

HONG KONG / JUDGMENT

HKSAR v. LEE SHING HUNG

COURT

Court of First Instance

DECIDED

6 December 2007

CASE / FILE NUMBER

HCMA438/2007

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Before: Hon Beeson J in Court

Date of Hearing: 2 November 2007

Date of Judgment: 6 December 2007

J U D G M E N T

The Appellant was convicted by Mr Joseph To, in the Magistracy, on 5 charges of Procuring an Entry in the Record of a Bank by Deception, contrary to s. 18D(l) of the Theft Ordinance, Cap. 210 and on 5

charges of Theft of a Chose in Action, contrary to s. 9 of the Theft Ordinance, Cap. 210. He was granted an absolute discharge in respect of those charges. The Appellant appealed against his conviction.

There was no dispute about the facts underlying the charges. The prosecution evidence was contained in two sets of Admitted Facts, 6

banker

s affirmations and the testimony of 3 oral witnesses.

The Appellant was a civil servant who was entitled to apply for a Home Financing Allowance (HFA), which he did in 1993. The terms are set out in Civil Service Regulations (CSRs). Briefly, they provided for receipt by an officer, who fitted the criteria, and whose property was approved, of a monthly allowance for a maximum aggregate period of 120

months. The allowance was paid monthly during that period, until whichever came first of disposal of the property, or repayment/redemption of the mortgage.

Of that allowance 50% was accountable and 50% non-accountable. The accountable portion had to be applied to repayment of the mortgage loan. If the monthly mortgage payment was less than 50% of an officer

s entitled rate, the non-accountable portion was reduced proportionately.

If an officer

s entitlement decreased he was obliged to report it and refund any overpayment to Director of Accounting Services (DAS). If the mortgage ceased the officer had to give DAS notice within 14 days and the allowance ceased to be payable from the date of the cessation. The allowance for the last 30 days of the mortgage was payable upon production of documentary proof that the mortgage repayments for the period had been made. The officer himself was required to live in the property.

Initially the Applicant received \$13,000 per month under the scheme for his flat at Fortress Hill. Subsequently he bought another property in Quarry Bay (Kornville I), and in October

1995 made another application for the HFA to be transferred to that property. On 18 October 1996 he made a formal application to do so. The revised rate was \$15,000 per month and the Appellant, as he was required to do, and as he had done on initial application, signed a declaration that he understood and would abide by the provisions of the Home Financing Scheme.

In January 1998 the Appellant applied for an upward adjustment of the allowance, to \$17,000 per month. Again the Appellant signed the relevant declaration. The increased allowance took effect from 1

January 1998.

In November 2002 at the end of the 120 month period, DAS requested the Appellant to produce recent repayment records for his mortgage loan, but the Appellant failed to do so. On making enquiries of HSBC, the lending bank, DAS discovered that the Appellant had stopped making mortgage payments after making a payment in November 2001, which had covered the mortgage payment up to 28 September 2001.

DAS was advised that the bank had repossessed Kornville I in March 2002 and sold it in July 2002. The DAS was not notified by the Appellant that he had stopped making mortgage payments, or that he had moved into another flat (Kornville II) from March 2002.

The Appellant had continued to receive HFA of \$17,000 per month until December 2002. DAS in February 2003 sent a memo asking the Appellant to explain the cessation of mortgage payments and requesting a return of the overpayment.

The Buildings Department, in which the Appellant worked, having learned of the DAS request, made its own enquiries in March 2003; on 4 occasions telephoning Appellant to collect the memo from their office. The Appellant on each occasion promised to do so, but never did.

DAS sent a memo, in April 2003, advising the Appellant that the overpayment - a sum of \$254,506.45 would be deducted from his salary. A report was made to police in April 2003.

In October 2004 the Appellant was arrested and cautioned for these offences and admitted that he had received the HFA for the relevant period.

