Common Law Division
Supreme Court
New South Wales

Case Name:	Deputy Commissioner of Taxation v Demian
Medium Neutral Citation:	[2018] NSWSC 1191
Hearing Date(s):	30 July 2018
Date of Decision:	2 August 2018
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	See paragraph [98]
Catchwords:	PRACTICE AND PROCEDURE – pleadings – whether plaintiff required to allege mode of proof of service – pleadings not deficient PRACTICE AND PROCEDURE – application for summary judgment of tax debt – whether issue to be tried as to date on which defendants received notices – admissions made in defendants' affidavits – statutory provision which converts allegation in pleading into prima facie evidence – no issue to be tried PRACTICE AND PROCEDURE – application for stay – no evidence of hardship – stay refused
Legislation Cited:	Acts Interpretation Act 1901 (Cth), s 29 Civil Procedure Act 2005 (NSW), Pt 6, ss 56, 58 Corporations Act 2001 (Cth), ss 203B, 206B Evidence Act 1995 (Cth), ss 160, 163 Evidence Act 1995 (NSW), s 81 Income Tax Assessment Act 1936 (Cth), s 204 Income Tax Assessment Act 1997 (Cth), ss 5-5, 5-10, 5-15 Income Tax Regulations 1936, cl 40 Judiciary Act 1903 (Cth), s 39B Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth), ss 3, 6 Taxation Administration Act 1953 (Cth), ss 14ZYA,

	14ZZK, 14ZZM, 14ZZR, Sch 1, ss 255-10, 255-45, 255-50, 284-75, 298-10, 298-15, 350-10 Uniform Civil Procedure Rules 2005 (NSW), rr 9.10, 14.3, 14.7, 14.23, 13.1
Cases Cited:	Anglo American Investments Pty Ltd v Deputy Commissioner of Taxation [2017] NSWCA 17; (2017) 347 ALR 134 Australian Competition and Consumer Commission v Cabcharge Australia Ltd (No 2) [2010] FCA 837 Blackett v Clutterbuck Brothers (Adelaide) Ltd [1923] SASR 301 Commercial Bank Co of Sydney Ltd v Pollard [1983] 1 NSWLR 74 Deputy Commissioner of Taxation v Cassaniti (Unreported, District Court of NSW, 10 March 2005, Quirk DCJ) Deputy Commissioner of Taxation v Swain (1993) 93 ATC 4886 Deputy Commissioner of Taxation v Tabuso [2013] NSWSC 688; (2013) 94 ATR 343 Deputy Commissioner of Taxation v Thai (1993) 26 ATR 108 Dever v Creevey, ex parte Creevey [1993] 1 Qd R 232 Fenato v Chief Commissioner of State Revenue (2010) 78 NSWLR 20; [2010] NSWCA 80 Snow v Deputy Commissioner of Taxation (1987) 14 FCR 119 Soong v Deputy Commissioner of Taxation (2011) 80 NSWLR 226; [2011] NSWCA 26 Southgate Investment Funds Limited v Deputy Commissioner of Taxation (2013) 211 FCR 274; [2013] FCAFC 10
Texts Cited:	Explanatory Memorandum for Tax Laws Amendment (Improvement to Self Assessment) Bill (No. 1) 2005 and Shortfall Interest Charge (Imposition) Bill 2005
Category:	Principal judgment
Parties:	Deputy Commissioner of Taxation (Plaintiff) Charbel Demian (2018/7081) (Defendant) Hoda Demian (2018/10601) (Defendant)
Representation:	Counsel: R Scruby SC/K Josifoski (Plaintiff) M Richmond SC/I Young (Defendants) Solicitors: Review and Dispute Resolution, Australian Taxation

	Office (Plaintiff) Lionheart Lawyers (Defendants)
File Number(s):	2018/7081; 2018/10601
Publication Restriction:	

JUDGMENT

Introduction

1 By statements of claim filed on 8 January 2018 and 11 January 2018 respectively the Deputy Commissioner of Taxation (the plaintiff) commenced proceedings against Charbel and Hoda Demian (the defendants, or Mr and Ms Demian) for unpaid tax and penalties. Neither filed a defence until 23 July 2018. On 30 July 2018 I extended the time within which the defendants were to file their defences to 23 July 2018.

2 Apart from a few matters to which reference will be made below, the position of the two defendants is relevantly identical. Accordingly I will address their positions collectively, except where otherwise stated.

3 There are six notices of motion (three in each proceedings) to be determined:

(1) The defendants' notices of motion filed on 9 March 2018 seeking orders for a separate question; dismissal of the proceedings; and that the statements of claim be struck out and that the plaintiff be granted leave to amend;

(2) The plaintiff's notices of motion filed on 14 March 2018 for default judgment (which is no longer pressed as defences have been filed) or, in the alternative, summary judgment;

(3) The defendants' notices of motion filed on 23 May 2018 for a stay of the proceedings pending finalisation of proceedings brought under Part IVC of the *Taxation Administration Act 1953* (Cth) (TAA) in the Administrative Appeals Tribunal (AAT) and the Federal Court; or an order staying execution of judgment.

4 For completeness I note that the defendants handed up a draft cross-claim on the morning of the hearing. Mr Richmond ultimately accepted that that the matters raised in the draft cross-claim did not amount to a defence to the

plaintiff's claim and could only be considered as a cross-claim: cf. *Commercial Bank Co of Sydney Ltd v Pollard* [1983] 1 NSWLR 74. I note that the defences as filed on 23 July 2018 did not raise the matters sought to be raised in the cross-claim. It was common ground, on the basis of *Anglo American Investments Pty Ltd v Deputy Commissioner of Taxation* [2017] NSWCA 17; (2017) 347 ALR 134 at [46]-[50] (Payne JA, McColl and Meagher JJA agreeing), that such matters did not amount to a defence to the plaintiff's claim.

5 It was also common ground that the draft cross-claim raised a special federal matter within the meaning of s 3(1)(e) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (being a matter that is within the original jurisdiction of the Federal Court by virtue of s 39B of the *Judiciary Act 1903* (Cth)). This Court is required, by s 6 of the *Jurisdiction of Courts (Cross-vesting) Act*, to transfer the matter unless satisfied that there are "special reasons" for determining it in this Court. The relevant period for notice to be given to the Attorneys-General for the Commonwealth and New South Wales has not expired. Mr Richmond submitted that, if summary judgment were ordered for the whole of the plaintiff's claim, any cross-claim could still be filed and determined in these proceedings: Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 9.10.

