HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

PAUL JOHN COOK (As Trustee of the property of Peter Robert Benson) APPELLANT

AND

PETER ROBERT BENSON & ORS RESPONDENTS

Cook v Benson
[2003] HCA 36
19 June 2003
M2/2003

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

G T Bigmore QC with M J Galvin for the appellant (instructed by Gadens Lawyers)

M J L Rajanayagam for the first respondent (instructed by IFS Fairley)

M N C Harvey for the second to fourth respondents (instructed by Clayton Utz)

CATCHWORDS

Cook v Benson

Bankruptcy – Avoidance of settlement of property – Roll-over of superannuation entitlements – Superannuation entitlements applied in payment of contributions to other superannuation schemes – Whether settlements of property – Whether trustees were purchasers – Whether trustees purchasers for valuable consideration – *Bankruptcy Act* 1966 (Cth), s 120(1).

Words and phrases: "purchaser", "valuable consideration", "settlement of property".

Bankruptcy Act 1966 (Cth), ss 120(1), (8).

1 GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ. The question in this appeal is whether s 120 of the *Bankruptcy Act* 1966 (Cth) ("the Act"), in the form in which it stood at the relevant time (September 1990), operated so as to render void as against the trustee in bankruptcy payments made as contributions to superannuation funds by a person who later became bankrupt.

2 Section 120 of the Act provided:

> "120 (1) A settlement of property, whether made before or after the commencement of this Act, not being:
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> (a) a settlement made before and in consideration of marriage, or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration; or
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> (b) a settlement made on or for the spouse or children of the settlor of property that has accrued to the settlor after marriage in right of the spouse of the settlor;
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> is, if the settlor becomes a bankrupt and the settlement came into operation after, or within 2 years before, the commencement of the bankruptcy, void as against the trustee in the bankruptcy.
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> ...
>
> (8) In this section, **'settlement of property'** includes any disposition of property."

3 The term "property" was defined, in s 5, to include real or personal property of every description. A disposition of property, therefore, included a payment of money.

4 The appeal in this Court was conducted, by both sides, on the basis that the payments in question each constituted a settlement of property within the meaning of s 120, and that the issue was whether the recipients were purchasers for valuable consideration. No question of want of good faith arose. Although at one stage of the proceedings there had been a claim that the conduct of the first respondent involved fraudulent dispositions within s 121 of the Act, the Federal Court resolved that issue in his favour, and it was not pursued in this Court.

5 The facts may be summarised as follows.

6 The first respondent became a bankrupt on 21 July 1992, when a sequestration order was made against his estate. He had committed an act of

bankruptcy on 18 September 1991, and the bankruptcy was deemed to commence on that date (s 115 of the Act.)

7 There were three payments in question, which were respectively of $20,000, $40,000 and $20,000. They were made, in September 1990, at the first respondent's direction, out of an amount of $96,192.36 which became payable to him in his capacity as a member of the ISAS (Tas) Retirement Fund. The first respondent had been employed by Industrial Sales and Service (Tas) Pty Ltd ("ISAS") since 1972. He was a member of that company's superannuation scheme. ISAS ceased to carry on business on 20 April 1990, and went into liquidation on 4 June 1990. In consequence, the first respondent's employment was terminated. He became entitled to a lump sum benefit in the amount of $96,192.36. He was in his forties, well below the normal retirement age. He decided to "roll-over" an amount of $80,000 into other superannuation funds. Accordingly, he directed the making of the payments the subject of the appeal.

8 The fact that the amount of $96,192.36, of which the $80,000 formed part, represented entitlements under another superannuation scheme was directly relevant to the appellant's attempt, in the Federal Court, to rely on s 121 of the Act. It provided a commercial explanation of the first respondent's conduct, unrelated to any attempt to defeat his creditors. On the face of it, what was involved was an ordinary commercial dealing, being a re-investment of funds representing the proceeds of superannuation benefits to which the first respondent had become entitled prematurely. His original intention had been to make provision for his retirement, and he wished to carry that intention forward.

9 The three roll-over transactions involved an investment of $20,000 in a Legal & General Personal Super Investment Growth Bond, $40,000 in a Prudential Investment Bond, and $20,000 in a Mercantile Mutual Superannuation Bond. It will be necessary to attempt to define those transactions with greater particularity, to the extent to which the evidence enables that to be done.

10 The appellant commenced proceedings in the Federal Court, claiming declarations that each payment was void as against the appellant. In addition to the first respondent, the appellant sued Legal & General Superannuation Services Pty Ltd as second respondent, Prudential Corporation Australia Ltd as third respondent, and Mercantile Mutual Custodians Pty Ltd as fourth respondent. The appellant sought an order for repayment by the second, third and fourth respondents of the amounts of $20,000, $40,000 and $20,000 respectively.

11 The evidence adduced by the appellant as to the contractual arrangements pursuant to which the payments were made was sketchy. However, it was

regarded by the parties as sufficient to enable them to present their competing arguments.

12 In the case of the second respondent, there was a letter from Legal & General Life of Australia Ltd, dated 31 March 1994, confirming that, at that date, the first respondent held a certain number of "Stable Fund Units" of a certain value each, which at that date amounted in all to $27,442.19. There was also in evidence a copy of the "Legal & General Employed Persons Superannuation Fund Trust Deed". The deed provided that the trustee (identified in the deed as Legener (Australia) Limited) was to effect and maintain in its own name a policy on the life of each member of the fund with the Legal and General Assurance Society Limited. Such policy was to be held on the trusts of the deed. The trustee was to have no beneficial interest in it. Each member's contributions were to be applied in payment of the premium or premiums on the policy. Other forms of investment were also contemplated. Retirement and death benefits were payable in accordance with the deed. Clause 7 provided:

> "7. At any given date the benefit of a Member under the Fund shall consist of the Policy on his life, *any other form of investment referred to in Clause 4(b)(1)* and the amount (if any) of his Member's credit, including any interest thereon calculated to that date." (emphasis in original)

13 Subject to presently irrelevant qualifications, benefits were not payable until a member's death or retirement date[1].

14 The precise relationship between the second respondent, (Legal & General Superannuation Services Pty Ltd), Legener (Australia) Limited, and Legal and General Assurance Society Limited, was not examined in evidence, and was not the subject of findings of fact in the Federal Court. It may be inferred that they are all members of the same corporate group, but the parties appear to have risen above any attempt to identify with precision the contractual relationships that resulted from the "roll-over". The evidence included a letter to the appellant's solicitor from the second respondent's solicitor, dated 13 August 1998, stating:

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1 Superannuation schemes, such as those into which the first respondent entered, were regulated, and complying schemes enjoyed concessional taxation treatment. An inability to obtain benefits prematurely was part of the scheme of regulation - see *Occupational Superannuation Standards Act* 1987 (Cth) and Occupational Superannuation Standards Regulations, reg 11.

