

# HIGH COURT OF AUSTRALIA

GLEESON CJ,  
GUMMOW, KIRBY, HAYNE AND CRENNAN JJ

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BLUEBOTTLE UK LIMITED & ORS

APPELLANTS

AND

DEPUTY COMMISSIONER OF TAXATION & ANOR

RESPONDENTS

*Bluebottle UK Limited v Deputy Commissioner of Taxation* [2007] HCA 54  
5 December 2007  
S302/2007

## ORDER

*Appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

### Representation

D F Jackson QC with A J Sullivan QC, S H Steward and S A Goodman for the appellants (instructed by Clayton Utz Lawyers)

A Robertson SC with S W Gibb SC and J H Momsen for the first respondent (instructed by Australian Government Solicitor)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Bluebottle UK Limited v Deputy Commissioner of Taxation**

Taxes and duties – Income tax and related legislation – Collection and recovery of tax – Collection of tax due and payable by a non-resident from a third party – Two non-resident shareholders in Virgin Blue Holdings Limited ("Virgin Blue") allegedly derived income or profits or gains of a capital nature from a source in Australia – Directors of Virgin Blue declared a dividend due for payment on 15 December 2005 to those who were shareholders on a specified record date of 28 November 2005 – After the record date but before the date for payment of the dividend, the Deputy Commissioner of Taxation ("the Commissioner") issued notices to Virgin Blue pursuant to s 255 of the *Income Tax Assessment Act 1936* (Cth) ("the Act") purporting to require Virgin Blue to retain an amount from the dividend owed to each shareholder to meet the shareholder's tax liability – The following day, which was before the date for payment of the dividend, the shareholders agreed to assign their rights to the dividend to a third party and informed Virgin Blue of that agreement – The following day, which was still before the date for payment of the dividend, the Commissioner issued tax assessment notices to the shareholders and further notices to Virgin Blue pursuant to s 255 of the Act – Whether Virgin Blue was required to retain the dividend to pay the shareholders' tax liability.

Taxes and duties – Income tax and related legislation – Whether s 255 of the Act required the Commissioner to assess a non-resident's tax liability before the Commissioner could require a third party to pay the tax due and payable by that non-resident – Relevance of relationship between s 218 and s 255 of the Act.

Corporations – Share capital – Shares – Dividends – Assignment of rights to receive a dividend – Whether a shareholder could assign its rights to receive a dividend to a third party – Whether a corporation was bound to recognise a shareholder's assignment of its rights to receive a dividend to a third party – Relevance of statutory contract under s 140(1) of the *Corporations Act 2001* (Cth) – Time at which Virgin Blue incurred a "debt" to its shareholders in respect of the dividend – Relevance of distinction between declaring a dividend and determining that a dividend is payable – Relevance of "record date".

Equity – Assignments in equity – Whether the shareholders' agreement to assign the rights to the dividend purported to effect an equitable assignment or a statutory assignment pursuant to s 199 of the *Property Law Act 1974* (Q).

Words and phrases – "declare", "debt", "determine", "due", "due and payable", "final dividend", "interim dividend", "record date".



*Corporations Act 2001 (Cth)*, ss 140(1), 254T, 254U, 254V.

*Company Law Review Act 1998 (Cth)*.

*Income Tax Assessment Act 1936 (Cth)*, ss 218, 255, 256, 257.

*Property Law Act 1974 (Q)*, s 199.



1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND CRENNAN JJ. The second respondent, Virgin Blue Holdings Limited ("Virgin Blue"), is a listed public company, limited by shares. Its constitution provides that the replaceable rules contained in the *Corporations Act* 2001 (Cth) ("the Corporations Act") do not apply to the company. Its constitution gives the directors power "from time to time [to] determine that a Dividend is payable".

2 On 11 November 2005, the directors of Virgin Blue resolved that, subject to receiving an unqualified audit report, the directors "declared" a final, fully franked dividend of 25 cents per ordinary share. The directors fixed the "record date for the dividend" as 28 November 2005 "with payment being made on 15 December 2005". On the record date of 28 November 2005, the second appellant (Cricket SA – "Cricket") held 23.00 per cent of the issued capital of Virgin Blue<sup>1</sup>; the third appellant (Virgin Holdings SA – "Holdings") held 2.08 per cent; the fourth appellant (Barfair Limited – "Barfair") held 0.48 per cent. The dividend attributable to the shareholdings of Cricket and Holdings was about \$65 million.

3 The Deputy Commissioner of Taxation ("the Commissioner"), the first respondent in this Court, alleges that Cricket and Holdings each became liable to pay income tax on the capital gain made on disposal of shares each held in Virgin Blue. Those disposals were said to have occurred in the one case on or about 30 June 2003, and in the other on or about 4 November and 8 December 2003. This litigation concerns attempts made by the Commissioner to intercept Virgin Blue's payment of the dividend that the directors resolved was to be paid on 15 December 2005, and have the amounts attributable to the shares held by Cricket and Holdings applied in satisfaction of the tax liabilities of Cricket and Holdings.

4 Cricket and Holdings contend that on 13 December 2005 each made a valid and effective deed of assignment assigning its rights in respect of the dividend to the first appellant (Bluebottle UK Limited – "Bluebottle"), and that Bluebottle gave Virgin Blue an irrevocable direction to pay the sums in question to Barfair. On 15 December 2005, Bluebottle, Cricket, Holdings and Barfair commenced a proceeding in the Supreme Court of New South Wales seeking

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1 Cricket was recorded twice in the list of the top 20 holders of shares in Virgin Blue, once in respect of 22.51 per cent of the issued capital and once in respect of a further 0.49 per cent. Different addresses were recorded in respect of the two holdings. The significance of this was not explored in argument.

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declarations (in effect) that the various transactions described were effective and that certain notices issued by the Commissioner had "no force or effect in relation to" the dividend.

5        At first instance, Gzell J made declarations of the kind sought by the plaintiffs<sup>2</sup>. The Commissioner's appeal to the Court of Appeal was allowed<sup>3</sup>. That Court (Mason P, Santow and Basten JJA) set aside the principal orders of the primary judge and ordered Virgin Blue to pay the Commissioner the dividends that had been declared. By special leave, Bluebottle, Cricket, Holdings and Barfair appeal to this Court. Virgin Blue has filed a submitting appearance.

#### The order of events

6        It is necessary to describe in more detail the events that occurred after the directors' resolution of 11 November 2005 and after the record date of 28 November 2005 fixed by that resolution. The order of the events is important.

7        *First*, on 12 December 2005, the Commissioner gave Virgin Blue two notices, each described as "Notice Pursuant to Section 255 of the *Income Tax Assessment Act 1936*". Each notice recited that, in the one case Cricket, in the other, Holdings, "is a non-resident who derives income, or profits or gains of a capital nature, from a source in Australia or who is a shareholder in a company deriving income, or profits or gains of a capital nature from a source in Australia". The notice went on to say that a number of companies (of which Virgin Blue was one):

"shall, when required by the Commissioner, pay the tax due and payable by the Taxpayer [Cricket in the one case; Holdings in the other] and are, accordingly, authorised and required pursuant to section 255 of the *Income Tax Assessment Act 1936* ... to retain [a specified amount] being the amount of tax that is due or will become due by the Taxpayer, from the amount the Companies have receipt, control or disposal of belonging to the Taxpayer".

It will be convenient to call these notices "the Commissioner's first notices".

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2    *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2006) 233 ALR 747.

3    *Deputy Commissioner of Taxation v Bluebottle UK Ltd* 2006 ATC 4803; 64 ATR 621.



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8 Subsequent events reveal that the amount specified in each of the Commissioner's first notices was more than the sum of the amount the Commissioner stated, in position papers sent to Cricket and Holdings, to be the amount of tax due from each, together with the amount of general interest charge calculated to 15 December 2005. The Commissioner's first notices required Virgin Blue to retain \$72,518,346.06 in respect of Cricket and \$20,839,554.45 in respect of Holdings. The later position papers alleged that Cricket was liable to tax of \$61,680,494.10 and general interest charge to 15 December 2005 of \$2,761,119.76 (a total of \$64,441,613.86) and that Holdings was liable to tax of \$17,722,873.80 and general interest charge to 15 December 2005 of \$2,761,119.76<sup>4</sup> (a total of \$20,483,993.56).

9 *Second*, on 13 December 2005, after receipt of the Commissioner's first notices, Cricket and Holdings each made a deed of assignment with Bluebottle. On the same day, a supplementary deed was made by Cricket and Bluebottle amending the deed of assignment, and an associated loan agreement, but nothing was said to turn on the terms of this supplementary deed. It may be put aside from further consideration. Clause 2.1(a) of each deed of assignment provided that the assignor (Cricket or Holdings) "transfers and assigns to [Bluebottle] in equity all Rights of the Assignor which are capable of assignment". The term "Rights" was defined in the deed as "all right, title and interest to receive the Dividend which the Assignor has, or will have upon them coming into existence, against Virgin Blue". Clause 2.1(b) of each deed provided that:

"On the date fixed for payment of the Dividend, the Assignor transfers and assigns to [Bluebottle] absolutely all Rights of the Assignor both legal and beneficial which have not otherwise been transferred and assigned under clause 2.1(a)."

