SUPREME COURT OF QUEENSLAND

CITATION:	*Shaw v Deputy Commissioner of Taxation; Rablin v Deputy Commissioner of Taxation* [2016] QCA 275
PARTIES:	**In Appeal No 4249 of 2016** **WILLIAM DOUGLAS SHAW** (appellant) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent) **In Appeal No 4251 of 2016** **DALE FRANCIS RABLIN** (appellant) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent)
FILE NO/S:	Appeal No 4249 of 2016 Appeal No 4251 of 2016 SC No 3369 of 2014 SC No 3009 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 68
DELIVERED ON:	1 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2016
JUDGES:	Gotterson and Philip McMurdo JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 4249 of 2016:** **1. Appeal allowed.** **2. Set aside the order made in proceeding No 3369 of 2014 on 1 April 2016.** **3. Refuse the relief sought in paragraph 1 of the application filed in that proceeding on 24 August 2015.** **4. Otherwise remit the application to the Trial Division for further consideration.** **5. The respondent is to pay the appellant's costs of the appeal on the standard basis.**

In Appeal No 4251 of 2016:

1. **Appeal allowed.**
2. **Set aside the order made in proceeding No 3009 of 2014 on 1 April 2016.**
3. **Refuse the relief sought in paragraph 1 of the application filed in that proceeding on 24 August 2015.**
4. **Otherwise remit the application to the Trial Division for further consideration.**
5. **The respondent is to pay the appellant's costs of the appeal on the standard basis.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SETTING ASIDE – where the respondent commenced proceedings claiming penalties imposed on the appellants *qua* directors for amounts withheld by their company in respect of PAYG tax from payments made to its employees that were not paid to the respondent – where the respondent successfully sought summary judgment against the appellants because the Trial Division judge concluded that the defences pleaded have no real prospect of success – where the appellants allege that there was error in finding that the evidence fell a long way short of establishing an arguable case that they took all reasonable steps to ensure that one of the events under s 269-35(2)(a) of the *Taxation Administration Act* 1953 (Cth) occurred – where there was no dispute over the existence of steps taken – whether such steps were capable of satisfying the requirement of taking all reasonable steps

Taxation Administration Act 1953 (Cth), s 269-30, s 269-35
Uniform Civil Procedure Rules 1999 (Qld), r 292

Canty v Deputy Commissioner of Taxation (2005) 63 NSWLR 152; [2005] NSWCA 84, considered
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, considered
Gray v Morris [2004] 2 Qd R 118; [2004] QCA 5, cited
Miller v Deputy Commissioner of Taxation (1997) 98 ATC 4059; [1997] NSWCA 205, considered
Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq) [2003] 1 Qd R 259; [2002] QCA 224, cited
Roche v Deputy Commissioner of Taxation [2015] WASCA 196, distinguished

COUNSEL: S D Anderson for the appellants
P Looney QC, with M Lyons, for the respondent

SOLICITORS: JHK Legal for the appellants
ATO Dispute Resolution for the respondent

[1] **GOTTERSON JA**: On 1 April 2016, an order was made in proceeding No 3369 of 2014 in the Supreme Court that William Douglas Shaw pay the Deputy Commissioner of Taxation the amount of $981,915.86. The component parts of the amount were $879,526 for the balance of the claim, $90,422.51 for interest and $11,967.35 for fixed costs. On the same date, a like order was made in proceeding No. 3009 of 2014 in the Supreme Court that Dale Francis Rablin pay the Deputy Commissioner of Taxation the amount of $910,912.65, of which the components were $814,090.32 for the balance of the claim, $84,854.98 for interest and $11,967.35 for fixed costs.

[2] The orders were made upon publication of reasons for judgment earlier that day which determined a summary judgment application that the Deputy Commissioner had made in each proceeding. The applications were heard together. The one set of published reasons were applicable to both applications. The orders made reflected the conclusions reached by the learned primary judge in those reasons.

[3] On 28 April 2016, each of Mr Shaw and Mr Rablin filed a notice of appeal to this Court against the order made against him. Each relied on the same two grounds of appeal. The appeals were heard together on 5 September 2016. It is appropriate then that there be one set of reasons which applies to both appeals.

The Claims in the proceedings

[4] Mr Shaw and Mr Rablin were directors of State Wide Trades & Labour Hire Pty Ltd ("STL"). They had been directors of STL since 10 December 1998 and were directors of it during the period relevant to these proceedings from 13 March 2013 to 27 June 2013. In the proceeding against Mr Shaw, the amount claimed at the time of the hearing of the summary judgment application was $879,526, and in the proceeding against Mr Rablin, the amount then claimed was $910,912.65. The two amounts were claimed as penalties imposed on them *qua* directors of STL. They were in respect of PAYG deductions withheld by STL from payments for work and services made by that company to its employees, but which were not paid by it to the Commissioner of Taxation.

[5] The PAYG deductions withheld for which the penalties were imposed, fell due for payment progressively on successive dates, the first of which was 21 March 2013 (for the withholding period, 13 March 2013 to 15 March 2013) and the last of which was 27 June 2013 (for the withholding period, 19 June 2013 to 21 June 2013). In the claim against Mr Shaw, the penalties related to deductions which fell due for payment on some 14 dates within the period from 13 March 2013 to 27 June 2013.[1] However, in Mr Rablin's case, they related to deductions which fell due for payment on 13 dates within that period.[2] The penalties were calculated after setting off against each amount for PAYG deductions unpaid to the Commissioner, a proportion of an amount of $473,797.83 paid by way of distribution to the Commissioner by the liquidators of STL, following upon their appointment on 3 October 2013 upon a creditors voluntary winding up.[3]

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1 See Second Further Amended Reply para 6(c): Shaw AB455-456.

