

DISTRICT COURT OF QUEENSLAND

CITATION: *Deputy Commissioner of Taxation v Gore* [2015] QDC 13

PARTIES: **Deputy Commissioner of Taxation**

(Plaintiff)

v

Marina Ulrika Lovisa Gore

(Defendant)

FILE NO/S: D335 of 2013

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court at Southport

DELIVERED ON: 3 February 2015

DELIVERED AT: Southport

HEARING DATE: 19 January 2015

JUDGE: Judge McGinness DCJ

ORDER: **1. Judgment for the plaintiff against the defendant in the sum of \$68,938.90 together with interest in the sum of \$5,859.80.**

2. The defendant pay the plaintiff's costs, on the standard basis, in the amount of \$4,002.60.

CATCHWORDS: Practice – where summary Judgment sought by the plaintiff – whether the defendant has no real prospect of successfully defending all or part of the claim – whether defendant was served with director penalty notices pursuant to section 269-25 of Schedule 1 of the *Taxation Administration Act 1953* (Cth)

Uniform Civil Procedure Rules 1999 (Qld), r 292.
Taxation Administration Act 1953 (Cth), s269-25.

Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232.

COUNSEL: M Cuskelly (solicitor) for the plaintiff

W Chan for the defendant

SOLICITORS: Australian Taxation Office Dispute Resolution Branch for the Plaintiff
Clamenz Lawyers for the defendant

Introduction

- [1] The Deputy Commissioner of Taxation applies for summary judgment in the amount of \$68,938.90 together with interest in the sum of \$5,859.80.
- [2] The application is opposed by the defendant on a limited basis outlined in the defendant's oral and written submissions which are on the court file. Specifically, the defendant submits the plaintiff is prohibited from commencing proceedings for the above amount, because the plaintiff failed to give notice to commence these proceedings in accordance with section 269-25 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) ("*TAA*").
- [3] The application is brought against the defendant pursuant to rule 292 of the *Uniform Civil Procedure Rules 1999* (Qld) ("*UCPR*").
- [4] Rule 292(2) of the *UCPR* provides that the court may grant Summary Judgment if it is satisfied that:
- The Defendant has no real prospects of successfully defending all or part of the Plaintiff's claim; and
 - There is no need for a trial of the claim or part of the claim
- [5] The interpretation and application of r292 has been considered in numerous cases. In *Deputy Commissioner of Taxation v Salcedo*¹ Williams J reviewed the authorities and the test to be applied. He said at [17]:

"Ultimately the rules are there to facilitate the fair and just resolution of the matters in dispute. Summary judgment will not be obtained as a matter of course and the judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect of succeeding at a trial: if that is established then the matter must go to trial."

Background and factual basis of claim

- [6] The defendant does not dispute the factual summary set out in the plaintiff's written submissions except regarding service of the penalty notice. I have therefore taken the liberty of reproducing the plaintiff's written summary of the background to the proceedings and the facts supporting the plaintiff's claim, as follows²:

"Background

On 16 October 2013, the Plaintiff commenced proceedings against the Defendant in respect of the Defendant's outstanding taxation liability in the amount of \$199,347.45 and further general interest charge.

¹ [2005] 2 Qd R 232.

² Plaintiff's outline of submissions filed 19 January 2015

On 23 September 2014, the Plaintiff filed and served an Amended Claim and Statement of Claim reducing the Defendant's outstanding taxation liability to \$68,938.90.

The Plaintiff seeks to recover Director Penalty Liabilities incurred by the Defendant for unpaid actual Pay As You Go Withholding ("PAYGW") liabilities of the company (MOGS Pty Ltd A.C.N. 136 499 360) of which the Defendant was a director. MOGS Pty Ltd was the corporate trustee of the MOGS Unit Trust.

On 11 December 2013, the Defendant filed a Notice of Intention to Defend and Defence. The Defendant has not filed an Amended Defence in response to the Plaintiff's Amended Claim and Statement of Claim.

On 10 January 2014, the Plaintiff filed and served a Notice in Reply on the Defendant.

On 20 November 2014, the Plaintiff filed an Application for Summary Judgment and Affidavits of Anne Nicholson sworn 13 November 2014, Charles Moses affirmed 29 April 2014, Second Affidavit of Charles Sean Michael Moses affirmed 29 April 2014, Third Affidavit of Charles Sean Michael Moses affirmed 27 August 2014 and served those documents upon the Defendant on 24 November 2014 (**affidavit of Mathew Cuskelly paragraph 7 and exhibit "MC-6"**)

Director Penalty Liability

The Defendant was a director of MOGS Pty Ltd A.C.N. 136 499 360 from 7 April 2009 and remained a director during all material times (**Affidavit of Anne Nicholson paragraph 20(c) and exhibit "AN-1"**).

The Company was an employer and liable to withhold amounts from payments made to employees for the purposes of Division 12 in Schedule 1 to the *Taxation Administration Act 1953* (Cth) ("TAA53") (**Affidavit of Anne Nicholson paragraph 21**).

The Company notified the Plaintiff through the lodgement of Business Activity Statements ("BAS") that amounts had been withheld from payments made to employees. The total reported liability of amounts withheld by the Company was \$99,019.00 (**Affidavit of Anne Nicholson at paragraphs 22 to 25 and exhibit "AN-2"**).

The Company did not remit those monies to the Plaintiff in breach of section 16-70 of the TAA53 (**Affidavit of Anne Nicholson at paragraph 34 and exhibited "AN-3"**).

