FEDERAL CIRCUIT COURT OF AUSTRALIA

DEPUTY COMMISSIONER OF TAXATION v BURHALA *[2016] FCCA 2225*

Catchwords:
BANKRUPTCY – Ruling on adjournment application.

Legislation:
Federal Circuit Court of Australia Act 1999, s.42

Cases cited:
Seymour v Commissioner of Taxation [2016] FCAFC 18
Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175

Applicant:	DEPUTY COMMISSIONER OF TAXATION
Respondent:	FLORIN BURHALA
File Number:	MLG 160 of 2016
Judgment of:	Judge Burchardt
Hearing date:	9 August 2016
Delivered at:	Melbourne
Delivered on:	10 August 2016

REPRESENTATION

Counsel for the Applicant:	Mr Connard
Solicitors for the Applicant:	Deputy Commissioner of Taxation
Counsel for the Respondent:	Mr Bearman, Mr Purton
Solicitors for the Respondent:	AUM Lawyers Pty Ltd

ORDERS

(1) That the application for adjournment be dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 160 of 2016

DEPUTY COMMISSIONER OF TAXATION
Applicant

And

FLORIN BURHALA
Respondent

REASONS FOR JUDGMENT

1. Yesterday, I heard argument in which, putting the matter shortly, Mr Burhala sought to appear today by video link and, if that were not permitted, sought that the matter be adjourned until after a posited hearing in the Administrative Appeals Tribunal (AAT) in September. I indicated yesterday that I would not permit Mr Burhala to appear by video link, although I have not yet given my reasons for that ruling and will do so shortly. I reserved till today the question as to whether the adjournment application should be granted. I would indicate that I have formed a view, but not without some cogitation.

2. In order to understand this matter, it is appropriate to commence with the history of the proceeding, albeit in paraphrased form. On 29 January 2016, a Creditor's Petition was lodged by the Deputy Commissioner. A subsequent amendment is of no relevance for these purposes. The Petition was supported by an affidavit of Mr Aris Zafiriou, filed contemporaneously. Putting the matter perhaps slightly broadly, Mr Zafiriou deposed to the fact that a number of companies in which the respondent, Mr Burhala, was involved were in liquidation. It asserted a major tax liability on Mr Burhala's part to the Commissioner of over $3.7 million. It noted that there was a review challenge to that quantum due to be heard before the AAT on 17 and 18 February 2016.

The affidavit noted that the respondent and his son had left Australia on 2 October 2015 and had not returned. The affidavit also asserted, at para.33, which I will read out, as follows:

> *"On 5 November 2015 Athanasiou responded to D'Cruz seeking an extension of time to 20 November 2015 and advising inter alia that:*
>
> *Florin is presently overseas dealing with the same personal issue with the health needs of an elderly relative and won't be able to return to Australia until 16 November."*

3. At para.40 of the affidavit, Mr Zafiriou deposed:

> *"On 2 October 2015, the respondent departed Australia. Annexed hereto and marked "AZ-22" is a copy of the Respondent's completed Outgoing Passenger Card dated 2 October 2015 which declared that the Respondent:*
>
> *(a) is an Australian resident departing temporarily;*
>
> *(b) will spend most of his time abroad in Romania;*
>
> *(c) had intended to stay overseas for 21 days; and*
>
> *(d) that the main reason for travel was 'Business'.*

4. Mr Zafiriou's affidavit went on to depose that the respondent's daughter left Australia on 5 November 2015. The respondent's dogs left on 9 November 2015. The affidavit concluded that the respondent had left Australia to avoid his tax debts and, of course, this was the asserted act of bankruptcy.

5. On 4 March 2016, the applicant made an application for substituted service supported by, again, an affidavit of Mr Zafiriou, filed 7 March 2016. This noted various different addresses for the respondent and also noted the disposal of the property in Lower Templestowe. It noted that the applicant's lawyer in the AAT proceeding was no longer instructed and although I do not think anybody has deposed directly as to the matter, it seems plain that the posited hearing in February did not proceed.

