IN THE SUPREME COURT OF NEW ZEALAND

SC 59/2013
SC 60/2013
SC 61/2013
SC 62/2013
[2013] NZSC 104

BETWEEN	DOUGLAS ARTHUR MONTROSE GRAHAM, MICHAEL HOWARD REEVES, WILLIAM PATRICK JEFFRIES AND LAWRENCE ROLAND VALPY BRYANT Applicants
AND	THE QUEEN Respondent

Court: Elias CJ, William Young and Glazebrook JJ

Counsel: J A Farmer QC, M A Corlett, D H O'Leary and M A Sissons for Applicants
C R Carruthers QC and D R La Hood for Respondent

Judgment: 25 October 2013

JUDGMENT OF THE COURT

A The applications for leave to appeal are allowed in relation to sentence but dismissed as to conviction.

B The approved question in relation to sentence is whether the Court of Appeal was in error in allowing the Solicitor-General's appeals, and in particular, as to the necessity for sentences of imprisonment for the offending.

REASONS

The convictions

[1] The applicants were all directors of Lombard Finance and Investments Ltd, a company which raised money from the public pursuant to, inter alia, an amended prospectus of 24 December 2007. Lombard was placed in receivership in April

2008. Following trial before Dobson J sitting without a jury, the applicants were found guilty on four counts alleging offences under subss 58(1) and (3) of the Securities Act 1978. Count one (laid under s 58(3)) related to the amended prospectus. Counts two–four (laid under s 58(1)) related to advertisements for particular investment products marketed by Lombard. For present purposes, it is sufficient to focus on the prospectus count. This is because the advertisements were found to be untrue for reasons which were very similar to those which the Judge relied on in relation to the prospectus.

The approaches taken by the Judge and the Court of Appeal

An untrue prospectus?

[2] The Judge found that the prospectus was untrue by reason of:[1]

> The omission of material information relating to adverse liquidity issues including the deterioration in the company's cash position from the balance at 30 September 2007 and the failure to achieve forecast cash receipts and loan payments.

For this reason, it was also untrue because it asserted that there were no other material matters relating to the offer of securities under the prospectus. The Judge rejected other Crown contentions as to untruthfulness, in particular the non-recognition in the prospectus of impairment in relation to the recoverability (or otherwise) of Lombard's loans to five major borrower groups.

[3] The section of the prospectus that dealt with liquidity risk is set out at [57] of the Court of Appeal judgment.[2] Developments relevant to liquidity from mid-September through to 24 December 2007 are reviewed in the Court of Appeal judgment from [36] to [52]. By 19 December (which was the date of the last board meeting of the year), cash on hand had decreased significantly, both in absolute terms (as against the cash on hand at 30 September) and as compared to earlier forecasts. This was primarily a function of loan repayments not being made as expected. This was a cause of some anxiety to the directors.

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1 *R v Graham* [2012] NZHC 265, [2012] NZCCLR 6 [HC judgment] at [92], [104]–[106], [118] and [123].

2 *Jeffries v R* [2013] NZCA 188 [CA judgment].

[4] The Judge concluded that the prospectus was untrue in three respects:[3]

(a) The omission of statements as to the lack of reliable forecasts about the timing of loan repayments;

(b) The omission of any acknowledgment about the reduction in cash on hand; and

(c) The omission of any reference to concerns which the directors had as to liquidity.

The Judge took the view that the general and conditional language of the section of the prospectus dealing with liquidity understated the liquidity risk as perceived by the directors.[4] And the Judge explained what he considered might have been said in the amended prospectus.[5]

[5] The Court of Appeal's evaluation of the Judge's conclusion is at [140]–[173] and follows a lengthy analysis of the evidence. That Court construed the relevant section of the prospectus as a statement to the effect that Lombard would be unable to meet its repayment obligations only if the reduction in the level of reinvestment was extreme, an assertion which the Court considered to be incorrect.[6] It also considered that the reference in the prospectus to the Board being "confident" that Lombard would have sufficient cash to fund all payments to investors was incorrect as not sufficiently or accurately conveying the vulnerable state of Lombard and the directors' actual concerns.[7] As well, the Court placed emphasis on the failure to record the deteriorating position in relation to cash on hand[8] and the delays in loan repayments and associated discrepancies between forecasts and actual receipts.[9]

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3 HC judgment at [123].
4 At [92].
5 At [121].
6 CA judgment at [143].
7 At [144]–[149].
8 At [150]–[152].
9 At [153]–[166].

