

TAX AND DIRECTORS-ARE THE BARBARIANS AT THE GATE

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1. INTRODUCTION

Over the past few years the former Commissioner of Taxation, Michael Carmody, has stated that from a taxation perspective the approach of the Australian Tax Office (“ATO”):

...is based on the expectation that large businesses will ensure appropriate oversight and systems for management and integrity assurance relative to the importance of the various tax issues in the context of the particular business.¹

The Commissioner acknowledged that tax planning is a key feature of any tax landscape but was of the view that one of the more fundamental issues for a board and CEO is to consciously decide the position it wishes to take on tax planning, rather than have it made for them by others.

The Commissioner returned to this theme on a number of occasions² and in due course issued a booklet entitled *Large Business and Tax Compliance 2006*. In it the Commissioner states there is an obligation on directors of large businesses³ to ensure companies meet their tax obligations.⁴

In August 2006 the current Commissioner, Michael D’Ascenzo,⁵ in keeping with the above themes, said:

As Australia’s taxation policy and law evolve, senior managers and company boards have become increasingly aware of the relationship between taxation and sound corporate governance.

As was stated in a UK context,

We have referred to the ‘tax gap’ – the difference between tax revenues and the amount which HM Revenue & Customs (HMRC) think should be paid. Naturally, in pursuit of this additional tax, HMRC are focusing first on the very largest of corporate taxpayers. They have done this by risk assessing the large corporates, to

¹ An address delivered by he then Commissioner of Taxation, Michael Carmody, entitled *Large Business and Tax Compliance: A Corporate Governance Issue* to the Australian Financial Review Leaders’ Luncheon 10 June 2003 Sydney, NSW.

² For example in a paper delivered to the Australian Institute of Company Directors, Perth Compliance issues for Corporations by Michael Carmody Commissioner of Taxation 17 June 2003.

³ The large business segment is described as being made up of ‘enterprises with a turnover of around \$100 million, and high wealth individuals who (together with their families and business entities) control more than \$30 million in assets.’

⁴ The question ‘what is the correct amount of tax’ is one that occupies the minds of all tax professionals. The implication is that it is the amount which the Commissioner believes should be paid.

⁵ Commissioner's address to the large business symposium Sydney, Wednesday 30 August 2006.

identify which are likely to yield the most tax from an enquiry. HMRC are now aiming to adopt this approach with middle market companies.⁶

There can be no doubt this approach is being followed in Australia. The ATO will examine corporate governance issues very carefully when assessing a company or imposing penalties for what are perceived to be incorrect returns caused as a result of breaches of director's corporate responsibilities.

The Commissioner has a number of weapons available in this armory to ensure compliance by directors of their obligations. On of these is the ability to hold directors, directly or indirectly, liable for the tax obligations of the companies they represent. Prior to the decision in *DCT v Dick*⁷ it was very difficult to discharge the onus under division 9 of the *Income Tax Assessment Act 1936* (ITAA 36) against claims by the Commissioner.

This decision upheld a novel defence that the provisions of section 1318 of the *Corporations Act 2001* can be used as a shield to claims under the provisions of division 9 of the ITAA 1936. From a company perspective it has been said the barbarians are always at the gate.

Barbarians. They will always be at the gates. Always. And there are two sets of gates that every company should be concerned about. The first are the gates to the courthouse. Barbarians commonly breach these gates by simply naming a corporation in a lawsuit. The second and more important set of gates are the gates to the boardroom. If the litigation barbarians are able to enter the boardroom by naming individual directors, the plaintiff almost automatically has improved leverage.⁸

The decision in *Dick* could well be the reverse situation from the Commissioner's point of view. The result could be a significant loss to the revenue.

The facts and reasons for judgment in *Dick* call for a review of the law by which a director can be held, directly or indirectly, personally liable for the tax obligations imposed on the company he or she represents under divisions 8 and 9 of the ITAA 36 and the defences available.

2. TERMS DEFINED

The meaning ascribed to the concept of 'director' is essentially the same for all the legislation under consideration.⁹

A director is a person appointed to the position of director or alternate director irrespective of the name given to that position. The concept of director includes those

⁶ *Inside Tax Newsletter*, KPMG UK, Issue 3 Autumn 2006.

⁷ [2006] NSWDC 17.

⁸ Q F Lindsmith, *Loss Prevention in the Boardroom. Keeping Blood off the Walls*. Acredula, January 2000, Vol 1 No 2, p2 ><http://www.antitrustattorneys.com/publications/articles/130.pdf>< at 27 November 2006. The principle that a claim against directors personally constitutes a breach of the corporate walls by barbarians from a corporate perspective should not raise any eyebrows.

⁹ For a discussion on the meaning and extent of the office of director see for example *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236 and *Deputy Commissioner of Taxation v Leslie Raymond Austin* [1998] 1034 FCA.

persons who are described as shadow directors. These are persons not validly appointed who act in the position of a director or where the directors are accustomed to act in accordance with that person's wishes. This accords with the definition of director under section 9 the *Corporations Act 2001*.¹⁰ For purposes of divisions 8 and 9 of the ITAA 36 a director of a company has the same meaning as set out above.¹¹

3. THE SCHEME OF THIS PAPER

Section one is introductory. Section two defines the concept of director. Section four considers the potential liability of directors for the tax liabilities of companies they represent under the ITAA 36.¹² The next section briefly considers the obligations of directors under the *Corporations Act 2001*. Section 6 refers to the decision in *DCT v Dick*¹³ and critically reviews the reasons for judgment. Section seven contains the author's conclusions.

4. THE INCOME TAX ASSESSMENT ACT 1936

4.1 DIVISIONS 8 AND 9

4.1.1 INTRODUCTION

Directors of companies can be held liable by way of penalty, for the equivalent amount of withholding payments deducted but not paid over to the ATO, in terms of Divisions 8 and 9 of the *Income Tax Assessment Act 1936* ("ITAA 36").¹⁴ The purpose of Division 8 is described in the following terms under section 222 AFA:

The purpose of this Division is to enable the Commissioner to take prompt and effective action to recover amounts not remitted as required by Divisions 1AAA, 3B and 4 of this Act, or Part 2-5 in Schedule 1 to the *Taxation Administration Act 1953*.

Division 9 has a similar purpose.¹⁵ In *Joosse v DCT*¹⁶ the court described this purpose as follows:

10 To assess if a person is acting as a director depends on the nature of the functions or powers which are exercised and the extent of their exercise. The answer depends on the nature of the functions or powers which are exercised and the extent of their exercise. It will often be a question of degree, and requires consideration of the duties performed by that person in the context of the operations and circumstances of the particular company concerned. Factors which influence such a decision are how outsiders perceive that person to be acting or if there was an express holding out by the company.

