SUPREME COURT OF QUEENSLAND

CITATION:	*Deputy Com of Taxation v Salcedo* [2005] QCA 227
PARTIES:	**DEPUTY COMMISSIONER OF TAXATION** (plaintiff/respondent) **v** **TAREK SALCEDO** (defendant/appellant)
FILE NO/S:	Appeal No 10078 of 2004 SC No 1469 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2005
JUDGES:	McMurdo P, Williams JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TAXES AND DUTIES – INCOME TAX AND RELATED LEGISLATION – COLLECTION AND RECOVERY OF TAX – PROCEEDINGS FOR RECOVERY – SUMMARY JUDGMENT – where company entered into payment agreement pursuant to s 222ALA *Income Tax Assessment Act* 1936 (Cth) ("ITAA") – appellant was sole director of company – company defaulted under agreement – under s 222AQA ITAA, the director is liable to pay money owing under the agreement – trial judge granted summary judgment against appellant – whether the evidence before the court established the defence under subsections (3) and (5) of s 222AQD ITAA PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – appeal against order of trial division judge granting summary judgment against the appellant for the amount of $309,067.05 – application of r 292 and r 293 *Uniform Civil Procedure Rules* 1999 (Qld) in granting summary judgment – whether the appellant had no real prospect of successfully defending the respondent's

claim

Income Tax Assessment Act 1936 (Cth), s 222ALA, s 222AOB, s 222ANA, s 222AQA, s 222AQD
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 292, r 293

Agar v Hyde (2000) 201 CLR 552, considered
Bernstrom v National Australia Bank Ltd [2003] 1 Qd R 469, considered
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87, applied
Foodco Management Pty Ltd v Go My Travel Pty Ltd [2002] 2 Qd R 249, applied
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, not followed
Gray v Morris [2004] 2 Qd R 118, not followed
Rich v CGU Insurance Ltd (2005) 79 ALJR 856, cited
Swain v Hillman [2001] 1 All ER 91, considered
Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1, considered
Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq) [2003] 1 Qd R 259, applied

COUNSEL: R G Fryberg for the appellant
P G Bickford for the respondent

SOLICITORS: Morgan Conley Solicitors for the appellant
Australian Government Solicitor for the respondent

[1] **McMURDO P:** I agree with Williams JA's reasons for concluding that the appeal should be dismissed with costs and add only the following brief observation as to applications for summary judgment under *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") r 292 and r 293.

[2] UCPR r 292 and r 293 should be applied using their clear and unambiguous language and keeping in mind the purpose of the UCPR to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.[1]

[3] Nothing in the UCPR, however, detracts from the well established general principle that issues raised in proceedings will be determined summarily only in the clearest of cases. Gaudron, McHugh, Gummow and Hayne JJ said in *Agar v Hyde*,[2] recently cited with approval by Gleeson CJ, McHugh and Gummow JJ in *Rich v CGU Insurance Ltd*:[3]

> "… Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae

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1 UCPR, r 5.
2 (2000) 201 CLR 552, 575-576, [57].
3 (2005) 79 ALJR 856, 859, [18]-[19].

> which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[4]

[4] As Williams JA explains, this was an appropriately clear case for summary judgment because the appellant had no real prospect of successfully defending the respondent's claim or any part of it, so that there was no need for a trial.

[5] **WILLIAMS JA:** This is an appeal against an order of a judge of the trial division granting summary judgment against the appellant for the amount of $309,067.05 with interest. That was the amount which the respondent, the Deputy Commissioner of Taxation, alleged in the amended statement of claim was payable consequent upon the appellant breaching the terms of an agreement entered into pursuant to s 222ALA of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"). It should be noted that in the amended statement of claim a further amount, approximately $500,000, was claimed in respect of PAYG and similar liabilities for the period 7 February 2001 to 26 June 2001. That claim was not the subject of the application for summary judgment, and the order of the learned judge at first instance contained directions with respect to the prosecution of that claim. There is no appeal from that aspect of the order.

[6] At all material times the appellant was the sole director of Traffic Control Operations (Australia) Pty Ltd which changed its name to Aura Homes Pty Ltd on 14 November 2002; hereinafter that entity will be referred to as "the company".

