

FULL COURT

BEFORE:

Mr. Justice Connolly

Mr. Justice McPherson

Mr. Justice Derrington

BRISBANE, 22 OCTOBER 1986

BETWEEN:

DEPUTY COMMISSIONER FOR TAXATION

Plaintiff

-and-

MOORE BANK PTY. LTD.

Defendant

and: Picadilly Investments Pty. Ltd. (1340/1986);
Pamela Enterprises Pty. Ltd. (1897/1986); Parkville
Pty. Ltd. (1341/1986); Oakdale Pty. Ltd. (1342/1986);
Hillgrove Pty. Ltd. (1343/1986); Long Wood Pty. Ltd.
(1344/1986); Wandin Enterprises Pty. Ltd. (1346/1986);
Springbank Pty. Ltd. (1347/1986); Toolong Enterprises
Pty. Ltd. (1348/1986); Carrowbrook Pty. Ltd.
(1349/1986); Shoalhaven Pty. Ltd. (1350/1986); Swansea
Investments Pty. Ltd. (1353/1986); Serpentine
Investments Pty. Ltd. (1345/1986); Terry Hills Pty.
Ltd. (1355/1986); Woodville Pty. Ltd. (1357/1986);
Glenburn Pty. Ltd. (1358/1986)

JUDGMENT

MR. JUSTICE CONNOLLY: In this case the Court was constituted by my brother McPherson, my brother Derrington and myself.

In the case of Moore Bank I would declare that the plaintiff is entitled to recover such additional tax as accrued due between 1 April 1984 and the expiration of the period of six years after the date when the income tax the subject of this action became due and payable. I would otherwise dismiss the action.

I would order that the defendant's costs of the action should be taxed and paid by the plaintiff.

I publish my reasons.

I am authorised by my brother McPherson to say that he agrees in the order which I propose and in my reasons.

MR. JUSTICE DERRINGTON: I agree.

MR. JUSTICE CONNOLLY: The order of the Court will be as I have indicated.

The basis of the judgment - I mention this because we are about to turn to the related cases - is that additional tax ceases to be payable when the income tax in question becomes statute barred and that it is in any case subject to the two-year period of limitation. May I take it that in the cases which are listed on the sheet which was given to us by the defendants as formulating the judgment which the defendants sought - the amended version of that - that in those cases a similar judgment should be entered? I hand this down because there have been so many pieces of paper floating around in this case that I would like to be sure everybody is in agreement about it.

MR. FRAZER: I am instructed the judgment would be in precisely the same terms in each case.

MR. JUSTICE CONNOLLY: I am not sure about two things. You will see what I mean when you read my reasons. I am not quite sure when the tax became due and payable because I am not sure what the notice of assessment says, and I have made it an assumption just for the purpose of the argument.

I made the order by way of declaration because I was not sure when the tax became due and payable. As you know, it is either the date specified in the notice of assessment or 30 days from service of the notice of assessment. We do not have either of those facts.

MR. FRAZER: I think I can get instructions on that.

MR. JUSTICE CONNOLLY: It does not matter. It is conceivable that it is a slightly different date in relation to some of the other actions so it may be desirable to have a judgment in general terms.

MR. FRAZER: Yes.

MR. HACK: So far as I am aware those orders flow.

MR. JUSTICE CONNOLLY: If I can have that back I will initial it and it can be put with the papers. To cover the possibility that there is a different commencement date, as it were - a different date of the issue of the writ - do we know whether the writs were issued on the same date?

MR. FRAZER: I am instructed they were all issued on the same date.

MR. JUSTICE CONNOLLY: You have no doubt about it? Do you have one handy? 1 April 1986 seems to be the date - no, there are differences.

In the circumstances, so we do not have to keep talking on this subject, what I propose is this: in relation to all the other cases I would declare that the plaintiff is entitled to recover such additional tax as accrued due between the date two years prior to the issue

of the writ of summons and the expiration of the period of six years after the date when the income tax the subject of the action became due and payable.

It seems to me that that is in quite general terms and will enable the order to be moulded to the facts of the particular case.

Without consenting to it, does the Bar agree that in the other cases which are listed on the sheet which I initial and date it is appropriate for similar judgments to be entered?

MR. HACK: Yes.

MR. FRAZER: Yes.

MR. JUSTICE CONNOLLY: Very well. That will be placed with the papers.

IN THE SUPREME COURT OF QUEENSLAND Writ No. 1345 of 1986

FULL COURT

BETWEEN:

DEPUTY COMMISSIONER OF TAXATION

Plaintiff

AND:

MOORE BANK PTY. LTD.

Defendant

CONNOLLY J.

McPHERSON J.

DERRINGTON J.

