SUPREME COURT OF QUEENSLAND

CITATION:	*Reardon & Anor v Deputy Commissioner of Taxation* [2013] QCA 46
PARTIES:	**SHAUN THOMAS REARDON** **HEATHER WEGNER** (appellants) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent)
FILE NO/S:	Appeal No 3598 of 2012 Appeal No 3597 of 2012 SC No 8487 of 2010 SC No 8483 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2012
JUDGES:	Holmes JA, Philip McMurdo and McMeekin JJ Separate reasons for judgment of each member of the Court, Holmes JA and Philip McMurdo J concurring as to the order made, McMeekin J dissenting
ORDER:	**Appeals dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – NATURE OF RIGHT – SUBSTANTIVE RIGHT OR MATTER OF PROCEDURE – where summary judgment was given against each of the appellants on claims by the respondent for directors' penalties under the *Income Tax Assessment Act* – where the appellants proposed to defend the claim on the basis that the relevant directors penalty notices were not sent – where the primary judge concluded that neither appellant had a real prospect of successfully defending the respondent's claim at trial – where the appellants were permitted to cross-examine the ATO officer who prepared and sent the notices, confined to the question of whether the notices were posted – where the appellants contend that they were denied procedural fairness because the cross-examination was limited – whether there was any infringement of the duty to accord procedural fairness

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – OTHER MATTERS – where the appellants contend that incomplete documents and discrepancies in the respondent's files constituted evidence that directors penalty notices were not sent – whether the primary judge erred in her finding that the material did not raise a real prospect of the appellants successfully defending the claim at trial

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where the appellants contend the directors penalty notices were invalid because they referred to the recipients having 14 days from the date of the notices to take the required steps – where s 29 of the *Acts Interpretation Act* (Cth) deemed service to take place at the date the notice would be delivered in the ordinary course of the post – whether the notices were misleading and invalid – whether the notices were saved by validating legislation which deemed the notices to have been given by sending – whether the respondent had an accrued right to take recovery proceedings because 14 days had elapsed from the giving of the notices without the appellants taking the required steps – whether a contrary intent was evinced in amending legislation which required the lapse of 21 days before the respondent could take proceedings – whether the validating legislation effected an implied repeal of the amending legislation so far as the notices the subject of the validating legislation were concerned

Acts Interpretation Act 1901 (Cth), s 7, s 8, s 29
Income Tax Assessment Act 1936 (Cth), s 222AOB(1), s 222AOC, s 222AOE, s 222AOF, s 222AOG
Taxation Administration Act 1953 (Cth), s 255-45, s 255-50, s 269-15, s 269-20, s 269-25, s 269-30
Tax Laws Amendment (2011 Measures No 7) Act 2011 (Cth), Schedule 7
Tax Laws Amendment (Transfer of Provisions) Act 2010 (Cth), Item 64, Item 65
Uniform Civil Procedure Rules 1999 (Qld), r 292, r 765(1)

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41, considered
Allina Pty Ltd v Federal Commissioner of Taxation (1991) 28 FCR 203; [1991] FCA 78, cited
Brennan v Comcare (1994) 50 FCR 555; [1994] FCA 360, cited
Deputy Commissioner of Taxation v Meredith (2007) 245 ALR 150; [2007] NSWCA 354, considered
Deputy Commissioner of Taxation v Woodhams (2000) 199 CLR 370; [2000] HCA 10, considered

Deputy Commissioner of Taxation v Zammitt [2012] NSWDC 135, distinguished
Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd (1936) 57 CLR 610; [1936] HCA 64, cited
Farbenfabriken Bayer AG v Bayer Pharma Pt. Ltd (1965) 113 CLR 520; [1965] HCA 24, cited
GF Heublein and Bro Inc v Continental Liqueurs Pty Ltd (1962) 109 CLR 153; [1962] HCA 66, cited
Goodwin v Phillips (1908) 7 CLR 1, [1908] HCA 55, cited
Grain Elevators Board (Vic) v Dunmunkle Corporation (1946) 73 CLR 70; [1946] HCA 13, considered
Hunter Resources Ltd v Melville (1988) 164 CLR 234, [1988] HCA 5, considered
Kioa v West (1985) 159 CLR 550; [1985] HCA 81, cited
Lennon v Gibson and Howes Ltd (1919) 26 CLR 285; [1919] AC 709, cited
Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (2006) 228 CLR 566; [2006] HCA 50, cited
Residual Assco Group Ltd v Spalvins (2000) 202 CLR 629; [2000] HCA 33, cited
Saraswati v The Queen (1991) 172 CLR 1; [1991] HCA 21, cited
Soong v Deputy Commissioner of Taxation (2011) 278 ALR 538; (2011) 80 NSWLR 226; [2011] NSWCA 26, considered
Yule v Junek (1978) 139 CLR 1; [1978] HCA 4, cited

COUNSEL: P G Bickford for the appellants
R M Derrington SC, with P A Looney, for the respondent

SOLICITORS: Wonderley & Hall Solicitors for the appellants
Australian Taxation Office Legal Services Branch for the respondent

[1] **HOLMES JA**: On 15 March 2012, summary judgment was given against each of the appellants for identical amounts of $297,587.57 on claims by the respondent Deputy Commissioner of Taxation for directors' penalties pursuant to s 222AOC of the *Income Tax Assessment Act* 1936, together with interest and costs. Applying the criteria under r 292 of the *Uniform Civil Procedure Rules* 1999, the learned judge at first instance concluded that neither appellant had a real prospect of successfully defending, in each case, the respondent's claim and that there was no need for a trial.

The appeal grounds

[2] The appellants challenged the correctness of her Honour's conclusion, arguing error in her finding that the material did not raise a real prospect of the appellants' successfully defending the claims on the basis that directors penalty notices were not sent to them; more particularly it was said that she should not have found that the respondent had satisfactorily accounted for discrepancies in his records as to

whether the notices were sent. Other grounds were that the material raised issues of credit concerning the officer of the Australian Taxation Office who deposed to sending the notices, which could not be resolved in summary judgment proceedings, and that there was a failure to observe the rules of procedural fairness when the learned judge limited cross-examination of that officer on the discrepancies in the respondent's records.

[3] A further ground now advanced, that the notices were invalid, was not the subject of any argument before her Honour. That ground involved an argument that the respondent was bound by, and had not met, requirements for directors penalty notices set out in s 269-25(1) of schedule 1 to the *Taxation Administration Act* 1953, so that he was not entitled to commence proceedings for recovery. This appeal proceeds as a re-hearing;[1] the ground concerns a question of law as to which further evidence could not assist; and the respondent does not oppose its addition. In the circumstances, the court has been prepared to allow the fresh argument to be advanced. Because if successful it would require the resolution of the litigation in the appellants' favour, I propose to deal with it first.

The directors' penalties regime

[4] Each appellant was a director of a company, Toowoomba Parcel Services Pty Ltd, which was said to have failed to remit PAYG withholdings from the salaries and wages of employees between 1 June 2008 and 28 February 2010. Division 9 of Part VI of the *Income Tax Assessment Act* 1936 contained the regime for recovery of directors' penalties applicable during that period. Section 222AOB(1) required directors of a company which had withheld PAYG amounts to cause the relevant company to do one of four things: meet its obligations with respect to withheld amounts; make an agreement with the Commissioner in respect of its liability for those amounts; appoint an administrator; or begin its winding up.

