SUPREME COURT OF QUEENSLAND

CITATION:	*Deputy Commissioner of Taxation v Coco* [2003] QSC 119
PARTIES:	**DEPUTY COMMISSIONER OF TAXATION** (plaintiff/applicant) v **SANTO ANTONIO COCO** (defendant/respondent)
FILE NO/S:	S8502 of 2001
DIVISION:	Trial Division
PROCEEDING:	Applications
DELIVERED ON:	14 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25 February 2003
JUDGE:	Mullins J
ORDERS:	**1.The application filed on 24 December 2002 be dismissed.** **2.The application filed on 21 February 2003 be dismissed.**
CATCHWORDS:	PROCEDURE – SUMMARY JUDGMENT – where plaintiff applied for summary judgment under r 292 *UCPR* – whether defendant had no real prospect of successfully defending all or part of claim INCOME TAX – *Income Tax Assessment Act 1936* (Cth) - liability of director for penalty for the amount of PAYG withholdings not remitted by the company - where director claimed non-receipt of penalty notice given under s222AOE – assertion of non-receipt did not displace presumption that the notice was delivered INCOME TAX – *Income Tax Assessment Act 1936* (Cth) - liability of director for penalty for the amount of PAYG withholdings not remitted by the company – where director raised reasonable steps defence pursuant to s222AOJ(3) – reasonable steps defence arguable on the facts *Acts Interpretation Act* 1901 (Cth) *Income Tax Assessment Act* 1936 (Cth) *Taxation Administration Act* 1953 (Cth) *UCPR*, r 292

Deputy Commissioner of Taxation v Gruber (1998) 43 NSWLR 271
Deputy Commissioner of Taxation v Saunig (2002) 43 ACSR 387
DFC of T v George 2002 ATC 4930
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87
Foodco Management Pty Ltd v Go My Travel Pty Ltd [2002] 2 QdR 249
Re Scobie; ex parte Commissioner of Taxation (1995) 59 FCR 177
Simpson v Deputy Commissioner of Taxation (1996) 132 FLR 459

COUNSEL: P G Bickford for the plaintiff/applicant
A B Crowe SC and D W Williams for the defendant/respondent

SOLICITORS: Australian Government Solicitor for the plaintiff/applicant
Gilshenan & Luton for the defendant/respondent

[1] **MULLINS J:** The Deputy Commissioner of Taxation ("the applicant") who is the plaintiff in this proceeding applies for summary judgment under r 292 of the *UCPR*. The application was filed on 24 December 2002. That application is opposed by Mr Santo Antonio Coco ("the respondent") who is the defendant in this proceeding and who has cross applied by application filed on 21 February 2003 for disclosure.

The claim

[2] The proceeding was commenced by claim and statement of claim filed on 20 September 2001. The applicant seeks to recover debts from the respondent which it is claimed are due to the Commonwealth of Australia and payable to the Commissioner of Taxation.

[3] It is not in issue that the respondent was a director of Softex Industries Pty Ltd ("the company") continuously in the period beginning on 1 August 2000 and ending on 9 November 2000. In fact, the respondent had been a director of the company from 17 June 1996.

[4] The applicant alleges that the company withheld amounts for the purposes of Division 12 in Schedule 1 to the *Taxation Administration Act* 1953 ("the *TAA*"). These amounts were PAYG withholdings. The details of the due amount of each amount withheld and the first deduction day in respect of each amount withheld for the purposes of s 222AOB of the *Income Tax Assessment Act* 1936 ("the *ITAA*") are particularised in the statement of claim as follows:

The Amount Withheld	Period of Withholding (The first deduction day was a day falling within this period)	Due Date	Amount Withheld
First	1 August 2000 to 31 August 2000	4 September 2000	$159,923
Second	1 September 2000 to 30 September 2000	5 October 2000	122,585
Third	1 October 2000 to 31 October 2000	9 November 2000	123,011
Total			$405,519

[5] It is alleged that s 222AOB of the *ITAA* was not complied with in relation to the amounts withheld on or before the due dates of the amounts withheld.

[6] It is alleged by the applicant that on 10 May 2001 an officer employed in the office of the Commissioner at Parramatta served the respondent with a notice pursuant to s 222AOE of the *ITAA* by posting the said notice by ordinary post addressed to the respondent at 11 Anzac Road, Carina Heights, Queensland, 4152, which was the address shown as the respondent's place of residence or business according to the documents held by the Australian Securities and Investments Commission in respect of the company. This director penalty notice was in respect of the sum of $405,519.

[7] On or about 21 August 2001 the company received a GST credit of $5,807 which was applied to the unpaid amount of the company's liabilities in respect of the amounts withheld, so that the balance after that credit was $399,712.

[8] The applicant relies on s 222AOC of the *ITAA* to allege that the respondent is liable to pay to the Commissioner a penalty equal to the unpaid amount of each of the amounts withheld and each penalty is due and payable to the Commissioner, so that the defendant is liable to pay the Commissioner the total sum of the balance of the penalties of $399,712.

[9] The applicant relies on the relevant provisions of the *TAA* to allege that the unpaid amount of each penalty after it has become due and payable is a debt due to the Commonwealth and payable to the Commissioner.

[10] The applicant relies on the certificate pursuant to s 255-45 of Schedule 1 to the *TAA* signed under the hand of the Deputy Commissioner of Taxation certifying that the respondent has a tax related liability and, as at the date of the certificate of 24 December 2002, the amount of $399,712 was a debt due and payable by the respondent by way of penalty amount under Subdivision B of Division 9 of Part VI of the *ITAA*. The certificate is Ex BMH5 to the affidavit of Ms B M Horton filed on 24 December 2002.

[11] The applicant also issued separate proceedings against other directors of the company, namely Mr William Guthridge, Mr Brian Jones and Mr John Reid, who had each been sent a director penalty notice for the same sum of $405,519. The applicant applied for summary judgment against each of those directors at the same time as making the application against the respondent. The hearing of those applications followed the hearing of the application against the respondent.

