HIGH COURT OF AUSTRALIA

HAYNE J

HELLJAY INVESTMENTS PTY LTD APPLICANT

AND

DEPUTY COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA RESPONDENT

Helljay Investments Pty Ltd v Deputy Commissioner of Taxation
[1999] HCA 56
7 October 1999
S18/1999

ORDER

1. *Application for removal pursuant to s 40 of the* Judiciary Act *1903 (Cth) dismissed.*

2. *James Joseph Murphy pay the costs of the liquidator of Helljay Pty Ltd (in liq) and the costs of the respondent of and incidental to the application for removal, such costs to be taxed on the basis (in each case) that the costs include all costs except in so far as they are of an unreasonable amount or were unreasonably incurred so that, subject to such exceptions, each of the liquidator and the respondent is completely indemnified by the said James Joseph Murphy for his costs.*

3. *Certify that this was a matter proper for the attendance of counsel in chambers.*

Representation:

D C Fitzgibbon for James Joseph Murphy, a director of Helljay Investments Pty Ltd (instructed by Wayne Levick & Associates)

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

P E Smith appearing on behalf of Mr Rangott, Liquidator of Helljay Investments Pty Ltd (instructed by Gillespie-Jones & Co)

CATCHWORDS

Helljay Investments Pty Ltd v Deputy Commissioner of Taxation

High Court – Practice and procedure – Removal of causes – Points raised in application not arguable.

Constitutional law – Sovereignty – Whether certain legislation invalid due to a "break in sovereignty".

Practice and procedure – Costs – Award – Jurisdiction against non-party – Indemnity costs where application obviously untenable.

Courts and judges – Bias – Prejudgment of legal issues – Legal issues similar to those in case previously decided by judge – No grounds for reasonable suspicion that a proper hearing would not be obtained.

The Constitution, covering cl 5, s 44(i).
Corporations Law, s 471A(1).
Judiciary Act 1903 (Cth), ss 40, 78B.

1 HAYNE J. On 10 November 1998, the Deputy Commissioner of Taxation filed an application in the Supreme Court of the Australian Capital Territory seeking an order that Helljay Investments Pty Ltd ("Helljay") be wound up in insolvency. The application relied on Helljay's failure to comply with a statutory demand.

2 On 8 February 1999, the application came on for directions before a Registrar of the Supreme Court. A director of Helljay, Mr James Murphy, sought to oppose the application for winding up. He handed the Registrar a copy of a Notice of Motion filed in this Court in the name of Helljay which sought an order removing the cause into this Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth). Mr Murphy also handed up a copy of a Notice he had given to Attorneys-General under s 78B of the *Judiciary Act*. The Registrar adjourned the further hearing of the winding up application to 15 February 1999, directing Helljay to give notice of intention to appear. On the adjourned hearing, Mr Murphy again sought to oppose the application but an order for winding up was made.

3 On 15 February 1999, Helljay filed in the Supreme Court a Notice of Appeal from the Registrar's order. That appeal was heard by a single judge of the Supreme Court (Higgins J) on 19 February 1999 and on 5 March 1999 the appeal and an application for stay that had been made by Helljay were both dismissed. Further applications have been made by Helljay both to the Supreme Court and to the Federal Court but it is not necessary to notice those further.

4 A Further Amended Notice of Motion seeking an order for removal under s 40 of the *Judiciary Act* was filed on 21 May 1999 (after the order for winding up of Helljay). When the matter was brought on for hearing before me, counsel announced an appearance for Mr Murphy. (Counsel was instructed by the firm of solicitors that had filed Helljay's application for removal.) The liquidator of Helljay also appeared by counsel and told me that his client had not consented, and did not consent, to the further prosecution of the application for removal[1]. The Deputy Commissioner of Taxation appeared by counsel to oppose the application for removal.

5 Counsel for Mr Murphy submitted that I should disqualify myself from hearing and determining the application for removal on the grounds that there was a reasonable apprehension of prejudgment or "apparent bias that the matter will be decided adversely to the applicant". Notice of Motion for such an order was filed by the solicitor instructing counsel for Mr Murphy in which the solicitor signed the notice "on behalf of the Applicant" (which, so far as the Notice of Motion revealed, was said to be Helljay). That motion was supported by an affidavit sworn by the solicitor in which he deposed that he is the solicitor for the applicant in the

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1 cf Corporations Law, s 471A.

matter (which, again, on the face of the affidavit, could be intended to mean only Helljay).

6 After hearing argument on the matter I announced that the application that I disqualify myself would be dismissed for reasons which I would give at the time of giving reasons for decision on the application for removal. It is to the reasons for refusing to disqualify myself that I turn first.