[7] On 24 April 2001 the company entered into a "Payment Agreement" (hereinafter referred to as "the agreement") pursuant to s 222ALA of the Act with the respondent. Therein the company acknowledged that it owed the respondent the total sum of $752,134.09 and agreed to pay off that indebtedness by payment of specified amounts on specified days. The agreement then provided that if the specified amount was not paid on the specified day the balance of the total indebtedness "becomes due and payable on that day as the balance payable under this agreement." Pursuant to the agreement the company also undertook to remit to the respondent other amounts which it became liable to pay to the respondent under the relevant legislation on or before the date on which such payment became due. Again, default in making such a payment made the balance of the indebtedness referred to in the agreement immediately due and payable.

[8] The material before the learned judge at first instance established a breach of the agreement, in that amounts withheld for PAYG tax for the period 21 to 24 April 2001 were not paid. The material also established failure to pay a specified amount pursuant to the agreement on 4 May 2001 but that was not alleged in the statement of claim as a relevant breach. On the hearing of the appeal the finding with respect to breaching the agreement was not challenged.

[9] The learned judge at first instance concluded (obviously referring to the wording of r 292) that the appellant "has no real prospect of successfully defending the . . . claim under the s 222ALA agreement" and gave judgment for the respondent.

[10] On the hearing of the appeal counsel for the appellant referred to *Gray v Morris* [2004] 2 Qd R 118 and in particular observations by Chesterman J at 126 and 127

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4 Footnotes deleted.

that the onus was on the applicant for summary judgment to establish that the defence was "bound to fail", "one which cannot possibly succeed", one which had "no prospect of success" and or one that was "hopeless." Those words were used in the context of reasoning by that learned judge based on the proposition that the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") had not effected any substantial change in the approach to summary judgment from that which applied under the former Rules of the Supreme Court.

[11] With respect that approach is not correct. Rule 292 and r 293 brought about significant changes in the law and procedure relating to summary judgment. The wording of r 292 and r 293 is clearly based on the drafting used in Part 24 of the *Civil Procedure Rules* (UK) which came into force in the United Kingdom in 1999. In *Swain v Hillman* [2001] 1 All ER 91 the Court of Appeal had to consider rule 24.2, the equivalent of rule 292. Lord Woolf MR said at 92:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or . . .they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

Later, again speaking of the rule, he said at 94:

> "It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."

In his reasons at 95, Pill LJ accepted that the term "real" was used in contradistinction to "fanciful". The third member of the court, Judge LJ, whilst recognising that summary judgment was a "serious step", went on to say at 96:

> "This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable."

[12] Wilson J followed and applied that approach in *Foodco Management Pty Ltd v Go My Travel Pty Ltd* [2002] 2 Qd R 249. At 254 her Honour emphasised that the "test is that of 'no real prospect' of success and not that of improbability of success."

[13] The approach adopted by the Court of Appeal in *Swain v Hillman* was approved by the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1; particular reference should be made to Lord Hope of Craighead at 259-260, Lord Hutton at 272-3, and Lord Hobhouse of Woodborough at 282-3. Lord Hope at 260 approved of a statement that:

> "particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred."

But in saying that, and this is a theme running through all the judgments, the overriding consideration must be the just disposition of the case - there must be a fair hearing. As Lord Hope put it again at 260:

> "I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly."

It is clear from his Lordship's reasoning that the test to be applied was whether there was a "real prospect of succeeding"; the test should not be formulated by using other verbiage. As Lord Hobhouse expressed at 282: "the criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality."

[14] This Court approved that approach in *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259. There Holmes J, with the concurrence of Davies JA and Mullins J, speaking of r 293(2) and the expression "no real prospect of succeeding" said at 264-5:

> "That level of satisfaction may not require the meeting of as high a test as that posited by Barwicks CJ in *General Steel*: 'that the case for the plaintiff is so clearly untenable that it cannot possibly succeed'. The more appropriate inquiry is in terms of the Rule itself: that is, whether there exists a real, as opposed to a fanciful, prospect of success. However, it remains, without doubt, the case that: 'great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case.'"

In making that statement her Honour made a footnote reference to *Swain v Hillman* and *Three Rivers District Council v Bank of England (No 3).*

[15] The question was also considered by this Court in *Bernstrom v National Australia Bank Ltd* [2003] 1 Qd R 469. Jones J, with the concurrence of Cullinane J, said of r 293(2) at 475:

> "This new rule results, not only in a change in terms, but also reflects a change in the philosophy from that embodied in the former rules and in the propositions identified in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99. Wilson J considered this new rule in *Foodco Management Pty Ltd v Go My Travel Pty Ltd* and found guidance in the approach taken by the Court of Appeal in the United Kingdom in *Swain v Hillman*."

