

Huber
8/4/09

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 23 of 2007

(Indictment No. 6/07(A-B))

(Summary Case Nos: 2937/05 & 2938/05)

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

**GODFREY BOWEN &
AIR TECH CORPORATION LTD.**

Appellant

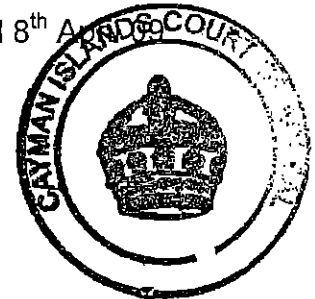
**Before: The Right Hon. Sir John Chadwick, President
The Hon. Mr. Justice Forte, Justice of Appeal
The Hon. Dr. Justice Conteh, Justice of Appeal**

Appearances: Clyde Allen for the appellant and Trevor Ward, Senior Crown counsel for the respondent.

Heard: 25th & 30th March, 2009.

Judgment delivered 8th April 2009

Chadwick, P.



Judgment & Reasons

1. On 12 October 2007, following a trial on indictment before Justice Sanderson and a jury, these two appellants were each convicted of an offence under section 3(2) of the Health Insurance Law, 1977 (Law 15 of 1997); and the appellant Air Tech Corporation Ltd was convicted of a further offence under section 7 of that Law.
2. The Law was enacted in order to provide that those resident or employed in the Cayman Islands were protected by health insurance. It does so by imposing duties on residents and employers to effect standard health insurance contracts for themselves, their unemployed spouses, their employees and the unemployed spouses and children of their employees. The expression "standard health insurance contract" is defined, by section 2,

to mean a contract issued by an approved provider to provide insurance cover in respect of minimum health care benefits, prescribed by regulations made under section 19; and which provides those benefits on terms and conditions similarly prescribed. Those duties are backed by criminal sanctions:

3. The principal duties are imposed by sections 3(1) and 3(2) of the Law. Section 3(1) requires that every person resident in the Islands shall effect a standard health insurance contract in respect himself, his unemployed spouse and his children unless (a) he is covered by a contract of insurance effected by an employer under section 3(2), (b) he is covered by a contract of insurance effected by Government under section 3(3) (or, where Government does not effect such a contract, medical services are provided to him by Government under the General Orders), or (c) he is an uninsurable person. Section 3(2) requires that every employer shall effect and continue a standard health insurance contract on behalf of (a) himself, (b) his unemployed spouse and his children, (c) each of his employees and (d) any child and unemployed spouse of an employee. A person who fails to comply with a duty imposed on him by sections 3(1) or 3(2) commits an offence and is liable on conviction on indictment to a fine not exceeding \$10,000: section 3(13).

4. Section 5 of the Law provides that, in the case of an employee who is not a high risk insurance person, the employer is liable to pay, pursuant to section 3(2), the total cost of the standard premium payable under any standard health insurance contract effected in respect of that employee; but is entitled to deduct from the salary, wage or other remuneration of such employee an amount not exceeding one half of the premium so paid. The expression "high risk insurance person" is defined in section 2; but has no application in the present case. Section 7 provides that an employer who deducts from the salary, wage or remuneration of an employee more than the amount which he is entitled to deduct under section 5 commits an offence and is liable on conviction on indictment to a fine not exceeding \$5,000.

5. There are other provisions of the Law to which I should refer. Section 2 defines "employer" to include not only "any person who has entered into a contract of employment with an employee" but also "any agent, representative or manager of such a person who is placed in authority over an employee". Section 14(1) provides that where an offence under the Law committed by a corporate body is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a manager, director, secretary or other similar officer of the corporate body, or any person who was purporting to act in any such capacity, that person commits an offence and is liable on conviction on indictment to a fine not exceeding \$5,000. Section 14(3) provides that a person may be convicted of an offence under section 14(1) notwithstanding that no proceedings are brought against the corporate body in respect of the offence; or (curiously) notwithstanding that the corporate body is found not guilty in respect of the offence.
6. Section 8(1) of the Law requires every employee to keep his employer informed of all facts related to the employer's liability under section 3(2) and of any change of circumstances which would affect the employer's liability under that section. Section 8(2) provides that an employee who contravenes section 8(1) shall be liable to his employer for any expense incurred by the employer for which he would otherwise not have been liable.
7. Section 10(1) provides that where an employer to whom the Law applies fails or neglects to effect any contract of health insurance which he is required to effect by section 3 or to comply with the requirements of the Law relating to the payment of premiums and, by reason thereof, any person has lost any benefit to which he would have been entitled if such failure or neglect had not occurred, that person shall be entitled to recover from the employer as a civil debt the amount of the benefit so lost. Section 10(3) is in these terms:

"10(3) In any proceedings under this subsection relating to the failure or neglect of an employer to comply with this

Law in respect of the unemployed spouse and children of an employee, it shall be a defence for the employer to prove that he did not know, and could not reasonably be expected to have known, that the employee in question had a spouse or children or that such spouse or children were persons in respect of whom he was required to effect a contract of insurance."

8. The circumstances which gave rise to the criminal proceedings in this case are helpfully summarised in the skeleton argument submitted by the Crown on this appeal. They have not been in dispute before us; and I can adopt that summary:

(1) Between 31 May 1999 and 29 January 2005 Mr Junior Wade Hall ("the complainant") was an employee of Air Tech Corporation Ltd (formerly Cayman Repairs, Appliances & Air Conditioning Co Ltd) of which Mr Godfrey Bowen was the General Manager. It was the Crown's case that Mr Bowen was the person who dealt directly with brokers on matters of health insurance cover for employees.

(2) The complainant, Mr Hall, was in receipt of a standard weekly salary from which deductions were made for health insurance cover. In early 2003 the complainant discovered that, notwithstanding such deductions, no health insurance cover in respect of him was in place. On making inquiries he learnt that the company's policy of health insurance had been terminated, with effect from 31 October 2002, on the grounds of outstanding arrears of premium. The total of the deductions made from the complainant's salary over so much of the period of his employment during which no health insurance cover was in place was \$1,315.75.

(3) The complainant made formal complaint to the Supervisor of Health Insurance. When informed of the complaint by the Health Insurance Commission, Mr Godfrey Bowen said, at first, that the absence of health insurance coverage was attributable to the poor state of the

company's finances. He was later to assert that he had no knowledge that the policy had lapsed until some time in 2005.

9. Mr Godfrey Bowen and Air Tech Corporation Ltd were each charged both under section 3(2) of the Law – failure, between 31 October 2002 and 30 January 2005, to effect and continue a standard health insurance contract in respect of the complainant – and under section 7 – unlawful deductions by the employer from the salary of the complainant between the same two dates, there being no health insurance contract in place by reference to which deductions could be made. In the course of the trial the judge directed a verdict of not guilty on the section 7 charge brought against Mr Godfrey Bowen. It is pertinent to keep in mind that Mr Godfrey Bowen was not charged under section 14(1) of the Law.

10. At the conclusion of the trial – following argument – the judge ruled that sections 3(2) and 7 of the Law each created offences of strict or absolute liability, not requiring the existence of a guilty mind in the offender. He subsequently put his reasons for that ruling in writing.

11. The judge directed the jury accordingly He said this:

“I would like to deal briefly with the issue of intention. In this case, it is not necessary for the Crown to prove that the defendants intended to not effect or not continue a standard health insurance contract for Junior Hall. All that is necessary for the Crown to prove, so that you are sure, is that the events occurred, and I will take you to what events or facts are necessary. So it is not necessary to prove the events were intended or came about because of recklessness or negligence or mistake or lack of knowledge. It is simply enough to prove that the key events happened”

Later, he said this:

“Finally, it is not a defence for Mr Bowen to say in answer to count 1, that he was not the person responsible for health insurance, or that he was unaware that health insurance was not in place. Lack of knowledge is not a defence, provided that

he was a manager, agent or representative of Air Tech and was placed in authority over Mr Hall.”

And, before sending the jury out to consider their verdict he said this:

“It would not be a defence to that charge [under count 1] for Mr Bowen to say that he did not intentionally fail to effect and continue health insurance or that the company did not have the funds to pay, or that failure to pay was due to a misunderstanding or a mistake.”

