

FEDERAL COURT OF AUSTRALIA

Vasiliades v Commissioner of Taxation (No 2) [2017] FCA 185

File numbers: VID 66 of 2015
VID 67 of 2015
VID 68 of 2015

Judge: **DAVIES J**

Date of judgment: 1 March 2017

Catchwords: **PRACTICE AND PROCEDURE** – application to give evidence by way of video link – whether an order should be made pursuant to s 47A(1) of the *Federal Court Act 1976* (Cth) – whether issues of credit and reliability are central in the case – balancing of factors in exercising discretionary power under s 47A(1) – application in the alternative for an adjournment of the trial date

Legislation: *Federal Court Act 1976* (Cth), ss 47A(1), 47C

Cases cited: *Commissioner of Taxation v Oswal (No 5)* [2015] FCA 1504
Deputy Commissioner of Taxation v Binetter [2017] FCA 69
Hua Wang Bank Berhad v Commissioner of Taxation (No 4) [2014] FCA 495

Date of hearing: 24 February 2017

Registry: Victoria

Division: General Division

National Practice Area: Taxation

Category: Catchwords

Number of paragraphs: 15

Counsel for the Applicant: M Y Bearman

Solicitor for the Applicant: HDL Legal and Consulting

Counsel for the Respondent: S Sharpley QC with S Linden

Solicitor for the Respondent: Review and Dispute Resolution, Australian Taxation Office

ORDERS

VID 66 of 2015
VID 67 of 2015
VID 68 of 2015

BETWEEN: **SOCRATES VASILIADES**
Applicant

AND: **COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA**
Respondent

JUDGE: **DAVIES J**

DATE OF ORDER: **1 MARCH 2017**

THE COURT ORDERS THAT:

1. The applicant's interlocutory application filed 17 February 2017 be dismissed.
2. The applicant pay the respondent's costs of the interlocutory application, such costs to be taxed in default of agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DAVIES J:

1 This proceeding is set down for trial to commence on 15 March 2017 on an estimate of four to five hearing days. The applicant (“**Mr Vasiliades**”), who is presently residing in France, has made an application for his evidence to be given via video link from Paris due to health reasons. In the event that the Court is not disposed to grant that application, Mr Vasiliades alternatively seeks an adjournment of the trial date. Mr Vasiliades has supported his application with a statement which is exhibited to an affidavit of his solicitor, H. Derek Lippner of the firm HDL Legal and Consulting (“**Mr Lippner**”), who has deposed that he is informed by Mr Vasiliades and believes the matters stated in Mr Vasiliades’ statement are true. The respondent (“**the Commissioner**”) has opposed the application.

2 Section 47A(1) of the *Federal Court of Australia Act 1976* (Cth) (“**the Act**”) provides that:

The Court or a Judge may, for the purposes of any proceeding, direct or allow testimony to be given by video link, audio link or other appropriate means.

Note: See also section 47C.

3 Section 47C provides that the discretion must not be exercised unless the Court is satisfied that the conditions set out in s 47C in relation to the video link are met. Section 47C provides:

Conditions for use of video links, audio links or other appropriate means

Video link

- (1) The Court or a Judge must not exercise the power conferred by subsection 47A(1) or section 47B in relation to a video link unless the Court or the Judge is satisfied that the following conditions are met in relation to the video link:
 - (a) the courtroom or other place where the Court or the Judge is sitting is equipped with facilities (for example, television monitors) that enable all eligible persons present in that courtroom or place to see and hear the person (the *remote person*) who is:
 - (i) giving the testimony; or
 - (ii) appearing; or
 - (iii) making the submission;by way of the video link;
 - (b) the place at which the remote person is located is equipped with facilities (for example, television monitors) that enable all eligible

persons present in that place to see and hear each eligible person who is present in the courtroom or other place where the Court or the Judge is sitting;

- (c) such other conditions (if any) as are prescribed by the Rules of Court in relation to the video link;
 - (d) such other conditions (if any) as are imposed by the Court or the Judge.
- (2) The conditions that may be prescribed by the Rules of Court in accordance with paragraph (1)(c) include conditions relating to:
- (a) the form of the video link; and
 - (b) the equipment, or class of equipment, used to establish the link; and
 - (c) the layout of cameras; and
 - (d) the standard of transmission; and
 - (e) the speed of transmission; and
 - (f) the quality of communication.