6 Mr Richmond SC, who appeared with Mr Young for the defendants, accepted that I could not assess the merits of the cross-claim but submitted that the cross-claim was germane to the stay application on the motion in (3) above. Mr Scruby SC, who appeared with Mr Josifoski for the plaintiff, contended that the proposed cross-claim was irrelevant to the plaintiff's applications.

7 The respective applications give rise to three principal questions: first, is the statement of claim deficient as a matter of pleading; secondly, ought summary judgment be ordered; and, thirdly, ought the proceedings, or judgment, be stayed pending determination of the plaintiff's objections in the AAT and the Federal Court and of the draft cross claim.

The background facts

8 I propose to set out the background facts which are not relevantly controverted.

Lodgement of returns and subsequent audit

9 In December 2013 Mr Demian signed his tax returns for the years ended 30 June 2011 (FY2011) and 30 June 2012 (FY2012) and declared a taxable income in the order of $16,000. In the same month Ms Demian signed her tax returns for the years ended 30 June 2010 (FY2010), FY2011 and FY2012 and also declared a taxable income in the order of $16,000. In December 2013 the plaintiff issued notices of assessment to the defendants in respect of the years for which they had submitted tax returns. Later in December 2013, the plaintiff notified the defendants of his intention to conduct an audit of their taxation affairs.

10 It was common ground that the dispute between the plaintiff and the defendants which led to the amended assessments (referred to below) related to the following. The defendants' bank statements showed substantial deposits which were not reflected in the income declared in their tax returns. The defendants contended that these deposits represented repayment by Shimden Pty Ltd (Shimden) and other companies within the Demian group of companies (which comprised 44 separate companies) of loans which the defendants had made to them. As is apparent from the plaintiff's reasons for his decision on the objections, the plaintiff considered, based on the ATO's analysis of the material provided, that all funds advanced by the defendants to the Demian group had been exhausted by 1 July 2009. Consequently, the plaintiff adjudged that all amounts received by either or both of the defendants or spent for their benefit after that date were not loan repayments and were assessable as income.

The plaintiff's position paper and the defendants' response

11 On about 24 February 2015 the plaintiff issued a position paper in which he set out the position of the Australian Taxation Office (ATO) with respect to the defendants' tax liabilities for FY2011-2013. The defendants, through their accountants, responded on 22 May 2015. On 7 July 2015 the plaintiff requested further information from both defendants which was provided on 30 October 2015 and 2 November 2015.

Notices of amended assessments and shortfall penalties

12 On 10 May 2016 the plaintiff issued to Mr Demian notices of amended assessment and notices of assessment of shortfall penalty for FY2011 and FY2012. These documents were sent by post to his postal address, which was a post office box at the Parramatta Post Office. Mr Demian admitted in his affidavit sworn on 8 May 2018 that he had received those documents "[o]n or about 10 May 2016". The notices of amended assessment stated that payment was due on 3 June 2016, failing which General Interest Charge (GIC) would accrue on outstanding amounts until the entire amount was paid. The notices of assessment of shortfall penalty were issued on 10 May 2016 and stated that payment was due on 27 May 2016. On about 25 May 2016 the plaintiff provided reasons for the amended assessments and penalty assessments to Mr Demian. Amended reasons were provided on 23 August 2016.

13 On 19 August 2016 the plaintiff issued to Ms Demian notices of amended assessment and notices of assessment of shortfall penalty for FY2010, FY2011 and FY2012. They were sent by post to her postal address, which was the same post office box at the Parramatta Post Office as that of Mr Demian. Ms Demian admitted in her affidavit sworn 8 May 2016 that she had received these documents "[o]n or about 19 August 2016." The notices of amended assessment were issued on 19 August 2016 and stated that payment was due on 12 September 2016, failing which GIC would accrue on outstanding amounts until the entire amount was paid. The notices of

assessment of shortfall penalty were issued on 19 August 2016 and stated that payment was due on 9 September 2016.

14 On 19 August 2016 the plaintiff provided reasons to Ms Demian which explained his position with respect to her tax affairs.

The defendants' lodgement of objections to the amended assessments and penalty assessments

15 On 14 September 2016 Mr Demian lodged objections against the amended assessments and penalty assessments. On about 28 April 2017 Mr Demian received a letter from the plaintiff seeking further information in respect of the objections, to which Mr Demian responded on 26 May 2017. On 28 November 2017 the plaintiff asked Mr Demian to provide further information by 22 December 2017. As referred to above, the statement of claim against Mr Demian was filed by the plaintiff on 8 January 2018. Mr Demian provided the further information on or about 1 February 2018.

16 On 21 February 2018 Mr Demian issued a notice to the plaintiff pursuant to s 14ZYA of the TAA. The effect of the notice was to require the plaintiff to determine the objections or be deemed, if no determination was made within 60 days, to have made an adverse decision, which would entitle Mr Demian to apply to the AAT for review.

17 On 20 April 2018 the plaintiff issued a decision in which he allowed some of Mr Demian's objections. As a consequence, the plaintiff issued further notices of amended assessment for FY2011 and FY2012.

18 On 1 February 2017 Ms Demian lodged objections against the amended assessments and penalty assessments. On about 1 May 2017 Ms Demian received a letter from the plaintiff seeking further information in respect of the objections, to which Ms Demian responded on 26 May 2017. On 28 November 2017 the plaintiff asked Ms Demian for further information by 22 December 2017. As referred to above, the plaintiff filed the statement of claim against Ms Demian on 11 January 2018. The further information which the

plaintiff had requested was provided by Ms Demian on or about 1 February 2018.

19 On 21 February 2018 Ms Demian issued a notice to the plaintiff pursuant to s 14ZYA of the TAA, the effect of which is set out above.

20 On 15 March 2018 the defendants offered to pay their primary tax liability and GIC as stipulated in the statement of claim. This total amount of $879,833.03 ($406,344.39 for Mr Demian and $473,488.64 for Ms Demian) was offered on condition that the proceedings be dismissed with no order as to costs; that the amounts be paid within 14 days; and that the plaintiff refrain from taking enforcement action until the Part IVC proceedings were resolved or otherwise finally determined. This offer left a balance of administrative penalties and SIC for both defendants of $697,333.67. The plaintiff refused the offer on the basis that it did not satisfy the current tax debt "in an appropriate way".

21 On 20 April 2018 the plaintiff issued his decision on Ms Demian's objections, which allowed part of the objections. As a consequence, the plaintiff issued a notice of amended assessment for FY2011.

22 On 18 May 2018 the defendants applied for a deferral of the due date for payment of 50% of their respective primary tax under s 255-10 of Sch 1 of the TAA.