2 See Second Further Amended Reply para 6(c): Rablin AB453-454.

3 I note that penalties in respect of an unpaid, but payable, amount of $77,524 due on 29 April 2013 (for the withholding period, 20 April 2013 to 23 April 2013) were claimed against Mr Shaw, but not against Mr Rablin. After a set off of $12,088.32 had been made against that amount, the penalties claimed in respect of the unpaid amount were $65,435.68. This accounts for the difference of $65,435.68 between the penalties claimed against Mr Shaw and Mr Rablin at the time when the summary judgment application was heard. No issue arises in this appeal with respect to the difference in the amounts claimed against them. Also, no issue arises with respect to the respective

The legislative scheme - *Taxation Administration Act* 1953 (Cth) ("the Act")

[6] The learned primary judge summarised features of the legislative scheme for PAYG deductions and payment of corresponding amounts to the Commissioner in his reasons for judgment. It is convenient to adopt aspects of the summary which are relevant to this appeal. His Honour said:

> "[5] Division 12 of Schedule 1 to [the Act] ('the Schedule') obliges companies to withhold certain amounts from various payments they make. One such obligation is found in s 12-35 which provides that a company must withhold an amount from salary, wages, commission, bonuses or allowances it pays to an individual as an employee.
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> [6] Division 16-A of the Schedule imposes various other obligations on a company which, pursuant to Division 12, is obliged to withhold an amount from a payment. Division 16 operates to set the time when the company must withhold the payment, namely at the time of making the payment of salary, wages and other payments (s 16-5), to discharge the company from liability to the recipient for the amount withheld (s 16-20) and creates an offence and imposes penalties on the company for failure to withhold as required (ss 16-25 and 16-30).
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> [7] Division 16-B of the Schedule operates to oblige the company to pay to the Commissioner the amounts withheld (s 16-70), sets the time and manner by which that must occur (ss 16-75 and 16-85) and imposes a penalty for failure to pay within time (s 16-80). Notably:
>
> (a) Section 16-70 provides that a company that withholds an amount under Division 12 must pay the amount to the Commissioner in accordance with Division 16-B.
>
> (b) The timing and manner of such payments differs as to whether the company obliged to withhold amounts is a 'large withholder', a 'medium withholder' or a 'small withholder': s 16-75.
>
> (c) A 'large withholder' (and it is common ground that [STL] fell within that description) is obliged to pay the Commissioner on or before a particular day during the week after the date the amount was withheld, depending on the day of the week on which the payment was withheld: s 16-75(1).
>
> (d) Such payment must be made by means of an 'electronic payment': s 16-85(1)."

[7] At that point, his Honour began to describe provisions relating to notification to the Commissioner of amounts that a company must pay the Commissioner under the scheme. Those provisions underpinned an argument advanced at first instance on behalf of Mr Shaw and Mr Rablin that the penalties had been remitted by operation

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proportions of the liquidators' payment which was set off against each of the amounts that were to be paid to the Commissioner. As to the appointment of the liquidators, see Shaw AB167.

of law pursuant to s 269-30 of the Act. His Honour found against the argument.[4] It is not pursued on appeal. It is therefore unnecessary to set out the description given of the notification provisions.

[8] His Honour continued:

> "[9] Division 269 of the Schedule contains provisions the expressed object of which is to ensure that a company either meets its obligations under Division 16-B or goes promptly into voluntary administration or liquidation: s 269-5. The way Division 269 goes about achieving that object is to impose an obligation on a director of a company by the end of the due day to have the company either meet its obligations under Subdivision 16-B or be placed into voluntary administration or into liquidation, failing which the director will be subject to a penalty. The Division also provides that penalties can be remitted in certain circumstances and creates a defence if the director took all reasonable steps to ensure the company complied with its obligations.
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> [10] Notably and in relation to a company's obligations to pay amounts withheld from salary, wages and other payments it paid to an individual as an employee:
>
> (a) Section 16-5 requires the company to withhold the payment at the time of making the payment. For the purposes of Division 269 that date is referred to as 'the initial day': s 269-10.
>
> (b) Section 16-75 requires a company which is a large withholder to pay the Commissioner the amount withheld on or before a particular day during the week after the date the amount was withheld, depending on the day of the week on which the payment was withheld. For the purposes of Division 269 that date is referred to as 'the due day': s 269-10.
>
> (c) Section 269-10 provides that Division 269 applies as set out in a table in the body of the section. The table is expressed to identify the obligations with which directors must cause a company to comply. The relevant part of the table provides that Division 269 applies if, on the initial day, a company withholds an amount under Division 12 and the company is obliged to pay to the Commissioner on or before the due day that amount in accordance with Division 16-B. (Although curiously worded, the section probably does no more than reinforce the intention – confirmed by s 269-15 – that Division 269 applies to require the directors to cause a company to comply with its obligation to pay withheld amounts to the Commissioner on or before the due day as required by Division 16-B.)

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4 Reasons [16]-[36].

(d) Section 269-15 directly imposes relevant obligations on directors. The directors must on or after the initial day cause the company to comply with 'its obligation': s 269-15(1). And they continue to be under the obligation so to do until the company complies with 'its obligation', or goes into administration or liquidation: s 269-15(2). In light of the wording of ss 269-5 and 269-10, there is no doubt that the obligation of the company with which the directors must cause the company to comply must be the obligation to pay withheld amounts to the Commissioner on or before the due day as required by Division 16-B.