Clause 2.1(c) of each deed provided that the consideration for the transfers and assignments in pars (a) and (b) of cl 2.1 was a sum being the equivalent in Swiss francs of the Dividend and that this amount was to remain outstanding on the terms of a loan agreement also made 13 December 2005 between the parties to the respective deeds of assignment. Clause 2.2(c) obliged Holdings or Cricket to give or to concur in the giving of any notice required by Bluebottle to Virgin Blue or any other person. Each deed contained an express choice of governing law as the law of Queensland.

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4 Why identical sums should be due for the general interest charge was not explored.

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10        *Third*, on the same day, 13 December 2005, Bluebottle executed an irrevocable direction to Virgin Blue requiring Virgin Blue to pay a stated amount of money which was described as "payment from Virgin Blue for the dividend owed to Bluebottle (as announced by Virgin Blue on 16 November 2005)". The direction required Virgin Blue to make the payment to Barfair "or any other entity specified in writing to Virgin Blue" by Barfair.

11        *Fourth*, on the following day, 14 December 2005, Virgin Blue received a letter from Cricket and Holdings enclosing copies of the deeds of assignment and the irrevocable direction to pay. The letter said that:

"Pursuant to the above Deeds of Assignment, [Cricket and Holdings] have assigned all legal and beneficial rights to the Dividend to [Bluebottle]. Consequently, when the monies comprising the Dividend become payable on 15 December, they will belong and will have always belonged to [Bluebottle] and will not be monies held or controlled by [Virgin Blue] for [Cricket and Holdings]."

A document referred to as a "brief analysis of the legal effect of the assignments" was attached to the letter. It asserted that the Commissioner's first notices did not prevent the assignments taking effect according to their terms.

12        *Fifth*, on the same day, 14 December 2005, the Commissioner issued and served notices of assessment on Cricket and Holdings. Each assessment was a default assessment issued under s 167 of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act") and was accompanied by a position paper setting out the Commissioner's views. Each assessment related to the year ended 31 March 2004 and gave 1 September 2004 as the due date for payment of the amount assessed.

13        *Sixth*, also on 14 December 2005, but *after* the assessments just described had issued and *after* Virgin Blue had received the letter from Cricket and Holdings (the fourth event), Virgin Blue received letters from the Commissioner advising that "payment of any amount retained pursuant to [the Commissioner's first notices] is now required". These letters may be referred to as "the Commissioner's second notices".

#### The issues

14        In the courts below, attention was directed principally to the proper construction and application of the relevant provisions of the 1936 Act, and

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particularly s 255. Before dealing with those issues, however, it is necessary to consider what was the effect of the several steps taken by Virgin Blue in connection with the fixing and payment of a final dividend and the several steps taken by Cricket and Holdings (as shareholders of Virgin Blue) in relation to that dividend. It is not useful to examine the questions about the engagement of s 255 of the 1936 Act without first considering the effect of the transactions described earlier.

15 Questions about the effect of those transactions were raised in the course of the oral argument of the appeal. After the completion of the hearing the parties, by leave, filed further written submissions directed to those questions. Subsequently, the appellants sought amplification of the leave that had been granted to permit them to rely on additional written submissions then filed in response to some matters raised in the Commissioner's written submissions. That leave should be granted.

16 Two premises underpinned much of the appellants' arguments about the effect of the transactions. First, they submitted that Virgin Blue did not "incur a debt merely by fixing the amount or time for payment of [the] dividend"<sup>5</sup> and that the debt arose "only when the time fixed for payment" (15 December 2005) arrived<sup>6</sup>. Secondly, the appellants submitted that the deeds of assignment, of which notice had been given to Virgin Blue, operated according to their terms. In consequence, so the argument proceeded, at no time was Virgin Blue a person of the kind described in s 255(1) – a "person having the receipt control or disposal of money belonging to a non-resident, who derives income, or profits or gains of a capital nature, from a source in Australia or who is a shareholder, debenture holder, or depositor in a company deriving income, or profits or gains of a capital nature, from a source in Australia".

17 The first premise underpinning the appellants' arguments assumed that the relevant "debt" is sufficiently identified by identifying its amount, who owes it, and when it is due. That is, the first premise assumed that the identity of the creditor is unimportant, even though the "debt" is a company dividend. Whether that is so will require consideration of important questions of company law. The validity of the second premise depends upon the correctness of the first.

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5 *Corporations Act* 2001 (Cth) ("the Corporations Act"), s 254V(1).

6 *Corporations Act*, s 254V(1).

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Company dividends before the *Company Law Review Act*

18 Before the enactment of the *Company Law Review Act* 1998 (Cth) some propositions about company dividends were well established. Some of those propositions directly reflected provisions of the applicable companies legislation; others depended upon the particular terms of commonly adopted forms of the constituent documents of companies.

19 A distinction was drawn<sup>7</sup> between a power given in the constituent documents of a company to *declare* a *final* dividend and a power to *pay* an *interim* dividend. The distinction between interim and final dividends reflected two related considerations – that a dividend could be paid only out of profits and that profits were determined according to annual statements of accounts that were to be laid before the company in general meeting. A final dividend thus reflected the results of a completed year of trading; an interim dividend reflected what was anticipated to be the position at the end of the relevant year of trading<sup>8</sup>. The distinction between the two forms of dividend was also reflected in the description usually applied to the decision to make the dividend payment. A final dividend was "declared" and the power to declare a final dividend was often vested in the company in general meeting. By contrast, the power with respect to interim dividends (usually vested in the board of directors) was commonly described as a power to "pay" interim dividends.

20 A decision to pay an interim dividend, even if described as a "declaration", was revocable until the dividend was paid<sup>9</sup>. By contrast, "the declaration of a final dividend [gave] rise to a debt payable by the company to the shareholder immediately or from the date stipulated for payment"<sup>10</sup>. And in the case of a final dividend, it was clear from at least the end of the nineteenth century that, absent particular provision to the contrary in the company's

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7 *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 at 572.

8 See, for example, *Lucas v FitzGerald* (1903) 20 TLR 16 at 18.

9 *Brookton Co-operative Society Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 441 at 455; *Marra Developments Ltd v B W Rofe Pty Ltd* [1977] 2 NSWLR 616 at 622.

10 *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 at 572.

constituent documents, a shareholder could not sue to recover a dividend unless and until it had been declared<sup>11</sup>.

21 The *Company Law Review Act* made radical changes to company law. The provisions of what was then the Corporations Law on a number of subjects were rewritten. The changes that were then made have, for the most part, continued to apply following the change from the national scheme rooted in the *Corporations Act* 1989 (Cth) and separate State Corporations Laws<sup>12</sup> to the 2001 federal Act – the Corporations Act. For present purposes, it is necessary to notice some of the changes made by the *Company Law Review Act* in relation to the constituent documents of companies and in relation to dividends. It is only with an understanding of those changes that the effect of the dividend resolution passed by the directors of Virgin Blue can be determined.

#### Constituent documents

22 Before the *Company Law Review Act*, the constituent documents of a company were the Memorandum of Association and the Articles of Association. The rules that governed alteration of the Memorandum of Association differed from those governing alteration of the Articles.

23 The *Company Law Review Act* provided<sup>13</sup> for the government of a company's internal management either by provisions of the Corporations Law that applied to the company as "replaceable rules", or by a constitution, or by a combination of both. Those sections of the Law designated as "replaceable rules" could be "displaced or modified by the company's constitution"<sup>14</sup>.

24 A public company adopting, modifying or repealing its constitution (all of which were steps requiring a special resolution of the company) was bound to lodge copies of both the resolution and the constitution with the regulator (then the Australian Securities Commission, now the Australian Securities and

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11 *In re Severn and Wye and Severn Bridge Railway Co* [1896] 1 Ch 559; *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353 at 362.

12 Some aspects of the origins and the operation of the national scheme were examined by this Court in *R v Hughes* (2000) 202 CLR 535.

13 By what became s 134 of the Corporations Law.

14 Corporations Law, s 135(2).

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Investments Commission – "ASIC"). The constitution of a public company was, and is, a matter of public record.

25 The company's constitution, like the former constituent documents of Memorandum and Articles of Association, is one of the two critically important sources of the rights of members. The other source of those rights is the relevant legislation, particularly the Corporations Act. The two sources intersect in what is now s 140(1) of the Corporations Act, which provides:

"A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:

- (a) between the company and each member; and
- (b) between the company and each director and company secretary; and
- (c) between a member and each other member;

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person."

Company dividends after the *Company Law Review Act*

26 The provisions made by the *Company Law Review Act* in relation to dividends were set out in a new Pt 2H.5 of Ch 2H of the Corporations Law and those same provisions are now set out as Pt 2H.5 of Ch 2H of the Corporations Act. The central requirement of these provisions, contained in s 254T, is not a replaceable rule and is that dividends be paid only out of profits of the company. Section 254U provides a replaceable rule. So far as now relevant it provides that:

"(1) The directors may determine that a dividend is payable and fix:

- (a) the amount; and
- (b) the time for payment; and
- (c) the method of payment.

The methods of payment may include the payment of cash, the issue of shares, the grant of options and the transfer of assets."

