

FEDERAL COURT OF AUSTRALIA

Bazzo v Commissioner of Taxation [2017] FCAFC 139

Appeal from: *Bazzo v Commissioner of Taxation* [2017] FCA 71
Caratti v Commissioner of Taxation [2017] FCA 70

File numbers: NSD 306 of 2017
NSD 307 of 2017

Judges: **DOWSETT, PAGONE AND DAVIES JJ**

Date of judgment: 31 August 2017

Catchwords: **TAXATION** - construction of Deed of Agreement between parties which limited Commissioner's powers to collect a taxation debt; extent of obligations conferred under Deed of Agreement; whether Deed operated such that general interest charge that continued to accrue after date of execution of Deed of Agreement was not part of 'taxation debt' as defined; whether Deed of Agreement limited Commissioner's ability to collect in respect of general interest charge accruing following execution of Deed of Agreement.

Cases cited: *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Limited* (2014) 251 CLR 640
Federal Commissioner of Taxation v Myer Emporium Ltd (1987) 163 CLR 199
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104
Norman v Federal Commissioner of Taxation (1963) 109 CLR 9
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

Date of hearing: 14 August 2017

Registry: New South Wales

Division: General Division

National Practice Area: Taxation

Category: Catchwords

Number of paragraphs: 10

Counsel for the Appellants: Mr M Robertson QC

Solicitor for the Appellants: Zafra Legal

Counsel for the Respondent: Mr S White SC with Mr P Afshar

Solicitor for the Respondent: Australian Government Solicitor

ORDERS

**NSD 306 of 2017
NSD 307 of 2017**

BETWEEN: **TINA MICHELLE BAZZO**
First Appellant

MOONSPARK NOMINEES PTY LTD (ACN 114 932 651)
Second Appellant

AND: **THE COMMONWEALTH OF AUSTRALIA AS**
REPRESENTED BY THE COMMISSIONER OF TAXATION
Respondent

JUDGES: **DOWSETT, PAGONE AND DAVIES JJ**

DATE OF ORDER: **31 AUGUST 2017**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

BETWEEN: **ALLEN BRUCE CARATTI**
First Appellant

APPLEY HOLDINGS PTY LTD (ACN 160 806 673 (AS))
Second Appellant

PLATINUM SKY PTY LTD (ACN 126 519 935)
Third Appellant

AND: **THE COMMONWEALTH OF AUSTRALIA AS**
REPRESENTED BY THE COMMISSIONER OF TAXATION
Respondent

JUDGES: **DOWSETT, PAGONE AND DAVIES JJ**

DATE OF ORDER: **##**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellants pay the respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

- 1 Two appeals raise a common issue of construction of common terms in deeds of agreement in which the Commissioner agreed to refrain from commencing proceedings to recover any part of a taxation debt. On 3 September 2015 a deed of agreement was made between the Commonwealth of Australia as represented by the Commissioner of Taxation, Ms Tina Michelle Bazzo (referred to in the deed as “the Taxpayer”) and Moonspark Nominees Pty Ltd (referred to in the deed as “the Guarantor”). On 23 September 2015 a deed of agreement was made between the Commonwealth of Australia as represented by the Commissioner of Taxation, Mr Allen Bruce Caratti (referred to in the deed as “the Taxpayer”), Appley Holdings Pty Ltd and Platinum Sky Pty Ltd (together referred to in the deed as “the Guarantor”). In each deed the Commissioner agreed by clause 6.1 to refrain from recovering any part of what was defined in clause 1.1 as the “Taxation Debt”. The Commissioner contends, and the learned trial judge held, that the Commissioner’s obligation under the deeds did not extend to general interest charge accruing to the Taxpayer in each case after 7 August 2015. The appellants contend, in contrast, that the Commissioner’s obligation extended to general interest charge accruing after 7 August 2015.
- 2 The deeds of agreement provided by clause 6.1 that the Commissioner would forbear from undertaking recovery action in respect of the “Taxation Debt” (as defined in clause 1.1) upon the terms and conditions of the deed of agreement in exchange for securities given in accordance with the deed. In each case the Commissioner agreed to accept specified securities in accordance with the terms of the deed. The Commissioner agreed by clause 6.1 of the deeds to refrain from commencing any proceeding to recover any part of the taxation debt (as defined) subject to clause 11.2. That clause permitted the Commissioner to recover the balance of the Taxation Debt upon the occurrence of an event of default. Clause 11.1 described the occurrence of events of default for the purposes of the operation of the deeds including, by clause 11.1(e), the failure by the Taxpayer “to comply with any requirement of the taxation law while this deed is in operation”. General interest charge continued to accrue to each taxpayer after 7 August 2015 and in each case the Commissioner demanded payment, some 12 months after the deeds were entered into, of the general interest charge which had accrued to each taxpayer since 7 August 2015. In each case the Taxpayer failed to pay the general interest charge which the Commissioner demanded and in each case the

