HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE AND CRENNAN JJ

KENNETH JOHN FOOTS APPELLANT

AND

SOUTHERN CROSS MINE MANAGEMENT
PTY LTD & ORS RESPONDENTS

Foots v Southern Cross Mine Management Pty Ltd
[2007] HCA 56
7 December 2007
B26/2007

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation

P J Dunning SC with S A McLeod and S J Williams for the appellant (instructed by Conroy & Associates)

No appearance for the first and third to tenth respondents

W Sofronoff QC with A M Pomerenke for the second respondent (instructed by Allens Arthur Robinson)

CATCHWORDS

Foots v Southern Cross Mine Management Pty Ltd

Bankruptcy – Provable debt – Costs order – Trial judge gave judgment and awarded damages in favour of second respondent against first respondent and appellant – After judgment appellant became bankrupt upon presentation of own petition – After appellant's bankruptcy trial judge made order for indemnity costs against appellant – Whether costs order was a provable debt within the meaning of s 82 of the *Bankruptcy Act* 1966 (Cth) – Whether costs order was a debt or liability arising from an obligation before bankruptcy – Whether costs order was a contingent liability – Whether costs order was "incidental" to a provable debt.

Bankruptcy – Stay of proceedings – Whether proceedings in which costs order was sought should have been stayed pursuant to s 58(3) of the *Bankruptcy Act* 1966 (Cth) – Whether leave to proceed should have been granted pursuant to r 72(1) of the Uniform Civil Procedure Rules 1999 (Q).

Statutes – Interpretation – Relevance of legislative history and antecedent statutes – Relevance of decision in *In re British Gold Fields of West Africa* [1899] 2 Ch 7.

Words and phrases – "contingent liability", "costs order", "incidental", "liability", "provable debt".

Bankruptcy Act 1966 (Cth), ss 58(3), 82, 153.
Uniform Civil Procedure Rules 1999 (Q), r 72(1).

1 GLEESON CJ, GUMMOW, HAYNE AND CRENNAN JJ. This appeal from the Queensland Court of Appeal concerns the interrelationship between federal bankruptcy law and the civil procedure of the courts of that State. The litigation arises out of a costs order made by the Supreme Court of Queensland on 3 February 2006 in favour of the second respondent, Ensham Resources Pty Ltd ("Ensham"), against the appellant, Mr Foots. He had become bankrupt on 15 September 2005, upon his own petition. Other respondents were joined in the appeal to this Court but Ensham was the only active participant.

2 A significant part of the argument in this Court concerned the authority to be accorded in Australia to a 19th century English decision, *In re British Gold Fields of West Africa*[1]. The English case law concerning the bankruptcy statutes as they were developed in that century is part of the context for an understanding of the modern legislation in this country, using the term "context" in the wide sense spoken of in *CIC Insurance Ltd v Bankstown Football Club Ltd*[2]. Nonetheless, this should not obscure the consideration that the appeal essentially turns upon the construction of s 82 of the *Bankruptcy Act* 1966 (Cth) ("the Bankruptcy Act") in particular the identification of the debts and liabilities which are provable in bankruptcy. When s 82 is construed it is apparent that in Australia *British Gold Fields* does not retain the significance for which the appellant contends.

3 Atypically, this case does not involve an attempt by a creditor to bring its claim within s 82 so as to prove in the bankruptcy of the debtor. Rather, it is the bankrupt debtor, Mr Foots, who wishes to bring a claim against himself within the statutory definition. He does so apparently for two reasons. First, if the costs order made by the Supreme Court were a debt or liability provable in his bankruptcy within the meaning of s 82, the proceedings in which the costs order was made would have been subject to s 58(3) of the Bankruptcy Act. This requires the leave of the Federal Court or Federal Magistrates Court before a creditor takes any fresh step in such a proceeding and that leave was neither sought nor given. Conversely, if the costs order did not give rise to a provable debt, the Supreme Court was free to proceed, subject only to the requirements of Queensland procedure contained in r 72 of the Uniform Civil Procedure Rules 1999 (Q) ("the UCPR"). Secondly, if the costs order did produce a provable debt or liability, then Mr Foots would be free of it upon his discharge from bankruptcy. This is because the release provided by s 153 of the Bankruptcy Act

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1 [1899] 2 Ch 7.

2 (1997) 187 CLR 384 at 408.

releases a bankrupt from debts which were provable in the bankruptcy, but not otherwise.

4 The appellant fails to attain these objectives and his appeal should be dismissed.

The facts

5 In the Supreme Court of Queensland Chesterman J heard a complex multi-party action concerning the ownership of machinery at an open-cut coal mine. There were many claims and cross-claims, but the relevant outcome was that Ensham succeeded in its cross-claim against the appellant, Mr Foots, who was formerly its Chief Executive Officer. On 26 August 2005, Chesterman J gave his reasons for judgment, and found that Mr Foots breached his fiduciary and contractual duties of good faith towards Ensham, and that he was also liable pursuant to s 75B(1) of the *Trade Practices Act* 1974 (Cth) for breaches of s 52 of that Act by the first respondent, Southern Cross Mine Management Pty Ltd ("Southern Cross")[3]. At that stage, Chesterman J did not make any orders against Mr Foots, although he did do so in respect of other unsuccessful parties.

6 On 1 September 2005, the matter returned before Chesterman J. He gave judgment for Ensham against Southern Cross and Mr Foots, and awarded damages in the sum of $2,460,000. As noted above, on 15 September 2005 Mr Foots entered bankruptcy. Thereafter, on 3 February 2006, the matter was again listed before Chesterman J. His Honour gave detailed reasons[4], and ordered that Mr Foots pay Ensham's costs on an indemnity basis of its successful counter-claim against him. It appears that the costs order has not been taxed.

The legislation

7 In this Court, Mr Foots argues that the costs order made against him was a provable debt within the meaning of s 82 of the Bankruptcy Act as it was a debt or liability arising out of an obligation incurred before his bankruptcy. That "obligation" was said to arise from the judgment against him for the money sum awarded on 1 September 2005. Alternatively, Mr Foots submitted that the phrase "all debts and liabilities" in s 82 is broad enough to encompass an obligation that

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3 *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* [2005] QSC 233.

4 (2006) 196 FLR 419.

is incidental to a provable debt, even if the incidental obligation was not a necessary concomitant in law of the provable debt. However, Mr Foots did not submit that the costs order itself was a relevant "obligation" or that it was a "contingent" liability within the meaning of s 82.

8 The soundness of the arguments advanced in support of the appeal must ultimately be tested against the requirements of the statute itself. Section 82 introduces Div 1 of Pt VI of that Act which is headed "Proof of Debts". The section identifies those debts and liabilities which are provable and relevantly provides:

> "(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 or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.
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> ...
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> (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.
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> …
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> (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.
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> (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 not later than 28 days after the day on which the person is notified of the estimate.
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> (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." (emphasis in original)

9 Two aspects of s 82 should be noticed at once. First, not all of the debtor's debts and liabilities are provable in bankruptcy. Notably, the classes of provable debts are narrower than those encompassed by s 553 of the *Corporations Act* 2001 (Cth) as regards corporate insolvency[5]; the most obvious omission is of claims in the nature of unliquidated damages which arise "otherwise" than by reason of a contract, promise or breach of trust (s 82(2)). It was that sub-section which was at stake in *Coventry v Charter Pacific Corporation Ltd*[6]; the Court held that a statutory claim for unliquidated damages for misleading or deceptive conduct, which induced the claimant to contract not with the bankrupt but with a third party, was not a provable debt and might be pursued after discharge.

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5 The interrelationship between proof of debts in bankruptcy and in corporate insolvency was considered in *Sons of Gwalia Ltd v Margaretic* (2007) 81 ALJR 525 at 557-558 [158]-[161]; 232 ALR 232 at 274-275.

6 (2005) 227 CLR 234.

10 Section 82 limits provable debts both by subject-matter, in that they must answer the statutory descriptions, and temporally, in that they must arise before (not after) bankruptcy. At first glance, neither criterion is fulfilled in the present case: this particular costs order was incurred after bankruptcy, and the appellant was under no obligation to pay those costs beforehand.

11 A second aspect of s 82 flows from the first. Contrary to the appellant's submissions, there is no express or implied textual support for the notion of a debt being provable if it is incidental to, or consequent upon, a debt which is itself provable. Those debts which are provable are spelled out by the section: matters falling outside those categories are not provable.

12 With respect to the *Bankruptcy Act* 1869 (UK) ("the 1869 Bankruptcy Act"), a forerunner of the Australian legislation, James LJ remarked in *Ex parte Llynvi Coal and Iron Co. In re Hide*[7]:

> "Every 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. The broad purview of this Act is, that the bankrupt is to be a freed man – freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind."

That statement was repeated with approval as applicable to the *Bankruptcy Act* 1898 (NSW) by AH Simpson CJ in Eq in *Rickard v Caldwell*[8]. But in considering s 82 of the Bankruptcy Act the proposition respecting the "broad purview" of the legislation obscures the controlling force of the current statutory description of what is and is not provable in bankruptcy. For example, in addition to the matters dealt with in that portion of s 82 which has been set out above, s 82 also excludes from proof[9] such amounts as those payable under the *Higher Education Support Act* 2003 (Cth) and under proceeds of crime legislation.

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

8 (1911) 12 SR (NSW) 1 at 3-4.

9 s 82(3AB), s 82(3A) respectively.

13 Something now should be said respecting s 58(3) of the Bankruptcy Act. The scope and operation of that provision turns on the proper interpretation of s 82 and the concept of provable debt. Section 58(3) provides[10]:

> "Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:
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> (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
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> (b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding."

14 Rule 72(1) of the UCPR states:

> "If a party to a proceeding becomes bankrupt, becomes a person with impaired capacity or dies during the proceeding, a person may take any further step in the proceeding for or against the party only if—
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> (a) the court gives the person leave to proceed; and
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> (b) the person follows the court's directions on how to proceed."

It will be noticed that the provision on stay of proceedings and the requirement for leave contained in s 58(3) of the Bankruptcy Act are expressed more narrowly than the requirements contained in s 72 of the UCPR. The latter applies to any "proceeding", whereas the former only applies to proceedings "in respect of a provable debt". No party contended that the federal statute covers the field to the exclusion of the UCPR by operation of s 109 of the Constitution.

The decision at first instance

15 Chesterman J referred to ss 58(3) and 82(1) of the Bankruptcy Act, and accepted that "[t]he application for costs against Mr Foots is either a legal

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10 The expression "the Court" is so defined in ss 5(1) and 27 as to identify the Federal Court and the Federal Magistrates Court. In some circumstances the Family Court exercises bankruptcy jurisdiction (s 35A).

proceeding or a fresh step in a proceeding"[11]. That acceptance was not challenged in this Court. His Honour then framed the issue as being[12]:

> "whether an order for costs made against Mr Foots would be a debt or liability, future or contingent, to which he was subject at the date of the bankruptcy, or to which he may later become subject by reason of an obligation incurred prior to the bankruptcy."

That is, the stay in s 58(3) would only operate if the order for costs were a debt or liability within the meaning of s 82(1).

16 His Honour concluded that, notwithstanding what had been said in 1899 in *British Gold Fields*[13], modern authority established that such an order would not be a debt or liability of that nature[14]. He referred in particular to *Glenister v Rowe*[15] and Australian authorities including *Fraser Property Developments Pty Ltd v Sommerfeld (No 2)*[16]. Thus, since the costs order would not be a debt provable in Mr Foots' bankruptcy, s 58(3) of the Bankruptcy Act was no impediment to the Court making a costs order. His Honour accordingly granted leave to Ensham pursuant to r 72 of the UCPR to proceed against Mr Foots, and granted its application for indemnity costs[17].

