HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

JUDITH GAIL TALACKO (AS APPOINTED REPRESENTATIVE OF THE ESTATE OF JAN EMIL TALACKO) APPELLANT

AND

ALEXANDRA BENNETT & ORS RESPONDENTS

Talacko v Bennett
[2017] HCA 15
3 May 2017
M154/2016

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2 to 6 of the Court of Appeal of the Supreme Court of Victoria made in proceeding S APCI 2016 0024 on 28 July 2016 and, in their place, order that:*

   (a) *the appeal to the Court of Appeal of the Supreme Court of Victoria be dismissed; and*

   (b) *the applicants pay the first respondent's costs in proceeding S APCI 2016 0024.*

3. *The first to third respondents pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of Victoria

Representation

B W Walker SC with J B Masters for the appellant (instructed by Strongman & Crouch)

P H Solomon QC with O M Ciolek for the first to third respondents (instructed by Brand Partners)

Submitting appearance for the fourth respondent

CATCHWORDS

Talacko v Bennett

Procedure – Enforcement of Australian judgment debt in foreign jurisdiction – Where respondents obtained certificate under s 15(1) of *Foreign Judgments Act* 1991 (Cth) certifying finality of Australian judgment – Where application for such certificate may not be made until expiration of any stay of enforcement of judgment in question – Where judgment debtor bankrupt – Whether certificate valid – Whether s 58(3) of *Bankruptcy Act* 1966 (Cth) operated to impose a stay of enforcement for purposes of *Foreign Judgments Act* 1991 (Cth).

Words and phrases – "enforcement by execution", "stay of enforcement of the judgment".

Bankruptcy Act 1966 (Cth), ss 58(3), 60(1)(b), 60(2).
Foreign Judgments Act 1991 (Cth), ss 3(1), 15.

1 KIEFEL CJ, BELL, KEANE, GORDON AND EDELMAN JJ. At issue in this appeal is whether s 15(2) of the *Foreign Judgments Act* 1991 (Cth) ("the Foreign Judgments Act") prevents a judgment creditor of a bankrupt from obtaining a certificate under that Act to facilitate the enforcement of the judgment in a foreign jurisdiction. In particular, the issue is whether a "stay of enforcement" of a judgment within the meaning of s 15(2) of the Foreign Judgments Act is brought about by s 58(3) of the *Bankruptcy Act* 1966 (Cth) ("the Bankruptcy Act").

2 The Court of Appeal of the Supreme Court of Victoria held, by majority, that s 15(2) of the Foreign Judgments Act did not prevent the issue of a certificate even though the judgment in question could not be enforced by execution by reason of s 58(3) of the Bankruptcy Act[1]. In so holding, the Court of Appeal erred in its understanding of the operation of s 15(2) of the Foreign Judgments Act. Accordingly, the appeal must be allowed.

3 While the issue on which the appeal turns is within short compass, a summary of the circumstances which gave rise to the issue is, unavoidably, as lengthy as it is sad.

Background

The parties and the properties

4 Before World War II, Anna and Alois Talacko ("Anna and Alois") resided in what was then Czechoslovakia. They owned several properties, including five properties in the centre of Prague, 0.8 hectares of land in suburban Kbely, 17.44 hectares of land on the outskirts of Prague at Řepy, a 368 hectare private forest plantation at Sucha, Slovakia, and an apartment building and adjacent vacant land in Dresden, Germany[2]. After World War II, the properties were seized by and vested in the state, both in Czechoslovakia and in East Germany. Anna and Alois left Europe and settled in Australia[3].

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1 *Bennett v Talacko* [2016] VSCA 179.

2 *Bennett v Talacko* [2016] VSCA 179 at [121].

3 *Bennett v Talacko* [2016] VSCA 179 at [122].

5 Anna and Alois had three children: Jan Emil Talacko ("Jan Emil"), Peter Talacko ("Peter") and Helena Talacko ("Helena")[4].

6 Jan Emil was married to Judith Talacko ("Judith"), and they had four children, including two sons: David Talacko ("David") and Paul Talacko ("Paul")[5].

7 Peter was married to Margaret Talacko ("Margaret"), and they had three children: Alexandra Bennett ("Alexandra"), Martin Talacko ("Martin") and Rowena Talacko ("Rowena")[6].

8 Helena had two children: Anna Talacko and Jan Talacko ("Jan")[7].

9 Alois and Anna died in Melbourne, in 1964 and 1984 respectively[8].

10 After the end of Communist rule in Czechoslovakia in 1989, Jan Emil, Peter and Helena became interested in reclaiming their deceased parents' properties[9]. In September 1991, Jan Emil applied for restitution of five properties in central Prague. At that time, only a resident and citizen of what had become the Czech Republic could make such a claim. Jan Emil satisfied these requirements, while Peter and Helena did not. In March 1992, the five Prague properties were restored to Jan Emil, either wholly or in part[10].

11 Helena and the wife and children of Peter (who died in 1995) subsequently alleged that the three siblings had reached an agreement to pursue

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4 *Bennett v Talacko* [2016] VSCA 179 at [123].

5 *Bennett v Talacko* [2016] VSCA 179 at [124].

6 *Bennett v Talacko* [2016] VSCA 179 at [125].

7 *Bennett v Talacko* [2016] VSCA 179 at [63].

8 *Bennett v Talacko* [2016] VSCA 179 at [126].

9 *Bennett v Talacko* [2016] VSCA 179 at [128].

10 *Bennett v Talacko* [2016] VSCA 179 at [130].

the restitution of the properties together, and to share the proceeds equally. Jan Emil denied making such an agreement[11].

The 1998 Proceeding

12 On 2 October 1998, Peter's three children and his sister, Helena, commenced proceedings in the Supreme Court of Victoria ("the 1998 Proceeding") against Jan Emil, with Peter's widow and executrix, Margaret, subsequently added as a fifth plaintiff[12]. They sought equitable relief against Jan Emil on the basis that it had been agreed in March 1991 that the three children of Anna and Alois would share equally in the benefit of the properties[13].

13 On 23 February 2001, the parties compromised the 1998 Proceeding by written terms of settlement which required the transfer by Jan Emil of all rights, title and interest in certain properties to a person nominated by the plaintiffs. The terms also required that Jan Emil not deal with those properties otherwise than in accordance with the settlement[14].

