SUPREME COURT OF QUEENSLAND

CITATION:	*Deputy Commissioner of Taxation v Salcedo* [2004] QSC 361
PARTIES:	**DEPUTY COMMISSIONER OF TAXATION** (plaintiff/ applicant) **v** **TAREK ANDREAS SALCEDO** (defendant/ respondent)
FILE NO/S:	SC No 1469 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	3 August 2004; 18 August 2004
JUDGE:	Holmes J
ORDER:	**Judgment in the amount of $309,067.05 against the defendant with interest to be determined.**
CATCHWORDS:	TAXES AND DUTIES – INCOME TAX AND RELATED LEGISLATION – COLLECTION AND RECOVERY OF TAX – PROCEEDINGS FOR RECOVERY – SUMMARY JUDGMENT – where respondent defendant was a director of a company which had outstanding PAYE and PAYG withholdings – where the company entered an agreement with the plaintiff under s 222ALA *Income Tax Assessment Act* 1936 – where the plaintiff alleges that the agreement had been breached and that it was therefore entitled to recover a sum equivalent to the unpaid balance under the agreement – where the plaintiff seeks judgment for that amount – where defendant advances the following arguments: that there was no binding s 222ALA agreement, that the pleadings were defective, that no amount was outstanding, that further disclosure was required and that a defence under s 222AQD *Income Tax Assessment Act* is available – whether the plaintiff is entitled to summary judgment against the defendant *Income Tax Assessment Act* 1936, s 220AAM, s 222 ALA, s 222 AQA(2), s 222AQD, s 222AOB, s 222AOE *Taxation Administration Act* 1953, s 8AAZLA, s 8AAZLE, ss 16 – 75 in Schedule 1

Uniform Civil Procedure Rules 1999, r 292

COUNSEL: Mr Bickford for the applicant plaintiff
Mr Favell with Mr Fryberg for the respondent defendant

SOLICITORS: Australian Government Solicitor for the applicant plaintiff
Morgan Conley for the respondent defendant

The application

[1] The applicant plaintiff seeks summary judgment under r 292 of the *Uniform Civil Procedure Rules* 1999 for the amount of $309,067.05 claimed as a director's penalty under s 222AQA(2) of the *Income Tax Assessment Act* 1936 (Cth). The sub-section provides for imposition of such a penalty where a company's agreement under s 222ALA of the Act to discharge specified liabilities is contravened, either by its failure to pay a specified amount on or before the specified day, or by its contravention of a special condition; the penalty equates to the balance payable under the agreement. The respondent defendant and a Mr Allan Ivory were at all relevant times directors of the company Traffic Control Operations (Australia) Pty Ltd, which as at April 2001 had outstanding PAYE and PAYG withholdings due to the plaintiff. On 24 April 2001, the company entered a s 222ALA agreement in respect of some of those liabilities. The plaintiff alleges a breach of the agreement entitling her to recover from the defendant a sum equivalent to the unpaid balance under the agreement, and seeks judgment for that amount.

[2] The defendant advanced these arguments against the granting of summary judgment: firstly, that there was no binding s 222ALA agreement, or at least that the term relied on as a special condition was not valid; that the pleadings were defective in failing to allege a date of contravention of the agreement; that no amount was presently outstanding under the agreement, or, alternatively, that it was impossible to ascertain whether there was an amount outstanding without further particulars and disclosure; and finally that he had a good defence under s 222AQD of the *Income Tax Assessment Act*.

Were the agreement and the special condition effective?

[3] Section 222ALA, so far as is relevant, is in the following terms:

> (1) The Commissioner may make with a person a written agreement under which the person is to pay specified amounts, on specific days, for the purpose of discharging one or more specified liabilities of the person, each of which is:
>
> (a) a liability under a remittance provision; or
>
> (b) a liability to pay an estimate.
>
> (2) An agreement may contain other provisions.
>
> (3) An agreement may also provide that, if the person contravenes specified provisions of it, so much of the total

> of the specified amounts as remains unpaid becomes due and payable on the day of the contravention. If an agreement so provides, the specified provisions are called *special conditions*.
>
> (4) The amounts specified in an agreement are due and payable on the specified days.
>
> (5) However, if:
>
> (a) a specified amount is not paid on or before the specified day; or
>
> (b) the person contravenes a special condition;
>
> so much of the total of the specified amount as remains unpaid:
>
> (c) becomes due and payable on that day, or on the day of the contravention, as the case may be; and
>
> (d) is called *the balance payable under the agreement.*

[4] The amended statement of claim pleads the making of the s 222ALA agreement, and relies on contravention of a special condition in the form of cl 5 of the agreement. Clause 5 provides:

> "If, on or after the date of this agreement, the Company becomes liable to pay an amount to the Commissioner under a remittance provision in Schedule 1 to the *Taxation Administration Act 1953* ("the TAA53") (not being an amount referred to in Clause 1), the Company will pay such amount to the Commissioner on or before the day on which the amount becomes due and payable under Schedule 1 to the TAA53."

