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FEDERAL COURT OF AUSTRALIA

Oswal v Commissioner of Taxation (No 2) [2015] FCA 1143

Citation:	Oswal v Commissioner of Taxation (No 2) [2015] FCA 1143
Parties:	**RADHIKA PANKAJ OSWAL v COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA**
File number:	NSD 850 of 2012
Parties:	**PANKAJ OSWAL v COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA**
File number:	NSD 851 of 2012
Parties:	**PANKAJ OSWAL AS TRUSTEE OF THE BURRUP TRUST v COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA**
File number:	NSD 852 of 2012
Judge:	**NICHOLAS J**
Date of judgment:	5 November 2015
Catchwords:	**PRACTICE AND PROCEDURE** – security for costs – applicants commenced proceedings under Part IVC of the *Taxation Administration Act 1953* (Cth) challenging tax assessments by respondent – where applicants natural persons – where applicants ordinarily resident overseas – where applicants entered into litigation funding agreements in relation to various proceedings including the Part IVC proceedings – where applicants mortgaged or assigned or purported to mortgage or assign assets to litigation funder – whether applicants should be required to provide security for respondent's costs – whether court has power to make such an order in Part IVC proceedings – relevant considerations – orders made requiring applicants to provide security for respondent's costs
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) s 44(1) *Companies (Victoria) Code* s 533(1) *Federal Court of Australia Act 1976* (Cth) s 56 *Federal Court Rules 1979* (Cth) O 53, r 8 *Federal Court Rules 2011* (Cth) r 19.01 *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK) *Foreign Judgments Regulations 1992* (Cth)

	Income Tax Assessment Act 1936 (Cth) s 177(1) *Judiciary Act 1903* (Cth) 78B *Taxation Administration Act 1953* (Cth) Part IVC, s 14ZZ
Cases cited:	*Athprom Ltd v Federal Commissioner of Taxation* (1987) 87 FLR 465 *Barton v Minister for Foreign Affairs* (1984) 2 FCR 463 *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 *Commissioner of Taxation v Oswal (No 3)* [2015] FCA 276 *Cowell v Taylor* (1885) 31 Ch D 34 *Deputy Commissioner of Taxation v Brown* (1958) 100 CLR 32 *Deputy Commissioner of Taxation v Richard Walter Pty Limited* (1995) 183 CLR 168 *Energy Drilling Inc v Petroz NL* (1989) ATPR 40-954 *Fletcher v Commissioner of Taxation* (1992) 37 FCR 288 *Green v CGU Insurance Ltd* (2008) 67 ACSR 105 *King v The Commercial Bank of Australia Limited* (1920) 28 CLR 289 *Maatschappij voor Fondsenbezit v Shell Transport and Trading Co* (1923) 2 KB 166 *Madgwick v Kelly* (2013) 212 FCR 1 *Merribee Pastoral Industries Pty Ltd v Australian and New Zealand Banking Group Limited* (1998) 193 CLR 502 *Oswal v Commissioner of Taxation* [2013] FCA 745 *Oswal v Commissioner of Taxation* [2014] FCA 812 *PS Chellaram & Co Ltd v China Ocean Shipping Co* (1991) 102 ALR 321 *Willey v Synan* (1935) 54 CLR 175 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 245; [2013] VSCA 156
Date of hearing:	25 May 2015
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	74
Counsel for the Applicants:	Ms R Seiden SC with Ms E Bishop and Mr T Russell
Solicitor for the Applicants:	Kennedys
Counsel for the Respondent:	Mr BJ Sullivan SC with Ms MJ Hirschhorn

Solicitor for the Respondent:	Minter Ellison

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 850 of 2012**

BETWEEN:	**RADHIKA PANKAJ OSWAL** **Applicant**
AND:	**COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA** **Respondent**

JUDGE:	**NICHOLAS J**
DATE OF ORDER:	**5 NOVEMBER 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The applicants provide security for the respondent's costs of the Part IVC proceedings in the amount of $1,200,000 ("the relevant sum") which is to be provided within 28 days by:

   (a) paying the relevant sum into Court by way of bank cheque issued by an Australian trading bank or a trust cheque drawn by the applicants' solicitors; or

   (b) lodging with the Court a bank guarantee issued by an Australian trading bank in a form agreed between the solicitors for the parties or, in default of agreement, in a form to be determined by the District Registrar.

   In these orders:

   - "Part IVC proceedings" means:

     (a) this proceeding;

     (b) proceeding number NSD 851 of 2012; and

     (c) proceeding number NSD 852 of 2012;

   - the "applicants" means Radhika Pankaj Oswal and Pankaj Oswal.

2. The respondent is given liberty to apply on 7 days' notice for orders for a stay or dismissal of the Part IVC proceedings in the event that order 1 is not complied with.

3. The applicants pay the respondent's costs of the interlocutory application seeking security for costs.

THE COURT NOTES THAT:

4. The relevant sum represents the total amount of security to be provided by the applicants in respect of the respondent's costs in the Part IVC proceedings.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 851 of 2012**

BETWEEN:	**PANKAJ OSWAL** **Applicant**
AND:	**COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA** **Respondent**

JUDGE:	**NICHOLAS J**
DATE OF ORDER:	**5 NOVEMBER 2015**
WHERE MADE:	**SYDNEY**

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   In these orders:

   - "Part IVC proceedings" means:

     (a) this proceeding;

     (b) proceeding number NSD 850 of 2012; and

     (c) proceeding number NSD 852 of 2012;

   - the "applicants" means Pankaj Oswal and Radhika Pankaj Oswal.

2. The respondent is given liberty to apply on 7 days' notice for orders for a stay or dismissal of the Part IVC proceedings in the event that order 1 is not complied with.

