FEDERAL COURT OF AUSTRALIA

Zaghloul v Jewellery & Gift Buying Service Pty Ltd t/as Nationwide Jewellers [2020] FCA 1045

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| Appeal from: | *Zaghloul v Jewellery & Gift Buying Services Pty Ltd t/as Nationwide Jewellers* [2019] FCCA 583  |
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| File number: |  |
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| Judge: | **BANKS-SMITH J** |
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| Date of judgment: | 24 July 2020 |
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| Catchwords: | **BANKRUPTCY** - annulment - appeal from decision to dismiss application for annulment of bankruptcy - application for annulment brought after discharge - creditor's petition based on failure to comply with bankruptcy notice requiring payment of judgment debt - whether court should go behind judgment debt - whether appellant was solvent at time of sequestration order - where service of creditor's petition was pursuant to substituted service orders - whether sequestration order ought not to have been made - whether discretion ought to have been exercised to grant annulment - where appellant alleged misleading or deceptive conduct and negligence on part of petitioning creditor and sought award of damages - where appellant alleged breach of duty on part of trustee in bankruptcy and sought relief - where primary judge refused to award damages or other relief - no error on part of primary judge demonstrated |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 149, 153B, 154, 309*Federal Circuit Court of Australia Act 1999* (Cth) s 79*Federal Court of Australia Act* *1976* (Cth) s 24, 25*Federal Circuit Court Rules 2001* (Cth) r 21.02 |
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| Cases cited: | *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172*Austar Finance Group Pty Ltd v Campbell* [2007] NSWSC 1493;*Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424*Bulic v Commonwealth Bank of Australia Ltd* [2007] FCA 307*Cameron v Cole* (1944) 68 CLR 571*Compton v Ramsay Health Care Australia Pty Ltd* [2016] FCAFC 106; (2016) 246 FCR 508*Corney v Brien* (1951) 84 CLR 343*David Grant & Co Pty Ltd v Westpac Banking Corp* [1995] HCA 43; (1995) 184 CLR 265*Ginnane v Diners Club Ltd* (1993) 42 FCR 90*Ginos Engineers Pty Ltd v Autodesk Australia Pty Ltd* [2008] FCA 1051*Hislop v Paltar Petroleum Limited (No 4)* [2017] FCA 1632*House v The King* (1936) 55 CLR 499*Howship Holdings Pty Ltd v Leslie (No 2)* (1996) 41 NSWLR 542*Jaafar v Gleeson in his capacity as bankruptcy trustee of bankrupt estate of Mohamad Jaafar* [2019] FCCA 1226*Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17; (2001) 205 CLR 507*Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28; (2017) 261 CLR 132*Re Anasis; Ex parte Total Australia Ltd* (1985) 11 FCR 127*Re Oates; Ex parte Deputy Commissioner of Taxation* (1987) 17 FCR 402*Re Papps; Ex parte Tapp* (1987) 78 FCR 524*Re Stewart; Ex parte Barrett* (1967) 10 FLR 99*Rigg v Baker* [2006] FCAFC 179; (2006) 155 FCR 531*Sandell v Porter* (1966) 115 CLR 666*Seven Network Limited v News Limited* [2007] FCA 2059*Stankiewicz v Plata* [2000] FCA 1185*Taylor v Taylor* (1979) 143 CLR 1*Thredgold v Fyfe Pty Ltd* [2013] FCA 1363*Woodgate v Garard Pty Ltd* [2010] NSWSC 508 |
|  |  |
| Date of hearing: | 23 September 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 187 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Counsel for the Respondents: | Mr SD Majteles |
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| Solicitor for the Respondents: | Patrick Ferguson Solicitor |
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ORDERS

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|  | WAD 130 of 2019 |
|   |
| BETWEEN: | DR HASSAN ZAGHLOULAppellant |
| AND: | JEWELLERY & GIFT BUYING SERVICE PTY LTD T/AS NATIONWIDE JEWELLERS (ACN 050 055 591)First RespondentDAVID LOMBE (TRUSTEE)Second Respondent |

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| JUDGE: | BANKS-SMITH J |
| DATE OF ORDER: | 24 JULY 2020 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondents' costs to be assessed if not agreed.
3. The parties have liberty to apply within seven days for order 2 above to be set aside or varied.

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

REASONS FOR JUDGMENT

BANKS-SMITH J:

## Introduction

1. Dr Zaghloul was made bankrupt by a sequestration order on 26 July 2013.
2. Although now discharged from bankruptcy under s 149 of the *Bankruptcy Act 1966* (Cth), Dr Zaghloul pursues an annulment of the bankruptcy.
3. Dr Zaghloul applied to the Federal Circuit Court for an annulment under s 153B of the *Bankruptcy Act*, but his application was dismissed. He now appeals from that decision.
4. At the core of Dr Zaghloul's complaint before the primary judge and this Court is an arrangement he entered into to buy watches at discount prices and sell them in a store that he operated under the name 'Zag Watches'. The first respondent, which trades as Nationwide Jewellers (**Nationwide**), had a network of suppliers and offered discount prices to members who ordered from those suppliers. Dr Zaghloul was a member. Nationwide obtained judgment against Dr Zaghloul in 2012 for outstanding payment for a number of watches, together with interest and costs. Dr Zaghloul claimed in the annulment proceedings that the Court should look behind the judgment debt and should have regard to asserted counterclaims Dr Zaghloul made against Nationwide relating to its alleged misleading or deceptive conduct and negligence.
5. Dr Zaghloul relies on additional complaints that he says justify an annulment of the bankruptcy or other relief, but having regard to the manner in which Dr Zaghloul made his submissions before me, it is clear that he places most emphasis upon the arrangement with Nationwide.
6. Dr Zaghloul also pursues a complaint against the second respondent, Mr Lombe, who was the trustee of Dr Zaghloul's bankrupt estate (initially as a joint trustee and later as sole trustee). Dr Zaghloul asserts that Mr Lombe should pay damages for 'inefficient management of the estate'. Mr Lombe provided affidavit evidence and was cross‑examined by Dr Zaghloul at the Federal Circuit Court hearing.

## Principles - annulment

1. Section 153B(1) of the *Bankruptcy Act* provides:

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

1. A application may be brought under s 153B(1) by a discharged bankrupt: *Re Oates; Ex parte Deputy Commissioner of Taxation* (1987) 17 FCR 402 at 404-405.
2. Section 154 of the *Bankruptcy Act* provides for the effect of an annulment.
3. The application of s 153B has been considered in a number of authorities, including *Rigg v Baker* [2006] FCAFC 179; (2006) 155 FCR 531; *Stankiewicz v Plata* [2000] FCA 1185; *Bulic v Commonwealth Bank of Australia Ltd* [2007] FCA 307 (see in particular at [12]); and *Thredgold v Fyfe Pty Ltd* [2013] FCA 1363. The relevant principles are settled. Both the text of s 153B and the authorities (see *Rigg v Baker* at [59]) indicate that the exercise of the power to annul involves two elements:
	1. satisfaction by the Court that the sequestration order ought not to have been made; and
	2. the exercise of a discretion.
4. In determining whether a sequestration order ought not to have been made, the Court is entitled to consider not only the circumstances disclosed at the time the order was made, but as they would have been had all the true facts been before the Court at the time. A sequestration order ought not to have been made if, in light of the true facts existing at the time of its making, the judicial officer making the order was 'bound' not to make it: *Rigg v Baker* at [62]; *Bulic* at [12(4)]; and *Thredgold* at [10].
5. As to the exercise of the discretion, guiding factors include:
	1. whether the applicant debtor is solvent;
	2. whether the applicant has made full disclosure of his financial affairs, a matter as to which the applicant carries a heavy burden (*Biluc* at [12]; and *Re Papps; Ex parte Tapp* (1987) 78 FCR 524 at 531);
	3. unexplained delay in any application;
	4. a failure by the bankrupt to oppose the creditor's petition and attend the hearing at which the sequestration order was made;
	5. whether the applicant debtor has made any proposal for the payment of the fees and disbursements of his or her trustee in bankruptcy; and
	6. the basis for any finding that a sequestration order ought not to have been made.
6. *Thredgold* provides an example of where it was accepted that the sequestration order ought not to have been made, but an annulment was refused in the exercise of the Court's discretion.

## Principles - appeal

1. The appeal is brought under s 24(1)(d) of the *Federal Court of Australia Act* *1976* (Cth) which invests the Federal Court with jurisdiction to hear appeals from the Federal Circuit Court. An appeal under s 24 is in the nature of a re-hearing and not an appeal in the strict sense, nor an appeal de novo: see *Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17; (2001) 205 CLR 507 at [75]. The exercise of appellate jurisdiction under s 24(1) is concerned with the correction of error: *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 at [20]‑[25]. The Chief Justice has directed that this appeal be heard by a single judge in accordance with s 25(1) and (1A) of the *Federal Court Act.*
2. As Dr Zaghloul appeals against a discretionary judgment, he must show an error of the kind identified in *House v The King* (1936) 55 CLR 499 at 504‑505, namely, that the primary judge failed to have regard to a relevant consideration, had regard to an irrelevant consideration, or made some error of fact or law. If the appellant is unable to establish an error of that kind, the Court may intervene if it is satisfied that the decision is plainly unreasonable or unjust. This Court is not entitled to intervene simply because it considers that, if it had been in the position of the primary judge, it would have taken a different course.

## Principles - where foundation is an unpaid judgment debt

1. Although not conclusive as to the debt in bankruptcy proceedings, it is rare that the Court will look behind a judgment debt. The issue was addressed by the High Court in *Ramsay Health Care Australia Pty Ltd v Compton Pty Ltd* [2017] HCA 28; (2017) 261 CLR 132, the plurality summarising the position as follows:

[68] For the purposes of s 52 of the Act, a judgment may usually be taken to be sufficient evidence of a debt in that a judgment against a debtor in favour of a creditor obtained after a trial is, generally speaking, a reliable indication of the true state of indebtedness as between creditor and debtor. Indeed, such a judgment can usually be expected to provide the most reliable statement of the debt humanly attainable because the ordinary processes of the adversarial system provide a practical guarantee of reliability. The testing of the relative merits of a claim and counterclaim under the rigours of adversarial litigation will usually establish the true state of accounts as between the parties to the proceedings. Accordingly, a Bankruptcy Court will usually have no occasion to investigate whether the judgment debt is a true reflection of the real debt. But where the merits of a claim and counterclaim have not been tested in adversarial litigation, a judgment debt will not have this practical guarantee of reliability.

[69] In *Petrie v Redmond* [[1943] St R Qd 71 at 75‑76], Latham CJ, with whom Rich and McTiernan JJ agreed, said that the Bankruptcy Court:

is entitled to go behind the judgment and inquire into the validity of the debt where there has been fraud, collusion or miscarriage of justice … Also the court looks with suspicion on consent judgments and default judgments … The Bankruptcy Court does not examine every judgment debt. Special circumstances must be established before it will do so. It is impossible to lay down any general rule.

