DISTRICT COURT

CIVIL JURISDICTION

JUDGE R JONES

No 2510 of 2010

COMMISSIONER OF STATE REVENUE Plaintiff

and

DENNIS PETER RIGON AND ANOTHER Defendants

BRISBANE

..DATE 09/03/2011

ORDER

HIS HONOUR: This is an application by the Commissioner of State Revenue seeking the following relief: (1) That summary judgment be entered in favour of the plaintiff pursuant to Rule 292 of the Uniform Civil Procedure Rules 1999; further, alternatively, that the defendant's defence be struck out for failing to disclose a reasonable defence pursuant to rule 171A; further that the defendant's counterclaim be struck out for failing to disclose a reasonable cause of action pursuant to rule 171A and that the defendant pay the plaintiff's cost of and incidental to this application.

During the course of proceedings the order in respect of costs was varied to seek costs on an indemnity basis, but for the reasons I've already given I am not prepared to order costs on an indemnity basis.

Essentially, the claim is for unpaid stamp duty in the amount of $52,174.18, together with interest referred to as unpaid tax interest. The totality of the unpaid stamp duty and the unpaid tax interest is $62,099.26. The quantum of that amount has been deposed to in the material which I'll come to in a moment.

The background to the application can be largely gleaned from the statement of claim filed by the applicant. The defendants relevantly were trustees of the Rigon Family Trust and the defendants, as purchasers, and a Ms Hammond and an entity known as Cartmell Nominees Pty Ltd as vendors and others entered into a deed of sale of interest on the 26th of August 2008.

Pursuant to that deed the vendors agreed to sell to the defendants all the interest held by the vendors in the trust known as the Windsor Trust. The Windsor Trust was a unit trust. That trust had on issue 1,000 units, each unit carrying the same rights. Each unit represented an interest of the unit holder from time to time as a beneficiary of the trust. The vendors had between them 700 of those 1,000 units. Under the deed the vendors agreed to sell to the defendants those 700 units.

The units were transferred to the defendants in the following proportions, by Ms Hammond 600 units and by Cartmell Nominees Pty Ltd 100 units. The two trust acquisitions together arose from the one arrangement for the purposes of section 30(1) of the Duties Act 2001. None of those factual matters are disputed in the defence of the defendants.

The effect of those transactions was to create, according to the applicant, liability on the part of the defendants under the Duties Act 2001. The duty of all transaction being one created under section 9(1)(i) of that Act, being a trust acquisition or trust surrender.

On 16 December 2008 the applicant assessed the transfer duty payable at $92,428.50 and on the same day served an assessment notice on the defendants. Again, those facts were admitted by the defendants.

On 13 February 2009 the defendants paid to the applicant the sum of $10,000 on account of the tax debt to which I have

referred. On 4 February 2009 the defendants applied for a payment arrangement with the applicant, which was agreed to after the first payment to which I've referred. The date of the agreement to the payment arrangement was 16 February 2009.

The defendants defaulted in respect of that arrangement and as a consequence a new payment arrangement was entered into on 16 March 2009, but the defendants also defaulted on that arrangement. A new arrangement was entered into in July 2009, but that was also defaulted on.

On 2 September 2010 the applicant commenced proceedings in this Court for recovery of the outstanding tax and the unpaid tax interest. On 23rd November 2010 the defendant filed its defence and counterclaim. Significantly, the defendants admitted in its defence a number of the allegations made against them by the applicant. I don't intend to refer to them exhaustively, but I consider a number of these bear mentioning.

The transaction between the defendants and Hammond and Cartmell Nominees was admitted. It was also admitted that the applicant had served the notice of assessment on the defendants. The due date for payment of the duty was admitted. The various payment arrangements to which I have referred have been admitted, as was the payment of $10,000. It was also admitted that the defendants had breached the payment arrangements.

However, notwithstanding those admissions the defendants denied paragraphs 10, 15, 17, 19, 22, 23 and 45 of the statement of claim and pleaded by way of defence and counterclaim, in paragraphs 3(i) through to 8 of the defence, the following. "3.1. In respect of paragraph 10 the defendant denies the allegations because the assets in the balance sheet at the time of assessment contained inter-company loans and cash which were in the business at the time of transfer. Therefore, I make the following comments." Thereafter some particularisation follows.

Then under paragraph 3.2 of the defence; “under chapter 3, section 1721, value of a particular property disregarded (a) cash - balance sheet shows $83,798; (d) loans to associated persons of the corporation - D Rigon $10,092; (e) loans that are to be repaid within one year after due money is lent, including" - Thereafter various loan particulars are set out.

In paragraph 3.3 it is said that "In respect of paragraph 15(b) the defendant denies the allegations because the Windsor Trust dutiable value should have been $701,199 and not $2,904,818 and that in respect of paragraph 17(a) of the statement of claim the defendant denied the allegations because of increases in the trust interest from Cartmell Nominees' dutiable value. It is then submitted that the dutiable value should have been 10 per cent of $701,199 and not 10 per cent of the figure of $2,904,818.

