

Australian judge gives tax office go ahead with Cranswick case



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STORIES

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An Australian Judge Neil McKerracher ruled on 18 August 2010 that the Australian Tax Office could go ahead with its bankruptcy case against African Consolidated Resources chief executive Andrew Cranswick because it had done everything to serve him with court papers after he had absconded from Australia. The tax office said Cranswick owed it more than A\$1 million. The court was told that Cranswick left Australia on 9 June 2009 promising to return on 22 June but has never returned to that country. Here is the judgment in full.

FEDERAL COURT OF AUSTRALIA

Deputy Commissioner of Taxation v Cranswick [2010] FCA 891

Citation:

Deputy Commissioner of Taxation v Cranswick [2010] FCA 891

Parties:

PUTY COMMISSIONER OF TAXATION v ANDREW NOEL CRANSWICK



File number:

WAD 223 of 2009

Judge:

MCKERRACHER J

Date of judgment:

18 August 2010

Catchwords:

BANKRUPTCY – service out of the jurisdiction – leave required – arguable or prima facie case – ordinarily resident in Australia – jurisdiction to make sequestration order – departing Australia – remaining outside Australia – intent to defeat or delay creditors – substituted service – abnormal difficulties in effecting personal service – reasonable probability that debtor will be informed of petition by substituted service



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Income Tax Assessment Act 1936 (Cth) s 177

Taxation Administration Act 1953 (Cth) s 255-45

- Cases cited:
- Battenberg v Restrom (2006) 149 FCR 128
 - Deputy Commissioner of Taxation v Barnes (2008) 70 ATR 776
 - Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd (2008) 237 CLR 473
 - Equititrust Ltd v Bosiljevac [2007] FCA 323
 - Ginnane v Diners Club Ltd (1993) 42 FCR 90
 - Re Mendonca; Ex Parte Federal Commissioner of Taxation (1969) 15 FLR 256
 - Re Meredith; Ex parte Commonwealth Bank of Australia (1992) 38 FCR 467
 - Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
 - Re Thai; Ex parte Commissioner of Taxation (1994) 50 FCR 127
 - Re Trimbole; Ex parte Deputy Commissioner of Taxation (1984) 4 FCR 586

Time of hearing:

August 2010

Place:

Perth

Division:

GENERAL DIVISION

Category:

Catchwords

Number of paragraphs:

81

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Solicitor for the Applicant:

Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY

GENERAL DIVISION

WAD 223 of 2009

BETWEEN:

DEPUTY COMMISSIONER OF TAXATION

plicant

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ID:

ANDREW NOEL CRANSWICK

Respondent

JUDGE:

MCKERRACHER J

DATE OF ORDER:

5 AUGUST 2010

WHERE MADE:

PERTH

THE COURT ORDERS THAT:

1.

The Applicant be granted leave to serve the documents required to be served in accordance with Rule 4.05 of the Federal Court (Bankruptcy) Rules 2005 together with a copy of these orders ("the Documents") on the Respondent being a person outside the jurisdiction of the Commonwealth of Australia.
2.

The Documents be served on the Respondent by way of substituted service and the need for personal service be dispensed with.
3.

Substituted service in the manner provided for in paragraph 3 below of the Documents be effected by:
- 3.1

leaving a copy of the Documents and a copy of the Court's orders in an envelope addressed to the Respondent at the address, 7A Swan Road, Attadale WA 6156 ("the 7A Swan Road property");

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- 3.3 sending a copy of the Documents and a copy of the Court's orders by pre-paid post addressed to the Respondent at Peter Lark & Co., PO Box 518 West Perth WA 6872;
- 3.4 sending an electronic copy of the Documents and the Court's orders to the Respondent at the email address, ancranswick@bigpond.com; and
- 3.5 sending an electronic copy of the Documents and the Court's orders to the Respondent at the email address, peter@peterlark.com.
4. Service in accordance with these orders be deemed good and sufficient service of the Documents upon the Respondent.
5. Service of the Documents be deemed to have been effected on the Respondent two business days after service has been effected in accordance with paragraph 3 above.
6. The petition be heard by a judge at 2:15 pm on 31 August 2010.
7. Costs of this application be in the cause.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA

< :STERN AUSTRALIA DISTRICT REGISTRY



GENERAL DIVISION

WAD 223 of 2009

BETWEEN:

DEPUTY COMMISSIONER OF TAXATION

Applicant

AND:

ANDREW NOEL CRANSWICK

Respondent

JUDGE:

MCKERRACHER J

DATE:

18 AUGUST 2010

PLACE:

PERTH



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INTRODUCTION

1 The applicant (the Commissioner) seeks orders under s 309(2) of the Bankruptcy Act 1966 (Cth) (the Act) for leave to serve the creditor's petition and affidavit on the respondent (Mr Cranswick) outside the jurisdiction. It also seeks orders for substituted service.

