

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No BS202 of 2004

DEPUTY COMMISSIONER OF TAXATION Plaintiff

and

MARTIN JOHN STEWART JENNINGS Defendant

No BS203 of 2004

DEPUTY COMMISSIONER OF TAXATION Plaintiff

and

DANIELLE MAYNADIER JENNINGS Defendant

BRISBANE

..DATE 19/10/2005

- [1] HIS HONOUR: In each of these cases the Deputy Commissioner of Taxation applies for summary judgment pursuant to Rule 292 for unpaid income tax and interest. The defendants were beneficiaries under a discretionary trust. They were the directors of the company which was the trustee. It made contributions to a fund in New Zealand purportedly for the welfare of employees and claimed deductions. The deductions were disallowed.
- [2] According to the Trust Deed the defendants take the income of the trust in default of a distribution by the trustee. In consequence, the defendants have been assessed upon the income which corresponds to the disallowed deductions.
- [3] The defendants at first resisted the applications for judgment arguing that Section 177 of the Income Tax Assessment Act 1936 did not assist the Commissioner's case because the notices of assessment or copies of them were not under the hand of a relevant person. But subsequently further notices were produced which were tendered and which the defendants' counsel concedes to be sufficient to provide the assistance of Section 177. Ultimately then there was no opposition to the applications for judgment and the arguments involved only whether the judgments should be stayed.

- [4] The defendants are challenging these assessments by applications they have brought before the Administrative Appeals Tribunal. They say that if the judgments are not stayed, they will likely be made bankrupt and they will be unable to direct the companies which conduct the business from which they and their family make their living and they will be prevented from prosecuting their applications in the Tribunal. I was informed that the Tribunal has offered four days for hearing in December this year which the defendants wish to take up but which were not convenient to counsel for the Deputy Commissioner. I infer that the Tribunal case, if the defendants were able to prosecute it, would be heard either in December this year or in the first few months of next year.
- [5] The stay applications are made pursuant to Rule 800 of the Uniform Civil Procedure Rules. That rule provides a broad discretion but the exercise of that discretion in this context, that is where judgment is given for unpaid tax the original liability for which is challenged in other proceedings, is informed by a substantial body of case law. Particular considerations apply in relation to tax recovery proceedings because of the operation of Sections 14ZZM and 14ZZR of the Taxation Administration Act 1953.
- [6] By Section 14ZZM the fact that a review of the assessment is pending does not affect the assessment and any tax may be recovered as if no review were pending. But as is common ground, the Court retains its power to stay a judgment in an appropriate case and the respective submissions accept that the relevant considerations were summarised by French J in *Snow and the Deputy Commissioner of Taxation* (1987) 14 FCR 119 at 139.
- [7] As French J there said, there are different approaches apparent from the cases as to the relevance of a taxpayer's prospects of challenging the assessment. In my view there is some tension between the notion that, for example, this Court should undertake some investigation of the merits of a taxpayer's challenge and on the other hand, the statutory regime of which Sections 14ZZM and 14ZZR, together with Section 177 of the 1936 Act are elements, which are directed towards limiting an investigation of the correctness of the assessments to a review or appeal for which that regime provides.
- [8] In some cases it might plainly appear that a taxpayer lacks any merit, in which case the demerit of his or her case would be a very important consideration. Save for those cases however, there will not be a justification for a rehearsal of the arguments involved in a pending review or appeal and there is a risk that something less than a full hearing, in this Court of the challenge to the assessment, could be unfair to one side or to the other.
- [9] The Administrative Appeals Tribunal has indicated that four days should be allocated for the hearing, undoubtedly because in the Tribunal's view there are factual issues as well as perhaps legal issues involved in the taxpayer's challenges. I am not persuaded in this case that the defendants' prospects of challenging the assessments are so plainly negligible that the demerits of their cases provides a substantial reason for refusing the stay. Nor on the other hand are their prospects of successfully challenging the assessment so plainly strong that they provide a substantial reason of themselves for granting a stay.

- [10] I turn then to the evidence of the defendants' financial position and of the likely impact upon that position were a stay not to be granted. That evidence is contained in affidavits sworn by each of the defendants and also an affidavit sworn by Mr R W McSwain, an accountant familiar with their affairs. The defendants own some real property as detailed in Mr McSwain's affidavit. They are also, according to his affidavit, beneficiaries under certain discretionary trusts, although it is said that they have no present entitlement to any interest in respect of the property or income of those trusts and their only potential interest is in the event that a discretion is exercised in their favour, in terms of any distribution or payment which might be made.
- [11] From other evidence I infer that those trusts are trusts through which the businesses of the defendants, being a concrete business and some grazing businesses are conducted. The defendants are directors of companies which it appears are the trustees of those trusts. One consequence of the defendants being bankrupted, as they might be in consequence of these judgments if they are not stayed, is that the defendants would be disentitled to act as directors of those companies and it seems to me that there is a substantial prospect that the businesses conducted by those companies would be affected and might have to cease. There is an obvious connection between the companies' prospects and in particular its ability to raise capital and borrow money and the pending bankruptcy or actual bankruptcy of its directors or former directors.
- [12] The defendants each swear to the effect that if the judgments are not stayed and they are made bankrupt, one consequence will be that they will be unable to continue to prosecute their challenges to the assessments presently before the Administrative Appeals Tribunal. In theory at least, it is possible that there might still be a stream of income flowing from the trusts which conduct those businesses. But as I have said there is some likelihood at least that their bankruptcy would lead to an impact upon those businesses and therefore to a cessation of that income stream.
- [13] There is no suggestion by the Deputy Commissioner of Taxation that bankruptcy proceedings would not be pursued if the judgments were not stayed and in particular will not be pursued ahead of what seems to be the imminent hearing of the cases in the Administrative Appeals Tribunal. I am persuaded that there is at least a real prospect that if the judgments are not stayed the defendants would be bankrupted and would be unable to continue to conduct their businesses with the likely cessation of those businesses ahead of the hearing of their cases in the Administrative Appeals Tribunal.
- [14] In the circumstances of these cases, those events would in my view constitute what French J described in Snow's case as an extreme personal hardship to the defendants. Against that there is no suggestion, as I understand the arguments, that the defendants in the meantime are looking to dispose of assets for the purpose of preventing recovery of these amounts.
- [15] Accordingly I am persuaded that there should be some stay of the judgments which will be given in favour of the plaintiff. An application was made by each defendant in terms that the enforcement of the money order made in this matter be stayed until further order of the Court. In my view it is more appropriate to limit the stay, at least at this stage, to a certain period of time designed insofar as it can be to provide sufficient

time for the expeditious determination of the proceedings in the Administrative Appeals Tribunal.

- [16] In my view the appropriate stay is one whereby the enforcement of the judgment be stayed for a period of six months or for such other period as is further ordered. In the proceedings then against Mr MJS Jennings, there will be judgment for the plaintiff in the sum of \$519,876.99. In the proceedings against Danielle Maynadier Jennings, there will be judgment for the plaintiff against the defendant in the sum of \$520,706.89.
- [17] In each case it is ordered that the enforcement of that judgment be stayed for a period of six months from today or until such other date as is further ordered.
- [18] HIS HONOUR: I further order that the defendant in each case pay to the plaintiff the costs of and incidental to the proceedings including reserved costs if any to be assessed on a standard basis.