The application for disqualification

7 In December 1998, I dismissed applications for removal in five separate proceedings which appeared to raise issues that were similar to each other[2]. Counsel for Mr Murphy submitted that I had made findings of fact in those matters which were such that I should not hear the present application. As best I understood it, counsel submitted that the decisions I had reached in *Joosse v ASIC* were based on findings of fact about certain historical events that were issues of fact that would fall for consideration in the present matter. But exactly what the relevant factual issues were said to be did not emerge with any clarity.

8 The applications considered in *Joosse* all sought to rely on certain historical facts. The present application seeks to rely on some or all of the same facts. But what is important in the present case (and what was important in *Joosse*) is the legal significance to be given to those facts. The occurrence of the facts was not the subject of any evidence, whether in *Joosse* or in the present matter, and is not in dispute. The facts were treated by all concerned as so notorious as to be proper for judicial notice.

9 There is no doubt that the legal issues which it is sought to remove into this Court are very similar to those that were discussed in *Joosse*. By the present application it is sought to attack the constitutional validity of nine Acts: the "Supreme Court Act" (presumably the *Supreme Court Act* 1933 (ACT)), the *Income Tax Assessment Act* 1936 (Cth), the *Income Tax Assessment Act* 1997 (Cth), the *Taxation Administration Act* 1953 (Cth), the *Crimes (Taxation Offences) Act* 1980 (Cth), the *Fringe Benefits Tax Assessment Act* 1986 (Cth), the *Fringe Benefits Tax (Application to the Commonwealth) Act* 1986 (Cth), the *Commonwealth Electoral Act* 1918 (Cth) and the *Australian Capital Territory (Self-Government) Act* 1988 (Cth).

10 Various bases of attack are advanced but all, or nearly all, seem to assert what I described in *Joosse* as an "unremedied, perhaps even irremediable, 'break in sovereignty' in Australia"[3]. The breadth of the attack that it is sought to mount can

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2 *Joosse v ASIC* (1998) 73 ALJR 232; 159 ALR 260.

3 (1998) 73 ALJR 232 at 234; 159 ALR 260 at 263.

be gauged from what the Further Amended Notice of Motion says are the "Constitutional issues relating to" the nine Acts I have mentioned:

> "a. That this Honourable Court rule that the Royal Commission into the Constitution of 1927 reporting in 1929 and the Inter-Imperial relations Committee of the Imperial Conference 1926 were both incorrect when they ruled as follows in relation to the Dominions and their relationship with Great Britain; 'They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations' (Appendix C- Page 348). And this Honourable Court is requested it further rule that the domestic sovereignty outlined by these bodies does not and did not exist.
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> b. That this Honourable Court rule that despite historical links the only legal foundation of law within the borders of the territory of the Commonwealth of Australia is the sovereignty of the people of Australia.
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> c. That the legislation under which current proceedings before the Supreme Court of the Australian Capital Territory are made derives only from the legal authority of the Imperial Parliament of the United Kingdom through the Commonwealth of Australia Constitution Act 1900 (UK) and is therefore ultra vires within the sovereign nation of Australia.
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> d. Under the terms of current United Kingdom legislation being the Immigration Act 1972 (UK) which supersedes and overrides prior British legislation all Australian citizens are declared to neither be British citizens, nor British residents and to have no entitlements under British law.
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> e. By this instrument of the Imperial Parliament all United Kingdom Acts covered by the Imperial Acts Application Act (Cth) insofar as they apply Imperial law to Australian citizens are thereby rendered null and void.
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> f. Further that the continued application of Imperial law within Australia is in contravention of the decision of the Commonwealth Parliament on 1 October 1919 unanimously ratifying the Treaty of Versailles and explicitly by the motion of the Prime Minister and Attorney General dated 10 September 1919 accepting new independent nation status for Australia.
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> g. That the creation of the Instrument of Accession to the Covenant of the League of Nations arising directly from the above mentioned decision by the Commonwealth Parliament to be ratified and be bound by the terms of the treaty and the lodgement, acceptance and registration of the

Instrument by the Secretariat of the League of Nations constituted a formal acknowledgment of the sovereign independence of the Commonwealth of Australia.

h. That the speech by the Prime Minister, being a legally qualified person, in the House of Representatives on 10 September 1919 as recorded in the Hansard, pages 12163 to 12179, is a recognisable legal precedent establishing the independence of the Commonwealth of Australia as from the date on which the binding treaty was signed 28 June 1919.

