# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

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MICHAEL JOHN COVENTRY AND
LYNETTE HELEN COVENTRY (AS
TRUSTEES OF THE MIKE AND LYN
COVENTRY FAMILY TRUST) & ANOR APPELLANTS

AND

CHARTER PACIFIC CORPORATION
LIMITED & ANOR RESPONDENTS

*Coventry v Charter Pacific Corporation Limited* [2005] HCA 67
*15 November 2005*
B68/2004

**ORDER**

*1. Appeal of the first appellant dismissed for want of prosecution.*

*2. Appeal of the second appellant dismissed with costs.*

On appeal from the Supreme Court of Queensland

**Representation:**

No appearance for the first appellant

M M Stewart SC with C A Wilkins for the second appellant (instructed by McMahons)

D F Jackson QC with N J Owens for the first respondent (instructed by Allens Arthur Robinson)

No appearance for the second respondent

## CATCHWORDS

### Coventry v Charter Pacific Corporation Limited

Bankruptcy – Provable debt – Appellants acted in breach of s 995(2) Corporations Law (Q) by engaging in misleading and deceptive conduct in securities dealings – Respondent thereby induced to enter contractual relations with a third party – Whether respondent's claim for unliquidated damages under s 1005 Corporations Law (Q) arose otherwise than by reason of a contract, promise or breach of trust – Whether, pursuant to s 82(2) *Bankruptcy Act* 1966 (Cth), the respondent's claim for unliquidated damages constituted a debt provable in the bankruptcy of appellants.

Words and phrases – "demand in the nature of unliquidated damages", "provable debt", "set-off", "contract, promise or breach of trust".

*Bankruptcy Act* 1966 (Cth), ss 82(2), 86(1).
Corporations Law (Q), ss 995(2), 1005.

1 GLEESON CJ, GUMMOW, HAYNE AND CALLINAN JJ. The issue to be decided in this appeal is whether a claim for unliquidated damages for contravention of a statutory prohibition is a debt provable in the bankruptcy of the person who contravened the prohibition and, by that conduct, induced the claimant to make a contract with a third party.

2 In this case, the statutory prohibition, contained in s 995(2) of the Corporations Law of Queensland, prohibited misleading or deceptive conduct in connection with dealings in securities. The provision for an action for damages was s 1005 of the Corporations Law.

3 Satisfaction of the criteria for proof of a debt has a significance beyond the allowance of the proof in the administration of the sequestrated estate. As these reasons later demonstrate, the provisions for set-off engage those criteria. So also do those provisions dealing with the competence of proceedings against the person or property of the bankrupt, and with the consequences of discharge and release of the bankrupt.

4 If the claim for unliquidated damages made pursuant to the Corporations Law is a debt provable in that person's bankruptcy, discharge from bankruptcy operates to release that person from that claim[1]. If it is not a debt provable in the bankruptcy, discharge from bankruptcy does not operate to release the bankrupt from the claim and, subject to any question of limitation of actions, the claim can be pursued against the former bankrupt after discharge. Moreover, s 58(3) of the *Bankruptcy Act* 1966 (Cth) does not prevent the claimant, during the bankruptcy, from commencing a legal proceeding in respect of the claim or enforcing any remedy against the person or the property of the bankrupt in respect of that claim. The sub-section denies such competency to a creditor only in respect of "a provable debt".

5 The central question in the appeal hinges on the meaning of s 82(2) of the *Bankruptcy Act* 1966 and, in particular, what is meant by a demand in the nature of unliquidated damages arising otherwise than by reason of a contract or promise. That expression, used to identify an exception to the definition of debts provable in bankruptcy, has been held[2] not to include a claim for unliquidated damages for fraudulent misrepresentation which induced the party misled to make a contract with the bankrupt (a "bilateral" case). That is, such a claim for

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**1** *Bankruptcy Act* 1966 (Cth), s 153(1).

**2** *Jack v Kipping* (1882) 9 QBD 113 at 116 per Cave J.

damages has been held to be a debt provable in the bankruptcy, and a claim that was to be set off against a claim by the bankrupt estate. But a claim for unliquidated damages for fraudulent misrepresentations where the representations induced the claimant to make a contract with another (a "tripartite" case) has been held[3] not to be a claim provable in the bankruptcy. The bankrupt having made no contract with the party who claims damages from the bankrupt, the claim for damages for fraudulent misrepresentation has been held to be a demand arising *otherwise* than by reason of a contract or promise.

6 These reasons demonstrate that a statutory claim for unliquidated damages for misleading or deceptive conduct which induced the claimant to make a contract not with the bankrupt but with a third party is not a debt provable in bankruptcy. It is a demand in the nature of unliquidated damages arising *otherwise* than by reason of a contract or promise[4]. The bankrupt is not discharged from liability. The claim may be pursued by the claimant during the bankruptcy and after discharge from bankruptcy. By contrast, a claim for unliquidated damages for misleading or deceptive conduct by the bankrupt, which induced the claimant to make a contract with the bankrupt, would be a debt provable in bankruptcy.

7 At once it must be said that to distinguish between a case where the bankrupt's conduct induced the claimant to make a contract with the bankrupt and the tripartite case where the conduct induced the claimant to make a contract with another is anomalous. But it is a particular example of anomalies of the kind identified by the Australian Law Reform Commission as long ago as 1988 in its General Insolvency Inquiry[5]. The Commission recommended changing the law governing both personal and corporate insolvency to remove anomalies of this kind. Amendments were made to Corporations legislation[6]. The Commission's recommendations about this aspect of personal insolvency law have not been carried into effect.

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**3** *Re Giles; Ex parte Stone* (1889) 61 LT (NS) 82.

**4** *Bankruptcy Act* 1966, s 82(2).

**5** Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 315-319.

**6** See now *Corporations Act* 2001 (Cth), s 553(1).

The facts

8 In 1992 and 1993, Mr Michael Coventry, one of the first appellants, and his brother, Mr Andrew Coventry, the second appellant, made representations to the first respondent ("Charter Pacific") which induced Charter Pacific to make a deed. The parties to the deed were Charter Pacific, Evtech Pty Ltd, Barry Tabe as trustee of the Tabe Trust, Michael John Coventry and Lynette Helen Coventry as trustees of the Mike and Lyn Coventry Family Trust and Belrida Enterprises Pty Ltd as trustee of the Quinn Family Trust. Andrew Coventry was not a party. By the deed, made on 24 March 1993, Charter Pacific agreed to buy some shares in Evtech from other parties to the deed and to lend money to Evtech. The representations made by the Coventry brothers were later found to have been misleading and deceptive. The money which Charter Pacific lent to Evtech under the deed was not repaid. Some further money which Charter Pacific lent to Evtech was likewise not repaid. The shares that Charter Pacific acquired proved ultimately to be worthless.

9 Both the brothers Coventry were made bankrupt in 1994 and both were discharged from bankruptcy in 1997.

The proceedings below and the appeal to this Court

10 In June 1994, Charter Pacific commenced an action in the Supreme Court of Queensland against a number of parties. Andrew Coventry was named as fifth defendant. Michael Coventry and Lynette Helen Coventry were sued "as trustees of the Mike and Lyn Coventry Family Trust". It is convenient to refer to Michael and Lynette as the Coventry Trustees.

11 The action came to trial in 2000, that is to say after the discharges of Andrew and Michael Coventry from bankruptcy. The trial lasted 157 hearing days spread over a period of about 18 months.

12 As ultimately formulated in a further Amended Statement of Claim that was delivered during the trial of the action, Charter Pacific claimed against the Coventry Trustees and against Andrew Coventry damages for what were described as "misrepresentations, misleading and deceptive conduct and/or breaches of contract". Various other claims were made against other parties to the proceeding but their detail need not be noticed.

13 Andrew Coventry and the Coventry Trustees denied the claims made. They denied that there had been any misrepresentation and denied that Charter Pacific had suffered loss. In addition, they alleged that the claims made against Michael Coventry (as one of the Coventry Trustees) and against Andrew

Coventry were provable debts from which they had been discharged by operation of law pursuant to s 153(1) of the *Bankruptcy Act* 1966.

14 The primary judge (Fryberg J) held[7] that Charter Pacific had made good its allegations of misleading or deceptive conduct contrary to s 995(2) of the Corporations Law. His Honour also held that Charter Pacific's claims against Michael Coventry (as trustee) and against Andrew Coventry for damages for that contravention were not claims for a debt provable in bankruptcy.

15 The Coventry Trustees and Andrew Coventry appealed to the Court of Appeal of Queensland. Their appeal was dismissed[8]. The Court of Appeal, following the decision of the Court of Appeal of Victoria in *Aliferis v Kyriacou*[9], concluded[10] that a claim arises by reason of a contract or promise only if a contract or promise is an essential element of the cause of action. Here, although Charter Pacific suffered the damage it claimed because it had performed its obligations under the deed (or its subsequent agreement to make further advances), the Court of Appeal held[11] that a contract or promise was not an essential element of Charter Pacific's claim. Rather, the claim for damages for misleading or deceptive conduct was held to be founded upon conduct anterior to and separate from the making of the deed or subsequent agreement for further advances.

16 By special leave, the Coventry Trustees and Andrew Coventry appealed to this Court. Shortly before the date fixed for oral argument of the appeal, Michael Coventry was again made bankrupt. The Court was told that his trustee in bankruptcy was notified of the pendency of the appeal, and of the date fixed for oral argument, but when the appeal was called on for hearing there was no appearance for the Coventry Trustees or for Michael Coventry's trustee in bankruptcy. Provision was made for the Coventry Trustees and Michael

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**7** *Charter Pacific Corporation Ltd v Belrida Enterprises Pty Ltd* [2002] QSC 254.

**8** *Charter Pacific Corporation Ltd v Belrida Enterprises Pty Ltd* (2003) 179 FLR 438.

**9** (2000) 1 VR 447.

**10** (2003) 179 FLR 438 at 440 [4] per McMurdo P, 452-454 [49]-[53], 457 [66] per Jerrard JA, 461 [81] per White J.

**11** (2003) 179 FLR 438 at 440 [4] per McMurdo P, 457 [66] per Jerrard JA, 461 [81] per White J.

Coventry's trustee in bankruptcy to make submissions in writing but they did not. The appeal of the Coventry Trustees should stand dismissed for want of prosecution. It will be necessary to deal later with Charter Pacific's submission that it should have an order for costs against the Coventry Trustees. Subject to that, it is convenient to refer to Andrew Coventry in the balance of these reasons as if he were the only appellant.

The *Bankruptcy Act* 1966

17 The central provision of the *Bankruptcy Act* 1966 to which attention must be given in this appeal is s 82 and its definition of the concept of debt provable in the bankruptcy. It is upon that concept that the provisions for the effect of discharge from bankruptcy, found in s 153, and the provisions for protection from enforcement of remedies by creditors, found in s 58(3), both hinge.

18 If Charter Pacific's claim for damages for contravention of the statutory prohibition of misleading or deceptive conduct was a debt provable in the appellant's bankruptcy, Charter Pacific's action in the Supreme Court of Queensland was commenced in contravention of s 58(3) and the appellant's discharge from bankruptcy operated to release him from the claim[12]. (It was not suggested that any of the exceptions from release provided by s 153(2) was engaged.)

19 What are debts provable in bankruptcy is identified in s 82. Although the central provision that must be considered is sub-section (2) (and its provision that "[d]emands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy") it is necessary to set out the whole of the section as it stood at the time Charter Pacific commenced its action in the Supreme Court of Queensland[13]:

> "**(1)** Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he may become subject before his

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**12** *Bankruptcy Act* 1966, s 153(1).

**13** Section 82 was later amended by the *Bankruptcy Legislation Amendment Act* 1996 (Cth) in two respects. Item 182 of Sched 1 amended s 82(1A) in a way that is not material; Items 1 to 4 of Sched 2 introduced gender neutral language throughout the Act's provisions.

discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his bankruptcy.

