HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND CALLINAN JJ

JOSEPH GUSS APPELLANT

AND

RAYMOND JOHNSTONE RESPONDENT

Guss v Johnstone [2000] HCA 26
11 May 2000
M55/1999

ORDER

1. *Appeal dismissed.*

2. *Appellant to pay the intervener's costs of the appeal.*

On appeal from the Federal Court of Australia

Representation:

F G A Beaumont QC with L M F Watts for the appellant (instructed by Joseph Guss)

No appearance for the respondent

Intervener:

D S Levin QC with S P Gardiner intervening on behalf of Geelong Building Society (In Liquidation) (instructed by Minter Ellison)

CATCHWORDS

Guss v Johnstone

Bankruptcy – Bankruptcy notice served on debtor after creditor obtained order for costs – Debtor claimed counter-claim, set-off or cross demand equal to or exceeding amount of order for costs being a counter-claim, set-off or cross demand that he could not have set up in the proceedings in which the order for costs was obtained – Debtor applying to the Court for order setting aside bankruptcy notice – Whether Court satisfied that debtor had such a counter-claim, set-off or cross demand before expiration of time fixed for compliance with requirements of bankruptcy notice.

Bankruptcy – Sequestration order – Appeal against orders of primary judge that Court not satisfied that debtor has a relevant counter-claim, set-off or cross demand – Issues to be determined by appellate court – Utility of appeal.

Bankruptcy Act 1966 (Cth), ss 40(1)(g), 41(7).

1 GLEESON CJ, GAUDRON, McHUGH, KIRBY AND CALLINAN JJ. The appellant is indebted to the respondent in the sum of $4,989.40, which is the amount payable under a final order for costs made in proceedings in the Supreme Court of Victoria in 1994.

2 In September 1996 the respondent served on the appellant a bankruptcy notice under the provisions of the *Bankruptcy Act* 1966 (Cth). The appellant attempted to satisfy the Federal Court that he had a counter-claim, set-off or cross demand equal to or exceeding the amount of the debt, being a counter-claim, set-off or cross demand that he could not have set up in the action or proceeding in which the order for costs was obtained. The attempt was unsuccessful. A judge of the Federal Court (Sundberg J) declared that the Court was not so satisfied. An appeal to the Full Court of the Federal Court failed. A further appeal is brought to this Court against the decision of the Full Court.

3 Before examining the background to, and the basis of, the appeal, it is convenient to set out the relevant provisions of the *Bankruptcy Act*. They are to be found in ss 40 and 41, and are as follows:

> "40 (1) A debtor commits an act of bankruptcy in each of the following cases:
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> …
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> (g) if a creditor who has obtained against the debtor a final judgment or final order, being a judgment or order the execution of which has not been stayed, has served on the debtor in Australia or, by leave of the Court, elsewhere, a bankruptcy notice under this Act and the debtor does not:
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> (i) where the notice was served in Australia – within the time specified in the notice; or
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> (ii) where the notice was served elsewhere – within the time fixed for the purpose by the order giving leave to effect the service;
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> comply with the requirements of the notice or satisfy the Court that he or she has a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt or sum payable under the final order, as the case may be, being a counter-claim, set-off or cross demand that he or she could not have set up in the action or proceeding in which the judgment or order was obtained;
>
> …

41 …

(6A) Where, before the expiration of the time fixed for compliance with the requirements of a bankruptcy notice:

(a) proceedings to set aside the judgment or order in respect of which the bankruptcy notice was issued have been instituted by the debtor; or

(b) an application has been made to the Court to set aside the bankruptcy notice;

the Court may, subject to subsection (6C), extend the time for compliance with the bankruptcy notice.

…

(7) Where, before the expiration of the time fixed for compliance with the requirements of a bankruptcy notice, the debtor has applied to the Court for an order setting aside the bankruptcy notice on the ground that the debtor has such a counter-claim, set-off or cross demand as is referred to in paragraph 40(1)(g), and the Court has not, before the expiration of that time, determined whether it is satisfied that the debtor has such a counter-claim, set-off or cross demand, that time shall be deemed to have been extended, immediately before its expiration, until and including the day on which the Court determines whether it is so satisfied."

4 Before 16 December 1996, s 41(7) was expressed slightly differently, and referred to filing an affidavit raising a counter-claim, set-off or cross demand rather than applying for an order setting aside the bankruptcy notice[1]. The difference explains why, in the present case, the appellant, on 13 December 1996, merely filed an affidavit without making any formal application to set aside the bankruptcy notice. The procedure that was adopted also explains the form of the order made by Sundberg J.

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1 The amendment was effected by the *Bankruptcy Legislation Amendment Act* 1996 (Cth). As to the operation of the earlier provision, see *James v Abrahams* (1981) 34 ALR 657.