11 Sections 222 AFB and 222 ANB of the ITAA 36.

12 This paper does not consider section 252 of the ITAA 36 as the court in *Reynolds v DCT (Act)* 15 ATR 1073 determined that the section does not create a personal liability on the part of directors. The paper also does not consider 8Y of the *Tax Administration Act 1953* read with section 21B of the *Crimes Act 1914* other than to state that if convicted of a Taxation Offence, as defined, a director can be ordered to make reparation in his personal capacity to the Commonwealth or company for any loss suffered as a result of such offence. This issue, not being germane to a consideration of the issues in *DCT v Dick* [2006] NSWDC 17 will be considered in a later paper by the author.

13 [2006] NSWDC 17.

14 Unless stated otherwise all references to sections and divisions in this part of the paper are to the ITAA 36.

15 Section 222 ANA.

By s 222 ANA it is made clear that the purpose of the Division is to ensure that a company either meets its obligations, including those relating to group tax at the relevant times, or goes promptly into voluntary administration or into liquidation. The Division imposes a duty on the directors to cause the company to do so and the duty is enforced by penalties.

The Court in *Joosse*¹⁷ made the point that the debt created by division 9 was statutory in nature and Commissioner did not become a preferred creditor by this process.

The High Court also considered the purpose of division 9.¹⁸ It held that it does not create a liability for tax but rather a responsibility to collect tax and to remit the amounts collected. Division 9 seeks to protect the revenue by the imposition of penalties upon directors of non-remitting corporate employers. The Court¹⁹ stated:

Division 9 seeks to achieve the object that either the deducted amounts are remitted or paid to the Commissioner or the company is promptly taken out of the control of the directors and dealt with under the insolvency laws.²⁰

4.1.2 LIABILITY

These Divisions provide that directors are held personally liable by way of penalty for the monetary equivalent of these unaccounted withholding payments unless one of a number of prescribed things occur.²¹ The Commissioner may not proceed to recover the penalty unless he gives the director 14 days notice of the matters giving rise to the penalty and action to be taken.²² The penalty amount and the original obligation of the company are described as parallel liabilities and the discharge of the one operates to discharge the other.²³ If the director discharges the liability he/she has rights of subrogation against the company and other directors against whom a notice has been given by the Commissioner as if the directors were jointly and severally guarantors for the company's debts.²⁴

16 [2003] FCA 1325 at paragraph 21.

17 Id at paragraph 54.

18 *DCT v Woodhams* [2000] HCA 10.

19 Per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

20 Id at paragraph 37.

21 Section 222 AOB (1) provides for example that:

(1) The persons who are directors of the company from time to time on or after the first deduction day must cause the company to do at least one of the following on or before the due date:

(a) comply with its obligations in relation to deductions (if any) and amounts withheld (if any) whose due date is the same as the due date;

(b) make an agreement with the Commissioner under section 222 LA in relation to the company's liability under a remittance provision in respect of such deductions (if any) and amounts withheld (if any);

(c) appoint an administrator of the company under section 436A of the Corporations Act 2001 ;

(d) begin to be wound up within the meaning of that Act.

A failure to act after notice is given has the effect that directors of the company become liable by way of penalty for an amount equivalent to the unpaid monies. See for example *Falcetta v FCT* [2004] FCAFC 117.

22 These steps include the company paying the relevant obligation or winding up proceedings being commenced against the company or an administrator being appointed.

23 Section 222 AOH.

24 Section 222.AOI.

In *Kolistatsis v DCT* ²⁵ the court of Appeal in New South Wales unanimously held that:

The statutory duty to pay arises anew each month with respect to the total of the deductions made in the previous month. Each such liability is discrete and can be the subject of a separate notice or, as in the present case, a notice for more than one month."

Even if a person were not a director at the time the debt became payable he or she may be liable for such a penalty. If a person becomes a director after the due date for such payment and one of the prescribed steps that could have been taken have not been taken 14 days after the appointment that person is liable to pay to the Commissioner, by way of penalty, an amount equal to the unpaid monies.²⁶ A 14 day notice must be given by the Commissioner before the right to recover arises.²⁷

In *Fitzgerald v DCT* ²⁸ a director was appointed some months after the obligation to account for withholding payments had arisen and remained in office for only 17 days. After resigning the Commissioner caused a notice in terms of section 222 AOE to be served on him. The defences raised were that he was no longer a director of the company required to remit tax at the time the notice was sent to him and in the alternative it was submitted that as he did not take part in the management of the company, was not aware of the tax debt until he ceased being a director, and he was not in a position to take reasonable steps to ensure payment. French DCJ holding against the appellant stated:

Although he was only a director for a period of 17 days there is nothing to suggest that he did not take part in the management of the company. Although he was not aware of the company's financial position or the moneys due to the respondent this is not sufficient to provide a defence...It is the responsibility of a new director at or prior to taking up his appointment to make inquiries of the relevant officers of the company as to whether there were any moneys owing by the company to the respondent.

There are similar provisions relating to estimates made by the Commissioner where the Commissioner believes that a remittance payment has not been made.²⁹ In these circumstances, if after the requisite 14 day notice has been given none of the required steps must be taken, the Commissioner can proceed to recover this debt. The actual liability for this estimate is described as being a parallel liability to the estimate. The discharge of one results in the discharge of the other. An overpayment will cause the Commissioner to refund the excess.

If the company enters into an agreement with the Commissioner to pay off these liabilities and the company defaults each person who was a director of the company at any time during the period beginning on the day when the agreement was made and ending on the day of the contravention is liable to pay to the Commissioner, by way

25 2005 ATC 451 at paragraph 21 and 22.

26 Section 222 AOD.

27 Section 222 AOE.

28 95 ATC 4587.

29 See sections 222 AGA read with section 222 APB.

of penalty, an amount equal to the balance payable under the agreement.³⁰ No notice need be given to enable the Commissioner proceed to payment of this debt.

4.2 DEFENCES UNDER THE ITAA 36.

It is a defence if the director proves that he took all reasonable³¹ steps to ensure that the directors complied with the relevant obligations imposed by the sections in question or there were no such steps that the person could have taken.³²

*DCT v Coco*³³ held the test of reasonableness was objective. The court said:

There is nothing in any of the relevant sections suggesting that all that matters is the actual knowledge of the director or that a director who is ignorant of the law or of any fact of which he ought to know is in a better position than a director aware of the law and aware of facts which he found out. In other words, there is nothing in the legislation to displace the prima facie meaning of "reasonable."

