District Court
New South Wales

Medium Neutral Citation:	**Deputy Commissioner of Taxation v Young [2017] NSWDC 146**
Hearing dates:	25 and 26 May, 14 June 2017
Date of orders:	14 June 2017
Decision date:	14 June 2017
Jurisdiction:	Civil
Before:	Gibson DCJ
Decision:	(1) Application for leave to the first defendant to reopen his case to lead further evidence and further cross-examine the second defendant refused. (2) Judgment for the plaintiff against the first defendant for $226,529.00, plus interest. (3) Plaintiff's claim against the second defendant dismissed. (4) First defendant pay plaintiff's and second defendant's costs. (5) Liberty to restore in relation to interest and costs. (6) Exhibits retained until further order.
Catchwords:	TAXATION – director penalty notices (DPNs) issued to company director in respect of unpaid PAYG owed by the company to the Australian Taxation Office for an employee who carried out legal and building work – company director denies employing the employee – whether taxation records, employment contract and other documentation establish an employer/employee relationship – plaintiff joins employee as second defendant – employment relationship established – judgment for the plaintiff against the first defendant – proceedings against second defendant dismissed FRAUD – allegations of forged signatures, fake documents and "convenient fires" neither pleaded nor particularised – obligation to plead fraud with specificity – obligation to confront witness in cross-examination – inability to make findings of fraud consistent with but going beyond case advanced at trial LEAVE TO REOPEN – evidence the subject of the

	application available prior to the hearing and already known to all parties – application refused.
Legislation Cited:	Corporations Act 2001 (Cth), ss 436A, 436B and 436C Taxation Administration Act 1953 (Cth), Sch 1, ss 12-35, 16-70, 16-75, 250-10, 255-5, 269-15, 269-20, 269-25, 269-30 and 269-50 Uniform Civil Procedure Rules 2005 (NSW), r 42.1
Cases Cited:	Angel v Hawkesbury City Council [2008] NSWCA 130 Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175 Blacktown City Council v Hocking [2008] NSWCA 144 Deputy Commissioner of Taxation v Gruber (1998) 43 NSWLR 271 Everet v Williams (1725) In the marriage of Ferraro (1992) 16 Fam LR 1 Kartal & Dutsanee [2016] FAMCA 1158 Morvatjou v Moradkhani [2013] NSWCA 157 Nadinic v Drinkwater [2017] NSWCA 114 Reid v Brett [2005] VSC 18 Seymour v Commissioner of Taxation (2016) 241 FCR 361 Smith v New South Wales Bar Association (1992) 176 CLR 256 Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm) (2009) 2 BCLC 563 (HL)
Category:	Principal judgment
Parties:	Plaintiff: Deputy Commissioner of Taxation First Defendant: Matthew John Neil Young Second Defendant: Wlodzimierz Antoni Kozlowski
Representation:	Counsel: Plaintiff: Mr R Scruby / Mr N Swan First Defendant: Mr C A Evatt / Mr J Henness Second Defendant: Mr M Gracie; Mr B Douglas-Baker Solicitors: Plaintiff: ATO Legal Services First Defendant: Brendan Pigott Second Defendant: Lou Baker & Associates
File Number(s):	2015/84609
Publication restriction:	None

JUDGMENT

The plaintiff's alternative claims against the two defendants

1

The circumstances of this claim are unusual. The plaintiff, the Deputy Commissioner of Taxation, commenced proceedings for recovery of PAYG withholding-related liabilities and penalties against the first defendant as sole director of a company named Asia Pacific Offsite Pty Ltd ("APO"), arising out of the employment of the second defendant. In his defence, the first defendant claimed the second defendant was never an employee of the company. In response to this claim, the plaintiff sought and was granted leave to amend the statement of claim to join the second defendant and to bring that claim in the alternative to its claim against the first defendant. There is no cross-claim between the defendants.

