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← **Moeliker v Chapman** → **B8/2000 [2000] HCATrans 242** **(17 May 2000)**

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry

Brisbane No B70 of 1999

B e t w e e n -

JOHN DOONEY

Plaintiff

and

MORRIS JAMES CLIFFORD HENRY (also known as JIM HENRY)

Defendant

Office of the Registry

Brisbane No B71 of 1999

B e t w e e n -

JOHN DOONEY

Plaintiff

and

STEPHEN CHAPMAN, Deputy Commissioner of Taxation

Defendant

Office of the Registry

Brisbane No B76 of 1999

B e t w e e n -

BRUCE SOCKHILL and ROM FERRIER

Plaintiffs

and

STEPHEN CHAPMAN, Deputy Commissioner of Taxation

Defendant

Office of the Registry

Brisbane No B77 of 1999

B e t w e e n -

BRUCE SOCKHILL and ROM FERRIER

Plaintiffs

and

MARGARET KEY

Defendant

Office of the Registry

Brisbane No B79 of 1999

B e t w e e n -

VINCENT MORGILLO

Plaintiff

and

SPENCER ROSS DE VERE

Defendant

Office of the Registry

Brisbane No B80 of 1999

B e t w e e n -

VINCENT MORGILLO

Plaintiff

and

STEPHEN CHAPMAN, Deputy Commissioner of Taxation

Defendant

Office of the Registry

Brisbane No B86 of 1999

B e t w e e n -

IVAN GORSHKOV

Plaintiff

and

MARGARET MARY KEY

Defendant

Office of the Registry

Brisbane No B87 of 1999

B e t w e e n -

IVAN GORSHKOV

Plaintiff

and

STEPHEN CHAPMAN, Deputy Commissioner of Taxation

Defendant

Office of the Registry

Brisbane No B88 of 1999

B e t w e e n -

JEREMY DIVE

Plaintiff

and

STEPHEN CHAPMAN, Deputy Commissioner of Taxation

Defendant

Office of the Registry

Brisbane No B89 of 1999

B e t w e e n -

JEREMY DIVE

Plaintiff

and

MARGARET MARY KEY

Defendant

Office of the Registry

Brisbane No B5 of 2000

B e t w e e n -

WILLIAM GAIR

Plaintiff

and

STEPHEN CHAPMAN, Deputy Commissioner of Taxation

Defendant

Office of the Registry

Brisbane No B7 of 2000

B e t w e e n -

MATTHEW MOELIKER

Plaintiff

and

MORRIS JAMES CLIFFORD HENRY (also known as JIM HENRY)

Defendant

Office of the Registry

Brisbane No B8 of 2000

B e t w e e n -

MATTHEW MOELIKER

Plaintiff

and

STEPHEN CHAPMAN

Defendant

Summonses to strike out statements of claim

CALLINAN J

(In Chambers)

TRANSCRIPT OF PROCEEDINGS

AT BRISBANE ON WEDNESDAY, 17 MAY 2000, AT 11.23 AM

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MR J.A. LOGAN, SC: If your Honour pleases, in each of those cases, I appear with my learned friend, **MR C.D. COULSEN**, for the applicant today, who is the defendant variously named in each of the cases. (instructed by the Australian Government Solicitor) In one of those, there is an additional defendant joined by your Honour in December last year. That was the liquidator of the company concerned in *Moeliker's Case*.

MR D.C. FITZGIBBON: Your Honour, I appear for all of the respondents in the matters. (instructed by Peter Brooke & Company in matters No B70, B71, B76, B77, B86, B87, B88, B89 of 1999, B7 and B8 of 2000 and instructed by Rea & Sockhill in matters No B79, B80 of 1999 and B5 of 2000)

HIS HONOUR: There are no other appearances? Is there any reason why these matters cannot be heard together?

MR FITZGIBBON: I think there is, your Honour, with respect. I think the problem divides, firstly, into the fact that writs in regard to companies have - - -

HIS HONOUR: Yes, you go ahead, Mr Fitzgibbon.

MR FITZGIBBON: Thank you. Your Honour, apart from two matters, they relate to corporations and some have been wound up, some have not.

HIS HONOUR: Let us be clear about this. How many of the matters relate to corporations that are in liquidation? Which matters?

MR FITZGIBBON: I am informed, your Honour, that the matters of R.Gair Pty Ltd - - -

HIS HONOUR: Wait a moment. Are all of the respondents natural persons? Mr Logan.

MR LOGAN: I might be able to assist there, your Honour. Could I hand up an outline of submissions which has annexed to it a tabulation which sets out, if you like, the parallel proceedings in other forums.

HIS HONOUR: Thank you. Could you do that, Mr Logan. I think there was one sent to me but it is upstairs, I think.

MR LOGAN: It also sets out the status of the corporations concerned, whether they are in liquidation or not. So I will just hand that up, if I may.

HIS HONOUR: Mr Fitzgibbon, one of your points, it seemed to me, in the material is no statute that has been passed since, was it 1931, has any validity. Is that effectively one of your submissions?

MR FITZGIBBON: That relates, your Honour, to the two individual writs involving - - -

HIS HONOUR: Those two matters - I have summarised what the submission is. Well, I am appointed under a statute. What is the point of applying to me? According to you, nothing that I would do would have any validity anyway.

MR FITZGIBBON: No, that is not quite correct.

HIS HONOUR: Not quite right?

MR FITZGIBBON: Not quite correct.

HIS HONOUR: Just think about that. We will come to that. I am sorry, Mr Logan. I will just hear from Mr Logan for a moment.

MR FITZGIBBON: Thank you, your Honour.

MR LOGAN: I might get my solicitor to hand those up.

HIS HONOUR: Thank you. My associate has just gone to get some papers for me. Not, let us see - - -

MR LOGAN: To answer your Honour's immediate question, could I ask you to turn to the summary table.

HIS HONOUR: That is A, Mr Logan?

MR LOGAN: A, yes, and following, and if I could just run through those, if your Honour please. B70, *Dooney v Henry*, the company concerned, Dooney Superannuation, the winding-up application there is presently adjourned in the Supreme Court. There has been set aside already an application to set aside the statutory demand and there are appellate proceedings pending in the Court of Appeal in relation to Justice Muir's decision in that regard. So no winding-up order yet with B70. B71, the same situation applies.

B76 and B77 concern Messrs Sockhill and Ferrier personally; no corporation involved in those. B79, *Morgillo*, the company concerned is Shercorp. A winding-up order has been made in respect of that company, 10 December last year. B80, the same situation applies. *Morgillo* was the one that was the subject of an application before your Honour in December last year.

B86, *Gorshkov*, the company concerned is Lee's Manufacturing Jewellers. A winding-up order was made on 16 December last year. B 87, the same situation applies. B88, *Dive v Chapman*, the company concerned in Goldsette Pty Ltd; a winding-up order made 13 December last year. B89, *Dive v Key*, the same situation.

Gair v Chapman, which is B5 of 2000, there are two companies mentioned in the pleadings. R. Gair Pty Ltd, your Honour has heard mention of. That company was wound up but the winding-up order was terminated - I beg your pardon, winding-up application, I should say. It was not wound up. The winding-up application was dismissed after a satisfactory resolution as far as the Commissioner was concerned of outstanding liabilities. That was on 28 January. So the winding-up proceeding was dismissed. The other company mentioned is Cottageview Pty Ltd. That company was the subject of a statutory demand but that did not progress last year to winding up and there are now proceedings pending in - there are now summary judgment proceedings in a Magistrates Court pending in relation to that company.

HIS HONOUR: B7 there is a winding-up order made.

MR LOGAN: Yes, that is right. B7 and B8 are the same. So that is the run of things.

MR FITZGIBBON: Do you have a copy of that. I am sorry, I have not been given a copy. Thank you.

HIS HONOUR: Now, I will come back to you, Mr Fitzgibbon. Do not be concerned about this, but if I can just get some matters clear from Mr Logan. Mr Logan, the plaintiff in each of the cases is a natural person. Where do I find the reference in the pleadings to a company?

MR LOGAN: It is usually in the first paragraph of the statement of claim. They tend to follow a standard form, your Honour, and if one has, for argument sake, your Honour, the *Gorshkov Case*, B86 - - -

HIS HONOUR: Yes, I have that.

MR LOGAN: There is an affidavit of Mr Henry which was filed in that case and exhibit 5, MJCH-5 to that, is the statement of claim which has been delivered.

HIS HONOUR: Yes, I think I have that.

MR LOGAN: So, one sees - - -

HIS HONOUR: It says, "The plaintiff Gorshkov is, and at all times, a director of a company known as Lee's".

MR LOGAN: Yes. That is the pleadings in each of the cases tend to follow a standard form and one sees in the first paragraph the allegation that the plaintiff is a director of whatever body corporate happens to be associated. In this case it is Lee's Manufacturing Jewellers and, as I mentioned to your Honour, that company was the subject of a winding-up order in the Supreme Court here on 16 December. That order was subsequently terminated, again after satisfactory resolution of outstanding debts on 24 December.

HIS HONOUR: This is one that the company is not in liquidation.

MR LOGAN: Not now.

HIS HONOUR: Not now. But the relief that is sought is relief nonetheless sought by a natural person as a director, in effect, for and on behalf of the company.

MR LOGAN: Yes, well, it - - -

HIS HONOUR: Is that right? If you look at the prayer for relief in B86, paragraph 1 is non-specific. Then paragraph 2, that, "Any winding-up orders obtained by the presentation to any court", well, there is no extant winding-up order now anyway in that one. Then 3, "In the event of a winding-up order or orders being set aside, then an order for full restitution be made against the defendant." It does not say restitution in favour of whom?

MR LOGAN: One presumes it must be the company.

HIS HONOUR: I am still dealing, Mr Fitzgibbon, with the question whether the matters should be tried - or a number of them should be heard together. What is your view about getting them heard together?

MR LOGAN: Your Honour, in my submission, the statements of claim follow such a standard form, they raise very similar issues, both as to procedure in terms of parallel proceedings and also in terms of the substantive worth, if any, of the standard form defences. So they lend themselves naturally, in my submission, to being heard together.

HIS HONOUR: All right. Now, just confining yourself to the question whether they should be heard together, Mr Fitzgibbon, what do you say about that?

MR FITZGIBBON: Your Honour, I have prepared a short set of submissions in relation to that issue - or to more than that issue, but I have addressed there a wider issue in that I say that in each and every case - and I am talking about the corporations matters - in fact their directors - - -

HIS HONOUR: Just tell me why they should not be heard together, that is all.