Background to the proceedings in the Federal Court

5 The following summary of the background to the proceedings in the Federal Court, and of the issues which the appellant sought to raise, is taken from the reasons for judgment of Sundberg J.

6 The appellant is a solicitor. The respondent is a barrister. (The respondent took no part in the appeal to this Court and submitted to any order the Court might make save as to costs. There was, however, a contradictor, a company which is also a creditor of the appellant, and which, by consent, was given leave to intervene.)

7 Courts in Victoria, over a number of years, have dealt with disputes between the appellant and the respondent concerning fees which the respondent claims he is owed by the appellant. Those disputes arose out of proceedings in 1991 and 1992 in which the appellant, acting as solicitor for a number of parties, including a company named Tropitone Furniture Co International Pty Ltd ("Tropitone") and the appellant himself, briefed the respondent in an action to recover certain property which a company named Sietel Limited was holding in premises at Moorabbin. The action, which the respondent originally advised, was held to be defective in relation to parties, and failed. It then became necessary to persuade the liquidator of a related company to institute proceedings to recover the property. The liquidator was prepared to do so only if the parties represented by the appellant agreed to pay his costs of the contemplated action. They agreed. The liquidator commenced fresh proceedings, and obtained an order. The liquidator's costs amounted to $11,889.57. The solicitors for the liquidator held in trust a sum of $16,200, from which the costs of $11,889.57 were deducted, leaving a balance of $4,310.43. A cheque for the latter amount was sent to the appellant, presumably to be applied in favour of the parties he represented.

8 Notwithstanding the success of the liquidator's action, further difficulties arose. Tropitone was not able to recover its property. The property was later said to have been worth approximately $50,000, and Tropitone was alleged to have suffered losses in the amount of approximately $100,000 for delay in recommencing its business.

9 In September 1992, the respondent commenced proceedings in the Magistrates' Court against the appellant to recover his fees. He obtained judgment in the amount of $8,430, together with interest and costs. An application to the Magistrates' Court to set the judgment aside was dismissed. An application for leave to appeal from that order was dismissed by a Master of

the Supreme Court. An appeal from that dismissal was dismissed by Beach J. A further application to the Magistrates' Court to set aside the judgment was dismissed. The appellant then applied to the Supreme Court for a declaration that that dismissal was a nullity. That application was dismissed by Hayne J. The appellant appealed to the Full Court against the decision of Hayne J. The Full Court ordered the appellant to give security for costs, in default of which the appeal would be dismissed. The security was not provided, and the appeal was dismissed. The appellant was ordered to pay the respondent's costs. The respondent's costs were taxed in the amount of $4,989.40. That is the debt upon which the bankruptcy notice was based.

10 The history of the matter is significant when considering the response of Sundberg J, and subsequently of the Full Court, to attempts made by the appellant to raise new contentions at various stages of the proceedings in the Federal Court. The view might fairly be taken that he has had his day in court.

11 The bankruptcy notice was issued on 19 September 1996. It required the appellant, within 14 days of the service of the notice, to pay the amount of $4,989.40, or to secure its payment to the satisfaction of the Court or the respondent, or to compound the sum to the respondent's satisfaction. Before the expiration of the period specified in the bankruptcy notice, the appellant filed an affidavit pursuant to s 41(7) of the *Bankruptcy Act*. The result was that time for compliance with the notice was extended until the Court determined whether it was satisfied that the appellant had a counter-claim, set-off or cross demand such as is referred to in s 40(1)(g). The *Bankruptcy Act* defines "the Court" as a court having jurisdiction in bankruptcy under the Act. That is the Federal Court[2].

12 No application was ever made by the appellant under s 41(6A) for an extension of time for compliance with the bankruptcy notice.

13 The proceedings under s 41(7) were heard before Sundberg J on 22 May 1997. Judgment was reserved, and was delivered on 30 May 1997. Sundberg J declared that the Court was not satisfied that the appellant possessed a counter-claim, set-off or cross demand of the kind referred to in s 40(1)(g) of the *Bankruptcy Act*. The appellant did not comply with the requirements of the bankruptcy notice. In the result, the appellant committed an act of bankruptcy on 30 May 1997. That is not in dispute.

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2 *Bankruptcy Act*, s 27(1).

The reasons for judgment of Sundberg J, and subsequent proceedings

14 Before commencing his examination of the facts, and the arguments presented to him, Sundberg J referred to the principles governing an application of the kind in question. He observed that it was upon the appellant to show a prima facie case of the existence of a counter-claim, set-off or cross demand of the kind referred to in the relevant provisions, even if he did not adduce admissible evidence which would make out a case before a court trying the issues involved in such a counter-claim, set-off or cross demand[3]. It has not been suggested that his Honour misunderstood or misapplied the principles governing the exercise in which he was engaged.