Defences

[12] The defence of the respondent was filed on 3 December 2001. The respondent does not admit the liability of the company for the balance of $399,712 in respect of PAYG withholdings, on the basis that the respondent was not aware of the amounts withheld and the GST credit relied on by the applicant to calculate the balance of $399,712. The respondent alleges that he was not served with a notice pursuant to s 222AOE and s 222AOF of the *ITAA* and therefore denies liability for the amount claimed of $399,712 on the basis that the notice which must be given by the Commissioner to entitle the Commissioner to recover from a director a penalty payable under Subdivision B of Division 9 of Pt 6 of the *ITAA* was not given.

[13] Other defences were sought to be raised by the affidavit of the respondent filed on 12 February 2003. It was frankly conceded by Mr Crowe of senior counsel who appeared with Mr Williams of counsel on behalf of the respondent that if the applicant did not obtain summary judgment, the respondent's defence would need to be amended to plead the defences foreshadowed by his affidavit. Those defences were summarised as:

(a) an estoppel based on an alleged statement made by an officer of the Australian Taxation Office ("ATO") which the respondent seeks to rely on as preventing the Commissioner from relying on the asserted failure of the respondent to do one of the things referred to in s 222AOE(b) or s 222AOB(1);

(b) pursuant to s 222AOJ(3) the respondent took all reasonable steps to ensure that the other directors of the company complied with s 222AOB(1).

Relevant legislative provisions

[14] The provisions of the *ITAA* that are relevant to this proceeding are those that were in force when the company's and directors' obligations relating to the subject withholdings accrued.

[15] The purpose of Division 9 of Pt VI of the *ITAA* is set out in s 222ANA(1) which is to ensure that a company either meets its obligations under the *TAA* relating to the remission of deductions or amounts withheld or goes promptly into voluntary administration or into liquidation. Section 222ANA(2) explains how the division works:

> "The Division imposes a duty on the directors to cause the company to do so. The duty is enforced by penalties. However, a penalty can be recovered only if the Commissioner gives written notice to the person concerned. The penalty is automatically remitted if the company meets its obligations, or goes into voluntary administration or liquidation, within 14 days after the notice is given."

[16] Relevant definitions are set out in ss 222AOA(2) and (3):

> (2) The earliest day on which the company, for the purposes of one of those Divisions (other than Division 13 or 14 in Schedule 1 to the *Taxation Administration Act 1953*):

(a) made a deduction that has that particular due date; or
(b) withheld an amount that has that particular due date;

is called the **"first deduction day"**.

(3) That due date is called **"the due date"**.

[17] Section 222AOB of the *ITAA* prescribes the obligations of directors in relation to deductions and amounts withheld by a company and how those obligations can be complied with:

"(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 222ALA 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 Law;
(d) begin to be wound up within the meaning of that Law.

(1A) For the purposes of paragraph (1)(a), the obligations are:
(a) to comply with Division 1AAA, 3B or 4, as the case may be, in relation to each deduction (if any):
  (i) that the company has made for the purposes of Division 1AAA, 3B or 4; and
  (ii) whose due date is the same as the due date; and
(b) to comply with Subdivision 16-B in Schedule 1 to the *Taxation Administration Act 1953* in relation to each amount that the company has withheld (if any):
  (i) for the purposes of Division 12 of that Schedule; and
  (ii) whose due date is the same as the due date.

(2) This section is complied with when:

(a) the company complies as mentioned in paragraph (1)(a); or
(b) the company makes an agreement as mentioned in paragraph (1)(b); or
(c) an administrator of the company is appointed under section 436A, 436B or 436C of the Corporations Law; or
(d) the company begins to be wound up within the meaning of that Law;

whichever first happens, even if the directors did not cause the event to happen.

(3) If this section is not complied with on or before the due date, the persons who are directors of the company from time to time after the due date continue to be under the obligation imposed by subsection (1) until this section is complied with."

[18] The penalty for directors who are in office when s 222AOB is not complied with on or before the due date is set out in s 222AOC and the penalty for a person who becomes a director of the company after the due date when s 222AOB has not yet been complied with is set out in 222AOD:

"222AOC(1) If section 222AOB is not complied with on or before the due date, each person who was a director of the company at any time during the period beginning on the first deduction day and ending on the due date is liable to pay to the Commissioner, by way of penalty, an amount equal to the unpaid amount of the company's liability under a remittance provision in respect of deductions or amounts withheld:

(a) that the company has deducted for the purposes of Division 1AAA, 3B or 4, of this Act, or withheld for the purposes of Division 12 in Schedule 1 to the *Taxation Administration Act 1953* (as the case requires); and

(b) whose due date is the same as the due date.

222AOD(1) If:

(a) after the due date, a person becomes, or again becomes, a director of the company at a time when section 222AOB has not yet been complied with; and

(b) at the end of 14 days after the person becomes a director, that section has still not been complied with;

the person is liable to pay to the Commissioner, by way of penalty, an amount equal to the unpaid amount of the liability referred to in section 222AOC(1)."

[19] Section 222AOE which requires the Commissioner to give 14 days' notice before recovering a penalty under s 222AOC provides:

"The Commissioner is not entitled to recover from a person a penalty payable under this Subdivision until the end of 14 days after the Commissioner gives to the person a notice that:

(a) sets out details of the unpaid amount of the liability referred to in subsection 222AOC(1) or (2) (whichever relates to the penalty); and

(b) states that the person is liable to pay to the Commissioner, by way of penalty, an amount equal to that unpaid amount, but that the penalty will be remitted if, at the end of 14 days after the notice is given:

(i) the liability has been discharged; or

(ii) an agreement relating to the liability is in force under section 222ALA; or

(iii) the company is under administration within the meaning of the Corporations Law; or

(iv) the company is being wound up."

[20] Where liability to pay a penalty has accrued under either ss 222AOC or 222AOD, the penalty can be remitted by the operation of s 222AOG:

> "If:
>
> (a) a penalty is payable by a person under this Subdivision; and
>
> (b) section 222AOB or 222OBA (whichever relates to the penalty) is complied with at a time when the Commissioner has not yet given the person a notice under section 222AOE, or within 14 days after the Commissioner gives the person such a notice;
>
> the penalty is remitted because of this section."

