

DISTRICT COURT OF QUEENSLAND

CITATION: *Deputy Commissioner of Taxation v Birt* [2015] QDC 179

PARTIES: **DEPUTY COMMISSIONER OF TAXATION**

(Plaintiff)

AND

GERALD PETER BIRT

(Defendant)

FILE NO/S: 2112/12

PROCEEDING: Application for summary judgment

DELIVERED ON: 24 July 2015

DELIVERED AT: Brisbane

HEARING DATE: 14 July 2015

JUDGE: Bowskill QC DCJ

- ORDERS:
- 1. Pursuant to rule 292 of the UCPR judgment be entered for the plaintiff against the defendant in the amount of \$178,944.21.**
 - 2. The defendant pay the plaintiff's costs fixed in the amount of \$4,161.60.**

CATCHWORDS: TAXES AND DUTIES – Recovery of penalty imposed on director where company fails to comply with obligation to pay amounts of PAYG income tax withheld from salaries or wages paid to employees - Whether reasonable prospects of successfully defending claim on the basis the defendant complied with obligation on a director; defences on the basis of illness and having taken all reasonable steps to ensure the directors complied with their obligations; or challenge to the validity of director's penalty notice.

Income Tax Assessment Act 1936 (Cth)

Taxation Administration Act 1953 (Cth)

Uniform Civil Procedure Rules 1999 (Qld)

Canty v Deputy Commissioner of Taxation (2005) 63
NSWLR 152

Paola v Deputy Commissioner of Taxation [2007] NSWCA
108

Deputy Commissioner of Taxation v George (2002) 55
NSWLR 511

Deputy Commissioner of Taxation v PejkoVIC (2000) ATC

4825

Deputy Commissioner of Taxation v Saunig (2002) 55
NSWLR 722

Deputy Commissioner of Taxation v Solomon (2003) 199
ALR 325

Deputy Commissioner of Taxation v Woodhams (2000) 199
CLR 370

Miller v Deputy Commissioner of Taxation (1997) 38 ATR
51

Reardon v Deputy Commissioner of Taxation (2013) 275
FLR 9

Scobie v Commissioner of Taxation (1995) 59 FCR 177

SOLICITORS: M Cuskelly for the plaintiff
G Birt self-represented

Introduction

- [1] By this proceeding commenced on 28 May 2012, the plaintiff seeks to recover from the defendant “director penalties” under s 222AOC of the *Income Tax Assessment Act 1936 (Cth)* (**ITAA 1936**) and division 269 of schedule 1 to the *Taxation Administration Act 1953 (Cth)* (**TAA**). The penalties are said to have been incurred by the defendant for unpaid Pay As You Go (**PAYG**) amounts withheld by a company, Birt Mariott Developments Pty Ltd, of which the defendant was a director at the relevant times.¹
- [2] By application filed on 11 May 2015, the plaintiff seeks summary judgment in respect of its claim, under r 292 of the *Uniform Civil Procedure Rules 1999 (UCPR)*.
- [3] The defendant, by application filed 7 July 2015, seeks leave to file a second further amended defence,² and an adjournment of the plaintiff’s summary judgment application “until such time as to allow a full discovery and consideration by the parties of the matters now raised by each party in the proceeding”.
- [4] When these applications came on for hearing on 14 July 2015, I declined the defendant’s application for an adjournment, but nevertheless indicated that, in considering the plaintiff’s summary judgment application, I would have regard to the matters set out in the defendant’s proposed second further amended defence.³ I declined the adjournment because the material the defendant said he wished to rely on, if given leave to amend his

¹ Notwithstanding the repeal of part VI (which includes ss 222AOB and 222AOC) of the ITAA 1936 by the *Tax Laws Amendment (Transfer of Provisions) Act 2010 (Cth)* (**2010 Act**), the liability to penalty in respect of amounts withheld which were required to be paid before 1 July 2010 (the commencement day of the 2010 Act), remains under s 222AOC (see s 65(1), schedule 1, of the 2010 Act); although division 269 in schedule 1 to the *Taxation Administration Act 1953* (other than s 269-20) applies to the penalty, as if it were payable under subdivision 269-B (s 65(4), schedule 1, of the 2010 Act).

² The proposed form of which is in exhibit GPB-30 to the affidavit of Mr Birt filed on 7 July 2015 (p 117).

³ Keeping in mind the approach to a summary judgment application, as explained by Finkelstein J in *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* (2008) 252 ALR 41 at [6].

defence as foreshadowed, is, with one exception, already before the Court. The exception is that the defendant said he would need further time to obtain evidence, including expert evidence, in support of his argument concerning the “reasonable steps” defence, and the relevance of the impact of the Global Financial Crisis (GFC) and the actions of certain banks to that defence. The relevance of that evidence turns on acceptance of the interpretation of “reasonable steps” urged by the defendant (to which I will return to below). In relation to the latter, I formed the view that it was appropriate to proceed with the summary judgment application, because the questions whether the defendant has a reasonable prospect of successfully defending the plaintiff’s claim on that (or any other) basis, and whether there is any need for a trial, can be answered without any such further material being available.

Summary judgment – relevant principles

[5] Rule 292(2) of the UCPR provides as follows:

“If the court is satisfied that –

- (a) the defendant has no real prospect of successfully defending all or part of the plaintiff’s claim; and
- (b) there is no need for a trial of the claim or the part of the claim;

the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff’s claim and may make any other order the court considers appropriate.”

[6] As White JA (with whom de Jersey CJ and McMurdo P agreed) observed, in *Coldham-Fussell v Commissioner of Taxation* (2011) 82 ACSR 439 at [98]:

“[98] The key expressions are ‘no real prospect’ in respect of the defence of a claim and ‘there is no need for a trial of the claim’. Other expressions have been proffered in an attempt to describe the task of the court in language which is thought to be of more assistance. Rule 292 is expressed in clear and plain language. It requires no judicial gloss to understand its meaning. What those phrases mean is best understood, in the time honoured way, on a case by case basis, informed by judgment about the relevant legal principles. In *Deputy Commissioner of Taxation v Salcedo*⁴ the President described the rule as ‘clear and unambiguous language’.⁵ Justice Williams quoted with approval observations of Lord Woolf MR in *Swain v Hillman*⁶ considering the English Rule 24.2 upon which r 292 was based:

The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success or ... they direct the

⁴ [2005] 2 Qd R 232; [2005] QCA 227.

⁵ At [2]. See also Williams JA at [11]-[17] and Atkinson J at [47].