Service out of the jurisdiction – leave required

2 Court process cannot be served out of the jurisdiction without some legislative authority. Section 309(2) of the Act confers such legislative authority: *Battenberg v Restrom* (2006) 149 FCR 128 at [13] – [18].

3 Section 309 of the Act relevantly provides:

309 Service of notices etc.

(1A) Where a trustee carries on business at 2 or more addresses, a notice or other document in relation to which no special manner of service is prescribed may be sent to the trustee at any of those addresses.

(2) Where a notice or other document is required by this Act to be served on or given to a person, the Court may, in a particular case, order that it be given or served in a manner specified by the Court, whether or not any other manner of giving or serving the notice or other document is prescribed.



4 The exercise of the power conferred by s 309(2) of the Act is not conditioned upon the debtor's presence in Australia and s 309(2) of the Act authorises service out of Australia even when the relevant process was issued after the debtor left Australia and whilst the debtor is out of Australia: *Battenberg v Restrom* at [18] – [19].

5 In *Re Mendonca; Ex Parte Federal Commissioner of Taxation* (1969) 15 FLR 256, Gibbs J (then sitting as a Judge of the Federal Court of Bankruptcy) observed at 261 that although the Act and the (then) rules made thereunder did not make express provision for service out of the jurisdiction, s 309(2) of the Act was sufficient to provide the Court with ample power to order service outside the jurisdiction. As such, O 8 of the Federal Court Rules is not engaged. See also r 1.03(2) of the Federal Court (Bankruptcy) Rules 2006.

6 Orders as sought in the amended notice of motion are consistent with those previously made by Lucev FM in *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776. The concerns raised in *Re Trimbole; Ex parte Deputy Commissioner of Taxation* (1984) 4 FCR 586, at 587 do not apply when, as in this case, consideration of it is not proposed to serve court documents outside Australia.

7 Before granting leave to serve the creditor's petition outside the jurisdiction, the Court is required to reach a provisional or tentative conclusion on the material before it that the Commissioner has an arguable case. The appropriate time to consider in detail the Court's jurisdiction to make a sequestration order is at the hearing of the creditor's petition: *Re Meredith; Ex parte Commonwealth Bank of Australia* (1992) 38 FCR 467.

Arguable or prima facie case

8 The acts of bankruptcy relied on by the Commissioner are contained in the allegations that:

1. Mr Cranswick departed Australia on 9 June 2009 with intent to defeat or delay his creditors within the meaning of s 40(1)(c)(i) of the Act; and

2. Mr Cranswick, with intent to defeat or delay his creditors, remained out of Australia during the period from 9 June 2009 to 8 December 2009, within the meaning of s 40(1)(c)(i) of the Act.

9 At the time when the acts of bankruptcy were allegedly committed, the debtor was personally present or ordinarily resident in Australia and had a dwelling-house in Australia: s 43(1)(b)(i) and (ii) of the Act.

10 The detail supporting these contentions has been set out in affidavits in support from which the following events emerge.



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his taxation affairs.

12 On 15 April 2009 an interview was conducted by auditors of the ATO with Mr Cranswick pursuant to s 264(1)(b) of the Income Tax Assessment Act 1936 (Cth) (the 1936 Act).

13 During the course of that interview the materials disclose that Mr Cranswick:

◀ stated that his wife, two children, brother and parents-in-law reside in Australia, and that he does not have any immediate family in Zimbabwe; ▶

... asserted that he had not considered himself to be a permanent resident for the purposes of paying income tax in Australia since at least 2003;

3. asserted that one of his primary motivations for allegedly ceasing permanent residency in Australia was due to irreconcilable differences with his wife which had manifested in 2003. It was further asserted that his wife had engaged solicitors and was considering instituting divorce proceedings;

4. stated that despite considering himself a resident of Zimbabwe at all material times, he had in fact not lodged any income tax returns in that country during the years in issue;