Reasons for Judgment delivered by Connolly J. on 22nd
October, 1986. McPherson J. and Derrington J. concurring.

"Declare that the plaintiff is entitled to recover such
additional tax as accrued due between 1st April, 1984 and
the expiration of the period of six years after the date
that the income tax the subject of this action became due
and payable. Otherwise action dismissed. Order that the
defendant's costs of the action be taxed and paid by the
Plaintiff."

IN THE SUPREME COURT OF QUEENSLAND

No. 1345 of 1986

FULL COURT

Before the Full Court

Mr Justice Connolly

Mr Justice McPherson

Mr Justice Derrington

BETWEEN:

DEPUTY COMMISSIONER FOR TAXATION

Plaintiff

AND:

MOORE BANK PTY. LTD.

Defendant

JUDGMENT: CONNOLLY J.

Delivered the Twenty-second day of October, 1986

CATCHWORDS:

Counsel: Fitzgerald Q.C. for P. Hack for
Commissioner of Taxation
Davies Q.C. & H. Frazer & B. Clarke for
Defendant
Solicitors: Australian Government Solicitor for
Commissioner of Taxation
Henderson Lahey Trout Bernays for Defendant
Hearing dates: 20th and 21st August, 1986.

IN THE SUPREME COURT OF QUEENSLAND

1986 No. 1345

FULL COURT

BETWEEN:

DEPUTY COMMISSIONER OF TAXATION

Plaintiff

AND:

MOORE BANK PTY. LTD.

Defendant

JUDGMENT - CONNOLLY J.

Delivered the Twenty-second day of October, 1986.

On 3rd September of this year the Court overruled a demurrer by the plaintiff to the allegation of the defendant taxpayer that claims by the plaintiff to recover income tax and additional tax were subject to the operation of s. 10(1)(d) and (5) of the Limitation of Actions Act 1974-1981. On 26th September the defendant moved, pursuant to O. 29 r. 10 for such judgment as to the plaintiff's causes of action as it appeared to be entitled to on the pleadings. The plaintiff's claim was to recover income tax relating to the years ended 30th June, 1974, 1975 and 1976 the subject of assessment notices which issued on 21st April, 1978. As the period of limitation in relation to income tax is six years it was not disputed that the defendant was entitled, in terms of the Court's judgment on demurrer, to judgment in relation to these sums, s.

10(1)(d) denying the right of the plaintiff to bring an action in relation to them.

The plaintiff also claimed additional tax pursuant to s. 207 of the Income Tax Assessment Act (Commonwealth) in respect of the unpaid tax of each of those years of income. Additional tax is a penalty and the period of limitation is two years. It follows that any additional tax which accrued prior to 1st April, 1984 is not recoverable in this action. In relation to each year of income the Commissioner claimed additional tax at 10 per cent up to 13th February, 1983 and it follows that the defendant is entitled to judgment in relation to that part of the plaintiff's claim. However, in relation to each year of tax, there is a further claim for additional tax at 20 per cent from 14th February, 1983 to the date of the writ, 1st April, 1986. The substantial question before us at present is whether that additional tax or any part of it is recoverable.

Income tax becomes due and payable on the date specified in the notice of assessment or, if no date is so specified, on the thirtieth day after service of that notice. The pleadings do not enable one to identify exactly when the income tax in this case became due and payable but if one assumes that no date was specified this occurred on 21st May, 1978. The statute commenced to run therefore, on this assumption on 21st May, 1984 and after six years from that date the three amounts of income tax the subject of the action became irrecoverable. Because the period of limitation for additional tax is shorter no additional tax which accrued up to 1st April, 1984 is recoverable on any view, as I have already pointed out. But as additional tax continues to accrue so long as tax remains unpaid and as, concededly, the provisions of s. 10(1) (d) and (5) operate only to bar the remedy and not to extinguish the debt, it is contended for the plaintiff that additional tax has continued to accrue and that so much of it as accrued between 1st April, 1984 and the date of issue of the writ is recoverable in this action. The defendant on the other hand contended that additional tax payable under s. 207

should be regarded as at least analogous to interest. It was decided in Hollis v. Palmer (1836) 2 Bing. N.C. 713 that, interest being a mere accessory to the principal, where the principal is statute barred the interest also becomes irrecoverable. The rule was affirmed by the Privy Council in Cheang Thye Phin v. Lam Kin Sang [1929] A.C. 670 although the decision acknowledges that if there was an independent contract to pay interest the rule would be otherwise. See at p. 677. See also Healy v. Anderson [1938] St.R.Qd. 336 at p. 341 per Webb J., as he then was. Mr. Hack for the plaintiff however, pointed out that while the occasion of the imposition of the penalty was non-payment of the primary tax obligation and while the amount of the penalty was referable to the amount of primary tax unpaid, it could not be regarded as a mere accessory of the latter but was the subject of a distinct provision of the Act.