After quoting passages from the judgment of Lord Woolf in *Swain v Hillman*, Jones J went on to say at 475-6:

> "This statement by Lord Woolf is clearly consonant with the philosophy of the *UCPR* as set out in r. 5. It is this philosophy with underpins the change in approach reflected in the new rules. These remarks apply with equal force to both rr. 292 and 293 of the *UCPR*. . . . In my view, the reasoning of the Court of Appeal (UK) in *Swain* should be adopted as setting the proper test for applications pursuant to rr. 292 and 293 of the *UCPR*."

[16] Finally it should be noted that P D McMurdo J, with whom McPherson JA agreed, (and who constituted the majority in *Gray v Morris*) said at 133:

> "With respect to those who may have expressed a different view, it seems to me that rr. 292 and 293 should be applied by reference to their clear and unambiguous language, without a need for any paraphrase or comparison with a previous rule. But in the application of the plain words of rr. 292 and 293, and in particular the consideration of whether there is a need for a trial, a court must keep in mind why the interests of justice usually require the issues to be investigated at a trial."

[17] That review of the authorities clearly establishes to my mind that there has been a significant change brought about by the implementation of r 292 and r 293 of the UCPR. The test for summary judgment is different, and the court must apply the words found in the rule. To use other language to define the test (as was contended for in this case by counsel for the appellant relying on the reasoning of Chesterman J in *Gray v Morris*) only diverts the decision-maker from the relevant considerations. But, and this underlies all that is contained in the UCPR, ultimately the rules are there to facilitate the fair and just resolution of the matters in dispute. Summary judgment will not be obtained as a matter of course and the judge determining such an application is essentially called upon to determine whether the respondent to the application has established some real prospect of succeeding at a trial; if that is established then the matter must go to trial. In my view, the observations on summary judgment made by the judges of the High Court in *Fancourt v Mercantile Credits Ltd* [1983] 154 CLR 87 at 99 are not incompatible with that application of r 292 and r 293; what is important is that in following the broad principle laid down by their Honours the test as defined by the rules is applied.

[18] In order to understand the issues raised on the application at first instance, and on the appeal, it is necessary to set out the relevant parts of s 222ALA, s 222AQA and s 222AQD of the Act. Relevantly s 222ALA provides:

> "(1) The Commissioner may make with a person a written agreement under which the person is to pay specified amounts, on specified 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 . . .
>
> (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 remain unpaid becomes due and payable on the day of the contravention. If an agreement so provides, the specified provisions are called *special conditions*."

[19] It is obvious, and no submission was made to the contrary, that the agreement complied with s 222ALA.

[20] S 222AQA then provides:

"(1) If a company . . . makes an agreement with the Commissioner under section 222ALA of this Act, the persons who are directors of the company from time to time must cause the company to comply with the agreement.

(2) If the company contravenes the agreement by failing to pay a specified amount on or before the specified day, or by contravening a special condition, each person who was a director of the company at any time during the period beginning on the day when the agreement was made and ending on the day of the contravention is liable to pay to the Commissioner, by way of penalty, an amount equal to the balance payable under the agreement."

[21] Again it was not disputed that for the purposes of s 222AQA the appellant was a director of the company at all material times. Given that contravention of the agreement was established, s 222AQA applied so that, prima facie, the appellant was liable to pay to the respondent, by way of penalty, an amount equal to the balance payable under the agreement.

[22] The Act then provides in s 222AQD that a director of a company in that position has certain defences available to him. Relevantly that section provides:

"(1) This section has effect for the purposes of:

(a) proceedings to recover from a person a penalty payable under section 222AQA; . . .

(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, during the period referred to in subsection 222AQA(2), when the person was a director.

(3) It is also a defence if it is proved that;

(a) the person took all reasonable steps to ensure that the company complied with the agreement; 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.

(5) If the person was a director of the company at the time when the agreement was made, he or she is not entitled to rely on a defence under subsection (2) or (3) unless it is also proved that, at that time, the person had reasonable grounds to

> expect, and did expect, that the company would comply with the agreement."

[23] The principal matter argued on behalf of the appellant on the hearing of the appeal was that he had a defence under subsections (3) and (5) of s 222AQD, or more precisely it could not be said the appellant had "no real prospect of successfully defending" the claim relying on those subsections (r 292 of the UCPR).

