34/81

HIGH COURT OF AUSTRALIA

SHAPOWLOFF v DUNN

Gibbs CJ, Stephen, Murphy, Aickin and Wilson JJ

14 May 1981

[1981] HCA 21 (1981) 148 CLR 72; 55 ALJR 410; 34 ALR 417; 5 ACLR 577; [1981] ACLC 33,127

COMPANIES – S303(3) *COMPANIES ACT* 1961 (NSW) IS COMPATIBLE WITH S374(C) *COMPANIES ACT* 1961 (VIC).

1. Debt provable.
2. Reasonable or probable ground of expectation. Objective and/or subjective test.

WILSON J: On 20 February 1975 in the Court of Petty Sessions in Sydney the appellant was convicted of an offence under s303(3) of the *Companies Act* 1961 (NSW) ('the Act') as that provision stood in 1970. The information was laid by the respondent, in his capacity as an officer of the Corporate Affairs Department, in the following terms, namely;

> "that between the 2nd day of January 1970 and the 31st day of March 1970, in the course of the winding up of Stirling Henry Limited (hereinafter called "the Company") a company within the meaning of the *Companies Act* 1961 which was ordered to be wound up by an order of the Supreme Court on 5th April 1971 it appeared that one WALTER GEOFFREY JOHN SHAPOWLOFF (hereinafter called "the Defendant"), being at all material times an officer of the company was knowingly a party to the contracting of a debt provable in the winding up of the company, to wit a debt contracted with Messrs Donovan & Co and the said defendant had at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities of the company at that time, of the company being able to pay the debt."

Thereafter the appellant instituted proceedings by summons in the Supreme Court of New South Wales seeking the relief provided by way of statutory prohibition pursuant to s112 of the *Justices Act* 1902. The application succeeded before Cantor J, but an appeal to the Court of Appeal (Reynolds, Glass and Mahoney JJ A) was allowed unanimously, and the conviction and orders restored. The appellant now appeals to this Court by special leave.

The principles on which the Supreme Court is to act in the exercise of jurisdiction under s112 are well established. Section 115 provides, so far as relevant, that:

> "If ... in the opinion of the Court or Judge after inquiry and consideration of the evidence adduced before the Justice or Justices, the conviction or order cannot be supported, the Court or Judge may direct that the writ applied for be issued, and may make such further order as may be just and necessary ..."

The meaning of the phrase "the conviction cannot be supported" has been elucidated in decisions both of the Supreme Court of NSW and of this Court: *Ex parte Wetherburn: re Mills* (1935) 53 WN (NSW) 103; *Ex parte Ross: re Pym* (1953) 70 WN (NSW) 174; *Hooper v Gorman* (1976) 2 NSWLR 431; *Peck v Adelaide Steamship Co Ltd* [1914] HCA 31; (1914) 18 CLR 167; *Williams v Hobday* [1954] HCA 40; (1954) 91 CLR 193. These cases establish that a conviction will only be disturbed if there is no evidence within reason to support it or if there is such a fundamental error of law as leads to a failure to determine the relevant facts.

Mr McHugh QC, Counsel for the appellant, attacks the conviction on several grounds which I think may be considered conveniently under three heads. The first related to the creation of the alleged debt and includes the question whether there was any evidence to show that it was

a debt provable in the winding-up. The second focuses on the construction of the element of the offence described by the words "no reasonable or probable expectation ... of the company being able to pay the debt", and in particular whether the test of reasonable expectation is objective or subjective. The third involves a critical examination of the sufficiency of the evidence and of the magistrate's handling of it.

Section 303(3) of the Act reads as follows:

> "(3) If in the course of the winding up of a company it appears that an officer of the company who was knowingly a party to the contracting of a debt provable in the winding up had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time, of the company being able to pay the debt, the officer shall be guilty of an offence against this Act.
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> Penalty: Imprisonment for three months or two hundred dollars."

In relation to the first matter, Mr McHugh argues that the whole basis of the charge is misconceived in that it alleges that the debt was contracted with Donovan, and that it came into existence on the 5 February 1970 when Donovan acted on an order from Stirling Henry for 5000 Tasminex shares. He argues that the only contract between Stirling Henry and Donovan was an agency contract, under which Stirling Henry was liable to pay commission and to indemnify Donovan against any losses it might suffer. As the Principal, whether or not its identity was disclosed, Stirling Henry became liable to the vendors of the shares on the delivery of the share scrip to Donovan. The evidence shows, and it is not in dispute, that Donovan filled the order for 5000 shares by making twenty-nine separate purchases of shares, all of them on 5 February.

