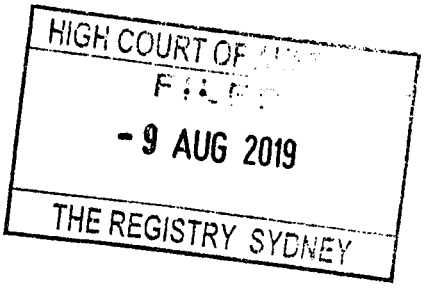
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S216 of 2019

ON APPEAL FROM THE FULL COURT
OF THE FEDERAL COURT OF AUSTRALIA



BETWEEN:

FRANZ BOENSCH AS TRUSTEE OF THE BOENSCH TRUST

Appellant

And:

SCOTT DARREN PASCOE

Respondent

APPELLANT'S SUBMISSIONS

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PART I: CERTIFICATION FOR PUBLICATION ON THE INTERNET

1. We certify that these submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF THE ISSUES ARISING ON THE APPEAL

2. Whether the legal interest held by the appellant ("Mr Boensch") in 255 Victoria Road, Rydalmere ("Rydalmere") as trustee of the Boensch Trust vested in the respondent ("Mr Pascoe") as the trustee in bankruptcy of Mr Boensch on the sequestration of the estate of Mr Boensch on 23 August 2005 by force of s. 58(1)(a) of the *Bankruptcy Act 1966*?

3. Whether an equitable interest in Rydalmere referable to an unsatisfied right of indemnity of Mr Boensch as a trustee vested in Mr Pascoe under s. 58(1)(a) of the *Bankruptcy Act*?

4. If 'Yes' to (1) or (2), whether that interest constituted a legal or equitable estate in Rydalmere (and hence, constituted a "caveatable interest") within the meaning of s. 74F(1) of the *Real Property Act 1900* for the purposes of s. 74P(1) of that Act?

5. Precisely what interest in Rydalmere did Mr Pascoe claim in the caveat that he lodged over it ("the caveat") within the meaning of s. 74F(1) of the *Real Property Act 1900*?

6. Whether the test to ascertain if a caveator has lodged a caveat over property, or failed or refused to remove it when requested to do so before it has lapsed, "without reasonable cause", in s.74P(1) of the *Real Property Act*, is an objective test qualifying (relevantly) the acts of lodgment and maintenance of the caveat, on one hand, or a subjective test of the honest belief of the caveator in the interest that he or she claimed in the caveat *and* an objective test as to whether that belief was held on reasonable grounds, on the other?

7. Whether Mr Pascoe, as caveator, *lodged* the caveat over Rydalmere on 25 August 2005 without reasonable cause within the meaning of s. 74P(1)(a) of the *Real Property Act?*

8. If Mr Pascoe lodged the caveat with reasonable cause, whether he *refused or failed to withdraw it* when requested to remove it *after* 25 August 2005 "without reasonable cause" and, if so, as from which date was his maintenance of the caveat undertaken "without reasonable cause" within the meaning of s. 74P(1)(c) of the *Real Property Act?*

PART III: CONSIDERATION OF THE ISSUE OF SECTION 78B NOTICES

9. We certify that the appellant has considered whether any notices should be given in compliance with s. 78B of the *Judiciary Act 1903* and that no such notices are necessary.

PART IV: CITATIONS TO THE JUDGMENTS IN THE COURTS BELOW

10. *Boensch as trustee of the Boensch Trust v Pascoe* [2015] NSWSC 1882 (Darke J).

11. *Boensch as trustee of the Boensch Trust v Pascoe* [2018] FCAFC 234; (2018) 16 ABC(NS) 365; (2018) 365 ALR 24; (2018) 133 ACSR 268.

PART V: BRIEF STATEMENT OF THE FACTS

12. In May 1999 Mr Boensch and his wife, Mrs Sabine Boensch ("Mrs Boensch"), entered a matrimonial property settlement in the Family Court. Mrs Boensch agreed to transfer her joint interest in Rydalmere to Mr Boensch for $50,000.[1] On 23 August 1999, Mr and Mrs Boensch executed a memorandum of trust ("Memorandum of Trust") which declared an express trust over Rydalmere ("Trust") for the joint benefit of their two children, Dominic and Stephanie Boensch, as its only beneficiaries. The Memorandum of Trust provided for the Trust to be confirmed at a later date by a deed to be prepared by a solicitor.[2] Their execution of the Memorandum of Trust was witnessed by a JP.[3]

13. Michael Costin obtained a judgment against Mr Boensch in July 2003 ("the judgment debt"). [The debt was not incurred as the trustee of the Trust.] In October 2003, Mr Costin served a bankruptcy notice on Mr Boensch in reliance on the judgment debt.[4]

14. On 18 March 2004 Mr and Mrs Boensch, as joint settlors of the Trust, entered a deed of trust ("the Deed of Trust") with Mr Boensch, as the trustee of the Trust. The Deed of Trust confirmed the Trust created on 23 August 1999, confirmed an estate in fee simple in Rydalmere constituted the trust property and otherwise added to the terms of the Trust.[5] The Memorandum of Trust was annexed to it as an aspect of its confirmation.[6]

15. On 21 March 2004 Mr and Mrs Boensch executed a Memorandum of Transfer of the fee simple in Rydalmere to Mr Boensch but the Transfer was not registered because the mortgagee, the State Bank of New South Wales, refused to consent to its registration.[7] The Memorandum of Trust was not stamped with *ad valorem* duty until 29 March 2004[8]

16. In July 2005 Mr Boensch lodged the Deed of Trust and Memorandum of Trust and made a request that the Registrar-General record a caveat on Rydalmere pursuant to s. 82 of *Real Property Act*.[9] In July 2005, Mr Costin filed a creditor's petition against Mr Boensch.[10] On 17 August 2005, the Registrar-General registered a caveat on Rydalmere pursuant to the request under the *Real Property Act* ("the Registrar-General's caveat").[11]

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[1] SC [11] (CAB 9); FC [16] (CAB 78)
[2] SC [12] (CAB 9); FC [17] (CAB 78); Memorandum of Trust dated 23 August 1999 (AFMB 29)
[3] SC [12] (CAB 9)
[4] SC [14] (CAB 10); FC [18] (CAB 78)
[5] SC [15] and [16] (CAB 10); FC [19] (CAB 78; Deed of Trust dated 18 March 2004 (AFMB 31)
[6] SC [17] (CAB 11); FC [19] (CAB 78); Memorandum of Trust as annexure 'A' to the Deed (AFMB 45)
[7] SC [18] (CAB 11); FC [16] and [20] (CAB 78 and 79); Memorandum of Transfer, 21 Mar 2004 (AFMB 47)
[8] SC [13] (CAB 10); stamped Deed of Trust and Memorandum of Trust (AFMB 59 and 72)
[9] SC [19] (CAB 11); Request under s. 82 of the *Real Property Act 1900* dated 12 July 2005 (AFMB 51)
[10] SC [19] (CAB 11)
[11] SC [19] ((CAB 11); FC [21] (CAB 79); Caveat by the Registrar-General dated 17 Aug 2005 (AFMB 57)

17. On 23 August 2005 a sequestration order was made against Mr Boensch's estate on the application of Mr Costin. Mr Pascoe became trustee of Mr Boensch's bankrupt estate.[12]

18. On the day of the sequestration, Mr Pascoe spoke with Ms McLean, the solicitor for Mr Costin, the petitioning creditor.[13] During this meeting there was a long discussion about a "purported trust" over Rydalmere. Mr Pascoe said that Ms McLean informed him that Mr Johnson, counsel for Mr Costin, believed that there were strong prospects of defeating the claim about a trust made by Mr Boensch or of having the Trust set aside.

