

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT AUCKLAND
(CIVIL DIVISION)

PLAINT 15/08

IN THE MATTER of Sections 8 and 9 of the Judicature Act
1980-81

AND

IN THE MATTER of the Income Tax Act 1997

BETWEEN HEDLEY GEORGE RADFORD
Plaintiff

AND GEOFFREY COLIN STODDART
Defendant

Hearing date: 2 and 3 June 2010

Counsel: Mr G Clews for the Plaintiff
Ms R Edwards for the Defendant

Decision: 2 July, 2010 (NZ Time)

DECISION OF GRICE J

1. Unfortunately Mr Radford died shortly before this hearing. He was a successful architect and businessman who first visited the Cook Islands in about 1987. This case relates to tax assessed on interest he earned on various loans made to Cook Islanders in the 1990s.
2. Mr Radford obtained tax concessions in relation to withholding and turnover tax from the then Cook Islands Monetary Board (the Board) in October 1996. He made some 22 loans between 23 August 1994 and 6 May 1997 some of which were rolled over beyond the initial term. The exact terms of the tax exemption were not recorded in any written agreement. Mr Radford and Mr Stoddart, the Collector of Inland Revenue (the Collector), disagreed on the terms of the agreement which led to years of dispute over the extent of the exemption.
3. Mr Radford says the nub of the argument between him and the Collector was that the Collector only allowed tax exemptions based on the original term of any loan for which approval had been given before May 1997. Mr Radford argued that the exemption granted by the Board contemplated the possibility that the actual repayment might be delayed beyond the original term and so the exemption would apply to interest accrued beyond the original term of the loan subject always to a maximum of five years. Both parties agreed that the concession ceased, at the latest, in October 2001.
4. In December 2000 the Collector raised assessments on the loan interest for the years 1997 to 2000 (the December 2000 Assessments). Mr Radford did not object to those assessments within the time limit set out in the Income Tax Act. The Collector then commenced proceedings to recover outstanding tax amounting to approximately \$172,000.00 arising from the December 2000 Assessments. These proceedings came before the High Court (Greig CJ) on 23 November 2001.
5. Mr Radford appeared for himself. The Chief Justice recorded that:

“As Mr Radford appeared on his own I allowed him considerable scope to ask question (sic) of the Collector in cross examination and to address me by way of evidence on a wide variety of matters. Most of these were irrelevant involving hearsay and opinions of other persons...”

6. The Chief Justice noted that the underlying question was whether Mr Radford had been granted an exemption which permitted him to invest money and to receive income free of tax. His Honour reviewed the papers produced by Mr Radford in support of his claim. The Judge said that the papers did not support a tax moratorium as claimed. However he noted that the original validity of the tax exemptions was not an issue before him and so he expressed no view on that. The Chief Justice said:

“Mr Radford has thus received a purported exemption which is limited in the way I have expressed it. That exemption has been honoured in the assessments that have been made. He is not entitled to any exemption beyond that. He has not shown me or pointed me to any authority or authoritative statement which would support an extension beyond those granted to May 1997. I therefore reject his claim that he is entitled to any exemption”.

7. Judgment was entered against Mr Radford in the sum sought of \$172,168.32.
8. Subsequently, Mr Radford, having learnt the importance of ensuring an objection is made in a timely manner, objected to subsequent assessments as well as renewing his objections to the December 2000 Assessments. The correspondence between him and the Collector was produced as appendices to an exhibit to Mr Radford’s affidavit of 4 March 2008. The chronology from December 2000 is as follows:

9. 7 November 2001	10. Objections to assessments of 5 November 2001 for periods September to October 2001.
11. 3 September 2002	12. Objections to assessments dated December 2000 to November 2001.
13. 24 February 2003	14. Objections to assessments dated 22 December 2000 to 5 November 2001.
15. November 2003 – February 2005	16. Assessments issued for September 2001 – October 2004.
17. 22 December 2003	18. Objections to 12 November and 20 November 2003 assessments and all other assessments.
19. 23 June 2004	20. Objections disallowed.
21. 28 June 2004	22. Objections to assessment dated 25 May 2004 and all previous assessments.

