FEDERAL COURT OF AUSTRALIA

Luck v University of Southern Queensland [2016] FCAFC 167

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| Appeal from: | *Luck v University of Southern Queensland* [2015] FCA 286 |
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| File number: |  |
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| Judge: | **COLLIER, JESSUP AND KATZMANN JJ** |
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| Date of judgment: | 5 December 2016 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – request for adjournment of Full Court hearing – where parties had had ample time to prepare – request for adjournment based on appellant’s wish to prepare for other Full Court matters, alleged settlement negotiations, appellant’s health conditions – no affidavit evidence supporting adjournment – appellant’s history of non-attendance at hearings – s 37M *Federal Court of Australia Act 1976* (Cth) – public interest to expeditiously determine bankruptcy matters – adjournment refused  **BANKRUPTCY** – whether primary judge erred in failing to make order staying or adjourning appellant’s application pending determination of special leave application – whether primary judge erred in not giving reasons for exclusion of material – whether primary judge erred in failing to consider appellant’s grounds for stay or adjournment – whether denial of natural justice – applications for special leave not related to judgment founding bankruptcy notice – no cross-claim, set-off or cross demand within meaning of s 40(1)(g) *Bankruptcy Act 1966* (Cth) |
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| Legislation: | *Constitution*  *Bankruptcy Act 1966* (Cth), ss 40, 41  *Federal Court of Australia Act 1976* (Cth), ss 25, 37M, 37N |
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| Cases cited: | *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175  *Cirillo v Consolidated Press Property Pty Ltd* (2007) 245 ALR 374  *Gaye Luck v University of Southern Queensland* [2016] HCASL 286  *Luck v Federal Court of Australia* [2011] HCATrans 290  *Luck v University of Southern Queensland* [2008] FCA 1582  *Luck v University of Southern Queensland* [2009] FCAFC 73  *Luck v University of Southern Queensland (No 3)* [2010] FCA 1402  *Luck v University of Southern Queensland (No 4)* [2011] FCA 43  *Luck v University of Southern Queensland (No 2)* [2013] FCA 1141  *Luck v University of Southern Queensland* [2014] FCAFC 135  *Luck v Chief Executive Officer of Centrelink* [2015] FCAFC 75  *Luck v University of Southern Queensland* [2015] HCATrans 125  *Totev v Sfar* (2008) 167 FCR 193 |
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| Date of hearing: | 30 November 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 76 |
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| Counsel for the Appellant: | The appellant did not appear |
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| Counsel for the Respondents: | Ms P Mitchell |
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| Solicitor for the Respondents: | Clayton Utz |

ORDERS

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|  | | VID 189 of 2015 |
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| BETWEEN: | GAYE LUCK  Appellant | |
| AND: | UNIVERSITY OF SOUTHERN QUEENSLAND  First Respondent  CHIEF EXECUTIVE OFFICER OF UNIVERSITY OF SOUTHERN QUEENSLAND  Second Respondent | |

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| JUDGES: | COLLIER, JESSUP AND KATZMANN JJ |
| DATE OF ORDER: | 30 NOVEMBER 2016 |

THE COURT ORDERS THAT:

The appeal be dismissed with costs.

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

REASONS FOR JUDGMENT

THE COURT:

1. On 30 November 2016, this appeal was listed for hearing. The appellant, Gaye Luck, did not appear. The reason for her non-appearance had been the subject of correspondence which she had sent to the court in the days preceding the listing of the appeal. In that correspondence, Ms Luck sought the adjournment of the appeal. We were not persuaded that an adjournment was necessary in the interests of justice, and we proceeded to hear the appeal in her absence. Our reasons for having done so are set out below.
2. Having heard the appeal, we dismissed it with costs. Our reasons for having done so are also set out below.

## Background

1. Ms Luck was aggrieved by the failure of the respondent, the University of Southern Queensland (the **University**) to respond to a request she made under the *Freedom of Information Act* *1982* (Cth) for access to certain documents. She applied to the Administrative Appeals Tribunal for relief, but the Tribunal dismissed the application for want of jurisdiction. She appealed from the Tribunal. The docket judge (Tracey J) declined to recuse himself, as Ms Luck had sought, and dismissed her appeal with costs. A Full Court dismissed the appeal from Tracey J’s judgment, once again ordering Ms Luck to pay the University’s costs: *Luck v University of Southern Queensland* [2009] FCAFC 73. Costs were then taxed and a certificate of taxation was issued.
2. Ms Luck failed to pay the costs and on 25 January 2015 the University served her with a bankruptcy notice, which had been issued by the Official Receiver on 7 January 2015. It claimed that Ms Luck owed the University $43,804.22, made up of the following two sums:
3. $29,755.87 under the orders of the court; and
4. $14,048.35 in accrued post-judgment interest.

Under the terms of the notice, Ms Luck had 21 days after service either to pay the creditor the full amount or to make arrangements to the University’s satisfaction for settlement of the debt.

1. Ms Luck did not pay the debt or make suitable arrangements. In the result, unless she was able to satisfy the Court that she had a counter-claim, set-off or cross demand equal to or greater than the amount of the debt which she could not have set up in the proceeding in which the order was obtained, she would have committed an act of bankruptcy: the Bankruptcy Act, s 40(1)(g). On 13 February 2015, Ms Luck applied to the Court to have the bankruptcy notice set aside on the ground that she had what she described as “a novel set-off” against the University. On 30 March 2015, that application, and an interim application for an adjournment, were dismissed by the primary judge. This appeal was from that judgment.

