FEDERAL COURT OF AUSTRALIA

Miller v Chapman [2001] FCA 105

TAXATION - application challenged taxation assessments on grounds foredoomed to failure - applicant did not press claims at hearing and application dismissed - claims pursued upon advice and at direction of third party - third party joined as party to proceedings to seek costs against it - whether costs should be awarded against party joined - whether costs should be on indemnity basis.

CIVIL PROCEDURE - joinder of a party to proceedings with a view to seeking an order for costs against that party on an indemnity basis - presentation and maintenance of claims which had no prospect of success - whether that conduct amounted to an abuse of process - claims presented and maintained upon advice and under direction of party joined - party joined played active part in conduct of proceedings - party joined knew or had good reason to know claims had no prospect of success - whether appropriate to order party joined to pay costs - whether appropriate to order costs payable on indemnity basis.

Federal Court of Australia Act 1976 (Cth) s 43
Income Tax Assessment Act 1936 (Cth) s 208 and s 209
Taxation Administration Act 1953 (Cth) ss 4, 6D, 7, 8 and 8A
Federal Court Rules O 22 r 2(1)(d)

Deputy Commissioner of Taxation v Levick (1999) 168 ALR 383 applied
Levick v Deputy Commissioner of Taxation [2000] FCA 674 applied, followed
Knight v F P Special Assets Ltd (1992) 174 CLR 178 considered
Walton v Gardiner (1992-1993) 177 CLR 378 applied
Dooney v Henry 174 ALR 41 applied, followed
Poonon Pty Ltd v Deputy Commissioner of Taxation [1999] NSW SC 1121 applied
McKewins Hairdressing and Beauty Supplies Pty Ltd (in Liquidation) v Deputy Commissioner of Taxation (2000) 171 ALR 335 followed
Money Tree Management Services Pty Ltd v Deputy Commissioner of Taxation (No 1) [2000] SASC 54 referred to
Money Tree Management Services Pty Ltd v Deputy Commissioner of Taxation (No 2) [2000] SASC 63 applied
Helljay Investments Pty Ltd v Deputy Commissioner of Taxation (1999) 166 ALR 302 referred to
Joosse v Australian Securities and Investment Commission (1998) 159 ALR 260 referred to
Professional Nominees Pty Ltd v Walsh [1998] Qld CA 5591 referred to

HARRY MILLER v STEPHEN CHAPMAN, DEPUTY COMMISSIONER OF TAXATION and INSTITUTE OF TAXATION RESEARCH PTY LTD

S 100 OF 2000

MANSFIELD J
23 FEBRUARY 2001
ADELAIDE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **S 100 OF 2000**

BETWEEN:	**HARRY MILLER** **APPLICANT**
AND:	**STEPHEN CHAPMAN** **DEPUTY COMMISSIONER OF TAXATION** **FIRST RESPONDENT**
	INSTITUTE OF TAXATION RESEARCH PTY LTD **SECOND RESPONDENT**

JUDGE:	**MANSFIELD J**
DATE OF ORDER:	**23 FEBRUARY 2001**
WHERE MADE:	**ADELAIDE**

THE COURT ORDERS THAT:

1. The second respondent, the Institute of Taxation Research Pty Ltd, pay to the first respondent, the Deputy Commissioner of Taxation, costs of the application to be taxed, such costs to be taxed on an indemnity basis to the intent that the first respondent should recover all his costs except those which have been unreasonably incurred or those which are unreasonable in amount.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **S 100 OF 2000**

BETWEEN:	**HARRY MILLER** **APPLICANT**
AND:	**STEPHEN CHAPMAN** **DEPUTY COMMISSIONER OF TAXATION** **FIRST RESPONDENT**
	INSTITUTE OF TAXATION RESEARCH PTY LTD **SECOND RESPONDENT**

JUDGE:	**MANSFIELD J**
DATE:	**23 FEBRUARY 2001**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

1 This application commenced in the High Court of Australia on 10 April 2000. On 10 August 2000, Callinan J remitted the matter to this Court for hearing and determination. On 24 October 2000, Institute of Taxation Research Pty Ltd ("ITR") was joined as a party to the proceeding. The DCT made it clear at the time that the purpose of the joinder was to bring ITR before the Court with a view to seeking an order for costs against it on an indemnity basis if the applicant's claim were unsuccessful. That is an appropriate procedure to adopt: *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383 per Hill J at 395 (*"Levick"*) (affirmed on appeal: *Levick v Deputy Commissioner of Taxation* [2000] FCA 674). ITR was duly served, but it did not avail itself of the opportunity made available to it by the Court to submit that the joinder order should be set aside. Nor did ITR file any appearance or other pleading, nor participate in any way in the hearing.

