ANNOTATED

IN THE HIGH COURT OF AUSTRALIA NO. S 218 OF 2011
SYDNEY REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF NEW SOUTH WALES

BETWEEN: TASTY CHICKS PTY LIMITED
First Appellant
ANGELO TRANSPORT PTY LIMITED
Second Appellant
SOURIS HOLDINGS PTY LIMITED
Third Appellant
MINAS SOURIS
Fourth Appellant
JENNY SOURIS
Fifth Appellant

AND: CHIEF COMMISSIONER OF STATE REVENUE
Respondent

REPLY

Part I:

1. The appellants certify this Reply is in a form suitable for publication on the internet.

Part II:

2. RS [2]-[3] should not be accepted for four reasons. *First,* the grant of special leave is limited to the "*substance of ... point 5 of the Respondent's summary of argument*". This requires the consideration of the approaches of the Primary Judge and Court of Appeal to delineate the "*review*" rights conferred by s. 97 of the *Administration Act*. This necessarily involves an analysis of the functions of both Courts exercising s. 97 jurisdiction. Not only did the Court of Appeal incorrectly interpret Part 10 of the Act, because it imported, without justification, assumed notions of the proper function of the Primary Judge, it also failed to apply the principles that it held to be applicable, as described in AS [72]-[81], by making the errors addressed in AS [82]-[126].

3. *Secondly,* the appellants were invited to address on special leave on merits in response to the "*futility*" contention. They addressed until informed they no longer needed to be heard ([2001] HCA Trans 151 at p.5 line 120). The respondent gave *no* response to it.

4. *Thirdly,* appeal grounds directed at reversing the findings of an intermediate appellate court, as to the jurisdiction of the Primary Judge to determine a controversy between parties, are not properly justiciable unless they support or respond to an appeal against the findings of the Primary Judge which, once determined, resolve that controversy.

5. *Fourthly,* the grounds of appeal, save for ground 6 (objected to because "*it is repetitive of ground [3]*"), were agreed between the parties before the notice of appeal was filed.

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Part IV:

6. In reply to RS [7]-[8], the respondent agreed with applicants' summary of argument [II.1]-[II.3] (**AB111-112 – special leave**), namely, that they each owned and managed their businesses: respondent's summary of argument [II.6] (**AB427 – special leave**). That concession is relevant to an assessment of whether the Court of Appeal fell into error in re-exercising the discretion to de-group as an aspect of the miscarriage ground.

Part V:

7. In reply to RS [10]-[11], and adopting their subparagraph numbering in reply to them:

(a) the argument at AS [52]-[53] calls in aid sections 2 and 5 of the *Australia Act* only to make good the appellants' contention that the separation of powers doctrine, which is the rationale for the principles stated in *Avon Downs*, has no direct application to the Supreme Court of a State exercising State power;

(b) the respondent's proposition that the grouping provisions have no relevance to this appeal because it is limited in its terms to de-grouping (notice of appeal at [1] (**AB 231**)) is erroneous for two reasons. *First*, the discretion to de-group cannot be properly exercised unless the basis for grouping is understood. *Secondly*, for the reasons given at AS [97]-[105], the Court of Appeal made various factual errors in applying grouping provisions which led to, and also compounded, the errors it made in its application of de-grouping provisions;

(c) the respondent's criticism of the appellants' reliance on the legislative history of Part 10 of the *Administration Act*, on the ground that it analyses provisions other than those in the notice of appeal, should not be accepted. Sections 97 and 100 of the *Administration Act* cannot be construed in isolation. They must be interpreted in their proper statutory context, especially the part (Part 10 – Objections and reviews) they are in, to ascertain their true legislative purpose;

(d) Chapter III of the *Constitution* arises because it is at the heart of the separation of powers doctrine, which is relevant for the reason in subparagraph (a) above.

Part VI:

A. Reply to the respondent's submissions in narrative form

8. Contrary to RS [14], the essential reasoning of the Court of Appeal on the nature of the review is found in [32]-[33] (**AB203**) and not in [36] (**AB204**). The culmination of the reasoning on nature of the review is [33] (**AB203**). At [35] (**AB204**), the Court of Appeal starts to apply its conclusion on the nature of the review to the facts. The reasoning at [35]-[97] (**AB204**), as its headings suggest, is an *application* of what precedes it (at [32]-[33]) in the first period. The reasoning at [98]-[114] (**AB218**), as its heading suggests, is an *application* of the reasons at [32]-[33] in the second period.