3. The applicants pay the respondent's costs of the interlocutory application seeking security for costs.

THE COURT NOTES THAT:

4. The relevant sum represents the total amount of security to be provided by the applicants in respect of the respondent's costs in the Part IVC proceedings.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 852 of 2012**

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

JUDGE:	**NICHOLAS J**
DATE OF ORDER:	**5 NOVEMBER 2015**
WHERE MADE:	**SYDNEY**

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   In these orders:

   - "Part IVC proceedings" means:

     (a) this proceeding;

     (b) proceeding number NSD 850 of 2012; and

     (c) proceeding number NSD 851 of 2012;

   - the "applicants" means Pankaj Oswal and Radhika Pankaj Oswal.

2. The respondent is given liberty to apply on 7 days' notice for orders for a stay or dismissal of the Part IVC proceedings in the event that order 1 is not complied with.

3. The applicants pay the respondent's costs of the interlocutory application seeking security for costs.

THE COURT NOTES THAT:

4. The relevant sum represents the total amount of security to be provided by the applicants in respect of the respondent's costs in the Part IVC proceedings.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 850 of 2012**

BETWEEN:	**RADHIKA PANKAJ OSWAL** **Applicant**
AND:	**COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA** **Respondent**

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 851 of 2012**

BETWEEN:	**PANKAJ OSWAL** **Applicant**
AND:	**COMMISSIONER OF TAXATION FOR THE COMMONWEALTH OF AUSTRALIA** **Respondent**

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 852 of 2012**

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

JUDGE:	**NICHOLAS J**
DATE:	**5 NOVEMBER 2015**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION

1 These three proceedings (collectively "the Part IVC proceedings") concern tax assessments dated 22 February 2011 issued in respect of the 2007 income years and the respondent's disallowance of the applicants' objections thereto. Mrs Oswal is the applicant in the first proceeding (NSD 850 of 2012) and her husband, Mr Oswal, is the applicant in the second proceeding (NSD 851 of 2012). The third proceeding (NSD 852 of 2012) was commenced by Mr Oswal as trustee of the Burrup Trust.

2 All three proceedings are brought under Part IVC, s 14ZZ of the *Taxation Administration Act 1953* (Cth) as it stood at all relevant times ("*the Administration Act*"), having been commenced by the applicants on 19 June 2012. The tax assessments are predicated upon a CGT event happening in relation to shares in Burrup Holdings Pty Ltd ("BHPL") held by Mr Oswal as trustee of the Burrup Trust during the 2007 income year.

3 The respondent now seeks orders requiring the applicants in the Part IVC proceedings to provide security for the respondent's costs on a joint and several basis in the amount of $2.297 million. The respondent's application is brought pursuant to s 56 of the *Federal Court of Australia Act 1976* (Cth) ("Federal Court Act") and r 19.01 of the *Federal Court Rules 2011* (Cth) ("the Rules").

4 The evidence relied upon by the respondent in support of the application for security for costs consists of a number of affidavits made by his solicitor, Mr Poulos. Affidavit evidence from Mrs and Mr Oswal, and their lawyers (Ms Giles, Mr Hoser and Mr Melvin) was also read and relied upon by Mrs and Mr Oswal. None of the deponents was cross-examined.

5 It is common ground that Mrs Oswal and Mr Oswal are ordinarily resident outside Australia and that they reside in Dubai in the United Arab Emirates.

SECTION 56 AND RULE 19.01

6 Section 56 of the Federal Court Act provides:

> (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.

7 Rule 19.01(1) of the Rules provides:

(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.

ADDITIONAL BACKGROUND

8 The tax liability of each of the applicants is evidenced by the relevant notice of assessment which creates a debt due and payable to the respondent. By virtue of s 177(1) of the *Income Tax Assessment Act 1936* (Cth) as it stood at all relevant times:

> a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

9 Section 14ZZR of the *Administration Act* provides that the fact that:

> … an appeal is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no appeal were pending.

10 On 9 August 2011 Gilmour J, in proceeding number WAD 95 of 2011, entered summary judgment against the applicant in proceeding number NSD 850 of 2012 ("Mrs Oswal") in favour of the respondent for $186,321,790.11. His Honour also extended freezing orders he had previously made in relation to Mrs Oswal's assets. The freezing orders as varied by his Honour remain in force.

11 The tax assessments the subject of the Part IVC proceedings issued to Mr Oswal are "alternative assessments" or "concurrent assessments" of the kind referred to by Brennan J in *Deputy Commissioner of Taxation v Richard Walter Pty Limited* (1995) 183 CLR 168 at 201-202.

12 On 31 July 2013 Edmonds J gave a judgment which decided two preliminary questions. The preliminary questions, and answers given, were as follows:

> Question 1: Whether Mrs Radhika Pankaj Oswal and Mr Pankaj Oswal became "absolutely entitled" within s 104-75 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) in the income year ended 30 June 2007 to any of the shares in Burrup Holdings Pty Ltd held by the trustee of the Burrup Trust.
>
> Answer: No.
>
> Question 2: Whether either CGT event E1 or CGT event A1 happened in relation to any of the shares in Burrup Holdings Pty Ltd held by the trustee of the Burrup Trust at any time during the income year ended 30 June 2007, pursuant to either s 104-55 or s 104-10 of the ITAA 1997.
>
> Answer: Yes; CGT event E1 happened in relation to 902 shares in Burrup Holdings Pty Ltd during the income year ended 30 June 2007 pursuant to s 104-55 of the ITAA 1997.

(See *Oswal v Commissioner of Taxation* [2013] FCA 745).

13 An application for leave to appeal against his Honour's judgment was dismissed by Foster J on 4 August 2014 (*Oswal v Commissioner of Taxation* [2014] FCA 812).

14 The further hearing of the Part IVC proceedings has been provisionally fixed for 4 April 2016 for the purpose of deciding all remaining issues. A total of 15 hearing days has been set aside. All of the applicants' evidence-in-chief for that hearing should by now have been filed and served. The respondent is yet to file any evidence-in-chief apart from what was filed for the purposes of the hearing of the preliminary questions.

