Federal Court of Australia

Shaw v The Official Trustee in Bankruptcy of the Australian Financial Security Authority (No 3) [2021] FCA 1569

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| File number: |  |
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| Judgment of: | **WIGNEY J** |
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| Date of judgment: | 17 December 2021 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – application by bankrupt for orders pursuant to s 90-10 and s 90-15 of Schedule 2 – Insolvency Practice Schedule (Bankruptcy) to the *Bankruptcy Act 1966* (Cth) including orders for the trustee to compensate the bankrupt estate for alleged breaches of trustee’s duty – whether there were substantial grounds for believing, or whether there were grounds for finding, that the trustee committed malfeasance, misfeasance, wilful default or breach of trust in the administration of bankrupt’s estate – where no grounds for believing that the trustee committed any breach of duty such as to warrant an inquiry into the administration of the estate – where the evidence did not support any finding of malfeasance, misfeasance, wilful default or breach of trust in the administration of bankrupt’s estate or any basis to support the making of the orders sought – application dismissed **PRACTICE AND PROCEDURE** – interlocutory application to reopen case – where evidence and no proper basis demonstrated for permitting applicant to amend his pleadings, or adduce further evidence, or make further submissions – where application to reopen based on speculation and an apparent desire to investigate and construct a new case – application dismissed  |
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| Legislation: | *Bankruptcy (Fees and Remuneration) Determination* *2015* (Cth)*Bankruptcy Act 1966* (Cth), s 19(1), 179, Sch 2 ss 5-15(a), 5-30(a)(i), 90-10, 90-15, 90-20*Civil Dispute Resolution Act 2011* (Cth), s 7*Evidence Act 1995* (Cth), s 136*Federal Court Rules 2011* (Cth), r 5.03 |
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| Cases cited: | *Adsett v Berlouis* (1992) 37 FCR 201*Borg v de Vries (Trustee), in the matter of the Bankrupt Estate of David Morton Bertram* [2018] FCA 2116*Frigger v Trenfield (No 7)* [2020] FCA 1740*Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22*Macchia v Nilant* (2001) 110 FCR 101; [2001] FCA 7*Mannigel v Aitken* (1983) 77 FLR 406*Murray v Figge* (1974) 4 ALR 612*Official Trustee in Bankruptcy as trustee of the property of John Rashleigh Shaw, a Bankrupt v Shaw* [2019] VSC 681*Patel v Ruhe* [2016] FCA 520*Re Gault; Gault v Law* (1981) 57 FLR 165*Re Tyndall* (1977) 30 FLR 6*Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority* [2019] FCA 1412*Shaw v The Official Trustee in Bankruptcy of the Australian Financial Security Authority* [2020] FCA 1570*Shaw v The Official Trustee in Bankruptcy of the Australian Financial Security Authority (No 2)* [2020] FCA 1575*Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority* [2020] FCAFC 142*Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority (No 2)* [2019] FCA 1574*Shaw v Yarranova Pty Ltd* (2017) 252 FCR 267; [2017] FCAFC 88*Shaw v Yarranova Pty Ltd* [2013] FCCA 1627*Shaw v Yarranova Pty Ltd* [2014] FCA 557*Shaw v Yarranova Pty Ltd* [2014] FCAFC 171*Shaw v Yarranova Pty Ltd* [2016] FCA 88*Trkulja v Morton* [2005] FCA 659*Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616 |
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| Date of last submission: | 15 April 2021 |
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| Date of hearing: | 8-9 October and 25 November 2020, 20 April 2021  |
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| Counsel for the Applicant: | The applicant appeared in person |
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| Counsel for the Respondent: | Mr C R Brown |
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| Solicitor for the Respondent: | Harris Carlson Lawyers |

ORDERS

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|  | NSD 1690 of 2019 |
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| BETWEEN: | JOHN RASHLEIGH SHAWApplicant |
| AND: | THE OFFICIAL TRUSTEE IN BANKRUPTCY OF THE AUSTRALIAN FINANCIAL SECURITY AUTHORITYRespondent |

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| order made by: | WIGNEY J |
| DATE OF ORDER: | 17 December 2021 |

THE COURT ORDERS THAT:

1. The interlocutory application filed by the applicant on 22 January 2021 be dismissed.
2. The originating application filed by the applicant on 10 October 2019 be dismissed.
3. The applicant pay the respondent’s costs without prejudice to the right of the respondent to claim those costs as a cost of the administration of the applicant’s bankrupt estate.

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

REASONS FOR JUDGMENT

WIGNEY J:

1. The applicant in this proceeding, Mr John **Shaw**, is a disgruntled bankrupt. He is a bankrupt because, on 11 June 2014, a judge of this Court made a sequestration order against him. He appears to be disgruntled for many reasons, though the present focus of his disgruntlement is the respondent, the Official **Trustee** in Bankruptcy, who is the trustee of Mr Shaw’s bankrupt estate. Mr Shaw’s complaints about the Trustee are many and varied, but relevantly include the claim that the Trustee has acted negligently, unconscionably and unreasonably in the administration of his estate, in particular in respect of the sale of properties formerly owned by Mr Shaw which vested in the Trustee upon Mr Shaw becoming bankrupt. The orders sought by Mr Shaw in this proceeding are also many and varied, but relevantly include that the Trustee compensate the estate in respect of losses and damages sustained as a result of the alleged breaches of duty by the Trustee.
2. For the reasons that follow, Mr Shaw is not entitled to any of the relief sought by him. In particular, he has failed to demonstrate that the Trustee has erred in any, or any material, way in the administration of Mr Shaw’s estate, or engaged in any misconduct, or that there is any basis for ordering that the Trustee compensate or reimburse the estate for any losses or expenses incurred. Mr Shaw has also failed to demonstrate that there are grounds for believing that the Trustee erred in any way in the administration of his estate such as to warrant any, or any further, inquiry into the Trustee’s conduct.

# THE NATURE OF THIS PROCEEDING

1. It is first necessary to address the precise nature of this case and the Court’s jurisdiction to entertain it, particularly as there was some debate about the approach that the Court should take to Mr Shaw’s claims.
2. Mr Shaw appeared throughout the course of this proceeding without any legal representation. It would appear, however, that he is somewhat of a seasoned litigator and has some knowledge of and familiarity with both the Court’s processes and the relevant provisions of the ***Bankruptcy Act*** *1966* (Cth). It would nevertheless not be unfair to say that Mr Shaw’s originating application (**Application**) and statement of claim were not entirely helpful in terms of appropriately defining and delineating the relief sought by him and the basis upon which that relief was sought.
3. In paragraph 1 of his Application filed on 9 October 2019, Mr Shaw identified five orders that he sought. The five orders were in the following terms:

a. an order that a person within AFSA with experience & qualifications to be decided by the court be appointed as the representative of the Trustee of the estate;

b. an order that the costs of Harris Carlson solicitors acting in court action VID 778 of 2019 be assessed & fully or partially borne by the Trustee.

c. An order that the costs of Harris Carlson solicitors appearing in annulment application VID 774 of 2014 & subsequent appeal be assessed & fully or partially borne by the Trustee

d. an order to compensate the estate losses & damages sustained because of breaches of duty by the Trustee;

e. an order to require the Trustee to charge a fair and reasonable remuneration based on a court assessment of the value of tasks performed & services provided by the Trustee.

1. It should be noted that **Harris Carlson** is the firm of solicitors that has acted and continues to act for the Trustee in respect of issues and events, including court cases, which have arisen in relation to the administration of Mr Shaw’s bankrupt estate.
2. In paragraph 2 of the Application, Mr Shaw seeks compensation for alleged “breaches of duty in the Trustee’s conduct in the administration, financial dealings & transactions” of his bankrupt estate. The paragraph also identifies eight alleged breaches of duty, but states, in effect, that the list of alleged breaches was not intended to be exhaustive. The eight alleged breaches of duty will be referred to in detail later. It suffices at this point to note that the claim for compensation arising from those breaches of duty may be taken to be encompassed by the order for compensation sought in paragraph 1. Paragraph 3 of the Application also relates to the claim for compensation. It simply states that the compensation to be paid to the estate by the Trustee should be “based on an assessment of damages to be agreed by the parties or determined by the court”.
3. Paragraph 1 of the Application also purports to identify the source of the Court’s jurisdiction or power to make the orders. That source is said to be ss 90-10, 90-15 and 90-20 of the ***Insolvency Law Reform Act*** *2016* (Cth), the Bankruptcy Act and the ***Civil Dispute Resolution Act*** *2011* (Cth). No specific provisions of the Bankruptcy Act or the Civil Dispute Resolution Act are identified.
4. The reference to ss 90-10, 90-15 and 90-20 of the Insolvency Law Reform Act may be taken to be a reference to ss 90-10, 90-15 and 90-20 of Schedule 2 to the Bankruptcy Act – the Insolvency Practice **Schedule** (Bankruptcy) – which was inserted into the Bankruptcy Act by the Insolvency Law Reform Act. Those sections provide as follows:

**90‑10 Court may inquire on application of creditors etc.**

(1) The Court may, on the application of a person mentioned in subsection (2), inquire into the administration of a regulated debtor’s estate.

(2) Each of the following persons may make an application for an inquiry:

(a) a person with a financial interest in the administration of the regulated debtor’s estate;

(b) if the committee of inspection (if any) so resolves—a creditor, on behalf of the committee;

(c) the Inspector‑General.

(3) The Court may, for the purposes of such an inquiry, require a person who is or has at any time been the trustee of the regulated debtor’s estate to:

(a) give information; or

(b) provide a report; or

(c) produce a document;

to the Court in relation to the administration of the estate.

(4) If an application is made by a person referred to in paragraph (2)(b), the reasonable expenses associated with the application are to be taken to be expenses of the administration of the estate unless otherwise ordered by the Court.

(5) This section does not limit the Court’s powers under any other provision of this Act, or under any other law.

**90‑15 Court may make orders in relation to estate administration**

*Court may make orders*

(1) The Court may make such orders as it thinks fit in relation to the administration of a regulated debtor’s estate.

*Orders on own initiative or on application*

(2) The Court may exercise the power under subsection (1):

(a) on its own initiative, during proceedings before the Court; or

(b) on application under section 90‑20.

*Examples of orders that may be made*

(3) Without limiting subsection (1), those orders may include any one or more of the following:

(a) an order determining any question arising in the administration of the estate;

(b) an order that a person cease to be the trustee of the estate;

(c) an order that another person be appointed as the trustee of the estate;

(d) an order in relation to the costs of an action (including court action) taken by the trustee of the estate or another person in relation to the administration of the estate;

(e) an order in relation to any loss that the estate has sustained because of a breach of duty by the trustee;

(f) an order in relation to remuneration, including an order requiring a person to repay to the estate of a regulated debtor, or the creditors of a regulated debtor, remuneration paid to the person as trustee.

*Matters that may be taken into account*

(4) Without limiting the matters which the Court may take into account when making orders, the Court may take into account:

(a) whether the trustee has faithfully performed, or is faithfully performing, the trustee’s duties; and

(b) whether an action or failure to act by the trustee is in compliance with this Act and the Insolvency Practice Rules; and

(c) whether an action or failure to act by the trustee is in compliance with an order of the Court; and

(d) whether the regulated debtor’s estate or any person has suffered, or is likely to suffer, loss or damage because of an action or failure to act by the trustee; and

(e) the seriousness of the consequences of any action or failure to act by the trustee, including the effect of that action or failure to act on public confidence in registered trustees as a group.

*Costs orders*

(5) Without limiting subsection (1), an order mentioned in paragraph (3)(d) in relation to the costs of an action may include an order that:

(a) the trustee or another person is personally liable for some or all of those costs; and

(b) the trustee or another person is not entitled to be reimbursed by the regulated debtor’s estate or creditors in relation to some or all of those costs.

*Orders to make good loss sustained because of a breach of duty*

(6) Without limiting subsection (1), an order mentioned in paragraph (3)(e) in relation to a loss may include an order that:

(a) the trustee is personally liable to make good some or all of the loss; and

(b) the trustee is not entitled to be reimbursed by the regulated debtor’s estate or creditors in relation to the amount made good.

*Section does not limit Court’s powers*

(7) This section does not limit the Court’s powers under any other provision of this Act, or under any other law.

**90‑20 Application for Court order**

(1) Each of the following persons may apply for an order under section 90‑15:

(a) a person with a financial interest in the administration of the regulated debtor’s estate;

(b) if the committee of inspection (if any) so resolves—a creditor, on behalf of the committee;

(c) the Inspector-General.

(2) If an application is made by a person referred to in paragraph (1)(b), the reasonable expenses associated with the application are to be taken to be expenses of the administration of the estate.

