

DISTRICT COURT OF QUEENSLAND

CITATION: *Commissioner of State Revenue v Emrold Pty Ltd as trustee for the Jones Superannuation Fund* [2010] QDC 276

PARTIES: **Commissioner of State Revenue
(Plaintiff)**
V
**Emrold Pty Ltd (ACN 105 347 939) as trustee for the
Jones Superannuation Fund
(Defendant)**

FILE NO/S: No D3498 of 08

PROCEEDING: Application

ORIGINATING COURT: District Court Brisbane

DELIVERED ON: 26 March 2010

DELIVERED AT: District Court Southport

HEARING DATE: 9 October 2009

JUDGE: McGinness DCJ

ORDER: **1. Judgment for the plaintiff against the defendant in the sum of \$54,382.14**
2. The defendant pay the plaintiff's costs of and incidental to the application to be assessed on the standard basis.

CATCHWORDS: SUMMARY JUDGMENT – whether judgment ought to be granted under r292 Uniform Civil Procedure Rules 1999 – STAMP DUTIES – Recovery of duty – whether action can be defended on ground assessment in error.
Duties Act 2001 (Qld), s 8, s 9(1)(a), s10(1)(c), s 11(7)(b)(i), s 16, s 17(2), s 115 and schedule 1
Taxation Administration Act 2001 (Qld), s 30, s 45, s54, s63, s69, s 131 and s 132
Uniform Civil Procedure Rules, s 292

Bolton Properties Pty Ltd v J K Investments (Aust) Pty Ltd [2009] QCA 135
Deputy Commissioner of Taxation and Salcedo [2005] 2 Qd R 232
Deputy Commissioner of Taxation v Broadbeach Properties Ltd (2008) 82 ALJR 1411
Federal Commissioner of Taxation v Futuris Corporation Ltd (2008) 82 ALJR 1127

FJ Bloeman Pty Ltd v Federal Commissioner of Taxation
(1981) 147 CLR 360

*Queensland University of Technology v Project
Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259

COUNSEL: D Marks, for the plaintiff

D Keane, for the defendant

SOLICITORS: Crown Law, for the plaintiff

Russell and Company, for the defendant

Introduction

- [1] The plaintiff seeks summary judgment against the defendant pursuant to rule 292 *Uniform Civil Procedure Rules* (“UCPR”).
- [2] Rule 292(2) *UCPR* provides that the court may grant Summary Judgment if it is satisfied that:
- The Defendant has no real prospects of successfully defending all or part of the Plaintiff’s claim; and
 - There is no need for a trial of the claim or the part of the claim
- [3] The interpretation and application of r 292 has been considered in numerous cases. The Court must consider whether there is a realistic as opposed to fanciful prospect that the defence might successfully defend the Plaintiff’s claim.¹
- [4] In *Deputy Commissioner of Taxation and Salcedo*² Williams J reviewed the authorities and the test to be applied. He said at [17]:

“Ultimately the rules are there to facilitate the fair and just resolution of the matters in dispute. Summary judgment will not be obtained as a matter of course and the judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect of succeeding at a trial: if that is established then the matter must go to trial.”

- [5] The plaintiff’s claim is for the sum of \$54,382.14 which it maintains is a debt due and payable under s 45(2) of the *Taxation Administration Act 2001* (Qld). The plaintiff claims the debt comprises transfer duty and unpaid tax interest for transfer duty assessed on 23 May 2006.

Plaintiff’s Claim

- [6] On 15 December 2008 the plaintiff commenced proceedings in the District Court by way of Claim and Statement of Claim to recover unpaid stamp duty and unpaid interest.
- [7] On 27 February 2009 the plaintiff filed an Amended Statement of Claim.

¹ *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259 at 265; *Bolton Properties Pty Ltd v J K Investments (Aust) Pty Ltd* [2009] QCA 135 at [2] and [74].

² [2005] 2 Qd R 232.