[5] If s 222AOB(1) was not complied with "on or before the due date" (the due date for remittance of the withheld amount for the purposes of Division 12, Schedule 1 of the *Taxation Administration Act* 1953), under s 222AOC(1) the directors became liable to pay, by way of penalty, an amount equal to the company's liability for the amounts withheld and not paid. The effect of s 222AOC(1) in the present case was that the appellants became liable to pay penalties as the due dates fell for payment of the amounts withheld. But the fact of that liability did not, of itself, allow the respondent to recover the penalties from them, because of a statutory constraint on his entitlement to do so.

The s 222AOE requirements for directors penalty notices

[6] The Commissioner's ability to recover penalties was governed by s 222AOE, as it stood until the commencement of the *Tax Laws Amendment (Transfer of Provisions) Act* 2010 on 1 July 2010. That provision was in the following terms:

> "**222AOE Commissioner must give 14 days' notice before recovering penalty**
>
> The Commissioner is not entitled to recover from a person a penalty payable under this Subdivision until the end of 14 days after the Commissioner gives to the person a notice that:

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1 *Uniform Civil Procedure Rules* r 765(1).

> (a) sets out details of the unpaid amount of the liability referred to in subsection 222AOC(1), (1A) or (2) (whichever relates to the penalty); and
>
> (b) states that the person is liable to pay to the Commissioner, by way of penalty, an amount equal to that unpaid amount, but that the penalty will be remitted if, at the end of 14 days after the notice is given:
>
> (i) the liability has been discharged; or
>
> (ii) an agreement relating to the liability is in force under section 222ALA; or
>
> (iii) the company is under administration within the meaning of the *Corporations Act 2001*; or
>
> (iv) the company is being wound up."

If one of the specified steps was taken, as the notice under s 222AOE indicated, the penalty would be remitted by virtue of s 222AOG. Section 222AOF allowed the Commissioner to give a notice under section 222AOE by leaving it at, or sending it by post to, an address that appeared from Australian Securities and Investment Commission records to be the director's place of residence or business.

[7] Section 222AOE was considered by the New South Wales Court of Appeal in *Deputy Commissioner of Taxation v Meredith*.[2] The majority in that case held that service of a directors penalty notice was complete on the Commissioner's sending it by post to the director's address as ascertained from Australian Securities and Investments Commission records. Section 29 of the *Acts Interpretation Act* 1901 had no application. (That section deems service to be effected, in the absence of proof to the contrary, at the time when a letter would be delivered in the ordinary course of the post and applies where an Act authorises or requires any document to be served by post.) In April 2010, when the notices in this case were served, *Meredith* was understood to represent the law.

The notices sent to the appellants

[8] An employee of the Australian Taxation Office, Ms Kailainathan, deposed in an affidavit that she gave each appellant a directors penalty notice by sending it on 27 April 2010 by pre-paid post to the address shown on Australian Securities and Investments Commission records. The notices were dated 27 April 2010, and contained this statement:

> "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 14 days after the date of this notice:-**
>
> (a) the company's liability in respect of that unpaid amount has been discharged; or
>
> (b) an agreement relating to the liability is in force under section 222ALA of the ITAA 1936; or

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2 (2007) 245 ALR 150.

(c) the company is under administration within the meaning of the *Corporations Act 2001*; or

(d) the company is being wound up."

The letters accompanying the notices similarly referred to the need to adopt one of those options

> "within 14 days from the date the enclosed notice is given to you; that is, 14 days from the issue date of this letter."

and went on to point out that the recipient would remain liable to a penalty

> "if any one of the options has not been adopted at the end of 14 days after the date of this letter".

[9] Each of the appellants swore an affidavit to the effect that they had not received the notice. None of the prescribed steps had been taken by either appellant within 14 days after the notices were posted.

A new directors' penalties regime

[10] The *Tax Laws Amendment (Transfer of Provisions) Act* 2010 repealed Part VI of the *Income Tax Assessment Act* 1936. The regime for the recovery of directors' penalties was replaced by a new division, 269, inserted as schedule 1 of the *Taxation Administration Act* 1953. Division 269 commenced on 1 July 2010. Subdivision 269-B, headed "Obligations and penalties" contains provisions, as the heading suggests, dealing with directors' obligations, their liability to penalty and the recovery by the Commissioner of penalties.

[11] Of particular significance for present purposes are s 269-20 and s 269-25. Section 269-20 is the successor to s 222AOC(1). It imposes liability for penalties in respect of directors' unmet obligations to make payments to the Commissioner, but under the transitional provisions of the *Tax Laws Amendment (Transfer of Provisions) Act*, it has no application where the liability to pay penalties arose before 1 July 2010. In such cases (including the appellants'), the liability to pay penalty continues to exist under s 222AOC.

[12] Section 269-25 replaced s 222AOE. That subsection is as follows:

> "**269-25 Notice**
>
> *Commissioner must give notice of penalty*
>
> (1) The Commissioner must not commence proceedings to recover from you a penalty payable under this Subdivision until the end of 21 days after the Commissioner gives you a written notice under this section.
>
> *Content of notice*
>
> (2) The notice 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.

(3) To avoid doubt, a single notice may relate to 2 or more penalties, but must comply with subsection (2) in relation to each of them.

When notice is given

(4) Despite section 29 of the *Acts Interpretation Act 1901*, a notice under subsection (1) is taken to be given at the time the Commissioner leaves or posts it."

[13] Division 5 of schedule 1 of the *Tax Laws Amendment (Transfer of Provisions) Act* contains items dealing with the application of division 269. Item 64 provides that, subject to item 65, the division

> "applies in relation to an amount payable by a company to the Commissioner before, on or after the commencement time."
>
> (The commencement time is 1 July 2010.)

[14] Item 65 is in these terms:

> **"65 Transitional – penalties**
>
> *No doubling-up of penalties*
>
> (1) Subsection 269-20(1) in Schedule 1 to the *Taxation Administration Act 1953*, as added by this Schedule, does not apply if the due day referred to in that subsection occurs before the commencement time.
>
> (2) Subsection 269-20(3) in Schedule 1 to that Act, as added by this Schedule, does not apply if the 14th day referred to in that subsection occurs before the commencement time.
>
> *New provisions apply to existing penalties*
>
> (3) Subitem (4) applies in relation to a penalty that, just before the commencement time, was payable under Division 9 of Part VI of the *Income Tax Assessment Act 1936*.
>
> (4) Division 269 in Schedule 1 to the *Taxation Administration Act 1953* (other than section 269-20) has effect, from the commencement time, as if the penalty were payable under Subdivision 269-B in that Schedule."

[15] As to the significance of the amendments effected by the *Tax Laws Amendment (Transfer of Provisions) Act* for the present case, the appellants argued by reference to a New South Wales District Court decision, *Deputy Commissioner of Taxation v Zammitt*,[3] that as a result of the transitional provisions in item 65, s 269-25 applied to any case in which there was a liability to penalty as at 1 July 2010. Consequently, the Commissioner could not commence recovery proceedings until he had served a notice allowing 21 days for compliance. I will return to that argument, but it is first necessary to deal with some more common law and legislative developments.

Meredith overruled on when notice "given"

[16] After the new regime had been put in place, the New South Wales Court of Appeal, constituted by a bench of five, declined to follow *Meredith*. *Soong v Deputy Commissioner of Taxation*[4] concerned a notice sent in November 2007 pursuant to s 222AOE. The Court held that no contrary intention was established to exclude the application of s 29 of the *Acts Interpretation Act* to s 222AOF as a provision authorising or requiring a document to be served by post. Consequently, service was deemed to have been effected at the ordinary time for delivery, not posting, in the absence of proof to the contrary.

