FEDERAL COURT OF AUSTRALIA

Shaw v Yarranova Pty Ltd [2017] FCAFC 88

|  |  |
| --- | --- |
| Appeal from: | *Shaw v Yarranova Pty Ltd* [2016] FCA 88  |
|  |  |
| File number: | VID 182 of 2016 |
|  |  |
| Judges: | **NORTH, PERRY, CHARLESWORTH JJ** |
|  |  |
| Date of judgment: | 30 May 2017 |
|  |  |
| Catchwords: | **BANKRUPTCY** – dismissal of annulment application – appeal – refusal by primary judge to go behind judgment debts – history of litigation challenging judgment debts – solvency not proven – discretion to refuse annulment application irrespective of proof of solvency – no appealable error  |
|  |  |
| Legislation: | *Bankruptcy Act 1966* (Cth), ss 43, 52, 153B, 154*Corporations Act 2001* (Cth)*Federal Court of Australia Act 1976* (Cth), s 28*Federal Court Rules 2011*, r 20.12  |
|  |  |
| Cases cited: | *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430*BKL15 v Minister for Immigration and Border Protection* (2016) 241 FCR 450*Boles v Official Trustee in Bankruptcy* [2001] FCA 639, (2001) 183 ALR 239*Branir Pty Ltd v Owston Nominees (No 2)* (2001) 117 FCR 424*Cachia v Haines* (1994) 179 CLR 403*CDJ v VAJ* (1999) 197 CLR 172*Condon v Pompano Pty Ltd* (2013) 252 CLR 38*Corney v Brien* (1951) 84 CLR 343*Culleton v Balwyn Nominees Pty Ltd* [2017] FCAFC 8*Dean v Pepper Finance Corporation Ltd (Trustee)* [2016] FCA 648*Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346*General of Berne Insurance Co v Jardine Reinsurance Management Ltd* [1998] 2 All ER 301*Harold v Smith* (1860) 157 ER 1229*House v Defence Force Retirement and Death Benefits Authority* (2011) 193 FCR 112*House v The King* (1936) 55 CLR 499*Hunter v Transport Accident Commission & Avalanche* [2005] VSCA 1*Makhoul v Barnes* (1995) 60 FCR 572*Marek v Tregenza* (1963) 109 CLR 1*Mifsud v Campbell* (1991) 21 NSWLR 725*Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507*Ozer v Australian Liquor Marketers Pty Ltd* [2001] FCA 1197*Prudential Finance Ltd v Davander Nominees Pty Ltd and others* [1992] 1 VR 468*Public Service Board of NSW v Osmond* (1986) 159 CLR 656*Public Service Board of NSW v Osmond* (1986) 159 CLR 656*Re Flatau; Ex parte Scotch Whisky Distillers Ltd* (1888) 22 QBD 83*Re Frank, ex parte Piliszky* (1987) 16 FCR 396Re Lawson (1939) 11 ABC 137*Re Sarina; ex parte Wollondilly Shire Council* [1980] FCA 175, (1980) 32 ALR 596*Sandell v Porter* (1966) 115 CLR 666*Shaw v MAB Corporation Pty Ltd* [2013] FCA 1231*Shaw v MAB v Corporation* (2014) 220 FCR 425*Shaw v Yarranova Pty Ltd* [2006] VSC 45*Shaw v Yarranova Pty Ltd* [2006] VSCA 291*Shaw v Yarranova Pty Ltd* [2011] VSCA 55*Shaw v Yarranova Pty Ltd* [2013] FCCA 1627*Shaw v Yarranova Pty Ltd* [2014] FCAFC 171*Shaw v Yarranova Pty Ltd* [2014] FCA 557*Shaw v Yarranova Pty Ltd & Anor (No 2)* [2007] VSCA 48*Shaw v Yarranova Pty Ltd and NewQuay Stage 2 Pty Ltd* (Unreported, Supreme Court of Victoria, Master Daly, 7 March 2008)*Wainohu v New South Wales* (2011) 243 CLR 181*Wentworth v Rogers* (2006) 66 NSWLR 474*Wren v Mahony* (1972) 126 CLR 212*Xu v Wan Ze Property Development (Aust) Pty Ltd (in liquidation)* [2014] FCA 610*Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616*Yarranova Pty Ltd v Shaw* [2014] FCA 403  |
|  |  |
| Date of hearing: | 13 and 14 February 2017 |
|  |  |
| Registry: | Victoria |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 142 |
|  |  |
| Counsel for the Appellant: | The Appellant appeared in person |
|  |  |
| Counsel for the Respondents: | Mr P Fary |
|  |  |
| Solicitor for the Respondents: | Norton Rose Fullbright Australia |
|  |  |
| Counsel for Interested Party | Ms N Angelo |
|  |  |
| Solicitor for Interested Party | Harris Carlson Lawyers |

ORDERS

|  |  |
| --- | --- |
|  | VID 182 of 2016 |
|   |
| BETWEEN: | JOHN RASHLEIGH SHAWAppellant |
| AND: | YARRANOVA PTY LTD (ACN 077 517 616)First RespondentNEWQUAY STAGE 2 PTY LTD (ACN 086 482 644)Second Respondent |

|  |  |
| --- | --- |
| JUDGES: | NORTH, PERRY, CHARLESWORTH JJ |
| DATE OF ORDER: | 30 MAY 2017 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant is to pay the respondents’ costs of the appeal.
3. The parties have leave to apply for orders varying or revoking the order in paragraph 2, such leave to be exercised within seven days of the date of these orders.

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

REASONS FOR JUDGMENT

THE COURT

1. The appellant, Mr John Shaw, is an undischarged bankrupt. In December 2014, he made an application under s 153B of the ***Bankruptcy Act*** *1966* (Cth) for the annulment of his bankruptcy. Pagone J dismissed the application: *Shaw v Yarranova Pty Ltd* [2016] FCA 88. This is an appeal from that judgment.
2. There are 75 grounds of appeal. For the reasons that follow, the grounds are not made out and the appeal should be dismissed.

# THE SEQUESTRATION AND ANNULMENT PROCEEDINGS

1. Mr Shaw was made bankrupt by a sequestration order on a creditor’s petition presented by the respondents, **Yarranova** Pty Ltd and **NewQuay** Stage 2 Pty Ltd: *Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616. Gordon J held that Mr Shaw had failed to comply with a bankruptcy notice requiring him to pay certain judgment debts and that he had therefore committed an act of bankruptcy: *Bankruptcy Act,* s 43(1)(a). Her Honour rejected a series of arguments advanced by Mr Shaw to the effect that, among other things, he did not owe the respondents the judgment debts and that the respondents were not otherwise bona fide creditors.
2. A court may dismiss a creditor’s petition if the debtor proves that he or she is able to pay his or her debts: *Bankruptcy Act*, s 52(2)(a). Mr Shaw did not adduce evidence before Gordon J to prove his solvency at the time that the sequestration order was made. Her Honour made no findings on that question.
3. Mr Shaw appealed against the sequestration order. He applied on his appeal to adduce new evidence to establish his solvency at the time of the proceedings before Gordon J. The Full Court dismissed the application to adduce new evidence and the appeal itself: *Shaw v Yarranova Pty Ltd* [2014] FCAFC 171 (Bennett, Flick and Yates JJ).
4. Mr Shaw made his application under s 153B of the *Bankruptcy Act* five days later. On such an application a bankruptcy may be annulled if the Court is satisfied that the sequestration order ought not to have been made: *Bankruptcy Act,* s 153B(1). In considering the application, the primary judge had a discretion to decline to annul the bankruptcy, even if satisfied that the sequestration order ought not to have been made: *Ozer v Australian Liquor Marketers Pty Ltd* [2001] FCA 1197 at [30] (Heerey, Emmett and Allsop JJ).
5. His Honour refused to go behind the judgment debts and rejected Mr Shaw’s contention that the sequestration order ought not to have been made. His Honour said that even if he had been satisfied that the sequestration order ought not to have been made, he would not have annulled Mr Shaw’s bankruptcy because Mr Shaw’s conduct in his dealings with the respondents had revealed “a disregard for the entitlements of others in his pursuit of those he claims for himself” (Reasons [18]).

# ISSUES ARISING ON THE APPEAL

1. The grounds of appeal are contained in a notice of appeal (**NOA**) dated 26 February 2016. They are repetitive and most of them contain multiple contentions. There is no utility in reproducing the grounds of appeal here. Where appropriate, they will be referred to by their paragraph numbers in the course of these reasons.
2. Mr Shaw’s central arguments are to the effect that the primary judge erred by:
3. refusing to go behind the judgments upon which the debts specified in the bankruptcy notice were based (the judgment debt issue);
4. failing to find that the bankruptcy notice had been issued, and the creditor’s petition presented, by a solicitor acting without the respondents’ authority (the authority issue);
5. dismissing in whole or in part Mr Shaw’s various applications for the discovery and production of documents (the discovery issue);
6. finding that Mr Shaw had failed to establish that he was solvent at the time that the sequestration order was made (the solvency issue);
7. viewing Mr Shaw’s conduct *vis á vis* the respondents as going beyond that of a person seeking to rely upon his legitimate rights (the conduct issue); and
8. giving inadequate reasons for interlocutory rulings and final judgment (the reasons issue).
9. Any grounds of appeal not subsumed in our consideration of these six central arguments will be considered separately at the conclusion of these reasons.

# NATURE OF THE APPEAL

1. This appeal is in the nature of a rehearing: *Minister for Immigration and Multicultural Affairs v Jia* *Legeng* (2001) 205 CLR 507 at [75] (Gleeson CJ and Gummow J). The task of the Court on such an appeal is the correction of error: *CDJ v VAJ* (1999) 197 CLR 172 at [111]. The demonstration of error in any given case depends not only upon the evidence but also on the nature of the findings or conclusions made by the primary judge.
2. The demonstration of error affecting findings or conclusions involving elements of fact, degree, opinion or judgment will ordinarily be more difficult to demonstrate than errors affecting conclusions about matters in respect of which there can be only one correct answer: *Branir Pty Ltd v Owston Nominees (No 2)* (2001) 117 FCR 424 at [24] – [25] (Allsop J). Where error affecting the exercise of a discretionary power is alleged, the Court on appeal will not interfere unless the error falls within the principles stated by the High Court in ***House v The King*** (1936) 55 CLR 499 at 504 – 505 (Dixon, Evatt and McTiernan JJ):

The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

1. The cumulative effect of these principles is that the appeal is not an occasion for Mr Shaw to re-agitate arguments that were rejected in the sequestration proceedings, or other proceedings in which he has been unsuccessful against the respondents, so as to have this Court determine the issues afresh in his favour. Rather, he must demonstrate appealable error affecting the decision of the primary judge not to annul his bankruptcy in accordance with the principles we have stated.

# The JUDGMENT DEBT ISSUE

1. This issue is to be determined having regard to the nature of the jurisdiction exercised by the Court in making the sequestration order against Mr Shaw, the nature of the jurisdiction exercised by the primary judge in dismissing the annulment application and the nature of this appeal.

