HIGH COURT OF AUSTRALIA

Public Information Officer

5 December 2007

BLUEBOTTLE UK LIMITED, CRICKET SA, VIRGIN HOLDINGS SA AND BARFAIR LIMITED v DEPUTY COMMISSIONER OF TAXATION AND VIRGIN BLUE HOLDINGS LIMITED

Assignments of dividend rights to two foreign shareholders in Virgin Blue were ineffective to displace Virgin Blue's obligation to retain money to cover the tax liabilities of those shareholders resulting from earlier transactions, the High Court of Australia held today.

On 11 November 2005, Virgin Blue's directors declared a final, fully franked dividend of 25 cents per ordinary share with payment due on 15 December 2005. They fixed 28 November 2005 as the record date. On that date, Cricket held 23 per cent of the issued capital of Virgin Blue and Virgin Holdings held 2.08 per cent. Cricket and Virgin Holdings, both Geneva-based corporations, could expect dividends of about $65 million. The Tax Commissioner alleged that each was liable to pay tax on a capital gain made on disposal of Virgin Blue shares in 2003. The Commissioner attempted to intercept the two companies' dividend payments and have the amounts applied to their tax liabilities. On 12 December 2005, the Commissioner gave Virgin Blue two notices directing it to retain $72,518,346.06 in respect of Cricket and $20,839,554.45 in respect of Virgin Holdings to cover their tax. (Cricket was later assessed to be liable to pay $64,441,613.86 in tax and interest and Virgin Holdings' liability was assessed at $20,483,993.56.) The notices were issued pursuant to section 255 of the *Income Tax Assessment Act* (ITAA). The day after the notices were issued, the two companies assigned their dividend rights to Bluebottle which gave Virgin Blue an irrevocable direction to pay the dividends to Barfair. On 14 December 2005, the Commissioner issued assessment notices to Cricket and Virgin Holdings for the year to 31 March 2004.

On 15 December 2005, Bluebottle, Cricket, Virgin Holdings and Barfair commenced proceedings in the New South Wales Supreme Court seeking declarations that the various transactions were effective and that notices issued by the Commissioner had no force or effect in relation to the dividend. Justice Ian Gzell made such declarations but the Commissioner's appeal to the Court of Appeal was allowed. The Court of Appeal ordered Virgin Blue to pay the Commissioner the dividends that had been declared. The other four companies appealed to the High Court.

The Court unanimously dismissed the appeal. It held that in the circumstances of the case the Commissioner's first notices did not comply with section 255(1) of the ITAA as no assessment had been issued to Cricket or Virgin Holdings so no tax was due by them. By contrast, when the Commissioner's second notice was given, assessments had been issued to the two companies and tax was then due and payable. Virgin Blue had control of money belonging to its shareholders because it was liable to pay the declared dividend to those who were its shareholders on the record date. Despite the assignments to Bluebottle, Virgin Blue remained liable to pay the dividend to Cricket and Virgin Holdings. Virgin Blue was obliged to retain from the dividends sufficient funds to pay the tax due under each assessment.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

Address: PO Box 6309, Kingston ACT 2604 Telephone: (02) 6270 6998 Fax: (02) 6270 6909
Email: fhamilton@hcourt.gov.au