FEDERAL CIRCUIT COURT OF AUSTRALIA

VLAD v LOPEZ (No.2) *[2017] FCCA 2032*

Catchwords:
BANKRUPTCY – Application for extension of time for review of Registrar's decision to issue a sequestration order.

BANKRUPTCY – Annulment of sequestration order.

PRACTICE AND PROCEDURE – Extension of time to file for review of Registrar's decision – factors for consideration.

Legislation:
Bankruptcy Act 1966 (Cth), ss.43, 44, 47, 51, 52, 153B
Bankruptcy Regulations 1996 (Cth), reg.16.03
Federal Circuit Court of Australia Act 1999 (Cth), s.104
Federal Circuit Court (Bankruptcy) Rules 2006 (Cth), rr.2.03, 4.02, 4.04, 4.06
Federal Circuit Court Rules 2001 (Cth), rr.16.05, 20.03
Federal Court Rules 2011 (Cth), r.9.12
Taxation Administration Act 1953 (Cth), Part IVC, s.14ZZM

Cases cited:
Baker v Perpetual Trustee Company Limited [2012] FCA 553; (2012) 204 FCR 593
Bank of Australasia v Hill (1907) 4 CLR 1514; (1907) 14 ALR 51
Boles v Official Trustee in Bankruptcy [2001] FCA 639; (2001) 183 ALR 239
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; (1996) 70 ALJR 866; (1996) 139 ALR 1
Bulic v Commonwealth Bank of Australia Ltd [2007] FCA 307; (2007) 5 ABC(NS) 122
BZABK v Minister for Immigration & Citizenship & Anor [2012] FCA 774; (2012) 205 FCR 83
Cain v Whyte (1933) 48 CLR 639; (1933) 6 ABC 117; (1933) 6 ALJ 457
Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd [2008] HCA 41; (2008) 237 CLR 473; (2008) 82 ALJR 1411; (2008) 69 ATR 357; (2008) 248 ALR 693; (2008) 67 ACSR 593; (2008) ATC 20-045; (2008) 26 ACLC 880
Esanda Finance Corp Ltd v Velissaris [1999] FCA 1359
Francis v Eggleston Mitchell Lawyers Pty Ltd [2014] FCAFC 18; (2014) 12 ABC(NS) 25
Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344; (1984) 58 ALR 305; (1984) 7 ALD 315

International Alpaca Management Pty Ltd v Ensor [1999] FCA 72
Manoher v Minister for Immigration, Local Government and Ethnic Affairs (No.2) (1991) 24 ALD 410
Miller v Bond: Securities (unreported, Federal Court of Australia, 2 September 1994)
Re Commonwealth of Australia & Anor; Ex parte Marks [2000] HCA 67; (2000) 75 ALJR 470; (2000) 177 ALR 491
Re Lakatos; Ex parte Lakatos v Deputy Commissioner of Taxation (1996) 33 ATR 145
Re Sanders; Knudsen and Yates (t/a The Hargreaves Practice) v Sanders [2003] FCA 1079; (2003) 1 ABC(NS) 408
Re Sarina, Ex parte Council of the Shire of Wollondilly (1980) 43 FLR 163; (1980) 30 ALR 266
Re Svir; Ex parte Commissioner of Taxation (1998) 83 FCR 314; (1998) 39 ATR 113; (1998) 154 ALR 710
Rigg v Baker [2006] FCAFC 179; (2006) 155 FCR 531; (2006) 236 ALR 629; (2006) 4 ABC(NS) 419
Sandell v Porter & Anor (1966) 115 CLR 666; (1966) 40 ALJR 71
Sanders v Knudsen & Yates trading as The Hargreaves Practice [2004] FCAFC 305
Sarina v Council of the Shire of Wollondilly (1980) 48 FLR 372; (1980) 32 ALR 596
Tran v Minister for Immigration & Border Protection [2014] FCA 533
Winn v Blueprint Instant Printing Pty Ltd [2011] FCA 292

Applicant:	TRAIAN VLAD
Respondent:	GEORGE LOPEZ
Intervener:	DEPUTY COMMISSIONER OF TAXATION
File Number:	PEG 246 of 2015
Judgment of:	Judge Antoni Lucev
Hearing dates:	14 and 15 April 2016
Date of Last Submission:	15 April 2016
Delivered at:	Perth
Delivered on:	29 August 2017

REPRESENTATION

Counsel for the Applicant:	Mr BW Duckham
Solicitors for the Applicant:	BW Duckham & Co
For the Respondent:	Mr G Lopez in person
Counsel for the Intervener:	Mr JE Scovell
Solicitors for the Intervener:	ATO Dispute Resolution

ORDERS

(1) That the Applicant's application pursuant to s.104(2) of the *Federal Circuit Court of Australia Act 1999* (Cth) for an extension of time in which to file an application for review of a Registrar's decision on 4 February 2014 to issue a sequestration order be dismissed.

(2) That the Applicant's application pursuant to s.153B(1) of the *Bankruptcy Act 1966* (Cth) for an annulment of the bankruptcy arising from the issue of the sequestration order by a Registrar on 4 February 2014 be dismissed.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT PERTH

PEG 246 of 2015

TRAIAN VLAD
Applicant

And

GEORGE LOPEZ
Respondent

DEPUTY COMMISSIONER OF TAXATION
Intervener

REASONS FOR JUDGMENT

The application before the Court

1. Before the Court is an application originally filed in the Federal Court on 21 January 2015, amended on 9 February 2015, and transferred to this Court on 3 June 2015 which seeks to:

   a) as provided by s.104(2) of the *Federal Court of Australia Act 1999* (Cth) ("*FCCA Act*") have the Court review the Registrar's decision to make the Sequestration Order; and

   b) annul a bankruptcy pursuant to s.153B of the *Bankruptcy Act 1966* (Cth) ("*Bankruptcy Act*"), the applicant having been made bankrupt under a sequestration order ("Sequestration Order") made on 4 February 2014 by a Registrar of this Court.

2. The orders sought by the applicant, Traian Vlad ("Mr Vlad") are opposed by the intervener, the Deputy Commissioner of Taxation ("Commissioner") upon whose application the sequestration order was

originally made. The Trustee appeared and filed evidence but otherwise took a neutral stance as to the outcome of proceedings.

3. On 26 March 2015 the Deputy Commissioner was granted leave by the Federal Court to intervene in the proceedings to oppose the application pursuant to r.9.12 of the *Federal Court Rules 2011* (Cth) ("*FC Rules*") with the right to tender evidence and make submissions as to directed from time to time by an order of this Court, and liable for such orders as to costs as determined by this Court.

The alleged debts

The Creditor's Petition

4. The Creditor's Petition upon which the sequestration order was made was based upon a failure to observe a Bankruptcy Notice by Mr Vlad, and, in turn, the Bankruptcy Notice was based on a District Court judgment obtained by the Deputy Commissioner against Mr Vlad ("District Court Judgment") which had not been set aside nor paid.

5. The District Court Judgment was based on a Running Balance Account ("RBA") deficit debt relating to Mr Vlad's liability in relation to Pay As You Go ("PAYG") income tax instalment liabilities.

Further liability – income tax assessments

6. Before the District Court Judgment was handed down amended assessments were issued in respect of the years ended 30 June 2006, 30 June 2007 and 30 June 2008 ("Amended Assessments"). Objections to these assessments by Mr Vlad were disallowed by the Commissioner in March 2010, and the Amended Assessments give rise to a separate and distinct liability to that arising from the District Court Judgment.

7. Further details of the review of the Amended Assessments under Part IVC of the *Taxation Administration Act 1953* (Cth) ("*TA Act*") are set out below: see [124]-[131] below.

