**MONEY TREE MANAGEMENT SERVICES PTY LTD & INSTITUTE OF TAXATION RESEARCH v DEPUTY COMMISSIONER OF TAXATION (No 3)**
**[2000] SASC 286**

**Civil**

1 ............. DEBELLE J. ....On 1 March 2000 the Chief Justice dismissed an application by the applicant, Money Tree Management Services Pty Ltd ("Money Tree"), for an order setting aside a demand by the respondent, Deputy Commissioner of Taxation ("the Commissioner"), pursuant to s 459E of the *Corporations Law* for payment of a debt due to the Commissioner for income tax, penalty and penalty interest. Speaking very broadly, Money Tree had contended that both the *Income Tax Assessment Act* and the appointment of the Deputy Commissioner of Taxation were invalid. The Chief Justice rejected all of the contentions advanced on behalf of Money Tree. In addition to the order dismissing the application by Money Tree, the Chief Justice made an order that Money Tree pay the Commissioner's costs on an indemnity basis. The order was made on the footing that it should have been very clear to Money Tree, or at least to its advisers, that the submissions put were manifestly untenable and that there was no prospect of the proceedings being successful. The Chief Justice published reasons for his decision: *Money Tree Management Services Pty Ltd v Deputy Commissioner of Taxation (No 1)* [2000] SASC 54.

2 The Commissioner had applied to join as parties to the proceedings Mr Peter Kerin, the solicitor for Money Tree, and Institute of Taxation Research Pty Ltd ("ITR"). On 20 March 2000 the Chief Justice made an order joining ITR as a party. He further ordered that ITR pay the Commissioner its costs of the proceedings on an indemnity basis. The Chief Justice dismissed the Commissioner's application insofar as it related to Mr Kerin. The reasons for this decision are *Money Tree Management Services Pty Ltd v Deputy Commissioner of Taxation (No 2)* (2000) 207 LSJS 287.

3 On 23 March 2000 Mr Kerin, as solicitor for Money Tree, filed a notice of appeal against the orders of the Chief Justice made on 1 March 2000. Rule 95.02(a) of the *Supreme Court Rules* provides that a notice of appeal should be filed and delivered within 14 days after the decision appealed from. The rule is expressed in these terms:

> "Unless any enactment otherwise provides:
>
> (a) ... an appeal as of right must be instituted within fourteen days after the decision, judgment, order or award appealed from, or within such other time as the court may fix."

There is no enactment which provides for any other time limit or which otherwise qualifies the operation of the rule. The notice of appeal was, therefore,

filed out of time. No application was2then made for an extension of time within which to file the notice of appeal.

4 On 4 April 2000 Mr Kerin, acting as the Adelaide agent of the solicitors for ITR, filed a notice of appeal against the orders made by the Chief Justice on 20 March 2000. That appeal was lodged one day late. The Commissioner does not, as I understand his submissions, rely on the appeal being late.

5 No further step was taken in the action until 6 July 2000 when the Commissioner filed an application for an order dismissing the appeal by Money Tree as incompetent and, in the alternative, applying for security for costs. An affidavit was filed in support of the application. On 27 July the application was referred by a Master to a Judge for hearing on 4 August 2000.

6 On 3 August the solicitor for Money Tree filed an application seeking an extension of time within which to appeal and other orders. The application was listed to be heard with the Commissioner's application dated 6 July 2000. On 4 August Bleby J adjourned the hearing of both applications until yesterday. The applications were part heard yesterday and the hearing resumed today.

7 The Commissioner's application to dismiss the appeal by Money Tree as incompetent is grounded only on the fact that the notice of appeal was filed and delivered out of time. The success of that application depends upon the outcome of the application by Money Tree for an extension of time within which to appeal. I therefore deal first with both the Commissioner's application to dismiss the appeal as incompetent and the application by Money Tree for an extension of the time within which to appeal. It will have been noted that the application for an extension of time within which to appeal was not made until the eve of the hearing to strike out the appeal as incompetent. I simply note that fact but place no reliance upon it.