- [8] The plaintiff alleges the defendant was a party, as transferee, to two transfers of “dutiable property” in terms of the then section 10(1)(c) of the *Duties Act 2001* (Qld), namely, “Queensland Marketable Securities” being shares in companies taken to be registered in Queensland.
- [9] The other parties to the transfers were, as transferors, Mr and Mrs Jones. The defendant was a company and was the trustee of the Jones Superannuation Fund. The plaintiff alleges that on 14 March 2006 Mr and Mrs Jones as trustees for the Jones Family Superfund Account transferred 2,047,500 ordinary shares in Australian Technology Innovation Fund Limited (“ATIF”) to the defendant (“the first transfer”). Also, on 14 March 2006 Mr and Mrs Jones as trustees for the S&N Superfund Account transferred 1,190,000 ordinary shares in CBio Limited to the defendant (“the second transfer”).
- [10] On 11 May 2006 solicitors acting on behalf of the defendant provided to the plaintiff the following documents for the purpose of assessing transfer duty with respect to the first and second transfers: (a) Australian Standard Transfer Form for the transfer of 2,047,500 ordinary shares in ATIF from Mr and Mrs Jones to the defendant; (b) corresponding Form 2.2 for the first transfer; (c) ATIF Annual Report; (d) Australian Standard Transfer Form for the transfer of 1,190,000 ordinary shares in CBio Limited from Mr and Mrs Jones to the defendant; (e) corresponding Form 2.2 for the second transfer, and (f) DFS Equities Weekly Wrap.
- [11] The plaintiff assessed the transfer duty payable in respect of the transfers on 23 May 2006, and on or about that date issued the defendant with Notices of Assessment in respect of the transfers.³
- [12] The plaintiff in the Statement of Claim further alleges the following:
- Each transfer was a “dutiable transaction” in terms of s 9(1)(a) of the *Duties Act*;
 - The transfer duty imposed on the dutiable transactions by s 8 of the *Duties Act* is payable by the defendant as a party to the dutiable transaction in accordance with s 17(2) of the Act;
 - The transfer duty became due on 26 June 2006, the date specified in the Assessment Notice⁴ in accordance with s 30 of the *Taxation Administration Act 2001* (Qld);
 - The transfer duty became payable on execution of the transfers in accordance with s 16 of the *Duties Act* and paragraph (b) of the first Item in the Table in Schedule 2 of the *Duties Act*;
 - The transfer duty is imposed on the dutiable value of each dutiable transaction in accordance with s 8(2) of the *Duties Act*;
 - The dutiable value in accordance with s 11(7)(b)(i) of the *Duties Act* is (a) as to the first transfer \$3,071,250; and (b) as to the second transfer \$3,570,000 being in each case the unencumbered value of the dutiable property;

³ See Amended Statement of Claim [8].

⁴ See [8] Amended Statement of Claim.

- The rate of duty was 60 cents for each \$100 (or part of \$100) of the dutiable value, in accordance with then s 24(1) of the *Duties Act*;
- The total transfer duty was \$39,847.80⁵;
- The transfer duty has not been paid.

[13] The plaintiff further submits it is entitled to receive unpaid tax interest (“UTI”) on the amount of \$39,847.80 owing by the defendant under the Assessments, pursuant to s 54 of the *Tax Administration Act*, calculated daily in accordance with the annual percentage rates as particularised at [10] of the Amended Statement of Claim.

[14] On 23 May 2006 the plaintiff sent an Assessment Notice to the defendant’s solicitors with respect to the transfers requesting payment of the total amount of \$39,582.40.

[15] The amount of \$54,382.14 remains outstanding which is comprised of the total amount owing under the Assessments, namely, \$39,847.80 and the UTI accrued from and including the UTI start date (30 May 2006) on each Assessment until the date of filing of the Claim.

Defendant’s Defence

[16] The defendant filed an Amended Defence on 8 April 2009. The defendant denies the plaintiff’s interpretation of s 17(2) of the *Duties Act* on the basis that s 17(2) of the Act records that transfer duties must be paid by the parties to the transaction, of which the defendant is only one.