Evidence – affidavits relied upon by the parties

8. Mr Vlad relies upon the following affidavits:

a) Mr Vlad's affidavit sworn 16 January 2015 ("Mr Vlad's January 2015 Affidavit");

b) Mr Vlad's affidavit sworn 11 February 2015 ("Mr Vlad's February 2015 Affidavit");

c) Mr Vlad's affidavit sworn 30 April 2015 ("Mr Vlad's April 2015 Affidavit");

d) Mr Vlad's affidavit sworn 10 July 2015 ("Mr Vlad's July 2015 Affidavit");

e) Mr Vlad's affidavit sworn 8 August 2015 ("Mr Vlad's August 2015 Affidavit");

f) the affidavit of Adrian John Gamble sworn 16 February 2016 ("Mr Gamble's Affidavit");

g) the affidavit of Graeme John MacEwan sworn 10 July 2015 ("Mr MacEwan's Affidavit");

h) the affidavit of Philip Walter Barber sworn 8 July 2015 ("Mr Barber's Affidavit");

i) the affidavit of Peter James Young sworn 10 August 2015 ("Mr Young's Affidavit");

j) the affidavit of Bradley Maxwell Nottle sworn 6 August 2015 ("Mr Nottle's Affidavit");

k) the affidavit of Bruce William Duckham sworn 26 May 2015 ("Mr Duckham's May 2015 Affidavit"); and

l) the affidavit of Bruce William Duckham sworn 22 February 2016 ("Mr Duckham's February 2016 Affidavit").

9. The Deputy Commissioner relies upon the following affidavits:

a) the affidavit of Pamela Comty sworn 11 March 2015 ("Ms Comty's March 2015 Affidavit");

b) the affidavit of Ms Melissa Anne Spurge sworn 28 May 2015 ("Ms Spurge's May 2015 Affidavit");

c) the affidavit of Ms Comty sworn 29 May 2015 ("Ms Comty's May 2015 Affidavit");

d) the affidavit of Ms Comty sworn 11 August 2015 ("Ms Comty's August 2015 Affidavit");

e) the affidavit of Elizabeth Robina Conquest sworn 11 August 2015 ("Ms Conquest's Affidavit"); and

f) the affidavit of Pamela Comty sworn 8 April 2016 ("Ms Comty's April 2016 Affidavit").

10. The Trustee filed an affidavit sworn 12 April 2016 ("Trustee's Affidavit").

Objections to evidence

11. A number of objections to evidence were dealt with at hearing, but the Deputy Commissioner's objections to Mr Vlad's various affidavits were left to be dealt with by the Court on the basis of objections sent to the Court by the Deputy Commissioner on 13 April 2016. In relation to those objections the Court has concluded that:

a) in relation to Mr Vlad's January 2015 Affidavit:

i) paragraphs 15 (first sentence commencing "and stated" onwards), 16(b) and (d) and (g), 32 (second sentence), 61, 63, 64 and 70 (second sentence) are to be struck out on the basis that they are hearsay;

ii) paragraphs 15 (second sentence) and 59 on the basis that they are either speculation, opinion or conclusion;

iii) paragraphs 16(e), 21, 24(g) and 54 on the basis that they are opinion or conclusion;

iv) paragraph 51 on the basis that it is speculation;

v) paragraphs 67 and Annexure TV 15 and 76 on the basis that they are opinion; and

vi) paragraph 70 on the basis that it is speculation or conclusion; and

b) in relation to Mr Vlad's February 2015 Affidavit:

i) paragraph 4 on the basis that it is opinion or conclusion;

ii) paragraphs 5 and 7 on the basis that they are hearsay; and

iii) paragraphs 10 and 12 on the basis that they are speculation;

c) in relation to Mr Vlad's 3 April 2015 Affidavit:

i) paragraphs 3(a), 3(c) (the first sentence of the second paragraph), 11 and Annexure TV 28, 22 (second sentence) and 43(c) (first sentence, commencing "and I would expect" onwards) on the basis that they are speculation or opinion;

ii) paragraph 8(a) (second sentence, commencing "he declined" and onwards) on the basis that it is hearsay;

iii) paragraph 15(c) and the reference to Attachment TV 11 to Mr Vlad's January 2015 Affidavit on the basis that it is hearsay, as it is relied upon as to the contents of the Attachment;

iv) paragraphs 25 and 26 on the basis that they are hearsay assuming a fact not in evidence; and

v) paragraphs 36 and Annexures TV 38 and TV 39 on the basis that they are hearsay;

d) in relation to Mr Vlad's July 2015 Affidavit, paragraph 8 and Annexure TV 5 on the basis that it is opinion; and

e) in relation to Mr Vlad's August 2015 Affidavit, paragraphs 18, 19, 20 and 21 on the basis of relevance.

12. Otherwise, objections to other affidavit material were dealt with at the hearing and appear in the Transcript.

13. The Court admitted the Pollock opinion on the basis that although it was hearsay for the purposes of the affidavit to which it was annexed, it was in the nature of expert evidence and was in relation to issues of relevance, and might be of assistance to the Court. As it has transpired,

the evidence of little assistance to the Court for reasons otherwise set out below: see [99] below.

Factual background/chronology

14. The relevant background chronology is set out hereunder.

15. On 12 July 1958 Mr Vlad was born in Romania: Mr Vlad's January 2015 Affidavit at [2].

16. From July 2002 until February 2009 Mr Vlad engaged in gambling both with the TAB and at Burswood Casino: Mr Vlad's January 2015 Affidavit at [7].

17. On 5 February 2003 Mr Vlad was registered as the proprietor of 26 Curtis Way, Girrawheen in the State of Western Australia: Mr Vlad's April 2015 Affidavit at [35] and Annexure TV 37 at page 375.

18. On 3 December 2004 Mr Vlad was registered as the proprietor of 4 Galen Court, Mirrabooka in the State of Western Australia: Mr Vlad's April 2015 Affidavit at [35] and Annexure TV 37 at page 378.

19. In the period 30 June 2006 to 30 June 2008 Mr Vlad deposited cash to his bank accounts as follows:

    a) for the period to 30 June 2006 - $67,470;

    b) for the period to 30 June 2007 - $41,550; and

    c) for the period to 30 June 2008 - $280,719:

    Mr Vlad's January 2015 Affidavit at [6].

20. For the years ending 30 June 2006 to 30 June 2008 Mr Vlad's income tax returns were prepared by professionals instructed by and paid for by Mr Vlad: Mr Vlad's January 2015 Affidavit at [57];

21. Between December 2006 and April 2007 Mr Vlad made various cash withdrawals at the Burswood Casino: Mr Vlad's April 2015 Affidavit at Annexure TV 26 at pages 166-170.

22. On 29 October 2007 Mr Vlad mortgaged the Girrawheen Property and the Mirrabooka Property to the Westpac Bank ("Westpac"): Mr Vlad's April 2015 Affidavit at [38] and Annexure TV 41 at pages 441-447.

23. Up to 2008 Mr Vlad was employed as a plumber's hand and a painting contractor's assistant: Mr Vlad's January 2015 Affidavit at [4].

24. On 26 March 2008 Mr Vlad acquired a farm property of 400 hectares at 17181 Dwarlaking Road, Bulyee in the State of Western Australia ("Bulyee Farm"): Mr Vlad's January 2015 Affidavit at [9] and Mr Vlad's April 2015 Affidavit at [35] and Annexure TV 37 at page 379.

25. From 2008 until 2009 the Deputy Commissioner carried out an audit of Mr Vlad's affairs: Mr Vlad's January 2015 Affidavit at [13]-[16].

26. On 6 October 2009 Mr Vlad received the Amended Assessments for the years ended 30 June 2006, 30 June 2007 and 30 June 2008, which Amended Assessments included as assessable income the proceeds of gambling, and penalties for recklessness in respect of the preparation of tax returns: Mr Vlad's January 2015 Affidavit at [18] [and] [117], and at that time Mr Vlad was advised by an accountant, Mr Papalia: Mr Vlad's January 2015 Affidavit at [20].

27. On 20 and 26 October 2009 and 16 November 2009 Mr Vlad prepared and lodged his own objections to the Amended Assessments: Mr Vlad's January 2015 Affidavit at [22] and Annexure TV 4 at page 54.

28. On 28 October 2009 there was a change in Mr Vlad's PAYG quarterly instalments for the year ended 30 June 2010 to $40,383 per quarter: Mr Vlad's April 2015 Affidavit at [27] and Annexure TV 36 at page 344.

29. On 9 November 2009 Mr Vlad's amended tax for the year ended 30 June 2008 in the sum of $146,930.12 was imposed: Mr Vlad's April 2015 Affidavit at page 34.

30. On 11 November 2009 the penalty for recklessness in the amount of $73,465.05 was imposed: Mr Vlad's April 2015 Affidavit at [3(c)] and Annexure TV 22 at page 34.

31. In the period from January until 23 March 2010 Mr Vlad was unwell and was hospitalised and subject to medical care: Mr Vlad's January 2015 Affidavit at [27]-[28] and Annexure TV 7 at pages 62-63.