## The application for adjournment

1. As we observed at the outset, when the appeal was called on for hearing Ms Luck did not appear. In these circumstances the Court may dismiss the appeal without considering its merits: *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**), s 25(2B)(bb)(ii).
2. Had there been no explanation for Ms Luck’s absence, we would have been inclined to take that course. That was not, however, the position.
3. From the time the Registry explored with the parties the question of suitable hearing dates for the appeal, Ms Luck resisted the matter being fixed for hearing at short notice. She sent a total of five letters on 18, 21, 23, 24 and 29 November 2016 in which she pleaded for the hearing to be delayed. No formal application for adjournment was filed.
4. At the hearing we asked counsel for the University for its view. She submitted that the appeal should proceed to hearing on its merits.
5. For the following reasons, the Court decided that the course proposed by the University was appropriate, that the Court should decline to exercise its discretion either to dismiss the appeal for want of Ms Luck’s appearance or to adjourn the hearing of the appeal, and that the Court should determine the appeal on its merits.
6. *First*, in light of the procedural history of this matter we were satisfied Ms Luck had had ample time to prepare for the hearing of the appeal.
7. The primary judge published her judgment on 30 March 2015. Subsequently, on 9 April 2015 the University filed a creditor’s petition founded on Ms Luck’s failure to comply with the bankruptcy notice.
8. Ms Luck filed her notice of appeal on 13 April 2015. A week later, she filed in the High Court an application for the removal of the appeal (the **removal application**) and in this Court an interlocutory application for a stay or adjournment pending the hearing and determination of both the removal application and her application for special leave to appeal from the Full Court’s judgment in her other appeal involving the University (*Luck v University of Southern Queensland* (2014) FCAFC 135) (M116/2014).
9. Timetabling orders in respect of the present appeal were made by Beach J on 4 May 2015. They required Ms Luck to file and serve, by 18 May 2015, an Amended Notice of Appeal setting out precisely the errors said to have been made by the primary judge, and, by 25 May 2015, to file and serve her outline of submissions, a list of the materials relied upon by her in support of her appeal and a copy of such materials.
10. Ms Luck did not comply with these orders, but submissions were filed by the University on 9 June 2015 in anticipation of possible future submissions by Ms Luck.
11. On 3 June 2015, the parties were notified that the appeal was listed for hearing on 21 August 2015.
12. On 8 August 2015 Ms Luck filed an Amended Notice of Appeal.
13. On 14 August 2015 Jessup J made orders extending the time for compliance with the orders of 4 May 2015, including in respect of the filing of an Amended Notice of Appeal, and submissions. Materially, on Ms Luck’s application, Jessup J also ordered that:

4. The hearing of this appeal be stayed pending the determination by the High Court of Australia of [Ms Luck’s] application for the removal of the appeal into that court pursuant to s 40 of the *Judiciary Act 1903* (Cth).

5. The listing of this appeal for 21 August 2015 be vacated.

6. In the event that the High Court of Australia rejects the appellant’s application for removal, this appeal be listed for hearing on the first available date thereafter, not before 7 days after the expiry of the time limited under Order 10 below.

1. The time limited by Order 10 (which provided for the filing of the final tranche of submissions) would have expired on 18 September 2015, but, on 9 September 2015, further orders were made by consent which had the effect that the time so limited expired on 25 September 2015. Conformably with those consent orders, Ms Luck filed her submissions and chronology on 11 September 2015, the University filed further submissions on 18 September 2015, and Ms Luck filed an amended outline of submissions, and submissions in reply, on 25 September 2015.
2. In the meantime, on 3 September 2015, Ms Luck’s special leave application was dismissed: *Gaye Luck v University of Southern Queensland* [2015] HCASL 136 (M116/2014).
3. On 11 November 2016 the High Court dismissed Ms Luck’s removal application: *Luck v University of Southern Queensland* [2016] HCASL 286. These orders of the High Court triggered the operation of order 6 of Jessup J’s orders of 14 August 2015, and the appeal was listed by the Federal Court Registry for hearing on the first available date thereafter, being 30 November 2016.
4. The upshot is that Ms Luck had more than eighteen months to prepare for the hearing of this appeal. Ms Luck filed submissions and replied to the University’s submissions. All steps had already been taken by the parties to prepare the appeal for hearing save for the filing and service of lists of authorities. Apart from once again drawing our attention to the disposition by the High Court of the removal and special leave applications, at the hearing the University was content to rely on its written submissions.
5. Ms Luck was on notice following the orders of Jessup J of 14 August 2015 that the appeal would be listed expeditiously once the High Court had ruled on the removal application. Indeed, the appeal was listed to take place slightly less than three weeks after the High Court rulings, but not so expeditiously as to impose an onerous burden on the parties in light of the material already filed in Court.
6. *Secondly*, the reasons propounded for an adjournment were unpersuasive.
7. Ms Luck’s reasons for seeking an adjournment ranged from her wish to prepare for other appeals to the Full Court, to alleged settlement negotiations with the University, to her mental and physical condition.
8. Ms Luck’s numerous letters to the Court referred to her “mental and physical disabilities” as well as her claimed need to prepare for other planned litigation in this Court:

* In her letter of 18 November 2016, Ms Luck stated that she would be “able to manage a Full Court hearing in respect of this matter, late in the February 2017 sittings” because she had two other matters pending appeal to the Full Court. She stated that the University would not suffer prejudice if the hearing of the appeal were adjourned because “the extended order in the Federal Circuit Court matter MLG737/2015 [the creditor’s petition] [lapsed] on the 8 April 2017 and it could be adjourned on 8 December 2016 pending the hearing in VID189/2015”. Further, Ms Luck stated that her health was “not good currently” and requested, “as reasonable adjustments”, that she be allowed to stagger the work involved in the preparation of the other two matters over December and January, so that the three matters could be heard in the February Full Court and appeal sittings. Attached to this letter was a medical certificate from Dr Priscilla Leow, her general practitioner, stating that Ms Luck suffered from conditions including systemic scleroderma, complications arising from failed prosthetic surgery in her left foot, and an inability to cope with multiple tasks in her daily life “including her litigation duties”. Neither Ms Luck in her letter nor Dr Leow in her certificate indicated that Ms Luck was unable to appear or present arguments at a hearing in the near future.
* In her letter of 21 November 2016, Ms Luck referred to her earlier letter of 18 November 2016 and stated, amongst other things, that she would suffer “irreparable prejudice” in respect of her other (unlisted) appeals if this appeal were determined against her before the other two matters were heard.
* On 22 November 2016 the present appeal was listed for hearing on 30 November 2016. The following day the Registry wrote to the parties stating materially:

The Court is yet to receive a list of authorities from either party. Their Honours request that each party file a list of authorities by **4pm (VIC time) on Friday 25 November 2016**.

(emphasis in original.)

The Registry also requested that the parties provide a joint hard copy of authorities and legislation by 29 November and two joint USBs of the parties’ authorities by 29 November 2016.