⁶ [2001] 1 All ER 91 at 92.

court to the need to see whether there is a ‘realistic’ as opposed to ‘fanciful’ prospect of success.’⁷

- [7] Rule 292 is also to be applied keeping in mind the purpose of the UCPR, articulated in r 5, to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.⁸
- [8] That of course does not detract from the well-established principle that the exercise of powers to summarily terminate proceedings must always be attended with caution.⁹

The plaintiff’s claim

- [9] The following matters are not disputed:
- (a) Birt Marriott Developments Pty Ltd (the **company**) withheld amounts of PAYG tax from the salaries and wages of employees for the purposes of division 12 in schedule 1 to the TAA.
 - (b) The company was required to pay those amounts to the Commissioner under s 16-70(1) in schedule 1 to the TAA.
 - (c) The relevant details, as to the period of withholding, due dates for payment, and amounts withheld are as pleaded in [5] of the statement of claim, which is admitted by the defendant.¹⁰
 - (d) The defendant was a director of the company continuously during the whole of the periods of withholding and due dates referred to in [5] of the statement of claim. Indeed, the defendant has been a director of the company (one of the two directors of it) continuously since the company was registered on 6 February 2004, as well as the secretary of the company for that period as well.¹¹
- [10] Part VI, division 9 of the ITAA 1936 provided for a penalty to be imposed on the director(s) of a company which fails to pay such amounts withheld by it as required by s 16-70 in schedule 1 to the TAA.
- [11] The purpose of division 9 was set out in s 222ANA(1) and (2), as follows:

⁷ Footnotes in the original.

⁸ *Bernstrom v National Australia Bank Ltd* [2003] 1 Qd R 469 at [38]; *Salcedo* at [3], [17] and [45]; *Coldham-Fussell v Commissioner of Taxation* at [101]; *Thomas v Balanced Securities Ltd* [2012] 2 Qd R 482 at [69].

⁹ *Agar v Hyde* (2000) 201 CLR 552 at 575-576 per Gaudron, McHugh, Gummow and Hayne JJ; *Spencer v Commonwealth* (2010) 241 CLR 118 at [24] per French CJ and Gummow J and at [60] per Hayne, Crennan, Kiefel and Bell JJ.

¹⁰ See [4]-[5] of the statement of claim filed 28 May 2010 and [1] of the further amended defence filed 21 May 2014 (the most recent iteration of the defence, prior to the proposed amendment for which leave is now sought).

¹¹ Exhibit ST-1 to the affidavit of Santana Theofilopoulos filed on 11 May 2015 (**Theofilopoulos**).

- “(1) The purpose of this Division is to ensure that a company either meets its obligations under ... Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953*, or goes **promptly** into voluntary administration under Part 5.3A of the *Corporations Act 2001* or into liquidation.
- (2) The Division imposes a duty on the directors to cause the company to do so. The duty is enforced by penalties. However, a penalty can be recovered only if the Commissioner gives written notice to the person concerned. The penalty is automatically remitted if the company meets its obligations, or goes into voluntary administration or liquidation, within 14 days after the notice is given.”¹²

[12] Section 222AOB(1) of the ITAA1936 required a director of a company, on or before the due date,¹³ to cause the company to do at least one of the following:

- (a) comply with its obligation in relation to amounts withheld – that is to pay those amounts to the Commissioner;
- (b) to “make an agreement with the Commissioner under section 222ALA in relation to the company’s liability under a remittance provision¹⁴ in respect of such ... amounts withheld”;
- (c) to appoint an administrator of the company under s 436A of the *Corporations Act 2001*; or
- (d) begin to be wound up within the meaning of that Act.

[13] By s 222AOB(3), if that provision is not complied with on or before the due date, the persons who are directors of the company from time to time after the due date continue to be under the obligation imposed by s 222AOB(1) until it is complied with.

[14] If s 222AOB is not complied with on or before the due date, “each person who was a director of the company at any time during the period beginning on the first deduction day¹⁵ and ending on the due date is liable to pay to the Commissioner, by way of penalty, an amount equal to the unpaid amount of the company’s liability” for amounts withheld: s 222AOC(1).

¹² This same object is expressed in s 269-5, in relation to division 269 of schedule 1 of the TAA. Emphasis added.

¹³ Defined in s 222AOA(3) as the due date for payment of amounts withheld, for the purposes of division 12 in schedule 1 to the TAA.

¹⁴ Defined in s 222AFB to mean, relevantly, s 16-70 in schedule 1 to the TAA.

¹⁵ Defined in s 222AOA(2) as, relevantly, the earliest day on which the company withheld an amount that has the particular due date.

- [15] The plaintiff's case is that s 222AOB(1) was not complied with by any of the due dates, and accordingly the defendant is liable to a penalty under s 222AOC, in an amount equal to the unpaid amount of the company's liability for amounts withheld.¹⁶
- [16] Section 222AOE of the ITAA 1936 required the Commissioner to give 14 days' written notice to a person, before recovering the penalty.
- [17] As already noted, part VI, division 9 (which included s 222AOE) was repealed by the 2010 Act, which commenced on 1 July 2010. The equivalent replacement provisions are now contained in division 269 of schedule 1 to the TAA. By operation of s 65(4) of the 2010 Act, division 269 in schedule 1 to the TAA (apart from s 269-20, which is the equivalent provision to s 222AOC, under which a penalty is imposed on a director) has effect, from the commencement time (1 July 2010) as if a penalty, which was payable under s 222AOC, were payable under subdivision 269-B in that schedule.
- [18] The reason for s 65(4) of the 2010 Act being in these terms is of course to avoid a doubling up of penalty, where (as in this case) liability had already arisen under s 222AOC, prior to 1 July 2010.
- [19] The obligation on a director under division 269 is varied in one respect from the previous s 222AOB. Under s 269-15, the directors of the company have an obligation to cause the company to comply with its obligation (to pay moneys withheld to the Commissioner) which continues until:
- (a) the company complies with its obligation; or
 - (b) an administrator of the company is appointed under ss 436A, 436B or 436C of the *Corporations Act 2001*; or
 - (c) the company begins to be wound up within the meaning of that Act.
- [20] So the option of causing the company to enter into a particular type of agreement (cf s 222AOB(1)(b), referring to an agreement under s 222ALA) is no longer a means of discharging this liability.¹⁷

¹⁶ See Theofilopoulos at [28]-[34] (in relation to the amount of **\$40,824.21**, being the unpaid balance of the amounts withheld in the periods 1 April 2009 to 30 June 2009) and at [37], [40], [42]-[43], [47]-[52] (in relation to the amount of **\$138,120**, being the unpaid balance of the amounts withheld in the periods 1 July 2009 to 30 April 2010). Note that, although [5] of the statement of claim includes reference to the unpaid amount withheld in the period 1 May 2010 to 31 May 2010 (\$20,354), at [40] of Theofilopoulos it is said that the plaintiff has elected to forego recovery of the withholding for this period. This explains the difference between the total unpaid amount referred to in [37] of that affidavit (\$158,474) and the amount of \$138,120 referred to in [48(a)], [51(a)] and [52] of that affidavit. The total unpaid amount sought to be recovered by the plaintiff is **\$178,944.21** (which is the sum of \$40,824.21 and \$138,120): see exhibit ST-6 to Theofilopoulos (certificate under s 255-45 dated 7 May 2015). See also exhibit ST-1 to the further affidavit of Ms Theofilopoulos filed 9 July 2015 (updated certificate under s 255-45 dated 7 July 2015).