14 In July 2005, the plaintiffs reactivated the 1998 Proceeding, alleging that Jan Emil had failed to transfer the relevant properties in accordance with the terms of settlement[15]. On 24 April 2008, Osborn J of the Supreme Court of Victoria held that Jan Emil had breached the terms of settlement of the 1998 Proceeding, but left the extent of relief to be determined upon a further hearing[16].

15 On 12 May 2009, Jan Emil executed three donation agreements with his sons, David and Paul, by which he agreed to transfer to them certain properties in the Czech Republic[17].

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11 *Bennett v Talacko* [2016] VSCA 179 at [127], [129].

12 *Bennett v Talacko* [2016] VSCA 179 at [132].

13 *Bennett v Talacko* [2016] VSCA 179 at [132].

14 *Bennett v Talacko* [2016] VSCA 179 at [133].

15 *Bennett v Talacko* [2016] VSCA 179 at [134].

16 *Talacko v Talacko* [2008] VSC 128 at [218]-[221].

17 *Bennett v Talacko* [2016] VSCA 179 at [136].

16 On 28 October 2009, Wood AsJ of the Supreme Court of Victoria made a costs order in the 1998 Proceeding requiring Jan Emil to pay the plaintiffs in that proceeding an interim sum of $81,914.40[18].

17 On 24 November 2009, Kyrou J delivered judgment in the 1998 Proceeding. His Honour held that the plaintiffs were entitled to equitable compensation, pursuant to the terms of settlement[19]. On 11 December 2009, his Honour made final orders requiring Jan Emil to pay the plaintiffs the total sum of €10,073,818 by way of equitable compensation[20].

18 On 18 March 2011, an appeal by Jan Emil from that decision to the Court of Appeal of Victoria was dismissed[21], as was a subsequent application for special leave to appeal to this Court[22].

19 On 4 November 2011, Alexandra, Martin and Rowena, who are the first to third respondents to this appeal ("the respondents"), commenced two proceedings in the courts of the Czech Republic: one seeking to enforce the orders of Kyrou J for the payment of equitable compensation ("the Execution Proceeding"), and the other seeking to contest the effectiveness of donations made by Jan Emil in favour of David and Paul[23].

20 On 7 November 2011, Jan Emil was made bankrupt by order of North J of the Federal Court of Australia, upon the petition of the same five members of the Talacko family who were the plaintiffs in the 1998 Proceeding[24].

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18 *Bennett v Talacko* [2016] VSCA 179 at [137].

19 *Talacko v Talacko* [2009] VSC 533 at [372], [215].

20 *Talacko v Talacko* [2009] VSC 579 at [72]; *Bennett v Talacko* [2016] VSCA 179 at [138].

21 *Talacko v Talacko* (2011) 31 VR 340.

22 *Talacko v Talacko* [2011] HCATrans 301.

23 *Bennett v Talacko* [2016] VSCA 179 at [141].

24 *Bennett v Talacko* [2016] VSCA 179 at [142].

The Certificates

21 On 4 July 2012, upon the request of the respondents, the Prothonotary of the Supreme Court of Victoria issued a document entitled "Certificate of Finality of Judgments and Orders", evidently in reliance on s 15 of the Foreign Judgments Act[25] ("the First Certificate"). The First Certificate stated that the various judgments and orders that had been made in favour of the plaintiffs in the 1998 Proceeding were "FINAL, BINDING AND ENFORCEABLE according to law"[26]. That certificate was subsequently filed in the Execution Proceeding[27].

22 On 10 December 2012, in the bankruptcy of Jan Emil, North J granted leave *nunc pro tunc* to the respondents, pursuant to s 58(3) of the Bankruptcy Act, to commence an application in the Supreme Court of Victoria Costs Court for the assessment and taxation of their costs in the foregoing proceedings, and to continue to take further steps towards judgment. This included defending or pursuing any appeal, provided that no step be taken to enforce any judgment against Jan Emil without the prior leave of the Court[28]. By this time Helena had died, and so an order was made giving leave to her son, Jan, to appear on behalf of her estate (which he continues to do as fourth respondent to this appeal).

23 On 16 September 2013, Kyrou J made a final costs order in the 1998 Proceeding requiring Jan Emil to pay the plaintiffs in that proceeding a total sum of $2,680,239.

24 When Jan Emil became aware of the existence of the First Certificate, he began to take steps to have it set aside, and on 30 October 2014, his solicitor issued a summons in the 1998 Proceeding seeking orders to that effect[29]. However, on 3 November 2014, Jan Emil died intestate[30].

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25 *Bennett v Talacko* [2016] VSCA 179 at [143].

26 *Bennett v Talacko* [2016] VSCA 179 at [145].

27 *Talacko v Talacko* (2015) 305 FLR 353 at 362 [21].

28 *Bennett v Talacko* [2016] VSCA 179 at [147].

29 *Bennett v Talacko* [2016] VSCA 179 at [152].

30 *Bennett v Talacko* [2016] VSCA 179 at [153].

25 On 16 December 2014, Jan Emil's widow, Judith, issued a summons in the 1998 Proceeding by which she applied for orders that she be appointed to represent the estate of Jan Emil for the purpose of conducting an application. Judith also sought declarations that the Prothonotary of the Supreme Court of Victoria had exceeded his authority in issuing the First Certificate and that the First Certificate was invalid, and orders that the First Certificate be set aside, or amended if the Court deemed appropriate[31].

26 On 4 February 2015, Daly AsJ of the Supreme Court of Victoria dismissed Judith's summons[32]. On 18 February 2015, Judith filed a notice of appeal against that ruling[33].

27 On 23 February 2015, upon the request of the respondents, the Prothonotary of the Supreme Court of Victoria issued a further document ("the Second Certificate") in evident reliance on s 15 of the Foreign Judgments Act, which stated that "[t]his certificate is an amendment and replaces in its entirety [the First Certificate]".

28 There were some differences between the two certificates, but it is not necessary for the purposes of this appeal to consider these differences: nothing now turns on them. It is sufficient to observe that the effect of the issuing of the Second Certificate was to render futile Judith's notice of appeal of 18 February 2015[34]. And so, on 8 May 2015, Judith issued a fresh summons by which she sought to have both the First Certificate and the Second Certificate revoked, declared invalid or set aside, and to have the Court appoint her as Jan Emil's representative for the purpose of conducting that application[35]. This summons raised the issue as to the effect of s 58(3) of the Bankruptcy Act upon the respondents' application for a certificate under s 15 of the Foreign Judgments Act.

