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Improper use of position by company officers: The Queen v Hopwood & Byrnes

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Improper Use of Position by Company Officers: *The Queen v Hopwood & Byrnes*

Supreme Court of South Australia, 21 April 1994

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Companies (South Australia) Code, s 229(4) - improper use of office - mens rea required -* Chew's *case considered* - Yuill's *case considered - relevance of defendant's state of mind

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Headings in this case note:

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1. The facts

{1} In Hopwood and Byrnes (1994) (Supreme Court of South Australia, 21 April 1994, Legoe, Mohr, Bollen JJ) the defendants were charged under s 229(4) of the Companies (South Australia) Code which provides:

An officer or employee of a corporation shall not make improper use of his position as such an officer or employee, to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation.
Penalty: $20,000 or imprisonment for 5 years, or both.

{2} The facts are complex, but in essence the Crown alleged that the defendants, as directors of Magnacrete Limited ("Magnacrete"), committed that company to guaranteeing an overdraft facility in favour of Vicksburg Pty Ltd ("Vicksburg"). Vicksburg had been floated for the specific purpose of taking up an anticipated shortfall under a convertible note issue by Jeffcott Investments Ltd, ("Jeffcott"). Byrnes was managing director of Jeffcott and Hopwood was a substantial shareholder. The independent directors on the board of Magnacrete were not informed of this transaction. The trial judge made adverse findings against the defendants including (i) that they had acted in a situation of conflict of interest; (ii) that their purpose was to benefit Jeffcott; (iii) that they acted without authority, and (iv) that they did not tell the other directors what they were doing. The Court of Appeal allowed the appeal and quashed the convictions under 229(4) on the ground that the Crown had failed to prove the necessary mens rea. Bollen J referred to passages in *Chew v The Queen* (1992) 173 CLR 626; 60 A Crim R 82 which, his Honour considered, supported the need for mens rea in relation to improper use of office.

2. *Chew's* and *Yuill's* cases

{3} In *Chew* (1992) the High Court held, inter alia: (i) section 229(4) requires proof of purposive conduct; (ii) it is necessary to show that the defendants intended a result and believed that the intended result would be an advantage for himself or for some other person or a detriment to the corporation; (iii) "advantage" and "detriment" are alternatives - the Crown need only prove one; (iv) the accrual of an advantage or benefit is not an element of the offence; (v) purposive conduct cannot be inferred simply from the fact that benefit or detriment occurred. With respect to improper use of position, the majority held (vi) proof of a willed or deliberate act which constitutes making "improper use" of the position is required; and (vii) the accused's state of mind is relevant, in an appropriate case, to the element of improper use of position.

{4} The mental element associated with improper use of position was not defined with precision in *Chew*. It was not necessary to do so. The principal issue in that case related to the ulterior intent associated with the improper use of office. Indeed, at trial it was conceded that conduct could amount to an improper use of position even if the defendant believed such conduct to be in the interests of the company. However, various dicta in *Chew* suggest that whether a particular transaction amounts to an improper use of office is not a subjective matter, although subjective factors may bear upon it. D's beliefs, state of knowledge and motivation may be relevant to whether a particular transaction amounts to an abuse of office. Conduct may however be improper even though the person authorising it believes that it is in the best interests of the company. The joint judgment states:

The accused's state of mind is relevant not only to the requirement of purpose but also to the element of improper use of his or her position. If, for example, an accused person reasonably but mistakenly believed that a particular transaction which he or she authorised was genuinely for the benefit of the corporation, that belief may, in an appropriate case, be material in determining whether the accused person can be held criminally responsible for using his or her position in a manner which would objectively be seen to be improper. (at 634)

See also *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285; 70 ALR 251; *Jeffree v National Companies & Securities Commission* [1990] WAR 183; (1989) 15 ACLR 217, at 227.