2 The sums sought by the plaintiff, and the basis for these alternative claims against each of the defendants may briefly be summarised as follows:

(1) The sum of $226,529.00, plus interests and costs, from the first defendant, arising from a liability to pay the Commissioner of Taxation a penalty under s 269-20(1), Sch 1, *Taxation Administration Act 1953* (Cth) ("TAA"); or

(2) In the alternative, if the first defendant has no such liability to the Commissioner of Taxation, the sum of $279,744.97, plus further general interest charges and costs, from the second defendant, in respect of unpaid income tax.

3 The statutory basis of the plaintiff's claim against the first defendant is for an amount of a tax-related liability that is due and payable, as a debt due to the Commonwealth and payable to the Commissioner: s 255-5, Sch 1, TAA. The Deputy Commissioner of Taxation may sue to recover an amount of tax-related liability that remains unpaid: s 255-5, Sch 1, TAA. Both income tax and a penalty under s 269-20, Sch 1, TAA are a tax-related liability: see Items 37 and 139, s 250-10(1), Sch 1, TAA.

4 The statutory basis for the plaintiff's alternative claim against the second defendant arises only if I accept the first defendant's claim that the second defendant was not an employee of APO and/or find that no amounts were withheld by APO under s 12-35, Sch 1, TAA, as in those circumstances the plaintiff cannot succeed against the first defendant.

5 The first defendant states (written submissions dated 12 June 2017) that the parties agree the issue is whether or not the second defendant received three payments in the period 26 February to 4 March 2013 as an employee of APO is determinative, adding that the "mysterious deposit" into the second defendant's account of three payments of $10,000 cash by the first defendant on 3 July 2013 "may not be relevant" (submissions, paragraph 62).

6 It does appear that the second defendant, in his second set of submissions, is restricting his claim for employment payments to 1 January to 31 March 2013 (see paragraph 3 of the second set of submissions dated 12 June 2017). These three payments were identified in the second defendant's first set of written submissions (19 May 2017, paragraph 24) in the list of 5 payslips as items 3 – 5 being payments for the periods April, May and June 2013, and as being referred to as such in emails between the first and second defendants (paragraphs 27 and 28) as well as featuring in the list of electronic wage payments in paragraph 34 of those submissions.

7 However, the existence of these three payments as part of the five payslips is confirmed in paragraphs 59 – 60 of the second defendant's submissions of 12 June 2017. The second defendant identified these as payments made pursuant to the contract in cross-examination. It is too late for either the first or second defendant to disavow these transactions now, however embarrassing they may be to one or both of them.

The defences

8 The first defendant's Defence filed on 14 April 2015 consists of denials of paragraphs 4 – 10 of the Statement of Claim, followed by the assertion that the plaintiff "has failed to act in good faith in considering the alleged facts and evidence" in relation to the statements set out in paragraph 4 of the statement of claim.

9 The Defence of the second defendant notes (at paragraphs 13 and 14), in relation to this defence, that the first defendant was provided with pay slips and a group certificate.

10 The following difficulties arise in relation to the manner in which each defendant has approached the defences:

(a) The first defendant has sought to lead evidence of fraud when this has not been pleaded, which is impermissible (see below); and

(b) The second defendant submits that the plaintiff's alternative case, in that it treats both defendants equally, "runs the risk of failing against both because it fails to discharge its onus of proof against either", which misconceives the conclusive nature of the legislation-based presumptions upon which the plaintiff's case is based. Effectively the plaintiff can prove a case against either of the defendants based on those presumptions; the question is then which of the defendants is liable.

11 I shall first set out the allegations of fraud made by the first defendant against the second defendant:

(a) **Forgery:** Not only initials (T 63 – 64) and signatures (T 6, 101 – 102) are forged, but "any documents" which are produced by the second defendant "which required tax to be withheld and remitted to the Plaintiff would have been forged by my former solicitor" (affidavit of the first defendant of 5 November 2015 at paragraph 11). The "former solicitor" referred to is the second defendant. These documents include the first defendant's signature on the employment contracts and two documents lodged by the second defendant as part of his 2012/2013 tax return. None of this has been pleaded or particularised as fraud in the manner identified as necessary in *Nadinic v Drinkwater* [2017] NSWCA 114.

