HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE AND CALLINAN JJ

MICHAEL JOHN GLENNAN APPELLANT

AND

COMMISSIONER OF TAXATION RESPONDENT

Glennan v Commissioner of Taxation
[2003] HCA 31
17 June 2003
S195/2002

ORDER

1. *Notices of Motion respectively dated 5 May 2003 and 22 May 2003 dismissed with costs.*

2. *Appeal dismissed with costs.*

On appeal from the High Court of Australia

Representation:

J D Harris SC for the appellant (instructed by Higgins Solicitors)

D B McGovern SC with A J O'Brien for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Glennan v Commissioner of Taxation

Income taxation – Assessment – Objection and appeal – Review process established by Pt IVC, *Taxation Administration Act* 1953 (Cth) – Whether covering cl 5 of the Constitution empowers appellant to seek collateral relief pursuant to s 75(v) of the Constitution in respect of an assessment by the Commissioner of Taxation – Whether existence of avenue of appeal to High Court is relevant to the exercise of discretion in granting relief pursuant to s 75(v) of the Constitution.

Income taxation – Assessable income – Taxation Determination – Whether alleged failure by Commissioner of Taxation to bring relevant Taxation Determination to the attention of the appellant and the Administrative Appeals Tribunal ("AAT") amounts to "equitable fraud" – Whether Commissioner's conduct, in alleged contravention of s 14ZZF(1)(a)(v) of the *Taxation Administration Act* 1953 (Cth), gives rise to jurisdictional error by AAT.

Practice and procedure – Federal jurisdiction – s 78B, *Judiciary Act* 1903 (Cth) – Whether compliance with s 78B(1) is a necessary condition for the further exercise of jurisdiction by the court in question.

Constitution, s 75(v).
Judiciary Act 1903 (Cth), s 78B.
Taxation Administration Act 1953 (Cth), Pt IVC.

1 GUMMOW, HAYNE AND CALLINAN JJ. On 7 May 2002, the Chief Justice ordered that an action (No S65/2001) by the present appellant (Mr Glennan) instituted in the original jurisdiction of this Court against the respondent ("the Commissioner") be dismissed and that judgment be entered for the Commissioner with costs. His Honour also ordered that Mr Glennan's Amended Statement of Claim be struck out and that his Summons for Particulars be dismissed. Mr Glennan appeals from that decision. The orders of the Chief Justice included final orders disposing of the action and it is accepted that the appeal lies as of right under s 73(i) of the Constitution and s 34 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act").

2 In the Amended Statement of Claim, Mr Glennan had sought various relief respecting the disallowance of his objection dated 19 July 1995 to an assessment by the Commissioner issued on 8 May 1995 in respect of the year of income ending 30 June 1988. The Commissioner included in the assessment a lump sum of $1,365,000 received by Mr Glennan from Kumagai Gumi Co Ltd and Transfield Pty Ltd after settlement on 29 June 1987 of litigation in the Supreme Court of New South Wales. Mr Glennan contended that the receipt was wholly of a capital nature.

3 Section 14ZZ of the *Taxation Administration Act* 1953 (Cth) ("the Administration Act") gave to Mr Glennan, as a person dissatisfied with the disallowance of his objection, the rights, in the alternative, to apply to the Administrative Appeals Tribunal ("the AAT") for review of the Commissioner's decision or to "appeal" directly to the Federal Court against that decision. Section 14ZZ of the Administration Act appears in Pt IVC (ss 14ZL-14ZZS). Division 4 (ss 14ZZA-14ZZM) deals with review by the AAT and Div 5 (ss 14ZZN-14ZZS) with "appeals" directly to the Federal Court. On 27 March 1996, Mr Glennan applied to the AAT for review of the decision.

4 The subsequent and lengthy course of litigation before the AAT and the Federal Court is summarised by the Chief Justice in the judgment now under appeal. On 26 March 1999, the Full Court of the Federal Court made orders[1] which allowed an appeal by the Commissioner against a decision of Foster J, on "appeal" on a question of law from the AAT under s 44(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"). Foster J had given judgment in favour of Mr Glennan. The Full Court held that the AAT had not erred in law in concluding that the whole of the receipt in question was assessable under s 25 of the *Income Tax Assessment Act* 1936 (Cth) ("the Tax Act") as income according to ordinary concepts.