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Section 254V then deals with when the company incurs a debt in respect of dividends. It provides:

- "(1) A company does not incur a debt merely by fixing the amount or time for payment of a dividend. The debt arises only when the time fixed for payment arrives and the decision to pay the dividend may be revoked at any time before then.
- (2) However, if the company has a constitution and it provides for the declaration of dividends, the company incurs a debt when the dividend is declared."

Virgin Blue's constitution and dividends

27 In the present matter, the appellants submitted that s 254V(1) was engaged, not s 254V(2), and that Virgin Blue did not "incur a debt" when its directors passed the resolution of 11 November 2005. The appellants submitted that a debt arose only when the time fixed for payment of the dividend arrived and that, by that time, Cricket and Holdings had assigned their rights to Bluebottle.

28 These submissions proceeded from the premise that, although the directors' resolution spoke of "declaring" a final dividend, the only relevant power given to the board by the constitution of Virgin Blue was a power to *determine* that a dividend is payable and to fix the amount, the time for payment and the method of payment.

29 As noted at the outset of these reasons, the constitution of Virgin Blue provided that the replaceable rules contained in the Corporations Act did not apply to the company. It follows that s 254U (giving directors a power to determine that a dividend is payable) did not apply.

30 The constitution of Virgin Blue contained a number of provisions relevant to the subject of dividends. The central provision was r 63. It provided:

- "(a) The Directors may from time to time determine that a Dividend is payable. The Directors may fix the amount, the time for payment and the method of payment of a Dividend. The method of payment may include the payment of cash, the issue of shares, the grant of options and the transfer of assets, including shares or other Securities in another body corporate (or any combination of them).

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(b) No Dividend bears interest against the company."

The appellants emphasised that this rule is, for all practical purposes, identical with s 254U. They submitted that it should therefore be construed as meaning what s 254U means. In particular, they submitted that the rule should be read as using the word "determine" as not providing for what s 254V(2) refers to as "the declaration of dividends".

31 Rule 63 cannot be construed in isolation from its context. First and foremost, it cannot be construed as if, despite the general provision that the replaceable rules do not apply, it simply incorporated the replaceable rule set out in s 254U. Of course, it is important to recognise that r 63 of Virgin Blue's constitution used the same words as s 254U, but those words sit in a context provided by the whole of the constitution and the Corporations Act, not in a context provided only by the Act. It is, therefore, important to notice other provisions of the constitution that spoke of "declaration" of a dividend and other provisions of that document that used the word "determine" or cognate words.

32 Rule 5 concerning preference shares provided in par (c)(ii) that, "in addition to the preferential Dividend, the preference shares may participate with the ordinary shares in Dividends *declared* by the Directors ...", but the same rule also provided in par (d)(i)(B) for "the aggregate of any Dividends accrued (whether *determined* or not) but unpaid" (emphasis added). Rule 14 provided for the company having a lien on every share and on the proceeds of sale of every share and, by par (c), that "[t]he lien extends to all Dividends and entitlements *declared* in respect of the shares" (emphasis added). Rule 73 provided for the establishment of Dividend Reinvestment Plans, and in par (a)(i)(B) spoke of some or all shareholders electing "that Dividends from the company not be *declared* or paid and that instead a payment or distribution other than a Dividend ... be made" (emphasis added).

33 The uses of the word "declared" in these particular provisions point against reading r 63 as using the word "determine" in a way that distinguishes determination from declaration. It may readily be accepted that, as the appellants submitted, care must be taken before placing too much weight upon use of the word "declared" or cognate terms elsewhere in the constitution. But the care that must be taken stems ultimately from the recognition of the possibility that "declared" and "determined" were used interchangeably by those who drafted the constitution of the company, without the drafters adverting to the distinction between determination to pay a dividend and declaration of a dividend which the companies legislation has made since the *Company Law Review Act*. And contrary to the appellants' submissions, that possibility does not mean that the



uses in the constitution of the word "declared" and its cognate forms may be set aside as irrelevant to the proper construction of r 63. In particular, it does not entail that attention may be confined to the way in which the Corporations Act uses the words "determine" and "declaration". Rather, the uses made in Virgin Blue's constitution of both "declared" and "determined" (and their cognate forms) point towards reading "determine" as being used in r 63 to convey no narrower or more precise a meaning than "decide".

34 That view of r 63 is supported by references, made in other rules dealing with the subject of dividends and distributions to members, to matters being "determined" by the directors. Thus, r 64(a) provided that, "[s]ubject to any special rights or restrictions attached to any shares, every Dividend on a share in the company is to be paid as follows, unless otherwise *determined* by the Directors" (emphasis added). Rule 66 provided that "[i]f the Directors have *determined* to pay a Dividend *or to return capital* by a reduction of capital, a buy-back or otherwise", certain provisions were engaged. The provisions thus engaged included that "if a difficulty arises in regard to that distribution, [the directors may] settle the matter as they *determine*", and further provisions for the directors "to appropriately adjust the rights of all shareholders as the Directors *determine* in their discretion" (emphasis added). Similarly, r 67 provided that where payment of dividends and of other distributions is to be made in a currency other than Australian dollars, "the Directors may *determine* in their discretion the appropriate exchange rate and the time of calculation"; these determinations of the directors were said to be final, in the absence of manifest error (emphasis added).

35 All of these uses of the words "determine" and "determined", in combination with the several other considerations mentioned earlier in these reasons, lead to the conclusion that the better construction of r 63 is that the word "determine" means "decide". The rule should not be construed as confining the directors' power over dividends to making only what s 254U identifies as a "determination" as distinct from a "declaration" of dividend. So understood, the rule would empower the directors to declare a dividend or to determine that one is to be paid.

36 This understanding of the rule leads to no inconsistency with applicable provisions of the Corporations Act. To demonstrate why that is so, it is necessary to say something further about those provisions, their purposes and their operation.

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### The Corporations Act and dividends

37 As noted earlier, it had been established before the enactment of the *Company Law Review Act* that the decision to pay an interim dividend differed in important respects from the decision to pay a final dividend. The decision to pay an interim dividend was revocable until implemented by payment. When a final dividend was declared, the company incurred a debt when the declaration was made or from the date on which the dividend was to be paid in accordance with the declaration<sup>15</sup>.

38 The difference between interim and final dividends was critical to the application of those provisions of the companies legislation which governed insolvent trading. Those provisions were then contained in Div 3 of Pt 5.7B of the Corporations Law (ss 588G-588H) and are now found, in generally similar terms, in Div 3 of Pt 5.7B of the Corporations Act (ss 588G-588H). (One difference is that the *Company Law Review Act* provided, in its enactment of s 588G(1A), rules governing when, for the purposes of s 588G, a debt is incurred. In relation to dividends, s 588G(1A) of the Corporations Act now provides that a debt is incurred "when the dividend is paid or, if the company has a constitution that provides for the declaration of dividends, when the dividend is declared".)

39 If, after deciding to pay an interim dividend, a company's financial position deteriorated to the point where, before or upon payment of the dividend, it could not pay its debts as and when they fell due, and the directors proceeded to make the payment, the directors might be liable to pay the amount of the dividend to the company<sup>16</sup>. A purpose of the bill for what was to become the *Company Law Review Act* was<sup>17</sup> to "allow companies to avoid the problems that would arise if profits that would have been sufficient to cover the dividend when it was declared have ceased to exist when the time comes to pay the dividend". This was said<sup>18</sup> to be achieved by implementing two propositions – first, that "a debt will not arise until the time fixed for payment has arrived, unless the

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15 *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 at 572.

16 *Ammonia Soda Co v Chamberlain* [1918] 1 Ch 266 at 291-292; *Hilton International Ltd v Hilton* [1989] 1 NZLR 442.

17 Explanatory Memorandum, Company Law Review Bill 1997, par 11.40.

18 Explanatory Memorandum, Company Law Review Bill 1997, par 11.40.

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company has a constitution that provides for the declaration of a dividend" and secondly, that "[d]irectors will be able to revoke a decision to pay a dividend at any time before the time fixed for payment, and thus avoid a debt being incurred". But as the reference to declaration of dividends shows, no absolute rule was imposed. Rather, it was left to companies to decide when a debt was to be incurred.

40 If, as we would hold to be the better construction of Virgin Blue's constitution, the board of that company was empowered to choose between declaring a dividend and determining that a dividend would be paid, fixing its amount and time for payment, the question of when did the company incur a debt will be decided by applying the relevant branch of s 254V. In this matter, on 11 November 2005, the board of Virgin Blue *declared* a dividend, and, by operation of s 254V(2), the company incurred a debt when the dividend was declared. Because the declaration made in this case was subject to satisfaction of a condition precedent (receiving an unqualified audit report) the declaration took effect on satisfaction of that condition.

41 The debt was payable on 15 December 2005, the date stipulated for payment<sup>19</sup>. But the liability to make the payment was complete when the shareholders to whom the liability was owed were identified. Those shareholders were identified on the record date, 28 November 2005.

42 Whether, and when, the term "debt" can be applied to the relevant obligations may obscure some deeper questions presented by the appellants' arguments. It is to those questions that these reasons now turn.

