HIGH COURT OF AUSTRALIA

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

FRANZ BOENSCH AS TRUSTEE OF THE
BOENSCH TRUST APPELLANT

AND

SCOTT DARREN PASCOE RESPONDENT

Boensch v Pascoe
[2019] HCA 49
Date of Hearing: 11 October 2019
Date of Judgment: 13 December 2019
S216/2019

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

C J Bevan with M J Wells for the appellant (instructed by John D Bingham Solicitor)

D A Priestley SC with M F Newton for the respondent (instructed by Gilchrist Connell)

CATCHWORDS

Boensch v Pascoe

Bankruptcy – Bankrupt estate – Where "the property of the bankrupt" vested in trustee in bankruptcy pursuant to s 58 of *Bankruptcy Act 1966* (Cth) – Where bankrupt held estate in land under Torrens system on trust – Whether property held by bankrupt on trust capable of vesting in trustee in bankruptcy – Whether bankrupt had a valid beneficial interest – Whether estate vested in trustee in bankruptcy in equity.

Real property – Torrens system – Caveats – Where trustee in bankruptcy lodged caveat claiming "Legal Interest pursuant to the *Bankruptcy Act 1966*" and refused or failed to withdraw caveat after request – Whether caveator liable to pay compensation under s 74P(1) of *Real Property Act 1900* (NSW) for lodging and maintaining caveat "without reasonable cause" – Whether existence of caveatable interest or honest belief on reasonable grounds in such interest sufficient for "reasonable cause" – Whether claimant established that caveator had neither caveatable interest in property nor honest belief on reasonable grounds in having such interest – Whether possibility of trust being set aside under s 120 or s 121 of *Bankruptcy Act* conferred caveatable interest – Whether caveat adequately described equitable estate in fee simple – Whether deficiency in statement of interest demonstrated absence of "reasonable cause".

Trusts – Trustees – Right of indemnity – Where trustee incurred significant expenses in his capacity as trustee ordinarily entitling him to be indemnified out of trust property – Where trustee asserted "mutually beneficial arrangement" with "the trust" – Whether asserted arrangement prejudiced trustee's right of indemnity wholly or in part – Whether value of benefits to trustee under asserted arrangement equal to or exceeded total of trust expenses incurred.

Words and phrases – "beneficial interest", "caveatable interest", "caveat against dealings", "circuity of action", "contingent beneficial interest", "determination of non-dispositive issues in appeals", "honest belief on reasonable grounds", "judicial economy", "most remote possibility of interest", "property held by the bankrupt in trust for another person", "right of indemnity", "subject to the equities", "the property divisible among the bankrupt's creditors", "the property of the bankrupt", "without reasonable cause".

Bankruptcy Act 1966 (Cth), ss 5(1), 58, 116.
Real Property Act 1900 (NSW), ss 74F(1), 74K, 74P(1), 90.

1 KIEFEL CJ, GAGELER AND KEANE JJ. Upon a person becoming bankrupt, s 58(1) of the *Bankruptcy Act 1966* (Cth) vests in the trustee of the estate of the bankrupt property then belonging to the bankrupt that is divisible among the bankrupt's creditors together with any rights or powers in relation to that property that would have been exercisable by the person had the person not become a bankrupt. The property belonging to the bankrupt includes real or personal property and any estate or interest in real or personal property belonging to the person at the time of bankruptcy. Excluded from the property belonging to the bankrupt that is divisible among the bankrupt's creditors by s 116(2)(a) of the *Bankruptcy Act* is property held in trust by the bankrupt for another person.

2 It was settled in *Octavo Investments Pty Ltd v Knight*[1] that, where the person who becomes bankrupt is a trustee of property who has incurred liabilities in the performance of the trust, such entitlement as the person has in equity to be indemnified out of the property held on trust gives rise to an equitable interest in the property held on trust which takes that property outside the exclusion in s 116(2)(a) on the basis that the exclusion is limited to property held by the bankrupt solely in trust for another person. The bankrupt's entitlement in equity to be indemnified out of the property held on trust is property belonging to the bankrupt that is divisible among the bankrupt's creditors. The entitlement is therefore property that vests in the trustee of the estate of the bankrupt.

3 Left open in *Octavo Investments*[2] was the question whether the legal estate in the property held on trust by the bankrupt out of which the bankrupt has an entitlement in equity to be indemnified also vests in the trustee of the estate of the bankrupt. The question is an aspect of the more general question whether the legal estate in property held on trust by a bankrupt in which the bankrupt has an equitable interest vests in the trustee of the estate of the bankrupt.

4 That more general question was substantially answered by the recent analysis in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth*[3]. The answer is informed in part by recognition of the fundamental nature of an equitable interest as something that "is not carved out

---

1 (1979) 144 CLR 360 at 369-370.

2 (1979) 144 CLR 360 at 370-371.

3 (2019) 93 ALJR 807 at 829-830 [83]-[84], 832-833 [94]; 368 ALR 390 at 416-417, 421.

of a legal estate but impressed upon it"[4] and in part by recognition of the consistency with the objects of the *Bankruptcy Act* of the trustee of the estate of the bankrupt automatically obtaining the legal estate in property held by the bankrupt in which the bankrupt has an equitable interest in order better to secure the realisation of that equitable interest for the benefit of creditors. Those considerations combine to support the answer, pithily expressed more than a century ago by Sir George Jessel MR in *Morgan v Swansea Urban Sanitary Authority*[5], that "under the *Bankruptcy Act*, where a trustee has no beneficial interest, the legal estate does not pass; but where he has, it does pass". Where the legal estate in the property held on trust by the bankrupt passes to the trustee of the estate of the bankrupt, it passes with all of the equitable interests that were impressed on it when it remained in the hands of the bankrupt: equitable interests of the bankrupt as well as equitable interests of the beneficiaries of the trust[6].

5 Where the property held on trust by the bankrupt out of which the bankrupt has an entitlement in equity to be indemnified comprises legal title to land registered under the *Real Property Act 1900* (NSW), the slight variation to the principles just stated is that, by operation of s 58(2) of the *Bankruptcy Act*, what is vested in the trustee of the estate of the bankrupt upon bankruptcy, and until the trustee can obtain legal title by registration, is not the legal estate but the equitable estate. Like the legal estate which passes to the trustee of the estate of the bankrupt under s 58(1), the equitable estate which passes to the trustee of the estate of the bankrupt under s 58(2) passes with all of the equitable interests that were impressed on the legal estate when the legal estate remained in the hands of the bankrupt[7].

6 The wrinkle in the application of those principles in the circumstances of the present case, which are described in the reasons for judgment of Bell, Nettle, Gordon and Edelman JJ, arises from the absence of a determination by the primary judge in the Supreme Court of New South Wales or by the Full Court of the Federal Court on appeal of the issue whether the bankrupt Mr Boensch had at the time of his bankruptcy an entitlement in equity to be indemnified out of the Rydalmere property which he then held on trust for his children. The primary

---

4 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 474.

5 (1878) 9 Ch D 582 at 585.

6 *Official Trustee in Bankruptcy v Ritchie* (1988) 12 NSWLR 162 at 174.

7 *Lewis v Condon* (2013) 85 NSWLR 99 at 119 [91]-[92].

judge and the Full Court evidently saw no need to determine that issue because they were persuaded to the view that the legal or equitable estate in property held on trust by a bankrupt would always vest in the trustee of the estate of the bankrupt subject to equitable interests that were impressed on it, under s 58(1) or (2) of the *Bankruptcy Act* as the case may be, irrespective of whether or not the bankrupt had an equitable interest in the property. That view was unduly wide.

7 Though it would have been preferable for the primary judge to have made findings on all of the facts that were in contest before him, we would not criticise the Full Court for not addressing an issue raised before it which it did not consider to be dispositive. The principle that an appellate court should confine itself to determining only those issues which it considers to be dispositive of the justiciable controversy raised by the appeal before it is so much embedded in a common law system of adjudication that we have no name for it. In some other systems, it is known as "judicial economy". Judicial economy promotes judicial efficiency in a common law system not only by narrowing the scope of the issues that need to be determined in the individual case but also by ensuring that such pronouncements as are made by appellate courts on contested issues of law are limited to those that have the status of precedent.

8 Within the integrated Australian legal system, the mere potential for an appeal to be brought, by special leave, to the High Court provides no reason for an intermediate court of appeal to sacrifice those efficiencies. That is not to deny that there will be occasions when departure from judicial economy will enhance the overall efficiency of the system or that the prospect of an appeal being brought, by special leave, to this Court in a particular case can give rise to such an occasion[8]. There is accordingly no reason to deny that, "although there can be no universal rule, it is important for intermediate courts of appeal to consider whether to deal with all grounds of appeal, not just with what is identified as the decisive ground"[9]. But a non-universal rule making it important for intermediate courts of appeal to consider whether to deal with all grounds of appeal is quite different from a rule that always or even ordinarily requires those courts to deal

---

8 eg, *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1 at 19-20 [34]-[35]; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* (2004) 217 CLR 274 at 312 [105].

9 *Kuru v New South Wales* (2008) 236 CLR 1 at 6 [12]. See also *Cornwell v The Queen* (2007) 231 CLR 260 at 300-301 [105]. cf *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd* (2011) 244 CLR 1 at 20 [56].

with all grounds of appeal. It is important to the efficiency of the system as a whole that intermediate courts of appeal should not feel compelled to treat determination of non-dispositive issues in appeals before them as the norm.

9 The question whether Mr Boensch had an entitlement in equity to be indemnified out of the Rydalmere property can, and in the interests of finality should, be determined in the appeal in this Court notwithstanding that it was not addressed by the primary judge or the Full Court. That is because Mr Boensch did not dispute that he had incurred liabilities in the performance of the trust of the Rydalmere property for his children in respect of which he acquired an entitlement in equity to be indemnified out of the Rydalmere property. The substance of what Mr Boensch sought by evidence to establish, taken at its highest, was that he also had an obligation in equity to account to the trust for the monetary value of a benefit he had received from living in the Rydalmere property free of rent[10]. Mr Boensch's obligation to account to the trust, if established by the evidence, would have impeached his entitlement to indemnification from the trust so as to result in a set-off in equity of the obligation against the entitlement[11]. That equitable set-off would have operated to reduce his entitlement to indemnification independently of proceedings to vindicate either the obligation or the entitlement[12]. If the obligation to account could have been established by Mr Boensch and shown to have had a monetary value equal to or greater than the monetary value of his entitlement to indemnification, the result would have been to negate his entitlement to indemnification, and with it his equitable interest in the Rydalmere property which arose from that entitlement. The problem for Mr Boensch is that his evidence was too ill-developed to provide a factual foundation for the obligation to account which he sought to establish. Bearing the onus of proving on the balance of probabilities the facts on which his claim for compensation under s 74P(1) of the *Real Property Act* was founded, Mr Boensch simply failed on this issue to discharge that onus of proof.

---

10 cf *Chan v Zacharia* (1984) 154 CLR 178 at 198-199.

11 *Hill v Ziymack* (1908) 7 CLR 352 at 361; *Hawes v Dean* [2014] NSWCA 380 at [59]-[65].

12 *Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd Receiver & Manager Appointed (formerly Cel Home Video Pty Ltd)* (1997) 42 NSWLR 462 at 481; *MIWA Pty Ltd v Siantan Properties Pte Ltd* (2011) 15 BPR 29,545 at 29,555-29,556 [53]-[54]. cf *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* (2019) 93 ALJR 807 at 819 [31]; 368 ALR 390 at 403-404.

10 In the result, by reason of his having an entitlement to indemnification out of the trust property, Mr Boensch had an equitable interest in the Rydalmere property which subsisted at the time of his bankruptcy. That equitable interest, and with it the equitable estate in the Rydalmere property, vested in Mr Pascoe as the trustee in bankruptcy of the estate of Mr Boensch.

11 The equitable estate in the Rydalmere property so vested in Mr Boensch was a caveatable interest. In our opinion, that equitable estate in the Rydalmere property was adequately described in the caveat which Mr Pascoe lodged over the Rydalmere property and then refused to withdraw as a "[l]egal [i]nterest pursuant to the Bankruptcy Act".