{5} In Hopwood, Bollen J inferred from this key passage that the defendant's intention was determinative even in a case where what was done was objectively improper according to a civil standard. Bollen J said:

The High Court tells us that the state of mind is ... relevant to the element of improper use. It is relevant because it may determine whether a person is criminally responsible (i.e. guilty of the offence created by s 229(4)) for conduct which is objectively seen as improper. That is to say once the conduct which is objectively improper has been proved beyond reasonable doubt you turn to consider the intention of the actor to see if civil impropriety is translated into criminal impropriety" (OO178)

{6} Unfortunately, his Honour did not provide an abstract test for criminal intent. He referred to the findings of the learned trial judge and said:

The finding that the transaction was not a total "scam", the belief that what was being done would not harm Magnacrete, the possibility that they were not mistaken and the belief on the part of Hopwood in likely ratification, together with the fact that any vice was said to have existed in how something was done and not what was done, all amount to an absence of criminal intent or at least to the reasonable possibility of that absence". (00180)

{7} The approach taken by Bollen J contrasts sharply with that taken by the New South Wales Court of Appeal in *Yuill* (Unreported, 29 June 1994, 19 July 1994, NSW Court of Appeal, Hunt CJ at CL; Abadee, Simpson JJ). Hunt CJ at CL stated:

Our conclusion ... is that the state of mind of the accused becomes relevant to the issue as to whether the use made of his position as a director is improper only when the Crown has not established that the use was improper from a purely objective standard. The jury should be directed in relation to the accused's state of mind that: (1) They should first consider the issue from a purely objective standard, as to whether the use made by the accused of his position is improperly inconsistent with the particular duties and responsibilities of that position. (2) If they are satisfied beyond reasonable doubt that the use made by the accused of his position was improper from that purely objective standard, the reasonable possibility that the accused believed that what he was doing was in the best interests of the company is irrelevant to that issue, and it will not mean that [the] Crown has failed to prove that such use of his position was improper. (3) It is only if they are not satisfied beyond reasonable doubt that the use made by the accused of his position was improper from a purely objective standard that they may consider whether the accused's state of mind made that use improper. (4) The relevant state of mind in that situation may be of varying kinds, depending upon the circumstances of the particular case, but it may include a consciousness by the accused that what he is doing constitutes an improper use of his position. The effect of such directions is that the accused's state of mind is relevant only to render the use by him or her of his position improper where it is not already improper from a purely objective standard. His state of mind is not relevant to translate use which is objectively improper into use which is not improper. (emphasis added)

3. Comment - the two limbs of s 229(4)

{8} *Yuill* and *Hopwood* deal with the mens rea required in relation to "improper use of position", and come to conflicting conclusions. According to *Yuill* the ulterior intent is sufficient to satisfy the common law presumption of intent and no additional mens rea is required. The accused's state of mind is not relevant to translate use which is objectively improper into use which is not improper. *Hopwood*, by comparison, holds that evidence that the accused believed that what he was doing was in the best interests of the company may be relevant to the issue of criminal intent.

{9} In cases dealing with "proper" corporate behaviour courts are understandably reluctant to give company officers a blank cheque to determine for themselves the scope of proper conduct. It is not OK to say "I thought it was OK". This is so in other areas of dubious moral behaviour as well: for example, indecency: see *Court* [1989] AC 28, at 42-43; *Drago* (1992) 63 A Crim R 59, at 74 (WA, CCA); *Harkin* (1989) 38 A Crim R 296 (NSW, CCA). Here the courts have tended to adopt an objective standard - at least in cases where D's conduct is intrinsically indecent. In cases where D's conduct is not intrinsically indecent (lifting a highlander's kilt?) the defendant may excuse herself by showing an innocent motive.

(i) The ulterior intent

{10} *Chew* establishes that the improper use of a corporate office must be for one or two purposes: either to gain an advantage for oneself or another, or to cause a detriment to the company. (In *O'Connor* (1980) 146 CLR 64; 4 A Crim R 348 Barwick CJ considered the purpose with which a person acts to be not part of the mens rea, but an element of the actus reus. He called the purpose with which an act was performed the "ulterior" intent. Accordingly, the ulterior intent was part of the actus reus of the offence.)

(ii) The two limbs of s 229(4)

{11} The advantage and detriment limbs are in fact quite different. They require separate treatment. Unfortunately, running the two limbs together tends to blur this crucial difference.

(iii) The "detriment" limb

{12} This limb of s 229(4) may be abbreviated:

An officer shall not make improper use of his position for the purpose of causing detriment to the corporation.

{13} Here the prosecution alleges that D's purpose in using his position was to harm the company. If so, his conduct is necessarily improper and no further mens rea in relation to improper use of office need be proved. Of course, the prosecution will have to show that the improper purpose (namely, that of causing detriment to the company) was effected by a deliberate use of his position. A director who sells his own shares at a discount in order to undermine the company acts qua shareholder and not qua director - such conduct would not fall under s 229(4).

{14} A use of office for the purpose of causing detriment to the company must necessarily be an improper use of office. In cases under the detriment limb - where the conduct is improper because of the defendant's improper purpose - the ulterior intent to cause harm to the company defines the crime - no further mens rea relating to improper use of office is required.

