HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, NETTLE AND EDELMAN JJ

RAMSAY HEALTH CARE AUSTRALIA PTY LTD APPELLANT

AND

ADRIAN JOHN COMPTON RESPONDENT

Ramsay Health Care Australia Pty Ltd v Compton
[2017] HCA 28
Date of Order: 4 May 2017
Date of Publication of Reasons: 17 August 2017
S53/2017

ORDER

1. Appeal dismissed.

2. Appellant pay the respondent's costs.

On appeal from the Federal Court of Australia

Representation

J Stoljar SC with J E Hynes for the appellant (instructed by MinterEllison)

G O'L Reynolds SC with M J O'Meara and S Kanagaratnam for the respondent (instructed by Pavuk Legal)

CATCHWORDS

Ramsay Health Care Australia Pty Ltd v Compton

Bankruptcy – Creditor's petition – Where petitioning creditor relied upon judgment debt – Where judgment debt resulted from contested hearing – Where no suggestion of fraud or collusion in obtaining judgment – Where evidence adduced to suggest debt not truly owing – Whether Bankruptcy Court has, and should exercise, discretion to "go behind" judgment to investigate debt.

Words and phrases – "debt truly owing", "fraud, collusion or miscarriage of justice", "'go behind' a judgment", "miscarriage of justice".

Bankruptcy Act 1966 (Cth), s 52.

1 KIEFEL CJ, KEANE AND NETTLE JJ. A Bankruptcy Court exercising jurisdiction under s 52 of the *Bankruptcy Act* 1966 (Cth) ("the Act") may, in some circumstances, "go behind" a judgment in order to be satisfied that the debt relied upon by the petitioning creditor is truly owing. The Bankruptcy Court may take this course in order to satisfy itself that there is an extant petitioning creditor's debt as a necessary foundation for the making of a sequestration order.

2 In this case, the primary judge decided not to go behind a judgment in favour of the appellant, Ramsay Health Care Australia Pty Ltd ("Ramsay"). The judgment was given after a trial at which both parties were represented, and there was no suggestion that the judgment had been obtained by fraud or collusion. On that basis, the primary judge rejected an application by the judgment debtor that he should investigate whether the debt was truly owing. The Full Court of the Federal Court held that the primary judge erred in declining to investigate whether the debt was truly owing, given that the material before the primary judge raised substantial questions as to whether there was, in truth and reality, a debt due to Ramsay.

3 Ramsay appealed to this Court. At the conclusion of the hearing of the appeal, because there was some urgency attending the determination of the matter, and because at least a majority of the Court was of opinion that the decision of the Full Court was correct, the Court made orders dismissing Ramsay's appeal with costs. What follows are our reasons for joining in the making of those orders.

Background

4 Ramsay and associated corporate entities operate private hospitals within Australia and overseas. In November 2012, Ramsay entered into an agreement with Compton Fellers Pty Ltd trading as Medichoice ("Medichoice"), whereby Medichoice agreed to import medical products on Ramsay's behalf and was appointed Ramsay's distributor to coordinate the procurement, importation, logistics and inventory management of the products[1].

5 The directors of Medichoice were Adrian Compton (the respondent in this appeal) and Anna Stevis[2]. The shares in the company were owned by Mr Compton and his wife, Amy[3]. Pursuant to cl 3.1 of a "Guarantee and

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1 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] NSWSC 163 at [7], [9]-[11].

2 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] NSWSC 163 at [8], [15].

3 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] NSWSC 163 at [8].

Indemnity" ("the Guarantee") executed in connection with the agreement, which Mr Compton signed in his personal capacity, Mr Compton irrevocably and unconditionally guaranteed to Ramsay the payment of all money that Medichoice might become liable to pay Ramsay on any account in connection with Medichoice's performance of its obligations under the agreement[4]. Pursuant to cl 12 of the Guarantee, the parties agreed that "[a] certificate from Ramsay stating that an amount is owing or an event has occurred is taken to be correct unless the contrary is proved".

6 The agreement expired on 30 June 2013. Medichoice subsequently went into liquidation and took no further active part in the proceedings.

The judgment debt

7 On 2 June 2014, Ramsay commenced proceedings in the Commercial List of the Equity Division of the Supreme Court of New South Wales against Mr Compton, claiming money purportedly owing to it by Mr Compton under the Guarantee.

8 Prior to the trial of Ramsay's action against Mr Compton, both sides retained solicitors and briefed counsel in the proceedings. Both sides also filed and served evidence on the issue of the quantum of the alleged indebtedness. Ramsay's commercial list statement filed in the Supreme Court proceedings put in issue the quantum of Mr Compton's indebtedness to Ramsay; but Mr Compton's commercial list response raised only a *non est factum* defence to Ramsay's claim.

9 At the trial in the Supreme Court before Hammerschlag J, Mr Compton relied solely on his *non est factum* defence[5]. He did not tender evidence in respect of quantum, nor did he seek to dispute the quantum of the alleged debt. As Hammerschlag J noted in his reasons for judgment, "[q]uantum is not in dispute"[6].

10 Mr Compton's *non est factum* defence failed[7]; and, in the absence of any issue as to the quantum of the debt alleged by Ramsay, Hammerschlag J awarded

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4 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] NSWSC 163 at [3].

5 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] NSWSC 163 at [35].

6 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] NSWSC 163 at [6].

7 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] NSWSC 163 at [82].

judgment for Ramsay against Mr Compton in the amount of $9,810,312.33[8] ("the Judgment"), being the amount stated in a Certificate of Debt adduced by Ramsay in accordance with cl 12 of the Guarantee.

11 Mr Compton did not appeal from the Judgment; and on 29 April 2015, Ramsay served a bankruptcy notice on Mr Compton requiring that he pay the amount of the Judgment or make arrangements for settlement of the debt by 20 May 2015.

The bankruptcy proceedings

12 Mr Compton failed to comply with the bankruptcy notice, thereby committing an act of bankruptcy[9]. On 4 June 2015, Ramsay presented a creditor's petition in reliance upon that act of bankruptcy in the Federal Court of Australia[10].

13 On 7 July 2015, Mr Compton filed a notice stating grounds of opposition to the creditor's petition. Mr Compton contended that "no debt is or was really owed by [Mr Compton] to [Ramsay] because the [J]udgment is not founded on a debt that in truth and reality was or is owed by [Mr Compton] to [Ramsay]" and that "the Court should exercise its discretion to go behind the [J]udgment upon which the Creditor's Petition is based and consider whether the amount of the claimed debt as a whole is actually owed by [Mr Compton] to [Ramsay]".

14 Section 52(1) of the Act relevantly provides:

> "At the hearing of a creditor's petition, the Court shall require proof of:
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> …
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> (c) the fact that the debt or debts on which the petitioning creditor relies is or are still owing;
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> and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor."

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8 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] NSWSC 163 at [83].

9 *Bankruptcy Act* 1966 (Cth), s 40(1)(g).

10 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 510 [2].

15 Mr Compton filed an interim application, seeking an order that there be a separate determination of the question of whether the Court should exercise its discretion to go behind the Judgment to investigate the debt upon which the creditor's petition was based, and to consider whether it was actually owed.

16 It may be noted here that no objection was raised to the separate determination of the question of whether to go behind the Judgment. This practice provides a convenient way of proceeding where a question is raised as to whether a judgment establishes the amount truly owing to the petitioning creditor. This procedure was approved by the Full Court of the Federal Court in *Wolff v Donovan*[11]; but it is apparent from the decision of Philp J in *Petrie v Redmond*[12] that this had been the practice of the Bankruptcy Court for many years before the decision in *Wolff v Donovan*.

The primary judge's decision

17 The primary judge (Flick J) dismissed Mr Compton's interim application[13].

18 At the hearing before the primary judge, Mr Compton sought to rely on a "reconciliation" of the indebtedness between the parties[14]. It was submitted on Mr Compton's behalf that, if accepted, the "reconciliation" established that it was Ramsay that owed money to Medichoice, and not the other way around[15]. The "reconciliation" was supported by evidence on affidavit from Ms Stevis. In addition, Richard Albarran (one of three joint liquidators of Medichoice) gave affidavit evidence to the effect that it was more likely that Ramsay was indebted to Medichoice than vice versa[16].

19 Before the primary judge, senior counsel for Ramsay said that it was an "open question" whether the calculations set forth in the "reconciliation" with

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11 (1991) 29 FCR 480 at 486.

12 [1943] St R Qd 71 at 73-74.

13 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] FCA 1207 at [5].

14 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] FCA 1207 at [10].

15 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] FCA 1207 at [11].