23. 16 August 2004	24. Further objections to all previous assessments.
25. 6 September 2004	26. Further objections to all previous assessments.
27. 16 December 2004	28. Further Judgment of Greig CJ on OA 3/2003. Objections to assessments including December 2000 assessments, ruled out of time (with exception of 7 December 2001 objection).
29. 14 February 2005	30. Objections disallowed.
31. 3 April 2005	32. Mr Radford requests case stated for "All 94 objections".
33. 15 April 2005	34. General objection.
35. 13 May 2005	36. Case stated filed by Collector.

9. As the chronology indicates Mr Radford brought further High Court proceedings which were heard by Greig CJ on 16 December 2004. In those proceedings Mr Radford argued that a Statutory Notice issued following the assessment was defective in that it did not comply with the Act nor allow for the exclusion of the day of receipt in the calculation of the time to object. He said that the period for objection therefore had not expired so the right of the objector to lodge an objection remained open until the objections were actually sent to the Collector. The Chief Justice did not agree and the application failed.
10. Following the filing of the Case Stated by the Collector on 13 May 2005, Mr Radford instructed Mr Clews as counsel. The earlier "scattergun" approach which relied on irrelevant and repetitive matters was abandoned and the case was significantly refined.
11. The amount of the tax in dispute was quantified by Mr Radford at \$1,672.50 relating only to the tax treatment in relation to two of the loans (namely in the Portafino and the Tavioni loans). Following this quantification the Collector responded by agreeing to allow Mr Radford's claim in respect of that tax in dispute. The Collector advised the Court in a memorandum dated 28 February 2006 that he would issue an amended assessment of tax for Mr Radford for the periods in issue. This occurred.
12. Following the settlement of the Case Stated proceedings in March 2006 Mr Radford's Solicitor, Mr Arnold, wrote to the Collector requesting that the assessments of tax relating to all 22 loans made by Mr Radford be altered. He said the assessments were

now not correct as they were inconsistent with the tax treatment given the amended assessments for the Portafino and Tavioni loans. He argued that by settling and so allowing the objections for those two loans the Collector had conceded that Mr Radford was correct in his arguments on the tax treatment of the interest on all of the loans and the December 2000 Assessments should be altered accordingly.

13. The Collector replied on 6 April 2006 advising that his decision to allow the Case Stated was:

"... purely an economical decision and not made with the merits of your client's argument in mind."

14. The Collector refused to reopen those earlier assessments. Judicial review is now sought against that refusal (the April 2006 decision).

15. These proceedings were commenced on 4 March 2008. In the Statement of Claim Mr Radford seeks relief by way of declaration against the Collector, as Defendant, in the following terms:

- "30
- (a) *A declaration that the Defendant has no general dispensing power in relation to taxes under his administration and does not possess a general care and management power in relation to those taxes.*
 - (b) *A declaration that the decision by the Defendant to concede the Plaintiff's objection in respect of five periods confirmed at law the correctness of the Plaintiff's tax position in relation to those periods as reflected in his objections affecting them and legally determined the Plaintiff's tax liability in respect of those periods.*
 - (c) *A declaration that the Defendant's refusal to accept a late objection for, or to reopen, other assessments as requested by the Plaintiff is inconsistent with the duties of the Defendant and is unlawful or is unreasonable, arbitrary and capricious.*
 - (d) *A direction to the Defendant that he should either:*
 - (i) *Accept a late objection to assessments made for earlier tax periods for which objections have not been made in a timely way, and which evince the same material circumstances as the five periods the Defendant has*

conceded, and resolve such objection consistently with his concession of the five periods; or

- (ii) Exercise his power under section 22 of the ITA to reopen the assessments made for earlier tax periods for which objections have not been made in a timely way, and which evince the same material circumstances as the five periods the Defendant has conceded, and reassess those periods consistently with his concession of the five periods.*
- (e) Alternatively, a declaration that the Defendant's concession of the Case Stated proceedings as they affected five periods was made with an improper motive, for reasons not available to the Defendant and was unlawful.*
- (f) A direction consequent upon (e) in the same terms as paragraph (d), (i) or (ii)."*

"ITA" refers to the Income Tax Act.