**(1A)** Without limiting the generality of subsection (1), debts and liabilities referred to in that subsection shall be taken to include a debt or liability by way of the whole or a part of:

(a) a periodical sum that became payable by the bankrupt before, but not more than one year before, the date of the bankruptcy under a maintenance agreement or maintenance order (whether entered into or made, as the case may be, before or after the commencement of this subsection); and

(b) a lump sum (whether payable in one amount or by instalments) that became payable by the bankrupt before the date of the bankruptcy under a maintenance agreement or maintenance order (whether entered into or made, as the case may be, before or after the commencement of this subsection).

**(2)** Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy.

**(3)** Subject to subsection (3A), penalties or fines imposed by a court in respect of an offence against a law, whether a law of the Commonwealth or not, are not provable in bankruptcy.

**(3AA)** An amount payable under an order made under paragraph 1317EA(3)(b) of the Corporations Law of a State or Territory is not provable in bankruptcy.

**(3A)** An amount payable under a pecuniary penalty order or an interstate pecuniary penalty order is provable in bankruptcy.

**(3B)** A debt is not provable in a bankruptcy in so far as the debt consists of interest accruing, in respect of a period commencing on or after the date of the bankruptcy, on a debt that is provable in the bankruptcy.

**(4)** The trustee shall make an estimate of the value of a debt or liability provable in the bankruptcy which, by reason of its being subject to a contingency, or for any other reason, does not bear a certain value.

**(5)** A person aggrieved by an estimate so made may appeal to the Court.

**(6)** If the Court finds that the value of the debt or liability cannot be fairly estimated, the debt or liability shall be deemed not to be provable in the bankruptcy.

**(7)** If the Court finds that the value of the debt or liability can be fairly estimated, the Court shall assess the value in such manner as it thinks proper.

**(8)** In this section, '**liability**' includes:

(a) compensation for work or labour done;

(b) an obligation or possible obligation to pay money or money's worth on the breach of an express or implied covenant, contract, agreement or undertaking, whether or not the breach occurs, is likely to occur or is capable of occurring, before the discharge of the bankrupt; and

(c) an express or implied engagement, agreement or undertaking, to pay, or capable of resulting in the payment of, money or money's worth, whether the payment is:

(i) in respect of amount—fixed or unliquidated;

(ii) in respect of time—present or future, or certain or dependent on a contingency; or

(iii) in respect of the manner of valuation—capable of being ascertained by fixed rules or only as matter of opinion."

20 Several features of s 82 should be noticed. Sub-section (1) identifies the debts and liabilities that are provable in bankruptcy in terms that are very wide. Sub-section (8) amplifies the width of the provision by making plain that no narrow meaning is to be given to the references in the section to "liability". Sub-section (1A) then extends the debts provable in bankruptcy to include some particular kinds of obligations: obligations arising under maintenance agreements or maintenance orders.

21 Sub-sections (2), (3), (3AA), (3A) and (3B) of s 82 identify certain kinds of liability that are not debts provable in bankruptcy. Sub-section (2) which is at

the centre of this appeal is, therefore, an exception to an otherwise broadly drawn definition of debts provable in bankruptcy.

The origin of s 82

22 On appeal to this Court, and in the courts below, both sides placed the chief weight of their argument upon an examination of several nineteenth century English decisions which were said to bear upon the construction of s 82(2). Argument took this course because the form of statutory definition of the debts provable in bankruptcy now found in s 82 of the *Bankruptcy Act* 1966 is very old. Its origins can be traced in Australia to s 81 of the *Bankruptcy Act* 1924 (Cth), the first federal bankruptcy statute, and to earlier State and colonial bankruptcy legislation[14]. Those State and colonial provisions can, in turn, be traced in origin to s 31 of the *Bankruptcy Act* 1869 (UK) (32 & 33 Vict c 71) ("the 1869 English Act"). Both the form which s 31 of the 1869 English Act took, and the nineteenth century English cases which considered its application, must be understood against the background provided by still earlier forms of English bankruptcy legislation, including the *Bankruptcy Act* 1861 (UK) (24 & 25 Vict c 134) ("the 1861 English Act").

23 The development of bankruptcy legislation in the United Kingdom, especially during the nineteenth century, reflected the shifting accommodation made from time to time between a number of competing considerations. What debtors could take advantage of the legislation? Was it to be available only to traders or to debtors more generally? Was there to be official control of the bankrupt's estate or were creditors to have control? What kinds of debt were to fall within the legislation? What was to be done about contingent obligations or unliquidated claims? These questions provoked great public debate[15] and considerable political controversy[16].

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**14** *Bankruptcy Act* 1898 (NSW), s 45; *Insolvency Act* 1915 (Vic), s 187; *Insolvency Act* 1874 (Q), s 140; *Insolvent Act* 1886 (SA), s 211; *Bankruptcy Act* 1892 (WA), s 35; *Bankruptcy Act* 1870 (Tas), s 30.

**15** See, for example, Johnes, Remarks on the late Report from the Select Committee on the Bankruptcy Act; in a letter to Lord Brougham and Vaux (1866).

**16** United Kingdom, House of Commons, *Report from the Select Committee on the Bankruptcy Act*, (1864); United Kingdom, House of Commons, *Report from the Select Committee on the Bankruptcy Act*, (1865); Lester, *Victorian Insolvency*, (1995).

24 Up to and including the Act of 6 Geo IV c 16 (1825) the rule about contingent obligations of and unliquidated claims against a bankrupt could be stated[17] as being that:

> "Where damages are contingent and uncertain, as in *some* cases of demands founded in *contract*, and in *all* cases of *torts*; where both the right to any damages at all, and also the amount of them, depend upon circumstances of which a jury alone can properly judge, and which therefore it requires the intervention of a jury to ascertain, such damages are not capable of proof under a commission [of bankruptcy]." (original emphasis)

Thereafter, however, there was what the authors of *Williams on Bankruptcy* described in their first edition[18] as "a continuous tendency to relax this rule".

25 In the *Bankruptcy Law Consolidation Act* 1849 (UK) (12 & 13 Vict c 106) provision was made for proof of some contingent debts (s 177), some contingent liabilities (s 178), and a number of particular kinds of liabilities: claims of obligees of bottomry and respondentia bonds and policies of insurance (s 174), debts not payable at the time of bankruptcy (s 172), claims by sureties or persons becoming bail (s 173), claims by annuitants (s 175) and costs of certain actions (s 181). But the first provision having particular textual connections with language of the kind now found in s 82(2) of the *Bankruptcy Act* 1966 was s 153 of the 1861 English Act.

26 That section made provision for a court acting in prosecution of a bankruptcy to direct damages to be assessed by a jury in certain cases. The amount of damage, when assessed, was provable as if it was a debt due at the time of the bankruptcy. That course could be taken if a bankrupt, "at the time of adjudication be liable, *by reason of any contract or promise*, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained" (emphasis added). This provision appears to have been treated as an enabling and not an imperative section, applying only where the amount was

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**17** Henley, *A Practical Treatise on the Bankrupt Law, as Amended by the New Act of the 6 Geo IV c 16 with an Appendix of Precedents*, (1825) (usually referred to as "*Eden on Bankruptcy*") at 121-122.

**18** Williams and Williams, *The New Law and Practice in Bankruptcy*, (1870) at 43 ("*Williams on Bankruptcy*").

disputed, not liability itself[19]. It was a provision that was soon overtaken by the 1869 English Act.

27 The 1869 English Act effected considerable changes to English bankruptcy law and it was enacted only after unsuccessful attempts at legislation in several successive sessions of Parliament[20]. Section 31 of the 1869 Act provided:

> "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.
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> Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy.
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> An estimate shall be made according to the rules of the Court for the time being in force, so far as the same may be applicable, and where they are not applicable at the discretion of the trustee, of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.
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> Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court, and the Court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such order being made such debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy, but if the Court think that the value of the debt or liability is capable of being fairly estimated it may direct such value to be assessed

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**19** *Ex parte Wilmot; In re Thompson* (1867) LR 2 Ch App 795 at 799 per Lord Chelmsford LC; *Williams on Bankruptcy* at 43.

**20** Robson, *A Treatise on the Law of Bankruptcy*, 3rd ed (1876) at 11.

> with the consent of all the parties interested before the Court itself without the intervention of a jury, or if such parties do not consent by a jury, either before the Court itself or some other competent Court, and may give all necessary directions for such purpose, and the amount of such value when assessed shall be provable as a debt under the bankruptcy.
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> 'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain, or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion."

Two observations may be made about this provision. First, there can be no doubt that s 31 of the 1869 English Act was intended to go much further than s 153 of the 1861 English Act. Secondly, it is readily apparent that s 82 of the current federal Act had its origin in s 31 of the 1869 English Act.

28 Apart from the *Bankruptcy Act* 1966 (like its immediate predecessor, the *Bankruptcy Act* 1924) breaking the provisions into several sub-sections and rearranging the order in which those provisions appear, the most notable difference between s 82 of the current federal Act and s 31 of the 1869 English Act is that the demands in the nature of unliquidated damages which are not to be provable in bankruptcy were confined in the 1869 English Act to demands "arising otherwise than by reason of a contract or promise". Reference to demands arising by reason of breach of trust first appeared in the English legislation in the *Bankruptcy Act* 1883 (UK) (46 & 47 Vict c 52) ("the 1883 English Act")[21]. As already noted, s 82(2) of the *Bankruptcy Act* 1966 refers to demands arising otherwise than by reason of a contract, promise or breach of trust, but it was not suggested that breach of trust is relevant to the present case.

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**21** s 37(1).

29 There is one other important aspect of the nineteenth century English and current federal legislation to which reference must be made – the provisions for set-off of mutual credits and dealings. The cases to which the Court was taken in the argument of this appeal can be understood only if account is taken of these provisions.

Set-off in bankruptcy

30 The history of the balancing accounts in bankruptcy and the development of the rights of set-off in bankruptcy, together with the competing theories respecting their origins, were considered by Powell JA in *Gye v Davies*[22]. For a very long time, the right of set-off in bankruptcy has not rested on the same principles as the right of set-off between solvent parties[23]. The latter right was given by the Statutes of Set-off of 1729 and 1735 (2 Geo II c 22 s 13 and 8 Geo II c 24 s 4) to prevent cross-action. Separate provision was made for set-off in bankruptcy, first in 1705 (4 & 5 Ann c 17), continued in 1732 (5 Geo II c 30), and re-enacted in 1825 (6 Geo IV c 16).

31 In *Forster v Wilson*[24], Parke B remarked that the right of set-off given by the Georgian statutes of set-off was to prevent cross-actions between solvent parties in respect of legal debts due to each in his own right. His Lordship contrasted the statutory set-off in bankruptcy as given "not to avoid cross actions, for none would lie against assignees [in bankruptcy], and one against the bankrupt would be unavailing, but to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate"[25]. The 1825 statute (6 Geo IV c 16) was a consolidating statute which replaced the various statutes which until then had set out the law of bankruptcy. Section 50 was confined to mutual credits and mutual debts but went on to say that "every Debt or Demand hereby made proveable against the Estate of the Bankrupt, may also be set off in manner aforesaid". A provision to like effect appeared as s 171 of the *Bankruptcy Law Consolidation Act* 1849.

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**22** (1995) 37 NSWLR 421 at 424-425. See also Derham, *The Law of Set-Off*, 3rd ed (2003) at §6.14-6.24.

**23** *Forster v Wilson* (1843) 12 M & W 191 at 203 per Parke B [152 ER 1165 at 1171].

**24** (1843) 12 M & W 191 at 203-204 [152 ER 1165 at 1171].

**25** (1843) 12 M & W 191 at 204 [152 ER 1165 at 1171].

32 Writing of the decisions given in this period, Derham states[26]:

> "Sometimes, when the courts held that a particular claim could not be employed in a set-off pursuant to the 1825 or the 1849 set-off section, the justification was that the demand was not provable, although this was not always the case. There are instances in which the courts instead had regard to the definition of mutual credit adopted in *Rose v Hart*[27] as a means of rejecting an argument for a set-off."

This emphasis upon the requirement of mutuality is to be seen in the later nineteenth century cases to which further reference will be made later in these reasons.

