and it was stated that R3 had lived on the Island for ten years immediately preceding the commencement of their occupation.

Consent to the transaction was given by the Housing Committee on 21 September 1978. On 29 September the contract for the purchase of the property by R1 was passed before the Royal Court.

On the same day, 29 September 1978, four agreements were signed:-

(i) An Agreement between R1 (as vendor) of the one part and R2 and R3 (as purchasers) of the other part under which R1 agreed to sell the property to R2 and R3 for a consideration of £25,800. After reciting that R1 had acquired the property on that day ... "for occupation by the purchasers"... the recitals continued:-

..."(b) The Purchasers have financed the purchase of the property as appears by the terms of a bond

of even date in the sum of twenty five thousand eight hundred pounds (£25,800) Sterling given by the Vendor to the Purchasers.

- (c) The Purchasers are desirous of purchasing the property from the Vendor who is willing to sell the same to them.
- (d) The Purchasers are prevented by law from purchasing the property by virtue of the fact that they are unable to obtain the consent of the Housing Committee of the States of the Island of Jersey to the transaction as required by the Housing (Jersey) Law 1949 (as amended).
- (e) The parties have agreed that the Vendor shall sell the property to the Purchasers who shall purchase the same at such time as the Purchasers may obtain the consent of the Housing Committee of the States of the Island of Jersey and of such other competent authority whose permission may from time to time be required (the date from which such permission shall be obtainable is hereinafter called "the operative date") and until such time the Purchasers may occupy the property in accordance with the terms of a tenancy agreement entered into by the parties bearing even date"...

Clause 8 of the agreement provided that the Vendor or the Purchasers might at any time after the operative date serve upon the other a notice requiring the other to execute the contract of sale and conveyance; and Clause 9 obliged the parties to pass and conclude before the Royal Court a contract of sale and conveyance within one month after the service of such a notice.

(ii) An Agreement and Obligation made between R2 and R3 (as lenders) and R1 (as borrower) in which it was recited that the lenders had advanced to the borrower the sum of £25,800, being the cost of the purchase of the property; and in which the borrower undertook to repay that sum to the lenders on demand

..."such demand not to be made by the lenders to the borrower unless and until the borrower shall be in default of the terms and conditions binding him in virtue of a certain agreement of sale of the property between the parties hereto and of even date..."

It was expressly agreed that the monies lent (£25,800) should not bear interest.

(iii) An Agreement made between the wife of R1 (as lender) of the one part and R2 and R3 (as borrowers) on the other part under which the borrowers acknowledged that they were indebted to the lender in the amount of £15,800; and under which the whole sum would become repayable by the borrowers to the lender in the event that the borrowers purchased the property in accordance with the agreement for sale.

(iv) A tenancy agreement made between R1 (as landlord) and R2 and R3 (as tenants) which, after reciting that the landlord had purchased the property for occupation by the tenants, continued:-

..."NOW TODAY IT IS AGREED AS FOLLOWS:

that the landlord for himself and his heirs lets to the tenants for themselves, the survivor of them and the heirs of such survivor, the said property for a term to be determined by either party on the giving of three months written notice of their intention so to do to the other party provided that such notice may not be given by the landlord to the tenants unless and until the tenants shall be in default of the terms and conditions binding upon them by virtue of a certain agreement of sale of the property between the the parties hereto and of even date"...

The rent payable under the tenancy was a sum equivalent to the landlord's liability to Schedule A Income Tax in respect of the property.

The effect of these arrangements was that R2 and R3 had (subject to their own borrowing from the wife of R1) provided the whole of the purchase price; that they would be entitled to become owners of the property when so qualified without further payment; and that in the meantime they would have the right to occupy the property without payment of rent. Further, provided that R2 and R3 remained resident in the property for a further ten years (until 1988) consent to the sale of the property to them at the end of that period would have to be granted by the Housing Committee by virtue of Regulation 1 (1) (e). For most practical purposes, as was no doubt intended, R2 and R3 were in the same position as if they had purchased the property on 29 September 1978. But, unless the agreements which the parties executed on that date are to be regarded as sham - that is to say, not intended to have legal effect in accordance with their terms - the position of R2 and R3 in law differed from that of owner in a number of material respects.