Certificate under s 255-45 of Sch 1 of the TAA

23 On 14 March 2018 the plaintiff certified as follows:

> "Pursuant to section 255-45 of Schedule 1 of the *Taxation Administration Act* 1953 I hereby certify that:
> 1. The following notices of assessments were or are taken to have been served on Charbel Demian under a taxation law:
> a. Notice of amended assessment as to income tax for the year ended 30 June 2011 which issued on 10 May 2016,
> b. Notice of amended assessment as to income tax for the year ended 30 June 2012 which issued on 10 May 2016,
> c. Notice of assessment of liability to pay penalty for the year ended 30 June 2011 which issued on 10 May 2016,

d. Notice of assessment of liability to pay penalty for the year ended 30 June 2012 which issued on 10 May 2016.

2. That as at 14 March 2018, the sum of $701,809.19 is a debt due and payable to the Commonwealth by the said Charbel Demian in relation to the tax related liability referred to in this certificate."

The present recovery proceedings

24 On 8 January 2018 the plaintiff filed a statement of claim against Mr Demian in the District Court. The District Court proceedings were subsequently transferred to this Court. On 11 January 2018 the plaintiff filed a statement of claim against Ms Demian in this Court. Ms Demian was served on 9 February 2018 and Mr Demian was served on 10 February 2018. Neither filed a defence within 28 days after service as required by UCPR, r 14.3(1). Accordingly the defendants were in default by mid-March 2018 and remained in default until 30 July 2018 when I extended the time for filing their defences to 23 July 2018.

Proceedings under Part IVC of the TAA

25 On 6 June 2018 the defendants commenced proceedings in the AAT for review of the plaintiff's decision on their respective objections.

Relevant statutory provisions

26 The parties agreed that, with the exceptions noted below, the relevant law was as set out in Compilation No. 181 of the *Income Tax Assessment Act 1997* (Cth) (ITAA) and Compilation No. 154 of the *Taxation Administration Act 1953* (Cth) (TAA). Section 298-10 of Sch 1 to the TAA, which applied at the material time, was as set out in Compilation No. 136 of the TAA. Section 204 of the *Income Tax Assessment Act 1936* (Cth) (the 1936 Act) applies to FY2010, which is relevant in the case of Ms Demian. Section 204(2) of the 1936 Act is in similar terms to s 5-5 of the ITAA, which replaced it.

Categories of payment and when each becomes due and payable

27 There are, relevantly, four categories of payments for which a taxpayer will be liable to pay the plaintiff: income tax; shortfall interest charge (interest on

unpaid tax, SIC); general interest charge (interest on outstanding amounts (including outstanding SIC), GIC); and administrative penalties (penalties).

Income tax, SIC and GIC

28 Income tax is payable as a result of an assessment made by the plaintiff: s 5-5, ITAA. If the plaintiff amends an assessment, any extra income tax resulting from the amendment is due and payable 21 days after the day on which the plaintiff gives notice of the amended assessment: s 204 of the 1936 Act (for the FY2010 return) and s 5-5(7), ITAA (for subsequent returns). A taxpayer is liable to pay a SIC 21 days after the plaintiff has given notice of the SIC: s 204(2A) of the 1936 Act and s 5-10, ITAA. GIC is charged from the due date of, relevantly, income tax or SIC: s 204(3) of the 1936 Act and s 5-15, ITAA.

Administrative penalties

29 Section 284-75(1) of Sch 1 to the TAA provides for liability to an administrative penalty if a taxpayer makes a statement to the plaintiff which is false or misleading in a material particular.

30 The plaintiff is obliged to give notice to a taxpayer of his or her obligation to pay an administrative penalty and the reasons why the taxpayer is liable to pay the penalty. At the relevant time, s 298-10 of Sch 1 to the TAA provided:

> "The Commissioner must give written notice to the entity of the entity's liability to pay the penalty and of the reasons why the entity is liable to pay the penalty. The Commissioner may do so in any other notice he or she gives to the entity. The Commissioner is not required to give reasons if he or she decides to remit all of the penalty."

31 The Explanatory Memorandum for the bill which introduced the section in these terms said:

> "3.21 The law does not specify when the reasons must be supplied. However it is intended that the Commissioner supply the reasons at the same time as, or as soon as possible after, the Commissioner notifies the entity of the penalty. In some cases the Commissioner may supply reasons before issuing notice of the penalty."

32 Section 298-15 of Sch 1 to the TAA provides for the due date for an administrative penalty as follows:

> "The penalty becomes due for payment on the day specified in the notice, which must be at least 14 days after the notice is given to the entity."

33 The word "given" is defined in s 29 of the *Acts Interpretation Act 1901* (Cth) as follows:

> "**29 Meaning of service by post**
>
> (1) Where an Act authorises or requires any document to be served by post, whether the expression "serve" or the expression "give" or "send" or any other expression is used, then the service shall be deemed to be effected by properly addressing, prepaying and posting the document as a letter and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.
>
> (2) This section does not affect the operation of section 160 of the *Evidence Act 1995*."

Service of documents

34 Clause 40 of the Income Tax Regulations 1936 (ITR) permits the plaintiff to serve a document by posting a copy to the taxpayer's nominated address.

Provisions which affect proof of matters alleged

Evidence Act 1995 (Cth)

35 Section 160 of the *Evidence Act 1995* (Cth) relevantly provides that it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by pre-paid post addressed to a person at a specified address in Australia was received at that address on the fourth working day after having been posted. Section 163 provides that a letter from a Commonwealth agency addressed to a person at a specified address is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) to have been sent by prepaid post to that address on the fifth business day after the date (if any) that, because of its placement on the letter or otherwise, purports to be the date on which the letter was prepared.

TAA

36 Section 255-45 of Sch 1 of the TAA provides that a certificate signed by the plaintiff is *prima facie* evidence of certain matters in a proceeding to recover an amount of tax-related liability. The certificate may state that a notice required to be served was, or is taken to have been, served (TAA, Sch 1, s 255-45(2)(c)) or that a sum specified in the certificate is, as at the due date specified in the certificate, a debt due and payable by the person to the Commonwealth (TAA, Sch 1, s 255-45(2)(e)).

37 Section 255-50 of Sch 1 to the TAA provides that an allegation in, relevantly, the plaintiff's pleading is *prima facie* evidence of the matter, being evidence of the fact. The section applies even if evidence is given in support or rebuttal of the matter.

38 Section 350-10(1) of Sch 1 to the TAA provides that a notice of assessment is conclusive evidence that the assessment was properly made and, except in proceedings under Part IVC of the TAA on a review or appeal relating to the assessment – that the amounts and particulars of the assessment are correct. Section 350-10(3) provides that production of a certificate signed by the plaintiff which states that from the time specified in the certificate an amount was payable under a tax law is *prima facie* evidence that the amount is payable from that time and that the particulars stated in the certificate are correct.