(e) Section 269-20 imposes a penalty on a director who has not complied with the s 269-15 obligation. A director becomes liable to pay to the Commissioner a penalty if, at the end of the due day, the directors of the company are under an obligation under s 269-15 and the director was under that obligation at or before that time. That phrasing makes sense because if the directors have complied with s 269-15, they would have either caused the company to pay the withheld amounts or the company would have gone into administration or liquidation. In any of those cases, the director would no longer be under an obligation and, accordingly, would not be liable for a penalty.

(f) The penalty is due and payable by the director to the Commissioner at the end of the due day: s 269-20(2). The amount of the penalty is 'equal to the unpaid amount of the company's liability under its obligation': s 269-20(5). Again, that obligation must be the obligation to pay withheld amounts to the Commissioner on or before the due day as required by Division 16-B.

(g) Section 269-25(1) prohibits the Commissioner from commencing proceedings to recover such a penalty 'until the end of 21 days after the Commissioner gives [the director] a written notice under this section'. The notice must, inter alia, 'set out what the Commissioner thinks is the unpaid amount of the company's liability under its obligation': s 269-25(2)(a). *Ex hypothesi*, the Commissioner could not give a notice unless the Commissioner formed the view that a particular amount had been withheld and was unpaid."

[9] Section 269-35 provides for a range of statutory defences to a claim for penalties. A director is relieved from liability to pay a penalty if the circumstances of any of the defences exist. The defence in s 269-35(2) is relevant for present purposes. It provides as follows:

"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 that Act); or

(b) there were no reasonable steps you could have taken to ensure that any of those things happened."

[10] Subsection 269-35(3) states that in determining what are reasonable steps for the purposes of sub-s (2), you are to have regard to:

"(a) when, and for how long, you were a director and took part in the management of the company; and

(b) all other relevant circumstances."

For sub-s 269-35(2) to apply in penalty recovery proceedings, the director must prove the matters mentioned in the subsection.[5]

The pleadings

[11] Each of Mr Shaw and Mr Rablin pleaded the unsuccessful remission of penalties defence to which I have referred. They also pleaded a defence based on s 269-35(2). The defence was pleaded in the alternative in the following terms:

"(a) in reliance on paragraph 2(b) herein, he took all reasonable steps to ensure the company complied with its obligations, in the circumstances, which gives rise to a defence to the plaintiff' s claim pursuant to section 269-35(2)(a)(i) of Schedule 1 to the TAA 1953; or

(b) in the alternative says, in reliance on paragraph 2(b) herein, there were no reasonable steps that he could have taken to ensure that any of the things set out in section 269-35(2)(a) of Schedule 1 to the TAA 1953 happened, which gives rise to a defence to the plaintiff's claim pursuant to section 269-35(2)(b) of Schedule 1 to the TAA 1953."[6]

[12] The paragraph 2(b) of the pleading to which these paragraphs referred, pleaded steps taken by STL to lodge BAS statements for the periods 1 January 2013 to 31 March 2013 and 1 April 2013 to 30 June 2013 which, it was said, notified the Commissioner of the PAYG withheld amounts. No specific conduct on the part of Mr Shaw or Mr Rablin individually was pleaded in paragraph 2(b).

The directors' evidence

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5 Section 269-35(4).

6 Shaw Further Amended Defence, paragraph 3: AB384; Rablin Further Amended Defence, paragraph 3: AB434.

[13] Each of Mr Shaw and Mr Rablin filed an affidavit in response to the summary judgment application against him. Unlike the defences, the affidavits referred to specific conduct on their respective parts.[7] Neither deponent was cross-examined on his affidavit.

[14] Mr Shaw's affidavit was admitted into evidence without objection.[8] So far as is relevant for present purposes, he swore:

> "2. I was a Director of [STL], a company in the State Wide Group.
>
> 3. The State Wide Group consisted of STL, State Wide Traffic Control Pty Ltd ACN 093 853 180 ('STC'), State Wide Construction Services Pty Ltd ACN 101 403 454 and Statewide Group also included Statewide Staffing Solutions Pty Ltd ACN 127 816 951 and Statewide Traffic Management Pty Ltd ACN 101 029 270.
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> **Background**
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> 4. STL was a large withholder with the Australian Taxation Office ('the ATO') pursuant to the terms of Part 16, Schedule 1 of the Taxation Administration Act 1953.
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> 5. STL paid varying amounts to the ATO electronically on a weekly basis.
>
> 6. The varying amounts paid by STL to the ATO were based on the PAYG amounts withheld for the preceding pay period.
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> 7. An annual return was lodged by STL and was assessed against the weekly contributions made by STL. STL either 'topped up' the amount required to be paid or was entitled to a refund of any overpayment.
>
> 8. On or about 22 February 2013, an Administrator was appointed to STC ('the Appointment'). The appointment was precipitated by defaults with STC's financer and its ability to pay immediate debts.
>
> 9. Prior to the Appointment, STC entered into a sale agreement with an unrelated entity, however the sale contract was not completed prior to the Appointment.
>
> 10. St George Bank held the first ranking registered security interest over STC. This was held for a debtor factoring facility and other motor vehicle and equipment finance facilities.
>
> 11. STL was an operating company which met all its commitments, was compliant with all of the ATO lodgements and never defaulted on payment plans.
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> 12. A registered charge over STL was also held by St George Bank in relation to the STC loans and a debtor factoring facility which STL also used for its operations. The State

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7 It appears that this conduct had been detailed in particulars that had already been provided: Reasons [44].

8 Subject to paragraph 26 thereof being read as if prefaced by the words "so far as I am aware": Shaw AB6; Tr1-6 l13.

Wide Group had a limit of $6,000,000.00 in place, however the State Wide Group entities could transfer the limit between them as the operating requirements demanded.

