

Not on CLR list

ORIGINAL

(17)

IN THE HIGH COURT OF AUSTRALIA

McGOVERN

V.

WALTER CAVILL PTY. LIMITED AND
ANOTHER

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 17th April 1959

PATRICK SILVESTA McGOVERN

v.

WALTER CAVILL PTY. LIMITED AND ANOR.

JUDGMENT

McTIERNAN J.

McGOVERN

v.

WALTER CAVILL PTY. LIMITED AND ANOTHER

ORDER

This case was in the list last Friday and I then announced my decision. Mr. Holmes for the plaintiff asked me to defer pronouncing judgment until to-day. I acceded to that application. I now order that judgment be entered in accordance with my decision. The judgment is that each defendant is guilty of the offences alleged under s. 231 and that each defendant should pay to the plaintiff a penalty of £250 for each offence and the costs of this action.

PATRICK SILVESTA McGOVERN

v.

WALTER CAVILL PTY. LIMITED AND ANOR.

In these proceedings, which are taxation prosecutions, pecuniary penalties are claimed against both defendants. The prosecutions are concerned with the years of income ending 30th June 1950 and that ending 30th June 1951. The assessment of tax in respect of the former year was governed by the Income Tax and Social Services Contribution Assessment Act 1936-1950 and in respect of the second year by the Income Tax and Social Services Contribution Assessment Act 1936-1951. Part VII of both of those Acts contains penal provisions and the procedure for the recovery by the Crown of a pecuniary penalty under the Act. The provisions of these Acts which are now material are the same. The charges against the defendant company are made under ss. 231 and 227 respectively. The charges against the other defendant are concerned with the commission by the company of those offences and are founded on s. 5 of the Commonwealth Crimes Act 1914-1950. The Commissioner of Taxation is authorised under s. 233 of the Income Tax and Social Services Contribution Assessment Act to institute the taxation prosecution under Part VII. He avers all the allegations contained in the statement of claim pursuant to s. 243. The returns of the defendant company for each relevant year and the notices of assessment issued to it were put in evidence. The Commissioner relied upon the averments in the statement of claim as amended, the returns and the notices of assessment to prove the charges made against each defendant. The only witness called on behalf of the defendants was E. C. Bingham, who was a director of the defendant company. The defendant Walter Cavill

who was the managing director did not give evidence. The statement of claim is lengthy and complex. All the matters contained in it are important. Para. 24 is in these terms: "In respect of the year ended 30th June 1950 the Defendant Company was a company on whose behalf the Defendant Walter Cavill, being a director thereof, did by wilful act, default or neglect, or by fraud, art or contrivance particulars whereof are set out in the next succeeding paragraph hereof avoid or attempt to avoid taxation". This paragraph follows the provisions of s. 231(1) of the Income Tax and Social Services Contribution Assessment Act 1936-1950. Para. 25 of the statement of claim as amended is in these terms: "Particulars of the said wilful act, default or neglect, or the fraud, art or contrivance alleged and averred in paragraph 24 hereof are that (a) the Defendant Company did fail to keep proper books of account in accordance with the requirements of law and the usual commercial practice and that such failure was the direct result of a decision and instruction made and given by the Defendant Walter Cavill; (b) that the Defendant Walter Cavill owned the majority of the shares or controlled the majority voting power in the Defendant Company and was in direct personal control of the activities of the defendant Company and could and did from time to time give instructions to its employees concerning both the keeping of its books and the conduct of its business well knowing that the income tax return of the Defendant Company for the year ended 30th June, 1950, would be prepared from the said books (c) that during the year ended 30th June 1950 the Defendant Company did receive payments in cash in sums totalling the amounts and from the persons respectively set forth in the First Schedule hereto amounting to the sum of £2,434 such persons being customers and other persons and such payments being received in the ordinary course of the business of the Defendant Company; (d) the said payments were made to the Defendant Company by the persons concerned as payment for the

sale to them by it of bottled beer; (e) all such sales were made at a price in excess of One pound eight shillings and sixpence (£1.8.6) per dozen bottles; (f) the Defendant Walter Cavill instructed employees of the Defendant Company that an amount of One pound eight shillings and sixpence (£1.8.6) per dozen bottles and no more was to be entered in the books of the Defendant Company in respect of the said payments and that the receipt of the balance of the moneys so paid was not to be entered in the said books, and that the portion of such moneys representing the difference between the price charged and a price calculated at the rate of One pound eight shillings and sixpence (£1.8.6) per dozen bottles was to be taken out of the said moneys and handed to him; (g) the said instructions of the Defendant Walter Cavill were carried out by the employees of the Defendant Company; (h) the amount of the difference as so calculated was £2,434 in respect of the year ended 30th June 1950; (i) the income tax return of the Defendant Company for the year ended 30th June, 1950, was prepared from the said books and stated that the gross profit of the Defendant Company for the said year was the sum of £105,062. 18. 5 whereas the gross profit of the Defendant Company for the said year was not less than the sum £107,497 or thereabouts." Para. 27 says this: "After the receipt by the Plaintiff of the said 1950 return the Plaintiff accepted the same in fulfilment of the liability of the Defendant Company under Section 161 of the said Act and the notice referred to in paragraph 4 hereof and in respect of the year of income ended 30th June 1950 did make assessments of the amount of the taxable income of the Defendant Company and the tax (including additional tax in accordance with Division 7 of Part III of the said Act) payable thereon in the sums of £24,881 and £7,219. 5. 0 respectively." Paras. 28 and 29 also aver matters in proof of the commission by the defendant company of an offence under s. 231. The first of these paragraphs is as follows: "The amount of the tax

