Federal Court of Australia

Feldman v Tayar [2023] FCAFC 79

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| Appeal from: | *Tayar v Feldman* [2022] FCA 1432 |
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| File number(s): |  |
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| Judgment of: | **O’CALLAGHAN, ANDERSON AND JACKMAN JJ** |
|  |  |
| Date of judgment: | 29 May 2023 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY –** appeal from a decision of a single judge affirming orders made by a registrar that the estates of the appellants be sequestrated under the *Bankruptcy Act 1966* (Cth) – appeal dismissed |
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| Legislation: | *Bankruptcy Act 1966* (Cth) s 52  *Federal Court (Bankruptcy) Rules 2016* (Cth)r 2.03  *Commercial Arbitration Act 2011* (Vic) s 36 |
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| Cases cited: | *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570  *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419  *CSR Ltd v Adecco (Australia) Pty Ltd* [2017] NSWCA 121  *Feldman v GNM* [2017] NSWCA 107  *Feldman v Tayar* [2021] HCASL 224  *Feldman v Tayar* [2021] VSCA 185  *Market Services International Pty Ltd v Nutri-Metrics (International) Australia Pty Ltd* [1995] FCA 1152  *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd* [2017] NSWCA 132  *Tayar v Feldman* [2020] VSC 66  *Totev v Sfar* [2006] FCA 470; (2006) 230 ALR 236 |
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| Date of hearing: | 18 May 2023 |
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| Counsel for the Appellants: | Mr J Cohen |
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| Solicitor for the Appellants: | Eddy Neumann Lawyers |
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| Solicitor for the Respondent: | Mr D Silberman |
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| Counsel for the Interested Persons: | Mr J Kohn |
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| Solicitor for the Interested Persons: | Gilchrist Connell |

ORDERS

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|  | | VID 2 of 2023 |
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| BETWEEN: | PINCHUS FELDMAN  First Appellant  YOSEF YITZCHAK FELDMAN  Second Appellant | |
| AND: | COREY STEPHEN TAYAR  Respondent | |
|  | JONATHON KINGSLEY COLBRAN AND GREGORY BRUCE DUDLEY IN THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES OF THE BANKRUPT ESTATE OF PINCHUS FELDMAN AND BANKRUPT ESTATE OF YOSEF FELDMAN  Interested Persons | |

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| order made by: | o’callaghan, anderson AND jackman JJ |
| DATE OF ORDER: | 29 MAY 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The respondent’s costs be paid on an indemnity basis from the estates of the appellants in accordance with the *Bankruptcy Act 1966* (Cth).
3. The trustees’ costs of the appeal and of the review application before the primary judge be paid from the estates of the appellants in accordance with the *Bankruptcy Act 1966* (Cth).

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

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. This is an appeal from a decision of a judge of this court affirming orders made by a registrar on 21 July 2022 that the estates of each of Rabbi Pinchus Feldman and Rabbi Yosef Feldman, who are the first and second appellants (collectively, the **appellants**), be sequestrated under the *Bankruptcy Act 1966* (Cth).
2. The first appellant is the father of the second appellant. They and the respondent, Corey Tayar, are rabbis. Each is an adherent to the Chabad Lubavitch movement, an orthodox Hasidic movement within Judaism.
3. Rabbi Tayar has the credentials of “Yodin Yodin” which demonstrate his expertise in Jewish commercial law and has established “Mehadr Beis Din Tribunal” in Melbourne, which hears commercial disputes.
4. Mr Jonathan Colbran and Mr Gregory Dudley, are the trustees of the appellants’ bankrupt estates. They appeared with counsel as interested parties on the appeal.

## The facts

1. Rabbi Tayar worked at the Yeshivah Centre on Flood Street in Bondi, New South Wales. It was operated by the appellants. While working there, he made a series of advances to the appellants for the purposes of meeting the ongoing expenses of the centre.
2. In about 2010, the parties entered into a series of what the primary judge called “complicated commercial transactions”. It is not necessary to detail them here.
3. Disputes arose, as a result of which Rabbi Tayar and the appellants entered into an agreement to refer those disputes to arbitration (the **arbitration agreement**). The arbitration agreement provided that the arbitration was to be conducted by a panel of three rabbis, Rabbis Heimlich, Donenbaum and Raskin (together, the **arbitral panel**), in accordance with the principles of orthodox Jewish law known as “Halacha”, and that the arbitral panel was appointed to determine five “Disputed Matters”, as defined.
4. The arbitration agreement also provided that the arbitral panel was to act as an arbitral tribunal under the *Commercial Arbitration Act 2011* (Vic) and that it was governed by the laws in force in Victoria.
5. On 9 May 2013, the arbitral panel published its award and reasons for the award to the parties. The award provided:

The Court has decided the proceedings to be held in the Holy Language [Hebrew], Yiddish and English, as required for proceedings and evidence etc, as well as due to the fact those languages are understandable both to the court and the parties involved, also the court decision will be delivered to the parties in the Holy Language[.]

Parts of the decision mainly based on claims frankly made by the Parties on a court hearing and on the claims expressed orally on the second hearing of the Court (as the Court was unable to approve the claims sent and written via email).

**Claim 1** — the claim on the whole property or a part thereof located at 67&69 Penkivil Street, 7 Park Street, Office within the Adler Building, Dormitory Building

Court decision: The mentioned properties remain in possession of the defendants and nevertheless the defendants are obliged to pay the amount of $1,635,802 to the plaintiff. However, the lender retains a lien on the properties up to the value of the aforementioned amount.

**Claim 2** — the claim regarding $17,815.47 pcm rental agreement

Court decision: The defendants must pay the entire amount of the rental agreement $17,815.47 pcm, as agreed between the parties initially (including all outstanding payments, which have not been paid completely yet). This obligation continues until the defendants pay the entire above mentioned amount mentioned in claim 1. Regarding the monthly payments from that time till [sic] September 2013, it depends on the details of initially made agreement and needs further clarification by the Court.

**Claim 3** — the claim of apartment rental payment of $850 per week

Court decision: Mr Joseph Feldman must pay the entire amount of the claim related to the rent that has not yet been paid.

**Claim 4** — the claim regarding salary

Court decision: The defendants must pay the entire amount of the salary (that has not yet been paid) to the plaintiff for all the time of his service at the office etc, but not for the time after he resigned from work.

**Claim 5** — the claim regarding redundancy payments

Court decision: At the moment, the defendants are exempt from compensating the plaintiff.

1. On 2 March 2014, the arbitral panel sent a letter to the parties, correcting a minor typographical error in the award and stating that the appellants “must pay the amounts stated in the [award] as soon as possible”, as follows:

Whereas there are impediments and delays for the Parties to proceed before the Court of Torah due to a number of reasons, we hereby declare and confirm the decision which has been issued taking into account the law as well as the principle of compromise and honesty, as it is understood by the Court, as well as world judicial practice and the Arbitration Agreement, as follows: the Court Decision made on day 29 of the month of lyar year 5773, 9 May 2013 is valid (there is only one typographical error in claim 3 and it has been amended, stating that the apartment rent is $850 per week [and not per month])

The defendants must pay the amounts stated in the Court Decision as soon as possible.

We hereby sign this document on the day 30 of the month of Adar I, year 5774, 2 March 2014 in Melbourne

1. On 9 May 2014, Rabbi Raskin, a member of the arbitral panel, sent a letter in Hebrew to the parties on behalf of all members of the panel (the **first Raskin letter**). A translation of that letter was in evidence. It read as follows:

By the Grace of G-d

7 Adar Beis 5774

In honour of the claimant R’ Shabsi Tayar and the respondents R’ Pinchos and R’ Yosef Feldman

Since the arbitrators are finding it difficult to continue with a further Din Torah on this topic for numerous reasons, and we also stipulated before we began that we do not accept upon ourselves to bring the judgement to actualization, or to be involved in Mesadrin etc, and therefore it’s on you to search for another Beis Din to organise this.

It is self-understood the great obligation on the respondents to quickly pay off the debt etc, (including Mesadrin, beginning to pay the debt etc) whatever is possible as explained in the books of the Poskim.

And since the arbitrators invested plenty of effort and time (without compensation), and therefore it is our request that you don’t disturb the arbitrators any further from today onwards. And you have something urgent to be in contact with the arbitrators please turn to R’ Binyomin Koppel head of the community of Adass Yisroel.