19. On 23 August 2005 Mr Pascoe's assistant, Mr Moretti, undertook a title search of Rydalmere. The search disclosed that: (1) Mr and Mrs Boensch were joint registered
10 proprietors of Rydalmere; (2) the Registrar-General's caveat gave notice of the Trust.[14]

20. On 24 August 2005 Mr Boensch produced to Mr Pascoe the Memorandum of Trust and front page of the Deed of Trust. He said Rydalmere was held on trust for his children.[15]

21. On 25 August 2005 Mr Pascoe had Ms McLean lodge a caveat on Rydalmere.[16] The caveat was lodged very promptly by Mr Pascoe. In particular, he had not even received his official notification of his appointment as Mr Boensch's trustee from ITSA.[17]

22. Mr Pascoe conceded, firstly, that when the caveat was lodged by Ms McLean (Mr Costin's solicitor) he had no reason to believe one way or the other, whether Mr Boensch was insolvent when the Trust was established six years before his appointment,[18] and secondly, that there was no suggestion of any imminent transfer of title to Rydalmere.[19]

20 23. The Full Court found, firstly, that "Mr Pascoe did not claim a right of indemnity in the caveat",[20] and secondly, that "it is true that the right of indemnity is not claimed in the caveat".[21] The primary judge did not find that Mr Pascoe had any right of indemnity.[22] Mr Pascoe did not pursue any claim for a right of indemnity because he ultimately came to the view that such a right was likely to have little value to Mr Boensch's creditors.[23]

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[12] SC [20] (CAB 11); FC [21] (CAB 79); sequestration order dated 23 Aug 2005 (AFMB 113)
[13] SC [21] (CAB 12); FC [22] (CAB 79)
[14] SC [23] (CAB 12); FC [23] (CAB 79); title search, 23 Aug 2005 (AFMB 87); caveat AB617278 (AFMB 57)
[15] SC [24] (CAB 12)
[16] SC [21], [25], [26] (CAB 12, 13); FC [24], [26] (CAB 79 and 80); Caveat dated 25 Aug 2005 (AFMB 117)
[17] SC [30] (CAB 14); Certificate of Appointment of a Trustee to a Bankrupt Estate, 25 Aug 2005 (AFMB 115)
[18] SC [30] (CAB 14); FC [28] (CAB 80)
[19] SC [30] (CAB 14); FC [28] (CAB 80)
[20] FC [142] (CAB 111)
[21] FC [158] (CAB 114)
[22] FC [150] (CAB 112)
[23] SC [86] (CAB 29); FC [153] (CAB 112); Mr Pascoe's caveat AB721857 dated 25 Aug 2005 (AFMB 117)

24. On 27 September 2005 Mr Stephen Mullette, the solicitor for Mr Boensch, wrote to Mr Pascoe and requested him to remove the caveat. This was the first request as a fact.[24]

25. On 31 October 2005 Mr Mullette once again wrote to Mr Pascoe and requested that he remove the caveat.[25] This was the second request as a fact.

26. On 7 November 2005 Mr Mullette sent Mr Pascoe certified copies of the two trust documents and made the stamped originals available for inspection at his office.[26]

27. On 15 November 2005 Mr Mullette wrote to Mr Pascoe and made a further request to remove the caveat. It was the third request to remove it as a fact and the first pleaded.[27]

28. On 30 November 2005 Messrs Pascoe and Moretti attended at Mr Mullette's office and inspected the original trust documents,[28] but neither made any complaints about them.

29. On 21 February 2006 Mr Boensch sent an email to Mr Pascoe, to which he attached a signed statement answering questions asked by Mr Pascoe. The statement included details of a "mutually beneficial arrangement", under which most of Mr Boensch's living expenses were provided by the Trust, and stated that his accommodation was at the mercy of the Trust and, in return, that he provided a form of security for the Trust.[29]

30. On 22 February 2006 Mr Pascoe sent Mr Boensch a letter seeking information about this "mutually beneficial arrangement", to which Mr Boensch promptly responded.[30]

31. On 10 December 2007 Mr Malcolm Wright, who was now acting for Mr Boensch, wrote to Ms McLean, requesting removal of the caveat. This was the fourth request to remove the caveat as a fact and the second request pleaded in the Statement of Claim.[31]

32. On 18 August 2008 Mr Wright again requested removal of the caveat. This was the fifth request to remove the caveat and the third request pleaded in the Statement of Claim.[32]

33. On 25 August 2009 Ms McLean was served with a lapsing notice for the caveat. [33].

34. The caveat lapsed on about 15 September 2009.[34]

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[24] SC [37] (CAB 16); FC [36] (CAB 82); letter Argyle Partnership to Mr Pascoe, 27 Sept 2005 (AFMB 149)
[25] SC [45] (CAB 19); FC [44] (CAB 84); letter Argyle Partnership to Mr Pascoe, 31 Oct 2005 (AFMB 215)
[26] SC [46] (CAB 19); FC [45] (CAB 84); letter Argyle Partnership to Mr Pascoe, 9 Nov 2005 (AFMB 225)
[27] SC [48], [49] (CAB 19, 20); FC [48] (CAB 85); Statement of Claim [10]-[14] (AFMB 5); letter Argyle Partnership to Mr Pascoe, 15 Nov. 2005 (AFMB 251)
[28] SC [52] (CAB 20); FC [51] (CAB 85)
[29] SC [56] (CAB 21); FC [54], [143] (CAB 86, 111); email Mr Boensch to Mr Pascoe, 21 Feb 2006 (AFMB 265)
[30] SC [51] (CAB 20); FC [55] (CAB 86); letter Mr Pascoe to Mr Boensch, 22 Feb 2006 (AFMB 269)
[31] SC [71] (CAB 26); FC [68] (CAB 89); Statement of Claim [15]-[19] (AFMB 6); letter 10 Dec 07 (AFMB 293)
[32] SC [79]-[81] (CAB 27); FC [75] (CAB 90); Statement of Claim [20]-[23] (AFMB 7); letter 18 Aug 2008 (AFMB 295)
[33] SC [84] and [85] (CAB 28, 29); FC [79] (CAB 91); Notice to Caveator of Proposed Lapsing (AFMB 353)
[34] SC [88] (CAB 29); FC [82] (CAB 91)

PART VI: ARGUMENT

Issue 1: Did any trust property vest in Mr Pascoe by force of s 58(1)(a) of the Bankruptcy Act?

35. Mr Pascoe contended at trial "that upon the making of the sequestration order against Mr Boensch, his interest in the property vested forthwith in Mr Pascoe, and this was so even if Mr Boensch held the property as trustee on trust for other persons."[35] In the Full Court, he contended that "there is no question that the bankrupt has the bare legal title"[36] and "the bare legal interest of the trustee is not relevantly held on trust within the meaning of s 116(2)(a)."[37] He amplified his "bare legal title thesis" by embracing the approach taken in *Ritchie*[38] and *Lewis v Condon,*[39] which became foundations for the decision of the primary judge and the Full Court.[40] In *Lewis*, the Court of Appeal held:

> "[The trustee in bankruptcy] had a caveatable interest ... From the time the sequestration order and his appointment as trustee in bankruptcy for by dint of s. 58 of the *Bankruptcy Act (Cth)*, he was entitled to become registered proprietor. This was so irrespective of whether [the bankrupt] was the trustee of the ... Trust."[41]

36. The *ratio* of the primary judge's decision is that:

> "It follows from ... *Ritchie* and ... *Lewis v Condon* that Mr Pascoe had a caveatable interest in the Rydalmere property. He had such an interest from the time he became Mr Boensch's trustee in bankruptcy ... s. 58(1)(a) of the *Bankruptcy Act 1966* operated, in equity, to vest Mr Boensch's interest in the property (as the proprietor of an estate in fee simple) in Mr Pascoe"[42] [and] "the vesting in Mr Pascoe was itself subject to the terms of the Trust. Nonetheless, the existence of the Trust does not mean that Mr Boensch's interest did not vest to Mr Pascoe in accordance with s. 58(1)(a)."[43]

37. The primary judge found the entire fee simple, subject to the Trust, vested in Mr Pascoe, consistently with *Lewis*[44] and that "it is clear law the statutory vestings do not destroy any trust of which the bankrupt was trustee."[45] The Full Court affirmed this approach.[46] The Full Court rejected Mr Boensch's contentions, firstly, that such an approach is incorrect by reference to the proper interpretation of ss. 58(1)(a), 115, 116(1) and 116(2), and of the definitions in s. 5(1) of "property" and "the property of the bankrupt", in the *Bankruptcy Act* and, secondly, that *Ritchie* and *Lewis* should not be followed.[47]

