HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 08 Feb 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S106/2023
File Title:	HBSY Pty Ltd ACN 151 894 049 v. Lewis & Anor
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Plaintiff
Date filed:	08 Feb 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HBSY PTY LTD ACN 151 894 049**
Plaintiff

and

GEOFFREY LEWIS
First Defendant

THE FEDERAL COURT OF AUSTRALIA AND THE JUDGES THEREOF
Second Defendants

PLAINTIFF'S SUBMISSIONS

Part I: Certification for internet publication

1. The plaintiff certifies that these submissions are in a form suitable for publication on the internet.

Part II: Concise statement of the issues

2. The Full Court of the Federal Court[1] held that it did not have jurisdiction to hear an appeal from the Supreme Court of New South Wales[2] under s 7(5) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (C'th) (***Cross-Vesting Act***). The Full Court reasoned that s 7(5) of the *Cross-Vesting Act* only directs appeals from State courts to the Full Court where the court at first instance had been exercising cross-vested jurisdiction under s 4(1) of the *Cross-Vesting Act*.

---

[1] *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303; [2023] FCAFC 109 (Markovic, Downes and Kennett JJ): Court Book (**CB**) at 430.
[2] *HBSY Pty Ltd v Lewis* (2022) 108 NSWLR 558; [2022] NSWSC 841 (Kunc J): CB at 173.

3. The issue for determination in these proceedings is whether, as the plaintiff contends, s 7(5) of the *Cross-Vesting Act* directed the appeal from the Supreme Court to the Full Court (irrespective of whether the court at first instance had been exercising cross-vested jurisdiction) because a matter arising for determination in the appeal was a matter arising under the *Bankruptcy Act 1966* (C'th) (***Bankruptcy Act***). That Act is listed in the Schedule.

4. The Full Court erred in holding that it did not have jurisdiction to hear the appeal. Mistakenly to deny jurisdiction is a jurisdictional error attracting a writ of certiorari.[3]

Part III: Certification re s 78B of the *Judiciary Act 1903* (C'th)

5. The plaintiff certifies that it has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (C'th). Such notice has been given.[4]

Part IV: Judgments below

6. Primary Judgment: *HBSY Pty Ltd v Lewis* (2022) 108 NSWLR 558; [2022] NSWSC 841.[5]

7. Full Court Judgment: *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303; [2023] FCAFC 109 (**Judgment** or **J[#]**).[6]

Part V: Narrative statement of facts

8. A statement of agreed facts is at CB page 54.

9. Marjorie Lewis (**Marjorie**) died on 15 August 2008 leaving a will dated 10 October 2006. Save for a legacy of $5,000, Marjorie's estate (**the Estate**) fell into residue. Anthony Lewis (**Anthony**) was one of the residuary beneficiaries under the will.[7]

---

[3] *Edwards v Santos Ltd* (2011) 242 CLR 421; [2011] HCA 8 at [46] (Heydon J; French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ agreeing).
[4] CB at 46.
[5] CB at 173.
[6] CB at 430.
[7] J [3]; CB at 434.

10. After Marjorie's death, Anthony became liable to her estate (**the Estate**) for $571,084.93. This sum represents the loss Anthony caused to the Estate by reason of a breach of fiduciary duty owed by him to the Estate as an executor *de son tort*. On 2 April 2009, Anthony was declared bankrupt.[8]

11. On 21 July 2011, Anthony's trustee in bankruptcy entered into an asset sale agreement with the plaintiff, HBSY Pty Ltd (**HBSY/the plaintiff**). Pursuant to this agreement, various assets were assigned to HBSY in return for $275,000.[9] Those assets included Anthony's interest in the residue of the Estate; or more precisely, the residuary beneficiary's right to compel the due administration of the Estate.[10] It is common ground that the assignment was effective, and that it was 'subject to the equities' including, relevantly, Anthony's liability to the Estate.[11]

12. Anthony obtained his discharge from bankruptcy on 3 April 2012. The Estate remains in administration, and no distributions to beneficiaries have been made.[12] Anthony's brother Geoffrey Lewis (the defendant; **Geoffrey**) is the administrator. Geoffrey is another of the residuary beneficiaries.[13]

13. HBSY asserts a right to receive Anthony's share of residue free of any liability to contribute anything to the Estate in respect of Anthony's breach of fiduciary duty. In its Defence to the Amended Cross-Claim (in the event, only the Cross-Claim was litigated at first instance and on appeal), HBSY pleaded that Anthony's liability to the Estate was extinguished upon his discharge from bankruptcy pursuant to s 153(1) of the *Bankruptcy Act*.[14] That section provides:

> Subject to this section, where a bankrupt is discharged from a bankruptcy, the discharge operates to release him or her from all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his or her security for the benefit of creditors generally.