MR FITZGIBBON: They are essentially by virtue of the *Income Tax Act*. They are guarantors to the corporation, so I take a wider view then - - -

HIS HONOUR: Yes, but why should they not be heard together? There are numerous common issues, are there not?

MR FITZGIBBON: Yes. I see no difficulty with that.

HIS HONOUR: So they can be heard together.

MR FITZGIBBON: I think there is no difficulty with that.

HIS HONOUR: All right. I will make an order that all of the matters that have been called that are before me, and as set out in the schedule that has been provided by Mr Logan, be heard together.

MR FITZGIBBON: Perhaps, your Honour, I ought to clarify my position on that. I would have thought that the two writs against one Sockhill and Rea and the other matter were really in a separate category.

HIS HONOUR: Which matter?

MR FITZGIBBON: They, in fact, are - sorry, someone has lifted my list. I believe that they are listed - - -

MR LOGAN: B76 and B77.

MR FITZGIBBON: Yes.

HIS HONOUR: B76 and B77, there is no winding-up order in those.

MR LOGAN: No, your Honour. The similarity there is in the standard form defences utilised by each of - not defences, standard form pleadings in the statement of claim and, beyond that, the application today really focuses on there are parallel proceedings of one sort or another.

HIS HONOUR: Look, Mr Logan, it might be quicker to perhaps exclude those from the order that the matters all be heard together and it may be that the submissions in respect of all of the other matters, in any event, will cover a number of the issues that arise in those matters
- - -

MR LOGAN: Yes, it will.

HIS HONOUR: And there may not be too much repetition. Mr Fitzgibbon - - -

MR FITZGIBBON: Your Honour, might I hand to the Court - - -

HIS HONOUR: No, before you do that, I want you to focus on what I am putting to you because I want to know how we are going to proceed here. If I exclude matters B76 and B77

from the present argument and make an order that all of the other matters be heard together, you do not have any problem with that?

MR FITZGIBBON: No, I do not see any difficulty, your Honour, in view of the submission I am going to make to your Honour as to the constitutional validity and it is not the - - -

HIS HONOUR: Very well, then.

MR FITZGIBBON: It is not the argument that is contained in the two separate matters. It is quite different.

HIS HONOUR: We will deal with B76 and B77 after I have heard argument on all of the other matters in respect of which I make an order that they be heard together. Thank you. Now, you want to hand up to me your written submission.

MR FITZGIBBON: Yes, thank you.

HIS HONOUR: Would you do that, and I will look at it.

MR FITZGIBBON: I do apologise for the lateness. Someone lifted my bag at Melbourne Airport on Monday, and it did not help things. Hence the lateness.

HIS HONOUR: That is all right. I will just read this first.

MR LOGAN: If your Honour pleases.

HIS HONOUR: Mr Fitzgibbon, have any of the points that you want to raise before me been the subject of decision by any other court?

MR FITZGIBBON: No, your Honour.

HIS HONOUR: You are quite sure about that?

MR FITZGIBBON: The *Hughes'* matter was the one, of course, that I do very much rely on and your Honour will see that.

HIS HONOUR: All right, thank you.

MR FITZGIBBON: And what I say is that the issues that I have raised have never been, to my experience, and unfortunately or fortunately, I have been involved in quite a number of them. Indeed, we were hopeful that the *Hughes'* decision would have been returned in time for these and, hence, I have quoted in part - - -

HIS HONOUR: All right, thank you.

MR FITZGIBBON: The answer to that, your Honour, is no. I say that - in fact it almost emerges partly out of a stream which involves the incorporation cases. Then, of course, we have the Court's decision last year in *Wakim* and then of course we have the - - -

HIS HONOUR: Thank you. Mr Logan, it is your application. We are dealing with all of the matters except B76 and B77. I have B86 in front of me just for a reference point.

MR LOGAN: Yes, B86 is *Gorshkov*. What I wanted to do, your Honour, really is to perhaps use that as an exemplar for them. *Gorshkov* involves - - -

HIS HONOUR: Nothing turns on the fact at this stage in your argument that it is not in liquidation?

MR LOGAN: No. There are some particular - - -

HIS HONOUR: - - -matters that may apply to the company - - -

MR LOGAN: That is right, which might arise with others, but in terms of the generality of matters, what one sees in *Gorshkov's Case* is an endeavour, through proceedings in this Court's original jurisdiction, to impeach or challenge the outcome of proceedings in another forum. In other words, it is not just a matter of concurrent jurisdictions where your Honour might be called upon to exercise a discretion, as was frequently done in the building union cases days of the 80s in exclusive jurisdiction days with the Federal Court, with the *Trade Practices Act 1990*, but rather it is an *Anshun* situation where, in effect, the very purpose of each of these proceedings - and it does not matter for present purposes whether it is concerning the affairs of a natural persons, Messrs Ferrier or Sockhill, or bodies corporate such as Lee's Jewellers in *Gorshkov's Case*.

HIS HONOUR: Mr Logan, I wonder whether - I do not want to interrupt you but I wonder whether it might not be initially more helpful to me to focus on the prayers for relief. Can we go to them at first.

MR LOGAN: That highlights, with respect, your Honour, the endeavour that is made here because, in terms of the prayer for relief - and your Honour has already looked to paragraph 2 - what is sought there is - - -

HIS HONOUR: If we look, perhaps, at paragraph 1, there is no efficacy in paragraph 1 now, is there, because this particular company - I am sorry, this company is not in liquidation. You go ahead. We will look at paragraph 2.

MR LOGAN: What is sought there is directly to challenge the judgment obtained in another forum. So that the very purpose of this proceeding is to impeach or challenge - - -

HIS HONOUR: - - - the winding-up order if it is made in this particular matter in the future.

MR LOGAN: Yes.

HIS HONOUR: Or if anybody seeks to make a winding-up order in the future wants a declaration in advance that any winding-up order made in the future will have no force and effect. It says, "obtained by the presentation to any court". Presentation of what?

MR LOGAN: Well, the language is unorthodox.

HIS HONOUR: Presentation of a petition, I suppose, to any court.

MR LOGAN: Or application, these days.

HIS HONOUR: Yes, "presentation of any application", let us read that in, "that any winding-up orders obtained by the presentation of any application to any court", to "any" court, "by the defendant acting on behalf of a person or persons illegally claiming to be delegates be set aside". We will not know whether they are illegally claiming to be delegated unless and until the application is made. And that will be decided by the court to which the application is made.

MR LOGAN: Yes, in the future, with a given set of facts.

HIS HONOUR: Exactly.

MR LOGAN: This Court does not give advisory opinions.

HIS HONOUR: Then, if you look at 3, "In the event of a winding-up order or orders being set aside, that an order for full restitution" - well, again, that raises the same sort of question about something that may or may not occur, legally or illegally, in the future.

MR LOGAN: There are no facts.

HIS HONOUR: Exactly. Then the costs. Then what about order 5, though, the declaration that "The Australian Taxation Office is a body without legal persona", but the Australian Taxation Office is not a party to this litigation.

MR LOGAN: It is not, and it has declarations which....has some utility.

HIS HONOUR: The Court does not make a declaration in respect of a non-existent legal personality.

MR LOGAN: If - if there were some moment in the non-existence of that legal personality in terms of rights, perhaps so, but here it is just hanging in the air. Each of the prayers for relief, in my submission, really centres around an existing - or then existing, thought to be existing - factual scenario as pleaded and that factual scenario as pleaded in the statement of claim, one sees, was the paragraph 3, service on the company of a notice of statutory demand, and that seems to be the essence of what has excited the plaintiff. Events, of course, moved beyond the statutory demand stage. But in terms of finding a focus factually, it lies in particular statutory demand and what has followed from that.

HIS HONOUR: Mr Logan, the Australian Taxation Office is not a legal personality, is it?

MR LOGAN: It is not.

HIS HONOUR: It is not mentioned in the Act, is it?

MR LOGAN: It is not a legal personality.

HIS HONOUR: Is it mentioned anywhere in the Act, the office?

MR LOGAN: No, it is not. I think I can say that with some - it is a big Act to read, but I cannot - - -

HIS HONOUR: It is indeed.

MR LOGAN: But I do not know - I have never come across Australian Taxation Office in the Act.

HIS HONOUR: I have not struck it.

MR LOGAN: What one sees, of course, is the Commissioner, Deputy Commissioner, and ability to delegate.

HIS HONOUR: Now, Mr Logan, is the prayer for relief identical in all of the cases we are hearing together now?

MR LOGAN: Where there is a body corporate involved, yes.

HIS HONOUR: They are the only matters we are hearing at the moment, the ones with the body corporate.

MR LOGAN: Yes. So where there is a bodies corporate, yes, that is what is sought?

HIS HONOUR: Is that right, Mr Fitzgibbon, that the relief sought is identical in all of the cases we are hearing together.

MR FITZGIBBON: Yes, your Honour, I can confirm that is the correct position.

HIS HONOUR: All right. I might hear from you now. I will come back to Mr Logan. Mr Fitzgibbon, can you draw my attention to any section in the *Income Tax Assessment Act* or any of the associated legislation which refers to the Australian Taxation Office?

MR FITZGIBBON: Your Honour, if I - and I do not want to outwear the patience of the Court - - -

HIS HONOUR: You will, unless you answer this question. The answer yes or no.

MR FITZGIBBON: The answer is that yes, it is in fact - - -

HIS HONOUR: What is the section?

MR FITZGIBBON: It was re-established, your Honour - - -

HIS HONOUR: What is the section, Mr Fitzgibbon?

MR FITZGIBBON: - - -under regulations in November of last year and promulgated on 19 December. I speak - that I am not trying to - - -

HIS HONOUR: Mr Logan, have you a copy of the Act? For some reason I have not got my Act here with me.

MR FITZGIBBON: The position was this, your Honour, that originally - and the history of this matter is one where I have been involved - - -

HIS HONOUR: Do not tell me the history of the matter. Read to me the section which refers to the Australian Taxation Office.

MR FITZGIBBON: No, it does not, but the problem was that much of the documentation was in fact being taken out in the name of the Australian Taxation Office and not the Deputy Commissioner.

HIS HONOUR: That does not matter. If, in fact, the Australian Taxation Office is not a legal personality, there is no point and no efficacy in the Court making a declaration in respect of it. Now, what is the document that you say was taken out, to use your language, in the name of the Australian Taxation Office? Which document? Is it in your material?

MR FITZGIBBON: Your Honour, I would have to reserve that position.

HIS HONOUR: No, you cannot. We are here to argue and hear the matter now. The Court time is quite valuable. I have a lot of other things to do. What is the document that refers to the Australian Taxation Office?

MR FITZGIBBON: Your Honour, I am indebted.