i. Further that all courts within the judicial system of Australia are bound by the decision of the superior court of the Nation, being the Parliament of the Commonwealth on the first day of October 1919 recorded at page 12815 of the Parliamentary Hansard, ratifying and accepting as binding the new sovereign status of Australia constitutes a binding legal precedent over all inferior courts including the High Court.

j. That this 1919 decision of the Parliament was acknowledged and reaffirmed by the Parliament in the Report of the Senate Legal and Constitutional References Committee on the Commonwealth Power to Make and Implement Treaties dated November 1995 which was tabled and approved by the Parliament.

k. That Section 4 of the Commonwealth of Australia Constitution Act 1900 (UK) establishes a legal entity, the Commonwealth of Australia, as a subordinate colonial possession of the Crown.

l. That the Constitution of the Commonwealth of Australia being the subordinate Section 9 of the Commonwealth of Australia Constitution Act 1900 (UK) (See Quick and Garran - 'Annotated Constitution of the Australian Commonwealth 1901') setting up the method of government of legal entity established by S4 is dependent upon of the antecedent Sections 1 - 8 of the said Act and requires the continued application of all eight antecedent sections to remain in force.

m. That the change of status to independent nation as duly and validly made by the vote of the Parliament of the Commonwealth on 1 October 1919 with the consent of the Crown and the United Kingdom Government changed the status of the legal entity established by S4 thereby causing the lapse of all antecedent sections pertinent to the former colonial status and thereby invalidating the operation of S9 insofar as it depends on the antecedent clauses.

n. That no legal instrument exists or has existed under the doctrine known as the law of State succession to enable the continued unmodified

application of British colonial law within the internationally recognised borders of the new sovereign State of Australia.

o. That the transfer of sovereignty from the Crown of the United Kingdom to the sovereign people of Australia with effect from 28 June 1919 was not codified, limited or modified in any way capable of overcoming the break in legal continuity necessarily arising from the event.

p. That the sovereignty of the people of Australia is not, has not and cannot be expressed through any extant legal instrument, institution, parliament or judicial body since no plebiscite, referendum, enactment of the former Imperial power, or other instrument exists conveying the informed consent of the Australian people to such expression.

q. That all Federal elections held since 1919 have been held under the Electoral Act 1918, a law wholly dependent on the sovereign authority of the Imperial Parliament but whose application to Australian citizens was voided by the Immigration Act 1972 (UK).

r. Further that from 26 January 1949 the electoral role for such elections has included names of voters created as Australian citizens under the National Citizenship Act 1948. Since no power exists within S9 of the Commonwealth of Australia Constitution Act 1900 (UK) to create other than British citizens it therefore follows that parliaments since 26 January 1949 have been elected by unqualified voters and therefore have no status as representatives of the Australian people."

11 The principles concerning what has come to be called shortly, if not wholly accurately, the "appearance of bias" by judicial officers are well established[4]. What must be demonstrated to the requisite degree is the appearance of prejudgment, not simply that a particular outcome of the litigation is likely or unlikely. As Mason J said in *Re JRL; Ex parte CJL*[5]:

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4 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; *Vakauta v Kelly* (1989) 167 CLR 568; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78.

5 (1986) 161 CLR 342 at 352.

> "It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as *Watson*[6] and *Livesey*[7] has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established': *Reg v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group*[8]; *Watson*[9]; *Re Lusink; Ex parte Shaw*[10]."

12 The principles about apprehension of bias must be understood in the context of a judicial system founded in precedent and directed to establishing, and maintaining, consistency of judicial decision so that like cases are treated alike and principles of law are applied uniformly. The bare fact that a judicial officer has earlier expressed an opinion on questions of law will therefore seldom, if ever, warrant a conclusion of appearance of bias, no matter how important that opinion may have been to the disposition of the past case or how important it may be to the outcome of the instant case. Fidelity to precedent and consistency may make it very likely that the same opinion about a question of law will be expressed in both cases. But that stops well short of saying that the judicial officer will not listen to

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6 (1976) 136 CLR 248.

7 (1983) 151 CLR 288.

8 (1969) 122 CLR 546 at 553-554.

9 (1976) 136 CLR 248 at 262.

10 (1980) 55 ALJR 12 at 14; 32 ALR 47 at 50-51.

and properly consider arguments against the earlier holding. As Lush J said in *Ewert v Lonie*[11]:

> "Every reasonable man knows that consistency in decision is one of the aims of judicial or quasi-judicial institutions, but if he is exercising his quality of reasonableness he does not suppose that a tribunal will refuse to entertain or will fail to give proper attention to a submission opposed to its former decision merely because it is so opposed. In this case, the reasonable onlooker might have thought that the appellants would not have much chance of succeeding, but this is not the same thing as feeling or believing that they would not get a proper hearing. It is not a characteristic of the law's reasonable man either to be irrationally suspicious of every institution or authority or to think that every cynical appraisal represents an absolute truth."