#### Dividends as debts

43 As noted earlier, the relationship between Virgin Blue on the one hand and its members, Cricket and Holdings, on the other, was regulated by the constitution of the company and the applicable legislative provisions. The constitution had effect as a contract between the company and each member<sup>20</sup> and between a member and each other member<sup>21</sup> "under which each person

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19 *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 at 572.

20 Corporations Act, s 140(1)(a).

21 s 140(1)(c).

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agrees to observe and perform the constitution and rules so far as they apply to that person"<sup>22</sup>. Rule 6 of Virgin Blue's constitution provided that:

- "(a) Except as required by law, the company is not bound to recognise a person as holding a Security on any trust.
- (b) Whether or not it has notice of the rights or interests concerned, the company is not bound to recognise:
  - (i) any equitable, contingent, future or partial claim to, or interest in, any Security or unit of a Security; or
  - (ii) any other right in respect of a Security,except an absolute right of ownership of the Security holder or as otherwise provided by this Constitution or by law."

"Securities" were defined as including "shares, rights to shares, options to acquire shares and other securities with rights of conversion to equity". Thus, by r 6, Virgin Blue was "not bound to recognise ... any ... right in respect of" a share.

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By the resolution declaring a dividend the directors of Virgin Blue fixed a record date, 28 November 2005. The better view may well be that the directors were required to fix a record date because Virgin Blue was a public listed company subject to the listing rules<sup>23</sup> of the financial market on whose official list its shares were traded, and the operating rules<sup>24</sup> of a relevant clearing and settlement facility (a "CS facility"). In particular, the ASX Listing Rules may be understood as obliging listed entities to "follow the time limits set out in this timetable [contained in Appendix 6A to the Rules] when paying a dividend". One of the "events" in that timetable was "[r]ecord date to identify security holders entitled to the dividend" (footnote omitted). "[R]ecord date" was defined in Ch 19 of the Listing Rules (in effect) as the date fixed for the purpose of identifying those entitled to dividends or other entitlements.

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**22** s 140(1).

**23** Corporations Act, s 761A definition of "listing rules".

**24** Corporations Act, s 761A definition of "operating rules".

45 A "body corporate that is, with its acquiescence, included in the official list of a licensed market ... is taken to be under an obligation to comply with the operating rules of that market to the extent to which those rules purport to apply to the body corporate"<sup>25</sup>. Listing rules are one form of operating rules of a financial market<sup>26</sup>. A person aggrieved by a failure to comply with operating rules may obtain orders for compliance with or enforcement of the rules<sup>27</sup>.

46 It is not necessary, however, to decide whether the directors of Virgin Blue were bound to fix a record date for payment of the dividend now in question. Nor is it necessary to examine further the source or extent of such an obligation. For present purposes, it is important to notice only that a record date *was* fixed. By fixing a record date the directors identified who were to be the members entitled to participate in the dividend – those who were entitled to be recorded on the register of members on the record date.

47 It well may be that, as the Commissioner submitted, this result (that the company was obliged to pay dividends to those who were registered shareholders on the record date) follows from the operation of reg 7.11.39 of the Corporations

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25 Corporations Act, s 793C(3).

26 Corporations Act, s 761A, definition of "operating rules".

27 Corporations Act, s 793C(1) and (2).

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Regulations 2001<sup>28</sup> and r 5.20.5 of the ASTC Settlement Rules<sup>29</sup>. But whether or not those provisions require the conclusion that the company was bound to pay

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28 Regulation 7.11.39 provided:

**"Determination of who holds Division 4 financial products for the purposes of conferring security benefits"**

(1) If the ASTC operating rules include provisions relating to the determination, for the purposes of conferring security benefits, of who holds or is taken to hold Division 4 financial products at a particular time, those provisions have effect accordingly despite anything in:

- (a) the Act; and
- (b) these Regulations; and
- (c) any other law (written or unwritten) that applies to the conferral; and
- (d) any document that applies to the conferral (for example, the body corporate's constitution or a relevant trust deed).

(2) In subregulation (1), *conferring a security benefit* means:

- (a) paying or transferring money or property to a person because the person holds or held a Division 4 financial product; or
- (b) issuing securities to a person because the person holds or held a Division 4 financial product; or
- (c) conferring a right on a person because the person holds or held a Division 4 financial product."

29 ASX Settlement and Transfer Corporation Pty Ltd ("ASTC") is a prescribed CS facility. It has issued ASTC Settlement Rules, r 5.20.5 of which provided:

**"Distribution of Entitlement under Corporate Actions"**

If ASTC and an Issuer have established Cum Entitlement Balances for a Corporate Action in accordance with these Rules, then:

(Footnote continues on next page)

the dividend to those who were shareholders on the record date, that result follows from other, more general, considerations about assignments and company membership.

### The assignments

48       The assumption underpinning the appellants' case, broadly expressed, was that the right of a shareholder to receive a dividend was assignable. Before giving attention to the accuracy of that assumption, something more should first be said respecting the operation of cl 2.1 of the deeds of assignment dated 13 December 2005.

49       Clause 2.1 is headed "Equitable and Legal Assignments". It is apparent from what follows in pars (a) and (b) that the purported subject matter was the respective legal and equitable (or "beneficial") rights of Cricket and Holdings to receive the dividend which had been declared by Virgin Blue on 11 November. Paragraph (a) was drawn as an equitable assignment (for value, as indicated by par (c)) of those legal and equitable rights, with effect immediately on 13 December. Paragraph (b) was drawn as an agreement for value to catch any legal and equitable rights not assigned by par (a) but the assignment was to be effective on the payment date of 15 December. Clause 2.1 thus indicates the taking of some caution concerning the temporal derivation of the assigned rights with respect to the dividend declared 11 November but with a payment date yet to arrive when the deeds were executed on 13 December.

50       Despite assumptions made in written submissions and oral argument, neither par (a) nor par (b) of cl 2.1 was drawn so as to effect a statutory

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- (a) the identity of persons who are to receive an Entitlement under the Corporate Action will be determined by reference to those persons in respect of whom the Cum Entitlement Balance is recorded immediately prior to ASTC terminating Cum Processing for that Entitlement; and
  - (b) distribution of Entitlements under the Corporate Action will be determined by reference to the number of Parent Financial Products recorded in the Cum Entitlement Balance for each person immediately prior to ASTC terminating Cum Processing for that Entitlement.

*Note: Rule 5.20.5 derives binding effect from Regulation 7.11.39 of the Corporations Regulations.*

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assignment under the Queensland statutory provisions<sup>30</sup> relating to assignment of choses in action. The Queensland provisions were modelled on the *Judicature Act* 1873 (UK) provisions (s 25(6)) that provide the common form<sup>31</sup> for such provisions. Section 199 of the *Property Law Act* 1974 (Q) provided:

**"Statutory assignments of things in action**

(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

- (a) the legal right to such debt or thing in action; and
- (b) all legal and other remedies for the same; and
- (c) the power to give a good discharge for the same without the concurrence of the assignor.

(2) If the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

- (a) that the assignment is disputed by the assignor or any person claiming under the assignor; or
- (b) of any other opposing or conflicting claims to such debt or thing in action;

the debtor may, if the debtor thinks fit, either call upon the persons making claim to the debt or other thing in action to interplead concerning the same, or pay the debt or other thing in action into court under and in conformity with the provisions of the Acts relating to relief of trustees."

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<sup>30</sup> *Property Law Act* 1974 (Q), s 199.

<sup>31</sup> See, for example, *Conveyancing Act* 1919 (NSW), s 12; *Property Law Act* 1958 (Vic), s 134; *Law of Property Act* 1936 (SA), s 15; *Property Law Act* 1969 (WA), s 20; *Conveyancing and Law of Property Act* 1884 (Tas), s 86.



51 The statutory system was not engaged for several reasons. First, par (a) of cl 2.1 was drawn in terms as an equitable assignment for value, to be effective forthwith, with no precondition for the giving of notice as required by the statute. Secondly, par (b) was drawn so as to be effective in the future, namely on the payment date, and was an agreement for value which equity would enforce; it was not drawn as an absolute assignment of presently subsisting rights and as immediately effectual at law.

52 However, the classification of the species of assignment attempted in cl 2.1 is not determinative of the relevant issue. This turns upon the identification of the nature and content of the rights created by the declaration of dividend and the identity of those parties which enjoyed those rights. The assignments could have no greater efficacy than that given by the rights which provided their subject matter. Here, requirements of the constitution of Virgin Blue and the Corporations Act were of primary importance.

53 The appellants' argument characterised the obligation of Virgin Blue to pay the dividend as a "debt". That term is apposite but its use may mislead if inquiry stops at asking whether the word may be applied to describe the relevant obligation. A duty or obligation to pay a liquidated sum may be enforced by the action of debt<sup>32</sup>. The availability of that action does not identify, however, either the source, or the full content, of the duty or obligation that is enforced.

54 In particular, the "debt" which Virgin Blue incurred in respect of the dividend is incompletely described by reference only to its amount, the date on which it would fall (or had fallen) due for payment, and its being a dividend. It is incompletely described because no creditor is identified. The identification of the creditor is an essential element of the description of the kind of debt which is in issue in this case. It is an essential element because the Corporations Act and the constitution of Virgin Blue make it essential. To explain why that is so, it is necessary to begin with some matters of history that found reflection in this Court's decision in *Norman v Federal Commissioner of Taxation*<sup>33</sup>.