HIS HONOUR: If you take the creditor's statutory demand for payment of debt, that seems to have been signed by Mr Steve Chapman, Deputy Commissioner of Taxation and Small Business for and on behalf of the Commonwealth of Australia, creditor.

MR FITZGIBBON: Yes, that is the - - -

HIS HONOUR: There is no mention of the Australian Taxation Office there. The affidavit of Ms Key refers to the Commonwealth of Australia as the creditor.

MR FITZGIBBON: On the second page of that document there is a reference to the Australian Taxation Office at about point 2.

HIS HONOUR: Which page is that?

MR FITZGIBBON: That is Ms Key's affidavit, your Honour.

HIS HONOUR: "In the Office of the Deputy Commissioner of Taxation". He has to have an office to carry on his statutory function.

MR FITZGIBBON: Yes.

HIS HONOUR: That does not purport to seek to do anything on behalf of the Australian Taxation Office.

MR FITZGIBBON: No. But the actual affidavits made out by Ms Key are also, of course, said to - - -

HIS HONOUR: There is not a document - you told me there was a document taken out in the name of the Australian Taxation Office. There does not seem to be any such document. Ms Key, in a later affidavit, she says, "I am a debt collection officer, small business, in the Australian Taxation Office." But that is simply shorthand for saying "the office of the Commissioner", and that is clear from the next paragraph where she says, "The applicant is a Deputy Commissioner of Taxation for and on behalf of the Commonwealth of Australia."

MR FITZGIBBON: Yes. That is the extent of it, your Honour. I cannot tell your Honour that it goes - - -

HIS HONOUR: You can see that there is no point in my making a declaration in respect of a factual situation which just does not exist. It is not pleaded, it cannot be pleaded and does not exist.

MR FITZGIBBON: That is why, your Honour - I am not trying to weary your Honour, but the history of the matter was initially there was a denial and the position taken - - -

HIS HONOUR: No, Mr Fitzgibbon, that will not assist. We have to attend to what you pleaded and what you seek. This is a strike-out application. I am not going to go outside the documents. I am going to look at the documents that you put before me. I am not going to look at any other documents outside them. Indeed, it is questionable to the extent to which I should go outside your statement of claim, but for present purposes I am looking at the documents and I am not going to look at something that is not in evidence.

Let me go then to your other prayers for relief. Look at paragraph 2. I am prepared to read into that the words "that any winding-up orders obtained by the presentation of an application", because I assume that is what was intended, but that seeks a judgment of this Court, a judgment by me, that some unspecified factual situation may present itself in the future and that I should make some sort of an order now to deal with that non-specific factual situation. I cannot do that, Mr Fitzgibbon. No court can do that. If you have a good argument, if and when a winding-up order is presented in this matter, that it is tainted in some way with illegality, then that matter will be tried on the application for the winding-up order. It will not be tried by me here on some non-specific set of facts. I cannot try it. Similarly I cannot try the issue that you seek to raise by paragraphs 3 and 4.

MR FITZGIBBON: Your Honour, with respect, I suggest that you might consider that the serving of the 459G notice with a declared intention to conduct a certain course does give rise to an issue that - - -

HIS HONOUR: Let me look at the matters now where there is an extant winding-up order where the companies are in fact in liquidation. Your remedy there, if those matters are in any way tainted with illegality, is to appeal, is it not, to get the - what do you need? You need the leave of the Court, do you not, for a company that is in liquidation to appeal? That is your remedy, is it not, to apply to the Court for leave to appeal, for leave to proceed, whatever the position is, and then appeal? Is that right, Mr Logan? How does one appeal against a winding-up order?

MR LOGAN: Yes, 471A of the *Corporations Law* would dictate such a requirement.

HIS HONOUR: What about a director or a shareholder? Can a director or a shareholder appeal or apply?

MR LOGAN: It would still require permission from a liquidator or the Court to do that. So it can be done but there is a need to get leave or permission.

MR FITZGIBBON: With respect, your Honour, what occurred here, in my submission, gave rise to the statement of claim being issued with a number of constitutional questions attaching to that.

HIS HONOUR: Were those constitutional questions raised when the matter came before the Supreme Court when winding-up orders were sought? Winding-up orders were made by the Supreme Court, were they?

MR LOGAN: Yes, they were. Our Supreme Court here.

HIS HONOUR: There were none made by the Federal Court?

MR LOGAN: No, there is no *Wakim's Case* problem.

HIS HONOUR: There is no cross-vesting problem?

MR LOGAN: No, there is not.

MR FITZGIBBON: Subject to the objection I take and have taken this morning.

HIS HONOUR: Were any of the orders made by the Federal Court?

MR FITZGIBBON: No, that is correct; they were made here. But my objection is there is no power for the Supreme Court to do - - -

HIS HONOUR: Why?

MR FITZGIBBON: Why? Because, if your Honour examines the position, in my submission, what we have is - and I set it out in my submissions - what has occurred in the past is that the Deputy Commissioner of Taxation has relied on two separate sources of law for the power to liquidate, the Commonwealth *Corporations Act*, and it was thought that in fact when the incorporations case effectively - I will use the vernacular - struck that down, then in fact it was thought that by the use of Commonwealth law within the ACT - that was the 1990 amendment, which was a claim at that time that in fact section 29 of the various mirror State Acts - and we are dealing here with one of them this morning - gave the Court power in fact to regard the law of the ACT as indeed the law of the Commonwealth.

With respect, it is my submission that the Court in *Hughes* has very carefully pointed out that there is a very distinct difference. As I say, that has been a cumulative position taken in regard to the position of what is Commonwealth law and what in fact is State or Territory law. If I may take your Honour to the Queensland *Corporations Act*, the Act very clearly in Parts 8 and 9 has a delineation between those two categories. Section 29 very clearly takes the view - - -

HIS HONOUR: Mr Fitzgibbon, you told me that some of these matters had not been decided by the Court. Did not the *Helljay Case* raise at least one of the same issues?

MR FITZGIBBON: I was counsel in *Helljay*.

HIS HONOUR: That is what concerns me, because it is your obligation to bring to my attention any cases on the point that might be of assistance to me, and particularly any cases in which you appeared.

MR FITZGIBBON: Your Honour, that is why I - - -

HIS HONOUR: That is your ethical obligation, Mr Fitzgibbon.

MR FITZGIBBON: Yes. I apologise if I have in any way infringed, but that was the very reason I asked your Honour to consider those two other cases being separate.

HIS HONOUR: I see, all right.

MR FITZGIBBON: *Helljay*, they do come into that but not into this situation at all, in my submission. *Helljay* was entirely different. So what I am in fact submitting here is that - if I just may take a moment to take your Honour to the *Hughes'* judgment - - -

HIS HONOUR: What is the proposition for which you are contending?

MR FITZGIBBON: The proposition is very simple. If one is to look at Part 8 of the *Corporations Act* and look at whether this is an offence under 29 - your Honour will remember of course they all are mirror sections right round the country - and, in effect, if it were to be argued that not paying income tax is an offence, as indeed it is under 221, then the *Hughes'* decision applied to that proposition would in fact not permit the Commonwealth Act to be used. That is 459G and that was the amendment that was in fact implemented in 1992, your Honour, to permit the Deputy Commissioner to issue a notice as we have here and upon that notice in fact go on to take the subsequent steps which may or may not include liquidation. The problem is, your Honour, there is no Commonwealth head of power.

HIS HONOUR: No Commonwealth head of power to do what?

MR FITZGIBBON: To liquidate companies.

HIS HONOUR: But the company was not liquidated by the Commonwealth. The company was liquidated as a result of an order by the Supreme Court on the application of a creditor.

MR FITZGIBBON: Yes, but, your Honour, the problem here is that if your Honour looks at - and I do not think it is a Part 8 argument, but let us suppose it is a Part 8 argument - - -

HIS HONOUR: No, let us get to the point. What is the non-existent Commonwealth head of power purportedly exercised? Just tell me that.

MR FITZGIBBON: The power to in fact liquidate companies.

HIS HONOUR: But the company was not liquidated by any Commonwealth instrumentality or body. The company was liquidated as a result of an order of the Supreme Court of Queensland on the application of a creditor. It is wrong to say the company was liquidated by the Commonwealth of Australia. The Commonwealth of Australia did not liquidate the company. It cannot liquidate the company. Only the court can make an order for liquidation.

MR FITZGIBBON: I hear what your Honour says but the power to in fact take the step - - -

HIS HONOUR: Are you saying that the Commonwealth had no power or right to make the application? Is that what you are saying?

MR FITZGIBBON: Yes, your Honour.

HIS HONOUR: Why?

MR FITZGIBBON: Because in fact there is no power, as I say, and I hear what your Honour says, that there is no Commonwealth power.

HIS HONOUR: But you want to attack the assessment, do you? Are you not confronted with the fact that there is a demand? The demand was based upon the assessment, is that correct?

MR FITZGIBBON: No, that is not, your Honour. This is what has been happening.

HIS HONOUR: What happened? Tell me what happened.

MR FITZGIBBON: What has been happening is there has been in almost all company cases no assessment made under 177. What in fact has been occurring is that - and neither indeed, your Honour, has the Commissioner been proceeding to judgment. They have been using the method of simply serving a notice of statutory demand under 459G and upon that basis they then move through the various processes within the Supreme Court. What I am saying is that because of the *Incorporations Case*, *Wakim's Case*, *Hughes' Case*, the cumulative effect is that in fact the State of Queensland did not possess any head of power capable of enacting a Commonwealth law.

The situation, your Honour, is worse under Part 9. When you go to Part 9 of the State Act, in fact it very clearly does not refer at any point to the Commonwealth. Part 8 does; Part 9 does not. So, in effect, I say that the position is such that to use a State law in this way contravenes in fact the argument that in fact you must have, as the Court rightly says in *Hughes*, a head of power.

HIS HONOUR: What head of power is absent?

MR FITZGIBBON: Your Honour, if I - - -

HIS HONOUR: What unauthorised act did the Commissioner or the Deputy Commissioner do?

MR FITZGIBBON: The unauthorised act is to use a State Act.

HIS HONOUR: To recover its debt.

MR FITZGIBBON: Yes, but - - -

HIS HONOUR: Are you saying the Commonwealth cannot sue or take action in the State courts? Is that your argument?

MR FITZGIBBON: Not in the way that this has been done. There is a proper way of doing it.

HIS HONOUR: What is the defect? What was not done that should have been done?

MR FITZGIBBON: Your Honour, I believe the position is this, that - - -

HIS HONOUR: No, do not tell me what you believe the position is. Tell me what was the defect. What was not done that should have been done?

MR FITZGIBBON: The defect is that the correct way of dealing with the matter is to either (a) issue an assessment - and your Honour will remember in the *Sunrise Case* the Full Court - - -

HIS HONOUR: All right, you say there was not an assessment. Is that the first point?

