JUD/*2016*fca58 -

FEDERAL COURT OF AUSTRALIA

Hii v Commissioner of Taxation (No 3) [2016] FCA 58

File number:	QUD 57 of 2014
Judge:	**COLLIER J**
Date of judgment:	8 February 2016
Catchwords:	**PRACTICE AND PROCEDURE** – security for costs – Part IVC *Taxation Administration Act 1953* (Cth) – relevant principles – applicant a natural person – applicant's case essentially defensive – foreign resident – inadequate assets in jurisdiction – prospect of enforcement of judgment in foreign jurisdictions
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 56 *Foreign Judgments Act 1991* (Cth) *Taxation Administration Act 1953* (Cth) Pt IVC *Federal Court Rules 2011* (Cth) r 19.01(1)
Cases cited:	*Appleglen Pty Ltd v Mainzeal Corporation Pty Limited* (1988) 79 ALR 634; [1988] FCA 15 *Austcorp Project Number 20 Pty Ltd v LM Investment Management Ltd (in liq)* [2014] FCA 1371 *Australian Equity Investors v Colliers International (NSW) Pty Limited* [2012] FCAFC 57 *Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1 *Goodman v Thomson Maloney & Partners Pty Ltd trading as Charter Keck Cramer* [2010] FCA 1264 *Hii v Commissioner of Taxation* [2015] FCA 375 *Knight v Beyond Properties Pty Ltd* [2005] FCA 764 *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189 *Logue v Hansen Technologies Ltd* (2003) 125 FCR 590 *Madgwick v Kelly* (2013) 212 FCR 1 *Ninan v St George Bank Ltd* (2012) 294 ALR 190; [2012] FCA 905 *Oswal v Commissioner of Taxation for the Commonwealth of Australia (No 2)* [2015] FCA 1143 discussed *PS Chellaram & Co Ltd v China Ocean Shipping Co* (1991) 102 ALR 321; [1991] HCA 36 *Randall v Deputy Commissioner of Taxation* (2008) 174

FCR 441

Date of hearing:	5 February 2016
Registry:	Queensland
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	33
Counsel for the Applicant:	Mr MJ May
Solicitor for the Applicant:	Shand Taylor Lawyers
Counsel for the Respondent:	Ms KE Downes QC with Mr MJ Ballans
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

QUD 57 of 2014

BETWEEN:	**YII ANN HII** Applicant
AND:	**THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA** Respondent

JUDGE: **COLLIER J**

DATE OF ORDER: **8 FEBRUARY 2016**

THE COURT ORDERS THAT:

1. Mr Yii Ann Hii pay $400,000 by way of security for costs into the Federal Court of Australia by or before 4 pm on 22 February 2016.
2. Mr Yii Ann Hii pay the costs of the Commissioner of Taxation in respect of the interlocutory application filed 13 November 2015 on a party-party basis.
3. These proceedings are stayed until such time as Order 1 has been satisfied.
4. If Mr Yii Ann Hii fails to comply with Order 1, then these proceedings are deemed dismissed, with Mr Yii Ann Hii to pay the Commissioner of Taxation's costs of and incidental to the proceedings on a party-party basis.

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

REASONS FOR JUDGMENT

COLLIER J:

1 Before the Court is an interlocutory application filed on 13 November 2015 by the Commissioner of Taxation, being the respondent in the substantive proceedings. The Commissioner seeks the following orders:

> 1. The applicant pay $400,000 by way of security for costs into the Federal Court of Australia by or before 4pm, on the fourteenth day after the Court delivers judgment in this application.
> 2. The applicant pay the respondent's costs of this application.
> 3. These proceedings are stayed until such time as Order 1 has been satisfied.
> 4. If the applicant fails to comply with Order 1, then these proceedings are deemed dismissed, with the applicant to pay the respondent's costs of and incidental to the proceedings on a standard basis.

