Supreme Court Notes

by Anita Del Medico

CORPORATIONS - Winding up - Statutory Demand - Application to Set Aside - Costs of Application - Principles for Award of Costs - *Corporations Law (Commonwealth)* S 459N.

Ranford Gold Mines Pty Ltd -v- P & H Earthmoving Pty Ltd

25.05.94 Kearney J

The applicant ("A") had succeeded in obtaining an order on 24.05.94 that the respondent's ("R") Statutory Demand of 09.02.94 under S 459E (2) (e) of the *Corporations Law* be set aside (S 459G *Corporations Law*). A had applied for costs and this had been contested by R.

Counsel for A argued that the ordinary principle (that costs should follow the event) be applied, as A had done nothing to render it inapplicable. A had not "concealed its hand" from R until R had served its Statutory Demand on 09.02.94. A director of R had given affidavit evidence to the effect that 2 days' before the issue of the statutory demand, A had indicated in some detail to R the basis of its denial of indebtedness.

Counsel for R submitted that there should be no order as to costs because A's case had been provided late - only 2 days' before the hearing and until then R could reasonably have expected to succeed.

HELD, ordering costs in favour of the applicant:

Section 459N *Corporations Law (Commonwealth)* vests in the Court discretionary power to order R to pay A's costs of its successful action to set aside the statutory demand. R could not rely on having been taken by surprise as it chose to unsuccessfully contest the application. The following statement of Heerey J in *Felkro Nominees Pty Ltd -v- Austissue Pty Ltd* (1993) 11 ACSR 607 and 608, followed: "... creditors have to realise that if they invoke winding up provisions by issuing a statutory demand they run the risk that if a debtor establishes that the amount claimed is subject to a genuine dispute, the debtor will get an order for costs, as S 459N expressly contemplates."

Application for costs.

A Wyvill, instructed by Halfpennys, for the plaintiff/applicant.

N Henwood, instructed by Cridlands, for the defendant/respondent.

CRIMINAL LAW - Justices's Appeal - criminal damage - whether proof of aggravating factors in S 251 *Criminal Code* goes to greater punishment for the offence in S 251 (1) or affects the identity of that offence - SS 251, 188 and 305 (4) *Criminal Code.*

Joshua -v- Thompson; Svikart; Thompson

27.05.94 Kearney J

The appellant ("A") appealed inter alia against a sentence imposed by the CSJ after he had pleaded guilty to an offence of unlawfully damaging school property, and a circumstance of aggravation in that the loss occasioned by the damage exceeded $500.00. The offence was charged in an indictment as an offence under S 251 (1) *Criminal Code*, the loss occasioned thereby being charged as a circumstance of aggravation pursuant to SS 251 (2) (c) and 305 (4) *Criminal Code.*

In the course of the appeal, which was allowed on other grounds (not reported), Counsel for the appellant submitted that the indictment had wrongly charged criminal damage with a circumstance of aggravation, that S 251 created 13 separate offences, one of which was constituted by S 251 (2) (c), that the indictment should have charged it as such and that the proceedings on the indictment were a nullity. Section 251 *Criminal Code* relevantly provides:

"(1) Any person who unlawfully damages any property is guilty of an offence and is liable to imprisonment for 2 years.

(2) if -

(a) ...

(b) ...

(c) the loss caused or intended to be caused by such damage is greater than $500.00; or

(d) ...

the offender is guilty of a crime and is liable to imprisonment for 7 years."

HELD: A's Counsel's submission as to the proper construction of S 251 is very arguable, but the better view is that there is but one "offence" created by S 251 and 12 different circumstances of aggravation and the indictment was correctly framed. Section 251 is to be similarly treated to S 188 *Criminal Code* and in O'Brien -v- Fraser (1989 - 90) 66 NTR 9, Asche CJ had held that S 188 (2) does not create separate offences, but circumstances of aggravation of the offences

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created by S 188 (1). The fact that S 251 (1) speaks of an "offence" and S 251 (2) speaks of "a crime" makes no difference: Kingswell (1985) 159 CLR 264, referred to.

[The case does not call for further reporting.]

Justices' Appeals.

