HIGH COURT OF AUSTRALIA

GUMMOW J

McKEWINS HAIRDRESSING AND
BEAUTY SUPPLIES PTY LTD (IN LIQUIDATION) APPLICANT

AND

DEPUTY COMMISSIONER OF TAXATION FIRST RESPONDENT

WAYNE LEVICK SECOND RESPONDENT

McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation
[2000] HCA 27
5 May 2000
S123/1999

ORDER

1. *The notice of motion filed 1 May 2000 is dismissed.*

2. *The document described as a notice of discontinuance, which was filed on 1 May 2000, is set aside.*

3. *The notice of motion for removal filed on 29 July 1999 is amended to add Wayne Levick as second respondent but is then dismissed.*

4. *The second respondent, Mr Levick, is to bear the costs of the Deputy Commissioner of Taxation of and incidental to his two motions and of Mr Levick's motion filed on 1 May 2000. Such costs are to be taxed on the basis, in each case, that the costs include all costs except in so far as they are of an unreasonable amount or were unreasonably incurred so that, subject to such exceptions, the Deputy Commissioner is completely indemnified by Mr Levick for the Deputy Commissioner's costs.*

5. *Certify that these motions were a matter proper for the attendance of counsel in chambers.*

6. *Otherwise dismiss the Deputy Commissioner's motions filed on 2 February 2000 and 27 April 2000.*

Representation:

No appearance for McKewins Hairdressing and Beauty Supplies Pty Ltd (In Liquidation)

R G Orr QC with G L Ebbeck for the first respondent (instructed by Australian Government Solicitor)

D C Fitzgibbon for the second respondent (instructed by Wayne Levick & Associates)

CATCHWORDS

McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation

High Court – Practice and procedure – Removal of causes – Constitutional arguments raised in application untenable – Application made on instructions of a third party to the litigation – Solicitor's duties to Court.

Constitutional law – Office of Governor-General – Validity of commission and appointment of.

Practice and procedure – Joinder of solicitor – Costs – Award of costs against solicitor – Award of costs on indemnity basis – Discontinuance under O 27 r 1(1) of High Court Rules – Notice thereunder purportedly given by a person other than the applicant on record.

Words and phrases – "indemnity costs".

Constitution, ss 2, 4, 58.
Corporations Law, s 471A.
Judiciary Act 1903 (Cth), ss 40, 78B.
High Court Rules, O 27 r 1(1).

1 GUMMOW J. On 19 September 1999, the Supreme Court of New South Wales ordered that McKewins Hairdressing and Beauty Supplies Pty Ltd ("McKewins") be wound up on the application of the Deputy Commissioner of Taxation. Mr Warren Pantzer was appointed liquidator.

2 Earlier, on 29 July 1999, there had been filed in this Court two documents. The first is an application in the name of McKewins and signed by a solicitor, Mr Wayne Levick, "on behalf of the [a]pplicant" seeking removal of part of the then pending Supreme Court winding-up application. This was said to involve questions arising under the Constitution or involving its interpretation within the meaning of s 40 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). The second document is a notice under s 78B of the Judiciary Act. A third document filed on 12 November 1999 is headed "APPLICANT'S SUMMARY OF ARGUMENT". The second and third documents were signed by Mr Levick, as solicitor for or on behalf of the applicant. The outline of argument and the s 78B notice set out arguments which appear to follow those later rejected by Hill J in a judgment delivered on 1 December 1999[1].

3 At no time since his appointment on 19 September 1999 has the liquidator consented to the continuance of the application for removal under s 40 of the Judiciary Act. On 15 November 1999, the solicitor for the Deputy Commissioner of Taxation wrote to Mr Levick enclosing a copy of the winding-up order and, on 19 November 1999, the liquidator wrote to Mr Levick drawing his attention to s 471A of the Corporations Law and objecting to a pending purported application to the Supreme Court contesting the winding-up order. On 22 November 1999, that application to the Supreme Court was dismissed with costs.