"I am instructed that the trustee of the fund in which Mr Benson's superannuation is held is Legal and General Superannuation Services Pty Ltd."

15 The proceedings in the Federal Court were constituted, and conducted, on the basis that the second respondent, Legal & General Superannuation Services Pty Ltd, was both the recipient of the amount of $20,000 which the appellant was suing to recover, and was also the trustee of the superannuation fund under which the first respondent was entitled to future benefits.

16 In the case of the third respondent (Prudential Corporation Australia Limited), there was in evidence a letter, dated 21 September 1990, from The Prudential Assurance Company Limited to the first respondent, acknowledging receipt of his application, and enclosing his "Prudential Investment Bond policy", which was said to confirm his investment and to set out the terms and conditions of a policy. The first respondent also received a "Prudential Bond Certificate". This identified a policy number and identified the class as "Superannuation Class". The owner of the policy was Prudential Australian Superannuation Limited. The total initial contribution was said to be $40,000, and the "investment fund" was divided into two components: a capital fixed interest component of $12,000; and a capital guaranteed component of $28,000. The Prudential Superannuation Bond described itself as a "policy". Its conditions, together with the Bond Certificate, were said to form the basis of a contract of insurance between The Prudential Assurance Company Limited, and the first respondent. Prudential was also to maintain a number of investment funds for the purposes of the policy. The benefits payable to the first respondent were specified.

17 There was also tendered a copy of the trust deed establishing The Prudential Personal Retirement Fund. The deed established a superannuation fund and set out the rules governing its operation. The trustee was identified as Prudential Australian Superannuation Limited or any trustee which took its place. The fund was vested in the Trust to be administered in accordance with the rules. Membership of the fund was by application. The deed contemplated that the trustee would take out a life insurance policy in respect of a member, using the member's contribution for that purpose. Death and retirement benefits were payable in accordance with the rules. In the Full Court, it was said that the third respondent was the trustee of the Prudential Fund. How and when this came about does not appear from the evidence, but the statement of fact was not challenged in this Court. Again, the proceedings were conducted on the basis that the third respondent was the recipient of the amount of $40,000.

18 In relation to both the Legal and General Bond and the Prudential Bond, there was evidence that, in October 1999, the statutory funds of the Prudential Assurance Company Limited merged with those of the Colonial Mutual Life Assurance Society Ltd ("Colonial Mutual"). There was also evidence that, in June 2000, there was a merger between the statutory funds of Legal & General Life of Australia Ltd and those of Colonial Mutual. In both cases, the trustee of the superannuation fund in which the first respondent had an interest became Colonial Mutual Superannuation Pty Ltd. As at 29 November 2000, the value of the Legal and General policy was said to be $38,237.17 and the value of the Prudential policy was said to be $64,122.47. The basis upon which that value was calculated does not appear. The mergers occurred after the commencement of the proceedings, and resulted in no amendment to the proceedings.

19 In the case of the fourth respondent (Mercantile Mutual Custodians Pty Ltd) there was tendered, in blank, a form of Application for Membership of Mercantile Mutual Life Employed Persons Superannuation Fund. The case was conducted on the basis that such a form was either signed by, or in some other way applied to, the first respondent. It contained the following paragraphs:

> "2. I have been advised in writing of the benefits which I am entitled to receive from the Fund on joining the Fund, in the event of my retirement, death or disablement, the method of determining those benefits and any conditions relating to those benefits.
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> 3. In consideration of my admission to membership, I agree to abide by and be bound by the provisions of the Deed governing the Fund.
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> 4. I agree to Mercantile Mutual Custodians Pty Limited acting as Trustee of the Fund."

The evidence showed that the first respondent became the holder of a Mercantile Mutual Personal Superannuation Bond on 18 September 1990. As at 24 February 1994, his "policy" was said to be "invested" in a "capital stable investment portfolio" which was then valued at $30,303.32. The trust deed governing the operation of the fund of which the first respondent was a member, and of which the fourth respondent was the trustee, provided for death and retirement benefits. Contributions received from a member were to be received by the trustee and invested in a life policy, which was to fund the benefits ultimately payable.

20 In the case of each of the "roll-over" transactions, the substance of what occurred was as follows. The first respondent applied for membership of a superannuation fund. The fund was administered by a trustee. The general

scheme was that the trustee would receive the amount contributed by the first respondent and apply it in taking out a policy on the life of the first respondent and in making other forms of investment. The first respondent was entitled to death and retirement benefits in accordance with the terms of the deed governing the fund. The detail of the manner in which the value of the first respondent's entitlements varied from time to time is not a matter of relevance to the present appeal. Each of the three payments in question was made for the acquisition of the rights secured by the respective deeds of trust. Those rights were enforceable by the first respondent against the respective trustees.

21 In the Federal Court, there was a question as to whether the payments were settlements of property. That question was answered in the affirmative by Marshall J at first instance[2], and by the Full Court[3]. It is not a live issue in this Court, but it is relevant to note what was said, in the context of a consideration of that issue and of the issue that was contested in this Court, as to the facts.

22 Marshall J noted that it was submitted on behalf of the first respondent that the first respondent's interest in the funds which emanated from the ISAS superannuation scheme was never received by him, and, further, that any property that passed to the other respondents was immediately dissipated. Those arguments were rejected, and, since they have not been repeated in this Court, it is unnecessary to say more about them. The judge did not make any detailed findings as to the contractual arrangements between the first respondent and the other respondents.

23 In the Full Court, Beaumont J treated the Legal and General transaction as typical. He considered the deed of trust executed by Legener (Australia) Limited as trustee. He referred to the qualifications for membership, the provisions for the trustee to take out a policy on the life of each member, the benefits provided under the policy by the insurer, the various options that were available, the application of a member's contributions towards payment of premiums on the policy, and the trustee's obligations to hold each policy on trust to be administered according to the provisions of the trust deed. He noted that provision was also made for contributions, to the extent not required for premium payments, to be invested in other ways. Death, retirement and other benefits were payable in accordance with the deed.

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2 *Cook (Trustee); In the matter of Benson* [2000] FCA 1777.

3 *Benson v Cook* (2001) 114 FCR 542.

24 Beaumont J said[4]:

> "In my opinion, the transfer of the 'rolled-over' funds, effected ... on 17 September 1990 at the [first respondent's] direction, constituted a 'disposition of property' by the [first respondent] within the meaning of s 120(8). It is clear that, by then, the [first respondent] was beneficially entitled to that amount as a chose in action indefeasibly vested in him. He then directed [the company that held the funds] to transfer the funds (or choses in action) to the three assurance (superannuation) companies, to be held by them in their respective retirement funds."

