No S 65 of 2001

MICHAEL JOHN GLENNAN

v

COMMISSIONER OF TAXATION

JUDGMENT

GLEESON CJ

MICHAEL JOHN GLENNAN

v

COMMISSIONER OF TAXATION

Mr Glennan, the plaintiff in this action, has for many years been in dispute with the defendant, the Commissioner of Taxation, concerning an income tax assessment which included an amount of $1,365,000 in his assessable income for the year ended 30 June 1988.

The facts giving rise to that assessment are set out in the judgment of the Full Court of the Federal Court in *Commissioner of Taxation v Glennan*[1] and in the judgment of Kirby J in *Re Carmody; Ex parte Glennan*[2]. I will not repeat them in detail. For present purposes, it is necessary to refer to them only in outline.

The plaintiff was a party to a joint venture agreement in connection with a proposed engineering project. He sued in the Supreme Court of New South Wales for moneys he claimed were due to him under the agreement. The action was settled. He was paid $1,365,000. The Commissioner asserted that the amount was assessable income, and assessed accordingly. The plaintiff objected to the assessment. The objection was disallowed. The matter came

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1 (1999) 90 FCR 538.

2 (2000) 173 ALR 145 74 ALJR 1148.

before the Administrative Appeals Tribunal. The Tribunal upheld the assessment. The plaintiff appealed to the Federal Court of Australia. He succeeded at first instance. The Commissioner appealed to the Full Court of the Federal Court. The appeal was successful. The Full Court, on 26 March 1999, held that the Tribunal had not erred in law in concluding that the whole of the amount in question was income according to ordinary concepts, and assessable under s 25(1) of the *Income Tax Assessment Act* 1936 (Cth). The reasons for that conclusion turned upon the provisions of the joint venture agreement, the nature of the plaintiff's claims in the Supreme Court action, and the relationship between those claims and the settlement payment. The plaintiff filed applications for special leave to appeal to this Court. He discontinued those applications, on 9 April 2001, by filing Notices of Discontinuance.

In the meantime, following the decision of the Full Court of the Federal Court, the plaintiff commenced proceedings in this Court for constitutional writs. The nature of those proceedings appears from the judgment of Kirby J mentioned above. In brief, they challenged the actions of the Commissioner, and the jurisdiction of the Federal Court, in relation to the assessment. The proceedings were dismissed by Kirby J on 27 June 2000. There was an application for leave to appeal from the decision of Kirby J. That application also was discontinued by Notice of Discontinuance filed on 9 April 2001.

One of the grounds relied upon before Kirby J, and a central contention in the present proceedings in this Court, was an assertion that the assessment under challenge in the Administrative Appeals Tribunal, and the Federal Court, was inconsistent with a public ruling set out in Taxation Determination TD

93/58, dealing with the circumstances under which the receipt of a lump sum settlement payment will constitute assessable income. I should say at once that, as at present advised, I cannot see that there is any disconformity between the ruling and the assessment. The assessment was based upon the view, upheld by the Administrative Appeals Tribunal, and found by the Full Court of the Federal Court not to involve error of law, that the whole of the settlement amount was income according to ordinary concepts. As the Full Court put it, that fell "to be determined by reference to what the payment was received for"[3]. The ruling appears to me to have been directed to the kind of problem that arises when a settlement relates to claims partly of a revenue and partly of a capital nature. And it states that a settlement sum is assessable income "if the payment is compensation for loss of income only." Here, on the view upheld by the Full Court, the claims were wholly for loss of revenue. The plaintiff disputes that. But he has failed in that argument. If the view of the Tribunal and the Full Court were correct, then it appears to be consistent with the ruling. I should also point out that the defendant argues that, by reason of the history of the matter, the self-assessment regime, of which the public ruling system forms part, did not apply to the present case. However, it is unnecessary for me to form a concluded view upon either of these matters. I mention them only to indicate that there is a serious doubt as to whether the ruling applied and, if it applied, as to whether there was any disconformity between the ruling and the assessment.

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3 (1999) 90 FCR 538 at 554.

It should also be mentioned that the plaintiff did not rely on the ruling in ordering his affairs, or raise the ruling in his notice of objection to the assessment; but he raised it, very late in the piece, before the Full Court. The Full Court did not mention the ruling in its reasons for judgment. Perhaps it simply regarded it as irrelevant. However that may be, the plaintiff discontinued his application for special leave to appeal to this Court. He is bound by the decision of the Full Court, upholding the decision of the Administrative Appeals Tribunal, and the defendant is entitled to the benefit of that decision, with its implications as to the character of the payment received by the plaintiff, and the account on which that payment was made.

The present action (No S 65 of 2001) was commenced by the plaintiff against the defendant, in the original jurisdiction of this Court, on 9 April 2001, the same day as the discontinuance of the applications for special leave and leave referred to above.

The defendant responded by making an application under O 26 r 18, which provides:

> "(1) The Court or a Justice may order a pleading to be struck out on the ground that it does not disclose a reasonable cause of action or answer.
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> (2) In that case, or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Justice may order the action to be stayed or dismissed, or judgment to be entered accordingly, as is just."

Alternatively, the defendant sought a permanent stay of the proceedings under O 63 rr1 and 2.

The defendant's application came for hearing before me on 30 November 2001. The plaintiff acknowledged that there were serious deficiencies in his Statement of Claim, and sought an adjournment to seek to cure them. The adjournment was granted. He filed an Amended Statement of Claim on 17 December 2001. By an affidavit filed on 20 March 2002, he indicated a desire to make further amendments to his pleading.