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1 *Commissioner of Taxation v Glennan* (1999) 90 FCR 538 at 558-559.

5 The course followed before the AAT and the Federal Court was that laid down by Div 4 of Pt IVC of the Administration Act in conjunction with related legislation, the AAT Act and the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). The appeal to the Full Court of the Federal Court was provided by s 24 of the Federal Court Act. Section 14ZZQ of the Administration Act had no application to that appellate procedure; it is found in Div 5 of Pt IVC, which is concerned with "appeals" against decisions by the Commissioner which are brought in the first instance to the Federal Court. Submissions to the contrary should be rejected.

6 Thereafter, and before the institution of action No S65/2001 from which this appeal arises, Mr Glennan instituted a proceeding in the original jurisdiction of this Court challenging the actions of the Commissioner and the jurisdiction of the Federal Court. This proceeding came before Kirby J, who dismissed it on 27 June 2000[2].

7 Applications by Mr Glennan for special leave to appeal from the orders of the Full Court of the Federal Court and for leave to appeal from those of Kirby J were discontinued on 9 April 2001. The action No S65/2001 was commenced on the same day.

8 Mr Glennan appeared for himself before the Chief Justice. On the present appeal he was represented by senior counsel who developed written amended submissions dated 5 March 2003.

Section 23 of the Judiciary Act

9 The appellant submits that the decision of the Chief Justice involved "a question affecting the constitutional powers of the Commonwealth" within the meaning of s 23(1) of the Judiciary Act. That provision states:

> "A Full Court consisting of less than all the Justices shall not give a decision on a question affecting the constitutional powers of the Commonwealth, unless at least three Justices concur in the decision."

Section 19 states that, "[e]xcept as hereinafter provided, a Full Court may be constituted by any two or more Justices". These provisions are contained in Div 3 of Pt III of the Judiciary Act, headed "Full Court". General provision for the exercise of jurisdiction is made in s 15 which comprises Div 1. This states:

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2 *Re Carmody; Ex parte Glennan* (2000) 74 ALJR 1148; 173 ALR 145.

"The jurisdiction of the High Court may, subject to the provisions of this Act, be exercised by any one or more Justices sitting in open Court."

10 It is apparent that s 23(1) is addressed to the exercise of jurisdiction by a Full Court, not a single Justice, and that it can have no bearing upon the decision under appeal.

Section 78B of the Judiciary Act

11 There is a further and related contention respecting the notice provisions of s 78B of the Judiciary Act. That section is engaged where a cause pending in a federal court "involves a matter arising under the Constitution or involving its interpretation". Section 78B(1) states that, in those circumstances, "it is the duty of the court not to proceed in the cause unless and until the court is satisfied" that the necessary notices have been issued to the Attorneys-General of the Commonwealth and the States. Section 78B(5) states that nothing in sub-s (1) prevents a court, if it thinks it necessary in the interests of justice to do so, from proceeding without delay to deal with the grant of urgent relief of an interlocutory nature.

12 Before the Chief Justice, neither side suggested that s 78B was engaged. No notices thereunder were given. The result now is said to be the "nullity" or lack of "competence" of the Chief Justice's decision and orders; the terms used appear to be designed to indicate an alleged want of jurisdiction.

13 The jurisdiction exercised by the Chief Justice included that vested by s 75(iii) of the Constitution. The Commissioner answers the description of "the Commonwealth, or a person ... being sued on behalf of the Commonwealth"[3]. If, upon its proper construction, s 78B imposed upon the operation of the Constitution itself a condition, non-observance of which withdrew the continued exercise of the jurisdiction of which this Court was seized pursuant to s 75, there would be a serious question respecting the validity of the provision. However, the section does not purport to nullify the continued exercise of jurisdiction in cases where its terms apply but there is a failure in their observance. In that sense, the "duty" which s 78B imposes is one of imperfect obligation.