25 In considering the question whether there was valuable consideration for the settlements, Beaumont J said[5]:

> "Here the reality at the time of the 'roll-over' was that the bankrupt was many years from retirement age, so that unless his entitlement from the ISAS fund on its termination was 'rolled-over' into another *bona fide* superannuation fund, the entitlement would have been taxed. Common sense indicates that, to this extent, there was a strong practical incentive, perhaps a practical compulsion, to 'roll-over' the entitlement, an action in fact carried out in this case with the approval of the Australian Taxation Office. Moreover, the dealings in question involved far more than the constitution of a 'bare' trust. The contemplated role of the related assurance company, guaranteed by the fund's trustee, was of fundamental practical importance to the superannuation transaction. In return for premiums received, the fund's trustee promised the beneficiary that the assurance company would provide assurance cover. This involved the provision of a real and truly valuable quid pro quo by the fund's trustee. Those were not nominal, colourable, abnormal or collusive dealings of the kind aimed at by s 120".

26 Kiefel J said[6]:

> "It is accepted that the second to fourth respondents are trustees of the funds into which the [three amounts which together made up $80,000] were placed and that they are responsible for their further investment. It

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4 (2001) 114 FCR 542 at 555 [49].

5 (2001) 114 FCR 542 at 559-560 [70].

6 (2001) 114 FCR 542 at 567, 568 [109], [111].

> was also assumed that they would receive something, by way of fees or charges, for their role. The letter of 17 September 1990 discloses that a bond or policy issued with respect to the monies received ... and that units were held by the appellant in particular types of investments. The description of one or more of them implies a guarantee of repayment of the monies initially paid in. The deeds or rules governing the funds, which provide the conditions relating to members' rights to benefits, also require a policy to be maintained upon the life of its members, the premiums for which are paid from contributions.
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> ...
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> Here the [first respondent's] rights can be seen to have been altered by the transaction. In lieu of the money to which he was entitled he now has future rights with respect to the fund and rights arising from his contracts with each of the respondents. The respondents have corresponding obligations which will require the repayment to the appellant of his initial investment together with an amount representing the monies earned by the fund relative to the investment. On any view it would seem to me that something more than a nominal consideration has been provided for the monies."

27 Hely J set out the evidence summarised earlier in these reasons. He identified the subject matter of the settlement of property in a manner that will require further examination. However, he did not disagree with the facts found by the other members of the Full Court.

28 The arguments in this Court did not challenge the accuracy of the facts found in the Full Court. The level of generality at which those findings were expressed was dictated by the lack of detail in the evidence. The appellant bore the onus of proof on the issues of present concern, and any incompleteness in the evidence is to his disadvantage.

29 In the Full Court, Beaumont and Kiefel JJ held that property the subject of settlements under s 120 consisted of the amount to which the first respondent was entitled under the ISAS superannuation scheme (or, more precisely, $80,000, part of that amount), the disposition being the direction to transfer those funds to the second, third and fourth respondents to be received by them as contributions to their respective retirement funds, and the payments made pursuant to that direction. They considered that the substantial issue in the case was whether the settlements were made in favour of a purchaser in good faith and for valuable consideration. They resolved that issue in favour of the respondents. Hely J dissented. That is the point to which argument to this Court has been directed.

30 The history of s 120, and the English legislation upon which it was based, is set out in the judgment of this Court in *Barton v Official Receiver*[7]. The Court said that the purpose of the English legislation was "to prevent properties from being put into the hands of relatives to the disadvantage of creditors"[8]. Of course, it is not confined to dispositions to relatives, and the width of the definition of property has already been noted.

31 As Lockhart J, in the Full Court of the Federal Court, pointed out in *Barton*[9], the concept of a "purchaser ... for valuable consideration", while it involves two elements, does not involve two separate and independent notions. It has repeatedly been held that the legislation uses those terms in a commercial, rather than a conveyancing, sense[10]. It does not refer to a purchaser in the limited sense of a purchase and sale, but to a person who in a commercial sense provides a quid pro quo[11].

32 A question that arose for decision in *Barton* was whether the concept of valuable consideration requires something more than a merely nominal consideration that would suffice to make a contract enforceable at common law[12]. In that case, a bankrupt had made a payment of $170,000 to an uncle in the form of an unsecured loan for 20 years, no interest being payable for the first five years, and interest being payable at 4.25 per cent per annum thereafter (which was, at the time, a very low rate). It was held that the uncle was not a "purchaser ... for valuable consideration". To constitute a purchaser for valuable consideration, "a nominal, trivial, colourable or fictitious consideration will not suffice"[13].

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7 (1986) 161 CLR 75 at 80-84.

8 (1986) 161 CLR 75 at 85.

9 (1984) 4 FCR 380 at 395.

10 eg *Hance v Harding* (1888) 20 QBD 732; *In re Pope; Ex parte Dicksee* [1908] 2 KB 169 at 172.

11 *Barton v Official Receiver* (1986) 161 CLR 75 at 84.

12 (1986) 161 CLR 75 at 80.

13 (1984) 4 FCR 380 at 396; (1986) 161 CLR 75 at 86, 87.

33 In the present case, the payments in question were made pursuant to arm's-length, commercial transactions. The payments, at the direction of the first respondent, out of the funds due to him under the ISAS superannuation scheme, by way of contributions to other, commercially marketed, superannuation schemes, were made in return for the obligations, undertaken by the trustees of those schemes, to provide him with the rights and benefits to which he would in due course become entitled under the rules of each scheme. Those rights and benefits constituted substantial and valuable consideration for the contributions of the first respondent.

34 As Beaumont J pointed out in the Full Court[14], the concept of "purchaser" in s 120 must be understood and applied in the light of the expanded concepts of "disposition of property" and "settlement". Since a payment of money, or a transfer of a chose in action, is capable of constituting a settlement, then the payee or transferee must be capable of being a "purchaser ... for valuable consideration". The second, third and fourth respondents, as trustees of the respective superannuation schemes, in return for the contributions to the schemes, undertook to provide the rights and benefits to which contributors would become entitled on death or retirement. The contributions fall within the expanded concept of settlements of property. A payment of money is, by definition, a disposition of property. If the recipient of the money, in the commercial sense relevant to the application of s 120, provides valuable consideration in return, then there is no reason to deny to the recipient the character of a purchaser. The trustees satisfy the description of purchasers for valuable consideration.

