SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of Taxation v Croft & Anor* [2016] QSC 190
PARTIES:	COMMISSIONER OF TAXATION (plaintiff) v STEVEN WILLIAM CROFT (first defendant) and ANNE MAREE CROFT (second defendant)
FILE NO:	No 1203 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	26 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2016
JUDGE:	Jackson J
ORDERS:	**The judgment of the court is that:** **1. The defendants pay the plaintiff the sum of $1,262,444.93.** **2. The defendants' counterclaim is dismissed.** **3. The parties may provide written submissions as to costs of no more than two pages in length within 14 days.**
CATCHWORDS:	TAXES AND DUTIES – ADMINISTRATION OF FEDERAL TAX LEGISLATION – COLLECTION AND RECOVERY OF TAX – GENERALLY – where a company agreed to repay a tax debt to the plaintiff by a series of instalment payments – where the defendants agreed to guarantee payment of the debt, and to pay the outstanding balance on demand if the company defaulted on any instalment payment – whether s 3A of the *Taxation Administration Act 1953* (Cth) authorised the plaintiff to enter into the contract of guarantee under – whether such a power was impliedly excluded by the plaintiff's other statutory powers to issue a garnishee notice to a third party debtor of the taxpayer or to make an arrangement with a taxpayer to permit that taxpayer to pay by instalments under an arrangement

CONTRACTS – PARTICULAR PARTIES – PRINCIPAL AND AGENT – RATIFICATION – where the instruments delegating power to the employees who entered the relevant contracts on behalf of the plaintiff expressly excluded the plaintiff's power under s 3A – whether the employees were authorised to contract on the plaintiff's behalf – whether the plaintiff ratified the relevant contracts by being substituted as a plaintiff to the proceeding

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where the plaintiff had agreed to refrain from taking further steps to recover the debt on the basis set out in the agreement – where in the event of default the plaintiff was entitled to immediate payment of the outstanding balance and to enforce all rights against the company and defendants – where the company defaulted by failing to pay an instalment – where the plaintiff issued a garnishee notice to a third party debtor of the company and received payment under the notice – whether it was an implied term of the contract that the plaintiff would not hinder, prevent, impede or defeat the defendants' performance of their obligations, including that the plaintiff would not do anything to interfere with the company's ability to earn commission from the third party debtor – whether any such implied term had been breached by the plaintiff exercising the statutory power to issue the garnishee notice

Corporations Act 2001 (Cth), s 500
Income Tax Assessment Act 1997 (Cth), s 995-1
Taxation Administration Act 1953 (Cth), s 3A, s 3AA, s 8, Sch 1 (s 250-25, s 255-5, s 255-10, s 255-15, s 260-5)

Balog v Independent Commission Against Corruption (1990) 169 CLR 625; [1990] HCA 28, cited
Bilborough v Deputy Commissioner of Taxation (2007) 162 FCR 160; [2007] FCA 773, considered
Brogden v Metropolitan Railway Co (1877) 2 App Cas 666, cited
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25, cited
Celthene Pty Ltd v WKJ Hauliers Pty Ltd [1981] 1 NSWLR 606, applied
Chamberlain v Deputy Commissioner of Taxation (1987-88) 164 CLR 502; [1988] HCA 21, cited
Collector of Customs v Palmer Steel Trading (Aust) Pty Ltd [2003] QSC 434, cited
Commissioner of Stamp Duties (Qld) v Agenti Architects Pty Ltd (2003) 53 ATR 242; [2003] QCA 265, cited
Commissioner of Taxation (Cth) v Sara Lee Household & Bodycare (Australia) Pty Ltd (2000) 201 CLR 520; [2000] HCA 35, applied

Commissioner of Taxation v Ryan (2000) 201 CLR 109; [2000] HCA 4, cited
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169; [2014] HCA 32, applied
Day Ford Pty Ltd v Sciacca [1990] 2 Qd R 209, cited
Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd (2004) 9 VR 549; [2004] VSC 157, cited
Deputy Commissioner of Taxation v Haritos (2014) 287 FLR 136; [2014] VSC 379, cited
Federal Commissioner of Taxation v ANZ Savings Bank Ltd (1994) 181 CLR 466; [1994] HCA 58, cited
Federal Commissioner of Taxation v Wade (1951) 84 CLR 105; [1951] HCA 66, cited
Maritime Electric Co Ltd v General Dairies Ltd [1937] AC 610, considered
McEvoy v The Body Corporate for No 9 Port Douglas Road [2013] QCA 168, cited
Oswal v Commissioner of Taxation [2015] FCA 1439, considered
Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144; [2011] HCA 32, cited
Precision Pools Pty Ltd v Commissioner of Taxation (1992) 37 FCR 554, considered
Roma Electric Light & Power Co Ltd v Hair [1955] St R Qd 311, cited
Smith v Bone (2015) 104 ACSR 528; [2015] FCA 319, cited
Sultana Investments Pty Ltd v Cellcom Pty Ltd [2009] 1 Qd R 589; [2008] QCA 357, cited
TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 251 CLR 533; [2013] HCA 5, cited
Tipperary Developments Pty Ltd v Western Australia (2009) 38 WAR 488; [2009] WASCA 126, cited

COUNSEL: NM Cooke for the plaintiff
L Harrison QC for the defendants

SOLICITORS: McInnes Wilson Lawyers for the plaintiff
Deacon & Milani Solicitors for the defendants

[1] **Jackson J**: The claim is for the sum of $1,262,444.93 as either a debt, liquidated demand or liquidated sum that is due and payable by the defendants pursuant to a Deed of Guarantee and Indemnity made on 13 July 2012 as varied, together with interest under s 58 of the *Civil Proceedings Act* 2011 (Qld).