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31 *Bennett v Talacko* [2016] VSCA 179 at [156].

32 *Bennett v Talacko* [2016] VSCA 179 at [158].

33 *Bennett v Talacko* [2016] VSCA 179 at [160].

34 *Talacko v Talacko* (2015) 305 FLR 353 at 373-374 [55]-[57]; *Bennett v Talacko* [2016] VSCA 179 at [164].

35 *Bennett v Talacko* [2016] VSCA 179 at [166].

29 Before proceeding to a consideration of the determination of this issue by the courts below, it is convenient to set out the material provisions of the legislation which bear upon it.

Foreign Judgments Act

30 The Foreign Judgments Act enables a judgment creditor to obtain a certificate from the Australian court which has rendered the judgment, in order to facilitate the enforcement of the judgment by the courts of a foreign legal system. Section 15 of the Foreign Judgments Act relevantly provides:

> "(1) Subject to this section, where an application is duly made by a judgment creditor who wishes to enforce in a country a judgment that has been given in an Australian court, the Registrar of the court must issue to the judgment creditor:
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> (a) a certified copy of the judgment; and
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> (b) a certificate with respect to the judgment containing such particulars, including:
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> (i) the causes of action to which the judgment relates; and
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> (ii) the rate of interest (if any) payable on any amount payable under the judgment;
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> as are prescribed by the regulations or by Rules of Court.
>
> (2) An application may not be made until the expiration of any stay of enforcement of the judgment in question."

31 Importantly, s 3(1) of the Foreign Judgments Act provides that, unless the contrary intention appears, "enforcement" means "where there is an amount of money payable under the judgment, enforcement by execution". Insofar as the enforcement of the judgment for payment of an amount of money by way of equitable compensation is concerned, enforcement means "enforcement by execution" of the rights conferred by the judgment.

32 Part 2 of the Foreign Judgments Act – entitled "Reciprocal enforcement of judgments" – "establishes a regime for the registration and enforcement of

judgments of foreign courts" in Australia[36]. Its operation is premised on there being "substantial reciprocity of treatment" in relation to the enforcement in a particular foreign country of "money judgments given in all Australian superior courts"[37]. If the Governor-General is satisfied that such treatment will be assured in the event that Pt 2 is applied to money judgments given in the superior courts of the foreign country, then regulations may be made extending the operation of Pt 2 to that foreign country[38].

33 Section 15 is contained in Pt 3 – "Miscellaneous". Section 15(1) facilitates the reciprocal treatment upon which Pt 2 hinges by enabling a judgment creditor who "wishes to enforce", in a foreign jurisdiction, a judgment given in an Australian court to obtain a certified copy of the judgment and a certificate with respect to that judgment. As is plain from the requirement that only a judgment creditor who wishes to enforce an Australian judgment in a foreign country can make an application under s 15(1), the purpose of those documents being issued is to enable a judgment creditor to rely on them in a foreign court to enforce the Australian judgment in a foreign country.

34 It is against that legislative background that the question of statutory construction in this case is to be considered: the proper construction of the phrase "any stay of enforcement of the judgment" in s 15(2) of the Foreign Judgments Act and, in particular, whether that phrase extends to include the operation of s 58(3) of the Bankruptcy Act.

Bankruptcy Act

35 "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"[39]. The Bankruptcy Act implements such a system. The Bankruptcy Act includes provisions "to stop individual

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36 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975 at 980 [20]; 325 ALR 168 at 174; [2015] HCA 36.

37 Section 5(1) of the Foreign Judgments Act. See *PT Bayan* (2015) 89 ALJR 975 at 980 [21]; 325 ALR 168 at 174. See also s 5(3) of the Foreign Judgments Act.

38 Section 5(1) of the Foreign Judgments Act.

39 *Storey v Lane* (1981) 147 CLR 549 at 556; [1981] HCA 47. See also *Re McMaster; Ex parte McMaster* (1991) 33 FCR 70 at 72-73.

action by creditors for the purpose of obtaining payment of the debts due to them when the aim of the law is to secure administration of the debtor's assets in the interest of the creditors generally"[40]. Such provisions are necessary "to prevent one creditor obtaining an undue advantage over the others, and to prevent the scheme of the [Bankruptcy Act] from being defeated"[41]. Section 58(3) is one of those provisions[42].

36 Section 58 of the Bankruptcy Act provides relevantly as follows:

> "(1) Subject to this Act, where a debtor becomes a bankrupt:
>
> (a) the property of the bankrupt … vests forthwith in the Official Trustee …
>
> (3) 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."

37 Section 58(3) operates in aid of s 58(1) to ensure that the property of the bankrupt which has vested in the Official Trustee, so as to be available for distribution to creditors in accordance with the other provisions of the Bankruptcy Act, is not depleted to the advantage of individual creditors and the disadvantage of creditors generally. That purpose is also aided by s 60 of the Bankruptcy Act, which relevantly provides:

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40 *Storey* (1981) 147 CLR 549 at 557.

41 *Storey* (1981) 147 CLR 549 at 557.

42 See *Piccone v Suncorp Metway Insurance Ltd* (2005) 148 FCR 437 at 440 [11].

"(1) The Court may, at any time after the presentation of a petition …

(b) stay any legal process … against the person or property of the debtor:

(i) in respect of the non-payment of a provable debt …

(2) An action commenced by a person who subsequently becomes a bankrupt is, upon his or her becoming a bankrupt, stayed until the trustee makes election, in writing, to prosecute or discontinue the action."

38 It may be noted that the power conferred on the Court by s 60(1)(b) may be exercised at any time, from the presentation of a petition, throughout the consequent bankruptcy, and even after the bankrupt has been discharged from bankruptcy[43]. Section 60 complements s 58. In *Storey v Lane*[44], Gibbs CJ explained that the object of s 60 is:

> "to ensure that if a sequestration order is (or has been) made against the estate of the debtor his assets will be available for administration in the interest of his creditors generally, to prevent one creditor, who has the right to enforce payment of his debt under some other law, from exercising that right so as to gain an advantage over other creditors".