1. As the primary judge explained (at [17] of her Honour’s reasons):

(1) 7 Adar 5774 is the Hebrew date for 9 May 2014;

(2) “Din Torah” means Jewish legal proceedings;

(3) “Beis Din” (also referred to as a Beth Din) is a Jewish arbitral tribunal usually comprised of three rabbis;

(4) “Mesadrin” is a process by which a Beth Din investigates the assets and liabilities of a debtor to determine how the amount owed should be paid and what assets the debtor can retain; and

(5) “Poskim” means Jewish judges throughout the centuries.

1. The question of whether the parties had agreed to and subsequently engaged in a Mesadrin was central to the grounds of opposition relied on by the appellants before the primary judge and on this appeal. No party sought to rely on evidence of Jewish law. Instead, as the primary judge observed at [18], “each of Rabbis Tayar and Yosef Feldman gave evidence of their understanding of the process”.
2. Her Honour summarised that evidence as follows (at [19]-[20]):

… according to Rabbi Tayar, a Mesadrin is a process by which a Beth Din, which is a Jewish arbitral tribunal, investigates the assets and liabilities of a debtor to determine how an amount owed should be paid and what assets the debtor can retain. Rabbi Yosef Feldman’s evidence was that an integral part of Jewish bankruptcy law is that there must be a “Mesadrin” which he described as an arrangement of how to pay and deal with the debt including the sale of the debtor’s property in order to repay it. This would be determined by the Beth Din unless agreed upon by the parties.

According to Rabbi Yosef Feldman, he and, I infer, Rabbi Pinchus Feldman underwent a Mesadrin. Although the timing is not clear, it seems, based on Rabbi Yosef Feldman’s evidence, that at some time after the First Raskin Letter, the respondents engaged in a Mesadrin. However, it is also plain from Rabbi Yosef Feldman’s evidence that they did so without disclosing to Rabbi Tayar the identity of the “judge” who advised them at that time or, indeed, that at least as far as they were concerned they had undergone a Mesadrin. However, Rabbi Yosef Feldman deposed that the rabbi who provided the advice for the Mesadrin at that time is now amenable to the disclosure of his identity. The rabbi in question is Rabbi Mordechai Gutnick AM who is Rabbi Yosef Feldman’s uncle and Rabbi Pinchus Feldman’s brother in law. A letter dated 14 March 2022 from Rabbi Gutnick addressed to “whom it may concern” includes:

About 8 years ago I was consulted regarding a dispute between Rabbi Tayar (RT) and the Rabbis Feldman (the RF). It had been agreed by all parties to settle their dispute by a Beth Din arbitration panel. The result of that arbitration was that the RF were required to pay RT a certain amount of money. However, the RF claimed they did not have the amount determined. I was informed that the Beth Din arbitration panel thereupon further directed that the way to deal with his outcome was through Jewish law bankruptcy procedures. This essentially required that all assets not required for basic daily living needs and expenses were to be liquidated and the resulting amount was to be paid to the plaintiff, RT. In addition, the defendants, the RF, were to then pay a further set amount at determined intervals gleaned from future income, over and above their basic living expenses, until the debt was paid in full.

It was my understanding that the original Beth Din panel did not wish to accept the responsibility for the assessment of assets or the future repayment options and so referred the parties to seek the input of another Beth Din panel or another mutually acceptable method of assessment, in order to determine the value of any assets and any future payment amounts and intervals, that would be in accordance with applicable Jewish law.

I was contacted by the defendants, the RF, at the time and I advised on a process of repayment that, to the best of my knowledge, had subsequently been accepted by both parties. It basically was agreed that the defendants had no assets that could effectively be liquidated and that they would pay a set amount, as determined and agreed on between the parties, on a regular basis. To the best of my knowledge this has been adhered to over the many years since the agreement was finalised.

I am now informed that RT had decided to register the outstanding debt at this time in order to leave him with the possibility that he could institute legal bankruptcy proceedings, with permission from a Jewish Beth Din panel, if the RF don’t continue to pay as per the current agreement.

There is, however, a serious claim being made by the RF that permission to institute civil bankruptcy proceeding would not be permitted in this case and at this time. This is based on the original ruling of the Beth Din arbitration panel (and is also based on the application of Jewish bankruptcy law generally) to the effect that, as long as the RF continued paying the amounts due as per the agreed undertaking currently in force and observed unchallenged over the all these years, the original payment agreement and schedule still stands.

I am further informed, however, that, after the registering of the debt, RT is now taking the RF to court in order to institute bankruptcy proceedings - notwithstanding the claim of the defendants that the conditions of the original agreement as instituted in accordance with the original Beth Din arbitration are still very much extant. The RF assure me that they have continued paying all this time until very recently when the RF notified RT that whatever finances are needed to defend these proceedings would need to be taken off the regular payments as they simply don’t have enough for both.

It is my considered opinion therefore, that, according to Jewish law and indeed according to the ruling of the original Beth Din arbitration panel, it would be prohibited by Jewish law for the plaintiff, RT, to commence civil bankruptcy proceedings unless he can verify before a Beth Din panel that the RF do indeed have assets or additional income that they did not, or have not, declared accurately or have otherwise reneged on the original agreement. RT would then need to receive that Beth Din panel’s permission to proceed with civil bankruptcy proceedings accordingly.

I may not be in possession of all the details involved in this case and I acknowledge that I am related to the defendants. Accordingly, I am not issuing a binding, firm ruling on this matter. However, I certainly take the opportunity to strongly urge both parties to remove the matter from civil court at this time and, as expected by Jewish law, to refer the dispute to a mutually acceptable Beth Din panel and agree to abide by its decision and ruling - all in accordance with the ruling following the original arbitration conducted by the original Beth Din panel.

If there is any way that I can assist in providing further information or detail on Jewish law issues, please do not hesitate to contact me.

1. Her Honour then noted evidence given by Rabbi Yosef Feldman that “he understood that the parties had reached a Mesadrin” (at [24]).
2. Her Honour then said that she found that “evidence is difficult to accept”, for the following reasons (at [25]-[28]):

First, Rabbi Yosef Feldman does not set out who constituted the tribunal for the purpose of determining the Mesadrin. On his own evidence a Mesadrin is usually determined by a Beth Din i.e. an arbitral panel constituted by rabbis or by “an expert judge”, who I infer is a rabbi appointed for that purpose. Nor does he say what was determined at the Mesadrin or if and how Rabbi Tayar was involved.

Secondly, I do not accept Rabbi Yosef Feldman’s understanding that a Mesadrin had been reached because of the advice given by Rabbi Gutnick. On Rabbi Yosef Feldman’s evidence Rabbi Gutnick gave his advice on an anonymous basis and, to the extent it was given, it was only provided to the respondents and not communicated to Rabbi Tayar. To that end, I accept Rabbi Tayar’s evidence that he was not aware that a tribunal was ever appointed for the purpose of a Mesadrin. That evidence is entirely consistent with Rabbi Yosef Feldman’s evidence that Rabbi Gutnick’s identity was kept secret as was, it seems, any advice that he gave.

Thirdly, that the respondents made some payments to Rabbi Tayar, by paying his wife sums of money from time to time (see [35] – [37] below), does not lead to a conclusion that there was a Mesadrin. The payments were irregular. Rabbi Yosef Feldman described them as payments of at least $180 per week and “all up probably around 150k”. But no record of the amounts and times of payment and the total in fact paid was provided to the Court nor was there any evidence which would permit me to draw a conclusion that the payments were made pursuant to a Mesadrin of which both parties were aware and by which they felt bound as opposed to the payments being made by the respondents because of their obligation to make payment of the amount owing under the award.

Rabbi Tayar felt he had a religious duty to give the respondents an opportunity to pay him without the necessity for civil enforcement proceedings. He therefore approached Rabbi Raskin and three other rabbis, who were not part of the arbitral tribunal. However, their attempts to arrange payment failed.