33 In the 1869 English Act the reach of the set-off provision was extended to "other mutual dealings". Section 39 provided that:

> "Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had at the time of giving credit to the bankrupt notice of an act of bankruptcy committed by such bankrupt and available against him for adjudication."

Again, the provision made in s 86 of the *Bankruptcy Act* 1966 for set-off is evidently based on the model of the 1869 English Act. Section 86 (again in the form in which it stood when Charter Pacific commenced its action) provided:

> "**(1)** Subject to this section, where there have been mutual credits, mutual debts or other mutual dealings between a person who has become a bankrupt and a person claiming to prove a debt in the bankruptcy:

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**26** *The Law of Set-Off*, 3rd ed (2003) at §7.16. He gives as an example *Abbott v Hicks* (1839) 5 Bing NC 578 [132 ER 1222].

**27** (1818) 8 Taunt 499 at 506 [129 ER 477 at 480]. See also the judgment of J D Phillips J in *Lloyds Bank NZA Limited v National Safety Council of Australia Victoria Division (In liquidation)* [1993] 2 VR 506 at 516-517.

(a) an account shall be taken of what is due from the one party to the other in respect of those mutual dealings;

(b) the sum due from the one party shall be set off against any sum due from the other party; and

(c) only the balance of the account may be claimed in the bankruptcy, or is payable to the trustee in the bankruptcy, as the case may be.

**(2)** A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the person who has become a bankrupt or at the time of receiving credit from that person, he had notice of an available act of bankruptcy committed by that person."

34 For present purposes, what is important to notice is that the set-off provisions found in both Acts are engaged where there have been *mutual dealings* between the bankrupt and another person *proving or claiming to prove a debt* in the bankruptcy. The set-off cases therefore cast light upon what debts are provable in bankruptcy. And what an examination of the nineteenth century cases will reveal is that the set-off provisions were used to extend the reach of debts provable in bankruptcy by giving to the expression "demand in the nature of unliquidated damages arising … by reason of a contract or promise" a more ample operation than the words might at first have been thought to suggest.

The nineteenth century cases

35 It is convenient to begin with *Johnson v Skafte*[28] a case much discussed in *Aliferis*. It concerned a claim by a tenant for damages for wrongful distraint of goods by the landlord. The landlord went bankrupt. Under s 153 of the 1861 English Act, was the landlord "liable, by reason of any contract or promise, to a demand in the nature of damages"? The landlord argued[29] that the claim was brought upon the implied contract for quiet enjoyment and thus was founded on an implied promise. The Queen's Bench (Lush and Hayes JJ) held[30] that such a claim was not within s 153 of the 1861 English Act. That section was said[31] to contemplate only *express* contracts.

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**28** (1869) LR 4 QB 700.

**29** (1869) LR 4 QB 700 at 702.

**30** (1869) LR 4 QB 700 at 705-706.

**31** (1869) LR 4 QB 700 at 705 per Lush J.

36 It was against the background provided by this understanding of the operation of s 153 of the 1861 English Act that the English courts approached the construction of s 31 of the 1869 English Act. In *Ex parte Llynvi Coal and Iron Co; In re Hide*[32], Mellish LJ said that:

> "The Legislature, in Bankrupt Act after Bankrupt Act, has been trying to relieve the bankrupts from both their present and future liabilities upon contracts; but up to the passing of this last Act, that had been very incompletely provided for, and by the construction which has been put on previous sections, it was found that, notwithstanding the language used by the Legislature, a bankrupt did still remain liable on a variety of contracts which he had previously entered into."

Section 31 of the 1869 English Act was thus seen as intended to spread the net of debts provable in bankruptcy very wide.

37 But what also emerges clearly from *Ex parte Llynvi Coal* and other cases of the time is that the meaning of the expression "demands … arising otherwise than by reason of a contract or promise" was determined upon an assumption that the litigious world (apart from claims for breach of trust) could be divided into claims arising in contract and other claims. This last class of other claims was identified as claims for "personal torts". The intention of the 1869 English Act was described in *Ex parte Llynvi Coal* by James LJ[33] as being that "[e]very possible demand, every possible claim, every possible liability, *except for personal torts*, is to be the subject of proof in bankruptcy, and to be ascertained either by the Court itself or with the aid of a jury" (emphasis added). Nonetheless, the legislative intention was described[34] as being that "the bankrupt is to be a freed man – freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind".

38 Particular emphasis was given in argument of the present case to *Jack v Kipping*[35]. The plaintiff was the trustee of one Kelly appointed on a bankruptcy

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**32** (1871) LR 7 Ch App 28 at 33.

**33** (1871) LR 7 Ch App 28 at 31-32.

**34** (1871) LR 7 Ch App 28 at 32.

**35** (1882) 9 QBD 113. The case is also reported at (1882) 46 LT (NS) 169, where the pleadings are set out.

petition presented by Kelly himself. The trustee claimed the unpaid balance of the price of certain shares sold to the defendant. The defendant pleaded by way of set-off and counterclaim that fraudulent misrepresentations by Kelly had induced his entry into the contract, that the shares were worthless, and that the amount of the price paid should be set-off against the balance claimed by Kelly.

39 The submissions nevertheless proceeded on the basis that unliquidated damages were involved. Counsel for the trustee submitted[36]:

> "Set-off in bankruptcy is only in respect of mutual dealings and mutual credits; and here the defendant does not show anything which amounts to mutual dealing or credit with the liquidating debtor which is provable in bankruptcy".

Counsel for the defendant countered[37]:

> "the misrepresentation and fraud here alleged is not a mere independent personal tort, but forms a mutual dealing, unliquidated damages in respect of which can be set off. This question is governed by *Peat v Jones*[38]. In that case the Master of the Rolls said: 'A contract of sale and purchase is in its nature mutual, imposing reciprocal obligations on the vendor and purchaser. Any claim arising out of the mutual dealings could be set off.'"

It is apparent that the notion of a "personal tort" was used by counsel in contradistinction to the reciprocity involved in a mutual dealing. This is apparent from the judgment of the Divisional Court of the Queen's Bench Division.

40 Mathew and Cave JJ held[39] that the claim was not for "a personal tort, but a breach of the obligation arising out of the contract of sale". The claim for damages was held able to be set off against the claim for the balance of the purchase price. This conclusion was said to be required by what had earlier been said in *Peat v Jones*[40], that "[a]ny claim arising out of the mutual dealings [between a vendor and purchaser] could be set off".

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**36** (1882) 46 LT (NS) 169 at 171.

**37** (1882) 46 LT (NS) 169 at 171.

**38** (1881) 8 QBD 147.

**39** (1882) 9 QBD 113 at 117.

**40** (1881) 8 QBD 147 at 149 per Jessel MR.

41 It is to be noted, however, that much was treated in both *Jack v Kipping* and *Peat v Jones* as turning upon whether the claims arising out of the contract of sale and purchase were mutual dealings within s 39. Little or no attention was given directly to whether the claim which it was sought to set off was to be characterised as a debt provable in the bankruptcy. Rather, the availability of set-off was treated as following from two considerations. First, mutuality of dealings was identified as arising from the relationship between vendor and purchaser, the contract of sale and purchase imposing reciprocal obligations on each party. Secondly, it was thought inequitable that a purchaser who "had an article which turns out to be worthless palmed off on him by fraudulent misrepresentations"[41] should be compelled to pay the agreed price to the trustee of the bankrupt vendor but be left to recover only as much as he could as a dividend in the estate.

42 That little attention was given in *Peat v Jones* to whether the claim to be set off was a claim to a debt provable in bankruptcy is not surprising. There the bankrupt's estate claimed the unpaid balance of the price of goods sold to the defendant and the defendant sought to set off a claim for damages for non-delivery of some of the goods and the consequences of a rise in the price of the goods. Both claim and counterclaim arose directly out of the contract.

43 By contrast, however, the counterclaim in *Jack v Kipping* was described[42] by Cave J, who gave the judgment of the Court, as a claim for unliquidated damages for fraudulent misrepresentation. To the modern eye, at least, that suggests that the claim was for the tort of deceit and not a demand arising by reason of a contract or promise. And it appears from a case note published in *The Solicitors' Journal*[43], immediately after *Jack v Kipping* was decided, that some surprise was expressed that the liability to damages for fraudulent misrepresentation could be described as a demand arising by reason of a contract or promise.

44 In this connection, as already noted, the pleading in *Jack v Kipping*[44] shows that the relevant claim to set-off was of the amount which had been paid

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**41** (1882) 9 QBD 113 at 116 per Cave J.

**42** (1882) 9 QBD 113 at 116.

**43** (1882) 26 *The Solicitors' Journal* 575.

**44** (1882) 46 LT (NS) 169 at 170.

as the price of the shares. (A further claim to set off an amount due on a bill of exchange was held[45] to be bad.) Nothing said in *Jack v Kipping* gave emphasis, however, to the fact that the claim was framed as a claim for return of what had been paid.

45 Subsequently, in *Re Giles; Ex parte Stone*[46] (a decision to which Cave J was also party) the Queen's Bench considered whether a claim for damages against the bankrupt, for fraudulent misrepresentations the bankrupt had made when director of a company, was a debt provable in the bankruptcy. The claimant alleged that the misrepresentations induced him to take up debentures in the company. It was held that the claim for damages was not a debt provable in the bankruptcy.

46 It is important to note that *Re Giles* was a case of disputed proof. There arose no question of set-off, and thus no question of mutual dealings. The decision in *Re Giles* turned immediately on the fact that, unlike *Jack v Kipping*, there was no contract between the party claiming damages and the bankrupt. That fact was held to preclude proof on the ground that the claim for unliquidated damages did not arise by reason of a contract, promise or breach of trust[47]. Cave J said that the principle was[48]:

> "that if a man is guilty of a fraud and by that means gets into his own pocket the money of persons whom he has defrauded, those persons are at liberty to prove for the amount of the money which has thus come into the hands of the man who has defrauded them. That principle does not apply here, for the benefit has not gone into the pocket of the directors, but of the company. This then is a mere unliquidated damage, which does not arise on contract, promise, or breach of trust; and as it does not arise out of fraud, as explained in *Ex parte Adamson*, it is not provable, as the judgment was not obtained until after the receiving order."

47 The reference to *Ex parte Adamson; In re Collie*[49] was to the well-known statement by James LJ to the effect that in a suit in equity for restoration of

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**45** (1882) 9 QBD 113 at 117.

**46** (1889) 61 LT (NS) 82.

**47** (1889) 61 LT (NS) 82 at 83 per Cave J.

**48** (1889) 61 LT (NS) 82 at 83.

**49** (1878) 8 Ch D 807 at 819.

money or property of which the claimant has been cheated, earmarked money or an asset which could be found in specie or traced might be the subject of a proof in bankruptcy; this was on the footing that what was admitted on the proof was an equitable debt or a liability in the nature of an equitable debt.

48 It is not necessary to examine the sufficiency of this explanation of *Jack v Kipping*. For present purposes, it is enough to recognise two points that emerge from the nineteenth century cases. First, *Jack v Kipping* is taken to have established that a claim for damages for fraudulent misrepresentation, where the claim is made by one party to a contract against another, is a demand for unliquidated damages arising by reason of a contract or promise. But the second and related point, made in *Re Giles*, is that a claim for damages for fraudulent misrepresentation which has induced the claimant to make a contract with a third party is not a demand arising by reason of a contract or promise.

49 Had *Re Giles* been a set-off case then, unlike the situation in *Jack v Kipping*, there may have been lacking the necessary mutual dealing to make the case more than one of a "personal tort". But as a case purely of disputed proof, no recourse was had to the notion of "personal tort".

