

SUPREME COURT OF QUEENSLAND

CITATION: *Deputy Commissioner of Taxation v Clayton* [2026] QSC 236

PARTIES: **DEPUTY COMMISSIONER OF TAXATION**
(plaintiff)
V
MICHELLE WENDY CLAYTON
(defendant)

FILE NO/S: 15065/24

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 2 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 7 August 2026; defendant further submissions filed 17 August 2026; plaintiff further submissions filed 1 September 2026

JUDGE: Treston J

ORDER:

- 1. Pursuant to r 290 of the *Uniform Civil Procedure Rules 1999* (Qld) the default judgment entered on 28 February 2025 is amended by reducing the judgment sum from \$2,830,118.60 to \$2,660,204.80.**
- 2. Save as provided for in order 1, the application filed 1 May 2026 is dismissed.**
- 3. The defendant pay 60 per cent of the plaintiff's costs of the application on the standard basis, as assessed or agreed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – GENERAL PRINCIPLES – where defendant applies to set aside a default judgment obtained by the plaintiff in February 2025 – where plaintiff claims for director penalties arising by operation of s 269-10 of the *Taxation Administration Act 1953* – where defendant alleges a *prima facie* defence arises under s 269-35(1) or (2) that the defendant did not participate in the management of the relevant companies or that all reasonable steps were taken to ensure the companies complied with their obligations – where defendant's explanation for delay that she received advice from a solicitor that she did not have a defence –

where application brought upon being advised that a potential defence available – whether default judgment should be set aside

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS -- AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS – GENERAL PRINCIPLES – where default judgment obtained despite irregularity in statement of claim – where irregularity conceded – where parties agree appropriate order is to excise portion of judgment which is irregular – whether power to vary judgment should be exercised

Taxation Administration Act 1953 (Cth), s 269-20, s 269-35
Uniform Civil Procedure Rules 1999 (Qld), r 290

Canty v Deputy Commissioner of Taxation (2005) 63 NSWLR 152; [2005] NSWCA 84
Cusack v de Angelis [2008] 1 Qd R 344; [2007] QCA 313
De Castro v Burtenshaw Super Pty Ltd [2023] QCA 218
Deputy Commissioner of Taxation v Clark (2003) 57 NSWLR 113, [109]; [2003] NSWCA 91
Embrey v Smart [2014] QCA 75
Kumar v Ernst [2021] QCA 260
National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd [1983] 2 Qd R 441
Roche v Deputy Commissioner of Taxation [2015] WASCA 196
Snell v Deputy Commissioner of Taxation [2020] NSWCA 29

COUNSEL: V G Brennan for the plaintiff/respondent
 D J Alexander for the defendant/applicant

SOLICITORS: ATO Legal and Litigation Services for the plaintiff/respondent
 Lillas and Loel Lawyers for the defendant/applicant

Introduction

- [1] This is the defendant's application to set aside a default judgment obtained against her by the plaintiff comprising debts owing for director penalties pursuant to s 269-20 of the *Taxation Administration Act 1953* (Cth) (**TAA**). The application is brought pursuant to r 290 of the *Uniform Civil Procedure Rules 1999* (**UCPR**).
- [2] The hearing proceeded on the basis that the judgment was regularly entered. At the conclusion of the matter the defendant alleged that the judgement was irregularly entered by reason of the Statement of Claim failing to properly allege the basis of the defendant's liability under the TAA. It can be accepted that a defendant is entitled to set aside an irregularly entered default judgement *ex debito justitiae*, subject to the

power of amendment being exercised and the futility of interfering with the judgment.¹

- [3] Consequently, I made orders on 7 August 2026 that the defendant had leave to make further written submissions by 17 August 2026 as to the irregularity issue, with the plaintiff to file and serve submissions in reply by 1 September 2026. In accordance with those orders, the defendant sought a further oral hearing which was listed for 22 September 2026.
- [4] On 18 September 2026, the defendant informed the court that she did not press for a further oral hearing given concessions made by the plaintiff in its submissions in reply.
- [5] The plaintiff concedes that the court may proceed on the basis that the judgment was irregularly entered, although the quantum of the irregularity is confined to \$169,913.80. Each party accepts that, if the set aside application is not successful on the merits, that the appropriate order is that the default judgment is amended by that sum, and the application is otherwise dismissed.
- [6] For the reasons that follow, I conclude that the defendant's application to set aside the default judgment on the merits should be dismissed. The appropriate order is that the judgment entered by the registrar on 28 February 2025 should be amended to reflect the agreement reached by the parties.