(b) **Joint criminal enterprise:** The first defendant sets out his complaints to the NSW Police and to the Law Society concerning the circumstances in which he has reported the second defendant's conduct to them (paragraphs 8, 9 and 11 of the affidavit of 5 November 2015). However, as is noted in the second defendant's written submissions of 12 June (paragraphs 42 – 44), these are unparticularised allegations of joint wrongdoing "to defraud the creditors of APO" and moreover were never put to the second defendant in cross-examination.

(c) **"$108,040 to lift a caveat":** At paragraphs 26 – 31 of the first defendant's submissions of 12 June 2017 it is claimed that the second defendant corroborated the first defendant's version of the reasons for

the payment, namely to release the caveat put on by a company called "One Steel". If this is asserted to be evidence of a fraudulent claim that this was therefore not income, it should have been pleaded and particularised as fraud, for the reasons set out in *Nadinic v Drinkwater*.

(d) **"Convenient fire":** In paragraphs 54 – 59 of the first defendant's written submissions the complaint is made that the evidence of the second defendant that his home was burned down and relevant documents destroyed (as well as to similar evidence from Mr Hancock, the solicitor who drew up the employment contract, whose house fire also caused him to lose records) should be regarded as fraudulent and the documents produced should be regarded as "questionable" (paragraph 59), including the three different copies of the employment contract. None of this is pleaded or particularised as fraud (or, indeed, even mentioned in the pleadings or affidavit material).

12 The obligation to plead fraud with specificity is a fundamental rule of fairness in litigation. In *Nadinic v Drinkwater* at [105] – [117], Leeming JA (with whom Beazley P and Sackville AJA agreed) stated that, unless there is an adequately pleaded and particularised allegation of fraud, the trial judge cannot make findings of fraud consistent with, but going beyond, the case as pleaded, particularly where the allegations in question have not been put to the party, not only in cross-examination, but also in the pleadings and particulars.

13 That obligation has clearly not been complied with by the first defendant and, by reason of the operation of the statutory presumptions and the absence of any substantive defence, this is a complete answer to the plaintiff's case against the first defendant as well as in relation to the first defendant's assertions against the second defendant. I shall, however, set out the evidence in question and make findings in relation both to the plaintiff's claim against the first defendant and to the failure of the first defendant's claim against the second defendant.

The evidence

14 The evidence of the plaintiff (the affidavits of Deborah Abbott affirmed 10 November 2015, Barbara Robinson sworn 11 November 2016, Prateek Das sworn 15 December 2015 and Amon-Ra Barton affirmed 13 December 2016) is not challenged, and these witnesses were not required for cross-examination.

15 The first defendant relied upon two affidavits sworn 5 November 2015 and 28 January 2016. I rejected an application to rely upon an affidavit sworn on 24 May 2017, served one day prior to the hearing, by reason of its lateness and because of the failure of the first defendant to provide any explanation for the proffering of such material at the door of the court (*Seymour v Commissioner of Taxation* (2016) 241 FCR 361, citing *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [103]).

16 The second defendant relied upon his own affidavits sworn 7 and 8 March 2017, an affidavit of Edward Piper sworn 10 February 2017 and an affidavit of John Hancock sworn 14 January 2017.

The documents which are claimed to be evidence of employment

17 In both sets of written submissions and in cross-examination, the second defendant has identified the documents which demonstrate that he was an employee of APO as follows:

(a) **A contract of employment** – This is asserted to run from 12 September 2012 but no payments were made until March 2013. Mr John Hancock, at that time a solicitor, gave evidence that he prepared an employment contract in March 2013. There are three versions: the first has no signatures, the second has one set of signatures; and the third appears to be signed by both parties, although the signatures are on the opposite side from the second version of the contract.