[17] In the present case, that meant that the 14 day period during which the directors could take the steps necessary to achieve remission of penalty commenced at the time when the notices sent on 27 April 2010 would ordinarily have been received by post. The letters and the notice, however, referred to the date of sending as commencing the relevant 14 days period; on the reasoning in *Soong*, that was wrong. Any such error was significant. In *Deputy Commissioner of Taxation v Woodhams*,[5] the High Court said that the statutory purposes of a s 222AOE notice were, first, to inform the recipient of the unpaid amount of the company's liability and of his or her liability to a penalty in that amount, and, second, to inform the recipient of the alternative courses available to achieve remission of the penalty,

> "the object being to encourage the recipient to take such steps as are necessary to bring about the result that one or other of those courses is followed."[6]

A notice misleading as to the time for compliance with it might well be regarded as failing in the second purpose, and hence as invalid.

The validating legislation

[18] The decision in *Soong* gave rise to further legislation. On 29 November 2011, the *Tax Laws Amendment (2011 Measures No 7) Act* 2011 commenced. Schedule 7 provided for validation of penalty notices in these terms:

> "**Schedule 7—Penalty notice validation**
>
> **1 Validation of notices**
>
> (1) This item applies if the Commissioner gave (or purported to give) a notice under former section 222AOE on or after

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3 [2012] NSWDC 135.
4 (2011) 278 ALR 538; [2011] NSWCA 26.
5 (2000) 199 CLR 370.
6 At 384.

> 10 December 2007 by sending it by pre-paid post in accordance with section 28A of the *Acts Interpretation Act 1901*.
>
> (2) For the purpose of former section 222AOE, treat the notice as having been given at the time the Commissioner sent it by pre-paid post in accordance with section 28A of the *Acts Interpretation Act 1901*.
>
> (3) This item applies despite section 29 of the *Acts Interpretation Act 1901*.
>
> (4) This item does not affect rights or liabilities arising between parties to proceedings heard and finally determined by a court on or before the commencement of this item, to the extent that those rights or liabilities arose from, or were affected by, a notice referred to in subitem (1).
>
> (5) In this item:
>
> ***former section 222AOE*** means former section 222AOE of the *Income Tax Assessment Act 1936* (as that section was in force before the commencement of Schedule 1 to the *Tax Laws Amendment (Transfer of Provisions) Act 2010*)."

[19] Sub-item (2), plainly enough, deems notices sent between 10 December 2007 and 1 July 2010 to have been "given" when sent by pre-paid post. What is not spelt out are the implications of giving them that status "For the purpose of former section 222AOE". But it seems to follow that the consequential effects of schedule 7.1 (2) are to render the terms of those notices accurate when they spoke of compliance within 14 days of the date of the notice, hence making them valid and giving the Commissioner the right to recover penalties as of the end of 14 days after sending of any such notice. The inference from sub-item (4), which provides that the item does not affect rights or liabilities where proceedings have been heard and finally determined by a court, is that in other instances, rights and liabilities are to be affected. Other material supports that view.

[20] In the second reading speech for the *Tax Law Amendment (2011 Measures No 7) Bill* 2011, the Assistant Treasurer and Minister for Financial Services and Superannuation said this of the effect of the then proposed schedule 7:

> "Schedule 7 preserves the integrity of the taxation laws compliance framework by ensuring that certain director penalty notices remain valid...
>
> These amendments will simply restore the precedential understanding of the law at the time these notices were issued, yet they will not impact the individual director in the latter Court of Appeal decision. These amendments are retrospective in nature, however, this is essential for ensuring these notices remain valid, and the penalties attaching to these notices remain recoverable."

[21] The explanatory memorandum for the *Tax Laws Amendment (2011 Measures No 7) Bill* 2011 contained a chapter headed "Penalty notice validation". It observed that the effect of the decision in *Soong* was that some 17,000 directors penalty notices

issued between 10 December 2007 and 30 June 2010 did not advise the recipients of the correct period of time in which they could act to have their penalty remitted and could be invalid.[7] The schedule was designed to address that concern.

> "These amendments will ensure that the operation of the law, as understood at the time of issuing these director penalty notices, is maintained. As such, the validity of these director penalty notices will not be able to be questioned merely because of the NSWCA's later construction (in *Soong*) of the former director penalty notice provisions.
>
> To achieve this, any director penalty notice issued between 10 December 2007 and 30 June 2010 (inclusive) will be treated as having been 'given' at the time the Commissioner sent it by pre-paid post. [Some examples follow.]
>
> As a consequence, these amendments also ensure that penalty remission is only available to those directors who complied with the penalty remission condition within 14 days of the director penalty notice having been sent by pre-paid post (and not within 14 days of the director penalty notice having been delivered)."[8]

[22] Those statements affirm the schedule's intention by rendering the notices valid to confer on the Commissioner a right to recover which he arguably did not previously possess. The consequence of the legislation in the present case (subject to arguments about whether the notices actually were sent) is that valid notices were given under s 222AOE on 27 April 2010, within 14 days of which the appellants had not taken the steps necessary to achieve remission of the penalties. The conditions for the respondents being able to bring recovery proceedings for the penalties were thus met, by virtue of schedule 7, 14 days after 27 April 2010. I did not understand the appellants to argue to the contrary; rather, they relied on the reasoning in *Zammitt* to argue that the Commissioner's retrospectively conferred right to commence proceedings to recover the penalties was extinguished by s 269-25(1), which required the service of notices in compliance with that section before recovery proceedings could be commenced.

The reasoning in Zammitt

[23] The directors penalty notice in *Zammitt* was given on 27 November 2009, before the commencement of division 269 in schedule 1 to the *Taxation Administration Act*. P Taylor SC DCJ accepted that the notice (which was in identical terms to those in the present case) was validated by schedule 7. His Honour reasoned, however, that item 64(4) of schedule 1 of the *Tax Laws Amendment (Transfer of Provisions) Act* gave division 269, with the exception of s 269-20, effect in respect of the penalty payable in that case. That meant that s 269-25 applied, requiring the Deputy Commissioner not to commence proceedings to recover a penalty payable under subdivision 269-B until the end of 21 days after written notice was given under that section.

[24] The Deputy Commissioner had contended for a distinction between directors who had merely incurred a liability to pay under s 222AOC and those whose penalty

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7 Paragraph 7.15 at page 76.

8 7.16-7.18 Explanatory Memorandum, *Tax Laws Amendment (2011 Measures No 7) Bill* 2011.

was recoverable under s 222AOE. But there was nothing in the legislation, P Taylor SC DCJ said, to distinguish circumstances where no directors penalty notice had been issued from those where the director had received a penalty notice, whether valid or invalid. The transitional provisions did not focus on recoverability or remission but on whether the debt was "payable". The explanatory memorandum also focussed on penalties unpaid but payable, supporting the argument that s 269-25 applied to penalties incurred whether or not they were recoverable at the time the provisions commenced.

[25] The Deputy Commissioner sought to rely on s 8 of the *Acts Interpretation Act* 1901, which provided that unless a contrary intention appeared, the repeal of an Act did not affect any "right...acquired...under [the repealed] Act".[9] P Taylor SC DCJ rejected that argument: assuming that schedule 7 retrospectively created rights which would be preserved by s 8 in the absence of a contrary intention, the express words of item 64 and sub-item 65(3) and 65(4), the express exclusion of s 269-20, the terms of sub-divisions 269-B and 269-C, and the absence in all of those provisions of any distinction between penalties recoverable and not yet recoverable at the commencement time, collectively displaced the presumption in s 8. The result of his Honour's reasoning was that the Deputy Commissioner had no right to recover the penalty without service of a further directors penalty notice in accordance with s 269-25.

[26] The appellants argued that the analysis in *Zammitt* was correct and equally applicable in the present case. Section 269-25 prevented the respondent from commencing proceedings for recovery until 21 days had elapsed from the giving of directors penalty notices. No such notice had been given.

