FEDERAL COURT OF AUSTRALIA

Culleton v Balwyn Nominees Pty Ltd [2017] FCAFC 8

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| Appeal from: | *Balwyn Nominees Pty Ltd v Culleton* [2016] FCA 1578 |
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| File number: | WAD 2 of 2017 |
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| Judges: | **ALLSOP CJ, DOWSETT AND BESANKO JJ** |
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| Date of judgment: | 3 February 2017 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – sequestration order pursuant to s 52 *Bankruptcy Act 1966* (Cth) – Appeal against the making of a sequestration order – Whether the hearing of the creditor’s petition ought to have been adjourned as a matter of procedural fairness – Whether sufficient material and evidence was led below to require an adjournment to allow the appellant to prove solvency with the assistance of legal representation – Application of principles in *Ahern v Deputy Commissioner of Taxation (Qld)* – Nature of the bankruptcy jurisdiction – Application of principles in *Sarina v Council of the Shire of Wollondilly* – Centrality of the question of solvency to the bankruptcy jurisdiction  **BANKRUPTCY AND INSOLVENCY** – Application for a trial by jury pursuant to s 30(3) *Bankruptcy Act 1966* – Whether primary judge erred in deciding to decline to exercise discretion to grant application for a trial by jury  **BANKRUPTCY AND INSOLVENCY –** Service of bankruptcy notice and service of creditor’s petition – Whether there was compliance with the service requirements in s 47 *Bankruptcy Act 1966* and rr 4.04, 4.05 and 4.06 *Federal Court (Bankruptcy) Rules 2016* (Cth) – Whether the primary judge erred in finding that there had been compliance  **PRACTICE AND PROCEDURE –** s 37M *Federal Court of Australia Act 1976* (Cth) – The just determination of proceedings is a central consideration to the overarching purpose of the civil practice and procedure provisions |
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| Legislation: | *Constitution* ss 44, 45  *Bankruptcy Act 1966* (Cth) ss 30, 40, 43, 47, 52, 86, 306  *Evidence Act 1995* (Cth) s 131  *Federal Court Rules 2011* (Cth) rr 1.61(5), 10.11  *Federal Court of Australia Act 1976* (Cth) Pt VB  *Federal Court (Bankruptcy) Rules 2016* (Cth) rr 1.03, 4.02, 4.04, 4.05, 4.06  *Judiciary Act 1903* (Cth) s 78B |
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| Cases cited: | *Ahern v Deputy Commissioner of Taxation (Qld)* [1987] FCA 504; 76 ALR 137  *Appellant WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 30; 134 FCR 271  *Balwyn Nominees Pty Ltd v Culleton* [2016] FCA 1578  *Bloch v Bloch* [1981] HCA 56; 37 ALR 55  *Coulton and Others v Holcombe and Others* [1986] HCA 33; 162 CLR 1  *Culleton* [2016] FCA 1193  *Culleton v Dakin Farms Pty Ltd* [2015] WASCA 183  *Culleton v Macquarie Leasing Pty Ltd (No 2)* [2015] FCA 1478  *De Robillard v Carver* [2007] FCAFC 73; 159 FCR 38  *Dowling v Colonial Mutual Life Assurance Society Ltd* [1915] HCA 56; 20 CLR 509  *House v The King* [1936] HCA 40; 55 CLR 499  *Kleinwort Benson Australia Ltd v Crowl* [1988] HCA 34; 165 CLR 71  *Macquarie Leasing Pty Ltd v Culleton* [2014] FCCA 1714  *Maxwell v Keun* [1928] 1 KB 645  *O’Farrell v Palicave Pty Ltd* [2009] FCAFC 64; 176 FCR 134  *O'Mara Constructions Pty Ltd v Avery* [2006] FCAFC 55; 151 FCR 196  *Pattison v Hadjimouratis* [2006] FCAFC 153; 155 FCR 226  *Rangott v Marshall* [2004] FCA 961; 139 FCR 14  *Re Freeholders Oil Co Ltd* (1953) 33 CBR 149  *Re Culleton (No 2)* [2017] HCA 4  *Re Sarina; Ex parte Council of the Shire of Wollondilly* [1980] FCA 85; 43 FLR 163  *Sarina v Council of the Shire of Wollondilly* [1980] FCA 138; 48 FLR 372  *Simon v Vincent J O’Gorman Pty Ltd* [1979] FCA 112; 41 FLR 95  *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; 256 CLR 507  *Totev v Sfar and Another* [2008] FCAFC 35; 167 FCR 193  *Walker v Walker* [1967] 1 WLR 327  *Williams v Spautz* [1992] HCA 34; 174 CLR 509  *Wren v Mahony* [1972] HCA 5; 126 CLR 212 |
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| Date of hearing: | 27 January 2017 |
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| Registry: | Western Australia |
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| Division: | General Division |
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| National Practice Area: |  |
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| Sub-area: | General and Personal Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 113 |
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| Counsel for the Appellant: | Mr PE King |
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| Solicitor for the Appellant: | Maitland Lawyers |
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| Counsel for the Respondent: | Mr MG Lundberg and Mr A Rompotis |
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| Solicitor for the Respondent: | King & Wood Mallesons |

ORDERS

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|  | | WAD 2 of 2017 |
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| BETWEEN: | RODNEY NORMAN CULLETON  Appellant | |
| AND: | BALWYN NOMINEES PTY LTD  Respondent | |

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| JUDGES: | ALLSOP CJ, DOWSETT AND BESANKO JJ |
| DATE OF ORDER: | 3 FEBRUARY 2017 |

THE COURT ORDERS THAT:

1. Paragraphs 13, 14 and 17 of the affidavit of the appellant dated 11 January 2017, the whole of the affidavit of the appellant dated 18 January 2017 and the whole of the affidavit of Ioanna Culleton dated 18 January 2017 be rejected.
2. The appeal be dismissed with costs.
3. All proceedings under the sequestration order made on 23 December 2016 against Rodney Norman Culleton be stayed until midnight (Australian Eastern Daylight Savings Time) on Monday 6 February 2017.

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

REASONS FOR JUDGMENT

THE COURT:

1. This is an appeal by Rodney Norman Culleton against a sequestration order made against his estate under s 43 of the *Bankruptcy Act 1966* (Cth) (**the Act**) on 23 December 2016: *Balwyn Nominees Pty Ltd v Culleton* [2016] FCA 1578. We will, without intended disrespect, refer to the appellant as such. The prima facie effect of the order of the Court on 23 December 2016 was to cause the vacation of his office as a Senator for Western Australia: ss 44 and 45 of the *Australian Constitution*. Were this appeal to be allowed, important questions would arise upon the making of the order setting aside the sequestration order as to the legal effect of the relevant order: cf *Simon v Vincent J O’Gorman Pty Ltd* [1979] FCA 112; 41 FLR 95 at 102; *Rangott v Marshall* [2004] FCA 961; 139 FCR 14 at [17]-[29]; *De Robillard v Carver* [2007] FCAFC 73; 159 FCR 38 at [140]-[150], especially [149]-[150] and [1]; and *Pattison v Hadjimouratis* [2006] FCAFC 153; 155 FCR 226 at [14], [51]-[53] and [177]-[181], and the relationship of that legal effect at general law and under the Act to the operation of ss 44 and 45 of the *Australian Constitution*. (See now *Re Culleton (No 2)* [2017] HCA 4 at [29].) These considerations made it important to hear the appeal as soon as possible prior to the Parliamentary sittings in February. The matter was therefore expedited. We should at this point express our gratitude to counsel and solicitors for their helpful submissions given the short timeframe for the hearing of the appeal.
2. For the reasons that follow, the appeal should be dismissed with costs.
3. The sequestration order was made upon a creditor’s petition filed by the respondent on 19 October 2016. The petition was founded on a final judgment of the District Court of Western Australia of $271,134.26 dated 24 October 2013. The bankruptcy notice, based on the judgment, was found by the primary judge to have been served on 8 August 2016. The time for compliance with the requirements of the notice expired on 29 August 2016. There was thus an act of bankruptcy for the purposes of s 40(1)(g) of the Act on 30 August 2016. We should add at this point that one aspect of the appeal involves the questions agitated at the hearing of the creditor’s petition as to whether the appellant was served with the bankruptcy notice and the creditor’s petition.
4. On 17 November 2016, the appellant filed a notice of appearance.
5. On 18 November 2016, the appellant filed a notice under s 78B of the *Judiciary Act 1903* (Cth) asserting a Constitutional question that the removal in Western Australia from the judicial oath of reference to allegiance to the Queen meant that the judgment was not valid.
6. Also on 18 November 2016, the appellant filed a notice stating the grounds of opposition to the creditor’s petition. In substance these grounds were:
   1. that the appellant had not been served;
   2. that he should be entitled to an account of mutual dealings under ss 30(2) and 86(1) of the Act;
   3. that there was no contract underlying the debt and there were no facts sufficient to found damages (in effect, going behind the judgment); and
   4. the so-called Constitutional issue referred to above.
7. It is important to note that the appellant did not assert in the notice that he was solvent. As a matter of history, though it was not canvassed before the primary judge, the appellant was made bankrupt in October 2014 after a contested creditor’s petition on the application of a leasing company for a debt of a little under $100,000 in which he represented himself, and in which he led evidence of solvency based on intellectual property said to be valuable being held by the Australian Keg Company Pty Ltd (**AKC**): *Macquarie Leasing Pty Ltd v Culleton* [2014] FCCA 1714. This intellectual property is discussed in a little more detail later in these reasons. He was unsuccessful in that attempt to prove solvency and was made bankrupt. The bankruptcy was set aside consensually in December 2015: *Culleton v Macquarie Leasing Pty Ltd (No 2)* [2015] FCA 1478. As will be discussed later, from this there can be no doubt that the appellant was aware of the importance of the question of solvency to the resolution of a creditor’s petition, and also of the potential relevance of the intellectual property (to which we have referred) to that question. Though these matters were not canvassed before the primary judge, they are important to appreciate in order to assess any injustice consequent upon the effect of the primary judge’s approach, whether or not error can be ascribed to it.
8. On 5 October 2016, another judge of the Court (McKerracher J) dealt with the so-called Constitutional question. This question had arisen at this time in the context of the appellant seeking, by proceedings filed on 30 September 2016, to restrain various parties, including the respondent, from enforcing the District Court judgment. Justice McKerracher characterised the Constitutional argument as “entirely unarguable”, refused relief and refused to issue a s 78B notice: *Culleton* [2016] FCA 1193.
9. On 21 November 2016, the creditor’s petition came before the Western Australian District Registrar on its first return date. The orders that were made on that day provided for submissions to be filed by the appellant (as respondent to the petition) by 29 November in answer to submissions of the respondent (as applicant to the petition) that were apparently before the Court, but which were filed on 24 November, and for the petition to be listed for hearing before a judge on 8 December 2016. The report of listing of the Registrar records that there was no appearance for the appellant. The submissions of the respondent that were filed on 24 November dealt with the grounds of opposition and the formal satisfaction of the requirements of s 52 of the Act.
10. During late November and into December 2016, the appellant became embroiled in proceedings in the High Court concerning the legitimacy of his candidacy for the Senate. He was before the High Court on 7 December and he was unable to return to Perth by 8 December. The primary judge vacated the date and set the matter down for hearing on 19 December. (The Court does not have a formal end of term. Rule 1.61(5) of the *Federal Court Rules 2011* (Cth) suspends the running of time from 24 December to 14 January.)
11. On 6 December 2016, the appellant swore an affidavit that dealt with the issues in the notice of grounds of opposition. He prepared the affidavit himself. Lawyers were not responsible for it. However, he had lawyers available to him for advice at the time. The body of the affidavit was eight pages in length. It dealt with the topics in the notice. Paragraph 10 of the affidavit set out the terms of s 52(2). The next paragraph began immediately with “other sufficient cause”. A few paragraphs later, at para 18, in dealing with “other sufficient cause” under s 52(2)(b) he said:

“Other sufficient cause” Number two, available to the Court can arise if the disputed amount is paid into Court on trust until the Court decides on available admissible evidence, and upon a properly conducted trial, whether in fact there is any money owing at all. There is a groundswell of support but it will take some time, and on a Salary of around $200,000 per annum, as a Senator, if it is found to actually be owing, I would have no trouble paying off that amount, even if I never got compensation for the illegal activities of the ANZ Banking Corporation.

1. Though ill-organised in expression, in this paragraph he did assert solvency based on his salary and, it would seem, expectations of support from others. Further, the setting out of s 52(2) in para 10 revealed his appreciation of the relevance of solvency to the petition.
2. One aspect of the asserted unfairness as to how the primary judge dealt with the matter on 19 December was that the appellant asserted that he had thought only interlocutory and case management issues would be dealt with on the adjourned date. In this regard, it should be noted that a letter from the creditor respondent’s solicitors, dated 3 December 2016, clearly told the appellant that on 8 December their instructions were to proceed to seek a sequestration order. There was nothing in the circumstances of the adjournment from 8 to 19 December that indicated any change in attitude of the creditor, and there was no statement by the primary judge that indicated any limitations upon the hearing on 19 December. Given all the circumstances to which we will refer, the primary judge was entitled not to put operative weight on this assertion by the appellant.
3. On Friday 16 December 2016, the appellant filed two affidavits sworn by himself and also written submissions. One affidavit annexed documents purporting to support an appeal to the Western Australian Court of Appeal from the 2013 District Court judgment. The other affidavit annexed documents purporting to show that the “ANZ Banking Corporation has an interest in these proceedings”.
4. The submissions were nine and a half pages of single spaced typing. They began with the following:

I have decided to represent myself in these proceedings, because what I want to say is not something a lawyer will argue in most cases.

1. It is necessary to say something about the character of the submissions. We do so without intended personal disrespect to the appellant. With the exception of an important reference to solvency referred to in the next paragraph, the submissions barely touched the issues to be considered on the application, at least directly. They reveal a degree of unfocused and erratic content expressed with not a little assertiveness that deflected attention from whatever might have been the real defences to an application to make him bankrupt. (It is this character of the submission to which counsel for the appellant pointed in aid of the proposition that the appellant should have been granted an adjournment to obtain legal advice.) The submissions commenced with some complaints about how the High Court issues its process, about the *Crimes Act 1914* (Cth) and a grand jury. The submissions then touch on asserted misconduct of the “ANZ Banking Corporation”. This appears to be potentially relevant, being part of an assertion that the bankruptcy proceedings were politically motivated, in part at least, at the instance of that bank. This was how the abuse of process argument appeared to be structured – that the ANZ Bank and the creditor were somehow working together to bankrupt him to stifle his work in Parliament investigating the banks. The submissions then set out some concerns that the appellant says he has had about certain High Court decisions that appear to have no bearing on the bankruptcy proceeding. The submissions then turned to the appellant’s position as a Senator, to the *Federal Court (Criminal Procedure) Rules 2016* [sic], to s51(xxxi) of the *Constitution*, to asserted corruption in Western Australia, to the asserted protection of the banks by the government, to the asserted unconstitutionality of judges sitting without juries, to the level of filing fees in the courts, to the request by him for a jury in the bankruptcy proceeding and to various other matters, none of which had any bearing on the substantive issues in his bankruptcy proceedings.
2. The second last paragraph of the written submissions was in the following terms:

We now come to my Counterclaim against the ANZ Banking Corporation which goes to the heart of my claim to be solvent. I have made and filed an Affidavit containing admissions made by Permanent Custodians Limited that is a subsidiary of ANZ Banking Corporation in pleading in a case in Victoria.

1. This was the second time in the course of the application that the appellant asserted his solvency. Importantly, this time his solvency was said to be bound up with an asserted claim against the ANZ Bank. (It was said to be based on his salary and anticipated support on 6 December.) The affidavit dealing with the claim against the ANZ Bank filed on 16 December 2016 lacked any focus other than generalised assertions of wrongdoing by the bank. The claim was not reduced to an articulated pleading; and any proceeds from it (if it had any basis) could hardly be said to be likely to assist in the payment of his debts as and when they fell due.
2. On 18 and 19 December, the appellant filed a number of affidavits. They were directed to proving that the appellant was not served with the bankruptcy notice and the creditor’s petition (the affidavits of Mr John Codrington, Mr Peter King, Ms Laona Jones, Ms Anne-Maree Leonard, and Dr Chamonix Terblanche).
3. Shortly before the commencement of the hearing another affidavit was sent to the Court from a solicitor in Melbourne, Mr John Maitland. The relevant parts of it are referred to below.
4. When the matter was called on the appellant asked for an adjournment. He did so claiming not to be ready. The following exchanges took place:

MR CULLETON: [referring to the Maitland affidavit] Well, I have a copy of that. It’s all signed and witnessed, and if it serves the purpose, your Honour, which is – clearly shows that I have – I certainly have money in trust, **which proves the solvency of myself and my wife.** So it is a very important affidavit to submit because **that is one of the key issues today, I would assume; is that correct, your Honour?**

HIS HONOUR: Well, assuming for the moment that Mr Maitland’s affidavit has been filed and is before the court, what do you seek to make of it? Are you making an application for an adjournment or are you ready to proceed?

MR CULLETON: Well, I will let his Honour – well, today I’m certainly looking for an adjournment. This has taken us by surprise and - - -

HIS HONOUR: Sorry. What has taken you by surprise?

MR CULLETON: Well, the whole – you know, we’re only less than a week away from Christmas, your Honour. I’m sitting here as a self-litigant. I haven’t been served any documents. I understand you’ve got some particular gentleman up in northern New South Wales who appears behind you today as a police character, that he is giving evidence about some sort of service. So I guess they are the two issues that – well, not issues; they are the two points that will have to be raised today as well, your Honour. So - - -

HIS HONOUR: All right. Well, I had the impression that you were ready. Despite Mr Maitland’s affidavit, you - - -

MR CULLETON: No. **I am not ready for a full trial.** This is – you know, I – in all due respect, your Honour, I have been forced into these court dates. I have been taken also by surprise to a High Court matter which I didn’t intend, but that was referred by the Attorney-General, so I had to deal with that, and also my parliamentary duties. So I have been a bit busy, your Honour.   
(Tp 3, ll.6-36; emphasis added)

1. The primary judge then enquired as to why he needed an adjournment; the appellant explained that he wanted a lawyer, as follows:

HIS HONOUR: Sorry. Just before I do, though, can you explain exactly what you propose would happen if the matter were adjourned. Are you intending to be represented by a lawyer in the matter?

MR CULLETON: Absolutely. And there are constitutional issues around this as well. It is to deal with also the matter of, you know, the $17.8 million price tag that came along with Rathgar, and the actual notes and contentious notes that Dick Lester and how Balwyn Nominees was never a party to any discussion or notes as appeared with a judgment.

HIS HONOUR: Well, you’ve - - -

MR CULLETON: So there has to be – this has to be vented properly and I have a right to appeal to the primary judgment against Curthoys. And I have counsel already lined up, but because it’s so close to Christmas they cannot and **there is funds in trust**.

HIS HONOUR: Well, you say you have counsel lined up. Do I have any evidence of that before me?

MR CULLETON: Well, I can get them on the phone now, if you wish, but John Maitland will be the instructing solicitor; Peter King; and James Kewley.

HIS HONOUR: Well, I have the affidavit of Mr King; it says nothing about being engaged as counsel in the matter.

MR CULLETON: Well, as you would appreciate, your Honour, Mr King will be engaged by John Maitland; I can’t engage him. That’s an agreement between John Maitland to instruct the solicitor. But they have been talking. I actually have spoken to them up to late yesterday, and history would show that I’ve had Peter King appear for me in a number of actions, you know, that I’ve been left a victim through the ANZ Bank.

(Tp 4, l.30 – 5, l.15; emphasis added)

1. The relevant content of the affidavit was set out by the primary judge in [27] of his reasons:

In this affidavit, Mr Maitland stated as follows:

1. I am the principal of Maitland Lawyers, the solicitors acting for the Respondent. I have the care and conduct of this proceeding on behalf of the Respondent, and I am authorised to make this Affidavit on their behalf.

2. I make this Affidavit from facts within my own knowledge, save where I state otherwise, and after having made all relevant enquiries.

3. I have previously acted for the Respondent ['Culleton'] in the High Court sitting as the Court of Disputed Returns at Canberra on 7 December 2016 and have recently received instructions to act on behalf of Culleton in this proceeding.

4. Time and logistics precluded me from retaining counsel and/ or a town agent to appear at the application which is listed this morning and for this reason I would respectfully request the Court to adjourn the application to allow time for Mr Culleton to have legal representation in the Court at Perth.