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[35] SC [98] (CAB 33)
[36] Respondent's Submissions in the Full Federal Court at [22] (Not reproduced)
[37] Respondent's Submissions in the Full Federal Court at [24] (Not reproduced)
[38] *Official Trustee in Bankruptcy v Ritchie* (1988) 12 NSWLR 162 at 174
[39] *Lewis v Condon* (2013) 85 NSWLR 99 at [91], [92] and [100]
[40] Respondent's Submissions in the Full Federal Court at [22]-[28] (Not reproduced)
[41] SC [100] (CAB 34) (citing *Lewis v Condon* (*supra*) at [100])
[42] SC [103] (CAB 35)
[43] SC [104] (CAB 35)
[44] *Lewis v Condon* (*supra*) at [92]
[45] SC [103]-[104] (CAB 35)
[46] FC [101]-[106] (CAB 99-101)
[47] FC [96]-[100] (CAB 99) and [106] (CAB 101)

38. Two consequences follow from this. First, the subject matter of the vesting is an *entire* legal estate subject to the Trust. Secondly, the subject matter of this vesting is *not* a quantifiable (or a quantified)[48] unsatisfied right of recoupment from the Trust property. However, the law is not as stated in *Lewis* (and followed on appeal because it is "not … clearly wrong"[49]). Rather, the law is as stated in *Carter Holt Harvey Woodproducts Pty Ltd v The Cth.*,[50] where it was held that, where property is held in trust *solely* for other persons (to distinguish a trustee with a beneficial interest to the extent of an unsatisfied right of indemnity), no trust property vests in the trustee in bankruptcy of the trustee.

39. This is the law as it was argued by Mr Boensch. It relies on the line of authority and the approach to the interpretation of the *Bankruptcy Act* which he contended for below.[51] It is a reflection of "Australian bankruptcy legislation having … expressly adopted this principle by excluding from the property divisible among creditors all property held by the bankrupt for another person".[52] This "is understood to mean held on trust *solely* for another person",[53] to exclude a beneficial interest based upon a right of indemnity.

40. The approach adopted by the primary judge and the Full Court, in reliance on *Ritchie* and *Lewis v Condon*, is contrary to the proper interpretation of s. 5(1) ("property" and "the property of the bankrupt") and ss. 58(1), 115, 116(1) and (2) of the *Bankruptcy Act* and the authorities cited by Mr Boensch on appeal below.[54] The Full Court was wrong to follow *Ritchie* and *Lewis*. Subject to the resolution of Issue 2, it is contended that, firstly, the findings that: (a) in consequence of the making of the sequestration order against Mr Boensch; and (b) insofar as Rydalmere constitutes trust property of the Trust, Mr Boensch's estate in fee simple (but subject to the Trust) in Rydalmere vested in Mr Pascoe as his trustee in bankruptcy by force of s. 58(1)(a) of the *Bankruptcy Act*,[55] and, secondly, its affirmation by the Full Court,[56] were made in error and should be set aside.

Issue 2: Did a right of indemnity ever vest in Mr Pascoe by force of s 58(1)(a) Bankruptcy Act?

41. Mr Pascoe pleaded he had a right of indemnity[57] but did not particularise it. In Opening Submissions[58] (operating as his opening[59]), Mr Pascoe devoted 14 paragraphs ([98]-[110]

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[48] See *Ovtavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 364C and 372E (an indemnity for $49,750)
[49] FC [106] (CAB 101)
[50] *Carter Holt Harvey Woodproducts Pty Ltd v The Cth* [2019] HCA 20; (2015) 93 ALJR 807 at [25]-[36], [94]
[51] SC [102] (CAB 34); FC [96]-[100] (CAB 97) and FC [103]-[106] (CAB 100)
[52] *Carter Holt Harvey Woodproducts* (*supra*) at [25], citing ss. 5(1) & 116(2)(a) of the *Bankruptcy Act*
[53] *Carter Holt Harvey Woodproducts* (*supra*) at [94], citing *Octavo Investments* (*supra*) at 370
[54] FC [98]-[100] (CAB 98)
[55] SC [103]-[107] (CAB 35)
[56] FC [106] (CAB 101)
[57] Defence at [7(e)] (AFMB 14)
[58] Defendant's Outline of Opening Submissions dated 14 Sept. 2015 (AFMB 739)
[59] See Transcript p. 3 line 31 (AFMB 521) ("proceed on the basis … that I have read the written submissions")

"*Caveatable interest by reason Mr Boensch's proprietorship of the land*") to his principal case. He succeeded on that case.[60] But his alternative case occupied only one paragraph in his Opening Submissions ([111] "*Caveatable interest by reason of trustee's right of indemnity*"). He also eschewed the primary judge's invitation to open orally,[61] limiting his oral opening to a response to the plaintiff's opening on his issue estoppel case.[62] In his principal affidavit he merely sought to prove a *belief* in a *possible* right of indemnity.[63]

42. His alternative "right of indemnity" case was pitched at the level of a theoretical right of indemnity. On no view of it was there any assertion of any actual right of indemnity *as a fact* nor any attempt made to quantify any actual right of indemnity. In his written opening he referred to "... *any* liability he [Mr Boensch] incurred as trustee"; "*If* Mr Boensch had incurred liabilities ..."; "Such a proprietary interest *would have passed* to Mr Pascoe ...").

43. This purely theoretical "right of indemnity" opening explains why the primary judge, firstly, did not determine the existence of any right of indemnity *as a fact*; secondly, analysed it at the level of a mere theoretical possibility ("Mr Pascoe thought that, *even if* Mr Boensch's trust claims were valid, Mr Boensch *might* have a right of indemnity out of trust assets"); and, thirdly, analysed it solely within the context of Mr Pascoe's *honest belief in the possible existence of such a right* as being a reasonable cause for maintaining the caveat as from 29 May 2009, when he issued his insolvency report.[64]

44. The Full Court analysed a *possible* right of indemnity the very same way because that was how Mr Pascoe conducted his defence at trial *and* on his Notice of Contention.[65] It declined to determine Mr Pascoe's Notice of Contention.[66] His one paragraph Notice of Contention to the Full Court was limited to seeking the single finding that Mr Boensch:

> "did not discharge his onus of proving that the respondent ... had no caveatable interest in ... Rydalmere ... in circumstances where the appellant had incurred liabilities in the performance or administration of the Boensch Trust and did not disprove that ... he had a proprietary interest in the Rydalmere property ... by reason of an entitlement to be indemnified for the ... liabilities ... from out of the assets of the Boensch Trust."

Mr Pascoe was *not* seeking to affirmatively *prove* the existence of a right of indemnity on appeal but rather was seeking to establish that Mr Boensch failed to *disprove* it.[67] He does not seek to prove its existence *as a fact* in this Court in his Notice of Contention.

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[60] SC [103]-[107] (CAB 35) (vesting of bankrupt's legal estate under s. 58(1)(a)); FC [101]-[106] (CAB 99)
[61] Transcript p. 10 line 1-p. 11 line 6 (AFMB 528) (one page, not one word of which asserts a right of indemnity)
[62] Transcript p. 9 line 50 (AFMB 527)
[63] Affidavit of SD Pascoe sworn 4 June 2014 (AFMB 502-516) at [64], [74]-[76], [106], [107], [117]-[119]
[64] SC [109], [129] (CAB 37, 43) operating together; FC [144] (CAB 111) (confirming the appellant's analysis)
[65] FC [157] (CAB 114)
[66] Notice of Contention filed on 5 April 2017 by the respondent in the Full Federal Court (CAB 68)
[67] The same approach is adopted in this Court: see Notice of Contention filed on 10 July 2019 (CAB 139)

45. The detailed procedural chronology in pars 41-44 above demonstrates that Mr Pascoe complained to the Full Court (and now in this Court) that Mr Boensch did not *disprove* his alternative case. But that case, at worst, was not opened at all; at best, it was opened at the level of theoretical possibility irrespective of what Mr Pascoe said at the close of the trial.[68] This procedural fairness impediment to success of his Notices of Contention in the Full Court and in this Court is compounded by the following appellate findings.