The Appellant chose to give evidence. He owned 3 properties in 1993, 2 of them were rented out to provide for his retirement. In 2001 as a result of his financial difficulties caused by the economic downturn he sold 2 properties and paid \$300,000 to release them for sale. This sum he had borrowed from the bank as a personal loan.

He was able to manage financially until November 2001, but was arrested by ICAC in December 2001. His wife, who had her own business, was also investigated; this affected her business and, consequentially, her contribution to the family income. The Appellant was under stress and his marital relationship was affected badly. Post-arrest, the Appellant was suspended from work, but continued to receive his full salary. That was paid by cheque originally, but later he was required to collect it from his office. The family, allegedly, was troubled by debt-collectors at this period.

It was the Appellant

s evidence that to avoid the debt collectors, the family decided to move to Kornville II and took a two-year lease on a flat there, commencing 1 March 2002. The Applicant claimed that the arrangement was meant to be temporary and he had told the landlord that the family might move out at any time.

The Appellant was granted bail by the ICAC and returned to full work duties in mid-2002. He was suspended from his duties in 2003, charged, prosecuted and acquitted; these charges are not relevant. He denied that he had had any intention to deceive the government. Because he could barely cope financially at the time, his wife, who had long handled the family finances, would pay the more urgent expenses first. He left those matters to his wife, claiming he did not want to bother her further with financial matters, or discuss them with her.

Between December 2001 and December 2002 he said he had once received a call from the bank advising him that mortgage payments were in arrears. He told the court that whenever possible he would remind his wife to pay the mortgage instalments. He did not make any checks himself, despite the call. However when after February or March 2002 no similar calls were received, he thought, mistakenly, that things were all right. Because his wife had once worked as a bank clerk he claimed that he relied on her opinion that late mortgage repayment was all right and that the bank was unlikely to take repossession action as a result.

His entitlement to the HFA, according to his understanding, was not calculated by the month. He believed he had complied with the rule which required 50% of the total HFA allowance to be applied toward the total mortgage repayment. In fact he considered he had done better than required by the rules, as the mortgage instalments ranged from \$21,000 to \$22,000 per month. He had applied all the HFA towards repayment and had repaid the bank more than the amount of the HFA he received.

It was his impression that this approach was acceptable, because his colleagues had followed that approach in the past and he knew that the Treasury performed a final adjustment towards the end of the entitlement period. He believed there were delays in obtaining documents from the bank and that the bank would know if there had been any change in the mortgage position. It was impossible, according to the Applicant, to cheat the government in the manner alleged.

The Appellant claimed that the bank had never informed him about the repossession of Kornville I in March 2002; he knew about it only towards the end of 2002. He recalled receiving a memorandum from the DAS saying that the 120 months entitlement period was nearly over and asking him for records relating to the mortgage. He asked his wife for that information and she told him she would need to put the information together and at that time, told him that several mortgage instalments had not been paid. The Appellant admitted that he knew only at that time about a delay or non-payment of the mortgage instalments.

After the Appellant was suspended from work in January 2003, he was paid half his usual salary. He repeated that it was his wife who assured him that late mortgage repayment was acceptable and he believed this because of her previous post as a clerk in a bank. He understood there was a live-in requirement for the property subject to the HFA scheme.

He told the court he had not read all the CSRs, but insisted he had complied with them and that his mortgage loan liability had never decreased. He denied ever making any misrepresentation to the government.

The Appellant

s wife gave evidence. She had worked in a bank for 10 years as a clerical officer, but by the time of these events was operating her own business. She described the decision to move to Kornville II and said that she had registered for the Post Office redirection of mail service. She had been the one who had dealt with the repayments for the mortgaged property and in the 10 years prior to 2001 there had been no problems with the mortgage.

When the family

s financial position began to deteriorate the Hong Kong Bank, according to her, was not chasing them so hard for outstanding payments as other creditors were. Accordingly, she decided to repay what appeared to be the more urgent debts, such as those owed to financial institutions. It was her view that failure to make one or two mortgage instalments would not make much difference, and that foreclosure by the bank because of a delay in mortgage repayments was rare.