2 The background facts to this interlocutory application are set out in *Hii v Commissioner of Taxation* [2015] FCA 375. Essentially, the substantive proceedings concern a determination whether income tax assessments in respect of Mr Hii for the period ended 30 June 2001 to 30 June 2009 were excessive. Those assessments have been challenged by Mr Hii pursuant to Pt IVC of the *Taxation Administration Act 1953* (Cth) (the **TAA**). Key issues for determination in the substantive proceedings include:

- whether Mr Hii was an Australian resident during the income tax years the subject of the challenged assessments;
- whether Mr Hii had engaged in tax evasion during a number of those income tax years; and
- whether the amount of income tax assessed was excessive.

3 There is some urgency associated with determination of this interlocutory application because the trial of the substantive application is listed to commence on 4 April 2016.

4 Both parties in this matter were represented by Counsel. Detailed written submissions were filed, and oral submissions were made by Counsel at the hearing.

5 In summary, the case of the Commissioner supporting the interlocutory order he has sought is as follows:

- Mr Hii is a Malaysian citizen, who ordinarily lives outside Australia. He is currently outside Australia, and it appears that he has not visited Australia since 2009.
- Mr Hii has limited assets in Australia, many of which are jointly owned with others and/or subject to security interests which result in Mr Hii's actual interest in those assets being negligible.
- Such assets as Mr Hii has would be inadequate to meet a costs order in these proceedings should he be unsuccessful. Mr Hii's evidence is that the net value of his assets in Australia as at 3 February 2016 is $1,007,173, which does not take into account a judgment entered against him by consent in the Supreme Court of Queensland on 11 May 2015 in favour of the Commissioner in the amount of $59,848,407.32. Mr Hii also gave evidence in the Supreme Court of Queensland proceedings that his net worth overall is negative $14 million. To date, the Commissioner has taken no steps to enforce the judgment of the Supreme Court of Queensland.
- While Mr Hii may have assets elsewhere than Australia, he does not have sufficient assets in foreign jurisdictions in which an Australian judgment may be enforced to meet an adverse costs order in these proceedings.
- Mr Hii filed no evidence in respect of the appropriate quantum amount of a security for costs order in favour of the Commissioner. To that extent, the estimate of the Commissioner of his costs leading up to the trial in the substantive proceedings is uncontested.
- The principles discussed by Nicholas J in *Oswal v Commissioner of Taxation for the Commonwealth of Australia (No 2)* [2015] FCA 1143 – a case comparable to these proceedings – support an order for security for costs.

6 Mr Hii submits, in summary:

- His case in the substantive proceedings is reasonably arguable.
- Although he is the applicant in the substantive proceedings, because his action is pursuant to Pt IVC of the TAA and opposes claims of the Commissioner, his case is essentially defensive. For this reason an order for security for cost should not be made.

- The Commissioner cannot rely on considerations relating to foreign residents because the case against Mr Hii is that Mr Hii was a resident of Australia at relevant times.
- Mr Hii's conduct in this case does not warrant imposing a security for costs order.
- Mr Hii has already offered the Commissioner arrangements which would give the Commissioner access to real estate assets in Australia, with available equity which far exceeds the Commissioner's cost estimate.

Consideration

7 The power of the Court to make an order for security for costs is found in s 56 of the *Federal Court of Australia Act 1976* (Cth) and r 19.01(1) of the *Federal Court Rules 2011* (Cth).

8 These provisions provide, respectively:

> **Section 56**
>
> (1) The Court or a Judge may order an applicant in a proceeding in the Court, or an appellant in an appeal under Division 2 of Part III, to give security for the payment of costs that may be awarded against him or her.
>
> (2) The security shall be of such amount, and given at such time and in such manner and form, as the Court or Judge directs.
>
> (3) The Court or a Judge may reduce or increase the amount of security ordered to be given and may vary the time at which, or manner or form in which, the security is to be given.
>
> (4) If security, or further security, is not given in accordance with an order under this section, the Court or a Judge may order that the proceeding or appeal be dismissed.
>
> (5) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court for or in relation to the furnishing of security.
>
> **Rule 19.01(1)**
>
> (1) A respondent may apply to the Court for an order:
>
> (a) that an applicant give security for costs and for the manner, time and terms for the giving of the security; and
>
> (b) that the applicant's proceeding be stayed until security is given; and
>
> (c) that if the applicant fails to comply with the order to provide security within the time specified in the order, the proceeding be stayed or dismissed.

