
JURISDICTION : DISTRICT COURT OF WESTERN AUSTRALIA
IN CIVIL

LOCATION : PERTH

CITATION : DEPUTY COMMISSIONER OF TAXATION -v-
PEDLEY [No 2] [2017] WADC 107

CORAM : PETRUSA DCJ

HEARD : 7 JUNE 2017

DELIVERED : 17 AUGUST 2017

FILE NO/S : CIV 1518 of 2015

BETWEEN : DEPUTY COMMISSIONER OF TAXATION
Plaintiff

AND

MICHAEL PEDLEY
Defendant

ON APPEAL FROM:

Jurisdiction : DISTRICT COURT OF WESTERN AUSTRALIA

Coram : DEPUTY REGISTRAR KINGSLEY

Citation : [2016] WADC 166

Catchwords:

Practice and procedure - Appeal from registrar - Plaintiff's appeal from registrar's refusal to grant summary judgment - Liability of director for unpaid tax liabilities - 'Reasonable steps' defence, s 269-35 *Taxation Administration Act 1953* (Cth) - Turns on own facts

Legislation:

Rules of the Supreme Court 1971 O 14
Taxation Administration Act 1953 (Cth)

Result:

Appeal dismissed

Representation:

Counsel:

Plaintiff : Ms C H Thompson
Defendant : Mr J W Fickling

Solicitors:

Plaintiff : Jackson McDonald
Defendant : Nova Legal

Case(s) referred to in judgment(s):

Anglo-American Investments Pty Ltd v Deputy Commissioner of Taxation
[2017] NSWCA 17
Ansearch Ltd v Wavetech Pty Ltd [2006] WASC 184
Canty v Deputy Commissioner of Taxation [2005] NSWCA 84; (2005) 63
NSWLR 152
Deputy Commissioner of Taxation v Pedley [2016] WADC 166
Deputy Commissioner of Taxation v Saunig (2002) 55 NSWLR 722; (2002) 43
ACSR 387
EMG Mee Wyong v Letchumanans O Velayutham (1980) App 331
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 89
Lewkowski v Bergalin (Unreported, WASC, Library No 8488, 26 May 1989)
Miller v Deputy Commissioner of Taxation (1997) 98 ATC 4059
Morgan v Pallister [2004] WASC 188
Moscow & Narodny Bank Ltd v Mosbert Finance (Aust) Pty Ltd [1976] WAR
109
Roche v Deputy Commissioner of Taxation [2015] WASCA 196
Shaw v Deputy Commissioner of Taxation; Rablin v Deputy Commissioner of
Taxation [2016] QCA 275

Thesus Exploration NL v Foyster [1972] HCA 41; (1972) 126 CLR 507
Webster v Lampard (1993) 177 CLR 598
Wollingford v Mutual Society (1885) APP CAS 685

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1 **PETRUSA DCJ:** By application dated 16 July 2016, the plaintiff (appellant) sought summary judgment against the defendant (respondent) for pecuniary penalties imposed on the defendant by reason of the failure by Stellar Corporate Solutions Pty Ltd (Stellar), a company of which the defendant was a director, to remit to the plaintiff amounts withheld from wages paid to employees pursuant to the provisions of the *Taxation Administration Act 1953* (TAA). On 1 December 2016 Deputy Registrar Kingsley dismissed the appellant's application for summary judgment. Reasons for the decision of the registrar were published in *Deputy Commissioner of Taxation v Pedley* [2016] WADC 166.

2 The plaintiff appeals from the decision of Deputy Registrar Kingsley seeking orders that the plaintiff's application for summary judgment be allowed.

3 Pursuant to *District Court Rules 2005* O15 this appeal takes place by way of a new hearing of the summary judgment application. I am to determine it on both the evidence before the registrar and the further affidavits which the plaintiff and the defendant served before the hearing of this appeal.

4 The evidence for consideration by me on this appeal comprises:

- (a) For the plaintiff, two affidavits (with annexures) of Mark Simpson dated 12 July 2016 and 3 March 2017 and the affidavit of Andrea Joan Jennings dated 15 July 2016;
- (b) For the defendant, three affidavits by Michael Pedley dated 6 October 2016, 17 October 2016 and 8 April 2017 with their various annexures, and two affidavits by John Galluccio dated 17 October 2016 and 10 April 2017.