(b) **Payments and payslips allegedly made pursuant to the contract of employment** – Details of these payments, which do not relate to the amounts set out in the written contract, are set out below.

(c) **An APO Group Certificate for $631,090.83 for the period 1 July 2012 to 30 June 2013** – As is set out below, this does not appear to relate to the salary set out in the contract of employment.

(d) **A Tax File Number Declaration** – On or about 1 March 2013 the second defendant lodged a tax file declaration at the Australian Taxation Office.

(e) **Income Tax Return for the financial year ending 30 June 2013** – In this document the second defendant claimed a tax credit for PAYG payments of $234,436.00 relating to tax withheld by his "employer", APO.

(f) **Letter confirming employment** – The first defendant provided the second defendant with a letter on APO letterhead dated 9 August 2013 in support of the second defendant's home loan application. In that letter, an explanation for the unusual pattern of payments to the second defendant is offered, namely that two payments were made to the second defendant (of $108,040 and $165,927.83) to "reserve" his building licence for the exclusive use of the company.

The plaintiff's case against the first defendant

18 The first defendant's liability to the Commissioner arises in relation to amounts withheld (pursuant to the PAYG Withholding scheme, described above) by APO in February and March 2013. The first defendant was, between 14 September 2012 and 15 November 2015, the sole director of APO (affidavit of Prateek Das, Annexure F). The plaintiff relies upon the documents listed above (namely the Tax File Number Declaration form dated 1 July 2013 and lodged with the Australian Taxation Office (affidavit of Amon-Ra Barton at [9] and Annexure B), the contract of employment and payments made, the PAYG summaries and 30 June 2013 tax return.

19 Relying upon these documents, the plaintiff determined that, in February and March 2013, the second defendant was an employee of APO, that APO made the payments to the second defendant as "salary, wages, commission, bonuses or allowances", and that APO withheld, pursuant to s 12-35, Sch 1, TAA, $226,529.00 from the payments. APO was obliged to pay the amount withheld to the Commissioner: s 16-70(1), Sch 1, TAA. As APO was a "small withholder" (affidavit of Prateek Das at paragraphs 21 – 22), it

was required to pay the amount withheld to the Commissioner by 28 April 2013 (s 16-75(4), Sch 1, TAA). APO has never paid the amount withheld to the Commissioner (affidavit of Prateek Das at paragraphs 24 and 26 and Annexure D)).

20 The mere denial by the first defendant of the claim, as set out in his defence, is not capable of amounting to a defence, for the reasons set out below.

21 The first defendant's liability for a director penalty may be explained as follows. As the sole director of APO, he was obliged to ensure APO complied with its obligation to pay the amounts withheld to the Commissioner: s 269-15(1), Sch 1, TAA until (s 269-15(2), Sch 1, TAA):

(1) APO complied with its own obligation (under s 16-70, Sch 1, TAA) to pay the amount withheld; or

(2) An administrator was appointed to APO under ss 436A, 436B or 436C of the *Corporations Act 2001* (Cth); or

(3) APO began to be wound up.

22 The first defendant is liable because APO failed to pay the amount withheld by the due date, no administrator having been appointed or winding up being commenced: s 269-20(1), Sch 1, TAA; affidavit of Prateek Das, Annexure F.

23 The penalty imposed on the first defendant is the same amount as the sum withheld, namely $226,529.00, payable on and from 28 April 2013 (the due date): s 269-20(2), (5), Sch 1, TAA. The penalty imposed has not been remitted because the he did not stop being under the statutory obligation to do so (s 269-15, Sch 1, TAA) within 21 days after the Commissioner gave the first defendant with a Director Penalty Notice (served as set out in paragraph 19 below): see s 269-30(1), Sch 1, TAA.

24 The Director Penalty Notice is taken to be given on the day on which it is posted: s 269-25(4), Sch 1, TAA. This notice was given by post to the first defendant on 27 March 2014. The first defendant's claim that this was withheld by the second defendant and accidentally discovered by him too late is not a defence and was not, in any event, put to the second defendant in cross-examination.

