

CHALLENGING THE VALIDITY OF AN ASSESSMENT ON THE BASIS OF CONSCIOUS MALADMINISTRATION

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- **Brief facts in *Donoghue*:**
 - January 2010, D received advice re litigation from law student (SM)
 - February 2010, D retained law firm (SM's father) to act in litigation – much of work done by SM working for and under supervision of partner – SM billed on own letterhead

*** Relevant litigation documents moved to SM's home in July 2010**

*** August 2010, SM sends bill for \$753k ("fantasy"), threatens to send documents to ATO if unpaid**

- **D refuses to pay, so SM (later – January 2011) sends materials re litigation to ATO**
- **Law firm ceased to act for D in September 2010**
- **ATO auditor uses SM information to assess D – auditor believes he should not use privileged information**

- **D becomes aware that privileged documents may have been sent to ATO, takes action to quash assessments, alleging conscious maladministration by ATO**

* **First instance: Logan J** in Fed Ct upholds D's argument, on basis that:

- ATO officer did not deliberately act in bad faith, but was “recklessly indifferent” to possibility that documents were privileged and shouldn't be used
- This constituted “conscious maladministration” (**Futuris**)
- assessments were therefore invalid

- Other issues decided by Logan J:
- **S 175, 177** do not protect assessments against conscious maladministration
- **S 166 wording** “any other information in his possession” (note 2013 change) and decision in **Denlay** did not give ATO *carte blanche* to maladminister tax Acts

- **S 263**
- did not authorise use of privileged material;
- does not apply to ATO premises; and
- there is an obligation to act reasonably and create protective regime (*JMA; etc*)

- **No waiver** of privilege

- Criticised ATO “**obfuscation**” re LPP inquiry

- ▶ ATO appealed to Full Federal Court, which overturned Logan J's decision
- ▶ **Full Fed Ct:** different approach to Logan J – case was not re privilege: key was **s 166**

Kenny and Perram JJ (Davies J agreeing):

- Concept taking an assessment beyond the protection of **ss 175, 177 ITAA36** is lack of good faith (conscious maladministration being one example):

Futuris

- D had abandoned claim for breach of confidence – case was based purely on privilege
- But LPP is not a bar to inspection – only provides immunity from compulsory production: *Propend, Pape*.
- so privilege is irrelevant when issue is not compulsory production: key is *s 166*

- Therefore no relief against person merely for receiving privileged documents:
Gummow J in Propend
- *Calcraft* and *Daniels*: once information is disclosed to third parties, there is nothing to stop its use, unless through an equitable action for breach of confidence as per *Coco* (3 elements)
- This is a different test to LPP

- i.e., LPP requires confidentiality, but does not incorporate the necessary (inherent confidentiality) element for breach of confidence action under **Coco** – eg map
- Donoghue *may* have had remedy if took action for breach of confidence before ATO used the information to assess (**Pape**)
- **Is this realistic !?**

- In any event, Full Court refused leave for Donoghue to argue Breach of Confidence
- And Full Court indicated that even if D had run Breach of Confidence, it would have been defeated by **s 166 ITAA36**

- On the facts before it, the Full Court couldn't resolve reckless indifference issue
- However: "There may be something to be said for the view that not all of the mental state [honestly, not in bad faith, and with reckless indifference] can be simultaneously held".

- The core of the Full Court's reasoning: the over-riding role of *ITAA36*:
- **S 166** not only permits but **requires** Commr to act on information in his possession *regardless* of how he came to have it:
Denlay - cf **Awad** (note 2013 change)
- **S 166** reflects a policy which explicitly privileges the need for accurate assessments over other private law rights

- That is, the circumstances under which information came into the ATO's possession and was used for assessment could not alter a liability to tax which the law imposed on the taxpayer
- The Australian community's interest in having assessments based on the best information available is not to be defeated by ATO officers' default which does not affect the accuracy of the assessment

- No need to qualify **Denlay** as Logan J had done, because the actions of ATO officers will be controlled by the fact that they are subject to the law of the land in carrying out their functions
- Is this the appropriate approach?
- Implications?

- **Full Court** reiterated this view:
- **Denlay**: means it didn't matter that info might have been unlawfully obtained by ATO ... all that mattered was that it had come into the Commr's possession
- Combined effect of **Denlay** and **Awad** is that Commr is **obliged** to use info in his possession "even if he knows it is subject to a claim for breach of confidence ... [or] **privileged**"

- **And:**
- “Lest there be any doubt”, the use by ATO of privileged documents received from 3rd party does not involve Conscious Maladministration; assessments were valid
- ATO officer (Main) had acted properly – he acted precisely as **s 166** required ...

- **Other matters (obiter):**
- **S 263**: does not apply to ATO premises
- **Good faith, honesty & reckless indifference: couldn't be resolved on the facts before the court, which related to privilege, not breach of confidence**

- **Privilege: (obiter)** can apply where client believes person is entitled to give legal advice - but not where they believes it's privileged only because of its legal nature
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- Documents created by SM before law firm was involved: D knew Simeon was not a lawyer and not employed *then* by a lawyer
- Whether later materials were copied by SM would not affect privileged status (**Propend**)

- **Penalty**: not protected by s 166 or 175, but is imposed by **Div 284**, and its application did not require the ATO to use the information provided by SM
- **Davies J**: it was not a misuse of power to assess a penalty in reliance on the same info that Commissioner relied on for assessment under s 166, where info shows taxpayer is liable to admin penalty under **Div 284**

On to the High Court ?

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