2 The matter was listed for hearing on 14 December 2000. The applicant attended on that occasion and sought leave to discontinue it under O 22 r 2(1)(d) of the Federal Court Rules. The first respondent ("the DCT") opposed that leave. For brief reasons given at the

time, I refused to grant the leave sought. The applicant indicated that he did not wish to proceed with his claim against the DCT and would tender no evidence or argument in support of it. I accordingly dismissed the application. I ordered that the applicant pay to the DCT costs of the application to be taxed.

3 The DCT further sought an order that ITR pay the DCT's costs of the proceeding on an indemnity basis. It sought that order for costs because, it was contended, the ITR stood behind the applicant so that the applicant was in effect the pawn of the ITR and that the proceeding had no prospect of success as the matters raised by the application had already been decided adversely to the applicant in a number of other proceedings with which ITR had been involved. The evidence disclosed that ITR was given specific notice of the DCT's application for an order for costs against it, and of the grounds for that application. On that application, the applicant also gave evidence about his dealings with ITR. I accept that evidence, which was confirmed in material respects by documentary material.

4 On the material before me, including the evidence of the applicant, I find that this application was made in response to an assessment of tax liability by the DCT imposed upon the applicant. That liability was not met. On 30 November 1999, the DCT commenced proceedings in the District Court of South Australia to recover the tax liability. That action was defended. On 28 February 2000, that Court entered judgment in favour of the DCT against the applicant for the full amount of the claim.

5 It is not clear precisely how the applicant came into contact with ITR. I accept that, as a result of learning of ITR from another source, the applicant made the initial contact with ITR. He was not then able readily to pay the tax assessed, and was looking for some means of avoiding or delaying having to make that payment. He received an application from ITR to seek its assistance, and duly completed it. It is called a Consultancy and Research Agreement ("the Contract"). Under the Contract, he agreed to pay fees of $6,000 or 15 per cent of "any taxation monies claimed as due and owing by any taxation authority saved by [the ITR] on behalf of" the applicant.

6 Effectively, from that point, the applicant dealt with the DCT only as directed by ITR and its officers. He had one or two particular persons with whom he dealt, either by telephone or by facsimile. He was told that ITR would look after his tax affairs for a fee, and

that the ITR had a sound legal foundation for asserting that the tax assessments against the applicant were invalid. The ITR provided the applicant with the form of the documents which he filed in his unsuccessful defence of the proceedings in the District Court of South Australia. It also advised him to institute this application in the High Court of Australia, and provided him with drafts of the documents which he used to do so as well as documents filed in the course of the proceeding both in the High Court and in this Court. The applicant nominally acted for himself in defending the proceedings in the District Court of South Australia and in prosecuting this application, but generally his submissions on occasions when he addressed the High Court, or this Court, or the District Court were based upon speaking notes provided to him by ITR. The applicant was given assurances that his position was sound and that the proceedings were being conducted on his behalf routinely and competently.

7 I also accept the applicant's evidence that he did not really understand the arguments he was putting to the Court to dispute his tax liability. They were arguments prepared by ITR and provided to the applicant; in effect, he was the mouthpiece of ITR. He relied upon the officers of ITR entirely as to the merits of the arguments.

8 I also find that, pursuant to the terms of his engagement of ITR, the applicant has paid ITR $8,290 for the work it has carried out on his behalf and for the advice he has been given.

