Federal Court of Australia

Donoghue v Russells (A Firm) [2021] FCA 798

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| Appeal from: | *Russells (A Firm) v Donoghue* [2019] FCCA 1864 |
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| File number: | QUD 446 of 2019 |
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| Judgment of: | **RANGIAH J** |
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| Date of judgment: | 16 July 2021 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – appeal against judgment of Federal Circuit Court of Australia – *Bankruptcy Act 1966* (Cth) – where primary judge made sequestration order against debtor – whether primary judge erred in finding that debtor “was carrying on business in Australia” under s 43(1)(b)(iii) – whether primary judge erred in finding that debtor “had a place of business in Australia” under s 43(1)(b)(ii) – whether servicing a debt in Australia constitutes “carrying on business in Australia” – whether *Jones v Dunkel* inference properly drawn where debtor failed to give evidence on source of funds used for loan repayments – whether debtor’s address for a company directorship grounds an inference of the debtor having a “place of business in Australia” – appeal dismissed  |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 43(1) and 52(1)*Corporations Act 2001* (Cth) s 21(2)*Evidence Act 1995* (Cth) s 140(2)*Privacy Act 1988* (Cth) s 5B(3)(b)*Federal Court Rules 2011* (Cth) rr 10.42, 10.43*Local Government Act 1919* (NSW) s 118Bankruptcy Act 1914(UK) s 1(2)Rules of the Supreme Court 1883 (UK) Ord IX, r 8  |
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| Cases cited: | *Actiesselskabet Dampskib “Hercules” v Grand Trunk Pacific Railway Company* [1912] 1 KB 222*Ahern v Deputy Commissioner of Taxation* *(Qld)* (1987) 76 ALR 137*ASIC v Hellicar* (2012) 247 CLR 345*Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307*Badcock v Cumberland Gap Park Company* [1893] 1 Ch 362*Blatch v Archer* (1774) 1 Cowp 64*Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1*Briginshaw v Briginshaw* (1938) 60 CLR 336*Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466*Fuller* *v Alford* (2017) 252 FCR 168*G v H* (1994) 181 CLR 387*Girlock (Sales) Pty Ltd v Hurrell* (1982) 149 CLR 155*Haggin v Comptoir D’Escompte de Paris* (1889) 23 QBD 519*Hamilton v Warne* (1907) 4 CLR 1293*Henderson v State of Queensland* (2014) 255 CLR 1*HML v The Queen* (2008) 235 CLR 334*Hope v Bathurst City Council* (1980) 144 CLR 1*In* *re Bird v Inland Revenue Commissioners; Ex parte the Debtor* [1962] 1 WLR 686*In re Brauch (A Debtor); Ex parte Britannic Securities and Investments Ltd* [1978] Ch 316*Jones v Dunkel* (1959) 101 CLR 298*Kuhl v Zurich Financial Services* *Australia Ltd* (2011) 243 CLR 361*Napiat Pty Ltd v Salfinger (No 7)* (2011) 202 FCR 264*Newby v Von Oppen and The Colt’s Patent Firearms Manufacturing Company* (1872) LR 7 QB 293*Re Application of Campbell; Gebo Investments (Labuan) Ltd v Signatory Investments Pty Ltd* (2005) 54 ACSR 111*Re Mendonca; Ex parte Federal Commissioner of Taxation* (1969) 1 ATR 571*Re TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (No 2)* (2019) 369 ALR 192*Re Vassis; Ex Parte Leung* (1986) 9 FCR 518*Russells (A Firm) v Donoghue* [2019] FCCA 1864*Smith (on behalf of National Parks and Wildlife Service) v Capewell* (1979) 142 CLR 509*South India Shipping Corporation Ltd v Export-Import Bank of Korea* [1985] 1 WLR 585*Theophile v The Solicitor‐General* [1950] AC 186*Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548*Trustees of the Property of Cummins (A Bankrupt) v Cummins* (2006) 227 CLR 278*Turner v Trevorrow* (1994) 49 FCR 566*Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190 |
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| Date of last submissions: | 7 April 2021 (Respondent)21 April 2021 (Appellant) |
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| Date of hearing: | 22 March 2021  |
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| Counsel for the Appellant: | Mr M Amerena |
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| Solicitor for the Appellant: | O’Shea & Partners |
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| Counsel for the Respondent: | Mr P Somers |
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| Solicitor for the Respondent: | Russells |

ORDERS

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|  | QUD 446 of 2019 |
|   |
| BETWEEN: | GARRY JOHN DONOGHUEAppellant |
| AND: | RUSSELLS (A FIRM)Respondent |

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| order made by: | RANGIAH J |
| DATE OF ORDER: | 16 JULY 2021 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant pay the respondent’s costs of the appeal.

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

REASONS FOR JUDGMENT

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| The reasons of the primary judge | [7] |
| The submissions | [21] |
| Whether the primary judge erred in finding that the debtor was carrying on business in Australia | [28] |
| Alleged errors in construction of s 43(1)(b)(iii) of the Act | [29] |
| Alleged errors in making findings of fact | [52] |
| Alleged errors in finding that the debtor was carrying on business in Australia | [76] |
| Whether the primary judge erred in finding that the debtor had a place of business in Australia | [80] |
| Summary | [90] |

RANGIAH J:

1. On 4 July 2019, in *Russells (A Firm) v Donoghue* [2019] FCCA 1864, the Federal Circuit Court of Australia made a sequestration order against the estate of the present appellant. This is an appeal against that judgment.
2. It is convenient to refer to the appellant as **the debtor**, and to the respondent as **the creditor**.
3. At first instance, the debtor did not dispute that he had committed an act of bankruptcy, but contended that the Court lacked jurisdiction to make a sequestration order on the basis that the requirements of s 43(1)(b) of the *Bankruptcy Act 1966* (Cth) (the **Act**) were not satisfied.
4. Section 43(1) of the Act provides:

**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.

…

1. The primary judge found that the debtor “had a place of business in Australia” and “was carrying on business in Australia” at the time when the act of bankruptcy was committed. Accordingly, his Honour held that the Court had jurisdiction to make a sequestration order and proceeded to make such an order. In the appeal, the debtor contends that the primary judge erred in making both findings.
2. I will describe the reasons of the primary judge before considering the submissions of the parties.