Contrary intention

[27] The respondent contended that when the transitional provisions in the *Tax Laws Amendment (Transfer of Provisions) Act* came into effect, he had an accrued right to recover penalties from the directors. (In fact, the position is more complex than the respondent describes: at the time the provisions were enacted the legislature would have understood the Commissioner to have that right, but if the notices were not properly given it is only by virtue of the validating legislation's effect on them that he can be deemed to have had the right of recovery as at the commencement date of division 269.) The *Tax Laws Amendment (Transfer of Provisions) Act* expressed no intention to destroy that right, and, it was submitted, in the absence of such an expression would not be taken to have done so. But the absence of an expression of intent to destroy what was at least perceived to be the respondent's right of recovery is not conclusive: a contrary intention may appear through the exhaustive effect of transitional provisions, without any explicit statement of intent.[10]

The explanatory memorandum

[28] The respondent placed some reliance on the explanatory memorandum[11] as evincing no intention that fresh notices would be delivered or that penalties previously recoverable would now be rendered irrecoverable. According to the explanatory

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9 Section 7 of the *Acts Interpretation Act* has replaced s 8, but is to the same effect.

10 See, for example, *Yule v Junek* (1978) 139 CLR 1; *Farbenfabriken Bayer Aktien gesellschaft v Bayer Pharma Pty. Ltd* (1965) 113 CLR 520; *GF Heublein & Bro Inc. v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153; *Brennan v Comcare* (1994) 122 ALR 615.

11 Explanatory Memorandum to the *Tax Laws Amendment (Transfer of Provisions) Bill* 2010.

memorandum, the legislation was rewritten with regard to decisions including *Meredith*; and to put matters beyond doubt, the operation of s 29 of the *Acts Interpretation Act* 1901 had been excluded to remove any possibility of a "future misunderstanding". The memorandum continued,

> "This has not resulted in a policy change as it simply reflected the current state of the law as set out in the *Meredith* decision."

However, because the effect of the *Meredith* decision was that directors might be left with less than 14 days to comply with a notice because of a delay in the post, the 14 day period had been extended to 21 days

> "so that all directors will at least have as much time as they would under the Commissioner's administrative practice [of counting the 14 days from when the notice would normally have been delivered]."[12]

[29] The explanatory memorandum had this to say as to items 64 and 65,

> "2.105 The rewrite applies to obligations arising both before and after 1 July 2010 subject to a number of transitional rules. For example, the Commissioner can issue a notice of a penalty that arose in relation to an unfulfilled obligation under the current law as if the new law had always applied. This approach will ensure a smooth transition between the old law and new law. ***[Schedule 1, item 64]***
>
> ***Transitional rules***
>
> 2.106 No penalties are imposed under the new law if a penalty was payable under the old law at anytime before 1 July 2010. This will prevent a taxpayer being subject to multiple penalties in relation to a breach of a single obligation. ***[Schedule 1, item 65]***
>
> 2.107 Penalties that remain unpaid as at 1 July 2010 under the old law are taken to have been payable under the new law for the purposes of the machinery provisions. This will ensure a smooth transition between the old and new law. ***[Schedule 1, item 65]***"[13]

[30] In my view, the explanatory memorandum contains indications both for and against each of the competing constructions of the transitional provisions urged by the parties. The reference in the passages relied on to giving "all directors" a lengthier period for compliance provides some support for the notion that fresh notices were envisaged. The part of the explanatory memorandum which deals with items 64 and 65 refers, as P Taylor SC DCJ observed, generally to penalties which are "payable", without limiting them to those which are not yet recoverable. On the other hand, the phrase "the Commissioner can issue a notice of a penalty" and the references to ensuring a smooth transition between old and new law suggest a facilitative role for the transitional provisions, rather than an intention to destroy existing rights. Because it is equivocal, I have found the explanatory memorandum of no assistance in the present exercise of construction.

Use of amending legislation to construe an earlier Act

[31] The respondent submitted that it was appropriate to look at schedule 7 to ascertain what Parliament intended when it enacted the transitional provisions in the

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12 At 2.78-2.81.

13 2.105 – 2.107.

Tax Laws Amendment (Transfer of Provisions) Act. Reliance was placed on Dixon J's statement in *Grain Elevators Board (Vic) v Dunmunkle Corporation*[14] to the effect that an amending Act could be taken into account in interpreting earlier legislation so as to avoid a result which would render the later legislation futile.[15] The respondent also referred to the judgment of Dawson J in *Hunter Resources Limited v Melville*,[16] in which his Honour regarded it as permissible to advance on Dixon J's approach in *Dunmunkle* by taking an amending Act into account in interpreting prior legislation to avoid a result that would render the amending legislation "deficient" (as opposed to "futile").[17]

[32] The appellants, in response to this argument, contended that an amending Act could only be used as an aid in interpretation of an earlier Act which it was amending, and schedule 7 did not purport to amend the *Tax Laws Amendment (Transfer of Provisions) Act.* I am not sure that there is any rule to that effect, particularly where the two Acts concerned are different incarnations of the same scheme for recovery of tax. But the second point made by the appellants has more force: recourse may be had to a later Act only where there is ambiguity in the earlier Act.[18] And the fact that the later Act indicates a particular understanding of the earlier Act may not assist:

> "it is not permissible to construe an unambiguous phrase in an earlier Act by an erroneous assumption of its effect contained in a later Act which did not purport to alter or amend the earlier Act"[19]

There is no obvious ambiguity in the transitional provisions reference to penalties payable "just before the commencement time" or in their application of division 269 to such penalties.

Implied amendment or repeal

[33] Rather than an attempt to discern an intent in the transitional provisions which seems at odds with their plain effect, what is needed, in my view, is a consideration of whether schedule 7.1(2) is capable of "sensible operation" [20] if item 65 gives s 269-25 effect. One starts from

> "a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other"[21]

but there is obvious difficulty in reconciling the provisions. The explanatory memorandum and the second reading speech confirm that the intention of the amending legislation was to validate notices issued under s 222AOE in order to ensure that recovery of penalties could proceed; and there is no other conceivable purpose for the legislation. But as the respondent submitted, if the appellants' arguments were accepted, schedule 7 was rendered otiose.

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14 (1946) 73 CLR 70.
15 At 86.
16 (1988) 164 CLR 234.
17 At 255.
18 *Allina Pty Limited v Federal Commissioner of Taxation* (1991) 28 FCR 203 at 212.
19 *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor C. Ltd* (1936) 57 CLR 610 at 626.
20 As Gummow and Hayne JJ framed the question in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 585.
21 *Saraswati v The Queen* (1991) 172 CLR 1 per Gaudron J at 17.

[34] Schedule 7 is not said expressly to amend or repeal any part of the *Tax Laws Amendment (Transfer of Provisions) Act*, but there is an implicit contradiction between it, on the one hand, and the combined effect of Item 65 and s 269-25, on the other. The circumstances, in my view, fall within the second branch of implied repeal to which Griffiths CJ referred in *Goodwin v Phillips*:[22]

> "if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."[23]

And as O'Connor J put it in the same case:

> "Where there is a general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply."[24]

[35] To the extent that the transitional provisions apply to penalties recoverable before 1 July 2010 and thus preclude recovery before the giving of a 21 day notice, they are inconsistent with schedule 7, the intent of which is to confirm a right of recovery (previously cast into doubt by *Soong*) after the giving of a 14 day notice under s 222AOE. That inconsistency can only be resolved by regarding the transitional provisions as repealed or modified to the extent that they purport to apply in the latter case.