9 The DCT submitted that I should further find that ITR, in its involvement with the applicant, demonstrated that it was "preying on the gullible" for its own benefit, namely the earning of fees from its clients by encouraging them to maintain what it knew or should have known were unmeritorious legal arguments. He further submitted that that practice imposed considerable disadvantage upon its clients, both emotionally and economically. I accept that, in the case of the applicant, his contract with ITR from about April 1999 took place when he was emotionally distressed for reasons unrelated to his taxation liability, and was also hard pressed to meet that liability. His communications with ITR from time to time thereafter would have disclosed those circumstances to ITR. He clearly became entirely dependent upon its advice, in a trusting and naive way. Ultimately, when he learned that the matters he was claiming had been the subject of a number of other adverse judgments, he was clearly very disappointed and distressed. In the period between April 1999 and December 2000, the

taxation liability had not been paid and had no doubt increased by the interest and penalty payments for which the legislation provides.

10 However, I am not prepared to infer that the applicant's particular circumstances are typical of the other clients of ITR from the information before me on this application. I do not think that his evidence, or the terms of the general communications from ITR to its clients, go so far as to indicate such a cynical and manipulative attitude on the part of ITR and its officers. The clients of ITR may be motivated to seek and adopt its advice for a variety of reasons, and with a range of perspicuity about the strength (or lack of strength) of the arguments which it apparently advises its clients to present. The allegation of the DCT that ITR is operating a "professional and smoothly run scam" is a serious one, and not one which should be readily inferred from equivocal material: cp. *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 343-344.

11 That is not to say that it is understandable on the material before me how a professional taxation adviser could continue to advise clients to argue the matters which the applicant asserted, when it could not but be aware that those matters had no real prospect of success. That may be a matter between ITR and its clients.

12 In the event, I do not regard such a finding as critical to the making of the order for costs for which the DCT contends. I also do not need to make any finding about the timeliness and the quality of the service which ITR provided to the applicant, putting aside the question of its legal correctness.

13 The power to award costs under s 43 of the *Federal Court of Australia Act 1976* (Cth) is a broad one. In certain circumstances, it enables the awarding of costs against an entity not a party to the proceedings: *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 (*"Knight"*) per Mason CJ and Deane J at 185 and 189-190, per Dawson J at 202-203 and per Gaudron J at 205.

14 In the light of the role of ITR in the institution and conduct of these proceedings, the DCT submits that the costs should be ordered to be paid by ITR on an indemnity basis because the proceedings constitute an abuse of the process of the Court, particularly in the light of its role as a professional adviser to, and indeed the motivator of, the proceedings. It

is clear that proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail: *Walton v Gardiner* (1992-1993) 177 CLR 378 per Mason CJ, Deane and Dawson JJ at 393.

15 The applicant's statement of claim, the expression of which I have found to have been at the initiative of and under the direction of ITR, appears to raise three matters. They are:

(a) a claim that the assessment of the applicant's taxation liability was unlawful, and the recovery of that assessed taxation liability was unlawful, due to improper or inadequate delegations and authorisations under the Income Tax legislation ("the delegation argument")

(b) a claim that the DCT, and the Australian Taxation Office ("the ATO"), has no legal existence and hence no entitlement to issue taxation assessments because the Income Tax legislation does not constitute a valid Act ("the status of the ATO argument")

(c) a claim that the grant of the Royal Assent to the *Income Tax Assessment Act 1936* (Cth) ("the ITAA") by the Governor-General was somehow illegal or unlawful and without authority, because the appointment of the Governor-General was itself irregular, so that the Act itself was invalid ("the interregnum argument").

16 In my judgment, each of those contentions was clearly foredoomed to fail.

17 The delegation argument, as it emerges from the documents filed by the applicant, is also set out in some detail by Hill J in *Levick*. His Honour rejected those arguments at [24-25], and as noted earlier in these reasons that decision was upheld on appeal. Callinan J in *Dooney v Henry* 174 ALR 41 [10-17] (*"Dooney"*) similarly rejected those contentions.

