SUPREME COURT OF QUEENSLAND

CITATION:	*Hii v Deputy Commissioner of Taxation* [2015] QSC 366
PARTIES:	**YII ANN HII** (applicant) and **DEPUTY COMMISSIONER OF TAXATION** (respondent)
FILE NO/S:	BS 7720 of 2015
DIVISION:	Trial
PROCEEDING:	Originating Application
DELIVERED ON:	17 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2015 and 21 September 2015
JUDGE:	Bond J
ORDER:	**The order of the court is that:** **1. Upon the respondent's undertaking as set out in exhibit 2, the application is dismissed.** **2. The applicant should pay the respondent's costs of the proceeding (including reserved costs) to be assessed on the standard basis.**
CATCHWORDS:	TAXES AND DUTIES – ADMINISTRATION OF FEDERAL TAX LEGISLATION – COLLECTION AND RECOVERY OF TAX – EFFECT OF PENDING REVIEW OR APPEAL ON IMPLEMENTATION OF TAXATION DECISION – where summary judgment entered against the applicant for amounts of income tax, interest and penalties assessed as owing to the respondent – where applicant appealed tax assessment in the Federal Court – where application for a stay of enforcement pending the determination of that appeal – exercise of discretion while pending appeal – consideration of policy in taxation legislation TAXES AND DUTIES – INCOME TAX AND RELATED LEGISLATION – COLLECTION AND RECOVERY OF TAX – PROCEEDINGS FOR RECOVERY – WHERE APPEAL PENDING – STAY OF PROCEEDINGS OR EXECUTION – principles to be applied in exercise of discretion – where clear legislative policy gives priority to recovery by Commissioner – whether merits of a pending

appeal may be considered – whether consideration of merits of pending appeal would constitute engaging in speculation – whether failure to grant a stay will result in extreme personal hardship – whether appropriate exercise of discretion to grant stay

Bankruptcy Act 1966 (Cth), s 43
Taxation Administration Act 1953 (Cth), s 14ZZM, s 14ZZR
Uniform Civil Procedure Rules 1999 (Qld), r 800

Bulstrode v Trimble [1970] VR 840, cited
Commonwealth Bank of Australia v Oswal [2013] FCA 391, cited
Deputy Commissioner of Taxation v Akers (1989) 89 ATC 4725, cited
Deputy Commissioner of Taxation v Denlay [2010] QCA 217, considered
Deputy Commissioner of Taxation v Jennings [2005] QSC 312, cited
Deputy Commissioner of Taxation v Wachjo [2005] FCA 561, cited
Dempsey v Commissioner of Taxation [2014] AATA 335, cited
Govic v Boral Australian Gypsum Ltd [2015] VSCA 130, cited
Mathai v Kwee [2005] FCA 932, cited
Re Boles [2000] FCA 1782, cited
Re Brauch; Ex parte Britannic Securities and Investments Ltd [1978] Ch 316, cited
Snow v Deputy Commissioner of Taxation (1987) 14 FCR 119, considered
Southgate Investment Funds Ltd v Deputy Commissioner of Taxation (2013) 211 FCR 274, considered
Turner v Trevorrow [2013] FCA 391, cited
WAQ v Di Pino [2012] QCA 283, cited

COUNSEL: G J Gibson QC, with A J Anderson, for the applicant
R M Derrington QC, with M J Ballans, for the respondent

SOLICITORS: HopgoodGanim Lawyers for the applicant
Australian Government Solicitor for the respondent

Introduction

[1] Between July and August 2012 the Deputy Commissioner of Taxation issued amended assessments to Yii Ann Hii, asserting the existence of an income tax debt of $35,533,514.82.

[2] The Commissioner issued the amended assessments consequent upon having formed the view that – contrary to the position which had been taken in Mr Hii's taxation returns – Mr

Hii was an Australian resident during the period 2001 to 2009, and, accordingly, liable to taxation in respect of income earned overseas.

[3] On 14 February 2014, Mr Hii commenced a proceeding in the Federal Court under Part IVC of the *Taxation Administration Act* 1953 (Cth) ("the Act") to appeal the Commissioner's assessment of his tax liability. In that proceeding, Mr Hii seeks to overturn the Commissioner's assessment on the basis that:

(a) he was a resident of Australia for tax purposes during the relevant periods;

(b) the Commissioner's opinion that his conduct constituted fraud or evasion was not properly formed; and

(c) the Commissioner's assessment of the overseas income was excessive.

[4] The appeal is presently listed for a three week trial to commence on 4 April 2016.

[5] On 11 May 2015, the Commissioner obtained summary judgment against Mr Hii in the Supreme Court of Queensland in the amount of $59,848,407.32. The judgment sum represented tax, interest and penalties which derived from the amended assessments which had been issued in 2012.

[6] On 6 August 2015, Mr Hii commenced the present proceeding by which he seeks an order that enforcement of the $59,848,407.32 judgment be stayed to permit him to prosecute his appeal under Part IVC.

[7] It is now necessary to make a final determination[1] of the question whether there should be any stay of execution of the judgment for the unpaid tax debt, pending the determination of the appeal in the Federal Court.