The decision of the Court of Appeal

17 By majority, the Queensland Court of Appeal dismissed the appeal by Mr Foots against the decision of Chesterman J (Jerrard and Holmes JJA, Mullins J dissenting)[18]. Jerrard JA noted that the trial judge's strongly adverse

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11 (2006) 196 FLR 419 at 424.

12 (2006) 196 FLR 419 at 424.

13 [1899] 2 Ch 7.

14 (2006) 196 FLR 419 at 427.

15 [2000] Ch 76.

16 [2005] 2 Qd R 404.

17 (2006) 196 FLR 419 at 427-428.

18 [2006] QCA 531.

findings in the principal judgment delivered 26 August 2005 made it "very likely" that a costs order would be made against Mr Foots. Nonetheless, Jerrard JA observed that[19]:

> "the liability created by the costs order – and none existed until it was made – was one to which, at the date of Mr Foots' bankruptcy, he might become subject before his discharge 'by reason of' the independent exercise of a discretionary judgment based on the result in the proceedings, the fact that there were proceedings, and on Mr Foots' conduct in those. It was not a liability to which he would potentially be subjected 'by reason of' his obligation to pay $2.4 million to Ensham. That obligation had existed independently of the necessity for, and the fact of, proceedings to explain its existence to Mr Foots. I agree with the submission of Mr Sofronoff [Counsel for Ensham] that the appellant accordingly offered no explanation as a matter of legal reasoning why a post-bankruptcy debt, which is incidental to, or attached to, or associated with, a pre-bankruptcy provable debt falls within any of the words of s 82."

18 However, in the light of the full arguments of counsel Jerrard JA turned to the 19th century and other case law. It will be necessary to return to a discussion of some of those authorities later in these reasons. After his review of the authorities, Jerrard JA acknowledged that some support for the appellant's position could be found in the reasoning or results in a number of the earlier cases. However, his Honour concluded that[20]:

> "those supports are an inadequate basis to demonstrate a long established principle that costs ordered after bankruptcy are provable if judgment in the action in respect of which the costs were incurred was given before the bankruptcy, and if the judgment debt itself is provable. That proposition cannot sit with the language of s 82(1), and there are no unequivocal and authoritative examples of its application ...
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> Accordingly, I agree with the learned trial judge that costs, ordered against Mr Foots after his bankruptcy, would not be a provable debt in it, even though incurred in proceedings in respect of a provable debt and in which judgment had been pronounced before bankruptcy."

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19 [2006] QCA 531 at [14].

20 [2006] QCA 531 at [48]-[49].

19 Holmes JA agreed with Jerrard JA. Her Honour gave particular attention to the historical context in which the 19th century bankruptcy cases were decided, namely the distinctive regimes for the award of costs before and after the commencement in England of the Judicature Acts of 1873[21] ("the 1873 Act") and 1875[22] ("the 1875 Act") and the Rules of the Supreme Court made under the latter statute. These are matters to which we will return. Referring to *British Gold Fields*, her Honour observed that the relevant costs order in that case was made pursuant to a particular power with respect to costs conferred by s 35 of the *Companies Act* 1862 (UK)[23] ("the 1862 Companies Act")[24]:

> "Under s 35 … those costs were at the discretion of the court which made the rectification order. Lindley MR, delivering the judgment of the Court of Appeal, does not offer any explanation of how they could constitute a present or contingent liability at the date of the winding-up, rather reciting what were described as the rules established by earlier bankruptcy cases. That recitation contains no acknowledgment of the way in which the *Judicature Act* 1875 and the rules made under it had changed the incidence of costs."

20 Holmes JA remarked that the approach in *British Gold Fields* to costs as an "incident" of, or "attached" to, a provable debt was[25]:

> "a product of the strong influence of earlier cases, decided at a time when success did enliven a statutory entitlement to costs, so that there was little cause to distinguish between the claim and the costs of winning it. To some extent, that view still held good for jury verdicts at the time when *British Gold Fields* was decided, because the party who obtained the verdict retained a statutory right to costs under the *Rules*, subject to displacement by a contrary order. But it is not, as Jerrard JA has explained, an approach which sits well with 20th and 21st century authority, and the fundamental change, in the awarding of costs, to

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21 *Supreme Court of Judicature Act* 1873 (UK) (36 & 37 Vict c 66).

22 *Supreme Court of Judicature Act* 1875 (UK) (38 & 39 Vict c 77).

23 25 & 26 Vict c 89.

24 [2006] QCA 531 at [69].

25 [2006] QCA 531 at [74].

> exercise of discretion. Nor is it readily reconciled, as he points out, with the terms of s 82(1). I do not think it should now prevail."

Thus, in the absence of an order before bankruptcy, the costs awarded against Mr Foots were not a provable debt.

21 Mullins J dissented. She was impressed by what she took to be the approach to the 19th century bankruptcy law taken by Gleeson CJ, Gummow, Hayne and Callinan JJ when construing s 82(2) in *Coventry*[26]. Mullins J concluded that the holding in *British Gold Fields* remained applicable in Australia, and that it was not determinative that modern costs orders are made as a matter of discretion. As her Honour put it[27]:

> "The favourable exercise of the discretion to order costs does not weaken the link between the underlying provable debt and the order for costs in those circumstances where, in accordance with *British Gold Fields*, the basis for the costs being a provable debt in bankruptcy is that they are incidental to the provable debt."

Mullins J went on to distinguish both *Glenister* and *Sommerfeld* as instances where the costs orders were not incidental to that which would otherwise be a provable debt[28].

22 Mullins J therefore would have allowed the appeal "[o]n the basis that the origin and history of s 82(1) of the [Bankruptcy] Act justifies reference to the *dicta* in *British Gold Fields* including the specific rule on which the appellant relies ...."[29]. Since the costs order against Mr Foots was a provable debt, leave of the Federal Court or the Federal Magistrates Court had been required pursuant to s 58(3) of the Bankruptcy Act in respect of the application for costs as a "fresh step" in the action.

23 For the reasons which follow, the views of the majority in the Queensland Court of Appeal are to be preferred.

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26 (2005) 227 CLR 234.

27 [2006] QCA 531 at [98].

28 [2006] QCA 531 at [99]-[105].

29 [2006] QCA 531 at [106].

The nature of a costs order

24 As already remarked, in this Court, the appellant contended, first, that his exposure to an adverse costs order was, in the terms of s 82(1) of the Bankruptcy Act, a debt or liability arising from an "obligation" incurred prior to his bankruptcy, and, secondly, that it was a liability "incidental" to a provable debt.

25 Before considering those submissions, several general propositions regarding an award of costs should be noted. First, the award is discretionary but generally that discretion is exercised in favour of the successful party; in Queensland, this general understanding is expressed in r 689(1) of the UCPR, which states: "[c]osts of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court considers another order is more appropriate". Further, although capable of estimation, the actual monetary value of an award of costs cannot be ascertained until those costs are taxed or otherwise assessed.

26 In *Oshlack v Richmond River Council*[30], this Court emphasised the breadth of the power exercised in making costs orders. There the trial judge had made no order as to costs despite the Council's success, and this decision was affirmed on appeal to this Court. Gaudron and Gummow JJ rejected a submission that there was an automatic rule that costs always follow the event[31]:

> "There is no absolute rule with respect to the exercise of the power conferred by a provision such as s 69 of the [Land and Environment] Court Act [(1979) (NSW)] that, in the absence of disentitling conduct, a successful party is to be compensated by the unsuccessful party. Nor is there any rule that there is no jurisdiction to order a successful party to bear the costs of the unsuccessful party.
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> If regard be had to the myriad circumstances presenting themselves in the institution and conduct of litigation, and to the varied nature of litigation, particularly in the equity jurisdiction, it will be seen that there is nothing remarkable in the above propositions."

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30 (1998) 193 CLR 72.

31 (1998) 193 CLR 72 at 88 [40]-[41] (footnote omitted).

27 Their Honours also remarked upon the power to make a costs award otherwise than on a party and party basis[32]:

> "It may be true in a general sense that costs orders are not made to punish an unsuccessful party. However, in the particular circumstance of a case involving some relevant delinquency on the part of the unsuccessful party, an order is made not for party and party costs but for costs on a 'solicitor and client' basis or on an indemnity basis. The result is more fully or adequately to compensate the successful party to the disadvantage of what otherwise would have been the position of the unsuccessful party in the absence of such delinquency on its part."

28 In the Supreme Court, Chesterman J made his costs order against the present appellant not on the usual party and party basis – now known as the "standard basis" in Queensland (UCPR r 703) – but on an indemnity basis in light of Mr Foots' manifest delinquency. In this respect at least, it cannot be said that the making of the costs order in this case followed a usual, let alone automatic, practice. Other examples of departure from this usual practice readily come to mind, including the making of costs orders against successful parties[33], against non-parties[34], against legal representatives[35], *Bullock* orders[36], *Sanderson* orders[37], or orders that costs be awarded out of a fund such as a trust or estate.

29 The approach taken in this country to the award of costs may be contrasted with the "American Rule" whereby in the absence of limited statutory exceptions each party bears its own costs[38]. However, the most important

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32 (1998) 193 CLR 72 at 89 [44] (footnotes omitted).

33 Upon the grant of special leave to appeal to this Court a condition may be imposed that the applicant pay the costs of the respondent in any event. A recent example was *Attorney-General for the Northern Territory v Chaffey* (2007) 81 ALJR 1388; 237 ALR 194.

34 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178.

35 Cf UCPR r 708.

36 After *Bullock v London General Omnibus Co* [1907] 1 KB 264.

37 After *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

38 *Alyeska Pipeline Service Co v Wilderness Society* 421 US 240 at 247 (1975); *Sole v Wyner* 167 L Ed 2d 1069 (2007).

contrast for present purposes is that with the pre-Judicature system in England. It is the operation of the pre-Judicature system with respect to costs which infuses, and to some extent now undermines, many of the 19th century bankruptcy cases upon which the appellant relied.

30 The discretion to award or refuse costs in common law actions did not appear until the general provision made by r 47 of the Rules of Procedure in the Schedule to the 1873 Act. Rule 47 stated:

> "Subject to the provisions of this Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in Courts of Equity."

In the Rules made under the 1875 Act, r 47 was re-enacted as O 55, with the addition of the following proviso:

> "Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial for good cause shown the Judge before whom such action or issue is tried or the Court shall otherwise order."

The enactment of those Rules was one of the many ways in which the newly created Supreme Court followed not the "brutal simplicities"[39] of the procedures of the previous common law courts, but rather the procedures of the courts of equity.

31 Before the Judicature Acts, costs in common law actions were creatures of statute but the general rule was that they followed the event. The procedural history was outlined in *Knight v F P Special Assets Ltd*[40] and need not be rehearsed here.

32 However, the rule that, at law, costs followed the event had one important consequence, namely that costs came to be seen as part and parcel of the jury's verdict and the judgment of the court. Blackstone wrote[41]: "[t]hus much for

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39 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 86 [34].

40 (1992) 174 CLR 178 at 182-183.

41 *Commentaries on the Laws of England*, (1768), vol 3 at 399.

judgments; to which costs are a necessary appendage; it being now as well the maxim of ours as of the civil law, that '*victus victori in expensis condemnandus est*'". After referring to the *Statute of Gloucester* 1278 (Eng)[42], Blackstone observed that "even now, costs for the plaintiff are always entered on the roll as increase of damages by the court"[43]. Therein lay the origin of the expression that sometimes appeared in the cases, namely that of costs "*de incremento*", being an addition to, or augmentation of, the verdict returned by the jury.

