HIGH COURT OF AUSTRALIA

HEYDON J

Matter No S167/2011

ACN 078 272 867 PTY LIMITED (IN LIQUIDATION)
(FORMERLY ADVANCE FINANCES PTY LIMITED)
& ANOR PLAINTIFFS

AND

DEPUTY COMMISSIONER OF TAXATION & ANOR DEFENDANTS

Matter No S210/2011

GARY BINETTER PLAINTIFF

AND

DEPUTY COMMISSIONER OF TAXATION & ANOR DEFENDANTS

ACN 078 272 867 Pty Limited (In liquidation) (Formerly Advance Finances Pty Limited) v Deputy Commissioner of Taxation
Binetter v Deputy Commissioner of Taxation
[2011] HCA 46
2 November 2011
S167/2011 & S210/2011

ORDER

1. *In each matter, application dismissed.*

2. *The plaintiff in S210/2011 to pay the costs of the first defendant in S210/2011 and in S167/2011.*

Representation

R L Seiden with S Kaur-Bains and N Kulkarni for the plaintiffs (instructed by Signet Lawyers Pty Limited)

M L Brabazon SC with A J O'Brien for the first defendant in both matters (instructed by Australian Government Solicitor)

Submitting appearance for the second defendant in both matters

CATCHWORDS

ACN 078 272 867 Pty Limited (In liquidation) (Formerly Advance Finances Pty Limited) v Deputy Commissioner of Taxation

Binetter v Deputy Commissioner of Taxation

Corporations – Reinstatement to register – Winding up – Companies deregistered under *Corporations Act* 2001 (Cth) ("Act") – Federal Court made orders reinstating companies to register pursuant to s 601AH(2) of Act and thereupon winding them up – Companies and former director sought writs of certiorari, to quash winding-up orders made by Federal Court, mandamus and prohibition – Whether Federal Court had jurisdiction to wind up companies – Whether Federal Court wound up deregistered companies – Whether Federal Court ordered that winding up take effect from date when companies reinstated – Whether s 601AH(5) of Act requires that company, when reregistered, come back into existence in same form as on deregistration.

Procedural fairness – Whether companies should have been given opportunity to be heard before winding-up orders made – Discretionary nature of relief sought – Whether there was unfairness as matter of substance – Whether opportunity to be heard could have made difference to outcome.

Words and phrases – "company", "jurisdictional error".

Corporations Act 2001 (Cth), ss 459A, 459P, 601AH(2), 601AH(5).
Corporations Law, s 574(1)(b).

1 HEYDON J. There are two proceedings before the Court: S167/2011 and S210/2011.

2 In S167/2011 the plaintiffs are two companies. The first company is ACN 078 272 867 Pty Ltd (in liq). It was formerly called Advance Finances Pty Ltd and will be referred to below as "Advance". The second company is ACN 087 623 541 Pty Ltd (in liq). It was formerly called Civic Finance Pty Ltd and will be referred to below as "Civic". The companies have filed an amended application for an order to show cause why writs of certiorari, mandamus and prohibition should not be issued to the Federal Court of Australia. The primary relief sought is certiorari to quash orders which Jagot J, a judge of that Court, made on 16 December 2010[1] and 11 March 2011[2].

3 The orders of 16 December were orders that Advance and Civic be reinstated to the register and thereupon placed into liquidation. The orders of 11 March 2011 were orders dismissing with costs an application by a former director of the two companies, Mr Gary Binetter, seeking to set aside the winding-up orders. In S210/2011, Mr Binetter has filed an amended application to show cause which is similar to that filed by the companies in S167/2011.

4 In each proceeding the second defendant, which is described as "The Federal Court of Australia and Judges thereof", has filed a submitting appearance.

5 The background is as follows.

6 On 21 April 1997, Advance was incorporated. Mr Gary Binetter was appointed a director. On 17 May 1999, Civic was incorporated. Mr Gary Binetter was appointed a director. One of the other directors of both companies was Mr Emil Binetter, Mr Gary Binetter's father. The activities of the companies allegedly centred on borrowing money from banks in Israel, namely the Israel Discount Bank and Mercantile Discount Bank, and on-lending it to other entities.

