HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

MALCOLM GEOFFREY VALE APPELLANT

AND

RODERICK MACKAY SUTHERLAND RESPONDENT

Vale v Sutherland
[2009] HCA 26
29 July 2009
S38/2009

ORDER

1. *The respondent have special leave to cross-appeal against order 3 of the orders of the Full Court of the Federal Court of Australia made 20 August 2008 ("the Full Court Orders"), upon the condition that he bear the appellant's costs of the proceedings in this Court.*

2. *The respondent be deemed to have filed and served the Notice of Cross-Appeal on 21 May 2009.*

3. *Upon the cross-appeal, order that:*

   (a) *cross-appeal allowed;*

   (b) *order 3 of the Full Court Orders be set aside and in place thereof:*

      (i) *on the cross-claim by the respondent there be judgment entered for the respondent in the sum of $208,350.00, and*

      (ii) *all questions of the award of interest upon that sum be remitted to the Federal Magistrates Court.*

4. *Set aside order 5 of the Full Court Orders, to the intent that there be no costs order in respect of the appeal to the Full Court, but otherwise dismiss the appeal to this Court.*

5. *The respondent pay the costs of the appellant of the proceedings in this Court.*

On appeal from the Federal Court of Australia

Representation

G T Bigmore QC for the appellant (instructed by Watson Mangioni Solicitors)

B A J Coles QC with B J Skinner for the respondent (instructed by Sparke Helmore)

CATCHWORDS

Vale v Sutherland

Bankruptcy – Notice – Official Receiver issued notice under s 139ZQ of the *Bankruptcy Act* 1966 (Cth) ("the Act") asserting certain property transactions void under s 120 of the Act – Notice asserted market value of properties at time of transfer – Failure to comply with notice may result in criminal sanctions under s 139ZT of the Act – Whether notice should be set aside under s 30 or s 139ZS if value stated incorrect.

Bankruptcy – Notice – Whether value in s 139ZQ of the Act value at time of transfer or when notice given.

Practice and procedure – Pleadings – Whether correctness of value traversed in defence or cross-claim – Effect of failure to make specific denial or specific non-admission in pleadings where trial conducted on basis that correctness of value was in issue.

Words and phrases – "valuation", "value ".

Bankruptcy Act 1966 (Cth), ss 5, 30, 40(1)(g), 115, 120, 127, 139K, 139ZQ, 139ZR, 139ZS, 139ZT.
Federal Court Rules (Cth), O 11, r 13(2).
Federal Magistrates Court Rules 2001 (Cth), rr 1.03, 1.05.
Federal Magistrates Court Act 1999 (Cth), s 76.

1 GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. The appellant, Mr Vale, is the husband of the bankrupt, Mrs Vale, in respect of whose estate a sequestration order was made on 24 April 2001 by the Federal Magistrates Court of Australia. The respondent ("the Trustee") is the trustee of the estate of Mrs Vale.

2 This appeal from the Full Court of the Federal Court of Australia (Gray and Tracey JJ, Lindgren J dissenting)[1] concerns the operation of the procedures contained in Pt VI, Div 4B, Subdiv J of the *Bankruptcy Act* 1966 (Cth) ("the Act"). Subdivision J (ss 139ZQ-139ZT) is headed "Collection of money or property by Official Receiver from party to transaction that is void against the trustee". The Full Court allowed an appeal by the present respondent against the decision of the Federal Magistrates Court (Lloyd-Jones FM)[2].

3 The litigation in both courts was conducted on the then unchallenged basis of the correctness of a line of Federal Court authority upon the construction of Subdiv J, and the dispute concerned other issues respecting the application of Subdiv J. In this Court, both parties now accept that what was said in the earlier authorities should not be followed. It will be necessary later in these reasons to consider the consequences of this acceptance for the outcome in this Court. But it is convenient first to deal with the other live issues.

Section 120

4 The operation of Subdiv J in the present case is contingent upon the "undervalued transactions" provision in s 120 of the Act. This relevantly provides:

> "(1) A transfer of property by a person who later becomes a bankrupt (the **transferor**) to another person (the **transferee**) is void against the trustee in the transferor's bankruptcy if:
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> (a) the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and

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1 *Sutherland v Vale* (2008) 170 FCR 112.