6. On 26 April 2016, orders were made for substituted service. The respondent, understandably, did not attend and was not represented.

On 24 May 2016, however, the respondent filed a notice of appearance by his lawyers and on 27 May 2016, Mr Mete, the solicitor for the respondent, filed an affidavit. Although the terms of that affidavit are necessarily hearsay, they were clearly set out on the direct instructions of the respondent. This notes, inter alia, that the respondent's brother made Mr Burhala aware on 20 May 2016 of the Petition and the matters that had been filed. The affidavit deposes to a long-running dispute with the Australian Taxation Office ("ATO") going back to 2009. It also noted that someone described as the respondent's ex-partner was also in Romania with the son and daughter. I will read some of that affidavit out. It should be noted that the ex-partner is in fact the mother of his children and is living with him in Romania as things presently stand. I will now read paras.23 to 26 inclusive of that affidavit. Under the heading 'Adjournment', the text of the affidavit reads:

> *"In consequence of the proceeding matters, a six-week adjournment of this hearing is sought.*
>
> *On my present instructions, the issue of the creditor's petition and these proceedings were directly contrary to an agreement between Florin and the Assistant Commissioner Kendrick. On that basis, a question arises as to whether the Commissioner should be estopped from bringing them, or they are an abuse of process. In particular, I am informed by Florin that but for the agreement, he would have taken steps to borrow to meet some or all of the debt or to provide further security.*
>
> *Moreover, in the circumstances in which service of the materials in this proceeding occurred and the non-disclosure to Mr Athanasiou of the content of these materials, it may be that a question arises whether the Commissioner has issued the creditor's petition and these proceedings in an attempt to stifle Florin's right to a hearing in respect of the substantive debt in the Tribunal."*

7. I omit the first sentence of para.26, which was struck following objection.

> *"In that circumstance, amongst other thing (sic), this firm needs to seek and obtain copies of all of the relevant documents relating to the assessment, the agreement not to pursue recovery proceedings during negotiations, and about the status of the security provided by Florin's ex-partner. Consideration will also*

need to be given as to whether to seek discovery as to documents relating to the foregoing allegations prior to the return of this hearing. Moreover, consideration will need to be given to whether an uplift of these proceedings to the Federal Court of Australia should be sought."

No such application has yet been made.

8. On 27 May 2016, at which time the respondent was represented in Court, I made orders. I ordered a trial to commence today and to be heard tomorrow. I ordered that by 30 June 2016 Mr Burhala file and serve materials and I note that I provided liberty to apply. I propose to read the transcript of that hearing that is relevant. I start at page 6 of the transcript at line 28. This is Mr Purton, counsel for Mr Burhala, speaking:

> *"…the ground - the act of bankruptcy relied on is that my client departed Australia with the intent to defeat or delay his creditors and, from 2 October, has remained out of Australia with the intent to defeat or delay his creditors. The affidavit filed by my instructor seeks to go to the elements of intent and the reasons why it is that my client is out of Australia and the submission is that, in the fullness of time and with an affidavit put on by – a primary affidavit not free of hearsay concerns would set up fully the reasons why my client is out of Australia and once the court has before it its evidence it will not be able to make the creditor's petition because the applicant will not be able to prove the requisite intent.*
>
> *Your Honour, I have a minute of order that I prepared and provided to my friend which sets out the timeframe that we would seek if your Honour was with me on the adjournment application. What we would seek is a period of slightly over six weeks, your Honour, which is what – the period that was alluded to in the affidavit of my instructor. The reason that period of time is sought is so that my client can prepare and swear an affidavit with all the appropriate supporting material, as well as prepare a notice of objection, setting out the grounds of objection to the petition and to allow for a period of time for the applicant to respond and putting evidence on in response that they may wish to provide.*

9. Continuing on page 7 at line 11, Mr Purton:

> *"That's right. He says that he left for family reasons and for business reasons and, in addition to that, there's a – presently a*

dispute in the Administrative Appeals Tribunal with respect to the liability and that there are no other creditors chasing Mr Burhala at this time."