1. The procedure often invoked by the Court where a debtor challenges reliance on a judgment debt is that the first hearing involves a preliminary investigation as to whether the Court should 'go behind' the judgment, and that if the question is answered in the affirmative, there is a second hearing. If the question is answered in the negative, and subject to satisfaction of the requisite formalities, then it is open to proceed at the first hearing to make a sequestration order: *Corney v Brien* (1951) 84 CLR 343 at 358; and *Compton v Ramsay Health Care Australia Pty Ltd* [2016] FCAFC 106; (2016) 246 FCR 508 at [13].

## The judgment debt and bankruptcy proceedings

1. The circumstances giving rise to the annulment application in this case were as follows.
2. Dr Zaghloul applied for membership of Nationwide in September 2010.
3. On 30 June 2011 Nationwide instituted proceedings in the Local Court of New South Wales against Dr Zaghloul seeking payment for goods sold and delivered. On 4 April 2012 the matter was heard and judgment was entered in favour of Nationwide for $8,350.51.
4. On 17 April 2012 Dr Zaghloul filed a motion seeking a stay of enforcement of the judgment but that motion was dismissed for failure to disclose any grounds, and no appeal from the judgment was instituted.
5. Dr Zaghloul did not pay the judgment debt. On 17 August 2012 Dr Zaghloul was served with a bankruptcy notice that relied on the non‑payment. He did not comply with the bankruptcy notice.
6. On 21 September 2012 a creditor's petition was filed in the Federal Magistrate's Court. Nationwide had difficulty personally serving Dr Zaghloul with the creditor's petition and accordingly sought and obtained an order for substituted service.
7. Nationwide served the creditor's petition and supporting documents by email, post and in person (to a person over the age of 16 years at a designated address), in accordance with the orders.
8. On 26 July 2013 the Federal Circuit Court (by a Federal Circuit Court Registrar) made a sequestration order against Dr Zaghloul's estate, and appointed David Lombe and Elizabeth Russell as trustees in bankruptcy (Ms Russell subsequently retired as trustee). Dr Zaghloul did not appear at the hearing of the creditor's petition proceedings. It should be noted that another creditor, Macquarie Leasing, filed a notice of appearance as a supporting creditor in the proceedings. Dr Zaghloul acknowledged in submissions before the primary judge that the debt to Macquarie Leasing ($16,300) was due and payable.
9. Nationwide was awarded the costs of the creditor's petition proceedings and those costs were subsequently paid to it by Mr Lombe as the trustee in bankruptcy, but the underlying judgment debt was not paid or satisfied.
10. On 13 August 2016 Dr Zaghloul was discharged from bankruptcy.
11. On 24 July 2017 Dr Zaghloul filed the bankruptcy annulment application in the Federal Circuit Court and on 20 February 2019 the annulment application was heard and dismissed by the primary judge.

## The terms of payment

1. Because it is a matter that took on some significance to Dr Zaghloul, it is worth noting the terms of payment as between Dr Zaghloul and Nationwide.
2. Relevantly, they are as follows (Dr Zaghloul being a 'Retailer' and Nationwide being referred to as 'JGBS'):

(e) The terms upon which the Retailer is entitled to place orders with Suppliers shall be deemed to be as follows:

(i) the Goods the subject of the order shall be delivered directly by the Supplier to the Retailer on behalf of JGBS

(ii) by placing an order for Goods with the Supplier as agent and fiduciary for JGBS, the Retailer shall be deemed to have simultaneously placed an order for those Goods at the purchase price appearing on the relevant JGBS statement relating to the Goods

(iii) the Retailer shall indemnify JGBS for any goods and services tax or any other duty or liability which JGBS may incur as a result either directly or indirectly of any of the transactions contemplated by the membership application form and involving the retailer, JGBS or any Supplier

(iv) the retailer shall be primarily liable for all transport, delivery and handing costs associated with any transactions

(v) JGBS will send a statement to the Retailer each month detailing the Goods purchased by the Retailer from JGBS in the preceding months, the relevant Supplier of those Goods and the purchase price

(vi) the **retailer shall pay JGBS the purchase price for the Goods within 30 day of the date of the statement** referred to in paragraph (v) provided that:

(aa) the retailer shall receive a discount of 2% of the purchase price for payment in full within 26 days of the date of such statement and

(bb) interest on any amounts outstanding between the Retailer and JGBS, calculated at the rate of 24% p a compounded, shall be payable by the Retailer if full payment of the Purchase Price is not received within 60 days of the date of the statement.

(emphasis added)

1. The terms and conditions also provide that there is no trustee, beneficiary or partnership relationship created as between Nationwide and a member. Nationwide also has the benefit of a retention of title clause for unpaid goods.
2. Dr Zaghloul now denies receiving Nationwide's terms and conditions when he applied for membership of Nationwide in September 2010. However, in his evidence before the Local Court he said that he received the terms and conditions on 15 September 2010 together with the application form.
3. Even if he did not receive the terms and conditions at that time, he was on notice of the manner in which payment was to be made. This follows from an extract of a booklet which was attached to an email from a director of Nationwide, Mr Colin Pocklington, of 15 September 2010 that was attached to Dr Zaghloul's evidence statement in the Local Court that states:

Ordering

Full details of our Preferred Suppliers, discounts, ranges and agents are supplied to all new members in the Supplier Profile Directory.

1. You continue to order direct with suppliers.

2. Your Nationwide membership number is quoted when placing all orders.

3. Jewellery & Gift Buying Service (the trading entity of Nationwide) supply an order book for the use of members.

4. If a written order is not required, an order number may be quoted from your order book.

Goods will be delivered by the supplier direct to the member. A copy of the invoice will accompany the merchandise for checking & pricing. The original invoice is sent by the supplier to Jewellery & Gift Buying Service Pty Ltd.

Invoicing

1. Upon receipt of supplier invoices Jewellery & Gift Buying Service processes them for payment.

2. **A Jewellery & Gift Buying Service invoice is raised and forwarded to the member**.

3. **A monthly statement is sent to members**.

Payments

REDUCE YOUR MONTHLY BOOKKEEPING

ONLY ONE PAYMENT TO JGBS

Current invoices paid by the 26th day of the next month are eligible for

2% SETTLEMENT DISCOUNT

A finance fee, 2% per month, will be charged on all payments not received within 60 days from statement. Invoices must be paid within 90 days from statement. Members can pay their monthly account by direct credit, credit cards (Visa or Mastercard) or BPAY.

(emphasis added)

1. An email exchange also occurred on 5 January 2011 indicating that Dr Zaghloul had the capacity to access invoices online. Relevantly, Dr Zaghloul wrote to Mr Pocklington asking:

Can you please send me breakdown of my entire account

Where are charges coming from so I can reconcile against what I have

Please show what I owe, from which supplier and how much have I paid

Please send me a copy of your Ts and Cs

Thanks

Hassan

1. Mr Pocklington replied:

Hi Hassan

All invoices have been sent, however to help, Amanda will resend all invoices to you tomorrow am. You can also access any invoices on your account 24/7 via our website (www.jgbs.com) Your password was sent in a letter when you joined. If you do not have it to hand. Let Amanda know and she will email it to you.

So far you have purchased $16,267.89 and paid $5,000.00 on 27/10/10 leaving the balance as per statement of $11,267.89. Payments are allocated on a first in first out basis. Terms & Conditions attached.

## The primary judge's reasons

1. After a hearing that included cross‑examination of witnesses, the primary judge delivered ex tempore reasons dismissing Dr Zaghloul's application for an annulment of the bankruptcy and for other relief. It is apparent from the reasons that there had been a long history of interlocutory applications in the proceedings. Whilst questions arise as to the manner in which claims by Dr Zaghloul for relief such as 'equitable damages' and challenges to Mr Lombe's remuneration were dealt with as part of what was commenced as an annulment application, that was the course undertaken by the Federal Circuit Court, no doubt having considered the most efficient way to deal with a large number of claims by Dr Zaghloul and voluminous documentation.
2. Having recited the history of the events, the primary judge first dealt with the Local Court judgment debt. The Court was satisfied that the Local Court had looked at the claim properly and there was insufficient evidence to persuade the primary judge that he should go behind the judgment debt. The primary judge found that Dr Zaghloul's recollection of events was reconstructed and based on documents or intuition.
3. The primary judge then considered whether Dr Zaghloul was solvent at the time of the sequestration order such that it ought not to have been made. The primary judge preferred the contemporaneous evidence provided by Dr Zaghloul by way of the Statement of Affairs to the evidence he sought to rely upon at the hearing, noting that Dr Zaghloul had given 'very unsatisfactory answers' as to certain anomalies and inconsistencies. The primary judge noted several concerns but was particularly concerned as to two examples where it appeared Dr Zaghloul had failed to disclose assets in the Statement of Affairs and gave conflicting evidence as to ownership that was unreliable. Dr Zaghloul said in evidence/submissions before the primary judge that at the time of the sequestration order he owned a BMW car and owned 3,000 shares said to be worth $100,000. Those items were not referred to in the Statement of Affairs. Mr Lombe's evidence was that he had been unable to find evidence of ownership of any motor vehicle or shares.
4. The primary judge was not persuaded that Dr Zaghloul was solvent when the sequestration order was made and declined to exercise his discretion to annul the bankruptcy.
5. The primary judge then addressed a claim by Dr Zaghloul that Nationwide had engaged in misleading or deceptive conduct by way of its terms and conditions and because it failed to disclose discounts that were provided to other parties. The primary judge dismissed the claim on the basis that the evidence 'does not go anywhere near' the standard that would be required to establish such a claim.
6. The primary judge then addressed Dr Zaghloul's claim that Nationwide was negligent because it failed to keep proper accounts. The primary judge found that Dr Zaghloul failed to keep proper accounts, that his evidences was 'shambolic' and on that basis the Court could not be satisfied as to any claim of negligence.
7. The primary judge then dealt with a number of complaints made by Dr Zaghloul as to the conduct of Mr Lombe in his capacity of trustee. It rejected a complaint that Mr Lombe ought to have taken control of real property, noting that the Commonwealth Bank controlled the sale process of the property as mortgagee in possession. The primary judge rejected criticism of Mr Lombe's conduct relating to lodgement of a caveat against the title to the property (which resulted in penalty interest being imposed for a short period), noting that it was prudent for a trustee in bankruptcy to lodge a caveat.
8. The primary judge similarly dismissed claims relating to decisions by Mr Lombe to realise watches that had been in Dr Zaghloul's possession; the decision to discontinue proceedings to tax costs that had been charged by Dr Zaghloul's former solicitors relating to Supreme Court proceedings; and an allegation that Mr Lombe has charged excessive remuneration. The primary judge accepted Mr Lombe's evidence as to those matters.
9. After dismissing the claim, the Court made orders for the provision of schedules relating to costs and for a further hearing on costs.