Clause 6 gives the effect of contravention of cl 5:

> "If the Company contravenes a provision of clause 5, so much of the total of the specified amounts in Column 4 of the Schedule that remains unpaid become due and payable on the day of the contravention."

[5] The third amended defence raises a contention that the agreement was not one made pursuant to s 222ALA. That contention was refined somewhat in argument to this point: s 222ALA contemplated an agreement to pay specified amounts on specified days, but not an agreement – such as cl 5 contained – to pay unascertained amounts at some point in the future. If cl 5 was not properly part of the s 222ALA agreement, the penalty which the plaintiff purported to impose in respect of its breach could not be supported.

[6] Mr Bickford, for the plaintiff, pointed out that, quite apart from any breach of cl 5, there was a failure to pay a specified amount under the agreement on a specified date: a payment due on 4 May 2001 was not made. However, the statement of claim does not allege that failure, although it is raised in the affidavit material. To obtain

summary judgment on this pleading, it is incumbent on the plaintiff to establish the breach of the special condition pleaded.

[7] I do not think, however, that s 222ALA requires that a clause provide for payment of specified amounts in order to be a special condition. Indeed, if that were its effect, s 222ALA (5)(b) would be redundant. Subsection (5)(a) makes failure to pay a specified amount on or before the specified day a contravention per se; if special conditions were only those which provided for payment of specified amounts on specified days, s 5(b) would merely repeat the effect of s 5(a). It is clear, in my view, that any provision of which contravention is expressed to render the specified, unpaid amounts due and payable will be a special condition; the condition itself may deal with any subject matter. The plaintiff is, I conclude, entitled to rely on a breach of cl 5 as a contravention of a special condition rendering so much of the total of the specified amounts as remained unpaid due and payable.

Was the contravention adequately pleaded?

[8] It is necessary at this point to say something more about the liabilities encompassed by the s 222ALA agreement. Under it, Traffic Control Operations (Australia) Pty Ltd agreed to meet its liabilities, firstly for Pay As You Earn (PAYE) withholdings for the months of April 2000 to June 2000, in specified amounts to be paid on specified days between 13 April 2001 and 30 June 2001, and secondly for Pay As You Go (PAYG) withholdings under the new tax system, for the months of September 2000 to January 2001, to be paid on 30 June 2001. The total of those amounts to be paid under the agreement was $752,134.09. In addition, the company agreed that it would pay its remittance liabilities from the date of the agreement (its current liabilities) on or before their due dates under the *Taxation Administration Act* 1953 (Cth).

[9] The statement of claim pleads a breach of the last requirement as the contravention of cl 5: the amounts withheld for the period 21 April 2001 to 24 April 2001 were not paid to the plaintiff. It does not plead the date of the contravention, that is to say the day on which those payments were due. Mr Favell, for the defendant, argued that the failure to plead a date of contravention constituted a defect in the pleadings.

[10] Section 16-75 of Schedule 1 to the *Taxation Administration Act* provides for payment by large withholders within a week or so, depending on the day of week on which the amount is withheld. The period referred to in the statement of claim, 21 April 2001 to 24 April 2001, is not itself a distinct pay period; in fact it overlaps two pay periods. Ms Genoveffa King, an officer of the Australian Taxation Office, has sworn an affidavit which provides some details of what was due and when in this case. An email, exhibit GK12 to Ms King's affidavit, sent from the company on 30 August 2001, sets out its weekly liabilities, which include an amount for the week ending 22 April (a Sunday). That week, plainly enough, includes the first two days of the period pleaded. A note on the hard copy of the email records that corresponding deductions were made from employees' pay on the following Thursday, in this case the 26 April. According to a table in Ms King's affidavit, the amount deducted on that date was due to be remitted to the plaintiff on 3 May 2001.