¹⁷ Although, if there is an arrangement for payment of the company's tax-related liabilities by instalments in force under s 255-15, the Commissioner cannot commence, or take a procedural step as a party to, proceedings to enforce an obligation, or recover a penalty, from a director under division 269: s 269-

- [21] Although division 269 includes a section requiring 21 days' notice to be given before any recovery proceedings may be commenced against a director (s 269-25), if a notice had already been given under s 222AOE prior to 1 July 2010, it was not necessary to give a further notice, under s 269-25, before the penalty could be recovered by the Commissioner.¹⁸
- [22] In relation to the penalties the subject of this proceeding, the defendant was given two "director penalty notices".¹⁹ The first notice was dated 14 August 2009,²⁰ and was given under s 222AOE of the ITAA 1936 (in respect of the amounts withheld in the periods spanning 1 February 2009 to 30 June 2009). The second notice was dated 22 July 2010,²¹ and was given under s 269-25 of the TAA (in respect of the amounts withheld in the periods spanning 1 July 2009 to 31 May 2010). The service of these notices is not disputed.²²
- [23] Section 222AOG provided for remission of the penalty imposed on a director, if one of the four things set out in s 222AOB(1) was done, either before the notice under s 222AOE was issued, or within 14 days of the notice. Under division 269, s 269-30 provides for remission of the penalty, if one of the three things set out in s 269-15(2) is done, either before the notice under s 269-25 is issued, or within 21 days of the notice. The plaintiff's evidence is that none of those things were done,²³ and therefore that the defendant remains liable to the penalties.
- [24] As to the amount of the penalty, the plaintiff relies upon the production of the "running balance account" statement for the company²⁴ which, by virtue of s 8AAZI of the TAA, is prima facie evidence that the running balance account was duly kept and that the amounts and particulars in it are correct. The plaintiff also relies upon a certificate signed by the Deputy Commissioner under s 255-45, stating that the defendant has a tax-related liability, by way of penalty under s 269-20(1) in schedule 1 to the TAA and s 222AOC of the ITAA 1936, and that the sum of \$178,944.21 is a debt due and payable

15(3). As note 2 below s 269-15(3) states, this does not prevent the Commissioner from giving the director a notice about a penalty under s 269-25. On the material before me, there was no such "arrangement" in force when these proceedings were commenced on 28 May 2012. On the contrary, there is in the evidence a letter from the Deputy Commissioner to the company dated 10 May 2012 making a demand for payment of \$1,109,475.61, being the amounts outstanding for the superannuation guarantee charge debt and in respect of the company's integrated client account, and foreshadowing legal action if payment in full is not received by 18 May 2012 (affidavit of Mr Birt filed 4 June 2015 at p 31).

¹⁸ *Reardon v Deputy Commissioner of Taxation* (2013) 275 FLR 9 at [35]-[36] per Holmes JA and at [59], [64]-[65] per Philip McMurdo J.

¹⁹ A third director penalty notice, dated 8 June 2012, was referred to at the hearing (a copy of which appears annexed to Mr Birt's affidavit filed 4 June 2015, at p 35 of the exhibits) – but is in respect of later periods, not the subject of the claim and statement of claim filed in this proceeding, and so I make no further reference to this.

²⁰ Exhibit MF-2 to the affidavit of Meryl Fraser filed 12 May 2015 (**Fraser**).

²¹ Exhibit DN-2 to the affidavit of Diane Norton filed 12 May 2015 (**Norton**).

²² See [2] of the affidavit of Mr Birt filed on 19 June 2015.

²³ Theofilopoulos at [28], [33], [34], [42], [48], [51] and [52].

²⁴ Exhibit ST-3 to Theofilopoulos.

by him to the Commonwealth.²⁵ By force of s 255-45(1), that certificate is prima facie evidence of those matters.

[25] Subject to the defences raised by the defendant, to which I now turn, the plaintiff has established its entitlement to the relief sought in these proceedings.

The defendant's defences

[26] The defendant opposes the plaintiff's claim on the following bases:

(a) that he complied with s 222AOB(1)(b), because on or about 28 August 2009 he caused the company to enter into an agreement with the Commissioner under s 222ALA of the ITAA 1936 (and on the basis of further arrangements between the plaintiff and the company entered into on 27 August 2011);

(b) that he complied with s 222AOB(1)(c), in that administrators were appointed to the company on 11 January 2011;

further, as foreshadowed in the proposed further amended defence,

(c) that he complied with s 222AOB(1)(d) because the company had begun to be wound-up pursuant to Supreme Court proceedings 8207/2009 commenced on 30 July 2009 and ongoing beyond 14 August 2009;

(d) that he has a defence under s 222AOJ(2) of the ITAA 1936 and/or s 269-35(1) of schedule 1 to the TAA on the basis of illness;

(e) that he has a defence under s 222AOJ(3) of the ITAA 1936 and/or s 269-35(2) of schedule 1 to the TAA, on the basis that he took all reasonable steps to ensure the directors complied with their obligations under s 222AOB and/or s 269-15; and

(f) that the second director's penalty notice is invalid because it fails to make reference to the possibility of the penalty being remitted in circumstances where an agreement or arrangement has been entered into and fails to use the language which appears in s 269-15.

[27] Each of these will be considered in turn.

Agreement with the Commissioner

[28] The defendant acknowledged that his argument as to the existence of an agreement with the plaintiff applies only to the penalty amounts the subject of the first director's penalty notice, dated 14 August 2009.²⁶

²⁵ Exhibit ST-1 to the further affidavit of Santana Theofilopoulos, filed 9 July 2015 (certificate dated 7 July 2015).

²⁶ This is because of the difference between the scope of the obligation on directors under s 222AOB (which required directors to do at least one of the **four** things set out in s 222AOB(1)(a) to (d) (one of which, subsection (b), was to cause the company to make an agreement under s 222ALA) as compared with s

- [29] To make out a defence on this basis, what the defendant needs to be able to show is that the company had made an agreement with the Commissioner under s 222ALA in relation to the company's liability under s 16-70 (that is, liability to pay the amounts for PAYG withheld by the company) before the "due date" (s 222AOB(1)(b) and s 222AOB(2)(b)); or before the Commissioner issued the first director penalty notice on 14 August 2009, or within 14 days after being given a copy of that notice (s 222AOG).
- [30] Section 222ALA of the ITAA 1936 provided, relevantly, that the Commissioner may make with a person a written agreement under which the person is to pay specified amounts on specified days for the purpose of discharging one or more specified liabilities of the person, each of which is, relevantly, a liability under a remittance provision (in this case, s 16-70).
- [31] As to the evidence of such an agreement, the defendant relied upon a letter from the company to the Deputy Commissioner, dated 26 August 2009, which refers, in the subject line, to the "integrated client account²⁷ - \$220,317.13", and requests approval for a payment arrangement in accordance with an attached schedule.²⁸
- [32] Having regard to the timing, and the amount referred to, that would seem to be a letter sent in response to a letter from the Australian Taxation Office (ATO) to the company dated 23 July 2009, demanding payment of the amount of \$220,317.13, a partial copy of which appears in exhibit GPB-13.²⁹
- [33] The correspondence otherwise forming part of exhibit GPB-13 indicates a further proposal was made, by the solicitor for the company, on 27 August 2009 (see pp 271-273), which was not accepted by the ATO (p 274). A further proposal was likewise not accepted (p 283), although in late September 2009 the company made two payments to the ATO (pp 290-293). At the same time, there appear to have been negotiations between the company and the ATO, in relation to the Deputy Commissioner's application to be substituted as applicant in winding up proceedings originally instituted in the Supreme Court by Torque Recruitment Pty Ltd (pp 283-299, in particular 296). It seems the company made further payments in October 2009, which were credited to the company's running balance account debt, although later partially credited to the superannuation guarantee charge debt (p 301). Following a further adjournment of the winding up proceedings, the ATO corresponded with the company's solicitor on 11 December 2009,

269-15 (which contemplated directors doing one of **three** things – not including an equivalent of s 222AOB(1)(b)).

