Supreme Court
New South Wales

Case Name:	Deputy Commissioner of Taxation v Anglo American Investments Pty Ltd; Deputy Commissioner of Taxation v Golden Investments Pty Limited; Deputy Commissioner of Taxation v Melbourne Insurance Co Pty Ltd; Deputy Commissioner of Taxation v Morning Star Fiduciaries Pty Limited; Deputy Commissioner of Taxation v Education Corporation of Australia Pty Limited; Deputy Commissioner of Taxation v Malackey Holdings Pty Limited trading as Malackey Trust
Medium Neutral Citation:	[2016] NSWSC 975
Hearing Date(s):	4 March 2016
Date of Decision:	14 July 2016
Jurisdiction:	Common Law
Before:	Button J
Decision:	(1) The defence is struck out. (2) Judgment for the plaintiff. (3) Costs reserved.
Catchwords:	PROCEDURE – application to strike out amended defence – whether amended defence doomed to failure – judicial consideration of "conscious maladministration in process of assessment" – combined effect of s 175 of the Income Tax Assessment Act 1936 (Cth) and s 350-10(1) of Sch 1 of the Taxation Administration Act 1953 (Cth) – defence struck out
Legislation Cited:	Income Tax Assessment Act 1936 (Cth), ss 175, 177, 177(1) Judiciary Act 1903 (Cth), s 39B Taxation Administration Act 1953 (Cth) sch 1, s 350-10(1) Public Service Act 1999 (Cth), ss 13, 13(1), 13(8), 13(11)
Cases Cited:	Denlay v Federal Commissioner of Taxation [2011] FCAFC 63; (2011) 193 FCR 412

	Deputy Commissioner of Taxation v Leaver [2015] FCA 1454 Deputy Commissioner of Taxation v Loftus [2002] VSC 68; (2002) 49 ATR 131 Federal Commissioner of Taxation v Bosanac [2016] FCA 448 Federal Commissioner of Taxation v Donoghue [2015] FCAFC 183; (2015) 237 FCR 316 Federal Commissioner of Taxation v Futuris Corporation Ltd [2008] HCA 32; (2008) 237 CLR 146 General Steel Industries Inc v Commissioner for Railways [1964] HCA 69; (1964) 112 CLR 125 Gett v Tabet [2009] NSWCA 76; (2009) 254 ALR 504 Hamilton Island Enterprises Pty Ltd v Federal Commissioner of Taxation (1982) 1 NSWLR 113 Re York Street Mezzanine Pty Ltd (in liq) [2007] FCA 922; (2007) 162 FCR 358 Ren v Hong Jiang [2014] NSWCA 388; (2014) 104 ACSR 149
Category:	Procedural and other rulings
Parties:	Deputy Commissioner of Taxation (Plaintiff) Golden Investments Pty Limited (Defendant) Melbourne Insurance Co Pty Ltd (Defendant) Anglo American Investments Pty Ltd (Defendant) Morning Star Fiduciaries Pty Limited (Defendant) Education Corporation of Australia Pty Limited (Defendant) Malackey Holdings Pty Limited trading as Malackey Trust (Defendant)
Representation:	Counsel: J McGovern SC (Plaintiff) J Jaques (Plaintiff) N Hutley SC (Defendants) J Hyde-Page (Defendants) T Bagley (Defendants) Solicitors: Australian Government Solicitor (Plaintiff) Mark J Ord Lawyer & Consultant (Defendants)
File Number(s):	15/149240; 15/149448; 15/166051; 15/241288; 15/247161; 15/247564
Publication Restriction:	

JUDGMENT

Introduction

1 This is an application to strike out amended defences filed in a number of separate proceedings by related but different defendants. A number of ancillary orders are also sought in the notice of motion. The orders pressed as at the end of the hearing before me are as follows:

> 2. That the Defence be struck out.
>
> 3. Judgment be entered for the Plaintiff.
>
> 4. Defendant to pay the Plaintiff's costs of the proceedings, such costs to be paid on an indemnity basis from 11 August 2015.