16 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 512 [14], 514 [26].

respect to "offsets" and "rebates" were factually correct[17]. He submitted that "the best finding of fact your Honour could make on this application in relation to the issue is that perhaps there's enough evidence to show that there is a matter that upon further inquiry might lead to a different result".

20 The primary judge declined to go behind the Judgment. His Honour approached the issue before him on the basis that two questions were involved: first, whether the discretion to go behind the Judgment had arisen at all; and secondly, whether that discretion should be exercised in favour of going behind the Judgment[18]. It may be that his Honour unduly complicated the resolution of the application before him: there was only one discretion to be exercised. As Barwick CJ explained in *Wren v Mahony*[19]:

> "The Court's discretion in my opinion is a discretion to accept the judgment as satisfactory proof of [the petitioning creditor's] debt. That discretion is not well exercised where substantial reasons are given for questioning whether behind that judgment there was in truth and reality a debt due to the petitioner."

21 The primary judge decided not to make his own investigation as to whether the debt relied on by Ramsay was truly owing. In concluding that he had no discretion to go behind the Judgment, his Honour noted that:

- Mr Compton was represented by counsel in the proceedings before the Supreme Court;
- there was available evidence that had been filed in that Court addressing the quantum of any debt that may be owed; and
- a forensic decision had been made to confine the issue to be resolved by that Court to the enforceability of the Guarantee[20].

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17 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 528 [69].

18 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] FCA 1207 at [17].

19 (1972) 126 CLR 212 at 224-225; [1972] HCA 5.

20 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] FCA 1207 at [20].

22 His Honour considered that, even if the circumstances had enlivened the discretion to go behind the Judgment, the discretion should not be exercised in this case, for the same reasons, together with further reasons including that:

- the factual materials upon which the "reconciliation" was carried out were available to Mr Compton at the time of the Supreme Court hearing;
- no explanation was advanced on behalf of Mr Compton as to why the quantum of indebtedness was not put in issue before the Supreme Court or why the "reconciliation" was not previously undertaken;
- Ramsay maintained that there remained outstanding an indebtedness of a significant amount, although it accepted that the amount may be less than $9,810,312.33; and
- there was a "disturbing discrepancy" between the affidavits of Ms Stevis before the Supreme Court and before the Federal Court[21].

23 It is convenient to note here that the "disturbing discrepancy" referred to by the primary judge was the difference between Ms Stevis' estimate, for the purposes of the Supreme Court proceedings, of a balance of account in favour of Medichoice of approximately $2.45 million, and her estimate of $2.26 million in the bankruptcy proceedings[22]. Given the relatively small amount of this discrepancy, and Mr Albarran's evidence in the bankruptcy proceedings, it is readily understandable that the primary judge was not disposed to treat the discrepancy as indicating a want of good faith on the part of Mr Compton in seeking to challenge the debt.

24 Mr Compton sought leave to appeal from this decision to the Full Court of the Federal Court.

The Full Court

25 In a unanimous judgment, the Full Court (Siopis, Katzmann and Moshinsky JJ) granted leave to appeal and allowed Mr Compton's appeal.

26 Ramsay argued that the decision of this Court in *Corney v Brien*[23] established that a Bankruptcy Court should not go behind a judgment which

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21 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] FCA 1207 at [22].

22 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] FCA 1207 at [8], [12].

23 (1951) 84 CLR 343; [1951] HCA 31.

follows a full investigation at trial at which both parties were represented. Ramsay argued that this decision stands for the proposition that "fraud, collusion or miscarriage of justice" are exhaustive of the circumstances in which a Bankruptcy Court may or should go behind a judgment.

27 The Full Court rejected that argument, concluding that neither the plurality judgment in *Corney v Brien*, nor the reasons of Fullagar J, established such a narrow view of the function of a Bankruptcy Court[24]. The Full Court applied the approach of Barwick CJ (with whom Windeyer and Owen JJ agreed) in *Wren v Mahony*[25] that in circumstances "where reason is shown for questioning whether behind the judgment ... there was in truth and reality a debt due to the petitioning creditor, the Court of Bankruptcy can no longer accept the judgment as such satisfactory proof" but rather must "exercise its ... discretion to look at what is behind the judgment"[26].

28 The Full Court went on to hold that the primary judge erred in focusing on[27]:

> "the way in which Mr Compton conducted his case in the Supreme Court rather than on the central issue, which was whether reason was shown for questioning whether behind the judgment there was in truth and reality a debt due to the petitioning creditor".

29 The Full Court held that a focus upon that "central issue" reveals that substantial reasons were shown for questioning whether Mr Compton was indebted to Ramsay. The Court held that the evidence supporting the "reconciliation" and Ramsay's concession that there was a "question" as to the debt raised a question which required resolution before the Bankruptcy Court could proceed to make a sequestration order. While some, and possibly all, of the factual materials underpinning the "reconciliation" may have been available before the Supreme Court, the issue for the Bankruptcy Court was not the finality of forensic choices made by the parties in the litigation which resulted in the

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24 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 525 [60].

25 (1972) 126 CLR 212 at 224-225.

26 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 525-526 [62].

27 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 527 [69].

Judgment, but the requirement of s 52(1) of the Act that the Bankruptcy Court have satisfactory proof of the petitioning creditor's debt before proceeding to make a sequestration order[28].

30 The Full Court held that the primary judge erred in concluding that the discretion to go behind the Judgment had not been enlivened. Their Honours said that these same considerations tended towards a conclusion that the primary judge also erred in holding that should the discretion be enlivened, it should not be exercised[29]. The Full Court proceeded to consider afresh whether to go behind the Judgment[30], and concluded that the Bankruptcy Court should go behind the Judgment, to determine whether there was in truth and reality any debt owing to the petitioning creditor.

31 Accordingly, the Full Court granted leave to appeal and allowed Mr Compton's appeal, ordering that the Bankruptcy Court should go behind the Judgment[31].

32 By special leave, Ramsay appealed to this Court, arguing that the Full Court erred in setting aside the decision of the primary judge to decline to go behind the Judgment.

The parties' arguments in this Court

Ramsay

33 Ramsay again put at the forefront of its submissions the contention that this Court's decision in *Corney v Brien*[32] established that a Bankruptcy Court's discretion to go behind a judgment after a contested hearing is enlivened only in the event of some fraud, collusion or miscarriage of justice. There was no

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28 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 528 [70].

29 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 529-530 [75]-[76].

30 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 530 [77]-[78].

31 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 530 [80].

32 (1951) 84 CLR 343.

suggestion of fraud or collusion, and Ramsay argued that the expression "miscarriage of justice" refers, in this context, only to circumstances which impeach the judgment such that the judgment should never have been obtained. Ramsay argued that the Full Court did not, and could not, conclude that the Judgment was affected by miscarriage of justice in this special sense.

34 These propositions were said to be consistent with the principle of finality in litigation, which is part of the common law framework in which the discretion conferred by s 52 of the Act should be considered. It was said that the statutory discretion conferred by s 52 should be applied in a manner giving primacy to a final judgment given after a contested hearing.

35 Ramsay argued that the Full Court took too broad a view of the holding in *Wren v Mahony*[33]. That broad view was said to overlook the circumstance that *Wren v Mahony* involved a default judgment, with Barwick CJ observing that "[t]here had been no more in the Supreme Court than a contest at the pleading stage of the action"[34].

36 As to the concession before the primary judge that there was an "open question" as to whether the debt was in fact owed, Ramsay submitted that this amounted to no more than an acceptance of the obvious proposition that if the Bankruptcy Court were in due course to go behind the Judgment, there would be a factual contest as to the amount of the debt, a contest which would be resolved on further evidence to be adduced by Ramsay.

Mr Compton

37 Mr Compton submitted that, by reason of s 52(1)(c) of the Act, and as *Wren v Mahony*[35] concluded, the question for the Bankruptcy Court was whether the judge was persuaded that there was a debt truly owing to the petitioning creditor. It was said that the Bankruptcy Court should go behind a judgment where sufficient reason is shown for questioning whether behind the judgment there is in truth and reality a debt due to the petitioning creditor, and that sufficient reason was shown in this case.

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33 (1972) 126 CLR 212.

34 *Wren v Mahony* (1972) 126 CLR 212 at 225.

35 (1972) 126 CLR 212.

38 An examination of the competing arguments shows that, both in point of authority and in point of principle, Ramsay's contentions should be rejected and those advanced for Mr Compton accepted.

Corney v Brien

39 By reason of s 52 of the Act, a Bankruptcy Court must be satisfied with the proof of "the fact that the debt … on which the petitioning creditor relies is … still owing", if the court's power to make a sequestration order is to be enlivened. The plurality in *Corney v Brien* did not hold that a Bankruptcy Court must treat a judgment as satisfactory proof of the petitioning creditor's debt save in cases of fraud, collusion or miscarriage of justice. Rather, the plurality held that a Bankruptcy Court has "undoubted jurisdiction" to go behind a judgment in those circumstances[36]. To say that the court may do a thing in certain circumstances is not to say it may do that thing only in those circumstances.