15 The judge referred in his reasons for judgment to the two matters upon which the appellant had relied, in his affidavit, and in argument, as giving rise to a counter-claim, set-off or cross demand.

16 The first matter concerned the liquidator's costs of $11,889.57. These were not costs thrown away by the plaintiffs, including the appellant, in the original defectively constituted proceedings. The claim related to the amount that the interested parties had to agree to pay to the liquidator before the liquidator would agree to commence the properly constituted proceedings for the recovery of their property. It was an amount that would have had to be paid even if the proceedings had been properly constituted in the first place. Sundberg J said he could find no causal connection between any negligence on the part of the respondent and the payment of that amount. If, at the outset, the respondent had advised that the liquidator should be asked to commence the proceedings, the liquidator would have required an agreement to cover his costs in any event.

17 On this issue, Sundberg J was clearly correct.

18 The second matter relied upon by the appellant was the loss suffered by Tropitone, said to have been $50,000 for loss of property and $100,000 for delay in recommencing its business. The judge pointed out that this was a loss of Tropitone, not of the appellant. Equally clearly, Sundberg J was correct about that. The appellant attempted to make an assertion that he was liable (presumably to Tropitone) for such loss, but Sundberg J said that this assertion was unsupported by any facts showing either that Tropitone had made such a

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3 *Ebert v The Union Trustee Co of Australia Ltd* (1960) 104 CLR 346 at 350 per Dixon CJ, McTiernan and Windeyer JJ.

claim against the appellant (for an alleged loss which had been suffered five years previously) or that such a claim had merit.

19 Sundberg J then went on to consider the significance of the lengthy delay that had occurred in the appellant's attempt to raise a claim against the respondent. (The amount of fees owing to the respondent, it may be noted, was $8,430. The alleged loss to Tropitone was $150,000.) Sundberg J concluded that delay was not necessarily fatal to the appellant, but the fact that over five years had passed since the alleged loss was suffered, without the appellant having commenced proceedings against the respondent, contributed to his lack of satisfaction that the appellant had a prima facie case in relation to the money paid to the liquidator, and reinforced his lack of satisfaction that the appellant had a prima facie case in relation to the loss allegedly suffered by Tropitone.

20 Sundberg J expressed his conclusions as follows:

> "I am not satisfied that the debtor has a prima facie case against the creditor in relation to the costs paid to the liquidator or in relation to the damage allegedly suffered by Tropitone."

21 In conclusion, Sundberg J made reference to another matter involving an order for costs which the appellant had obtained in some other proceedings against the respondent. The costs had not been taxed, but the appellant assessed their likely amount at $2,500. Since that was less than the amount the subject of the bankruptcy notice, it could not satisfy the requirements of s 40(1)(g).

22 It appears that, in the course of argument on 22 May 1997, Sundberg J had indicated his difficulty in relation to the second matter relied upon by the appellant, arising out of the fact that it was the loss of Tropitone, rather than the loss of the appellant, that was involved. That may account for the fact that, on 29 May 1997, the day before judgment was due to be delivered, proceedings were commenced in the County Court of Victoria on behalf of Tropitone, claiming damages in the sum of $185,494 against both the appellant and the respondent. The appellant, in turn, contended that this gave him a claim for contribution against the respondent. When, on 30 May 1997, Sundberg J came to hand down his reserved judgment, an application was made to him to allow the appellant to re-open his case to adduce evidence of the County Court proceedings. That application was refused. That was a discretionary decision which, in the light of the history of the matter, and the delays earlier mentioned, it is not possible to criticise.

23 Following the delivery of judgment, an oral application was made to Sundberg J for a stay of his order. An objection was taken to the informality of the application, which was not supported by any originating process or evidence. Sundberg J refused to deal with the application in that informal manner. On 16 June 1997, the respondent filed a petition for a sequestration order. On 20 June 1997, the appellant filed a notice of appeal to the Full Court of the Federal Court against the decision of 30 May. Included in that notice of appeal was an appeal against the ruling of Sundberg J declining leave to re-open the appellant's case in relation to the matter of the County Court proceedings. On 23 June 1997 the appellant filed a notice of motion seeking a stay of the orders made on 30 May 1997. That application was heard, and dismissed, by Sundberg J on 1 July 1997.

24 The appeal to the Full Court of the Federal Court (Ryan, Whitlam and Marshall JJ) was heard on 3 October 1997. The original notice of appeal was amended in two presently relevant respects. The complaint about the ruling of Sundberg J dismissing the application for leave to re-open in relation to the County Court proceedings was deleted in the amended notice of appeal. There was added to the amended notice of appeal a complaint about the ruling of Sundberg J on 1 July 1997 declining a stay of proceedings. (There was no appeal relating to the way Sundberg J dealt, on 30 May 1997, with the informal application for a stay.)