2 *Sutherland v Vale* [2007] FMCA 1617.

(b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.

...

(3) Despite subsection (1), a transfer is not void against the trustee if:

(a) the transfer took place more than 2 years before the commencement of the bankruptcy; and

(b) the transferee proves that, at the time of the transfer, the transferor was solvent.

(4) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee."

5 For the purposes of s 120, "transfer of property" includes a payment of money, and the "market value of property transferred" is its market value at the time of the transfer (s 120(7)(c))[3]. An action under s 120 shall not be commenced by a trustee after the expiration of six years from the date of bankruptcy (s 127(3)).

6 In *Anscor Pty Ltd v Clout*[4], Lindgren J emphasised that s 120(1) requires the Court to be satisfied only that the value of the consideration was less than the market value at the date of transfer; it does not require the Court to assign any particular value to the consideration. His Honour added[5]:

> "the policy underlying s 120 is to enable the trustee in bankruptcy to recapture the amount of the 'shortfall in consideration'; not to go further by, in effect, requiring the transferee to pay more for the property than its market value at the time of the transfer".

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3 "The market value of property transferred" is given the same temporal connection in the other avoidance provisions in ss 121(9)(c) and 122(8)(c).

4 (2004) 135 FCR 469 at 478-479.

5 (2004) 135 FCR 469 at 479.

7 In the present case, six years have passed and no such action was taken by the Trustee within time. Rather, the Trustee relied upon the remedies conferred by Subdiv J and thus upon the notice provisions it contains.

Subdivision J

8 If a transaction be void, by operation of provisions including s 120, then, upon application by the trustee, the Official Receiver is empowered by s 139ZQ(1) to take a certain step. The operation of s 120 upon the facts of this case is not disputed. The step then authorised by s 139ZQ(1) is the issue by the Official Receiver of a notice to a person who received property as a result of that transaction requiring that person to "pay to the trustee an amount equal to the money or the value of the property received". The term "value" in this provision has the meaning given by the definition of "value" in s 139K, namely "the market value of the property when the notice is given". The words "the property received" in s 139ZQ(1) identify that which is to be valued at the time the notice is given. The result is that any rise or fall in value since the date of the transaction is taken into account for the purposes of the notice provisions. In the present case there was a period of some three years between the transaction and the issue of the relevant notice.

9 Nevertheless, a line of Federal Court authority, mentioned earlier in these reasons and to which Lindgren J referred[6], treats the value in s 139ZQ(1) as that at the date of the transfer of the property under the avoided transaction. The authorities included *Re Lucera*; *Ex parte Official Trustee v Lucera*[7] and *Re Aley; Ex parte Sweeney v Aley*[8]. They did not refer to s 139K, the definitions in which apply to Div 4B and thus to Subdiv J.

10 The area of debate in this Court first assumed the need for valuation at the transfer date, and the dispute concerned the making of a proper finding of that value and the operation of the notice provisions.

11 The notice must "set out the facts and circumstances because of which the Official Receiver considers that the transaction is void" (s 139ZQ(2)). Once a

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6 (2008) 170 FCR 112 at 132.

7 (1994) 53 FCR 329 at 337-338.

8 (1996) 63 FCR 294 at 300-301.

notice has been issued the property is "charged with the liability of the person to make payments to the trustee as required by the notice" (s 139ZR(1)). Failure or refusal to comply with the notice is an offence (s 139ZT(1)). The amount payable to the trustee under the section is recoverable as a debt by action in a court of competent jurisdiction (s 139ZQ(8)). However, on application by the person subject to the notice, or any other interested person, a Court having jurisdiction in bankruptcy under the Act may set aside the notice where it is satisfied that Subdivision J does not apply to the person "on the basis of the alleged facts and circumstances set out in the notice" (s 139ZS(1)). These words are important in construing the section[9].

