IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S53 of 2017

BETWEEN: **RAMSAY HEALTH CARE AUSTRALIA PTY LIMITED**
Appellant

AND: **ADRIAN JOHN COMPTON**
Respondent

RESPONDENT'S SUBMISSIONS (ANNOTATED)

Filed on behalf of the Respondent by
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Part I: Suitability for publication on the internet

1. The respondent certifies that these submissions are suitable for publication on the internet.

Part II: Concise statement of issues arising on the appeal

2. First, in what circumstances can a bankruptcy court determining proof of debt under s.52(1)(c) of the *Bankruptcy Act 1966* (Cth) exercise its discretion to go behind a judgment?

3. Secondly, for what principles is *Wren v Mahony* (1972) 126 CLR 212 authority?

4. Thirdly, for what principles is *Corney v Brien* (1951) 84 CLR 343 authority?

Part III: Section 78B certification

5. The respondent certifies that there are no matters arising under the Constitution or involving its interpretation.

Part IV: Material facts contested

6. In eight respects the statement of facts in Part V of the appellant's submissions ("AS") is contested or needs to be amplified.

7. First, the account of the commercial relationship between Ramsay (on the one hand) and Medichoice and Compton (on the other) at AS[6]-[7] omits a number of important features which were referred to at [1] – [4] of Ramsay's Commercial List Statement in the Supreme Court: Appeal Book ("AB") pp126-127. The distribution agreement between Medichoice and Ramsay (which commenced with effect from 1 July 2010) operated by Medichoice using advances made by Ramsay to purchase products ordered by Ramsay (or its related entities). Medichoice would import, store, sell and distribute the products and would receive payment from Ramsay (or its related entities). Medichoice was then obliged to repay the advance and pay various other amounts to Ramsay. Thus, a form of running account was maintained between Medichoice and Ramsay. The potential liability of Compton under the guarantee depended on the state of the account between Medichoice and Ramsay.

8. Secondly, the description of the evidence in the Supreme Court at AS[8]-[12] omits the following details. The evidence of Ms Stevis filed by Compton (but not read in that Court) calculated the amount owing by Medichoice to Ramsay (and thus Compton's exposure under the guarantee) at $2,264,824.17: AB p214. Ultimately, the only evidence as to the quantum of any debt owing by Medichoice to Ramsay adduced in the Supreme Court was the Dobbs Certificate[1] that stated the debt at $9,810,312: [2015] FCAFC 106 ("FC") at [16] AB p366.

9. Thirdly, at AS[12] it is said that it may be inferred that Compton failed to contest quantum in the Supreme Court after advice from counsel and in what he regarded as his forensic interests. No such inference was drawn by the primary judge or the Full Court. Compton does not accept that it should be drawn by this Court.

[1] The Dobbs Certificate is at AB p268.

10. Fourthly, the description of material before the primary judge at the hearing at AS[18]–[19] needs to be supplemented in two respects. The first is to note that it included the following:

(i) an affidavit of Ms Stevis[2] deposing that she had conducted an analysis of the accounts between Ramsay and Medichoice which concluded that Ramsay owed at least $2.449 million to Medichoice: [2015] FCA 107 ("PJ") at [12] AB p304; FC [25] AB p357; that evidence was not challenged before Flick J: FC [76] AB p377; at FC[70] (AB p375) the Full Court said that it may be assumed that the factual materials underpinning that analysis were available before the Supreme Court trial;[3]

(ii) affidavits of the liquidators of Medichoice expressing opinions to the effect that on the basis of the documents currently before them it was more likely than not that Ramsay was a debtor of Medichoice and not a creditor with the consequence, if that was correct, that nothing would be owing by Compton under the guarantee (FC [26]-[29] AB p358; the affidavits appear at AB pp60-61, 77-78);

(iii) an affidavit of Michael Hirner, the Group Financial Controller for Ramsay, stating that Ramsay had received invoices totalling $3,431,604 from Medichoice which had not been paid and of which at least some would have to be set off against any amount the subject of a proof of debt in the liquidation of Medichoice and the bankruptcy of Compton (PJ [12] AB p304; FC [30] AB p359; the affidavit appears at AB pp274-275);

(iv) a table referred to as a reconciliation summarising the effect of the evidence of Ms Stevis and Mr Hirner which was handed to Flick J during the hearing; the reconciliation concluded that approximately $900,000 was owing by Ramsay to Medichoice (PJ [10] AB pp302-303; FC [31]-[32] AB p360) which, if correct, meant that no amount was owing by Compton under the guarantee.