12 Mr Pascoe having had a caveatable interest throughout the life of the caveat, Mr Boensch's claim for compensation under s 74P(1) of the *Real Property Act* must fail. To sustain a claim that a caveat was lodged or maintained without "reasonable cause", a claimant for compensation under the section must establish, in the language of Clarke JA in *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd*[13], that "the caveator neither had a caveatable interest nor an honest belief, based on reasonable grounds, that he had one". The existence of a caveatable interest, without more, supplies "reasonable cause" for lodging and maintaining the caveat. *Beca Developments* pre-dated the amendment of the section to take its current form[14] in circumstances[15] indicating legislative advertence to and endorsement of the test for the absence of "reasonable cause" it expounded[16]. The test in *Beca Developments* should not be disturbed.

13 For these reasons, we agree that the appeal should be dismissed with costs.

---

13 (1990) 21 NSWLR 459 at 474-475.

14 *Real Property Amendment Act 1996* (NSW), Sch 1 [19].

15 New South Wales, *Real Property Amendment Bill 1996*, Explanatory Note at 4.

16 *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 502-503 [15]-[16].

14 BELL, NETTLE, GORDON AND EDELMAN JJ. This is an appeal from a judgment of the Full Court of the Federal Court of Australia dismissing an appeal from the decision of the Supreme Court of New South Wales that the respondent, Mr Pascoe, did not act without "reasonable cause" within the meaning of s 74P(1) of the *Real Property Act 1900* (NSW) in lodging and not withdrawing a caveat against dealings over land in respect of which the appellant, Mr Boensch, was the registered proprietor of an estate in fee simple ("the Rydalmere property").

15 Mr Boensch was granted special leave to appeal to this Court because the appeal raises a question of principle of general importance as to whether property held by a bankrupt on trust for another vests in the bankrupt's trustee in bankruptcy pursuant to s 58 of the *Bankruptcy Act 1966* (Cth). For the reasons which follow, the question should be answered that, provided the bankrupt has a valid beneficial interest in the trust property, the trust property will vest in the trustee in bankruptcy subject to the equities to which it is subject in the hands of the bankrupt. For these purposes, a valid beneficial interest means a vested or (subject to applicable laws as to remoteness of vesting) contingent right or power to obtain some personal benefit from the trust property.

Relevant statutory provisions

16 The word "property" is defined in s 5(1) of the *Bankruptcy Act 1966* for the purposes of that Act as meaning "real or personal property of every description, whether situate in Australia or elsewhere", and including "any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property". The phrase "the property of the bankrupt" is also there defined, in relation to a bankrupt and except for the purposes of s 58(3) and (4) of the Act, as meaning "the property divisible among the bankrupt's creditors" and "any rights and powers in relation to that property that would have been exercisable by the bankrupt if he or she had not become a bankrupt".

17 So far as is relevant, s 116(1) of the *Bankruptcy Act 1966* provides that the property of a bankrupt divisible among his or her creditors includes "all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge". Perforce of s 116(2)(a), however, such property does not extend to "property held by the bankrupt in trust for another person".

18 In substance, s 58(1) of the *Bankruptcy Act 1966* provides that, subject to the Act, where a debtor becomes a bankrupt, "the property of the bankrupt" vests

in the Official Trustee or any registered trustee who has become the trustee of the bankrupt's estate under s 156A, either forthwith or as soon as the property is acquired by or devolves on the bankrupt. Nevertheless, s 58(2) of the *Bankruptcy Act 1966* provides in substance that, where a Commonwealth, State or Territory law requires the transmission of property to be registered and enables the trustee of a bankrupt's estate to be registered as the owner of the property of the bankrupt, although in equity the property vests in the trustee by virtue of s 58, at law it does not so vest until the requirements of the law have been complied with.

19 Read with the *Bankruptcy Act 1966*, s 90 of the *Real Property Act* provides, in substance and so far as is relevant, that the Official Trustee, a trustee, or any other person claiming to be entitled to land subject to the *Real Property Act* by virtue of the operation of the *Bankruptcy Act 1966*, or of anything done thereunder, may apply in the approved form to the Registrar-General to be registered as proprietor of that land, and that, on being satisfied that such an applicant is entitled to be registered as proprietor of the land, the Registrar-General may record the applicant in the Register as proprietor.

20 Part 7A of the *Real Property Act* provides, inter alia, for the lodgement, lapse and withdrawal of caveats, including "caveats against dealings". In particular, s 74F(1) of the Act provides, so far as is relevant, that any person who, "by devolution of law or otherwise, claims to be entitled to a legal or equitable estate or interest in land" under the provisions of the Act "may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest to which the person claims to be entitled". Section 74F(5) of the *Real Property Act* provides, inter alia, that a caveat against dealings must be in the approved form and specify "the prescribed particulars of the legal or equitable estate or interest ... to which the caveator claims to be entitled". Section 74L provides in substance, however, that failures strictly to comply with the formal requirements for caveats are to be disregarded by a court in determining the validity of a caveat.

21 Section 74J(1) of the *Real Property Act* provides in substance that, where a caveat lodged under s 74F remains in force, the Registrar-General shall, upon an application in the approved form by the registered proprietor of an estate or interest in the land described in the caveat, prepare for service on the caveator a notice that the caveat will lapse unless the caveator has, before the expiry of 21 days after the date of service, obtained from the Supreme Court an order extending the operation of the caveat for such further period as is specified in the order or until the further order of that Court, and lodged the order or an office copy of the order with the Registrar-General. Section 74J(2) provides in substance that the applicant must lodge evidence of the due service of the notice on the caveator. Section 74J(4) then provides in substance that, if such evidence

is lodged in time and the caveator has not lodged the order of the Court or an office copy of the order with the Registrar-General in accordance with s 74J(1), the Registrar-General shall make a recording in the Register to the effect that the caveat has lapsed, and the caveat so lapses on the making of that recording.

22 Section 74M(1) of the *Real Property Act* provides, inter alia, that a caveator may withdraw a caveat. Section 74MA(1) of the *Real Property Act* provides, so far as is relevant, that any person who is or claims to be entitled to an estate or interest in the land described in a caveat lodged under s 74F may apply to the Supreme Court for an order that the caveat be withdrawn by the caveator.

23 Section 74P(1) of the *Real Property Act* provides, in substance and so far as is relevant, that any person who, "without reasonable cause", lodges a caveat with the Registrar-General under s 74F, or refuses or fails to withdraw such a caveat after being requested to do so, is liable to pay compensation to any person who sustains pecuniary loss attributable to the lodging of the caveat, or the refusal or failure to withdraw it.

The facts

24 At all relevant times, Mr Boensch and his former wife, Sabine Boensch, were registered as joint proprietors in fee simple of the Rydalmere property. Mr Boensch claimed that, in May 1999, he and Ms Boensch reached a matrimonial property settlement under which Ms Boensch agreed to transfer her interest in the Rydalmere property to him for a consideration of $50,000.

25 Mr Boensch also claimed that, on 23 August 1999, he and Ms Boensch executed a memorandum of trust ("the Memorandum of Trust") in the following terms:

> "This is a memorandum of trust created for the benefit of Boensch family with the most important purpose to provide secure means of support to the children of the marriage ... after the divorce of their parents.
>
> The trust property is the land and buildings at [the Rydalmere property].
>
> Sabine Boensch will cause her share of ownership of that land to be transferred to Franz Boensch for him to hold the whole of land in trust as described above.
>
> In due course Franz Boensch will arrange with a solicitor or accountant to prepare a detailed trust document, professionally drafted to

give best protection to the children and to ensure favourable tax treatment of income earned by the trust."

The Memorandum of Trust was not stamped until 29 March 2004.

26 In the meantime, in October 2003, Mr Boensch was served with a bankruptcy notice demanding payment of a judgment debt due to one Michael Costin.

27 Mr Boensch claimed that, on 18 March 2004, he and Ms Boensch, as settlors, executed a deed of trust prepared by solicitors ("the Deed of Trust"). The recitals to the Deed of Trust stated that the settlors wished to confirm the settlement upon Mr Boensch as trustee in the Memorandum of Trust, constituting "the Boensch trust" (hereafter, "the Boensch Trust"). The First Group Beneficiaries of the Boensch Trust were defined as the children of Mr and Ms Boensch. Mr Boensch was nominated as the appointor.

28 On 21 March 2004, Mr and Ms Boensch executed a transfer of their estate in fee simple in the Rydalmere property to Mr Boensch. The first mortgagee of the property at the time would not, however, consent to registration of the transfer, and it was not registered.

29 On 12 July 2005, Mr Boensch lodged the Deed of Trust (with the Memorandum of Trust attached) with the Registrar-General and requested that the Registrar-General record a caveat over the Rydalmere property forbidding registration of any instrument not in accordance with the Boensch Trust[17]. A caveat to that effect was recorded on the title on 17 August 2005.

30 By then, Mr Costin had filed a Creditor's Petition dated 15 July 2005 in the Federal Magistrates Court seeking a sequestration order against Mr Boensch. On 23 August 2005, the Federal Magistrates Court made that order and appointed Mr Pascoe as Mr Boensch's trustee in bankruptcy. Later that day, Mr Pascoe received advice from counsel that, in counsel's opinion, there were strong prospects of defeating the trust claim (presumably by demonstrating that the Boensch Trust was a sham) or, alternatively, of having any trust set aside (presumably under s 120 or s 121 of the *Bankruptcy Act 1966* as a transfer of property made to defeat creditors).

---

17 See *Real Property Act*, ss 12(1)(f), 82(1).

31 On 24 August 2005, Mr Pascoe had a meeting with Mr Boensch at which Mr Boensch provided a number of documents. They included a copy of the Memorandum of Trust and at least the front page of the Deed of Trust. Mr Boensch told Mr Pascoe that Mr Boensch held the property on trust for his children. Mr Pascoe was not satisfied of the truth of Mr Boensch's claim, which he suspected might be a means of putting the Rydalmere property beyond the reach of his creditors.

32 Mr Pascoe's usual practice when appointed as a trustee in bankruptcy was to lodge a caveat against dealings at an early stage of the administration over any land held by the bankrupt. Mr Pascoe believed that whatever beneficial interest the bankrupt might have in such land would vest in him as trustee in bankruptcy and that that was enough to support a caveat. Usually, Mr Pascoe used a standard form of words to describe his interest as trustee in bankruptcy: "Legal Interest pursuant to the *Bankruptcy Act 1966*".

33 On 25 August 2005, Mr Pascoe lodged a caveat against dealings over the Rydalmere property. In accordance with his usual practice, he claimed a "Legal Interest pursuant to the *Bankruptcy Act 1966*". The caveat was certified by Mr Pascoe's solicitor, who declared that Mr Pascoe had a good and valid claim to the estate or interest claimed therein.

34 At the time of lodging the caveat, Mr Pascoe did not know, and could not tell, whether Mr Boensch was insolvent when the Boensch Trust was alleged to have been established in 1999, and there was no suggestion of any imminent transfer of the Rydalmere property. Mr Pascoe believed, however, that, as a trustee in bankruptcy, he needed to lodge his caveat without delay because of the risk of unknown circumstances that could affect title.

35 On 29 August 2005, Mr Pascoe sent a "Notice to Produce Books of an Associated Entity pursuant to s 77A of the Bankruptcy Act" to Mr Leong of Mr Boensch's solicitors at the time. The notice required the production of documents prior to 12 September 2005. Mr Leong received the letter on about 31 August 2005 but did nothing about it because, he later said, he considered that virtually all of his file relating to the trust was privileged. On 23 September 2005, Mr Pascoe sent a letter to Mr Leong stating that the period under the notice had expired and that he was referring the issue of non-compliance to the Insolvency and Trustee Service Australia ("ITSA") Fraud Investigation Unit for prosecution.

36 Mr Leong responded on 29 September 2005. He stated, incorrectly as it seems, that the notice had been complied with. He observed that, as Mr Boensch's trustee in bankruptcy, Mr Pascoe was "defacto [sic] trustee of the

[Boensch Family] Trust", and he enquired whether Mr Pascoe was prepared to relinquish that position.

37 On 30 September 2005, Mr Leong provided Mr Pascoe with a photocopy of what he said was his entire file. He did not assert any claim to privilege over it. The documents so produced included a further copy of the Memorandum of Trust dated 23 August 1999 and a copy of an executed transfer of the Rydalmere property from Mr and Ms Boensch to Mr Boensch dated 21 March 2004. This copy of the Memorandum of Trust was differently formatted from that previously provided to Mr Pascoe, and it contained no notation that the execution had been witnessed by a Justice of the Peace. Mr Pascoe thought that to be unusual in the absence of an explanation. His scepticism was increased by another document – a letter from Mr Leong to Mr Boensch dated 17 March 2004 which referred to Mr Boensch wanting to be nominated as a beneficiary of the Boensch Trust. Mr Pascoe's suspicions were further aroused by affidavits affirmed by Mr and Ms Boensch in March 2004, which Mr Pascoe thought may have been prepared to support the claim that the Rydalmere property had been held on trust since 1999, and by the fact that the executed transfer of the Rydalmere property to Mr Boensch was dated 21 March 2004, some five years after the alleged formation of the trust and approximately five months after service of Mr Costin's bankruptcy notice. Mr Pascoe suspected an attempt by Mr Boensch to defeat his creditors.