5. stated that he had lodged some non-resident income tax returns for the income years ended 30 June 2005 to 30 June 2008 in the United Kingdom reporting about 10% of his gross income;

6. stated that he still banked in Australia and tried to visit his children every six weeks;

7. conceded he was aware that there may well be issues concerning the status of his residency by reason of the manner in which he was conducting his affairs;

8. confirmed that he opened accounts in Australia and only had bank accounts in Australia. He further stated that he had started to apply for an account in the United Kingdom 'partly because of these inquiries', 'just to avoid this whole issue' and 'to keep it clean from a tax issue', and intended to apply for an account with the Standard Bank Isle of Man;

9. asserted that he was trying to become a tax resident and permanent resident in Mauritius; and

10. stated that he would be returning to Australia on 22 June 2009 for at least 10 days.

14 On 2 June 2009 the Commissioner sent an email to Mr Cranswick requesting that he provide certain documents and information relevant to the investigation of his taxation affairs. On 8 June 2009 Mr Cranswick advised the Commissioner by email that the requested documents and information would be forwarded to the Commissioner by early July 2009. That documentation was not provided by Mr Cranswick and despite further emails sent by the Commissioner to Mr Cranswick on 7 August 2009 and 27 August 2009 that information was not provided and has not been provided.

15 In the meantime, on 9 June 2009 Mr Cranswick departed from Australia and has not returned.



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2009.

17 Also on 3 December 2009 the Commissioner issued and sent to Mr Cranswick notices of assessment in respect of the following income years ended 30 June stating Mr Cranswick's taxable income, tax payable and due dates for payment as follows:

Year	Taxable income	Tax payable	Due date
2005	\$372,821	\$170,258.39	5 June 2006
2006	\$731,286	\$345,536.57	5 June 2007
2007	\$184,220	\$67,854.50	21 November 2007
2008	\$335,537	\$138,980.07	21 November 2008
2009	\$321,041	\$129,494.47	21 November 2009

18 The notices of assessment were served on Mr Cranswick at various addresses and by email, including Mr Cranswick's preferred address for service at the address at 7A Swan Road, in a Perth suburb (7A Swan Road) being the address of the place of residence of Mr Cranswick last known to the Commissioner.

19 As at 7 December 2009 the amount due and payable by Mr Cranswick to the Commonwealth pursuant to the notices of assessment together with general interest charged total \$1,117,716.33. The Commissioner has made an evidentiary certificate pursuant to s 255-45 in Sch 1 to the Taxation Administration Act 1953 (Cth) (the TAA) that as at 7 December 2009 that sum was a tax-related liability and a debt due and payable by Mr Cranswick to the Commissioner. Section 255-45 relevantly provides:

255 45 Evidentiary certificate

(1) A certificate:

(a) stating one or more of the matters covered by subsection (2) or (3); and

signed by the Commissioner, a Second Commissioner or a Deputy Commissioner;

(b) being prima facie evidence of the matter or matters in a proceeding to recover an amount of a *tax related liability.

(2) A certificate may state:

(a) that a person named in the certificate has a *tax related liability; or

...

(e) that a sum specified in the certificate is, as at the date specified in the certificate, a debt due and payable by a person to the Commonwealth.

...

20 Section 177 of the 1936 Act relevantly provides:

177 Evidence

(1) The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be 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.

...

The presence and residence of Mr Cranswick and his family in Australia

21 On 5 April 2002 Mr Cranswick and his family were granted a BN-136 Skilled Independent (Migrant) Visa by the Department of Immigration and Citizenship. This visa expired in 2007. Mr Cranswick was subsequently granted two other visas.

22 As a result Mr Cranswick has a valid visa for residence in Australia to 2012.

23 After initially renting, on 21 February 2003 Mr Cranswick and his wife jointly applied for a home loan with Colonial Bank for \$800,000 to fund the purchase of a residential property at 2 Philip Street, East Fremantle (Philip Street). In his application for the loan, Mr Cranswick



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property on 26 February 2003 in the sum of \$1,015,000. Mr Cranswick paid for the purchase of the Philip Street property.

25 On 29 October 2005 Mr Cranswick's wife entered into a contract to purchase another residential property at 3/5 Swan Road, in a Perth suburb for \$400,000 (3/5 Swan Road).

26 On 18 November 2005 Mr Cranswick and his wife lodged a further application for finance with Colonial Bank for the amount of \$420,000 to fund the purchase of the 3/5 Swan Road property. In that loan application Mr Cranswick said that he was a citizen or permanent resident of Australia.