MR FITZGIBBON: There was not an assessment and there was not a judgment. All there is in fact is a claim that - - -

HIS HONOUR: You say that the Commonwealth, the Commissioner of Taxation, may not seek to wind up a company unless there has been an assessment, you say, under section 177, I think you said before, and unless there is a judgment on that assessment?

MR FITZGIBBON: Yes.

HIS HONOUR: Are there any other defects?

MR FITZGIBBON: Yes. The other defect is this, that in fact the Federal Court system, your Honour, was specifically put in place and has the expertise and the appellate system to deal with, for instance, objections to assessments. I bear in mind - - -

HIS HONOUR: What is your proposition?

MR FITZGIBBON: My proposition is really quite simple.

HIS HONOUR: Is your proposition that the Commonwealth cannot ever pursue any claims for revenue by way of taxation other than in the Federal Court? Is that your proposition?

MR FITZGIBBON: My proposition, your Honour, is found at paragraph 46 of *Hughes*. I then refer to that - - -

HIS HONOUR: Just tell me in a nutshell what your proposition is.

MR FITZGIBBON: What I say is that - - -

HIS HONOUR: That the Federal Court is the only forum for the prosecution of taxation claims? Is that your proposition?

MR FITZGIBBON: It would be perfectly different if one had an assessment of a judgment and then went into a State court, but what is happening here is quite different. What is happening is the - - -

HIS HONOUR: Look, let us try and be a bit focused, Mr Fitzgibbon. I want to know what the defects are. You have told me what two of them are. Is there some other one that is in some way connected with the Federal Court and, if it is, what is it, please?

MR FITZGIBBON: Thank you. If I might refer your Honour to paragraphs 9 and 10 of my written submissions, I there take up - the first argument I believe I have taken your Honour through, because I say that under the *Corporation Act* what is attempted to be done here is that there is a power which is being used to liquidate companies. That is my first thing that I say is wrong. But in the second, if your Honour looks at paragraph 10, your Honour will quickly realise that some of the matters I have raised there are very much matters which were in issue in *Hughes' Case* and the Court - - -

HIS HONOUR: Mr Fitzgibbon, I do not think these points have anything to do with *Hughes' Case*. You will have to persuade me of that.

MR FITZGIBBON: Well, to this extent, your Honour. If one looks at - if I may take your Honour to the *Corporations (Queensland) Act*.

HIS HONOUR: What section?

MR FITZGIBBON: Section 29, your Honour. Here the legislature in Queensland - history is of course important to this extent, that it was thought that when this legislation was in fact passed, we did have a uniform scheme. Under 29(1), your Honour:

The Commonwealth laws apply as laws of Queensland in relation to an offence -

I do not believe in fact it does fall within this Part 8 but I deal with it because I think it could be an argument that my friend may wish to raise against me. This effectively was the argument that was raised in *Hughes*. In effect, under (2)(a):

is taken to be an offence against the laws of the Commonwealth, in the same way as if those provisions were laws of the Commonwealth;

and

(b) is taken not to be an offence against the laws of Queensland.

The Court in *Hughes* at paragraph 46 at point 5:

The present case emphasises that for the Commonwealth to impose on an officer or instrumentality of the Commonwealth powers coupled with duties adversely to affect the rights of individuals, where no such power is directly conferred on that officer or

instrumentality by the [Constitution](#) itself, requires a law of the Commonwealth supported by an appropriate head of power.

Your Honour, the Court came to the view that through the foreign affairs power - I do not think I wrongly state that - there was power in fact to deal with this but in fact, if your Honour remembers that [Part 8](#) is quite different from [Part 9](#) in that - if I may then direct your Honour to [section 40](#). [Section 40\(1\)](#) deals with civil matters arising under the *Corporations Law* of Queensland:

the jurisdiction of the courts of Queensland in respect of civil matters arising under the *Corporations Law* of another State or the Capital Territory -

At no point throughout [Part 9](#) is the Commonwealth in fact added to that definition. I say that is of considerable significance. So, in effect, bearing in mind history and bearing in mind what has happened, then indeed the answers given in *Hughes* - then I also in fact refer to Justice Kirby who took a slightly different pathway but the same result at the end of the day. But in paragraph 87 of *Hughes*, his Honour says:

The WA *Corporations Act 1987*, s 29, read in the context of the cooperative legislative scheme, does not purport, in fact or law, to enact a law of the Commonwealth. Instead, out of the legislative powers of the Parliament of Western Australia, it applies certain "Commonwealth laws" in Western Australia. It does so, as twice indicated, by the use of statutory fictions. The first fiction is evident in the statement that such "Commonwealth laws" apply "as laws of Western Australia". The second is that such laws apply "as if those provisions were laws of the Commonwealth and were not laws of Western Australia".

Whilst it would certainly be impermissible for the Parliament of Western Australia to purport to exercise the legislative powers of the Federal Parliament, it is not impermissible, in the present context, for that State Parliament to apply designated federal laws "as laws of Western Australia".

But the problem is, your Honour, that deals with Part 8. Part 9 nowhere refers to the Commonwealth.

So what I am putting to your Honour is this, that if indeed the words - one can take sections 40 or 41 and 42. In each of the cases when one looks at those, one finds that in fact they refer to - 40(1)(b) is perhaps the best:

the jurisdiction of the courts of Queensland in respect of civil matters arising under the *Corporations Law* of another State or the Capital Territory.

The difficulty, your Honour, is this, that at paragraph 22 of the *Hughes'* judgment, the Court says:

Section 29 uses the expression "[t]he Commonwealth laws". "Commonwealth law" is defined in s 3(1) as meaning "any of the written or unwritten laws of the Commonwealth, including laws about the exercise of prerogative powers, rights and privileges ...". The definition excludes from its operation certain statutes, in particular the Law. This is identified -

I do not know whether that is an error, your Honour; this is the original copy -

in the definition as "the *Corporations Law* of the [Australian] Capital Territory". (The exclusion avoids a risk of repetition and circularity: the Law is already "picked up" by s 7 of the WA *Corporations Act* -

When one goes to section 7, in fact that relies on section 80, but section 80 was in fact - I am sorry, I erred. It is section 82. Section 7 reads:

The *Corporations Law* set out in section 82 of the *Corporations Act* as in force for the time being -

(a) applies as a law of Queensland;

and

(b) as so applying, may be referred to as the *Corporations Law* of Queensland.

The difficulty is, your Honour, section 82 no longer is in any of the State Acts, including the Queensland Act. It was in fact, as the Full Court in fact referred to in *Hughes' Case*, repealed by the 1998 - in any case, there is reference in *Hughes* - to have been repealed by the 1998 Act. I can take your Honour to that. Hence, there is no section 82 in the *Corporations Act* Queensland. What I then take your Honour to is the issue that - your Honour, as I say, would have seen those same issues in *Hughes* but the Court did not say they were not issues without merit. It did not simply need to answer them in terms of the course adopted.

I have already taken your Honour to the argument that in Part 9 there is no provision as there is in Part 8 of the Commonwealth....., so what is occurring here, in my submission, is this. There is in fact, as a result of history, legal decisions by this Court that in fact has created a position where what is taking place in all these corporations cases - and I say that globally - is outside the power that was once thought to exist.

Perhaps I ought to add to the argument which is so often raised under 471A, and indeed I appeared in the *Morgillo* matter in front of your Honour last year on one such matter, but, in my submission, if the law is in fact an unconstitutional law in the fact that there is no head of power, I cannot see that a barrier such as 471A can be put in place to stop either a guarantor or the director who was.....under a guarantee to the bank, a position that they have adopted here.

I have tried to encapsulate that, your Honour, but I have set it out in some detail in the submissions which I have put to the Court. It could be - and apart from *Morgillo* I have not been involved in the other, I think, ten matters. Some may have assessments if I erred in that but in genera there have been no assessments, as I understand it, according to my instructions.

Your Honour, just one matter before I leave my feet. I do really think I ought to draw your Honour's attention to that matter which has a very thoughtful photograph of the federal Attorney on it, but in part of that there is something there which I think is of importance.

HIS HONOUR: Are you relying upon a newspaper article?

MR FITZGIBBON: Just in genera. In fact, where Professor Ramsey says that federal institutions could only enforce those parts of the *Corporations Law* that had a federal nexus.

It is for what weight that can be given. That in effect is still the same argument I am putting forward.

HIS HONOUR: Have you finished, Mr Fitzgibbon?

MR FITZGIBBON: Yes, thank you, your Honour, unless there is anything your Honour wishes. The authority for the argument that once a matter is void - the view seems to be of Quick and Garran that it is void ab initio, travels backwards. I can refer your Honour to that, but that is exactly what they are say.

HIS HONOUR: Thank you. Mr Logan, can I just go perhaps to the statement of claim. If you do not mind, I will ask you some questions.

MR LOGAN: If your Honour pleases, yes.

HIS HONOUR: The facts in paragraphs 1, 2 and 3, are they correct, the allegations? Is there an admission of that?

MR LOGAN: Your Honour has come back to *Gorshkov*?

HIS HONOUR: Yes, I am still with *Gorshkov*. It will save time rather than my going to your defence, but paragraphs 1, 2 and 3, are they correct?

MR LOGAN: Yes, 1 is correct, 2 is inelegantly stated, with respect.

HIS HONOUR: Yes, I see what you mean about that. It seems to contradict one of Mr Fitzgibbon's propositions, paragraph 2. It is self-contradictory, is it not?

MR LOGAN: Yes.

HIS HONOUR: If the Australian Taxation Office does not exist and the Deputy Commissioner is not validly appointed and all who sail in her or with her. It would have to be in some doubt.

MR LOGAN: Yes, it is - - -

HIS HONOUR: Anyway, what about paragraph 3?

MR LOGAN: There was a statutory demand notice served.

HIS HONOUR: Is that the right section?

MR LOGAN: No, the section concerned is not accurately stated. It is 459E of the *Corporations Law*.

HIS HONOUR: And it is the *Corporations Law*, is it not?

MR LOGAN: Yes, the *Corporations Law* of Queensland, not the *Companies Law*.

HIS HONOUR: And who signed that notice of statutory demand?

MR LOGAN: Yes, it has a facsimile signature on it of Mr Chapman, so it is admitted in the case that it was not - - -

HIS HONOUR: Not personally signed by him?

MR LOGAN: Not personally by him, that is right. So the essence of that allegation is correct, although it is not the person delegated but rather someone authorised to affix - - -

HIS HONOUR: I will come to that in a moment. It was particularly paragraphs 1 and 3 that I wanted to know. If we look at the shape of the statement of claim, the first point taken is that there was some kind of an unlawful delegation. That seems to be the first point, Mr Logan.