Taxation objections, reviews and appeals

39 Part IVC of the TAA provides for taxation objections, reviews and appeals. On an application for review of a relevant decision, the applicant has the burden of proving, if the tax decision is an assessment, both that the assessment is excessive or otherwise incorrect and what the assessment should have been: s 14ZZK(b)(i). In any other case, the applicant has the burden of proving that the taxation decision should not have been made or should have been made differently: s 14ZZK(b)(ii).

40 The fact that a review (s 14ZZM) or an appeal (s 14ZZR) is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review or appeal were pending.

Rules concerning pleading

41 UCPR, r 14.7 provides:

> "**14.7 Pleadings to contain facts, not evidence**
>
> Subject to this Part, Part 6 and Part 15, a party's pleading must contain only a summary of the material facts on which the party relies, and not the evidence by which those facts are to be proved."

42 UCPR, r 14.23 required the defendants' defences to be verified by affidavit, the requirements of which are as follows:

> "(3) The affidavit verifying a pleading must state:
> (a) as to any allegations of fact in the pleading, that the deponent believes that the allegations are true, and
> (b) as to any allegations of fact that the pleading denies, that the deponent believes that the allegations are untrue, and
> (c) as to any allegations of fact that the pleading does not admit, that after reasonable inquiry the deponent does not know whether or not the allegations are true."

Consideration

43 It is convenient to address the defendants' application to strike out the statements of claim first, before turning to the application for summary judgment and the application for a stay.

The defendants' application to strike out the statements of claim

44 In order to address the defendants' arguments that the statements of claim are defective and ought be struck out it is convenient to set out portions of the statement of claim filed against Mr Demian. As Mr Richmond did not distinguish between the pleadings for liability based on the amended assessments, SIC, GIC or administrative penalties, it is sufficient, for present purposes, to set out the allegations relating to income tax as follows:

"The plaintiff pleads his cause of action, and avers and states pursuant to section 255-50 of Schedule 1 of the *Taxation Administration Act 1953* ("the TAA 1953"), as follows:

1. The plaintiff is a Deputy Commissioner of Taxation and in his official name is entitled, pursuant to subsection 255-5(2) of Schedule 1 of the TAA 1953, to sue to recover an amount of a tax-related liability that remains unpaid after it has become a debt due to the Commonwealth of Australia and payable to the Commissioner of Taxation ("the Commissioner").

AMOUNTS PAYABLE IN RESPECT OF INCOME TAX

2. The defendant was assessed to pay income tax for the years of income ended 30 June 2011 and 30 June 2012 ("the Relevant Periods").

3. Notices of amended assessment in respect of the Relevant Periods were served on the defendant on or about the issue dates of the said notices in accordance with the *Income Tax Assessment Act 1936* ("the ITAA 1936") and the Income Tax Regulations 1936.

PARTICULARS

The issue dates of the notices of amended assessment are as stated in paragraph 4 below.

4. Income tax for the Relevant Periods became due and payable pursuant to section 5-5 of the *Income Tax Assessment Act 1997* ("the ITAA 1997") on the following due dates:

Income tax for the Relevant Period	Issue date of Notice of Amended Assessment	Due Date
30 June 2011	10 May 2016	3 June 2016
30 June 2012	10 May 2016	3 June 2016

5. The defendant failed to pay income tax for the Relevant Periods on or before the relevant due dates.

6. By reason of the failure to pay income tax by the relevant due dates the defendant became liable to pay the general interest charge pursuant to section 5-15 of the ITAA 1997 and Part IIA of the TAA 1953.

7 The defendant is indebted to the Commonwealth of Australia in the sum of $406,344.39, in respect of income tax and additional charges for late payment, particulars of which are as follows.

PARTICULARS

[Amounts set out.]"

45 Mr Richmond contended that the material facts required to be pleaded (and, in due course, proved), which are also "essential elements" were:

(1) the due making of an assessment;

(2) the service of that notice of assessment on the taxpayer;

(3) the establishment or ascertainment of a due date on which the tax was due and payable; and

(4) that the taxpayer has failed to pay tax on that due date.

46 Mr Richmond relied on *Deputy Commissioner of Taxation v Thai* (1993) 26 ATR 108 (*Thai*). He accepted that the pleading in *Thai* was significantly different from the present pleading but contended that the statements of principle made by Master Malpass in that case (which were approved by Abadee J in *Deputy Commissioner of Taxation v Swain* (1993) 93 ATC 4886) remained applicable. Master Malpass said, at 111:

> "It seems to me that the plaintiff should also plead the material facts which cause the assessed tax to become due and payable and the failure of the defendant to pay the tax on the due and payable date."

47 Mr Richmond submitted that, if this principle were applied to the present pleading, the pleading would be deficient because the plaintiff was required to plead not only the *date* of service, but also *how* service was effected. He also contended that the plaintiff was required to allege that service was *deemed* to have occurred by a particular date and the due date calculated by reference to the date of service. Mr Richmond contended that it was insufficient to allege that the notice had been served "on or about" a particular date since that expression imported an unacceptable margin of vagueness.

48 Mr Richmond also relied on *Deputy Commissioner of Taxation v Cassaniti* (Unreported, District Court of NSW, 10 March 2005, Quirk DCJ) (*Cassaniti*) where Quirk DCJ set aside default judgment on the basis that the pleadings were irregular in that they failed to disclose the date on which tax was due and payable.

49 Mr Richmond cited *Fenato v Chief Commissioner of State Revenue* (2010) 78 NSWLR 20; [2010] NSWCA 80 (*Fenato*) in support of the submission that the pleading must make clear how the due date is ascertained and how tax comes to be due on a particular date. He relied on what Gzell J (Beazley and Macfarlan JJA agreeing) said at [39]-[41] as follows:

> "[39] In my view the making of an assessment is an essential element of the cause of action for money due under the *Taxation Administration Act* as it arises in this case. Section 14(1) of the *Land Tax Management Act* required the Chief Commissioner to do so and land tax does not become due and payable until a notice of assessment is served and that requires the due making of an assessment.
>
> [40] Proof of service of the notice of assessment is an essential element because land tax is not due and payable until the date specified for payment in a notice of assessment, a date which must not be within 30 days after service in terms of s 39(3) of the *Land Tax Management Act*.
>
> [41] The establishment of a due date on which land tax becomes due and payable is an essential element because land tax does not become due and payable before the date so specified in a notice of assessment under s 39(1) of the *Land Tax Management Act*."

50 Mr Richmond also relied on the subsequent statements in *Fenato* to the effect that failure to plead those matters made the pleading defective such that default judgment ought be set aside.

