SHORT PARTICULARS OF CASES
APPEALS

BRISBANE SITTINGS
16 – 18 JUNE 2008

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DEPUTY COMMISSIONER OF TAXATION v. BROADBEACH PROPERTIES PTY LTD (B10/2008);
DEPUTY COMMISSIONER OF TAXATION v. MA HOWARD RACING PTY LTD (B11/2008);
DEPUTY COMMISSIONER OF TAXATION v. NEUTRAL BAY PTY LTD (B12/2008)

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

Date of grant of special leave: 8 February 2008

These three appeals all involve similar fact situations and the application of provisions of sections 459H and 459J of the *Corporations Act* 2001 (Cth) and section 105-100 of Schedule 1 to the *Taxation Administration Act* 1953 (Cth) ("the TAA") and section 177(1) of the *Income Tax Assessment Act* 1936 (Cth) ("the ITAA"). The matters were all heard together, although separate orders were made in respect of each.

The appellant in each matter served on each respondent a statutory demand under the Corporations Act for payment of a debt. The demands of Neutral Bay and MA Howard Racing (approximately $8.5 million and $6.3 million respectively) were in respect of goods and services tax together with penalties and interest. The demand of Broadbeach Properties (approximately $1.6 million) was for income tax, together with penalties and interest. The demands were the triggering step for the winding up of the companies. All three respondents have sought review of the assessments in the Administrative Appeals Tribunal under Part IVC of the TAA, and those applications are continuing.

All three respondents also sought orders by the Supreme Court setting aside the demands, pursuant to sections 459H and 459J of the Corporations Act. Section 459H provides that the court may set aside a statutory demand if satisfied that "there is a genuine dispute … about the existence or amount of a debt to which the demand relates". Section 459J provides that the court may set aside a statutory demand if satisfied that "substantial injustice" would otherwise occur because of a defect in the demand or "there is some other reason why the demand should be set aside". It was conceded by the appellant that the challenges in the AAT to the existence and amount of the assessments were arguable. Sections 105-100 of Schedule 1 of the TAA (in respect of GST liability) and section 177(1) of the ITAA (in respect of income tax liabilities) provide, in effect, that an assessment of tax (or, for GST, an amount of tax falling due by operation of the relevant legislation) is conclusive of the making of an assessment and that the amount of the assessment is correct for all purposes other than proceedings under Part IVC of the TAA for review or appeal of the assessment. The issue was therefore whether, in light of the conclusiveness of such assessments, there could be a "genuine dispute" as to the debt in the statutory demand, and whether the court had power to set aside the demand, or to exercise its discretion on grounds of substantial injustice to set aside the demand.

The Supreme Court (McMurdo J) set aside the statutory demands as to some components of the GST debts for Neutral Bay and MA Howard Racing on the basis of there being a genuine dispute, and set aside the demands as to the remainder under s459J of the Corporations Act. In relation to Broadbeach

Properties, McMurdo J found there was no genuine dispute as to any part of the debt, but set aside the demand under s459J of the Corporations Act.

The Court of Appeal (Keane, Holmes and Muir JJA) dismissed the appellant's appeals. Keane JA wrote the leading judgment. His Honour concluded that there was a genuine dispute for the purposes of s459H of the Corporations Act as to the debt demanded from all three companies. His Honour also concluded that McMurdo J did not err in exercising the discretion under s459J to set aside some or all of the debts demanded. His Honour declined to follow the decision of the Full Court of the Federal Court in *Hoare Bros Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 302, which held that the conclusive nature of assessments meant that there could not be a genuine dispute as to a debt demanded, on the basis that this decision only applied to income tax assessments, not as to GST liabilities, and that subsequent amendments to s204 of the ITAA had altered the situation in respect of income tax assessments.

The grounds of appeal include:

- For the purposes of s459H of the *Corporations Act*, can there be a "genuine dispute" as to the "existence or amount" of a debt where the debt constitutes amounts of GST or income tax as assessed or otherwise due and the taxpayer has commenced review proceedings under Part IVC of the *Taxation Administration Act* challenging each aspect of the assessments or amounts due?

- Does the fact that the taxpayer has sought review of the assessment constitute a sufficient basis for the exercise of the discretion to set aside a statutory demand under s459J of the *Corporations Act*?

NORTHERN TERRITORY OF AUSTRALIA v. COLLINS & ANOR (D2/2008)

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

Date of grant of special leave: 7 March 2008

The respondents, Vincent and Maryann Collins, are the registered owners of a patent for a process to produce an essential oil from a particular species of tree, *Callitris Intratropica*. The Northern Territory granted licences to the Australian Cypress Oil Company Pty Ltd ("ACOC") to take timber from a plantation of the trees on Crown land, and ACOC used the timber to produce blue cyprus oil. The respondents commenced proceedings alleging that by issuing the licences the Northern Territory had infringed their patent, invoking section 117 of the *Patents Act* 1990 (Cth) ("Act") which extends the concept of infringement to cover "contributory infringement". Section 117 of the Act relevantly provides:

> (1) If the use of a product by a person would infringe a patent, the supply of that product by one person to another is an infringement of the patent by the supplier unless the supplier is a patentee or licensee of the patent.
>
> (2) A reference in subsection (1) to the use of a product by a person is a reference to:
>
> (a) if the product is capable of only one reasonable use, having regard to its nature or design – that use; or
> (b) if the product is not a staple commercial product – any use of the product, if the supplier had reason to believe that the person would put it to that use; or
> (c) …

Schedule 1 to the Act defines "supply" to mean "supply by way of sale, exchange, lease, hire or hire-purchase".

The trial judge (Mansfield J) held that the grant of the licences to ACOC did not amount to "supply", and that the timber was a staple commercial product, and dismissed the respondents' action.

On appeal, the Full Court (Branson and Sundberg JJ; French J in dissent) in a majority judgment concluded that unmilled *Callitris Intratropica* trees are not a commodity or raw material that is commonly or readily available for purchase and therefore are not a "staple commercial product" within the meaning of s117 of the Act. The majority also concluded that in the circumstances, the Northern Territory "supplied" the felled but unmilled trees to ACOC. The majority allowed the respondents' appeal. French J would have dismissed the appeal. His Honour held that the licences granted by the Northern Territory to ACOC did not amount to the "supply" of the timber and were in the nature of a realty interest akin to a profit a prendre. French J held that, if that conclusion was wrong, the timber itself was a staple commercial product within the meaning of s117 of the Act.

The grounds of appeal include:

- Whether the majority of the Court erred in holding that the grant of licences to ACOC to go on Crown land and take timber amounted to a "supply" of the timber to ACOC for the purposes of s117 of the *Patents Act*;

- Whether the majority of the Court erred in holding that the timber the subject of the licences was not a "staple commercial product" for the purposes of s177(2)(b) of the *Patents Act*;

- Whether the majority of the Court erred in failing to consider, and failing to answer in the affirmative, the question of whether the supply of an input into a method or process the subject of a patent is incapable of attracting the operation of s117 of the *Patents Act*.