7 The income tax returns for the two companies in the years from incorporation until 2006 showed nil taxable income. Those returns were said to be self-assessments prepared by accountants without source documents and in reliance on information provided by Mr Emil Binetter. Neither company paid any income tax. On 31 July 2006 and 8 September 2006, the Australian Taxation

---

1 *Deputy Commissioner of Taxation v Australian Securities and Investments Commission* [2010] FCA 1411.

2 *Deputy Commissioner of Taxation v Australian Securities and Investments Commission* [2011] FCA 219.

Office ("the ATO") wrote to the then solicitors for Advance and Civic and stated that the ATO intended to audit a number of entities associated with Mr Emil Binetter.

8 Five days after the last letter, on 13 September 2006, Advance and Civic each lodged an application with the Australian Securities and Investments Commission ("ASIC"). Each application was an application for the relevant company to be deregistered administratively under the *Corporations Act* 2001 (Cth) ("the Corporations Act"). ASIC was given no notice of the impending audits. The ATO was given no notice of the applications.

9 These applications for deregistration succeeded. In her judgment of 16 December 2010, Jagot J found that Civic was deregistered on 25 November 2006 and Advance on 26 November 2006[3].

10 From the respective dates of deregistration, Mr Gary Binetter ceased to be a director of the companies.

11 The ATO did not become aware of the deregistrations until Mr Emil Binetter was interviewed, pursuant to statutory power, on 27 April 2007.

12 By 2009 the ATO had formed the view that certain of the tax returns of the companies were incorrect and that but for the deregistrations tax would be owing once notices of assessment were served.

13 On 20 January 2010, the first defendant, the Deputy Commissioner of Taxation ("the Commissioner"), filed an application and supporting affidavits in proceedings NSD41/2010 in the Federal Court of Australia. The Commissioner sought orders, inter alia, that ASIC reinstate Civic to the register pursuant to s 601AH(2) of the Corporations Act and that on reinstatement Civic be wound up and a liquidator appointed. The application and affidavits were served on the four persons who had been directors at the time Civic was deregistered, namely Gary Binetter, Emil Binetter, Lisa Michelle Binetter and Debbie Ann Binetter.

14 On 20 January 2010, similar documents were filed in proceedings relating to Advance in the Federal Court – NSD44/2010. They were served on the persons who had been directors at the time Advance was deregistered, namely the same four former directors of Civic.

---

3 *Deputy Commissioner of Taxation v Australian Securities and Investments Commission* [2010] FCA 1411 at [7] (6).

15 Each of the proceedings was listed for directions on 12 February 2010. On 9 February 2010, the then solicitors for the former directors of Civic and of Advance informed the solicitors for the Commissioner that, on 12 February 2010, applications would be made for orders that the directors be joined or be heard. On 12 February 2010, District Registrar Wall, without opposition from the Commissioner, granted leave for Mr Gary Binetter to be heard. He was not joined as a party in either proceeding. Directions were made for the filing of evidence and outlines of submissions.

16 On 16 December 2010, Jagot J, after a hearing held between 30 November and 2 December 2010, made the orders requested by the Commissioner[4]. At that hearing Mr Gary Binetter was represented by two counsel. He called what Jagot J described as "extensive" evidence. He cross-examined witnesses called by the Commissioner. He put lengthy and sophisticated submissions opposing the reinstatement and the winding up of Advance and Civic.

17 On 17 December 2010, Jagot J stayed execution in order to enable Mr Gary Binetter to apply for leave to appeal or be joined as a party to any appeal.