## The reasons of the primary judge

1. The evidence before the Federal Circuit Court was given by way of affidavit. There was no cross-examination of the deponents. Accordingly, the primary evidence was not in dispute. The matters principally in dispute were what inferences were capable of being drawn, and what inferences ought to be drawn, from that evidence.
2. From 2011, the debtor had been engaged in litigation with the Commissioner of Taxation. The creditor is a firm of solicitors that acted for the debtor in much of that litigation. The litigation ended in May 2018 when judgment was entered against the debtor for an amount in excess of $48 million.
3. In the course of the litigation, the Commissioner of Taxation served several departure prohibition orders against the debtor to prevent him departing from Australia without discharging, or making satisfactory arrangements for the discharge of, his tax liability. The debtor was able to obtain certificates allowing him to temporarily leave Australia. However, the debtor has not returned and has been absent from Australia since about July 2014.
4. The creditor has commenced litigation against the debtor for unpaid fees. The litigation is ongoing, but the creditor has the benefit of an interlocutory costs order made by the District Court of Queensland on 12 March 2018 in the sum of $10,000.
5. On 22 March 2018, a bankruptcy notice was issued at the request of the creditor, asserting a debt of $10,000 based on the District Court’s order.
6. On 18 April 2018, the creditor obtained an order for substituted service of the bankruptcy notice. The bankruptcy notice was required to be complied with by 12 June 2018. It was not complied with.
7. On 10 December 2018, the creditor filed a creditor’s petition alleging an act of bankruptcy based upon the debtor’s failure to comply with the bankruptcy notice. The creditor’s petition was later amended to add a ground alleging that the debtor had remained out of Australia with intent to defeat or delay his creditors.
8. The primary judge observed that the creditor did not contend that the debtor was personally present or ordinarily resident in Australia when he was served with the bankruptcy notice. However, the creditor contended that the debtor had a dwelling house in Australia, had a place of business in Australia and was carrying on business in Australia.
9. These allegations were denied by the debtor. The debtor was represented by counsel at the hearing. The debtor did not give evidence.
10. Much of the evidence was directed to the question of whether the debtor had a dwelling house in Australia at the time of the act of bankruptcy. The primary judge found that the debtor had resided with his wife, Sandra Donoghue, at a property at Langside Road, in Hamilton, in Brisbane (the **Hamilton property**), but that they had separated by about 1998. They had entered into an informal separation agreement which would allow Mrs Donoghue and their daughter to continue to live at the Hamilton property, while the debtor paid them sufficient money to support their lifestyles. In the ensuing years, Mrs Donoghue had remained at the Hamilton property and the debtor had honoured the agreement. The primary judge found that the debtor had not lived in Australia since 2014, and probably lives in Ecuador. His Honour was not satisfied that the debtor had a dwelling house in Australia when he failed to comply with the bankruptcy notice on 12 June 2018. That finding has not been challenged.
11. However, some of the primary judge’s findings concerning whether the debtor had a dwelling house in Australia were also relevant to whether, when the act of bankruptcy was committed, the debtor had a place of business in Australia and was carrying on business in Australia. His Honour found:

24. In 2008, so some 10 years after the parties separated, the respondent borrowed between $4m and $5m from the Commonwealth Bank. The evidence of Mr Tiplady and Mrs Donogohue (sic) is that it was borrowed by the respondent for business purposes. Mrs Donoghue says that he continues to use that facility for his business. In her capacity as trustee of the family trust Mrs Donoghue agreed to be the borrower of the funds and for the Hamilton property being used for security for the loan, which was advanced over a period of time. However, the only evidence is that the funds were borrowed for the respondent’s business purposes and he had, and continues to have, the use of those funds.

25. The respondent is responsible for repaying the loan secured over the Hamilton property. He has personally guaranteed that loan. The current balance owing on the loan is in the order of $5.5m. The monthly repayments of that loan are in the order of $45,205. Mrs Donoghue has no capacity to make the repayments on the loan and nor does the family trust. Only the respondent has the capacity to meet the loan repayments. According to Mrs Donoghue’s evidence, the loan repayments are made by the respondent from “a US Account” to Mrs Donoghue’s CBA bank account. From there, Mrs Donoghue repays the CBA Loan. The repayments are made in Brisbane, Australia.

26. There is nothing in the evidence about the source of the funds the respondent uses to repay the Loan. I accept that all the evidence demonstrates is that he obtained the loan for his business and continues to use it for that purpose. The petitioning creditor invites me to infer that the substantial monthly repayments are made from the respondent’s business activities. I think that inference is reasonable, especially where the respondent has not given any evidence to explain those dealings. I draw the inference and find that the substantial monthly repayments of the CBA borrowings are made from the respondent’s business activities.

27. The evidence shows that the respondent listed the Hamilton property as the address for service of notices under his personal guarantee with the CBA. He also gave to the CBA the Hamilton property as his residential address. There is no evidence that the respondent has updated the Bank with any other address for service of such notices or any other residential address.

…

1. The primary judge went on to conclude that the debtor had a place of business in Australia when the act of bankruptcy was committed. His Honour found:

36. The evidence satisfies me that the CBA loan obtained by Mrs Donoghue for the respondent is part of the respondent’s business activities. It was obtained for business purposes and is used for business purposes.

37. The loan was obtained here in Australia, from an Australian bank. The respondent gave a personal guarantee in respect of the borrowing. The respondent provides the funds so that repayments of the loan can be made. Those repayments are made here in Australia. The uncontroverted evidence is that for the purposes of that loan, the respondent has provided the address at the Hamilton property as his residential address and the address at which notices for the purposes of the personal guarantee might be served.

