

39/75

SUPREME COURT OF VICTORIA

WALDRON (Registrar of Companies) v BIRD (No 2)

Fullagar J

22 August 1975

COMPANIES – COMPANY DIRECTOR CHARGED WITH SEVERAL OFFENCES IN RELATION TO HIS COMPANY – DEFENDANT STATED THAT HE HAD AN HONEST AND REASONABLE BELIEF IN RELATION TO A BILL OF SALE – *PROUDMAN v DAYMAN* DOCTRINE OF HONEST AND REASONABLE BELIEF CONSIDERED – CHARGES DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR.

HELD: Order nisi absolute.

1. It was argued that it was a defence to a charge of having committed the offence created by s187(1)(c) of the *Companies Act* that the defendant had an honest and reasonable belief in facts which, if true, would have been a defence or which, if true, would have led to the section being not contravened.
2. In the present case, after making every legally permissible inference in favour of the defendant, the proper conclusion was that the mistake which the defendant made may simply in his undoubtedly honest and perfectly reasonable belief that the bill of sale, which he knew to have been executed by the Roto Company in favour of the MGMA Company, did not in law make MGMA Company a mortgagee of the property of the Roto Company.
3. The matter as to which the defendant had an honest and reasonable belief was a pure matter of law and not a matter of mixed fact and law of the kind indicated and referred to in the judgment of Sir Owen Dixon in *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279; [1938] ALR 37.
4. Accordingly, it followed that the order nisi was made absolute.

FULLAGAR J: This is the return of an order nisi to review granted by Master Brett on 12th February this year. The defendant, Alex Neville Bird, was found not guilty of an offence charged under s187(1)(c) of the *Companies Act* 1961. The order nisi was granted upon seven numbered grounds and, in my opinion, the order nisi should be made absolute and, in my opinion, I should uphold all of the grounds of the order nisi except the ground numbered five.

Mr Rendit for the defendant respondent, Alex Neville Bird, argued that it is a defence to a charge of having committed the offence created by s187(1)(c) of the *Companies Act* that the defendant had an honest and reasonable belief in facts which, if true, would be a defence or which, if true, would lead to the section being not contravened, and relied upon the decision of the High Court of Australia in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 and particularly upon the judgment of Sir Owen Dixon at p540, In that case, Sir Owen Dixon said:

"It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule, an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence."

The second step of Mr Rendit's argument was that the relevant matter as to which Mr Bird had an honest and reasonable belief was a matter of mixed law and fact which he said was, on final analysis, question of fact within the meaning of the doctrine referred to in *Proudman v Dayman*. He contended that the essential mistake honestly made by Mr Bird was whether there was in existence a mortgage of the character described in s187(1)(c) of the *Companies Act*.

In the course of argument, Mr Rendit relied upon a passage in the judgment of Sir Owen Dixon in the case of *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279 at pp306-7; [1938] ALR 37.

In that passage, His Honour pointed out that many questions which involve necessarily questions of law are in reality questions of fact within the doctrine referred to in *Proudman v Dayman*. If a man A marries a woman B in the honest belief that B was once a married woman but has been divorced before his marriage to her, it can, of course, be said that, in a sense, the question of whether or not she was previously divorced is a question of law. But it often is, in my opinion, a question of fact in a very real sense. If A believes that B has been divorced, the belief when analysed includes a belief that at some time in the past, a judge of the appropriate court has pronounced a decree for dissolution of the marriage, that that decree has been duly taken out, that that decree has subsequently become absolute and that the judge who made the decree had jurisdiction to make it, both under the municipal law under which he acted and in accordance with the private international law principles of the Forum in which the marriage of A to B takes place.

It is therefore to be seen that A's belief that B has been divorced involves as a matter of legalistic logic a belief in a number of legal propositions. However, in most cases where the belief of A becomes relevant, A being a layman, the critical matter is whether A believes that some Judge has pronounced a decree for divorce which has been made apparently absolute by the execution of a piece of paper, and the question whether those things have been done or not is, in my opinion, a question of fact within the doctrine discussed in *Proudman v Dayman*.

In the present case, however, after making every legally permissible inference in favour of Mr Bird which, in all the circumstances, I am prepared to do, I think that the proper conclusion is that the mistake which he made may simply in his undoubtedly honest and perfectly reasonable belief that the bill of sale, which he knew to have been executed by the Roto Company in favour of the MGMA Company, did not in law make MGMA Company a mortgagee of the property of the Roto Company. He knew all the facts upon which the decision of that question could possibly turn. He knew that he was a director and the secretary of the MGMA Company and knew that a bill of sale had been executed in favour of that company by the Roto Company; and, more than that, he knew that a question of law arose as to whether those circumstances made MGMA Company 'a mortgagee of the property of' the Roto Company within the meaning (which is a matter of law) of the sub-section, and upon that question of law he sought the advice of a reputable firm of solicitors. I infer that that firm of solicitors doubtless acting *bona fide* and after due consideration of the question, advised him that the question ought to be answered in the negative and that the facts predicated did not in law make the MGMA Company a mortgagee of the property of the Roto Company for the purposes of the sub-section.

In my opinion the matter as to which Mr Bird had an honest and reasonable belief was a pure matter of law and not a matter of mixed fact and law of the kind indicated and referred to in the judgment of Sir Owen Dixon in *Thomas v R*. In my opinion, it follows from these conclusions that the order nisi should be made absolute and, upon my understanding of the grounds set out in the order nisi all the grounds should be upheld except ground five.

The Stipendiary Magistrate made reference to s365 of the *Companies Act*, sub-section (1) of which provides in effect that if, in any proceeding for default against a person to whom the section applies, it appears to the court that he is liable in respect thereof but that he has acted honestly and reasonably and that he ought fairly to be excused for the default, the court may relieve him wholly or partly from his liability on such terms as the court thinks fit. The Full Court of this Court has held that s365 of the *Companies Act* applies only to civil cases and not to criminal cases or cases for offences against direct statutory proscriptions. (See *Lawson v Mitchell* [1975] VicRp 57; [1975] VR 579 especially at p582.) I am, of course, bound by that decision and so is the Stipendiary Magistrate.

Mr Rendit has made it plain that he wishes to be recorded as making a formal contention that that view of the ambit of s365 is erroneous, in order to preserve his rights of any appeal that may be taken from my decision. Insofar as the Magistrate held or found that Mr Bird acted honestly and *bona fide* in accordance with what he reasonably believed to be the law, I think that he was undoubtedly correct in that finding. What I find to be error of law is that he treated that position as being relevant to the question whether or not the offence alleged was made out.

[Ed note: This case previously came before Mr Justice Gillard in relation to meaning of "mortgage", "judicial notice of signature", "presumptions of regularity" and "presumption of continuance". See MC5/1974.]