5. Meantime, I have received substantial payments into my Trust Account on behalf of Mr Culleton **which I am instructed can be used to pay his creditors.** The payments received thus far have been by bank cheque. The trust account rules require my firm to wait for at least 3 working days before the proceeds of the bank cheque can be cleared.

(emphasis added)

1. The adjournment application was opposed.
2. Before examining the reasons given by the primary judge for refusing the adjournment it is appropriate in the next three paragraphs to make some comments about the issues that were said on appeal (though the third issue was quietly put to one side in oral submissions) to have justified the adjournment as legally necessary: solvency, the asserted abuse of process, and the pending appeal of the appellant against the District Court judgment.
3. As to solvency, the appellant prior to and on 19 December had pointed to three reasons for his asserted present solvency: his salary and assistance from supporters; the unsubstantiated claim against the ANZ Bank; and the unspecified moneys held by Mr Maitland. It is crucial to appreciate that the appellant did not say to the judge on 19 December that he needed time to marshal other evidence directed to the question of solvency; he did not say that he needed more time to bring forward evidence as to some valuable intellectual property yet, as must have been evident to the primary judge, the appellant was intelligent, not unworldly and well able to grasp the concept of solvency. On the appeal, the appellant led evidence of the value of intellectual property said to be held by a company which can, it was said, be accessed by the appellant. The value was said to be up to $19,000,000. However, not a word was said to the primary judge throughout the whole of the hearing (before and after the extempore reasons on the adjournment) about this topic. Yet on a number of occasions during the hearing the appellant displayed a clear recognition that solvency was a critical issue. The primary judge was faced with a varied and limited group of assertions to justify solvency. He was given no hint that there may be another body of evidence directed to that topic. He was not told that time had not permitted the collection of same. He was not told that the appellant, a not unworldly man who was intelligent and capable of clear articulation, needed the assistance of a lawyer to put together further evidence on solvency.
4. As to the asserted abuse of process, the material put to the primary judge about this focused upon the asserted collusion between the ANZ Bank and the creditor. There was some oblique reference to Mr Lester, the controller of the creditor. On the appeal a large body of material was sought to be relied upon (including some plainly without prejudice communications) to prove a case that Mr Lester was seeking to use the bankruptcy proceedings improperly to obtain the valuable intellectual property to which we have referred. This was a quite different case to one based on the assertions against the ANZ Bank and the creditor before the primary judge. There was no statement of any clarity before the primary judge that informed the primary judge that there was some as yet unarticulated abuse of process claim for the presentation of which the appellant would need time and legal assistance. On appeal, no complaint was pressed about how the primary judge disposed of the abuse of process claim presented to him.
5. As to the appeal against the District Court judgment, the appellant’s wife had her appeal dealt with finally by the Western Australian Court of Appeal, who dismissed it and, it may be said, did so comprehensively. The appellant’s appeal did not proceed because of his earlier bankruptcy. There was no suggestion before the primary judge, or on appeal, that the factual or legal positions of the appellant and his wife in relation to the underlying facts were different.
6. The primary judge refused the application, giving some brief reasons extempore as follow:

HIS HONOUR: Yes. Thank you. Well, I will deal immediately with the question of whether or not today’s hearing should be adjourned to another date. I’ve heard Senator Culleton’s submissions and I’ve heard Mr Abbott for the applicant on the matter. I’m satisfied that there should be no adjournment today. The hearing set for today is an adjournment from 8 December when the matter would have gone ahead save for Senator Culleton’s inability to be here by reason of flight difficulties from Melbourne on that date. It’s quite clear, despite what Senator Culleton has just said, that all parties have understood that this hearing today, as the hearing originally scheduled for 8 December, is the final hearing on the creditor’s petition. It is correct, as Mr Abbott says, that in submissions filed very recently Senator Culleton has said that he seeks to represent himself in the matter. The affidavit, which came through just some 45 minutes before the hearing was to commence this morning from a solicitor in Melbourne to say that he has, by inference, just been instructed in the matter and has received some money into his trust account, adverts to holding a significant sum but not saying exactly what it is, **does not provide me with any confidence in all the circumstances that the sending of that affidavit** - - -

MR CULLETON: Can I give clarity to that, your Honour? Can you - - -

HIS HONOUR: - - - **was anything but a last minute matter.** The simple fact is that there have been a number of affidavits filed, including by Senator Culleton and other persons whose affidavits he has filed in the proceeding. I received submissions from Senator Culleton in relation to matters in issue which are reasonably extensive. A question of whether or not he has been served with the bankruptcy notice in the matter is a clear issue. Arrangements were being made as to whether or not Senator Culleton wished to cross-examine the person who says he served the bankruptcy notice on him. The circumstances are such that the court shouldn’t simply agree to the adjournment of this proceeding in all of those circumstances. The court should proceed. It shouldn’t delay. It shouldn’t incur additional expense to any of the parties in the circumstances. I do not consider in the circumstances that the dictates of justice require a further adjournment of this proceeding. All right. So we proceed to the question of the hearing. Mr Abbott?

(Tp 8, ll.14-45; emphasis added)

1. During the hearing of the petition after the adjournment had been refused, various submissions were put and matters raised. We have taken the approach that the primary judge was obliged to reconsider the adjournment issue if a matter arose that warranted it. Thus what happened during the course of the hearing is relevant to assess the legitimacy of the refusal of the adjournment.
2. On Friday 23 December, when the sequestration order was made, the primary judge published reasons for the making of that order and also published more detailed reasons for the refusal of the adjournment, at [25]-[33] of the reasons:

**SHOULD THE HEARING BE ADJOURNED?**

[25] At the commencement of the hearing on 19 December 2016, the respondent debtor, after some initial hesitation, sought an adjournment of the proceeding, ostensibly so that he could obtain legal representation and notwithstanding that in his Submission filed 16 December 2016 he had expressly stated that he had decided to represent himself in the proceeding. I refused the adjournment. These are the reasons for doing so.

[26] In connection with his adjournment application, the respondent debtor made reference to the affidavit of Mr Edward John Maitland, dated that same day, 19 December 2016. The affidavit of Mr Maitland, who is a solicitor in Melbourne, had not been filed in the proceeding, but had apparently been emailed by a law clerk at Mr Maitland's office to the petitioning creditor's solicitors and the Court less than an hour before the hearing was due to commence at 10.15am (WST).

[27] In this affidavit, Mr Maitland stated as follows:

1. I am the principal of Maitland Lawyers, the solicitors acting for the Respondent. I have the care and conduct of this proceeding on behalf of the Respondent, and I am authorised to make this Affidavit on their behalf.

2. I make this Affidavit from facts within my own knowledge, save where I state otherwise, and after having made all relevant enquiries.

3. I have previously acted for the Respondent ['Culleton'] in the High Court sitting as the Court of Disputed Returns at Canberra on 7 December 2016 and have recently received instructions to act on behalf of Culleton in this proceeding.

4. Time and logistics precluded me from retaining counsel and/ or a town agent to appear at the application which is listed this morning and for this reason I would respectfully request the Court to adjourn the application to allow time for Mr Culleton to have legal representation in the Court at Perth.

5. Meantime, I have received substantial payments into my Trust Account on behalf of Mr Culleton which I am instructed can be used to pay his creditors. The payments received thus far have been by bank cheque. The trust account rules require my firm to wait for at least 3 working days before the proceeds of the bank cheque can be cleared.

[28] Mr Maitland obviously was not, at material times, the solicitor on the record for the respondent debtor and, in circulating his affidavit on the morning of the hearing, did not take any steps to become the solicitor on the record. Nor was it clear from his affidavit that any steps had been taken to retain counsel to appear in this proceeding on behalf of the respondent debtor.

[29] In this regard, the respondent debtor said, from the bar table, in the course of making submissions on the adjournment application, that Mr Peter Edward King of counsel had agreed to represent him in this matter. There was no such evidentiary material before the Court, however, to confirm that fact and certainly nothing in the affidavit of Mr Maitland to that effect. An affidavit of Mr King, which had, incidentally, been filed in the proceeding by the respondent debtor on 19 December 2016, and which is referred to further below, contained no indications of his intention to appear for the respondent debtor in the matter or any brief from the respondent debtor to do so.

[30] The overarching purpose of the civil practice and procedure provisions of this Court, as stated by s 37M of the Federal Court of Australia Act 1976 (Cth), is to facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible. The overarching purpose includes the objectives of the just determination of all proceedings before the Court, the efficient use of judicial and administrative resources available for the purposes of the Court, the efficient disposal of the Court's overall caseload, the disposal of all proceedings in a timely manner, and the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

[31] The Court pointed out at the hearing and repeats that the proceeding has been pending in the Court for some time and that the respondent debtor was well aware of the scheduled hearing. Indeed, the creditor's petition was filed on 20 October 2016. The respondent debtor was ostensibly served on 8 August 2016. On 18 November 2016, he entered an appearance (a matter further dealt with below), filed the notice stating grounds of opposition to the petition and a notice under s 78B of the Judiciary Act, as noted above. The matter came on for hearing before District Registrar Jan in Perth on 21 November 2016. Registrar Jan then made programming orders that provided for the application to come before a judge of the Court for hearing on 8 December 2016 at 2.15pm. It was listed before me. As a result of difficulties that the respondent debtor experienced in travelling by air from Melbourne to Perth on the morning of 8 December 2016, I agreed that same day to the adjournment of the hearing then listed before me, to 19 December 2016 at 10.15am. The parties, including the respondent debtor, expressly agreed to the adjournment of the hearing to that date and time.

[32] Having regard to those various factors, and the need to consider the s 37M factors mentioned above, I considered that the hearing of the proceeding should not be adjourned. The parties were ready for the hearing. The respondent debtor had had appropriate time, if he wished, to engage lawyers to represent him. He had firmly stated in his written Submission filed 16 December 2016, the Friday before the Monday hearing of the matter, that he intended to represent himself in the proceeding. The applicant creditor opposed the adjournment and plainly desired the matter to be heard at a reasonable time, having held its judgment from the District Court since October 2013, some three years.

[33] For these reasons, at the commencement of the hearing, I dismissed the oral application of the respondent debtor for an adjournment of the hearing.