* Ms Luck’s response of the same date stated that she was unable to cope with the Registry’s requests in the short period of time available. She reiterated points made in her previous letters that she could not manage the appeal on 30 November 2016 and that she sought “a reasonable adjustment, pursuant to [her] rights under the *Disability Discrimination Act 1992*, and the *United Nations Convention on the Rights of Persons with Disabilities*” that she be allowed to prepare for the hearing when she was “fit and able to cope with the work involved”.
* In her letter of 24 November 2016, Ms Luck informed the Court that “since the 17 November 2016, the respondents, via their legal representative, Clayton Utz, have been in ‘without prejudice’ settlement negotiations with me”. Ms Luck stated that the hearing date of 30 November 2016 had interrupted the time frames in which the matter could be negotiated and that the outcome of the negotiations could result in the discontinuation of the matter by consent. Ms Luck concluded this letter by requesting that the hearing date of the matter be reconsidered and adjourned pending conclusion of the negotiations, and reiterating her health circumstances and position.
* Finally, in her letter of 29 November 2016, Ms Luck informed the Court that she was unable to appear at the hearing of the appeal on 30 November 2016 on the grounds of her mental and physical disabilities. She therefore applied for the hearing to be adjourned “pending conclusion of the ‘without prejudice’ negotiations, currently on foot between myself and the respondents, as notified to the Court on 24 November 2016, when I will again be well enough to prepare for and make submissions at a hearing, if necessary”. In this letter Ms Luck also anticipated that the “without prejudice” negotiations might not be concluded before 8 December 2016 when the creditor’s petition was listed for hearing in the Federal Circuit Court, and said that in that eventuality she would make an application for further adjournment of that matter. Ms Luck attached two certificates:

○ a further medical certificate of Dr Leow. Dr Leow wrote that Ms Luck had been severely distressed by “the recent turn of events relating to her litigation” and that Ms Luck was not fit mentally or physically to appear for the hearing on 30 November 2016;

○ a certificate of Ms Melanie Canning, psychologist, in which Ms Canning wrote *inter alia* that Ms Luck was highly distressed, overwhelmed, unable to cope with the pressure and stress of the preparation for and attendance at the hearing, and suffering from an adjustment disorder.

1. We interpolate that on 24 November 2016 the University reluctantly indicated that it would consent to an adjournment until 9 December 2016.
2. Notwithstanding the University’s position on 24 November 2016, none of the reasons advanced by Ms Luck, nor the combination of them, persuaded us that an adjournment of the hearing of the appeal was justified.
3. The hearing for this appeal had been pending for eighteen months under case management. If Ms Luck had difficulties with the case management of other appeals she was planning, it was open to her to seek orders in those appeals to accommodate them. Further, it was not clear to us how Ms Luck would suffer “irreparable prejudice” in respect of her other planned appeals if the hearing of this appeal was not postponed.
4. There was no material before the Court, other than Ms Luck’s assertions in her correspondence to the Registry, to suggest that the appeal was on the verge of settlement or that the hearing of the appeal in some way would disrupt genuine settlement negotiations. There is no sworn evidence to that effect, from either Ms Luck or – more particularly – the University. There were no consent orders from the parties seeking an adjournment of the appeal because the parties were in settlement negotiations. There was no application by Ms Luck to discontinue the appeal on the basis that she had settled with the University. In the circumstances we did not accept the allegedly imminent settlement of the appeal as a basis on which to adjourn the hearing.
5. Even if the appeal were adjourned for a short time – for example until 9 December 2016 – we considered it unlikely that Ms Luck would appear on that day to prosecute her appeal. She has a history of non-compliance with court orders and non-attendance at hearings. A superficial examination of recent decisions in this Court alone indicates that Ms Luck was unavailable to attend hearings for health reasons in:

* *Luck v University of Southern Queensland (No 3)* [2010] FCA 1402
* *Luck v University of Southern Queensland (No 4)* [2011] FCA 433
* *Luck v University of Southern Queensland (No 2)* [2013] FCA 1141
* *Luck v Chief Executive Officer of Centrelink* [2015] FCAFC 75

Similarly, Ms Luck failed to attend directions hearings in the High Court purportedly for health reasons, such as in *Luck v Federal Court of Australia* [2011] HCATrans 290 and *Luck v University of Southern Queensland* [2015] HCATrans 125.

1. The limited evidence from her GP and psychologist annexed to her correspondence with the Registry indicated that the position was unlikely to be any different on 9 December or even by February next year.
2. In *Luck v Chief Executive Officer of Centrelink* [2015] FCAFC 75 the Full Court refused Ms Luck’s adjournment application relying on apparently similar material from her GP and made the following observations at [48]:

Her medical evidence is unpersuasive. It is not verified on affidavit, a matter which has been highlighted in earlier cases in which Ms Luck has unsuccessfully relied on similarly worded assessments by Dr Leow…. Dr Leow’s letter in this proceeding refers to conditions Ms Luck has suffered since at least 2013. There is nothing in the letter concerning any recent development, exacerbations or new diagnoses. The treatment to which it refers appears to be treatment Ms Luck has been undergoing for some time, and at least since 2009…. It is unclear what Dr Leow means by “litigation duties”. No “duty” is imposed on Ms Luck in relation to litigation: rather she has elected to bring multiple proceedings in this Court, and in other courts, challenging a variety of decisions… Ms Luck herself compounds the amount of litigation she has to deal with by applications such as repeated stay and removal, and special leave, applications to the High Court. The amount of preparation for hearings, interlocutory applications and appeals she needs to undertake is in that sense a self-fulfilling prophecy.

All of these observations are equally applicable to the circumstances of this appeal. In this case no affidavits were filed from the GP or the psychologist. We also note that the certificate of Dr Leow in this case appears to be similar in terms to the medical certificate provided to the Full Court in *Luck v Chief Executive Officer of Centrelink*, including her curious reference to Ms Luck’s “litigation duties”.