MR LOGAN: Yes, that is right.

HIS HONOUR: What is the answer to that, do you say?

MR LOGAN: Your Honour, the answer to that really is in *O'Reilly's Case*, if one is looking at beyond a mere ministerial Act, I can hand up a book of cases which might - - -

HIS HONOUR: Would you do that.

MR LOGAN: Yes, I can do that now. *O'Reilly* is copied in that.

HIS HONOUR: Tell me what the practice is in the Tax Office.

MR LOGAN: The practice is for officers to affix a facsimile signature of a Deputy Commissioner, the relevant Deputy Commissioner whose office administers that particular company's tax affairs, to a statutory demand notice. It would be rarely, if ever, that a Deputy Commissioner would personally sign.

HIS HONOUR: Where does the authority for that procedure come from?

MR LOGAN: The authority for the - two places. Firstly, in income tax regulations, regulation 172. I think they are probably in that - - -

HIS HONOUR: Are they in here?

MR LOGAN: No, they are not in the folder but your Honour has that big set of the red - - -

HIS HONOUR: Volume 3, is it?

MR LOGAN: Volume 3. If your Honour turns up page 1253.

HIS HONOUR: Yes. Which regulation, Mr Logan?

MR LOGAN: Regulation 172 and 172(2) particularly.

HIS HONOUR: So it is a rebuttable presumption but rebuttable only on proof by the recipient or a relevant person that it was issued without authority, is that right?

MR LOGAN: Yes, and then aside from that, your Honour, there is in terms of public administration a principle known as the *Carltona* principle in relation to - - -

HIS HONOUR: Presumed regularity really.

MR LOGAN: Well, agents in matters of public administration, particularly matters of great volume, in ministerial matters acting on behalf of their Minister, or in this case their Deputy Commissioner. *O'Reilly's Case* is directed to that in the tax context.

HIS HONOUR: How would you prove that something was done without authority? What would constitute an act done without authority?

MR LOGAN: Aside from an admission - - -

HIS HONOUR: I suppose if some officer went out on a frolic of his or her own and was acting entirely outside the Act and purported to issue an assessment or a demand when there was absolutely no basis for it, that would have to be regarded as being without authority.

MR LOGAN: One would expect and hope that that sort of aberration would be, upon complaint by the citizen concerned, quickly flushed out and proved in that fashion.

HIS HONOUR: But there is no - the allegation in the statement of claim here does not touch upon a question of authority. It touches upon a question of delegation. Is there any provision in the Act that refers to delegation?

MR LOGAN: Yes, in the - - -

HIS HONOUR: In other words, is there any basis at all for saying that there should have been a delegation here, and there was not?

MR LOGAN: The answer to that is it is a misconception that there is a delegation involved.

HIS HONOUR: That is why I am asking what the delegation provisions deal with in fact, because there are some in the Act, are there not?

MR LOGAN: And in the [*Taxation Administration Act*](#).

HIS HONOUR: Yes.

MR LOGAN: But perhaps the root of it, really, your Honour, is the debt concerned with income tax under section 208 is a debt which is due to the Commonwealth. So that what one is looking at is a Commonwealth officer who is able to collect it. The Commissioner or a Deputy Commissioner is able to sue for it. Then having the facsimile signature affixed to, in this case, a statutory demand for that debt. Your Honour has seen already, in the course of argument with my learned friend, that statutory demand, which is in the final analysis issued on behalf of the Commonwealth of Australia - - -

HIS HONOUR: It seems to me that the problem anyway, now you have drawn my attention to this regulation, is that there is no allegation of an excess in any way of authority or an absence of authority by the officer who signed it and the statement of claim would need at

least to state some facts. But just tell me this, Mr Logan, with what are the delegation provisions in the Act concerned.

MR LOGAN: Yes, section 8 in the [*Taxation Administration Act*](#).

HIS HONOUR: Which volume is that one in?

MR LOGAN: It is also in that same volume, volume 3.

HIS HONOUR: Can you give me a page?

MR LOGAN: I was waiting for that. Page 1950.

HIS HONOUR: Would it inconvenience anybody if I sit on for a while?

MR LOGAN: No, thank you, your Honour.

HIS HONOUR: Yes, [section 8](#). Now, Mr Logan, is there any basis at all for saying that it is the Commissioner's duty to administer the Act and included in the administration of the Act is to make assessments and issue statutory demands and that, therefore, section 8 is capable of applying to what happened here?

MR LOGAN: Yes. Section 3A on page 1931 is the section in the [*Taxation Administration Act*](#) - if your Honour gives me a moment, there is a like section as well in the *Income Tax Assessment Act* to 3A

HIS HONOUR: Section 3A, "The Commissioner has the general administration of the Act", yes, and is there a similar provision in the Act itself, the *Income Tax Assessment Act*?

MR LOGAN: In the *Income Tax Assessment Act* there is. It is very early in the Act. One finds it in each of the federal assessing statutes.

HIS HONOUR: Right.

MR LOGAN: Anyway, it is there. I will give your Honour the section number later.

HIS HONOUR: Yes. Now, what about delegation, provisions in respect to delegation?

MR LOGAN: The delegation power in section 8 of the Administration Act is quite broad. As your Honour sees, "under a taxation law". "Taxation law" is defined in section 2 on page 1930.

HIS HONOUR: It would certainly cover - - -

MR LOGAN: It covers it, that is right. Acts of which the Commissioner has the general administration.

HIS HONOUR: Does the Commissioner - what delegation does the Commissioner give in practice to the Deputy Commissioner?

MR LOGAN: To the deputies, they are quite wide-ranging delegations because of the seniority of the official concerned. So that virtually all of the discretions which the Commissioner can exercise under the *Income Tax Assessment Act* can be exercised by a Deputy Commissioner. Then there are, as one moves down the hierarchy, progressive restrictions in terms of either amount or type of discretion which could be exercised.

HIS HONOUR: Why could not the Commissioner, as part of the general administration of the Act, authorise Deputy Commissioners and officials who are working under Deputy Commissioners to do all such things as may be necessary duly to collect the tax? Is that putting it too widely?

MR LOGAN: It has not been tried that way, but rather there is a more section-specific focus in delegations that I have seen anyway.

HIS HONOUR: Is there any delegation section that could remotely apply here? That is what I want to know. Why cannot Mr Fitzgibbon say it is the Commissioner's duty to administer the Act and part of the administration of the Act is to cause to be made assessments and to recover the tax and therefore that should be done either by him or by a delegate? What is the answer to that?

MR LOGAN: The answer to that lies in the public administration practice identified in *O'Reilly's Case* really.

HIS HONOUR: You have given me *O'Reilly's Case*?

MR LOGAN: Yes. The case to which I am referring is *O'Reilly v State Bank of Victoria*. Your Honour probably most knows it from its - it dealt with, amongst other things, legal professional privilege which did not survive *Baker v Campbell*, but it also dealt with the public administration of practice. If your Honour turns to page 15 first in the judgment of Justice Mason, you will see the topical heading, "Power of the Commissioner's Delegate to Empower Others to Perform the Commissioner's Powers". There were 264 notices, the inquiry powers, at issue there. If your Honour turns over the page to page 16 - - -

HIS HONOUR: I was just looking at what the Chief Justice said at page 11 too, about point 7:

However, they also rest on the recognition - - -

MR LOGAN: Yes. In the middle of the page is the *Carltona* principle.

HIS HONOUR: - - -

that the functions of a Minister are so multifarious that the business of government could not be carried on.....judicially recognized.

Page 15, you say?

MR LOGAN: Yes. Page 15 is a lengthy treatment by Justice Mason, as he then was, of that same topic. He concludes though with a reference to *Carltona* at page 19 point 9 of the way down the page. That statement is that of a dissenting judge in that case. So that if one

compares and contrasts the use made of *Carltona* between the Chief Justice and Justice Mason, one sees that the view that the Chief Justice expressed, in particular the comment his Honour makes at the bottom of page 11 and the top of page 12:

I can see no reason why, in construing sections of the Act which confer powers on the Commissioner, it should not be proper to consider the undoubted fact that the Commissioner could not possibly exercise all those powers personally.

HIS HONOUR: Yes, and then he says, the point that I was interested in at page 12, about point 7:

The existence of a power to delegate is of course an important consideration.....However, the fact that the Act itself contemplates that the delegation will be to a Deputy Commissioner only.....suggests that it was not intended that there should be a wholesale delegation of powers to comparatively minor officials.....a practical necessity that the powers conferred on the Commissioner should be exercised by the officers of his Department -

Mr Logan, was Justice Mason in the minority?

MR LOGAN: On this issue in the majority, yes.

HIS HONOUR: Was Justice Mason in a minority on this issue?

MR LOGAN: That is right. He has a dissenting view though.

HIS HONOUR: Was he of the view that there should be a delegation?

MR LOGAN: He was of the view that the presence of the delegation power cut across, if you like, that *Carltona*-type principle and *Carltona* was more peculiarly relevant to ministerial responsibility situations.

HIS HONOUR: Yes, all right. The Court was constituted - were there any others in dissent on this point?

MR LOGAN: I will just turn up Justice Wilson. At page 30 in Justice Wilson's judgment - - -

HIS HONOUR: What did - - -

MR LOGAN: One sees the start of the argument in the paragraph that starts - - -

HIS HONOUR: Justice Murphy seems to have agreed with the Chief Justice if this matter was relevant to questions 3 to 6. Do you know whether it was? This is at the top of page 27.

MR LOGAN: Yes. I was going to take your Honour then to Justice Wilson. At page 31 point 9 of the page, his Honour notes the argument there:

However, the defendants further argue that the existence of the power to delegate (s 8, [*Taxation Administration Act*](#)) makes it unnecessary to resort to the *Carltona* principle -

He then refers to a decision Justice Brennan gave when sitting as President of the Administrative Appeals Tribunal. Then at about point 6 of the way down page 32:

Nor does the plaintiffs' argument have the result that [s 8](#) of the *Taxation Administration Act* is otiose, in that there is no need for a power of delegation. There is every need for such a power -

and so on. So, there was obviously a conflict of view in that case.

HIS HONOUR: But if anything, Justice Wilson's view is an even stronger one in your favour than the Chief Justice's.

MR LOGAN: Yes.

HIS HONOUR: What about the other members of the Court? Justice Aickin died before judgment was delivered.

MR LOGAN: Yes, that is right.

HIS HONOUR: Then the matter was directed to be reargued before a Bench of seven.

MR LOGAN: Yes, that was because of the legal professional privilege controversy.