Legal principles relevant to stay applications in a tax appeal context

[8] A number of cases were cited to me as containing a discussion of the principles which relate to the grant of a stay of enforcement in circumstances such as the present. It suffices to refer to only two of them.

[9] The most recent consideration of the issue by an intermediate court of appeal appears in *Southgate Investment Funds Ltd v Deputy Commissioner of Taxation* (2013) 211 FCR 274, a decision of the Full Court of the Federal Court. After reviewing the relevant cases, the Court essayed a summary of the relevant principles governing the stay discretion at [77], which I set out below, slightly edited for clarity:

(a) the power to grant a stay should be exercised sparingly and the taxpayer bears the onus of persuading the court that a stay ought to be granted in the particular circumstances;

(b) great weight must be given to the clear legislative policy manifested in provisions such as ss 14ZZM and 14ZZR of the Act which give priority to the recovery of taxation revenue notwithstanding that a taxpayer has a Part IVC proceeding on foot.

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[1] Between the date of the judgment for the unpaid tax debt and the date of this judgment the status quo has been preserved, initially by agreement between the parties and then by interim and interlocutory injunctions granted by me.

The Commissioner is placed by the legislation in a position of special advantage and is generally free to pursue recovery despite the pendency of a Part IVC proceeding;

(c) the merits of a pending Part IVC proceeding may be a relevant consideration to be taken into account in the exercise of the discretion, but:

(i) the court should not attempt to determine the merits unless it has sufficient material before it to do so and it should avoid speculation;

(ii) in cases where a judge is unable to form even a tentative view of the strength of Part IVC proceedings, it is unlikely that the judge's discretion in refusing a stay will miscarry by reason only of the judge being unable on the material before him or her to reach a view as to the taxpayer's prospects of success in having the assessment overturned;

(iii) it is too narrow a view of the discretion to grant a stay of proceedings or execution merely because Part IVC proceedings are pending, or because on review of those proceedings there appears to be an arguable case or complex questions to be determined by the Act or the court;

(iv) that is not to say, however, that the outcome of Part IVC proceedings has to be certain in the sense that they are bound to succeed or fail. That puts the bar too high;

(v) in cases where the court considers that it is in a position to assess the merits of pending Part IVC proceedings and that it is appropriate to do so, the weight to be attached to those merits will vary according to the relative strength of the merits. But the taxpayer needs to have more than merely an arguable case;

(vi) similarly, more weight would be given to the merits factor if the case is one where the Commissioner has abused his position or it is clear that the Commissioner is endeavouring to collect tax in defiance of a decision of the High Court or other superior court which is precisely in point;

(d) due acknowledgment should be given to the asperity with which provisions such as ss 14ZZM and 14ZZR may operate, but in appropriate circumstances a court might consider that a stay is warranted in cases of extreme hardship to a taxpayer, noting however that:

(i) the mere obligation to pay income tax of itself does not impose extreme hardship; and

(ii) the possibility that the taxpayer may be bankrupted is generally not of itself an extreme hardship, however, different considerations may arise if, for example, it is demonstrated that the execution of a judgment debt would deprive the taxpayer of the financial resources needed to prosecute extant Part IVC proceedings;

(e) irrespective of the merits of pending Part IVC proceedings, a stay will not usually be granted where the taxpayer is party to a contrivance to avoid liability to pay the relevant tax; and

(f) other considerations may need to be taken into account in determining whether to exercise the discretion in a particular case, such as any conduct on the part of the taxpayer or the Commissioner which impacts upon the efficient and expeditious conduct of Part IVC proceedings.

[10] The other relevant decision is the earlier decision of the Queensland Court of Appeal in *Deputy Commissioner of Taxation v Denlay* [2010] QCA 217. The Court in that case (in the judgment of Chesterman JA, with whom McMurdo P and Muir JA agreed), also articulated the relevant principles in a manner which, save in two respects, was consonant with the summary later expressed in *Southgate*.

[11] The first respect concerns the approach which should be taken to the question of the underlying merits of the Part IVC proceeding. As to this:

(a) In *Denlay*, Chesterman JA said that the following summary of principle expressed by Nathan J in *Deputy Commissioner of Taxation v Akers* (1989) 89 ATC 4725 was both comprehensive and accurate and likely to provide valuable assistance in the exercise of the discretion whether or not to grant a stay in this class of case (emphasis added):

> (1) The Court's inherent jurisdiction to grant a stay is not vitiated by the terms of sec 201, but that discretion must be exercised in a way which gives the policy directions of the "pay first, argue later," provision effect. The discretion is dependent entirely upon the facts of a given situation, and they can never be defined. The discretion is circumscribed by sec 201. The onus is upon the applicant to establish the discretion should be exercised in his favour.
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> **(2) The Court should not go into the issues in dispute, but should apprise itself of such facts as will enable it to determine the nature of the dispute. It should not speculate upon the outcome.**
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> (3) The obligation to pay tax, does not of itself impose extreme personal hardship.
>
> (4) The possibility that the taxpayer may be bankrupted is not of itself an extreme personal hardship.