1. Ms Luck’s correspondence assumed that the Court was obliged to accommodate her interests. But the Court is required to weigh the interests of all parties as well as limitations imposed by its own resources. It is not for Ms Luck to seek to dictate when the Court should hear her matters.
2. We did not accept Ms Luck’s contention that she was unduly burdened by the Registry’s request for the authorities. In any case, no adverse consequences flowed to Ms Luck from her failure to accede to it.
3. *Thirdly*, we did not consider that adjourning the hearing would have been the best way to promote the overarching purpose of the civil practice and procedure provisions of the FCA Act and Rules of Court.
4. The overarching purpose of those provisions is to facilitate the just resolution of disputes according to law, and as quickly, inexpensively and efficiently as possible: the FCA Act, s 37M(1). The Court is obliged to exercise its powers and discharge its duties under those provisions in the way that best promotes that purpose: the FCA Act, s 37M(2). Furthermore, the parties are obliged to conduct the litigation in a way that is consistent with the overarching purpose: the FCA Act, s 37N. In *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 the High Court of Australia explained the importance of case management principles in determining applications affecting the progress of litigation, such as applications for adjournment.
5. An appeal to the Full Court from a decision of a judge of this Court requires a bench of three judges. Two of the judges in this appeal travelled from interstate to hear the appeal. It is certain that if the hearing of the appeal were adjourned to a date later in 2016, one if not more of those judges would be unavailable, and it would be necessary to empanel a new bench. Even assuming at this late stage, and so close to the end of the calendar year, that this could have been done, the inconvenience to the Court would be considerable.
6. Further, the University was ready to proceed. Indeed, it appears that the University has been ready to proceed at least since it filed its first set of submissions in 2015.
7. The desirability of appeals being heard in as timely a fashion as possible and the burden on the Court and other parties to ensure that this occurs were factors we were bound to take into account.
8. *Fourthly*, we considered the effect of an adjournment on the University and the extent to which it would be prejudiced by an adjournment.
9. The University’s creditor’s petition against Ms Luck is listed for hearing in the Federal Circuit Court on 8 December 2016. While we understood that the creditor’s petition would not lapse until 8 April 2017, an adjournment of the hearing of this appeal would also have required the University to seek an adjournment of the Federal Circuit Court hearing. This requirement would be oppressive in circumstances where, as we have already observed, the judgment debt arose from orders made by this Court some seven and half years ago, the appeal has been pending for eighteen months, and the University is not responsible for the delay.
10. *Last but not least*, in all the circumstances the adjournment of the hearing of the appeal would have been inconsistent with the public interest in the expeditious determination of bankruptcy matters: *Cirillo v Consolidated Press Property Pty Ltd* (2007) 245 ALR 374 at [51]; *Totev v Sfar* (2008) 167 FCR 193 at [17].

## The appeal

1. In the proceeding from which the present appeal arises, which was commenced on 13 February 2015, Ms Luck sought to set aside the bankruptcy notice on the following grounds:

a. On 12 November 2014, I filed an application for special leave to appeal, on constitutional grounds pursuant to the *Judiciary Act 1901*, from the judgments of the Full Court of the Federal Court, made on 15 October 2014, on appeal from the judgments of his Honour, Tracey, J made on 1 November and 11 October 2013 in the matter of *Gaye Luck v University of Southern Queensland* M116/2014; VID1158/2014; VID357/2009….

b. I seek to set aside BN177801 on the grounds that the issues as submitted in my Special Leave Application currently pending hearing and determination in the High Court of Australia, are a novel set-off to this bankruptcy matter and include strong argument challenging the correctness of the Federal Full Court’s decisions in VID1158/2014, VID54/2009 and VlD899/2008 and the validity of the sitting primary judge’s judgments in those cases, and in this one, seeking to set aside BN177801 ….

c. In the event that the High Court makes a determination in my favour in the matter of *Luck v USQ*, M116/2014, it would constitute authority for each of the determinations of my matters, heard by his Honour, Justice Tracey, and the subsequent Full Court appeal determinations, to be invalid, and liable upon judicial review or upon relief in the nature of certiorari or prohibition.

d. It would therefore be in the interests of the administration of justice for this matter to be stayed or adjourned pending the hearing and determination of my special leave application and if leave is granted, upon the hearing and determination of the appeal in the High Court and subsequent hearing and determination of this matter by the Federal Court.

1. In her Originating Application in the proceeding below, Ms Luck included an application for interim orders as follows:

1. That the time for the hearing of this application be extended to a future date pending the hearing and determination by the High Court of Australia of the constitutional High Court of Australia matter, *Luck v University of Southern Queensland* M116 of 2014; VID1158/2014; VID357/2009;

2. In the event that the Bankruptcy Notice BN177801 not be set aside, that the time for compliance with the Bankruptcy Notice or Orders of the Court be extended for at least up to 90 days following the hearing and determination by the Federal Court of this Bankruptcy Notice.

1. The proceeding came before the primary judge for case management on 24 February 2015. Her Honour then made the following orders:

1. The time for compliance with bankruptcy notice BN 177801 of 2015 be extended until 4.00pm on 16 March 2015.

2. The Respondent file and serve a notice of opposition and any affidavits in support by 4.00pm on Friday 27 February 2015.

3. The proceeding be adjourned to an interlocutory hearing on 16 March 2015 at 10.15am.

4. Costs be reserved.

The “interlocutory hearing” referred to in Order 3 was the hearing of Ms Luck’s application for interim orders, to which we have referred.

1. Conformably with Order 2 made on 24 February 2015, on 27 February 2015 the University filed its notice of opposition in the proceeding. Omitting formal parts, it read as follows:

The University of Southern Queensland, creditor, intends to oppose the application to set aside bankruptcy notice BN177801 issued by the Official Receiver on 7 January 2015 (Bankruptcy Notice) on the following grounds:

1. No recognised “counter-claim, set-off or cross demand” within the meaning of ss 40(1)(g) and 41(7) of the *Bankruptcy Act 1966* (Cth) (Act) or r 3.02(2) of the *Federal Court (Bankruptcy) Rules 2005* (Cth) (Rules) is particularised in either:

(a) the application to set aside the Bankruptcy Notice; or

(b) the affidavit in support of the application to set aside the Bankruptcy Notice,

filed in the Federal Court by the Applicant on 13 February 2015.

2. In relation to the Bankruptcy Notice, the applicant has no “counter-claim, set-off or cross demand” within the meaning of ss 40(1 )(g) and 41 (7) of the Act or r 3.02(2) of the Rules of which the creditor is aware.

3. Given grounds 1 and 2, it would be futile for the Court to adjourn its consideration of the application or to further extend time for the applicant to comply with the Bankruptcy Notice pursuant to s 41 (7) of the Act.

