HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HSBY PTY LIMITED ACN 151 894 049**
Plaintiff

and

GEOFFREY LEWIS
First Defendant

THE FEDERAL COURT OF AUSTRALIA AND THE JUDGES THEREOF
Second Defendants

FIRST DEFENDANT'S SUBMISSIONS

Part I: Certification for internet publication.

1. The first defendant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Concise statement of the issues.

2. The issue for determination in these proceedings is whether the Full Court of the Federal Court (**Full Court**) in *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303; [2023] FCAFC 109 (**Judgment** or **J[#]**)[1] was correct or erred in holding that it did not have jurisdiction to hear the appeal before it.

3. The plaintiff contends that s 7(5) of the *Jurisdiction of Courts (Cross-Vesting) Act* 1987 (Cth) (**Cross-Vesting Act**) directed the appeal from a decision of the Supreme Court be taken to the Full Court because a matter arising for determination in the

[1] Court Book (**CB**) at 430.

appeal was a matter arising under the *Bankruptcy Act* 1966 (Cth), an Act listed in the Schedule of the *Cross-Vesting Act*.[2]

4. The first defendant contends that the Full Court was correct to hold that it did not have jurisdiction to hear the relevant appeal because s 7(5) only applies to an appeal from a decision of a single judge of a Supreme Court made in the exercise of cross-vested jurisdiction. The first defendant also supports the decision of the Full Court on the reading of s 7(5) set out at [46] to [54] below.

Part III: Certification in relation to compliance with 78B of *the Judiciary Act* 1903 (Cth)

5. The first defendant certifies that it has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth) (**Judiciary Act**). The plaintiff gave such notices on 11 September 2023.[3] However, those notices only identified the fact of this Court's jurisdiction under s 75(v) of the Constitution to determine the plaintiff's application, not the constitutional issue which the Attorney-General for the Commonwealth (**the Attorney-General**) contends arises under s 7(3) of the *Cross-Vesting Act*.[4]

6. On 22 November 2023, The Court ordered a timetable for the filing and serving of: an agreed statement of facts, a court book, submissions and a book of authorities. That timetable made no reference to interveners.[5] On 22 February 2024 (14 days after the filing of the plaintiff's submissions), the Attorney-General filed and served a Notice of Intervention under s 78B and written submissions. These submissions respond to the submissions of the plaintiff and the Attorney-General.

Part IV: A statement of any material facts set out in plaintiff's narrative or chronology that are contested.

7. A Statement of Agreed Facts is at CB page 54.

8. The Plaintiff submits (at [14]) that the primary judge "granted leave" to the first defendant (Geoffrey Lewis) to advance a defence under s153(2)(b) of the *Bankruptcy Act* 1966 (Cth) (**Bankruptcy Act**). The first defendant does not accept that

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[2] Plaintiff submissions at [2] to [4].
[3] CB at 46.
[4] A-G submissions, fn. 1.
[5] CB at 51.

characterisation. His Honour did not couch his ruling in those terms and did not use the term "leave". This matter is dealt with at [19] of the Statement of Agreed Facts: CB at 56[19].

Part V: A statement of argument in answer to the argument of the plaintiff and Attorney-General (intervener).

The scope and objects of the *Cross-Vesting Act* found in the extrinsic materials and Preamble.

9. The Full Court summarises the statutory purposes of the *Cross-Vesting Act* at [20] and [30] of its judgment and notes, at [30], that: "Its purposes (as set out, for example, in the Preamble) do not include more far-reaching reform of the respective court systems."

10. The Explanatory Memorandum also summarises the statutory purposes at [2] to [7] and states (at [8]) that:

> "Provision is made in the Bill (Clauses 3, 6 and 7) to recognise the special role of the Federal Court in matters in which it now has, apart from the jurisdiction of the High Court, exclusive original or appellate jurisdiction…"; (Emphasis added)

11. The Explanatory Memorandum also says at [20] that, but for clause 7 (now, section 7) the full cross-vesting of Federal and State jurisdiction between the relevant courts at the appellate level could result in appeals being taken, inter alia:

(a) from a single judge of a State Supreme Court to the Full Federal Court; and

(b) from a single judge of the Federal Court to a Full Supreme Court

in matters that, *apart from the cross-vesting legislation*, would be entirely outside of the jurisdiction of those appeal courts. It further says that:

> "Clause 7 is designed to prevent the cross-vesting from giving rise to any such appeals except where a matter in the appeal from a single judge of a State Supreme Court is a matter arising under a Commonwealth Act specified in the Schedule to the Bill. In such a case, the whole appeal will lie only to the Full

Federal Court. The scheduled Acts are Acts, such as the *Bankruptcy Act* 1966 and the *Commonwealth Electoral* Act 1918, under which the Full Federal Court now has exclusive appellate jurisdiction." (Emphasis added)

The Second Reading Speech

12. Similarly, in his Second Reading Speech, the Attorney General, Mr Bowen, said the following:

> "… The Bill will not detract from the existing jurisdiction of the [Federal, State and Territory courts …];"[6]
>
> "…Provision is made in the Bill to recognise the special role of the Federal Court in matters in which it now has, apart from the jurisdiction of the High Court, exclusive original or appellate jurisdiction …[7]; and
>
> "…The special role of the Federal Court is also recognised in relation to appeal matters which presently lie within the exclusive appellate jurisdiction of the Federal Court. The Schedule to the Bill lists certain Acts such as the *Bankruptcy Act* 1966 and the *Commonwealth Electoral Act* 1919. Appeals in matters under the listed Acts will remain within the exclusive appellate jurisdiction of the Full Federal Court."[8] (Emphasis added).

