FEDERAL COURT OF AUSTRALIA

Shaw v Yarranova Pty Ltd [2016] FCA 88

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| File number: | VID 774 of 2014 |
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| Judge: | **PAGONE J** |
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| Date of judgment: | 15 February 2016 |
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| Catchwords: | **BANKRUPTCY** – application to annul bankruptcy – sequestration order – whether applicant indemnified from paying debts set out in bankruptcy notice and creditor’s petition – whether respondent lacked legal standing to be named as creditor – whether applicant solvent – whether court should look behind judgment upon which sequestration order based – whether solicitors for respondent creditors had authority to act – exercise of discretion to annul bankruptcy – conduct of applicant relevant to exercise of discretion  |
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| Legislation: | *Bankruptcy Act 1966* (Cth) s 153B |
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| Cases cited: | *Bulic* *v Commonwealth Bank of Australia Limited* [2007] FCA 307*Francis v Eggleston Mitchell Lawyers Pty Ltd* [2014] FCAFC 18*Hacker v Weston* [2015] FCA 363*Halliday v High Performance Personnel Pty Ltd (in liq)* (1993) 67 ALJR 678*Hawksford v Hawksford* [2005] NSWSC 463*Makhoul v Barnes* (1995) 60 FCR 572*Marek v Tregenza* (1963) 109 CLR 1*Ozer v Australian Liquor Marketers Pty Ltd* [2001] FCA 1197*Re Flatau; ex parte Scotch Whisky Distillers Limited* (1888) 22 QBD 83*Re Lawson* (1939) 11 ABC 137*Re Sarina; ex parte Wollondilly Shire Council* (1980) 32 ALR 596*Reaper v Baycorp Collections PDL (Australia) Pty Ltd* [2014] FCA 13*Shaw v Yarranova and Another* (Unreported, Supreme Court of Victoria, 2 June 2008)*Shaw v Yarranova Pty Ltd* [2011] VSCA 55*Shaw v Yarranova Pty Ltd* [2014] FCA 557*Stankiewicz v Plata* [2000] FCA 1185*Wolff v Donovan* (1991) 29 FCR 480*Wood v Inglis* [2008] NSWSC 1147*Yarranova Pty Ltd v Shaw* *(No 2)* [2014] FCA 616 |
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| Date of hearing: | 21-22 April, 20-21 July and 21-23 December 2015 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
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| Counsel for the Applicant: | The applicant appeared in person |
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| Counsel for the Respondents: | Mr P Fary |
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| Solicitor for the Respondents: | Arnold Bloch Leibler |
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| Solicitor for the Official Trustee in Bankruptcy: | Ms N Angelo of Harris Carlson Lawyers |

ORDERS

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|  | VID 774 of 2014 |
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| BETWEEN: | JOHN RASHLEIGH SHAWApplicant |
| AND: | YARRANOVA PTY LTD (ACN 077 517 616)First RespondentNEWQUAY STAGE 2 PTY LTD (ACN 086 482 644)Second Respondent |

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| JUDGE: | PAGONE J |
| DATE OF ORDER: | 15 February 2016 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the respondents’ costs.

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

REASONS FOR JUDGMENT

PAGONE J:

1. On 17 December 2014 Mr Shaw commenced this proceeding under s 153B of the *Bankruptcy Act 1966* (Cth) to have annulled, or to have set aside, a sequestration order which had been made on 11 June 2014 by Gordon J in *Yarranova Pty Ltd v Shaw* *(No 2)* [2014] FCA 616. Mr Shaw’s application was accompanied by an affidavit dated 17 December 2014 setting out his grounds in general terms. Mr Shaw subsequently filed additional affidavits adding to his grounds including an affidavit made on on 30 June 2015 seeking leave to include, or to add to, his grounds. The hearing of Mr Shaw’s application took several days over many months because the hearing exceeded the times which had been allocated on several occasions on the basis of the parties’ estimates.
2. The unfortunate history leading to Mr Shaw’s sequestration can be found in the many reported decisions involving the dispute between him and the respondents, including the reasons for decision of Gordon J in *Yarranova Pty Ltd v Shaw* *(No 2)* [2014] FCA 616 in which the sequestration order was made. The genesis was a contract entered into by Mr Shaw on 12 April 2000 for the purchase by him of an apartment in the Docklands in Melbourne which had been sold to him by Yarranova Pty Ltd (“Yarranova”) as nominee for MAB Docklands Pty Ltd (“MAB Docklands”). On 13 December 2000 Yarranova assigned the benefit of its interest in the contract to NewQuay Pty Ltd (“NewQuay”) as nominee for MAB Docklands. Mr Shaw was subsequently given written notice of the assignment from Yarranova to NewQuay, and in July 2002 NewQuay called on Mr Shaw to complete the contract by paying the balance of the purchase price. Mr Shaw did not complete the purchase of the apartment, maintaining that the works were incomplete, and in August 2003 NewQuay served on Mr Shaw a notice of default and rescission. Mr Shaw subsequently forfeited his deposit and ceased to be entitled to the benefit of the contract. In October 2003, however, Mr Shaw lodged a caveat over the title to the apartment, and on 1 December 2003 he commenced unsuccessful proceedings against both Yarranova and NewQuay in the Supreme Court of Victoria seeking specific performance of the contract which had been rescinded after his failure to complete the contract when called upon by NewQuay. Mr Shaw also was unsuccessful in an appeal from those proceedings and, significantly for Mr Shaw’s application under s 153B, was ordered to pay the costs of Yarranova and NewQuay and to pay damages sustained by them by reason of a stay which he had obtained on 26 May 2006 upon his undertaking to the Supreme Court of Victoria to pay security for the stay and to pay damages that might be occasioned by reason of the stay. The costs against Mr Shaw in his dispute with Yarranova and NewQuay have grown over the years from some $60,000 in September 2009 to $412,891.64 by 11 October 2011 as a result of numerous costs orders made against Mr Shaw during that period in favour of Yarranova and NewQuay: see *Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616 at [22].
3. On 14 December 2012 Mr Shaw was served with a bankruptcy notice in reliance upon the debts owed to Yarranova and NewQuay on account of unpaid costs orders. On 24 December 2012 Mr Shaw applied for an order extending the time for compliance with the bankruptcy notice and for an order seeking to set aside the bankruptcy notice. Time for compliance was extended on 21 February 2013 pending the hearing of another application by Mr Shaw in the Supreme Court of Victoria. On 3 August 2013 Mr Shaw commenced proceedings in this Court against Yarranova and NewQuay which were summarised by Gordon J in *Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616 at [27]:

On 3 August 2013, Mr Shaw filed proceeding VID 796 of 2013 in the Victorian Registry of the Federal Court of Australia against the applicant creditors (and some others). Mr Shaw alleged the tort of conspiracy, fraud, the tort of deceit, fraudulent concealment, breaches of s 52 of *the Trade Practices Act 1976* (Cth), unconscionable conduct, breaches of the *Corporations Act 2001* (Cth) and the tort of intimidation. On 31 October 2013, Jessup J heard the applicant creditors’ application for summary judgment or a permanent stay of the proceeding. On 22 November 2013, Jessup J gave judgment for the applicant creditors: *Shaw v MAB Corporation Pty Ltd* [2013] FCA 1231. Mr Shaw sought leave to appeal from those orders and an extension of time in which to make that application. On 17 February 2014, Mortimer J granted Mr Shaw’s application for an extension of time but dismissed his application for leave to appeal the orders of Jessup J: *Shaw v MAB Corporation Pty Ltd* [2014] FCA 62. On the same day, Jessup J ordered Mr Shaw to pay the applicant creditors’ costs of the proceeding before him on an indemnity basis: *Shaw v MAB Corporation Pty Ltd (No 2)* [2014] FCA 88.

The application which Mr Shaw had made on 24 December 2012 to set aside the bankruptcy notice (which had been served on him on 14 December 2012) was heard by Judge Burchardt on 7 August 2013 and was dismissed by his Honour on 25 October 2013. On 20 December 2013 Yarranova and NewQuay thereafter filed a creditors’ petition for a sequestration order which was determined by Gordon J on 11 June 2014 in *Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616. In the meantime an appeal against the decision by Judge Burchardt dismissing Mr Shaw’s application to set aside the bankruptcy notice was itself dismissed with costs on 28 May 2014: *Shaw v Yarranova Pty Ltd* [2014] FCA 557.

1. Mr Shaw’s present application was originally based upon four unparticularised general grounds in five paragraphs in the affidavit dated 17 December 2014 filed with his application. The first paragraph of the affidavit contended that the bankruptcy notice and creditors’ petition were false and misleading as both Yarranova and NewQuay, or either of them, had “not incurred and [were] not liable for the costs claimed in the judgment debts supporting the bankruptcy notice & creditors’ petition”. The second paragraph raised as an alternative ground that Yarranova did “not have legal standing to be named as a creditor on the bankruptcy notice and/or creditors’ petition as Yarranova assigned [its] power of attorney & benefit of contract to NewQuay in December 2000”. The third paragraph alleged that Yarranova “was not a bona fide party to any of the proceedings that resulted in the costs orders and judgment debts”. The fourth paragraph asserted in the alternative that Mr Shaw “was not insolvent at the time the sequestration order was made”. There were no particulars of the four matters claimed in the affidavit, and there was no evidence in the affidavit, in support of any of those grounds, but in paragraph 5 Mr Shaw stated that he intended to support his application “with further affidavit evidence”. Mr Shaw subsequently filed affidavits dated 30 January 2015, 16 March 2015, 31 March 2015, 30 June 2015, 3 December 2015 and 18 December 2015. Mr Shaw also gave oral evidence at the hearing of his application and cross-examined witnesses who had made affidavits on behalf of Yarranova and NewQuay.
2. Mr Shaw’s grounds were ultimately as set out in an affidavit made by him dated 30 June 2015 in which he sought leave to include grounds “as outlined” in an earlier affidavit of 30 January 2015 and to make further amendments to his grounds as follows:

a. the sequestration order be annulled or set aside on the basis that the bankruptcy notice and/or creditors petition was false & misleading as both Yarranova & Newquay and/or Yarranova have not incurred and are not liable for the costs claimed in the judgment debts supporting the bankruptcy notice &/or creditors petition. The creditor's petition and the supporting affidavit of debt is misleading & defective & if the true facts were known would not have been issued by the receiver or a sequestration order made.

b. despite the existence of the judgement orders in the respondent's names I submit that fresh evidence obtained (during bankruptcy proceedings) since the costs were taxed will show that the *Costs* *Indemnity principle* operated to indemnify me from paying any costs that the respondents are not liable for.