## The adjournment question

1. The first complaint about the making of the sequestration order, as reflected in grounds 1, 2 and 9 of the Notice of Appeal, was that the appellant had been treated unfairly by the primary judge in not giving him an adjournment to obtain legal representation.
2. Grounds 1, 2 and 9 of the Notice of Appeal were in the following terms:
3. The primary judge erred in failing to afford legal representation to the Appellant.
4. The primary judge erred in fixing the trial in the absence of the Appellant and/or in refusing an adjournment of the trial of the matter and in making findings that:
5. the Appellant was ‘ready’ for the hearing, having regard to the issues and the state of the evidence and Submissions;
6. the Appellant had ‘appropriate’ time to engage lawyers;
7. the Submissions of the Appellant filed 16 December in response to email directions from the Associate were a sufficient basis to try the matter, in circumstances where it reasonably apparent from that material and from the transcript that the Appellant was not able to represent himself on the bankruptcy issues before the Court.

…

9. The primary judge erred in failing to afford procedural fairness to the Appellant.

1. The two points of focus of the asserted unfairness pressed on appeal were solvency and abuse of process (with the question of the pending appeal in the Western Australian Court of Appeal for the appellant assuming little emphasis on appeal).
2. The review by an appellate court of the refusal of an adjournment of a matter regularly fixed for hearing must first recognise the quintessentially discretionary character of the decision. A Court will not lightly interfere in such a decision, and certainly not merely because it would have made a different decision.
3. A Full Court of this Court in *Ahern v Deputy Commissioner of Taxation (Qld)* [1987] FCA 504; 76 ALR 137 set out principles that, whilst they must be considered in the light of Part VB of the *Federal Court of Australia Act 1976* (Cth) and especially s 37M, are of enduring importance. In that case a judge of the Court had refused an adjournment of the creditor’s petition that was based on a default judgment that was the subject of a pending appeal. The Court referred (76 ALR at 146) to the expression of the matter by Atkin LJ in *Maxwell v Keun* [1928] 1 KB 645 at 653 that was approved of in *Bloch v Bloch* [1981] HCA 56; 37 ALR 55 at 58 by Wilson J, with whom Gibbs CJ, Murphy and Aickin JJ agreed (at 56):

The decision whether or not to adjourn the hearing of the petition was within the discretion of the primary judge. It is well established that an appellate court will rarely interfere with a trial judge's exercise of discretion upon an application for adjournment. However, the refusal to grant an adjournment may in some cases prevent the party seeking it from presenting his case or defence and in some circumstances this may result in injustice of such kind or magnitude as to warrant interference on appeal. In *Maxwell v Keun* [1928] 1 KB 645 Aitken LJ [sic] said (at 653): “I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so.”

1. The Court (76 ALR at 146) also referred to and approved the further but similar expression of the matter by Sir Jocelyn Simon P in *Walker v Walker* [1967] 1 WLR 327 (at 330):

First where the refusal of an adjournment would result in a serious injustice to the party requesting the adjournment, the adjournment should only be refused if that is the only way that justice can be done to the other party; and, secondly, that although the granting or refusal of an adjournment is a matter of discretion, if an appellate court is satisfied that the discretion has been exercised in such a way as would result in an injustice to one of the parties, such appellate court has both the power and the duty to review the exercise of the discretion.

1. In *Ahern*, in circumstances where there was accepted to be a genuine and arguable appeal, the Court said (at 148):

It is also well established that in general a court exercising jurisdiction in bankruptcy should not proceed to sequestrate the estate of a debtor where an appeal is pending against the judgment relied on as the foundation of the bankruptcy proceedings provided that the appeal is based on genuine and arguable grounds: *Re Rhodes; Ex parte Heyworth* (1884) 14 QBD 49 *Bayne v Baillieu* (1907) 5 CLR 64 and *Re Verma; Ex parte DCT* (1985) 4 FCR 181.

1. No submission was put that these principles are distinct from the application of the judgment of Dixon, Evatt and McTiernan JJ in *House v The King* [1936] HCA 40; 55 CLR 499 at 505. These principles can be seen to be an illustration or example of the residual category in *House* (at 505):

It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion …

1. In considering the question of an adjournment of the hearing of a creditor’s petition, it is fundamental to keep firmly in mind, at all times, the nature of the jurisdiction. Bankruptcy is not just a variety of inter partes litigation; it does not deal only with the private rights and obligations of the debtor and creditor; it is not a form of judgment execution. It is directed to the estate of a person who is insolvent. In that sense it has a public interest, through the general body of creditors and potential creditors of the debtor and prospective bankrupt, and through what is referred to as the change of status of the person who becomes a bankrupt. That status is changed because of the provisions of the Act which inhibit conduct and affect rights and obligations of the bankrupt, including making the bankrupt susceptible to criminal punishment for what would otherwise be innocent conduct. The matter was put pellucidly by Bowen CJ, CA Sweeney and Lockhart JJ in *Sarina v Council of the Shire of Wollondilly* [1980] FCA 138; 48 FLR 372, dismissing an appeal from a judgment of Deane J (*Re Sarina; Ex parte Council of the Shire of Wollondilly* [1980] FCA 85; 43 FLR 163). There the debtor refused to pay the judgment debt for council rates. He was able, but not willing, to pay his debts. The argument was that “able to pay his debts” meant **willing and able** to pay his debts. A Canadian bankruptcy case (*Re Freeholders Oil Co Ltd* (1953) 33 CBR 149) supported the argument. Deane J said (43 FLR at 165-166):

It does not appear to me that it is possible to divine any policy underlying the provisions of the Act to the effect that a creditor should be entitled to make a recalcitrant debtor bankrupt even though the debtor satisfies the court that he is plainly solvent and able to pay his debts. It seems to me that it may well be that the legislative intent was to leave a creditor, in those circumstances, to the ordinary remedies by way of execution and garnishee.

1. Bowen CJ, CA Sweeney and Lockhart JJ agreed, saying (48 FLR at 376):

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

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

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

These considerations negate the existence of any policy underlying the Act that a debtor should be made bankrupt if he is able to pay his debts but is unwilling to do so. If a debtor is able to pay his debts but is recalcitrant, his creditors may resort to the remedies otherwise afforded by the law such as execution against his property and garnishee proceedings. The words “able to pay his debts” in s 52(2) of the Act do not mean “willing and able” to do so.

1. The Court then examined whether the appellant’s ability to pay his debts meant that the Court was bound to refuse to make a sequestration order. Their Honours said (at 377):

The power conferred upon the court by s 52(2) is permissive, not mandatory, although it seems that the occasions on which the discretion not to dismiss the petition might be exercised would not be frequent. It may, in a proper case, require the refusal of a sequestration order, yet permit the adjournment of the petition rather than its dismissal. The variety of circumstances that may arise in particular cases renders plain the undesirability of seeking to define parameters of the exercise of the power.

Counsel for the respondent submitted that, notwithstanding the ability of the appellant to pay his debts within the meaning of s 52(2), the court, in the exercise of its discretion, should make a sequestration order against the estate of the appellant. The essence of the argument was that as the appellant was able to pay the debt due to the respondent but was unwilling to pay it, the court should make a sequestration order as a mark of its disapproval of such conduct.

In our opinion that would not be a proper exercise of discretion on the facts of this case. This case does not fall within the ambit of the discretion conferred by s 52(2). Nor does it call for the adoption of any course except dismissal of the petition.

