In addition, the court held, in obiter, that the trust (and RESI), as Crown agents, were capable of being vicariously liable for torts committed by their employees during the course of their employment.[8] This is because the statutory provisions contemplated that the trust[9] (and RESI) should have, under their sole control and direction, their own employees who were therefore not servants of the Crown. PL

Endnotes:

1. Heydon and Hodgson JJ.A and Ipp A.J.A.
2. Section 5(1), *Electricity Trust of South Australia Act* 1946 (SA).
3. Section 36(1), *Electricity Trust of South Australia Act* 1946 (SA).
4. The RESI Corporation was established pursuant to s 8 *Electricity Corporations Act* 1994 (SA) and was originally called the ETSA Corporation.
5. DDT 163/01.
6. [2002] NSWCA 123 per Hodgson J.A. (Heydon J.A. and Ipp A.J.A. agreeing).
7. See ss 4(1) and 5(1) *Crown Proceedings Act* 1992 (SA).
8. At [55], [57-58] and [61]. The trust's vicarious liability would have also, in an appropriate case, passed to RESI.
9. Section 17 *Electricity Trust of South Australia Act* 1946 (SA) provided that the trust may appoint such employees as it required, on terms determined by the trust, and such employees shall not be subject to the *Public Service Act*.

TRACEY CARVER, QLD

Misnomer of title in civil proceedings

Brookfield v Davey Products Pty Ltd [2002] FCA 889, Federal Court of Australia, South Australia, 24 July 2002

In *Brookfield v Davey Products Pty Ltd*, Mansfield J considered an application for an order to amend a Federal Court judgment. A respondent to proceedings sought the order, in connection with the judgment's attempted enforcement, in circumstances where the respondent, in whose favour the judgement had been granted, had changed their name during trial without amending the proceedings.

The case, therefore, provides a timely reminder to legal practitioners of the importance of keeping the particulars of proceedings, and any documents lodged in relation to them, current, and the additional cost and procedural difficulties which may arise from a failure to do so.

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BACKGROUND

During December 1997, in proceedings commenced in 1993 by the first applicant (Brookfield) against the first respondent Davey Products Pty Ltd (Davey), Brookfield was ordered to pay Davey's costs totalling $380,493.82. However, on 6 March 1995 upon the sale of Davey's business, Davey had changed its name to 'Yevad Products Pty Ltd' (Yevad), and the purchaser, Domali Pty Ltd, was renamed 'Davey Products Pty Ltd'. Despite the name change, at all times during the proceedings the first respondent was described as 'Davey Products Pty Ltd'.

In July 2001, in connection with the enforcement of the costs order payable to them (with interest), Davey/Yevad issued a bankruptcy notice against Brookfield. However, in April 2002, Brookfield applied[1] to have the bankruptcy notice set aside on grounds that the party applying for the bankruptcy notice was not the same party as named in the judgment.[2] In his application, Brookfield described Davey/Yevad as 'Yevad Products Pty Ltd (formerly Davey Products Pty Ltd)'.

THE PRESENT APPLICATION

Davey/Yevad made its application to the Federal Court in order to avoid the complications caused by Brookfield's

claim as to the identity of his creditor. However, Brookfield contended that the order sought, amending the judgment, should not be made as Davey/Yevad deliberately did not cause its name in the proceedings to be changed after 6 March 1995.

Brookfield alleged that the respondent wished to mislead the court, himself and others as to its true identity, because its parent company at the time was in financial difficulty and needed unencumbered access to the proceeds of the sale of the Davey business to continue to operate.[3] Brookfield stated that had he been aware of Davey's name change, he would have applied for a Mareva injunction,[4] and the withholding of the sale proceeds to the parent company's detriment.

THE DECISION

The Federal Court held that there was no evidence that Davey/Yevad had deliberately withheld its change of name to preclude the making of the order claimed. Rather, the parent company's reports specifically disclosed the sale of the Davey business as part of a debt reduction program, and the sale was announced to the Australian Stock Exchange.[5]

However, the court considered it unnecessary to amend the terms of the judgment itself,[6] stating that it was 'the title to the proceedings which, in reality, Davey/Yevad wished to change'[7]. The present circumstances resulted from the misnomer of the respondent in the title of the original proceedings following their change of name.

Therefore, pursuant to s161(2) *Corporations Act* 2001 (Cth)[8] and O13 r2 Federal Court Rules[9], the court ordered that:[10]

- From 6 March 1995 the title of the proceedings be amended to show Yevad as first respondent; and
- Davey/Yevad, pay all costs of the motion, including any costs thrown away by Brookfield, as its failure to alter the proceedings to reflect its name change led to the motion.

This decision was influenced by the fact that:

- Brookfield at all times understood that Davey/Yevad was the first respondent, notwithstanding the change in name,[11] and therefore could not be prejudiced by the amendment; and
- There was no question of a statute-barred claim being revived, or the addition or substitution of another party to the proceedings.[12] PL

Endnotes:

1 Pursuant to s.41 *Bankruptcy Act* 1966 (Cth).

2 [2002] FCA 889 at [5].

3 At [6].

4 A Mareva injunction is an interlocutory prohibitory injunction that restrains a defendant from removing assets from a jurisdiction, or otherwise dealing with assets either within or outside the jurisdiction. See *Mareva Compania Naviera S.A. v International Bulkcarriers S.A.* [1980] 1 All ER 213.

5 [2002] FCA 889 at [7-11].

6 As the costs order was in favour of 'the first respondent', which clearly was Davey/Yevad. At [13].

7 At [13].

8 Section 161(2) provides that 'any legal proceedings that could have been continued or begun … against the company in its former name may be continued … against it in its new name'.

9 See especially O13 r2(1),(2),(3) and (4) of the Federal Court Rules.

10 [2002] FCA 889 at [15-17].

11 In that Davey/Yevad's ACN number remained the same, and Brookfield in his bankruptcy application demonstrated his understanding of the companies' connection. See [3], [12-13] and [15].

12 At [15]. See *Metropolitan Oils Pty Ltd v Fortron Industrial Lubricants Pty Ltd* [1986] 11 FCR 335 and *Smithkline Beecham (Australia) Pty Ltd v Minister for Family Services* [1993] 45 FCR 587, to which the court referred.

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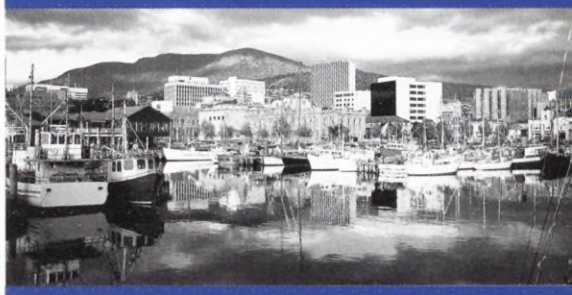

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