Before leasing Kornville II, some time had been expended in choosing the property and signing the necessary documents. The family moved in after Lunar New Year 2002. She claimed she knew about the repossession of Kornville I by the bank only in September 2002, when, as she put it, the management office informed her that she need no longer pay the management fee. In fact Exh D2 is a letter from the management office which, apparently, answers an enquiry by the Appellant and his wife, and merely confirms that there was no management fee outstanding for the period from January 2002 to November 2002.

The Appellant

s wife also produced a Demand for Rates, ostensibly to show rates payment for Kornville I between July and September 2002 (Exh D3). However, all that document showed was that there were no rates owing for that period.

The gravamen of the prosecution case was that the Appellant had entered into a scheme in which Kornville I was to be abandoned to foreclosure, thus saving the family \$21,000 to \$22,000 per month in mortgage payments. The continuance of the HFA payments improved the family

s financial position by \$17,000 per month. By entering the lease for Kornville II, at a rental of \$12,000 per month, the family benefitted by \$27,000 per month.

Charges 1 to 9 covered the period from 28 September 2002 to 21

December 2002. For each charge the Appellant was alleged to have represented, falsely, that he was applying the HFA allowance to repay the mortgage loan on Kornville I, causing money to be transferred from the account of DAS into the Appellant

s account, thus procuring the entry of the transactions in the record of a bank.

Between 28 February 2003 and 30 July 2004 the Appellant had received 6 cheques from DAS which were deposited into the Appellant

s accounts - these being the alleged thefts of the choses in action.

The Magistrate had to decide whether the Appellant had the necessary knowledge and intention to commit the offences. He was satisfied beyond reasonable doubt that the Appellant knew he had a duty to report any decrease of his costs of repayment of his mortgage within 14

days; to repay any overpayment; that he had full knowledge of that requirement and that he knew his mortgage payments were in arrears.

He did not find the evidence given by the Appellant or his wife credible. In particular, he was not prepared to accept as likely or probable the ostrich-like attitude the Appellant claimed to have adopted in relation to the family finances, or his claimed ignorance of his responsibilities in relation to the HFA.

He did not accept the interpretation of the CSRs which the Appellant claimed to have relied on mistakenly, nor did he believe the Appellant

s claim to know nothing about the cessation of the mortgage payments. However, for the earlier period from 28 September 2001 to 29

January 2002 covered by charges 1, 2, 3, 4 and 10, he was not satisfied that the evidence established beyond reasonable doubt that the Appellant

s intention must have been dishonest according to the Ghosh test. Accordingly he gave the benefit of those doubts to the Applicant and acquitted him of charges 1, 2, 3, 4 and 10.

The perfected grounds of appeal, overall, were submissions that the Magistrate had erred in his assessment of the evidence. The matters raised by counsel on appeal, in the main, were matters that had been canvassed at trial. Their gist is set out below.

Ground 1 complained that the Magistrate erred in acquitting the Appellant on charges 1, 2, 3, 4 and 10 because he had accepted it was possible to fall behind with mortgage payments without having any dishonest intention, but failed to recognise that there was no material difference between the circumstances of those charges and the other charges faced by the Appellant.

Ground 2

This ground alleged that in finding that the Appellant had devised a scheme to cheat the government, the Magistrate failed to consider the inherent improbability of the Appellant doing so when such a scheme was bound to be discovered in a very short time, as his period of entitlement to HFA was almost at an end.

Ground 3 and Ground 5

Grounds 3 and 5 were almost identical and could be read together. The Magistrate failed to have regard to human nature when finding that it defied logic for the Appellant not to have obtained the necessary knowledge about what it was he was declaring in the HFA. He found, wrongly, that it was impossible for the Appellant to have made an honest mistake in interpreting CSRs.