Background

- [7] On 5 November 2024, the plaintiff filed a proceeding against the defendant to recover unpaid director penalties in a sum of \$2,830,118.60, together with interest and costs.
- [8] The proceedings arose out of the failure of two companies, Banfrost Haulage Pty Ltd ACN 601 845 238 (**BH**) and Bundaberg Refrigerated Transport Pty Ltd ACN 113 427 991 (**BRT**) (collectively, the **companies**), to comply with their taxation and superannuation obligations in the period 2015 to 2021.
- [9] The defendant was the sole director of both companies at the time the proceedings were issued. She was appointed as director of BH from its incorporation on 16 September 2014, and in place of her husband, Mr McDonald, as director of BRT on 17 June 2021.
- [10] The defendant identifies that the financial struggles of BRT and BH largely arose out of the misconduct of the manager of the companies, Mr Neal. Mr Neal was an in-house accountant and financial controller who was originally employed by Mr McDonald in 2015.
- [11] Mr Neal is alleged to have misused his position and concealed the true financial state of the companies until he was ultimately terminated in October 2020. Legal advice was sought to recover funds from Mr Neal, but no action was ultimately pursued.
- [12] Mr Gavin Morton of Morton & Lee Insolvency was appointed as liquidator of BH on 11 August 2021, and BRT on 15 September 2021.

¹ *Cusack v de Angelis* [2008] 1 Qd R 344, [37], [44]; [2007] QCA 313 (Muir JA, Lyons J agreeing).

- [13] The proceeding was personally served on the defendant on 11 January 2025.
- [14] No defence was filed.
- [15] On 28 February 2025, this court entered judgment in default of filing a defence against the defendant in the amount of \$2,821,188.92 including costs of \$2,334.32.
- [16] On 28 November 2025, the plaintiff commenced sequestration proceedings by way of creditor's petition in the Federal Circuit and Family Court (Division 2). The bankruptcy proceedings were originally listed on 11 February 2026 and appear to have been in pendency until this set aside application is determined.
- [17] The defendant's application to set aside the default judgment was filed on 1 May 2026, 13 months after default judgment had been obtained.

Principles for setting aside a default judgment

- [18] There is no dispute as to the principles which are relevant to setting aside a default judgment.
- [19] Those principles were recently set out by Bond JA (Dalton JA and Cooper J agreeing) in *De Castro v Burtenshaw Super Pty Ltd*:²

“[7] Rule 290 of the *Uniform Civil Procedure Rules 1999* conferred on the primary judge a discretion “... to set aside or amend a judgment by default ..., on terms, including terms about costs and the giving of security, the court considers appropriate.”

[8] The discretion is untrammelled although it must be exercised judicially. Its evident purpose is to permit the Court in an appropriate case to avoid the injustice which might be caused if judgment followed automatically on default. Relevant considerations include:

- (a) first, whether the defendant has given a satisfactory explanation of the failure to defend within time;
- (b) second, whether any delay by the defendant in making the application to set aside precludes it from obtaining relief; and
- (c) third, whether the defendant has a prima facie defence on the merits.

(footnotes omitted)

- [20] The third consideration is generally considered to be the most important. That characterisation was taken up by Fraser JA in *Kumar v Ernst*:³

² [2023] QCA 218, [7] – [13].

³ [2021] QCA 260, [13] (Sofronoff P and Mullins JA agreeing) citing *Embrey v Smart* [2014] QCA 75 (Applegarth J, Muir and Morrison JJA agreeing) and *National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd* [1983] 2 Qd R 441, 450 (McPherson J).

“... a defendant who had an apparently good ground of defence would not often be refused the opportunity of defending, even though a lengthy interval of time had elapsed, provided that no irreparable prejudice was thereby done to the plaintiff ...”

- [21] The evidence that ought to be produced to demonstrate that a defendant has a *prima facie* case was described by Applegarth J in *Embrey*:⁴

“The third matter has been described in different ways. Lord Atkin in *Evans v Bartlam* referred to rules that guide the discretion and one of them was “an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence”. It has been said that the affidavit “must set out all the defences on which the defendant intends to rely and briefly set out the facts by which the defendant seeks to establish such defences”. The defendant must make more than a bare allegation: the allegation must be supported by “some reference to evidence to suggest that the defence is plausible and not just raised for the purpose of having default judgment set aside”. It is insufficient for an applicant:

“to allege that he has a defence upon the merits and swear to such a defence generally. He must go further and disclose what such merits are, and show to the court that his application is *bona fide*.””

