JUD/*2016*fca666 -

FEDERAL COURT OF AUSTRALIA

Oswal v Commissioner of Taxation [2016] FCA 666

File numbers:	NSD 850 of 2012 NSD 851 of 2012 NSD 852 of 2012
Judge:	**PAGONE J**
Date of judgment:	24 May 2016
Catchwords:	**PRACTICE AND PROCEDURE** – interlocutory application – application to set aside notice to produce – documents filed in other proceedings – whether production contrary to implied undertaking – achievement of justice guiding principle.
Legislation:	*Income Tax Assessment Act 1997* (Cth)
Cases cited:	*Cadbury Schweppes Pty Ltd v Amcor Limited* [2008] FCA 398 *Comcare v John Holland Rail Pty Ltd (No 5)* (2011) 195 FCR 43 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 *Hearne v Street* (2008) 235 CLR 125 *Oswal & Ors v Federal Commissioner of Taxation* (2013) 233 FCR 110 *Springfield Nominees Pty Ltd v Bridgelands Securities Limited* (1992) 38 FCR 217
Date of hearing:	19 and 24 May 2016
Date of publication of reasons:	3 June 2016
Registry:	New South Wales
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	10

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Solicitor for the Respondent:	Minter Ellison

ORDERS

NSD 850 of 2012

BETWEEN:	**RADHIKA PANKAJ OSWAL** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

JUDGE: **PAGONE J**

DATE OF ORDER: ##

THE COURT ORDERS THAT:

1.

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

ORDERS

NSD 851 of 2012

BETWEEN:	**PANKAJ OSWAL** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

JUDGE: **PAGONE J**

DATE OF ORDER: ##

THE COURT ORDERS THAT:

1.

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

ORDERS

NSD 852 of 2012

BETWEEN:	**PANKAJ OSWAL AS TRUSTEE OF THE BURRUP TRUST** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

JUDGE: **PAGONE J**

DATE OF ORDER: ##

THE COURT ORDERS THAT:

1.

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

REASONS FOR JUDGMENT

PAGONE J:

1 On 24 May 2016 I dealt with, and decided, two interlocutory matters arising in this proceeding and indicated that I would give my reasons subsequently. The two matters were an application by the Commissioner to set aside a notice to produce dated 18 April 2016 and a related application by the applicants (who will be referred to in these reasons compendiously as "the Oswals") for leave to issue a subpoena to Mr Vikas Rambal to attend to give evidence at the hearing fixed to commence on 6 June 2016.

2 The hearing of the respondent's interlocutory application to set aside the notice to produce commenced on 19 May 2016 but was adjourned to 24 May 2016 on an oral application by counsel for the Oswals during the course of submissions on 19 May to permit the issues raised by the notice to produce to be considered in the context of the broader question of whether the Oswals would be permitted to rely upon evidence from Mr Rambal. The notice to produce, and the application for leave to issue the subpoena to Mr Rambal, assumed (at least) that the Oswals would be permitted to lead oral evidence from Mr Rambal at the hearing of the proceeding set to commence on 6 June 2016 notwithstanding that the proceeding had been managed on the basis that the parties were to file evidence by affidavits and that orders had previously been made for evidence to be filed by affidavit.

3 The interlocutory dispute arose in the context of an issue in the proceeding concerning the basis for calculating the share price of 246 shares in Burrup Holdings Pty Ltd transferred from the Vikas Rambal Family Trust. In *Oswal & Ors v Federal Commissioner of Taxation* (2013) 233 FCR 110 Edmonds J found that CGT Event E1 happened on 13 March 2007 relating to 902 shares in Burrup Holdings. An issue in the current proceeding concerns the size of the capital gain arising from that CGT Event. The dispute between the parties concerning that issue is about the capital proceeds. No consideration was exchanged for the transfer of the shares, but s 116-30(1) of the *Income Tax Assessment Act 1997* (Cth) relevantly provides that the first element of the cost base (where no capital proceeds are received) is taken to be equal to the "market value" of the CGT asset worked out at the time that the CGT event happened. The Commissioner has assessed the taxpayers on the basis that the best evidence of market value of the shares in question was the most recent transaction in relation to the shares. The Commissioner relied in that regard upon an amount in the settlement of a dispute involving the Burrup Holdings shares between Mr Rambal as trustee

for the Vikas Rambal Family Trust and Mr Oswal as trustee for the Burrup Trust that was reached on 12 January 2007. That settlement occurred two months before the happening of the relevant CGT Event and included a transfer of 246 Burrup Holdings shares.

