SHORT PARTICULARS OF CASES
APPEALS

COMMENCING WEDNESDAY, 27 AUGUST 2008

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COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v WORD INVESTMENTS LIMITED (M41/2008)

Court appealed from: Full Court, Federal Court of Australia

Date of judgment: 14 November 2007

Date special leave granted: 23 May 2008

In March 2002 the respondent ("Word") applied to the appellant for endorsement as a charitable entity pursuant to subdivision 50-B of Division 50 of Part 2-15 of the *Income Tax Assessment Act* 1997 (Cth) ("the Act"). The application was refused, on the ground that Word was not an organisation "instituted to advance or promote charitable purposes". Word is a company which was established in 1975 by Wycliffe Bible Translators Australia ("Wycliffe") to provide it with financial and fund raising support. Wycliffe is an evangelical missionary organisation that seeks to spread the Christian religion through literacy and translation work, primarily in the third world. The commercial activities carried on by Word included a funeral business and a financial planning business.

The Administrative Appeals Tribunal (Pascoe SM) affirmed the decision of the appellant. The Tribunal held that the funeral business was a commercial operation for the purpose of making a commercial profit. It did not accept that Word was a charitable institution whilst operating that business.

Word's appeal to the Federal Court (Sundberg J) was successful. His Honour found that the Tribunal had made two errors of law. First, it was wrong to consider the funeral business in isolation from the remainder of Word's operations. The question was not whether the funeral business was a charitable organisation, but whether Word was. The second error was to draw an unwarranted distinction between active and passive investment. Sundberg J thought that distinction was at odds with the practice of contemporary charitable organisations, many of which had established business ventures to generate the income necessary to support their activities.

The Full Federal Court (Stone, Allsop and Jessup JJ) dismissed the appellant's appeal. The Full Court found that the primary judge had accurately described the test as follows: "In determining whether an institution is charitable, it is necessary to consider the institution's essential object, which is itself to be determined by a consideration of the purpose of its formation, its constitution and its activities". The Court considered that on the proper understanding of Word's memorandum of association, the purpose of all its activities was, and could only be, religious and charitable. The commercial nature of the activities did not necessarily destroy the capacity of the company to be characterised as a charitable institution.

The grounds of appeal include:

- The Full Court erred in finding that, on the proper construction of the memorandum of association:
  (a) the purpose of all the respondent's activities was, and could only be, religious and therefore charitable;
  (b) the substantive objects were wholly charitable.

- The Full Court erred in finding that, during the relevant period, the respondent applied all of its profits for charitable purposes.

COMMISSIONER OF TAXATION v DAY (S315/2008)

Court appealed from: Full Court of the Federal Court of Australia

Date of judgment: 21 December 2007

Date of grant of special leave: 13 June 2008

This matter concerns the deductibility of legal expenses ("the expenses") incurred by Mr Shane Day ("the Taxpayer") arising from his defence of three sets of charges brought against him pursuant to the *Public Service Act 1922* (Cth).

The Taxpayer appealed against a decision of the Commissioner of Taxation ("the Commissioner") in relation to an objection against the deducibility of the expenses for the 2001/02 financial year. Justice Emmett disallowed their deductibility with respect to the first set of charges, but allowed it concerning the second set. His Honour however found that the Commissioner was estopped from denying deductibility with respect to the third set of charges. That estoppel was said to arise from a consent judgment concerning that set of charges.

The Commissioner appealed against the estoppel finding in respect of the third set of charges. The Taxpayer however cross-appealed concerning the deductibility findings concerning the first and third set of charges.

On 21 December 2007 the Full Federal Court (Spender, Dowsett & Edmonds JJ) upheld the Commissioner's appeal. Their Honours also upheld the Taxpayer's cross-appeal. Justice Spender (with whom Justice Edmonds agreed) held that there was no issue estoppel and that Justice Emmett had erred in so finding. This was because the consent judgment involved no determination of the issues, including the deductibility of the expenses under section 8-1 of the *Income Assessment Tax Act 1997* (Cth) ("the Act").