1. It can be seen that the effect of s 90-10(1) and (2)(a) of the Schedule is that the Court may, on the application of a person with a financial interest in the administration of a regulated debtor’s estate, inquire into the administration of the regulated debtor’s estate. A ‘regulated debtor’ includes a bankrupt: s 5-15(a) of the Schedule. A person has a ‘financial interest’ in the administration of a regulated debtor’s estate if the person is the regulated debtor: s 5-30(a)(i) of the Schedule. It may accordingly be accepted that the Court has jurisdiction to entertain an application by Mr Shaw for an order that the Court inquire into the administration of his estate by the Trustee.
2. It may also be seen that the effect of s 90-15(1) and (2) and s 90-20(1)(a) of the Schedule is that the Court may, on the application of a person with a financial interest in the administration of a regulated debtor’s estate, make “such orders as it thinks fit in relation to the administration of a regulated debtor’s estate”. Those orders include, relevantly, an “order in relation to the costs of an action (including court action) taken by the trustee … in relation to the administration of the estate” (s 90-15(3)(d) of the Schedule); an “order in relation to any loss that the estate has sustained because of a breach of duty by the trustee” (s 90-15(3)(e) of the Schedule), including an order that the “trustee is personally liable to make good some or all of the loss” (s 90-15(6)(a)); and an “order in relation to remuneration, including … remuneration paid to the person as trustee” (s 90-15(3)(f) of the Schedule).
3. Section 5 of the Bankruptcy Act defines ‘breach of duty’ to mean “malfeasance, misfeasance, negligence, wilful default or breach of trust”. While Mr Shaw employed various different expressions to describe his contentions and claims against the Trustee, it may be accepted that his claims all fell within this broad definition of breach of duty.
4. It may accordingly be accepted that the Court has jurisdiction to entertain Mr Shaw’s claims for the five orders referred to in paragraph 1 of his Application, though some attention will need to be given to the question whether the proceedings which are the subject of orders (b) and (c) in paragraph 1 were proceedings “taken by the Trustee” in relation to the administration of Mr Shaw’s estate.
5. The Trustee submitted, at an early stage of the proceeding, that the Court should approach, or deal with, Mr Shaw’s claims by way of a two-stage process: the first stage being to consider whether the Court should inquire into the conduct of the Trustee; and the second stage being the inquiry itself, if one is found to be warranted, and the making of any order or orders considered to be appropriate in light of the inquiry. Such an approach was said to be broadly consistent with the approach under the statutory predecessor to s 90-10 and s 90-15 of the Schedule, s 179 of the Bankruptcy Act: see generally *Macchia v Nilant* (2001) 110 FCR 101; [2001] FCA 7 at [49]-[51]; *Trkulja v Morton* [2005] FCA 659 at [4]; ***Borg v de Vries*** *(Trustee), in the matter of the Bankrupt Estate of David Morton Bertram* [2018] FCA 2116 at [22]. The Trustee submitted that such an approach would also be entirely consistent with the policy consideration which was said to underlie such provisions, namely that “the court should not unduly interfere with the day-to-day administration of a bankrupt’s estate by a trustee”: *Re* ***Tyndall*** (1977) 30 FLR 6 at 10; *Re Gault; Gault v Law* (1981) 57 FLR 165 at 173.
6. Mr Shaw was directed, again at an early stage of this proceeding, to file submissions in relation to the nature of the hearing and in particular in relation to the Trustee’s contention that a two-stage process was warranted in the circumstances of this case. He neglected or declined to do so. In the written submissions he filed on 24 September 2020 for the purposes of the final hearing, Mr Shaw indicated that he accepted that the hearing would involve a two-stage process, though he appeared to suggest in his written submissions in reply that he accepted that to be the case only because it was not practicable for him to prepare for a “full hearing” given the case management of the proceeding. His main complaint in relation to the case management appeared to be that his application to strike out parts of the Trustee’s defence had been listed to be heard at the commencement of the final hearing. Mr Shaw submitted that he should not have to “prepare to deal with pleadings that might be struck out partially or in full”.
7. The circumstances in which Mr Shaw’s strike-out application was listed to be heard at the commencement of the final hearing are explained in an earlier judgment of the Court dismissing a recusal application by Mr Shaw: *Shaw v The Official Trustee in Bankruptcy of the Australian Financial Security Authority* [2020] FCA 1570 (***Shaw No 1***). It is unnecessary to rehearse what was said in that judgment in the present context. It suffices to note that there is no substance whatsoever to the claim that it was not practicable for Mr Shaw to prepare for a full hearing because the hearing of his strike-out application was deferred, or for any other reason. Mr Shaw was given every opportunity to file his evidence and submissions and every opportunity to properly prepare for the hearing of both his strike-out application and his Application. His strike-out application was ultimately dismissed: *Shaw v The Official Trustee in Bankruptcy of the Australian Financial Security Authority (No 2)* [2020] FCA 1575 (***Shaw No 2***).
8. At no stage did Mr Shaw indicate any opposition to the two-stage process proposed by the Trustee, let alone advance any submission or argument as to why such an approach was not appropriate and warranted in the circumstances of his case. The most that he said was that the Court was not bound to approach his application in that manner. As has already been noted, however, Mr Shaw appeared to accept that there were sound practical reasons for adopting the two-stage process. He ultimately approached the hearing of his application on the basis that it was the first stage in the two-stage process and that he was required to demonstrate, at the very least, that there were substantial grounds for believing that the Trustee had erred in the administration of his estate. On that approach, if Mr Shaw established such grounds, the Court would then move on to inquire further into the Trustee’s administration of his estate. Mr Shaw appeared to recognise that this two-stage process was essentially to his advantage, particularly as he had been given every opportunity to file whatever evidence he wanted in establishing his case that the Trustee had erred in the administration of his estate.
9. Mr Shaw’s Application did not expressly seek an order that the Court inquire into the administration of his estate. The Application did, however, refer to s 90-10 of the Schedule, which is the provision which empowers the Court to inquire into the administration of a bankrupt’s estate. There is thus a clear indication in the Application that Mr Shaw wanted the Court to conduct an inquiry into the Trustee’s administration of his estate. That said, most of the orders sought by Mr Shaw appeared to have been sought pursuant to s 90-15 of the Schedule.
10. There is no doubt that s 90-15 of the Schedule is different in its terms to the former s 179 of the Bankruptcy Act. Section 179 of the Bankruptcy Act was framed in such a way as to make it clear that a two-stage process was required. The Court’s power to remove the trustee from office, or make “such order as it thinks proper”, was dependent on the Court having first determined that there were grounds for inquiring into the trustee’s conduct. If the Court determined that there were grounds for an inquiry, it would then conduct the inquiry to determine whether the Trustee should be removed from office or some other order or orders should be made.
11. The terms of s 90-10 and s 90-15 do not, however, expressly require such a two-stage process. While s 90-10 empowers the Court to conduct an inquiry into the administration of a bankrupt’s estate, the Court’s powers to make orders under s 90-15 are not expressly premised on such an inquiry having been conducted. To seek or obtain an order pursuant to s 90-15 of the Schedule, the applicant does not necessarily have to first persuade the Court that there are grounds for an inquiry into the administration of the estate, or that such an inquiry should be conducted: *Borg v de Vries* at [24]. There may be cases where orders under s 90-15 may be made without the need for any inquiry, or any broad inquiry, into the trustee’s administration of the estate. *Borg v de Vries* was such a case.
12. It does not necessarily follow, however, that the Court cannot, or should not, approach some applications for orders pursuant to s 90-15 of the Schedule on the basis that, before embarking on a full hearing and consideration of a case involving allegations of breaches of duty against a trustee and claims that the trustee should compensate the estate for losses arising from those breaches, the Court must first be satisfied that there are grounds for conducting an inquiry into the administration of the bankrupt’s estate; that a two-stage process similar to that required under the former s 179 of the Bankruptcy Act is appropriate. Such an approach may be appropriate where the orders sought by the applicant are based on broad allegations of misfeasance, neglect or other error in the conduct of the administration of the estate by the trustee, particularly where those allegations effectively encompass almost every aspect of the administration of the estate.
13. The reason that a two-stage process may be appropriate in those types of cases is that, while s 90-15 of the Schedule is in different terms to the former s 179 of the Bankruptcy Act, it nonetheless remains the case that, as a matter of principle, the Court should not unduly interfere with the trustee’s day-to-day administration of a bankrupt’s estate. Nor should the Court put a trustee and possibly the creditors to the trouble and expense of what would, in effect, amount to an inquiry into the trustee’s administration of the estate unless the Court is first satisfied that there are substantial grounds for believing that the trustee had erred in its administration of the estate and that an inquiry, if conducted, would reveal misconduct: see *Borg de Vries* at [33].
14. There could be no doubt that Mr Shaw’s case was built on claims and allegations of breach of duty by the Trustee in the administration of his estate. Moreover, Mr Shaw’s claims and allegations encompass just about every aspect of the Trustee’s administration of the estate. A hearing involving the consideration and determination of those claims and allegations on a final basis would amount, in effect, to a detailed inquiry into the Trustee’s administration of Mr Shaw’s estate over a number of years. There is much to be said for the proposition that the Court should not put the Trustee to the trouble and expense of such an inquiry unless Mr Shaw is first able to demonstrate that such an inquiry is warranted, and that there are substantial grounds for believing that the Trustee erred in his administration of the estate. That is all the more so given Mr Shaw’s apparent begrudging concession or acknowledgment, referred to earlier, that such an approach may be appropriate and was probably to his advantage in all the circumstances.
15. Ultimately, however, it makes little, if any, difference whether the Court approaches Mr Shaw’s application by way of a two-stage process, or instead embarks on a consideration of whether Mr Shaw had made out his case that the Trustee had acted negligently or had otherwise breached or failed to perform its statutory duties in respect of the administration of Mr Shaw’s estate. That is because, as has already been noted, Mr Shaw was given every opportunity to adduce evidence in support of his case against the Trustee. He was also given every opportunity to advance submissions in support of his case. The evidence and submissions relied on by Mr Shaw fail to demonstrate any misfeasance, neglect or other error in the conduct of the administration of the estate by the Trustee, or even that there are any grounds for believing that the Trustee so erred in the conduct of the administration. Mr Shaw’s case fails whether it is approached as a two-stage process, or whether full and detailed consideration is given to all the evidence, for the purpose of determining whether Mr Shaw has made out his case.

# RELEVANT PRINCIPLES

1. The relevant principles to apply in cases involving allegations of breach of duty by a trustee in the administration of a bankrupt’s estate have already been touched on in the context of the consideration of the nature of this proceeding.
2. A non-exhaustive list of the duties of the trustee of the estate of a bankrupt are set out in s 19(1) of the Bankruptcy Act. They include, relevantly to the facts of this case and to Mr Shaw’s allegations: “determining whether the estate includes property that can be realised to pay a dividend to creditors”; “administering the estate as efficiently as possible by avoiding unnecessary expense”; and “exercising powers and performing functions in a commercially sound way”: s 19(1)(b), (j) and (k) of the Bankruptcy Act.
3. A trustee in bankruptcy is subject to the general law relating to trustees, except where bankruptcy legislation modifies the general law: ***Adsett*** *v Berlouis* (1992) 37 FCR 201 at 208-210. In *Adsett*,the Full Court adopted the following observations of Smithers J in *Mannigel v Aitken* (1983) 77 FLR 406 at 408-409 as a correct statement of the duties, and the proper manner of performance of those duties, of a trustee in bankruptcy:

In the case of bankruptcy the Trustee is in charge of the assets of the bankrupt and those assets are to be applied for the benefit of the creditors and if there be any surplus for the benefit of the bankrupt. It is clear that the minimum standard required of the Trustee is that he shall handle the assets with a view to achieving the maximum return from the assets to satisfy the claims of the creditors and to provide the best surplus possible for the bankrupt. Obviously a great deal of discretion and judgment is required to be exercised by the Trustee. It was said by Rogerson J in *Re Ladyman* (1981) 55 FLR 383 at 394-396 that the standard of conduct required of the Trustee will ordinarily be the standard required of a professional man and perhaps higher. The learned judge referred to “the high standard of conduct required of trustees”.

In *Re Brogden* [1888] All ER 927 Lord Justice Fry said at p 935:

“A Trustee undoubtedly has a discretion as to the mode and manner, and very often as to the time in which or at which, he shall carry his duty into effect. But his discretion is never an absolute one. It is always limited by – the dominant duty – the guiding duty of recovering, securing and duly applying the trust fund; and no Trustee can claim any right of discretion which does not agree with that paramount obligation.”

Where an order is sought that the Trustee be removed and to make good the losses suffered by the estate, it must be established that the Trustee has been guilty of a breach of duty to act “diligently and prudently in regard to the business of the Trust”. See Riley J in *Re Alafaci* (supra) at 285.

According to *Halsbury’s Laws of England* (3rd ed) Vol 38, p 967, a trustee must take all reasonable and proper measures to obtain possession of the trust property and to get in all debts and funds due to the trust estate, and to preserve it, and to secure it from loss. He must take reasonable precautions to see the property is not stolen or lost by default. The Trustee is bound to execute the trust with fidelity and reasonable diligence and ought to conduct its affairs in the same manner as an ordinary prudent man of business would conduct his own affairs. But beyond this he is not bound to adopt further precautions. It was said by their Honours Dixon CJ, McTiernan and Windeyer JJ in *Elder's Trustee and Executor Co Ltd v Higgins* (1963) 113 CLR 426 that:

“We are not to judge what the Trustee then did or failed to do by the light of later events…The duty of the Trustee was to exercise due diligence, care and prudence in the conduct of the business, bearing in mind the need to preserve the capital of the Testator's estate…The argument that the Trustee having, it was said, exercised a discretion, its conduct is now unchallengeable is sufficiently answered by a passage from the judgment of Fry LJ in *Re Brogden* (supra)…Whether or not one calls [the trustee’s action] an exercise of discretion, the question remains was it the act of a prudent Trustee.”