I do not intend to go into all of the subparagraphs of paragraph 3 of the defence other than to note that

subparagraphs 5 onwards, to varying degrees, reflect the same sort of assertions made in subparagraph 4.

In Mr Rigon's affidavit filed 1 March 2011 some of those defences are addressed, particularly in paragraphs 15 and 16 of that affidavit. In respect of this affidavit I should in fairness note that it was admitted by me under objection by Mr Marks.

The scheme of the Taxation Administration Act 2001, as I understand it, provides for a process for review and appeals against taxation assessments. Section 63 of that Act deals with the right to object. Sections 64 to 68 deal with a number of substantive and procedural matters, including who bears the onus of proof and that the Commissioner must give written notice of his decision on the objection to the objector.

Section 69(2) provides that "a taxpayer dissatisfied with the decision may appeal to the Supreme Court or apply to QCAT for a review of the decision." Under both of those bases, be it by appeal or application, they must be commenced within 60 days of the notice being given.

The defendants did not avail themselves of this process, that is there was no objection was made to the decision notice within the time limit of 60 days. When asked why the defendants did not avail themselves of this process Mr Rigon was quite candidly said that at the time, he was busy trying

to save his company in the face of the global financial crisis and adverse weather.

He said essentially that the defendants took the assessment at face value as being true and correct and it was only later, after having some more time to consider the situation, did it occur to him that he might have had a defence to the claim. In this regard, Mr Rigon was also quite candid in conceding that the facts and matters making up the defence and counterclaim were really, in substance, what would have grounded the defendant's objections had that course of action been taken by the defendants.

In respect of the allegations in the defence and counterclaim Mr Marks submitted that - and here I will quote from his submissions at paragraphs 21 through to 28. "The only point raised by the defendant's defence is about the operation of the different chapter altogether, chapter 3 of the Duties Act. The key to the pleaded defence is at the top of page 2, the reference to section 172. This is misguided. Section 172 is in chapter 3, part 1, division 2, subdivision 3. This subdivision applies for determining whether a corporation is a land rich corporation. That is not something relevant to the calculation of the duty under chapter 2." I pause here to note that that is the chapter under which the subject duty was assessed.

Mr Marks' submissions then go on to say, "Rather, section 172 is a provision to prevent avoidance of one of the criteria for duty under chapter 3, i.e., that the company be land rich."

He then goes on to submit that "Section 172 excludes liquid and not arms length assets from chapter 3 calculation.

Mr Marks' submissions conclude by saying that "This is irrelevant to the assessment of transfer duty under chapter 2 and this is why section 172 and, indeed, all of subdivision 3 is confined by section 169 to determining whether a corporation is land rich." In paragraph 28 Mr Marks' submissions conclude by saying, "That is all the defence and the cross-claim states and both are misguided."

By reference to the material before me I am satisfied that Mr Marks' submissions are correct. If I might pause here to note that some of the matters raised in the defence might have been able to be agitated at any objection hearing under the provisions of the Assessment Act to which I have referred. However they do not constitute a defence or ground a counterclaim in respect of the case pleaded against the defendants.

As I have already alluded to, the transaction underlying the subject duty has been admitted by the defendants. In an affidavit filed 16 December 2010, being an affidavit of Ms Ferguson, Exhibit 1 is a document stated to be a Commissioner assessment notice. It gives an assessment summary stating the duty payable to be $92,428 and noting that the amount is the total liability as at 16 December 2008.

Exhibit 1 to the affidavit of Mr David Walsh filed 8 March 2011, is a Commissioner's certificate signed by Mr Walsh as a

senior revenue officer, being a delegate of the Commissioner of State Revenue. That certificate relevantly states, "I, David John Walsh, Senior Revenue Officer, delegate of the Commissioner of State Revenue, hereby certify that (1) Dennis Peter Rigon and Amanda Mary Rigon as trustees for the Rigon Family Trust is on 7 March 2011 liable to pay to the Commissioner of State Revenue the sum of $62,099.26 in accordance with section 45 of the Taxation Administration Act 2011; (2) The sum of $62,099.26 is on account of transfer duty and unpaid tax interest for transfer duty assessed on 16 December 2009."

In this regard, section 132 of the Tax Administration Act 2001 provides, "Evidentiary Provisions for Assessments. Subsection 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 a 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. Subsection 2 provides the validity of an assessment is not affected merely because a provision of a tax law has not been complied with."

When asked be me why section 132 of the Tax Administration Act did not apply in the circumstances of this application Mr Rigon responded by, in essence, saying that the certificate was invalid because it failed to take into account the

defendant's objections to the tax liability. Those objections were articulated in an e-mail sent to the Commissioner on 30 December 2009.

That e-mail correspondence relevantly stated that the trust acquisition was a result of the death of a member of the Windsor Trust and therefore should not have attracted any duty and that under section 121(a) at the time of acquisition the gross assets of a company group, Trueline Group, was overstated and included in the assets, were buildings located at 290 Quay Street, Rockhampton, owned by Namco Pty Ltd, that company being part of a group of companies that were acquired and apparently, according to this e-mail, that building was sold on the 26th of June 2008 for $1.3 million.