[2] The defence is that the guarantee is not binding with the result that the debt claimed is not owing. Alternatively, the defendants set-off or counterclaim damages for breach of an implied term of the contract of guarantee comprised in the deed.

[3] On the date of the hearing of cross applications for summary judgment I ordered that the proceeding be tried instanter, with the exception of a separated issue as to any damages or set-off.

[4] The guarantee arises out of the tax-related liabilities of Croft Steel Pty Ltd ("the company"). As at 13 July 2012, it had a taxation liability for goods and services tax and a general interest charge on a running balance account deficit debt in the sum of $2,707,060.85.

[5] On 13 July 2012, a Deed of Agreement was entered into by the plaintiff, the company and the defendants. The deed recited the tax-related liabilities as a debt that the company agreed to pay by a series of instalment payments, that the defendants had agreed to jointly and severally guarantee payment of the debt and that the plaintiff had agreed to refrain from taking further steps to recover the debt on the basis set out in the agreement.

[6] The operative provisions of the Deed of Agreement included cl 2.1, by which the company acknowledged the debt. By cl 3.1 the company and the defendants warranted that they had made full and true disclosure of the circumstances and that the information provided by them was true, complete and correct. Clause 4.1 provided that the company "agrees to pay to the [plaintiff] the tax debt by instalments in the amounts and on or before the date set out in Schedule 2".

[7] Schedule 2 to the Deed of Agreement provided for instalments of $25,000 per month for five months, followed by instalments of $238,000 per month for the next 12 months and a final monthly payment of any balance remaining, plus any accrued general interest charge.

[8] Also on 13 July 2012, the plaintiff and the defendants entered into the Deed of Guarantee and Indemnity on which the claim in this proceeding is made. It recited the Deed of Agreement and the provision that the company's obligation to pay the debt was to be secured by a guarantee to be given by the defendants to the plaintiff.

[9] The operative provisions defined the "guaranteed money" as all moneys owed under the Deed of Agreement. Clause 2.1.1 provided that "in consideration of the [plaintiff] agreeing to enter into the Deed of Agreement the [defendants guarantee] to the [plaintiff] the due and punctual payment by the taxpayer to the [plaintiff] of the guaranteed money."

[10] Clause 2.1.2 of the Deed of Guarantee and Indemnity provided that if the company defaulted "in the due and punctual payment of any instalment of the guaranteed money", the defendants must pay the outstanding balance on demand to, or as directed by, the plaintiff.

[11] Following upon the Deed of Agreement and the Deed of Guarantee and Indemnity, the parties entered into five successive contracts of variation. It is unnecessary to refer to all of them.

[12] On 22 September 2014, the parties entered into a Deed of Variation Number 5 of Deed of Agreement and Deed of Guarantee and Indemnity ("Deed of Variation 5"). By cl 2.1, it provided that a prior version of Sch 2 was to be amended to provide for monthly payments of $75,000 commencing 15 August 2014 and ending on 16

December 2014 with a payment of the outstanding balance, together with accrued general interest charges.

[13] Clause 3.1 of Deed of Variation 5 provided that, save to the extent that the Deed of Agreement had been expressly varied by the provisions of cl 2, the parties ratified and affirmed the terms of the Deed of Agreement and the Deed of Guarantee and Indemnity (and the prior deeds of variation) and agreed that they should continue to be bound by the same Deeds as amended.

[14] The company defaulted in paying the instalment of $75,000 due on 15 October 2014.

[15] On 27 November 2014, the plaintiff issued a demand to the defendants for $1,374,946.03, alleged to be due and payable as at 27 November 2014. The defendants failed to pay that or any amount.

[16] On 15 January 2015, the plaintiff received an amount of $112,501.10 under a garnishee notice issued to Mitsubishi Australia Ltd ("Mitsubishi") as a third party debtor of the company.

Power to contract

[17] The defendants press two arguments as to why the guarantee in cl 2 of the Deed of Guarantee and Indemnity, as varied, was not binding. First, they submit that the plaintiff did not have power to enter into the contract of guarantee comprised in the deed. Second, they submit that, even if the plaintiff had power to enter into the contract of guarantee, it was invalidly made because the person who purported to do so on the plaintiff's behalf was not validly delegated the power to do so.

[18] The starting point is that the company's primary liability to pay the tax arose under divs 7 and 31 of *A New Tax System (Goods and Services Tax) Act* 1999 (Cth), which are included in the definition of the "BAS provisions".[1] Those primary tax debts were allocated to a Running Balance Account ("RBA").[2] The company would be liable to pay sums in respect of the RBA deficit debt pursuant to s 8AAZH of the *Taxation Administration Act* 1953 (Cth) ("TAA").

[19] Next, the plaintiff submits that the power to enter into the Deed of Agreement and the Deed of Guarantee and Indemnity was conferred by s 3A of the TAA which provides:

> "The Commissioner has the general administration of this Act."

[20] Section 3AA of the TAA is also relevant. It provides that "Schedule 1 has effect". Part 4-15 of ch 4 in Sch 1 provides for the collection and recovery of tax-related liabilities and other amounts. Section 250-25 of pt 4-15 provides that the object of the part is "to ensure that unpaid amounts of tax-related liabilities and other related amounts are collected or recovered in a timely manner."

[21] Section 255-5(1) of pt 4-15 provides that an amount of a tax-related liability that is due and payable is a debt due to the Commonwealth and is payable to the plaintiff. Section 255-5(2) provides that the plaintiff, a Second Commissioner or a Deputy

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1 As defined in the *Income Tax Assessment Act* 1997 (Cth), s 995-1(1) (definitions of "BAS provisions", "indirect tax law" and "GST law").