The s 58(4) defence

[6] The Judge rejected the defence based on s 58(4). In doing so, he accepted that each of the defendants believed that the amended prospectus was true when it was issued and they had confidence in the forecasts which were prepared by management.[10] However, he concluded that it was not reasonable for the directors to omit reference to the relative inaccuracy of the previous projections of loan repayments and likewise it was not reasonable for them to believe that they could omit references to the trend of reduced cash on hand and their concerns over liquidity.[11] As well, he considered that the reliance placed by the directors on the advice given by external competent advisers was not enough to provide a basis for reasonable belief if such basis did not independently exist.[12]

[7] The Court of Appeal dismissed the challenge to this part of the Judge's reasons. It recognised that references by the Judge to whether it was reasonable for the directors to believe that they could omit certain material from the prospectus did not coincide with the text of s 58(4) which is addressed to whether the directors believed on reasonable grounds that the prospectus was true. They saw this, however, as coming down simply to "infelicities of language" and were "not persuaded that the Judge had misunderstood the correct statutory question".[13] And the Court also concluded that the Judge's rejection of the defence on the facts was open to him.[14]

The proposed conviction appeal

Overview

[8] The submissions in support of the application for leave to appeal appear to be based on the following propositions:

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10 HC judgment at [125].
11 At [126]–[127].
12 At [145]
13 At [189].
14 At [194]–[198].

(a) The Court of Appeal was wrong to treat as substantially irrelevant the events which occurred between the signing of the amended prospectus in December 2007 and the eventual failure of Lombard in April 2008.

(b) The Court of Appeal was wrong to conclude that the prospectus did not convey the imminence of the identified risks and the vulnerable state of the company.

(c) The Court of Appeal wrongly dealt with whether the prospectus was untrue as a matter of overall impression and related issues.

(d) The Judge and the Court of Appeal were wrong to place reliance on a particular schedule (referred to as the "Peden schedule").

(e) The Judge and the Court of Appeal conflated the elements of the offence and the defence.

The Court of Appeal was wrong to treat as substantially irrelevant the events which occurred between the signing of the amended prospectus in December 2007 and the eventual failure of Lombard in April 2008

[9] The argument is that the reason why Lombard failed was the "bank lock-up" of early 2008, something which was entirely unforeseen as at December 2007. The complaint seems to be that the Judge and Court of Appeal allowed their approach to be tainted by the hindsight knowledge that Lombard collapsed and wrongly failed to take into account the fact that this was for reasons not foreseeable in December 2007. The difficulty with this argument is that whether the prospectus was true had to be assessed as at 24 December 2007. There is nothing in the judgments to suggest that the conclusions of the Judge or the Court of Appeal were tainted by hindsight. If the prospectus was untrue when issued – as was held to be the case – what happened later was irrelevant.

The Court of Appeal was wrong to conclude that the prospectus did not convey the imminence of the identified risks and the vulnerable state of the company

[10] This is a very factual issue on which there are concurrent findings of fact in the High Court and Court of Appeal. The arguments are closely related to the next point and do not warrant elaborate discussion, save for mention of a few additional points.

[11] The focus of the submissions seems to be on the liquidity position as at 30 November 2007 and the assumption appears to be that the substantial rejection by the Judge of the Crown case as to impairment of the loans equated to a "validation of Lombard's balance sheet". But the correct date for assessment of the amended prospectus was 24 December by which stage Lombard's liquidity position was worse than had been forecast as at 21 November. And the inability of the Crown to prove beyond reasonable doubt that there was substantial impairment to the loans does not equate to a finding that all loans were recoverable and still less to a finding that they would be repaid in a timely way or otherwise in accordance with forecasts.