[24] Section 222AQA and s 222AQD are found in Part VI Division 9 of the Act. Section 222ANA provides that that Division imposes a duty on directors to cause the company to meet its obligations under the relevant provisions of the Act. It also provides that a failure to comply with the duty results in the imposition of a penalty which may be recovered by the Commissioner. Relevantly then s 222AOB provides that the directors of a company, obliged to remit an amount to the Commissioner pursuant to the Act, must do at least one of four things "on or before the due date" for the remittance. The choices available to a director are therein stated to be:

(a) comply with its obligations;

(b) make an agreement with the Commissioner under s 222ALA;

(c) appoint an administrator of the company;

(d) commence the winding up of the company.

Clearly therefore an agreement pursuant to s 222ALA is not to be entered into lightly, and any director must be conscious of the implications of the company so doing. Almost invariably the company will be in some financial difficulty and any director acting reasonably would appreciate that special steps would need to be taken if the company was to comply with its obligations thereunder.

[25] The learned judge at first instance disposed of the defence relying on s 222AQD in the following way. She assumed in the appellant's favour that he expected the company would comply with the agreement and that meant that the relevant questions were "whether there was a reasonable basis for that expectation, and whether he did all that was reasonable to that end." It was then noted, correctly in my view, that most of the material put before the court on behalf of the appellant "was directed to explaining how the company got into financial difficulties and what he did to try and rectify that situation, as opposed to dealing with the specific question of what was done to ensure compliance with the agreement." Reference was made to the allegation that the company's creditors were unfairly able to undercut the company's tenders and that its "debtors were tardy in payment and it was obliged to enter into a factoring arrangement which in turn reduced its profit margin." The reasons for judgment then referred to the appellant's evidence that after April 2001 he had approached unions in the hope of compelling the company's competitors to pay award wages, and to the fact that in mid 2001 other steps were taken in order to provide a level playing field for the company and its competitors. A business development plan was made available in October 2001.

[26] The learned judge at first instance then went on at [31]-[33]:

> "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 into 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 the 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.*
>
> 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 affidavits 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 . . .
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> 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 . . . "
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> (Telfer was the Financial Controller for the company.)

[27] The learned judge at first instance then went on to say that for the reasons stated "the defendant has no real prospect of successfully defending the plaintiff's claim under the s 222ALA agreement." That, as is obvious, took up the wording of Rule 292 of the UCPR.

[28] Counsel for the appellant relied heavily on the statement made in the reasons for judgment that the "reality may be that there was nothing more he could have done to retrieve the situation" in the light of s 222AQD(3)(b) of the Act. That is a matter to which I will return.

[29] Importantly it must be remembered that a director does not have a defence under subsection (2) or (3) of s 222AQD unless the director also proves, pursuant to subsection (5), that at the time the agreement was made he had reasonable grounds to expect that the company would comply with the agreement. The fact that the appellant had that expectation, as was assumed by the learned judge at first instance, is not sufficient.

[30] In my view the learned judge at first instance was clearly correct in concluding that the material placed before the court on behalf of the appellant went mainly to the causes of the company getting into financial difficulties and what was done in an attempt to avoid liquidation, rather than to establishing reasonable grounds for the appellant to expect that the company would comply with the agreement and establishing that he took all reasonable steps to ensure that the company complied with the agreement. The appellant refers to the factoring agreement as a step taken to ensure compliance with the agreement, but it is not disclosed when that factoring agreement was entered into.

[31] An administrator was appointed to the company on 22 January 2003 and he prepared a report to be delivered at a creditors meeting on 18 February 2003. That report was admitted into evidence against objection by counsel for the appellant before the learned judge at first instance. It was contended on the hearing of the appeal that her Honour erred in receiving that report and in the use which she made of it. It was said that the report was not admissible because it was made well after the relevant time for present purposes, namely April-May 2001.

[32] In my view the report was properly admitted into evidence. Whilst it could not be used, and was not in fact used by the learned judge at first instance, to establish actual knowledge in the appellant as at April-May 2001, it was relevant when the court was considering what the appellant ought to have known at that time and what he would have known if he had taken reasonable steps as the sole director to ascertain the true position.

[33] As quoted in the reasons for judgment at first instance that report indicates that for the year ended 30 June 2001 the company made a loss of $1,585,931 and as at that date had an excess of liabilities over assets of $1,685,214. Further, the administrator in that report considered "that the company was insolvent at least as early as 30 June 2000."

[34] Those figures, and that opinion, provide a basis for inferring that a reasonable director taking reasonable steps to ascertain the true financial position of the company would have concluded as at 24 April 2001 that there were no reasonable grounds for expecting that the company could comply with its obligations under the agreement.