2 Pursuant to the *Taxation Administration Act* 1953 (Cth), s 8AAZD.

Commissioner may sue in his or her official name in a court of competent jurisdiction to recover an amount of a tax-related liability that remains unpaid after it has become due and payable.

[22] Subdivision 255-B contains sections dealing with the plaintiff's power to vary payment times. Under s 255-10(1) the plaintiff may defer the time at which an amount of a tax-related liability is or would become due and payable. If the plaintiff does so, the time is varied accordingly. Under s 255-10(2) the power is to be exercised by a written notice given to the taxpayer.

[23] When an amount is payable, s 255-15(1) provides that the plaintiff may permit a taxpayer to pay an amount of a tax-related liability by instalments under an arrangement between the taxpayer and the plaintiff (whether or not the liability has already arisen). Under s 255-15(2) such an arrangement does not vary the time at which the amount is due and payable.

[24] Section 260-5 provides for the plaintiff to collect an amount from a third party who owes or may owe money to a debtor for a tax-related liability ("garnishee process").

[25] The expression "tax-related liability" is defined in s 255-1 to mean a "pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable)."

[26] The plaintiff submits that the defendants' liability under the guarantee is a liability under a deed and contract. As mentioned, the plaintiff submits that the power to enter into the contract arose under s 3A of the TAA. In particular, the plaintiff relied on *Precision Pools Pty Ltd v Commissioner of Taxation*,[3] *Bilborough v Deputy Commissioner of Taxation*[4] and *Oswal v Commissioner of Taxation*.[5]

[27] In *Precision Pools*, Spender J said:

> "I reject the suggestion that there is no power in the Commissioner to agree to receive moneys on the basis that, if it were to be held subsequently that he had no right to be paid those moneys, the Commissioner would repay them. By s 4 of the [*Sales Tax Assessment Act (No 1)* 1930 (Cth)] the Commissioner is given the general administration of that Act. That administration has to be bona fide and for the purposes of the Act, but it is a grant of a wide power and would encompass, for instance, the power to compromise proceedings in which he was a party or to make agreements or arrangements concerning the efficient management of a dispute in which he was involved."[6]

[28] In *Bilborough*, Kiefel J said:

> "In a case such as this, the general power given by the ITAA and TAA, to recover unpaid taxes, carries with it a power to compromise the debt sued for, or which could be sued for or otherwise recovered. The

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3 (1992) 37 FCR 554.
4 (2007) 162 FCR 160.
5 [2015] FCA 1439.
6 (1992) 37 FCR 554, 566-567.

> exercise of this power might be subject to, or conditioned by, a duty of good faith, but no such issue arises in the present case ... Importantly, the power is one to enter into a consensual arrangement with a taxpayer, one which may bind the Commissioner. The exercise of it may bring an agreement into effect, but any rights or obligations arising from it owe their existence to the recognition which the general law would give. A decision, to accept a compromise, does not unilaterally confer any such right ... The decision does not derive its potential capacity to bind from statute, but from the general law."[7]

[29] In *Oswal,* Griffiths J said:

> "In any event, as Spender J emphasised, provisions such as s 3A involves [sic] 'a grant of a wide power'. Even if it were accepted that 'the efficient management of a dispute' is a relevant purpose of such a provision, that is not the only purpose. The primary purpose of the TAA is to provide for the administration of taxation legislation which is directed to the assessment of taxable income and to the tax payable for the purposes of collecting revenue (see the pertinent observations of Gleeson CJ in *Carr v Western Australia* concerning the presence in taxation legislation of the general purpose of raising revenue for government and more specific statutory purposes). In considering whether or not to give an undertaking such as that sought by the Oswals, the Commissioner is entitled to take into account a wide range of considerations which are relevant to that general statutory purpose. The Commissioner would not be confined to considering only matters which concern 'the efficient management of a dispute'."[8] (citations omitted)

[30] The defendants submit that s 3A, in context, does not operate so broadly.

[31] Their first contention is that even if s 3A might otherwise have empowered the plaintiff to enter into an agreement of compromise or an agreement with a third party in relation to a tax-related liability, any such power was extracted from s 3A by the specific provision made in s 3AA and Sch 1 in the provisions mentioned above.

[32] For example, they submit that the power conferred by s 255-15(1) of Sch 1 for the plaintiff to make an arrangement with a taxpayer to permit the taxpayer to pay an amount by instalments excludes any contractual power to arrive at the same result. That section provides:

> "**255-15 To permit payments by instalments**
>
> (1) The Commissioner may, having regard to the circumstances of your particular case, permit you to pay an amount of a tax-related liability by instalments under an arrangement between you and the Commissioner (whether or not the liability has already arisen).
>
> (2) The arrangement does not vary the time at which the amount is due and payable."

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7 (2007) 162 FCR 160, 166 [19].

8 [2015] FCA 1439, [63]; see also *Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd* (2004) 9 VR 549, 566 [429].

[33] The point raised is one of statutory construction. In effect, it is a contention that even if the general power of administration under s 3A would otherwise extend to the plaintiff making a contract for the payment of instalments, no contract can be made on that subject because that subject is exclusively covered by s 255-15(1).

[34] It is important to identify that the point raised is not one of constitutional power. The defendants do not challenge the power of the Commonwealth or the plaintiff to make contracts, in general,[9] or on the subject of administration of and recovery of a debt due to the Commonwealth.

[35] Further, s 255-15(1) does not expressly deal with the plaintiff's power to enter into a contract to compromise a claim for a tax-related liability. The defendants' contention must be that it impliedly prohibits any power that the plaintiff would otherwise have to enter into such a contract under s 3A. Even if it did, that would not answer the question whether s 3A otherwise confers a contractual power to compromise a claim for a tax-related liability with either a taxpayer or a third party.

