**71/82**

**SUPREME COURT OF VICTORIA**

# *NICHOLAS v WADE (COMMISSIONER OF CORPORATE AFFAIRS)*

**Marks J**

**1 September 1982 — [1983] VicRp 66; [1983] 1 VR 703; 7 ACLR 45**

**COMPANIES – SUBSTANTIAL SHAREHOLDING – AWARENESS – AID AND ABET COMMISSION OF AN OFFENCE – *MENS REA*: *COMPANIES ACT* 1961, SS69D, 69E.**

**MARKS J:** This is the return of 26 orders nisi to review 26 convictions of the applicant ("Nicholas") for aiding abetting counselling and procuring ("aiding and abetting") breaches by Mid-East Minerals No Liability ("Mid-East") of the substantial shareholder provisions of the *Companies Act* 1961 ("the Act"). The respondent, the Commissioner for Corporate Affairs ("the Commissioner"), was the informant on 35 informations on which Nicholas was summonsed to appear on May 11, 1981 at the Magistrates' Court at Melbourne. In the course of the hearing nine were withdrawn. The informations related to the activities of Nicholas as Chairman of Directors of Mid-East between March and June 1979 when Mid-East purchased large parcels of shares in Metals Exploration Ltd ("Metals Ex").

The orders nisi each relate to a conviction and contain the same 14 grounds. Mr Gillard QC who appeared with Mr F Davey for Nicholas abandoned those relating to the informations being bad for duplicity, failure of the learned Stipendiary Magistrate to direct election by the prosecution "of a set of facts on which it intended to rely", and error in finding that "shares purchased were appropriated to Mid-East on a daily basis."

In the upshot Mr Gillard said the grounds on which he relied rested on three main arguments:-

> 1. That the Commissioner had failed to prove that Mid-East had become a substantial shareholder at any relevant time, in other words, any breach of the Act. Therefore, Nicholas could not be convicted of aiding and abetting.
>
> 2. That the Commissioner had failed to prove that Mid-East and/or Nicholas had at any relevant time the necessary "awareness" of the acquisition of a "substantial shareholding" or change thereof within the meaning of the Act.
>
> 3. That the learned Stipendiary Magistrate had misdirected himself as to the mental element of the offence which the Commissioner was required to prove against Mid-East and/or Nicholas.

The substantial shareholder provisions were in Division 3A of Part VI of the Act and applied to shares in Stock Exchange listed companies. By s69C a substantial shareholding in effect comprised "a relevant interest" in not less than ten per cent of the aggregate of the nominal amounts of all the voting shares in the company. The total issued capital of Metals Ex was 22,933,333 ordinary shares. By s69D(1) a substantial shareholder was required to give notice in writing to the company giving particulars of "the relevant interest". Section 69D(2) provided:-

> "A person required to give notice under ss(1) shall give the notice within 14 days after that person became or becomes aware of the relevant interest or interests by virtue of which he is a substantial shareholder."

Section 69E required notice to be given of any change in the relevant interest within 14 days after becoming aware of it. Section 69L, under which the informations were laid, provided that "a person who fails to comply with ss69D, 69E or 69F is guilty of an offence". By s69M knowledge of a servant or agent was imputed to the master or principals. Section 6A provided when a person had a "relevant interest in a share in a body corporate".

Section 6A so far as relevant provided:-

"6A(1) Subject to this section, a person has a relevant interest in a share in a body corporate—
(a) for the purposes of Division 3A of Part IV, if that share is a voting share and that person has power—
(i) to exercise, or to control the exercise of, the right to vote attached to that share; or
(ii) dispose of, or to exercise control over the disposal of, that share;

(2) It is immaterial for the purposes of this section whether the power of a person—
(a) to exercise, or to control the exercise of, the right to vote attached to a voting share in a body corporate; or
(b) to dispose of, or exercise control over the disposal of, a share—
is express or implied or formal or informal, is exercisable alone or jointly with another person or other persons, cannot be related to a particular share, or is, or is capable of being made, subject to restraint or restriction and any such power exercisable jointly with another person or other persons shall, for those purposes, be deemed to be exercisable by either or any of those persons.

(3) A reference in this section to power or control includes a reference to power or control that is direct or indirect or is, or is capable of being, exercised as a result of, or by means of, or in breach of, trusts, agreements, arrangements, understandings and practices, or any of them, whether or not they are enforceable, and a reference in this section to a controlling interest includes a reference to such an interest as gives control.