With respect to the cross-appeal, Justice Spender held that the expenses associated with all sets of charges were deductible pursuant to section 8-1 of the Act. His Honour also held that Justice Emmett's reasoning (but not his conclusion) was correct when Justice Emmett said that:

“If incurring costs can be shown to contribute to the success of an employee in defending himself from dismissal from his employment and costs are incurred to preserve the employee’s entitlement to receive, in return for his services, assessable income, the costs will be deductible.”

Justice Dowsett also held that the Commissioner’s estoppel appeal should be allowed. His Honour however held that Justice Emmett was correct to conclude that the expenses relating to the first and third set of charges were not deductible pursuant to section 8-1 of the Act. He also agreed with Justice Emmett that none of the conduct, the subject of the third set of charges, related to the Taxpayer's discharge of his duties as an ACS officer.

The grounds of appeal include:

- The Full Court erred in holding that legal expenses incurred by the Taxpayer relating to charges made against him under the Act referred to in the judgments below as the "first charges" and the "third charges", were allowable deductions to the Taxpayer under section 8-1 of the Act.

SPRY v KENNON & ORS (M25/2008); KENNON & ORS v SPRY & ORS (M26/2008)

Court appealed from: Full Court of the Family Court of Australia

Date of judgment: 13 July 2007

Date special leave granted: 7 March 2008

Ian Spry ('the husband') and Helen Spry ('the wife') were married in December 1978 and divorced on 17 February 2003. On 21 June 1968 the ICF Spry Trust ('the Spry Trust') was created orally. The husband was the settlor and trustee of the Spry Trust, and made all the financial contributions to it. On 15 October 1981 the Spry Trust instrument was executed and the husband was and always has been the sole trustee. Under the terms of the Spry Trust, the beneficiaries were defined to mean all issue of the husband's father and all persons married to such issue. In 1983, by a deed executed by the husband (in his personal capacity and as a trustee of the Spry Trust) and by the wife, it was provided that the term "issue" in the definition of "the beneficiaries" should include all descendants of the husband's father however remote and not merely children; that the husband "*release and abandon all and any beneficial interest or rights held by him or which may hereafter be held by him under the trust instrument, or under the trust, or in the trust fund, or income thereof*"; and confirmed that "*by reason hereof he cease[d] to be a beneficiary of the trust or a person to whom or for whose benefit all or any part of the trust fund and income thereof may be applied*". Finally, the deed provided that any variation of the trust should be invalid to the extent to which it purported to confer directly or indirectly any right or benefit upon the husband.

On 7 December 1998 the husband executed an instrument of variation which excluded both himself and the wife absolutely and irrevocably from having or obtaining any interest in the capital of the Spry Trust. The instrument was executed by the husband without communication of that fact to the wife. There were four children of the marriage. On 18 January 2002 (after the parties had separated in October 2001) the husband established four individual trusts for the benefit of each child, all in similar form. On that day the assets of the Spry Trust were distributed equally to each of the children's trusts.

On 19 April 2002 the wife instituted proceedings in the Family Court which were heard by Strickland J in August 2005. His Honour ultimately made orders settling property, including an order setting aside the instrument of variation of 7 December 1998. This was done pursuant to s 106B of the *Family Law Act* 1975 (Cth) ('the Act'). Strickland J also ordered that the instrument of 18 January 2002, whereby the income and capital of the Spry Trust fund was applied to the children's trusts, was to be set aside pursuant to s 106B. This had the effect that the pool of assets to be taken into account for the purposes of making the order for property settlement included the amounts the subject of the children's trusts, which was some $4.64 million.