It is not the role of the court to decide whether the path chosen by the Trustee led to the realisation of the greatest value for the assets of the estate. The court is in a different position from that of the Trustee. The court can examine the facts with hindsight and with the benefit of the evidence on oath of the relevant debtors and creditors and witnesses called in their support. The Trustee is required to act diligently and prudently in the exercise of his discretion in deciding matters as they arise in the course of administration of the estate. He may be constrained to act by reference to the knowledge which he has of the circumstances balancing the benefit of further inquiry against further delay and the further expense to the estate, to the creditors and possibly to the debtor if there is a surplus in the estate.

1. As has already been noted, in *Tyndall*, Deane J referred (at 10) to the “well-established policy under bankruptcy legislation that the court should not unduly interfere with the day-to-day administration of a bankrupt’s estate by a trustee”. His Honour continued (at 10):

The trustee is made responsible for the administration of the bankrupt estate under the general provisions of the Act. He must, in the course of that administration, make a variety of decisions aimed at enabling the administration to be carried out with promptness and efficiency. Some of these decisions will be business or commercial decisions in which the business or commercial experience of the trustee would itself provide a basis for arguing that, unless it were shown that the trustee’s decision was perverse or clearly wrong, it would be inappropriate and unjust for the court to interfere.

1. In *Patel v Ruhe* [2016] FCA 520, Buchanan J said (at [33]):

Although a trustee may not disregard the legitimate interests of a bankrupt, a primary duty of a trustee is to protect the interests of creditors and recover for the estate such property as may reasonably be recovered in a commercially sound way. Judgments are required. The judgments are ones for the trustee to make and the Court will normally not interfere unless it is clear that some maladministration of the estate has occurred or is likely …

1. Those principles must be steadily borne in mind when considering Mr Shaw’s allegations against the Trustee.

# CHRONOLOGY OF RELEVANT EVENTS AND CIRCUMSTANCES

1. Mr Shaw relied on four affidavits in which he outlined what he considered to be the relevant facts and circumstances. It would not be unfair to characterise Mr Shaw’s affidavit evidence as comprising a series of sweeping and mostly general and inadequately particularised assertions, allegations and submissions.
2. The Trustee did not object to any of Mr Shaw’s affidavit evidence, though it was submitted that much of what Mr Shaw had said in his affidavits amounted to no more than argument or submission, rather than evidence. While the Trustee did not formally apply for an order under s 136 of the *Evidence Act 1995* (Cth) that specific parts of Mr Shaw’s affidavits that were said to constitute argument or submissions should be limited as to use, the effect or purport of its submission was that the Court should simply read those parts of the affidavits that were obviously submissions or argument on that basis.
3. There was much to be said for that practical and common sense approach in all the circumstances. Much of what Mr Shaw said in his various affidavits did, as the Trustee contended, obviously amount to no more than bare assertion, argument or submission. There would, however, have been little to be gained from entertaining lengthy and detailed objections to Mr Shaw’s affidavits, particularly given the nature of the proceeding. That was all the more so given that Mr Shaw effectively conceded that his case against the Trustee was essentially a documentary case and did not hinge to any real extent on his affidavit evidence. It was also tolerably clear that most of the assertions in Mr Shaw’s affidavit evidence were essentially based on the documentary record.
4. The Trustee, in apparent consultation with Mr Shaw, produced a Court Book which not only included the pleadings and affidavits relied on by the parties, but also all of the documentary evidence relied on by the parties. The documents included in the Court Book were tendered by consent.
5. Given the nature of the case and the nature of the evidence, the Trustee elected not to cross-examine Mr Shaw.
6. The Trustee relied on an affidavit affirmed by an officer of the Australian Financial Security Authority (**AFSA**), Mr Abid **Hasan**, who, at least as at the time the affidavit was affirmed, had the care, conduct and supervision of the administration of Mr Shaw’s estate on behalf of the Trustee. Mr Hasan was not, however, the person who was directly responsible for the actions or decisions that were made on behalf of the Trustee which were the focus of Mr Shaw’s complaints. Much of Mr Hasan’s evidence was based on his familiarity with the events based on his consideration of documents which were annexed or exhibited to his affidavit. While Mr Hasan was cross-examined by Mr Shaw, that cross-examination did not challenge, or cast any real doubt on, Mr Hasan’s recitation of the chronology of relevant events.
7. As events transpired, the basic factual chronology of decisions and events in the course of the administration of the estate was not in dispute. The issues in the case turned on whether, as Mr Shaw argued, the chronology of decisions and events revealed maladministration, breach of trust or negligence on the part of the Trustee in the administration of Mr Shaw’s estate, or at least revealed that there were substantial grounds for believing that there had been maladministration, breach of trust or negligence such as to warrant further inquiry.
8. The following chronology of the events and circumstances relevant to Mr Shaw’s case against the Trustee is based primarily on the documentary evidence. Some ineluctable or uncontested facts as recited in the affidavit evidence have also been included. The chronology does not necessarily include or refer to decisions, events or circumstances which were not referred to by either Mr Shaw or the Trustee in their respective submissions, or facts or evidence which were not apparently relevant to any of the arguments advanced by the parties. References in the chronology to actions taken or decisions made by the Trustee may be taken to mean that officers or employees of AFSA acting for or on behalf of the Trustee took those actions or made those decisions. Mr Shaw appeared to challenge the authority of AFSA and its employees to make decisions or take action on behalf of the Trustee, though his arguments in support of that challenge were far from pellucid or persuasive.
9. On 20 December 2013, Yarranova Pty Ltd and Newquay Stage 2 Pty Ltd filed a creditor’s petition in this Court in Victoria. The creditor’s petition was founded upon an act of bankruptcy by Mr Shaw constituted by his failure to comply with a bankruptcy notice served on him on 14 December 2012. The bankruptcy notice was founded on a total net debt of $388,880.16 owed to the petitioning creditors.
10. Mr Shaw unsuccessfully challenged the bankruptcy notice in proceedings in the Federal **Circuit Court** of Australia: *Shaw v Yarranova Pty Ltd* [2013] FCCA 1627. His appeal against the judgment of the Circuit Court was dismissed: *Shaw v Yarranova Pty Ltd* [2014] FCA 557.
11. On 11 June 2014, a sequestration order was made against Mr Shaw: *Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616. An appeal against that order was dismissed on 12 December 2014: *Shaw v Yarranova Pty Ltd* [2014] FCAFC 171.
12. On 17 December 2014, Mr Shaw commenced proceedings in this Court which sought the annulment of his bankruptcy. That application was dismissed on 15 February 2016: *Shaw v Yarranova Pty Ltd* [2016] FCA 88. Mr Shaw filed an appeal against the dismissal of his annulment application. As will be seen, that appeal was in due course dismissed.
13. It should be noted, in this context, that Harris Carlson were engaged by the Trustee to represent and appear for it in the annulment proceeding and appeal.
14. When the sequestration order was made, Mr Shaw was the sole registered proprietor of three properties (collectively referred to as the **Properties**): a property at 8/145 Cubitt Street, Cremorne, Victoria (also known as 116 Gwynne Street) (the **Gwynne Street property**); a property at unit 5 and accessory unit known as lot 19 (a car park), 12 Tivoli Road, South Yarra, Victoria (the **Tivoli Road property**); and a property at 5 Mast Gully Road, Upwey, Victoria (the **Mast Gully Road Property**).
15. Each of the Properties was subject to a mortgage in favour of the National Australia Bank (**NAB**) which secured a loan account or line of credit which Mr Shaw had with NAB. It was a term of the mortgages that Mr Shaw would be in default if he committed an act of bankruptcy. As discussed later, Mr Shaw made a last-minute (and ultimately unsuccessful) attempt to assert, or persuade the Court, that NAB’s mortgage over the Gwynne Street property did not in fact secure his indebtedness to NAB under the loan account or line of credit.
16. Shortly after Mr Shaw’s annulment application was dismissed at first instance, the Trustee sought and obtained from NAB a payout figure in respect of Mr Shaw’s line of credit. As at 22 February 2016, the payout figure was $188,327.56.
17. In March 2016, the Trustee obtained valuations in respect of the Gwynne Street and Tivoli Road properties. The Gwynne Street property was valued at $925,000 and the Tivoli Road property was valued at $320,000.
18. Each of the Properties was tenanted as at the date of the sequestration order. The Trustee allowed Mr Shaw to retain the rental income from the Properties from the date of bankruptcy up to the time of the dismissal of the annulment application at first instance on 15 February 2016, at which time the Trustee commenced the process of ensuring that the rent was directed to the estate.
19. Mr Shaw did not apply any of the rental income he received from the Properties during this period towards repaying his loan from NAB.
20. On 7 March 2016, the Trustee wrote to Mr Shaw and advised him that, following the dismissal of his annulment application, the Trustee was “in the process of seeking repayment of the rental income [Mr Shaw had] collected” and that the Trustee had taken steps to have the future rental income directed to the estate.
21. In September 2016, there were some communications between the Trustee and Mr Shaw concerning the NAB loan. Mr Shaw suggested that, pending the determination of his appeal from the dismissal of the annulment application, the Trustee should apply some of the rental income from the Properties towards the NAB loan so as to avoid NAB issuing a default notice. The Trustee advised that it would make a payment of $5,000 to NAB to ensure that a default notice was not issued. A cheque for $5,000 payable to NAB was drawn by the Trustee but was never presented and was ultimately cancelled in May 2017. There appeared to be an error in the drawing of the cheque, or some other discrepancy which meant that it was never presented by NAB.
22. On 28 September 2016, Mr Shaw entered into a lease with a new tenant in respect of the Gwynne Street property. The rent payable under the new lease was $3,215 per month, effective from February 2017. The Trustee asked Mr Shaw to provide it with details concerning the lease and tenant. Mr Shaw eventually gave the Trustee a copy of the new lease in January 2017.
23. The Trustee then contacted the tenant and requested that the rent be paid to the Trustee rather than Mr Shaw. The Trustee did not receive any of the rent paid in respect of the Gwynne Street property between September 2016 and January 2017. Mr Shaw did not apply any of the rent he appears to have received in respect of the Gwynne Street property during that period towards his NAB loan.
24. There were communications between the Trustee and Mr Shaw in September 2016 concerning increasing the rent in respect of the Mast Gully Road property.
25. On 30 May 2017, Mr Shaw’s appeal from the judgment dismissing his annulment application was dismissed by the Full Court: *Shaw v Yarranova Pty Ltd* (2017) 252 FCR 267; [2017] FCAFC 88. Mr Shaw subsequently filed an application for special leave to appeal to the High Court.
26. On 21 June 2017, the Trustee sought and NAB provided details concerning the balance of Mr Shaw’s loan from NAB. The balance was a debit balance of $202,893.37.
27. On 29 June 2017, the Trustee wrote to Mr Shaw. The Trustee noted that Mr Shaw had not yet filed a statement of affairs. The Trustee also provided an estimate of the claims of creditors of the estate based on the Trustee’s enquiries and the information provided by creditors. The estimated claims totalled $2,184,160. Mr Shaw subsequently sent emails to the Trustee disputing many of the creditors’ claims. He did not, however, lodge a statement of affairs.
28. On 25 August 2017, the Trustee wrote to NAB concerning Mr Shaw’s loan account. The Trustee advised that, in light of Mr Shaw’s application for special leave to appeal to the High Court in respect of his unsuccessful annulment application and appeal, the Trustee was “not in a position to undertake any realisation action”. The Trustee inquired whether, in those circumstances, NAB “may be prepared to accept a payment program” pending the hearing of Mr Shaw’s application.
29. On 14 September 2017, NAB replied and advised that it was willing to consider a “realistic and reasonable proposal”.
30. On 14 September 2017, the High Court dismissed Mr Shaw’s application for special leave to appeal the judgment of the Full Court of this Court dismissing his appeal against the dismissal of his annulment application.
31. On 8 November 2017, the switchboard for the Gwynne Street property was damaged and its tenants consequently vacated the property for 15 days. The Trustee ceded $1,585.71 in rent for the period, plus $1,385.99 in compensatory expenses taking the form of reduced rent for the tenants in the following rental period.
32. On 4 April 2018, NAB issued Mr Shaw with a default notice in respect of his loan and the mortgages over the Properties. The balance of the loan as at 4 April 2018 was a debit balance of $215,347.81. The default notice stated, amongst other things, that to rectify the default, Mr Shaw was required to pay the full balance to NAB by no later than 14 May 2018 and that, if that did not occur, NAB may exercise its power of sale under the mortgages in respect of the Properties without further notice. A copy of the default notice was sent to the Trustee.
33. On 28 June 2018, NAB commenced proceedings in the Supreme Court of Victoria in which it sought various orders, including an order for possession of the Properties. The writ filed by NAB was served on Mr Shaw on 28 July 2018. On the day that he was served with the writ, Mr Shaw sent an email to NAB’s solicitors, copied to the Trustee, advising that he was prepared to admit that he was in default and agree with NAB’s claims. He also indicated that he was amenable to “selling one or more of the properties to satisfy the debt”.
34. During August 2018, there was email correspondence between the Trustee and NAB’s lawyers concerning the sale of the Gwynne Street property. The Trustee advised Mr Shaw that it was “looking to list” the property for sale. The Trustee also told NAB’s solicitors that it was seeking to “maximise the return to creditors in the estate” and believed that that would be best achieved by the Trustee “undertaking the sale rather than by mortgagee in possession”. In their reply to the Trustee, however, NAB’s solicitors made it abundantly clear that NAB held the first registered mortgages over the Properties and that NAB intended to exercise its power of sale under the mortgages.
35. On 24 September 2018, Mr Shaw advised the Trustee by email that the tenant at the Tivoli Road property wished to vacate the property. The Trustee replied to Mr Shaw’s email and advised that the Trustee did not intend to find a new tenant for the Tivoli Road property but instead anticipated selling the property. The Tivoli Road property was not rented from September 2018 until it was sold in July 2019.
36. On 19 October 2018, the Trustee sent an email to Mr Shaw which advised that the Gwynne Street property had been listed for auction on 27 October 2018 and that the Trustee would “hold the [sic] any action in abeyance in relation to the other properties pending the outcome of the auction”.
37. The Gwynne Street property was sold by NAB at auction on 27 October 2018 for $980,000. NAB subsequently requested the Trustee to remove the caveat which the Trustee had caused to be registered in respect of the property. The Trustee arranged for the caveat to be removed on 22 November 2018.
38. On 15 November 2018, the Trustee received a proof of debt from the petitioning creditors. The proof of debt was for the sum of $1,763,691. Four proofs of debt totalling $80,643.46 were also lodged with the Trustee by the Legal Practitioners’ Liability Committee (**LPLC**) on 29 November 2018.
39. The sale of the Gwynne Street property was settled on 28 November 2018 and, on 21 December 2018, the Trustee received the net proceeds of sale (after the deduction of the amount owed to NAB and other deductions), being $686,373.21.
40. On 22 January 2019, the Trustee sent Mr Shaw an email which attached a summary of the rental payments that had been received in respect of the Mast Gully Road property. Mr Shaw replied to that email and enquired whether it was possible to raise the rent in respect of the property as it was “well below market value”. The basis of the assertion that the rent was below market value was not spelled out.
41. On 9 March 2019, Mr Shaw sent an email to the Trustee in which he made a number of complaints concerning the Trustee’s administration of the estate, including that the Gwynne Street property was “unnecessarily sold” for a price which Mr Shaw believed was “well under the market value of $1.4 million”. The basis of Mr Shaw’s belief concerning the market value of the property was not explained.
42. On 14 March 2019, the Trustee replied to Mr Shaw’s email of 9 March 2019. It was conceded in that email that “in a number of instances [the Trustee had] not effectively communicated [its] actions or adequately responded to [Mr Shaw’s] requests for information”. It was, however, noted in the email that Mr Shaw had not completed a statement of affairs and that that had affected the Trustee’s “ability to effectively administer [the] estate and in particular communicate with all of [Mr Shaw’s] creditors”.
43. The Trustee’s email of 14 March 2019 also responded to Mr Shaw’s specific complaints. As for the sale of the Gwynne Street property, the Trustee’s email stated that the Trustee believed that the “sale program” was “undertaken in a manner to ensure the best result and the $980,000 reflected [the property’s] true market value”. As for the other Properties, the email noted that the Trustee had not located a new tenant in respect of the Tivoli Road property as realisation of the property was anticipated, but that “any realisation action” would be held in abeyance “pending the adjudication on the creditors’ claims”. Similarly, the Trustee advised that it had not sought to increase the rent in respect of the Mast Gully Road property “pending the outcome of the adjudication on the creditor’s claims and whether a realisation of this properly will also be required”.
44. On 18 March 2019, the Trustee obtained a valuation of the Tivoli Road property of $330,000.
45. On 19 March 2019, the Trustee obtained a valuation of the Mast Gully Road property of $660,000.
46. On 3 May 2019, the Trustee sent an email to Mr Shaw in which it was noted that the Trustee had “a duty to realise vested property for the benefit of the estate” and that:

Based on the information held, the provable debts known to date and the costs incurred in the administration are insufficient to annul the bankruptcy. Accordingly, the Official Trustee will shortly be listing the property at 5/12 Tivoli Road, South Yarra VIC 3141 on the market for sale.

1. The Trustee’s email of 3 May 2019 noted yet again that Mr Shaw had not filed his statement of affairs.
2. During May 2019, the Trustee and Mr Shaw exchanged emails in respect of, amongst other things, the proofs of debt. The Trustee advised that an “initial review” of the petitioning creditors’ proof of debt indicated that “they [were] entitled to claim the sum of at least $450,584”. The Trustee also reiterated that its assessment was that the funds currently held by the estate were not sufficient to annul the bankruptcy, which was why the Trustee was taking steps to sell the Tivoli Road property. For his part, Mr Shaw made it clear that he disputed the petitioning creditors’ proof of debt. The Trustee subsequently told Mr Shaw that it was seeking legal advice in respect of the issues which he had raised concerning the proofs of debt.
3. The Trustee commenced the sale process for the Tivoli Road property on 23 May 2019. A real estate agent was appointed at that time to market the property.
4. The Trustee and Mr Shaw continued to exchange emails concerning the proofs of debt during June and into early July 2019. Mr Shaw queried why the Tivoli Road property had been listed for sale in circumstances where the Trustee had not determined the validity of the petitioning creditors’ proof of debt. Mr Shaw also queried the Trustee’s claim that the estate held insufficient funds to annul the bankruptcy, including the Trustee’s calculation of its remuneration. The Trustee maintained that it held insufficient funds on the basis that the petitioning creditors’ claims were at least $450,584. It also provided details as to how its remuneration had been calculated.
5. On 5 July 2019, the Trustee, through its solicitors, advised Mr Shaw that the Trustee was going to admit the petitioning creditors’ debt in the amount of $450,584.08.
6. The Tivoli Road property was sold for $363,000 on 6 July 2019. Mr Shaw was advised of the sale on 8 July 2019.
7. During July 2019, Mr Shaw and the Trustee exchanged emails concerning increasing the rent in respect of the Mast Gully Road property.
8. On 24 July 2019, Mr Shaw commenced proceedings against the Trustee in this Court seeking a review of the Trustee’s partial admission of the proof of debt lodged by the petitioning creditors (the **review proceeding**). Mr Shaw also sought an interim order preventing the settlement of the sale of the Tivoli Road property.
9. On 6 August 2019, Mr Shaw filed an interlocutory application in the review proceeding in which he sought an order that Harris Carlson be restrained from acting for the Trustee. That application was dismissed on 29 August 2019: *Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority* [2019] FCA 1412.
10. On 8 August 2019, the Trustee prepared a schedule which calculated the estimated amount needed to annul Mr Shaw’s bankruptcy. The schedule revealed that if the Trustee only admitted the judgment debts owed to the petitioning creditors which founded the bankruptcy notice, plus interest up to 7 August 2019, the estate would be $127,085.83 short of the amount needed to annul Mr Shaw’s bankruptcy based on the Trustee’s total realisations to date, excluding the sale proceeds from the Tivoli Road property.
11. Effective from 23 September 2019, the rent for the Mast Gully Road property was increased from $335 per week to $375 per week.
12. On 26 September 2019, judgment was handed down in the review proceeding. The Court confirmed the Trustee’s partial admission of the proof of debt lodged by the petitioning creditors and otherwise dismissed Mr Shaw’s application: *Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority (No 2)* [2019] FCA 1574.
13. On 3 October 2019, the day before the settlement of the sale of the Tivoli Road property, Mr Shaw lodged a caveat over that property. On 4 October 2019, the Trustee commenced proceedings in the Supreme Court of Victoria to remove the caveat. On 7 October 2019, the Supreme Court of Victoria ordered that the caveat be removed: *Official Trustee in Bankruptcy as trustee of the property of John Rashleigh Shaw, a Bankrupt v Shaw* [2019] VSC 681.
14. On 14 October 2019, Mr Shaw filed a notice of appeal against the judgment in the review proceeding.
15. On 15 October 2019, the Trustee emailed a letter to Mr Shaw which summarised the issues that Mr Shaw had been complaining about since July 2019, together with the Trustee’s explanation or justification for its decisions and actions which were the subject of the complaints. Those justifications included: the Trustee “did not propose increasing the weekly rent on the Mast Gully Road property” because it planned to sell all three Properties to meet the bankrupt’s debts; “the Trustee did not intend to enter into a new lease agreement or locate a tenant as the realisation of the Tivoli Road property was anticipated”; “[g]iven that NAB controlled the sale [of the Gwynne Street property], there was no reason for the Trustee to obtain an updated valuation”; “NAB had commenced proceedings for possession of the three properties and intended to exercise its power of sale under the mortgage”; the Tivoli Road property “vested in the Trustee” upon Mr Shaw’s bankruptcy and therefore his “involvement in the sale was not required”; “the Trustee had to reserve the funds in the estate in order to meet the costs incurred in administering the estate (particularly its legal costs)”; “the Trustee was under no obligation to service the mortgage”; and Mr Shaw was “collecting the rental monies from all three properties between the date of bankruptcy and February 2016 (approximately 22 months)” during which time he “had not made any mortgage repayments to NAB”.
16. The letter concluded that the Trustee was “satisfied that all matters [Mr Shaw had] raised have been appropriately investigated and responded to” and that “[f]uture correspondence about these same matters will be read, filed and not responded to, unless [Mr Shaw] provide[d] new information that warrants a response.”
17. Mr Shaw commenced this proceeding by way of originating application filed on 10 October 2019.
18. On 4 August 2020, the Full Court refused Mr Shaw’s application for leave to appeal the interlocutory orders made in the review proceeding on 29 August 2019 and dismissed the appeal against the judgment in the review proceeding: *Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority* [2020] FCAFC 142.

# MR SHAW’S COMPLAINTS and allegations AGAINST THE TRUSTEE

1. Most of Mr Shaw’s specific complaints and allegations against the Trustee concern the manner in which the Trustee dealt with the three Properties that formed part of the estate: the Gwynne Street property, the Tivoli Road property and the Mast Gully Road property. Mr Shaw’s claims and allegations concerning the Trustee’s dealing with those Properties included:
2. failing to take reasonable steps to prevent the default of the mortgage held over the Gwynne Street property by NAB: Application at [2(a)]; statement of claim at [14], [16];
3. failing to take reasonable steps to prevent NAB from enforcing its securities by first selling the Gwynne Street property instead of the Tivoli Road or Mast Gully Road properties: Application at [2(c)]; statement of claim at [15], [20];
4. failing to take reasonable steps to prevent NAB from selling the Gwynne Street property below a reasonable market value: Application at [2(e)]; statement of claim at [17], [18];
5. failing to take reasonable steps to maximise rental returns from the Gwynne Street, Tivoli Road and the Mast Gully Road properties: Application at [2(f)]; statement of claim at [12], [29];
6. selling the Tivoli Road property when there were otherwise sufficient funds in the estate to satisfy creditors at the time of sale, prior to admitting further proofs of debt: Application at [2(g)]; statement of claim at [21];
7. failing to advise or inform Mr Shaw about the NAB loan and default and the fact that NAB and not the Trustee was selling the Gwynne Street property: Application at [2(b)], [2(d)]; statement of claim at [16], [18]; and
8. failing to consult Mr Shaw or failing to respond to, or act in accordance with, Mr Shaw’s complaints, queries or requests in relation to the sale of the Properties, or alternative options or decisions: Application at [2(h)]; statement of claim at [11], [19].
9. Mr Shaw also made a series of complaints concerning the Trustee’s engagement and utilisation of the services of solicitors, Harris Carlson, including the fact that Harris Carlson had been engaged to appear in, or attend court, in respect of various proceedings concerning Mr Shaw’s bankruptcy: Application at [1(b) and (c)]; statement of claim at [23]-[27].
10. Finally, Mr Shaw made a number of very general complaints concerning the way the Trustee administered the estate and dealt with him, including that the Trustee had: failed to keep him informed or advise him about issues or events in the administration; failed to promptly respond to his enquiries or comments concerning the administration; delayed making certain decisions or take certain steps; and generally acted in an uncommercial way. Mr Shaw also appeared to challenge or dispute the Trustee’s remuneration.