12 It will be necessary to set out the text of several of these provisions later in these reasons.

13 The "jurisdictional fact", upon the existence of which depends the exercise of the power conferred by s 139ZQ, was identified by Carr J in *Re McLernon; Ex parte SWF Hoists and Industrial Equipment Pty Ltd v Prebble*[10]. His Honour said[11]:

> "the power to issue the notice is conditioned not upon the Official Receiver's opinion or satisfaction that the transaction is void against the trustee but upon the existence of certain circumstances in which a person has received money or property as a result of a transaction that is void against the trustee. The Official Receiver's power is 'dependent upon the existence of a jurisdictional fact'[12] and must be subject to challenge in circumstances where the supposed existence of that fact is relied upon[13]."

14 There is no provision to the effect that the s 139ZQ notice otherwise is conclusive. Further, the use in s 139ZS of the word "alleged" in the phrase "the

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9 cf *Halse v Norton* (1997) 76 FCR 389 at 399.

10 (1995) 58 FCR 391.

11 (1995) 58 FCR 391 at 401.

12 *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 427; [1983] HCA 19.

13 cf *R v Marks; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1981) 147 CLR 471 at 489; [1981] HCA 33.

basis of the alleged facts and circumstances" is significant. Hence, Carr J held in *McLernon*[14]:

> "A hearing under s 139ZS is in my opinion a hearing de novo in which the Court may investigate and determine the correctness of the facts and circumstances stated in the notice and whether any defence to the liability asserted in the notice arises out of additional facts proved by the applicant."

The issue of construction between the parties

15 The general terms in which Carr J spoke conceal what in the present litigation is a disputed question of construction of Subdiv J. Sub-sections (1) and (2) of s 139ZQ state:

> "(1) If a person has received any money or property as a result of a transaction that is void against the trustee of a bankrupt under Division 3, the Official Receiver:
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> (a) if the Official Trustee is the trustee – on the initiative of the Official Receiver; or
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> (b) if a registered trustee is the trustee – on application by the trustee;
>
> may require the person, by written notice given to the person, to pay to the trustee an amount equal to the money or the value of the property received.
>
> (2) *The notice must set out the facts and circumstances* because of which the Official Receiver considers that the transaction is void against the trustee." (emphasis added)

Section 139ZS provides:

> "(1) If the Court, on application by a person to whom a notice has been given under section 139ZQ or by any other interested person, is satisfied that this Subdivision does not apply to the person on the basis of *the*

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14 (1995) 58 FCR 391 at 403.

alleged facts and circumstances set out in the notice, the Court may make an order setting aside the notice.

(2) A notice that has been set aside is taken not to have been given." (emphasis added)

16 The Trustee submits that (i) the ground for an application by the appellant under s 139ZS(1) is that Subdiv J "does not apply to [the appellant] on the basis of the alleged facts and circumstances set out in the notice", (ii) the facts and circumstances there identified correspond to those considered by the Official Receiver to render the transaction in question void against the Trustee and identified as required by s 139ZQ(2), (iii) those facts and circumstances do not, where s 120 is the ground of avoidance of a transaction, include the specification of any particular sum of money or value of property received as a result of the transaction, (iv) a notice which, as indicated by s 139ZQ(1), does specify for payment to the Trustee an amount equal to the money or the value of the property received, but is in error as to that amount, is not for that reason liable to attack on the sole ground which is provided by s 139ZS(1), (v) that is because s 139ZS(1) is linked back to s 139ZQ(2), and not s 139ZQ(1), and (vi) any dispute as to the accuracy of the amount to be paid to the Trustee is to be resolved in proceedings to recover the debt or to enforce the charge.

17 On the other hand, the appellant, with the support of Lindgren J in the Full Court, submits that the amount claimed by the Trustee for payment under s 139ZQ(1) is included in "the alleged facts and circumstances set out in the notice", within the meaning of s 139ZS(1), and error in that amount founds a remedy under that sub-section.

18 Both sides appeared to accept that in s 139ZS(1) the phrase "the Court may ..." was used in the sense indicated in authorities such as *Leach v The Queen*[15], namely "the Court shall ...". The sub-section confers a power upon the Court with an obligation to exercise it if the ground specified in the sub-section is made out.