Ground 4

The Appellant contended that the Magistrate was wrong to find that the alleged scheme benefitted the family by \$27,000 per month, because the property was in negative equity and the mortgage loan would have to be repaid in any event. Further, there were only 10 months of HFA entitlement remaining.

Ground 6

The Magistrate erred in finding that the move to Kornville II could not have been merely coincidental with the time of the foreclosure, while stating that actual knowledge of when foreclosure took place was irrelevant.

Ground 7

The Magistrate found, erroneously, that Appellant's wife thought that a delay in making mortgage payments would be alright

, when the thrust of her evidence was that she would prioritise creditors, so as to pay first those who pressed hardest for payment.

Ground 8**The Magistrate was wrong in finding that the Appellant**

s wish to protect his wife went to motive, rather than intention. His evidence was that he had tried to avoid troubling her with financial matters and thus did not know what bills were paid first - a matter of inherent probability.

Ground 9**The Magistrate erred by finding it insignificant that the Appellant**

s wife had paid the rates for several months after abandoning the property, when such payments were inconsistent with the alleged scheme to enhance the family financial situation.

Ground 10

It was submitted that in all the circumstances the conviction was unsafe and satisfactory.

Ground 1

The Magistrate sought to distinguish the Appellant

s knowledge and intention at the earlier stages from his later position. Although counsel argued that the Appellant

s position was the same throughout, that was not in fact so. The Magistrate had to consider the question of intention and had to be able to deduce that intention by drawing inferences from the evidence. Although the Appellant

s behaviour may have aroused suspicion from about September 2001, there was insufficient material from which to infer a clearly dishonest intention to receive and retain mortgage payments until after the Tenancy Agreement for Kornville II had been concluded. The Magistrate properly gave the Appellant the benefit of the doubt on this point, recognising that it was possible for a mortgage payment, or payments, to be missed without there being any intention to defraud.

The position altered markedly once the Appellant had entered into a tenancy and left Kornville I. He could not fail to have known that he was in breach of CSRs in not advising DAS of his cessation of mortgage payments, or that he was no longer living in the property for which he was receiving an allowance. His claim that it was mere coincidence that the family moved to Kornville

II before Kornville I was repossessed, was inherently improbable and the Magistrate did not accept the evidence of the Appellant and his wife on that point.

The Magistrate might also have noted that despite the Appellant

s expressed desire to avoid debt collectors, the Appellant took a lease of premises (Kornville II) that were very close to Kornville I. One might expect that if a move had to be made at all for the reasons claimed by Appellant and his wife, commonsense would suggest that their moving to another area altogether, or, at least, moving to an entirely different premises, would have been more likely to achieve that purpose. Moving to Kornville II would make it simple for such debt collectors as wished to do so, to trace the family.

Grounds 2 and 4 concentrate on the improbability of the Appellant embarking on such a scheme when his HFA period was in its last stages. However as the Appellant was experiencing grave financial difficulties and his wife

s business was disrupted thus further damaging the family finances, it was quite possible that the Appellant would take such a risk to improve his financial position. In the event the Appellant gained 12

months of payments and accommodation for his family, as well as buying time to work out ways of improving his position.

As for the Appellant

s claim that his knowledge of CSRs was inadequate, that knowledge had to be assessed by the Magistrate against his age (50); educational background, (University graduate); the length of time he had been a civil servant (14 years) and the number of years during which he had been a recipient under the scheme (9 years). In the years after January 1993 he had been the owner of 2 separate properties which were approved, in turn, as suitable for acquisition under the scheme.

He had made a number of applications to vary the amounts paid. He had been required to declare his understanding of terms and conditions on several occasions.

Although when giving evidence the Appellant at first alleged he did not know that he was obliged to live in the property covered by the scheme, the Magistrate did not accept that as truthful. Eventually, when taxed with an admission he had made when giving evidence on an earlier occasion, the Appellant agreed that he did know that. Given the amount of publicity accorded to fraudulent schemes related to housing allowance and government rules against double housing benefits etc it is not surprising the Magistrate did not accept his original evidence.