35 Hely J, whose reasoning in this respect was supported by the appellant, denied the provision of valuable consideration by treating the case as analogous to a transfer of property to a trustee who agrees to hold it upon the terms of the trust and administer it accordingly. It may be accepted that, if the first respondent had simply paid $80,000 to a person to hold on trust for him, the trustee would not be a purchaser for valuable consideration. In such a case, no issue under s 120 would have arisen; the first respondent would have remained the beneficial owner of the $80,000 or the assets in which it had been invested, and the property of which he was the beneficial owner would have been available to his creditors. However, that is not what occurred in the present case. The trustees of the superannuation funds did not undertake to accept funds, hold them on trust for the first respondent, and administer them on his behalf. The rights and benefits to which contributors to the funds were entitled, although they might

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14 (2001) 114 FCR 542 at 559 [67].

vary with the success or otherwise of the investment policies of the fund managers, were governed by the rules of the superannuation scheme. As Kiefel J pointed out, in at least one case those rights included a "capital guarantee".

36 Hely J also referred to *Tooheys Ltd v Commissioner of Stamp Duties (NSW)*[15]. In that case, a deed, providing for the establishment of a pension scheme for the employees of a company, was made between the company and trustees. The company paid £50,000 to the trustees as an initial contribution to the fund. The deed was chargeable to stamp duty as a declaration of trust, and was therefore chargeable with the same duty as if it were an instrument of conveyance of the property comprised therein. It became necessary to consider the rate at which duty should be calculated. That turned upon whether the deed was the equivalent of a conveyance made upon a consideration in money or moneys worth of not less than the value of the property to which it related. The only parties to the dutiable instrument were the company and the trustees. Employees who might in the future become members of the fund would, upon joining, obtain rights by reason of the provisions of the deed, but they were not parties to it. Nor would they themselves be obliged to make contributions[16]. The question of consideration arose in relation to the position as between the parties to the deed; that is to say, the company and the trustees. Dixon CJ said[17]:

> "The company as the party directing the creation of the trust and the trustees as the parties creating the trust by the declaration of the trust obtained no consideration in money or money's worth."

The payment of £50,000 by the company to the trustees was not made in return for any property, or right, received by or conferred upon the company in return. On the other hand, in the present case the first respondent made contributions in return for the undertaking by the trustees of the funds of obligations to pay death, retirement or other related benefits, to him or his nominees, in accordance with the rules of the respective funds. He obtained consideration in money's worth in return for the payments.

37 There was a difference between the approach of the majority in the Full Court, and that of Hely J, to the identification of the property that was settled for the purposes of s 120. Beaumont and Kiefel JJ, consistently with the relief

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15 [1960] SR (NSW) 539; (1961) 105 CLR 602.

16 (1961) 105 CLR 602 at 610.

17 (1961) 105 CLR 602 at 616.

claimed by the appellant, treated the three payments of money as the relevant settlements of property, and enquired whether the first respondent had received valuable consideration for them. Hely J, on the other hand, observing that the amounts were applied in payment of premiums on policies of insurance on the life of the first respondent, identified the "settlement of the life policies on the trustees" as the relevant settlement of property, and enquired whether the trustees provided "valuable consideration for that settlement"[18]. He answered that question in the negative, pointing out that the trustees held the life policies on trust, and that "a trustee who promises to receive and hold property transferred to him ... does not thereby give valuable consideration for the property transferred"[19]. However, the settlements or dispositions of property which the appellant claimed to be void were the three payments of money, not the issue of the life policies. The Amended Statement of Claim made no reference to the life policies. It asserted that each of the payments of $20,000, $40,000 and $20,000 respectively was void as against the appellant, claimed declarations accordingly, and sought orders for repayment of those amounts. There is no reason to doubt that the property, and the only property, of which the first respondent divested himself by the impugned transactions was the $80,000. Once that is accepted, the question whether he received substantial and valuable consideration in return is to be answered in the affirmative. The first respondent never divested himself of the life policies, and they did not constitute the property which the appellant alleged was settled in terms of s 120. It is erroneous to ask what consideration the trustees gave for the life policies. The question is what consideration they gave for the $80,000.

38 The majority in the Full Court were correct in treating the three payments, by way of contribution to the superannuation funds, as the settlements of property to which s 120 potentially applied, and in concluding that they were settlements made in favour of purchasers for valuable consideration.

39 The appeal should be dismissed with costs.

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18 (2001) 114 FCR 542 at 572 [137].

19 (2001) 114 FCR 542 at 572 [138].

40 KIRBY J. This appeal[20] concerns the meaning and application of s 120 of the *Bankruptcy Act* 1966 (Cth) ("the Act"). That is an important section designed to protect the interests of creditors in respect of dispositions of property of a person who becomes bankrupt. Save for specified exceptions, it provides for the retrospective "clawing back" by a trustee in bankruptcy of property disposed of by the bankrupt within a given time of the commencement of the bankruptcy.

41 In this case, within the period, the bankrupt directed that a sum of $80,000 in money under his control should be paid to three corporations. He gave this direction knowing that four months earlier judgment had been entered against him for $35,216.25 which remained unpaid. Following a sequestration order made in respect of his estate, the trustee in bankruptcy moved to recover the $80,000 from the recipients to whom the payments had been made.

42 The primary judge in the Federal Court (Marshall J)[21] and the dissenting judge in the Full Court (Hely J)[22], concluded that the trustee was entitled to succeed. The majority of the Full Court (Beaumont and Kiefel JJ)[23] concluded otherwise. They held, relevantly, that s 120 of the Act did not permit the asserted recoupment. In another case in the Federal Court, although mainly concerned with the application of s 121 of the Act, Madgwick J expressed agreement with the approach adopted to s 120 in this case by the primary judge[24].

43 So stated, the conclusions of the primary judge, of Hely J in the Full Court and of Madgwick J in the later case, seem unremarkable. They appear to carry into effect the language and purposes of s 120 of the Act[25]. In such a disposition of money to corporations (and for purposes ultimately to the bankrupt's own benefit), a decision that such dispositions were within the retrospective operation of s 120 for the protection of creditors would not be surprising. Indeed, the

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20 From a judgment of the Full Court of the Federal Court: *Benson v Cook* (2001) 114 FCR 542.

21 *Cook (Trustee), In the matter of Benson* [2000] FCA 1777.

22 (2001) 114 FCR 542 at 573 [142].

23 (2001) 114 FCR 542 at 560 [71] per Beaumont J; 568 [113] per Kiefel J.

24 *Official Trustee in Bankruptcy v Trevor Newton Small Superannuation Fund Pty Ltd* (2001) 114 FCR 160 at 175 [40].