[21] The defences which can be raised in respect of proceedings to recover a penalty payable under Division 9 of Part VI are set out in s 222AOJ:

> "(1) This section has effect for the purposes of:
>
> (a) proceedings to recover from a person a penalty payable under this Subdivision; or
>
> (b) proceedings under section 222AOI against a person of the kind referred to in paragraph 222AOI(d)
>
> (2) It is a defence if it is proved that, 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:
>
> (a) the person was a director; and
>
> (b) the directors were under the obligation to comply with subsection 222AOB(1).
>
> (3) It is also a defence if it is proved that:
>
> (a) the person took all reasonable steps to ensure that the directors complied with subsection 222AOB(1) or 222AOBA(1) (whichever is relevant); or
>
> (b) there were no such steps that the person could have taken.
>
> (4) In subsection (3):
>
> **"reasonable"** means reasonable having regard to :
>
> (a) when, and for how long, the person was a director and took part in the management of the company; and
>
> (b) all other relevant circumstances."

Service of director penalty notice

[22] Ms J A Beck, an officer employed by the ATO, deposes to giving the respondent the penalty notice pursuant to s 222AOE on 10 May 2001 by posting the director penalty notice by pre-paid ordinary post addressed to the respondent at his address at 11 Anzac Road, Carina Heights, Queensland 4152. The applicant seeks to rely on s 222AOF(1) which permits a director penalty notice to be given by sending it by post to an address that appears from relevant documents held by the Australian Securities and Investments Commission to be the director's place of residence or business. There is no issue that the address used by the applicant was the appropriate address for that purpose.

[23] The respondent swears to not believing that he ever received the original director penalty notice and that he has no recollection of receiving it, nor seeing any original

of it. He swears that if he had received the notice, he would have hand delivered the original of the notice directly to his then solicitors, Minter Ellison, and that he would have taken advice from Minter Ellison as to whether he needed to respond to the notice and how to respond to the notice. The respondent does not recall ever hand delivering the notice (or a copy of it) to Minter Ellison at all.

[24] In her affidavit filed on 10 February 2003, Ms Beck deposes to the fact that the envelope in which the director's penalty notice was sent to the respondent was marked with a return address, if it were unclaimed. Ms Beck deposes to having conducted a thorough search within the ATO at Parramatta, from where the director's penalty notice was despatched, and has not found any evidence to suggest that the envelope was returned to the applicant unclaimed.

[25] For the purpose of the hearing of this application, the applicant issued a subpoena to Minter Ellison to produce all documents between Minter Ellison, its partners, employees, servants or agents and the respondent or any other person acting on his behalf in relation to the receipt by the respondent of a notice pursuant to s 222AOE of the *ITAA* dated 10 May 2001. An original file note dated 22 May 2001 of Minter Ellison in which the client is referred to as "Softex" and the matter is referred to as "Affairs" was disclosed. That file note referred to "Attg Santa Coco with AXS at our office; Received copy documents". A number of photocopied documents were also produced by Minter Ellison including the director penalty notice addressed to the respondent dated 10 May 2001 and an envelope addressed to the respondent with the ATO's return address shown on the envelope which was postmarked "Sydney 5 p.m. 10 May 2001". The produced documents also included a copy of a letter from the company to the ATO dated 17 May 2001 which was signed by the chief financial officer, Mr Ian McCall, and contained a proposal for repayment which included PAYG withholding liability. The subject matter of the letter included a reference to directors' notices under s 222AOE and identified Messrs Reid, Coco, Guthridge and Jones. Minter Ellison sent a letter dated 24 May 2001 to the ATO on behalf of the company in respect of "your notice of 10 May 2001 to its directors, including Mr Santo Coco".

[26] No partner or employee from Minter Ellison was required to give evidence. There was no cross examination of the respondent. Although the documents produced by Minter Ellison strongly support an inference that the respondent did, in fact, receive the director penalty notice addressed to him and dated 10 May 2001, it is not appropriate to make any such finding on an application of this nature without proper testing of evidence.

[27] Apart from claiming non-receipt of the notice, what is not controverted by the respondent's material in response to the application is the fact that the director penalty notice addressed to him was sent by the applicant in the manner provided for in s 222AOF. The respondent's belief that he did not receive the notice does not displace the proof put forward on behalf of the applicant that the notice was sent by post. The applicant can rely on the deeming provision contained in s 29 of the *Acts Interpretation Act* 1901 (Cth).

[28] The relevance of evidence of non-receipt of a director penalty notice was considered in *Deputy Commissioner of Taxation v Gruber* (1998) 43 NSWLR 271, 277. Although the Commissioner in that case had sent the notice to the address permitted by s 222AOF, it had been some years since the recipient had resided at that address

and he did not receive the notice. Relying on *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 96-97, Stein JA stated the proof of non-receipt is not proof of non-delivery and that the presumptions inherent in ss 28A and 29 of the *Acts Interpretation Act* 1901 (Cth) are not displaced by evidence of non-receipt. It is proper that this same approach be applied to this matter. On that basis, the respondent's assertions of non-receipt of the notice do not displace the evidence and presumptions which allow the conclusion that the director penalty notice addressed to the respondent and sent by pre-paid ordinary post was delivered. The defence based on alleged non-receipt of the director penalty notice by the respondent does not justify the matter proceeding to trial.

Estoppel defence

[29] The facts relied on by the respondent to support the defence of estoppel concern the repayment program which the company entered into with the Commissioner of Taxation on or about 30 June 2000 in respect of sales tax then owing for the period August 1998 to June 2000. Mr Ray Pflaum of the ATO was attending at the company's premises each week to collect a cheque from the company in accordance with their repayment plan. The respondent states that on or about 18 July 2000, when Mr Pflaum visited him at the company's premises to collect the third cheque, Mr Pflaum said words to the effect that he had been instructed not to attend the company's premises any more and not to take any further payments, because the unpaid sales tax would be dealt with as part of an overall settlement of outstanding tax liabilities which was being discussed with the Commissioner at that time. The respondent states that he has had no personal dealings with the ATO since that meeting with Mr Pflaum on 18 July 2000 and has referred all matters concerning the negotiation of a global settlement of any tax issues affecting the company and its directors directly to Mr McCormick of Minter Ellison. The respondent states that, on and from around July 2000, he understood that there were discussions between officers of the ATO and the company's solicitors and accountants with a view to achieving a global settlement of all sums claimed by the Commissioner to be owed by the company to the Commissioner, but that the respondent did not take a direct role in those discussions. The respondent swears that he assumed that the global settlement negotiations covered all taxes, interest and penalties claimed by the ATO against the company and its directors.

