FEDERAL COURT OF AUSTRALIA

Gittins v Field (Trustee) [2018] FCA 976

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| File number: | WAD 532 of 2017 |
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| Judge: | **CHARLESWORTH J** |
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| Date of judgment: | 29 June 2018 |
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| Catchwords: | **BANKRUPTCY** – bankrupt in receipt of income in the nature of monthly payments under an income protection policy – whether payments are income for the purposes of Div 4B of Pt VI of the *Bankruptcy Act 1966* (Cth) – whether bankrupt liable to pay a contribution to his bankrupt estate calculated by reference to the amount of the payments – whether application of income contribution scheme impliedly excluded or modified by reason of the payments being in the nature of compensation for personal injury |
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| Legislation: | *Bankruptcy Act 1924* (Cth) s 101  *Bankruptcy Act 1966* (Cth) ss 5, 42, 58, 60, 116, 120, 121, 122, 131, 134, 139, 139J, 139L, 139N, 139P, 139R, 139S, 139T, 139U, 139V, 139W, 139ZG, 139ZQ, 140, 149D, Pt VI, Div 4B, Div 5  *Bankruptcy Amendment Act 1991* (Cth) |
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| Cases cited: | *Berryman v Zurich Australia Ltd* [2016] WASC 196  *Combis, the Trustee of the Property of Landers, a Bankrupt v Harding, Billington and Regan as Executors of the Deceased Estate of Billington* [2014] FCA 1391  *Cox v Journeaux (No 2)* (1935) 52 CLR 713  *Di Cioccio v Official Trustee in Bankruptcy* (2015) 229 FCR 1  *Dwyer v Ross* (1992) 34 FCR 463  *Federal Commissioner of Taxation v Smith* (1981) 147 CLR 578  *MacMahon Contractors Pty Ltd v Lee* [2017] NTSC 33  *Moss v Eaglestone* (2011) 83 NSWLR 476  *Nyoni v Pharmacy Board of Australia (No 4)* [2017] FCA 911  *Randall v Deputy Commissioner of Taxation* (2008) 174 FCR 441  *Re Gillies; Ex parte Official Trustee in Bankruptcy* (1993) 42 FCR 571  *Re Lee* (2012) 207 FCR 96  *Re Sharpe; Ex parte Donnelly* (1998) 80 FCR 536  *Re Weiss; Ex Parte Official Trustee in Bankruptcy* (1985) 7 FCR 121  *Royal v El Ali* [2016] FCA 782  *Sheehan v Brett-Young & Ors (No 3)* [2016] VSC 39  *Watson v Deputy Commissioner of Taxation* (2010) 182 FCR 104  *Watson v Secretary, Department of Family and Community Services* (2003) 128 FCR 564  *Wilson v United Counties Bank Ltd* [1920] AC 102 |
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| Date of hearing: | 25 January 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 70 |
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| Solicitor for the Respondent: | Carles Solicitors |

ORDERS

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|  | | WAD 532 of 2017 |
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| BETWEEN: | JOHN JAMES GITTINS  Applicant | |
| AND: | MALCOLM FIELD  Respondent | |

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| JUDGE: | CHARLESWORTH J |
| DATE OF ORDER: | 29 JUNE 2018 |

THE COURT ORDERS THAT:

1. The application is dismissed.

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

REASONS FOR JUDGMENT

CHARLESWORTH J:

# INTRODUCTION

1. The applicant, John James Gittins, is an undischarged bankrupt. His bankruptcy commenced on 25 January 2017. On the same day, the Trustee of Mr Gittins’ bankrupt estate issued to Mr Gittins a contribution assessment notice under s 139W of the *Bankruptcy* ***Act*** *1966* (Cth). The notice set out the Trustee’s assessment of the contribution Mr Gittins was liable to make to his bankrupt estate in respect of the period commencing on 25 January 2017 and ending on 25 January 2018. The amount of Mr Gittins’ liability was calculated having regard to payments he has received, or was likely to receive, in the nature of monthly payments under two contracts for income protection insurance (the Benefits). It is the Trustee’s position that the Benefits are “income” and so must be taken into account when applying the regime established by Div 4B of Pt VI of the Act. In these reasons, the regime will be referred to as the income contribution scheme.
2. By his amended originating application, Mr Gittins seeks *inter alia* declaratory relief to the effect that:
3. the Benefits are “property” for the purposes of the Act;
4. the Benefits are property that is not divisible between his creditors by virtue of s 116(2)(g) of the Act; and
5. the Trustee has no entitlement to the Benefits.
6. Mr Gittins’ claim for relief turns on the proper construction of the Act. It is his contention that the Benefits are excluded from the property that is divisible among his creditors because they are characterised as compensation for personal injury within the meaning of s 116(2)(g). Section 116(2)(g), he submits, is to be given “primacy” over Div 4B of Pt VI “so as to give effect to the manifest objective of the sub-section”.

# the FACTS

1. The following facts are extracted from a statement of agreed facts executed by the parties on 6 December 2017:

1. The Applicant was born on 22 August 1959 and is 58 years old.

2. The Applicant is a qualified dentist.

3. The Applicant holds two income protection policies with The National Mutual Life Association of Australasia Limited trading as AMP Insurance as follows:

(a) Premier Income Protection Plan described by the identification number D311705016; and

(b) Income Replacement Plan described by the identification number D302783105

(the Policies).

4. The Policies provide that the insurer will pay a monthly benefit to the Applicant in the event that he suffers ‘a total disablement through injury or sickness.’ The Policies classify the Applicant as ‘totally disabled if, because of an injury or sickness, he or she is:

─ unable to perform at least one income producing duty of his or her occupation;

─ not working; and

─ under the regular care and attendance of a medical practitioner.’

5. The monthly benefit paid to the insured ‘is based on a percentage (up to 75%) of [the Applicant’s] average income when [he] applied for’ the Policies.

6. On 6 October 2015 the Applicant suffered an injury to his index finger which resulted in its amputation below the knuckle (‘the Injury’). The symptoms of the Injury, which are both physical and mental, continue to be experienced by the Applicant who has not returned to work.

