18/80

SUPREME COURT OF WESTERN AUSTRALIA

WARREN v BARTLETT and ORS

Brinsden J

25 July; 30 August 1979

[1980] WAR 121; 4 ACLR 354; [1979] ACLC 32,419 (¶91-097)

COMPANY LAW – CERTAIN COMPANY RECORDS NOT KEPT – "THROUGHOUT THE PERIOD OF TWO YEARS" – SUBMISSION OF "NO CASE" – "EXEMPTION, EXCEPTION, PROVISO OR CONDITION" – PROOF OF "EXCUSE": *COMPANIES ACT* (WA).

Defendants were charged that they had knowingly and wilfully authorized or permitted the Company not to keep certain records throughout the period between the date of incorporation and the relevant day, contrary to the provisions of the *Companies Act*. The date of incorporation was 1/12/75 and the relevant day was 14/2/77. The Magistrate found that records were not properly kept between 1/7/76 and 14/2/77, but ruled that, because the complainant had not established that for the whole of the period 1/12/75 to 14/2/77 proper records were not kept, there was no case to answer.

The Court held (after discussing the history of the sections of the *Companies Act* involved) that if default is made at any time during the appropriate period an offence is committed. In the course of judgment a decision of the High Court of Justiciary (Scotland), *Laurenson v HM Advocate*, was referred to. It dealt with a similar provision in the *Companies Act* of the United Kingdom, and, referring to the expression "Throughout the period", came to the conclusion that "the section imposed a duty to keep proper books for the whole of the two year period. A failure to keep proper books for part of that period involved necessarily a breach of the duty".

In relation to the no case submission the Court said:

> "... on a submission of no case, the character of the question in law to be decided is whether the defendant could lawfully be convicted on the evidence as it stands – whether there is with respect to each element of the offence some evidence which, if accepted, would either prove the element directly or enable its existence to be inferred: see *Manning v Cory* [1974] WAR 60 per Burt J p61–62 and *Zanetti v Hill* [1962] HCA 62; (1962) 108 CLR 433 at p442; [1963] ALR 165; 36 ALJR 276 per Kitto J. There was therefore no occasion on the submission of no case for his Worship to make a finding of fact."

As to the words "every officer who is in default is, unless he acted honestly and shows that in the circumstances in which the business of the Company was carried out the default was excusable, guilty", the Court said:

"The point of interpretation of s374B upon which the submission turns is that though it is conceded that the burden is cast upon a defendant to show that in the circumstances in which the business of the company was carried on the default was excusable, nevertheless it is upon the prosecution to establish unless negatived as an exemption, exception or proviso, that a defendant did not act honestly. The distinction is drawn because the words are "unless he acted honestly" rather than "unless he shows he acted honestly". In my view far too much weight is placed upon the omission of the words "he shows that" in the first part of the exclusion. It seems to me, taking into account the policy of the Act, quite unlikely that the draftsman intended to make any change in the burden of proof from what appears in the United Kingdom Act by the omission of that phrase.

In s331 of the 1948 Act it is provided that an officer of the company is guilty unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable. In my view s374B lays down the principle of liability

which is meant to apply generally and then provides for some special ground of excuse, namely if the officer concerned shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable. The burden of proof is therefore placed upon the party seeking to rely upon the excuse: *Vines v Djordjevitch* [1955] HCA 19; (1955) 91 CLR 512, per Dixon CJ at 519; [1955] ALR 431. In other words this is a case of a general prohibition subject to an exception. It is not the case where the exception is an element in the specification of the prohibited act: see also *Barritt v Baker* [1948] VicLawRp 85; (1948) VLR 491 per Fullagar J at 494; [1949] ALR 144. In my view therefore, s72 of the *Justices Act* 1902-77 has no application in this particular case as the provision of s374B which provides an excuse is not a provision amounting to an exemption, exception, proviso or condition within the meaning of s72.

It also should be noted that the excuse is dependent upon two conditions, namely that the officer has acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable. The respondent, Levy's, interpretation of the provision would place the burden of proof partly on the prosecution and partly on the defence. It would, I think, be more difficult in most cases for the prosecution to establish a *prima facie* case that an officer did not act honestly in the failure of the company to comply with the provisions of s161A, than for the defence to establish that the officer acted honestly. For both these additional reasons, I think it improbable that Parliament intended what the respondent Levy contends.

[The Judgment concludes with a review of the facts and indicates what inferences the Magistrate should have drawn from them.]
