

HIGH COURT OF AUSTRALIA

CALLINAN J

ARUNDEL CHIROPRACTIC CENTRE PTY LTD

APPLICANT

AND

DEPUTY COMMISSIONER OF TAXATION

RESPONDENT

Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation
[2001] HCA 26
16 February 2001
B61/1999

ORDER

1. *Application removed.*
2. *Institute of Taxation Research Pty Limited joined as a party to the proceedings.*
3. *Institute of Taxation Research Pty Limited to pay the costs of the respondent, including costs of the proceedings seeking joinder.*

Representation:

A J H Morris QC with A Julian-Armitage for the applicant (instructed by Rea & Sockhill)

P V Slattery with G L Ebbeck for the respondent (instructed by Australian Government Solicitor)

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

CALLINAN J.

The facts

1 On 30 June 1999, the Deputy Commissioner of Taxation issued and served a statutory demand on the applicant pursuant to s 459E of the Corporations Law. It required payment of unpaid tax and additional tax for late payment in the sum of \$8001.14. The applicant did not comply with the statutory demand. On 15 July 1999 the applicant filed an Originating Application in the Supreme Court of Queensland seeking to set the demand aside pursuant to s 459G of the Corporations Law. The matter came on before Muir J on 4 August 1999. His Honour ordered that the application be dismissed with costs. His Honour stated:

"My reasons for the orders are those given in the matter of *Kevjen Pty Ltd*¹ which apply equally to this matter."

In that case, his Honour stated that the grounds of appeal in *Kevjen* were the same as in this case²:

"The principal one is that there is a genuine dispute as to the existence of the debt [arising out of an income tax assessment under the *Income Tax Assessment Act* 1936 (Cth)]. The dispute is said to arise as a result of the applicant's assertion that the Constitution is legislation of a foreign power, namely, that of the United Kingdom.

The contention proceeded this way: Australia is a sovereign State (*Sue v Hill*³) and 'an independent sovereign State cannot be controlled by foreign legislation'. It was also submitted that 'a sovereign independent power cannot have laws enacted by a foreign parliament' (and that) the 'moment Australia attains sovereignty laws enacted by a foreign power (eg the Constitution) cease to have effect'.

In para 4 and para 5 of the applicant's counsel's outline of submissions it was stated:

'4. It is submitted that this question and other questions arising under the Constitution, including the incapacity of members of the

1 *Re Kevjen Pty Ltd* unreported, Supreme Court of Queensland, 4 August 1999.

2 *Re Kevjen Pty Ltd* unreported, Supreme Court of Queensland, 4 August 1999 at 2-3.

3 (1999) 199 CLR 462.

2.

House of Representatives and/or Senators to sit in Parliament, given their acknowledgment of allegiance to Her Majesty The Queen as an inseparable part of the legislature of the United Kingdom, are not issues to be determined in this jurisdiction.

5. It is submitted that the High Court of Australia is the appropriate jurisdiction for determination of the issues raised by the applicant ...!

...

I am unable to conclude that there is any 'genuine dispute' as to the existence of a debt. It is obvious, I think, that if a litigant wishes to assert legal rights in a sovereign State (and so much is admitted) on the basis of contentions that the Constitution of that State, its Federal Parliament and the laws made by that Parliament have failed, that litigant has an extremely heavy onus of showing that there is some substance or degree of arguability in those contentions. After all, the contentions, on their face seem fanciful and foolish."

There was no appeal against that decision.

2 On 30 September 1999, the respondent instituted winding-up proceedings pursuant to s 459P of the Corporations Law against the applicant in the Supreme Court of Queensland. The applicant's solicitors sought the consent of the respondent's solicitors to have the application, set down for hearing on 5 November 1999, adjourned until 17 December 1999 in order to enable the applicant to pay the debt and associated costs.

3 On 25 October 1999, the applicant filed a notice of motion seeking the removal of the proceedings into the High Court of Australia pursuant to s 40 of the *Judiciary Act* 1903 (Cth).

4 On 5 November 1999, the winding-up application was adjourned by consent until 3 December 1999. It was again adjourned on 3 December 1999 until 17 December 1999. On 17 December 1999, the debt claimed by the respondent, together with costs, was paid in full and the winding-up application was dismissed by consent.