It might, perhaps, be said that – if knowledge was a necessary ingredient in the offences charged under count 1 - it would not be necessary (in any event) for Mr Godfrey Bowen to prove lack of knowledge: the burden of establishing knowledge would be on the Crown. But the judge had made the position clear in the first of the three passages cited. In the subsequent passages he was, as it seems to me, doing no more than clarify for the jury that, not only was it not necessary for the Crown to establish knowledge, it was no defence for Mr Bowen to assert and prove lack of knowledge.

12. The jury returned a verdict of guilty against each of Mr Godfrey Bowen and Air Tech Corporation Ltd on the charges under section 3(2): respectively, counts 1 and 3 in the indictment. They returned a verdict of guilty against Air Tech Corporation Ltd on the charge under section 7: count 4 in the indictment. The judge sentenced Mr Godfrey Bowen to payment of a fine of \$5,000 on count 1 to be paid within four months; with 30 days imprisonment in default. He sentenced Air Tech Corporation Ltd to fines of \$5,000 on count 3 and \$2,500 on count 4.

13. Following sentence counsel for the defendants informed the judge that his clients intended to appeal the decision. He said this: “I believe the format is to notify the Court immediately and then later to formalise it in writing”. No formal notice of appeal was ever given; notwithstanding numerous reminders from the Registrar to which I shall need to refer at a later stage in this judgment. When the matter came before this Court for hearing on 25 March 2009, there was no written notice and no grounds of appeal. Exceptionally, having regard

to the need to resolve at an appellate level the question whether offences under section 3(2) and 7 of the Health Insurance Law are indeed offences of strict liability (a question of some general importance in the Cayman Islands), we dispensed with formal notice of appeal and gave permission to advance, out of time, a single ground of appeal. That ground was framed in these terms:

"The learned Judge erred during the trial when construing the statute, the Health Insurance Law (15 of 1997 as amended) sections 3(2) and 7, as imposing offences of absolute liability against Air Tech Corporation Ltd and/or Godfrey Bowen and so erred in the direction that he gave to the jury as to whether they could convict."

That is the only ground of appeal which is before us.

14. The judge reminded himself of the well established presumption that *mens rea*, or a guilty mind, is a necessary element in the commission of a criminal offence. He referred to the familiar passages in the judgment of Mr Justice Wright in *Sherras v De Rutzen* [1895] 1QB 918, 921 and in the judgment of Lord Goddard, Chief Justice, in *Brend v Wood* (1946) 62 TLR 462. He noted that those passages were approved by the Privy Council in *Lim Chin Aik v The Queen* [1963] AC 160, 173; and he reminded himself of the observations of Lord Reid and Lord Diplock in *Sweet v Parsley* [1970] AC 132, 149, 163.

15. It is not, I think, necessary to set out each of those passages again in this judgment. The relevant principles are conveniently summarised in the judgment of the Privy Council in *Gammon (Hong Kong) Limited and others v Attorney General of Hong Kong* [1985] AC 1. But I should record that the judge found particular assistance in what Lord Diplock had to say in *Sweet v Parsley* (*ibid*, page 163):

"... it is contrary to a rational and civilised criminal code, such as Parliament must be presumed to have intended, to penalise one who has performed his duty as a citizen to ascertain what acts are prohibited by law (*ignorantia juris non*

excusat) and has taken all proper care to inform himself of any facts which would make his conduct lawful.

Where penal provisions are of general application to the conduct of ordinary citizens, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful is that of the familiar common-law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving particular danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation."

The final sentence in that passage echoes what was said by the Privy Council in *Lim Chin Aik v The Queen* [1963] AC 160, 174-175:

"But it is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this be so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim. . . . where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even

where the statute is dealing with a grave social evil, strict liability is not likely to be intended.”

16. The issue before the Privy Council in *Gammon (Hong Kong) Limited and others v Attorney General of Hong Kong* [1985] AC 1 was whether, in a prosecution for offences under section 40(2A) and (2B) of the Buildings Ordinance (Laws of Hong Kong, 1981 Rev), it was necessary for the Crown to establish *mens rea*. The statutory offences were in these terms (so far as material):

“40(2A) . . . any . . . registered contractor . . . directly concerned with [building works] who . . . (b) diverges or deviates in any material way from any work shown in a plan approved by the building authority under this Ordinance . . . shall be guilty of an offence and shall be liable on conviction to a fine . . . and to imprisonment. . . .