4 For present purposes the dispute between the parties concerning this aspect of the issues may be taken from the submissions of the Oswals in the interlocutory applications where the competing contentions of the Commissioner and the Oswals were set out at [9] and [10] as follows:

> 9 The Commissioner takes the figure of US$75 million and applies it as if it was the market value solely for the transfer of 246 BHPL shares (that is US$304,878 per share), and gives no allowance to any part of the US$75 million being for the release from litigation by Mr Rambal and compensation payable to Mr Rambal as Trustee. The Commissioner then says that the per share value of the January transaction implies that the market value of 902 shares in BHPL was 902 x US$304,878 or US$275 million. Therefore, the Commissioner says that the deemed capital proceeds were US$275 million or A$347,749,115 (based on a USD to AUD exchange rate of 0.7908) (refer Appeal statement at [63c]).
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> 10 The Applicants say that it is incorrect to apply the US$75 million value as the basis for calculating the per share price because that sum of money was paid largely for the settlement of litigation between Oswal and Rambal. The Applicants' own expert (Sapere Forensic) values the 902 shares at only A$135.3 million. Equally, the Commissioner's own expert (Halligan & Co) values the 902 shares at only A$161.6 million.

Directions had been made in this proceeding which required the affidavit evidence for the Oswals, contemplating also any evidence by Mr Oswal, to be filed by 29 April 2016. On 12 May 2016 counsel for the Oswals informed the Court that the applicants would not be giving evidence but that they would seek to rely upon the proposed evidence of Mr Rambal. On 18 April 2016 the notice to produce was served upon the Commissioner seeking the production of the evidence which had been filed in previous proceedings between Mr Rambal and the Commissioner ("the Rambal proceeding"). On 28 April 2016 the Commissioner issued an interlocutory application to have set aside that notice to produce.

5 The Commissioner formally produced the documents to the Court, subject to the Commissioner's objections to production and allowing inspection, together with an index to assist the Court to decide whether any of the documents ought to be made available for inspection by the Oswals and the extent to which the Commissioner should be relieved of the implied undertaking given in the proceedings involving Mr Rambal. The material produced by the Commissioner also included documents in respect of which there was no implied undertaking, or which the Oswals had already received through other means. Those

documents were directed to be made available again to the Oswals for the avoidance of doubt. There remained, however, a number of documents that had been created solely for the dispute and litigation between the Commissioner and the taxpayer in the Rambal proceedings, including pre-litigation notices of objection, decisions on notices of objection, and various affidavits which had been filed, but not deployed, in the Rambal proceedings. Those remaining documents were in the Commissioner's possession subject to an implied undertaking to the Court arising from the Rambal proceedings or were subject to the Commissioner's statutory duty of confidentiality.

6 The Commissioner submitted that the subpoena and notice to produce should be set aside, amongst other reasons, because they sought production of documents in breach of the Commissioner's implied undertaking or because they sought production inconsistently with the correct procedure for seeking leave of the Court to inspect the relevant court files. There is no doubt that the subpoena and the notice to produce sought from the Commissioner documents in the Rambal proceedings in respect of which the Commissioner was bound by an implied undertaking against disclosure or use in any other proceeding. In *Hearne v Street* (2008) 235 CLR 125 the majority of the High Court said at [96]:

> Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits. […]
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> (footnotes omitted)

The implied undertaking, however, must yield to "inconsistent statutory provisions and to the requirements of curial process in other litigation": *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 33. Gordon J in *Cadbury Schweppes Pty Ltd v Amcor Limited* [2008] FCA 398 explained at [13] the position of a litigant faced with competing and inconsistent obligations:

> However, the resolution of any tension between what would otherwise be competing and inconsistent obligations, is readily apparent; resolution lies in properly identifying the contents of the implied undertaking. In particular, it is necessary to recognise that the undertaking impliedly given in one proceeding not to use documents compulsorily produced in that proceeding except for the purposes of that proceeding is necessarily subject to other requirements of the law. So to take what

> may be a clearer example of the limits of the undertaking, the implied undertaking given in one proceeding would provide no answer to a subpoena for production of these documents in another proceeding. When a party is subpoenaed to produce documents obtained in another proceeding, it is no answer to say that "I am subject to an undertaking about how I may use these documents". The party's undertaking in the first proceeding restricts the uses to which that party may choose to put the documents. But the undertaking is no answer to otherwise valid compulsive processes of law: *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 32, 36-37, 46. As the Court in *Plowman* stated (at 33):
>
> > No doubt the implied obligation must yield to inconsistent statutory provisions and *to the requirements of curial process in other litigation*, eg discovery and inspection, but that circumstance is not a reason for denying the existence of the implied obligation.
> >
> > (Emphasis added)
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> See also *Patrick v Capital Finance Pty Ltd (No 4)* [2003] FCA 436 at [15]-[22]. Accordingly, Visy's implied undertaking in the ACCC proceeding is no answer to its discovery obligations in these proceedings.

The question for present purposes, therefore, is not whether the Commissioner can be required to comply with the subpoena and notice to produce but, rather, whether the Commissioner should be required to do so in this instance.