50 Why should this understanding of s 31 of the 1869 English Act be carried over to the construction of s 82(2) of the *Bankruptcy Act* 1966? Again, there are two related reasons. First, the text of s 82, like its legislative ancestors, shows that not all claims are provable in bankruptcy. Some content must therefore be given to s 82(2) and its reference to demands "arising otherwise than by reason of a contract, promise or breach of trust". Secondly, any amplification or extension of the content to be given to s 82(2), beyond the immediate operation conveyed by reference to demands arising by reason of a contract or promise, is to be fixed by reference to the operation of other provisions of the statute, and particularly the set-off provisions of s 86. A claim which may be made in answer to a claim which the bankrupt estate makes for damages for breach of a contract between bankrupt and claimant may be provable. That answering claim may be provable because it arises out of the mutual dealing or bilateral relationship of contract between bankrupt and claimant. By contrast, a claim which comes from a tripartite transaction, in which the bankrupt's misrepresentation induced the claimant to make a contract with a third party, does not arise from a mutual dealing and it arises otherwise than by reason of a contract or promise.

51 It is against the background provided by these nineteenth century English cases that the Australian cases must be considered. Not only is the drafting of the relevant provisions of the *Bankruptcy Act* 1966 for all practical purposes identical to the statutory language considered in those cases, there is the same

need to work out the relationship between the provision for what debts are provable in bankruptcy (s 82) and the provision for set-off (s 86).

The Australian cases

52 Chief attention was given in argument to *Gye v McIntyre*[50], a unanimous decision of this Court and *Aliferis*[51], a decision of the Court of Appeal of Victoria. *Gye v McIntyre* concerned the set-off provisions of s 86(1) of the *Bankruptcy Act* 1966. And as already noted, s 86(1) is framed in terms very similar to those of s 39 of the 1869 English Act considered in *Peat v Jones* and *Jack v Kipping*. *Aliferis* focused directly upon whether the claim in question in that case was a debt provable in bankruptcy.

53 In addition, reference should be made to *Bank of Australasia v Hall*[52], a decision of this Court concerning the *Insolvency Act* 1874 (Q). As noted earlier, the definition of debts provable in bankruptcy found in this Act was not materially different from s 31 of the 1869 English Act. The principal point of the case concerned the preference provisions of the Queensland Act. But the reasons of some members of the Court touched upon the question of whether a claim for damages arising from the debtor's fraudulent misrepresentation inducing the creditors to enter a contract with the debtor was a provable debt. Griffith CJ[53], with whom Barton J agreed[54], and Isaacs J[55], treated *Jack v Kipping* as establishing that such a claim was provable in a bilateral case; O'Connor J[56] expressed the same conclusion but did not refer to *Jack v Kipping*.

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**50** (1991) 171 CLR 609.

**51** (2000) 1 VR 447.

**52** (1907) 4 CLR 1514.

**53** (1907) 4 CLR 1514 at 1527.

**54** (1907) 4 CLR 1514 at 1531.

**55** (1907) 4 CLR 1514 at 1548.

**56** (1907) 4 CLR 1514 at 1534, 1538.

*Gye v McIntyre*

54 *Gye v McIntyre* concerned a composition made under Pt X of the *Bankruptcy Act* 1966. Section 243 applied s 86 to a composition as if a sequestration order had been made and it is convenient, if inaccurate, to refer to the parties in *Gye v McIntyre* as the "bankrupt" and the "creditor". The bankrupt's estate had sought damages for fraudulent misrepresentation against the bankrupt's creditor. The immediate question in the case was whether the claim which the *bankrupt* sought to set off against the *creditor's* claim had to be a claim that would have been a provable debt if the creditor had gone bankrupt.

55 The Court held[57] that there was no reason to confine the operation of s 86 in this way. The Court rejected[58] the contention that support for so confining the operation of s 86 was to be found in *Jack v Kipping*. The Court held[59] that *Jack v Kipping*, "properly understood, recognizes that a claim against the bankrupt can be set off under s 86 only if it would, but for the set-off, be provable in the bankruptcy". The Court concluded[60] that *Jack v Kipping* should be understood as holding that the claim made by the creditor in that case was a claim for a provable debt because it arose "by reason of contract".

56 It is as well to begin the consideration of *Gye v McIntyre* from some established premises about the operation of set-off in bankruptcy. As already remarked in these reasons, to achieve the purpose of doing "substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate"[61], a set-off provision like s 86 should be given the widest possible scope[62]. Nonetheless, set-off is to be confined within limits. One of the limits is that creditors of the bankrupt should not be disadvantaged by allowing set-off where the debts, credits or other dealings were not genuinely mutual as a matter

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**57** (1991) 171 CLR 609 at 628.

**58** (1991) 171 CLR 609 at 631.

**59** (1991) 171 CLR 609 at 631.

**60** (1991) 171 CLR 609 at 631-632.

**61** *Forster v Wilson* (1843) 12 M & W 191 at 204 [152 ER 1165 at 1171].

**62** *Gye v McIntyre* (1991) 171 CLR 609 at 619; *Day & Dent Constructions Pty Ltd v North Australian Properties Pty Ltd* (1982) 150 CLR 85 at 108; *Eberle's Hotels and Restaurant Company v Jonas* (1887) 18 QBD 459 at 465.

of substance. One example of such a case (which may or may not have had relevance to the position of the Coventry Trustees and particularly Michael Coventry) is where the beneficial entitlement and liability in respect of the countervailing credits and debits did not correspond[63].

57 The reasons of the Court in *Gye v McIntyre* pointed out[64] that s 86, in its terms, makes plain that the section operates regardless of whether the result of a set-off would give a balance in favour of or against the bankrupt. As cases like *Peat v Jones* show, the section extends to a person who seeks to answer a claim brought by the trustee in bankruptcy by asserting a set-off of a claim otherwise provable in the bankruptcy[65] but who has not lodged a proof of debt.

58 Finally, the "mutual dealings" which may give rise to a set-off include commercial transactions and the negotiations leading up to them. Thus, "[w]here a fraudulent misrepresentation is made in the course of such negotiations, the fraudulent misrepresentation is itself part of the relevant 'dealings'"[66].

59 Both *Jack v Kipping* and *Gye v McIntyre* were concerned with the treatment of mutual claims between a bankrupt and a debtor to the estate of the bankrupt. That is, they were bilateral cases. Neither decision said anything about the tripartite case, where there were no mutual dealings. And the present case is of that latter kind.

60 This case turns immediately not upon the set-off provision in s 86 but upon the question of the discharge of Andrew Coventry from bankruptcy and his release from provable debts. But, in any event, s 86 could have had no application to the present case. Because the appellant was not a party to the deed or subsequent agreement which his conduct was found to have induced Charter Pacific to make, he could have no claim against Charter Pacific which arose out of the dealings between them. Charter Pacific was not a debtor to the bankrupt estate of the appellant.

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**63** *In re City Life Assurance Co* [1926] Ch 191 at 216-217; *Hiley v Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468 at 497; *Gye v McIntyre* (1991) 171 CLR 609 at 619.

**64** (1991) 171 CLR 609 at 621.

**65** *In re Daintrey; Ex parte Mant* [1900] 1 QB 546 at 549; *Gye v McIntyre* (1991) 171 CLR 609 at 619.

**66** *Gye v McIntyre* (1991) 171 CLR 609 at 625.

61 It follows that s 86 provides no basis upon which to conclude that the claim Charter Pacific made against the appellant fell outside the exceptional class of claims fixed by s 82(2) as not provable in bankruptcy. The claim which Charter Pacific made was not a "demand … arising … by reason of a contract [or] promise".

62 That is, although a claim for damages for fraudulent misrepresentation brought by one contracting party against another may be a debt provable in the bankruptcy of the latter party, as a demand in the nature of unliquidated damages arising by reason of contract, a similar claim arising out of a tripartite transaction is not. And contrary to the submission which necessarily underpinned the appellant's case, it does not follow, whether from the text of s 82(2), from the nineteenth century cases, or from *Gye v McIntyre*, that *any* and every claim for damages for fraudulent misrepresentation inducing another to enter a contract – whether with the bankrupt or a third party – is a debt provable in bankruptcy as arising by reason of contract. And it is only if this more general proposition could be established that the appellant would begin to make good his argument that the claim made against him for damages for misleading or deceptive conduct was for a debt provable in his bankruptcy.

63 It is desirable at this point to consider what was said, in the Court of Appeal of Victoria, in *Aliferis*[67]. As noted earlier, extensive reference was made to *Aliferis* in the decisions below in the present matter.

*Aliferis v Kyriacou*

64 *Aliferis* was a bilateral case. It concerned a claim, pleaded in both contract and tort, by a client against a solicitor alleging negligent performance of a retainer. The solicitor entered a deed of arrangement under Pt X of the *Bankruptcy Act* 1966 but the client (the plaintiff in the action) did not participate in the arrangement. Was the client's claim a debt provable in bankruptcy?

65 The Court of Appeal of Victoria held that the claim was one arising otherwise than by reason of a contract and thus not a claim provable in the solicitor's bankruptcy. The Court held[68] that a claim arises by reason of a

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**67** (2000) 1 VR 447.

**68** (2000) 1 VR 447 at 452 [14] per Brooking JA, 453 [16] per Phillips JA, 463 [46] per Charles JA.

contract or promise only if a contract or promise is an "element" or "essential element" of the cause of action. Charles JA, with whose reasons the other members of the Court agreed, held[69] that the pleading of the contract of retainer was not an essential element of the cause of action in negligence.

66 Two points must be made about this conclusion and the reasoning underpinning it. First, the decision appears to proceed from an assumption that, despite the way the case was pleaded, the claim actually pursued was framed only as a claim in tort[70]. It is not necessary to examine whether, in the particular circumstances of that case, the assumption was well founded. Even if the assumption was well founded, *Jack v Kipping* reveals that framing a claim as a claim in tort does not conclude the question whether the demand arises by reason of a contract or promise.

67 The second and more important point is that the test stated in *Aliferis*, and applied by the Court of Appeal in the present matter, to decide whether a demand arises by reason of a contract or promise does not satisfactorily reflect the meaning to be given to s 82(2). It should not be adopted or applied.

68 The test stated in *Aliferis* does not give any weight to the need to read s 82(2) in the light provided by the set-off provisions of s 86. It is a test which does not distinguish between bilateral and tripartite cases. It treats as the critical question whether the claimant must plead the existence of a contract, any contract. It treats as irrelevant whether the bankrupt was a party to the contract.

69 Further, to express the relevant test in the way it was in *Aliferis* places heavy emphasis upon the way in which the particular claim is or could be pleaded. That may serve only to mask what is to be understood by the reference to "element" or "essential element". Thus, in the present case, this formulation of the test provoked debate about whether the manner in which Charter Pacific alleged that it had suffered damage (by performance of contractually stipulated obligations) was an "essential element" of the claim for damages for misleading or deceptive conduct. Approaching the problem in that way shifts attention away from the statutory test to subsidiary questions about proper pleading practice.

70 What is revealed by the analysis of decided cases recorded in the preceding pages of these reasons is that s 82(2) and its legislative predecessors

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**69** (2000) 1 VR 447 at 463 [46].

**70** (2000) 1 VR 447 at 453 [19] per Phillips JA.

stopped short of providing that "the bankrupt is to be a freed man – freed not only from debts, but from contracts, liabilities, engagements, and contingencies of *every* kind" (emphasis added)[71]. Some claims stand outside the reach of the statute. Although consideration of the application of the set-off provision required the inclusion, within the class of debts provable in bankruptcy, of those claims for unliquidated damages for fraudulent misrepresentation which had induced the making of a contract between the bankrupt and the claimant, the words of the section were not and are not to be stretched to encompass every other kind of claim which a person may have against the bankrupt.

71 The claim in the present matter was a statutory claim. The relevant question is whether that claim is a demand arising "otherwise than by reason of a contract [or] promise". What the fraudulent misrepresentation cases of *Jack v Kipping* and *Re Giles* show is that claims of the kind made in this case (for unliquidated damages for misleading or deceptive conduct which induced the party misled to make a contract with a party *other than the bankrupt*) are claims arising otherwise than by reason of a contract. They are claims of a kind which s 82(2) provides are not provable. By contrast, however, claims for unliquidated damages for misleading or deceptive conduct inducing the making of a contract with the bankrupt are claims arising by reason of a contract. They are provable. To the extent to which *Aliferis* held to the contrary, it should be overruled.

