DISTRICT COURT OF QUEENSLAND

CITATION:	*Morrow v Deputy Commissioner of Taxation* [2019] QDC 46
PARTIES:	**GLEN MICHAEL MORROW** (Appellant) **v** **DEPUTY COMMISSIONER OF TAXATION** (Respondent)
FILE NO/S:	1195/18
DIVISION:	Civil
PROCEEDING:	Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 April 2019 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2019
JUDGE:	Koppenol DCJ
ORDER:	**1. Appeal dismissed** **2. Appellant to pay Respondent's costs of and incidental to the appeal on the standard basis, as agreed or assessed.**
CATCHWORDS:	APPEAL – GROUNDS OF APPEAL - section 78B of *Judiciary Act 1903* (Cth) – effect of non-compliance - whether magistrate should have heard application or adjourned to allow for compliance APPEAL – GROUNDS OF APPEAL – summary judgment application – outstanding taxation liability - whether *Evidence Act 1995* (Cth) or *Uniform Civil Procedure Rules* (*UCPR*) applied – whether hearsay evidence inadmissible – whether affidavit evidence inadmissible APPEAL – GROUNDS OF APPEAL – whether magistrate erred in not ordering Respondent to provide further particulars – whether magistrate erred in not striking out paragraphs of further amended statement of claim (FASC) APPEAL – GROUNDS OF APPEAL – whether FASC, particulars or evidentiary certificates inconsistent - effect on summary judgment application of any inconsistencies – whether evidentiary certificates could be challenged - whether magistrate erred in not allowing Appellant's

applications for particulars or to strike out FASC – whether magistrate erred in allowing Respondent's application for summary judgment

Evidence Act 1995 (Cth), ss 4(1), 192A, Chapter 3
Taxation Administration Act 1953 (Cth), ss 8AAZJ, Sched 1 ss 255-45, 255-50, 350-10
Judiciary Act 1903 (Cth), ss 78B, 79(1)
Supreme Court of Queensland Act 1991, s 85
Uniform Civil Procedure Rules, rr 295(2), 295(5), 292

Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd (2008) 237 CLR 473, applied
Glennan v Commissioner of Taxation (2003) 77 ALJR 1195, applied
MacDonald v Deputy Commissioner of Taxation [2017] QCA 206, applied
Equititrust Ltd v Gamp Developments Pty Ltd & Ors [2009] QSC 115, followed

COUNSEL:	Appellant appeared on his own behalf
	Dr R Schulte for the respondent
SOLICITORS:	Appellant appeared on his own behalf
	Australian Government Solicitors for the respondent

[1] On 2 March 2018, the Respondent obtained summary judgment in the Magistrates Court against the Appellant, for $150,000 for his outstanding taxation liability and interest, and costs fixed at $2,401.35.

[2] The Appellant appealed against that judgment on six grounds, which I will now identify and discuss.

Ground (a) Section 78B of Judiciary Act 1903 (Cth)

[3] The Appellant's submission was that the magistrate should not have heard the application but instead should have adjourned it pending compliance with section 78B.

[4] The submission should not be accepted. A court's failure to ensure that section 78B notices are given to the various Attorneys-General does not have the consequence that the court's decision is a nullity or should be set aside. In *Glennan v Commissioner of Taxation* (2003) 77 ALJR 1195, the High Court (Gummow, Hayne and Callinan JJ) said at [13] that section 78B:

> "does not purport to nullify the continued exercise of jurisdiction in cases where its terms apply but there is a failure in their observance. In that sense, the 'duty' which s 78B imposes [namely, the duty of the court not to proceed in the cause unless and until the court is satisfied

> that the necessary notices have been issued to the various Atorneys-General] is one of imperfect obligation."

[5] In *Glennan*, as in this case, no section 78B notices were given at first instance but they had been given before the hearing of the appeal. On appeal, the High Court said at [14] that:

> "There was no lack of competence attending the judgment and orders under appeal. It should be added that s 78B notices were given on the hearing of the appeal."

[6] The Appellant submitted that *Glennan* was authority for the narrow point that a court would still have *jurisdiction* if the section 78B notices were not issued but says nothing about the *validity of a judgment* given on that occasion. However, in my view, the passage cited above from paragraph [14] of *Glennan* makes it clear that the judgment would still be valid as well.

[7] The first ground of appeal is rejected.

Ground (b) Conflict of laws

[8] The Appellant's submission was put in a number of ways but as I understood it, the argument was essentially that the Respondent cannot rely on hearsay evidence under UCPR rule 295(2) in an application for summary judgment.

[9] When a State court exercises federal jurisdiction, section 79(1) of the Judiciary Act relevantly provides that the laws of the State (including its laws relating to procedure and evidence) apply, except as otherwise provided by the Constitution or the laws of the Commonwealth.

[10] There was no dispute that the Magistrates Court was exercising federal jurisdiction when it heard and decided the summary judgment application which was brought under UCPR rule 292. Thus, Queensland laws of procedure and evidence applied—except as otherwise provided by the Constitution or Commonwealth laws.

