[2011] QSC 342

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 9257 of 2010

DEPUTY COMMISSIONER OF TAXATION Plaintiff

and

ALLAN MITCHELL Defendant

BRISBANE

..DATE 04/11/2011

JUDGMENT

HIS HONOUR: The plaintiff, the Deputy Commissioner of Taxation, has applied in this action for summary judgment. He has sued the defendant for money due under an amended assessment to income tax. The defendant concedes that he cannot contest the assessment in the summary judgment application and makes no submissions in that application. If, therefore, the application is to be heard and is to proceed to determination, the only issue is whether the Deputy Commissioner has shown the elements of his action. It is unnecessary to recite them. Plainly, he has.

Mr Mitchell, the defendant, seeks a stay of proceedings antecedent to the determination of the summary judgment application and in the alternative, a stay of execution.

In his application, the onus is upon him to demonstrate that the case is an appropriate one for a stay. He accepts that onus. Mr Mitchell and the Deputy Commissioner both rely upon the principles set out by French J, as he then was, in *Snow v DCT* (1987) 14 FCR 119 at page 139:

> 1. The policy of the ITAA as reflected in its provisions gives priority to recovery of the revenue against the determination of the taxpayer's appeal against his assessment.
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> 2. The power to grant a stay is therefore exercised sparingly and the onus is on the taxpayer to justify it.
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> 3. The merits of the taxpayer's appeal constitute a factor to be taken into account in the exercise of the discretion (although some Judges have expressed different views on this point).
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> 4. Irrespective of the legal merits of the appeal a stay will not usually be granted

where the taxpayer is party to a contrivance to avoid his liability to payment of the tax.

5. A stay may be granted in a case of abuse of office by the Commissioner or extreme personal hardship to the taxpayer called on to pay.

6. The mere imposition of the obligation to pay does not constitute hardship.

7. The existence of a request for reference of an objection for review where appeal is a factor relevant to the exercise of the discretion.

The facts giving rise to the assessment are relevant only by way of background in terms of the enforceability of the assessment, but they are relevant directly to the question of the stay. They are very complicated and there has been little attempt on the part of Mr Mitchell to explain them. It seems that in about the year 2000, Mr Mitchell, who was associated with a Professor Stevenson from Newcastle, wished to patent and commercialise an invention whereby water could be converted into hydrogen for the use of powering of automobiles. This idea, it must be said, has been around for quite a while.

Mr Mitchell went to a company ("Sovereign") whose business seems to have been establishing structures, allegedly fiduciary structures, for persons in overseas countries, and in this particular case, in a notorious tax haven, the British Virgin Islands. Such a company was established for Mr Mitchell and Professor Stevenson by Sovereign.

Mr Mitchell claims that the reason for establishing a company

offshore was to avoid provisions of the Corporations Law in Australia regarding the raising of money. No attempt was made to demonstrate precisely what provisions of that law would have affected the raising of money in Australia such as to necessitate the use of an overseas company, but in any event, there is no evidence that, apart from for one company, which is an associated company in the group, that any money was raised in Australia.

Mr Mitchell alleges that there are some 250 shareholders who contributed money, but it seems that they were induced to join, if join they did, according to Mr Mitchell, by the fact that the company, being incorporated in a foreign jurisdiction, was more attractive to overseas investors.

It is all very obscure because Mr Mitchell did not identify the investors. Nor did he provide a certified copy of the Shareholders' Register from the British Virgin Islands.

He claimed that the shareholders had instructed him, as the sole director of the company, to not to copy the share register or permit it to be removed from the British Virgin Islands, but there is no evidence to support that claim. Indeed, the certified copy of the share register up to earlier this year, which was put into evidence on behalf of the Deputy Commissioner, discloses no such shareholders in existence.

The basis upon which the shareholders could give such an

instruction is not demonstrated. Ordinarily, the Board of Directors has the running of a company and a decision such as this would be one for the Board of Directors - at least that is so under Australian law - and in the absence of any evidence of the law of the British Virgin Islands, I must take it that, relevantly, the law there is the same.