(b) Chesterman JA had earlier referred with apparent approval to the decision of Philip McMurdo J in *Deputy Commissioner of Taxation v Jennings* [2005] QSC 312, where, amongst other things, his Honour relevantly observed:

> In some cases it might plainly appear that a taxpayer lacks any merit, in which case the demerit of his or her case would be a very important consideration. Save for those cases however, there will not be a justification for a rehearsal of the arguments involved in a pending review or appeal …

(c) These counsels of reticence as to the possibility that the judge hearing the stay application might embark upon an examination of the merits of the pending review or appeal differ from the approach taken in *Southgate* and which I have quoted at [9](c) above. *Southgate* suggests that a judge hearing a stay application should consider whether he or she has sufficient material to make a determination on the merits of the appeal (or to "assess" the merits, if that be different) and, if so, to form a view on the relative strength of the case. The judge would then take the assessment into account in the way suggested at [9](c) above.

(d) It seems to me that I am bound to follow *Denlay* in preference to the approach taken in *Southgate*. I should not go into the issues in dispute on the Part IVC proceeding

more than is sufficient for me to determine their nature. If it plainly appeared that the review or appeal lacked merit, that would be very important. But otherwise I should not speculate on the outcome.

[12] The second respect concerns the evaluation of what might constitute extreme personal hardship. As to this:

(a) In *Denlay* (at [30]), Chesterman JA specifically considered an argument that as a matter of law, bankruptcy and the loss of a right of appeal against the assessments which might flow from bankruptcy, is not extreme personal hardship justifying a stay. His Honour concluded:

> With due respect I do not think this can be right. If it were, it is hard to imagine a case which might qualify for the designation. Whether or not the particular circumstances advanced as the basis for a stay of execution amount to extreme personal hardship is a question of fact and judgment, not of law.

(b) His Honour later observed (at [50]):

> This leads to the appellant's third point, that the loss of [the taxpayers'] property and consequent inability to prosecute their appeals does not constitute extreme personal hardship. The point may be answered shortly. It is preposterous to contend that the loss of [the taxpayers'] entire estate, and with it any chance of demonstrating that the basis for the assessments was wrong so that they should not have lost their property, could not be a hardship rightly called extreme. It is not easy to imagine a greater hardship in this context. …

(c) The difference between these observations and those in *Southgate* on the similar topic (which I have quoted at [9](d)(ii) above) may only be of degree. But in the event that the evidence in this case did persuade me that refusal to grant a stay would be causative of inability to prosecute the Part IVC proceeding, I would treat that consideration with a similar degree of importance is it was treated in *Denlay*, noting, of course, that ultimately whether the particular circumstances amounted to extreme personal hardship was a question of fact and judgment for me.

[13] Of the considerations identified in *Southgate* and *Denlay*, the following are significant for the purposes of this case:

(a) the counsels of restraint, onus and legislative policy identified at [9](a) and [9](b) above;

(b) the question of what, if any, regard I should have to the underlying merits of the Part IVC proceeding;

(c) the question of whether the evidence in this case suggests a stay is warranted because of extreme personal hardship to Mr Hii.

[14] I will deal with each of those matters under a separate heading.

Restraint, onus and legislative policy

[15] The legislative policy referred to in *Southgate* does not operate to overwhelm all other considerations and constrain the exercise of my discretion to the extent that the only appropriate consideration that I may consider is the Commissioner's right to recover its judgment debt: *Denlay* at [40] to [41].

[16] It is nevertheless true that the policy of the Act is a powerful factor against the stay of proceedings pending appeal. The jurisdiction is to be exercised sparingly. The onus is on the applicant taxpayer and the discharge of that onus is no small thing.

[17] I will take these considerations into account in the exercise of my discretion.

The underlying merits of the Part IVC proceeding

[18] The three main grounds on which Mr Hii seeks to overturn the Commissioner's assessment are those identified at [3] above, namely –

(a) he was a resident of Australia for tax purposes during the relevant periods;

(b) the Commissioner's opinion that his conduct constituted fraud or evasion was not properly formed; and

(c) the Commissioner's assessment of the overseas income was excessive.

[19] Mr Hii's amended appeal statement before the Federal Court is in evidence before me. He has also outlined in his affidavit the facts which go to the merits of his contention that he was a resident of Australia for tax purposes during the relevant periods. He explained in detail why he regarded himself as a Malaysian resident and not an Australian resident. His case was that although he had long ago moved his wife and children to Australia and they properly regarded themselves as Australian residents, as far as he personally was concerned, he had never ceased regarding Malaysia as his home.

[20] Senior Counsel on his behalf submitted that –

(a) the principal issue in the Part IVC proceeding was the residence issue;

(b) in reliance on *Dempsey v Commissioner of Taxation* [2014] AATA 335, the question of residence was ultimately one of fact and not law;

(c) (relying on *Dempsey*) where the taxpayer was physically absent from a place during the relevant periods, as was the case here, it is important to consider whether that person has an intention to return to that place and an attitude that that place remains "home";

(d) Mr Hii's intention was a factual circumstance that the court must take into account when considering the residence issue and that, on the basis of the limited materials I had before me, it was not appropriate for me to undertake this analysis;

(e) (relying on *Denlay*) it was not appropriate to consider the merits of the arguments in the appeal beyond determining that the appeal has merit; and

(f) the appeal had merit and, taking into account the complex factual matrix, it was open to conclude that Mr Hii may be wholly or at least partially successful in the determination of the appeal.