c. the sequestration order to be set aside or annulled on the basis that Yarranova &/or Newquay does not have legal standing to be named as a creditor on the bankruptcy notice and/or creditor's petition as Yarranova assigned it power of attorney & benefit of contract to Newquay in Dec 2000

d. The assignment of benefit of contract from Yarranova to Newquay executed in Dec 2000 means that Yarranova cannot be regarded as a bona fide creditor for the purposes of the Bankruptcy Act

e. The legal services were procured by MAB Docklands Pty Ltd purchase order & the costs claimed have been invoiced to MAB Docklands Pty Ltd that was liable for those costs under Corporations Law & the principle of Estoppel established over several years of invoicing MAB Docklands & MAB Docklands arranging for those invoices to be paid without recourse to the respondents.

f. Yarravova was not a bona-fide party to any of the proceedings that resulted in the costs orders and judgement debts that support the bankruptcy notice and creditors petition and as such cannot be Yarranova considered to be a bona fide creditor.

g. the sequestration order to be set aside or annulled on the basis that I was not insolvent at the time the sequestration order was made.

h. I seek to ask the court to go behind the judgement debts to establish whether in Bankruptcy law Yarranova (and or Newquay) is a bona fide creditor & if not whether the creditor's petition is therefore invalid or has been issued in error or the sequestration order should be annulled.

i. despite Yarranova’s &/or Newquays name appearing as a party in the damages assessment, this was a sham arrangement protecting respective unit trusts and Yarranova&/or Nwewquay had no standing to claim damages before AsJ Daly, did not incur & has no obligation to pay any legal expenses and consequently has no standing as a creditor in accordance with the requirements of the Bankruptcy Act.

The nine matters in Mr Shaw’s 30 June 2015 affidavit appear to raise four broad grounds which can conveniently be considered in four groups and are broadly similar to the matters which had been set out in the initial affidavit of 17 December 2014. The matters listed above as (a), (b), (e) and (h) are to the effect that Mr Shaw was indemnified from paying the costs upon which the bankruptcy notice and creditors’ petition were founded because the costs were not supported by the true facts. This group was dealt with in written submissions on behalf of Yarranova and NewQuay as “the indemnity principle ground” and seeks to go behind the judgment debts. The three matters listed as (c), (d) and (f) contended, in effect, that Yarranova lacked the legal standing to be named as a creditor on the bankruptcy notice or the creditors’ petition. This group was referred to as the “no legal standing ground” in the written submissions for Yarranova and NewQuay. The matter listed with the letter (i) maintains that the claims by Yarranova and NewQuay for their costs was a “sham” and, like the first group, seeks to go behind the judgment debts. This matter was described as the “fraud ground” in the written submissions for Yarranova and NewQuay. Mr Shaw conceded in oral submissions both that there was no evidence to support his claim of “sham” in respect of the unit trusts and that the word “fraud” was too strong an allegation, but otherwise maintained the ground on what he described as a “wider” basis than fraud. The ground listed as (g) continued the claim which Mr Shaw had made in his affidavit of 17 December 2014 that he was not insolvent at the time the sequestration order was made (“the solvency ground”).

1. The power in s 153B of the *Bankruptcy Act* to annul a bankruptcy is discretionary but the power is made conditional upon the Court being satisfied that the sequestration order ought not to have been made. The section provides:

(1) If the Court is satisfied that a sequestration order ought not to have been made or, in the case of a debtor’s petition, that the petition ought not to have been presented or ought not to have been accepted by the Official Receiver, the Court may make an order annulling the bankruptcy.

The terms of s 153B impose a heavy burden upon an applicant seeking to rely upon its provision. An applicant under s 153B must satisfy the Court that the sequestration order ought not to have been made and must also satisfy the Court that the Court should exercise its discretion by annulling the bankruptcy: see *Hacker v Weston* [2015] FCA 363 at [18]. Tracey J summarised the principles applicable to the exercise of the power conferred by s 153B in *Bulic* *v Commonwealth Bank of Australia Limited* [2007] FCA 307 at [12] (in a passage approved by the Full Court in *Francis v Eggleston Mitchell Lawyers Pty Ltd* [2014] FCAFC 18 at [16]) saying:

(1) An order can be made under s 153B(1) of the Act notwithstanding that the applicant has been discharged from bankruptcy; *Re Oates; ex parte Deputy Commissioner of Taxation* (1987) 17 FCR 402.

(2) An applicant who seeks an annulment of his or her bankruptcy “carries a heavy burden”. It is incumbent on an applicant “to place before the Court all relevant material with respect to his or her financial affairs so that the Court may be properly informed and may make a judgment that is based on the actual circumstances of the applicant”: *Re Papps; Ex parte Tapp* (1997) 78 FCR 524 at 531.

(3) In determining whether or not a sequestration order “ought not to have been made” the Court is not confined to a consideration of whether the order should have been made on the facts known to the Court at the time at which it was made. The Court must take account of facts, known at the time at which the sequestration order was made and at which it determines an annulment application, even if those facts were not before the Court at the time at which the sequestration order was made: *Boles v Official Trustee in Bankruptcy* (2001) 183 ALR 239 at 243; *Re Raymond; ex parte Raymond* (1992) 36 FCR 424 at 426.

(4) A sequestration order “ought not to have been made” if, on the facts known at the time of the annulment application, the Court would have been bound not to make the sequestration order: *Re Frank; ex parte Piliszky* (1987) 16 FCR 396.