2 Before me, all of the defendants were represented by one member of the inner Bar. It was agreed between him and senior counsel for the Deputy Commissioner of Taxation (the plaintiff) that, due to the identity of questions of fact and law relevant to the determination of the motions in all proceedings, one matter would be the subject of detailed submissions leading to my judgment, but my resulting orders would apply to all matters. The particular defendant upon which focus has been placed is Anglo American Investments Pty Ltd.

Background

3 The background leading up to the filing of the motion by the plaintiff on 1 December 2015 may be shortly stated.

4 Officers of the plaintiff conducted an investigation with regard to the tax affairs of the defendant, and sought and obtained information from the authorities in the Cayman Islands. The position of the defendant is that those acts of employees of the plaintiff were unlawful, done in bad faith, and constituted not only "*conscious maladministration*" (to use the oft-cited phrase in *Federal Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; (2008) 237 CLR 146 (*Futuris*)), but also a contempt of court.

5 In due course, the plaintiff issued notices of assessment to the defendant. Founded upon those assessments, the plaintiff has commenced "*debt recovery*" proceedings in this Court by way of a statement of claim filed on 19 May 2015.

6 In those proceedings, the plaintiff relies upon s 175 of the *Income Tax Assessment Act 1936* (Cth) (the Act), which is as follows:

> 175 Validity of assessment
>
> The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

7 The plaintiff further relies on s 350-10(1) in Sch 1 of the *Taxation Administration Act 1953* (Cth), which deals with the same subject matter as the previous s 177 of the Act. Although that provision is in an unusual table format that covers a large number of situations, the relevant portions of the provision can be extracted and synthesised as follows: "*The production of a notice of assessment under a taxation law… is conclusive evidence that the assessment… was properly made… and except in proceedings under Part IVC of this Act on a review or appeal relating to the assessment… the amounts and particulars of the assessment… are correct*".

8 In its amended defence filed on 1 March 2016, the defendant resists the claim of the plaintiff. That resistance is based, in short, upon a denial that the assessments in question are valid because of the actions of officers of the plaintiff. That submission in turn relies on asserted conscious maladministration on the part of the officers of the plaintiff in the course of the process of assessment, and a failure of the officers of the plaintiff to act in accordance with s 13 of the *Public Service Act 1999* (Cth). That section is as follows:

> 13 The APS Code of Conduct
>
> **(1) An APS employee must behave honestly and with integrity in connection with APS employment.**

(2) An APS employee must act with care and diligence in connection with APS employment.

(3) An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.

(4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:
(a) any Act (including this Act), or any instrument made under an Act; or
(b) any law of a State or Territory, including any instrument made under such a law.

(5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.

(6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.

(7) An APS employee must:
(a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and
(b) disclose details of any material personal interest of the employee in connection with the employee's APS employment.

(8) An APS employee must use Commonwealth resources in a proper manner and for a proper purpose.

(9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.

(10) An APS employee must not improperly use inside information or the employee's duties, status, power or authority:
(a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or
(b) to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.

(11) An APS employee must at all times behave in a way that upholds:
(a) the APS Values and APS Employment Principles; and
(b) the integrity and good reputation of the employee's Agency and the APS.

(12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.

(13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

[emphasis added]

9 In short, the essential question I am called upon to answer by the motion is whether the plaintiff has persuaded me that the bases for resistance to the claim of the plaintiff disclosed in the defence are simply doomed to fail, and that the pleading is therefore liable to be struck out: see *General Steel Industries Inc v Commissioner for Railways* [1964] HCA 69; (1964) 112 CLR 125; and *Ren v Hong Jiang* [2014] NSWCA 388; (2014) 104 ACSR 149.

The amended defence

10 In order to answer that question, it is convenient to set out in a little more detail the contents of the amended defence.

