JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	NUGAWELA -v- DEPUTY COMMISSIONER OF TAXATION [2017] WASCA 9
CORAM	**:**	NEWNES JA MURPHY JA
HEARD	**:**	7 DECEMBER 2016
DELIVERED	**:**	7 FEBRUARY 2017
FILE NO/S	**:**	CACV 29 of 2016
BETWEEN	**:**	PATRICK ALLAN NUGAWELA Appellant AND DEPUTY COMMISSIONER OF TAXATION Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	KENNETH MARTIN J
Citation	**:**	DEPUTY COMMISSIONER OF TAXATION -v- NUGAWELA [2015] WASC 468
File No	**:**	CIV 2686 of 2014

Catchwords:

Practice and procedure - Appeal dismissed for non-compliance with springing order - Application to extend time to comply with springing order - Whether

appeal has any reasonable prospect of success - Whether primary judge erred in entering summary judgment - Whether reasonable apprehension of bias - Turns on own facts

Legislation:

Nil

Result:

Application dismissed

Category: B

Representation:

Counsel:

Appellant	:	In person
Respondent	:	Mr C Slater

Solicitors:

Appellant	:	In person
Respondent	:	Jackson McDonald

Case(s) referred to in judgment(s):

Bahonko v Moorefields Community [2012] VSCA 89
British American Tobacco Australia Services Ltd v Laurie [2011] HCA 2; (2011) 242 CLR 283
Johnson v Johnson [2000] HCA 48; (2000) 201 CLR 488
Re Deputy Commissioner of Taxation (WA); Ex parte Briggs (1986) 12 FCR 301
Smits v Roach [2006] HCA 36; (2006) 227 CLR 423
Southgate Investment Funds Ltd v Deputy Commissioner of Taxation [2013] FCAFC 10; (2013) 211 FCR 274
Vakauta v Kelly [1989] HCA 44; (1989) 167 CLR 568

1 **JUDGMENT OF THE COURT**: This is an application by the appellant for an extension of time to comply with a springing order made on 5 August 2016. The order required the appellant's case to be filed and served by 19 August 2016. It was not filed and served within that time and the appeal therefore currently stands dismissed. The appellant seeks, in effect, to restore the appeal.

2 The application is opposed by the respondent on the ground that the appeal has no merit and would inevitably fail, so that no purpose would be served by resuscitating it.

Background

3 The appellant is and was at all material times a medical practitioner who practised as a general practitioner. It was not in issue that the appellant failed to lodge income tax returns for the financial years ended 30 June 2003 to 30 June 2010, inclusive. As the appellant was in default in furnishing the tax returns, the Commissioner of Taxation (the Commissioner) made assessments for those years pursuant to s 167 of the *Income Tax Assessment Act 1936* (Cth) (ITAA). Notices of assessment were issued to the appellant on 30 November 2011 for the financial years ended 30 June 2003 and 30 June 2004 respectively, and on 8 December 2011 for each of the financial years ended 30 June 2005 to 30 June 2010. The appellant also became liable for general interest charges on the unpaid tax.

4 On 30 April 2015, Mr David Diment, a Deputy Commissioner of Taxation, issued a certificate pursuant to s 255-45 of sch 1 of the *Taxation Administration Act 1953* (Cth) (TAA), certifying that notices in respect of the tax-related liabilities stated in the notices of assessment were taken to have been served on the appellant under a taxation law and that the sum of $1,632,255.22 was a debt due and payable by the appellant to the Commonwealth of Australia.

5 In the following three financial years, namely, the years ending 30 June 2011, 30 June 2012 and 30 June 2013, no income tax returns were filed by the appellant. The respondent issued a notice of administrative penalty in respect of each period, resulting in the appellant incurring an administrative penalty in the sum of $550 in respect of the 2011 financial year; $670 in respect of the 2012 financial year; and $850 in respect of the 2013 financial year. The appellant also became liable for general interest charges on those penalties.

6 On 30 April 2015, Mr Diment issued a certificate pursuant to s 255-45 of sch 1 of the TAA certifying that notices in respect of the tax-related liabilities stated in the notices of administrative penalties were taken to have been served on the appellant under a taxation law, and the sum of $2,442.63 was a debt due and payable by the appellant to the Commonwealth of Australia.