19 Nor did there appear to be any dispute upon another question of construction of the Act. This concerns the interrelation between s 139ZS and s 30(1) of the Act. The latter endows courts of bankruptcy with "full power to decide all questions, whether of law or of fact, in any case of bankruptcy" and to

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15 (2007) 230 CLR 1 at 17-18 [38]; [2007] HCA 3.

make "such orders ... as the Court considers necessary for the purposes of carrying out or giving effect to this Act ...". Section 30 has a provenance which includes s 72 of the *Bankruptcy Act* 1869 (UK)[16], s 105 of the *Bankruptcy Act* 1914 (UK) and s 25 of the *Bankruptcy Act* 1924 (Cth). It is to be generously construed[17], but, consistently with the reasoning in cases such as *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[18], it does not authorise the making of an order which would bring about a result which differs from that prescribed elsewhere in the Act[19]. Section 139ZS(2) states that a notice set aside under s 139ZS(1) "is taken not to have been given"; the sub-section does not contemplate severance, reading down or amendment of a notice.

20 The result of that construction of the legislation is that s 30 could not be relied upon to qualify what otherwise would be the operation of s 139ZS for which the appellant contends. If his interpretation of that section be correct then an error in valuation will found an application to set aside the notice in question. Section 30 cannot save the notice from expungement under s 139ZS(2) by an order preserving its life as to that part of the amount which is accurately claimed.

21 Valuation for the purposes of s 120 (and s 121 and s 122) involves market value at the time of the transfer. Valuation is a notoriously inexact science[20]. It is apparent from the reference in the opening words of s 139ZQ(1) to those provisions as rendering transactions void under Div 3 of Pt VI of the Act, that questions of the accuracy of particular valuations may be presented by Subdiv J. Section 139ZQ(8) makes allowance for this by using the phrase "recoverable ... as a debt", stating:

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16 32 & 33 Vict c 71.

17 See *Price v Parsons* (1936) 54 CLR 332 at 354, 360; [1936] HCA 5.

18 (1932) 47 CLR 1; [1932] HCA 9. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 586-589 [52]-[59], 615-616 [162]-[166]; [2006] HCA 50.

19 *Clyne v Deputy Commissioner of Taxation* (1984) 154 CLR 589 at 597-598; [1984] HCA 44.

20 See *Boland v Yates* (1999) 74 ALJR 209; 167 ALR 575; [1999] HCA 64.

> "An amount payable by a person to the trustee under this section is recoverable by the trustee as a debt by action against the person in a court of competent jurisdiction."

The provision requires treatment as a liquidated sum of an amount claimed by the trustee as being equal to the value received. In that sense it represents an adaptation and extension of the rule in *Shepherd v Hills*[21] respecting statutory obligations to pay money and recovery on a liquidated claim.

22 The scheme of Subdiv J encourages the saving of costs by, on the one hand, compliance with the notice by the transfer to the trustee of property in respect of the value of which the notice requires payment (s 139ZQ(7)) and on the other, by the revocation or amendment of notices to accommodate a settlement (s 139ZQ(4)).

23 But s 139ZS does not provide the means for the determination of a dispute, not as to the engagement of the avoidance provision, here s 120, but as to the amount payment of which is required by the notice. Such disputes are to be resolved in proceedings to recover the debt or enforce the charge.

24 In an action by the Trustee to recover that amount as a debt, the appellant would be at liberty to establish such matters of fact, from which the liability was alleged to arise, as were disputed[22]. The same would be so in any action to restrain the exercise of the power of sale conferred by s 139ZR(6).

25 There remains for consideration s 139ZT. This revives the spectre of imprisonment for failure to pay a debt, namely the amount payment of which is required by the notice. But the section should not be construed so as to permit imprisonment for a period not exceeding six months for failure or refusal to pay that which could not have been recovered in full by civil action pursuant to s 139ZQ(8).

26 When Subdiv J is read as a whole, it is apparent that the construction of s 139ZS for which the Trustee contends in steps (i)-(vi) set out above should be

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21 (1855) 11 Ex 55 at 67 [156 ER 743 at 747]; see *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 313 [65]; [1998] HCA 20.

22 See *Young v Queensland Trustees Ltd* (1956) 99 CLR 560; [1956] HCA 51.

accepted. With that in mind, it is convenient to turn to the facts and the course of the litigation.