[21] The primary submission of Senior Counsel on behalf of the Commissioner was that –

(a) the Part IVC proceeding involved the examination of Mr Hii's living arrangements over a 10-year period;

(b) the evidence to be given in the appeal may include the oral testimony of up to 70 witnesses and necessarily requires the resolution of complex factual questions;

(c) any assessment of the outcome of the appeal without the benefit of all relevant evidence would necessitate engaging in speculation; and

(d) in those circumstances a view could not be formed of the prospects of Mr Hii's case without engaging in speculation.

[22] The alternative submission of Senior Counsel on behalf of the Commissioner was that –

(a) in the event I was able to form a view on the merits of Mr Hii's appeal without engaging in speculation I should conclude that Mr Hii does not have more than a merely arguable case;

(b) there were a number of factors which supported the Commissioner's assessment that Mr Hii had a clear and consistent connection to Australia throughout the relevant years, including –

(i) Mr Hii's holding a returning resident visa for all of the relevant years;

(ii) Mr Hii's spending significant periods of time in Australia during the relevant years;

(iii) numerous incidences of travel documentation in which Mr Hii indicated he was a resident returning to Australia or an Australian resident departing temporarily;

(iv) Mr Hii's engagement in various social functions and family activities while in Australia; and

(c) the absence of Mr Hii having more than a merely arguable case found further support from –

(i) the inconsistency of Mr Hii's asserted case with the contemporaneous documents tendered by the Commissioner in this application;

(ii) the absence of documents (in circumstances where documents would be expected) that support Mr Hii's asserted case; and

(iii) aspects of Mr Hii's affidavit evidence before me which suggest that in the Part IVC proceeding his credit will be seriously in question.

[23] For reasons which I have already articulated, the approach which I take to the relevance of the underling merits of the Part IVC proceeding is –

(a) to determine their nature;

(b) to ask myself if it has plainly appeared that the proceeding lacks merit;

(c) otherwise not to speculate on the outcome of the proceeding.

[24] As to the first matter, I have in my identification of the grounds of the proceeding and the arguments which were advanced before me determined the nature of the proceeding.

[25] As to the second matter:

(a) The resolution of the correctness or otherwise of Mr Hii's contention concerning residency will at least require a reasonably significant exercise of fact finding in relation to the evidence which is to be adduced by Mr Hii and the challenges to his

subjective intention which have been identified by the Commissioner. Amongst other things, issues of credit will have to be determined.

(b) Whether the Commissioner's points are as strong as the Commissioner contends or Mr Hii's evidence is able to answer the criticisms will be a matter for the Federal Court.

(c) My evaluation of the current position is that it does not plainly appear to me that there is no merit in Mr Hii's challenge to the Commissioner's conclusion regarding his residency.

[26] I will not otherwise embark upon an evaluation of the merits of the case.

Would a refusal of stay cause extreme personal hardship to Mr Hii?

[27] Senior Counsel for Mr Hii submitted that I should conclude that refusal to grant a stay would cause Mr Hii extreme personal hardship in two ways.

[28] First, it would precipitate a chain of financial outcomes which would result in his inability to fund the Part IVC proceeding. The posited causal hypothesis was that the enforcement of the judgment would result in -

(a) his defaulting on various loan facilities;

(b) his being declared bankrupt in Australia;

(c) irreparable damage to his overseas business ventures; and

(d) his being unable to fund the Part IVC proceeding.

[29] Second, the same chain of financial outcomes would result in significant financial detriment to Mr Hii and to members of his family. Mr Hii's family would lose the residence in which they live and there would be no funding for the education of his children and other costs.

[30] Senior Counsel for the Commissioner rejected each of these submissions. He advanced the following points:

(a) There were evidentiary weaknesses in Mr Hii's evidence which would suggest that he has not been entirely candid as to the full extent of his assets.

(b) But even on Mr Hii's own evidence, the proposition that refusal to grant the stay would be causative of the adverse financial outcomes to which he referred could not be accepted because Mr Hii was in a $14 million negative net asset position even before consideration of the tax debt and did not provide any evidence of an income stream which might remedy that position.

(c) There was another flaw in the causation hypothesis in any event, namely the assumption that refusal to grant a stay would result in Mr Hii being declared bankrupt in Australia. The assumption was unsound as the Commissioner could not petition for a sequestration order against Mr Hii because he was not subject to the *Bankruptcy Act*.

[31] There was some legal debate on the correctness of the last point.

[32] Relevantly, Senior Counsel for Mr Hii directed my attention to s 43(1) of the *Bankruptcy Act* which provides –

> (1) Subject to this Act, where:
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> (a) a debtor has committed an act of bankruptcy; and
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> (b) at the time when the act of bankruptcy was committed, the debtor:
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> (i) was personally present or ordinarily resident in Australia;
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> (ii) had a dwelling-house or place of business in Australia;
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> (iii) was carrying on business in Australia, either personally or by means of an agent or manager; or
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> (iv) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager;
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> the Court may, on a petition presented by a creditor, make a sequestration order against the estate of the debtor.