It will be noted that there is a degree of novelty about this submission. Hitherto, it has been argued that the fact that Donovan filled the order for 5000 shares with twenty-nine separate purchases led to the conclusion that there was twenty-nine debts rather than one contracted between Stirling Henry and Donovan on 5 February. In the Courts below, Counsel for the appellant at no time invoked the general principles of agency law to challenge the basic proposition in this case concerning the contraction of a debt between Stirling Henry and Donovan. In my opinion, the reason is not far to seek. The obligation on Stirling Henry to pay the price of the shares to Donovan which forms the foundation of the alleged debt was the subject of express arrangement between the parties, and this has always been conceded by the appellant. This emerges from the evidence of Mr JN Donovan, a principal of the firm. In the original Court of Appeal hearing, the occasion for which will be mentioned shortly, reference is made to certain agreed facts, including the fact "whereby it (Stirling Henry) agreed to pay Donovan & Co the price of the shares upon delivery of the scrip to Donovan & Co": *Shapowloff v Dunn* (1973) 2 NSWLR 468, at pp470-471. Cantor J refers to such an agreement in this case as "a special arrangement".

The meaning of the word 'debt' in s303 in its application to the facts of this case has been the subject of prolonged controversy. Initially, the prosecution attempted to base the alleged offence on the contraction of a debt evidenced by the computation of a debit balance to an account. The facts were that between 2 January 1970 and the 31 March 1970 Stirling Henry entered into a series of contracts with Donovan, stock and share brokers, for the purchase of shares from time to time. The arrangement was that Stirling Henry would pay Donovan the price of the shares upon delivery of the scrip to Donovan. On 5 April 1971 Stirling Henry was ordered to be wound up. Despite some payments by Stirling Henry to Donovan, the account was in debit, and it was this balance upon which the prosecution relied. The case for the prosecution having been opened before the magistrate, the appellant instituted proceedings in the Court of Appeal of the Supreme Court of NSW seeking, *inter alia*, a declaration as to the construction of s303(3) of the Act. As already appears, the decision of the Court is reported. The Court concluded that the contracting of each debt and not the ultimate indebtedness is the essential element of any particular alleged offence, and made a declaration in the following terms:

> "that, for the purposes of s303(3) of the *Companies Act*, where a series of contracts are made from time to time which result in a liability on behalf of the company to pay in respect of each of them then each such liability constitutes a debt; and the time when each such debt is contracted is the time when each respective liability arises, and not the time or times when the balance is declared or computed."

As a result of this declaration the prosecution elected to proceed on the basis that the debt the subject of the information was a sum of $131,315.50 being the price of 5000 Tasminex shares purchased by Donovan on 5 February 1970 to meet an order lodged by Stirling Henry on the same day. The appellant was represented in the proceedings before the magistrate by Mr Murray QC who argued that the information was still bad for duplicity, this time because there was not one debt but twenty-nine debts contracted on 5 February, being the number of distinct transactions entered into by Donovan in the course of filling the order. The magistrate found that the twenty-nine transactions required to fill the order were sufficiently integrated to establish the creation of a single debt based on the contract between Stirling Henry and Donovan. In the proceedings before Cantor J the same argument for the appellant was propounded by Mr Officer QC but again it failed, this time after a careful and exhaustive consideration by his Honour, including a reference to *Byrne v Garrisson* [1965] VicRp 70; (1965) VR 523, *Jemmison v Priddle* (1972) 1 QB 489; (1971) 56 Cr App R 229, *R v Merriman* (1973) AC 584; (1972) 3 All ER 42; (1972) 56 Cr App R 766 and *Phillips v The Corporate Affairs Commission* (1974) 2 NSWLR 489. The point does not appear to have been canvassed in any detail in the Court of Appeal, where the appellant was not represented by Counsel.