11. The second respect in which the description of the material before the primary judge at AS[18]-[19] needs to be supplemented is to note that at the hearing before Flick J, senior counsel then appearing for Ramsay accepted that:

(i) the factual details in the affidavits of Ms Stevis and Mr Hirner resulted in the calculations in the reconciliation, although the factual accuracy of all those details was not accepted (PJ [10] AB p303; FC [33] AB p361);

(ii) the indebtedness of Compton was for an amount less than the judgment amount (PJ [11], p304; FC [33], p361); this necessarily carried with it the concession that the only evidence of quantum before the Supreme Court (ie., the Dobbs Certificate) was wrong;

(iii) it was an "open question" as to whether the calculations in the reconciliation were factually correct (PJ[11] AB p304; FC [33] AB p361; see also, T53.34 at AB p296); meaning that it was an "open question" whether any amount was actually owing by Compton to Ramsay;

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[2] Her affidavit appears at AB p95.

[3] In the light of the Full Court's observation at FC [70], the natural inference is that the calculations in Ms Stevis's (unread) Supreme Court affidavit were mistaken.

(iv) the best finding of fact which could be made on the present application was that there was enough evidence to show that further inquiry into the indebtedness of Compton to Ramsay might lead to a different result (T53.4 – 53.6; AB p296).

12. Fifthly, Compton disputes the characterisation of the concession made by senior counsel for Ramsay before Flick J in the second and third sentences of AS[18] and at [48]-[49], viz., that it was a mere acceptance that if there was to be a factual contest on whether any debt was owing by Compton to Ramsay its outcome was unknown and unknowable. In fact, it was an acknowledgment that, on the evidence before Flick J, a finding was open that nothing was owing by Compton under the guarantee. At the hearing of the appeal, senior counsel then appearing for Ramsay repeated the concession that there was a possibility there was no debt owing from Medichoice to Ramsay (T66.35 – 67.10, AB pp331 - 332).

13. Sixthly, the description of the reasons of the primary judge at AS[20] should be supplemented. The principal points made by the primary judge were as follows:

(i) Compton had participated by solicitors and counsel in the Supreme Court hearing (PJ[20-22], AB pp308-309);

(ii) there was available evidence as to the quantum of indebtedness of Medichoice to Ramsay, but a forensic decision had been made not to put quantum in issue and no explanation given for the failure to do so (PJ[20]-[22], AB pp308-309);

(iii) the highest the evidence now available reached was that it remained an "open question whether there is any indebtedness" (PJ[26], AB p311);

(iv) it could not be said that judgment should never have been entered against Compton upon the evidence placed before the Supreme Court (PJ[26], AB p311);

(v) no "injustice" would arise from holding Compton to the manner in which he had conducted the Supreme Court proceedings (PJ[21], AB p308).

14. Seventhly, the description of the reasons of the Full Court at AS[20] should be supplemented by noting that, in allowing the appeal, the Full Court held that:

(i) in the exercise of his discretion to "go behind" the judgment, Flick J incorrectly focussed on the way Compton conducted his case in the Supreme Court and the forensic choices he had made and not on the requirement that there be satisfactory proof of the petitioning creditor's debt (FC [69]-[70], [76-77]; AB pp375-378);

(ii) the central issue in the exercise of the discretion to go behind a judgment was whether reason had been shown for questioning whether there was in truth and reality a debt due to the petitioning creditor (FC [69]-[70]; AB pp375-376);

(iii) in considering afresh the question of whether the Court should go behind the judgment, it was relevant to take into account that there had been a contested hearing in the Supreme Court and an unexplained failure of Compton to contest quantum (FC [78]; AB p378);

(iv) nevertheless, there had been no trial on quantum and the unchallenged evidence and concessions made before Flick J disclosed substantial reasons for questioning whether Compton was indebted to Ramsay: therefore, the Court should "go behind" the judgment (FC [78]-[79]; AB p378).

15. Eighthly, at the commencement of the application for special leave to appeal to this Court ([2017] HCATrans 55), Ramsay's proposed grounds of appeal were numerous and wide-ranging. The matter was adjourned for a short time to permit the proposed grounds to be re-formulated. In the course of argument, the proposed grounds were further amended and special leave granted on the re-formulated grounds as amended. The grant of special leave to appeal to Ramsay was limited to three grounds (AB p384-385); namely whether the Full Court erred by:

(i) failing to apply the test described in *Corney v Brien* (1951) 84 CLR 343 for going behind a judgment given after a fully contested hearing;

(ii) finding that the Court may go behind a judgment in any circumstance in which the judgment debtor adduces evidence which shows that there is "substantial reason to believe" that he or she does not owe the debt, regardless of whether the debtor had the opportunity of taking that point at the earlier contested hearing;

(iii) failing to give any or sufficient weight to the principle of finality in litigation.