25 On 13 November 1997, the Full Court of the Federal Court handed down its decision dismissing the appeal. On 9 December 1997, the intervener filed an application to be substituted as petitioning creditor. On 21 December 1998, Kenny J substituted the intervener as petitioning creditor, and made a sequestration order against the appellant. Because of the subsequent appeal to this Court, that order was stayed on 20 May 1999.

The reasons of the Full Court

26 In the written submissions filed on behalf of the appellant in this Court, the following appears:

> "1. The basis of this appeal is that the Full Federal Court, in effect, refused to act as a court of appeal from the decision of Justice Sundberg at first instance, because they said there was no utility in doing so."

As elaborated in further written submissions and in oral argument, that contention amounted to the proposition that, by reason of the view they took as to

the operation of ss 40 and 41 of the *Bankruptcy Act*, the members of the Full Court failed to deal with the appeal against the judgment of Sundberg J on its merits, saying that, in the events that had occurred, an act of bankruptcy had taken place on 30 May 1997, and that there was therefore no purpose to be served by overruling the decision at first instance.

27 That being the appellant's contention, an analysis of the reasoning of the Full Court in some detail is unavoidable.

28 Their Honours dealt, in turn, with various matters sought to be raised by way of counter-claim, set-off or cross demand by the appellant.

29 The first matter they considered was the amount of $11,889.57 paid by way of costs to the liquidator. The argument advanced on behalf of the appellant was that Sundberg J had erred in failing to find a causal connection between that payment and any alleged negligence on the part of the respondent.

30 It was pointed out by the Full Court that those costs were different from any costs that might have been thrown away by the plaintiffs for whom the respondent had acted in the misconceived proceedings. In fact, costs of that kind had never been paid by anybody. In respect of the costs of the liquidator, the appellant's only liability was to contribute an appropriate share, having regard to his interest in the litigation for which the company in liquidation became the nominal plaintiff. No error was shown in the reasoning of Sundberg J. With that conclusion we agree.

31 The next matter considered by the Full Court had not been argued before Sundberg J. It was noted earlier that an amount of approximately $2,500 was said to be owing by the respondent to the appellant for costs in certain proceedings, but that amount did not cover the debt the subject of the bankruptcy notice. Counsel for the appellant, before the Full Court, sought to raise an argument based on notations found on a brief to the respondent, which was an exhibit to an affidavit in proceedings before Sundberg J, from which it was said to be possible to calculate an amount of at least $4,330 thrown away in respect of the misconceived proceedings which could be added to the estimated $2,500 "to overtop the judgment debt".

32 In dealing with this subject, the Full Court said that "[i]t should first be pointed out that this argument was not even hinted at before the learned primary Judge and, except for the fortuitous presence of the exhibit constituted by the back sheet of the brief to the [respondent], no foundation for it was laid in the evidence."

33 It was no part of the obligation of Sundberg J to undertake an investigation of his own, independently of the arguments put before him on behalf of the appellant, to see whether he could possibly manufacture, out of any of the materials tendered in evidence, some possible claim which had not been thought of by the appellant.

34 Their Honours then went on to deal with a legal question raised by the appellant's submission. It was whether, if there were a counter-claim or set-off of the kind relied upon, it could have been set up in the action or proceeding in which the judgment or order upon which the bankruptcy notice was based was obtained. If it were so, it would not be a counter-claim, set-off or cross demand of the kind referred to in s 40(1)(g). The order for costs which gave rise to the debt the subject of the bankruptcy notice was an order made in proceedings in the Supreme Court relating to an application for judicial review of the decision in the Magistrates' Court. After some discussion of the legal merits of the question, their Honours went on to the matter of utility, which will be considered below. They returned to the question later, however, and expressed the opinion that the claim for $4,330 could have been set up in the proceedings in which the order for costs was obtained.

35 It is the discussion of the question of utility, following the references to other issues, in relation to the matter of $4,330, that gives rise, in part, to the appellant's characterisation of the judgment of the Full Court. Their Honours referred to what they described as a more fundamental obstacle to the appellant's success in his attack on the declaration at first instance by relying on a counter-claim or set-off in professional negligence. They pointed out that, by reason of the operation of s 40(1)(g) and s 41(7), and bearing in mind that no application had been made for an extension of time for compliance with the bankruptcy notice under s 41(6A), an act of bankruptcy was committed on 30 May 1997. They said:

> "As a result, there is no utility in this Court's acceding to the appellant's invitation to set aside the declaration made at first instance. It should be remembered that, in determining whether or not it is satisfied in terms of s 40(1)(g), this Court does not determine the validity of the set-off or counter-claim but merely decides whether the debtor has a substantial and bona fide claim which he should fairly be permitted to litigate before bankruptcy proceedings are allowed to continue …
>
> Accordingly, even if this Court were persuaded to take a different view from the learned primary Judge and decide that issue in favour of the debtor, it would not nullify the act of bankruptcy committed at the end of