[36] In a similar vein, the defendants rely on s 260-5 as providing for the manner in which the plaintiff might make a third party liable to pay a sum in respect of a tax-related liability. That section provides, in part:

> "**260-5 Commissioner may collect amounts from third party**
>
> *Amount recoverable under this Subdivision*
>
> (1) This Subdivision applies if any of the following amounts (the ***debt***) is payable to the Commonwealth by an entity (the ***debtor***) (whether or not the debt has become due and payable):
>
> (a) an amount of a tax-related liability;
>
> (b) a judgment debt for a tax-related liability;
>
> (c) costs for such a judgment debt;
>
> (d) an amount that a court has ordered the debtor to pay to the Commissioner following the debtor's conviction for an offence against a taxation law.
>
> *Commissioner may give notice to an entity*
>
> (2) The Commissioner may give a written notice to an entity (the ***third party***) under this section if the third party owes or may later owe money to the debtor.
>
> *Third party regarded as owing money in these circumstances*
>
> (3) The third party is taken to owe money (the ***available money***) to the debtor if the third party:

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9 For example, see *Tipperary Developments Pty Ltd v Western Australia* (2009) 38 WAR 488, 511-512 [88]-[97].

(a) is an entity by whom the money is due or accruing to the debtor; or

(b) holds the money for or on account of the debtor; or

(c) holds the money on account of some other entity for payment to the debtor; or

(d) has authority from some other entity to pay the money to the debtor.

The third party is so taken to owe the money to the debtor even if:

(e) the money is not due, or is not so held, or payable under the authority, unless a condition is fulfilled; and

(f) the condition has not been fulfilled.

How much is payable under the notice

(4) A notice under this section must:

(a) require the third party to pay to the Commissioner the lesser of, or a specified amount not exceeding the lesser of:

(i) the debt; or

(ii) the available money; or

(b) if there will be amounts of the available money from time to time – require the third party to pay to the Commissioner a specified amount, or a specified percentage, of each amount of the available money, until the debt is satisfied."

[37] However, s 260-5 is not expressly concerned with the plaintiff's power to enter into a contract with a third party under which the third party agrees to pay a taxpayer's tax-related liability. The defendants' argument is necessarily that it impliedly prohibits any power of the plaintiff to so contract.

[38] The defendants submit that their arguments are founded in the principles expressed by the maxims *expressio unius est exclusio alterius* or *expressum facit cessare tacitum*. A modern statement of the relevant principles was made in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*,[10] as follows:

> "The constructional principle thereby invoked was discussed in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*. In that case, Gavan Duffy CJ and Dixon J said:
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> 'When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised

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10 (2011) 244 CLR 144.

> and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.'

That decision and subsequent authorities were considered in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*. Gummow and Hayne JJ observed in that case:

> '*Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the 'same power', or are with respect to the same subject matter, or whether the general power encroaches upon the subject matter exhaustively governed by the special power. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power.'

This approach has been described as one of 'obvious good sense'. It reflects a principle of wide application embodied in what Pearce and Geddes call the 'difficult-to-translate maxim', *expressum facit cessare tacitum*. Like all such principles, however, it must be applied subject to the particular text, context and purpose of the statute to be construed".[11] (footnotes omitted)

[39] In the context of statutory interpretation, the High Court said in *Balog v Independent Commission Against Corruption*:

> "However, that maxim, whilst a valuable servant is apt to be a dangerous master and it is necessary to seek confirmation in the broader context of the whole Act."[12]

[40] A related concept is raised in the obverse case where positive provisions of a statute and statutory duty exclude a private law based contract or estoppel that would run against the operation of the statute.

[41] There are many cases, but the leading case is often considered to be *Maritime Electric Co Ltd v General Dairies Ltd*,[13] where it was held that an estoppel cannot be raised against the operation of a statute for the recovery of a sum due for electricity supply. The statute provided that if the supplier charged or received greater or less than the statutory amount it was guilty of unjust discrimination and subject to a penalty. The Privy Council said:

> "A similar conclusion will be reached if the question put by the learned judge is looked at from a somewhat different angle. It cannot be doubted that if the appellants, with every possible formality, had purported to

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11 (2011) 244 CLR 144, 176-177 [50].
12 (1990) 169 CLR 625, 632.
13 [1937] AC 610.

> release their right to sue for the sums remaining due according to the schedules, such a release would be null and void. A contract to do a thing which cannot be done without a violation of the law is clearly void. It may be asked with force why, if a voluntary release will not put an end to the obligation of the respondents, an inadvertent mistake by the appellants acted upon by the respondents can have the result of absolving the appellants from their duty of collecting and receiving payment in accordance with the law."[14]

[42] *Maritime Electric* was followed in *Roma Electric Light & Power Co Ltd v Hair*[15] and has been considered on many occasions since.[16] There is also a strong body of case law dealing with estoppels raised against a liability for a sum under a revenue statute.[17] Another cognate principle is the inability of a person charged with a statutory duty to collect monies to contract out of the performance of the duty. As P McMurdo J said in *Collector of Customs v Palmer Steel Trading (Aust) Pty Ltd*:

> "And insofar as the conduct of the plaintiff is concerned, the argument seeks to raise an estoppel against the performance of a public duty, which is the Collector's duty to collect what is payable according to the statute. Just as the executive cannot by a contract disable itself or its officers from performing a statutory duty or exercising a discretionary power according to law, nor can it do so by a representation and the operation of an estoppel: *Attorney-General v Quin*; *Minister for Immigration and Ethnic Affairs v Kurtovic*."[18] (footnotes and citations omitted)

[43] The particular point of interest in the present case is that there can be a difficulty about the application of private law principles of contract law or estoppel in answer to the recovery of a sum due under a statute, particularly a taxing statute. But the present case differs from those cases, because the contract relied upon by the plaintiff is not alleged to operate in a way that would contradict the liability of a person under the taxing statute for an amount provided by the statute.