8 Mr Kerin has filed an affidavit sworn by him in support of the application. In that affidavit he says that on or about 6 March he "sought advice from a senior solicitor in Adelaide as to the time prescribed by the *Supreme Court Rules*" within which to appeal against the judgment or order of a single judge of this Court. He says that he was told that the appeal must be filed and served within 21 days. The senior solicitor is not named. Although Mr Kerin has been cross-examined on his affidavit, he was not asked anything about the advice he received as to time limits. Nevertheless, it is extraordinary that a solicitor of this Court of some years standing, like Mr Kerin, does not know such an important fact as the time within which appeals from a single judge of this Court to the Full Court must be filed and delivered. If the time has been forgotten, it can be readily ascertained from the *Supreme Court Rules*.

9 The court has a general discretion to extend the time within which to appeal. That is implicit in the terms of Rule 95.02(a) and is expressly provided in Rule 3.04. The factors affecting the exercise of that discretion have been examined in a number of decisions. It is sufficient to refer to *Burke v Garsden* (unreported, 12 March 1993, Judgment No. S3865); *Esther Investments Pty Ltd v*

*Markalinga Pty Ltd* (1989) 2 WAR3196; *Jackamarra v Krakouer* (1998) 153 ALR 276; and *Levi v Unisure Pty Ltd* [1999] SASC 432. The fact the delay has been caused by the negligence of the solicitor for the applicant will not operate as severely as delay by the applicant: *Burke v Garsden* (supra). The delay in this case is of eight days only. The fact that the notice was filed out of time appears to be a consequence of the negligence of the applicant's solicitor. A delay of eight days would not, on its face, cause any real prejudice to the Commissioner and no prejudice was suggested. If the only relevant factors were the short period of the delay, the fact that the delay resulted from the negligence of the applicant's solicitor and the absence of prejudice, I might have exercised my discretion in favour of granting the application for an extension of time.

10 However, another relevant factor is the prospects of success of the appeal. The time within which to appeal should not be extended where the appeal will not succeed: *Gallo v Dawson (No 2)* (1992) 109 ALR 319 and *Jackamarra v Krakouer* (supra) at 285 – 286 and at 295. Mr Walsh QC, who appeared for the appellant, submitted that the question whether the appeal was arguable was but one factor to be weighed with all other relevant factors. I do not agree. If the appeal is hopeless, that fact will prevail over others. A party who has a judgment in its favour should not be required to incur the cost of opposing an argument which is bound to fail or be delayed in enforcing its judgment by an appeal which is hopeless.

11 As the Chief Justice noted in his reasons for judgment published on 1 March 2000, the arguments advanced by Money Tree in this case are substantially the same as arguments considered by Hayne J in *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation* (1999) 74 ALJR 68 and *Joosse v Australian Securities and Investment Commission* (1998) 73 ALJR 232. One argument which attacked the validity of the *Income Tax Assessment Act* was identical with an argument dismissed by Hill J in *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383. The Chief Justice adopted the reasoning of Hayne J and Hill J in those decisions. Other arguments raised by the applicant are dealt with by the Chief Justice in paras 18 to 24 of his reasons. His Honour held that there was simply no substance in the applicant's argument. I respectfully agree. I add that the Chief Justice is clearly correct. There was no merit in any of the arguments advanced in support of the application. That conclusion is reinforced by the fact that several judges, including three judges of the High Court, have also decided that the arguments relied on are untenable.

12 In addition to the decisions of Hayne J in *Helljay* and *Joosse,* two applications based on similar grounds were decided in the High Court after the Chief Justice had published his reasons. Both applications were dismissed, the first by McHugh J in *Greer v Deputy Commissioner of Taxation* (unreported, 26 April 2000) and the second by Gummow J in *McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation* (2000) 171 ALR 335. It is pertinent to add that all or, if not all, almost all, of those applications are based on documents prepared by ITR. Those arguments have been consistently rejected in the decision to which I have referred. To the extent that the notice of

appeal seeks to advance arguments led4before the Chief Justice, I think they are bound to fail.

13 The notice of appeal raises grounds which were not argued before the Chief Justice. Some of those grounds would require facts to be proved. In the ordinary course, that might be sufficient ground to prevent them now being raised: *Banque Commerciale, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 284. Ordinarily courts do not allow new questions of law to be raised on an appeal which involves new issues of fact unless it is in the interests of justice to entertain the point. However, in the reasons which follow it is apparent that each of the points is plainly untenable and I therefore deal with them.