16. The parties agree that the April 2006 decision of the Collector is susceptible to judicial review. They also agree that the provisions of the Judicature Amendment Act 2008, which widened the available relief, govern the remedies available. I also note that as objection procedures are available under the Income Tax Act 1997, only in exceptional cases will the Court entertain Judicial Review.
17. In his submissions Counsel enlarged on the particular relief sought by Mr Radford. This included that the Court direct the Collector to receive a late objection or amend his earlier assessments so that they conformed to those issued following the compromise of the Case Stated. He noted an alternative would be a direction that the Collector must reconsider the earlier assessments. Mr Radford's preference would however be to have the earlier assessments amended.
18. Mr Radford also submitted that if he did not succeed in his argument that the Collector had no power to make the April 2006 decision, but nevertheless did succeed in his argument that he had been denied the opportunity to test the issue of the tax exemption, then a remedy should be granted which best returns him to the position he would have been in before the Collector conceded the Case Stated. That would require a direction by me to the Collector that he accept a late objection to the earlier assessments allowing Mr Radford to bring the matter back before the Court.

19. As a preliminary point I note that while the Judicature Amendment Act 2008, allows the Court in appropriate circumstances, to direct a person to reconsider the matter and may give such directions as it thinks just as to the reconsideration, it should not substitute its decision for that of the Collector's. I would not therefore be prepared to grant the particular relief sought which seeks that I substitute my decision for that of the Collector's.

20. At this point it is useful to set out the relevant statutory framework. The Income Tax legislation stems from Article 70(5) of the Cook Islands Constitution which provides:

"Subject to the foregoing provisions of this Article, the collection, receipt, custody, banking, issue, expenditure, care, and management of money credited or to be credited to the Cook Islands Government Account or to any other public fund or account shall be as prescribed by enactment."

21. The statutory prescription is found in the Income Tax Act 1997 which provides that the Collector will administer the Act. Under s 6 the Revenue Management Division of the Ministry of Finance and Economic Management is established. The role of the Collector is not specifically created by the Income Tax Act but this position is recognised by definition of the word "Collector" in s 2. It means the Treasurer of the Revenue Management Division of the Ministry of Finance and Economic Management. Under s 6 the Revenue Management Division is stated to be:

"...responsible for the administration of this Act..."

22. Section 39 of the Act provides that subject to the provisions of the Income Tax Act:

"...there shall be levied and paid for the use of the Crown for the year commencing on 1 January in each year, tax herein referred to as income tax."

23. The type of tax in question in this case is non resident withholding tax ("NRWT") which is imposed by s 100:

"Every person who derives withholding income shall be liable for withholding tax upon that income and where...interest... (is) paid by any person who is not resident in the Cook Islands, the amount of the withholding tax shall be fifteen percent (15%) of the...interest...so paid."

24. Section 203 specifically allows the Collector to refrain from issuing a notice of assessment or collecting tax where the balance of any tax payable does not exceed \$5.00. Section 203((2) now repealed and not applicable at the relevant time, provided for the Collector to refund or remit tax up to \$1,000.
25. The objection procedure is set out in Part IV of the Income Tax Act. If an objection is made within the prescribed time limit or the Collector permits an extension of time it proceeds by way of Case Stated to the High Court. The Court may confirm, cancel or alter the assessment under s 33. An appeal to the Court of Appeal is available. Otherwise no assessment made by the Collector can be disputed in any Court or proceedings and every assessment is conclusively deemed to be correct (s 25).
26. I now turn to the arguments advanced by Mr Radford in support of his application for review and the Collector's responses.
27. The first main argument is that legal effect of the April 2006 decision to allow the Case Stated is that the Collector has allowed a tax exemption for five years, a longer exemption period than allowed in the December 2000 Assessments. This means, Mr Radford says, that the Collector is attempting to maintain two different bases for assessing income of the same material character:
28. If the Court accepts this argument, then Mr Radford says he has strong grounds to persuade the Collector to reopen the December 2000 Assessments and amend them to ensure their correctness. This would have the same effect as if Mr Radford had been allowed to run the Case Stated and his arguments had been successful.
29. Mr Radford says that this result is reached because the Collector has no power to make a decision to compromise a tax matter on the basis of economy rather than merits. He has no dispensing powers nor care and general management powers which would allow him to make a decision to dispense with the payment of tax by settlement of proceedings. The Collector, Mr Radford argues, has a function to collect tax where tax is due and he cannot compromise no matter how economic such a settlement may be.
30. Mr Radford further argues that the Collector was on notice that the Case Stated was to be a test case. This, he argues, was made clear in his letters and notices to the Commissioner dating back to 22 December 2000. Therefore, the Collector made the

decision to allow the assessments in April 2006 with the ulterior motive of depriving Mr Radford of a favourable precedent.