9 It is well-settled that there are no fixed rules confirming the Court's consideration of a security for costs application. Recent recognition of this principle can be seen in the

endorsement by the Full Court of the following comments of the primary Judge in *Madgwick v Kelly* (2013) 212 FCR 1 at [6]:

> It is established that the discretion conferred by s 56 is broad and unfettered. Many attempts to set limitations upon the discretion have been rejected by the Courts, and the only limitation is that it must be exercised judicially: *Bell Wholesale Co Pty Ltd v Gates Export Corporation* [1984] FCA 34; (1984) 2 FCR 1...at 3 per Sheppard, Morling and Neaves JJ. It is a discretion to be exercised according to the merits of each case and without any particular predisposition: *Bryan E Fencott Pty Ltd v Eretta Pty Ltd* [1987] FCA 102; (1987) 16 FCR 497...at 511 per French J. The discretion is to be exercised by reference to the particular circumstances arising in each case: *Woodhouse v McPhee* [1997] FCA 1509; (1997) 80 FCR 529...at 533 per Merkel J.

10 Notwithstanding this, some guidance to the Court in considering applications for security for costs may be garnered from a review of the authorities. Relevant principles include the following:

- Whether the application for security for costs has been brought promptly: *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189 at 197.
- Whether the applicant is a natural person or a corporation. Traditionally the Courts are disinclined to order security against natural persons. However as Lindgren J observed in *Knight v Beyond Properties Pty Ltd* [2005] FCA 764 at [33] the state of being a natural person is no bar to an order for security for costs particularly when coupled with other factors (for example, an applicant's impecuniosity and residence outside Australia).
- Whether the applicant is impecunious such that the applicant would not be able to satisfy a costs order against it. The general rule is that where the applicant is a natural person he or she will not be required to provide security for costs merely because he or she is impecunious, however Courts have nonetheless ordered security in such circumstances: *Randall v Deputy Commissioner of Taxation* (2008) 174 FCR 441; *Goodman v Thomson Maloney & Partners Pty Ltd trading as Charter Keck Cramer* [2010] FCA 1264 at [21].
- Whether such impecuniosity has been caused by the conduct of the respondent. Ordinarily before a court could accept that the plaintiff's impecuniosity was caused by the defendant's conduct, it would be necessary to form a provisional view as to the strength of the plaintiff's case: Gleeson J in *Austcorp Project Number 20 Pty Ltd v LM Investment Management Ltd (in liq)* [2014] FCA 1371 at [40].

- Whether an order for security for costs would stifle the litigation (*Bell Wholesale Co Ltd v Gates Export Corporation* (1984) 2 FCR 1 at 4; *Australian Equity Investors v Colliers International (NSW) Pty Limited* [2012] FCAFC 57 at [25]-[30]).
- Whether the applicant is a foreign resident. The following observation of McHugh J in *PS Chellaram & Co Ltd v China Ocean Shipping Co* (1991) 102 ALR 321 at 323; [1991] HCA 36 at [7] is commonly cited in this respect:

> However, for over 200 years, the fact that a party, bringing proceedings, is resident out of the jurisdiction and has no assets within the jurisdiction has been seen as a circumstance of great weight in determining whether an order for security for costs should be made. Indeed, for many years the practice has been to order such a party to provide security for costs unless that party can point to other circumstances which overcome the weight of the circumstance that that person is resident out of and has no assets within the jurisdiction.

  As explained by Weinberg J in *Logue v Hansen Technologies Ltd* (2003) 125 FCR 590 at [18], the clear rationale of this principle is:

> to create a fund within this country against which a successful respondent may enforce a judgment for costs thereby enabling the avoiding of the risks, uncertainties and delays of attempting to enforce such a judgment in the applicant's claimed country of residence.