4 The effect of Mr Levick's evidence in this Court is that, in proceedings respecting McKewins, he has received instructions, including the text of two documents filed on 29 July 1999 and a third on 12 November 1999, subject to checking for typographical errors and the like, not from the directors of the company but from a body based in Melbourne. This is called the Institute of Taxation Research ("the ITR"). Mr Levick gave some information concerning the ITR. In his oral evidence he said:

> "I've met a number but not all of the directors. They are engaged in, as I understand it, research into the Constitution with particular regard to taxation. They have also, or members of that group have also prepared and,

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1 *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383. See also *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 74 ALJR 68; 166 ALR 302; *Poonon Pty Ltd v Deputy Commissioner of Taxation* [1999] NSWSC 1121, a decision of Austin J delivered on 11 November 1999.

> I believe, filed a two volume application relating to these issues with a number of United Nations bodies and that was filed, I am told and verily believe, on 1 September last year."

It was to the ITR that Mr Levick would look for his fees if he has not already billed the ITR in relation to the proceedings in this Court. He has a number of matters on which instructions are received from the ITR.

5 At some date after 19 November 1999, Mr Levick received a telephone call from Mrs McKewin, the wife of a director of McKewins, in which she said that neither she nor her husband desired "this matter" to continue. He received no further communications from either of the McKewins until the morning of the hearing on 2 May 2000.

6 The constitutional arguments which are propounded in the s 78B notice and the written outline are without foundation. They are untenable. I agree in that regard with what Hill J said in his judgment in *Levick*[2]. I also agree with what was said by Hayne J in *Helljay*[3].

7 I should also add that at least some of these matters had been canvassed in the submissions McHugh J dealt with in *Greer v Deputy Commissioner of Taxation*[4], in which the applicant was represented by the same counsel and solicitor. His Honour said, after dealing with various submissions[5]:

> "But, in addition to that, it seems to me that two of the points really have no merit at all. The second point sought to be raised concerns the constitutional validity of the *Income Tax Assessment Act* 1936 [(Cth) ('the Act')]. This argument is based on the proposition that, at the time when Lord Gowrie gave his assent to [the Act], His Majesty King George V, who had appointed Lord Gowrie on 20 December 1935, had died on 20 January 1936 and that Lord Gowrie's commission was not gazetted until 23 January 1936. It is argued that the Letters Patent, which were the source of the appointment of Lord Gowrie, expired with the death of the King and that no new Letters Patent were issued until 10 January 1938 after King George VI ascended the throne of the United Kingdom. The applicant contends that, as a result, Lord Gowrie had no power to assent to [the Act].

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2 (1999) 168 ALR 383 at 391-394.

3 (1999) 74 ALJR 68 at 73; 166 ALR 302 at 308.

4 Unreported, 26 April 2000.

5 Transcript at 11.

> This argument was raised in *Deputy Commissioner of Taxation v Levick*[6]. Justice Hill rejected the argument and, in my view, the reasons his Honour gave for rejecting it were well taken."

8 Further, the text of the Constitution itself points to the efficacy of the Royal Assent given to the Act. The statute was assented to on 2 June 1936. Section 58 of the Constitution states:

> "When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure."

Section 58 is to be read with s 4 of the Constitution. This states:

> "The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being …"

Lord Gowrie answered that description for the purposes of s 58 because he had been appointed by King George V pursuant to s 2 of the Constitution. This provides:

> "A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth ..."

9 In the light of the foregoing, there was never any prospect of an order for removal being made under s 40 of the Judiciary Act on the present application. Further, nothing in *R v Hughes*[7] provides any support for the additional arguments which counsel for Mr Levick outlined in oral submissions.

10 On 1 May 2000, on counsel's advice, Mr Levick filed a document headed "NOTICE OF DISCONTINUANCE". It states:

> "The Applicant Wayne Levick discontinues his application for removal of this matter pursuant to section 40 of [the Judiciary Act]."

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6 (1999) 168 ALR 383.

7 [2000] HCA 22.

11 Order 27 r 1(1) of the High Court Rules states:

> "A party to an action or proceeding may, by notice in writing, wholly discontinue or withdraw his action, counterclaim or defence as against another party, or withdraw part or parts of his claim or cause of complaint, counterclaim or defence."

The document I have just described was ineffective to bring about the consequences spelled out in O 27. Mr Levick was not the applicant for removal. The applicant was stated to be McKewins but Mr Levick had been retained to take the steps he had taken by a third party, a stranger to the litigation, the ITR.