25 See the Act, s 120 as it appears in application to bankruptcies occurring on and from 16 December 1996, following the *Bankruptcy Legislation Amendment Act* 1996 (Cth). By item 457 in the first Schedule to the amending Act, s 120 of the Act, in its previous terms, continues to apply to pending cases such as the present.

contrary conclusion would seem inconsistent with the provision, which is only the latest manifestation of an unbroken chain of provisions in bankruptcy law to like effect[26].

44 In support of the application for special leave following the judgment giving effect to the majority view in the Full Court, an affidavit was read asserting the suggested significance, and deleterious consequences for bankruptcy administration and the rights of creditors, resulting from the majority approach. At the hearing of this appeal, that point was elaborated by argument. Allowing for an intervening amendment of the Act that has occurred, the trustee suggested that, without express statutory authority, the approach of the majority would effectively permit persons such as the bankrupt, facing the possibility of bankruptcy, to put beyond the reach of creditors very significant funds (including in money or money's worth) by a simple device, beneficial to the bankrupt, similar to that adopted in this case.

45 Such considerations do not solve the legal question that is presented by this appeal. But they do render the opinion of the majority surprising when the terms of s 120 of the Act are read on their face. The appeal cannot be decided by intuition or impression. It requires analysis of the facts, of the precise language and intended operation of the section, of the decisional authority that has considered its meaning and of the issues of legal principle and legal policy that inform the correct approach to the section, as it is to be applied in the circumstances of this case.

The facts

46 Most of the facts relevant to my reasons are set out in the reasons of Gleeson CJ, Gummow, Hayne and Heydon JJ ("the joint reasons")[27]. The facts so stated include the circumstance that Mr Peter Benson ("the first respondent") became entitled to a lump sum of $96,192.36 on the termination of his previous employment and that the sum of $80,000, in issue in this appeal, constituted the "rolling-over" of most of that sum into "other superannuation funds"[28]. Presumably, these facts are stated to support a suggestion that the payment

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26 The language of s 120 gives effect to principles of bankruptcy law that can be traced back at least to the *Bankruptcy Act* 1869 (UK), s 91.

27 Joint reasons at [5]-[20].

28 Joint reasons at [7].

involved "was an ordinary commercial dealing, being a re-investment of funds representing the proceeds of superannuation benefits" that fell in "prematurely"[29].

47 Because a full understanding of the facts of a case can sometimes affect an appreciation of how legislation was intended to operate, it is perhaps relevant to add some more facts to the foregoing[30]. In January 1990, whilst the first respondent's original employment (and original superannuation entitlements) were continuing, Bridge Wholesale Acceptance Corporation (Australia) Ltd commenced a proceeding in the Supreme Court of Victoria against the first respondent and R F Benson Pty Ltd claiming a sum of $222,588.32 together with interest and costs in respect of a floor plan bailment agreement concerned with a tractor dealership business in which he was engaged. On 16 May 1990 Esanda (Wholesale) Pty Ltd obtained judgment against the first respondent for an amount in the order of $35,216.25. That judgment was unpaid. On 20 April 1990, the first respondent's employment with ISAS[31] was terminated when that company ceased to carry on business. That company was wound up on 4 June 1990.

48 The first respondent was not therefore, as it were, a hapless employee who became a victim of the collapse of his employer with its superannuation scheme. He was a trustee of the ISAS superannuation fund. It was in that capacity, on 27 June 1990, that he wrote to the insurance company with whom, pursuant to its superannuation deed, ISAS had effected a retirement accumulation and group life insurance policy. In his letter the first respondent confirmed that the trustees of that fund had determined that he, as beneficiary, should receive 51.2% of the funds held by that insurer. It was pursuant to that letter that the insurer, on 17 September 1990, paid the sum of $96,192.36 in favour of the first respondent. That amount of money was duly received. When received, it was wholly within the first respondent's disposition.

49 The first respondent could have purchased a sports car, a recreational boat, a block of land or some other asset which, subject to the Act, would have been available to his creditors upon his subsequent bankruptcy. Instead, he engaged a financial planner, Spectrum Financial Planners Pty Ltd ("Spectrum"), to pay the greater part of the money at his disposition into superannuation funds for his own benefit. Spectrum notified the first respondent that it had "invested" $80,000

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29 Joint reasons at [8]; cf *Trust Company of Australia Ltd v Commissioner of State Revenue* [2003] HCA 23 at [61].

30 *Trust Company of Australia* [2003] HCA 23 at [66].

31 The same descriptions will be used as appear in the joint reasons. See joint reasons at [7].

with the three corporate respondents in this appeal, as trustees of their respective superannuation funds. Each such fund was an Approved Deposit Fund within federal law[32]. Of course, the first respondent had a strong motivation to reinvest the lump sum of money that came into his control in this way. Had he not done so, the sum would have been taxed.

50 The first respondent's act of bankruptcy occurred on 18 September 1991. On 21 July 1992 the sequestration order was made in respect of his estate. The question, in these circumstances, is whether, pursuant to s 120 of the Act, the payment of $80,000 directed by the first respondent within two years before the commencement of his bankruptcy were void against Mr Paul Cook ("the appellant"), as trustee of the first respondent's property. The appellant asserted that it was. The first respondent submitted that it was not. The corporate respondents took no partisan role. They submitted to the orders of this Court.

The legislation

51 None of the parties suggested that the Court needed to consider any of the provisions of the complicated federal legislation governing superannuation. In the circumstances, I am content to assume that this is so. Only necessity and duty would encourage me to enter once again upon the consideration of those provisions[33].

52 The critical words of s 120 of the Act[34], applicable to this case, are confined:

> "120(1) A settlement of property … not being:
>
> (a) a settlement … made in favour of a purchaser … in good faith and for valuable consideration …
>
> …
>
> is, if the settlor becomes a bankrupt and the settlement came into operation … within 2 years before … the commencement of the bankruptcy, void as against the trustee in the bankruptcy."

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32 See *Occupational Superannuation Standards Act* 1987 (Cth), s 3(1). The relevant circumstances are described by Kiefel J: *Benson* (2001) 114 FCR 542 at 563 [90], 566 [101]-[104].

33 cf *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 118-119 [67].

34 The relevant parts of the section are set out in the joint reasons at [2].

53 Many of the elements of the foregoing sub-section were accepted as applicable, or were found to apply and are not now in contest. Given the wide definitions of "property"[35] and "settlement of property"[36] adopted in the Act this outcome is unsurprising. Thus, although, at trial, the first respondent contested that there had been a "settlement of property" in the sense of a "disposition", that point was found against him by all judges of the Federal Court[37]. It is no longer in dispute. Similarly, there was no contest that the first respondent, as settlor, had become "a bankrupt" and that the relevant settlement had occurred within two years before the commencement of his bankruptcy. For the purposes of the appeal, the appellant accepted that the settlement upon the corporate respondents was made "in good faith". He made no criticism of the conduct of those respondents.