R4 and R5 were advocates who had acted for the parties in drawing up the agreements which have been described.

At the close of the prosecution case, it was submitted on behalf of the Respondents that the offence with which they were charged was not one of strict liability; and that, accordingly - the Attorney General having

accepted that none of the Respondents had any intention to contravene the Housing Law - they must be discharged. The Royal Court accepted that submission and the Respondents were acquitted.

The points of law which have been referred to this Court by the Attorney General are these:

- (i) Whether offences under Article 14 (1) (c) and (d) of the Housing (Jersey) Law, 1949, are offences of strict liability, or whether they require mens rea.
- (ii) If offences under Article 14 (1) (c) and (d) are not offences of strict liability, whether they are offences of general or of specific intent.
- (iii) If they are offences of specific intent, what is the specific intent required.

Paragraphs (c) and (d) of Article 14 (1) of the Housing Law must, of course, be construed in the context of the Law as a whole; and, in particular, in the light of the other provisions of that Article. In our view it is appropriate to approach Article 14 (1) on the basis that each of the four paragraphs is intended to have a distinct purpose; that is to say, that each successive paragraph is directed to a distinct mischief which, but for that paragraph, would not constitute an offence. It is not an appropriate approach to the construction of this Article - which

imposes the same criminal penalty in respect of the contravention of each paragraph - to assume that the legislature has chosen to use four separate paragraphs, expressed in different language, to cover the same mischief.

Paragraph (a) of Article 14 (1) is directed to acts in contravention of, or failure to comply with, any provision in Part III of the Law or any condition made or imposed under that Part. It is clear that that paragraph will cover acts which are prohibited under Article 7 - that is to say, entering into a relevant transaction without first obtaining the consent of the Committee, or procuring or inducing an other to do so. It will also cover failure to comply with a condition to which a grant of consent under Article 10 (1) has been made subject. But in order to obtain a conviction under paragraph (a), the prosecution would have to show that the act or omission had been committed ..."without lawful excuse"...

Paragraph (b) of Article 14 (1) is directed to false or misleading statements in, or material omissions from, any application to the Housing Committee - including, in particular, any application for consent made under Article 9 - or any other communication to the Committee, or any other person, for the purposes of Part III of the Law. Failure to disclose the full terms of the transaction in respect of which an application for consent is made, or the terms of any other transaction in any way related thereto - in response to paragraph 16 in the prescribed form of application - would be likely to constitute a material omission

from the application; and, perhaps, also to render other statements in the application false or misleading. But, in order to obtain a conviction under paragraph (b), the prosecution would have to show that there had been an intent to deceive.

Paragraph (c) introduces the concept of ..."any transaction or arrangement that is or is intended to be inconsistent with an application made or to be made, or consent given or to be given, under this Part of this Law".... For convenience, we will refer to this as ..."an inconsistent transaction"... The paragraph makes it an offence (i) to enter into an inconsistent transaction (ii) to offer to enter into such a transaction, (iii) to procure or induce an other to enter into such a transaction or (iv) to attempt to procure or induce an other to enter into such a transaction. The relationship between paragraph (c) and the two preceding paragraphs can, we think, be illustrated by the following examples.

First, suppose that consent has been obtained to a registered contract for the sale or transfer of land, and that that consent has been made subject to a condition that the land shall be occupied only by the transferee. Then a contractual licence to occupy granted by the transferee to an other would be a transaction or arrangement which was inconsistent with the consent which had been given. It would also - at least if occupation were in fact taken under the licence - be a contravention of, or failure to comply with a condition imposed under, Part III of the Law; and so would be within paragraph (a). But, an offer

to enter into such a licence - or an attempt (whether or not successful) by a third party to induce the transferee to enter into such a licence - would not be within paragraph (a).