A majority of the Full Court (Bryant CJ and Warnick J, Finn J dissenting) dismissed the husband's appeal. The question was whether, from the execution of the 1983 deed, the assets of the Spry Trust could properly be regarded as the husband's property. This in turn depended on whether or not the 1983 deed could be cancelled. Bryant CJ found that it remained open to the husband at all relevant times since 1983 to cancel the deed. Warnick J, with whom Bryant CJ largely

agreed, found that the 1983 deed could not vary the substratum of the Spry Trust and the husband remained within the enumeration of beneficiaries, albeit having relinquished his entitlement to consideration in the exercise of the trustee's discretion, and declared himself no longer a beneficiary. To reverse his election, no variation of the Spry Trust was required and the release by the husband of the 1983 deed of his entitlements as a beneficiary of the Spry Trust could be rescinded. The trial judge was correct in setting aside the 1998 instrument and the 2002 dispositions and including the assets of the Spry Trust in the pool of assets for division.

In dissent, Finn J held that as from the execution of the 1983 deed those assets could not properly be regarded as the husband's property and he did not have control in any relevant sense over the assets. The release containing cl. 2 of the 1983 deed having been executed, it could not be withdrawn.

The grounds of appeal include:

- The majority erred in holding that the release by deed dated 4 March 1983 could be revoked, rescinded or cancelled or otherwise vitiated or rendered inefficacious so as to cause the assets of the trust created on 21 June 1968 or any part thereof to be included in the property of the releasor.

- The majority erred in so far as they proceeded on the basis that the trustee of the trust could be compelled or empowered to add the releasor as a beneficiary or as a person having beneficial interests in or rights under the trust.

CESAN v THE QUEEN (S233/2008), MAS RIVADAVIA v THE QUEEN (S236/2008)

Court appealed from: New South Wales Court of Criminal Appeal

Date of judgment: 5 September 2007

Date special leave grantedl: 16 May 2008

On 28 June 2004, the appellants, Cesan and Mas Rivadavia, were found guilty by a jury of conspiracy to import into Australia a commercial quantity of the drug known as ecstasy. They had been charged under section 11.5 of the *Criminal Code* 1995 (Cth) with conspiring with each other and with others to import a commercial quantity of narcotic goods, as defined under section 233B of the *Customs Act* 1901 (Cth).

The appellants were sentenced on 18 March 2005. Cesan was sentenced to imprisonment for thirteen years six months with a non-parole period of nine years. Mas Rivadavia was sentenced to imprisonment for eleven years for this offence but, associated with a sentence for a separate offence of conspiring to import heroin, he was required to serve a sentence of fifteen years imprisonment with a non-parole period of ten years.

Both appellants appealed against conviction and sentence. It was claimed that the trial Judge had fallen asleep during parts of the trial, and that this gave rise to a miscarriage of justice. It was also claimed that the trial Judge had erred in his directions to the jury in relation to lies and the elements of the offence. The focus of the case on appeal was the challenge to the legality of the trial based on evidence that the trial Judge had fallen asleep for several days and for significant periods including during the oral testimony of Cesan. It was clear from the evidence that the Judge did fall asleep.

The Court of Criminal Appeal, by majority, dismissed the appeals. Basten JA would have allowed the appeals against conviction finding that "[T]he conduct of a trial before a judge and jury required that the judge be present and conscious during the whole of the trial proceedings……".

Each appellant has filed a section 78B Notice claiming that the appeal involves a matter arising under Chapter III of the Constitution.

The grounds of appeal (in each appeal) include:

- The Court of Criminal Appeal erred in holding that there was no miscarriage of justice arising from the fact that the trial judge was asleep during the course of the trial.
- The Court of Criminal Appeal, having found that the trial judge was asleep during the trial, erred in failing to hold that the trial did not comply with the requirements of "trial by jury" as required by section 80 of the *Commonwealth of Australia Constitution*.
- The Court of Criminal Appeal, having found that the trial judge was asleep during the trial, erred in holding that the trial was held "before a judge" for the purposes of s 11 of the *District Court Act* 1973.

