FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Iannuzzi [2018] FCA 1053

File number:	NSD 1510 of 2017
Judge:	**PERRAM J**
Date of judgment:	16 July 2018
Catchwords:	**CORPORATIONS** – application for inquiry pursuant to *Corporations Act 2001* (Cth) s 536(1) **EVIDENCE** – objection to evidence – whether evidence adduced for administration or operation of a taxation law – where Commissioner seeks to adduce evidence for inquiry into liquidator – where Commissioner obtained evidence using compulsory powers
Legislation:	*Corporations Act 2011* (Cth) s 536 *Income Tax Assessment Act 1936* (Cth) s 263 *Taxation Administration Act 1953* (Cth) Schedule 1 ss 353-10, 355-25, 355-30, 355-50
Cases cited:	*Australian Securities and Investments Commission v Dunner* [2013] FCA 872 *Australian Securities and Investments Commission v Edge* [2007] VSC 170; 211 FLR 137 *Australian Securities and Investments Commission v McDermott* [2016] FCA 1186 *Bluehaven Transport Pty Ltd v Commissioner of Taxation* [2000] QSC 268; 157 FLR 26 *Canadian Pacific Tobacco Company Limited v Stapleton* (1952) 86 CLR 1 *Commissioner for Corporate Affairs v Harvey* (1979) 4 ACLR 259 *Commissioner of Taxation v De Vonk* [1995] FCA 994; 61 FCR 564 *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41; 237 CLR 473 *Hall v Poolman (No 1)* [2007] NSWSC 1330 *Hall v Poolman (No 2)* [2007] NSWSC 1494 *Hall v Poolman* [2009] NSWCA 64; 75 NSWLR 99 *Johns v Australian Securities Commission* [1993] HCA 53; 178 CLR 408

	Leslie, in the matter of the Aboriginal Councils and Associations Act 1976 v Hennessy [2001] FCA 371 *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434 *Saraceni v Jones* [2012] WASCA 59; 42 WAR 518
Date of hearing:	23 April 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Category:	Catchwords
Number of paragraphs:	34
Counsel for the Plaintiff:	Mr D McLure SC; Mr T Prince
Solicitor for the Plaintiff:	Minter Ellison Lawyers
Counsel for the Defendant:	Mr I Pike SC
Solicitor for the Defendant:	Johnson Winter & Slattery

ORDERS

NSD 1510 of 2017

BETWEEN:	**COMMISSIONER OF TAXATION** Plaintiff
AND:	**DAVID NICHOLAS IANNUZZI** Defendant

JUDGE: **PERRAM J**

DATE OF ORDER: **16 JULY 2018**

THE COURT DIRECTS THAT:

1. The Plaintiff's claim for an inquiry be held at the same time as the hearing of his claims for final relief.
2. The matter be stood over for further a further case management hearing on 24 July 2018 at 9.30am.
3. Costs be reserved.

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

REASONS FOR JUDGMENT

PERRAM J:

1. Introduction

1 This is an interlocutory application for an order pursuant to the now repealed s 536 of the *Corporations Act 2001* (Cth) ('the Act') for an inquiry into the external administration by the Defendant of some 23 separate companies. The Defendant is a registered liquidator. The power in s 536 is concerned with conduct of liquidators which may be 'liable to attract sanctions or control for what might broadly be described as disciplinary reasons': *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434 at 438.

2 The Plaintiff is the Federal Commissioner of Taxation ('Commissioner'). The Plaintiff submits that he is a creditor of some 18 of the 23 companies in question. The Plaintiff alleges that the Defendant has defaulted in his duties as the liquidator of each company. The allegations include contentions that the Defendant:

- failed to exercise reasonable care and diligence in the conduct of some of the liquidations;
- made knowingly false and misleading statements to meetings of creditors;
- failed to declare relevant relationships;
- failed to investigate proofs of debt;
- was party to the appointment of a sham director; and
- failed to undertake inquiries into potential phoenixing activities.

3 The Plaintiff filed this proceeding on 25 August 2017. He seeks by way of interlocutory relief orders for the s 536 inquiry. The Plaintiff's originating process also seeks final relief against the Defendant removing him as the liquidator of the two of the 23 companies of which he remains in office, removing the Defendant's name from the Register of Liquidators and restraining him from applying to be restored to that register for a period of 10 years. In addition, the Plaintiff also seeks orders barring the Defendant from, loosely speaking, any other role as an insolvency practitioner for 10 years and requiring him to pay compensation to the 23 companies for any loss sustained by them by reason of his alleged breaches of duty as a liquidator.