38 Meanwhile, on 1 September 2005, ITSA had forwarded Mr Pascoe an email from Mr Boensch of the previous day, in which Mr Boensch referred to himself as being trustee of a trust of a property for his children and stated that the agreement for the trust was made with a memorandum of trust in 1999. The email also referred to a decision made in 2003 to establish a trading trust with Elise Capital Pty Ltd as trustee, and Mr Boensch and his children as beneficiaries. Mr Boensch was the sole director of Elise Capital Pty Ltd. The assertion of two different trusts, and the fact that the Deed of Trust for the Boensch Trust was not executed until 18 March 2004, after the establishment of the "trading trust" in 2003, in circumstances where Mr Costin was pursuing Mr Boensch for payment of the judgment debt, further increased Mr Pascoe's suspicions that Mr Boensch was making statements to defeat his creditors.

39 On 22 September 2005, Mr Pascoe had another meeting with Mr Boensch. Mr Boensch there produced his Statement of Affairs, in which he answered the question of when he had first experienced difficulty in paying his debts by writing "always". In identifying his secured creditors, he stated that, as trustee of the Boensch Trust, he considered himself to be a joint guarantor of a registered mortgage over the Rydalmere property in favour of the Commonwealth Bank of Australia, and that the loan repayments were made "by the Boensch Trust". In

providing details of his company associations, he stated that Elise Capital Pty Ltd was the trustee of the "Boensch Family Trust No 1" and the "Boensch Family Trust No 2". Mr Pascoe was not persuaded by Mr Boensch's claims that he held the Rydalmere property on trust for the Boensch Trust and suggested to Mr Boensch that it would be sensible for him to make a proposal to creditors for the purposes of s 75 of the *Bankruptcy Act 1966*.

40 On 23 September 2005, Mr Pascoe received a telephone call from one Stephen Mullette of a firm of solicitors, who said that he was acting for Mr Boensch. Mr Mullette apparently sought to persuade Mr Pascoe to remove the caveat that Mr Pascoe had lodged over the Rydalmere property. On 27 September 2005, Mr Mullette sent a letter to Mr Pascoe which included the following:

> "I note that following your appointment, and no doubt as a matter of course, a caveat was lodged on Property Registered in the name of Mr Boensch together with his former wife, Sabine Boensch ... ('the Property').
>
> I am instructed that the Property is held on trust for Mr Boensch's children pursuant to the terms of a memorandum of trust created between Mr Boensch and his former wife on 23 August 1999, and confirmed by Deed of Trust dated 18 March 2004. A copy of these documents are [sic] enclosed.
>
> No doubt you will need to review these documents for your own benefit. However, the terms of the trust are clear, such that the property does not fall within the divisible property in the bankruptcy, and the trustee's interest will not support the caveat lodged on the title.
>
> My client requests that the caveat be withdrawn within 21 days from the date of this letter, in the absence of which he will need to consider his options, including whether to file a lapsing notice at the Department of Lands. I will notify you prior to filing the lapsing notice. If you require longer than the 21 days to form a view on my client's claim please advise how long and I will obtain instructions."

41 On 11 October 2005, a chartered accountant acting for Mr Boensch and for companies associated with Mr and Ms Boensch, including Elise Capital Pty Ltd and Boensch Pty Ltd, sent various records to an assistant of Mr Pascoe. They included trust deeds dated 18 November 2003 for the "Boensch Family Trust No 1" and "Boensch Family Trust No 2 – Rentals". Mr Pascoe reviewed the deeds but had difficulty identifying the trust assets. That reinforced his doubts as

to whether the documents already provided by Mr Boensch were reflective of the true state of affairs.

42 On 12 October 2005, Mr Pascoe sent a letter to Mr Mullette asking that Mr Boensch provide, by 8 November 2005, any documentation on which he intended to rely to establish the existence of the Boensch Trust and originals of the trust documents. In a further letter to Mr Mullette of the same date, Mr Pascoe asked for 60 days in which to obtain documentation and advice and form a view about the validity of Mr Boensch's claims.

43 On 17 October 2005, Mr Pascoe, his assistant and his solicitor conferred with counsel. There was some discussion regarding the need to sight original documents. Following the conference, Mr Pascoe sent a letter to his solicitor outlining further action to be undertaken in relation to the "recovery process". At that stage, it was envisaged that, to begin with, they would obtain preliminary advice from counsel on the prospects of success, and it was contemplated that examinations of Mr and Ms Boensch may be necessary.

44 On 21 October 2005, Mr Pascoe made his first report to creditors. He advised that he was investigating the validity of the Boensch Trust for various reasons including the fact that no action in relation to the trust appeared to have been taken until the debt recovery proceedings taken by Mr Costin were well advanced. Mr Pascoe also referred to the fact that he could not obtain registration as proprietor of the Rydalmere property because of the caveat which Mr Boensch had lodged on the title to protect the interests of the Boensch Trust.

45 On 24 October 2005, Mr Pascoe sought information from the Commonwealth Bank of Australia concerning the mortgage over the Rydalmere property, and, on 28 October 2005, he sent a letter to Mr Boensch requiring him to produce the original Boensch Trust deed and declarations of trust.

46 On 31 October 2005, Mr Mullette wrote to Mr Pascoe in part as follows:

> "I refer to your recent letters. My client relies upon the trust deed and declaration provided to you previously. If there is any reason not to accept these documents as sufficient to satisfy the trustee of the claim of my client, then please advise. Otherwise I will be advising my client to lodge an application for a lapsing notice on the caveat on the property. My client is not prepared to wait 60 days and does not understand why such a long period would be required.
>
> I note that you have requested certain documents from my client, including original trust documentation. This is not property of the

bankrupt estate, and is required for the administration of the trust. My client will provide a certified copy shortly, and is prepared to allow the inspection of the original trust deed at our offices by prior arrangement. ...

I look forward to your advice as to when the caveat will be withdrawn."

47 On 7 November 2005, Mr Boensch forwarded a certified copy of the Memorandum of Trust dated 23 August 1999 attached to a certified copy of the Deed of Trust dated 18 March 2004. On 9 November 2005, Mr Mullette advised that the original Deed of Trust was available for inspection at his office.

48 On 11 November 2005, Mr Leong sent a letter to Mr Pascoe advising that he now acted for Ms Boensch, maintaining that the Rydalmere property had vested in Mr Pascoe as Mr Boensch's trustee in bankruptcy, and asking Mr Pascoe to sign a deed providing for Ms Boensch to be appointed as trustee in Mr Pascoe's place.

49 On 15 November 2005, Mr Mullette sent a letter to Mr Pascoe in which he disputed concerns that Mr Pascoe had expressed in his report concerning the validity of the Boensch Trust. That letter included the following:

"In reality, it seems to us, the only basis upon which the trust may be questioned is if the Memorandum of Trust dated 23 August 1999 is some form of fraud or sham. There is simply no evidence or indication of this and we do not understand the trustee to seriously contest otherwise. If we are incorrect, please let us know.

In the circumstances, then, there can be no question of the entitlement of our client, as trustee of the Boensch Trust to hold the property clear of encumbrances including the caveat which you have caused to be lodged. Our client instructs us that he has given all such information as the trustee required in relation to the establishment of the trust, and yet the report to creditors and our previous communications have given no indication that the caveat will be withdrawn in the immediate future. In the circumstances, our client is no longer prepared to suffer the caveat to remain on title. We will be filing a Lapsing Notice after seven days from the date hereof unless the caveat is withdrawn by that time."

50 A meeting of creditors was held on 16 November 2005. It included discussion about the possibility of action to recover property from the Boensch Trust and the funding of the action. By that stage, Mr Pascoe had formed the

view that, even if Mr Boensch's trust claims were valid, Mr Boensch was likely to have a trustee's right of indemnity out of the Boensch Trust assets.

51 On about 23 November 2005, Mr Pascoe's solicitor arranged with Mr Mullette for an inspection of the original trust documents. Mr Mullette agreed that no lapsing notice would be issued in the meantime.

52 On 30 November 2005, Mr Pascoe and his assistant attended at Mr Mullette's office to inspect the original trust documents. Mr Boensch was present and produced the original documents. He assured Mr Pascoe that there was only one original executed Memorandum of Trust. Given the existence of the second executed version of the Memorandum of Trust in Mr Leong's file, that caused Mr Pascoe to have further doubts about Mr Boensch's credibility.

53 On 5 December 2005, Mr Mullette sent an email to Mr Pascoe's solicitor, copied to Mr Pascoe, which included an attached statutory declaration of Mr Boensch to the effect that there was only one version of the Memorandum of Trust. The email also provided an address for the Justice of the Peace who was said to have witnessed the signatures on the Memorandum of Trust. And it included the following:

> "On my instructions and from the documents I have seen, there can be no question that the trust is valid. My client intends filing a lapsing notice shortly. I will seek instructions and notify you beforehand. If you have any reason to suspect that the trust is not exactly what it says it is, I would be happy to take instructions regarding the trustee's concerns."

54 On 14 December 2005, Mr Leong sent a letter to Mr Pascoe calling for execution of the deed that he had earlier forwarded and stating that, if the deed were not executed and returned by 27 January 2006, proceedings would be instituted. Mr Pascoe did not respond to Mr Mullette's email of 5 December 2005 or to Mr Leong's letter of 14 December 2005. No lapsing notice was served, and no proceedings were instituted.

55 On 21 February 2006, Mr Boensch sent an email to Mr Pascoe which contained a signed statement of Mr Boensch that included the following:

> "Most of the living expenses are provided for by the Trust. I live at the trusts [sic] will. At the moment I do not have any living expenses. My accommodation is at the mercy of the Trust as it is a mutually beneficial arrangement. I provide some form of security for the balance of the property."

56 On 22 February 2006, Mr Pascoe wrote to Mr Boensch seeking further information about various matters, including the "mutually beneficial arrangement" referred to in Mr Boensch's statement. Mr Boensch responded to the effect that the arrangement concerned only the room that he occupied in the Rydalmere property. He explained that the room was not of a standard that would enable it to be let and that the mutual benefit was that he had a roof over his head and the property appeared to be occupied.

57 It was arranged that Mr and Ms Boensch should be examined in the Federal Court on 3 May 2006. Ms Boensch attended and was examined on that date. Mr Boensch did not attend, reputedly for medical reasons, and was not examined until March 2009.

58 Following Ms Boensch's examination, Mr Pascoe received further advice from counsel, to the effect that the underlying transaction concerning the Boensch Trust appeared to have taken place on 23 August 1999 and, that being so, a claim under s 120 of the *Bankruptcy Act 1966* would not be available. As to a claim under s 121, however, counsel advised that it was clear from the terms of the Memorandum of Trust of 23 August 1999 that no consideration was paid for the transfer and that it was apparent from the file notes obtained from Mr Leong's file that it was at all times the intention of the bankrupt to retain an equity in the Rydalmere property. In counsel's opinion, therefore, it could be inferred that the terms of the Memorandum of Trust were a "sham", or illusory – not truly reflective of the parties' legal relationship, at least until the Deed of Trust was executed. It followed, in counsel's opinion, that it was appropriate for Mr Pascoe to make an application for orders under s 121 of the *Bankruptcy Act 1966* setting aside the Memorandum of Trust and the Deed of Trust. Based on that advice, Mr Pascoe concluded that such proceedings would have good prospects of success.

59 On 9 June 2006, Mr Pascoe conveyed the substance of counsel's advice to a second meeting of creditors, and, on 19 July 2006, he instituted proceedings in the Federal Magistrates Court for a declaration pursuant to s 121 of the *Bankruptcy Act 1966* that the Memorandum of Trust was void as against Mr Pascoe, and for relief under s 120 or alternatively s 121 of the *Bankruptcy Act 1966* in respect of the Deed of Trust and the transfer dated 21 March 2004.