46. The Full Court declined to determine Mr Pascoe's Notice of Contention for several reasons.[69] First, it found that it would require the Full Court to make findings of fact about Mr Boensch's "mutually beneficial arrangement", the terms of which it accurately identified.[70] This was because Mr Boensch's answer to the pleaded right of indemnity is that, although he conceded that he[71] (and his wife's company, Boensch Pty Ltd[72]) paid outgoings on Rydalmere since creation of the Trust and before the sequestration order, he and his children were in occupation of the entire property in that period while he (and Boensch Pty Ltd) conducted a motor mechanical workshop from the ground floor premises and the children and he lived in the apartment above his workshop, with the payment of outgoings being the *quid pro quo* for their rent-free joint occupation. Mr Pascoe embraced Mr Boensch's evidence of his payment of the outgoings (but not his evidence of the payment by Boensch Pty Ltd) and rent-free occupation of the property by Mr Boensch and his children, and said that the "mutually convenient arrangement", assuming it existed, was of no consequence to his defence in his closing submissions.[73]

47. The importance of establishing, as a complete answer to the un-particularised defence of a right of indemnity,[74] that his "mutually convenient arrangement" did exist as a fact, cannot be underestimated. It was Mr Boensch's answer to this fallback case. It was recognised in *Carter Holt Harvey* that establishment of a countervailing liability owed *by* the trustee *to* the trust will negate any right of indemnity by way of reimbursement or exoneration for trust liabilities that are met by the trustee out of his own resources:[75]

> "However, the value of the power of exoneration, like the value of the power of reimbursement, may decrease by 'netting-off reciprocal monetary obligations',[76] to the extent to which the trustee has incurred a duty to increase the trust funds or, more loosely, a 'liability which the trustee owes to the trust estate[77]."

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[68] Defendant's Closing Submissions, 23 Sept. 2015, at [13(a)]-[13(h)] (AFMB 769); and [45]-[49] (AFMB 780)
[69] FC [155] and [156] (CAB 113)
[70] FC [143] (CAB 111)
[71] Evidence of Mr Boensch at Tp. 17.25-20.50 (AFMB 535) and Tp. 28.8-30.21 (AFMB 546)
[72] Evidence of Mr Boensch at Tp. 32.5-32.28 (AFMB 550)
[73] Defendant's Closing Submissions, 23 Sept. 2015, at [13(a)]-[13(h)] (AFMB 769) and [46] (AFMB 782)
[74] Defence at [7(e)] (AFMB 14)
[75] *Carter Holt Harvey* (*supra*) at [31] (per Kiefel CJ and Keane and Edelman JJ)
[76] Citing *In re Kaupthing Singer & Friedlander Ltd [No 2]* [2012] 1 AC 804 at 813 [8]
[77] Citing *Lane v Deputy Commissioner of Taxation* (2017) 253 FCR 46 at 68 [54] (which had cited *Cherry v*

48. If Mr Boensch had occupied Rydalmere rent-free in the period following the creation of the Trust on 23 August 1999 until sequestration of his estate on 23 August 2005 under an arrangement with himself, as trustee and as tenant/occupier, or alternatively, made with his former wife, Mrs Boensch, the joint custodial parent of the two children (who are the only beneficiaries of the Trust),[78] then he has a complete answer, founded upon this principle, to Mr Pascoe's pleaded case of an (unquantified) right of indemnity.[79]

49. Secondly, the Full Court found that Mr Pascoe's Notice of Contention also required it to determine whether the right of indemnity had any value, despite the opinion of Mr Pascoe, which the primary judge accepted,[80] that, even if there was a right of indemnity at the commencement of the bankruptcy, it was likely to have such little value as to not warrant his continued maintenance of the caveat. It can be inferred that the basis for that opinion is that, after investigation, he found that the outgoings on Rydalmere met by Mr Boensch were substantially accounted for by Mr Boensch's rent-free occupation under the "mutually beneficial arrangement" which thereby depleted such a right of any value.

50. Thirdly, "his Honour made no general finding about Mr Boensch's credibility and reliability".[81] The primary judge *only* made a credibility finding about Mr Pascoe.[82] Had Mr Pascoe opened a case propounding a quantified right of indemnity by Mr Boensch in Rydalmere *as a fact*, and sought to quantify that right, consistently with the authorities on establishing an entitlement to a beneficial interest in the trust property to support a right of exoneration or recoupment out of it,[83] the primary judge would have made the necessary general finding about Mr Boensch's credibility and reliability. It is trite law that making any credibility findings on appeal requires special circumstances to exist.[84]

51. Fourthly, as addressed in para 23 above, the Full Court found that Mr Pascoe did *not* claim right of indemnity in the caveat, so that establishing its existence on appeal could not sensibly advance that pleaded defence under s. 74P(1) of the *Real Property Act*.

52. Mr Boensch does *not* dispute that he (and Boensch Pty Ltd) paid all the outgoings on Rydalmere. He does *not* dispute that he bore the onus of refuting *every* case propounded by Mr Pascoe (with procedural fairness) as an aspect of an onus to prove that lodgment

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Boultbee (1839) 4 My & Cr 442 [41 ER 171]), and also citing *Jennings v Mather* [1902] 1 KB 1 at 5

[78] Mrs Boensch took an active interest in the Trust. She retained her solicitor to seek the removal of Mr Pascoe from his position in control of the Trust and his cooperation in appointing herself as the new trustee of the Trust, efforts that Mr Pascoe did not cooperate with: see SC [38] (CAB 17); and FC [30] and [31] (CAB 81).

[79] See evidence of Mr Boensch of the arrangement at Tp.17.25-20.50 (AFMB 535); Tp. 28.8-30.21 (AFMB 546)

[80] SC [129] (CAB 43); and affirmed at FC [156] (CAB 113)

[81] FC [155] (CAB 113)

[82] SC [110] (CAB 37) (where a positive credibility finding was made about Mr Pascoe by the primary judge)

[83] See *Ovtavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 364C and 372E (an indemnity for $49,750)

[84] See *Abalos v Australian Postal Commission* (1988) 171 CLR 167 at 178-180; 168

and maintenance of the caveat occurred "without reasonable cause". But Mr Pascoe bore, firstly, an evidential burden of establishing that, as caveator, he had a caveatable interest of the kind claimed in the caveat; secondly, an evidential burden of identifying precisely what alleged interests Mr Boensch needed refute. Otherwise, Mr Boensch had nothing to refute on his onus. So much follows from principles of procedural fairness.[85]

53. However, Mr Boensch lost his opportunity to defend a case asserting the existence of a right of indemnity *as a fact* founded on the payment of outgoings on Rydalmere when Mr Pascoe elected not to open such a case or to formulate, with precision, any quantified right of indemnity sourced in the payments, in accordance with applicable principles.[86]

54. The Full Court was right to refuse to decide the Notice of Contention to it in the absence of any findings about Mr Boensch's credibility or reliability. His answer to it is founded on a "mutually beneficial arrangement" which is not documented[87] (nor could it be – he is both the trustee *and* tenant). Accordingly, its proof depends entirely on his credibility. This Court should decline to find that there was any right of indemnity in Rydalmere[88] for the same reasons the Full Court declined to do so and the abovementioned reasons.

Issue 3: Did Mr Pascoe have a caveatable interest under s. 74F(1) of the Real Property Act?

55. Mr Boensch concedes that the answer to Issue 3 follows the event of the answer for Issue 1 *or* Issue 2 so that, if it is found that Mr Pascoe had vested in him, from the date of the sequestration order, by force (or "by dint") of s. 58(1)(a) of the *Bankruptcy Act*:

(a) as the primary judge and Full Court held, a bare legal estate in Rydalmere held by Mr Boensch as a trustee (subject to the Boensch Trust) or, to use the language of the caveat, a "Legal interest pursuant to the *Bankruptcy Act 1966*"[89]; or

(b) a beneficial interest, or equitable estate, in Rydalmere held by Mr Boensch as the trustee of the Trust referable to an unsatisfied right of reimbursement out of Rydalmere for the outgoings on the property paid by him on behalf of the Trust during the six-year life of the Trust before the sequestration order was made,[90]

then he had a legal, *or* an equitable, estate in Rydalmere within the meaning of s. 74F(1).