1. On 16 March 2015, Ms Luck’s application for interim orders came on before the primary judge. In the course of argument, her Honour noted that the essence of the University’s opposition to the making of the interim orders sought was that, to the extent that the application for the setting aside of the bankruptcy notice was based on the alleged existence of a counter-claim, set-off or cross demand, it was bound to fail and that the grant of an adjournment, deferral or extension of time would be “futile”. Giving consideration to that contention would inevitably, as her Honour saw it, require her to consider the merits of Ms Luck’s case for the setting aside of the bankruptcy notice. Thus her Honour informed the parties that she proposed to receive submissions on the final relief Ms Luck sought in the proceeding, while at the same time making it clear that she would receive and consider any submissions Ms Luck chose to make on her interim application as such.
2. The University was content with the primary judge’s proposal. Ms Luck was not, but the reasons she advanced for the position then adopted should be noted. She submitted to her Honour that, if she succeeded in the High Court in proceeding M116/2014, whether she had a counter-claim, set-off or cross demand would be irrelevant because a favourable judgment in that court would undermine the very debt upon which the University relied. The consequence of her High Court challenge being upheld would be that the continuation of the proceeding before the primary judge would amount to nothing more than a waste of public money.
3. Ms Luck did not suggest to the primary judge on 16 March 2015 that she was unprepared to advance her substantive case, or to deal with the points made in the University’s notice of opposition. Her Honour then heard argument on all questions arising in the case and, in a reserved judgment delivered on 30 March 2015, dismissed the Application.
4. We mention this aspect of the proceeding at first instance not because Ms Luck made a point of it in her grounds of appeal, but in recognition of the circumstance that the course followed by the primary judge was, on one way of looking at it, unconventional. But, since her Honour made it clear to the parties that she did intend to follow that course, and the issues involved were well-developed in the parties’ submissions on the interim application, we take the view that the course was unobjectionable.
5. Turning to the merits of the appeal, we would commence by identifying two series of proceedings that involved judgments of the Court. The first commenced with proceeding VID476/2008, which was initially determined by a judgment of Tracey J on 22 October 2008: *Luck v University of Southern Queensland* [2008] FCA 1582. Ms Luck’s appeal from that judgment was proceeding VID899/2009, and was determined on 19 June 2009 by the judgment to which we have referred in paragraph 3 above. Ms Luck was ordered to pay the University’s costs of that appeal. She applied for special leave to appeal to the High Court but, by the operation of an order made in that court by Crennan J on 26 May 2010, that application was deemed to have been abandoned. As noted above, in due course a certificate of the University’s costs in proceeding VID899/2009 issued, and it was the debt arising from those certified costs that formed the basis of the bankruptcy notice which Ms Luck sought to have set aside.
6. The second series of proceedings commenced with proceeding VID357/2009, and was initially determined by a judgment of Tracey J on 1 November 2013: *Luck v University of Southern Queensland (No 2)* [2013] FCA 1141. Ms Luck’s appeal from that judgment was proceeding VID1158/2013, and was determined, adversely to herself, on 15 October 2014 by the judgment to which we have referred in paragraph 13 above. Ms Luck applied for special leave to appeal to the High Court from that Full Court judgment, and it was that application, No M116/2014 in the files of the High Court, on which Ms Luck relied in her endeavour to have the University’s bankruptcy notice set aside. Likewise, it was that application on which she relied in her interim application for the deferral of the hearing and determination of the proceeding being dealt with by the primary judge.
7. It will be noted that the judgment which, at the time of the hearing before the primary judge, Ms Luck challenged in the High Court was not the judgment which formed the basis of the University’s bankruptcy notice. Further, the proceeding which led to that challenge did not involve a money claim by Ms Luck against the University. It was for the review, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), of what were alleged to be decisions made by the Acting Vice Chancellor, and members of the staff, of the University. These circumstances were significant in the way that her Honour disposed of the case before her.
8. The primary judge was prepared, favourably to Ms Luck, to treat her contention that a successful result in M116/2014 would give rise to “a novel set-off” as amounting to the proposition that she had a cross-claim, set-off or cross demand within the meaning of s 40(1)(g) of the Bankruptcy Act, which provides:

A debtor commits an act of bankruptcy …

...

(g) if a creditor who has obtained against the debtor a final judgment or final order, being a judgment or order the execution of which has not been stayed, has served on the debtor in Australia or, by leave of the Court, elsewhere, a bankruptcy notice under this Act and the debtor does not:

(i) where the notice was served in Australia – within the time specified in the notice; or

(ii) where the notice was served elsewhere – within the time fixed for the purpose by the order giving leave to effect the service;

comply with the requirements of the notice or satisfy the Court that he or she has a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt or sum payable under the final order, as the case may be, being a counter-claim, set-off or cross demand that he or she could not have set up in the action or proceeding in which the judgment or order was obtained; …

1. But the only money claim Ms Luck might have had against the University arising from a successful result in M116/2014 would have been (as she contended) a costs order, or (as she might realistically have anticipated) an order for the University to pay her disbursements. Either way, pending the outcome of that proceeding, Ms Luck could point only to an entitlement that *might* come her way. The primary judge held that Ms Luck did not have a cross-claim, set-off or cross demand within the meaning of s 40(1)(g).
2. Her Honour said:

23. For the following reasons Ms Luck has not shown that she has a counter-claim, set-off or cross demand within the meaning of s 40(1)(g) of the Bankruptcy Act.

24. First, the counter-claim, set-off or cross demand stipulated in s 40(1)(g) must be something sounding in money: that is, it must be in respect of a money demand, whether liquidated or unliquidated: see *Re Jocumsen* (1929) 1 ABC 82 at 85 (per Henchman J); *Vogwell v Vogwell* (1939) 11 ABC 83 at 85 (per Latham CJ); *Re Brink; Ex parte Commercial Banking Co of Sydney Ltd* (1980) 30 ALR 433 … The constitutional issues relied on by Ms Luck, even if resolved in her favour, would not sound in a monetary award to Ms Luck. The only claim made by Ms Luck which would sound in a monetary award is her claim for costs, as part of the orders that she seeks in her proposed appeal.

25. Secondly, the counter-claim, set-off or cross demand stipulated by s 40(1)(g) must exist at the time when the application to set aside the bankruptcy notice is heard: *Re Ganke*; … [1995] FCA 195 at [32]. Ms Luck does not have a presently existing counter-claim, set-off or cross-demand in respect of costs because her claim for costs is contingent upon a successful appeal and an order for costs being made in her favour. A counter-claim, set-off or cross-demand has not been created merely because Ms Luck would seek an order for costs on her appeal if special leave is granted and the appeal successful: *Re Thompson*; … (1995) 61 FCR 544 at 552.

26. Thirdly, it is impossible to quantify the counter-claim set off or cross demand that Ms Luck asserts that she has, and therefore she has not shown that such a claim would equal or exceed the sum of $29,755.87.

