

# FEDERAL COURT OF AUSTRALIA

## Deputy Commissioner of Taxation v Binetter [2017] FCA 69

File number: NSD 69 of 2015

Judge: **PAGONE J**

Date of judgment: 8 February 2017

Catchwords: **PRACTICE AND PROCEDURE** – application for respondent witness in the United States to give evidence by way of video link – discretionary power – considerations relevant to exercise of discretion – application refused

Legislation: *Federal Court of Australia Act 1976* (Cth)  
*Federal Court Rules 2011* (Cth)

Cases cited: *Australian Competition and Consumer Commissioner v Pirovic Enterprises Pty Ltd* [2014] FCA 544  
*Black Rock Asset Management Australia Services Ltd v Waked (No 2)* [2011] FCA 479  
*Campaign Master (UK) Limited v Forty Two International Pty Ltd (No 3)* (2009) 181 FCR 152  
*Commissioner of Taxation v Oswal (No 5)* [2015] FCA 1504  
*Federal Commissioner of Taxation v Seymour* (2015) 65 AAR 443  
*Hua Wang Bank Berhad v Commissioner of Taxation (No 4)* [2013] FCA 495  
*Kirby v Centro Properties Limited* (2012) 288 ALR 601  
*Mulherin v Commissioner of Taxation* [2013] FCAFC 115  
*Seymour v Federal Commissioner of Taxation* (2016) 241 FCR 361

Date of hearing: 2 February 2017

Registry: New South Wales

Division: General Division

National Practice Area: Taxation

Category: Catchwords

Number of paragraphs: 10

Counsel for the Applicant: Ms K Stern SC with Mr G O'Mahoney and Mr I Josifoski

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondents: Ms T Phillips

Solicitor for the  
Respondents: Speed and Stracey Lawyers

## ORDERS

NSD 69 of 2015

**BETWEEN:**                **DEPUTY COMMISSIONER OF TAXATION**  
Applicant

**AND:**                    **ANDREW JOHN BINETTER**  
First Respondent

**MARGARET BINETTER**  
Second Respondent

**LIGON 158 PTY LIMITED IN ALL ITS CAPACITIES**  
**INCLUDING ATF THE CARINGBAH INVESTMENT TRUST**  
(and others named in the Schedule)  
Third Respondent

**JUDGE:**                **PAGONE J**

**DATE OF ORDER:**    **8 FEBRUARY 2017**

### **THE COURT ORDERS THAT:**

1.     The application be dismissed.

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

## REASONS FOR JUDGMENT

### PAGONE J:

1 On 25 October 2016 this proceeding was listed for directions at the start of 2017 for the purpose of being given a hearing date. The parties were informed at that time that the proceeding might be listed for February 2017 once available dates in February were known. The directions hearing listed for that purpose took place at 9.30am on 1 February 2017 but counsel appearing for the respondents on that occasion informed the Court that an application was to be made, but had not yet been made, for the evidence of Mr Binetter to be given via video link. Such an application was subsequently made in the afternoon of 1 February 2017 and was heard the following morning. The application was supported by an affidavit of Mr Benjamin Mark Giles dated 2 February 2017 together with an exhibit comprising a paginated bundle of documents relating to the medical situation of Mr Binetter's wife, Ms Samantha Kelliher, and their young son Daniel. The Deputy Commissioner of Taxation ("the Commissioner") opposed the application and relied in support on an affidavit of Mr David William Morris dated 2 February 2017 and an exhibit to that affidavit. The parties filed written submissions and made oral submissions on 2 February 2017.

2 The Court may, for the purposes of the any proceeding, direct or allow testimony to be given by video link, audio link or other appropriate means. Section 47A(1) of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act") provides:

- (1) 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.

The discretion conferred by this provision in relation to video link must not be exercised, however, unless the Court is satisfied that the particular conditions set out in s 47C in relation to the video link are met. Section 47C provides:

#### *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.

[...]

The affidavit of Mr Giles deals in part with the matters required to be satisfied by s 47C and in part with the material upon which the Court is asked to exercise its discretion in favour of the application. It is proposed that the evidence of Mr Binetter be given by video link from a company in New York which provides international video conferencing facilities and related services. For present purposes it may be accepted that the conditions required to be satisfied by s 47C are met.