Commissioner gave notice of an event of default in reliance upon clause 11.1(e) of the deed of agreement.

- 3 The Commissioner's agreement in clause 6.1 not to recover any part of the Taxation Debt (as defined) was in the following terms:

The Commissioner agrees, subject to clause 11.2, to refrain from commencing any proceedings or employing his statutory "garnishee" power (pursuant to s260-5 of Schedule 1 of the TAA 1953) to recover any part of the Taxation Debt. For the sake of clarity, however, the Commissioner may employ any and all recovery options and powers to pursue any tax-related liabilities of the Taxpayer which are not part of the Taxation Debt which is the subject of this Deed, including any income tax liability that might be due following lodgment of the 2014 Income Tax return.

Critical to the restraint assumed by the Commissioner was the definition of "Taxation Debt" in each of the two deeds. That definition in clause 1.1 of the agreement with Ms Bazzo provided:

Taxation Debt means the amount of \$13,828,790.35, which is comprised of Tax Related Liability and applicable GIC due and payable by the Taxpayer as at 7 August 2015, subject to any adjustment to those amounts by virtue of the Determination of the Objection Process.

The corresponding definition in the deed with Mr Caratti was the same except for the amount stated which in that deed was \$10,948,507.45.

- 4 His Honour correctly concluded that the definition of Taxation Debt in the deed did not include the general interest charge which continued to accrue to each taxpayer after 7 August 2017. The Taxation Debt is identified precisely in each deed by reference to a specific amount. The specific amount in each deed was the amount owing at a particular date and comprised the elements identified in the definition. An adjustment to those amounts was contemplated by the definition in clause 1.1 but the only adjustment contemplated was that which, as his Honour correctly found, might be made by virtue of determinations of the objection process (as defined) but not otherwise. It was not contemplated by the definition in clause 1.1, therefore, that the amount identified in each deed as the Taxation Debt might be adjusted by reference to the future liability which otherwise continued to arise.

- 5 The proper construction of the deed requires consideration of the words used by the parties in the context of the surrounding circumstances known to the parties. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40] the High Court said:

This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract

are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

(Footnotes omitted).

In *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Limited* (2014) 251 CLR 640 at [35], the majority reaffirmed that construction of a commercial contract requires “consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract”: see also *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46]-[52], [59].

6 An objective reading of the words in the definition, as his Honour observed, was that the Taxation Debt was a stated amount in each case. The amount was stated to comprise specifically identified elements and were subject to adjustment in a specific way. The elements comprising the defined Taxation Debts at the time were known to the parties as those which together made up the stated amounts, and the adjustments contemplated by the definition were limited to such adjustments to those amounts as might be made through the process in Part IVC proceedings. There is no basis or reason to construe the terms of the agreement to extend the restraint to any other liability arising after 7 August 2015.