13. Thus the Explanatory Memorandum and the Second Reading Speech make it clear that s 7(5) of the *Cross-Vesting Act* was only intended to protect the *existing* exclusive appellate jurisdiction of the Federal Court from being diluted by cross-vesting.[9] Section 7(5) was *not* intended to erode the appellate jurisdiction of State Supreme Courts.

The Preamble

14. Similarly, Preamble (a), says it is desirable to establish a system of cross-vesting "…without detracting from the existing jurisdiction of any court". (emphasis added)

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[6] Commonwealth House of Representatives, Parliamentary Debates (Hansard), 22 October 1986 at 2555.20
[7] Hansard at 2556.20 (second column)
[8] Hansard at 2556.60 (second column)
[9] J[37]; CB at 443

15. The plaintiff submits (at [58]) tha[10]t a preamble cannot cut down clear and unambiguous operative provisions and cites Gibbs CJ in *Wacando v Cth* [1981] HCA 60; (1981) 148 CLR 1 at 15 – 16 to that effect. However, in *Wacando* (at [23]), Mason J said that a court can obtain assistance from a preamble to ascertain the meaning of an operative provision. His Honour said: "The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object."

The pre-existing regime of federal jurisdiction conferred by s 39(2) of the *Judiciary Act*.

16. The Full Court also considered the pre-existing regime of federal jurisdiction conferred on State courts by s 39(2) of the *Judiciary Act*.[11]

17. In that regard, the Full Court noted (correctly, it is submitted) that, prior to the enactment of the *Cross-Vesting Act:*

    (a) State courts had original *and appellate* jurisdiction in federal matters pursuant to s 39(2) of the *Judiciary Act*: see *Ah Yick v Lehmert* [1905] HCA 22; (1905) 2 CLR 593[12];

    (b) federal cases (at first instance and on appeal) became part of the normal flow of business in State courts and usually did not even need to be consciously identified as such;[13]

    (c) a case like the present one, (involving a matter "arising under" the *Bankruptcy Act* but not "jurisdiction in bankruptcy") would have been heard in the relevant State Supreme Court pursuant to s 39(2) and any appeal would have proceeded to the State's appeal court pursuant to s 39(2);[14] and

    (d) the Federal Court did not have broad jurisdiction in matters arising under the laws of the Commonwealth that is now found in s 39B(1A)(c) of the *Judiciary*

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11 J[32] - [36]; CB at 441 - 443.
12 J[32]; CB at 441.
13 J[32]; CB at 441
14 J[35]; CB at 442.

Act. As a consequence, it would not have seen an estate matter like the present one either at first instance or on appeal.[15]

18. In that context, the Full Court noted that:

> "…if read literally, s 7(5) effected an implied partial repeal of s 39(2) and a fundamental change in the allocation of jurisdiction in respect of 'matter[s] arising under' any of the Acts listed in the Schedule to the *Cross-Vesting Act* …"[16]

19. The Attorney-General accepts that, if interpreted literally, s 7(5) *expanded* the category of appeals (arising under the Scheduled Acts) required to be instituted and determined in the Full Federal Courts rather than State appeal courts.[17] The Attorney-General gives, as an example, the *Bankruptcy Act* which, when the *Cross-Vesting Act* was enacted, conferred exclusive appellate jurisdiction "in bankruptcy" on the Federal Court: see s 38. However, as noted above (at [17(c)]), when a single judge of a Supreme Court decided a matter "arising under" the *Bankruptcy Act* (so the source of jurisdiction was s 39(2) of the *Judiciary Act*) any appeal went to the relevant State appeal court under s 39(2). The Attorney-General accepts that, if read literally, s 7(5) would now require that appeal be instituted and determined in a Full Federal Court.[18] The Attorney-General makes a similar point in relation to the *Family Law Act* 1975 (Cth).[19]

20. The Attorney-General submits that a literal reading of s 7(5) only creates a minor expansion of the appellate jurisdiction of the Federal Courts. He says that it makes s 7(5) "slightly over-inclusive" when compared with the exclusive appellate jurisdiction that the Scheduled Acts previously conferred upon Federal Courts.[20] However, the *Bankruptcy Act* is a substantial Act which crops up in a wide range of appeals. The Attorney-General's submissions also note that, before the enactment of the *Cross-Vesting Act*, at least some decisions of single judges of Supreme Courts arising under

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[15] J[36]: CB at 442
[16] J[36]; CB at 442.
[17] A-G submissions at [32]
[18] A-G submissions at [32]
[19] A-G submissions at [33]
[20] A-G submissions at [34]

every Scheduled Act (except one), which were made in the exercise of s 39(2) jurisdiction, were taken to a State *appeal* court also exercising s 39(2) jurisdiction.[21]

21. Thus, if s 7(5) is given a literal interpretation, the potential expansion of the appellate jurisdiction of the Full Federal Courts (and diminution of the appellate jurisdiction of State appeal courts) was and is large.