31. Mr Radford's argument that the Collector has no power to compromise proceedings is based on the wording of the Income Tax Act 1997 which is similar to that of the Income Tax Act 1976 (NZ) before enactment of the Tax Administration Act 1994 (NZ). The 1994 legislation expressly allows to the New Zealand Commissioner of Inland Revenue (the equivalent office to that of the Collector) powers of general care and management.
32. Mr Radford submits that the New Zealand Courts construed the 1976 Act narrowly and indicated that the Commissioner had no general care and management or dispensing powers. The Commissioner was a statutory functionary whose powers were limited and had discretion only to the extent specified in the legislation. In Reckitt & Coleman (NZ) Limited v Taxation Board of Review (1966) NZLR 1032 (CA), the Court held that the Commissioner had no power to waive the late filing of a Notice of Appeal to the Supreme Court. Similarly in Hawkes Bay Hide Processors of Hastings v CIR (1990) 3 NZLR 313 (CA), the tax payer failed to send a case on appeal to the Registrar of the Court within the statutory 14 days after the tax payer received the case from the Taxation Review Authority. The Commissioner purported to waive compliance with the time limit, but the majority of the five member bench decided he could not do so. In that case Richardson J took the opportunity to review the law and noted the absence of a general dispensing power by the Commissioner. Casey J dissented and maintained that the Commissioner had the right to waive delay of a reasonable time.
33. The issue of the Commissioner's discretion was again the subject of judicial comment in Brierley Investments Limited v CIR (1993) 15 NZTC 10212 (CA). This was an appeal by the tax payer against the refusal of the High Court to judicially review the Commissioner's decision to investigate and review various formula applied to the tax payer's income and deductions. The taxpayer argued that previous dealings between it and the Commissioner amounted to a future commitment by the Commissioner not to investigate various tax positions. The Court of Appeal dismissed the appeal on the facts. In that decision Casey J commented that the Commissioner's duty to collect taxes when they are properly due cannot be isolated from his functions of administration and management of the taxation system for which he is responsible. Casey J said that in New Zealand the Commissioner is charged with the administration of the Inland Revenue Acts and there is no essential distinction between the Commissioner's obligations and those of the United Kingdom Tax Commissioners who are specifically

charged with the “care, management and collection” of tax. Richardson J was of the view that given the special features of the New Zealand income tax legislation there was no scope for weighing and balancing management functions against collection responsibilities in respect of particular tax payers as was present under the English statutes.

34. Counsel also referred me to a line of Australian cases which examined the Australian Commissioners’ general administration powers under the Australian tax legislation which is similar to that of the Cook Islands. In Precision Pools Limited et Ors v Commissioner of Taxation and Commonwealth of Australia (1992) FCR 554 (Queensland), the Commissioner had been paid money by Precision Pools on the express terms that the Commissioner would hold the money pending the outcome of proceedings and repay it if a test case being run on the same issue was decided in that tax payer’s favour. The test case was decided in favour of the tax payer. The Commissioner then reneged on his original agreement with Precision Pools and refused to repay the money arguing that he had no power to agree to grant a tax payer a refund under the relevant legislation.

35. The Australian legislation does not have a specific “care and management” provision in favour of the Commissioner. Spender J said:

“By s 4 of the Assessment Act No.1 the Commissioner is given the general administration of that Act. That administration has to be bona fide and for the purposes of the Act, but it is a grant of a wide power and would encompass, for instance, the power to compromise proceedings in which he was a party or to make agreements or arrangements concerning the efficient management of a dispute in which he was involved....” (p. 567).