The matter came for further hearing before me on 21 March 2002. It was agreed between the parties that I should deal with the defendant's application on the basis that the plaintiff's claim was as appeared in the Amended Statement of Claim of 17 December 2001, as further amended in accordance with the affidavit of 20 March 2002. After the conclusion of oral argument, the plaintiff sought, and received, an opportunity to make further written submissions.

The plaintiff also filed a Summons seeking further "particulars" of matters relating to the assessment. If the defendant's application succeeds, that Summons will become otiose.

The defendant contends that the present action is, in substance, an attempt to make a collateral challenge to the decisions of the Full Court and of Kirby J, and that, upon the principles stated in *Metropolitan Bank v Pooley*[4] and *Rogers v The Queen*[5], it should not be permitted. In this respect, the defendant

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4 [1885] 10 App Cas 210 at 216-217.

5 (1994) 181 CLR 251 at 273.

also points to the discontinuance of the applications for special leave to appeal, and leave to appeal, from the decisions of the Full Court and of Kirby J and refers to *Blair v Curran*[6], *Port of Melbourne Authority v Anshun Pty Ltd*[7], and *Walton v Gardiner*[8]. It is also submitted that the plaintiff's claim is, on its face, without substance. I agree with these contentions.

The relief sought in the Amended Statement of Claim may be summarised as follows:

1. A declaration that the income tax assessment referred to above was illegal and void.
2. A declaration that s 25(1) of the Income Tax Assessment Act was impliedly repealed by the legislation relating to the self-assessment system, in its operation with respect to the amount received by the plaintiff by way of settlement of his Supreme Court action.
3. A declaration that the defendant's conduct in making the assessment was arbitrary and unconstitutional.
4. A declaration that the decisions of the Administrative Appeals Tribunal and the Federal Court are of no legal effect.
5. An order restraining the defendant from acting upon or giving effect to the assessment.

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6 (1939) 62 CLR 464.

7 (1981) 147 CLR 589.

8 (1993) 177 CLR 378.

6. An order setting aside the decisions referred to in 4 above on the ground that they were procured by the defendant's equitable fraud.

7. Damages, including aggravated and exemplary damages.

The equitable fraud alleged relates to the tax ruling, the representations said to have been involved in it, the failure to bring the ruling to the notice of the plaintiff, and the failure to bring the ruling to the notice of the Tribunal and the Federal Court. In that connection, a number of observations may be made. The ruling was a public ruling. It was never concealed from anybody. The plaintiff himself brought it to the notice of the Full Court of the Federal Court before the Full Court delivered judgment. Although the plaintiff represented himself in this Court, he was represented by Senior Counsel in the Full Court. There was nothing to prevent the plaintiff, at any stage, from making whatever use of the ruling he desired. The fact that he only came upon it at a late stage is not a ground for complaint against the defendant. It was not referred to in the notice of objection to the assessment, or relied on before the Administrative Appeals Tribunal. As I have indicated, I would not wish to be taken to be suggesting that such reliance would have been of any use to the plaintiff. But to make the absence of reference to the ruling the basis of an allegation of equitable fraud against the defendant goes beyond the bounds of even the most enthusiastic advocacy.

The ruling, it should be added, was raised before, and dealt with by, Kirby J, who said[9]:

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9 (2000) 173 ALR 145 at 154.

> "The fundamental flaw in the applicant's argument on this ground concerns whether the Commissioner and his officers could ever be subject to a lawful duty to perform their functions, as asserted by the applicant, in a way that would contradict their undoubted duty to comply with a judgment which has been formally entered by the Full Court of the Federal Court with respect to the same subject matter."

Much of the Amended Statement of Claim is taken up with factual and legal contentions directed to the merits of the income tax assessment, and the decision that the settlement amount received by the plaintiff was wholly income according to ordinary concepts, and therefore within s 25 (1) of the Income Tax Assessment Act. There are also allegations and contentions directed to the proposition that, in any event, the receipt was covered by the ruling, and fell outside the circumstances in which, according to the ruling, it would constitute assessable income. All this is an attempt to re-litigate the merits of the tax assessment. I am willing to accept that the plaintiff genuinely believes the merits are on his side; but they have been authoritatively and conclusively determined against him.

In addition, there are the allegations of want of good faith in the making of the income tax assessment, disappointment of the plaintiff's legitimate expectations, contravention of the Taxpayer's Charter in relation to public rulings, want of jurisdiction in the Federal Court, and disqualification for interest or association of the presiding member of the Administrative Appeals Tribunal.

As to the allegation of want of good faith, the plaintiffs principal difficulty is that, when the plaintiff challenged the defendant's assessment by the procedures provided by the legislation, the defendant was ultimately held to

be right. The plaintiff had no legitimate expectation to be relieved from paying tax on the settlement sum if, after the assessment was challenged by the proper procedures, the assessment was confirmed. The plaintiff did not rely on the public ruling in his notice of objection. The plaintiff is seeking to re-argue the merits of his assessed liability to tax. The Federal Court plainly had jurisdiction. The facts alleged do not make out an arguable case that the presiding member of the Tribunal was disqualified.

The form of the plaintiff's pleading remains deficient in many respects. But the problems in the plaintiff's case go beyond matters of form. In essence, he is seeking to re-litigate his liability to income tax. He is seeking to make a collateral challenge to decisions that went against him. And this is done against a background of having discontinued attempts to appeal against those decisions.

The pleading does not disclose a cause of action and I am compelled to conclude that the action is vexatious. The plaintiff's Amended Statement of Claim is struck out. The action is dismissed. Judgment will be entered for the defendant. The plaintiff's summons for particulars is dismissed. The plaintiff must pay the defendant's costs, including those previously reserved. I certify for the attendance of counsel in chambers.