[35] Counsel for the appellant sought to counter the drawing of that inference by referring to the Business Plan which was presented to the company on or about 29 October 2001, well after the relevant time. That document referred to an agreement between the company and an Asian company for the supply of safety equipment and signs to the Australian market. The document suggested that there was a ready market for such product and good profits could be generated. It made the recommendation that the company "continue with the project, but a sense of urgency is required." In that context it is said that the "business is profitable and

does diversify the risk". That appears to be limited to the particular project of importing the product and not to the general financial situation of the company. There appears to be no in depth consideration of the company's financial affairs, but there is reference to methods of financing the importation project. In the circumstances the Business Plan is of little assistance in determining the relevant facts.

[36] What is of more significance is that shortly after the Business Plan was received the business of the company was sold to a New South Wales company. It appears that that was done on 31 December 2001 and the sale price was $200,000; the purchaser also assumed responsibility for extensive liabilities of the company. Thereupon the company ceased trading, and did not trade between then and when it was wound up on 18 February 2003.

[37] The learned judge at first instance clearly concluded that at the relevant time, namely April-May 2001, the company was in such financial difficulty that it had no reasonable prospect of complying with the terms of the agreement. The appellant, as sole director, if he had taken reasonable steps to ascertain the true position, would have been aware of that.

[38] It was because the company was so hopelessly insolvent that her Honour made the observation in the reasons for judgment that the "reality may be that there was nothing more he could have done to retrieve the situation." That is not what is envisaged by s 222AQD(3)(b) of the Act. For that provision to become operative it must be proved that the director had reasonable grounds to expect, and did expect, that the company would comply with the agreement but for some reason beyond that director's control (in other words there was nothing he could have done) there was in fact failure to comply.

[39] Here the material placed before the Court does not establish that the appellant had any real prospect of successfully defending the claim. The learned judge at first instance applied the correct test and, for the reasons given above, her conclusion on the evidence was inevitable.

[40] The appeal should be dismissed with costs.

[41] **ATKINSON J:** I agree that the appeal should be dismissed with costs for the reasons given by Williams JA.

[42] What a court must do in determining an application for summary judgment pursuant to r 292 and r 293 of the *Uniform Civil Procedure Rules* 1999 (UCPR), is apply the plain meaning of the words of those rules and not impose a gloss taken from the practice and procedure that applied to summary judgment applications before the introduction of the UCPR.

[43] When a plaintiff makes an application for judgment pursuant to r 292(1) or a defendant makes an application for judgment pursuant to r 293(1), the court must first consider if it is satisfied of the circumstances set out in r 292(2)(a) and (b) or r 293(2)(a) and (b) as the case may be.

[44] In the case of an application by the plaintiff, the court must consider if it is satisfied that:

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

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

If the court is satisfied of those circumstances then it has a discretion to give judgment for the plaintiff and make any other order that it considers appropriate. Similar criteria apply to an application by a defendant pursuant to r 293.

[45] These rules have been adopted to give effect to the overriding purpose of the UCPR set out in r 5(1), "to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense." The goal of expeditious resolution, at a minimum of expense, is pursued by the ability of the court to give summary judgment in the circumstances set out in r 292 and r 293. The goal of just resolution of the real issues is protected by the necessity to satisfy the requirements of both paragraphs (2)(a) and (b) and the residual discretion the court has to refuse summary judgment even when the requirements of paragraphs (2)(a) and (b) are satisfied.

[46] As a result of r 5, r 292 and r 293 of the UCPR, a party seeking summary judgment is no longer required to satisfy the test set out by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 "that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

[47] As has been held in this Court,[5] the test to be applied is that adopted by Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 92 in relation to r 24 of the *Civil Procedure Rules* (UK) which is in similar terms to r 292 and r 293; that is, the court must consider whether there exists a real, as opposed to a fanciful, prospect of success. If there is no real prospect that a party will be successful in all or part of a claim, and there is no need for a trial, then ordinarily the other party is entitled to judgment. These rules benefit both parties as neither faces the expense of taking a matter to trial when the result of such a trial is inevitable as there is no real prospect of one of the parties being successful. There are also obvious advantages to the administration of justice if matters that can and ought be dealt with summarily, are so dealt with.

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5 *Queensland University of Technology v Project Construction (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259; *Bernstrom v National Australia Bank Ltd* [2003] 1 Qd R 469.