It is also a defence if because of illness or for some other good reason, the person did not take part in the management of the company at any time when the person was a director and when the directors were under the obligation to comply with the relevant provisions.³⁴

In *DCT v. George*³⁵ the full court held the period in which the director did not take part in the management of the company must endure for the entire period in which the director had obligations under Division 9 and that the obligation created was a continuing one commencing from when the deduction is made until payment or one of the other steps mentioned in the division occur. The court was of the view that the Commissioner had to act expeditiously in invoking the provisions as a failure to do so could have draconian consequences.

*Canty v DCT*³⁶ held both that the 14 day notice could be given to a director even after he had resigned and that a director could not select one of the four alternatives to avoid liability but had to consider all of them.

In *Re Scobie & Anor; Ex Parte DFC of T*³⁷ Cooper J considered the defence granted to a director under division 9 and said:

The statutory defence provided in s. 222AOJ only has any relevant operation when there remains in existence a penalty recoverable as a debt due to the Commonwealth by proceedings instituted in a court of competent jurisdiction...The Commissioner's right to such a judgment may only be defeated by the directors raising in the

30 Section 222 AQA.

31 Reasonable means having regard to when, and for how long, the person was a director; and took part in the management of the company; and all other relevant circumstances.

32 Section 222 AOJ and 222 AQD and 222 API.

33 (2003)QSC 119 at paragraph 46.

34 Section 222 AOJ. The time for considering the defence under s 222 AOJ (3) is on or before the due dates of the payment of the instalments, not at the time of the notice given to the directors. See *Simpson v Deputy Commissioner of Taxation* 33 ATR 139.

35 (2002) 55 NSWLR 511.

36 [2005] NSWCA 84.

37 95 ATC 4525.

appropriate manner the statutory defence provided in s. 222AOJ and proving by admissible evidence the facts and circumstances specified in ss. 222AOJ(2) or (3).

The operation of these provisions is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977* as:

There is no application, inquiry or dispute that is determined by or as a result of it. It is a mere procedural formality, in the nature of a warning to the applicant that recovery proceedings will be taken unless the company's liability has been discharged or one of the other things mentioned in s 222APE(1)(b) has occurred.³⁸

It does not avail a director to allege that it was impossible to comply with the penalty notice issued by the Commissioner within the 14 day period stated in the legislation as:

The obligation imposed on director's arises from the first deduction day and continues until compliance by the occurrence of one of the events specified in sec 222 AOB (2). The obvious purpose of Div 9 of Pt VI is to force directors to address the issue of compliance before the due date and to take whatever action is appropriate to bring about compliance. It is entirely contrary to the purpose of the division to construe the requirements of compliance on the basis that directors are free to ignore the continuing statutory obligation imposed upon them by sec 222 AOB (1) until receipt of the notice.³⁹

It is interesting to note that a defence of estoppel was upheld in a claim for summary judgment under these divisions.⁴⁰ An official of the ATO led the taxpayer director to believe that after receipt of the relevant 14 day notice the ATO wished for the company to continue trading so as to enable it to liquidate the debt due. The director accepted this and acted on the advice of the ATO. The ATO was held to be estopped from relying on the notice sent.

Mere errors in the penalty notice addressed to directors would not invalidate it unless perhaps it caused some significant disadvantage to the director or was misleading.⁴¹ In addition there is no obligation on the Commissioner to issue a fresh penalty notice if the director furnishes a declaration to an estimate and the amount of the estimate is reduced.⁴²

In *Deputy Commissioner of Taxation v Moorebank Pty Ltd and Ors*⁴³ the High Court held that the various Limitation Acts passed by the various States and Territories have no application to claims under the ITAA 36.

5. DIRECTORS UNDER THE CORPORATIONS ACT 2001.

5.1 INTRODUCTION

38 Per Sundberg J in *Guss v Deputy Commissioner of Taxation* [2005] FCA 1499 at para 17. A majority of the Court of Appeal upheld this decision per Edmonds and Greenwood JJ in *Guss v DCT* [2006] FCAFC 88. An application for leave to appeal to the High Court was refused.

39 Per Master Greenwood in *Deputy Commissioner of Taxation v Zorbas and Another* 36 ATR 174 at p 175 citing Cooper J in *Re Scobie; Ex parte DCT* 95 ATC 4525 at 4531.

40 *FCT v Winters* 97 ATC 4967.

41 *DCT v Woodhams* [2000] HCA 10.

42 *Deputy Commissioner of Taxation v Clark* [2006] SADC 99 and *DCT v Woodhams* [2000] HCA 10.

See also section 222 AKA.

43 (1988) 165 CLR 55.

This section of the paper does not consider the duties of directors at length.⁴⁴ Its purpose is both to give an overview on some of the duties imposed on directors by the *Corporations Act 2001*⁴⁵ and for a proper consideration of the issues in *Deputy Commissioner of Taxation v Dick*.⁴⁶

5.2 GENERAL

Significant duties are imposed upon directors by equity and the common law and the legislature. This paper refers only to certain of the duties that are imposed by the Act with some discussion on those that could have the most impact to the issues under discussion.⁴⁷ The most significant duties are:

1. To act with a degree of care and diligence⁴⁸ that a reasonable person would exercise in the circumstances;
2. To act in good faith⁴⁹ and in what the director believes to be the best interests of the company;
3. To exercise their powers for a proper purpose.⁵⁰
4. Not to improperly use their position or information of the corporation to gain an advantage for themselves or someone else; or cause detriment to the corporation;⁵¹

The paper concentrates on the duties of care, diligence and good faith for two reasons. Firstly a breach of one or more of these duties would be the most likely to result in claims being made against a director for payment to the corporation⁵² of penalties and interest imposed on the company by the ATO and secondly the observation or breach of these duties impact to a large degree on the discretion to be exercised by a Court under section 1318.

5.3 DUTIES

A brief overview of the duties of good faith and care and diligence will suffice for purposes of this paper.

44 Issues such as the continuous disclosure requirements and other duties of directors are not canvassed in this paper. They form the subject matter of later papers.

45 This statute is referred to as 'the Act' throughout the remainder of this paper. All further legislative references are to the Act unless otherwise stated.

46 [2006] NSWDC 17.

47 Section 179 (1) refers to the sections mentioned in this paper as being some of the most significant duties of directors, secretaries, other officers and employees of corporations.