The Appellant

s wife gave evidence which supported his. She dealt with the family finances and said that she paid the more persistent creditors first and did not trouble herself about the mortgagee bank. She was aware that default in payment of mortgage instalments could lead to repossession, but said it was only when told in September 2002 that she no longer had to pay management fees, did it cross her mind that the bank might have repossessed the property. [B431] She could not recall the Appellant informing her that the bank had reported a late mortgage payment.

It beggars belief that the Appellant and his wife would adopt such a cavalier attitude to non-payment of the mortgage instalments, particularly at a time when their finances were so desperate. The one telephone call which the Appellant admitted receiving from the bank was sufficiently explicit for him to have made some check, or enquiry, or at least to have asked his wife to do so. Nor was it probable or credible that the Appellant

s wife would

prioritise

debt repayments in such a manner that no payments at all were made on the mortgage for 12 months and then rationalise that behaviour by claiming that she did not think the bank would foreclose just because some payments were missed.

Whether or not they continued to pay rates and/or management fees is of no import

the Appellant must have known that such payments which are fairly minor, could not replace mortgage payments and would not prevent the mortgagee bank from repossessing the property. There could be other reasons for their continuing to make such payments, if in fact they were made. For example, because the Appellant had moved only as far as another flat in the same development with, presumably the same management company, he might have considered it advisable to pay fees on Kornville I, to avoid possible difficulties with the management company which knew the family had moved to Kornville II and could pursue them for payment.

The prosecution evidence was circumstantial and in order to decide what the Appellant

s intention was at the relevant time it was necessary for the Magistrate to draw inferences from those matters he found proved. The circumstances included the family

s move to Kornhill

II in March 2002 and the repossession of Kornhill I on 21 March 2002; the cutting off of the utility services to Kornhill I; the registration with the Hong Kong Post Office for diversion of mail and the continued failure to make mortgage payments.

Given those circumstances it is not surprising that the Magistrate came to the irresistible conclusion that at least by the time the Appellant and his family moved to Kornhill II, he knew of the repossession and had formed the intention to abandon Kornhill I while continuing to draw the HFA. It mattered not whether he was aware of the date the property was to be re-possessed.

The Magistrate had ample opportunity at trial to hear and observe the Appellant

he directed himself in terms of Berrada as the Appellant was a man of clear record, and concluded that he was not telling the truth. In particular he did not accept that the Appellant had no, or insufficient, understanding of his obligations under the HFA scheme and/or CSRs. The Magistrate was scrupulous in giving the Appellant the benefit of the doubts that he had about the initial period of non-payment and acquitted him of the relevant charges.

All the matters which were submitted in support of this appeal were matters brought to the attention of the Magistrate at trial. Having considered the evidence he had to decide whether what was done by the Appellant was dishonest according to the standards of reasonable and honest people. After satisfying himself of that he then had to be sure that the Appellant must have realised that what he was doing by those standards was dishonest.

It was for the Magistrate to decide whether he accepted the prosecution evidence and whether it was sufficient to allow him to draw the inferences necessary to prove the Appellant

s intention. From his Statement of Findings it is clear that he was able to do so. He did not find the Appellant or his wife were credible witnesses. Although it is clear that the Appellant does not agree with the decision, there has been nothing put before this court to show that the Magistrate dealt incorrectly with the evidence, or that he was wrong to reach the decision he did.

There is no basis on which this court can, or should interfere with the conviction.

Accordingly the appeal is dismissed.

(C-M Beeson)

Judge of the Court of First Instance

Mr Robert Y H Pang and Ms Cancy Liu, instructed by Philip K H Wong, Kennedy Y H Wong & Co.,
for the Appellant

Ms Kathie Cheung, SGC of Department of Justice, for the Respondent

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