The facts and the litigation

27 Mr and Mrs Vale were the registered proprietors as joint tenants of seven parcels of land registered under the *Real Property Act* 1900 (NSW). On 28 September 1998 Mr and Mrs Vale obtained a "valuation" ("the 1998 valuation") which was based upon the sum of the highest range of prices given, and gave a total valuation of $540,000.00. The sum of the lowest range of prices given was $520,000.00. This "valuation" contained a disclaimer that it was "an opinion of a reasonable asking price only and not to be taken as a sworn valuation". On 31 March 1999 a further valuation of the properties was obtained, giving a total value of $416,700.00 ("the 1999 valuation"). This valuation was obtained for the purpose of assessing the stamp duty payable on the proposed transfer of Mrs Vale's interests in the properties to Mr Vale. It was undertaken by a registered valuer and it did not contain a disclaimer.

28 The interest of Mrs Vale as joint tenant in the properties was transferred to Mr Vale on 23 April 1999, the date certified on the transfer, in exchange for $2.00. On 26 February 2001 Mrs Vale committed an act of bankruptcy upon failure to comply with a bankruptcy notice (s 40(1)(g)). This marked the commencement of bankruptcy, for the purposes of the Act (ss 5 and 115).

29 The transfer of Mrs Vale's interests in the properties occurred within two years of the commencement of her bankruptcy and was for less than the market value of the properties. The result is that the transfer was void by reason of s 120(1) of the Act and s 120(3) had no application. As remarked earlier in these reasons, the appellant does not deny the operation of s 120 to the facts of this case. On 27 May 2002 a notice was issued by the Official Receiver to Mr Vale and was expressed to be pursuant to s 139ZQ of the Act ("the Notice"). The Notice recited the 1998 valuation of $540,000.00 and Mrs Vale's ownership as joint tenant with Mr Vale. It stated that payment by him of one half of that sum, $270,000.00, was required 28 days after service upon him of the Notice. The charge created by s 139ZR in favour of the Trustee was registered upon the title to the properties. The dispute concerns not the satisfaction of the jurisdictional fact presented by s 120, but the amount claimed by the Notice.

30 Several years passed. By Statement of Claim filed on 19 April 2006 in the Federal Magistrates Court (which is a court of bankruptcy identified in s 27 of the Act), the Trustee sought possession of the land against which the charge was registered, and also sought to recover by an action in debt with a claim for

judgment against Mr Vale for $270,000.00 "together with interest". By his cross-claim, and his defence, Mr Vale sought an order under s 139ZQ setting aside the Notice.

31 On 2 October 2007 Lloyd-Jones FM, on the cross-claim, set aside the Notice and, consequently refused the relief sought by the Trustee in this action. The Notice was set aside on the ground that it contained three "significant errors". These were that the Notice, (1) referred to the 1998 valuation as a "registered valuation" when, in fact, it was only a "market appraisal"; (2) valued the properties at $540,000.00 which was not established to be their "proper value" in light of the 1999 valuation; and (3) stated that the transfer of properties had taken place "within two years" of Mrs Vale's bankruptcy when in fact this was not the case.

32 The Trustee appealed to the Full Court of the Federal Court of Australia. By majority (Gray and Tracey JJ, Lindgren J dissenting) the appeal was allowed, the orders of Lloyd-Jones FM were set aside and the proceedings were remitted "to be heard and determined according to law".

33 The majority held that "it was not open to the Federal Magistrate to find that the asserted value of Mrs Vale's interest [in] the properties constituted a material error in the s 139ZQ notice"[23] because none of the "significant errors" found by Lloyd-Jones FM had been pleaded or put in issue by Mr Vale's defence or cross-claim[24]. Furthermore, their Honours held that the first error was "of no consequence" and that the third error did not exist because the transaction in fact had occurred within two years of the commencement of Mrs Vale's bankruptcy. In relation to the second error their Honours observed that[25]:

> "Had the valuation been put in issue in Mr Vale's cross-claim or, perhaps, in his defence, the onus of satisfying the Court that the value of the transfer, said to be void against the trustee under s 120(1) of the Act, would have fallen on the trustee: see *Halse v Norton*[26]."

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23 (2008) 170 FCR 112 at 122.

24 (2008) 170 FCR 112 at 119.

25 (2008) 170 FCR 112 at 119.

26 (1997) 76 FCR 389.