1. *Re Sarina* demonstrates the centrality of the question of solvency to the jurisdiction of bankruptcy. Whilst one must recognise the permissive “may” in s 52(2), the circumstances where a sequestration order would be made if the debtor satisfied the Court of his or her solvency are difficult to imagine. Proof of solvency may not necessitate dismissal of the petition; an adjournment may be the appropriate course.
2. Whilst it is legitimate for a creditor to proceed in bankruptcy for the purpose of recovering a debt, that does not mean that bankruptcy should be viewed in its essential character as part of the process of execution of judgment debts. It is the changing of the status of an insolvent person: *O'Mara Constructions Pty Ltd v Avery* [2006] FCAFC 55; 151 FCR 196 at [53] (and the cases there discussed) and see also *O’Farrell v Palicave Pty Ltd* [2009] FCAFC 64; 176 FCR 134 at [24]. A sequestration order, as demonstrated by *Re Sarina*, will not be made against the estate of someone who refuses to pay a debt if that person can prove (the onus being on him or her) that he or she is solvent.
3. The centrality of the question of solvency or insolvency might, in a given case, be why an adjournment is not granted when solvency is asserted. If material before the Court gives rise to the inference that further time to prove solvency is unlikely to be of utility, there may be a risk of further prejudice to creditors generally if there is delay in making the order. On the other hand, if the evidence reveals the real possibility that there is further material that may prove the debtor is solvent, attention should generally be given to the question whether some time or opportunity should be afforded to the debtor. Whether it is afforded will depend upon all the circumstances.
4. One must, therefore, bring the framework of analysis of the centrality of the question of solvency to the facts here.
5. Here, the question of solvency was raised in the context of (but not as the requested reason for) a request for an adjournment to obtain legal representation). The assertion of solvency was made by the debtor from the bar table and, for different reasons, in an affidavit and submissions. The affidavit of the solicitor, Mr Maitland, was that he had received “substantial payments” which he was instructed “can be used to pay his creditors”. This, however, was not the totality of the circumstances. The appellant plainly knew of the importance of solvency – he had quoted s 52(2) in his affidavit of 6 December. He asserted during the hearing and in his affidavit that other factors showed his solvency: the reference to his salary and to expectations of support. Then on 16 December in his submissions he linked his solvency with the otherwise unarticulated claim against ANZ Bank. At no time did the appellant say prior to or on 19 December that there was more he could say about solvency if he were granted time. This is fundamental to our view that the primary judge made no appellable error in refusing the adjournment.
6. The limited scope of the assertion and evidence as to solvency is striking in the otherwise widely ranging submissions. The affidavit of Mr Maitland (which was never elaborated upon or clarified at the hearing (or even on appeal)) and the assertion of the appellant from the bar table and the two references (in the 6 December affidavit and the 16 December submissions) did raise the issue as to whether the appellant was solvent and so raised the fundamental question going to the proper exercise of the jurisdiction of bankruptcy. The relevant question to address at the point of the adjournment was not whether solvency had been demonstrated, but whether that evidence, in the context of the submissions as to why the adjournment was being sought, made it necessary to grant an adjournment, or made it unjust to deny the adjournment.
7. It is critical to appreciate that the appellant did not say that he needed the adjournment and the legal assistance to help him prove solvency. He gave no indication of other available evidence on the point. This is to be understood from the primary judge’s perspective; especially in the circumstances that a large volume of material had been filed and the question of solvency was not an abstruse legal issue. The facts concerning it were likely to be easily known to someone who was intelligent and not unworldly in the position of the appellant.
8. The appellant submitted on appeal that there was sufficient material before the Court to raise the real question of the possibility of solvency and because of that an adjournment should have been granted. The creditor’s petition was only two months old, the debtor was embroiled in other litigation, the public interest in the order and its validity if made was manifest, the consequences of an order were of private and public importance. Further, the material had dealt with such meritless points that it demonstrated the author’s need for assistance. So it was submitted.
9. On the other hand, in the respondent’s submissions, the whole context of the assertion of solvency revealed the lack of a bona fide issue: its absence in the grounds of opposition, its particular basis in the affidavit of 6 December, its different particular basis in the 16 December submissions, and the vaguely and opaquely worded affidavit of Mr Maitland. Further, the appellant was not asking for time to prove solvency.
10. Section 37M makes clear that a central consideration to the overarching purpose is the just determination of proceedings. The just determination of a creditor’s petition requires solvency to be addressed if the issue is raised on the material before the Court. If an adjournment is sought to obtain legal representation in order to help substantiate an assertion of solvency that has some bona fide and real basis, consideration should be given to the legitimacy and utility of time and legal assistance for proof of that matter. This is not to fetter any approach. It is not to pander to recalcitrant debtors. It is not to say any assertion will lead to an adjournment. Each case must be dealt with on its merits. But it is to be recognised that insolvency, not judgment execution or debt collection, is the essence of an application for a sequestration order. An assertion of solvency with some real and bona fide foundation is not a collateral question. It goes to the heart of the jurisdiction; though it is for the debtor to prove: s 52(2)(a). How a judicial officer deals with a request for more time to prove solvency will depend on the circumstances of the particular case. But it should be approached recognising the importance of the question to the exercise of the Court’s jurisdiction.
11. Here the debtor (who was intelligent, evidently apprised of the Act, and not unworldly) did not ask for more time to add to the evidence on solvency; he did not say that he needed help to prove it. He asserted solvency by reference to the evidence he had filed. The question is whether the primary judge can be seen to have had before him material which should have told him that there was a real issue for trial as to solvency that could be addressed by evidence that was as yet not before the Court and not adverted to by the articulate debtor before him. In all the circumstances, we do not think he was obliged to adjourn for this purpose on the material before him. This is not answered by an examination of the affidavits now placed before the Court. The only realistic conclusion from the material before the primary judge was that this debtor thought he was solvent by reference to his salary and likely supporters, the claim against the ANZ Bank and the funds with Mr Maitland. No other possible source was identified. Error is not evident in the primary judge’s view that the material did not warrant an adjournment. This would not be the case only if the judge was required to think that a lawyer might be likely to think of evidence about solvency that the appellant had not put forward. In circumstances where it is plain from the appellant’s affidavit of 6 December and from the exchange with the primary judge that he was fully aware of the central importance of proving solvency, and where, as here, the question of solvency could be seen as one amenable to understanding by a non-lawyer such as the appellant, we see no error in not granting an adjournment on this basis.
12. The question of an adjournment of a creditor’s petition is often not easy. Bankruptcy lists, by their nature, have many litigants who are insolvent, who may be insolvent, and who may be desperate to avoid bankruptcy. A desire to delay and prevaricate is not uncommon. Often delay is in no one’s (including an insolvent debtor’s) interests. Sometimes, however, an adjournment will be necessary to avoid injustice. Each case should be dealt with on the merits. Central to the decision will generally, if not invariably, be the consideration of solvency or insolvency, because of its essentiality in the exercise of the jurisdiction.
13. Further, the human reality of bankruptcy is never to be forgotten. Whilst the words of Deane J in *Kleinwort Benson Australia Ltd v Crowl* [1988] HCA 34; 165 CLR 71 at 82 may not describe the appellant, they are words worthy of repetition and of being reminded of to illuminate the important consequences of a sequestration order:

It is true that the strictness of the above rules leaves open the possibility of abuse by unscrupulous debtors. That is, however, an unavoidable concomitant of the protection of ordinary people faced with the threat of being made bankrupt. Many, and possibly most, of the petitions in the bankruptcy lists of this country see the bankruptcy of honest, albeit unbusinesslike or naïve, people whose indebtedness springs from causes which evoke sympathy rather than indignation. For such people, bankruptcy does not represent a game to be played to the frustration of their creditors. It represents a pronouncement of failure and humiliation attended by the fear of unknown consequences and the susceptibility to criminal punishment for what would otherwise be innocent conduct.

(citations omitted)

1. Turning to the claim of abuse of process, the first substantive question on appeal is whether there was enough material and evidence put to the primary judge to require him in fairness to give the appellant further time to prove solvency with the assistance of legal representation. In all the circumstances that we have set out, not least that the appellant was not asking for assistance from a lawyer to prove solvency, the answer to this question is no.
2. Did justice demand that the appellant be given an adjournment to press his abuse of process claim (as then articulated) or to prosecute his appeal? In our view, no. Though the abuse of process claim was unfocused and incoherent, it was not of a nature that may have been likely to have been better expressed or articulated by a lawyer. (We later refer to what the primary judge said about the claim before him (see [70] below), with which we agree.) No identification was given to the primary judge of the abuse of process claim as was later enunciated in the evidence and submissions on appeal – that Mr Lester was presenting the insolvency claim improperly through the creditor in order to extract the valuable intellectual property from the appellant.
3. As to the appeal to the Court of Appeal, the principle in *Ahern* as to an adjournment for a pending appeal did not require an adjournment here where Mrs Culleton’s appeal had already been dealt with by the Court of Appeal, the appellant’s position was no different to her position and there had been ample time for him to challenge the judgment since December 2015 when he emerged from the earlier bankruptcy. In the circumstances, it would not be described as genuine and arguable.
4. The appellant raised other arguments on appeal as to error in approach by the primary judge as to his decision on the adjournment. First, at [32] of his reasons the primary judge said that the parties were “ready” for the hearing. It was submitted that this was a clear error in the fact finding relevant to the discretion that invited appellate review: cf *House* 55 CLR at 505, “if he [the judge] mistakes the facts”. This was so, it was submitted, because the appellant said on a number of occasions on the day that he was not ready.
5. We reject that submission. The reference to the parties being “ready” was a reference, as we read it, to the fact that no party was saying that the material before the Court was incomplete. Rather, one party was asking for legal representation to present it. Read thus, there was no factual error.
6. A broader submission was put that, as an unrepresented litigant, the appellant was legally entitled to a lawyer to represent him and so the primary judge was obliged to grant an adjournment to afford the appellant procedural fairness. The submission was based on what French and Lee JJ said in *Appellant WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 30; 134 FCR 271 at [54]-[73] and especially what their Honours said at [59] and [69]. It can be accepted that the circumstances of some cases might make it unjust and unfair to require a litigant in person to present his or her own case without a lawyer. Whilst it can be accepted that the submissions and material before the primary judge reveal an unfocused and at times assertively incoherent approach, there was no real basis for the primary judge to think that any further time (with or without a lawyer) would be of utility in relation to solvency or abuse of process. As to the former (a subject which a person such as the appellant could be expected to understand) there was no suggestion that there was any more material to be prepared and filed. As to the latter, the claim was so wide, incoherent and unsubstantiated that it was open to consider that it would have been unjust to the creditor to be denied a hearing of the petition on the day.

## Solvency

1. We should add for completeness that to the extent the appellant submitted that even if the primary judge was correct to refuse an adjournment, he nevertheless erred in finding that the appellant had not proved he was solvent, we reject the submission. The appellant’s statement from the bar table and the material before the primary judge and specifically Mr Maitland’s affidavit did not prove solvency. The primary judge was correct when he said of Mr Maitland’s affidavit that there was a complete lack of clarity and indeed much ambiguity about the nature and amount of funds that had been paid into Mr Maitland’s trust account and that the appellant had been far from frank about just what funds he had at his disposal. The primary judge was correct in concluding that Mr Maitland’s evidence did not prove the appellant’s solvency as the appellant asserted that it did, and that there was no other material which would form the basis of a conclusion that the appellant was able to pay his debts.

## The evidence led on appeal

1. On the appeal, the appellant relied on a body of evidence directed to his solvency. We permitted this course not to undertake the task of making findings about solvency but to permit the appellant to identify what he would have sought to prove if an adjournment had been granted. In an affidavit read on appeal the appellant said that the intellectual property was worth over $5,000,000. There was also evidence on the appeal that accountants and property valuers placed between $5,000,000 and $19,000,000 on the value of the company. Whilst there are considerations that make this evidence questionable, and whilst the valuation says that the shares are held by him as a trustee of an unexplained trust, we would accept that there may be seen to be a triable issue as to solvency. But we repeat, this evidence was not foreshadowed before the primary judge as a reason why time and legal assistance should be afforded to the appellant.
2. As to the evidence on the new abuse of process claim, over objection we provisionally admitted paragraphs [13], [14] and [17] of the appellant’s affidavit of 11 January 2017, and the entire affidavits of the appellant and Mrs Culleton of 18 January 2017, notwithstanding that this contained without prejudice communications, ex facie inadmissible under s 131 of the *Evidence Act 1995* (Cth). We would reject those paragraphs because there is nothing in the surrounding material that gives the slightest basis for an assertion of abuse of process. They include no more than the fact that the controller of the creditor was prepared to cause the creditor not to enforce its debt through bankruptcy if the intellectual property was transferred to him. The separate legal status of the creditor and Mr Lester does not make this improper, especially so in circumstances where the creditor had been unsuccessfully attempting to enforce its debt for some time.

## Abuse of process

1. Before addressing this ground of the appeal it is convenient to say something of the nature of abuse of process.
2. Abuse of process occurs when a party seeks to use court processes in a way which is likely to cause manifest unfairness to another party or otherwise to bring the administration of justice into disrepute. Abuse of process may involve the commencement and prosecution of proceedings for an improper purpose. In *Dowling v Colonial Mutual Life Assurance Society Ltd* [1915] HCA 56; 20 CLR 509 at 521‑522, Isaacs J said:

In English law there has long been recognized a form of wrong by malicious use of process—such as by malicious arrest. But in order to maintain an action for malicious *use* of the process there must have been a termination of the suit in plaintiff's favour. If, however, there has been an *abuse* of the process, as distinguished from the *use* of it, it is unnecessary to show any such termination of the suit. If the object sought to be effected by the process is within the lawful scope of the process, it is a *use* of the process within the meaning of the law, though it may be malicious, or even fraudulent, and in the circumstances the fraud may be an answer; if, however, the object sought to be effected by means of the process is outside the lawful scope of the process, and is fraudulent, then—both circumstances concurring—it is a case of *abuse* of that process, and the Court will neither enforce nor allow it to afford any protection, and will interpose, if necessary, to prevent its process being made the instrument of abuse. ... The purpose is foreign to the nature of the process. ...