51 I was also referred by Mr Richmond to *Deputy Commissioner of Taxation v Tabuso* [2013] NSWSC 688; (2013) 94 ATR 343 (*Tabuso*), in which Harrison J distinguished *Fenato* on the basis that the judgment in *Tabuso* was obtained by consent.

52 I do not accept the defendants' submissions. *Cassaniti* is not relevant since the present pleading *does* allege the due date and the date of service. The various provisions set out above indicate a statutory intention that the plaintiff be entitled to serve documents on taxpayers by post. While the plaintiff may rely on various deeming provisions and presumptions, he is not obliged to rely on them: see, for example *Soong v Deputy Commissioner of Taxation* (2011) 80 NSWLR 226; [2011] NSWCA 26 at [24] (Gzell J, Allsop P, Giles, Hodgson and Tobias JJA agreeing), where proof of actual delivery rendered the

presumption of delivery on a particular date inoperative. Indeed, as set out above, s 255-50 of the TAA provides that an allegation in a relevant pleading is *prima facie* evidence of the fact alleged.

53 What the plaintiff is required to prove with respect to, say, amended notices of assessment, is that the notice was given to the taxpayer no fewer than 21 days prior to the due date specified in the notice. There are various ways in which the plaintiff could plead this material fact. The plaintiff could make the allegation in terms: that the notice was given to the tax payer no fewer than 21 days prior to the due date, which would need to be alleged, specified in the notice. Alternatively, the plaintiff could allege a specific date of service (which would be appropriate in the case of personal service) and a due date specified in the notice; or the plaintiff could (as in the present case) allege an approximate date for service and a due date.

54 If the plaintiff chooses, as in the case of Mr Demian, not to rely on the deeming provisions or any of the applicable presumptions, the plaintiff may allege an approximate date of service and a due date. In that event, the plaintiff runs a risk that he will not be able to prove service more than 21 days before the due date, if the allegation is successfully controverted by evidence adduced by the defendant. However, if the defendant either admits, or fails to controvert by evidence, the approximate date for service alleged, then as long as the range of approximation fulfils the statutory requirements, the plaintiff will have established this element.

55 Mr Scruby referred me to *Dever v Creevey, ex parte Creevey* [1993] 1 Qd R 232 at 238-239 in which the Full Court of the Supreme Court of Queensland considered an appeal against a conviction on the basis of an indictment to which the Commissioner for Consumer Affairs (the Commissioner) was obliged to consent prior to the institution of proceedings. The Commissioner had consented to an indictment which alleged certain conduct on 3 January 1990. The indictment was subsequently amended to allege that the conduct had occurred “on or about” 4 January 1990. The Full Court dismissed the

appeal on the basis that the amendment did not charge a new and different offence. McPherson ACJ said at 238:

> "Something done on 4 January cannot be said to be done 'on' 3 January; but it can fairly be described as done on 'about' 3 January. As was said in *R. v. Hartley* [1972] 2 Q.B. 1, 7:
>
> > '… if the words 'on or about' the date are used in the indictment, then provided that the offence is shown to have been committed within some period that has a reasonable approximation to the date mentioned in the indictment, then the fact that the date is not correctly stated does not preclude a valid verdict of guilty.'
>
> Except in matters where time is of the essence of the offence, the time has long gone since it was necessary for the date of the offence to be laid with absolute certainty: see *Archbold's Pleading and Evidence in Criminal Cases*, (21st ed., 1893), at 56; Kennedy Allen: *The Justices Acts of Queensland*, (3rd ed., 1956), at 97. Here the offending conduct as particularised was probably committed on 3 January 1990 ('causing an advertisement to be published …'); but it is not incapable of being considered as having continued to 4 January 1990. Either occasion reasonably approximates to the date of the other."

56 In *Blackett v Clutterbuck Brothers (Adelaide) Ltd* [1923] SASR 301 a question of construction arose concerning a contractual term that certain machinery be delivered "on or about" 1 October 1922. Murray CJ said, at 306-307:

> "Delivery on 2nd September could not … be a reasonable performance of an order asking for delivery 'on or about' the 1st day of October … The words 'on or about' in the context in which they are used, do not allow of much latitude. If the expression had been 'in or about the first week in October' possibly a week on either side would be included but I should have no hesitation in holding that twenty-nine days would not … **A day or two on either side or perhaps three … would … be the most that could reasonably be held to be covered by the expression**."
>
> [Emphasis added.]

57 A different question would arise if the plaintiff chose to allege an approximate date by the use of the words "on or about" but chose the date exactly 21 days before the due date. In that event, the allegation would comprehend a date, say, 20 days or 19 days before the due date, which would not fulfil the statutory requirement. However, in the present case, the plaintiff has pleaded a date for service of "on or about 10 May 2016". The date of 10 May 2016 is 24 days before the "due date" of 3 June 2016. The last date for service which could legally support a specified due date of 3 June 2016 is 13 May 2016. The expression "on or about 10 May 2016" would, in my view, include at least 11

and 12 May 2016, and possibly 13 May 2016, each of which would fulfil the statutory requirement for service to produce a due date of 3 June 2016. As a matter of construction, I do not regard 14 May 2016 (which would be the first day outside the statutory range for a due date of 3 June 2016) as being "on or about 10 May 2016".

58 The position is the same for the notices of amended assessment to Ms Demian since the issue date of the relevant notices of amended assessments was 19 August 2016; the date of service was alleged to be "on or about 19 August 2016" and the alleged due date was 12 September 2016. The last day on which the defendant could have received the notice for a due date of 12 September 2016 was 22 August 2016 (21 days before the due date), which was three days after the date of issue. The expression "on or about 19 August 2016" did not, in my view, comprehend a date as late as 23 August 2016, being the first date outside the range permitted by the TAA.

59 For Ms Demian, the position is *a fortiori* for administrative penalties. The statement of claim alleged that the notices were given "on or about" the issue dates which were said to be 19 August 2016. The alleged due date of 9 September 2016 was 21 days after the issue date. However, only 14 days' notice is required for notices of administrative penalties.

60 I reject Mr Richmond's contention that the plaintiff must allege as a material fact *how* service was effected and *how* the due date was calculated. The manner in which service was effected is a matter for particulars, not pleading, since the material fact is that the defendant was served. Nor is it necessary for the plaintiff to allege, in the statement of claim, how the due date was calculated since this is a matter of argument, not a material fact. As referred to above, UCPR r 14.7 requires a pleading to contain a summary of material facts, not evidence. One of the purposes of a statement of claim is to put the defendant on notice of the case he or she has to meet. Another purpose is to ascertain, by the filing of a defence in response, whether any of the allegations are controverted or admitted. In the present case, both defendants admitted that they had been served "on or about" the date of issue of the

relevant notices as alleged. There is no basis for any suggestion that the defendants are unaware of the case they have to meet or that the date on which the notices were given to them is *bona fide* in dispute.