4 It is not the Court's function on an application such as the present to express any view on the correctness of these allegations. I merely mention them to put the application for an inquiry into its proper context.

2. Section 536

5 At the time immediately before its repeal s 536 provided:

> '536 Supervision of liquidators
>
> (1A) In this section:
>
> liquidator includes a provisional liquidator.
>
> (1) Where:
>
> (a) it appears to the Court or to ASIC that a liquidator has not faithfully performed or is not faithfully performing his or her duties or has not observed or is not observing:
>
> (i) a requirement of the Court; or
>
> (ii) a requirement of this Act, of the regulations or of the rules; or
>
> (b) a complaint is made to the Court or to ASIC by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties;
>
> the Court or ASIC, as the case may be, may inquire into the matter and, where the Court or ASIC so inquires, the Court may take such action as it thinks fit.
>
> (2) ASIC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss that the estate of the company has sustained thereby and may make such other order or orders as it thinks fit.
>
> (3) The Court may at any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator.'

6 The date upon which s 536 was repealed was 1 March 2017. Complex transitional provisions gave s 536 (along with many other provisions) continuing life until 1 September 2017. This proceeding was commenced on 25 August 2017 just a few days before that day. Although in most cases s 536 does not apply after 1 September 2017, the reasons for that need not be explored. This is because s 1617 of the Act has the effect of continuing in force, *inter alia*, s 536 in relation to a proceeding commenced before 1 September 2017. It is, therefore, s 536 rather than its replacement, s 90-10 of Schedule 2 to the Act, which applies in this case.

3. Relevant Principles

7 It is only subs (1) which is relevant to the Commissioner's application. The power in subs (1) can be enlivened by either of the matters referred to in (a) or (b). Subs (a) may be thought apposite where the Court (or ASIC) moves *ex mero motu* (as happened, for example, in the first instance decision of Palmer J in *Hall v Poolman (No 1)* [2007] NSWSC 1330 at [396]; *Hall v Poolman (No 2)* [2007] NSWSC 1494). Subsection (b), on the other hand, requires a 'complaint' to be made to the Court. It is established that 'complaint' is a broad expression and certainly includes an application for an inquiry brought by originating application: *Hall v Poolman* [2009] NSWCA 64; 75 NSWLR 99 ('*Hall v Poolman*') at 127 [94] and 129 [98].

8 In either case, the threshold is low. For subs (1)(a) a plaintiff must show 'a sufficient basis for making an order, that there is something that requires inquiry': *Leslie, in the matter of the Aboriginal Councils and Associations Act 1976 v Hennessy* [2001] FCA 371 ('*Leslie v Hennessy*') at [6]. The sufficient basis must relate to the performance of the duties referred to in subs (1)(a): *Hall v Poolman* at 121 [59]. For subs (1)(b), the prerequisites to subs (1)(a) need not be established although the Court will still need to be persuaded that there is a sufficient basis for making the order: *Hall v Poolman* at 126-127 [89]-[90]. And, in both cases it is established that the demonstration of a sufficient basis is less formal than the demonstration of a *prima facie* case: *Leslie v Hennessy* at [6].

9 Some insight into the kind of process at work can be gleaned from the fact that the inquiry contemplated by s 536(1) has been held to be adversarial in nature: *Commissioner for Corporate Affairs v Harvey* (1979) 4 ACLR 259 at 275-276 per Marks J; *Australian Securities and Investments Commission v McDermott* [2016] FCA 1186 at [14]; *Australian Securities and Investments Commission v Edge* [2007] VSC 170; 211 FLR 137 at [97]; *Saraceni v Jones* [2012] WASCA 59; 42 WAR 518 at 548-549 [157] per McLure P (Neunes JA agreeing at 566 [255]) (special leave refused: *Saraceni v Jones* [2012] HCA 38; 246 CLR 251). Where there is no contradictor it will usually be appropriate for ASIC to take that role. In this case, the Plaintiff has prepared a very detailed pleading and filed evidence. If the inquiry is ordered, it will essentially resemble an ordinary piece of *inter partes* litigation.