(5) The Court will be so satisfied if it is established that the debtor was not, at the time the sequestration order was made, indebted to the petitioning creditor: *Re Deriu* (1970) 16 FLR 420 at 422.

(6) If the Court is so satisfied, it is not precluded from annulling the bankruptcy because the bankrupt had not sought to have the default judgment set aside or failed to oppose the creditor’s petition or failed to seek a review of the sequestration order: *Re Raymond; ex parte Raymond* (1992) 36 FCR 424 at 426.

(7) The power conferred on the Court by s 153B(1) is discretionary in nature. Even if persuaded that the sequestration order ought not to have been made, the Court can, in appropriate circumstances, decline to annul the bankruptcy: *Boles v Official Trustee in Bankruptcy* (2001) 183 ALR 239 at 243.

(8) Considerations which may have a bearing on the exercise of discretion include unexplained delay in the making of the application, whether or not the applicant is solvent, whether or not the applicant has made full disclosure of his or her financial affairs and a failure by the bankrupt to oppose the creditor’s petition and attend the hearing at which the sequestration order was made: *Re Williams* (1968) 13 FLR 10 at 24-5; *Boles* at 247; *Re Papps; ex parte Tapp* (1997) 78 FCR 524 at 531; *Rigg v Baker* [2006] FCAFC 179 at [79]; *Cottrell v Wilcox* [2002] FCA 1115 at [7]. Additional considerations are collected in D. A. Hassall, “Annulment of Bankruptcy and Review of Sequestration Orders” (1993) 67 ALJ 761 at 766.

Issues relevant to the exercise of the Court’s discretion include the conduct of the bankrupt (see *Marek v Tregenza* (1963) 109 CLR 1, 4-5; *Ozer v Australian Liquor Marketers Pty Ltd* [2001] FCA 1197, [29]-[34]) and whether the annulment is for the benefit of creditors and “will be conducive or detrimental to commercial morality and to the interests of the public” (see *Re Lawson* (1939) 11 ABC 137 at [139]).

1. It may be convenient to consider first Mr Shaw’s claim to have been, and to continue to be, solvent. Mr Shaw’s solvency was a relevant consideration to the exercise of the Court’s discretion when making the sequestration order under s 52 and is relevant to whether the sequestration order ought not to have been made for the purposes of s 153B. It is not mandatory for the Court to make a sequestration order under s 52 of the *Bankruptcy Act 1966* (Cth) if a debtor is unable to pay his or her debts (*Re Sarina; ex parte Wollondilly Shire Council* (1980) 32 ALR 596, 600), but the debtor, in this case Mr Shaw, bore the onus of establishing solvency in the sense of being “able to pay his” debts within the meaning of s 52(2)(a). An ability to pay debts is not the same as a willingness to do so (see *Re Sarina,* 597, 599-600) and Mr Shaw maintained an unwillingness, but not an inability, to pay his debts to the respondents, contending that he was not insolvent (as well as contending that the debts were not properly due).
2. Mr Shaw had not provided a statement of his affairs in the proceeding before Gordon J, but maintained a belief that his assets exceeded the amounts claimed at the date of the making of the sequestration order. In an affidavit dated 30 January 2015 Mr Shaw said, as his explanation for not having provided direct evidence of his assets at the time the sequestration order was made, that he believed that his assets would have to be taken into account by the Court in that proceeding because “the creditors had already obtained a freezing order over [his] asset base to a value of $450,000”.
3. Mr Shaw did not provide a statement of his affairs in his application for annulment under s 153B but sought to give evidence relating to his assets and about the respondents’ state of knowledge from 2009 about his assets. Mr Shaw claimed to have “an asset base well in excess of” $1 million including access to the proceeds of sale of his interest in a property at Mast Gully Road in Upwey. The sale of that property, and Mr Shaw’s role in the attempts by the Sheriff to sell the property, was the subject of cross-examination of him, but for present purposes it may be assumed that Mr Shaw has the interest that he claimed. Three properties were identified by Mr Shaw with values ascribed by him amounting to $1,450,000. The properties included (a) 5 Mast Gully Road, Upwey which Mr Shaw valued at about $400,000 on the basis of a Valuer General’s valuation of $310,000 in December 2009 prior to it being auctioned by the Sheriff, (b) Units 5 and 12 Tivoli Road, South Yarra valued by Mr Shaw at $350,000 based on the sale of similar units in the same block, and (c) 116 Gwynne Street, Richmond estimated at $700,000 by Mr Shaw on an agent’s valuation. Mr Shaw’s affidavit of 30 January 2015 went on to say that he “had net assets potentially worth in the order $1.5 million”, excluding vehicles and minor personal assets, after taking into account encumbrances to the National Australia Bank on a line of credit and superannuation funds available to him as at the date of the sequestration order made in May 2014. Mr Shaw returned to these matters in a subsequent affidavit made on 31 March 2015 in which he deposed as to his income from casual employment, savings and rental income.
4. I accept that Mr Shaw had access to assets in May 2014 in excess of the judgment debt due to the respondents. The availability of those assets are relevant to Mr Shaw’s solvency as at the date of making of the sequestration order but it is not sufficient to establish solvency for Mr Shaw to say that he had assets that could be realised without having taken any steps to do so or without showing that he could do so within a relatively short time: *Stankiewicz v Plata* [2000] FCA 1185, [30]-[32]; *Reaper v Baycorp Collections PDL (Australia) Pty Ltd* [2014] FCA 13, [11]. Mr Shaw has not demonstrated that in May 2014, or if relevant, at any time thereafter, he was in a position to “realise assets, sufficient to pay the debt, within a relatively short time”: *Stankiewicz*, [30]. In cross-examination Mr Shaw conceded that he had taken no steps to sell any of his properties by May 2014 and that there was “no way” he could borrow money, saying:

I mean, it’s just too – not practical. I mean, I – I virtually had no income. There’s just – there’s just – you know, subject to freezing orders, how can I borrow?