10. At line 25:

"HIS HONOUR: Is it his intention to come and give evidence, if I accede to your application for an adjournment?

MR PERTON: Your Honour, so it was certainly the affidavit evidence filed by client and I'm instructed that he will be in the country… He will be in the country in August so that would not fit in with the timeframe set by my time – my order but if the court were minded to extend that period out to August my client could be available for cross-examination.

HIS HONOUR: Well, what I would be minded to do is list it. If I adjourn I'm going to list it and if your client files an affidavit he would have to be available for cross-examination.

MR PERTON: Yes. If ---

HIS HONOUR: And if he wasn't I wouldn't pay a lot of regard to his affidavit.

MR PURTON: Yes. I understand your Honour.

HIS HONOUR: So he will coming back when I list it.

MR PURTON: Yes."

11. Continuing on page 9 at line 40:

"MR PERTON: … my instructor has pointed out to me that the AAT proceeding is listed in September – early September. My client would certainly be in Australia for that hearing and the closer we get to September, the more sense it makes, in our submission, for the - this matter to be heard after that matter has been determined.

HIS HONOUR: The difficulty with that submission is I don't know anything at all of any material moment about the proceeding in the AAT.

MR PURTON: Your Honour, I'm – I have the same difficulty myself. … But I just – I make the submission - - -

HIS HONOUR: Well, I hear what you say. I can hear this matter on 9 and 10 August and that would fit in with the timetable. Everybody would have filed all their materials over a month before. I hear what you say, Mr Perton. I don't dismiss it for a moment but …the pressures on this court's listings are such – you will still be jostling with a migration application at the start of the day anyway so you know …

MR PURTON: If your Honour pleases.

HIS HONOUR: They're normally fairly quick but if they take two hours you will just two hours and we will have a short lunch or something like that but I - you will have to take the dates that I've got.

12. On page 11, there was a further exchange:

"HIS HONOUR: So I expect issues about documentation to be resolved sensibly."

13. The word "liberty" is missed, but:

"There's [liberty] to apply if anyone is being stupid.

MR PERTON: Yes.

MR CONNARD: There certainly will be.

HIS HONOUR: And, by the same token, I'm not going to make an order about notice for cross-examination but you're already on those - your client is required, Mr Perton.

MR PERTON: Yes. Understood, your Honour."

14. I then went on at line 25 to state:

"So list the matter for trial on 9 August for two days at 10.15, otherwise there will be orders in terms of the minute as amended. The court will engross these orders and forward them."

15. And then there was an exchange about notice of address for service. I should interpolate and say, of course, that the application for adjournment was opposed and Mr Burhala was successful in getting exactly the amount of time and indeed slightly more time than he had asked for.

16. On 8 July 2016, Tania Burhala filed an affidavit. Putting the matter broadly, this explained why the family was in Romania. I note that she has a five-year visa, which, on the dates given in the narrative, would appear to have her in Romania without any difficulty until 2020. On the same date, a Notice of Opposition was filed by Mr Burhala that took the point that the act of bankruptcy had not been committed as asserted. Mr Burhala's affidavit was also filed on the same date. At para.4, he disputes the ATO debt. He goes on to depose that there is an AAT hearing due to commence on 5 September 2016 with a 10-day estimate.

17. At para.8, he deposes he has no other creditors, and he thereafter sets out the reasons for his move to Romania. He deposes to business reasons. He has affairs in Dubai and Egypt, and Romania is conveniently sited for him to conduct such business. He deposed to difficulties faced by his son at Scotch College at Melbourne as being a significant reason for the decision to remain in Romania. I note that it would have been perfectly possible for him to move schools in Australia.