9. The reasoning at [36] is wholly inconsistent with that at [32] on nature of the review. At [32] (**AB203**), a finding was made that a strict right of appeal lay to the Supreme Court because of the limitation in the bestowal of jurisdiction in s. 97(1) of the *Administration Act*, due to ss. 19(2) and 75A of the *Supreme Court Act*, by virtue of their engagement by s. 97(4): see [29]-[31] (**AB202**). If correct, the Supreme Court's jurisdiction is the same, irrespective of the nature of the decision, because the nature of the decision does not inform the bestowal of jurisdiction, under the reasoning at

[29]-[31] (i.e. s. 97(1) gives a right of review of *all* reviewable decisions). AS [48] makes the point that there is "*nothing in the language of s. 97 ... [that] warrant(s) any different approach by virtue of the class of decision that is subject to review*".

10. The conundrum created by the inconsistency between the reasoning at [32] (**AB203**) and [36] (**AB204**) need not be resolved. This appeal is limited to the application of the de-grouping provisions: see the notice of appeal at [1] (**AB231**), and the Court of Appeal has not repeated the observations it made at [36] in the context of de-grouping.

11. In reply to RS [15]-[29], the appellants adopt what they put in chief at AS [15]-[44].

12. In reply to RS [26(b)], citing *Ballarat Brewing*, it is distinguishable. The legislation which bestowed jurisdiction on the Victorian Supreme Court in 1971 did so in the language of "*appeal*" as distinct from "*review*". See s. 33 of the *Payroll Tax Act,* 1971 (Vic) (when *Ballarat Brewing* was decided), reproduced at **AB648 – special leave.**

B. *Reply to the respondent's submissions on appellants' issue 1*

13. In reply to RS [30], the powers on review necessarily inform the nature of the review.

14. In reply to RS [31], sections 96 and 97 of the *Administration Act, exist* in parallel; they *do not operate* in parallel. There is no suggestion by the appellants that they can be engaged in parallel. Section 97(2) contains a statutory election between s. 96 and s. 97.

15. RS [32] cites no extrinsic materials to support the proposition as to the "*intendment of TAA s. 97(4)*". It is also contrary to the provisions and materials cited at AS [18]-[32].

16. Contrary to RS [34], the existence or absence of provisions in another statute (namely, the *ADT Act*) cannot constrain the ordinary meaning, or the operation, of the words in s. 97 of the *Administration Act* employed to bestow jurisdiction on the Supreme Court.

17. Contrary to RS [35], *B & L Linings* is relevant. Section 75A of the *Supreme Court Act* must have the same meaning, as *B & L Linings* found, whether applied to a strict right of appeal to the Supreme Court from the Tribunal under s. 119 of the *ADT Act*, or to a merits "*review*" by the Court in the first instance under s. 97 of the *Administration Act*.

18. Contrary to RS [36], *Paspaley* is relevant. It contrasted s. 97, which gives a right of "*full review*", with a "*review limited to jurisdictional error on the face of the record*".

19. Furthermore, by identifying the subject matter of the "*review*" as the assessment or the decision the assessment gives effect to (where reasons are not given), rather than the objection decision, *Paspaley* reinforces the existence of a right of "*full review*" in s.97.

C. *Reply to the respondent's submissions on appellants' issue 2*

20. Contrary to RS [39], for the reasons given in paragraphs 8-9 above, the reasoning at [36] (**AB204**) is irreconcilable with that at [32] (**AB203**). The reasoning at [32] is also irreconcilable with that at [33], for the reasons the appellants give at AS [46]-[48]. As submitted in paragraph 10 above, the resolution of the inconsistency is unnecessary.

21. In reply to RS [41], the prescription of a procedure for conducting reviews in the Tribunal under s. 63(1) of the *ADT Act* cannot meaningfully inform the nature of the bestowal of jurisdiction on the Supreme Court under s. 97 of the *Administration Act*.

22. RS [42] is incorrect. The appellants make reference to the constitutional validity of s. 101(1)(b) of the *Administration Act* but only in support of their statutory interpretation contention, that its operation is a permissible bestowal of power on the Supreme Court which prevents the principles in *Avon Downs* from having any present application.

D. Reply to the respondent's submissions on appellants' issue 4

23. The reasoning in RS [51] is circular. If the Court of Appeal erred in holding that the appellants had to establish error on the part of the respondent (his proposition (a)) then the appellants cannot have a cumulative requirement ("*and*") to establish such error affecting the respondent's decision to de-group (his proposition (c)). The appellants' success on the former surely renders the latter requirement otiose. Furthermore, his proposition (b) is the same as proposition (a) in substance, because proposition (a) is the content of the principles enunciated in *Avon Downs*, which is his proposition (b).

24. In reply to RS [54], the respondent fails to come to grips with the submissions at AS [74]-[81], which demonstrate that the Court of Appeal, *first*, took the evidence and factual findings of the Primary Judge (see AS [76], [78]), *secondly*, made no findings of error of principle by him (save for the one at [109] (**AB221**): it is addressed below), *thirdly*, came to a different conclusion on the same facts (AS [77], [79]), and therefore, exceeded its jurisdiction by re-exercising a discretion, contrary to *House v The King*.