Part V: Applicable statutory provisions

16. The respondent agrees with the appellant's list of applicable statutory provisions.

Part VI: Respondent's argument

17. The respondent's argument is conveniently stated under the following headings.

Relevant legal principles

18. The starting point for the consideration of the relevant legal issues is the text of s.52(1) of the *Bankruptcy Act 1966* (Cth) (as interpreted by the majority in *Wren v Mahony* (1972) 126 CLR 212). That sub-section provides as follows:

> (1) At the hearing of a creditor's petition, the Court shall require proof of:
>
> (a) ...
>
> (b) ...
>
> (c) the fact that the debt or debts on which the petitioning creditor relies is or are still owing;
>
> and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor.

19. The key words in this provision are that the Court "may make a sequestration order" "if it is satisfied with the proof of" "the fact that the debt ... on which the petitioning creditor relies is ... still owing".

20. Thus the *ultimate question* for the bankruptcy judge is whether the judge is persuaded by the petitioning creditor that the debt on which that creditor relies is still owing: "the emphasis is upon the paramount need to have satisfactory proof of the petitioning creditor's debt": *Wren v Mahony* at 224.

21. The present case involves a judgment debt, that is the petitioning creditor now has a judgment in which the Supreme Court of NSW has found that the petitioning creditor has proved a debt.

22. In that context, how does a bankruptcy court approach the task of determining whether the petitioning creditor has proved that the relevant debt is still owing?

23. The first point to note is that the "debt" referred to in s. 52(1)(c) (and which needs to be proved to the satisfaction of the bankruptcy judge) is the debt underlying the judgment debt: *Wolff v Donovan* (1991) 22 FCR 480 at 487 ("underlying debt"); *Corney v Brien* at 358 ("debt antecedent to the judgment"); *Ross Ireland v Tour Finance Ltd* (1965) 39 ALJR 49 at 49; *Re Ferguson* (1969) 14 FLR 311 at 320; *Ahern v DCT* (1987) 76 ALR 137 at 147-148.

24. Moreover the petitioning creditor cannot rely upon the judgment as a res judicata: see, for example, *Ex parte Lennox* (1885) 16 QBD 315 at 323; *Wren v Mahony* at 224 ("judgment is never conclusive"). The cases give a number of reasons for this. First, the rights of third parties (ie., creditors) are affected by the adjudication of a debtor as a bankrupt: *Ex parte Lennox* at 321, 328; *In re Fraser; Ex parte Central Bank of London* [1892] 2 QB 633 at 636; *In re Hawkins; Ex parte Troup* [1895] 1 QB 404 at 408 – 409, 412; *Ahern v DCT* at 146. Secondly, bankruptcy involves a change in status and has quasi-penal consequences: *In re Hawkins; Ex parte Troup* at 412 ("The principle appears to be ... in full to their prejudice"); *Ahern v DCT* at 146. Thirdly, the Court has a statutory duty to be "satisfied" as to the existence of the petitioning creditor's debt (ie., the "real" debt): *Ex parte Lennox* at 324; *Ahern v DCT* at 146. Fourthly, a creditor should not be able to make a person bankrupt on a debt which may not be provable: *Ex parte Lennox* at 322, 328. Fifthly, the bankruptcy court is not estopped by the conduct of the parties but has a right to inquire into the debt: *Ex parte Lennox* at 323. Sixthly, the bankrupt's conduct of the earlier case ought not to prejudice the right of his creditors to dispute the judgment: *Ex parte Anderson* (1885) 14 QBD 606, at 610.

25. However, once the judgment is received into evidence it is "prima facie evidence of the existence of the underlying debt " (*Wolff* at 487) although the "judgment is never conclusive in bankruptcy": *Wren* at 224.

26. That said, the bankruptcy court has a "discretion" to "accept the judgment as satisfactory proof of the petitioning creditor's debt": *Wren* at 224.