38. I note that there is no suggestion that Sterling Pacific Pty Ltd has any connection with the CBA loan. However, the respondent remains a director of that company registered in Australia and the Hamilton property is his address according to the records held by ASIC in respect of that company. Those matters are indicia of the respondent having a place of business in Australia: *Deputy Commissioner of Taxation v Wachjo* (2005) 216 ALR 682 at [11]. It was open to the respondent to give evidence about his involvement in the company and the purpose for which he remains a director but he did not do so.

39. I find that as at the date of the act of bankruptcy, 12 June, 2018, the respondent had a place of business in Australia namely the address of the Hamilton property. He maintained that address for the purposes of the loan that was obtained from the CBA and his dealings with the CBA in respect of that loan and in particular, the personal guarantee. I am satisfied that the requirement contained in s.43(1)(b)(ii) of the Bankruptcy Act is therefore met.

1. The primary judge also concluded that the debtor was carrying on business in Australia when the act of bankruptcy was committed. His Honour found:

40. I am also satisfied that for the purposes of s.43(1)(b)(iii) of the Bankruptcy Act the respondent is carrying on business in Australia. Although the respondent is not primarily liable for the CBA borrowings (the borrower being the trustee of the Donoghue family trust) the practical arrangements as explained by Mrs Donoghue demonstrate that it is a loan for business purposes obtained at the respondent’s request, used by him for his business and serviced by him here in Australia through the repayments of the loan as and when they fall due.

41. Whilst the evidence does not permit of a precise finding about the nature or extent of the respondent’s business, none is necessary. All that needs to be found is that he is carrying on business in Australia. As cases like *In Re Mendonca; Ex parte FC of T* (1969) 15 FLR 256 (esp at 260-1) and *Re Vassis, Ex Parte Leo Leung* (1986) 64 ALR 407 demonstrate the phrase *was carrying on business* in s.43(1)(b)(iii) has a very wide meaning.

42. The servicing of debt here in Australia for the purposes of the respondent’s business whatever that might be is, in my view, part of the respondent’s business. In circumstances where the loan was obtained here, the loan was funded in Australia, relies upon security in Australia and the repayments are made here in Australia from funds which I have found are generated in the respondent’s business, the requirement that the respondent was carrying on business in Australia as at the date of the act of bankruptcy, 12 June, 2018, is satisfied. I so find.

43. Alternatively, to the extent that there is some arrangement, either legally binding or otherwise between the respondent and Mrs Donoghue for the purposes of the CBA loan, that too, constitutes, in my view, the carrying on of business in Australia. It is plainly an arrangement or a facility that the respondent has organised with Mrs Donoghue to enable funds to be obtained for the purposes of his business. That arrangement was in place as at the date of the act of bankruptcy.

1. The primary judge was satisfied of the matters set out in s 52(1) of the Act, including that the debt was still owing. His Honour considered it unnecessary to address the creditor’s alternative argument that the debtor had committed an act of bankruptcy by remaining out of Australia. His Honour proceeded to make a sequestration order against the estate of the debtor. His Honour also awarded costs in favour of the creditor.

## The submissions

1. The Notice of Appeal contains five grounds, which are, in summary:

1. The finding that the monthly repayments of the Commonwealth Bank loan were made from “the debtor’s business activities” was not supported by the evidence.

2. That finding, being based on the debtor’s failure to give evidence, was erroneous, because the failure to give evidence could not be used to make up the deficiency of evidence.

3. The finding that maintaining an address for the purposes of a loan was maintaining a place of business in Australia was erroneous.

4. The finding that the debtor’s directorship of Sterling Pacific Pty Ltd and his address as director indicated that the debtor had a place of business in Australia was erroneous.

5. The finding that the debtor borrowing money and repaying the loan in Australia constituted carrying on business in Australia was erroneous.

1. It may be seen that the debtor challenges the primary judge’s finding that, at the time of the act of bankruptcy on 12 June 2018, the debtor “was carrying on business in Australia” within s 43(1)(b)(iii), and the finding that the debtor “had a place of business in Australia” within s 43(1)(b)(ii) of the Act.
2. The debtor submits that the primary judge’s description of the phrase “carrying on business in Australia” as having “a very wide meaning” was mistaken. The debtor submits that what is required is a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purposes of profit on a continuous and repetitive basis in Australia. He contends that the phrase requires “trading” in Australia, whereas the evidence suggests that any trading by any relevant business was overseas. The debtor submits that merely borrowing and repaying borrowed funds in Australia for the purpose of a business conducted in a foreign country does not amount to carrying on business in Australia.
3. The debtor also submits that the evidence was inadequate to permit a conclusion that any relevant business was the debtor’s own business. He argues that Mrs Donoghue’s references to “his [the debtor’s] business” are inexact and equivocal. The debtor submits that there is no evidence as to how he acquired the funds that enabled him to make payments to service the debt. In particular, there is no evidence as to whether the debtor obtained such funds from a business he owned as opposed to a business owned by other legal entities. The debtor also argues that it was inappropriate for the primary judge to rely upon a *Jones v Dunkel* inference for the conclusion that the repayments were made from the debtor’s business activities.
4. The debtor points out that the creditor bore the onus of proving, on the balance of probabilities, that the debtor was carrying on business, or had a place of business, in Australia, at the date of the act of bankruptcy. He submits that s 140(2) of the *Evidence Act 1995* (Cth) and the *Briginshaw* standard must be taken into account.
5. The inference that the debtor had a place of business in Australia was drawn from findings that the debtor was carrying on business in Australia, that the debtor gave the Hamilton property as his address for his guarantee of the Commonwealth Bank loan, and that the debtor gave the Hamilton property to ASIC as his address for his directorship of Sterling Pacific Pty Ltd. The debtor submits that these facts did not permit an inference that the debtor had a place of business in Australia.
6. The creditor submits that no error has been demonstrated in the reasons of the primary judge. The creditor emphasises that Mrs Donoghue was called by the debtor himself and submits that it is no answer for the debtor to now assert that her evidence was inexact or equivocal. The creditor argues that the debtor did not make any submission to the primary judge that the business was not that of the debtor, nor that there was evidence to support a conclusion that the business was being carried on by an entity other than the debtor.