54 Further common ground should be noted in order to afford the context of the decision. It was no longer contested for the first respondent, as it had been at trial, that s 116(2)(d) of the Act, as it applied at the relevant time, did not exempt from his property the original sum received by him as the payout of his ISAS superannuation entitlement. At that time, that provision of the Act only made reference to policies of life insurance and endowment insurance and not to superannuation as such[38].

55 Although, for the appellant, it had originally been asserted that the payments made to the corporate respondents were void against the trustee having regard to s 121 of the Act (which concerns "fraudulent dispositions") the primary judge, having found that the payments were void because of s 120, concluded that it was unnecessary to consider s 121[39]. In the Full Court, by notice of contention, the appellant re-agitated the s 121 question. However, the majority of that Court concluded that the application of s 121 was not established by the evidence[40]. That point has not been maintained in this Court.

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35 The Act, s 5.

36 The Act, s 120(8): set out in the joint reasons at [2].

37 [2000] FCA 1777 at [13] per Marshall J; (2001) 114 FCR 542 at 555-556 [51], 563 [87], 570 [127]-[128].

38 (2001) 114 FCR 542 at 546 [3] citing *NM Superannuation Pty Ltd v Young* (1993) 41 FCR 182 at 190.

39 [2000] FCA 1777 [15]; cf (2001) 114 FCR 542 at 546 [3].

40 (2001) 114 FCR 542 at 560 [72], 568 [112].

56 The appellant accepted that if, at the relevant time, the first respondent had used the $80,000 to purchase a life insurance policy it would have been exempt from recoupment for the benefit of creditors in accordance with the Act as it then stood[41]. He also accepted that under the Act as it now stands, had the first respondent purchased a superannuation policy or policies, depending on the circumstances, they would now be exempt and unavailable to the creditors[42]. However, that express exemption was inapplicable at the relevant time. This was a point upon which the appellant laid emphasis[43]. Any "exemption" for the investment of the moneys in a superannuation fund (even one regulated in accordance with the federal legislation as may be accepted to be the case here) had to fall within the general language of s 120(1)(a). No express, specific and particular exemption applied.

57 Despite the large area of agreement between the parties, now fully described, the two remaining issues, critical to the exemption claimed by the first respondent, remained. They were based on the language of s 120(1) of the Act. They concerned whether the corporate respondents could properly be described as "purchasers" of the settlement (disposition) of the sums of money respectively paid to each of them. And whether, in each case, such "settlement" was made "for valuable consideration" passing from the corporate respondents to the first respondent for the "settlement" as such.

Analysis of authority on s 120 of the Act

58 As might be expected in a provision having a long history and playing a crucial part in the operation of bankruptcy law, s 120(1) (and its predecessor and like provisions in this and other countries) has been examined by trial and appellate courts for over 150 years. Little that is new remains to be written. Indeed, the key to the residual questions in this appeal is to be found in close attention to the analysis of s 120 set out in the principal decision of this Court on the section, *Barton v Official Receiver*[44].

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41 The Act, s 116(2)(d).

42 By virtue of amendments introduced by the *Superannuation Industry (Supervision) Consequential Amendments Act* 1993 (Cth), s 116(2)(d)(iii) now includes "[t]he interest of the bankrupt in: (A) a regulated superannuation fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*)".

43 (2001) 114 FCR 542 at 546 [3], 560-561 [79]-[80]; cf *Trust Company of Australia* [2003] HCA 23 at [87]-[88].

44 (1986) 161 CLR 75.

59 The purpose of the section has been stated several times. It is "clearly framed to prevent properties from being put into the hands of relatives to the disadvantage of creditors"[45]. Although relatives, and particularly spouses, have been the most frequent actors in the dramas that have been played out in the cases concerning s 120, used as receptacles for the property of the future bankrupt within the period of the retrospective "clawback" allowed by the law, the joint reasons correctly point out that it is not only families as beneficiaries of settlements to which s 120(1) of the Act is addressed. So much is clear, from a reading of the full sub-section[46]. It refers not only to family arrangements ("in consideration of marriage", "for the spouse or children of the settlor") but also to other recipients of the bankrupt's property falling within the provision.

60 In several cases, it has been pointed out that the words, critical to this appeal, "in favour of a purchaser … for valuable consideration" constitute a composite phrase. That phrase is to be read as a whole; not split into separate single verbal parts[47]. This insight involves no more than an application, in the present context, of the contemporary insistence that the normal unit of communication in the English language is not the single word but, at the very least, the sentence containing the relevant composite idea[48]. To derive the applicable meaning with any degree of certainty, it is usually necessary to read the paragraph, and perhaps the chapter, so that the sentence will be read and fully understood in its proper context. The bits and pieces approach to interpretation has now been discarded.

61 Approaching s 120(1) and the critical words in this way, it is clear that the provision represents an important measure protective of creditors. It is enacted as a response to the common experience of the law that bankrupts, facing the prospect of bankruptcy, will often attempt, within a given time of that anticipated event, to divest themselves of property to people (usually family) whom they specially wish to favour, whom they trust and whose use of the property will generally inure to the advantage of the bankrupt, in the event that bankruptcy supervenes. Against fraudulent and semi-fraudulent dispositions of property of

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45 *In re A Debtor; Ex parte Official Receiver v Morrison* [1965] 1 WLR 1498 at 1505; [1965] 3 All ER 453 at 457 per Stamp J approved in this respect in *Barton* (1986) 161 CLR 75 at 83.

46 The full terms of s 120(1) of the Act appear in the joint reasons at [2].

47 eg *Barton* (1986) 161 CLR 75 at 79, 86. See also the reasons of Lockhart J in *Barton v Official Receiver* (1984) 4 FCR 380 at 396 cited in *Benson* (2001) 114 FCR 542 at 558 [63] by Beaumont J.

48 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397, citing *R v Brown* [1996] 1 AC 543 at 561.

this kind, s 121 stands as guardian. Against other, non-fraudulent, dispositions, s 120 provides protection to creditors. In case of any ambiguity, it is the duty of courts giving effect to the Act, to apply such provisions so as to achieve, and not frustrate, the attainment of these purposes[49].