22. It is also worth noting that s 7(5) operates if just *one* "matter for determination" agitated in the appeal "arises under an Act specified in the Schedule"[22]. That means that other matters for determination on appeal (whether they arise under Federal Acts not listed in the Schedule or under *State law*) must *also* be heard by a Full Federal Court. Thus, appeals to which s 7(5) applies have the potential to pick up and carry along with them many matters which State appeal courts would normally hear and determine. That is another reason why s 7(5) should be interpreted as narrowly as possible rather than be given the expansive interpretation for which the plaintiff and Attorney-General contend.

23. The plaintiff submits (at [62]) that, as a matter of "legal theory", s 7(5) of the *Cross-Vesting Act* does not revoke the s 39(2) appellate jurisdiction of State appeal courts but imposes an obligation on State appeal courts as to the way in which their s 39(2) appellate jurisdiction is to be exercised. The Attorney-General makes a similar submission (at [25] and [27]). They both refer to the judgment of Leeming JA in 2 *Elizabeth Bay Road Pty Limited v The Owners-Strata Plan No 739* (2014) 88 NSWLR 488; [2014] NSWCA 409 at [91]. However, in that case, Leeming JA only refers to ss 7(7) and (8) of the *Cross-Vesting Act* which confer jurisdiction on State appeal courts when one of two narrowly confined events occur. In *Eberstaller v Poulos* (2014) 87 NSWLR 394; [2014] NSWCA 211 (**Eberstaller**), the Court (Beazley P, Meagher and Leeming JJA) said that ss 7(7) was "in truth, a limited investment of jurisdiction to hear and determine certain appeals." However, the Court found that s 7(5) applied and dismissed the husband's appeal "for want of jurisdiction"[23] and because the husband had "wrongly invoked this court's jurisdiction".[24]

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[21] A-G submissions at [32] and fn 34.
[22] J[28]; CB at 440.
[23] at [28].
[24] at [33].

24. The Attorney-General submits that s 7(5) serves the procedural function of "channelling" appeals to certain Federal appeal courts.[25] However, the Attorney-General is effectively redefining a problem to make it go away. Section 7(5) says that the appeal proceedings referred to in s 7(5) "shall be instituted only in, and shall be determined only by …" the relevant Federal Full Court. In *Eberstaller*, the Court said those words were *not* merely "procedural or directory" and cannot be "sidestepped" by invoking s 7(7).[26] Thus s 7(5) does not provide a Supreme Court channel through which an appeal pass. Indeed, in *Eberstaller*, the Court held that it had no power to transfer to the Federal Court a matter which wrongly invoked the jurisdiction of the Court (and to which s 7(7) and (8) did not apply).[27]

25. The Attorney-General also submits that s 7(5) does not "diminish" the jurisdiction of State appeal courts.[28] However, even if this Court (contrary to these submissions) accepts the Attorney-General's argument that s 7(5) only *regulates* jurisdiction[29], such regulation surely diminishes jurisdiction. It *at least* imposes limits and restraints upon jurisdiction and thereby effects an implied partial repeal of s 39(2) of the *Judiciary Act* in relation to the Scheduled Acts.[30]

26. The plaintiff submits (at [50] and [51]) that ss 7(3) and (5) does not include any *express* statement that they are concerned with "jurisdiction", unlike certain other sections of the *Cross-Vesting Act*. The Attorney-General makes a similar submission (at [22]). However, whether a statutory provision repeals or limits "jurisdiction" does not depend upon whether that specific word is used. It depends upon the effect of the provision. There are many statutory provisions which deny a court jurisdiction without using that expressed term.

27. In conclusion, the literal interpretation of s 7(5) that the plaintiff and Attorney-General advance would impliedly repeal the jurisdiction that State *appeal* courts had, prior to the enactment of the *Cross-Vesting Act*, to hear and determine appeals where s 39(2) of the *Judiciary Act* conferred jurisdiction upon them[31] and the Scheduled Acts had not withdrawn that jurisdiction by granting exclusive appellate jurisdiction to a Full

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[25] A-G submissions at [25].
[26] at [27]
[27] at [28]
[28] A-G submissions at [27]
[29] A-G submissions at [22]
[30] Cf the A-G submissions at [42(a)]
[31] J[33]; CB at 442.