[11] Thus the withholdings for the first two days of the period specified in the Statement of Claim ought to have been remitted on 3 May; that is the earliest date of breach on the claim as pleaded. By that time, on Ms King's account, four amounts had been paid under the agreement: on 6, 12, 19 and 27 April. Ms King, on the other hand, has centred her calculations round an earlier failure, on 26 April 2001, to remit amounts which should have been deducted on 19 April 2001. The failure to allow for the payment on 27 April means the amount of $695,884.09 alleged in the statement of claim to be the balance payable under the agreement as at the date of the contravention is overstated; another $18,750 should have been credited as paid by that time, leaving an outstanding balance as at 3 May 2001, the date of contravention, of $677,134.09. The amount of the claim remains unaffected, because the payment of 27 April was in any event set off, with other payments, against that balance to arrive at the amount of $319,264.11 as owing and claimed.

[12] Notwithstanding the failure to credit the last of the relevant payments in calculating the amount due at the date of contravention, it seems to me that the substance of what is required to establish liability under s 222 ALA, and consequently under s 222 AQA, is pleaded: that there was a contravention and that there was a balance payable under the agreement at the date of contravention. The evidence, unchallenged in this regard, supports the occurrence of the contravention and makes it possible to identify the relevant date and amount owed at that date. The date of contravention was properly a matter for particulars; but the defendant, while he sought particulars in many respects, did not make any request in relation to the date. In any event, there was no defect in the pleading which would disentitle the plaintiff to judgment.

The amount owing, and the sufficiency of particulars and disclosure

[13] The defendant did not challenge Ms King's evidence that the company had not made any payment in respect of its current withholding obligations between February and the end of June 2001 or, more specifically, contend that the contravention pleaded in the form of the failure to remit withholdings for the period 21 to 24 April 2001 had not occurred. His arguments were that he could not properly defend the claim without further particulars and disclosure of documents as to how the amounts in the statement of claim were calculated, and that payments made after the agreement was entered were not properly brought to account.

[14] As to the first, the defendant professed to be unable to determine how the amount claimed in the statement of claim was arrived at, and said in his affidavit that he needed disclosure in order to carry out a full reconciliation of the payments made by the company with what was credited by the plaintiff against the outstanding balance. The necessary documents were said to be the company's withholding returns and payment advices, the plaintiff's running account balance in respect of the company, any penalty notices, and records revealing discussions with the company and internal decision-making on the questions of how payments should be, and were, applied. In any event, the defendant maintained, there were payments made which should have been credited against the amount said to be outstanding under the agreement.

[15] To understand the arguments, it is necessary to set out, to some degree, how the pleadings evolved. There were two separate claims for director's penalties in the statement of claim. The penalty arising under the s 222 ALA agreement, in respect of which summary judgment is now sought, was claimed in the pleadings in an amount of $319,264.11, but Ms King explains that the amount has been reduced to $309,067.05 to reflect the crediting of two income tax refund cheques against the s 222ALA liability in 2003. (The last amount is now certified under s 255-45 of the schedule to the *Taxation Administration Act* as the amount owing, the certificate constituting prima facie evidence of the fact.) A further penalty (roughly $500,000), was not involved in this application; it was claimed in respect of PAYG liabilities for the period between 7 February 2001 and 26 June 2001. These were the company's ongoing liabilities, and were not the subject of the s 222 ALA agreement, except to the extent that the company had agreed to meet its current liabilities during the life of the agreement. They formed no part of the specified amounts which the company was required to pay upon breach of the agreement; the defendant's liability for a penalty in respect of them arose because he had taken none of the steps prescribed by s 222AOB of the *Income Tax Assessment Act.* The plaintiff had issued director's penalty notices to the defendant and Mr Ivory, as she was required to do under s 222AOE of the Act before recovery action.

[16] In the defendant's second amended defence, he alleged that the company had, by letter of 30 July 2001, directed the plaintiff to apply all future payments made on its account to the arrears in respect of the director's penalty notice issued to him, and that amounts totalling $821,019.58 had been remitted to the plaintiff from about the beginning of August "in reduction of amounts owing by the Company to the plaintiff and under the Director's Penalty Notices issued to the defendant". In fact the addition seems slightly awry; the figures set out in the defence actually add up to $803,519.58. The plaintiff filed a reply to the second amended defence, dealing with each of the amounts set out in the defence and identifying the application of each payment to the company's withholding obligations for specific periods.