15 The respondent did not notify the applicants of his intention to seek security for costs until some months after the application for leave to appeal was dismissed by Foster J. However, the applicants made clear in their submissions that they did not raise any issue arising out of the respondent's delay in making the application. In light of that concession I need not concern myself with the respondent's explanation for his delay in bringing the present application.

16 The respondent accepted that each of the Part IVC proceedings in which he now seeks security for costs has been brought in good faith and that each of the applicants has a reasonably arguable claim for the relief sought.

17 According to Mr Poulos, the issues that remain to be determined are as follows:

(a) the quantum of the capital gain made by the trustee of the Burrup Trust pursuant to CGT event E1 of the ITAA 1997 (which turns on the market value of the relevant CGT assets, being shares in BHPL, and the cost base of those shares at the time CGT event E1 happened);

(b) whether Mrs Radhika Oswal was presently entitled to 100% of the income of the Burrup Trust during the income year ended 30 June 2007 and therefore to 100% of the net income of the trust for tax purposes in that income year;

(c) alternatively to (b), whether Mrs Radhika Oswal, Mr Pankaj Oswal and Mr Pankaj Oswal as trustee of the Burrup Trust (on behalf of his daughter who was under a legal disability) were each presently entitled to one-third of the income of the Burrup Trust during the income year ended 30 June 2007 (pursuant to the operation of the trust deed) and therefore to one-third each of the net income of the trust for tax purposes in that income year;

(d) whether ss 768-915 of the ITAA 1997 is capable of applying to disregard any capital gain that Mrs Radhika Oswal or Mr Pankaj Oswal as trustee of the Burrup Trust are taken to have made for the purposes of Division 102 pursuant to ss 115-215(3) of the ITAA 1997 in the 2007 income year; and

(e) if (d) is answered in the affirmative, whether or not the CGT assets (being the shares in BHPL) were "taxable Australian property" for the purposes of ss 855-10(1)(b) of the ITAA 1997. This in turn raises whether or not those shares passed the "principal asset test" which depends on the extent to which the company's assets and the underlying assets of its subsidiary, then called Burrup Fertilisers Pty Ltd, constituted "real property" and hence "taxable Australian real property" (TARP) assets. Division 855 will require the Court to ascertain whether the sum of the market values of the assets of the relevant companies that were TARP assets exceeded the market values of the assets of those companies that were not TARP assets.

MRS AND MR OSWAL'S ASSET POSITION

18 Mrs and Mr Oswal have some assets within the jurisdiction, though it is not possible to say what the current values of those assets are.

19 There are two properties of which Mrs Oswal is the registered proprietor. Both are encumbered by a mortgage given in favour of Mrs and Mr Oswal's litigation funder, Mercury Services Limited ("Mercury"). The first property is located at Peppermint Grove, Western Australia. It was said by Mrs Oswal in an affidavit made by her on 26 May 2011 to have a market value of approximately $40,000,000 but to be the subject of a mortgage in favour of Mercury to secure a loan of $45,000,000 Mercury previously made to her in 2009 or 2010 which she says was used to make repayments to the Australia and New Zealand Banking Group Limited ("ANZ"), the Commonwealth Bank of Australia Limited, and BNP Paribas. The other property is located at Dalkeith in Western Australia. In her affidavit of 26 May 2011 Mrs Oswal estimates the value of this property as approximately $4,900,000. However, she says that it is also the subject of the same mortgage in favour of Mercury.

20 The validity of the mortgage said to have been given by Mrs Oswal to Mercury is in issue in another proceeding (number WAD 264 of 2012) which is being case managed by Gilmour J: see *Commissioner of Taxation v Oswal (No 3)* [2015] FCA 276. To complicate matters further, various third parties are also asserting, in different proceedings, that they have a beneficial interest in Mrs Oswal's properties.

21 Both Mrs Oswal and Mr Oswal are asserting claims against third parties including, in particular, in proceedings in the Supreme Court of Victoria ("the Supreme Court proceedings") which Mrs Oswal has brought against ANZ and receivers and managers purportedly appointed to sell certain shares owned by Mrs Oswal in BHPL which were the subject of a share mortgage to ANZ. The Supreme Court proceedings are complex. Mrs Oswal's statement of claim runs to several hundred pages. It is apparent that a key allegation made by Mrs Oswal is that receivers appointed by ANZ sold the shares owned by her in BHPL without her authority or consent, in breach of duty, and at a substantial undervalue. Mrs Oswal also alleges that the share mortgage and a guarantee provided by her in favour of ANZ were signed by her under duress or undue influence, and were the result of unconscionable conduct on the part of ANZ. Mr Oswal has brought his own claim against the receivers appointed by ANZ. He also alleges that the receivers sold his shares in BHPL at a substantial undervalue.

22 The agreements pursuant to which shares in BHPL were sold made provision for the retention of various amounts to be held in escrow. These amounts are referred to in the evidence as the "Holdback Amount" which, according to Mr Melvin, totalled, as at 30 May 2014, about USD$15,000,000. According to Mr Melvin, the Holdback Amount is a fund in which Mrs and Mr Oswal have a beneficial interest. However, the account in which the Holdback Amount is held is not in their names, and they do not have access to the funds in it. It appears that the Holdback Amount is held in escrow to secure various entitlements of the ANZ, the receivers, and the purchasers of the shares in BHPL, in relation to their costs of the litigation in which they and Mrs and Mr Oswal are entangled: see *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 245; [2013] VSCA 156.

23 I accept that Mrs and Mr Oswal may have a beneficial interest in the Holdback Amount and a right to see that those funds (including any surplus to which they may be entitled) are properly disbursed. However, the other parties' costs of the litigation which those funds secure are likely to be very substantial, and so there must be a substantial risk that Mrs and Mr Oswal will not receive any part of the Holdback Amount. In any event, it appears that any entitlement Mrs and Mr Oswal may have to receive the Holdback Amount (or any part thereof) has been assigned, or purportedly assigned, by them to Mercury.