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[85] *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99 at 108-111 (esp. at 111) (Dixon CJ, Webb, Fullagar and Taylor JJ); *Scott Fell v Lloyd* (1911) 13 CLR 230 at 241 (Griffith CJ), 245 (Barton J), 245-246 (O'Connor J); *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635 at 639 (Rich J), 642 (Starke J), 643-644 (Dixon J), 646 (McTiernan J); *Ex p. Ferguson; Re Alexander* (1944) 45 SR (NSW) 64 at 65 (Jordan CJ)

[86] See *Ovtavo* (*supra*) at 364C and 372E; *Chief Comm'r Stamp Duties v Buckle* (1998) 192 CLR 226 at [43]-[51]

[87] FC [158] (CAB 114) (finding that "... the ... 'mutually beneficial arrangement' was not documented")

[88] Notice of Contention (Full Court, 1 para) (CAB 68); *cf.* Notice of Contention (High Court, 2 paras) (CAB 139)

[89] SC [3] (CAB 7); FC [24] (CAB 79)

[90] Albeit Mr Pascoe still does *not* allege a right of indemnity *as a fact* in his Notice of Contention (CAB 139)

56. Mr Boensch accepts – in the light of the statements of principle made in *Carter Holt Harvey*[91] (about *both* of the above categories of interest which are *capable* of being held by the bankrupt trustee of a trust of property held for the benefit of other persons: the former category being a trust of property held *solely* for other persons; and the latter category being a trust of property held for the benefit of the trustee, to the extent of any unsatisfied right of indemnity, *and thereafter,* held for the named beneficiaries of the trust) – that he must secure a negative answer to the questions posed by *both* Issues 1 and 2 in order to secure a negative answer to the question posed by Issue 3 above.

57. If, contrary to contentions on Issues 1 and 2 above, it is found that Mr Pascoe had a legal interest (as found in both courts below) or equitable interest in Rydalmere (as found at first instance but not upheld in the Full Court) he had a caveatable interest in Rydalmere.

58. However, a critical component of the test postulated in s. 74P(1) – for the reasons which are identified in addressing Issue 5 below – is that the Court must determine not merely the existence of this legal or equitable estate in Rydalmere but must *also* determine its *extent and value* in order to answer Issue 3. The reason is that, if it be the fact that Mr Pascoe held a bare legal estate subject to the terms of the Trust in Rydalmere, or he held an equitable estate referable to an unsatisfied right of indemnity in it, and if the interest held is of either negligible value or is worthless for the purposes of it constituting the divisible property of the creditors of Mr Boensch within the meaning of s.116(1) of the *Bankruptcy Act*, then the question of *objective reasonableness* of claiming the interest in the first instance, when the caveat was lodged, and thereafter of maintaining it for the four years of the life of the caveat, is critical to the answer to Issue 5. The Full Court recognised the necessity to value any right of indemnity (if one was found) for s. 74P(1) purposes. Its refusal to do so was one of the reasons for refusing to determine the Notice of Contention because that would involve an extensive fact-finding exercise on appeal.[92]

59. This last contention follows from a recognition that a caveat lodged over land held under Torrens title is a statutory "injunction to the Registrar-General" which precludes the registered proprietor from dealing with the land to the extent of dealings inconsistent with the interest claimed in the caveat.[93] Section 74F of the *Real Property Act* creates a statutory entitlement to injunct the use of another person's land without judicial sanction – without *any* undertaking as to damages or making out any *prima facie* case that the interest claimed exists and that the claim is made on objectively reasonable grounds –

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[91] *Carter Holt Harvey Woodproducts* (*supra*) at [24]-[44], esp. at [25]-[27] and [31]-[36]; and at [94]
[92] FC [155] (CAB 113)
[93] *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546 at 552.D (Barwick CJ)

such as is required to secure a *quia timet* injunction over the land. But the *quid pro quo* for imposing the statutory injunction on the land owned by another is a statutory liability to pay compensation for the loss suffered by the registered proprietor in consequence of his or her inability to deal with the land during the pendency of the caveat, as reflected in the terms of s. 74P(1) of the *Real Property Act* and its interstate equivalents.[94]

60. For example, if Mr Pascoe can establish that a bare legal estate in Rydalmere vested in him, and having regard to its self-evident lack of any commercial value,[95] it cannot be established that his claiming it and maintaining that claim for four years was reasonable. Likewise, if he were able to establish a right of indemnity vested in him, and keeping in mind, firstly, his admission that, having investigated it at the end of the life of the caveat, he concluded, in the face of the lapsing notice, that it was of such little value as to not warrant his continued maintenance of the caveat,[96] and secondly, the absence of *any* evidence as to its value, he cannot satisfy a test of objective reasonableness in s. 74P(1).

Issue 4: What interest did Mr Pascoe claim in his caveat under s. 74F(1) Real Property Act?

61. The primary judge found[97] that "it would not be accurate to describe his interest as a legal, as opposed to an equitable, interest ... I do not think Mr Pascoe's caveat, albeit that it employs the expression 'legal interest', should be construed that way,"[98] and that[99] "the estate or interest claimed consists of the property of Mr Boensch ... which vested in Mr Pascoe pursuant to s. 58(1)(a) ... The expression 'Legal interest pursuant to the *Bankruptcy Act 1966'* is apt to include 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)." With respect, it is difficult to see how a claim of a "legal interest" includes "equitable interest", particularly as s. 74F(1) of the *Real Property Act 1900* and reg. 7 Sch. 3 cl. 10 of the *Real Property Reg. 2014*, in their terms, distinguish between each category of estate or interest.

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[94] The equivalent provisions to s. 74K of the *Real Property Act 1900* (NSW) in all the other States are: s. 137, *Transfer Of Land Act 1893* (WA); s. 89(1), *Transfer Of Land Act 1958* (Vic); s. 122(1), *Land Title Act 1994* (Qld); s. 191(1)(a), *Real Property Act 1886* (SA); s. 133(1), *Land Titles Act 1980* (Tas.). The equivalent provisions to s. 74P of the *Real Property Act 1900* (NSW) in all the other States (all of which employ the common phrase "without reasonable cause", save that in Tasmania there is the added requirement of "wrongfully") are s. 140, *Transfer Of Land Act 1893* (WA); s. 118, *Transfer Of Land Act 1958* (Vic); s. 130, *Land Title Act 1994* (Qld); s. 191(1)(j), *Real Property Act 1886* (SA); s. 138(1), *Land Titles Act 1980* (Tas.).

[95] *Re Stansfield DIY Wealth Pty Ltd (in liq.)* (2014) 291 FLR 17 at [16]-[19] ("it could be sold for what, if anything, it is worth"); Deed of Trust cll. 21-48 & 61-66 (AFMB 31) (trustee's obligation to act gratuitously)

[96] See the findings made at SC [129] (CAB 43) and at FC [154] and [156] (CAB 112 and 113)

[97] SC [3] (CAB 7)

[98] SC [106] (CAB 35)

[99] SC [106] (CAB 35)

62. The alternative reasoning[100] is that the Regulation[101] excused any requirement to specify a legal or equitable estate or interest in order to comply with the requirements of s. 74F(1) for claiming an interest in a caveat. The second alternative reasoning[102] is that the claim of the "legal interest" was a mere "technical deficiency" in Mr Pascoe's intended claim of "whatever interest the bankrupt had at the date of the bankruptcy [which] was vested in him as trustee."[103] The primary judge concluded that "legal interest" means *both* the bare legal estate in Rydalmere *and* the equitable interest referable to the trustee's right of indemnity. This approach is erroneous because it treats the claim as a subjective concept ("intention"). The correct test for what has been claimed is an entirely objective test of construing the language employed in the caveat to identify the interest that is claimed.

63. Part of this reasoning was affirmed and part was reversed in the Full Court.[104] It held that "the description in the Caveat covers not only the interest identified by the primary judge, but also a full legal interest, that is, an interest subject to a trust because no valid trust had been created or the transaction creating the purported trust is void by virtue of s 120 or s 121 of the *Bankruptcy Act*."[105] The Full Court held that[106] "we reject the submission ... that a caveator cannot claim 'inconsistent interests', an interest acknowledging the trust and [also] an interest denying the trust". This finding permitted Mr Pascoe to claim an interest subject to the trust (as found by the primary judge) and a contradictory interest which denied the trust's validity. It is contended this appellate finding was made in error.