The application to this Court

5 It is unnecessary to say anything about the grounds of the applicant's application except that they were utterly unsustainable. Those grounds had been advanced by other parties on other occasions and had invariably been rejected by several courts in this country.

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6 Arundel Chiropractic Centre Pty Ltd ("Arundel") has now filed a notice of discontinuance. The respondent has applied to have that notice of discontinuance set aside. The respondent also seeks to have the Institute of Taxation Research Pty Limited ("ITR"), which is a private company, joined as a party, and an order made, preferably on an indemnity basis, that ITR pay the respondent's costs of the proceedings.

7 In substance it is the respondent's case that ITR incited Arundel to bring and maintain hopeless proceedings and was so intimately involved and directly interested in them that an order for costs should be visited upon it.

8 The relevant facts are these.

9 Arundel was at all material times controlled by Dr Brown, who is a chiropractor who has studied law and was entitled to admission as a solicitor although he has never in fact practised law.

10 In about February 1999, Arundel entered into a "Consultancy & Research Agreement" with ITR.

11 In the agreement, which was of a standard form and prepared by ITR, it defines itself as a body of persons interested in the gathering, collating and supplying of information, intelligence and legal research for the purposes of assisting persons for the better understanding of matters relating to claims, assessment and demands from authorities involved in the area of taxation. By the agreement, ITR also disclaimed any intention or willingness to act as a lawyer but acknowledged that it had lawyers and legally qualified persons "on staff and at call".

12 Clause 1 of the agreement was in the following form:

"The Institute agrees with the Client to provide research to the Client and to any adviser nominated by the Client provided the Client pays to The Institute the fees as required under the terms contained in Schedule C herein. Such fees shall be determined by a 'once only' non-refundable down payment for initial administration and research fees with the remainder to be paid on the basis of twelve and one half percent, or \$5000 which ever is the greater (12.5% is the total amount paid including what is paid under Schedule C) of any taxation monies claimed as due and owing by any taxation authority saved by The Institute on behalf of the Client."

13 Clause 2 was as follows:

"For the purposes of Clause 1 herein and for the purposes of securing the interest of The Institute with regard to the payment of agreed fees the Client shall pay to into [sic] a nominated Trust Account the sum of money

specified in Schedule D herein. The said monies paid into The Institute's Trust Account shall only be dispensed in accordance with the dates, targets and authorities as contained in Schedule E herein. However, the Institute reserves to the client the right on receipt of any further assessments from the Australian Taxation Office to increase the total amount of taxation claim against which protection is sought and the Institute reserves the right to increase the total fee payable to match the revised totals in accordance with the provisions of Article 1 of this contract."

- 14 On the execution of the agreement, Arundel paid \$2000 to "Institute of Taxation Research Trust Account". A schedule to the agreement stated that money could be released from the trust account on the issuing by any taxation authority:

"of a reduced level claim against the client ... the adjournment of any pending proceeding 'sine die' on the basis of constitutional references ... by the use of constitutional references, the removal, cancellation or negation of any future liability on the part of the client to lodge returns and/or liability to pay future taxation to the ATO ... [and] any negotiated settlement between the parties of which the Institute is notified or becomes aware".

- 15 On 9 March 1999, ITR wrote to the respondent stating that it had been retained as a consultant by Arundel in the matter of an income tax notice and demands for payments issued. The letter continued, that a notice of objection was attached and was based upon factual material and historical events, rulings of international legal bodies and the High Court. It is unnecessary to set out the contents of the notice of objection which was signed by Dr Brown. It is sufficient to say that aspects of it are incomprehensible and that it advances no arguments which would in any way support the stance that ITR takes, that the respondent is unable to issue valid notices of assessment and levy income tax in this country. Indeed, of the arguments set out in the notice of objection, senior counsel for ITR submitted that although he had no instructions to make any concessions of any kind, he would not (and by very clear implication could not) rely upon any of the matters which ITR advanced in the notice of objection and has advanced on other occasions in other courts. It may, however, be relevant to notice that ground 31 of the notice of objection discloses that ITR was well aware of the universal rejection by the courts of arguments of the kind appearing in the notice of objection. Ground 31 of the notice was as follows:

"That the decision made by His Honour, Mr Justice Hayne on 15 December 1998 in the cases of *Joosse & Anor v the Australian Securities Commission* being M35/1998, *Burke v The Queen* being M63/1998, *Bowers v Askin & Anor* being M65/1998, *Young v Deputy Commissioner of Taxation* being M93/1998 and *David Keys Australia Pty*

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Ltd v Textile Clothing and Footwear Union of Australia being M95/1998 is in fact incorrect at law in that His Honour acted '*ultra vires*' as to the capacity of the High Court to make decisions in relation to these matters and that the said decision is subject to certiorari and shall be subject to further amended Notices of Motion".

16 The respondent disallowed the objection of Arundel on or about 7 May 1999. On 10 May 1999, ITR requested particulars of "the authority which allowed the respondent and the ATO to override decisions of the High Court of Australia already made and to pre-empt decisions which were still before the Court".

17 On 22 May 1999, the respondent wrote to Arundel, care of ITR, giving notice of intended legal action for the recovery of the amount outstanding for income tax payable by Arundel.

18 On 28 May 1999, ITR informed the respondent in writing that the disallowance would "be placed before the Administrative Appeals Tribunal or the Federal Court of Australia as decided by legal counsel". In the same letter, ITR alleged "deliberate deception of the public" and gave notice that it would immediately initiate action against the issuing officers under the relevant sections of the *Public Service Act* 1922 (Cth).

19 The file kept by ITR with respect to the affairs of Arundel contains a letter by Dr Brown to Mr Henke who is the controlling mind of ITR, dated 2 July 1999, in which Arundel seeks advice from ITR as to how to deal with the creditor's statutory demand made by the respondent.

20 On 5 July 1999, ITR sent a document to the respondent entitled "Notice to cease action" on behalf of Arundel. It again threatened officials with legal action and said in terms that it was issued on behalf of Arundel. The document was signed by Mr Henke as Executive Director of ITR.

21 Mr Brooke, a solicitor, had become involved in the matter by 22 July 1999. On that date he wrote to ITR to report that documents in relation to Arundel had been filed and served. Mr Brooke inquired in his letter whether he or ITR would advise Arundel of the hearing date, and informed ITR that filing and service fees of \$246.50 had been incurred.

22 Even though a solicitor on behalf of Arundel had become involved in the matter, ITR remained active. On 3 August 1999 ITR wrote to the respondent on behalf of Arundel contending that the respondent was misrepresenting the legal position and wishing the ATO "good luck in dealing with [its] looming problems".

23 Notwithstanding that Dr Brown in evidence said that Mr Brooke the solicitor was acting on his instructions, the latter maintained a close liaison with ITR. Each step that was taken in the matter was the subject of a report to ITR. And, tellingly, on about 16 August 1999, ITR in writing authorised Mr Brooke's firm "to act on behalf of ITR in relation to the matter of Arundel and to pay ... accounts on behalf of Arundel and ITR for legal fees owed to counsel and town agents". Contemporaneously, ITR persisted in writing on behalf of Arundel to threaten the respondent with proceedings and contending that the respondent was acting unlawfully. It is unnecessary to go any further into the contents of the barrage of letters that ITR sent to the respondent.

24 In due course, Arundel engaged another firm of solicitors, Tavoularis & Company. That firm however, had no instructions in respect of the application which had been filed in the High Court by Mr Brooke on behalf of Arundel. The winding-up proceedings which had been commenced in the Supreme Court of Queensland were settled and dismissed on 17 September 1999 following on the dismissal by Muir J in that Court of the application to set aside the statutory demand. The proceedings in the Supreme Court were then purportedly made the subject of an application filed on 25 October 1999 for removal to this Court. On 12 January 2000, the Australian Government Solicitor advised Mr Tavoularis that he had been instructed to file a notice of motion to have Arundel's application for removal struck out, and to seek indemnity costs against either Dr Brown or Mr Brooke.

25 By this time, Mr Brooke was becoming anxious about his own position. On 28 January 2000, he asked ITR for confirmation that he would be indemnified by it in relation to costs and "other detriment" that might be suffered by him by reason of the application of the respondent which had been filed on 19 January 2000.