(6) Where a person—
(a) has entered into an agreement with respect to a share;
(b) has a right relating to a share whether the right is enforceable presently or in the future and whether on the fulfilment of a condition or not; or
(c) has an option with respect to a share and, on fulfilment of the agreement, enforcement of the right or exercise of the option that person would have a relevant interest in the share he shall, for the purposes of this section, be deemed to have that relevant interest in the share.

(8) A relevant interest in a share shall not be disregarded by reason only of—
(a) its remoteness; or
(b) the manner in which it arose."

The informations against Nicholas were heard at the same time as those on which Mid-East was convicted for the breaches of the Act which Nicholas was alleged to have aided and abetted. Mid-East has not appealed but it is not suggested that places any barrier to success here on the part of Nicholas.

The result (of the transactions) was a type of carousel, the money going in one direction and the shares in another but having the same likely points of departure and arrival. It worked this way:
Mid-East 'sold' the shares to FAI who could compel their sale to Hambro who could in turn compel their sale back to Mid-East. The circuit would be fully run if the various put or call options were exercised. But the likelihood of their exercise was enhanced by the financial arrangements with which they were enmeshed. FAI's "purchase" involved provision of the purchase price of the shares in exchange for an interest commitment at a money market rate calculated on the nominal value of the shares. FAI could recoup its outlay and interest only if the put or call options were exercised pursuant to the arrangement with Hambro. Hambro received a minimum "service fee" of $25,000 from Mid-East but the only "service" capable of being provided by Hambro to Mid-East was the call and put agreements with FAI, which if exercised would involve an outlay by Hambro it could recoup only if it put its option to Mid-East. Accordingly, the carousel was unlikely to break down. Its only possibility was if there was a meteoric rise in the value of shares in Metals Ex, an unlikely event within the period specified and in view of Metals Ex not having paid any dividend over the previous two years.

Later in April, Mid-East through Nicholas and Ashton generated another round of agreements to the same purpose, although in slightly different form, in relation to additional parcels of shares in Metals Ex. Nicholas arranged Accelerating Assets of Australia Pty Ltd ("Accelerating Assets") to play the role Hambro had in the earlier agreements. However Ashton conducted the negotiations with Consolidated Press Holdings Ltd. ("C.P.H.") which agreed to provide $1.5 million for the purchase of shares in Metals Ex. There was no agreement in writing between C.P.H. and Mid-East as indeed there had been none between F.A.I. and Mid-East. However written put and call agreements were made between C.P.H. and Accelerating Assets but only after Mid-East provided

financial wherewithal to Accelerating Assets to meet some conditions laid down by C.P.H. These conditions included the deposit of $500,000 with a bank to secure the performance of the put and call options, a loan by Mid-East to Accelerating Assets of $1.5 million and a guarantee from Corartie Pty Ltd the parent company of Accelerating Assets. In turn, by a written agreement, April 27, 1979, Mid-Fast granted to Accelerating Assets a put option on the subject shares in terms similar to the one to Hambro. On or about June 5, 1979 newspaper publicity resulted in Mid-East making a public disclosure of its shareholding in Metals Ex. Apparently the parties to the agreements were prepared to act, for the call and put options were exercised or assigned, the shares and money moved in accordance with their potential and Mid-East received the shares. On July 19, 1979 the Board of Mid-East was informed its holding in Metals Ex was 6,839,864 shares representing 27.12% of its issued capital.

The learned Stipendiary Magistrate held that Mid-East had a relevant interest in not less than 10% of the voting shares in Metals Ex by March 20, 1979 and that thereafter the purchases on the various dates set out in the informations amounted to changes of which notice was required by the substantial shareholder provisions of the Act. He held that the put agreements were "caught" by s6A(6) of the Act. Mr Gillard submitted that even if the learned Stipendiary Magistrate was correct in this regard in finding that no concluded agreement was reached prior to documentation he misdirected himself as to the mental element which the Commissioner was required to prove against Mid-East and Nicholas. I will deal with this aspect in due course.

Mr Gillard QC then contended that the agreements were effective to obviate need for notice after their execution April 2 and 3. The learned Stipendiary Magistrate held that the agreements did not overcome the statutory provisions, particularly in the light of s6A(6) and notice was required. As regards s6A(6), I understand the relevant agreements were those between Hambro and Mid-East on the one hand and Accelerating Assets and Mid-East on the other. It is accepted that they must be construed according to established legal principles and not otherwise. The question is whether the learned Stipendiary Magistrate was right or whether, if not, his decision otherwise can be supported. At the conclusion of the evidence for the prosecution submissions by counsel for the defendants that there was no case to answer were rejected, whereupon Mid-East and Nicholas each elected not to call any evidence. Further submissions were then entertained by the learned Stipendiary Magistrate.