# MR SHAW’S APPLICATION TO REOPEN HIS CASE

1. Before addressing the merits of Mr Shaw’s allegations and claims against the Trustee, it is necessary to deal briefly with a procedural issue that arose during the course of the proceeding.
2. Mr Shaw’s application was listed for hearing on 8 and 9 October 2020. Much of the hearing time was consumed by the necessity to deal with Mr Shaw’s various interlocutory applications, including his recusal and strike-out applications. As events transpired, once the interlocutory applications had been disposed of, it was possible to conclude the hearing of the evidence in the principal Application on 9 October 2020, though it was necessary to adjourn the matter to 25 November 2020 for the hearing of final submissions.
3. In the course of his oral evidence on 9 October, Mr Hasan referred to what he considered to be the ordinary or general practice of the Trustee, in the administration of a bankrupt estate, to proceed to sell real property that had vested in the Trustee, rather than continue to rent the property out and apply the rental payments towards any loan and mortgage that the bankrupt had entered into in respect of the property. Mr Hasan referred, in that specific context, to the existence of “procedure manuals” which contained a reference to the Trustee’s “standard practice” to “realise properties as soon as practicable”. Mr Shaw did not cross-examine Mr Hasan further in respect of the content of that manual, or call for the production of the manual while Mr Hasan was still in cross-examination.
4. After the closure of the evidence on 9 October 2020, but before the parties made their final submissions on 25 November 2020, Mr Shaw caused a subpoena to issue to AFSA. That subpoena required AFSA to produce “sections, pages or paragraphs” of the “AFSA Procedure Manual” which related to a large list of topics in respect of the administration of a bankrupt estate. The subpoena was not limited to the parts of the manual that dealt with the specific topic to which Mr Hasan’s evidence concerning the manual was directed.
5. On 26 October 2020, the Trustee filed an interlocutory application which sought to set aside the subpoena on a number of bases, including that: it sought documents that were not relevant to the proceeding; the description of the documents in the subpoena was ambiguous and broad; compliance with the subpoena would be onerous; the subpoena was not served for a legitimate forensic purpose; and the subpoena was oppressive. In short, the Trustee contended that the subpoena was an abuse of process in all the circumstances.
6. The Trustee’s application to set aside the subpoena was heard at the commencement of the further hearing on 25 November 2020.
7. The Trustee’s contentions concerning the subpoena were correct. The subpoena was, in all the circumstances, an abuse of process. By the time it was issued on 16 October 2020, the evidence had closed. The apparent impetus for the subpoena was Mr Hasan’s brief reference to the manual in the specific context of the Trustee’s general practice in relation to the realisation of real property. The subpoena that Mr Shaw served on AFSA, however, went well beyond that issue and sought the production of parts of the manual that dealt with a whole range of issues, almost all of which had nothing at all to do with Mr Shaw’s case as pleaded and conducted. It was plainly a ‘fishing expedition’, to use the metaphor so frequently deployed in the context of subpoenas. When pressed, Mr Shaw was unable to articulate any legitimate forensic purpose for the subpoena and ultimately conceded that he would be content for the subpoena to be limited to require production of the parts of the manual that related to the practice about which Mr Hasan had been specifically cross-examined; namely, the Trustee’s ordinary practice or procedure in dealing with the realisation or leasing of properties.
8. It was, in all the circumstances, appropriate to set the subpoena aside to the extent that it required the production of parts of the manual that went beyond the topic addressed in Mr Hasan’s evidence. Instead of attempting to perform surgery on the subpoena itself, the Court ordered the Trustee to produce extracts from the manual which dealt with that topic. Mr Shaw indicated that he may seek to tender any extract produced in response to the subpoena.
9. The Trustee produced a bundle of documents as directed. At the hearing on 25 November 2020, Mr Shaw sought and was granted leave to reopen his case for the purpose of the tender of the documents produced by the Trustee. He was also given time to consider the documents so that he could make submissions in relation to them.
10. In the course of Mr Shaw’s oral submissions, and despite his earlier concession, Mr Shaw sought to renew his request for a “more comprehensive version” of the manual to be produced. That oral application was refused for essentially the same reasons that the subpoena was set aside. It was a further attempt by Mr Shaw to conduct a fishing expedition. Mr Shaw had no legitimate or proper basis for believing that a more comprehensive version of the manual might assist his pleaded case. Rather, he sought the production of the documents so he could see if he could make out some sort of new case.
11. The parties completed their final submissions and the Court subsequently reserved its judgment.
12. That was, however, by no means the end of the matter.
13. On 22 January 2021, Mr Shaw filed what was said to be an interlocutory application which sought the following orders:

1. Reopen hearing, admission of fresh evidence & review of orders made on 09 Oct & 25 Nov 2020.

2. Admission of Shaw affidavit 21 Jan 2021 and the affidavit of Mr Hasan 24 Nov 2020 into evidence.

3. Re-examination of Mr Hasan.

4. Leave to amend statement of claim.

5. Restraint of solicitors Harris Carlson on the basis of conflict of interest.

6. Orders that Mr Hasan produce evidence of authority to authorise the respondents defence & accompanying affidavit, give evidence on behalf of the respondents with regards to the respondents operating policies & procedures & reasons for actions or failures to act in the administration of my estate

7. Determination of the authority of Mr Hasan to give evidence on behalf of the respondent

8. Extension of time to file & serve final submissions

9. Costs

1. While Mr Shaw filed evidence and written submissions in relation to this application and made lengthy oral submissions, the precise basis of his application to reopen his case remained entirely unclear. In particular, he never clearly articulated a reason why he should be permitted to reopen his case in all the circumstances.
2. The nature and scope of the “fresh evidence” that Mr Shaw wanted to tender, beyond the two affidavits referred to in order 2, was never explained. The two affidavits referred to in order 2 had no apparent relevance to Mr Shaw’s case as pleaded.
3. Mr Shaw’s affidavit of 21 January 2021 raised a number of complaints about the Trustee’s response to the subpoena and the Court’s order that the Trustee produce documents limited to the topic in the manual about which Mr Hasan had been cross-examined. The affidavit also included a request by Mr Shaw for “further discovery” and referred to a “FOI request” that Mr Shaw had supposedly made. The affidavit also included a lengthy analysis of what were asserted to be inconsistencies between the actions of the Trustee in the administration of Mr Shaw’s estate and the policies, procedures or practices referred to in the extracts from the manual. The relevance of those alleged inconsistencies to Mr Shaw’s pleaded case was not in any way explained.
4. The affidavit of Mr Hasan that Mr Shaw wanted to tender was the affidavit affirmed by Mr Hasan on 24 November 2020 in support of the Trustee’s application to set aside the subpoena. It was difficult to comprehend how that affidavit could in any way have advanced Mr Shaw’s pleaded case. Nor was it at all apparent why Mr Shaw should be permitted to reopen his case so as to tender it.
5. Mr Shaw also did not provide any explanation for why he should be granted leave to amend his statement of claim, or what the proposed amendments would be, should he be given leave to reopen. When pressed, Mr Shaw simply repeated or rehashed the sweeping generalised assertions about the conduct of the Trustee and officers of AFSA that typified his evidence and submissions throughout the proceeding.
6. As for the orders sought concerning the restraint of Harris Carlson and the issue concerning Mr Hasan’s authority, Mr Shaw’s evidence and submissions in support of those orders again simply rehashed what Mr Shaw had already said in support of his principal Application. There was nothing new.
7. Mr Shaw’s interlocutory application to, amongst other things, reopen his case was heard by the Court on 20 April 2021. The Court reserved its judgment. Obviously if the application was to be allowed, it would have been necessary to list the matter for further hearing. If, however, the application was to be dismissed, it would obviously be convenient and appropriate to include the reasons for that decision in the reasons for judgment in respect of the principal Application. As events transpired, the latter turned out to be the case.
8. The interlocutory application filed by Mr Shaw months after the close of his case was entirely unmeritorious and must be dismissed. It is necessary to briefly provide the Court’s reasons for dismissing the interlocutory application.
9. The Court has “an inherent power to reopen a trial after judgment has been reserved and before it has been delivered”: *Frigger v Trenfield (No 7)* [2020] FCA 1740 at [20]; *Murray v Figge* (1974) 4 ALR 612 at 613. The relevant principles in relation to the power to reopen were conveniently summarised by Kenny J in *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22 (at [24]):

The authorities indicate that, broadly speaking, there are four recognised classes of case in which a court may grant leave to re-open, although these classes overlap and are not exhaustive. These four classes are (1) fresh evidence (*Hughes v Hill* [1937] SASR 285 at 287; *Smith v New South Wales Bar Association [No 2]* (1992) 108 ALR 55 at 61-2); (2) inadvertent error (*Brown v Petranker* (1991) 22 NSWLR 717 at 728 (application to recall a witness); *Murray v Figge* (1974) 4 ALR 612 at 614 (application to tender answers to interrogatories); *Henning v Lynch* [1974] 2 NSWLR 254 at 259 (application to re-open); (3) mistaken apprehension of the facts (*Urban Transport Authority of NSW v NWEISER* (1992) 28 NSWLR 471 (“UTA”) at 478; and (4) mistaken apprehension of the law (*UTA* at 478). In every case the overriding principle to be applied is whether the interests of justice are better served by allowing or rejecting the application for leave to re-open: see *UTA* at 478; also *The Silver Fox Company Pty Ltd as Trustee for the Baker Family Trust v Lenard’s Pty Ltd (No 2)* [2004] FCA 1310 (“Silver Fox”) at [22] and [25].

1. It would appear that the main basis upon which Mr Shaw sought to reopen his case was to adduce fresh evidence. As noted earlier, however, he never clearly articulated exactly what the nature and scope of that evidence would be. Indeed, he made it tolerably clear that the evidence he might seek to adduce was open-ended and depended on what he was able to obtain by way of “further discovery” or pursuant to his “FOI request” (about which there was no admissible evidence). More significantly, Mr Shaw did not provide any proper or legitimate basis for why he should be given a further opportunity to adduce supposed fresh evidence. He appeared to pin his case in that regard on the fact that the Trustee had produced extracts from the AFSA manual during the course of the hearing, however those documents were produced at Mr Shaw’s request and Mr Shaw was permitted to tender and make submissions concerning them. What Mr Shaw apparently wanted to do was to obtain other parts of the manual so he could trawl through them for the purpose of trying to find some practice or policy that the Trustee did not follow.
2. The contention or suggestion by Mr Shaw that the Trustee may not have followed some practice or procedure in the manual and may therefore have acted “ultra vires”, or “failed to properly exercise the authority & discretion delegated to them” amounted to nothing more than speculation. The mere failure to follow some internal practice or procedure would not in any event necessarily constitute any maladministration, breach of duty or negligence on the part of the Trustee. Mr Shaw never persuasively explained how any of the alleged failures on the part of the Trustee to act in accordance with the practices or procedures set out in the extracts from the manual that had been produced related to, let alone supported, his pleaded case. More significantly, the apparent suggestion that, if permitted to reopen his case and tender further evidence, including further extracts from the manual, Mr Shaw may have been able to demonstrate that there were further instances of the Trustee failing to follow internal procedures or practices was entirely speculative.
3. Mr Shaw did not suggest that he should be permitted to reopen his case because he had been operating under some misapprehension of fact or law, or had made an inadvertent error. He did indicate that he wanted Mr Hasan to be recalled for further cross-examination, but he did not provide any persuasive reason why he should be given another opportunity to cross-examine Mr Hasan. He did not ask Mr Hasan any questions about the AFSA manual in cross-examination after the existence of the manual was first revealed, so it is difficult to see why the production of parts of the manual at Mr Shaw’s request after the close of the evidence in the case provided any justification for the further cross-examination of Mr Hasan. In any event, Mr Shaw did not explain how his further cross-examination of Mr Hasan on that topic, or any other topic, would be relevant to the issues in the case.
4. As for the question of Mr Hasan’s authority (order 6 in the interlocutory application) Mr Shaw had every opportunity to cross-examine Mr Hasan on that topic at the hearing. There was no proper basis for allowing that issue to be further agitated. It is, in any event, difficult to see the relevance, let alone the cogency, of Mr Shaw’s arguments concerning Mr Hasan’s authority.
5. There could, in all the circumstances, be no doubt that the interests of justice were and are better served by refusing Mr Shaw’s application for leave to reopen. Mr Shaw was given every opportunity to adduce evidence in support of his pleaded case at the hearing. He affirmed and relied on a number of affidavits and tendered (via the joint Court Book) a very large number of documents. He filed lengthy and detailed written submissions and made lengthy oral submissions at the hearing. What it appeared that Mr Shaw wanted to do, if permitted to reopen his case, was to not only re-agitate and perhaps repackage many of the allegations and assertions he had already advanced and addressed, but also to endeavour to put new arguments, or construct some speculative new case, based on some unspecified and open-ended “fresh evidence” and unspecified and open-ended new pleadings.
6. Mr Shaw failed to articulate any, or any persuasive, basis upon which he should be permitted to raise new arguments, or put a new case, in all the circumstances. He failed to explain, or adequately explain, why the supposedly new evidence he wished to adduce, or the new arguments he apparently wished to advance, had not been adduced or advanced at the hearing in October and November 2020. It would, in all the circumstances, be manifestly unfair to the Trustee, and not in the interests of justice, to permit Mr Shaw to take the course he proposed.
7. Mr Shaw’s application to reopen his case, adduce further evidence, re-examine Mr Hasan, and advance further arguments or submissions must be rejected and dismissed. His Application has been determined on the basis of the evidence adduced and submissions put at the hearing in October and November 2020.
8. Finally, it should be noted that there was no basis whatsoever for Mr Shaw’s claim that Harris Carlson should be restrained on the basis of an asserted conflict of interest. Mr Shaw’s persistent litany of complaints about Harris Carlson were referred to and rejected in *Shaw No 2* at [48]-[49]. Similar arguments also appear to have been put and rejected by the Court, differently constituted, in the review proceeding. It is unnecessary to rehearse the complaints here. Mr Shaw’s attempt to repackage and re-agitate those complaints in the context of an application to reopen was tantamount to an abuse of process.
9. As for the alleged conflict of interest, Mr Shaw’s argument appeared to be that Harris Carlson had a conflict of interest in acting for the Trustee in this proceeding because its conduct was also being called into question by Mr Shaw. He also appeared to argue that Harris Carlson’s appearance was somehow unauthorised and amounted to an abuse of process. There is no merit in those arguments. This proceeding is about the conduct of the Trustee in the administration of the estate. Mr Shaw cannot contrive or manufacture a conflict of interest with the Trustee such as to justify an order that Harris Carlson cease to act by making baseless allegations against those solicitors.
10. There was no basis for restraining Harris Carlson from continuing to act for the Trustee. Mr Shaw’s complaints about Harris Carlson are also dealt with later in these reasons as they featured in Mr Shaw’s submissions in support of his Application.