However, they held, because Mr Vale had not put in issue the value given to the properties in the Notice, that the resolution of that issue could not form the foundation for an order setting aside the Notice. This holding in relation to the second error found at first instance forms the basis of the appeal by Mr Vale to this Court.

34 Mr Vale submits that, given the course of the proceedings at first instance, the valuation had been put in issue both in the principal proceeding and also on his cross-claim under s 139ZS and that it was open to Lloyd-Jones FM, based upon the material before him, to conclude that the value of $270,000.00 asserted in the Notice constituted a significant error. However, as indicated earlier in these reasons, the Trustee counters this with the submission that s 139ZS did not provide a forum for the determination of the accuracy of the value asserted in the Notice. It is convenient to deal first with the submission by Mr Vale and then further with that by the Trustee.

Was the trustee put to proof?

35 The Trustee was put to proof of the value asserted in the Notice. Paragraph 3 of the statement of claim read as follows:

> "On or about 28 September 1998, [Mr and Mrs Vale] obtained a valuation of the properties from First National Real Estate. The market value at that time was $540,000."

Mr Vale's defence responded that he:

> "(a) Admits that he received from Tony Riley of O'Brien McGregor First National Real Estate a letter dated 28 September 1998 which indicated a *reasonable asking price* for each of the Properties
>
> (b) On or about 31 March 1999, [Mr Vale] received an Appraisal and Report by Patrick James Wood, registered valuer, each dated 31 March 1999, in respect of each of the Properties." (emphasis added)

36 It is clear from Mr Vale's response to par 3 of the statement of claim that, as Lindgren J rightly noted, Mr Vale did not admit that $540,000.00, the value given in the 1998 valuation, was a correct valuation of the properties' market value and, in light of (b) above, he intended to put the Trustee to proof in relation to that value. Further, in par 12 of his defence Mr Vale denied that he was

obliged to pay any principal sum asserted. However, Gray and Tracey JJ noted that[27]:

> "[Mr Vale] acknowledged that the sum of $270,000, which was demanded in the notice, was 'properly payable'."

This acknowledgment by Mr Vale was in response to par 11 of the Trustee's statement of claim:

> "As a result of this certificate, a charge in the sum of $270,000.00 in favour of [the Trustee] was created over the properties."

Mr Vale's response was that he:

> "Admits paragraph 11 [above] to the extent that the amount $270,000.00 is properly payable."

37 In light of the paragraphs disclaiming admission set out above, Lindgren J concluded that the words "the extent that" meant that if it should be found that $270,000.00 was properly payable then Mr Vale admitted that a charge was created as a result of the certificate[28]. This conclusion is supported by the submissions of counsel for Mr Vale in his final address:

> "So far as the statements made by [the Trustee's counsel] dealing with the effect of the registration of the charge is concerned, the charge has been lodged, the certificate has been lodged on its face. It is a charge. It's only a charge though for the amount that's properly due and owed. What is, I must admit, quite surprising is we have an officer of the Court being [the Trustee] who knowing that he has registered valuations in his possession of 30 March 1999 which bring the value in at $208,850 [sic] procures the official receiver to issue a notice for [$270,000.00] based on a valuation, which isn't a valuation, almost a year before."

38 It is true that, as was noted by Lindgren J, nothing in the defence amounted to a "specific denial" or "a statement of specific non-admission", as

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27 (2008) 170 FCR 112 at 119.

28 (2008) 170 FCR 112 at 130.

required by the applicable court rules (Federal Court Rules (Cth) O 11, r 13(2))[29] in order to avoid a deemed admission.

39 Nevertheless, the hearing was conducted on the basis that the value of the properties at the time of the transfer which was stated in the Notice was in issue. Counsel for Mr Vale made it clear in his opening address that Mr Vale was challenging the amount stated in the Notice:

> "... the notice on its face is wrong. It's wrong (a) as to amount and (b) as to any evidentiary basis upon which you can substantiate what the value is."

40 It is also clear from his closing address outlined above that value was in issue. Furthermore, the Trustee was cross-examined in relation to the value of the properties given in the Notice. Specifically, he was taken through the ramifications of the 1999 valuation, for example:

> "Then, on page 13, this is in respect of the lot 18 valuation, it values the property, with improvements, at $130,000? --- Yes, it does."