1. The primary judge was also prepared, favourably to Ms Luck, to treat her application for special leave in M116/2014 as challenging the University’s entitlement to its costs arising from the judgment of the Full Court in VID899/09. But her Honour took the view that any such challenge would be hopeless. She said:

27. Fourthly, the only judgment and orders which can be the subject of challenge by Ms Luck by her proposed appeal are the judgment and orders made in VID 1158/2013. A successful appeal against the judgment and orders made in VID 1158/2013 would not entitle Ms Luck to orders setting aside or quashing the orders made in VID 54/2009 or VID899/2009 or entitle her to costs orders in her favour in substitution for the costs orders that were made in those other proceedings. Ms Luck cannot reopen and relitigate VID54/2009 or VID899/2009 which both have been brought to conclusion and the appeal she wishes to bring from the judgment and orders made in VID1158/2013 would not result in the extinguishment of her liability for the debt on which the bankruptcy notice is founded.

For present purposes, the other proceeding here referred to, VID54/2009, does not require separate consideration.

1. Her Honour’s conclusion was stated as follows:

28. Accordingly, as Ms Luck does not have counter-claim, set-off or cross-demand within the meaning of s 40(1)(g) of the Bankruptcy Act, I accept the contention for USQ that there would be no utility in staying or adjourning Ms Luck’s application to set aside the bankruptcy notice pending the determination of her special leave application. Ms Luck’s application to for a stay or adjournment of her application and her application to set aside the bankruptcy notice should both be dismissed.

1. In the present appeal, Ms Luck’s grounds of appeal, omitting footnotes, are as follows:

1. That the Honourable Court erred in and misapplied the law in that it failed to make an order to refuse or grant the appellant’s application, made on 12, 16 and 30 March 2015, for a stay or an adjournment of matter VID61/2015, pending the hearing and determination of the appellant’s Special Leave Application in the associated High Court matter heard and determined by primary judge Tracey, J on 1 November 2013, and by the Full Court of the Federal Court of Australia on 15 October 2014, in matter *Luck v University of Southern Queensland ABN 40 234 732 081 & Anor M116/2015; FCFCA VID1158/2013; FCA VID357/2009*, whereby it was “sufficient that the applicant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour” and, if a stay or adjournment was granted pursuant to the Honourable Court’s powers under sections 22 and 23 of the *Federal Court of Australia Act 1976*, Division 1.3 of the Federal Court Rules, sections 30 and 33 of the *Bankruptcy Act 1966* and Rule 3.03 of the *Federal Court (Bankruptcy) Rules 2005*, it would have prevented the appellant from committing an act of bankruptcy, and the dire consequences of same, prior to the matter involving the important Constitutional questions of law being heard and determined by either the High Court of Australia, and for which the appellant had demonstrated an appropriate case for a stay or an adjournment, and was entitled to commence with the presumption that the primary judgment was correct.

2. That the Honourable Court erred in and misapplied the law, in that it failed to expose its path of reasoning for exclusion of significant material, including the appellant’s Special Leave Application in the High Court, M116/2014, Notice of Constitutional Matter in Removal of Cause Application M49/2015, Affidavits and Exhibits and written submissions, copies of which were filed in the Federal Court and served in accordance with the Federal Court Rules and the Federal Court (Bankruptcy) Rules by the appellant, in support of her grounds for a stay or an adjournment of *VID61/2015*, which involved matters arising under the Constitution, for which the appellant had also filed and served Notices of Constitutional Matter, for this matter, in the Victorian District Registry of the Federal Court of Australia and in the Melbourne Office of the Registry of the High Court of Australia, for her application to the High Court of Australia for Removal of this Cause, to that Court, whereby the Constitutional questions arose as to whether a breach of the doctrine of the separation of the powers occurred when the Federal Court of Australia and the primary judge, his Honour, Justice Tracey, whilst exercising the power of the Federal Court of Australia under *Chapter III* of the *Constitution*, as Justices of that Court, in respect of hearing and determining the appellant’s matters, and whether the learned justices, in the matter of *VID1158/2014*, erred in applying the concept of judicial immunity to exclude the operation of s 29 of the *Disability Discrimination Act 1992* (Cth), in addition to whether they misconstrued the role of the Judge Advocate General, Major General of the Army, in reporting and being answerable to the executive in accordance with s. 196A of the *Defence Force Discipline Act 1982* (Cth), when applying the test for apprehended bias enunciated in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, which brings into question the validity of the provisions relating to the appointment and required qualifications of the JAG pursuant to the *Defence Force Discipline Act 1982* (DFDA), and, if affirmed, would likely invalidate the determinations of the judiciary in both the Federal Court and the High Court in respect of this matter and the appellant’s other matters heard and determined, or proposed to be heard and determined by his Honour, Justice Tracey, and as a consequence of the upholding of those ultra vires primary determinations through the appellate processes of the Federal Court and the High Court, the orders and determinations of both Courts would ultimately be subject to, by the High Court, the application of orders of certiorari and prohibition directed to all relevant determinations and orders, and conjointly exercising the power of the Executive government in making decisions to refuse or grant to the appellant, reasonable adjustments sought pursuant to her rights under the *Disability Discrimination Act 1992* (Cth), and whether they misconstrued the meaning of the expression in s 29 of that Act, “… a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program …” and whether the learned justices, in the matter of *VID1158/2014*, erred in applying the concept of judicial immunity to exclude the operation of s 29 of the *Disability Discrimination Act 1992* (Cth), in addition to whether they misconstrued the role of the Judge Advocate General, Major General of the Army, in reporting and being answerable to the executive in accordance with s. 196A of the *Defence Force Discipline Act 1982* (Cth), when applying the test for apprehended bias enunciated in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, which brings into question the validity of the provisions relating to the appointment and required qualifications of the JAG pursuant to the *Defence Force Discipline Act 1982* (DFDA), and, if affirmed, would likely invalidate the determinations of the judiciary in both the Federal Court and the High Court in respect of this matter and the appellant’s other matters heard and determined, or proposed to be heard and determined by his Honour, Justice Tracey, and as a consequence of the upholding of those ultra vires primary determinations through the appellate processes of the Federal Court and the High Court, the orders and determinations of both Courts would ultimately be subject to, by the High Court, the application of orders of certiorari and prohibition directed to all relevant determinations and orders.

