IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M154 of 2016

BETWEEN

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

Appellant

and

ALEXANDRA BENNETT

First Respondent

MARTIN TALACKO

Second Respondent

ROWENA TALACKO

Third Respondent

JAN TALACKO (AS EXECUTOR OF THE ESTATE OF HELENA MARIE TALACKO)

Fourth Respondent

APPELLANT'S REPLY

Filed on behalf of the Appellant
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4th January 2017
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Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Reply

A The first issue

2 For the reasons referred to in the appellant's submissions filed on 15 December 2016, the correct construction of subsec 15(2) of the *Foreign Judgments Act* is that it applies to any stay of enforcement of a judgment imposed by law, including a stay of enforcement imposed by para 58(3)(a) of the *Bankruptcy Act*.

3 The respondents refer to three reasons why in their submission subsec 58(3) of the *Bankruptcy Act* does not operate to impose a stay of enforcement for the purposes of subsec 15(2) of the *Foreign Judgments Act*. None of those reasons justifies that conclusion.

4 First, the respondents submit (at [20]–[25]) that the term 'stay of enforcement of [a] judgment', as used in subsec 15(2) of the *Foreign Judgments Act*, has a settled technical meaning, and that the critical, characteristic feature of that term is that such a stay operates directly on an order or judgment and not on the party who might otherwise seek enforcement. This is different from what the respondents identified as the term's 'settled' legal technical meaning in the Court of Appeal. They no longer rely on the contention that in its legal technical sense a stay of enforcement of a judgment is an order made by a court (see CA [190]). The respondents submit (at [25]) that para 58(3)(a) of the *Bankruptcy Act* lacks a characteristic feature of a stay of enforcement of a judgment, as it operates directly on a judgment creditor by denying that person's competence to enforce a remedy, rather than operating directly on a court order or judgment.

5 In essence, the respondents' position appears to be that the term 'any stay of enforcement of the judgment in question' refers only to a statutory provision or court order which expressly provides that enforcement of the judgment is stayed, as opposed to a provision or order which otherwise has the effect of staying enforcement of the judgment. It is difficult to understand how that proposition can be maintained.

6 Paragraph 58(3)(a) of the *Bankruptcy Act* relevantly provides that, after a debtor has become a bankrupt, it is not competent for a creditor to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt. The only person who would otherwise be competent to enforce such a remedy is, of course, the creditor. Thus, there is no difference in substance between a provision or order which provides that a judgment debt may not be enforced (the form that the respondents contend a stay must take for the purposes of subsec 15(2) of the *Foreign Judgments Act*), and a provision or order which provides that a

creditor may not enforce the judgment debt (as provided by para 58(3)(a) of the *Bankruptcy Act*). The distinction sought to be drawn by the respondents is illusory.

7 Indeed, where the provable debt is a judgment debt, para 58(3)(a) does 'operate on', and 'interfere' with the operation of, a judgment (see [25] of the respondents' submissions); it has the effect that the judgment cannot be enforced. That is, para 58(3)(a) has precisely the same effect as would a statutory provision or court order which provided that a particular judgment debt 'may not be enforced', or that enforcement of a particular judgment debt 'is stayed'. The respondents' submission that the term 'any stay of enforcement of [a] judgment' does not comprehend the effect of para 58(3)(a) of the *Bankruptcy Act* is therefore untenable.

8 Secondly, the respondents submit (at [26]–[29]) that para 58(3)(a) of the *Bankruptcy Act* does not in terms operate to impose a stay of enforcement in respect of a judgment or order of a court, but rather provides that it is not competent for a creditor to enforce any remedy. However, as referred to above, there is no distinction in substance between a statutory provision or order which provides that enforcement of a judgment is 'stayed' and a provision or order which provides that a judgment creditor may not enforce the judgment. As referred to in the appellant's primary submissions (at [53]), subsection 15(2) should be given a purposive construction; the provision applies where the effect of the relevant statutory provision or order is to impose a stay of enforcement, irrespective of the terms that are used.