Audio link

- (3) The Court or a Judge must not exercise the power conferred by subsection 47A(1) or section 47B in relation to an audio link unless the Court or the Judge is satisfied that the following conditions are met in relation to the audio link:
- (a) the courtroom or other place where the Court or the Judge is sitting is equipped with facilities (for example, loudspeakers) that enable all eligible persons present in that courtroom or place to hear the person (the *remote person*) who is:
 - (i) giving the testimony; or
 - (ii) appearing; or
 - (iii) making the submission;by way of the audio link;
 - (b) the place at which the remote person is located is equipped with facilities (for example, loudspeakers) that enable all eligible persons present in that place to hear each eligible person who is present in the courtroom or other place where the Court or the Judge is sitting;
 - (c) such other conditions (if any) as are prescribed by the Rules of Court in relation to the audio link;
 - (d) such other conditions (if any) as are imposed by the Court or the Judge.
- (4) The conditions that may be prescribed by the Rules of Court in accordance with paragraph (3)(c) include conditions relating to:
- (a) the form of the audio link; and

- (b) the equipment, or class of equipment, used to establish the audio link; and
- (c) the standard of transmission; and
- (d) the speed of transmission; and
- (e) the quality of communication.

Other appropriate means

- (5) The Court or a Judge must not exercise the power conferred by subsection 47A(1) or section 47B in relation to an appropriate means other than video link or audio link unless the Court or the Judge is satisfied that the following conditions are met in relation to that means:
 - (a) the conditions (if any) as are prescribed by the Rules of Court in relation to that means;
 - (b) such other conditions (if any) as are imposed by the Court or the Judge.

Eligible persons

- (6) For the purposes of the application of this section to a particular proceeding, ***eligible persons*** are such persons as the Court or a Judge considers should be treated as eligible persons for the purposes of that proceeding.

4 Mr Vasiliades has not yet made any arrangements for giving his evidence by video link and the conditions provided by s 47C are not met. Nonetheless, it was submitted for Mr Vasiliades that the Court should not dismiss his application simply because the arrangements have not been put into place but should consider the merits as to whether the order under s 47A(1) should be made and, if satisfied that an order should be made, the Court can make that order conditional on the requirements of s 47C being met.

5 This proceeding is brought by Mr Vasiliades under Part IVC of the *Taxation Administration Act 1953* (Cth). Mr Vasiliades is appealing the decisions of the Commissioner to disallow his objections to assessments of income tax for the years of income ended 30 June 2007, 2008 and 2009. The evidence in the proceeding is to be given by way of affidavit with a right of cross-examination and both parties have filed and served the affidavit evidence on which they intend to rely. Mr Vasiliades' proposed evidence includes an affidavit sworn by him.

6 In his statement exhibited to Mr Lippner's affidavit, Mr Vasiliades has set out the reasons why he has applied for an order that he give his evidence by way of video link, failing which he seeks the adjournment of the trial. He stated relevantly:

- 5. During October 2016, I began having migraines on a daily basis, dizzy spells and short of breath. I have had long term trouble with my eyes. I suffer from strabismus amongst other issues linked to neurology and my

eyes since I was a child, and have had about 10 eye surgeries in my lifetime to deal with the issue which the last was in 2006. If I become highly stressed I relapse which causes double vision and lack of binocular vision. This causes headaches, dizzy spells and I have been dealing with it by being bed ridden sometimes for days until the matter stabilizes.. When that occurs, I effectively cannot see to read, and am unable to concentrate. This was happening to me frequently from October 2016. I understood that the most likely outcome would be more surgery which involves many tests beforehand such as MRI scans etc.. I felt the problem was not only eyes as I was having short breath and occasional chest pains. I made an appointment to see my doctor, a general practitioner, in Paris for 27 December 2016. That was the earliest appointment I could obtain.