payable upon the true taxable income of the Defendant Company which was not less than £27,315 or thereabouts as hereinbefore alleged and averred was the sum of £9,042. 18. 0." Para. 29 avers that the amount of income tax which was avoided or attempted to be avoided by the defendant company by the wilful act, default or neglect, or by fraud, art or contrivance of Walter Cavill was the sum of £1,823. 13. 0. Paras. 34, 35, 37, 38 and 39 plead and aver substantially the same matters as those contained in the paragraphs to which I have mentioned specially. These paragraphs relate to the year of income ended 30th June 1951. As regards that year it is alleged and averred that the defendant company avoided or attempted to avoid income tax amounting to £7,005. 3. 0. In my opinion the averment of the matters included in (f) of paras. 25 and 35 respectively constitute under s. 243 prima facie evidence of wilful acts within the meaning of s. 231(1), and the matters alleged in the statement of claim as amended, particularly in the paragraphs which I have specially referred to, constitute prima facie evidence under s. 243 that the defendant company committed an offence under s. 231(1) in respect of the years in question respectively.

The evidence of E. C. Bingham was relied upon to rebut this prima facie proof. It was argued that this evidence proves that the defendant company did not in fact receive the sum of £2,434 mentioned in para. 25 or the amount of £15,567 mentioned in para. 35 but on the contrary that these sums were received by Cavill for his own benefit or the alternative that they were moneys of the company of which Cavill defrauded it and knowledge of avoidance of tax resulting from Cavill's fraud ought not to be imputed to the defendant company. I have carefully considered Bingham's evidence. I am not satisfied that it proves that Cavill regarded the sums in question as secret commissions for himself or that his intention was to defraud the company of any part of the proceeds

of the sale of its goods. The inference which I draw is that Cavill had decided that the defendant company would sell its goods to the customers mentioned in the schedule to the statement of claim, as amended, at prices in excess of the lawful prices for the goods, and that he gave the instructions alleged and averred in the statement of claim in order to conceal from the price fixing authorities, but not from the company, the true prices at which the company was making these particular sales in order to avoid the risk of prosecution for black marketing offences. ^{And} /Cavill must be presumed to have known that the company's taxation returns would be prepared from the books thus falsified. I therefore find the defendant company guilty of an offence under s. 231 of the Income Tax and Social Services Contribution Assessment Acts 1936-1950 and of 1936-1951. Para. 24A of the statement of claim alleges and avers that the defendant, Walter Cavill, is deemed to have committed the offence alleged in para. 24 thereof in that he procured and by art was knowingly concerned in the commission of that offence and para. 25 and para. 34A allege and aver similar matter in respect of the offence mentioned in para. 34. The offences alleged in paras. 24A and 34A are created by s. 5 of the Commonwealth Crimes Act 1914-1950. In my opinion the averments in those two paragraphs constitute prima facie evidence under s. 243 that Walter Cavill procured and was knowingly concerned in the commission of the offences of which I have found the defendant company guilty and in my opinion Bingham's evidence supports the averments. I therefore find that under s. 5 of the Commonwealth Crimes Act the defendant Walter Cavill should be deemed to have committed both of the offences.

In consequence of disclosures made during the enquiries conducted by Mr. Justice Maxwell as a Royal Commissioner into the Liquor Trade in New South Wales, the

defendant Walter Cavill returned to the defendant company the moneys, paid by the company's customers for goods sold to them in excess of the legal price. (Cavill had assumed personal possession of these amounts, and the company's employees, on his instructions, had omitted them from the company's books of account.) Thereafter the company, in its turn, made complete tax returns of its income derived during the years in question and full disclosure of its affairs to the Commissioner. In the circumstances I order the defendant company to pay a penalty of £250 for each offence of which it has been found guilty and the defendant Walter Cavill a penalty of the same amount for each of those offences on the footing that he is deemed to have committed it.

It is not necessary to deal with the charges made under s. 227 because it was stated by counsel on behalf of the Commissioner that those charges would not be pressed if the defendants were found guilty under s. 231.

I therefore make an order against each defendant for the penalties that I have stated. They must pay the costs of these proceedings. Judgment accordingly.