24 Mrs and Mr Oswal also own shares in various companies though their evidence indicates that the value of these assets is likely to be very slight. Mr Oswal has also had a number of costs orders made in his favour in other proceedings, some of which have been taxed, and some of which are yet to be taxed. The costs paid or payable to Mr Oswal as a result of such orders have also been assigned, or purportedly assigned, by Mr Oswal to Mercury.

25 Mr Oswal's evidence also indicates that he is no longer the trustee of the Burrup Trust. Mr Melvin's evidence indicates that the Burrup Trust does not have any assets.

THE LITIGATION FUNDING AGREEMENTS

26 Mrs Oswal entered into a litigation funding agreement with Mercury on 16 December 2013. The recitals to the agreement indicate that Mercury agrees to provide funding, financial and other assistance to Mrs Oswal in relation to various legal proceedings in return for Mrs Oswal agreeing to assign her right, title and interest in any amounts she recovers (including in relation to costs) as a result of such proceedings. Mr Oswal also entered into an

agreement in relevantly identical terms on 16 December 2013. The proceedings to which the agreements relate include the Part IVC proceedings and the Supreme Court proceedings.

27 Mr Oswal's evidence indicates that Mercury has paid in excess of $31.0 million to Australian law firms which have acted for Mrs Oswal and himself in relation to the various legal proceedings that are referred to in the litigation funding agreements and that approximately $6.0 million has been paid to the firm of solicitors which is acting for them in the Part IVC proceedings.

28 Mr Oswal says that his brother-in-law, Raghav Gupta (Mrs Oswal's brother) is one of three directors of Mercury, and also its sole shareholder. His evidence does not indicate whether Mr Gupta is the beneficial owner of the share in Mercury or whether he holds it on trust for any other person. Nor does it indicate the source of the funds used by Mercury to finance Mr Oswal's and Mrs Oswal's representation in the various legal proceedings. Mr Oswal says that he has never been a director or shareholder of Mercury. According to Mr Oswal's evidence, he entered into his litigation funding agreement because he would not otherwise have been able to pay any of the costs incurred in conducting the proceedings.

29 Mrs Oswal and Mr Oswal have purportedly assigned any proceeds which may be obtained from their various claims (including their claims against the ANZ and the other defendants in the Supreme Court proceedings) to Mercury pursuant to the litigation funding agreements they have entered into with that company.

30 Clause 3.1 of the litigation funding agreements purport to assign to Mercury all interest in any "Recovery" including any right to demand and receive payment. Clause 3.1 provides:

> 3.1 In consideration of the Funder taking over the Other Funding and agreeing to continue to provide financial accommodation to the Litigant und agreeing to enter into this Agreement and perform the obligations imposed on the Funder herein:
>
> 3.1.1 the Litigant covenants and agrees to pay (and to instruct the Solicitors to pay from the Recovery) to the Funder an amount equal to the aggregate of the Interest and the Reimbursement on receipt by the Litigant (or the Solicitor) of the Recovery; and
>
> 3.1.2 subject in all respects to clause 3 3, the Litigant (as sole, absolute, legal and beneficial owner of the Action) hereby assigns absolutely (and not by way of security) to the Funder right title and interest in and to any Recovery including, without limitation:
>
> 3.1.2.1 the right to demand and receive payment of the Recovery

(including any interest and costs which may accrue in the future); and

3.1.2.2 the right to enforce any rights or bring any actions for the recovery of the Recovery.

31 The term "Recovery" is defined in cl 1.15 in Mr Oswal's agreement and cl 1.16 in Mrs Oswal's agreement to mean:

> "Recovery" means all and any amounts received by the Litigant or to be received by the Litigant (or to which the Litigant is entitled) by way of judgment, settlement sum, compromise, interest, and costs or otherwise in or as a result of (or as part of resolution of) or in respect of the Action and any other Causes of Action available to the Litigant against the defendants to the Principal Cause of Action or any Related Parties to those defendants including without limitation the value of any releases or other consideration or benefits of whatever form received by the Litigant.

32 Mercury has various obligations under each of the agreements including those arising under cl 16 and cl 20. These relevantly provide:

> 16.1 Subject to and in accordance with the terms of this Agreement, the Funder agrees to pay:
>
> 16.1.1 Any Adverse Costs; and
>
> 16.1.2 all Action Costs;
>
> provided that all such payments by the Funder will be to the Solicitors on account of such amounts and in the event that the Funder is requested to pay or required by law to make any payments referred to in this clause 16 to any person other than the Solicitors the Funder has no obligations under this Agreement to make such payments to such other person.
>
> 16.2 For the avoidance of doubt the Funder is not liable to pay any other amount due to be paid by the Litigant in respect of the Action including without limitation in respect of any Counterclaim.
>
> …
>
> 20.1 The parties agree that the Action may expose the Litigant to a contingent liability for costs incurred in the Action by the defendants contingent upon the Action not being ultimately successful or wholly successful which a court orders that the Litigant must pay ("Adverse Costs"). The Funder indemnifies the Litigant against the Adverse Costs except to the extent such liability for Adverse Costs arises out of the negligent acts or omission, misfeasance or acts in breach of this Agreement by the Litigant.
>
> 20.2 The Funder is not liable for Adverse Costs in the event that the Funder terminates this Agreement pursuant to clause 14.2.

33 "Adverse Costs" has the meaning given to it in cl 20.1, and which would include an order for costs made against Mrs Oswal or Mr Oswal in the Part IVC proceedings. "Action

Costs" is defined to include various professional costs and expenses in respect of the various proceedings in which Mrs and Mr Oswal are involved (as referred to in the agreement) including, relevantly, any fees, costs or charges in respect of the funding of an order for security for costs. "Reimbursement" refers to the aggregate of the Action Costs and the Adverse Costs. Clause 3.1.1 (which I have previously set out) requires Mrs and Mr Oswal to pay an amount equal to the aggregate of the "Interest" and the "Reimbursement" upon receipt. It is in the definition of "Interest" that Mercury's financial interest in the outcome of the various proceedings referred to in the agreements becomes apparent. Clause 1.8 defines "Interest" as follows:

> "**Interest**" means:
>
> 1.8.1 in respect of any Recovery received on or before 31 July 2014, thirty five (35%) percent of that Recovery;
>
> 1.8.2 in respect of any Recovery received after 31 July 2014 but on or before 31 July 2015, fifty (50%) percent of that Recovery; and
>
> 1.8.3 sixty (60%) percent of each Recovery received after 31 July 2015.