The "fair and unprejudiced mind" which must be brought to bear upon the determination of litigation is, as the Court said in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group*[12], "not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it".

13 Finally, counsel for Mr Murphy referred to the joint judgment of Gleeson CJ, Gummow J and me in *Sue v Hill*[13] as providing an additional reason for my disqualifying myself from hearing the present application. It was said that I had joined in expressing views about whether, at the time relevant to that matter, the United Kingdom answered the description of "a foreign power" in s 44(i) of the Constitution. But again, the fact that I reached certain conclusions on the issues of law raised in that matter does not mean that I should not hear the present application.

14 I turn then to consider the application for removal.

The application for removal

15 The submissions of counsel for Mr Murphy proceeded from the premise that his client was entitled to prosecute the application for removal. It is far from clear that this is so. The Supreme Court has ordered that Helljay be wound up and that

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11 [1972] VR 308 at 311-312. See also *Re Finance Sector Union of Australia; Ex parte Illaton Pty Ltd* (1992) 66 ALJR 583; 107 ALR 581.

12 (1969) 122 CLR 546 at 554.

13 (1999) 73 ALJR 1016; 163 ALR 648.

order has not been stayed or set aside. Section 471A(1) of the Corporations Law provides:

> "While a company is being wound up in insolvency or by the Court, a person cannot perform or exercise, and must not purport to perform or exercise, a function or power as an officer of the company, except:
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> (a) as a liquidator appointed for the purposes of the winding up; or
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> (b) as an administrator appointed for the purposes of an administration of the company beginning after the winding up order was made; or
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> (c) with the liquidator's written approval; or
>
> (d) with the approval of the Court."

None of the exceptions mentioned in s 471A(1) applies in this case. It follows that no director of Helljay has authority to prosecute the application brought in the company's name. No other application for removal has been made. The fact that the liquidator does not seek to prosecute the application for removal is very probably reason enough to dismiss it.

16 Further, there may, perhaps, be some question whether the order for winding up the company was, for the purposes of s 40(1) of the *Judiciary Act*, "final judgment" in a cause that had previously been pending in a court of a Territory. This question was, however, not explored in argument and I express no view about it.

17 Given the course the matter has taken, however, it is as well to consider the arguments advanced in support of the application on the assumption that the difficulties to which I have pointed could be overcome.

18 In my opinion none of the contentions which it is sought to urge against validity of the nine Acts mentioned in the Further Amended Notice of Motion is arguable and, for that reason, no order for removal should be made. For the reasons I gave in *Joosse*[14], I consider that the contentions advanced confuse questions of political sovereignty with the question of identifying the supreme legislative authority recognised in this legal system and the rules for recognising its valid laws[15]. As I said in *Joosse*, the questions which the present application seeks to

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14 (1998) 73 ALJR 232 at 235-236; 159 ALR 260 at 263-265.

15 HLA Hart, *The Concept of Law*, 2nd ed (1994) at 223-224.

agitate are resolved by covering cl 5 of the Constitution[16]. Considering the history of relations between this country and the United Kingdom or the history of the international dealings of this country is not to the point. The decision in *Sue v Hill* does not assist in resolving the issues that it is sought to raise; the conclusion that the United Kingdom is a foreign power within the meaning of s 44(i) does not support the argument that the impugned Acts are invalid.

19 The Further Amended Notice of Motion referred to some aspects of the proceedings before Higgins J in the appeal from the winding up order and in an ancillary stay application. It was contended that in certain respects Higgins J acted in breach of procedural fairness or without jurisdiction. Those contentions raise no constitutional issue.

20 It was contended further that the appointment of the Registrar who made the winding up order was not constitutionally valid. No separate oral argument was advanced in support of this contention and the basis for it is far from clear. That being so, it would be wholly inappropriate to remove the cause on this account (assuming, of course, as I have, that the other barriers to removal are not insuperable).

21 Finally, I should add that, even if I were of the view that the contentions which it was sought to advance were arguable, I consider that the proceedings are at a stage where it would be wholly inappropriate to make any order for removal. Helljay has, it seems, sought to appeal to the Full Court of the Federal Court. (There was said to be some doubt about whether the appeal was instituted properly but I say nothing about that.) The issues which are said to arise are far from precisely identified. In all these circumstances, even if, contrary to my view, an arguable case were identified, no order for removal should be made.