60 On 29 August 2006, counsel sent an email to Mr Pascoe's solicitor advising that principles concerning voluntary assignments discussed in a

then-recent decision of the Federal Court[18] were of relevance to the proceedings against Mr Boensch. Counsel also expressed the view that it was obvious that the Memorandum of Trust was an imperfect gift, and so not effective to convey any equity for the purposes stated, and that the Deed of Trust made on 18 March 2004 was, if anything, a declaration of trust that would clearly fall within the ambit of s 120 or s 121 of the *Bankruptcy Act 1966*.

61 Following numerous interlocutory skirmishes, on 6 September 2007 it was ordered that the question of whether the Memorandum of Trust constituted a valid declaration of trust or otherwise created a valid interest in the property be set down for determination as a preliminary question. On 6 December 2007, the Federal Magistrates Court (Federal Magistrate Raphael) concluded[19] that the Memorandum of Trust was not a sham and that it manifested a sufficient intention to constitute a trust.

62 On 10 December 2007, Mr Boensch's then solicitors, Wright Commercial Lawyers, sent a letter to Mr Pascoe's solicitor formally requesting that Mr Pascoe withdraw his caveat. The letter stated that, if the caveat were not promptly removed, Mr Boensch would apply either for an order for removal under s 74MA of the *Real Property Act* or for a lapsing notice to be prepared under s 74J(1) of the *Real Property Act*. The request was expressed to be made without prejudice to Mr Boensch's rights to claim compensation under s 74P(1) of the *Real Property Act*.

63 Thereafter, Mr Pascoe received further advice from counsel: that it would be appropriate for him to seek leave to appeal from the orders of the Federal Magistrates Court and also that, even if the Boensch Trust were upheld as valid, Mr Boensch may still have a beneficial interest in the property as a beneficiary of the trust or by reason of his right of indemnity as trustee out of the trust assets, which interest would have vested in Mr Pascoe as Mr Boensch's trustee in bankruptcy. On that basis, Mr Pascoe determined to seek leave to appeal against the Federal Magistrates Court's decision and not to withdraw the caveat until that appeal had been determined.

64 Although leave to appeal was granted, the appeal was dismissed by the Full Court of the Federal Court (Finn, Dowsett and Edmonds JJ) on 18 August

---

18 *Re Vasiliou; Marchesi v Vasiliou* (2006) 235 ALR 136.

19 *Pascoe v Boensch [No 6]* [2007] FMCA 2038 at [8], [19].

2008[20]. On the same day, Wright Commercial Lawyers again requested withdrawal of the caveat. Mr Pascoe, however, continued to believe that he had a basis for maintaining his caveat, relying on his applications under ss 120 and 121 of the *Bankruptcy Act 1966* and the fact that he had not received any legal advice to the effect that he should now withdraw the caveat.

65 On 15 September 2008, Mr Pascoe filed an application for special leave to appeal to this Court. On 12 March 2009, Gummow and Kiefel JJ dismissed that application without oral argument, their Honours not being satisfied that any issue of principle could determine the matter or that an appeal would have sufficient prospects of success[21].

66 On 13 August 2009, the Federal Magistrates Court rejected an application by Mr Pascoe to amend his application to particularise his claim under s 121 of the *Bankruptcy Act 1966*, and allowed Mr Boensch's application pursuant to r 13.10 of the *Federal Magistrates Court Rules 2001* (Cth) for summary dismissal of the Federal Magistrates Court proceeding on the basis that Mr Pascoe did not have reasonable prospects of success in establishing Mr Boensch's insolvency at the time of the declaration of trust[22].

67 On 25 August 2009, Mr Pascoe's solicitor was served with a lapsing notice. She sent it to Mr Pascoe the same day. On 8 September 2009, she sought instructions from Mr Pascoe about whether to make an application to extend the operation of the caveat. Mr Pascoe responded on the same day in the following terms:

> "I have thought about this overnight and think we should try to minimise the fronts we are fighting him on by letting the caveat lapse.
>
> He still has the Reg Gen caveat and the mortgage on title. We know that he won't sell. His only option is refinance. It would take a very brave refinancer to lend against the property after doing a title search. I think this is a risk we can bare [sic]."

---

20 *Pascoe v Boensch* (2008) 250 ALR 24.

21 *Pascoe v Boensch* [2009] HCASL 61.

22 *Pascoe v Boensch [No 9]* (2009) 8 ABC (NS) 495.

68 At that stage, Mr Pascoe considered that such interest as Mr Boensch may have in the Rydalmere property by virtue of his right of indemnity as trustee "would be of limited value", and Mr Pascoe did not want to be a party to another set of proceedings that might ultimately be of little value to creditors. The caveat lapsed on 15 September 2009.

69 Finally, on 3 November 2009, the Federal Court (Graham J) dismissed Mr Pascoe's application for leave to appeal against the Federal Magistrates Court's refusal of leave to amend and summary dismissal of the Federal Magistrates Court proceeding[23].

The proceedings at first instance

70 On 24 May 2012, Mr Boensch instituted proceedings in the Equity Division of the Supreme Court of New South Wales alleging that Mr Pascoe had lodged, and later refused or failed to withdraw, the caveat without reasonable cause, and claiming compensation therefor pursuant to s 74P(1) of the *Real Property Act*.

71 On 15 May 2015, Bergin CJ in Eq made orders by consent under r 28.2 of the *Uniform Civil Procedure Rules 2005* (NSW) for the separate determination of the following three questions:

(1) Did Mr Pascoe lodge Caveat AB721857 over the Rydalmere property without reasonable cause within the meaning of s 74P(1) of the *Real Property Act*?

(2) Did Mr Pascoe, without reasonable cause within the meaning of s 74P(1) of the *Real Property Act*, refuse or fail to withdraw the caveat after being requested to do so?

(3) If the answer to question 2 above is "yes", on what date should Mr Pascoe have withdrawn the caveat?

---

23 *Pascoe v Boensch* [2009] FCA 1240.

72 Following *Official Trustee in Bankruptcy v Ritchie*[24] and *Lewis v Condon*[25], the primary judge (Darke J) held[26] that, upon the making of a sequestration order against a bankrupt who holds property on trust, s 58(1)(a) of the *Bankruptcy Act 1966* operates in equity to vest such property in the bankrupt's trustee in bankruptcy subject to the trust, and that the trustee in bankruptcy thereby acquires a caveatable interest in the property. It followed that, upon the making of the sequestration order against Mr Boensch, the Rydalmere property vested in equity in Mr Pascoe – thereby conferring a caveatable interest on Mr Pascoe. His Honour further held[27] that, although Mr Pascoe's interest in the property was but equitable and would remain so unless and until Mr Pascoe obtained registration as proprietor of the property, the description of Mr Pascoe's interest in the property in the caveat as a "Legal Interest pursuant to the *Bankruptcy Act 1966*" was an adequate description for the purposes of s 74F(5) of the *Real Property Act*.

73 Applying the two-step test laid down in *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd*[28] and followed in *Mahendran v Chase Enterprises Pty Ltd*[29], the primary judge concluded[30] that, because Mr Boensch had not proven that Mr Pascoe lacked a caveatable interest (the first step), it could not be said that Mr Pascoe had lodged or maintained the caveat without "reasonable cause"

---

24 (1988) 12 NSWLR 162 at 174 per Powell J.

25 (2013) 85 NSWLR 99 at 119 [91]-[92], 120 [100] per Leeming JA (McColl JA and Sackville A-JA agreeing at 102 [1], 124 [118]).

26 *Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe* [2015] NSWSC 1882 at [103]-[104].

27 *Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe* [2015] NSWSC 1882 at [106].

28 (1990) 21 NSWLR 459 at 474-475 per Clarke JA, 479-480 per Waddell A-JA, see also at 463 per Kirby P.

29 (2013) 17 BPR 32,733 at 32,739-32,740 [52] per Barrett JA (Emmett and Gleeson JJA agreeing at 32,740 [59], 32,741 [60]).

30 *Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe* [2015] NSWSC 1882 at [94], [107].

within the meaning of s 74P(1). As his Honour observed[31], so to conclude was sufficient to resolve the matter, but, in case that conclusion were wrong, his Honour then went on to determine whether, if Mr Pascoe did not have a caveatable interest, Mr Pascoe would nevertheless have had an honest belief based on reasonable grounds that he had a caveatable interest (the second step), and thus reasonable cause to lodge and maintain the caveat within the meaning of s 74P(1) of the *Real Property Act*.

74 As to Mr Pascoe's beliefs, the primary judge found[32] as follows:

(1) At all relevant times, Mr Pascoe honestly believed in accordance with his usual practice that, by reason alone of the fact of being appointed the trustee in bankruptcy of the bankrupt Mr Boensch, who was the registered proprietor of the Rydalmere property, he acquired an interest in the Rydalmere property sufficient to support a caveat.

(2) At all relevant times up to 3 November 2009, when Mr Pascoe's application for leave to appeal against the orders of the Federal Magistrates Court was rejected, Mr Pascoe honestly believed on the basis of his investigations and legal advice that there were reasonable prospects that the trust or trusts alleged by Mr Boensch in respect of the Rydalmere property would be held invalid or alternatively declared void as against him under the *Bankruptcy Act 1966*.

(3) From at least the time of the first meeting of creditors in November 2005, Mr Pascoe honestly believed on the basis of his investigations and legal advice that, even if Mr Boensch held the Rydalmere property on trust for others, Mr Boensch may have a right of indemnity in relation to the Rydalmere property giving Mr Boensch a beneficial interest in the property that, upon the making of the sequestration order, had vested in Mr Pascoe as trustee in bankruptcy and so supported a caveat.

---

31 *Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe* [2015] NSWSC 1882 at [108].

32 *Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe* [2015] NSWSC 1882 at [109], [111]-[113].

75 As to the grounds upon which those beliefs were based, the primary judge held[33] as follows:

(1) Mr Pascoe did have reasonable grounds to believe that the alleged trust might not be valid or enforceable against him, and, therefore, that he had reasonable prospects of succeeding on that basis in the Federal Magistrates Court proceedings.

(2) It had not been shown that Mr Pascoe lacked reasonable grounds to believe, at least up to 13 August 2009, that his application under s 121 of the *Bankruptcy Act 1966* had reasonable prospects of success.

(3) From May 2009 at the latest, Mr Pascoe had reasonable grounds to believe that Mr Boensch might have had a right of indemnity out of the Rydalmere property, albeit that it was likely to have little value.

76 It followed, as the primary judge concluded[34], that Mr Boensch had not established that Mr Pascoe lodged or maintained the caveat without reasonable cause within the meaning of s 74P(1) of the *Real Property Act*. In the result, the primary judge answered[35] the questions earlier set out: (1) "No", (2) "No", and (3) "Does not arise"; and his Honour ordered[36] that the proceeding be dismissed with costs.

The Full Court proceedings

77 Mr Boensch appealed to the Full Court of the Federal Court, after the Court of Appeal of the Supreme Court of New South Wales (Leeming JA) had

---

33 *Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe* [2015] NSWSC 1882 at [115], [128]-[129].

34 *Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe* [2015] NSWSC 1882 at [131].

35 *Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe* [2015] NSWSC 1882 at [135].

36 *Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe* [2015] NSWSC 1882 at [136]. See also *Boensch as trustee of the Boensch Trust v Pascoe [No 2]* [2016] NSWSC 343.

dismissed an earlier appeal as incompetent for want of jurisdiction[37]. The Full Court (Besanko, McKerracher and Gleeson JJ) held[38] that, although the question of whether trust property vests in a trustee's trustee in bankruptcy is not free of difficulty, they, like the primary judge, should follow *Official Trustee in Bankruptcy v Ritchie* and *Lewis v Condon*, and, therefore, that, even if Mr Boensch held only a "bare legal interest" in the Rydalmere property (scil without any beneficial interest at all), the property vested in Mr Pascoe upon the making of the sequestration order and conferred on Mr Pascoe a caveatable interest in the property.

78 The Full Court further held[39] that the primary judge was right to conclude that the description of Mr Pascoe's caveatable interest as "Legal Interest pursuant to the *Bankruptcy Act 1966*" was adequate. Their Honours considered[40] that the description was apt to cover not only the interest identified by the primary judge (the "bare legal interest") but also a "full legal interest" in the event that any purported trust was held invalid or set aside under s 120 or s 121 of the *Bankruptcy Act 1966*.