32. On 2 March 2010 a debit of $76,156 to the RBA was posted for PAYG instalments for the period ended 31 December 2009: Mr Vlad's April 2015 Affidavit at [27(a)] and Annexure TV 36 at page 365.

33. On 24 March 2010 Mr Vlad's objections were disallowed, but Mr Vlad says he did not receive the reasons for the disallowance at that time and says he received them in 2015: Mr Vlad's January 2015 Affidavit at [24] and Annexure TV 5 at page 57 and Mr Vlad's April 2015 Affidavit at [12] and Annexure TV 29 at page 204 and following.

34. On 28 April 2010 Mr Vlad was notified that there was no tax payable for the quarter ended 31 March 2010: Mr Vlad's April 2015 Affidavit at Annexure Annexure TV 36 at page 354.

35. On 11 May 2010 Mr Vlad notified the ATO of a variation to the instalment amount for the quarter ended 31 March 2010: Mr Vlad's April 2015 Affidavit at Annexure TV 36 at page 337.

36. On 7 June 2010 Mr Vlad was advised by the ATO of a change to his PAYG instalment rates for the tax year ending 30 June 2010, with effect from 1 April 2010, namely $1,058.75 per quarter: Mr Vlad's April 2015 Affidavit at Annexure TV 36 at page 346.

37. On 3 August 2010 in a tax calculation which is plainly professionally prepared Mr Vlad's tax calculation for the year ended 30 June 2010 was nil: Mr Vlad's April 2015 Affidavit at Annexure TV 24 (last page).

38. On 16 February 2011 District Court proceedings were commenced by the Deputy Commissioner claiming $98,372.64: Mr Vlad's January 2015 Affidavit at [29] and Annexure TV 8 at page 65 and Ms Comty's March 2015 Affidavit at [3]-[4] and Annexure PC 1 at page 7.

39. In February 2011 Mr Vlad instructed a lawyer, a Mr Ashley Wilson, to assist him in the District Court proceedings: Mr Vlad's December 2011 Affidavit at [4], and on 16 March 2011 Mr Wilson entered a memorandum of appearance for Mr Vlad in the District Court proceedings: Mr Vlad's December 2011 Affidavit at [7].

40. On 12 April 2011 Mr Vlad was issued with an assessment for the year ended 30 June 2010 indicating no income and no tax payable, and an $80,766 tax credit: Mr Vlad's April 2015 Affidavit at Annexure TV 34 at page 327 and Annexure TV 36 at page 360.

41. On 28 April 2011 the Deputy Commissioner entered judgment in default of a defence in the District Court proceedings ("District Court Judgment"): Mr Vlad's December 2011 Affidavit at [9]; Mr Vlad's January 2015 Affidavit at [31] and Annexure TV 9; Ms Comty's March 2015 Affidavit at [5] and Annexure PC 2 at page 12.

42. On 22 November 2011 the Deputy Commissioner issued a Bankruptcy Notice dated 27 May 2011 on Mr Vlad: Mr Vlad's December 2011 Affidavit at [9].

43. On 27 November 2011 the Bankruptcy Notice was served on Mr Vlad: Mr Vlad's January 2015 Affidavit at [41].

44. On 7 December 2011 Mr Vlad commenced an application to set aside the District Court Judgment and to extend time to comply with the Bankruptcy Notice, using the services of a Mr Sklarz, a barrister and solicitor, and Mr Vlad's December 2011 Affidavit was sworn in support thereof: Mr Vlad's January 2015 Affidavit at [33]; Mr Vlad's December 2011 Affidavit at [13]; Ms Comty's March 2015 Affidavit at [7] and Annexure PC 3 at page 13. (Mr Vlad's December 2011 Affidavit appears at Ms Spurge's May 2015 Affidavit at Annexure MS 1 commencing at page 4). Mr Vlad utilised Mr Sklarz's services until October 2012: Mr Vlad's January 2015 Affidavit at [35].

45. On 16 December 2011 Virginia Kevorkian on behalf of the Deputy Commissioner provided an affidavit ("Ms Kevorkian's December 2011 Affidavit") opposing the setting aside of the District Court Judgment and explaining the debt due, and including evidence that Mr Vlad received credits in the sum of $85,842 when assessing Mr Vlad's liability for the years ended 30 June 2009 and 30 June 2010: Mr Vlad's April 2015 Affidavit at [27] and Annexure TV 36 at page 333; Ms Spurge's May 2015 Affidavit at [7] and Annexure MS 3 at page 36.

46. On 3 January 2012 Mr Vlad employed a Mr Cooke as his accountant to advise him on income tax procedure: Mr Vlad's January 2015 Affidavit at [36].

47. On 9 January 2012 Mr Vlad swore another affidavit in the District Court proceedings to set aside the District Court Judgment ("Mr Vlad's January 2012 Affidavit"): Ms Spurge's May 2015 Affidavit at Annexure MS 2 at page 33.

48. On 10 January 2012 a Deputy Registrar of the District Court dismissed Mr Vlad's application to set aside the District Court Judgment ("District Court Set Aside Judgment"): Ms Comty's March 2015 Affidavit at [9] and Annexure PC 4 at page 15.

49. On 20 January 2012 Mr Vlad filed a notice of appeal in the District Court in relation to the District Court Set Aside Judgment: Ms Comty's March 2015 Affidavit at [10] ("District Court Appeal").

50. On 30 January 2012 Mr Vlad made an application to the ATO to pay by instalments (using Mr Cooke to make the application), which application was refused on 6 February 2012, with the ATO's refusal letter noting that "The financial information accompanying the Proposal indicates that your client has substantial assets. No information has been provided with respect to any actions taken by your client to rearrange his finances or borrow against these assets in order to meet the debt": Mr Vlad's January 2015 Affidavit at [37] and Annexure TV 10 at page 101.

51. On 1 February 2012 Mr Vlad swore an affidavit in support of the District Court Appeal ("Mr Vlad's February 2012 Affidavit"): Ms Comty's March 2015 Affidavit at [13] and Annexure PC 5 at page 18.

52. On 13 March 2012 Mr Vlad's then lawyer, Mr Sklarz, was sent a letter by Mr Mark Pollock, a director of BDO Tax (WA) Pty Ltd in which it was noted that taxpayers who disagreed with Amended Assessments may lodge a formal objection in the required format and within the required time period, and that there may be grounds to argue that Mr Vlad's response to the ATO was not a formal objection. Mr Pollock went on to suggest that certain deposit slips "appear to have been

ignored by the ATO" and suggested that Mr Vlad's Amended Assessments "appear to have been overstated" by a sum of $156,724.02 over the three years to the year ended 30 June 2008: Mr Vlad's April 2015 Affidavit at Annexure TV 35 at page 330.

53. On 11 May 2012 Mr Vlad sought an expert opinion from Mr Pollock who provided an affidavit and report in support of Mr Vlad's District Court Appeal: Mr Vlad's January 2015 Affidavit at [37]-[39] and Annexure TV 10 at page 101 and Annexure TV 11 at page 103.

54. Mr Pollock's 11 May 2012 Affidavit ("Mr Pollock's Opinion") attaches the Deputy Commissioner's October 2009 decisions in relation to the Amended Assessments, including the reasoning, and a covering letter dated 6 October 2009 from the ATO, addressed to Mr Vlad, care of "BHR Papalia" his then accountant: see [26] above, informing Mr Vlad of his rights to challenge the Commissioner's decisions: Mr Vlad's January 2015 Affidavit at Annexure TV 11 at page 112. The ATO letter:

a) enclosed the "Taxpayers Charter Explanatory Booklet" explaining what a taxpayer could do if they believed their legal right, or the ATO's service and other standards had not been met;

b) explained that there was a right to object to the assessment of the revised amounts, the assessment of income tax to be paid and any administrative penalties that had been assessed; and

c) gave advice as to how an objection must be lodged and the time limits which applied when lodging an objection.

The ATO letter, on its face, was sent to Mr Vlad's then accountant, BHR Papalia, at a post office box address in Balcatta in Western Australia and was copied to Mr Vlad at the Girrawheen Property address: Mr Vlad's January 2015 Affidavit at Annexure TV 11 at pages 112-113.

55. On 27 August 2012 orders were made dismissing the District Court Appeal in relation to the District Court Set Aside Judgment: Mr Vlad's January 2015 Affidavit at [33]; Ms Comty's March 2015 Affidavit at [14] and Annexure PC 6 at page 22.