14 The first is that the appointment of the Chief Justice is invalid. The grounds upon which the appointment is said to be invalid are not set out. A similar ground is to be found in para 3 of the notice of appeal filed on behalf of ITR which is articulated in these terms:

> "That the judicial commission of his Honour the Chief Justice issued by the Governor of the State of South Australia in May of 1995 pursuant to the purported authority granted to Her by Letters Patent dated the 14th of February, 1986, which Letters Patent were gazetted in the State of South Australia on the 6th of March, 1986 and issued under the authority of the Great Seal of the United Kingdom purportedly establishing the office of the Governor of the State of South Australia is invalid ab initio in that the operation of the Letters Patent is contrary to the *Australia Act*, 1986 (Cwth.) and in particular Section 10 thereof which terminated the involvement of the United Kingdom in the government of the States as of and from the commencement of the *Australia Act*, 1986 (Cwth.), namely the 3rd of March 1986."

This ground is plainly untenable on at least two grounds. The first is that judges of this Court are appointed pursuant to s 9(1) of the *Supreme Court Act* 1935. Section 9(1) provides:

> "Whenever necessary, the Governor shall appoint a qualified person to hold the office of judge of the court with a tenure prescribed by the *Constitution Act*, 1934–1980, but subject to the provision of this Act as to retirement."

The Parliament of this State has the legislative competence to enact such a provision. Thus the Letters Patent are not relevant. The second is that a reading of the Letters Patent dated 14 February 1986 discloses that they contain no power to appoint judges.

15 If it is submitted that the commencement of the *Australia Act* 1986 (Cth) on 3 March 1986 invalidated the Letters Patent or created some kind of hiatus in the office of the Governor, that submission too is clearly misconceived. The Letters Patent are dated 14 February 1986, some three weeks before the *Australia Act* commenced operation. It was competent for the Government of the State of

South Australia to adopt the Letters5Patent upon the *Australia Act* coming into operation. Furthermore, it is apparent from the preamble to the Letters Patent that they are intended to make new provisions relating to the office of Governor given that the bill enacting the *Australia Act* had been enacted and was about to come into operation. The Letters Patent revoked prior Letters Patent, in particular those dated 29 October 1900 which provided a power to the Governor to appoint judges. There was nothing in the *Australia Act*, therefore, which in any respect impinges upon the validity of the Letters Patent.

16 Ground 2 of the notice of appeal by Money Tree states:

> "That by virtue of the provisions of the Australia Act, 1986 and the use of Letters Patent after the date of the commencement of that legislation, a defect has arisen consequent upon the use of the Great Seal of the United Kingdom to create the office of the Governor of the State of South Australia and, by reason of that purported authority, to:
>
> 2.1 appoint the Executive Government of the State of South Australia; and
>
> 2.2 issue Writs for Elections under the said authority,
>
> as a result of which various commissions and appointments, including the commission of the Honourable Chief Justice, are thereby rendered invalid."

This ground mirrors ground 3 in the notice of appeal by ITR. The appointment of the Governor of the State is under the Sign Manual: para 3 of the Letters Patent dated 14 February 1986.

17 Further, s 7 of the *Australia Act* contemplates that State Governors will continue to be appointed by the Queen. In doing so, Her Majesty will act on the advice of the Government of this State: s 7(5) and s 10 of the *Australia Act*. The argument, therefore, in para 2, proceeds on a wholly false premise and is plainly untenable.

18 Another new ground of appeal is set out in para 3 of the notice of appeal of Money Tree.

> "3. That the Honourable Chief Justice erred in law by:
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> 3.1... applying the provisions of the Corporations Law (SA) 1990 at a time when there is currently an application before the High Court in respect of:
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> 3.1.1 the multiple defects in the legal capacity of the Respondent acting outside his legislative capacity; and
>
> 3.1.2 the Corporations Law (SA) 1990 arising under Section 109 of the Commonwealth Constitution; and
>
> 3.2 disregarding that:

3.2.1 since the High6Court ruled in the matter of Sue -v- Hill;

3.2.1.1 ..... for the purpose of Section 44(1) of the Commonwealth Constitution, the United Kingdom is a foreign power; and