13. Originally the State Wide Group facility was allocated as follows:

    a. STC - $3,500,000.00

    b. STL - $2,000,000.00

    c. State Wide Construction Services - $500,000.00

14. At the time STC went into Voluntary Administration, the limits were:

    a. STC - $4,250,000,00

    b. STL - $1,500,000.00

    c. State Wide Construction Services - $250,000.00

15 On or about 28 February 2013, I contacted my relationship manager at St George Bank, requesting an increase in the limit by $1,000,000.00 for STL to cover normal business operations ('the Request').

16. On or about 1 March 2013 I received a response from St George Bank advising that the Request was being referred to the credit manager of St George Bank.

17. Between on or about 1 March 2013 and 12 March 2013, I made telephone calls to St George Bank to follow up on a response to my Request.

18. On or about 12 March 2013, I received a response from Craig Moore of St George Bank advising that St George Bank was unable to extend any further support by way of further advances or reallocation of limits, primarily due to the events and defaults (sic) of the STC entity. The available limit for STL was to the limit it had at the time, being $1,500,000.00, which was insufficient to operate the business.

19 On or about 21 March 2013, I engaged a specialist business consultancy firm, De Jonge Read, for advice and to assist with negotiations with St George Bank. Despite negotiations and numerous requests, St George would not reconsider the Request.

20. On or about April 2013, debtor factoring companies, Bibby and Scottish Pacific, were approached by De Jonge Read to refinance the St George Bank facility. Funding approval was received from both financers in or around early May 2013; each approving a facility for $2,500,000.00. While STL had been having difficulty meeting its cash flow operational requirements, the increased facility approval resulted in expectations that STL could meet its obligations in the near future and buoyant ongoing trading would ensure future outgoing payments could be met.

21. Between on or about May 2013 to June 2013, discussions took place with St George Bank for settlement of the debtor factoring facility in the name of STL.

22. On or about 2 July 2013, I had telephone discussions with a representative of De Jonge Read who advised that St George Bank had contacted them and stated that the Bank would not be prepared to settle on refinance of STL debtor finance facility until the sale of STC took place.

23. The settlement of the STC sale did not occur until 2 August 2013.

24. On or about 20 September 2013, settlement of STL debtor finance facility was effected with St George Bank, however by this stage it was considered too late to be of benefit (sic) STL.

25. On or about 4 October 2013, STL was placed into liquidation.

26. At all material times STL complied with its obligations under Subdivision 16B, Schedule 1 of the Taxation Administration Act 1953, and notified the ATO in the prescribed form within the prescribed statutory period.

27. The ATO issued me with a Director Penalty Notice ('DPN') dated 21 January 2014, for $1,834,883.

28. The DPN states, inter alia:

'Please note, as these liabilities remained unreported for three months from the due date, you are unable to achieve remission of these penalties through the company entering into or having entered into voluntary administration or liquidation.'"[9]

[15] Mr Rablin's affidavit was similarly structured to that of Mr Shaw. However, it revealed a different focus of responsibilities in the group activities and an absence of involvement in refinancing on his part. So much is revealed by the following paragraphs of his affidavit:

"4. Whilst I was a Director of STL, the management of STL was undertaken by William Douglas Shaw whilst I managed the traffic companies within the group STC and Statewide Traffic Management Pty Ltd.

…

12. As far as I was aware, STL was an operating company which met all its commitments, was compliant with all of the ATO lodgements and never defaulted on payment plans.

…

16. I was aware that William Shaw was liaising with St George bank to have the limit increased for STL to cover normal business operations.

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9 Shaw AB275-277. There is an error in paragraph 25 in that STL was placed into liquidation on 3 October 2013: Shaw AB167.

17. I was aware that William Shaw engaged a specialist business consultancy firm, De Jonge Read, for advice and to assist with negotiations with St George Bank.

18. I was aware that St George would not agree to the refinance of the debtor factoring facility until the sale of STC business took place."[10]

The application

[16] On 24 August 2015, the Deputy Commissioner filed an application for summary judgment in each proceeding. Each application was duly amended on 29 October 2015 to claim, in the alternative, orders striking out the paragraphs 2(b), 3(a) and 3(b) of the Further Amended Defence to which I have referred and also paragraphs 4, 5 and 6 thereof, as disclosing no reasonable defence or being otherwise embarrassing.[11] Paragraphs 4 and 5 concerned the unsuccessful remission defence and paragraph 6 pleaded that the whole of the amount distributed by the liquidators ought to have been set off against the amounts to which the penalties claimed were referable.[12]

Rule 292

[17] Rule 292 of the *Uniform Civil Procedure Rules* 1999 permits a plaintiff, once a notice of intention to defend has been filed, to apply for summary judgment. Rule 292(2) states:

> "If the court is satisfied that—
>
> (a) the defendant has no real prospect of successfully defending all or a 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."

The reasons of the learned primary judge

[18] The learned primary judge addressed the question whether the proposed s 269-35(2) defence had any real prospect of success. His Honour considered first the content of the obligation under s 269-35(2)(a). He observed:

> "[39] Consistently with the explicit purpose of Division 269, namely that a company either meets its obligations under Division 16-B or goes promptly into voluntary administration or liquidation, the section provides a defence if a director takes all reasonable steps to achieve those goals or there were no reasonable steps which the director could have taken to ensure the achievement of those goals.

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10 Rablin AB275-276.
11 Shaw AB459; Rablin AB457.
12 It appears that the defence based on paragraph 6 was not pursued at first instance: Reasons [14].