Mr Shaw’s answer in cross-examination to the effect that he had “no income” is to be understood as him having a lack of “surplus income” rather than no income at all, because it is plain from the evidence that he has had at least casual employment income in addition to some savings and some rental income from his properties. The amounts available to him, however, are not sufficient to discharge his debts in a relatively short time. Mr Shaw’s position is not shown by him to be that of a solvent creditor who is able but unwilling to pay debts in a relatively short time if called upon to do so. His position is, rather, that of a debtor with assets but who is not able to pay his debts in a relatively short time and who is also unwilling to pay them. A document described as “J Shaw Assets as at 30 May 2014” created by Mr Shaw, and exhibited to his 16 March 2015 affidavit, listed a total available amount of cash at bank of about $31,000 with about $35,000 credit available to him from the National Australia Bank. The total cash available to him was, however, less than the debt shown in the same document due to Rigby Cooke solicitors of $70,000 and well below the total liabilities disclosed by him aggregating in that document to $683,971. In submissions Mr Shaw repeated his claim that he had taken no steps to sell any of his properties and gave as his justification that his assets had been subject to a freezing order. However it is not possible to accept his excuse as genuine because in cross-examination Mr Shaw accepted that the freezing orders contained an exception to permit him to pay the respondents. Mr Shaw claimed in his statement of assets that he had a net asset position of $1,013,935 as at 30 May 2014 but he did not show an ability to pay his debts within a reasonable time and has not established his solvency.

1. The other three groups of grounds raised by Mr Shaw seek either to go behind the judgment upon which the sequestration order was based or, for reasons similar to those upon which he seeks to go behind the judgment, seek to impugn the basis upon which the creditors relied upon the judgment in issuing the bankruptcy notice or signing the creditor’s petition. The Court may go behind a judgment to see whether in truth and reality a debt was due if there is sufficient reason to question the existence of a real debt. In *Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616 Gordon J said at [69]:

The principles for going behind a judgment were summarised by Robertson J in *Xu v Wan Ze Property Development (Aust) Pty Ltd* *(in liquidation)* [2014] FCA 61 at [55]ff. The applicable principles may be summarised as follows:

1. The Court may, in an appropriate case, go behind a judgment to see whether in truth and reality a debt is due from the judgment debtor to the judgment creditor: *Corney v Brien* (1951) 84 CLR 343 and *Wren v Mahony* (1972) 126 CLR 212.

2. An appropriate case may include where a judgment debt that has been obtained by fraud or collusion or where there has been some miscarriage of justice: *Corney* at 347-348 and 352-353 and *Emerson v Wreckair Pty Ltd* (1992) 33 FCR 581 at 588.

3. If the judgment in question followed a full investigation at a trial on which both parties appeared, the court will not reopen the matter unless a *prima facie* case of fraud or collusion or miscarriage of justice is made out: *Corney* at 356.

4. The enquiry involved is a two stage process enquiring (1) as to whether there is sufficient reason to question the existence of a real debt behind the judgment and (2) if there is, determining that issue. These two steps may be determined together or independently: *Makhoul v Barnes* (1995) 60 FCR 572 at 584 and *Wolff v Donovan* (1991) 29 FCR 480.

The fact that the Court can go behind the judgment debt does not entitle an applicant to require the Court to do so without reason. The “two stage process” referred to in *Makhoul v Barnes* (1995) 60 FCR 572 and *Wolff v Donovan* (1991) 29 FCR 480 requires the Court to be satisfied that there is “sufficient reason” to look behind the judgments relied upon. In *Wolff v Donovan* Davies J explained at 481 that in an “appropriate case” a court “both may and should go behind a judgment to ascertain that the debt relied upon is a good debt, a debt due in truth and reality”. His Honour explained that a bankruptcy court “will go behind [a judgment obtained by default] provided that a ground for questioning the truth and reality of the debt has been raised”. In the joint judgment of Lee and Hill JJ their Honours similarly explained at 486 that “it will not be in every case that the Court will go behind a judgment” and adopted what had been said by Lord Esher in *Re Flatau; ex parte Scotch Whisky Distillers Limited* (1888) 22 QBD 83 at 85-86 that “the Court will not go behind the judgment as a matter of course but only if appropriate circumstances are shown to exist”. In *Makhoul v Barnes* (1995) 60 FCR 572 the Court said at 584:

It is clear that in not all cases will the Court go behind a judgment debt to see if there is a real consideration. It will do so only where reasons are shown for questioning whether there was really a debt: *Boral Johns Perry Industry Pty Ltd v Piccardi* (unreported, Federal Court, Full Court, 23 June 1989), p 13. The existence of the judgment will be prima facie evidence of the debt and the Court will not go behind the judgment as a matter of course: *Re Flatau; Ex parte Scotch Whisky Distillers Ltd* (1888) 22 QBD 83 at 85-86 per Lord Esher MR.