34 Clause 20.1 also requires Mercury to indemnify Mrs Oswal and Mr Oswal against their liability under any order for costs in the Part IVC proceedings except to the extent that such liability arises out of their negligent acts or omissions, or their breach of the agreement.

35 Clause 23 is concerned with the distribution of any "Recovery". It provides:

> If the Litigant receives any Recovery from any source the Litigant must pay or procure the payment of the Recovery into the account nominated by the Funder to be held on trust for the Litigant and the Funder and as soon as reasonably practicable the Litigant will ensure that the Recovery is paid as follows and in the following order of priority.
>
> 23.1 in paying Action Costs or Adverse Costs incurred in prosecuting the Action for which the Funder has a liability to pay as at the date of distribution but which have not yet been paid by the Funder, including, without limitation all and any, costs or expenses that have been incurred whether billed or not from Solicitors and their counsel, insurers and professional advisers;
>
> 23.2 to the Funder, by way of reimbursement of any GST paid by the Funder and in respect of which the Funder has not obtained or is not entitled to obtain an input tax credit);
>
> 23.3 to the Funder, in satisfaction of the liabilities of the Litigant to pay the Reimbursement (calculated as at the date of distribution) to the extent not paid under clause 3;
>
> 23.4 to the Funder, in satisfaction of the liabilities of the Litigant to pay the interest under clause 3;

> 23.5 to the Funder, an amount equal to the liability of the Funder to pay GST on or in respect of the amounts to which the Funder is entitled under clauses 23.1 to 23.4 inclusive, if any; and
>
> 23.6 the Litigant will retain the balance.
>
> For the avoidance of doubt the parties acknowledge that any property other than cash recovered in or as a result of the Action will, unless agreed by the parties otherwise, be realised and converted to cash as quickly as reasonably possible by the Litigant and then applied in accordance with this clause 23.

CONSIDERATION

36 It was submitted on Mrs and Mr Oswal's behalf that they have assets in the jurisdiction that exceed the tax debt. I do not accept that submission. In any event, their only assets of any real value were either mortgaged by Mrs Oswal to Mercury or are the subject of assignments to Mercury said to have been effected by entry into the litigation funding agreements.

37 It was also submitted on behalf of Mrs and Mr Oswal that I should in any event disregard the tax debt when assessing whether there was a real prospect that the respondent would not be able to recover his costs of the proceedings brought by the applicants if they were unsuccessful and one or more of them was ordered to pay his costs. I do not accept this submission. The respondent's entitlement to security for costs must be evaluated against the distinct possibility that Mrs Oswal will not obtain the relief she seeks in her Part IVC proceeding and that she will be ordered to pay the respondent's costs or a substantial proportion of them.

38 Nevertheless, the tax debts evidenced by the judgment and the relevant notices of assessment must be understood for what they are. They reflect determinations by the respondent which he accepts were arguably made in error. Hence, for the purpose of deciding whether or not to order security for costs, and despite the substantial judgment that the Commissioner has already obtained against Mrs Oswal in other proceedings, the fact that the tax debts are the subject of challenges in the Part IVC proceedings which the respondent concedes are reasonably arguable, is a matter of considerable significance on the present application.

39 It was submitted on behalf of the applicants that to make an order for security against a taxpayer who brought a proceeding seeking to set-aside a tax assessment is beyond the power of the Court because, by requiring an applicant to provide security for costs, the Court

would be lending its authority, and the force of its order, to the imposition of an "incontestable tax".

40 After Mrs and Mr Oswal foreshadowed this argument at a directions hearing, orders were made for the giving of notices pursuant to s 78B of the *Judiciary Act 1903* (Cth). The question postulated in those notices, which were said to involve a matter arising under the Constitution or involving its interpretation, was as follows:

> … whether a court in tax proceedings under Part IVC of the *Taxation Administration Act 1953* may order dismissal of proceedings on non-payment of security for costs in circumstances where a taxpayer's rights to approach the Court to appeal an objection decision is what makes a tax constitutionally valid: *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

41 The provisions of Part IVC of the *Administration Act* that permit a taxpayer to challenge a tax assessment in this Court (and, with special leave, in the High Court) satisfy the requirement of the *Constitution* that a tax not be made incontestable: *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [9] per Gummow, Hayne, Heydon and Crennan JJ.

42 There is nothing to prevent the applicants challenging the validity of the relevant tax assessments in this Court. Indeed, they are in the very process of doing so, and have been engaged in that process since the time they commenced their proceedings under Part IVC of the *Administration Act.* The provisions of Part IVC provide them with "recourse to … judicial power" (*Deputy Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 40) so that the question whether the relevant tax assessments were properly made may be judicially determined according to law.

43 Once the judicial process is engaged, as has happened here, it is for the Court to exercise its powers in the ordinary way. The Court has power to make procedural orders requiring a taxpayer to (inter alia) provide particulars, give discovery or file written evidence, together with the power to make costs orders against the taxpayer, and to stay or dismiss the taxpayer's proceeding, if he or she refuses or neglects to comply with such orders. Similarly, the Court has power to order that a taxpayer provide security for costs and to stay or dismiss the taxpayer's proceeding if he or she refuses or neglects to comply with such an order. Of course, the Court's discretionary powers in relation to these and all other matters must be exercised judicially and according to law.