[36] Having reached that view, while accepting most of P Taylor SC DCJ's careful and informed analysis of the provisions, I would depart from his conclusion that the Commissioner is precluded from commencing recovery proceedings in circumstances such as those of the present case.

[37] There remain to be considered the appellants' original grounds of appeal.

Procedural fairness

[38] The procedural fairness point can be speedily dealt with. At first instance, counsel for the appellants submitted that there were discrepancies in the respondent's material which suggested that the directors penalty notices had not been posted. On that basis, he sought leave to cross-examine Ms Kailainathan. The primary judge granted that leave, confined to the question of whether the directors penalty notices were posted on 27 April 2010. Her Honour refused to permit cross-examination as to "anomalies" in entries in the electronic file (eFile) notes maintained by the Australian Taxation Office which counsel said went to credit; those entries were for dates other than 27 April 2010. That limiting of cross-examination was said to amount to a denial of procedural fairness.

[39] The starting point in considering the summary judgment application was that there was, by way of certificates,[25] prima facie evidence of the amounts the appellants

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22 (1908) 7 CLR 1.

23 At 7.

24 At 14.

25 Under s 255-45 of schedule 1 of the *Taxation Administration Act* 1953 the certificates were *prima facie* evidence of the matters contained in them. Section 255-50 similarly made the matters averred in the claim *prima facie* evidence.

owed by way of penalty and of service of notices under s 222AOE on them. The evidentiary burden had thus shifted. The question for the trial judge was whether the matters raised by the appellants – the fact that they had not received the notices and the discrepancies identified in the Australian Taxation Office records – were such as to raise a real prospect of their successfully defending the respondent's claim; and, more particularly whether they had raised a real prospect of displacing the effect of the prima facie evidence against them.

[40] Permitting Ms Kailainathan to be cross-examined was an unorthodox approach on a summary judgment application. One might reasonably argue that if the case was such as to require cross-examination of a witness, it was such as to require a trial. But the transcript suggests otherwise. Her Honour said in response to the request to have Ms Kailainathan called:

> "Rather than argue this, let's just have her cross-examined on this. So on this point about whether the DPN notices were posted, I'll give you leave to cross-examine."

It appears that the trial judge acceded to the request for cross-examination in an attempt at expedition rather than because she considered it necessary to resolve the issues.

[41] The content of the duty to act fairly is largely a matter of statutory construction.[26] The very nature of r 292, which permits judgment to be given in an appropriate case without any hearing of evidence, runs counter to the notion that procedural fairness required cross-examination at all. If the questioning which was not permitted had some basis in the material which suggested a real issue, that would go to the question of whether a trial was necessary. But where the duty to accord procedural fairness does not dictate the permitting of cross-examination, its curtailment can hardly amount to an infringement of that duty.

Discrepancies in the ATO records

[42] As I have said, however, the real point was whether the appellants' material raised sufficient to demonstrate a real prospect of defending the case on the basis that the directors penalty notices were not sent. Their argument was that discrepancies in the Australian Taxation Office records disclosed to them raised an issue in that regard. The points they made are outlined in the following paragraphs.

The fact that the notices were not received

[43] Ms Kailainathan's evidence, both on affidavit and under cross-examination, was that she had posted the directors penalty notices to each appellant by pre-paid (but not registered) post. On 27 April 2010 she had made entries in the eFile notes which recorded her search of Australian Securities and Investment Commission records for the directors' addresses, the preparation of the notices and the details they contained, and their sending; with this note as to the last:

> "DPN for the two directors as previous note posted in Australia Post Box located at the corner of Mason St and Foster St at 2.25pm on 27/04/10 …"

But the evidence from the appellants was that they had not received the notices. They had not been returned to the Australian Taxation Office as undelivered mail.

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26 *Kioa v West* (1985) 159 CLR 550 per Mason J at 584-585.

[44] The name of Mr Reardon's street was misspelt on his directors penalty notice by reversing two letters in it. But the misspelling was reproduced in the Australian Securities and Investments Commission records, on which the Commissioner was entitled to rely, so the error cannot be said to have affected the validity of service. Mr Reardon deposed that if the notice had been sent to him at the incorrectly spelt address, he would not expect it to be delivered; an expectation which tends against any inference that because it was not received it was not sent. In Ms Wegner's case, her address was shown in the Australian Securities and Investments Commission records by reference to number and street in Toowoomba, but without inclusion of the suburb of Toowoomba in which she resided, and the directors penalty notice was addressed to her in the same way.

The incomplete service document in Mr Reardon's file

[45] The Australian Taxation Office file for each appellant contained a document headed "Service of Directors Penalty Notice" which contained details of service. The notice for Ms Wegner had been completed by hand with the date and time of posting of the notice, where it was mailed, the date on which it would be deemed served and the date of the last day of the 14 day period. Ms Kailainathan had printed her name to show that it was served by her and had signed the document. The equivalent document on Mr Reardon's file contained the same details but Ms Kailainathan had not printed or signed her name on it. Under cross-examination, she said that she had simply forgotten to sign that document, but she had recorded the posting of the directors penalty notices in the eFile notes.

The failure to keep a copy of the envelope on Mr Reardon's file

[46] The Australian Taxation Office disclosed to Ms Wegner a copy of the envelope which it was said had contained her directors penalty notice, but no equivalent copy was disclosed to Mr Reardon. Ms Kailainathan said in evidence that it was her usual practice to keep a copy of the envelope in which the directors penalty notice was sent but she had missed doing so in respect of Mr Reardon's envelope.

The failure to produce signed copies of the notices

[47] Ms Kailainathan said that it was the practice of the Australian Taxation Office to keep signed copies of the directors penalty notices sent to directors on the file. However, the Australian Taxation Office eFile notes disclosed to the appellants and annexed to Ms Wegner's affidavit showed an entry for 15 October 2010 by an officer of the Australian Taxation Office (not Ms Kailainathan) which recorded

> "DPN letter and notice for Shaun & Heather [the appellants.] No signed copy could be found"

A senior manager of Toowoomba Parcel Services, Mr Shannon, recalled that he had requested copies of the directors penalty notices in July 2010 and had been sent, by facsimile, unsigned copies. Ms Kailainathan agreed that she had sent unsigned copies of the directors penalty notices to Mr Shannon, but, she said, that was simply to let him know the amounts involved.

[48] However, against the suggestion that the failure to send signed copies of the directors penalty notices to Mr Shannon and the inability to find them in October 2010 indicated that they had never existed was the fact that signed copies of the notices were disclosed. Each bore an Australian Taxation Office imprint showing

that it had been entered into the system on 27 April 2010; at 2.36 pm, in the case of Mr Reardon's notice, and 2.37 pm in the case of Ms Wegner's notice. That was shortly after the originals were sent, according to the Australian Taxation Office records.

Issues of credit

[49] The credit issue raised in the grounds of appeal went no further than that it was suggested that Ms Kailainathan was generally unreliable because she had not correctly recorded, or in one instance had not recorded at all, conversations in relation to the directors penalty notices. As to the instance of non-recording, the company accountant for Toowoomba Parcel Services, Mr Grey, deposed that he had received a telephone call on 27 April 2010 from a woman at the Australian Taxation Office to let him know that director penalty notices were being sent. That would rather suggest the notices were sent, but the appellants' point was that the conversation was not recorded in the eFile notes for that date, and Ms Kailainathan said that she did not believe she had made the calls because there was no reference to it in her note of what she had done on 27 April 2010. The inferences invited were that Ms Kailainathan's recollection and note-taking were both unreliable; but of course one would have to ignore the obvious possibility that it was not she who telephoned Mr Grey.