Secondly, suppose that the application for consent had contained the statement - in response to paragraph 10 on the prescribed form - that the transferee was to be the proposed occupier. Then a contractual licence to occupy granted by the transferee to an other would be a transaction or arrangement which was inconsistent with the application which had been made. If the licence had been granted, or was in contemplation, at the time the application was made, then the statement as to proposed occupancy would have been false or misleading - alternatively the failure to disclose the licence would have been a material omission - within paragraph (b). But, if the intention or proposal to grant the licence did not originate until after the application was made, and the consent granted, there could be no actus reus within paragraph (b).

It is clear, therefore, that paragraph (c) of Article 14 (1) is intended to go well beyond paragraphs (a) and (b), and to catch transactions, or intended or proposed transactions, which would not fall within those preceding paragraphs. This must, we think, be regarded as the purpose for which paragraph (c) was primarily enacted. But, as we have sought to illustrate, the language which has been used does also cover transactions which are (or which would be, given the necessary mental element) within paragraphs (a) or (b). This raises the question whether it could have

been the intention of the legislature to provide that a transaction which is within one or other of paragraphs (a) or (b) - say, that described in the first of the illustrations we have set out above - but which would not give rise to an offence under those paragraphs unless effected or done without lawful excuse, or with intent to deceive, (as the case may be), could nevertheless be prosecuted successfully under paragraph (c) as an offence of strict liability.

A similar question is posed by an analysis of the inter-relation of paragraph (d) with the two earlier paragraphs (a) and (b). Paragraph (d) is also concerned with inconsistent transactions, but it extends these to include..."any transaction or arrangement that is or is intended to be in contravention of this Part of this Law"... The paragraph makes it an offence to be party to any device, plan or scheme for any such transaction. It is difficult to conceive of circumstances in which a person who had acted - at least if in conjunction with others - in a manner which contravened paragraphs (a) or (b) could have avoided becoming party to a device, plan or scheme for an inconsistent transaction; and there must also be a considerable degree of overlap between procuring or inducing, or attempting to procure or induce, an other to enter into an inconsistent transaction within paragraph (c) and becoming party to a device, plan or scheme for such a transaction. But paragraph (d) does go beyond the preceding paragraphs; as can be illustrated by the facts which were before the Royal Court in the case which has given rise to the present reference. The wife of R1, who was not charged, could not be said to have acted in contravention of Part III

of the Law; nor to have made any false or misleading statement to the Committee; nor to have entered into, or procured or induced an other to enter into, an inconsistent transaction. But, as the lender to R2 and R3 of £15,800 upon terms which were linked with the other agreements executed on 29 September 1978, it would be hard to contend that she was not party to the overall scheme which included an inconsistent transaction - namely a transaction which ought to have been, but was not, disclosed in response to paragraph 16 of the application which her husband, R1, made to the Committee. The question arises, therefore, whether R1 - who could not be liable under paragraph (b) in the absence of an intent to deceive - and his wife - who could not be liable under that paragraph because she made no application - could nevertheless be liable under paragraph (d) - as parties to the scheme; notwithstanding that, as the prosecution must have accepted, neither had any intention to contravene the Housing Law.

In our opinion these questions must be answered in the negative. We find it inconceivable that the legislature could have intended to impose strict liability under paragraphs (c) and (d) in circumstances in which liability for the same act or omission - or for an act or omission which was an integral part of the overall scheme - would not lie under paragraphs (a) or (b) in the absence of either lack of lawful excuse or intent to deceive. If paragraphs (c) and (d) create offences of strict liability, we are unable to see what purpose paragraphs (a) and (b) were intended to serve.