(2B) Any person . . . directly concerned with any [building works] who . . . (b) carries out or permits . . . such works to be carried out, in such manner as is likely to cause a risk of injury to any person or damage to any property, shall be guilty of an offence and shall be liable on conviction to a fine . . . and to imprisonment”

In delivering the opinion of the Judicial Committee Lord Scarman, after citing three of the cases to which I have already referred - *Sherras v De Rutzen*, *Lim Chin Aik v The Queen* and *Sweet v Parsley* - said this (at page 14):

“In their Lordships’ opinion, the law relevant to this appeal may be stated in the following propositions . . . : (1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is ‘truly criminal’ in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.”

Applying those principles the Judicial Committee concluded (i) that since greater vigilance would be promoted if knowledge of the materiality of the deviation from the plan was not a necessary ingredient of the offence, subsection (2A)(b) was to be construed as requiring knowledge of the deviation from the plan but imposing strict liability for the deviation being a material one; and (ii) that, similarly, provided the defendants had knowledge of the manner in which the works were carried out, they had committed an offence under subsection (2B)(b) even if they did not know that there was a resulting risk of injury or damage. Accordingly, to that extent, the offences charged were offences of strict liability.

17. The judge directed himself, correctly in my view, that he should adopt and apply those principles to the issues before him. He recognised that there was a presumption of law that the Crown must prove *mens rea* before the defendants could be convicted under either sections 3(2) or 7 of the Health Insurance Law. He noted that the presumption was stronger where the offence was truly criminal in nature; but held that that was not a factor in the present case. As he put it: "The offences created are more related to public welfare or regulation than what lawyers or society traditionally consider criminal activity. . . . There is no provision for imprisonment contained in the present legislation". He acknowledged that the presumption could only be displaced by clear statutory language – which was not the present case – or by necessary implication.

18. He went on to address the question whether this was a case in which the presumption that *mens rea* must be established was displaced by necessary implication. As to the offence created by section 3(13) of the Law – read with section 3(2) – he said this:

"The only situation in which the presumption can be displaced [by necessary implication] is where the statute in question deals with an issue of social concern. Health insurance is clearly such an issue. The requirement that employers must place a standard form of health insurance for every employee

is extremely important to all employees and their families. Health insurance is vital if the person faces serious injury or illness. The cost of health care could be crippling and failure to have health insurance could be life threatening. The problem of employers not placing health insurance for employees is a serious one. It is also too common in the Cayman Islands. Employees and their families should not be placed in a situation where they do not have essential health care insurance because the consequences are potentially so extremely serious. . . .”

He took a similar view in respect of the offence created by section 7 of the Law – read with section 5:

“. . . It is also important that employers deduct from employees wages only the amount they are entitled to deduct and that amounts so deducted for health insurance premiums be paid to insurers to place health coverage. . . . Employers must be accountable and responsible for ensuring that only proper deductions are made and then remitted for their employee’s insurance coverage.”

19. Nevertheless, as the judge reminded himself, although the legislation in question was concerned with the very important social issue of health care insurance, the presumption that *mens rea* must be proved was not displaced unless it were shown that the imposition of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance. He was satisfied that that requirement was satisfied in the present case. As he put it: “Imposing strict liability will clearly encourage employers to ensure their employees have basic health care insurance”. He went on - no doubt with the observations of Lord Diplock in *Sweet v Parsley* in mind - to say this:

“Clearly, the best way of ensuring employers effect health care insurance and only make proper deductions, is to hold them absolutely liable when such insurance is not effected or continued, or improper deductions are made. . . . It does not result in prosecution of a class of persons whose conduct could not in any way affect the observance of the law. Rather it would prosecute only those who are primarily responsible for insurance with this legislation.”

20. It was for those reasons that the judge concluded that sections 3(2) and 7 of the Health Insurance Law, 1977 imposed strict or absolute liability.