[11] The Appellant submitted that the expression "laws of a State" refers to laws enacted by the State's legislature and therefore excludes subordinate legislation such as the UCPR. The submission should not be accepted. It was not supported by authority and is inconsistent with the broad reference in section 79(1) to a State's "laws relating to procedure". Those words are not expressed to be limited to laws enacted by the legislature and are otherwise apt to include relevant subordinate legislation. The laws of Queensland relating to court procedure include the UCPR, which applies in the Magistrates Court and governs the practice and procedure of that court. The UCPR is subordinate legislation made under the rule-making power contained in section 85 of the *Supreme Court of Queensland Act 1991.*

[12] It was also submitted that Chapter 3 (Admissibility of Evidence) of the *Evidence Act 1995* (Cth) constituted an exclusive code in respect of its subject matter, such that the Chapter 3 provisions (and not the UCPR provisions) control or govern the admissibility of evidence on a summary judgment application in a State court exercising federal jurisdiction. This submission should not be accepted. It is incorrect because under section 4(1) of the Evidence Act, the Act is expressed to apply to "all proceedings in a federal court"—and "federal court" is defined in the

Dictionary at the end of the Act to expressly *exclude* "a court or magistrate of a State.

[13] The second ground of appeal is rejected.

Ground (c) Appellant's application pursuant to s 192A of Evidence Act 1995 (Cth)

[14] Section 192A (Advance rulings and findings) of the Evidence Act provides that "the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to" a question about the admissibility or use of evidence before the evidence is adduced.

[15] The submission was that the magistrate erred in law by failing to find that by reason of various sections of the Evidence Act, the affidavit of Ms Tiko (for the Respondent) and numerous paragraphs in and exhibits to that affidavit were inadmissible. This submission should not be accepted. It is incorrect because, as noted in paragraph [11] above, the Evidence Act does not govern the admissibility of evidence on a summary judgment application in a State court exercising federal jurisdiction.

[16] It was also submitted that under UCPR rule 295(2), Ms Tiko's affidavit (or parts of it) and Mr Beckett's affidavit (which were filed on behalf of the Respondent) were inadmissible. Rule 295(2) provides that in a summary judgment application, an affidavit may contain statements of information and belief if the person making the affidavit states the sources of the information and the reasons for the belief. Those affidavits were said not to have stated the sources of the information or the reasons for the belief, or indeed that the deponents held any belief in the truth of the matters deposed to. Those submissions should not be accepted.

[17] Each of Ms Tiko's and Mr Beckett's affidavits expressly set out the sources of the information deposed to. Ms Tiko was the principal deponent for the Respondent. Her lengthy affidavit set out the detail of the Appellant's liability and how it arose. As the magistrate aptly observed (Decision, T4, lines 45-46): "[T]he affidavit is set out in a manner which sets out the framework within which the evidence is given and then descends into the particulars." In paragraph 2, Ms Tiko affirmed that she was able to depose to the matters stated in her affidavit from her own knowledge of the Appellant's tax affairs, including knowledge obtained from the records and information in the Respondent's possession. When dealing with the specifics of the Appellant's liability, Ms Tiko frequently used the words: "From my perusal of the ATO records, I say and believe to be true" (see, for example, paragraph 20). She also produced evidentiary certificates as to the Appellant's tax liability. The Appellant even submitted that Ms Tiko expressed conclusions and not facts and was not properly qualified to express any opinion and therefore her affidavit was inadmissible hearsay. That submission should not be accepted.

[18] Ms Tiko was the Respondent's officer who had the conduct of this matter (paragraph 1). She deposed to the history of the tax recovery proceedings. For example, she said (paragraph 7) that the Respondent was the Deputy Commissioner of Taxation and pursuant to the provisions of the *Taxation Administration Act 1953* (Cth) (TAA), was entitled to bring the proceedings to recover the amount claimed. The Appellant objected to that paragraph. He also objected to 11 other paragraphs which deposed to how the Appellant's tax liability arose and was calculated. All of those paragraphs are important aspects of the case and were set out in great detail in

the affidavit. The proposition that the Respondent's officer with the conduct of this very matter could not depose to them is entirely misconceived.

[19] Mr Beckett affirmed the Respondent's affidavit of debt as at the date of the summary judgment application. Such an affidavit was necessary for the application. He referred to his searching the Respondent's computer system for the Appellant's tax liabilities and produced evidentiary certificates as to the Appellant's then liability.

[20] The evidentiary certificates which were produced by Ms Tiko and Mr Beckett (who were Respondent-authorised deponents) were created under statutory authority and have prima facie (or in some cases, conclusive) evidence status: see section 8AAZJ (Evidentiary certificate about RBA transactions etc.) of the TAA and sections 255-45 Evidentiary certificates), 255-50 (Certain statements or averments) and 350-10 (Evidence) of Schedule 1 to the TAA. The use of evidentiary certificates and other prima facie evidence in tax-recovery cases is unquestioned: see, for example, *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473, per Gummow ACJ, Heydon, Crennan and Kiefel JJ at [38]. Thus, in *MacDonald v Deputy Commissioner of Taxation* [2017] QCA 206, Gotterson JA (with whom Sofronoff P and Philippides JA agreed) said at [42]:

> "Here there was prima facie evidence by way of certificates before the learned primary judge of the component parts of the respondent's claim. That evidence was not challenged."