## Whether the primary judge erred in finding that the debtor was carrying on business in Australia

1. It is convenient to commence by examining the primary judge’s finding that, when the act of bankruptcy was committed on 12 June 2018, the debtor was “carrying on business in Australia” within s 43(1)(b)(iii) of the Act.

### Alleged errors in construction of s 43(1)(b)(iii) of the Act

1. The debtor argues that the primary judge made two related errors of construction of s 43(1)(b)(iii) of the Act. First, it is submitted that the primary judge’s description of the phrase “carrying on business in Australia” as having “a very wide meaning” was mistaken. Second, it is submitted that the phrase requires the conduct of a commercial enterprise in the nature of a going concern, or trading, in Australia.
2. As to the first alleged error, the primary judge relied upon *Re Mendonca; Ex parte Federal Commissioner of Taxation* (1969) 1 ATR 571 and *Re Vassis; Ex Parte Leung* (1986) 9 FCR 518 for the proposition that the phrase has “a very wide meaning”. In *Theophile v The Solicitor‐General* [1950] AC 186, the House of Lords considered s 1(2) of the *Bankruptcy Act 1914* (UK) which defined a “debtor” as including a person who, “was carrying on business in England, personally, or by means of an agent or manager”. Lord Porter held at 201:

In a sense it is true that the appellant was not actively carrying on business within three months of the presentation of the petition, but there is a series of cases…which in unbroken sequence have decided that trading does not cease when, as the expression is, “the shutters are put up,” but continues until the sums due are collected and all debts paid.

1. In *In* *re Bird v Inland Revenue Commissioners; Ex parte the Debtor* [1962] 1 WLR 686, the Court of Appeal at 693, 697-698 and 699, described the ratio decidendi of *Theophile* as being that, “trading is not completed until you have performed all the obligations that the fact of trading imposed upon you”.
2. In *Mendonca*, Gibbs J referred at 574-575 to, “the somewhat wide understanding of those words [“carrying on business”] that has come to be established in bankruptcy law”, citing *Theophile* and *Bird*.
3. In *Vassis*, Burchett J at 525-526 adopted the view of Gibbs J and added that the words, “either personally or by means of an agent or manager”, are words of extension, not limitation. Justice Burchett held that the debtor was "carrying on business in Australia" since the winding-up of the debtor’s business and the payment of its debts had not been concluded.
4. I accept the debtor’s submission that the primary judge’s description of the phrase “carrying on business” as having “a very wide meaning” somewhat overstates the effect of *Mendonca* and *Vassis*. However, that overstatement had no ultimate consequence. The judgments in *Theophile*, *Bird, Mendonca* and *Vassis* have a significance for the present case that will be considered later in these reasons.
5. The debtor’s second submission is that the primary judge erred in failing to find that s 43(1)(b)(iii) of the Act requires a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis in Australia. The debtor submits that there must be evidence of trading in Australia.
6. In response, the creditor submits that it is unnecessary that the whole of a business, or even a substantial part of the business, be conducted in Australia. The creditor argues that all that is required is that some part of a business, not necessarily direct trading activity, be carried on in Australia.
7. There is no authority that directly addresses the competing submissions in the context of s 43(1)(b)(iii) of the Act, but assistance may be gained from cases that have considered a similar phrase in statutory provisions that have a similar context. That context is the foundation of a jurisdictional nexus.
8. The debtor relies upon *Hope v Bathurst City Council* (1980) 144 CLR 1, where Mason J accepted at 8 that the dictionary definition of “business” which comes closest to its popular meaning is, “a commercial enterprise as a going concern”. His Honour considered that, “it is the words “carrying on” which imply the repetition of acts…and activities which possess something of a permanent character”. In the context of s 118 of the *Local Government Act 1919* (NSW), his Honour held at 8-9 that “business” denoted, “activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis”.
9. In *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548, the Full Court considered the meaning of “carrying on business in Australia” in r 10.42 of the *Federal Court Rules 2011* (Cth) (**Rules**), for the purpose of r 10.43 of the Rules which deals with service of an originating application in a foreign country. The Full Court observed:

50 The expression “carrying on business” may have different meanings in different contexts: *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164 at 178 (Gibbs J). So, care must be taken to understand the context in which the requirement is being considered. However, when used to ensure a jurisdictional nexus as a matter of comity it will have a meaning informed by the requirement to ensure there is sufficient connection with the country asserting jurisdiction. It requires resort to the usual or ordinary meaning of the phrase and invites a factual inquiry. As the Court said in *Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd* (2018) 259 FCR 514 at [99]:

Whether a company is carrying on business in Australia is a question of fact: *Luckins (Receiver & Manager of Australian Trailways Pty Ltd) v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164 at 186. While it is correct to say that a company may be found to carry on business in Australia even though it does not maintain an office in Australia or the bulk of its business is carried on outside Australia, it does not follow that such a company will be found to carry on business in Australia merely because it has engaged in a small number of isolated transactions. Each case will depend on its own facts.

51 The activities must form a commercial enterprise: *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647 at [197].

52 The words ‘carrying on’ imply the repetition of acts and activities which possess something of a permanent character: *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8 (Mason J). Participation in a single transaction or a number of isolated transactions will not satisfy this aspect.