64. But the Full Court also found that "Mr Pascoe did not claim a right of indemnity in the Caveat"[107] and it confirmed that "it is true that a right of indemnity is not claimed in the Caveat".[108] The combined effect of these findings is that Mr Pascoe claimed in the caveat *only* a bare legal interest in Rydalmere (i.e. an estate in fee simple "subject to the terms of the trust"[109]), but did *not* claim any equitable estate or interest in Rydalmere referable to any right of indemnity in Rydalmere. The inescapable inference is that the Full Court did *not* accept the primary judge's finding that Mr Pascoe claimed a right of indemnity. This appellate finding is fatal to the alternative ground of defence of a right of indemnity.

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[100] SC [106] (CAB 35)
[101] Clause 7 and Schedule 3 of the *Real Property Regulation 2003* (NSW)
[102] SC [106] (CAB 40) citing *Beca Developments v Idameneo (No 92) Pty Ltd* (1990) 21 NSWLR 459 at 468.E
[103] SC [109] (CAB 37)
[104] The Notice of Contention in this Court (CAB 139) does *not* challenge the Full Court's reversal on this issue.
[105] FC [108] (CAB 101)
[106] FC [108] (CAB 101)
[107] FC [142] (CAB 111) (A reversal of the finding at SC [106] (CAB 36) that the caveat claimed "an equitable interest in the property". The respondent does not challenge this reversal in his current Notice of Contention.)
[108] FC [158] (CAB 114)
[109] SC [104] (CAB 35)

Issue 5: What is the correct test for determining whether a caveat has been lodged or maintained "without reasonable cause" within the meaning of s. 74P(1) Real Property Act?

65. The primary judge found the test under s. 74P(1) that he had to apply was as follows:[110]

(a) "'without reasonable cause' meant an absence of an honest belief based on reasonable grounds that the caveator had a caveatable interest";[111]

(b) "if a caveator had a caveatable interest, that would provide reasonable cause for the lodging of the caveat";[112]

(c) "in order to establish that a caveat was lodged without reasonable cause, it is necessary [for the registered proprietor] to show that: (a) the caveator did not have a caveatable interest; (b) the caveator did not have an honest belief based on reasonable grounds that he had a caveatable interest"[113] ("the *Beca* test");

(d) the *Beca* test has been expressly approved in Western Australia[114] and, as refined in *Natuna*[115] and *Mahendran*,[116] and also in New South Wales;[117] it is a two-step test, partly subjective and partly objective, that is, it is: (a) a test of honest belief as the first step; and (b) which is held on reasonable grounds as the second step.

66. Mr Boensch contends that this is not the test posed by s. 74P(1) and that this line of authority, commencing with *Beca Developments* in 1990, should not be followed. He contends[118] that the test is a wholly objective test, so that the test does *not* depend upon the caveator's honest belief in what he claimed in the caveat. He contends that the text of s. 74P(1), taken within its context in Part 7A ("Caveats") of the Act[119] and its purpose, pose an entirely objective test of "reasonable cause" which takes into account all the facts and circumstances available to the caveator at any *one* of the three statutory times.

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[110] SC [89]-[96] (CAB 29-32)

[111] SC [93] (CAB 31) citing *Beca Developments* at 463B, 469G, 470E-F, 471C-D, 474G-475A; 478G-479A

[112] SC [93] (CAB 31) citing *Beca Developments* (*supra*) at 475A

[113] SC [94] (CAB 32) citing *Collingridge v Sontor* [1997] NSWSC 522 at [10] (Young J); *Lee v Ross (No 2)* [2003] NSWSC 507 at [23] (Palmer J); *Natuna Pty Ltd v Cook* [2007] NSWSC 121 at [195] (Biscoe AJ)

[114] *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* (2007) 35 WAR 27; [2007] WASCA 179 at [81]

[115] *Natuna* (*supra*) at [195]

[116] *Mahendran v Chase Enterprises* [2013] NSWCA 280 at [52] (Barrett JA; Emmett & Gleeson JJA agreeing)

[117] *Mahendran v Chase Enterprises* [2013] NSWCA 280 at [52]

[118] FC [116] (CAB 103) (recounting that "Mr Boensch submitted that ... the test [in s. 74P(1)] did not involve ... an honest belief ... and [that it] was ... [an] objective [test]".)

[119] *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ); *Commissioner of Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 (Dixon CJ); *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 at 320-21; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc. v Aust. Broadcasting Corp.* (1998) 194 CLR 355 at 381 [69]-[71]; *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 55 [2]; 83 [96(1]-[96(3)]; *Gypsy Jokers Inc. v Comm'r of Police* (2008) 234 CLR 532 at 592 [165]; *Kennon v Spry* (2008) 238 CLR 366 at 440 [218]; and *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 at 651 [97], 664 [47], 668 [62], 669 [65].

67. The subject matter of "reasonable cause" is one aspect of statutory conduct, namely, lodging a caveat (caveator), procuring the lapsing of a caveat (registered proprietor), or refusing or failing to remove a caveat (caveator). No other conduct of the "actor" is relevant in terms of the text of s. 74P(1) and nothing in its context alters that conclusion.

68. On close analysis, s. 74P(1) poses three independent and unrelated tests, the failure of *any one of which* (because "or" joins its limbs) by a caveator renders him or her liable to pay compensation for his objectively unreasonable statutory conduct (be it lodging a caveat, procuring its removal or failing or refusing to remove it upon request). Nothing in the text or the statutory context, or indeed any overriding legislative purpose, of s. 74P(1) supports the *Beca* two-step "subjective-and-objective" interpretation of the provision, requiring the words "without reasonable cause" to be read (indeed rewritten) as instead posing a test of "without an honest belief based on reasonable grounds".[120]

69. The principal authority that was cited in support of this contention is recounted by the Full Court.[121] In *Taylor*,[122] the plurality held that the phrase in s. 151A(5)(c) of the *Workers Compensation Act 1987* (NSW) "at the time of the election, there was no reasonable cause to believe that the further deterioration would occur" (relating to the ability of an injured worker to change a statutory election to claim compensation for permanent loss under the Act following a deterioration in his or her medical condition after the election), namely, postulates an entirely objective test which pays no regard to the belief of the injured person at the date of the election. The plurality found that "what the applicant knew or ought to have known is irrelevant". It held that s. 151A(5)(c) "requires the Court to determine whether it would be unreasonable for a person to believe that the evidence before the Court, concerning the applicant's condition at the time of election, demonstrated that the further deterioration would occur."

70. An application of the *Taylor* objective test, if this contention is upheld as the correct test that is postulated by s. 74P(1), to the facts of this case, would treat actual or constructive knowledge of Mr Pascoe at the test times – the lodgment of the caveat in the case of s. 74P(1)(a), and his failure or refusal to remove the caveat on the date of each request to remove it in the case of s. 74P(1)(c) – as being quite irrelevant. Rather the test focuses on the surrounding facts and circumstances, as found by the primary judge at each test time, in determining the facts for the purposes of ss. 74P(1)(a) and (c), rather than, as

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[120] Contrary to what was enunciated in *Natuna* (*supra*) at [195] and approved in *Mahendran* (*supra*) at [52]

[121] FC [116]-[117] (CAB 104) ; *NSW v Taylor* (2001) 204 CLR 461 at 464 [1]-[4] (esp. [4]); 466-470 [10]-[22]; *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* [2007] WASCA 179; (2007) 35 WAR 27 at 42-43 (Pullin JA in *obiter*: "'without reasonable cause' might appear to introduce an entirely objective condition")

[122] *Taylor* (*supra*) at 464 [4]

Mr Pascoe contends, by focusing on what he honestly believed at those times. His resort to allowing the caveator to formulate his or her defence to a claim for compensation for the loss suffered from imposing this statutory injunction based on his belief is flawed.

71. The approach adopted in *Taylor* – in respect of as near an equivalent statutory provision to s.74P(1) as the appellant's counsel have been able to find – requires adopting the test of a reasonable caveator having regard to all the facts and circumstances at the test date.