HIS HONOUR: Was there no argument on the delegation point?

MR LOGAN: I beg your pardon, your Honour?

HIS HONOUR: Did the delegation point arise again?

MR LOGAN: No, the occasion for the rearguing was legal professional privilege.

HIS HONOUR: All seven Justices sat - no, wait a moment. Five Justices sat at first: the Chief Justice, Justices Mason, Murphy, Aickin and Wilson. So that accounts for them all, does it not? Justice Mason was in dissent on this point, Justice Aickin did not give a judgment, but Justice Wilson's view was the same as the Chief Justice's and Justice Murphy seems also to have agreed.

MR LOGAN: Yes, so what is really sought, in my submission, to be agitated in that part of the pleading is a point which, if it had any legs, was disposed of in *O'Reilly's Case*.

HIS HONOUR: Right. Let us move on then. That is your response to the first point.

MR LOGAN: Yes. The next - - -

HIS HONOUR: The next point seems to be the one in paragraph (c) on page 2.

MR LOGAN: The answer to that is really, and with respect to the author of the pleadings, so what, in the sense that one does not need to - - -

HIS HONOUR: One does not need a judgment to issue the notice.

MR LOGAN: No, you need a debt and the existence of that debt can be challenged in an application to set aside the statutory demand.

HIS HONOUR: And there is no obligation of course upon a person issuing such a notice to go around to try to find out whether the company is solvent before the notice is issued.

MR LOGAN: No, nor is there, with respect, an obligation to seek evidence of the solvency of the company.

HIS HONOUR: That is what I mean. That is what I was looking at (d). Now, (e) - - -

MR LOGAN: Yes, (e) firstly has the difficulty that it - - -

HIS HONOUR: Is that the section?

MR LOGAN: It is not the section, no. With corporations these days, 166A of the *Income Tax Assessment Act* deems the return lodged to be an assessment.

HIS HONOUR: What page is that?

MR LOGAN: 166A. It is in volume 3 of the red - and it is on page 100.

HIS HONOUR: And a corporation is a relevant entity.

MR LOGAN: Is a relevant entity, that is right, yes.

HIS HONOUR: So when a return is furnished - is that different from the situation with respect to natural persons?

MR LOGAN: With natural persons there is still an assessment - - -

HIS HONOUR: Has to be raised?

MR LOGAN: - - - which is raised rather than a deemed assessment. That of course is where one is dealing with income tax - - -

HIS HONOUR: This is the self-assessment provision really, is it?

MR LOGAN: It is, that is right. That is what it is, and a self-assessment of one's income tax liability. Not all of the cases before your Honour have as their foundation income tax liability as opposed to a liability to remit tax deducted from one's employees' group tax. The pleadings are not discriminatory.

HIS HONOUR: Some of the cases relate to group tax, do they?

MR LOGAN: Group tax, yes. So that the pleadings do not make that discrimination. The statement of claim does not but - - -

HIS HONOUR: We had a case on group tax, did we not, *Woodhams*?

MR LOGAN: Yes. There was one quite recently.

HIS HONOUR: Was it *Woodhams*?

MR LOGAN: Director's penalty, I think, your Honour, would be - yes, about some defect in the procedure. There is a notice procedure for - - -

HIS HONOUR: Yes, the director lost, I remember.

MR LOGAN: That is right, yes. There is nothing like that flavoured in any of the statements of claim in these cases.

HIS HONOUR: Right.

MR LOGAN: Anyway, I should show your Honour 177 just so that one sees the basis for why it is said to be misconceived in reference at page 126. It is, if you like, the conclusive evidence provision. The Court at one stage some years ago had to look at 177 as well, but again there is no 177-type issues raised in the statement of claim.

HIS HONOUR: All right. If we go to paragraph 5, that is the delegation point again, is it not?

MR LOGAN: It is a variant of that, that is right, yes.

HIS HONOUR: And 6 does not seem to take the matter any further.

MR LOGAN: It is unparticularised.

HIS HONOUR: We know that that is factually incorrect, that the Australian Taxation Office issued them a - - -

MR LOGAN: Yes, and so much is admitted on the pleadings in the defence that the Australian Tax Office is not a legal entity.

HIS HONOUR: But also it is factually incorrect to say that the non-existent legal personality - - -

MR LOGAN: That is right.

HIS HONOUR: So none of those particulars really touch the point, do they? They are all purported to be particulars of paragraph 7.

MR LOGAN: The particulars stray away from that point about the Australian Taxation Office not having legal existence into what one might call the interregnum point. That starts at paragraph (g) on page 3.

HIS HONOUR: That interregnum point has been decided, has it not, by other judges?

MR LOGAN: Yes, that is right. Just recently your Honour's brother Judge, Justice Gummow, in *McKewin's Case*, which is in the bundle, approved of the treatment of that by Justice Hill

in the Federal Court in a case called *Levick*, but it is probably instructive if your Honour goes - it was given very short treatment in *McKewin's Case*.

HIS HONOUR: Before you go to that, which are the particulars that stray beyond the allegation in paragraph 7? Well, (a) has nothing to do with 7 but it has nothing to do with any allegation. It does not go anywhere.

MR LOGAN: 8 does seem in some way, your Honour, perhaps - it is very inelegantly put again - to relate to what was being put up by my learned friend earlier.

HIS HONOUR: The *Hughes'* point. Let us come to that. But at the moment, looking at - - -

MR LOGAN: Can we just deal with that interregnum one and run that to ground?

HIS HONOUR: I just want to know though which are the particulars.

MR LOGAN: If one runs 8 through to (m) in the particulars, each of those set out particular factual propositions which - - -

HIS HONOUR: No, but just look at (a) first.

MR LOGAN: I am sorry, your Honour, yes. (a) is a variant of the - - -

HIS HONOUR: It seems to be the delegation point.

MR LOGAN: - - - delegation point blended with the ATO does not have legal existence.

HIS HONOUR: That is right. Then (b) - - -

MR LOGAN: (b) is a reference to a statement made by someone in my place in another place.

HIS HONOUR: That cannot have any - - -

MR LOGAN: He made a like acknowledgment apparently to the one I have made.

HIS HONOUR: (c)?

MR LOGAN: (c) seems to be some evidentiary reference to the ATO not having existence; (d), likewise; (e) states what is a fact.

HIS HONOUR: And then (f) is the beginning of the interregnum point, is it?

MR LOGAN: Yes.

HIS HONOUR: "The Bill for this Act passed by the Parliament has never been given royal assent". That is the *Income Tax Assessment Act*, is it?

MR LOGAN: Yes, it would be. I assume it is.

MR FITZGIBBON: Yes, it is.

HIS HONOUR: And it says it has not "been given the royal assent in conformity with the Commonwealth of Australia [Constitution](#)." Why is it said it has not been given that consent?

MR LOGAN: The defect seems to be that after Lord Gowrie's commission was signed by King George V and before he came here, King George V died and his successor was never crowned. That is in some way then said to mean that his appointment was - - -

HIS HONOUR: Edward never had a coronation.

MR LOGAN: Yes.

HIS HONOUR: So?

MR LOGAN: Well, as I understand the argument - - -

HIS HONOUR: There was no king of England.

MR LOGAN: That is really what it comes - or perhaps an endeavour to engage a very old common law.

HIS HONOUR: Anyway, you rely upon and adopt as your submission the reasons of Justice Gummow in *McKewin's Case*, is that right?

MR LOGAN: That is right.

HIS HONOUR: There is nothing to be added to those, I would take it?

MR LOGAN: No, your Honour, I would not want to.

HIS HONOUR: Then that only leaves paragraph 8. I have to confess that I do not fully understand this.

MR LOGAN: In the statement of claim it does what on the face of things is a reply, but we come to that after 8. 8, your Honour, is a proposition that the Commonwealth cannot use the *Corporations Law* in effect to collect a debt. That is as I understand it. The answer to that, in my submission, is one states the proposition, section 208 in the case of income tax - and there are like provisions with group tax - establishes a debt due to the Commonwealth.

HIS HONOUR: 208 is - - -

MR LOGAN: In the *Income Tax Assessment Act*.

HIS HONOUR: Page 177, is it?

MR LOGAN: It is on page 177.

HIS HONOUR: And it becomes due and payable by reason of that provision in relation to corporations, the self-assessment provision, as I called it.

MR LOGAN: 166A.

HIS HONOUR: It is immediately a debt. It is an assessment, therefore it is a debt.

MR LOGAN: Yes, that is right. Then 209 I should just mention to your Honour, which allows:

(1) Any tax unpaid may be used for and recovered in any Court of competent jurisdiction by the Commissioner or a Deputy Commissioner suing in his official name.

So all of the recovery proceedings in State courts have that as their foundation. Section 208 establishes a debt due to the Commonwealth. The statutory demand, your Honour has seen, is signed off on behalf of the Commonwealth by a Commonwealth officer asking for the debt.

HIS HONOUR: Very well. Is there anything further raised in the reply? I suppose I had better - - -

MR LOGAN: There is. There is really a new point which one might term the seal's point. These were filed rather than delivered. They all seem to have been filed on 17 March, so in *Gorshkov's Case* I have one here with the Court's stamp filed 17 March 2000.

HIS HONOUR: This is the reply?

MR LOGAN: The reply document, yes.

HIS HONOUR: Yes, I have the reply. What is the new point raised there then?

MR LOGAN: The point seems to be that the letters patent which we reconstituted the office of Governor of Queensland in 1986 bore the great seal of the United Kingdom as well as her Majesty's signature on it. It is then said that that amounts to an assertion of sovereignty by a foreign power, the United Kingdom, in a way forbidden by the *Australia Acts*. That is as I understand it. That is one which has about it a difficulty that when one traces through the letters patent concerned which are referred to in this pleading document, they are signed by her Majesty on 14 February 1986, which is prior to the *Australia Acts*.

HIS HONOUR: What date was that?

MR LOGAN: 14 February 1986. Could I hand up - - -

HIS HONOUR: Where is the evidence of that?

MR LOGAN: - - - an index of statutes which also has the document referred to in the pleading in it.

HIS HONOUR: So the letters patent were signed, you say, on 14 February 1986.

MR LOGAN: That is right.

HIS HONOUR: When was the *Australia Act* assented to?

MR LOGAN: Proclaimed on 3 March 1986.

HIS HONOUR: It is alleged in paragraph 6 that it was on 4 December 1985.

MR LOGAN: Royal assent, yes, that is right, but proclaimed into force later.

HIS HONOUR: Is that right though that it was given the royal assent on 4 December 1985?

MR LOGAN: Yes.

HIS HONOUR: When you say "royal assent", royal assent or the Governor-General's assent would it be?