48 Section 180.

49 Section 180.

50 Section 181.

51 Section 182 and 183.

52 Austin J in *Asic v Rich* [2003] NSWSC 328 stated that a breach of the civil penalty provisions, which include a breach of the duties of care and of good faith, could result in a claim under section 1317H with the resultant potential for directors being held liable for losses suffered by the company

5.3.1 GENERAL

Austin J in *Asic v Vines*⁵³ was of the opinion that the statutory formulation of the duties of care and diligence and good faith adopt an objective standard of care, measured by reference to what a reasonable person of ordinary prudence would do, enhanced where an appointment to the board of directors is based on the appointee having some special skill, by an objective standard of skill referable to the circumstances.⁵⁴ The learned Judge referred to and adopted a statement from Mason J⁵⁵ (as he then was) in *Wyong Shire Council v Shirt*⁵⁶ where it was said that the tribunal of fact needs to consider:

The magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities the defendant may have. The measure of care increased in proportion with the danger involved.

The statutory standard, like the general law, permits the court to take into account the circumstances of the particular case, and requires the standard to be applied to those circumstances as they existed at the relevant time, without the benefit of hindsight.⁵⁷ The standard of proof is on a balance of probabilities with the proviso that:⁵⁸

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must perfect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

5.3.2 DUTY OF GOOD FAITH

When considering a breach of the duty of good faith the focus of the inquiry is the state of mind of the decision-maker. The Court is not simply evaluating the wisdom of an impugned decision. The circumstances must show dishonesty (or capriciousness) on the part of the decision-maker.⁵⁹

In *St George Soccer Football Association Inc v Soccer NSW Ltd*⁶⁰ Barrett J considered that the statutory requirement of "good faith" will be found not to be satisfied where there is fraud, dishonesty, malice, an intentional breach of duty, recklessness or an improper purpose or where a director acts honestly but fails to make a real or genuine attempt to discharge his or her duty. A power granted to a director must be exercised bona fide, for the purpose for which it was conferred, not arbitrarily or at the absolute will of the directors, but honestly in the interest of the shareholders as a whole.

53 *Asic v Vines* (2005) 23 ACLC 1,387.

54 *Id* at paragraph 1058.

55 *Id* at paragraph 1071 and 1072.

56 (1980) 146 CLR 40 at 47.

57 *Asic v Vines* (2005) 23 ACLC 1,387 at paragraph 1077.

58 Per Dixon CJ in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361, 362.

59 *Spalla v St George Motor Finance Ltd (No 7)* [2006] FCA 1177 per Kenny J at paragraph 167.

60 [2005] NSWSC 1288.

5.3.3 DUTY OF CARE AND SKILL

Clarke and Sheller JJA in *Daniels & Ors v Anderson & Ors*⁶¹ citing extracts from the judgment of Pollock J in *Francis v United Jersey Bank*⁶² explained this obligation of directors in the following terms:

Because directors are bound to exercise ordinary care, they cannot set up as a defence lack of the knowledge needed to exercise the requisite degree of care. If one 'feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act.'... Directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect... Upon discovery of an illegal course of action, a director has a duty to object and, if the corporation does not correct the conduct, to resign... A director is not an ornament, but an essential component of corporate governance. Consequently, a director cannot protect himself behind a paper shield bearing the motto 'dummy director'.

The fact that the person was a shadow or de facto or unpaid or non executive director does not negate or limit this duty in any way.⁶³

However a director will not be found to be negligent:⁶⁴

By failing to make inquiries or otherwise participate in the decision-making processes of the company, when that director acts in reliance on assurances from, or the conduct of, another director whom he or she has come to trust... However, nothing in *Mallina Holdings* suggests that total non-participation is permissible.

On the issue of reliance on others Santow J in *ASIC v Adler & 4 Ors*⁶⁵ said:

At general law, a director is entitled to rely without verification on the judgment, information and advice of management and other officers appropriately so entrusted. However, reliance would be unreasonable where directors know, or by the exercise of ordinary care should have known, any facts that would deny reliance on others.

The conclusion to be drawn from these cases is that there are positive obligations imposed on directors in terms of the law and must act proactively. They cannot be supine and if things go wrong allege they knew nothing about the affairs of the company or did not take part in its management.

61 *Daniels Ors formerly practicing as Deloitte Haskin & Sells) v Anderson & Ors; Hooke v Daniels & Ors (Formerly (formerly practicing as Deloitte Haskin & Sells); Daniel & Ors ((formerly practicing as Deloitte Haskin & Sells v AWA Ltd (1995) 13 ACLC 614 at 664, 665.*

62 432 A 2d 814 (1981).

63 Tadgell J in *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 at page 197 where the following was said:

The Code does not in terms distinguish between executive and non-executive directors, or between paid and honorary directors. Again, the obligations cast by the Code on companies having the benefit of limited liability are in general applicable alike to companies not for profit and profit-making companies. There is nothing in the Code to suggest that the standard to be expected of a part-time non-executive director of a company not for profit is different from the standard expected of any other director of a profit-making company.

64 *DCT v Clark* [2003] NSWCA 91 at paragraph 107.

65 [2002] NSWSC 171.

6. DEPUTY COMMISSIONER OF TAXATION V DICK

6.1 THE FACTS

The NSW District Court recently considered whether section 1318 could be a defence to a claim under division 9 of the ITAA 36 in *Deputy Commissioner of Taxation v Dick*.⁶⁶ It concluded that it was a defence.

The basic facts of the case are not complex. The defendant was a director of a company that failed to remit PAYG deductions to the Commissioner. After the director had resigned the requisite 14 day notice under division 9 of the ITAA 36 was sent and none of the required steps were taken. Three notices had been sent by the Commissioner. The first was issued on 23 November 2002 for the period June, August and September 2002; the second was issued on 23 January 2003 for the months of October and November 2002 and the third was issued on 8 July 2003 for the months of December 2002 and January to March 2003. The Commissioner sought to hold the defendant director personally liable by way of penalty for the equivalent amount of the unpaid PAYG deductions referred to in the last notice.