72 As noted at the start of these reasons, this result is anomalous. But the anomaly of the result stems ultimately from adopting the language used in the 1869 English Act without making any later accommodation not only for the provision of statutory causes of action of the kind at issue in this case but also for the differential outcomes revealed so long ago by the decisions in *Jack v Kipping* and *Re Giles*.

Conclusion and Orders

73 As earlier indicated, the appeal of the first appellant should be dismissed for want of prosecution. Charter Pacific contended that it should have an order for costs against the first appellant. An order for costs could not be made against Michael Coventry if the claim which Charter Pacific made against him, as one of the Coventry Trustees, was a proceeding in respect of a provable debt. Without the leave of a court having jurisdiction in bankruptcy under the *Bankruptcy Act* 1966, and on such terms as that court thinks fit, Charter Pacific may take no fresh

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**71** *Ex parte Llynvi Coal and Iron Co; In re Hide* (1871) LR 7 Ch App 28 at 32.

step in such a proceeding[72]. And if no order could be made against one of two trustees, it is not immediately apparent why an order should be made against the other trustee. Indeed to make an order creating a liability in respect of which that other trustee would apparently have a right to contribution or indemnity from the bankrupt may itself present some question about the application of the *Bankruptcy Act* 1966.

74 In the particular circumstances of this case, where no substantial argument has been advanced on the hearing of the appeal on the issues just mentioned, or on the issue of whether the claim against the Coventry Trustees was a claim for a debt provable in the bankruptcy of Michael Coventry, and where an order for costs should be made against the second appellant, Andrew Coventry, no order for costs should be made against the Coventry Trustees. The appeal of the second appellant should be dismissed with costs.

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**72** *Bankruptcy Act* 1966, s 58(3).

75 KIRBY J. The joint reasons[73] in this appeal[74] acknowledge that the conclusion reached by their Honours is "anomalous". Reaching an anomalous conclusion, in the interpretation of a law of general application throughout the Commonwealth, enacted by the Federal Parliament in 1966, does not represent a congenial outcome. At least, it is not congenial to me because of the purpose, ordinarily to be attributed to the Parliament, that the laws that it enacts will be rational and designed to advance a coherent and discernible policy.

76 Textual mistakes, intractable ambiguities and unthinking re-enactments of past legislation can sometimes bring the judicial interpreter to a conclusion that anomaly is inescapable and cannot be repaired by a court[75]. The danger of copying language in Australian legislation, originally enacted far away and long ago, may be seen in this appeal in an acute form. The assumptions of the original legislative language (such as the postulate that demands arising "by reason of a contract [or] promise" are readily identifiable and easily distinguished from other demands, such as in tort) have been shaken by a century that has involved the further development of legal doctrine[76]. Indeed, so substantial are the changes of legal understanding that have occurred in the interim that a contemporary Australian judge, reading words borrowed from English statutes of the nineteenth century, inevitably sees things differently than would have been the case when those words were read by judges in England at that time.

77 Faced by this dilemma, courts, performing their interpretative function, may sometimes engage in a little careful surgery, in an attempt to avoid an interpretation that they decide is so inconvenient, contrary to policy and inimical to legal history, that it could not have been intended[77]. However, in the present

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**73** Reasons of Gleeson CJ, Gummow, Hayne and Callinan JJ ("the joint reasons") at [7], [72].

**74** From the orders and judgment of the Court of Appeal of the Supreme Court of Queensland in *Charter Pacific Corporation Ltd v Belrida Enterprises Pty Ltd* (2003) 179 FLR 438 at 460 [80].

**75** See discussion in *R v Lavender* (2005) 79 ALJR 1337 at 1350 [69]; 218 ALR 521 at 537-538.

**76** See eg *Groom v Crocker* [1939] 1 KB 194 at 205; *Hawkins v Clayton* (1988) 164 CLR 539 at 574; cf *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387 at 440; (1935) 54 CLR 49 (PC).

**77** See eg *R v Lavender* (2005) 79 ALJR 1337 at 1362 [133]-[135]; 218 ALR 521 at 555; cf *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 283; *Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292 at 299-300, 301, 302.

case, such surgery is impossible. The borrowing of the earlier statutory language is clear. In the conventional sense, it is intentional[78]. In these circumstances, a dilemma of a different kind is presented. Should the re-enacted statutory language simply be given its historical meaning? Or, as an Australian law of contemporary application, should the courts struggle to find a new principle in the language chosen, given that such language is of daily application in countless circumstances of claims against bankrupts arising throughout Australia for which, if possible, the law should provide a clear, simple and modern rule of ready application? Such is the dilemma presented by this appeal.

The facts and legislation

78 *The facts*: Charter Pacific Corporation Limited ("Charter Pacific") brought proceedings in the Supreme Court of Queensland against, among others, Michael Coventry and Lynette Coventry (as trustees of the Mike and Lyn Coventry Family Trust) and against Mr Andrew Coventry ("the Coventrys"). The proceedings alleged misleading or deceptive conduct by the Coventrys, contrary to the Corporations Law (Q), s 995(2). Such contravention was found by the primary judge after a trial that astonishingly lasted 157 days. In August 2002 judgment was given at trial in favour of Charter Pacific.

79 The judgment comprised unliquidated damages, calculated pursuant to s 1005 of the Corporations Law, in the sum of $604, 634.30[79]. It was held that the loss and damage was suffered by Charter Pacific when it lent $400,000 to Evtech Pty Ltd, pursuant to a deed, the entry into (and performance of) which was induced by misleading or deceptive representations made by the Coventrys[80]. Charter Pacific was also held to have suffered loss and damage consequential upon the making of the loan when later it made further advances to Evtech Pty Ltd totalling $204,634.30[81].

80 Before Charter Pacific's case against the Coventrys was finalised, both Mr Andrew Coventry (in March 1994) and Mr Michael Coventry (in August 1994) were made bankrupt. Each was later discharged from bankruptcy, respectively in April 1997 and September 1997. The issue then presented was whether Charter Pacific could continue its legal proceedings against the

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**78** Joint reasons at [22]-[28] referring to English and Australian antecedents to the *Bankruptcy Act* 1966 (Cth), s 82.

**79** *Charter Pacific Corporation Ltd v Belrida Enterprises Pty Ltd* [2002] QSC 254 at [826]. See also (2003) 179 FLR 438 at 443 [12].

**80** [2002] QSC 254 at [573]. See also (2003) 179 FLR 438 at 442-443 [11].

**81** [2002] QSC 254 at [775]. See also (2003) 179 FLR 438 at 443 [12].

Coventrys in respect of the judgment debt, at least without first having obtained leave to do so from the Federal Court of Australia[82].

81 In the events that had occurred, was Charter Pacific confined, in the pursuit of the debt or liability which it had alleged against the Coventrys (and against whom it had recovered judgment), to proving against them in their respective bankruptcies? Or was there no relevant legal impediment to the recovery of the damages awarded against the Coventrys so that, when they were later discharged from their respective bankruptcies, they were again exposed to recovery proceedings based on such judgment, without the need for the leave of the Federal Court or anyone else?

82 The position of Mr Michael Coventry was further complicated by a supervening second bankruptcy[83]; by his non-appearance on the return of his appeal to this Court; and by the disclaimer by his trustee of any involvement in procuring his dismissal from the proceedings[84]. This appeal has proceeded as if it was concerned with the legal rights of Mr Andrew Coventry and with his rights alone[85].

83 *The legislation*: The provisions of the *Bankruptcy Act* 1966 (Cth) ("the Bankruptcy Act"), and of predecessor and similar provisions of earlier English and Australian legislation, are set out in the joint reasons. There too is described the way in which provisions similar to the key sub-sections of s 82 of the Bankruptcy Act found their way into bankruptcy statutes enacted in the United Kingdom in the nineteenth century, as that country moved to ameliorate the harsh laws previously providing for the punishment of debtors by imprisonment as a normal sanction to ensure that debts were paid and legal liabilities discharged[86].

84 Mr Andrew Coventry, effectively the only moving party in this Court (whom I too shall call "the appellant"[87]), submitted, correctly, that the question of

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**82** *Bankruptcy Act* 1966 (Cth), s 58(3)(b); cf *Capel v Caram Finance Australia Ltd* [2000] 2 Qd R 126.

**83** Joint reasons at [16].

**84** See [2005] HCATrans 138 at 274.

**85** Joint reasons at [16].

**86** Holdsworth, *A History of English Law*, vol 8 at 229-245; vol 11 at 446-447, 595-600; vol 13 at 376-378; vol 15 at 97-100. See also *Storey v Lane* (1981) 147 CLR 549 at 563 per Aickin J.

**87** Joint reasons at [16].

fundamental importance for resolution in this appeal, was the meaning of a "provable debt" within the applicable provisions of the Bankruptcy Act.

85 It is not my purpose to repeat the key provisions of the Bankruptcy Act or of the Corporations Law from which the solution to the problem in this appeal must be derived. However, it is worth repeating the following extracts:

86 By s 153(1), the Bankruptcy Act relevantly provided[88]:

> "Subject to this section, where a bankrupt is discharged from a bankruptcy, the discharge operates to release him from all debts … provable in the bankruptcy".

87 By s 5(1) of the Bankruptcy Act, "debt" is defined to include "liability". On the face of things, therefore, when the appellant was discharged from his bankruptcy, in April 1997[89], such discharge operated to release him from all debts and liabilities, including any that were outstanding to Charter Pacific, provided such debts and liabilities were "provable in the bankruptcy".

88 To this extent, s 153(1) of the Bankruptcy Act expresses one of the primary rules and central purposes for which, under the Constitution[90], the law of bankruptcy is afforded in Australia. This is to release discharged bankrupts from the potentially crushing burden of inescapable debts and liabilities; but under conditions of conforming to the requirements of bankruptcy and submitting to the disadvantages that are still inherent in the making and then administering of bankruptcy orders.

89 To ascertain whether the discharge has the postulated consequence, it is necessary to discover whether the debts (and liabilities) from which discharge is claimed were "provable in the bankruptcy". Section 82 of the Bankruptcy Act affords the answer to that question. It provides, relevantly:

> "(1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he may become subject before his discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his bankruptcy.

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**88** These reasons refer to the Bankruptcy Act as it stood at the time of the appellant's Bankruptcy. The Act was amended in 1996 to provide for gender neutral language: see joint reasons at [19] fn 13.

**89** (2003) 179 FLR 438 at 444 [15].

**90** Constitution, s 51(xvii).

...

(2) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy."

90 On the face of things, the debt or liability of the appellant to Charter Pacific was one, at least, that fell within the words of s 82(1) of the Bankruptcy Act. Whether as a result of representations made before, or promises contained within, the deed pursuant to which Charter Pacific made its advances to Evtech Pty Ltd, the debts and liabilities thereby incurred were at least "liabilities" to which the appellant, later made bankrupt, was subject at the date of his bankruptcy in March 1994. The obligation was incurred before the date of the bankruptcy. It follows therefore that it was seemingly "provable in his … bankruptcy" within s 82(1) of the Bankruptcy Act.

91 It was common ground that Charter Pacific had done nothing to prove its debt in the appellant's bankruptcy. It took no steps to recover there, with other creditors of the appellant, proportionately as the administration of the bankruptcy permitted. However, this fact is ultimately irrelevant as a matter of law. A creditor may not, by lethargy, indifference or attempting to control events to its own advantage, determine the existence, or absence, of legal rights in and beyond bankruptcy. An election of remedies on the part of a creditor may prove significant[91]. But the words in s 82(2) of the Bankruptcy Act are "provable in ... bankruptcy". The search is thus for legal entitlements and not, as such, for what the creditor has actually done[92]. So much was not contested.

92 *Analysis of s 82(2)*: This brings the analysis to s 82(2) of the Bankruptcy Act, which contains the provisions determinative of this appeal. Several points may be made immediately concerning this sub-section. It starts not with a reference to causes of action or even the consequential "debts and liabilities". It addresses "demands". This is a less precise word than the others that might have been chosen. The word casts a wider net. The width of that net is made even clearer by the introduction of a fiction. It is sufficient if the "demands" are "in the nature of" unliquidated damages. They may not actually *be* for unliquidated damages so long as their *nature* is sufficiently analogous. It is this wide expression that, Charter Pacific claimed, attracted the *prima facie* operation of

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**91** At the relevant time, see eg Bankruptcy Act, s 228 (Deed of assignment to bind all creditors), s 233 (Deed of arrangement to bind all creditors). In the current Act, see s 229 (Personal insolvency agreement to bind all creditors).

