SUPREME COURT OF QUEENSLAND

CITATION:	*Lis-Con Concrete Constructions Pty Ltd v Commissioner of State Revenue* [2011] QSC 363
PARTIES:	**LIS-CON CONCRETE CONSTRUCTIONS PTY LTD** ACN 106 854 111 (applicant) **v** **THE COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	BS 10170 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2011
JUDGE:	Chief Justice
ORDERS:	**1. Application dismissed.** **2. Applicant to pay the respondent's costs, including any reserved costs, to be assessed on the standard basis.**
CATCHWORDS:	TAXES AND DUTIES – PAY-ROLL TAX – ADDITIONAL TAX, AND COLLECTION AND RECOVERY OF TAX – where the applicant had failed to pay payroll tax over a three year period – where judicial review is sought of the respondent's decision to issue a garnishee notice to the applicant – where notices of assessment were given to the applicant on 20 October 2011, with each specifying 17 October as 2011 as the "due date" and 20 October 2011 as the "due date for recovery action", and a garnishee notice was served later that day – where the notice require payment of an amount "not more than" approximately $5.16 million – whether the applicant should have been afforded an opportunity to be heard before the notice issued – whether there was a debt payable when the notice issued – whether the notice was defective for failing to require the recipient to pay a stated amount – whether the notice was invalid because the preceding notices of assessment specified a date for payment which had passed before service of those notices – whether the respondent acted unreasonably

Judicial Review Act 1991 (Qld), s 20
Payroll Tax Act 1971 (Qld), s 11, s 59(1), s 60
Taxation Administration Act 2001 (Qld), s 26(2), s 30, s 33, s 50, s 54, s 58, s 132

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, cited
Commissioner of Taxation of the Commonwealth of Australia v Futuris Corporation Ltd (2008) 237 CLR 146, considered
General Electronics International Pty Ltd v Deputy Federal Commissioner of Taxation (1996) 96 ATC 5036, cited
Walker v Secretary, Department of Social Security (No 2) (1997) 75 FCR 493, cited
Webb v Stenton (1883) 11 QBD 518, considered

COUNSEL: M Wilson for the applicant
D W Marks for the respondent

SOLICITORS: Cleary Hoare Solicitors for the applicant
Crown Law for the respondent

[1] The applicant seeks the review, under s 20 of the *Judicial Review Act* 1991 (Qld), of the respondent's decision to issue a garnishee notice under s 50 of the *Taxation Administration Act* 2001 (Qld).

[2] That followed the issue, on 17 October 2011, of the following assessments:

(a) an arrears assessment in respect of the year ended 30 June 2009, in the amount of $1,423,906.99, including payroll tax, penalty tax and interest on unpaid tax;
(b) an arrears assessment in respect of the year ended 30 June 2010, in the amount of $1,761,395.07, including the same components; and
(c) a default assessment in respect of the year ended 30 June 2011, in the amount of $1,982,919.51, again including the same components.

[3] The notices of assessment were given to the applicant on 20 October 2011. Each specified 17 October 2011 as the "due date", and 20 October 2011 as the "due date for recovery action". The applicant was then warned of the garnishee notice, which was served on John Holland Pty Ltd and Thiess Pty Ltd (trading as Thiess John Holland) later that day.

[4] These events arose from the applicant's failure to pay payroll tax over the three year period, and the respondent's investigation into the applicant's financial affairs.

[5] The applicant challenged the issue of the garnishee notice on a number of grounds, which I summarize as follows (my numbering):

1. the applicant was not afforded an opportunity to be heard before the notice issued;
2. when the notice issued, there was no debt payable by the applicant;
3. the notice is defective because it does not require the recipient to pay a stated amount;
4. the notice is invalid because the notices of assessment which preceded it specified a date for payment which had passed by the time of service of those notices;

5. the respondent acted unreasonably:
   (a) in failing to have regard to the consequences for the applicant and unrelated third parties;
   (b) in not having regard to the merits of the case;
   (c) and in a way no reasonable person would act: without awaiting any objection to the assessment, timing the events to exert "extreme commercial pressure" on the applicant, and paralysing its business.

Ground one: opportunity to be heard prior to the issue of the garnishee notice

[6] Mr M Wilson, Counsel for the applicant, acknowledged that the legislation did not require that the applicant be given an opportunity to be heard on the question whether or not a garnishee notice might issue, but he submitted that because the legislation does not in terms which are "unambiguously clear" exclude the giving of that opportunity, such an opportunity should on ordinary principles of administrative law have been accorded. He relied on *Medway v Minister for Planning* (1993) 30 NSWLR 646, 652.

[7] Section 50 of the *Taxation Administration Act* 2001 sets out, in sub-s (1), the prerequisites for the issue of a garnishee notice, and then provides in sub-s (3) that the respondent may in those circumstances issue a notice. An obligation to provide an opportunity to be heard should not be implied into the legislation, especially because meeting such a requirement could "put at risk the effectiveness of the remedy" afforded by s 50. See *Walker v Secretary, Department of Social Security (No 2)* (1997) 75 FCR 493, 508, following *General Electronics International Pty Ltd v Deputy Federal Commissioner of Taxation* (1996) 96 ATC 5036, 5045.

Ground two: whether debt payable when notice issued

[8] One of the prerequisites for the issue of a garnishee notice under s 50(1)(a) is that "a debt is payable by [the] taxpayer".

[9] The applicant contends that because the notices of assessment were served on the applicant on 20 October 2011, "the earliest date at which a debt could have arisen was at the close of business on 20 October [2011] if the debt remained unpaid".

[10] There are two answers to that submission.