7. As a result of the Injury the applicant lodged a claim with AMP Insurance pursuant to the Policies. AMP Insurance assessed the Applicant’s medical, occupational and functional capacity information. By letter dated 6 November 2015 AMP Insurance advised the Applicant that his claim had been accepted as from 6 October 2015.

8. Pursuant to the Policies the Applicant is entitled to receive income protection payments of $270,000 per annum for his lifetime.

9. The Applicant became bankrupt by way of a debtor’s petition on 25 January 2017 and the Respondent (who is a registered trustee in bankruptcy) was appointed as trustee of the bankrupt estate on that date. The Respondent remains the trustee of the bankrupt estate.

10. On 25 January 2017 the Respondent issued to the Applicant an income contribution assessment (‘the Assessment’) pursuant to Division 4B Part VI of the Bankruptcy Act 1966 for the first contribution assessment period (‘CAP’) from 25 January 2017 to 25 January 2018 as follows:

**Assessed Income**

Total Income 270,000

Less: Tax Payable (100,104)

Medicare levy (4,050)

**Assessed Income $165,846**

Assessed Income Threshold Amount based on number

of dependants (54,737)

Sub Total **$111,110**

Annual Contribution **Assessment at 50% $ 55,555**

***Monthly Contributions* $ 4,630**

11. Pursuant to the Assessment the Respondent has received the following income contribution payments from the Applicant, the source of which was the net (after income tax) monthly benefits paid to the Applicant pursuant to the Policies:

Payments Received

20/02/17 $ 4,630.00

14/03/17 $ 4,630.00

18/04/17 $ 4,630.00

16/05/17 $ 4,630.00

19/06/17 $ 4,630.00

13/07/17 $ 4,630.00

**TOTAL: $27,780.00**

12. Under the Assessment a further four monthly income contribution payments each for $4,630 were due to be paid by the Applicant on 17 August 2017, 17 September 2017, 17 October 2017 and 17 November 2017 but have not been received by the Respondent. Further payments of $4,630 will be due on 17 December 2017 and 17 January 2018 under the Assessment.

(footnote omitted)

1. The Court has before it the insurance contracts pursuant to which the Benefits are paid. Some additional features should be noted. The first is that the contractual entitlement to the Benefits depends upon total and permanent disablement, whether or not the disablement is caused by or accompanied by mental pain and suffering. The second is that the amount of the Benefit bears no relation to the actual loss of income that might have resulted from the injury triggering the entitlement to be paid, nor any relation to the actual income the insured might have derived at the time that the incapacity occurred. The amount of the Benefit is calculated as a percentage of the income the insured happened to earn at the time that the contract for insurance was entered into. The third is that the Benefits are payable whether or not the injury results from the act of a third party who might also be liable to compensate the insured in respect of it. The fourth is a rather obvious point: the Benefits are paid pursuant to a contractual promise to pay a defined sum in a defined event, rather than a general law obligation to pay damages or compensation as, for example, on a claim for damages founded in tort.

# THE ACT

1. It is necessary to survey the relevant provisions of the Act, commencing with s 58. It relevantly provides:

**Vesting of property upon bankruptcy—general rule**

(1) Subject to this Act, where a debtor becomes a bankrupt:

(a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and

(b) after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.

…

(6) In this section, ***after-acquired property***, in relation to a bankrupt, means property that is acquired by, or devolves on, the bankrupt on or after the date of the bankruptcy, being property that is divisible amongst the creditors of the bankrupt.

1. Section 5(1) of the Act defines certain terms. The word “property” is defined to mean:

real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property.

1. The phrase “the property of the bankrupt” is relevantly defined in s 5(1) to mean:

(i) the property divisible among the bankrupt’s creditors; and

(ii) any rights and powers in relation to that property that would have been exercisable by the bankrupt if he or she had not become a bankrupt; …

1. Whether or not “property” is “divisible among the bankrupt’s creditors” depends on s 116 of the Act. It relevantly provides:

**116 Property divisible among creditors**

(1) Subject to this Act:

(a) all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge; and

(b) the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his or her own benefit at the commencement of the bankruptcy or at any time after the commencement of the bankruptcy and before his or her discharge; and

(c) property that is vested in the trustee of the bankrupt’s estate by or under an order under section 139D or 139DA; and

(d) money that is paid to the trustee of the bankrupt’s estate under an order under section 139E or 139EA; and

(e) money that is paid to the trustee of the bankrupt’s estate under an order under paragraph 128K(1)(b); and

(f) money that is paid to the trustee of the bankrupt’s estate under a section 139ZQ notice that relates to a transaction that is void against the trustee under section 128C; and

(g) money that is paid to the trustee of the bankrupt’s estate under an order under section 139ZU;

is property divisible amongst the creditors of the bankrupt.

(2) Subsection (1) does not extend to the following property:

…

(g) any right of the bankrupt to recover damages or compensation:

(i) for personal injury or wrong done to the bankrupt, the spouse or de facto partner of the bankrupt or a member of the family of the bankrupt; or

…

and any damages or compensation recovered by the bankrupt (whether before or after he or she became a bankrupt) in respect of such an injury or wrong or the death of such a person;

1. Subject to two qualifications, the combined effect of these provisions is that after-acquired property of a kind described in s 116(2)(g)(i) is not “the property of the bankrupt” as that phrase is defined. It is not divisible amongst the bankrupt’s creditors and so does not vest in the trustee of the bankrupt’s estate: s 58. The qualifications are that the definitions in s 5(1) apply unless a contrary intention appears and that s 58(1) and s 116(1) of the Act are each expressed to apply “subject to this Act”.
2. The objective that compensation for damages for personal injury (as property) not vest in the Trustee is reinforced by s 60(4) of the Act. It permits a bankrupt to continue in his or her own name an action commenced by him or her prior to the commencement of the bankruptcy “in respect of … any personal injury or wrong done to the bankrupt”.
3. The statutory definitions confine the subject matter with which s 58, s 60(4) and s 116 of the Act are concerned. They are concerned with the effect of the debtor’s bankruptcy on his or her property and thus with his or her proprietary rights. They operate on that subject matter by vesting divisible property in the trustee, so that the trustee “steps into the shoes” of the bankrupt in respect of it: *Royal v El Ali* [2016] FCA 782 at [194], citing *Dwyer v Ross* (1992) 34 FCR 463 at 466. Property that is not divisible among the bankrupt’s creditors does not so vest. Non-divisible property includes assets purchased by a bankrupt with “protected money”, which includes money falling within s 116(2)(g) of the Act: see ss 116(2)(n), 116(2D) and 116(3).
4. Part VI of the Act is (and has always been) titled “Administration of Property”. Division 4B was inserted by the *Bankruptcy Amendment Act 1991* (Cth) (the Amending Act). It is entitled “Contribution by bankrupt and recovery of property”. The objects of Div 4B are stated in s 139J:

(a) to require a bankrupt who derives income during the bankruptcy to pay contributions towards the bankrupt’s estate; and

(b) to enable the recovery of certain money and property for the benefit of the bankrupt’s estate.