56. On 29 August 2012 Mr Vlad was advised by Mr Sklarz of an entitlement to pursue a review in the Administrative Appeals Tribunal ("AAT"), with that advice indicating that it may be futile to do so, and that it would not operate to stop recovery action by the Deputy Commissioner: Mr Vlad's April 2015 Affidavit at [23] and Annexure TV 31 at page 267.

57. On 12 December 2012 Mr Vlad wrote to the Commonwealth Ombudsman who responded by saying that he would not investigate his complaint as there were review mechanisms available to dispute the debt, and referred Mr Vlad to the ATO website in relation to the lodgement of an objection: Mr Vlad's January 2015 Affidavit at [26] and Annexure TV 6 at pages 60-60A.

58. On 19 April 2013 the Deputy Commissioner issued a second Bankruptcy Notice in reliance upon the District Court Judgment: Ms Comty's March 2015 Affidavit at [19] and Annexure PC 7 at page 41.

59. On 23 May 2013 the Deputy Commissioner served the Second Bankruptcy Notice on Mr Vlad: Ms Comty's March 2015 Affidavit at [16] and Annexure PC 7 at page 23.

60. On 10 December 2013 the Deputy Commissioner filed a Creditor's Petition for the sequestration of Mr Vlad's estate: Ms Comty's March 2015 Affidavit at [17]. The Creditor's Petition was served on Mr Vlad the same day as it was filed: Ms Comty's March 2015 Affidavit at [18].

61. On 17 December 2013 an affidavit of service of the Creditor's Petition was sworn by Helen Shaw: Ms Comty's March 2015 Affidavit at [19] and Annexure PC 7 at page 23.

62. On 4 February 2014 Mr Vlad was made bankrupt by the issuance of the Sequestration Order a Registrar of this Court: Ms Comty's March 2015 Affidavit at [21] and Annexure PC 8 at page 47, at a hearing at which Mr Vlad was not present: Mr Vlad's January 2015 Affidavit at [45]-[46] and Annexure TV 13 at page 191.

63. On 9 May 2014 Mr Vlad signed a statement of affairs: Mr Vlad's January 2015 Affidavit at [47] and Annexure TV 14 at page 193.

64. In June 2014 Mr Vlad attended Joondalup Hospital to deal with a hernia, but a haematoma resulted which burst two weeks later, which resulted in a substantial infection for which Mr Vlad had to return to hospital. Mr Vlad was in hospital for one and a half weeks on the first occasion and almost three weeks on the second occasion: Mr Vlad's January 2015 Affidavit at [28(d)-(e)].

65. On 3 July 2014 Mr Vlad received a notice of demand from Westpac, in relation to which Westpac has taken no further action: Mr Vlad's January 2015 Affidavit at [50] and Annexure TV 16 at page 224.

66. In September 2014 Mr Vlad engaged Mr Fickling, a barrister, to obtain advice about tax, and became aware of a further debt of approximately $300,000: Mr Vlad's February 2015 Affidavit at [3] and Annexure TV 18 at page 6.

67. On 16 January 2015 Mr Vlad prepared a statement of assets and liabilities as at 4 February 2014, which is based on Mr Vlad's own estimates, and excludes his liability to the Deputy Commissioner: Mr Vlad's January 2015 Affidavit at [48] and Annexure TV 15 at page 222, which is said to show, excluding the contingent taxation liability of $457,749.89, that Mr Vlad had an excess of assets over liabilities of $1,737,033.61 with the major assets being the Girrawheen Property and the Mirrabooka Property which he valued at $420,000 each, the Farm which he valued at $700,000, stock including 5,000 ewes and rams and 1,500 goats which combined were valued at $775,000, and various farming equipment and machinery valued at $50,450. The principal liabilities (not including taxation) were a mortgage to Westpac in the sum of $597,000 and a liability to the Water Corporation of $32,543.06: Mr Vlad's January 2015 Affidavit at [48] and Annexure TV 15 at page 222.

68. On 21 January 2015 Mr Vlad filed with the Federal Court an application to annul his bankruptcy.

69. As at 27 February 2015 Mr Vlad owed to the Commissioner $462,984.29, which includes the debt the subject of the District Court Judgment in the amount of $99,054.29: Ms Comty's March 2015 Affidavit at [22]-[23].

70. On 1 April 2015 Mr Vlad received advice that the payout figure for his debt to Westpac was $619,987.80: Mr Vlad's April 2015 Affidavit at [37] and Annexure TV 40 at page 438.

71. On 6 April 2015 Mr Vlad visited the Bulyee Farm and claimed to have noticed damage and property (including livestock) which were missing and filed a report with the police and later made an insurance claim: Mr Vlad's April 2015 Affidavit at [43] and Annexures TV 46 and TV 47 at pages 471 and 475; Mr Duckham's May 2015 Affidavit at [7].

72. On 8 April 2015 Mr Vlad's new lawyers, BW Duckham & Co, advised Mr Vlad that it was possible to make an application out of time in which to appeal the disallowance of his objections to the Amended Assessments: Mr Vlad's April 2015 Affidavit at Annexure TV 28 at pages 199-203.

Review of Registrar's decision

Extension of time

73. In order for the Court to deal with Mr Vlad's application for review of a Registrar's decision to issue the Sequestration Order Mr Vlad needs an extension of time in which to make that application.

74. At the instance of an applicant or respondent, a decision of a Registrar of this Court can only come before a Judge by way of a review under s.104(2) and (3) of the *Federal Circuit Court of Australia Act 1999* (Cth) ("*FCCA Act*").

75. There is a time limit to make an application for a review of a Registrar's decision. That limit is 21 days: *Federal Circuit Court (Bankruptcy) Rules 2005* (Cth), r.2.03(1)

76. This application was made on 21 January 2015 in relation to the Sequestration Order issued on 4 February 2014. The application for review ought therefore to have been made by 25 February 2014, and is made 330 days out of time, that is almost 16 times the period of the legislative limitation period. An extension of time is sought.

Factors for consideration on an extension of time application

77. In the exercise of its discretion to extend time in which to file an application for review, this Court's discretion is unfettered, but it is generally accepted that it may apply the factors set out by the Federal Court in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344; (1984) 58 ALR 305; (1984) 7 ALD 315 ("*Cohen*") namely:

    a) the extent of the delay;

    b) the explanation for the delay;

    c) the prejudice to the respondent; and

    d) the prospects of success of the underlying application.

    Cohen FCR at 348-349 per Wilcox J; *Winn v Blueprint Instant Printing Pty Ltd* [2011] FCA 292 at [15]-[16] per Ryan J.

Extent of delay

78. The delay in this case is 330 days, or almost 16 times the relevant limitation period. There is therefore a very considerable delay in the context of the relevant time limit.

79. It is generally recognised that the greater the period of delay the more persuasive the explanation needs to be in order to justify the extension of time: *Manoher v Minister for Immigration, Local Government and Ethnic Affairs (No.2)* (1991) 24 ALD 410 at 411 per Lee J; *Tran v Minister for Immigration & Border Protection* [2014] FCA 533 at [38] per Wigney J ("*Tran*"). In *Tran* an 18 month delay in relation to a limitation period of 35 days was held to be excessive in circumstances where the explanation was neither adequate nor satisfactory: *Tran* at [35] per Wigney J.

Explanation for delay

80. Mr Vlad's explanation for the delay in making the application is that:

    a) he was medically indisposed: Mr Vlad's January 2015 Affidavit at [28]; and

b) he received no professional advice as to his rights to make such an application: Mr Vlad's April 2015 Affidavit at [23]-[24].

81. The evidence indicates that Mr Vlad first became medically indisposed during the relevant period in June 2014, that is some four months or approximately 120 days after the Sequestration Order was made. Again, there is no explanation as to why Mr Vlad did not make his application for review of the Registrar's Order within time, or at least within the extended time, again many times the relevant limitation period, prior to attending Joondalup Hospital in June 2014, and returning to hospital for a number of weeks over the next two months.

82. The evidence concerning Mr Vlad's medical indisposition during the relevant period indicates that he was medically indisposed for a maximum period of six and a half weeks from June 2014, and even with the benefit of the doubt, and assuming that he was medically indisposed for a period of up to three months, there is still a delay in excess of 230 days in making the application, which otherwise remains unexplained.