[44] Among the cases already referred to, *Precision Pools* raised a similar contention to the plaintiff's claim in the present case, although it was the taxpayer in that case who sought to enforce the contractual liability of the commissioner for duties. The commissioner sought to escape liability to repay the sum due under the contract. The contract provided for repayment of the sum if the alleged duty was found not to be payable. The commissioner alleged that the contract was void as beyond his power to make. That argument was rejected on the basis that the general power of administration of the legislation empowered the commissioner to make the contract.

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14 [1937] AC 610, 620-621.

15 [1955] St R Qd 311.

16 See for example, *Sultana Investments Pty Ltd v Cellcom Pty Ltd* [2009] 1 Qd R 589, 605 [51]; *Day Ford Pty Ltd v Sciacca* [1990] 2 Qd R 209, 216.

17 *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105, 117; *Chamberlain v Deputy Commissioner of Taxation* (1987-88) 164 CLR 502, 510; *Federal Commissioner of Taxation v ANZ Savings Bank Ltd* (1994) 181 CLR 466, 479; *Commissioner of Taxation v Ryan* (2000) 201 CLR 109, 124 [22]; *Commissioner of Stamp Duties (Qld) v Agenti Architects Pty Ltd* [2003] QCA 265, [28]; see also *Smith v Bone* (2015) 104 ACSR 528, 537-538 [44].

18 [2003] QSC 434, [7].

That conclusion was reached notwithstanding that the statute contained an express provision for repayment of overpaid amounts of duty.

[45] In my view, in a similar way, s 3A is wide enough to empower the plaintiff to enter into a contract of compromise over a tax-related liability with the taxpayer and with a third party to pay the tax-related liability. This is consistent with not only the cases relied on by the plaintiff referred to previously, but also with general principles as to governmental contracting power of the Commonwealth.

[46] In my view, s 260-5 is in no way inconsistent with a power in the plaintiff to enter into a contract with a third party to pay the tax-related liability of a taxpayer. The purpose of s 260-5 is akin to attachment of a debt by way of execution, now known in Queensland as the redirection of a debt.[19] It does not depend on and is not akin to agreement or contract at all.

[47] Similarly, there is no inconsistency between the power to permit a taxpayer to pay an amount of a tax-related liability by instalments and the plaintiff's power to make such a contract. The power to permit payment by instalments is a power to do so under an "arrangement", which is defined to include agreement, including one intended to be enforceable by legal proceedings.[20] In my view, that includes an arrangement made by contract.

[48] Since the exercise of the powers under ss 255-10 or 260-5 is not directly inconsistent with a power in the plaintiff to make a contract with a third party for the payment of a taxpayer's tax-related liability, the defendants would have to show that those sections disclose an intention to cover the field of any arrangement for the payment of a tax-related liability by a taxpayer or third party. No reason was advanced by the defendants why that conclusion should be reached.

[49] The statutory context and history do not reveal any reason why that conclusion should be reached, either. The context includes that the relevant provisions of pt 4-15 that include these sections were introduced by *A New Tax System (Tax Administration) Bill* 1999 (Cth) as elements of the standardised collection and recovery rules that replaced provisions throughout the various prior taxation laws that were duplicated and to some extent inconsistent. It was nowhere stated in or suggested by the explanatory material that the aim was to adopt an exclusive code that would limit powers that the plaintiff otherwise had.

[50] In my view, there is no reason why the power in s 3A should not be construed as operating broadly enough to authorise the plaintiff to enter into a contract with a third party, such as the contract comprised in the Deed of Guarantee and Indemnity in the present case.

[51] It follows that I reject the defendants' first ground of invalidity of the guarantee.

Authority of the plaintiff's agents to contract

[52] The defendants' second ground of invalidity is that the officers of the plaintiff who made the Deed of Agreement, Deed of Guarantee and Indemnity and the subsequent variations on his behalf were not authorised in law to make those contracts.

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19 *Uniform Civil Procedure Rules* 1999 (Qld), rr 839-867.

20 *Income Tax Assessment Act* 1997 (Cth), s 995-1(1) (definition of "arrangement").

[53] The plaintiff is the Commissioner of Taxation. He was not the plaintiff when the proceeding was started, but was later substituted as the plaintiff.

[54] The plaintiff is empowered to delegate his powers, including the power under s 3A, by s 8(1) of the TAA, as follows:

> "The Commissioner may, either generally or as otherwise provided by the instrument of delegation, by writing signed by the Commissioner, delegate to a Deputy Commissioner or any other person all or any of the Commissioner's powers or functions under a taxation law or any other law of the Commonwealth or a Territory, other than this power of delegation."

[55] Melinda Ann Balkin executed the Deed of Agreement and Deed of Guarantee and Indemnity on behalf of the plaintiff as "a duly authorised officer". Her authority stemmed from an Instrument of Authorisation dated 19 July 2012 signed by a Deputy Commissioner of Taxation and Chief Operating Officer. By that instrument, he delegated "all the powers and functions delegated to the office of Deputy Commissioner of Taxation and Chief Operating Officer" in respect of particular Acts listed in the instrument, subject to presently irrelevant exceptions. The relevant powers included the powers under the TAA as follows:

> "All my powers and functions except in [section] 3A ..."