1. Section 139L of the Act provides that, in Div 4B, “income”, in relation to a bankrupt, has its ordinary meaning, subject to express qualifications, none of which apply to the Benefits. In its ordinary meaning, the word “income” is of wide import: ***Re Weiss****; Ex Parte Official Trustee in Bankruptcy* (1985) 7 FCR 121 at 123 – 124; ***Re Gillies****; Ex parte Official Trustee in Bankruptcy* (1993) 42 FCR 571. As French J said in *Re Gillies* (at 574):

While not necessarily connoting a regular periodicity in payment, the concept of a bankrupt ‘in *receipt* of income’ was said to suggest recurrence as an actual or expected characteristic: *Nette v Howarth* (1935) 53 CLR 55 at 64 per Dixon J, applied to s 131 in *Weissova v Official Trustee in Bankruptcy* (1986) 12 FCR 106 at 110 per Beaumont J (Evatt and Neaves JJ agreeing). See also *Edelsten’s Trustee v Commissioner of Taxation* (1987) 16 FCR 386 at 393 per Burchett J.

(emphasis in original)

1. Section 139P is a key provision. It states:

**139P Liability of bankrupt to pay contribution**

(1) Subject to section 139Q, if the income that a bankrupt is likely to derive during a contribution assessment period as assessed by the trustee under an original assessment exceeds the actual income threshold amount applicable in relation to the bankrupt when that assessment is made, the bankrupt is liable to pay to the trustee a contribution in respect of that period.

(2) Subject to section 139Q, if the income that a bankrupt is likely to derive during a contribution assessment period as assessed by the trustee under an original assessment does not exceed the actual income threshold amount applicable in relation to the bankrupt when that assessment is made, the bankrupt is not liable to, but may if he or she so wishes, pay to the trustee a contribution in respect of that period.

1. The contribution payable by the bankrupt in respect of a contribution assessment period is to be worked out in accordance with a formula specified in s 139S. The formula incorporates defined terms which need not be detailed. In broad summary, the bankrupt is liable to pay a contribution equal to one half of the amount by which his or her income (as assessed by the trustee) exceeds a statutorily prescribed threshold. For the purpose of assessing the amount of the bankrupt’s income, a reduction is to be made to allow for income tax the bankrupt pays or is likely to pay in respect of it: s 139N of the Act.
2. Paragraph 10 of the statement of agreed facts sets out how the statutory formula has been applied by the Trustee of Mr Gittins’ bankrupt estate by reference to the Benefits received by Mr Gittins in the first year of his bankruptcy. The Trustee’s arithmetic is not disputed. As can be seen, the assessment of Mr Gittins’ income has been made having regard to the income tax Mr Gittins has paid or is likely to pay in respect of the Benefits.
3. Section 139T of the Act confers a discretion upon the trustee of a bankrupt estate to determine a higher income threshold amount (and so reduce or eliminate the liability) in cases of proven hardship. The liability created by s 139P is not affected by the discharge of the bankrupt from bankruptcy after the making of the assessment giving rise to the liability: s 139R of the Act.
4. The trustee may permit a contribution to be paid by instalments. Contributions (or instalment towards contributions) are payable at such times as the trustee determines: s 139ZG of the Act.
5. The objectives of Div 4B are reinforced by a number of ancillary and enforcement provisions, notably:
6. Section 139ZG(3), which provides that the total of any contributions or instalments that are not paid by the bankrupt is recoverable by the trustee as a debt due to the estate of the bankrupt. Such a debt may be recovered by the trustee in the exercise of the power conferred by s 134(1)(j) to bring or institute a legal proceeding or action relating to the administration of the bankrupt estate.
7. Section 139U, which compels (by the creation of a criminal offence) a bankrupt to provide information to the trustee in relation to the income derived in a contribution assessment period and the income expected to be derived in subsequent assessment contribution periods.
8. Section 139V, which confers a power on the trustee to require the bankrupt to provide additional evidence of actual or expected income.
9. Subdivision HA, which establishes a detailed supervised account regime so as to require the bankrupt, in cases where the regime is determined by the trustee to apply, to deposit all monetary income into a single account. The trustee may supervise withdrawals from a supervised account, so as to improve the likelihood that a bankrupt will have sufficient money to pay contributions.
10. Section 149D(1)(e) and (f) which respectively specify any failure of the bankrupt to comply with s 139U or to pay a contribution or an instalment in accordance with s 139ZG as alternate bases upon which the trustee may object to the bankrupt’s discharge from bankruptcy.
11. It remains necessary to consider the mechanisms by which a bankrupt’s creditors share in the bankrupt estate. As has been said, s 116 (extracted at [9] above) identifies the “property” that is or is not divisible among a bankrupt’s creditors. The divisible property includes not only that property which vests in the trustee by the operation of s 116(1)(a), but also money that is paid to the trustee pursuant to orders made under certain provisions of the Act or directly under the Act itself: see ss 116(1)(d) to (g). Significantly, money paid by the bankrupt in the nature of income contributions pursuant to s 139P and s 139ZG is not listed in s 116(1).
12. Subject to certain exceptions that do not presently apply, the creditors of the bankrupt may receive payments by way of monetary dividends in accordance with Div 5 of Pt VI. Section 140 relevantly provides:

**140 Declaration and distribution of dividends**

(1) The trustee of the estate of a bankrupt shall, subject to this section, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts.