> 30 May 1997. Nor would it determine the merits of the counter-claim or set-off which the debtor asserts. It would amount to no more than an expression of an opinion, on necessarily incomplete evidence, which might be taken into account, amongst a multitude of other factors, by the Court differently constituted, in deciding how to exercise its discretion whether or not to make a sequestration order on a petition invoking the ineluctable act of bankruptcy which we have held has been committed. There is high authority to the effect that a court should not grant declaratory relief which is not confirmatory of an existing right or obligation in controversy between the parties or which would otherwise be of little practical value …
>
> For these reasons, we decline to consider further the strengths or weaknesses of the counter-claim or set-off on which the appellant seeks to rely.
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> The same considerations apply to the third basis on which the debtor founded his appeal."

36 It will be necessary to come to the third basis shortly. The concluding sentence in the passage quoted above, however, makes it clear that the issue to which those remarks were directed was the issue relating to the matter of the $4,330 raised in the appeal, and that this was the counter-claim or set-off referred to in the penultimate sentence. The appellant's attempt to apply that sentence to all the matters of counter-claim, set-off or cross demand sought to be relied upon, including those that had been argued before Sundberg J, is unwarranted.

37 In the passage quoted above, the Full Court correctly observed that the decision made by Sundberg J under s 40(1)(g) and s 41(7) was not in any sense a determination of the rights of the parties in relation to the supposed counter-claims, set-offs, or cross demands which the appellant sought to raise. Those rights could be determined in separate proceedings, unaffected by any view of Sundberg J, or they could be examined at the time of application for a sequestration order[4].

38 The nature of the exercise upon which Sundberg J was engaged is well established by a long line of authority.

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4 cf *Wren v Mahony* (1972) 126 CLR 212.

39 In *Vogwell v Vogwell*[5], Latham CJ said, in relation to a corresponding provision:

> "[T]he authorities show that the matter to which the court looks is this, – whether it is just that the claim should be determined before the bankruptcy proceedings are allowed to continue; in other words, whether it is a claim which it is proper and reasonable to litigate."

40 The state of satisfaction referred to in s 40(1)(g), and s 41(7), involves weighing up considerations as to the legal and factual merit of the claim relied upon by the debtor, and the justice of allowing the bankruptcy proceedings to go ahead or requiring them to await the determination of the claim.

41 The appeal appears to have been argued, and decided, in the Full Court as though Sundberg J had considered, and rejected, an application to set aside the bankruptcy notice. That is not strictly correct. The misapprehension probably resulted from the amendment made to s 41(7) a matter of days after the appellant filed his affidavit. The only orders made by Sundberg J took the form of a declaration that the Court was not satisfied of a certain state of affairs, and an order for costs. No point was taken, either in the Full Court or in this Court, to the effect that the declaration was interlocutory, and that leave to appeal to the Full Court was required[6]. That being so, it is unnecessary to express a view on that question.

42 The third matter, described as the "third basis on which [the appellant] founded his appeal", was also a point that had not been argued before Sundberg J. It was contended that the appellant and respondent were joint tortfeasors, who had incurred a liability in damages to the various plaintiffs in the original proceedings to recover property which were wrongly constituted. Their Honours dealt with this argument on the merits. They said:

> "Had either Mr Guss or [the respondent] or both of them sued the other plaintiffs for their professional fees and disbursements in relation to the misconceived proceedings, they would, on the appellant's case, have been bound to fail when met by a defence based on negligence, breach of contract or a total failure of consideration. Accordingly, Mr Guss never

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5 (1939) 11 ABC 83 at 85.

6 *Federal Court of Australia Act* 1976 (Cth), s 24(1A).

> became liable to his co-plaintiffs for any amount of costs and disbursements in connection with the misconceived proceedings for which he could look to the [respondent] for contribution or indemnity.
>
> All that Mr Guss, on his own account, ever had against [the respondent] in respect of the misconceived proceedings was a claim in damages, perhaps measured by the amount of fees paid to or recovered by the [respondent] plus the value of Mr Guss's own work and any disbursements which were incurred in connection with the misconceived proceedings. That is, in essence, the claim for $4,330 plus some additional elements which we have just indicated and was available to be pursued by the debtor in the context of the proceedings in the Magistrates Court … However, for the reasons explained above there would, in the events which have happened, be no utility in this Court's making a declaration of the prima facie existence, or otherwise pronouncing on the strength or weakness, of that counter-claim, set-off or cross demand."