5 The parties have each filed submissions and supplementary submissions.

Leave

6 A preliminary matter to be considered is the question of leave. Leave is required to bring the application given that the last date for filing an application for summary judgment, without leave, was 11 June 2015. The application was not filed until some 13 months later. Accordingly, leave is required.

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7 I am satisfied that leave should be granted to extend time for the bringing of the application because it is not disputed that the plaintiff actively attempted to resolve the matter by engaging in settlement discussions with the defendant, who was for a period of time acting in person.

Summary judgment principles

8 It is well established that the power to order summary judgment should be exercised with great care and should never be exercised unless it is clear there is no real question to be tried: *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 89, 99.

9 Where a plaintiff has satisfied all the requirements of O 14 *Rules of the Supreme Court 1971* to give him, prima facie, the right to an order in the terms asked, the burden shifts to the defendant to satisfy the court why judgment should not be given against him: *Moscow & Narodny Bank Ltd v Mosbert Finance (Aust) Pty Ltd* [1976] WAR 109, 110. This is an evidentiary burden; the overall legal burden of persuasion remains on the plaintiff: *Morgan v Pallister* [2004] WASC 188 [4].

10 The defendant must show by affidavit or otherwise that there is some triable issue, either of fact or law, and that he has an arguable defence or a defence on the merits: *Moscow & Narodny Bank v Mosbert Finance (Aust) Pty Ltd* (110 - 111).

11 The application is to be determined on the basis that the defendant's version of the facts, assuming that it is not inherently incredible, would ultimately be accepted at the trial of the action: *Webster v Lampard* (1993) 177 CLR 598, 608.

12 The court is not bound to accept uncritically as raising a dispute of fact calling for further investigation every statement in an affidavit, however equivocal, lacking in precision or inconsistent with contemporary documents or other statements by the deponent: *EMG Mee Wyong v Letchumanans O Velayutham* (1980) App 331, 334.

13 With respect to any affidavit sworn by the defendant in opposition to this application for summary judgment, it is incumbent upon the defendant to condescend to particulars. In *Lewkowski v Bergalin* (Unreported, WASC, Library No 8488, 26 May 1989), the court said:

Affidavits in opposition should condescend to particulars and should so far as possible deal with the plaintiff's claim and state clearly what the defence is and what facts are relied upon as supporting it. However, the

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requirement is for the condescension of the particulars of an arguable defence, and not the defence in its complete form and a statement of the facts which go to show that it is arguable and not the facts which should be necessary to establish it at trial.

14 The affidavit should state clearly and precisely what the defence is and what facts are relied upon as supporting it. It should not contain bare allegations unsupported by material facts. In *Wollingford v Mutual Society* (1885) APP CAS 685, Lord Blackburn said (701):

I think that when the affidavits are brought forward to raise that defence they must ... condescend upon particulars. It is not enough to swear 'I say I owe the man nothing'. Doubtless if it was true, that you owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the Judge that there is reasonable grounds for saying so ...

15 This passage was cited with approval in *Moscow & Narodny Bank Ltd v Mosbert Finance (Aust) Pty Ltd* [113].

16 However, if after argument, there remains a real uncertainty about the plaintiff's right to judgment without further investigation of the facts, summary judgment must be refused: *Ansearch Ltd v Wavetech Pty Ltd* [2006] WASC 184 [28] (Newnes M).

17 While the court may determine a difficult question of law on a summary judgment application, usually it is appropriate to leave the determination of such a question for trial: *Thesus Exploration NL v Foyster* [1972] HCA 41; (1972) 126 CLR 507, 514 – 515.

The factual background

18 Stellar was a company registered on 1 December 2011. The sole director of the company at that time was Craig Dale. Mr Dale remained a director until his resignation on 1 February 2014. He, again, became a director on 30 April 2014 and was a director at the time the company was wound up on 28 April 2015.

19 The defendant first became a director of the company on 28 June 2013. He subsequently resigned on 15 July 2013. He, again, became a director of the company on 26 September 2013 until his resignation on 15 April 2014.