[40] The approach which should be taken to the section was recently discussed by the Western Australia Court of Appeal in *Roche v Deputy Commissioner of Taxation* [2015] WASCA 196. In that case the Court dismissed an appeal from the decision of the master which found that a defendant had no arguable defence under s 269-35. The Court of Appeal followed and applied to s 269-35 the approach which the New South Wales Court of Appeal decision of *Canty v Deputy Commissioner of Taxation* (2005) 63 NSWLR 152 had taken to an earlier statutory analogue of s 269-35. Buss, Newnes and Murphy JJA observed as follows (emphasis added):

(a) At [29]:

> **What is 'reasonable' for the purposes of s 269-35(2) does not depend merely upon the actual knowledge of the director but involves an objective test. The director must prove that he or she took all steps which were reasonable, having regard to the circumstances of which the director, acting reasonably, knew or ought to have known**: see *Deputy Commissioner of Taxation v Saunig* (2002) 55 NSWLR 722; (2002) 43 ACSR 387 [25].

(b) At [34] to [35]:

> In our view, although the statutory provision considered in *Canty* was not in identical terms to s 269-35(2)(a), Handley JA's reasoning is equally applicable to s 269-35(2)(a).
>
> So, compliance with s 269-35(2)(a) requires the director to have taken all reasonable steps to ensure that one of the three alternative events specified happened. **The taking by the director of 'all reasonable steps to ensure', within s 269-35(2)(a), requires that each of the alternative events be addressed, either on the basis of taking reasonable steps to ensure the event happened or declining to do anything about that particular event on the basis that there were no reasonable steps that the director could have taken to ensure that the event happened**. See, generally, *Miller v Deputy Commissioner of Taxation* (1997) 98 ATC 4059, 4063 - 4064 (Mason P, Beazley JA agreeing).

(c) At [40]:

> In our respectful view, the master was correct to find that the appellant had no arguable defence to the claim. **To establish a defence under s 269-35(2), the appellant was required to prove that from the time he came under the obligation in s 269-15 he took all reasonable steps to ensure that one of the s 269-35(2)(a) events occurred or that there were no reasonable steps that he could have taken to ensure**

> **that any of those events happened**. The evidence, which, as the master observed, was conspicuous for its paucity, fell a long way short of that. …

[41] The passage from *Miller* to which their Honours referred at [35] was to the following passage (emphasis added):

> The appellant submits that a director need only address one of the four options offered to the company by s 222APB(l), and that it suffices if he or she proves that, in relation to that option, all reasonable steps were taken by that person to ensure that the directors caused the company to do one of the four options, or that there were no such steps that the person could have taken. In support of this contention, reference was made to s 222APB(1) where it speaks of the directors causing the company 'to do at least one' of the four matters.
>
> I would reject this submission. What the directors have to do to comply with s 222APB(l) is cause the company to do at least one of the four matters. If none of the four matters occurs there has been noncompliance 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 (option (a)) because the company were hopelessly insolvent, the director could 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 s 222ANA(l) and (2)."

[19] His Honour noted that the pleading of the defence based on s 269-35(2) was devoid of material facts and, as such, could not of itself warrant a conclusion that it had any real prospects of success.[13] He also noted that the affidavit evidence and the particulars revealed a case that had not been pleaded.[14]

[20] The learned primary judge set out paragraphs 4 to 25 inclusive of Mr Shaw's affidavit. He then proceeded to analyse what Mr Shaw had deposed to with a view to determining whether the s 269-35(2) defence had any real prospects of success. His Honour reasoned:

> "[45] I accept the Commissioner's submission that the essence of the case in the evidence (and in the particulars), is, in effect, that the defendant tried to ensure that the Company could obtain funding to meet its obligations but was unsuccessful.
>
> [46] The problem with that case is that the defendant's evidence – like the evidence in *Roche* – falls a long way short of establishing

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13 Reasons [43].
14 *Ibid* [44].

an arguable case that the defendant took all reasonable steps to ensure that one of the s 269-35(2)(a) events occurred or that there were no reasonable steps that he could have taken to ensure that any of those events happened. There was no evidence indicating that each option was 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.

[47] The fact of the matter is that by 12 March 2013 the Company had insufficient funds to operate its business. From 21 March 2013, the Company was failing to meet its obligation to pay very substantial sums to the Commissioner. The unmet liability was increasing week by week over a period of 3 months. The Company obviously did not have sufficient funds to operate its business, let alone to meet its obligation to the Commissioner.

[48] In order to avail himself of the defence, Mr Shaw had to take all steps which were objectively reasonable, having regard to the circumstances of which he, acting reasonably, knew or ought to have known. Yet even the evidence which touched upon the steps which were taken towards ensuring that the Company could pay was couched at the vaguest levels of generality and was expressed in relation to debts generally rather than the debt owed to the Commissioner in particular. And, insofar as the evidence touched upon expectations which were formed (see Shaw at paragraph 20, quoted at [44] above), it was at the highest level of generality and there was no real evidence of the foundation of the expectation as might enable the defendant to persuade me that there were real prospects of establishing its objective reasonableness.

[49] Moreover, as I have said, there was no evidence touching upon the defendant's examination of the other options, namely administration and liquidation, and this despite the fact that a related company was already in voluntary administration. One may infer from the fact that a creditors voluntary winding up commenced on 3 October 2013, that there must have been some consideration of the liquidation option, but there is an absence of evidence addressing what was that consideration, when it occurred, and whether it was reasonable. And there is nothing at all touching upon the administration option. In the absence of any explanation for the absence of that evidence (or even of evidence describing the existence of matters which could be developed further at a trial) and noting that the application for summary judgment was filed on 24 August 2015 and argued before me on 16 November 2015, I infer that the evidence has not been adduced because it would not assist the defendant's case.

> [50] On the material before me, I conclude that the defendant's s 269-35(2) defence does not have any real prospect of success."