21. This, then, is an appeal brought in circumstances where the applicable principles have been established by high authority and are not in doubt; where the judge identified those principles correctly and sought to apply them; and where the judge's conclusion is supported by careful and cogent reasoning. I turn, therefore, to the submissions advanced on behalf of the appellants in support of their challenge to that conclusion.

22. First, it is said that the judge failed to distinguish between strict liability and absolute liability: in that, it is said, he should have recognised that in, a case of strict liability, the statute may provide a defence in certain circumstances but that, in a case of absolute liability, there can be no defence based on the absence of *mens rea*. The submission that the judge made no distinction between strict and absolute liability is well-founded: he used both expressions in his judgment. But there is no substance in the point which the appellants seek to make. The relevant question – on which the judge directed the jury – was whether the Crown needed to establish, in the context of an offence charged under section 3 of the Law, that Mr Godfrey Bowen, or Air Tech Corporation Ltd (as the case might be), knew that no standard health insurance contract was in force in respect of the complainant; or, in the context of an offence charged under section 7 of the Law, that Air Tech Corporation Ltd knew that deductions were being made from the complainant's salary in respect of premiums which were not being paid. If the answer to that question was that the Crown did not need to establish such knowledge, it was immaterial whether the liability to which that gave rise was described as strict or absolute.

23. Second, it is said that the judge failed to distinguish between Air Tech Corporation Ltd – the corporate entity – and Mr Godfrey Bowen – the general

manager. Reference was made to the observations of Lord Reid in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170 and to the observations of Lord Parker, Chief Justice, in *Huckerby v Elliott* [1970] 1 All ER 189, 194.

24. I have already drawn attention to the extended definition of "employer" which is contained in section 2 of the Law. "Employer" is defined in terms which include not only the person who has entered into a contract of employment with the employee ("the contractual employer" - in this case, Air Tech Corporation Ltd) but also "any . . . manager of such person who is placed in authority over that employee". The offences under sections 3(2) and 7 of the Law are offences by the "employer". In the circumstances of this case, the jury could not convict Mr Godfrey Bowen under section 3(2) unless they were satisfied that he was a manager of Air Tech Corporation Ltd and a person placed in authority over the complainant. It was necessary for the judge to give a direction to that effect. He did so.

25. I have drawn attention, also, to the provisions of section 14(1) of the Law. It is clear that, where the contractual employer is a corporate body, "a manager, director, secretary or other similar officer" of that corporate body can be convicted under that section if, but only if, the offence committed by the contractual employer has been committed "with the consent or connivance of"; or is "attributable to any neglect on the part of" the relevant officer. Similar words appeared in section 305(3) of the Customs and Excise Act 1952 in the laws of the United Kingdom: the statutory provision which was under consideration in *Huckerby v Elliott* and to which Lord Parker's observations - on which counsel for Mr Godfrey Bowen seeks to place reliance in the present appeal - were directed.

26. It is important to keep in mind that, where an offence has been committed by a contractual employer who is a corporate body, not all those officers of that body who could be charged under section 14(1) of the Law could, necessarily, be charged also under section 3(2). To charge a manager of the

corporate body under section 3(2) it is necessary that he should have been "placed in authority" over the employee in respect of whom no standard health insurance contract has been effected and continued. Such a manager is liable as an employer; and the requirement (or lack of requirement) as to knowledge in his case is that applicable to an employer. It is no answer to a charge under section 3(2) to assert that, if the defendant had been charged under section 14(1), it would have been necessary for the Crown to establish that he had relevant knowledge. The Act plainly draws a distinction in this respect between those managers who are charged as officers under section 14(1) and those who are charged as employers under section 3(2). As I have said, Mr Godfrey Bowen was not charged under section 14(1); he was charged under section 3(2) of the Law.

27. Counsel drew our attention to section 3(7) of the Law. That section addresses the position where a person is employed by two or more employers. Put shortly, the section provides that the obligation to effect health insurance on his behalf and on behalf of his unemployed spouse and children falls on his principal employer. Sections 3(8) and 3(9) specify how the principal employer is to be determined. It was said that, if Mr Godfrey Bowen was an employer of the complainant – by virtue of the extended definition in section 2 – then he was not the principal employer: the principal employer was Air Tech Corporation Ltd. For my part, I would reject that submission. It is, I think, clear that the effect of the extended definition in section 2 is not to create two distinct employers for the purposes of the Law: the contractual employer and the manager placed in authority. Where the extended definition applies there is only one employer for the purposes of the Law (unless, of course there is a second contractual employer). The effect of the extended definition, where it applies, is that there may be more than one person (the contractual employer and one or more managers placed in authority) who are, together, to be treated as the employer. Sections 3(7) to 3(9) have no application in that case: they apply where there is more than one contractual employer.