²⁷ The "integrated client account" encompasses all the liabilities of the company to the plaintiff at a particular time. In the plaintiff's material reference is made to the ATO Integrated System (AIS), a computer system used by the plaintiff to maintain a record of liabilities owed by taxpayers and all payments and other credits which are applied against those liabilities (Theofilopoulos at [17(c)]) and the running balance account (as to which see ss 8AAZC and 8AAZI of the TAA) for the company, which is generated from the AIS (Theofilopoulos at [29], [47] and exhibit ST-3).

²⁸ See exhibit GPB-12C to the affidavit of Mr Birt filed 19 June 2015 at pp 211-213.

²⁹ To the affidavit of Mr Birt filed 19 June 2015 at p 266.

advising of the Deputy Commissioner's intention to advertise its winding up application, to enable the application to proceed on 23 December 2009 (p 317). It appears the proceedings were again adjourned, to Friday 22 January 2010. The correspondence in GPB-13 refers to further negotiations with respect to a payment arrangement (emails of 18 and 19 January 2010 at pp 318-325). That email chain of 18 and 19 January 2010 is supplemented in exhibit ST-5,³⁰ from which it is apparent that upon agreement being reached as to the payment proposal outlined in the email from Amanda Walker of the ATO sent on 19 January 2010 at 11:19, it was agreed the winding up proceedings would be dismissed. This in fact occurred.³¹

- [34] The plaintiff acknowledges that a "payment arrangement" was entered into, in January 2010, in the context of resolving, by agreement, an application to wind up the company, in respect of which the plaintiff was substituted as applicant.³² The plaintiff says this arrangement related to the company's running balance account deficit debt and its superannuation guarantee charge debt. However, the plaintiff says that was not an agreement pursuant to s 222ALA of the ITAA.³³
- [35] There are two reasons why the defendant has, in my view, no reasonable prospects of defending the plaintiff's claim on this basis.
- [36] First, the evidence relied on by the defendant does not prove any agreement prior to 19 January 2010. On the contrary, the evidence reveals no agreement was reached. The relevant time frame, in order for a director's penalty to be remitted under s 222AOG, is before the notice under s 222AOE was issued (14 August 2009) or within 14 days after that (28 August 2009).
- [37] Secondly, and in any event, the agreement that was reached, reflected in the email correspondence of 18 and 19 January 2010, is not an agreement for the purposes of s 222ALA. Such an agreement must be "a written agreement under which the person is to pay specified amounts, on specified days, for the purpose of discharging one or more specified liabilities of the person, each of which is [relevantly] a liability under a remittance provision" (s 222ALA(1)).
- [38] It may be accepted that there is no particular form that a written agreement under s 222ALA must take, and that it is not necessary that s 222ALA be expressly referred to in any such agreement.³⁴ But the substance of s 222ALA must be reflected in the agreement, in order for the agreement to be found to be one made under s 222ALA.

³⁰ To the affidavit of Theofilopoulos, at p 79 (see also [54]-[55] of that affidavit).

³¹ A copy of the order appears as part of exhibit ST-5 at p 85.

³² See [54]-[55] and exhibit ST-5 to Theofilopoulos.

³³ Relying on *Deputy Commissioner of Taxation v Paola* [2006] NSWSC 193 (Patten AJ), confirmed in *Paola v Deputy Commissioner of Taxation* [2007] NSWCA 108.

³⁴ *Deputy Commissioner of Taxation v Paola* [2006] NSWSC 193 at [31] and [32].

- [39] The payment arrangement reflected in the correspondence which appears in GPB-13 and SF-5 (referred to above) is concerned with discharging the company's overall liabilities (that is, in respect of its "integrated client account"), as well as its superannuation guarantee charge debt at that time.
- [40] For an agreement to be one under s 222ALA it must specify, or make unambiguously clear, the liabilities under a remittance provision (keeping in mind the definition of that term in s 222AFB) which are to be discharged by payment of the sums specified;³⁵ and it must be clear that the payment of sums specified is for the purpose of discharging one or more specified liabilities under a remittance provision.³⁶ Here, what would be required is for the agreement to specify the company's liability under s 16-70 (the relevant "remittance provision"), and to specify particular amounts, to be paid on specified days, for the purpose of discharging that specified liability. An agreement or arrangement entered into for the general purpose of discharging the company's tax liabilities (even if these include liabilities under a remittance provision), which does not specify the liabilities of the company under a remittance provision, is not an agreement under s 222ALA.
- [41] For completeness, I note that the defendant refers, in paragraph 2(d) of his further amended defence filed 21 May 2014, to (three) further payment arrangements made by the company on 27 August 2011. There is in evidence correspondence referring to such payment arrangements entered into by the company on 27 August 2011, in relation to amounts owed by the company to the Commissioner in respect of the company's running balance account deficit debt and superannuation guarantee charge debt at that time.³⁷ Having regard both to the time frame in which a director must cause the company to enter an agreement under s 222ALA, and the requirements of such an agreement, these general payment arrangements entered into in August 2011 are of no relevance, and provide no basis for any defence of the plaintiff's claim in this proceeding.

Appointment of administrators to the company

- [42] It appears that, on 11 January 2011, receivers and managers of the assets and undertakings of the company were appointed, pursuant to a registered charge held by the National Australia Bank.³⁸
- [43] In so far as s 222AOB is concerned, the obligation on a director under s 222AOB(1)(c) was to cause the company to appoint an administrator of the company under s 436A of the *Corporations Act 2001* on or before the due date. If this had been done before the first director penalty notice was issued (14 August 2009) or within 14 days of that notice, the penalties the subject of that notice would have been remitted (s 222AOG).

³⁵ *Paola v Deputy Commissioner of Taxation* [2007] NSWCA 108 at [24].

³⁶ *Ibid* at [20] and [21].

³⁷ See affidavit of Mr Birt filed 4 June 2015 at pp 9, 12 and 47 (of the exhibits).

³⁸ See affidavit of Mr Birt filed 4 June 2015 at pp 53-56. See also exhibit MHC-7 to the affidavit of Mr Cuskelly filed 13 July 2015 (ASIC extract for the company) (at pp 80-83).

- [44] In so far as s 269-15 is concerned, the continuing obligation on a director is to cause the company to comply with its obligation to pay the amounts withheld until, under s 269-15(2)(b), an administrator of the company is appointed under ss 436A, 436B or 436C of the *Corporations Act 2001*. If this had been done before the second director penalty notice was issued (22 July 2010) or within 21 days of that notice, the penalties the subject of this notice would have been remitted (s 269-30(1)).
- [45] The appointment of receivers and managers on 11 January 2011 does not afford the defendant any defence to the plaintiff's claim to recover the subject penalties from him.