40 In point of authority, it is important to appreciate that, in *Corney v Brien*, the plurality referred with evident approval to the earlier decision in *Petrie v Redmond*[37]. An examination of the decision in *Petrie v Redmond* shows that it stands squarely against the propositions for which Ramsay contends in this case.

41 In *Petrie v Redmond*[38], Philp J, sitting as the Bankruptcy Court, decided, of his own motion, to go behind a judgment given after a trial where both parties "were represented by independent counsel, and there is no suggestion of fraud or collusion in the obtaining of the judgment", to investigate an issue that had not been raised in the course of the contested proceedings which led to the judgment. Having heard argument on that issue, his Honour concluded that it should be resolved in favour of the petitioning creditor. On the basis that he would not be "doing any injustice to the other creditors", Philp J proceeded to order a sequestration. On appeal to the High Court, Latham CJ, with whom Rich and McTiernan JJ agreed, said of the course taken by Philp J: "The judge was doing only what he was required to do to satisfy himself that there was a petitioning creditor's debt."[39]

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36 *Corney v Brien* (1951) 84 CLR 343 at 347.

37 [1943] St R Qd 71.

38 [1943] St R Qd 71 at 72-74.

39 [1943] St R Qd 71 at 76.

Wren v Mahony

42 In *Wren v Mahony*[40], Barwick CJ, with whom Windeyer and Owen JJ agreed, said:

> "The judgment is never conclusive in bankruptcy. It does not always represent itself as the relevant debt of the petitioning creditor, even though under the general law, the prior existing debt has merged in a judgment. But the Bankruptcy Court may accept the judgment as satisfactory proof of the petitioning creditor's debt. In that sense that court has a discretion. It may or may not so accept the judgment. But it has been made quite clear by the decisions of the past that where reason is shown for questioning whether behind the judgment or as it is said, as the consideration for it, there was in truth and reality a debt due to the petitioning creditor, the Court of Bankruptcy can no longer accept the judgment as such satisfactory proof. It must then exercise its power, or if you will, its discretion to look at what is behind the judgment: to what is its consideration."

43 There are good reasons why this statement should not be given the artificially narrow application urged on behalf of Ramsay. First, it is not correct to say that *Wren v Mahony* involved a default judgment. In truth, it involved a default that resulted from the defendant's failure to plead a good defence, having chosen to defend the claim on a point of law that was resolved against him. The primary judge in bankruptcy declined to reconsider the resolution of the point of law; and the High Court held that the primary judge erred in failing to reconsider the point, which the High Court went on to uphold.

44 Secondly, *Wren v Mahony* held that a Bankruptcy Court may go behind a judgment, notwithstanding that the judgment was obtained after a contested hearing. That can be seen by reference to the reasons of the dissentients, reasons that were necessarily rejected by the majority[41].

45 In this regard, Menzies J, with whom Walsh J agreed, expressly rested his judgment in the case[42]:

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40 (1972) 126 CLR 212 at 224.

41 (1972) 126 CLR 212 at 236.

42 *Wren v Mahony* (1972) 126 CLR 212 at 236.

> "solely upon my view that it was within the discretion of the judge of the Court of Bankruptcy not to reconsider the judgment of the Supreme Court of New South Wales obtained in the circumstances stated".

46 The circumstances to which Menzies J referred were that the Bankruptcy Court was "faced with a judgment of the Supreme Court of one of the States, fairly obtained without collusion or fraud after a contested hearing"[43]. This statement reflects a submission made by the respondent's counsel, who submitted: "No cases have gone behind the judgment where the only issue has been litigated, in the absence of fraud or collusion."[44] As the consideration of *Petrie v Redmond* shows, that submission was incorrect.

47 In point of authority then, the decision of the majority in *Wren v Mahony* stands as a rejection of Ramsay's proposition that the circumstance that a judgment of the Supreme Court was obtained without collusion or fraud after a contested hearing precludes the possibility of sufficient reason for questioning whether behind that judgment there was, in truth and reality, a debt due to the petitioner.

48 *Wren v Mahony* has long been accepted as standing against the proposition advanced by Ramsay. Thus, in *Simon v O'Gorman Pty Ltd*[45], Lockhart J, with whom Fisher J agreed, said:

> "The circumstances in which the court will inquire into the validity of a judgment debt are not closed; but it is clear that the court will not inquire as a matter of course into that question.
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> Circumstances tending to show fraud, collusion or miscarriage of justice or that a compromise was not a fair and reasonable one are the most frequent examples of the exercise by the court of this jurisdiction.
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> The courts are reluctant to exercise this jurisdiction where the judgment was entered after a full investigation of the issues at a trial where both parties appeared and had ample opportunity to put their case to the court".

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43 *Wren v Mahony* (1972) 126 CLR 212 at 236.

44 *Wren v Mahony* (1972) 126 CLR 212 at 214.

45 (1979) 27 ALR 619 at 633 (citations omitted).

49 To the same effect are statements by Davies, Lockhart and Neaves JJ in *Ahern v Deputy Commissioner of Taxation (Qld)*[46], and Sackville, North and Hely JJ in *Wenkart v Abignano*[47]. As Lockhart J explained in *Simon*, "fraud, collusion or miscarriage of justice" are the most frequent examples of the exercise of a Bankruptcy Court's jurisdiction to go behind a judgment; but the overarching obligation imposed by s 52(1) of the Act requires a Bankruptcy Court to be satisfied that there is, in truth and reality, a debt.

50 It is convenient to note here that Ramsay relied, as did the primary judge, on the decision of Hely J in *Commonwealth Bank of Australia v Jeans*[48], in which his Honour refused to go behind a judgment, saying of the case before him[49]:

> "[T]he circumstances of this case are far removed from a case in which a judgment is entered by default. There was a fully contested hearing ... on the issue of the debtor's liability under the guarantee, after the debtor had a reasonable opportunity to raise whatever grounds he wished to rely upon to resist the Bank's case based upon the guarantee. As is always the case, the scope of the contest was determined by the respective cases put forward by the parties, who are ordinarily bound by the way in which they have chosen to conduct the proceedings."

51 It must be understood, however, that in *Jeans*, Hely J explicitly applied the approach in *Wren v Mahony* in reaching his decision. Hely J refused to go behind a judgment on a guarantee given after the trial judge had refused the debtor leave to withdraw his admission that he had signed the guarantee. Leave to withdraw the admission was refused for reasons which included the circumstance that the debtor had repeatedly and deliberately admitted that he had signed the guarantee[50]. The circumstances which justified refusal of leave to withdraw the admission meant that no question was raised in good faith in the Bankruptcy Court as to whether the debt based on the guarantee was truly owing.

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46 (1987) 76 ALR 137 at 147-148.

47 [1999] FCA 354 at [22]-[24].

48 [2005] FCA 978.

49 [2005] FCA 978 at [18].

50 [2005] FCA 978 at [6].

52 By contrast, in the present case, the primary judge did not conclude that the "discrepancy" in the evidence of Ms Stevis to which he referred[51] revealed a want of good faith in Mr Compton's application. It may be that the investigation which the primary judge declined to conduct would have led to the conclusion that the evidence disputing the debt was not reliable. However, that conclusion could only have been reached had his Honour proceeded to investigate the issue.

Impeaching the judgment

53 Ramsay's argument that "miscarriage of justice" in this context is confined to the kind of miscarriage of justice which would suffice to impeach the obtaining of the judgment echoes the contention unsuccessfully advanced in the course of argument in *Wren v Mahony*[52] by the respondent's counsel, who submitted: "The Bankruptcy Court must not become an appeal court from other tribunals." That submission resonated only with the dissentients, Menzies J[53] and Walsh J[54]. That the submission failed to carry the day is understandable because the concern to which it gave voice is misconceived.

54 In point of principle, scrutiny by a Bankruptcy Court of the debt propounded by a judgment creditor seeking a sequestration order in no sense involves an attempt to impeach the judgment. A Bankruptcy Court is not concerned with whether the judgment should be set aside as upon an appeal, or even as a default judgment or a judgment obtained by fraud may be set aside; nor is a Bankruptcy Court concerned to deny the effect of the judgment as "res judicata" between the parties to it. A Bankruptcy Court is not concerned to prevent the judgment creditor from invoking the ordinary processes of execution available under the general law. Rather, a Bankruptcy Court is concerned with whether the debt on which it is based is truly a basis for the making of a sequestration order[55]. A Bankruptcy Court has a statutory duty to be "satisfied" as to the existence of the petitioning creditor's debt; a creditor should not be able to make a person bankrupt on a debt which is not provable.