[17] A third amended defence was filed immediately prior to the hearing of the summary judgment application. It added the allegations as to the efficacy of the s 222ALA agreement, and raised a s 222AQD defence. In the third amended defence, the defendant contended, for the first time, that the company had complied with the agreement by paying amounts sufficient to meet its liability under it. The defence sets out a table (now sworn to by the defendant in his affidavit) which identifies payments between 12 April 2001 and 7 February 2002 by reference to date. Those payments in total amount to $832,541.94. The defendant's contention is that all of those payments should have been set off against the balance owing under the s 222 ALA agreement, and that the debt under the agreement, had all payments been credited against it, would have been extinguished by 6 December 2001. The defendant's affidavit also identifies a further four payments totalling $159,275, made in October and November 2001; he says he is unable to determine how they have been applied by the plaintiff.

[18] In addition to the table of payments, the defendant also exhibited to his affidavit a document described as "a reconciliation of the 1999/2000 financial year tax

liabilities of the company prepared by Mr Telfer," Mr Telfer having been the company's financial controller. It may be that it was exhibited more for the purposes of a s 222AQD defence than as showing that the company's liabilities under the s 222ALA agreement were met, but it is as well to say that it does not assist on the latter point. The document, which appears to be a single page from a larger set of figures, sets out amounts underpaid or not paid to the Australian Taxation Officer for the financial year 1999/2000 and payments made between 7 July 2000 and 16 August 2001. It purports to show an amount of $572,940.20 in liabilities and an amount of $647,500 paid. Quite apart from the fact that the figures it contains are unverified in any way, the document is of no use for the purposes of this application. The liabilities with which the reconciliation is concerned are those over a period from July 1999 to June 2000, which coincides only to a limited extent with the period the subject of the s 222ALA agreement, encompassing liabilities accruing from April 2000. Two thirds of the payments relate to a period before the s 222ALA agreement was entered. Setting off liabilities and payments for those periods does not assist here.

[19] A submission forwarded on the defendant's behalf after the initial hearing of the application expanded his position somewhat. It contended that because liability under the s 222ALA agreement crystallised upon its breach, the plaintiff could not seek to hold the defendant responsible for later liabilities incurred by the company. So much may be accepted; but then the defendant sought to argue, the plaintiff was not entitled to credit payments to liabilities of the company which arose after the alleged breach; she should instead have applied them to the defendant's debt. In oral argument at a re-opening of the hearing, it was suggested for the defendant that some payments might have been made by him personally rather than the company, and that such amounts ought to be credited to him. But no attempt was made to identify any such payment, counsel for the defendant saying merely that he had not at present sufficient information to do so.

[20] The plaintiff has responded both to the defendant's pleadings and requests for particulars in explaining how the amounts in the statement of claim were arrived at, and what became of the payments received. On 16 March 2004, in answer to a request for further and better particulars, the plaintiff's solicitor sent a letter to the defendant's solicitors with a table identifying the payments for which credit was given, so as to reach the balance then claimed of $319,264.11, and detailing how those payments were applied. Ms King has exhibited to her affidavit filed prior to this application a schedule setting out all payments referred to in the second amended defence, those payments received by the plaintiff (the discrepancy is minor: $50.10) the date of receipt, the payment method and source (including bank account details and cheque numbers where applicable) and the liabilities against which the payments were credited. Copies of the plaintiff's statements of account are annexed, giving running balances for the company's PAYE and PAYG liabilities included in the s 222 ALA agreement as well as its ongoing PAYG, Fringe Benefits Tax (FBT), and Superannuation Guarantee Charge (SGC) liabilities. Another schedule was forwarded prior to the hearing's resumption, indicating where each of the amounts listed on the third amended defence may be found on the statements of account.

[21] As to how the payments were applied, an examination of the schedules shows that until 10 July 2001 amounts received on the company's behalf (including the defendant's tax refund for the year ending 30 June 2000) were credited against the amounts outstanding under the s 222 ALA agreement. Thereafter, the plaintiff began to credit the amounts received against the company's current PAYG liabilities. By 10 July, $267,185.05 had been paid off the amounts owing under the s 222ALA agreement.