The importance of the existence or otherwise of shareholders and their alleged contributions of capital lies in the fact that notwithstanding the incorporation of the company in a British Virgin Islands, the company did not have a bank account there, or if it did, there has been no evidence of its existence. Instead, Mr Mitchell says he tried to open a bank account in Australia. He claims he went to the National Australia Bank and was told that he could not open an account in the name of a foreign company with that bank. Apparently, this was for reasons internal to the bank involving its ability to scrutinise its client rather than for any legal reason.

Mr Mitchell says that he registered the Virgin Island company's name as a business name in Queensland and then opened a bank account in the business name. He showed himself as the proprietor of the business name. He says that the eight or $10 million that went into the bank account at one time or another was the money which came from share subscriptions by the shareholders and was not income of his. However, he has not produced any evidence of the nature of deposits, deposit slips or identification of the sources of

money in the bank and it remains completely opaque.

On the basis of Mr Mitchell's evidence, his counsel submits that this was not a sham, but a real project. It follows, so the submission goes, that the money in the bank account was the money of the company. It could not at the same time be income of Mr Mitchell, according to ordinary concepts.

Two things must be said at the outset about that submission. First, it depends entirely upon Mr Mitchell's credibility. If he is not believed, the remaining evidence is quite insufficient to support that view of things. I say at once that I do not believe Mr Mitchell. I would not accept anything which he said in evidence without corroboration from an independent, reliable source. Mr Mitchell's answers in evidence were frequently inconsistent, they were frequently evasive and they were frequently nonresponsive.

When caught in an apparent inconsistency, Mr Mitchell was willing to put up propositions which were commercially ridiculous, or allege a state of his own mind which is incredible. It must be remembered that Mr Mitchell is a middle aged to elderly gentleman with training in accountancy and a long experience, according to his CV, in establishing international business operations. Yet, he said in evidence: "I was under the impression that as a disability pensioner, I did not have to keep records of offshore companies."

It was true that he was a disability pensioner. He sought

that pension for his heart condition and told the Commonwealth that his income was such as to entitle him to a pension. He received it. He now receives an aged pension. What is incredible is the belief that as a disability pensioner, he did not have to keep records of offshore companies. A man of his knowledge and experience simply could not have such a belief.

He was forced into saying this because there were no records kept of the British Virgin Islands company, or if there were, they certainly have not been put into evidence and Mr Mitchell claims he did not keep them. He says that there were bank statements and other primary documents and he claims that he gave them to a Thai company to carry out an audit. They are not in evidence. I'll come back to the question of the audit in due course.

Further on the question of credibility, Mr Mitchell was argumentative in his evidence and I thought he tailored his evidence to suit what he perceived to be his case. Toward the end of his cross-examination, when pressed with an earlier inconsistent answer, he explained the inconsistency by saying - and I quote from my note - "What I say is not what I mean." That may have been true but in a sense which Mr Mitchell did not intend.

He sought to explain his inability to give proper answers by the tender of two medical certificates regarding his 1984 heart condition and an assertion in one of them to the effect

that his memory has been affected. The medical evidence does not in any way explain the tenor of his answers in evidence. In any event, it certainly does not turn them into reliable answers. In short, I don't believe Mr Mitchell's evidence.

The second aspect of Mr Mitchell's case is that the money in the bank account was indeed that of the company. I have already said why I am not prepared to make such a finding, but let it be assumed that it was company money. The Commissioner certainly seems to have issued his assessment on some sort of assumption that part at least of the money may have been company money for he did allow some expenditure as company expenditure. Quite why he did that, I do not understand, but in any event, let it be assumed that the money in the account was company money. The evidence shows that Mr Mitchell has steadily, over a period of years, drawn a large part of the money from the account for private use. He has used it for his own expenses or to distribute to members of his family or, in one case, to a person with the same surname who he claims is not a member of his family but a lady in the Philippines.