[30] It was in issue on the hearing of this application as to whether or not a defence of estoppel could be advanced, as a matter of law. Even if it could, the statement of Mr Pflaum alleged to have been relied upon by the respondent on 18 July 2000 had nothing whatsoever to do with PAYG withholdings yet to be deducted by the company in August, September and October 2000 in the normal course of the company continuing to operate its business, pay employees for that purpose and deduct payments of income tax from those employees' wages for remission to the Commissioner as PAYG withholdings. There is no likelihood, whatsoever, that a defence of estoppel based on the facts alleged by the respondent could be successful.

Law relating to reasonable steps defence

[31] The obligations placed on a director under s 222AOB(1) are stringent and have a significant consequence which was no doubt intended, in order to provide the incentive for a director to ensure that a company complies with its obligation to

remit deductions or amounts withheld to the Commissioner. If a director does not cause the relevant company to remit the withheld amounts on or before the due date for payment or to enter into an agreement with the Commissioner as to the payment of the withheld amounts or appoint an administrator or cause the company to begin to be wound up, the director becomes liable for a penalty equal to the unpaid amount of the relevant company's liability to remit the amounts withheld: s 222AOC(1).

[32] The stringency of the obligation under s 222AOB(1) is extended by s 222AOB(3) which provides that if s 222AOB is not complied with on or before the due date for remission of the amounts withheld, the directors continue to be under the obligation imposed by s 222AOB(1) until s 222AOB is complied with. This allows for the penalty to be imposed on a new director under s 222AOD(1) if, after the due date for remission of the amount withheld, a person becomes a director of the relevant company when s 222AOB has not been complied with and that section has still not been complied with at the end of 14 days after the person becomes a director.

[33] The entitlement of the Commissioner to recover a penalty from a director does not accrue until the end of 14 days after the Commissioner gives the notice under s 222AOE. If a director causes s 222AOB to be complied with prior to the giving by the Commissioner of a notice to that director under s 222AOE or within 14 days after the Commissioner gives that director such a notice, the penalty is remitted because of s 222AOG. The only other means for the penalty to be discharged is for the relevant company to pay the underlying liability or for that director or another person to have paid the penalty.

[34] Where the Commissioner seeks to recover a penalty payable under Division 9 of Part 6 of the *ITAA* from a director, there are statutory defences provided for in ss 222AOJ(2) and (3). The defence that is raised by the respondent on this application is that provided for in s 222AOJ(3)(a) that he took all reasonable steps to ensure that the directors complied with s 222AOB(1).

[35] An issue of construction of s 222AOJ(3) has arisen on this application and that is what is the period to which the defence must relate, in order for it to be successfully raised by the respondent.

[36] In *Re Scobie; ex parte Commissioner of Taxation* (1995) 59 FCR 177 the issue raised by the directors was that they took all reasonable steps to comply with s 222AOB(1) within the period of 14 days after being served with the notice under s 222AOE. Cooper J rejected that approach and stated at 184:

> "In my view the approach of the respondents is misconceived. They seek to equate the giving of a necessary notice as a condition precedent to recovery proceedings for a penalty with the point in time at which a duty of compliance by the directors arises. They also seek to set the requirements of compliance as the doing or causing to be done of one act specified in the notice within the period specified in the notice. It is only because the respondents seek to impose a 14 day time limit on the occurrence of all factual circumstances described in the notice that the submission can be made that "the option of winding up the company [would be] illusory" if the time for compliance was fixed when the process of winding up commenced, in fact, or by the operation of s 513A of

> the Corporations Law. As I set out earlier in these reasons, the obligation imposed on directors arises from the first deduction day and continues until compliance by the occurrence of one of the events specified in s 222AOB(2). The submissions of the respondents totally ignores the obligation cast upon the directors in the period prior to receiving the notice."

[37] The issue in *Simpson v Deputy Commissioner of Taxation* (1996) 132 FLR 459 was whether the defence created by s 222AOJ(3) applied to the conduct of the directors in the period provided for by the notice under s 222AOE or the period provided for by s 222AOB(1). Duggan J concluded that the directors could not ignore the period before the due date provided for in s 222AOB(1), when setting out to prove the defence. The directors' appeal against the decision of a magistrate was dismissed as the affidavits relied upon by the directors did not establish that they took all reasonable steps to ensure compliance with s 222AOB(1) at any time on or before the due date. It was not necessary for the decision for the Court to deal with the issue of whether the reasonable steps defence needed to cover any part of the period after the due date during which the obligation under s 222AOB(1) remained extant, by virtue of s 222AOB(3).

[38] *DFC of T v George* 2002 ATC 4930 ("*George"*) was concerned with a defence under s 222AOJ(2) rather than s 222AOJ(3). The leading judgment of the New South Wales Court of Appeal in *George* was given by Gzell J with whom the other members of the court agreed. The analysis undertaken by Gzell J of Division 9 of Part VI of the *ITAA* is pertinent to the construction which should be given to s 222AOJ(3).

[39] The relevant company in *George* which was referred to as Netcom failed to remit to the Commissioner PAYE deductions which had due dates from 3 September 1998 to 21 February 2000. The respondent in that case was a director of Netcom from 26 June 1995 until March 2000, but was appointed an acting District Court Judge between 18 September 1996 and 30 June 1999. It was found that the respondent did not participate in the management of Netcom during the time he was an acting Judge. He did, however, in about March 1999 receive a letter from the Commissioner advising him that Netcom was in arrears of remittances of PAYE deductions. The trial judge found that the respondent was liable to a penalty under s 222AOC for the remainder of the period after 30 June 1999, as the respondent had made out a defence under s 222AOJ(2) for the period up to 30 June 1999. The Commissioner appealed.

[40] Gzell J dealt with the effect of s 222AOB(3) at paras 16 to 18:

> "…the respondent ceased to be a judge when none of the courses of action referred to in s222AOB(1) had been taken such that, at first sight, s220AOB(3) would appear to have resulted in the respondent continuing to be under the obligation in s222AOB(1) and the failure of Netcom to take one of the four alternative courses of action rendered him liable to penalty under s222AOC.
>
> 17. There is some infelicity of language in s222AOB(3) because it related to a period *after* the due date yet provided that directors continued to be under an obligation under s222AOB(1). That obligation was to cause one of the alternative events to happen *on or*

> *before* the due date. Nevertheless, I think the structure of the legislation was plain.
>
> 18. S222AOB(1) cast an obligation upon existing directors to achieve one of the four results by the due date. If that did not happen, s222AOB(3) continued the obligation both in respect of existing directors and in respect of new directors. The obligation imposed by s222AOB(1) to which s222AOB(3) referred, was the obligation to cause the company to take one or other of the four steps. The obligation was not defined as the achievement of this result *by* the due date. That would have made a nonsense of s222AOB(3) which continued the obligation under s222AOB(1) *after* the due date."