62 Read in this context, and in the light of these purposes, what is the meaning of the word "purchaser" when used to identify one of the categories of exemption from the trustee's powers of recoupment of property for the benefit of creditors? In the context, the word connotes a person who buys the property in question "in good faith and for valuable consideration". Such a person is to be viewed as a genuine acquirer of the relevant part of the respondent's property and not someone who receives it on some other basis, that does not warrant the exceptional exemption from the property that would otherwise be available to the creditors. The word may not be used in the strict sense of a "purchaser" as in a contract of purchase and sale[50]. But the very word "purchaser" connotes someone who buys something from another, acquiring something in exchange for something else that is valuable and is given in return.

63 Ordinarily, love and affection would not be sufficient, alone, to make the recipient qualify for a description as a "purchaser" as that word is used in contemporary speech[51]. It is for that reason that special provision is made by s 120(1) for exemption of particular (non-"purchase") cases of familial settlements. However, for the most part, to be exempt, the acquirer of the bankrupt's property must qualify as a "purchaser". The purchase must not have been effected for "nominal or trivial or colourable" consideration[52], but, in the terms of the Act, "for valuable consideration"[53].

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49 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 109-110. See also *New South Wales v Taylor* (2001) 204 CLR 461 at 478-479 [54]; *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28 at [22].

50 *In re Windle (A Bankrupt); Ex parte Trustee of the Property of the Bankrupt v The Bankrupt* [1975] 1 WLR 1628 at 1637; [1975] 3 All ER 987 at 994; *Barton* (1986) 161 CLR 75 at 84; cf *Trust Company of Australia* [2003] HCA 23 at [17]-[18], [45], [76], [126].

51 *In re Abbott (A Bankrupt); Ex parte Trustee of the Property v Abbott* [1983] Ch 45 at 57 per Sir Robert Megarry VC.

52 *In re Abbott* [1983] Ch 45 at 57.

53 The Act, s 120(1).

64 Normally, in judging the validity of a contract by way of disposition, the common law does not concern itself with the sufficiency of the consideration paid by one party to a contract to another[54]. However, as this Court pointed out in *Barton*[55], in relation to the section with which we are here concerned, the Act is "social legislation". It therefore requires a degree of vigilance against the risk that even in good faith (s 120) or fraudulently (s 121), property which, for social purposes, Parliament has decided must be available to the creditors of a bankrupt, is put beyond that purpose otherwise than strictly in accordance with the enacted exemption. This is why the cases have insisted that consideration must have moved from a person who answers to the description of "purchaser" to the bankrupt and replaces the property thus purchased with "valuable consideration". Ordinarily, if still existing, such "valuable consideration" will itself be recoverable by the trustee. The existence of such valuable consideration, in any case, assures the creditors against a transaction having the purpose, or effect, of defeating their interests.

65 Bankruptcy is a "special code" of law[56]. The repeated judicial statements that transactions impugned under s 120(1) of the Act are to be judged in "a commercial sense"[57], do not mean that proof that a bankrupt had good commercial reasons for divesting himself or herself of property would alone bring that disposition within the exemption in s 120(1). Were that so, in many or most cases, the bankrupt would have "commercial" reasons for so acting. It remains in each case to decide whether the party who acquired part of the bankrupt's property at the critical time did so as a "purchaser" and gave "valuable consideration" for the disposition concerned[58].

The recipients were not "purchaser[s] … for valuable consideration"

66 When the problem presented by this appeal is analysed in this way, I would conclude that the primary judge and Hely J were right to decide that the corporate respondents were not entitled to the exemption provided by s 120(1) of the Act. Correctly, Hely J[59] approached the problem, citing and applying what

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54 *Barton* (1986) 161 CLR 75 at 79-80 citing *Midland Bank Trust Co Ltd v Green* [1981] AC 513 at 528.

55 (1986) 161 CLR 75 at 86.

56 *Ex parte Hillman; In re Pumfrey* (1879) 10 Ch D 622 at 625 per Jessel MR.

57 *Barton* (1986) 161 CLR 75 at 86.

58 cf *In re Pope; Ex parte Dicksee* [1908] 2 KB 169 at 172.

59 (2001) 114 FCR 542 at 571 [134].

this Court said in *Barton*[60], namely that, to fall within s 120(1), a purchaser must have "given such valuable consideration as is sufficient in all the circumstances to make him a 'buyer' in a commercial sense of the interest passing to him under the settlement".

67 Note that this Court used the word "buyer" in *Barton* (whose authority was accepted by all as governing this case) as a synonym for "purchaser" as appearing in the Act. It was in that sense that the primary judge used the word "buyer" at first instance[61] and that Madgwick J cited it in analogous circumstances in *Official Trustee in Bankruptcy v Trevor Newton Small Superannuation Fund Pty Ltd*[62].

68 It is extremely difficult, if not impossible, to describe the corporate respondents in this case as the "buyers" of the respective sums making up the $80,000 paid to them at the direction of the first respondent. It is true that an entitlement to a sum of money may constitute a chose in action. A bundle of currency may amount to a form of personal property and thus may, in some circumstances be sold to a "buyer". However, this would ordinarily be possible only where the sale contemplated the purchase of foreign money for a quantity of local money or, possibly, different money for a quantity of local money that was subject to a risk of devaluation or withdrawal as legal tender. None of those circumstances applied here.

69 It is therefore artificial in the extreme to describe the disposition of property made by Spectrum at the direction of the first respondent as a settlement "in favour of a purchaser". In this context, in the ordinary use of the language, the corporate respondents could not be described as "purchasers" or "buyers" in the commercial sense of the sums of money that they so received[63]. With respect, the mistake of the majority in the Full Court was to overlook the importance of context and of the insertion in the Act of the word "purchaser". As Hely J pointed out[64]:

> "The history of the legislation suggests that the element of 'purchaser' adds something to the requirement that the disposition be for valuable consideration, as the requirement that there be a purchaser as well as

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60 (1986) 161 CLR 75 at 86.

61 [2000] FCA 1777 at [14].

62 (2001) 114 FCR 160 at 175 [40].

63 cf *Trust Company of Australia* [2003] HCA 23 at [76]-[77].

64 (2001) 114 FCR 542 at 571 [133].

valuable consideration was introduced by s 91 of the *Bankruptcy Act 1869* (UK)[65]".

In the task of statutory construction, it is an elementary rule that a court must give weight to anything relevant in the history of the provision and to each component part of that legislative expression in question[66].