- Whether the party against whom security is sought is in substance a defendant. An order ought not to be made against parties who are defending themselves and thus forced to litigate: *KP Cable Investments* at 198.
- The prospects of success of the applicant's claim (although this has been treated as a minor issue in such cases as *Ninan v St George Bank Ltd* (2012) 294 ALR 190; [2012] FCA 905 at [39] and *Appleglen Pty Ltd v Mainzeal Corporation Pty Limited* (1988) 79 ALR 634; [1988] FCA 15 at [3]).

11 Having regard to these factors, in my view it is appropriate to order security for costs against Mr Hii in this case.

12 First, no issue was raised before me by Mr Hii that the Commissioner's application for security for costs was not brought promptly. In so observing, I note that this litigation has been on foot since 2014, but that the Commissioner's application for security for costs was not filed until 13 November 2015. However I also note consent orders by the Supreme Court of Queensland on 11 May 2015 giving judgment to the Commissioner against Mr Hii in the amount of $59,848,407.32 (plus costs) in respect of outstanding income tax and penalty assessments and interest for the income years spanning 2002 to 2009. I also note the more

recent order of Bond J in the Supreme Court of Queensland on 17 December 2015 dismissing Mr Hii's application for a stay of the May orders of that Court. It does not appear to be in dispute that none of the costs orders made against Mr Hii in the Commissioner's favour in this Court or in the Supreme Court have been paid by him. It appears that the Commissioner has, until now, extended an indulgence to Mr Hii in respect of both the outstanding judgment debt and costs.

13 In my view, the promptitude of this interlocutory application in the context of the broader litigation is a neutral factor.

14 Second, Mr Hii is clearly a natural person rather than a corporation. However, I note that there is a very large sum of money at stake in these proceedings. It is also clear that Mr Hii is currently out of the jurisdiction, has been out of the jurisdiction for some time, and his permanent residency visa enabling him to enter Australia expired on 16 March 2014. At the hearing of this interlocutory application Ms Downes QC for the Commissioner submitted that Mr Hii intended to seek leave to give evidence at the trial by video link – presumably from overseas. This submission was not contested by Mr May for Mr Hii.

15 Mr Hii submits that the aspect of the Commissioner's interlocutory claim relating to his residency is inconsistent with the Commissioner's position relating to Mr Hii's residency in the substantive proceedings, however I do not accept this. As the Commissioner correctly submits, while Mr Hii's Australian residency is controversial for the income years spanning 2001 to 2009, it is uncontroversial that he is not currently a resident of Australia.

16 Third, and related to Mr Hii's current residency, is the fact that the value attributable to Mr Hii's assets in Australia would not satisfy the Commissioner's costs of $400,000 should Mr Hii be unsuccessful in the substantive proceedings. In this respect I note Mr Hii's affidavit sworn 8 September 2015 in the Supreme Court of Queensland proceedings, and uncontroversial evidence that:

- Overall he had "a negative net worth of over -$14million".
- He jointly owns with his wife a property at Hamilton, Queensland, which property Mr Hii estimates as valued at $10.5million. That property is currently subject to a mortgage in favour of the National Australia Bank Ltd to secure a loan facility, said by Mr Hii to be $11.5million (and therefore in excess of the value of the property).

- He jointly owns with Mr Francis Tong a parcel of vacant land in Lyons, Queensland. Mr Hii gave evidence that the value of his unencumbered interest in that property was $650,000.
- He owns a 2006 Lamborghini Murcielago motor vehicle, valued at between $202,100 and $225,700, and subject to an unquantified security interest in favour of Irish Bentleys Lawyers (former lawyers of Mr Hii).
- He owns a 2006 Rolls Royce Phantom motor vehicle, valued at between $227,200 and $253,800, and subject to an unquantified security interest in favour of SMH Lawyers (former lawyers of Mr Hii).
- He owns a 90% interest in the shares of Investwell Holdings Pty Ltd (**Investwell**). Mr Hii estimates that the combined value of the assets of Investwell total $2.725 million, however the assets of the company are subject to a mortgage in favour of National Australia Bank Ltd.
- He owns a 43.75% interest in the shares of Traxview Pty Ltd, which Mr Hii claims to have a effective nil net asset position.
- He owns a 51.25% interest in the shares of Wrensand Pty Ltd, which Mr Hii claims to have a negative net asset value.