(2) Subject to the retention of such sums as are necessary to meet the costs of administration or to give effect to the provisions of this Act, the trustee shall distribute as dividend all moneys in hand.

…

1. The phrase “moneys in hand” is not defined. The Trustee submits that the phrase captures all money in the hands of a trustee resulting from the exercise of the trustee’s powers in the administration of a bankrupt estate. The phrase, it is submitted, is not confined to money obtained by the realisation of property that has vested in the trustee and divisible among creditors, but extends to money in the form of contributions paid by the bankrupt, whether in the discharge of the liability imposed by s 139P(1) or voluntarily in accordance with s 139P(2). It is in that way, the Trustee submits, that the objectives of Div 4B of Pt VI of the Act are fulfilled.

# The purpose of s 116(2)(g)

1. In ***Moss******v Eaglestone***(2011) 83 NSWLR 476, the New South Wales Court of Appeal examined the development of the common law of bankruptcy to the extent that it informed or explained the policy considerations underlying provisions such as s 116(2)(g) and s 60(4). The issue in that case was whether a bankrupt was precluded from continuing an action against his former solicitor founded in negligence or breach of contract. Relief claimed in the proposed action included an award of damages for the loss of an opportunity to bring proceedings in defamation claiming compensation for injury to the bankrupt’s personal reputation. In respect of s 60(4), Allsop P (Campbell and Young JJA agreeing) referred to the test stated by Dixon J in ***Cox******v Journeaux*** *(No 2)* (1935) 52 CLR 713 at 721:

The test appears to be whether the damages or part of them are to be estimated by immediate reference to pain felt by the bankrupt in respect of his mind, body or character and without reference to his rights of property.

1. In the application of that test to a claim founded in the tort of defamation, Allsop P said that the remedies available might be such as to enure for the benefit of the bankrupt in some respects, but not in others. As Lord Atkinson concluded in *Wilson v United Counties Bank Ltd* [1920] AC 102 (at 131 ⸺ 132):

In the present case by parity of reasoning it would seem to follow that the negligence of the defendants gave rise to two distinct causes of action, the one consisting of injury to the bankrupt’s estate, the other personal and consisting of injury to his character, credit and repute; the first passing to his trustee, the second remaining vested in himself. If that be so, independent actions could have been instituted against the defendants, the one by the trustee the other by the bankrupt; each claiming damages in respect of the right of action vested in him. I do not think any insurmountable difficulty is created in the present case by the fact that both sue as plaintiffs, since the damages to which they are respectively entitled have been separately found.

1. Provisions such as s 60(4), Allsop P held, require the substance of the matter to be examined, bearing in mind the distinction identified by Lord Atkinson between “person and property”.
2. As to the policy considerations underlying s 116(2)(g), Allsop P said (at [63] ⸺ [64]):

63 In 1966, the Act was passed. As enacted, it contained s 60(4) and introduced s 116(2)(g). Subsequent amendments to those sections have not affected the exemption in respect of personal wrongs. The 1966 Act was preceded by the *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth* in 1962. The committee was chaired by the Hon Sir Thomas Clyne, Federal Judge in Bankruptcy (the Clyne Report). There was no direct discussion in the Clyne Report regarding s 60. Comments were made, however, about the new s 116(2)(g). Paragraph 164 stated that the Committee considered that it should be expressly provided that the property divisible amongst creditors was not to include any right to recover damages or compensation, stating:

‘[164] Such a provision appears to the Committee to be a necessary corollary to clause 60(4) of the Bill, which authorizes a bankrupt to continue, in his own name and for his own benefit, any action or proceeding commenced by him before his bankruptcy for any personal injury or wrong done to himself or to any member of his family. The proposed provision will also make it clear that damages or compensation recovered in respect of such an injury or wrong are equally protected.’

64 Thus, when one comes to the words of s 60(4) and s 116(2)(g) it is to be recognised that the background and context are, through various Colonial and State, and later Commonwealth provisions, reflective of, and embodying, the notions within the common law of bankruptcy. That assists in appreciating that the distinction (in s 60(4) and s 116(2)(g)) between person and property is a substantive one. It was a distinction made by courts and judges of the highest authority who declared it to be unjust and harsh that the estate of the bankrupt and the participating creditors should be swelled and advantaged by a wrong to the person or reputation of the bankrupt.

1. In *Sheehan v Brett-Young & Ors (No 3)* [2016] VSC 39 John Dixon J referred (at [62(f)]) to the same policy considerations as they applied to a claim for the impairment of earning capacity:

… It is well recognised that impairment of earning capacity is compensable without reference to any property right of a plaintiff who sustains injury to his mind body or character. It is not within the contemplation of the *Bankruptcy Act* that compensation for damage to such a personal asset should be available for the payment of provable debts;

1. In ***Berryman*** *v Zurich Australia Ltd* [2016] WASC 196, the plaintiff held an insurance policy pursuant to which the insurer agreed to pay a benefit in a fixed sum in the event that the plaintiff suffered total and permanent disability. Prior to the commencement of his bankruptcy, the plaintiff commenced an action founded in contract to recover a $2 million fixed sum under the contract. The question before the Supreme Court of Western Australia was whether the right of action had vested in the plaintiff’s trustee in bankruptcy pursuant to s 58 of the Act. For the insurer it was argued that the plaintiff had sued to enforce a contractual remedy that was not immediately referrable to the bankrupt’s person or personal feelings and so did not satisfy the test in *Cox v Journeaux*.
2. As to the purpose of s 116(2)(g) and s 60(4), Tottle J said (at [62])

Plainly the purpose of these sections is to protect a bankrupt’s right to compensation for personal injury or wrong from his or her creditors. It is important to appreciate the underlying principle as developed by the common law of bankruptcy, that is, that it was considered harsh and unjust to give the solace for the hurt to the person or personal feelings of the bankrupt to general creditors: *Moss v Eaglestone* at [55] and [64]. To adapt Kirby P’s words in *Daemar v Industrial Commission of New South Wales* compensation for such personal injury or wrong was not part of the ‘legitimate entitlements’ of the creditors.

