DISTRICT COURT OF QUEENSLAND

CITATION:	*Deputy Commissioner of Taxation v Tenardi* [2007] QDC 093
PARTIES:	**Deputy Commissioner of Taxation (Plaintiff)** **AND** **Tenardi (Defendant)**
FILE NO:	Maroochydore 450/06
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Maroochydore District Court
DELIVERED ON:	25 May 2007
DELIVERED AT:	Maroochydore
HEARING DATE:	11 May 2007
JUDGE:	Judge J.M. Robertson
ORDER:	• **Defendant's application for stay and/or adjournment refused with costs.** • **Plaintiff's application for summary judgement granted with costs.** • **Judgment in the amount of $106,814.10 awarded to the plaintiff.**
CATCHWORDS:	Application to stay proceedings pending determination by AAT – Summary judgment application – whether any real prospect of successfully defending **Cases cited:** *Victoria Patient Transport Pty Ltd v Commissioner of Taxation* [2007] AATA 1239 *Stevens v Trewin and Van Den Broek* [1968] Qd.R. 411 *Hydronic Industries Pty Ltd v Taylor* Queensland Lawyer and Reports (1980) Vol 5 on p. 313 *Deputy Commissioner of Taxation v Finerty* [2007] QDC 058 *Gray v Morris* [2004] 2 Qd.R *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd.R. 232 **Legislation:** *Uniform Civil Procedure Rules* *Superannuation Guarantee (Administration) Act 1992* *Taxation Administration Act 1953* *Tax Assessment Act 1997*
COUNSEL:	Mr Bell Counsel for the Plaintiff Mr Kimbell Solicitor for the Defendant
SOLICITORS:	Australian Taxation Office Sajen Legal

[1] The plaintiff Deputy Commissioner filed its claim initially in the Townsville District Court on 10 November 2006. The proceedings were transferred to this Court and the Deputy Commissioner applied for summary judgment pursuant to r292 of the *Uniform Civil Procedure Rules* (the UCPR). On the return date of that application, 10 March 2007, the defendant Mr Tenardi applied for a stay of the proceeding in this Court, alternatively an adjournment of the summary judgment application, pending determination of the application to the Administrative Appeals Tribunal (the AAT) filed by the defendant's solicitors on the 8th May which seeks to review the assessments made by the plaintiff which are the subject of claims made against Tenardi in the Amended Statement of Claim filed 22 March 2007. Mr Bell, who appeared on behalf of the plaintiff, did not object to leave being given to the defendant to file his stay application and supporting material at the commencement of the hearing on 10 May 2007, so, in effect, both applications were heard together. Mr Kimball, who appeared on behalf of Mr Tenardi, conceded that if I were to grant a stay and his client was unsuccessful in the AAT then his client would have no defence to the plaintiff's claim.

The Nature of the Claim

[2] The claim is under two separate heads. On the June 2006, Mr Tenardi, who was an employer at all material times within the meaning of the *Superannuation Guarantee (Administration) Act 1992* (the Act), was issued with default assessments for superannuation guarantee charges under the Act for the quarters commencing 1 July 2003, 1 October 2003 and 1 January 2004. The total amount including general interest charges, nominal interest charges and administration charges payable under the Act was at the time of claim $32,491.65. Under the second head of claim, the plaintiff claims the balance under a running balance account established in the defendant's name pursuant to the *Taxation Administration Act 1953* (the 1953 Act) which contains primary tax debits due by Mr Tenardi under the Business Activity Statement (BAS) provisions of the Income *Tax Assessment Act 1997* (the 1997 Act) together with general interest charges payable under the 1953 Act. As at the date of filing of the Amended Statement of Claim on 22 March 2007, the sum claimed under this head was $66,512.21. A Certificate issued pursuant to the 1953 Act certified the total debt as at 10 May 2007 at $105,389.50

[3] Mr Kimball advances no submission to the effect that these calculations are not accurate. His primary argument was to the effect that I should grant a stay to prevent "an injustice to the (defendant)" pending the determination of his clients application to the AAT.

[4] It appears to be common ground for the purposes of these applications, that Mr Tenardi did fail to pay the Superannuation Guarantee Certificate (SGC) due as alleged in the Amended Claim due to cash flow problems in the relevant period but that once his cash flow improved, the outstanding SGC were repaid on or before 28 July 2004. As I have noted, his non-payment for the three quarters was established by an audit conducted in 2006.

[5] It is accepted on his behalf that under the Act, he is liable to pay the SGC equivalent to the amount of the shortfall in the relevant quarter plus an interest and administrative charge component (s17 of the Act). The Act makes no provision for any extension of time to make contributions, and the Commissioner of Taxation has no discretion to remit any components of the SG charge. In a number of decisions in the AAT it has been held that employers who paid contributions late are nonetheless liable to the Superannuation Guarantee charge for the whole of the relevant period. (see *Victoria Patient Transport Pty Ltd v Commissioner of Taxation* [2007] AATA 1239 and the cases cited therein in the judgment of Senior Member Pascoe).

[6] In relation to the claim based on the running balance account deficit debt, this is based on self reporting by the defendant over the period March 2005 – September 2006, which monies have not been paid by the defendant by the due date, and remain unpaid. As I have noted the defendant raises no argument about his liability for, or the accuracy of, the sums as calculated and claimed.

The AAT Application

[7] The application to review both assessment "decisions" was forwarded to the AAT on 8 May 2007. Mr Kimball, in his affidavit in support of the stay application filed by leave on 10 May, also states that "he has received instructions to file an objection with the Australian Tax Office as required under Part IVC of the Taxation Administration Act 1953". A copy of the form of the objection is attached to his affidavit but had not been lodged prior to the hearing of the applications.