6.2 DEFENCES UNDER SECTION 222 AOJ OF THE ITAA 36

The defendant alleged that he did not take part in the management of the company at any time when he was a director and when the directors were under the obligation to comply with divisions 8 and 9 of the ITAA 36 or that he took all reasonable steps to ensure that the directors complied with their obligations to account for these monies or there were no such steps that he could have taken.⁶⁷

The basis of this defence was that he ceased to take part in the management of the company from 6 January 2003, on which date a new financial controller was appointed. The defendant resigned as a director on 14 March 2003. The submission was that although he was a director in the period from 6 January 2003 to 14 March 2003, and ready willing and able to take part in the management, he in fact took no part in the management because the majority owner of shares in the company excluded him from doing so.⁶⁸

This defence was unsuccessful. The court held that:⁶⁹

A failure to take part in management, to attract the operation of the defence under s 222AOJ(2), must necessarily be temporary in nature: *Deputy Commissioner of Taxation v Clarke* [2003] NSWCA 91. Non-participation *per se* is not “good reason”. It is a director’s responsibility to inform himself about the company’s financial position. It is also to be assumed that a director understands the responsibilities that office carries with it.

The defendant was clearly aware not just that the company was in a parlous financial position, but also that it was failing to meet its tax obligations. He failed to make any

66 [2006] NSWDC 17.

67 This is a defence under section 222 AOJ of the ITAA 36.

68 The defendant had been appointed a director on 19 January 2001 and held this position until 14 March 2003.

69 *DCT v Dick* [2006] NSWDC 17 at paragraph 110, 111.

independent investigation or enquiry, choosing at each turn not to ensure compliance with the notices issued by the Commissioner and instead to rely on the cursory assurances of Mr Gelonesi that the situation would be rectified. That was not conduct that satisfied the duty to exercise reasonable care and diligence. A director in the position of the defendant was not entitled to rely on ignorance, but should have ensured that there was in place a system to ensure compliance. (My emphasis.)

In the light of the above and the authorities cited in sections 4.1.2 and 4.2 of this paper this finding should not be the subject of attack.

6.3 DEFENCES UNDER SECTION 1318 OF THE CORPORATIONS ACT 2001

It was alleged in the alternative that the defendant ought fairly to be excused for his default and asked the court to relieve him of liability under division 9 of the ITAA 36 by virtue of the provisions of section 1318 of the Act. The relevant part of this section reads:

If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.

To make a proper assessment of this decision requires a review of the purpose for which the Act was passed; the jurisdictional requirements to be met before section 1318 can become operative; and if operative how should the discretion be exercised.

6.4 DISCUSSION OF SECTION 1318

6.4.1 THE PURPOSE OF THE CORPORATIONS ACT 2001 AND ITS INTERPRETATION

Before one can utilise the provisions of a statute to a given factual matrix the purpose of the legislation, its meaning and jurisdictional requirements must first be ascertained.

6.4.1.1 PURPOSE

Young CJ in Eq in delivering the judgment of the Court of Appeal in *Edwards v Attorney-General*⁷⁰ said:

The purpose of the *Corporations Act* and its predecessor was for permitting the economy to be advantaged by such entrepreneurial ventures with limited liability and to regulate the rights of members inter se, the rights between members and creditors of corporations.

70 (2004) 60 NSWLR 667 at 681.

The policy considerations behind the Act would not authorise the Court lightly to set aside the requirements of the Act where they have not been observed. Each application for the exercise of the Court's relieving power will require consideration of all the circumstances of the case to ensure that the indulgence sought is appropriate and does not undermine the requirements of the Act.⁷¹

The NSW Court of Appeal held that the purpose of section 1318 is to excuse company officers from liability in situations where it would be unjust and oppressive not to do so, recognising that such officers are businessmen and women who act in an environment involving risk in commercial decision-making.⁷²

In *Manpac Industries Pty Ltd v Ceccattini*⁷³ the court indicated there was a limit to the protection under section 1318 where directors have reasonable grounds to believe that the company is no longer solvent. When that point is reached, the field of limited liability to a degree evaporates unless the directors can demonstrate some special circumstances as to why they should still be protected.

6.4.1.2 INTERPRETATION

In interpreting a statute it is a basic tenet of construction that a court must not look at a provision in isolation but must look at the entire piece of legislation to determine its scope and purpose. The High Court in *Project Blue Sky v Australian Broadcasting Authority*⁷⁴ discussing the purpose of statutory construction said:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.

Austin J was of the view that in interpreting section 1318:

The court when exercising its discretion must ascertain the scope and purpose of the statutory enactment and exercise the power judicially, that is to say, not arbitrarily or capriciously so as to frustrate the legislative intent.⁷⁵

The maxim *Generalia specialibus non derogant* may be a factor that is taken into account in considering if section 1318 is a defence to the provisions of divisions 9 of the ITAA 36. Isaacs and Rich JJ in dealing with this concept in *The Bank Officials' Association (South Australian Branch) v The Savings Bank of South Australia Prosecutor*⁷⁶ explained the meaning of the maxim by citing with approval an extract

71 *Wave Capital Limited* [2003] FCA 969 per French J at paragraph 29.

72 *Daniels Ors formerly practicing as Deloitte Haskin & Sells v Anderson & Ors; Hooke v Daniels & Ors (Formerly formerly practicing as Deloitte Haskin & Sells); Daniel & Ors ((formerly practicing as Deloitte Haskin & Sells v AWA Ltd* (1995) 13 ACLC 614 at

73 [2002] NSWSC 330 at paragraph 78.

74 [1998] HCA 28 per McHugh, Gummow, Kirby and Hayne JJ at paragraph 69.

75 Per Austin J in *ASIC v Vines* [2005] NSWSC 1349 at paragraph 45.

76 [1923] HCA 25; (1923) 32 CLR 276 (6 June 1923) per.

from the judgment of Lord Hobhouse in *Barker v. Edger* speaking for the Judicial Committee as follows:

When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly."

The ITAA 36 deals with the case of directors and their obligations where withholding payments are not accounted to the Commissioner in specific and unambiguous terms. Section 1318 is a general provision. In enacting this provision the 'special declaration' referred to in the *Bank Officials' Association* case does not appear to be present. Section 1318, if of application, could possibly emasculate the purpose under which division 9 of the ITAA 36 was enacted. The penalties imposed under division 9 of the ITAA 36 act as an inducement for directors to act in the prescribed manner.

This maxim was raised by the Commissioner in *Dick* and as an ancillary argument the Commissioner contended the ITAA 36 was a code and as such the Act could not infringe on it. Both submissions were summarily rejected by the court by holding:

This provision was passed later in time and the usual principles of statutory construction lead to the assumption that in the absence of an express provision to the contrary, the legislature intended it to be available to excuse a director from a liability imposed by the *ITAA36*, in appropriate circumstances.