## Principles

1. The power to make a sequestration order may be exercised only where a debtor has committed an act of bankruptcy: *Bankruptcy* *Act*, s 43(1)(a). The petitioning creditor must prove, among other things, that the debt or debts upon which he or she relies is, or are, still owing: *Bankruptcy* *Act,* s 52(1).
2. The requirement that the creditor prove that the debt relied upon is still owing will ordinarily be more easy to fulfil in respect of a judgment debt, the judgment being *prima facie* evidence of the debt: ***Corney*** *v Brien* (1951) 84 CLR 343 at 355 (Fullagar J). The Court nonetheless has the power to go “round the judgment”, to enquire into its subject matter, so as to satisfy itself that the creditor’s petition is founded on a “good debt”: *Dean v Pepper Finance Corporation Ltd (Trustee)* [2016] FCA 648 at [43] (Katzmann J); see also *Corney* at 347 (Dixon, Williams, Webb and Kitto JJ), 353 — 354 (Fullagar J).
3. In *Wren v Mahony* (1972) 126 CLR 212 (at 224 – 225) Barwick CJ considered Lord Esher’s oft-quoted statement in *Re Flatau; Ex parte Scotch Whisky Distillers Ltd* (1888) 22 QBD 83 at 85 — 86 to the effect that the power to go behind the debt is a “mere discretion”. Barwick CJ said:

His Lordship, in using this expression, was not intending, in my opinion, to weaken the emphasis he had always placed on the need for the Court of Bankruptcy to be satisfied of the existence of the petitioning creditor’s debt. Rather, if one reads all his expressions in the several cases I have cited, he was pointing out that the Bankruptcy Court could in general accept a judgment debt as sufficient proof of that debt particularly where it resulted from a fully heard contest between parties but that it always had the power to go behind the judgment and if the case was a proper one, should do so. The judgment is never conclusive in bankruptcy. It does not always represent itself as the relevant debt of the petitioning creditor, even though under the general law, the prior existing debt has merged in a judgment. But the Bankruptcy Court may accept the judgment as satisfactory proof of the petitioning creditor’s debt. In that sense that court has a discretion. It may or may not so accept the judgment. But it has been made quite clear by the decisions of the past that where reason is shown for questioning whether behind the judgment or as it is said, as the consideration for it, there was in truth and reality a debt due to the petitioning creditor, the Court of Bankruptcy can no longer accept the judgment as such satisfactory proof. It must then exercise its power, or if you will, its discretion to look at what is behind the judgment: to what is its consideration. It is not the law, in my opinion, that whether in any case the Court of Bankruptcy will consider whether there is satisfactory proof of the petitioning creditor’s debt is a mere matter of its own discretion. Nothing in *Corney v Brien* lends support for such a view. Rather the emphasis is upon the paramount need to have satisfactory proof of the petitioning creditor’s debt. The Court’s discretion in my opinion is a discretion to accept the judgment as satisfactory proof of that debt. That discretion is not well exercised where substantial reasons are given for questioning whether behind that judgment there was in truth and reality a debt due to the petitioner.

(Footnote omitted)

1. Where substantial reasons are asserted for going behind the judgment, the bankruptcy court should engage in a preliminary investigation about the merits of the attack that is made. The invitation to go behind the judgment may be rejected at that preliminary stage. However, once the Court decides it will go behind the judgment, the “whole [of the] matter is open”: *Corney* at 358. It is in this sense that the task of the bankruptcy court involves a two-stage process, recognised by the Full Court in *Makhoul v Barnes* (1995) 60 FCR 572 (at 584):

As was pointed out in the judgment of Lee and Hill JJ in *Wolff v Donovan* there will be circumstances where the question will involve a two-stage process. A party may seek to have the judge in bankruptcy decide as a preliminary question whether reason has been shown for questioning whether behind the judgment there was a real debt before proceeding to determine that issue itself. The judgment discusses an appropriate procedure to be adopted in such a case. However in other cases it will be appropriate for the two questions to be determined at the one time, as indeed happened in *Wolff*. What is important is that all parties are aware how the case is to proceed.

1. The foregoing discussion concerns the powers of a bankruptcy court in determining whether or not a sequestration order should be made on a creditor’s petition. The application before the primary judge was not an application for a sequestration order, but an application to annul Mr Shaw’s bankruptcy in the exercise of the power conferred by s 153B of the *Bankruptcy* *Act*. On that application, the primary judge should not be regarded as hearing afresh the issues arising on the respondents’ creditor’s petition. Rather, it was necessary for his Honour to determine whether the sequestration order made by Gordon J “ought not to have been made”.
2. The word “ought” was considered by Fisher J in *Re Frank, ex parte Piliszky* (1987) 16 FCR 396 in the course of deciding an annulment application made under a statutory predecessor to s 153B of the *Bankruptcy* *Act*,worded in relevantly the same terms. His Honour first observed that a sequestration order, once made, may be revisited and set aside in three ways. First, the judge making the sequestration order may rescind or vary the order at any time before it has been signed and sealed. Second, a Full Court on an appeal from a sequestration order may set the order aside in the exercise of its appellate powers under s 28(1) of the *Federal Court of Australia Act 1976* (Cth). Third, bankruptcy brought about by the sequestration order may be annulled, under the predecessor to s 153B. The availability of those “various contrasting avenues” required that the phrase “ought not to have been made” be strictly construed: at 401 — 403. The word “ought” his Honour held, had “imperative significance”, such that a sequestration order should not be annulled unless the judge was, in the circumstances, bound *not* to make it “and even then there is a residual discretion not to annul” (at 403). His Honour said:

In circumstances where it was open to a judge to make [a sequestration order] in the exercise of his discretion, it can only be said he ‘ought not to have made the order’ if none of the circumstances could justify the making of an order. Alternatively it can be established that an order ‘ought’ not to have been made because subsequent evidence discloses that all of the true facts were not before the court when the order was made: *Re Cook* (1946) 13 ABC 245 at 249.

1. To those principles we would add the following.
2. Where, as here, a judge hearing the application for a sequestration order has declined to go behind a judgment that evidences or constitutes a petitioner’s debt, the bankrupt will face a significant hurdle in demonstrating that the Court should do so on a subsequent annulment application. That is particularly so where, as here, the judge hearing the creditor’s petition determined not to go behind the judgment and that determination has been unsuccessfully challenged on an appeal. In those circumstances, it will be necessary to show that there is evidence in existence that was not before the judge who made the sequestration order and that that judge would have been bound, in the face of that evidence, not to make the sequestration order. In other words, an annulment application is not an occasion for a bankrupt to have the question of whether to go behind the judgment considered anew, as though the proceedings on the creditor’s petition and the subsequent appeal had never occurred. Nor is an annulment application an occasion to seek to obtain, by compulsory processes, evidence that might sway the judge on the annulment application to a different view from that reached by the judge who made the sequestration order. A bankrupt who alleges grounds for the annulment of his or her bankruptcy should not advance grounds for annulment that cannot be proven by evidence already known to, or in the possession of, the bankrupt. That is particularly so when the grounds for annulment include allegations of fraud or other wrongdoing. The annulment proceedings ought not to be commenced in the hope that such evidence might somehow emerge, by compulsive processes or otherwise.

## The factual context

1. As we have mentioned, the bankruptcy notice required Mr Shaw to pay a series of judgment debts. The debts are in the nature of taxation orders. They quantify the amounts to be paid pursuant to a series of costs orders made against Mr Shaw in the **Supreme Court** of Victoria. When it is said that the primary judge should have “gone behind the judgment” it is meant that the judge should have gone behind not only the assessment orders, but also behind the adverse costs orders to which the assessments referred. In one particular respect it is said that a substantive dispute in the proceedings in which an adverse costs order was made was wrongly decided and should be revisited on its merits.
2. It is therefore necessary to give an overview of the long and unfortunate history of dealings between the parties in sufficient detail to explain the circumstances in which the judgment debts arose. Setting out that history will also illuminate the reasons why the primary judge made the rulings and findings now challenged by Mr Shaw on this appeal. We reject Mr Shaw’s contentions that any part of the history is irrelevant: contra NOA [11], [22].

### The original transaction

1. The parties’ dealings began in April 2000 when Mr Shaw entered into a contract to purchase an off-the-plan apartment located in New Quay in Melbourne’s Docklands. He paid a deposit on the contract of $66,550. The vendor named on the contract was Yarranova “as nominee for MAB Docklands Pty Ltd”. Later that year, Yarranova assigned the benefit of its interest under the contract to NewQuay “as nominee for MAB Docklands Pty Ltd”. The certificate of title for the apartment was issued to NewQuay on 28 June 2002 and, shortly afterward, NewQuay called upon Mr Shaw to pay the balance of the purchase price.
2. The two respondent companies and MAB Docklands Pty Ltd form part of a corporate group referred to as the MAB Group. The primary judge heard unchallenged evidence to the effect that the group is comprised of “hundreds” of companies, the shares of which are owned by two brothers, Michael and Andrew Buxton, whether directly, indirectly, legally or beneficially.
3. Mr Shaw refused to pay the balance of the purchase price because, he alleged, the works on the apartment were incomplete. NewQuay rescinded the contract and Mr Shaw lodged a caveat over the title to the apartment. There followed a series of actions which may be referred to later in these reasons by the short headings below.

### The Bell J proceedings

1. Having lodged the caveat, on 1 December 2003, Mr Shaw commenced proceedings in the Supreme Court seeking specific performance of the contract. He named the current respondents, Yarranova and NewQuay, as defendants. The respondents counterclaimed for the removal of the caveat. Bell J held that the contract had been validly rescinded by NewQuay and that Mr Shaw had forfeited his deposit under the contract. His Honour dismissed Mr Shaw’s application, ordered that the caveat be removed and further ordered that Mr Shaw pay the respondents’ costs of both the claim and the counterclaim: *Shaw v Yarranova Pty Ltd* [2006] VSC 45. Mr Shaw has paid the respondents’ costs in accordance with Bell J’s orders.

### The 2006 appeal

1. Mr Shaw appealed to the Victorian Supreme Court of Appeal. He joined Yarranova and NewQuay as respondents to the appeal. He applied for a stay of the orders of Bell J pending the hearing and determination of the appeal. The stay was granted on 26 May 2006, subject to Mr Shaw giving an undertaking to pay any damages that might be suffered as a result of a stay and the payment of approximately $182,000 as security for any such damages into an interest bearing account held by the respondents’ solicitors. The practical effect of the stay was that the caveat remained on the title to the apartment, thus preventing its sale pending the outcome of the appeal.
2. The appeal was dismissed: *Shaw v Yarranova Pty Ltd* [2006] VSCA 291 (Warren CJ, Eames and Neave JJA); *Shaw v Yarranova Pty Ltd & Anor (No 2)* [2007] VSCA 48 (Warren CJ, Eames and Neave JJA). On 20 April 2007, the Court of Appeal ordered an inquiry by a Master for the assessment of any damages sustained by the respondents by reason of the maintenance of the caveat.