[33] Senior Counsel for Mr Hii submitted that –

(a) (relying on *Deputy Commissioner of Taxation v Wachjo* [2005] FCA 561) a debtor's residence at a property is immaterial to whether that property constitutes a "dwelling-house" and notwithstanding that Mr Hii did not reside at the relevant properties, Mr Hii's ownership of two residential properties in Australia meant that he had "dwelling-houses" in Australia within the meaning of s 43(1)(b)(ii) of the *Bankruptcy Act*;

(b) (relying on *Commonwealth Bank of Australia v Oswal* [2013] FCA 391) that Mr Hii's ownership of various shares and directorships of companies constituted "carrying on business in Australia" within the meaning of s 43(1)(b)(iii) of the *Bankruptcy Act*;

(c) should the jurisdiction of the *Bankruptcy Act* be engaged, the operation of s 29(4) rendered Mr Hii liable to the enforcement of any order made in Australia against Mr Hii's overseas assets.

[34] Senior Counsel for the Commissioner rejected the first two of those submissions.

[35] First, as to what constitutes a "dwelling-house" for the purposes of the *Bankruptcy Act*, he submitted –

(a) (relying on *Re Boles* [2000] FCA 1782 at [48] and *Mathai v Kwee* [2005] FCA 932) that where a debtor has abandoned a property and does not intent to return to it, that property does not constitute a "dwelling-house";

(b) on Mr Hii's own evidence he had separated from his wife (who dwells at one of the residential properties) and did not intend to return to either of the residential properties; and

(c) in the relevant years one of the properties could be regarded as Mr Hii's dwelling house, however on the basis of the evidence advanced before me, Mr Hii should be considered as having abandoned the relevant properties such that they could not be regarded as "dwelling-houses" within the meaning of s 43(1)(b)(ii) of the *Bankruptcy Act*.

[36] Second, as to what constitutes "carrying on business in Australia" for the purposes of the *Bankruptcy Act*, he submitted –

(a) that Mr Hii's reliance on *Commonwealth Bank v Oswal* was misplaced because that case related to whether it was appropriate for the court to issue a bankruptcy notice by substituted service, an issue separate to whether the court has jurisdiction to issue a sequestration notice; and

(b) (relying on *Turner v Trevorrow* [2013] FCA 391 at [37] and *Re Brauch; Ex parte Britannic Securities and Investments Ltd* [1978] Ch 316 at 328) it would be wrong to conclude that a debtor who is the sole shareholder or director of a company in Australia is carrying on the business of that company and necessarily falls within the scope of s 43(1)(b)(iii) of the *Bankruptcy Act*.

[37] It remains to note that the Commissioner did offer an undertaking with a view to defusing one aspect of harm which might be suffered by Mr Hii in the event a stay was refused. The undertaking was in exhibit 2 and was in these terms:

> The Commissioner of Taxation undertakes not to issue a notice pursuant to section 260-5 of schedule 1 of the *Taxation Administration Act* 1953 to HopgoodGanim Lawyers regarding funds of Yii Ann Hii for an amount of up to $1 million held in the trust account of HopgoodGanim Lawyers for the only purpose of Mr Yii Ann Hii progressing his taxation appeal (QUD57/14) in the Federal Court of Australia

[38] I turn first to the evidence said to support the propositions advanced by Senior Counsel on behalf of Mr Hii that refusal to grant the stay would cause extreme personal hardship to Mr Hii.

[39] Mr Hii was not cross-examined on his affidavit. But it does not follow that I must accept everything contained in it. The proper approach is that articulated by Newton J in *Bulstrode v Trimble*[2]:

> In its second aspect the rule in *Browne v Dunn* is, in my opinion, as I earlier said, a rule relating to weight or cogency of evidence: compare *R v Jawke* [1957] 2 SAfLR 187, at p. 190**.** In this aspect the rule says no more than that **if a witness is not cross-examined upon a particular matter, upon which he has given evidence, then that circumstance will often be very good reason for accepting the witness's evidence upon that matter. If I may say so, this is little more than common sense. I have used the word "often" advisedly, because if a witness's evidence upon a particular matter appeared in his evidence-in-chief to be incredible or unconvincing, or if it was contradicted by other evidence which appeared worthy of credence, the fact that the witness had not been cross-examined would, or might be of little importance in deciding whether to accept his evidence**.
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> …
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> **I know of no case where it has been held that where evidence of a witness upon a particular matter is allowed to pass without cross-examination, but evidence of a substantial character is called by the opposite party in direct contradiction thereof**, the judge or jury is required in law to accept the former evidence. And, in my view, this is plainly not the law. Indeed *Re Brace* [1966] 1 WLR 595; [1966] 2 All ER 38 (to which Mr. Ormiston very candidly and properly referred me), is an express authority to the contrary: see, too, *Re Jawke* supra.