In view of this conclusion, his Honour considered it unnecessary to consider the various pleading complaints advanced by the Deputy Commissioner.[15]

The grounds of appeal

[21] The stated grounds of appeal in both appeals are identical. They are:

> "(a) His Honour erred in finding that the Defendant's evidence fell a long way short of establishing an arguable case that the Defendant took all reasonable steps to ensure that one of the s 269-35(2)(a) events occurred or that there were no reasonable steps that he could have taken to ensure that any of those events happened; and
>
> (b) His Honour erred in granting summary judgment in circumstances where an arguable case was made out giving rise to questions of fact which required a trial of the matter to be determined."[16]

[22] The first of these grounds is premised upon an acceptance by each appellant that, the Deputy Commissioner having established a prima facie case for recovery, the onus lay upon him to adduce evidence of facts on which he would rely to defend.[17] However, the onus remained on the Deputy Commissioner to persuade the court that neither had a real prospect of defending their claim against him.

The appellants' submissions

[23] As appellants, Mr Shaw and Mr Rablin submitted that there was evidence of steps taken referable to s 269-35(2)(a). Reliance was placed on the evidence of the efforts to increase the limit on the St George Bank ("the Bank") debtor factoring facility, to refinance by facility arrangements with other debtor factoring companies, to settle the Bank facility in order to accommodate a refinancing, and the liquidation of STL on 3 October 2013. Whilst that evidence was not challenged and there was no factual dispute at first instance in relation to it, there had been a dispute at first instance as to whether what was done was capable of satisfying the requirement of taking all reasonable steps under that section.

[24] In oral submissions, counsel for the appellants conceded that the evidence that had been adduced at first instance lacked particularity. It did not give a picture of the overall indebtedness of STL at any point in time; it did not expressly state that the increase of $1 million in the limit sought, if granted, would have enabled STL to pay to the Commissioner all or some of the amounts that had fallen due. It was submitted that, notwithstanding, sufficient evidence had been adduced to justify a conclusion that there was available to the appellants an arguable case that they had taken all reasonable steps in terms of the section and that there ought to have been a trial to determine whether they had or not.

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15 Reasons [51].
16 Shaw AB477-478; Rablin AB475-476.
17 *Qld Pork P/L v Lott* [2003] QCA 271 at [41] per Jones J.

[25] The appellants submitted that the learned primary judge had, in effect, made a determination on the evidence that had been adduced, that the appellants had not taken all reasonable steps such as entitled them to a defence under s 269-35(2)(a). It was further submitted that his Honour's view of the evidence before him as being as deficient as that in *Roche* was wrong. The appellants' evidence did not fall a long way short of establishing an arguable case.

The respondent's submissions

[26] The respondent Deputy Commissioner emphasised that the appellants had obligations as directors under s 269-15(1) with respect to different amounts for which the due dates for payment were different. The earliest of them was for an amount of $61,479 for which the due date was 21 March 2013 and the latest for an amount of $82,796 for which the due date was 27 June 2013. The appellants became liable under s 269-20 to pay a separate penalty referable to each amount once it remained unpaid at its respective due date.

[27] It follows, the respondent submitted, that the availability of a defence under s 269-35(2)(a) was to be considered with respect to each amount, according to the date it fell due. The question was whether there was sufficient evidence for summary judgment purposes that, from the date when each amount became due until STL was wound up, all reasonable steps had been taken to ensure that one of the outcomes in s 269-35(2)(a) had happened.[18]

[28] The respondent accepted that the director's obligation under s 269-15(1) is a continuing one. Thus, here, conduct on the part of the appellants after each due date was relevant to the availability of a defence under s 269-35(2)(a).[19] In oral submissions, senior counsel for the respondent made the following submission as to what was required in order to rely upon the defence:

> "… [T]he proper construction of this defence is that you have to have as at the circumstances, as at the due date, and the facts that have arisen to that point have demonstrated that you have taken all reasonable steps and that in effect at each point in time thereafter, when looked at objectively, the facts support that you have either continued to take all reasonable steps for that particular course or one of the other two courses."[20]

[29] The respondent further submitted that his Honour had correctly regarded the appellants' evidence as deficient for its generality. Cogent evidence had been required in circumstances where the amounts unpaid to the Commissioner were mounting weekly over a three month period. Yet, it was argued, the evidence indicated little activity towards making arrangements for payment of the due amounts during that period. Nor was there evidence that administration or liquidation of STL were considered at that time.

Discussion

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18 Appeal Transcript 1-14 ll21-28.
19 Appeal Transcript 1-17 ll7-13.
20 *Ibid* ll23-29.

[30] The discretion to give summary judgment under r 292 is dependent upon the court being satisfied of each of the matters referred to in r 292(2)(a) and (b) respectively. Each appellant submits that the learned primary judge erred in concluding that he was satisfied with respect to each matter. The conclusion was not open, it was submitted, hence the occasion for exercise of the discretion did not arise.

[31] The content of the test of "no real prospect of successfully defending" set by r 292(2)(a) was considered by this Court in *Deputy Commissioner of Taxation v Salcedo*.[21] Williams JA (with whom McMurdo P and Atkinson J agreed) quoted[22] with approval the following observations of Lord Woolf MR in *Swain v Hillman*[23] concerning the English analogue of r 292. His Lordship said:

> "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 court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."[24]

[32] Williams JA recalled that in *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)*,[25] this Court had cautioned that great care must be exercised to ensure that under the guise of achieving expeditious finality, a party is not deprived of an opportunity for the trial of their case.[26] His Honour also noted that, with particular reference to r 292(2)(b), P D McMurdo J had observed in *Gray v Morris*[27] that in considering that matter, a court must keep in mind why the interests of justice usually require the issues to be investigated at a trial.