18 On 4 March 2011, Perram J delivered two decisions.

19 In the first, Perram J held, after a hearing on 1 March 2011 at which Mr Gary Binetter was represented by two counsel, that leave should not be granted to him to appeal against Jagot J's orders of 16 December 2010[5]. He concluded that Mr Gary Binetter had no standing to appeal. The risks posed to him as a former director arising from any investigations by the liquidator and possible proceedings against him were insufficient to make him aggrieved by the winding-up orders.

20 The second decision of 4 March 2011 concerned an application by counsel on behalf of Mr Gary Binetter for a continuation of the stay of Jagot J's orders pending an application for special leave to appeal to this Court[6]. Perram J considered that no appeal lay to this Court from his decision refusing leave to appeal. He did this because his refusal to grant leave to appeal was an exercise of the jurisdiction described in s 25(2)(a) of the *Federal Court of Australia Act* 1976 (Cth) and s 33(4B)(a) of that Act provides that no appeal lies to the

---

4 *Deputy Commissioner of Taxation v Australian Securities and Investments Commission* [2010] FCA 1411.

5 *Binetter v Deputy Commissioner of Taxation* [2011] FCA 184.

6 *Binetter v Deputy Commissioner of Taxation (No 2)* [2011] FCA 207.

High Court from a judgment of the Federal Court in the exercise of its appellate jurisdiction if the judgment is a determination of the kind mentioned in s 25(2). Hence, there was no available proceeding to which the stay application could be seen as incidental. The right to appeal is a creature of statute and that controversial statutory restriction on the right to apply for special leave to appeal to this Court has brought about these applications for constitutional writs in the original jurisdiction of the Court.

21 On 9 March 2011, Jagot J heard an application on behalf of Mr Gary Binetter which was presented by senior and junior counsel. The application was that the winding-up orders of 16 December 2010 be set aside on the ground that the companies should have been joined as parties to the winding-up proceedings. On 11 March 2011, Jagot J dismissed that application[7]. She rejected the submission that there was a temporal gap between the operation of the orders for reinstatement and the operation of the winding-up orders. Thus it could not be said that in that interval there were existing companies, the rights of which would be affected by the winding-up orders.

22 On 11 March 2011, the companies were reinstated on the ASIC company register.

23 On 16 March 2011, Mr Gary Binetter instituted further proceedings in the Federal Court of Australia for orders under the Corporations Act to permit him to institute proceedings in the names of Civic and Advance, including applications seeking leave to set aside the winding-up orders and to appeal against Jagot J's orders of 16 December 2010 on behalf of Civic and Advance. Those proceedings were argued over two days. Mr Gary Binetter was represented by two counsel. On 21 October 2011, Stone J dismissed the application[8]. She rejected a submission that the Federal Court had no power to wind up a company while it was deregistered. She also rejected other submissions which had already been considered by Jagot J. She considered that Jagot J's reasoning was not attended with sufficient doubt to warrant its reconsideration.

24 On 17 October 2011, Mr Gary Binetter applied to the Federal Court for a stay of the winding up of Civic and Advance until this Court determined S167/2011 and S210/2011, which proceedings had been on foot for some time. The matter was listed before Stone J on 24 October 2011. She dismissed an application to disqualify herself on grounds of apprehended bias. She accepted that Mr Gary Binetter's standing in this Court to set aside the winding-up orders

---

7 *Deputy Commissioner of Taxation v Australian Securities and Investments Commission* [2011] FCA 219.

8 *Binetter v Commissioner of Taxation* [2011] FCA 1195.

would give him standing to seek a stay in the Federal Court. She saw little damage to Mr Gary Binetter's interests if a stay were refused and she saw a stay as causing greater prejudice to the liquidator. She, therefore, refused the application[9].

25 On 14 March 2011, three days after the companies had been reinstated, the Commissioner served on the liquidator of the companies notices of assessment, notices of amended assessment and penalty notices issued by the Commissioner to the companies. On 12 May 2011 and 6 October 2011, objections signed by Mr Gary Binetter were lodged. In oral argument the plaintiffs submitted, while going through some of the material, that the objections had significant prospects of success. On 13 May 2011, the companies sent letters to the Commissioner seeking deferral of the due date for payment of the alleged tax liabilities.