Winding up

- [46] The material before the Court reveals that an application to wind up the company, made by the Commissioner, was filed on 25 September 2012,³⁹ and the order for the company to be wound up was made on 2 November 2012.⁴⁰
- [47] The defendant's purported reliance on the institution of the earlier winding up proceedings (2009) is misplaced. As already mentioned, those proceedings were dismissed (following agreement between the ATO and the company as to a payment arrangement in January 2010). Where the winding up involves a compulsory winding up by the court, the winding up does not begin or commence until the winding-up order is made by the court.⁴¹

Illness

- [48] Section 222AOJ provided that, in proceedings to recover a penalty payable under, relevantly s 222AOC, it is a defence if it is proved that, because of illness or for some other good reason, the person did not take part in the management of the company at any time when:
- (a) the person was a director; and
 - (b) the directors were under the obligation to comply with s 222AOB(1).
- [49] An equivalent defence is provided for in s 269-35(1) of the TAA, in the following terms:
- “You are not liable to a penalty under this Division if, because of illness or for some other good reason, it would have been unreasonable to expect you to take part, and you did not take part, in the management of the company at any time when:
- (a) you were a director of the company; and
 - (b) the directors were under the relevant obligations under subsection 269-15(1).”

³⁹ See exhibit GPB-08 to the affidavit of Mr Birt filed 19 June 2015.

⁴⁰ See [16] and [17] and exhibit MHC-8 to the affidavit of Mr Cuskelly filed 13 July 2015 at p 84-86.

⁴¹ *Scobie v Commissioner of Taxation* (1995) 59 FCR 177 at 185F-G.

- [50] A defence under this provision will be effective only if the director establishes that because of illness (or some other good reason) they did not take part in the management of the company for the entirety of the period of their directorship during which the obligation under s 22AOB(1) or s 269-15(1) existed.⁴² The relevant time in the case of each of the director's penalty notices begins when the first deduction (amount withheld) the subject of the notice is made, and continues until the expiry of each notice.⁴³
- [51] The evidence of illness relied upon by the defendant is contained in exhibit GPB-24 to his affidavit filed 19 June 2015. I note in particular the report from Dr Glen Kennedy, the Deputy Director of the Department of Haematology, Cancer Care Services, Royal Brisbane Women's Hospital (at pp 436-44 of that exhibit). The report is dated 14 November 2007, but signed on 1 January 2008. It is clear the defendant has suffered from some very serious medical conditions in the past, which are detailed at pp 438-439 of exhibit GPB-24, and which were diagnosed in the period from July 2000 (stage 4A small lymphocytic lymphoma) to 2003. According to a letter from Dr Helen Hoey dated 8 July 2014 (p 435), he developed an anxiety disorder with mixed features of depression and anxiety in about January 2001, as a result of experiencing a life threatening illness with the diagnosis of lymphoma in July 2000, and Dr Hoey refers to seeing the defendant on a regular basis since January 2001 to provide ongoing psychological support.
- [52] Exhibit GPB-24 also includes (at pp 451-452) a document dated 22 January 2000 referring to the defendant no longer being able to fill the role of "managing director, general manager and company chairman of Birt & Associates Pty Ltd", which is described as a civil construction company.
- [53] Notwithstanding his medical history, the defendant did become one of the two directors of the company when it was registered in 2004, and remained in that role until the company was de-registered on 5 July 2015.
- [54] In his affidavit material, and in his written submissions, the defendant seemed to draw a distinction between "managing the operations of the company", for example as managing director (referring in this regard to his resigning as managing director of Birt & Associates Pty Ltd), and acting as a director, in accordance with duties imposed under the Corporations Act; duties which the defendant said he does not resile from.
- [55] At the hearing, the defendant made it clear that he was an active director of the company throughout the whole of the relevant period. He expressly disavowed that, in seeking to rely on this, or the "reasonable steps" defence referred to below, he was suggesting he

⁴² *Deputy Commissioner of Taxation v George* (2002) 55 NSWLR 511 at [21]-[26] per Gzell J (Handley and Giles JJA agreeing); *Canty v Deputy Commissioner of Taxation* (2005) 63 NSWLR 152 at [48].

⁴³ *Canty v Deputy Commissioner of Taxation* (2005) 63 NSWLR 152 at [43]-[49] per Handley JA (with whom Beazley and Santow JJA agreed). Cf *Deputy Commissioner v Coco* (2003) 179 FLR 362 at [44] and [50] where Mullins J favoured a slightly different construction, which would extend the relevant period in which the defence needs to be established beyond expiry of the notice. Even if that construction were adopted here, contrary to the New South Wales Court of Appeal's later decision in *Canty*, it would not alter the outcome for the defendant.

was a “sleeping director” or anything of that kind. He acknowledged that he “certainly partook as a director of its [the company’s] financial matters”.⁴⁴

[56] In so far as the relevant period in 2009/2010 is concerned, this is, in any event, apparent from the material the defendant has filed. For example, in a letter the defendant wrote to the Deputy Commissioner on 21 August 2009,⁴⁵ although he states that “I have been retired from active operational duties for the Company since July 2004, from which time I have been on a Total and Permanent Disability Pension”, he goes on to say “Notwithstanding this, I remain informed as to the Company’s financial situation to the point that I am able to relate and report to a number of specific observations”, which are then detailed in the subsequent three pages. It is also apparent from the correspondence included in exhibit GPB-13 to the affidavit of Mr Birt filed on 19 June 2015 that both directors (the defendant and Chris Marriott) were involved in instructing the solicitors then acting for the company in attempts to negotiate with the ATO in late 2009/early 2010, both in terms of repayments of the company’s outstanding taxation liabilities, and also the 2009 winding up proceedings. The defendant was clearly, in my view, taking part in the management of the company at this time.⁴⁶

[57] At the hearing of this application, the defendant seemed to indicate that he accepted his illness “is not a complete defence”, because of his acknowledgment that he remained an active director, but submitted that it is a “partial defence if you put it together with what ... are the reasonable steps I could have taken”.⁴⁷ As I note below, the defendant includes his health as a relevant factor that, he submits, ought to be taken into account in determination what “reasonable steps” are for the purposes of s 222AOJ(3) and s 269-35(2).

[58] In so far as the “illness” defence under s 269-35(1) is concerned, however, the defendant has no reasonable prospects of defending the plaintiff’s claim on this basis.

Reasonable steps

[59] Section 222AOJ(3) provided that it is a defence to a proceeding to recover a penalty under s 222AOC, if it is proved that:

- (a) the person took all reasonable steps to ensure that the directors complied with, relevantly, s 222AOB(1); or
- (b) there were no such steps that the person could have taken.

[60] For that purpose, “reasonable” was defined in s 222AOJ(4) to mean reasonable having regard to:

⁴⁴ T 1-21.35.

⁴⁵ Exhibit GPB-12A to the affidavit of Mr Birt filed 19 June 2015 (at p 62).

⁴⁶ See *Deputy Commissioner of Taxation v Lister* [2002] QCA 270 at [14] per Williams JA (with whom Davies and Jerrard JJA agreed) in this regard.

⁴⁷ T 1-14.1-4.

- (a) when, and for how long, the person was a director and took part in the management of the company; and
- (b) all other relevant circumstances.

[61] An equivalent defence is now provided for in s 269-35(2), in the following terms:

“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 the Act); or
- (b) there were no reasonable steps you could have taken to ensure that any of those things happened.”