12 The Deputy Commissioner of Taxation has filed two motions, one of 2 February 2000 and the other of 27 April 2000. That of 2 February seeks an order that Mr Levick be joined as a party and that he bear the costs of the Deputy Commissioner and that the costs be on an indemnity or party and party basis. The motion also seeks an order of joinder of Mr Keith McKewin as a director of McKewins and the making of similar costs orders against him. The notice of motion filed on 27 April seeks an order that any notice of discontinuance be set aside and that the costs of that motion form part of the costs of the proceedings. There is also a prayer for such other orders as the Court shall see fit to make.

13 On 7 December 1999, the solicitor for the Deputy Commissioner sent to Mr Levick a letter, the text of which includes the following:

> "I note that your client's summary of argument was filed on 12 November 1999. My client is of the view that the above proceedings are not competently before the Court by reason of sec 471A of the *Corporations Laws*. The costs of the above proceedings should not fall on the company or ultimately its creditors. You may recall that an identical problem arose in *Helljay Investments Pty Ltd v DC of T* … and that Hayne J of the High Court made an order for indemnity costs against the directors in those proceedings.
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> 2. Please note that I am instructed to seek an order for indemnity costs in the above matter against you personally as the solicitor on the record. The basis for the indemnity costs order is that the arguments advanced are untenable and amount to an abuse of the process of the Court. My client may also seek an indemnity costs order against the directors as the above proceedings have been continued without the approval of the liquidator or the Court."

14 *Helljay* (like *Levick* and *Poonon*) was a matter in which Mr Levick had instructed counsel who appears for him now. In *Helljay*, Hayne J said of their then client, Mr Murphy[8]:

> "[T]he application for removal was untenable and obviously so. That being so, and Mr Murphy having continued to prosecute the application brought by Helljay despite the expressed attitude of the liquidator, this is a case in which the award of costs, both to the liquidator and to the respondent, should go beyond the ordinary party and party basis and extend to indemnity costs as that expression was explained by Sir Robert Megarry V-C in *EMI Records Ltd v Ian Cameron Wallace Ltd*[9]."

On the second notice of motion, it should be ordered that the document filed as a notice of discontinuance on 1 May 2000 be set aside. Under the other relief sought by that notice of motion, the motion for removal under s 40 of the Judiciary Act will be dismissed. That was not a process instituted by the party named therein as the applicant. Further, and in any event, no order as sought would be made even if the notice of motion were competently instituted.

15 There remains the question of costs. The Deputy Commissioner of Taxation should not be left without any prospect of recouping his costs. I make order 1(a) in the notice of motion filed on 2 February 2000. Mr Levick is added as the second respondent to the notice of motion for removal under s 40 before that motion is dismissed. Joinder is not a necessary course but it was undertaken by Hill J in *Levick* and it is prudent to follow it[10]. I would not add Mr Keith McKewin, a director of McKewins, as third respondent. I am not satisfied he has personally been served with the necessary process, nor is it clear on the present state of the record that he was more than a lay person who, so far as he was involved, was drawn in by the efforts of Mr Levick's instructor, the ITR.

16 An order for costs should be made against Mr Levick. The power to make such an order should be exercised sparingly, in particular where the order sought is one for indemnity costs. However, it is of the first importance that solicitors observe the basic professional requirement and obligation to the courts before which they appear that they not institute and conduct litigation on instructions for some third party which is a stranger to that litigation. It is not to the point that Mr Levick may have believed that what was sought to be done would have

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8 (1999) 74 ALJR 68 at 74; 166 ALR 302 at 310.

9 [1983] Ch 59 at 74.

10 See *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 203 per Dawson J.

benefited the company or its directors or that for a time at least the directors may have acquiesced in this course. This must be all the more so where a liquidation has supervened in the proceedings and where those proceedings, in any event, have no prospect of success.

17 In all the circumstances, not only should Mr Levick bear the costs of the Deputy Commissioner but this should be on an indemnity basis[11].

18 On 1 May, Mr Levick filed a cross-motion, on its face brought by McKewins, in effect seeking to defer the disposition of the Deputy Commissioner's motions pending the outcome of *R v Hughes*. Nothing in that case could support the propositions of law which Mr Levick seeks to put respecting the validity of a notice of a statutory demand by the Commissioner and of winding-up orders made by the Supreme Court of New South Wales consequent upon a failure to meet such a statutory demand. That motion should be dismissed, with the same consequences as to costs.

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11 *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59 at 74.