25 The Director Penalty Notices were posted to the address of the first defendant identified on an ASIC search (see affidavit of Deborah Abbott, paragraphs 3 and 5 and Annexure C). A Director Penalty Notice sent to an address found in ASIC records will satisfy the requirements as to how such notice may be given: s 269-50, Sch 1, TAA. Given that the Director Penalty Notice is taken to have been given to the first defendant at the time it was posted (s 269-25(4), Sch 1, TAA) the first defendant's evidence, to the effect that he did not receive the Director Penalty Notice (affidavit of Matthew Young sworn 28 January 2016 at paragraph 14) thus is of no effect. In any event, a Director Penalty Notice may be validly given even if it is not in fact received by the addressee: *Deputy Commissioner of Taxation v Gruber* (1998) 43 NSWLR 271 at 277.

26 The first defendant has failed to pay to the Commissioner the penalty imposed under s 269-20, Sch 1, TAA (or any part of that penalty). Unless the first defendant can establish that the employment documents relied upon by the plaintiff are fraudulent, the

plaintiff is entitled to judgment against the first defendant in the amount of $226,529.00, plus interest and costs.

The plaintiff's case against the second defendant

27 There certainly are some unusual features in the transactions between the first and second defendant. Counsel for the plaintiff has helpfully listed some of these in his written submissions, which I set out and comment upon as follows:

(1) The payments to the second defendant do not have an obvious correlation to the salary referred to in the employment agreement. That agreement provides that the second defendant's remuneration is $191,200 gross per annum. The second defendant was paid nothing for seven months after the commencement of his employment and then was paid over a seven day period, a gross amount of $517,361.00 for an entitlement which has nothing to do with salary. He was questioned about this by Mr Evatt but his explanation for not seeking a salary for seven months was unconvincing. It was never explained to me how a payment to the second defendant to reserve his services was in fact a payment of salary due in accordance with his employment contract.

(2) The second defendant's 2013 income tax return states that he was paid $631,091 gross by APO. That has no correlation to the employment agreement and was not adequately explained by either defendant's affidavits or evidence.

(3) Other than these payments, the bank statements provided by the second defendant show no deposits to him by APO in the 2013 financial year.

(4) The employment agreement with APO required him to work 38 hours per week (plus overtime). However, the second defendant was, at the same time, employed by Steel Building Systems Pty Ltd working full time as a builder and was also the principal of his own law firm, Lou Baker & Associates. The second defendant's explanation in cross-examination about being very energetic and proactive did not sufficiently explain to me how he could possibly work 38 hours for the company while engaged in all these other activities. Mr Hancock's evidence about the terms of what is clearly a pro forma contract of employment suggests that these are the figures in the pro forma and have little to do with reality. That suggests the employment contract does not reflect the true nature of the relationship between the defendants.

28 The second defendant gave evidence that he was not only paid the two large amounts to reserve his licence but that he was also paid three payments which accord with the monthly salary in his contract. In response to cross-examination by Mr Evatt, the second defendant stated:

> "Q. But it's not passive income. The 108,040 and the 170,900 is compensation and only compensation for you to reserve your building supervising activities to APO and to no other company. That's what it was for?
>
> A. Not only, sir. You're not remembering that I've said that there's two limbs to my income. There's reserving my licence so that APO could have a New South Wales builder's licence and grow and prosper, and separately to that I'm earning $10,000 net per month to be working for APO to do things. Now, if I'm sitting there in the site office not doing anything because there's nothing to direct me to do, it's not up to me to go and get the work and do the work, go and find the work. I just do the work that's given to me.
>
> Q. This one 10,000 a week, is it, a week or a month?
>
> A. Sorry, a month. Overall gross was $192,000 a year.
>
> Q. Were you being paid 10,000 a month by APO to do work? You were not?