20 During the time that it operated, Stellar was required to withhold Pay As You Go Withholding (PAYGW) amounts which it was obliged to remit to the deputy commissioner. Stellar notified the deputy

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commissioner, through the lodgement of activity statements, that it withheld amounts pursuant to div 12 of sch 1 of the TAA (amounts withheld). The amounts were payable by the statutory due dates pursuant to s 255-10 of sch 1 of the TAA (due dates).

21 Relevant to this case, the amounts withheld and the due dates are set out below:

Particular withholding period	Amount withheld	Due date	Lodged date
1 August 2013 – 31 August 2013	\$53,934	23 September 2013	16 December 2013
1 September 2013 – 30 September 2013	\$38,992	21 October 2013	16 December 2013
1 October 2013 – 31 October 2013	\$68,952	21 November 2013	16 December 2013
1 November 2013 – 30 November 2013	\$41,920	23 December 2013	20 January 2014

22 On 21 January 2014 the plaintiff issued to the defendant a notice of director liability to pay a penalty to the commissioner pursuant to s 269-25 of sch 1 of the TAA in respect of the amounts withheld which had not been paid. The defendant's personal liability arises by reason of the director penalty notice (DPN) regime set out in s 269-20(1) sch 1 TAA. By reason of Stellar's failure to remit the PAYGW, the defendant became liable to pay to the deputy commission a penalty in an amount equal to the unremitted amounts. The total amount said to be owed at the time of the issue of the notice was \$203,798.

23 The issue of the DPN is a pre-condition to the plaintiff commencing proceedings against the director personally. However, the obligation of the defendant, as a director of a company, to cause the company to comply with its obligations to remit the PAYGW was an ongoing one: s 269-15 TAA.

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24 In May 2015 the plaintiff issued a writ against the defendant in respect of the monies the subject of the DPN. By reason of payments and credits made, the total amount pleaded as owing by the defendant to the deputy commissioner is \$159,767.79. The defendant has filed a defence and a proposed amended defence. The plaintiff has taken issue with the amended defence on the basis the amendments include withdrawal of admissions. This issue has not been finally determined, however, it was accepted at the hearing that for the purposes of this appeal, the focus is on what the evidence raises by way of a triable issue unconfined by the issues raised on the pleadings.

25 It is not in dispute that the plaintiff has established, subject to any triable issues, a prima facie right to judgement. The triable issues said to arise in this case are:

1. Whether the defendant has a 'reasonable steps' defence pursuant to s269-35 of sch1 of the TAA; and/or
2. Whether the monies the subject of the DPN have been paid.

26 Before considering the evidence, it is necessary to consider the relevant statutory framework.

Relevant statutory framework

27 The starting point is the relevant statutory provisions. Section 269-15 provides, relevantly:

- (1) The directors (within the meaning of the Corporations Act 2001) of the company (from time to time) on or after the initial day must cause the company to comply with its obligation.
- (2) The directors of the company (from time to time) continue to be under their obligation until:
 - (a) the company complies with its obligation; or
 - (b) an administrator of the company is appointed under section 436A, 436B or 436C of the Corporations Act 2001; or
 - (c) the company begins to be wound up (within the meaning of that Act).

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28

In s 269-10, the 'initial day' is defined to mean, in effect, the day upon which the company withholds an amount under div 12 that it is obliged to pay to the commissioner on or before a particular day (the due day) in accordance with div 16 subdivision 16B. Section 269-20 provides (relevantly):

- (1) You are liable to pay to the Commissioner a penalty if:
 - (a) at the end of the due day, the directors of the company are still under an obligation under section 269-15; and
 - (b) you were under that obligation at or before that time (because you were a director).
- (2) The penalty is due and payable at the end of the due day.
- (3) you are liable to pay to the Commissioner a penalty if:
 - (a) after the due day, you became a director of the company and began to be under the obligation under section 269-15; and
 - (b) 30 days later you are still under that obligation.
- (4) the penalty is due and payable at the end of the 30th day.
- (5) The amount of the penalty ... is equal to the unpaid amount of the company's liability under its obligation.