28. There are, however, more formidable arguments against construing section 3(2) of the Law as imposing strict or absolute liability. These emerged in the course of the hearing before us.

29. First, it is said, the legislature could not have intended to impose strict liability in respect of each of the paragraphs of section 3(2): that is to say, it could not have been intended that an employer should be strictly liable for failing to insure himself and his unemployed spouse and children (in breach of the duty imposed by paragraphs (a) and (b) of section 3(2)) as well as for failing to insure his employee and his employee's child and unemployed spouse (in breach of the duty imposed by paragraphs (c) and (d) of that section).

30. Second, it is pointed out (correctly) that the offence is created by section 3(13) in respect of a failure to comply with section 3(1) as well as in respect of a failure to comply with section 3(2). This invites the question whether it was the intention of the legislature that every resident in the Islands should be strictly liable for failing to insure himself and his unemployed spouse and children unless he was a person who fell within one or other of paragraphs (a), (b) or (c) of section 3(1). The facts in the present case illustrate one result which, it is said, would follow from such a conclusion. As from 31 October 2002 the complainant was a person who was not, in fact, covered by a contract of insurance effected by his employer (although he should have been so covered). On the clear language of section 3(1)(a) the complainant was a person who, from 31 October 2002, was under a duty to effect his own health insurance contract. But, it is said, it would be bizarre to think that the legislature intended that he was committing an offence of strict liability in failing to do so when, (before he discovered the true position) he had every reason to think (wrongly as it turned out) that he was covered by a contract of insurance effected by his employer in respect of which his employer was making deductions from his salary.

31. Third, it is submitted that – given that section 8(1) imposes a duty on the employee to keep his employer informed of all facts related to the employer's liability under section 3(2) and of any change of circumstances which would affect the employer's liability under that section – it could not have been the intention of the legislature that the employer should be strictly liable (say) for failing to insure an employee's spouse who was formerly employed (and so not then within the scope of the duty imposed by paragraph (d) of section 3(2)) but who became unemployed without the employer's knowledge. It is important to keep in mind that, although section 8 of the Law may have been enacted with the protection of the employer in mind - in that, for example, it requires the employee to inform the employer when his spouse ceases to be an unemployed spouse for the purposes of paragraph (d) of section 3(2), so relieving the employer from a burden under that paragraph – it clearly does have the effect, also, of requiring the employee to inform the employer when his spouse becomes an unemployed spouse for the purposes of paragraph (d), so imposing an additional burden on the employer under that paragraph.

32. In my view it is reasonably clear that the legislature did not intend to impose strict liability in a case where the employer does not know of the person in respect of whom he ought to effect and continue a standard health insurance contract. So, if the employer does not know that the employee in question had a spouse or children or does not know the facts which would identify such spouse or children as persons in respect of whom he was required to effect a contract of insurance, the employer will not commit an offence under section 3(13) of the Law. I reach that conclusion for two reasons. First, because the existence and status of the employee's dependants are matters which may ordinarily be expected to be within the knowledge of the employee (rather than within the knowledge of the employer) unless and until the employee complies with his duty under section 8(1) of the Law. It would be unreasonable – and so not to be taken to be the intention of the legislature – for the employer to be exposed to strict liability in a case where, through the

default of the employee in complying with his duty under section 8(1), the employer did not know that there were persons who fell within paragraph (d) of section 3(2); or did not know who those persons were. Second, because that approach to (criminal) liability under section 3(13) is consistent with the legislature's intention (expressed in section 10(3)) to provide a defence to civil liability under section 10(1) in such cases.