1. On 18 August 2014, Rabbi Tayar received written (in Hebrew) permission from four rabbis to escalate the matter to a secular court, which included the following (translated from Hebrew): “And therefore according to what the Alter Rebbe says in his code of Jewish law (laws of damages at the end of section 6), we give permission to Rabbi [Tayar] above to turn to the civil courts to save what belongs to us according to our holy Torah”.
2. On 8 September 2014, Rabbi Raskin wrote to the parties and to the three rabbis who were signatories to the permission, relevantly as follows (translated from Hebrew):

The Thirteenth day of the month of Elul 5774 (Hebrew Date)

I hereby clarify my opinion regarding permission to go to secular court that was written on Sunday night the 22nd of Av 5774 (Hebrew Date),

I hereby inform all that Rabbi Pinchus and Rabbi Yosef Yitzchak Feldman received a ruling to pay according to the “ZABLA” (A Zabla stands for the words “Zeh Borer Lo Echad/Each one chooses one,” A Zabla works as follows: Each side picks one judge of his choice and the two chosen judges then pick a third judge, for the three person Beis Din (court of law). All three judges judge the case and bring out a justified verdict1) consisting of Rabbi Menachem Mendel Raskin, Rabbi Chaim Heimlich and Rabbi Moshe Dannenbaam Shlita.

On the 20th of Iyar 5773 (Hebrew Date), the court ruled:

1. That the defendants, Rabbi Pinchus and Rabbi Yosef Yitzchak Feldman, must pay a total of $1,635,802 to the plaintiff, Rabbi Shabtai Asher Tayar, and that the loan be secured on certain lands with that same worth.

These are the lands that are under his security: 67-69 Penkivi1 Street, 7 Park Street, The Dormitory, Office within the Adler building,

2. That the defendants must pay the rental agreement

3. Defendant R. Yosef Feldman must pay the entire amount of the claim relating to rent that has not yet been paid.

4. That the defendants must pay all the salaries they have not yet paid.

On the 7th of Adar 2 (Hebrew Month), the judges added that:

It is understandable that there is an obligation on the defendants to expedite the payments of the debt (including M’sadrin from a Beis din i.e. that the Beis din assesses and evaluats the assets of the borrower and anything beyond basic living should be repaid to the lender and they should also begin the payments etc.) in any way possible as it’s explained in the works of the Halachists.

And being that it has already been 16 months from the first ruling and from the most recent ruling of this year 5 months have passed and the creditor complains that the defendants have not paid the entire debt and they have only paid a small amount that is only a very small percentage of the total amount they owe and that is also after a lot of requests. Therefore, we have agreed that the defendant is allowed to go to the courts to claim the amount that is due according to the aforementioned verdict from the Beis Din.

But because the defendants claim to be given a verdict, but they don’t now have the funds to pay and that they called in an expert Rabbi in the field of monetary disputes and received a Halachic assets test, but he won’t reveal his name nor put the ruling in writing. However, it doesn’t give the plaintiff any way of knowing what the method of the test was and therefore we ask the defendants to appoint a new expert rabbi who can be named and is able to write down his method. And I already talked to the defendants about it and they agreed to it.

And so it is my opinion that by the Jewish New year, the defendants should appoint an expert rabbi to arrange an assets test and that 30 days after the new year they will receive the order and notify all of this to the rabbis dealing with the subject and the creditor. And if the defendants accept this offer, according to my opinion, I can delay the permit to go to a secular court. But if they do not accept this offer, or they will not have appointed an expert rabbi by the new year or they don’t accept the ruling after 30 days of the new year then the permit to go to a secular court shall stand.

And meanwhile, the defendants are obliged to pay the defendant whatever possible and no funds shall be delayed at all until an assessment has been conducted.

I also seek and ask in every way that both parties respect and not denigrate the rabbis who may not agree with you or one party to the next and write to them to pressure them and to potentially belittle great rabbis.

I sent a copy of this letter to the other rabbis who signed the letter of the 22nd of Av (Hebrew Date) and agreed to this letter.

Signed-Rabbi Menachem Mendel Raskin.

1. Her Honour found (at [31]) that letter (the **second Raskin letter**):

[S]upports the finding made above that the advice given by Rabbi Gutnick did not constitute a Mesadrin which bound Rabbi Tayar. So much is evident from Rabbi Raskin’s observation that the rabbi called in by the respondents would not reveal his identity nor put his ruling in writing so that Rabbi Tayar would have no way of understanding the test which was applied. Rabbi Raskin thus asked the respondents to appoint a new expert rabbi who could record his ruling and his reasons or methodology and to do so by Jewish new year.

1. Her Honour also relied (at [33]) on the fact that “Rabbi Tayar [did not] recall having any discussions about a Mesadrin with the [appellants] following receipt of the Second Raskin Letter” and found that “[h]e never participated in, approved of or was informed by anyone about the election of any particular rabbi for the purpose of a Mesadrin”.

## The enforcement of the arbitral award

1. In May 2019, Rabbi Tayar commenced a proceeding against the appellants in the Supreme Court of Victoria seeking an order pursuant to s 35 of the Commercial Arbitration Act in relation to the award. By interlocutory application, the appellants sought orders pursuant to s 36 of that Act refusing recognition or enforcement of the award. In doing so, it was no part of their case that that the parties had agreed to or entered into a Mesadrin.
2. The judge who heard the proceeding (Lyons J) held that the court was entitled to enforce the award in respect of claim 1 only and that the amount to be awarded in respect of that claim should be adjusted to take into account the amounts acknowledged by Rabbi Tayar as having already been paid by the appellants. Thus the amount to be enforced was $1,515,402.02. See *Tayar v Feldman* [2020] VSC 66 at [169]-[171].
3. Justice Lyons ordered:

1. Pursuant to s 35 of the *Commercial Arbitration Act 2011* (Vic), the Respondents pay the Applicant the sum of $1,515,402.02 in respect of Claim 1 of the Award made by the Arbitrators dated 9 May 2013.

2. For the avoidance of doubt, the Respondents pay the Applicant interest on the amount in order 1 (or any parts thereof that remain outstanding) pursuant to s 101 of the *Supreme Court Act 1986* (Vic).

1. The appellants appealed (unsuccessfully) to the Victorian Court of Appeal. See *Feldman v Tayar* [2021] VSCA 185. An application for special leave to the High Court was also refused. See *Feldman v Tayar* [2021] HCASL 224.

## Bankruptcy proceeding

1. On 18 November 2021, a bankruptcy noticeaddressed to the appellants claiming a total amount of $1,751,793.53 was issued by the Official Receiver.
2. The amount claimed in the bankruptcy notice was made up of the amount the subject of the Supreme Court orders including interest payable up to 17 November 2021 less amounts received. The bankruptcy notice required the appellants to pay the amount claimed in it within 21 days after the date of its service to Rabbi Tayar at the office of his solicitor, Dov Silberman, or to make arrangements to Rabbi Tayar’s satisfaction for settlement of the debt.
3. On 24 November 2021, a sealed copy of the bankruptcy notice was personally served on the second appellant and on 3 December 2021, a sealed copy of the bankruptcy notice was personally served on the first appellant.
4. On 15 December 2021, the appellants commenced a proceeding in this court seeking to set aside the bankruptcy notice. That application was dismissed.
5. On 4 May 2022, an amended creditor’s petition was filed with the court.
6. On 19 May 2022, the amended creditor’s petition, among other things, was personally served on the first appellant. On 3 June 2022, the amended creditor’s petition, among other things, was personally served on the second appellant.
7. On 14 June 2022, the appellants filed a notice stating grounds of opposition to application, interim application or petition.
8. On 21 July 2022, a sequestration order was made by a registrar of this court in relation to the estates of each of the appellants.