Federal Court. Section 7(5) involves a transfer of jurisdiction to the Full Federal Courts that is not merely regulatory or procedural.

28. A major statutory purpose of the *Cross-Vesting Act* is to protect the exclusive appellate jurisdiction of the Federal Court *without* detracting from the existing jurisdiction of any court: see [9] to [15] above. Such an implied repeal would conflict with that statutory purpose.

29. In *Shergold v Tanner* [2002] HCA 19 at [32]; (2002) 209 CLR 126 (**Shergold**), the Court (Gleeson CJ; McHugh, Gummow, Kirby and Hayne JJ) said that: "a law of the Commonwealth is not to be interpreted as withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakably."[32] (Emphasis added)

30. The Court said that this reflected the general proposition, stated by Gaudron J in *Saraswati v The Queen* [1991] HCA 21 at [17]; (1991) 172 CLR 1, that:

> "It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision of a law of the Commonwealth unless an intention to that effect is necessary to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other: see *Butler v Attorney General* (Vict) [1961] HCA 32; (1961) 106 CLR 268 at 276 per Fullagar J; 290 per Windeyer J."[33]

31. In *Shergold*, the Court had to decide whether a provision of the *Freedom of Information Act* 1982 (Cth) (**the FOI Act**) withdrew or limited a right to obtain judicial review from the Federal Court of a decision under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (**the ADJR Act**). The Court held it did not. The Court came to that conclusion after giving significant weight to the fact that the later Act (the FOI Act) did not "*in terms*" amend the operation of the earlier Act (the ADJR Act).[34]

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[32] See also DC Pearce, *Statutory Interpretation in Australia* (10th ed) at 5.59
[33] at [34]
[34] at [28].

32. Similarly, the *Cross-Vesting Act* does not "in terms" amend the operation of s 39(2) of the *Judiciary Act*. Indeed, there is no reference in the *Cross-Vesting Act* to s 39(2) or vice versa.

33. Further, *Shergold* does not require that there has been a complete repeal of jurisdiction for the presumption to apply. It applies where jurisdiction has been "limited" in some way. Indeed, as Gaudron J pointed out, it is enough if an earlier statutory provision (not necessarily about jurisdiction) is "altered or derogated from" in some way. It is clear that, if read literally, s 7(5), at the least, significantly limits the appellate operation of s 39(2) of the *Judiciary Act*, particularly in relation to the *Bankruptcy Act*.

34. The presumption in *Shergold* is a very strong one. What heightens it further in the present case is that a major statutory purpose of the *Cross-Vesting Act* (found in the Preamble and extrinsic materials) is to ensure that cross-vesting does not derogate from the jurisdiction of any court: see [9] to [15] above.

35. Another presumption of statutory construction that assists the first defendant is the presumption that the investment of a court with jurisdiction is intended to include all the procedures of the court: *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560; [1956] HCA 22 at [7]). In the present case, the plaintiff does not dispute that the primary judge in the NSW Supreme Court was exercising jurisdiction pursuant to s 39(2) of the *Judiciary Act*.[35] However, it argues that s 7(5) requires that any appeal be taken to the Federal Court. That transfer between courts would be contrary to the presumption referred to above.

The Submissions of the Attorney-General on ss 7(3) and (5) of the *Cross-Vesting Act*

Section 7(3) of the *Cross-Vesting Act*

36. The Attorney-General submits that s 7(3) should be given a *non*-literal interpretation[36] and s 7(5) should be given a literal interpretation.[37] He submits that the purpose of s 7(3) of the *Cross-Vesting Act* is to stipulate that appeals from single judges of State Supreme Courts (*which do not involve a matter arising under a Scheduled Act but do involve Federal jurisdiction under s 39(2) of the Judiciary Act*) are to be instituted in

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[35] Plaintiff submissions at [23]
[36] A-G submissions at [14]
[37] A-G submissions at [34]

and determined only by the relevant *State* appeal court.[38] The Attorney-General submits that: "In that way, save in the case of appeals arising under a scheduled Act, [s 7(3)] keeps appeals within a single court."[39]

37. Thus, in effect, the Attorney General interprets s 7(3) as ensuring that State appeal courts *can* exercise their jurisdiction under s 39(2) when the matter for determination does *not* arise under a Scheduled Act, but interprets s 7(5) as ensuring that State appeal Courts *cannot* exercise their jurisdiction under s 39(2) when the matter *does* arise under a Scheduled Act.

38. However, there is no sound reason for keeping first-instance decisions and appeals made pursuant to s 39(2) of the *Judiciary Act* "within a single court" when they *do not* arise under a Scheduled Act (per s 7(3)), but splitting them between State and Federal Courts when they do (per s 7(5)). That distinction derogates from the jurisdiction of State Supreme Courts without protecting the exclusive jurisdiction of Federal Courts. That cannot be what Federal Parliament intended.