6. At that time, a lawyer at my former solicitors HWL Ebsworth informed me by telephone that there was a directions' hearing on 23 December 2016. The lawyer was either Mr Evan Stent, or Mr Scott Cromb, or both, I cannot recall. I informed them of my issue. They told me that if the issue was going to create difficulties for my attending the trial, the Court should be informed on the 23rd. They told me that if there were to be an issue, when I saw my doctor, I should obtain as detailed a report as I could and send it to them with a translation.
7. I saw my doctor on 27 December 2016. He said to me that my eye issues were probably stress related and requires further investigation. He thought that I should have them looked at by a specialist which I am making arrangements. However, to my concern, he also said to me that he had serious concerns about the state of my heart. I have a heart valve issue which required monitoring over the years. He said to me that he would refer me to a cardiologist. He said that I did not need to go to hospital right away – I was not having a heart attack – but that I should see the cardiologist as soon as I possibly could. I then asked him about my travelling to Australia for the trial. He told me that until I saw the cardiologist, I should not do so. He then rang the cardiologist to make an appointment for me. I was told that the earliest appointment would be in March and that I would be called with a specific date.
8. I asked my doctor to give me a report of what his advice, with his diagnosis, and as to my ability to travel. On the same day as my appointment but shortly thereafter, my doctor provided me two letters. The first letter was report and diagnosis that I requested. I assume that the reference to the end of March or beginning of April for long distance flights was intended to mean that I should see the cardiologist before undertaking long distance travel. The second letter was the referral to the cardiologist. The next day, I took these letters and obtained the translations.
9. I then sent the letters and transactions to my then solicitors with a copy to my barristers. But my then solicitors' firm was closed until 9 January 2017 for the Christmas break. For the purposes of this my present application, I have sent further copies to Mr Lippner.
10. On 11 January 2017, I received a call from the cardiologist's office telling me that my appointment was for 16 March 2017 with Dr Isabelle Moreau at the Faculty of Medicine of Paris. I have cut and paste Dr Moreau's resume [sic] I found it as follows.

Dr Isabelle MOREAU:

Formation

Diplôme Universitaire d'Echocardiographie (Paris)

Diplôme d'Etudes Approfondies des médicaments cardio-vasculaires (Paris)

Diplôme de Pharmacologie Clinique (University of California, San Francisco)

Expérience

Ancien Interne de Hôpitaux de Paris

Ancien Chef de clinique à la faculté - Assistant des Hôpitaux de Paris

Spécialités

Membre Titulaire de la société Française de Cardiologie (Filiale Hypertension Artérielle)

Membre de la Société Francophone d'Athérosclérose

I immediately realised that that was the first day of the trial, and asked for an earlier date. I was told that 16 March 2017 was the earliest appointment date.

11. During mid-January, I am not precisely certain of the date but for the reasons below I am confident it was either on or a day or two before 17 January 2017, I managed to contact my barrister, Mr Bearman, who was on leave, by telephone. He told me that my doctor's report might be adequate for taking sick leave from an employer but was not exactly an expert medical report for a court. He told me to contact the doctor to obtain a more detailed report. He also told me that I should try and move the cardiologist's.
12. At this time, I was engaging in negotiations with the Australian Taxation Office to try and resolve my case. I was unwell, stressed, angry and completely frustrated with state of the negotiations, the case, by what Mr Bearman had told me, and also by my then solicitors. In an email to the ATO of 17 January 2017, which was part of my negotiations, I also stated:

My health

As mentioned the stress of all this has been too much and has taken its toll on me and it is not clear I will recover. I do not feel well at all. I have provided my barrister the details and the various medical documents from my doctor. I am scheduled to see the cardiologist in March.

Under medical advice I cannot make it personally to Australia for the trial. I will have to see if I am up to having a video link

13. I did not intend to convey that I did not want my trial to proceed, or that I was refusing to participate. I was just trying to explain that I was not well.
14. Between 17 January 2017 and today, I have called my doctor's office several times to see if I could obtain a more detailed medical report. But I have not been able to speak to him. I am informed by his reception that his report is correct.
15. I have also tried to move the cardiologist appointment to an earlier date by

telephoning the cardiologist's reception on several occasions since 17 January, to see if an earlier time had become free. I did so again yesterday but was told that there is no opening earlier than 16 March 2017.

16. I do not want to travel contrary to medical advice for the trial and certainly prior to seeing the cardiologist. Nor do I wish to miss a medical appointment that I have been advised to attend at the earliest possible time.
17. On the other hand, I do wish for my case to be heard by the Court and I do wish to give evidence. I am still struggling with my eyes and I intend to see the specialist in March but am stressed, I will just have to cope with being cross examined. The reason I am away from Paris is that I am trying to take a short break to reduce my stress levels.
18. I understand that moving a trial date that has long been fixed would be a serious inconvenience for the Court, and for the respondent. That is why I apply to be permitted to appear by video link. Unless the cardiologist refers me urgently to hospital as a result of my appointment, I would be able to arrange a video link and English speaking lawyers in Paris to supervise my appearance. I am also willing to meet the costs of the video link; in any event, they would be less than my traveling to Australia.
19. If a video link is not acceptable to the Court, I have no choice but to request in the alternative that the trial date be moved to allow me to attend.