[33] Guided by these judicial observations, I now turn to consider whether it was open to the learned primary judge to conclude that each appellant had no real prospects of defending the claim against him and that there was no need for a trial of it.

[34] In *Roche*, their Honours quoted[28] with approval, the explanation given in *Canty* of the effect of the defence under s 222AOJ(3)(a) of the *Income Tax Assessment Act* 1936 (Cth). That provision was a statutory antecedent to s 269-35(2)(a). Although the two provisions were not enacted in identical terms, their Honours considered that the reasoning in the explanation is equally applicable to s 269-35(2)(a).[29] I would respectfully agree and note that it received the implicit endorsement of Gummow and Hayne JJ upon a refusal of special leave to appeal.[30] However, it was neither quoted, nor expressly referred to, by the learned primary judge here.

[35] The explanation to which I have referred was given some years after the decision in *Miller*. The explanation provides useful guidance with respect to the operation of

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21 [2005] QCA 227; [2005] 2 Qd R 232.
22 At [11].
23 [2001] 1 All ER 91.
24 At 92.
25 [2002] QCA 224; [2003] 1 Qd R 259.
26 At [7] per Holmes J (Davies JA and Mullins J agreeing).
27 [2004] QCA 5; [2004] 2 Qd R 118 at [46] (McPherson JA agreeing).
28 At [32].
29 At [34].
30 *Canty v Deputy Commissioner of Taxation* [2005] HCATrans 670 (2 September 2005). Their Honours said that they saw no reason to doubt the correctness of the conclusion of the Court of Appeal.

the defence. In elaborating it, Handley JA (with whom Beazley and Santow JJA agreed) observed:

> "[38] The defences under par (a) and par (b) are cumulative not mutually exclusive. A defendant may establish that there was nothing that could reasonably be done to achieve payment. He or she may also establish that there was no point in attempting to negotiate an agreement with the Commissioner. In such a case the defence under par (b) would succeed pro tanto leaving the defence under par (a) to address the remaining options.
>
> [39] In other cases the defence under par (b) may succeed in relation to all options, so that the defence under par (a) need not be considered. If the only feasible options are the appointment of an administrator or a liquidator a person under the duty, acting reasonably, may decide to seek a winding up. If so, he or she will not be acting unreasonably by doing nothing to secure the appointment of an administrator at that stage. The converse will also be true.
>
> [40] Thus a person under the duty, who acted reasonably in choosing one of the possible events and took all reasonable steps to bring it about would, to that extent, make out the par (a) defence although no attempt was made at that stage to achieve compliance in any other way. A person who acted reasonably in choosing between the alternatives but failed to take all reasonable steps to bring about the selected event would fail, as would a person who acted unreasonably in choosing the option to be pursued.
>
> [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 subs (3) defences will have to cover all options…"

[36] I mention at this point, that Handley JA then proceeded to consider whether the defence need be established for the whole of the period between the due dates and the expiry of a compliance notice served on a director.[31] He answered that question in the affirmative[32] and then observed that proof that nothing could have been done at various times during the period would not establish that nothing could have been done at other times, and that proof that the person took all reasonable steps at various times would not establish that he or she took all reasonable steps.[33]

[37] The explanation given by Handley JA had regard for the dicta in *Miller* to the effect that each of the options under the defence provision must be addressed. It then elucidated how that may be done conformably with the provision: it may be reasonable to

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31 At [42]-[46]. These paragraphs were not set out in the decision in *Roche*.
32 At [45].
33 At [46].

choose and take all reasonable steps to pursue one option but if pursuit of it fails, then all reasonable steps to pursue another option must then be undertaken. Significantly, steps to pursue all of the options concurrently need not be taken. It is obvious that to attempt to do so could be counterproductive.

[38] The evidence that was adduced disclosed that by the end of February 2013, Mr Shaw had taken a step towards increasing the allocated limit for STL on the Bank facility from $1.5 million to $2.5 million. On or about 12 March, the Bank intimated to him that it was unable to increase the limit. On 21 March, Mr Shaw engaged a specialist business consulting firm for advice and to attempt to negotiate with the Bank. Those attempts failed and in April 2013, the consultancy firm sought funding approval from two debtor factoring companies. By early May, each of those companies had approved a facility of $2.5 million for STL. According to Mr Shaw, the approvals resulted in expectations that STL could meet its obligations in the near future and that buoyant ongoing trading would ensure future outgoing payments could be met.

[39] Evidently, it was intended that the Bank facility for STL would be settled from funds advanced under a replacement facility. In May and June 2013, discussions took place with the Bank for settlement of the then current facility. On 2 July, the Bank notified that it would not permit settlement until sale of the group company, STC, had taken place. The sale was completed on 2 August. The Bank facility was settled on 20 September. By that time, it was too late to be of benefit to STL. The company was then placed in liquidation on 3 October 2013.

[40] As the learned primary judge observed, some consideration must have been given to liquidation or voluntary administration prior to the liquidation date. It is not clear precisely when consideration was so given. It may well not have been until after the Bank facility was settled.

[41] However, it is equally clear that the directors of STL were not obliged to pursue the options of liquidation or voluntary administration whilever they were taking all reasonable steps to enable STL to pay the amounts due to the Commissioner. Within the factual context deposed to by Mr Shaw, it would have been reasonable for the directors to have pursued such steps in that direction only so long as it was reasonable to expect that either of the approved refinancings would have continued to avail STL.

[42] For how long it was reasonable to pursue the refinancing option in order to pay the amounts due and payable to the Commissioner and whether all reasonable steps were taken to pursue that option within that period, are factual questions to be answered by reference to, and upon a consideration of, the constellation of primary facts relevant to them. In response to an application for summary judgment, it was not necessary for the appellants to have adduced evidence, as they might at trial, which comprehensively addressed all such facts.