39 It may be noted that s 60(1)(b)(i), which forms part of the context in which s 58(3)(a) appears, expressly refers to a "stay" as an order of a court. In contrast, s 58(3)(a) does not use that language. This difference in language might be said to assist an argument that the state of affairs wrought by s 58(3)(a), rather than by an order of a court, is not "a stay" for the purposes of the Bankruptcy Act. On the other hand, s 60(2) expressly refers to a stay that occurs by operation of the statute. That might be said to detract from the respondents' argument that a "stay" is necessarily a court-ordered stay. It might also be said that the express use of the word "stay" in s 60(2) suggests that what is brought about by s 58(3)(a) is not a stay within the meaning of the Bankruptcy Act. In the end, however, these straws in the wind are of little assistance because the issue for determination turns on the meaning of "stay" in s 15(2) of the Foreign

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43 *Re Malins; Ex parte The Bankrupt; Robinson* (1936) 9 ABC 140; *Re Rooney; Ex parte Rooney* (1986) 13 FCR 175.

44 (1981) 147 CLR 549 at 556.

Judgments Act having regard to the effect of s 58(3) of the Bankruptcy Act on the enforcement of the rights of a judgment creditor.

The primary judge

40 On 12 November 2015, Sloss J determined that Judith should be appointed as the representative of the estate of Jan Emil for the purposes of conducting the application for the orders set out in the summons of 8 May 2015[45]. Her Honour also gave reasons presaging the making of a declaration that the First Certificate and the Second Certificate were invalid[46].

41 Her Honour concluded that the certificates were invalid for two reasons. The first was that s 58(3) of the Bankruptcy Act operates so as to impose a "stay of enforcement of the judgment" within the meaning of s 15(2) of the Foreign Judgments Act[47]. Secondly, the Prothonotary's power to issue a certificate is enlivened only when "an application is duly made by a judgment creditor who wishes to enforce in a country a judgment that has been given in an Australian court"; in her Honour's view, the respondents did not wish to enforce the judgment in the Czech Republic, as they had contended that they sought only to have the judgment "recognised", but not enforced, in the Czech proceedings[48].

42 On 4 February 2016, Sloss J made orders to the effect foreshadowed in her reasons, declaring the First Certificate and the Second Certificate to be invalid.

43 At this point, it is necessary to say something about the limited basis on which the respondents put their case before Sloss J. The argument advanced on their behalf did not seek to dispute that s 58 operated without regard to any personal equities which they might have sought to enforce against Jan Emil. Further, neither before the primary judge, nor, for that matter, before the Court of Appeal or this Court, did the respondents seek to argue that their rights against Jan Emil were not merely those that subsist between creditor and debtor within s 58(3).

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45 *Talacko v Talacko* (2015) 305 FLR 353 at 406 [170], 407 [174].

46 *Talacko v Talacko* (2015) 305 FLR 353 at 375-393 [63]-[114].

47 *Talacko v Talacko* (2015) 305 FLR 353 at 385 [89].

48 *Talacko v Talacko* (2015) 305 FLR 353 at 392 [113].

44 The respondents did not argue that, because the vesting of property effected by s 58(1) operates subject to equities which affect it in the hands of the bankrupt[49], Jan Emil was accountable to them as a fiduciary. They did not argue that their entitlement to equitable compensation for the loss of their equitable interest in the properties meant that their claims, albeit for the payment of money, were to enforce obligations to them in respect of properties that were, in the eye of equity, held by Jan Emil for their benefit. Nor did the respondents argue that, insofar as their claim against Jan Emil was for the payment of money by way of equitable compensation, it was immaterial that the land to which Jan Emil's fiduciary obligations to them attached was in another country[50].

45 Attention is drawn to the narrow basis of the respondents' argument, not by way of criticism of the manner in which the case for the respondents has been conducted – there may have been good reason for the course which has been taken – but to make the point that the case advanced by them turns solely on whether the state of affairs wrought by s 58(3) of the Bankruptcy Act amounts to a stay of enforcement by execution within the meaning of s 15(2) of the Foreign Judgments Act.

The Court of Appeal

46 On 2 March 2016, the respondents filed an application for leave to appeal in the Court of Appeal of Victoria, contending that Sloss J erred in holding the First Certificate and the Second Certificate to be invalid. In opposing the respondents' application, Judith sought to have the judgment of Sloss J affirmed, not because, as Sloss J had held, the respondents did not, in fact, wish to enforce

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49 *Ex parte James; In re Condon* (1874) LR 9 Ch App 609; *In re Clark (A Bankrupt); Ex parte The Trustee v Texaco Ltd* [1975] 1 WLR 559; [1975] 1 All ER 453; *Re M and J De Wit; Ex parte Custom Credit Corporation Ltd; Official Receiver* (1961) 19 ABC 63.

50 Cf *Deschamps v Miller* [1908] 1 Ch 856 at 863. See also *Cranstown (Lord) v Johnston* (1796) 3 Ves 170 at 182 [30 ER 952 at 958-959]; *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416 at 439 [10 ER 961 at 971]; *Companhia de Mocambique v British South Africa Co* [1892] 2 QB 358 at 364; *In re The Anchor Line (Henderson Brothers) Ltd* [1937] Ch 483 at 488; *Razelos v Razelos (No 2)* [1970] 1 WLR 392; [1969] 3 All ER 929.

the judgment, but rather because the application itself was the enforcement of a remedy contrary to s 58(3)(a) of the Bankruptcy Act[51].

47 Jan (as executor of the estate of his mother, Helena) was made the second respondent to the proceedings before the Court of Appeal to ensure that all necessary parties were before the Court; however, by notice dated 6 April 2016, he informed the Court that his mother's estate did not intend to respond to the application for leave to appeal[52]. Similarly, he filed a submitting appearance as fourth respondent in the appeal before this Court. It also appears that Margaret had, by this stage, ceased to be involved in the litigation.

48 On 28 July 2016, the Court of Appeal of Victoria by majority (Ashley and Priest JJA; Santamaria JA dissenting) allowed the appeal[53]. While each of the judges wrote separately, the majority were in agreement on two key points: first, that the expression "stay of enforcement" in s 15(2) of the Foreign Judgments Act refers only to a judicially ordered stay (or similar) and accordingly does not extend to include any statutory bar imposed by s 58(3) of the Bankruptcy Act[54]; and second, that the application made under s 15(1) of the Foreign Judgments Act did not amount to the enforcement of a remedy contrary to s 58(3)(a) of the Bankruptcy Act so as to prevent the application being "duly made" pursuant to s 15(1) – rather, the application was merely a step towards having the judgment "recognised" in the Czech proceedings, that being a step antecedent to enforcement within the meaning of s 58(3)[55].