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51 *Ramsay Health Care Australia Pty Ltd v Compton* [2015] FCA 1207 at [22].

52 (1972) 126 CLR 212 at 214.

53 (1972) 126 CLR 212 at 235-236.

54 (1972) 126 CLR 212 at 238.

55 *In re Fraser; Ex parte Central Bank of London* [1892] 2 QB 633 at 636-637.

55 The scrutiny required by s 52 as to whether there is, in truth and reality, a debt owing to the petitioning creditor serves to protect the interests of third parties, particularly other creditors of the debtor. It is of critical importance to appreciate that such persons were not parties to the proceedings that resulted in the judgment debt. It has long been recognised that their interest in being paid their debts in full should not be prejudiced by the making of a sequestration order in reliance on a judgment debt which does not reflect the true indebtedness of the debtor to the petitioning creditor[56]. In *In re Fraser; Ex parte Central Bank of London*, Lord Esher MR said[57]:

> "The decision is based upon the highest ground – viz, that in making a receiving order, the Court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made, will not be able to sue the debtor for their debts, and that the Court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor. The existence of the judgment is no doubt prima facie evidence of a debt; but still the Court of Bankruptcy is entitled to inquire whether there really is a debt due to the petitioning creditor."

56 Almost a century later, the effect of the authorities on the topic was summarised in similar terms in *Ahern v Deputy Commissioner of Taxation (Qld)*[58] by Davies, Lockhart and Neaves JJ:

> "[B]efore a person can be made bankrupt the court must be satisfied that the debt on which the petitioning creditor relies is due by the debtor and that if any genuine dispute exists as to the liability of the debtor to the petitioning creditor it ought to be investigated before he is made bankrupt. Bankruptcy is not mere *inter partes* litigation. It involves change of status and has quasi-penal consequences."

57 The cases do not suggest that the merger of a debt in a judgment limits the power of a Bankruptcy Court to go behind a judgment so that it is confined to circumstances in which the judgment itself might be set aside. Nothing in

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56 *Ex parte Kibble; In re Onslow* (1875) LR 10 Ch App 373 at 376-377; *Ex parte Lennox; In re Lennox* (1885) 16 QBD 315 at 321-322, 329; *In re Fraser; Ex parte Central Bank of London* [1892] 2 QB 633 at 636-637, 638; *Corney v Brien* (1951) 84 CLR 343 at 347-348; *Wren v Mahony* (1972) 126 CLR 212 at 221-222.

57 [1892] 2 QB 633 at 636-637.

58 (1987) 76 ALR 137 at 148.

Corney v Brien supports Ramsay's argument in this respect. And the protean character of the concept "miscarriage of justice" suggests that it is not limited to cases where the judgment is so tainted that it may be set aside.

58 The circumstance that under the general law a prior existing debt is taken to merge in a judgment has not been regarded as in some way operating to relieve a Bankruptcy Court of the paramount need to have satisfactory proof of the petitioning creditor's debt. In *Wren v Mahony* itself, Barwick CJ expressly adverted to the principle of the general law that a debt merges in a judgment, and went on to observe[59] that "[t]he judgment is never conclusive in bankruptcy" and that that is so "even though under the general law, the prior existing debt has merged in a judgment". As his Honour said, in s 52(1)(c) of the Act "the emphasis is upon the paramount need to have satisfactory proof of the petitioning creditor's debt"[60]. It may also be noted that the reasons of the dissenting judges in *Wren v Mahony* were not grounded on any conceptual concern that the judgment extinguishes the prior existing debt.

59 A similar view prevails in the United Kingdom. In *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc*[61], Lord Hoffmann – with whom Lord Bingham of Cornhill, Lord Hutton, Lord Rodger of Earlsferry and Lord Carswell agreed – referred to the proposition that under the general law, "[t]he judgment itself is treated as the source of the right" of the creditor, but went on to say:

> "The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."

60 Ramsay sought to support its contention that, by the time a creditor's petition is presented on the basis of a judgment, any cause of action arising from the original underlying factual contest has merged with that judgment and the "debt" referred to in s 52(1)(c) is the debt comprised in the judgment itself, by reference to observations of Etherton J in *Dawodu v American Express Bank*[62].

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59 (1972) 126 CLR 212 at 224.

60 (1972) 126 CLR 212 at 224.

61 [2007] 1 AC 508 at 516 [13]-[14].

62 [2001] BPIR 983.

There, his Lordship, acknowledging that the phrase "miscarriage of justice" is capable of wide application, said that, in this context, what is required is that[63]:

> "the court be shown something from which it can conclude that had there been a properly conducted judicial process it would have been found, or very likely would have been found, that nothing was in fact due to the claimant."

61 It is not entirely clear that this statement supports Ramsay's argument, but if it does, it is at odds with the course of authority. Indeed, Etherton J had, earlier in his judgment[64], referred with evident approval to the statement of Warner J in *McCourt and Siequien v Baron Meats Ltd and the Official Receiver*[65] that "the grounds upon which a bankruptcy court may go behind a judgment are more extensive than the grounds upon which an ordinary court of law or equity may set it aside".

62 Ramsay also sought support for its argument in the observation of Buckley LJ in *In re Van Laun; Ex parte Chatterton*[66]:

> "It is sufficient, in the language of Lord Esher, to shew miscarriage of justice – that is to say, that for some good reason there ought not to have been a judgment."

63 That statement, understood in context, does not support Ramsay's argument at all. It appears after Buckley LJ had said[67]: "It is well settled that the Court can inquire into the consideration for a judgment debt." Indeed, his Lordship went on to hold that it was permissible to say to a putative creditor "'Very well, you say you are a creditor; make out your case as if there was … no judgment. Satisfy me that the amount for which you say you are creditor is right.'"[68] Clearly, his Lordship was not concerned with whether there was reason

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63 [2001] BPIR 983 at 990.

64 [2001] BPIR 983 at 989.

65 [1997] BPIR 114 at 120.

66 [1907] 2 KB 23 at 31.

67 [1907] 2 KB 23 at 31.

68 [1907] 2 KB 23 at 32.

to set aside a judgment, but with whether the evidence established the true state of accounts between the parties.

64 Finally in this regard, it is to be noted that in no case has it been said that whether, or the extent to which, a Bankruptcy Court may go behind a judgment turns in any way upon the choice of the petitioning creditor to base its petition upon the anterior debt or the judgment. Indeed, if it were thought that the choice to rely upon the judgment might limit the scope for the Bankruptcy Court to go behind the judgment, no petitioning creditor would ever choose to base its petition upon the antecedent debt rather than a judgment for the debt.

Finality in litigation

65 Before the primary judge, there were, in the words of Barwick CJ in *Wren v Mahony*[69], "substantial reasons … for questioning whether behind [the] judgment there was in truth and reality a debt due to the petitioner".

66 It may be accepted, as Ramsay argued, that the concession made by its senior counsel before the primary judge was made only for the purpose of the inquiry into whether the court should go behind the Judgment (as opposed to the findings which should be made at the subsequent hearing that would take place if the court chose to investigate the debt for itself). The concession was no more than an acknowledgment of the existence of evidence which might tend towards a different result from that reflected in the Judgment. But that concession meant that, before the primary judge, there was evidence which, if left unanswered, would support the conclusion that Mr Compton was not indebted to Ramsay at all. While the failure of Mr Compton to rely upon this evidence at trial was unexplained, there was on the face of things a real question as to whether Mr Compton had failed to present his case on its merits at the trial in the Supreme Court.

67 It is no answer to the latter point for Ramsay to say, as the primary judge did, that Mr Compton is bound by the conduct of his case on his behalf at the trial in the Supreme Court. As has been seen, the notion that a party is bound by the conduct of his or her case has never been a sufficient reason not to look behind a consent judgment or a default judgment. That is because a Bankruptcy Court is concerned, not to discipline litigants or to protect finality in the administration of justice as between parties to litigation, but to protect the interests of third parties who were not participants in the litigation which led to the judgment in question.

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69 (1972) 126 CLR 212 at 225.

68 For the purposes of s 52 of the Act, a judgment may usually be taken to be sufficient evidence of a debt[70] in that a judgment against a debtor in favour of a creditor obtained after a trial is, generally speaking, a reliable indication of the true state of indebtedness as between creditor and debtor. Indeed, such a judgment can usually be expected to provide the most reliable statement of the debt humanly attainable because the ordinary processes of the adversarial system provide a practical guarantee of reliability. The testing of the relative merits of a claim and counterclaim under the rigours of adversarial litigation will usually establish the true state of accounts as between the parties to the proceedings. Accordingly, a Bankruptcy Court will usually have no occasion to investigate whether the judgment debt is a true reflection of the real debt. But where the merits of a claim and counterclaim have not been tested in adversarial litigation, a judgment debt will not have this practical guarantee of reliability.