9 The respondents contend (at [28]) that a distinction between the effect of para 58(3)(a) of the *Bankruptcy Act* and what they say constitutes a stay of enforcement emerges from a consideration of the context of that provision. They suggest that para 60(1)(b)(i) of the *Bankruptcy Act* provides specifically for the power of a court to make an order of the kind contemplated by subsec 15(2) of the *Foreign Judgments Act*, 'namely, an order staying (and therefore operating on or interfering with) the legal process of enforcement'.

10 Paragraph 60(1)(b)(i) of the *Bankruptcy Act* confers power on the court, at any time after the presentation of a petition, to stay any legal process, whether civil or criminal, against the person or property of the debtor in respect of the non-payment of a provable debt or of a pecuniary penalty payable in consequence of the non-payment of a provable debt. Paragraph 58(3)(a) applies once a sequestration order has been made: after that time, the provision imposes an absolute bar on enforcement of any remedy against the person or property of a bankrupt in respect of a provable debt. It is therefore not correct that, after a debtor has been made bankrupt, para 60(1)(b)(i) empowers the court to make an order staying enforcement of a judgment debt. In those circumstances, such an order could not properly be made, as

enforcement of a judgment debt obtained against a bankrupt is already prohibited by operation of para 58(3)(a). Thus, para 60(1)(b)(i) does not assist the respondents.

11 Thirdly, the respondents submit (at [30]–[33]) that subsec 58(3) of the *Bankruptcy Act* does not bear upon the proper construction of subsec 15(2) of the *Foreign Judgments Act*, and that the construction for which they contend does not circumvent any objective of the scheme of the *Bankruptcy Act*. They submit (at [30]) that the presumption that Parliament intends the provisions of different statutes to operate rationally and sensibly together does not operate at large, but only where the provisions belong to interrelated statutes or statutes making up a legislative scheme.

12 Plainly, the *Bankruptcy Act* and the *Foreign Judgments Act* are not part of a legislative scheme. However, in construing subsec 15(2) of the *Foreign Judgments Act*, it should be presumed that Parliament intended that provision to operate rationally and sensibly with subsec 58(3) of the *Bankruptcy Act*. Subject to the doctrine of implied repeal where two provisions cannot stand or live together, there is a general presumption that Parliament intends its enactments to operate harmoniously.

13 As referred to in the appellant's primary submissions (at [57]), the construction of subsec 15(2) adopted by the Court of Appeal (and also that now advanced by the respondents) would enable a judgment creditor to apply for, and obtain, a certificate under subsec 15(1) for the purpose of enforcing in a foreign country a judgment obtained against a bankrupt, notwithstanding the absolute bar on enforcement imposed by para 58(3)(a) of the *Bankruptcy Act*. The consequence of this would be that, upon the making of a sequestration order, a judgment creditor of the bankrupt would be prohibited from enforcing the judgment debt against the bankrupt in Australia, but could nevertheless apply for, and obtain, a certificate from an Australian court for the purpose of enforcing the judgment debt in a foreign country. This cannot have been Parliament's intention in enacting subsec 15(2). Rather, according to its proper construction, subsec 15(2) prohibits a judgment creditor from applying for a certificate under subsec 15(1) until the expiry of any stay of enforcement imposed by law, including a stay of enforcement imposed by para 58(3)(a) of the *Bankruptcy Act*.

14 According to the respondents (at [32]), the judgment of the Court of Appeal does not permit the circumvention of a fundamental objective of the scheme of the *Bankruptcy Act*. They contend that para 58(3)(a) of the *Bankruptcy Act* continues to operate according to its terms in respect of a judgment creditor, whether or not there has been an exercise of power under sec 15 of the *Foreign Judgments Act*. That is, they submit that, in circumstances where a certificate has been issued under subsec 15(1) and the judgment debtor has been made

bankrupt, the absolute bar on enforcement in respect of the judgment debt under para 58(3)(a) cannot be circumvented by virtue of para 58(3)(a) itself. This proposition is not only circular, but ignores the reality of the jurisdictional limits of Australian courts. Courts in Australia have no power to regulate the procedures that foreign courts might adopt in deciding whether to act upon a certificate given by an Australian court (see CA [230], per Santamaria JA). Particularly having regard to those jurisdictional limitations, it is apparent that the Court of Appeal's construction of subsec 15(2) would have the effect of circumventing the absolute bar on enforcement under para 58(3)(a).