[62] In determining what are reasonable steps, s 269-35(3) is in the same terms as s 222AOJ(4).

[63] In terms of what a director needs to prove to make out a defence on this basis, assistance can be gained from the decision of the New South Wales Court of Appeal in *Miller v Deputy Commissioner of Taxation* (1997) 38 ATR 51, which dealt with s 222API(3) of the ITAA 1936.⁴⁸ In that case, Mason P (with whom Beazley JA agreed) said, at 56:

“What the directors have to do to comply with s 222APB(1) is *cause* the company to do *at least one* of the four matters. If none of the four matters occurs there has been non-compliance by the directors: see s 222APB(2). The taking by a director of ‘*all reasonable steps to ensure*’ compliance by the directors **obviously requires that each option be addressed**, either in the sense of taking reasonable steps to bring it about or declining to do anything on the basis that there were no such steps that the director could have taken. The alternative construction would mean that if it were reasonable not to cause the company to pay the estimate to the Commissioner ... because the company were hopelessly insolvent, the director could

⁴⁸ It is noted that s 222API(3) is in substantively identical terms to s 222AOJ(3) and that the provision the person was required to prove they had taken all reasonable steps to comply with (s 222APB, in relation to directors’ obligation where the company becomes liable to pay an estimate under s 222AHA) was in substantively identical terms to s 222AOB. *Miller* was recently applied in relation to s 269-35(2) in *Deputy Commissioner of Taxation v Roche* [2014] WASC 222 per Sanderson M.

sit on his or her hands yet still make out the ‘defence’. That would be absurd, and would defeat the purpose spelled out explicitly in s222ANA(1) and s222ANA(2).”⁴⁹

[64] The approach described by Mason P in *Miller* was adopted by Gzell J (with whom Handley and Sheller JJA agreed) in *Deputy Commissioner of Taxation v Solomon* (2003) 199 ALR 325 at 335-336.

[65] In *Canty v Deputy Commissioner of Taxation* (2005) 63 NSWLR 152, Handley JA (with whom Beazley and Santow JJA agreed) referred with approval to Mason P’s decision in *Miller* (at [35]), but also expanded on the relevant principles to be applied in considering a defence raised under s 222AOJ(3) (at [36]-[42]), by reference to the time available to a director to achieve compliance before a notice is served (under s 222AOE), and also by noting that the defences under s 222AOJ(3)(a) and (b) are cumulative not mutually exclusive (so, for example, a defendant may establish that there was nothing that could reasonably be done to achieve payment, and that there was no point in attempting to negotiate a s 222ALA agreement with the Commissioner, in which case the defence under s 222AOJ(3)(b) would succeed in those respects, but it would remain necessary to address the other two options (appointment of an administrator or beginning winding up) under s 222AOJ(3)(a)). As Handley JA said, at [41]:

“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 [s 222AOJ(3)] defences will have to cover all options.”

[66] Santow JA observed in *Canty* at [85]:

“What is entailed by taking *all* reasonable steps is not directed to the conventional supervisory obligation of care and diligence of a company director with regard to the company’s affairs, with its statutory provisions regulating that duty and the power of delegation. **Rather it is directed to ensuring that a specific outcome is brought about**, so far as taking all reasonable steps is capable of doing so. Because those reasonable steps are directed to ensuring that specific outcome, rather than, more broadly and less directly, to a director’s duties with respect to the supervisory control of the affairs of the company, recourse to the latter with its corporate law obligations would be apt to mislead when explaining what are ‘all reasonable steps’ in the circumstances.”⁵⁰

[67] As to the meaning of “reasonable” in s 222AOJ(3), in *Deputy Commissioner of Taxation v Saunig* (2002) 55 NSWLR 722, the New South Wales Court of Appeal (Heydon JA, with whom Sheller JA and Gzell J agreed) said, at [25]:

⁴⁹ Italicised emphasis in the original. Bold emphasis added. Section s 222ANA is set out at paragraph [11] above.

⁵⁰ Emphasis added.

“In *Re A Solicitor* [1045] 1 KB 368 at 371, Scott LJ, delivering the judgment of the Court of Appeal, said: ‘The word ‘reasonable’ has in law the prima facie meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, knows or ought to know’. The better construction of s 222AOJ(3) is that the test is an objective one, corresponding to that of Scott LJ. There is nothing in any of the relevant sections suggesting that all that matters is the actual knowledge of the director or that a director who is ignorant of the law or of any fact of which he ought to know is in a better position than a director aware of the law and aware of facts which he found out. In other words, there is nothing in the legislation to displace the prima facie meaning of ‘reasonable’ in s 222AOJ(3) which adopting of Scott LJ’s approach would ascribe to it. Hence, on its true construction, s 222AOJ(3) gives a defence to a defendant to proceedings for the recovery of a penalty imposed by s 222AOC if the defendant proves that he or she took all steps which were reasonable, having regard to the circumstances of which the defendant, acting reasonably, knew or ought to have known, to ensure that the directors complied with s 222AOB(1)...”

[68] Justice Heydon continued, at [29], to say:

“There is a certain harshness in the speed of action which s 222AOB(1)(b)-s 222AOB(1)(d) calls for because in the case of a company which cannot pay the deduction under para (a), the time allowed within which to arrive at an agreement with the Commissioner, appoint an administrator, or commence the winding up of the company is very short. The harshness was no doubt seen as appropriate, because the evils of tax payers deducting taxation payments from employees’ wages and not passing them to the authorities are considerable and perhaps widespread. The evils are not limited to the tax avoided: they extend to the use made of the money, namely either theft or use as working capital, thereby permitting companies to trade which in truth are not capable of continuing to trade lawfully. To adopt the language of Gzell J in *Deputy Commissioner of Taxation v George* [2002] NSWCA 336 at [33], an ‘early sign of problems in a company is its living on the false reserves of non-remitted’ deductions from employees’ wages. The harshness is to some extent ameliorated by the fact that the directors cannot be sued until a s 222AOE notice is served, and by the time it has been served and a further fourteen days have passed, the director will have had a period sufficient to procure the company to take one of the four steps referred to in s 222AOB(1). If one of the steps is taken, the director ceases to be liable. Harsh or not, the legislative scheme is in this respect clear...”

[69] It is apparent from the defendant’s letter to the Deputy Commissioner of 21 August 2009⁵¹ that he knew the PAYG amounts withheld had not been passed on to the ATO and that the company was in financial difficulty (albeit the defendant attributed that to the actions of Australian banks in response to the GFC) but the defendant was hopeful of various development projects and construction contracts going ahead which would generate funds to enable the company to pay its liabilities sometime in the future. This is precisely the “evil” which Heydon JA refers to in the passage just quoted.

⁵¹ Affidavit of Mr Birt filed 19 June 2015 at p 62.