27 According to the transcript of Mr Cranswick's interview with the ATO the 3/5 Swan Road property was purchased for Mr Cranswick's parents-in-law, the parents-in-law paid rent but that did not cover the interest which Mr Cranswick and his wife paid.

28 When describing his net worth Mr Cranswick included the 3/5 Swan Road property as one of his assets.

29 The repayments of the loan of \$420,000 for the 3/5 Swan Road property came from a Commonwealth Bank account in the joint names of Mr Cranswick and his wife.

30 On 23 March 2006 Mr Cranswick's wife purchased the 7A Swan Road property for the sum of \$770,000.

31 In Mr Cranswick's transcript of interview with the ATO he said that he and his wife owned the 7A Swan Road property though it was in his wife's name.

32 In his transcript of interview with the ATO Mr Cranswick also said that:

1. his net worth included the 7A Swan Road property;
2. the funds for the purchase of the 7A Swan Road property were procured from the sale of the Philip Street property;
3. he met all the expenses in servicing the household including the children's school fees and the debts on the 7A Swan Road and the 3/5 Swan Road properties; and
4. the 7A Swan Road property was at the date of the interview with the ATO his registered address for banking purposes and Mr Cranswick lived at the 7A Swan Road property when his wife was there, and he sometimes stayed with his brother.

As at 15 April 2009 Mr Cranswick had 13 bank accounts in Australia in his name. Five of those were held jointly with his wife.

During his interview with the ATO Mr Cranswick said that he had no other bank accounts outside of Australia.

35 On 14 December 2005 Mr Cranswick and his wife, pursuant to the original loan application executed in respect of finance for the purchase of the 3/5 Swan Road property, established a line of credit of \$50,000.

36 On 10 July 2006 Mr Cranswick and his wife established a line of credit of \$250,000 from Colonial Bank at Perth.

Ordinarily resident in Australia?

37 From 1 July 2004 to 9 December 2008 Mr Cranswick travelled in and out of Australia on 58 occasions. On 28 occasions when Mr Cranswick arrived in Australia he listed his intended address as the Philip Street property or the 7A Swan Road property. On one occasion he gave as the address 6A Swan Road, Attadale. On each occasion he entered Australia Mr Cranswick said he was a resident returning to Australia and on each occasion he left Australia Mr Cranswick said he was a resident temporarily departing Australia.

38 On 5 April 2007 Mr Cranswick's resident visa expired while he was absent from Australia and on arrival at Perth International Airport on 14 April 2007 Mr Cranswick completed an application for a border visa, which was granted. In this he declared that he was resuming residence in Australia, that he intended to reside at the 7A Swan Road property and his intended stay in Australia was indefinite.

39 On each of the three occasions in which he arrived in Australia in 2009 he declared his address was the 7A Swan Road property. On the first two occasions he said he was an Australian resident returning to Australia but on the last occasion on 5 June 2009, after he was interviewed by the ATO on 15 April 2009, he declared that he was a visitor or temporary entrant. On the last two occasions he notified that he did not intend to live in Australia for the next 12 months.

40 As at 4 December 2009 Mr Cranswick was a director of two companies incorporated in Western Australia, held one of the two shares issued in one of the companies and his address for both companies was listed as the Philip Street property.

41 At his interview with the ATO Mr Cranswick said that he was a member of the East Fremantle Yacht Club, he was the owner of a motor vehicle with the registered address being the 7A Swan Road property, he held an Australian driver's licence, the 7A Swan Road property had a fixed line telephone service, a Foxtel subscription television service and electricity service connected to it in his name, he maintained a mobile telephone account in Australia and he possessed a valid visa for residence in Australia.

42 On 21 February 2008 Mr Cranswick sat and successfully completed an Australian citizenship test.

43 As at 3 December 2009 Mr Cranswick was listed on the White Pages internet entry as residing at the 7A Swan Road property.



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44 Sections 40, 43 and 44 respectively, of the Act, relevantly provide:

40 Acts of bankruptcy

(1) A debtor commits an act of bankruptcy in each of the following cases:

...