44 The question whether the Commissioner could obtain security for costs in a proceeding by way of an appeal from a decision of the Administrative Appeals Tribunal ("the Tribunal") was considered by Hill J in *Fletcher v Commissioner of Taxation* (1992) 37 FCR 288. In that case the appeal was brought by the taxpayers (who were natural persons) pursuant to s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth). The Commissioner filed a notice of motion seeking security for his costs of the appeal which he later abandoned. The taxpayers sought their costs of the motion which Hill J awarded to them. In his reasons for judgment his Honour indicated that it was at that time "unprecedented" in the conduct of taxation appeals in this country for the Commissioner to seek security against an applicant in such a proceeding.

45 It is clear from a reading of Hill J's reasons that he did not doubt that the Court had power under s 56 of the Act and what was then O 53, r 8 of the *Federal Court Rules 1979* (Cth) to award security for costs, but that discretionary considerations weighed heavily in favour of not doing so against a natural person in a proceeding brought by him or her under Part IVC of the *Administration Act*.

46 In his reasons in *Fletcher*, Hill J referred to the well-known passage in the judgment of Bowen LJ in *Cowell v Taylor* (1885) 31 Ch D 34 at 38. His Honour said at 290:

> As a general rule, in the exercise of its general discretion to order security for costs, a court will not make an order for security for costs against an individual plaintiff solely on the grounds of impecuniosity. Thus, in *Cowell v Taylor* (1885) 31 Ch D 34 at 38, Bowen LJ said:
>
> > "The general rule is that poverty is no bar to a litigant, that, from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another. There is also an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security ... Those are the common cases, I do not say that there may not be others."

47 His Honour said at 291:

> Clearly the fact that the present proceeding is an appeal from an administrative decision of a government authority, the Commissioner of Taxation, maintaining the imposition of income tax, would be no reason to depart from this general rule. Quite the contrary. Manifest injustice could well be done and would certainly be seen to be done if despite the conferral of a right to appeal to this Court on a question of law that right could, in the absence of special circumstances, be frustrated by the Commissioner requiring security to be given by an impecunious litigant.

48 His Honour then turned to consider various other authorities relating to "special circumstances" under Order 53, r 8, a rule specifically concerned with security for costs in appeals from decisions of the Tribunal. That rule provided that the Court could order that security for the costs of such an appeal be provided "in special circumstances". Hill J concluded at 293:

> Given that, as a general rule and in the exercise of an unfettered discretion, mere impecuniosity of a plaintiff who is a natural person (not being an appellant from an existing judicial decision) will not be a ground for ordering that person to provide security, why should the position be different when the case arises under 0 53, r 8? Indeed, it is difficult to see, when the court's rules require the existence of "special circumstances" before security will be ordered, that the court would be more ready to make an order against an impecunious natural person than it would be if there was no request that "special circumstances" be present. This is not to say that impecuniosity will be irrelevant to the exercise of the discretion, but mere impecuniosity of itself will not generally result in an order being made.
>
> For my part, I would add that it would be a rare case where security for costs would be awarded at the instance of the Commissioner of Taxation against a natural person seeking to appeal from a decision of the Administrative Appeals Tribunal reviewing an objection decision, where it was conceded that there was a real issue to be decided between the parties. Certainly more than mere impecuniosity would be required before the court's discretion would be exercised in a way which could bring about the inability of a taxpayer to challenge in a court a question of law affecting his liability to income tax.

49 The respondent sought to distinguish *Fletcher* on the ground that the proceeding in that case involved an appeal against a decision of the Tribunal. However, as Hill J's reasons make clear, what was significant in his Honour's judgment was that the appeal was not against a judicial decision, but a decision of the Tribunal.

50 The respondent also submitted that a factor that weighed in favour of an order for security was that the applicants chose to commence proceedings in this Court rather than by filing an application seeking review of the relevant tax assessments by the Tribunal. In support of this submission the respondent relied upon the decision of Southwell J in *Athprom Ltd v Federal Commissioner of Taxation* (1987) 87 FLR 465 in which his Honour made an order for security in favour of the Commissioner against a plaintiff company pursuant to s 533(1) of the *Companies (Victoria) Code*. His Honour considered it significant that the company had chosen to commence its proceeding in the Supreme Court of Victoria rather than seek review of the disputed tax assessment by the Tribunal in what is often referred to as a "no costs" jurisdiction. However, I consider the fact that the taxpayers could have sought to have their tax assessments reviewed by the Tribunal rather than in this Court to be a neutral

consideration in deciding whether an order for security for costs should be made. This seems to me to be consistent with Hill J's approach in *Fletcher*.

51 *Athprom* was not referred to by Hill J in *Fletcher*, which is perhaps not surprising in that it involved an application for security for costs made against a company. *Athprom* is distinguishable on that basis. Moreover, there was no concession by the Commissioner in that case as to the existence of any arguable grounds of appeal, and in his reasons for judgment Southwell J said (at 466) that the evidence did not enable him to undertake any sensible evaluation of the company's prospects of success.

52 The applicants also submitted that security for costs should not be ordered against them because they are in substance in the position of defendants. In support of this submission they relied upon the decision of the High Court in *Willey v Synan* (1935) 54 CLR 175. In that case Dixon J (with whom Rich J agreed) said at 184:

> The principle is that a party to judicial proceedings, who resides beyond the jurisdiction, should not be required to give security for costs unless, however the parties are arranged upon the record, he is the person invoking or resorting to the jurisdiction for the purpose of establishing rights or obtaining relief. If he does avail himself of the remedies the jurisdiction provides in order to obtain affirmative relief or redress, he may be ordered to give security, although he becomes a defendant in the action.

His Honour referred with approval at 184-185 to the following statement of Scrutton LJ in *Maatschappij voor Fondsenbezit v Shell Transport and Trading Co* (1923) 2 KB 166 at 177:

> The position, I think, extends to every case where the person against whom security is sought is really defending himself against attack, even if he be nominally a plaintiff, but really defending himself against defendants' previous action against him.