27. When "the judgment is proved, and it is prima facie evidence of the existence of the underlying debt, there is a tactical onus on the debtor to show that there are circumstances which make it appropriate to go behind the debt to see whether the judgment was in truth and reality a true debt": *Wolff v Donovan* (1991) 29 FCR 480 at 487 per Lee and Hill JJ. However, the "overall onus of proof of the existence of a real debt underlying a judgment ... remains always with the petitioning creditor": *ibid.*

28. The bankruptcy court *may* go behind the judgment to see whether the underlying debt is in truth and reality a true debt "if the case [is] a proper one [to] do so", that is, "if appropriate circumstances [are] shown to exist": *Wren* at 224. "Occasions" amounting to such "appropriate circumstances" include where there are "[c]ircumstances *tending to show* fraud or collusion or miscarriage of justice or that a compromise was not a fair and reasonable one": *Wren* at 223 (emphasis added).

29. Further, the bankruptcy court *must* exercise its discretion to go behind the judgment where "reason is shown for questioning whether behind the judgment ... there [is] in truth and reality a debt due to the petitioning creditor": *Wren* at 224. In that situation "the Court of Bankruptcy can no longer accept the judgment as such satisfactory proof": *Wren* at 224.

30. Once the bankruptcy court exercises its discretion to go behind the judgment, the petitioning creditor must establish "the existence of a real debt underlying [the] judgment" (*Wolff* at 487) at which point "the emphasis is upon the paramount need to have satisfactory proof of the petitioning creditor's debt": *Wren* at 224.

31. The bankruptcy court will then either conclude that the underlying debt is still owing or that it is not still owing. This will involve the court in the determination of matters of fact or law (or both).

32. Very similar principles operate at three other stages in the bankruptcy process.

33. First, prior to the making of a sequestration order, a court may reopen the correctness of an earlier judgment on an application to set aside a bankruptcy notice: *Wilkinson v Osborne* (1915) 21 CLR 89. In that situation the Court may go behind the judgment even where there has already been a fully heard contest between the parties. Thus in *Wilkinson* the plaintiff in the Supreme Court obtained judgment on a contract, the court having ruled that the contract was not illegal: *Osborne v Wilkinson* (1914) 14 SR (NSW) 309. The plaintiff then obtained the issue of a bankruptcy notice based on that judgment. In the bankruptcy court (then the Supreme Court) the judgment debtor sought to set aside the bankruptcy notice on the ground that the contract was illegal. That argument was rejected by the Supreme Court (in bankruptcy) and the Full Court, but upheld on appeal by the High Court, despite there having been an earlier full contest on that issue between the parties. The cases have assimilated the position on the making of a sequestration order to that which obtains on an application to set aside a bankruptcy notice: *Emerson v Wrekair Pty Ltd* (1992) 33 FCR 581 at 587-588; *Wenkart v Abigano* [1999] FCA 354 at [22]-[24]; *Katter v Melham* (2014) 319 ALR 646, at [69]-[79].

34. Secondly, at a later stage (after a sequestration order has been made), when the trustee is considering whether to accept a proof of debt under s102 of the *Bankruptcy Act* or the Court is hearing an appeal from a trustee's decision under s104, both the trustee and the Court are entitled to "go behind" a judgment debt and reject a proof founded on it if there is shown some good reason that there ought not to have been a judgment: *Re Van Laun; Ex parte Chatterton* [1907] 2 KB 23 at 31; *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 339-340. In *Tanning Research* Brennan and Dawson JJ applied to this later stage the guidance given by Barwick CJ in *Wren v Mahoney* as to some of the "occasions" when a court of bankruptcy may "go behind" a judgment.

35. Thirdly, the bankruptcy court's power to "go behind" a judgment may also arise on an application to annul a bankruptcy under s153B of the *Bankruptcy Act* (on the basis that the sequestration order ought not to have been made). In this context also, the power to "go behind" the judgment has been exercised on the basis of the same principles applying at the hearing of a creditor's petition: *Re Deriu* (1970) 16 FLR 420; *Re McCollum; Ex parte the Bankrupt* (1987) 71 ALR 626; *Re Raymond; ex parte Raymond* (1992) 36 FCR 424; *Pollock v DFC of T* (1994) 94 ATC 4148 at 4155.

36. Finally, it should be noted that the principles established in *Wren v Mahony* for going behind judgments have also been applied in the context of company liquidation: see, for example, *Re Quatrovision* [1982] 1 NSWLR 95, at 100-103, *Ilhan v Cvitanovic* (2009) 73 NSWLR 644, at [14]-[32].