18 I adopt the reasons of their Honours for rejecting the delegation argument. Indeed, I am bound to follow them. It would serve no useful purpose to repeat those reasons in detail. It is sufficient to observe that the *Taxation Administration Act 1953* (Cth) ("the TA Act") provides by ss 4 and 7 for the existence of the Commissioner of Taxation and the DCT, and s 6D of that Act empowers a Second Commissioner of Taxation to have all the powers, and to exercise all the functions, of the Commissioner of Taxation. Sections 8 and 8A empower the

delegation of those powers and functions to the DCT, and to officers employed in the Australian Taxation Office. An assessment of income tax has the consequence that the tax, when it becomes due and payable, is a debt due to the Commonwealth: s 208 of the ITAA, and may be recovered as a debt in any court of competent jurisdiction: s 209 of the ITAA. The evidence shows that the recovery proceedings in the District Court of South Australia were commenced by an officer duly authorised by the DCT and in the name of the DCT.

19 The status of the ATO argument, even if correct, does not, in my judgment, lead to the application succeeding. That is also the view of Hill J in *Levick* (at [23]). Moreover, the argument was rejected by Hill J in *Levick* (at [22-23]) and by Austin J in *Poonon Pty Ltd v Deputy Commissioner of Taxation* [1999] NSW SC 1121 at [23] (*"Poonon"*). Again, I respectfully agree with and adopt their Honours' reasons for so doing. I will not repeat them.

20 The interregnum argument is also one which has been dealt with in earlier cases. Hill J in *Levick* at [26-33], Austin J in *Poonon* at [26], Gummow J in *McKewins Hairdressing and Beauty Supplies Pty Ltd (in Liquidation) v Deputy Commissioner of Taxation* (2000) 171 ALR 335 at [7-9] (*"McKewins"*) and Callinan J in *Dooney* at [19] have all rejected the argument. Again, I respectfully adopt the reasons given by their Honours, and for those reasons I reject the argument.

21 It is further clear that ITR was not unaware of the import of those decisions, or at least of some of them. It played a role in relation to Money Tree Management Services Pty Ltd in its proceedings against the Deputy Commissioner of Taxation (*Money Tree Management Services Pty Ltd v Deputy Commissioner of Taxation (No 1)* [2000] SASC 54. When dealing with the claim that ITR should pay the costs of that claim on an indemnity basis, Doyle CJ noted that ITR had been closely involved in that action and that the arguments advanced were provided by ITR. They were much the same arguments as were adduced in the present application. In his judgment on costs in *Money Tree Management Services Pty Ltd v Deputy Commissioner of Taxation (No 2)* [2000] SASC 63 (*"Money Tree (No 2)"*), when he made an order similar to that which is now sought, Doyle CJ at [6] referred to *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 166 ALR 302 per Hayne J; *Joosse v Australian Securities and Investment Commission* (1998) 159 ALR 260 per Hayne J, and *Professional Nominees Pty Ltd v Walsh* [1998] Qld CA 5591, as well as *Levick* as having been

"rejected on each occasion, being variously described as 'groundless', 'manifestly untenable', 'confused', 'nonsense' and 'an abuse of process'."

22 In *McKewins* also, it is apparent from the reasons of Gummow J at [4] and]15] that ITR was in some way behind the contentions put forward, and rejected, in that case.

23 In those circumstances, in my view, ITR has played an active part in this application (see *Knight* at 193), and it has promoted the adoption of claims which had no prospect of success in circumstances where it knew or had good reason to know that those claims had that character. Its conduct, in my judgment, amounted to an abuse of the Court's process.

24 I do not consider it necessary to address whether the jurisdiction to award costs is only, or primarily, compensatory and not punitive. That question was addressed by Doyle CJ in *Money Tree (No 2)* at [34-38]. In this matter, I have no reason to think that the order for costs made in the DCT's favour against the applicant will readily be met and indeed the applicant's evidence, albeit obliquely, tended to suggest that he would not presently be in a position to pay such costs as well as his taxation liability and the interest and penalty taxation imposed. I think that the order for costs which is sought against ITR is desirable to ensure that the DCT is compensated for the costs of this application.

25 I order that ITR pay to the DCT costs of the application to be taxed, such costs to be taxed on an indemnity basis to the intent that the DCT should recover all his costs except those which have been unreasonably incurred or those which are unreasonable in amount.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 23 February 2001

Counsel for the Applicant:	The Applicant appeared in person
Counsel for the First Respondent:	Ms S Maharaj with her Dr G Ebbeck
Solicitors for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	No appearance
Date of Hearing:	14 and 15 December 2000
Date of Judgment:	23 February 2001