

JERSEY / JUDGMENT

Lewis and Others v AG [2012]

JCA 217A (21 November 2012)

[2012] JCA 217A

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Court of Appeal 21 November 2012 Before : Sir John Nutting, Bt., Q. C. sitting as a single judge. Ian Michael Christmas -v- The Attorney General Application for bail pending appeal against conviction and sentence. Crown Advocate M. T. Jowitt. Advocate R. MacRae for Christmas.

JUDGMENT

nutting ja: 1. This is an application made on behalf of Ian Christmas ("the Applicant") for bail pending appeal. 2. The background to the application is that on Thursday 15th November, I was constrained to adjourn the hearing of an appeal, which was scheduled to take place on 27 th November, 2012. The appeal concerned this Applicant and three other men, John Lewis, Russell Foot and James Cameron. The Applicant has been ready for that appeal, at least since the 23rd October 2012 when Contentions for leave to appeal against conviction were settled and filed by his lawyer, Advocate MacRae, and, in relation to the application for leave to appeal against sentence, at least since 2nd November 2012 when Advocate MacRae filed detailed grounds in support of that sentence application. The appeal is now due to be heard on 21 January 2013. 3. I propose to give the Applicant and indeed Messrs Lewis, Foot and Cameron, leave to appeal in respect of their convictions and sentences. 4. It is necessary, shortly, for me to outline the circumstances in which the Applicant was convicted on the Indictment which he and his co-appellants faced. 5. Before I do so, I must emphasise that for the purposes of this hearing I have read, (I underline) among other matters, the Summing up of the Commissioner dated 20th July 2012, the Contentions of Advocate MacRae which supported the application for leave to appeal the conviction, dated 23rd October 2012, and the Contentions of the Crown in response dated 14th November 2012. In respect of Advocate MacRae's application for leave to appeal the sentence, I have read a Summary of Facts for the sentencing hearing, settled by Advocate Jowitt, as well as the Sentencing Conclusions which appear at the end of that document, dated 5th October 2012. I have read an extract of a transcript of the Sentencing Remarks of the Commissioner. I have read an Advice accompanying the grounds of application of leave to appeal against sentence, dated 2nd November 2012, settled by Advocate MacRae. I have read his further Contentions on leave to appeal against sentence dated the 20th November 2012. And I have read a Statement of Facts, agreed and settled yesterday by the Crown and by Advocate MacRae, for the purposes of this bail application. 6. It is to that document that I now turn, emphasising that I am grateful to both advocates for the time and the trouble that they have taken to allow me to refer,

for the purposes of this application, to a non-contentious document outlining the facts on which the Applicant was sentenced. 7. On 16th May 2012, these four men, including the Applicant, stood trial before the Inferior Number on an indictment containing 27 counts alleging fraudulent inducement to invest or lend money contrary to the Investors (Prevention of Fraud)(Jersey) Law 1967 . The case was heard before Mr Commissioner Pitchers and Jurats. At the end of an 11 week trial the appellant Lewis was convicted of 13 counts of fraudulently inducing investments totalling £785,000. The appellant Foot was convicted of 13 counts of fraudulently inducing investments totalling £678,000. The appellant Cameron was convicted of 16 counts of fraudulently inducing investments totalling£943,000. The Applicant was convicted of 1 count of fraudulently inducing an investment of £100,000. The Applicant was sentenced to 15 months imprisonment. The rest to four and a half years. 8. It is material that the Applicant and the appellant Lewis were convicted of the relevant count, Count 2, on the basis that they had acted recklessly in regard to the investment made by the loser, Mrs Cotrel. 9. All the appellants are men of good character. 10. The case concerned investments in property in the USA over the period between December 2003 and mid-2008. In late 2003 the appellant Lewis became enthused with the idea of making profits from the rising property market in Florida. 11. The appellants Lewis, Cameron and Foot had known each other for several years and had worked together as independent financial advisors through an entity called Goldridge Stone in Jersey. At the outset the plan was for a company called De Lec, in which the Applicant and the appellant Lewis were involved, to invest in "off-plan" Florida properties, yet to be completed, and to benefit from the rise in value of those properties over the duration of the build. 12. The Jurats found in relation to the Applicant's involvement, is that he went into the De Lec office on most days and that he and the appellant Lewis and Mr Evans (who was a witness for the Prosecution) reserved properties in Florida to be funded in part by mortgages and in part by funds provided by investors in Jersey. 13. In late 2003 when the first properties were reserved "off-plan" by De Lec, Florida house prices were climbing at a rate of between 10-15% per year. 14. The appellant Lewis did not limit himself to De Lec, however, and in 2005 he set up a second company, this time with his co-appellants Foot and Cameron. They called this company Sunstone Holdings, but it functioned in the same way as De Lec, that is as a vehicle for investing in US property, not only in Florida but also in Colorado. 15. Over the lifetime of De Lec between February 2004 and January 2008 properties were purchased for De Lec, and on its behalf, with mortgages totalling US\$6,621,000 with a purchase value in excess of US\$9,000,000. The directors expected that appreciation in the value of property would result in quick profits both for them and their investment partners. However the more US property was purchased, the more money was needed to pay the costs which accompany the ownership of property, such as mortgage interests, association fees for golf courses and other leisure facilities with which the Florida properties were encumbered, as well as the share of utility bills and maintenance. Of course it was necessary also to pay profits and interest to existing Jersey investors who had been promised returns on their investments. These expenses, as the Royal Court found, were in large measure paid using funds from existing and subsequent investors. 16. The properties proved to be more difficult to sell than at first thought and in sentencing the Commissioner stated that it was apparent that insufficient research had been carried out prior to launching the business model in relation to the problems which this