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32 *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 66 at 70, citing *Shepherd v Hills* (1855) 11 Ex 55 at 67 [156 ER 743 at 747]. See also *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 313 [65] per McHugh and Gummow JJ.

33 (1963) 109 CLR 9.

55 One premise for the decision in that case was that the taxpayer was a shareholder, registered in the share registers as such, in the companies declaring the dividends and that<sup>34</sup> "[a]s between him and the companies, he was therefore entitled to the dividends". The Court divided about the effect of a deed purporting to assign future dividends in the companies to another, by way of gift. But the unchallenged premise for the debate appears to have been that absent some enabling provision in the companies' Articles of Association, the companies were bound to pay dividends, once declared, to only the registered shareholders.

56 This premise reflected what were then long-established provisions of statutes regulating company law that forbade the entry on a register of members of notice of any trust, expressed, implied or constructive<sup>35</sup>. That rule is no longer absolute. It is qualified in relation to companies that are not listed companies<sup>36</sup> and in relation to trustees, executors or administrators of the estates of deceased, bankrupt or infirm persons<sup>37</sup>. But subject to those qualifications, no other notice of a trust whether express, implied or constructive may be entered on a share register kept within the jurisdiction or be receivable by ASIC<sup>38</sup>.

57 The significance of provisions like s 30 of the *Companies Act* 1862 (UK) forbidding entry on a register of members of notice of a trust was examined in a number of nineteenth century cases. In *Bradford Banking Co v Briggs*<sup>39</sup>, it was held that the statutory provision (standing alone) relieved the company from taking notice of trusts, but not from the obligation to take notice of an equitable mortgage of the shares made by a shareholder. But, by contrast, where the Articles of Association of the company provided that the company was not bound by, or compelled to recognise (even when having notice thereof), any equitable or other interest in a share, the company was held entitled to disregard

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34 (1963) 109 CLR 9 at 15 per Dixon CJ.

35 *Companies Act* 1862 (UK) (25 & 26 Vict c 89), s 30. See also *Muir v City of Glasgow Bank* (1879) 4 App Cas 337 at 360.

36 Corporations Act, s 169(5A).

37 s 1072E.

38 s 1072E(10).

39 (1886) 12 App Cas 29.

notice of equities<sup>40</sup>. The reason for the rule was expressed by Lord Coleridge CJ<sup>41</sup>:

"It seems to me that, if we were to throw any doubt upon that rule, we should make the carrying on of their business by joint stock companies extremely difficult, and might involve those companies in very serious questions, and the ultimate result would be anything but beneficial to the holders of shares in such companies themselves."

And it is, therefore, not surprising that a form of Article intended to have this effect was included in standard precedents of Articles in successive editions of *Palmer's Company Precedents*<sup>42</sup>. Eventually, a form of such an Article was set out in Table A in the First Schedule to the *Companies Act* 1948 (UK) and in Table A in the so-called uniform *Companies Acts* 1961 of several Australian States, and succeeding Australian companies legislation until Table A was repealed with the enactment of the *Company Law Review Act*.

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As noted earlier, Virgin Blue's constitution contained a provision of the kind described. Paragraph (a) of r 6 provided that "[e]xcept as required by law, the company is not bound to recognise a person as holding a Security on any trust". There having been no assignment of the shares or any interest in the shares, this paragraph had no application in the present matter. It may be

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**40** *Browne v The Bank of New South Wales* (1872) 11 NSW 392; *Budge v The Bank of New South Wales* (1890) 11 NSW 385; *New London and Brazilian Bank v Brocklebank* (1882) 21 Ch D 302; *In re Perkins*; *Ex parte Mexican Santa Barbara Mining Co* (1890) 24 QBD 613; *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 30 and see also, in the Court of Appeal, *Société Générale de Paris v Tramways Union Co* (1884) 14 QBD 424 at 451-452 per Lindley LJ; cf *Harvey v Commercial Bank of Australia Ltd* (1937) 58 CLR 382 at 394 per Dixon J.

**41** *In re Perkins* (1890) 24 QBD 613 at 616.

**42** See, for example, Palmer, *Company Precedents for use in relation to Companies subject to the Companies Acts 1862 to 1880*, 2nd ed (1881) at 97-98; Palmer, *Company Precedents for use in relation to Companies subject to the Companies Acts, 1862 to 1890*, 6th ed (1895), Pt 1 at 309-310; Palmer, *Company Precedents for use in relation to Companies subject to the Companies Acts, 1862 to 1900*, 9th ed (1906), Pt 1 at 537-539; Mackinnon and Buchanan-Dunlop (eds), *Palmer's Company Precedents*, 17th ed (1956), Pt 1 at 418-421.

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noticed, however, that the introductory exception ("[e]xcept as required by law") makes plain that the clause does not prevent a person having an equitable interest in the shares procuring the intervention of the court to protect that interest by order<sup>43</sup>.

59 Paragraph (b) of r 6 was engaged. It provided that "[w]hether or not it has notice of the rights or interests concerned, the company is not bound to recognise ... any other right in respect of a Security, except an absolute right of ownership of the Security holder or as otherwise provided by this Constitution or by law". The provision deals expressly with the case where the company has notice of the rights or interests concerned. It provided that whether or not the company had notice it was not bound to recognise "any other right in respect of a Security". Again, an exception is made – by the words "as otherwise provided by this Constitution or by law". But this exception, like the exception to r 6(a), is directed to requirements imposed by law (as, for example, by court order) otherwise than from the bare fact of notice of the rights or interests concerned.

60 For present purposes, it is important to recognise that the debt which is now in question arises out of and is governed by the contract constituted by Virgin Blue's constitution. By fixing a record date of 28 November 2005, the directors determined the class of those who would be entitled to receive the dividend as those entitled to be registered as members on that day and by fixing a record date the directors determined that it was those and *only* those members with whom Virgin Blue was to deal with respect to the dividend. (Of course, the fixing of a record date takes on added significance if its fixing was mandatory and if its fixing has significance in the securities market for dividing trading in the shares between trading cum-dividend and trading ex-dividend. It is convenient, however, to leave these statutory consequences aside.)

#### Assignments and dividends

61 What is the significance of the provisions of Virgin Blue's constitution that have been described for the provision of the subject matter of the assignments set out in cl 2.1 of the deeds of 13 December 2005? That question is best approached by first pointing to what the provisions of the constitution do *not* do. Virgin Blue's constitution does not purport to prohibit a member alienating any rights the member may have. In particular, the relevant provisions do not

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43 *Taylor v Midland Railway Co* (1860) 8 WR 401; *Binney v Ince Hall Coal and Cannel Co* (1866) 35 LJ Ch 363.

purport to make inalienable the right to receive a dividend that has been declared. Questions about applying the doctrine against restraint on alienation that applies in relation to interests in land<sup>44</sup> do not arise. Further, the relevant provisions of Virgin Blue's constitution do not purport to (and do not) render the deeds of assignment void<sup>45</sup> or unenforceable as between the parties to the deeds<sup>46</sup>.

62 The assignments in cl 2.1 of each deed of assignment<sup>47</sup> were expressed to be for value and, as between assignor and assignee, once the dividend was received by the assignor (Cricket or Holdings) equity obliged the assignor to hold it on trust for the assignee (Bluebottle). But as between assignor (Cricket or Holdings) and debtor (Virgin Blue) the terms of the company's constitution which s 140(1) of the Corporations Act provides has effect as a contract between the company and its members stipulated that the company (the debtor) remained free to pay the assignor and, because the record date identified those to whom the dividend was to be paid, was *bound* to pay the assignor. By that imputed contract, the company remained free to set up equities against the assignor as if no assignment had taken place. That is, the imputed contract stipulated that, regardless of notice of the deeds of assignment, Virgin Blue could look only to its members on the record date for a discharge of the debt and could set up against any member the lien it had under r 14 of the constitution on "all Dividends and entitlements declared in respect of the shares". How is effect to be given to those stipulations?

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44 *Hall v Busst* (1960) 104 CLR 206 at 217 per Dixon CJ; *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225 at 234-237 per Northrop, Gummow and Hill JJ; *Caboche v Ramsay* (1993) 119 ALR 215 at 231-232 per Gummow J. See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 106-107; Tolhurst, *The Assignment of Contractual Rights*, (2006) at 249-254.

45 Starke, *Assignments of Choses in Action in Australia*, (1972) at 66-67 [91].

46 cf *Tom Shaw & Co v Moss Empires Ltd* (1908) 25 TLR 190 at 191; *Hodder & Tolley Ltd v Cornes* [1923] NZLR 876 at 878; Allcock, "Restrictions on the Assignment of Contractual Rights", (1983) *Cambridge Law Journal* 328; Goode, "Inalienable Rights?", (1979) 42 *Modern Law Review* 553; Goode, *Legal Problems of Credit and Security*, 3rd ed (2003) at 106-107 [3-40].