1. In *Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307, Thawley J held the Commission had established a prima facie case that Facebook Inc carried on business in Australia within the meaning of s 5B(3)(b) of the *Privacy Act 1988* (Cth), by providing services to a subsidiary by undertaking data processing activities, including operating cookies on the devices of users in Australia. This was in circumstances where Facebook Inc carried out the bulk of its business overseas.
2. In *Re Application of Campbell; Gebo Investments (Labuan) Ltd v Signatory Investments Pty Ltd* (2005) 54 ACSR 111, Barrett J, considering s 21(2) of the *Corporations Act 2001* (Cth), stated at [31]:

Case law makes it clear that the territorial concept of carrying on business involves acts within the relevant territory that amount to or are ancillary to transactions that make up or support the business.

This passage was approved by the Full Court of the Federal Court in *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190 at [149].

1. In *Smith (on behalf of National Parks and Wildlife Service) v Capewell* (1979) 142 CLR 509, the defendant was charged with a breach of s 105(a) of the *National Parks and Wildlife Act 1974* (NSW), which provided that, “a person shall not exercise or carry on…the business of a skin dealer” unless properly licenced. Justice Gibbs held at 519:

It seems clear that a solitary transaction of sale or purchase of skins in New South Wales will only constitute an offence against s 105(a) of the Act, if the sale of (sic) purchase has been made by the defendant with the intention that it shall be the first of several transactions in a business which he thereby commences to carry on, or if it has been made in the course of a business which the defendant is carrying on elsewhere.

1. In *Gebo*, Barrett J, referring to the last part of this passage, concluded at [39]:

…a company may be found to be carrying on business “in” a particular geographic area even though the bulk of its business is conducted elsewhere.

1. In *Re TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (No 2)* (2019) 369 ALR 192, McKerracher J, also considering s 21(2) of the *Corporations Act*, observed at [19]:

It was held a considerable time ago that carrying on business generally connotes a commercial enterprise conducted systematically and regularly with a view to profit or a succession of acts designed to advance some enterprise of the company pursued with the view to pecuniary gain: *Hyde v Sullivan* (1955) 56 SR (NSW) 113 at 119. But as Barrett J emphasised in *Gebo*, it is not necessary for the purposes of Pt 5.7 that the company in question engages in a series of acts within Australia. Particularly, in modern times, a company may be found to be carrying on business in Australia even though the bulk of its business is conducted elsewhere. This, indeed, has long been the case: see, for example, *Dunlop Pneumatic Tyre Co Ltd v Aktien-Gesellschaft Fur Motor Und Motorfahrzeugbau Vorm Cudell & Co* [1902] 1 KB 342; [1900-3] All ER Rep 195.

1. In *Theophile*, *Bird, Mendonca* and *Vassis*, it was held that a person carries on business during the process of a business being wound up and repaying its debts, even though the business has ceased to actually trade.
2. In *Actiesselskabet Dampskib “Hercules” v Grand Trunk Pacific Railway Company* [1912] 1 KB 222, the defendant was a company engaged in the construction of a railway in Canada. Four of its directors resided in London and formed a committee which raised loan capital to be used for the construction of the railway. The money raised was paid into a bank account in London and then remitted to Canada. The committee had a secretary and staff and met at an office in London. No other business of the company was transacted by the committee.
3. In *Actiesselskabet*,in the context of Ord IX, r 8 of the Rules of the Supreme Court 1883(UK), Lord Buckley held at 227-228 that a writ could only be served upon the company in London if the company was carrying on business in England. While the language of Ord IX, r 8 did not include the phrase “carrying on business”, a body of case law dealing with service of a process on foreign corporations favours the expression “carrying on business” as a “convenient test” of presence in the jurisdiction for the purpose of effective service: see, for example, *South India Shipping Corporation Ltd v Export-Import Bank of Korea* [1985] 1 WLR 585, 589; *Badcock v Cumberland Gap Park Company* [1893] 1 Ch 362, 367-368; *Haggin v Comptoir D’Escompte de Paris* (1889) 23 QBD 519, 522; *Newby v Von Oppen and The Colt’s Patent Firearms Manufacturing Company* (1872) LR 7 QB 293, 296; and see *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1 at [61].
4. In *Actiesselskabet,* the Court of Appeal held that the raising of capital in London for use in the company’s railway operations in Canada amounted to carrying on business in England. Lord Vaughan Williams held at 227:

Undoubtedly the defendants have officers here who act on their behalf at a fixed residence and who circulate advertisements of the defendants in their name; but it is contended that we ought to hold that they are not carrying on the business of the company, because the business carried on here is not that of running or managing the railway, but of raising money by means of the issue of bonds and debentures, which money is to be used by the company in Canada. In my judgment it is impossible to draw any such distinction. I think that in doing what it did the London board was carrying on the business of the company, and that it makes no difference that they pay no rent for the office in which they carry it on. The office is the office of the company; the business is advertised in every way as being carried on at the office. The appeal must therefore be dismissed.

1. Lord Buckley held at 228:

The cardinal factors are that the company does acts within the jurisdiction which are part of its business as a company, and does them at a fixed place within the jurisdiction. The raising of this loan capital is part of the company’s business, and it is done here by a London committee constituted of the directors resident in England. They are the company’s agents in this country for that purpose.

1. Section 43(1)(b)(iii) of the Act requires that the debtor “was carrying on business in Australia” at the time of the act of bankruptcy as a foundation for the jurisdiction of a court to make a sequestration order. Applying the cases that have considered a similar phrase in broadly similar contexts, it can be concluded that:
2. Whether a company is “carrying on business in Australia” is a question of fact.
3. The words “carrying on” imply the repetition of acts and activities which possess something of a permanent character; and it is generally insufficient for there to be a single transaction or a number of isolated transactions.
4. A single transaction in Australia may be enough if it has been made in the course of business which the debtor is carrying on overseas.
5. A debtor may carry on business “in” Australia even though the bulk of his or her business is conducted overseas.
6. It may be sufficient that there are acts done in Australia ancillary to activities or transactions that make up a business. In this regard, trading is not regarded as completed until a business has performed all the obligations imposed by the fact of trading. Therefore, it is not essential that a business engage in actual trading activity in Australia. Examples of such ancillary acts may include the raising of capital in Australia for use by a business overseas, or the winding up of a business and the payment of debts after a business has ceased to actually trade in Australia.
7. A person may carry on business in Australia without necessarily having a place of business in Australia.
8. I reject the debtor’s submission that for the debtor to carry on business in Australia, it is essential that a going concern exist in Australia. It is not essential to demonstrate actual trading activity in Australia. It may be enough for the creditor to demonstrate that the debtor engages in acts or transactions in Australia which are ancillary to trading activity conducted overseas. Whether it is enough will depend upon the particular facts of the case.

