

# SUPREME COURT OF QUEENSLAND

CITATION: *Deputy Commissioner of Taxation v Reid; Deputy Commissioner of Taxation v Jones* [2003] QSC 121

PARTIES: **DEPUTY COMMISSIONER OF TAXATION**  
(plaintiff/applicant)  
v  
**JOHN BOYD REID**  
(defendant/respondent)  
v  
**SANTO ANTONIO COCO**  
(third party)

**DEPUTY COMMISSIONER OF TAXATION**  
(plaintiff/applicant)  
v  
**BRIAN PETER JONES**  
(defendant/respondent)  
v  
**SANTO ANTONIO COCO**  
(third party)

FILE NO/S: S8499 of 2001  
S8500 of 2001

DIVISION: Trial Division

PROCEEDING: Applications

DELIVERED ON: 14 May 2003

DELIVERED AT: Brisbane

HEARING DATE: 25 February 2003

JUDGE: Mullins J

ORDER: **S8499 of 2001**  
**The application be dismissed.**  
**S8500 of 2001**  
**The application be dismissed.**

CATCHWORDS: PROCEDURE – SUMMARY JUDGMENT – where plaintiff applied for summary judgment under r 292 UCPR – whether defendant had no real prospect of successfully defending all or part of claim

INCOME TAX – *Income Tax Assessment Act 1936* (Cth) - liability of director for penalty for the amount of PAYG withholdings not remitted by the company – where director raised reasonable steps defence pursuant to s222AOJ(3) –

reasonable steps defence arguable on the facts

*Income Tax Assessment Act 1936* (Cth)  
*UCPR*, r 292

*AWA Ltd v Daniels* (1992) 7 ACSR 759  
*Deputy Commissioner of Taxation v Coco* [2003] QSC 119  
*Deputy Commissioner of Taxation v Guthridge* [2003] QSC  
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COUNSEL: P G Bickford for the plaintiff/applicant in each proceeding  
 K A Barlow for the defendant/respondent in each proceeding

SOLICITORS: Australian Government Solicitor for the plaintiff/applicant in  
 each proceeding  
 Clarke and Kann for the defendant/respondent in each  
 proceeding

- [1] **MULLINS J:** The Deputy Commissioner of Taxation (“the applicant”) who is the plaintiff in each proceeding on 24 December 2002 filed an application for summary judgment under r 292 of the *UCPR* in each proceeding. Those applications were heard together on 25 February 2003 after the hearing of each of the applications made by the applicant in proceedings S8502 of 2001 and S8501 of 2001 against Mr Coco and Mr Guthridge respectively. Mr John Boyd Reid (“Reid”) opposes the application in proceeding S8499 of 2001. Mr Brian Peter Jones (“Jones”) opposes the application in proceeding S8500 of 2001.
- [2] The claim pleaded against each of Reid and Jones is in identical terms to that pleaded by the applicant against Mr Guthridge and in similar terms to that pleaded by the applicant against Mr Coco. The applicant relies on s 222AOD of the *Income Tax Amendment Act 1936* (Cth) (“*ITAA*”) to seek to recover against each of Reid and Jones the debt of \$399,712 as a penalty in respect of PAYG withholdings for August, September and October 2000 which were not remitted by Softex Industries Pty Ltd (“the company”) to the Commissioner.
- [3] The issue on each application is whether the prospects of defending the claim on the basis of the defence under s 222AOJ(3) of the *ITAA* are such, as to preclude summary judgment.
- [4] I set out the relative legislative provisions and summarised the law relating to the defence under s 222AOJ(3) in my reasons for judgment published contemporaneously in *Deputy Commissioner of Taxation v Coco* [2003] QSC 119 (“*Coco*”) and rely on those aspects of those reasons for the purpose of this judgment.

#### **Evidence of Jones relating to reasonable steps defence**

- [5] Jones is an investment director of Business Management Limited (“BML”) which is involved in the business of providing funding to private companies. Jones has extensive experience over 20 years as a company director. Jones describes himself as a non-executive director of the company, relying on the distinction which is made between executive and non-executive directors, where non-executive directors are not bound to give continuous attention to the affairs of the corporation: *AWA Ltd v*

*Daniels* (1992) 7 ACSR 759, 867. Jones alleges in his defence filed on 22 January 2002 that he was appointed a non-executive director of the company, by reason of his position as a director of BML and the fact of BML's investment in the company.