69 In *Petrie v Redmond*[71], Latham CJ, with whom Rich and McTiernan JJ agreed, said that the Bankruptcy Court:

> "is entitled to go behind the judgment and inquire into the validity of the debt where there has been fraud, collusion or miscarriage of justice. … Also the court looks with suspicion on consent judgments and default judgments. … The Bankruptcy Court does not examine every judgment debt. Special circumstances must be established before it will do so. It is impossible to lay down any general rule."

70 The first two sentences of that passage were cited with evident approval by Dixon, Williams, Webb and Kitto JJ in *Corney v Brien*[72]. The passage was explicitly concerned with consent judgments and default judgments. As a matter of practical experience, these are the sorts of cases in which third parties can be expected to be disadvantaged by the making of a sequestration order based on a judgment which was not the outcome of the rigorous processes of adversarial litigation. The same concern may also arise in a case where the judgment was obtained in circumstances which suggest a failure on the part of the judgment debtor to present his or her case on its merits in the litigation that led to the judgment.

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70 *Ex parte Lennox; In re Lennox* (1885) 16 QBD 315 at 323; *In re Flatau; Ex parte Scotch Whisky Distillers Ltd* (1888) 22 QBD 83 at 85; *Corney v Brien* (1951) 84 CLR 343 at 353.

71 [1943] St R Qd 71 at 75-76.

72 (1951) 84 CLR 343 at 348.

71 In the present case, the unexplained failure by Medichoice and Mr Compton to present and rely upon evidence of the kind on which the "reconciliation" is based before the trial in the Supreme Court is consistent with the possibility that the present was such a case. To say this is not to say that a suspicion of inadequate representation is of itself sufficient to give rise to a question worthy of investigation by a Bankruptcy Court. But in this case, there was evidence before the primary judge which, while it remained uncontradicted, was apt to suggest that the debt was not truly owing; and as noted above, the primary judge did not consider that this evidence was not adduced in good faith. If it were the case that this evidence was not adduced by reason of a failure on the part of Mr Compton or those representing him and Medichoice in the Supreme Court to present their case on its merits, that failure should not enure to the disadvantage of persons who were not parties to those proceedings. Third parties, such as Mr Compton's creditors, should not have been prejudiced by the making of a sequestration order with that question unresolved.

Conclusion

72 The Full Court was correct to conclude that there was a substantial question as to whether the debt on which Ramsay relied was owing. That being so, the Bankruptcy Court should proceed to investigate this question in order to decide whether it was open to it to make a sequestration order.

73 GAGELER J. These are my reasons for dissenting from the orders made at the conclusion of the hearing.

74 Section 43(1) of the Act empowers the Federal Court, on a petition presented by a creditor, to make a sequestration order against the estate of a debtor who committed an act of bankruptcy at a time when the debtor was personally present or ordinarily resident in Australia. Section 44(1) prevents a creditor from presenting a petition against a debtor unless, relevantly, the debtor owes the creditor a debt or debts amounting to $5,000 and the debt or each debt is a liquidated sum due at law or in equity and is payable either immediately or at a certain future time.

75 Section 52 relevantly provides:

> "(1) At the hearing of a creditor's petition, the Court shall require proof of:
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> ...
>
> (c) the fact that the debt or debts on which the petitioning creditor relies is or are still owing;
>
> and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor.
>
> ...
>
> (2) If the Court is not satisfied with the proof of any of those matters, or is satisfied by the debtor:
>
> ...
>
> (b) that for other sufficient cause a sequestration order ought not to be made;
>
> it may dismiss the petition."

76 Where a creditor to whom a debtor has a legal or equitable obligation to pay a liquidated sum that is owed proceeds first to obtain a judgment against a debtor, the antecedent obligation is not treated for the purposes of bankruptcy as merging in the judgment. The creditor, in going on to present a bankruptcy petition, can rely either on the debt created by the judgment or on the prior debt, which arose at law or in equity[73]. Whether the creditor relies on the debt created

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73 *O'Mara Constructions Pty Ltd v Avery* (2006) 151 FCR 196 at 199 [9], quoting *In re King & Beesley; Ex parte King & Beesley* [1895] 1 QB 189 at 191-192.

by the judgment or relies on the judgment as proof of the antecedent debt, a court exercising jurisdiction in bankruptcy "may, upon a prima-facie case being shown, go behind a judgment for the purpose of satisfying itself that the debt enforceable thereunder was a real debt"[74]. That discretion has on occasions been described in the antique language of the Court of Chancery as one to examine "if there is not a Debt due in *Truth and Reality*, for which the Consideration must be looked to"[75].

77 Numerous statements in the case law would tend to locate the modern statutory source of that longstanding and undisputed discretion in s 52(2)(b). The predominant view, however, is that the discretion inheres in an ability of the court to refuse to accept a judgment as proof of the fact that a debt on which the petitioning creditor relies is owing for the purpose of s 52(1)(c). Nothing for present purposes turns on the precise statutory source of the discretion.

78 Unlike *Wren v Mahony*[76], where the debt on which the petitioning creditor relied was a liability for breach of a covenant of indemnity under a deed and where the judgment entered in favour of the creditor against the debtor was relied on by the creditor as no more than proof of that debt, the debt on which Ramsay relied in its creditor's petition against Mr Compton was the liability created by the judgment which Ramsay entered against Mr Compton in the Supreme Court of New South Wales in the amount of $9,810,312.33. Entry of that judgment was consequent upon a judicial determination of Mr Compton's liability to Ramsay made after a contested hearing on the merits in which Ramsay bore the onus of proof and in which Mr Compton, who was legally represented, chose not to put quantum in issue.

79 Mr Compton's interim application to the Federal Court in the proceeding on Ramsay's creditor's petition was for "an order that there be a separate determination of the question of whether the Court should exercise its discretion to go behind the judgment upon which the Creditor's Petition in this proceeding is based and consider whether the amount of the claimed debt as a whole is actually owed by [Mr Compton] to [Ramsay]". Following Mr Compton making that interim application, the parties proceeded as if the order for separate determination had been made. That the Federal Court had the discretion to "go behind" the judgment of the Supreme Court was not in issue. The sole question on which issue was joined was whether Mr Compton had shown a *prima facie* case for the exercise of that discretion. The primary judge determined that he

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74 *Corney v Brien* (1951) 84 CLR 343 at 347-348; [1951] HCA 31, quoting *In re A Debtor* [1929] 1 Ch 125 at 127.

75 *Corney v Brien* (1951) 84 CLR 343 at 347, quoting *Ex parte Bryant* (1813) 1 V & B 211 at 214 [35 ER 83 at 84].

76 (1972) 126 CLR 212; [1972] HCA 5.

had not, and that the discretion should not be exercised; the Full Court determined that it should.

80 The Full Court's affirmative determination of the separate question has the consequence that, for the Federal Court to make a sequestration order on Ramsay's petition, the Federal Court must now conduct its own independent hearing into the merits of the claim which has already been determined on the merits in the Supreme Court of New South Wales. There will be, in effect, another trial. Ramsay will again bear the onus of proof. Presumably, both parties will again be represented. The difference this next time round is that the factual contest between the parties will be expanded. Mr Compton will put quantum in issue.

81 That consequence follows from the explanation of the nature of the discretion given by Fullagar J, after thorough examination of relevant history, in *Corney v Brien*[77]:

> "The question whether the judgment is to be reopened or 'gone behind' at all will, of course, often involve some preliminary investigation of the merits of the attack on the judgment. But, when once the court decides that it will 'go behind' the judgment, … the whole matter is open. When once it is considered proper to 'reopen', the only question will be whether there was, in fact and in law, a debt which could legally found the judgment – whether there was in 'Truth and Reality' an obligation not of record before there was an obligation of record. If the case should be one of those rare cases (I have not actually found one in the Reports since 1888, when Fry LJ said that he knew of none) where it is legitimate to 'go behind' a judgment entered after trial in court, there would be … no alternative but to re-try the whole case. The matter to be decided is the existence or non-existence of a debt antecedent to the judgment."

82 His Honour's reference to what Fry LJ had said in 1888 was an allusion to the decision of the English Court of Appeal in *In re Flatau; Ex parte Scotch Whisky Distillers Ltd*[78]. An argument there rejected was recorded by Lord Esher MR in the following terms[79]:

> "Another point was taken – viz, that although an action has been tried by the proper tribunal, a judge alone or a judge with a jury, and definite issues have been thoroughly tried out, and decided against the

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77 (1951) 84 CLR 343 at 358.