47 See these reasons at [9].

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63 As R M Goode (later Professor Sir Roy Goode) wrote<sup>48</sup>, "If A, when contracting to pay money to B, makes it clear that his undertaking to B is of a personal character and that payment will be made to B alone, there is no reason why he should be compelled to accept a variation of the contract by being required to pay B's assignee, C." And that, in essence, was the nature of the contract that is deemed<sup>49</sup> to be constituted by the constitution of Virgin Blue. The company agreed to deal with its members for the time being, not with the assignees of rights enjoyed by the members.

64 Insofar as these questions arise (as they do here) in the context of equitable assignments for value of legal and equitable rights, the simple proposition is that equity follows the provisions of company law and the constitution of Virgin Blue which create and define the nature and scope of the rights with which equity deals under the assignments. Insofar as the questions arise in a case where statutory provisions on the *Judicature Act* pattern apply, the following may be said.

65 Those provisions have not been construed as permitting assignment of the benefit of a contract involving "personal skill or confidence, such that personal performance by one party can be insisted upon by the other"<sup>50</sup>. As Isaacs J put the point in *Bruce v Tyley*<sup>51</sup>, to permit assignment of the benefit of such a contract "would alter the rights" of the other party to the contract. And once it is observed that there are contracts of a kind where the benefit of the contract cannot be assigned, it follows that the apparently general words of the relevant statutory provision governing assignment (here, s 199 of the *Property Law Act*) must be read as subject to some relevant qualification or limitation on its operation.

66 That is not done by grafting some judicially determined exception upon the generality of the provision. There is no textual or other footing upon which that could be done. Rather, the relevant limitation in the operation or engagement of the statutory provision lies in the proper identification of the particular "debt or other legal thing in action" to which it is sought to have the

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48 Goode, "Inalienable Rights?", (1979) 42 *Modern Law Review* 553 at 553.

49 Corporations Act, s 140.

50 Starke, *Assignments of Choses in Action in Australia*, (1972) at 64 [90].

51 (1916) 21 CLR 277 at 289.

provision apply. In the present matter, the debt or other legal thing in action was the right to receive a dividend. For the reasons given earlier, that right is not completely and accurately identified if no account is taken of those provisions of Virgin Blue's constitution which regulate with whom the company will deal in that regard. Complete and accurate identification of the right requires recognition of the fact that under the company's constitution, by fixing a record date the directors determined the class of those entitled to receive the dividend as those entitled to be registered as members on that record date.

67 Whether an absolute covenant against assignment would raise any wider or different issues than those that must be considered in this matter need not be examined. Questions about assignment in breach of a covenant against assignment were touched on, but not decided, in *Broadcast Australia Pty Ltd v Minister Assisting the Minister for Natural Resources (Lands)*<sup>52</sup>.

68 Nor is it necessary to enter the debate about whether the *Judicature Act* provisions for assignment create what one author has described<sup>53</sup> as a "procedural regime" as distinct from a "substantive regime". Even if, as that author concludes<sup>54</sup>, the statutory provisions are substantive in effect, "so that the assignee becomes the owner at law of the subject chose in action", it is essential to recognise, and give full effect to, what is a defining characteristic of the "debt or other legal thing in action" which is the subject of debate in this case. Here the contractual stipulation regulating with whom the debtor (Virgin Blue) will deal in relation to dividends (its members on the record date) is a stipulation that cannot be severed from the "debt or other legal thing in action" which is the subject of the assignment. Any assignments by Cricket or Holdings which attempted to rely upon the *Judicature Act* provisions could not alter that stipulation or deprive it of force.

69 For these reasons, it follows that on and from the record date Cricket and Holdings, as members of Virgin Blue on the record date, had rights to receive the

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52 (2004) 221 CLR 178 at 185-186 [15]. See also *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq)* (2000) 202 CLR 588 at 601 [21]; *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225 at 234-237; *Don King Productions Inc v Warren* [2000] Ch 291 at 318-320; affd [2000] Ch 291 at 327.

53 Tolhurst, *The Assignment of Contractual Rights*, (2006) at 103-117 [5.01]-[5.27].

54 Tolhurst at 117 [5.27].

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dividend which the directors had declared on 11 November 2005 and which was due for payment on 15 December 2005. The assignments each made of those rights created rights and obligations as between each assignor and Bluebottle as assignee. Those assignments did not, however, alter the force of the contractual stipulation deemed to exist between Virgin Blue and each of Cricket and Holdings that Virgin Blue could and in this case would deal with the dividend only with those who were its members on the record date. Virgin Blue therefore was and remained liable to pay the dividend to those who were its members on the record date.

70 It is only against this understanding of the legal consequences of Virgin Blue's declaration of dividend, and the assignments and other documents passing between Cricket and Holdings, Bluebottle and Virgin Blue, that the application of s 255 of the 1936 Act can be considered. It is with that subject that these reasons will now deal.

#### Section 255 of the 1936 Act

71 At the times relevant to this matter, s 255 provided:

#### **"Person in receipt or control of money from non-resident**

- (1) With respect to every person having the receipt control or disposal of money belonging to a non-resident, who derives income, or profits or gains of a capital nature, from a source in Australia or who is a shareholder, debenture holder, or depositor in a company deriving income, or profits or gains of a capital nature, from a source in Australia, the following provisions shall, subject to this Act, apply:
  - (a) he shall when required by the Commissioner pay the tax due and payable by the non-resident;
  - (b) he is hereby authorised and required to retain from time to time out of any money which comes to him on behalf of the non-resident so much as is sufficient to pay the tax which is or will become due by the non-resident;
  - (c) he is hereby made personally liable for the tax payable by him on behalf of the non-resident to the extent of any amount that he has retained, or should have retained, under paragraph (b); but he shall not be otherwise personally liable for the tax;



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- (d) he is hereby indemnified for all payments which he makes in pursuance of this Act or of any requirement of the Commissioner.
- (2) Every person who is liable to pay money to a non-resident shall be deemed to be a person having the control of money belonging to the non-resident, and, subject to subsection (2A), all money due by him to the non-resident shall be deemed to be money which comes to him on behalf of the non-resident.
- (2A) For the purposes of this section, money due by a person to a non-resident by way of a natural resource payment within the meaning of Division 3B of Part VI of this Act, or section 12-325 in Schedule 1 to the *Taxation Administration Act 1953* (as the case requires), shall be deemed not to be money which comes to the person on behalf of the non-resident.
- (3) Where the Commonwealth, a State or an authority of the Commonwealth or a State has the receipt, control or disposal of money belonging to a non-resident, this section (other than paragraph (1)(c)) applies to and in relation to the Commonwealth, the State or the authority, as the case may be, in the same manner as it applies to and in relation to any other person.
- (4) In this section, **tax** includes the general interest charge under section 163AA, section 170AA, subsection 204(3), subsection 221AZMAA(1), subsection 221AZP(1), subsection 221YD(3) or section 221YDB, additional tax under Part VII and shortfall interest charge.

Note 1: The general interest charge is worked out under Division 1 of Part IIA of the *Taxation Administration Act 1953* and shortfall interest charge is worked out under Division 280 in Schedule 1 to that Act.

Note 2: Subsection 8AAB(4) of that Act lists the provisions that apply the general interest charge.

- (5) This section applies to an equity holder in the same way as it applies to a shareholder."

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- (a) to oblige persons of the kind described in the chapeau to s 255(1) to pay the tax assessed as due and payable by a non-resident who meets the relevant characteristics identified in that chapeau (s 255(1)(a));
- (b) to permit the person paying the tax to recoup the tax paid or to be paid by retaining sufficient out of the money of the non-resident coming into the payer's hands and to oblige the person to retain sufficient of the non-resident's money to do so (s 255(1)(b));
- (c) to extend the notion of money of the non-resident in the hands of the payer to include amounts which the payer is liable to pay the non-resident (s 255(2)) but subject to the presently irrelevant qualification made by s 255(2A);
- (d) to limit the liability of the payer to the amount that comes into the hands of the payer (s 255(1)(c));
- (e) to give the payer indemnity for all payments made in pursuance of the Act (s 255(1)(d)); and
- (f) to make like provision with respect to the Commonwealth, a State or an authority of the Commonwealth or a State (s 255(3)).

73       The Commissioner, however, contended the provision has a more extensive operation. In particular, the Commissioner submitted (a) that s 255 could be engaged before any assessment of tax due by the non-resident had issued; (b) that the section "deals separately and differently with the obligation to retain and the obligation to pay" with the consequence that the section should be read as providing for two different kinds of notice: a notice to retain moneys (issued under s 255(1)(b)) and a notice to pay (issued under s 255(1)(a)); and (c) that even without the Commissioner giving a notice to retain moneys (under s 255(1)(b)) a person of the kind described in s 255(1) was bound to retain from moneys of the non-resident coming into that person's hands sufficient to pay whatever taxation liabilities the non-resident then had or would have in the future.

74       The central proposition about which the Commissioner's submissions about the construction of s 255 ultimately hinged was the second of those just identified: that the section deals separately and differently with the obligation to pay and the obligation to retain. In part that question was examined by reference to whether the section provides for two forms of notice: notice to retain and

notice to pay. It is not useful, however, to begin by asking whether the section provides for or allows the giving of two kinds of notice. The answer to that last question either would address only a question of form, or its answer would depend upon the answer to the substantive question which underlies the Commissioner's contention that the 1936 Act treats the obligations of retention and payment separately. That substantive question is what *are* the relevant differences?