3. That the Honourable Court erred in and misapplied the law by failing to consider the appellant’s grounds for a stay or adjournment of this matter, in that the questions for hearing and determination by the High Court submitted in her Special Leave Application in matter *M116/2014*, directly relate to the grounds in the appellant’s originating process (appeal from the Administrative Appeals Tribunal (AAT)) in this Federal Court matter VID61/2015; VID899/2009; *VID476/2008*, whereby the appellant submitted that the first and second respondents, the University of Southern Queensland and its Chief Executive Officer were subject to the *Freedom of Information Act 1982* (Cth) because it was an officer of the Commonwealth, and that the AAT had jurisdiction to hear and determine her application made to that Tribunal. If the question of whether the appellant’s submissions in respect of the definitions of “officer of the Commonwealth” and the word “enactment” are affirmed by the High Court, the orders and determinations of both Courts would ultimately be subject to, by the High Court, the application of orders of certiorari and prohibition directed to all relevant determinations and orders and the orders for costs in this case, made in *VID899/2009*, would be subject to the same treatment, hence this matter and each of the other matters in which judgments were made by the primary judge and upheld by the Full Courts’ of the Federal Court would be deemed nugatory.

4. That errors on the face of the record occurred in this matter, firstly, in that the title of this proceeding, as accepted for filing by the Principal Registrar on 13 February 2015, was “University of Southern Queensland and another named in the schedule” and the title of the Honourable Court’s judgment and Reasons for Judgment of 30 March 2015, omits the part of the title “and another named in the schedule” and is written as “University of Southern Queensland”.

Secondly, that documents filed by the appellant by hand up to the Honourable Court Bench on 16 March 2015, have not been recorded on this matter VID61/2015, in the Federal Law Search Site, and in the judgment of 30 March 2015, the Honourable Court referred to the applicant filing two affidavits in support of her application, without reference to the dates on which they were filed. The Federal Law search shows three affidavits being filed by the applicant and none of them refer to the documents as handed up on the 16 March 2015, which included the Applicant’s Submission for Hearing 16 March 2015, accompanied by a 9 page Affidavit sworn before an Officer Acting with the Authority of the Registrar Federal Court of Australia on 16 March 2015, and annexed to the affidavit were Certificates of Identifying Exhibits “GL05 - Copy of Applicant’s High Court Affidavit in matter M8/2010” and “GL06 - Copy of Applicant’s Amended Special Leave Application, Summons and Affidavit of 16 March 2015”. All documents were signed received by Ms Pip Mitchell of the respondents’ legal representative, Clayton Utz, following the appellant’s hand up.

5. The applicant was denied natural justice in the processing and administration of her matters and denied the opportunity to progress the matter with the presumption that the primary judgment was correct, which should occur following a competent, independent and impartial hearing of the important Constitutional questions that arise in this matter, particularly in reference to the validity of the primary judges determinations. These issues are of great importance and rely on the hearing and determination of them by the High Court of Australia in regard to the appellant’s application to the High Court for leave to appeal against the Federal Court of Australia exercising federal jurisdiction. It concerns matters of statutory construction and of significance for the whole country and concerns questions of the separation of powers.

1. Commencing with Ms Luck’s first ground of appeal, in her Amended Outline of Submissions filed on 25 September 2015, Ms Luck said that this ground involved the following issue:

Whether the Honourable Court erred in and misapplied the law, in that it failed to make an order to refuse or grant the appellant’s application, made on 12, 16 and 30 March 2015, for a stay or an adjournment of matter *VID61/2015*, pending the hearing and determination of the Constitutional issues, as raised in this matter and the appellant’s Special Leave Application in the associated High Court matter, heard and determined by the same primary judge Tracey, J on 1 November 2013, and by the Full Court of the Federal Court of Australia on 15 October 2014, in matter *Luck v University of Southern Queensland* M116/201*5;* FCFCA VID1158/2013; FCA VID357/2009?

1. Ms Luck submitted that the primary judge had a duty to hear and determine her application for interim relief by making, or refusing to make, an order staying the further conduct of the matter before her pending the hearing and determination of the constitutional issues that arose in the High Court special leave application. Those issues lay within the jurisdiction of the High Court, and the resolution of them should not, and could not, have been foreclosed by the primary judge permitting the matter before her to proceed to judgment, with the normal result that Ms Luck would have committed an act of bankruptcy (ie by the operation of s 40(1)(g) and s 41(7) of the Bankruptcy Act).
2. To understand and to dispose of this ground of appeal, it is not necessary to recite the terms of the constitutional point around which Ms Luck framed her special leave application. As is apparent from what we have written above, the approach which her Honour took was to propound that, even if it were to be anticipated that Ms Luck would be successful in the High Court, she did not, at the time which was relevant, have a counterclaim, set-off or cross demand. Even complete success, to the extent of achieving the reversal of the Full Court judgment of 15 October 2014, would not disturb the debt based on the costs order of 19 June 2009.
3. By proceeding to hear and determine Ms Luck’s application to have the bankruptcy notice set aside, the primary judge was not trammelling upon the High Court’s capacity to consider Ms Luck’s constitutional point. It is true that, in theory, the impact of s 40(1)(g) of the Bankruptcy Act had the potential to be a strong discretionary consideration in favour of a litigant making a stay application of the kind that Ms Luck did make, but there is nothing in her Honour’s reasons to suggest that she was not alive to the reality that Ms Luck would have committed an act of bankruptcy upon the final determination of her application. On the approach she took (and with which we agree), Ms Luck’s High Court proceeding was irrelevant to the prospects of her challenge to the University’s bankruptcy notice.
4. We reject Ms Luck’s first ground of appeal.
5. In her Amended Outline of Submissions, Ms Luck dealt with the second and third grounds together. They were said to involve the following issues:

* Whether the Honourable Court erred in and misapplied the law, in that it failed to expose its path of reasoning for exclusion of significant material, filed in the Federal Court and served in accordance with the *Federal Court Rules* and the *Federal Court (Bankruptcy) Rules* by the appellant, in support of her grounds for a stay or an adjournment of VID61/2015?
* Whether the Honourable Court erred in and misapplied the law by failing to consider the appellant’s grounds for a stay or adjournment of this matter, in that the questions for hearing and determination by the High Court submitted in her Special Leave Application in matter *M116/2014*, and submitted in the Notice of Constitutional Matter filed in the Federal Court in this matter, directly related to the grounds in the appellant’s originating process (appeal from the Administrative Appeals Tribunal (AAT)) which were not severable from Constitutional issues that arise in this Federal Court matter, *VID476/2008; VID899/2008; VID61/2015*, as it was before her Honour, Justice Davies on the 16 and 30 March 2015?