## The notice of appeal

1. By his amended notice of appeal Dr Zaghloul seeks to rely on 12 grounds of appeal with numerous parts. The grounds overlap and some were not addressed in submissions. However, it is possible to distil the grounds by way of the following contentions:
2. the primary judge erred in failing to go behind the judgment debt and failing to apply the correct test in that regard;
3. the primary judge erred in failing to find that Dr Zaghloul was solvent at the time of the sequestration order;
4. the primary judge erred in failing to find that there had been misleading or deceptive conduct on the part of Nationwide with respect to the terms of the arrangement by which Dr Zaghloul acquired and sold watches;
5. the primary judge erred in failing to find that Nationwide was negligent in its record and account keeping relating to Dr Zaghloul;
6. the primary judge erred in failing to find that there had been a denial of procedural fairness with respect to substituted service of the creditor's petition;
7. the primary judge erred in failing to make findings as to the conduct of the trustee, including as to the sale of a property in Peppermint Grove and certain watches;
8. the primary judge erred in failing to find that Mr Lombe wrongly retained unauthorised or excessive remuneration;
9. the primary judge erred in failing to award damages or compensation;
10. the primary judge erred in failing to find that the Local Court did not extend procedural fairness to Dr Zaghloul; and
11. the primary judge erred in failing to afford Dr Zaghloul an opportunity to be heard as to the costs of his unsuccessful application in the Federal Circuit Court.
12. Although there is some repetition and it was unclear that all claims were relied upon at the hearing, I will address each of the above contentions.

## Refusal to go behind the judgment debt

### The Local Court hearing and judgment

1. The primary judge rejected Dr Zaghloul's submission that the Court should go behind the judgment debt. His Honour did so on the basis that there had been a trial before the Local Court that tested the issues and because he found that Dr Zaghloul's memory of events as disclosed at the hearing before him was reconstructed, reliant on documents and unreliable. In those circumstances the primary judge was not persuaded that the evidence was such as to justify the 'very serious step' of going behind the judgment.
2. Having carefully considered the documents provided to this Court and Dr Zaghloul's submissions, I have come to the same view as the primary judge as to the unreliability of Dr Zaghloul's reconstruction of events relating to the account as between him and Nationwide.
3. The evidence before the primary judge included a statement relied on for the purpose of the Local Court proceedings from Mr Pocklington dated 6 March 2012. Only two pages of the body of the statement were before me, but in those extracts Mr Pocklington explained that Nationwide offers membership to jewellery shops throughout Australia. Nationwide maintains a group of some 150 preferred suppliers, and Nationwide members can purchase from those suppliers with preferential trade discounts. The members place their orders direct with the suppliers on behalf of Nationwide. The price of the goods is charged by the supplier to Nationwide and Nationwide pays the suppliers. Nationwide then invoices the member for the goods (at the same price) and the member is responsible for paying the Nationwide invoice.
4. According to a reconciliation statement attached to Mr Pocklington's statement, the sum due when the proceedings were issued was $8,253.74. This was the amount claimed for goods sold and delivered in the statement of claim dated 30 June 2011. Allowing for further credits, as at 6 March 2012 the amount due was $6,876.37 for some 102 watches which had been supplied to Dr Zaghloul but not returned nor paid for.
5. Nationwide's lawyers explained the reconciliation of those amounts in a letter to Dr Zaghloul of 14 September 2011 as follows:

I refer to your email of 12 September 2011. The documents you have posted have not yet been received.

In any event, I have taken my client's instructions in relation to the goods itemised in paragraph 27 of your statement of facts which you say our client has not taken into account and have been instructed as follows:

1. Fossil

My client arranged for the fossil representative to collect 21 watches. However, prior to the representative visiting the shop, Zaghloul returned 14 watches to Fossil. These 14 watches were credited on credit 19506 for $1,014.20. Refer-email attachment 35. Therefore no further credit is due.

2. Guess (Designa Accessories)

Guess have a no return policy. However, my client arranged for Guess to accept the return of 11 watches on credit 54814 $1,673.34. my client offered to try and sell the remaining 12 watches to other retailers on Zaghlouls behalf. My client sold 3 watches totalling $472.86 in March and this amount was credited to the Zaghloul account as per reconciliation. My client has since sold the balance of 9 watches on behalf of Zaghloul. This credit dated today is for $1,251.95. See attachment.

3. Ice Watch

47 watches that were returned were credited on credit note NJ4 totalling $2,796.67. According to Ice Watch 47 and not 49 were returned. However, Ice Watch have authorised a credit for an additional 2 watches totalling $125.42.

4. Casio

5 watches were returned to Casio and have been credited on 931976C totalling $1,077.59. Zaghloul claim that additional watches were returned. However, Casio have not received any further watches **and Zaghloul have not provided proof of delivery in response to the email dated 10th March 2011**. See attachment 25.

My client will therefore amend claim as follows:

Original claim was $8,253.74

Less Guess credit above $1,251.95

Less Ice watch credit $125.42

Amended total $6,876.37

(original emphasis)

1. The transcript of the hearing in the Local Court (conducted before a judicial officer referred to as an Assessor) indicates that Dr Zaghloul did not provide records as to what he claimed was ordered or what he asserted was not delivered. On the other hand, Nationwide provided evidence from suppliers as to what had been supplied.
2. The transcript of the Assessor's reasons for judgment discloses the following findings and reasons:
3. Dr Zaghloul took up membership of Nationwide and ordered watches for his watch shop;
4. there was an absence of evidence from Dr Zaghloul as to what he had ordered, how he had made the orders and what he had sold;
5. watches were supplied to him by suppliers, relevantly Designer; Ice Watch; Shriro; and Fossil. There were statements in evidence from those suppliers as to which watches had been supplied and which watches had been returned;
6. although the terms and conditions of membership required orders to be placed in a particular manner, and Dr Zaghloul did not place orders in that manner, he still placed orders and could not rely on his own failure to use the standard order form to assert a breach of contract by Nationwide;
7. the Court was satisfied on the balance of probabilities that Nationwide's business records reflected the orders that were made by Dr Zaghloul and even if watches were supplied in excess of orders, both Nationwide and the suppliers had indicated a willingness to receive returns of the watches;
8. the invoices provided by Nationwide should be accepted in the absence of contradictory evidence from Dr Zaghloul;
9. the Court was satisfied that the watches had been supplied, and, regardless of whether he ordered them, Dr Zaghloul failed to return 102 watches and was liable to pay $6,876.37 on the basis that such sum reflected the value of the watches supplied; and
10. a counterclaim that asserted that a $5,000 payment by Dr Zaghloul was a 'goodwill' payment rather than a reduction in indebtedness was dismissed in the absence of any supporting evidence.
11. It should also be noted that the transcript indicates that the parties were provided with the opportunity to file and serve evidence prior to the hearing and were provided with the opportunity to make submissions. Dr Zaghloul had filed 'a whole bundle of evidence' but did not provide accounting records that supported his claim. The hearing had also been adjourned once at Dr Zaghloul's request (as discussed further below).

### Dr Zaghloul's claim that he received and returned unsolicited watches

1. Dr Zaghloul claims he received 62 unsolicited watches from suppliers, being 18 Casio, 21 Fossil and 23 Guess watches. He claims that Nationwide's claim against him took into account a credit for only 42 of the 62 unsolicited watches, but that he returned them all and should receive a credit for the balance. He asserts a credit with respect to watches he says were returned to Casio and Fossil. He also claims he should receive a credit for watches received from Ice that he claims he had already paid for before he became a Nationwide member.
2. He claimed that such credit would have reduced the amount of the judgment debt below $5,000. The alleged credit has three components: two are based on returns that Dr Zaghloul claims he made to Casio and Fossil; the third relates to an alleged duplicate payment to Ice.

#### Casio

1. First, Dr Zaghloul claims that he returned 18 Casio watches in a parcel addressed to Shriro (Casio's supplier), but that Nationwide gave a credit for only five of those watches. He asserts he should have been given a credit for an additional $1,621.10 for 13 watches.
2. Dr Zaghloul relies on an Australia Post lodgement receipt for a package sent to Shriro by 'Claire' on 18 October 2010. The receipt describes that package as 3.875 kg and includes registered post charges. Dr Zaghloul has no evidence of what was in fact placed in the parcel at the time, but relies on its weight to found an inference that he asks the Court to draw that it contained 18 Casio watches. Dr Zaghloul made submissions as to the weight of watches, but apart from the fact that such submissions did not comprise evidence, an indication of weight alone is not probative of the content of the package absent evidence as to packaging and other matters that might assist as to the assessment of weight per item.
3. Dr Zaghloul relies on an email he sent to the Casio representative on 7 February 2011 that lists 18 watches that he claims were returned. That list, appearing in an email prepared three months later, without more does not comprise evidence that the listed watches were returned but rather comprises Dr Zaghloul's claim to that effect.
4. Dr Zaghloul also relies on an email from Nationwide of 4 March 2011 which includes the phrase 'the watches are now all back or on their way back to the suppliers'. However, it is clear that Nationwide was referring to the watches that it accepts were returned - that statement does not comprise a concession that Nationwide or Shriro received 18 Casio watches as asserted by Dr Zaghloul. The email also refers to Fossil and Ice watches and makes no reference to Casio or Shriro. Dr Zaghloul seeks to fit the email into his chronology when it is by no means clear on its face that it relates to the Casio watches.
5. Evidence that tells against Dr Zaghloul's claim includes a statement from the credit manager of Shriro (Ms Welsby) which apparently listed all invoices and watches delivered to Dr Zaghloul/Zag Watches. The invoices were not attached to the extract of Ms Welsby's statement. However, Ms Welsby deposes to her searches of records and enquiries, and deposes to the fact that only five Casio watches were returned by Dr Zaghloul and a credit was provided for those watches.
6. In those circumstances there is no reliable evidence that Dr Zaghloul returned 18 watches to Casio.

#### Ice

1. Second, Dr Zaghloul claims he was charged by Nationwide for an Ice 'starter pack' when he had already paid the supplier direct for that pack, and that he should receive a credit of $1,481.35. Dr Zaghloul accepted that he did not have any evidence that supported the claim that he had earlier ordered and paid for a starter pack, apart from an email where he made that claim to Ice.
2. By contrast, there was evidence before the Local Court (and in the appeal book) from Mr Porter, the general manager of Ice, to the effect that in total some 81 watches had been supplied to Dr Zaghloul. The records indicate that 10 watches were returned by Dr Zaghloul and that he was given a credit for those 10 watches. The records also indicate that a further 47 watches were returned for credit and accepted by Ice. As what was described as a goodwill gesture to Nationwide, Ice also provided credit for a further two watches. Mr Porter said that having carefully checked Ice's records he could confirm that only 57 of 81 watches were returned by Dr Zaghloul. The invoices in evidence accurately reflect that position.
3. In contrast to that persuasive evidence, Dr Zaghloul has failed to point to any reliable evidence to support his argument that he was charged twice for a starter pack and should also receive a further credit.