**92** This is clearly the position in the United States: see Prosser, *Selected Topics on the Law of Torts*, (1954) at 449. See also Guest, "Tort or Contract?", (1961) 3 *University of Malaya Law Review* 191 at 196.

the exclusion of its demand for damages pursuant to s 1005 of the Corporations Law. Even this analogy might be conceded by the appellant. But the ultimate issue is then reached. This is whether Charter Pacific's demands on the appellant were "not provable" because such demands arose "otherwise than by reason of a contract [or] promise". It was never suggested that the demand arose by reason of breach of trust, so that that possible ground of inclusion was always disregarded.

93 So what is the meaning and purpose of "demands ... arising otherwise than by reason of a contract [or] promise"? Why is that provision included in s 82(2) of the Bankruptcy Act as an exception to the normal exclusion from the capacity to prove demands, as here, "in the nature of unliquidated damages"? Why did the legislature (and specifically the Australian Federal Parliament as recently as 1966), exclude demands in the nature of unliquidated damages from provability? Why did the Parliament exempt from this exclusion such demands where arising "by reason of a contract [or] promise"? What does the reason for such demands mean in this context?

94 Given that most, if not all, events in life have multiple "reasons", (and especially the complex events from which demands *inter partes* in litigation may arise), what is to be done where some relevant reasons appear connected with a contract or promise but others are wholly unconnected with such sources of obligation? How is such a case to be classified for the purposes of s 82(2) of the Bankruptcy Act?

95 Accepting the possibility of multiple reasons, giving rise to the relevant unliquidated damages demands, how is the "true" or "relevant" reason to be characterised by a court? Putting this in a concrete way, in a case such as the present, where various classifications compete for acceptance, how is one to differentiate the "demands" made by Charter Pacific on the appellant? May such "demands" be classified as "arising otherwise than by reason of a contact [or] promise"? Did they, for example, arise *by reason* of the earlier misrepresentations found to have been made by the appellant to Charter Pacific? Is it sufficient that those earlier misrepresentations were made, so that Charter Pacific is excused in law from the obligation of seeking to prove such a demand in the nature of unliquidated damages arising under the Corporations Law, in the appellant's bankruptcy? Or is it enough (as the appellant asserts) that one of the sources from which the demand of Charter Pacific against him arose was the contract and promise constituted by the deed which was both pleaded and relied upon factually to make good Charter Pacific's demand on the appellant and to establish the appellant's debt and liability to Charter Pacific?

96 Ascertainment of the legal entitlements and obligations of parties affected by the Bankruptcy Act, upon which hang decisions of no little moment, should not depend upon the resolution of such nebulous questions. This is so because, in particular factual circumstances, such questions may easily attract differing

responses. The diversity of opinions in cases of this kind is evident in courts of appeal and amongst primary judges. It was such diversity[93] that attracted the grant of special leave in the present proceedings[94].

97 The preferable way to resolve difficulties such as have arisen in this and earlier cases is by the enactment of clarifying legislation. However, in default of such legislation, it is the duty of courts to construe the applicable law and to elaborate its meaning by reference to the language of the text and such other aids as are available to assist in fulfilling that task. The statutory words, awkward though they may be, cannot be wished away[95]. The courts, ultimately in Australia this Court, must say what the Parliament meant. They must derive that meaning as best they can from the language used in the statute, given effect as far as possible to the apparent purpose of the law.

98 The difficulty in the present case is that the language is unclear. It reflects partly outdated legal notions. The purpose or policy of the law is also unclear. Opportunities to clarify it have not been availed of. What, then, is the best meaning that this Court can give to the contested language of the Bankruptcy Act applicable to this case?

Doubt and the test in *Aliferis*

99 *Approach in Aliferis*: The starting point for ascertaining, and expressing, an acceptable approach to the exempting phrase in s 82(2) of the Bankruptcy Act is an appreciation of how the ground shifted in this case once it reached this Court.

100 In the Queensland Court of Appeal, the judges resolved the problem of the meaning and application of s 82(2) of the Bankruptcy Act by applying the reasoning of the Victorian Court of Appeal in *Aliferis v Kyriacou*[96]. In that case, the Victorian court held that a claim arose "by reason of" a contract or promise only when the contract or promise constituted an essential element of the cause

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**93** For example, *Re Pyramid Building Society (In Liq)* (1991) 6 ACSR 405 at 410 per Vincent J; (reversed on other grounds) (1992) 8 ACSR 33; *Chittick v Maxwell* (1993) 118 ALR 728 at 738-739 per Young J; *Re Sharp; Ex parte Tietyens Investments Pty Ltd (In Liq)* [1998] FCA 1367 per Weinberg J; *Aliferis v Kyriacou*, unreported, Supreme Court of Victoria, 23 June 1998, Beach J; reversed on appeal (2000) 1 VR 447.

**94** [2004] HCATrans 445 at 12.

**95** cf *R v Lavender* (2005) 79 ALJR 1337 at 1357 [107]; 218 ALR 521 at 548.

**96** (2000) 1 VR 447.

of action. A claim based on a tortious duty of care, did not arise "by reason of" a contract, even if a contract was pleaded for the purpose of establishing the tort[97]. The relevance of this holding for the present case was clear. Although a contract or promise undoubtedly existed, as part of the background facts, and had been pleaded by reference to the deed executed by the parties, the misrepresentation, which was the source from which the demand in the nature of unliquidated damages arose in law, existed separately from, anterior to and sufficiently in the misrepresentations pleaded and proved. It was not necessary to the cause of action to postulate the deed.

101 The fact that the deed constituted part of the background circumstances – or even that it might separately give rise to a demand in the nature of unliquidated damages – did not render the demand one "provable in bankruptcy". Jerrard JA, in the Queensland Court of Appeal embraced the approach adopted in *Aliferis*. He did so because of[98]:

> "the advantages of historical consistency, consistency with the right of election long recognised to exist [and] … inconsistent with the appellant's 'underlying transaction' approach. A problem with that approach is that it assumes what the argument seeks to prove, namely that claims for misrepresentations necessarily arise out of a (subsequent) underlying transaction rather than out of the negotiations leading to it. The appellant's alternative way of putting its case, namely its version of what constitutes an essential element of a cause of action, elevates a matter of normally necessary evidence (of how damage was suffered) into an essential element of the cause of action."

102 At the special leave hearing, and again in the written and oral submissions before this Court, Charter Pacific defended the *Aliferis* decision. The appellant attacked it as erroneous.

103 Now, in this Court, the joint reasons are critical of *Aliferis* – to such an extent that they hold that the holding in that case should be overruled in so far as it suggests that demands for unliquidated damages for misleading or deceptive conduct, which induced the party misled to make a contract, are of a type that *are not* provable whereas claims for unliquidated damages for misleading or

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**97** (2000) 1 VR 447 at 451 [9], 452 [14]-[15], 453 [18], 455 [22], 463 [46], 464 [51].

**98** 2003) 179 FLR 438 at 457 [66]. White J at 461 [81] agreed with Jerrard JA. McMurdo P at 440 [4]-[5] followed *Aliferis* in the Court of Appeal of Victoria on the basis of the principles stated by this Court in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492-493.

deceptive conduct, inducing the making of a contract with the bankrupt, are claims arising "by reason of" a contract and *are* provable in the bankruptcy[99].

104 *Suggested relevance of set-offs*: To sustain this conclusion, the joint reasons place very considerable emphasis upon the set-off provision of the Bankruptcy Act, contained in s 86(1). This was not an emphasis relied upon in the arguments of Charter Pacific either at trial or in the Court of Appeal. The result is that, on a substantially new point, derived from the history of and provisions on set-off, a conclusion is reached in the joint reasons concerning the ambit of debts and liabilities provable in a bankruptcy more generally.

105 It is not unknown for parties to succeed in this Court upon new points, overlooked[100] or even disclaimed in the courts below. However, when this occurs and this Court effectively says that six appellate judges were in error in their approach, it is essential to justify the criticism. Especially is this so where, as in this case, the alternative hypothesis, propounded in the joint reasons, appears at first blush to allow a *particular* provision of the Bankruptcy Act dealing with the special circumstances of set-off (s 86(1)) to drive the meaning of *general* provisions of the Bankruptcy Act intended to deal with "all debts and liabilities" and all "demands" of the identified character.

106 It may be that the set-off provisions in the Bankruptcy Act have a much larger significance for the meaning of s 82(2) than was previously appreciated in this case or in cases generally. But if this is so, it is essential that the fact be convincingly demonstrated. Not least, because s 86 of the Bankruptcy Act requires that, but for the set-off effected by it, the claim against the bankrupt must be provable under s 82[101]. It does not require that the bankrupt's claim against the creditor must be in the nature of a "provable debt"[102].

107 It is the shifting of the forensic ground, from the foundation that supported Charter Pacific's demand against the appellant in the Supreme Court of Queensland that causes me to write separately. The provisions of s 82 are, it is true, unclear. The criticism that the decision in *Aliferis* was unduly dependent on the pleading of the demand in issue is well made[103]. But the meaning of the

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**99** Joint reasons at [71].

**100** eg *Giannarelli v The Queen* (1983) 154 CLR 212 at 217, 221; *Giannarelli v Wraith* (1988) 165 CLR 543 at 553-554; *Fingleton v The Queen* (2005) 79 ALJR 1250 at 1282 [161]; 216 ALR 474 at 517.

**101** *Gye v McIntyre* (1991) 171 CLR 609 at 621.

**102** (1991) 171 CLR 609 at 628-629.

**103** Joint reasons at [66].

exception to non-provable demands in the nature of unliquidated damages contemplated by s 82(2) remains obscure, at least to my own mind. So can anything better be offered than the suggestion that s 82(2) must be elaborated "in the light provided by the set-off provisions of s 86"[104]? For a provision such as s 82, of such large and varied application, to find its meaning in such an oblique source, does not seem very logical. After all, demands will be many and varied. Set offs involve a distinctly narrower universe of instances.

Source of doubt: bankruptcy's purpose

108 *Historical intentions of lawmakers*: If one believes that statutory interpretation involves a search for the "intention" of the Parliament in enacting the law in question, it is natural enough to seek a meaning that fits comfortably with what the legislators who adopted the words of the law thought it meant when giving their assent to the passage of the law.

109 In the present case, that would send the judicial interpreter back to the imputed purposes of the Australian legislators in the Federal Parliament in 1966, relevantly, in enacting s 82(2) of the Bankruptcy Act. Specifically, it would direct the interpreter's attention to the legislators' purpose in providing an exception for demands arising by reason of a "contract" or "promise" to the general rule that demands in the nature of unliquidated damages are not provable in bankruptcy.

110 Because the contested words were themselves adapted from earlier Australian federal and English predecessor enactments[105], this approach to statutory construction would, if need be, attribute to the legislators in 1966 the intentions of their parliamentary predecessors who had earlier adopted the same texts. If no intermediate, or different, consideration was given to the text, it would, upon this view, be an understandable approach to the ascertainment of legislative "intention" to assume that the later lawmakers (as in 1966 in Australia), adopted and re-affirmed the intentions nominated to explain the earlier texts.

111 I do not accept this approach to statutory interpretation. I do not believe that it is the way that laws are ordinarily interpreted. Indeed, I consider that this approach is inconsistent with the command, as provided in the Constitution, to those who are subject to such laws. Such command operates from time to time. This explains how the language, adopted by a legislature in an earlier age can,

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**104** Joint reasons at [68].

**105** Joint reasons at [22].

with the passage of time, and new insights and values, come to enjoy meanings that would not previously have been attributed to it[106].