26 Proceedings S167/2011 were instituted in this Court on 10 May 2011. Proceedings S210/2011 were instituted in this Court on 16 June 2011. On 29 July 2011, the liquidator consented to the institution of S167/2011. The lateness of that consent was not relied on by the Commissioner in opposition to the proceedings.

27 On 3 August 2011, a summons for directions was filed. The applications which initiated S167/2011 and S210/2011 were not served on the Commissioner until 4 August 2011. In the case of S167/2011, that was just within the period of 90 days from issue stipulated as the permissible period for service in r 25.01(g) of the High Court Rules 2004 (Cth). Service was effected only after complaint by the solicitors for the Commissioner. They learned of the filing of the documents only after this Court notified them of the proceedings on 23 June 2011. Their request for the documents was initially refused and not complied with for six weeks. The summons for directions was heard on 12 September 2011 and directions were made for the filing of evidence and submissions.

28 On 10 October 2011, the plaintiffs filed outlines of submissions in both proceedings contending that certiorari lay to the Federal Court of Australia in the original jurisdiction of this Court for non-jurisdictional error of law on the face of the record.

29 On 25 October 2011, the Commissioner indicated that he proposed to issue notices under s 78B of the *Judiciary Act* 1903 (Cth) in that regard on the basis that there was a matter involving the interpretation of the Constitution. At a directions hearing on 31 October 2011 the necessity for this was obviated when the plaintiffs indicated that they would abandon the point, as they did in their reply filed on that day.

---

9 *Binetter v Commissioner of Taxation (No 2)* [2011] FCA 1214.

30 Before Jagot J the plaintiffs had argued against the reinstatement of the companies. They do not do so in this Court. In this Court their complaints are instead directed solely to the making of the winding-up orders.

31 The plaintiffs in both proceedings made two substantive points. One concerned jurisdictional error in relation to the deregistration of the companies. The other concerned jurisdictional error in the sense of a breach of the rules of natural justice.

32 The plaintiffs submitted that Jagot J only had jurisdiction to wind up the companies if they existed. They advanced a submission which depended in part on a particular construction of her orders. That construction was that she wound up the companies at a time when they did not exist because they had been deregistered and not yet reregistered. In that lay one aspect of the jurisdictional error. The plaintiffs pointed out that up to 30 June 1998, s 574(1)(b) of the Corporations Law provided that "nothing in this subsection affects the power of the Court to wind up a company the registration of which has been cancelled."

33 They also pointed out that McLelland J said that this gave legislative authority to wind up a deregistered company without ordering reinstatement: *Re Williams United Mines Pty Ltd*[10]. They submitted that s 574 had been repealed and that no equivalent provision had been enacted. They submitted that this removed any legislative authority of the kind to which McLelland J had referred.

34 The plaintiffs traced the history of s 574(1)(b) through United Kingdom enactments from before 1880 and New South Wales enactments from 1899. They also relied on the somewhat different history of the legislation in Victoria. The plaintiffs submitted that the history showed that inconvenient results could be produced when creditors sought a winding up without first restoring the company to the register. Hence, Jagot J had no jurisdiction to make orders winding up the companies until they had actually come back into existence by being restored to the ASIC register.

35 The central question is: what is the true interpretation of s 601AH of the Corporations Act and one set of the winding-up provisions on which Jagot J relied, namely ss 459A and 459P? It is not necessary to consider the other set – ss 461(1)(k) and 462(4). Section 459A provides:

> "On an application under section 459P, the Court may order that an insolvent company be wound up in insolvency."

---

10 (1992) 29 NSWLR 88 at 89; see also at 90.

Section 459P provides in part:

> "(2) An application [to wind up a company in insolvency] by any of the following, or by persons including any of the following, may only be made with the leave of the Court:
>
> (a) a person who is a creditor only because of a contingent or prospective debt;
>
> …
>
> (3) The Court may give leave if satisfied that there is a prima facie case that the company is insolvent, but not otherwise."

