

GLENCORE INTERNATIONAL AG & ORS v COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA & ORS (S256/2018)

Date writ of summons filed: 27 September 2018

Date demurrer referred to Full Court: 5 November 2018

The Plaintiffs are four companies in the international “Glencore group” of entities. In October 2014 an Australian law practice instructed by the Plaintiffs engaged a law practice in Bermuda to provide legal advice on a corporate restructure of the Australian entities within the Glencore group that was known as “Project Everest”. Consequently the Bermudan law practice held a number of documents in electronic form relating to Project Everest.

In November 2017, media reports indicated that journalists had come into the possession of copies of many documents that were held by the Bermudan law practice (which were described colloquially as “the Paradise Papers”). A statement published by the Australian Taxation Office (“the ATO”) indicated the ATO’s interest in such documents and that the ATO was seeking to identify possible Australian links, in aid of tackling tax avoidance. Officers of the ATO later acknowledged, in a meeting with the Plaintiffs, that they were in possession of documents relating to Project Everest.

In the proceedings in this Court, the Plaintiffs seek an order for the delivery up of those documents in the possession of the Defendants which were created for the sole or dominant purpose of the Bermudan law practice giving legal advice to the Plaintiffs (“the Glencore Documents”), on the basis that such documents are subject to legal professional privilege. The Plaintiffs also seek an injunction restraining the Defendants and any other officer of the ATO from making use of any of the Glencore Documents.

The Plaintiffs filed an amended statement of claim, to which the Defendants demur. On 5 November 2018 Justice Edelman referred the Defendants’ demurrer for hearing by the Full Court. The grounds of the demurrer are that, even if the Glencore Documents are documents or evidence communications to which legal professional privilege attaches under the common law of Australia:

- 1) the amended statement of claim does not disclose a cause of action in respect of which the Plaintiffs are entitled to the relief sought; and
- 2) further or alternatively, the Defendants are entitled and obliged to retain and use those documents by reason of, and for the purposes of, s 166 of the *Income Tax Assessment Act 1936* (Cth).

The Plaintiffs have filed a notice of a constitutional matter. No Attorney-General has given notice of an intention to intervene in the matter.

The Association of Corporate Counsel and its Australian chapter, the Australian Corporate Lawyers Association, have applied for leave to make submissions as amicus curiae.