[41] Gzell J concluded at para 21:

> "It follows from this construction that a defence under s222AOJ(2) was effective only if the director established a good reason for a failure to take part in the management of a company for the entirety of the period of the directorship during which the obligation under s222AOB(1) existed. Since any good reason the respondent may have had for not taking part in the management of Netcom ceased while he remained a director and when the obligation under s222AOB(1) continued to apply to him by operation of s222AOB(3) there was, after that cessation, no defence under s222AOJ to the penalty to which he was subjected by s222AOC."

[42] Gzell J rejected the argument of the respondent that the obligation under s 222AOB(1) was temporally limited and ceased to apply when the due date was reached. The argument that, because of the use of the words "at any time" in s 222AOJ(2), it was sufficient for the defence to be established at any time when an obligation under s 222AOB(1) existed and that the defence then enured forever was also rejected. Gzell J also rejected the argument that there were separate and distinct obligations under ss 222AOB(1) and 222AOB(3) and that the defences under ss 222AOJ(2) and 222AOJ(3) applied only to the obligations under s 222AOB(1). Gzell J concluded at para 25:

> "… Under the construction set forth earlier, s222AOB(3) imposed a s222AOB(1) obligation upon a new director or a person who again became a director, the sanction for non-compliance with which was a penalty under s222AOD. Since the new director or the returning director was subjected to a s222AOB(1) obligation, the defences in s222AOJ(2) and 222AOJ(3) were available. Likewise, the director continuing in office after the due date continued to be subject to a s222AOB(1) obligation if none of the four steps had been achieved, by operation of s222AOB(3) and, again, since that was a s222AOB(1) obligation, the s222AOJ defences were available to the director to relieve from the sanction under s222AOC. That provision applied because the director in question had been a director on the due date."

[43] Gzell J concluded that it was consistent with the objective of Division 9 that a defence which was not available for the entire period of a directorship when a s 222AOB(1) obligation existed, would not avoid a penalty under ss 222AOC or

222AOD. The appeal was allowed and the respondent in *George* was found to be liable for a penalty equal to the whole of the non-remitted withholdings.

[44] Despite the difference in wording between ss 222AOJ(2) and 222AOJ(3) in that the words "at any time" are used in s 222AOJ(2) and not s 222AOJ(3), the reasoning for the conclusion of Gzell J in *George* that the defence under either of these provisions must apply to the entire period of a directorship when a s 222AOB(1) obligation existed including the extended period as a result of the effect of s 222AOB(3) is as valid for a defence under s 222AOJ(3), as it is for a defence under s 222AOJ(2). When the period of 14 days after the service of the s 222AOE notice has expired, it is not possible for a director who then causes the obligation under s 222AOB(1) to be satisfied in a way other than remitting in full to the Commissioner the PAYG withholdings to avoid the penalty which is enforceable against that director after the effluxion of time provided for in the s 222AOE notice. Although such a director does not obtain the benefit conferred by s 222AOG in satisfying the obligation under s 222AOB(1) at such a late stage, that is not a reason not to give full effect to the extension, by virtue of s 222AOB(3), of the time for compliance with the obligation under s 222AOB(1). That full effect would be denied, if the defence under s 222AOJ(3) need only be made out in respect of a limited time period rather than the period during which the obligation under s 222AOB(1) remains in existence. The defences under ss 222AOJ(2) and (3) have a separate operation to the remission of penalty provision found in s 222AOG. It is therefore not an odd result that the defences under ss 222AOJ(2) and (3) must apply to the entire period of the relevant directorship whilst the obligation under s 222AOB(1) subsists, even though s 222AOG no longer applies after the expiry of the period of 14 days after the service of the director penalty notice.

[45] The New South Wales Court of Appeal considered a defence under s 222AOJ(3) in *Deputy Commissioner of Taxation v Saunig* (2002) 43 ACSR 387 ("*Saunig"*). The facts of that case were that Mr Saunig was one of three directors of the relevant company. In March-June 1997 Mr Saunig ascertained that the company had deducted PAYE taxation instalments from its employees' wages, but had not passed them to the ATO. He informed the ATO of the problem. At a meeting in February/March 1998 Mr Saunig was unsuccessful in persuading the other directors to put the company into liquidation. The ATO's claim was for 17 deductions for the months of November 1996 to March 1998. A notice under s 222AOE was served on the directors on 26 June 1998.

[46] Heydon JA (with whom the other members of the court agreed) stated at para [25]:

> "In *Re a Solicitor* [1945] 1 KB 368; at 371; [1945] 1 All ER 445; at 446 Scott LJ, delivering the judgment of the Court of Appeal, said:
>
> > The word "reasonable" has in law the prima facie meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, knows or ought to know.
>
> The better construction of s 222AOJ(3) is that the test is an objective one, corresponding to that of Scott LJ. 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" in s 222AOJ(3) which adoption of Scott LJ's approach would ascribe to it. Hence, on its true construction, s 222AOJ(3) gives a defence to a defendant to proceedings for the recovery of a penalty imposed by s 222AOC if the defendant proves that he or she took all steps which were reasonable, having regard to the circumstances of which the defendant, acting reasonably, knew or ought to have known, to ensure that the directors complied with s 222AOB(1). It is not necessary to decide in this case whether the qualification to the test propounded by the appellant, namely that it was legitimate to take into account the knowledge and abilities of a particular director which were superior to those of an ordinary reasonable director: Mr Saunig did not have knowledge and ability superior to those of an ordinary reasonable director."