[21] The third ground of appeal is rejected.

Ground (d) Appellant's application pursuant to UCPR

[22] The Appellant submitted that the magistrate erred in not ordering the Respondent to provide further particulars of the further amended statement of claim and in not striking out certain paragraphs of it. Some of the paragraphs were said to be "inconsistent" with others or with the particulars provided or with the evidentiary certificates, such that summary judgment should not have been ordered. It was also said that the magistrate erroneously "took into account his proposed ruling" on the summary judgment application when determining the Appellant's application. This submission should not be accepted.

[23] If there were inconsistencies in a Deputy Commissioner of Taxation (DCT)'s pleadings to recover a tax debt or if the particulars were deficient or inconsistent with the pleadings or the evidentiary certificates, then the authoritative principle to be applied is that—leaving aside possible instances where a statement of claim is "so deficient as to mislead a defendant as to the plaintiff's true cause of action" (which is not the case here)—any such pleading defect will not disentitle the DCT from obtaining summary judgment for a tax debt if the DCT establishes (in terms of UCPR rule 292) that there is no real prospect of defending all or part of its claim and there is no need for a trial of the claim or part of the claim: see *MacDonald v Deputy Commissioner of Taxation* [2017] QCA 206, at [40].

[24] The foundation for that principle was explained by P. McMurdo J (later JA) in *Equititrust Ltd v Gamp Developments Pty Ltd & Ors* [2009] QSC 115, at [12] (which was approved in *MacDonald*, at [40]), in the following terms: (1) the power to give summary judgment to a plaintiff is according to the terms of rule 292, (2) the

rule requires attention to a plaintiff's claim and does not expressly refer to a plaintiff's pleading, and (3) the rule does not limit the power to give summary judgment to instances where the plaintiff's argument precisely accords with its pleadings.

[25] Therefore, when considering the Appellant's applications, the magistrate was entitled to also consider the Respondent's rule 292 application and the evidentiary certificates (which, relevantly, had prima facie evidence status and were unchallenged by any sworn evidence by the Appellant) and to conclude that in all of the circumstances, the appropriate order was that because the Respondent had established that there was no real prospect of the Appellant's defending all or part of the claim and that there was no need for a trial of the claim or part of the claim, the Respondent was entitled to summary judgment. That approach was correct, even if there were inconsistencies between the further amended statement of claim, the particulars and the evidentiary certificates.

[26] The fourth ground of appeal is rejected.

Ground (e) Respondent's amended application for summary judgment filed 16.11.2017

[27] The Appellant submitted that the magistrate erred in not allowing his applications (as referred to in paragraph [22] above) and in allowing the Respondent's application, even though there were errors in the Respondent's evidence in respect of interest claimed. This submission should not be accepted.

[28] This ground raises similar issues to those raised (and rejected) under Ground (d) above.

[29] This ground of appeal is rejected.

Ground (f) General grounds

[30] The Appellant submitted that the magistrate erred in fact and in law, made findings and relied on evidence contrary to the *Evidence Act 1995* (Cth) and the UCPR, found that the Appellant could not challenge the Respondent's certificates, and admitted evidence that was inadmissible. This submission should not be accepted.

[31] There was only one point raised in this ground which had not been raised (and decided) under other grounds. That was the assertion that the magistrate found that the Appellant could not challenge the certificates "on any basis". However, that was not what the magistrate said or found.

[32] In his Decision, the magistrate observed that (1) the certificates are prima facie evidence "which can be challenged" (T3, lines 45-46), (2) the fact that it "may be subject to review in another place, does not mean that I should here commence on some search and inquiry exercise" (T4, lines 2-4), (3) "[t]he Tax Act is a code. If a person challenges, then the challenge takes place in the AAT, through to the Federal Court on appeal, not as part of some corollary attack to an assessment as part of a summary judgment application" (T4, lines 23-25), and (4) "as confirmed by counsel to me in the course of these proceedings, if a taxpayer has summary judgment entered against them and subsequently has the amount of the assessment set aside or

varied, then it is incumbent upon the Commissioner to move in the relevant state court to either have the judgment set aside or varied to accommodate what has occurred in the assessment stream" (T4, lines 27-33).

[33] No authority was cited which disputed the correctness of the magistrate's approach or understanding of the relevant legislative provisions or administrative practice.

[34] This ground of appeal is rejected.

Conclusion

[35] The appeal is dismissed.

[36] I will hear the parties as to costs.

[*Following submissions, the Appellant was ordered to pay the Respondent's costs of and incidental to the appeal, on the standard basis, as agreed or assessed.*]