[50] Other instances relied on were that Ms Kailainathan had recorded a telephone call on 12 July 2010 as being from Mr Reardon when he deposed to having made no such call; Mr Shannon said that it was he who had telephoned her on that day, requesting copies of the directors penalty notices. There was also a suggestion that Ms Kailainathan had mis-recorded a conversation with Mr Shannon on 24 May 2010 because the relevant conversation had, as the eFile notes showed, actually taken place on 1 April 2010. That, fairly plainly, involved a misreading of Ms Kailainathan's note of 24 May 2010, which referred to the relevant conversation in a historical sense, not as one which had taken place on that day.

[51] In sum, the evidence points to possible error by Ms Kailainathan in recording the identity of the caller on 12 July 2010, and some chance that she had, but forgot to note and did not recall, an innocuous telephone conversation with Mr Grey. To those can be added Ms Kailainathan's omission in respect of Mr Reardon's file to write her name on and sign the note of service or to keep a copy of the envelope sent. Taken altogether, it seems a remarkably fragile basis for challenging her reliability as to whether she sent the notices, the more so because it has to be pitted against her evidence and the other contemporary records she made.

No error in findings

[52] The trial judge noted that the errors in the appellants' addresses as recorded in the Australian Securities and Investments Commission records might provide good reason as to why the directors penalty notices were not, in fact, received. She did not regard the discrepancies identified as such as to have any real impact on the Australian Taxation Office's records supporting Ms Kailainathan's evidence that she had posted each directors penalty notice. The defence based on a failure to give the notice in each case had, she considered, no chance of success.

[53] I do not think it has been shown that her Honour's conclusion was wrong. The fact that the appellants had not received the notices was probably the strongest point

against their having been sent, but as her Honour observed, it was explicable in light of the errors in the addresses. The other points taken about the state of the Australian Taxation Office records and their implications for Ms Kailainathan's reliability are slight indeed, taken individually or collectively. Having considered them and applying the correct test, the learned trial judge was entitled to conclude, as she did, that there was no real prospect of the appellant successfully defending the claims and that there was no need for a trial.

[54] I would dismiss the appeals with costs.

[55] **PHILIP McMURDO J:** I agree with Holmes JA that these appeals should be dismissed. I agree with the reasons given by Holmes JA save in one respect, which relates to the argument, raised for the first time on appeal, that the respondent was bound to give penalty notices to the appellants under Division 269 in Schedule 1 to the *Taxation Administration Act 1953* (Cth). Like Holmes JA, I have concluded that notices under Division 269 were unnecessary but there are some differences in my reasoning which I should set out.

[56] As Holmes JA has explained and as was common ground, the penalty notices which the primary judge found were posted to the appellants were not, when posted, valid notices. They were purportedly given under s 222AOE of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"), which required such a notice to specify the period of 14 days after which a penalty payable by a director would become recoverable, absent an event which effected a remission of the penalty. The notices here specified that period as commencing on 27 April 2010, which the primary judge found was the date upon which they were posted. In *Soong v Deputy Commissioner of Taxation*,[27] the New South Wales Court of Appeal held that s 29 of the *Acts Interpretation Act* 1901 (Cth) applied in this context. Consequently, the notices here could not be treated as having been given as early as the date on which they were posted. According to s 29, they were deemed to have been given, unless the contrary was proved, at the time at which they would be delivered in the ordinary course of post. Now the evidence before the primary judge cast doubt upon whether the notices were actually delivered in the post, because each of the appellants denied their receipt. There was no finding as to either delivery or receipt of the notices, as distinct from the finding that they were posted. But in any case, the most favourable position for the respondent would have been a deemed giving of the notices on a date which was after that on which the notices were posted and thereby after the dates specified as the commencement of the 14 day period. Consequently, the notices were at that time invalid and the penalties remained payable but not then recoverable.

[57] Then came the new regime under Division 269 of Schedule 1 of the *Taxation Administration Act*, which was inserted with effect from 1 July 2010 and which I will call the 2010 Act. The relevant transitional provisions for this enactment have been set out by Holmes JA at paragraphs [13] and [14]. The penalty in each of these cases was one which "just before the commencement time, was payable under Division 9 of Part VI of the *Income Tax Assessment Act 1936*". So on the face of item 65(4) of those transitional provisions, Division 269 (other than section 269-20) had effect "as if the penalty were payable under Subdivision 269-B in that Schedule".

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27 (2011) 80 NSWLR 226; (2011) 278 ALR 538.

[58] In *Deputy Commissioner of Taxation v Zammitt*,[28] P Taylor SC DCJ held that as a result of this provision, s 269-25 applied to any case in which there was a liability to a penalty as at 1 July 2010. I gratefully adopt the summary of that judgment given by Holmes JA as well as her Honour's discussion of the relevant explanatory memorandum for the 2010 Act.

[59] In my view the 2010 Act did not have the effect which it was given in *Zammitt*. In particular, the 2010 Act did not require a further penalty notice to be given where a penalty was not only payable but also recoverable, that is to say where a valid notice had been given under the previous s 222AOE and there had been no remission of the penalty under the previous s 222AOG. In such cases, there was a "right … acquired … under [the repealed] Act" (namely a right to recover the penalty) within what was then s 8(c) of the *Acts Interpretation Act*. Therefore the repeal of the relevant provisions from the 1936 Act was not to affect such a right unless the contrary intention appeared in the 2010 Act. In *Zammitt*, it was held that the contrary intention clearly appeared. I respectfully disagree.

[60] The text of the transitional provisions in the 2010 Act do not distinguish between penalties payable and recoverable and those payable but not yet recoverable. However, a consideration of whether the text of these provisions was sufficient to displace the operation of s 8(c) must also have regard to the possible effects of that interpretation.

[61] The passage of a period of 14 days specified in a penalty notice under s 222AOE had relevantly two consequences. One was that the penalty became recoverable. The second was that the possibility of a remission of the penalty by, in particular, the company being placed under administration or being wound up, was precluded. If s 269-25 required a further notice where the penalty was both payable and recoverable at its commencement, what was to be the content of that notice insofar as compliance with it was concerned? According to s 269-25(2)(c), a notice was to "explain the main circumstances in which the penalty will be remitted". By s 269-30(1), a penalty was to be remitted if the directors of the company stopped being under the relevant obligation under s 269-15 before the notice under s 269-25 is given, or within 21 days from the giving of that notice. By s 269-15, the directors were to continue to be under the obligation until the company complied with it or it went into administration or liquidation. But what of a case where the penalty became recoverable and the company was subsequently wound up but before 1 July 2010? In such a case, what was a notice under s 269-25 to say about compliance?

[62] Then there would be the impact upon proceedings which had been commenced by 1 July 2010 in relation to then recoverable penalties. Were they intended to be invalidated, requiring the plaintiffs to give notices under s 269-25 before commencing fresh proceedings to recover the penalties? It is to be noted that s 269-25(1) precludes the *commencement of proceedings* to recover a penalty until after the end of 21 days from a written notice under that section. This language does not indicate an intention to affect proceedings which had been duly commenced before 1 July 2010.

[63] The 2010 Act preceded the decision in *Soong*. At this time at least, it could not have been considered that there would be no penalties which were then both payable and recoverable under the 1936 Act.

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28 [2012] NSWDC 135.

[64] There is no indication in the explanatory memorandum for the 2010 Act of an intention to put paid to the immediate recoverability of penalties for which valid notices had been given and the time for remission had passed. Nor in my view was such an intention expressed in the transitional provisions. The generality of their references to a "penalty … payable" had to be interpreted according to s 8(c) of the *Acts Interpretation Act*, rather than that generality of language being sufficient to show an intention to displace the operation of s 8(c).