[47] Because the deductions had been made over a period of 17 months and the obligation under s 222AOB(1) arose in each month in respect of that month's deductions, it was not necessary for the Court of Appeal in *Saunig* to consider the construction question as to what period of time the defence under s 222AOJ(3) had to relate. On the facts in *Saunig*, the defence under s 222AOJ(3) was rejected in the Court of Appeal with Heydon JA stating at para [28]:

> "While even in a relatively small organisation like the company in this case it may not be right to require each director to take personal steps to ensure compliance with s 222AOB(1)(a), it was incumbent upon Mr Saunig to ascertain what the company's duties in relation to tax instalments deducted from employees' wages were and to ensure that some system was in place which would produce compliance. There was no evidence of any such system. … Applying the construction of s 222AOJ(3) adopted above, Mr Saunig's conduct must be judged not only by a reference to what he knew, but also by a reference to what he ought to have known. He ought to have known that there were deduction payments, that the deduction payments should have been passed to the taxation office and that they were not being passed to the taxation office."

[48] The obligation imposed on a director under s 222AOB(1) therefore is not dependent on the director's knowledge of the obligation, as it is an obligation about which, objectively speaking, all directors ought to know.

[49] Nothing in *Saunig* detracts from the conclusion in *George* which supports the proposition that a defence under s 222AOJ(3) must be applicable to the entire period during which the obligation under s 222AOB(1), as extended by s 222AOB(3), existed for the relevant director.

[50] The fact that the defence under s 222AOJ(3)(a) must apply to the entire period during which the obligation under s 222AOB(1) existed for a particular director means that the reasonable step or steps taken by the director to ensure that all directors (including that director) complied with s 222AOB(1) cumulatively had effect over the entire period. It does not mean that the director was continuously required to take steps during the period to ensure that the directors complied with s

222AOB(1), if the steps or steps which were taken from time to time together could apply to the entire period. By way of example, a reasonable step taken by a director early in the relevant period to ensure compliance with s 222AOB(1) may provide a defence for that director until it was reasonable for another step to be taken. The decision in *Saunig* illustrates how the objective test of reasonableness under s 222AOJ(3)(a) must be applied in the circumstances relating to the particular company, the relevant director and other directors, in order to give effect to the meaning of "reasonable" given by s 222AOJ(4).

Evidence relating to reasonable steps defence

[51] The company was incorporated on 4 July 1980. It has since 1983 carried on the business of recycling paper and manufacturing both recycled and non-recycled paper products. The respondent ceased to be a director of 6 June 1992, but was re-appointed on 17 June 1996. The respondent was the sole director from 19 November 1996 until 9 October 2000. From about 1993 a dispute developed between the company and the ATO over a sales tax issue which was ongoing and resulted in proceedings between the company and the ATO. Apart from the sales tax dispute, the company was also engaged in a long running dispute with the ATO over a claim made by the company for income tax adjustments arising from payments to which it claimed it was entitled under the Transitional Assistance Payments Scheme.

[52] The respondent does not have formal education in accounting and financial matters. He states that due to the complexity of the company's taxation dealings and his acrimonious relationship with the ATO, he developed the practice of referring all documents relating to the ATO and tax matters to his solicitor, Mr McCormick. As a result of what the respondent describes as the ATO's special interest in the company from the early 1990's, the respondent states that he did not take an active part in any company dealings relating to the ATO, or in the payment of tax, or the preparation of the books of account for the company, except to the limited extent he was advised to do so by his lawyers and accountants.

[53] The respondent states that he did not know how to work a computer and never used a computer when working for the company. He relied on other staff for accessing, storing and processing of information and data on the computer system. Although the respondent regularly attended and fully participated in meetings of the board of directors of the company, he states that he never presented financial accounts or statements to the board, always relying on others to produce the relevant documents and report on those matters.

[54] The respondent states that in or about 1998 he met Mr William Guthridge who was then employed by, but proposing to leave, Visy Board. The respondent states that Mr Guthridge was engaged by the company as a consultant and took over the accounts section. The respondent states that Mr Guthridge commenced full time employment with the company in or about October 1999 and it was expected that he would explore opportunities for the company to expand its waste paper collection network and oversee the administration of the company's accounts and financial reporting obligations. The respondent states that Mr Guthridge was paid in the

vicinity of $341,000 per annum plus expenses and made himself completely familiar with all aspects of the activities of the company.

[55] The respondent states that by the beginning of 2000 the company was experiencing some financial difficulties and that he was advised by Mr Guthridge that those difficulties were likely to be compounded, if the ATO's claims in respect of taxation matters then in dispute were not resolved. The respondent states that Mr Guthridge attempted to explore the selling of the company or positioning the company for an initial public offering. The respondent states that at that time the company had banking facilities with National Australia Bank ("NAB") and that, as he was experiencing difficulties with certain officers of NAB, Mr Guthridge took over the role of dealing with them and arranged for the company to switch its banking business from NAB to Westpac and later to Bankwest.

[56] The respondent states that, as far as he was concerned, Mr Guthridge was acting as a director of the company from early 2000 and directing the company's accounting and financial obligations to the ATO and regulatory authorities and that from January 2000 up until his formal appointment as a director, Mr Guthridge was totally involved in maintaining the financial records of the company.

[57] The respondent sets out the steps taken by Mr Guthridge to bring together a capital funding arrangement for the company: on 28 June 2000 on Mr Guthridge's recommendation the respondent signed an investment deed on behalf of the company and himself with Business Management Limited ("*BML*") and Mr Guthridge under which *BML* invested $4m in the company through a subscription for 4 million convertible notes issued by the company to *BML*; and the documents and records of the company were supplied by Mr Guthridge to Messrs Reid and Jones of *BML* who carried out an extensive due diligence procedure before *BML* entered into the investment deed. The respondent states that he was informed by Mr Guthridge that it was a requirement of *BML* that Messrs Guthridge, Reid and Jones be appointed to the board of the company and that was effected on 9 October 2000. The respondent states that Messrs Reid and Jones had joined Mr Guthridge in controlling the management of the financial affairs of the company from the time the investment deed was signed.

[58] The respondent also states that, upon those directors being appointed, Mr Guthridge arranged for and the respondent agreed to the appointment of Mr Guthridge's personal accountant, Mr Ian McCall, as the company's accountant and chief financial officer. The respondent states that he was told by Mr Guthridge that Mr McCall would look after all the accounting requirements of the company and that Mr McCall held the necessary accounting qualifications to take the company to the proposed public float.