---

[8] J[5]-[6]; CB at 434.
[9] J[7]; CB at 434.
[10] *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 314.
[11] J[7]; CB at 434.
[12] J[8]; CB at 435.
[13] J[3]; CB at 434.
[14] Defence to Amended Cross-Claim at [39(c)]; CB at 90-91.

14. At trial, the primary judge granted leave to Geoffrey to advance a defence under s 153(2)(b), on the limited basis that the fraud alleged against Anthony was "*confined to equitable fraud and did not require proof of state of mind*".[15] Leave to amend was required, and granted on this limited basis, because Geoffrey had not initially pleaded reliance on s 153(2)(b).[16] That subsection provides:

> (2) The discharge of a bankrupt from a bankruptcy does not:
> …
> (b) release the bankrupt from a debt incurred by means of fraud or a fraudulent breach of trust to which he or she was a party or a debt of which he or she has obtained forbearance by fraud; …

15. The primary judge held that Anthony's liability was not extinguished because Anthony had committed a "*fraudulent breach of trust*" for the purposes of s 153(2)(b) of the *Bankruptcy Act*.

16. Final orders were pronounced by the primary judge on 1 July 2022.[17]

17. On 27 July 2022, HBSY filed and served a notice of intention to appeal to the New South Wales Court of Appeal. Pursuant to rule 51.9 of the *Uniform Civil Procedure Rules 2005* (NSW), HBSY had until 1 October 2022 to file a summons seeking leave to appeal.

18. On 31 August 2022, while preparing the relevant papers, HBSY's legal advisers came to the view that the appeal would concern a matter arising under the *Bankruptcy Act* and that accordingly an appeal lay only to the Full Court pursuant to section 7(5) of the *Cross-Vesting Act*. By that time, the deadline for filing a notice of appeal under rule 36.03 of the *Federal Court Rules 2011* (C'th) had expired.

19. On 2 September 2022, HBSY filed an application for an extension of time to appeal to the Full Court,[18] together with a draft notice of appeal.[19] One issue requiring

---

[15] First instance judgment at [122]; CB at 211.
[16] See Reply at [2]; CB at 94. See also the first instance judgment at [122]; CB at 211.
[17] CB at 229.
[18] CB at 233.
[19] CB at 236.

determination on the draft notice of appeal was whether s 153(1) of the *Bankruptcy Act* operated to discharge Anthony from his liability to the Estate.[20]

20. Geoffrey's only ground of opposition to the extension of time application was that the Full Court lacked jurisdiction to hear the appeal.[21]

21. On 14 July 2023, the Full Court delivered judgment.[22] It held that it did not have jurisdiction under s 7(5) of the *Cross-Vesting Act* to hear the appeal and that the extension of time application was incompetent for want of jurisdiction. Absent that matter, the Full Court would have granted an extension of time to appeal.[23]

Part VI: Succinct statement of argument

Uncontroversial matters concerning the appellate jurisdiction of the Federal Court

22. The issue at hand is the proper construction of s 7(5) of the *Cross-Vesting Act*. A number of matters informing its construction are uncontroversial and, with respect, were correctly addressed by the Full Court, which at the date of the hearing provided:

> Subject to subsections (7) and (8), where it appears that a matter for determination in a proceeding by way of an appeal from a decision of a single judge of the Supreme Court of a State or Territory (not being a proceeding to which subsection (6) applies) is a matter arising under an Act specified in the Schedule, that proceeding shall be instituted only in, and shall be determined only by:
>
> > (a) the Full Court of the Federal Court or of the Family Court, as the case requires; or
> >
> > (b) with special leave of the High Court, the High Court.