Counsel for the Trustee did not object to this line of questioning. The evidence of the disparity between the valuations had been in the Trustee's possession and was in evidence.

41 In his written submissions to this Court the Trustee contends that the determination of whether Mr Vale disputed the value asserted in the Notice "depends entirely" upon whether in his defence he made a "specific denial" or a statement of "specific non-admission" in accordance with the rules, as outlined above. However, in *Banque Commerciale SA (En Liquidation) v Akhil Holdings Ltd*[30] Dawson J noted:

> "But modern pleadings have never imposed so rigid a framework that if evidence which raises fresh issues is admitted without objection at trial, the case is to be decided upon a basis which does not embrace the real controversy between the parties. ... cases are determined on the evidence, not the pleadings."

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29 These rules were applicable by virtue of rr 1.03 and 1.05 of the Federal Magistrates Court Rules 2001 (Cth).

30 (1990) 169 CLR 279 at 296-297; [1990] HCA 11.

Thus, whatever view is taken of the range of issues tendered by the pleadings, it was open to Lloyd-Jones FM to decide the case as he did. No unfairness results to the Trustee from such a result.

The correctness of the valuation

42 A Notice issued under s 139ZQ(1) can only require a person to pay to the Trustee "an amount equal to the money or the value of the property received". As observed earlier in these reasons, there was no challenge in the Full Court to the line of Federal Court authority that the value identified in this section is that at the date of receipt, rather than (as the definition in s 139K requires) at the date when the notice is given.

43 Gray and Tracey JJ accepted that if the correctness of the value in the Notice had been put in issue by Mr Vale, which, as outlined above, was in fact the case, the onus of satisfying the court as to the value's correctness would have been upon the Trustee[31]. However, their Honours also stated that evidence adduced pursuant to this onus as to the value of the property, at the time of transfer, "will not be found wanting simply because the third party is able to tender evidence of another valuation of the property at the time of the transfer", given "the inherent imprecision of valuations of this kind"[32]. This gives insufficient weight to the evidence and the onus borne on the Trustee. The 1998 valuation was undertaken on 28 September, almost seven months prior to the date when the property was transferred, and was "an opinion of a reasonable asking price only and not to be taken as a sworn valuation". The 1999 valuation was undertaken on 31 March, less than one month prior to the date when the property was transferred, by a registered valuer for the purpose of assessing stamp duty. Furthermore, the figure of $540,000.00 marked the upper limit of the 1998 valuation, and no explanation was given as to why this figure was to be preferred to $520,000.00, the lower limit of the 1998 valuation. In these circumstances, the finding by Lloyd-Jones FM that the 1999 valuation was the "best evidence" of the "proper value" of the property at the time of transfer should not have been disturbed by the Full Court.

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31 *Halse v Norton* (1997) 76 FCR 389.

32 (2008) 170 FCR 112 at 122.

The result of the appeal to this Court

44 The majority of the Full Court was correct in its conclusion that the Federal Magistrate had erred in allowing the counter-claim and setting aside the Notice. But the decision of the majority is to be supported on reasoning which differs from that on which they relied. This is because, for the reasons given above, under the heading "The issue of construction between the parties", the Trustee's submission respecting the scope of s 139ZS should be accepted.

45 To that extent, the appeal to this Court should be dismissed. If no further order is made in this Court, the orders of the Full Court will stand. These involve remittal to the Federal Magistrates Court for hearing of the claim brought by the Trustee against the appellant.

46 The relief sought by the Trustee in the statement of claim was an order for possession of the properties and judgment in the sum of $270,000.00 plus interest. The only reason given by the Federal Magistrate for refusing relief was that the Notice had been set aside.

47 The majority in the Full Court expressed strong reservations as to whether the order for possession could be made[33]. That would leave the money claim for determination on remitter.

48 On the second day of the hearing in this Court the Trustee sought special leave to cross-appeal against the order for remitter made by the Full Court.

49 The question then arises whether, if special leave to cross-appeal is to be granted, it should be on terms respecting the carriage of costs by the Trustee of the Full Court appeal with the restoration of the costs order made by the Federal Magistrate. Written submissions on that question were filed pursuant to orders made at the conclusion of oral submissions.