1. His Honour continued (at [68]):

In *Moss v Eaglestone* Allsop P emphasised the necessity to have regard to the substance of the matter rather than the form of the action. Kiefel J made the same point in *Re Dosanjh; Ex parte Duus* by drawing attention to the real enquiry, that is, whether the monies were payable as compensation for the injury or wrong done. To focus on whether the amount is payable pursuant to a contract or indeed whether the amount is fixed by the contract distracts from the real enquiry. Provided that there is a relation between the amount of compensation and the nature of the injury, neither the fact that the claim is contractual in nature nor that it is for a fixed amount, negate the essential character of the payment as compensation for injury.

1. Tottle J went on to conclude that it was not necessary to show that the personal injury to the plaintiff was one “done to” him by a third party. The word “or” in both s 116(2)(g)(i) and s 60(4) was to be interpreted disjunctively. There was, his Honour held, no policy reason why the provisions should be limited to rights to damages or compensation for personal injuries done to a bankrupt by a third party. Any fixed payment made pursuant to the policy was, his Honour found, immediately referrable to plaintiff’s personal injury in the necessary sense. It was, his Honour concluded, consistent with the objectives of s 116(2)(g), as identified in *Moss* *v Eaglestone*, to characterise the lump sum payment in that way.
2. The reasoning in *Berryman* has been adopted by this and other courts exercising bankruptcy jurisdiction: *MacMahon Contractors Pty Ltd v Lee* [2017] NTSC 33 at [114] – [116]; *Nyoni v Pharmacy Board of Australia (No 4)* [2017] FCA 911 (Siopis J).

# COMMON GROUND

## The Benefits as property

1. The reasoning in *Berryman* addresses only a small part of the controversy in the present case, namely that the Benefits, if they are to be treated as property for all purposes under the Act, would fall within s 116(2)(g) notwithstanding that they are payable under a contract for insurance and notwithstanding that they are fixed at a pre-defined amount and not equivalent to the actual value of Mr Gittins’ lost earning capacity.
2. Significantly, the fixed sum benefit payable under the policy in *Berryman* was not “income” within the meaning of s 139L of the Act and so no question of construction arose as to the interplay between s 116(2)(g) and Div 4B of Pt VI of the Act. None of the cases to which the parties referred directly bore on that question.
3. Both parties invite the Court to proceed on the basis that the Benefits fall within the definitions of “property” and “the property of the bankrupt” in s 5(1) of the Act extracted at [7] and [8] above. The Trustee does not contest Mr Gittins’ submission that, *as property* the Benefits fall within s 116(2)(g)(i). The Trustee does not seek to argue that the reasoning in *Berryman* was plainly wrong and should not be followed.
4. These submissions and concessions are to be understood in the context of the Trustee’s submissions as a whole, particularly the contentions discussed at [42] below.

## The Benefits as income

1. As Mr Gittins properly acknowledged, the Benefits meet the statutory descriptions of both property and income (ignoring for present purposes the qualification “unless the contrary intention appears” in s 5(1) in respect of the property definitions). Their characterisation as “income” is clearly correct. The treatment of regular payments under a contract for income protection insurance as income for the purposes of Div 4B of Pt VI of the Act is consistent with the treatment of such payments in other statutory contexts: see, for example, *Federal Commissioner of Taxation v Smith* (1981) 147 CLR 578; *Watson v Deputy Commissioner of Taxation* (2010) 182 FCR 104; *Watson v Secretary, Department of Family and Community Services* (2003) 128 FCR 564.
2. Section 139L(1)(b) specifically excludes from the definition of “income” certain payments which are not to be regarded as income, whether or not they would otherwise fall within the ordinary meaning of the word. None of the exclusions capture the Benefits.
3. Unlike the definitions of “property” and “the property of the bankrupt”, and unlike s 116(1), Div 4B of Pt VI is not made expressly subject to any other provision of the Act. The definition of “income” in s 139L is exhaustive and, unlike the definitions in s 5(1), it is not subject to a contrary intention appearing.