3.2.1.2 the continued use of the authority of the United Kingdom Parliament has been adjudged to no longer be legal;

3.2.2 Section 10 of the Australia Act, 1986 (Cwth.) explicitly removes any continued authority of the United Kingdom Government jurisdiction in respect of the government of the States of Australia, the High Court in Sue -v- Hill having specifically outlawed this practice; and

3.2.3 the actions of the Government of the State of South Australia in passing and giving Royal Assent to the Corporations Law (SA), 1990 were contrary to Commonwealth law and, pursuant to Section 109 of the Commonwealth Constitution, the Corporations Law (SA), 1990 is overridden by Commonwealth Law."

The application to which para 3.1 refers is an application in *Moeliker v Chapman*, heard by Callinan J in the High Court of Australia on 17 May 2000. His Honour has reserved judgment. This is another application promoted by ITR. In that application, arguments were advanced challenging the validity of the *Income Tax Assessment Act* and the validity of the appointment of respondent, Chapman, a Deputy Commissioner of Taxation. The arguments were similar to those rejected by the Chief Justice in this case. With respect, I do not think that the fact that an application has been made to Callinan J and that His Honour has reserved his decision, in any respect, demonstrates that the Chief Justice has erred in law. The simple fact is that the Chief Justice has made a decision for reasons similar to those which have been used by other members of the High Court, who have all rejected like arguments. The fact that an application is currently before a justice of the High Court cannot, in any respect, mean that the Chief Justice has erred in reaching his conclusion. Further, the argument is completely untenable.

19 Other grounds in para 3 seek to call in aid a decision of the High Court in *Sue v Hill* (1999) 73 ALJR 1016. The argument portrays the same or similar misunderstandings of that decision as were identified by Hayne J in *Helljay v Deputy Commissioner of Taxation* (supra) at 73, in particular at para 18, where His Honour said:

> "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 in7*Joose*, 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. As I said in *Joosse*, the questions which the present application seeks to agitate are resolved by covering cl 5 of the Constitution. 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."

Those grounds of appeal show that the appellant clearly misunderstands the effect of the decision in *Sue v Hill*. That decision is not of any assistance to the appellant.

20 Paragraph 3.2.2 again portrays a complete failure to understand the meaning and operation of the *Australia Act*. Although the effect of s 10 of the Act is correctly paraphrased in this ground, the draftsman has failed to have regard to, or understand the operation of the Act.

21 Paragraph 3.2.3 again proceeds on fundamental misconceptions. The Parliament of South Australia has legislative competence to enact the *Corporations (South Australia) Act* 1990 (which is incorrectly named in this ground) and the Governor had power to give the Royal Assent. Instead of being contrary to Commonwealth law, the enactment of the *Corporations (South Australia) Act* formed part of a legislative scheme in which the Commonwealth and the States participated. There is no provision in the Commonwealth *Corporations Law* which conflicts with the State Act and none has been identified. This argument too is plainly untenable.

22 For all of these reasons, the applicant is quite unable to demonstrate that it has any kind of arguable case. Its case, in short, is quite hopeless. I am not, therefore, prepared to extend the time within which to appeal. For these reasons I will dismiss the application of Money Tree for an extension of time within which to appeal. I grant the Commissioner's application to dismiss the appeal as incompetent.

23 Although it is unnecessary to deal with the Commissioner's application for security for costs, I briefly state my reasons for concluding that, had I extended the time within which to appeal, I would have ordered that the applicant provide security for the costs of the appeal. The power to order security for costs is set out in Rule 95.13(b). The Rule invests the court with a discretion to order that the applicant give security for costs if there are special circumstances. An appellant will be ordered to give security for the costs of the appeal if it is shown that he could not pay the costs if unsuccessful. Money Tree has not paid the Commissioner's demand for tax nor has it paid the costs ordered by the Chief Justice. Evidence from Ms Matthews, an officer of Money Tree, discloses that

Money Tree does not have assets out of8which it can pay either the tax alleged to be due, the costs so far ordered, or the costs of the appeal. Indeed, it could not simply pay the costs of the appeal. I would therefore have ordered security for the costs for two reasons; that first is that, for the reasons already given, the applicant has no reasonable prospects of success and, secondly, the fact that the applicant is unable to pay the costs of the appeal. However, it is unnecessary to make such an order.