29

In s 269-10, the 'due day' is defined to mean, in effect, the day on or before which the company is obliged to pay the withheld amount.

30

Section 269-35 provides, relevantly:

- (2) You are not liable to a penalty under this Division if:
 - (a) you took all reasonable steps to ensure that one of the following happened:
 - (i) the directors caused the company to comply with its obligation;
 - (ii) the directors caused an administrator of the company to be appointed under section 436A, 436B or 436C of the Corporations Act 2001;
 - (iii) the directors caused the company to begin to be wound up (within the meaning of that Act); or

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- (b) there were no reasonable steps you could have taken to ensure that any of those things happened.
- (3) In determining what are reasonable steps for the purposes of subsection (2), have regard to:
 - (a) when, and for how long, you were a director and took part in the management of the company; and
 - (b) all other relevant circumstances.

31 What is 'reasonable' for the purposes of s 269-35(2) does not depend merely upon the actual knowledge of the director, but involves an objective test. The director must prove that he or she took all steps which were reasonable, having regard to the circumstances of which the director, acting reasonably, knew or ought to have known: *Deputy Commissioner of Taxation v Saunig* (2002) 55 NSWLR 722; (2002) 43 ACSR 387 [25].

32 The Court of Appeal in *Roche v Deputy Commissioner of Taxation* [2015] WASCA 196 recently followed and applied to s 269-35 the approach taken by Handley JA in *Canty v Deputy Commissioner of Taxation* [2005] NSWCA 84; (2005) 63 NSWLR 152.

33 In *Canty v Deputy Commissioner of Taxation*, Handley JA was dealing with the provisions of the *Income Tax Assessment Act 1936*, the predecessor of the TAA. Section 222AOB(1) of the *Income Tax Assessment Act 1997* required the directors, on or before the due date, to cause the company to do at least one of the following:

- (a) to pay the withheld tax;
- (b) to make an agreement with the commissioner under s 222ALA;
- (c) to appoint an administrator; or to begin to be wound up.

34 Section 222AOC provided, relevantly, that it was a defence for a director to prove that he or she took all reasonable steps to ensure the directors complied with s 222AOC(1) (s 222AOC(1)(a)), that there were no such steps that he or she could have taken (s 222AOC(1)(b)).

35 Handley JA (Beazley & Santow JJA) explained the effect of the defence under s 222AOC as follows:

The defence under par (a) is that the person 'took all reasonable steps to ensure that the directors complied with subsection 222AOB(1)'. Compliance would be achieved if any one of those events were to occur.

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Thus if payment was made there is no need for an agreement, an administrator, or a liquidator. If payment was being pursued the other courses would for the time being be unnecessary and counterproductive. If payment is out of the question or cannot be achieved the person bound must address the other steps. If winding up then becomes the preferred option there will be no need for the time being to seek the appointment of an administrator.

The defences under par (a) and par (b) are cumulative, not mutually exclusive. A defendant may establish that there was nothing that could reasonably be done to achieve payment. He or she may also establish that there was no point in attempting to negotiate an agreement with the commissioner. In such a case the defence under par (b) would succeed pro tanto leaving the defence under par (a) to address the remaining options.

In other cases the defence under par (b) may succeed in relation to all options, so that the defence under par (a) need not be considered. If the only feasible options are the appointment of an administrator or a liquidator, a person under the duty, acting reasonably, may decide to seek a winding up. If so, he or she will not be acting unreasonably by doing nothing to secure the appointment of an administrator at that stage. The converse will also be true.

Thus, a person under the duty, who acted reasonably in choosing one of the possible events and took all reasonable steps to bring it about would, to that extent, make out the par (a) defence although no attempt was made at that stage to achieve compliance in any other way. A person who acted reasonably in choosing between the alternatives but failed to take all reasonable steps to bring about the selected event would fail, as would a person who acted unreasonably in choosing the option to be pursued.

If reasonable steps taken in pursuit of one option fail, non-compliance and the obligation of the director or former director will continue. The director or former director will therefore have to take reasonable steps to achieve compliance in another way. If non-compliance continues long enough before a notice is served each of the four options will eventually have to be addressed and the subs (3) defences will have to cover all options: [37] - [41].