11 The amended defence pleads that the assessments referred to are not "*assessments*" to which s 175 of the Act applies. That, as I have said, is alleged to be because of conscious maladministration on the part of the officers of the plaintiff, and a failure to act in accordance with s 13 of the *Public Service Act.*

12 The following matters underlying those propositions are asserted in the defence.

13 First, the plaintiff based its assessments on the hypothesis that the principal of the defendant, Mr Vanda Russell Gould, was also the beneficial owner and controller of JA Investments Limited, a company registered in the Cayman Islands (JA Investments). Further, the plaintiff obtained confidential documents that were the property of JA Investments and a separate company, and those documents formed the basis of the assessments in question.

14 Secondly, the plaintiff transmitted a written request to the Cayman Islands Tax Information Authority (CITIA) on 23 February 2011 stating, among other things, that the plaintiff was conducting a "*real time review*" of the tax liability of Mr Gould (the first written request).

15 Thirdly, a second written request was transmitted to the CITIA on 27 May 2011 stating, among other things, that the plaintiff was conducting a real time review of Mr Gould. The CITIA provided documents in response to this written request on 20 September 2011.

16 The following contentions about those alleged events are pleaded in the amended defence.

17 First, the first and second written requests were transmitted for an invalid purpose.

18 Secondly, the two officers that prepared the two written requests were actually aware that the plaintiff was not conducting a real time review, and that any information received would not be used for such a purpose. The defendant further pleads that the intention of one of the officers in sending false information in the first written request was to ensure compliance with it by the CITIA.

19 Thirdly, the transmission of each written request was a breach of ss 13(1), 13(8) and 13(11) of the *Public Service Act*; was a criminal offence under the law of the Cayman Islands; and was effected for an invalid purpose under the "*Agreement between the Government of Australia and the Government of the Cayman Islands on the Exchange of Information*" (the Agreement).

20 Fourthly, the defence pleads that the power of the plaintiff to transmit information requests pursuant to the Agreement did not extend to the making of the first or second written request. That is said to be because the requests were actuated by an impermissible substantial purpose; because they would interfere with third party property rights; because they included a deliberate misstatement of fact intended to procure compliance; because they constituted a criminal act under the law of the Cayman Islands; and because they breached ss 13(1), 13(8) and 13(11) of the *Public Service Act*. Additionally, the second written request is pleaded to be without authority because it constituted a contempt of court.

21 Fifthly, the defence pleads that the two written requests were made in bad faith, as the officers of the plaintiff were aware that each request was not authorised by law, or were at least recklessly indifferent to that lack of authorisation. It is further pleaded that the actions and states of mind of the officers of the plaintiff must be imputed to the plaintiff.

22 Sixthly, in relation to the second written request, the defence pleads that a real time review was not being conducted of Mr Gould. It further pleads that the directors and officers of JA Investments (in the Cayman Islands), and the directors in separate Australian proceedings, were not aware that the plaintiff had obtained the Cayman Island documents pursuant to the second written request until they were served upon them as proposed evidence in Australian court proceedings on 20 June 2012. The defence pleads that it was a contempt of court to use compulsory information-gathering powers for the sole or dominant purpose of obtaining evidence for use in Australian court proceedings that were already underway.

23 Seventhly, it is asserted that, as a result of proceedings in the Cayman Islands, CITIA made a formal request of the plaintiff on 14 September 2013 that the documents obtained by the plaintiff be returned and any copies thereof destroyed. It is noted that the plaintiff indicated that it would not comply with that request on 16 September 2013. On 19 September 2013, the plaintiff published those documents in Australian court proceedings and opposed a suppression order in relation to them. The defence pleads that that non-compliance with the request from CITIA was a breach of s 13(11) of the *Public Service Act.*

24 Eighthly, it is pleaded that the use of the Cayman Islands documents constitutes conscious maladministration.

25 Ninthly and finally, the defence pleads that the assessments relied upon by the plaintiff were not made in good faith, and were a deliberate failure to comply with the Act. As a consequence of that, it is alleged that the

assessments in question made by the plaintiff are invalid and of no force and effect.

26 In short, it can be seen that the defence asserts that officers of the plaintiff knowingly and intentionally obtained material about the defendant in ways that were unlawful. Although expressed in various ways, the result of that, it is asserted, is that the proceedings cannot be conclusively determined against the defendant based upon the two statutory provisions to which I have referred.