#### Fossil

1. Third, Dr Zaghloul claims that he returned 21 watches to Fossil but received a credit for only 14 and so should be given credit of a further $797.10.
2. Again, Dr Zaghloul relies upon an Australia Post lodgement receipt, dated 2 March 2011 and with Fossil Australia marked as the addressee. The parcel was insured to $2000. Dr Zaghloul suggests the level of insurance indicates it must have contained 21 watches and not 14. There is also a copy of what is said to be a list of stock (the list exceeds 21 in number) but on its face it discloses no connection with Fossil.
3. Dr Zaghloul also relies on the email from Nationwide of 4 March 2011 that includes the statement that 'the watches are now all back or on their way back to the suppliers'.
4. However, there is specific evidence from Fossil that in total it supplied 39 watches to Dr Zaghloul. The statement listing the 39 items was before the Local Court and before this Court. So too was a credit note for 14 watches, all itemised. Mr Sharma, the director of Licensed Brands for Fossil, deposed for the purpose of the Local Court proceedings that he had carefully rechecked all of Fossil's records and confirmed that only the 14 watches referred to in the credit note were returned to Fossil by Dr Zaghloul. There is also an email from Mr D'Arcy of Fossil to Nationwide dated 2 June 2011 that explains that only 14 watches were returned and notes that the Fossil representative planned to collect 21 watches from the Zag Watches store in Perth, but before the representative could do so, Dr Zaghloul sent 14 watches back.
5. In contrast to that persuasive evidence, Dr Zaghloul has failed to point to any reliable evidence to support his argument that he returned 21 watches, rather than 14, and that he should therefore receive a further credit for those watches.

#### The interest issue and failure to collect

1. I note that Dr Zaghloul also claims that interest was overcharged. He properly abandoned an argument during the appeal hearing that interest did not continue to accrue on outstanding debts because he raised a dispute. He conceded that he could not unilaterally stay the accrual of interest. However Dr Zaghloul contends that Nationwide had a right to retake possession and said it should have exercised its remedy and retrieved the excess watches earlier, so that interest would have ceased accruing.
2. I reject that contention. The terms and conditions impose on Dr Zaghloul an obligation to pay for watches upon supply. The payment date was 30 days from the date of invoice, with invoices rendered monthly. The terms included a retention of title clause and Dr Zaghloul suggests that Nationwide was obliged to rely upon that clause and 'take back' the watches, so (I infer) reducing any debt due at that time. The fact that Nationwide may have had the option of such recourse rather than suing for the purchase price did not compel it to exercise such rights - and in any event the issue remains that it has not been established that Nationwide provided unsolicited watches.

#### Alleged unsolicited supply of watches

1. Dr Zaghloul's argument that he received unsolicited watches was put at a general level and without reliable supporting evidence. It is apparent from the evidence that was before the Local Court that the suppliers provided credit for those watches that were in fact returned to them.
2. Dr Zaghloul was not able to produce any records of the orders that he says he made. He asserted in submissions that he made orders when representatives came into his shop and that after they left the shop he made a record of what he ordered, but that he has lost the records. Mr Pocklington said in his evidence relied upon before the Local Court that Dr Zaghloul placed orders by telephone. On one occasion Dr Zaghloul was able to produce the body of an email that appeared to relate to a watch order but he claimed to have no record of the attachment (the email of 7 October 2010 to Mr Michael Moss of Designa Accessories referred to below). It appears that Dr Zaghloul has attempted to recreate the history of his dealings with Nationwide from a select group of documents that do not accurately reflect the events. Dr Zaghloul's evidentiary difficulties are such that there is no reliable evidence that he received unsolicited watches.
3. It seems that Dr Zaghloul has read much into an exchange of emails and assumed from them that there was an admission as to unsolicited supply. I am not persuaded that the evidence supports Dr Zaghloul's submission.
4. The question of unsolicited supply appears to have arisen with respect to Guess watches. On 7 October 2010 Dr Zaghloul wrote to Mr Moss of Designa Accessories (the Guess brand manager) asking him whether the first order of Guess watches contained any models that had not been ordered and purportedly attaching a list (the list was not in evidence).
5. Mr Moss responded to the email but the response did not answer the question. Rather, Mr Moss referred to the list and said that there were eight top styles from the 'top 10 newness styles' that Dr Zaghloul had not included in his order list and stated that those key styles should always be in stock. Mr Moss asked if Dr Zaghloul would like him to order those styles in for him. Nothing in that response suggests that Mr Moss in fact ordered those watches or supplied them to Dr Zaghloul.
6. Dr Zaghloul then sent an email to Mr Pocklington in which he asserted that he received a parcel from Designa which contained watches he had previously returned. Dr Zaghloul said in the email that he had not ordered the watches and said that he would not return the watches again, but someone could come and collect them from his store.
7. Mr Pocklington replied, saying that:

We will ask Designa for a credit. From the email from Michael it appears that he added top sellers to the order. Whilst I am sure he was trying to be helpful, he should have sought your approval first.

1. As it happens, the evidence relating to Designa was not consistent with a claim of unsolicited watches. Accordingly Mr Pocklington appears to have made an assumption that Mr Moss provided unsolicited watches. That assumption was not supported by the invoicing and evidence from Designa. Mr Pocklington's email does not comprise evidence that Mr Moss in fact provided unsolicited watches. Rather, Designa provided evidence of all 57 watches provided to Dr Zaghloul in September 2010 (before Mr Moss's offer to provide additional models). According to a statement of evidence from Ms Hillen, the sales support manager for Designa, a statement that was before the Local Court (and in the appeal book), Dr Zaghloul returned 23 watches. A credit was given for 11 watches but the other watches had not been supplied by Designa in the first place, and so Designa refused to take delivery of those or provide a credit, and forwarded the 12 other watches to Nationwide. As the letter of 14 September 2011 reproduced above indicates, Nationwide sold the balance of the Guess watches and Dr Zaghloul was provided with a credit for them (see [51] above). Dr Zaghloul does not allege any further credit is due with respect to Guess watches.

#### Determination as to argument about additional credits

1. The Local Court was not satisfied that there was evidence to support the assertion made by Dr Zaghloul that he was entitled to additional credits. Having carefully considered the evidence to which I have been taken by Dr Zaghloul, I consider the Assessor's decision was correct and there is no basis upon which the primary judge should have looked behind that judgment. No error on the part of the primary judge is disclosed.
2. Nationwide put on evidence before the Local Court that contradicted Dr Zaghloul's case. In particular, Nationwide evinced credible and reliable evidence from each of Casio, Ice and Fossil that supported the debt that Nationwide claimed was due and payable by Dr Zaghloul. The evidence before me does not support a contrary position.

## Alleged error by failure to find that Dr Zaghloul was solvent at the time of the sequestration order

1. In his statement of affairs dated 9 August 2013 (**Statement of Affairs**) provided to his trustees in bankruptcy, Dr Zaghloul disclosed one secured creditor, being the Commonwealth Bank. The debt was said to be $1,400,000 and was secured by a real property mortgage over a property in Peppermint Grove in Perth, said to have a value of between $1,000,000 and $1,500,000. It was stated by Dr Zaghloul that repayments were not up to date.
2. Unsecured liabilities to some 11 creditors in the total sum of approximately $279,000 were listed.
3. Dr Zaghloul was also cross‑examined before the primary judge and said that the list of creditors in the Statement of Affairs was true and correct. He referred to the absence of any judgment with respect to some of the debts. He said that he wanted the benefit of bankruptcy to shield himself from liability.
4. Mr Lombe also provided an affidavit that verified, amongst other things, his report to creditors dated 30 August 2013 (**Report to Creditors**). Having set out the matters he had investigated, Mr Lombe stated that it was unlikely that a dividend would be paid in the estate; that the Commonwealth Bank had issued proceedings to recover possession of the Peppermint Grove property and there was unlikely to be any equity in the estate for unsecured creditors after selling costs; and that other than the watches that had been disclosed (said to have a value of $13,000) he was not aware of any other assets or claims that could be realised or pursued in the bankrupt estate.
5. Dr Zaghloul's submissions on this aspect of the appeal were at times inconsistent and difficult to follow. However, it is apparent that first, he alleges that the primary judge was wrong to prefer the evidence by way of the Statement of Affairs over his more recent submissions as to his debt position, although he accepted that he did not put on evidence before the primary judge about those debts. Second, Dr Zaghloul alleges that he was not insolvent because he had access to various assets from which he could have paid his debts at the time of his bankruptcy.

#### Whether liabilities should have been reduced

1. As to the first aspect and the quantum of disclosed debts due and payable, it is apparent that Dr Zaghloul places some importance on the absence of any judgment for some of the debts. Such absence does not assist Dr Zaghloul. It is not the case that a debt is due and payable only where a judgment has been entered. It is trite to say that for contractual debts, when a debt is due and payable depends upon the terms of the agreement entered into between the parties.
2. Dr Zaghloul's submissions before the primary judge set out a table that listed each of the debts referred to in the Statement of Affairs together with commentary as to the basis upon which he contended the debt was not due and payable. Dr Zaghloul relied on that commentary to purportedly evidence a reduction in his liabilities at that time from $276,622 to $60,164. For example, Dr Zaghloul assessed the quantum of a debt due to Bankwest, disclosed in the Statement of Affairs as $95,341, as nil because:

Disputed. Bank sold the property significantly undervalued and did not take legal action to recover the shortfall.

1. There was no evidence to explain or substantiate the submission, and the same can be said generally about the submissions that assert an alleged reduction in liability. Apart from where a creditor has secured a judgment debt, Dr Zaghloul provides an explanation in the submission as to why he asserts no debt was due and payable at the time of the sequestration order, but he does not appear to have taken the primary judge to evidence that would support his submission or explain why the debts were disclosed without qualification in the Statement of Affairs, a statement prepared contemporaneously with the bankruptcy. The primary judge was not obliged to accept Dr Zaghloul's submission. It does not comprise evidence. In those circumstances the primary judge was justified in proceeding on the basis that the evidence by way of the Statement of Affairs was to be preferred to Dr Zaghloul's reconstruction in his affidavit evidence provided some five years later.