(iv) The "advantage" limb

{15} The "advantage" limb may be abbreviated:

An officer shall not make improper use of his position for the purpose of gaining an advantage for himself or another.

{16} The prosecution alleges that D's purpose in using his position was to obtain a personal advantage. D responds that he believed that the transaction was in the best interests of the company. There is of course a difference between this and the previous case. A use of office for the purpose of harming the company is necessarily improper. By contrast, a transaction entered into for personal advantage is not always improper - a collateral benefit may be bestowed on the company. In that event D's state of mind is relevant to the question of improper use, whether or not his belief that the transaction is in the best interests of the company is well founded.

4. Dishonesty as mens rea

{17} One possibility is to read "improper use" as requiring proof of dishonesty. Section 1317FA of the Corporations Law (which applies from 1st February 1993) has precisely this effect. By virtue of that provision a criminal conviction under s 232(6) (which replaces s 229(4) without relevant change) will require proof of at least dishonesty or an intention to deceive or defraud. An intention to defraud is necessarily dishonest, and intention to deceive invariably so. Hence, the basic mens rea required under s 232(6) will be dishonesty. The Corporations Law follows a series of legislative reforms in replacing intent to defraud with dishonesty as the relevant mens rea in property offences: see Crimes Act 1958 (Vic) ss 73, 81-83; Crimes Act 1900 (NSW) s 178BA, Criminal Code (Tas) s 226, 252A.

{18} In Ghosh [1982] QB 1053 the English Court of Appeal held that "dishonestly" described the state of mind of a person who is subjectively aware that his or her conduct is dishonest according to the standards of honest and reasonable people. The Ghosh test has been applied in Australia: see for example Laurie (1986) 23 A Crim R 219 (Qld CCA). If dishonesty unlocks the key to the relevant mens rea under s 229(4), the test should be whether the defendant actually realised that his or her conduct was improper according to those standards of corporate behaviour observed by reasonable and honest company officials. The question is not simply whether D believed that his conduct had contravened s 229(4). The question is whether such conduct would be regarded as dishonest and wrong by right-thinking company directors, and whether the defendant was aware that it would be so regarded. There is however no direct authority for reading into s 229(4) a requirement of dishonesty.

(i) The Ghosh model applied to improper use

{19} The two-tiered Ghosh approach to dishonesty (which incorporates some awareness of community standards) is quite capable of adaptation to improper use of office under s 229(4).

{20} Thus, the relevant question would be whether D knew that his conduct was improper and realised that it would be regarded as such by right-thinking company directors. D would be entitled to an acquittal if the jury considered it reasonably possible that D believed his conduct to be proper and honestly thought that it would be perceived as such by other company directors. This is not the test applied by Bollen J in *Hopwood*, although it may provide a test for translating civil wrongdoing into criminal wrongdoing.

(ii) Strict liability and normative error

{21} The defence of honest and reasonable mistake (under Proudman v Dayman (1941) 67 CLR 536) is available in relation to the element of improper use of office. A mistake of fact going to an appreciation of the basic facts of a commercial transaction would provide a defence. This was rightly conceded by counsel for the Crown in argument in *Hopwood*. However, the instant facts do not generate that sort of case. This was not a case where there was some misunderstanding by the defendants as to what in point of fact had been done. It was rather a case where the legal (or ethical) significance of particular conduct was in doubt. In other words, it was the normative rather than the factual dimensions of the case which were before the court. (See discussion at para [19]). However, for completeness, we note that when mistake of fact is raised as a live issue, it is for the Crown to prove beyond reasonable doubt that the defendant did not honestly believe on reasonable grounds in the existence of facts which, in the circumstances, would take his or her act outside the operation of the statute: see Jiminez (1992) 173 CLR 572, at 582; 59 A Crim R 308, at 314; He Kaw Teh (1985) 157 CLR 523, at 534, 573, 582, 592; 15 A Crim R 203, at 210, 239, 246, 253; Australian Iron & Steel Pty Ltd v Environment Protection Authority (1992) 66 A Crim R 134 (CCA, NSW); Hawthorn (Department of Health) v Morcam Pty Ltd (1992) 65 A Crim R 227 (CCA, NSW); State Rail Authority of NSW v Hunter Water Board (1992) 65 A Crim R 101 (CCA, NSW); Pollard v Commonwealth DPP (1992) 63 A Crim R 383 (SC, NSW); Environment Protection Authority v N (1992) 59 A Crim R 408 (CCA, NSW); Strathfield Municipal Corp v Elvy (1992) 25 NSWLR 745; 58 A Crim R 352; Lergesner v Carrol (1990) 49 A Crim R 51 (CCA, Qld); Binskin v Watson (1990) 48 A Crim R 33 (CA, NSW); Von Lieven v Stewart (1990) 21 NSWLR 52; Wampfler (1987) 11 NSWLR 541 at 547; 34 A Crim R 218] These cases show that absolute liability (where the defence of reasonable mistake of fact is excluded) is exceedingly rare in Australia. Where serious penal provisions apply there is a strong presumption against absolute liability. In the present context, absolute liability would imply that, for example, a belief based upon reasonable grounds that the board had in fact passed a resolution which ratified a proposal which would otherwise amount to a breach of fiduciary duty would be devoid of exculpatory effect.