17 Mr Hii's evidence in the Supreme Court of Queensland – including an affidavit sworn by him on 8 September 2015 in those proceedings – was that if the properties secured by the National Australia Bank loan were sold, the proceeds of sale may be insufficient to repay that loan. I note that Mr Hii further deposed in his affidavit that his loan from National Australia Bank was secured not only by mortgages over relevant properties but also a guarantee from himself to the bank. The Commissioner has submitted that as a result, any equity held by Mr Hii in the Lyons property could well be absorbed by that guarantee in the event that the value on realisation of the mortgaged properties did not satisfy the loan. In my view this is feasible, and means that, as matters presently stand, Mr Hii's unencumbered interest in the Lyons property would not be available to satisfy an adverse costs order against him in the amount currently sought by the Commissioner.

18 Further, the evidence of Mr Hii that the net value of his assets in Australia as at 3 February 2016 is $1,007,173 does not appear to take into account the May 2015 order of the Supreme Court of Queensland and the Commissioner's judgment debt against Mr Hii of $59,848,407.32.

19 Mr Hii submits that he has offered to make available to the Commissioner four properties in Queensland by way of security, and that the prospective enforcement by the Commissioner of his judgment debt of $59,848,407.32 against Mr Hii should be disregarded by the Court because:

- the prospective impecuniosity of Mr Hii results from the conduct of the Commissioner; and
- if the Commissioner enforces his judgment against those properties he will have funds to secure his risk for an unpaid costs order.

20 I am not persuaded of the merit of this argument. The alleged "conduct" of the Commissioner in this case relates to a legally-enforceable tax debt, resulting from an order of the Supreme Court of Queensland in the Commissioner's favour. In my view the recognition by another superior Court of the legal rights of the Commissioner cannot reasonably be equated as "conduct" to which can be attributed the impecuniosity of Mr Hii, such that this Court should exercise its discretion against the Commissioner seeking security for costs in these proceedings.

21 As I have already observed, to date the Commissioner has not sought to enforce his judgment debt obtained in the Supreme Court of Queensland (or apparently outstanding costs orders). In this respect the Commissioner has not prevented Mr Hii from pursuing his legal rights in relation to the relevant income tax assessments, including having access to sufficient funds to ensure legal representation to pursue those rights.

22 Further, I do not accept the logic of Mr Hii's submission that enforcement by the Commissioner of his judgment against Mr Hii's properties will result in funds which will serve to secure the Commissioner's risk for an unpaid costs order. The judgment of the Supreme Court of Queensland means that the Commissioner is currently entitled to pursue Mr Hii for that amount. The amount sought by the Commissioner by way of security for costs is additional to the amount of the judgment debt. I am not persuaded that it is proper to assume that any realisation of Mr Hii's interests in his assets in this jurisdiction should first be used to satisfy an adverse costs order rather than the existing judgment debt. In any event, on the evidence the value of Mr Hii's assets in Australia would be inadequate to meet an adverse costs order, much less his current debts.

23 Fourth, there is no evidence before me that Mr Hii could satisfy an adverse costs order in these proceedings from assets in foreign jurisdictions in which an Australian judgment could be enforced. Counsel for Mr Hii directed my attention to evidence in Mr Hii's affidavit of 8 September 2015 detailing his assets in Malaysia, Singapore, the Philippines, Hong Kong, the British Virgin Islands and Papua New Guinea. In summary, and relevantly, that evidence demonstrates that:

- In respect of his assets in Malaysia, including shares in a company which owns property in Malaysia, Mr Hii estimates his interest in the company to be valued at approximately $280,000.
- His assets in Singapore, are either heavily mortgaged or of nil value.
- His assets in the Philippines are either of no current value (in relation to iron ore mining companies in that jurisdiction) or of comparatively minor value (in respect of his interests in two companies – totalling $33,111.00).
- He owns shares in two companies in Hong Kong however his debt to one of those companies considerably exceeds the value of his shares, and the value of his shares in the other company is nil.
- He owns shares in companies in the British Virgin Islands, however the value of those shares is nil or of nominal value.
- Mr Hii is recorded as owning shares in a company incorporated in Papua New Guinea, however he asserts that he has assigned those shares to a third party and no longer beneficially holds assets of any value in Papua New Guinea.