The Act deals with the issue of withholding payments under the ITAA 36 in a special way.⁷⁷ In section 443 BA the administrator of a company must account to the Commissioner of Taxation for withholding payments. Section 588 FGA provides that where a court sets aside a payment that is a withholding payment to the Commissioner as a voidable transaction each person who was a director of the company when the payment was made is liable to indemnify the Commissioner in respect of any loss or damage resulting from the order.⁷⁸ This is similar to the liability imposed on directors under divisions 8 and 9 of the ITAA 36.⁷⁹

Directors liable under this head would not be able to avail themselves of section 1318 as their liability arises merely by virtue of the office they hold. The Act acknowledges the special nature of withholding payments. It seems as if the maxim *Generalia specialibus non derogant* should be applied to the circumstances where it is sought to apply section 1318 of the Act to a penalty imposed by division 9 of the ITAA 36. It is improbable that the legislature intended a different consequence by making 1318 available as a defence to division 9 of the ITAA 36?

Finally on this point Spiegelman CJ in *DCT v Clark*⁸⁰ said the following of provisions of wide generality when dealing with the issues of insolvent trading under the Act:

⁷⁷ For example 443 BA; 588F and 588 FGA.

⁷⁸ Section 588 FGA (2). The failure to pay is a default of the type envisaged by section 1318.

⁷⁹ The defences to 588 FGA are set out in section 588 FGB. These relate to the inability of the company to pay its debts and the steps taken by or knowledge of the party against whom the indemnity is sought as well as a similar defence to that given by section 222 AOJ of the ITAA 36.

⁸⁰ [2003] NSWCA 91 at paragraph 142.

Where, as here, Parliament has chosen a formulation which is of indeterminate scope and of a high level of generality, a court should interpret the provision on the basis that the intention of the original enactment was that the particular application of the provision may vary over time. The context, however, remains one of the law of corporations.

It is the author's opinion that this is an indication that section 1318 may not be of application to claims under division 9 of the ITAA 36.

6.5 JURISDICTIONAL REQUIREMENTS

6.5.1 THE PROCEEDINGS MUST BE FOR NEGLIGENCE, DEFAULT OR BREACH OF DUTY OR TRUST

The court in *Dick* was of the view that section 1318 sits as a safety net behind division 9 of the ITAA 36 and could be relied on to excuse a director either completely or partially from liability, if there were other broader considerations which the court considers should properly be taken into account.

In *Dick* the Commissioner proceeded under sections 255-45 and 255 -50 of Schedule One to the *Tax Administration Act* 1953 and relied on an averment and a certificate to prove liability. The court non the less found there was a default or a breach of a duty based on the fact that the defendant failed to take the steps prescribed by division 9.

The primary problem with the decision in *Dick* on this point is that the court described the test as "whether the liability is for negligence, default, breach of trust or breach of duty." On a proper construction of the Act this is not the test. The true test, in the author's opinion, is whether the proceedings are for negligence, default, breach of trust or duty. In the author's view they are not. The proceedings in the District Court in *Dick* are nothing more or less than a statutory claim in debt. The legislature in Division 9 of the ITAA 36 granted a statutory remedy and a statutory cause of action based in debt. The issue of negligence, default or breach of trust or duty does not form any part of the matters for consideration. Section 1318 provides that it is only the court where the issue of negligence or breach of duty or default is considered that may exercise the discretion given by that section.

The judgment of Campbell J in *John Vouris Re; Epromotions Australia Pty Ltd and Relectronic-Remech Pty Ltd (In Liq)*⁸¹ supports this approach. The learned Judge in that case stated:

It is a precondition for the operation of section 1318(1) that there be a civil proceeding, in a court, against a person who occupies one of the roles identified in section 1318(4) in a corporation, and that those proceedings be "*for negligence, default, breach of trust or breach of duty in a capacity as such a person*". There are no proceedings of that kind against Mr Vouris. Further, the power to relieve which is conferred by section 1318(1) is one which can only be exercised by "*the court before which the proceedings are taken*". Thus, section 1318(1) cannot be availed of by Mr Vouris in the present case.

81 [2003] NSWSC 702 at paragraph 115.

The Commissioner did raise the argument that the case did not involve negligence, default, breach of duty or trust but, based on that set out in the judgment, seemed not to put up a foundation for the submission. In the author's opinion the above is a sound basis in law for the view that the court did not have jurisdiction to hear the matter.

For section 1318 to operate there must be a finding of negligence, default or a breach of a duty or trust. A claim in debt under the ITAA 36 does not permit of such a finding. This suggests that the author's view may well be correct on the issue of lack of jurisdiction.

The court may well be wrong in its assumption of jurisdiction in the matter.

6.5.2 FINDING OF HONESTY

One of the jurisdictional facts that must be present is a positive finding of honesty by the court. If there is no such finding the court is precluded from coming to the assistance of the defendant.

In *ASIC v Adler & 4 Ors*,⁸² Santow J held that there is an onus on defendant to show honesty. He was of the view there must be a positive finding of honesty. Simply failing to find dishonesty is not sufficient.

Tadgell J in *Commonwealth bank of Australia v Friedrich*⁸³ was of the view that if the conduct involved a flagrant breach of both the letter and intent of the law the court would not come to the assistance of the defendant. He was of the view to do otherwise do a serious disservice to the administration of the Code⁸⁴ and to the commercial community.

The court in *Dick* (at paragraph 120) did not appear to make a finding of honesty other than possibly inferentially.⁸⁵ In the passage that is most clearly directed to this issue it said:

It was not submitted that the defendant acted dishonestly. In any event I am satisfied that his failure to exercise reasonable care and diligence as a director did not amount to dishonest conduct carrying with it the degree of moral turpitude that would be required to oust the application of s 1318.

This is not a direct finding of honesty as required by section 1318.

The court may have been mistaken in exercising jurisdiction for this reason as well.

6.5.3 THE EXERCISE OF THE DISCRETION

Accepting that on a proper construction of section 1318 it is of application to claims under division 9 of the ITAA 36, it remains to consider whether the court in *Dick* correctly exercised the discretion granted to it.

82 [2002] NSWSC 483 at paragraphs 166 to 169.

83 (1991) 5 ACSR 115 at page 198, 199.

84 The predecessor of the Act.

85 Findings of naivety or ingenuousness are not the equivalent of a positive finding of honesty.

In exercising its discretion under section 1318 the court must take into account not only the interests of the parties but also the public interest. Evidence of a blatant disregard of the provisions of the Act or the constitution of the company may lead to refusal of relief.⁸⁶ Thus in *Dick*, the court cited with approval the following passage:⁸⁷

“...the evils of taxpayers deducting taxation payments from employees’ wages and not passing them on to the authorities...The evils are not limited to the tax avoided: they extend to the use made of the money, namely theft or use as working capital, thereby permitting companies to continue to trade which in truth are not capable of continuing to trade lawfully.”