It was well that Ms Luck condensed her second ground of appeal in the terms set out above: as expressed in the Amended Notice of Appeal, the ground involved substantial repetition and was, we would have to say, barely comprehensible.

1. Developing her submissions on these issues, in her outline Ms Luck submitted that the primary judge’s reasons should have dealt with the constitutional points which had been raised by her, and with her proposition that her allegation as to the validity of Tracey J’s judgments in both series of proceedings was a matter that arose under the *Constitution* or involved its interpretation. That proposition, she said, “was the substantial point made in argument for a stay pending the hearing and determination by the High Court of those constitutional issues under its original jurisdiction”. Further, she complained that her Honour did not make any judgment on Ms Luck’s application for interim relief. Her Honour did not, it was said, “provide an intelligible explanation of the process of reasoning from the evidence to the finding that the substantive matter was without merit, and from that finding to the ultimate conclusion to fail to make an order for a grant or a refusal of the stay sought by the appellant …”. Ms Luck continued that, without properly considering the evidence for the grounds upon which she relied – namely, those which invoked the relevance of the special leave application – the primary judge was in no position to determine the merits of the substantive question presented by the proceeding. Further, her Honour ought to have considered, and dealt with, all of the evidence which Ms Luck had filed and on which she relied in her interim application.
2. In dealing with the second and third grounds of appeal, we commence with the observation that the application which came before the primary judge on 16 March 2015 was an interim one apropos Ms Luck’s application to have the bankruptcy notice set aside. Of its nature, such an application is concerned with maintaining or adjusting the state of affairs existing as between the parties over the time it would take to have the claims in the main proceeding heard and determined on a final basis. Where is it both feasible and just to have those claims dealt with, on a final basis, at an early date, the need for, and the point of, an interim order necessarily fall away. Once the primary judge embarked on the process of hearing the parties’ final cases, her Honour was concerned with Ms Luck’s interim application only against the possibility that the University’s grounds of opposition were unsuccessful and the proceeding continued on foot.
3. It must also be accepted that Ms Luck’s interim application was not a conventional one. She seemed to be saying that, even though her main application for the setting aside of the bankruptcy notice could be heard and determined in March 2015, given time and a successful result in the High Court, she would be armed with a newly-declared legal order that would greatly improve her prospects in the proceeding before the primary judge. There are two answers to this. First, a respondent to a proceeding of a kind that enlivens the operation of s 41(7) of the Bankruptcy Act should not, at least in the normal case, be obliged to await the outcome of another court proceeding for no better reason than that it might produce a more advantageous legal order for his or her opponent. And secondly, in the present case the primary judge did give attention to what Ms Luck claimed would be the consequence of the success which she anticipated in the High Court: see paragraphs 57 and 58 above. Her Honour’s reasoning, which was clear and unquestionably correct, did not engage with Ms Luck’s constitutional point because it did not need to do so.
4. At base, Ms Luck’s complaint embodied in these grounds of appeal relates to her Honour’s failure to deal with the interim application as such and to her Honour’s failure to consider the rights and wrongs of the constitutional point. For reasons set out above, her Honour was justified in proceeding the way she did. Ms Luck’s complaint about what was said to be her Honour’s failure to give reasons is misconceived. Her Honour did give reasons for the conclusion which she reached. Those reasons did not require the making of an excursus into the area covered by Ms Luck’s constitutional case in the High Court because that was not why her Honour disposed of the proceeding in the way that she did. Had her Honour been in error not to have taken the prospect of that constitutional case succeeding into account, she might have been corrected on appeal. But she was not in error in this way.
5. We reject Ms Luck’s second and third grounds of appeal.
6. Although, in her outline, Ms Luck submitted that one of the issues in the appeal was “whether errors on the face of the record occurred in this matter”, nothing further was said about that issue. In the circumstances, we would go no further than to take this opportunity to point out, in relation to the first element of this ground, that the sealed orders made by the primary judge on 30 June 2015 did name the Chief Executive Officer of the University as the second respondent. Otherwise, Ms Luck’s fourth ground of appeal is without substance, and should be rejected.
7. Ms Luck submitted that her fifth ground of appeal involved the following issue:

Whether the applicant was denied natural justice in the processing and administration of her matters and denied the opportunity to progress the matter with the presumption that the primary judgment was correct.

In her outline, nothing further was said about this issue. For our own part, once it is accepted, as we have above, that the primary judge’s decision to proceed to hear Ms Luck’s final claims on 16 March 2015 was unobjectionable, there is nothing in the facts of the case that gives rise to any natural justice point. The only other observation we would make is that what Ms Luck means by “the primary judgment”, both in the ground and in the above statement of issue is, with respect to her, quite obscure.

1. In her outline, Ms Luck included the submission that there was a further issue, not referable to any ground of appeal, as follows:

Whether the Honourable Court erred in and misapplied the law by finding that costs in respect of the Certificate of Taxation of 1 February 2010, for which Bankruptcy Notice *BN177801/2015* was issued on 7 January 2015 by the Official Receiver, and other incidental costs orders associated and connected with each of the appellant’s other matters, heard and determined by the same primary judge, and subsequently by the Full Courts of the Federal Court and other judges of the Federal Court, did not constitute a counter-claim, set-off or cross demand that sounded in money, when the validity of each of those costs orders was dependent upon the hearing and determination by the High Court of Australia, the Constitutional issues raised in this matter *VID61/2015*, as it was before her Honour, Justice Davies, on the 16 and 30 March 2015?

1. This statement of issue is based on a misunderstanding of what the primary judge said in the first of the reasons given for rejecting Ms Luck’s case, set out in paragraph 57 above. Her Honour did not suggest that the costs order achieved by the University in proceeding VID899/2009 did not sound in money. It clearly did, but it was the University which had a money entitlement under that order. It could not have been relevant to Ms Luck’s asserted counter-claim, setoff or cross demand. What did *not* sound in money was the result which Ms Luck might have anticipated in her High Court proceeding. As her Honour rightly held, even a successful outcome in the High Court for Ms Luck would have had no impact on the University’s entitlement to its costs in proceeding VID899/2009.
2. It was for the foregoing reasons that we dismissed the appeal with costs.

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| I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Collier, Jessup and Katzmann. |

Associate:

Dated: 5 December 2016