36 So, compliance with s 269-35(2)(a) requires the director to have taken all reasonable steps to ensure that one of the three alternative events specified happened. The taking by the director of 'all reasonable steps to ensure', within s 269-35(2)(a), requires that each of the alternative events be addressed, either on the basis of taking reasonable steps to ensure the event happened or declining to do anything about that particular event on the basis that there were no reasonable steps that the director could have taken to ensure that the event happened. Also see *Miller v Deputy*

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Commissioner of Taxation (1997) 98 ATC 4059, 4063 - 4064 (Mason P) (Beazley JA).

37 An issue that arises in respect of the defence of reasonable steps is the period during which it is said the defendant must establish that he took all reasonable steps. The plaintiff's position is that in order to establish a defence under s 269-35(2) the evidence must demonstrate the defendant took all reasonable steps from the time he came under the obligation in s 269-15(1): **Roche v Deputy Commissioner of Taxation** [40]. In this case the plaintiff submits that the relevant period commenced on 1 August 2013 and continued until the 21st day after the service of the DPN. The evidence as to reasonable steps must therefore address the entirety of the period from 1 August 2013 until 12 February 2014: **Canty v Deputy Commission of Taxation** [45] – [46]. The plaintiff submits the effect of this is that the conduct of the defendant after the expiry of the 21 days from the service of the notice cannot assist in the making out of the defence of 'reasonable steps'.

38 The defendant, however, submits that this issue is not settled given the comments of his Honour P McMurdo JA in **Shaw v Deputy Commissioner of Taxation; Rablin v Deputy Commissioner of Taxation** [2016] QCA 275 [52], wherein he said:

The availability of a defence under s 269-35 depends upon the director's conduct *after* the due day. A director is not obliged to take reasonable steps to have an administrator appointed or the company wound up before the due day. That is apparent from s 269-1 which provides:

'The directors of a company have a duty to ensure that the company either:

- (a) meets its obligations under subdivision 16-B (obligation to pay withheld amounts to the commissioner (...)); or
- (b) goes promptly into voluntary administration under the *Corporations Act 2001* or into liquidation.'

The word 'promptly' indicates that the step of an administration or a liquidation need be pursued if the company fails to pay the withheld amount on the due day. This is the way in which the relevantly equivalent provisions of an earlier regime were understood by Handley JA in **Canty v The Deputy Commissioner of Taxation**.

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39 As a result of this claimed uncertainty, the defendant submits that his conduct after 12 February 2014 is relevant and significant to making out the 'reasonable steps' defence. In any event, the defendant submits that the existence of this legal question raises a triable issue that justifies the dismissal of the plaintiff's application for summary judgement.

40 The plaintiff submits that the judgment of P McMurdo JA is not as far reaching as the defendant suggests. Properly construed, the remarks go no further than to suggest that the director is not required to take reasonable steps to pursue the options of liquidation and administration until after the relevant due date. The remarks are obiter and were not adopted by other members of the court. Finally, it is submitted that the position of P McMurdo JA is inconsistent with both the New South Wales Court of Appeal in *Canty* and the Western Australian Court of Appeal in *Roche*.

41 In my view, the position submitted by the plaintiff is consistent with the weight of authority and the obligation of the directors to ensure the monies withheld are paid and not to wait to take action as the monies may have been dissipated. I will, then, proceed on the basis that the relevant period for the 'reasonable steps' defence is from 26 September 2013 (being the date on which he became a director of Stellar) to 12 February 2014.

42 I do not, however, consider this to be the end of the matter because evidence of the behaviour of the defendant and/or the plaintiff subsequent to this can be relevant to an evaluation of the material put before the court as to the conduct of the parties and/or the company's position during the relevant period. This is consistent with the terms of s269-35(3)(b) TAA.

The defendant's position – 'reasonable steps' defence

43 In support of his submission that he has a 'reasonable steps' defence, the material put before the court by the defendant is set out below.

44 He is an accountant and was the company accountant from at least June 2013. This fact by implication suggests that he had knowledge of the company's financial position.