Where it can be shown in a case of insolvency that the creditor is making his application not intending to pursue it to a recognized lawful end—whatever his motive may be for attaining that lawful end—but for the real purpose of attaining some other and improper end, such as extorting money as in *Davies' Case*, where the petition was hung up while in existence and used as a means of extortion, there is an abuse of process.

(Footnotes omitted.)

1. In *Williams v Spautz* [1992] HCA 34; 174 CLR 509 at 526, Mason CJ, Dawson, Toohey and McHugh JJ said, concerning that passage:

The observations ... of Isaacs J. in *Dowling*, to which we referred earlier, represent an attempt to achieve a formulation which keeps the concept of abuse of process within reasonable bounds. To say that a purpose of a litigant in bringing proceedings which is not within the scope of the proceedings constitutes, without more, an abuse of process might unduly expand the concept. The purpose of a litigant may be to bring the proceedings to a successful conclusion so as to take advantage of an entitlement or benefit which the law gives the litigant in that event.

(Footnotes omitted.)

Their Honours continued, at 526‑527:

It is otherwise when the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers. So, in *Dowling*, Isaacs J. pointed out that “if, for instance, it had been shown that the Society had simply threatened Dowling that unless he did what they had no right to demand from him, namely, give up certain names, they would proceed to sequestration, and they had proceeded accordingly, there would have been in law an abuse of the process”. However, because the Society wished to use the process for the very purpose for which it was designed, there was no abuse of process.

1. In *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; 256 CLR 507 at [25], the majority of the High Court said:

Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute.

(Footnotes omitted.)

1. At first instance, the appellant submitted that:

The very first thing the court should decide is if these proceedings are politically motivated, given that the Petitioning Creditors Lawyer firm also acts for the ANZ Banking Corporation and ANZ is one of the Banks potentially liable for the huge damages if ever made accountable in the Federal Court of Australia.

1. In the primary judge’s reasons at [141]‑[144] his Honour said:

[141] It may be said, without flourish and very shortly, that I take the intent of this allegation to be that the petitioning creditor has somehow conspired with ANZ Bank to bring and maintain this particular proceeding concerning the respondent debtor.

[142] There is no evidentiary support for this allegation. It appears to be made wildly, very much as a political flourish. The allegation is followed at the top of p 2 by further statements by the respondent debtor that, as a Senator, he has been “gathering and disseminating evidence against this bank in particular, in an attempt to hold a Banking Royal Commission. It would grant them enormous benefit if I were to be bankrupted and forced to resign from the Senate”.

[143] There is, as I say, no evidence to support this allegation and I do not consider that there is any evidence at all of the petitioning creditor bringing and maintaining the proceeding in order to achieve some ulterior motive such as that ascribed by the respondent debtor in these submissions.

[144] I reject the submission.

1. In his oral submissions on appeal, the appellant’s counsel identified appeal grounds 3, 7 and 8 as constituting the “abuse of process ground”. Those grounds provide as follows:

3. The primary judge erred in failing to consider properly or at all whether or not he should exercise his discretion under Bankruptcy Act 1966 section 52(2)(a) and (b).

…

7. The primary judge erred in not giving consideration or due weight to the possibility that the Appellant has a good or arguable answer to the judgment relied on, both under section 52(2)(b) and section 41(1)(g) of Bankruptcy Act 1966.

8. The primary judge erred in failing to treat appropriately or with due seriousness the case of the Appellant that the Petition was an abuse of the Court’s process and brought for an ulterior purpose and contrary to the public interest.

1. Fairly clearly, the abuse of process alleged in ground 8 is that considered by the primary judge and dismissed, namely the assertion concerning the ANZ Bank. On appeal counsel abandoned that case. See tp 45 at ll.43‑47. The appellant now alleges that Mr Lester, a director of the petitioning creditor (**Balwyn**) had another improper purpose in prosecuting the bankruptcy petition, which improper purpose amounted to an abuse of process. It seems that Mr Lester is also a director of Dakin Farms Pty Ltd (**Dakin**). The appellant and his wife are the sole shareholders in AKC. AKC holds registered patent number 2012202885 (**the patent**). The appellant alleges that Mr Lester was, and is, effectively prosecuting the bankruptcy proceedings for the purpose of forcing Mr Culleton to cause AKC to transfer the patent to either Dakin or the petitioning creditor, Balwyn, in consideration of Balwyn forgiving the debt upon which the bankruptcy petition is based, and discontinuing proceedings pursuant to that petition. He also asserts that Mr Lester is seeking to achieve this result by exploiting the serious consequences of such proceedings for the appellant as a Senator in the Commonwealth Parliament. There is no suggestion of such a case in the notice of appeal. However the appellant submits that a short passage in the transcript of proceedings at first instance raised the matter, and that his Honour was obliged to consider it. That proposition is hardly consistent with the absence of any reference to such a case in the notice of appeal. The relevant passage appears at tp 34, l.38 to tp 35, l.22 as follows:

MR CULLETON: You know, the whole issue today is you’re going to say, “Are you solvent, Mr Culleton?” And I am.

HIS HONOUR: No, no. I’m wanting to understand clearly the terms of the proposition put. And the reason is this: Mr Abbott on behalf of the applicant earlier in the day, when the question of the adjournment came up, said there was obviously no firm proposal, as sometimes happens in bankruptcy proceedings, where at the last minute people find the wherewithal to settle up with the creditor, and everyone is then happy because the matter is resolved. What I’m going to do for a short period is adjourn so that you can outline to Mr Abbott – I’m not in a position immediately to accede to that, but the applicant might possibly be interested; I don’t know. So I’m going to give you the opportunity to explain exactly what you’re proposing to him. He may need to take some instructions about it. And – it’s 5 to 12. At a quarter past 12, I will open the court again and I will see what has happened to your proposal.

MR CULLETON: Yes. Can I just say for the record, your Honour, that has always been the case with - - -

HIS HONOUR: Well, I’m - - -

MR CULLETON: Mr Lester has always wanted the intellectual property as a patent troll.

HIS HONOUR: No. Save me that. I’m interested in the bankruptcy proceeding. So - - -

MR CULLETON: Yes. Okay. He has never wanted to take any funds, your Honour.

HIS HONOUR: If you can deal with the precise sums involved and there was consent to an order being made, that may possibly resolve the matter presently. I will adjourn to a quarter past.

1. The passage occurred in an exchange between the primary judge and the appellant concerning a possible negotiated “settlement”, pursuant to which the appellant would have paid funds into Court whilst he pursued attempts to set aside the judgment on which the petition was based. The passage contains no express allegation that Mr Lester was causing Balwyn to prosecute the bankruptcy proceedings in order to force the appellant to transfer the patent at his direction. However the statements that Mr Lester had always wanted the patent, and had never wanted money, may possibly suggest as much. The appellant submits that there had been no attempt to enforce the judgment prior to his standing for election to the Senate. He invites the inference that his election or prospects of being elected led to the presentation of the petition. However it seems that there was an attempt to execute in November or December 2013, shortly after the judgment in the District Court. At some time after the judgment, the appeal to the Court of Appeal was commenced. It remained on foot until its dismissal on 8 September 2015. It is understandable that no further attempt at execution was made after the lodgment of the notice of appeal (whenever that was), and before the judgment in the Court of Appeal. Between the delivery of that judgment and the issue of the bankruptcy notice in these proceedings on 29 June 2016, Mrs Culleton applied unsuccessfully for a suspension of enforcement of the District Court judgment to which we have referred. We see no basis for drawing from that history any inference that proceedings were commenced for an improper purpose.
2. The present assertion of abuse of process was not fairly raised before the primary judge. The appellant had tendered a substantial body of evidence in connection with the ANZ Bank matter. He, at no time, suggested any alternative basis for such a case. The passage cited above was insufficient to direct his Honour to the possibility of any other basis. We do not accept that the appellant was, in fact, so asserting. It is much more likely that the idea occurred to him at some later stage. The passage upon which he relies seems to have been a suggestion that negotiations with Mr Lester would be unsuccessful because of Mr Lester’s alleged desire to acquire the patent. Had the appellant sought leave to add a new ground of appeal raising this issue, and had Balwyn opposed the application, we would have been inclined to reject the application.
3. In any event, as we demonstrate elsewhere in these reasons, the evidence to which the appellant points in order to support this new claim of abuse of process, does not do so, and is therefore irrelevant. Although the appellant points to a desire on the part of Mr Lester to acquire the patent, he fails to recognise the substantial amount owed to the petitioning creditor pursuant to the District Court judgment. It cannot seriously be suggested that Mr Lester does not intend to proceed with the bankruptcy proceedings in any event. Clearly, if he does not achieve satisfaction of the debt in some other way, he will do so. In those circumstances, it is not necessary to consider the associated legal questions concerning “without prejudice” communications and the meaning and scope of s 131 of the *Evidence Act.*

## Going behind the judgment

1. These proceedings are based upon the appellant’s failure to comply with a bankruptcy notice, the relevant debt being pursuant to a judgment of the District Court of Western Australia after a trial. The plaintiffs were Balwyn and Dakin. The defendants were Elite Grains Pty Ltd, the appellant and Mrs Culleton. The District Court judge found that there had been a breach of a contract made between Balwyn and Dakin on the one hand, and the appellant and Mrs Culleton on the other, awarding damages accordingly. The appellant and Mrs Culleton appealed to the Court of Appeal of Western Australia. Prior to the hearing of that appeal a sequestration order (discussed at [7] above) had been made against the appellant’s estate. Whilst Mrs Culleton was represented by counsel at the hearing of the appeal, the appellant did not appear, but was present in Court. See *Culleton v Dakin Farms Pty Ltd* [2015] WASCA 183 at [4].
2. The grounds in the notice of appeal to the Court of Appeal were limited to questions as to damages. However, at the beginning of the hearing, Mrs Culleton sought to add a ground of appeal to the effect that any “contract” was void for uncertainty. The Court refused the application on the ground that had the matter been raised at trial, the respondents may have taken certain steps. The Court of Appeal then considered the merits of the grounds raised in the notice of appeal and dismissed Mrs Culleton’s appeal. The Court found that as the appellant’s trustee had not adopted the appeal, it was deemed to have been abandoned. On that basis, the appellant’s appeal was dismissed. Mrs Culleton sought special leave to appeal to the High Court. Such application was abandoned by virtue of her failure to file a written case. Mrs Culleton then applied to the District Court to suspend enforcement of the judgment. The application was unsuccessful. In August 2016, her application for leave to appeal to the Court of Appeal against that decision was dismissed.
3. In *Wren v Mahony* [1972] HCA 5; 126 CLR 212, the High Court considered the duty of a bankruptcy court where the debtor challenges the judgment upon which a bankruptcy notice is based. Barwick CJ (Windeyer and Owen JJ concurring) pointed out at 218 that, before making a sequestration order, pursuant to s 52, the court must be satisfied that the petitioning creditor’s debt is due. After setting out extensive extracts from the cases, his Honour observed at 223‑225:

I have made these several quotations in order to emphasize the dominant place the mandatory words of s. 52 (1) occupy in relation to the making of a sequestration order and that the resolution of the question whether or not the proof of the petitioning creditor's debt is satisfactory does not concern only the immediate parties to the petition. Also in this case the learned judge in Bankruptcy appeared to have had some reservation as to the existence of the Court's power to examine the consideration for the judgment and seemed to think that whether or not he should consider whether or not there was a debt due to the petitioning creditor rested merely in discretion.