# THE MERITS OF MR SHAW’S COMPLAINTS IN HIS APPLICATION

1. While Mr Shaw’s evidence and submissions tended to merge and blur his various complaints concerning the Trustee’s administration of his estate into a single amorphous mass, it is convenient to separately address what appeared to be his main complaints or allegations. His main complaints concerned the manner and circumstances in which the Gwynne Street property was sold by NAB, the manner and circumstances in which the Tivoli Road property was sold and the Trustee’s conduct in respect of the rental and management of all of the relevant Properties. Mr Shaw’s more general complaints concerning the Trustee’s administration of his estate, including general allegations of delay and lack of communication, will then be dealt with.

## The sale of the Gwynne Street property

1. Mr Shaw’s main or central complaint concerning the sale of the Gwynne Street property would appear to be that it should not have been sold at all. He claimed, in effect, that if any of the three Properties had to be realised, it should have been one of the Properties other than the Gwynne Street property, which was said to be the ‘jewel in the crown’. According to Mr Shaw, the Trustee should have ensured that his NAB loan did not go into default, or should otherwise have prevented NAB from selling the Gwynne Street property. He also complained, in that context, that the Trustee did not tell him that NAB was selling the Gwynne Street property and that the Gwynne Street property was sold at less than its market value. Finally, Mr Shaw appeared to assert that the mortgage over the Gwynne Street property did not secure his loan facility with NAB and NAB was therefore not entitled to exercise its power of sale in respect of that property when the loan went into default.
2. There is no merit in any of those complaints. That is so for a number of reasons.
3. First, it is clear that Mr Shaw was in default of the mortgages over each of the Properties by the time the sequestration order was made against Mr Shaw on 11 June 2014. As noted earlier, it was a term of the mortgages that Mr Shaw, as debtor, was in default if he became insolvent, including if he committed an act of bankruptcy. It would have been open to NAB to issue a default notice and exercise its power of sale under the mortgages at any time after June 2014.
4. Second, it was by no means incumbent on the Trustee to make payments towards Mr Shaw’s loan facility with NAB so that the facility was not in default. Mr Shaw contended that the Trustee should have applied the rental payments received from the three Properties towards the loan facility with NAB. That submission rather conveniently ignored the fact that the Trustee permitted Mr Shaw to continue to receive the rent from the Properties from the time of the sequestration order up to March 2016. The Trustee allowed that to occur because Mr Shaw was seeking to have his bankruptcy annulled. Be that as it may, the fact is that Mr Shaw received the rent from the Properties and himself failed to apply that rent towards the loan facility. The Trustee estimated that the rent received by Mr Shaw from 11 June 2014 to March 2016 totalled approximately $70,000. Mr Shaw did not apply any of those funds to the loan account.
5. Third, it is clear that, even if the Trustee decided to make payments in respect of the NAB loan so that it did not – temporarily, at least – go into default, it was in any event inevitable that either the Trustee or NAB would at some point have had to realise at least one of the Properties so as to fully repay NAB and satisfy the claims of the petitioning creditors. The petitioning creditors lodged a proof of debt totalling $1,763,691. While, ultimately, the petitioning creditors’ proof of debt was only admitted in the sum of $450,584, even a debt of that amount could only have been satisfied by the realisation of one or more of the Properties. The sale of the Tivoli Road property alone would not have been sufficient, as it was valued (in March 2019) at only $330,000.
6. Fourth, it would appear that, in September 2016, while Mr Shaw’s appeal against the dismissal of his annulment application was still on foot, the Trustee intended to make a payment of $5,000 toward the NAB loan to prevent the issue of a default notice by NAB. As events transpired, a cheque was drawn but not presented, apparently because the cheque was made out to an incorrect account. That payment would, in any event, have only represented a very temporary measure.
7. Fifth, by April 2018, NAB had notified Mr Shaw that his loan account was in default and had demanded that the balance of $215,476.58 be repaid in full by 14 May 2018. That obviously did not occur and, on 26 June 2018, NAB commenced proceedings in Victoria to obtain possession of the Properties, no doubt so it could exercise its power of sale. The Trustee initially sought to persuade NAB to allow the Trustee to sell the Gwynne Street property, rather than have NAB sell it pursuant to its power of sale. NAB ultimately made it clear that, as the holder of first registered mortgages over each of the Properties, it intended to obtain possession of the Properties and exercise its power of sale. The Trustee was unable to prevent NAB from pursuing that course. Amongst other things, s 58(5) of the Bankruptcy Act provides that nothing in s 58 (which provides for the vesting of a bankrupt’s property in the Trustee) “affects the right of a secured creditor to realize or otherwise deal with his or her security”.
8. Sixth, by 19 October 2018 at the latest, Mr Shaw was aware that the Gwynne Street property was to be auctioned. While Mr Shaw claimed that he did not know that the property was to be auctioned by NAB, as opposed to the Trustee, the point remains that he did not object to the sale of the property at that point. Rather, he corresponded with the Trustee as to the manner and price of sale. That rather flies in the face of the claim that he now makes that the property should not have been sold at all.
9. Seventh, Mr Shaw was aware by at least late October 2018 that the Gwynne Street property had sold at auction for $980,000. While Mr Shaw told the Trustee at that point that he believed that the market value of the property was $1.4 million, he has never identified the basis for that belief, let alone sought to substantiate it by valuation or otherwise. The Trustee’s response to Mr Shaw’s complaints concerning the price achieved at auction was that the sale of the property had been “undertaken in a manner to ensure the best result” and included detailed information concerning the marketing of the property by NAB. Mr Shaw did not adduce any evidence to suggest that the Trustee’s claims concerning the manner in which the property was marketed and sold by NAB were unfounded.
10. Eighth, the valuation of the Gwynne Street property obtained by the Trustee in March 2016 valued the property at $925,000. There is no evidence that the sale price of $980,000 in October 2018 was less than the market value of the property at the time of sale. Mr Shaw’s claim to the contrary rose no higher than bare assertion.
11. Ninth, Mr Shaw’s claim, at the heel of the hunt, that the mortgage over the Gwynne Street property in favour of NAB did not in fact secure his loan facility with NAB and that NAB was therefore not entitled to exercise its power of sale has no substance. It was supported by nothing more than bare assertion – based on an apparent claim or belief that the loan had been paid off, aside from a small administrative fee – and flew in the face of the documentary evidence and Mr Shaw’s past conduct.
12. The certificate of title in respect of the Gwynne Street property refers to a mortgage to NAB. Both the mortgage and the incorporated Mortgage Memorandum of Common Provisions were in evidence. The import of the documentation is that the mortgage secured any indebtedness that Mr Shaw may have had to NAB from time to time. Mr Shaw’s own evidence was also that in 2009 he asked NAB to “add 2 other properties (Gwynne and Tivoli) to the loan as security” so he could increase the credit limit to $300,000. Moreover, when Mr Shaw was served with NAB’s writ which sought possession of the Properties, he sent an email to NAB which stated, amongst other things, that he was prepared to sign a document admitting that he was in default and “agreeing with the claims and selling one or more of the properties to satisfy the debt”. There was no suggestion whatsoever by Mr Shaw at that time, in July 2018, that his loan with NAB was not in fact secured by the Gwynne Street property mortgage.
13. Mr Shaw’s belated claim that NAB was never entitled to sell the Gwynne Street property would appear to be little more than a recent invention that Mr Shaw attempted to throw into the mix for the first time in this proceeding. It was not even included in the statement of claim. In any event, it is a claim that has no substance whatsoever. It should also be noted in this context that Mr Shaw also appeared to claim, somewhat inconsistently with his claim that the mortgage in respect of the Gwynne Street property did not secure his indebtedness to the NAB at all, that there was an understanding between him and NAB that the Mast Gully property would “go first” unless he elected otherwise. This claim again amounted to little more than bare assertion and was unsupported by any admissible evidence. There is also nothing to suggest that the Trustee was ever made aware of this supposed understanding.
14. Tenth, even putting to one side the fact that it was NAB’s decision, not the Trustee’s decision, to sell the Gwynne Street property first, Mr Shaw’s claim that the Tivoli Road or Mast Gully Road properties should have been sold before the Gwynne Street property raised no higher than bare assertion or an expression of Mr Shaw’s opinion. Even accepting that the Gwynne Street property had a higher value, and commanded higher rent, than the other Properties, it does not follow that it should have been retained. The order in which the Properties were to be realised was a commercial decision. No proper basis has been shown for why the Court should intervene or inquire further into the merits of that commercial decision.
15. In all the circumstances, Mr Shaw’s claim that the Trustee’s handling of the realisation of the Gwynne Street property involved any breach of duty on the part of the Trustee, or resulted in any loss to the estate, was not made out by the evidence. Mr Shaw failed to demonstrate that any of his complaints or allegations concerning the manner in which the Trustee dealt with the NAB loan and NAB’s sale of the Gwynne Street property pursuant to its power of sale as mortgagee had any merit, or warranted further inquiry. There were no grounds for believing that the Trustee’s decisions or actions in relation to those matters involved any misconduct, or caused any loss to the estate.

## The sale of the Tivoli Road property

1. As was the case in respect of the Gwynne Street property, Mr Shaw’s central complaint in relation to the Tivoli Road property was that the Trustee should not have sold it at all. That was said to be because the sale was unnecessary as the proceeds from the sale of the Gwynne Street property ($686,373 following satisfaction of NAB’s debt) were sufficient to meet the claims of all of the creditors of the estate: statement of claim at [21]. Given Mr Shaw took issue with multiple steps taken by the Trustee prior to the sale of the Tivoli Road property, this complaint would appear to have been put in the alternative to the complaint that the Gwynne Street property should never have been sold: statement of claim at [20], [28(f)].
2. There is no merit in Mr Shaw’s contention that the Trustee’s sale of the Tivoli Road property involved any breach of duty on the part of the Trustee. That is so for a number of reasons.
3. First, the Trustee advised Mr Shaw by at least early May 2019 that the funds held by the estate following the sale of the Gwynne Street property were unlikely to be sufficient to annul the bankruptcy and that the Trustee was accordingly going to sell the Tivoli Road property. The Trustee’s assessment concerning the shortfall in the estate was based on an assumption that the provable debts in the estate would be at least $450,584, being the debt to the petitioning creditors upon which the bankruptcy notice had been based (plus interest), and that the Trustee’s administration costs to that point were $96,984.46. The assumption that the provable debts in the estate would be at least $450,584 was entirely reasonable in all the circumstances. Mr Shaw failed to demonstrate to the contrary.
4. Second, ultimately the Trustee admitted the claims of the petitioning creditors in the sum of $450,584. The Trustee assessed that, having regard to that debt, the estate did not hold sufficient funds to pay out the debts in full and that accordingly the Tivoli Road property would need to be sold. Mr Shaw applied for a review of the Trustee’s decision to admit the petitioning creditor’s proof of debt in the sum of $450,584 and sought injunctive relief in October 2019 to prevent the sale of the Tivoli Road property. That application was heard and dismissed before the property was sold. Mr Shaw’s complaints in this proceeding concerning the sale of the Tivoli Road property to a large extent seek to re-agitate arguments that were expressly or implicitly rejected in the review proceeding, despite the fact that the judgment in the review proceeding was eventually upheld on appeal.
5. Third, following the sale of the Tivoli Road property for $363,000 on 6 July 2019, the Trustee prepared a calculation which showed the realisations in the estate, not including the sale of the Tivoli Road property, for the purpose of calculating an estimate of the amount necessary to annul the bankruptcy. The calculation was based on the assumption that the only admitted debt was the debt to the petitioning creditors of $450,584, plus interest up to 7 August 2019, and on the basis of the expenses that had been incurred in the administration of the estate up to that point. The calculation revealed a shortfall of $127,085. While prepared about a month after the sale of the Tivoli Road property, the calculation nonetheless confirmed the Trustee’s previous assessment that it was necessary to sell the Tivoli Road property to make good the shortfall in the estate. Mr Shaw appeared to challenge this calculation, though the precise basis of his challenge was far from pellucid. He failed to demonstrate any material error in the calculation.
6. Fourth, Mr Shaw cross-examined Mr Hasan at some length concerning the Trustee’s decision to sell the Tivoli Road property, including the assessment and calculation of the shortfall. As already noted, Mr Shaw’s cross-examination of Mr Hasan concerning the calculation of the shortfall failed to establish any material error in the calculation. Mr Hasan maintained that it was appropriate to sell the Tivoli Road property given the shortfall revealed in the – albeit subsequently made – calculation. He pointed out, in that context, that given the shortfall, it was necessary for the Trustee to sell either the Tivoli Road property or the Mast Gully Road property and that it was preferable to sell the Tivoli Road property because it was untenanted at the time and the Mast Gully Road property had an estimated value which was almost double that of the Tivoli Road property.
7. Mr Shaw appeared to put to Mr Hasan that it was inappropriate to sell the Tivoli Road property because proofs of debt had not been admitted at the time it was sold. That questioning appeared to be based on the false premise that the petitioning creditors’ proof of debt had not been partially admitted at the time. In any event, as Mr Hasan pointed out, because Mr Shaw had not lodged his statement of affairs, the Trustee was required to make a fair assessment of the likely debts on the basis of the available information.
8. As events transpired, the Trustee’s assessment was correct. As for Mr Shaw’s apparent suggestion that the Trustee should have continued to hold the Tivoli Road property, receive rental income and pay the NAB loan, Mr Hasan’s evidence was that, as a “general practice”, the Trustee does not “rent out properties or assume the role of a landlord” and does not speculate as to whether the property might increase in value over time. Rather, the general practice was to realise properties in an orderly fashion as soon as practicable. Mr Shaw failed to demonstrate any material error in the general practice referred to by Mr Hasan, either generally or in the context of his case specifically.
9. Fifth, even if Mr Shaw succeeded in demonstrating that the Trustee’s decision to sell the Tivoli Road property at the time and in the circumstances involved a breach of duty, he failed to demonstrate that the sale caused any loss or damage to the estate. The Tivoli Road property was valued at $330,000 in March 2019. It sold for $363,000 in July 2019. It could not, in those circumstances, at least in the absence of further evidence, be contended that the property was sold at less than market value. Mr Shaw did not adduce any evidence capable of demonstrating that the property was sold at less than market value. Mr Shaw’s case appeared to be that it would have been advantageous for the Trustee to continue to hold the property so it could continue to receive rental income and take advantage of any capital appreciation. That contention was unsupported by any probative evidence and appeared to be based on nothing more than speculation or Mr Shaw’s bare assertion.
10. In all the circumstances, Mr Shaw failed to demonstrate that the Trustee erred in any way in relation to the sale of the Tivoli Road property. His claim that the sale was unnecessary and that it would have been preferable for the Trustee to retain the property has no substance. None of the issues raised by Mr Shaw concerning the sale of the Tivoli Road property warrant any, or any further, inquiry into the Trustee’s conduct or administration of the estate.