### The damages assessment proceedings

1. The respondents and Mr Shaw appeared before Master Daly (as she then was) of the Supreme Court for the purposes of the inquiry as to damages. The damages assessment was undertaken within the same appeal proceedings that had been commenced by Mr Shaw. Yarranova and NewQuay are named as the “Respondent” on the reasons for judgment given by Master Daly. They are jointly referred to in the reasons as “the vendor”. Mr Shaw did not submit before Master Daly that Yarranova was not a proper or necessary party on the assessment, nor did he make any application to have Yarranova disjoined as a party.
2. Master Daly heard evidence from the chief financial officer of the MAB Group, Mr Ian Smith, to the effect that the “vendor” would have applied the proceeds of the apartment’s sale to debts of other companies within the MAB Group or otherwise to fund other projects carried on within the group. Mr Shaw disputed that the proceeds would have been applied in that way.
3. In her reasons for judgment Master Daly said:

… There is some force in Mr Shaw’s submissions that the process [*sic* proceeds] would not have been retained or used by the actual vendor company. While I accept that it would have been the practice of the company to remit any proceeds to its head companies or other companies within the MAB group, it is not clear that there was any liability imposed upon the vendor to remit the funds to any particular entity. However, the Court of Appeal in its orders clearly intended the vendor to be compensated for the loss of use of the sale proceeds of the property.

See *Shaw v Yarranova Pty Ltd and NewQuay Stage 2 Pty Ltd* (Unreported, Supreme Court of Victoria, Master Daly, 7 March 2008) at [9].

1. Importantly for present purposes, Master Daly was alive to the circumstance that Yarranova had divested itself of its interest in the apartment and was not, strictly speaking, a “vendor” at the time that the caveat was lodged. She heard but rejected Mr Shaw’s contention that Yarranova should not be jointly entitled to the benefit of any damages award.
2. Master Daly ordered that Mr Shaw pay the respondents damages assessed at $60,389.37 inclusive of interest, and that the award be paid out of the security deposit. Master Daly also ordered Mr Shaw to pay the respondents’ costs of the damages assessment proceedings, with some minor exceptions.

### The damages assessment appeals

1. Mr Shaw filed two notices of appeal against the orders made by Master Daly in the damages assessment proceedings. The respondents sought a stay of those appeals pending payment of the original judgment debt. They also sought orders to the effect that Mr Shaw’s assets be disclosed and frozen.

### The settlement agreement

1. On 27 March 2008 the parties entered into a settlement agreement. The recitals to the agreement record the parties’ intention to compromise their respective interests in the damages assessment appeals, the freezing order application and the original judgment debt. The operative terms of the settlement agreement were fairly summarised by Gordon J in *Yarranova Pty Ltd* *v Shaw* *(No 2)* [2014] FCA 616 at [16] as follows:

1. Upon execution, Mr Shaw irrevocably authorised and agreed that $90,000 held in ANZ Bank Account 700514299 (defined as ‘the ANZ account’) be paid directly to Yarranova from the ANZ account: cl 1.

2. Within 2 business days of execution of the [Settlement Agreement], the balance of the ANZ account remaining after disbursement of (a) $60,389.57 pursuant to paragraph 4 of the Assessment Orders of 7 March 2008 and (b) the $90,000 pursuant to paragraph 1 of this [Settlement Agreement], be paid directly from the ANZ account by way of electronic transfer into an account nominated and held solely by Mr Shaw: cl 2.

3. On or before 24 April 2008, Mr Shaw would pay to Yarranova $141,118.15 in full and final satisfaction of the judgment debt, such payment to be made by way of bank cheque drawn payable to Yarranova: cl 5.

1. Mr Shaw alleges that in the course of performing the settlement agreement, he learned that a non-negotiable cheque that he had drawn in favour of Yarranova had been deposited into a bank account in the name of MAB Corporation. He refused to perform the remainder of the settlement agreement. He claimed (and continues to claim, including on this appeal) that he had been “duped”.

### The stay of the assessment appeals

1. On 2 June 2008, Judd J of the Supreme Court found that Mr Shaw was in breach of the settlement agreement. He granted the respondents’ application for a stay of the appeals against the damages assessment pending payment by Mr Shaw of the original judgment debt. An application for leave to appeal against those orders was dismissed with costs on 1 August 2008.
2. Mr Shaw gave an undertaking before Judd J to the effect that he would not dispose of, deal with or otherwise encumber certain real property he owned in Upwey, Victoria (the Upwey Property). On the basis of that undertaking, Judd J dismissed the respondents’ application for orders that Mr Shaw’s assets be disclosed and frozen.

### The enforcement proceedings

1. On 27 August 2008 the respondents obtained a sheriff’s warrant for the enforcement of a number of outstanding judgment debts owed by Mr Shaw. The attempts by the respondents to execute the warrant are conveniently described by Gordon J in the sequestration judgment as follows:

19. On 27 August 2008, the applicant creditors obtained a warrant in respect of various outstanding judgment debts owed by Mr Shaw to the applicant creditors. Despite numerous attempts at execution, the warrant was returned unsatisfied on 7 November 2008. The applicant creditors then successfully applied for a warrant of seizure and sale of the Upwey Property (the **Warrant**). An auction of the Upwey Property was arranged for 27 May 2009. On 25 May 2009, Mr Shaw applied for an order staying execution of the Warrant to prevent the auction on 27 May 2009. That application was dismissed with costs on 27 May 2009. The Upwey Property was auctioned on 27 May 2009. It did not sell. There were no bids. On 16 July 2009, the applicant creditors obtained an order that the Sheriff auction the Upwey Property without reserve. Mr Shaw was given an opportunity to be heard on that application, but declined that opportunity.

20. In late July or early August 2009, a second auction of the Upwey Property was scheduled for 9 September 2009. On 19 August 2009, the applicant creditors applied for an order that the Warrant be extended for a period of one year, to allow for the execution of the Warrant by the Sheriff at that auction. Mr Shaw opposed the application, but it was granted with costs by Kings AsJ on 24 August 2009. An appeal from those orders was lodged by Mr Shaw. The appeal was heard by Forrest J on 3 September 2009. His Honour dismissed the appeal with costs.

21 On 8 September 2009, the applicant creditors were informed that Mr Shaw had granted a mortgage over the Upwey Property on 17 August 2009, in breach of the undertaking he had given to Judd J on 2 June 2008. The applicant creditors made a further application for a freezing order, resulting in an interim freezing order made on 30 September 2009 by Vickery J in the amount of $310,000, and a freezing order made on 21 October 2009 by Harper J in the amount of $400,000.

1. The respondents’ unsuccessful attempts to enforce costs orders against Mr Shaw resulted in yet further costs orders being made against him.

### The taxation proceedings

1. Orders were made in a series of taxation proceedings quantifying the amounts payable by Mr Shaw to the respondents pursuant to the costs orders. The costs allowed in the assessments are referred to as the “defendants’ costs”, “respondents’ costs”, “applicants’ costs” or “the costs of the applicants”, depending upon the description given to the respondents as parties in the various proceedings. The orders are in favour Yarranova and NewQuay jointly.

### The taxation review proceedings

1. Mr Shaw has made or attempted to make several applications for review of the costs assessments. One application was heard by Wood AsJ who confirmed the quantifications stated in the orders. Mr Shaw then applied for review of the orders of Wood AsJ, and for review of additional taxation orders not previously reviewed by Wood AsJ. That application was dismissed with costs by Beach J of the Supreme Court (as his Honour then was) on 13 December 2010. An application by Mr Shaw for leave to appeal the orders of Beach J was dismissed with costs by Redlich and Mandie JJA on 18 February 2011: *Shaw v Yarranova Pty Ltd* [2011] VSCA 55.

### The 2012 summons

1. On 4 September 2012, Mr Shaw filed a summons in the Supreme Court seeking to have the orders made in the damages assessment proceedings set aside. Mukhtar J dismissed the summons for a procedural irregularity without determining its merits. The orders of Mukhtar J were ultimately upheld in the Court of Appeal: see the procedural history cited in *Shaw v Yarranova Pty Ltd* [2014] FCA 557 (Bromberg J) at [11] – [19].
2. Mr Shaw has made further unsuccessful attempts to revisit the orders of Master Daly. It is not necessary to reiterate them here, except to say that Mr Shaw maintained before the primary judge (and maintains on this appeal) that his attempts to have the orders overturned are not exhausted.

### Bankruptcy notice

1. As we have said, Yarranova and NewQuay served a bankruptcy notice on Mr Shaw on 14 December 2012 founded on a debt of $388,880.16. The debt comprises 12 orders made in the taxation proceedings totalling $412,891.64, less a credit of $24,011.48, which is the subject of a separate issue dealt with at [135] and [136] below.

### Application to set aside the bankruptcy notice

1. Concurrently with his proceedings in the Supreme Court, Mr Shaw applied to have the bankruptcy notice set aside. His application was dismissed by Judge Burchardt of the Federal Circuit Court of Australia on 25 October 2013: *Shaw v Yarranova Pty Ltd* [2013] FCCA 1627. An appeal against that dismissal was also dismissed with costs on 28 May 2014: *Shaw v Yarranova* [2014] FCA 557 (Bromberg J).

### Fraud proceedings

1. Mr Shaw also commenced a separate proceeding in the Victorian Registry of this Court against the respondents and other parties on 3 August 2013. He alleged the torts of conspiracy and intimidation, fraud, deceit, fraudulent concealment, misleading and deceptive conduct, unconscionable conduct and contraventions of the *Corporations Act 2001* (Cth). Jessup J gave summary judgment for the respondents: *Shaw v MAB Corporation Pty Ltd* [2013] FCA 1231. His Honour ordered Mr Shaw to pay the respondents’ costs on an indemnity basis. The allegations made by Mr Shaw against Yarranova and NewQuay in the fraud proceedings largely align with those made in the proceedings before the primary judge.
2. Mortimer J refused an application for leave to appeal against the judgment of Jessup J and ordered Mr Shaw to pay the respondents costs: *Shaw v MAB v Corporation* (2014) 220 FCR 425.
3. All of that explains why the sequestration order was not made until some 18 months after the creditor’s petition was filed.