83. For reasons set out in considerable detail below: see [124]-[131] below, Mr Vlad was not without access to financial and legal advice from qualified legal and accounting professionals. There is nothing in the evidence which accounts for the delay of some 330 days. Mr Vlad engaged Mr Fickling, a barrister, to obtain advice about tax some four months prior to eventually making the application on 21 January 2015. There is no explanation as to why an application could not have been made after Mr Vlad had engaged Mr Fickling, or as to what advice Mr Fickling did or did not give him about obtaining or applying for an extension of time in which to review the Sequestration Order. The delay between September 2014 and 21 January 2015 is well in excess of 100 days, and again therefore many times the relevant time limitation.

84. In all of the above circumstances there is simply no proper or acceptable explanation for the very considerable delay in making the application.

Prejudice to the Trustee and the Deputy Commissioner

85. There is prejudice to both the Trustee and the Deputy Commissioner if time is extended. There is no suggestion in Mr Vlad's Submissions as to how the costs of the Trustee already incurred might properly be met, and Mr Vlad has incurred, and continues to incur, an ongoing and substantial tax liability to the Deputy Commissioner, and costs in relation to this litigation, which may or may not be recoverable, in whole or part when the Trustee finally deals with Mr Vlad's bankrupt estate. Having regard to the lack of prospect of success of the underlying application (as to which see [89]-[111] below), there would be significant prejudice to the Trustee and Deputy Commissioner if time to make the application were to be extended.

Prospects of success of underlying application

86. Because there is not yet a review application on foot (because Mr Vlad needs an extension of time in which to file a review application) it was unnecessary for the Deputy Commissioner to file the usual affidavits for the purposes of the then applicable *Federal Circuit Court (Bankruptcy) Rules 2006* (Cth) ("*FCC Bankruptcy Rules*").

87. In terms of assessing the success of the underlying application that can be done by reference to the parties' arguments concerning solvency and other sufficient cause for the purposes of s.52(2) of the *Bankruptcy Act*.

Section 52 of the *Bankruptcy Act*

88. Section 52(1) and (2) of the *Bankruptcy Act* relevantly provides as follows:

> *(1) At the hearing of a creditor's petition, the Court shall require proof of:*
>
> *(a) the matters stated in the petition (for which purpose the Court may accept the affidavit verifying the petition as sufficient);*
>
> *(b) service of the petition; and*
>
> *(c) the fact that the debt or debts on which the petitioning creditor relies is or are still owing;*

and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor.

(2) If the Court is not satisfied with the proof of any of those matters, or is satisfied by the debtor:

(a) that he or she is able to pay his or her debts; or

(b) that for other sufficient cause a sequestration order ought not to be made;

it may dismiss the petition.

Whether Mr Vlad is solvent

89. Solvency means being "able to pay all … debts, as and when they become due and payable": *Bankruptcy Act*, s.5(2). Solvency is relevantly expressed in terms of a debtor being "able to pay his or her debts": *Bankruptcy Act*, s.52(2)(a).

90. If Mr Vlad can prove to the Court that he is solvent the Court may dismiss the Creditor's Petition: *Re Sanders; Knudsen and Yates (t/a The Hargreaves Practice) v Sanders* [2003] FCA 1079; (2003) 1 ABC(NS) 408 ("*Re Sanders*") at [22] per Bennett J ("*Re Sanders*").

91. Solvency requires that Mr Vlad be able to pay debts as they fall due out of his own money. This includes both cash on hand and money reasonably quickly realisable by asset realisation. Temporary lack of liquidity will not generally constitute insolvency: *Sandell v Porter & Anor* (1966) 115 CLR 666; (1966) 40 ALJR 71; CLR at 670 per Barwick CJ.

92. Account must be taken of debts "which will fall due in the reasonably immediate future pursuant to existing obligations": *Re Sanders* at [27] per Bennett J, and whether Mr Vlad will be able to pay them: *Re Sanders* at [26] per Bennett J; *International Alpaca Management Pty Ltd v Ensor* [1999] FCA 72 at [8]-[10] per Katz J ("*International Alpaca*"); *Bank of Australasia v Hill* (1907) 4 CLR 1514; (1907) 14 ALR 51; CLR at 1527 per Griffith CJ. Even where assets exceed liabilities it is possible to find that a person is not able to pay their debts within the meaning of s.52(2)(a) of the *Bankruptcy Act*: *Re Sanders*, affirmed on appeal in *Sanders v Knudsen & Yates trading as The Hargreaves Practice* [2004] FCAFC 305 at [14] per Whitlam,

Branson and Sackville JJ; *Re Lakatos; Ex parte Lakatos v Deputy Commissioner of Taxation* (1996) 33 ATR 145. What has to be proved is that assets are available to be realised and capable of ready realisation likely to result in payment of outstanding debts within a reasonable time: *Re Sanders*. In assessing solvency the Court ought not take account of realisable assets required for Mr Vlad to live a reasonably comfortable and dignified existence: *International Alpaca* at [15]-[16] per Katz J.

93. If Mr Vlad is in a position to pay debts owed within a reasonable time, no sequestration ought be made: *Re Sarina, Ex parte Council of the Shire of Wollondilly* (1980) 43 FLR 163; (1980) 30 ALR 266; FLR at 165 per Deane J; *Sarina v Council of the Shire of Wollondilly* (1980) 48 FLR 372; (1980) 32 ALR 596; FLR at 376 per Bowen CJ, CA Sweeney and Lockhart JJ. It is Mr Vlad who must prove that his assets are sufficiently susceptible to liquidation to enable him to pay his liabilities as and when they become due and payable: *Esanda Finance Corp Ltd v Velissaris* [1999] FCA 1359.

94. In determining this issue the Court notes that although Mr Vlad's "expert evidence" purports to value the plant, equipment and livestock, the "experts", particularly in relation to the farming plant, equipment and livestock, generally the expert evidence does not provide any sound basis for their valuations, and the nature of the evidence led was not such that the Court places significant weight upon it, insofar as the evidence of farming plant, equipment and livestock is concerned. More particularly, the expert evidence does not, and nor does the evidence of Mr Vlad, provide any evidence of Mr Vlad's ability to readily realise his assets, be it the Farm, or the Girrawheen or Mirrabooka Properties, the livestock, or the plant and equipment. In that regard, the Court notes that the evidence of Mr MacEwan and Mr Barber is silent in relation to realisation of assets, and the evidence of Mr Gamble as to the realisation of livestock assets was struck out. Having regard to the Trustee's Affidavit there must in any event be considerable doubt as to the amount of livestock upon the Farm at the time the Sequestration Order was made. The Trustee cannot be criticised for not preparing an inventory prior to Mr Vlad reporting missing livestock and damaged property as reg.16.03 of the *Bankruptcy Regulations 1996* (Cth) only requires the Trustee to prepare an inventory "as soon as is reasonably

practicable", and in these circumstances it was not reasonably practicable to do so earlier by reason of the fact that Mr Vlad could not be found and the Farm could not be accessed because gates were locked.

95. Although the "reports" of Messrs Gamble, Young, Barber, Nottle and McEwan were admitted into evidence, the Court's reliance upon them is significantly diminished by reason of the fact that:

a) no proper letter of instruction appears to have been provided to the expert in any instance;

b) Mr Barber does not appear to have been provided with the Federal Court's guidelines for expert evidence ("Expert Evidence Guidelines");

c) the independence of some of the experts is questionable given that each of the affidavits of Messrs McEwan, Young and Gamble are said to be "sworn in support of the claim of … [Mr Vlad] in these proceedings";

d) although Messrs Gamble and Barber to ascribe values to livestock in their reports, the basis for such values, other than their experience, is not evident, and there is none of the basic underpinning information which a Court would expect of an expert in such circumstances, including comparative prices at the relevant times as achieved at livestock sales within the relevant region;

e) neither Messrs Gamble nor Barber undertook a proper inspection of the livestock, and there is no indication that they properly determined numbers, breed, age or the pregnancy status of the livestock; and

f) the visual inspection of the farming plant and equipment by Mr Barber did not include a determination of the usage level or working order of the plant and equipment concerned.

96. Although there is market valuation of the Farm for $700,000, there is again no evidence of how or when that property might be realised to meet outstanding debts.

97. There is no expert evidence of the value of the Girrawheen Property or the Mirrabooka Property, or how or when those two properties might be realised in order to meet any debts due.

