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SUPREME COURT OF VICTORIA

COMMISSIONER for CORPORATE AFFAIRS v GUARDIAN INVESTMENTS PTY LTD

Ormiston J

6-8, 24 February 1984

[1984] VicRp 81; [1984] VR 1019; [1984] 2 ACLC 165; 9 ACLR 162

COMPANY LAW – APPLICATION FOR ORDER TO APPOINT RECEIVER – INVESTIGATION BY COMMISSIONER FOR CORPORATE AFFAIRS – WHETHER INVESTIGATION CARRIED OUT UNDER COMPANIES CODE – PRE-CONDITION FOR INVESTIGATION – "REASON TO SUSPECT" – MEANING OF DISCUSSED: *COMPANIES (VICTORIA) CODE* SS16A, 573.

Section 16A of the *Companies (Victoria) Code* provides:

"Where the Commission has reason to suspect that a person has committed an offence under a provision of this Act, the Commission may make such investigation as the Commission thinks expedient for the due administration of this Act."

HELD:
(1) Before an investigation can take place pursuant to s16A, it is necessary for the Commission to have reason to suspect that a particular person has committed an offence under a specific provision of the Code.

(2) In s16A, the word "suspect" requires a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation as to whether an event has occurred or not.
***Dictum* of Kitto J in *Queensland Bacon Pty Ltd v Rees* [1966] HCA 21; [1966] 115 CLR 266; [1966] ALR 855; 40 ALJR 13, applied.**
***Fisher v McGee* [1947] VicLawRp 46; [1947] VLR 324; [1947] ALR 356, discussed.**

(3) Further, it is necessary to show that there are good grounds for holding the relevant suspicion.
***Misel v Teese* [1942] VicLawRp 16; [1942] VLR 69; [1942] ALR 100, applied.**

ORMISTON J: *[After setting out the relevant provisions of the Code and Act, and referring to the circumstances of the investigation carried out, His Honour continued]*: … **[8]** Upon its proper construction I consider that, before an investigation can take place pursuant to s16A, it is necessary for the Commission or its delegate to have reason to suspect that a particular person has committed an offence under a specific provision of the Code. In the present case I am not satisfied that Mr Whitehouse had any belief as to the affairs of the company other than that one of a number of persons, including the company, may have committed offences against one or more of a number of sections of the Code, and that his object in directing an investigation was merely to commence an enquiry as to whether or not such offences had been committed.

As I already said, that is not to suggest that Mr Whitehouse's direction that Mr Chung should investigate the matter was unlawful, although the procedure for an investigation under s16A had not been invoked. I should add that in the present case the evidence indicated that it was Mr Whitehouse's experience that ordinarily a combination of bad book-keeping and insolvency normally ran hand in hand with the commission of offences under the Code which led him to the conclusion that Guardian Investments was a proper company to enquire into, although I would conclude that the nature of the information revealed to Mr Whitehouse was not such as to lead him to any firm conclusions or even any specific suspicions.

The difficulty of ascertaining whether s16A had **[9]** been applied or invoked is compounded by the fact that no formal procedures are prescribed or have been adopted whereby it can be ascertained whether an investigation under that section has been commenced. Mr Whitehouse

conceded that he had no written record of the matter so that it seems difficult to me for the Commissioner to argue that, even if Mr Whitehouse had wrongly formed a reason to suspect that an offence had been committed, she could rely on any principle that these matters are inherently unexaminable. There is a line of cases which suggests that where a condition is satisfied upon the basis that a minister or public official has "reason to believe" something then the matter believed cannot be examined as to its truth or otherwise for the only question is whether the minister or official held the relevant belief: see *Lloyd v Wallach* [1915] HCA 60; [1915] 20 CLR 299 at p309 and 313; (1915) 21 ALR 353 and cf. *FCT v Brian Hatch Timber Co (Sales) Pty Ltd* [1972] HCA 73; [1972] 128 CLR 28 at pp56-58; 2 ATR 295; 45 ALJR 287 per Windeyer J. For myself I consider that those cases point at least to the conclusion that if it can be established by appropriate evidence that the minister or official has been moved "by some misconception of it or by some extraneous consideration" (*FCT v Brian Hatch Timber Co (Sales) Pty Ltd* at p58) then the conclusion may properly be attacked, as was suggested by Dixon J in *Avon Downs Pty Ltd v FCT* [1949] HCA 26; [1949] 78 CLR 353 at p360; [1949] ALR 792; 9 ATD 5; 4 AITR 195. But in the present case there is no formal document of satisfaction as to Mr Whitehouse's "reason to suspect" for it was not his practice to bring such a document into existence nor **[10]** does the section require one, however desirable that course may be in certain circumstances.

Thus in the present case, though I was not asked to determine whether such satisfaction was based on a misconception or an extraneous consideration, it is necessary for me to determine whether a suspicion of the relevant kind was in fact forged. Although the presumption of regularity might otherwise apply, I have had the benefit of hearing the witness himself give his evidence, as well as reading his affidavits, and at no stage did Mr Whitehouse explicitly state that he had "reason to suspect" that any particular person had committed any specific offence under the Code. He was prepared to say only that he had formed a suspicion that one or more of a number of persons may have committed offences under one or more sections. In my opinion that is not sufficient to satisfy s16A.