45 He, as part of the management of the company, met every Wednesday morning at 7.30 am with Mr Craig Dale, Mr John Galluccio and Mr Anthony Boer to discuss matters relating to the running of the company. Without providing particulars of what was said, the defendant

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swears that as a result of his attendance at these meetings, and of reassurances he received from Mr Dale, he understood:

1. That the Department of Housing of Western Australia owed Stellar over \$900,000, more than enough to cover any liability owed to the plaintiff;
2. There was no reason that the Department of Housing accounts would not be paid;
3. That Craig Dale was taking steps to ensure payments would be made.

46 In this regard, it is said, that Mr Dale was the director of the company who had the established relationship with the Department of Housing and therefore, in effect, it was appropriate and sufficient to rely on the information provided by him without the need to do more. Mr Galluccio has also sworn to these understandings, again without descending into any detail of what was said.

47 Further, the defendant says that during the time that he was a director he, by agreements dated 1 September 2013, facilitated the payment of \$350,000 to the company. This money was raised by Mr John Galluccio and a corporate trustee controlled by the defendant repaying debts owed to the company by Mr Dale. Whilst nothing is said as to what was done with this money, I take this to be submitted as evidence which together with the information about the Department of Housing debt goes to address any suggestion that it was not reasonable to pursue the option of having the company comply with its obligation throughout the relevant period. By implication then he did not need to pursue the options of winding up or administration.

48 Subsequent to the receipt of the DPN, the defendant negotiated a repayment arrangement with the plaintiff. That arrangement involved the payment of \$200,000 on 7 April 2014 and for there to be further payments of \$50,000 per month commencing in June 2014. The repayment arrangement with the Commissioner of Taxation is said to have been reached in March 2014 and evidenced by letter dated 5 July 2014.

49 The defendant resigned as a director on 15 April 2015, though he remained involved as the company accountant and a shareholder of the company. Following his resignation from Stellar, Mr Dale sought to purchase his shares in Stellar. Mr Dale also sought to purchase Mr Galluccio's shares in Stellar. To give effect to the purchase,

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the defendant, Mr Galluccio and Mr Dale entered into a heads of agreement dated 4 August 2014. When entering into this, the defendant included in the sale agreement terms that Mr Dale and his wife, Nancy Dale, were to provide a guarantee in regards to the current payment arrangements with the Commissioner of Taxation. This, the defendant submits, demonstrates that he had taken all reasonable steps to secure payment of the monies owed.

50 The defendant also provides some information to the effect that Mr Dale is unavailable to provide information because he is currently facing fraud charges in relation to his involvement with the Department of Housing and, relevantly, his activities in diverting payments made by them to Stellar. The significance of this was not made clear. Presumably though, the defendant seeks to suggest that Mr Dale was a convincing raconteur such that his acceptance of the representations made about the matters relating to the Department of Housing set out above were credible. It cannot be that the defendant is suggesting he was misled about issues regarding payment of the PAYGW because the defendant does not himself say he was misled about this. It is clear, though, that there may be material relevant to the matters to be considered by the court that are in the knowledge of Mr Dale and there may well be actions he took relevant to the court's consideration of the issues that arise.

The plaintiff's position – reasonable steps defence

51 The plaintiff's position is that the defendant has provided no evidence at all of anything he did in the relevant period being 26 September 2013 until 12 February 2014. The plaintiff submits the defendant's material does not reveal any action by him directed to the matters set out in s 269-35(2)(a). In particular, the defendant provides no evidence of any steps taken by him during the time when he was the sole director: from 1 February, 2014 to 12 February 2014. At its highest, the evidence demonstrates attempts were made to enter into an arrangement with the plaintiff to pay the debt which arrangement the defendant says was made in March 2014 but which, on its face, was clearly made in July 2014.

52 Evidence of discussions between directors and fundraising activities with an investor say nothing at all about any attempt to meet the company's obligation to remit the PAYGW and so are not relevant to any defence under s 269-35(2)(a)(i).

53 The fact that the defendant may have taken some steps after the service of the notice is not sufficient to establish the defence because it does not address all steps taken throughout the period and relates to steps

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taken after the expiry of notice in the DPN. This, it is submitted, does not assist the defendant in making out the defence.