The two step process contemplated by these authorities draws attention to the need for the person seeking to go behind the judgment to establish that there are reasons for questioning whether there was really a debt. The two stage process may be determined together or independently as required by the facts (see *Makhoul v Barnes* (1995) 60 FCR 572, 584; *Wolff v Donovan* (1991) 29 FCR 480, 486-7), but the party seeking to go behind the judgment must satisfy the Court that there is reason for doing so. In this case the judgment debt relied upon by the respondents arose from proceedings commenced by Mr Shaw against them in which he was unsuccessful. The undoubted fact in Mr Shaw’s case is that he was ordered by a court to pay costs to the respondents in proceedings which he had elected to bring against them and Mr Shaw did not establish that there was a reason to go behind the judgment upon which the sequestration order was based.

1. Mr Shaw sought to cast doubt upon the judgment debt, and the subsequent creditors’ petition, by asserting claims without foundation that the respondents were not entitled to the costs which had been ordered in their favour or were not authorised to have issued the bankruptcy notice or to have sought the sequestration order. Many of Mr Shaw’s contentions, upon which his claims depend, have previously been argued and determined against him. His reliance upon the indemnity principle ground, for example, had been fully agitated and had been dealt with and decided against him by a number of courts, including those exercising bankruptcy jurisdiction: see *Shaw v Yarranova Pty Ltd* [2011] VSCA 55, [8]-[16]; *Shaw v Yarranova Pty Ltd* [2014] FCA 557, [47]-[56]; *Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616, [89]. His claim that either Yarranova or NewQuay lacked legal standing to seek costs is misconceived in circumstances where the costs had been ordered in favour of both respondents in proceedings which he had commenced against them. His more particular complaint that Yarranova “was not a bona fide party to any of the proceedings that resulted in the cost orders and judgment debts” cannot be accepted since Yarranova had been made a defendant by Mr Shaw. Mr Shaw’s oral submission that Yarranova was otherwise not entitled to the fruits of the judgment and ought not to have applied for costs were assertions by him without foundation and were inconsistent with his conduct in having made Yarranova a party to the proceeding which he lost: it was a party to the proceedings, he had made it a party, he had lost the proceedings, and it was awarded the costs incurred in the proceedings which he had commenced.
2. Although Mr Shaw had no foundation to support his claim that Yarranova or NewQuay were not entitled to the costs that were awarded in their favour against him, he sought to explore possibilities, by numerous interlocutory proceedings, cross-examination and assertions of inference, which might provide the evidence he lacked. Mr Shaw sought to contend, for example, that Arnold Bloch Leibler (“ABL”) had lacked authority to incur costs in providing legal services in defending proceedings on behalf of those for whom they acted in the proceedings he had commenced against their clients. There was no suggestion that the costs were not incurred or that the proceedings he had commenced had not been successfully defended by ABL. His submissions were, rather, that those he had sued were not entitled to claim the costs following his unsuccessful action and that what prevented their entitlement might possibly be found if he were allowed to explore their material. I am unable to accept any of Mr Shaw’s submissions as being anything more than an expression of an unfounded hope.
3. Mr Shaw’s submission that Yarranova or NewQuay were not entitled to have their costs paid was based in part upon his lack of understanding of corporate group accounting and, in particular, his lack of understanding of the accounting between companies in a group of companies, and of the role played in such a group of a company providing a treasury function for the group. Mr Shaw pursued in cross‑examination (and in applications for discovery, notices to produce, and subpoenas) the hypothesis that Yarranova and NewQuay had incurred no costs because any legal fees had been formally billed to, or paid by, a group company which acted as the finance company in the group rather than to the two companies actually sued by him and for whose proceeding the costs were incurred. His cross-examination of the witnesses on this issue, and his submissions, revealed that Mr Shaw’s hypothesis was not based upon any evidence that the costs were not properly owed by him to those who had the benefit of the costs orders, but was based, at most, upon a misunderstanding of group accounting and upon a hope of finding a lack of obligation to pay where no lack could be seen. Mr Shaw may have had a grievance about the way he had been treated by the respondents, and may have formed a suspicion that perhaps the companies he had sued might, somehow, not have been entitled to the costs which had been incurred in defending his actions against them, but he had, and there was, no basis for his claim. In cross‑examination Mr Shaw was asked about the basis of his belief that “the debt [was] not a true debt” and replied by saying:

What is that belief based on?---Based on all of the – yes, the research and, you know, obviously the – and my – I mean, and I say this in my affidavit, that, you know, I – quite frankly, I just could not comprehend that a company of the size they are, with the resources they have, would not see fit to provide some measly invoices at the press of a button on a word processor, just to say, “Here, look, that’s what you want. Go away and pay us the money,” you know? You know, and this is what has, I guess, fuelled my suspicion over many, many years. And, you know, and of course, the information that I’ve been getting piecemeal over the years has been like pulling teeth. And that has caused me to look much harder than I thought I would ever have to. And, you know, I mean, I never heard of the indemnity principle until I started looking, and then, of course, I – “Oh, the indemnity principle, what does that mean?” And, of course, you read into it and, “Oh, well, maybe that’s part of it,” you know? I mean, and it hasn’t been proven by Woods AsJ that the indemnity principle hasn’t displaced. It just means that in that hearing I was unsuccessful because I couldn’t get past the first base. So, yes, it has been my – it has been – obviously I have had to do a lot of reading and a lot of, you know, the internet and looking at the case studies and trying my best, but obviously failing miserably. But, yes, it is my belief.