(c) if, with intent to defeat or delay his or her creditors:

(i) he or she departs or remains out of Australia;

(ii) he or she departs from his or her dwelling-house or usual place of business;

(iii) he or she otherwise absents himself or herself; or

▫ he or she begins to keep house;



43 Jurisdiction to make sequestration orders

(1) Subject to this Act, where:

(a) a debtor has committed an act of bankruptcy; and

(b) at the time when the act of bankruptcy was committed, the debtor:

(i) was personally present or ordinarily resident in Australia;

(ii) had a dwelling-house or place of business in Australia;

(iii) was carrying on business in Australia, either personally or by means of an agent or manager; or

(iv) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager;

the Court may, on a petition presented by a creditor, make a sequestration order against the estate of the debtor.

...

44 Conditions on which creditor may petition

(1) A creditor's petition shall not be presented against a debtor unless:

(a) there is owing by the debtor to the petitioning creditor a debt that amounts to \$2,000 or 2 or more debts that amount in the aggregate to \$2,000, or, where 2 or more creditors join in the petition, there is owing by the debtor to the several petitioning creditors debts that amount in the aggregate to \$2,000;

(b) that debt, or each of those debts, as the case may be:



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(c) the act of bankruptcy on which the petition is founded was committed within 6 months before the presentation of the petition.

...

45 To bring the case within s 43(1) of the Act, the Commissioner must establish that Mr Cranswick has committed an act of bankruptcy (within the meaning of s 40 of the Act) and that at the time the act of bankruptcy was committed at least one of the circumstances in s 43(1)(b) (i)-(iv) of the Act applies.

46 In order to present a creditors' petition there must be owing by the debtor to the petitioning creditor a liquidated sum at law or in equity, or partly so in each, and payable either immediately or at a certain future time of at least \$5,000: s 44(1) of the Act. Also the act of bankruptcy on which the petition is founded must have been committed within six months before the presentation of the petition: s 44(1)(c) of the Act.

The debt owing to the Commissioner

47 The notices of assessment issued to Mr Cranswick created debts in a liquidated sum due in law and payable upon expiry of the prescribed date for payment.

48 Section 204 of the 1936 Act provides:

204 When tax payable

(1) Subject to the provisions of this Part, the tax payable by a taxpayer other than a full self-assessment taxpayer for a year of income becomes due and payable:

(a) if the taxpayer's return of income is lodged on or before the due date for lodgment—on the later of:

(i) 21 days after the due date for lodgment of that return specified in the Gazette under section 161 for the year of income; or

21 days after a notice of assessment is given to the taxpayer; or

in any other case—21 days after that due date for lodgment.



(1AA) To avoid doubt, the reference in subparagraph (1)(a)(ii) to an assessment does not include a reference to an amended assessment.

(1A) Subject to the provisions of this Part, the tax payable by a full self-assessment taxpayer for a year of income becomes due and payable as follows:

(a) if the taxpayer's year of income ends on 30 June—on 1 December of the following year of income or on such later date as the Commissioner allows by notice published in the Gazette;

(b) if the taxpayer's year of income ends on a day other than 30 June—on the first day of the sixth month of the following year of income, or on such later date as the Commissioner allows by notice published in the Gazette.

(2) An amount of tax that a taxpayer is liable to pay because the Commissioner amends the taxpayer's assessment is due and payable on the 21st day after the day on which the Commissioner gives the taxpayer notice of the amended assessment.

(2A) An amount of shortfall interest charge that a taxpayer is liable to pay is due and payable on the 21st day after the day on which the Commissioner gives the taxpayer notice of the amount of the charge.

(3) If any of the tax or shortfall interest charge which a person is liable to pay remains unpaid after the time by which the tax or charge is due to be paid, the person is liable to pay the general interest charge on the unpaid amount for each day in the period that:

(a) started at the beginning of the day by which the tax or shortfall interest charge was due to be paid; and

(b) finishes at the end of the last day on which, at the end of the day, any of the following remains unpaid:

(i) the tax or shortfall interest charge;

(ii) general interest charge on any of the tax or shortfall interest charge.



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operation of s 204(1)(b) of the 1936 Act, the due dates for payment in each of the years were those specified in the assessments for each year, as set out above.

50 The making of an assessment which ascertains the taxable income and the tax payable thereon is a precondition for an amount of tax becoming due and payable. When an assessment is issued and served the date when the tax becomes due and payable is fixed by s 204(1)(b) of the 1936 Act. Section 204 now operates both prospectively and retrospectively as the date fixed under the section can be in the past. Prior to its amendment in 2000, s 204 could only operate prospectively.