Section 601AH provides in part:

> "(2) The Court may make an order that ASIC reinstate the registration of a company if:
>
> (a) an application for reinstatement is made to the Court by:
>
> (i) a person aggrieved by the deregistration;
>
> … and
>
> (b) the Court is satisfied that it is just that the company's registration be reinstated.
>
> (3) If the Court makes an order under subsection (2), it may:
>
> (a) validate anything done between the deregistration of the company and its reinstatement; and
>
> (b) make any other order it considers appropriate.
>
> …
>
> (5) If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. …"

36 The Commissioner was an aggrieved person for the purposes of s 601AH(2)(a)(i) and a contingent or prospective creditor for the purposes of s 459P(2)(a), or so Jagot J found.

37 The plaintiffs relied on the definition of "company" in s 9 of the Corporations Act as meaning "a company registered under this Act". They stressed the word "registered". They also stressed the word "company" in ss 459A and 459P. The plaintiffs submitted that on the day when the winding-up

orders were made, the companies did not exist and were not registered under the Act. However, the definition in s 9 does not apply if "the contrary intention appears". A contrary intention appears from s 601AH, for all references to "company" up to the time of reinstatement are references to a company which is not registered under the Act because it has been deregistered.

38 There is nothing in s 601AH, either appearing from the express words or by necessary intendment, which prevents an order for the winding up of a company being made under s 459A with effect from the time when the company is reinstated pursuant to a s 601AH(2) order and there is nothing in s 459A which prevents the winding-up order being made with effect from the date when the company is reinstated pursuant to the s 601AH(2) order. Once reinstatement took place pursuant to the s 601AH(2) orders, the companies were companies within the meaning of the Act and were liable to be wound up under orders which, though made earlier, did not come into operation until reinstatement took place.

39 The reliance by the plaintiffs on the repeal of s 574(1)(b) does not support their position. If the plaintiffs' submissions were correct, the repeal would have worked a revolution. Yet the plaintiffs pointed to nothing in the legislation, the Explanatory Memorandum to the Company Law Review Bill 1997 (Cth), or the Second Reading Speech for that Bill which suggested that the function of the repeal was to prevent an application being made and granted simultaneously to order that the registration of the company be reinstated by ASIC at some future date and, upon reinstatement of the registration on that future date, that the company be wound up.

40 Contrary to the plaintiffs' construction of Jagot J's orders referred to earlier, that is what those orders did. The orders conformed with the terms of s 601AH. The orders were that the registration of each company be reinstated in the future and that at that moment in the future the company reinstated would be wound up. Up to the time when those orders were made the companies had no existence. They only came into existence on their later reinstatement and the winding-up order took effect only at that time.

41 There is one other argument of the plaintiffs which should be referred to. The plaintiffs submitted that s 601AH(5) provides that when a company is reregistered it comes back into existence in the same form as it was on deregistration. The plaintiffs relied on *JP Morgan Portfolio Services Ltd v Deloitte Touche Tohmatsu*[11]. In fact s 601AH(5) does not provide that the company comes back into existence in the same form. Rather it provides that it is taken to have continued in existence as if it had not been deregistered. That

---

11 (2008) 167 FCR 212.

does not preclude a court order being made so that its new form will differ from its old in that its new form will be as a company in liquidation.

42 Before turning to the second substantive point of the plaintiffs, which was concerned with natural justice, there is one final submission of the plaintiffs that is relevant in that respect. The plaintiffs submitted that the construction of s 601AH operating against them was erroneous because it had the effect of denying them natural justice. It is true that it is relevant in construing legislation to analyse what impact a particular construction would have on natural justice. However, the language of s 601AH is sufficiently clear to lead to the conclusion that it has excluded natural justice, at least in a sense.