# CONSIDERATION

1. It is convenient to deal first with Mr Gittins’ contention (inherent in his application for declaratory relief) that the Trustee has “no entitlement to the Benefits”. In my view, this contention raises a false issue.
2. Resolution of the controversy between the parties does not turn on the Trustee’s entitlement *to the Benefits*. The Trustee asserts no such entitlement. He does not assert that the Benefits (or any part of them) are property that has vested in him, whether as after-acquired property or otherwise. Rather, it is the Trustee’s submission that the amount of the Benefits must be factored in when applying a statutory formula which results in an unsecured debt being raised against Mr Gittins. The debt is owed to the bankrupt’s estate. It is the Trustee’s position that the debt arises irrespective of whether the Benefits also meet the description in s 116(2)(g)(i). The Act, it is submitted, is not concerned with the source of the funds from which that unsecured debt might be paid and confers no proprietary interest upon the Trustee in the Benefits, whether to secure its payment or for any other purpose.
3. I accept the Trustee’s submission as to the nature of the rights and liabilities created by the income contribution scheme against a bankrupt.
4. Upon payment of the contribution, the Trustee submits, the money must be paid to Mr Gittins’ creditors, not by reason of the contribution or any part of the Benefits becoming divisible “property”, but because the contribution, once paid, would form a part of the “moneys in hand” under s 140 of the Act.
5. Mr Gittins’ remaining contentions interrelate and may be considered together.
6. The central submission is that s 116(1) is “an exhaustive statement of every form of property that is available to the trustee to pay dividends” and the “only source of a statutory power to make money divisible pursuant to the Act”. He submits that where money (as property) falls within s 116(2)(g) (such that it is not property divisible among creditors and does not vest in the Trustee) then it cannot, by the operation of Div 4B of Pt VI of the Act, become divisible among the bankrupt’s creditors by any other statutory mechanism. That central submission is supported by a number of propositions, each one of which, I conclude, must be rejected.
7. The first is that where the legislature intends that property in the form of recurring payments falling within any one of the descriptors in s 116(2) also be caught by the income contribution provisions, it has evinced that intention by expressly *including* the payments within the extended definition of “income” in s 139L. Payments in the form of an annuity or pension received by the bankrupt under a policy of life assurance or endowment assurance were given as one example: see s 116(2)(d) (which provides that benefits under such policies are not divisible) and s 139L(1)(a)(iii) (which includes such payments within the definition of income, whether or not they would fall within the ordinary meaning of the word). As payments in the nature of the Benefits are not expressly included in the definition, the Act must be construed, the submission goes, so as to exclude them from the operation of Div 4B of Part VI.
8. I do not agree. The definition of “income” is qualified in two ways: the inclusion of certain payments by s 139L(1)(a) and the exclusion of certain payments by s 139L(1)(b). The inclusions and exclusions apply whether or not the payments described within them would fall within the ordinary meaning of the word. Receipts that fall within neither s 139L(1)(a) nor s 139L(1)(b) are to be characterised as income (or not) in accordance with the ordinary meaning of the word. The enactment of a provision expressly excluding the Benefits from the definition of “income” would be an obvious drafting device by which an intention to exclude the Benefits from Div 4B of Pt VI might be made clear. The absence of an express exclusion in s 139L(1)(b) of the Act tells against the asserted implication that Div 4B not operate on the Benefits in accordance with its terms. An express or implied exclusion is necessary because, as Mr Gittins properly concedes, the Benefits would otherwise fall within the ordinary meaning of the word and be captured by Div 4B and, I would add, because the provisions contained in that Division are not made subject to any other provision of the Act.
9. The second argument is that in cases where a contribution is made, Div 4B operates as a “vesting mechanism for income” and, to the extent that a contribution is made, “a bankrupt’s income is divisible property”. Reliance is placed on ***Randall*** *v Deputy Commissioner of Taxation* (2008) 174 FCR 441 Lander J (at [57] – [61]). It is by bringing the Benefits (or at least the contribution) within s 116(1) of the Act that Mr Gittins invokes the exemption in s 116(2)(g) to deny any obligation to pay. To construe the Act in any other way would, he submits, defeat the objectives of s 116(2)(g)(i) and involve a departure from decided authority to which, it is submitted, this Court is bound.

## Authorities

1. In *Re Gillies* an undischarged bankrupt submitted to the Official Trustee a proposal for a composition with his creditors. The proposed composition involved the bankrupt paying a sum of $4,000 held in a bank account to the credit of the bankrupt. The bankrupt had accumulated the money from earnings derived as a contract diver since the commencement of his bankruptcy. The bankrupt had previously paid a contribution to the trustee of his estate in respect of income earned over the “actual income threshold amount” and there was no suggestion that he would not pay a subsequent contribution that had been assessed by the trustee. The trustee applied for directions as to whether the $4,000 saved by the bankrupt had vested in the trustee.
2. French J referred to s 101 of the former *Bankruptcy Act 1924* (Cth) and to the now-repealed s 131 of the Act. His Honour emphasised that neither of those provisions operated to vest the income of a bankrupt in the trustee of the bankrupt’s estate. The language of the formerly enacted s 131 was, his Honour said, more generous to the bankrupt than that of its predecessor s 101, because it imposed on the trustee the burden of satisfying a court that an order should be made requiring a bankrupt to pay a contribution to the bankrupt estate. In the absence of such an order, the bankrupt was expressly entitled to retain his or her income for his or her benefit. French J continued (at 576 – 577):

The *Bankruptcy Act* 1966 no longer contains the equivalent of s 101 of the 1924 Act or the former s 131. Section 101 of the 1924 Act was the foundation of the views expressed by members of the High Court in the *Official Receiver* case which ultimately led to the enactment of s 131. Despite the absence of an equivalent of s 101 of the 1924 Act or s 131, the scheme of Div 4B rests upon the continuing assumption that the income of the bankrupt does not vest in the trustee. The liability to contribute is limited to half the excess of assessed income over the actual income threshold amount. Before it arises, a process of assessment is required to be undertaken by the trustee. It is true that the after-acquired property to which ss 58 and 116 apply is defined widely enough to encompass income. However, in my opinion, the legislative scheme now in place is quite inconsistent with the application of those provisions to after-acquired income. This follows from the comprehensive scheme embodied in Div 4B which approaches a code for dealing with after-acquired income of the bankrupt. There is nothing in the extrinsic material to support a change in the approach to after-acquired income which would bring it within after-acquired property vesting in the trustee. In my opinion such income does not vest in the trustee.

…

The contributions against Mr Gillies in this case give rise to a statutory liability to make the payment determined by the Trustee on the date specified. The liability does not operate to vest accumulated income in the Official Trustee. For the reasons I have previously discussed therefore, the sum of $4,000 accumulated from Mr Gillies’ income since 1 July 1992 is not after-acquired property and can be offered to his known creditors in the form of a composition proposal.

1. French J also referred (at 575) to the explanatory memorandum relating to the amendments which introduced Div 4B into Pt VI of the Act. His Honour said:

Reference was made in the Memorandum to the class of bankrupts who earned large incomes after bankruptcy and for all practical purposes were not required to make any repayment to creditors from that income. The Memorandum went on to outline the statutory mechanism established by the amendments for imposing upon bankrupts a liability to contribute. There was no suggestion in the Memorandum that the amendments would effect a vesting of after-acquired income in the trustee.

1. The principle that a bankrupt’s income does not vest in the trustee was subsequently applied in *Combis, the Trustee of the Property of Landers, a Bankrupt v Harding, Billington and Regan as Executors of the Deceased Estate of Billington* [2014] FCA 1391, *Re Lee* (2012) 207 FCR 96, *Re Sharpe; Ex parte Donnelly* (1998) 80 FCR 536, and *Randall*. In the last mentioned case, Lander J said (at [74]):

If the bankrupt’s income does not vest in the trustee, it must be because it is not property or at least property divisible among the bankrupt’s creditors.