B The second issue

15 The respondents contend (at [46]) that it is clear from the text and structure of sec 15 of the *Foreign Judgments Act* that the expression 'who wishes to enforce' does not import an entitlement to enforce.

16 In their submissions (at [32]), the respondents accept that they have no entitlement to enforce the judgment in question by reason of subsec 58(3)(a) of the *Bankruptcy Act*. They also submit (at [48]) that they were creditors who wished to enforce a judgment in a foreign country for the purposes of subsec 15(1) of the *Foreign Judgments Act*, notwithstanding that they had no entitlement to do so. As stated in the appellant's primary submissions (at [81]), such a result cannot have been the intention of Parliament. Further, the respondents' contention that they were creditors who wished to enforce a judgment in a foreign country is directly contradicted by their earlier statement (at [33]), albeit without reference to any evidence, that their purpose in deploying the certificates was not to enforce the judgment debt, but rather to have the judgment debt recognised. It is apparent that the respondents seek to steer a course between, on the one hand, the requirement under subsec 15(1) of the *Foreign Judgments Act* that a judgment creditor applying for a certificate wish to enforce the judgment and, on the other hand, the absolute bar on enforcement imposed by para 58(3)(a) of the *Bankruptcy Act*. That position is untenable, and gives rises to the contradiction which is manifest in the respondents' submissions.

17 The respondents contend (at [47]) that subsec 15(2) of the *Foreign Judgments Act* is an exhaustive statement of the circumstances in which a judgment creditor's entitlement to apply for a certificate under subsec 15(1) is denied. However, subsec 15(2) supports a construction of the words 'who wishes to enforce' in subsec 15(1) as importing an entitlement to enforce. Indeed, subsec 15(2) aligns completely with that construction by providing that an application under subsec 15(1) may not be made while enforcement is stayed.

18 The respondents further submit (at [36]–[44]) that a judgment creditor's wish to enforce for the purposes of subsec 15(1) of the *Foreign Judgments Act* is not a condition on the power of the Registrar to issue a certificate. It is to be noted that the respondents do not dispute that compliance with subsec 15(2) is a condition on the Registrar's power to issue a certificate. Indeed, they accept (at [47]) that 'a Registrar will ... have no power to issue certification' in the circumstances provided for in subsec 15(2).

19 According to the respondents (at [42]), a judgment creditor's wish to enforce the judgment debt is not a condition on the Registrar's power to issue a certificate because determining a creditor's state of mind may be difficult and is an evaluative exercise on which reasonable minds may differ. That these statements are without substance is made plain by the respondents' own proposition (at [44]) that a judgment creditor's wish to enforce a judgment is manifested by the fact of the application, and that no more stringent requirement is imposed. It may well be that, where a judgment creditor is entitled to enforce the judgment, the creditor's wish to enforce is manifested by the fact of the application. However, neither the fact of an application under subsec 15(1) nor the entitlement of a creditor to enforce the judgment is a matter requiring an evaluative assessment of the creditor's statement of mind.

20 The phrase 'wishes to enforce' in subsec 15(1) is not a reference to the subjective psychology of a judgment creditor, but to the stance of a creditor, as a matter of lawful process, in seeking to have a judgment enforced in a foreign country. It would be self-defeating and serve no useful purpose if subsec 15(1) were engaged by the subjective desire of a creditor to enforce a judgment in circumstances that are illegal.

21 The proper construction of subsec 15(1) is that a judgment creditor cannot '[wish] to enforce' a judgment for the purposes of that provision where the creditor is prohibited from doing so. In those circumstances, the Registrar has no power to issue a certificate to the creditor.

4th January 2017

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