[56] In turn, the Deputy Commissioner's powers were delegated by the plaintiff. The plaintiff's predecessor in office, by an Instrument of Delegation dated 12 July 2010 delegated to the "Deputy Commissioner of Taxation, Chief Operating Officer, Operations" the plaintiff's powers under legislation including the TAA in the following terms:

> "All my powers and functions except those in [section] 3A ..."

[57] There were further instruments of delegation, but they were in the same terms, *mutatis mutandis*.

[58] Accordingly, the defendants submit that there was no lawful delegation of the plaintiff's power under s 3A of the TAA to the officer who purported to make the Deed of Agreement and Deed of Guarantee and Indemnity on behalf of the plaintiff. In my view, that submission might be well-founded.

[59] Similarly, Deed of Variation 5 was executed by John Gabor Lynn on behalf of the plaintiff. For the same reasons as set out in relation to the Deed of Agreement and Deed of Guarantee and Indemnity, Mr Lynn was not delegated power to exercise the plaintiff's power under s 3A of the TAA.

[60] In *Deputy Commissioner of Taxation v Haritos*,[21] a question arose as to the authority of a Deputy Commissioner of Taxation to start a proceeding seeking declaratory relief as to the liability of a taxpayer. As in this case, the instrument of delegation to the relevant Deputy Commissioner of Taxation excluded authority and power under s 3A. It was held that there was a real question as to the authority of the Deputy

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21 (2014) 287 FLR 136.

Commissioner to bring the proceeding, so an order was made that the Commissioner of Taxation be substituted as plaintiff.[22]

[61] The plaintiff has been substituted for the Deputy Commissioner of Taxation in the present case as well. Accordingly, there is no question as to the plaintiff having the power conferred by s 3A. However, the question in the present case is not whether the plaintiff has the power or authority to bring the present proceeding. It is whether the contracts comprised in the Deed of Agreement, the Deed of Guarantee and Indemnity and the deeds of variation are binding where they were not made by the plaintiff personally.

[62] It is convenient to analyse the liabilities under the deeds as liabilities in contract without separate consideration of those liabilities as obligations under a deed. Where an agent without actual or apparent (or ostensible) authority makes a contract, the principal is not bound by the agent's action in doing so. A possible consequence of accepting the limit on Ms Balkin and Mr Lynn's authority, that they were not delegated the plaintiff's power to make a contract under s 3A, is that the contracts sued upon by the plaintiff were not binding upon the plaintiff and, therefore, not binding upon the defendants.

[63] In private law, and in some government contracts, a contract made by an agent who lacked actual authority but who had apparent authority may bind the principal. It is not relevant to consider apparent authority because the defendants do not wish to enforce the contract comprised in the Deed of Guarantee and Indemnity as varied. Conversely, it is trite that a principal under a "contract" made by a purported agent outside the agent's actual authority may ratify the unauthorised act, and thereby make a binding contract as between the principal and the other contracting party.

[64] Where a principal sues on a contract effected by an agent outside his or her authority it is implicit that they have ratified the unauthorised contract.[23] In *Celthene Pty Ltd v WKJ Hauliers Pty Ltd*[24] Yeldham J said:

> "... in my opinion the second defendant, by his defence in the present proceedings, ratified the act of TNT Management Pty Ltd in purporting to contract on his behalf. That such ratification can occur by a pleading in the action itself is plain."[25]

[65] In my view, there is no reason to doubt that the plaintiff ratified the contract, according to usual principles of agency, by being substituted as plaintiff and by pursuing the claim in the present proceeding.

[66] It does not matter that the defendants had repudiated the contract or their liability under it before the ratification. In *Commissioner of Taxation (Cth) v Sara Lee Household & Bodycare (Australia) Pty Ltd*,[26] it was said:

> "... where a principal ratifies the earlier act of a person acting as agent without authority, the ratification relates back to the date of the

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22 (2014) 287 FLR 136, 140-146.
23 G E Dal Pont, *Law of Agency*, (LexisNexis Butterworths, 2014, 3rd ed) 117 [5.29].
24 [1981] 1 NSWLR 606.
25 [1981] 1 NSWLR 606, 614-615.
26 (2000) 201 CLR 520.

> unauthorised act, and the principal is bound as if the agent had had authority at the earlier time."[27] (footnote omitted)

[67] In the present case the consideration moving under the contract from the plaintiff lay in the forbearance from recovery proceedings and execution, or other process, against the taxpayer. That consideration was executed by the time that the plaintiff ratified the contract by being substituted as plaintiff and continued the proceeding. There is an accepted legal fiction, in the case of ratification by the principal of a contract made without the authority by an agent, that the ratification relates to the contract that came into existence back at the time when the contract was purportedly made by the agent.

[68] Accordingly, I reject the defendants' contention that the contract comprised in the Deed of Guarantee and Indemnity as varied was not binding because of the lack of authority of the agents who made the contracts.

Implied term not to hinder

[69] On the assumption that the Deed of Guarantee and Indemnity and Deed of Variation 5 were validly made and are binding, the defendants alternatively submit that it was an implied term of the contract of guarantee, as varied, that the plaintiff would not hinder, prevent, impede or defeat the performance by the defendants of their obligations under the guarantee, including that the plaintiff would not do anything to interfere with the company's ability to earn commission from Mitsubishi for procuring customers for Mitsubishi's steel products ("implied term not to hinder").

[70] The defendants further submit that the garnishee notice served by the plaintiff on Mitsubishi under s 260-5 and the recovery by the plaintiff of $112,501.10 from Mitsubishi constituted a breach of that implied term. Specifically, the defendants submit that the plaintiff's receipt and retention of that payment were unlawful and constituted the breach of contract.