The public interest requires that monies deducted from wages for tax be paid to the Commissioner.

Austin J undertook a detailed review of how the discretion in section 1318 is to be exercised.⁸⁸ He held the court has a wide discretion and it should not be fettered. The discretion should be exercised where a person acted honourably, fairly, in good faith and in a common sense manner as judged by the standards of others of a similar professional background.

The various factors to be considered when exercising the discretion were said to be:⁸⁹

The degree of care with which a person has acted is relevant to the question whether he or she ought fairly to be excused. The degree to which the contravening conduct departed from the standard of reasonableness prescribed by the statutory duty is a closely connected consideration;

The extent to which the defendants had fallen short of discharging their duties and the degree to which their conduct was unreasonable;

The defendant's subsequent conduct or present financial or other circumstances;

If a matter is relevant to be considered by the court in deciding on the orders that it will make following a contravention, from which orders a liability will flow, that matter is relevant to be considered by the court in deciding whether to grant relief from the liability;

The seriousness of the contravention which has three components: the importance of the provision contravened, in terms of public policy; the degree of flagrancy of the contravention; and the consequences of the contravention in terms of harm to others. Evidence of a blatant disregard of the provisions of the Act or the constitution of the company may lead to refusal of relief;

Where to grant relief would do serious disservice to the administration of company law and to the commercial community;

86 Per French J in *Wave Capital Limited* [2003] FCA 969 at page 199.

87 *Deputy Commissioner for Taxation v Saunig* 55 NSWLR 72.

88 *ASIC v Vines* [2005] NSWSC 1349 at paragraphs 46 to 74.

89 The items mentioned are taken from the judgment of Austin J in *Vines* case but have been summarized for this paper. See n 88 above.

Whether the person concerned obtained and followed competent advice before acting in contravention ;

Whether the conduct was in accordance with some established practice;

Whether the person concerned was paid for undertaking the contravening conduct; and

The defendant's service to the community, the effect of the proceedings on his reputation and career, and the suffering caused to him and his family.

In *Edwards ASIC v Edwards*⁹⁰ the court declined to exercise the discretion in section 1318 when a defendant allowed a company to incur debts when he knew the company would not be able to pay. This was held to be morally wrong and precluded a finding of honesty.

6.6 THE DISCRETION IN DICK

The court took a number of factors into account in reaching a decision favourable to the defendant. In considering how to exercise its discretion the court in *Dick* did not seem to take into account any factors averse to a favourable finding. The court may have erred in this regard. Each factor raised by the court is mentioned separately together with the author's comments.

6.6.1 DEFENDANT HAD NO BUSINESS ACUMEN

After his appointment in 2001, the defendant never had and took no steps to acquire any of the skills and knowledge needed to act as director. He was aware the company had significant financial problems but did nothing. The fact that the defendant was an unpaid director does not negate his duties.⁹¹

The defendant has fallen well short of the degree of care required of a director. This is in fact acknowledged by the court in *Dick* when considering the defences under the ITAA 36, it said:

The defendant was clearly aware not just that the company was in a parlous financial position, but also that it was failing to meet its tax obligations. He failed to make any independent investigation or enquiry, choosing at each turn not to ensure compliance with the notices issued by the Commissioner and instead to rely on the cursory assurances of Mr Gelonesi that the situation would be rectified.⁹²

In the author's opinion the court should have looked at this as an important reason to exercise its discretion against the defendant rather than the reverse.

6.6.2 THE INNOCENCE OF THE DEFENDANT

The court was of the view that the evidence supported the inference that the defendant was "conned" by Mr. Gelonesi the majority shareholder who took control of the

⁹⁰ [2006] NSWSC 376 at paragraph 35.

⁹¹ *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 at page 197.

⁹² See judgment in *Dick* at paragraphs 110, 111; note 69 above.

affairs of the company during the period January to March 2003. The defendant believed Mr. Gelonesi to be reputable, honourable and of some considerable means.

The judgment refers to three representations made by Gelonesi. The first, which happened in late 2002 when the issue of Directors' and Officers' Liability insurance was discussed. No insurer would accept the risk. Gelonesi told the defendant "Don't worry, I'll indemnify you." The second occasion was on the 23 November 2002 after the defendant had received the first of three notices from the Commissioner. He contacted Mr Gelonesi who said to the defendant, "Don't worry about it, leave it to me, I have a lot of dealings with the ATO". The defendant replied, "I'm concerned, will it affect me?" Mr Gelonesi replied, "No, I'll indemnify you." The third occasion was after the second notice was received. The defendant met with Mr Gelonesi on 28 January 2003. The minutes of the meeting record "GD reported that he had received a second letter from the ATO on non payment of Tax due and expressed concern...AG reconfirmed that GD would be indemnified against any claims."

These representations do not justify the inference drawn by the Court.⁹³ The statements of Gelonesi seem to envisage that the defendant may be called upon and would be obliged to pay the Commissioner. There was no representation that would entitle the defendant to believe that the problems of the company relating to liquidity and non payment to the ATO and other creditors had been resolved. The defendant knew, at least until November 2002 by virtue of the reports made to him by the accountant of the company and from his own dealings just how bad its financial affairs were. With this knowledge he ignores each and every obligation he had as a director. He knew, or would have known had he made proper enquiry, that the company was probably trading in insolvent circumstances and he certainly knew the company could not meet its day to day obligations. At paragraph 72 of the judgment in *Dick* the court said

The evidence makes it clear that from about the time that the Glasgow Rangers started to withdraw, the Club was experiencing severe ongoing financial difficulties. Not only did it not pay its PAYG deductions to the Commissioner, but it was also often late with player payments and other creditors.

The defendant was aware of these facts. Until November 2002 on the defendant's own version he was an active director.

The receipt of the second notice from the Commissioner issued on 23 January 2003 was a warning that there had been no improvement in the financial status of the company. The defendant simply ignores his obligations as a director. The defendant's conduct departed to a significant degree from the standard of reasonableness mandated by the Act.⁹⁴

This is against the findings of the court in *Dick*.

⁹³ *Warren v Coombes* (1979) 142 CLR 531. A Court of Appeal is entitled to draw its own inference from the undisputed facts

⁹⁴ See n 88 above.