7 It was suggested in argument that his Honour’s construction should not be accepted because it would mean that the taxpayers in each case were in default immediately, or at least very soon after, the deeds were entered into. That, however, is not so. The restraint effected by clause 6.1 was subject to clause 11.2. Clause 11.2 provided:

Upon the occurrence of an Event of Default (without in any way limiting any other provision of this Deed) the Commissioner may, in addition to any other powers conferred by this Deed, and subject to the Notification requirement in clause 11.3, exercise his rights to recover the balance of the Taxation Debt.

Clause 11.3 restricted the Commissioner's ability to commence recovery action in respect of the Taxation Debt until notifying the taxpayers and guarantors of the occurrence of an event of default. Clause 11.3 provided:

The Commissioner must not exercise his rights to commence recovery action in respect of the balance of the Taxation Debt or appoint a receiver to enforce his security until he has Notified the Taxpayer and/or the Guarantor of the occurrence of an Event of Default and warned them that the Commissioner may elect to exercise his recovery and/or enforcement rights if the Event of Default is not remedied to the Commissioner's satisfaction within ten Business Days.

Events of default were those identified by clause 11.1 which included that in clause 11.1(e), namely a failure to comply with any requirement of a taxation law (as defined) while the deeds were in operation. Clause 11.1 provided, however, that for such an event to be an event of default it had to be notified and not be remedied within 10 business days of being notified. It is plain, and known to the parties, that the amounts owing by the taxpayers to the Commissioner would increase or decrease over time depending upon, amongst other things, the operation of such provisions as in Division 298 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) imposing general interest charge, payments by the taxpayer, and other adjustments as might be made. The amounts owing at a particular date were quantified and identified for the purpose of the deeds by reference to their components but those amounts could increase or decrease over time. The Commissioner agreed not to recover the stated amounts, which comprised the specified elements, other than according to the terms of the deed. The taxpayers, however, continued to have the obligation to pay accruing general interest charge, although the Commissioner's recourse to the security given pursuant to the deeds was subject to the terms of the deed – including clause 11. The Commissioner could also recover the balance of the Taxation Debt if the taxpayers failed to comply with any requirement of a taxation law while the deed was in operation provided that clause 11.1 had been engaged. Clause 11.1 was engaged by the taxpayers not paying the subsequently accruing liability to pay general interest charge, by the Commissioner giving notice as required by the deed and by the default not being remedied by the Taxpayer. The taxpayers were thus not in default of the terms of the deed at, or close to, their execution. The Commissioner's ability to recover the remaining tax debt, and to have recourse to the securities given under the deeds, required default of payment, notice of default and a failure to remedy the notified default.

8 The taxpayers sought also to rely upon observations in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 and *Federal Commissioner of Taxation v Myer Emporium Ltd*

(1987) 163 CLR 199 in support of the construction for which they contended. In *Norman Windeyer J* had said at 29 that “[a] creditor cannot recover a debt piecemeal in a court of law”. In *Myer Emporium* the High Court observed that interest was intricately linked with principal and that “interest which becomes due is not the produce of the mere contractual right to interest severed from the debt for the money lent. Interest is regarded as flowing from the principal sum”.

- 9 Neither passage, as his Honour correctly held, assists in the construction of the terms of the settlement deed. Windeyer J in *Norman* was addressing a situation where part of a debt had been assigned to a third party. In that context his Honour said at 29:

Before the statute an assignee was permitted to bring his action at law in the name of the assignor when he was seeking to recover a whole debt assigned to him. If a debt had been broken into parts this procedure was not appropriate. A creditor cannot recover a debt piecemeal in a court of law. Therefore, when part of a debt was assigned, proceedings to enforce the assignment had to be brought in a court of equity.

The passage does not address, or prevent, parties agreeing to forbear to recover debts in part. There is no reason why the parties could not agree to refrain from recovering part of a debt but for the balance to be recovered. Similarly the observation in *Myer Emporium* does not prevent parties agreeing upon the payment of interest separately from payment of principal. Neither case justifies or requires the construction advanced on behalf of the taxpayers.

- 10 Accordingly, the appeals should be dismissed with costs.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett, Pagone and Davies.

Associate:



Dated: 31 August 2017