[11] The first is that because of s 132(1)(b)(ii), the notices (copies are exhibited to the affidavit of R E Jolly filed by leave on 21 November 2011) constituted "conclusive evidence that the amount and all particulars of the assessment [in each case] are correct". Compare, in relation to a similar regime, *Commissioner of Taxation of the Commonwealth of Australia v Futuris Corporation Ltd* (2008) 237 CLR 146, 156-7, 167. The service of the notices of assessment crystallized the applicant's obligation to pay, and that preceded the giving of the garnishee notice.

[12] In any case, the nomination of an invalid "due date" for payment, so that none was validly nominated, did not have the consequence that there was no "debt". A "debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation" (*Webb v Stenton* (1883) 11 QBD 518, 527 per Lindley LJ).

[13] Second, because of s 11 of the *Payroll Tax Act* 1971 (Qld) liability to pay payroll tax arises "on the return date for lodgement by an employer of a return". In this case, calendar monthly returns were required (s 60). By s 59(1), the applicant was obliged to lodge a return not later than seven days after the end of the month. Accordingly, the debt in relation to the payroll tax arose seven days after the end of each month over that three year period. There was therefore, at the time of the issue of the garnishee notice, a debt payable in respect of those monies by the applicant.

[14] The unpaid tax interest component had accrued prior to the issue of the notice of assessment, because of the operation of s 54 of the *Taxation Administration Act*.

[15] Section 58 of the *Taxation Administration Act* deals with the penalty tax component. While Mr Wilson accepted that the amount was payable as a debt, he excepted the "uplift" provided for by sub-s (3) – included here – because it depended on the exercise of a discretion by the respondent. But once the discretion was exercised, to apply the uplift, the amount assessed fell due: the liability was provided for by s 58(1).

[16] The garnishee order was served on Thiess John Holland after service on the applicant of the notices of assessment, so that the condition under s 50(1)(a) that the debt must have been payable, was satisfied.

Ground three: whether garnishee notice required recipient to pay a stated amount

[17] Section 50(3) of the *Taxation Administration Act* provides that a garnishee notice must require the recipient to pay to the respondent "a stated amount". This notice required payment of:

> "The amount, not being more than $5,168,221.57, which the Garnishee is liable or may become liable to pay to the Taxpayer by way of a Progress Payment Claim, Final Payment Claim or return of Security or Retention pursuant to the following six contracts in writing between the Garnishee and the Taxpayer concerning the 'Airport Link/Northern Busway…' construction project…"

[18] Counsel for the applicant submitted that the amount being sought was left unclear because of the use of the words "not being more than" $5,168,221.27. I do not accept that submission. The notice makes it clear that the recipient is to pay to the respondent all progress payment claims, final payment claims, and security or retention monies, until the payments made aggregate $5,168,221.27 (which as has been seen is the total amount payable under the notices of assessment). The notice thereby complied with s 50(3).

Ground four: due date for payment specified in notices of assessment

[19] Because of s 30(1)(d) and (2), and s 33(2) and (3), it was impermissible to state, on the reassessment notices, a date for payment prior to the date on which the notices were given, which was 20 October 2011. The same position applied to the default assessment notice, because of s 30(1)(c).

[20] The respondent relies on the conclusive evidence provision in s 132(1)(b)(ii), "that the amount and all particulars of the assessment are correct", and additionally on

sub-s (2), which provides that the validity of an assessment is not affected "merely because a provision of a tax law has not been complied with".

[21] Mr Marks, who appeared for the respondent, also submitted that a fair reading of the notices would suggest the nomination of 20 October as the date for payment. It would be difficult to sustain that position because of the express specification of 17 October as the "due date" – albeit the failure to change that date involved a simple clerical mistake.

[22] Counsel for the applicant submitted that s 132 preserves only the assessment, not the notice of assessment, and that nominating the date for payment is separate from the process of assessment.

[23] But the section in terms relates to an assessment notice and preserves the validity of "all particulars of the assessment". There is no reason to exclude from that the date for payment. Also, the definition of "assessment" in the schedule to the Act allies assessment with an assessment notice. I do not consider that the separate reference in s 26(2) to the specifying in the notice of assessment of the amount of tax assessed, and the date for payment, divorces the latter from the process of assessment.

Ground five: reasonableness

[24] As developed in his oral submissions, Mr Wilson's essential points were two:

(a) that the dynamics in relation to the respondent's office left its relevant officers insufficient time to consider whether to exercise the discretion to issue a garnishee notice under s 50(3); and

(b) that the revenue officer Ms McDonnell erred in issuing a notice in relation to the entire debt, in focusing on the payment by Thiess John Holland of an amount equivalent to only about one-half of the total debt leading to her conclusion that the applicant's commercial liability would not be prejudiced. See her "memo to file" of 20 October 2011, exhibit 36 to the supplementary affidavit of K J G Easton filed on 18 November 2011.

[25] Assuming for the present that there would be substance in the factual basis for each of those challenges, nevertheless they could not succeed on this application for judicial review. That is because, in the case of the first, the challenge concerns the quality of the administrative decision made; and in the case of the second, because any factual mistake could not vitiate the decision – it concerned but a "step along the way" to the ultimate determination (cf. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 340-1).

[26] In para 5 of these reasons, my summary of the applicant's written material in relation to this ground suggests a challenge based more broadly in considerations of fairness. That could not survive the constraints on judicial review. It is not reasonably arguable that the level for intrusion established by the *Wednesbury Corporation* test (that no decision-maker could reasonably have decided that way) has been reached.

Conclusion

[27] None of the grounds of complaint has been sustained.

[28] There will be orders that the application is dismissed, and that the applicant pay the respondent's costs, including any reserved costs, to be assessed on the standard basis.