## The reasons of the primary judge

1. The following findings made by the learned primary judge about proof of matters in s 52(1) of the Bankruptcy Act (at [52]-[53]) were not challenged on appeal:
2. As at 15 November 2022, Rabbi Tayer was owed $1,923,903.06, made up of the amount owing as at 18 November 2021, being the date of issuing the bankruptcy notice to the appellants, of $1,751,793.53 plus interest of $173,739.53 and less the sum of $1,630 which had been paid since that date.
3. There was no agreement or other arrangement with either or both of the appellants to pay any or all of the amount owing to Rabbi Tayar by instalments or to postpone the enforcement of any or all of the debt.
4. On 16 November 2022, Mr Silberman, Rabbi Tayar’s lawyer, undertook a search of the National Personal Insolvency Index for each of the appellants. It revealed that there were no extant creditor’s petitions in relation to either of them, other than the amended creditor’s petition, that although they are now undischarged bankrupts by reason of the orders made by the registrar, neither of the appellants was a bankrupt at the time those orders were made nor had they (or have they subsequently) entered into a debt agreement in relation to the judgment debt the subject of the bankruptcy notice which founded the act of bankruptcy.
5. Her Honour found (at [58]) that “[b]ased on the evidence relied on by Rabbi Tayar, I am satisfied of, among other requirements, the matters set out in s 43 and s 52(1) of the Bankruptcy Act”, viz:

(1) the bankruptcy notice has been served on each of Rabbi Pinchus Feldman and Rabbi Yosef Feldman;

(2) each of Rabbi Pinchus Feldman and Rabbi Yosef Feldman has committed an act of bankruptcy in that they have each failed to comply with the requirements of the bankruptcy notice within 21 days after the date of service of it on them;

(3) the amended creditor’s petition is in the proper form as required by s 47(1A) of the Bankruptcy Act;

(4) the debt owed to Rabbi Tayar exceeds the statutory minimum as required by s 44(1) of the Bankruptcy Act;

(5) the creditor’s petition has been presented within six months of the date of commission of the act of bankruptcy as required by s 44(1)(c) of the Bankruptcy Act;

(6) the amended creditor’s petition, which included the affidavit verifying [4] of the petition, has been served on each of Rabbi Pinchus Feldman and Rabbi Yosef Feldman as required by r 4.02 and r 4.04 of the Bankruptcy Rules; and

(7) subject to the matter considered below, that the debt on which the amended creditor’s petition relies is still owing.

1. As her Honour went on to say, that meant that Rabbi Tayar as petitioning creditor had a prima facie right to a sequestration order. Having said so, she went on to consider the grounds of opposition relied upon by the appellants and determine whether she should exercise the discretion conferred under s 52(2) of the Bankruptcy Act to refuse to make such an order.
2. The only ground of opposition contended for below that bears any resemblance to the grounds of appeal before us was put this way (set out by the primary judge at [54]): “According to the final judgement of the arbitration, [Rabbi] Tayar must agree to a “Mesadrin” (Jewish bankruptcy process) and has implicitly agreed to one through his acceptance of about $150,000.00 over the years, which was in accordance with the “Mesadrin” and not requesting a further “Mesadrin” with a Jewish court”.
3. Her Honour summarised the appellants’ contentions in relation to that ground as follows:

The respondents submitted that as they were, at all material times, “severely lacking in funds and assets” and had no capacity to repay the debt, they commenced paying small periodic payments into Rabbi Tayar’s wife’s account. They understood these payments to be in accordance with a Mesadrin. The respondents submitted that prior to commencing the Supreme Court Proceeding Rabbi Tayar did not assert that there was no valid Mesadrin and did not suggest that there should be another Mesadrin. They contended that at all times it was open to Rabbi Tayar to either challenge the Mesadrin that they asserted had taken place or, alternatively, to seek a further Mesadrin.

1. Her Honour also observed (at [72]) that “[i]n their oral submissions, the respondents submitted that the parties to the proceeding are members of the Lubavitch community, a known Jewish orthodox community, and that when one looks at the totality of the evidence it is clear that the parties agreed to deal with this dispute from start to finish in accordance with Jewish law” and that, among other things no longer relevant, “there is a collateral contract between the parties by which they agreed to deal with the question of enforcement of the award under Jewish law”. Her Honour noted, however, that the appellants “did not make any detailed submissions in support” of that proposition.
2. Her Honour also recorded these submissions, which were also pressed on appeal (at [74]-[75]):

The respondents contended that it was clear from the dealings between the parties that there is no time frame for payment of the amount found to be payable in the award and there is in fact evidence, in the supplemental award, that the debt must be paid “as soon as possible”. They said that the fact that there is no timeframe attached to the award is entirely in accordance with Jewish law and ties into the concept of Mesadrin. The requirement is to pay as soon as possible and if one does not have the money to pay, one simply has to do the best one can. The respondents submitted that is what “as soon as possible” means in this context.

The respondents also submitted that it is apparent from the First Raskin Letter that the Arbitral Panel understood that there would be a Mesadrin after they handed down their award. The respondents said that reference was a sufficient basis on which to conclude that there is a collateral agreement between the parties to that effect. The respondents submitted that the fact that the parties foresaw entering into a Mesadrin was reinforced by Rabbi Tayar seeking permission to go to a civil court.

1. Having noted those, and other submissions that have no bearing on this appeal, the learned primary judge turned to address the question whether there was other sufficient cause which would lead her Honour to exercise a discretion to dismiss the amended creditor’s petition. Having referred (at [78]) to what Allsop J (as he then was) said in *Totev v Sfar* [2006] FCA 470; (2006) 230 ALR 236 at [37] about the meaning of “other sufficient cause” as used in s 52(2)(b) of the Bankruptcy Act, her Honour said (at [81]-[82]):

Grounds 1 and 2 of the Notice of Grounds of Opposition can be considered together. By those grounds the respondents, in effect, contend that the Supreme Court Orders cannot presently, (or indeed ever) be enforced. This is because Rabbi Tayar must agree to a Mesadrin, before he can take steps to bankrupt them, and has implicitly agreed to a Mesadrin by his acceptance of the payments made to date by the respondents or, if Rabbi Tayar contends that there has been no Mesadrin, he should apply for another Mesadrin rather than invoking the procedures under the Bankruptcy Act.

While not expressly stated to be the case and despite the respondents’ contention that they do not ask this Court to go behind the judgment in Tayar v Feldman, at the heart of these grounds (and ground 3) is a contention that the amount the subject of the Supreme Court Orders is not presently owing. If that is so then the discretion in s 52(1) of the Bankruptcy Act to make a sequestration order is not enlivened or, alternatively, that fact, if established, could be sufficient to establish “other sufficient cause” for the purposes of s 52(2)(b) of the Bankruptcy Act. If that is so, then on one analysis and noting that the respondents did not in fact seek to do so, the question that arises is whether the Court should go behind the judgment given in the Supreme Court Proceeding in order to consider whether the Supreme Court Orders establish the amount truly owing to Rabbi Tayar.

1. Her Honour continued (at [85]-[87]):

In this case, I am satisfied that the Supreme Court Orders establish that there is a debt truly owing to Rabbi Tayar. My reasons for reaching that conclusion follow.

As set out at [12] above, the parties entered into the Arbitration Agreement and appointed the Arbitral Panel to determine the “Disputed Matters” in the manner set out in that agreement. That was the extent of the role of the Arbitral Panel under the Arbitration Agreement. Its role did not extend to enforcement of any award that they issued. I pause to note that any submission to the contrary or suggestion that the Arbitral Panel was charged by the parties to concern themselves with questions of enforcement must be rejected.

The Arbitration Agreement also provided that the Arbitral Panel is to act as an arbitral panel under the Commercial Arbitration Act and that the agreement is governed by the laws in force in Victoria.

1. Having considered ss 35 and 36 of the Commercial Arbitration Act and concluded that there was no basis upon which the court would go behind the judgment which resulted in the Supreme Court orders (not relevant to this appeal), her Honour then turned to consider the alternative way in which the appellants sought to establish other sufficient cause for the purposes of s 52(2)(b) of the Bankruptcy Act, namely the contention “that the debt was not presently payable and/or a sequestration order should not be made because the parties have agreed to address the question of enforcement by application of Jewish law and by submitting to the Mesadrin procedure” (at [100]). Her Honour continued (at [101]-[104]):

Both Rabbi Tayar and each of the respondents are orthodox Jews. As the evidence establishes, and likely because of their adherence to the orthodox principles of Judaism, they elected to have their commercial dispute determined by a Beth Din by reference to principles of Jewish law (known as Halacha). As set out at [12] above, pursuant to the Arbitration Agreement the Arbitral Panel was appointed to determine the “Disputed Matters”. They, in turn, were to be defined by, among other things, the statement of claim, defence and any cross-claim, filed in the arbitration. However, while no such documents were provided to the Arbitral Panel: see *Tayar v Feldman* at [33], the Arbitral Panel identified the claims which it determined. Based on that definition, the award and the evidence before me it is clear that the Arbitral Panel was not appointed to address questions relating to, or processes of enforcement of any award issued by it in relation to the Disputed Matters.