Wren v Mahony

37. *Wren v Mahony* (1972) 126 CLR 212 is the leading case on all these issues and the only High Court decision on s.52 of the *Bankruptcy Act* 1966 (Cth). In that case Mr Mahony brought an action against Mr Wren asserting that the latter was obliged to indemnify him against various claims and demands made by the Commissioner of Taxation. The only plea filed by Mr Wren (under the pre-*Judicature Act* rules of pleading then obtaining in NSW) simply stated that Mr Mahony had not paid to the Commissioner any of the sums to which he had referred in his pleading. This amounted to an assertion that the action was premature because the defendant was not liable to be sued for breach of the covenant of indemnity until *after* the plaintiff had paid the Commissioner (*Mahony v Wren* [1970] 2 NSWR 8, at page 11.40). In other words, Mr Wren was saying (in substance) that his only defence to the case was a point based on the construction of the indemnity (a matter of law) and the asserted fact that no payment had been made to the Commissioner. Mr Mahony sought to strike out this plea. The primary judge (Collins J) held that "the plea affords no defence to the action, does not answer the declaration, and is clearly demurrable" (at page 13.50) and struck out Mr Wren's plea. No leave to re-plead had been sought by Mr Wren. No leave to re-plead was granted. Accordingly judgment was entered against Mr Wren based on his default in failing thereafter to plead to the statement of claim. Mr Wren did not seek to appeal the decision of the primary judge to either the Court of Appeal or the High Court.

38. Mr Mahony then sought to bankrupt Mr Wren based upon that judgment debt. In his original particulars of objection to the petition, Mr Wren did not raise the question of law earlier argued before Collins J. At the hearing, Mr Wren's counsel (Mr Darvall) sought to amend those grounds to assert a "miscarriage of justice", namely, that Collins J had been wrong in law on the construction of the indemnity. The Federal Judge in Bankruptcy (Sweeney J) delivered reasons both refusing leave to Mr Wren to amend his grounds of objection and stating that (in any event) the case was not "one in which as a matter of discretion the power to go behind a judgment ... should be exercised in favour of [Mr Wren]": 126 CLR at 219. Mr Wren then appealed to the High Court.

39. The High Court majority (Barwick CJ; Windeyer and Owen JJ concurring) allowed Mr Wren's appeal. Barwick CJ stated the principles noted above at [19]-[31] and held that Sweeney J's reasons did not justify his refusal to consider the question of whether there was a debt in truth and reality. Barwick CJ then went on to consider whether there was sufficient proof of the debt due to the petitioning creditor and

declined to exercise his discretion to accept the judgment debt as satisfactory proof of the underlying debt on the ground that there was reason for questioning whether behind the judgment there was in truth and reality a debt due to the petitioning creditor. The Chief Justice then determined that Mr Wren's construction of the indemnity was correct, allowed the appeal and ordered that the creditor's petition be dismissed.

40. Menzies J dissented and said that he was content to "rest my judgment solely upon my view that it was within the discretion of the judge of the Court of Bankruptcy not to consider the judgment of the Supreme Court of New South Wales obtained in the circumstances stated" (at 236). Menzies J also stated (at 236) that "when the Court of Bankruptcy is faced with a judgment of the Supreme Court of one of the States, fairly obtained without collusion or fraud after a contested hearing, it would *normally* be a wise exercise of discretion on its part not to embark on a reconsideration of the case" (emphasis added).

41. Walsh J agreed with Menzies J. However, Walsh J went on to add the following observations (at 237-238):

> "But I do not wish to exclude the possibility that, in deciding how that discretion should have been exercised, there could be a case in which it appeared clearly to this Court that the decision of the court in which a judgment had been obtained was wrong and in which the Court would hold that a sequestration order, which depended on that judgment, ought not to be allowed to stand. But that would be an exceptional case".

42. The following observations may be made about *Wren v Mahony*:

(i) the majority clearly stated that the bankruptcy court had a discretion to accept the Supreme Court judgment as satisfactory proof of the petitioning creditor's debt: p.224;

(ii) the majority also clearly stated that the bankruptcy court *may* refuse to do so where "appropriate circumstances were shown to exist" or "if the case was a proper one": p.224;

(iii) the majority also stated in terms that the bankruptcy court *must* not exercise its discretion to accept the judgment as satisfactory proof if "reason is shown for questioning whether behind the judgment or as it is said, as the consideration for it, there was in truth and reality a debt due to the petitioning creditor": at 224.

Reasoning of the Full Court

43. The reasoning of the Full Federal Court in the present case is a very abecedarian application of the principles in *Wren v Mahony*. The Court's essential reasoning is to be found at FC [68]-[78] (AB, pp374-378).

44. The Court first found error in the primary judge's reasoning (see FC [68]-[69]) noting that the primary judge "focussed on the way in which Mr Compton conducted his case in the Supreme Court rather than on the central issue, which was whether reason was shown for questioning whether behind the judgment there was in truth and reality a debt due to the petitioning creditor" (the principle stated in *Wren* at p224).