Submissions of the plaintiff

27 Senior counsel mounted a number of separate attacks on the defence.

28 His central criticism was that, pursuant to s 175 of the Act and s 350-10(1) in Sch 1 of the *Taxation Administration Act* (the successor to s 177 of the Act), a validly issued notice of assessment cannot be the subject of dispute before this Court. It was said that the Act provides a forum and mechanism whereby assessments can readily be disputed. But this Court is not the appropriate place for such a dispute. Nor, it was said, is a defence to a statement of claim alleging a debt based upon a notice of assessment an available mechanism for disputing an assessment.

29 It was said that, since *Futuris*, it has been clear that, due to the operation of s 175 of the Act and the successor to s 177(1) of the Act, an assessment can only be resisted on very limited grounds. The first is that the assessment is tentative or provisional. The second is that there has been conscious maladministration in the assessment process.

30 It was also submitted that the jurisprudence that has developed since *Futuris* shows that courts, including one of the two intermediate courts of appeal within the federal court structure, have interpreted the concept of conscious maladministration very strictly. In particular, that allegation cannot be made out if founded upon things done or not done merely recklessly, negligently, or

by oversight; such concepts cannot be equated with *conscious* maladministration.

31 Furthermore, senior counsel submitted that the authorities show that any conscious maladministration must attach to the process of assessment *itself*, not to any preceding process of obtaining material, and upon which any assessment is subsequently based.

32 With regard to the question of alleged maladministration, he submitted that, even if it be the case that the allegedly unlawful obtaining of material from the Cayman Islands can constitute conscious maladministration, thereby permitting the defendant to escape the strictures of the successor of s 177(1) of the Act, he submitted that it is not open to the defendant to litigate that issue in these debt recovery proceedings in the Supreme Court. Again, his submission was that the defendant must undertake that resistance in the Federal Court of Australia.

33 Finally, he made the pleading point that the defence filed does not adequately particularise the conduct said to constitute conscious maladministration. In that regard, he relied upon the recent decision in *Deputy Commissioner of Taxation v Leaver* [2015] FCA 1454, in which Pagone J struck out a pleading filed by parties related to the defendant in similar circumstances, on the basis of lack of particularisation of an allegation of conscious maladministration.

34 In short, senior counsel for the plaintiff accepted that I should not strike out the defence and order judgment forthwith unless I were affirmatively satisfied that the defence was doomed to fail. But on a number of bases - chief among them the proposition that, even accepting all of the facts alleged in the defence, they would not constitute conscious maladministration as that concept has come to be understood in the past eight years - he submitted that, due to the effect of the successor of s 177(1), any resistance to the proceedings in this Court must indeed fail.

Submissions of the defendant

35 Senior counsel for the defendant made the following submission in resistance to the motion.

36 First, and turning to the central dispute between the parties, senior counsel submitted that what is alleged by way of the defence is deliberately and knowingly unlawful conduct by officers of the plaintiff. He submitted that such conduct could certainly fall within the general concept of conscious maladministration.

37 Separately, he noted that many of the cases upon which the plaintiff relied are ones in which the asserted wrongdoing was not committed by officers of the plaintiff, but rather by persons external to the organisation.

38 For example, in *Denlay v Federal Commissioner of Taxation* [2011] FCAFC 63; (2011) 193 FCR 412 (*Denlay)* information was provided to the Commissioner by a disgruntled employee of an overseas bank connected to the defendants. In *Federal Commissioner of Taxation v Donoghue* [2015] FCAFC 183; (2015) 237 FCR 316, information was provided by a disgruntled person associated with the law firm of the defendant. In short, senior counsel submitted that there is no authority that has directly dealt with the position that arises here; namely, an allegation not that material was obtained by officers of the plaintiff that had been unlawfully obtained by others; but, rather, that the unlawfulness attached to the actions of the officers of the plaintiff themselves.