#### Whether Dr Zaghloul could pay debts from own monies

1. As to the second aspect, Dr Zaghloul relies on the well-known statement of Barwick CJ in *Sandell v Porter* (1966) 115 CLR 666 at 670 as to when a debtor is solvent: the test as to whether a debtor can pay their debts as and when they fall due from their own monies extends to monies that can be procured by sale or by mortgage or pledge of assets in a relatively short time, having regard to the nature of the business of the debtor. The onus is on the debtor in this regard.
2. Dr Zaghloul seeks to rely on five sources of funds that he says were available to him at the time:
3. a line of credit from Colonial (according to the scant documentary evidence before the Court, being a banking product of the Commonwealth Bank of Australia) repayable on demand and described as subject to the terms of a consumer mortgage. The line of credit was for $400,000 and Dr Zaghloul submits that some $160,409.57 remained available to him;
4. superannuation in the amount of $127,793.53;
5. a half share of the Peppermint Grove property which Dr Zaghloul claimed in the proceedings was worth $1,650,000 to $2,000,000 and that secured a loan of $1,436,248 as at July 2012;
6. a stock of watches worth $56,373.18; and
7. cash in hand, cash at bank and other business assets in the sum of $6,341.
8. The difficulty with the first source is that to draw on the facility would simply have increased Dr Zaghloul's level of debt in circumstances where he was already in default under his arrangement with the Commonwealth Bank and was involved in proceedings in the Supreme Court of Western Australia relating to repossession of the Peppermint Grove property. Another difficulty is the lack of evidence that supports Dr Zaghloul's contention that he could have accessed the funds as he considered appropriate. There is some evidence before the Court that suggests that perhaps the line of credit facility set up in 2007 was being used to meet some payments to the Commonwealth Bank. If so, that was simply reorganising, rather than reducing, debts due to the Commonwealth Bank. There was no evidence to explain how interest would be met or how any drawdowns on the facility would be repaid, having regard to the debt due to the Commonwealth Bank and other creditors at the time. There is no evidence that the funds were available for Dr Zaghloul's use for a purpose that included the payment of third party debts or for any particular time period without recourse.
9. Furthermore, the Statement of Affairs did not refer to the balance of the undrawn facility as an available asset. Rather, the Commonwealth Bank was referred to in the Statement of Affairs as a creditor and there was no other mention of it (or Colonial).
10. In those circumstances I am not persuaded that Dr Zaghloul met the onus of establishing that the line of credit was an asset to which he could have recourse to meet other debts as and when they fell due without a counterbalancing incurring of a debt that was immediately payable on demand.
11. As to the second proposed source of funding, Dr Zaghloul referred in his Statement of Affairs to a 'superfund' with a balance of $90,000. Mr Lombe referred in the Report to Creditors to that policy and the balance of $90,000, but noted that superannuation and life insurance policies are non-divisible property and not available to creditors. Mr Lombe also confirmed this position by affidavit.
12. Dr Zaghloul asserted in an affidavit that he was able to draw on the superannuation fund but there was no evidence to support that assertion. The only evidence identified before me was a member statement from 30 August 2013 that referred to an opening balance of $127,540.05. There was no evidence of any request to withdraw funds around the time of bankruptcy. It is not sufficient to make suppositions as to whether Dr Zaghloul might have been able to access any of his superannuation to pay debts as at 2013. Having regard to Mr Lombe's inquiries, I am unable to conclude that Dr Zaghloul has any reasonable argument that he was entitled to have recourse to his superannuation benefits to pay debts.
13. As to the third contention that there was equity in the Peppermint Grove property, so much was confirmed by the evidence as to the value and sale price of the property. However, the equity was not available equity. It was insufficient to meet the unsecured liabilities of Dr Zaghloul. Dr Zaghloul valued the property in the Statement of Affairs at between $1,000,000 and $1,500,000. Mr Lombe gave evidence about the circumstances of the sale of the property, which was as follows:
14. the Commonwealth Bank had informed Mr Lombe at the time of his appointment that the debt owed to it was $1,455,000 with costs accruing and that it had issued a writ and would be proceeding to seek judgment and to take possession;
15. the Commonwealth Bank took possession of the property under its security in October 2013;
16. Mr Lombe's office maintained contact with the Commonwealth Bank during the sale process and was kept appraised of its status;
17. the reserve price set for the auction sale was initially $1,650,000 but it was sold for $1,600,000;
18. after deducting selling costs and payment of secured debt, there was a net return to Dr Zaghloul's estate of $21,841.40; and
19. based on Mr Lombe's inquiries, he considered the property was sold by the Commonwealth Bank for market value.
20. Separately, there was evidence before the primary judge (by way of an attachment to one of Dr Zaghloul's affidavits) of a CBRE Residential Valuations registered valuer's assessment of the current market value of the property 'as is' to be $1,600,000.
21. Mr Lombe deposed to the fact that other than Nationwide's priority costs as petitioning creditor and the costs and disbursements he incurred as trustee, no other creditors received any dividend during Dr Zaghloul's bankruptcy as there were insufficient funds.
22. Having regard to those matters, there is no reasonable basis upon which a finding could be made that there was equity in the property that was available for Dr Zaghloul's use to pay all of his debts as and when they fell due.
23. As to the fourth alleged source of monies for payment, the evidence did not support the assertion that there were watches on hand that could have been realised for $56,373.18. Mr Lombe gave evidence by affidavit dated 14 November 2018 as to the watches that he recovered and the sale price. He said he obtained an inventory of the watches after he took possession of them from 'GraysOnline', which recorded 151 watches with an estimated resale value collectively of $9,299.25. The watches were sold through GraysOnline and the net proceeds were $6,313.21. An email from Mr Lombe to Dr Zaghloul was in evidence that reported on the sale and attached a copy of the GraysOnline remittance that listed the watches sold. Before the primary judge Dr Zaghloul purported to rely on a list of watches that he said he 'recently' compiled and that he asserted proved that there were watches in his possession to the value of $56,373.18. The source documents were not in evidence. In short, there is no basis upon which it could be found that the list was reliable, having regard to other gaps in Dr Zaghloul's records and having regard to the disclosure in the Statement of Affairs that he held watches with a value of $13,000. That is a significant difference which is unexplained. Dr Zaghloul sought to rely on issues pertaining to his mental health in explaining why he did not properly recall matters as at the time he completed his Statement of Affairs. I accept that Dr Zaghloul has suffered from significant issues relating to his mental health at various times over the years. However, that does not mean that a reconstructed list compiled some years after the event and provided without documentary supporting evidence or further information is to be accepted as reliable evidence. The evidence of Mr Lombe as to the sale of the watches is to be preferred as reliable and credible.
24. Finally, as to the cash in hand, cash at bank and other (undisclosed) business assets said to be in the sum of $6,341, there is quite simply a paucity of evidence. I was not taken to any evidence supporting access to funds in that amount. The Statement of Affairs discloses cash including cash at bank as $2,850 and 'other business assets' of $3,000. Leaving aside all other unsecured creditors, such amount would not have met the Nationwide judgment debt. There is also reference to two unsecured loans to third parties (total $5,700) in the Statement of Affairs, but there is no evidence as to their recoverability or when they were due and payable.
25. It follows that the failure of the primary judge to rely on such alleged sources of funding and so find that Dr Zaghloul was solvent at the relevant time was not in error. There was insufficient reliable or credible evidence to the contrary and the primary judge was justified in drawing conclusions based on the Statement of Affairs and Report to Creditors.
26. I note for completeness that Dr Zaghloul did not provide evidence before the primary judge as to his current position as to solvency and did not explain whether or how he intended to meet the unpaid debts of Nationwide and the other unsecured creditors in his bankruptcy, none of whom received any dividend payment. Dr Zaghloul suggested in submissions before the primary judge that the Nationwide debt should have been paid by Mr Lombe from the proceeds of the sale of the Peppermint Grove property, but any such payment would have been contrary to the statutory priority payment regime and would have had the effect of denying Mr Lombe access to funds otherwise available for payment of his costs and expenses.

## Alleged error by failure to find that there had been misleading or deceptive conduct on the part of Nationwide

1. Much of Dr Zaghloul's complaint in this regard rests on his assertion that he did not receive the terms and conditions of membership until 6 March 2011, and on the alleged miscalculation of the amounts due and owing by him.
2. It is not clear on what basis Dr Zaghloul asserts he was misled, even assuming for the moment that he did not receive the terms and conditions at the time he arranged to become a member of Nationwide. Regardless of how he placed an order, the position remains that he requested supply and he was liable to pay for watches supplied within 30 days of an invoice from Nationwide. Dr Zaghloul accepted during the hearing in this Court that if he did not pay for ordered watches and did not return them, he would remain liable to pay for them.
3. Nationwide's conduct in issuing invoices for payment for goods ordered by Dr Zaghloul from identified suppliers is consistent with the terms and conditions.
4. Further, it appears that Dr Zaghloul had access to a complete record of invoices by access to the Nationwide website, if he sought it (see [35] above). The arrangement with Nationwide was therefore transparent.
5. I have already rejected the assertion that there was evidence that undermined the fact that Nationwide had established it was owed the threshold level of debt (ground 1). Nationwide's books and records were such that it was able to establish its claim.
6. Dr Zaghloul's application in the primary proceedings did not address any evidence of reliance, causation or loss. Nor did Dr Zaghloul pursue a claim for misleading or deceptive conduct in the Local Court proceedings.
7. The evidence presented does not support a claim of misleading or deceptive conduct on the part of Nationwide. Rather, the evidence supports Nationwide's position that credit was in fact granted with respect to watches that were returned. It was a simple process to return them.
8. Finally, Dr Zaghloul asserts an omission by silence on the part of Nationwide in allegedly failing to disclose that Myer sold similar watches at volume discounts. On his own evidence, Dr Zaghloul knew of the alleged position relating to Myer from at least January 2011. The allegation against Nationwide was not raised in the proceedings before the Local Court. Nor was it originally raised in the Federal Circuit Court proceedings. It was first raised by Dr Zaghloul in his amended application before the primary judge, filed on 7 May 2018.
9. There are considerable difficulties with this assertion.
10. There is some relevant correspondence. By email dated 11 January 2011 Dr Zaghloul said to Mr Pocklington:

A lot of watches in my shop are now in excess of my need having found (2 days after ordering a large order from GUESS) that MYER sells some of those watches cheaper than my cost is.

1. Then on 24 January 2011 Dr Zaghloul included the following in an email to Mr Pocklington:

When I ordered watches from Guess and Fossil, no one mentioned that David Jones and Myer had 35 per cent discount, leaving me no room at all to sell. With Traffic Momentum, DJ and Myer and with 35 per cent discount, it is not surprising I did not sell any of the models.

1. Mr Pocklington replied:

Many of your Nationwide retail colleagues live and prosper in the same conditions that you outline. Did you quiz the supplier or other stockists in your area? David Jones and Myer enjoy significant discounts due to their strong retail presence and the volume they sell. No doubt if you're able to shift similar volumes, they will enjoy similar discounts.

1. There is simply an absence of evidence that Nationwide made any representation by silence or otherwise about the general market for watches, about prices charged by competition, or that it provided watches at a cheaper rate than any competition. There was no evidence that Nationwide had any relationship with Myer or David Jones. Nor was there any evidence that Nationwide's preferred suppliers had any relationship with Myer or David Jones. There was no evidence of discounts actually being offered by Myer or David Jones or the reason any such discounts were offered. As counsel for Nationwide suggested, it might have been the case that Myer or David Jones were selling stock cheap and incurring a loss on watches in order to increase the number of customers coming through the door, or to make room for new stock. In short, the evidence falls far short of establishing a representation by silence that was misleading or deceptive or establishing reliance on any such conduct. The evidence does not suggest that any such claim would have any prospect of success. It falls short of establishing any right to assert a set off of a claim against the debt that was due and payable to Nationwide.
2. The primary judge did not err in failing to find that any potential claim based on misleading or deceptive conduct had insufficient prospects of success to justify going behind the judgment debt obtained by Nationwide or to justify the grant of other relief. I do not consider the primary judge erred in that regard.