MR LOGAN: I think that one was reserved for - - -

HIS HONOUR: Yes, reserved for her Majesty.

MR LOGAN: Reserved for royal assent. I think that one was.

HIS HONOUR: Yes, it would be because there was mirror legislation in the United Kingdom, in the Commonwealth and in all the States, I think.

MR LOGAN: Exactly so. It was enacted pursuant to request and consent provisions found in - - -

HIS HONOUR: Yes, which are in the recitals to the legislation.

MR LOGAN: That is right, your Honour, yes.

HIS HONOUR: So it was given royal assent on 4 December. The letters patent were signed on 14 February. When was the Act proclaimed?

MR LOGAN: 3 March.

HIS HONOUR: But assume for present purposes that this had happened after the Act was proclaimed. The contention is that Justice Muir, who dealt with this matter, was not lawfully appointed. Is that the contention?

MR LOGAN: Because - yes.

HIS HONOUR: Because?

MR LOGAN: Because it would seem to be a domino effect, that would say that the office of Governor did not exist, therefore the commission could not be signed off by Major-General Arnison, I think, was in office at that stage, and therefore the commission was invalid, therefore his Honour's appointment was invalid. That seems to be the chain of things.

HIS HONOUR: His Excellency Major-General Arnison was not validly appointed, why?

MR LOGAN: He holds office actually pursuant to a State Act which came into force and suspended the operation of these letters patent, which is the *Constitution (Office of Governor) Acts* which refers to these letters patent as gazetted and suspends their operation and provides for there to be an office of Governor in the State. So that in a strictly technical sense the point is one without - - -

HIS HONOUR: It is a very technical point, so if there is a good technical answer to it, there is no reason why that should not be given effect.

MR LOGAN: With respect, that is right.

HIS HONOUR: So the 1987 Act effectively acknowledges his office, is that what you say?

MR LOGAN: That is right. I have a copy of the Act for your Honour.

HIS HONOUR: And Justice Muir was sworn in long after that Act.

MR LOGAN: It is a matter of notoriety, yes.

HIS HONOUR: All right, I think that disposes of all the points that are taken, or those are your arguments on all of the points that are taken, is that right?

MR LOGAN: Yes. It is a matter for your Honour whether - the submissions really go to there being no merit in terms of the statements of claim points but, if one steps back even from that, they are each of them points which could have been raised in State court proceedings.

HIS HONOUR: That is your *Anshun* point.

MR LOGAN: That is right, and I do not want to elaborate on what is put in the written submission about that. There is an interesting example of that in Justice Wilcox's judgment which I have referred to in the outline where his Honour uses that really to terminate a Federal Court proceeding. Even if one were concerned to go to the merits, the primary submission is it is an *Anshun* situation where there is an attempt collaterally to challenge judgments in other courts but, even if one were concerned to look to the merits, there are none for the reasons that have been canvassed with your Honour.

HIS HONOUR: I suppose your *Anshun* point and the collateral challenge point really go more, if I am with you, to the relief that should be granted, whether I should simply strike it out if I am in your favour or whether I should permanently stay the - yes.

MR LOGAN: Yes. I do not know that I have anything further, your Honour.

HIS HONOUR: Thank you, Mr Logan. Any reply, Mr Fitzgibbon?

MR FITZGIBBON: Your Honour, I have just a couple of very short matters. It is fine, your Honour, to say that in fact these are mere technical points, and I will take the last - - -

HIS HONOUR: No, I did not mean to disparage it. I was saying that - if it is a good point, it does not matter whether it is technical or not, but all I was saying was that the same applies to

Mr Logan's response to it. If his point is technical but it is a good point, he should succeed on it in the same way as if your technical point is a good point, you should succeed on yours.

MR FITZGIBBON: I tell your Honour this because it will certainly come up in the part of the proceedings involving the other two separated parts: the technical parts may seem technical as such but at the moment - and I have a sworn affidavit by one of my solicitors to this effect - and if I might take your Honour back, your Honour raised of course in *Sue v Hill* the grave difficulties that have arisen and are going to arise from a failure to establish a date of when.

HIS HONOUR: I was on my own. It is a very lonely position.

MR FITZGIBBON: You were on your own but may I point this out, that they are so technical - and, please, I do not want your Honour to think that I am holding a gun at the Court's head, I am not - but, in fact, there is reference to an application to a UN committee and they are coming down here because of the replies given over when we attain sovereignty or not. So, technicalities aside, they have very, very important consequences.

I really did not come here today, your Honour, prepared to argue the interregnum point but I do have an excellent parliamentary comment which I would be happy to provide - my friends have had copies of it before - on when is a king not a king, and no one more famous than Spencer Walpole himself. The short answer seems to be in that argument that King appointed - I am unsure and unable to discover whether he actually signed the appointment or not but before the Governor took up his appointment the problem was, of course, the King died.

Under British constitutional law - and I know what Justice Gummow said to me, "Well, go to England and take it on there", but it does have the effect of - the 36 Act, of course, is basic to, indeed, all the actions that are taken here.

There is one additional matter, your Honour. It is this: my memory is, and I am a little surprised of my friend raising the issue of a debt owing to the Commonwealth because that amendment seems to be before the *Sunrise Auto Cases* and I can obtain copies of that where the Full Federal Court held that the assessment was the thing that set it going but it was the only thing that, in fact, set the whole thing and, indeed, leave was sought to the High Court but refused. I can obtain a copy of that, in short, your Honour. But I find that surprising but it goes back to my issue. It is not a debt. They are saying here we have a debt. Fine. But my argument goes to the issue that - - -

HIS HONOUR: The return itself acknowledged a debt though. I mean, I wonder whether, even independently of the Act, if you put in an income tax return in which you say you owe X dollars to the Commissioner for income tax, you are immediately acknowledging a debt yourself. You are making an admission that you owe it for income tax. I do not know whether you even need a provision, a deeming provision. You may or you may not, but I do not see why that should not be an admission against interest or an acknowledgment of a debt.

MR FITZGIBBON: The difficulty here, your Honour, is, and I speak in genre, what has occurred in the past is that frequently, and in a number of these cases there has been an assessment, if one can call it that, earlier on, but down the track we have other - and I do not want to use the word "assessment - based on those earlier figures. Now, that is the type of problem that arises.

HIS HONOUR: All right. Is there anything else in reply, Mr Fitzgibbon?

MR FITZGIBBON: Just one matter, your Honour. It is the matter of delegation. I know your Honour and my friend have discussed it at great length. The argument really quite simply was, as your Honour has pointed out throughout the judgment, and I really do not want to take too much more time on it, the fact is that what is being said is although there may be a delegation to Erin Holland, the Deputy Commissioner, it is not to be delegation willy-nilly and that is the problem here that we have.

HIS HONOUR: No, your problem, it seems to me is that you cannot prove, and you do not even seek to allege, why is it Ms Keys does not have authority. You do not seek to bring yourself outside the regulation which would appear to give her authority. You at least need an allegation that she has conducted or she has committed some aberrant act or done something which she was not entitled or permitted to do under the Act, something of that kind. You would at least need an allegation.

MR FITZGIBBON: Yes. Well, in essence, the allegation is there in broad terms in the fact that what has been said is although there is power to delegate from Commissioner to a Deputy Commissioner, the delegation beyond that is where the problem lies.

HIS HONOUR: All right. Look, I understand - - -

MR FITZGIBBON: To that extent, your Honour. I do not think there is anything unless your Honour - - -

HIS HONOUR: All right.

MR FITZGIBBON: The 86 constitutional argument, your Honour, is very clear, if you take a time line. The fact is the Great Seal came down, signed by Arnison who was a public servant - and I am able to provide your Honour with proof of that - five days outside when Britain said, in her Act, under section 10: "After the commencement of this Act, her Majesty's Government of the United Kingdom shall have no responsibility for the government of any State", and then Queensland, of course, had a special mention in there as well under section 13.

HIS HONOUR: Very well, all right. Well, would you like to move on now to the other two cases. And if you do not mind, Mr Fitzgibbon, try not to be repetitive because some of the arguments are the same, I think.

MR FITZGIBBON: Thank you, your Honour. They are, your Honour, and if I might - - -

HIS HONOUR: If you therefore would just deal with the matters that are peculiar to them, I think.

MR FITZGIBBON: Yes, thank you, your Honour. If your Honour will just grant me a moment. There is an application, your Honour, here also to join my solicitor.

HIS HONOUR: Now, you say there is an application to join your solicitor, what, as a plaintiff?

MR FITZGIBBON: In fact, on an indemnity basis on the basis of a summons that this action was instituted without the plaintiffs' instructions. That is a matter - - -

HIS HONOUR: Have you had any notice of this summons, Mr Logan?

MR LOGAN: It is the subject of a summons, yes, although what I would ask your Honour to do with that is to stand questions of cost concerning Mr Gair's case over. I have not in any way canvassed in submissions matters going to costs. But if one were to get to a stage to entertain questions of costs today, in *Gair's Case* I would ask your Honour to stand that over.

HIS HONOUR: I have that summons, do I? I just cannot find the summons. Which matter is the summons in, Mr - - -

MR LOGAN: It is B5 of 2000.

HIS HONOUR: Mr Sockhill is who? Is he your instructing - - -

MR FITZGIBBON: He, in fact, is my instructing solicitor, your Honour, to my left.

HIS HONOUR: I see, this is an application by the Australian Government Solicitor?

MR FITZGIBBON: Yes.

HIS HONOUR: I am sorry, Mr Logan, I thought it was Mr Fitzgibbon's application.

MR LOGAN: No, no. In fact, I should have handed up at the outset, your Honour, a list of the material that was read.

HIS HONOUR: Right. Well, you do not want to pursue the summons today?

MR LOGAN: Not today.

HIS HONOUR: Well, I think we should stand it over. We have got enough today, Mr Fitzgibbon if Mr Logan does not want to pursue it.

MR FITZGIBBON: I agree, your Honour. I would be perfectly content with that course.

HIS HONOUR: Well, we will stand that over to a date to be fixed, Mr Logan.

MR LOGAN: If your Honour pleases, yes.

HIS HONOUR: Now, Mr Fitzgibbon, then if you can focus on the matters that are peculiar to the two other - there is no reason why those two cannot themselves be heard together, is there?

MR FITZGIBBON: No, your Honour.

HIS HONOUR: Well, if you would focus upon the matters peculiar to them.

MR FITZGIBBON: Your Honour, if I might hand a very short set of submissions and they are short, together with an affidavit sworn by my solicitor at my request.

HIS HONOUR: But what does the affidavit go to?

MR FITZGIBBON: The affidavit basically deals with - they are matters, your Honour, that I have raised in oral submissions.