[17] The defendant further denies that the sum of \$54,382.14 is a debt due and payable to the State under s 45(2) of the *Taxation Administration Act 2001* on the basis that the transfers were never concluded. The defendant argues the first alleged transfer and second alleged transfer were never carried into effect because:

- The share transfer forms were not delivered to the secretary of the share companies and no request was made to either company to register the transfer of shares.
- The directors of the companies made no resolution to register the transfer of the shares.
- The secretary or share registrar of the companies did not write up the transfer of shares in the Register of Members, remove the name of Mr and Mrs Jones from the Register of Members, or reduce Mr and Mrs Jones’ shareholding in the companies,
- The name of the defendant was not added to the company’s Register of Members.
- The companies did not issue the defendant with a Share Certificate or Holdings Statement.
- The defendant did not pay any consideration to Mr and Mrs Jones for these shares.

⁵ [8] Amended Statement of Claim

- [18] The defendant further relies on a Deed of Rescission dated 17 July 2008 in which Mr and Mrs Jones and the defendant agreed and declared that the parties no longer wished to complete the transfer of the shares to either company, the transfer of the shares in each case was rescinded and the transfers of the shares in each case was at an end.
- [19] The defendant submits there has been no further agreement entered into between the parties for the transfer of either group of shares.
- [20] The defendant further submits that pursuant to s 115(1)(d) of the *Duties Act* transfer duty is not imposed on a dutiable transaction that is an agreement for the transfer of dutiable property if the agreement is ended with the consent of the parties to it and there is no resale agreement.
- [21] In summary, the defence argues that the sum of \$54,382.14 is not an amount payable under a tax law for the purposes of s 45(1) of the *Taxation Administration Act*.
- [22] The defendant's solicitors provided the plaintiff with two Deeds of Rescission in accordance with the above facts and argue that, pursuant to s 115(3) of the *Duties Act 2001*, if on assessment, transfer duty has been paid on an agreement that is not liable to transfer duty because of that section, the Commissioner must make a re-assessment if an Application is made within six months after the agreement is ended or within the longer period the Commissioner allows and therefore the plaintiff is obliged to make a re-assessment of its assessment dated 23 May 2006.

Submissions by the plaintiff on the application

- [23] The plaintiff seeks to prove the debt under the evidentiary provisions of the *Taxation Administration Act 2001* (Qld). Section 132 provides:
- “132 Evidentiary provisions for assessments**
- (1) Production of a document signed by the Commissioner purporting to be a copy of an assessment notice—
- (a) is conclusive evidence of the proper making of the assessment; and
- (b) for—
- (i) a proceeding on an appeal against, or review of, a decision on an objection—is evidence that the amount and all particulars of the assessment are correct; or
- (ii) another proceeding—is conclusive evidence that the amount and all particulars of the assessment are correct.
- (2) The validity of an assessment is not affected merely because a provision of a tax law has not been complied with.”
- [24] The plaintiff relies on the following documents as conclusive (prima facie) evidence of the debt owing:

- The Evidence Certificate of the Commissioner's signed Assessment.⁶
- The Commissioner's Certificate signed by David John Walsh pursuant to s 131(1)(a) of the *Taxation Administration Act* as delegate of the Commission of State Revenue.⁷

[25] The Commissioner's Certificate certifies that:

1. Emrold Pty Ltd (A.C.N 105 347 939) as trustee for the Jones Superannuation Fund is on 8 October 2009 liable to pay to the Commissioner of State Revenue the sum of \$54,382.14 in accordance with section 45 of the *Taxation Administration Act 2001 (Qld)*.
2. The sum of \$54,382.14 is on account of transfer duty and unpaid tax interest for transfer duty assessed on 23 May 2006.

[26] The plaintiff submits the function of s 132(1)(b)(i) concludes debate in the court of recovery, namely, this court, and any objections to the amount and particulars must be made to the Commissioner or appealed to the Queensland Supreme Court.

[27] The plaintiff submits that the *Tax Administration Act* makes provision for objections and appeals under ss 63 and 69, and submits that in that context s 132 is in the same terms as Federal statutes concerning income tax and GST.