49 Both Ashley JA and Priest JA went on to hold, in addition, that Sloss J erred in concluding that the respondents did not "wish to enforce" the judgment in a foreign court[56]. Because the appeal to this Court must be allowed on the basis that their Honours erred in their view of the operation of s 15(2), it is

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51 *Bennett v Talacko* [2016] VSCA 179 at [80].

52 *Bennett v Talacko* [2016] VSCA 179 at [174].

53 *Bennett v Talacko* [2016] VSCA 179.

54 *Bennett v Talacko* [2016] VSCA 179 at [7], [108].

55 *Bennett v Talacko* [2016] VSCA 179 at [25], [90], [93].

56 *Bennett v Talacko* [2016] VSCA 179 at [21]-[22], [109].

unnecessary to consider further this aspect of the case before the Court of Appeal.

50 As to s 15(2) of the Foreign Judgments Act, Ashley JA held that the expression "'the expiration of any stay', is … redolent of a judicially ordered stay on execution"[57]. His Honour also held that, even if "stay of enforcement" were construed to encompass statutory stays, it would not follow that s 58(3) imposes such a stay[58] because neither the application for, nor the issue of, the certificate under s 15(1) of the Foreign Judgments Act was itself the enforcement of a remedy. Rather, his Honour said an enforcement action in reliance on a certificate is a step that might be taken at a later stage, at which point s 58(3)(a) would then deny the respondents competence to proceed[59]. Nor, his Honour held, did s 58(3)(b) impede the making of an application, for once the judgment of Kyrou J was upheld, the only step in a legal proceeding that remained to be taken would be the execution of the judgment, which is the exclusive province of s 58(3)(a)[60].

51 Ashley JA also noted that r 11.11(c)(i) of the Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Vic) ("the Victorian Rules") requires that certificates under s 15(1) of the Foreign Judgments Act state "that the proceeding is at an end except for enforcement of the judgment", which was said to support the construction that "stay of enforcement" means a judicially ordered stay[61]. As to this last point, it may be said immediately that, as a general proposition, State rules for practice and procedure of State courts cannot determine the meaning of a Commonwealth statute, and that the Victorian Rules, in particular, do not purport to do so.

52 Priest JA also held that "stay of enforcement" in s 15(2) comprehends only a judicially imposed stay (or similar)[62]. His Honour also held that the purpose of

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57 *Bennett v Talacko* [2016] VSCA 179 at [9].

58 *Bennett v Talacko* [2016] VSCA 179 at [11].

59 *Bennett v Talacko* [2016] VSCA 179 at [26].

60 *Bennett v Talacko* [2016] VSCA 179 at [31].

61 *Bennett v Talacko* [2016] VSCA 179 at [12].

62 *Bennett v Talacko* [2016] VSCA 179 at [108].

the application for the certificate under s 15(1) of the Foreign Judgments Act was not to "enforce" the judgment in the sense of seeking "to compel observance of" it[63]: rather, the application was a step precursory to enforcement[64].

53 Santamaria JA, in dissent, held that the incompetence of a judgment creditor to enforce remedies brought about by s 58(3)(a) is general, and includes the making of an application under s 15[65]. Santamaria JA reasoned[66] that, just as a judgment creditor of a bankrupt could not invoke the provisions of the Supreme Court (General Civil Procedure) Rules 2005 (Vic) or the Federal Court Rules 2011 (Cth) that relate to enforcement, so too is he or she disabled from invoking s 15 of the Foreign Judgments Act. This reading of s 15 was said to be consistent with the design of the Bankruptcy Act, which, once a sequestration order is made, converts a creditor's right of action into a right to prove in the bankruptcy[67].

54 Santamaria JA reasoned that, although the word "stay" may properly be said to have a particular reference to legal proceedings, the phrase "any stay of enforcement of the judgment in question" in s 15(2) is unqualified by any indication that it refers exclusively to a stay which has been imposed by judicial order[68]. In addition, Santamaria JA did not consider that the phrase "the expiration of" in s 15(2) tilted the balance in favour of the construction advanced by the respondents. His Honour reasoned that, while a judicial stay may expire, it may also terminate in other ways – for instance, by being lifted, amended or revoked – while a stay imposed by statute may also expire[69].

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63 *Bennett v Talacko* [2016] VSCA 179 at [92], citing *Fraser v Commissioner of Taxation* (1996) 69 FCR 99 at 111.

64 *Bennett v Talacko* [2016] VSCA 179 at [93].

65 *Bennett v Talacko* [2016] VSCA 179 at [207].

66 *Bennett v Talacko* [2016] VSCA 179 at [207].

67 *Bennett v Talacko* [2016] VSCA 179 at [210].

68 *Bennett v Talacko* [2016] VSCA 179 at [195].

69 *Bennett v Talacko* [2016] VSCA 179 at [196].

55 By special leave, Judith (as representative of Jan Emil's estate) brought an appeal to this Court against the decision of the Court of Appeal.

The submissions of the parties

The appellant's arguments

56 The appellant argued that the view of s 15(2) taken by the majority in the Court of Appeal would circumvent the purposes of the Bankruptcy Act, because its consequence would be that, upon the making of a sequestration order, a judgment creditor of the bankrupt would be prohibited from enforcing the judgment in Australia, but could nevertheless apply to enforce the judgment overseas.

57 Echoing Santamaria JA, the appellant emphasised that nothing in the text of s 15(2) qualifies the words "any stay of enforcement of the judgment in question" so as to limit the provision exclusively to judicially ordered stays. Further, it was said that the words "the expiration of" do not confine the meaning of "stay" to a judicial stay, as stays imposed by statute may also expire. In this regard, the appellant submitted that Ashley JA's observation that "'the expiration of any stay', is … redolent of a judicially ordered stay" collapses under the weight of his Honour's acknowledgement that a statute might prescribe something which could be described as a stay and which might also expire in certain prescribed circumstances.