- 3 The Commissioner opposes the application for Mr Binetter's evidence to be given by video link because he wishes to cross-examine Mr Binetter on the matters in an affidavit dated 2 August 2016 filed by Mr Binetter in the proceeding in support of a number of issues arising in the proceedings. A witness giving evidence by affidavit may generally be required by an opposing party, upon notice, to attend court for cross-examination. Rule 29.09 of the *Federal*

*Court Rules 2011* (Cth) deals with the cross-examination of deponents who have made affidavits filed and proposed to be used in proceedings. Rule 29.09 provides:

**29.09 Cross-examination of deponent**

- (1) A party may give notice requiring a person making an affidavit to attend for cross-examination.
- (2) The notice under subrule (1) must be given to the party filing the affidavit or proposing to use it.
- (3) If a person required to attend under subrule (1) fails to do so, the person's affidavit may not be used.

Note: The Court may dispense with compliance with the Rules—see rule 1.34.

- (4) If a person making an affidavit is cross-examined, the party using the affidavit may re-examine the person.

On 22 December 2016 Mr Morris wrote to the solicitors for the respondents, amongst other matters, giving notice that the Commissioner required Mr Binetter to attend for cross-examination.

- 4 Rule 29.09 permits a party to require a deponent to attend for cross-examination but it does not exclude the possibility of that attendance being by video link in accordance with an order under s 47A(1) of the Federal Court Act. The Court retains a discretion about whether to allow evidence to be given, and for cross-examination to occur, by video link. The overriding consideration in the exercise of the discretion is what the Court considers to be in the best interests of the administration of justice including the need to ensure that justice is done as between the parties: *Australian Competition and Consumer Commissioner v Pirovic Enterprises Pty Ltd* [2014] FCA 544 at [11]. In *Kirby v Centro Properties Limited* (2012) 288 ALR 601 Gordon J said at [11]:

There is little to be gained by adding another or different gloss on the state of the authorities. In the end, each case will turn on its own facts and circumstances and the exercise of discretion as to what is appropriate in a particular case will involve a balancing exercise as to what will best serve the administration of justice consistently with maintaining justice between the parties. All modern Courts seek to limit the costs of litigation. One cost is in requiring a witness, especially a witness who is not a party, to travel to Australia to give viva voce evidence. Whether that cost can be minimised by giving that evidence by video link, as has been said, will need to be assessed not just on a case by case basis but also on a witness by witness basis.

Her Honour considered at [10] that the matters relevant to the exercise of the Court's discretion included:

1. the employment commitments of an overseas witness: see, for example, *Reinsurance Australia Corp* at [4];
2. whether the credibility of the witness is in issue: *ASIC v Rich* at [28]; *Australia Medical Imaging* at [27]; *Sunstate Airlines (Qld)* at 6 and *Lamesa Holdings BV v Commissioner of Taxation* (unreported, FCA, Sackville J, 30 July 1998) at [6];
3. whether the witness' evidence will be "centrally important" to the case: see, for example, *StoresOnline International Inc* at [15] and *ASIC v Rich* at [22] and [28];
4. whether the use of video link may frustrate or delay the management of documents in cross examination: see, for example, *ASIC v Rich* at [31].

In *Australian Competition and Consumer Commissioner v Pirovic Enterprises Pty Ltd* [2014] FCA 544 Flick J considered the factors relevant to the exercise of the Court's discretion and said at [11]:

The exercise of the discretion conferred by s 47A(1) must unquestionably be guided by the facts and circumstances of the individual case in which permission is sought to adduce evidence by way of video link. It would be unwise, if not impossible, to attempt any exhaustive list of considerations relevant to the exercise of discretion. Courts have, accordingly, resisted any temptation to attempt to do so: e.g., *Australian Securities and Investments Commission v Rich* [2004] NSWSC 467 at [20] to [39], (2004) 49 ACSR 578 at 583 and 587 per Austin J; *Kirby v Centro Properties Ltd* [2012] FCA 60 at [10], (2012) 288 ALR 601 at 604 to 605 per Gordon J. Subject to that necessary qualification, considerations which may assume relevance would include:

- the extent to which the proposed witness seeks to give evidence of facts relevant to the dispute as opposed to opinions founded upon, or largely founded upon, agreed facts or assumptions;
- whether the parties are in agreement as to the utility in allowing evidence to be given by way of video link;
- whether the proposed evidence is centrally relevant to the issues to be resolved or more tangential to those matters of real dispute;
- the extent to which any cross-examination may be inhibited by the absence of the witness being present;
- the relevance of the evidence the subject of any cross-examination – the more limited the cross-examination and the more questionable the relevance of the evidence the more limited may be the prejudice to the cross-examiner;
- the reasons proffered by the witness as to the inability to come to Australia; and
- the practical impediments that a refusal to allow cross-examination to proceed by way of video link upon the ability of a party to present its case.