23. The Federal Court has appellate jurisdiction pursuant to s 24(1)(c) of the *Federal Court of Australia Act 1976* (C'th) to hear cases from State courts exercising federal

---

[20] Draft notice of appeal at [5]-[8]; CB at 237-8.
[21] J[2]; CB at 434.
[22] CB at 430.
[23] J[15]; CB at 436.

jurisdiction where an enactment so provides.[24] There is "*no doubt*" that the primary judge was exercising federal jurisdiction by reason of s 39 of the *Judiciary Act*.[25]

24. Section 7(5) of the *Cross-Vesting Act* directs certain appeals from State courts to the Full Court. That section requires consideration of whether a matter for determination in an appeal is a matter "*arising under*" Acts specified in the Schedule to the *Cross-Vesting Act*. The *Bankruptcy Act* is such an Act.

25. A matter "*arises under*" an Act if a right or duty in question owes its existence to that Act or depends upon the Act for its enforcement, and further the same is true if an Act is the source of a defence.[26] Thus the Full Court concluded, with respect correctly, that the appeal "*... clearly involves a 'matter arising under' the Bankruptcy Act*."[27]

26. Federal courts have exclusive jurisdiction over matters "*in bankruptcy*" pursuant to s 27 of the *Bankruptcy Act*.[28] Jurisdiction "*in bankruptcy*" is different from and narrower than matters "*arising under*" the *Bankruptcy Act*.[29] Thus federal courts have exclusive jurisdiction "*in bankruptcy*", but that does not extend to all matters "*arising under*" the *Bankruptcy Act*.

27. The primary judge was not acting "*in bankruptcy*" and as such federal courts did not have exclusive jurisdiction.[30] Had the Court at first instance been exercising jurisdiction "*in bankruptcy*", the Court would have been exercising jurisdiction cross-vested in it pursuant to s 4(1) of the *Cross-Vesting Act*.[31]

28. In summary, the Court at first instance was exercising federal jurisdiction under s 39 of the *Judiciary Act*, and a matter for determination in the appeal was a matter "*arising under*" the *Bankruptcy Act*. It was not exercising cross-vested jurisdiction. Consequently, on a literal reading,[32] s 7(5) directs this appeal to the Full Court.

---

[24] J[16]; CB at 436.
[25] J[17]; CB at 436.
[26] J[27]; CB at 440.
[27] J[28]; CB at 440.
[28] J[17(b)]; CB at 437.
[29] J[17(b)]; CB at 437.
[30] J[17(b)]; CB at 437.
[31] J[20]-[21]; CB at 438.
[32] E.g. J[37]; CB at 443.

29. However, the Full Court held that s 7(5) is only concerned with appeals from first instance judgments in which a court was exercising cross-vested jurisdiction. In doing so, it erred and reached a conclusion inconsistent with Court of Appeal authority.[33]

30. Among other arguments, the plaintiff submits that its construction of s 7(5) should be preferred because:

    a. it gives the words of the section their natural and ordinary meaning, whereas the construction adopted by the Full Court requires that additional, unwritten, words be read into s 7(5);

    b. it gives effect to the purpose of the section, as set out in the Explanatory Memorandum – being the conferral of exclusive appellate jurisdiction on the Full Court where matters arise under specified federal Acts; and

    c. there is no basis to impute to Parliament an intention that appeals only be disposed of by the Full Court where the court at first instance was exercising cross-vested jurisdiction, leaving State courts to hear appeals where the court at first instance was exercising jurisdiction under s 39(2) of the *Judiciary Act*.

The authorities prior to the judgment of the Full Court

31. *Bramco Electronics Pty Ltd v ATF Electrics Pty Ltd* (2013) 86 NSWLR 115; [2013] NSWCA 392 (***Bramco***) concerned proceedings for breach of a contract whereby parties had compromised patent infringement proceedings. The court at first instance was exercising federal jurisdiction under s 39(2) of the *Judiciary Act*.[34] The Court of Appeal (Meagher, Barrett and Ward JJA) held that under s 7(5) of the *Cross-Vesting Act*, only the Full Court had jurisdiction to hear the appeal because a matter to be determined arose under the *Patents Act 1990* (C'th) (one of the Acts in the Schedule to the *Cross-Vesting Act*).[35] Meagher JA reasoned that the expression "arising under" as used in that subsection was to be given the same meaning as it has in Ch III of

---

[33] J[43]; CB at 446.
[34] At [1] (Meagher JA) and [46] (Barrett JA).
[35] At [52] (Barrett JA).

the *Commonwealth Constitution*; and to read that expression more narrowly in this context, and as referring only to matters which have been the subject of an express conferral of federal jurisdiction by the legislation specified in the Schedule, would involve reading into the subsection words which are not there.[36]

32. *Bramco* has been applied in a series of subsequent judgments of the Court of Appeal.