[59] The respondent states that from the time the investment deed was signed, Mr Guthridge had daily contact with Messrs Reid and Jones, but particularly Mr Jones, about the company's business due to *BML*'s financial investment in the company.

[60] Although he was the sole signatory to the company's cheque account, the respondent states that many of the company's accounts, including PAYG withholdings, were paid electronically which did not require his authorisation. The respondent states that he relied on Mr Guthridge, Mr McCall and the accounts staff

to present him with cheques for signature in order to make the expenditures that were required on behalf of the company.

[61] The respondent does not recall Messrs Guthridge, Reid, Jones or McCall or any of the accounts staff contacting him about whether or not PAYG withholdings for the periods August, September and October 2000 needed to be paid to the ATO by their respective due dates. The respondent believes that any inquiries from accounts staff relating to payment of those PAYG withholdings would have been made to Messrs Guthridge or McCall.

[62] The respondent therefore states that he had no reason to believe from the fact that he did not receive a cheque addressed for payment to the ATO in the relevant period that the company was not meeting its obligations to pay tax and remit PAYG withholdings. Although the respondent was aware that the ATO was claiming large amounts of tax from the company, he states that he was not aware that the PAYG withholdings for August, September and October 2000 had not been remitted to the ATO by their due dates and that he believed that Mr Guthridge and, under his supervision, Mr McCall had put in place a proper process of ensuring that all the tax liabilities of the company would be addressed and met as appropriate.

[63] Although the respondent states that he was aware in the second half of 2000 that negotiations were being held between the ATO and the company's solicitors and accountants, he was not involved in them and nothing was said to him about the need for the company to attend to the remitting of the unpaid PAYG withholdings. The respondent states that he assumed that global settlement negotiations that were being undertaken covered all taxes, interest and penalties claimed by the ATO against the company and its directors.

[64] The respondent does not specifically depose to the timing of his awareness that the subject PAYG withholdings had not been paid to the ATO. He states at para 82 of his affidavit filed on 12 February 2003:

> "I was informed by Mr McCormick around the middle part of 2001 and believed that an agreement had been made for the Company to pay the unpaid PAYG withholdings referred to in the Notice by a date in July 2001 (which I now believe to have been 6 July 2001). The subject matter of the agreement was determined by Mr Guthridge in consultation with Minter Ellison."

[65] Other than asserting that he was informed by Mr McCormick in the middle part of 2001 that an agreement had been made by the company to pay the subject PAYG withholdings by 6 July 2001, the respondent does not adduce any documentary evidence in support of such an agreement. In fact, the correspondence between the ATO and the company or its solicitors belies such an agreement. A letter dated 24 May 2001 was sent by the ATO to the company's solicitors by facsimile at 1.05pm on that date. A copy of the letter and facsimile receipt is Ex MAB5 to the affidavit of Ms MA Balkin filed on 19 February 2003. That letter advised that the Commissioner regarded any settlement negotiations in respect of the global settlement offer by the company as having ended and referred to the failure of the company to discharge its PAYG liabilities for August, September and October 2000. The letter dated 24 May 2001 sent by Minter Ellison on behalf of the company in respect of the director penalty notices stated:

> "Our client instructs us to say that it has arranged to pay out the full amount of the tax owing the subject of your notice of 10 March *(sic)* 2001 together with interest and penalties by 6 July 2001. We are instructed that at that time the full indebtedness will be discharged."

The contact at Minter Ellison shown on that letter was Mr McCormick. The ATO responded by letter dated 31 May 2001 to Mr McCormick in which the proposal of the company to pay the tax, interest and penalties the subject of the notices to its directors by 6 July 2001 was rejected.

[66] It is neither possible or necessary to resolve the inconsistencies between what the respondent swears he was informed by Mr McCormick and the contents of the correspondence passing between Mr McCormick and the ATO. The application was argued on the basis that, except where the respondent's assertions were expressly controverted by the applicant's material (such as on the issue of the non-receipt of the director penalty notice), the application should be determined on the basis that the respondent's evidence was not contradicted. There was a certain artificiality about this approach, in light of the evidence adduced on behalf of the other directors of the company on the respective summary judgment applications made against each of them by the applicant. In view of the nature of this application, however, there was no available course, other than to determine it on the basis of the evidence adduced by the applicant and the respondent to this application.

[67] The respondent swears in para 112 of his affidavit filed on 12 February 2003 as follows:

> "Had I been aware of the Notice and had I been aware that the ATO intended to rely on the asserted service of it and the asserted non-payment of the un-remitted PAYG withholdings other than pursuant to the agreement referred to in paragraph 82 above, I would have immediately taken advice in relation to my position and, I believe, taken immediate steps to either have the Company remit the PAYG withholdings or, if not, place it in administration or liquidation."

[68] The respondent also swears to his belief that the director penalty notice was initially used by the ATO to progress negotiations between the ATO and the company over settlement of the disputed taxation liabilities. This attack in the respondent's affidavit as to the purpose of the applicant in issuing the director penalty notice was not sought to be pursued on the respondent's behalf during the hearing. Nothing in the material filed in respect of the application supports such attack.

[69] On 19 June 2001 the Commissioner served on the company a creditor's statutory demand for payment of debt. The respondent deposes to the statutory demand including the debt arising from the subject PAYG withholdings. The company applied to this Court on 10 July 2001 for an order setting aside the statutory demand. That application was heard by me on 7 September 2001. On 5 October 2001 I ordered that the statutory demand be set aside. The company was placed in voluntary administration on 5 October 2001.

[70] According to the affidavit of Ms MA Balkin, on 5 September 2001 Mr Jones together with an accountant met an officer of the ATO in order to negotiate a time period to pay off the tax debts of the company including the subject PAYG

withholdings and the company was invited to submit a proposal for payment. By letter dated 6 September 2001 Messrs Guthridge and Jones put a proposal on behalf of the company to pay $100,000 per week towards the company's unpaid taxation liabilities, including the amounts which were the subject of the director penalty notices. The respondent deposes to being aware of these negotiations. By letter dated 21 September 2001 the ATO refused the request made on behalf of the company to pay the outstanding taxes by instalments. Messrs Guthridge and Jones on behalf of the company sent a letter dated 24 September 2001 to the ATO requesting reconsideration of the company's offer to pay outstanding taxation amounts by way of instalments. That offer was formally rejected by the ATO by letter dated 3 October 2001.