61 For these reasons, I propose to dismiss the defendants' notices of motion filed on 9 March 2018.

The plaintiff's application for summary judgment

The ambit of the dispute

62 Mr Richmond accepted that the only part of the plaintiff's claim against either defendant in respect of which there was an issue to be tried was the claim for administrative penalties. In other words, he did not resist the plaintiff's claim for summary judgment in so far as it applied to the defendants' liability for tax, SIC and GIC. Accordingly, it is only necessary to consider the plaintiff's claim for administrative penalties for the purposes of the plaintiff's application for summary judgment.

The pleading of the plaintiff's claim for administrative penalties

63 In order to address the submissions it is necessary to set out relevant extracts of the pleadings.

Extract from statement of claim against Mr Demian

64 The plaintiff relevantly alleged against Mr Demian:

> 9. The Commissioner gave written notices of the Statement Penalties to the defendant on or about the issue dates of the said notices in accordance with section 298-10 of Schedule 1 to the TAA 1953 ("the Statement Penalty Notices").
>
> PARTICULARS
> The issue dates of the Statement Penalty Notices are stated in paragraph 10 below.
>
> 10. The Statement Penalties became due and payable pursuant to section 298-15 of Schedule 1 to the TAA 1953 on the following due dates:

Statement Penalties for the Relevant Period	Issue date of Statement Penalty Notices	Due Date

ended		
30 June 2011	10 May 2016	27 May 2016
30 June 2012	10 May 2016	27 May 2016

Extract from statement of claim against Ms Demian

65 The plaintiff relevantly alleged against Ms Demian:

> 9. The Commissioner gave written notices of the Statement Penalties to the defendant on or about the issue dates of the said notices in accordance with section 298-10 of Schedule 1 to the TAA 1953 ("the Statement Penalty Notices").
>
> PARTICULARS
> The issue dates of the Statement Penalty Notices are stated in paragraph 10 below.
>
> 10. The Statement Penalties became due and payable pursuant to section 298-15 of Schedule 1 to the TAA 1953 on the following due dates:

Statement Penalties for the Relevant Period ended	Issue date of Statement Penalty Notices	Due Date
30 June 2010	19 August 2016	9 September 2016
30 June 2011	19 August 2016	9 September 2016
30 June 2012	19 August 2016	9 September 2016

Defences

66 The defendants' defences responded to those paragraphs in identical terms as follows:

> "9. The Defendant does not admit paragraph 9 of the Statement of Claim. The 'Statement Penalty Notices' referred to in paragraph 9 of the Statement of Claim did not constitute written notice to the Defendant of the Defendant's liability to pay the penalty and the reasons why the Defendant is liable to pay the penalty as mandatorily required by section 298-10 of Schedule 1 to the Taxation Administration Act 1953 (the 'TAA'). **The Defendant does not know and cannot admit whether the relevant notices were lawfully given in accordance with section 298-10 of Schedule 1 to the TAA on or about the issue date of the relevant notices as alleged**.
>
> 10. The Defendant does not admit paragraph 10 of the Statement of Claim. The 'Statement Penalties' referred to in paragraph 10 of the Statement of Claim did not become due and payable on the due dates as alleged on account of the failure of the Plaintiff to comply with the mandatory requirements of sections 298-10 and 298-15 of Schedule 1 to the TAA. The due dates were not lawfully ascertained pursuant to section 298-15 of Schedule 1 to the TAA as alleged."

[Emphasis added.]

The parties' submissions

67 Mr Scruby relied on the following to establish service and the due date in respect of Mr Demian:

(1) Mr Demian's admission on affidavit that he had received the notice of administrative penalties on or about 10 May 2016;

(2) section 255-50 of Sch 1 to the TAA which converted the allegations in [9] and [10] of the statement of claim into *prima facie* evidence that the notices were given to the defendant on or about 10 May 2016 (being the issue date), and that the due date for each was 27 May 2016;

(3) the certificate issued by the plaintiff on 14 March 2018 set out above; and

(4) the defence filed by Mr Demian in response to [9] and [10] of the statement of claim.

68 Mr Scruby contended that the admission by Mr Demian in his affidavit was sufficient to establish that he had been given the notice more than 14 days before 27 May 2016, which was the due date, as provided for in s 298-15 of Sch 1 to the TAA. Further, Mr Scruby submitted that the effect of s 255-50 of Sch 1 to the TAA was that there was *prima facie* evidence of those matters. The *prima facie* evidence that the notice had been given to Mr Demian more than 14 days before the due date was unchallenged, as could be seen by the non-admission of the allegation in paragraph [9] of the defence (set out above), as well as the admission that the defendant "did not know" of the facts alleged.

69 Mr Richmond contended that the plaintiff was not entitled to summary judgment for the administrative penalties because he could not prove

compliance with s 298-15 of Sch 1 to the TAA: that is, that the notice was given to the defendants at least 14 days before the due date.

70 Mr Richmond argued that the effect of the presumptions in ss 160 and 163 of the *Evidence Act* (Cth) was that the taxpayer received the notice of administrative penalty fewer than 14 days prior to the alleged due date. He submitted that the defendants' affidavit evidence that they had received the relevant notices "on or about" the dates of issue could not be used as admissions against them because of the vagueness of the expression "on or about".

71 He submitted that, in these circumstances, the plaintiff could not establish that the due date in the notices conformed to the statutory provisions and that summary judgment for the administrative penalties ought be refused.

Consideration

72 Summary judgment may be given if there is evidence of the facts on which the plaintiff's claim for relief is based and evidence by some responsible person that, in the belief of that person, the defendant has no defence to the claim: UCPR, r 13.1. Christopher Coombes, a public servant at the ATO, has deposed on affidavit to the latter matter. There is evidence of the facts on which the plaintiff's claim for relief is based. For the reasons given above, I am satisfied that the admission made by Mr Demian in his affidavit ought be construed as an admission that he had received the notices by 13 May 2018 at the latest. Moreover, paragraphs [9] and [10] constitute *prima facie* evidence of this matter by reason of s 255-50 of Sch 1 to the TAA.

73 The principles relating to summary judgment are well established. If there is an issue to be tried, summary judgment will be declined. Part 6 of the *Civil Procedure Act 2005* (NSW) applies. Thus, I am required by s 56(2) to seek to give effect to the overriding purpose (to facilitate the just, quick and cheap resolution of the real issues in the proceedings) when deciding whether to exercise the power in UCPR, r 13.1 to order summary judgment. I am also

required to seek to act in accordance with the dictates of justice: s 58, *Civil Procedure Act*.