75 It is to be noticed that s 255(1)(a) obliges the person who has "the receipt control or disposal of money belonging to a non-resident" ("the controller"), "when required by the Commissioner [to] pay *the tax due and payable* by the non-resident". By contrast, s 255(1)(b) gives the controller authority to retain (and requires the controller to retain) "so much as is sufficient to pay *the tax which is or will become* due by the non-resident". The Commissioner emphasised both the need to give effect to the phrase "the tax which ... *will* become due" in par (b) and the use of the different phrase in par (a) "the tax due and payable".

76 There are two principal points to make about these differences between the two paragraphs. First, par (a) concerns payment; par (b) concerns retention. It is, therefore, not surprising that the provision for payment (par (a)) should deal with what is "due and payable", and the provision for retention should acknowledge and deal with the possibility that the time for payment of the tax in question may not have arrived when the controller first becomes liable to pay money to the non-resident or money of the non-resident first "comes to him".

77 Secondly, the amount of money which is to be dealt with in accordance with par (a) (by *payment*) is readily ascertained. It is the amount of the tax that is due and payable by the non-resident. The description of the tax as "due and payable" necessarily presupposes that an assessment has been made<sup>55</sup>. The Commissioner submitted that par (b) should be read differently, and as speaking "both of the time of assessment and of a time prior to assessment". It was said that it was sufficient that there should be "an inchoate liability for tax" and that "the tax would become due, whether considered temporally or as a matter of probability". These submissions should be rejected.

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55 *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 251-252 per Kitto J; *Federal Commissioner of Taxation v Prestige Motors Pty Ltd* (1994) 181 CLR 1 at 13; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 191-192.

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Crennan J

30.

78 When s 255(1)(b) refers to "the tax which is or will become due by the non-resident" it must be read as referring to an ascertained sum. If the paragraph is not read in that way, the obligation to retain money which is imposed on the controller is an obligation of undefined content. It is undefined because all that may be retained (the controller "is hereby authorised ... to retain") "out of any money which comes to him on behalf of the non-resident" is *sufficient* to pay the tax which is or will become due. And it is *that* amount (and only that amount) which the controller is obliged to retain. And as the facts of the present matter show, if s 255(1)(b) is not read as referring to an ascertained sum, the Commissioner may require the controller to retain more than the amount later assessed as due from the non-resident. But that would require the controller, as the Commissioner's first notices did in this case, to retain more than sufficient to pay the tax which is or will become due.

79 Until the tax payable by the non-resident has been assessed it is not possible to say more than that there *may* be tax due by the non-resident. It is not possible to say that tax *is* due or that tax *will become* due. The prediction that tax *may* be due (and any prediction of its likely amount) may be able to be made with more or less certainty by a person who is armed with a deal of information, but there is no reason to suppose that the controller of a non-resident's money would ordinarily, let alone invariably, have that information and be in a position to make any useful prediction about the taxation affairs of the non-resident whose money the controller receives. The present case illustrates why that is so. The taxation liabilities of Cricket and Holdings relate to transactions they are alleged to have made on capital account and yielded a tax liability in the year ended 31 March 2004. The sums of money which Virgin Blue is now alleged to have been obliged to retain were payments in a different tax year and owing to its shareholders on revenue account. Neither the holding of shares by Cricket and Holdings, nor the fact that Virgin Blue was bound to pay the dividend that was declared, gave any basis for Virgin Blue knowing anything of the relevant Australian taxation affairs of Cricket or Holdings.

80 Paragraph (b) of s 255(1) should be read as referring to an amount of tax that has been assessed. The phrase "tax which ... will become due" is to be understood as referring to tax which, although assessed, is not yet due for payment.

81 This construction of s 255(1)(b) gives proper weight to the language used in that paragraph ("the tax which is or will become due by the non-resident") when compared with the different expression used in par (a) ("the tax due and payable by the non-resident"). As Gibbs CJ observed in *Clyne v Deputy*

*Commissioner of Taxation*<sup>56</sup>, "[t]he word 'due' is ambiguous; it can mean owing, although not payable until some future date, or it can mean presently payable". And as the decision in *Clyne* illustrates, it is necessary to consider expressions like "due", and "due and payable", when used in the 1936 Act, in the context of the Act as a whole. When "due" is used in the collocation found in s 255(1)(b), "the tax which is or will become due by the non-resident", the requirement for specifying the amount of money that meets that description requires that the word "due" is read as meaning assessed as owing.

82        Once those steps are taken, the obligations to retain and to pay are seen as intersecting obligations. The point of their intersection is the specification of the tax which under par (a) is to be paid when required by the Commissioner, and which under par (b) is both the amount that may be retained (the controller "is hereby authorised") and the amount that must be retained (the controller "is hereby ... required"). Once this intersection between the operation of par (a) and par (b) of s 255(1) is identified, many of the issues that would otherwise arise on the construction urged by the Commissioner fall away. It is, however, necessary to consider the statutory setting in which s 255 takes its place. Two aspects of the statutory setting for s 255 require consideration: the history of the section and the other provisions of the 1936 Act that relate to the collection of tax from persons other than the taxpayer.

#### Legislative antecedents of s 255

83        Some of the expressions found in s 255 of the 1936 Act can be traced to provisions first made in the *Income Tax Assessment Act* 1915 (Cth) ("the 1915 Act") dealing with "agents" and "trustees". An "agent" was defined, in s 3 of the 1915 Act, as including:

"every person who in Australia, for or on behalf of any person out of Australia (in this section called 'the principal') has the control receipt or disposal of any income belonging to the principal, and every person declared by the Commissioner to be an agent or the sole agent for any person for the purposes of this Act."

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56 (1981) 150 CLR 1 at 8.

*Gleeson CJ*  
*Gummow J*  
*Kirby J*  
*Hayne J*  
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32.

Section 52 of the 1915 Act provided:

"With respect to every agent and with respect also to every trustee, the following provisions shall apply:—

- (a) He shall be answerable as taxpayer for the doing of all such things as are required to be done by virtue of this Act in respect of the income derived by him in his representative capacity and the payment of income tax thereon.
- (b) He shall in respect of such income make the returns and be assessed thereon, but in his representative capacity only, and each return and assessment shall, except as otherwise provided by this Act, be separate and distinct from any other.
- ...
- (d) Where as agent or trustee he pays income tax, he is hereby authorised to recover the amount so paid from the person in whose behalf he paid it, or to deduct it from any money in his hands belonging to that person.
- (e) He is hereby authorised and required to retain from time to time out of any money which comes to him in his representative capacity so much as is sufficient to pay the income tax which is or will become due in respect of the income.
- (f) He is hereby made personally liable for the income tax payable in respect of the income if, after the Commissioner has required him to make a return, or while the tax remains unpaid, he disposes of or parts with any fund or money which comes to him from or out of which income tax could legally be paid, but he shall not be otherwise personally liable for the tax:

Provided that the Commissioner may, upon application by the agent, permit disposal of such fund or money or part thereof as he considers necessary.

33.

- (g) He is hereby indemnified for all payments which he makes in pursuance of this Act or by requirements of the Commissioner.
- (h) For the purpose of insuring the payment of income tax the Commissioner shall have the same remedies against attachable property of any kind vested in or under the control or management or in the possession of any agent or trustee, as he would have against the property of any other taxpayer in respect of income tax, and in as full and ample a manner."

84 The authority given (and requirement made) by s 52(e) of the 1915 Act to retain "sufficient to pay the income tax which is or will become due" has obvious similarities with the present provisions of s 255(1)(b). But the context in which s 52(e) appeared is radically different from that provided by s 255 of the 1936 Act. First, s 52(a) of the 1915 Act made the agent "answerable *as taxpayer* for the doing of all such things as are required [by the Act] in respect of the income derived by him in his representative capacity and the payment of income tax thereon" (emphasis added). Secondly, the authority given (and requirement made) by s 52(e) related to the tax due "in respect of the income" as if the amounts with which the agent dealt both founded the relevant taxation liability and marked the outer boundary of that liability. Thirdly, the agent's personal liability for tax depended upon his paying away money from which tax could be paid after the Commissioner had required him to make a return or "while the tax remains unpaid".

85 Expressions similar to those used in s 52 of the 1915 Act were then used in the first provision that can be seen as the direct legislative antecedent of s 255 of the 1936 Act. The *Income Tax Assessment Act* 1918 (Cth) amended the 1915 Act by inserting s 52A. That section provided:

"With respect to every person who has the receipt control or disposal of money belonging to a person resident out of Australia, who derives income from a source in Australia or who is a shareholder, stock holder, debenture holder, or depositor in a company carrying on business in Australia, the following provisions shall, subject to this Act, apply:—

- (a) He shall when required by the Commissioner pay the income tax due and payable by the person on whose behalf he has the control receipt or disposal of money.

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34.