45. The Court, as it was bound to do, then considered afresh the question whether it should go behind the judgment upon which the creditor's petition was based.

46. The Court then asked whether "reason was shown for questioning whether behind the judgment there was in truth and reality a debt due to the petitioning creditor": FC [69], [76] (the principle articulated by Barwick CJ in *Wren* at p.224).

47. The Court answered that question by noting that there were "*substantial* reasons for questioning whether behind the judgment debt there is in "truth and reality" any debt owing to the petitioning creditor": FC [78] (see *Wren* at 224-225). Those reasons were said to include the following:

    (i) Ramsay acknowledged (through its senior counsel) that there was an open question as to whether any debt was in fact owed by Compton to Ramsay pursuant to the guarantee: FC [78];

    (ii) there was affidavit evidence from Ms Stevis (which was not the subject of cross-examination) that Ramsay owed money to MediChoice (not the other way around) and Ramsay had not filed any "evidence which critiqued either the methodology or the factual basis of Ms Stevis' evidence": FC [76];

    (iii) there was also evidence from Mr Albarran, confirmed by Mr Ingram (both liquidators of MediChoice), that on their calculations it was more likely that Ramsay was indebted to MediChoice than that MediChoice was indebted to Ramsay (meaning that there was no debt owed to Ramsay by Compton pursuant to the guarantee): FC [69].

48. The Full Court added that it was relevant to note that there had been an earlier hearing where Compton had not contested quantum when it was open to him to do so: FC [78]. However, applying *Wren* the Full Court held that there were substantial reasons for questioning whether behind the judgment there was in truth and reality any debt due: FC [78]. That was because there was an open question (as Ramsay acknowledged) as to whether Compton was truly indebted to Ramsay. Accordingly, the Full Court determined that the Court should go behind the judgment of the Supreme Court of NSW upon which the creditor's petition was based, leaving it to a single judge to determine the fundamental question raised by s.52(1)(c), namely, whether Ramsay had satisfied the court that the debt it relies upon was still owing.

49. It is appropriate to make a number of comments on this reasoning:

    (i) the Full Court applied the principle in *Wren* at 224, namely, whether there was reason for questioning whether behind the judgment debt there was in truth and reality a debt due;

    (ii) Ramsay does not challenge the principle in *Wren* at 224 or suggest that that test was not applied;

    (iii) in determining that that principle was satisfied, the Full Court found that there were *substantial* reasons for questioning whether behind the judgment debt there was in truth any debt owing to the petitioning creditor: see *Wren* at 224-225;

    (iv) there is no challenge by Ramsay to that finding.

50. It is submitted that these four circumstances do not present a very promising platform for an appeal to this Court.

Appellant's first ground

51. The appellant's first ground of appeal is that the Full Court "erred ... by ... failing to apply the test described in *Corney v Brien* (1951) 84 CLR 343 for going behind a judgment after a fully contested hearing".

52. Ramsay's argument involves a number of steps.

53. First, Ramsay submits that *Corney v Brien* and *Petrie v Redmond* (1942) 13 ABC 44 establish that the bankruptcy court's discretion to go behind a judgment is *only* enlivened in the event of a prima facie case of fraud, collusion or miscarriage of justice: AS [33]-[37].

54. There is a number of difficulties with this. The first is that this proposition is never stated by the plurality in *Corney*: the plurality in *Corney* simply state that a court of bankruptcy "has *undoubted* jurisdiction to go behind a judgment obtained by default or compromise or where fraud or collusion is alleged and inquire whether the judgment is founded on a real debt": p.347 (emphasis added). To say that a court can undoubtedly do X in situations A, B and C does not mean that the Court can only do X in in those three situations. Secondly, in *Petrie* Latham CJ noted that a court of bankruptcy "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": p.348. Again to say that a court is entitled to do X in situations A, B and C does not assert clearly that the Court can only do X in those three situations. Importantly, in *Wren* at 224 Barwick CJ said that the bankruptcy court can go behind a judgment in "appropriate circumstances" or "if the case [is] a proper one" which does not limit the power to three situations. Moreover, as Barwick CJ notes in *Wren,* these are simply three instances which "offer *occasions* for the exercise by the Court of Bankruptcy of its power to inquire into the consideration for the judgment": p.223 (emphasis added). Further, to Ramsay's three categories one must add "that a compromise was not a fair one" (*Wren* at 223), which is bound to lead in some cases to reagitation of factual issues. Finally, Ramsay's tripartite formulation seeks to confine what is essentially a matter of fact and proof by reference to criteria of law. In any event, the present case is a paradigm example of a *prima facie* miscarriage of justice.