26 There are some other matters which I should mention. ITR had a practice of sending circulars to its "clients". One such circular which was probably sent to Arundel, of 5 August 1999, recorded that:

"we [ITR] are taking legal steps to refer every matter to the High Court and remove them from the jurisdiction of the QLD courts until the illegality comes to an end".

In another circular, also probably sent to Arundel and this time described as a "Client Information Bulletin", ITR stated that:

"we need to stay in control and one step in front of the ATO. We cannot do this if we do not receive your mail until a few days/months later. If documents are not forwarded *immediately*, penalty fees may be imposed".

27 Both Dr Brown and Mr Henke gave oral evidence. An attempt was made by ITR to establish that, in effect, Dr Brown was uninfluenced by ITR in bringing and maintaining the proceedings and that he was guided by Mr Brooke in doing so. At one point in his evidence he said that he trusted Mr Brooke and his judgment and expected that if the arguments (prepared by ITR) were untenable Mr Brooke would have told him so, that he had known Mr Brooke for a long time, and had served as an articled clerk at the same time as Mr Brooke had.

28 It is also relevant that ITR acted in an entrepreneurial way in soliciting "clients" by paying commissions to people who introduced "clients" to them. Dr Brown had acted as an agent on behalf of ITR to find such clients. His oral evidence included the following:

"**MR SLATTERY:** ... Dr Brown, I just want to ask you a couple of other questions in relation to your relationship with the ITR, as way of background for his Honour. The document which is exhibit AA was a document whereby you became a client of the ITR. That is correct, is it not?---That's correct, yes.

But you had another relationship with the ITR, did you not?---That's correct.

You were an agent of the ITR.---That is true.

What did that mean?---That meant that I could refer clients through to the ITR to have them represented and be paid a fee, a commission for referring people through.

I think that fee was about 18 per cent, was it, of the net gain to the ITR from having that person referred to it?---Yes, it could be around about that or 15 per cent, 18 per cent, something like that.

And I think throughout 1999 you were paid fees, were you not?---That's correct.

Do you know how much you were paid?---Not exactly. It would have been probably in the order of about 12,000, something like that.

And that is in respect of people you introduced to the ITR?---That's correct.

In that period, you were the person responsible for those clients being introduced to the ITR, were you not?---Yes.

In that period as well, you were having contact, as you have said, with Mr Ian Henke, both in relation to your own matters and in relation to the

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clients that you introduced to the ITR?---Not so much in relation to clients that I referred through to the ITR. Once those clients were, you know, had become clients of ITR, one ceased to have any further dealings with – you know, the ITR then would engage in their own sort of relationship with the client.

In the same fashion as happened to Arundel?---That's correct.

And you left it to the ITR?---That's correct.

Both in respect of yourself and in respect of the clients you introduced?---That's correct."

29 And later he gave answers as follows:

"HIS HONOUR: Dr Brown, you also had a financial interest in this matter, did you not, in the sense that if you introduced customers to the so-called Institute, you would be paid for it?---That is correct, your Honour.

It was not just an academic interest, was it?---Well, that is true. You know, there are other interests as well.

A very strong financial interest?---But my first connection with all of this was as an academic ...

So the 15 per cent was totally irrelevant to you?---No, obviously not, but that was not my driving motivation and, you know, as I have mentioned, I was very much in connexion with what people associated with, what became the ITR, well before ITR ever sort of was formed.

How many people did you introduce to the Institute?---I can't say for sure. It might have been, I don't know, 40, or something like that; 30, 40.

And how much money were you paid as a result or did you receive as a result?---I would have been paid maybe 12,000, or something like that, over a period of time. Not all the people that were introduced would necessarily follow through with it. I would sort of connect them with the ITR and then they would conduct their own negotiations with them."

30 I would accept that although Dr Brown had a financial interest in ITR's business in the sense that whilst it continued to operate, he might be able to refer clients to it for a commission, he also stubbornly and totally unreasonably believed that the statutory scheme for the imposition and collection of income tax in this country was invalid. I would also accept that he did look to Mr Brooke, his solicitor for advice, but I do not accept that Mr Brooke's views would have had the greatest, or indeed very much influence on him. The correspondence to which I have referred between ITR and Mr Brooke shows that the latter was little

more than a postbox for, and legal functionary on behalf of, ITR: that in fact Mr Brooke was exercising little or no independent judgment, let alone informed legal judgment on any of the relevant matters; and that he (Mr Brooke) and ITR were reporting to Dr Brown in such a way as to make it unmistakably clear that ITR was making the running on behalf of Arundel in all relevant respects. Mr Brooke's plaintive request for indemnity from ITR, and the written materials to which I have referred all support these inferences.