33. *Eberstaller v Poulos* (2014) 87 NSWLR 394; [2014] NSWCA 211 (***Eberstaller***) concerned an application to set aside a transfer of real property where the purported transfer was in breach of consent orders made in the Family Court. The Court of Appeal (Beazley P, Meagher and Leeming JJA) identified two sources of federal jurisdiction being exercised at first instance. One was s 39 of the *Judiciary Act;*[37] the other was cross-vested jurisdiction under s 4 of the *Cross-Vesting Act*.[38] The Court of Appeal did not see any need to distinguish between these when concluding that s 7(5) required that the appeal be instituted in the Family Court.[39]

34. In *Boensch v Pascoe* (2016) 349 ALR 193; [2016] NSWCA 191 (***Boensch***), the appellant purported to appeal a judgment dismissing a claim that the respondent had lodged and maintained a caveat without reasonable cause within the meaning of s 74P of the *Real Property Act 1900* (NSW). Consistent with *Bramco* and *Eberstaller*, Leeming JA applied the construction which appears on the face of s 7(5): that where a matter arising for determination on the appeal arises under the *Bankruptcy Act*, the Full Court, and only the Full Court, has jurisdiction.[40] It was thus not necessary for Leeming JA to consider whether the court at first instance was exercising cross-vested jurisdiction, though it would appear that it was not because the claim concerned a caveat.

35. In *Morris Finance Ltd v Brown* (2016) 93 NSWLR 551; [2016] NSWCA 343 (***Morris Finance***), the applicant had commenced proceedings against two bankrupts without leave. The court at first instance determined that leave was required. The applicant sought leave to appeal that decision. Applying ***Boensch***, Payne JA

---

[36] At [5].
[37] At [16]-[17].
[38] At [19].
[39] See e.g. at [25].
[40] At [11].

(Basten JA agreeing) held that "*The only question is whether the present appeal raises a matter for determination being 'a matter arising under the Bankruptcy Act.*"[41] The Court of Appeal dismissed the summons.

36. The applicant then filed an appeal in the Full Court: *Morris Finance Ltd v Brown* (2017) 252 FCR 557; [2017] FCFCA 97 (Beach, Markovic and Moshinsky JJ). The Full Court noted the failed application for leave to appeal to the Court of Appeal.[42] The Full Court did not doubt its jurisdiction to hear the appeal, without any need to consider whether the court at first instance had been exercising cross-vested jurisdiction.

37. *Karlsson v Griffith University* (2020) 103 NSWLR 131; [2020] NSWCA 176 (***Karlsson***) concerned a claim for trade mark infringement. The statement of claim had been struck out and, in a separate judgment, the proceedings had been summarily dismissed. The applicant sought leave to appeal both judgments. The Court of Appeal (Payne and White JJ) applied *Bramco*, *Eberstaller*, *Boensch* and *Morris Finance*: the relevant enquiry was whether a matter for determination on each appeal was a matter arising under the *Trade Marks Act*.[43] There was no need to consider whether either or both of the strike out and summary dismissal judgments involved the exercise of cross-vested jurisdiction,[44] though it seems clear they did not.

38. *Guan v Li* (2022) 405 ALR 701; [2022] NSWCA 173 (***Guan***) concerned an appeal against a freezing order. The freezing order was sought in Supreme Court proceedings in which Li had obtained judgment against Guan's husband, but in substance the freezing order was in aid of proceedings in the Family Court in which Li sought to set aside a financial settlement between Guan and her husband. Bell CJ (Ward P and Meagher JA agreeing) applied *Bramco*, *Eberstaller*, *Boench* and *Karlsson*. The learned Chief Justice accepted the question as being whether a matter for determination in the appeal was a matter arising under the *Family Law Act*.[45] It was not necessary to consider the irrelevant issue of whether the court at first instance had been exercising cross-vested jurisdiction; unquestionably it was not.