1. His Honour’s reasoning appears to rest on the defined terms in s 5(1) being subject to a contrary intention. It is also consistent with s 116(1) being a provision that is subject to the Act. It also aligns with the views of French J that Div 4B of Pt VI “approaches a code” in respect of payments in the nature of income, to which the provisions of the Act that are concerned with the vesting of property are not intended to apply.
2. Whether s 116 of the Act might apply to assets (property) purchased from the income is, however, a different question. On that topic, the trustee in *Re Gillies* sought a further direction from the Court as to whether a car purchased by the bankrupt with the $4,000 accumulated from his income would be after-acquired property which would vest in the trustee pursuant to s 58(1)(a) and (6) of the Act. French J said (at 577):

No question of an asset purchase, other than the purchase of a motor vehicle, arises in the present case. Provided such motor vehicle would answer the description of property used by the bankrupt as a means of transport and whose aggregate value does not exceed $2,500, then it would not constitute property divisible among the creditors. It would, of course, be open to the creditors under s 116(2)(ca) to authorise expenditure of a greater amount. I am inclined to the view that assets purchased by a bankrupt with after-acquired income will, if not within any of the excluded categories in s 116(2), constitute property divisible among the creditors and vest in the trustee. In my opinion, however, no final decision should be given on this point which is still rather hypothetical.

1. The status of assets purchased from income accumulated by a bankrupt after the commencement of bankruptcy arose again in ***Di Cioccio*** *v Official Trustee in Bankruptcy* (2015) 229 FCR 1. The Full Court (Edmonds, Gordon and Beach JJ) held that shares purchased by a bankrupt using income falling beneath the statutory threshold were property divisible among the bankrupt’s creditors for the purposes of s 116(1) and so vested in the trustee of the bankrupt’s estate by the operation of s 58 of the Act. That part of the judgment is consistent with the tentative views expressed by French J in *Re Gillies* in respect of property acquired with income not otherwise falling within the excluded categories in s 116(2) or (3). As the shares forming the subject matter of the decision in *Di Cioccio* did not meet any of the descriptions in s 116(2), they had vested in the trustee and were divisible among the bankrupt’s creditors. By way of contrast, the Full Court held, property purchased from money that fell within s 116(2)(g) would not vest in the trustee because of the combined operation of s 116(2)(n) and (3).
2. The Full Court construed the Act in its application to the shares as follows:

37 [The provisions in Div 4B of Pt VI] do not address what is, or what is not, the property of the bankrupt divisible amongst the bankrupt’s creditors. The provisions are directed to different concepts. There is no conflict between Div 4B of Pt VI of the Act, and s 58(1)(b) in Div 4 of Pt IV and s 116 in Div 3 of Pt VI of the Act: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70].

38 Why did the Shares acquired by the bankrupt vest in the Official Trustee?

39 As we have seen, a bankrupt is entitled to retain income derived below the *actual income threshold amount* applicable to the bankrupt: see [22]-[23] above. Given that the *actual income threshold amount* applicable to a bankrupt is calculated by reference to pension rates, it is open to infer that it is an amount sufficient to enable a bankrupt to feed, house and clothe themselves and their dependents. However, Div 4B of Pt VI says nothing about how a bankrupt might spend that amount.

40 Conversely, ss 58 and 116 provide that after-acquired property (except for the specific items of property listed in s 116(2), as read with the Regulations) vests in a bankrupt’s trustee. The Act does not prohibit a bankrupt from acquiring a specific item of property. The Act simply deems that after-acquired property vests in the bankrupt’s trustee, unless the property is of a kind specified in s 116(2).

(emphasis in original)

1. Having concluded that the shares had vested in the trustee, the Full Court went on to consider an “anomaly” that was said by the bankrupt to arise should the Court adopt the trustee’s construction. The submission, and the Court’s response to it, are as follows:

41 During the course of argument, counsel for Mr Di Cioccio submitted that if this construction of the Act was adopted, it would create an anomaly. An anomaly was said to arise because an amount standing to the credit of a bank account in the name of the bankrupt would be property (see *Foley v Hill* (1848) 2 HL Cas 28 and [9]-[10] above) that would immediately vest in a trustee (s 58) and be divisible amongst the creditors of the bankrupt (s 116(1)) even if the amounts standing to the credit of the bank account were in fact income derived by the bankrupt below the *actual income threshold amount* applicable to that bankrupt.

42 There are a number of answers to that contention, all found in the Act. First, s 134(1)(ma) provides that, subject to the Act, a trustee may ‘make such allowance out of the estate as he or she thinks just to the bankrupt, the spouse or de facto partner of the bankrupt or the family of the bankrupt’: see [17] above. Section 134 operates as a safety value [*sic*]. It is a provision which assumes that a trustee will act sensibly and fairly. A decision of the trustee is reviewable: s 178 of the Act. Secondly, it is not uncommon for a bankrupt to be required to open a supervised account: s 139ZIE of the Act. Under the supervised account regime, a bankrupt must not make a withdrawal from the supervised account unless, amongst other things, the bankrupt has the consent of the trustee: s 139ZIG(1), (2)(a) and (3). The Act, or at least those provisions of the Act dealing with supervised accounts, suggests that the safety valve provided by s 134 is intended to operate in relation to a bank account into which income derived by the bankrupt below the *actual income threshold amount* applicable to that bankrupt is deposited.

43 Thirdly, s 116 of the Act. The fact that an amount standing to the credit of a bank account in the name of the bankrupt would constitute after-acquired property under s 116(1) is not a complete statement. If, for example, the bankrupt retained the credit balance in the bank account to build up sufficient funds to later buy tools of trade for use in earning income by personal exertion, the amount may arguably fall within the exception provided under s 116(2)(c) as ‘property that is for use by the bankrupt in earning income by personal exertion’. In this context, ‘property’ is defined both for s 116(1) and (2): see [9] above. There is no anomaly.