## Debts founding the creditor’s petition

1. The 12 judgments specified in the bankruptcy notice and founding the creditor’s petition were conveniently presented in a table by Gordon J. It is reproduced in full below, save that her Honour’s cross references to her own judgment have been replaced with cross references to these reasons.

| **Date of Order** | **Amount of taxed costs**  | **Date and subject matter of underlying costs order** |
| --- | --- | --- |
| 24 September 2009 | $51,950.20 | On 7 March 2008, Master Daly ordered Mr Shaw to pay the applicant creditors “costs of the assessment save for the costs of preparing the supplementary affidavit of Ian Michael Smith affirmed 8 November 2007, and the costs reserved on 11 December 2007, on a party / party basis”: see [35] above. |
| 24 September 2009 | $9,919.43 | On 1 August 2008, the Court of Appeal dismissed an application for leave to appeal made by Mr Shaw and awarded costs against him: see [39] above.  |
| 27 April 2010 | $25,000.00 | On 19 November 2009, the applicant creditors’ issued a summons for taxation in relation to costs orders made against Mr Shaw on 22 May 2009, 27 May 2009, 16 July 2009, 24 August 2009 and 3 September 2009: see [41] above. |
| 29 July 2010 | $11,470.49 | Mr Shaw was ordered to pay the applicant creditors a further amount of $11,470.49 in relation to the applicant creditors 19 November 2009 summons for taxation, which was resumed part heard from 27 April 2010.  |
| 7 October 2011 | $149,372.67 | On 15 April 2010, Harper J ordered Mr Shaw pay on a solicitor and client basis the costs of and incidental to summons filed by Mr Shaw on 7 October 2009 and summons filed by the applicant creditors’ on 29 September 2009 and 14 October 2009 (save for the applicant creditors appearances on 16 and 19 October 2009). |
| 10 October 2011 | $55,759.12 | On 25 October 2010, the Court of Appeal dismissed summons filed by Mr Shaw on 17 November 2009 and 22 December 2009 and ordered Mr Shaw pay the applicant creditors’ costs.  |
| 10 October 2011 | $74,140.61 | On 4 December 2009, Judd J dismissed a summons filed by Mr Shaw on 24 November 2009 and ordered Mr Shaw to pay the applicant creditors’ costs on an indemnity basis. On 17 December 2009, Judd J ordered that costs of and incidental to an oral application made by the applicant creditors on 4 December 2009 and the applicant creditors’ summons of 7 December 2009 be paid by Mr Shaw.  |
| 10 October 2011 | $4,501.20 | On 26 July 2010, Mr Shaw was ordered to pay the applicant creditors’ costs of a notice to review filed by Mr Shaw on 4 May 2010.  |
| 11 October 2011 | $14,320.90 | On 18 February 2011, the Court of Appeal ordered Mr Shaw to pay the applicant creditors’ costs of an application by Mr Shaw for leave to appeal.  |
| 11 October 2011 | $9,422.62 | On 13 December 2010, Mr Shaw was ordered to pay the applicant creditors’ costs of an application for review filed by him on 24 August 2010.  |
| 11 October 2011 | $4,297.54 | On 15 September 2011, Mr Shaw was ordered to pay the applicant creditors’ costs of an application by Mr Shaw for the production of documents outlined in a letter dated 15 August 2011.  |
| 11 October 2011 | $2,736.86 | On 25 October 2010, Mr Shaw was ordered to pay the applicant creditors’ costs of a hearing on 2 June 2008 before Judd J. |
| **TOTAL** |  **$412,891.64** |  |

## Findings of the primary judge

1. There were three components to Mr Shaw’s arguments before the primary judge.
2. First, it was alleged that Yarranova was not a proper party to the damages assessment proceedings because it had assigned all of its interest in the apartment to NewQuay. Accordingly, Yarranova could not have made any loss as a result of the maintenance of the caveat and, accordingly, it was not entitled to the benefit of a costs order in its favour made in that proceeding and was, accordingly, not a bona fide creditor in the sequestration proceedings.
3. Second, Mr Shaw alleged that the evidence adduced by the respondents in the damages assessment proceedings was knowingly deceptive in that neither Yarranova nor NewQuay would have applied the proceeds of the sale of the apartment in the manner they had alleged, namely to pay debts owed by other companies in the MAB Group or otherwise to apply the proceeds carried on by other entities in the group.
4. Third, Mr Shaw contended that he was not liable to pay Yarranova or NewQuay any sum pursuant to the adverse costs order because Yarranova and NewQuay did not themselves have a costs liability toward their solicitors. Any such liability, he contended, was one owed by MAB Corporation, being another company in the MAB Group. This aspect of Mr Shaw’s argument involved an attack on the orders made in the taxation proceedings and the taxation review proceedings. It invoked a principle conveniently summarised by Redlich and Mandie JJA in *Shaw v Yarranova Pty Ltd* [2011] VSCA 55 at [8] and referred to as the “indemnity rule”:

An order for costs against the unsuccessful litigant aims to provide the successful party with some level of indemnity for the legal costs the successful party would not have incurred had it not been necessary to uphold his or her rights in court. Such an order does not entitle the successful litigant to recover more than he or she has paid or is liable to pay to his or her own lawyer. The rule limits the successful party’s right to indemnification to the ‘necessary or proper’ costs incurred to obtain justice in the case. The costs are usually confined to those that the successful party ‘was primarily and potentially legally obliged to pay to his solicitor’. Hence the existence and scope of the successful litigant’s duty to pay his or her own solicitors is central to the ability to recover costs.

(Footnotes omitted)

1. Among other authorities, their Honours cited *Cachia v Haines* (1994) 179 CLR 403, 410 (Mason CJ, Brennan, Deane, Dawson and McHugh JJ); *Harold v Smith* (1860) 157 ER 1229, 1231 (Branwell B); *General of Berne Insurance Co v Jardine Reinsurance Management Ltd* [1998] 2 All ER 301, 308 (May LJ), 312 (Sir Brian Neill); *Prudential Finance Ltd v Davander Nominees Pty Ltd and others* [1992] 1 VR 468, 474 (Ashley J) and *Wentworth v Rogers* (2006) 66 NSWLR 474, [45] – [46] (Santow JA).
2. The primary judge set out the grounds for annulment in Mr Shaw’s own words, then correctly identified the broad issues arising from those grounds. We reject Mr Shaw’s submission that in doing so the primary judge mischaracterised or misunderstood the issues: NOA [24].
3. The primary judge then summarised the applicable principles. Consistent with what we have said above, his Honour emphasised that if a judgment follows a full investigation at trial on which both parties appeared, the Court will not reopen the matter unless a *prima facie* case of fraud or collusion or miscarriage of justice is made out: *Xu v Wan Ze Property Development (Aust) Pty Ltd (in liquidation)* [2014] FCA 610 (Robertson J). He added (Reasons [11]):

The fact that the Court can go behind the judgment does not entitle an applicant to require the Court to do so without reason.

1. His Honour referred to the two-stage process contemplated by the authorities to which we have referred. Read fairly, the reasons for judgment disclose that the primary judge had considered, in a preliminary way, the reasons asserted by Mr Shaw for going behind the judgment but had determined that insufficient reason had been shown to justify the Court delving further because a *prima facie* case of fraud or collusion or a miscarriage of justice had not been made out (Reasons [11]). The following findings support his Honour’s conclusion:

(1) Mr Shaw had been ordered to pay costs to the respondents in proceedings which he had elected to bring against them (Reasons [12]). In particular, Yarranova had been made a party to the damages assessment proceedings by Mr Shaw, such that his claim that Yarranova was not a bona fide party in that proceeding was misconceived (Reasons [12]).

(2) Mr Shaw’s contention that neither Yarranova nor NewQuay had incurred costs such that he was not liable to indemnify them involved an expression of unfounded hope and a misunderstanding of corporate group accounting (Reasons [13] and [14]). His Honour elaborated on this particular topic as follows (Reasons [14]):

… In any event there was ample evidence to establish how the respondents were billed and how their costs were accounted for within the group accounts. ABL was retained at all times to act for the MAB group and acted for that part of the group, namely the respondents, in the litigation which Mr Shaw had commenced against them. The authority to act arose from general retainer and the costs were incurred in Mr Shaw’s proceedings against Yarranova and NewQuay. The costs were billed by ABL to the group and accounted for internally in the MAB accounts. …

(3) Many of Mr Shaw’s contentions, particularly in relation to the indemnity question, had been previously argued and determined against him (Reasons [12]).

## Consideration: the judgment debt issue

1. Insofar as his Honour proceeded on the assumption that all of the costs orders constituting the judgment debt were made in proceedings in which Mr Shaw was the moving party, the assumption was not wholly correct. It is more correct to say that most, but not all, of the orders bear that character. However, in instances where the orders do not bear that character, they are nonetheless orders made in proceedings in which the respondents moved a court for orders that their costs be taxed (over Mr Shaw’s unsuccessful opposition) or for orders facilitating the enforcement of their entitlement to costs (again, over Mr Shaw’s unsuccessful opposition). All of the orders originate in a legal and practical sense in Mr Shaw’s refusal to accept and satisfy the orders made in, or as a consequence of, the appeal proceedings that he had commenced. Any assumption by the primary judge concerning the categorisation of Mr Shaw as the literal moving party in all of the proceedings to which the judgment debts related could not in our view give rise to any possibility that the result in the annulment proceedings would be any different had such an assumption not been made: cf *House v Defence Force Retirement and Death Benefits Authority* (2011) 193 FCR 112. We would not allow the appeal on that basis.
2. Relatedly, the primary judge ascribed considerable weight to the circumstance that each “judgment” Mr Shaw had invited the Court to go behind was a judgment in the nature of a costs order. That plainly correct observation explains his Honour’s reasons for rejecting Mr Shaw’s contention that Yarranova was not a bona fide creditor: contra NOA [27], [40], [62]. Yarranova was in fact a party in whose favour costs orders had been made. The costs orders, in and of themselves, created the obligation to pay. The case was not one in which an antecedent transaction giving rise to a pre-existing debt had merged in a default or consent judgment or in a judgment following a contested trial as to the existence of a liability to pay. That was a circumstance to which the primary judge was entitled to afford great weight in determining whether there was a debt owing by Mr Shaw to the respondents.
3. His Honour was correct to determine that there could be no doubt that Yarranova and NewQuay were the parties in whose favour the costs orders were made in the damages assessment proceedings, that the costs orders were made within appeal proceedings in which Mr Shaw had joined Yarranova, and that Mr Shaw had unsuccessfully opposed the making of the damages assessment itself. We reject Mr Shaw’s submissions attacking that substantive finding and the process of reasoning that led to it: NOA [27], [30], [38] — [40], [45], [46], [51].
4. As to the application of the “indemnity principle”, the primary judge was, with respect, correct to determine (Reasons [12]) that the issue was one that had been argued by, and determined against, Mr Shaw in previous proceedings. Although the primary judge referred to only two proceedings, that short list of proceedings should not be understood as exhaustive. So much is apparent from his Honour’s earlier reference (Reasons [3]) to the fraud proceedings that had been commenced by Mr Shaw in this Court and summarily dismissed by Jessup J. It was open to the primary judge to find that the issue of indemnification had been a central grievance litigated or sought to be litigated by Mr Shaw repeatedly in the Supreme Court and in this Court. Of critical importance is the circumstance that the issue was one that Mr Shaw had unsuccessfully raised in opposition to the respondents’ creditor’s petition and on his appeal against the sequestration order. The primary judge was correct to take into account the earlier proceedings in determining whether Mr Shaw had shown sufficient reason to go behind the judgments.
5. As the primary judge had observed from the outset, it was not sufficient for Mr Shaw to show merely that the costs orders were wrongly made. Rather, it was necessary in all of the circumstances to show evidence of fraud, collusion or a miscarriage of justice. Mr Shaw acknowledged as much in the course of submissions on this appeal. He then submitted that there was before the primary judge sufficient “new material” to justify the Court going behind the orders made in the taxation assessment proceedings: NOA [25]. The “new material” was said to include:

… invoicing & payment practice, [purchase] order no 3656, course of dealing, apparent lack of written authorisation & internal corporate accounting & testimony of Mr Perry, Mr Calvi, Mr Smith & Mr King …

1. In relation to invoicing, it was not disputed that solicitors from the law firm Arnold Bloch Liebler (ABL) had appeared for the respondents in all of the proceedings to which we have referred. The purchase order to which Mr Shaw refers is an order relating to an invoice from ABL to MAB Corporation. The revelation that ABL had issued its invoices to an entity in the MAB Group other than the respondent was not new: see [127] below. The purchase order to which Mr Shaw referred corresponded with an ABL invoice that Mr Shaw had relied upon in earlier proceedings. It added nothing to the undisputed evidence that ABL had not addressed any invoices to Yarranova or NewQuay for legal services.
2. The evidence of Mr Perry, Mr Calvi, Mr Smith and Mr King (all named at NOA [25]) was to the effect that there existed no written retainer between ABL and either of the respondents. The circumstance that there existed no written retainer or authorisation between Yarranova, NewQuay and ABL could not properly be regarded as “new”. No written retainer had been adduced in previous proceedings, nor did Mr Shaw demonstrate that it had ever been asserted by the respondents that any such written retainer ever existed.
3. The “course of dealing” to which Mr Shaw refers was said to give rise to an estoppel that, he submitted, operated to prevent ABL from enforcing its invoices against Yarranova or NewQuay rather than the named recipient of the invoices. Mr Shaw did not demonstrate on the appeal that the evidence before the primary judge supported the existence of an estoppel, whether arising by a course of dealing or otherwise: contra NOA [26]. The asserted existence of an estoppel was not new in any event.
4. As to the issue of “invoicing & payment practice,” it may be accepted that the evidence given by Mr Perry in the annulment proceedings differed from that given in earlier actions, in that he first gave oral evidence about the existence of intercompany loans but later corrected that testimony by deposing to the existence of joint venture accounts. He stated that at times prior to February 2010, legal expenses incurred in the proceedings involving Mr Shaw were recorded as an expense recorded to NewQuay in the joint venture accounts. None of that detracts from the finding of the primary judge that the evidence adduced by Mr Shaw had fallen short of establishing fraud, even in a broad sense. The primary judge simply did not regard the kind of accounting practices to which the respondents’ witnesses referred as *prima facie* evidence of the commission of a fraud or a miscarriage of justice. Nor did the accounting practices to which the respondents referred support a finding that the costs liabilities forming the subject of the creditor’s petition “were not properly owned by [Mr Shaw] to those who had the benefit of the costs orders” (Reasons [14]). In that sense, the primary judge came full circle: the judgments were *prima facie* evidence of the debt and Mr Shaw had not shown a sufficient basis to persuade his Honour that there was, in truth, no debt payable. There is no appealable error affecting the formation of his Honour’s satisfaction that Mr Shaw owed the respondents the amounts specified in the bankruptcy notice.
5. In all of the circumstances we have described, and having regard to the principles we have stated at [11] – [13] and [15] – [22] above, the primary judge did not err in refusing to go behind the judgments specified in the bankruptcy notice and upon which the creditor’s petition was based.

# THE AUTHORITY ISSUE

1. The bankruptcy notice served upon Mr Shaw had been signed by Mr King of ABL in his capacity as “solicitor and agent” of the petitioning creditors. The petition was verified by an affidavit of Mr Perry who was, at that time, senior legal counsel and company secretary for all companies in the MAB Group. Mr Shaw submitted before the primary judge that the evidence of Mr Perry and Mr King was insufficient to establish that they acted on the authorisation of Yarranova and NewQuay in relation to the bankruptcy notice and creditor’s petition. His Honour held that Mr Shaw had challenged, without foundation, Mr King’s authority to sign the bankruptcy notice (Reasons [15]). His Honour continued (Reasons [16]):

Evidence was given both by Mr King and Mr Perry. Mr Perry was both the company secretary and the senior legal counsel for the respondents as well as for their parent company. Each was cross-examined by Mr Shaw and each gave evidence of the steps taken on behalf of the companies on whose behalf they acted. Mr Shaw was not satisfied with their evidence and submitted that the evidence lacked proof by them of their authority to act on behalf of the respondents. Mr Shaw’s contention concerning Mr King’s retainer was ultimately that Mr King carried the burden to establish that he had been retained to act on behalf of Yarranova and NewQuay. The evidence of Mr Perry, however, supported ABL’s retainer to act on behalf of Yarranova and NewQuay as subsidiaries of MAB Corporation. Mr King’s evidence of the way in which the firm received instructions to act on behalf of companies within the group was sufficient to establish the retainer in question, including the authority to sign the bankruptcy notice and to apply for the sequestration order. It may be accepted that both ABL and the respondents had greater means than Mr Shaw to produce more evidence relating to ABL’s retainer, and of the decision by the respondents to institute bankruptcy proceedings against Mr Shaw, but it was for Mr Shaw to adduce sufficient evidence from which to infer the negative proposition he sought to establish: *Hawksford v Hawksford* [2005] NSWSC 463, [54]–[55]; *Halliday v High Performance Personnel Pty Ltd (in liq)* (1993) 67 ALJR 678, [55]; *Wood v Inglis* [2008] NSWSC 1147, [21]. There was no such evidence upon which the inference could sensibly be founded.

1. Some of Mr Shaw’s grounds of appeal in connection with this issue wrongly assert that the respondents were obliged to produce or tender evidence that they had authorised Mr King to sign the bankruptcy notice and Mr Perry to verify the creditor’s petition on their behalf: NOA [35] — [37], [63] – [67], [69], [74]. They were under no obligation to do so. It is well established that a party who challenges the existence of a retainer bears the onus of establishing the absence of it. In his submissions on the appeal, Mr Shaw submitted that the absence of a written retainer was sufficient proof that ABL had not been retained at all. That submission should be rejected. Whilst the absence of a written agreement may be a relevant consideration, it is not determinative. The primary judge did not err in determining, on the evidence as a whole, that Mr Shaw had failed to discharge his onus of proof.
2. It is then alleged that the primary judge gave the evidence of Mr King and Mr Perry “too much weight”: NOA [34]. That contention cannot be made out. The weight to be given to the evidence of each witness was a matter for the primary judge.
3. It is also alleged that the primary judge denied Mr Shaw the opportunity to “test witness credibility” and “adduce evidence”: NOA [12]. That ground of appeal is not made out. Mr Shaw was given a fair opportunity to cross-examine Mr Perry in respect of his authority to give instructions to ABL in connection with all of the relevant legal proceedings. His cross-examination may have been ineffectual, but that circumstance cannot give rise to an appealable error. Insofar as Mr Shaw sought to draw the Court’s attention to allegedly inconsistent evidence given by Mr Perry in earlier proceedings, it was open to Mr Shaw to put any such inconsistencies to Mr Perry in the course of cross-examination, but he did not do so: contra NOA [13].
4. Mr Shaw further alleges that the primary judge subjected him to “undue influence” to accept the evidence given by Mr Perry: NOA [13]. He has not, however, articulated how any such error is said to have occurred. It does not appear that Mr Shaw made any concessions concerning the truthfulness or reliability of Mr Perry’s evidence in relation to any subject matter arising for consideration in the annulment proceedings.
5. It is further alleged that his Honour erred in failing to make adverse credibility findings against the respondents’ witnesses by reference to alleged inconsistences given in their responses to notices to admit: NOA [14]. Mr Shaw’s submissions on that topic involved wrong assumptions about the forensic purposes to which a notice to admit might be put. Moreover, to the extent that Mr Shaw sought to exploit any prior inconsistent statements made by any one of the respondents’ witnesses in cross-examination, he was not unfairly deprived the opportunity to do so.
6. There is no appealable error affecting the conclusion of the primary judge that Mr Shaw had not discharged his onus of establishing that the solicitors lacked authority to sign the bankruptcy notice and present the creditor’s petition. In the circumstances, it was strictly speaking unnecessary for his Honour to go further and to find that there did indeed exist a retainer. The grounds of appeal in relation to this issue are not made out.

# THE DISCOVERY ISSUE

1. All of what we have said in relation to the judgment debt issue and the authorisation issue presupposes that the primary judge did not err in making a series of interlocutory rulings against Mr Shaw which had the legal or practical effect of precluding Mr Shaw from obtaining evidentiary materials he hoped would prove his allegations against the respondents.
2. In his oral submissions on this appeal, Mr Shaw acknowledged that he had not commenced the annulment proceedings with all of the evidence he required to prove the allegations of fraud (in the wide sense of the word) he had levelled at the respondents. It was in that context that Mr Shaw made multiple applications for orders requiring the respondents to produce further documents.
3. At the direction of the primary judge, Mr Shaw first made a written request to the respondents for the disclosure of wide categories of documents in advance of the trial. When the request was declined, Mr Shaw obtained leave to issue five subpoenas returnable on 21 April 2015, the first day of the trial. On the same day, he made an oral application for discovery and production of the documents the respondents had refused to provide voluntarily. Between June 2015 and December 2015, Mr Shaw served five notices to produce and sought leave to issue multiple further subpoenas. He filed two further interlocutory applications seeking orders for discovery.
4. The respondents disclosed some documents voluntarily to Mr Shaw, but otherwise opposed the various applications. With some minor exceptions, the applications were otherwise dismissed, either in full or in part.
5. The reasons of the primary judge were given orally on 22 April 2015, 20 July 2015 and 21 December 2015. It is neither necessary nor helpful to set out his Honour’s reasons in full. The following is a summary of the effect of the reasons given to Mr Shaw by the primary judge over the course of the trial.
6. Mr Shaw’s earlier applications were allowed in part but otherwise dismissed on the basis that they constituted fishing and that Mr Shaw was seeking to make applications for discovery of a kind that had been dismissed in earlier proceedings, particularly by Redlich and Mandie JJ in the taxation review proceedings.
7. Later in the proceedings, the primary judge rejected Mr Shaw’s submissions that he had an entitlement to the production of any further documents. In doing so, his Honour implicitly rejected Mr Shaw’s contention that sufficient new evidence had emerged in the proceedings so as to put a different complexion on the issues. His Honour further stated that the proceedings were not an action in which the existence of a debt was being tried at first instance. Rather, the action was one in which the judgment debts were costs orders. His Honour said that Mr Shaw was “a step removed” from that of an ordinary litigant in a debt dispute who would not in any event have an absolute entitlement to discovery. Other categories of documents were refused on the basis that they did not take the evidence in a forensic sense any further than the material already in Mr Shaw’s possession. Further categories were refused because they sought only to explore whether there were documents corroborative of the oral evidence given by the respondents’ witnesses.
8. In his written reasons for judgment, the primary judge stated that Mr Shaw did not have an evidentiary basis to support his grounds for going behind the judgments “other than what he might hope to obtain by persistent applications for discovery, subpoenas or questions in cross-examination” (Reasons [17]).
9. His Honour’s rulings are challenged on multiple bases: NOA [6] – [8], [15] – [21]. In large part, the grounds of appeal proceed from the incorrect footing that the annulment proceeding was one in which Mr Shaw ought to have been able to obtain, as of right, any documents that might assist him to prove or formulate his claims. The submissions ignore two things.
10. First, there was, as we have said, a threshold requirement that Mr Shaw establish a sufficient basis for going behind the judgment debts, especially having regard to the circumstance that his arguments had been rejected in earlier proceedings. Although it is to be accepted that the primary judge was obliged to engage with Mr Shaw’s submissions and evidence in order to make a preliminary assessment of the merits of the attack sought to be made on the judgment debts, his Honour was under no obligation to conduct a complete trial, let alone an inquisitorial hearing, in relation to that preliminary issue.
11. Second, many of the grounds of appeal do not address the circumstance that the question of whether orders for discovery or like orders should be made was a matter for the discretion of the primary judge. A party seeking discovery must satisfy the Court that such an order should be made under r 20.12 of the *Federal Court Rules 2011*. Orders for discovery may be refused even where it is apparent that a party cannot prove his or her case without the benefit of documents in the possession of an opposing party.
12. It is necessary for Mr Shaw to establish that the primary judge erred in the exercise of the discretion in a manner identified in *House v The King*. It is not sufficient that Mr Shaw demonstrate that it was open to his Honour to order further discovery or that another judge (including a judge sitting on this appeal) might have exercised the discretion in a different way in the same circumstances.
13. It remains necessary to deal separately with two remaining groups of complaints concerning the manner in which the issue of discovery was dealt with in the proceedings below.