[71] In my view, this part of the defendants' claim must fail, because there was no implied term as alleged and because, in any event, there was no breach of any implied term.

[72] Clause 8.1.1 of the Deed of Agreement provided that in the event of default the plaintiff was entitled "to immediate payment of the outstanding balance" of the tax debt and to enforce all rights against the company under the Deed of Agreement, without any requirement to give prior notice or demand. The clause did not refer to the plaintiff's other rights under the taxation legislation, but the contract expressly provided that it contained the entire agreement between the parties (cl 18).

[73] There was no express provision of the Deed of Guarantee and Indemnity that affects the question of the alleged implied term.

[74] The principles as to the implication of a term ad hoc or in fact are well established and need not be repeated. Of present relevance, in *Commonwealth Bank of Australia v Barker*,[28] it was said:

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27 (2000) 201 CLR 520, 533; cited in *McEvoy v The Body Corporate for No 9 Port Douglas Road* [2013] QCA 168, [39].

28 (2014) 253 CLR 169.

"Implication of a term in fact in a contract, by reference to what is necessary to give it business efficacy, was described in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* as raising issues 'as to the meaning and effect of the contract'. Implication is not 'an orthodox exercise in the interpretation of the language of a contract, that is, assigning a meaning to a particular provision'. It is nevertheless an 'exercise in interpretation, though not an orthodox instance'. The implication of terms in fact was also characterised in *Attorney-General (Belize) v Belize Telecom Ltd* as an exercise in construction. Lord Hoffmann, delivering the judgment of the Privy Council, said:

> '[I]t is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.'

The distinction thus drawn is appropriate even though the scope of the constructional approach adopted by Lord Hoffmann has been debated.

In *Codelfa*, the implication of a term in law was said to be based upon 'more general considerations' than those covered by the concept of business efficacy. That distinction attracted authoritative support in *Con-Stan Industries*...

It has also been argued that some 'terms' said to be implied in law are in fact rules of construction and that all implied 'terms' of universal application fall into that category. The application of that proposition to what has been treated as a contractual duty to co-operate is considered below. Debates about characterisation have attracted persuasive protagonists on both sides. They involve taxonomical distinctions which do not necessarily yield practical differences. Those debates are not concerned with the distinct question whether, and when, implication of a term is to be regarded as an exercise in the construction of a contract or class of contract.

It has been accepted in this court that some rules treated as implications of terms in law in particular classes of contract, or contracts generally, can also be characterised as rules of construction. Mason J, in *Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd*, so characterised the principle enunciated by Lord Blackburn in *Mackay v Dick*:

> '[W]here in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.'

> The language of Lord Blackburn was indicative of a rule of construction rather than of implication. Nevertheless, Mason J also referred to the rule as defining an implied 'duty to co-operate'."[29] (footnotes omitted)

[75] In my view, the contracts contained in the Deed of Agreement and the Deed of Guarantee and Indemnity, including those contracts as varied, operated according to their terms without the need to imply the alleged term not do anything to interfere with the company's ability to earn commission from Mitsubishi for procuring customers for Mitsubishi's steel products, or with the defendants' ability to fulfil their obligations under the guarantee. It is not enough to characterise the alleged implied term as though it is an aspect of the duty to cooperate. It must be able to stand unsupported as necessary to give business efficacy.[30] It does not do so. Nor is the term so obvious that it "it goes without saying".[31]

Breach of the implied term

[76] Even if there was an implied term not to hinder of a kind alleged by the defendants, in my view it was not a breach of the term for the plaintiff to exercise his statutory power under s 260-5.

[77] On 15 October 2014, the company defaulted in payment of an instalment due under the amended Sch 2 to the Deed of Agreement.

[78] The express terms of the Deed of Agreement included cll 6.1, 7 and 8 which provided, in part as follows:

> "Provided that [the company] continues to comply in all respects with her [sic] payment obligations under this Deed and an Event of Default has not occurred ... the [plaintiff] agrees to take no further steps against [the company] by way of enforcement of any component of the Tax Debt..."
>
> "An Event of Default for the purposes of this Deed occurs if ... [the company] fails to comply with any of its obligations under this Deed and in particular fails to make any payment strictly in accordance with the requirements set out in Schedule 4..."
>
> "If an Event of Default occurs, the [plaintiff] will be entitled (without any requirement to give prior notice or demand) to immediate payment of the outstanding balance of Tax Debt [sic] **and to enforce all rights against** [the company and the defendants] under this Deed and Guarantee."

[79] In such circumstances of default, the defendants can have had no reasonable expectation that the plaintiff would be further prevented from exercising any rights to recover the amount of the company's tax-related liabilities in whatever fashion may have been convenient.

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29 (2014) 253 CLR 169, 186-188 [22]-[25].

30 See, for example, *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 358-359 [170].

31 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 566 [74].

[80] It was an ordinary consequence of default in payment, as agreed by the company, that the plaintiff might seek to use his statutory power to obtain payment from a third party who was the company's debtor under s 260-5.

[81] On 5 November 2014 the members of the company resolved to voluntarily wind it up. Because the company was insolvent, it was inevitable that it would be a creditor's voluntary winding up.

[82] On 6 November 2014, the plaintiff issued a notice to Mitsubishi, a debtor of the company, under s 260-5. In my view, having regard to cll 6.1, 7 and 8 of the Deed of Agreement it was no breach of any implied term of the contract contained in the Deed of Guarantee and Indemnity for the plaintiff to do so. The contrary conclusion would permit the implied term to operate inconsistently with the express permission "to enforce" all rights.