43 The second substantive point made by the plaintiffs turned on the submission that if, contrary to their first substantive point, there was power to order the winding up of an unregistered company on its reinstatement, the winding-up orders changed the status of the companies and thus affected the rights or interests of those companies. They submitted that the winding-up orders should not have been made unless the companies had been given an opportunity to be heard. Since they had not been heard, they were entitled to have the orders they seek in this Court made. The plaintiffs relied in particular on *Cameron v Cole*[12] and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*[13].

44 It is true that from the time of the reinstatement, but for the winding-up orders, the companies were taken to have continued in existence as if they had not been deregistered: s 601AH(5). It is also true that the winding-up orders changed that status. But at the time when the merits of making both the reinstatement and the winding-up orders were being debated, the companies did not exist. Indeed, they did not exist until the reinstatement orders were complied with. Thus the companies had no standing to participate in that debate. The failure of the plaintiffs' first substantive submission means that it was open to Jagot J, notwithstanding s 601AH(5), to make a winding-up order changing the former status of each company on reinstatement.

45 At first sight there may appear to be a certain theoretical unfairness in this outcome. But in reality there was no unfairness as a matter of substance. An ample opportunity was given by Jagot J to a person who did exist and whom she treated as a person interested, namely Mr Gary Binetter, to participate fully in the hearing. There is no reason to suppose that he lacked the ability to perceive, and

---

12 (1944) 68 CLR 571 at 580; [1944] HCA 5.

13 (2010) 241 CLR 1; [2010] HCA 19.

give instructions to his lawyers about, every consideration bearing on the companies' interests in the proceedings before Jagot J.

46 As part of the plaintiffs' submission that the Federal Court wrongly assumed jurisdiction to wind up the companies at a time when they did not exist because they had been deregistered, the plaintiffs submitted that the correct course would have been for orders to be made that the companies be restored to the ASIC register of companies. Only then would the Federal Court have had jurisdiction to order that the companies be wound up. In the proceedings during which the winding-up orders were thereafter applied for, the companies would have had standing to be heard. Thus both the first substantive point and the second substantive point raise the common question of whether there was a denial of procedural fairness. That question also relates to discretion, for the relief sought by the plaintiffs is discretionary.

47 A question which goes to discretion, and perhaps to the second substantive point as well, is whether conferment on the companies of an opportunity to be heard could have made a difference. That is a relevant question on an appeal from a trial where there was a denial of an opportunity to make submissions: *Stead v State Government Insurance Commission*[14]. The plaintiffs advanced the following submissions:

> "The Plaintiffs contend that they do not have to establish in this Court that the opportunity to be heard would have made a difference albeit they have to show that there was a denial of procedural fairness. In *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[15] at [84] per McHugh J and at [210] and [211] per Hayne J and at [174] per Kirby J, their Honours determined that if a decision (in that case, of the [Refugee Review] Tribunal) is invalid for want of procedural fairness (in that case, failure to give a person the opportunity to comment on adverse material) then there is no reason to withhold discretionary relief. The Plaintiffs adopt that position in this case." (footnote omitted)

48 The *SAAP* case was a very different case. A citizen of Iran – "A" – and her younger daughter applied to the Refugee Review Tribunal for review of a decision by a delegate of the responsible Minister refusing to grant them protection visas. The hearing was conducted by video link, the applicants being in South Australia and the Tribunal member and others, including the applicants' migration agent, being in Sydney. The Tribunal took evidence from A's elder daughter in the absence of A. The Tribunal then raised with A information about

---

14 (1986) 161 CLR 141; [1986] HCA 54.

15 (2005) 228 CLR 294; [2005] HCA 24.

matters of which the elder daughter had given evidence which were adverse to A. The Tribunal decided to affirm the delegate's decision, in part because of the elder daughter's evidence. McHugh, Kirby and Hayne JJ held that the Tribunal had failed to comply with the obligation created by s 424A of the *Migration Act* 1958 (Cth) ("the Migration Act") to supply the information in writing.