43 The fourth matter relied on in the Full Court was the second of the two matters that had been relied on before Sundberg J. It concerned the loss to Tropitone, said to have been in the amount of $150,000. That did not, at first sight, involve any claim by or against the appellant. As was noted, there had been an attempt by the appellant, at the last minute, before Sundberg J, to introduce the matter of the County Court proceedings instituted by Tropitone against the appellant and the respondent on 29 May 1997, and the appellant's claim for contribution against the respondent. Their Honours recorded that counsel "candidly acknowledged that the counter-claim, set-off or cross demand stipulated by s 40(1)(g) must exist at the time when the application to set aside the bankruptcy notice is heard." Reference was made to a passage in a judgment of Vaughan Williams LJ in *In re GEB*[7]. Their Honours said:

> "That case concerned a set-off but the principle is equally applicable to a counter-claim or cross demand. It is clear that, at the time when the hearing at first instance concluded, any claim for contribution in respect of the cause of action in damages earlier quantified in the sum of $150,000 attributed to Tropitone was inchoate or contingent. However, the conclusion which we have already reached that there cannot now be declaratory or other relief of any utility in favour of the debtor in respect of

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7 [1903] 2 KB 340 at 348. See also *Re A Debtor; Ex parte Commissioner of Taxation (Cth)* (1963) 19 ABC 296.

the bankruptcy notice entails that it would be a sterile exercise for us to evaluate for ourselves the County Court proceedings as giving rise to a cross demand in the debtor. Accordingly, the application to further amend the amended notice of appeal and for leave to adduce evidence of the County Court proceedings is refused."

44 In dealing with the aspect of the appeal concerning the refusal of Sundberg J to grant a stay on 1 July 1997, their Honours said:

"The same reasoning leads us to uphold the learned primary Judge's refusal on 1 July 1997 of an application for a stay of his order of 30 May 1997 determining that he was not satisfied that the debtor possessed a counter-claim, set-off or cross demand of the type referred to in s 40(1)(g). As we have already explained, at the time of that application to his Honour, there was nothing to stay because an act of bankruptcy occurred once and for all at the end of 30 May 1997."

45 In dealing with the significance attached by Sundberg J to the matter of delay on the part of the appellant the Full Court said:

"We have indicated our reasons for concluding that the sum of $11,898.57 [sic] paid in respect of costs incurred by the liquidator … was never recoverable by the debtor from the creditor. The learned primary Judge's lack of satisfaction that the debtor had a prima facie case in relation to the loss allegedly suffered by Tropitone was primarily, and, we consider, correctly, based on the absence of any attempt before 30 May 1997 to make it his loss. His Honour's reference to the debtor's delay as reinforcing his inability to be satisfied of the existence of a counter-claim or cross demand in respect of the loss ascribed to Tropitone therefore cannot be invoked as casting doubt on what we regard as a correct analysis of the evidence as it stood at the end of the hearing below."

46 Contrary to what is now asserted by the appellant, the reasons for judgment of the Full Court, and, in particular, the concluding words of the passage just quoted, make it clear that the Court considered, on their merits, the arguments that had been advanced before Sundberg J and came to the conclusion that, on the material before him, Sundberg J was correct in failing to be satisfied that the appellant had a counter-claim, set-off, or cross demand such as was referred to in s 40(1)(g) of the *Bankruptcy Act*.

47 That part of the reasoning of the Full Court was correct.

48 The references to the question of utility, and to the significance of the fact that the appellant had committed an act of bankruptcy on 30 May 1997, were made in relation to attempts by the appellant, on the appeal, to advance new arguments, and rely upon new evidence, in connection with certain matters, and also in relation to the appeal against the refusal of Sundberg J to grant a stay in relation to his orders. Those new matters were also considered on their merits.

49 It will be necessary to consider further the approach taken by the Full Court in relation to the question of utility, and its significance in relation to the Full Court's ultimate decision. It is apparent, however, that it is an incorrect characterisation of the reasons for judgment of the Full Court to say that their Honours "refused to act as a court of appeal from the decision of Justice Sundberg at first instance, because they said there was no utility in doing so." What was described as "[t]he basis of this appeal", therefore, disappears.

50 Arguments were advanced to the effect that the members of the Full Court were under a misapprehension as to the effect of the relevant statutory provisions. Accordingly, it is necessary to examine the effect of those provisions.

The statutory provisions and the act of bankruptcy

51 By reason of s 27 of the *Bankruptcy Act*, the reference in ss 40 and 41 to "the Court" is, relevantly, a reference to the Federal Court. Section 14(1) of the *Federal Court of Australia Act* provides that the Court may be constituted by a single judge or as a Full Court. Sundberg J was exercising the jurisdiction of the Federal Court. On 30 May 1997, he declared that the Court was not satisfied that the judgment debtor, the appellant, possessed a counter-claim, set-off or cross demand of the type referred to in s 40(1)(g).