Further, it does not follow that, because of their faith and their adherence to orthodox principles, all issues that arise between them are to be resolved according to Jewish law. In cross-examination Rabbi Tayar did not accept that the process the parties embarked upon to resolve their dispute involved the Arbitral Panel or another Beth Din dealing with how the debt the subject of an award would be paid according to Jewish law. Rather his evidence was that was possible, but not necessarily so. Rabbi Tayar gave further evidence explaining his answer. He said that the stricter view is that the parties should first try to deal with the question of enforcement of an award internally. If that fails, in that one party refuses to take part in or comply with the Mesadrin process, then the rabbis who are aiding in and overseeing that process will give Halachic permission to approach a secular court.

As to whether permission is required to take a matter to a secular court, Rabbi Tayar explained that there are two views: one is that following the issuing of an award by a Beth Din a party can immediately go to a secular court for the purposes of enforcement without first seeking permission; and the other is that before going to a secular court for the purposes of enforcement permission should be sought. The latter shows respect for the Jewish religion and the authorities. Rabbi Tayar explained that he always follows the more stringent (second) approach.

In other words it is apparent that while the Mesadrin process may be favoured by members of the orthodox Jewish community, it is not obligatory. There is no bar to approaching a secular court for the purposes of enforcement of an award given by a Beth Din.

1. More relevantly for the purposes of this appeal, her Honour held that the appellants had “not established that there was an agreement (or collateral contract) that the question of enforcement be dealt with by a Mesadrin or that a Mesadrin took place”, reasoning as follows (at [106]-[108]):

As to the former there is no evidence that would lead me to that conclusion or to conclude that Rabbi Tayar is estopped from undertaking enforcement processes in the secular courts or that the respondents can rely on unilateral mistake or to find that this proceeding is an abuse of process. The evidence supports the contrary conclusion. First, the terms of the Arbitration Agreement limit the maters to be addressed by the Arbitral Panel to the Disputed Matters. Secondly, to the extent that the Arbitral Panel’s supplemental award required the amounts stated in the award to be paid by the respondents “as soon as possible” this did not mean that the Arbitral Panel was considering enforcement or payment terms. Rather, it seems that the Arbitral Panel was simply stating that the debt was immediately due and payable and should be paid. Thirdly, the First Raskin Letter makes it clear that the Arbitral Panel’s role was not to “bring the judgment to actualization, or to be involved in Mesadrin etc”. Fourthly, Rabbi Tayar gave the respondents an opportunity to pay the amount owing because he felt he had a religious duty to do so (see [28] above) and because of his adherence to a stricter view of how to address enforcement (see [103] above). There is no evidence that he did so because he had entered into any agreement which restricted enforcement to a Mesadrin procedure. Fifthly, the permission was issued. Finally, the Second Raskin Letter does no more than to give the respondents an opportunity to arrange a Mesadrin presided over by a rabbi or rabbis made known to Rabbi Tayar and involving a transparent process. That letter did no more than to “delay” the permission in order to give the respondents time to embark on the process set out in it. There is no evidence that the respondents did so or that Rabbi Tayar agreed to any different process.

As to the latter, as set out at [24]-[27] above, the evidence does not establish that there has been a Mesadrin.

Accordingly, grounds 1 and 2 of the Notice of Grounds of Opposition are not made out.

1. Her Honour then considered other submissions not presently relevant, and held that she was satisfied of the matters set out in s 52(1) of the Bankruptcy Act and that the appellants had not made out any of the grounds in their Notice of Grounds of Opposition. She accordingly affirmed the orders made by the registrar and dismissed the appellants’ interim application.

## The appeal grounds

1. The solicitor who appeared for the respondent on the appeal consented to leave being given to the appellants to rely on amended grounds of appeal contained in a Second Further Amended Notice of Appeal. Those grounds were:

1. [Omitted]

2. Her Honour erred, by rejecting the evidence of the second appellant, Yosef Feldman when the second appellant was not subject to cross-examination

3. [Omitted]

4. Her Honour erred at law by not determining that it was a miscarriage of justice for the Court to make a sequestration order.

5. [Omitted]

6. Her Honour erred by not setting aside the sequestration order and not dismissing the creditors petition pursuant to s 52(2)(b) Bankruptcy Act 1966(Cth).

7. Her Honour erred in determining that there was no collateral contract and or agreement between the parties to enter into a mesadrin.

8. Her Honour erred in making findings of act not supported by evidence.

(Errors in original.)

### Grounds 6, 7 and 8

1. At the hearing of the appeal, counsel for the appellants agreed that grounds 6, 7 and 8 were each directed to the proposition that the primary judge erred as a matter of law in not finding that there was an express or implied agreement entered into prior to the date of the arbitration agreement that any amount awarded by the arbitrators under the agreement would be dealt with by way of a Mesadrin.
2. Counsel commenced with these grounds, so we shall too.
3. Counsel submitted that the following evidence required the primary judge to find such an agreement.
4. The first piece of evidence relied upon is the evidence given by the second appellant at [6], [8] and [10] of his 10 August 2022 affidavit, viz:

6. Sometime in about 2013 I was involved in a dispute with Rabbi Tayar over a debt which Rabbi Tayar asserted was owed to him by both **RPF** [the first appellant] and myself The arbitration came about after there was an agreement between myself, **RPF** and **CST** [the respondent] that three religious Jewish judges (known as Dayanim) constituting a Beth Din, would determine this dispute and deal with the matter accordance with Jewish law. On that basis, I entered into the Commercial Arbitration Agreement shortly before the Beth Din hearing, and it is my understanding that my father, who is also a Rabbi agreed to the Arbitration for the same reason.

…

8. It was therefore agreed by **CST**, **RPF** and myself, that the matter should be resolved by a Beth Din in accordance with orthodox Jewish law. Within my community it is a common practice for monetary disputes to be resolved by a Beth Din. What this means (according to my understanding and according to custom) is that the Beth Din would deal with both the issue of whether or not there is a debt (and if so, the extent of the debt), and thereafter the Beth Din would also determine, if necessary, how it should be paid off, which would include any issues relating to a Jewish bankruptcy (as distinct from a bankruptcy according to the secular law of Australia). This includes the Beth Din taking into account the ability of the debtors to pay off the debt. An integral part of the Jewish law of bankruptcy, is that there must be a “mesadrin” (arrangement of how to pay with, and deal with the debt including the sale of the debtors properties in order to repay) which also would be determined by the Beth Din unless agreed upon by the parties.

…

10. As previously stated, Jewish law requires parties to enter into a mesadrin, which includes the arrangement of how repay the debt and the sale of any of the debtors properties I decided on behalf of myself and **RPF** not to continue agitating the issue of the appeal within the Beth Din, not just in light of the statement made by the three judges of the Beth Din referred to in paragraph 9, but because I was told there would be a mesadrin in any event. For the same reason I also determined at the time not to appeal to the Supreme Court of Victoria, as I believed and was told by the Beth Din, there would be a mesadrin. The arbitration decision itself contains a number of irregularities although the Supreme Court dealt with some but not all of them.

1. The second piece of evidence relied upon was the following paragraph from the first Raskin letter, set out at paragraph [11] above:

Since the arbitrators are finding it difficult to continue with a further Din Torah on this topic for numerous reasons, and we also stipulated before we began that we do not accept upon ourselves to bring the judgement to actualization, or to be involved in Mesadrin etc, and therefore it’s on you to search for another Beis Din to organise this.

It is self-understood the great obligation on the respondents to quickly pay off the debt etc, (including Mesadrin, beginning to pay the debt etc) whatever is possible as explained in the books of the Poskim.

1. Counsel made this submission about that evidence:

MR COHEN: So what we say there is two things: (a) in a sense, it’s evidence of discussions beforehand about the issue of the Mesadrin. It’s, indeed, put in the Tayar – I will say the respondent’s affidavit. He doesn’t dispute the contents of it. He puts it and translates it. There is a better copy of that. I will take your Honours to that in a moment, but the bottom line is we say that that there is one example of evidence where it may well be and most likely was – there are obviously some form issues – there were form issues in the appellant’s primary affidavit or the one dated 10 August 2022. There’s no attempt to get around that, but it is what is it. But, in any event

O’CALLAGHAN J: The letter says that the – assume that Rabbi Raskin

MR COHEN: Yes.