49 The plaintiffs relied on the following passage in McHugh J's reasons for judgment at 323-324 [84]:

> "If the decision of the Tribunal is invalid for want of procedural fairness, there is no reason to withhold discretionary relief. There is nothing to suggest that the conduct of the appellants warrants the refusal to exercise the discretion. There is no suggestion of delay, waiver, acquiescence or unclean hands. Whether the first appellant was in fact deprived of a relevant opportunity to deal with the adverse material received by the Tribunal from her eldest daughter should not affect the discretion to grant relief."

The plaintiffs also relied on what Hayne J said at 355 [210]-[211]:

> "The Minister submitted that no relief should be granted to the appellants. It was contended, in effect, that the course of events at the Tribunal was such that the first appellant (at least by her migration agent) was aware of what the eldest daughter said and had sufficient opportunity to meet it. Lying behind that submission might be thought to have lurked the suggestion that because the first appellant is illiterate in any language and the second appellant is a young child, giving of notice in writing to them in accordance with s 424A would have served no practical purpose. Whether or not that was a proposition that did lie behind the submission that relief should be refused on discretionary grounds, the submission should be rejected.
>
> For the reasons given earlier, the decision reached by the Tribunal is invalid. There is no basis, in this case, on which the undoubted discretion to refuse the relief sought could be exercised against its grant. There has been no suggestion of delay, waiver, acquiescence or other conduct of the appellants said to stand in their way."

50 After quoting what Gaudron J said in *Enfield City Corporation v Development Assessment Commission*[16], Hayne J continued at 355 [211]:

> "Even if the considerations advanced by the Minister were relevant to considering whether relief should go for jurisdictional error constituted

---

16 (2000) 199 CLR 135 at 157 [56]; [2000] HCA 5.

> by a want of procedural fairness (a question I need not examine) they are not considerations that bear upon whether certiorari should go to quash what is found to be an invalid decision."

The plaintiffs also relied on Kirby J's agreement with Hayne J on this point at 346 [174].

51 These passages are not to be taken to overrule the authorities which hold that the grant of the relevant relief is discretionary. They do not purport to do so. They deal with the reasons why in the particular circumstances of that case the discretion was not exercised against the grant of relief. In that regard it is important to note Hayne J's use of the expression "in this case". There is a radical difference between non-compliance with a statutory requirement operating in relation to refugee claimants and the circumstances of the present case. The majority in the *SAAP* case stressed the importance of compliance with the mandatory obligations created by s 424A of the Migration Act[17].

52 Given that Mr Gary Binetter was given an extensive hearing in which he put fully to Jagot J the arguments against winding up, a key question remains. Even if Jagot J erred in ordering the windings up from the date of reinstatement but before the companies had been reinstated by failing to afford procedural fairness, what difference would there have been if she had proceeded in the manner urged in this Court by the plaintiffs and heard from them before making the winding-up orders? A decision about the duties of the Refugee Review Tribunal in dealing with refugee claimants who may not speak English and may be of limited capacity to deal with administrative procedures in a country which is to them foreign in many respects has little to say about the problem created by the present circumstances. The present circumstances, on the plaintiffs' case, involve drawing a distinction between what Mr Gary Binetter said, or could have said, to Jagot J, and what the companies could have said to her. The distinction is extremely tenuous, to the point of invisibility, in view of the fact that Mr Gary Binetter was, for practical purposes, the organising brain behind the companies, at least in relation to their dealings with the ATO and in relation to the Federal Court proceedings. He is a legal entity having separate existence from the companies as legal entities, and his interests may differ from theirs in some ways, but he put, or could have put, everything which they could have put on their own behalf.

53 The plaintiffs deny that. They contend that, by reason of the course taken by Jagot J, the companies have lost an opportunity which Mr Gary Binetter could

---

17 (2005) 228 CLR 294 at 321-322 [77] per McHugh J, 345-346 [173] per Kirby J and 353-355 [204]-[208] per Hayne J.

not have taken up. The submission depends on the view that a desirable course of events immediately after the reinstatements would have been:

(a) service of the ATO assessments on the companies;

(b) lodgement of objections to the assessments pursuant to Pt IVC of the *Taxation Administration Act* 1953 (Cth) ("the TAA") in similar terms to those lodged by Mr Gary Binetter on 12 May and 6 October 2011;

(c) proceedings contesting any unsatisfactory objection decision in either the Administrative Appeals Tribunal or the Federal Court of Australia.