58 The appellant submitted that Priest JA attached too much significance to the circumstance that s 58(3)(a) provides that "it is not competent for a creditor … to enforce any remedy", rather than stating simply that enforcement of such a remedy is "stayed". It was said that Priest JA paid insufficient regard to the purpose and function of s 58(3), which is to deny to individual creditors the right to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt.

59 It was submitted that, so long as the substantive effect of s 58(3) is to prevent enforcement by execution, the absence of the word "stay" from s 58(3) cannot be determinative of the operation of s 15(2). There is force in this submission. The Bankruptcy Act does not control the operation of the Foreign Judgments Act: s 15(2) may be engaged by a range of circumstances other than the operation of the Bankruptcy Act. It is to the purpose of s 15(2) of the Foreign Judgments Act that one must look to discern its true meaning. That purpose may be considered after the respondents' submissions have been addressed.

The respondents' arguments

60 The respondents argued that a "stay of enforcement of a judgment" has a settled, technical legal meaning, being a stay ordered by a court that operates directly on an order or judgment and not, in contrast, on the party who might otherwise seek enforcement of that judgment. It was said that where, in framing a statutory provision, the Parliament chooses to use a technical legal term, the term should be presumed to bear that meaning unless its context indicates a different meaning. In support of their favoured meaning of "stay of enforcement of a judgment", the respondents called in aid the observations of this Court in *Whan v McConaghy*[70], where it was said that a "stay of execution, as its name implies, operates directly on the judgment or order the subject of the stay" and in doing so, "interfere[s] with the operation of the order". So much may be accepted for the sake of argument, although one may note that s 60(2) of the Bankruptcy Act furnishes an example of a departure from the technical legal meaning of "stay" urged by the respondents.

61 The respondents went on, however, to argue that s 58(3)(a) of the Bankruptcy Act operates, not on the judgment, but on the judgment creditor, by denying that person competence to execute the judgment. Accordingly, so it was said, s 58(3)(a) lacks a characteristic feature of a stay of enforcement of a judgment. That contention may be dealt with immediately. Given that the only person who could seek to enforce a judgment pursuant to s 15 of the Foreign Judgments Act is a judgment creditor (or perhaps a person standing in his or her shoes), the distinction sought to be drawn by the respondents is a distinction with no bearing on the meaning or operation of s 15(2) of the Foreign Judgments Act.

62 The respondents also argued, echoing Ashley and Priest JJA, for the drawing of a distinction between a stay of execution of a judgment and a stay on the operation of the judgment[71]. It was said that even if s 58(3) prevents execution upon a judgment, the judgment still exists for other purposes and may usefully be invoked by the judgment creditor, for example, by way of set-off[72]. This contention should also be rejected, for reasons which may be stated briefly.

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70 (1984) 153 CLR 631 at 638; [1984] HCA 22.

71 Cf *Re Hughes; Ex parte Westpac Banking Corporation* unreported, Federal Court of Australia, 28 November 1997 per Merkel J.

72 *Pollack v Commissioner of Taxation* (1991) 32 FCR 40 at 51.

63 Section 58(3)(a) is concerned with the execution of a judgment, as distinct from steps in a proceeding toward obtaining the judgment in question[73]. Indeed, in *Clyne v Deputy Commissioner of Taxation*[74], Gibbs CJ, Murphy, Brennan and Dawson JJ doubted that the word "remedy" in s 58(3)(a) of the Bankruptcy Act includes a remedy by way of an action or suit because of the express reference in s 58(3)(b) to a legal proceeding. The circumstance that s 58(3)(b) expressly contemplates the possibility that a fresh legal proceeding may be commenced or an existing proceeding further pursued (albeit with the leave of the Court) in respect of a provable debt tends to confirm that s 58(3)(a) refers, not to a case where the entitlement to the remedy has yet to be established by judgment, but to a case where it is sought to execute upon an entitlement which has been so established.

64 All that having been said, the crucial point remains that s 15(2) of the Foreign Judgments Act prohibits the making of an application for a certificate until the expiration of any stay on the enforcement *by execution* of the judgment in question. The issue is not whether there might be some utility in having the judgment recognised in the Czech Republic, for example as a basis for a set-off against a claim by the appellant against the respondents. The issue is whether s 15(2) of the Foreign Judgments Act prohibited the making of an application while the judgment could not, by Australian law, be enforced by execution.

The meaning of s 15(2) of the Foreign Judgments Act

65 One must focus upon s 15(2) of the Foreign Judgments Act to determine whether the prevention of the execution of a judgment brought about by s 58(3) of the Bankruptcy Act is a stay of enforcement within the meaning of s 15(2). The meaning of s 15(2) is to be determined by reference to considerations of text, context and purpose[75].

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73 *Fraser v Commissioner of Taxation* (1996) 69 FCR 99 at 111-112, citing *R v Bates* [1982] 2 NSWLR 894 at 895; *Piccone v Suncorp Metway Insurance Ltd* (2005) 148 FCR 437 at 443 [21], 444 [25]. See also *Clyne v Deputy Commissioner of Taxation* (1984) 154 CLR 589 at 594-595; [1984] HCA 44.

74 (1984) 154 CLR 589 at 595.

75 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70]; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 45-46 [44]; [2009] HCA 41.

66 In Commonwealth legislation, the use of the word "stay" is not confined to stays imposed by courts. It appears that, in addition to s 60(2) of the Bankruptcy Act, as Santamaria JA noted[76], s 91 of the *Insurance Act* 1973 (Cth), s 161 of the *Life Insurance Act* 1995 (Cth), s 189AAA of the Bankruptcy Act itself, s 16 of the *Cross-Border Insolvency Act* 2008 (Cth) and s 58DD of the *Federal Court of Australia Act* 1976 (Cth) are examples of stays which operate without judicial process. Finally, so far as the text of s 15(2) is concerned, the use of the word "any" in relation to "stay" is some, though perhaps not a decisive, indication of a legislative intention to comprehend any legal impediment to execution upon the judgment.