Lord Esher in emphasizing that the Bankruptcy Court did not go behind a judgment as a matter of course but only if appropriate circumstances were shown to exist, said ... :

“There is no statute which imposes any such obligation on the Court of Bankruptcy. Section 7 [of which s. 52 (1) is a counterpart] does no more than give a discretion.”

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

(Footnotes omitted.)

1. In the appellant’s grounds of objection, he asserted an entitlement to an account as between himself and Balwyn. We do not understand him to persist in that assertion. His grounds for going behind the judgment appear in paras 4‑5 as follows:

4. The alleged agreement between the Petitioning Creditor and the Defendant Company was nothing more than an invitation to treat, not a concluded contract.

5. The evidence does not disclose any dealings with Balwyn Nominees Pty Ltd except an un-concluded invitation to treat which could not found damages for breach of contract.

5. As a consequence the Court is required to go behind the Judgment to determine if there is any amount owing at all.

(There are two paragraphs numbered 5 in the grounds of appeal.)

1. At [99], the primary judge identified two bases for the appellant’s challenge to the judgment, namely:

The respondent debtor submits that the District Court judgment upon which the bankruptcy notice is founded is flawed both as a result of a fact finding error made by the trial judge, and because the trial judge lacked the constitutional status to make a binding decision because he had not taken an oath of allegiance to the Queen when appointed to his office.

1. At [101] his Honour identified the first ground as a challenge to the finding that there was a concluded contract. His Honour noted that in their notice of appeal filed in the Court of Appeal, neither Mr nor Mrs Culleton had appealed against that finding. As we have said, the matter was only raised at the hearing of the appeal. Mrs Culleton unsuccessfully sought to add such a ground of appeal. The primary judge then considered the reasons of the Court of Appeal for upholding the District Court judge’s decision. His Honour clearly found no reason to doubt the correctness of that reasoning. His Honour considered the “fresh” evidence which was before him and found no reason to doubt the correctness of the decision of the Court of Appeal. The appellant simply did not identify any issue which would have led the primary judge to go behind the District Court judgment. It would be absurd to suggest he may have succeeded where his wife had failed. The same case was advanced against both of them. We have elsewhere dealt with the other ground advanced before the primary judge. It is not the subject of this appeal.
2. On appeal the appellant now asserts that:

The primary judge erred in not giving consideration or due weight to the possibility that the Appellant has a good or arguable answer to the judgment relied on, both under section 52(2)(b) and section 40(1)(g) of the Bankruptcy Act 1966.

1. At para 52 of his outline of submissions counsel for the appellant identified the issue in this way:

There is listed before the Court of Appeal of the Supreme Court of Western Australia on [date] an application by the Appellant for leave to re-open his case on the question of the correctness of the underlying judgment of Curthoys DJ of 13 October 2013. The two issues for consideration in that Court are firstly whether the Judge erred in holding that the informal lease contract in that case was with Mr Lester personally or with Balwyn Nominees Pty Ltd, the Appellant believing upon evidence that it was with the former, and secondly whether the acreage representation was made and led the Appellant and his wife into error and loss giving rise to a counterclaim diminishing or exceeding the judgment sum.

1. These matters were not raised in the Court of Appeal and were not raised at first instance in this Court. Further, the appellant no longer asserts that there was no contract. Concerning these matters, at the hearing of the appeal, counsel for the appellant relied on his written submissions. As these matters were not raised before the primary judge we see no reason for allowing them to be raised on appeal. There is, in any event, no real basis for concluding that the assertions made in the outline would have justified the primary judge in going behind the judgment. It is true that the appellant refers to both matters at para 80 of the affidavit filed on 11 January 2017 as follows:

I have filed a notice of appeal in the Court of Appeal in the Supreme Court. I have two issues. The first is that the lease of our farm at Williams was not signed for or on behalf of Balwyn Nominees Pty Ltd by Mr Lester but by himself personally as ‘Dick Lester’. The second is that I had a good cross‑action for damages arising from a misrepresentation as to the carrying capacity and arable [acreage] of the land in question.

1. One of the appellant’s affidavits filed on 16 December 2016 deals with the agency/parties point and is otherwise of some interest. At the beginning of the affidavit its “contents” are described thus:

Documents supporting an Appeal to the Supreme Court of Appeal to show that “it would be a monstrous thing that a [receiving] order should be made whilst an appeal is pending” Authority 1 Part A. Bayne v Baillieu [1908] HCA39 page 2. (3) Griffith CJ

1. The appellant then swears that:

1. I lodge the documents that will prove that I have a good grounds for an Appeal.

2. These Documents prove that unless you are a farmer and understand the land, a person should not sit as Judge in a dispute between farmers.

1. In the various attached documents, there are references to questions of agency and parties, but we see no reference to any alleged misrepresentation. In any event, nothing is said about the status of these documents. Further, there is no apparent explanation of either alleged ground. Rather, we find only a confused attempt to hide behind misconceived propositions concerning the law of agency. Had these matters been raised before the primary judge, they would not have led him to go behind the District Court judgment. We do not think that the primary judge erred in rejecting the appellant’s grounds for challenging the District Court judgment.
2. Shortly prior to delivery of this judgment, we were informed that the Court of Appeal (Martin CJ, Newnes and Murphy JJA) unanimously dismissed the appellant’s appeal with costs, giving extempore reasons.

## The application for a trial by jury

1. Section 30(3) of the Act is in the following terms:

(3) If in a proceeding before the Federal Court under this Act a question of fact arises that a party desires to have tried before a jury, the Federal Court may, if it thinks fit, direct the trial of that question to be had before a jury, and the trial may be had accordingly in the same manner as if it were the trial of an issue of fact in an action.

1. The appellant submitted that he had a right to a trial by jury, but that submission was rejected by the primary judge. That decision was clearly correct and the argument was not repeated on the appeal.
2. The primary judge considered whether in the exercise of his discretion under s 30(3) of the Act (and/or s 40 of the *Federal Court of Australia Act*) he should direct a trial by jury of an issue of fact in the proceeding. He decided that he should not.
3. It was not easy to follow the appellant’s complaint about the primary judge’s exercise of discretion. We think that he raised two points. First, it was said that the primary judge failed to identify the “real questions of fact” which the appellant identified as all the questions of fact which he had raised either before the primary judge or before this Court. This criticism is misplaced because the primary judge’s approach was the same as to all the questions of fact which were raised. It is true that he considered the most obvious one was the dispute about the service of the bankruptcy notice, but bearing in mind our conclusions about the extent to which the appellant raised solvency before the primary judge and the shift in the appellant’s abuse of process case, he was clearly correct, in our view, to do so. Secondly, it was said by the appellant that the primary judge imposed too demanding a test for a trial by jury. We do not think that he did. We would emphasise that this is not the occasion for this Court to examine in an exhaustive way the principles attending the exercise of the discretion in s 30(3) of the Act. To deal with this particular matter it is sufficient for us to make two points. First, the primary judge did not say that there needed to be a “special reason” for there to be an order for a trial by jury of an issue of fact and he was plainly not in error in saying “there needs to be some reason, having merit, that suggests that a jury trial is the appropriate means to try a particular question of fact” (at [42]). Secondly, it is not correct to say that the primary judge considered, as the only relevant consideration, whether he, a judge sitting alone, could hear and determine the issue as appropriately as a jury. He also considered that there would be unreasonable delay and unnecessary additional expense occasioned by an order for a trial by jury, and they are plainly relevant matters (at [43]).
4. The challenge to his Honour’s decision not to order a trial by jury must be rejected.