33 The irony of the present case is that had Ensham's claim for breach of fiduciary duty against Mr Foots been brought in a pre-Judicature Act court of equity, there could have been no suggestion that the ensuing costs order was automatic, or that it was necessarily incidental to the substantive judgment. As Dawson J observed in *Knight v F P Special Assets Ltd*, "in equity the power to award costs formed part of the discretionary authority of the Lord Chancellor and was not derived from statute"[44].

34 That was not to say that Chancery awarded costs on an unpredictable or irregular basis. As explained in Daniell's *Practice of the High Court of Chancery*, the discretionary nature of the award of costs meant simply that an equity court[45]:

> "is not, like the ordinary Courts, held inflexibly to the rule of giving the costs of the suit to the successful party; but that it will, in awarding costs, take into consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise its discretion with reference to those points. In exercising this discretion, however, the Court does not consider the costs as a penalty or punishment; but merely as a necessary consequence of a party having created a litigation in which he has failed; and the Court is, generally, governed by certain fixed principles which it has adopted upon the subject of costs, and does not, as is frequently supposed, act upon the mere caprice of the Judge before whom the cause happens to be tried."

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42 6 Edw I c 1.

43 *Commentaries on the Laws of England*, (1768), vol 3 at 399.

44 (1992) 174 CLR 178 at 193. See also *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 85-86 [33] where reference is made to the pre-Judicature position respecting costs in the Courts of Admiralty and of Probate and Divorce in addition to that in Chancery.

45 5th ed (1871), vol 2 at 1239 (footnote omitted).

The similarity with the modern treatment of costs applications will be readily apparent.

Obligation incurred prior to bankruptcy?

35 What, then of the appellant's first submission? This is, that his exposure to an adverse costs order arose from an "obligation" incurred prior to his bankruptcy. The submission should be rejected: no such obligation arose until the costs order was made. This conclusion is consistent both with the Australian authorities upon which Chesterman J had relied and the 20th century English authorities regarding the proof of costs in bankruptcy, particularly *In re A Debtor*[46], *In re Pitchford*[47] and *Glenister*[48]. Each of these authorities emphasises the distinct nature of the proof of a costs order and the proof of an underlying debt[49].

36 The most that can be said, as Mummery LJ observed in *Glenister*, is that "[o]nce legal proceedings have been commenced there is always a possibility or a risk that an order for costs may be made against a party"[50]. But that risk is not a contingent liability within the sense of s 82(1). The order for costs itself is the source of the legal liability and there is no certainty that the court in question will decide to make an order. It should be remarked that in support of his reasoning in *Glenister*[51], Mummery LJ referred to what had been said by Kitto J in *Community Development Pty Ltd v Engwirda Construction Co*[52] and by Tadgell J in *Federal Commissioner of Taxation v Gosstray*[53]. The first submission by the appellant should be rejected.

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46 [1911] 2 KB 652.

47 [1924] 2 Ch 260.

48 [2000] Ch 76.

49 See also *McLellan v Australian Stock Exchange Ltd* (2005) 144 FCR 327 at 332-333.

50 [2000] Ch 76 at 84.

51 [2000] Ch 76 at 83.

52 (1969) 120 CLR 455 at 459.

53 [1986] VR 876 at 878.

"Incidental?"

37 Upon like considerations, and again contrary to the appellant's submissions, it cannot be said that exposure to an adverse costs order is "incidental" to liability for the underlying judgment debt[54]. For reasons that will be explored later in these reasons, it is highly doubtful that the text of s 82 supports the notion of "incidental" liabilities that are not themselves provable debts. However, it is sufficient for present purposes to observe that, as a factual and legal matter, costs are no longer an "incident" of either verdict or judgment. As explained above, the making of an adverse costs order turns upon discretionary considerations that arise independently of the entry of judgment against the debtor.

The pre-1869 statutes

38 As indicated earlier in these reasons, the appellant sought to meet the adverse conclusions reached so far in these reasons, by recourse to 19th century case law, in particular the decision of the English Court of Appeal in *British Gold Fields*[55]. The reasoning in that case is said to supply a foundation upon which subsequent legislation, including s 82 of the Bankruptcy Act, was based and which controls its interpretation.

39 However, an understanding of the 19th century cases requires attention to the bankruptcy statute law in England over that period. Those statutes did indeed include explicit provision for the proof of costs orders; and provision for such orders seems to have continued as a matter of judicial accommodation even after statute no longer provided any such clear textual support.

40 Until the bankruptcy statute of 1825[56] ("the 1825 Act"), no special provision was made for the proof of costs, as distinct from the proof of debts more generally. The proof of costs had been a matter of some complexity, but in 1804 the reasons of Lord Eldon LC in *Ex parte Hill*[57] shed some light upon the subject. The actual decision in the case was that costs might not be proved where the action at law was commenced before bankruptcy but the verdict, judgment

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54 Cf *McCluskey v Pasminco Ltd* (2002) 120 FCR 326 at 338.

55 [1899] 2 Ch 7.

56 6 Geo IV c 16, repealed in 1849 by 12 & 13 Vict c 106.

57 (1804) 11 Ves Jun 646 [32 ER 1239].

and taxation of costs all occurred after bankruptcy. However, the Lord Chancellor clarified two propositions. First, at law, as there was no demand for costs until judgment, costs were not provable if bankruptcy intervened before judgment was given. In this regard the Lord Chancellor approved the decision in *Ex parte Todd*[58]. Secondly, in equity, costs were not provable until they had been taxed; the taxation constituted the demand, and costs ordered before bankruptcy but taxed thereafter thus were not provable. Lord Eldon approved the decision of Lord Thurlow LC in *Ex parte Sneaps*[59], and remarked that[60]:

> "I apprehend, he held that, not upon any such ground of distinction as that the costs in Equity are in the discretion of the Court, but, considering an Order of this Court analogous to a proceeding at Law, that the costs could not be proved, unless ascertained by taxation; and he seems to approve the Law, as laid down by Lord *Henley* in *Ex parte Todd*."

In addition, it should be mentioned that there was authority that, at law, costs were ascertained only by the entry of the judgment itself and not by the antecedent verdict[61].

41 That state of affairs changed upon the enactment of the 1825 Act. Section 58 stated:

> "if any Plaintiff in any Action at Law or Suit in Equity, or Petition in Bankruptcy or Lunacy, shall have obtained any Judgment, Decree or Order against any Person who shall thereafter become Bankrupt for any Debt or Demand in respect of which such Plaintiff or Petitioner shall prove under the Commission, such Plaintiff or Petitioner shall also be

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58 The case is cited in the reports of *Ex parte Hill* (1804) 11 Ves Jun 646 at 650 [32 ER 1239 at 1240] and *Goddard v Vanderheyden* (1771) 3 Wils KB 262 at 270 [95 ER 1046 at 1050]; and is recorded in Cooke, *Bankrupt Laws*, 7th ed (1817), vol 1 at 200, 211.

59 (1783). The case is cited in the report of *Ex parte Hill* (1804) 11 Ves Jun 646 at 650 [32 ER 1239 at 1240] and is recorded in Cooke, *Bankrupt Laws*, 7th ed (1817), vol 1 at 211-212.

60 (1804) 11 Ves Jun 646 at 650 [32 ER 1239 at 1240].

61 The case of *Walter v Sherlock* is cited in the report of *Ex parte Hill* (1804) 11 Ves Jun 646 at 652-653 [32 ER 1239 at 1241] and is recorded in Cooke, *Bankrupt Laws*, 7th ed (1817), vol 1 at 200.

> entitled to prove for the Costs which he shall have incurred in obtaining the same, although such Costs shall not have been taxed at the Time of the Bankruptcy."

This measure was re-enacted in substantially the same form in 1849[62], with the addition in s 181 of a provision entitling successful defendants to prove for their costs as well.

42 Section 149 of the Act of 1861[63] provided that:

> "A Person entitled to enforce against the Bankrupt Payment of any Money, Costs, or Expenses by Process of Contempt issuing out of any Court, shall be entitled to come in as a Creditor under the Bankruptcy, and prove for the Amount payable under the Process, subject to such ascertaining of the Amount as may be properly had by Taxation or otherwise."

The significance of the reference to "Process of Contempt" was that orders for costs could be enforced by writ of sequestration or writ of attachment, disobedience of which was a contempt.

43 In each of the bankruptcy statutes of 1825, 1849 and 1861, the proof of costs could indeed be said to be "incidental" to proof of the underlying debt, albeit not in the sense for which Mr Foots contends. In each statute, the existence of two statutory provisions (one for the proof of costs and one for the proof of the underlying debt) meant that the proof of costs was not an incidental matter in the sense of being subsumed by the proof of the underlying debt. Rather, the statute made separate provision for the proof of each matter; and as between the two provisions, it could be said that the proof of costs was the incidental or subsidiary one. Thus, so long as the creditor had obtained a judgment, decree or order in its favour before bankruptcy, it was possible to prove for the costs of obtaining that judgment, decree or order even though the costs had not yet been taxed. In this way, the United Kingdom legislature recognised the differing costs regimes at law and in equity, and provided a means by which they could be treated equivalently in bankruptcy. In particular, the discretionary nature of a costs award in equity was no bar to its proof.

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62 12 & 13 Vict c 106.

63 24 & 25 Vict c 134. This repealed the 1849 statute.

44 This statutory largesse was not, however, unlimited. The proof of costs was dependent on either the debtor being under an antecedent obligation to pay costs or else upon the giving of a judgment, order or decree before bankruptcy. Thus, in *Re Weller; Ex parte Weller*[64], where a creditor obtained judgment and a costs order against a debtor who had executed and registered a deed of composition immediately before judgment was given, the costs award was not provable because it had arisen only after bankruptcy. This was the outcome, notwithstanding that the underlying debt was plainly provable. Turner LJ, with whom Lord Cairns LJ agreed, held that "the costs were in nowise due at the date of the execution of the deed, and the creditor could not have proved for them under a bankruptcy at that date"[65].

The 1869 Bankruptcy Act

45 The statutory nexus between the giving of judgment and the proof of costs was broken by the 1869 Bankruptcy Act[66] which contained no separate provision for the proof of costs. This nexus has remained broken. Since 1869, a costs order is not provable merely because it is a costs order, and – unlike the earlier statutes – it is not provable merely because judgment has previously been given in the creditor's favour. Thus, since 1869, a costs order is provable only if it falls within the requirements of the section regarding proof of debts generally (now, in Australia, s 82 of the Bankruptcy Act).

46 With presently immaterial exceptions, s 31 of the 1869 Bankruptcy Act deemed to be debts provable in bankruptcy:

> "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

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64 (1867) 17 LT 125.

65 (1867) 17 LT 125 at 126. In argument ((1867) 17 LT 125 at 125), Lord Cairns LJ distinguished the admission to proof in *Ex parte Harding* (1854) 5 De GM & G 367 [43 ER 912] of a judgment for costs entered up after bankruptcy upon a pre-bankruptcy arbitration award, saying that the award itself had given the creditor the costs. Cf the remarks of Finkelstein J in *McLellan v Australian Stock Exchange Ltd* (2005) 144 FCR 327 at 333.

66 32 & 33 Vict c 71.

reason of any obligation incurred previously to the date of the order of adjudication ..."

The provenance of s 82(1) of the present Australian legislation is readily apparent.

The post-1869 English cases

47 The judicial interpretation of s 31 of the 1869 Bankruptcy Act in the years which followed owed as much to the underlying law of procedure or to earlier practice in bankruptcy as it did to the exposition of the text of s 31. For example, in *In re Duffield; Ex parte Peacock*[67], in the Court of Common Pleas a verdict had been found for the defendants and this carried an entitlement to costs; a composition with creditors of the plaintiff followed before judgment was signed and the costs taxed. The effect of the reasoning in *Duffield* was that a proof for costs in such circumstances would be allowed. Mellish LJ spoke of the debtor's obligation arising out of the verdict and not the entry of judgment. The assumption seems to have been that an obligation had sufficiently arisen at the earlier stage. The result also resembles that which would have obtained under the bankruptcy statute of 1861 where s 149 had made specific provision for subsequent taxation of costs.