Section 7(5) of the *Cross-Vesting Act*

39. The central finding of the Full Court is that s 7(5):

> "… is only to prevent the cross-vesting of additional jurisdiction to State courts from eroding areas in which the Federal Court already has exclusive appellate jurisdiction …".[40] (Emphasis added).

40. It naturally flows from that finding (and the other matters raised in these submissions) that ss 7(3) and (5) were not intended to deprive State *appeal* courts of their jurisdiction to determine matters arising under the Scheduled Acts if their jurisdiction derives from s 39(2) of the *Judiciary Act.* Thus s 7(5) does not apply to a case like the present one where the primary judge determined the relevant matter in the exercise of his s 39(2) jurisdiction and the appeal would have been heard, in the normal course, by the NSW Court of Appeal exercising s 39(2) jurisdiction. The decision of the Full Court in the present case was correct.

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[38] A-G submissions at [23] and [24]
[39] A-G submissions at [23]
[40] J[41]; CB at 445.

41. The Attorney-General has, inter alia, criticised the formula which the Full Court used when interpreting s 7(5). The Full Court said that s 7(5) "… applies only to an appeal from a decision [of a single judge of a Supreme Court] made in the exercise of cross-vested jurisdiction." [41]

42. The Attorney-General submits (at [35] to [40]) that, just before the *Cross-Vesting Act* was enacted, the Full Federal Courts often had exclusive jurisdiction (under the Scheduled Acts) to hear *appeals* from decisions of single judges of State Supreme Courts made pursuant to a specific conferral of jurisdiction or s 39(2) of the *Judiciary Act*. He says a purpose of s 7(5) was to stop s 4(1) being used to divert those appeals to State appeal courts. The Attorney-General argues that the Full Court's interpretation disables s 7(5) in those cases. That is because, in those cases, single judges of Supreme Courts have never exercised cross-vested jurisdiction. Therefore, appeals from decisions of those single judges could be diverted to State appeal courts.[42]

43. The Attorney-General submits that the Full Court appears to have overlooked the fact that, at the time when the *Cross-Vesting Act* was enacted, the Federal Court's appellate jurisdiction did not correspond with the scope of its original jurisdiction.[43] The first defendant does not accept that characterisation. The Full Court obviously had in mind the structure of the Federal Court prior to the enactment of the *Cross-Vesting Act*. Indeed, it noted that structure in its judgment.[44] Rather, it focused on the danger of appeals from decisions of single judges of the Supreme Court, made in the exercise of *original cross-vested* jurisdiction, being heard in State appeal courts rather than Full Federal Courts and, in that way, eroding the exclusive jurisdiction of the Full Federal Courts. That was all the Full Court needed to focus on to resolve the matter before it. In the present case (where the primary judge exercised s 39(2) jurisdiction under the *Bankruptcy Act*), the *Bankruptcy Act* did not give the Federal Court exclusive appellate jurisdiction.

44. The Full Court held that s 7 (3) has to be read down to avoid unnecessary overlap with s 39(2) of the *Judiciary Act*.[45] The Attorney-General disagrees. He submits that the purpose of s 7(3) is to ensure that all appeals (unrelated to the Scheduled Acts), where

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[41] J[41]; CB at 445.
[42] It is not clear that Federal Parliament was concerned that s 4(1) would disrupt such a well-settled regime.
[43] A-G submissions at [28].
[44] J[36].
[45] J(33) and (38(b))

State appeal courts exercise jurisdiction under s 39(2) of the *Judiciary Act,* are only heard in those State appeal courts "notwithstanding the parallel appellate jurisdiction of federal courts conferred by s 4(2) of the *Cross-Vesting Act.*" However, it is difficult to see how the cross-vesting of jurisdiction from a Supreme Court "*of a Territory*" to Full Federal Courts (under s 4 (2)) gives Federal Full Courts parallel jurisdiction under s 39(2) of the *Judiciary Act* with *State* courts of appeal.

45. However, as mentioned above, the Attorney-General also contends that s 7(5) was designed to preserve the regime of exclusive Federal appellate jurisdiction already in place when the *Cross-Vesting Act* was enacted and the interpretation of the Full Court does not deal with that.

46. If the Court sees force in that argument, ss 7(3) and (5) should be given a broader interpretation which focuses upon appellate (rather than first-instance) jurisdiction and still affirms the decision of the Full Court. That broader interpretation has already been stated above: at [40]. It is that ss 7(3) and (5) were not intended to deprive State *appeal* courts of their jurisdiction to determine matters arising under the Scheduled Acts when their jurisdiction derives from s 39(2) of the *Judiciary Act.*

47. Thus, *for example*, in s 7(5), the phrase "a matter arising under an Act specified in the Schedule" could be read as not applying to a matter which the Full Court of the Supreme Court of a State or Territory can hear and determine in the exercise of jurisdiction under s 39(2) of the *Judiciary Act*.