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3 *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 336-337.

14 Whether or not s 78B notices should have been issued thus is a question which it is unnecessary to determine for the purposes of the present appeal. However, it is appropriate to repeat and endorse the statement by Toohey J in *Re Finlayson; Ex parte Finlayson*[4]:

> "In terms of s 78B, a cause does not 'involve' a matter arising under the Constitution or involving its interpretation merely because someone asserts that it does. That is not to say that the strength or weakness of the proposition is critical[5]. But it must be established that the challenge does involve a matter arising under the Constitution."

There was no lack of competence attending the judgment and orders under appeal. It should be added that s 78B notices were given on the hearing of the appeal.

"Constitutional right"?

15 The appellant relies in particular upon what is said to be a "constitutional right" given or supported by covering cl 5 of the Constitution[6] which empowers him, if he so wishes, to challenge by application for relief under s 75 of the Constitution an assessment by the Commissioner and to do so independently of the review process under Pt IVC of the Administration Act and related legislation and after the conclusion of that process. The argument confuses several basic principles which, together, identify that which is rendered "binding" by covering cl 5. First, it is well accepted in this Court[7] that, under the Constitution, there cannot be an "incontestable tax" which "purports to deny [the taxpayer] all right to resist an assessment by proving in the courts that the criteria of liability were

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4 (1997) 72 ALJR 73 at 74.

5 See *Green v Jones* [1979] 2 NSWLR 812 at 817-818.

6 This states:

> "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth."

7 *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639-640.

not satisfied in his case"[8], and that there must be left open to the taxpayer "*some* judicial process by which he may show that in truth he was not taxable or not taxable in the sum assessed"[9].

16 Secondly, Pt IVC of the Administration Act and related legislation make provision for such a process and this was utilised by Mr Glennan in the manner already described. Thirdly, that provision included the exercise by the Federal Court of the judicial power of the Commonwealth. This, subject to two qualifications, resolved the controversy between the parties by a final and binding judgment in the Full Court[10]. The first qualification concerns the exercise by this Court of its appellate jurisdiction under s 73 of the Constitution following a grant of special leave. That avenue, as has been explained above, was not fully pursued and came to an end on 9 April 2001. The second qualification is the setting aside of the Full Court judgment by relief granted in a proceeding in the original jurisdiction of this Court under s 75(v) of the Constitution.

17 Two things may be said with respect to s 75(v). The first is that it would be encumbent to show not merely error of fact or law on the part of any one or more of the Commissioner, the AAT and the Federal Court but error amounting to jurisdictional error[11]. The second is that the remedies for which s 75(v) provides do not lie as of right[12]. One matter to be taken into account is the existence of jurisdiction such as that provided for in Pt IVC of the Administration Act and related legislation, and ending with the appellate jurisdiction of this Court under s 73 of the Constitution[13]. The view expressed by Barwick CJ in *R v*

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8 *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 379.

9 *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 40 (emphasis added).

10 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 177 [22], 185-186 [52]-[53], 215-216 [152], 235-236 [216], 248-249 [255]-[257], 279 [343]-[344].

11 *Plaintiff S157/2002 v The Commonwealth* (2003) 77 ALJR 454; 195 ALR 24.

12 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 107 [54], 136-137 [145]-[150], 144 [172], 156 [217].

13 *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 127; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193-195, 203, 214-215, 215-220, 222-224; *Re Family Court of Australia; Ex parte Herbert* (1991) 65 ALJR 688 at 689; *Re Heerey; Ex parte Heinrich* (2001) 185 ALR 106 at 109-110 [17]-[18].

Federal Court of Australia; Ex parte WA National Football League[14], with the agreement of Stephen J and Aickin J[15] and the disagreement of Mason J and Jacobs J[16], that the existence of the right of appeal to this Court, subject to the grant of special leave, is irrelevant to the exercise of the jurisdiction under s 75(v) to grant prohibition, does not represent the present doctrine of the Court. The doctrine was correctly described by Kirby J in *Re Heerey; Ex parte Heinrich*[17].