48 A contrast may be seen three years later in *In re Newman; Ex parte Brooke*[68]. There a judgment and costs order in favour of a plaintiff in an action in tort (instituted before and tried after the commencement of the Judicature system[69]) were not provable because the judgment for the amount of the verdict and for taxed costs was not signed until after the bankruptcy of the debtor had intervened. Mellish LJ referred to the costs sharing the same fate as the damages, "being a mere addition or appurtenance to the damages" and thus following "the same rule as that to which they are attached"[70]. Section 31 of the 1869 Bankruptcy Act had not altered the "old law" that damages in a tort action did not found a provable debt before judgment was signed[71]. The approach taken to

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67 (1873) LR 8 Ch App 682.

68 (1876) 3 Ch D 494.

69 On 1 November 1875. See *Daniell's Chancery Practice*, 7th ed (1901), vol 1 at 1.

70 (1876) 3 Ch D 494 at 497.

71 (1876) 3 Ch D 494 at 497.

costs appears to be a reprise of the recently superseded common law procedure in relation to costs. The description of costs as an "appurtenance" to an underlying provable debt may also reflect, if inadequately, the change in the statutory scheme between 1861 and 1869. In the absence of s 149 of the 1861 Act, it may have been thought that debts arising from costs orders were not provable at all unless the order related to an otherwise provable debt.

49 The absence of any obligation to pay costs at the time of bankruptcy was also at issue in *Re Bluck; Ex parte Bluck*[72]. There, the verdict for the defendant, judgment and costs order in a tort action all ensued after the bankruptcy of the plaintiff. The proof of the untaxed costs of the defendant was expunged by Cave J on the application of the bankrupt. The creditor put a submission reminiscent of that now advanced by Mr Foots. This was that "the obligation was incurred previous to the receiving order, as the bankrupt was under the obligation to pay whatever was awarded against him in case of an adverse judgment"[73]. Cave J rejected that argument[74]:

> "The contention was, that this was a contingent liability to which he might become subject by reason of an obligation incurred before his discharge; but it is impossible to see what that obligation is. There had been litigation, and that too commenced by the plaintiff, but where is the obligation? If a man brings an action he does not place on himself an obligation to pay the costs, that obligation arises when judgment is given against him. I quite agree that, if the obligation is there, the amount of the costs need not have been accurately ascertained."

This litigation post-dated the commencement of the costs regime provided under the Judicature system, and for the reasons explained above, by 1887 it was no longer accurate to describe the giving of judgment as imposing an obligation to pay costs independently of the making of a costs order. However, the essential reasoning in *Re Bluck* still stands. It explains the conclusion in *Vint v Hudspith*[75]

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72 (1887) 57 LT 419.

73 (1887) 57 LT 419 at 419-420.

74 (1887) 57 LT 419 at 420.

75 (1885) 30 Ch D 24. Lindley LJ (at 27) described the case as showing the misfortune for the plaintiff of marrying an executrix before the passing of the *Married Women's Property Act* 1882 (UK).

that the mere possibility, at the date of bankruptcy, of an obligation to pay costs cannot found a provable debt[76].

British Gold Fields

50 Speaking in 1884 of the case law, Robson's *Treatise on the Law of Bankruptcy* rightly observed that "[t]he proof of costs has given rise to some rather nice distinctions, and the decisions have not been uniform"[77]. In 1898, immediately before the decision in *British Gold Fields*[78], the seventh edition of Williams' *Law and Practice in Bankruptcy* attempted to summarise the position as follows[79]:

> "a successful plaintiff's costs can only be proved in the bankruptcy of the defendant in cases where the debt or claim in respect of which the costs are recoverable is itself provable, because a plaintiff's right to costs is a mere addition or appurtenance to the claim or cause of action, and must follow the same rule as that to which they are attached. … It seems to follow that where judgment has been signed before [bankruptcy] proof may be made for the costs, even though they have not been taxed, but it is doubtful whether a mere possibility of having to pay costs is provable."

51 The decision in *British Gold Fields* was itself a further attempt at summary and synthesis of the case law. There, a number of shareholders applied under s 35 of the 1862 Companies Act[80]. (Section 35 and its legislative successors later were considered by Fullagar J in *Grant v John Grant & Sons Pty Ltd*[81].) The shareholders in *British Gold Fields* sought removal of their names from the register and repayment of the subscription moneys for their shares which they had paid by reason of misrepresentations in the prospectus. Section 35 contained its own costs regime for applications under that section. It stated that "the Court may either refuse such Application, with or without Costs,

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76 See the discussion of these cases by Finkelstein J in *McLellan v Australian Stock Exchange Ltd* (2005) 144 FCR 327 at 331-332.

77 5th ed (1884) at 283.

78 [1899] 2 Ch 7.

79 7th ed (1898) at 117-118.

80 25 & 26 Vict c 89.

81 (1950) 82 CLR 1 at 51-52.

to be paid by the Applicant" and went on to empower the Court to award against the company costs of successful applicants.

52 Two of the applications in *British Gold Fields* succeeded and the costs of those applications were awarded against the company. However, the company entered winding up before any order was made upon the remaining applications. In the winding up action those applicants obtained without opposition an order for rectification. They then were permitted by the liquidator to prove for the amount paid for their shares, but the liquidator refused the proof for their costs under s 35 of the 1862 Companies Act. On an appeal from the liquidator's decision, Wright J allowed the applicants to prove for their costs, and it was against that order that the liquidator unsuccessfully appealed to the Court of Appeal.

53 Section 10 of the 1875 Act rendered applicable in corporate insolvency the rules found in s 37 of the current bankruptcy statute, the *Bankruptcy Act* 1883 (UK) ("the 1883 Bankruptcy Act")[82]. In *British Gold Fields* Mr Gore-Brown for the liquidator argued that the matter was governed by *Re Bluck*[83], and that the applicants' costs were not provable as there had been no order for those costs made before bankruptcy. He was stopped by the Court in the course of his argument[84], a deceptively encouraging sign because the Court (Lindley MR, Rigby and Collins LJJ) decided against him. Lindley MR, who delivered the judgment of the Court, held that[85]:

> "If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise.
>
> If, therefore, what is recovered is unliquidated damages 'arising otherwise than by reason of a contract, promise, or breach of trust,' that sum is not recoverable unless judgment, or at least a verdict for it, has been obtained before adjudication, or now the receiving order; and if the sum recovered is not provable, neither are the costs of recovering it: *In re*

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82 46 & 47 Vict c 52.

83 (1887) 57 LT 419.

84 So much appears from the report of the case in (1899) 80 LT 638 at 638.

85 [1899] 2 Ch 7 at 11-12.

> *Newman*[86]; *Re Bluck*[87]. On the other hand, if what is recovered is provable, so are the costs of recovering it: see *Emma Silver Mining Co v Grant*[88].
>
> …
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> But if an unsuccessful action is brought by a man who becomes bankrupt, then, if he is ordered to pay the costs, or if a verdict is given against him before he becomes bankrupt, they are provable: *Ex parte Peacock*[89]. On the other hand, if no verdict is given against him and no order is made for payment of costs until after he becomes bankrupt, they are not provable. In such a case there is no provable debt to which the costs are incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy; nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy. This was the case of *Vint v Hudspith*[90]."

54 Mr Foots seized upon this decision. There have been many occasions on which *British Gold Fields* has been cited as authority both in cases[91] and in texts[92]. However, the value of *British Gold Fields* as a determinative authority in the present case is open to doubt on a number of fronts.

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86 (1876) 3 Ch D 494.

87 (1887) 57 LT 419.

88 (1880) 17 Ch D 122.

89 (1873) LR 8 Ch App 682.

90 (1885) 30 Ch D 24.

91 *In re A Debtor* [1911] 2 KB 652 at 655-656; *In re Pitchford* [1924] 2 Ch 260 at 265-267, 269-270; *Re Hedge; Ex parte Goddard* (1994) 50 FCR 421 at 422-423; *McCluskey v Pasminco Ltd* (2002) 120 FCR 326 at 339; *McLellan v Australian Stock Exchange Ltd* (2005) 144 FCR 327 at 332; *Sommerfeld* [2005] 2 Qd R 404 at 407.

92 Examples include Lewis, *Australian Bankruptcy Law*, 2nd ed (1934) at 130; 11th ed (1999) at 110; McDonald, Henry and Meek, *Australian Bankruptcy Law & Practice*, (1928) at 146; McPherson, *Law of Company Liquidation*, (1968) at 334; 2nd ed (1980) at 324, 335; 3rd ed (1987) at 368; 4th ed (1999) at 535-536;

(Footnote continues on next page)

55 British Gold Fields is a case whose authority stems more from repetition than from analysis. This is itself a reason for caution, but a number of more specific grounds should be noted. First, with the exception of his reference to unliquidated damages, nowhere does the Master of the Rolls relate the stated principles to the text of s 37 of the 1883 Bankruptcy Act. Notwithstanding his Lordship's avowal that the cases to which he referred were "consistent and reasonable, and quite in accordance with the language of the section"[93], it is not always clear that he had at the forefront of his mind the text of the applicable statute. Few of the cases seem to have given attention to any particular statutory text as distinct from generalised and sometimes anachronistic perceptions about past bankruptcy practice. Secondly, Emma Silver Mining[94] does not stand for the proposition for which it is cited; namely that "if what is recovered is provable, so are the costs of recovering it"[95]. Nor was there any other authority that provided plain support for the conclusion Lindley MR reached.

56 Thirdly, to the extent that repetition is itself a source of authority, it must be realised that *British Gold Fields* stands for a number of propositions, and not every subsequent citation supports the proposition for which the appellant presently contends. Fourthly, repetition and lack of analysis may have had the effect of perpetuating confusing distinctions of doubtful utility.

57 Most importantly, what difference does it make whether the creditor's costs are incidental to a provable debt or not? If it does make a difference, what justifies the drawing of such a distinction? In the decision of the Queensland Court of Appeal in *Sommerfeld* it is said, with respect rightly, and by reference to *British Gold Fields* that "[a] potential or contingent liability for costs is not a provable debt unless an order for payment of those costs has been made before bankruptcy intervenes"[96]. It is then observed in the same paragraph that "[t]he case is not one in which it can be said that there is a provable debt to which an order for costs is or would be incidental in the sense laid down in [*British Gold Fields*]". The latter comment was made in passing, but what justification was

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looseleaf ed at [12.320]; Williams, *Law and Practice in Bankruptcy*, 8th ed (1904) at 124; 19th ed (1979) at 157.

93 [1899] 2 Ch 7 at 11.

94 (1880) 17 Ch D 122.

95 *British Gold Fields* [1899] 2 Ch 7 at 11.

96 [2005] 2 Qd R 404 at 408.

there for assuming the result would differ if the litigation concerned a provable debt? Neither *British Gold Fields* nor *Sommerfeld* offers an explanation of the distinction, nor is one apparent from the text of the current or former bankruptcy statutes.

58 It may well be, as counsel for Ensham suggested, that *British Gold Fields* reached the correct result but for the wrong reasons. In that case, counsel for the shareholders had submitted that fraud had been found against the company in the two applications completed before the winding up, that it was by then clear that the remaining applications were bound to succeed when heard and that the company would have to pay the costs under s 35 of the 1862 Companies Act, and that the bankruptcy statute had nothing to do with the case[97].