48. The same phrase in s 7(3) could be given similar effect. It could (noting the impact of the phrase "other than") also be read as not applying to matters which the Full Court of a State or Territory can hear and determine in the exercise of jurisdiction under s 39(2) of the *Judiciary Act*.

49. The above interpretations: (i) focus upon the *appellate* jurisdiction of State Supreme Courts and Federal Courts; (ii) protect the s 39(2) *appellate* jurisdiction of the State Supreme Courts in relation to the Scheduled Acts, and (iii) do not make the operation of s 7(5) contingent on the judge at first instance having exercising *cross-vested* jurisdiction.

50. However, most importantly, if interpreted in this way, ss 7(3) and (5) ensure that Full Federal Courts will hear *all* appeals (arising under a Scheduled Act) within the *exclusive* jurisdiction of the Full Federal Courts. Section 7(5) will still require that all

such appeals be heard in the Full Federal Courts. However, if a Scheduled Act has not conferred exclusive appellate jurisdiction on a Full Federal Court (and State appeal courts have therefore retained their s 39(2) jurisdiction), then s 7(5) will not apply.

51. Those interpretations of ss 7(3) and (5) promote two major statutory purposes of the *Cross-Vesting Act*. Namely, they protect: (a) the exclusive appellate jurisdiction of the Full Federal Courts under the Scheduled Acts; and (b) the jurisdiction of State appeal courts under s 39(2). The interpretation of s 7(5) would also dovetail neatly with the Attorney-General's suggested interpretation of s 7(3)[46] The Attorney-General submits that s 7(3) is intended to ensure that State appeal courts *can* exercised their s 39(2) jurisdiction when a matter for determination does *not* arise under a Scheduled Act. The interpretation of s 7(5) above would ensure that State appeal courts *can also* exercise their s 39(2) jurisdiction when a matter *does* arise under a Scheduled Act.

52. The interpretations of ss 7(3) and (5) above are consistent with the findings of the Full Court, the statutory purposes of the *Cross-Vesting Act* and the presumption in *Shergold*. They are more apt than the literal readings of the plaintiff and Attorney-General.

53. In *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531; 306 ALR 547 at [66] (**"Taylor"**); Gageler and Keane JJ said:

> "Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies."[47]

54. If the above broader interpretation of s 7(5) is applied in the present case, the Full Court correctly found that it did not have jurisdiction to hear the subject appeal. That is because, when the *Cross-Vesting Act* was enacted, s 39(2) of the *Judiciary Act* gave State *appeal* courts jurisdiction to hear appeals in matters arising under the *Bankruptcy Act* like the present one: see [17(c)] above. That is still the case.

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[46] A-G submissions at [16] and [23]; see also [36] to [38] above.
[47] See also *ENT19 v Minister for Home Affairs* [2023] HCA 18 (14 June 2023) at [86] and [87] (Gordon, Edelman, Steward and Gleeson JJ).

Summary of Attorney-General's submissions and the first defendant's response.

55. The Attorney-General says that a literal interpretation of s 7(5) "Somewhat expands the category of appeals required to be instituted and determined in the Federal Court".[48]

56. The Attorney-General justifies that expansion on at least two bases:

(a) the "jurisdiction" of State appeal courts is not thereby "diminished"[49]; and

(b) a literal interpretation of s 7(5) "nevertheless achieves the undisputed purpose of the provision, being preventing existing areas of exclusive appellate jurisdiction [of Federal Courts] being diluted."[50]

57. The Attorney-General also argues that the Full Court's interpretation overlooks the regime of exclusive Federal appellate jurisdiction in place when the *Cross-Vesting Act* was enacted.

58. The first defendant says that:

(a) the expansion of the category of appeals in the Federal Court is significant;

(b) it is impossible for s 7(5) to expand the category of appeals "required" to be instituted and determined in the Federal Court without, at least, also significantly diminishing the jurisdiction of State appeal courts. Indeed, that expansion constitutes an implied repeal of jurisdiction;

(c) the Attorney-General does not refer to the prerogatives of State appeal courts. The cross-vesting scheme is a reciprocal arrangement. Section 7 of the *Cross-Vesting Act* was *not* intended to diminish the jurisdiction of *State* appeal courts; and

(d) the broader construction of ss 7(3) and (5) deals with any objections to the manner in which the Full Court construed s 7(5).

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[48] A-G submissions at [32].
[49] A-G submissions at [27]
[50] A-G submissions at [34]

Other authorities in relation to s 7 of the *Cross-Vesting Act*

59. The plaintiff refers (at [31] to [42]) and the Attorney-General refers (at [43] to [44]) to other authorities which have touched upon s 7(5) of the *Cross-Vesting Act.*

60. The Full Court refers in its judgment to *Bramco Electronics Pty Ltd v AFT Electrics Pty Ltd* (2013) 86 NSWLR 115; [2013] NSWCA 392 (**Bramco**); *Boensch v Pascoe* (2016) 349 ALR 193; [2016] NSWCA 191 (**Boensch**); *Morris Finance Pty Ltd v Brown* (2017) 93 NSWLR 551; [2016] NSWCA 343 (**Morris Finance**); *Singh v Khan* [2021] NSWCA 281 (**Singh**) and *Guan v Li* (2022) 405 ALR 701; [2022] NSWCA 173 (**Guan**).