The first two steps which the plaintiffs contend should have taken place before the winding-up applications were heard have in fact taken place after the winding-up orders took effect. The third can take place in future. Mr Gary Binetter, while opposing the making of the winding-up orders, did not seek an adjournment along the lines now advocated by the plaintiffs. The plaintiffs submit, however, that the progress and merits of the process under Pt IVC of the TAA would have been relevant to the determination of the winding-up applications.

54 In support of that proposition they cited *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd*[18]. The citations are inapposite to the present problem. That an existing Pt IVC process would be relevant in a winding up does not establish that winding up must be delayed until a Pt IVC process which has not been instituted could be invoked.

55 The plaintiffs went on to submit that whether the companies should have been put into liquidation depended on whether debts from them to the ATO were due and payable. Whether they were due and payable depended on their due dates. What the due dates might be would depend on whether the ATO complied with requests by the plaintiffs to defer the dates. The plaintiffs submitted that if the hearing of the winding-up applications had been listed only after the reinstatement applications had been decided, it would have been open to the companies to seek an adjournment of the hearing pending determination of the objections and of applications for a deferral of the due dates.

56 The plaintiffs also submitted that it might have been the case that by the time the winding-up applications were heard, the Commissioner acting within a reasonable time and expeditiously would have determined the objections or

---

18 (2008) 237 CLR 473 at 484 [13] and 497 [62] (particularly the second last sentence); [2008] HCA 41.

requests for deferral in the plaintiffs' favour. With respect, these submissions are to some degree fanciful. The objections may succeed. It is entirely speculative whether they will.

57 The background against which the winding-up orders were made was suspicious in the sense that those responsible for deregistering the companies did not tell the ATO about what they were doing and did not tell ASIC of the ATO's intentions.

58 In those circumstances, an outcome pursuant to which a liquidator is in charge of the companies' affairs and property rather than the former controllers is not irrational. Nor is it irrational that the winding-up orders and the appointments of a liquidator came into operation immediately on the reinstatements being made without any interval of time within which persons other than the liquidator might be able to deal with the assets of the companies adversely to the legitimate interests of the ATO.

59 The plaintiffs submitted that as a result of Civic and Advance not having had an opportunity in their own right to be heard before the winding-up orders were made, they were deprived of the valuable right to appeal as of right against the winding-up orders. There is one sense in which that is not so. The liquidator could have consented to an appeal by the companies had he thought it right to do so.

60 The plaintiffs also advanced various arguments to the effect that Jagot J made other errors of law in deciding to make the winding-up orders. The process by which constitutional writs are granted is not an alternative to the appellate process. The alleged errors do not go to jurisdiction. However, the plaintiffs relied on the alleged errors for different purposes. They did so to show the value of what was lost by not having a right of appeal, and to show that on the issue of discretion granting relief in these proceedings is not futile. The latter point is defeated by the plaintiffs' failure on the first substantive point they raised. As to the former point, the value of a right of appeal in circumstances where applications for leave to appeal have in fact failed is low.

61 Despite the detail and learning of their arguments, both the plaintiffs in S167/2011 and the plaintiff in S210/2011 fail to establish the grounds necessary for the relief they seek. Each proceeding should be dismissed. Mr Gary Binetter should pay the first defendant's costs in S210/2011. The first defendant made an application that he should also pay the costs of the first defendant in S167/2011. That application should be granted because he is the moving force behind S167/2011 and, in those circumstances, it is wrong that other persons interested in the assets of the companies should be responsible for the costs which have been incurred as a result of the tactical decisions he has made to institute and continue those proceedings.