W J Stubbs, Counsel for the appellant, instructed by NAALAS.

C B Cato, Counsel for the respondent, instructed by DPP.

CRIMINAL LAW - Justices' Appeals - Sentencing - Breach of Recognisance after serving partially suspended sentence - Whether sentence for new offence may be made partially cumulative upon the term for which the offender is committed when in breach of the recognisance - S 405 (3) *Criminal Code*; SS 5 (1) (b), 6 (3) (d) and (e) *Criminal Law (Conditional Release of Offenders) Act*.

Kuiper -v- Svikart and Hill
01.06.94 Kearney J

On 08.07.93 the appellant ("A") was sentenced to an effective term of 12 months imprisonment for 7 offences. Pursuant to S 5 (1) (b) of the *Criminal Law (Conditional Release of Offenders) Act* (the "Act"), the court directed that he be released on a good behaviour bond after serving 3 months. He was released after serving 3 months. On 19.01.94, he was convicted by a Magistrate of 26 offences committed during the currency of the bond. The Magistrate dealt with A under S 6 (3) (e) of the *Act* by committing him to prison to serve the balance of the term of imprisonment unserved and then sentenced A to a total of 26 months imprisonment for the 26 offences. He directed that those sentences be served in part concurrently with and in part cumulatively upon the balance of the original term. It was argued on appeal that this direction was an error in law. The question raised by this ground was how S 405 (3) *Criminal Code* is to be interpreted in light of S 6 (3) (e) the Act.

Section 405 (3) of the *Criminal Code* provides:

"(3) When a person who is convicted of an offence is undergoing, or has been sentenced to undergo, for any offence a sentence involving deprivation of liberty, the punishment to be inflicted upon him for the first-mentioned offence may be ordered to take effect on the expiration of the deprivation of liberty for the last-mentioned offence or any earlier day."

Section 6 (3) (e) of the *Act* provides, as far as is relevant, that when a person is found to be in breach of a bond entered into under S 5 (1) (6) of the *Act*, the Court may:

"(e) in a case where the person having been sentenced, was released ... after he had served a specified part of the sentence imposed on him - commit the person to prison to undergo imprisonment for such term, being a term not exceeding ... the balance of that sentence ...".

It was submitted by Counsel for A that at the time A was convicted of the 26 offences he was not then a person "undergoing or ... sentenced to undergo ... a sentence involving a deprivation of liberty" in terms of S 405 (3) *Criminal Code*. It was submitted that for S 405 (3) to apply at the moment of conviction of the 26 offences, the offender must already have been "sentenced to undergo ... a sentence involving deprivation of liberty" for the earlier offence, and here he had been sentenced after that conviction. It was submitted that therefore the sentence of imprisonment for the 26 offences could not be made partially cumulative upon the "sentence involving deprivation of liberty" which arose out of the breach of bond. Counsel for the Crown submitted inter alia, that the partially suspended sentence of 08.07.93 was "a sentence of imprisonment involving deprivation of liberty" for the purposes of S 405 (3).

HELD, dismissing the appeals:

It was not necessary to decide whether the submission of Counsel for the Crown was correct. S 405 (3) is no warrant for directing that a period of "deprivation of liberty" imposed by reactivating a suspended sentence consequent upon a breach of bond be served cumulatively upon the sentences for "new" offences. For the purposes of S 405 (3) the order of sentencing is all important. The Magistrate was correct in first committing A to prison under S 6 (3) (e) of the *Act* by way of reactivating the 1993 partially - suspended sentence and thereafter sentencing him in respect of the 26 offences and utilising S 405 (e) to direct that those sentences be served in part concurrently with and in part cumulatively upon the term for which he had just committed A in respect of the 1993 offences. The position under S 405 (3) is to be tested as at the moment of sentencing for the second offence, rather than at the moment of conviction.

Dunn [1984] 2 QdR 400 at 401, per Connolly J, followed.

Section 405 (3) looks to the situation at the moment of sentencing for the 26 offences, not at the moment of convicting for them.

Justices' Appeals.

P Burrows, Counsel for the appellant, instructed by NAALAS.

C B Cato, Counsel for the respondent, instructed by the DPP.