78 (1888) 22 QBD 83.

79 (1888) 22 QBD 83 at 85.

> debtor, and judgment has been given against him accordingly, he against whom judgment has thus been given, without his being able to suggest that there was any miscarriage of justice at the trial, is entitled to go into the Court of Bankruptcy, and, even though he has appealed against the judgment, assert that the action was not properly tried, and say to the registrar, you must try every one of the issues over again, upon the same evidence if I choose, or upon new evidence, and you have no discretion in this matter."

Lord Esher MR responded[80]:

> "It is not necessary now to repeat that, when an issue has been determined in any other court, if evidence is brought before the Court of Bankruptcy of circumstances tending to shew that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition."

Fry LJ said[81]:

> "It is true that in some cases the Court of Bankruptcy has gone behind a judgment, when it has been obtained by fraud, collusion, or mistake. But this power has never, so far as I am aware, been extended to cases in which a judgment has been obtained after issues have been tried out before a Court."

Lopes LJ agreed, adding[82]:

> "Proceedings in bankruptcy are already scandalously long; if this contention were well founded they would be almost interminable. I agree that in cases of mistake, fraud, or miscarriage of justice the Court of Bankruptcy will go behind a judgment, but the present case is not one of that kind."

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80 (1888) 22 QBD 83 at 85.

81 (1888) 22 QBD 83 at 86.

82 (1888) 22 QBD 83 at 87.

83 *In re Flatau* was applied in *In re Beauchamp; Ex parte Beauchamp*[83] and in *In re Howell*[84], in each case to uphold on appeal a refusal by a registrar to exercise discretion to "go behind" a judgment entered in consequence of a judicial determination after a trial on the merits. In the first of those cases, Vaughan Williams LJ expressed the opinion of the Court of Appeal that "the fact that the judgment may be irregular or wrong in form is no sufficient reason for going behind the judgment and dismissing the petition"[85]. In the second, Horridge J said that "[e]ven supposing this Court thought the decision of the learned Judge was not correct ... that would not establish a case of miscarriage of justice" and Shearman J stated the relevant "working rule" to be that the registrar "ought not to go behind it, when the judgment has been given in open Court against a person who is represented"[86].

84 In Australia, *In re Flatau* and *In re Howell* were applied by Philp J in the Court of Bankruptcy in *Petrie v Redmond*[87] to hold in respect of a judgment given on the merits in respect of which there was no suggestion of fraud or collusion that he "should not go behind a judgment … merely because the [debtor] might or would have succeeded if counsel had fought the action differently".

85 Consistently with the English decisions and with the approach of Philp J in *Petrie v Redmond*, and with specific reference to what Fry LJ had said in *In re Flatau*, Fullagar J stated in *Corney v Brien*[88]:

> "No precise rules exist as to what circumstances call for an exercise of the power, but certain things are, I think, clear enough. If the judgment in question followed a full investigation at a trial on which both parties appeared, the court will not reopen the matter unless a prima-facie case of fraud or collusion or miscarriage of justice is made out."

86 Except for whatever might be taken to have been decided in *Wren v Mahony*, the researches of the legal representatives of the parties in the present case unearthed no case since *Corney v Brien* was decided in 1951 in which a

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83 [1904] 1 KB 572.

84 (1915) 84 LJKB 1399.

85 [1904] 1 KB 572 at 581.

86 (1915) 84 LJKB 1399 at 1400.

87 [1943] St R Qd 71 at 73.

88 (1951) 84 CLR 343 at 356-357.

court exercising bankruptcy jurisdiction has exercised its discretion to "go behind" a judgment entered after a trial on the merits. The present case appears to have the distinction of becoming the first, maybe ever.

87 *Wren v Mahony*, as I have already noted, was a case in which the petitioning creditor chose to rely not on the judgment debt but on an antecedent contractual liability. The judgment was not entered after a trial on the merits, but was rather entered in default of the debtor pleading a defence after an interlocutory hearing had resulted in an earlier pleaded defence being struck out.

88 Barwick CJ, with whom Windeyer and Owen JJ agreed, took the opportunity in *Wren v Mahony* to state as a general principle that the discretion to accept a judgment as satisfactory proof of a debt "is not well exercised where substantial reasons are given for questioning whether behind that judgment there was in truth and reality a debt due to the petitioner"[89]. The generality of the principle should not be confused with the generality of its ambit. His Honour's reference to "substantial reasons" cannot be read as if it were an unqualified reference to any substantial reason for considering that the judgment debt might have failed to reflect the extent of the debtor's underlying obligation. It must be read in light of his Honour's earlier uncritical references both to *In re Flatau* and to *Corney v Brien*. Telling against a novel and expansive reading of the statement of principle is that his Honour prefaced it by referring to what had been "made quite clear by the decisions of the past"[90].

89 *Wren v Mahony* was put in appropriate perspective in *Simon v O'Gorman Pty Ltd*[91]. After stating that the "circumstances in which the court will inquire into the validity of a judgment debt are not closed" and that "[c]ircumstances tending to show fraud, collusion or miscarriage of justice or that a compromise was not a fair and reasonable one are the most frequent examples of the exercise by the court of this jurisdiction", Lockhart J observed that "courts are reluctant to exercise this jurisdiction where the judgment was entered after a full investigation of the issues at a trial where both parties appeared and had ample opportunity to put their case to the court"[92]. His Honour cited *Wren v Mahony* together with *Corney v Brien* in support of that observation.

90 Implicit in the observation of Lockhart J in *Simon* was an acknowledgement that Fullagar J's statement in *Corney v Brien* to the effect that

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89 (1972) 126 CLR 212 at 224-225.

90 (1972) 126 CLR 212 at 224.

91 (1979) 27 ALR 619.

92 (1979) 27 ALR 619 at 633.

a court of bankruptcy *will not* exercise its discretion to "go behind" a judgment entered after a trial on the merits absent a *prima facie* case of fraud, collusion or miscarriage of justice cannot be treated as an absolute proposition. The difficulty of anticipating all circumstances in which the exercise of the discretion might potentially fall to be considered means that, as Latham CJ had earlier observed on appeal from the decision of Philp J in *Petrie v Redmond*, although a court exercising bankruptcy jurisdiction "does not examine every judgment debt", it is "impossible to lay down any general rule"[93]. Recognition of the inappropriateness of introducing rigidity into the discretion can be seen to underlie later judicial statements making similar observations in cautious terms[94].

91 Nevertheless, Fullagar J's clear-cut statement in *Corney v Brien* has repeatedly been interpreted and applied as the expression of a "guiding principle"[95]. In my opinion, it should continue to be so treated. A court exercising bankruptcy jurisdiction should not disregard the guidance provided by that principle merely because substantial reasons might be shown to that court for considering that the determination of another court after a trial on the merits might have been wrong on the evidence presented to that other court. Much less should the principle be disregarded in circumstances where the debtor might be able to show substantial reasons for considering that a different determination might have been reached in light of evidence (which the creditor would contest) which the debtor (for undisclosed reasons) chose not to present to that other court.

92 The foundational consideration remains that stated by Cotton LJ in *Ex parte Lennox; In re Lennox*[96]: "that, under whatever circumstances a

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93 [1943] St R Qd 71 at 76.

94 Eg *Ahern v Deputy Commissioner of Taxation (Qld)* (1987) 76 ALR 137 at 147-148; *Emerson v Wreckair Pty Ltd* (1992) 33 FCR 581 at 587-588; *Wenkart v Abignano* [1999] FCA 354 at [24].

95 *Udovenko v Mitchell* (1997) 79 FCR 418 at 421; *Seymour v Housing Guarantee Fund Ltd* [1999] FCA 1441 at [9]; *I & L Securities Pty Ltd v Burckhardt* [1999] FCA 1502 at [12]; *Freeman v National Australia Bank Ltd* [2003] FCAFC 200 at [26]; *Commonwealth Bank of Australia v Jeans* [2005] FCA 978 at [15]; *Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616 at [69] (approved in *Shaw v Yarranova Pty Ltd* [2014] FCAFC 171 at [27]); *Katter v Melhem (No 2)* (2014) 319 ALR 646 at 658 [69].