(footnotes omitted)

- [22] In approaching the issue of the merits of the suggested defence, it must be appreciated that the judge is not conducting a trial.⁵

Merits of the proposed defence

- [23] The defendant has provided a proposed draft defence and has sworn to the truth of the factual matters raised. The defendant relies upon on her affidavits and those of her solicitor and her husband. In that material, she contends that:

- (a) she did not take part in the management of the companies and it would have been unreasonable to expect her to take part so as to invoke the statutory defence available under s 269-35(1) of the TAA; and/or
- (b) she took reasonable steps, or there were no reasonable steps so as to invoke the statutory defence available under s 269-35(2) of the TAA.

- [24] Section 269-35 provides:

“269-35 Defences

Illness

- (1) You are not liable to a penalty under this Division if, because of illness or for some other good reason, it would have been unreasonable to expect you to take part, and you did not take part, in the management of the company at any time when:

⁴ *Embrey*, [68].

⁵ *De Castro*, [12].

- (a) you were a director of the company; and
- (b) the directors were under the relevant obligations under subsection 269-15(1).

All reasonable steps

- (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 436A, 436B or 436C of the Corporations Act 2001;
 - (ia) the directors caused a small business restructuring practitioner for the company to be appointed under section 453B of that Act;
 - (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.”

[25] The statutory defence under s 269-35(1) was considered in *Snell v Deputy Commissioner of Taxation*,⁶ where Brereton J observed that the defence:

“... involves justifiable non-participation in management, against the backdrop that **it is the obligation of a director to participate in management of the company, and a director is not entitled to choose not to participate. It is unsurprising that, against that backdrop, the defence is not easily established.** The defence means that a director who justifiably does not participate in management is not responsible for the Company’s default. Broadly it has two components: *first*, that the director does not participate in management at **any relevant time**, and *secondly*, that it would have been unreasonable to expect him to do so either because of illness or for some other good reason. **Thus if, despite even serious illness, the director continues to participate in management, the defence is not available.**”

(emphasis added) (footnotes omitted)

⁶ [2020] NSWCA 29, (Brereton JA, Gleeson JA and Barrett AJA agreeing).

[26] The defence must cover the whole of the period commencing on the breach of the director's obligation on the due day and continuing until the expiry of the director penalty notice.⁷

[27] The reason for non-participation is only good, if, viewed objectively, it is not only adequate but "valid" and "sound".⁸ In *Deputy Commissioner of Taxation v Clarke*,⁹ Justice Spigelman (Handley and Hodgson JJA agreeing) observed that "...it is a basal structural feature of corporations legislation in Australia that directors are expected to participate in the management of the corporation", and:

"... there is no justification for a doctrine which would hold **sleeping directors to be "de facto non-directors" who should be relieved of their liabilities** ... the conduct of such directors may never meet the requisite standard of participation in management, such conduct should not be excused as a "good reason" in law."

(emphasis added)

[28] While a "good reason" might turn on its own facts, the court in *Clarke* rejected that total reliance on another director met the relevant threshold.¹⁰

[29] As to the defence available under s 269-35(2), Buss, Newnes and Murphy JJA explained in *Roche v Deputy Commissioner of Taxation*:¹¹

"29 What is 'reasonable' for the purposes of s 269-35(2) does not depend merely upon the actual knowledge of the director but involves an objective test. The director must prove that he or she took all steps which were reasonable, having regard to the circumstances of which the director, acting reasonably, knew or ought to have known: see *Deputy Commissioner of Taxation v Saunig* (2002) 55 NSWLR 722; (2002) 43 ACSR 387 [25].

...

31 What it was necessary for a director to do to establish a defence under the corresponding provisions previously contained in the *Income Tax Assessment Act 1936* (Cth) was considered in *Canty v Deputy Commissioner of Taxation* [2005] NSWCA 84; (2005) 63 NSWLR 152. At the relevant time, s 222AOB(1) of the *Income Tax Assessment Act* required the directors, on or before the due date, to cause the company to do at least one of the following: to pay the withheld tax; to make an agreement with the Commissioner under s 222ALA; to appoint an administrator; or to begin to be wound up. Section 222AOC provided, relevantly, that it was a defence for a director to prove (par (a)) that he or she

⁷ *Snell*, [52] – [58]; *Canty v Deputy Commissioner of Taxation* (2005) 63 NSWLR 152; [2005] NSWCA 84.