The e-mail asserts, as I understand it, that that amount should not have been included in any taxation calculations. The e-mail goes on to say that the defendants therefore believe they were entitled to 100 per cent refund.

Mr Walsh was cross-examined by Mr Rigon. I do not think it is necessary to go into the details of that cross-examination because it seems to me that the failure of the assessment officer, in this case Mr Walsh, to deal with or take into account the matters raised in the e-mail does not detract from the statutory meaning and effect given to such documents under section 132 of the Act. Accordingly, in my view the applicant is entitled to the benefit of the full force and effect of that section.

In the Commissioner of State Revenue v Emrold Pty Ltd [2010] QDC 276 Judge McGinness was concerned with an application for judgment by the Commissioner in circumstances where - quoting from the reasons of her Honour in paragraphs 16 and 17 - "The defendant filed an amended defence. The defendant denied the plaintiff's interpretation of section 17(2) of the Duties Act on the basis that section 17(2) of that Act records that transfer duties must be paid by the parties to the transaction, of which the defendant was only one. The defendant further denied the tax debt on the basis that the transfers were never concluded, arguing that the first alleged transfer and second alleged transfer were never carried into effect for various reasons."

Mr Marks before her Honour in that case, as is the case here, relied at least in part on the meaning and effect of section 132 of the Act to prove the debt. In paragraph 28 her Honour considered a number of decisions to which I have also been referred, including the Deputy Commissioner of Taxation v Broadbeach Properties Ltd and Others (2008) 82 Australian Law Journal Reports 1411. F J Bloemen Pty Ltd v The Federal Commissioner of Taxation (1981) 147 Commonwealth Law Reports 360 and the Federal Commissioner of Taxation v Futuris Corporation Ltd (2008) 82 Australian Law Journal Reports 1127.

In paragraph 31 Judge McGinness noted that the issues raised in the defence were interesting, but it was neither necessary or appropriate to decide them to resolve the application before her Honour.

After making the observation that the defence raised interesting questions, her Honour at paragraphs 32 and 33 said, "The reason is that these are issues for any proper challenge to the assessment by the mechanism provided by the Duties Act under sections 63 and 69. The effect of the provision relied on by the plaintiff - section 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 provisions means what it says has been confirmed by the relevant authorities on it and similar provisions in revenue statute. Not only do I not need to decide these interesting issues, I am prohibited by statute from deciding them."

And paragraph 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 provision 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 defendant. 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."

I, with respect, generally agree with the reasoning of her Honour in paragraph 33. It seems to me that by virtue of the operation of section 132 the certificate is to be taken as being conclusive evidence of the matters stated therein and, as was the case in Emrold, the matters raised either in the defence or in the e-mail to which I have referred do not detract in any way from the full force, effect and consequences of the operation of section 132.

Some might think that the operation of section 132 could lead, in some cases, to unjust results. That may be so, but that is no basis for denying what seems to me to be the clear intention of the wording of the section.

This, of course, is an application for summary judgment and therefore it is a case requiring the exercise of caution. In the Court of Appeal decision of the Deputy Commissioner of Taxation v Salcedo [2005] QCA 227 his Honour Justice Williams noted that the introduction of rule 292 and rule 293 brought about significant changes in the law and procedure relating to summary judgment.

However, after noting that those rules did make significant changes, his Honour at paragraph 14 went on to cite with approval the decision of her Honour Justice Holmes, as she then was, in the decision of Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq) [2003] 1 QdR 259 where Her Honour said, referring to that part of the rule that there be no real prospect of succeeding "That level of satisfaction may not require the meeting of as high a

test as that posited by Barwick CJ in General Steel 'that the case for the plaintiff is so clearly untenable that it cannot possibly succeed.' The more appropriate inquiry is in terms of the rule itself, that is whether there exists a real, as opposed to a fanciful, prospect of success. However, it remains without doubt the case that great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case." The same reasoning, of course, applies in respect of a defendant in such proceedings.

The need for caution and care, if not extreme care, has been reinforced in a number of more recent decisions, including in the Court of Appeal in Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2010} QCA 119 where Justice of Appeal Muir and Chesterman and also by Justice Daubney in Elderslie Property Investments No 2 Pty Ltd v Dunn [2007] QSC 192 at paragraphs 6 and 8.

However, for the reasons given, and particularly in respect of the deficiencies in the defendant's defence and counterclaim and the effect of section 132, in the circumstances of this application, I have reached the conclusion that the defendants have no real prospects of successful defending all or part of the applicant's claim and that there is no need for a trial of the claim or part thereof.

Accordingly, for the reasons given I order as follows:

1. The defendant's defence and counterclaim be struck out.

2. Judgment is entered in favour of the plaintiff in the sum of $62,099.26.

3. The defendants are to pay the applicant's costs of and incidental to-----

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HIS HONOUR: Costs of and incidental to the proceedings up to and including 9 March 2011 on the standard basis.

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