25. In reply to RS [55], asserting "*errors of principle*" made by the Primary Judge:

(a) findings at [109] and [111] (**AB221**) are of an error of principle (and only one);

(b) but it was made by reference to criteria chosen by the respondent alone in his discretion ("*any other matter*") rather than by reference to statutory criteria;

(c) the appellants address this at AS [112]-[116] by contending that the respondent is bound to only have regard to "*other matters*" which are *sui generis* to the statutory criteria, otherwise he alone determines the basis for a liability to tax;

(d) the findings at [116]-[117] simply reflect the *effect* the finding at [109], [111], made for the second period, has for the third period, due to similar legislation.

F. Reply to the respondent's submissions on appellants' issue 5

26. In reply to RS [57], the Court of Appeal's only real focus was on nature of the appeal. No concerted effort was made to analyse the application of the de-grouping provisions because it was not "*the real question*" to be decided: see [96] (**AB218**); [113] (**AB222**)

27. Contrary to RS [57], the findings on interpretation and application of the de-grouping provisions were not a concerted exercise in formulating "*an alternative basis*" for the decision because they were found not to be "*the real question*" arising for decision.

28. In reply to RS [59], for the reasons in AS [39] enunciated in *Paspaley*, the decisions under review are the decision to refuse to de-group and assessments giving effect to it. Material provided in support of the objection or tendered to the Primary Judge under s. 97 was not necessarily before the respondent when he made his decisions. The Court of Appeal made no attempt to ascertain what materials were ever before him for *Avon Downs* purposes. That was impossible to ascertain because the Primary Judge treated himself as undertaking a review on the merits and never identified those materials.

29. In reply to RS [60(a)], the appellants do not enliven any rights of appeal on grouping. They only complain about de-grouping: see AS [105]; notice of appeal at [1] (**AB231**).

30. In reply to RS [60(b)], the extent to which the Court of Appeal took into account impermissible factors is identified: see AS [117]-[124]. It gave its imprimatur to the selection of "*other matters*" by the respondent alone in his discretion at [110] (**AB221**).

31. In reply to RS [62(a)], the appellants have squarely challenged erroneous findings of fact, quite apart from their contentions about the reliance on irrelevant factors. At AS [120] they contend that the Court of Appeal made an erroneous finding about the place where the appellants conducted their businesses, contrary to uncontradicted evidence.

32. In reply to RS [62(b)], the appellants do not contend cl. 2 of the Deeds should be read down. They accept cl. 2 required the principal employer (Tasty Chicks) to "*employ the greater part of its staff*" at premises occupied by their clients: see [71]-[72] (**AB212**). The complaint is that it is the *only* clause in any deed which satisfied the statutory test. It matters not whether the Court of Appeal misunderstood the effect of other clauses or lost sight of the test stated at [67] (**AB211**) when applying it. Either way, it is an error.

33. In reply to [62(c)], the appellants contend, by adopting the same paragraph numbering:

(i) the supposed finding of error of principle on the part of the Primary Judge at [109] and [111] (AB221) is addressed in paragraphs 25 and 30 above;

(ii) if factors are individually irrelevant under the statutory criteria (identified at [99]-[100] (**AB218**)), they do not somehow become relevant by virtue of being considered together, nor do they become relevant because the respondent considers them relevant in his (absolute) discretion, as found at [110] (**AB221**);

(iii) the facts supporting the appellants' criticism are identified at AS [97]-[105]; the respondent's primary contention based on an "*unconfined*" discretion to de-group, is contrary to *Giris*, cited at AS [116]; and *Browning* is distinguishable – the *Irrigation Act*, 1912 specified *no* criteria for the exercise of the discretion to grant a consent – it is not an authority at all for a discretion to assess a tax;

(v) there is no attempt to reconcile the proposition that the appellants' contentions "*unduly limit the function of the Court of Appeal on an appeal (by way of re-hearing) from a divisional judge of the Supreme Court under SCA s. 75A(5)*", with counter-veiling propositions on the nature of the appeal, namely, "*SCA ss. 19(2)(a) and 75A – imports the notion that an 'appeal' under s. 97 was a procedure to correct 'error'* (RS [20(a)]) and "*Nothing in SCA s. 75A justified a departure from ... Ballarat Brewing*" [upholding a strict right of appeal] (RS [26(b)]) – that is, the respondent contends that the Court of Appeal has a wider jurisdiction on appeal than the Primary Judge has at first instance under s. 75A.

Dated: 2nd August 2011

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