59 It may have been that the costs under s 35 were admissible to proof as costs of the winding up, rather than as being appurtenant to an underlying provable debt. Such a rationale would explain the apparent discrepancy between the result in *British Gold Fields* and that in *Re Pitchford*[98]. In the later case, despite the fact that the underlying debt was undoubtedly provable, the costs were held not to be, as there was no order that they be paid before bankruptcy intervened and there was no suggestion that they were costs of the bankruptcy itself. Lawrence J observed that "[w]hat was decided [in *British Gold Fields*] was that the applicants ought to be allowed to prove for the costs incurred by them in obtaining an order in the winding up for the rectification of the register of the company, as, without such an order, their proofs could not have been admitted"[99]. *British Gold Fields* may thus be of more value as an authority upon s 35 of the 1862 Companies Act than as an application of s 37 of the 1883 Bankruptcy Act.

60 Whatever may be the proper explanation for the result, *British Gold Fields* should not now be accepted as authority for a proposition which compels a construction of s 82 of the Bankruptcy Act whereby an untaxed order for costs made after bankruptcy is a provable debt.

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97 [1899] 2 Ch 7 at 9.

98 [1924] 2 Ch 260.

99 [1924] 2 Ch 260 at 270.

Interpreting the Bankruptcy Act

61 Contrary to what appears to have influenced the reasoning in this case of Mullins J, what was said in the joint judgment in *Coventry*[100] respecting the utility when construing s 82(2) of the Bankruptcy Act and s 31 of the 1869 Bankruptcy Act and its judicial interpretation does not control the present case.

62 In *Coventry* relevance of legislative history and prior case law lay in the exposition of the terms of the present legislation, not otherwise[101]. The particular issue concerned the content of the phrase "arising otherwise than by reason of a contract"; a matter of textual exposition upon which earlier authorities were of significant assistance. However, in the present case the appellant points to statements which at best sit uneasily with the statutory text. In like vein, in *Sons of Gwalia*[102], this Court affirmed the primacy of the statutory text, freed from what were shown to be anachronistic 19th century judicial accretions.

63 But what of the submission that the correctness of *British Gold Fields* has been assumed in the enactment of s 82 of the Bankruptcy Act and its predecessor, s 81 of the *Bankruptcy Act* 1924 (Cth)? In *R v Reynhoudt*, Dixon CJ said that[103]:

> "the view that in modern legislation the repetition of a provision which has been dealt with by the courts means that a judicial interpretation has been legislatively approved is, I think, quite artificial".

Notwithstanding the appellant's submissions, that artificiality is all the more apparent when the judicial exposition in question is more a gloss than an interpretation of a particular text.

64 Of course, this Court is not permitted to "arrive at [its] own judgment as though the pages of the law reports were blank"[104]. In *Coventry*, that is why in their joint judgment, Gleeson CJ, Gummow, Hayne and Callinan JJ turned to the

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100 (2005) 227 CLR 234 at 253 [50]-[51].

101 (2005) 227 CLR 234 at 243-244 [22].

102 (2007) 81 ALJR 525; 232 ALR 232.

103 (1962) 107 CLR 381 at 388. See also *Flaherty v Girgis* (1987) 162 CLR 574 at 594; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329, 351.

104 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 per Gibbs J.

earlier authorities to give content to, and to elucidate the meaning of, the current statute. However, to the extent that it concerns the proof of a costs order made after bankruptcy, the decision in *British Gold Fields* neither gives content to, nor elucidates, s 82 of the Bankruptcy Act. Rather, what was said in that case is at odds with the natural and ordinary meaning of the legislation. In that regard, it should no longer be followed in Australia.

Conclusions

65 If the distraction of *British Gold Fields* is resisted when construing the text of the Bankruptcy Act, and the nature of a costs order is appreciated, several difficulties lie in the path of the admission to proof of the costs order made against Mr Foots. First, the order made falls outside s 82(1) because it was made after bankruptcy, and was thus not a liability "to which a bankrupt was subject *at the date of the bankruptcy*, or to which he or she may become subject before his or her discharge by reason of an obligation incurred *before the date of the bankruptcy*" (emphasis added). Secondly, as explained earlier in these reasons, Mr Foots was under no antecedent obligation to pay costs until the order was made against him. Thirdly, there is no scope in the text or structure of the Bankruptcy Act for the notion of an obligation or liability "incidental" to a provable debt. The necessary corollary of the appellant's argument is the admission that such an obligation is not itself a provable debt, but is only "incidental" to one. If such an obligation is not a provable debt, when then should it be admitted to proof? Dressing the notion in the language of "incidence" does not alter matters: rather, it is apt to disguise the text of the Bankruptcy Act.

66 It may be added that once these points are grasped, it will be seen that the decision of Lord Eldon LC in *Ex parte Hill* is of more than mere antiquarian interest[105]. Then, as now, a costs order could only be admitted to proof if it fell within the ordinary terms of the statutory provision governing proof of debts generally. No special judge-made rules were applicable to the proof of costs. It is perhaps regrettable that the law has taken 203 years to return to this simple and orthodox position.

67 Had the costs order made by Chesterman J on 3 February 2006 been made and taxed before the appellant's bankruptcy ensued, it would have been a provable debt. Even if the order had not been taxed before bankruptcy, it would nonetheless have been provable as a debt incurred "by reason of an obligation

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105 (1804) 11 Ves Jun 646 [32 ER 1239].

incurred before the date of the bankruptcy"; namely the antecedent making of the costs order. However, the order was made only after bankruptcy had already intervened, and the appellant's liability to meet that order did not arise from an obligation incurred before bankruptcy. Thus, it was not a provable debt, and the stay contained in s 58(3) of the Bankruptcy Act was not engaged. His Honour was therefore entitled to make the costs order against Mr Foots.

68 If it be thought that the result reveals a lacuna in the text or operation of the Bankruptcy Act the questions whether and if so how changes should be made are for the Parliament.

Order

69 The appeal should be dismissed with costs.

70 KIRBY J. Both sides in this appeal agree that the issue for decision is one of statutory interpretation. Both sides accept that the essential question is the meaning and application of s 82 of the *Bankruptcy Act* 1966 (Cth) ("the Bankruptcy Act"). Both sides invoke judicial authority on this and earlier provisions to support their arguments. In the end, the answer to the issue before this Court depends upon what s 82 of the Bankruptcy Act requires.

71 I differ over the approach evident in the reasons of Gleeson CJ, Gummow, Hayne and Crennan JJ ("the joint reasons"). Respectfully, I regard their Honours' analysis as being distracted by historical considerations, interesting and marginally useful though they may be. It is one thing to say that considerations of legal history "should not obscure the consideration that the appeal essentially turns upon the construction of s 82 of [the Bankruptcy Act] in particular the identification of the debts and liabilities which are provable in bankruptcy"[106]. It is quite another thing to pursue a detailed journey through the same English decisions that, in my view, are only of peripheral relevance to the elucidation of the command of the Australian Parliament that governs the outcome of this appeal[107].

72 The point of distinction in my reasoning and conclusion thus turns (as earlier appeals have done) on the correct approach to the task in hand. This appeal bears many similarities to the decision of this Court in *Coventry v Charter Pacific Corporation Ltd*[108]. In that case too, I disagreed with the majority reasoning which, I thought, had strayed from a textual consideration of the Bankruptcy Act and, instead, pursued a lengthy, fascinating but ultimately indeterminate examination of non-binding 19th century English authority[109]. In the result, the decision has been criticised[110].

73 In the present appeal the majority's scrutiny of 19th century English authority is, if anything, even more detailed and certainly lengthier than in

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106 Joint reasons at [2].

107 The correct approach has a constitutional foundation: *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168 at 196 [77]-[78], 201 [96]; *Cornwell v The Queen* (2007) 81 ALJR 840 at 879-880 [181]-[185]; 234 ALR 51 at 104-105.

108 (2005) 227 CLR 234.

109 (2005) 227 CLR 234 at 258-259 [76], cf at 249-253 [35]-[51].

110 McDonald, Henry and Meek, *Australian Bankruptcy Law and Practice* (Darvall and Fernon eds), 5th ed (rev) (2005), vol 1 at 4076-4079 [82.2.05].

Coventry[111]. Misled by the way in which the parties presented their arguments, with copious references to, and analysis of, the old cases (especially the decision of the English Court of Appeal in *In re British Gold Fields of West Africa*[112]), the joint reasons depart from the proper approach which they correctly identify at their beginning[113]. In doing so, they fail to observe the approach which this Court has laid down as the correct one for the construction of contested Australian statutory provisions.

74 When the right approach to elucidating s 82 of the Bankruptcy Act is adopted, it leads to a conclusion opposite to that reached in the joint reasons. In my view, the appeal succeeds. Only the construction urged by the appellant gives effect to the language, purpose, context and policy of the contested provisions of the Bankruptcy Act. None of the 19th century English decisions binds this Court or controls its outcomes. The Court should be consistent in the way it approaches problems of statutory construction. Unless the approach is consistent, the outcomes become unpredictable. The task of other courts and of those administering the relevant law then becomes needlessly difficult.

The facts and legislation

75 *The facts*: The background facts are explained in the joint reasons[114]. For the purposes of the appeal, the central facts could not have been clearer.

76 Mr Kenneth Foots ("the appellant") became embroiled in a substantial action in the Supreme Court of Queensland in which the plaintiffs, Southern Cross Mine Management Pty Ltd ("Southern Cross") and Mr Foots and his companies, were unsuccessful. The trial judge (Chesterman J) gave judgment for Ensham Resources Pty Ltd ("Ensham") and related companies on a counterclaim against Southern Cross and Mr Foots. That judgment was entered in the sum of $2,460,000. The primary judge found that no distinction could be drawn between Mr Foots and Southern Cross. Mr Foots was Southern Cross's alter-ego. The case for Southern Cross had been expressly conducted on the basis that Mr Foots was representing that company.

77 The primary judge found that Mr Foots's dealings with Ensham, which was his employer, were "thoroughly dishonest and that his testimony, by which he sought to secure success in the action for himself and Southern Cross, was

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111 Joint reasons at [38]-[60].

112 [1899] 2 Ch 7. See joint reasons at [2], [38], [50]-[60].

113 Joint reasons at [2].

114 Joint reasons at [5]-[6].

untruthful"[115]. Reasons supporting these conclusions were published when judgment was given by the primary judge on 26 August 2005[116].

78 At that stage, the making of final orders for costs was postponed. Still less had the recoverable costs been assessed and found. However, no one would have been in any doubt (least of all Ensham, Southern Cross and Mr Foots) that, following the strongly worded reasons for judgment of the primary judge, the unsuccessful parties (including Mr Foots) were then facing a most substantial costs order against them. In other words, Mr Foots was liable to have such an order made. Its making was inevitable.

79 Having regard to the historical developments explained in the joint reasons[117], the equitable rule governing costs has prevailed in countries deriving their legal tradition from England. It has done so including in respect of actions at common law. Such costs are therefore now discretionary. Nevertheless, the discretion concerned is a judicial one. It is not arbitrary or idiosyncratic. It is generally subject to appellate review, although typically requiring leave[118].

80 It would therefore border on the fantastic to suggest that, in light of his published conclusions, the primary judge would relieve Mr Foots and his interests entirely from a costs order. Indeed, the only practical question that remained to be determined by the primary judge was whether, in light of his expressed conclusions, he would order Mr Foots to pay Ensham's costs on a basis other than the usual liability for party and party costs. The general power of the primary judge to order the payment of costs on an indemnity basis was not contested[119]. Any informed person reading the primary judge's reasons in disposing of Mr Foots's action would have then known that a costs order was certain and that an indemnity costs order was very likely.