61. The plaintiff refers in its present submissions to two other authorities: *Eberstaller v Poulos* (2014) 87 NSWLR 394; [2014] NSWCA 211 (**Eberstaller**) and *Karlsson v Griffith University* (2020) 103 NSWLR 131; [2020] NSWCA 176 (**Karlsson**).

62. The plaintiff[51] and the Attorney-General[52] submit that those judgments (except for *Singh)* gave an "*ordinary and literal meaning*" to s 7(5) of the *Cross-Vesting Act.*

63. However, it is submitted that:

(a) the judgments of Brereton JA in *Singh* and the Full Court in the proceedings below are the only authorities that have considered the context and statutory purposes of the *Cross-Vesting Act.*[53]

(b) the other judgments contain only brief statements of principle[54]; and

(c) *Boensch, Morris Finance, Eberstaller* and *Karlsson* were all cases where the Full Federal Courts had exclusive appellate jurisdiction in relation to the relevant matters for determination. Therefore, the application of s 7(5) to the relevant matters was not really in contest and the judges did not need to turn their minds to the issues raised in *Singh* and before the Full Court. Further, in *Guan* the Court did not need to interpret s 7(5) of the *Cross-Vesting Act.*[55]

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[51] Plaintiff submissions at [39]
[52] A-G submissions at [43]
[53] J[51]; CB at 448.
[54] J[51]; CB at 449.
[55] J[51]; CB at 448.

64. In relation to the above authorities, it is also noted that:

(a) the only two authorities which concern the *Bankruptcy Act* are *Boensch* (2016) and *Morris Finance Pty Ltd* (2017). In both cases, it is submitted, the primary judges exercised jurisdiction "in bankruptcy" and the proceedings were therefore within the exclusive appellate jurisdiction of the Federal Court.[56] Certainly, in both cases the relevant trustee in bankruptcy was a party to the proceedings. In *Boensch* the central issue on appeal was whether a trustee in bankruptcy of a registered proprietor of land had reasonable grounds to lodge a caveat over that land. The primary judge held that the trustee had a caveatable interest as a consequence of s 58(1)(a) of the *Bankruptcy Act* (which vested the property in the trustee). See Leeming JA at [2] to [9]. In *Morris Finance*, the primary judge determined that leave to proceed was needed (pursuant to s 58(3) of the *Bankruptcy Act*) with respect to a provable debt. Payne JA noted that the trustee in bankruptcy was a party to the proceedings and claimed the subject property. Thus, the proceedings would affect the "divisible property of the bankrupt estate": see Payne JA at [39], [40], [43] and [44].

As mentioned, proceedings "in bankruptcy" would normally be heard, at first instance and on appeal, in the Federal Court. Therefore, the appeal judges had no cause to question a literal reading of s 7(5). However, Payne JA clearly felt that the special role of the trustee in the litigation, and the fact that the proceedings affected "divisible property", supported his conclusion that s 7(5) applied to the appeal proceedings.

There are also decisions of State appeal courts where it was assumed that the court could deal with a matter that was *not* "in bankruptcy". Only one of those decisions - *Robert Whitton as Trustee in Bankruptcy Estate of Steven Leonard Watton v Watton* [2018] NSWCA 277 (20 November 2018) at [25] to [28] (McColl JA; Leeming JA; Sackville AJA) - mentions s 7(5) of the *Cross-Vesting Act*. The other two decisions are *Jakimowicz v Jacks* [2016] VSCA 42 (17 March 2016) (Warren CJ; Tate and Ferguson JJA) at [41] and *Moss v Eaglestone* (2011) 83 NSWLR 476. See Allsop P (as his Honour then was) at [2] (Campbell and Young JJA agreeing).

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[56] s 27(1) of the *Bankruptcy Act*.

(b) In *Eberstaller* (2014), the NSW Court of Appeal said that: "the dispute before the primary judge answered the description of a matrimonial cause within the meaning of s 4 of the *Family Law Act*." It accepted that the first-instance judge had exercised jurisdiction under s 4 of the *Cross-Vesting Act* and cited the reasoning of Brereton J in *Young v Lalic* [2006] NSWSC 18; 197 FLR 27 at [37] - [39] to that effect.[57] Thus the Court of Appeal was not confronted with a situation where it had appellate jurisdiction pursuant to s 39(2) of the *Judiciary Act.* That section was not mentioned.