55. Secondly, the appellant seems to submit that *Corney* establishes that in this context "miscarriage of justice" means a "miscarriage of justice which impeaches the obtaining of [the] judgment [so that] the words do not capture conduct extraneous to the forensic process": AS [26], [37] ("judgment should not have been obtained").

56. However, the plurality judgment in *Corney* simply does not say this. Nor does Ramsay refer to any passage in *Corney* which supports this proposition. Moreover the words "miscarriage of justice" are well known words of very broad import[4] and are not naturally to be taken as limited by reference to Ramsay's criterion, a criterion which is unclear and of indeterminate reference. And again, the submission does not come to grips with the problem that in *Wren* Barwick CJ (speaking for a majority)

[4] At FC [60] the Full Court quote Besanko J as noting that the principles for going behind judgments need to be applied flexibly in view of the myriad circumstances which might arise.

said that the court could go behind a judgment when it was "proper" or "appropriate" to do so (at 224).

57. Thirdly, Ramsay submits (at AS [26]) that two English decisions support a very narrow test of "miscarriage of justice" which this court should adopt: *Re Van Laun* [1907] 2 KB 23 at 31 is said to support the proposition that "miscarriage of justice denotes in this context circumstances occurring at the time of the hearing which precluded any fair trial taking place, such that the judgment should never have been obtained": AS [26]. And the judgment of Etherton J in *Dawodu v American Express Bank* [2001] BPIR 983 at 990 is said to define "miscarriage of justice" as requiring that "the court be shown something from which it can conclude that had there been a properly conducted judicial process it would have been found, or very likely would have been found, that nothing was in fact due": AS [26]. The two cases are then said to support a "narrow approach" to the meaning of "miscarriage of justice" so that the discretion to go behind a judgment "only arises if the judgment ought never to have been given": AS [27]; see also AS [37] (last twelve words).

58. However, in *Van Laun* at 31 Buckley LJ refers to whether "for some good reason there ought not to have been a judgment": this does not support the proposition cited and is consistent with a broad meaning of miscarriage of justice. And the words plucked from *Dawodu* at 990 are ambiguous; nor was the meaning of miscarriage of justice the subject of argument; and the dicta do not form part of the ratio of the decision. Moreover, in the same passage, Etherton J states that the words "miscarriage of justice" are "capable of wide application according to the particular circumstances of the case". Nor does *Corney* or *Wren* support the narrow test advocated by Ramsay. Indeed in *Wren* Barwick CJ (at 224) refers to whether "the case was a proper one" to go behind the judgment and to whether "appropriate circumstances" were shown to exist.

59. Fourthly, *Commonwealth Bank v Jeans [No 2]* (2005) 3 ABC (NS) 712 is said to support this "narrow approach" to the notion of miscarriage of justice: AS [29] (first line), picking up AS [27] (first sentence).

60. However, the judgment in *Jeans* provides no textual support for the narrow approach to "miscarriage of justice" suggested by Ramsay. At p.717, Hely J applied the principles in *Wren* at 224 and rejected a submission that there was a "miscarriage of justice" in circumstances where seven judges had already held that there was no miscarriage of justice

61. Fifthly, at AS [32] it is submitted that this test of miscarriage of justice is not satisfied as "the judicial process had been properly conducted" [sc. in the Supreme Court].

62. This submission picks up the words of Etherton J. But (as noted at [58] above) these obiter words are sufficiently opaque and protean to cover a situation where (as here) there is a prima facie case that the petitioning creditor's evidence in the earlier case was wrong and that the judgment debtor's failure to dispute that evidence erroneous. As AS acknowledge (at [33]) the test must be qualified by reference to a *prima facie* case of miscarriage.

Appellant's second ground

63. The second ground of appeal states that the Full Court "erred ... by ... finding that the court may go behind a judgment in any circumstance in which the judgment debtor adduces evidence which shows that there is 'substantial reason to believe' that he or she does not owe the debt, regardless of whether the debtor had the opportunity of taking that point at the earlier contested hearing".

64. Ramsay makes the following points in support of this ground.

65. First, Ramsay submits at AS [39]-[42] that *Wren* is not authority for the proposition that where there is material which demonstrates that there are substantial reasons for questioning whether behind the judgment debt there is in 'truth and reality' any debt owing to the petitioning creditor the court may go behind the judgment debt.