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115 *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* (2006) 196 FLR 419 at 422 [13].

116 *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* [2005] QCA 233 per Chesterman J.

117 Joint reasons at [33]-[34].

118 *Latoudis v Casey* (1990) 170 CLR 534 at 544-545; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 88-89 [40]-[44], 120-123 [134].

119 See (2006) 196 FLR 419 at 423 [14]-[15] citing *Degmam Pty Ltd (In Liq) v Wright (No 2)* [1983] 2 NSWLR 354 at 358; *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359 at 362; *Rouse v Shepherd [No 2]* (1994) 35 NSWLR 277; *Re Talk Finance and Insurance Services Pty Ltd* [1994] 1 Qd R 558.

81 It would therefore have come as no surprise (the considerations presented by this appeal aside) when the primary judge ordered Mr Foots to pay Ensham's costs on an indemnity basis. Indeed, as the record shows, Mr Foots was not surprised. His submissions in opposition to a costs order did not condescend to the merits of such an order, beyond the issue of his bankruptcy. His Honour remarked[120]:

> "He was the architect and chief executive of the deception practised on Ensham. The only reason advanced against the making of the order is his bankruptcy which it is said precludes the order."

82 Following the publication of the reasons and entry of judgment by the primary judge on 26 August 2005, Mr Foots moved quickly. On 15 September 2005, on his own petition, he became bankrupt. An order to that effect was made by the Federal Court. That order was made pursuant to the Bankruptcy Act, a federal statute. Under that Act, the order immediately affected the status of Mr Foots. It did not operate merely *inter partes*. It operated against the world.

83 *The legislation*: Two provisions in the Bankruptcy Act, and not a collection of 19th century case law, now govern the outcome of this appeal. The provisions must be examined.

84 The terms of s 82 of the Bankruptcy Act are stated in the joint reasons[121]. The critical words must be interpreted in the context of the entire section and of the Act as a whole. I will not repeat the entire language of s 82. However, it is important to note the key provisions (reproduced with emphasis added):

> "(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 or she may become subject before his or her discharge by reason of an obligation incurred* before the date of the bankruptcy, are provable in his or her bankruptcy.
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> …
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> (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.

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120 (2006) 196 FLR 419 at 423 [18].

121 Joint reasons at [8].

(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*.

…

(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."

85 The provisions of s 58 of the Bankruptcy Act should also be noted. Relevantly, the section is titled "Vesting of property upon bankruptcy – general rule". It states:

"(1) Subject to this Act, where a debtor becomes a bankrupt:

(a) the property of the bankrupt … vests forthwith in the Official Trustee …

(2) …

(3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

(a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or

(b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

…".

86 The provisions of r 72 of the Uniform Civil Procedure Rules 1999 (Q) ("the UCPR") read, so far as relevant:

"(1) If a party to a proceeding becomes bankrupt, … a person may take any further step in the proceeding for or against the party only if –

(a) the court gives the person leave to proceed; and

(b) the person follows the court's directions on how to proceed.

(2) If a party to a proceeding becomes bankrupt … the court may, at any stage of the proceeding, order the trustee … to be included or substituted as a party for the original party.

(3) Subrules (1) and (2) apply subject to the *Bankruptcy Act 1966* (Cth)".

87 A notable difference between the requirements for leave in the Bankruptcy Act, s 58(3) and the UCPR, r 72(1) is that s 58(3) requires the leave of the Federal Court or the Federal Magistrates Court[122] whereas r 72(1) requires the leave of the State (Queensland) court[123].

The decisions of the Supreme Court of Queensland

88 *The primary judge*: Notwithstanding the supervening bankruptcy, the provisions of the Bankruptcy Act and Mr Foots's submission to the contrary, the primary judge proceeded with the determination of the outstanding orders for costs, including those sought by Ensham against Mr Foots. As noted in the primary judge's reasons, the outstanding costs for the litigation were "likely to exceed $2,000,000"[124]. This was only just short of the very substantial judgment earlier ordered. Purportedly acting under the UCPR, r 72 and exercising State jurisdiction, the primary judge gave Ensham leave to proceed against Mr Foots[125].

89 The primary judge expressly rejected the argument for Mr Foots that Ensham's step, seeking to secure the costs order against him, could not be taken consistently with his supervening bankruptcy and the requirements of the Bankruptcy Act[126]. Specifically, the primary judge rejected Mr Foots's argument that the post-bankruptcy order for the payment of costs was a "debt" or "liability" within s 82(1) of the Bankruptcy Act, such that that "fresh step" in proceedings against a bankrupt required leave of the Federal Court or the Federal Magistrates Court pursuant to s 58(3) of the Bankruptcy Act[127].

90 In the result, the primary judge made the order that is contested in these proceedings. That order provided that Mr Foots pay Ensham "costs of and incidental to the counter-claim against him, including the costs of this application and all reserved costs, and that those costs be assessed on the indemnity basis."

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122 See Bankruptcy Act, ss 5 ("the Court"), 27.

123 See UCPR, r 3.

124 (2006) 196 FLR 419 at 428 [40].

125 (2006) 196 FLR 419 at 427-428 [36].

126 (2006) 196 FLR 416 at 428 [40].

127 (2006) 196 FLR 419 at 424 [20]-[21].

The costs order was entered by the Supreme Court of Queensland on 3 February 2006. At no stage does the record disclose that the leave of the Federal Court or the Federal Magistrates Court was sought, or given, before that order was made and entered. Nor does the record indicate that Mr Foots's trustee in bankruptcy was involved in any way in approving (or contesting) the making of that order.

91 *The intermediate court*: By majority[128], the Queensland Court of Appeal dismissed Mr Foots's appeal against the costs order. The Court upheld that order. However, Mullins J dissented. Her Honour concluded that the grant of leave under r 72 of the UCPR and the costs order made against Mr Foots should be set aside; that the application should be adjourned until Ensham obtained leave of the Federal Court or the Federal Magistrates Court under s 58(3) of the Bankruptcy Act; and that Ensham pay Mr Foots's costs of the appeal and the costs hearings before Chesterman J on 16 and 22 November 2005[129].

92 Substantially, Mullins J reached her conclusion on the basis of her understanding of the approach to the task of interpretation mandated by the reasoning of the majority of this Court in *Coventry*[130]. On that basis, her Honour acted on what she took to be the requirement of 19th century English judicial decisions concerning the status of a costs order as a provable debt in bankruptcy, most notably the decision of the English Court of Appeal in *British Gold Fields*[131].

93 Doubtless, for similar reasons, given the approach adopted by the majority in *Coventry*, the judges in the majority in the Court of Appeal also devoted a great deal of their attention to examining the same English decisions[132]. In my respectful opinion, this is the misfortune inflicted on Australian courts by the historical approach taken in *Coventry* and now repeated in this appeal. The majority reached the conclusion opposite to Mullins J. They affirmed the primary judge's costs order.

94 Instead of the courts spending their energies examining closely the text of the applicable statutory language; elucidating its apparent purposes; and identifying the policy to which it was seeking to give effect as a contemporary law of the Australian Parliament, judges are transformed into legal historians. It

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128 Jerrard and Holmes JJA; Mullins J dissenting.

129 [2006] QCA 531 at [107].

130 [2006] QCA 531 at [83]-[92].

131 [2006] QCA 531 at [93]-[98] citing *British Gold Fields* [1899] 2 Ch 7.

132 [2006] QCA 531 at [15]-[34] per Jerrard JA; [56]-[77] per Holmes JA.

is a role they can only fulfil imperfectly. It is not their essential function, for which they have been prepared by their training and experience. That function is to give effect to the will of the Australian Parliament, as stated in the statutory language in which that legislature has stated its will[133]. That will is to be identified by techniques of legal analysis in which considerations of history play a part, but no more than a subordinate one.

The correct approach to the task of construction

95 As it seems to me, respectfully, in the present appeal the majority depart from the instruction that this Court has given concerning the way in which Australian courts should address disputed questions of statutory interpretation[134].

96 Five principles are relevant:

(1) *The textual analysis principle*: The correct starting point for any analysis of a problem of statutory interpretation is the language of the statute itself[135]. It is not a mass of past judicial authority dealing with the same or similar statutory provisions. If there has been one principle of statutory interpretation upon which this Court has spoken with general unanimity in recent years, it has been the obligation to begin the ascertainment of the applicable law by analysing the *text* in issue. Any other approach fails to accord proper attention to the authentic voice in which the lawmaker has expressed the governing rule. Provided the rule is constitutionally valid, it is the duty of courts to give it effect. To the extent that advocates and courts continue to address themselves to judicial remarks (often *obiter dicta*) in earlier cases, they run the risk of failing to perform their proper functions as the Constitution envisages within the integrated Judicature of the Commonwealth;

(2) *The contextual interpretation principle*: The reading of contested statutory language must take place in the context of the entire section in question, the surrounding part of the Act and other relevant provisions of

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133 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Chang v Laidley Shire Council* (2007) 81 ALJR 1598 at 1611 [59]; 237 ALR 482 at 496-497.

134 Other cases include *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194 at 226-227 [88]; *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 285 [113].

135 *Combet v The Commonwealth* (2005) 224 CLR 494 at 567 [135], fn 150 where the relevant authorities are collected.

the statute, read as a whole[136]. This principle recognises the risks that can arise in giving meaning to particular words viewed in isolation from the context in which those words appear. Necessarily, words take their colour from their context. Applying judicial observations, especially those written in a different context, to words or phrases appearing in a new and different context, without careful regard to that context, risks leading the decision-maker into error. Thus, in the present instance, applying remarks written in a different country, in respect of different statutes, with purposes distinct from those of the Australian Bankruptcy Act, endangers the correct elucidation of contested words appearing in that Act;

(3) *The purposive construction principle*: The Court must also give effect to the ascertained purpose of the legislature when it enacted the contested law. Statutory provisions[137] and common law rules in this Court[138], in other courts of high authority[139] and in State courts[140] repeatedly lay emphasis on the need to go beyond a purely semantic approach to the discovery of statutory meaning. The reasons for these developments in the approach to statutory interpretation are many and varied. I will not repeat them here. They are well known. The challenge is to ensure that they are observed consistently and to avoid temptations to revert to discarded techniques. Those techniques include purely grammatical approaches to interpretive questions or approaches that give undue attention to considerations of decisional history; and

(4) *The foreign decisional authority principle*: There is a fourth principle that needs to be stated in the present case. Since the termination of Privy Council appeals from Australia, no judicial authority of England or any other country binds any court of this nation. A question (not yet finally resolved) concerning the status of Privy Council holdings in Australian appeals at the time when the Privy Council was a part of the Australian judicial hierarchy need not be considered because it does not arise in this

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

137 *Acts Interpretation Act* 1901 (Cth), s 15AA; *Acts Interpretation Act* 1954 (Q), s 14A.

138 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384-385 [78]-[81].

139 *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272-273, 275, 280, 291.

140 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423-425.

appeal. Specifically, the decisions of English superior courts, including the House of Lords and the English Court of Appeal, enjoy no special precedential function for reasoning in this Court or any other Australian court[141]. Earlier observations of this Court to the contrary must now be regarded as overruled[142].

This is not to say that the resource of English and other judicial decisions outside Australia is ignored. Where Australian legislation has an English or other foreign provenance, it will sometimes be useful to have recourse to the decisions of overseas courts[143]. However, not a single one of the decisions of the English judges in the 19th century over which the primary judge, the Court of Appeal (and now the majority in this Court) have laboured, obliges this Court to come to the same conclusion when giving effect to the relevant provisions of the Australian Bankruptcy Act. That Act is a major public statute of the Parliament of the Australian Commonwealth. It is enacted under a constitutional power permitting that Parliament to make laws for this country with respect to "bankruptcy and insolvency"[144]. Its validity is unquestioned. Our duty to the Act is therefore clear. It is a constitutional duty. We are sworn to obey it. We should not let ourselves become distracted by excessive attention to remarks written by judges who are not, and never were, part of Australia's integrated Judicature.