## Alleged error by failure to find that Nationwide was negligent in its record and account keeping

1. Again this assertion rests on failings that Dr Zaghloul perceives in the manner in which Nationwide dealt with returned watches and alleged unsolicited watches.
2. Leaving aside the difficulty that Dr Zaghloul would face in establishing any requisite duty of care as between himself and Nationwide, as a matter of evidence Dr Zaghloul has not established anything that would rise to the level of a breach of such duty. The difficulties that Dr Zaghloul perceives with the accounting records appear to arise from his own inadequate record keeping. Nationwide established to the satisfaction of the Local Court Assessor that the relevant debt was due and payable. Its records and those of its suppliers were persuasive in that regard. Dr Zaghloul did not establish a case that there were unsolicited watches delivered by suppliers. No error has been disclosed by the primary judge who understandably found that in light of the state of the records he was not convinced that there was any negligence with regard to the watches.

## Alleged denial of procedural fairness where service of the creditor's petition pursuant to substituted service orders

1. Dr Zaghloul contends that he did not receive copies of the creditor's petition prior to the hearing of the application for the sequestration order and so did not attend the hearing.
2. Mr Ferguson, Nationwide's solicitor, gave evidence before the primary judge as to the substituted service order made by the Federal Circuit Court Registrar that permitted service of the creditor's petition other than by personal service. Mr Ferguson also gave evidence as to compliance with those orders.
3. The evidence was to the following effect:
4. Dr Zaghloul was served with the bankruptcy notice in accordance with r 16.01(1)(c) of the *Bankruptcy Regulations* *1996* (Cth);
5. the judgment debt remained unpaid;
6. the creditor's petition was filed on 21 September 2012;
7. attempts were made by process servers on various occasions in October 2012 and on some four occasions in December 2012 to serve Dr Zaghloul at the Peppermint Grove address but without success, although it was apparent that the house was occupied;
8. despite numerous attempts, it was not possible to effect personal service of the creditor's petition on Dr Zaghloul and so in February 2013 he applied on behalf of Nationwide for an order for substituted service;
9. it was necessary to ask the Federal Magistrates Court to issue subpoenas to, for example, the Department of Immigration, in order to find out physical and email address details for Dr Zaghloul;
10. on 16 May 2013 Mr Ferguson sent copies of all the relevant bankruptcy documents by email to two email addresses that Dr Zaghloul had utilised during the course of the Local Court matter, one of which 'bounced back' as undelivered;
11. on 7 June 2013 Dr Zaghloul filed a 'notice of address for service' in separate proceedings in this Court and identified the Peppermint Grove address and a nominated email address as his address for service;
12. on 12 June 2013 an unsuccessful attempt was made to serve Dr Zaghloul with the papers relating to the substituted service application at the Peppermint Grove address;
13. on 20 June 2013 a Registrar of the Federal Magistrates Court made substituted service orders to the effect that personal service was dispensed with and that service of the creditor's petition and supporting documents could be effected: by leaving them at the Peppermint Grove address with a person apparently over the age of 16 years, but if that were not possible, by leaving them in a letterbox at that address or affixed to the front door; by sending them by prepaid mail to that address; and by scanning them and sending them by email to the email address listed in the notice of appearance of 7 June 2013;
14. Mr Ferguson arranged for service to be effected in accordance with the substituted service orders by scanning the creditor's petition and supporting documents and emailing them to the designated email address: the email to Dr Zaghloul did not bounce back, and Mr Ferguson blind copied himself on the email at his personal email address and received the email at that address; and
15. Mr Ferguson also arranged for the creditor's petition and supporting documents to be sent by pre-paid mail in accordance with the substituted service orders and they were not returned by Australia Post as undelivered.
16. There was affidavit evidence before the primary judge from a process server to the effect that on 27 June 2013 the process server attended the Peppermint Grove property and served a person apparently over the age of 16 years who identified herself as 'Rona' with the relevant documents.
17. Dr Zaghloul submits that he did not know about the hearing of the creditor's petition. He denies receiving the email sent by Mr Ferguson in accordance with the substituted service order (and in this regard it should be noted that the substituted service order required that the email be sent to the designated email address and did not condition service on proof that Dr Zaghloul received or opened the email).
18. Dr Zaghloul relies on *Austar Finance Group Pty Ltd v Campbell* [2007] NSWSC 1493 by way of support for his submission that there was non-compliance with the substituted service order. The difficulty for Dr Zaghloul is that *Austar* is not a case about substituted service. It is a case about service of an application to set aside a statutory demand under s 459G(1) of the *Corporations Act 2001* (Cth). It is well recognised that if such application is made outside the statutory 21 day period, the Court cannot exercise jurisdiction under s 459G(1): *David Grant & Co Pty Ltd v Westpac Banking Corp* [1995] HCA 43; (1995) 184 CLR 265 at 277‑278. Under s 459G(3) an application is 'made' only where the application and affidavit are served within 21 days. Proof of service in that context has particular importance.
19. Although s 459G does not define 'service', the meaning of the term was described by Young J in *Howship Holdings Pty Ltd v Leslie (No 2)* (1996) 41 NSWLR 542 at 544, as follows:

Section 459G itself does not deal with what is service. The ordinary meaning of 'service' is personal service, and personal service merely means that the document in question must come to the notice of the person for whom it is intended. The means by which that person obtains the document are usually immaterial. This is clear in cases that have been considered good law over the centuries, including *Hope v Hope* (1854) 4 De GM & G 328 at 341-345; 43 ER 534 at 539-540; *R v Heron; Ex parte Mulder* (1884) 10 VLR 314 at 315; *Pino v Prosser* [1967] VR 835 at 838. Some of those cases were complicated by the requirement in the former statutes that a person serving initiating process had to endorse the initiating process, but the principle is clear from them.

If this were not so, one would get the absurd situation referred to by McInerney J in *Pino v Prosser* (at 837), that the conclusion would be one which is:

'… remarkable to the point of seeming absurdity, in that the defendant who, on his own affidavit admits that he received the writ … should be held not to have been served.'

1. Justice Palmer described this rule in *Woodgate v Garard Pty Ltd* [2010] NSWSC 508 at [42] as the 'effective informal service rule'. A party invoking the effective informal service rule bears the onus of proving the time at which the documents came to the actual attention of the recipient, and in view of the serious consequences which may follow, the Court will not lightly draw inferences or make assumptions as to the time of service: *Woodgate* at [44], citing *Howship* at 548.
2. In *Austar*, Young J held at [49] that email transmission cannot constitute service for the purposes of s 459G(3) unless either it is shown that the documents electronically transmitted have actually been received in a readable form by the person to be served, or the case falls within one of the special exceptions permitted by the rules of court. In that case, a provision of the *Uniform Civil Procedure Rules 2005* (NSW) permitted service via email if the notice advising the address for service included an email address (and similarly see s 28A of the *Acts Interpretation Act* *1901* (Cth) and s 9(1) and s 14A(1)(b)(ii) of the *Electronic Transactions Act 1999* (Cth)).
3. However, Nationwide has not sought to establish personal service by reliance on the 'effective informal service rule'. Rather, in the face of difficulties in effecting service, it took the step of applying for a substituted service order. Section 309(2) of the *Bankruptcy Act* permits such course: *Ginnane v Diners Club Ltd* (1993) 42 FCR 90.
4. Substituted service orders are not to be made lightly. The Court must generally be satisfied that there have been considerable difficulties in effecting service in the usual manner and that there is a reasonable probability that a method of substituted service will result in the debtor being informed of the relevant proceedings: *Re Stewart; Ex parte Barrett* (1967) 10 FLR 99. In this case, there is no reason to suspect the Registrar failed to have regard to such principles. In particular, there is evidence as to repeated failed attempts over a period of time to effect personal service. There is the telling acknowledgment by Dr Zaghloul, by the notice of address for service filed in this Court, that he could be served at the given address and utilising the given email address. In light of the notice of address for service, the Registrar had good reason to believe that there was a reasonable probability that the substituted service orders would bring the petition and supporting documents to Dr Zaghloul's attention. The notice of address for service was filed only weeks before the substituted service orders were made and so could reasonably be assumed at that time to be current.
5. The primary judge considered the matters to which I have referred and found that:

[14] The documents were sent by registered mail to the address, and the solicitor did send the documents by email. The email did not bounce back, and the solicitor had sent a blind copy to his own personal email address, and it was received.

[15] On that evidence, it is clear that substituted service had been effected, and therefore [Dr Zaghloul] had been served …

1. No error is disclosed in the primary judge's understanding of the relevance of the substituted service order or his finding that Dr Zaghloul was accordingly served with the creditor's petition. The primary judge clearly accepted Mr Ferguson's evidence and it was open to him to do so. Dr Zaghloul sought to place some weight on the lack of a reference to a blind copy in Mr Ferguson's email before the Court - but it was by no means clear that where there was a blind copy addressee, that addressee would be disclosed in the primary email. Dr Zaghloul's submission was no more than supposition.
2. In my view the evidence discloses both a reasonable basis for the grant of the substituted service orders and that there was compliance with them. It follows that I do not find error in the primary judge's conclusion on this issue. I note that the primary judge found that, having reviewed all of the evidence dealing with service, Dr Zaghloul proved to be 'quite elusive' and there was 'little doubt that there was a concerted effort by [Dr Zaghloul] to avoid the person trying to serve the documents'. Dr Zaghloul indicated that he is aggrieved by and disagrees with those statements. Although others might have described his conduct in less strident terms, there was a reasonable foundation for the inferences drawn by the primary judge. Dr Zaghloul says he was not living in the Peppermint Grove property at the time and his wife was not speaking to him. He did not think to redirect his mail. He asserts Nationwide could have contacted him by his mobile phone number. He refers to dates when he was hospitalised (although those dates do not coincide with the October 2012 and December 2012 dates of attempted service). I have taken those matters into account. However, even having regard to those matters, the difficulty remains for Dr Zaghloul that he expressly represented that he could be served by use of the Peppermint Grove address and specified email address. Despite that representation, process servers were unable to serve Dr Zaghloul at the Peppermint Grove property. Accordingly, reliance on substituted service orders and compliance with those orders was entirely appropriate. The facts in this case are distinguishable from those where the Court has set aside a sequestration order in the face of service pursuant to a substituted service order that should not have been made: *Re Cook* (1946) 13 ABC 245.
3. Therefore, I do not consider Dr Zaghloul's argument that he was denied procedural fairness in the face of the substituted service order has a sound basis. Dr Zaghloul referred in his submissions to principles that apply more broadly in circumstances where a person is absent from a court hearing, and cited the decision of the Federal Circuit Court in *Jaafar v Gleeson in his capacity as bankruptcy trustee of bankrupt estate of Mohamad Jaafar* [2019] FCCA 1226. In that case a debtor failed to attend at the hearing of a creditor's petition but the Court refused to exercise any implied jurisdiction to set aside the sequestration order. The Court had regard to authorities such as *Re Anasis; Ex parte Total Australia Ltd* (1985) 11 FCR 127 at 133 (Burchett J) (citing *Cameron v Cole* (1944) 68 CLR 571 and *Taylor v Taylor* (1979) 143 CLR 1) and *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172.
4. Expressed generally, those authorities confirm that in an appropriate case the Court may set aside an order made against a person who did not have the reasonable opportunity to appear and present their case. See in particular *Taylor v Taylor* at 8‑9 (Gibbs J), 16 (Mason J), 22 (Aickin J); and *Allesch v Maunz* at [27] (Gaudron, McHugh, Gummow and Hayne JJ), [50] (Kirby J). Whether the Court sets aside an order is a matter in its discretion having regard to matters such as the reason for non‑attendance, the interests of other parties, the delay in making any application and whether on any rehearing there would likely be any different or any materially different result.
5. Dr Zaghloul had been served with the bankruptcy notice. He did not pursue any appeal with respect to the judgment debt and did not pay it. Service of the creditor's petition was effected pursuant to a substituted service order and utilising a physical and email address which Dr Zaghloul had informed this Court were his addresses for service. Although he said that he knew about the sequestration order four days after it was made, he waited until after the period of his bankruptcy expired before bringing annulment proceedings, and in circumstances where the trustee had therefore proceeded to exercise his powers and obligations as trustee in bankruptcy. Having regard to the matters I have already addressed as to the veracity of the judgment debt, there was not in my view evidence before the primary judge that suggested any different or any materially different result might have followed at the hearing of the sequestration order had Dr Zaghloul attended.
6. The primary judge referred to the matters set out at [138] above, being matters relevant to the exercise of discretion, at various points in his reasons. Having regard to those matters, I do not consider that error is disclosed in his failure to exercise any discretion to set aside the sequestration order on the basis of Dr Zaghloul's non‑appearance at the hearing of the creditor's petition.
7. Finally, I note that Dr Zaghloul's filed documents were confusing on this aspect of his appeal. His amended notice of appeal suggested that his complaint was directed at a lack of natural justice before the primary judge. However his submission before this Court appeared to be directed towards his non-appearance at the hearing of the creditor's petition. I have focused on the latter argument. To the extent some claim is maintained based on an alleged failure by the primary judge to consider Dr Zaghloul's submissions as to substituted service, it cannot in my view succeed. The reasons disclose that the primary judge gave attention to the factual matters relevant to the grant of the substituted service order and compliance with that order.