72. If Mr Pascoe lodged the caveat without reasonable cause his liability for compensation is complete under s. 74P(1)(a) in consequence of the terms upon which the question of his liability under s. 74P(1) is to be determined by reference to answers to three separate questions. It is only if Mr Pascoe did *not* lodge the caveat *without* reasonable cause, as determined under the objective test in s. 74P(1), that it will be necessary to go further and ascertain whether he failed or refused to remove it "without reasonable cause" on any of the dates requested as pleaded in the Statement of Claim (see s. 74P(1)(c)).[123]

Issue 6: Did Mr Pascoe lodge the caveat or refuse or fail to remove it when he was requested "without reasonable cause" within the meaning of s. 74P(1)(a) of the Real Property Act?

73. The circumstances of the lodgment of the caveat (pars 17-23 above[124]) in applying the objective test of "reasonable cause" in s.74P(1)(a), by analogy to the test in *Taylor*,[125] and Issue 3 suggest that the caveat was lodged without reasonable cause on 9 grounds.

74. First, the Trust was created six years before the sequestration order. Mr Pascoe conceded that, upon lodgment, he had no reason to believe – one way or the other – whether Mr Boensch was insolvent when the Trust was established by Mr and Mrs Boensch.[126]

75. Secondly, Mr Pascoe conceded that he knew about the existence *and* the terms of the Trust as at the lodgment date because Mr Moretti's search made on 23 August 2005 disclosed its existence[127] and also its terms[128] and the following day Mr Boensch met with them both and disclosed its existence and the terms of its beneficial interests.[129] Mr Pascoe's disbelief in its validity or efficacy against him as trustee in bankruptcy under ss. 120-121 of the *Bankruptcy Act*,[130] according to the test in *Taylor*, is quite irrelevant.

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[123] SC [49] (CAB 20) (15 November 2005); SC [71] (CAB 26) (10 December 2007); and SC [81] (CAB 28) (18 August 2008); those findings were affirmed on appeal at FC [48], [68] and [75] (CAB 85, 89 and 90)
[124] See Appellant's Chronology for a more detailed account of the circumstances of the lodgement of the caveat.
[125] *Taylor* (*supra*) at 464 [4]
[126] SC [11], [12] and [30] (CAB 9 and 14)
[127] SC [23] (CAB 12)
[128] SC [23] (CAB 12); Registrar-General's caveat no. AB 617268K (AFMB 57) (annexing the Deed of Trust (AFMB 58) and the Memorandum of Trust (which it confirms and which is annexed to it)) (AFMB 72)
[129] SC [25]-[26] (CAB 13)
[130] SC [29] (CAB 14)

However, adoption in this case of his "usual practice" [131] for lodging the caveat – which assumed a bankrupt registered proprietor with an estate in fee simple unencumbered by any express trust on the land – and with full knowledge of the existence *and* the terms of the Trust, must surely be fatal to his defence under *either* version of the s. 74P(1) test.

76. Thirdly, the timing of the creation of the Trust, shortly after a Family Court property settlement between Mr and Mrs Boensch, coupled with their status as joint settlors of the Trust, and the solemn nature of the Memorandum of Trust (as its execution by the two of them was in the presence of a Justice of the Peace),[132] coupled with their steps in having their family solicitor, Mr James Leong, confirm the terms of the Trust and also amplify its terms by a Deed of Trust some four a half years later, and the fact that the sole beneficiaries of the Trust are their two infant children, informed the casual observer of the objective *bona fides* in creating a trust for the joint benefit of the two children.[133]

77. In 2007 a Full Court[134] held that the objective circumstances surrounding creation of the Trust are critical in determining the validity of its creation.[135] Those circumstances are also determinative in applying the objective test of "without reasonable cause" in s. 74P.

78. Fourthly, Mr Boensch had arranged for the Registrar-General to lodge a caveat over Rydalmere pursuant to s. 82 of the *Real Property Act* to forbid dealings in it that are inconsistent with the terms of the Trust and placed *both* Trust documents on the Public Register, facts well known to Messrs Pascoe and Moretti alike at the lodgment date.[136]

79. Fifthly, Mr Pascoe conceded that, at the date of lodgment of the caveat,[137] and the date it lapsed,[138] and it can be inferred at all times during the life of the caveat, there was no suggestion of any imminent (or any) transfer of Rydalmere proposed by Mr Boensch.[139]

80. Sixthly, Mr Pascoe had no evidence to suggest that there was any unsatisfied right of indemnity held by Mr Boensch in Rydalmere at the date of lodgment. That follows because Mr Pascoe frankly conceded, firstly, that he did not even turn his mind to such a possibility until shortly before the first creditors' meeting in mid-November 2005,[140]

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[131] See the findings on Mr Pascoe's reasons for lodgment at SC [27]-[29] (CAB 13); FC [27] and [28] (CAB 80)
[132] *Pascoe v Boensch* [2007] FCAFC 147; (2008) 250 ALR 24; (2008) 6 ABC(NS) 360 at [32]
[133] SC [11]-[18] (CAB 9-11)
[134] *Pascoe v Boensch* [2007] FCAFC 147; (2008) 250 ALR 24; (2008) 6 ABC(NS) 360 at [15]-[16]. This finding was made in explaining its dismissal of Mr Pascoe's appeal from a Federal Magistrate's decision dismissing his challenge to the validity of the Trust on the ground it was an imperfect gift. (He did not appeal on sham.)
[135] *Pascoe v Boensch* [2007] FCAFC 147; (2008) 250 ALR 24; (2008) 6 ABC(NS) 360 at [28]-[36]
[136] SC [19] (CAB 11)
[137] SC [30] (CAB 14)
[138] SC [85] (CAB 29)
[139] SC [30] (CAB 14) and [85] (CAB 29)
[140] SC [50] (CAB 20); FC [144] (CAB 111)

secondly, that having investigated that possibility, he had concluded by 29 May 2009, at the latest, that such a right *might* exist but he was unaware of its likely value,[141] and thirdly, that, by 8 September 2009, he had concluded that, *if* such a right ever did exist (a fact upon which he never made up his mind),[142] it was of such little value as not to be worthwhile extending the caveat to realise for the benefit of Mr Boensch's creditors.[143]

81. Seventhly, although Mr Pascoe received legal advice to challenge the validity of the Trust, and that if that failed to apply to set it aside under the *Bankruptcy Act*, before his lodgment of the caveat, from Mr Costin's lawyers, Mr Johnson and Ms McLean,[144] that advice was unreliable, at best, or plainly wrong, at worst. First, there is no evidence the lawyers had read the documents constituting the Trust or were aware of circumstances surrounding its creation, as known to Messrs Pascoe and Moretti, before lodgment of the caveat. Secondly, they were lawyers retained by the petitioning creditor, Mr Costin, and acted on instructions and information from Mr Costin rather than from Mr Pascoe. There is no evidence the lawyers were ever given possession of, or read, the documents and information that came into the possession of Messrs Pascoe and Moretti during the days leading up to lodgment of the caveat, including in their meeting with Mr Boensch. Nor is there any evidence of any explanation for failing to so instruct those two lawyers.