(c) In *Guan v Li* [2022], the NSW Court of Appeal did not need to consider whether a matter for determination in the appeal was a matter "arising under" the *Family Law Act*[58] after the appellate withdrew the only ground of appeal which might have done so. Thus the Court of Appeal did need to test whether s 7(5) of the *Cross-Vesting Act* applied.[59]

(d) In *Karlsson* (2020), the two primary judges dealt with a claim for a trade mark infringement. The NSW Court of Appeal gave only a cursory analysis of s 7(5). That is not surprising as, it is submitted, the Federal Court had exclusive appellate jurisdiction in relation to the matter pursuant to ss 192(1) and ss 195(1) and (4) of the *Trade Marks Act* 1995 (Cth).

Orders and Costs

65. The first defendant submits that the Application should be dismissed and the plaintiff should pay the costs of the first defendant in this Court. The costs order in the Full Court should not be disturbed.

66. However, if the plaintiff is successful, the Court should order that costs be in the cause (above and below) or that each party should pay its own costs for the following reasons:

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[57] J[19].
[58] at [60] and [61]; J[51]; CB at 448.
[59] J[50]; CB at 448.

(a) the first duty of a Court is to determine whether or not it has jurisdiction.[60] Indeed, a court must satisfy itself that it has jurisdiction whether or not a party raises that issue;[61]

(b) the first defendant promptly raised, before the Full Court, a serious jurisdictional issue and the Full Court found that it did not have jurisdiction. Thus, it must be assumed, the Full Court would have raised that issue itself and asked the parties to make submissions on it. Thereafter, the first defendant was (in opposing the Application to this Court) supporting a decision of a Full Court on a question of jurisdiction;

(c) in the Federal Court, the first defendant raised the jurisdictional issue in opposition to the plaintiff's application for an extension of time to file a notice of appeal. He raised no other objections.[62] The ordinary rule is that a successful applicant for an extension of time should pay the costs of such applications, save where the opposition is wholly unreasonable, as the applicant is seeking an indulgence: see Yates J in *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 4)* [2018] FCA 74 at [5].

(d) the plaintiff claims (as assignee) the beneficial entitlement of Anthony Lewis who engaged in serious misconduct (breach of fiduciary duty) which caused severe financial damage to the deceased estate which the first defendant administers[63]. As a consequence, the sum in dispute when the primary cross-claim commence was at most $61,000.[64] A successful party may be deprived of all or part of its costs where that party engages in disentitling conduct in relation to the transaction the subject of the proceedings: Lord Justice Atkin in *Ritter v Godfrey* [1920] 2 KB 47 at 60 - 61. See also *Monier Ltd v Metalwork Tiling Company of Australia Ltd (No 2)* (1987) 43 SASR 588 where Jacobs J said that the Court was entitled to look at the "commercial morality" of the transaction

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[60] *Re Nash* [No 2] [2017] HCA 52 (6 December 2017); (2017) 263 CLR 443 (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) at [16]. See also Spigelman CJ in *Zhang v Zemin* [2010] (**Zemin**) NSWCA 255; 79 NSWLR 513 at [39]- [41].

[61] *Zemin* at [37]

[62] J[2] and [15]

[63] Plaintiff submissions at [10]. Statement of Agreed Facts at [5], [6] and [16]; CB at 55

[64] See Response at [7]; CB at 31. Reply at [7]; CB at 38.

the subject of the proceedings; see also *Piddington v Philips* (1893) 14 LR (NSW) Eq 159 at 165.

67. The first defendant also notes that the Full Court concurrently heard the plaintiff's application for an extension of time to appeal and the plaintiff's substantive appeal. [65] The hearing lasted for two days. The Full Court then ordered that the plaintiff pay the "*costs of the application*".[66] The first defendant (Respondent below) submits that the "*costs of the application*" includes the costs which the first defendant incurred opposing the substantive appeal.

68. If the plaintiff's application in this Court is successful and the matter is effectively returned to the Full Court for a determination of the substantive appeal, the parties will presumably rely upon steps already taken in the Federal Court. Those steps included the preparation of appeal books and the presentation of written and oral submissions. Therefore, if the plaintiff is successful, the Court should not make any costs orders in relation to the Federal Court proceedings. Those costs should abide any further proceedings in that Court.

Part VII: Time estimate for oral argument

69. The first defendant estimates that 1.5 hours will be required for the presentation of his oral argument.

Dated 6 March 2024

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[65] J[2] at CB 434.
[66] J(Orders) at CB 433.

ANNEXURE

PRACTICE DIRECTION NO 1 OF 2019 – APPLICABLE STATUTORY PROVISIONS

LEGISLATION	PROVISION	RELEVANT DATE	RELEVANT COMPILATION
Bankruptcy Act 1966 (Cth)	ss 27(1) and 153	2 August 2021	Compilation C89 in force from 2 August 2021 to 31 August 2021
Judiciary Act 1903 (Cth)	s 39	2 August 2021	Compilation C47 in force from 25 August 2018 to 31 August 2021
Jurisdiction of Courts (Cross-Vesting Act) 1987 (Cth)	ss 4(1), 7, Schedule	2 August 2021	Compilation C21 in force from 2 December 2016 to 31 August 2021.