(5) *The federal predominance principle*: An appropriately circumscribed reference to the history of English decisions, which were precursors to the contested sections of the Australian Bankruptcy Act (ss 58 and 82), could not be objected to. It is the disproportionate attention to those authorities, as if they were still effectively binding and cast a shining light on the meaning that this Court should give to applicable provisions of the contemporary Australian Bankruptcy Act, that I resist. Our attention should be focused on the provisions of that Act, a statute of our Parliament, enacted in 1966, having daily consequences for the status, entitlements and obligations of Australian bankrupts and creditors in the

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141 *Cook v Cook* (1986) 162 CLR 376 at 389-390 per Mason, Wilson, Deane and Dawson JJ; cf *Viro v The Queen* (1978) 141 CLR 88 at 118-122, 151, 166.

142 See eg *Commissioner of Stamp Duties (NSW) v Pearse* (1953) 89 CLR 51 at 64 (PC); *Skelton v Collins* (1966) 115 CLR 94 at 104, 122, 133, 139; *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 341, 349; *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 590-591.

143 *Stingel v Clark* (2006) 226 CLR 442 at 453 [17], 464 [49], 480 [113].

144 Constitution, s 51(xvii).

> 21st century. It is in that text, primarily, and not in history books or in superseded English decisional law, that we will find the answer to Mr Foots's appeal.
>
> Especially is this so because that text contains, in s 58(3) of the Bankruptcy Act, provisions mandating the supervision by federal courts over the orders of State courts affecting the estates of bankrupts. In this sense, the foreign decisional authority principle defends yet another interpretive principle that must be obeyed. This is the federal predominance principle. It holds that, where there is an inconsistency between federal and State legislative provisions, it is the federal law which, under the Constitution[145], must be given predominance to the extent of the inconsistency. Where possible, the legislation should be construed to avoid any inconsistency. This is done because it will be assumed that the federal and State legislative provisions have been enacted with the postulate of federal priority clearly in mind.

Application of the principles to the case

97 *An intuitive reflection*: Before turning to analyse the application of ss 82 and 58 of the Bankruptcy Act in the normal way, it is as well to pause and notice the apparently unrealistic outcome reached by the majority judges below.

98 Mr Foots has incontestably entered upon his bankruptcy and his civil status thereupon changed. The financial adventure that brought him to that status was, apparently, his litigation with Ensham. At the moment that he became bankrupt, he and his creditors (including Ensham) were fully aware of the damning reasons for judgment of the primary judge. Any informed person who, at that stage, suggested that there was the slightest prospect that Mr Foots would wholly escape a costs order against him (indeed a special order by reason of the strongly adverse findings) would have been laughed out of court. In the proper exercise of the discretion to award costs in that litigation, no Australian judge could have released Mr Foots from liability for those costs. To hold otherwise would, in effect, reward delay (or attempted delay) of entry into bankruptcy. Yet the scheme of the Bankruptcy Act is designed to expedite the commencement of bankruptcy, once relevant financial exigencies exist and are demonstrated. Only this approach will protect other creditors and persons dealing with someone in the position of Mr Foots.

99 To treat the prospective costs *obligation* of Mr Foots (I use a neutral expression) as outside the scheme of s 82(1) would be seriously to defeat, or certainly to wound, the operation of the Bankruptcy Act in important respects.

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145 Constitution, s 109.

Potentially, it would encourage delay in the commencement of the bankruptcy; reduce the control of Mr Foots's trustee over the entirety of his relevant assets, debts and liabilities as at the time of the bankruptcy; permit a creditor to pursue, outside the bankruptcy, a most substantial obligation (in this case $2 million plus); and leave that large obligation outstanding for Mr Foots to face as a personal liability after he is ultimately discharged from bankruptcy.

100 On the face of things, this does not appear to be the way in which the Bankruptcy Act was intended to operate. That this might be so is hinted at in the joint reasons, in the closing statement that the result reached by their Honours might reveal "a lacuna in the text or operation of the Bankruptcy Act"[146]. However, the so-called "lacuna" is not simply an inconvenient gap in the operation of that Act. It is such an unlikely outcome that it sends the judicial mind searching for whether it is truly the result intended and provided for by the Act.

101 Gaps and inconvenient results can sometimes arise in the course of statutory interpretation[147]. However, where they threaten to undermine a fundamental purpose of the legislation in question, something more than an historical chronicle is, in my opinion, needed to attribute such a purpose and consequence to the Parliament of the Commonwealth.

102 *A textual analysis*: This intuitive doubt that history should lead the reader to a result so manifestly antithetical to the purposes of bankruptcy, takes one back to the language of s 82, which, rather than history, should be the commencement and focus of the legal analysis in this appeal.

103 In defining the obligations that are "provable in … bankruptcy", s 82(1) of the Bankruptcy Act distinguishes between "debts" and "liabilities". Thus, to be provable, it is not necessary that the "obligation" should be an already established or liquidated "debt"[148]. Certainly, before final orders were made by the primary judge, the obligations of Mr Foots for the costs of his litigation with Ensham did not amount to a "debt" in that sense. I am unconvinced that they did not amount to a "liability".

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146 Joint reasons at [68].

147 *Sons of Gwalia Ltd v Margaretic* (2007) 81 ALJR 525 at 548 [103]-[104]; 232 ALR 232 at 261.

148 Even the word "debt" should not be given a narrow or technical meaning; cf *Gye v McIntyre* (1991) 171 CLR 609 at 619; *GM & AM Pearce v RGM Australia Pty Ltd* [1998] 4 VR 888 at 895; *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 at 778; [1975] 2 All ER 390 at 409.

104 Mr Foots (and others whom he controlled) launched the litigation, relevantly, against Ensham. To Mr Foots must be attributed knowledge that embarking upon such an action entailed risks and potential liabilities. Those risks included the risk that the litigation would provoke a cross-claim that would, as happened here, succeed. If he were to lose the cross-claim, the liabilities would certainly involve costs of the litigation. It would require a very starry-eyed view of litigious realities to attribute to Mr Foots a belief that he could litigate as he did, and lose, without any personal liability as to costs.

105 Moreover, the "liabilities" provable in Mr Foots's bankruptcy included, as the language of s 82(1) of the Bankruptcy Act made plain, "future" and "contingent" liabilities. So who could deny that, at the time immediately after the excoriating reasons for judgment were published by the primary judge, Mr Foots had a future and contingent "liability" for the costs of the litigation, notably of the cross-action? Such liability for costs lay in the "future" because the final costs orders had not then yet been made. It was "contingent" because the primary judge had not yet exercised his powers and discretion. He had not yet made his orders and entered them in the form of a constitutional "judgment" or "order"[149]. They had not yet been assessed and found by a registrar or agreed between the legal representatives. But to suggest that the "liability" for the costs of the proceedings did not answer to the description of a "future" and "contingent" liability is to impose altogether too narrow a meaning upon the statutory words. On the face of things, the "liability" for costs was contingently established as a future liability in existence "at the date of the bankruptcy". It simply awaited the conclusion of steps which were, in this case at least, both formal and predictable.

106 *The contextual meaning*: This conclusion, based on no more than the language of s 82(1) of the Bankruptcy Act, and giving the words their ordinary grammatical meaning, is reinforced when the context of s 82(1) is appreciated by reading that sub-section within the entirety of s 82. The provision in s 82(3B) governing liability for interest accruing suggests that the sub-section was considered necessary because, otherwise, interest accruing would be a "debt" or at least a "liability", absent the provisions of sub-s (3B). "Interest accruing" would ordinarily depend on a number of post-bankruptcy contingencies. These would include the accumulating size of the debt; the variable published interest rate; and any particular provisions of the credit contract. The special treatment of accruing interest supports a meaning for "debts and liabilities" contrary to that advanced for Ensham of legally accrued and formally determined obligations.

107 Other sub-sections of s 82 of the Bankruptcy Act tend to reinforce this view of the character of "future" or "contingent" "debts and liabilities". Thus,

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149 Constitution, s 73.

s 82(4) contemplates that, at the moment of the bankruptcy, the precise "value of a debt or liability" may "not bear a certain value". That, indeed, is the case here. The "value" of Mr Foots's "future" or "contingent" liability for costs was not certain at the time of his bankruptcy. However, the Bankruptcy Act resolves that uncertainty by providing practical machinery. The trustee "shall make an estimate of the value of a debt or liability" (s 82(4)). If a person is aggrieved by the trustee's estimate, that person may "appeal to the Court", meaning the Federal Court or the Federal Magistrates Court[150]. It is then left to the Court to find the value of the debt or liability, so long as it "can be fairly estimated": s 82(7).

108 The Court is given a broad latitude to determine the value "as it thinks proper" (s 82(7)). Given that courts must often make estimates of future contingencies, the notion that it would be beyond the capacity of the Federal Court or the Federal Magistrates Court, absent a final determination of cost orders by the primary judge and assessment of such costs, fairly to estimate what those orders should properly be, is fanciful. In s 82(7), the Act clearly contemplates that courts may be empowered to provide just such an estimate. The provision of this power is yet another indication in the statutory context that favours a meaning of the words "future … or contingent [liabilities]" that is both practical and just, and helps to carry forward the general purposes of the Act.

109 To the extent that an historical excursus into 19th century English authority influences a different outcome, a contemporary Australian court should give effect to the command of the Australian Parliament in preference to the *dicta* (many of them conflicting) of earlier English and other judges. Especially is this so because only this approach is faithful to this Court's constitutional duty. That duty is to give effect not to what English legal history provides but to what the Parliament of the Commonwealth has provided, derived from the text and context of the Act, so as to apply a comprehensive statutory measure designed to deal with the financial affairs of a bankrupt's estate in contemporary Australia. To say that the future contingent liability for costs in a case such as the present slips out of the net that the bankrupt's estate is designed to catch, is unconvincing, at least to me. It is not a result required by the text or context of s 82(1). Nor is it suggested by the purpose of the Act. To the contrary, it tends to defeat that purpose – another reason why it should not be favoured.

110 *Answering the contrary analysis*: I appreciate that the Bankruptcy Act uses the words "debts and liabilities" in a legal context. The word "liabilities" is therefore open to an interpretation that ascribes to it formality and certainty, as in already accrued "debts and liabilities", binding and enforceable at law.

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150 Bankruptcy Act, ss 5 "the Court", 27 and 82(5).

111 There are *dicta*, although in a different legal context (company winding up) that lend some support to this approach[151]. Further, as the joint reasons note[152], s 82 of the Bankruptcy Act does not gather in *all* of the bankrupt's debts and liabilities to render them provable in bankruptcy. Claims in the nature of unliquidated damages arising "otherwise" than by reason of contract, promise or breach of trust are expressly excluded under s 82(2), the issue considered in *Coventry*[153]. Yet in all truth that Act does gather in nearly *all* of the bankruptcy debts and liabilities. That is its very purpose and its distinctive methodology, designed to tackle the problem that bankruptcy presents to the bankrupt, creditors and society.

112 It is only when the correct approach to construing s 82(1) is adopted that the countervailing considerations are given proper attention. First, the grammatical meaning of "liabilities" (especially in juxtaposition to "debts") is certainly not confined to "liabilities" that are legally binding and enforceable. Thus, the *Macquarie Dictionary*[154] defines a "liability" as "1. an obligation, especially for payment; debt or pecuniary obligations (opposed to *asset*). 2. something disadvantageous. 3. the state or fact of being liable: *liability to jury duty; liability to disease*." (emphasis in original) The adjective "liable" is defined primarily as "subject, exposed, or open to something possible or likely, especially something undesirable"[155]. The definition "under legal obligation; responsible or answerable" is given as a secondary meaning.