### Alleged errors in making findings of fact

1. The debtor submits that the primary judge erred in making certain findings of fact. More particularly, the debtor alleges that his Honour erred in drawing inferences from findings of fact that led to a conclusion that the debtor was carrying on business in Australia at 12 June 2018, the date of the act of bankruptcy.
2. The primary judge’s reasoning proceeded as follows:
* In 2008, Mrs Donoghue, as trustee of a family trust that owns the Hamilton property, borrowed between $4 million and $5 million from the Commonwealth Bank for the use of the debtor in his business.
* The Commonwealth Bank loan is secured by a mortgage over the Hamilton property and the debtor’s personal guarantee.
* The debtor had, and continues to have, the use of the loan funds for his business, which business is based overseas.
* The debtor makes monthly payments in the order of $45,205 to Mrs Donoghue’s bank account in Brisbane and, from there, Mrs Donoghue repays the Commonwealth Bank loan.
* An inference is available that the debtor’s monthly repayments are made from funds from the debtor’s overseas business activities. That inference should be drawn, particularly as the debtor failed to give evidence to the contrary.
* The servicing in Australia of the loan obtained for the purposes of the debtor’s business forms part of the debtor’s business.
* In circumstances where the loan was obtained in Australia, the debtor relies upon security in Australia and repayments are made in Australia from funds received from the debtor’s business, the debtor was carrying on business in Australia at the date of the act of bankruptcy.
* Alternatively, to the extent that there is an arrangement between the debtor and Mrs Donoghue in respect of the Commonwealth Bank loan, that arrangement constitutes the carrying on of business in Australia because it is a facility that the debtor organised to enable funds to be obtained for the purposes of his business.
1. The debtor submits that several of the findings made by the primary judge along this path of reasoning were wrong. The debtor takes as the starting point for his arguments that it was for the creditor to prove on the balance of probabilities that the Federal Circuit Court had jurisdiction, and to do so having regard to the matters prescribed in s 140(2) of the *Evidence Act 1995* (Cth). Section 140 of the *Evidence Act* provides:

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

(a) the nature of the cause of action or defence; and

(b) the nature of the subject matter of the proceeding; and

(c) the gravity of the matters alleged.

1. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at [31], the Full Court observed that Dixon J’s explanation of the civil standard of proof in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-363, “appositely expresses the considerations which s 140(2) of the *Evidence Act* now requires a Court to take into account”. The consequences of a sequestration order have been described as quasi-penal: *Hamilton v Warne* (1907) 4 CLR 1293 at 1297, 1300 and 1302; *Ahern v Deputy Commissioner of Taxation* *(Qld)* (1987) 76 ALR 137 at 148. These consequences call for the application of the *Briginshaw* principle. In particular, a creditor will not make out its case by inexact proofs, indefinite testimony or indirect references.
2. Nevertheless, the standard remains the balance of probabilities. Further, there is no requirement that a creditor may only rely upon direct evidence. Appropriate inferences may be drawn.
3. In *G v H* (1994) 181 CLR 387, Brennan and McHugh JJ at 390 explained the circumstances in which inferences may be drawn:

An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law.

1. In *Henderson v State of Queensland* (2014) 255 CLR 1, Gageler J observed at [89]:

Generally speaking, and subject always to statutory modification, a party who bears the legal burden of proving the happening of an event or the existence of a state of affairs on the balance of probabilities can discharge that burden by adducing evidence of some fact the existence of which, in the absence of further evidence, is sufficient to justify the drawing of an inference that it is more likely than not that the event occurred or that the state of affairs exists. The threshold requirement for the party bearing the burden of proof to adduce evidence at least to establish some fact which provides the basis for such a further inference was explained by Kitto J in *Jones v Dunkel* [(1959) 101 CLR 298 at 305]:

One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed.

1. The facts proved must give rise to a reasonable and definite inference, and not merely to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture: *Jones v Dunkel* (1959) 101 CLR 298 at 304-305, 309-310, 317; *Girlock (Sales) Pty Ltd v Hurrell* (1982) 149 CLR 155 at 161–162; *Trustees of the Property of Cummins (A Bankrupt) v Cummins* (2006) 227 CLR 278 at [34].
2. In *Australian Information Commissioner v Facebook Inc (No 2)*, Thawley J summarised some further principles at [38]:

(1) First, there can be no inference unless there are objective facts from which to infer the fact which it is sought to establish.

(2) Secondly, the making of a finding of fact through a process of inference can involve combining facts like strands in a cable or links in a chain. An inference can be drawn on the basis of circumstantial evidence.

(3) Thirdly, where it is the civil standard of the balance of probabilities that applies, the inference cannot be drawn if the evidence only establishes a possibility; the inference can only be drawn if the evidence establishes that the inferred fact is more probable than not.

(Citations omitted.)

1. The debtor submits that his Honour erred in finding that any relevant business operated by the debtor was the debtor’s own business. In *Turner v Trevorrow* (1994) 49 FCR 566 at 572, the Full Court held that for a debtor to come within s 43(1)(b)(iii) of the Act, it must be shown that the debtor was carrying on his or her own business, and it is insufficient that the debtor was engaged as an employee in the business of somebody else: see also *In re Brauch (A Debtor)*; *Ex parte Britannic Securities and Investments Ltd* [1978] Ch 316 at 328; *Napiat Pty Ltd v Salfinger (No 7)* (2011) 202 FCR 264 at [77]; *Fuller* *v Alford* (2017) 252 FCR 168 at [50].
2. At first instance, the debtor relied on an affidavit of Mrs Donoghue. She deposed:

24. When the house at Langside Road was built, there was a mortgage in the order of approximately $100,000.00. Garry borrowed money from the trust that owns the house for his business.