⁸ *Snell*, [88].

⁹ (2003) 57 NSWLR 113; [2003] NSWCA 91.

¹⁰ *Snell*, [89].

¹¹ [2015] WASCA 196.

took all reasonable steps to ensure the directors complied with s 222AOB(1), or (par (b)) that there were no such steps that he or she could have taken.

32

Handley JA (with whom Beazley and Santow JJA agreed) explained the effect of the defence under s 222AOC as follows:

The defence under par (a) is that the person 'took all reasonable steps to ensure that the directors complied with subsection 222AOB(1)'. Compliance would be achieved if any one of those events were to occur. Thus if payment was made there is no need for an agreement, an administrator, or a liquidator. If payment was being pursued the other courses would for the time being be unnecessary and counterproductive. If payment is out of the question or cannot be achieved the person bound must address the other steps. If winding up then becomes the preferred option there will be no need for the time being to seek the appointment of an administrator.

The defences under par (a) and par (b) are cumulative not mutually exclusive. A defendant may establish that there was nothing that could reasonably be done to achieve payment. He or she may also establish that there was no point in attempting to negotiate an agreement with the Commissioner. In such a case the defence under par (b) would succeed pro tanto leaving the defence under par (a) to address the remaining options.

In other cases the defence under par (b) may succeed in relation to all options, so that the defence under par (a) need not be considered. If the only feasible options are the appointment of an administrator or a liquidator a person under the duty, acting reasonably, may decide to seek a winding up. If so, he or she will not be acting unreasonably by doing nothing to secure the appointment of an administrator at that stage. The converse will also be true.

Thus a person under the duty, who acted reasonably in choosing one of the possible events and took all reasonable steps to bring it about would, to that extent, make out the par (a) defence although no attempt was made at that stage to achieve compliance in any other way. A person who acted reasonably in choosing between the alternatives but failed to take all reasonable steps to bring about the selected event would fail, as would a person who acted unreasonably in choosing the option to be pursued.

If reasonable steps taken in pursuit of one option fail, non-compliance and the obligation of the director or former director will continue. The director or former director will therefore have to take reasonable steps to achieve compliance in another way. If non-compliance continues long enough before a notice is served each of the four options will eventually have to be addressed and the subs (3) defences will have to cover all options [37] - [41].

...

35 So, compliance with s 269-35(2)(a) requires the director to have taken all reasonable steps to ensure that one of the three alternative events specified happened. The taking by the director of 'all reasonable steps to ensure', within s 269-35(2)(a), requires that each of the alternative events be addressed, either on the basis of taking reasonable steps to ensure the event happened or declining to do anything about that particular event on the basis that there were no reasonable steps that the director could have taken to ensure that the event happened. See, generally, *Miller v Deputy Commissioner of Taxation* (1997) 98 ATC 4059, 4063 - 4064 (Mason P, Beazley JA agreeing).

Defendant's explanation for non-participation

- [30] Whether relevant to the defence under s 269-35(1) or (2), the explanations for the defendant's non-participation were pleaded in the draft defence exhibited to the defendant's solicitor's affidavit dated 26 May 2026 and appear generally to arise out of the following facts:
- (a) first, that the defendant was uneducated without any of the basic knowledge or skills necessary to take part in the management of the companies;
 - (b) second, the defendant did not understand why she was a director of the companies, nor did she have any knowledge of what the role of a director entailed; and
 - (c) third, that the defendant had left the entire management of the companies to another person, Mr Neal, who she described had the full management and control of the companies, and that she simply followed the advice of him and other professional advisors in all respect concerning the companies.
- [31] The defendant raises each of the three non-participation explanations, for both BRT and BH, for each individual alleged taxation liability, save for the allegation that the defendant was not a director of BH at the time certain liabilities were incurred and for that reason s 269-20(1) was not engaged. This aspect of the defence gave rise to the irregular nature of the default judgment, which is dealt with above.
- [32] I do not accept the non-participation explanations because the defendant's affidavits demonstrate that:

- (a) the defendant was told, at an unspecified time, by the companies' accountants that "[her] name needed to be on the documents for the business". She must have agreed to and accepted this advice because she in fact became a director of each of BH and BRT. While the defendant says that she never understood why, she must have accepted the advice that it was necessary. It is unclear whether this was in 2014 or 2021, but either occasion was some years before the proceedings were taken against her, and sometime before the appointment of Mr Morton as liquidator;
- (b) that the defendant followed the advice of Mr Neal, and to a lesser extent, Mr Whitehouse (accountant) and Ms Thomas (the defendant's husband's daughter) over many years about documents that needed to be signed. When asked to do so, she signed those documents;
- (c) after receiving an "overdue notice for \$6,230.00" from the Australian Taxation Office (**ATO**) in July 2019 the defendant immediately texted Mr Neal. Mr Neal responded to her and provided an explanation for the notice. I conclude that the defendant was involved in the business of the company at least to the extent that she monitored the incoming mail and then sought to action issues arising from that mail;
- (d) in respect of the same overdue notice in 2019, when Mr Neal advised the defendant by text message "[p]lease do not stress...sorting this out with the ATO...", the defendant replied "I am stressing" suggesting that she knew and understood the companies' tax liabilities were matters about which she, as a director, ought to be concerned;
- (e) after then being told in early 2020 by Mr Neal, that BH was behind in its tax obligations, the defendant sought advice from her husband about what that meant, suggesting she took a role in understanding BH's obligations;
- (f) upon being advised in 2021, by Mr Whitehouse that the appropriate course was to appoint a liquidator to BH, the defendant acted upon that advice and later took the same approach with BRT (though whether this followed from advice is not stated);
- (g) the defendant says she attended "multiple meetings" with Mr Neal, and was shown, on some occasions, "figures, emails and other documents" produced by him, and on others, spreadsheets which demonstrated that company debts were being paid. Again, this suggests she took a role in understanding at least BH's obligations and had a broader understanding of what those obligations would be to BRT;
- (h) in 2020, when she found out about employee superannuation debt owing by BH, the defendant says that she told Mr Neal to "remove the BH employees and [get] BRT to hire them", evidencing her involvement in decision making on behalf of the companies; and
- (i) the defendant was aware of an agreement that was entered into between BRT and BH rendering BRT responsible for any and all costs that BRT incurred from time to time. Again, this suggests she took a role in understanding the companies' obligations and arrangements.

- [33] Such participation in management of the companies would not support the assertion that the role of management of the companies was entirely left to Mr Neal and other advisors. The defendant's participation is too involved to reach such a conclusion. That is not to decide the issue as if it were a trial; it is to say that the evidence does not reach the standard required to demonstrate a *prima facie* case on the merits, even accepting the defendant's case at its highest.
- [34] In any event, Mr Neal was terminated as and from October 2020, and no reliance can be placed on his management of BRT and BH between that date and when Mr Morton was appointed as liquidator of BH on 11 August 2021, and BRT on 15 September 2021. From at least October 2020, the defendant was aware of financial issues with BH, and expressly began to doubt the truthfulness of Mr Neal's assurances in relation to BH's tax position. Despite that, no effort is made to explain what steps were taken at that stage to enquire into BH's tax position, or how reliance was to be placed on Ms Thomas to address these issues. Similarly, no proper explanation was proffered for how once the defendant was appointed to BRT she placed reliance on others given her awareness of the issues facing BRT attributable to Mr Neal.
- [35] Second, there is no real explanation as to why the defendant's level of education and inexperience deprived her of a capacity to understand her obligations as a director, or indeed to discharge them. This is particularly so in the context of the defendant's history where she sets out at some length that she owned and operated a previous business, which had a number of employees, for about eight years prior to selling that business and assuming the directorship of BH. The defendant's ability to own and manage her own business does make it difficult to accept her education level prevented her from understanding her role as director of a company. That the defendant also attained a qualification as an assistant in nursing and later had the role in BH to "make sure the trucks [of BH] were compliant with their NHVAS requirements ..." and that she "ensured each truck was mechanically sound by reference to the mechanics['] records", is another factor which does not support the defendant's asserted lack of capacity to understand her obligations as a director.
- [36] Third, the defendant's lack of understanding as to why she became a director, or what it entailed does not withstand scrutiny in the context of the fact that it is a director's obligation to inform themselves as to their role.¹² It may be inferred from the fact that the defendant actively attended meetings with Mr Neal and received notices from the ATO that she had at least some grasp of her responsibility towards BH, and later, BRT. The defendant offers no clear explanation of how it is that she came to be a director of BRT in June 2021, but it was long after Mr Neal was sacked in October 2020. It is fair to infer that some events must have precipitated this change in the directorship, but the defendant does not explain.
- [37] Fourth, to the extent that the defendant relies on affidavits of her husband and her solicitor, there are some inconsistencies between the affidavits provided by the defendant, and by her husband as to her involvement in the business. For example, the sweeping statements in Mr McDonald's affidavit as to his wife's complete lack of involvement in the business is in conflict with the factual matters I have set out above.