We find support for this conclusion, and an indication of the mens rea

required, in the words ... "is or is intended to be" ... which form part of the full description of what we have referred to as an inconsistent transaction. It is clearly contemplated, in both paragraphs (c) and (d), that the transaction or arrangement, which (in the case of the former) is the subject of the offer or the attempt to procure or induce or (in the case of the latter paragraph) an element in the plan or scheme, may not, in the event, be carried into effect. The offer may be rejected; the attempt may fail; the plan or scheme may be abandoned. It was necessary, therefore, to provide for a situation in which the transaction does not take place. There are, as a matter of draftsmanship, two ways in which this could be done. First, the draftsman could describe the transaction as one which ... "if carried into effect would be inconsistent" ... with the application made or consent given. Secondly, he could refer (as he did) to the proposed transaction as one which ... "is intended to be inconsistent" ... with the application made or consent given. In choosing the second form of words, the draftsman - and the legislature when enacting those words - must be taken to have intended that, in the circumstances where the transaction or arrangement is not carried into effect, a guilty mind is an essential ingredient in the offence under paragraphs (c) and (d). It is not enough that the transaction would have turned out to be inconsistent with the application made or consent given; what is required is that the accused intended that it should be. There is no good reason, as it seems to us, for a distinction in this respect between those cases in which the inconsistent transaction is carried into effect and those in which it is not. The vice which, for example, paragraph (d) seeks to prevent is the participation in a plan or scheme

for an inconsistent transaction : that vice is present whether or not the scheme is carried through to completion. It follows, in our view, that the true effect of the words..."is or is intended to be"... in the full description of an inconsistent transaction is that, in cases where the transaction is carried into effect and is inconsistent with an application made or consent given, the word..."or"... is to be read conjunctively.

Further support for this conclusion can be found by examining what the effect would be in the first of the examples already given if the position were otherwise. Suppose that consent to a registered contract of sale has been made subject to a condition that the land shall be occupied only by the transferee. An offer by a third party, say X, to take a contractual licence to occupy from the transferee would be an offer by X to enter into a transaction which, if carried into effect, would be inconsistent with the consent given under Part III of the Law. If X knows of the condition, and intends to act in a manner inconsistent with it, then he will commit an offence under paragraph (c) of Article 14 (1) whether or not the offer is accepted by the transferee. But, if X does not know of the condition and if paragraph (c) were to be regarded as imposing strict liability, his liability under the paragraph would depend on whether or not the transferee accepted the offer. If the offer were accepted then the resulting transaction into which X had entered would be inconsistent with the consent and - on this hypothesis - X would have committed an offence. But, if the offer were rejected by the transferee there would be no transaction in fact, and no offence - because it would be impossible to say that X had offered to enter into a

transaction which was intended, by anyone, to be inconsistent with the consent. A construction which produces the extraordinary result that a person's liability in respect of an offer which he has made without any guilty intent depends upon whether or not that offer is accepted by another, also acting without guilty intent, must be rejected in favour of a construction which is consistent with some more rational legislative purpose; unless the language used is wholly compelling.

We were, of course, referred in the course of argument to the well known statement of principle in the judgement of the Privy Council in Gammon (Hong Kong) Limited -v- Attorney General of Hong Kong [1985] AC 1, at page 14. We draw attention, in particular, to propositions (1) and (3) in that statement - that there is a presumption of law that mens rea is required before a person can be found guilty of a criminal offence; that the presumption applies to statutory offences; and that the presumption can be displaced only if this is clearly or by necessary implication the effect of the statute. It is our view that, on a true analysis of the structure and language of Article 14 (1) of the Housing Law, read in the context of the statute as a whole, there is nothing to displace the presumption. On that contrary, the structure and language of the Article leads us to the conclusion, independently of the presumption, that mens rea is required.

For the reasons we have given, we answer the questions referred to the Court by the Attorney-General in the following terms

- (i) Offences under Article 14 (1) (c) and (d) of the Housing (Jersey) Law 1949 are not offences of strict liability; means rea is a necessary ingredient in these offences.
- (ii) and (iii). In each case it must be established by the prosecution that the transaction or arrangement in relation to which the accused's conduct is alleged to constitute the offence charged is a transaction or arrangement which was intended by the accused to be inconsistent with an application made or consent given or (as the case may be) to be in contravention of Part III of the Law.