At the end of the day it seems to me that the answer to this problem must be found in the provisions of the Income Tax Assessment Act and that one cannot use the analogy of principal and interest in this way. I turn then to s. 207(1) which imposes the additional tax. It reads:-

"207. (1) If any tax remains unpaid after the time when it became due and payable or would, but for section 206, have become due and payable, additional tax is due and payable by way of penalty by the person liable to pay the tax at the rate of 20% per annum on the amount unpaid, computed from that time or, where, under section 206, the Commissioner has granted an extension of time for payment of the tax or has permitted payment of the tax to be made by instalments, from such date as the Commissioner determines, not being a date prior to the date on which the tax was originally due and payable."

For present purposes it seems to me that the critical words are those which define the person subject to the obligation to pay the additional tax. It is due and payable by way of penalty by the person liable to pay the tax. The tax is plainly the tax which remains unpaid after the time when it became due and payable. The question then is whether the defendant in this case is, at least since the

running of the statute, which I have assumed to have been completed by 21st May, 1984, liable to pay the tax. In my opinion it is not. In my judgment in s. 207(1) reference to "the person liable to pay the tax" is to a person against whom payment of the tax can be enforced. In O'Keefe v. Calwell (1949) 77 C.L.R. 261 Williams J., in whose judgment Richard J. agreed, said at p. 295:-

"The ordinary natural grammatical meaning of a person being liable to some penalty or prohibition is that the event has occurred which will enable the penalty or prohibition to be enforced, but that it still lies within the discretion of some authorized person to decide whether or not to proceed with the enforcement. Cf. James v. Young (1884) 27 Ch. D. 652; In re Loftus-Otway v. Otway (1895) 2 Ch. 235. The word 'liable' is sometimes used in the sense of exposure to liability, but this is not the ordinary natural grammatical meaning of the word. It would require a context to give the word this meaning."

I find the following passage from Hall v. Bonnet [1956] S.A.S.R. 10 from the judgment of Napier C.J. and Abbott J., although spoken in a quite different context, to be helpful:-

"The dictionaries do not agree on the derivation of 'liable' (or 'lyable') from 'ligabilis' (cf. the Oxford English Dictionary with the Shorter Oxford Dictionary), but we think that they agree that the primary meaning (in law) is 'that can be bound'. In this context, however, where the legislature is dealing with 'proceedings against and contributions between tortfeasors', the meaning is rather narrower than that. A person 'liable' is one 'who can be compelled to pay by using the due process of law'. In other words, as 'vulnerable' means 'who can be wounded if attacked', so 'liable' means 'who can be bound if sued', or, to speak more accurately, 'who can be compelled to pay by taking such steps as may be or remain necessary to obtain and enforce the judgment of a court of justice'. In this sense it seems to us that 'liable' comprehends the state of a wrong-doer from the time of the fault committed to the point at which his liability is established and quantified by the judgment, and, beyond that, to the point at which it is discharged

whether by release or payment or otherwise, as by lapse of time. The context may show that some other meaning is intended, but this is, we think, the natural meaning."

I am of opinion therefore that additional tax ceased to accrue when the income tax became irrecoverable. In practical terms this means that additional tax which accrued between 1st April, 1984 and the date when the income tax became statute barred, a period of about seven weeks I would suppose, is recoverable but that the claim otherwise fails.

It was brought to our attention that a Bill for an Act to insert in the Taxation Administration Act 1953 a new section, 14ZKA, had been introduced into the Parliament of the Commonwealth but had not passed into law. The effect of the proposed legislation upon this action and the other actions the subject of the demurrers which the Court has determined is conceded to be uncertain. In my opinion however, for the reasons given in Willow Wren Canal Carrying Co. Ltd. v. British Transport Commission [1956] 1 W.L.R. 213, the Court can have no regard to proposed legislation of this type. As Upjohn J., as he then was, observed at p. 216 of the report of that case it is not right for the Court to take into account the possible effect of a Bill which, so far as the Court is concerned, may never be passed into law at all, or, if passed into law, may ultimately contain provisions which do not affect the rights of the parties before the Court at all. We are, in my opinion, obliged to give such judgment in this case as appears to be required without regard to possible amending legislation.

As we do not have the precise facts, I would declare that the plaintiff is entitled to recover such additional tax as accrued due between 1st April, 1984 and the expiration of a period of six years after the date when the income tax the subject of this action became due and payable. I would otherwise dismiss the action. In all the circumstances, in my judgment, the defendant's costs of the action should be taxed and paid by the plaintiff.