25. He asked me to borrow money against the house for him to use in his business, I can’t remember the exact amount now, it was (in 2-3 lots at different times for different business purposes) between four and five million added to the mortgage, borrowed from the trust on the basis that Garry agreed to pay it back.

26. I am aware that the mortgage is now in the order of $5.1M. I do not work and I have no capacity to service that mortgage. The arrangement I have with Garry is that he services the mortgage that he uses for his business.

…

30. The Australian Tax Office have a caveat lodged on the title of the Langside Road property. They asked me to provide the house as some sort of security before they would give Garry permission to travel overseas and as it was integral for him to be overseas for his business, I signed a mortgage…

1. The debtor argues that Mrs Donoghue’s references to the Commonwealth Bank loan being made for the purposes of the debtor’s business (“his business”) are inexact and equivocal and insufficient to found a conclusion that any business from which funds for the loan repayments were obtained was the debtor’s own business. The debtor submits there was no evidence as to how he acquired the funds that enabled him to make payments to service the debt. In particular, there was no evidence as to whether he obtained funds from a business he owned, rather than a business owned by other legal entities with which he is associated, such as Ecuadordomain SA.
2. Mrs Donoghue’s evidence was, relevantly, that:
* The debtor borrowed the money from the family trust “for his business” and “to use in his business”.
* The debtor borrowed the money from the trust on the basis that the debtor himself agreed to pay it back.
* The arrangement Mrs Donoghue has with the debtor is that “he services the mortgage that he uses for his business”.
* It was “integral for [the debtor] to be overseas for his business”.
1. The debtor expressly concedes that there is evidence demonstrating that the substantial monthly repayments of the Commonwealth Bank loan made by Mrs Donoghue are funded by payments made by the debtor.
2. Mrs Donoghue’s direct and unequivocal evidence was that the debtor borrowed and used, and continues to use, the money for the debtor’s business. The references to “his business” must, on their face, be understood as referring to the debtor’s own business. Mrs Donoghue’s evidence does not suggest that the money was borrowed for and used by a business operated by some person or entity other than the debtor.
3. Mrs Donoghue’s evidence was led by the debtor. The principle from *Blatch v Archer* (1774) 1 Cowp 64 at 65 is that, “all evidence is to be weighed according to the proof which was in the power of one side to have produced, and in the power of the other to have contradicted”. The debtor did not lead any evidence from Mrs Donoghue that she was using the expression “his business” in some loose sense. Mrs Donoghue’s evidence was not equivocal or uncertain. There is no good reason to regard Mrs Donoghue as having said things that she did not mean.
4. While there is some evidence that the debtor has an association with a company called Ecuadordomain SA and businesses called Dotla Domains and Essam Communications Group based overseas, the evidence does not give any indication as to whether those businesses generate income or have assets that may be being used by the debtor to make the repayments. Again, the principle from *Blatch v Archer* applies.
5. The person in the best position to explain the use of the money borrowed from the Commonwealth Bank and the source of the funds used to make repayments of the loan was the debtor himself. He did not give evidence, and provided no explanation for his failure to give evidence. The primary judge relied, in part, upon that failure to draw an inference that the repayments were made from the debtor’s business activities.
6. In *Kuhl v Zurich Financial Services* *Australia Ltd* (2011) 243 CLR 361, the High Court explained the rule in *Jones v Dunkel* as follows:

63. The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party’s case. That is particularly so where it is the party which is the uncalled witness. The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn…

64. The rule in *Jones v Dunkel* permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party…

1. Similarly, in *HML v The Queen* (2008) 235 CLR 334, Heydon J held at [303]:

…In civil cases the unexplained failure of a party to give evidence, call witnesses or tender material is not treated as evidence of fear that it would expose an unfavourable fact, nor as an assertion of the non-existence of the fact not proved: the only consequence is that the failure can cause an inference arising from the evidence of the opposing party to be more confidently drawn…

1. The position was reiterated in *ASIC v Hellicar* (2012) 247 CLR 345, where Heydon J held at [232]:

…[T]wo consequences can flow from the unexplained failure of a party to call a witness whom that party would be expected to call. One is that the trier of fact may infer that the evidence of the absent witness would not assist the case of that party. The other is that the trier of fact may draw an inference unfavourable to that party with greater confidence. But *Jones v Dunkel* does not enable the trier of fact to infer that the evidence of the absent witness would have been positively adverse to that party…

1. There was direct evidence from Mrs Donoghue that the debtor borrowed money from the family trust for use in his business overseas, and that the loan funds continue to be used by the debtor for his business. There was direct evidence from Mrs Donoghue that repayments of the loan are being met by the debtor, but there was no direct evidence as to the source of the funds used to make the repayments. However, an inference was available that, as the loan was used for a business being carried on by the debtor, it was the debtor’s business that was the source of the funds used to make the loan repayments. As the debtor did not give evidence, it was open to the primary judge to infer that any evidence he gave would not have assisted his case. The absence of evidence from the debtor also allowed a more confidently drawn inference that the debtor’s business was the source of the funds for the repayments. It was unnecessary for there to be evidence about the nature and extent of the debtor’s business.
2. Even bearing in mind s 140(2) of the *Evidence Act* and the *Briginshaw* standard, there was, in my opinion, no error by the primary judge in finding that the loan was obtained for the debtor’s business, that the debtor continued to use the borrowed money for the purposes of his business and that the monthly repayments were made from the debtor’s business activities. I reject the debtor’s submission that it was impermissible for his Honour to draw a *Jones v Dunkel* inference against the debtor in respect of the source of the funds used for the loan repayments.
3. I also reject the debtor’s submission that the evidence was inadequate to permit a finding that the relevant business was the debtor’s own business.