## Service of the bankruptcy notice

1. The respondent served with the creditor’s petition an affidavit of Sergeant Matthew Scott who was stationed at the Armidale Police Station. Sergeant Scott deposed to having served the bankruptcy notice on the appellant on 8 August 2016 at approximately 11.00 am at the Armidale Police Station. The service of Sergeant Scott’s affidavit with the creditor’s petition was in compliance with r 4.04 of the *Federal Court (Bankruptcy) Rules 2016* (Cth) (**the Rules**). In his notice of opposition, the appellant said he had four witnesses at Armidale and none of them saw the “alleged Personal Service”.
2. The evidence before the primary judge relating to the issue of service of the bankruptcy notice was the affidavit evidence of four persons who were associated with the appellant and the evidence of Sergeant Scott. As the primary judge noted, the appellant did not give evidence himself about the question of service. The four witnesses upon whom the appellant relied were not required for cross-examination. Sergeant Scott was cross-examined by the appellant. He appeared before the Court by video link.
3. The primary judge analysed the evidence carefully. He said that Sergeant Scott was independent and that he found his evidence compelling and he had no hesitation in accepting it (at [70] and [74]). He also placed weight on the fact that the appellant had seemed to be careful in avoiding the topic of service in his affidavits (at [75]). In the result, he found that the appellant had been served with the bankruptcy notice on 8 August 2016 (at [80]).
4. The appellant submitted that the primary judge erred in two respects. First, the appellant contended that the primary judge should have rejected Sergeant Scott’s evidence because of inconsistencies in the evidence. For example, there was an issue as to whether Sergeant Scott knew that he was serving a bankruptcy notice and this led to questions in cross-examination about whether he had read the documents or only perused them and the identity of the person from the law firm who had asked him to serve the documents. There was also an issue as to how Sergeant Scott knew it was the appellant he was serving and this led to evidence in cross-examination that he had met him earlier in the day. We do not propose to outline the details of the alleged inconsistencies any further. They were considered by the primary judge and it is sufficient for us to say that nothing put by the appellant’s counsel on the appeal suggests that the primary judge was not entitled to accept Sergeant Scott’s evidence. Secondly, the appellant contended that the primary judge erred in inferring that the three witnesses (excluding Mr King) upon whom the appellant relied were absent from the waiting room when he was allegedly served in circumstances where they were not cross-examined by the respondent. As we understand it, the submission is that that contradicts the affidavit evidence and the inference should have been drawn only if the witness against whom the inference is drawn is cross-examined. It seems to us, reading the affidavits, that they need to be construed and that at least two of the three deponents (Mr Ward and Mr Codrington) admitted that they were not in the appellant’s presence all of the time. Even if that were not so, we think in light of the primary judge’s conclusions about the compelling nature of Sergeant Scott’s evidence and the fact that the appellant did not address the topic of service in his various affidavits, it was open to the primary judge to draw the inference which he did (at [73]).
5. The challenge to his Honour’s finding that the bankruptcy notice was served on him must be rejected.
6. Before leaving this section, we should mention that there was passing reference in the appellant’s written outline of submissions to the “failure to swear [Sergeant Scott] by the video‑conference link” and that that also “appears to be an issue”. It seems from the transcript that the primary judge received all the affidavits which had been filed, including the sworn affidavit of Sergeant Scott. When Sergeant Scott was called, he was told by the primary judge that he was on his oath in his affidavit and remained on his oath. Other than the passing reference to which we have referred, the appellant has not developed any argument about this matter and, in fact, relies on inconsistencies said to emerge from Sergeant Scott’s cross-examination. In those circumstances, it is not an issue on the appeal.

## The creditor’s petition and related matters

1. The appellant submitted that the respondent had not complied with various requirements in the Act and the Rules in relation to a creditor’s petition. His submissions may be summarised as follows:
2. The creditor’s petition had not been served personally.
3. The creditor’s petition had not been verified by an affidavit of a person who knew the relevant facts as required by s 47(1) of the Act and r 4.05 of the Rules.
4. The respondent did not file an affidavit which complied with the requirements of r 4.06(4) of the Rules.
5. As we understand it, none of these submissions in the form they are now raised were raised before the primary judge. A variation of the first argument was raised, but not the precise argument now raised. We have reached the clear view that each submission should be rejected on the merits and we do not need to consider whether the appellant should be permitted to raise points on appeal which were not raised before the primary judge, including whether, had they been raised, any defects might have been cured by evidence.
6. As to the first submission, we note that before the primary judge the appellant raised an issue as to whether the respondent had established that the appellant had been served with the creditor’s petition and other documents referred to in r 4.05 of the Rules. The issue was raised in that general way and without any identification of the form of service required in the case of a creditor’s petition. The primary judge found that the appellant was actually in receipt of the creditor’s petition and other documents and had been served in accordance with the Rules (at [92]). His Honour went on to say that, in any event, the appellant had filed a Notice of Appearance and that cured any “technical want of service”. He referred to r 10.11 of the *Federal Court Rules* (at [93]).
7. The issue raised by the appellant on the appeal was whether he had been served personally with the creditor’s petition. The respondent accepted that a respondent to a creditor’s petition had to be served personally and that the appellant in this case, although “served” by email and mail in mid to late October 2016, had not been served personally with the creditor’s petition. The respondent relied on r 10.11 of the *Federal Court Rules* which provides that upon a respondent taking certain steps (filing an address for service, defence or affidavit or appearing before the Court), he or she is taken to have been served personally. The appellant filed a Notice of Appearance and Grounds of Opposition to the Petition in about mid November 2016, and affidavits between early to mid December 2016. He appeared before the Court on 19 December 2016. The Rules in r 1.03 provide that the other Rules of Court apply to any proceeding to which the Act applies except to the extent that there is inconsistency. There is no inconsistency between any rule in the Rules and r 10.11 of the *Federal Court Rules*. Any issue concerning personal service has been overcome by the operation of r 10.11 of the *Federal Court Rules.* We reject the appellant’s first submission.
8. As to the second submission, the starting point is s 47(1) of the Act which provides that a creditor’s petition must be verified by an affidavit of a person who knows the relevant facts. Section 47(1A) provides that if the Rules of Court prescribe a form for the purposes of the subsection, the petition must be in the form prescribed. Rule 4.02(1) prescribes a form, Form B6, and r 4.02(2) provides that the affidavit required by s 47(1) must be included in the petition in accordance with Form B6 or must accompany the petition. Rule 4.02(5) provides that if the petition is accompanied by the verifying affidavit in accordance with paragraph (2)(b), a copy of the petition must be attached to the verifying affidavit. In this case, the respondent’s case was that the verifying affidavit accompanied the petition and a copy of the petition was attached to the affidavit. The point that the appellant raised was that the petition attached to the verifying affidavit and verified by the deponent was a copy of the petition before it was issued and that what in fact was verified was a petition *to be filed*.
9. The only difference between the copy of the petition attached to the verifying affidavit and the petition as filed is that the latter is signed and dated by the respondent’s solicitor. Subject to the first submission about service, which we have already dealt with, it seems to us that there is no difficulty in saying that the verifying affidavit accompanied (in the sense of went with) the creditor’s petition. The critical thing is that it can be clearly seen that a person with the requisite knowledge has verified the allegations in the petition. That can be seen here by a comparison of the petition as filed and the petition as annexed to the verifying affidavit. As we have said, they are relevantly the same. We reject the appellant’s second submission.
10. The appellant’s third submission is that the respondent did not comply with r 4.06(4) of the Rules in that it did not file an affidavit of a person who knew the relevant facts that was sworn as soon as practicable before the hearing date for the petition and stating that the debt relied on is still owing. One of the matters of which the Court must be satisfied on the hearing of the creditor’s petition is that the debt relied on by the petitioning creditor is still owing (s 52(1)(c) of the Act). In this case, the respondent’s solicitor swore an affidavit on the day of the hearing before the primary judge to the effect that he had made inquiries of his client and he believed that the debt was still owing. The appellant’s submission was that the respondent’s solicitor did not have knowledge of the relevant facts and the respondent had not complied with r 4.06(1) and (4) of the Rules.
11. We would not accept that a solicitor could never have knowledge of whether or not a debt had been paid. For example, there may be cases where there are dealings between solicitors for parties over a long period of time and the solicitors do have knowledge of whether the debt has been repaid. Nevertheless, we will proceed on the same basis that the solicitor who swore the affidavit did and that is that he was relying on instructions from his client. The respondent submitted that the appellant had the solicitor’s affidavit at the hearing before the primary judge and failed to raise the point. Had the point been raised, the respondent could have taken steps to remedy any deficiency. In those circumstances, the respondent submits that the appellant cannot raise the point on appeal (*Coulton and Others v Holcombe and Others* [1986] HCA 33; 162 CLR 1 at 7-8). The appellant denies that he had the solicitor’s affidavit and points to a passage in the transcript where he raised the fact that he did not have the affidavit. This Court is not able to resolve that dispute on the material before it.
12. The appellant’s Grounds of Opposition and affidavits all proceed on the assumption that the judgment debt has not been paid. The appellant’s submissions to the primary judge on 19 December 2016 proceeded on the same assumption. More importantly, there were negotiations between the parties on 19 December 2016 and the primary judge allowed the parties time for that purpose. What the appellant told the primary judge about his intentions provide an ample basis for a conclusion that, as at 19 December 2016, the judgment debt had not been paid. We think s 306(1) of the Act is engaged in relation to the non‑compliance with r 4.06(4). Counsel for the appellant was unable (understandably in the circumstances) to point to any injustice, let alone substantial injustice, caused by the absence of an affidavit from the client as distinct from the solicitor. We do not think the case relied on by the appellant, *Totev v Sfar and Another* [2008] FCAFC 35; 167 FCR 193, stands in the way of our conclusion that s 306(1) of the Act is engaged. The case did not address the precise point under consideration, nor did it address s 306(1) of the Act. Unlike *Totev v Sfar*, in this case the primary judge was able to conclude that the requirements of s 52(1) of the Act were satisfied. We reject the appellant’s third submission.
13. Nothing we have said should be taken to lessen the importance of the Rules in the proper administration of the bankruptcy jurisdiction by this Court and by the Federal Circuit Court. They reflect the accumulated experience and wisdom of courts administering this important jurisdiction over many years. They also provide a disciplined framework for judges and registrars to adopt when exercising the jurisdiction.

## Orders

1. For those reasons the appeal should be dismissed with costs.
2. At the hearing of the appeal we indicated that were the Court to dismiss the appeal we would continue the stay of all proceedings under the sequestration order (first given by the primary judge under s 52(3) of the Act, and then made in the same terms by Dowsett J on 12 January 2017, under the *Federal Court of Australia Act* and *Federal Court Rules*, extended by Allsop CJ on 19 January 2017 and the Court on 27 January 2017) until a point in time 24 hours after the marking of orders disposing of the appeal. Given that we are disposing of the appeal on a Friday, we think it appropriate to extend the stay until midnight (Australian Eastern Daylight Saving Time) on Monday 6 February 2017.
3. Mr King, who appears for the appellant, has put the submission previously that the effect of this order is to nullify or stay the effect or the operation of the sequestration order itself. It has not been necessary to decide whether this is correct. It should not be thought that by extending the stay we agree with that submission.
4. The orders that we would make are:
5. Paragraphs 13, 14 and 17 of the affidavit of the appellant dated 11 January 2017, the whole of the affidavit of the appellant dated 18 January 2017 and the whole of the affidavit of Ioanna Culleton dated 18 January 2017 be rejected.
6. The appeal be dismissed with costs.
7. All proceedings under the sequestration order made on 23 December 2016 against Rodney Norman Culleton be stayed until midnight (Australian Eastern Daylight Saving Time) on Monday 6 February 2017.

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| I certify that the preceding one hundred and thirteen (113) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop, Justice Dowsett, and Justice Besanko. |

Associate:

Dated: 3 February 2017