(emphasis in original)

1. Mr Gittins submits that since the decision of the Full Court in *Di Cioccio* there is a “degree of difficulty in applying” *Re Gillies* and the line of authority that followed. To an extent, I agree. If the Act were to operate so as to vest in the trustee of a bankrupt’s estate an amount standing to the credit of a bank account in the bankrupt’s name comprised of money in the nature of income payments (and so confer proprietary rights in the money as income) it is difficult to comprehend what meaningful work the income contribution scheme would have to do. The closing paragraphs of the judgment in *Di Cioccio* appear to be an unexplained departure from the historical position that the income of a bankrupt does not vest in the trustee. The trustee in *Di Cioccio* laid no claim to the amount credited to the bankrupt in the bank account into which the bankrupt’s income was deposited. Accordingly, the latter part of the reasoning in *Di Cioccio* is properly to be regarded as *obiter*. If I am wrong in that regard, it remains that the conceptual difficulties that might arise in applying that part of the reasoning of the Full Court does not directly arise for resolution in the present case. No statutory liability to pay a contribution arose for consideration by the Full Court and the nature of the liability imposed by s 139P and s 139S was not considered.
2. Consistent with the reasoning in *Di Cioccio*, in the event that Mr Gittins purchased assets with the Benefits, the assets would be “property” but would not be divisible among his creditors because of the combined operation of s 116(2)(n) and (3). But none of that is in issue. As has already been emphasised, the Trustee has not asserted any proprietary rights or interests in the Benefits, or in any assets that might be purchased with that money in the future. Nor does the Trustee assert any proprietary interest in any amount credited to Mr Gittins in any bank account in which the Benefits might have been deposited. The Trustee asserts no proprietary rights as against Mr Gittins at all.
3. In my view, Mr Gittins’ submissions proceed on an assumption that the creation of a liability to pay a debt calculated by factoring the amount of the Benefits into a formula would create an entitlement in the Trustee to the Benefits (or at least a part of them) *as property*. I have rejected that assumption for reasons given earlier.
4. To the extent that the Benefits fall within the definition of income in s 139L, they are not divisible among Mr Gittins’ creditors *because* they are so defined*.* That is so because the regime established by Div 4B of Pt VI “approaches a code” (*Re Gillies* at 577) and because s 116 (which might otherwise capture the Benefits as income payments) is expressed to be subject to the Act. All of that is consistent with the historical position that the income of a bankrupt does not vest in the trustee of the bankrupt’s estate and with the accepted position that s 116 of the Act and Div 4B of Pt VI of the Act are directed to different concepts. There is no need to resort to s 116(2) to remove the Benefits, as income, out of the reach of s 116(1).
5. The liability to pay a contribution does not itself fall within s 116(1)(a) or (b) of the Act. Nor would money received by the Trustee upon the payment of the contribution or any part of it. Accordingly, it is unnecessary to resort to the exclusions in s 116(2) to determine whether the amount paid to discharge the debt is or is not property divisible among the Mr Gittins’ creditors. On its own terms, s 116(1) captures neither the liability for the debt, nor money paid by the bankrupt to the trustee to discharge it.
6. It follows that I reject Mr Gittins’ submission that s 116 of the Act is the sole means by which the sources of money divisible between a bankrupt’s creditors may be identified. To demonstrate the point it is pertinent to consider the operation of the Act in respect of a contribution payable by a bankrupt calculated by reference to “income” that does not also meet the description of property falling within any one of the exclusions in s 116(2). The unsecured debt arising under Div 4B of Pt VI (being a debt owed by the bankrupt to the bankrupt’s estate) would not fall within s 116(1) of the Act, nor would any money paid to the trustee in the discharge of the liability to pay the debt. Nor, for that matter, would any money paid by a bankrupt as a voluntary contribution to his or her estate pursuant to s 139P(2). The mechanism by which that money is paid to creditors is to be found elsewhere in the Act.
7. The Act expressly contemplates numerous ways by which money (not being “the property of the bankrupt” or money received by the trustee on realisation of such property) may be received by the trustee during the administration of a bankrupt estate. Realisation of the property of the bankrupt is not the only way. Section 116 does not, for example, contain any reference to money the trustee might receive in satisfaction of an order made pursuant to s 139ZQ in relation to transactions that are void against the trustee under ss 120, 121 or 122. Such money is clearly intended to be divisible among creditors, just as money obtained by the direct recourse to proprietary rights in relation to the subject matter of a void transaction must be. All of that tends toward a construction that gives s 140 of the Act a wide meaning so as to include property divisible among creditors within the meaning of s 116, *and* money received by the trustee by the operation of provisions having nothing to do with the vesting or realisation of the bankrupt’s property, including provisions such as s 139P and s 139S.

## Objectives

1. It remains to consider Mr Gittins’ submission that to adopt this construction of the Act would defeat the manifest objective of s 116(2)(g) as explained in cases such as *Moss v**Eaglestone*, *Cox v Journeaux* and *Berryman*.
2. By entering the contracts, Mr Gittins protected himself against an economic loss associated with the occurrence of a physical injury. The compensation for personal injury in the present case takes that form because that is what Mr Gittins contracted for. He contracted to receive an alternative income stream should he be rendered unable to earn an income from his personal exertions. The cases identifying the objective of s 116(2)(g) do not concern the construction of the Act in its application to an insurance contract promising benefits in the form of an income stream.
3. The objective that a bankrupt should retain the benefits of his or her income has historically been (and remains) subject to provisions that may require the bankrupt to make a contribution toward his or her estate. The contribution is payable whether or not the income is derived by the personal exercise of the bankrupt’s earning capacity. Had Mr Gittins not lost his earning capacity, his income as a dentist would be subject to the provisions of Div 4B of Pt VI of the Act in the manner I have described and the contributions would be divisible among his creditors in accordance with s 140 of the Act. Viewed in that way, it is difficult to see how the creditors of the bankrupt in that situation could be *unjustly* swelled or advantaged by the application of the income contribution scheme to the Benefits.
4. It is true that Mr Gittins’ overall financial position is less advantageous than it would be if a liability to contribute to his bankrupt estate did not arise. However, that is an outcome affecting all bankrupts who derive higher incomes giving rise to a statutory liability to pay a contribution. The outcome is clearly intended notwithstanding that the income does not vest in the trustee of the bankrupt’s estate and notwithstanding that the income is not property divisible among the bankrupt’s creditors. If there is a conflict between the objectives of the income contribution scheme and the objectives of s 116(2)(g) of the Act, for all of the reasons given above, the objectives of the income contribution scheme are to be given precedence.
5. The application should be dismissed with costs.

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| I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth. |

Associate:

Dated: 29 June 2018