At the conclusion of argument before me I drew the attention of counsel to an aspect of s6A(6) which was not the subject of argument. Apparently, neither had it been in the Magistrates' Court. Sub-section (6)(b) provides (*inter alia*) that where a person "has a right in relation to a share, whether the right is enforceable presently or in the future and whether on the fulfilment of a condition or not ... and on ... enforcement of the right that person would have a relevant interest in the share, he shall, for the purposes of this section, be deemed to have that relevant interest in the share". (My underlining.)

It is necessary to determine what sub-s (6)(b) means. I think its meaning includes a person being deemed to have a relevant interest where in relation to a share he has a right which arises or is enforceable on the fulfilment of a condition and if he enforced it he would have a relevant interest. I do not think sub-s (6)(b) refers only to an unenforceable right created at the time of and by the agreement which becomes enforceable on the fulfilment of a condition. It is difficult to think of an example of such a right or why such a narrow and subtle interpretation should be made. However this was not the basis of the decision of the learned Stipendiary Magistrate. He held that s6A(6)(a) applied so that the relevant put agreements themselves were "with respect to a share", the "fulfilment" of which would attract the deeming provisions. The argument before me focused substantially on the fulfilment of agreement concept and I think I should deal with it.

Argument took place as to whether the agreement should be regarded as conditional sales of the shares or as mere irrevocable offers to buy for valuable consideration. I think it inappropriate here to discuss the many cases on the topic. I conclude merely that the weight of authority of which *Laybutt v Amoco Australia Pty Ltd* [1974] HCA 49; (1974) 132 CLR 57; 4 ALR 482; (1974) 48 ALJR 492; *Braham v Walker* [1961] HCA 7; (1961) 104 CLR 366; [1961] ALR 402; (1961) 7 LGRA 167; (1961) 34 ALJR 459, *Goldsbrough, Mort & Co Ltd v Quinn* [1910] HCA 20; (1910) 10 CLR 674; (1910) 17 ALR 42, *Carter v Hyde* [1923] HCA 36; (1923) 33 CLR 115; 29 ALR 430; *Ballas v Theophilos* [1958] VicRp 91; (1958) VR 576; [1959] ALR 24, and No. 2 [1957] HCA 90; (1957) 98

CLR 193; [1957] ALR 713 might be regarded as leading examples, would compel the conclusion that the put agreements between Hambro and Mid-East and Accelerating Assets and Mid-East were indeed conditional sales of the shares. Each case I think depends on the language of the agreements but I am unable to distinguish the essential language of the agreements here from that of the agreements held in the above authorities to have been conditional sales. In my opinion, the authorities concerned with "options to purchase" are entirely in point, as I see no difference in principle between an option to "purchase" and an option to "put" or to "sell". Thus I think the learned Stipendiary Magistrate was correct in holding as he did that there was only one way in which the agreements could be fulfilled within the meaning of s6A(6), namely, by the sale which would result in Mid-East acquiring the shares.

This conclusion is reinforced by the decision of Helsham CJ in equity in *Re Adelaide Holdings Ltd* ([1982] 1 NSWLR 167; 6 ACLR 675; 1 ACLC 543, January 14, 1982). In that case Helsham CJ was concerned with quite a different problem but one which nevertheless involved consideration of the sister provisions in the New South Wales Code. They are identical save the word "performance" appears in place of "fulfilment". At p11 Helsham CJ said:

> "In entering into the agreement comprised in the put option Adelaide Holdings was then a person who had entered into an agreement with respect to issued shares and on performance of the agreement would have a relevant interest in those shares. I cannot see how it could be otherwise, in spite of learned senior counsel's attempt to argue otherwise in favour of Adelaide Holdings. The agreement gave the opportunity and right and obligation to Adelaide Holdings to get these 100,000 shares upon its performance, and on performance Adelaide Holdings would have the power to exercise the right to vote attached to those shares (s9(6) and 9(1)). This seems to me to be incontrovertible ..."

At p12 he said:-

> "I should perhaps mention that no argument was put to me that the put option could not be an agreement within the meaning of s9(6)" (the equivalent of our s6A(6)) of the code upon the basis that an option ought to be treated as a continuing offer and that no agreement with respect to an issued share came into existence until December 1981, when the notice of exercise of option was given. This raises the perennial question of the correct analysis in law of what an option is. I do not believe that this argument should prevail if it had been put."