18 The conclusion thus reached is that the appellant had no "constitutional right" to challenge by relief under s 75 of the Constitution an assessment by the Commissioner and to do so independently of the procedures earlier utilised by him in the AAT and the Federal Court. The action struck out by the Chief Justice was an attempt to mount a collateral attack upon the resolution ultimately obtained in the exercise of the judicial power of the Commonwealth by the Full Court of the Federal Court and to do so by reliance upon an ill-founded notion of "constitutional right".

"Equitable fraud"?

19 However, something further should be said of a related ground relied upon by the appellant. It is submitted that the decisions of the AAT and the Federal Court should be set aside on the ground that they were procured by the "equitable fraud" of the Commissioner. Attention here is directed to the public ruling set out in Taxation Determination TD 93/58 ("the Determination") issued by the Commissioner on 1 April 1993. That was before the Commissioner issued the assessment in question but several years after the relevant year of income.

20 The Determination stated that, to the extent that it was capable of being a "public ruling" in terms of Pt IVAAA of the Administration Act, it was a public ruling for the purposes of that Part. In argument on the present appeal, there was debate as to the applicability of the regime in Pt IVAAA to transactions entered into in the years of income preceding its enactment in its initial form by the *Taxation Laws Amendment (Self Assessment) Act* 1992 (Cth). It is unnecessary to rule upon any such issue[18].

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14 (1979) 143 CLR 190 at 205, 207.

15 (1979) 143 CLR 190 at 221, 240-241 respectively.

16 (1979) 143 CLR 190 at 230-231, 237 respectively.

17 (2001) 185 ALR 106 at 109-110 [17]-[18].

18 cf *Victoria Co Ltd v Deputy Commissioner of Taxation* (2001) 182 ALR 463.

21 However, counsel for the Commissioner rightly drew attention to s 170BA(3) of the Tax Act. The effect of this is that, if the Commissioner has provided a public ruling which is contrary to the law, then the Commissioner is bound to assess in accordance with the ruling but, where both the ruling and the law are in accord, the Commissioner has no obligation other than to apply the law.

22 The Determination restated, with reference to the decisions in *McLaurin v Federal Commissioner of Taxation*[19] and *Allsop v Federal Commissioner of Taxation*[20], the circumstances in which s 25(1) brings in a receipt to the extent that a portion of a lump sum compensation or settlement payment is identifiable and quantifiable as income. The position was reached in argument on the appeal that the Determination was but a restatement of the applicable law. The essential point made by the appellant was that the ruling should have been disclosed or specifically brought to his attention.

23 However, the ruling was never concealed by the Commissioner and, if the appellant had wished to utilise it before the AAT, it was discoverable by the exercise of reasonable diligence on his part. Further, it is difficult to see how that which did no more than restate a principle of law applicable to a particular outcome could itself have had any independent operation upon that outcome. The alleged failure of the Commissioner to apply the ruling or to draw the attention of Mr Glennan or the other decision-makers to it could not amount to an "equitable fraud".

24 Further, the doctrine relied upon and identified as "equitable fraud" was developed in Chancery with an *in personam* remedy to enjoin the enforcement of judgments obtained in the common law courts[21]. The AAT was not a court exercising the judicial power of the Commonwealth and, as an administrative body, it must at least be doubtful whether there could be any scope for the impeachment of its decisions in this way.

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19 (1961) 104 CLR 381.

20 (1965) 113 CLR 341.

21 *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at 238-241.

Performance of statutory duty

25 Apparently as a development of, or an alternative to, the submissions respecting equitable fraud, it is said that the Commissioner failed in the performance of a statutory duty imposed by s 37(1) of the AAT Act (as modified by s 14ZZF of the Administration Act) to produce the Determination or otherwise bring it to the attention of the AAT and the taxpayer. The consequence is said in the Amended Notice of Appeal to be that the orders of the Federal Court were in breach of covering cl 5 of the Constitution.