7 On 9 December 2014, the respondent commenced proceedings to recover the sum of $1,575,679.95 alleged to be owing by the appellant. An application for summary judgment was made on 12 May 2015. It was supported by, relevantly, two affidavits of an employee of the Australian Tax Office, Ms Burke. In an affidavit dated 27 April 2015, Ms Burke deposed to the manner in which the appellant's indebtedness arose and annexed the documents evidencing that indebtedness, an indebtedness which was said to be, as at that date, in the sum of $1,634,697.85. In a further affidavit of 19 August 2015, Ms Burke deposed that as at that date the debt was an amount of $1,668,164.16. A certificate of Mr Diment, pursuant to s 255-45 of sch 1 of the TAA, in respect of that amount was annexed to the affidavit.

8 The appellant filed an affidavit, sworn 13 August 2015, in opposition to the application. In that affidavit, the appellant said that his failure to lodge the tax returns was due to psychological problems since 2003, the flooding of his medical practice in 2014 from a burst water-pipe, and litigation with his landlord. He said that, on 12 August 2015, he had lodged tax returns for the financial years ended 30 June 2007 and 30 June 2008, copies of which were annexed to the affidavit. The tax return for the financial year ended 30 June 2007 assessed his tax liability to be $55,947.30, compared to the respondent's assessment of $122,600.40, and the return for the financial year ended 30 June 2008 assessed his tax liability to be $1,380.40, compared to the respondent's assessment of $211,813.95. The appellant said that his annual income for the period 2003 to 2006 was no more than $100,000 and for the financial years 2009 and 2010 would be similar to 2007 and 2008. Accordingly, he asserted, the Commissioner's assessments needed to be reconsidered as they were based on incomplete information. He said that he was in the process of instructing his accountants to prepare tax returns for the other years and while he did not dispute that he owed an amount for tax, his actual liability would be better assessed once those returns were lodged. The appellant sought to have the application for summary judgment adjourned to provide him with time to file those tax returns. (On the hearing of the application, the appellant's counsel said that the period sought was one month.)

9 On the hearing of the application, on 19 August 2015, the primary judge refused an adjournment and ordered that summary judgment be entered for the respondent in the sum of $1,668,164.16, plus interest.

The reasons of the primary judge

10 The primary judge noted that the application for summary judgment was out of time but considered that the delay had been satisfactorily explained and that leave to bring the application should be granted.

11 His Honour considered that the appellant's arguments for an adjournment of the application did not 'withstand intellectual scrutiny or analysis'. They were, in his Honour's view, 'very weak arguments' and, in any event, could only apply to the financial years ended 30 June 2007 and 30 June 2008 [28].

12 The primary judge observed that if the appellant intended to challenge the Commissioner's assessments he could do so under pt IVC of the TAA, although an extension of time might be required [30]. The fact that an assessment was disputed did not, on the face of it, relieve the taxpayer from paying it [35]. It was open to apply for a stay of the application for judgment in tax recovery proceedings where there is a pending tax objection under pt IVC of the TAA but a stay is not inevitable in those circumstances and was an even more remote prospect in the present case because no proceedings under pt IVC of the TAA had been commenced by the appellant [36].

13 The appellant's assertion that the flooding of his medical premises in 2014 had prevented him from lodging tax returns was rejected by the primary judge, who observed that it provided no explanation for the failure to do so in the period 2003 to 2013 [37] - [38]. Nor, in his Honour's view, did the mere statement that the appellant was involved in litigation with his landlord provide any explanation [40]. The explanation that the appellant had been suffering from psychological problems from 2003 for which he had been receiving treatment, was also rejected by the primary judge in the absence of a detailed expert report from a clinical psychologist or psychiatrist as to the psychological condition and details of the diagnosis and treatment [44], [47].

14 The primary judge said that whether or not the appellant's objections to the Commissioner's assessments had any substance would depend upon the outcome of a reconsideration of those assessments, such as by proceedings by the appellant under pt IVC of the TAA [50]. The correctness of the assessments could not be undermined by tax returns

filed many years out of time. Under the TAA, production of a notice of assessment was conclusive evidence that the assessment was properly made and correct in amount, and moreover tax returns had only been lodged for the financial years ended 30 June 2007 and 30 June 2008 [51]. His Honour observed that it appeared the appellant had not commenced proceedings under pt IVC of the TAA, or even applied for an extension of time to do so [54].

15 The primary judge was satisfied that the respondent had established the appellant's indebtedness and the appellant had not raised any arguable defence [57]. His Honour ordered that judgement be entered for the respondent in the sum of $1,668,164.16 [58].