[22] On 30 July 2001, the defendant wrote to the plaintiff asking that payments be directed first to the amounts owing under the Directors' Penalty Notices. However, on 13 August 2001, Mr Telfer requested that amounts paid in July and August be credited to the company's current liability for July PAYG payments, although one amount, of $15,000, was in fact credited against the s 222 ALA agreement balance. Later emails, copies of which are annexed to Ms King's affidavit, show that the company continued to deal with the taxation office on the basis that money paid would be first credited to current liabilities over the rest of 2001. As a result, according to Ms King's affidavit, between 4 July 2001 and 7 February 2002, $513,723 was paid in respect of the company's current liabilities accruing between July and December 2001. Other amounts were also paid by the company in reduction of its liabilities for superannuation guarantee charge ($145,846.18) and fringe benefits tax ($929.47). The four amounts, totalling $159,275, paid in October and November 2001, the fate of which was questioned by the respondent, were applied to the company's GST liability in accordance with a letter of 9 November 2001 from the company.

[23] Meanwhile, in October 2001, a further amount of $13,100 was paid off the agreement balance and in the first months of 2002, a further $50,075 was similarly applied. Other, smaller amounts totalling $97,706.95 were credited against the liability under the s 222ALA agreement: the directors' tax refunds were applied in reduction of it, as were funds garnisheed from a bank; there was a write-off of one small part of the debt, and a revised Business Activity Statement led to a credit.

[24] I do not think the defendant has any legitimate complaint of non-disclosure affecting his capacity to defend. Copies of directions given in connection with the company's payments have been annexed to Ms King's affidavit, as have the running balances to which they were applied. By a letter of 20 July 2004, the plaintiff's solicitor invited identification of any documents not already provided; none was nominated. To a large extent the relevant records were those of the company, not the plaintiff, because the regime was one of self-assessment. If there were some gap (and none has been identified) one would expect that copies of the company records could be obtained from the liquidator. But the defendant appears to have been able to assemble a list of payments made by the company. Essentially the evidence from both sides agrees as to what payments were made, and the effect of the plaintiff's material is to account for the application of each and every one of them.

[25] The submission that all monies should have been directed to the balance owing under the s 222ALA agreement is without any basis in fact or law. It somewhat unreasonably disregards the contrary requests of the defendant and the company in the course of 2001 as to how the money should be applied. More importantly, it

ignores the effect of s 8AAZLA of the *Taxation Administration Act*, which gives the Commissioner the discretion to allocate amounts paid in respect of tax debts to a running balance account "in the manner he … determines", and s 8AAZLE, which specifically provides that in doing anything under the relevant division of the Act (which includes allocation of payments) the Commissioner is not required to take account of anyone's instructions.

[26] The suggestion that the defendant might personally have made some payments which ought to have been credited to him is nothing but conjecture. There is only one credit which can be said to have emanated from him: it is his income tax refund, which was applied against the company's debt under the s 222ALA agreement, and hence went to reduce his penalty. He can hardly complain of that. If there were any payments made by him rather than the company, there seems no reason he would not have a record of them; the fact that the liquidator has the company's records is irrelevant in this regard. But, more to the point, the defendant does not in any of his affidavits suggest any monies were paid by him as an individual on his own account, as opposed to by and on behalf of the company.

[27] The plaintiff's claim is amply particularised; no lack of disclosure is identified which would cause me to think the matter should be left to trial; and the defendant cannot legitimately complain that payments were applied at the Commissioner's discretion rather than to his advantage.

Section 222AQD defence

[28] Finally, the defendant relied on s 222AQD of the *Income Tax Assessment Act*, which provides a defence to a director in proceedings to recover a penalty resulting from contravention of a s 222ALA agreement. The elements to be established in order to rely on the defence are, for present purposes:

- That the director took all reasonable steps to ensure that the company complied with the agreement.
- That the director had reasonable grounds to expect that the company would comply with the agreement.
- That the director did expect that the company would comply with the agreement.

On this application I assume the last element in the defendant's favour; that is to say, that he did expect compliance. The questions then are whether there was a reasonable basis for that expectation, and whether he did all that was reasonable to that end.

[29] Most of the defendant's material was directed to explaining how the company got into financial difficulties and what he did to try to rectify that situation, as opposed to dealing with the specific question of what was done to ensure compliance with the agreement. He deposed that the company had encountered a number of problems in its operations. Its competitors were not paying award wages or payroll tax, and were able to undercut the company's tenders and force it to reduce its profit margins. Its debtors were tardy in payment and it was obliged to enter a factoring

arrangement which in turn reduced its profit margin. In the 2001 year it incurred a large debt for legal fees in an attempt to restructure and thus streamline its overheads. The imposition of goods and services tax also had a damaging effect on its profit margin.