---

[41] At [14]; emphasis in original. These comments were repeated at [41].
[42] At [6].
[43] At [11].
[44] At [28].
[45] At [31], [41] and [51].

39. These cases represent a consistent line of authority over a period of 10 years from the Court of Appeal. They apply the ordinary and literal meaning of s 7(5) of the *Cross-Vesting Act*. The enquiry – whether a matter arises under one of the Acts in the Schedule – is uncomplicated and the phrase "*arising under*" has a settled meaning at law.[46]

40. There was one exception to these authorities: *Singh v Khan* [2021] NSWCA 281 (***Singh***), a judgment of Brereton JA sitting alone. The Full Court preferred *Singh* to the otherwise settled position in the Court of Appeal, whilst accepting that, as a matter of comity, Brereton JA arguably ought to have decided the application in *Singh* in accordance with the statements of principle in *Bramco* and *Boensch*.

41. Singh had sought leave to appeal a decision of an Appeal Panel of the NSW Civil and Administrative Tribunal to the Supreme Court of NSW. In the Supreme Court, the judge determined that the proceedings were stayed because Singh had since become bankrupt and the trustee in bankruptcy had not elected to continue the proceedings: s 60 of the *Bankruptcy Act*.

42. In concluding that the Court of Appeal had jurisdiction to hear the appeal, Brereton JA acknowledged that a literal construction of s 7(5) of the *Cross-Vesting Act* dictates that the only question is whether a matter for determination on the appeal was a matter arising under the Bankruptcy Act.[47] However, having regard to the Preamble,[48] Explanatory Memorandum[49] and Second Reading Speech,[50] his Honour concluded that the purpose of s 7 of the *Cross-Vesting Act* is to make provision for the appropriate destination of appeals where a first instance court had been exercising cross-vested jurisdiction.[51] In reaching this conclusion, Brereton JA was apparently not referred to any of the authorities discussed above, though his Honour cited *Bramco* and *Morris Finance* on a different point.[52]

---

[46] J[26]-[28].
[47] At [19].
[48] At [19].
[49] At [20].
[50] At [21].
[51] At [22].
[52] At [17] fn 11.

The construction of s 7(5) of the Cross-Vesting Act

43. The construction of the section requires that its text be considered in context. As such, regard can be had to (i) extrinsic material (such as the Explanatory Memorandum and the Second Reading Speech) and (ii) the purpose of the enactment.[53]

44. In *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39], the High Court (French CJ, Hayne, Crennan Ball and Gageler JJ) observed:

> The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

45. More recently, in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at [14], Kiefel CJ, Nettle and Gordon JJ stated:[54]

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

46. Questions of degree arise, and it will be difficult to displace an interpretation which enjoys a powerful advantage in ordinary meaning and grammatical sense.[55] Whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment which is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a

---

[53] *Theiss v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 at [23] (the Court); s 15AA of the *Acts Interpretation Act 1901* (C'th).
[54] See also Gageler J to similar effect at [35]-[39].
[55] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321 (Mason and Wilson JJ); *SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064; [2018] HCA 55 at [64] (Edelman J).

construction that fills "*gaps disclosed in legislation*" or makes an insertion which is "*too big, or too much at variance with the language in fact used by the legislature*".[56]

47. It is necessary, before a provision can be construed as if it contained additional words, that (i) the precise purpose of the provisions be identified; (ii) the court is satisfied that the provision has inadvertently failed to achieve that purpose; and (iii) that Court can identify words to achieve that purpose.[57] Parliament's intention must have been plain.[58] So much is consistent with the proposition that it is a strong thing to read into an Act words which are not there.[59]

48. Parliament's intention in drafting s 7(5) was plain and is accurately stated in the decisions of the Court of Appeal identified *supra* and in the Explanatory Memorandum addressed at paragraph 54 below. By contrast the construction preferred by the Full Court does not reflect any plain legislative intention.