O’CALLAGHAN J: is speaking on behalf of the other two arbitrators and himself. It says:

*We do not, in essence, wish to be involved in Mesadrin.*

MR COHEN: That’s right.

O’CALLAGHAN J: But how is that evidence that there was an expressed or implied agreement between the parties that there would be a Mesadrin?

MR COHEN: Yes. Well, it’s about drawing the inference, your Honour. The inference there is it was specifically (a) discussed, and (b) these particular adjudicators ..... as they’re translated or called in – or Jewish judges said, “Look, we’re not going to deal with that. It’s on you to find another beth din to deal with that issue.” But what it is, is it’s evidence of (a) it was discussed, and (b) it goes a bit further than that. It uses the term “stipulation”. So the term “stipulation” is what I would submit to the court evidence of there was an agreement between the parties as to going into another – entering into another process, being another – the Mesadrin process, but just that simply this beth din said, “Look, we’re not dealing with – it’s an inference. We’re not dealing with everything. We will deal with the first part. We’re not dealing with the next part.” And, indeed, it says:

*Since the arbitrators are finding it difficult to continue with a further Din Torah.*

So it suggests, in a sense, an ongoing affair. So the inference is that there was clearly – I would said clearly, but probably “clearly” is – without putting any spin on it or just simply that the inference is there was a discussion between the parties beforehand about this issue being the Mesadrin, and it was stipulated that you’ve got to use another beth din. We’re not dealing with that process. So that’s the – that is one piece of evidence that we rely on to establish that there was a contract beforehand, that there was – that the parties would enter into Mesadrin thereafter, and if we start looking at the pieces together, you have evidence from Rabbi Feldman as to – some of it, indeed, as to state of mind, but he certainly believed the Jewish law was primary.

He believed all that matters would be dealt with under Jewish law. That was his state of belief. The rabbi, Rabbi Raskin being the respondent, was part of the same community as him, and I will take – I will refer your Honours to some things that the respondent said in the – in evidence when he gave evidence in court that feeds into that, but both were of the same background, in a sense. Both had the same state of mind. There’s evidence where it’s stipulated – you’re talking about the express reference to the Mesadrin there, being it was stipulated, that you’ve got to go to a Mesadrin …

1. The third piece of evidence relied upon was what the arbitral panel said in its letter, viz that “[t]he defendants must pay the amounts stated in the Court Decision as soon as possible”. It was submitted that “as soon as possible” means “in good faith if possible”, and that there was thus never any debt due and payable. This extract from the transcript records the way the submission was put:

MR COHEN: So what this document here is, is a subsequent decision by the arbitrator or it’s a subsequent – it’s affirming of a decision. It’s dated May two thousand and – 9 May two thousand and – sorry, 2 March 2014. It’s in – it was translated from Hebrew to English and what this document essentially does, well, it speaks for itself. It – there was an ongoing process and it’s translated where it affirms the decision. There was one typographical error, and it says the defendants must pay the amounts raised in the court decision as soon as possible.

O’CALLAGHAN J: So “the court” being the

MR COHEN: The Jewish court.

O’CALLAGHAN J: Yes.

MR COHEN: The – not – this was not – that’s so, your Honour. So there were a number of issues, we say, that this document presents, is that, firstly, under the Commercial Arbitration Act – and I should have attached. I noticed in the authorities that I did not attach the relevant part, but that appears to be an amendment of some sort. It doesn’t amend the amount, but ultimately what it says is the defendants must pay the amount stated in the court decision as soon as possible and that, in a sense, does two things, is that it is indicative that, strictly speaking, not a debt due and payable and it is certainly due and payable if the appellant could afford it and if he was in a position to pay it and that’s what “as soon as possible” means. So there’s

O’CALLAGHAN J: So you say the words “as soon as possible” mean – so “pay as soon as possible” means, “Pay if you can afford it.”

MR COHEN: Pay – sorry?

O’CALLAGHAN J: “Pay if you can afford it.”

MR COHEN: Pay if possible. That’s so. So there are two

O’CALLAGHAN J: It doesn’t say “if possible”. It says “as soon as possible”.

MR COHEN: As soon as possible. That’s so, your Honour. I would say that that’s

O’CALLAGHAN J: Wouldn’t a court read – wouldn’t an Australian court read into that – and think this is what the primary judge said.

MR COHEN: That’s exactly right, your Honour.

O’CALLAGHAN J: You would say, well, it’s due within a reasonable period of time. So 30 days, 60 days.

MR COHEN: That’s indeed what her Honour did. My submission to the court is that – looking at it factually, that “as soon as possible” means “as soon as possible” in a literal sense. That is when the debt is due. So there are two issues there. There is (1) is there a debt due and payable? But the reality is it’s not necessarily helpful between distinguishing whether the debt is due and payable or as soon as possible and whether it’s actually due and payable and the issue that it feeds into is being whether the parties in fact in all the circumstances agreed to a Mesadrin because “as soon as possible”, consistent with – the evidence which I will take your Honours to in a moment, is consistent with there being some other process to determine what is as soon as possible, being what we submit to the court is a Mesadrin. So there are two issues there. There is one in relation to section 55(1), is whether there is in fact a debt due and payable.

…

O’CALLAGHAN J: All right. So we assume that we read this letter as effecting an amendment to the award, then you invite us to read the words:

*The defendants must pay the amount stated in the court decision as soon as possible –*

to mean the defendants must pay the amount stated in the court decision if possible.

MR COHEN: Yes.

O’CALLAGHAN J: All right.

MR COHEN: As in, if possible – in other words, in good faith, if possible. In other words, the best of your abilities, pay it. If you can’t, you can’t pay it. That’s what I might – that’s so, and there are two – what I would say is, there are two – that particular – that document has two effects. The first effect is, as your Honour has stated, are we arguing that the debt is currently not due and payable? And the answer is – I would say that the answer is that, based on that, it’s not due and payable, and the second point is, is that it ties into the question about whether there was an implied agreement or implied or express or a combination of both to enter into a Mesadrin to give efficacy, in a sense, to what was going on.

And it’s not necessarily a case of merely giving efficacy because it’s not – we’re not saying it’s an implied term within a contract. We’re saying that there an express – there is a contract that may well have been wholly implied by – when one looks at the conduct of the parties and one, for example, would look at – there are perhaps a reasonable bystander test, would, in all the circumstances, a reasonable person say that, given all the circumstances, that these people would have agreed beforehand, whether expressed or implied, to have all aspects in their dispute dealt with

1. The fourth piece of evidence relied upon was part of the second Raskin Letter set out at paragraph [18] above, that part being as follows:

It is understandable that there is an obligation on the defendants to expedite the payments of the debt (including M’sadrin from a Beis din i.e. that the Beis din assesses and evaluats the assets of the borrower and anything beyond basic living should be repaid to the lender and they should also begin the payments etc.) in any way possible as it’s explained in the works of the Halachists.

1. The presiding judge asked counsel how this part of the letter assisted, to which counsel responded:

Well, it’s a matter of putting the parts together, and it is a – I don’t suggest that – sometimes, it may not be the easiest task in the world to assert it’s a – when you have a – and, essentially, when you’re saying there’s a whole – possibly a wholly implied contract – I don’t – I don’t back away from the fact that that is not necessarily an easy thing to do. Obviously, if the contract is in writing, it’s certainly a lot simpler, but it’s a matter of putting the parts together, your Honour.

1. It was also submitted that the letter, which significantly post-dated the arbitration agreement, could be relied upon as “post-contractual conduct”. Quite how that could be so in light of cases like *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 582 [35] (Gummow, Hayne and Kiefel JJ) (it is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after it was made) was not explained. Whether that was so or not, this was the submission made about the point:

Well, I understand what your Honour – it’s talking about post-contractual conduct cannot be used to prove a prior contract, indeed, when it significantly postdates. Yes, it can, because post-contractual conduct can be taken into account to actually determine whether there was a contract or not in the first place. That is one question. Now, indeed, it does significantly postdate, but it may well be that in contradistinction to the other piece of evidence that I showed your Honour – indeed, the other piece of evidence is stronger in the sense that it’s not post-contractual. It’s evidence of something that happened prior to entering into the arbitration agreement, where it’s evidence of Rabbi Raskin being the – one of the panel – arbitration panel, saying that “I stipulated”

1. The fifth piece of evidence relied upon was an answer given by Rabbi Tayar in cross-examination before the primary judge:

HER HONOUR: That is, I think - - -?---What is - - -

- - - the answer you gave was “it depends” or “maybe” when there was a question as to whether a Mesadrin was a required step before going to a civil court. And I think you’ve started to answer that by saying - - -?---Yes.