39 As well as that, senior counsel submitted that, in *Futuris*, the High Court spoke of conscious maladministration "*in the process of assessment*". He submitted that, contrary to the submission of the plaintiff, that phrase cannot mean that the focus must be upon the ultimate step of arithmetical computation of sums said to be owed to the plaintiff. Rather, he submitted that no bright line could or should be drawn between the acts of various officers of the plaintiff leading up to an assessment. That approach means, he submitted, that the allegedly unlawful acts of officers of the plaintiff

undertaken to obtain material that was intended to be, and that was, relied upon to make the assessment, cannot be somehow insulated from a defence founded upon conscious maladministration.

40 Senior counsel implicitly conceded that there are decisions of the Federal Court of Australia, including the Full Federal Court, that post-date the decision of the High Court in *Futuris*, and that are adverse to his contentions. But he submitted that the salient parts of those judgments are *obiter dicta*, and therefore not strictly binding on me, or any judge of this Court who may in due course hear the substantive matter. He also respectfully submitted that it is hard to reconcile some of those judgments with the plain words of the judgment of the plurality in *Futuris*. And he submitted that, if there be a disjunction between a decision of the High Court and subsequent elaborations upon it, a strike out application – in which the contentions of the moving party must be unassailable – is hardly the place for resolution of any such disjunction.

41 Separately, as for the proposition that his client is prohibited from pleading conscious maladministration in this Court and in these proceedings, he submitted that there was no binding or persuasive authority to that effect: see *Deputy Commissioner of Taxation v Loftus* [2002] VSC 68; (2002) 49 ATR 131. And he submitted that, the plaintiff having decided to commence debt recovery proceedings in a State court, there should be no reason why his client is prohibited from defending those proceedings in such manner as it sees fit in the same court.

42 If I were against him on that point, as I have said, he indicated that cross-claims could readily be filed explicitly impugning the assessment pursuant to s 39B of the *Judiciary Act*.

43 Thirdly, as for the pleading point, senior counsel for the defendant submitted that the amended defence squarely pleads conscious maladministration, and sufficiently pleads the facts said to found that assertion. He submitted that the judgment in *Deputy Commissioner of Taxation v Leaver*, delivered with regard

to a different pleading, founded upon the different and more onerous Rules of the Federal Court, and informed by different submissions by different parties, is helpful merely as one of many examples of such an application. In other words, his submission was that the decision in that case has no binding force upon me.

44 In short, it was said on behalf of the defendant that I could not be satisfied that, taken at its highest, the defence is doomed to fail. Accordingly, it was submitted, it would be precipitous for me to strike out the defence, let alone to order judgment immediately thereafter.

Determination

45 As a starting point, I accept the joint submission of the parties that I would only strike out a defence without providing an opportunity to re-plead if I were affirmatively satisfied that the defence, even if subsequently impeccably pleaded, would nevertheless be doomed to failure.

46 It is convenient to deal with subsidiary disputes first. Because neither of them in my opinion is determinative of the matter, I shall be brief.

47 As for the assertion of the plaintiff that conscious maladministration is not sufficiently pleaded in the defence, I do not accept that submission. To my mind, the amended defence adequately particularises the alleged misconduct upon which the defendant relies. True it is that, in similar proceedings, Pagone J came to a different view. But I accept the submission of senior counsel for the defendant that I should respectfully regard that judgment as merely one of thousands that has been delivered throughout Australia when the particularity of matters pleaded in a defence has been impugned. Whilst it was helpful for it to be provided to me, I do not accept that the evaluative judgment of his Honour in *Deputy Commissioner of Taxation v Leaver* has any binding effect on the matter before me.

48 As for the proposition of the plaintiff that the Supreme Court is an inappropriate forum for an attack upon the validity of a notice of assessment, I accept that that could well be the case. But on the material placed before me, I am not so definitively satisfied of that proposition that I would be comfortable in striking the defence out on that ground.