33. If that is the correct view, there remains, of course, the important distinction that, in a prosecution under section 13(3) for failing to effect insurance in respect of the child or unemployed spouse of an employee, it will be for the Crown to establish that the employer did know of the identity of the person within section 3(2); whereas, in civil proceedings, the onus is on the employer to prove, by way of defence, that he did not have – and could not reasonably be expected to have had – that knowledge. But that distinction does not, I think, detract from the conclusion that it could not have been the intention of the legislature to impose criminal liability in respect of an employer's failure to insure a person within paragraph (d) of section 3(2) in a case where the employer did not know of that person – or, more accurately, did not know the facts which brought that person within paragraph (d).

34. It could be said that, if that is the correct view, the requirement that, in the prosecution of an employer under section 3(13) for failing to effect insurance, the Crown must establish that the employer knew the identity of the person in respect of whom he ought to effect and continue a standard health insurance contract must extend to other persons within section 3(2) – that is to say, to persons within paragraphs (a), (b) and (c) of that section – and, perhaps, that that requirement should apply in the context of a resident under section 3(1). I would reject such a submission. The factors which point to the legislative intention that the Crown must establish that the employer knew the identity of persons within paragraph (d) of section 3(2) – in particular, the provisions of section 8(1) and 10(3) – provide no support for a similar legislative intention in

respect of persons within paragraphs (a), (b) and (c) of section 3(2). The legislature must, I think, be taken to have assumed that the employer would, necessarily, know who those persons were. Similarly, in a case under section 3(1), the resident would know the identity of his unemployed spouse and his children.

35. I think it reasonably clear, also, that the legislature did not intend to impose strict liability on an employee who is prosecuted under section 3(13) (as a resident) for an offence under section 3(1) if that employee does not know that he is not covered by a contract of insurance effected by an employer under section 3(2). It could not have been the intention of the legislature to impose strict liability on the employee (as a resident) under section 3(1) where the default is that of the employer under section 3(2).

36. It follows, in my view, that in the prosecution of an employer under section 3(13) for failure to effect insurance under section 3(2) – where the failure alleged is in respect of a child and unemployed spouse of the employee – the Crown must establish (at the least) that the employer knew of that child and that unemployed spouse; and in the prosecution of a resident for failure to effect insurance under section 3(1), the Crown must establish (at the least) that that resident is not an employee – or (if he is) that he knew that he was not covered (as he should have been) by insurance effected by his employer – that he is not covered by a contract of insurance effected by Government and that he is not an uninsurable person.

37. But it does not follow from that conclusion that the Crown must establish any more extensive knowledge in those classes of case; or that the Crown must establish any knowledge in other classes of case which fall within sections 3(1) or 3(2) of the Law. The principle that it may be necessary for the Crown to establish knowledge in respect of certain matters – but not necessary for the Crown to establish knowledge in respect of other matters – was recognised by the Privy Council in the *Gammon* appeal. There, as I have

already explained, it was necessary – in the context of a prosecution under section 40(2A)(b) of the Hong Kong Building Ordinance – for the Crown to establish knowledge of the deviation from plan; but not necessary to establish knowledge that the deviation was material. It was necessary – in the context of a prosecution under section 40(2B)(b) of the Ordinance – for the Crown to establish knowledge of the manner in which the works were carried out; but not necessary to establish that there was a resulting risk of injury or damage.

38. For those reasons, notwithstanding the arguments advanced, I am satisfied that it is open to the Court to hold that the legislature intended to impose strict liability under section 3(2) of the Law: in the sense that it was the intention of the legislature that, in the context of a prosecution under section 3(13) for failure to comply with section 3(2), the Crown would not need to establish that the employer knew that there was no standard health insurance contract in effect in respect of his employee. The question on this appeal is whether that intention can be inferred from the provisions of the Law as a whole.