[12] Counsel for the applicants recently made available to the Court a copy of the judgment of the Court of Appeal of Victoria in *Woodcroft-Brown v Timbercorp Securities Ltd*,[15] a case dealing with the appropriate treatment of risk in disclosure documents under a regime which corresponds very broadly to that provided by the Securities Act. We did not derive much assistance from the judgment given the very different findings of fact made at trial. The reality is that the present case is very fact specific.

The Court of Appeal wrongly dealt with whether the prospectus was untrue as a matter of overall impression and related issues

[13] The argument encompasses more specific contentions, in particular that: (a) a specific statement in the prospectus should have been identified as being untrue, (b) there is no requirement under s 58 for investors to receive sufficient material to make their own judgment as to whether to invest, (c) the problem, as counsel see it, of

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[15] *Woodcroft-Brown v Timbercorp Securities Ltd* [2013] VSCA 284.

devising what could have been said in the prospectus and (d) an alleged down-playing of the significance of the advice received from external advisers.

[14] However:

(a) The statements to which the omissions related were clearly identified in the particulars (set out by the Judge at [87]) and by the Judge at [92], [106] and [115]–[117] and by the Court of Appeal at [88]–[89] and particularly at [141]–[145], [152], [162], [164] and [170]–[171].

(b) The Judge and Court of Appeal do not appear to have put a gloss on the words of the statute. The purpose of the provisions is to enable investors to make informed decisions, a purpose which is effectuated by the provision of information which qualifies what is said in the prospectus, if such qualification is necessary to ensure that what is said in the prospectus is true.

(c) The Judge did say what he considers should have been included in the prospectus (at [121]) and the Court of Appeal directly confronted the argument about the required level of detail (at [170]–[172]).

(d) The significance to be placed on management advice was reviewed generally by the Judge (at [28]–[35]) as was the significance of external advice (at [138]–[146]) and by the Court of Appeal (at [196]–[197]).

Therefore, this ground of appeal is without substance.

The Judge and the Court of Appeal were wrong to place reliance on a particular schedule (referred to as the "Peden schedule")

[15] This complaint concerns a schedule prepared by a Crown witness, Michelle Peden which was in the Crown bundle but not formally produced by her. It dealt with inconsistencies between forecast loan repayments and actual receipts. Sir Douglas Graham was cross-examined on it and this was allowed on the basis that Ms Peden could be recalled if the defence wished. Later the Judge stopped cross-

examination on the schedule of another defence witness but left open the possibility of Ms Peden and that witness being later recalled to give evidence. Neither was recalled. Later another defence witness gave evidence about the schedule and attacked the calculations.

[16] The Court of Appeal dealt with this point at [109]–[115] and [155]–[160]. The schedule recorded (or arguably misrecorded) facts which were otherwise in evidence and it had no value otherwise than as a tool for the analysis of such evidence.

The Judge and the Court of Appeal conflated the elements of the offence and the defence

[17] This argument is associated with the complaints about the Peden schedule. The more particular complaint is that the reasons why the prospectus was found to be untrue were illegitimately carried over into the assessment of whether the defence was made out. The relevant passages in the Court of Appeal judgment are at [188]–[190] and [194]–[198].

[18] Where it has been shown that a prospectus is untrue, the reasons why the prospectus is untrue will be relevant to whether the directors believed on reasonable grounds that it was true. In this case, the falsity of the prospectus related in part to the unqualified assertion as to the confidence of the board and, as well, matters within the knowledge of the directors which were omitted. So the basis of the finding that the prospectus was untrue was material to whether the s 58(4) defence was made out. There is thus no apparent illogicality in the approach taken by the Judge and the Court of Appeal.

Conclusion as to proposed conviction appeal

[19] The proposed appeal would turn primarily on issues of fact. In this respect, the application falls to be determined in the context of s 385(1)(a) of the Crimes Act 1961. The relevant findings of fact could only be set-aside if "unreasonable or [unable to] be supported having regard to the evidence". We see no appearance of a miscarriage of justice in relation to the critical findings. We similarly see no

appearance of a miscarriage of justice in any other respect (for instance as to the Peden schedule). As well, the proposed appeal does not raise a point of law of general or public importance. The statutory criteria for the grant of leave to appeal in respect of conviction are accordingly not made out.

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