26 The notion that any failure to observe requirements of a law of the Commonwealth necessarily renders invalid a decision of an administrative body or a court exercising the judicial power of the Commonwealth must be rejected. To the extent that the appeal processes provided for by the Constitution and by statute are engaged, the alleged failure may be advanced in that setting. To the extent that the error goes to the jurisdiction of the body in question, relief may be available in this Court under s 75(v) of the Constitution. But, as indicated earlier in these reasons, such relief is not available as of right.

27 Section 14ZZF(1)(a)(v) of the Administration Act required the Commissioner to lodge with the AAT copies of documents in his possession or under his control which he "considered ... to be *necessary* to the review of the [AAT] decision concerned" (emphasis added). It has not been shown that the Commissioner considered the Determination to be necessary in the sense required by sub-par (v) of s 14ZZF(1)(a). In any event, failure to comply with that requirement is a failure in procedure, and does not give rise to jurisdictional error by the AAT[22]. Nor, in the circumstances outlined above, where the Determination restated the applicable legal principles which applied in any event, does it found jurisdictional error for want of procedural fairness under the principles considered in *Re Refugee Review Tribunal; Ex parte Aala*[23].

Other grounds of appeal

28 In *General Steel Industries Inc v Commissioner for Railways (NSW)*[24], Barwick CJ said of powers of the nature of those exercised by the Chief Justice

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22 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389-390 [92].

23 (2000) 204 CLR 82.

24 (1964) 112 CLR 125 at 130.

in this case that they were not reserved for instances where argument is unnecessary to evoke the futility of the claim made by the plaintiff. Barwick CJ added[25]:

> "Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

Submissions by the appellant which seek to challenge those fundamental propositions should not be accepted.

29 The Chief Justice concluded that Mr Glennan's pleading did not disclose a cause of action and that the action was vexatious. In determining that an action is vexatious, this Court is not limited to consideration of the pleaded formulation of the case and may have regard to undisputed and disputed facts[26]. The Chief Justice had regard to affidavit evidence filed by both sides which detailed the history of the dispute between Mr Glennan and the Commissioner. Plainly, his Honour was at liberty to do so. In particular, the Chief Justice was not bound, as Mr Glennan submitted on the appeal, to proceed on the assumption contained in the pleading that the receipt in question had the character of capital in Mr Glennan's hands.

30 Mr Glennan also contends that the Chief Justice erred in failing to deal first with the application for particulars. It is said in the Amended Notice of Appeal dated 20 February 2003 that the answer to the request for particulars may have had a material bearing upon the pleading of the case in the Amended Statement of Claim. However, it is not ordinarily the function of particulars to enable a plaintiff to have an indication of the nature of the case which would be presented by the defendant at a hearing of a claim the plaintiff has yet to formulate. Nothing in *Bailey v Federal Commissioner of Taxation*[27] suggests the contrary.

Further submissions

31 By motions dated 5 May 2003 and 22 May 2003, the appellant seeks leave, as required by what was said by Mason J in *Carr v Finance Corporation*

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25 (1964) 112 CLR 125 at 130.

26 *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 720.

27 (1977) 136 CLR 214.

of Australia Ltd [No 1][28] and by the whole Court in *Eastman v Director of Public Prosecutions (ACT)*[29], to present further submissions. We have considered the substance of what are said to be the fresh or additional arguments which would be advanced were leave given. With one exception, these matters are already sufficiently dealt with in the above reasons.

32 The appellant would rely upon what is said to be the failure by the Full Court to apply "the general rule" in *Bunbury v Fuller*[30]. In the passage in question Coleridge J was explaining the common law principles respecting the issue by the Court of Queen's Bench of mandamus or prohibition in respect of jurisdictional error by inferior courts and tribunals. Reliance upon that authority would not advance the appellant's case in this Court.

33 Accordingly, the motions should be dismissed with costs.

Conclusions

34 No error has been demonstrated in the decision against which the appeal has been brought. The appeal should be dismissed with costs.

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28 (1981) 147 CLR 246 at 258.

29 [2003] HCA 28 at [27]-[31], [143].

30 (1853) 9 Exch 111 at 140 [156 ER 47 at 60].