49 Turning to the central dispute between the parties, the starting point is the salient portion of *Futuris*. There it was said by the plurality at [25]:

> But what are the limits beyond which s 175 does not reach? The section operates only where there has been what answers the statutory description of an "assessment". Reference is made later in these reasons to so-called tentative or provisional assessments which for that reason do not answer the statutory description in s 175 and which may attract a remedy for jurisdictional error. Further, conscious maladministration of the assessment process may be said also not to produce an "assessment" to which s 175 applies. Whether this be so is an important issue for the present appeal.

50 To the extent that the High Court spoke of a *process* of assessment, that suggests *prima facie* that one's focus should not merely be upon the final arithmetical exercise that leads to the computation of the assessment. Rather, it suggests that one can look to the acts of officers of the plaintiff in the process *leading up to* the issuing of the notice of assessment.

51 In short, taken on its own, the phrase used by the High Court in the seminal judgment supports the submission of the defendant that its allegation of conscious maladministration can arguably extend to *the process* of investigation that preceded the provision of the notice of assessment, and informed its preparation.

52 But the simple phrase adopted in *Futuris* has itself been the subject of quite a deal of subsequent judicial interpretation. To my mind, the most important analysis is contained in the decision of *Denlay*, a considered decision of the Full Court of the Federal Court.

53 Very briefly stated, the facts of that matter were as follows.

54 The Commissioner of Taxation issued amended assessments to several taxpayers, including Mr and Mrs Denlay, as a result of a belief that there had been fraud or evasion in relation to the original assessments.

55 The new assessments were based on information obtained from the Liechtenstein Group Trust (LGT) by a Mr Kieber, who was working for a bank associated with the LGT. That information was obtained by Mr Kieber without the consent of the LGT, and forwarded to the Commissioner. The information suggested that Mr and Mrs Denlay had beneficial interests overseas that were not declared on their tax returns. Officers of the Commissioner instituted an investigation into possible Australian tax evasion based on that information. As a result of his conduct, Mr Kieber was subsequently convicted of criminal offences in the Liechtenstein Criminal Court.

56 The taxpayers objected to the amended assessments, and argued that the Commissioner should have had a reasonable suspicion that the information was the proceeds of crime and had been unlawfully obtained. They instituted appeals in the Federal Court of Australia and argued that there had been conscious maladministration in the process of assessment.

57 In discussing the concept of conscious maladministration, the Full Court of the Federal Court unanimously said at [75]-[80]:

> [75] In *Futuris*, Gummow, Hayne, Heydon and Crennan JJ said at [60]:
>
> > Allegations that statutory powers have been exercised corruptly or with deliberate disregard to the scope of those powers are not lightly to be made or upheld. Remarks by Hill, Dowsett and Hely JJ in *Kordan Pty Ltd v Federal Commissioner of Taxation* are in point. Their Honours said:
> >
> > > The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith in assessing a taxpayer to income tax is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that applications directed at setting aside assessments on the basis of absence of good faith have generally been unsuccessful. Indeed one would hope that this was and would continue to be the case. As Hill J said in *San Remo Macaroni Co Pty Ltd v Federal Commissioner of Taxation* it would be a rare case where a taxpayer will succeed in showing that an

> assessment has in the relevant sense been made in bad faith and should for that reason be set aside.
>
> [Footnotes omitted].

[76] Those observations highlight that their Honours were concerned, in their reference to conscious maladministration, with bad faith in the exercise of the decision-making power under challenge and the need for proof of an allegation of bad faith against the Commissioner or his officers. Their Honours were concerned with actual bad faith, not with some form of "constructive" bad faith established by unwitting involvement in an offence.

[77] **The passages from the decision of the majority in *Futuris* set out above are concerned with the state of mind of the officers of the Commissioner involved in the making of the assessment.** They emphasise the importance of fidelity on the part of those officers to the purposes of the legislation. If Mr Kieber had merely told the Commissioner's officers of the contents of the documents he had taken from LGT, or had brought the documents into Australia himself and handed them over to the Commissioner's officers here, the taxpayers would have no argument. It is difficult to discern a rational basis for distinguishing these hypothetical examples from the present case in terms of the vice of "conscious maladministration" which is apt to vitiate an assessment.