- [70] Having carefully considered the large body of material the defendant has filed in this proceeding, I am not satisfied that he has reasonable prospects of making out a defence under s 269-35(2).
- [71] His material, and his submissions, fail to engage with the requirements of s 269-35(2), as that provision (or its predecessor, s 222AOJ(3)) has been interpreted, and explained, in the authorities. It is apparent that the defendant did not address all of the options under s 222AOB(1) (or s 269-15(2)) at the time he was required to.
- [72] What the defendant does say, at [19] of his affidavit filed 19 June 2015, is that he has “taken all reasonable steps, and [has] at all relevant times believed that those steps were valid, to cause the company to comply with its obligations identified at subsection 222AOBAA(1)(b) [sic, 222AOB(1)(b)]”. In the preceding paragraphs, reference is made to the evidence relied upon by the defendant to contend that an agreement under 222ALA was entered into. I have dealt with this at paragraphs [31] to [40] above.
- [73] What this material does show is that the company was negotiating with the ATO in relation to payment of its overall outstanding liabilities, but as Gzell J said in *Deputy Commissioner of Taxation v Solomon* (2003) 199 ALR 325 at [58]:
- “There was no explanation as to why an agreement under s 222ALA was not then negotiated. The only explanation was his ignorance of the existence of the provision. Unfortunately for him, ignorance is no excuse...”
- [74] More broadly, at [68] of his affidavit filed 19 June 2015 the defendant states that he has “taken all reasonable steps, given my circumstances and my health, to ensure that the company has complied with its obligations to the limit of my obligations as evidenced herein, where I believe that all of those obligations were capable of being abided by absent the perceived fraudulent conduct of others as related herein”. He reiterates this at [16] of his affidavit filed 7 July 2015.
- [75] The defendant’s argument, as I understand it, is that as at August 2009 and July 2010, the defendant was hopeful of being able to refinance in order to raise the funds necessary to discharge the company’s liabilities to the Commissioner. This, as I have said, is reflected in his letter of 21 August 2009.
- [76] As it turns out, that was not possible, and the defendant, to a significant extent, blames that on the impacts of the GFC; the policy of the government at the time in response to the GFC; and the operations of various banks at that time.
- [77] Further to this, at [56] of his affidavit filed 19 June 2015 the defendant says that “through unrelenting determination during the period since Deloitte [January 2011] and then Worrells [November 2012] have been appointed to the company” he has “identified gross misrepresentation amounting, I say, to fraud against the company, or against myself, by

the following individuals and/or entities”, which he then sets out in the following subparagraphs (a) to (f), including by reference to various legal proceedings. One of those entities is the National Australia Bank, to which the defendant also refers in his earlier affidavit filed 4 June 2015, exhibiting a Deed of Settlement of a dispute between him, Birt & Associates Pty Ltd and the National Australia Bank dated 19 December 2014.⁵²

[78] As I understand the defendant’s submissions (and his arguments which appear in the affidavits filed), the relevance of these matters is put on three bases:

- (a) first, it is said to be relevant to consideration of the “reasonable steps” defence, because the defendant submits that what is “reasonable” for the purposes of s 222AOJ / s 269-35 ought not be considered in an “economic vacuum”,⁵³ and ought to be considered having regard to the broader framework which includes the circumstances of the GFC, and the matters he refers to in [56] of his 19 June 2015 affidavit, of which he says he only subsequently became aware;
- (b) second, it is said to be relevant to his / the company’s ability to recover funds, which would have enabled it to discharge the company’s liabilities to the Commissioner, and would enable the defendant to pay his own outstanding liabilities to the Commissioner. This seems to be reflected in [9] of the defendant’s current defence, which refers to the defendant, “through research and discovery” having “identified, beyond reasonable doubt in its mind, at least one such Third Party that remains a viable entity capable of remunerating some, if not all, of the Company’s debt, the subject of the Director Penalty Notice in the proceeding, to the Plaintiff”; and
- (c) third, the defendant submits that his ability to recover such funds from these entities is dependent upon him having the “professional and legal capacity to appear as a viable Plaintiff / Applicant in those matters in respect of a director / former director of various entities”.⁵⁴ He alludes to the personal consequences to him of the plaintiff obtaining judgment against him in this proceeding, involving bankruptcy (at [63] of his affidavit of 19 June 2015) and submits (at [65]) that this “would add to the unconscionable misconduct that has impacted my life experiences since the Global Financial Crisis (“GFC”) of 2008...”.

[79] As to the first matter, the express terms, and purpose of these provisions (referred to at paragraphs [11] and also [68] above) militates strongly against the interpretation that the defendant urges on the concept of what is “reasonable” for the purposes of s 222AOJ(3) and s 269-35. The director penalty provisions are there to protect the revenue against the case where an employer has made deductions from salaries or wages, but has failed

⁵² Exhibit GB-2 to the affidavit of Mr Birt filed 4 June 2015.

⁵³ T 1-37.8.

⁵⁴ [57] of Mr Birt’s affidavit filed 19 June 2015.

to remit the amount of such deductions to the ATO.⁵⁵ The provisions plainly call for prompt action on the part of a director. Whilst the provisions contemplate having regard to “relevant circumstances”, that must, in light of the express terms of the provisions, and the authorities discussed above, refer to relevant circumstances, existing at the time the obligation is imposed and continues on the director, of which the director is aware or ought reasonably be aware. Reflective analysis on the basis of hindsight has no part to play in this analysis.

- [80] As to the second matter, this affords the defendant no defence. A similar argument by a director (as to his belief that the company would “ultimately” be able to pay the amounts withheld, on the basis of claims the director was hopeful would settle favourably, or contracts to be enforced which it was hoped could fund the payments) was clearly rejected by Whealy J in *Deputy Commissioner of Taxation v Pejkovic* (2000) ATC 4825 at 4834. The bottom line is that, as in that case, nothing was done by the due dates, nor by the date of expiry of each of the director penalty notices. As Whealy J said, if the amounts which the company is required to pay could not be paid:

“For the defence to arise, the defendant was obliged to try to enter an agreement with the [Commissioner] [that being a particular type of agreement, under s 222ALA]; if that failed, to take steps to appoint an administrator or bring about the commencement of the winding up. The fact is he did none of these things.”

- [81] The third matter is simply not relevant to any consideration of this defence.
- [82] The defendant’s material does not in any way demonstrate that any steps were taken by him (other than in relation to the negotiation of a payment arrangement already referred to, which does not satisfy the obligation under s 222AOB or s 269-15) to ensure the directors (that is, himself and his co-director) complied with any of the options in s 222AOB(1), or s 269-15(2), from the time the obligations arose, until the expiry of the notices (or even afterwards). In particular, the options of going into voluntary administration or liquidation were seemingly not addressed by the defendant at all.
- [83] In those circumstances, in my view, there are no reasonable prospects of defending the plaintiff’s claim on this basis.

Validity of second director’s penalty notice

- [84] Finally, the defendant seeks to challenge the validity of the second director’s penalty notice on the bases that the notice:
- (a) fails to refer to the potential option for remittance of the penalty where an agreement is entered into with the Commissioner, as contemplated by s 222AOB(1)(b) of the ITAA 1936; and

⁵⁵ *Deputy Commissioner of Taxation v Woodhams* (2000) 199 CLR 370 at 374.

(b) does not use the wording of s 269-15(2)(a) of the TAA, by replacing the word “obligation” with the word “liability”.⁵⁶

[85] As already noted, the second director’s penalty notice was given under s 269-25 of schedule 1 to the TAA, because that was the relevant provision which then applied (the previous provisions having been repealed by the 2010 Act). The transitional provisions in the 2010 Act make it clear that all of the provisions in division 269, other than s 269-20, are to apply to a penalty payable under s 222AOC, as if it was a penalty payable under division 269. That includes the obligation on directors under s 269-15, the notice provision in s 269-25, and the remittance provision in s 269-30.