[65] With that understanding of the scope of the 2010 Act, the 2011 enactment[29] must be considered. It requires notices such as those in the present cases to be treated as having been given at the time they were posted, for the purpose of former section 222AOE.[30] The present notices are to be treated as having been given at the time of the commencement of the 14 day period specified within them and therefore validly given. Consequently, these penalties are to be treated as not only payable but recoverable by 1 July 2010, so that no notice under the 2010 Act was required.

[66] As it happened, the relevant company here was wound up in September 2010. Absent the impact of the 2011 enactment, that event would have discharged the liability of the directors under s 269-15(2)(c). That is because absent the 2011 Act, the penalties were payable but not recoverable and thereby subject to s 269-15. However, once these notices are to be treated as having been given at a time which would make them valid for the purpose of the former s 222AOE, that operation of the 2010 Act is displaced. The effect of the 2011 Act is thereby retrospective but clear.

[67] For these reasons the orders should be as proposed by Holmes JA.

[68] **McMEEKIN J:** The question before the learned primary judge was whether there was any need for a trial in these proceedings. She decided that there was not and gave summary judgment under r 292 *Uniform Civil Procedure Rules* 1999. In my view there was a need for a trial, albeit that one might well entertain the view that the prospects of success of the appellants at any trial were not particularly good.

[69] There were two issues agitated on the appeal, one raising a factual issue and one a legal issue. First, the factual matter.

[70] The Deputy Commissioner of Taxation seeks to recover from the appellants, as a penalty, taxes that ought to have been remitted by a certain company of which the appellants were directors and which had not been remitted. It was common ground that to succeed the Deputy Commissioner was required to "give" to each of the appellants a directors penalty notice in accordance with s 222AOE of the *Income Tax Assessment Act* 1936 (Cth), the onus of proof being on the Deputy Commissioner. A notice was given within the meaning of the section if posted. The only question left to be determined was whether the Deputy Commissioner had posted the necessary notices.

[71] The appellants swore that the notices had not been received. For the purposes of the application that assertion had necessarily to be accepted. One possible explanation for the non receipt of the notices was that they were not sent. Another is that they were sent but went astray. If the former explanation was established, or at least

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29 Being Schedule 7 to the *Tax Laws Amendment (2011 Measures No 7) Act 2011*.

30 Clause 1(2) of Schedule 7.

shown to be as probable as the alternative, the appellants would succeed in their defence to the imposition of very substantial penalties sought to be imposed by the Deputy Commissioner. Hence there was a question of fact to be resolved.

[72] The respondent submitted that there was no need for a trial to resolve that issue because the appellants were not able to point to anything to throw into doubt the assertions of the officers of the Deputy Commissioner that the notices were posted. With respect I cannot accept that view of the matter.

[73] First, the notices were not received. That raises concerns. That there was another possible explanation other than non posting does not allay those concerns necessarily. That explanation was that the addresses in the ASIC records, on which the Deputy Commissioner was entitled to and did rely, were not accurate and so the notices may have been wrongly delivered. I observe that those inaccuracies in the addresses were not great. For one appellant a road "Glendale" was spelt "Gelndale" and for the other appellant the street address at which she lived and the city where she lived – Toowoomba - were correctly recorded but no suburb was recorded. I appreciate that one applicant argued the contrary but I would be very surprised if either mistake would mislead the post office for long. There is no evidence on the matter yet. Mistakes occur in delivering mail as in everything else in life but the point here is that the availability of an alternative explanation for the non delivery does not take the matter very far. Concerns remain.

[74] I observe too that the notices have not been returned as they should have been if the addresses could not be located. That is hardly conclusive but is consistent with them having never been posted.

[75] Secondly, there was another possible explanation for the non-delivery that remains unexplored. That is, that mistakes were made within the Deputy Commissioner's office. The appellants wished to agitate this possibility and to persuade the tribunal of fact that it was at least of equal probability to the alternative hypothesis. To do so effectively they needed to cross examine the officer who claimed to have posted the notices. The cross examination allowed below was limited. It cannot be said that this possibility has been thoroughly explored.

[76] Thirdly, the respondent's assertion that the evidence is plain that the notices were posted starts from a very improbable proposition – that the relevant officer remembers posting the notices. At least that is the implication of her affidavit. And it was forcefully submitted that there was positive evidence that the relevant officer did swear to the event occurring. If actually recalled then that is very strong evidence supporting the respondent's case.

[77] However I have a deal of trouble accepting that statement at face value. I say that it is improbable that the officer has an actual memory for two reasons. First, it is evident from the officer's evidence that the posting of such notices was an every day event. At one point in her cross examination she said that she could not recall a telephone call as it was two years ago.[31] So was the disputed posting.

[78] No fact is sworn to which suggests that this file was in any way out of the ordinary. The explanatory memorandum for the *Tax Laws Amendment (2011 Measures No. 7) Bill* 2011 spoke of there being some 17,000 similar notices issued over a period of

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31 AB 14/5.

two and half years. This officer's duties encompassed the sending of a portion of those notices. Without some evidence to show this posting of two letters two years ago for some reason might stick in her mind I would not be inclined to accept such evidence as remotely credible.

[79] Secondly, at another point in her evidence, the officer plainly enough accepted that she was speaking from usual practice and her records when she said, when directly challenged, that she had overlooked posting one notice – "Never. I – because when you put in the envelope, they always put – that is our practice".[32]

[80] There is no statement in the affidavit, as there must be if the officer has no actual recollection of posting, that the matters that she has sworn to are not based on recollection but belief, that belief being in turn based on her examination of the records and her knowledge of the usual, or her usual, practice and the inference that the usual practice was followed. The latter assertion is a very different statement to a claim to actually remembering an event.

[81] If the evidence of posting is based entirely on the records and the following of the usual practice – as it seems to me it very likely was - then the accuracy of the records becomes all important and discrepancies in the records which might otherwise be innocuous can assume more significance.

[82] And so the rigorous following of practices is the all important feature of the case. If there was such a following of the usual practices then the respondent's case might well be impregnable and a trial not needed. But the practices that were adopted as disclosed by the evidence fall well short of that standard. A worksheet was not signed that the practices required be signed. A copy of an envelope was not kept that was usually kept precisely for the purpose of evidencing posting. There were errors identified in the notices sent which were corrected by another notice which was not sent – as presumably it should have been. Phone calls were made but the details of them inaccurately, or potentially inaccurately, recorded. Many months after the notices were purportedly sent a signed copy of the notices could not be found on the respondent's file, where they should have been kept. Emails were not recorded as having been received when they ought to have been. And the appellants plainly wanted to explore other apparent anomalies that they were not allowed to explore on the limited cross examination permitted.

[83] The key question that such anomalies raise is this – if you failed to follow all your practices in these respects, and you can offer no explanation for that failure, why should you be believed when you insist that the usual practices were followed when it came to posting the notices?

[84] It is not to the point to say that, taken individually, each item does not show that there was no posting - of course they do not. But that is not what the attack is designed to show.

[85] Nor is it to the point on a summary judgment application to say, as was said, that there was evidence that supported the respondent's position. There certainly was and on the balance of probabilities after full examination of the issue the tribunal of fact might well decide that the probabilities favour that there was a posting as the

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32 AB 15/55.

records suggest. But without a close curial examination of all of the anomalies and of the explanation or lack of explanation for them there can be no satisfactory answer to the question that the appellants wish the Court to consider and answer.

[86] It is trite law that the power granted by r 292 must be exercised with care. The High Court held in *Agar v Hyde* (2000) 201 CLR 552 that "… Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[33] I do not have that degree of certainty.