98. Mr Vlad raised questions as to instalment amounts and credits due: Mr Duckham's May 2015 Affidavit at [2] and Annexure BWD at page 4. The issue was dealt with in the District Court proceedings and was addressed both by Mr Vlad and the Deputy Commissioner's Affidavits at that time: see Ms Comty's May 2015 Affidavit at [6] and Annexure PC 3 and Ms Spurge's May 2015 Affidavit at [6]-[7] and Annexures MS 2 at page 34 and MS 3 at page 39. In particular, Mr Vlad was given credit of $80,766 in relation to his income tax liabilities as at 30 June 2010: Ms Spurge's May 2015 Affidavit at page 63; Ms Comty's May 2015 Affidavit at page 17 and Ms Comty's April 2016 Affidavit at page 19.

99. Mr Pollock's opinion does not assist Mr Vlad. At its heart it rests upon the contention that Mr Vlad's income in the relevant years was primarily the result of gambling, which Mr Pollock has characterised as a hobby. Given the frequency of the gambling, the substantial sums of money, running to several hundred thousand dollars made by Mr Vlad, the characterisation of that income as being derived from a hobby is not persuasive in the Court's view. The better view is that it was income, and income in respect of which Mr Vlad ought to have accounted to the Deputy Commissioner, but did not, and in relation to which the Deputy Commissioner was entitled to both assess that income and impose the penalties that were imposed upon Mr Vlad. It is obvious that the winnings were of such frequency and of such amounts that they were a means of earning income, and not a hobby, and in relation to which all appropriate records ought to have been kept.

100. Mr Vlad has no cash on hand or income from which to satisfy his debts. Mr Vlad deposed that for the years 5 February 2013 to 5 February 2014 and 5 February 2014 to 4 February 2015 his income in each of those years had been nil, and further that it was anticipated that his income for the 12 months from 5 February 2015 to 4 February 2016 would also be nil.

101. In relation to liabilities Mr Vlad has significant debts.

102. Mr Vlad's debts as at the date of the Sequestration Order on 4 February 2014 were $875,765.09: Ms Comty's April 2016 Affidavit at PC 5.

103. Mr Vlad's taxation liability has continued to grow by reason of his failure to discharge it and as at 8 April 2016 was $597,952.14: Ms Comty's April 2016 Affidavit at [7]. Further, as at 8 April 2016 Mr Vlad's total liabilities were $960,164.66: see Trustee's August 2015 Affidavit at GAL 1 at page 5.

104. Mr Vlad asserts that the Court ought to be satisfied, notwithstanding the proof of the matters in the Creditor's Petition, that for the purposes of s.52(2) of the *Bankruptcy Act* he has the ability to pay his debts.

105. The Court notes that Mr Vlad has not evinced an ability to meet the debts that he does owe, including obligations owing since late 2009. In that regard, the Court notes that there is no indication that (save for the Girrawheen Property) Mr Vlad has endeavoured to make appropriate arrangements to dispose of any assets, or to rearrange his finances by mortgaging, or further mortgaging, assets, or otherwise borrowing to meet his liabilities. It is therefore the case that notwithstanding that he might have, as the Deputy Commissioner early observed "substantial assets", if he is not prepared to sell or further encumber those assets, or if, as the Court has found and finds, that there is no, or no sufficient, evidence that Mr Vlad's assets are readily able to be liquidated, the fact that his assets might exceed his liabilities does not mean that he is solvent.

106. Upon a consideration of the matters set out above the Court is of the view that Mr Vlad is not solvent, having evinced no evidence, and demonstrating no means, by which he may pay his outstanding debts, either presently or within a reasonable time. In all of the above circumstances, the Court is of the view that Mr Vlad has not demonstrated an ability to pay his debts for the purposes of s.52(2)(a) of the *Bankruptcy Act*. There is therefore no basis for extending time in which to file the application for review of the Registrar's decision to issue the Sequestration Order on the basis that Mr Vlad is solvent or able to pay his debts.

Whether other sufficient cause for Sequestration Order not to be made

107. The term "other sufficient cause" in s.52(2)(b) of the *Bankruptcy Act* is construed broadly by the Courts: *Totev 2008* at [87] per Cowdroy J; *Totev 2006* at [44] per Allsop J. In *Totev 2006* at [37] per Allsop J (citing *Cain v Whyte* (1933) 48 CLR 639; (1933) 6 ABC 117; (1933) 6 ALJ 457 ("*Cain*")) the Federal Court observed that:

> *On proof of the matters in s 52(1) of the Act, the Court will generally proceed to make a sequestration order unless the debtor is able to persuade the Court that the public interests in dealing with the insolvent debtor and the rights of individual creditors are outweighed by other considerations.*

108. In *Cain* CLR at 648 per Rich J (with whom Starke, Dixon, Evatt and McTiernan JJ agreed: CLR at 648) the High Court, in dismissing an appeal, agreed with the judgment of the Court of Bankruptcy (District of Southern Queensland), which had observed as follows: CLR at 645-646:

> *...To my mind, the High Court of Australia did not intend to put a limit on the meaning of the words "other sufficient cause" in Dowling v. Colonial Mutual Life Assurance Society (1915) 20 CLR 509, and I do not propose to be the first to say that such wide words as "other sufficient cause" are necessarily limited to meaning a cause in the nature of fraud or abuse of the provisions of the bankruptcy law. I can well conceive that "other sufficient cause" might arise in connection with any particular case. To my mind, it is the duty of the Bankruptcy Judge to examine in each case, if the question is raised, whether there is other sufficient cause than the fact that the debtor is able to pay his debts in full, for refusing to make an order.*
>
> *I rule then that I am fully entitled to examine the contention put forward by Mr. Philp on behalf of the debtor that there is, in the present case, other sufficient cause sufficient to justify the dismissal of this petition. I approach that question with the full appreciation that, prima facie, on proof of the matters mentioned in sec. 56 (2), the Court will proceed to make an order for sequestration, and that it is for the debtor to show some cause overriding the interest of the public in the stopping of unremunerative trading, and the rights of individual creditors who are unable to get their debts paid*

> *to them as they become due. Something has to be put before the Court to outweigh those considerations before it can be said that sufficient cause is shown against the making of a sequestration order. ...*

109. In *Re Svir; Ex parte Commissioner of Taxation* (1998) 83 FCR 314; (1998) 39 ATR 113; (1998) 154 ALR 710; FCR at 317 per Burchett J ("*Svir*") the Federal Court (after referring to the above passage from *Cain*) highlighted the need to have regard to the interests of the public and creditors when assessing whether an "other cause" raised by an applicant is "sufficient" for the purposes of exercising its otherwise wide discretion under s.52(2) of the *Bankruptcy Act*:

> *This exposition of the law emphasises the width of the discretion conferred by the 1966 Act upon the Court. At the same time it points to a fundamental limitation imposed by the nature of the jurisdiction in bankruptcy, which requires the Court to keep in mind, not only the interests of the individual parties before it in the particular case, but also the public interest, which may be adversely affected by the propping up of insolvency. However, in the present case that factor does not provide the bar to an exercise of discretion in the debtor's favour that it would provide in many cases, since the debtor has a paucity of creditors, other than the petitioning creditor, who would be likely to have any reason for concern. Of course, that merely removes a bar; it does not provide a positive ground constituting "other sufficient cause" why a sequestration order ought not to be made.*

110. In summary, it can be said that an "other sufficient cause" for the purposes of dismissing a creditor's petition is not limited and that the *Bankruptcy Act* confers a discretion on the Court which in its terms is unconfined: *Baker v Perpetual Trustee Company Limited* [2012] FCA 553; (2012) 204 FCR 593 at [35] per Katzmann J.

111. Mr Vlad's Submissions focussed upon the issue of his solvency, and in that regard also attacked his taxation liabilities. For reasons otherwise set out in these Reasons for Judgment the attack upon his taxation liabilities has not been made out, and does not provide another sufficient cause sufficient to warrant the dismissal of a Creditor's Petition. In the circumstances, there is no "other sufficient cause" which would warrant granting an extension of time in which to make an application to review the Registrar's decision to issue a Sequestration Order on 4 February 2014.