74 It is plain from the defence that was filed on 23 July 2018 that Mr Demian has, by his non-admission of paragraphs [9] and [10], chosen both to put the plaintiff to proof of the allegations and not to controvert the allegation. This is the combined effect of the non-admission in the pleading and the affidavit verifying the defence, as required by UCPR, r 14.3. The pleading and the verifying affidavit signal that the defendant does not propose to controvert the plaintiff's evidence on that point. A non-admission is to be contrasted with a denial of an allegation which signals that evidence will be adduced to controvert the plaintiff's allegation: *Australian Competition and Consumer Commission v Cabcharge Australia Ltd (No 2)* [2010] FCA 837 at [7] (Finkelstein J).

75 In these circumstances, the plaintiff's *prima facie* case not only stands unrebutted, but there is no indication that Mr Demian proposes to or would ever be able to rebut the case. That he not only *cannot admit*, but also does not *know* (according to the defence as pleaded) tells against there being any case in response, much less one which either controverts the allegations in [9] and [10] of the statement of claim or seeks to resile from Mr Demian's admission on oath in his affidavit. If the matter were permitted to go to trial and the defendants chose not to read the affidavits which contained their admissions, the position would be no different than on this application as the plaintiff would be entitled to tender the admissions in the defendants' affidavits as to the date of receipt in the plaintiff's case: s 81 of the *Evidence Act 1995* (NSW). Although there is an apparent inconsistency between Mr Demian's admission on oath that he received the relevant notices on or about 10 May 2016 and his response to paragraphs [9] and [10] of the pleading, in neither document is there any indication that he proposes to controvert the plaintiff's allegations about receipt and due date by evidence rather than legal argument.

76 The only substantive matters raised by Mr Richmond in defence of the claim for administrative penalties are, first, that the deeming provisions operate to produce a date for receipt fewer than 14 days before the due date in the notice; and, secondly, that Mr Demian's admission that he received the notices "on or about 10 May 2016" was insufficient to establish the fact alleged. For the reasons already given above, I have rejected the second of these arguments. As to the first, the presumptions in ss 160 and 163 of the *Evidence Act* (Cth) are both expressed to be subject to the proviso "unless evidence sufficient to raise doubt about the presumption is adduced". In the present case, Mr Demian's admission is one piece of evidence which has that effect. The second is the allegation in the pleading which is *prima facie* evidence by reason of s 255-50 of Sch 1 to the TAA. Mr Demian has failed to put forward any basis for a suggestion that his position is likely to change in respect of the only matters in issue if the matter were tried at a final hearing.

77 In these circumstances there is no point in allowing the matter to go to trial since there is, relevantly, no issue to be tried. For the reasons given above, there are, on proper analysis, no "real issues in the proceedings". Accordingly, I am satisfied that it is not only quick and cheap to order summary judgment (or at least quicker and cheaper than a final hearing would be) but also just. There is no injustice to the defendants in refusing to defer the day of judgment in circumstances where there is no legally sustainable contrary case to that put and established by the plaintiff in support of his application for summary judgment.

78 For the reasons given above, the plaintiff's position with respect to Ms Demian is, if anything, even stronger than with respect to Mr Demian when it comes to the administrative penalties. The due date of 9 September 2016 required the notices of administrative penalties to be given to Ms Demian by 26 August 2016, being the date 14 days prior. If the notices were posted on 19 August 2016 and one applied the presumption in s 160 of the *Evidence Act* (Cth), the notices would be presumed to have been received by Ms Demian on 25 August 2016. This date is more than 14 days before the due date in the notice.

79 Mr Scruby informed me that, if I were to order summary judgment within a week of the hearing of the applications, the plaintiff was content for the amounts specified in the affidavits of debt sworn by Mr Coombes on 25 July 2018 to be the relevant judgment sums.

80 I note for completeness that Mr Scruby put, in the alternative, that if I considered there to be an issue to be tried that the administrative penalty notices were not given prior to the requisite period of the due date specified in the notices, I ought still enter summary judgment because there was no issue that they were received and therefore the monies had become due, even if not on the date specified in the notices. It is not necessary to address this argument because, for the reasons given above, the plaintiff has established that there is no relevant issue to be tried as to whether the defendants received the notices in time for the due date specified in them.

The defendants' application for a stay of proceedings or judgment

81 As I am satisfied that there ought be summary judgment for the plaintiff against both defendants, the question is whether I should grant a stay of the judgment pending determination of the proceedings brought by the defendant under Part IVC of the TAA.

The principles and relevant factual matrix

82 The relevant factual matrix is set out in the narrative above. It was common ground that the relevant principles and factors to be taken into account were as summarised by the Full Federal Court in *Southgate Investment Funds Limited v Deputy Commissioner of Taxation* (2013) 211 FCR 274; [2013] FCAFC 10 (*Southgate*) at [77] (McKerracher, Jagot and Griffiths JJ). In accordance with these principles it was accepted that the power to grant a stay ought be exercised sparingly, having regard to the clear legislative policy in provisions such as ss 14ZZM and 14ZZR which give priority to the recovery of taxation revenue notwithstanding the pendency of proceedings under Part IVC of the TAA. It was accepted that I could not assess the merits of those proceedings and that it was not appropriate to form any judgment about the

draft cross-claim for the purposes of the stay application: *Southgate* at [51]-[56].

83 I note for completeness that the plaintiff objected to the affidavit evidence of Gerardo Incollingo, an accountant, concerning the characterisation of certain receipts as repayments of loans. As it is accepted that I am not in a position to determine the relative merits of the AAT proceedings, it is not necessary to rule on the matter.

The parties' submissions

84 Mr Richmond relied on a number of factors in support of the defendants' application for a stay. He referred to the offers made by the defendants on 15 March 2018 and 18 May 2018. As a condition of a stay, the defendants offered to provide security, within 14 days of an order for a stay, by way of a registered first mortgage of real property to secure the aggregate amount of $879,833.03 being the primary tax and GIC (for both defendants) as at the date of each statement of claim.

85 Mr Richmond also submitted that the plaintiff's delay in addressing and determining the defendants' objections ought be taken into account in favour of a stay and relied on *Snow v Deputy Commissioner of Taxation* (1987) 14 FCR 119 (*Snow*) where an order was made to restrain the Deputy Commissioner of Taxation (the respondent in that case) from instituting proceedings to recover tax liabilities until the respondent had referred the applicant's objections to the AAT for determination. Although Mr Richmond accepted that this factor was not one of the several listed by the Full Federal Court in *Southgate*, he sought to include it by analogy within the following factor in [77(h)] of *Southgate* where the Court said:

> "(h) similarly, more weight would be given to the merits factor if the case is one where the Commissioner has abused his position or it is clear that the Commissioner is endeavouring to collect tax in defiance of a decision of the High Court or other superior court which is precisely in point;"

86 Mr Richmond also submitted that it created "harshness" to a taxpayer to issue an assessment and then seek to recover the debt before the taxpayer is

permitted to have determined the question whether the liability exists in another forum such as the AAT.