70 The additional mistake was in failing to appreciate that the purchase in question must be *of the property* that is actually settled, in the sense of disposed of to the recipient from whom the relevant trustee is seeking recoupment. Here, that "property" was the money sum of $80,000 divided into three lots, or the legal entitlement to that sum. It is that fact that renders it impossible to describe the corporate respondents as "purchaser[s]" of the property. The "valuable consideration" must pass for the "settlement of property" concerned[67]. The majority in the Full Court mistakenly looked at the payment by direction of the first respondent and to the fact that, thereafter, he received three superannuation policies, entitling him to insurance cover and the resultant future rights and benefits[68]. They thereby drew the inference that there was the "valuable consideration" required by the Act. However, that analysis overlooked the necessity to show that the "valuable consideration" was for the disposition of property as such.

71 Here, the valuable consideration in question must be for the payment to the "purchaser" of the three sums comprising the $80,000 itself[69]. The first respondent did not receive consideration from the corporate respondents for any "purchase" of that sum. To the contrary, any benefits that he received were the result of a subsequent transaction, namely the issue of the three superannuation policies. Such "consideration" as was given by the companies that issued those policies was given in exchange for fees and entitlements thereafter payable by the first respondent pursuant to the respective superannuation deeds. For the actual disposition of the property ($80,000) there was, as such, no "valuable consideration". The "value" of the money sum went from the first respondent and returned to him. What the corporate respondents did was to purchase the

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65 Citing *In re Pope; Ex parte Dicksee* [1908] 2 KB 169.

66 *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28 at [8], [83], [85].

67 The "settlement of property" contested by the appellant was the disposition of the $80,000 to the corporate respondents, rather than the issuance to the first respondent of the superannuation policies, procured by the corporate respondents.

68 (2001) 114 FCR 542 at 559 [70], 568 [111]; see joint reasons at [23]-[26].

69 See joint reasons at [37].

profits they would make by managing the respective superannuation funds[70]. That this is so is shown by the fact that the money sums were quickly transmuted into the three superannuation policies in question.

72 To the complaint that the first respondent's superannuation assets would have been unavailable to the appellant, as trustee, had his former employer not ceased to trade, resulting in his demand for the payout from his original superannuation policy, the answer is clear. In 1993, the Parliament amended the Act[71] to enlarge the scope of exemptions to include the interest of a bankrupt in "a regulated superannuation fund" within the meaning of the *Superannuation Industry (Supervision) Act* 1993 (Cth)[72]. Although subsequent amendments to legislation do not necessarily control the construction of statutory language as it existed prior to the amendment[73], in some cases the perceived need for a specific exemption may reinforce an impression, derived from the pre-amendment statutory provisions, that they did not go so far as the later amending provisions did[74]. That is the conclusion that I have reached in this case.

Conclusion: the property was available to the trustee

73 The primary judge and Hely J in the Full Court were therefore correct to conclude that the two contested elements in s 120 of the Act did not apply to exempt the disposition of property made on the direction of the first respondent from the sum of $80,000 that he disposed of within two years before the commencement of his bankruptcy. The recipients were not "purchaser[s]". No "valuable consideration" was paid for the disposition of the property as such. This conclusion is reinforced by the *dictum* of Dixon CJ in *Tooheys Ltd v*

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70 It was common ground that the sum of $80,000, invested with the corporate respondents, had accumulated to a value of about $140,000.

71 The amendments were introduced by the *Superannuation Industry (Supervision) Consequential Amendments Act* 1993 (Cth), s 7.

72 See the Act, s 116(2)(d)(iii)(A), as now appearing.

73 *Grain Elevators Board (Vict) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85-86; *R v Reynhoudt* (1962) 107 CLR 381 at 388; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 351.

74 *Taikato v The Queen* (1996) 186 CLR 454 at 471-472; *Trust Company of Australia* [2003] HCA 23 at [89]-[91]; cf [87], [92].

Commissioner of Stamp Duties (NSW)[75], to which Hely J referred in the Full Court[76]:

> "The placing of the trust fund in the trustee's hands was no consideration for the present or future equitable interests created."

74 To like effect were the remarks of Walsh J in *Tooheys Ltd v Commissioner of Stamp Duties (NSW)*[77]:

> "An acceptance of a trust and an agreement to hold the trust property upon the terms of the trust and to administer it accordingly, do not constitute the giving of consideration by the trustees for the property so accepted. If it were so, every trust would have to be regarded as created for full consideration."

These observations have been endorsed in this Court[78] and applied elsewhere[79].

75 The benefits that accrued to the first respondent by virtue of the settlement – in the sense of the disposition of the property to the corporate respondents – which were propounded as the "valuable consideration" provided *by* the corporate respondents for the money or money's worth they had "purchased" flow, as Hely J noted[80], not from the provision by the corporate respondents of "valuable consideration" for the acquisition of the policies in question but from the terms of the trusts on which the policies were subsequently settled. In a commercial sense, the corporate respondents were not "buyers" of the $80,000. The two requirements to attract the exemption provided in s 120(1)(a), read severally and together, did not therefore attach.

76 If one seeks an explanation of the division of opinion in the Full Court, it can be traced, in my opinion, to the different views taken by the judges concerning the weight to be given to the essential purpose of s 120 as a means of recoupment of divested property for the benefit of a bankrupt's creditors. It is

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75 (1961) 105 CLR 602 at 616.

76 (2001) 114 FCR 542 at 572 [139].

77 [1960] SR(NSW) 539 at 548.

78 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 442 per Gibbs CJ.

79 *BL & M Grollo Homes Pty Ltd v Comptroller of Stamp* [1983] 1 VR 445 at 450.

80 (2001) 114 FCR 542 at 572 [141].

that purpose which this Court, in its unanimous opinion in *Barton*, emphasised in reaching the conclusion stated in that decision. In words that Hely J repeated in his analysis of this case[81], this Court in *Barton* said[82]:

> "A beneficiary under a settlement is not a purchaser within the meaning of the section unless he has given such valuable consideration as is sufficient in all the circumstances to make him a 'buyer' in a commercial sense *of the interest passing to him under the settlement*. …. [A] 'purchaser … for valuable consideration' within the meaning of s 120(1) of the Act is one who has given consideration *for his purchase* 'which has a real and substantial value, and not one which is merely nominal or trivial or colourable'[83]".

77 The words in this passage from *Barton* that I have emphasised are critical. In their application to the present case, they sustain the approach of the primary judge and of Hely J, with whose reasoning I substantially agree.

Orders

78 The appeal should be allowed. The order of the Full Court of the Federal Court of Australia should be set aside. In place of that order it should be ordered that the appeal to that Court be dismissed. The first respondent should pay the appellant's costs in this Court and in the Full Court of the Federal Court.

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81 (2001) 114 FCR 542 at 571 [134].

82 *Barton* (1986) 161 CLR 75 at 86 (emphasis added).

83 Citing *In re Abbott* [1983] Ch 45 at 57.