Consideration of extension of time application

112. Having regard to the fact that:

a) there is a very lengthy delay;

b) there is no reasonable or satisfactory explanation for the delay;

c) there is considerable prejudice, particularly financial, to the Deputy Commissioner; and

d) the underlying application if permitted has no reasonable prospect of success,

the Court, in the exercise of its discretion, has determined that there should not be an extension of time in which to file the application for review of the Registrar's decision to issue the Sequestration Order. Indeed, the Court is of the view that the extent of the unexplained delay, some 330 days or nearly 16 times the relevant limitation period, or if allowance is given for a period of three months' medical indisposition, in excess of 230 days or approximately 11 times the relevant limitation period, is such a considerable delay that it warrants the dismissal of the application for an extension of time in which to apply for the review. That would be so in all of the circumstances even if there were merit in the underlying application, which there is not: *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; (1996) 70 ALJR 866; (1996) 139 ALR 1; CLR at 553 per McHugh J where it was observed that the effect of a limitation period can be such that it may often result in a good cause of action being defeated, and *Re Commonwealth of Australia & Anor; Ex parte Marks* [2000] HCA 67; (2000) 75 ALJR 470; (2000) 177 ALR 491 at [13]-[16] per McHugh J.

113. It follows therefore that Mr Vlad's application for an extension of time in which to apply for a review of the Registrar's decision to issue the Sequestration Order will be dismissed. There will be an order accordingly. In those circumstances, it is unnecessary to make a further order dismissing the purported, but incompetent, review application: *BZABK v Minister for Immigration & Citizenship & Anor* [2012] FCA 774; (2012) 205 FCR 83 at [43] per Foster J.

Annulling a bankruptcy

114. Section 153B(1) of the *Bankruptcy Act* provides as follows:

> *(1) If the Court is satisfied that a sequestration order ought not to have been made or, in the case of a debtor's petition, that the petition ought not to have been presented or ought not to have been accepted by the Official Receiver, the Court may make an order annulling the bankruptcy.*

115. The relevant law has been conveniently summarised by the Full Court of the Federal Court of Australia in *Francis v Eggleston Mitchell Lawyers Pty Ltd* [2014] FCAFC 18; (2014) 12 ABC(NS) 25 at [16] per Rares, Flick and Bromberg JJ ("*Eggleston Mitchell*") adopting what was said in *Bulic v Commonwealth Bank of Australia Ltd* [2007] FCA 307; (2007) 5 ABC(NS) 122 at [12] per Tracey J ("*Bulic*"), as follows:

> *16 Tracey J helpfully summarised a number of principles relevant to the exercise of the discretionary power conferred by s 153B in Bulic v Commonwealth Bank of Australia Limited [2007] FCA 307 at [12] including the following:*
>
> > *"Section 153B(1) and its predecessors have been considered in many decisions of this and other Courts. These authorities establish a number of relevant propositions. They are:*
> >
> > *...*
> >
> > *(2) An applicant who seeks an annulment of his or her bankruptcy 'carries a heavy burden'. It is incumbent on an applicant 'to place before the Court all relevant material with respect to his or her financial affairs so that the Court may be properly informed and may make a judgment that is based on the actual circumstances of the applicant': Re Papps; Ex parte Tapp (1997) 78 FCR 524 at 531.*
> >
> > *(3) In determining whether or not a sequestration order 'ought not to have been made' the Court is not confined to a consideration of whether the order should have been made on the facts known to the Court at the time at which it was made. The Court must take account of facts, known at the time at which the sequestration order was made and at which it determines an annulment application, even if those facts were not before the Court at the time at which the sequestration order was made: Boles v Official Trustee in*

Bankruptcy (2001) 183 ALR 239 at 243;; Re Raymond; ex parte Raymond (1992) 36 FCR 424 at 426.

(4) A sequestration order 'ought not to have been made' if, on the facts known at the time of the annulment application, the Court would have been bound not to make the sequestration order: Re Frank; ex parte Piliszky (1987) 16 FCR 396.

…

(6) If the Court is so satisfied, it is not precluded from annulling the bankruptcy because the bankrupt had not sought to have the default judgment set aside or failed to oppose the creditor's petition or failed to seek a review of the sequestration order: Re Raymond; ex parte Raymond (1992) 36 FCR 424 at 426.

(7) The power conferred on the Court by s 153B(1) is discretionary in nature. Even if persuaded that the sequestration order ought not to have been made, the Court can, in appropriate circumstances, decline to annul the bankruptcy: Boles v Official Trustee in Bankruptcy (2001) 183 ALR 239 at 243.

(8) Considerations which may have a bearing on the exercise of discretion include unexplained delay in the making of the application, whether or not the applicant is solvent, whether or not the applicant has made full disclosure of his or her financial affairs and a failure by the bankrupt to oppose the creditor's petition and attend the hearing at which the sequestration order was made: Re Williams (1968) 13 FLR 10 at 24-5;; Boles at 247; Re Papps; ex parte Tapp (1997) 78 FCR 524 at 531; Rigg v Baker (2006) 155 FCR 531 at 548 [79] (per French J); Cottrell v Wilcox [2002] FCA 1115 at [7]. Additional considerations are collected in D. A. Hassall, 'Annulment of Bankruptcy and Review of Sequestration Orders' (1993) 67 ALJ 761 at 766."

116. In relation to circumstances where a court might exercise the discretion not to annul a bankruptcy even where the original sequestration order ought not to have been made the Full Court of the Federal Court in *Boles v Official Trustee in Bankruptcy* [2001] FCA 639; (2001) 183 ALR 239 at [36]-[40] per Emmett J (with whom Katz and Coni JJ

agreed) ("*Boles*") and said that reasons the discretion might not be exercised included:

a) that an applicant was not entirely frank in his application to the court for an annulment;

b) that the applicant had not assisted the Trustee in Bankruptcy in the administration of the bankrupt estate, for example, where the applicant's statement of affairs provided little financial information concerning the applicant's affairs, no information about how he has managed to live without funds, or, where the applicant has given no information as to the source of funds for the purchase of significant assets; and

c) the adequacy of the explanation for any delay in making the application.

117. An applicant for annulment thus carries a heavy onus to establish that a Registrar was "bound not to make" a sequestration order, and even then there is a discretion in the Court to refuse the application for annulment even though the Court has found that the Registrar was bound not to make the sequestration order: *Boles*.

Consideration of issues in relation to the application to annul the bankruptcy of Mr Vlad

Failure to attend the hearing

118. Mr Vlad appears to assert that he was not present at the hearing of the Creditor's Petition because he understood that there was no way available to him to resist the orders then being sought: Mr Vlad's April 2015 Affidavit at [30(c)]. On the available evidence, Mr Vlad, having taken advice from Mr Sklarz, was informed that there was no basis to resist the present Bankruptcy Notice as the District Court Judgment had not been set aside: Mr Vlad's April 2015 Affidavit at [30(b)], and voluntarily chose not to seek further advice in relation to the Creditor's Petition: Mr Vlad's April 2015 Affidavit at [30(c)].

119. Mr Vlad concedes he knew of the hearing of the Creditor's Petition, but did not attend relying on his understanding that he could not resist the orders made: Mr Vlad's April 2015 Affidavit at [30(c)]. The terms

of the Creditor's Petition make it plain that orders may be made in the absence of the alleged debtor: Ms Comty's March 2015 Affidavit at [19] and Annexure PC 7 at page 27.

120. There is no challenge to the Bankruptcy Notice which underlies the Creditor's Petition, or to the form of the Creditor's Petition, or any notice given in accordance with the Creditor's Petition to Mr Vlad. The application for an extension of time in which to review the Registrar's decision to issue the Sequestration Order having been dismissed, there is no challenge to the Sequestration Order, and it was regularly made upon the Deputy Commissioner's filing of the Creditor's Petition.

121. It is plain that Mr Vlad had access to considerable legal and accounting advice: see [124]-[131] below, and that he took advice concerning whether or not he should attend the Creditor's Petition hearing, and that that professional advice was that, he says, it would not have made any difference as to whether a Sequestration Order issued or not. That advice appears to have been correct. Mr Vlad, however, has made his own decision as to whether or not to attend, having regard to that advice, and in the circumstances must bear the consequences of his failure to attend the hearing before the Registrar. Put differently, by failing to attend, Mr Vlad did not give himself an opportunity to plead his own case before the Registrar, and did not give the Registrar any opportunity to explore with Mr Vlad any reason not to issue the Sequestration Order. As the Federal Court observed in *Rigg v Baker* [2006] FCAFC 179; (2006) 155 FCR 531; (2006) 236 ALR 629; (2006) 4 ABC(NS) 419 at [71] per French J ("*Rigg*"):

> *71. A further relevant fact was that Mrs Baker did not appear before the Registrar on the hearing of the petition. It is not open to disregard that as a matter which would have been relevant to the exercise of the Registrar's discretion. Indeed in circumstances where a party voluntarily absents himself or herself from a hearing of a petition and does not take any other step to oppose the order sought, there is a significant, if not insuperable, obstacle raised to the proposition that the registrar or a judge hearing the petition was bound not to make a sequestration order.*

122. It is relevant to observe that this was not a case of a self-represented litigant, or a litigant who either did not have advice, access to advice, or who had not been advised, either from a legal or accounting

viewpoint, during the course of matters relevant to the ultimate making of the Sequestration Order, and including the making of the Sequestration Order by the Registrar. In that regard, it is relevant to note that Mr Vlad had had access to legal and accounting advice, and appears to have been prepared where he was not satisfied with the advice, to change accountants and lawyers. There is no evidence that there was any impediment to Mr Vlad obtaining further legal or accounting advice in relation to the necessity or otherwise of his appearance at the hearing of the Creditor's Petition before the Registrar.