24 I turn to the amount of the costs, which I would have ordered had security been required. Given that the Chief Justice ordered that Money Tree pay the costs of its failed application on an indemnity basis and as the applicant has no reasonable prospects of success on appeal, the amount which I would have ordered security for costs of the appeal should also be calculated on an indemnity basis. Those costs have been estimated by the Commission to be $15500. I think that the estimate is a little generous. Had it been necessary to do so, I would have ordered that the amount to be paid for security for costs be $14000.

25 As already mentioned, the application by Money Tree on 3 August 2000 sought orders in addition to the order extending time within which to appeal. As expressed in the application, the orders sought by Money Tree are as follows:

> "2.... that the life of the appeal be extended until two [2] months after the determination by the High Court of Australia of preliminary matters which are relevant to the subject appeal;
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> 3. that:
>
> 3.1 the progress of the appeal; and
>
> 3.2... the Orders made on the 1st of March, 2000 Chief Justice Doyle of this Court,
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> be stayed until after the determination by the High Court of Australia of preliminary matters which are relevant to the subject appeal;
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> 4. that the First Appellant set down the appeal within two [2] months after the determination by the High Court of Australia of preliminary matters which are relevant to the subject appeal;"

It will be noticed that each paragraph refers to the determination by the High Court of preliminary matters said to be relevant to the appeal. Mr Walsh QC informed me that the only preliminary matter is the application in *Moeliker v Chapman,* to which reference has already been made. With respect, I do not think that the fact that Callinan J has reserved his decision requires that a stay be ordered, particularly since the same issue has already been the subject of decision by three members of the High Court of Australia, would have all rejected the argument. The applications in paras 2 and 4 appear also to be for a stay and that fact was confirmed by Mr Walsh QC.

26 I put to one side the question9whether there is any order to be stayed. In my view there is no ground which justifies the order of a stay. It is sufficient to note that the applicant has no prospect of success on this appeal, and that is a relevant fact. It is, in my view, sufficient to refuse the application for a stay.

**Application to join Mr Kerin**

27 On 4 August 2000, the Commissioner made an oral application to join Peter David Kerin, the solicitor for Money Tree, as a party to these proceedings, and for an order that he pay the costs of the Commissioner's application and the costs of the application by Money Management on an indemnity basis. A like application was made to the Chief Justice on the hearing of the application by Money Tree for an order setting aside the statutory demand. As already noted, the Chief Justice dismissed that application. The present application is not an appeal from the decision of the Chief Justice. If it were, it would plainly be incompetent. Instead, it is a fresh application which concerns only the institution of this appeal and the applications consequent upon it. The only issue is whether there are grounds which satisfy me that Mr Kerin should pay the costs of the appeal and pay those costs on an indemnity basis.

28 The court has jurisdiction to make an order that a person who is not a party to the proceeding pay costs: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178. That power includes the power to make an order for costs against the solicitor representing a party. *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224; *De Sousa v Minister for Immigration* (1993) 41 FCR 544. *Deputy Commissioner of Taxation v Levick* (supra) at 389 – 391, confirmed on appeal (2000) 44 ATR 315; and *McKewin's Hairdressing and Beauty Supplies Pty Ltd (in liq) v Deputy Commissioner of Taxation* (supra) at 339. The relevant principles are discussed in those cases. It is unnecessary to repeat them. The discussion includes an emphasis upon the caution which must be exercised before making such an order.

29 The discretion to make the order must be clearly distinguished from the jurisdiction to do so. As Hill J said in *Deputy Commissioner of Taxation v Levick* (supra) at 389:

> "The jurisdiction is, I think, one that must be exercised sparingly, having regard to all the circumstances of the particular case. It is clear enough that a litigant is entitled to representation to vindicate a particular legal right, or to maintain a legal defence. Should it turn out that the litigation is decided adversely to the litigant it does not follow that costs should, in consequence, be ordered against the legal adviser, be he or she a solicitor or a barrister. Were that the case those seeking to advance legitimate claims, or to pursue legitimate defences might well be deprived of legal representation and access to justice, in consequence, would be impeded."