## Failure to receive market rent in respect of the Properties

1. Mr Shaw’s claims concerning the rental of the Properties during the administration of the estate are similarly unmeritorious.
2. Each of the Properties was tenanted as at the time the sequestration order was made against Mr Shaw.
3. As has already been noted, the Trustee permitted Mr Shaw to continue to receive the rent from the Properties from the time the sequestration order was made until March 2016 on the basis that he had applied to annul his bankruptcy. The Trustee estimated that Mr Shaw received approximately $70,000 in rent during that period.
4. The rent received in respect of the Gwynne Street property in June and July 2016 was $1,384.50 per month. It is unclear whether Mr Shaw had any complaint about that rent. The tenant vacated Gwynne Street in September 2016. In late September 2016, Mr Shaw entered into a lease with a new tenant at a rent of $3,215 per month, beginning February 2017. It is difficult to see how Mr Shaw could contend that the rent was insufficient given that he appears to have negotiated the lease. Mr Shaw received the rent from the new tenant until the Trustee managed to obtain a copy of the lease and contact the tenant in January 2017. The Trustee continued to receive rent in respect of the Gwynne Street property from February 2017 to June 2018. There is nothing to suggest that Mr Shaw raised any issue with the Trustee concerning the rent in respect of the property during that period. The property was sold at auction some months later.
5. The Tivoli Road property was rented out throughout the period March 2016 to early October 2018. The rent payable was $1,040 per month. There is no indication that Mr Shaw said anything to the Trustee to the effect that the rent payable in respect of the property was deficient. The tenant vacated the Tivoli Road property in September or October 2018. The Trustee advised Mr Shaw that the Trustee did not intend to enter into a new lease in respect of the property as “the realisation of the property is anticipated”. As events transpired, the property was not sold until July 2019. As a result, the property was untenanted for roughly eight months.
6. It does not follow that the Trustee’s decision not to enter into a new lease when the tenant vacated the property was unreasonable or amounted to maladministration. The decision not to enter into a new lease must be considered having regard to the available information and the state of affairs current at the time of the decision. It is unfair to consider the decision with the benefit of hindsight. There is no basis for finding that it was unreasonable, on the basis of the information available to the Trustee as at September 2018, for the Trustee to have decided not to enter into a new lease in respect of the Tivoli Road property when the existing tenant vacated the property. It may be inferred that the Trustee envisaged that the property was likely to have been sold earlier or faster than it was eventually sold. There is nothing to suggest otherwise. There would, in those circumstances, have been little point in the Trustee endeavouring find a tenant willing to take a short term lease in respect of the property.
7. Nor can it be safely concluded that the estate suffered any material loss as a result of the Trustee’s decision. It cannot, for instance, be inferred or assumed that the Trustee would necessarily have been able to enter into a short term lease in respect of the Tivoli Road property pending its sale.
8. The Mast Gully Road property was, so far as the evidence revealed, tenanted at all material times. From March 2016 to mid-September 2019, the rent was $335 per week. In September 2016, Mr Shaw enquired of the Trustee whether the rent in respect of the property could be increased. The Trustee replied that the Trustee had no objection to Mr Shaw discussing a rental increase with the tenant. It does not appear that the rent was increased until mid-September 2019, when it was increased to $375 per week. Mr Shaw had, in January 2019, suggested to the Trustee that the rent should be increased to $355 per week. It is, in those circumstances, somewhat difficult to see how Mr Shaw could complain that the size of the rent increase was inadequate. In any event, there was no evidence to suggest that the rent in respect of the Mast Gully Road property at any point in time was less than the market rate for the property. Mr Shaw’s apparent claim to the contrary amounted to nothing more than bare assertion.
9. Finally, Mr Shaw complained that the Trustee had failed to make an insurance claim in respect of lost rental income and other expenses arising from the damage to a switchboard at the Gwynne Street property in November 2017. This was a very minor complaint. Mr Hasan’s evidence was that the total of the loss was less than $3,000 and that he was making enquiries as to whether an insurance claim could be made in respect of that loss. This is an issue which warrants no further investigation or examination. Nor does it demonstrate maladministration, breach of trust or negligence such as to warrant intervention by the Court. There is no reason to doubt Mr Hasan’s evidence that if an insurance claim can be made, it will be made.
10. In all the circumstances, Mr Shaw failed to demonstrate that the Trustee’s management of the Properties, insofar as renting them out pending realisation is concerned, was in any way negligent or amounted to maladministration or a breach of trust. Nor did he demonstrate that any further investigation or examination of the issues raised by him was warranted.

## Non-compliance with the Trustee’s Practice Guide and Statement

1. Mr Shaw’s submissions in support of his application to reopen included the contention that the Trustee failed to comply with various sections of the Official Trustee Practice **Guide** and the Official Trustee Practice **Statement** in relation to real estate. As already noted, Mr Shaw was permitted to reopen his case for the limited purpose of allowing him to tender the extracts from the Guide and the Statement that had been produced by the Trustee as a result of the orders made on the last day of the hearing. Those extracts related to the topic referred to in Mr Hasan’s evidence during cross-examination which revealed the existence of a practice manual of some type.
2. It is neither necessary nor desirable to specifically address Mr Shaw’s lengthy catalogue of the parts of the Guide and Statement that he contended were not followed by the Trustee. It suffices to say that, for the most part, Mr Shaw’s claims that sections or paragraphs of the Guide or Statement were not followed or strictly complied with amounted to no more than bare assertion and were for the most part unsupported by, or contrary to, the evidence that was before the Court in respect of the relevant transactions or events. Many of Mr Shaw’s claims concerning non-compliance were also in respect of relatively minor or administrative matters, or had little, if anything, to do with the main events and transactions, or the steps taken by the Trustee, which were the focus of Mr Shaw’s case prior to the production of the Guide and Statement. Many of Mr Shaw’s submissions concerning non-compliance were also based on extracts from the Guide and Statement which, considered in isolation, may at first blush have appeared to support his claims, but plainly did not do so when considered in context and in light of the evidence concerning the particular circumstances of his estate.
3. Most significantly, Mr Shaw did not demonstrate how or why any of the alleged instances of non-compliance, if made out, amounted to maladministration, breach of trust or negligence on the part of the Trustee, or resulted in any compensable loss or damage to the estate. Nor did he demonstrate why there was any sound basis for further inquiring into any of the alleged instances of non-compliance. He appeared to proceed on the erroneous basis that any departure from the Guide or Statement by the Trustee, no matter how trivial, immaterial or divorced from the particular circumstances of the case that the departure may be, would necessarily amount to maladministration, or would justify an inquiry into the Trustee’s administration of the estate.
4. The Guide appeared to be exactly what it was said to be – a general guide to how the Trustee should generally approach the administration of a bankrupt estate. The Statement similarly set out the general approach or steps that the Trustee should take in the administration. Each particular administration must, however, be considered having regard to its own unique facts and circumstances. The fact that the Trustee may have departed from one or more of the general practices set out in the Guide, or not taken one or more of the general steps set out in the Statement, in the particular circumstances of Mr Shaw’s bankrupt estate, would not necessarily demonstrate misconduct, maladministration or negligence on the part of the Trustee. That would depend on the nature of the departure from the general practice, or the particular step not followed, and the particular circumstances in which that departure or non-compliance occurred.
5. Mr Shaw also contended that the content of the extracts from the Guide and Statement somehow demonstrated that Mr Hasan’s evidence was not credible. That is also not the case. Indeed, the Guide and Statement corroborated Mr Hasan’s evidence in important respects. During the cross-examination of Mr Hasan, Mr Shaw questioned Mr Hasan about the Trustee’s general practice in relation to continuing to “manage” properties that were tenanted. Mr Hasan’s evidence was that the Trustee’s general preference was to realise such properties in an orderly fashion as soon as possible or practicable. When asked whether that general preference was reflected in a manual, Mr Hasan said:

We do have procedure manuals which basically dictates how we should conduct the affairs of the estate. And, as I stated previously, it is the standard practice for the trustee to not engage in letting out properties, do not speculate, and realise properties as soon as practicable.

1. That “standard practice” was in fact reflected in the terms of the Guide. In the version of the Guide which was updated on 26 September 2016, it is stated at paragraph 10.1 that “[a]t the earliest possible time when it is commercial to do so, the [Trustee] should proceed to realise the interest in the property for the benefit of the bankrupt’s unsecured creditors”. In relation to properties that are tenanted, paragraph 11.1 of the Guide stated that the fact that a property owned by the bankrupt is tenanted “poses problems” for the Trustee because, amongst other things, the Trustee is “reluctant to assume the position of landlord because of accounting, taxation and other liabilities”. Paragraph 11.2 of the same version of the Guide provides that where there is an existing tenancy or lease, the Trustee should not seek to renew it, no doubt so the property can be sold as soon as possible after the expiry of the lease.
2. When close consideration is given to the particular facts and circumstances of Mr Shaw’s estate and the way it was administered by the Trustee, nothing in the Guide or Statement provides any support for Mr Shaw’s case that the Trustee’s administration of the estate involved maladministration, breach of trust or negligence, or that any further inquiry into the Trustee’s administration is warranted.