123. In all the above circumstance, Mr Vlad's failure to attend the hearing of the Creditor's Petition does not provide any good reason, whether alone or in combination with other matters, for the Court to annul Mr Vlad's bankruptcy. Indeed, in the circumstances the Court is of the view, that it constitutes an insuperable obstacle to an order for annulment: *Rigg* at [71] per French J.

Absence of advice about a review of the Amended Assessments

124. Mr Vlad asserts that he did not receive advice in relation to reviewing the Amended Assessments:

a) from his accountant, a Mr Papalia, at the time of the initial Amended Assessments: Mr Vlad's January 2015 Affidavit at [20];

b) generally at the time when he prepared his own objections: Mr Vlad's January 2015 Affidavit at [23];

c) generally at the time when he wrote to the Commonwealth Ombudsman: Mr Vlad's January 2015 Affidavit at [26];

d) from his lawyer, Mr Ashley Wilson, at the time of the District Court proceedings: Mr Vlad's January 2015 Affidavit at [32] and Mr Vlad's April 2015 Affidavit at [22];

e) from his lawyer, Mr Henry Sklarz, at the time of the District Court set aside application and the District Court Appeal: Mr Vlad's January 2015 Affidavit at [34] and Mr Vlad's April 2015 Affidavit at [23];

f) from his accountant, Mr Cooke, at the time of the District Court applications: Mr Vlad's January 2015 Affidavit at [36] and Mr Vlad's April 2015 Affidavit at [24];

g) from his accountant, Mr Pollock, at the time of the District Court applications: Mr Vlad's January 2015 Affidavit at [40]; and

h) generally from his lawyers and accountants: Mr Vlad's January 2015 Affidavit at [46], [52] and [53] and Mr Vlad's April 2015 Affidavit at [32].

125. Mr Vlad's own evidence however makes it apparent that he received advice about the entitlement to a review of the Amended Assessments as follows:

a) by correspondence from the Deputy Commissioner dated 8 October 2009 informing him of his rights of review: Mr Vlad's January 2015 Affidavit at Annexure TV 2 at page 24.

b) from the Commonwealth Ombudsman to consider the right to review: Mr Vlad's January 2015 Affidavit at Annexure TV 6 at page 60; and

c) in a letter from Mr Sklarz, his then lawyer, on 29 August 2012 to the effect that a review would be futile as it would not restrain enforcement of the District Court Judgment: Mr Vlad's April 2015 Affidavit at [23] and Annexure TV 31 at page 267.

126. Mr Vlad contends that he is aggrieved as he has not raised in review proceedings under Part IVC of the *TA Act* the same objections to the Amended Assessments as he placed before the Deputy Commissioner in late 2009.

127. Mr Vlad argues that he had no advice about the review mechanisms or opportunities to extend the time limits to institute a review, but this does not matter as a review of the Amended Assessments does not affect the District Court Judgment as the Amended Assessments relate to different obligations. Further, a review does not operate to stay the enforcement of the Commissioner's assessments, and thus the existence of reviews of the Amended Assessments, even if now

commenced, would not affect the status of the debts under the Amended Assessments as being due and payable: *TA Act*, s.14ZZM.

128. Mr Vlad says that he has advice that:

a) the objections are maintainable and have merit, citing advice from Mr Duckham dated 8 April 2015: Mr Vlad's April 2015 Affidavit at [11] and Annexure TV 28 at page 199; and

b) Mr Pollock's opinion.

129. By s.14ZZM of the *TA Act* a review does not stay the enforcement of the Amended Assessments: *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41; (2008) 237 CLR 473; (2008) 82 ALJR 1411; (2008) 69 ATR 357; (2008) 248 ALR 693; (2008) 67 ACSR 593; (2008) ATC 20-045; (2008) 26 ACLC 880 ("*Broadbeach*"). There is a strong legislative policy manifested in the recovery of tax debts to protect the revenue pursuant to s.14ZZM of the *TA Act*: *Broadbeach* at [44] per Gummow ACJ, Heydon, Crennan and Kiefel JJ ("*Broadbeach*").

130. Mr Vlad ultimately concedes he employed legal and accounting advisers, and his evidence documents references to the rights of review, and the Court therefore considers that the proposition that all of those advisers, and Mr Vlad himself, overlooked the possibility of an extension of time to seek a review of his Amended Assessments is not only untenable, but contradicted by his own evidence. There is evidence which shows that his current lawyer gave advice about a possible application to extend the time to file a review application having "merit" and his taxation adviser was of the opinion that a different view could be taken of the evidence, does not establish that the review proceedings under Part IVC of the *TA Act*, if taken, would be successful.

131. In the circumstances, Mr Vlad's assertion that he did not have advice as to his entitlement to a review of the Amended Assessments under Part IVC of the *TA Act* cannot be sustained. In any event, for reasons set out below: see [129] above, a review does not operate to stay the enforcement of the Amended Assessments.

Solvency

132. For reasons set out above: see [89]-[106] above, the Court is of the view that Mr Vlad is not solvent, and in the circumstances, his lack of solvency militates against annulling his bankruptcy.

Delay

133. The unexplained delay in making the application to annul the bankruptcy, which at a minimum is approximately 230 days, and at a maximum 330 days, is such a lengthy, and unexplained, delay, that it does weigh significantly against the grant of the application to annul Mr Vlad's bankruptcy: *Miller v Bond: Securities* (unreported, Federal Court of Australia, 2 September 1994) at [77] per Beazley J.

Statement of affairs

134. Mr Vlad's completed statement of affairs: Mr Vlad's January 2015 Affidavit at [47] and Annexure TV 14 at page 193:

a) does not disclose the contact information for his appointed accountant or his appointed lawyer: pages 195 and 196;

b) discloses no income in the past year or anticipated in the next year or as arising from any activities on the Farm: pages 197-199;

c) acknowledges that the cause of his bankruptcy was a failure to keep proper books of accounting and costing records: page 201; and

d) suggests there are no business records kept relating to the business of the Farm and no financial statements or tax returns: page 215.

135. Mr Vlad's statement of affairs provides no basis on which to grant his application for an annulment of his bankruptcy, and, if anything, confirms his insolvency at the relevant time.

Conclusion - application for annulment

136. For all of the above reasons, the Court is satisfied that Mr Vlad has not made out a case that the Sequestration Order ought not to have been

made by the Registrar on 4 September 2014 and that having regard to the law as summarised in *Eggleston Mitchell* and *Bulic* in particular, that the discretion conferred by s.153B(1) of the *Bankruptcy Act* to annul Mr Vlad's bankruptcy ought not to be exercised in this case, for the reasons set out above. It follows that Mr Vlad's application to annul the bankruptcy arising from the issue of the Sequestration Order on 4 February 2014 must be dismissed. There will be an order accordingly.

Conclusion and orders

137. For the reasons set out above the Court has concluded that there will be orders dismissing Mr Vlad's application:

a) pursuant to s.104(2) of the *FCCA Act* for an extension of time in which to file an application for review of a Registrar's decision on 4 February 2014 to issue the Sequestration Order; and

b) pursuant to s.153B(1) of the *Bankruptcy Act* for an annulment of the bankruptcy arising from the issue of the Sequestration Order by a Registrar on 4 February 2014.

138. The Court will hear the parties as to costs.

I certify that the preceding one hundred and thirty-eight (138) paragraphs are a true copy of the reasons for judgment of Judge Antoni Lucev

Associate:

Date: 29 August 2017