[86] Under s 269-25(2), a notice given under s 269-25(1) must:

- “(a) set out what the Commissioner thinks is the unpaid amount of the company’s liability under its obligation; and
- (b) state that you are liable to pay to the Commissioner, by way of penalty, an amount equal to that unpaid amount because of an obligation you have or had under this Division; and
- (c) explain the main circumstances in which the penalty will be remitted.”

[87] The second director’s penalty notice was given⁵⁷ on 22 July 2010.⁵⁸ The notice comprises a letter to the defendant, to which is attached a “notice”. As required by s 269-25(2)(a) the notice sets out the unpaid amounts of the company’s liability under s 16-70. As required by s 269-25(2)(b), the notice states that the defendant “as a director of the company, are liable to pay the Commissioner by way of penalty an amount equal to the unpaid amount of each liability” of the company. As required by s 269-25(c), the notice explains the “main circumstances in which the penalty will be remitted”, in the following terms:

“The penalty in respect of each unpaid amount of the company’s liability as detailed in the above table will be remitted if, at the end of 21 days after the date on this notice:-

- (a) the company’s liability in respect of that unpaid amount has been discharged; or
- (b) the company is under administration within the meaning of section 436A, 436B or 436C of the *Corporations Act 2001*; or
- (c) the company is being wound up.”

⁵⁶ Paragraph 2(i) of the defendant’s proposed second further amended defence (exhibit GPB-30).

⁵⁷ See s 269-25(4), a notice under s 269-25(1) is taken to be given at the time the Commissioner leaves or posts it.

⁵⁸ Norton at [3]-[7] and exhibit DN-2.

- [88] Section 269-30 provides that, subject to s 269-30(2) (which it is not necessary for present purposes to refer to) a director’s penalty is remitted if the directors of the company stop being under the relevant obligation under s 269-15, either before a notice is given under s 269-25, or within 21 days of the notice.
- [89] The directors stop being under their obligation under s 269-15 if:
- (a) the “company complies with its obligation” (that obligation relevantly being defined in s 269-10(1) as an obligation, where the company withholds an amount under division 12, to pay that amount to the Commissioner by the due date in accordance with subdivision 16-B). In my view, the statement in the notice that the penalty will be remitted if, at the end of 21 days after the date on the notice “the company’s liability in respect of that unpaid amount has been discharged” clearly reflects this provision;
 - (b) “an administrator of the company is appointed” (under the identified provisions). The effect of an administrator of the company being appointed is that “the company is in under administration”. Accordingly, this part of the notice is also accurate; or
 - (c) “the company begins to be wound up”. If a company begins to be wound up, it “is being wound up”. So this part of the notice is also accurate.
- [90] It is not necessary to use the precise words of s 269-15(1) and (2)(a), read with s 269-10(1), for the notice to “explain the main circumstances in which the penalty will be remitted”, which is what s 269-25(2)(c) requires.
- [91] As the High Court observed in *Deputy Commissioner of Taxation v Woodhams* (2000) 199 CLR 370 at 384-385:
- “The notice in the present case contained all the information that was necessary to fulfil the statutory purpose to be served by the notice. It informed the recipient, in detail, of the unpaid amounts of the company’s liability, and of the liability by way of penalty which the revenue authorities were asserting attached to him. It also informed him of the steps available to bring about a remission of that penalty.”⁵⁹
- [92] The second director’s notice did not refer to the option for remission of the penalty which had been available under s 222AOG and s 222AOB(1)(b) (making an agreement with the Commissioner under s 222ALA in relation to the company’s liability within 14 days’ of the notice under s 222AOE), for the plain reason that those provisions were no longer in force. They were repealed by the 2010 Act.

⁵⁹ The issue in *Woodhams* was whether the notices were required to set out the “due dates” of the payments required to be made by the company. The Court held that was not required, because the statute fixed the due dates in respect of each deduction, and fulfilment of the purpose to be served by the notice before action did not necessitate informing the recipient of the operation of the statute in that respect (at 385).

- [93] What the covering letter to which the second director's notice was attached did say was that "[w]e may commence action for the recovery of the penalty without further warning unless, at the end of 21 days from the date on which the enclosed notice is given to you [one of the three things in s 269-15(2) has happened]; or an arrangement relating to such liability is in force under section 255-15" in schedule 1 to the TAA. That is an accurate reference to the effect of s 269-15(3), which, as noted above, prevents the Commissioner from commencing, or taking a procedural step as a party to, proceedings to recover a penalty from a director if an arrangement covering the company's obligation is in force under s 255-15.⁶⁰ However:
- (a) the making of an arrangement under s 255-15 is not one of the ways of ending the director's obligation under s 269-15(2), and therefore it is not one of the circumstances in which a penalty may be remitted under s 269-30; and
 - (b) therefore, it was appropriately not referred to in the second director's penalty notice in that context.
- [94] The defendant has no reasonable prospect of successfully defending this part of the plaintiff's claim on this basis either.
- [95] There is one final point to mention. The plaintiff has relied upon prima facie evidence of the amounts claimed from the defendant.⁶¹ No rebutting evidence has been produced by the defendant, although the defendant does submit that he has found it "impossible to verify the validity of the amount owing under each" director's penalty notice, due to the delay in the plaintiff commencing these proceedings, and the defendant being unable to access company records as a result of the appointment of external administrators in February 2011. This submission is not sufficient to displace the prima facie evidence relied upon by the plaintiff. Further, the amounts are based on information provided by the company, through the lodgement of business activity statements, of PAYG amounts withheld from the wages of employees in particular periods.⁶² That information would have been readily available to the defendant in 2009 and 2010, when the director penalty notices were given to him, if he wished to check their accuracy.
- [96] Although there has plainly been delay, firstly, in the commencement of these proceedings, but also in their prosecution, I note that the plaintiff does not press the claim for interest⁶³ and so the defendant cannot be said to be adversely affected in that respect, by the delay.

⁶⁰ See footnote 17 above.

⁶¹ See paragraph [24] and also footnote 16 above.

⁶² Theofilopoulos at [24], exhibit ST-2, [37] and exhibit ST-4.

⁶³ Cf the prayer for relief in the claim filed 28 May 2012 (the appropriate provision under which interest could have been awarded is s 58 of the *Civil Proceedings Act 2011 (Qld)*), and the draft order provided by the plaintiff at the hearing on 14 July 2015.

- [97] For the foregoing reasons, I am satisfied that the defendant has no reasonable prospect of defending the plaintiff's claim, and that there is no need for a trial of the claim, such that the discretion under r 292(2) is enlivened. In the circumstances it is appropriate that judgment be entered for the plaintiff against the defendant for the sum of \$178,944.21.
- [98] The plaintiff also seeks an order that the defendant pay its costs, fixed in the sum of \$4,161.60.⁶⁴ The plaintiff is entitled to its costs, and this amount is modest and reasonable.
- [99] There will be orders accordingly.

⁶⁴ The basis for calculation of this amount being set out in the affidavit of Mr Cuskelly sworn on 14 July 2015 (this affidavit was handed up on 14 July 2015, and I have since given leave to file it).