## Alleged unfair procedure

1. Mr Shaw first made an application for discovery orally at a pre-trial directions hearing. The primary judge directed that Mr Shaw provide the respondents with a list of the documents he sought. His Honour explained that any documents that were not provided voluntarily by the respondents could then be applied for formally at the commencement of the trial. Mr Shaw expressed concern that he may not have time to consider documents to which he was “entitled” and that may not be produced to him until the commencement of the trial. The primary judge explained that should Mr Shaw be entitled to obtain documents, and should he require time to consider the materials, he would be given that time. No appealable error is disclosed in his Honour’s dealing with the question of discovery at the pre-trial stage in that way. The suggested procedure did not involve a breach of procedural fairness in relation to Mr Shaw: contra NOA [6].
2. Other grounds of appeal are to the effect that the dismissal in whole or in part of Mr Shaw’s various applications wrongfully denied him the “opportunity to put the best evidence before the court” and that his Honour erred in determining some of the document categories to be irrelevant: see, for example, NOA [6], [8], [12], [19] — [21], [72]. Those grounds are founded on the same misconception as to the nature of the Court’s power to order discovery and as to matters affecting the exercise of the power in the particular context of the annulment proceedings. Mr Shaw’s submissions proceeded on the assumption that the proceedings before the primary judge were in the nature of an investigation or examination in which the Court had an obligation to cause the respondents to produce all documents that might assist Mr Shaw to formulate a claim, whether directly or indirectly. For the reasons we have already given, the assumption is wrong.

## Privilege claims

1. Some of the documents discovered by the respondents were subject to a claim for legal professional privilege. Mr Shaw contends that the primary judge erroneously upheld the privilege claims: NOA [7]. His contentions are not supported by submissions or evidence. There is no basis for the allegations that the privilege claims were improperly made or erroneously upheld. This ground of appeal is not made out.

## Interrogatories

1. The primary judge refused to make an order that the respondents answer interrogatories. Whether or not an order for interrogatories should be made is a matter involving the exercise of discretion. Mr Shaw’s ground of appeal in this respect is wrongly premised on an assumption that he was entitled to orders for interrogatories in order that he could put the “best evidence” before the Court: NOA [68], [72]. There is nothing to suggest that his Honour’s discretion in relation to interrogatories miscarried in any sense referred to in *House v The King*. This ground of appeal is rejected.

# THE SOLVENCY ISSUE

1. Mr Shaw raised the question of solvency before Gordon J in the sequestration proceedings in an oblique way: he asserted that Yarranova and NewQuay lacked bona fides because they were aware that he was solvent or otherwise had no reasonable belief that he was insolvent. Gordon J rejected that argument and further held that Mr Shaw had not discharged his onus to prove his solvency under s 52(2)(a) of the *Bankruptcy Act*: *Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616 at [95], [100]. As we have already observed, on appeal from the sequestration order, the Full Court (Bennett, Flick and Yates JJ) refused an application by Mr Shaw to adduce further evidence, including on the issue of his solvency. The Court said that “no injustice is occasioned to Mr Shaw in rejecting the evidence because he remains free to bring any such further application as he sees fit seeking to set aside or annul the sequestration order made by the primary Judge: *Bankruptcy Act* s 153B”: *Shaw v Yarranova Pty Ltd* [2014] FCAFC 171 at [68].
2. The test of ability to pay debts was stated by Barwick CJ in *Sandell v Porter* (1966) 115 CLR 666 at 670 as follows:

Insolvency is expressed in s 95 as an inability to pay debts as they fall due out of the debtor’s own money. But the debtor’s own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time—relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor’s financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor’s inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.

1. In the annulment proceedings, Mr Shaw sought to establish that he was able to pay his debts as they fell due at the relevant time and that his bankruptcy should be annulled on that basis, even if all other issues were determined against him. He did not, however, tender any statement of his financial affairs in evidence before the primary judge. Instead, he gave affidavit and oral evidence to the effect that he was the owner of three properties together valued at $1,450,000 and that his net assets were “potentially worth in the order of $1.5 million”. He deposed to be able to pay his debts by having recourse to his assets, but said he was unwilling to discharge the debts owed to the respondents because he continued to dispute his liability to pay them. From that premise Mr Shaw argued that he should be regarded as a recalcitrant debtor, but not an insolvent one.
2. The primary judge accepted that Mr Shaw had owned assets at the time of the sequestration proceedings in excess of the judgment debts owed by him to the respondents. His Honour went on to say (Reasons [10]):

… The availability of those assets are relevant to Mr Shaw’s solvency as at the date of making of the sequestration order but it is not sufficient to establish solvency for Mr Shaw to say that he had assets that could be realised without having taken any steps to do so or without showing that he could do so within a relatively short time: *Stankiewicz v Plata* [2000] FCA 1185, [30]-[32]; *Reaper v Baycorp Collections PDL (Australia) Pty Ltd* [2014] FCA 13, [11]. Mr Shaw has not demonstrated that in May 2014, or if relevant, at any time thereafter, he was in a position to ‘realise assets, sufficient to pay the debt, within a relatively short time’: *Stankiewicz*, [30] …

1. It would, his Honour held, be necessary for Mr Shaw to sell one or more of the properties in order to discharge his liabilities, that Mr Shaw was unable to do so “in a relatively short time” or a “reasonable time” and that he had therefore failed to established his solvency (Reasons [10]). Mr Shaw was, his Honour found, a person who was both unwilling *and* unable to pay his debts (Reasons [10]). For the reasons given below, there is no appealable error attending those findings. Moreover, the finding that Mr Shaw was unable to pay his debts rendered insignificant the evidence of his unwillingness to do so, at least insofar as the discrete question of solvency was concerned: contra NOA [41] — [44]. We reject the contention that evidence of Mr Shaw’s unwillingness to pay his debts was taken into account in his Honour’s determination that he was unable to do so. There is nothing in his Honour’s reasoning to suggest that the two issues were wrongly conflated.
2. The conclusion that Mr Shaw was unable to pay his debts within a “reasonable” or “relatively short” period of time is to be understood against the background that all of the judgment debts owed by Mr Shaw to the respondents were immediately due and payable. Whist his Honour’s reasons do not disclose any estimate of the actual time it would take for the net proceeds of any sale of the properties to be obtained, that is explained by Mr Shaw’s own failure to adduce evidence upon which any precise estimate might be made. A valuation report upon which Mr Shaw relied does not, of itself, support an inference that the assets could be realised in sufficient time to pay a significant amount that was immediately due for payment: Exhibit JRS 9 to the affidavit of Mr Shaw sworn on 17 March 2015. It was Mr Shaw who bore the onus of proving an ability to recover the proceeds from the sale of his assets within a time frame that correlated with the time in which his debts were due to be paid. The primary judge did not err in finding that Mr Shaw had not discharged his onus of proof. Moreover, the primary judge was under no obligation to make a positive finding that Mr Shaw was insolvent or to give reasons for so finding: contra NOA [43].

# THE CONDUCT ISSUE

1. It should be reiterated that proof of Mr Shaw’s solvency in the annulment proceedings would not have mandated the annulment of his bankruptcy by the primary judge. Even if Mr Shaw could show that a sequestration order “ought not to have been made,” including by reason of his solvency, it remained within the discretion of the primary judge to refuse to order that the bankruptcy be annulled: *Boles v Official Trustee in Bankruptcy* [2001] FCA 639; (2001) 183 ALR 239 at 243. The circumstance that a bankrupt was solvent at the time of the sequestration of his or her estate may of course weigh heavily in the exercise of the discretion conferred by s 153B of the *Bankruptcy Act*, but it will not be determinative.
2. In the present case, the primary judge determined that he would not, in his discretion, annul Mr Shaw’s bankruptcy even if it had been shown that a sequestration order ought not to have been made (Reasons [17]). His Honour should be understood as saying that he would not have annulled Mr Shaw’s bankruptcy even if Mr Shaw had established that he was solvent at the time that the sequestration order was made.
3. We have identified no error in his Honour’s determination that Mr Shaw had failed to establish his solvency or otherwise that the sequestration order ought not to have been made. Accordingly, the primary judge correctly determined that his discretion to annul Mr Shaw’s bankruptcy had not been enlivened at all. Strictly speaking, it was unnecessary for the primary judge to go further.
4. It is nonetheless appropriate to consider the issue agitated by Mr Shaw concerning his conduct, if only on the assumption that we are wrong in determining that the other grounds of appeal are not made out. The task will be undertaken by reference to whether the primary judge would have erred in the exercise of his own discretion under s 153B, had it fallen to be exercised. As will be seen, even if it had it fallen to this Court on appeal to exercise the same discretion, we would have arrived at the same conclusion as that arrived at by the primary judge in any event.
5. In ***Re Sarina****; ex parte Wollondilly Shire Council* [1980] FCA 175; (1980) 32 ALR 596 the debtor, Mr Sarina, demonstrated on the hearing of a creditor’s petition, that he had the means to pay the judgement debt on which the petition was founded. He simply refused to pay the debt. Counsel for the petitioner (the respondent on the appeal) submitted that the word “able” should be construed as meaning “willing and able” otherwise bankruptcy could not be resorted to by creditors of a debtor who is solvent but recalcitrant.
6. There were, the Full Court held, a number of considerations negating the existence of any policy underlying the Act that a debtor should be made bankrupt if he is able to pay his debts but is unwilling to do so. The considerations were expressed as follows (at 599):

An act of bankruptcy is the foundation of the doctrine of relation back which operates, upon the making of a sequestration order, retrospectively to vest title to the property of the bankrupt in the trustee of his estate. When a person becomes bankrupt his property is vested in the trustee for the benefit of his creditors generally. His property is realized and distributed amongst his creditors rateably, subject to priorities. The very notion of priorities postulates an insufficiency of assets to pay all creditors the full amount of their debts.