10 There has been a tendency in more recent times where an actual application for an inquiry is made to collapse the hearing of that application and the inquiry into a single hearing: see, e.g., *Australian Securities and Investments Commission v Dunner* [2013] FCA 872; *Australian Securities and Investments Commission v McDermott* [2016] FCA 1186. It is true

that the procedure in those cases was adopted with the consent of the parties but that does not detract from its instrumental attractiveness. As will be seen, this is a course I propose to adopt in this case. That approach is consistent with a view of the decision to hold an inquiry as resembling an order nisi in proceedings for prerogative writs or the show cause procedure in certain kinds of industrial disputation.

11 Of course, one difference between s 536(1) and procedures of that kind is that the latter are truly *ex parte* in nature. Another is that the scope of an inquiry may be quite amorphous, suggesting the need for supervision before such a case can be commenced. A further difference is that the inquiry process may be enlivened in many more circumstances than merely those where, as here, a person makes a fully pleaded complaint.

12 I do not mean by any of these remarks to suggest that the factors relevant to the exercise of the discretion under s 536(1) are any different to those explained by the Full Court in *Leslie v Hennessy* at [6] where it was said they included:

> 'the strength and nature of the allegations, any answers offered by the liquidator, other available remedies, the stage to which the liquidation has progressed, the likely amounts of money involved, the availability of funds to pay for any inquiry, the likely benefit to be derived from it and the legitimate "interest" of the applicant in the outcome.'

13 However, where it is apparent that the Plaintiff has formulated a fully pleaded case and put its evidence on, it may be appropriate, and possibly more efficient, to deal with the question of whether there should be an inquiry at the same time as the holding of the inquiry in much the same way that some applications for leave to appeal are dealt with at the same time as any appeal.

4. A Preliminary Point

14 When the matter was called on Mr Pike SC, who appeared for the Defendant, took a global objection to the Commissioner's evidence. Both parties indicated that if the objection were to be upheld it would have a significant impact on the Commissioner's case and the hearing would need to be adjourned to see how much of the case could proceed.

15 The Commissioner's evidence included two affidavits by Mr Aris Zafiriou, an official with the Australian Taxation Office. Exhibited to those affidavits was a large body of documentary evidence relating to the affairs of the 23 companies.

16 Objection was taken to this material on the basis that most of the material had been obtained by the Commissioner using compulsory powers under s 263 of the *Income Tax Assessment Act 1936* (Cth) ('ITAA 1936') and s 353-10 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) ('TAA 1953'). There was no dispute that this was true. The debate was confined to the legal consequences of that fact.

17 At the conclusion of the argument I overruled the objection and indicated I would give my reasons for doing so in due course. I now give those reasons.

18 Until it was repealed on 25 February 2015, s 263 of the ITAA 1936 had provided:

> '263 Access to books etc.
>
> (1) The Commissioner, or any officer authorized by the Commissioner in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.
>
> (2) An officer is not entitled to enter or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorised to exercise powers under this section.
>
> (3) The occupier of a building or place entered or proposed to be entered by the Commissioner, or by an officer, under subsection (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section.
>
> Penalty: 30 penalty units.
>
> Note: See section 4AA of the Crimes Act 1914 for the current value of a penalty unit.'

19 From 25 February 2015, s 353-10 of Schedule 1 of the TAA 1953 has provided:

> '353-10 Commissioner's power
>
> (1) The Commissioner may by notice in writing require you to do all or any of the following:
>
> (a) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a *taxation law;
>
> (b) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;
>
> (c) to produce to the Commissioner any documents in your custody or

> under your control for the purpose of the administration or operation of a taxation law.
>
> Note: Failing to comply with a requirement can be an offence under section 8C or 8D.
>
> (2) The Commissioner may require the information or evidence:
>
> (a) to be given on oath or affirmation; and
>
> (b) to be given orally or in writing.
>
> For that purpose, the Commissioner or the officer may administer an oath or affirmation.
>
> (3) The regulations may prescribe scales of expenses to be allowed to entities required to attend before the Commissioner or the officer.'