### Alleged errors in finding that the debtor was carrying on business in Australia

1. The debtor argues that even if his Honour’s primary findings are correct, the evidence did not allow a conclusion that the debtor was carrying on business in Australia at the time of the act of bankruptcy. His Honour’s conclusion was ultimately based upon findings that the loan was obtained in Australia, that the loan relies upon security in Australia and that repayments are made in Australia from funds received from the debtor’s business conducted overseas.
2. It is true, as the debtor points out, that the loan was obtained in 2008, whereas the date at which the debtor had to be carrying on business in Australia was 12 June 2018. That distinguishes the facts in *Actiesselskabet Dampskib “Hercules” v Grand Trunk Pacific Railway Company*, where the company’s raising of capital in England led to a conclusion that the company was carrying on business in England. However, if the raising of loans in a country is capable of constituting the carrying on of business in that country, so too must be the repayment of such loans. That is reinforced by *Theophile*, *Bird, Mendonca* and *Vassis*, which accepted that a business is regarded as trading when paying off its debts arising from the fact of trading, even after it has ceased actually trading. It is also clear that a debtor may carry on business in Australia even though the bulk of his or her business is conducted overseas.
3. In the present case, the evidence established that, at the date of the act of bankruptcy on 12 June 2018, the following circumstances existed. In 2008, Mrs Donoghue, as trustee of the family trust which owns the Hamilton property, had borrowed $4 million to $5 million from the Commonwealth Bank in Australia, and paid the money to the debtor. The security for the Commonwealth Bank loan includes a personal guarantee given by the debtor. The debtor borrowed the money from the family trust for use in his business, which is based overseas. The debtor continues to use the funds in his business. The debtor makes regular and ongoing repayments of approximately $45,000 per month to Mrs Donoghue in Australia. The debtor, it should be inferred, makes the loan repayments from the capital or income of his business. The making of the loan repayments is part of the carrying on of the debtor’s business.
4. I concur with the primary judge that, in these circumstances, the debtor was carrying on business in Australia at the time when the act of bankruptcy was committed. The debtor has failed to demonstrate any error on the part of the primary judge in so concluding.

## Whether the primary judge erred in finding that the debtor had a place of business in Australia

1. The primary judge also concluded that the criterion in s 43(1)(b)(ii) of the Act, that at the date of the act of bankruptcy the debtor had a place of business in Australia, was satisfied.
2. My finding that the primary judge did not err in concluding that the debtor was carrying on business in Australia is enough to dispose of the appeal. However, in case I am wrong, I will proceed to consider whether there was any error in his Honour’s finding that the debtor had a place of business in Australia.
3. The debtor submits that the primary judge erred in so concluding and in making findings of fact that led to that conclusion.
4. The primary judge’s conclusion was drawn from the following findings:
5. The debtor was carrying on business in Australia by servicing the debt to the family trust in Australia, in respect of which Mrs Donoghue had obtained a loan from the Commonwealth Bank.
6. The debtor provided the Hamilton property as his address for the personal guarantee he gave to secure the Commonwealth Bank loan.
7. The debtor remained a director of Sterling Pacific Pty Ltd, and his address for the directorship, according to the records held by ASIC, remained the Hamilton property. It was open to the debtor to give evidence about his involvement in Sterling Pacific Pty Ltd and the purpose for which he remained a director, but he did not do so, giving rise to a *Jones v Dunkel* inference.
8. The debtor submits that these matters, whether considered individually or in combination, do not permit any inference that the debtor had a place of business in Australia on 12 June 2018.
9. The parties made submissions concerning whether a person may have a place of business in Australia without carrying on business in Australia. The creditor submits that it is possible, while the debtor submits that it is not. The parties have not found any authority directly bearing on the issue. The strongest argument raised by the creditor is that the criteria in s 43(1)(b)(ii) and (iii) of the Act are disjunctive, suggesting that the criterion of “place of business in Australia” can be satisfied even if the criterion of “carrying on business in Australia” is not. However, it is unnecessary for me to decide the issue in the circumstances of this case. It is enough to assume the issue in favour of the creditor.
10. The first matter considered by the primary judge is that the debtor was carrying on business in Australia. However, I am proceeding upon the assumption that this finding was wrongly made.
11. The next matter was that the debtor provided the Hamilton property as his address for his personal guarantee to secure the Commonwealth Bank loan. However, this matter formed part of the primary judge’s reasoning for finding that the debtor was carrying on business in Australia, so I should also assume that his Honour’s reliance upon it was wrong.
12. That only leaves the debtor’s directorship of Sterling Pacific Pty Ltd. The ASIC records demonstrate that a 1998 Annual Return showed that Sterling Pacific Pty Ltd’s principal place of business, and the debtor’s residential address as a director, was the Hamilton property. The unchallenged evidence of Alexandria Geokas, the debtor’s daughter, was that Sterling Pacific Pty Ltd had never traded nor operated any business, and that the only thing it had done was purchase a car for Mrs Donoghue. That evidence does not support an inference that the debtor had a place of business in Australia at the date of the act of bankruptcy.
13. Accordingly, if it is assumed that the primary judge was wrong in concluding that the debtor was carrying on business in Australia, his Honour was also wrong to conclude that the debtor had a place of business in Australia.

## Summary

1. In summary, the debtor has failed to demonstrate error by the primary judge in finding that, at the date of the act of bankruptcy, the debtor was carrying on business in Australia. Consequently, the debtor has failed to demonstrate any error in the making of the sequestration order against the debtor’s estate.
2. The appeal must be dismissed with costs.

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| I certify that the preceding ninety-one (91) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah. |

Associate:

Dated: 16 July 2021