Observations to like effect have been made in the other decisions to which I have referred. It must consequently be borne in mind that the principle acknowledges

the competing principle that a party is10entitled to have a practitioner act for him or her, even in an unmeritorious case. Regard must also be had to the fact that clients are free to reject advice and insist that cases be litigated. As the Court of Appeal noted in *Ridehalgh v Horsefield* [1994] Ch 205, it is rarely, if ever, safe for the court to assume that a hopeless case has been litigated on the advice of the lawyers involved. The Court of Appeal added (at 234):

> "It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail, it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, ... It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

To like effect are the observations of the Full Court of the Federal Court in *Levick v Deputy Commissioner of Taxation* (2000) 44 ATR 315, where it said (at 324 – 325):

> "it is equally important to uphold the right of a court to order a solicitor to pay costs wasted by the solicitor's unreasonable conduct of a case. What constitutes unreasonable conduct must depend upon the circumstances of the case, no comprehensive definition is possible. In the context of instituting or maintaining a proceeding or defence, we agree with Goldberg J that unreasonable conduct must be more than acting on behalf of a client who has little or no prospect of success. There must be something akin to abuse of process, that is, using the proceeding for an ulterior purpose or without any, or any proper, consideration of the prospects of success."

It must also be remembered the purpose of this principle is not punitive or disciplinary. Instead, its purpose is to compensate the client.

30 Evidence concerning this issue was given by Ms Matthew and Mr Kerin. That evidence shows it was ITR, not Money Tree, which decided to institute the appeal by Money Tree. Once the decision had been made, Money Tree was asked if it would authorise the appeal, and it did so. Its authorisation does not alter the fact that it was ITR's decision to institute the appeal. It is also apparent that Money Tree has little or no understanding of the issues. Neither Money Tree, nor any officer of the company, has made any contribution to the content of the notice of appeal. The notice of appeal was drawn by Mr Kerin after receiving instructions from ITR. Mr Kerin says that ITR would be paying his costs. More accurately, the evidence was that he hoped that ITR would be paying his costs. Although Mr Kerin said that his client is Money Tree, it is apparent that he is also acting on behalf of ITR in prosecuting this appeal.

31 Mr Kerin is aware of the11decisions of Hayne J in *Helljay* and in *Joosse* and of the decision of the Full Federal Court in *Levick*. He is aware of the fact that the arguments of ITR have been described by Hayne J as “manifestly untenable”. Mr Kerin has drafted the notice of appeal for Money Tree, not on the instructions of Money Tree, but on the instructions of ITR. He has not advised Money Tree of the hopelessness of the case. It is apparent that Money Tree has no idea of the fact that it has no prospects of success. This is not a case of a client seeking to pursue a hopeless case against the advice of its solicitor. Instead, it is a case of a solicitor taking a quite unreasonable step which has no prospect of success and on behalf of a person who is not the appellant. It is an abuse of process in that the appeal has been instituted without any, or indeed, any proper, consideration of its prospects of success. No thought has been given to the position of Money Tree or its liability to costs if it should fail. Money Tree has not been advised of its potential liability for costs. There is a serious dereliction of a duty to Money Tree.

32 The arguments which are advanced are arguments which plainly stem from ITR. That is evidenced by the fact that the appeal instituted by ITR contains grounds very similar, if not at times identical grounds, to the grounds of appeal included in the Money Tree notice of appeal. These are arguments which have plainly originated with ITR or with its lawyers. Mr Kerin is now one of those lawyers. He drafted this notice which includes grounds which are clearly untenable. I repeat, that the jurisdiction to order costs against a solicitor in respect of an unsuccessful issue held to have been pursued in serious dereliction of duty ought to be exercised sparingly and with great caution. In my view, this is a case where it is proper to join Mr Kerin as a party and order that he pay costs.

**Costs Orders**

33 There remains the question whether the costs should be paid by Money Tree and on what footing those costs should be paid. In my view, there is no reason why Money Tree too should not be liable for costs in these proceedings. It has authorised them. It could have taken the step of deciding not to do so. I will in a moment order that the costs be paid jointly and severally by Mr Kerin and Money Tree. In my view, the costs should be paid on an indemnity basis. I have already referred to the fact that the arguments which have been advanced are plainly untenable. They are arguments which have been rejected on many occasions by judges in several jurisdictions and by Justices of the High Court. Mr Kerin is aware that they have been rejected. It is not entirely clear whether Money Tree is aware of that fact but, in this respect, it must accept the consequences of its solicitor’s actions. For these reasons, I order that the costs be paid on an indemnity basis.