The grounds of appeal

16 There are nine grounds of appeal but in substance the appellant alleges that the primary judge erred in:

1. finding that the appellant had not commenced proceedings under pt IVC of the TAA, when the effect of the lodgement of the tax returns for the financial years ended 30 June 2007 and 30 June 2008 was to commence such proceedings (grounds 1, 3 and 4);

2. granting summary judgment, in circumstances where the appellant's evidence demonstrated that the amount claimed by the respondent was inaccurate (grounds 2, 6 and 7);

3. failing to consider whether the assessments issued by the Commissioner were valid assessments (ground 5); and

4. making adverse findings as to the appellant's credibility based on disputed affidavit material (ground 8).

17 The appellant also alleged actual or apprehended bias on the part of the primary judge (ground 9).

The disposition of the application

18 It is appropriate to consider the merits of the various grounds of appeal in turn.

Grounds 1 - 4, 6 - 7

19 The appellant submitted that on the proper construction of s 350-10 of sch 1 to the TAA, once he had lodged an objection under pt IVC of the TAA the production of a notice of assessment was no longer conclusive evidence that the amounts and particulars of the Commissioner's assessment were correct. The appellant argued that, contrary to the finding of the primary judge, proceedings under pt IVC had been commenced by the lodging of tax returns for the financial years ended 30 June 2007 and 30 June 2008. It followed that as the conclusive evidence provisions of s 350-10 in relation to the amounts and particulars of the assessment no longer applied, it was necessary for the Commissioner to prove that the appellant was indebted in the sum claimed, at least in respect of the assessments for those years. The Commissioner had not done so.

20 That submission must be rejected. It is based on a misunderstanding of the effect of s 350-10. That provision, so far as relevant, is as follows:

> The production of … a notice of assessment under a taxation law … is conclusive evidence that … (a) the assessment … was properly made … and (b) except in proceedings under Part IVC of this Act on a review or appeal relating to the assessment … the amounts and particulars of the assessment … are correct.

21 Part IVC of the TAA deals with objections to, among other things, assessments: s 14ZL.

22 The effect of s 350-10 is that in all proceedings, other than proceedings under pt IVC on a review or appeal relating to the assessment, the production of a notice of assessment will be conclusive evidence that the amounts and particulars of the assessment are correct. The production of a notice of assessment is not conclusive in proceedings on a review or appeal under pt IVC because the very purpose of those proceedings is to challenge the assessment. But the fact that proceedings have been commenced under pt IVC to challenge an assessment does not detract from the conclusive nature of the notice of assessment in any other proceedings. In any other proceedings, the production of a notice of assessment remains conclusive.

23 Moreover, an objection to an assessment does not constitute 'proceedings under Part IVC … on a review or appeal' (emphasis added). It is clear that a 'review' refers to a review on an application to the Administrative Appeals Tribunal (AAT) under s 14ZZ, and 'appeal' refers to an appeal to the Federal Court under s 14ZZ. It is apparent from the

appellant's affidavit in support of the application for an extension of time that no such proceedings were on foot at the time of the summary judgment application and the first such proceedings were proceedings in the AAT commenced by the appellant in February 2016.

24 For the purposes of the summary judgment proceedings, the effect of s 350-10 was that, in respect of each year, the production of the notice of assessment was conclusive proof that the assessment was properly made and the amount and particulars of the assessment were correct. In those circumstances, the appellant's own (lower) estimates of his taxation liabilities for the relevant period were properly disregarded by the primary judge.

25 The appellant also submitted, in effect, that the primary judge had erred in the exercise of his discretion in refusing to adjourn the application until after the Commissioner had considered the tax returns the appellant had lodged the week before the hearing. Reference was made to ***Southgate Investment Funds Ltd v Deputy Commissioner of Taxation*** [2013] FCAFC 10; (2013) 211 FCR 274, for the proposition that, despite the conclusive evidence provisions of s 350-10 of sch 1 of the TAA, a court may stay or adjourn recovery proceedings by the Commissioner where the taxpayer has lodged an objection that is still to be determined. The appellant argued that the tax returns he had lodged for the financial years ended 30 June 2007 and 30 June 2008 constituted objections under pt IVC. The primary judge's discretion had therefore miscarried because he had acted under the mistaken belief that no objections under pt IVC had been lodged.

26 Whether, as the appellant contends, the tax returns he lodged were, for the purposes of pt IVC, objections to the Commissioner's assessments for those years is by no means clear, having regard to the provisions of s 388-50 of sch 1 and s 14ZU of the TAA as to the form and content of an objection under pt IVC. It is evident the primary judge considered that they did not constitute objections under pt IVC. But it is unnecessary to decide the point. Any question of an adjournment has been overtaken by events. After the hearing of the summary judgment application the Commissioner varied the original assessments in the light of the tax returns the appellant had lodged. Accordingly, even if it were established that the primary judge was in error in refusing the adjournment, there would be no injustice to the appellant if that decision were not set aside and no purpose would now be served by setting it aside.