5. Knowledge of unlawfulness as mens rea

{22} What if D is mistaken as to what we have called the normative aspects of the case? Assume that a company officer does something which she believes to be legitimate (or at least not illegitimate). Upon review by a competent authority (such as a court) the conduct is found to be improper. Her defence is that she had a mistaken understanding as to the legal significance of her conduct. Is this not simply a mistake of law? Conventional wisdom holds that mistake of law is not a defence and should be excluded from consideration. However, in some cases particular statutory provisions have been construed so as to require knowledge of the wrongfulness of particular conduct. See also Allday (1837) 8 Car & P 136; 173 ER 431; Wilson v Chambers (1926) 38 CLR 131 (where Isaacs J held that dishonesty was an ingredient of the offence of the evasion of import duty contrary to s 234 of the Customs Act 1901 (Cth) - therefore D's conduct was honest even though founded upon a mistake of law.) In some cases, it is possible to construe particular words (such as wilful) as requiring knowledge of unlawfulness: Wilson v Inyang [1951] 2 KB 799; Iannella v French (1967-68) 119 CLR 84 at 97 (per Barwick CJ, dissenting).

{23} Mens rea may in some cases, depending on the context and the subject matter, require that the defendant should know that the act is unlawful. That element of the offence itself cannot be eliminated in such a case by saying that ignorance of the law is no excuse. The defendant who is not shown in such a case to know that the act is unlawful needs no excuse. The offence has not been proved against him.

{24} Assuming that some offences require a certain type of mens rea which involves knowledge of illegality, then a mistaken belief as to the legal consequences of particular acts may provide a defence. If s 229(4) is such an offence, then a mistaken belief as to the standard of probity required by s 229(4) may preclude proof of mens rea. This is consistent with the view that an error as to a mixed matter of law or fact is a mistake of fact, although the cases dealing with this are somewhat muddled: see Wampfler (1987) 34 A Crim R 218; Thomas (1937) 59 CLR 279; Power v Huffa (1976) 14 SASR 337; Strathfield Municipal Council v Elvy (1992) 58 A Crim R 352.

(i) Relevance of state of mind

{25} It is submitted that, in relation to improper use of position, a person's state of mind may be relevant to criminal responsibility in at least three ways. The least controversial relates to the Proudman v Dayman defence. An honest and reasonable belief in facts which, if true, would make the director's use of office legitimate (or take the relevant conduct outside the scope of the prohibition) should be regarded as a defence. Secondly, D's state of mind may determine whether particular conduct would amount to a civil wrong, for example, by reason of abuse of power. No offence is committed under s 229(4) unless D's conduct amounts at least to a civil contravention. And finally, D's state of mind may negate the element of improper use within s 229(4). It may do so by raising the possibility that the director believed that the relevant conduct was proper according to the business standards accepted by right-thinking members of the business community. Once that defence is raised, the Crown must exclude the hypothesis by proving beyond reasonable doubt that the defendant believed that his conduct was improper and realised that it would be regarded by his or her peers as such.

6. Conclusions

{26} The misuse of corporate office is regarded as a serious criminal offence in Australia. Section 229(4) carries a maximum of 5 years imprisonment and the defendant is liable to disqualification as a company director. The seriousness of the offence defined by s 229(4) does not sit comfortably with the minimalist approach to criminal intent adopted in *Yuill*. However, *Hopwood* provides insufficient guidance as to the requisite mens rea required for improper use. The two step approach adopted in the dishonesty cases may provide a suitable test for criminal intent in cases falling under the "advantage" limb of s 229(4).