[28] The plaintiff relies on the recent High Court decision of *Deputy Commissioner of Taxation v Broadbeach Properties Ltd* (2008) 82 ALJR 1411. In that case the court held that production by the Commissioner, pursuant to the *Administration Act*, Schedule 1, ss 105-100, of Notices of Assessment and of GST Declarations conclusively demonstrates that the amounts and particulars of the Assessments and Declarations are correct. That being so, the operation of the provisions in the Taxation laws creating the debts and providing for their recovery by the Commissioner could not be sidestepped in an Application by a taxpayer under s 459G to set aside a statutory demand by the Commissioner. There was "no genuine dispute" within the meaning of s 459H(1).⁸ Reference may also be made to the decisions of the High Court in *FJ Bloeman Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360 and *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 82 ALJR 1127.

[29] In response the defendant advanced an argument based on the merits of the matters outlined in the defence, which I need not repeat. It was submitted that those matters raised issues which required a trial for determination, so that summary judgment should not be given.

Analysis

[30] The matters raised in the defence are interesting. Originally Stamp duty was a tax on instruments, ie documents, rather than transactions, and in such circumstances it would not be unusual for a liability for duty to arise in respect of an instrument before it had fulfilled its intended purpose. If the party or parties abandoned that

⁶ Affidavit of Maria Ferguson sworn 10 September 2009, Ex MF-1

⁷ Affidavit of David John Walsh sworn 8 October 2009, Ex DJW-1 & DJW-2

⁸ *Deputy Commissioner of Taxation v Broadbeach Properties Ltd* (2008) 82 ALJR 1411

purpose after the liability to duty arose, that ordinarily did not give rise to any entitlement to a refund. In time the tax came to be extended to transactions, particularly as an anti-avoidance device, but its conceptual origins should not be forgotten. If the requirements for stamping have arisen in respect of a particular instrument, or if duty has become payable in respect of a particular document, what is done with the document thereafter is usually of no consequence.

- [31] Reliance on s 115 depends on the proposition that the transfer was both an instrument of conveyance and an agreement to convey. So far as the transferor is concerned, it is not so much agreeing to transfer, as doing what is required of it in order to effect a transfer. Any agreement of the transferee may be rather an acceptance of the transfer, and an agreement with the company to take on any responsibilities as shareholder. These are interesting issues, but it is not necessary or appropriate to decide them in order to resolve this application.
- [32] The reason is that these are issues for any proper challenge to the assessment by the mechanism provided by the Duties Act, under s 63 and s69. The effect of the provision relied on by the Plaintiff, s 132 *Taxation Administration Act*, is that the evidentiary effect of the certificate which is before me is conclusive for this proceeding. I am bound by the statute to proceed on the basis that the amount and all the particulars of the assessment are correct. That this provision means what it says has been confirmed by the relevant authorities on it and similar provisions in revenues statutes. No only do I not need to decide those interesting issues, I am prohibited by statute from deciding them.
- [33] The defendant seeks to dispute the substance of the assessment in enforcement proceedings. It cannot do so. It did not show, or even attempt to show, that the amount claimed was not payable on any other basis. All the defendant's submissions were directed to the proposition that the assessment is wrong, but if I proceed on the basis that the assessment is right, as I am bound to do, the defendant has shown or suggested no defence. The position would be the same if the matter went to trial. I am therefore satisfied that in this matter there is no real possibility of the defendant succeeding if the matter went to trial, or indeed that there is any need for a trial of the action. The plaintiff has satisfied the requirements of r 292 and it is appropriate to give summary judgment.
- [34] I therefore give judgment that the defendant pay the plaintiff the sum of \$54,382.14.

Costs

- [35] Argument was heard at the end of the application proceedings in relation to costs. The plaintiff, with leave, filed an affidavit estimating costs of and incidental to the application⁹. The defendant did not specifically address the issue of quantum of costs sought by the plaintiff. The defendant submitted that the plaintiff should bear the costs of the application. The defendant submitted that the proceedings were commenced by the plaintiff after the plaintiff failed to properly answer an objection to the assessment submitted by the defendant. However, as the plaintiff submits, what the defendant was originally seeking was a re-assessment by the Commissioner, not an objection. Because the current application is an enforcement

⁹ Affidavit of Van Thu Thi Pham sworn 8 October 2009.

proceedings against which the defendant has no defence, costs should be awarded to the plaintiff.

- [36] The estimate of costs seems somewhat high. I therefore order the defendant pay the costs of the application to be assessed on the standard basis.