- [6] Jones refers to the rigorous due diligence process undertaken by BML before investing \$4m into the company on 28 June 2000. Jones states that one aspect of BML's due diligence involved a review of the tax liability position of the company which included interviews with the company's legal advisor, Mr Khory McCormick of Minter Ellison. This due diligence review confirmed that the company had paid all amounts which it had withheld for the purposes of Division 12 in Schedule 1 to the *Tax Administration Act 1953* (Cth).
- [7] On 28 June 2000 the company and BML entered into an investment deed which governed BML's investment in the company. The deed was signed by Mr Coco on behalf of the company and himself as warrantors. The effect of the warranties and the information provided by the company pursuant to them in respect of PAYG withholdings was that all such payments that were due and payable had been made.
- [8] Jones states that, in effect, nothing occurred between the provision of those warranties on 28 June 2000 and his appointment as a director of the company which alerted him to the non-payment of PAYG withholdings.
- [9] Jones states that from the time BML invested in the company, he received monthly financial statements. Copies of the statements which he still holds comprise Ex BPJ6 to his affidavit filed on 28 January 2003. They include the monthly financial statements for October 2000 which do not reveal any PAYG deductions were overdue for payment, which he would have expected to have been identified as an important creditor item. Jones states that at the board meeting on 4 December 2000 at which the October financial statement was discussed, there was no mention made of the outstanding PAYG withholdings. After the outstanding PAYG withholdings became known, Jones ascertained that they were incorporated in the sundry creditors item without being specifically isolated in the accounts.
- [10] Jones received the director penalty notice on 15 May 2001. He states that at the board meeting of the company on 15 May 2001 he referred to having received the notice and not knowing that the company owed anything to the ATO in relation to PAYG and asked Mr Coco what PAYG tax was owed to the ATO and what other amounts were owed to the ATO. He states that Mr Coco responded:  
"Don't worry about it. It is under control, we have reached an agreement with the ATO."
- [11] Jones had a conversation with the company's chief financial officer, Mr Ian McCall (a qualified accountant), a few days later in which Mr McCall informed him that there was no agreement, but a written offer by the company to settle the unpaid PAYG taxes.
- [12] Jones received a copy of the applicant's letter dated 21 May 2001 to the company which rejected the company's offer to settle. Jones then requested all correspondence between the company and the ATO and on 24 May 2001 had a conversation with Mr Coco in which he asked about when the unpaid PAYG tax would be paid. Jones states that Mr Coco responded:

“Don’t worry about it. Softex has now reached an agreement with the ATO to pay the tax by the 6<sup>th</sup> July.”

Jones states that he then reminded Mr Coco that last time he had said that, the company had only made an offer and that Mr Coco then responded:

“It’s alright, Minter Ellison has contacted the ATO and Softex will pay the ATO by the 6<sup>th</sup> of July.”

- [13] Jones discovered either later on that day or the next day that Mr Coco was referring to an offer to settle sent by Minter Ellison in a letter dated 24 May 2001 and that the company had not reached an agreement with the applicant. Jones states that he had a discussion with Mr Coco on 25 May 2001 at which Mr Guthridge was also present when he identified the choices for the company, if there was no agreement with the ATO which included appointing an administrator, for Mr Coco or investors to inject sufficient cash into the company to ensure that it could pay the PAYG by the agreed date or for Mr Coco to indemnify him and the other directors in respect of any liability in the event that the company did not pay the tax by the agreed date. Mr Coco responded that the ATO had given them 6 weeks to pay.
- [14] Jones states that on 28 May 2001 he had a conversation with Mr McCall about the controls exercised over creditor payments and ascertained for the first time that a daily priority creditors schedule was prepared and given to Mr Coco and Mr Guthridge, but that it was Mr Coco who decided what payments would be made to creditors of the company.
- [15] At a meeting with Messrs Coco and Guthridge on 6 June 2001, Jones inquired of Mr Coco as to whether the PAYG tax debt had been paid and was informed by Mr Coco that the ATO had agreed for it to be paid by the end of June.
- [16] Jones states that during a board meeting of the company on 28 June 2001 Mr Coco made a statement to the effect that he had met with the ATO the previous day and had reached an agreement with the ATO to extend the date for payment of the PAYG tax debts to 7 July.
- [17] In July 2001 Jones was advised by Minter Ellison that the subject PAYG withholdings were not paid on 7 July 2001, but that they formed part of a global settlement of all outstanding taxes being negotiated with the ATO. After this time Jones commenced detailed discussions with the company’s lawyers and accountants and with Mr Graeme Still of the ATO regarding the global settlement of all of the company’s tax debt. I have set out a summary of the meeting, correspondence and telephone calls between the company and the ATO which took place between 5 September and 4 October 2001 in paras [70] and [71] of *Coco*. The letter dated 6 September 2001 was an extremely detailed submission on behalf of the company to support an offer which, if accepted, would have resulted in an agreement under s 222ALA which is one of the outcomes a director is obliged to seek under s 222AOB(1).