82. Eighthly, there is no evidence that any advice on lodging or maintaining the caveat was ever sought or given here. In *New Galaxy Investments,*[145] Sackville AJA said that "the decided cases show [that] the fact that a solicitor has given advice to a caveator does not necessarily absolve the caveator from responsibility or rebut an inference that the caveat was lodged without reasonable cause."[146] Sackville AJA[147] held that the solicitor upon whom the caveator had relied "could not have [given advice about the lodgment of the caveats] on the basis of accurate instructions ..."[148] Although the majority[149] disagreed on the application of the principles under s. 74P(1) of the *Real Property Act* to the facts in that case, there was overall agreement as to the content of the principles.[150] When this principle in *New Galaxy Investments* is applied to the legal advice relied on by Mr Pascoe to establish that he had a reasonable cause for lodgment of the caveat, his

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[141] SC [129] (CAB 43); FC [142], [144], [156] and [157] (CAB 111, 113 and 114)
[142] SC [86] (CAB 29)
[143] SC [85] (CAB 29); FC [156] (CAB 113)
[144] SC [21] and [22] (CAB 12)
[145] *New Galaxy Investments* (*supra*) [2017] NSWCA 153
[146] *New Galaxy Investments* (*supra*) at [341] per Sackville AJA (dissenting in the result)
[147] *New Galaxy Investments* (*supra*) at [341] per Sackville AJA
[148] *New Galaxy Investments* (*supra*) at [341] per Sackville AJA
[149] *New Galaxy Investments* (*supra*) at [97]-[103] per Basten JA and at [121]-[123] per Gleeson JA
[150] *New Galaxy Investments* (*supra*) at [121]-[123] per Gleeson JA

reliance on advice is of no assistance. He had – on his own case – *far* greater knowledge about the terms of the Trust and circumstances surrounding its creation than the lawyers, knowledge which was found to be decisive in support of the *bona fides* of its creation.[151]

83. Ninthly, if no caveatable interest in Rydalmere ever vested in Mr Pascoe (Issue 3) then that is a further reason that his lodgment of the caveat was objectively unreasonable.

84. The objective test in s. 74P(1) of the reasonableness of Mr Pascoe's lodgment of the caveat for the purpose of s. 74P(1)(a) (the first limb) that is contended for enables the conclusion to be drawn that Mr Pascoe had no reasonable cause to *lodge* the caveat.

Issue 7: Did Mr Pascoe refuse or fail to remove the caveat when he was requested, without reasonable cause, and if so, on what date should he have removed it under s. 74P(1)(c)?

85. If the contention in para 84 is upheld, s. 74P(1)(c) does not arise due to the independent nature of the three limbs of s. 74P(1)(a)-(c) creating the liability to pay compensation.

86. *The first request*: The first pleaded request to remove the caveat (third as a fact) occurred on 15 November 2005.[152] The request was in a letter from Mr Mullette, Mr Boensch's solicitor, in which he expressed concern about an opinion published by Mr Pascoe in his first report to creditors. Mr Mullette firmly refuted Mr Pascoe's opinion that the Trust was a fraud or a sham. Mr Mullette also stated that Rydalmere did not vest in Mr Pascoe because it is trust property that is held for the benefit of the Boensch children, so "that the property does not fall within that the divisible property of the bankruptcy and the trustee's interest will not support the caveat ..."[153]. Mr Pascoe gave no reply to the request. There is no evidence or finding of *any* legal advice to maintain the caveat.

87. *The second request*: The second pleaded request to remove the caveat (fourth as a fact) was made on 10 December 2007.[154] This request was made four days after the Federal Magistrate dismissed Mr Pascoe's challenge to the validity of the Trust as a sham and as an imperfect gift.[155] Mr Malcolm Wright, Mr Boensch's new solicitor, wrote to Mr Pascoe noting the failure of that challenge and, once again, requested the removal of the caveat. Mr Pascoe did not reply to this request either. He did not seek or obtain *any* legal advice to maintain the caveat, according to the primary judge. Mr Pascoe said that "he did not receive any legal advice following that judgment to the effect that he should

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[151] *Pascoe v Boensch* [2007] FCAFC 147; (2008) 250 ALR 24; (2008) 6 ABC(NS) 360 at [29]

[152] SC [48]-[49] (CAB 19, 20); Statement of Claim at [10]-[14] ("*The first request*") (AFMB 5). It was the third request to remove the caveat made as a fact but it is the first relied upon for s. 74P(1) compensation purposes.

[153] SC [37] (CAB 16)

[154] SC [70] and [71] (CAB 25 and 26); Statement of Claim at [15]-[19] ("*The second request*") (AFMB 6)

[155] *Pascoe v Boensch (No 6)* [2007] FMCA 2038 per Raphael FM (6 December 2007)

withdraw the caveat." [156] But he did not give any evidence of seeking advice nor was there a finding that advice was ever provided. His defence relies upon his failure to do anything at all, just as it does in the case of all other pleaded requests for removal. He said he decided to appeal the dismissal of his case by the Magistrate.[157] His sole ground for maintaining the caveat in response to this request was his sanguine expectation that his proposed appeal to a Full Court of the Federal Court would (somehow) succeed.

88. *The third request*: The third pleaded request to remove the caveat (fifth as a fact) was on 18 August 2008.[158] Mr Wright wrote to Mr Pascoe on the very same day a Full Court of the Federal Court dismissed Mr Pascoe's appeal against dismissal of his imperfect gift case impeaching the validity of the Trust.[159]As in the case of the first four requests for removal, Mr Pascoe did not reply to this request nor give any reason for his refusal to accede to it nor did he obtain *any* legal advice at all to maintain the caveat. His defence relied *only* upon legal advice to challenge the Trust throughout the life of the caveat but relied on *no* legal advice to lodge or maintain it because none was ever sought or given.

89. Mr Pascoe said his application for special leave to appeal justified his maintenance of the caveat.[160] The *only* advice that he sought or relied on was about prospects of success of that application rather than on whether it constituted a firm basis for maintaining the caveat. That Full Court's reasoning[161] suggests his challenge to validity of the Trust on an imperfect gift ground was lacking in merit. But what matters most is that the caveat was securing a possible interest in land based on his four years of speculative litigation.

PART VII: ORDERS SOUGHT BY THE APPELLANT

90. If the appeal is allowed the appellant claims the following orders:

(a) Appeal allowed.

(b) Judgment and orders of the Full Court of the Federal Court of Australia dated 20 December 2018 be set aside.

(c) Orders 4 and 9 of the Federal Court of Australia made on 27 February 2017 be set aside.

(d) Judgments and orders of the Supreme Court of New South Wales dated 10 December 2015 and 9 May 2016 be set aside.

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[156] SC [73] (CAB 26)
[157] SC [73] (CAB 26)
[158] SC [79]-[81] (CAB 27, 28); Statement of Claim at [20]-[23] ("*The third request*") (AFMB 7)
[159] *Pascoe v Boensch* [2007] FCAFC 147; 250 ALR 24; 6 ABC(NS) 360 (Finn, Dowsett and Edmonds JJ)
[160] SC [82] (CAB 28)
[161] *Pascoe v Boensch* [2007] FCAFC 147; (2008) 250 ALR 24; (2008) 6 ABC(NS) 360 at [17]-[19]

(e) The three questions ordered to be determined separately to any other questions arising in the proceedings in the Supreme Court of New South Wales on 15 May 2015 by the Chief Judge in Equity of that Court be answered as follows:

(1) Did the defendant lodge caveat no. AB721857 ("the Caveat") over the property situated at 255 Victoria Road, Rydalmere, New South Wales ("the Property") without reasonable cause within the meaning of s. 74P(1) of the *Real Property Act 1900* (NSW) ("the Act")? (Question 1)

Answer: Yes.

(2) Did the defendant, without reasonable cause within the meaning of s. 74P(1) of the Act, refuse or fail to withdraw the Caveat after being requested to do so? (Question 2)

Answer: Does not arise; or, alternatively, Yes.

(3) If the answer to Question 2 is "Yes", on what date should the defendant have withdrawn the Caveat? (Question 3)

Answer: Does not arise; or, alternatively, 15 November 2006; or, alternatively, 10 December 2007; or, alternatively, 18 August 2008.

(f) The proceedings be remitted to the Supreme Court of New South Wales, differently constituted, for the determination of the amount of compensation payable to the appellant by the respondent pursuant to s. 74P(1) of the *Real Property Act 1900* (NSW) in respect of the respondent's lodgement and maintenance of the Caveat.

(g) The respondent pay the costs of the proceedings in the Supreme Court of New South Wales, the costs of the proceedings in the Federal Court of Australia and the costs of the appeal to the Full Court of the Federal Court of Australia.

(h) The respondent pay the costs of the appeal to this Court.

(i) The respondent repay the appellant the amount of $30,000 paid to the respondent in performance of order 5 made on 27 February 2017 by the Federal Court of Australia as security for costs of the appeal made to the Full Court of that Court.

PART VIII: ESTIMATED TIME FOR ORAL ARGUMENT

91. The appellant will require 2 hours for his argument in chief and 30 minutes in reply.

9 August 2019

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