Costs

22 The respondent and the liquidator both sought special orders for costs. Each submitted that costs should be taxed on an "indemnity basis"[17]. Further, each

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16 *Joosse* (1998) 73 ALJR 232 at 236; 159 ALR 260 at 265.

17 *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397; *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225; *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1996) 72 FCR 151; *Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd* (1995) 36 NSWLR 242; *Rosniak v Government Insurance Office* (1997) 41 NSWLR 608; *Pirrotta v Citibank Ltd* (1998) 72 SASR 259. See also *Re National Safety Council (No 2)* [1992] 1 VR 485 at 498-507 per JD Phillips J; *Norton v Morphett* (1995) 83 A Crim R 90 at 97-99 per Phillips JA; *EMI Records Ltd v Ian Cameron Wallace Ltd* [1983] Ch 59.

submitted that the order for costs should be made against the solicitors who instructed counsel for Mr Murphy and who had issued the Notice of Motion for removal, or against both the directors of Helljay (Mr Murphy and Helen Margaret Murphy), or against Mr Murphy alone. As I pointed out in the course of argument, no formal notice of application was given to the solicitors or Mrs Murphy. The only notice given was by way of submission in a supplementary summary of argument filed and served shortly before the matter came on. In those circumstances I am not prepared to make any order against the solicitors or against Mrs Murphy without proper notice of the application first having been given to the persons concerned.

23 The respondent submitted that the case for removal was so obviously untenable (in the face of the decision in *Joosse* and similar decisions in this and other courts[18]) that it should not have been brought. In addition, so the respondent's argument proceeded, its pursuit in face of the order for winding up, and the expressed opposition of the appointed liquidator, gave further reason to make a special order for costs.

24 As I have indicated earlier, on its face, the application for removal was prosecuted in the name of Helljay. But it is clear that the Court has power to make an order for costs against a person not a party to the proceeding[19].

25 There can be no doubt that Mr Murphy played an active part in prosecuting the application. As things stand, Helljay has been found to be insolvent and, in those circumstances, I have no hesitation in concluding that the costs of the unsuccessful prosecution of the application for removal should not fall on the company, and thus its creditors. This is a case in which it is appropriate to order Mr Murphy to pay the costs. The question then becomes on what scale should those costs be ordered?

26 The respondent's contention that the application was obviously untenable was cast in terms that might be said to have depended upon accepting the correctness of my decision in *Joosse*. But there is a more fundamental reason for concluding that the application was untenable. The central propositions which it was sought to advance in support of removal were contentions which, if accepted, would have

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18 Reference was made to *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086; 163 ALR 734; *Skelton v Registrar of Motor Vehicles* unreported, Supreme Court of the Australian Capital Territory, 4 April 1996; *Batten v Police* unreported, Supreme Court of South Australia, 11 March 1998; *Batten v Police* unreported, Supreme Court of South Australia, 13 July 1998; *Walsh v Professional Nominees Pty Ltd* unreported, Queensland Court of Appeal, 20 July 1998.

19 *Judiciary Act* 1903 (Cth), s 26; High Court Rules, O 71 r 1; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.

invalidated not only the various taxation laws that were mentioned in the application, but also the *Corporations Act* 1989 (Cth). Thus the very existence of the corporation which Mr Murphy seeks to preserve by the proceedings he has instituted in this Court and elsewhere, would have been destroyed by acceptance of the arguments he sought to advance. This, taken with the course of decisions to which the respondent referred, and the nature and content of the arguments which it was sought to advance in favour of the allegations of invalidity, all combine to demonstrate that the application for removal was untenable and obviously so. That being so, and Mr Murphy having continued to prosecute the application brought by Helljay despite the expressed attitude of the liquidator, this is a case in which the award of costs, both to the liquidator and to the respondent, should go beyond the ordinary party and party basis and extend to indemnity costs as that expression was explained by Sir Robert Megarry V-C in *EMI Records Ltd v Ian Cameron Wallace Ltd*[20].

27 Accordingly there will be orders:

1. Application for removal pursuant to s 40 of the *Judiciary Act* 1903 (Cth) dismissed.

2. James Joseph Murphy pay the costs of the liquidator of Helljay Pty Ltd (in liq) and the costs of the respondent of and incidental to the application for removal, such costs to be taxed on the basis (in each case) that the costs include all costs except in so far as they are of an unreasonable amount or were unreasonably incurred so that, subject to such exceptions, each of the liquidator and the respondent is completely indemnified by the said James Joseph Murphy for his costs.

3. Certify that this was a matter proper for the attendance of counsel in chambers.

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20 [1983] Ch 59 at 74.