It was then submitted by Mr Gillard that the learned Stipendiary Magistrate misdirected himself on the question of *mens rea*. This argument also has a degree of subtlety. Firstly it was said that Mid-East itself should not have been convicted because the Commissioner did not establish that Mid-East had the necessary awareness or mental element which was a necessary ingredient of the offence. Any such ingredient, it was said, had to be provided by Nicholas as the appointed representative (Mid-East's "brains") for the purposes of the subject activities. (See *R v Goodall* 11 SASR 94; (1975) 1 ACLR 17; *Mousell Bros Ltd v London & HW Rly Co* (1917) 2 KB 836 at 844; *HB Bolton (Engineering) Co Ltd v Graham* (1957) 1 QB 159 at 172; [1956] 3 All ER 624; *Tesco Ltd v Nattrass* ([1971] UKHL 1; [1972] AC 153 at 176; [1971] 2 All ER 127; [1971] 2 WLR 1166.) If Mid-East should not have been convicted then of course neither should Nicholas. However, if Mid-East was rightly convicted it did not follow that Nicholas was. For one thing, Mid-East could have imputed to it the knowledge of its agent Ashton (by virtue of s69M) whilst Nicholas could not.

Accordingly proof was required that Nicholas himself had "knowledge" or the mental element necessary for proof of the separate offence of "aiding and abetting". Further, it was argued that even if the offences of Mid-East in breaching ss69D and 69E were to be regarded as absolute nevertheless that of "aiding and abetting" could not, because, according to the principles of common law which governed it, proof of a guilty mind was necessary. The learned Stipendiary Magistrate in his reasons said:-

> "As to *mens rea* being a necessary element of proof of the charge I said that the offence here falls 'somewhere between the absolute offence and one where the proof of *mens rea* is necessary', simply put it means that the prosecution must prove (*inter alia*) that the defendants were aware of the relevant interest by virtue of which he is a substantial shareholder."

Later he said:-

> "As to the 'put' option agreement between Hambro and Mid-East, it is argued that Nicholas and thus

> the defendant company must be proved to have been aware of the circumstances by reason of which it had the relevant interest in the shares. As to this agreement it is said that it must be proved that Nicholas was aware of that deeming section. I do not think that knowledge of the provision of the section must be proved. Even if it were proved that Nicholas was not aware of the section ignorance of the law does not provide an excuse. In any case there is no evidence before the Court to say what belief Nicholas had as to the provisions of the Act except that Nicholas, the company and Ashton were well aware of the 10% substantial shareholding provisions and the necessity of giving notice."

As I understand Mr Gillard's submission the Commissioner was obliged to prove that Nicholas intentionally did not give the required notice knowing that he had a legal obligation to do so. This in turn meant that in the circumstances of this case the prosecution was obliged to prove that Nicholas knew that the various transactions including the put and call option agreements were ineffective to avoid the requirements of ss69D and 69E. Similarly, in relation to the first three informations Mr Gillard's submission was that the prosecution was obliged to prove an intention to commit the offence or, put another way, knowledge that notice was required and that intentionally it was not given. In this regard, the submissions assumed the mind of Mid-East was that of Nicholas.

Mr Gillard submitted that it is not correct to say that ignorance of the law in all cases is not an excuse and this was a case in which *mens rea* had to be proved although to some extent the knowledge of Mid-East and Nicholas to be established was knowledge of the law. In support, reliance was placed on *Lim Chin Aik v R* (1963) AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42 and *Secretary of State for Trade & Industry v Hart* (1982) 1 All ER 817; [1982] 1 WLR 481. In my opinion these cases turn on the true construction afforded the statutory provisions there under consideration. The general rule prevails that ignorance of the law provides no excuse. The exceptions, as the above authorities indicate, are where the statute under consideration requires interpretation to the contrary of the general rule.

The authorities on this subject are too numerous to discuss. I summarise as best I can my understanding of the law. There is a rebuttable presumption that *mens rea* or evil intention or knowledge of the wrongfulness of the act is an essential ingredient in every offence (per Wright J in *Sherras v DeRutzen* (1895) 1 QB 918 at 921; 11 TLR 369 approved by the House of Lords in *Lim Chin Aik* above cited) and the High Court in *Cameron v Holt* [1980] HCA 5; (1980) 142 CLR 342; 28 ALR 490; 54 ALJR 202). In determining whether the presumption is rebutted regard should be had to the wording of the statute and the mischief with which it purports to deal. In *Lim Chin Aik* (above cited) their Lordships said (at p174) that "it is pertinent also to enquire whether putting the defendant under strict liability will assist in the enforcement of the regulation. 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 regulation". Again at p175 they said:

> "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".