- - - “it depends”?---Well, what I – yes. I said - - -

If you’re – if you take a stricter view, then, yes, you say it is?---The stricter view is that you should first try to have it dealt with internally. Sort of like you would say through, like, a mediation process. You try to do it. And if that fails, then those 5 people or the Rabbis that are aiding in this process of inviting the other party to take part in that process – if they see that the other party refuses, which is what happened, they then will give you - - -

MR COHEN: I object, your Honour.

HER HONOUR: There’s an objection to the words “what happened”. Just, can you just stick to the objective - - -?---Sorry.

- - - process?---Yes. Sorry, just the process. Yes. So when the ones that are overlooking it see that the respondent or respondents refuse to comply – to take part in the Mesadrin process or any other process, they will then give the permission – Halachic permission to take it to court.

1. The following submission was made in support of the proposition that the evidence given by Rabbi Tayar in cross-examination supported the existence of the agreement contended for:

MR COHEN: So – and then he says, later down the track – so what he says is you try and deal with it internally, but that’s the stricter view. Now, what the appellant’s position is is, well, his evidence is – his evidence is, well, you must deal with it, in a sense, internally. In other words, you must go by Jewish law, at all times – I’m saying the effect of his evidence and his beliefs. So when you actually look at those views together, there is a level of agreement, because

O’CALLAGHAN J: A level of agreement about what?

MR COHEN: That you must deal with it internally first. There isn’t – in other words, he’s saying that if you take the stricter view, and I’m a strict person, you’ve got to deal with it internally first. Now, the importance of that point is that he is accepting that, if he’s taking a stricter view, that you’ve got to deal with internally first. He puts a certain, in a sense, flavour on it, which I’m going to – I will talk about in a moment, but then, if you look at that with the evidence of the appellant, saying “I believe”– “I believe there was a Mesadrin. Jewish law was applicable for that effect. My understanding was it was going to be Jewish law”

O’CALLAGHAN J: But if the witness says that the stricter view is that you deal with the Mesadrin internally, doesn’t that rather suggest that there are other views that may be adopted by others?

MR COHEN: That’s absolutely right, your Honour, but the question is is

O’CALLAGHAN J: And what do we then make of that, if you’re inviting us to, as I assume you are, to read this as the witness giving evidence of Jewish law?

MR COHEN: Because when you look at the evidence together, your Honour, he’s saying “there are other views, but I take the stricter view”. You have the appellant also saying “I take the stricter view”. So if you look at the – in a sense, the common denominator, they’re both saying they take the stricter view. If they both take the stricter view, you actually have, in a sense, ad idem. They both, at the very least, believe that prior to, or at least, once you have that award, being the arbitration, some other process involving rabbis and Jewish law takes place, before you can go to take that next step. Now, you have an agreement. Now, then, it becomes an issue of what are the terms of those agreement?

Is this something very – is this something, in a sense, vague and uncertain, or is this actually not vague and uncertain, and when you look at all the evidence, it’s not vague and uncertain. So

O’CALLAGHAN J: Yes. But what’s – so there’s – all right. Well, that’s the next – that bit of evidence is that Rabbi Tayar says that in his opinion, the stricter view is that you deal with the issue of a Mesadrin internally, before you resort to a civil court.

MR COHEN: That’s so, your Honour.

O’CALLAGHAN J: All right. Okay.

MR COHEN: And what I would say

O’CALLAGHAN J: So that’s his evidence, and you say that’s evidence of your agreement.

MR COHEN: Yes. It is, indeed. It’s, at least – what it’s evidence of is a common denominator, on one particular point, because there’s nothing to say that – what he doesn’t say is, the evidence is is they’re both part of the same community, and there’s – the appellant believes there’s a – now, belief – I’m not suggesting belief, in itself, can satisfy. It’s not about belief. It’s about the objective intentions of the party. But what you have, in a sense, is the appellant acting in a way, consistent with his beliefs, presumably, and you have Mr Tayar, in a sense, saying, “Well, I also take the stricter view. Notwithstanding there are divergent views, I take the stricter view.”

And there is nothing in the evidence that suggests that they were not, and indeed, if one, again, looks at the evidence, particularly of the appellant, who wasn’t cross-examined, there’s nothing to suggest – it wouldn’t be right to say that, well, despite the fact they both take the stricter view, they didn’t know that each other took the stricter view – that, in a sense, notwithstanding when we’re dealing with contract law, we’re looking – we’re not, in a sense, looking at what they believe. We’re looking at objective intentions, based on conduct, but the reality is at the end of the day, you have all the parts to say that there, in fact, is a contract.

1. The sixth piece of evidence relied upon was this exchange from the cross-examination of Rabbi Tayar before the primary judge:

MR COHEN: … do you suggest that you searched for another Beth Din to organise a Mesadrin? --- Not because he told me, but because that was my Halachic obligation.

1. The transcript also then records the following statement made by counsel: “All right. That was not responsive to the question. I will withdraw the question, actually. I would ask that answer to be struck from the record, your Honour, as being non-responsive”.
2. Counsel also accepted that the search for another Beth Din to organise a Mesadrin that he had in mind occurred well after the arbitral award had been published.
3. The following exchange then ensued:

JACKMAN J: Does that mean that he has got a religious duty?

MR COHEN: In a sense, yes. Halakah – it’s a little bit – it’s not simply a moral duty, although it could be said to be that, and again, I don’t wish to say anything outside the evidence and give my opinions from the bar table, but

JACKMAN J: But what’s your submission? That the reference to Halakhic obligation is reference to a religious duty?

MR COHEN: A legal – in other words, it’s – Halakah means law. In a sense, it’s a legal obligation under Jewish law.

JACKMAN J: But all of this follows your question at line 34:

*So you’re saying you did agree to enter into the Mesadrin* –

And he doesn’t agree with the proposition.

MR COHEN: No, he doesn’t agree with that. No, he doesn’t, your Honour. That’s so.

JACKMAN J: So we can’t – one can’t construe what he says, at lines 29 and – 28 and 29, as being a concession that there was an agreement for a Mesadrin.

MR COHEN: It’s not a – it’s not an intentional concession, your Honour. I mean, it’s cross-examination. He’s obviously going to be advocating his position.

1. The seventh piece of evidence relied upon was that the second appellant paid a sum of money, estimated by Rabbi Tayar to be between approximately $80,000 and $120,000, to Rabbi Tayar’s wife.
2. The primary judge noted that according to Rabbi Tayar, on numerous occasions the second appellant denied owing Rabbi Tayar any money, informed Rabbi Tayar’s wife that the payments were for charitable purposes and never informed Rabbi Tayar that the payments were part of a Mesadrin procedure.
3. The primary judge also noted that according to the second appellant he made the payments over a period of eight years. He gave evidence that even though according to Jewish law he was not obliged to pay, he made the payments because he felt morally compelled to do so. He said he stopped making payments because Rabbi Tayar’s wife told him to do so and because he needed those funds to bring the proceeding to set aside the bankruptcy notice which was served on him and his father. The second appellant said that the payments were made pursuant to the Mesadrin which he says took place, overseen by Rabbi Gutnick. But as, the primary judge noted (at [37]), “I have already found to be the case, while Rabbi Gutnick may have given advice to the respondents, Rabbi Tayar was unaware of the content and author of that advice. As far as Rabbi Tayar was aware there was no Mesadrin at that time nor at any time after the Second Raskin Letter”.
4. As noted above, ultimately the amount paid by the appellants was taken into account by the Supreme Court of Victoria in considering the question of enforcement of the award.
5. Her Honour made the following finding about that evidence (at [27]):

… that the respondents made some payments to Rabbi Tayar, by paying his wife sums of money from time to time … does not lead to a conclusion that there was a Mesadrin. The payments were irregular. Rabbi Yosef Feldman described them as payments of at least $180 per week and “all up probably around 150k”. But no record of the amounts and times of payment and the total in fact paid was provided to the Court nor was there any evidence which would permit me to draw a conclusion that the payments were made pursuant to a Mesadrin of which both parties were aware and by which they felt bound as opposed to the payments being made by the respondents because of their obligation to make payment of the amount owing under the award.