It remains to consider, in connection with the alleged debt, the objection that it was not one "provable in the winding up". Mr McHugh argues that the prosecution failed to prove the delivery of any of the relevant scrip to Donovan, with the result that it has not been shown that Stirling Henry ever became liable to pay the purchase price of the shares. There is therefore no proof of the contraction of a debt provable in the winding up.

Mr Handley QC Counsel for the respondent makes two answers to this argument. The first is to canvass the evidence to show the proof by documentary evidence of the delivery of the scrip to Donovan; the second is to argue that in any event a contingent debt came into existence on 5 February 1970 and that such a debt satisfied the description of a debt provable in the winding up. In this latter regard, he relies upon s291(1) of the Act, which reads as follows:

> "291. (1) In every winding up, subject in the case of insolvent companies to the application in accordance with the provisions of this Act of the law of the Commonwealth relating to bankruptcy, all debts payable on a contingency and all claims against the company present or future certain or contingent ascertained or sounding only in damages shall be admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value."

In my opinion, it is too late in the day for Mr Handley to succeed in making his first point. The magistrate's reasons show that the question of the proof of the actual delivery of the scrip was put in issue by the defence, and the magistrate expressly upheld its contention. As I understand it, the finding was not challenged by the respondent either before Cantor J or the Court of Appeal. It now appears that the critical exhibits have been mislaid and cannot be found. In any event, it would be a serious step for this Court to allow an informant to challenge, for the first time at this late stage, an adverse finding of the magistrate.

Nevertheless, the second point is one that found favour with the Court of Appeal in 1973, and subsequently with the magistrate, Cantor J and the Court of Appeal. In 1973 in the course of delivering the judgment of the Court, Jacobs P referred to the phrase used in s303(3), "a debt provable in the winding up" and said:

> "That refers to the quality of the debt, not to the amount of a proof in the winding up". (p472)

Mr McHugh argues that there was no debt until Donovan received some scrip; then, assuming default in payment by Stirling Henry, Donovan would be entitled to re-sell the shares, in which case it would be entitled to prove in the winding up only for the amount of any shortfall. In my opinion, this argument fails to grapple with the liability which is incurred by Stirling Henry on 5 February when Donovan fulfils its order by buying 5000 Tasminex shares. Undoubtedly that transaction gave rise to a liability of some sort. In the absence of proof of the delivery of the scrip to Donovan, the nature of the obligation contracted on 5 February remains that of a contingent debt. It is a debt which Stirling Henry is obliged to pay only if and when scrip is received by Donovan. Is such a debt provable in the winding up? Section 291 supplies the answer. It establishes that a contingent debt is a debt of a kind which is capable of being proved in a winding up. One is

not required, for the purposes of s303(3), to evaluate the contingency in order to arrive at a "just estimate' of the debt. All that s303(3) is concerned with in this regard is the contraction on a particular day of a debt of a certain quality. It is not concerned with a just estimate of the amount of the debt when it comes to be proved in the winding up. In my opinion, therefore, the submission fails.

Then Mr McHugh argues that the conviction cannot stand because the magistrate misdirected himself as to the law applicable to the allegation that at the time of contracting the debt the appellant had "no reasonable or probable ground of expectation", after taking into consideration the other liabilities of the company at the time, of the company being able to pay the debt. He complains that the magistrate applied an objective test instead of a subjective one to the evidence tendered in proof of this element of the offence, and relies, *inter alia*, on the concluding passage of the magistrate's reasons, which reads as follows:

> "I have come to the conclusion that a reasonable and prudent person, especially a Director in the position of the defendant and being cognisant of the over-all financial position of Stirling Henry Ltd would not have reasonable or probable grounds of expectation of that company being able to pay the debt of $131,315.50 which I have found the defendant contracted for on the 5th February, 1970."

The phrase in question has a long history in bankruptcy legislation, and has been the subject of judicial consideration both in the United Kingdom and here in Australia. In *Ex parte Brundrit, In re Caldwell* (1867) LR 3 Ch App 26, Lord Cairns ruled that in order to subject a bankrupt to the penalties of s159 of the *Bankruptcy Act* 1861(UK), as having contracted debts without reasonable expectation of being able to pay the same, it must be shown that there are particular subsisting debts which at the time when they were contracted he could not reasonably have expected to be able to pay, and that the Court must apply its mind to all the circumstances under which they were contracted.