113 To the extent that non-Australian dictionaries attribute as a primary meaning "obligation under the law"[156], in construing the Bankruptcy Act applicable in Australia I would prefer the primary meaning ascribed to the word in the Australian dictionary.

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151 *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455 at 459 per Kitto J.

152 Joint reasons at [9].

153 (2005) 227 CLR 234.

154 *Macquarie Dictionary*, 7th ed (2005) at 822. See also *Chambers English Dictionary*, 7th ed (1988) at 823.

155 *Macquarie Dictionary*, 7th ed (2005) at 823. See also *Chambers English Dictionary*, 7th ed (1988) at 823.

156 *Encarta World English Dictionary* (1999) at 1085; see also *The Shorter Oxford English Dictionary*, 3rd ed (rev) (1965), vol 1 at 1134.

114 In any event, for the reasons already stated, the contextual considerations (including in s 82(1), (3B), (4) and (7)) indicate, with sufficient clarity, that something different from immediately legally enforceable and certain "liabilities" is included in the statutory provision. The precise quantum of the "liability" need not be "certain". Thus, it may be "contingent", depending on the exact terms of the order for costs and then on any assessment of costs that may be required in default of agreement on the subject.

115 There is no analogy between an accrued liability for costs of a failed action and successful cross-action and unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust[157]. The reasons of policy that exclude from the assets provable in the bankruptcy liability for a personal damages judgment have no bearing on the inclusion of the already accumulated costs of failed litigation.

116 As it seems to me, there is an inconsistency in including in the bankrupt's estate the judgment debt but not the costs accrued in the proceedings that gave rise to that very judgment. They are obviously interconnected – temporally, causally and legally. All that is required is the happening of "future events" that will make the "liability" "certain" as well as the occurrence of "contingencies" (an order and costs assessment) that would make the amount of the "liability" known or knowable. Where those events have not occurred, the Act specifically empowers the trustee and the court to remove the residual uncertainty[158].

117 It follows that, in my opinion, "liabilities" in s 82(1) of the Bankruptcy Act should be interpreted to include obligations which (although they may be contingent or may not necessarily be immediately enforceable) are judged inevitable or highly probable at the time of the bankruptcy, such that they are capable of identification by the trustee or a court as envisaged by the Bankruptcy Act.

118 *The supervision by federal courts*: There is one further important contextual consideration that needs to be given weight. It is found in s 58(3)(b) of the Bankruptcy Act. Section 82(1) should be read with this provision in mind.

119 The purpose of s 58(3) is to effect an important objective of Australian bankruptcy law. It is to do so under the supervision of federal judicial officers in a federal court. The general purposes of bankruptcy law include the protection of creditors. But they also include the protection of bankrupts. If "provable debt" in s 58(3)(b) were given a narrow meaning, the result would be to diminish, to a

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157 cf joint reasons at [9].

158 s 82(4) and (7).

potentially significant degree, the protections afforded to the bankrupt by s 58(3)(a). It would limit the role of the federal courts in supervising post-bankruptcy legal proceedings against a bankrupt in a way that is difficult or impossible to reconcile with the text and the purposes of the Bankruptcy Act in this regard.

120 When this contextual consideration is given proper weight, it affords a further reason for refraining from assigning to the words "debts and liabilities" in s 82(1) of the Bankruptcy Act a meaning that is needlessly narrow. Although s 58(3)(b) refers only to a legal proceeding "in respect of a provable debt", this must be taken to be a shorthand description of a provable "debt" or "liability", as contemplated by s 82. No other meaning of s 58(3) would work in the Act, read as a whole.

121 *The purposes of bankruptcy law*: In *Coventry*[159], I made a number of general observations concerning the purposes of the Bankruptcy Act. These too are, in my view, relevant as providing a touchstone against which the preferred interpretation of s 82(1) of that Act will be found. I said[160]:

> "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."

122 I cited in *Coventry*[161] what Gibbs CJ said of those purposes in *Storey v Lane*[162] (I recalled that his Honour had earlier served as the Federal Judge in Bankruptcy). In *Storey*, Gibbs CJ said[163]:

> "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*

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159 (2005) 227 CLR 234.

160 (2005) 227 CLR 234 at 268 [114].

161 (2005) 227 CLR 234 at 268 [115].

162 (1981) 147 CLR 549.

163 (1981) 147 CLR 549 at 556-557.

West India Dock Co[164] Earl Cairns cited with approval the following passage from the judgment of James LJ in *Ex parte Walton; In re Levy*[165]:

> 'Now, the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably amongst 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.'"

123 Large purposes, personal, civic and economic, lie behind the facility of bankruptcy and the broad language in which s 82(1) of the Act is stated. As this Court said in *Gye v McIntyre*[166], citing the words of Parke B in *Forster v Wilson*[167], in interpreting the set-off provisions of the Bankruptcy Act, courts should strive to avoid unfairness if at all possible and especially where the provision has as its ultimate object "to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate". Equally so, where a contemporaneous liability is really due from the bankrupt to a creditor at the time of the bankruptcy. Given such purposes, I remain of the view that I expressed in *Coventry*[168]:

> "[I]t 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."

124 From the bankrupt's point of view, one consideration central to the purposes of bankruptcy is that object stated by James LJ long ago in *Ex parte Llynvi Coal & Iron Co; In re Hide*[169], but still relevant:

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164 (1884) 9 App Cas 448 at 456.

165 (1881) 17 Ch D 746 at 756.

166 (1991) 171 CLR 609 at 618; cf *GM & AM Pearce* [1998] 4 VR 888 at 900.

167 (1843) 12 M & W 191 at 204; 152 ER 1165 at 1171.

168 (2005) 227 CLR 234 at 269 [116].

169 (1871) LR 7 Ch App 28 at 32 cited with approval and applied to s 82 in *Official Trustee in Bankruptcy v CS & GJ Handby Pty Ltd* (1989) 21 FCR 19 at 24 per Morling, Beaumont and Burchett JJ.

> "The broad purview of this Act is, that the bankrupt is to be a freed man – freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind. On the other hand, all the persons from whose claims, and from liability to whom he is so freed are to come in with the other creditors and share in the distribution of the assets."

125 I do not see in the joint reasons any sustained reflection upon the purposes of the Act. Doubtless, the view has been taken that the language is intractable and demands a narrow view of "debts and liabilities" that excludes a post-bankruptcy order for costs – even one so coincident in time, cause and persons affected as the costs order in Mr Foots's case. However, in my respectful view, this is to turn the task of statutory interpretation on its head. Although it is true that the "free man" objective is not unqualified and there are various particular exceptions[170], the overall purpose of bankruptcy law remains applicable, namely to give those brought under the discipline of the Bankruptcy Act a fresh start. To the extent that the statutory language permits, this Court should endeavour to advance, and not to frustrate, the attainment of this objective.

126 Understanding the purpose of a statute helps to cast light on the meaning of the text, just as the context does. Knowing and understanding the purpose helps to remove lingering ambiguities and uncertainties. Excluding from Mr Foots's bankrupt estate the already accumulated, substantial, shortly to be ordered and readily predictable liability for the costs of his failed litigation, undermines the achievement of a central purpose of the Bankruptcy Act as I conceive the Federal Parliament to have intended it.

127 *The priority of federal superintendence*: The Bankruptcy Act also evinces a clear purpose to maintain the superiority of federal superintendence of the bankrupt's personal affairs at the time of bankruptcy, and so reposes that superintendence in the federal courts having the authority stated in s 58(3). It cannot have been intended that, in a case such as the present, the applicable federal court would effectively be excluded. If this were permitted, it would obviously break down the protection provided both to creditors and bankrupts by the supervision of a federal court, necessarily with jurisdiction applying throughout the entire Australian Commonwealth.

128 As the joint reasons note, UCPR, r 72 covers a broader range of proceedings than does s 58(3) of the Bankruptcy Act, and no party contended that the federal statute covers the field to the exclusion of the UCPR by operation of s 109 of the Constitution[171]. However, to the extent that r 72, in permitting a

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170 Joint reasons at [12].

171 Joint reasons at [14].

person to "take any further step in the proceeding" once the Queensland court has given leave, is inconsistent with the requirement in s 58(3) of the Bankruptcy Act that "it is not competent for a creditor … to take any fresh step" in respect of a provable debt except with the leave of the Federal Court or the Federal Magistrates Court, the latter requirement must prevail.

129 It follows that both constitutional principle and arguments of practical convenience favour upholding the application of s 58(3) in a case such as the present. The requirement to obtain the leave of a federal court, imposed by s 58(3) is, at least, a requirement additional to that in r 72. Because s 58(3) must be read as applying not only to provable debts but also to provable "debts and liabilities", consistently with s 82(1)[172], that requirement was engaged here. It was not complied with.

Approaching statutory interpretation correctly

130 I will refrain in these reasons from undertaking a detailed examination of the judicial authority referred to in the joint reasons. It is principally concerned with long since repealed English precursors to the Australian Bankruptcy Act. Altogether too much attention has been paid to it at the price of truly concentrating on the text, context and purpose of the applicable provisions of the Bankruptcy Act.

131 I recognise that the joint reasons, after the lengthy historical excursus, ultimately accept that the task before this Court is one requiring textual analysis[173]. To that extent, there is common ground between the approaches that we severally favour. However, the extensive examination of the old English cases is, in my opinion, an immaterial distraction. It reflects superseded legal thinking. It risks diverting the mind of the decision-maker. It is time that the judges of this Court put it aside.

132 I have started with the text. I have examined the context. I have considered the purpose. I have then given effect to the will of the Parliament of the Commonwealth as expressed in the Bankruptcy Act. In saying this, I mean, of course, no disrespect to the many English judges of the 19th century who have written on problems in some respects similar to those now before this Court. I have read and considered their reasons. I accept that history can sometimes be useful in the elucidation of statutory meaning, particularly where it helps to explain a distinctive legislative history. However, history should not distract a court, such as this, from performing the material task of statutory interpretation

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172 See above these reasons at [120].

173 Joint reasons at [61]-[64]; see also [2006] QCA 531 at [74].

in the correct way. Approach tends to affect outcomes. This is, I believe, such a case. Approach is therefore critical.

133 When the correct approach is taken, there is no gap in the Bankruptcy Act. Any ambiguity, uncertainty or gap disappears upon a reflection on the language, setting and objectives of the legislation. A sensible and practical outcome is then reached. That outcome avoids this Court once again holding that the legislation has failed to hit its obviously intended mark[174]. Moreover, the outcome upholds the uniquely Australian purpose of maintaining the superintendence by a federal judicial officer in a federal court with national jurisdiction of decisions seriously affecting the financial affairs and estate of an Australian bankrupt at the time of the bankruptcy.

Orders

134 The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of Queensland should be set aside with costs. In place of those orders, this Court should order that the appellant's appeal from orders 1 and 2 of the judgment of Chesterman J in the Supreme Court of Queensland of 3 February 2006 be allowed. The respondent, Ensham Resources Pty Ltd, should pay the appellant's costs of the hearings before Chesterman J on 16 and 22 November 2005. The proceedings in the Supreme Court of Queensland should be adjourned pending any leave that may be granted in that regard by the Federal Court of Australia or the Federal Magistrates Court, conformably with these reasons.

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174 Diplock, "The Courts as Legislators", in Harvey (ed), *The Lawyer and Justice*, (1978) 263 at 274, cited in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424.