Considerations in any particular case could also include:

- factors peculiar to the proposed witness, including ill-health or an inability to freely travel to and depart from Australia; and
- the extent to which the Court itself may consider that it would be assisted by evidence being given in person.

The overriding consideration must, however, forever remain what is considered by the Court to be in the best interests in the administration of justice, including the need to ensure that justice is done as between the parties.

See also the observations to the same effect by Gilmour J in *Commissioner of Taxation v Oswal (No 5)* [2015] FCA 1504 at [25].

- 5 The fifth to tenth respondents in the substantive proceeding (the “Nudie entities”) seek their costs in the proceedings and compensation for what is said to be loss and damage suffered by them by reason of freezing orders obtained by the Commissioner on 29 January 2015. The proceedings had been commenced by the Commissioner to recover monies said to be owed under certain income tax assessments for part of the year of income ended 30 January 2015 but objections to the assessments were subsequently allowed by the Commissioner in March 2016. On 29 January 2015, however, the Commissioner had obtained freezing orders in respect of \$45,230,237.40 of funds of the Nudie entities. Those freezing orders continued until 29 March 2016 when they were discharged by order of the Court.
- 6 The proposed evidence to be given by Mr Binetter in support of the claims by the Nudie entities in support of the substantive application were described in their written submissions in the application for his evidence to be given by video link as pertaining to the following matters:
- (a) The background to the proceedings, including the identities of the fifth to tenth respondents and the nature of the Nudie Juice business;
  - (b) The sale of the Nudie Juice business for \$82 million plus GST on 30 January 2015 and the disbursements of the sale proceeds;
  - (c) The working capital adjustment made to the sale price of the Nudie Juice business some time after completion;
  - (d) The freezing orders granted in the proceedings and in proceedings SAD 5 of 2015;



- (e) Amounts held on trust by Speed and Stracey in certain bank accounts in connection with the freezing orders;
- (f) Mr Binetter's authority within the Nudie entities to decide how the frozen funds would have been used if they had not been frozen; and
- (g) Mr Binetter's account as to the use to which the frozen funds would have been put, but for the freezing orders. Mr Binetter's evidence in this regard is that he would have placed the frozen funds in a US Dollar denominated bank account in Australia.

7 The evidence of Mr Binetter is of central importance to the determination of the claims by the Nudie entities although much will be relatively uncontroversial. The letter from Mr Morris dated 22 December 2016 to the solicitors for the respondents, previously referred to, enclosed a folder containing documents which the Commissioner intends to tender in the proceedings including documents to be used in cross-examination of Mr Binetter. The evidence of Mr Binetter about what steps he would have taken to invest significant sums of money if the freezing orders in the proceedings had not been made is of central importance to the case and his credibility and reliability is submitted to be, and is likely to be, a central issue. The Court will, therefore, need to evaluate his credibility, and his reliability, in determining the claims by the Nudie entities. Responsible counsel for the Commissioner with the carriage of the proceeding for the Commissioner submit that they intend to challenge Mr Binetter's evidence and to test his credibility in what they submit to be lengthy and complex cross-examination requiring detailed reference to documents including documents which may only become relevant in light of Mr Binetter's possible responses in cross-examination.

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.

- 9 A specific relevant consideration in considering whether to order evidence to be given by video link may be the presence of some “additional personal factor” in favour of ordering the giving of evidence by video link. In *Federal Commissioner of Taxation v Seymour* (2015) 65 AAR 443 Buchanan J, at first instance, contemplated that there might be “some particular additional personal factor” involved which might justify an order for evidence to be given by video link: see also *Seymour v Federal Commissioner of Taxation* (2016) 241 FCR 361 at

[60]. The additional personal factors in this case which are relied upon are the unwillingness of Mr Binetter to come to Australia because of the medical situation of his wife and young son, and his concern that, should he travel to Australia without them, he could find himself in a situation where he is separated from them for some time, including because of possible actions which may be taken by liquidators to prevent him from returning to the United States. The evidence relied upon in this regard is that of Mr Giles in his affidavit in which he deposes to being informed by Mr Binetter and believing that:

- (a) Mr Binetter travelled to the USA in January 2016 to take up a role as Chief Executive Officer of a growing pasta manufacturing business in the USA, known as Nate's Fine Foods;
- (b) Mr Binetter has significant personal responsibility for the management of that business;
- (c) in the USA, Mr Binetter lives in New York with his wife Samantha Kelliher and their young son Daniel who is approximately one year old, together with Mr Binetter's two sons from an earlier marriage who are aged 15 and 17 years old;
- (d) when Ms Kelliher was in the late stages of her pregnancy with Daniel she suffered from severe high blood pressure (also known as hypertension);
- (e) in November 2015 Ms Kelliher was admitted to hospital and, after unsuccessfully attempting to treat her hypertension, her treating doctors decided to deliver Daniel by caesarean section 11 weeks premature, because of concerns about his and Ms Kelliher's survival;
- (f) Daniel was delivered on 26 November 2015, eleven weeks premature and as a result of his premature birth Daniel suffered from respiratory and other difficulties and was on a respirator for his first 48 hours, and remained in a humidicrib with oxygen support for approximately six weeks thereafter;
- (g) Daniel has continued to have health difficulties since his birth and he remains in the bottom three percentile for height and weight, and continues to have weekly medical treatment;
- (h) Ms Kelliher also continues to have medical difficulties in connection with her hypertension and in October 2016 she was admitted to hospital and remained in hospital for 11 days due to hypertension;
- (i) Ms Kelliher remains on a number of medications to attempt to treat her hypertension, with some but limited success;
- (j) when Mr Binetter was last in Australia the liquidators of a number of corporations obtained orders against him requiring him to surrender his passport, and as a result Mr Binetter was unable to leave the country for a number of months until his passport was returned;
- (k) those liquidators above are continuing legal proceedings in Australia, and Mr Binetter is concerned that if he returns to Australia to give evidence he may be the subject of similar steps being taken by the liquidators to prevent him from leaving Australia;

- (l) Mr Binetter is concerned that travelling to Australia to give evidence in these proceedings will result in him being forced to be away from his family for an extended period of time; and
- (m) in all of the above circumstances Mr Binetter does not wish to travel to Australia to give evidence in these proceedings.

Mr Giles exhibited documents to his affidavit which had been provided to him by Mr Binetter relating to the medical situation of Mr Binetter's wife and young son. Those documents reveal that his wife has presented with a history of, and has been diagnosed with, a heart condition and that his son is performing below the norm for his age and was evaluated in a report as showing developmental delays and gross motor delays. The medical situation of Mr Binetter's wife and young son are matters evoking sympathy but do not justify an order that Mr Binetter give evidence by video link from New York. The medical situation of Mr Binetter's wife and son does not prevent Mr Binetter from traveling to Australia to give evidence in support of the claim made by the Nudie entities in reliance upon his evidence and is not such to outweigh the desirability for Mr Binetter's evidence to be given, and to be tested, in person in court rather than by video link from a remote place elsewhere. The possibility that liquidators might exercise their legal rights to prevent Mr Binetter from returning to the United States does not justify the making of an order that his evidence be given by video link but, in any event, there is no evidence of any impediment to Mr Binetter travelling to Australia and then returning to the United States after giving evidence in this proceeding.

10 Accordingly, the application will be dismissed.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Pagone.

Associate:



Dated: 8 February 2017

## **SCHEDULE OF PARTIES**

**NSD 69 of 2015**

### **Respondents**

Fourth Respondent:	LIGON 237 PTY LIMITED IN ALL ITS CAPACITIES INCLUDING ATF THE AJB FAMILY TRUST
Fifth Respondent:	TAMARAMA FRESH JUICES AUSTRALIA PTY LIMITED IN ALL ITS CAPACITIES INCLUDING ATF THE TFJA UNIT TRUST
Sixth Respondent:	NUDIE FOODS AUSTRALIA PTY LIMITED ATF THE NUDIE UNIT TRUST
Seventh Respondent:	NUDIE PTY LIMITED ATF THE NUDIE BRAND UNIT TRUST
Eighth Respondent:	NUDIE FOODS PTY LIMITED
Ninth Respondent:	REAL JUICE PTY LIMITED
Tenth Respondent:	NUDIE FRANCHISING SYSTEMS PTY LIMITED