27 These grounds of appeal have no merit.

Ground 5

28 In support of this ground, the appellant submitted, in effect, that there was an arguable case that the notices of assessment issued by the Commissioner were invalid because the amount of each of the assessments was a figure 'plucked from the air' or that had no rational basis. He referred to the decision of the Full Court of the Federal Court in ***Re Deputy Commissioner of Taxation (WA); Ex parte Briggs*** (1986) 12 FCR 301, in support of that submission.

29 ***Ex parte Briggs*** does not assist the appellant. In that case, the Deputy Commissioner conceded that neither he nor his officers had made any attempt to ascertain the taxpayer's taxable income or carried out any proper investigation of the taxpayer's affairs prior to making the assessments, and that the notices of assessment had been issued simply for the purpose of forcing the taxpayer to consult with the Deputy Commissioner or his officers. The court held that as the Deputy Commissioner had not intended to embark, and did not in fact embark, upon the process of ascertaining the taxpayer's income, no 'assessment' had been made within the meaning of s 177(1) of the ITAA (the predecessor to s 350-10). The court went on to observe that even if the Commissioner's conduct was construed as an endeavour to make an 'ambit' claim against the taxpayer with a view to issuing a further, definitive, assessment once the taxpayer provided the necessary information, an 'assessment' issued in such a tentative and provisional way was not an 'assessment' within the meaning of s 177(1).

30 There was, however, no evidence in this case that the notices of assessment were the result of anything other than a proper attempt by the respondent to assess the appellant's liability. Nor was there evidence from which an inference to the contrary might properly be drawn. Indeed, the appellant annexed to his affidavit of 30 November 2016 in support of his application for an extension of time, an affidavit filed in Federal Court proceedings against the respondent in which he deposed to an audit of his taxation affairs conducted by the ATO in 2011, before any notice of assessment was issued by the respondent. According to the appellant, the audit was initially to be conducted in relation to the financial year ending 30 June 2010, but was later extended to cover the period from 1 July 2000 to 31 March 2011. It is reasonably to be inferred that the notices of assessment issued to the appellant in late 2011 in relation to each of the financial years ended 30 June 2003 to 30 June 2011, were a result of the audit. Contrary to the appellant's submission, the mere fact that, after the appellant submitted tax returns for the financial years ended 30 June 2007

and 30 June 2008, the respondent reduced the amount claimed by the total sum of $238,378.83 is not capable of giving rise to an inference that the original assessments were not properly made.

31 This ground of appeal has no merit.

Ground 8

32 As we understand this ground from the appellant's submissions, it is submitted that the primary judge erred in failing to give any credence to the explanations the appellant provided on affidavit for the late lodgement of the tax returns. The appellant's primary complaint was that the primary judge had not accepted the appellant's explanation that he had been prevented from lodging the returns by a psychological illness from which he had been suffering since 2003. The appellant also submitted that his Honour had failed to have proper regard to a medical report, dated 14 November 2014, of a psychiatrist, Dr Skerritt, relating to the appellant's psychological problems.

33 There are two difficulties with that submission. In the first place, evidence as to the appellant's personal circumstances that had led to his failure to lodge the tax returns provided no arguable defence to the respondent's claim. Secondly, it is not the case that because the appellant's evidence as to his psychological condition was uncontradicted the primary judge was bound to accept it (see ***Bahonko v Moorefields Community*** [2012] VSCA 89 [20]), and in the circumstances of this case, his Honour was clearly entitled to reject it.

34 The only evidence adduced on behalf of the appellant in opposition to the summary judgment application was contained in the appellant's affidavit of 13 August 2015. There was no report of Dr Skerritt annexed to that affidavit and Dr Skerritt is not mentioned in it. The only statements as to the appellant's psychological condition were those of the appellant and they were at a very high level of generality. The primary judge correctly noted that there was no evidence from any practitioner who had treated the appellant since 2003 and nor was there any evidence of the nature and effect of the psychological illness or the treatment the appellant had received.