20 Mr Pike's point was short. Both provisions prevented the issue of a compulsory notice unless it was 'for the purpose of the administration or operation of a taxation law'. Those words said nothing directly about the subsequent use of such material but that issue had been dealt with by the Full Court in *Commissioner of Taxation v De Vonk* [1995] FCA 994; 61 FCR 564 ('*De Vonk*') and by the High Court in *Johns v Australian Securities Commission* [1993] HCA 53; 178 CLR 408 ('*Johns*'). In the latter case Brennan J said at 424:

> 'A statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed. The statute imposes on the person who obtains information in exercise of the power a duty not to disclose the information obtained except for that purpose. If it were otherwise, the definition of the particular purpose would impose no limit on the use or disclosure of the information. The person obtaining information in exercise of such a statutory power must therefore treat the information obtained as confidential whether or not the information is otherwise of a confidential nature. Where and so far as a duty of non-disclosure or non-use is imposed by the statute, the duty is closely analogous to a duty imposed by equity on a person who receives information of a confidential nature in circumstances importing a duty of confidence.'

21 *Johns* was concerned with s 19 notices issued by the Australian Securities Commission rather than with a notice under s 263 of the ITAA 1936. Mr Pike also relied upon some remarks by the Full Court in *De Vonk* at 568 and 572. The remarks were concerned with s 264 of the ITAA 1936 and, in any event, say no more than that the Court will restrain by injunction the use of the power for a foreign purpose. I do not think *De Vonk* takes the matter any further than *Johns*. In any event, the principle is clear: as a matter of ordinary statutory construction, where information is gathered for one purpose it cannot be used for another.

22 The next point was that the making of an application for an inquiry into the affairs of a liquidator was not part of the administration of a taxation law. If that were so, it followed that the Commissioner could be restrained by an injunction from tendering the material he had gathered by compulsory process. And, if the Court could restrain the Commissioner from tendering the material by injunction, then it could achieve the same outcome by refusing to admit the evidence.

23 The Commissioner's response was twofold. First, the application for the inquiry was for the purpose of the administration of a taxation law within the meaning of s 353-10. Secondly, even if it were not, the Commissioner was entitled to disclose information garnered by compulsory process in curial proceedings by reason of subdivision 355-B of the Schedule to the TAA 1953.

24 As to the first argument, Mr Pike submitted that an inquiry into Mr Iannuzzi under s 536 with a view to disciplining him was clearly not an activity which was for the purpose of administering a taxation law. If that were truly all that the Commissioner sought to do then, without deciding the issue, I might be disposed to see some force in this argument. However, it is not a complete or entirely accurate description of the Commissioner's proceeding. In particular, it omits reference to the Commissioner's claim for compensation from Mr Iannuzzi for his alleged defaults. The losses claimed are for unpaid tax which the Commissioner has been unable to recover allegedly because of defaults of Mr Iannuzzi. As such, I think it very difficult to say that the proceeding is not for the purpose of the administration or operation of a taxation law. In particular, the recovery of compensation from a liquidator where alleged phoenixing has resulted in revenue being lost appears to be centrally concerned with that concept. The question may be tested by observing that if Mr Pike's submission about this were correct, then the Commissioner would never be able to seek compensation from persons whose actions have resulted in tax not being paid by a taxpayer. This seems unlikely.

25 That the Commissioner's interest arises through the prism of an insolvency proceeding does not detract from the purpose he pursues. This is why it has always been accepted that the Commissioner may pursue insolvency proceedings: see *Bluehaven Transport Pty Ltd v Commissioner of Taxation* [2000] QSC 268; 157 FLR 26 at 22 [32]; approved *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41; 237 CLR 473 at 496 [58]. From this it follows that the principle of statutory interpretation in *Johns* has no

work to do in this case because the Commissioner is not seeking to use the information for a purpose alien to the power under which it was gathered.

26 Had it arisen I would also have accepted the Commissioner's second argument. This was that the principle in *Johns* had been outflanked by Subdivision 355-B of the TAA 1953. Subdivision 355-B to the Schedule to the TAA 1953 is entitled 'Disclosure of protected information by taxation officers' and contains detailed provisions regulating when officers of the ATO may use what it refers to as 'protected information'. That expression is defined in s 355-30(1) in these terms:

> '355-30 Meaning of protected information and taxation officer
>
> (1) Protected information means information that:
>
> (a) was disclosed or obtained under or for the purposes of a law that was a *taxation law (other than the Tax Agent Services Act 2009) when the information was disclosed or obtained; and
>
> (b) relates to the affairs of an entity; and
>
> (c) identifies, or is reasonably capable of being used to identify, the entity.
>
> Note: Tax file numbers do not constitute protected information because they are not, by themselves, reasonably capable of being used to identify an entity. For offences relating to tax file numbers, see Subdivision BA of Division 2 of Part III.
>
> …'