66. The problem with this is that *Wren* at p.224 states in terms that: "where reason is shown for questioning whether behind the judgment ... there was in truth and reality a debt due to the petitioning creditor, the Court of Bankruptcy can no longer accept the judgment as such satisfactory proof" and "must then exercise its power ... to look at what is behind the judgment". That statement of principle clearly covers the present case. See also, *Wren* at pp224-225.

67. Secondly, Ramsay suggests at AS [40] and [44] that *Wren* is distinguishable in principle from the present case because in *Wren* the earlier judgment "involved a default judgment" which was "given without any substantive hearing".

68. However, this is inaccurate and provides no point of distinction. *Wren* did not involve a judgment in default of appearance. The default was an inevitable default in failing to plead which was the result of an acceptance by Mr Wren that his only defence was a point of construction of the indemnity which the Supreme Court had rejected (after a hearing). There was clearly a substantive hearing on the only issue between the parties: as noted at [37] above, *Mahony v Wren* was a case determined on the merits by a hearing on the only issue raised by the defendant (which was a question of law). There is no point of relevant jurisprudential difference between a wrong decision of a question of law and a wrong determination of a question of fact. In either case it is open to the judgment debtor to establish a substantial reason for questioning whether behind the judgment there is in truth and reality a debt due to the petitioner. Both situations are capable of satisfying the principles articulated in *Wren* at p.224.

69. Thirdly, Ramsay suggests at AS [41] that *Wren* "turned on its idiosyncratic facts" namely the circumstance that the debt relied upon in the petition in that case was the underlying debt whereas here the debt relied upon in the creditor's petition was the judgment debt.

70. However, this submission implicitly proceeds on the mistaken assumption that in a case such as the present the relevant debt which a judgment creditor must prove to be still owing to the court's satisfaction is the judgment debt and not the underlying debt. That assumption is incorrect: see [23] above.

Appellant's third ground

71. The appellant's third ground states that the Full Court failed "to give any or sufficient weight to the principle of finality in litigation". The argument in support of this ground is set out at AS [45]-[46]. The argument involves the following steps.

72. First, Ramsay submits at AS [45] that various decisions of the High Court recognise that there is a principle of finality in litigation which is a central "tenet" of the legal system.

73. The cases referred to in footnote 11 (at AS page 12) certainly refer to this "tenet" in the context of advocate's immunity and the re-opening of final orders. However, none of those cases deal with the present context. In the present context the cases have to some extent recognised the public interest in finality of litigation by accepting the earlier judgment as *prima facie* evidence of the underlying debt. And the cases also accept that tenet by emphasising the general acceptance of a judgment debt as sufficient proof of the underlying debt particularly where it resulted from a fully heard contest between the parties: *Wren* at 224, 238, 236. Further, the principle that reason must be shown for questioning the earlier judgment (*Wren* at 224), thus placing a "tactical onus on the debtor" (*Wolff* at 487), is also pregnant with some acceptance of the importance of finality. Moreover, the "tenet" is not an absolute and is often qualified: in this context the cases have recognised the interests of other creditors and the importance of only bankrupting someone where there is, in truth and reality, a debt which is owing. A long line of cases accept that this is the appropriate balance of public interest factors in the context of a change of status apt to affect many divergent interests.

74. Secondly, Ramsay submits (AS [46]) that in the present context the finality tenet operates to enable a judgment creditor to "have the benefit of its judgment" and "not be put in the position in which the debtor has an opportunity for a retrial".

75. However, this submission flies in the face of *Wren* where the majority held that the bankruptcy court is obliged to go behind the earlier judgment where "reason is shown for questioning whether behind the judgment ... there was in truth and reality a debt due to the petitioning creditor": at 224. That is how the High Court balanced finality and the other relevant interests in the present context.

76. Thirdly, Ramsay submits at AS [45] that the Full Court erred in failing to give any or sufficient weight to the principle of finality in litigation.

77. The difficulty with this is that it cannot seriously be argued that the Full Court gave no weight to the public interest in finality of litigation. At FC [78] the Court noted that it was "relevant to take into account that the judgment of the Supreme Court followed a fully contested hearing, at which Mr Compton appeared, and that he could have, but did not, raise the issue of the quantum of any indebtedness to Ramsay Health Care in that proceeding". That was the only argument presented to the Full Court in relation to finality. The Full Court considered it and gave it due weight. Moreover, the Full Court applied the principles referred to at [73] above which accord some weight to finality.

Part VII: Respondent's argument on notice of contention

78. Not applicable.

Part VII: Time estimate

79. It is estimated that 1 – 1.5 hours will be required for the presentation of the oral argument of the Respondent.

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Dated: 19 April 2017