35 We should mention that a report of Dr Skerritt, dated 14 November 2014, was, however, annexed to an affidavit, dated 5 February 2015, sworn by the appellant's former solicitor, Mr Butcher, in support of an application for an order that Butcher Paull & Calder had ceased to act for the appellant. That affidavit was not referred to in the course of the

hearing of the summary judgment application on 19 August 2016. In any event, the report was of no assistance to the appellant. In it, Dr Skerritt referred to his understanding that the appellant needed to postpone some legal actions because of a psychological condition and, 'as [the appellant's] psychiatrist', expressed the view that the appellant's symptoms made it unlikely that he could cope with any court appearances and suggested an adjournment until further notice.

36 We should also mention that in an affidavit sworn on 20 April 2016 in support of an application for an extension of time to commence the appeal, the appellant asserted that he was medically unfit to attend to his taxation affairs until about the end of March 2016 and annexed to that affidavit a brief letter from Dr Skerritt dated 23 March 2016. In that letter, Dr Skerritt simply stated that he had previously certified that the appellant was unfit to participate in legal matters but that he was now fit to do so. Even if treated as additional evidence on the appeal, the letter is in such vague terms that it would not assist the appellant.

37 We do not accept what we understand to be a further contention by the appellant that, in circumstances where the primary judge knew that the appellant's solicitors were representing him unwillingly, it was incumbent upon his Honour to indicate any concerns he had about the sufficiency of the appellant's evidence and to enable the appellant to make good any deficiencies by a further affidavit. First, there was no evidence that the appellant's solicitors were representing him unwillingly. Secondly, it was no part of the role of the primary judge to provide a critique of the appellant's evidence so that the appellant might supplement it as necessary. The appellant was given a reasonable opportunity to file any affidavit evidence on which he sought to rely (a time period that was extended at his request after he failed to comply with the original time limit) and it was up to the appellant and his legal advisers to ensure that that evidence was put before his Honour. If at the hearing there were perceived to be deficiencies in it, it was for the appellant's counsel to apply to the primary judge for an opportunity to file additional affidavit evidence. No such application was made. We might add that had it been made it is unlikely to have been granted in circumstances where his Honour had earlier extended the time for the filing of the appellant's affidavit on the express basis that if the time limit was not complied with the appellant would not be permitted to adduce any evidence.

38 This ground of appeal has no merit.

Ground 9

39 The basis of this ground is unclear. It appears to be based upon (a) the fact that some two weeks before the hearing of the summary judgment application the primary judge heard an application by the appellant's former solicitors for an order that they had ceased to act for the appellant (an application that ultimately was not pressed) and refused to adjourn the hearing of the summary judgment application in light of it; and (b) the 'general tone and language' of his Honour during the hearing of the summary judgment application, which the appellant said 'is noted in the transcript', and what is described as the 'extreme' and 'trenchant' language used by his Honour in his reasons for decision.

40 The general principles applicable to a claim of apprehended bias are well-established. The test to be applied in determining whether a judge is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to determine: ***Johnson v Johnson*** [2000] HCA 48; (2000) 201 CLR 488, 492; ***British American Tobacco Australia Services Ltd v Laurie*** [2011] HCA 2; (2011) 242 CLR 283 [78] - [84], [132], [139].

41 If a party to civil proceedings, or the party's legal representative, knows the circumstances giving rise to the disqualification of the judge but acquiesces in the proceeding by not promptly taking objection, it will likely be held that the party has waived the objection: ***Smits v Roach*** [2006] HCA 36; (2006) 227 CLR 423 [43], [61] and [125]; ***Vakauta v Kelly*** [1989] HCA 44; (1989) 167 CLR 568, 572, 577 - 579, 587 - 588.

42 This ground cannot succeed. First, in relation to matters at or preceding the hearing, no objection was taken at the hearing by counsel for the appellant. Secondly, there is nothing that might be capable of establishing a reasonable apprehension of bias. Neither the fact that the primary judge heard the application by the appellant's former solicitors for an order that they had ceased to act, nor his Honour's refusal to adjourn the hearing of the summary judgment application, were capable of doing so. Nor was what his Honour said in the course of the hearing or his judgment. We have considered the transcript of the hearing of the summary judgment application and his Honour's reasons for decision on that application. While his Honour's views were at times strongly expressed, they fell a very long way short of giving rise to a reasonable apprehension of bias.

43 There is nothing that might be capable of establishing actual bias and no submissions were advanced in support of this ground.

44 This ground of appeal has no merit.

Conclusion

45 None of the grounds of appeal has a reasonable prospect of succeeding and in those circumstances no purpose would be served by granting an extension of time for compliance with the springing order. The application should be dismissed.