Although it might be said that, in answering the questions formally put to us by the Attorney-General's reference, we have fulfilled the task set by Article 42A of the Law of 1961, we do not think that it would be satisfactory to leave the matter there. It became clear, in the course of argument, that there is considerable uncertainty amongst professional advisers in the Island as to the scope of Article 14 (1) (d) of the Housing Law; and, in particular, whether arrangements of the nature which were entered into by R1, R2 and R3 in the present case - and which we have described in some detail - are in contravention of Part III of that Law. We were asked, both by the Attorney-General and by Advocate Bailhache, who appeared for R4 - the advocate who had advised in 1978 - to give some guidance on this question if we thought it appropriate to do so.

We should say at the outset that the question whether or not arrangements of the nature entered into in the present case ought to be disclosed in an application made under Article 9 of the Housing Law is quite distinct from the question whether those arrangements, if disclosed, would be in contravention of the Law. We do not think that there can be any real doubt that arrangements of this nature ought to be disclosed if they have been agreed, or are in contemplation, at the time the application is made.

The four transactions evidenced by the agreements signed on 29 September 1978 - under which R2 and R3 provided the purchase monies of £25,800, upon terms that they would be entitled to take a conveyance in 1988 - were all, we think, clearly within the description ..."any other transaction in any way related"... to the transaction of sale to R1 which was the subject matter of Application No. 59829; and so, if those transactions were agreed (or even, perhaps, if they were in contemplation) on 24 August 1978, at the time that the application was submitted, they ought to have been disclosed to the Housing Committee under paragraph 16 of that Application. Failure to disclose those arrangements made the response under that paragraph false or misleading. If that failure to disclose had been accompanied by an intent to deceive, then those responsible would have been guilty of an offence under Article 14 (1) (b) of the Housing Law. But, in the circumstances that it was accepted that there was no intent to deceive, there could be no conviction under paragraph (b); and, rightly, the Respondents were not indicted under that paragraph.

On the basis that the four transactions of 29 September 1978 were transactions related to the transaction of sale which was the subject matter of Application No. 59829, and were not disclosed in that application, it must follow that they were inconsistent transactions for the purpose of paragraphs (c) and (d) of Article 14 (1). The question for the Royal Court - but for the concession made by the prosecution - would have been whether it had been established that the Respondents knew between 24 August and 29 September 1978 that the transactions entered into on 29 September 1978 were inconsistent with the application which had been made; in other words, did the Respondents know that those were transactions which did, in some material way, relate to the transaction of sale which was the subject of Application No. 59829. We suspect that, faced with similar facts and having a proper understanding of what is required to obtain a conviction under paragraphs (c) and (d) of Article 14 (1), the prosecution may be less ready in the future to concede an absence of the relevant intent.

The question remains whether, had the proposed transactions been disclosed at the time of the application, there could have been a conviction under Article 14 (1). It seems clear that, had the transactions been disclosed, there could have been no offence under paragraph (b); nor, we would have thought, could it have been said as a matter of ordinary language that the transactions were, or were intended to be, inconsistent with the application. Whether or not they were inconsistent with the consent given would depend on the terms of the consent - for example, the consent might expressly prohibit the proposed

transactions by a condition imposed under Article 10 (1) - but in the absence of an express prohibition of that nature, it is difficult to see how transactions disclosed in the application leading to the consent could be said to be inconsistent with an unconditional consent given in the light of that disclosure. The real question, we think, would be whether the transactions taken together were, and were intended to be, in contravention of Part III of the Law - so giving rise to offences under paragraphs (a) and (d) of Article 14 (1).