A. I was paid three lots of $10,000 in July 2013 to catch up for the month in - prior - at the end of that financial year that I wasn't paid. I was paid $5,000 in March and then there was another $2,000 after the three payments on 3 July, there was a $2,000 payment, there was the balance of the money for March. I can't recall where the other $3,000 went or if, indeed, I was even paid it.

Q. You were never paid $10,000 a month by APO for any work whatsoever?

A. Well, I was, sir.

Q. You didn't mention it before?

A. It's in my affidavit, sir." (T 83)

29 However, I consider that a greater insight into the true relationship between the first and second defendants can be gleaned from the explanation given by the second defendant for the three cash "salary" payments made on 3 July 2013.

The defendants travel to The Entrance together for some banking

30 The first defendant does not refer to these payments at all in his affidavits, preferring instead to state that none of this money was applied to any purpose known to him (affidavit 28 January 2016, paragraph 12) and that the second defendant never answered his calls or told him what he was doing (the whole of his first affidavit).

31 However, in cross-examination, the second defendant referred to the circumstances in which they both travelled to The Entrance to deposit these three lots of cash, which were withdrawn almost immediately afterwards on that same day. The second defendant painted a picture of a degree of bonhomie between himself and the first defendant during this trip, which extended to the first defendant minding the second defendant's puppy while the second defendant took out the cash the first defendant had just lodged at the bank, moments before:

"EVATT: Let's go over the page.

Q. He puts, in fact, 32,000 into your account on 3 July?

A. That's correct.

Q. What was that for?

A. Will balance of my APO wages for those months that are sited there on the subject line of the deposit.

Q. All on the one day?

A. That's correct.

Q. What's this withdrawal, 31,900 also on 3 July?

HER HONOUR

Q. At The Entrance?

A. That's me taking the money out because I wished to purchase a property in Long Jetty, which is the subject of the emails around page 369 when I'm speaking to David Brody of PF Group seeking a mortgage.

Q. So you're at The Entrance as well?

A. No, your Honour. It was just a property that was derelict and I could build it.

Q. Yes, but the thing is, you see, you've said that Mr Young was at The Entrance paying you this money.

A. That's correct.

Q. Then there's a withdrawal at The Entrance, so I don't quite understand. Were you at The Entrance?

A. Yes, your Honour.

Q. So you were at The Entrance as well?

A. Yes, your Honour.

Q. And so was the property you wanted to invest it in?

A. That's correct, your Honour.

EVATT

Q. You paid those moneys in yourself, didn't you? Through Mr Young's account? They're your deposits?

HER HONOUR

Q. What's being put to you is that the person who paid those moneys in, in those four entries, is you, that you were at The Entrance and that you were paying those moneys in and then you took them out shortly afterwards?

A. No. I took it out as a bank cheque. I took it out as a bank cheque. Mr Young deposited the money.

Q. Was this at the same time? Was Mr Young standing beside you in the bank?

A. Well, we went there in the same car and Mr Young goes and deposits the money. It's my account. I have to go in and withdraw the money from my account for a deposit for the - to purchase the Long Jetty house.

EVATT

Q. The Entrance account was your account or Mr Young's account? Your account?

A. No. The money was deposited into the branch at The Entrance. The account is the Balmain account and it's my account and it - and then I take the bank cheque off to the solicitors for the vendor to pay a deposit.

Q. You wrote out the deposit slips for the 32,000 - 2,000, 10,000, 10,000, 10,000, you filled in the slips and you put down "wages"?