[71] The company sent a facsimile to the ATO on 3 October 2001 offering to enter into a settlement deed for the global settlement of the outstanding sales tax, income tax, PAYG, FBT and GST for an amount of $12m. The company sought an undertaking that the ATO would not move to wind up or otherwise act against the company based on the statutory demand while settlement discussions continued. By letter dated 4 October 2001 the ATO informed the company that such an undertaking would not be given.

Whether there is a real prospect of defending the claim

[72] Under r 292(2) of the *UCPR* the court must be satisfied of two conditions, before the discretion conferred by r 292(2) to give judgment is enlivened. Those two conditions are that:

(a) the defendant has no real prospect of successfully defending all or part of the plaintiff's claim; and

(b) there is no need for a trial of the claim or the part of the claim.

[73] The test to be applied under r 292(2)(a) is whether there is a realistic, as opposed to a fanciful, prospect of success: *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2002] 2 QdR 249 at para [8].

[74] On the basis of the construction given in *George* to the defence under s 222AOJ(3), the applicant must show that the respondent has no realistic prospect of succeeding in a defence under s 222AOJ(3)(a) for any part of the entire period commencing from the time when the first deduction was made by the company of PAYG withholding in the month of August 2000 until 5 October 2001 when the directors ultimately appointed an administrator to the company and therefore brought to an end their subsisting obligation under s 222AOB(1).

[75] It is arguable that from the time of the first deduction day relevant to the August PAYG withholdings until the point in time when the respondent became aware that the subject PAYG withholdings had not been remitted (which at the latest was the middle part of 2001 and before 6 July 2001) that the arrangements to which the respondent was party with Mr Guthridge (and subsequently with Messrs Jones and Reid) and the accounts staff did amount to a system which was in place to ensure that the company's PAYG withholdings had been paid and that it was reasonable in the circumstances for the respondent to expect to be notified of the non-payment of any PAYG withholdings. Although the respondent was the only formally appointed director between the first deduction day in August 2000 and 9 October 2000, on the

evidence adduced by him, it is arguable that Mr Guthridge was also a director, despite lack of formal appointment, within the meaning of the *Corporations Law*. Ultimately whether the respondent will be successful with this defence will depend on all the evidence relevant to his relationship with Mr Guthridge and the other relevant persons during this period. On the basis of the evidence put forward by the respondent, it is not possible on this application to conclude, as a matter of law, that there is no realistic prospect of the respondent successfully raising a defence under s 222AOJ(3)(a) for the period before the respondent became aware or should have become aware that the subject PAYG withholdings had not been remitted.

[76] The circumstances changed, however, at the latest when the respondent had notice that the Commissioner was relying on the non-payment of the subject PAYG withholdings to support a statutory demand. Although the respondent professes ignorance as to the obligation placed on him under s 222AOB(1), as soon as the respondent knew or ought to have known of the non-remission of the subject PAYG withholdings, the respondent was nevertheless required to take all reasonable steps to ensure that the directors complied with s 222AOB(1). The reasonableness of the respondent's actions must be considered in the light of all the relevant circumstances which could include the step taken by the Commissioner in serving a statutory demand which incorporated the subject PAYG withholdings. Apart from authorising the action of the company to seek to set aside that statutory demand, the respondent appears to have permitted other directors to undertake global settlement negotiations on behalf of the company with the Commissioner which, if successful, could have resulted in an agreement to pay a negotiated sum including the subject PAYG withholdings by instalments which would have amounted to an agreement under s 222ALA to the extent that it related to the subject PAYG withholdings. It is not possible to conclude that, as a matter of law, there are no realistic prospects of the respondent successfully raising a defence under s 222AOJ(3)(a) for the period commencing when he should have been aware of the non-payment of the PAYG withholdings until 5 October 2001. It will depend on a consideration of all the relevant evidence, as to whether or not it was a reasonable step taken in a timely way for the respondent to permit global settlement negotiations to be undertaken on behalf of the company with the Commissioner in respect of all its tax liabilities including the subject PAYG withholdings.

[77] Although the material suggests that there will be difficulties for the respondent in pursuing this defence, it is not a matter of the prospects of the respondent successfully raising a defence under s 222AOJ(3)(a) for the entire period between the first deduction day in August 2000 and 5 October 2001 being so fanciful as to justify denying the respondent a trial. The applicant's application for judgment should be dismissed.

Other matters

[78] The applicant provided a written list of objections to the affidavits filed by the respondent which was made Ex 2. It is not necessary to determine these objections, because even if all or most were determined in the applicant's favour, the outcome of the summary judgment application would not be altered.

[79] As I have concluded that the application for judgment should be dismissed, it is unnecessary to consider the argument raised by the respondent that the third party proceedings against him by his co-directors Messrs Reid and Jones in the

proceedings commenced against them by the applicant should be heard at the same time as this proceeding, so that it was not appropriate that summary judgment be entered.

[80] The application for disclosure was made by the respondent, as the applicant had refused to make disclosure after filing the application for summary judgment and the respondent sought disclosure to assist in its defences of non-service of the director penalty notice and estoppel and the possibility of assessing the conduct of the other directors for the purpose of a defence based on their conduct.

[81] As framed, the application for disclosure sought an adjournment of the summary judgment application, pending disclosure by the applicant. The need for disclosure was also relied on by the respondent as another basis for resisting the application for summary judgment.

[82] Having regard to the nature of the applicant's claim against the respondent, I have concluded that the application for disclosure would always have been determined by the outcome of the application for summary judgment. As the application for summary judgment has been dismissed, disclosure will now be dealt with in accordance with the *UCPR* or any directions which the parties may agree upon. The application for disclosure was unnecessary.

[83] It follows that the respondent's application for disclosure should be dismissed.

Orders:

[84] The formal orders which I make are:

1. The application filed on 24 December 2002 be dismissed.
2. The application filed on 21 February 2003 be dismissed.

[85] In the event of dismissal of the summary judgment application, the applicant sought directions. The respondent will need to file and serve an amended defence in a timely way. I will allow the parties an opportunity to consider whether directions are needed to supplement the operation of the *UCPR* to this proceeding and, if so, whether a timetable can be agreed between the parties.

[86] Before I make orders in relation to the question of costs in respect of each application, it will be necessary for the parties to make submissions on costs.