In bankruptcy, rights of creditors to sue the bankrupt are converted into rights of proof against his estate and he is protected from suit. The avoidance of preferences, voluntary settlements and fraudulent dispositions of property by the bankrupt is intended to restore the property or money of the bankrupt to his estate to achieve a fair and rateable division of the bankrupt’s property among his creditors.

The bankrupt is disqualified from holding certain offices. Bankruptcy involves a change of status and quasi-penal consequences. Upon discharge from bankruptcy, the bankrupt is released from his debts subject to certain exceptions.

1. The Court continued (at 599):

If a debtor is able to pay his debts but is recalcitrant, his creditors may resort to the remedies otherwise afforded by the law such as execution against his property and garnishee proceedings. The words ‘able to pay his debts’ in s 52(2) of the Act do not mean ‘willing and able’ to do so.

1. The Full Court upheld the decision of the primary judge to refuse to make the sequestration order (at 600). The Court said: “This case does not fall within the ambit of the discretion conferred by s 52(2). Nor does it call for the adoption of any course except dismissal of the petition”.
2. In ***Culleton*** *v Balwyn Nominees Pty Ltd* [2017] FCAFC 8 at [43], the Full Court (Allsop CJ, Dowsett and Besanko JJ) said at [43] – [44]:

*Re Sarina* demonstrates the centrality of the question of solvency to the jurisdiction of bankruptcy. Whilst one must recognise the permissive ‘may’ in s 52(2), the circumstances where a sequestration order would be made if the debtor satisfied the Court of his or her solvency are difficult to imagine. Proof of solvency may not necessitate dismissal of the petition; an adjournment may be the appropriate course.

Whilst it is legitimate for a creditor to proceed in bankruptcy for the purpose of recovering a debt, that does not mean that bankruptcy should be viewed in its essential character as part of the process of execution of judgment debts. It is the changing of the status of an insolvent person: *O’Mara Constructions Pty Ltd v Avery* [2006] FCAFC 55; 151 FCR 196 at [53] (and the cases there discussed) and see also *O’Farrell v Palicave Pty Ltd* [2009] FCAFC 64; 176 FCR 134 at [24]. A sequestration order, as demonstrated by *Re Sarina*, will not be made against the estate of someone who refuses to pay a debt if that person can prove (the onus being on him or her) that he or she is solvent.

1. The policy considerations to which the Full Court referred in *Re Sarina* and *Culleton* apply equally in an annulment context. As the Court in *Culleton* observed, it is “difficult to imagine” a circumstance where a bankrupt who could demonstrate his or her solvency at the time of sequestration should nonetheless be denied relief on a subsequent annulment application. The respondents submit that this is such a case.
2. Mr Shaw submitted that his unwillingness to pay the judgment debts was explained by his holding tight to a principle of considerable importance to him. In those circumstances, he submitted, the respondents should not have been permitted to invoke the bankruptcy jurisdiction in circumstances where they could have and should have resorted to ordinary enforcement processes. He was, he submitted, in an analogous position to Mr Marek, the appellant in ***Marek*** *v Tregenza* (1963) 109 CLR 1. Of Mr Marek, Kitto and Menzies JJ said (at 8):

With great respect to the learned Judge, we find ourselves driven to the conclusion that his Honour failed to give due weight to the considerations which were favourable to the application, and that without sufficient reason he withheld from the appellant the reward which the Act intends for such a case as his. Apart from the initial misguided but evidently quite honest opposition to the claim of Silver Top Taxi Service Pty. Ltd., which in the end caused that company no loss, the appellant’s conduct has been exemplary. His bankruptcy was not caused or contributed to by extravagance, recklessness or reprehensible conduct of any sort, and we see no reason why, his debts which were small having all been paid, he should not be absolved from the stigma of bankruptcy. No purpose, so far as we can discover, is served by refusal of the application. All the circumstances being viewed in due proportion, it seems to us to be the proper conclusion that considerations of general policy and of particular justice combine to entitle the appellant to have the sequestration order annulled.

1. As the primary judge correctly observed, the conduct of the bankrupt is a relevant consideration in determining whether an order annulling a bankruptcy should be made, as is whether an annulment will be conducive of or detrimental to commercial morality and the interests of the public (Reasons [17]): *Re Lawson* (1939) 11 ABC 137 at [139]. Against those principles, his Honour made the following findings:
2. Mr Shaw’s belief in his cause and his determination to act in the protection of his own interests tended against the exercise of the discretion in favour of annulment;
3. the annulment of Mr Shaw’s bankruptcy would not result in the efficient use of judicial resources or in the resolution of the disputes at a cost proportionate to the importance and complexity of the matters in dispute;
4. litigation had continued between the parties for more than 12 years in which Mr Shaw had attempted to re-agitate issues that had been decided against him in previous proceedings;
5. Mr Shaw had not complied with orders of other judicial officers; and
6. Mr Shaw had frustrated the respondents’ attempts to enforce judgment by giving a false name to a process server, encumbering the Upwey Property which had been the subject of attempts to enforce execution, and otherwise frustrating attempts to have that property sold. His conduct revealed a disregard for the entitlements of others in pursuit of those he claimed for himself.
7. On this appeal, Mr Shaw contended that the primary judge erred in finding that he had previously breached orders (NOA [53]) and gave too much weight to “the irrelevant statements of the bankrupts [sic] intention to never give up & do his best to protect his own interests”: NOA [48] (see, relatedly, NOA [5(u)], [52], [54] — [62]).
8. As to the question of whether Mr Shaw had previously breached court orders, that aspect of his Honour’s reasons should be understood as a reference to Mr Shaw’s refusal to pay the costs orders themselves (Reasons [17]) and also as a reference to the breach by Mr Shaw of an undertaking he had given to the Supreme Court not to encumber his property except for the purpose of discharging his indebtedness to the respondents (Reasons [18]). The finding that Mr Shaw had breached orders of other judicial officers was one that was open to his Honour to make, even if the undertaking given to the Supreme Court was not strictly in the nature of an order. To the extent that the primary judge failed to draw any distinction between breaching an order of a court and breaching an undertaking given to a court, the error is one that could not on any view have resulted in a different outcome in the annulment proceedings in all of the circumstances. We would not grant Mr Shaw relief on the appeal on that basis.
9. We reject Mr Shaw’s submission that evidence of conduct he engaged in prior to his bankruptcy should have been rejected by the primary judge as irrelevant: contra NOA [52], [55], [56], [58] — [60]. Mr Shaw’s conduct pre-dating bankruptcy was clearly relevant to the Court’s determination of whether the respondents should have recourse to the kind of enforcement procedures that Mr Shaw had successfully evaded or frustrated.
10. As to the allegation of irrelevance more generally, Mr Shaw’s statements of dogged determination and persistence were of critical importance in determining whether, in all of the circumstances, the respondents ought reasonably be expected to revert to other procedures for the recovery of the debts other than the enforcement of their rights as creditors in the administration of Mr Shaw’s bankrupt estate. Mr Shaw’s statements were also relevant in determining whether the annulment of his bankruptcy would be conducive to commercial morality and the interests of the public. The long history of proceedings between the parties demonstrated that the respondents had made reasonable attempts to enforce the costs orders, but that Mr Shaw had resisted and frustrated those attempts, including by means that were not legitimate. It is implicit in his Honour’s reasons that Mr Shaw’s past conduct was to be regarded as a reliable indicator that he would continue to frustrate any regular enforcement attempts in the future by whatever means he subjectively considered to be appropriate. That circumstance is sufficient to differentiate Mr Shaw’s circumstances from those of the bankrupt in *Marek*.
11. It has not been demonstrated that the weight attributed to the relevant circumstances was so erroneous as to cause his Honour’s discretion to miscarry, assuming the discretion properly fell to be exercised at all. The attribution of weight to the relevant considerations was a matter for the primary judge and should not be disturbed on appeal.
12. Mr Shaw then submits that the primary judge afforded too little weight to the respondents’ “adverse conduct”: NOA [48], [59]. He alleges that the respondents (without being exhaustive) wrongfully delayed enforcing judgment after obtaining freezing orders in the Supreme Court, wrongfully refused to provide evidentiary material to him until the sequestration hearing, wrongfully obtained an exorbitant costs order, and tendered “bogus” accounts in evidence (NOA [61]). Mr Shaw has not demonstrated that the evidence before the primary judge was sufficient to prove the adverse conduct he alleges, nor has he demonstrated that any error as to the attribution of weight should be disturbed in accordance with the principles enunciated in *House v The King*.
13. In the event that the same issues should have fallen for consideration in the disposition of this appeal, we would respectfully agree with the evaluation and conclusions of the primary judge. Mr Shaw’s submissions on this appeal only served to justify the concerns expressed by his Honour. Mr Shaw confirmed, for example, that if his bankruptcy were to be annulled he would not pay any sum to either respondent nor to any entity connected with them, notwithstanding that he cannot dispute that NewQuay was the vendor of the New Quay apartment. As a vendor, NewQuay clearly had standing to claim damages in connection with the caveat that prevented its sale and was awarded costs in respect of that successful claim. Moreover, even if Mr Shaw was successful in having the substantive orders made in the damages assessment proceedings set aside in full or in part, it would not and could not follow that all of the costs orders previously made against him would fall away. It will be recalled, for example, that Mr Shaw did not take any objection to Yarranova’s standing at the time of the damages assessment proceedings and Yarranova will not necessarily be disentitled to the costs of those proceedings if Mr Shaw succeeds in connection with a standing issue some 11 years later.
14. In addition, it became apparent in the course of submissions on the appeal that Mr Shaw’s total costs liability now equals or exceeds the value of his alleged assets. In the circumstances, it is difficult to see how the interests of the public, including the interests of Mr Shaw’s creditors and, indeed, Mr Shaw himself, might be served by the respondents attempting to invoke the same enforcement procedures that Mr Shaw has to date evaded or frustrated. Any further litigation between the parties would only serve to deplete the amounts lawfully owing not only to the respondents but to all of Mr Shaw’s creditors. If his bankruptcy is annulled, it may be fairly predicted that Mr Shaw will not relent in the expenditure of legal costs until all of his financial means are exhausted. In any subsequent bankruptcy the prospects of Mr Shaw’s creditors recovering their debts may be greatly diminished. The case is one in which the discretion to annul the bankruptcy should not be exercised, even assuming Mr Shaw could establish his solvency at the time that the sequestration order was made.