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[2] [1970] VR 840 at 848 to 849 (emphasis added), referred to with approval by the Queensland Court of Appeal in *WAQ v Di Pino* [2012] QCA 283 at [28] to [30] and [37] and by the Victorian Court of Appeal in *Govic v Boral Australian Gypsum Ltd* [2015] VSCA 130 at [97].

[40] Mr Hii deposed to having had three main businesses over the course of the financial years ending 30 June 2001 to 30 June 2009, namely:

(a) a timber business in Papua New Guinea;

(b) an iron ore mine in the Philippines; and

(c) property investments in Australia, Singapore, Malaysia, Philippines and Hong Kong (often being the offices from which Mr Hii would operate his other businesses).

[41] He deposed that in order to fund his business ventures, he relied on loans (including from banks and private individuals) and on investors. In the latter regard, he deposed that he was heavily reliant on a number of private investors who had been involved in his more substantial businesses. These investors were largely from Malaysia or from within the Chinese international community.

[42] He said that whilst the business ventures were operated through companies, most of the investments that his investors make were investments in him personally. He said that he rarely had written agreements documenting those investments, but the arrangement was usually that:

(a) they would pay money to him to invest in a particular business venture;

(b) he would sometimes (but not often) pay interim returns to investors and would pay a return to investors when their investments are finished; and

(c) investors could require repayment of their investment at any time.

[43] He said his practice had been to return his excess funds to Malaysia (where he intended to retire) and to invest those funds there. He said his investments in Malaysia were ordinarily passive investments, particularly property, but that recently, he had been losing money in his business ventures and had had to sell properties in Malaysia for cash flow purposes for his businesses.

[44] His affidavit identified and discussed assets said to be currently owned in Australia, PNG, Malaysia, Singapore, Philippines, Hong Kong, and British Virgin Islands. Amongst the Australian assets were land held jointly with his wife and land owned by a company in which he held 90% of the shares. That land, together with land owned by Mr Hii's son, was security for a loan facility from National Australia Bank.

[45] The recitation of information contained no evidence of any significant sources of ongoing income. Mr Hii and his wife have 6 children ranging in ages between 28 and 16. Mr Hii said his practice had been to meet almost all of the ongoing expenses of his wife and children but that since September 2014 he had not been financially able to do so. Despite that, his affidavit stated that he was responsible for the following amounts in monthly interest payments:

(a) between $43,000.00 and $47,000.00 to the National Australia Bank;

(b) approximately $87,500.00 to two companies in respect of his Singapore assets.

[46] Mr Hii's discussion of his assets and liabilities culminated in his expressing the view that he estimated that overall his net worth was negative $14 million. In support of that estimate he exhibited a spreadsheet which had been prepared by his management accountant from the information contained in his affidavit. The spreadsheet revealed that

Mr Hii's single major creditor was Mr Manaf, whose debt was recorded in the spreadsheet at approximately $26 million.

[47] Mr Hii's affidavit went on to make these points:

(a) if the judgment was stayed, he expected to be able to "raise funds" and then to "otherwise deal with" Mr Manaf, so as to avoid having to pay that creditor of the order of $26 million.

(b) the monthly loan repayments to the National Australia Bank and in respect of his Singapore assets were currently $130,156.00 (although that would increase when the borrowing from National Australia Bank converted to principal and interest in December 2015); and

(c) he was incurring significant legal and other fees funding the Part IVC proceeding;

(d) in order to meet the ongoing expenses until that proceeding was determined:

(i) it was likely to be necessary for his wife to sell assets in Australia to reduce the debt owing on the loan from National Australia Bank and to meet ongoing expenses of her and their children;

(ii) he believed he would be able to borrow money from private investors (at potentially high interest rates) and friends with whom he had previously dealt in order cover his overseas expenses and legal and other fees in respect of the Part IVC proceeding; and

(iii) Mr Hii went on to state that:

> However, borrowing further money from private investors and friends may not be possible if the Judgment is not stayed for the reasons set out below. Additionally, I am reluctant to put my friends and investors at further risk if the stay is not granted.

[48] Mr Hii summarized his case for financial hardship in the following paragraphs:

> **Financial hardship - Myself**
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> 191. I do not have sufficient funds to pay the Judgment. In particular, I have never had $60 million or ever earned this much income and have no capacity to pay this amount (or even half this amount), either now or at any time in the future. Further, I do not have sufficient assets or financial capacity to:
>
> (a) borrow funds to pay the Judgment (or even half that amount); or
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> (b) provide sufficient security to the ATO to secure the Judgment.
>
> 192. If I am not completely successful in the Appeal and there is a debt owing to the ATO for a smaller amount than the current assessments (although I am confident I will be successful in the Appeal), it may be necessary for me (with Dr Beh and through Investwell Australia) to sell some of the Australian Assets. However, it would be my intention to sell those assets in an orderly manner in order to ensure that the full market value is achieved and to ensure that Dr Beh and the children are not disadvantaged by the sale of those assets. I may also see if a payment arrangement can be negotiated to repay any remaining debt over a reasonable period.
>
> 193. If I am unsuccessful in this stay application, I am concerned that:
>
> (a) any steps the ATO takes to enforce the Judgment will in all likelihood result in a default under the NAB Loan;