54 In any event, the company did not comply with the arrangements.

55 Further, as to the potential defence of seeking to wind up the company, at best, the defendant has made vague assertions that he believed the company was solvent whilst he was a director, however, these are no more than unsubstantiated assertions as to the amounts of debt owed to the company by a third party.

56 Significantly, it is submitted that nothing at all is said about:

- (a) any system for payment of PAYGW;
- (b) who took responsibility for the filing of the BAS;
- (c) whether any assurances were given as to the company's obligation being met when they were due in September, October, November and December 2013;
- (d) what the defendant was actually told by Mr Craig Dale in the period from his appointment as a director in September 2013 to Mr Dale's resignation on 1 February 2014, as to the company's compliance with its obligation to remit PAYW;
- (e) whether he was misled as to the company's compliance with its tax obligations;
- (f) what were the circumstances of Mr Dale's resignation as a director on 1 February 2014;
- (g) what the defendant did upon receipt of the DPN in January 2014; or
- (h) what steps the defendant personally took, at any time whilst he was a director, to verify the company's financial viability and its compliance with its tax obligations.

57 Finally, there is no evidence as to whether consideration was given to placing the company into administration.

Is there a triable issue – 'reasonable steps' defence

58 Accepting that the position at law is that the 'reasonable steps' defence is only available if it can be established that the defendant took all reasonable steps in the period from 26 September 2013 to 12 February 2014, the defendant's position is it was reasonable for him to pursue through the entirety of that period to have the company comply with its obligation to remit the PAYGW tax. This is because the company was at all times viable and had outstanding accounts greater than the amount then owed to the Commissioner of Taxation. In this regard, in my view, the evidence of the conduct of the Deputy Commissioner of Taxation in subsequently agreeing to a repayment arrangement is consistent with this. In those circumstances, I consider that it is open on the evidence for the defendant to establish that it was reasonable for him to continue to pursue that option, that is, of having the company meet its obligation.

59 I agree that there is a sparsity of material before this court addressing what steps the defendant took to ensure the company fulfilled its obligations. This lack of detail is surprising given what is said about the frequency of the meetings, the amounts of monies owed and that they were owed by a government department and the repayments, in fact, made. It is unclear whether the lack of detail is the fault of the defendant himself or of those whom he instructs.

60 In any event, the effect of the material that is before the court is that the defendant throughout the relevant period relied on representations made by his co-director Mr Dale in respect of the monies owed by the Department of Housing and this in turn, by implication, informed his conduct which appears to have been to wait for the money to become available so that payment could be made. The question is whether this is enough to raise a triable issue in relation to the 'reasonable steps' defence, mindful of the matters that need to be proved and the obligations on the defendant on an application for summary judgement.

61 That the defendant was desirous of ensuring payment can be seen from the payment made on 7 April 2014, the repayment arrangement that was negotiated and the heads of agreement signed in August 2014.

62 The circumstances around the payment of the \$200,000 is not clear. Notwithstanding the defendant's statement that the \$200,000 was part of the repayment arrangement he negotiated with the commissioner, the letter of 5 July 2014 evidencing the repayment arrangement does not make any reference to it (despite referencing two other payments which

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pre-date the letter - \$50,000 on 4 and 27 June 2014). Further, there is no material regarding a \$100,000 amount paid on 4 April 2014.

63 These matters, together with those raised by the defendant, and the issues around Mr Dale who was, no doubt, central to events, lead me to conclude that there are factual matters to be resolved which raise a triable issue insofar as the 'reasonable steps' defence is concerned, albeit I have reached the conclusion by a very close margin.

64 Given I have found there is a triable issue, it is not necessary for me to consider whether there is a further triable issue on the basis that the monies have been paid. Notwithstanding this, I will make some observations about it.

The payment defence

65 It is not in dispute that the following payments were made by Stellar to the plaintiff:

1. 7 April 2014: \$200,000.
2. 4 June 2014: \$50,000.
3. 27 June 2014: \$50,000.
4. 5 August 2014: \$50,000.