Further more the findings against Gelonesi are of a serious nature and as such proof should not be produced by inexact proofs, indefinite testimony, or indirect inferences.⁹⁵ No consideration was given to the rule in *Jones v Dunkel*⁹⁶

6.6.3 INABILITY AFTER RESIGNATION TO TAKE REQUIRED STEPS IN TERMS OF ITAA 36

A mitigating factor was said to be the fact that at the date of issue of the third *Penalty Notice Demand*, on 8 July 2003 the defendant had resigned as a director. In addition there was no ability, in a real and practical sense, to bring about any of the four matters required under section 222 AOB (1) of the ITAA 36.

Cases such as *Fitzgerald*⁹⁷ and *George*⁹⁸ show that the obligation to take the steps arose when the deductions were made. All that the notice did was to enable the Commissioner to proceed to payment. The defendant was a director when the monies were deducted but did nothing to ensure they were paid over. He knew the company had financial problems. He simply closes his eyes to the obvious.

This factor cannot outweigh the defendant's dereliction of duty as a director.

The above three factors are sufficient in themselves to preclude a finding of honesty on the part of the defendant. They also, in the author's opinion, preclude the court coming to the defendant's assistance. To do so would do a disservice to the administration of the Act.

6.6.4 NO ONE ELSE COULD PAY

The view was taken that even if the defendant had carried out the prescribed tasks envisaged by the Division 9 of the ITAA 36, there is no evidence that the Commissioner would have received any payment. The court made the point that

The evidence establishes that the defendant has no prospect of recovery from anyone else by way of indemnity or contribution, including the company itself. He is literally the last man standing in the financial debacle that was the Northern Spirit Soccer Club.

The purpose of division 9 is not to guarantee payment to the Commissioner but rather to take the management of the company out of the hands of the directors in the event of non payment of withholding payments.⁹⁹ The findings of the court were not that the defendant could not pay the liability to the Commissioner but rather that he would be saddled with the entire debt. The Commissioner had a number of entities that were jointly and severally liable to the Commissioner for the debt owed to the Commonwealth. The Commissioner could look to one or more of these debtors for payment. Had the defendant acted in a manner mandated by the ITAA 36 or met his obligations as a director this claim would not have arisen.

⁹⁵ See note 58 above.

⁹⁶ (1959) 101 CLR 298. This principle provides that, if a seemingly material witness was not called, then an inference may be drawn that the evidence of the witness would not have assisted the party's case.

⁹⁷ See n 28 above.

⁹⁸ See n 35 above.

⁹⁹ See n 20 above.

6.6.5 DEFENDANTS COMMUNITY SPIRIT

The defendant as evidence of his community spirit and generosity received no further remuneration from the Club either as a director or in his management roles, from the time Mr. Gelonesi became the majority shareholder. The defendant had made an outstanding, selfless contribution to the community through his services to soccer.

This is a factor that may be taken into account in remission of the amount owing.

6.6.6 TOOK NO ACTIVE ROLL IN FINANCIAL AFFAIRS FROM JANUARY 2003

The judgment states from January 2003, after Mr. Gelonesi had installed his brother-in-law as the financial controller, the defendant took no further active role in the Club's financial affairs from a management perspective, concentrating on football matters where his strengths, skills and experience lay.

The obligations of directors are clear unambiguous.¹⁰⁰ The defendant seeks to avoid responsibility by saying he did not know he could demand information or attend director's meetings. Even accepting this as a mitigating factor there is no explanation for the monies withheld and not paid over in December 2002 which formed part of the Commissioner's claim in these proceedings.

The defendant cannot simply hide from the truth and expect the court to come to his assistance. Again the notice from the Commissioner in January 2003 should have put him on enquiry. He should at the least have sought professional advice on his rights and obligations. He should have demanded proof of payment to the Commissioner. He should have demanded regular access to the books and records of the company. He does nothing. There is nothing in section 1318 suggesting that a director who is ignorant of the law or of any fact of which he ought to know is in a better position than a director aware of the law and aware of facts which he found out.¹⁰¹

6.6.7 DEFENDANT DID NOT IGNORE COMMISSIONER'S NOTICES

The court was of the view that the defendant did not completely ignore the Commissioner's notices. On each occasion he took positive steps to attempt to deal with the issue of outstanding PAYG payments by raising them promptly with Mr. Gelonesi. Those steps led on each occasion to a genuine belief that the problem had been resolved. The deceit of Mr. Gelonesi belied the true situation.¹⁰²

None of the representations by Gelonesi suggest the problem had been resolved. The problem kept recurring. Creditors were not being paid, the Commissioner kept issuing notices. When the final notice is received the defendant does nothing on his own version. The judgment makes no mention of any action taken by the defendant on this occasion other than to say he could do nothing about it. Did he approach Gelonesi? What of the indemnities offered by Gelonesi? Did he now seek legal advice? The judgment is silent on these issues.

¹⁰⁰ See n 91 above.

¹⁰¹ See n 33 above.

¹⁰² *DCT v Dick* [2006] NSWDC 17 at paragraphs 143 to 153.

6.6.8 MISCELLANEOUS GROUNDS

There was a paragraph that seemed to incorporate a number of additional grounds which the court implicitly took into account. This passage reads:

Other circumstances which the courts have taken into account have included: the seriousness of the contravention; any harm caused to others; the presence or absence of personal gain; whether the director was paid for his services; whether the defendant was acting in a professional capacity, such as a lawyer or accountant; the nature of any community service or benefit to society arising from the director's service; the director's personal financial circumstances; and the effect on the director personally and on his family. I regard each of these circumstances as relevant to this defendant, together with his age, and I will come to some of them in more detail shortly.

As has been noted the breaches of the various obligations imposed on directors by the defendant was of the highest order. He is supine in all things when action is needed.

The public interest requires that monies deducted from employees are paid over to the Commissioner and if not that control of the company be taken from the directors. This is an aggravating factor. The Commissioner suffered a loss being the monies not paid over. Public policy requires nothing less than compliance.

The age of the defendant and his personal circumstances are favorable factors.

7 CONCLUSIONS

In the author's opinion the court did not have jurisdiction to come to the defendant's assistance under the provisions of section 1318. Even if it did the factors mentioned by the court are primarily of such a nature that the discretion should have been exercised against the defendant.

There is no doubt that the personal circumstances of the defendant cries out for sympathy but hard cases make bad law. To do otherwise would do serious disservice to the administration of the Act and to the commercial community. This case should not become a precedent on the use of section 1318.

Assuming the matter goes on appeal it is the author's view the Commissioner will be successful. If so the barbarians at the gate of the fiscus will be held at bay.