The Attorney-General drew our attention to the decision of the Royal Court in De Gruchy v Housing Committee (1985-86) JLR 130. The circumstances in that case were close to those in the present case, save that the arrangements were disclosed to the Housing Committee at the time of the application. The matter came before the Royal Court by way of an appeal against the Committee's refusal of consent. It is convenient to set out the arrangements as they were disclosed in letters written by the applicant's legal advisers

..."(a) that the proposed occupier was to be Mr D. Minikin who was qualified as from January 1982 to lease, for nine years or less, dwelling accommodation in accordance with the provisions of reg. 5 (1) (b) (ii) of the Housing (General Provisions) (Jersey) Regulations, 1970 as amended;

(b) that the whole of the consideration for the purchase was being lent to the appellant by Mr Minikin on favourable terms by way of an interest free loan which would be registered as a first charge against the property and would be repayable on demand;

(c) that the property would be legally and beneficially owned by the appellant and that he would be absolutely entitled to the proceeds of sale in the event of the property being sold. Although Mr Minikin would obviously wish to have the property transferred to him once he had become qualified by length of residence under the

appropriate Housing Regulations to buy it, he understood that the appellant was under no legal obligation to sell the property to him and if the appellant neglected or refused to do so, he would have no redress except of course that he could require repayment of the loan"...

The application by the appellant for consent to purchase the property referred to those letters and was made on 30 April 1982. On 11 June 1982 the Committee gave formal notice of refusal of consent, on the grounds -

..."that the proposed transaction is part of a device, plan or scheme, for a transaction or arrangement that is inconsistent with the application for consent to purchase and is inconsistent with an application to be made for consent to a lease of the property"...

In amplification of these grounds, the Committee contended before the Royal Court that the proposed transaction would constitute a device within Article 14 (1) (d) of the Housing Law; and was unlawful.

The Royal Court (Sir Frank Ereaut, Bailiff and two Jurats) upheld the Committee's refusal. In giving judgement the Bailiff said this, at page 141, from line 28,

..."the States have set about tackling the problem of the housing shortage by controlling not only occupation but also ownership... We conclude, therefore, that the mischief intended to be prevented by the legislation is not only the control of the occupation of land, but also the control of the ownership of it, and it seems to us that this conclusion receives support from the fact that counsel very properly conceded that if the appellant had been buying as an agent or trustee or had entered into some form of enforceable agreement concerning the future conveyance of the property, then such an arrangement would have been caught by Article 14 (1) (d).

It follows that the mischief alleged here is not the mere occupation by Mr and Mrs Minikin of the property, but the arrangement under which, as it is said, they would virtually become the owners of the property in all but title, the title

to be conveyed at the appropriate future time when they became legally eligible to receive it"...

And, at page 142 from line 24

..."Each step was an essential one in the whole arrangement, which was nothing less than the purchase of the property by Mr and Mrs Minikin, but deferred until they became eligible to take the conveyance"...

Having reached the conclusion that the arrangement was, in effect, a deferred purchase, the Royal Court - perhaps encouraged by the concession made on behalf of the appellant to which reference is made in the first of the passages set out above (and see also at page 140, lines 35-38) - appear to have regarded it as self evident that the arrangement was inconsistent with the application - see page 143 at line 5.

We have already indicated that we find it difficult to understand how a transaction, or proposed transaction, which has been fully disclosed at the time of the application - say, in response to paragraph 16 of the prescribed form - can be said to be inconsistent with the application itself. In circumstances where there has been full disclosure, the application is for consent to a transaction - for example a sale to R1, or to a sale to the appellant in the De Gruchy case - which is known to be the first in a chain of linked transactions. The subsequent links in the chain are not inconsistent with the application for consent to the first link; rather, the whole chain of transactions being disclosed, the subsequent links are dependent upon, and wholly consistent with, consent to the first link being granted.

The real question for the Court in De Gruchy, as it seems to us, was whether any of the subsequent links in the chain of transactions which had been disclosed would necessarily involve a contravention of Part III of the Housing Law. If it would, then (assuming the requisite knowledge and intention) the transaction for which consent was sought would have been the initial element in a plan or scheme for a transaction that was, or was intended to be, in contravention of the Law - and so would involve the commission of an offence under Article 14 (1) (d). Further, the entry into the subsequent transaction would, itself, be likely to involve an offence under Article 14 (1) (a).