## Alleged error by failure to make adverse findings as to the conduct of the trustee

1. Dr Zaghloul makes a number of complaints about Mr Lombe's conduct as trustee. The first example of impugned conduct relates to the sale process for the Peppermint Grove property. That process was undertaken by the Commonwealth Bank as mortgagee in possession. It was not a process that Mr Lombe was in a position to control, although he remained in communication with the secured creditor. I have already set out Mr Lombe's evidence in this regard: see [98]‑[100] above.
2. On its face, the property was sold by the Commonwealth Bank for a price that a valuer had indicated was market value. There is nothing in the documentary evidence before me that suggests that Mr Lombe acted other than entirely properly with respect to the sale of the property. Mr Lombe was cross‑examined by Dr Zaghloul before the primary judge and so there was an opportunity for the primary judge to assess the reliability and credibility of Mr Lombe's evidence. Dr Zaghloul did not take me to any aspect of Mr Lombe's oral evidence that supported his allegations as to the sale process relating to the house. The threshold for establishing a breach of duty in the context of the sale of an asset that proceeds at market value may be difficult to meet: that is particularly so when the party allegedly in breach does not control the sale process. Whether there would have been a willing purchaser at an earlier time at a different price had the Commonwealth Bank proceeded to an earlier sale is no more than speculation. It is not surprising that the primary judge was not satisfied that Dr Zaghloul established Mr Lombe acted other than 'as a Trustee should' (at [41] of the reasons). Such conclusion was inevitable on the evidence before the primary judge.
3. Second, Dr Zaghloul complains that Mr Lombe wrongly failed to remove a caveat to enable settlement to proceed, delaying settlement and so causing Dr Zaghloul loss by way of additional accrued interest of $4,438.38. As mortgagee in possession, it was the Commonwealth Bank that managed the settlement process with the purchaser, not Mr Lombe. Mr Lombe explained that he recalled that arrangements were not made with his office for the provision of a withdrawal of caveat until shortly before the proposed settlement date and a time when he was away on leave. That evidence does not rise to evidence of fault on the part of Mr Lombe that establishes a breach of duty. At most there may have been some breakdown in communication between the Commonwealth Bank's representatives and Mr Lombe, but in a process that was not driven by Mr Lombe.
4. The Court can take notice of the fact that it is standard and conservative practice for a trustee in bankruptcy to notify an interest in real property by filing a caveat in order to protect the bankrupt estate. The primary judge referred to the fact that penalty interest was imposed and clearly had regard to that fact. Whilst not clear in the reasons, it appears that the primary judge may have taken the view that the risk of penalty interest if the caveat could not be withdrawn was to be weighed against the importance of the trustee lodging a caveat (reasons at [42]). Regardless, and in light of what I have said above, there was no error in the circumstances in failing to make a finding that Mr Lombe had breached his duty as trustee.
5. Third, Dr Zaghloul asserts that Mr Lombe failed to distribute proceeds of sale from the Peppermint Grove property to his former wife. There is no evidence of any complaint by his former wife in this regard. Mr Lombe attested to the fact that funds were distributed at settlement by the Commonwealth Bank or its solicitors to Dr Zaghloul's former wife's solicitor, following discussions between Gadens (on behalf of the Commonwealth Bank) and Mr Richard Bannerman (Dr Zaghloul's former wife's solicitor). That would seem to be uncontentious. Mr Lombe had no control of the settlement proceeds. Dr Zaghloul has established nothing to the contrary.
6. Fourth, Dr Zaghloul alleges that Mr Lombe breached his duty in the manner in which he realised those watches that he took into his possession. That aspect has been dealt with above (at [102]). There is no evidence to suggest that Mr Lombe acted other than in a proper manner in selling the watches that were taken into his possession through GraysOnline.
7. Fifth, Dr Zaghloul alleges that the trustee should have proceeded to challenge costs of approximately $199,473 charged by Dr Zaghloul's former solicitors relating to separate Supreme Court proceedings. Dr Zaghloul asserts that the estate suffered in that Mr Lombe declined to pursue the taxation and an asset was thereby lost to it. This contention was put at a very general level.
8. I was unable to locate any evidence that explained the basis upon which the fees were incurred, any invoices, any challenges to the invoices or any articulation as to why a taxation may have resulted in a reduction in fees or any payment to the estate. Dr Zaghloul did not explain how the taxation would have been funded (as Mr Lombe had no funds) other than to submit that a submission could have been made to the taxing officer that the estate not bear any costs of the taxation. At most, there is an aura of speculation around this aspect of the appeal grounds.
9. Mr Lombe informed Dr Zaghloul in writing that he would not be in a position to pursue any taxation without funding. Mr Lombe also said under cross‑examination that he looked at the nature of the claims that Dr Zaghloul intended to rely upon for the purpose of the taxation, including Dr Zaghloul's claim that his lawyers had conspired with another party to act against his best interests. Mr Lombe said that having looked at the material he considered there were limited prospects of success. There is nothing in the evidence to suggest that Mr Lombe's decision in this regard was wrong or that any duty was breached. Again, there was no error in the failure of the primary judge to find otherwise.

## Alleged conduct by Mr Lombe as to remuneration

1. Dr Zaghloul submits that Mr Lombe should be denied his remuneration as trustee because of the alleged breaches of duty on his part. For the reasons I have given the evidence does not establish any breach of duty on the part of Mr Lombe.
2. Mr Lombe gave evidence before the primary judge as to his remuneration. His office received a total payment of $19,941.05 on account of costs and expenses including remuneration. That was less than the amount recorded for the work undertaken ($20,343.40). Further costs have been incurred relating to the proceedings but there are no further funds in the bankrupt estate.
3. Mr Lombe set out the costs incurred in his Report to Creditors. Because those fees exceeded $5000, Mr Lombe was obliged to obtain creditor approval. This was explained to the creditors and hourly rates were disclosed. By resolution of 25 September 2013 the creditors approved payment of remuneration in the sum of $18,216. They had been provided with a four page breakdown of work undertaken first, to 23 August 2012 and second, from 24 August 2013 to completion.
4. Dr Zaghloul did not seek to address any particular task that was undertaken by Mr Lombe that was said to have been unnecessary or any particular charges said to be excessive.
5. Dr Zaghloul had the opportunity to cross‑examine Mr Lombe about his fees. In particular he questioned Mr Lombe about why the costs and expenses were paid prior to payment to the unsecured creditors, including Nationwide. Mr Lombe explained that there was a statutory priority for those fees. There was no cross‑examination that descended into the detail of the fees or suggested they were excessive in regard to any particular task.
6. The primary judge accepted Mr Lombe's explanation as to fees and referred to it in his reasons. There is no evidentiary basis for any finding by the primary judge that the remuneration was not properly incurred or received, or should be disgorged. It follows that there was no error in failing to make such a finding.

## Alleged error by failure to award damages or compensation

1. This argument fails for the reasons already given as to the misleading or deceptive conduct, negligence and breach of duty claims.
2. As the primary judge did not err in dismissing those claims, there was no error in failing to award damages or compensation.