36. In Grofam Pty Limited v The Federal Commissioner of Tax 36 ATR 493, the full Court of the Federal Court of Australia considered the terms of a settlement made between the Commissioner and the tax payer. The Court confirmed that the Commissioner was entitled to enter a compromise. The Court cited Precision Pools Pty Limited and noted:

“The Commissioner’s power to settle or compromise proceedings to which he is a party derives from s 8 of the Act which provides that the Commissioner shall have the general administration of the Act....” (p. 503)

37. The Commissioner gave effect to the terms of the settlement by making assessments.
38. In Grofam, the Court made no orders on the appeal but urged the Commissioner and the tax payer to go away and settle the case. The case was then stood over for a short time to enable the parties and their legal representatives to consider what had been said by the Court. The case was then settled by the parties at mediation.
39. In this case the Collector maintains that he was entitled to settle the Case Stated proceedings by allowing the objection on economic grounds. He submits that the New Zealand cases can be distinguished, and the Australian line of authority supports a general management power at least to the extent of the Commissioner being able to compromise proceedings. The Collector also points to the United Kingdom position. The Collector also submits that the Cook Islands Income Tax Act must be interpreted in its own context and in particular the constitutional provisions which apply are relevant.
40. The second main ground advanced for Mr Radford, is that the April 2006 should be reviewed because the Collector acted with an improper and unlawful ulterior motive that tainted his decision. The Collector's motive was to prevent Mr Radford succeeding in his test case and so establishing that he had a five year tax exemption would have forced the Collector to reconsider the December 2000 decision and ultimately agree to review the earlier assessments.
41. The Collector's responds by pointing to his unchallenged evidence as to why he made the April 2006 decision is set out in his affidavit of 1 December 2009:

"21. At the beginning of 2006 Mr Radford narrowed his claim in the 2005 proceedings to five periods relating to the Portofino and Tavioni loans. The amount of tax in issue was \$1,675.

22. I could not justify spending money on litigating over \$1,675. There were plenty of other tax cases that required my time and resources. The costs of the 2005 proceeding were out of all proportion to what was at stake and for that reason I decided the best use of resources was to allow Mr Radford's claim in respect of those assessments in issue in the 2005 proceeding.

23. *Mr Radford alleges that I deliberately made that decision so as to deprive him of a hearing on a test case or that I made it with a malicious motive. I completely reject those allegations. I made my decision on the basis of the amount of tax at issue and the disproportionate resources needed to recover that sum. It was a decision based on economic reasons only.*"

42. The Collector rejects the allegation that he made the decision to deprive Mr Radford of a hearing in a test case. The Collector says that was a decision based on economic reasons only. He says in his affidavit:

"24. The decision to allow the objections on these periods only related to the periods in issue. I did not take into account the previous assessments made, or assessments which were no longer before the Court. Similarly, I was not influenced in any way by the prospect of further proceedings or Mr Radford's claim that this was a "test case". Whether or not Mr Radford brought further proceedings was not something I could control. My focus was on the proceedings then before the Court, and the assessment periods in issue in those proceedings."

25. *Contrary to Mr Radford's assertions, the decision did not in any way amount to an acceptance that his contention regarding the tax exemption for all other assessments was correct. I have consistently maintained that my application of the tax exemption to the loan periods the subject of the December 2000 assessments was correct and there was nothing in the 2005 proceedings that would have altered my position on that.*

26 *The decision to allow the objection for the periods in issue in that proceeding was made solely because the amount of tax at stake was so small compared to the cost of litigating about it."*

43. Counsel for Mr Radford said that he had considered requiring the Collector to be present for cross examination to put to him the issue of ulterior motive, but had concluded that the Collector would deny the allegation so no purpose would be served. Counsel argued the Collector's objective was clear from the effect of his April 2006 decision, that is, to

deprive Mr Radford of a successful judgment as ammunition to persuade the Collector to reopen the earlier assessments. Thus Mr Radford lost his last chance to test his argument in a Court.