#### **Evidence of Reid relating to reasonable steps defence**

- [18] Reid is also a director of BML and has had extensive experience as a company director for the past 50 years including directorships of a number of listed companies and was also the chairman for one listed company. Reid also describes himself as having been appointed as a non-executive director of the company.

- [19] The evidence of Reid relevant to the defence is virtually identical to that of Mr Jones, as their interests in the company were from the perspective of the investment of BML and Reid relied on Jones to consult with Messrs Coco and Guthridge and report to him on the results of relevant meetings and conversations with Mr Coco. Reid was informed by Jones on 9 July 2001 of his intention to commence discussions with the ATO in relation to a global settlement of all of the tax debt of the company and of the progress of the negotiations.

### **Objections to evidence**

- [20] The applicant made objections to certain paragraphs of each of the affidavits of Jones and Reid. The substance of the objections was either that the deponent was swearing the issue or expressing an opinion in circumstances where the matter was not a proper area for expert opinion. To the extent that it is claimed that the deponent was swearing the issue, each of the statements was admissible on the basis of the respective experiences of Jones and Reid as directors of various companies.
- [21] The objection taken to the expression of opinion on a matter which was submitted by the applicant as not falling within an area for expert opinion is the same objection taken by the applicant to the affidavits of Mr NE Summerson filed on 29 January and 3 February 2003. This evidence relates to the role of a non-executive director of a company and the expectation of a non-executive director about being informed if that company has not paid PAYG deductions when due.
- [22] It was also submitted on behalf of the applicant that the distinction between an executive director and a non-executive director was not contemplated by the *ITAA*. The concept of what is “reasonable” for the purpose of s 222AOJ(3), as defined in s 222AOJ(4), contemplates that the nature of the role undertaken by a particular director is relevant to determining what is reasonable. The terms executive director and non-executive director help define the nature of the role of the particular director: cf *AWA Ltd v Daniels* (1992) 7 ACSR 759. It is not necessary to rule on the applicant’s objection that the nature of the role of a non-executive director is not an area which is appropriate for expert evidence, in view of the conclusion which I have reached about the desirability for a trial in each of these proceedings.

### **Whether there is a real prospect of defending each of the claims**

- [23] For the purpose of determining the summary judgment applications, there are sufficient similarities between the respective positions of Jones and Reid and that of Mr Guthridge for the same reasoning which I applied in *Deputy Commissioner of Taxation v Guthridge* [2003] QSC 120 which is published contemporaneously with these reasons for judgment to be applied to the defence raised by each of Jones and Reid.
- [24] I am not satisfied that the prospects of a successful defence being raised by each of Jones and Reid under s 222AOJ(3)(a) in respect of the entire period during which each of them was under an obligation under s 222AOB(1) is so fanciful as to justify denying either of them a trial. It is unnecessary to consider the defence raised under s 222AOJ(3)(b).

### **Orders**

- [25] The orders which I make are:

S8499 of 2001

The application be dismissed.

S8500 of 2001

The application be dismissed.

- [26] I will hear submissions from the parties on the question of costs and whether any directions should be made.