1. Counsel for the appellants submitted that her Honour erred in so finding, as follows:

MR COHEN: Well, that does expose error, because the difficulty is, your Honour – is that, in a sense, what her Honour is doing is – rather than looking at it in a contractual sense of the word, has actually formed an opinion as to what a Mesadrin comprises of, when, indeed, there was no expert evidence before the court of what a Mesadrin is. It may have been helpful and useful, but the fact of the matter is there wasn’t, and what her Honour does is essentially adopt Rabbi Tayar’s position – in other words, his opinion of what a Mesadrin is, but the appellant wasn’t actually – wasn’t cross-examined on his position, so her Honour couldn’t really conclude what, indeed, comprises of a Mesadrin.

It may well be that, between the parties, that is something – that wouldn’t, for example, prevent a contract from being formed, because the fact that the court doesn’t have all the details before it – for example, just for argument’s sake, let’s assume that the parties did – it was clear that the parties agreed to enter into a Mesadrin, but the court did not have the details of what exactly a Mesadrin was.

1. Counsel for the appellants also took us to some cases (*CSR Ltd v Adecco (Australia) Pty Ltd* [2017] NSWCA 121 at [83]-[86] and [88]-[93] (McColl JA, with whom Macfarlan JA and Simpson JA agreed), *Feldman v GNM* [2017] NSWCA 107 at [60]-[61] (Beazley P, with whom McColl JA and Macfarlan JA agreed), and *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd* [2017] NSWCA 132), but it was unclear to what end.
2. In our view, the proposition advanced on behalf of the appellants that those pieces of evidence, taken as a whole or in any combination, obliged the learned primary judge to conclude that there was an express or implied agreement entered into prior to the date of the arbitration agreement that any amount awarded by the arbitrators under the agreement would be dealt with by way of a Mesadrin is completely untenable, and we reject it.
3. The appellants advanced an alternative argument in support of grounds 6-8 to the effect that there was in fact a Mesadrin. This was said to be based on the payments actually made by the appellants, and a lack of court action until 2019. As we have said above in relation to the reasoning of the primary judge in her Honour’s judgment at [25]-[28] and in relation to the seventh piece of evidence relied upon, it is not possible to attribute those payments to any Mesadrin process, and thus the argument fails at the first hurdle. Moreover, it is difficult to see how this argument operates independently of the argument that there was a binding agreement to engage in a Mesadrin prior to entry into the arbitration agreement.

### Ground 2

1. The second ground of appeal was that the primary judge “erred, by rejecting the evidence of the second appellant, Yosef Feldman when the second appellant was not subject to cross-examination”.
2. Counsel pointed to this evidence given by the second appellant in his affidavit dated 10 August 2022 at [11]:

Sometime in about August 2014, the Beth Din wrote a letter of permission to [Rabbi Tayar] stating that he was religiously permitted to go to a Civil Court (in this case the Supreme Court of Victoria). I had never been given such permission by the Beth Din. However, I then had further dealings with the Beth Din and I was informed by Rabbi Raskin of the Beth Din, who was also communicating with [Rabbi Tayar] that there was a in fact a valid mesadrin according to Jewish Law, and the matter should not go to a civil court under Jewish law. I then had further dealings with the Beth Din, and I was informed by Rabbi Raskin of the Beth Din, who was also communicating with [Rabbi Tayar] that there was in fact a valid mesadrin according to Jewish law and the matter should not go to a civil court under Jewish law.

1. As we understand it, the proposition put was that because the witness was not cross-examined about this (or anything), the primary judge was bound to accept it.
2. In his oral submissions, counsel for the appellants referred to paragraphs [24]-[26], [28], [31]-[32] and [104] of her Honour’s reasons, as containing relevant incorrect findings in relation to the second appellant. Paragraphs [24]-[26] and [28] are set out at paragraphs [15]-[16] above. Paragraphs [31]-[32] and [104] are set out below:

The Second Raskin Letter supports the finding made above that the advice given by Rabbi Gutnick did not constitute a Mesadrin which bound Rabbi Tayar. So much is evident from Rabbi Raskin’s observation that the rabbi called in by the respondents would not reveal his identity nor put his ruling in writing so that Rabbi Tayar would have no way of understanding the test which was applied. Rabbi Raskin thus asked the respondents to appoint a new expert rabbi who could record his ruling and his reasons or methodology and to do so by Jewish new year.

Rabbi Tayar is not aware of whether the procedure referred to in the Second Raskin Letter was undertaken and is unaware of what kind of “Halachic” test was performed, if any at all. He does not know whether the respondents’ assets were removed from their possession and whether they were made to take the Halachic oath that all future assets that come into their possession would be immediately handed over to him. In other words, Rabbi Tayar has no knowledge of the respondents undertaking the steps referred to in the Second Raskin Letter. One might expect that if they did, the name of the rabbi appointed would have been disclosed to Rabbi Tayar (and the Arbitral Panel as requested by Rabbi Raskin in his letter) and that the decision and methodology applied would have been reduced to writing and provided to Rabbi Tayar.

…

… it is apparent that while the Mesadrin process may be favoured by members of the orthodox Jewish community, it is not obligatory. There is no bar to approaching a secular court for the purposes of enforcement of an award given by a Beth Din.

1. In our view, ground 2 is also completely untenable. No error is exposed in her Honour’s reasoning. And the notion that a judge in a civil case is duty bound to accept anything a witness says merely because they are not cross-examined is contrary to authority. As Beazley, Giles and Santow JJA said in *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [113]:

It is well accepted that the absence of cross-examination is relevant in determining whether to accept evidence or not. However, it does not compel the acceptance of that evidence. As Samuels JA said in *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505 at 507:

“While I do not think that it would be right to conclude that the absence of cross-examination entails the acceptance of the evidence given, it certainly enables that evidence to be regarded by any tribunal of fact with a greater degree of assurance than might otherwise have been the case.”

### Ground 4

1. As to ground 4, counsel for the appellants accepted that it added nothing further and that the proposition that there had been a miscarriage of justice was merely another way of characterising the errors in alleged in the other grounds of appeal. In the circumstances, it is not necessary to say anything further about it.

## No reliance on written submissions

1. It should also be noted that the appellants filed written submissions, but we were not taken to a word of them. Nor did counsel for the appellants seek to adopt or rely on them, even in a global sense. Accordingly, we have not had regard to them. In any event, the submissions filed on 12 May 2023 and headed “The Appellants’ Amended Written Submissions” do not in any material or relevant way advance the grounds of appeal contended for.

## The trustees

1. The trustees were granted leave to be heard pursuant to r 2.03 of the *Federal Court (Bankruptcy) Rules 2016* (Cth) and appeared below and on appeal to assist the court.
2. Mr Joshua Kohn of counsel appeared for the trustees on appeal and advanced a submission premised on the possibility that the sequestration order was set aside. That is not the consequence of this appeal. On the contrary, for the reasons set out above, the appeal is to be dismissed.
3. The trustees also sought an order that the appellants pay the trustees’ costs of the appeal and the review application before the primary judge. Those orders will be made.

## Disposition

1. The appeal is to be dismissed.
2. The respondent seeks his costs on an indemnity basis. In our view, such an order is warranted. The appeal should never have been brought. It was self-evidently hopeless. As Foster J said in *Market Services International Pty Ltd v Nutri-Metrics (International) Australia Pty Ltd* [1995] FCA 1152 in making a costs order on an indemnity basis, “the appeal was basically hopeless and should not have been persisted in. … at no stage … has the appellant identified an arguable issue. … the appellant pay the respondent’s costs of each of the motions on a full indemnity basis”. Those reasons aptly describe this appeal.

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| I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices O’Callaghan, Anderson and Jackman. |

Associate:

Dated: 29 May 2023