51 As at the date of the presentation of the creditor's petition each of the debts arising under the assessments were due and payable at various dates between June 2006 (for the 2005 year) and November 2009 (for the 2009 year) (see the evidentiary certificate referred to above).

Departing Australia (the first limb of s 40(1)(c)(i))

52 Although when Mr Cranswick departed from Australia on 9 June 2009 there were no tax debts which were liquidated or payable immediately or at a future date, the position had changed by the date of the presentation of the creditor's petition by reason of the issue of the assessments and the operation of s 204(1)(b) of the 1936 Act. By that date the debts in all years save for the 2009 year had become due and payable at dates prior to 9 June 2009.

53 The position is to be assessed as at the date of the presentation of the creditor's petition and by reference to the evidence before the Court when the matter is decided. This includes the assessment notices that specify amounts of tax due and payable by virtue of s 204 of the 1936 Act at dates prior to 9 June 2009 for all years except 2009. (Tax debts are statutory in nature and the legislature has attached special incidents or characteristics to them which do not pertain to debts owed within the general sense of the law: *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at [51]).

54 The legislative framework is different from that pertaining at the time of the decision of Gibbs J in *Re Mendonca*. At that time s 204 of the 1936 Act made tax as assessed due and payable no less than thirty days after service of the assessment notice. Its operation was prospective and contingent on service of the assessment notice. The change in the operation of s 204 of the 1936 Act since its amendment in 2000 now produces (relevantly) a different result. As at the date of presentation of the creditor's petition the Commissioner has a provable debt established by force of the conclusive evidence provision of s 177 of the 1936 Act.

55 By reason of the above, as at 9 June 2009, at the date of Mr Cranswick's departure from Australia there were debts owing by Mr Cranswick within the terms of s 44(1)(a) and (b) of the Act. In this respect, this application differs from the statutory provisions on which *Re Mendonca* was determined.

Remaining outside Australia (the second limb of s 40(1)(c)(i))

56 The second limb of s 40(1)(c)(i) of the Act identifies as an act of bankruptcy, remaining out of Australia, with intent to delay his creditors.

57 Consistent with s 40(1)(c)(i) of the Act, it is not necessary that the debtor be personally present in Australia at the time of commission of the act of bankruptcy provided that the debtor has a connection with Australia set out in s 43(1)(b) of the Act. The act of bankruptcy constituted by remaining out of Australia with intent to delay or defeat creditors is a continuing one and a debtor commits an act of bankruptcy on each day the debtor remains out of Australia with the requisite intent: *Re Thai*; *Ex parte Commissioner of Taxation* (1994) 50 FCR 127 at 128 – 129.

58 Whilst Mr Cranswick has remained out of, and absented himself from Australia, he was throughout the period from 9 June 2009 to 8 December 2009, ordinarily resident in Australia, and had a dwelling-house in Australia within the meaning of s 43(1)(b)(i) and (ii) of the Act. Either of these matters is sufficient.

59 'Ordinarily resident in Australia' denotes some kind of habit. A person may be ordinarily resident in more than one place provided it is a place where he or she regularly and customarily lives. Since September 2002 Mr Cranswick regularly and customarily lived in Australia.

60 Mr Cranswick admits he owns a dwelling-house, (the 7A Swan Road property), where he resided prior to his departure from Australia as well as owning the 3/5 Swan Road property. There is no evidence to suggest he has divested himself of those interests. Prior to departing Australia he resided at 7A Swan Road.

61 Mr Cranswick has described himself as a citizen or permanent resident of Australia.

62 Mr Cranswick has continued to have and operate bank accounts and lines of credit in his name in Australia throughout the period to 8 December 2009.

63 After his departure from Australia on 9 June 2009 an application was made to the Colonial Bank to vary the loan repayments on the property at 3/5 Swan Road which was signed by both Mr Cranswick and his wife and declared the current address of each as the 7A Swan Road property.

64 Electricity services to the 7A Swan Road property remained connected in Mr Cranswick's name.

Intent to defeat or delay creditors

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66 The Commissioner submits and I accept that the relevant intent may be established:

1. even though it is not the debtor's sole intent in remaining out of Australia;
2. by attributing to a debtor the necessary consequences of his or her acts;
3. from awareness of an impending liability;
4. if the intent is only to defeat or to delay one creditor;
5. if the debtor has acted so as to render it impossible for creditors to ascertain the debtor's whereabouts;
6. by the debtor having no evidence, or there being an absence of evidence, as to any, honest reason for remaining overseas; from which it may be inferred that there is a fear of returning to Australia to face the consequences of bankruptcy.