96 (1885) 16 QBD 315 at 325-326, referred to in *Corney v Brien* (1951) 84 CLR 343 at 347 and 355. See, to similar effect, *Ex parte Kibble; In re Onslow* (1875) LR 10 Ch App 373 at 376-377, quoted in *McCourt and Siequien v Baron Meats Ltd* [1997] BPIR 114 at 120 and *Dawodu v American Express Bank* [2001] BPIR 983 at 989.

judgment may have been obtained against the bankrupt, yet no act of his – collusion, compromise improperly entered into, or anything else – ought to prejudice the rights of the other creditors, because the assets ought to be distributed in the bankruptcy only amongst the honest bonâ fide creditors of the bankrupt". Those other honest and *bona fide* creditors are not to be made the victims of a failure of legal process. Hence the acknowledged ability of a court exercising bankruptcy jurisdiction to go behind a judgment entered after a trial on the merits where a *prima facie* case of miscarriage of justice can be shown. But those other creditors are not to be protected by an exercise of judicial discretion from what might be shown in retrospect to have been poor forensic choices which the debtor made in the course of contesting proceedings which have resulted in a judgment on the merits against the debtor any more than they are to be protected from poor business decisions of the debtor which have resulted in other debts being incurred. Each creditor takes the debtor's estate for what it is.

93 The Full Court of the Federal Court, in the decision under appeal, accurately recorded that the primary judge "considered that the discretion to 'go behind' the Supreme Court judgment was not enlivened because Mr Compton was represented by counsel in the Supreme Court proceeding; there was available evidence that had been filed in that Court addressing the quantum of any liability that may be owed; and a forensic decision was made to confine the issue to be resolved by that Court to the enforceability of the guarantee". The Full Court continued[97]:

> "The matters upon which his Honour relied focused on the way in which Mr Compton conducted his case in the Supreme Court rather than on the central issue, which was whether reason was shown for questioning whether behind the judgment there was in truth and reality a debt due to the petitioning creditor. Had the focus been on that issue, the answer would have been quite different, for the evidence disclosed substantial reasons for questioning whether Mr Compton was indebted to [Ramsay]."

94 In my opinion, the focus of the primary judge on whether there had been a failure of legal process was correct in principle and the primary judge's conclusion that Mr Compton had failed to show a *prima facie* case for the exercise of the discretion was unimpeachable. The Full Court's identification of "the central issue" was wrong.

95 Accordingly, I would have allowed the appeal.

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97 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 527-528 [69].

96 EDELMAN J. At the conclusion of the hearing of this appeal, I joined in the orders made by the Court dismissing the appeal. The issue before this Court concerned the circumstances in which a Bankruptcy Court can "go behind" a judgment that creates a judgment debt relied upon by the creditor. One of the grounds of appeal before the Full Court of the Federal Court was that "the Court's discretion to go behind the Supreme Court judgment ... is not able to be enlivened". The Full Court held that the primary judge had erred in his conclusion that "the circumstances in which the discretion should be exercised had not been enlivened"[98]. The Full Court re-exercised the discretion to go behind the Supreme Court judgment. The sole issue argued on this appeal was whether the Full Court was correct that the discretion had been enlivened. There was no issue raised about whether the discretion had been properly exercised by the Full Court, including the principles that might apply to the exercise of the discretion, if it is properly so called.

97 I agree with the reasons of Kiefel CJ, Keane and Nettle JJ that neither precedent nor principle constrains the power of a court under s 52(1)(c) of the *Bankruptcy Act* 1966 (Cth) to go behind a judgment obtained after a contested trial. In particular, the power is not confined to circumstances of fraud, collusion, or miscarriage of justice. This conclusion was not a new creation by this Court in the twentieth century. Nor was it a new power created by s 52(1)(c). The power to go behind a judgment has a long history. It was developed by reference to the analogous power which was recognised by the Court of Chancery for hundreds of years under the rubric of "conscience". The principle upon which the power was exercised by a Bankruptcy Court was to protect the rights of creditors who were not parties to the litigation giving rise to a judgment debt.

98 The history of the power of a Bankruptcy Court to go behind a common law judgment obtained after a contested trial reveals that it was not, and is not, constrained to any category or categories. The history also demonstrates that since the nineteenth century the power has rarely been exercised outside categories of fraud, collusion, or miscarriage of justice. But this appeal was not concerned with the circumstances in which a court should *exercise* its power to go behind a judgment after a contested trial. The sole issue was whether such a power exists beyond the categories of fraud, collusion, and miscarriage of justice. It does.

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98 *Compton v Ramsay Health Care Australia Pty Ltd* (2016) 246 FCR 508 at 527 [68], 530 [78].

The Chancery power to go behind a common law judgment

99 Holdsworth explained that the "ultimate resource" of the Court of Chancery was the power to issue an injunction against pursuing legal proceedings at law or against enforcing a judgment obtained at law[99]. These injunctions were so common in the sixteenth century that the common form included a stay of execution if judgment had been given at law[100]. As Henderson observed[101], the frequency with which they were issued was such that many people must have drawn the inference that there was something wrong with the common law.

100 In *The Earl of Oxford's Case*[102], the Lord Chancellor's submission which prevailed included the statement that the Chancery jurisdiction could be exercised whenever a common law judgment was "obtained by Oppression, Wrong and a hard Conscience". The Chancellors were not precluded from exercising their "corrective" jurisdiction in any particular case; the governing principle was one of "conscience"[103]. A Chancellor might have followed a rule of the common law but he might also have decided against that rule or decided to extend the rule. As Lord Hardwicke said, "[w]hen the Court finds the rules of law right, it will follow them, but then it will likewise go beyond them"[104]. Since the circumstances in which the law could apply were "infinite", equitable principles could "be supplied out of that which is infinite"[105]. Much later, Windeyer J made the same point, quoting from De Lolme, who, with perhaps

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99 Holdsworth, *A History of English Law*, (1924), vol 5 at 335. See also Baker, *The Oxford History of the Laws of England*, (2003), vol 6 at 174-175.

100 Baker, *The Oxford History of the Laws of England*, (2003), vol 6 at 174-175.

101 Henderson, "Relief from Bonds in the English Chancery: Mid-Sixteenth Century", (1974) 18 *American Journal of Legal History* 298 at 306.

102 (1615) 1 Chan Rep 1 at 10 [21 ER 485 at 487].

103 Spence, *The Equitable Jurisdiction of The Court of Chancery*, (1846), vol 1 at 409; Browne, *Ashburner's Principles of Equity*, 2nd ed (1933) at 34.

104 *Paget v Gee* (1753) Amb 807 at 810 [27 ER 511 at 512].

105 Fonblanque, *A Treatise of Equity*, 4th ed (1812), vol 1 at 9.

exaggerated flourish, described the breadth of the jurisdiction of a court of equity as constituting it as[106]:

> "a kind of inferior experimental legislature, continually employed in finding out and providing law remedies for those new species of cases for which neither the courts of common law, nor the legislature, have as yet found it convenient or practicable to establish any".

101 Although there was no jurisdictional limit to the circumstances in which equity could intervene to restrain execution upon a common law judgment, by the nineteenth century Chancery judges were far more reluctant to restrain the enforcement of common law orders following an adjudication upon common law rights. In an Irish decision in 1803[107], the Lord Chancellor held that the principle of finality meant that "if a matter has already been investigated in a Court of justice according to the common and ordinary rules of investigation, a Court of Equity cannot take on itself to enter into it again". The "cannot" really meant "would not", because the Lord Chancellor recognised that equity would intervene in circumstances other than those before him. But he held that the case before him was one in which "everything might have been discussed in a Court of Law" and it was not sufficient that injustice was done "merely through the inattention of the parties"[108].

102 In summary, the Court of Chancery had powers to restrain the practical operation of legal rules in almost any circumstance considered, as a matter of principle, to be unconscionable. In a loose sense, it is possible to describe the approach of Chancery when staying execution of legal judgments as "going behind" the judgments. The Court took cognisance of the judgment but if the factual circumstances upon which the judgment was based were considered unconscionable on the basis of equitable principles, the Court might restrain the enforcement of the judgment. Although in many cases the Chancellors "from motives of policy or otherwise, refrained from exercising their reformatory function", this was not "any argument against the existence of the power"[109]. The power remained formally unconstrained by any particular category even as the rules of Chancery became systematised, and as the Chancellors became more reluctant to restrain the execution of common law judgments.

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106 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 397; [1970] HCA 8 quoting De Lolme, *The Constitution of England*, new ed (1800) at 149.

107 *Bateman v Willoe* (1803) 1 Sch & Lef 201 at 204.

108 *Bateman v Willoe* (1803) 1 Sch & Lef 201 at 206.

109 Symons, *Pomeroy's Equity Jurisprudence*, 5th ed (1941), §54.

The Bankruptcy Court's power to go behind a common law judgment

103 It is no coincidence that similar principles were applied in bankruptcy. From the time of Queen Elizabeth until 1831, the Lord Chancellor, or Lord Keeper of the Great Seal, had sole jurisdiction in matters of bankruptcy[110]. Principles of equity were applied[111]. From 1731, the legislation had required the application of equitable principles including the question of the "Truth and Reality" of the alleged underlying debt in a bankruptcy petition[112].