31 There is no doubt that the so-called arguments which were to be presented on behalf of Arundel in this Court had, in part at least, been formulated by ITR. They reflected the language and form of much of the correspondence sent by ITR to the respondent. Indeed, the summary of argument which had been requested by the Registrar of this Court was filed in the Court when Mr Brooke was overseas. There is no suggestion Mr Brooke himself participated in the preparation of any argument. And, furthermore, a file sheet in evidence notes that ITR sent the notice of motion to Mr Brooke to issue. That Dr Brown was aware that the notice of motion had been prepared by ITR was accepted by him in his oral evidence.

32 I should say a little about Mr Henke's evidence. I do not doubt that ITR is a money-making enterprise and that he stood to, and wished to gain from the promotion of proceedings of the kind which Arundel brought here. It may well be that he also genuinely holds a conscientious belief that he and those gullible people who rely upon ITR are pursuing a cause for the benefit of other Australians. Even if that be so, such a belief cannot justify or excuse the conduct of ITR, particularly as Mr Henke well understands the consequences of activities of the kind which ITR has promoted. This appears clearly from this evidence which was given by Mr Henke:

"HIS HONOUR: But, Mr Henke, you say you think he is wrong, but more than 300 cases on this point have failed. Are you a qualified lawyer?---No, sir, I am not.

Do you have any qualifications at all?---Yes, but not in law, sir.

What are your qualifications?---In science and social science.

Mr Henke, the law is what the courts declare it to be. Can you understand that?---Yes, I can.

And what the courts decide results in the imposition of sanctions which have a real effect upon people. They have to pay money and their property can be sequestered. In some circumstances, people can even go to prison. So, not only do the courts declare the law, but also there are enforcement authorities that give effect to it, and that effect has significant impacts upon people's lives. They lose money, they lose property, and in

some circumstances they go to prison. Do you understand all of that?---
Yes, of course, sir."

33 It was not contended by ITR that this Court did not have jurisdiction to make an order for costs against a third party. The material issue, ITR submitted, was whether it was responsible for the institution and maintenance by Arundel in this Court of the proceedings initiated by the notice of motion filed on 25 October 1999.

34 ITR submitted that there was an important difference between the exercise of a jurisdiction to award costs against a stranger, and the jurisdiction to award costs against a party. The jurisdiction is one, it was submitted, that should be exercised sparingly. I agree with those submissions. The legal system in this country is an adversary system. It is a system in which there are clearly defined roles. Solicitors and barristers present cases and judges decide them. Although lawyers are under obligations not to misuse the courts or to bring utterly hopeless cases, they are not obliged to act as de facto judges and to pre-empt judicial decision making, just as in the same way judges must be careful to keep out of the arena and not in any way supplant the roles of the practising lawyers. Very unpromising seeming cases do sometimes succeed. Changes do occur in the law other than by way of statutory intervention. As long ago as 1889, Lord Esher MR said this of the lawyers' obligations in *In re Cooke*⁴:

"[I]f the solicitor could not come to the certain and absolute opinion that the case was hopeless, it was his duty to inform his client of the risk he was running, and, having told him that and having advised him most strongly not to go on, if the client still insisted in going on the solicitor would be doing nothing dishonourable in taking his instructions."

35 Speaking of the risk of exposure to costs by a lawyer in pursuit of a hopeless case, Giles J in *McDonald v FAI (NZ) General Insurance Co Ltd*⁵ said this:

"[T]he pursuit of a hopeless case upon instructions will not necessarily attract the liability. Neither will mere mistake or error of judgment be enough. Each case will need to be considered on its own facts. But there will be cases where the cumulative effect of those factors are present".

It does seem to me, however, that, provided that the filing of the notice of discontinuance has not deprived the Court of jurisdiction to award costs, this case

4 (1889) 5 TLR 407 at 408.