53 But, as was emphasised by Allsop CJ and Middleton J in *Madgwick v Kelly* (2013) 212 FCR 1 at [16], the language used by Dixon J in *Willey* and Scrutton LJ in *Maatschappij voor Fondsenbezit* does not require the Court to undertake a minute analysis of the relevant legal relationship between the party seeking an order for security and the party resisting the making of such an order. Nor do I think the Court is required to take a binary view of the question whether the applicants are, in substance, defendants or plaintiffs. The discretion to order security for costs under both s 56 and r 19.01(1) is broad and conferred in terms which make clear that it is not fettered by rules that prescribe how it is to be exercised in any given case: see *King v The Commercial Bank of Australia Limited* (1920) 28 CLR 289

at 292-293, *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Limited* (1998) 193 CLR 502 at 513-515. The preferable approach is to consider the extent to which the proceeding brought by the applicant may reasonably be characterised as defensive. If it can be characterised as defensive, or at least as having a defensive element, then this may weigh against making an order for security for costs.

54 In the Part IVC proceedings the applicants have invoked the jurisdiction of the Court for the purposes of attacking the validity of the relevant tax assessments. Nevertheless, I view the proceedings as having a significant defensive element. Even if the proceedings are not regarded as defensive, the relief sought by the applicants, and the constitutional and statutory context in which that relief is sought, is still a highly relevant consideration when it comes to exercising the discretion.

55 I accept that, as a matter of general approach, there is a strong predilection against awarding security for costs against a natural person at least in proceedings at first instance that involve a bona fide claim. But the authorities demonstrate that there are some situations in which a different approach is often taken. One is where the applicant is a person who does not ordinarily reside in Australia, and who has no assets in the jurisdiction. Another is where the applicant is suing for the benefit of a third party. Both situations raise considerations that may weigh in favour of the court making an order for security for costs. However, these considerations are not determinative, and all relevant facts and circumstances must be considered for the purpose of deciding what weight they should be given when making what is a broad discretionary judgment.

56 The fact that the person bringing proceedings is ordinarily resident out of the jurisdiction, and that he or she has no assets in the jurisdiction can constitute a circumstance of great weight. As McHugh J pointed out in *PS Chellaram & Co Ltd v China Ocean Shipping Co* (1991) 102 ALR 321 at 323:

> … 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.

57 In *Energy Drilling Inc v Petroz NL* (1989) ATPR 40-954 Gummow J explained the purpose of making an order for security for costs against an applicant ordinarily resident outside the jurisdiction. His Honour said at 50,422:

> The purpose of ordering security for costs against an applicant ordinarily resident outside the jurisdiction is to ensure that a successful respondent will have a fund available within the jurisdiction of this Court against which it can enforce the judgment for costs, so that the respondent does not bear the risk as to the certainty of enforcement in the foreign country and as to the time and complexity of the action there which might be necessary to effect enforcement … On the other hand, the mere circumstance that an applicant is resident outside the jurisdiction does not necessarily invite an exercise of discretion in favour of ordering security, the question being how justice will best be served in the particular case …

(citations omitted)

58 It was submitted by Mrs and Mr Oswal that any difficulty that the respondent may encounter in enforcing an order for costs against them has nothing to do with the fact that they reside overseas. Reliance was placed on what Morling J said in *Barton v Minister for Foreign Affairs* (1984) 2 FCR 463 at 469:

> … it would be an odd result if an impecunious plaintiff was ordered to give security merely because he was ordinarily resident outside Australia, although his absence from Australia had little, if any, prejudicial effect on the respondent's prospects of recovering his costs."

59 Morling J made an order requiring the applicant to provide security for costs, but in a sum that was considerably less than appears to have been sought by the respondent in that case. It is apparent that his Honour's decision to award security in the lesser amount was heavily influenced by the fact that any judgment for costs awarded in favour of the respondent would be enforceable in the United Kingdom by virtue of the *Foreign Judgments (Reciprocal Enforcement) Act 1933* (UK). As his Honour observed, if the respondent registered his costs judgment in the United Kingdom, he would be in no worse position than if the applicant had been resident in Australia.

60 The United Arab Emirates is not a country referred to in the Schedule to the *Foreign Judgments Regulations 1992* (Cth) and I am satisfied that any costs order obtained by the respondent in these proceedings could not be enforced against Mrs Oswal or Mr Oswal in the United Arab Emirates without considerable difficulty.

61 While it is clear that Mercury is required by the litigation funding agreements to pay fees, costs or charges in respect of the funding of an order for security, it is apparent that they

do not by their terms require Mercury to provide security for costs. I therefore proceed on the basis that Mercury has no legal obligation under the litigation funding agreements to itself provide security for costs or to provide Mrs or Mr Oswal with the funds necessary to enable them to do so.

62 Be that as it may, there was no evidence to suggest that Mercury was either unable or unwilling to provide the applicants with the funds required in order to comply with any order for security for costs that may be made against Mrs or Mr Oswal. However, I was referred to some evidence which was relied upon in support of a submission that Mercury might seek to terminate the litigation funding agreements. In a letter dated 21 May 2015 written by Mercury's Australian solicitors to the applicants' solicitors, Mercury's position is said to be as follows:

> … should the Court determine that the assignments under clause 3.1.2 of the Litigation Funding Agreements between Mercury Services Limited and Pankaj Oswal and Radhika Pankaj Oswal are invalid or ineffective in whole or in part, our clients will not make any further payments pursuant to the Litigation Funding Agreements.

63 The letter does not address the issue of security for costs and appears to have been directed at a suggestion from the respondent that the assignments purportedly effected by the litigation funding agreements might not be valid. However, the validity of those assignments is not an issue in the Part IVC proceedings. Nor is it an issue appropriate for determination in an interlocutory application made in proceedings to which Mercury is not a party. It is sufficient for me to say that Mrs and Mr Oswal have either assigned, or at least purported to assign, the proceeds of their claims against third parties (including any claims they have against the respondent for costs in the Part IVC proceedings) to Mercury pursuant to cl 3.1.2 of the litigation funding agreements.