It does not seem to me that that really makes any difference. The Commissioner is entitled to defend the assessment, not only on the basis of the money being income according to ordinary perceptions, but also on any other basis which legally may be available. If Mr Mitchell has been extracting the money from the company funds in a way which might be regarded as fraudulent, it does not mean that the money so extracted is not income in his hands.

Alternatively, if the money has been extracted from the company in a way which is not fraudulent but with the agreement of the company, the Commissioner may well be able to defend the assessment as deemed dividends.

In short, Mr Mitchell has not demonstrated that the basis of the assessment, that is, that the money was income according to ordinary concepts, has been disproved, nor that the assessment cannot be upheld on any other basis.

Mr Mitchell sought to reinforce his own evidence with what he claimed was the audited financial accounts of the company produced this year for the first time in respect of the period of operation of the company. These accounts purported to have been audited by some firm in Thailand. That in itself is an oddity. Mr Mitchell, in his affidavit, deposed that when he received the company's bank records, he sought the help of a certified practising accountant in Australia. In oral evidence, he told Mr Flanagan that he couldn't remember the name of the accountants whom he approached for this purpose, but one was named Russell something and he couldn't remember the name of the other.

Subsequently in his evidence, he seemed to suggest that the accounts had been prepared by the Thai firm. When the difficulty of the proposition that the firm had both prepared the accounts and audited them was explored, Mr Mitchell denied that the Thai firm had prepared the

accounts. He said they had audited them. The accounts, he said, had been prepared by two of his employees. He couldn't remember the employees' names. They were Russell somebody and another person.

When it was pointed out that he had earlier said that they were certified practising accountants apparently in private practice, he changed his evidence yet again to assert that they were consultants, not employees.

I have no confidence that the so-called accounts are genuine or have any realistic relationship to the position of the company. They were not verified in any way by evidence from the so-called auditors, and none of them was made available for cross-examination.

Mr Mitchell further sought, as I have said, to support his evidence with what he claimed was an extract from the company register. At first, he was disposed to claim that it was the original company register, but all he produced was a set of printed pages stapled together. He produced this in the witness box to demonstrate that he ceased to be a shareholder of, though not a director of, the account in 2004. He claimed that he wanted to obtain the disability pension and ownership of these very valuable shares would have prevented this. At first, he suggested that he relinquished the shares and one of the earlier entries in the document which he produced suggests that he did indeed surrender the shares.

Later, he claimed he transferred them but he didn't know to whom since it was done by the company Sovereign, which was managing his affairs. Indeed, at times he seemed to suggest that Sovereign was controlling his actions and that he acted in response to what they instructed him to do. I did not believe that for a minute.

The alleged share transaction is quite inconsistent with the certified copy of the share register obtained by the Deputy Commissioner from the tax authorities in the British Virgin Islands. It must have come as something of a surprise to Mr Mitchell to find out that Australia is now able to obtain such documents from the British Virgin Islands.
I do not accept the document produced by Mr Mitchell, Exhibit 1, as a genuine document.

On Mr Mitchell's behalf, it was submitted that if judgment was given against him, that is to say if there were no stay of the proceedings, he would suffer hardship. Counsel identified the hardship as being his exposure to bankruptcy. I cannot see that any real hardship would flow from Mr Mitchell's bankruptcy. He claims that he has no sources of income, apart from his pension, and no assets. If what he says is true, it follows that the Commissioner will be unable to execute against any of his assets and any judgment that is given will be of no consequence to him. If he is made bankrupt, it will not affect his pension.

On behalf of Mr Mitchell, it was submitted that he would lose

his job. The evidence, according to Mr Mitchell, is that he does not have any paid employment. He said that he does still work as a consultant for the company and that he does so with the hope that some day he may get paid something. Well, perhaps he might. There's no evidence to support any realistic expectation that he will be paid something as a consultant, nor that anything would be likely to be paid within the period of a bankruptcy. It is therefore not a detriment to him.