7 Mr Lippner's affidavit exhibits the two letters referred to in paragraph 8 of Mr Vasiliades' statement. The first letter is from Doctor Jean-Pierre Bugeaud of the Faculty of Medicine of Paris ("**Dr Bugeaud**") and dated 27 December 2016. The letter (translated from French) states:

I, the undersigned, certify that [Mr Socrates Vasiliades'] cardiac health requires observation and explorations for several weeks or months prior to making long distance flights. Specifically it is necessary to wait until the end of March or beginning of April.

Signature and stamp

8 The other letter is the referral letter from Dr Bugeaud also dated 27 December 2016. That letter (translated from French) states:

Mr Socrates Vasiliades

- Make an appointment with a cardiologist for a classic consultation
- and make an appointment for an echocardiography for the study of the valves.

Signature

9 The Commissioner opposes Mr Vasiliades' application to give his evidence by way of video link on the basis that:

- (a) the Commissioner and the Court will be significantly disadvantaged if his evidence is given by video link as it is central to the case, is likely to involve

significant credit issues, the cross-examination is likely to be lengthy and involve numerous documents;

- (b) the material produced by Mr Vasiliades concerning his medical issues does not justify his non-attendance at the trial; and
- (c) in any event Mr Vasiliades has not satisfied the technical requirements for the exercise of the Court's power to allow the evidence by video link.

10 Given the closeness to trial, Mr Vasiliades' application should be considered on its merits, and not dismissed simply on the basis that Mr Vasiliades has not shown that he can satisfy the technical requirements set out in s 47C of the Act for the exercise of the Court's power to allow the evidence by video link. If an order pursuant to s 47A(1) of the Act was otherwise justified, such an order would have to be conditional upon the Court being satisfied of the matters set out in s 47C of the Act. I am not, however, persuaded to make the order under s 47A(1).

11 Mr Vasiliades' proposed evidence is a key part of his case. In his affidavit he gives evidence in support of his position on each of the three principal issues in the case, namely:

- (a) the market value of his shares in Champion Services Limited as at 7 August 2008;
- (b) the nature and tax character of two tax payments totalling US\$2,225,000 received by Mr Vasiliades from Ferrous Resources Limited in the 2007 and 2008 income years; and
- (c) the market value and costs base of four Paris properties owned by Mr Vasiliades as at 7 August 2008.

The affidavit is substantial, with 97 paragraphs and 55 exhibits spanning a date range from 1966 to 2014. The exhibits fill three standard ring binders.

12 The Commissioner wishes to cross-examine Mr Vasiliades on that evidence and has informed the Court that his evidence will involve significant credit issues and there will be a considerable number of documents involved in the cross-examination. The Commissioner's estimate of the time required to cross-examine Mr Vasiliades is at least half a day and possibly up to two days. In argument, senior counsel for the Commissioner went into some detail about the nature of the cross-examination and the credit issues expected to arise. In response, counsel for Mr Vasiliades sought to down play the foreshadowed attack on

Mr Vasiliades' credit, contending that the credit issues will essentially concern the reliability, rather than the honesty, of the evidence which Mr Vasiliades will give. Ultimately whether credit issues will carry the weight urged by the Commissioner will be a matter to be assessed in light of the evidence as a whole but for present purposes, what is relevant is that, on the case that the Commissioner seeks to advance, Mr Vasiliades' credit and the reliability of his evidence will be very much in issue.

- 13 In *Deputy Commissioner of Taxation v Binetter* [2017] FCA 69, Pagone J refused an application to allow evidence to be given by video link where the credit and reliability of the respondent witness would be a key issue in the proceeding. His Honour stated at [8]:

Cross-examination of this kind, where credit, credibility and reliability, is critical to the claim to be determined should, all things being equal, be given to the Court in person and not by video link from some other place. Such a deponent should, all things being equal, be present in the Court which is called upon to evaluate the credit, credibility and reliability of the evidence whose truthfulness or reliability is likely to be impugned. The effectiveness of cross-examination may be lessened when it takes place by video link and is made more difficult when the cross-examination is likely to require documents to be shown to a witness to challenge the oral testimony that the witness may have given. In *Campaign Master (UK) Ltd v 42 International Pty Ltd (No 3)* (2009) 181 FCR 152 Buchanan J referred at [78] to some of the difficulties of evidence being given by video link saying:

I share the concerns expressed by Spender J in *World Netscape* and by Stone J in *Dorajay* about the limitation on the effectiveness of video link arrangements as a means of taking oral evidence. I am particularly troubled by the prospect (or possibility) that the cross-examination of an important witness might be rendered less effective by the limitations of video link technology or the absence of the witness from the courtroom. Although the days are gone when witnesses are expected to feel any sense of intimidation as an aid to telling the truth, there is no doubt in my mind that the requirement to give evidence on oath or affirmation in the (generally) solemn atmosphere of a courtroom in the presence of a judge, and to answer questions in cross-examination in the presence also of cross-examining counsel, has at least three potential benefits. It enhances the prospect that the witness will remain conscious of the nature and solemnity of the occasion and of his or her obligations. It affords the cross-examiner some reassurance that the gravity and immediacy of the moment, and of the supervising presence of the judge, are not lost on the witness and the cross-examination is not thereby rendered any less effective, to the possible prejudice of the cross-examining party. It provides the Court with a more satisfactory environment in which to assess the nature, quality and reliability of responses by a witness, both to questions and to the overall situation presented by the necessity to give evidence in court. To my mind there remains, even in the modern context, a certain "chemistry" in oral interchanges in a courtroom, whether between a judge and counsel (or other representative) or between cross-examiner and witness. I would not wish too lightly to deprive a cross-examiner of that traditional forensic element in the exchange although, as the cases universally make clear, the Court must now, if asked to do so, balance the interests of a cross-examining party against claimed

inconvenience both in individual cases and with respect to individual witnesses. Notwithstanding the increased availability and use of video link technology, in my view, a case must be made out for the use of video link evidence if it is opposed by an affected party. I do not share the view expressed by Katz J. My own view and, I think, the weight of authority, is to the contrary.

These observations were cited with approval in *Mulherin v Commissioner of Taxation* [2013] FCAFC 115 at [51]; see also *Black Rock Asset Management Australia Services Ltd v Waked (No 2)* [2011] FCA 479 at [46] and *Hua Wang Bank Berhad v Commissioner of Taxation (No 4)* [2013] FCA 495 at [19]. I am not persuaded that this case is one in which video link evidence should be permitted. The Court will need to evaluate the evidence, credit, credibility and reliability of the evidence proposed to be given by Mr Binetter and the Court should do so by his evidence being given in person without the complications and difficulties occasioned by the complications of evidence given by video link and by remote reference to documents and folders.

The approach of Pagone J has been adopted in many other cases: see eg *Commissioner of Taxation v Oswal (No 5)* [2015] FCA 1504; *Hua Wang Bank Berhad v Commissioner of Taxation (No 4)* [2014] FCA 495 and the cases cited at [19] of that decision.

- 14 Whilst each case must be considered on its own facts and circumstances, I am not persuaded that I should take any different approach in this case, notwithstanding the reasons given by Mr Vasiliades for wanting to give his evidence by video link. Mr Vasiliades' evidence will be important to the case that he proposes to advance, and his credit and the reliability of his evidence are to be challenged. Another weighty consideration against the grant of leave to Mr Vasiliades to give his evidence by video link is that the cross-examination of him is likely to take some time and is expected to involve a significant volume of documents, many of which are difficult to read because of the quality of the available copies. There is also the practical difficulty of the time difference with Paris in conducting a cross-examination expected to last up to two days. In all the circumstances, particularly given that Mr Vasiliades will be a key witness whose evidence is to be challenged, he should attend in Australia to give his evidence in person. Mr Vasiliades' application to give his evidence by video link is accordingly refused.
- 15 The next issue is whether the trial should be adjourned because of Mr Vasiliades' health issues. Whilst Mr Vasiliades has furnished some medical support on that application, I am not, however, satisfied on the strength of Dr Bugeaud's medical certificate that Mr Vasiliades has a medical condition that does prevent him from travelling to Australia. The medical certificate has insufficient information concerning Mr Vasiliades' medical condition to enable the Court to be satisfied, on an informed basis, that the state of his health prevents him from

travelling. The mere statement to that effect by the doctor is not informative as to why Mr Vasiliades' medical condition prevents him from travelling and without more detail, the Court cannot evaluate whether there is a proper basis for the adjournment. I note that Mr Vasiliades has attempted to obtain a more detailed medical report from the doctor and has also attempted to get an earlier appointment with the cardiologist, unsuccessfully. Mr Vasiliades, understandably, does not want to miss the appointment on 16 March 2017 but absent cogent medical evidence supporting why Mr Vasiliades is prevented from travelling to Australia by reason of his health, I am not disposed to adjourn the hearing of the trial to a date after 16 March 2017 when he has his appointment with the cardiologist. An adjournment would mean the vacation of the trial date, not simply a delay in the commencement of the hearing for a few days pending the outcome of the appointment. Accordingly the application for an adjournment is also refused.

I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:



Dated: 1 March 2017