PUTTICK v FLETCHER CHALLENGE FORESTS LIMITED (M40/2008)

Court appealed from: Court of Appeal, Supreme Court of Victoria

Date of judgment below: 27 November 2007

Date special leave granted: 23 May 2008

Russell Puttick (the deceased) was an employee of a subsidiary corporation of the respondent (Fletcher), a New Zealand company. Between 1981 and 1989 the deceased was sent from New Zealand to asbestos manufacturing plants in Malaysia (on 8 occasions) and Belgium (on 3 occasions). In August 2003 the deceased was living in Melbourne with his wife and children and working for an Australian company when he developed symptoms of asbestos-caused malignant mesothelioma. He commenced proceedings in Victoria on 14 February 2005 against Fletcher for damages in negligence. He died from mesothelioma on 25 February 2005. His wife (the appellant) continued the claim on behalf of his estate and the children.

The appellant contended that the cause for complaint was that the deceased was permitted to be exposed to, and inhale, asbestos in the factories in Belgium and Malaysia, unaware of any danger and without any protection. It was alleged that Fletcher had a duty to, but had omitted to, take any action to warn or protect the deceased. Fletcher sought a permanent stay of the proceedings on the ground of *forum non conveniens*. Fletcher claimed that the law to be applied was the law of New Zealand and adduced evidence of the difficulties it claimed to face if the trial were held in Melbourne. The appellant submitted that the place where the cause for complaint arose and the place where Fletcher's omissions assumed any legal significance was the place where the exposure occurred. Harper J held that Fletcher's negligent conduct first assumed significance in New Zealand when the direction was given to the deceased to travel and without warning him of the dangers: the place of the tort was thus New Zealand, that consequently the applicable law (*lex loci delicti commissi*) was New Zealand law and that it would be undesirable for an Australian court to pronounce on the effect of the applicable New Zealand law. This was held to be the decisive factor, the balance of convenience being insufficient to render the forum clearly inappropriate. Fletcher had, in the alternative, sought that the action be permanently stayed on the ground that no viable cause of action was disclosed: since the *lex loci* was the law of New Zealand, under that law the appellant had no maintainable claim. Having stayed the action, Harper J did not rule on the strike-out application.

The appellant appealed and Fletcher cross-appealed, seeking to have the strike-out claim adjudicated if the stay were set aside. The majority of the Court of Appeal (Warren CJ & Chernov A, Maxwell P dissenting) dismissed the appeal on the basis that the *lex loci* was the law of New Zealand. Warren CJ considered, but distinguished three decisions of the NSW Court of Appeal on their facts. Chernov JA did not need to distinguish them as he considered that they supported the conclusion of Harper J. The majority found there was no error by Harper J in finding the place of the tort was New Zealand, nor was there error in the exercise of his discretion on the *forum non conveniens* ground. Maxwell P concluded that, while the relevant conduct began with Fletcher giving the travel direction in New Zealand, the conduct about which complaint was made was not complete until the deceased actually worked without protection in the unsafe workplaces in Malaysia and Belgium. Maxwell P considered that the NSW cases supported the conclusion

he had reached. As His Honour would have allowed the appellant's appeal, he went on to consider Fletcher's stay application. Maxwell P concluded that Fletcher had failed to establish that the Victorian Supreme Court would be a clearly inappropriate forum. His Honour further held that, since his view was that the tort occurred in the overseas factories, the grounds for Fletcher's strike-out application disappeared.

The respondent has filed a notice of contention seeking to affirm the decision of the Court of appeal on a number of grounds.

The ground of appeal is:

- the majority in the Court of Appeal erred in finding that the omissions of the respondent in New Zealand determined the place where, in substance, the tort occurred and gave rise to the appellant's 'complaint in law', as such omissions to act (and the further omissions in Belgium and Malaysia) were devoid of fault (and thus legal consequence) until the deceased was in the course of his employment foreseeably exposed to asbestos in Malaysia and Belgium.