[43] In my view, the facts deposed to by Mr Shaw are sufficient to warrant a conclusion that a possible defence under s 269-35(2) is potentially available to the appellants. It is not one that is apt to be characterised as a mere fanciful defence. There is a need for a trial in which the factual issues relevant to the defence can be investigated. In this regard, I would not differentiate between Mr Shaw and Mr Rablin. It is not appropriate at this point to conclude against the latter that, in relying on Mr Shaw consistently with the allocation of responsibilities between

them, he must not have taken all reasonable steps. I note that it was not submitted on behalf of the respondent that it would be appropriate to draw such a conclusion.

[44] Accordingly, I would not categorise the evidence in these appeals as comparable with that in *Roche*. There, the applicant for an extension of time within which to appeal against a summary judgment was a company director who had been sued by the Deputy Commissioner for penalties. He had failed to adduce evidence that he had taken any steps to cause the company to meet its obligations.[34] There was no evidence that he received any information or assurances as to the company's financial position on which he reasonably could have relied or that he took any other steps to ensure that one of the s 269-35(2)(a) events occurred in circumstances where he knew, or ought to have known, that the company was continuously failing to meet its obligations to the Commissioner.[35] By contrast, here, there was evidence of steps taken. They gave rise to the different question of whether they were all reasonable steps that ought to have been taken.

[45] Insofar as the learned primary judge expressed scepticism towards the defence, I would agree that serious questions might well be posed about a number of matters including the adequacy of the proposed increase in the facility limit, the adequacy of the approved refinancings, the vigour with which each of them was pursued, and justification in pursuing them in the face of the Bank's requirement that STC be sold. However, they are questions that would be appropriate to an inquiry into whether a defence has been made out. To pose them at this point would risk error by substituting such a test for the one of no real prospects of successfully defending the claim set by r 292. Moreover, to infer that the questions could never be satisfactorily answered because they were not comprehensively addressed in response to a summary judgment application, would tend to compound such an error.

[46] For these reasons, I consider that it was not open to the learned primary judge to be satisfied as to the matters referred to in r 292(2)(a) and (b). The discretion under that rule was not engaged and summary judgment ought not to have been granted.

Disposition

[47] The appeal should be allowed and the order made in each proceeding on 1 April 2016 be set aside. Each application should be refused insofar as it seeks summary judgment. Given that the learned primary judge did not determine the claim to alternative relief sought and that this Court was not addressed on it, the applications ought to be remitted to the Trial Division for further consideration. It is appropriate that the respondent to each appeal pay the appellant's costs of it on the standard basis.

Orders

[48] I would propose the following orders:

In Appeal No 4249 of 2016

1. Appeal allowed.

2. Set aside the order made in proceeding No 3369 of 2014 on 1 April 2016.

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34 At [17].
35 At [45].

3. Refuse the relief sought in paragraph 1 of the application filed in that proceeding on 24 August 2015.

4. Otherwise remit the application to the Trial Division for further consideration.

5. The respondent is to pay the appellant's costs of the appeal on the standard basis.

In Appeal No 4251 of 2016

1. Appeal allowed.

2. Set aside the order made in proceeding No 3009 of 2014 on 1 April 2016.

3. Refuse the relief sought in paragraph 1 of the application filed in that proceeding on 24 August 2015.

4. Otherwise remit the application to the Trial Division for further consideration.

5. The respondent is to pay the appellant's costs of the appeal on the standard basis.

[49] **PHILIP McMURDO JA:** I agree with the orders proposed by Gotterson JA and with his reasons. I wish to add only something about a particular submission for the respondent.

[50] The submission is that to which Gotterson JA has referred at [28]. The effect of the submission is that a defence under s 269-35(2) could be available only where the director took all reasonable steps as described in that provision, both before the due day for payment of a relevant amount and after that date. It was said that a failure to take reasonable steps before the due day could not be remedied subsequently so as to provide a defence under s 269-35.

[51] It appears that the submission was not made to the primary judge because it is not discussed in his judgment and it would have required a distinct factual consideration of the steps taken by the defendants, payment by payment, between "the initial day" and the "due day". At least for that reason, the submission could not be a basis for upholding these summary judgments if they were wrongly given upon the arguments which were made to the primary judge.

[52] But in any event the submission is far from persuasive. Until the due day, the obligation of a director, according to s 269-15, is to cause the company to comply with its obligation, namely to pay to the Commissioner the amount withheld from its employee. If a director fails to cause the company to comply by the due day, the director becomes liable to pay to the Commissioner a penalty (s 269-20) and remains bound to cause the company to comply with its obligation (s 269-15(2)). The availability of a defence under s 269-35 depends upon the director's conduct *after* the due day. A director is not obliged to take reasonable steps to have an administrator appointed or the company wound up before the due day. That is apparent from s 269-1 which provides:

> "The directors of a company have a duty to ensure that the company either:
>
> (a) meets its obligations under Subdivision 16-B (obligation to pay withheld amounts to the Commissioner) … or
>
> (b) goes promptly into voluntary administration under the *Corporations Act 2001* or into liquidation."

The word "promptly" indicates that the step of an administration or a liquidation need be pursued if the company fails to pay the withheld amount on the due day. This is the way in which the relevantly equivalent provisions of an earlier regime were understood by Handley JA in *Canty v Deputy Commissioner of Taxation*[36].

[53] **ATKINSON J:** I agree with the reasons for judgment of Gotterson JA and with the orders proposed by his Honour.

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[36] (2005) 63 NSWLR 152, see especially 160-161 [42]-[46].