79 Like the primary judge, too, the Full Court saw no reason to depart from the *Beca Developments* two-step test of reasonable cause, although their Honours cautioned[41] that the rule may be subject to an exception where a caveator has acted from an ulterior or improper motive. But as their Honours observed[42], there was no suggestion that Mr Pascoe had acted out of any ulterior or improper motive, and, accordingly, the existence of Mr Pascoe's caveatable interest sufficed for Mr Boensch's claim under s 74P(1) of the *Real Property Act* to be dismissed.

---

37 *Boensch v Pascoe* (2016) 349 ALR 193.

38 *Boensch v Pascoe* (2018) 264 FCR 25 at 46 [102], 47 [106].

39 *Boensch v Pascoe* (2018) 264 FCR 25 at 47-48 [107].

40 *Boensch v Pascoe* (2018) 264 FCR 25 at 48 [108].

41 *Boensch v Pascoe* (2018) 264 FCR 25 at 49 [111].

42 *Boensch v Pascoe* (2018) 264 FCR 25 at 49 [111]-[112].

80 On the alternative assumption that Mr Pascoe lacked a caveatable interest, the Full Court further held[43] that there was no basis for challenging the primary judge's conclusion that Mr Pascoe had reasonable grounds for considering that he had reasonable prospects of succeeding in the Federal Magistrates Court, and, for that reason, that the primary judge did not err in concluding that Mr Pascoe would have had an honest belief based on reasonable grounds that he had a caveatable interest.

81 The Full Court stated[44] that it was unnecessary to decide whether the primary judge erred in finding that Mr Pascoe had reasonable grounds from no later than May 2009 to believe that Mr Boensch might have a right of indemnity out of the Rydalmere property, or to decide whether such a right of indemnity comprised property which would have vested in Mr Pascoe sufficient to sustain a caveatable interest, because Mr Pascoe's honest belief based on reasonable grounds that the trust would be set aside or declared void made it difficult to see how a successful challenge to the primary judge's findings about the right of indemnity could affect the outcome of the case. Nonetheless, their Honours added[45] that they saw no reason to interfere with the primary judge's finding that Mr Pascoe honestly believed that Mr Boensch might have a right of indemnity, given that it seemed clear that Mr Boensch had made mortgage payments on the Rydalmere property, and the so-called "mutually beneficial arrangement" was not documented.

82 On that basis, the Full Court dismissed Mr Boensch's appeal[46].

The appeal to this Court

83 By grant of special leave, Mr Boensch appeals to this Court on grounds, in substance, as follows:

(1) The Full Court erred in holding that, upon the making of the sequestration order, any interest in the Rydalmere property that was held by Mr Boensch as trustee of the Boensch Trust vested in Mr Pascoe as

---

43 *Boensch v Pascoe* (2018) 264 FCR 25 at 49 [113], 54 [136].

44 *Boensch v Pascoe* (2018) 264 FCR 25 at 56-57 [155]-[156].

45 *Boensch v Pascoe* (2018) 264 FCR 25 at 57 [158].

46 *Boensch v Pascoe* (2018) 264 FCR 25 at 57 [159].

Mr Boensch's trustee in bankruptcy, and thus conferred on Mr Pascoe a caveatable interest in the Rydalmere property.

(2) The Full Court erred in holding that Mr Pascoe was entitled for the purposes of ss 74K(1) and 74P(1) of the *Real Property Act* to claim inconsistent caveatable interests, namely an interest acknowledging, as well as an interest denying, the existence of the Boensch Trust.

(3) The Full Court erred in holding that, because Mr Pascoe had a caveatable interest in the Rydalmere property, it was unnecessary for the purposes of s 74P(1) of the *Real Property Act* to consider whether Mr Pascoe had an honest belief on reasonable grounds that he held a caveatable interest in the property.

(4) The Full Court erred in holding that, notwithstanding that it may be found that a caveator did not have a caveatable interest in real property, it is sufficient for the purposes of s 74P(1) of the *Real Property Act* that the caveator had an honest belief based on reasonable grounds that the caveator was possessed of the claimed caveatable interest.

(5) The Full Court erred in finding that Mr Pascoe had an honest belief based on reasonable grounds that he had a caveatable interest in the Rydalmere property.

(6) The Full Court erred in concluding that the interest claimed in the caveat was adequately described.

In the course of oral argument, counsel for Mr Boensch restricted his submissions to a limited range of issues which are dealt with in greater detail in what follows.

84 As foreshadowed at the hearing on special leave, Mr Pascoe filed a notice of contention maintaining, in substance, that the Full Court ought to have found that Mr Boensch failed to discharge his onus of proving both that Mr Pascoe in fact had no caveatable interest by reason of Mr Boensch's right of indemnity and that Mr Pascoe held no honest belief on reasonable grounds to that effect.

The vesting of property held by a bankrupt on trust for another

85 In *Official Trustee in Bankruptcy v Ritchie*, Powell J rejected a contention that, although property held by a bankrupt as trustee for another is property within the meaning of the definition of "property" in s 5(1) of the *Bankruptcy Act 1966*, it is not property divisible among creditors within the meaning of s 116 of the *Bankruptcy Act 1966*, and, therefore, does not vest in the bankrupt's trustee in

bankruptcy under s 58 of the *Bankruptcy Act 1966*. After referring[47] to "authorities of long standing" for the "broad and general principle" that a "trustee in a bankruptcy takes only the property of the bankrupt, and takes it *subject to all the liabilities and equities which affect it in the bankrupt's hands*", Powell J stated[48]:

> "Although one cannot regard the matter as one which is completely free from doubt, it seems to me that the better view is that, even if the true position were that Mr Ritchie's [the bankrupt's] rights under the contract were held upon trust for Mrs Ritchie, those rights became vested in the Official Receiver upon the making of the sequestration order, but the benefit of those rights was to be regarded as held ... upon trust for Mrs Ritchie".

86 In *Lewis v Condon*, the Court of Appeal of the Supreme Court of New South Wales held that, where land subject to the *Real Property Act* had been held by a bankrupt on trust for others, a trustee in bankruptcy who was registered as proprietor under s 90 of the *Real Property Act* also held the land on trust. Leeming JA (with whom McColl JA and Sackville A-JA agreed) stated[49]:

> "Upon the making of the sequestration order ..., s 58 of the *Bankruptcy Act 1966* (Cth) applied. That had the effect that such interest as Colleen [the bankrupt] had in the Property vested forthwith in equity in Mr Condon [the trustee in bankruptcy]. Legal title did not vest forthwith in Mr Condon. (Section 90 of the *Real Property Act* establishes a procedure whereby a trustee in bankruptcy can obtain registration as proprietor of land pursuant to the vesting effected by s 58(2) of the *Bankruptcy Act [1966]*.) Mr Condon ultimately took advantage of that procedure to become registered proprietor of the Property and thereby acquire legal title.

---

47 *Official Trustee in Bankruptcy v Ritchie* (1988) 12 NSWLR 162 at 174 (emphasis in original), quoting *In re Clark; Ex parte Beardmore* [1894] 2 QB 393 at 410 per Davey LJ and citing *Tailby v Official Receiver* (1888) 13 App Cas 523 at 538 per Lord FitzGerald, *Ex parte Holthausen; In re Scheibler* (1874) LR 9 Ch App 722 and *In re Lind; Industrials Finance Syndicate Ltd v Lind* [1915] 2 Ch 345.

48 *Official Trustee in Bankruptcy v Ritchie* (1988) 12 NSWLR 162 at 174.

49 *Lewis v Condon* (2013) 85 NSWLR 99 at 119 [91]-[92].

> But it is clear law that those statutory vestings do not destroy any trust of which the bankrupt was a trustee. Section 116(2)(a) of the *Bankruptcy Act [1966]* excludes from the vesting property held by the bankrupt in trust for another person, and s 82 of the *Real Property Act* excludes notice of trusts on the register. It follows that neither the vesting effected by s 58(1) nor the title created by registration of a transfer of an 'estate in fee simple' to Mr Condon on which he relied destroyed any trusts in respect of the Property."

87 Subject to one qualification, what was stated by Powell J in *Official Trustee in Bankruptcy v Ritchie* and by Leeming JA in *Lewis v Condon* is substantially correct. The one qualification is that property held by a bankrupt on trust for another will *not* vest in the bankrupt's trustee in bankruptcy if the bankrupt does not have any interest in the property, whether vested or contingent, and no matter how remote (subject to applicable laws as to remoteness of vesting). But that is not to say that either *Official Trustee in Bankruptcy v Ritchie* or *Lewis v Condon* was wrongly decided. In each case, it appears that the ultimate decision might have been justified even on the assumption that the bankrupt had no beneficial interest in the trust property in issue.

88 As was recently demonstrated in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth*[50], a proper understanding of the manner and extent of the vesting of a bankrupt's property under the *Bankruptcy Act 1966* in the trustee in bankruptcy is informed by the long history of interaction between courts of law and equity in applying earlier bankruptcy legislation. Significantly for what follows, upon a petition under the *Bankrupts Act 1571*[51], commissioners appointed by the Lord Chancellor were empowered to assign all that a bankrupt could "lawfully depart withal" for the benefit of the bankrupt's creditors. Consistently with the requirement to construe bankruptcy statutes beneficially in favour of creditors[52], the property so assigned included even a

---

50 (2019) 93 ALJR 807 at 817-818 [25]-[28] per Kiefel CJ, Keane and Edelman JJ, 832-833 [94] per Bell, Gageler and Nettle JJ (Gordon J agreeing at 835 [106]); 368 ALR 390 at 401-402, 421, 424.

51 13 Eliz c 7, s 2. See generally *Smith v Mills (The Case of Bankrupts)* (1584) 2 Co Rep 25a [76 ER 441].

52 *Bankrupts Act 1623* (21 Jac I c 19), s 1.

"possibility" of right – a term commonly used in bankruptcy statutes[53], and consistently understood as referring to any contingent interest[54], as distinct from a mere expectancy[55]. From the outset, however, courts of equity resolved[56] that "the assignees in the commission", who "claimed under the bankrupt", "ought not to be in a better case than the bankrupt himself" and, therefore, that the property passed subject to equities in favour of third parties. Thus, where the bankrupt had no beneficial interest capable of being applied for the creditors' benefit, the assignees could be compelled in equity to settle the property upon trust for[57] – or, in some circumstances, to convey the property to[58] – the *cestuis que trust*.

89 Further, although courts of law had traditionally refused to take notice of trusts[59], during the latter half of the eighteenth century they began to consider the position in equity following assignments in bankruptcy (as well as other

---

53 See, eg, *Bankrupts Act 1623*, s 12; *Bankrupts Act 1732* (5 Geo II c 30), s 1.

54 *Higden v Williamson* (1731) 3 P Wms 132 at 133 per Jekyll MR [24 ER 1000 at 1000], affd (1732) 3 P Wms 133 per Lord King LC [24 ER 1000]; *Jewson v Moulson* (1742) 2 Atk 417 at 420-421 per Lord Hardwicke LC [26 ER 652 at 654]; cf *Jacobson v Williams* (1717) 1 P Wms 382 at 385-386 per Lord Cowper LC [24 ER 435 at 436]. See also *Bankrupts Act 1732*, s 1; *Bankrupts (England) Act 1825* (6 Geo IV c 16), s 63.

55 *Moth v Frome* (1761) Amb 394 per Clarke MR [27 ER 262 at 263]. See Dodd (ed), *Bacon's A New Abridgement of the Law*, 7th ed (1832), vol 1 at 613.

56 *Jacobson v Williams* (1717) 1 P Wms 382 at 383 per Lord Cowper LC [24 ER 435 at 435].

57 *Bennet v Davis* (1725) 2 P Wms 316 at 318-319 per Jekyll MR [24 ER 746 at 747]. See Eden, *A Practical Treatise on the Bankrupt Law*, 2nd ed (1826) at 244-249.

58 *Ex parte Dumas* (1754) 2 Ves Sen 582 at 585 per Lord Hardwicke LC [28 ER 372 at 373].

59 *Pawlett v Attorney General* (1667) Hardr 465 at 469 per Hale CB [145 ER 550 at 552].

principles "established on the other side of the hall" of Westminster[60]). In *Scott v Surman*, Willes LCJ appealed[61] to "the rule concerning circuity of action"[62] as supplying a rationale for why a trust might limit what vests in the assignees in bankruptcy "even at law": that "it would be very absurd to say that any thing shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them by which they will be obliged to refund and account". In accordance with that rationale, the decision of the Court of King's Bench in *Winch v Keeley* established[63] that property held by a bankrupt on trust for another would not pass at all to the bankrupt's trustee in bankruptcy if the bankrupt had no beneficial interest in the property whatsoever. But if, at the time of bankruptcy, the bankrupt had any form of valid beneficial interest in the property (whether vested or contingent), the whole of the property passed to the bankrupt's trustee, "subject to the rights and equities which would affect it in the hands of the bankrupt"[64].