A. No.

Q. Falsely?

A. No.

Q. Incorrectly?

A. No.

…

HER HONOUR

Q. Was this all in cash? It says, "cash deposits".

A. It must have been.

Q. You're saying that you and Mr Young were there with $30,000 in cash and he put it in, in four separate transactions?

A. Mr Young put it in, your Honour.

Q. Where were you when this was happening?

A. I was out in the car.

Q. Why would you be out in the car?

A. There was no parking there, your Honour.

EVATT

Q. Just a minute.

A. I have a - and also I have a little dog. He was only a puppy at that stage. I couldn't leave him just in the car.

Q. Did you race in, then, and withdraw the 31,900? How did you get that?

A. Well, when Mr Young came out, I then went back in, got the--

HER HONOUR

Q. With or without the dog?

A. Well, Mr Young was in the car minding the dog.

Q. Mr Young was minding your dog in the car?

A. Yes, your Honour." (T 95 – 97)

32 This transaction is relevant for two reasons. The first is that these are three of the five payslip payments referred to in the second defendant's written submissions, as noted above. The second is that these payments shortly preceded the "To whom this may concern" letter dated 9 August 2013 (Exhibit A, p. 385) signed by the first defendant asserting the second defendant was an employee was provided in relation to a house at Long Jetty that the second defendant wished to purchase.

33 The contents of that letter, to which the first defendant's name and signature are appended, could not be clearer:

"Asia Pacific Offsite Pty Ltd

ACN 160 356 507

[Address and phone number]

To whom this may concern

This letter is written in support of a mortgage application by Wlodek Kozlowski (Wlodimiersz Antoni Kozlowski) to purchase 73 Surf Street, Long Jetty.

Asia Pacific Offsite Pty Ltd (APO) employed Wlodek Kozlowski on 25 September 2012. The employment contract is effective from 1 July 2012 for calculation of employee entitlements.

Wiodek [sic: should be Wlodek] is employed for $191,000 annually, which calculates as $15,945.61 monthly (nett [sic] wage payment is $10,000 monthly). The first wages payment was $5,000 in March 2013.

There have been two payments to reserve Wlodek's builder's licence exclusively for APO for 5 years. In February 2013 APO paid Wlodek $108,040.00. In March 2013, APO paid Wlodek and [sic] $165,927.83.

I remain available for further contact: 0490 139 568.

Yours sincerely

ASIA PACIFIC OFFSITE PTY LTD

[signature "M Young"]

Matthew Young

Managing Director."

34 Mr Evatt did not cross-examine the second defendant on this letter and did not impugn its contents beyond his general statements (at T 6) that any document with the first defendant's signature on it was a fake.

35

What this incident portrays is that the first and second defendants were, if not "partners in crime" (*Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* (2009) 2 BCLC 563 (HL) at [189], referring to *Everet v Williams* (1725) ("the highwaymen case")), at least partners interested in promoting each other's financial well-being, in circumstances where they were prepared to make statements to third parties (such as a mortgage provider, or the ATO, or for employment contract purposes), for whatever motive, in circumstances where the effect of those representations is that tax is payable. While courts in other areas of the law may (*Morvatjou v Moradkhani* [2013] NSWCA 157) or may not (*In the marriage of Ferraro* (1992) 16 Fam LR 1 at 32; cf *Kartal & Dutsanee* [2016] FAMCA 1158 at [44]) be prepared to look behind taxation documentation for the purpose of determining actual financial loss, that should not apply to documents prepared for ATO purposes and/or submitted to the ATO for taxation purposes.

36 In those circumstances, notwithstanding the implausibility of some (possibly many) of the documents relied upon by the second defendant, I am satisfied that these documents were knowingly prepared by both parties with the intention of holding out to the ATO, among others, that the second defendant was a company employee.

37 I also note that I do not accept, in any event, the first defendant's claim that the signatures on the employment contract are forged, and I regard the absence of those signatures from one copy and the absence of one party's signature on another as being more likely than not to be for reasons of the kind given by the second defendant at T 101, namely that he needed to show the contract to the mortgage finance corporation (together with the first defendant's letter of 9 August 2013) and needed a fully signed copy. The circumstances in which a judge would draw a conclusion, without expert evidence, that a signature is a forgery, would have to be compelling, for reasons analogous to drawing conclusions about photographs in similar cases: *Angel v Hawkesbury City Council* [2008] NSWCA 130 at [72], referring to *Blacktown City Council v Hocking* [2008] NSWCA 144. If asked to do so, I would similarly refuse to make such findings in relation to the first defendant's signature on his "To whom this may concern" letter of 9 August 2013.