**A Fresh Application for a Stay**

34 There is one other matter. At the close of his submissions, Mr Walsh asked that I stay these proceedings. The ground of his application was that a notice of motion has been filed in the High Court today in action number A34 of 2000. That application names ITR as applicant. The respondents to it are David

Williams, Kimley Grant Barry,12Genevieve Ebbeck and Paul Vincent Slattery. Mr Williams is an officer employed by the Australian Government Solicitor. Mr Barry is an officer employed by the Commissioner of Taxation. Dr Ebbeck has appeared as counsel with Mr Slattery. The notice of motion states that the return date is to be fixed. It states that an order will be sought that part of a proceedings in the action number 837 of 1999 between the Deputy Commissioner of Taxation and Money Tree be removed into the High Court pursuant to s 40 of the *Judiciary Act* 1903 on grounds that they raise issues under the Constitution or involve its interpretation. Some particulars of those grounds, or what purports to be particulars of those grounds, are then set out. Other orders are also sought including the order that the respondents be enjoined from continuing any action before the Supreme Court in the name of any other party.

35 This notice of motion is between parties different from those in the action number 837 of 1999 with which I am now dealing. I do not think it, therefore, either necessary or appropriate to stay my consideration of these proceedings by reason of the issue of the notice of motion. If it was intended to stay these proceedings, the appropriate course was to make an application in this action. In any event, the issues raised in the notices of appeal do not give rise to any issues arising out of the Constitution or involve its interpretation with, perhaps, one possible exception. Instead, the issues raised in the notice of appeal concern the validity of acts of the Government of South Australia and the legislative competence of the state of South Australia.

36 The only issue which might arise out of the Commonwealth Constitution is the asserted conflict between the *Corporations (South Australia) Act* and the *Corporations Law*. For reasons already given, there is simply no possibility of any such conflict which will attract, in any sense, the operation of s 109 of the Constitution. In other words, the bare assertion of a ground of this kind should not be a cause for removal, where the assertion is manifestly untenable.

**Notice to Attorneys-General**

37 I add by way of a footnote that notice of the application by the Deputy Commissioner of Taxation was given to the Attorneys-General of the Commonwealth and of the States and Territories. All of those Attorneys, save one, have replied that they have no interest in the proceedings. The only Attorney who has any interest in the proceedings is the Attorney-General of South Australia. Through the Solicitor-General, he has informed counsel for the Commissioner that he did not wish to be heard on the applications which I have heard. He has informed Mr Slattery that the only interest of the Attorney-General was to ensure that the Court of Appeal understood the principles of *R v Boston* (1923) 33 CLR 386, namely, that the court takes judicial notice of the appointment of judges and there is a presumption of regularity in favour of such appointments. Regard has therefore been had to s 78B of the *Judiciary Act* 1903.

38 The orders are as follows:

1. That the appeal by Money Tree13Management Services Pty Ltd be dismissed as incompetent.

2. The application by Money Tree Management Services Pty Ltd in paras 1, 2, 3, 4 and 6 of its application dated 3 August 2000 be dismissed.

3. That Peter David Kerin be joined as a party to these proceedings.

4. That Peter David Kerin and Money Tree Management Services Pty Ltd are jointly and severally liable for the costs of an incidental to the Deputy Commissioner of Taxation's application dated 6 July 2000 and of the application by Money Tree Management Services Pty Ltd dated 3 August 2000.

5. That the costs, the subject of para 6 of this order, shall be taxed on the basis in each case that the costs include all costs of the Deputy Commissioner of Taxation except insofar as they are of an unreasonable amount or were unreasonably incurred so that, subject to such exceptions, the Deputy Commissioner is completely indemnified for his costs.

6. No order on the application of the Deputy Commissioner of Taxation dated 9 August 2000.

7. No further order on the application of the Deputy Commissioner of Taxation dated 6 July 2000.

8. Fit for counsel.