112 There are many vivid illustrations of this phenomenon[107]. It demonstrates that the duty of a court, asked to give meaning to a statute, is to give that meaning as it applies to a contemporary command of a legislature, operating within its relevant constitutional powers. Whilst *Hansard* and other historical materials may be scrutinised to assist in the elucidation of meaning, the task is essentially a legal and governmental one. It is not, as such, an exercise in judicial archaeology.

113 Adopting this view of the task in hand, it is interesting and possibly useful (but not determinative) to search the *Hansard* and old cases for what were taken to be the intentions of the lawmakers in the United Kingdom in enacting s 31 of the *Bankruptcy Act* 1869 (UK)[108] and, in Australia in enacting s 82 of the *Bankruptcy Act* 1966 (Cth). However, in the ultimate, it is the duty of a court, asked to give meaning to legislation that continues to operate, to give that meaning as best it can, having regard to the contemporary legal setting in which the law applies. Necessarily, this obliges a court to endeavour to give meaning to a provision such as the exception stated in s 82(2) of the Bankruptcy Act in a way that will advance sensibly the purpose and policy of that sub-section as it is expected to operate in the contemporary setting of bankruptcy law in Australia.

114 *General policy of bankruptcy law*: What is that policy? Unfortunately, it is not an easy task to identify a clear policy in the language chosen. In part, it must be acknowledged that this is because that language is a relic of earlier legal times. Nonetheless, from those times, and into the present age, certain fundamental purposes of bankruptcy law remain. They continue to inform the operation of the Bankruptcy Act in Australia. Other things being equal, in default of some textual reason for reaching a contrary conclusion, it is sensible to give meaning to s 82(2) of that Act such as advances the overall purposes of bankruptcy law as there provided and avoids frustrating those purposes.

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**106** *Coleman v Power* (2004) 78 ALJR 1166 at 1211 [245]-[246]; 209 ALR 182 at 244.

**107** eg *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 at 35, 45-46; cf *Brownlee v The Queen* (2001) 207 CLR 278 at 322 [126]. See also *R v Gee* (2003) 212 CLR 230 at 269 [114]; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 355 [109].

**108** 32 & 33 Vict c 71.

115 In *Storey v Lane*[109], several members of this Court had occasion to explain the purposes of the contemporary Australian law on bankruptcy and insolvency, valid within the constitutional power given to the Federal Parliament for that purpose. Thus, Gibbs CJ, who had special reason to know, explained[110]:

> "Under the *Bankruptcy Act*, once a debtor becomes bankrupt his property vests in the official trustee (s 58) and with certain exceptions is divisible amongst his creditors (s 116) and a court of bankruptcy may order that all or part of his income shall be paid to the trustee for the benefit of his creditors …
>
> An essential feature of any modern system of bankruptcy law is that provision is made for the appropriation of the assets of the debtor and their equitable distribution amongst his creditors, and for the discharge of the debtor from future liability for his existing debts. In *Hill v East and West India Dock Co*[111] Earl Cairns cited with approval the following passage from the judgment of James LJ in *Ex parte Walton; In re Levy*[112]:
>
> > 'Now, the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably among his creditors and persons to whom he is under liability, and, upon this *cessio bonorum*, to release him under certain conditions from future liability in respect of his debts and obligations.'"

116 In *Storey*, Gibbs CJ traced the history of the relieving provisions of bankruptcy law, first in England and then in Australia. The history of the evolution of enlightenment and economic wisdom, evident in the developments of bankruptcy law, helps to explain the objects of provisions such as s 153 of the Bankruptcy Act. That section is designed to release the bankrupt from debts and liabilities provable in the bankruptcy. Given the high purposes, personal and economic, that lie behind this facility, and the broad language in which s 82(1) of the Bankruptcy Act is expressed, it is reasonable to infer that the debts and liabilities of a bankrupt provable in his or her bankruptcy would not be given a narrow meaning. If the exceptions provided for demands of a particular kind were not held in close check, the important public, as well as private, objectives of the Bankruptcy Act would be undermined or frustrated. So much is obvious.

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**109** (1981) 147 CLR 549.

**110** (1981) 147 CLR 549 at 556-557. Gibbs CJ had served as the Federal Judge in Bankruptcy.

**111** (1884) 9 App Cas 448 at 456.

**112** (1881) 17 Ch D 746 at 756.

117 Historically, demands for unliquidated damages were not provable at all in bankruptcy because of the difficulty in quantifying such claims[113]. This prohibition was relaxed, in conformity with the objectives of bankruptcy law, to release the bankrupt from all liabilities and to provide him or her with a fresh start. However, it seems to be accepted that damages for personal torts were never provable, and the exemption from the exception for unliquidated demands (now s 82(2)) applied only to those demands arising by reason of contract or promise (or breach of trust)[114]. This seems to have been the case because of the disinclination of the law to free the bankrupt from the obligation to compensate for wrongs committed by him or her. As explained by Jordan CJ in *Page v Commonwealth Life Assurance Society Ltd*, the exclusion of claims in personal torts from the exemption was consistent with the purpose of bankruptcy law being[115]:

> "to protect the bankrupt from all suits on contracts entered into previous to his bankruptcy ... *but it was not the object of those laws to protect him from the consequences of his own wrongs*."

118 The appellant emphasised the overall purpose of the Bankruptcy Act of providing the bankrupt with a fresh start, contending that the exception in s 82(2) ("demands in the nature of unliquidated damages") should not be given such an ambit as would frustrate the achievement of this objective. By parity of reasoning, the rider on the exception ("arising otherwise than by reason of a contract [or] promise") should not be given an overly narrow interpretation. As the appellant put it, where there is doubt as to the meaning of s 82(2), the doubt should be resolved, so far as the words permit, by upholding the fundamental purposes of the Act. Those purposes were, with few exceptions, to provide bankruptcy as a means of ensuring fairness amongst the creditors of the bankrupt *inter se* and to afford the bankrupt the prospect of a new start after discharge, that would be beneficial for the bankrupt personally, consequently for the family of the bankrupt, and also for society and the economy more generally.

119 These remarks of a general character suggest an approach that should be taken to ascertaining the meaning of s 82(2) of the Bankruptcy Act. But they do not advance the task of interpretation very far. In particular, they do not afford a textual elucidation for the application of s 82(2) in the circumstances of the

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**113** *Eden on Bankruptcy*, (1825) at 121-122. See also Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) vol 1 at 318 [784].

**114** *Ex parte Llynvi Coal and Iron Co; In re Hide* (1871) LR 7 Ch App 28 at 31-32.

**115** (1935) 36 SR (NSW) 85 at 90. See also *Parker v Norton* (1796) 6 TR 695 at 701 [101 ER 777 at 780].

present case. In this case a deed, evidencing at least a promise, existed as part of the background facts. The demand in question was certainly "in the nature of unliquidated damages". Only partly (if at all) or subsequently, did it arise "*by reason* of a contract [or] promise". Was that enough?

Doubt: width of the statutory language

120 The appellant laid particular emphasis on the width of the language of s 82(2) of the Bankruptcy Act and especially on the expression "by reason of". He was critical of the use by the Queensland Court of Appeal of the question whether the "claim" arose "out of" the induced contract[116]. He suggested that a failure to adhere to the actual language of s 82(2) had similarly infected the earlier decision of the Victorian Court of Appeal in *Aliferis*[117]. He insisted on a return to the question posed by the statute, namely whether (as he put it), the "demand" arose "by reason of a contract [or] promise".

121 Because the case law relied on in the intermediate courts addressed provisions of bankruptcy legislation as they appeared from time to time[118], the appellant argued that the mis-statement of the statutory formula in the present case had led to an erroneous conclusion in both Court of Appeal decisions. It had led to an enquiry, as a matter of abstract legal theory of the factors lying behind the making of the impugned representations. Instead, according to the appellant, the enquiry that was required by the Bankruptcy Act, obliged attention to be addressed to those matters which "factually gave rise to the *demand* referred to in s 82(2)". Upon this footing, it was logical to conclude, so the appellant argued, that a contract, occurring prior in time to the demand was so connected with the demand that the "demand arises *by reason* of the contract".

122 In effect, the appellant urged on this Court the interpretation of the meaning of the phrase "by reason of", appearing in s 82(2), preferred in *Re Pyramid Building Society (In Liq)*[119]. There Vincent J said:

> "The choice by the legislature of the expression 'by reason of', in [s 82(2)] indicates that it is not necessary to establish more than an appropriate

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**116** (2003) 179 FLR 438 at 440 [2], 440 [4], 451-452 [45], 453-454 [53], 455-456 [61]-[64], 457 [66].

**117** (2000) 1 VR 447 at 453 [17]-[18], 454-455 [21]-[22] per Phillips JA, 460-461 [40]-[42], 463-464 [48]-[49] per Charles JA.

**118** Specifically, s 153 of the 1861 Act in the United Kingdom which used the language of "liability"; *Johnson v Skafte* (1869) LR 4 QB 700.

**119** (1991) 6 ACSR 405 at 410.

> nexus between the damages claimed and the contract or promise. While the claim must be causally connected to a contract or promise so that it could be said to have arisen by reason of the contract or promise, it is not required that a breach of contract or undertaking be proved, although, of course, in those circumstances the requirements of the section would clearly be satisfied."

123 The notion that the test in s 82(2) may be satisfied, in a case of misrepresentation inducing a contract, has been accepted by a number of experienced judges[120]. It also appears to have secured the approval of respected commentators and text-writers[121]. In each case, close attention to the evidentiary foundation of the demand in question would be essential. So far as the commentaries and texts are concerned, their usefulness depends upon the exact language of the statute being applied.

124 There is an obvious weakness in the statement of the test expressed by Vincent J in *Re Pyramid Building Society*, embraced by the appellant. It is stated in terms of "an appropriate nexus" between the damages claimed and the contract or promise. But what is "appropriate" as a nexus? That is the very issue to be decided. A test expressed in such a way gives little practical guidance. It conveys little by way of substantive content. In particular, it gives no guidance as to how "demands … arising otherwise than *by reason of* a contract [or] promise" are to be distinguished from demands arising *by* such reason.

125 Putting aside the decisions of subordinate courts which support the above "underlying transaction" approach, the best authority for the appellant's argument is probably that of *Jack v Kipping*[122]. On one view, *Jack v Kipping* upholds a reading of "otherwise than by reason of a contract" in s 82(2) which embraces a

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**120** In addition to the cases already cited see *Jack v Kipping* (1882) 9 QBD 113 at 116-117; *Palmer v Day & Sons* [1895] 2 QB 618 at 622; *Tilley v Bowman Ltd* [1910] 1 KB 745 at 752-753; *Re H B Harvey* [1972] ACLC ¶40-051 at 27,388 per Street JA; *In re D H Curtis (Builders) Ltd* [1978] Ch 162 at 170 per Brightman J; *Re Gye and Perkes; Ex parte McIntyre* (1989) 89 ALR 460 at 468-472 per Hill J; *McIntyre v Perkes and Gye* (1990) 22 FCR 260 at 262 per Pincus J; cf at 273-274 per Gummow and von Doussa JJ reserving the question; cf also *Re NIAA Corporation (In Liq)*, unreported, Supreme Court of New South Wales, 2 December 1994, McLelland CJ in Eq.

**121** Including all four editions of McPherson's *The Law of Company Liquidation*, 1st ed (1968) at 346; 2nd ed (1980) at 335; 3rd ed (1987) at 379; 4th ed (1999) at 551. See also *Williams and Muir Hunter on Bankruptcy*, 16th ed (1949) at 164; 19th ed (1979) at 162.

**122** (1882) 9 QBD 113.

wider range of demands than just those relying on contractual causes of action. This is because that decision assumed, if it did not decide, that a claim for fraudulent misrepresentation was a provable debt.

126 However, in so far as *Jack v Kipping* held that a claim for damages for fraudulent misrepresentation was a demand arising by reason of a contract or promise, it was probably wrong as being inconsistent with prior authority. In *Ex parte Baum; In re Edwards*, the Court stated that it was "clear that damages for false representation are not provable"[123]. Indeed, it was the view of the commentators writing on the case soon after it was decided that, while it might be "fairly argued that such damages ought to be proveable", the holding in *Jack v Kipping* that liability for fraudulent misrepresentation fell within the statutory description of demands arising by reason of contract involved "a great stretch of the words"[124].