87 Mr Richmond also relied on evidence adduced by the defendants to the effect that Mr Demian is a director of the 44 companies within the Demian group, which operated a property development and rental business. Mr Demian is sole director of Shimden, the business activities of which include property development and property rental. Mr Demain deposed that the plaintiff has issued at least five garnishee orders to tenants of land owned by Shimden and has recovered in the order of $2.6m in reduction of Shimden's tax debt. Mr Demian deposed that he does not own any land in his own name; he has little cash by reason of a garnishee notice issued by the plaintiff to the National Australia Bank; and his other assets comprise his shareholdings in the 44 companies in the Demian group.

88 Mr Richmond contended that if judgment were enforced for the full amount there was a risk that Mr Demian would be unable to pay and that he would be declared bankrupt on the petition of the plaintiff. In that event, he would be disqualified from being a director by ss 203B and 206B of the *Corporations Act 2001* (Cth).

89 Mr Scruby submitted that there had been no relevant delay but that, even if there were delay, there was no basis for considering that to be relevant to the question whether a stay ought be ordered. He submitted that, on proper analysis, *Snow* did not support the proposition that delay would warrant a stay in a case such as the present. Mr Scruby also submitted that, in the absence of any evidence of hardship, a stay ought not be granted.

Consideration

90 The evidence of the time the ATO has taken to address the defendants' objections is consistent with the complexity of the analysis required to determine the true character of payments either made to, or spent for the benefit of, the defendants by companies in the Demian group. The defendants provided the plaintiff with a substantial number of primary records, the

quantity of which was described by Mr Scruby as “massive”. Mr Richmond accepted that there was “a lot of it”. The parties agreed that it was not necessary for me to review the material (which was provided to me in the form of a USB stick) or its quantity, which was accepted to be large. The ATO was required to analyse this information before the plaintiff could rule on the defendants’ objections. That this task took a lengthy period is insufficient to establish “delay” in the sense of tardiness.

91 Moreover, I do not regard delay, even if it were established, as particularly germane to the question whether a stay ought be granted. I accept Mr Scruby’s submission that *Snow* provides no support for delay being a relevant factor in whether a stay ought be granted. In *Snow* the order to restrain the recovery proceedings was expressed to be very limited in time and covered only the period up until the respondent referred the applicant taxpayer’s objections to the AAT for its determination. French J refused to restrain the respondent from instituting the proceedings until the AAT had made a decision. It is apparent from his Honour’s reasons that the temporary stay was granted in order to enforce the respondent’s obligation to refer the applicant’s objections to the AAT upon the latter’s request. The legislative regime which applied in *Snow* is no longer operative.

92 Further, on the topic of delay, it is important to note that the plaintiff and the ATO do not operate or carry out their statutory obligations for any personal benefit. The speed which they can determine objections depends on a number of factors, including how many other objections have been made at the same time and the allocation of resources by reference to current priorities. There is no suggestion of any abuse of power or high-handed approach by the plaintiff or the ATO in the present case (factor (g) in [77] of *Southgate*). Indeed, the further information provided by the defendants led to the assessments being reduced in subsequent notices of amended assessment.

93 The defendants' offers to date reflect no more than their admitted indebtedness to the plaintiff. I am not persuaded that the plaintiff's rejection of those offers was unreasonable.

94 I reject the submission that I ought take into account the harshness that is created by the plaintiff pursuing the debt before the conclusion of the AAT proceedings. This is a choice open to the plaintiff which is both contemplated and sanctioned by provisions such as ss 14ZZM and 14ZZR of the TAA.

95 It is of great significance, in my view, that there is no evidence that either of the defendants cannot pay the full amount of the judgment or that paying the full amount would cause any degree of hardship. While Mr Demian does not presently have the cash to pay it, there is no evidence of the value of his shareholdings in any of the 44 companies in the Demian group and no evidence that he has made any attempt to borrow against the value of his shareholding. Although Mr Demian's unchallenged evidence was that he did not hold real property in his own name, he would appear to have access to real property. That the defendants were prepared to offer a first registered mortgage as security for the monies outstanding indicates that they have some access to unencumbered real property. In the absence of any evidence of hardship I am not persuaded that there is any injustice in requiring the defendants to pay the judgment and in refusing a stay of enforcement.

96 For these reasons I decline the defendants' application for a stay.

Costs

97 There does not appear to be any reason why costs ought not follow the event but, as I have not heard the parties on costs, I will make provision in the orders for application to vary the costs orders.

Orders

98 For the reasons given above, I make the following orders:

Proceedings 2018/7081

In respect of the defendant's notice of motion filed on 9 March 2018:

(1) Dismiss the notice of motion.

(2) Unless an application for a different order is made in writing to my Associate within fourteen days, order the defendant to pay the plaintiff's costs of the motion.

In respect of the plaintiff's notice of motion filed on 14 March 2018:

(3) Order summary judgment in favour of the plaintiff against the defendant in the sum of $585,015.21.

(4) Unless an application for a different order is made in writing to my Associate within fourteen days, order the defendant to pay the plaintiff's costs of the proceedings, including the costs of the notice of motion.

In respect of the defendant's notice of motion filed on 23 May 2018:

(5) Dismiss the notice of motion.

(6) Unless an application for a different order is made in writing to my Associate within fourteen days, order the defendant to pay the plaintiff's costs of the motion.

Proceedings 2018/10601

In respect of the defendant's notice of motion filed on 9 March 2018

(7) Dismiss the notice of motion.

(8) Unless an application for a different order is made in writing to my Associate within fourteen days, order the defendant to pay the plaintiff's costs of the motion.

In respect of the plaintiff's notice of motion filed on 14 March 2018:

(9) Order summary judgment in favour of the plaintiff against the defendant in the sum of $918,508.35.

(10) Unless an application for a different order is made in writing to my Associate within fourteen days, order the defendant to pay the plaintiff's costs of the proceedings, including the costs of the notice of motion.

In respect of the defendant's notice of motion filed on 23 May 2018:

(11) Dismiss the notice of motion.

(12) Unless an application for a different order is made in writing to my Associate within fourteen days, order the defendant to pay the plaintiff's costs of the motion.

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