(b) the ATO may issue a bankruptcy notice to me in Australia, which I would be unable to satisfy;

(c) if I am declared bankrupt in Australia, I will no longer be able to send funds to Australia to service the NAB Loan and none of Dr Beh, Investwell Australia and Reimen will be able to service the NAB Loan without my support;

(d) if the NAB Loan falls into default, NAB may take steps to enforce the NAB Loan by exercising its power of sale in respect of the NAB Properties;

(e) the ATO may seek to enforce the Judgment in Singapore, PNG, Malaysia and/or Hong Kong;

(f) the remaining private investors in my business ventures will seek to be repaid their investments (including Mr Manaf as referred to below), which would leave me no choice but to declare bankruptcy in Singapore;

(g) it will be very difficult (if not impossible) for me to borrow funds to pay my ongoing expenses, particularly where there will be significant uncertainty regarding the steps that the ATO may take to enforce the Judgment;

(h) I will not be able to fund the Appeal for the reasons set out below in more detail;

(i) Investwell Australia (the only active Australian Company) may effectively be liquidated by the ATO if it attempts to take steps to sell my 90% interest in that company. As the company is privately held and Dr Beh does not have sufficient income to be able to purchase the shares of that company, there will be no ready market in which to sell shares in Investwell Australia and the ATO may take steps to wind-up the company instead; and

(j) everything that I have worked for over the past 30 or so years will be destroyed and I will have little, if any, right to compensation for the losses I will suffer.

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194. The dispute with the ATO has already cost me over $2 million in legal fees.

195. I am informed by Richard Gardiner from HopgoodGanim Lawyers and I believe that he estimates that my legal fees to run the Appeal from now until the end of the trial are likely to be between $750,000.00 and $1.25 million (including counsel's fees and outlays).

196. I am also concerned that the ATO may attempt to bankrupt me in Australia. If I am declared bankrupt in Australia, I am concerned that:

(a) my trustee in bankruptcy will take over the conduct of the Appeal and they may decide not to prosecute the Appeal;

(b) if my trustee in bankruptcy did want to prosecute the Appeal, not only would they incur legal fees in prosecuting the Appeal they themselves would also incur fees, which would substantially increase the likely costs of the Appeal; and

(c) for the reasons outlined above there are unlikely to be any substantial funds left available to my trustee after repayment of the NAB Loan and the trustee may not be able to fund the Appeal even if they want to prosecute the Appeal.

197. Even if I am not declared bankrupt in Australia, I am concerned about my ability to continue funding the Appeal in circumstances where the ATO may be able to seize any funds I send to Australia.

198. Further, as set out above, I will be relying on loans from banks and/or private investors in order to fund the costs of the Appeal. It will be extremely difficult for me to borrow funds for the Appeal if the Judgment is not stayed, because lenders will be aware of the risk of me being forced into bankruptcy before the Appeal is even heard.

199. For those reasons, I am concerned that if the stay is not granted, it will be extremely difficult for me to fund the costs of the Appeal and, even if I am able to obtain funds, the ATO could take steps to effectively prevent me from prosecuting the Appeal.

[49] The position which obtained in respect of Mr Manaf was developed further in the following paragraphs (emphasis in original):

Mr Manaf

218. Mr Manaf was an investor in a number of my PNG timber business ventures and invested in a number of PNG companies that had purchased timber concessions.

219. In 2007, I entered into an agreement with Mr Manaf to repay one of his investments (**2007 Agreement**). In 2010, Mr Manaf commenced proceedings against me in the Queensland Supreme Court in 2010 to enforce the 2007 Agreement (**Queensland Proceedings**).

220. Mr Manaf and I settled the Queensland Proceedings in 2012 and we entered into a settlement agreement in that regard (**2012 Agreement**). The Queensland Proceedings were discontinued.

221. Following the adverse publicity referred to in paragraph 215 above, Mr Manaf commenced proceedings in the Singapore High Court to enforce the 2012 Agreement (**Singapore Proceedings**), including seeking a mareva order over Mr Hii's house at Sentosa (being the Singapore Order). The Singapore Proceedings were commenced in early April 2014, shortly after the adverse publicity.

222. Until the Singapore Proceedings were commenced, I had been dealing with Mr Manaf in relation to the amounts owing under the 2012 Agreement ~~and I believe that the only reason (or at least the main reason) Mr Manaf commenced the Singapore Proceedings was because of the adverse publicity.~~

223. The Singapore Order is currently acting as a form of security for an agreement with Mr Manaf under which I agreed to pay certain amounts to Mr Manaf in refund of the investment he made. The last remaining amount payable is as follows:

(a) an amount of US$1 million if paid on 31 October 2015; or

(b) an amount of US$5 million if there is default of the payment due on 31 October 2015.

224. If the Judgment is stayed, I expect I will be able to raise funds to pay Mr Manaf US$1 million before 31 October 2015 and avoid the extra US$4 million that would need to be paid after that date. If a stay of the Judgment is not granted, I am concerned that I will not be able to raise those funds to pay Mr Manaf because banks and investors will be concerned about the possibility of the ATO enforcing the Judgment.