In *Ex parte Mortimore* [1861] EngR 253; 45 ER 1011; (1861) 3 De GF & J 599 it was held by Lord Campbell LC and Knight Bruce LJ, that the phrase "without reasonable probability at the time of contract of being able to pay them" contained in s223 of the *Bankrupt Act* 1849 (UK) means "without a reasonable probability, reasonably supposed by the trader to exist at time of the contract, that he would be able to pay", The Lord Chancellor emphasises that the words in question refer you to "the state of the intentions, of the belief, of the conviction of the debtor".

The Australian cases are wholly consistent with this approach: *re Hill* (1870) 1 AJR 172; 1 VR (L) 192, *re Todd (No. 2)* [1910] NSWStRp 43; (1910) 10 SR (NSW) 490; 27 WN (NSW) 110; *re London* (1921) 39 WN (NSW) 29. Against the background provided by the history of the phrase in the bankruptcy legislation, it seems to me that the meaning of the relevant words of s303(3) is clear. The prosecution must prove beyond reasonable doubt that at the time of contracting the debt the defendant himself had no expectation, reasonably grounded in the whole of the circumstances then existent as he knew them, of being able to pay the debt. It will be seen that the test involves a blending of subjective and objective considerations. The test of reason imports an objective standard, but it is to be applied to the facts as known to the defendant.

Given this construction of the provision, I am unable to accept the submission of the appellant. The defendant himself cannot be the arbiter of the reasonableness or otherwise of an expectation that he would be able to meet the debt. However, it is a question of his expectation, and whether that expectation is objectively reasonable.

The question then is whether the magistrate erred in the manner in which he handled this aspect of the charge. I have already stated the magistrate's conclusion, and indicated the reliance placed by the appellant upon the manner of its expression as suggesting an erroneous approach to the question. Earlier in his reasons, the magistrate described the question for him as "whether or not I am satisfied that the defendant, at the time the debt was contracted, had no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of Stirling Henry Limited being able to pay the debt?". He then reviewed the circumstances as they were in the period leading up to and including 5 February 1970 when the relevant debt was contracted. These circumstances included the trading by Stirling Henry in Tasminex shares from 31 December 1969, the volatility of those shares, the postponement of liability for payment pending delivery of the scrip, and the position regarding the company's assets and liabilities as

they were on 5 February. The consideration of this latter item was dominated by four items: the value to be attributed to the large parcel of speculative shares held by the company in Endurance Mining NL, a liability approaching one million dollars in respect of Tasminex shares purchased prior to 5 February at prices well above the then market price, a contested debt due to the company in the sum of $173,913, and a disputed tax liability of $370,000. The magistrate devoted express and particular attention to the role played by the appellant in the management of the business of the company at material times, with a view to determining the state of his knowledge of the circumstances, and came to the conclusion that he was aware of all the relevant facts. The appellant acknowledges that he cannot challenge that finding,

The appellant did not give evidence, with the result that in considering the question of any expectation by him of an ability to pay the relevant debt and the existence of any reasonable or probable ground for such expectation, the magistrate lacked direct evidence from him. However, evidence had been adduced of an examination of the appellant before the Master in Equity under the provisions of s249 of the Act. In the course of that examination, the appellant was asked:

> "Well, as a matter of fact you did not really look at the situation to see how you were going to pay for the Tasminex shares you were ordering?"
> His Answer was: "No, I don't think so."

As the examination proceeded, the appellant mentioned several factors as evidencing grounds for an expectation of the company's ability to pay for the shares. In my opinion, the course adopted by the magistrate clearly emerges from his reasons. He ascertained the relevant facts, satisfied himself that the appellant was in possession of that information on 5 February, and then assuming an expectation on the appellant's part of an ability in the company to pay the relevant debt proceeded to evaluate the contingencies to which the facts were subject in a search for any reasonable or probable ground for that expectation. As a result of that exercise, the magistrate came to the conclusion that has been cited. I am satisfied that he did not misdirect himself as to the task which the proof of this element of the charge imposed upon him. At all times he was guided by the consideration that it was the whole of the circumstances as they were known to the appellant at the time of the contraction of the debt which required to be examined with a view to deciding whether those circumstances supplied any reasonable or probable ground of expectation of an ability in the company to meet the debt when it would be required to do so.

For these reasons, I would dismiss the appeal.