[30] The defendant then identified the steps he took to remedy the company's situation. Before and after April 2001, he approached two unions in the hope of compelling its competitors to pay award wages; that approach was fruitless because no staff member of the competitor companies had made any complaint. Also in mid-2001, the company became a member in an industry association in order to combat its rivals' practices of not paying award wages or payroll tax. The defendant says that in early 2001 he began a process of inviting investment in the company, which unfortunately met with no response. He directed a business development team and was personally engaged in efforts, at unspecified times after 24 April 2001, to procure new work for the company. In October 2001 the defendant took steps to obtain equipment directly from manufacturers and thus made savings on the cost of equipment purchases. Towards the end of 2001 he proposed an employee share offer proposal which would have enabled staff members to forego wages in exchange for equity in the company; but nothing eventuated.

[31] Those measures, described by the defendant as steps to ensure that the company complied with its obligations to meet its taxation liabilities, were, in truth, steps taken in the struggle to keep the company afloat; and almost all were taken after the company was already in breach of the s 222ALA agreement. They could not, in my view, assist in establishing the relevant element of the defence: that the defendant took all reasonable steps to ensure that the company complied with the agreement. On that point, he offered only this: that from the time the agreement was entered he met Mr Telfer daily to review account collections, regularly spoke with the two employees of the company responsible for recovering debts, pressing on them the need for faster turn around and resolution of disputed accounts, and made personal contact with company debtors in an endeavour to negotiate payment. I am dubious as to whether one could say that his actions amounted to "all reasonable steps"; but the reality may be that there was nothing more he could have done to retrieve the situation.

[32] As to whether there were reasonable grounds to expect that the company would comply with the agreement, the defendant said that its gross turnover for the financial year ending 2001 was the order of $7 to 8 million. He annexes to one of his affidavit budgets prepared for the company for 2000/2001 and 2001/2002 which projected a move into profit. What is lacking is any actual financial data, as opposed to forecasting. The restructuring proposal does, however, contain the information that the company had made a loss of $116,000 in 1999 and another loss of $393,000 in the year 2000. I have already mentioned the page from the Telfer reconciliation, which is limited in what it covers to one set of withholding arrears and payments made on account of them; it does not address the company's broader tax situation, and does not advance matters.

[33] On 22 January 2003, an administrator was appointed to the company, and it went into liquidation on 18 February 2003. The administrator reported that for the year

ended 30 June 2001 the company made a loss of $1,585,931.00, and it had an excess of liabilities over assets of $1,685,214. I do not think that is conclusive of the company's capacity to meet the terms of the agreement, although it is certainly not encouraging. What seems to me of more significance is that on the defendant's own affidavit the agreement was entered on 24 April 2001, and on 4 May 2001 Mr Telfer advised him that the company would not be able to meet the instalment due on that date under the agreement because there had been insufficient debt recovery. That suggests a hand-to-mouth existence. It is evident that the company was having considerable difficulty in recouping amounts outstanding as at the beginning of 2001, and it was reliant on recoveries from debtors to meet its commitments under the agreement. It had not since early February met its current PAYG liabilities. Its current liabilities continued to mount through April, May and June. The steps taken by the defendant in the course of the year were unlikely to rectify matters as early as in the beginning of May when the contravention in fact occurred. The matters referred to after that date cannot assist in establishing that there were reasonable grounds to expect that the company would be able to pay its debts.

[34] On the one hand, one has the objective evidence as to the company's financial state, its inability before and during the life of the agreement to meet its current withholding liabilities, and the fact that the agreement had been breached within a couple of weeks of its inception by both failure to meet current liabilities and failure to make a specified payment by the due date. On the other, there is the little that the defendant can say about doing his best to recover moneys owing. The defendant has not pointed to anything which gave him a basis for supposing that the company would be able to meet its obligations under the agreement, as opposed to wishful thinking that the company's debtors might suddenly change their ways for the better. Nor is there any reason to think that he might be able to improve his case for trial. In short, I do not see any realistic prospect of a s 222AQD defence being successfully mounted.

Conclusion

[35] For the reasons given, the defendant has no real prospect of successfully defending the plaintiff's claim under the s 222 ALA agreement, and there is no need for a trial of the action. The plaintiff is entitled to judgment against the defendant for the sum of $309,067.05, and there seems no reason not to award interest, as was sought in the application, from 3 May 2001 to the date of judgment. Subject to any further submissions on that head, I will invite counsel for the plaintiff to provide the necessary calculations. Again subject to submissions, the plaintiff should have her costs of the application.