18. At para.48, Mr Burhala deposes to three trips, as it were, to Europe in 2015 before he went to Romania in October. He deposed that he intended to return to Australia on 23 October 2015, but Nicholas liked being in Bucharest. He deposes to having a job in Romania, he deposes to being a Romanian citizen, and he deposes, importantly, to the fact that he caused himself to obtain a ticket on 8 June 2016 to return to Australia on 1 September 2016. I pause and interpolate by this stage he already knew this trial had been fixed for 9 August 2016. Continuing on, the affidavit asserts an agreement with the ATO not to proceed against him until settlement negotiations were finished. That has since been denied by the Taxation Office in an affidavit of Nicole Schriver.

19. On 25 July 2016, Mr Zafiriou filed a further affidavit. He asserted that the debt owed is now over $3.9 million. He further deposed that substantial sums in millions of dollars were transferred from Aspen Alpine, as I shall refer to it, a company of which Mr Burhala is the director and 100 percent shareholder, to Romania in October 2015, effectively remarkably contemporaneously with Mr Burhala's

departure from Australia. It deposes to the fact that more moneys were sent to Romania by Mr Burhala and Tania Burhala in November 2015, and further major transfers to Mr Burhala in Romania.

20. The next development took place on 2 August 2016, when Mr Mete, the solicitor for Mr Burhala, wrote to my associate seeking that Mr Burhala give evidence in the matter by video link. My associate replied on 4 August indicating that that request was not acceded to. It had, of course, been the subject of objection by the ATO in the meantime. On 5 August 2016, the application in the case presently falling for determination was filed. It sought that Mr Burhala give evidence by video and that the matter be adjourned until after the proceeding is due on 5 September 2016. It was supported by an affidavit from Mr Mete.

21. Amongst other things, the affidavit seeks to explain away the matters on the transcript that I have read out. It also refers to exhibit FB-7 to Mr Burhala's affidavit. That is a letter from his Romanian employer dated 22 June 2016 which intimates, but does not say in terms, that if Mr Burhala was to be absent for longer than September, then he might lose his position. I note, however, the terms of the affidavit suggest that nobody had previously been employed by his employer during the periods of July and August that were apparently now the subject of concern, and I will return to that exhibit in due course.

22. It should be noted in passing that on 13 July 2016, the ATO wrote to Mr Mete seeking confirmation that his client would be present at the hearing on 9 August 2016. That does not appear to have been responded to.

23. Mr Mete's affidavit, to return to, says video link is possible in Romania, but further asserts that Mr Burhala wishes to respond to Mr Zafiriou's most recent affidavit. I will read the affidavit of Mr Mete at para.28.

24. In para.27, to go back:

> *"I am informed by Mr Burhala and believe that he has reviewed Mr Zafiriuo's affidavit filed by the applicant on 25 July 2016 and that there are matters in those affidavits that in respect of which he seeks to file a written response.*

I am informed by Mr Burhala and believe that (a) because he was principally concerned about the settlement proceedings on 29 July 2016, he did not immediately take steps to respond to Mr Zafiriou's affidavit when it was received four days before, (b) he thereafter took steps to but will not be able to obtain all of the necessary information prior to 9 August 2016. In particular, Mr Burhala was seeking information and documents from the recipients of the funds that he transferred, as alleged by Mr Zafiriou, to demonstrate that he was repaying moneys lent to him together with information from the relevant bodies in Romania to confirm that he is not the owner of the properties Mr Zafiriou alleges he owns."

25. Mr Mete's affidavit goes on to attest to the fact that there would be prejudice to Mr Burhala if he was not heard by video or the matter was not adjourned, and the point was stressed that Mr Burhala would lose all his rights in the forthcoming posited proceeding in the AAT were he to be bankrupted.