¹² Clarke, [109].

[38] I am not satisfied that the evidence demonstrates a *prima facie* defence that the defendant did not participate in the management of the company for some “good reason”. Viewed objectively, her reasons are not valid and sound. I do not consider that the pleaded defence rises higher than a bare allegation, where I have concluded that it is not plausibly supported by the evidence filed by the defendant.

[39] The defendant cannot demonstrate a defence under s 269-35(1).

Whether reasonable steps taken or there were no reasonable steps that could have been taken

[40] In the alternative to the non-participation defence, the defendant relies on s 269-35(2) of the TAA in her proposed defence, to say:

- (a) by engaging appropriate professional services (including from an accountant) and relying on and following advice from the same, the defendant took all reasonable steps to ensure one of the things listed in s 269(2)(a)(i)-(iii) happened; or
- (b) that there were no reasonable steps that the defendant could have taken to ensure one of the things listed in s 269-35(2)(a)(i)-(iii) happened because of the criminal conduct of Mr Neal in respect of BH including him embezzling significant funds from BH.

[41] The plaintiff submits that the defendant’s evidence does not engage with how one, or each, of the cumulative requirements of s 269-35(2)(a)(i)-(iii) was being pursued by the defendant as was described in *Roche*, and the defence is thus not made out.

[42] Against that, the defendant submits that, notwithstanding the court may conclude that there remain serious questions as to the adequacy of the steps that the defendant has taken, the reasonableness of those steps is a matter for trial.

[43] I do not accept that submission. To set aside the judgement, the defendant must be able to objectively demonstrate that she took all steps to ensure that one of the matters in s 269-35(2)(a)(i)-(iii) happened, which were reasonable having regard to the circumstances of which she knew¹³ or that there were no reasonable steps she could have taken. For the same reasons arising from the evidence in [32] above, she has failed to meet that threshold.

[44] I therefore do not accept that the facts as disclosed by the defendant to substantiate her defence, demonstrate a *prima facie* defence under s 269-35(2).

Explanation of the failure to defend within time and delay in doing so

[45] The defendant’s explanation for her failure to defend the proceedings and her delay in doing so is that she received advice from a solicitor that she did not have a good basis to defend the claim.

[46] The circumstances of that advice are that one week after receiving the claim and statement of claim in late 2024, a solicitor who was acting on behalf of the defendant and her husband (in some unspecified circumstances) “called in” on her on his way

¹³ *Roche*, [29].

between Brisbane and Toowoomba and the defendant showed him the claim and statement of claim. The defendant alleges that the solicitor told her “[y]ou don’t have a defence. Just let it be.” As a consequence, she did not seek further legal advice, and default judgment was entered on 28 February 2025.

- [47] The solicitor who gave the advice did not provide an affidavit in these proceedings.
- [48] The date the defendant became aware of the default judgment is not known, but I infer that it must have been no later than around the time that the creditor’s petition was filed and served, around January 2026.
- [49] The application to set aside the default judgment was not filed until 1 May 2026.
- [50] Even accepting the defendant’s evidence on this issue as an explanation for the failure to defend, and the length of time to bring this application, it does not assist where there is no *prima facie* defence on the merits.

Conclusion

- [51] The defendant has not succeeded in setting aside the default judgment on the merits.
- [52] The plaintiff does not accept the judgement was irregularly entered. However, the plaintiff accepts that I may proceed on that basis in respect of one component of the judgment sum for which the plaintiff does not press, being \$169,913.80 payable as director penalties for BRT.
- [53] The defendant accepts that the correct course of action is in fact to amend the judgment to reduce it by the sum of \$169,913.80, dismiss the balance of the application, and for costs follow the event. By agreement between the parties those costs are limited to 60 per cent of the standard costs. There will be orders to that effect.