27 The words 'obtained under… a taxation law' is sufficient to include information which has been obtained under notices of the kind involved here. In particular, it is inevitable that included amongst the information provided is information which is 'reasonably capable of being used to identify' a taxpayer. This matters because s 355-25 creates an offence of disclosing information of that kind. It provides:

> '355-25 Offence—disclosure of protected information by taxation officers
>
> (1) An entity commits an offence if:
>
> (a) the entity is or was a *taxation officer; and
>
> (b) the entity:
>
> (i) makes a record of information; or
>
> (ii) discloses information to another entity (other than the entity to whom the information relates or an entity covered by subsection (2)) or to a court or tribunal; and

(c) the information is *protected information; and

(d) the information was acquired by the first-mentioned entity as a taxation officer.

Penalty: Imprisonment for 2 years.

…'

28 However, s 355-50 provides that s 355-25 does not apply in some circumstances:

'355-50 Exception—disclosure in performing duties

(1) Section 355-25 does not apply if:

(a) the entity is a *taxation officer; and

(b) the record or disclosure is made in performing the entity's duties as a taxation officer.

Note 1: A defendant bears an evidential burden in relation to the matters in this subsection: see subsection 13.3(3) of the Criminal Code.

Note 2: An example of a duty mentioned in paragraph (b) is the duty to make available information under sections 3C and 3E.

(2) Without limiting subsection (1), records or disclosures made in performing duties as a *taxation officer include those mentioned in the following table:'

29 There then follows this table which contains ten items. Only item 3 is material and the others are omitted:

Records or disclosures in performing duties		
Item	**The record is made for or the disclosure is to ...**	**and the record or disclosure ...**
3	any entity, court or tribunal	is for the purpose of criminal, civil or administrative proceedings (including merits review or judicial review) that are related to a *taxation law.

30 Item 3 determines the Defendant's objection. The Commissioner's proceeding 'is for the purposes of criminal, civil or administrative proceedings (including merits review) that are related to a taxation law'. The Defendant denied that this could be by submitting that the present case could not be described as being related to a 'taxation law'. Here the point was not that no 'taxation law' was involved but rather that the present proceeding could not be seen as 'related to' such a law.

31 Both parties submitted that their position was supported by what had been said by Dixon CJ in *Canadian Pacific Tobacco Company Limited v Stapleton* (1952) 86 CLR 1. That case

concerned the meaning of the words 'except in the performance of any duty as an officer' which is close to the language of s 355-50(2). However, the words to be interpreted are those in item 3. These are 'are related to' and they are words of broad connection. The present proceeding has as one of its endpoints an attempt to have compensated a number of defunct companies of which the Commissioner is a creditor. If that enterprise were to succeed it is certainly possible, although perhaps not inevitable, that the Commissioner will ultimately secure the payment of unpaid tax as a result of the proceeding. That easily means that the present proceeding is related to a taxation law. The matter is therefore covered by item 3. The prohibition in s 355-25(1) does not apply and the Defendant's objection fails.

5. Should there be an inquiry?

32 Once the evidence upon which the Plaintiff relies was admitted, Mr McLure SC made submissions in relation to one of the sets of transactions proposed to be subject of the inquiry. At the conclusion of this first part of the submissions Mr Pike rose to say that whilst the Defendant did not consent to the inquiry, neither did he wish to be heard in opposition. Mr McLure then curtailed his oral submissions and relied on his written submissions.

33 The course I propose to take is this. The Plaintiff has prepared a detailed pleading and ten volumes of material. I am satisfied from a cursory examination of the material that the Plaintiff's contentions are not frivolous. I will shortly make directions to prepare the case for trial. At the trial there will be simultaneously determined the initial question of whether an inquiry should be held and, if it should, the inquiry itself. Put another way, the question of whether there should be an inquiry and, if there should be, the inquiry itself, are to be heard together.

34 The directions I make are:

1. The Plaintiff's claim for an inquiry be held at the same time as the hearing of his claims for final relief.
2. The matter be stood over for further a further case management hearing on 24 July 2018 at 9.30am.
3. Costs be reserved.

I certify that the preceding thirty-

four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate: 

Dated: 16 July 2018