The Royal Court in De Gruchy, encouraged by counsel for the appellant as well as the respondent, appear to have taken the view that an agreement or understanding as to the future transfer of title to the property by the appellant to Mr Minikin was inconsistent with, or involved a contravention of, those provisions in the Housing Law and the Regulations which sought to control the ownership of land. In our opinion, that view was misconceived.

The Housing Law, and the Regulations, are - as the Royal Court correctly observed in De Gruchy - concerned to control both ownership and occupation of land. Control of occupation is effected under Article 10 of the Law. Under Article 10 (2) (which was introduced by the Housing (Amendment No.4) (Jersey) Law, 1974), every transaction consent to the sale, transfer or lease of any land to a body corporate must contain a condition restricting occupancy to persons who would themselves have

qualified for a transaction consent under that Article and the Regulations - see regulation 2A. When transaction consent is given to the sale, transfer or lease of land in any other case, the Committee may at its discretion impose a condition relating to the persons by whom the land may be occupied : see Article 10 (1) and (3) (a). The Committee's normal practice is to impose a condition restricting occupancy to the purchaser or persons who would themselves have qualified for a transaction consent.

This condition was imposed by the Committee by its consent granted in this case on the 21st September, 1978. R2 and R3 could not therefore lawfully have occupied the property unless they were persons who could have obtained a transaction consent - but not necessarily consent to the same transaction as that sought by R1. Since this occupancy condition was satisfied, there was nothing in the arrangements which enabled occupation to be taken by persons who were not qualified.

In the De Gruchy case there was no condition, because the application was rejected. Had consent been granted, it would presumably have been subject, as the consent in this case was, to the usual occupancy condition. Since Mr Minikin was a person who could have obtained a transaction consent, this occupancy condition would have been satisfied. There was nothing in the arrangements in that case which would have enabled occupation to be taken by persons who were not qualified.

Control of ownership is effected by Article 7 in conjunction with Article 10 (1) and the Regulations. But Article 7 seeks only to prohibit

transactions ..."to which this Part of this Law applies"... Part III of the Law does not apply to a contract for the sale or transfer of land unless that contract is ..."a registered contract"...; that is to say a contract passed before the Royal Court and registered in the Public Registry of Contracts - see Articles 6 (1) (a) and 5 of the Law. This, no doubt, reflects the position that, under the law in this Island, title to land cannot generally be transferred except under a contract which has been passed before the Royal Court and duly registered. In particular, there is no concept of equitable ownership in respect of land in Jersey. Immoveable property situated in Jersey is incapable of being the subject matter of a trust - see, now, Article 10 (2) (a) (iii) of the Trusts (Jersey) Law 1984, which gives statutory recognition to the existing customary law in this respect. In the absence of any such concept, the purchaser under a contract which has not been passed and registered obtains no proprietary interest in the land : his claim, if any, in the event that the contract is not perfected by the vendor's appearance before the Royal Court is limited to damages.

In these circumstances we find it difficult to understand how the concession in De Gruchy (at page 141, from line 28, supra) - that the arrangements in that case would have been caught by Article 14 (1) (d) of the Housing Law ..."if the appellant had been buying as an agent or trustee or had entered into some form of enforceable agreement concerning the future conveyance of the property"... - came to be made by counsel and accepted by the Court. The law in this Island did not recognise then, and does not recognise now, an agency or trusteeship in

relation to land in this Island such as to give the principal or beneficiary any title to, or ownership of, the land; nor does the Royal Court order specific performance of an unregistered contract for the sale of land in this Island. Neither the arrangement in the De Gruchy case, nor the agreement in the present case, could contravene those provisions of the Housing Law which seek to control ownership; for the reason that neither the arrangement nor the agreement could have any affect on the ownership of the land in question.