[8] Mr Kimball in oral submissions did argue that the application to the AAT was based on grounds which are stated in the application in the attachment B.T.4 to the application. Mr Bell, understandably anticipating an argument made on hardship grounds, submits correctly in his written outline that hardship claims for release from liability (which necessarily is acknowledged by the tax payer) are to be made to the Small Taxation Claims Tribunal under s340 of Schedule 1 to the 1953 Act. Following the hearing, and at my request, both lawyers provided me with copies of relevant sections in the various Acts but in addition, in his letter to my associate dated 11 May 2007 Mr Kimball (perhaps somewhat disingenuously) states:

> "Contrary to Mr Bell's submissions the defendant's grounds for relief from the AAT do not rely upon the particular relief against hardship which is provided for in the Taxation Administration Act 1953 but in fact relies upon the AAT's inherent jurisdiction to make a correct and preferable decision in light of the defendant's particular circumstances. Our submissions together with the affidavit in support of our client's application clarify this".

[9] This, as far as I can tell, is the first time the defendant has referred to "the inherent jurisdiction" of the AAT, and certainly there is no reference to this concept in the written submission or indeed, in the application to the AAT. A careful examination of the reasons for the application (B.T.4 to KJK-7 to Mr Kimball's affidavit filed by leave on 10 May) reveals no reference to "the inherent jurisdiction" of the Tribunal, and in fact the reasons sound very much like a hardship claim. The reasons also repeat and rely on the argument (untenable as a matter of law) that the SGC component of the claim should not be payable because the defendant has since paid the contributions out of time. It may well be that the Parliament has recognised the law as it stood at the relevant time was unfair to employers,

who like the defendant paid the charges late, by amending the Act to avoid the relevant employees receiving an undue benefit; but this is not a factor the AAT will find attractive having regard to the decision to which I earlier referred. As far as the remaining head of claim is concerned, the reasons for seeking a review are based entirely on a hardship claim, at the same time acknowledging the debt:

> "In relation to the amounts referred to under (2) I request that the Tax Office set aside the debt. Payment of this outstanding debt will place undue financial hardship on me and will potentially lead to insolvency". (My emphasis)

[10] Mr Kimball's reliance on the "inherent jurisdiction" of the AAT, perhaps comes about as a result of a full appreciation of Mr Bell's written submissions which include the correct assertion that the two types of tax debt, the subject of the claim, are not capable of release either under Part ICV of the 1953 Act or under s340 of Schedule 1 to that Act. As Mr Bell correctly observes in his written response to Mr Kimball's letter of 11 May, the AAT is a creature of statute and, unlike a court, is not invested with any inherent jurisdiction and it's powers are strictly defined.

The Stay Application

[11] The power of this court to stay proceedings is not derived from the Rules but comes from the inherent power of the Court to prevent an abuse of process: *Stevens v Trewin and Van Den Broek* [1968] Qd.R. 411, and the power to stay does probably extend in appropriate (but rare) cases to prevent injustice however it is not necessary for me to go as far in this case: *Hydronic Industries Pty Ltd v Taylor* Queensland Lawyer and Reports (1980) Vol 5 on p. 313 per Kimmins DCJ. That case involved quite different considerations including the fact that proceedings relating to the monies the subject of the claim in the District Court, had also been commenced in the Supreme Court. There is no suggestion here that the claim by the plaintiff is an abuse of process or oppressive or vexatious. Indeed the contrary is the case; the plaintiff is pursuing a claim she is entitled to pursue to which there appears to be no defence. Mr Bell in his submission referred to the unfettered discretion vested in a Court to stay enforcement of a judgment summarily granted pursuant to r.300 UCPR and to her Honour Judge Kingham's judgment in *Deputy Commissioner of Taxation v Finerty* [2007] QDC 058 in which she refused to stay

enforcement of a judgment for taxation liability. The defendant's application of course is for a stay of the proceedings pending the determination of the claim before the AAT, so r.300 does not come into play, although the principles she sets out therein are relevant.

[12] For the reasons I have stated there is no basis established here in the circumstances of this court for me to stay the proceedings. The belated reference to the AAT, and the belated preparation of an objection (see KJK 8) are clearly just a device to delay the inevitable.

Summary Judgment

[13] Rule 292(2) provides:

> "If the court is satisfied that-
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> a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
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> 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."

[14] The annotations to this sub-rule in Civil Procedure Queensland still refer to the judgment of Chesterman J in *Gray v Morris* [2004] 2 Qd.R. 118 as being authority for the general proposition that this Rule did not alter the previous law in relation to applications by plaintiffs for summary judgment. His Honour's reasoning was not adopted by the other members of the Court in that case, and has since been specifically rejected by the Court of Appeal in a number of cases including *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd.R. 232 per Williams JA. His Honour said (at 237) "…the Judge determining such an application is essentially called upon to determine whether (the defendant) has established some real prospect of succeeding at a trial; if that is established then the matter must go to trial."

[15] For the reasons I have enunciated, the defendant has no real prospect of succeeding here at trial. There is no challenge at all to evidentiary certificates relied upon by the plaintiff which are by virtue of sections 244-45 of the 1953 Act prima facie evidence that the amount claimed is a debt due by the defendant to the plaintiff. Further, by virtue of sections 35 and 75 of the Act, the Superannuation Guarantee Statements and the

plaintiff's default assessments are conclusive evidence that all amount and particulars of such assessments are correct.

[16] The orders are:

- Defendant's application for stay and/or adjournment refused with costs.
- Plaintiff's application for summary judgement granted with costs.

I will make a final money order on the date of Judgment in terms of the up-to-date calculations of the plaintiff.