Applicant and his co-appellants encountered. 17. In 2006 the US property market stalled. In 2007 it stagnated, and then crashed. From 2005 onwards the holding costs of both the De Lec and Sunstone property portfolios became crippling. Sunstone continued to bring in investors but De Lec did not take on any investors after 2006. 18. The Applicant resigned as a director of De Lec in December 2007. The appellants Cameron and Foot continued to encourage investors through Sunstone into 2008. Ultimately one of the Sunstone investors took legal action and a criminal investigation ensued. 19. That then is the general background against the single count of which the Applicant was convicted. 20. Mrs Cotrel, the victim, was an elderly widow, who, at the time, was in her late seventies. She had known the Appellant Lewis since the year 2000 as her financial adviser through Goldridge Stone and, accordingly, she trusted him where financial matters were concerned. 21. The Royal Court found that both the Applicant and Lewis must have known about the risk of disparity between what was being represented to Mrs Cotrel as to how investors' money would be used and the reality, which was that her money would be spent on the commitments required at that time, including De Lec's operating costs. 22. Mrs Cotrel was induced to invest the sum of £100,000. She gave evidence about a meeting at her house with the appellant Lewis at which she was persuaded to part with that sum. Mr Lewis told her that the sum would be used to buy two properties in Florida, specifically No. 104 and 203 Hawthorne. She said in evidence that she wouldn't have made the investment if she had known that that was not in fact the case. 23. The appellant Lewis clearly misled her verbally at the meeting because little of the £100,000 was ever spent on either of the Hawthorne properties but was spent instead, almost immediately, by the appellant Lewis and the Applicant, as well as by Mr Evans, on other liabilities. 24. Mrs Cotrel received a written Joint Venture Agreement, or JVA, which was at some stage signed both by the Applicant and the appellant Lewis. According to Mrs Cotrel she did not read that document. But plainly both men, as the Jurats found by their verdict, realised that the representation that the sum of £100,000 was to be used in the acquisition of the Hawthorne properties might not be true. 25. In sentencing the Applicant, the learned Commissioner said as follows:- "...the Jurats at trial were not satisfied to the required standard that the visit that you made to her undoubtedly on one occasion was related to Count 2 so they did not convict on the basis of that visit. However, they were satisfied that you knew that anybody in respect of whom the JVA had been signed, would have been promised an interest in property because that was agreed to be the way that the business would be conducted; and the Jurats were also satisfied that the signing of the JVA was part of one transaction which you encouraged and took part in. You knew that the JVA that you were signing did not present the true picture because you had said as much in the earlier email. The Jurats were satisfied that you shared with John Lewis the reckless state of mind as to what investors were told that I have already set out and that you knew that that would have been the position of John Lewis when he spoke to Marie Cotrel prior to the signing of the JVA." 26. It is unnecessary for me to set out in detail the grounds of appeal against conviction. Advocate MacRae has amplified his grounds this morning focussing on a particular aspect of them, and indeed we have spent some time exploring the evidence which supported Count 2 in justification of Advocate MacRae's assertions. In essence he submitted firstly that the Commissioner should have stopped the case at the close of the Prosecution case, secondly that there was no factual warrant for the conclusion of the Jurats that the Applicant was guilty in

respect of count 2 and thirdly that in any event the Jurats were misdirected by the Commissioner on certain aspects of the Law 27. The test which I am enjoined to apply in an application of this kind is reported in the case of AG v Barette

[2006] JRC 060 . On an application for bail pending appeal, the Deputy Bailiff, as he then was, made clear what was the test and I quote from his judgment:- "The test for granting bail on appeal is clear. It was laid down in the English case of R -v- Watton 68 Cr. App. R.293, and has been applied in this jurisdiction in the case of Stevenson -v- AG. The test is that bail pending appeal is granted only in exceptional circumstances. In Watton at page 296 the court approved the following as the correct formulation of the law, namely that bail is granted only where it appears prima facie that the appeal is likely to be successful, or where there is a risk that the sentence will have been served by the time the appeal is heard." 28. The appeal itself is reported in the Jersey Law Reports 2006 at page 407. The appeal was allowed but the proviso was applied and the Court therefore had to recall the Appellant to prison with a view to his serving the balance of his sentence. 29. I have listened with great care to all that Advocate MacRae has urged on me this morning. It is neither appropriate nor desirable for me to say more than this. In my view though he has outlined a number of powerful points which he will no doubt urge on the full Court on 21st January 2013 with the same persuasive force with which he has urged them on me, nonetheless I am not persuaded that the test which I have outlined has been met in this case. That test is one that constitutes, and is designed to constitute, a significant hurdle for any applicant for bail. It is, as I made clear in giving the judgment of the Court in Barette , most undesirable that an Appellant who has been released pending appeal has to be returned to custody because his appeal against conviction has not been allowed or because the appeal against sentence has not resulted in a situation where the applicant for bail would have been released by the time of the hearing of the appeal. 30. It is not my function at this stage to allow or disallow the appeal, in respect either of the appeal against conviction or sentence. Rather is it my task to make a preliminary assessment of the likelihood of the success of either appeal. As I have said, Advocate MacRae has not persuaded me that the very high hurdle that he has to overcome has been surmounted. In those circumstances I regret I must refuse this application. Authorities Investors (Prevention of Fraud)(Jersey) Law 1967. AG v Barette

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