## Alleged denial of procedural fairness before Local Court

1. There was no ground of appeal that squarely raised a complaint as to an absence of procedural fairness before the Local Court but it was a theme that was touched on several times within certain parts of Dr Zaghloul's submissions. Accordingly, I will address the issue.
2. Dr Zaghloul alleges he was taken by surprise when the Local Court Assessor proceeded to hear Nationwide's claim on 4 April 2012 and alleges that he was not given the opportunity to be heard.
3. However, the evidence before the primary judge suggests otherwise. Mr Ferguson provided evidence as to the history of the Local Court hearing. An early request for an adjournment was granted to Dr Zaghloul. A further request was made relating to a hearing that had been listed for 24 November 2011. Sometime prior to 4 November 2011 Dr Zaghloul applied for an adjournment on medical grounds. The Local Court Call Over Registrar wrote to the parties on 4 November 2011 confirming that the hearing that had been formally listed for 24 November 2011 was vacated and rescheduled 'for Assessment Hearing' on 4 April 2012. The parties were given until 21 March 2012 to file and serve their evidence. The notice from the Local Court stated that no further adjournment would be granted on medical grounds and if Dr Zaghloul was unable to prosecute his defence he would need to retain legal representation. On 11 November 2011 Dr Zaghloul corresponded with the Local Court, thanking it for considering his adjournment application and confirming he would attend by telephone on 4 April 2012. On 16 March 2012 Mr Ferguson provided copies of Nationwide's witness statements to Dr Zaghloul by email and Dr Zaghloul confirmed receipt of the relevant email.
4. Mr Ferguson also deposed to the procedures followed in the small claims division of the Local Court, being the relevant division for the hearing of Nationwide's claim against Dr Zaghloul. In accordance with those procedures the hearing proceeded by way of witness statements with oral submissions, rather than a formal trial with oral evidence and cross‑examination. Mr Ferguson referred to s 35 of the *Civil Procedure Act 2005* (NSW); s 35 of the *Local Court Act 2007* (NSW); and *Local Court of New South Wales* *Consolidated Civil Procedure Practice Note Civ 1*, 23 March 2011, Part C.
5. I should add that Dr Zaghloul referred in this appeal to a medical certificate that he had provided to the Local Court Call Over Registrar dated 23 September 2011. The medical certificate from a general practitioner said that Dr Zaghloul was at that time not well enough to deal with legal issues but that 'he is likely to have the physical and mental capacity to deal successfully with these matters by 1 November 2011'. The Registrar replied, stating that concise and specialised medical advice was required for an adjournment. As it happens, on 4 November 2011 the adjournment was granted. Dr Zaghloul did not point to any medical evidence that expressly dealt with his health at the time of the Local Court hearing.
6. Mr Ferguson provided a copy of the transcript of the proceedings before the Local Court. The transcript reveals that Dr Zaghloul participated by telephone. The Assessor commenced by confirming that the hearing was to 'deal with the proceedings that have been listed for hearing today'. The Assessor indicated that although Dr Zaghloul was attending by telephone he was (in effect) in a court room 'just like any other court proceedings'. The witness statements were tabled. The Assessor confirmed that Dr Zaghloul had copies of the statements. The Assessor gave the parties the opportunity to attempt to resolve the dispute before continuing with the proceeding. Dr Zaghloul made detailed submissions as to why he claimed there were errors in Nationwide's calculations and why he asserted Nationwide did not meet its burden of proof.
7. Dr Zaghloul made submissions before me that 'there was nothing that showed [him] that there was a trial', and so, he contends, there was a denial of natural justice or procedural fairness because he did not have the opportunity to be heard. He asserts he did not receive the evidence in sufficient time and that he thought it was an adjourned 'pre-trial hearing'. However, it is clear from the email to which I have referred from the Local Court and from the transcript that Dr Zaghloul knew the hearing of 4 April 2012 was a final hearing of Nationwide's application for judgment and he fully participated in the hearing. Evidence was filed ahead of the hearing by Nationwide and in accordance with directions. Dr Zaghloul also filed his evidence in advance of the hearing. Dr Zaghloul was informed of and participated in the hearing. The fact that an opportunity was provided during the hearing to participate in a last-minute mediation does not alter the fact that when that course failed, the nature of the hearing that proceeded was a final hearing.
8. The transcript also indicates that after the parties had made their submissions and the Assessor delivered judgment, Dr Zaghloul sought to re-open submissions, for example, as to the terms and conditions of membership, and also claimed that he did not know how the legal system in New South Wales worked. He said he did not understand that the assessment was a final hearing. The Assessor then referred to the preceding communications with the Local Court and in particular the directions that had been made listing the hearing and as to the filing of evidence. The Assessor also referred to what had been said at the commencement of the hearing. The Assessor was clearly satisfied that the hearing had been conducted in the usual manner and in accordance with the procedures of the Local Court. There is nothing on the face of the transcript or court directions to suggest otherwise. That Dr Zaghloul may have been unfamiliar with some of the processes of the Local Court and did not obtain legal advice does not of itself establish a denial of procedural fairness.
9. Accordingly, the evidence relied upon by Dr Zaghloul does not establish that he was denied procedural fairness by the Local Court and any failure by the primary judge to come to a different conclusion was not in error.
10. I note that the argument was raised in a somewhat different manner before the primary judge, in that one of the grounds of the application was that there was a denial of natural justice because a request to postpone the hearing in the Local Court until Dr Zaghloul's mental health stabilised was declined. However, Dr Zaghloul was not able to explain to me how he dealt with that matter before the primary judge and said during the hearing that he preferred to move on to other matters.
11. To the extent there was an application for an adjournment on medical grounds, an adjournment of the hearing date had already been granted. The transcript does not refer to any further request for an adjournment of the hearing on medical grounds (or otherwise), whether to enable Dr Zaghloul to appear in person or to enable him to seek legal representation. Nor does it refer to any complaint to the Assessor about the absence of an opportunity to seek a further adjournment on medical grounds.

## Alleged failure by primary judge to afford Dr Zaghloul an opportunity to be heard as to the costs of the annulment application

1. After judgment on the annulment application was delivered, Dr Zaghloul appeared before the primary judge at a subsequent costs hearing and was given an opportunity to be heard. He made submissions in that regard. Those submissions were referred to in the published reasons relating to costs: *Zaghloul v Jewellery & Gift Buying Services Pty Ltd t/as Nationwide Jewellers (No 2)* [2019] FCCA 595 at [9]‑[12]. Dr Zaghloul has not pointed to any particular submission that was overlooked by the primary judge in assessing costs. As the primary judge noted, Dr Zaghloul is experienced with court processes and he proceeded, in effect, with knowledge that if he were unsuccessful he would bear the costs of the respondents. Dr Zaghloul apparently acknowledged he would be liable for costs but was concerned about duplication of costs as between the first and second respondents and the primary judge squarely addressed that submission in his reasons.
2. The primary judge disclosed in advance that he wished to deal with costs quickly and on a lump sum basis to avoid the additional costs of a taxation exercise. He directed the respondents to provide schedules of costs on three bases and it appears this was done. The respondents sought costs on an indemnity basis. The primary judge took into account that he considered Dr Zaghloul's case for annulment to be described aptly as hopeless. He noted that the combined costs of the respondents on the basis of the schedule of costs would be just under $60,000 and that on an indemnity basis were a little over $90,000. He said that having regard to the authorities on indemnity costs he did not consider the order should be for all costs on a full indemnity basis. Rather he considered it was appropriate that costs be fixed and that they be fixed in the sum of $40,000 for each respondent.
3. Dr Zaghloul complains on this appeal that he wanted more time to consider and make written submissions on costs. His submissions before this Court were very brief on this point. I was not provided with any evidence that he sought an adjournment in order to make written submissions. He did seek a stay pending a decision as to whether he might appeal, but the primary judge declined to order a stay, preferring to give Dr Zaghloul a time period to pay that would be longer than the period in which Dr Zaghloul would need to decide on whether or not to appeal. Dr Zaghloul was given 75 days to pay.
4. Costs are in the discretion of the Federal Circuit Court judge: s 79 of the *Federal Circuit Court of Australia Act 1999* (Cth). The primary judge may set the amount of costs: r 21.02 of the *Federal Circuit Court Rules 2001* (Cth). This Court has often stated that the exercise of fixing a lump sum is 'one of estimation or assessment and not of arithmetic calculation or precision'; the approach must be 'logical, fair and reasonable'; the rule contemplates the 'application of a much broader brush than that applied on taxation': see, for example, *Seven Network Limited v News Limited* [2007] FCA 2059 at [25] (Sackville J); and *Hislop v Paltar Petroleum Limited (No 4)* [2017] FCA 1632 at [7] (Gleeson J). In *Ginos Engineers Pty Ltd v Autodesk Australia Pty Ltd* [2008] FCA 1051 at [22]‑[24] (Finn J) the principles were discussed in the context of the Federal Circuit Court (then the Federal Magistrates Court).
5. Dr Zaghloul has not established that the primary judge in the exercise of his discretion failed to have regard to a relevant consideration, had regard to an irrelevant consideration, or made some error of fact or law. It appears from the costs reasons that the primary judge dealt with matters relevant to the question of costs: for example, quantum, duplication and the potential for a proportion rather than all costs to be on an indemnity basis. It appears he had materials before him to assist with the assessment. The rules do not require an itemisation of costs prior to the making of a costs order. The primary judge had heard the annulment application only the preceding week and was well-placed to reflect on the conduct of the proceedings, Dr Zaghloul's prospects on the underlying application and the respondents' request for indemnity costs. The primary judge was also well-placed to anticipate that the costs of a taxation between parties with many differences between them, as evidenced by the many points relied upon by Dr Zaghloul in the annulment application, might be disproportionate to the costs already incurred and to any benefit that might flow from a formal taxation, as against an efficient exercise of discretion by way of a lump sum costs order.
6. I am not persuaded that the primary judge erred in the exercise of his discretion as to the costs order.

## Conclusion

1. The primary judge's refusal to annul the bankruptcy is to be viewed against the backdrop of all of the matters raised by the appeal grounds.
2. Importantly, the primary judge determined that Dr Zaghloul did not establish that he was solvent at the time of the sequestration order. That is a matter of some weight. For the reasons I have given above, that finding is entirely supported by the evidence.
3. Nor was the primary judge satisfied that there was a basis upon which the Court should go behind the judgment debt. Again, for the reasons I have given, that decision is supported by the evidence. Dr Zaghloul's evidence was not sufficiently reliable or credible to cast sufficient doubt on the quantum found by the Local Court to be owing to Nationwide. Nor was there probative evidence that suggested there was any prospect of any set off of the claim in debt on the basis of the asserted damages claim against Nationwide founded in misleading or deceptive conduct or negligence.
4. Dr Zaghloul did not establish that there was a reason for the Federal Circuit Court Registrar to go behind the judgment and inquire into the validity of the debt. The Registrar was entitled to rely upon the judgment debt for the purpose of the sequestration order. The Registrar was also entitled to proceed on the basis that Dr Zaghloul had been served with the creditor's petition in accordance with the substituted service order.
5. Therefore, Dr Zaghloul failed to establish that the sequestration order ought not to have been made and the primary judge did not err in that regard.
6. The primary judge's reasons (at [31]) indicate that his Honour also considered whether in any event, and having regard to the matters he had addressed, he should exercise his discretion to annul the bankruptcy, but he declined to do so. It is clear that the primary judge had serious concerns as to the veracity of Dr Zaghloul's evidence, in particular as to non‑disclosure of assets in his statement of affairs and as to his unsatisfactory explanations about those things, as discussed above. Bearing in mind the 'heavy burden' on an applicant for annulment to make full disclosure to the Court, such matters were relevant to the exercise of the primary judge's discretion.
7. I note that the absence of evidence as to the manner in which Nationwide and other unpaid creditors of the bankrupt estate were to be paid, although not expressly referred to by the primary judge in the reasons, would provide additional support for the manner in which the discretion was exercised.
8. Dr Zaghloul has not established that there was error on the part of the primary judge with respect to the annulment application. Nor am I satisfied that the decision is plainly unreasonable or unjust.
9. Neither has Dr Zaghloul established error in the primary judge's dismissal of the claims for damages against Nationwide or the dismissal of claims for damages or other relief relating to remuneration against Mr Lombe.
10. It follows that I would dismiss the appeal.

## Notice of contention

1. Nationwide raised in its written submissions before the primary judge the difficulty of potentially expired limitation periods faced by Dr Zaghloul. The primary judge did not deal with those submissions in his reasons. That is not surprising in light of the conclusions that were reached as to the non-viability of the claims based on misleading or deceptive conduct, negligence and breach of duty.
2. In light of my findings with respect to those claims, it is not necessary to determine the matters raised by the notice of contention. The limitation arguments are not dispositive of these proceedings and it is not efficient to deal with them, having regard to the view formed by the primary judge, which I have found to be without error, that the underlying misleading or deceptive conduct, negligence and breach of duty claims would have had no real prospect of success.

## Costs

1. In the ordinary course, Dr Zaghloul should pay the respondents' costs to be assessed if not agreed. As I have not heard from the parties on costs they may apply within seven days to vary that order if any different costs order is sought.

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| I certify that the preceding one hundred and eighty-seven (187) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Banks-Smith. |

Associate:

Dated: 24 July 2020