## Other complaints

1. Mr Shaw made a number of other miscellaneous complaints about the Trustee’s general conduct of the administration. Those complaints may be dealt with shortly.
2. First, he complained that the officers of AFSA who were handling the administration of the estate for, and on behalf of, the Trustee failed to keep him informed, or failed to advise him, in relation to certain events or issues in relation to the estate, in particular the status of NAB loan and the fact that NAB was selling the Gwynne Street property, not the Trustee. Similarly, he complained that the Trustee failed to respond, or respond in a timely fashion, to what he claimed were reasonable requests in respect of the administration of the estate.
3. It may be accepted that, particularly in the early days of the administration, the Trustee did not effectively inform or advise Mr Shaw in relation to some of the actions that were to be taken, or had to be taken, in the administration of the estate, and did not adequately respond to all of Mr Shaw’s requests for information in a timely fashion. The Trustee conceded as much in an email sent to Mr Shaw in March 2019. It would appear, however, that the communication between those acting on behalf of the Trustee and Mr Shaw improved significantly as the administration progressed.
4. A fair reading of the voluminous correspondence between the Trustee and Mr Shaw indicates that, on the whole, the standard or degree of the Trustee’s communication with Mr Shaw was adequate in all the circumstances. It would also not be unfair to say that Mr Shaw was, at times, a difficult and demanding bankrupt. He appeared to erroneously presume that the Trustee was required to seek his counsel, or furnish him with financial advice, in respect of each and every step that the Trustee took in the administration of the estate. Had the Trustee responded to every request or demand made by Mr Shaw, there would have been little time to attend to anything else. It would also not be unfair to conclude that Mr Shaw was not himself particularly cooperative or forthcoming and certainly did not make the administration of the estate easy for the Trustee. Most significant, of course, is the fact that Mr Shaw did not provide the Trustee with a statement of affairs as he was both required and requested to do. Mr Shaw never explained why he had not provided a statement of affairs. It no doubt would have substantially assisted the Trustee in the administration of the estate.
5. In all the circumstances, Mr Shaw’s general complaints concerning the manner in which the Trustee communicated and provided advice and information to him during the course of the administration do not warrant further inquiry or consideration and do not support the grant of any of the relief sought by Mr Shaw. While the degree of advice, assistance and information the Trustee provided to Mr Shaw during the administration may not have been perfect or ideal, the Trustee’s conduct in that regard is not actionable on the basis that it constituted a breach of duty as contended by Mr Shaw. Nor is there any evidence to suggest that the estate suffered any, or any compensable, loss or damage arising from any general lack of communication or delay by the Trustee in the administration of the estate.
6. Second, Mr Shaw made two specific complaints concerning delay on the part of the Trustee: first, at one point he appeared to complain about the delay in selling one or other of his Properties; and second, he complained that the Trustee took too long to decide or determine the proofs of debt.
7. The first complaint appeared to be raised in the course of Mr Shaw’s cross-examination of Mr Hasan. Mr Shaw suggested to Mr Hasan that it was an “unusual situation” that the Trustee did not put the Gwynne Street property on the market before NAB did. Mr Hasan’s evidence in response to that suggestion was that the Trustee initially deferred realising any of the Properties pending the determination of Mr Shaw’s annulment application and appeal. The documentary evidence not only supported Mr Hasan’s evidence in that regard, but also indicated that Mr Shaw was well aware that the Trustee had deferred taking any significant steps in the administration of the estate for that reason. The delay in realising the Properties was not unreasonable in all the circumstances. Mr Shaw’s complaint in this regard is also difficult to reconcile with what appears to be Mr Shaw’s main complaint, which was that the Gwynne Street and Tivoli Road properties should not have been sold at all, or were sold prematurely.
8. Mr Shaw’s second complaint concerning delay on the part of the Trustee, the delay in determining the proofs of debt lodged in the administration, featured more prominently in Mr Shaw’s submissions. The essence of Mr Shaw’s complaint was that the Tivoli Road property should not have been sold before the Trustee had determined the proofs of debt and the Trustee took an inordinate amount of time to determine the proofs.
9. The evidence indicated that the petitioning creditors lodged a proof of debt on 15 November 2018. The Trustee did not finally determine that proof until July 2019, some eight months later, when the proof was partially admitted. It is, however, readily apparent from the correspondence which was in evidence that the delay largely came about because the Trustee sought legal advice in relation to the proof. It was reasonable, or at least was not shown to be unreasonable, for the Trustee to seek legal advice concerning the proof of debt given Mr Shaw’s litigious nature. Mr Shaw in fact subsequently unsuccessfully challenged the Trustee’s decision in relation to the proof of debt.
10. Mr Shaw also complained about the Trustee’s delay in determining the proofs of debt lodged by the LPLC on 29 November 2018. Mr Hasan’s evidence was that the delay in determining those proofs arose because the costs orders upon which the proofs were based were first required to be taxed. That explanation should be accepted. Any delay in determining those proofs was not unreasonable.
11. Third, Mr Shaw complained that it was unnecessary and unreasonable for the Trustee to have retained Harris Carlson to represent it and appear at the hearing of his annulment application and the appeal from the dismissal of that application. He also persistently complained that it was unnecessary and unreasonable for the Trustee to retain Harris Carlson to advise and assist it in respect of various issues and steps in the administration of the estate.
12. There is no merit in any of Mr Shaw’s complaints concerning Harris Carlson or the Trustee’s retention of that firm to advise and assist in respect of the annulment application or the administration of the estate generally.
13. It was not unreasonable for the Trustee to retain Harris Carlson in respect of the annulment application. Mr Hasan’s evidence was that five affidavits were filed on behalf of the Trustee in the annulment proceedings. Those affidavits were sworn or affirmed by officers of AFSA and a solicitor from Harris Carlson. A solicitor from Harris Carlson also appeared at the annulment application and the appeal to provide assistance to the Court if required. The Trustee maintained and submitted that it was properly discharging its duties as an officer of the Court and its duties to the bankrupt by being represented at the hearing of the annulment application and appeal. That submission is accepted. It should also be noted that it is somewhat doubtful that the annulment application was an action covered by s 90-15(3)(d) of the Schedule in any event.
14. As for Mr Shaw’s complaints concerning the Trustee retaining Harris Carlson generally, Mr Hasan’s evidence was that Harris Carlson was not, as Mr Shaw appeared to contend, involved in the day-to-day administration of the estate. Mr Hasan also said that, while Harris Carlson, rather than the Trustee, often communicated with Mr Shaw, that was because the lines between the bankruptcy administration and the litigation instituted by Mr Shaw were “somewhat blurry”. It was also considered that, in the circumstances, there should be “one channel” of communication so as to avoid confusion and misunderstandings. Mr Hasan impressed as an honest and forthright witness. Mr Shaw advanced no persuasive reason for why Mr Hasan’s evidence, including his evidence concerning the involvement of Harris Carlson, should not be accepted unequivocally.
15. Fourth, Mr Shaw complained about the manner in which the Trustee and Harris Carlson had approached this proceeding. It was presumably on that basis that Mr Shaw referred to the Civil Dispute Resolution Act in his Application. Mr Shaw’s allegations in that regard appeared to focus on the genuine steps statement filed by the Trustee in accordance with s 7 of the Civil Dispute Resolution Act and r 5.03 of the *Federal Court* ***Rules*** *2011* (Cth), though it was unclear precisely why the Trustee’s genuine steps statement was defective or deficient in any material way or why, in the broader scheme of things, that mattered. The more general allegation appeared to be that the Trustee had failed or refused to negotiate with Mr Shaw or narrow the issues. These allegations are referred to later in the context of Mr Shaw’s submissions concerning costs. It suffices at this point to note that none of Mr Shaw’s allegations concerning the conduct of this proceeding by, or on behalf of, the Trustee have any merit or warrant any inquiry into the Trustee’s administration of the estate. Indeed, if anything, the length and complexity of the proceeding was of Mr Shaw’s own making.
16. Fifth, Mr Shaw appeared to question the Trustee’s remuneration. Mr Hasan’s evidence was that all of the Trustee’s fees were calculated and charged pursuant to the *Bankruptcy (Fees and Remuneration) Determination* *2015* (Cth). Mr Shaw cross-examined Mr Hasan about some of the fees which appeared in the Trustee’s calculation of the shortfall which demonstrated that the sale of the Tivoli Road property was warranted. That cross-examination did not reveal any error in respect of the calculation of the Trustee’s fees. It follows that Mr Shaw’s complaints concerning the Trustee’s remuneration have no merit.
17. Mr Shaw filed and relied on several voluminous affidavits and written submissions which were lengthy, prolix, repetitive and quarrelsome. It may be that some complaints or arguments which are buried somewhere deep within that material have not been specifically addressed in these reasons, particularly if those complaints or arguments were not referred to or addressed in the course of Mr Shaw’s oral submissions. These reasons have endeavoured to address all of the main complaints or arguments that Mr Shaw pressed at the final hearing. It may be assumed that any additional complaints or arguments that are contained somewhere in the material, but which have not been separately or specifically addressed in these reasons, have been considered to be of insufficient merit or materiality to warrant specific attention in what is already a very lengthy judgment in the circumstances.

# A PROPER BASIS FOR AN INQUIRY?

1. As discussed in detail earlier, Mr Shaw ultimately accepted, albeit somewhat begrudgingly, that it was appropriate for the Court to approach his application in two stages: the first stage being to determine whether the Court should inquire into the conduct of the Trustee in the administration of his bankrupt estate; and the second stage being the conduct of the inquiry, if such an inquiry is found to be warranted. Mr Shaw claimed that this two-stage procedure was the “only practical course given the case management” of his Application, though as explained earlier, and in *Shaw No 1*, Mr Shaw’s apparent complaints concerning the case management of his case which founded that claim have no merit. The fact remains that Mr Shaw never unequivocally opposed the two-stage procedure which the Trustee submitted was appropriate. Nor, despite being invited, if not directed, to do so, did Mr Shaw put forward any submissions, let alone persuasive submissions, as to why the proposed two-stage process was not appropriate in all the circumstances.
2. Mr Shaw correctly acknowledged that for him to demonstrate that an inquiry into the conduct of the Trustee was warranted, it was incumbent upon him to establish substantial grounds for believing that the Trustee erred in the administration of the estate or had engaged in misconduct. The authorities discussed earlier also establish that, in determining whether an inquiry is warranted, the Court should be mindful of the policy that the Court should not unduly interfere in the Trustee’s day-to-day administration of a bankrupt estate and must have regard to the likely utility of an inquiry and whether there is a likelihood that the Trustee should be held to account for the conduct of the administration which has affected the bankrupt in some way.
3. Mr Shaw has failed to demonstrate that there are substantial grounds for believing that the Trustee erred in the administration of his bankrupt estate or has engaged in any misconduct. Mr Shaw’s allegations of maladministration, breach of trust and negligence on the part of the Trustee were entirely unsupported by the evidence.
4. While it is abundantly clear that Mr Shaw does not agree with all, or most, of the decisions that the Trustee has made and the steps that the Trustee has taken in the administration of his estate, it does not follow that those decisions or steps were wrong, or involved maladministration, breach of trust or negligence. For the detailed reasons given earlier, there is no basis to conclude that the decisions and steps taken by the Trustee concerning the realisation of the Gwynne Street and Tivoli Road properties, the rental of the Properties, the determination of the proofs of debt, or the retention of Harris Carlson to assist and advise in relation to the administration of the estate, involved any breach of duty by the Trustee. Nor do any of Mr Shaw’s more general complaints about the officers of AFSA who engaged in the day-to-day administration of the estate provide any ground for believing that the Trustee erred in the administration of the estate or engaged in any misconduct.
5. It is clear that Mr Shaw stridently believes that those who have acted on the Trustee’s behalf in the administration of his estate have not done so competently, diligently or in a sufficiently commercial manner. The fact that the officers of AFSA with whom Mr Shaw engaged during the administration of his estate may not have lived up to Mr Shaw’s expectations does not, however, mean that they failed to act competently, diligently or in a sufficiently commercial manner such as to warrant an inquiry into the Trustee’s administration of the estate. The administration of a bankrupt’s estate is not a counsel of perfection. While some aspects of the day-to-day administration of Mr Shaw’s estate over the years may not have been perfect, there is nonetheless no sound basis for any further inquiry into the administration of the estate.

# A BASIS FOR ANY OF THE relief SOUGHT?

1. Given Mr Shaw’s apparent reluctance to unequivocally accept that a two-stage procedure was appropriate, consideration should be given to the question whether any of the relief sought by Mr Shaw on the grounds set out in his application and statement of claim was supported by the evidence. The short answer to that question is no.
2. For the reasons essentially already given, the evidence does not establish that the Trustee breached its duty in the administration of the estate in any of the ways alleged in Mr Shaw’s application and statement of claim. Nor does the evidence establish any maladministration, misconduct or negligence on the part of the Trustee, or that the estate has suffered any loss or damage as a result of any maladministration, misconduct or negligence on the part of the Trustee. It follows that there is no basis for any of the relief sought by Mr Shaw.

# CONCLUSION AND DISPOSITION

1. Mr Shaw’s application must be dismissed. The only remaining question concerns the costs of this proceeding.
2. Mr Shaw maintained that, even if his application were to be dismissed, he should not be ordered to pay the Trustee’s costs in whole or in part. The submission was based on the allegation by Mr Shaw that from “day one” the Trustee and its solicitors had failed to engage with him, failed to resolve or narrow the issues in dispute, failed to cooperate, and had not filed a genuine steps statement that complied with the Civil Dispute Resolution Act and the Rules. Mr Shaw also complained about the Trustee’s actions in moving to set aside the subpoena that he had caused to be issued and served on AFSA.
3. The problem for Mr Shaw is that there is no merit in any of his complaints concerning the actions of the Trustee and its solicitors in the conduct of this proceeding.
4. Most of Mr Shaw’s assertions and arguments concerning the conduct of the Trustee and its solicitors in respect of this proceeding were a rehash of the assertions and arguments that Mr Shaw advanced in support of his application to strike out the Trustee’s defence and his application for summary judgment in his favour. Those assertions and arguments were considered and rejected in *Shaw No 2*.
5. Mr Shaw’s contention that the Trustee and its solicitors had somehow acted unreasonably in the conduct of this proceeding was based on bare assertions by Mr Shaw and was unsupported by any objective or cogent evidence. The contention is also inconsistent with the Court’s own observations of the Trustee’s conduct of the proceedings at the numerous case management hearings that preceded the final hearing. A short procedural history of the matter is contained in *Shaw No 1*. In short, the Trustee essentially complied with the Court’s procedural orders and filed documents in an appropriate form. Mr Shaw’s unfounded complaint that the Trustee failed to narrow the issues warrants specific mention. In fact, it was Mr Shaw who not only failed to confine or narrow the issues, but continued to expand the issues throughout the hearing.
6. Mr Shaw has failed to demonstrate that any conduct on the part of the Trustee or its solicitors in the conduct of the proceeding disentitles the Trustee to a costs order in its favour. Accordingly, Mr Shaw should be ordered to pay the Trustee’s costs of and relating to Mr Shaw’s application, including all interlocutory applications. That costs order should be without prejudice to the right of the Trustee to claim those costs as a cost of the administration of Mr Shaw’s bankrupt estate.

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| I certify that the preceding two hundred and two (202) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney. |

Associate:

Dated: 17 December 2021