We find nothing in the Housing Law which seeks to prevent parties from making a contract for the sale of land which is conditional upon the consent of the Housing Committee being obtained before the transaction is completed by the contract being passed and registered. If consent were refused, the contract would lapse. We suspect that contracts of this nature are made as a matter of course. The contract is conditional, and completion is deferred until after consent has been obtained. If the Law does not seek to prevent a contract of this nature, then we can see no reason in principle why the position should not be the same in Law whether the period of deferment is one month, one year, five years or ten years. In each case the parties have agreed to do what the Law permits, namely to enter into a registered contract after consent has been obtained from the Housing Committee. In the meantime, occupation of the land is governed by the statutory condition imposed by Article 10 (2) of the Housing Law, or by such other condition as the Committee thinks fit to impose under

Article 10 (1) of that Law. It follows that we are of the opinion that De Gruchy was wrongly decided.

We have already expressed the view that arrangements of the nature under consideration in the De Gruchy case, and in the present case, ought to be disclosed if they have been agreed, or are in contemplation, at the time the application is made. If the arrangements are not disclosed, then - in the light of this Opinion - the parties and their professional advisers may find it difficult in the future to persuade a Court that the arrangements were not intended to be inconsistent transactions for the purpose of paragraphs (c) and (d) of Article 14 (1). If the arrangements are disclosed, then the Committee will have a proper opportunity to consider how best to control whatever social vice is perceived to arise from such arrangements by attaching to the consent which it may be required to give under Article 10 (1) such condition as it thinks fit.

Authorities

Court of Appeal (Jersey) Law, 1961, as amended: Article 42A.

Court of Appeal (Criminal) (Reference of Points of Law) (Jersey) Rules, 1990.

Housing (Jersey) Law, 1949 (as amended).

Housing (General Provisions) (Jersey) Regulations, 1970 (as amended).

Gammon (Hong Kong) Limited v. A.G. for Hong Kong (1984)
2 All ER 503.

Giggles Limited v. Att. Gen. (1985-86) JLR 276

A.G. v. Hales (1978) 40 PC 519

A.G. v. Miletic (1st May, 1986) Jersey Unreported.

A.G. v. F.P. Roberts and Son (Holdings) Limited (second judgment)
(3rd March, 1988) Jersey Unreported; (1987-88) JLR N.14.

A.G. v. Hogan (29th June, 1989) Jersey Unreported.

Re: Maidstone Buildings Provisions Limited (1971) 3AER 363.

Peace v. Brookes (1895) 2QB 451.

Australian Consolidated Press Limited v. Australian Newsprint Mills
Holdings Limited (1960) 105 CLR 473 at p.479.

R. v. Gould (1968) 1 AER 849.

Craven v. White (1988) 3 AER 495 at p.518 c/d.

Johnson v. Youden (1950) 1 All ER 300.

Building Materials and Housing Act (1945).

A.G. v. Perpignan Investments Limited (14th June, 1988)
Jersey Unreported.

European Court of Human Rights, Application No. 11125/84 v. U.K.

Sweet v. Parsley (1969) 1 All ER 348.

Lim Chin Aik v. R. (1963) 1 All ER 223.

De Gruchy v. Housing Committee (1985-86) JLR 130.

A.G. v. Aurora Hotel Limited (15th August, 1988) Jersey Unreported.

R. v. Sheppard (1980) 3 All ER 899.

Short Oxford English Dictionary: "Device"; "Party"; "Inconsistent".

Draft Building Loans (Miscellaneous Provisions) (Amendment No. 20)
(Jersey) Regulations, 199.

New Zealand Servicemen's Settlement and Land Sales Act (1943) and
(1944) amending Act.

Smith and Hogan: "Criminal Law" (6th Ed'n): Part 6: "Strict
Liability".

Maxwell: "Interpretation of Statutes" (12th Ed'n): p.p. 123-136.

Jowitt's Dictionary of English Law (2nd Ed'n): Inconsistency.

Archbold (43rd Ed'n): 17-2.