127 Additionally, even if correct, the brief reasons of Cave J in *Jack v Kipping* do not appear to help the appellant in this case. Cave J stated that "[i]t is said that such a fraudulent misrepresentation is a tort; but we think that it is not a personal tort, but a breach of the obligation arising out of the contract of sale"[125]. It is unclear how the tortious act considered in that case involved a breach of contract. However, even if that proposition were accepted in relation to a fraudulent misrepresentation, it could not be said that breach of a statutory provision, such as s 995 of the Corporations Law at issue in this case, would be a "breach of the obligation arising out of [a] contract". *Jack v Kipping*, therefore, is of no ultimate assistance to the appellant.

128 In virtually every case involving a written contract or promise there will have been antecedent negotiations. Often, indeed typically, such negotiations will include alleged misrepresentation said, as in a case such as the present, to give rise to contraventions of s 995(2) of the Corporations Law, entitling the victim to damages pursuant to s 1005 of that Law. Given that this is a normal, and in no way an atypical, situation, how is the "appropriate nexus" to be differentiated from an "inappropriate" or "inadequate" nexus between the damages claimed and the contract or promise said to render the debt or liability provable in the bankruptcy?

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**123** (1874) LR 9 Ch App 673 at 676 per Mellish LJ (James LJ agreeing). See also *Johnson v Skafte* (1869) LR 4 QB 700 at 705; cf *Bank of Australasia v Hall* (1907) 4 CLR 1514 at 1527, 1548, where this Court appears to have assumed that *Jack v Kipping* was correctly decided.

**124** "Set-off in Case of Mutual Dealings", (1882) 26 *The Solicitors' Journal* 575 at 575.

**125** (1882) 9 QBD 113 at 117.

Doubt: policy of bankruptcy law

129 Questions such as the foregoing eventually drove the appellant back to what is the crucial question, namely the purpose and policy of the Bankruptcy Act, within a regime of debts provable in a bankruptcy, to exclude some demands (for unliquidated damages) but then to exempt from that exclusion other demands (namely those arising by reason of a contract [or] promise.)

130 It was there that the appellant reached the two main points of his submission. The first was his contention that the language of s 82(2) of the Bankruptcy Act sustained his argument. The second was that the policy of the Act reinforced the conclusions suggested by the statutory language and filled any gaps or uncertainties appearing in that language in favour of the contention for which he urged.

131 It is true, as the appellant submitted, that the words of s 82(2) of the Bankruptcy Act ("damages arising … by reason of a contract [or promise]") do not indicate that the damages must be *for* a breach of contract. What is required is a causal connection between the damages and the contract or promise propounded[126]. To demand that the contract or promise must be an "essential element" of the cause of action would add an impermissible gloss to the statutory language. So what does that language mean?

132 Charter Pacific pointed out that the appellant was not a party to the deed relied upon to bring the appellant's case within the exemption from the exception expressed in s 82(2). The appellant submitted that this was irrelevant given that what is required is a causal connection between the demand and the contract or promise. Such a causal connection may exist in respect of demands against persons other than the parties to the contract or promise. The appellant submitted that, as a practical matter, the task of a trustee in bankruptcy in deciding whether the misleading or deceptive conduct led to entry into a contract or promise was not likely to be difficult in most cases. He argued that a practical approach would be taken. This would involve examining any postulated contract or promise to see whether or not it was causally related, in a commercial sense, to the demand in the nature of unliquidated damages. If it was so connected, such a demand would be provable in the bankruptcy. If it was not, the demand would not be provable, being within the exception, unrelieved by the exemption.

133 This postulated differentiation is not, however, much better than the earlier one urged by the appellant, expressed in terms of differentiation between an "appropriate" and "non-appropriate" nexus. Like that proposition, it affords

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**126** A matter recognised by Charles JA in *Aliferis* (2000) 1 VR 447 at 460 [40].

no clear point of distinction. On the contrary, it leaves the obligation of a creditor, and trustee in bankruptcy (not to mention the rights of the bankrupt) seriously unclear.

134 The present case is a good illustration. After such a lengthy trial, detailed argument in the intermediate court and now in this Court, no clear criterion could be suggested to distinguish between viewing a contract or promise as part of the background facts to the demand in question or as the reason for the contract or promise that would take the case outside the *prima facie* exemption from proof in bankruptcy of demands in the nature of unliquidated damages.

Approach to equivalent provisions in Canada and New Zealand

135 *Recourse to analogous law*: It is tiresome to struggle with the language of s 82(2) of the Bankruptcy Act in a search for a contemporary operation of the sub-section that will achieve a current policy of bankruptcy law that represents the will of the Federal Parliament in Australia. The truth of the matter is that legislative language has been handed down from the United Kingdom to Australia and from one version of the bankruptcy statute to a later version without considering whether such language fulfils a current social need and does so in words that are apt to a clear and straight-forward application of the law.

136 Prior to, and after, the passage of the Bankruptcy Act in 1966, the Federal Parliament has had available to it Canadian and New Zealand legislation that addresses the issue over which this Court has struggled in this appeal in the probably fruitless endeavour to find a rational and sensible path through a text of considerable opacity and in a wilderness of cases. Before amending their bankruptcy laws, both Canada and New Zealand had provisions, likewise inherited from the United Kingdom statutes, equivalent to s 82(2) of the Bankruptcy Act still in force in this country.

137 *The former law in Canada*: By the *Bankruptcy and Insolvency Act* 1949 (Can),[127] s 121[128] provides that:

> "All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before [that] day … shall be deemed to be claims provable in proceedings under this Act".

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**127** RSC 1985 c B-3.

**128** Originally, s 83.

138 In Canada, where there is a contingent or unliquidated claim, it is left to the trustee in bankruptcy to determine whether such claim is provable and, if so, to value it. The consequence is that demands for unliquidated damages in tort and otherwise are now provable debts in Canada[129]. When the Canadian law, prior to 1949, was expressed in language similar to that still appearing in s 82(2) of the Bankruptcy Act applicable in Australia, the Canadian courts looked to the cause of action underlying the demand[130]. They did so in order to classify the case as falling within, or outside, the category of demands "by reason of a contract, promise or breach of trust". This approach afforded the Canadian courts at that time an anchor in a legally decisive factor, namely the cause of action relied upon by the plaintiff. It avoided the necessarily disputable criterion urged upon this Court by the appellant, namely the prominence of a contract in the "underlying" facts and circumstances of the case. The outcome of that criterion, of its nature, is likely to depend on the eye of the beholder.

139 *The former law in New Zealand*: The *Insolvency Act* 1967 (NZ), s 87(1) similarly changed the law of that country which, under the *Bankruptcy Act* 1908 (NZ), s 98(1) had been expressed in terms identical to those still appearing in s 82(2) of the present Australian Act. Under the current New Zealand law, like that of Canada, *all* demands in the nature of unliquidated damages are provable debts. However, this position was brought about by legislative reform. As in Canada, before such reform, the question whether a demand in the nature of unliquidated damages was provable in a bankruptcy depended on the cause of action relied upon in the demand. Where the underlying facts gave rise to a cause of action, which could be pleaded both in contract and tort, the creditor was entitled to elect either to prove on the basis of a contractual claim or to sue in tort outside bankruptcy[131]. In New Zealand, as earlier in the United Kingdom, the courts looked to the cause of action relied upon in supporting the demand. They did not, as such, look to the "underlying" facts and circumstances in determining whether the demand was a provable debt. Understandably, they regarded such a search as contestable and bound to lead, in highly practical and sometimes urgent circumstances, to the very kind of contest that has plagued the present case[132].

140 *ALRC reforms unimplemented*: The result is that the Canadian and New Zealand reforming legislation addressed the issue raised in this appeal. Yet in Australia, reform of the Bankruptcy Act in this respect has not been forthcoming. This is so although the defects of the present law were specifically drawn to

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**129** *Re Letovsky and Mutual Motor Freight Ltd* (1958) 16 DLR (2d) 355.

**130** *Boland v Johnson* [1934] 1 DLR 672 at 676.

**131** *Re Forbes* [1924] GLR 80 at 81.

**132** cf *Parker v Norton* (1796) 6 TR 695 at 699 [101 ER 777 at 779].

attention in the Australian Law Reform Commission's Report in 1988 (the Harmer Report), *General Insolvency Inquiry*[133].

141 The failure to implement, or even to present to the Parliament for consideration, the reforms proposed by the Commission, at least in this respect, is unexplained. The result of that failure is that Australian bankruptcy law, in this particular concern, lingers behind the Australian law on corporate insolvency[134] and far behind the bankruptcy laws of the United Kingdom, Canada and New Zealand. The consequent uncertainty for creditors, trustees and indeed bankrupts themselves, involves a significant economic cost. The present case, and the convoluted legal problem presented by the enduring application in Australia of s 82(2) of the Bankruptcy Act, illustrates the need for urgent parliamentary attention to this aspect of bankruptcy law[135].

142 Rather than endeavouring to find a solution to the problem presented by s 82(2) of the Bankruptcy Act (almost certainly unintended by the drafters), relying on the highly specific provisions governing the particular matter of set-off in s 86 of the Act, (as favoured in the joint reasons) my own preference would be to return to the substance of the law as it was uniformly applied in Canada and New Zealand before their legislative reforms. So long as s 82(2) of the Bankruptcy Act is unreformed, there is a clear need for a simple, practical, efficient and readily ascertainable test to decide whether a demand in the nature of unliquidated damages arises "by reason of a contract [or] promise" or otherwise.

Conclusion: "demands" and identified causes of action

143 That test is afforded by considering the cause of action relied upon by the plaintiff. It is not decided by considering the underlying or background facts and circumstances as the appellant urged here. True, this approach has the disadvantage, referred to in the joint reasons, of affording the plaintiff a privilege, with interests of its own to prosecute, by the way it pleads its case, effectively to elect in many instances whether it must prove in any later

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**133** Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) vol 1 at 316-319 [779]-[786].

**134** See *Corporations Act* 2001 (Cth), s 553(1).

**135** The need for legislative amendment in this respect was noted as long ago as 1882: "Set-off in Case of Mutual Dealings", (1882) 26 *The Solicitors' Journal* 575 at 575 ("We think it probable that various difficult questions which the decision in *Jack v Kipping* suggests may turn up hereafter unless a new Bankruptcy Act is passed next session, containing provisions dealing more explicitly with these matters.")

bankruptcy or whether it may sue upon an action outside that system. However, the courts have long recognised that a plaintiff with concurrent causes of action may elect to proceed on the basis of the cause perceived by him or her to be more advantageous in terms of the resulting legal consequence[136].

144 This is an imperfect solution. Yet it does have a textual foundation in s 82(2) of the Bankruptcy Act. The sub-section talks of a "demand". In our system of law, "demands" are formulated by those who demand. Commonly, they make such demands by oral claims, letters before action and eventually by pleading a claim in a court of law. Such a pleading could not be conclusive. In every case it would remain for the court to characterise the "demand". This is made clear by the use of the expression "in the nature of" in s 82(2). The court deciding the character of the demand looks at the nature of the demand. It is not confined to the language of its formulation. But as a practical rule of thumb, where proceedings have been brought, the formulation of the demand in those proceedings will ordinarily be the best evidence of the true character of the plaintiff's "demand". At least this approach is more certain. It is supported by precedent. Until a more comprehensive and reformed law is adopted by the Parliament, that would be the solution I would favour.

Orders

145 From this approach it follows that the appellant fails in his endeavour to invoke the background facts and circumstances test. The chief point in the appeal, however, is the need for urgent legislative attention. The reforms enacted long ago in Canada and New Zealand show what can be done. Whilst it is true that the approach that I favour is different from that adopted by the Queensland Court of Appeal in this case, and the Victorian Court of Appeal in *Aliferis*, because the appellant fails, the orders that should be made are those proposed in the joint reasons. I would only add that I agree with the orders proposed there in respect of costs, on the basis explained in the joint reasons.

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**136** *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20 [44], approving *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481 at 522.