44. The Collector says his assessments are final unless an objection is successful, and this Application is merely a back door attempt to reopen his December 2000 decisions. Under s 25 of the Income Tax Act 1997 the Collector's assessments cannot be disputed in a Court on any ground and every assessment is conclusively deemed and taken to be correct. He says that Mr Radford lost the opportunity to object to the December 2000 decisions as his objection was out time and the Collector did not allow an extension of time. Mr Radford failed to pay the amounts owing under the assessments. Enforcement proceedings were filed and then came before Greig CJ on 23 November 2001 and again on 16 December 2004. In those decisions Greig CJ held the December 2000 assessments were made out of time and should stand.
45. In relation to Mr Radford's argument that the Collector's April 2006 decision was outside his decision making power, I am not persuaded that the Collector had no power to settle the Case Stated proceeding as he did. The Collector must administer the Income Tax Act and that will necessarily involve administrative decisions. In the course of proceedings he must make decisions on various interlocutory matters, strategy and options for settlement. Ultimately these decisions dictate how the case is run and will include the assessment of possible settlements.
46. If it were otherwise, he could leave no stone unturned in the conduct of the proceedings. To make decisions on the conduct and settlement of proceedings the Collector does not need an express power of care and management or dispensation in the Income Tax Act. Section 203 which permits the Commissioner to refrain from issuing a notice of assessment or collecting tax for a balance of less than \$5.00 does not affect the power of the Commissioner to compromise proceedings, but rather applies to assessments made in the ordinary course.
47. The New Zealand cases (including Reckitt & Colman and Hawkes Bay Meat Processors) do not expressly deal with a power to compromise proceedings. They are specific authority on the issue of the Commissioner's power to waive time limits imposed under the Act. The general issue of whether and the extent of the New Zealand Commissioner's "care and management" power was left open in Brierley.

48. The English and Australian position is that the relevant Commissioners' in those jurisdictions have a power of care and management and dispensation.

49. The United Kingdom statutory framework differs from the Income Tax Act 1997. In particular, a power of care and management is expressly given to the English Tax Commissioners. The Australian framework however is similar to the Income Tax Act 1997 and a power to compromise is recognised there (Precision Pools Pty Limited outlined above).

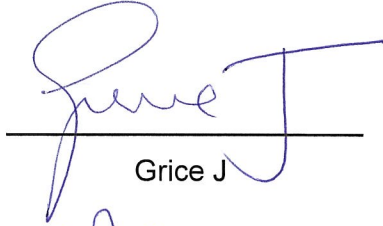
50. Counsel for the Collector also referred me to Article 65(2) of the Constitution which says:

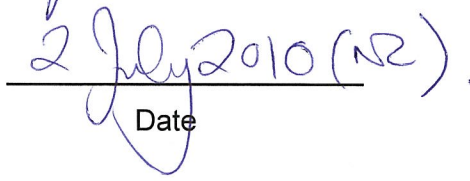
“65(2) Every enactment and every provision thereof shall be deemed remedial, whether its immediate purpose is to direct the doing of anything that the enacting authority deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly revive such fair, large and liberal construction and interpretation as will best ensure the attainment [[of the object]] of the enactment or provision thereof according to its true intent, meaning and spirit.”

51. Article 70(5) provides for the collection “... care, and management” of public funds to be prescribed by enactment. The Collector is entrusted with collection of taxes and responsible for the administration of the Income Tax Act. Adapting the purposive approach and in light of Article 65(2) the Act should be interpreted to allow the Commissioner latitude to efficiently enforce the Act and in doing so to settle Court proceedings and effect such a compromise by the issue of assessments. While the Income Tax Act 1997 does not specifically provide a “care and management” power it should be implied to the extent necessary for the Collector to effectively and efficiently administer the Act and particularly to settle proceedings. In this case I find he was entitled to make the April 2006 decision to settle the Case Stated.

52. The other main ground advanced by Mr Radford was that the Collectors April 2006 decision was made with an improper motive and was unlawful. I do not accept that the Collector had the ulterior motive alleged by Mr Radford. The Collector's evidence on the point is unchallenged. I accept the Collector's evidence that he made the decision for the purpose of settling the Case Stated economically. I therefore find for the Collector on this ground.

53. An alternative possibility submitted by Mr Radford was that the assessments following the April 2006 decision were not assessments at all as the Case Stated proceedings had not been finally determined. This also fails given I have decided that the Collector properly made the April 2006 decisions.
54. In conclusion, I find that the Collector was entitled to make the April 2006 decision to compromise or settle the Case Stated proceedings. Therefore the application for Judicial Review and the declarations sought in relation to the Collector's April 2006 decision and his refusal to accept a late objection or re-open his December 2000 Assessments are refused.
55. The Collector is entitled to costs in the usual way. If the parties are unable to agree on the quantum, submissions are to be filed as follows:
- (i) The Defendant is to file submissions on or before 16/7/2010;
 - (ii) The Plaintiff is to file submissions in reply on or before 23/7/2010; and
 - (iii) Any submissions in reply are to be filed on or before 30/7/2010.


Grice J


Date