[87] Here there was a limited cross examination, over the telephone, of a witness who, from the transcript, seems not to have had English as her first language. No assessment of her credit could or should have been made. The assessment of her credibility is at the heart of the matter. It may be, as Holmes JA has said, that if matters remain as they are then the attack on the officer's credibility rests on a fragile basis (at [51]). However, matters might not remain as they are and in my view, the resolution of that issue was a matter for trial and there ought to have been a trial here.

[88] I turn now to the legal issue. If the appellants have a valid defence, as they contend, reflecting the effect of recent decisions relating to amending legislation, then judgment should be entered in their favour. They assert that they are entitled to new notices under Division 269 in Schedule 1 to the *Taxation Administration Act 1953* (Cth) giving them 21 days to act to avoid the imposition of penalties.

[89] I have had the considerable benefit of reading the reasons of Holmes JA and Philip McMurdo J. I agree that the appellants have no valid defence on these grounds. The relevant factual background, legislative provisions and authorities are fully set out in those reasons. Essentially I agree with the reasoning of Philip McMurdo J but I would add the following.

[90] I acknowledge that there is much force in the careful reasoning of P Taylor SC DCJ in *Zammitt*. The evident deliberate inclusion of the 21 day notice provisions set out in s 269-25 in that part of Division 269 which is to apply to "a penalty that, just before the commencement time, was payable under Division 9 of Part VI of the *Income Tax Assessment Act* 1936" (a penalty of the type that the Deputy Commissioner seeks to enforce here) is not easy to understand if it is not to have the effect that his Honour found.

[91] But as Holmes JA has said the interpretation suffers from the difficulty that, if it is right, there was no point to the *Tax Laws Amendment (2011 Measures No. 7) Act* 2011 ("Schedule 7"). Why bother to validate notices, in the sense Holmes JA explains at [19], when the end result was that the notices needed to be re-issued regardless? If the wording of the legislation is so defective in its evident purpose that effect cannot be given to it then so be it. But it is not an attractive proposition and is one that both statute (s 15AA *Acts Interpretation Act* (Cth)) and authority (*Residual Assco Group Pty Ltd v Spalvins* (2000) 202 CLR 629, 644 at [28]) enjoin that I should be reluctant to reach unless there seemed no other course open.

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33 At [57].

[92] While there is no completely satisfactory answer the anomalies that Philip McMurdo J has pointed out that follow from the interpretation preferred by P Taylor SC DCJ tend against it.

[93] The key issue is what meaning should be given to the word "payable" in the phrase "to a penalty that, just before the commencement time, was payable under Division 9 of Part VI of the Income Tax Assessment Act 1936" that appears in sub item 65(3) of Division 5 of Schedule 1 of the *Tax Laws Amendment (Transfer of Provisions) Act*.

[94] The argument that found favour with P Taylor SC DCJ and which the appellants advance relies to a significant extent on the failure of the legislature to draw any distinction in Item 65 of the *Tax Laws Amendment (Transfer of Provisions) Act* 2010 (Cth) between those notices that were payable and those that were both payable and recoverable. If the application of subitem 65(4) was restricted to those directors where the liability to pay the penalty had accrued, because the company had not paid the withheld tax, but where the entitlement of the Deputy Commissioner to recover the penalty had not yet accrued then much of the difficulty disappears. The 21 day notice provisions introduced by Division 269 in the 2010 Act would then only apply to those cases where the due date for payment by the company of the withheld tax had passed and the Commissioner had not yet acquired any right to recover – either because no penalty notice had issued or the notice period was yet to expire.

[95] That distinction is drawn in the 1936 Act provisions between a liability to pay a penalty and the entitlement of the Deputy Commissioner to recover the penalty – compare s 222AOC with s 222AOE. The former section describes penalties as "payable" when the due date for payment of the withheld tax passes. The latter section expressly assumes the existence of penalties that are "payable" and defines when they are to become recoverable. It does not offend any canon of construction to assume that the legislature was conscious of the concepts enshrined in the existing legislation and assumed their continued understanding in the amending legislation. Rather such an approach accords with authority: *Lennon v Gibson and Howes Ltd* [1919] AC 709 at 711-12; 26 CLR 285 at 287; and see the cases collected in *Statutory Interpretation in Australia* by Pearce & Geddes (7th edn) p101 para 3.36.

[96] Nor am I persuaded that failure to refer to s 222AOG in Schedule 7 and the use of the phrase "For the purpose of former s 222AOE" that appears in s 1(2) of Schedule 7 which caused P Taylor SC DCJ concern should have any significant impact on what otherwise seems the evident construction. The purpose of s 222AOE was to define when the Commissioner's entitlement to recover a penalty came into existence. The converse of that is to define the time period within which a director must act to avoid the imposition of a penalty, later picked up in s 222AOG. If the word "gives" in s 222AOG in the phrase "gives the person such a notice" is read conformably with s 222AOE and Schedule 7 rather than determined by the decision in *Soong* then that avoids the conflict that P Taylor SC DCJ highlighted and at least has the effect of preserving the integrity of the provisions and meeting the evident purpose of the legislation.

[97] If this approach is not taken and the appellant's arguments adopted then the mischief created is substantial. As McMurdo J has observed, the one thing that is

clear is that as at 1 July 2010 the legislature would not have assumed that there were no penalties that satisfied the twin test of being both payable and recoverable. Immediately prior to the introduction of the 2010 Act this assumption would have been shared by both the Commissioner and the directors affected, the relevant notices having been given and the relevant periods having expired without remission of penalty. As I have mentioned, extrinsic material suggests that there were some 17,000 of these notices.

[98] The appellant's argument is that, despite that obvious assumption, the legislature has provided that all those penalties recoverable to that point in time were no longer to be recoverable without the notice procedure being gone through again. That, with respect, would be a remarkable intention to attribute to the legislature. As this case shows, and as one might expect, upon expiration of the notice period the Commissioner would go about recovering the penalties now recoverable – he would instruct solicitors, prepare pleadings for filing in court, prepare necessary affidavits or statements of evidence and where appropriate launch summary judgment applications. There is the possibility of costs having been incurred by directors in seeking advice on or defending such suits. Much of this effort would be wasted and the associated costs would be thrown away by the interpretation advanced by the appellants. I would be very slow to attribute to the legislature any such intention. Such an intention involving a retrospective alteration of rights has the potential to cause much injustice hence the oft repeated reminders that such an intention is not to be attributed to the legislature unless there are words of "sufficient clarity": *Bawn Pty Ltd v Metropolitan Meat Industry Board* (1970) 92 WN (NSW) 823 at 842 per Mason J. In my view the words used here lack that clarity.

[99] I appreciate that there is a twist here – Schedule 7 itself introduced a retrospective alteration of rights understood in a broad sense, rights that were unappreciated until the decision in *Soong*. There is the potential for injustice again. But in this case the necessary clarity is present to bring about that retrospective effect. As Mr Derrington SC submitted on behalf of the Deputy Commissioner the legislation is described in its headings as validating legislation and had no other purpose but to affect past rights.

[100] In summary, in passing the 2010 Act the legislature can be taken to have assumed either that the Commissioner had an accrued right to recover the penalties had the necessary penalty notices been issued and the period expired without remission or had no right at all. In the former case there was no intention expressed in the 2010 Act to affect those accrued rights. And in those circumstances s 8(c) of the *Acts Interpretation Act* 1901 (Cth) ensured that the repeal of the 1936 Act provisions did not affect those accrued rights.

Conclusion

[101] In my judgment there should be a trial here. I would allow the appeal, set aside the orders below and give any necessary directions to have the matter tried. As this is a dissenting view I need not explore the appropriate orders further.