52 The effect of s 41(7) was to extend time for compliance with the requirements of the bankruptcy notice (which involved either paying the debt of $4,989.40, or securing its payment to the satisfaction of the Federal Court or of the respondent, or compounding the sum to the satisfaction of the respondent) until 30 May 1997. No application was made under s 41(6A) for any other extension, and no attempt was made to secure payment of the sum, pending the resolution of any other dispute between the parties, to the satisfaction of the Court.

53 On 30 May 1997 the Court determined that it was not satisfied of the matter referred to in s 41(7).

54 By the end of 30 May 1997 the appellant had not, within the time referred to in s 40(1)(g), as extended by s 41(7), either complied with the requirements of the notice or satisfied the Federal Court that he had a counter-claim, set-off or cross demand of the relevant kind. Consequently, by virtue of s 40, he committed an act of bankruptcy.

55 When, on 1 July 1997, on the hearing of an application made by notice of motion filed on 23 June 1997, Sundberg J refused to stay the order of 30 May 1997 by which he declared that the Court was not satisfied of the matters referred to in s 40(1)(g), Sundberg J rightly pointed out that a grant of stay on 1 July would not cancel the act of bankruptcy which had already been committed. In *James v Abrahams*[8], Deane and Lockhart JJ held that the language of s 41(6A), including its express stipulations as to time, makes it impossible to imply any general power in the Federal Court to extend the time for compliance with a bankruptcy notice in a case which does not fall within s 41(6A). In any event, no application was made to Sundberg J to do anything other than stay his previous orders. The only order he had relevantly made was a declaration, and, by force of the statute, that had already resulted in certain consequences. The Full Court was right to dismiss the appeal against the decision of Sundberg J of 1 July 1997.

56 The argument in the present appeal was directed to a different question, that is to say, whether the Full Court was right when, in parts of its reasons, it expressed the view that there was no utility in the Full Court's determination of certain issues raised in the Full Court, there being nothing the Full Court could do about the act of bankruptcy that had been committed, and it still being open to the appellant to pursue his asserted claims, either in separate proceedings, or in opposition to the making of a sequestration order.

57 In *Ebert v The Union Trustee Co of Australia Ltd*[9] a debtor had applied unsuccessfully to the Federal Court of Bankruptcy to set aside a bankruptcy notice upon the ground that she had a certain cross demand against the creditor. She appealed to this Court. The Court considered her contention on the merits, and dismissed her appeal. That occurred in August 1960. In October 1960 the Federal Court of Bankruptcy made a sequestration order. The debtor, by then

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8 (1981) 34 ALR 657 at 662.

9 (1960) 104 CLR 346.

bankrupt, appealed again to this Court[10]. That appeal was also dismissed. One ground of appeal was that the date of the act of bankruptcy was mis-stated in the order of sequestration: it was stated as the date of the judgment of the Federal Court of Bankruptcy dismissing the application to set aside the bankruptcy notice, whereas, it was claimed, the date should have been that of the dismissal of the original appeal to this Court. That contention, which was contrary to the plain words of the statute (which are not materially different from the words of the present statute), was summarily rejected[11].

58 There is authority for the proposition that an act of bankruptcy remains in effect, even if the bankruptcy notice was based upon a debt resulting from a judgment which was later set aside[12]. At the same time, what is said to be the ineluctable nature of an act of bankruptcy is qualified by the consideration that time for compliance with a bankruptcy notice may be extended even after the time has expired, provided the conditions of s 41(6A) are otherwise satisfied[13].

59 The appellant, relying on the authority of *Commissioner for Railways (NSW) v Cavanough*[14], a case concerning the consequences of quashing a conviction on appeal, argues that if the Full Court of the Federal Court, or, for that matter, this Court, were to set aside the declaration made by Sundberg J on 30 May 1997, then that declaration would be of no effect; the Federal Court would not, within the meaning of s 41(7), have effectively determined whether it was satisfied of the matter there referred to; time for compliance with the bankruptcy notice would still be running; and the sequestration order made in the meantime would have been wrongly based.

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10 *Ebert v The Union Trustee Co of Australia Ltd* (1961) 105 CLR 327.

11 *Ebert v The Union Trustee Co of Australia Ltd* (1961) 105 CLR 327 at 333.

12 *Re Bedford; Ex parte H C Sleigh (Queensland) Pty Ltd* (1967) 9 FLR 497; *Re Hanby; Ex parte Flemington Central Spares Pty Ltd* (1967) 10 FLR 378; *Re Vella; Ex parte Seymour* (1983) 48 ALR 420.

13 *Streimer v Tamas* (1981) 37 ALR 211. See also *Ebert v The Union Trustee Co of Australia Ltd* (1961) 105 CLR 327 at 330.