67 As to the significance of s 60(1)(b) and (2) of the Bankruptcy Act, there is no reason to regard these provisions as part of the context in which s 15(2) of the Foreign Judgments Act is to be understood. As noted above, there may be sources of a legal impediment to the execution of a judgment other than the Bankruptcy Act; the Foreign Judgments Act is not to be understood as if it were one element of a single legislative measure to which the Bankruptcy Act made exclusive provision for the other element. The issue is not whether the expression "stay of enforcement of the judgment in question" in s 15(2) of the Foreign Judgments Act has the same meaning as the expressions "stay [of] legal process" in s 60(1)(b) or "stay" of an action in s 60(2) of the Bankruptcy Act. The issue is whether s 58(3)(a) of the Bankruptcy Act, by preventing the execution of the judgment in the 1998 Proceeding, has the effect of preventing the execution of the judgment for the purpose of s 15(2) of the Foreign Judgments Act.

68 The evident purpose of s 15(2) is to prevent an application for a certificate which, if granted, would facilitate the enforcement by execution by a foreign legal system of a judgment which is not enforceable by execution under the law in Australia. In this regard, the Explanatory Memorandum for the Foreign Judgments Bill 1991 explained in cl 2 that the Bill was largely modelled on the Foreign Judgments (Reciprocal Enforcement) Ordinance 1954 (ACT), which was in turn substantially modelled on the *Foreign Judgments (Reciprocal Enforcement) Act* 1933 (UK). The UK Act was the product of the work of the Foreign Judgments (Reciprocal Enforcement) Committee ("the Greer Committee"). In the Report of the Greer Committee in relation to a measure that was the precursor to s 15(2) of the Foreign Judgments Act, it was said that the

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76 *Bennett v Talacko* [2016] VSCA 179 at [197].

certified copy of the British judgment was "not to be issued if *execution* has been stayed"[77] (emphasis added).

69 The "mischief" of concern to the Committee was that a foreign court might be presented with a certified copy of a British judgment to be carried into execution by that foreign court in circumstances where the judgment could not be executed by a British court. The Committee's Report did not suggest any reason to differentiate between a stay of execution effected by an order of a court and a stay imposed by statute in relation to the concern at which the measure was directed. And no such reason suggests itself. It is impossible to conceive of any good reason why a judgment that cannot lawfully be executed under Australian law should be allowed to be executed in another country at the behest of an Australian court.

70 Given that the purpose of s 15(2) is to prevent the possibility of a foreign court acting upon a certificate to allow the execution of a judgment the execution of which would not be permitted under Australian law, there is no reason to distinguish between the case of a stay ordered by a court and a stay imposed by statute. It is not possible to attribute to s 15(2) an intention that a foreign court should enforce a judgment by execution which would not be permitted in Australia simply because the impediment to execution is brought about by statute rather than by an order of a court.

Effect of s 58(3)(a) of the Bankruptcy Act

71 The effect of s 58(3)(a) is to preclude a creditor from enforcing any remedy against "the person or the property of the bankrupt in respect of a provable debt". One would naturally speak of the effect of s 58(3)(a) as a "stay" of enforcement by execution upon the judgment[78]. To adopt the words of Denning J in describing the effect of a "stay of execution", it prevents a creditor "from putting into operation the machinery of [the] law"[79]. To remove s 58(3) from the reach of s 15(2) of the Foreign Judgments Act because it does not

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77 Foreign Judgments (Reciprocal Enforcement) Committee, *Report*, (1932) Cmd 4213 at 65.

78 *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 59 [14], [15]; [2007] HCA 56. See also *Re John Perkin Seers* (1955) 17 ABC 11 at 12-13; *Re Johnson; Ex parte Johnson v Tonkin* (1994) 53 FCR 70 at 76-77.

79 *Clifton Securities Ltd v Huntley* [1948] 2 All ER 283 at 284.

expressly refer to a "stay" would be to elevate form over substance without any justification.

72 The reason a judgment creditor seeks to obtain certification under s 15(1) of the Foreign Judgments Act is so that steps can be taken to enforce the judgment in a foreign country. And once documents are issued under s 15(1), there is nothing in Australian law to prevent the certification being relied upon to take steps to enforce the Australian judgment in a foreign country. To exclude the operation of s 58(3) from the reach of s 15(2) of the Foreign Judgments Act would be to undermine "an essential feature" of the Bankruptcy Act – it would enable a judgment creditor to take individual action for the purpose of obtaining payment of a debt due to them, thus obtaining an unfair advantage over other creditors[80].

73 The respondents' contention that s 58(3)(a) of the Bankruptcy Act is to be excluded from the reach of s 15(2) of the Foreign Judgments Act because s 58(3)(a) of the Bankruptcy Act would, itself, prevent action being taken by a judgment creditor in a foreign jurisdiction is also rejected. Section 15(2) of the Foreign Judgments Act is expressed to operate, and does operate, as an absolute bar to an application for a certificate. It neither requires nor permits the Registrar of an Australian court to undertake some assessment about the use to which the documents might be put in a foreign country by the judgment creditor or, as occurred here, by the authorities in that country.

74 In the present case, the evidence before the primary judge disclosed that after the Municipal Court in Prague confirmed the enforcement of the orders of the Supreme Court of Victoria, a bailiff in the Czech Republic had taken enforcement action against assets in the Czech Republic, including ordering the forced sale of property and confiscating funds in a bank account. It is the risk of such events occurring once documents have been issued under s 15(1) of the Foreign Judgments Act that explains why Parliament chose to impose the absolute bar in s 15(2).

Orders

75 For these reasons, the appeal should be allowed, and orders 2 to 6 of the Court of Appeal of the Supreme Court of Victoria made in proceeding S APCI 2016 0024 on 28 July 2016 should be set aside.

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80 *Storey* (1981) 147 CLR 549 at 556.

76 In place of those orders, the appeal to the Court of Appeal of the Supreme Court of Victoria should be dismissed, and the first to third respondents should pay the appellant's costs in proceeding S APCI 2016 0024.

77 The first to third respondents should pay the appellant's costs of the appeal to this Court.

78 GAGELER J. Agreeing with the reasons of Kiefel CJ, Bell, Keane, Gordon and Edelman JJ, and the observations of Nettle J, I join in allowing the appeal and making the consequential orders proposed.