90 In some of the older authorities, the nature of the interest sufficient to have that effect was described in terms of the "most remote possibility of interest" or

---

60 *Alexander v Owen* (1786) 1 TR 225 at 227 per Buller J [99 ER 1064 at 1065]. See Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 24-27 [1-200]-[1-270].

61 (1742) Willes 400 at 402 [125 ER 1235 at 1236-1237], quoted with approval in *Gladstone v Hadwen* (1813) 1 M & S 517 at 526 per Lord Ellenborough CJ for the Court of King's Bench [105 ER 193 at 197].

62 See and compare Rastell, *Les Termes de la Ley*, 1721 ed at 128-129; Bullen and Leake, *Precedents of Pleadings in Personal Actions in The Superior Courts of Common Law*, 3rd ed (1868) at 558, cited in *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584 at 614 per Windeyer J; Broom, *A Selection of Legal Maxims, Classified and Illustrated*, 5th ed (1870) at 343-346.

63 (1787) 1 TR 619 at 622-623 per Ashhurst J, 623 per Buller J [99 ER 1284 at 1286].

64 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 538 per Lord FitzGerald.

"any thing from which a benefit to the creditors would result"[65] or "might result"[66]. Thus, as Littledale J summarised the position in *Carvalho v Burn*[67]:

> "It is quite clear that the assignment [in bankruptcy] vested in the assignees all the personal estate and effects in which the bankrupt was, at the time of the act of bankruptcy, beneficially interested (with the statutory exceptions, [6 Geo IV c 16, ss 81, 82, 86, 112]); but as the object of the assignment of the bankrupt's property is, that it may be applied to the payment of his debts, it is equally clear that nothing passed by it which the bankrupt then held in trust for others, or in which he had only a mere legal interest, *Scott v Surman*, *Winch v Keeley*, *Carpenter v Marnel*, *Gladstone v Hadwen*; *but if, at the time of the act of bankruptcy, the bankrupt possessed a possibility of interest, from which a benefit to his creditors might result, if he had the legal interest in any property, and it was uncertain whether he would hold any part of that property, or if any, what part, as a trustee for others, the whole would pass by the assignment: it could not remain in the bankrupt subject to be transferred on a future contingency: and if it did pass to the assignees, it could not be divested out of them in whole or in part by the happening of events subsequent to the act of bankruptcy, which might make them hold the whole, or some specific part as trustees merely; for there is no provision in the statute which takes a right out of the assignees, that has once been vested in them.*"

91 It should be understood, however, that such terms bore a different meaning at that time. According to current acceptation, terms such as "the most remote *possibility* of interest", or anything from which a benefit to creditors "*might* result", might be thought to suggest the mere possibility that the bankrupt may have or acquire a beneficial interest in the property. But, consistently with the historical usage outlined above, they are properly to be understood as describing a contingent beneficial interest which is extant and valid; and as recognising that such an interest is capable of being immediately realised for the

---

65 *Carpenter v Marnell* (1802) 3 Bos & Pul 40 at 41 per Lord Alvanley CJ (Heath, Rooke and Chambre JJ agreeing at 42) [127 ER 23 at 24].

66 *Carvalho v Burn* (1833) 4 B & Ad 382 at 393 per Littledale J [110 ER 499 at 503].

67 (1833) 4 B & Ad 382 at 393-394 [110 ER 499 at 503] (citations and footnote omitted; emphasis added).

benefit of a bankrupt's creditors, even if it is likely to vest after the period of bankruptcy[68]. Accordingly, where the bankrupt has such a contingent interest – or, *a fortiori*, a vested beneficial interest – in property, the property itself will pass in bankruptcy, subject to the equities in favour of third parties. By contrast, where the bankrupt has but a mere expectancy, or a "possibility of becoming entitled in the future to a proprietary right"[69], no property can pass unless and until it is acquired by or devolves upon the bankrupt during the period of bankruptcy, as indeed this Court held in *Caraher v Lloyd*[70]. As the Court of Exchequer in effect held in *Parnham v Hurst*[71], nothing passes where there is merely the forensic possibility of a beneficial interest in the bankrupt being established.

92 At the same time, it is also important to keep in mind that a bankrupt trustee's vested or contingent beneficial interest in trust property sufficient for the property to pass to the bankrupt's trustee in bankruptcy may arise either under the express terms of the trust or *aliunde*, including by reason of the bankrupt trustee's right to be indemnified out of the trust property for obligations incurred in the bankrupt's capacity as trustee. Farwell LJ in effect summarised the position in *Governors of St Thomas's Hospital v Richardson*[72], under provisions of the *Bankruptcy Act 1883*[73] which were relevantly no different from the applicable provisions of the *Bankruptcy Act 1966*, thus:

---

68 *Caraher v Lloyd* (1905) 2 CLR 480 at 490-491 per Griffith CJ for the Court. See also *Peter v Shipway* (1908) 7 CLR 232 at 244 per Griffith CJ, 260-261 per Higgins J.

69 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 26 per Windeyer J.

70 (1905) 2 CLR 480 at 491-492. See also *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124 at 133 per Brennan CJ, Gaudron and McHugh JJ, cf at 145 per Dawson and Toohey JJ.

71 (1841) 8 M & W 743 at 748 per Parke B, 750 per Alderson B, 750-751 per Rolfe B [151 ER 1239 at 1242-1243]. See also *D'Arnay v Chesneau* (1845) 13 M & W 796 at 801-802 per Martin and Peacock (*arguendo*), 809 per Parke B [153 ER 334 at 337, 339-340].

72 [1910] 1 KB 271 at 284 (emphasis added).

73 46 & 47 Vict c 52.

> "[T]he property of the bankrupt does not include property held by the bankrupt on trust for any other person. But it does include property held by the bankrupt on any trust for his own benefit, and when ... he holds property to secure his own right of indemnity in priority to all claims of any cestui que trust, and the retention of such property is necessary to give full effect to such right, it follows that the property, ie, the legal estate, and right to possession vest in the trustee in bankruptcy to the extent to which they were vested in the bankrupt. The law is stated by Jessel MR in *Morgan v Swansea Urban Sanitary Authority*[74], where he says, 'Under the Bankruptcy Act[75], where a trustee has no beneficial interest, the legal estate does not pass; but where he has it does pass,' ... *The true test is, Can the trustee be compelled to convey the estate to the cestui que trust? If he can, then it does not pass to his trustee in bankruptcy, but if he cannot, then the property does pass.*"

93 Where, therefore, property is held by a bankrupt on trust for another, then, upon the making of a sequestration order, the property will pass to the bankrupt's trustee in bankruptcy (subject to the trust), unless the bankrupt has no valid beneficial interest in the property[76]. And, ordinarily, the burden of proving the absence of such a beneficial interest is on the bankrupt[77].

94 As has been seen, the position is complicated where the property is subject to a statutory registration scheme, such as the Torrens system. Notwithstanding s 58(1) of the *Bankruptcy Act 1966*, a legal estate or interest in land subject to the *Real Property Act* cannot pass to the bankrupt's trustee in bankruptcy unless and until the trustee in bankruptcy applies under s 90 of the *Real Property Act* to be, and is, registered as proprietor of the land. Nevertheless, so long as the bankrupt has some beneficial interest in the property, then, upon the making of a

---

74 (1878) 9 Ch D 582 at 585.

75 *Bankruptcy Act 1869* (32 & 33 Vict c 71).

76 *Carter Holt* (2019) 93 ALJR 807 at 818 [28] per Kiefel CJ, Keane and Edelman JJ, 833 [94] per Bell, Gageler and Nettle JJ (Gordon J agreeing at 835 [106]); 368 ALR 390 at 402, 421, 424.

77 cf *Trott v Smith* (1844) 12 M & W 688 at 703 per Tindal CJ for the Court of Exchequer Chamber [152 ER 1375 at 1381-1382]. See Bullen and Leake, *Precedents of Pleadings in Personal Actions in The Superior Courts of Common Law*, 3rd ed (1868) at 519-520.

sequestration order, the estate or interest of which the bankrupt is registered proprietor vests forthwith in equity in the trustee in bankruptcy, perforce of s 58(2) of the *Bankruptcy Act 1966*, and the trustee in bankruptcy may then apply to be registered as legal proprietor of that estate or interest in accordance with s 90 of the *Real Property Act*[78]. But of course, just as before, so, too, after the trustee in bankruptcy is so registered as proprietor, he or she will hold the estate or interest subject to the equities to which it was subject in the hands of the bankrupt. And that is so notwithstanding the principle of indefeasibility embodied in s 42 of the *Real Property Act*[79] because, plainly enough, the provision in that Act for a trustee in bankruptcy to become a registered proprietor cannot have been intended to supply a means to circumvent limitations on the property divisible among creditors under the *Bankruptcy Act 1966*[80].

The grounds for a caveat

95 In this matter, the primary judge and, on appeal, the Full Court approached the matter on the basis that, even if Mr Boensch did not have any beneficial interest in the Rydalmere property, the fact that he was the registered proprietor of the property at the time of commencement of his bankruptcy was sufficient to confer a caveatable interest in the property on Mr Pascoe. To that extent, their Honours overstated the position. As has been seen, if the fact were that Mr Boensch did not have any valid beneficial interest in the Rydalmere property, no interest in the property could have vested in equity in Mr Pascoe. For the reasons that follow, however, that overstatement was devoid of relevant consequence.

Mr Pascoe's interest by reason of Mr Boensch's right of indemnity

96 As counsel for Mr Boensch accepted before this Court, the onus was on Mr Boensch to establish that he lacked any valid beneficial interest in the Rydalmere property. At first instance, Mr Pascoe pleaded that such an interest arose from Mr Boensch's right of indemnity, and Mr Pascoe referred to that right

---

78 See and compare *Lewis v Condon* (2013) 85 NSWLR 99 at 119 [91] per Leeming JA.

79 See *Frazer v Walker* [1967] 1 AC 569 at 585 per Lord Wilberforce for the Privy Council.

80 See and compare *Sempill v Jarvis* (1867) 6 SCR (NSW) Eq 68 at 71-72 per Hargrave J.

in his affidavit filed some 15 months before trial. Whether the right in fact existed was then squarely identified as an issue in Mr Pascoe's written opening submissions; it was described by the primary judge at the start of the trial as the "one issue that does leap out a little"; and the principles and evidence on which it depended were discussed at length in counsel for Mr Pascoe's closing address and Mr Pascoe's written closing submissions.

97 That evidence included Mr Boensch's own admission that he had incurred significant expenses in his capacity as trustee for the Boensch Trust, in the form of "bank payments, loan payments, the council rates, [and] every other cost ... required" for the trust. In the absence of any suggestion that they were not properly incurred, such expenses would ordinarily entitle Mr Boensch to be indemnified out of the trust property[81], as counsel for Mr Boensch acknowledged before this Court.

98 From the outset, Mr Boensch sought to neutralise the effect of the right of indemnity by relying on his so-called "mutually beneficial arrangement" with "the trust". It will be recalled that his letter of 22 February 2006 identified that arrangement as only, in effect, permitting him to occupy a room in the Rydalmere property which was described as unfit to be let[82]. In his initial affidavit at trial, he deposed that that letter "fully explained" the arrangement. As will be apparent, however, much about the arrangement alleged was unexplained, including, most obviously, the person with whom, and in what form, it was made.

99 In turn, the legal basis upon which the arrangement is supposed to have prejudiced Mr Boensch's right of indemnity, either wholly or in part, was and remains almost entirely unexplained. Neither of the trust instruments purported to deprive Mr Boensch of his right of indemnity on the basis of any such arrangement[83]. If, as was posited in submissions for Mr Boensch, the alleged arrangement was made with himself only (purporting to act in different

---

81 See *Carter Holt* (2019) 93 ALJR 807 at 819 [29] per Kiefel CJ, Keane and Edelman JJ, 828 [80] per Bell, Gageler and Nettle JJ (Gordon J agreeing at 835 [106]); 368 ALR 390 at 403, 415, 424.