(See also *Cameron v Holt* [1980] HCA 5; (1980) 142 CLR 342 at 346; 28 ALR 490; 54 ALJR 202; *Sweet v Parsley* [1969] UKHL 1; [1970] AC 132 at p162; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470; *Warner v Metropolitan Police Commissioner* (1969) 2 AC 256; [1968] 2 All ER 356; (1968) 52 Cr App R 373; [1968] 2 WLR 1303.) The general rule is that where *mens rea* must be established it is knowledge of the facts which constitute the offence and not of the law which must be proved. (*Bank of New South Wales v Piper* (1897) AC 383 at pp389-390; *R v Warner* (1969) 2 AC 265 at p276.) It was accepted on behalf of the Commissioner that she was obliged to prove that Mid-East and therefore Nicholas "became aware" of the relevant interest at a particular time. This concession was necessary because the 14 days within which the notice had to be given only commenced to run after "awareness" of the relevant interest.

Accordingly that mental element was an ingredient of the offence which the prosecution was obliged to prove. Save as to that, I consider that the obligation to give notice was absolute. It could hardly be otherwise. Mr Gillard's contentions that the prosecution had to prove knowledge of the statute, of the legal obligation and a wilful intention to disobey it, cannot be supported by

any reasonable construction of the Act. The construction for which he contended would make the relevant provisions, in my view, virtually nugatory. It is unnecessary to analyse those provisions in detail. I observe merely that they reflect a clear intention on the part of the legislature to prevent company take-overs by stealth and to cast the legislative net as widely as possible to catch all manner of schemes of contrary purpose.

It is to be observed that regardless of what I have said, the evidence before the learned Stipendiary Magistrate was capable of a finding that Nicholas not only knew all the relevant facts but also the legal obligation to give notice. The evidence may well have compelled the inference that Nicholas believed he had successfully engineered avoidance of the need to give notice but that is not the same as belief that he (Mid-East) did not have control over the shares.

On the contrary the learned Stipendiary Magistrate would have been entitled in my view to infer from the evidence that Mid-East through Nicholas and Nicholas himself believed at all material times that control over the shares and therefore a relevant interest, had been retained. However, this is somewhat academic in the light of my view that any mental element which the Commissioner had to establish did not include knowledge of the law or knowledge that the 'carousel' transactions were legally ineffective to avoid need to comply with ss69D and 69E.

Accordingly, the Commissioner discharged her burden of proof of "awareness" if she proved that Mid-East by its appointed representative in this case Nicholas, was "aware" of the essential facts necessary to constitute the relevant interest which made Mid-East a substantial shareholder in Metals Ex and the various changes thereafter. There was ample evidence in this regard to support the decision of the learned Stipendiary Magistrate.

It is true, I think, that considerations in relation to "aiding and abetting" may be different from those governing the substantive offence. That results, I think, from what was said by Lord Goddard, CJ in *Johnson v Youden* (1950) 1 KB 544; (1950) 1 All ER 301:

> "Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence."

That statement was endorsed by the House of Lords in *R v Churchill* (No 2) [1967] 2 AC 244 and again in *R v Maxwell* [1978] 3 All ER 1140; (1979) 68 Cr App R 128; (1978) 1 WLR 1350. (See also *Ferguson v Weaving* [1951] 1 KB 814; [1951] 1 All ER 412; *Blackmore v Linton* [1961] VicRp 63; (1961) VR 374; *R v Glennan* (1970) 91 WN (NSW) 609; [1970] 2 NSWR 421; *Lenzi v Miller* (1965) SASR 1.) But it is not necessary to show that the aider and abettor knew all the matters known by the principal offender (*R v Maxwell* above).

As the appointed representative of Mid-East, Nicholas authorised and generated the purchase of the shares in Metals Ex, generated, participated in and understood the 'carousel' agreements and was kept regularly informed of all the relevant facts and circumstances relating to the acquisition by Mid-East of the shares in Metals Ex.

The learned Stipendiary Magistrate was well entitled to find as he did that Nicholas was guilty of the aiding and abetting charges and did not, in my view, misdirect himself as to the mental element involved. In my view, the Commissioner was not required to establish that Nicholas knew that Mid-East had according to law committed an offence before he could be found guilty of aiding and abetting. For these reasons, the orders nisi shall be discharged with costs to be taxed.

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