It was submitted that he would not be able to manage the company. Perhaps that is so. I do not know what the law of the British Virgin Islands is in this regard, but I am certainly not persuaded on the facts that any activities which Mr Mitchell presently carries out in relation to the company, according to his evidence, would be inhibited by his bankruptcy. There is, in short, on Mr Mitchell's evidence no harm done to him by giving judgment on the claim.

As far as execution is concerned, it is also difficult to see how there can be any harm. He says he has no assets. By definition he can suffer no harm from execution. On the other hand, it seems that he is concerned that the Commissioner will attempt to seize assets held in the names of other entities, companies or perhaps other persons, both in Australia and overseas. If the Deputy Commissioner attempts to do so, no doubt there will be a contest by the claimed owner of those assets. Now is not the time to resolve ownership questions.

Mr Mitchell submits that there is no need for judgment to be given against him or enforced and that the primary purpose of the legislative provisions making the assessments conclusive evidence is to protect the revenue from the risk of the dissipation through legal costs of the available assets in fighting the Commissioner. Reference was made to the dictum of Chief Justice Bowen in Re Roma Industries relating to the protection of the revenue against such risk. I do not accept that that is the only purpose of the legislation.

I refer not only to the first paragraph of the passage quoted above from Snow, but also to the general observation regarding the protection of the interests of the revenue in the High Court decision of Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd (2008) 237 CLR 473.

Mr Mitchell submitted that freezing orders which were already in place were sufficient to protect the interests of the revenue. They are not. It seems that a number of the items of property referred to in those orders have been disposed of. Those orders were consent orders made between the Commissioner and Mr Mitchell, but Mr Mitchell now says that notwithstanding he was restrained from disposing of the property, it was able to be disposed of because it was not his property. This left him in some difficulty in relation to some property, two motor cars, which he claimed he held in trust, but he then asserted that he saw no difference between holding the property in trust and holding it as a full owner.

I suggested to counsel that it was a little surprising that a man with accountancy training should be unaware of the nature of a trust and the submission was made that accountants would not necessarily be familiar with trusts. I am quite satisfied from Mr Mitchell's background that he has quite adequate familiarity with trusts sufficient to have understood what he was doing. The freezing orders simply have not been effective.

In the alternative, Mr Mitchell's submissions cast the Commissioner's conduct as an abuse of office. It was expressly conceded that it was not a case of intentional abuse of office, but what was contended for was conduct which amounted to such a breach. It seemed to be part of that submission that the fact that further litigation would be necessary in order to enable execution to take place meant that there was some abuse of process in either allowing judgment to run or in allowing it to be executed. That I do not accept.

It was suggested that there would be hardship if a stay were not now granted because it would be necessary to seek another stay in the Federal Court. That also I do not accept. If bankruptcy proceedings are brought against Mr Mitchell, he can resist on whatever ground he sees fit in those proceedings.

In the further alternative, it was submitted that there was no contrivance in the sense referred to by French J in

paragraph 4 of the passage quoted above, yet reliance was placed on Mr Mitchell's evidence that the structures which were set up were for the purpose of raising capital not avoiding tax. The evidence is remarkable in its lack of detail about the capital raising, as I have said. There has been no identification of the shareholders. Notwithstanding the amount of money allegedly subscribed, 8 or $10 million, no accounts were kept. The supposed 250-odd shareholders were so trusting that they allowed Mr Mitchell to remain the sole director for many years, notwithstanding the fact that, according to him, he ceased to be a shareholder in 2004.

The fact is that the company was set up as a foreign company in a tax haven. Mr Mitchell was aware at the time it was set up of the taxation benefits which would flow in the future if the company were profitable. It seems to me that there is every indication that this was indeed a contrivance. Certainly Mr Mitchell, upon whom the onus lies, has not demonstrated to the contrary.

For these reasons, Mr Mitchell's application for stay of proceedings and stay of execution should be dismissed. The plaintiff's application for judgment should be granted and judgment should be entered for the plaintiff in the amount claimed in the amended statement of claim.