# THE REASONS ISSUE

1. Mr Shaw complained that evidence favourable to him in the proceedings below was “not referred to” in the reasons of the primary judge. He submits that “many findings are simply declared without any explanation of the path of reasoning taken to arrive at those findings”. The complaint concerning the inadequacy of reasons is made in respect of all issues arising on the appeal: see, for example, NOA [28], [53], [57], [77]. It is especially agitated in relation to his Honour’s rulings on discovery and other like applications: NOA [6] — [8], [15] – [21].
2. The provision of reasons for a judicial decision is a defining characteristic which marks a court apart from other decision-making bodies: *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [67] (French CJ). See also *Wainohu v New South Wales* (2011) 243 CLR 181 at [55] (French CJ and Kiefel J); *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346 at [127] (North and Bromberg JJ).
3. A judge will be under an obligation to give reasons “where it is necessary to enable a matter to be properly considered on appeal”: *Public Service Board of NSW v* ***Osmond*** (1986) 159 CLR 656 at 666 – 667. The reasoning of a judge should be exposed in sufficient detail to enable a losing party to understand why they lost and to enable a matter to be considered on appeal: *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430 at 441 — 442 (Meagher JA); *Osmond* at 666 – 667. The degree of detail should be commensurate with the degree of finality attending the decision, such that reasons for decisions finally determining the rights of the parties ought ordinarily to be expressed in more detail than those relating to interlocutory or evidentiary rulings: *Hunter v Transport Accident Commission* *& Avalanche* [2005] VSCA 1 at [22].
4. It is, however, “plainly unnecessary for a judge to refer to all of the evidence led in the proceedings or to indicate which of it is accepted or rejected”: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728 (Samuels and Clarke JJA and Hope A-JA agreeing).
5. The adequacy of reasons will depend upon the statutory context in which a decision is required to be made and the individual circumstances of the particular case, including the judicial context in which decisions are made: ***BKL15*** *v Minister for Immigration and Border Protection* (2016) 241 FCR 450 at [14] – [15] (Flick J).
6. It is to be accepted that Mr Shaw is subjectively aggrieved by the reasons given by the primary judge in that he believes his evidence and arguments were deserving of more lengthy and detailed analysis. However, Mr Shaw was not disadvantaged in the presentation of his appeal by the asserted inadequacies in the reasons. Mr Shaw competently argued, in some detail, the various respects in which he claimed the findings or reasoning of the primary judge to be faulty. He adduced on the appeal all of the evidence he considered to be relevant and was afforded the opportunity to submit why the evidence did not support the findings that had been made below. The relative brevity of the reasons did not disable the Court on appeal from considering and determining the issues.
7. In respect of the judgment debt issue, the reasons of the primary judge are to be read in a legal context in which his Honour was required to determine whether some preliminary basis had been shown for the Court to go behind the judgments. The reasons should not be approached as if they were the conclusions reached at a contested trial of all of the allegations Mr Shaw had made. The reasons for judgment properly set out the principles governing that aspect of the annulment application and fairly disclose a path by which his Honour reasoned that Mr Shaw had not overcome the significant obstacles he faced in demonstrating sufficient reasons to go behind the judgment debts at all. Importantly, those circumstances included the long history of litigation between the parties to which his Honour had referred at the outset of his reasons.
8. As for the reasons for dismissing Mr Shaw’s various applications for discovery or like applications, those applications must be considered against the same background. In his reasons for refusing Mr Shaw’s applications, his Honour referred to the reasons for judgment given by Redlich and Mandie JJ on appeal from the taxation review proceedings before Wood AsJ and the review proceedings before Beach J. In relation to Mr Shaw’s applications for discovery in those proceedings, Redlich and Mandie JJ said (*Shaw v Yarranova Pty Ltd* [2011] VSCA 55, at [26]):

Wood AsJ and Beach J were correct to conclude that this was not a case in which the production of invoices and other indicia of payment should have been ordered. The principles governing an application for an order that documents be produced are not different from those governing applications for access to documents produced in answer to a subpoena. So where an application is made in the Costs Court that the party in whose favour a costs order has been made produce documents asserted to be relevant to the application of the indemnity principle, the applicant must identify a legitimate forensic purpose for which access is sought, and establish that it is ‘on the cards’ that the documents will materially assist his case. There will be no legitimate forensic purpose if, ‘all the party is doing is trying to get hold of the documents to see whether they may assist him in his case.’ The court must both be satisfied that the documents are relevant to an issue and that there is something in the material then before the court that makes it appear likely that the documents will materially assist the applicant.

(Footnotes omitted)

1. It should also be noted that in the sequestration proceedings, Mr Shaw sought to obtain the evidence by way of a pre-trial notice to produce directed at the respondents. In the course of evidence and argument on that application, Mr Shaw obtained an invoice that showed that ABL had issued invoices to MAB Corporation in respect of legal work conducted in proceedings between Mr Shaw and the respondents. He argued that the invoice, together with other evidence, justified an order that the respondents produce yet further documents. Gordon J held that the notice to produce was, in substance, an application for discovery. The application was set aside on the ground that it constituted fishing in the sense that Mr Shaw had sought to obtain evidence to support a case that he had not yet formulated: *Yarranova Pty Ltd v Shaw* [2014] FCA 403 at [5] – [13].
2. Against that known background, the exchanges between Mr Shaw and the primary judge in the course of the trial were sufficient to explain to Mr Shaw the basis for his Honour’s rulings on the multiple applications for discovery. Although brief, it is clear that his Honour formed the view that Mr Shaw had been the recipient of adverse rulings in relation to discovery in the past, particularly after the respondents brought the judgment of Redlich and Mandie JJ to his Honour’s attention. In the circumstances, it was not necessary for his Honour to descend into detail about what was meant by the phrase “fishing”. The term was one with which his Honour was entitled to assume Mr Shaw was familiar.
3. The generality of his Honour’s finding that Mr Shaw could not and should not use the annulment proceedings as a means of obtaining documents he hoped might exist rendered it unnecessary for his Honour to give reasons as to the relevance or potential relevance of the categories of documents Mr Shaw had sought. The documents in any event would have been relevant only insofar as they evidenced fraud, collusion or a miscarriage of justice. As we have said, it was not enough for Mr Shaw to show, for example, that Master Daly made an error of fact or law in the damages assessment proceedings.
4. Insofar as his Honour rejected those parts of Mr Shaw’s interlocutory applications seeking costs orders against the respondents, Mr Shaw made no submissions on the appeal in relation to those complaints: see NOA [67], [71]. In the absence of submissions or evidence to the contrary, it may be fairly assumed that Mr Shaw’s applications for costs were contingent upon the interlocutory applications being allowed. Having dismissed the applications the primary judge was not obliged to opine in his reasons as to why a costs order in favour of Mr Shaw would not be made.
5. We reject Mr Shaw’s contention that the reasons of the primary judge were inadequate in all of the circumstances.

# REMAINING GROUNDS OF APPEAL

1. There are some remnant grounds of appeal requiring separate consideration.
2. In the course of his oral submissions, Mr Shaw sought to raise an issue concerning the calculation of the amount of interest which, he contended, affected the amount of the judgment debt upon which the creditor’s petition was based. The interest is that payable on a credit ordered by Wood AsJ on 18 April 2012. The order was to the effect that certain costs payable by the respondents to Mr Shaw be “offset against any sums owing” by him to the respondents. The offset comprises costs in the amount of $22,567.70 plus interest for the period 19 April 2012 to 27 November 2012. Mr Shaw contends that the basis for the calculation of interest was not particularised on the bankruptcy notice.
3. We decline to deal with that issue. It was not fairly raised on the notice of appeal, nor did Mr Shaw establish that the issue was one that fairly arose on the grounds for annulment relied upon before the primary judge. In any event, Mr Shaw could not succeed on his annulment application by demonstrating that the debt specified in the bankruptcy notice was overstated by what must be regarded, in the scheme of things, as a trifling amount.
4. Other grounds are fairly raised in the NOA but were not addressed at all by Mr Shaw in the course of his submissions. They include his allegations of actual and apprehended bias (NOA [76], [77]) and an allegation that appears by its title to relate to security for costs (NOA [68]). Many grounds of appeal contain allegations that the primary judge wrongly denied Mr Shaw the opportunity to “put the best evidence before the Court” (eg, NOA [6] — [8], [12], [18] — [21], [72] — [74]). These grounds of appeal have been largely understood as raising an allegation to the effect that Mr Shaw was entitled to orders compelling the respondents to produce evidence, which we have rejected.
5. Other grounds allege that Mr Shaw was denied procedural fairness in that he did not have a fair opportunity to refer the Court to relevant authorities (NOA [10], [11], [77]), or to affidavits, exhibits and transcripts (NOA [9], [73], [77]). The Court on appeal has considered the whole of the transcript of the annulment proceedings. It discloses that Mr Shaw was given a fair opportunity to present his case, including by a sufficiently long period in which to make his closing submissions. There does not appear to have been a limit on the length of written submissions upon which Mr Shaw could rely, nor was he required to observe any limitation on the length of submissions he relied upon on the appeal itself. Although it is true that the primary judge has not referred to all of the authorities relied upon by Mr Shaw, it was not necessary that he do so. Despite his many and varied grounds of appeal, Mr Shaw has not contended that the primary judge erred in stating the law and principles that governed the application under s 153B of the *Bankruptcy Act* or any other legal principle arising in the proceedings.
6. Finally, NOA [75] contains a ground of appeal that is unintelligible. It does not appear to raise any contention that has not already been dealt with in these reasons.

# CONCLUSION

1. As we have mentioned from the outset, Mr Shaw’s grounds of appeal involve a fundamental misconception of the nature of the proceedings he had commenced and a failure to appreciate the significant onus upon him to demonstrate why his bankruptcy should be annulled. By his own admission, Mr Shaw commenced the action unarmed with new evidence of the kind he required to demonstrate why the sequestration order ought not to have been made. His central grievance is that he was not permitted to utilise the compulsory processes of the Court to conduct an investigation of the kind that he subjectively considered to be warranted.
2. The appeal should be dismissed.
3. The parties have not made oral submissions in relation to the costs of the appeal. Subject to hearing the parties, it is appropriate that Mr Shaw be ordered to pay the respondents’ costs. We will make that order and grant leave to all of the parties to apply within seven days to vary or revoke the order if so advised.

|  |
| --- |
| I certify that the preceding one hundred and forty-two (142) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North, Perry and Charlesworth. |

Associate:

Dated: 30 May 2017