39. In my view the purpose for which the Law was enacted and the striking contrast between the language of section 3(2) – read with section 3(13) – and the language of section 14(1) demands that that question be answered in the affirmative. The judge was plainly correct to take the view that the imposition of strict liability on employers would promote the statutory aim – to ensure that those employed on the Islands were protected by health insurance – by encouraging greater vigilance. He was right to say that “imposing strict liability will clearly encourage employers to ensure their employees have basic health insurance”. The offence under section 3(13) is committed where the employer “fails to comply with subsection . . . (2)”: that is to say, where the accused, being an employer, fails to “effect and continue on behalf of each of his employees . . . a standard health insurance contract”. The offence under section 14(1) is committed where a corporate body has itself committed an offence under section 3(13) and that offence is proved to have been committed “with the consent or connivance of, or to be attributable to, any

neglect on the part of" a manager of that body. In the one case, the ingredient of the offence is failure to effect insurance: in the other case, the ingredient is consent, connivance or neglect. *Mens rea* is a necessary element in an offence under section 14(1), for the reasons explained in *Huckerby v Elliott*: it is not (save to the extent already explained) a necessary element in an offence under section 3(13).

40. For those reasons I would dismiss this appeal. I am satisfied that the judge did not misdirect the jury on the knowledge required in the context of an offence under section 3(13), where the offence alleged was failure to insure in compliance with paragraph (c) of section 3(2) of the Law.

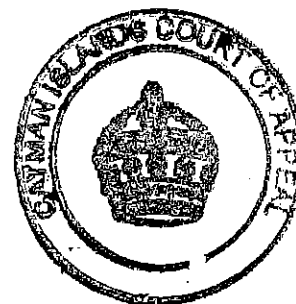
41. I should, however, say something about the circumstances in which the appeal has come before this Court. I have already mentioned that, following sentence, counsel for the defendants informed the judge that his clients intended to appeal the decision; but that no formal notice of appeal was ever given. Nor was any application made under Rule 40(2) of the Court of Appeal Rules (2004 Revision) to suspend the fine and the liability to imprisonment in default of payment to which Mr Godfrey Bowen was sentenced. The fines were simply not paid; and no steps to enforce the default order were taken.

42. On 15 May 2008 the Registrar of this Court – aware that there had been oral notification of intention to appeal - requested from counsel for the appellants a written notice of appeal: On 30 June 2008 – although written notice had still not been received -she informed counsel that (on the basis of the oral notification) she was minded to list the appeal for hearing on 29 July 2008; and she repeated the request for a written notice. On 8 July 2008 she was informed that counsel for the appellants would not be ready for a hearing during the summer sitting of this Court; and was asked to list the appeal for hearing in November 2008. On 10 September 2008 she reminded counsel for the appellants that written notice of appeal had not been received. For whatever reason the appeal was not heard during the winter sitting. On 18

February 2009 the registrar informed counsel that it would be listed for hearing on 25 March 2009. She reminded counsel for the appellants, again, that no written notice of appeal had been filed. On 12 March 2009 counsel sought a further adjournment on the ground that he was still not ready. That was refused and the matter came before the Court on 25 March 2009. There was still no written notice of appeal. Counsel applied for permission to file a notice of appeal – and grounds of appeal – out of time.

43. Given the history of the matter – which I have set out above – it was surprising (to say the least) that we should have been informed by counsel, when this appeal first came before us, that the reason why he had filed no written notice of appeal was that he believed that written notice had been filed by his clients. The sentences passed by the Grand Court some seventeen months ago have been ignored. We find that unsatisfactory. We express the hope that account will be taken of the matters to which we have referred; and that a similar position will not be allowed to occur in the future.

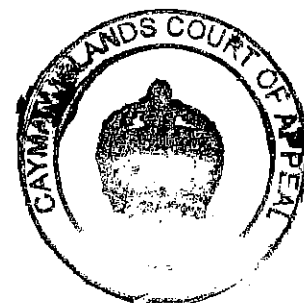
Chadwick, P.



Justice Forte, Justice of Appeal

44. Having read in draft the judgment of Sir John Chadwick, President, I agree with the conclusion and reasoning therein. In particular I agree that the offence created by section 3(13) in respect of the provisions of section 3(2) under which the appellant was charged creates an offence of strict liability for the reasons so clearly set out in the President's judgment. Significantly, when the legislature intended that *mens rea* in particular offences was necessary it clearly stated that in those sections, e.g. section 14.

Forte, J.A.



Justice Conteh, Justice of Appeal

45. I have had the benefit of reading in draft the judgment of the learned President. I agree with the reasons and conclusion that he arrived at that this appeal should be dismissed.

Conteh, J.A.