5 [1999] 1 NZLR 583 at 593.

is an appropriate one in which to make an award against ITR in favour of the respondent.

36 Mere encouragement of litigation would not suffice to attract liability for costs. But ITR has gone far beyond mere encouragement. It has been, in the clearest way, a promoter of this litigation. It is relevant that it had a direct financial interest in its promotion and its outcome. It acted as the de facto solicitor in the matter. It was either the author, or the major participant in the preparation of, the arguments to be advanced in this Court, and the tactics to be employed in the proceedings and activities leading up to the initiation of proceedings in this Court, these being the fusillade of letters to the respondent and the proceedings which came before Muir J in the Supreme Court of Queensland. ITR insisted upon persisting in these notwithstanding that various courts in this country had consistently held the claims made here and like claims to be utterly untenable. The impact upon the courts and upon the respondent as the responsible revenue-collecting authority has been very considerable. ITR used the proceedings to pursue its own interests, of vindicating a totally misconceived and irresponsible opinion that it held and was determined to pursue, about the taxation laws of this country.

37 It seems to me, therefore, that this is a case par excellence for the making of an order for costs, even though Arundel is neither an insolvent company nor Dr Brown a man of straw. An order for costs has been made against Mr Brooke but the evidence is that he has left Australia, and it seems rather unlikely that anything will be recovered from him. Although it may not be possible to say that ITR was the *only real party* in the relevant litigation, it was nonetheless in the nature of *a party* in the sense that it so heavily promoted, intermeddled in, had a continuing role in, and stood to benefit from it, and to benefit from it I might say, even if the litigation failed, because part of its charges was secured in any event. In *Knight v FP Special Assets Ltd*⁶, Mason CJ and Deane J (Gaudron J agreeing) said this⁷:

"The cases awarding costs against non-parties are more readily explicable on the footing that there was no absence of jurisdiction to order costs against non-parties in the strict sense and that the jurisdiction could be exercised against persons who were considered to be the 'real parties' to the litigation."

6 (1992) 174 CLR 178.

7 (1992) 174 CLR 178 at 188.

As I say, although ITR was not "the" real party to this litigation, it was nonetheless a real party in the very important and critical respects to which I have referred.

38 The question remains whether I am deprived of the jurisdiction to make an appropriate order by reason of the filing of the notice of discontinuance. Section 26 of the *Judiciary Act* provides that:

"The High Court and every Justice thereof sitting in Chambers shall have jurisdiction to award costs in all matters brought before the Court, including matters dismissed for want of jurisdiction."

39 This is a matter which has been properly brought before the Court, and not in any untimely way or after the entry of a relevant judgment. Order 27 of the High Court Rules is concerned with discontinuance but in terms deals only with the impact of discontinuance on the named parties to the proceedings. It is silent with respect to the position of non-parties and as to any costs which may be payable by them. It does not, indeed it could not, reduce the amplitude of the power conferred by s 26 of the *Judiciary Act* which I take to be wide enough to embrace an order of the kind which I contemplate making here. In any event, if the notice of discontinuance which has been filed, did stand as an obstacle to an award of costs, I would uphold the respondent's submission that the notice should be set aside to the extent necessary to enable me to order that ITR pay costs to the respondent. I do not doubt that this Court has an inherent jurisdiction to set aside an abuse of the kind which the notice of discontinuance in this case would represent to the extent if any that it might otherwise operate to prevent the imposition of the sanction of costs which this case calls for.

Orders

40 The formal order of the Court will be that Institute of Taxation Research Pty Limited be joined as a party in proceedings B61 of 1999, and that it pay the costs of the Deputy Commissioner of Taxation of the Commonwealth of Australia of those proceedings, including the proceedings seeking joinder and these orders on a solicitor and client basis. I would not order indemnity costs as the occasion for an order for these should, in my opinion, be exceedingly rare, as they have a tendency to encourage extravagance and put the quantum of legal fees beyond the effective scrutiny of the courts and their taxing officers. By costs on a solicitor and client basis I mean the actual costs incurred on proper and necessary instructions by the client, and the actual costs and outlays to the extent that they were reasonably incurred in this case.