104 In 1831, *An Act to establish a Court in Bankruptcy* (1 & 2 Will IV c 56), more commonly known as Lord Brougham's Act, created the Bankruptcy Court and Court of Review under the authority of the Lord Chancellor[113]. The Court of Bankruptcy was a court of "Law and Equity"[114]. Shortly after Lord Brougham's Act was passed, Baron Henley wrote[115]:

> "[T]he commissioners have power to admit the oath of the party claiming the debt, and to examine him or any other person on oath as to the truth of such debt. As the commissioners' jurisdiction, like the Chancellor's, is both legal and equitable, they may inquire into the consideration of a debt notwithstanding a verdict, and if there are equitable grounds upon which the verdict is impeachable they may reject the proof[116]. It may also be inferred, from an observation of Lord Eldon[117], that the commissioners may inquire into the consideration even though there be a judgment."

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110 Moffatt, *On the Bankruptcy Law of England*, (1865) at 10.

111 *Winch v Keeley* (1787) 1 T R 619 at 623 [99 ER 1284 at 1286].

112 *Bankrupts Act* 1731 (5 Geo II c 30), s 23. See *Ex parte Bryant* (1813) 1 V & B 211 at 214 [35 ER 83 at 84].

113 Moffatt, *On the Bankruptcy Law of England*, (1865) at 10.

114 *An Act to establish a Court in Bankruptcy* 1831 (1 & 2 Will IV c 56), s 1. See also *The Bankrupt Law Consolidation Act* 1849 (12 & 13 Vict c 106), s 6 and *The Bankruptcy Act* 1861 (24 & 25 Vict c 134), s 1.

115 Henley, *A Digest of the Bankrupt Law: with an Appendix of Precedents, framed with reference to The New Act of the 1 & 2 William IV c 56*, 3rd ed (1832) at 100-101.

116 *Ex parte Butterfill* (1811) 1 Rose 192.

117 *Ex parte Bryant* (1813) 1 V & B 211 at 214 [35 ER 83 at 84].

105 In 1840, in *Ex parte Prescott*[118], the issue before the Commissioners was when a Bankruptcy Court inquiring into the existence of a debt could look behind a judgment obtained at common law. Sir John Cross removed this issue from the Commissioners due to the importance of the question, saying that he had "long ago held that a judgment is conclusive evidence of a debt, unless it can be impeached on the ground of fraud"[119]. This view was not orthodox, unless fraud were to be understood in the fictional sense of "equitable fraud", meaning any sufficient basis for equity to act.

106 When the issue came before the Court of Review, Sir John Cross held that there were no good grounds for an inquiry as to the validity of the judgment[120]. Sir George Rose also dismissed the petition, but on the ground that the applicant had not offered, or undertaken, to pay what was found to be due. Sir George Rose said that the judgment was, in bankruptcy, "not conclusive evidence of the debt"[121]. He said that the judgment was not conclusive due to "the same principle that guides a Court of equity, on a bill filed by a party against a judgment creditor for an injunction, to prevent the creditor from suing out execution on the judgment"[122]. The reference by Sir George Rose to the judgment not being "conclusive evidence of the debt" must only have meant that it was not conclusive for the purposes of bankruptcy law. At general law, the underlying debt merged in the judgment, which was conclusive that a debt was owed.

107 Again, in *Ex parte Mudie*[123], the Vice-Chancellor made the same point at the stage of considering proof of a debt. His Lordship held that the judgment in question had been obtained at common law by an action brought in breach of trust, and therefore was an action which a court of equity could have restrained by injunction. He continued[124]:

> "[C]onsequently the judgment, however final at law, did not bar or preclude the bankrupt from equitable relief against it ... [T]he jurisdiction

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118 (1840) 1 M D & D 199.

119 *Ex parte Prescott* (1840) 1 M D & D 199 at 202.

120 *Ex parte Prescott* (1840) 1 M D & D 199 at 208.

121 *Ex parte Prescott* (1840) 1 M D & D 199 at 208.

122 *Ex parte Prescott* (1840) 1 M D & D 199 at 208.

123 (1842) 3 M D & D 66.

124 *Ex parte Mudie* (1842) 3 M D & D 66 at 73.

> in bankruptcy, being equitable as well as legal, is bound to reject any proof tendered on the foundation of such a judgment."

108 Consistently with the extreme caution that was exercised by the Court of Chancery before restraining the execution of common law judgments in the nineteenth century, the courts exercising bankruptcy powers were also extremely cautious before "going behind" a common law judgment. In 1885, in *Ex parte Lennox; In re Lennox*, Lord Esher MR said that even a judgment by consent which had not been subject to adjudication upon the merits "is very strong evidence"[125] of the validity of the debt and a reason why the Court should "lean heavily in favour"[126] of the consent judgment. And in 1888, in the decision of *In re Flatau; Ex parte Scotch Whisky Distillers Ltd*[127], Fry LJ said "this power has never, so far as I am aware, been extended to cases in which a judgment has been obtained after issues have been tried out before a Court". Perhaps the highest point of the caution might be the statement, in argument, by James LJ in 1881 that a "judgment is always conclusive when there has been a real fight between the parties"[128]. Even then, however, the point being made by James LJ was not a statement about the absence of jurisdiction. His point was made in the context of an attempt to prove a debt in bankruptcy by a party to the common law judgment (in that case, though, a judgment by consent). Indeed, some years earlier, James LJ had said that it was the "settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt"[129].

109 The caution taken by courts in the exercise of the power did not deny the existence of the power. In a statement described by Lopes LJ as one where the "law cannot be more clearly and ably stated"[130], Lord Esher MR said that the question was not so much the "right of the debtor" but whether the Bankruptcy Court, with equitable powers, should exercise the "great power, which deals not only with the particular debt of the petitioning creditor, but with the whole class of the creditors of the debtor"[131].

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125 *Ex parte Lennox; In re Lennox* (1885) 16 QBD 315 at 323.

126 *Ex parte Lennox; In re Lennox* (1885) 16 QBD 315 at 324.

127 (1888) 22 QBD 83 at 86.

128 *Ex parte Banner; In re Blythe* (1881) 17 Ch D 480 at 484.

129 *Ex parte Kibble; In re Onslow* (1875) LR 10 Ch App 373 at 376.

130 *In re Hawkins; Ex parte Troup* [1895] 1 QB 404 at 411.

131 *Ex parte Lennox; In re Lennox* (1885) 16 QBD 315 at 321.

The modern position

110 Section 52(1)(c) of the *Bankruptcy Act* has antecedents at least as old as 1731, which were the subject of the application of equitable principles for more than two centuries before the same principles were adopted by this Court. As the reasons of Kiefel CJ, Keane and Nettle JJ explain, the modern position, reflected in the course of decisions of this Court in *Petrie v Redmond*[132], *Corney v Brien*[133], and *Wren v Mahony*[134], remains that a court exercising jurisdiction in bankruptcy is not bound to accept as conclusive a judgment debt. The circumstances which enliven the discretion to go behind the judgment are not constrained to any categories, even when the judgment debt was obtained after a contested hearing. As for the *exercise* of the discretion to go behind the judgment and to conduct a hearing into whether the underlying debt existed (which was not in issue on this appeal), Barwick CJ said in *Wren v Mahony*[135] that the discretion to accept a judgment as satisfactory proof of a debt "is not well exercised where substantial reasons are given for questioning whether behind that judgment there was in truth and reality a debt due to the petitioner". The reference to "substantial reasons" echoed the language of earlier cases including a reference to "a prima facie case impeaching the judgment"[136], by which the courts meant that there were prima facie grounds upon which a court of equity would choose to intervene.

111 Whether a matter will amount to substantial reasons so as to permit the exercise of the discretion will depend upon the particular circumstances. But, as history shows, where a judgment debt has been obtained after the testing of the merits in adversarial litigation, then in the absence of some evidence of fraud, collusion, or miscarriage of justice, a court exercising bankruptcy jurisdiction will rarely have substantial reasons to investigate whether the debt which merged in the judgment was truly owed.

112 This appeal was concerned only with the question whether the Full Court of the Federal Court was correct to conclude that the discretion was enlivened because the jurisdiction of the Court under s 52(1)(c) of the *Bankruptcy Act* is not limited to these categories. As the joint judgment concludes, and for the reasons

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132 [1943] St R Qd 71.

133 (1951) 84 CLR 343; [1951] HCA 31.

134 (1972) 126 CLR 212; [1972] HCA 5.

135 (1972) 126 CLR 212 at 224-225.

136 *In re Hawkins; Ex parte Troup* [1895] 1 QB 404 at 412.

there expressed as well as the long history of this principle, the Full Court was correct to conclude that it is not so limited.