HIS HONOUR: What possible role could the United Nations have in this matter?

MR FITZGIBBON: It is because of the argument that, in fact, my solicitor has been frivolous in his actions and - - -

HIS HONOUR: Well, does this affidavit really go to the application that Mr Logan has asked to be stood over? It does, does it not?

MR FITZGIBBON: I think it does, your Honour. It goes to his belief and knowledge and it may never arise at the end of the day anyhow.

HIS HONOUR: I am just a little bit curious. I mean, we are not yet governed by the United Nations, Mr Fitzgibbon.

MR FITZGIBBON: No, I agree, your Honour.

HIS HONOUR: With headquarters in New York. Well, there is no need to - what is your attitude to that affidavit, Mr Logan?

MR FITZGIBBON: Well, I do not press it, your Honour.

HIS HONOUR: You do not press it?

MR FITZGIBBON: It is more appropriate on his belief if, in fact, we ever get back to the summons.

HIS HONOUR: Well, we may or we may not get back to the summons.

MR FITZGIBBON: That is what I am saying, yes.

HIS HONOUR: But, I suppose, if it is going to be filed, the sooner it is filed, the sooner Mr Logan can deal with it.

MR FITZGIBBON: Yes. Well, I have given my friend a copy.

HIS HONOUR: He might want to put in an affidavit himself if it is admissible and relevant. What is your attitude to it, Mr Logan?

MR LOGAN: Your Honour, if it is not tendered in relation to the application concerning the fate of the action itself, then I just reserve the position in relation to costs, if it is being tendered on that at a later date.

MR FITZGIBBON: Yes, I would agree.

HIS HONOUR: Well, Mr Fitzgibbon, I do not think I should receive it today.

MR FITZGIBBON: Thank you, your Honour. I am having thoughts, having read it, I believe it is appropriate that - your Honour, I have simply, therefore, referred to the basis of what my solicitor, in fact, has filed as argument, and that is yet to be heard in the Court of Appeal, and both these matters are in that category. So, that is why I urged on your Honour a separate - - -

HIS HONOUR: But are you telling me that these two matters are pending in the Court of Appeal in Queensland?

MR FITZGIBBON: Yes.

HIS HONOUR: Well, why should I hear anything in relation to them?

MR FITZGIBBON: That is why I urged on your Honour to leave them aside.

HIS HONOUR: So, you do not - - -

MR FITZGIBBON: I do not believe it is appropriate for the Court to deal with them.

HIS HONOUR: But is that not a reason for striking them out? I mean, courts do not normally permit parallel identical proceedings to be running, particularly in a federation where there is vested jurisdiction in the State Supreme Courts and where this Court is the ultimate Court of Appeal from any decision of the Supreme Courts where these two matters are pending.

MR FITZGIBBON: Your Honour, I have instructions to not proceed on either of the two matters.

HIS HONOUR: Does that mean that you would consent to a stay in respect of those two proceedings?

MR FITZGIBBON: Yes, I would, your Honour, yes. I think it would certainly clarify the - -
-

HIS HONOUR: To a permanent stay in respect of those two proceedings?

MR FITZGIBBON: Yes.

HIS HONOUR: You have your appeal right.

MR FITZGIBBON: The answer to that is yes because I think the appropriate course is to - -
-

HIS HONOUR: Mr Logan, those two matters, that is really the relief that you have sought, is it not?

MR LOGAN: It is certainly a form of relief sought, your Honour. Could I just, though, put on to the record the present position in relation to Mr Ferrier and Mr Sockhill's matters in a formal way by seeking leave to file and read an affidavit of Mr Henry which deposes to existence of a Court of Appeal proceeding in respect of one of the judgments obtained against Mr Sockhill and also deposes to the existence of a pending, so far as Mr Ferrier is concerned, creditor's petition in the Federal Court, founded upon a judgment already obtained.

HIS HONOUR: I am wondering about your creditor's petition in the Federal Court. Is that affected by the lack of decision?

MR LOGAN: No. There, the Federal Court is exercising its federal bankruptcy jurisdiction, your Honour.

HIS HONOUR: I see, a personal - - -

MR LOGAN: Yes, it is personal. Yes, it is not affected - - -

HIS HONOUR: Under the bankruptcy power, of course, that head of power.

MR LOGAN: Yes. No, with some relief I can say that is not affected.

HIS HONOUR: Mr Logan, it may be that we may not need those affidavits. I do not want to clutter the record if there is agreement on facts. Do you disagree with what has been stated there, that there is a creditor's petition pending in the Federal Court in respect of Mr Ferrier?

MR LOGAN: Mr Ferrier.

MR FITZGIBBON: Yes. No, I agree, your Honour, I am told - - -

HIS HONOUR: Which has not yet been heard and at which time you can raise any matters that you want to raise.

MR FITZGIBBON: That is right. That would seem to be appropriate, your Honour.

HIS HONOUR: And the other matter is a *Corporations Law* matter and it is going to the Court of Appeal. No, it is not.

MR FITZGIBBON: It is not a *Corporations Law* - - -

MR LOGAN: No. Sorry, I will let my friend speak.

MR FITZGIBBON: I sorry, I did not mean to cut across my friend, your Honour.

HIS HONOUR: No, you go ahead, Mr Fitzgibbon. What is the other matter?

MR FITZGIBBON: The other matter is a personal - - -

HIS HONOUR: It is personal but it is in the Court of Appeal.

MR FITZGIBBON: Yes.

HIS HONOUR: How did it get to the Court of Appeal? Was it a bankruptcy matter or just a contest as to the debt, is it?

MR LOGAN: It is really founded on a summary judgment for an income tax debt obtained in the District Court and then that is the subject of the appeal to the Court of Appeal.

HIS HONOUR: So, it is agreed then that both of these matters are still pending in other courts, is that right?

MR FITZGIBBON: Yes.

HIS HONOUR: And that any points that are sought to be raised can be raised there.

MR FITZGIBBON: In the normal appellate process.

HIS HONOUR: So, you would consent to a permanent stay in respect of those two proceedings?

MR FITZGIBBON: Yes, thank you.

HIS HONOUR: Well, Mr Logan, what is your attitude to that?

MR LOGAN: I do not oppose a permanent stay being granted if it is an alternative form of relief that was sought. It would only remain for your Honour to consider what costs - - -

HIS HONOUR: It might be better for you, might it not, to have a permanent stay because unless the whole action is struck out and I make an order that these are frivolous and vexatious applicants.

MR LOGAN: Yes.

HIS HONOUR: I am minded to make an order that those two matters be permanently stayed. Mr Fitzgibbon does not object to that.

MR LOGAN: Yes. Would your Honour then just consider about the costs in relation to that?

HIS HONOUR: Those two matters?

MR LOGAN: Yes.

HIS HONOUR: What is your attitude to costs, Mr Fitzgibbon? It is a little difficult to oppose it, is it not?

MR FITZGIBBON: Yes, I think I would be hard pressed to argue.

HIS HONOUR: Yes. I am minded to make an order permanently staying those two proceedings and an order that the plaintiffs in each case pay the defendant's costs. I am not minded to make an indemnity order or any other orders in those matters, Mr Logan. Mr Fitzgibbon has been quite reasonable about consenting to the - and his clients have been reasonable in their consenting to the permanent stay.

MR LOGAN: Yes. I, of course, would want to try and persuade your Honour, but - - -

HIS HONOUR: Well, is there anything you would like to say? I am really stating my inclinations.

MR LOGAN: Yes. That is an attitude given at a very late stage.

HIS HONOUR: Yes, but we had to be here for the other matters anyway.

MR LOGAN: We had to be here, indeed, yes.

HIS HONOUR: And we have only taken very, very little time - I know you have had to prepare but it is much the same argument. I think that is right, is it not?

MR LOGAN: It is really.

HIS HONOUR: Is there anything further you want to say?

MR LOGAN: No, your Honour.

HIS HONOUR: Thank you, Mr Logan. Well, I will make an order that those two matters be permanently stayed and that the plaintiffs pay the defendant's costs.

Now, gentlemen, I am going to reserve my decision in relation to the other matters. I am going to ask you to do something for me, each of you, in writing. What I really need is a schedule and I would like you each to do it independently so I can compare it; a schedule which will enable me to look, I hope, at one document which will show precisely what, if any, differences there are in factual allegations as between the different pleadings and similarly with respect to the relief. The purpose of that is plain. I do not want to be dealing with matters that I do not have to deal with separately. As much as can be dealt with collectively as can be, should be, obviously, in everybody's interests.

It would also be helpful to me that, in the case of any departures of differences, any different argument be highlighted. Do you follow that, Mr Fitzgibbon?

MR FITZGIBBON: Yes, thank you, your Honour.

HIS HONOUR: Mr Logan?

MR LOGAN: Yes.

HIS HONOUR: Is there any problem about that? Do both of you understand what I am seeking?

MR LOGAN: Yes, a comprehensive summary, in effect.

HIS HONOUR: Yes, but perhaps in some sort of a tabular form.

MR LOGAN: Yes, similar to that annexed to the - - -

HIS HONOUR: Yes, I just need more detail. It is a very useful document, thank you, but if I can get more detail.

MR LOGAN: Yes, we can do that, your Honour.

HIS HONOUR: Yes, thank you. And Mr Fitzgibbon will do it independently himself, yes.

MR FITZGIBBON: Yes, thank you, your Honour.

MR LOGAN: Your Honour, I did not, in a formal way, read material which is on the record.

HIS HONOUR: You want to hand up a schedule?

MR LOGAN: Can I hand that up. It will save the recitation of matters. There is a reference in it to two affidavits of Mr Henry to be filed by leave. They are the ones that proved unnecessary in Mr Sockhill and Mr Ferrier's cases.

HIS HONOUR: Yes, very well. Mr Fitzgibbon, I think all of your material we have referred to from time to time.

MR FITZGIBBON: Thank you, your Honour, yes.

HIS HONOUR: Is there anything further?

MR LOGAN: So, if your Honour could just disregard any of the matters where there is a reference in that tabulation to "filed by leave". The other material is the material that is relied on.

HIS HONOUR: So, you do not rely upon anything that is designated as having been "filed by leave"?

MR LOGAN: That is right, which I have not sought to file things by.

HIS HONOUR: All right. Anything further then?

MR LOGAN: No, thanks, your Honour.

MR FITZGIBBON: No, thank you, your Honour.

HIS HONOUR: It would help me if I could get that schedule fairly soon.

MR LOGAN: Yes.

HIS HONOUR: Thank you. Very well, these matters will be adjourned to a date to be fixed.

AT 1.43 PM THE MATTERS WERE ADJOURNED

TO A DATE TO BE FIXED

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