7 Whether the documents in the Commissioner's possession from the Rambal proceedings should be available to the Oswals depends upon the exercise of judicial discretion in which the achievement of justice must be the guiding principle. In *Springfield Nominees Pty Ltd v Bridgelands Securities Limited* (1992) 38 FCR 217 Wilcox J said at 225:

> I have reservations about the width of counsel's proposition concerning prejudice. But, generally, I accept these submissions, with the exception of the first. Especially having regard to the adoption by Burchett and Lockhart JJ of the "special circumstances" formula stipulated in *Crest*, I am not prepared to reject that test in favour of counsel's alternative reference to abuse of process. In saying that, of course, I adopt the explanation of that term given by Burchett J and applied by Lockhart J. For "special circumstances" to exist it is enough that there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present. The matter then becomes one of the proper exercise of the court's discretion, many factors being relevant. It is neither possible nor desirable to propound an exhaustive list of those factors. But plainly they include the nature of the document, the circumstances under which it came into existence, the attitude of the author of the document and any prejudice the author may sustain, whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain, the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information), the circumstances in which the document came into the hands of the applicant for leave and, perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding.
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> Consideration of these factors leads me to the conclusion that it is proper to give leave in the present case. Mr Preston's statement was prepared for use in litigation; it

> was not pre-existing. It does not contain personal data or commercially sensitive material. Although the author of the document does not consent, and would prefer it not used, he does not resist leave or advance any argument of prejudice. The document came into the possession of the present applicant under circumstances which reflect no discredit on it or its representatives. I cannot say that the document will be important to the achievement of justice in the Aetna-Hongkong Bank case; much depends upon the course of that case and the evidence given in it. But it deals with matters relevant to that proceeding. It is a statement made by a person involved in transactions the subject of that proceeding. It has at least the potential to be important to the proper determination of that case. I propose to grant leave.

In this case the achievement of justice does not require that the Commissioner make available to the Oswals any of the remaining documents sought, except an affidavit of Mr Halligan in the Rambal proceeding dated 19 August 2013.

8 The documents were sought by the Oswals for what was said to be the legitimate forensic purpose of enabling them to consider whether to use the material to cross-examine Mr Rambal. In written submissions for the Oswals it was submitted that:

> The documents are relevant for a legitimate forensic purpose as, upon receiving the material, the Applicants can consider whether to issue a subpoena to Mr Rambal to give evidence as to the matters set out in the documents obtained and if Mr Rambal is a hostile witness to use the material to cross-examine. Further, if Mr Rambal refuses to comply with the subpoena to give evidence, the Applicants' can consider whether they can serve a notice to tender the hearsay evidence obtained on the basis that the maker is unavailable.

What these submissions did not address, however, is why the Oswals should be permitted to rely upon the possible evidence of Mr Rambal in circumstances where (a) the relevant evidence could have been given by Mr Oswal and (b) a decision has been made not to call him. Whether the Oswals should have access to the documents in the Rambal proceedings depends in part upon an anterior question, namely, whether the applicants should be permitted to call Mr Rambal: see *Comcare v John Holland Rail Pty Ltd (No 5)* (2011) 195 FCR 43 at [8], [12], [17], [20]-[22], [25]-[41]. On 12 May 2016 the Court was informed that the Oswals were "no longer relying on the evidence of Mr Oswal, and [were not] calling him to appear at the hearing". The Court was informed that the Commissioner had been notified of this and that, as a result, a number of subpoenas were issued to "get the source documents that previously we were going on by Mr Oswal". The applications, however, went well beyond seeking documents which could, but need not necessarily, be tendered through Mr Oswal. The documents sought included the affidavit of Mr Rambal for the express intention of using it as a means by which evidence might be adduced through Mr Rambal, possibly through cross-examination if he were a hostile witness, about matters which Mr

Oswal could have given direct evidence. It is not in the interest of justice that subpoenas and notices to produce to the Commissioner should be used to elicit evidence from a third party which could have been given by Mr Oswal in circumstances where the reason he did not give evidence on those matters was a decision not to call him to give evidence.

9 The affidavit of Mr Halligan is in a somewhat different position. He was called as an expert on behalf of the Commissioner in the Rambal proceedings and is due to give evidence for the Commissioner as an expert in the Oswal proceedings. There is an overlap in the two proceedings and it is possible that the evidence he gave in the Rambal proceedings may bear relevantly upon the evidence he is to give in the Oswal proceedings. It would not be in the interests of justice for the Commissioner to withhold potentially relevant expert evidence previously given by the same witness in respect of the same issues and subject matter. A different conclusion may, perhaps, be required in the case of lay witnesses or the parties themselves, but Mr Halligan is to be called as an independent expert with duties as such to assist the Court without an interest in the dispute. His independent expert evidence in the Rambal proceedings should be disclosed to the Oswals for the assistance of the Court to the extent that his expert evidence was on the same issue and transaction as that in the Oswal proceeding.

10 The notice to produce and subpoena were otherwise set aside.

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: 3 June 2016