26. Against that history I come to the two issues. The first is the matter of video appearance. Mr Burhala knew by 27 May of the hearing listed for 9 August 2016, or at the very latest very shortly thereafter. He deliberately bought a ticket on 8 June 2016 to return to Australia on 1 September 2016. He made no application pursuant to the liberty to apply. He was on notice from the ATO by letter dated 13 July 2016 that he was required to attend, and that letter was not the subject of response. The application to appear by video link was made by email as late as 2 August 2016. This delay is quite impossible to justify, and to his credit, counsel for the respondent did not seek to do so. Each case concerning applications to give evidence by video link depends upon its own facts and circumstances, a point emphasised by Griffiths J in *Seymour v Commissioner of Taxation* [2016] FCAFC 18 at [41]. I have had regard to the various matters there set out.

27. I note one of the matters emphasised is that the Court is entitled to consider, amongst other things, the importance of the extent to which the Court considers it would be assisted by evidence in person. In this case, Mr Burhala's credit is plainly in issue and very significantly so. He is a solicitor. It is reasonable to infer he would not be particularly fazed by appearance in court. His demeanour on any view of the matter would be extremely significant. In my view, that of itself would

be sufficient to make it inappropriate to justify video link. Further, in any event, it is far from clear that the arrangements in Romania would be satisfactory. There is no direct evidence as to precisely what they would be before the Court, nor is it apparent that it would or would not have been practicable on such short notice. Furthermore, it is not clear if such evidence-taking is permitted by the law of Romania. In all these circumstances, it seems to me manifestly inappropriate to allow video link evidence, and I do not do so.

28. That brings me to the next issue, the matter of the adjournment. The power to adjourn is plainly a discretionary issue. It is a discretion, of course, that must be exercised judicially. Overarching is the need for the proper administration of justice, although I bear in mind that specific terms of s.42 of this Court's Act which requires the Court, so far as it is proper, to seek that matters are dealt with expeditiously.

29. Here I will commence by repeating some of the history. The respondent knew by 27 May 2016 of the hearing today and what it was about. He knew that the Petition was based on his absence from Australia. He instructed his lawyers he would be here, and the Court was told so in terms on 27 May 2016. Mr Burhala deliberately decided not to attend. He bought a ticket on 8 June 2016 to return to Australia on 1 September 2016. Mr Burhala is a solicitor, an experienced solicitor, as is apparent from his affidavit. He knew the likely difficulties that this might give rise to. No application for adjournment was made until 2 August 2016. As I indicate, there was not even the courtesy of a reply to the ATO's letter of 13 July 2016.

30. Mr Burhala says he cannot attend, but his exhibit FB-7 is scarcely unproblematic, even on its face. The letter from Mr Veteleanu asserts that he has known Mr Burhala for some three years, having cooperated previously when he referred some clients from Australia to the firm. He goes on to say:

> *"In October 2015, when Mr Burhala was in Romania I decided to offer him the opportunity that we work together, with him as a consultant, given that I required someone with Mr Burhala's experience to deal with overseas clients - specialising in common law - and clients in the area of sport in some of the projects we were undertaking.*

> *I was informed by Mr Burhala in February 2016 that he was required to travel to Australia on 1st September 2016 as he indicated to me he needs to attend a trial for some tax matters he has in Australia, and have agreed for him to undertake such travel as I would then cover the work required to be undertaken on any outstanding projects in the month of September, especially given that as during the months of July and August judges here are on holiday, hence I have the opportunity to have holidays to recover.*
>
> *Given that he will be away for a month in September, I cannot afford to agree for him to leave during August also as he is required for projects that he needs to attend to prior to his departure in September.*
>
> *I cannot have him away for two months of the year and if he cannot undertake his projects during the month of August I will have no option but to make alternate arrangements by using someone else."*

I note that Mr Burhala was not in the employment of the solicitor in Romania in 2015. It would seem that the employer managed to cover the whole of 2015 until October. I note that there is not much work, it would seem, in July or August because the judges – would that the same apply to me – have two months' leave. I note that he might have to engage someone else. This is scarcely a forbidding interdiction to travel on Mr Burhala's part.