[83] In my view, it is counterintuitive to say that the reasonable person in the position of the parties to the Deed of Agreement and the Deed of Guarantee and Indemnity when those contracts were made or varied would not have expected that if the company was in default there would be an implied obligation of the plaintiff in exercising his powers under s 260-5 that he would not to do so "unlawfully".

[84] The defendants advance two related submissions in support of their claim that the plaintiff had breached the alleged implied term. The first submission started with the proposition that s 500 of the *Corporations Act* 2001 (Cth) avoids any attachment put in force against the property of a company after the passing of a resolution for voluntary winding up. They submit that the payment obtained by the plaintiff from Mitsubishi under the garnishee notice was thus avoided by s 500.

[85] In my view, it is not necessary to decide whether the plaintiff's garnishee recovery from Mitsubishi was unlawful. Even if it was, the legal basis alleged for the plaintiff's rights against the defendants to have been affected was not identified. The defendants submit that the plaintiff was thereby guilty of the tort of inducing breaching of contract. I reject that submission. But in any event, that conduct was not a breach of any alleged implied term of the the contract comprised in the Deed of Guarantee and Indemnity.

[86] The defendants' second submission is even more complex. It starts from the proposition that the company had granted a charge over property that included the debt owed by Mitsubishi to the company to a secured creditor named Zenbon Pty Ltd ("Zenbon"). Next, the defendants submit that the garnishee notice given by the plaintiff to Mitsubishi was ineffective to require Mitsubishi to pay to the plaintiff the debt it owed to the company because of the priority enjoyed by Zenbon as a secured creditor.

[87] In my view, it is completely unnecessary to enter upon the detail of the defendants' submissions on these points. It does not matter whether as between the plaintiff and Zenbon or as between the plaintiff and Mitsubishi the plaintiff was actually entitled to receive the monies paid by Mitsubishi. It was no breach by the plaintiff of any alleged implied term of the Deed of Guarantee and Indemnity for the plaintiff to give the garnishee notice to Mitsubishi or to receive payment from Mitsubishi of money under the notice. The defendants' submission to the contrary must be rejected.

[88] Accordingly, in my view, even assuming that the defendants' alleged implied term was a term of the contracts comprised in the Deed of Guarantee and Indemnity as varied up to and including Deed of Variation 5, the actions of the plaintiff in seeking to obtain payment from Mitsubishi as garnishee did not constitute a breach of contract.

Deed of Variation 5 as a concluded agreement

[89] The defendants' last ground of defence is that even if the plaintiff was otherwise entitled to enforce the rights under the Deed of Guarantee and Indemnity as varied, that did not extend to the variation made under Deed of Variation 5. This is said to be because the contract made in that deed was not concluded because the plaintiff failed to accept the defendants' offer to make that contract. For present purposes, the question is not whether the officer acing on the plaintiff's behalf had authority, as previously considered, but whether any contract was purportedly concluded.

[90] In late September 2014, the defendants executed Deed of Variation 5 and sent it to the plaintiff. The defendants submit that this act should be viewed as an offer that was capable of acceptance by the plaintiff executing the deed and communicating that acceptance to the defendants. For the purposes of discussion, that starting point may be accepted.

[91] On 22 September 2014, John Gabor Lynn executed Deed of Variation 5 on behalf of the plaintiff and placed it in an envelope for return to the defendants. On the same day the envelope was dispatched to the defendants via Australia Post.

[92] However, the facts appear to be that Deed of Variation 5 was negotiated before it was executed by the defendants or forwarded by them to the plaintiff. That appears from the front page where the type written date was " day of July 2014", from Recital I which stated the Tax Debt as at 17 July 2014, from cl 2 which varies the prior deed of variation "with effect from 17 July 2014' and from the proposed variation to Sch 2 that included payments to be made on 15 August 2014 and 15 September 2014, each of $75,000. In fact, those payments were made around those dates, before the executed Deed of Variation 5 was sent by the defendants to the plaintiff for signature. They were followed by the defendants sending the draft written contract executed by them as a deed to the plaintiff.

[93] In those circumstances, there is an argument that the contract of variation was made by conduct including the defendants' execution and return of the draft deed of variation.[32]

[94] However, cl 6.2 expressly provided that "[t]his Deed of Variation Number Five becomes effective when executed by all parties". Accordingly, the parties intended to contract and by all their executions so contracted. The required acts did not include communication by the plaintiff of an acceptance of the defendants' offer by executing the proposed deed.

[95] However, even if the offer and acceptance approach contended for by the defendants is adopted, in my view, there would be a question whether there was acceptance by the plaintiff by putting the executed deed in the post.[33]

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32 *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666.

33 *Wardle v Agricultural and Rural Finance Pty Ltd* [2012] NSWCA 107.

Conclusions

[96] The plaintiff had power to enter into the Deed of Agreement and the Deed of Guarantee and Indemnity, together with the variations thereof.

[97] Although the Deed of Agreement, Deed of Guarantee and Indemnity and Deed of Variation 5 were entered into by persons without authority, they are binding on the parties because the plaintiff has ratified them.

[98] There was no implied term of the contracts that the plaintiff would not hinder, prevent, impede or defeat the performance by the defendants of their obligations under the guarantee, by not doing anything to interfere with the company's ability to earn commission from Mitsubishi or the defendants' ability to fulfil their obligations under the guarantee.

[99] The actions of the plaintiff in seeking to obtain payment and receiving payment from Mitsubishi as garnishee did not constitute a breach of contract.

[100] Subject to ratification by the plaintiff, Deed of Variation 5 was concluded as a contract binding upon the plaintiff and the defendants.

[101] It follows that the plaintiff is entitled to judgment upon the claim and that the defendants' counterclaim must be dismissed.