What Mr Shaw’s contentions overlooked, however, was that whatever may have been the internal position as between Yarranova and NewQuay, or as between them and the solicitors who acted for them, the fact was that costs were awarded to the parties he had unsuccessfully brought to Court. There was no doubt about the Court orders for the payment of costs in the proceedings he had commenced. It was his actions that occasioned the costs incurred by the respondents whatever may have been the internal arrangements within the MAB group about how they were to be billed and paid. In any event there was ample evidence to establish how the respondents were billed and how their costs were accounted for within the group accounts. ABL was retained at all times to act for the MAB group and acted for that part of the group, namely the respondents, in the litigation which Mr Shaw had commenced against them. The authority to act arose from general retainer and the costs were incurred in Mr Shaw’s proceedings against Yarranova and NewQuay. The costs were billed by ABL to the group and accounted for internally in the MAB accounts. There is no basis for the suggestion that the judgment debts were not due by Mr Shaw to Yarranova and NewQuay and there is neither reason nor basis to go behind the judgment debts.

1. Mr Shaw also sought to challenge the legality of the bankruptcy notice and the application by the creditors for the sequestration order. The bankruptcy notice had been signed by Mr Alexander King in his capacity as “solicitor or agent” of the creditors. Mr Shaw challenged, without foundation, Mr King’s authority to sign the notice. The creditor’s petition was signed by ABL and verified in part 2 by an affidavit by Mr Ben Perry who at the time was senior legal counsel and company secretary of MAB Corporation. Mr Shaw challenged, without foundation, Mr Perry’s authority to decide on behalf of Yarranova and NewQuay to seek a sequestration order by the petition without proof of a resolution, or of ratification to do so, by the board of directors of the respondents.
2. Evidence was given both by Mr King and Mr Perry. Mr Perry was both the company secretary and the senior legal counsel for the respondents as well as for their parent company. Each was cross-examined by Mr Shaw and each gave evidence of the steps taken on behalf of the companies on whose behalf they acted. Mr Shaw was not satisfied with their evidence and submitted that the evidence lacked proof by them of their authority to act on behalf of the respondents. Mr Shaw’s contention concerning Mr King’s retainer was ultimately that Mr King carried the burden to establish that he had been retained to act on behalf of Yarranova and NewQuay. The evidence of Mr Perry, however, supported ABL’s retainer to act on behalf of Yarranova and NewQuay as subsidiaries of MAB Corporation. Mr King’s evidence of the way in which the firm received instructions to act on behalf of companies within the group was sufficient to establish the retainer in question, including the authority to sign the bankruptcy notice and to apply for the sequestration order. It may be accepted that both ABL and the respondents had greater means than Mr Shaw to produce more evidence relating to ABL’s retainer, and of the decision by the respondents to institute bankruptcy proceedings against Mr Shaw, but it was for Mr Shaw to adduce sufficient evidence from which to infer the negative proposition he sought to establish: *Hawksford v Hawksford* [2005] NSWSC 463, [54]–[55]; *Halliday v High Performance Personnel Pty Ltd (in liq)* (1993) 67 ALJR 678, [55]; *Wood v Inglis* [2008] NSWSC 1147, [21]. There was no such evidence upon which the inference could sensibly be founded.
3. I would, in any event, not exercise the discretion under s 153B even if I had been satisfied that a sequestration order ought not to have been made. The power to annul a sequestration order under s 153B is discretionary and need not be exercised even if Mr Shaw had made out the grounds he wished to rely upon: *Hacker v Weston* [2015] FCA 363 at [18]. The conduct of Mr Shaw is relevant to the exercise of the discretion (*Marek v Tregenza* (1963) 109 CLR 1, 4-5; *Ozer v Australian Liquor Marketers* [2001] FCA 1197, [29]-[34]) as is whether an annulment will be conducive or detrimental to commercial morality and the interests of the public (*Re Lawson* (1939) 11 ABC 137, [139]). Much of Mr Shaw’s complaints were said by him to be a justifiable reaction to the way in which he was treated, but I do not accept the submission that his conduct was justifiable. Mr Shaw said in evidence before the Full Court of the Federal Court:

I believe that I was lied to, cheated and – you know, if – at the end of the day it was all a very small thing that got completely a life of its own. Partly my fault, because I wouldn’t give up, I agree. But that doesn’t mean I am wrong. I don’t – you know, it means I’m stubborn. But like, you know, Winston Churchill says, if you believe in something, never give up, never give up, and never give up. And that’s – you know, that’s me.

Mr Shaw repeated in submissions that he believed in his cause and would do his best to protect his own interests, however, both of these facts tend against an exercise of the discretion in his favour in the particular context of his case. An annulment of the bankruptcy would not result either in the efficient use of judicial resources or the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute. The litigation between Mr Shaw and the respondents has spanned over 12 years, has involved around 40 judicial officers and some 12 appeals or applications for leave to appeal. His attempt to challenge the retainer of the solicitors, and the entitlement of one party to seek costs notwithstanding an indemnity by another, was an attempt to re-agitate issues ruled against him in previous proceedings. In *Shaw v Yarranova Pty Ltd* [2011] VSCA 55 Redlich and Mandie JJA said at [27]:

Once it is recognised that it will ordinarily be presumed in the case of a solicitor who acts on the record for a party that there is a retainer and that the party for whom the solicitor acts is liable for the solicitor’s costs notwithstanding that the party is indemnified by another for the payment of those costs, there was nothing before the Costs Judge that made it likely that any of the material sought by the applicant would advance the contention that the indemnity principle had been displaced. The evidence did not raise the likelihood that the costs that had been or were to be paid were less than those that had been taxed. Beach J correctly concluded that the applicant was on a ‘fishing expedition’ to determine whether there may be relevant retainer documents or indicia of payment that might support an argument that the indemnity rule did not in whole or part apply.