Defendant's Obligation

The Defendant was a director of the Company at all material times and on the initial day, pursuant to section 269-15(1) of Schedule 1 to the TAA53. The Defendant remained subject to the obligation imposed by section 269-15(1)

(with respect to actual withholdings) until one of the following events occurred:

The debt was paid; or

An administrator of the company was appointed under section 436A, 436B, or 436C of the *Corporations Act 2001*; or

The company had begun to be wound up (within the meaning of the *Corporations Act 2001*).

The Defendant remained under the obligation imposed by section 269-15(1) of Schedule 1 to the TAA53 and, pursuant to section 269-20 of Schedule 1 to the TAA53, the Defendant became liable to pay a penalty equal to the unpaid actual PAYG Withholding liabilities of the Company. Pursuant to section 269-30 of Schedule 1 to the TAA53 the Defendant remained under the obligation imposed by section 269-15 of Schedule 1 to the TAA53. Payments/Credits were applied to the due and unpaid debt, and accordingly, the remaining penalty of \$68,938.90 is due by the Defendant to the Plaintiff (**Affidavit of Anne Nicholson paragraph 31**).

Director Penalty Notice – PAYG Withholdings

The Defendant was served with Director Penalty Notices (“DPN”), pursuant to section 269-25 of Schedule 1 to the TAA53 on 28 February 2013 and 13 December 2012 (**Affidavits of Charles Moses (10) paragraph 3 and Charles Sean Michael Moses (11) paragraph 3 and exhibits CM-2 on both affidavits**).

Following service of these Director Penalty Notices the company remained under an obligation to remit the due and payable PAYG withholding amounts, pursuant to section 269-15(1) of Schedule 1 to the TAA53, but failed to do so. Consequently the Defendant remains liable to pay the penalty pursuant to section 269-20 of Schedule 1 to the TAA53.”

Analysis

- [7] The defendant submits the plaintiff, through its officers, failed to serve on the defendant the penalty notices dated 13 December 2012 and 28 February 2013.
- [8] The defendant submits Mr Daniel Clarke’s affidavit³ at paragraph 3 provides evidence that the notices might not have been posted at all. The defendant also submits that evidence showing bad faith and a motive not to post the penalty notices is found at paragraph 6 of Mr Clarke’s affidavit. Mr Clarke, the defendant’s solicitor relevantly deposed as follows:

“3. I had a conference with the Defendant and my instruction were that the Defendant had not received any of the penalty notices.

³ Affidavit of Daniel Clarke affirmed on 16 January 2015

...

6. On 12 October 2012 an originating process was filed and served on the ATO's solicitors. Further on 07 December 2012 a statement of claim was served on the ATO's solicitors. This was subsequently filed on 14 December 2012 in the Federal Court of Australia, Sydney Registry, alleging (amongst other things) that Mr Charles Moses was party to bad faith and/or improper purpose in exercising his powers and those of the ATO."

- [9] Paragraph 3 of Mr Clarke's affidavit is certainly not evidence of non-receipt by the defendant of the relevant notices. Paragraph 3 does not comply with r295 (2) of the *UCPR*. It is not evidence based on information and belief. It is merely evidence of the defendant's instructions to Mr Clarke. It is not evidence of the truth that the defendant did not receive the notices.
- [10] In any case, s269-25(4) of the *TAA* provides that notice is taken to be given at the time it is left or posted. The uncontested affidavit evidence of Mr Moses⁴, who was not required for cross-examination at the hearing of this application, is that he, as officer for the plaintiff, posted the notices. Therefore s269-25(4) of the *TAA* has been complied with. Whether the notices were actually received is irrelevant. Non-receipt is not evidence of non-delivery.⁵
- [11] As to paragraph 6 of Mr Clarke's affidavit, this is merely evidence of the making of an allegation of bad faith in a matter litigated in other proceedings. It is certainly not evidence of bad faith in relation to the posting of the notices prior to commencing the current proceedings.
- [12] There is therefore no reason to doubt the veracity of Mr Moses' affidavits, there being no evidence to the contrary. In other words, there is no evidence at all to cause me to have any doubt the notices were posted.
- [13] These were the only issues that were argued by the defendant on the application for summary judgment. Various other matters pleaded in the defence were not argued or raised on the present application. I assume therefore the defendant no longer regards them as giving rise to any arguable grounds for dismissal of the application.

Conclusion

- [14] On the uncontested evidence, the Company deducted PAYG instalments and didn't remit them to the plaintiff. In those circumstances the defendant, as a director, is personally liable for the tax amount. There is a requirement to give notice before the proceedings are issued. Subject to that notice being properly issued and served the directors are liable for the tax.
- [15] There was some issue as to whether the company was the relevant employer at the time. That was investigated by the plaintiff and the claim was amended. There has been no argument advanced on this application as to the proposition the company wasn't the employer at the relevant time, in respect of the particular

⁴ Three Affidavits of Charles Moses affirmed on 29 April 2014; 29 April 2014; 27 August 2014

⁵ *Fancourt v Mercantile Credit Ltd* (1983) 154 CLR 87

claim which is now proceeding as a result of the amendment. The only issue that was raised on this application was in relation to the serving of the notices to proceed.

- [16] I am satisfied the plaintiff's material establishes the facts necessary to prove its case; and the Notices of Assessment in respect of the defendant's assessed income tax liabilities are conclusive evidence of the amounts owing.
- [17] I am satisfied that the defendant has no real prospect of defending all or part of the plaintiff's claim, and there is no need for a trial of the action. The plaintiff has satisfied the requirements of r292 of the *UCPR* and it is appropriate to give summary judgment.
- [18] I therefore give judgment that the defendant pay the plaintiff the sum in the amount of \$68,938.90 together with interest in the sum of \$5,859.80. I order the defendant pay the plaintiff's costs, on the standard basis, in the amount of \$4,002.60.