49. The words of s 7(5) do not expressly refer to any exercise of cross-vested jurisdiction in the court below. On the other hand, they incorporate into the statutory direction language with a meaning well-established by reference to s 76(ii) of the Constitution — namely, whether a matter arises under a specified enactment. The text thus focuses on the link between a matter in dispute and a particular statute. Its language is not apt to refer to an entirely different criterion, being the exercise, or not, of jurisdiction in the court below.

50. Recognition of that criterion would involve notionally inserting the words "*exercising jurisdiction under subsection 4(1)*" after the words "*a single judge of the Supreme Court of a State or Territory*" where they appear in s 7(5). The language of s 7(3) would have to be similarly amended.

51. These provisions do not include any language expressly indicating that they are concerned with jurisdiction conferred by the Act unlike other sections: see, for example, ss 9(2), 9(3), 11(1) and 14(1). This indicates that it would have been

---

[56] *Taylor v The Owners Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9 (***Taylor***) at [38] and the cases there cited.
[57] *Taylor* referring to *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105 (Lord Diplock). See also Herzfeld and Prince *Interpretation* (Lawbook Co, 2nd ed. 2020) at [5.320].
[58] *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551; [2017] HCA 54 at [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).
[59] *Thomson v Goold & Co* [1910] AC 409 at 420 (Lord Mersey)

reasonable for the draftsperson to supply the missing words.[60] Where the draftsperson has been careful to confirm that certain provisions are concerned with jurisdiction conferred under the Act, it is to be expected that the draftsperson was, equally, being careful in omitting such confirmation from s 7(5).

52. Here, the required insertion is not required because of a simple drafting error; here it substantially qualifies the literal meaning of the words.

53. The immediate statutory context does not detract from that position. Outside the *Cross-Vesting Act,* State courts might exercise federal jurisdiction by reference to a number of sources, principally s 39(2) of the *Judiciary Act*. By reason of s 4(1) of the *Cross-Vesting Act,* such courts can now exercise federal jurisdiction in all cases (subject to any other enactment) except for those stipulated in s 4(4) and the limitations attending a special federal matter (s 6). The evident statutory purpose is to identify, in the final piece of legislation, a code for determining where appeals should be heard.

54. This is supported by the Explanatory Memorandum. Paragraph 20 identified the mischief of appeals being brought in a court different from that which conducted the trial. But in all events, the express intent of the Act was to ensure that the "*Full Federal Court now has exclusive appellate jurisdiction*" in respect of the Acts in the Schedule.[61] The Second Reading Speech is to similar effect.[62] The construction favoured by the Full Court denies that outcome in so far as a State court has jurisdiction by reason of s 39(2) of the *Judiciary Act*.

55. No evident statutory purpose is served by a construction which confers exclusive jurisdiction on the Full Court only where the primary judge exercised jurisdiction under s 4(1) of the *Cross-Vesting Act,* but not s 39(2) of the *Judiciary Act*. Simply put, no sensible statutory purpose can be imputed to the Parliament in distinguishing the two situations. Moreover — as *Eberstaller* demonstrates — a State court may be concurrently invested with jurisdiction by reference to both sources — there because (i) one former spouse was attempting to enforce against the other an agreement

---

[60] *cf Minogue v Victoria* (2018) 264 CLR 252; [2018] HCA 27 at [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ)
[61] J[17(a)]; CB at 436-7.
[62] J[17(b)]; CB at 437.

which had effect under the *Family Law Act* and (ii) the dispute before the primary judge answered the description of a "matrimonial cause" within the meaning of s 4 of the *Family Law Act*, and thus s 4 of the *Cross-Vesting Act* was enlivened.

56. The Act's context also includes the parallel legislation enacted by each of the States and by the Northern Territory, which came into force on 1 July 1988. Most of its provisions are mirrored in the complementary State legislation.[63] Those State Acts all contain provisions corresponding with s 7(5) of the Commonwealth Act.[64] In paragraph 50 *supra* the proposition was advanced that the Full Court's reasoning required the implication of words into s 7(3) and s 7(5). So much would also be required of the State provisions, with the additional requirement that they would need to refer to the Commonwealth Act.