- (b) Where he pays income tax in accordance with the preceding paragraph he is hereby authorised to recover the amount so paid from the person on whose behalf he paid it or to deduct it from any money in his hands belonging to that person.
- (c) He is hereby authorised and required to retain from time to time out of any money which comes to him on behalf of the person resident out of Australia so much as is sufficient to pay the income tax which is or will become due by that person.
- (d) He is hereby made personally liable for the income tax payable by him on behalf of the person resident out of Australia if after the Commissioner has required him to pay the tax he disposes of or parts with any fund or money then in his possession or which comes to him from or out of which the income tax could legally be paid, but he shall not be otherwise personally liable for the tax:

Provided that the Commissioner may upon application permit disposal of such fund or money or part thereof as he considers necessary.

- (e) He is hereby indemnified for all payments which he makes in pursuance of this Act or by requirements of the Commissioner."

86 For present purposes, it is necessary to notice that s 52A(d) imposed personal liability on the controller of money belonging to a non-resident. That liability was imposed if, after the Commissioner had required him to pay the tax, the controller disposed of or parted with any fund or money then in his possession or which came to him from which the tax could be paid.

87 Neither the provisions of s 52A(d) nor any of the other provisions of s 52A limited the liability of the controller to the amount of money of the non-resident that came into the hands of the controller. Section 52A(a) obliged the controller (when required by the Commissioner) to pay the tax due and payable by the non-resident. Paragraph (b) entitled the controller to recover what was paid from the non-resident *or* to deduct it from any money in the controller's hands. In this respect, s 52A differs markedly from the presently applicable provisions of s 255 of the 1936 Act where the personal liability imposed on the controller is limited "to the extent of any amount that he has retained, or should be retained" under s 255(1)(b).



88 The change in provisions relating to non-residents that has just been identified was effected by the 1922 consolidating and amending legislation – the *Income Tax Assessment Act 1922* (Cth) ("the 1922 Act") – s 90 of which was substantially in the form now found in s 255(1). The 1922 Act contained only 100 sections. Apart from s 90, two provisions should be mentioned. Section 89 made provisions about agents and trustees that were generally similar to s 52 of the 1915 Act. Section 65 of the 1922 Act (a predecessor of which had been brought into the 1915 Act in 1918) provided for the Commissioner to collect tax from persons owing money to a taxpayer. Section 65(1) provided for the Commissioner, by notice in writing, to require (a) any person by whom any money is due or accruing due to a taxpayer, (b) any person who holds money for or on account of a taxpayer, (c) any person who holds money on account of some other person for payment to a taxpayer, and (d) any person having authority from some other person to pay money to a taxpayer, to pay the tax due by the taxpayer (as well as fines and costs imposed by a court in respect of an offence against the Act). Failure to comply with such a notice was an offence. A person making a payment in pursuance of the provision was "deemed to have been acting under the authority of the taxpayer and of all other persons concerned"<sup>57</sup>. This latter provision (which it is convenient to refer to as a form of "statutory garnishee provision") was, for many years, found in s 218 of the 1936 Act<sup>58</sup>.

89 The 1936 Act contained the three kinds of provision identified earlier in these reasons as found in the 1922 Act: a provision (s 254) about agents and trustees substantially the same as s 89 of the 1922 Act; a provision (s 255) about non-residents substantially the same as s 90 of the 1922 Act; and a statutory garnishee provision (s 218) like s 65 of the 1922 Act. What now is s 255(2), deeming certain persons who owe money to a non-resident to have the control of money belonging to the non-resident, was first enacted in the 1936 Act. In addition, s 256 of the 1936 Act dealt specifically with persons paying royalties to a non-resident taxpayer. Section 256(2) provided that s 255 was to "apply in respect of payments of royalty referred to in this section".

90 Further, s 257 of the 1936 Act provided that:

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57 s 65(4).

58 Section 218 was repealed, after the events giving rise to this appeal, by the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth). See now *Taxation Administration Act 1953* (Cth), Sched 1, ss 260-5 to 260-20.

*Gleeson CJ*  
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36.

"Where any income of any person out of Australia is paid into the account of that person with a banker, the Commissioner may, by notice in writing to the banker, appoint him to be the person's agent in respect of the money so paid so long as the banker is indebted in respect thereof, and thereupon the banker shall accordingly be that person's agent."

91 In the end, these matters of legislative history provide only limited assistance to the resolution of the questions about the application of s 255 that arise in this matter. Two features of the history warrant notice. First, provisions of a kind generally similar to s 255 were more fully developed before the statutory garnishee provisions until recently found in s 218. But the non-resident provisions began life in a form in which the controller of a non-resident's money could be personally liable for the whole of the tax payable by the non-resident regardless of the amount of money of the non-resident that person controlled. Now, of course, the controller's liability is limited to the amount of money held by or subject to the control of that person. Secondly, the provisions about non-residents have always sat in a context provided by the provisions with respect to agents and trustees, and more recently in a context provided by both those provisions and the statutory garnishee provisions.

#### The significance of s 218

92 Much of the Commissioner's argument about the construction of s 255 was informed by the need to differentiate between the operation of that section and the operation of the statutory garnishee provisions of s 218. Implicit in much of the Commissioner's argument was the assertion that to give s 255 a construction or operation narrower than that propounded by the Commissioner would give the section little or no work to do different from the work done by s 218. Two points may be made about this aspect of the matter.

93 First, s 255 is directed to a more limited class of tax liabilities than those with which s 218 deals. Section 255 concerns only tax which is or will become due from a non-resident; s 218 is not so limited. Secondly, and perhaps more importantly, s 255 makes the controller of moneys liable for the tax payable by the non-resident (to the extent of the amount that was, or should have been, retained); s 218 is a penal provision and does not permit the Commissioner to recover any of the tax due from the person to whom the notice is given. These differences suffice to distinguish between the two provisions and give each a separate operation in the 1936 Act.

Two decisions about s 255

94 Reference was made in argument to only two other decisions in which the construction and application of s 255 has been considered: *Commissioner of Taxation v Wong*<sup>59</sup> and *Elsinora Global Ltd v Healthscope Ltd (No 2)*<sup>60</sup>. The analysis of the section made in those cases formed the basis for much of what was said on that subject in the reasons of the primary judge and the Court of Appeal in the present matter. It is necessary to deal with only one aspect of that analysis.

95 In *Wong*, argument appears to have proceeded from the premise that s 255 permitted (perhaps even required) the giving of two notices: one under par (a) of sub-s (1) and the other under par (b). Notice under par (a) was treated as a "trigger" activating the operative provisions of s 255(1)<sup>61</sup> and a generally similar approach was adopted in *Elsinora*<sup>62</sup>. But the central focus of attention in both cases was upon questions of control of moneys of a non-resident and whether notice can be given under s 255 at a time when the person to whom the notice is directed does not have control of moneys of the non-resident. Argument in neither case seems to have been directed to the issue of what is meant by "tax which is or will become due by the non-resident".

96 It would be wrong to approach the construction of s 255 piecemeal. In particular, it would be wrong to treat s 255(1)(a) as wholly distinct and separate from s 255(1)(b). In that regard, the "trigger" metaphor adopted in *Wong*, though useful, should not be allowed to divert attention from recognising that pars (a) and (b) of s 255(1) have an intersecting operation. As noted earlier in these reasons, the point of that intersection is the amount with which both paragraphs deal: the tax which is or will become due by the non-resident (which defines the amount to be retained) and the amount which is to be paid to the Commissioner when required under par (a) (the tax due and payable by the non-resident).

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59 (2002) 121 FCR 60.

60 (2006) 227 ALR 570.

61 *Commissioner of Taxation v Wong* (2002) 121 FCR 60 at 65 [23].

62 (2006) 227 ALR 570 at 581-582 [51].

*Gleeson CJ*  
*Gummow J*  
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*Hayne J*  
*Crennan J*

38.

97        Once it is recognised that content can be given to the obligation imposed by s 255(1)(b) only if an assessment has issued, the operation of the provision, as a whole, can be seen to be that described at par [72] of these reasons.

#### Conclusion and orders

98        It follows that in the particular circumstances of this case, the Commissioner's first notices did not comply with s 255(1). At the time of the Commissioner's first notices, no assessment had issued to Cricket or to Holdings and there was then no "tax which is or will become due by the non-resident" within the meaning of s 255(1)(b). By contrast, when the Commissioner's second notices were given, assessments had issued to Cricket and to Holdings. There was then tax due and payable. Virgin Blue was then a "person having the receipt control or disposal of money belonging to" Cricket and to Holdings. Virgin Blue had receipt, control or disposal of money belonging to its shareholders because, within the meaning of s 255(2), it was then "liable to pay money", the declared dividend, to those who were its shareholders on the record date. In particular, despite the assignments, Virgin Blue remained liable to pay the declared dividend to Cricket and Holdings. Each of Cricket and Holdings was a non-resident who was said to have derived gains of a capital nature from a source in Australia. Virgin Blue was, therefore, obliged by the Commissioner's second notices to retain from the dividends otherwise due to be paid to Cricket and Holdings sufficient to pay the tax due under each assessment. Virgin Blue was personally liable for the tax due to the extent it should have retained funds. Virgin Blue was indemnified for all payments it made in pursuance of the Commissioner's requirements.

99        The appeal should be dismissed with costs.