82 See [56] above.

83 See and compare *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 394-395 per Brooking J.

capacities), then it would lack "intrinsic validity" in contract[84] and be "of itself inoperative" as a waiver[85]. Assent by Ms Boensch was also posited, but not supported by reference to evidence or any account of why her status as parent authorised her to deal with property held on trust for her children[86]. The alleged arrangement was not said to be a civil act in which the infant beneficiaries themselves had participated for their own benefit[87]. And Mr Boensch did not allege that his occupation of the trust property without paying rent constituted a breach of trust or fiduciary duty by him[88] – the correctness of which might have depended on the scope of his power to allow rent-free occupation by the infant beneficiaries.

100 In any event, Mr Boensch did not attempt to discharge his onus of proving that he had no right of indemnity because, after the taking of accounts, the value of benefits obtained under the alleged arrangement would be equal to or exceed the total of the trust expenses incurred by him[89]. On Mr Boensch's evidence, the sole benefit obtained under the arrangement was occupation of a room incapable of being let, and, although presumably within his power and undoubtedly in his interest in these proceedings[90], Mr Boensch produced no accounts of his benefits and expenditure as trustee. In those circumstances, it cannot be said that a court

---

84 *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395 at 423, 426 per Millett LJ, quoted in *Clay v Clay* (2001) 202 CLR 410 at 434 [51] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ.

85 *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248 at 257 per Jordan CJ.

86 See *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 237 per Mason CJ, Dawson, Toohey and Gaudron JJ, 315 per McHugh J.

87 *Minors (Property and Contracts) Act 1970* (NSW), s 18.

88 cf *Ex parte James* (1803) 8 Ves Jun 337 at 351 per Lord Eldon LC [32 ER 385 at 390]; *Shallcross v Oldham* (1862) 2 J & H 609 at 616 per Page Wood V-C [70 ER 1202 at 1205].

89 See and compare *Carter Holt* (2019) 93 ALJR 807 at 819 [31] per Kiefel CJ, Keane and Edelman JJ; 368 ALR 390 at 403-404.

90 See *Blatch v Archer* (1774) 1 Cowp 64 at 65 per Lord Mansfield [98 ER 969 at 970].

of equity would have compelled Mr Boensch to transfer title to the property to the beneficiaries of the Boensch Trust, had they been *sui juris* and so required[91], at least unless and until there had been a final accounting[92]. It follows that Mr Boensch's reliance on the alleged arrangement to controvert his right of indemnity is without merit.

101 We agree with the joint reasons of Kiefel CJ, Gageler and Keane JJ with respect to the responsibility of intermediate appellate courts when considering whether to deal with all grounds of appeal[93]. We also agree with their Honours' conclusion that, in the circumstances of this litigation, there is no criticism of the Full Court for not addressing an issue which it did not consider to be dispositive of the controversy before it. This is a case in which "[n]o remitter will be necessary"[94]. Given that the issue was pleaded and at no point abandoned, its determination by this Court on the basis of the available evidence cannot involve any denial of procedural fairness[95].

102 On the basis of such evidence as was adduced at first instance, there was and is no reason to doubt that Mr Boensch had a beneficial interest in the Rydalmere property – to the extent of his right to retain the property as security for satisfaction of his right of indemnity as trustee. By reason of that beneficial interest, an estate in the property vested forthwith in equity in Mr Pascoe pursuant to s 58 of the *Bankruptcy Act 1966*, subject to a subtrust on the terms of the Boensch Trust but permitting Mr Pascoe to exercise the right of indemnity. On that basis, Mr Pascoe was entitled to be registered as proprietor of the

---

91 *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 119 [47] per Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ.

92 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 245 [47] per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

93 See [7]-[8]. See also *Capital Securities XV Pty Ltd (formerly known as Prime Capital Securities Pty Ltd) v Calleja* [2018] NSWCA 26 at [7]-[8] per Leeming JA (Basten and Gleeson JJA agreeing at [1], [2]).

94 *Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd* (2011) 244 CLR 1 at 20 [56] per Gummow, Heydon, Crennan, Kiefel and Bell JJ.

95 cf *Banque Commerciale SA (En liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287 per Mason CJ and Gaudron J.

Rydalmere property in accordance with s 90 of the *Real Property Act*, and that was a sufficient basis to sustain his caveat.

Mr Pascoe's beliefs about the validity of the trust

103 Regardless of the position in fact, it is also apparent that Mr Pascoe had good reason to believe, as he did, that the Boensch Trust was not validly constituted. Much that emerged from Mr Leong's file remained, and still remains, unexplained. Of course, had the Memorandum of Trust been a sham[96], or not manifested a sufficiently certain intention to constitute a trust[97], an estate in the Rydalmere property would necessarily have vested in equity in Mr Pascoe upon the making of the sequestration order.

104 Contrary to the Full Court's reasoning, however, the possibility that the trust might have been set aside under s 120 or s 121 of the *Bankruptcy Act 1966* would not have been sufficient to sustain the caveat. In *Amaca Enterprises Pty Ltd v Official Trustee in Bankruptcy*, O'Bryan J held[98] that an alleged right under s 121 of the *Bankruptcy Act 1966* to bring an action to set aside a transfer of land justified declining to order the removal of a caveat by the trustee in bankruptcy. But that proposition was disapproved in *Martin v Official Trustee in Bankruptcy*, in which Green CJ noted[99] observations in this Court that only a legal or equitable interest in land can sustain a caveat[100] and that a mere statutory right to take steps to avoid a transaction does not confer such an interest[101], and

---

96 See *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at 486 [46] per Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ.

97 See *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (In liq) (Associated Alloys Case)* (2000) 202 CLR 588 at 604 [29] per Gaudron, McHugh, Gummow and Hayne JJ.

98 Unreported, Supreme Court of Victoria, 30 September 1983 at 5-6.

99 [1990] Tas R 65 at 68-69.

100 *Municipal District of Concord v Coles* (1905) 3 CLR 96 at 107 per Griffith CJ.

101 *N A Kratzmann Pty Ltd (In liq) v Tucker [No 1]* (1966) 123 CLR 257 at 291-292 per Kitto J.

concluded[102] that rights under ss 120 and 121 of the *Bankruptcy Act 1966* do not immediately confer a caveatable interest. As his Honour held[103]:

> "The interest asserted must be in existence at the time of the lodgment of the caveat. The assertion by a caveator who at the time of the lodgment of the caveat does not have an estate or interest in the land that he has commenced proceedings which may result in such an interest being vested in him does not disclose a sufficient caveatable interest".

That reasoning accords with principle and has since been followed in first-instance decisions in Tasmania[104], New South Wales[105], Western Australia[106] and Victoria[107]. There is no reason why it should not be adhered to.

105 That is not to say, however, that where, as here, there are reasonable grounds to conclude that a bankrupt has an extant beneficial interest in property

---

102 [1990] Tas R 65 at 70.

103 *Martin v Official Trustee in Bankruptcy* [1990] Tas R 65 at 69, citing *Ioppolo v Ioppolo* (1978) 5 Fam LN No 27, *Ex parte Goodlet & Smith Investments Pty Ltd* [1983] 2 Qd R 792, *Bethian Pty Ltd v Green* (1977) 3 Fam LR 11579 at 11583 per Powell J, *Re Haupiri Courts' Application* [1969] NZLR 348 at 351 per Richmond J, *Re Pile's Caveats* [1981] Qd R 81 and *Re Weeks' Caveat* [1971] QWN 4.

104 *Australian Eagle Insurance Co Ltd v Parry* (1992) ANZ Conv R 166 at 166 per Crawford J; *Shaw Excavations Pty Ltd v Portfolio Investments Pty Ltd* (2000) 9 Tas R 444 at 454 [20] per Slicer J.

105 *Sutherland v Vale* (2008) 14 BPR 26,255 at 26,258 [15] per Brereton J; *Griffiths v Falck* (2008) 220 FLR 278 at 286 [63] per Young CJ in Eq.

106 *Gangemi v Gangemi* [2009] WASC 195 at [40] per Murphy J; *Stacey v Stacey* [2010] WASC 85 at [12] per Beech J; *Westpac Banking Corporation v Murray Riverside Pty Ltd* [2013] WASC 433 at [20] per Beech J; *Watson v Gardner* [2015] WASC 192 at [14] per Mitchell J; *Binning v Avsar* [2016] WASC 194 at [120] per Kenneth Martin J; *Westpac Banking Corporation v Davey* [2018] WASC 189 at [14] per Chaney J.

107 *CFHW Pty Ltd (as trustee of the Watson Family Trust) v Burness* [2014] VSC 451 at [23]-[24] per Warren CJ.

held by the bankrupt on trust for another, the trustee in bankruptcy may not lodge a caveat to protect the interest of the trustee in bankruptcy *pendente lite*[108]. For reasons later to be explained[109], provided the caveat is lodged on the basis of an honest belief on reasonable grounds that the bankrupt has an extant beneficial interest in the property (including a beneficial interest by way of right of indemnity), the trustee in bankruptcy will be warranted in lodging a caveat, as Mr Pascoe did in this case.

The interest claimed in the caveat

106 As was earlier noticed[110], the interest which Mr Pascoe claimed in the caveat (in accordance with his usual practice) was a "Legal Interest pursuant to the *Bankruptcy Act 1966*". The primary judge found[111] that, read as a whole, the caveat thus claimed whatever interest in the land vested in Mr Pascoe by virtue of s 58(1)(a) of the *Bankruptcy Act 1966*. His Honour put the matter as follows:

> "The expression 'legal interest pursuant to the *Bankruptcy Act* 1966' is apt to describe an interest that arises as a matter of law pursuant to statute. I would not read it as expressing an intention to confine the claim to only a legal interest in the property as opposed to an equitable interest in the property. The intention seems to be to claim whatever interest arises by virtue of s 58(1)(a). The claimed interest is, in my view, adequately described in the caveat. I note further that it is not necessary, in order to comply with the requirements for particularisation of the estate or interest claimed, to specify whether the estate or interest is legal or equitable (see clause 7 and Schedule 3 to the Real Property Regulation 2003 (NSW), in force when the caveat was lodged)."

---

108 See, eg, *Gustin v Taajamba Pty Ltd* (1994) 6 BPR 13,393 at 13,396-13,397 per Handley JA (Sheller and Powell JJA agreeing at 13,398); *Edmonds v Donovan* (2005) 12 VR 513 at 548-549 [92]-[93] per Phillips JA (Winneke P and Charles JA agreeing at 516 [2], [3]).

109 See [113]-[114] below.

110 See [32]-[33] above.

111 *Franz Boensch as trustee of the Boensch Trust v Scott Darren Pascoe* [2015] NSWSC 1882 at [106].

His Honour added that, if he were not correct about that, the assertion of a *legal*, as opposed to an equitable, interest could properly be regarded as a technical deficiency, and that it would not necessarily follow that the caveat was lodged or maintained without reasonable cause.

107 Generally speaking, it is to be doubted that the expression "Legal Interest pursuant to the *Bankruptcy Act 1966*" in a caveat is adequate to describe an equitable estate vested in a trustee in bankruptcy pursuant to s 58(2) of the *Bankruptcy Act 1966* by reason of the bankrupt's right of indemnity. Although a caveat against dealings is not required to specify whether the interest claimed is legal or equitable[112], and although, semasiologically, the word "legal" may be capable of extending to rights recognised only in equity[113], use of that word in this context is apt to mislead someone reading the caveat; even accepting that he or she is not bereft of powers of inference or access to legal advice[114]. More to the point, the expression as a whole does not afford the Registrar-General, or anyone else, sufficient information to determine whether any other dealing with the property would adversely affect the interest claimed. For that reason, as Brereton J observed in *Sutherland v Vale*[115], the "description of the nature of the estate, interest or right claimed by a caveator is more than a mere formal requirement of the provisions of the Act, but goes to the heart and substance of their operation". It may be accepted that a court would not ordinarily make an order under s 74K(2) of the *Real Property Act* extending the operation of a caveat which employed that description[116].

---

112 *Real Property Regulation 2003* (NSW), cl 7(1)(b), (2), Sch 3, para 10(a). See now *Real Property Regulation 2019* (NSW), cl 7(b), Sch 2, item 10(a). See also *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222 at 232 per Holland J.

113 See *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 447 per Barwick CJ, Stephen, Mason and Wilson JJ.

114 *Ultra Marine Pty Ltd v Misson* (1981) ANZ Conv R 229 at 231-232 per Wootten J.

115 (2008) 14 BPR 26,255 at 26,257 [12].