225. In addition, Mr Manaf has invested a further US$15 million with me. ~~It is possible that Mr Manaf will seek to have the Singapore Order extended (or he will apply for a similar order) as security for this further amount if I cannot assure him that the Australian tax matter has been satisfactorily resolved for the time being by the granting of a stay of the Judgment.~~ If I can assure Mr Manaf that the Judgment has been stayed, I believe I will be able to deal with him so that he does not require repayment of his investment at this stage.

> 226. If execution of the Judgment is stayed, I believe I will be able to manage the remaining impact on my business reputation caused by the publicity of the Appeal. If I am then successful in the Appeal, I can begin to repair the damage done to my business reputation and to rebuild my business interests.

[50] In summary, on the evidence which Mr Hii has placed before me:

(a) He has a significantly negative net asset position.

(b) He has not identified any significant sources of ongoing income.

(c) His capacity to meet his debts as and when they fall due appears to turn on –

(i) converting his assets into cash;

(ii) the possibility of his making further borrowings; and

(iii) treating with existing creditors to postpone the relevant due dates.

(d) The conversion into cash of assets would not be sufficient to meet all his creditors, so, logically, the capacity to meet existing and ongoing debts (and, for that matter, to fund the Part IVC proceeding) would turn on the possibility of –

(i) making further borrowings; and

(ii) treating with some existing creditors, including Mr Manaf, to postpone the due date on their debts.

(e) Mr Hii believes that if a stay is granted he will be successful in one or other of those courses. He thinks the converse would be true if a stay is refused.

[51] It seems to me that the better analysis of the question of what if any harm might be caused to Mr Hii by refusing the stay is to ask what he might lose. It seems to me that the most which Mr Hii might lose from the refusal of a stay is the opportunity to overcome his present financial difficulties (and to fund the Part IVC proceeding) by making further borrowings and treating with existing creditors. The loss of this opportunity lies at the base of both of the ways in which he contended that refusal to grant a stay would cause him extreme personal hardship.

[52] But as to this:

(a) It was up to him to show not only that such an opportunity would be lost, but also why the loss of such an opportunity should be regarded as the loss of a valuable opportunity.

(b) He has not demonstrated that the opportunity should be regarded as valuable. I observe:

(i) There is no evidence of any sources of ongoing income. Indeed he says that he has not been able to pay the ongoing expenses of his wife and children.

(ii) Mr Hii adduced no basis for his belief concerning the likelihood of his being successful in borrowing money from investors or friends, apart from a vague "I have spoken to several of my contacts and they have confirmed they will lend me money for this purpose."

(iii) Mr Hii adduced no basis for his expectation of what he would be able to achieve in respect of Mr Manaf. In any event, the evidence suggests good

reason to doubt Mr Hii's confidence. The evidence reveals that Mr Manaf is actively pursuing a US$15 million component of the debt the existence of which is acknowledged in Mr Hii's affidavit. Mr Manaf commenced proceedings in the High Court of Singapore in September 2015 seeking to recover that debt, alleging it has been due since 31 December 2014. The evidence reveals that Mr Hii proposes to defend that claim by alleging that the sum claimed is not yet due. However that proposition is inconsistent with his sworn evidence before me.

(iv) Absent proof of a proper foundation for Mr Hii's expectation or belief, I would accord no weight to Mr Hii's expectation or belief on the question of whether or not he would be able to achieve the outcomes he hopes to achieve. It was suggested that the fact that he had successfully conducted his business in the past meant that I could give weight to his opinion of his prospects. I am not so persuaded.

(v) If the evidence had permitted, Mr Hii could have demonstrated by evidence rather than speculation the likelihood of events which would follow the grant of a stay. But he has not done that.

(c) The result is that I conclude that I cannot assess Mr Hii's prospects of success of making further borrowings or treating with existing creditors (including Mr Manaf) as anything more than speculative.

(d) Accordingly, I could not regard Mr Hii as having established that the refusal of a stay would cause the loss of an opportunity which has anything more than speculative value.

[53] I am not persuaded that the loss of such an opportunity should be regarded as such a personal hardship as to justify granting the stay, bearing in mind the other considerations relevant to that question. Although it was a matter of but little moment in reaching that conclusion, I should record that I have taken into account the undertaking offered by the Commissioner quoted at [37] above.

[54] In light of that conclusion, it does not seem to me to be necessary to resolve the other matters which were the subject of argument and to which I have adverted at [30](a) and [30](c) above.

Conclusion on whether a stay of execution should be granted

[55] Bearing in mind the considerations to which I have adverted, to my mind the application for stay rose or fell on whether the evidence adduced on behalf of Mr Hii as to the alleged extreme personal hardship which might be caused by refusal to grant a stay was sufficient to overcome the counsels of restraint, onus and legislative policy identified at [9](a) and [9](b) above.

[56] I have not been so persuaded.

[57] Accordingly, upon the Commissioner's undertaking as set out in exhibit 2, I dismiss the application for stay. Mr Hii should pay the Commissioner's costs of the proceeding (including reserved costs) to be assessed on the standard basis.