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**JURISDICTION** : DISTRICT COURT OF WESTERN AUSTRALIA  
IN CHAMBERS

**LOCATION** : PERTH

**CITATION** : DEPUTY COMMISSIONER OF TAXATION -v-  
NORE [2019] WADC 27

**CORAM** : DEPUTY REGISTRAR HEWITT

**HEARD** : 22 FEBRUARY 2019

**DELIVERED** : 6 MARCH 2019

**FILE NO/S** : CIV 3955 of 2017

**BETWEEN** : DEPUTY COMMISSIONER OF TAXATION  
Plaintiff

AND

DAVID LEONARD NORE  
Defendant

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*Catchwords:*

Practice and procedure - Summary judgment application - Director penalty notice - Company in liquidation - Whether any defence

*Legislation:*

*Superannuation Guarantee Administration Act 1992 (Cth)*  
*Taxation Administration Act 1953 (Cth), s 269-20 of sch 1*

*Result:*

Extension of time for summary judgment application granted.

Application dismissed.

**Representation:**

*Counsel:*

Plaintiff : Mr K L F Chu  
Defendant : Mr I R Gillon

*Solicitors:*

Plaintiff : Minter Ellison  
Defendant : Lawton Gillon

**Case(s) referred to in decision(s):**

Nil

**DEPUTY REGISTRAR HEWITT:**

1           The defendant to this action was from 18 December 2015 to 13 July 2016 a director of a company named Totally Regional Sales Pty Ltd. That company failed to satisfy the requirements of the *Superannuation Guarantee Administration Act 1992* (Cth) (the Act). On 10 May 2017, the plaintiff issued a large number of assessments against the company in regard to its obligations under the Act. By 25 May 2016, the company was under administration and by 13 July 2016, it was wound up and deregistered.

2           The amount of the assessments which are unpaid are recoverable as a debt owing by the company to the plaintiff and by virtue of s 269-20 of sch 1 of the *Taxation Administration Act 1953* (Cth), a director of a company which is in breach of its obligations becomes liable to pay to the plaintiff a penalty of an amount equal to the unremitted amounts required to be paid under the terms of the Act. A director penalty notice was given by the plaintiff to the defendant and is dated 28 September 2017. That date is of course subsequent to the deregistration of the company. The situation is therefore that the commissioner issued assessments in which the due dates for payment were a number of years prior to the date of the assessment, the amounts of the assessments were not paid, a number of months later a director penalty notice was issued to the defendant and the amounts remain outstanding. In summary, the argument advanced by the plaintiff is that this defendant has no defence to this claim.

3           It is not suggested that this defendant had anything to do with the failure by the company to remit the superannuation guarantee charges and it is further submitted that because the assessments specified due dates which were in many instances years prior to the issue of the notices, there is no step which the defendant can take to relieve himself of the obligation so imposed other than paying it. It is not open to the defendant to place the company in liquidation because that has already happened.

4           There are a number of steps which a director can take in order to relieve himself of the burden so imposed. Those steps are succinctly outlined in the outline of submissions dated and filed 7 January 2019 by the plaintiff and they are as follows:

- (2) You are not liable to a penalty under this Division if:

- (a) you took all reasonable steps to ensure that one of the following happened:
    - (i) the directors caused the company to comply with its obligation;
    - (ii) the directors caused an administrator of the company to be appointed under section 436AS, 436B or 436C of the Corporations Act 2001;
    - (iii) the directors caused the company to begin to be wound up (within the meaning of that Act); or
  - (b) there were no reasonable steps you could have taken to ensure that any of those things happened.
- (3) In determining what are reasonable steps for the purposes of subsection (2), have regard to:
- (a) when, and for how long, you were a director and took part in the management of the company; and
  - (b) all other relevant circumstances.

5 Relevant to the consideration of whether a director took reasonable steps which would have the effect of avoiding liability are:

1. The defendant was only a director for a short time and was not involved in the management of the company at the time it failed to remit the superannuation guarantee charges.
2. The large bulk of the debt sued for by the plaintiff arose under a director penalty notice which was issued after the company had been wound up and related to assessments which occurred a few days prior to that process beginning.
3. The assessments were sent to an address which the defendant deposes is not an address of which he is aware which was connected to the company.
4. The plaintiff made enquiries prior to accepting his directorship to ascertain if there was any outstanding liabilities and was assured there were none.

6 Another aspect of interest is the fact that a co-director of the company by the name of McKenzie was the subject of a proceeding in this court. That action related to what are obviously two related companies for director penalty notices. Of interest is the fact, firstly that the action is a 2017 action. Secondly, the action contains no reference to the director penalty which is pursued against the present defendant. Thirdly, that the defendant has testified that Mr McKenzie assured him that the director penalty notice issued against him had been withdrawn.

7 On the facts as I understand them from the information placed before me, Mr McKenzie would have been liable for the amount of a director penalty notice and it is difficult to understand exactly how it came about but the materials before me do suggest that some arrangement was reached between Mr McKenzie and the plaintiff such that when it pursued him for other director penalty notices it did not include a claim for the present company. Particularly surprising is the fact that Mr McKenzie was a director at the time when the alleged defaults of the company took place.

8 Also relevant to these matters are the provisions of s 269-20(3) and (4) of sch 1 of the Act which contains the following:

*Penalty for new director*

- (3) You are also liable to pay the Commissioner a penalty if:
  - (a) after the due day, you became a director of the company and began to be under an obligation under section 269-15; and
  - (b) 30 days later, you are still under that obligation.
- (4) The penalty is due and payable at the end of that 30th day.

9 The reference to s 269-15 is as follows:

*Directors' obligations*

- (1) The directors (within the meaning of the *Corporation Act 2001*) of the company (from time to time) on or after the initial day must cause the company to comply with its obligation.
- (2) The directors of the company (from time to time) continue to be under their obligation until:
  - (a) the company complies with its obligation; or

- (b) an administrator of the company is appointed under section 436A, 436B or 436C of the *Corporations Act* 2001; or
- (c) the company begins to be wound up (within the meaning of that Act).

10 In the circumstances of the present case I am struggling to see what the defendant could have done. He clearly was not implicated in the failure by the company to pay the superannuation guarantee charges as and when they fell due because he was not a director of the company and did not know of the existence of those charges. Additionally, many of the charges were created by assessments which, not only post-dated his appointment as a director but also post-dated the liquidation and deregistration of the company. In the present case the due date specified in the assessments were years before the date of the assessments and it is argued by the plaintiff that the defendant is not able to avail himself of the section.

11 All in all in my view there are sufficient uncertainties in the plaintiff's case to justify these matters being aired in court. In so far as the plaintiff seeks an extension of time within which to bring the summary judgment application I grant it but the application is dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Western Australia.

AC  
Court Officer

5 MARCH 2019