There is a further reason why I am not satisfied that Mr Whitehouse entertained the necessary suspicion. For this purpose it is necessary to determine what is the precise meaning of the word "suspect" in the context of the section. It is a word not uncommonly found in legislation but its meaning is not always clear. I prefer the analysis given by Kitto J in *Queensland Bacon Pty Ltd v Rees* [1966] HCA 21; [1966] 115 CLR 266 at p303; [1966] ALR 855; 40 ALJR 13. There in the context of s95 of the *Bankruptcy Act* 1924-1960 (now s122 of the *Bankruptcy Act* 1966) a payment is deemed not to be in good faith if it is shown that the payee accepted payment in circumstances where he knew or "had reason to suspect that the debtor was unable to pay his debts as they **[11]** became due ..." Kitto J stated:

> "In the first place, the precise force of the word 'suspect' needs to he noticed. A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as *Chambers Dictionary* expresses it. Consequently, a reason to suspect a fact exists is more than a reason to consider or to look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-section (4) is, I think, something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes – a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors."

This *dictum* was recently applied in the Supreme Court of New South Wales in *Re Chisum Services Pty Ltd* [1982] 1 ACLC 292 at pp293-294; (1982) 7 ACLR 641; 1 ACLC 292 and in the Supreme Court of Queensland in *Re Whitgift Nominees Pty Ltd (in Liquidation)* 68 FLR 258; (1983) 7 ACLR 680; [1983] 1 ACLC 1133 at p1137.

Since this case was argued I have looked at a number of authorities dealing with the meaning of the expression "reason to suspect" and similar phrases. They appear in a wide variety of legislation ranging from the *Gaming Acts* and summary offences legislation to the provisions in the *Crimes Act* relating to arrest. I do not believe any analysis that I have read in those cases would provide any basis for denying the distinction Kitto J drew in *Queensland Bacon Pty Ltd v Rees* (*supra*). The degree of mental conviction required by expressions connoting suspicion or belief has been the subject of a number of conflicting South Australian decisions **[12]** conveniently analysed

by Herring CJ in *Fisher v McGee* [1947] VicLawRp 46; [1947] VLR 324; [1947] ALR 356. However the problem considered in those cases was the distinction between "belief" and "suspicion".

Broadly speaking the conclusion drawn was that belief, but not knowledge, will be comprehended by the words "suspicion" or "suspecting". In one decision of the South Australian Full Court (*Lenthall v Newman* [1932] SASR 126 at p132) the Court stated that reasonable suspicion "is a state of mind in which the witness thinks, or believes, that the property is, or, at the least, that it may be, stolen or unlawfully obtained". That passage was cited with approval by Herring CJ in *Fisher v McGee* (*supra*) at p328. But belief that something may have occurred is different, in my opinion, from suspicion that it may or may not have occurred and the only case to my knowledge in which a lesser state of belief is required for reasonable suspicion are two decisions of Connor J in the Australian Capital Territory Supreme Court in *Cruikshank v Warren* [1976] 9 ACTR 30 and *McIntosh v Webster* [1980] 30 ACTR 19; (1980) 43 FLR 112 in which His Honour expressed the view that the phrase "reasonable cause to suspect" was satisfied if a member of the Police Force formed a reasonable view "that the person involved may have committed an offence": *McIntosh v Webster* (*supra)* at p27). No authorities were cited in either case and in particular there was no reference to the well known *dictum* of Kitto J in *Queensland Bacon Pty Ltd v Rees*.

Neither of these cases is sufficient reason for me to consider that the expression "reason to suspect" **[13]** comprehends something as slight as a reason to consider whether a particular offence has been committed or not. In particular if the latter two cases were intending to express such an opinion I would not follow them. My conclusion is that the word "suspect" requires a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation as to whether an event has occurred or not. In the present case I am not satisfied that the witness Whitehouse had, adapting Kitto J's words, any more than reason to consider or look into the possibility of the existence of offences by one or more persons against one or more of ss267, 555 and 556. He had reason to take that course, but I consider that that is not sufficient to constitute a reason for suspecting that any specific offence had been committed by any particular person against any one of those sections. In addition it should he noted that ss267 and 556 each describe at least two offences.

I should add that the expression "reason to suspect" might on its face point to the necessity of establishing a reason rather than a suspicion founded on the reason. However, in *Misel v Teese* [1942] VicLawRp 16; [1942] VLR 69; [1942] ALR 100 the Full Court held that the expression "reasonable cause to believe" in the *Police Offences Act* 1928 (s70) required proof both of an honest suspicion or belief and of just cause for such suspicion or belief, and they relied in founding their reasoning upon a decision of the South Australian Full Court in *White v Kain* [1921] SASR 339 in which the words there construed were "just cause to suspect". Consequently for the purposes of this **[14]** section it is necessary to show not merely that there were good grounds for holding the relevant suspicion, but also that the relevant suspicion was held. I have already held that no such suspicion was held by Mr Whitehouse. See also *Powell v Lenthall* [1930] HCA 43; [1930] 44 CLR 470. ...

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