Other orders made against him were found by other judicial officers not to have been complied with. In *Shaw v Yarranova and Another* (Unreported, Supreme Court of Victoria, 2 June 2008), Judd J said at [8]-[10]:

8 The plaintiff did not perform his side of that bargain. One cheque was dishonoured. The plaintiff has given no real explanation as to why this cheque was dishonoured or why the balance was not paid. It is the plaintiff's bank which has dishonoured the cheque and yet he is unable to inform the court of the reason. He says the account has sufficient funds to honour the cheque and yet has not made any attempt to make other arrangements for payment from that account or of the balance of the costs ordered. I note that the plaintiff says that he first became advised that the cheque had bounced last Wednesday evening or Thursday morning, but he concedes that he has obtained no information from the bank which would assist in providing an explanation as to why the cheque bounced or made any other arrangements.

9 I am persuaded that, for whatever reason, the plaintiff has means to satisfy the order for costs but is disinclined to make the necessary arrangements to do so. He says that he is unable to borrow at this time, although from time to time he has informed the defendants' solicitors of arrangements to enter into loan agreements to obtain the necessary funds. There is, of course, the balance left in the account which I have already mentioned, which, on the plaintiff's version of events, remains available for him to pay to the defendants, but which has not been paid.

10 The plaintiff has given various reasons to the defendants' solicitors for his failure to pay. His reasons are sometimes inconsistent and often evasive. He has refrained from giving any information about his purported loan applications. One consequence is that the defendants are unable to ascertain the nature and extent of the risks of dissipation of assets and in particular the likelihood that the encumbered land may be secured by a mortgage in respect of borrowings that may not be used necessarily to satisfy orders for costs.

Mr Shaw had no evidentiary basis to support his grounds for going behind the judgments other than what he might hope to obtain by persistent applications for discovery, subpoenas or questions in cross-examination. He was not, in other words, seeking to pursue a case which he had any reasonable foundation to believe existed.

1. Mr Shaw’s conduct in relation to his litigation against the respondents goes beyond that of a person seeking to rely upon his rights. He conceded in submissions that he had taken steps to frustrate the respondents’ attempts to enforce judgment, including by giving a false name to a process server, and by mortgaging the Mast Gully Road property which had been the subject of attempts to enforce execution. His submission in respect of his deception of the process server is revealing of his approach more generally and tells against a favourable exercise of the discretion. Mr Shaw submitted:

Yes. Well, we’ve been down that path a few times over the last six years. I think at every proceeding that line has been trotted out. Yes, and I have admitted to that. And yes, I will say it again for the record. It’s something that I apologised for in the court and I realise was a stupid thing to say at the time. Probably an indication of my desperation at the time. But to me, he was just a process server, nothing of great consequence. I realise now that the court looks at it a bit differently and certainly never have been – never said anything dishonestly to the court or, you know, lied to the court despite the accusation made in the witness box yesterday.

It may be true, as Mr Shaw submitted, that he “never said anything dishonestly to the Court” and his appearance in his application under s 153B was at all times courteous and respectful, however, his conduct in respect of the attempts to enforce judgments reveal a disregard for the entitlements of others in his pursuit of those he claims for himself. His conduct was not an isolated instance of an attempt to frustrate the rights of others and was not just an example of Mr Shaw relying upon his entitlements. There were, indeed, two attempts to sell the 5 Mast Gully Road property which were frustrated by Mr Shaw’s conduct. A sheriff’s auction had been arranged for the property scheduled for 27 May 2009 which was made difficult by Mr Shaw’s evasion of service upon him of an advertisement in respect of the sale by the Sherriff (although Mr Shaw claims not to have known what had been sought to be served upon him). On 25 May 2009 he applied for an order to stay the execution of the warrant to prevent the auction which was then scheduled to take place two days later. The auction was passed in as there were no bidders on a reserve of $308,000. On 17 August 2009 Mr Shaw thereafter granted a mortgage over the property in favour of the National Australia Bank on a loan for $200,000 and a subsequent auction scheduled for 9 September 2009 was aborted. At the time Mr Shaw was subject to an undertaking which he had given to Judd J in proceedings in the Supreme Court not to dispose of, deal with or otherwise encumber the 5 Mast Gully Road property without the prior consent of Yarranova or NewQuay, except to the extent necessary to obtain finance sufficient to discharge his indebtedness to those parties pursuant to the judgment debt. In submissions Mr Shaw claimed that there was no evidence that the mortgage he gave to the bank constituted a breach by him of the undertaking, but the evidence reveals a determination to frustrate the rights of others. Mr Shaw’s conduct goes well beyond that of a person seeking to preserve or advance a right to which he may wrongly believe to be entitled.

1. Accordingly, the application will be dismissed with costs.

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| I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Pagone. |

Associate:

Dated: 15 February 2016