67 It is open to infer that Mr Cranswick has departed and remained out of Australia with intent to defeat or delay his creditors as:

1. when Mr Cranswick departed Australia he was aware of the on-going ATO audit and the likelihood of income tax assessments issuing;
2. during the course of his interview with the ATO Mr Cranswick stated that he would be returning to Australia on 22 June 2009 for at least 10 days, in fact Mr Cranswick returned to Australia on 5 June 2009 but left again on 9 June 2009 and has not returned;
3. on previous arrival cards Mr Cranswick stated that he intended to resume residence in Australia but after he was interviewed by the ATO on 15 April 2009 when he became aware of an impending tax assessment said he was a visitor or temporary entrant to Australia;
4. since Mr Cranswick's arrival in September 2002 he regularly and ordinarily lived in Australia but he has not returned to Australia since departing on 9 June 2009;
5. Mr Cranswick's non-return to Australia has occurred despite his wife and children being resident in Australia and his personal and business connection with Australia;
6. through the period 4 December 2009 Mr Cranswick continued to hold directorship and shareholding interests in Western Australian companies and listed his address as being in Western Australia;

68 at all material dates Mr Cranswick continued to have and operate bank accounts with Australian financial institutions;



at all material dates Mr Cranswick continued to be listed on the internet White Pages as residing at the 7A Swan Road property;

9. at all material dates Mr Cranswick continued to have the electricity connection in his name at the 7A Swan Road property; and

10. Mr Cranswick has remained out of Australia knowing that notices of assessment have issued.

68 In all the circumstances the Commissioner has established a prima facie case for sequestration orders to issue against Mr Cranswick.

Substituted service

69 The Commissioner also applies under s 309(2) of the Act for substituted service rather than O 7 r 9 of the Federal Court Rules.

70 Section 309(2) of the Act confers a discretionary power on the Court to order that service of a document on a person may be done in a manner specified by the Court. The discretion is unfettered but is not to be exercised lightly: *Ginnane v Diners Club Ltd* (1993) 42 FCR 90 at 92.

71 In the exercise of the s 309(2) discretion, the Court must be satisfied both that abnormal difficulties exist in effecting personal service of the petition on the debtor and that there is a reasonable probability that the debtor will be informed of the petition as a result of the form of service identified: *Ginnane* at 92 and 95 per Northrop, Sheppard and Einfeld JJ; *Re Mendonca* at 261 per Gibbs J; *Equititrust Ltd v Bosiljevac* [2007] FCA 323 at [7]-[12] per Collier J.

72 The fact that a debtor may be overseas may not be sufficient for an order for substituted service but it is a factor to be taken into account: *Ginnane* at 95.

Abnormal difficulties in effecting personal service

73 The evidence shows that abnormal difficulties exist in serving Mr Cranswick for the following reasons:

1. Mr Cranswick has remained outside the jurisdiction since his departure on 9 June 2009;
2. Mr Cranswick's Gold Mastercard statements for the period from 9 June 2009 to 10 November 2009 show overseas transactions occurring at various times in Britain, South Africa and Zimbabwe, as well as Australian transactions;
3. The location of Mr Cranswick remains unknown to the Commissioner;
4. Mr Cranswick has not responded to attempts by the Commissioner to contact him by email and post; and



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1. On Mr Cranswick's outgoing passenger card dated 9 June 2009, he declared that the country where he would get off the flight was South Africa and that his country of residence was Zimbabwe;
2. Mr Cranswick is a director and chief executive office of African Consolidated Resources PLC whose registered office is in the United Kingdom with operations in Zimbabwe, Zambia and Mozambique;
3. Mr Cranswick is associated with Adonis Investments which is a private company administered out of Mauritius.
4. Mr Cranswick had previously provided a contact address in Zimbabwe but recent internet searches have revealed:
 - 4.1 that Mr Cranswick is engaged in a highly contentious dispute with interests associated with the Zimbabwe government;
 - 4.2. it has recently been reported that Mr Cranswick is no longer in Zimbabwe;
 - 4.3. it has also been recently reported that Mr Cranswick is in hiding because of his dispute with the Zimbabwe government;
 - 4.4. it has also been recently reported that Mr Cranswick is living in the United Kingdom; and
 - 4.5. it has been recently reported that Mr Cranswick is to be a speaker at a conference in South Africa at the end of July 2010.