[78] **The observations of the majority in *Futuris* do not support the proposition that any breach of the law by officers of the Commissioner in the course of processes anterior to, or even in the course of, making an assessment, suffices to establish conscious maladministration which is apt to vitiate the assessment.** Conscious maladministration, as explained in *Futuris*, involves actual bad faith on the part of the Commissioner or his officers. The findings of the primary judge to which we have referred at paragraphs [49] and [50] of these reasons negative bad faith on the part of the Commissioner's officers.

Section 166 of the ITAA 1936

[79] Conscious maladministration as explained in *Futuris* relates to the integrity of the assessment. Even if the circumstances in which the information in question became available to the Commissioner's officers involved unlawful conduct on their part, that would not necessarily deny the integrity of the assessment. What matters for that purpose is the accuracy of the information and the competence and honesty of those officers involved in making the assessment.

[80] The views of the majority in *Futuris* do not bear upon the proper interpretation of s 166 of the ITAA 1936. **Their views are concerned with making the point that an assessment which is the result of bad faith towards a taxpayer is not an assessment worthy of that description in the ITAA 1936.** It may be accepted that such a purported assessment would be contrary to s 13(4) of the *Public Service Act*. **But the reasons of the majority of the High Court in *Futuris* do not support the notion that an assessment, made in good faith on the basis of information believed to be accurate, may be vitiated by reason of a breach of s 13(4) of the Public Service Act in the course of obtaining that information.**

[emphasis added]

58 *Denlay* has been the subject of subsequent approval and application by the same court: see *Federal Commissioner of Taxation v Donoghue* at [42]; and *Federal Commissioner of Taxation v Bosanac* [2016] FCA 448 at [26].

59 I consider that those portions that I have extracted from the judgment in *Denlay* should be taken at face value; namely, as saying that any unlawfulness in the process of information gathering by officers of the plaintiff that precedes the formal making of an assessment will not, of itself, constitute conscious maladministration: at [78]. Their Honours explicitly adverted to the possibility that there may be unlawfulness within the information gathering process: at [78]; but nevertheless took the view that any such alleged illegality cannot be relied upon in a claim of conscious maladministration. That is because the relevant consideration is whether there was actual bad faith on the part of the officers of the plaintiff *in the making of the assessment*, not in the investigation of material leading up to it: at [76]-[77].

60 In short, the analysis of *Futuris* in *Denlay* is, to my mind, fatal to the defence. And I respectfully reject the submissions made for the plaintiff that what was said in *Denlay* can be distinguished, or even disregarded, by me. That is so for the following reasons.

61 First, it is true that the decision in *Denlay* is not strictly binding on me, in the sense of an appeal being available from any decision of mine to the Full Court of the Federal Court: see *Hamilton Island Enterprises Pty Ltd v Federal Commissioner of Taxation* (1982) 1 NSWLR 113 at 119-20, and *Re York Street Mezzanine Pty Ltd (in liq)* [2007] FCA 922; (2007) 162 FCR 358 at [22]-[23]. Nevertheless, it is a considered, unanimous decision of the particular intermediate appellate court within Australia that is very often entrusted with the task of statutory interpretation of Commonwealth Acts, including of course the Act under consideration. Accordingly, the rules of precedent dictate that I should follow that decision unless it is "*plainly wrong*", meaning that there must in my opinion be either a failure to collect and attend to relevant legal materials or egregiously erroneous reasoning: see *Gett v Tabet* [2009] NSWCA 76; (2009) 254 ALR 504 at [274]-[295].

62 Secondly, there is force in the submission of senior counsel for the defendant that what was said in those paragraphs was *obiter dicta*, in that it does not constitute the *ratio decidendi* of that decision. That is so because, on the facts of that appeal, the primary judge had made a finding that there was no conscious maladministration on the part of any officer of the plaintiff: see [49]-[50]. But, even accepting that what is said in the extracted paragraphs is not essential in that sense to the resolution of that appeal, their contents are surely a considered analysis of the central concept of conscious maladministration in the process of assessment that has been provided in a unanimous judgment of the Full Federal Court. I consider that, in all the circumstances, I must surely regard that analysis as being, if not strictly binding, then very close to it.