Judgment of the Full Court

57. Their Honours considered that context favoured a conclusion that s 7(5) cannot be understood in accordance with its terms. As will be submitted, the contextual factors relied upon by the Full Court are unpersuasive, and do not provide a sound basis for departing from the clear words of the *Cross-Vesting Act*.

58. The first contextual matter relied upon by the Full Court in the Judgment is that the *Cross-Vesting Act* was concerned with conferring additional federal jurisdiction on State courts.[65] This is said to emerge from the Preamble to the *Cross-Vesting Act*. With respect, the text of the Preamble does not support that proposition. Paragraph (b) of the Preamble states that the Act is to provide for "*the determination by one court of federal and State matters in appropriate cases*". This purpose is given effect by construing s 7(5) as providing that only the Full Court may hear appeals where matters arise for determination under specified federal Acts. Moreover, the Preamble cannot cut down clear and unambiguous operative provisions.[66]

---

[63] *NEC Information Systems Australia Pty Limited v Lockhart* (1992) 36 FCR 258 at 260; see also the Attorney-General's Second Reading Speech, Hansard, 22.1086, p 2555.
[64] See, for example, s 7(4) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) and s 7(4) of *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic)
[65] J[30]; CB at 441. *Cf* J[20]; CB at 438.
[66] *Wacando v The Commonwealth* (1981) 148 CLR 1 at 15-16 (Gibbs CJ)

59. The second contextual matter is said to be that s 7(3) of the *Cross-Vesting Act*, which is the mirror image of s 7(5), would trespass on the States' ability to legislate for their own court systems if read literally.[67] This is said to be a matter of "*significant weight*".[68] This fails properly to contend with the uniform nature of the cross-vesting regime and the fact that the States and Territories consented to it.[69]

60. The third contextual matter relied upon is the convenience of having federal cases flow through State courts without the need for them ever to be consciously identified as such.[70] This overlooks the need, in any event, to consider whether the court at first instance was exercising cross-vested jurisdiction where a matter for determination on appeal is a matter arising under one of the Acts in the Schedule. Rather than being expedient, the construction preferred by the Full Court gives rise to a different and more uncertain jurisdictional enquiry.

61. Moving on from these three contextual matters, the Full Court made some further observations. It was observed that s 7(3) of the *Cross-Vesting Act* does some of the work already done by s 39(2) of the *Judiciary Act*.[71] The fact that two statutory provisions directed at the same subject matter are consistent with one another, to the extent that they overlap to a small extent, is a very weak reason for eschewing the plain and literal meaning of one of those provisions.

62. It was further observed that s 7(5), if construed literally, effected "*an implied partial repeal of s 39(2) and a fundamental change in the allocation of jurisdiction*".[72] That is not an entirely accurate characterisation in legal theory. The *Cross-Vesting Act* does not revoke jurisdiction but imposes an obligation on the State court as to then way in which the jurisdiction is to be exercised.[73] It still has jurisdiction, as ss 7(7) and 7(8) acknowledge.

---

[67] J[31]; CB at 441.
[68] J[38]; CB at 444.
[69] E.g. *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW).
[70] J[32]; CB at 441.
[71] J[33]; CB at 442.
[72] J[34]; CB at 442.
[73] *2 Elizabeth Bay Road Pty Limited v The Owners-Strata Plan No 73943* (2014) 88 NSWLR 488; [2014] NSWCA 409 at [91] (Leeming JA)

63. The generality of s 39(2) is otherwise subject to particular statutory exceptions.[74] Thus, the investing of exclusive jurisdiction in bankruptcy in the courts prescribed by s 27 of the *Bankruptcy Act* has been said to effect a repeal of the general investing of federal jurisdiction in State courts within the limits of their several jurisdictions by s 39(2) to the extent any jurisdiction or proceeding arises under or by virtue of the *Bankruptcy Act*.[75] Justice Leeming, writing extra-curially identifies a number of instances where federal legislation has revoked, directly or indirectly, the jurisdiction of State and Territory courts.[76]

64. Where, as here, the *Cross-Vesting Act* records an agreement between the polities, there is no reason to read down the plain words of s 7(5) out of a concern that the rights of others are affected. The States and Territories have agreed upon a regime that affects their respective appeal courts.