38 For all of the above reasons, the plaintiff's claim for payment, to which the defendant has (as is noted above) no defence other than his claim that the second defendant was not an employee, must succeed, and judgment is accordingly entered in favour of the plaintiff against the first defendant for the sum claimed, with liberty to bring in Short Minutes of Order reflecting the mathematically agreed interest calculation. These orders, together with liberty to apply in relation to both interest and costs, are set out below, together with the order I made this morning refusing the first defendant leave to reopen his case, the reasons for which I now note.

Application to reopen the case

39

This morning, prior to commencing his closing submissions, Mr Evatt made an application to reopen his case in order to:

(a) Call more evidence from the first defendant in relation to

(i) The three deposits of $10,000;

(ii) The letter purportedly signed by him dated 9 August 2013;

(iii) The payment in March 2013 of $5,000 and an asserted payment to a barrister; and/or

(iv) Issues set out at paragraphs 9 – 11 of the first defendant's submissions.

(b) Recall the second defendant for cross-examination concerning the above.

40 I refused leave and indicated I would set out my reasons for doing so in the judgment I proposed to hand down later today.

41 The principles for reopening a case involving the recall of witnesses or seeking leave to adduce further evidence are set out in *Reid v Brett* [2005] VSC 18 at [41] and may be summarised as follows:

(a) The further evidence must not merely be admissible or relevant, but so material that the interests of justice require its submission;

(b) The further evidence, if accepted, would most probably affect the result of the case;

(c) The further evidence could not by reasonable diligence have been discovered earlier; and

(d) No prejudice would ensure to the other party by reason of the late admission of the further evidence.

42 I have also had regard to the principles set out by the High Court in *Smith v New South Wales Bar Association* (1992) 176 CLR 256 at 266-267, which are to the same effect.

43 Mr Evatt acknowledges that the material in question was available at the time of the hearing, and indeed has been available since the second defendant's affidavits and submissions were served last year.

44 As to the July/August 2013 documentation, in his written submissions (at paragraph 62), Mr Evatt stated that these transactions "may not be relevant to the issues to be determined by the court". They are not only relevant but their contents have either been cross-examined upon (as to the three payments of $10,000, as set out above) or not impugned (as in the case of the letter of 8 August 2013). As to the March 2013 bank transaction, this information was always in the first defendant's possession and was not mentioned until the first defendant put this new material into paragraphs 9 – 11 of his written submissions.

45 Not only was this information in the first defendant's hands at all relevant times, but the allegations he wishes to make (namely that the March and July bank transactions were fraudulent and the letter of 9 August 2013 a forgery) cannot be made for the reasons

set out by Leeming JA in *Nadinic v Drinkwater.* Accordingly, leave to the first defendant to reopen his case to lead further evidence and further cross-examine the second defendant was refused.

Costs and consequential orders

46 There will accordingly be judgment for the plaintiff against the first defendant for $226,529.00, plus interest.

47 I raised with the parties earlier this morning what order should be made in relation to the plaintiff's claim against the second defendant if judgment against the first defendant is entered. Counsel agreed with my proposal that the correct order was for the plaintiff's claim against the second defendant to be dismissed.

48 Costs should follow the event, but the question of the "event" in relation to the dismissal of proceedings against the second defendant under r 42.1 *Uniform Civil Procedure Rules 2005* (NSW) is foreshadowed to be the subject of challenge. I shall make an order that the first defendant pay the costs of the plaintiff and the second defendant, but with liberty to apply.

Orders

(1) Application for leave to the first defendant to reopen his case to lead further evidence and further cross-examine the second defendant refused.

(2) Judgment for the plaintiff against the first defendant for $226,529.00, plus interest.

(3) Plaintiff's claim against the second defendant dismissed.

(4) First defendant pay plaintiff's and second defendant's costs.

(5) Liberty to restore in relation to interest and costs.

(6) Exhibits retained until further order.

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Decision last updated: 14 June 2017