64 The fact that Mercury has already paid some $31 million to lawyers acting for the applicants in the various legal proceedings referred to in the litigation funding agreements suggests that Mercury has access to large amounts of money with which to fund the conduct of such proceedings including, if necessary, by providing security for costs that Mrs and Mr Oswal are not themselves able to provide using their own funds. There was no evidence to the contrary from Mrs Oswal, Mr Oswal or any officer or representative of Mercury. Nor was there any suggestion to that effect in the letter from Mercury's Australian solicitors to

which I have previously referred. I am satisfied that an order for security for costs in an appropriate amount will not stultify the Part IVC proceedings.

65 The proper exercise of the discretion to order security for costs requires the weighing of all relevant facts and circumstances. The matters to which I give particular weight are as follows:

- The applicants are natural persons who are seeking to exercise their rights to challenge tax assessments made against them in a court of law by the only means available to them. The Part IVC proceedings have a "defensive" element to them, but not such as would preclude the making of an order for security for costs if the Court considered that it was appropriate to make such an order.
- It is conceded by the respondent that the Part IVC proceedings are brought in good faith, and based upon reasonably arguable grounds. They are likely to be heard and determined within the next 12 months.
- The applicants ordinarily reside outside the jurisdiction in the United Arab Emirates, a country with which Australia does not have any reciprocal arrangements for the enforcement of judgments. The respondent could not enforce a costs order against Mrs or Mr Oswal in their ordinary place of residence without considerable difficulty.
- The respondent has already obtained a substantial judgment against Mrs Oswal in the proceedings heard by Gilmour J and freezing orders over all her assets (worldwide) up to a value of approximately $186 million. However, the only significant assets that are covered by the freezing orders are the subject of mortgages or assignments purportedly granted by Mrs Oswal to Mercury.
- The litigation funding agreements purport to assign any amounts recovered by Mrs and Mr Oswal to Mercury. Mrs and Mr Oswal have an entitlement to share in any surplus after payment of all relevant costs and expenses. Mercury also has an entitlement to share in any such surplus which, since 31 July 2015, is equal to 60% of any such surplus. By reason of these arrangements, Mercury has a significant financial interest in the outcome of the proceedings referred to in the litigation funding agreements to which Mrs and Mr Oswal are party including the Part IVC proceedings.
- The litigation funding agreements require Mercury to indemnify Mrs Oswal and Mr Oswal against any order for costs that may be made against them in the Part IVC proceedings and to pay fees, costs and charges in respect of an order for security for

costs. However, there is nothing in the agreements that requires Mercury to itself provide security for the respondent's costs.

66 Ultimately, the question is how justice will be best served. On balance, I am satisfied justice will be best served by making an order for security for costs. There is a significant risk that the respondent will be unable to recover any of his costs (which will be substantial) in the event that Mrs Oswal or Mr Oswal are ordered to pay them. The risk of this occurring can be eliminated, or substantially reduced, by making an order for security in an appropriate amount. Such an order can be made in this case without risk of injustice to Mrs and Mr Oswal because, as I have said, I am satisfied that an order for security for costs in an appropriate amount will not stultify their proceedings. While this is not determinative and, indeed, may be a matter of little weight in some cases (see *Green v CGU Insurance Ltd* (2008) 67 ACSR 105 at [46] per Hodgson JA), I think it is an important consideration in this case.

QUANTUM

67 As to the amount of security sought by the respondent, it does appear to be extremely large, but in light of Mr Poulos' uncontradicted evidence, I do not think it is unreasonable. Mr Poulos said in his affidavit evidence that he has arrived at his estimate on the basis that the respondent would only be entitled to party/party costs. However, I think some reduction is justified on the basis that, contrary to Mr Poulos' expectation, the respondent will only be entitled to a proportion of his actual costs incurred. While it is impossible to be precise about these matters, I think it reasonable to proceed on the basis that the respondent may well recover only 75% or thereabouts of his actual costs.

68 As previously noted, the notices of assessment issued to Mr Oswal that are the subject of challenge in the Part IVC proceedings are "alternative assessments". It therefore seems unlikely that, if the respondent is wholly or substantially successful in his defence of Mrs Oswal's proceeding, he will also succeed against Mr Oswal. One possible outcome is that Mrs Oswal will be required to pay the respondent's costs, with the respondent being ordered to pay Mr Oswal's costs. Another possible and perhaps more likely outcome in the event that Mrs Oswal is unsuccessful, is that she will be ordered to pay the respondent's costs, with no order as to the costs of the proceedings brought by Mr Oswal.

69 In the result, I think the amount of security should be fixed on the basis that there is a distinct possibility that, even if the respondent is wholly or substantially successful in his

defence of the proceeding brought by Mrs Oswal, the costs awarded to the respondent may be substantially less than his total party/party costs in the Part IVC proceedings as a whole due to a lack of success against Mr Oswal. On this basis, I propose to reduce the amount of the security to be ordered by a further 30%.

70 I will order that Mrs Oswal and Mr Oswal provide security for the respondent's costs of the Part IVC proceedings in the amount of $1,200,000 ("the relevant sum") to be provided within 28 days by either:

(a) paying the relevant sum into Court by way of bank cheque issued by an Australian trading bank or a trust cheque drawn by the applicants' solicitors; or

(b) lodging with the Court a bank guarantee issued by an Australian trading bank in a form agreed between the solicitors for the parties or, in default of agreement, in a form to be determined by the District Registrar.

71 I will make such an order in each of the Part IVC proceedings, but also note that the relevant sum represents the total amount of security to be provided by way of security for the respondent's costs in all three proceedings.

72 The respondent will also be granted liberty to apply on 7 days' notice for the purpose of seeking orders for a stay or dismissal of the Part IVC proceedings in the event that the orders requiring the applicants to provide security for costs are not complied with.

COSTS

73 Costs should follow the event. The respondent has been successful in obtaining orders for security for costs in the face of sustained opposition from the applicants. The applicants will be ordered to pay the respondent's costs of the interlocutory applications seeking security for costs.

74 Orders accordingly.

I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholas.

Associate:

Dated: 5 November 2015