65. The Full Court then noted three matters which fortified it in the construction it preferred. The Full Court (i) took issue with the unclear "*policy rationale*" of s 7(5), (ii) said that the literal reading of s 7(5) went beyond the objects that appear from a broader reading of the *Cross-Vesting Act*, and (iii) considered that s 7(5) introduced changes which were not presaged in the Explanatory Memorandum or the Second Reading Speech.[77]

66. An unclear policy rationale is no basis for eschewing the plain meaning of an Act. Nor is it hard to identify a policy rationale for Parliament ensuring that federal courts have exclusive appellate jurisdiction in respect of matters arising under Acts such as the *Commonwealth Electoral Act 1918* (C'th) and the *Referendum (Machinery Provisions) Act 1984* (C'th).

67. As submitted above, the Explanatory Memorandum supports the construction adopted in the Court of Appeal.

---

[74] M Leeming, *Authority to Decide, The Law of Jurisdiction in Australia*, 2nd edition (2020) at 168.
[75] *Meriton Apartments Pty Limited v Industrial Court of New South Wales* (2008) 171 FCR 380; [2008] FCAFC 172, at [81] (Greenwood J)
[76] *Authority to Decide*, at p 165 and following
[77] J[37]; CB at 443.

68. None of the matters relied on by the Full Court establish that s 7(5) of the *Cross-Vesting Act* is plainly concerned only with the destination of appeals from State courts exercising cross-vested jurisdiction.

69. *Guan*, a unanimous judgment of a bench of three (Bell CJ, Ward P and Meagher JA), was decided after *Singh* and held that a provision of Commonwealth legislation had a certain construction. In following *Singh* and declining to follow *Guan* and other authorities, the Full Court did not conclude that the other authorities were plainly wrong. It was obliged to reach such a conclusion before departing from them.[78] It was inadequate to dismiss authorities other than Singh as involving only "*extremely brief*" statements of principle[79] when those statements represented the *ratio decidendi* of the cases. The characterisation was also inaccurate.

70. The result is that the Full Court denied it had jurisdiction to hear the appeal because the primary judge was not exercising cross-vested jurisdiction. On the authority of *Guan* and other cases, the Court of Appeal would likewise deny it has jurisdiction. On its proper construction, consistent with *Guan* and other Court of Appeal authorities, s 7(5) of the *Cross-Vesting Act* confers jurisdiction on the Full Court. The Judgment should be quashed and the Full Court commanded to hear the appeal.

Part VII: Orders sought

71. A writ of certiorari issue directed to the second defendants to quash the decision of the Full Court of the Federal Court of Australia made on 14 July 2023 in proceeding NSD 726 of 2023 (*HBSY Pty Ltd v Lewis* (2023) 298 FCR 303; [2023] FCAFC 109).

72. A writ of mandamus issue directed to the second defendant commanding it to hear and determine the substantive appeal.

73. The first defendant pay the plaintiff's costs in the Full Court and this Court.

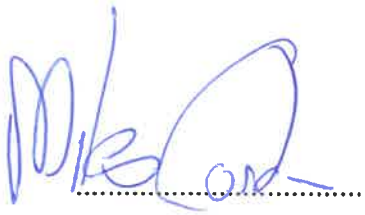
---

[78] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 (Mason CJ, Brennan, Dawson Toohey and Gaudron JJ); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).
[79] J[52]; CB at 449.

Part VIII: Time estimate for oral argument

74. The plaintiff estimates that 1.5 hours will be required for the presentation of its oral argument.

Dated: 8 February 2024



Name: M K Condon

Telephone: 02 9151 2017

Email: condon@newchambers.com.au

ANNEXURE

Practice Direction No 1 of 2019 – applicable statutory provisions

Legislation	Provision	Relevant date	Relevant compilation
Bankruptcy Act 1966 (C'th)	s 153	2 August 2021	Compilation C89 in force from 2 August 2021 to 31 August 2021
Judiciary Act 1903 (C'th)	s 39	2 August 2021	Compilation C47 in force from 25 August 2018 to 31 August 2021.
Jurisdiction of Courts (Cross-Vesting) Act 1987 (C'th)	ss 4(1), 7, Schedule	2 August 2021	Compilation C21 in force from 2 December 2016 to 31 August 2021.