14 (1935) 53 CLR 220.

60 Counsel for the intervener challenges this submission, whilst at the same time contending that, even if it be correct, it does not entitle the appellant to succeed in the present appeal.

61 Counsel for the appellant points out that this Court, when dealing with the first *Ebert* appeal, did not appear to consider that it was engaged in an exercise of futility.

62 There are examples of cases where appellate courts have considered, on their merits, appeals against decisions under provisions corresponding to s 40(1)(g) and s 41(7)[15]. It is true that there is no statutory grant of power to annul an act of bankruptcy[16], or to extend the time for compliance with a bankruptcy notice other than in a case where the conditions of s 41(6A) have been satisfied[17]. Suppose, however, that it had been demonstrated to the Full Court that the decision at first instance was based upon an error of law, perhaps involving a misapprehension as to the test to be applied in considering whether the judge was satisfied within the terms of the statute. In such a case, the Full Court may well have set aside the declaration.

63 We are unable to accept that whenever, in a proceeding under s 40(1)(g) and s 41(7), a judge at first instance has determined that he or she is not satisfied of the matter referred to in s 41(7), and has declined to interfere with the process initiated by a creditor, no appellate reversal of that decision, whether by the Full Court or by this Court, can alter the consequences of the decision. In a proper case it would have been within the power of the Full Court to set aside the declaration made by Sundberg J. The consequences for proceedings and events that had occurred in the meantime would vary with the circumstances, but they could include the same consequences as flowed from the order in *Streimer v Tamas*[18], where the statutory power to extend time for compliance with a bankruptcy notice, given by s 41(6A), was exercised after an act of bankruptcy had been committed.

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15 eg *In re A Debtor* [1958] Ch 81; *Eastick v Australia and New Zealand Banking Group Ltd* (1981) 53 FLR 91.

16 *King v Henderson* [1898] AC 720 at 728.

17 *James v Abrahams* (1981) 34 ALR 657.

18 (1981) 37 ALR 211.

64 That having been said, there remains the question of the appropriateness of appellate intervention. That, in turn, directs attention to the nature of the issue which was before the Full Court on appeal. The fact that an act of bankruptcy was committed on 30 May 1997 has a bearing on that matter.

65 In accordance with the requirements of s 41(7), Sundberg J made a determination as to whether the Court was satisfied of a certain fact. He made that determination upon the basis of the evidence and arguments before him. Although, by virtue of s 27 of the *Federal Court of Australia Act*, the Full Court had power in its discretion to receive fresh evidence, the exercise of that discretion is governed by the nature of the issues that arise on the appeal. The appeal in this case was a challenge to Sundberg J's determination, and the question was whether he was in error in not being satisfied of the matter referred to in s 40(1)(g). This is reflected in the Amended Notice of Appeal to the Full Court, in which the grounds of appeal consisted entirely of assertions of errors said to have been made in the reasoning of Sundberg J.

66 The appellant was unable to demonstrate to the Full Court, or to this Court, that there was any error in the reasoning of Sundberg J. Two matters of supposed cross demand were advanced before Sundberg J and, for reasons identified by Sundberg J, and repeated and accepted by the Full Court, they failed. The Full Court's reasoning in relation to those matters had nothing to do with the question of utility, or the issue as to the effect of s 41(7) discussed above. The challenges to the reasoning of Sundberg J were considered on the merits and were rightly rejected. No error was shown in the conclusion reached by Sundberg J that he was not satisfied of the relevant matter.

Conclusion

67 The Full Court's references to utility were made in relation to matters of possible cross demand that were not raised at first instance, and that did not go to vitiate the reasoning of Sundberg J or to affect his lack of satisfaction.

68 In fact, the Full Court considered those additional matters on their merits, and rejected the appellant's contentions.

69 In their references to the lack of utility in making a determination about those matters, the members of the Full Court were right, but for a reason somewhat different from the reason they advanced. It was the nature of the issue that arose on appeal (ie whether Sundberg J was in error in not being satisfied) and not the suggested inutility of the appeal itself that made it inappropriate, and futile, to make a decision about the new matters of argument and evidence which

the appellant attempted to raise. The circumstance that an act of bankruptcy had been committed on 30 May 1997, following Sundberg J's declaration of lack of satisfaction, assists to clarify the nature of the question to be addressed by the Full Court. It would only have been if some reason had been shown to interfere with that decision, and set aside that declaration, that the consequences of the decision and the declaration might have been undone. No such reason was to be found in the new matters relied upon by the appellant.

70 The appeal should be dismissed. The intervener, which was earlier substituted as petitioning creditor, has a real interest in the outcome of the appeal, and fulfilled the role of a contradictor. The appellant should pay the intervener's costs of the appeal.