24 In relation to these assets, it is relevant to note that:

- on Mr Hii's evidence, his only assets of any value appear to be in Malaysia and the Philippines;
- the provisions of the *Foreign Judgments Act 1991* (Cth) do not list Malaysia or the Philippines as jurisdictions in respect of which Australia has reciprocal arrangements for enforcement of judgments; however
- that Mr Hii apparently has access to assets in Malaysia and Philippines, which supports the conclusion that an order for security for costs would not stifle his claim.

25 Fifth, the Commissioner submits that, as a general proposition, the true extent of Mr Hii's assets (particularly in Malaysia and the Philippines) is unclear and indeed may be understated. This submission receives support from evidence of Mr Hii in his affidavit of 8 September 2015 where he deposes:

> 160. My practice has been to return my excess funds to Malaysia (where I intend to retire) and invest it there. My investments in Malaysia are ordinarily passive investments, particularly property. Recently, however, I have been losing money in my business ventures and have had to sell properties in Malaysia for cash flow purposes for my businesses.

26 To this extent, a question arises as to the location of the "excess funds" returned by Mr Hii to Malaysia.

27 I note the uncontested statement of Counsel for the Commissioner at the hearing that Mr Hii has already spent approximately $2 million in respect of legal fees in this litigation. It is clear that Mr Hii has had access to considerable sums of money to pursue his claim. In these circumstances I am not persuaded that the material currently before the Court necessarily provides a complete picture of Mr Hii's financial position overseas.

28 Finally, I note Mr Hii's submission that his claim can properly be considered as having a significant defensive aspect. Like Nicholas J in *Oswal*, I consider this submission has merit. However, and also like his Honour in *Oswal*, I also consider that the defensive element of Pt IVC proceedings does not preclude the making of an order for security for costs if the Court considers it appropriate to make such an order. In this respect I also note the submission of Counsel for the Commissioner that Mr Hii could have brought his substantive claim in the Administrative Appeals Tribunal, in which circumstances he would not have been exposed to the possibility of an award of security for costs against him in this Court.

29 On balance, while Mr Hii is a natural person, and notwithstanding that the reasonableness of Mr Hii's claims are not disputed, I am minded to order security for costs against him in the terms sought by the Commissioner. I have concluded that such an order is appropriate in circumstances where he is out of the jurisdiction, with apparent access to assets against which the Commissioner cannot enforce a costs order, and where assets of Mr Hii within Australia would not appear to be of sufficient value to satisfy such an order. As circumstances currently stand, in the absence of such an order there is a serious risk that the Commissioner would be unable to enforce a costs order in his favour against Mr Hii.

30 I also note that the history of this litigation demonstrates that Mr Hii has had access to legal advice (and funds to pay for such advice), and continues to do so notwithstanding his evidence that his net worth is negative $14 million. In this respect I am also satisfied that an order for security for costs in the amount sought by the Commissioner would not stifle Mr Hii's claims.

31 In respect of the quantum of costs sought by the Commissioner I note the evidence of Ms Suzannah Auld in her affidavits sworn 13 November 2015 and 1 February 2016. Certainly no evidence has been led by Mr Hii to support any finding other than that the amount of $400,000 is a reasonable and realistic estimate of the costs of the Commissioner to prepare for a trial which has been set down for three weeks, and due to commence in less than two months from now.

32 I consider it proper and reasonable to order that the proceedings be stayed pending payment by Mr Hii of the amount of $400,000 by way of security for costs within fourteen days of judgment.

33 Finally, it is appropriate that costs follow the event, and that Mr Hii pay the costs of the Commissioner in respect of this interlocutory application.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier.

Associate:

Dated: 8 February 2016