31. Further, Mr Burhala has also deposed that he has various other business interests, including those in Dubai and Egypt which caused him to choose Romania as the place where he was going to be based. Insofar as Mr Burhala says he cannot be here today, this evidence is unpersuasive.

32. I further note that the employer says he cannot be away for two months, but this case is listed for two days, obviously with additional travel and some time to prepare, and the AAT is now listed for five or, at the worst, ten days. He would not need to be absent for two whole months to attend both these hearings.

33. Against these matters, which all suggest a thoroughly unsatisfactory, deliberate course of conduct on Mr Burhala's part, there is, however, a very telling counterpoint, namely, the prejudice that is likely to occur to Mr Burhala if the matter is not adjourned. If the matter is to proceed

as it is listed, his affidavit will either not be read or necessarily attract little weight. He was put on express notice, of course, as to this matter on 27 May 2016.

34. It is highly probable that Mr Burhala will be bankrupted. That is a very significant matter. Yesterday I think I went so far as to say that he would be bankrupt by today if I did not adjourn, and no one dissembled from that. I should make it clear, however, if the matter does not adjourn, it will proceed in a proper fashion with appropriate consideration of the requirements under the legislation. My views yesterday were in passing and somewhat overstated. If a Sequestration Order issues, Mr Burhala will be bankrupt, and that is of itself an enormous step. He loses control of his affairs. His capacity to conduct a proceeding in the AAT, which I say again is part, obviously, of a long-running dispute with the Taxation Office, will certainly be removed.

35. However, the claim itself will not be defeated. Mr Burhala has deposed that his prospects of success in the proceeding are good. The trustee, if appointed, will have to decide whether to pursue the matter, and if there is significant merit, it is reasonable to suppose the trustee would elect to do so.

36. It is worth making some brief, limited assessment of Mr Burhala's case, noting that he has obviously not appeared and will not be appearing to give evidence. The fact is that his family and his dogs all left at much the same time in late 2015. Prima facie, it is a very large debt to the ATO, although I well appreciate it is disputed. It appears from Mr Burhala's affidavit that he concedes that millions of dollars were remitted to Romania in about October/November 2015. He says through his solicitor Mr Mete that this was to repay debt, but without in any sense expressing a conclusion, it seems surprising he should have had millions of dollars of debts in Romania, a country where he had only arrived in October 2015, and where he had lived, I think, for one year previously between 2013 and 2014, and of course if he is insolvent, it would seem that those repayments might attract the characterisation of being preferences. These matters, of course, cannot be conclusively determined in the circumstances, but they do all seem to me to emerge from the material.

37. The Court set aside two days to hear this case, and that is not irrelevant, as the High Court has made clear in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, although given the severity of the outcome to Mr Burhala in the event that the matter is not adjourned, that is not a matter to which I give great weight. I can hear this matter on 26 September 2016, which will be after the AAT hearing, but I note the AAT hearing was listed for hearing in February 2016. It has not yet been heard. There must be doubt whether it will proceed, and if so, when. There would be considerable doubt whether a hearing of that magnitude would have been finalised by late September, and I would imagine that the foreshadowed application indicated but overruled, effectively, on 27 May would be repeated, pending not only the resolution of the AAT hearing but any subsequent appearance by either side by way of appeal, and so on.

38. In my view, in all of the circumstances, Mr Burhala has had every proper opportunity to be here and give evidence. He has clearly elected not do so. He has simply decided not to appear before the Court. Taking all these matters into consideration, and bearing in mind that the debt alleged is a very substantial one, continuing to accrue very substantially even on a monthly basis, in my opinion, it is not appropriate to adjourn further. Accordingly, the application for adjournment is dismissed.

I certify that the preceding thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Judge Burchardt

Date: 29 August 2016