63 Thirdly, I do not accept that there is any inconsistency or disjunction between the judgment of the plurality in *Futuris* and the paragraphs that I have extracted from *Denlay*. But even if that were the case, I do not consider it my place, sitting as a single judge in the Common Law Division of the Supreme Court of New South Wales, to rely upon my understanding of *Futuris* and to disregard what I understood to have been said in *Denlay*. Resolution of any such putative disjunction is a function reposed in the New South Wales Court of Appeal (and of course the High Court itself). I do not regard it as being reposed in me.

64 In short, I consider that I must regard the salient paragraphs of the judgment in *Denlay* as being, in a practical sense, binding upon me in the resolution of this dispute.

65 Applying what was said in the extract that I have provided from *Denlay* to the defence in this matter, taken at its highest, and assuming (for the sake of the exercise in a strike out application) that all facts alleged in the defence are proven at trial, it can be seen that the attempt to allege conscious maladministration by way of an unlawful investigation by officers of the plaintiff preceding the mathematical process of assessment is doomed to failure. That is because it falls outside the parameters of what the Full Court of the Federal

Court has said constitutes "*conscious maladministration in the process of assessment*".

66 It follows from what I have said above that I consider that an alleged breach of the commendable principles of good public administration enunciated in s 13 of the *Public Service Act* does not provide a defence to the statement of claim that relies upon s 175 and the latest iteration of former s 177.

67 Finally, one may seriously doubt that, even assuming that officers of the plaintiff acted unlawfully, that conduct constituted a contempt of court. But even accepting for the sake of argument that that is the case, that would result in sanction against those persons; to my mind, it does not provide a defence to the statement of claim, founded as it is on the combined effect on the two statutory provisions under consideration.

68 In short, I am satisfied that the defence is doomed to failure as a matter of law, and that the defence should therefore be struck out.

69 As for permitting time to re-plead, I see no utility in that exercise. I am surely entitled to infer that, by way of the recent comprehensive amended defence, the defendant has put its case at its highest, and that the facts cannot be relevantly reconstituted.

70 It follows that ancillary order 3 sought by the plaintiff should also be made by me.

Conclusion

71 In summary then, I am not satisfied that the amended defence lacks appropriate particularity.

72 Nor am I satisfied that the defendant is incapable of litigating its contentions in this Court, as opposed to some other forum.

73 I am satisfied however, that binding authority of the Full Court of the Federal Court of Australia demonstrates that the contention of the defendant, taken at its highest, that there was conscious maladministration in the process of assessment by officers of the plaintiff (by way of unlawful investigations leading up to the issuing of the notice of assessment) thereby permitting the defendant to dispute the contents of that notice contrary to s 175 and the successor of s 177(1) is doomed to failure.

74 Finally, I am also satisfied that neither an alleged breach of the *Public Service Act* nor an alleged contempt of court can avail the defendant in resisting the combined force of the two statutory provisions under consideration.

Costs

75 No submission was placed before me that costs should not follow the resolution of the motion.

76 On the other hand, nor did the plaintiff make any submissions, whether written or oral, in support of the latter part of proposed order 4 in the notice of motion filed 1 December 2015 that "*such costs to be paid on an indemnity basis from 11 August 2015*".

77 In those circumstances, I think that I should formally reserve costs today. That will be on the basis that, unless my Associate is notified of a contention to the contrary by either party within one week from today, I shall make an order in Chambers that the defendant must pay the costs of the plaintiff of these proceedings on the ordinary basis.

78 If there is a notification by either party to the contrary, a brief hearing on a mutually convenient date will need to be conducted, to be assisted by concise written submissions of no more than four pages from each party, to be filed 48 hours before the time and date of such hearing. But for the time being, I shall simply order that costs are reserved, on the above basis.

Orders

79 I make the following orders:

(1) The defence is struck out.

(2) Judgment for the plaintiff.

(3) Costs reserved.

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