50 The Trustee as proposed cross-appellant seeks from this Court an order on the proposed cross-appeal for payment not of $270,000.00 but of $208,350.00 together with interest thereon from 28 May 2002. This involves belated acceptance of a proposition that the best evidence as to the value of the half share of the relevant properties was $208,350.00.

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33 (2008) 170 FCR 112 at 124.

51 However, it also assumes the erroneous identification of the temporal element in the valuation requirement, to which reference has been made. Accordingly, the Senior Registrar was directed by the Court to communicate with the parties as follows:

> "In addition to the questions about which the parties now have leave to make further submissions, the Court would be assisted by such submissions as the parties wish to make about the following questions:
>
> (a) Having regard to the definition of 'value' in s 139K, and the contrast that may be drawn between that definition and the provisions of ss 120(7)(c), 129(9)(c) and 122(8)(c), is the 'amount equal to ... the value of the property received' referred to in s 139ZQ to be determined by reference to the value of the property at the date it was transferred or at the date of the notice? That is, does the word 'received' in the phrase 'value of the property received' qualify 'property' or 'value'?
>
> (b) Is the course of authority referred to in the reasons of Lindgren J in this matter ((2008) 170 FCR 112 at 132 [90]-[91]) correct?
>
> (c) If the answer to (a) is that the value is that at the date of the notice, and to (b) is 'no', what then would be the proper outcome of the proceedings in this Court? In particular, should special leave to cross-appeal be refused (there being no evidence of value at the date of the notice), the appeal be dismissed, and the order of the Full Court for remitter for rehearing, stand?"

52 The further written submissions from both parties correctly answer (a) that the value is that at the date of the Notice and answer (b) in the negative. Further, the appellant now accepts for the purposes of the appeal and any cross-appeal that the relevant value is that of the property at the date of the Notice, 27 May 2002, which was $208,350.00. The Trustee seeks judgment on the cross-claim for that amount. There remain contentions between the parties as to the terms upon which a grant of special leave to cross-appeal might be granted and the provisions for interest upon the $208,350.00 and for the costs of the litigation.

53 The Trustee now seeks to be in the position that would have applied if he had provided the Official Receiver with direct evidence of the value of the properties in question at the date of the Notice. The application for special leave to cross-appeal should be granted but on terms that the Trustee bear the costs of the appellant of the appeal and cross-appeal. The Trustee has indicated acceptance of those terms.

54 The appellant wishes to dispute the appropriateness of an order for interest and submits that the question of the appropriate rate for any award should be remitted to the Federal Magistrates Court. That submission should be accepted.

55 Order 5 of the orders of the Full Court required the appellant to pay the Trustee's costs of the Full Court appeal. Order 4 provided for the Federal Magistrates Court to determine all questions of costs in that Court. Order 4 should not be disturbed. But order 5 calls for particular consideration. It favoured the Trustee but the Trustee is now held entitled to judgment for $208,350.00 on reasoning which differs from that upon which he succeeded in the Full Court. It would have been open to the Trustee to present to the Full Court the submissions which now have been accepted by this Court. In the circumstances, order 5 should be set aside, and in its place there should be no costs order upon the Full Court appeal.

Orders

1. The respondent have special leave to cross-appeal against order 3 of the orders of the Full Court of the Federal Court of Australia made 20 August 2008 ("the Full Court Orders"), upon the condition that he bear the appellant's costs of the proceedings in this Court.

2. The respondent be deemed to have filed and served the Notice of Cross-Appeal on 21 May 2009.

3. Upon the cross-appeal, order that:

    (a) cross-appeal allowed;

    (b) order 3 of the Full Court Orders be set aside and in place thereof:

        (i) on the cross-claim by the respondent there be judgment entered for the respondent in the sum of $208,350.00, and

        (ii) all questions of the award of interest upon that sum be remitted to the Federal Magistrates Court.

4. Set aside order 5 of the Full Court Orders, to the intent that there be no costs order in respect of the appeal to the Full Court, but otherwise dismiss the appeal to this Court.

5. The respondent pay the costs of the appellant of the proceedings in this Court.