116 It is not necessary to determine whether the court would have power to order amendment of the caveat in those circumstances, as to which see *Percy & Michele Pty Ltd v Gangemi* [2010] VSC 530 at [92]-[102] per Macaulay J.

108 It does not follow, however, that Mr Boensch was entitled to compensation under s 74P(1) of the *Real Property Act* because of the terms of Mr Pascoe's caveat. For, as Clarke JA concluded in *Beca Developments*, a mere technical deficiency in the statement of the interest claimed does not of itself demonstrate the absence of a "reasonable cause" to lodge and not withdraw the caveat, at least where the caveat does not "overstate the interest sought to be protected"[117]. Here, if anything, the description used in Mr Pascoe's caveat *understated* the extent of his interest – an estate in fee simple albeit in equity – and any prejudice to Mr Boensch from the inadequate description of that interest might have been remedied by the prompt service of a lapsing notice.

The *Beca Developments* test of reasonable cause

109 In *Beca Developments*, a majority of the Court of Appeal of the Supreme Court of New South Wales embraced Wootten J's conclusion in *Bedford Properties Pty Ltd v Surgo Pty Ltd*[118] concerning the former s 98 of the *Real Property Act* that:

> "the foundation for reasonable cause must be, not the actual possession of a caveatable interest, but an honest belief based on reasonable grounds that the caveator has such an interest".

110 Clarke JA, who delivered the leading judgment in *Beca Developments*, with which Kirby P relevantly agreed[119], noted[120] that "a caveat operates in much the same manner as does an injunction" and that this analogy supported the view that "in enacting s 98 the legislature intended to set up machinery for compensating persons who suffered as a consequence of a caveator, in effect, abusing the statutory power to lodge a caveat". It followed, in his Honour's view, that "Wootten J was correct to give to the phrase 'without reasonable cause' the same meaning as had been attributed to the like phrase in the tort of malicious prosecution", albeit that tort, unlike an award under s 98, also depended on proof

---

117 (1990) 21 NSWLR 459 at 468.

118 [1981] 1 NSWLR 106 at 108.

119 (1990) 21 NSWLR 459 at 463.

120 (1990) 21 NSWLR 459 at 471.

of malice[121]. Clarke JA proceeded to observe[122] that, while s 74P(1) of the *Real Property Act* extended compensation to cases where a person procures the lapsing of a caveat or refuses or fails to withdraw a caveat upon request, as then drafted it also added another pre-condition by the word "wrongfully", which his Honour construed as in effect requiring an abuse of the statutory procedure "for oppressive and other reasons". Accordingly, his Honour concluded[123] that, in order to sustain a claim for compensation under s 74P(1)(a), the claimant must establish[124] that the caveator had neither a caveatable interest nor an honest belief based on reasonable grounds that the caveator had a caveatable interest (and thus "without reasonable cause"), and that the caveator acted deliberately, knowing that he or she had no interest in the land (and thus "wrongfully").

111 Although s 74P(1)(a) was amended to remove the word "wrongfully"[125], the former requirement – described in these proceedings as the "two-step" *Beca Developments* test – has continued to be applied[126]. This continued approach is consistent with Parliament's aim to preserve the existing law although removing the word "wrongfully". As was observed in the Explanatory Note, the goal of the amendments was to have "the effect of reinstating the law that applied before 1986 when certain amendments to the Act relating to caveats were enacted"[127]. That earlier law, on "reasonable cause", was what had been explained and clarified in *Beca Developments*.

112 Before the Full Court, Mr Boensch accepted that he had to satisfy that two-step *Beca Developments* test. Before this Court, he sought to argue that *Beca*

---

121 See *A v New South Wales* (2007) 230 CLR 500 at 502-503 [1] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.

122 *Beca Developments* (1990) 21 NSWLR 459 at 472.

123 *Beca Developments* (1990) 21 NSWLR 459 at 472-473.

124 As to onus, see also *Young v Rydalmere Credits Pty Ltd* [1964-5] NSWR 1001 at 1013 per Macfarlan J; *Bedford Properties* [1981] 1 NSWLR 106 at 107 per Wootten J.

125 *Real Property Amendment Act 1996* (NSW), Sch 1 [19].

126 See fnn 136-137 below.

127 New South Wales, *Real Property Amendment Bill 1996*, Explanatory Note at 4.

Developments was wrongly decided; that the test under s 74P(1) of the *Real Property Act* is whether lodging and maintaining a caveat was objectively reasonable in all the circumstances, including the consequences of the caveat in preventing dealings with the property; and, accordingly, that whether the caveator in fact has a caveatable interest is not dispositive and whether the caveator had an honest belief in what was claimed in the caveat is irrelevant.

113 The argument should be rejected. The starting point is the text of s 74P(1) of the *Real Property Act*, which in terms directs attention to whether the "cause"[128], not consequence, of an act or omission is "reasonable", not necessarily right upon a proper application of the law to the facts. Moreover, a caveat against dealings has long been conceived of as "a statutory injunction to keep the property *in statu quo* until [the caveator's] title shall have been fully investigated"[129], and, although that conception has been criticised[130], it serves only to emphasise that a person may reasonably lodge and maintain a caveat although investigation reveals that he or she lacked an interest. True it is that, ordinarily, the price of a *quia timet* injunction is an undertaking as to damages, and that such an undertaking is ordinarily enforceable regardless of whether the claimant had an honest belief on the basis of reasonable grounds in the strength of his or her cause[131]. But the more limited protection afforded by s 74P(1) of the *Real Property Act* against the financial consequences of a misdirected caveat may readily be explained on the basis that the holder of an unregistered interest in land under the Torrens system is more vulnerable to inconsistent dealings[132],

---

128 See, in a different context, *New South Wales v Taylor* (2001) 204 CLR 461 at 464-465 [4] per Gleeson CJ, McHugh and Hayne JJ.

129 *Collins v Featherstone* (1889) 10 LR (NSW) Eq 192 at 193 per Owen CJ in Eq. See also *Barry v Heider* (1914) 19 CLR 197 at 221 per Isaacs J; *Hall v Richards* (1961) 108 CLR 84 at 92 per Kitto J (Dixon CJ and Windeyer J agreeing at 86, 105); *Eng Mee Yong v Letchumanan* [1980] AC 331 at 337-338 per Lord Diplock for the Privy Council; *Black v Garnock* (2007) 230 CLR 438 at 442-443 [8] per Gummow and Hayne JJ, 475 [104] per Crennan J.

130 See, eg, *Holt v Anchorage Management Ltd* [1987] 1 NZLR 108 at 116 per McMullin J, 118-120 per Somers J, 122-124 per Casey J.

131 See *Smith v Day* (1882) 21 Ch D 421 at 424-425 per Jessel MR, 427-428 per Brett LJ, 429 per Cotton LJ.

132 See *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ.

and so permitted reasonably to lodge and maintain a caveat without incurring liability to pay compensation, at least unless and until a lapsing notice is served and extension sought under ss 74J and 74K of the *Real Property Act*[133]. As Kirby P observed in effect in *Beca Developments*[134], if it were otherwise, s 74P(1) would have an undesirable chilling effect on the proper lodgement of caveats that are honestly and reasonably believed to be necessary to protect legitimate interests; and, given the ready capacity of a claimant to have an unwarranted caveat discharged pursuant to s 74J or s 74MA of the *Real Property Act*, it is unlikely that Parliament intended that s 74P(1) should prevent the lodgement of caveats honestly and reasonably believed to be valid. Furthermore, the fact that the New South Wales Parliament enacted s 74P(1) in relevantly the same terms as the former s 98 of the *Real Property Act*, after s 98 had been construed in *Bedford Properties* as requiring no more than an honest belief based on reasonable grounds, provides "a valuable presumption as to the meaning of the language employed"[135].

---

133 See *Martyn v Glennan* [1979] 2 NSWLR 234 at 242 per Waddell J; *Beca Developments* (1990) 21 NSWLR 459 at 478 per Waddell A-JA.

134 (1990) 21 NSWLR 459 at 463.

135 *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159 at 174 per Dixon, Williams and Webb JJ. See and compare *Flaherty v Girgis* (1987) 162 CLR 574 at 594 per Mason A-CJ, Wilson and Dawson JJ; *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 496 [3], 502-503 [15]-[16] per French CJ, Hayne, Kiefel, Gageler and Keane JJ; *Brisbane City Council v Amos* (2019) 93 ALJR 977 at 986 [24] per Kiefel CJ and Edelman J, 990 [45] per Gageler J, 991 [48] per Keane J, 992 [55] per Nettle J; 372 ALR 366 at 374, 380, 381, 382. See also Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 141-144 [3.48]-[3.49].

114 The *Beca Developments* test has been substantially followed in New South Wales[136] and by intermediate appellate courts in other States[137], and nothing which Mr Boensch has submitted in this matter gives cause to depart from it. It is, however, unnecessary to determine whether, if that test is not satisfied, a person may ever be liable under s 74P(1) of the *Real Property Act* by reason of acting with an ulterior motive[138] or where the only interest supporting a caveat is *de minimis* in terms of legal content or economic value[139]. It was neither suggested that Mr Pascoe acted for an ulterior purpose nor demonstrated that his equitable estate was *de minimis*, even after accounting for the rights under the Boensch Trust.

115 Finally, contrary to Mr Boensch's suggestion, Mr Pascoe did not "claim" any "inconsistent interests" by justifying his lodgement and maintenance of the

---

136 See *Natuna Pty Ltd v Cook* [2007] NSWSC 121 at [195] per Biscoe A-J, quoted with approval in *Mahendran* (2013) 17 BPR 32,733 at 32,739-32,740 [52] per Barrett JA (Emmett and Gleeson JJA agreeing at 32,740 [59], 32,741 [60]); *New Galaxy Investments Pty Ltd v Thomson* (2017) 18 BPR 36,811 at 36,815 [7], 36,816 [17] per Basten JA, 36,870 [324]-[325] per Sackville A-JA (Gleeson JA agreeing at 36,834 [121]).

137 See, eg, *Bolton v Excell* (1993) ANZ Conv R 562 at 564 per Owen J (Ipp J agreeing); *Edmonds v Donovan* (2005) 12 VR 513 at 548 [91] per Phillips JA (Winneke P and Charles JA agreeing at 516 [2], [3]); *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* (2007) 35 WAR 27 at 43 [49] per Pullin JA, 48-49 [80]-[81] per Buss JA. See also *Farvet Pty Ltd v Frost* [1997] 2 Qd R 39 at 45-46 per Demack J; *Quarmby v Oakley* [2015] TASFC 11 at [11]-[13] per Porter J; *Renshaw v Queensland Mining Corporation Ltd [No 2]* [2016] FCA 1482 at [94] per Katzmann J.

138 See *Young v Rydalmere* [1964-5] NSWR 1001 at 1014 per Macfarlan J; cf *Beca Developments* (1990) 21 NSWLR 459 at 475 per Clarke JA, 479 per Waddell A-JA. See also *Kuper v Keywest Constructions Pty Ltd* (1990) 3 WAR 419 at 434 per Malcolm CJ (Pidgeon and Seaman JJ agreeing at 437); *Commonwealth Bank of Australia v Baranyay* [1993] 1 VR 589 at 600 per Hayne J; *Brogue Tableau* (2007) 35 WAR 27 at 49 [83]-[84] per Buss JA.

139 See and compare *Commissioner of the Australian Federal Police v Hart* (2018) 262 CLR 76 at 106 [92] per Gordon J (Kiefel CJ, Bell, Gageler and Edelman JJ agreeing at 82 [2]).

caveat on the basis of his alternative beliefs that the Boensch Trust was void and that, were it not, Mr Boensch would enjoy a right of indemnity[140].

Conclusion and orders

116 For the reasons earlier stated, there is no reason to doubt that, upon the making of the sequestration order, the Rydalmere property vested in equity in Mr Pascoe by reason of Mr Boensch's right of indemnity and, therefore, that Mr Pascoe had a caveatable interest in the property. Nor is there any reason to doubt that Mr Pascoe honestly believed on reasonable grounds that the property so vested, either on the basis that the trust was void or on the basis of Mr Boensch's right of indemnity. On the facts as found, Mr Pascoe did not lodge or refuse to withdraw the caveat without reasonable cause.

117 It follows that the appeal should be dismissed with costs.

---

140 See also *New South Wales v Taylor* (2001) 204 CLR 461 at 467 [14] per Gleeson CJ, McHugh and Hayne JJ.