75 Further, even if it could be established that Mr Cranswick was in Zimbabwe it is submitted that abnormal difficulties would be involved in attempting to serve him there because:

1. It has taken almost five months for the Commissioner to obtain information from the Australian Embassy in Harare (through DFAT) for service of process in Zimbabwe and it can be inferred that the process of seeking to arrange personal service there would be equally protracted.
2. It is a matter of notoriety in Zimbabwe that Mr Cranswick is in dispute with the government of that country and that as a consequence he may be in hiding from that government's representatives.

76 Given Mr Cranswick's continued absence from Australia and the Commissioner's inability to locate Mr Cranswick, it has not been possible for the Commissioner to personally serve him with the petition and affidavit in support. Although considerable efforts have been made in order to locate him so that conventional personal service may be effected, those enquiries have not borne fruit, thus precluding further attempts at personal service.



reasonable probability that the debtor will be informed of the petition by substituted service

77 The Commissioner seeks substituted service by the same method of service the Commissioner adopted which successfully brought the notices of assessment to the attention of Mr Cranswick. One of the persons to whom the petition will be sent acts as a solicitor for Mr Cranswick in relation to an objection lodged by Mr Cranswick to the notices of assessment.

78 I accept the Commissioner's primary submission that, by reason of the operation of s 204 of the 1936 Act, as at 9 June 2009 (the date of Mr Cranswick's departure from Australia) it is arguable that there were debts owing by Mr Cranswick within the terms of s 44(1)(a) and (b) of the Act.

79 The Commissioner raises a further or raises an alternative argument which for present purposes does not need to be resolved. The Commissioner submits that, in light of the principles of statutory construction enunciated in cases such as *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, provided that a debtor is indebted to the creditor at the time of the act of bankruptcy within s 40 of the Act, the precondition in s 44(1) of the Act to the presentation of a creditor's petition that the debt be at that time a liquidated sum immediately due and payable at a certain time does not limit the scope of the acts of bankruptcy to which section 40 applies. It was submitted that earlier cases that have held to the contrary should be taken to have been wrongly decided. As I have said, for present purposes that argument does not need to be resolved on an ex parte motion.

80 For the reasons set out above, I was satisfied on 5 August 2010 that the following orders should be made.

CONCLUSION

81 The following orders were made:

1. The Applicant be granted leave to serve the documents required to be served in accordance with Rule 4.05 of the Federal Court (Bankruptcy) Rules 2005 together with a copy of these orders ("the Documents") on the Respondent being a person outside the jurisdiction of the Commonwealth of Australia.
2. The Documents be served on the Respondent by way of substituted service and the need for personal service be dispensed with.
3. Substituted service in the manner provided for in paragraph 3 below of the Documents be effected by:
 - 3.1 leaving a copy of the Documents and a copy of the Court's orders in an envelope addressed to the Respondent at the address, 7A Swan Road, Attadale WA 6156 ("the 7A Swan Road property");



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- 3.3 sending a copy of the Documents and a copy of the Court's orders by pre-paid post addressed to the Respondent at Peter Lark & Co., PO Box 518 West Perth WA 6872;
- 3.4 sending an electronic copy of the Documents and the Court's orders to the Respondent at the email address, ancranswick@bigpond.com; and
- 3.5 sending an electronic copy of the Documents and the Court's orders to the Respondent at the email address, peter@peterlark.com.
4. Service in accordance with these orders be deemed good and sufficient service of the Documents upon the Respondent.
5. Service of the Documents be deemed to have been effected on the Respondent two business days after service has been effected in accordance with paragraph 3 above.
6. The petition be heard by a judge at 2:15 pm on 31 August 2010.
7. Costs of this application be in the cause.

I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

ted: 18 August 2010

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The Insider is a political and business bulletin about Zimbabwe, edited by Charles Rukuni. Founded in 1990, it was a printed 12-page subscription only newsletter until 2003 when Zimbabwe's hyper-inflation made it impossible to continue printing.

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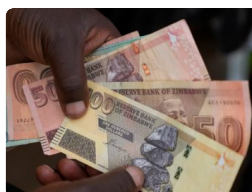
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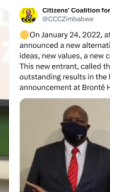
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