79 NETTLE J. I agree with the plurality that the appeal should be allowed but wish to add the following observations.

80 Conventionally, the expression "stay of execution" is taken to refer to an order of a court that prevents a judgment being executed[81]. It may equally be conceived of, as Santamaria JA recognised in the Court of Appeal[82], as referring to the effect of a statutory provision[83] that prevents a judgment being executed. But, as the first to third respondents submitted, there is a distinction between a court order or statutory provision which prevents a judgment being executed and a court order or statutory provision which prohibits a party taking steps to enforce a judgment by execution. The former operates on the judgment itself by depriving the judgment of enforceability for the period of the stay. The latter operates *in personam*, against the party to whom it is directed, as a restraint on that party taking steps that would otherwise be available to enforce the judgment by execution. Section 58(3) of the *Bankruptcy Act* 1966 (Cth) is a mechanism of the latter kind. As Sackville AJA stated in *Wardle v Agricultural & Rural Finance Pty Ltd (No 3)*[84], it does not operate automatically as a stay of proceedings, but rather imposes restrictions on the steps available to a creditor.

81 It does not follow, however, that s 15(2) of the *Foreign Judgments Act* 1991 (Cth) is to be read as referring only to stays of execution of the kind which operate directly on judgments to deprive them of enforceability for the period of the stay. Section 15(2) refers to a "stay of enforcement", presumably by execution, of a judgment, as opposed to a "stay of execution". The words of s 15(2) of the *Foreign Judgments Act* thus yield a constructional choice between, on the one hand, a narrow understanding of "stay of enforcement [by execution]"

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81 See *Ballentine's Law Dictionary*, 3rd ed (1969) at 1215, "stay of execution"; *Butterworths Australian Legal Dictionary*, (1997) at 1117, "stay of execution"; *Black's Law Dictionary*, 10th ed (2014) at 1639, "stay", sense 2; *Jowitt's Dictionary of English Law*, 4th ed (2015), vol 2 at 2306, "stay". See also *Whan v McConaghy* (1984) 153 CLR 631 at 638 per Mason, Murphy, Wilson and Deane JJ; [1984] HCA 22; *P Aker Flowerbulbs Pty Ltd v Coulter* (2004) 140 FCR 410 at 418 [40].

82 *Bennett v Talacko* [2016] VSCA 179 at [195], [197]-[198], [201]; see also at [6] per Ashley JA. See also *Black's Law Dictionary*, 10th ed (2014) at 1639, "stay", sense 1.

83 See, for example, *Bankruptcy Act* 1966 (Cth), ss 60(2), 189AAA; *Insurance Act* 1973 (Cth), ss 62P, 91; *Federal Court of Australia Act* 1976 (Cth), s 58DD(1); *Life Insurance Act* 1995 (Cth), s 161; *Corporations Act* 2001 (Cth), ss 440D, 471B; *Cross-Border Insolvency Act* 2008 (Cth), s 16.

84 (2013) 303 ALR 298 at 312 [64] (McColl JA and Barrett JA agreeing at 300 [1], [2]).

as equivalent to "stay of execution" strictly so-called, and, on the other hand, a more expansive interpretation of the words "stay of enforcement [by execution]" that embraces *in personam* anti-enforcement mechanisms which, although operating *in personam*, achieve an essentially identical result to a stay of execution strictly so-called.

82 Consistently with the established approach of this Court to statutory construction[85], the meaning of s 15(2) of the *Foreign Judgments Act* is to be derived from its text, context and purpose. As has been observed, the text is equivocal. The context is, however, more instructive. Although Pt 3 of the *Foreign Judgments Act*, in which s 15 appears, is entitled "Miscellaneous", and although s 15 deals with the enforcement in foreign jurisdictions of judgments of Australian courts, the provisions of Pt 3 are principally concerned with conditions that a foreign judgment must satisfy in order to be enforceable in Australia by registration under Pt 2 or by action at common law[86]. Importantly for present purposes, the application of Pt 2 is also restricted by the requirement, the result of s 6(6), that the foreign judgment be enforceable in the country of the original court. Correspondingly, s 15 provides for the conditions that must be satisfied in relation to a judgment given in this country before a certificate to facilitate enforcement of that judgment in a foreign country will be issued. And importantly, those conditions include the requirement, the result of s 15(2), that the judgment not be the subject of a stay of enforcement.

83 Viewed in context, the purpose of s 15(2) appears thus to be one of achieving the kind of reciprocity that, by reason of s 5, applies to the enforcement of foreign judgments by registration under Pt 2, and, by operation of s 13, is sought to be achieved in relation to the enforcement of foreign judgments at common law under Pt 3. That is to say, a foreign judgment should not be enforceable in this country unless it is enforceable according to the laws of the country of the original court, and, reciprocally, a certificate should not issue under s 15 to facilitate enforcement of a judgment of an Australian court in a foreign jurisdiction unless the judgment is enforceable according to the laws of this country.

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85 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388-392 [23]-[32] per French CJ and Hayne J, 404-405 [68]-[70] per Crennan and Bell JJ, 411-412 [88]-[89] per Kiefel J; [2012] HCA 56.

86 *Foreign Judgments Act*, ss 11, 12, 13, 14.

84 As Santamaria JA observed[87], if a foreign country had enacted a law like s 58(3) of the *Bankruptcy Act*, a judgment of a court of that country would not be enforceable in that country and, perforce of s 6(6) of the *Foreign Judgments Act*, could not be enforced in this country by registration under Pt 2. Likewise, it would not be a "final and conclusive judgment" according to the common law of this country, and consequently it could not be sued upon in this country[88].

85 In the result, the purpose of reciprocity that informs the *Foreign Judgments Act* strengthens the conclusion that the constructional choice open on the text of s 15(2) is to be made by construing s 15(2) as extending to *in personam* mechanisms, like s 58(3) of the *Bankruptcy Act*, which have the effect of rendering a judgment unenforceable.

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87 *Bennett v Talacko* [2016] VSCA 179 at [199]-[200].

88 See and compare *Colt Industries Inc v Sarlie (No 2)* [1966] 1 WLR 1287 at 1293 per Russell LJ; [1966] 3 All ER 85 at 88; *Berliner Industriebank Aktiengesellschaft v Jost* [1971] 2 QB 463 at 470-471 per Salmon and Phillimore LJJ, 473-476 per Lyell J. See also *Ainslie v Ainslie* (1927) 39 CLR 381 at 388 per Knox CJ, 410 per Starke J; [1927] HCA 23; *Schnabel v Lui* [2002] NSWSC 15 at [76]-[155], and the authorities cited therein; *Bank Polska Kasa Opieki Spolka Akcyjna v Opara* (2010) 238 FLR 309 at 326 [61].