66 The defendant swears that these monies were paid pursuant to a repayment arrangement reached in March 2014 and evidenced by letter dated 5 July 2014. The defendant, however, submits that the monies paid would discharge the amount the subject of the DPN. In this regard, the defendant has sworn to his belief that this was the effect of *Practice Statement Law Administration 2011/20* (PSLA 2011/20). In any event, the defendant submits that the proper construction of the practice statement should be that the monies are first applied to amounts owed by the company which would reduce his liability under the DPN: by virtue of the application of s 269-40 of sch 1 of the TAA, the defendant's liability by way of penalty is reduced by an equivalent amount when the company makes payment of the PAYGW referred to in the DPN.

67 The plaintiff does not dispute that the \$350,000 was paid to the deputy commissioner. Further, the plaintiff submits that the monies were allocated to discharge the company's tax liabilities in accordance with PSLA 2011/20. In this regard the plaintiff submits that, absent any direction from the defendant, PSLA 2011/20 provides that the monies will

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be allocated against the earliest debts of the company. The running balance account that the plaintiff maintained for Stellar revealed that the company owed other monies, being the GST, PAYGW and General Interest Charges (GIC) from periods prior to 1 August 2013. When monies were allocated to the earliest debts owed by the company, only the amount of \$44,030.21 from the payment of \$50,000 made on 5 August 2014 was applied in reduction of Stellar's PAYGW liability for the month of August 2013. This reduced the defendant's liability from \$203,798 to \$159,767.79, being the amount sought by the plaintiff.

68 Insofar as the defendant's submission regarding the allocation of the payments made by the deputy commissioner is concerned, the plaintiff submits:

1. That the allocation policy is in accordance with div 3 of pt IIIB TAA, being s 8AAZL, s 8AAZL(a), s 8AAZL(b), s 8AAZL(c), s 8AAZL(d) and s 8AAZL(e).
2. That whilst the defendant may have standing to make an application under the *Judiciary Act 1903* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth):
 - (a) no application has in fact been made despite the DPN having been served on 21 January 2014 and the writ having issued in May 2015;
 - (b) the District Court does not have jurisdiction to determine such an application: see s 50 *District Court of Western Australia Act 1969*;
 - (c) whilst the defendant could bring judicial review proceedings, he has chosen not to;
 - (d) the court should not entertain a defence based on a hypothetical possible future event but should confine its consideration to whether there is a triable issue to the matters raised in the pleadings and evidence placed before it: *Anglo-American Investments Pty Ltd v Deputy Commissioner of Taxation* [2017] NSWCA 17 [18], [55], [56], including, the commissioner's unchallenged evidence as to how the payments were, as a matter of fact, allocated; and

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- (e) as a result of the above, any hypothetical application does not raise a triable issue in this action.

69 Finally, the plaintiff submits that, at its highest, the defendant himself has only said that he had an understanding with Mr Galluccio that the monies would be applied to reduce his liability under the DPN and that was not a belief he shared with the commissioner. The plaintiff submits that, given there were a number of payments made, the defendant could not reasonably expect the commissioner to be aware of the monies that were the subject of the DPN and to allocate them in that way, absent a direction.

70 The legal basis for the defendant's position in respect of the allocation of payments is vague. It is unclear whether the defendant's position is that he is seeking a judicial or administrative review of the commissioner's decision or whether he is in fact relying on some aspect of the interpretation of the practice statement. Certainly the practice statement contains such statements as:

2. General Rules About The Allocation Decision

When you make a decision about allocation of payments and credits, you must apply the policy in this practice direction but you must also consider the particular facts of the case at hand. You must decide each case on its merit and exercise your judgment to make a decision that is made in good faith and without bias. You should not consider irrelevant considerations.

....

3. What Does The Law Say?

In some instances, even if they are not nominated, it will be clear from the amount of the payment that it is to be allocated to a specific debt.

71 In circumstances where the \$200,000 was paid on the one day, that amount is close to the amount claimed in the DPN, and there is no detailed material from either party as to the circumstances of this payment, there may well also be a factual finding relevant to this that raises a triable issue as to whether the monies have in fact been paid.

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Conclusion

72 Being satisfied that there is a triable issue, I dismiss the application for summary judgement.

73 I will hear the parties on the final orders to be made, having regard to these reasons.