IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S53 of 2017

BETWEEN:

RAMSAY HEALTH CARE AUSTRALIA PTY LTD
ACN 003 184 889
Appellant

and

ADRIAN JOHN COMPTON
Respondent

APPELLANT'S REPLY

Part I: Certification for publication

1. The appellant certifies that the appellant's reply is in a form suitable for publication on the internet.

Part II: Reply

2. While of limited relevance to this appeal, the respondent's submissions dated 19 April 2017 (**RS**) at paragraph 7 do not accurately describe the commercial relationship between Ramsay[1] and Medichoice. Many of the terms of the distribution agreement were pleaded in Ramsay's commercial list statement in the Supreme Court proceedings (**AB 126 at 131 [22] - [102]**) and, as those terms reveal, the arrangement was not a running account.[2] Rather, the arrangement comprised a number of separate and distinct

[1] In these submissions in reply capitalised terms which are otherwise undefined have the same meaning as in the appellant's annotated submissions dated 13 April 2017 (**AS**).

[2] *Airservices Australia v Ferrier & Anor (Compass Airlines case)* (1996) 185 CLR 483 at 504 – 505.

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categories of obligation on the part of each party, each of which category was regulated by different parts of the distribution agreement and turned on different facts.

3. At RS [10 – 12] the respondent refers to various materials before, or matters stated by then senior counsel on behalf of Ramsay to, the primary judge. The appellant does not accept all of the matters set out in RS [10 – 12], nor the conclusions drawn from them. For example, RS [11(iv)] does not accurately set out senior counsel's statement: among things the critical word "perhaps" has been omitted from RS [11(iv)]. In fact then senior counsel for Ramsay stated: "the best finding of fact your Honour could make on this application in relation to the issue is that **perhaps** there's enough evidence to show that there is a matter that upon further inquiry might lead to a different result" (emphasis added) (**AB 296.10-12**). Likewise, the "necessary" conclusion suggested at RS [11(ii)] is not an inference drawn below, nor one that the appellant accepts. Further, RS [10(ii)] summarises only parts of Mr Albarran's first affidavit sworn 7 July 2015, and does not go on to summarise Mr Albarran's important second affidavit sworn 20 July 2015 in which Mr Albarran deposed that he had now received further documents from the appellant containing calculations and workings supporting its claimed debt; that he had not previously seen these documents; and it would take him approximately one to two months to go through the documents and finalise the liquidators' position, although "at this point in time" he stood by the statements in his first affidavit (**AB 76-77; J [29] AB 359**).

4. However, rather than dealing with these matters in detail (which involves entering into the factual dispute that the respondent could have had, but chose not to have, before Hammerschlag J), the short point is that at the end of the day as set out at AS [47 – 49] the Full Court relied on only two matters in arriving at its conclusion: (1) that there had been, in the Full Court's view, no trial on quantum; and (2) "Ramsay Health Care acknowledged that there is an 'open question' whether any debt is in fact owed by MediChoice to Ramsay Health Care and thus whether any debt is owed by Mr Compton to Ramsay pursuant to the guarantee" (at **J[78]; AB 378**).

5. The submissions at RS [10 – 12] could only be relevant to the extent they relate to (2) in the above paragraph. As discussed in AS [18] and [47 – 48], statements to the effect that there was an open question as to whether a debt was owing need to be considered in context: the Court and the parties were involved only in the first stage of a two-step

process, namely a "preliminary investigation" of the merits of the attack on the judgment (see AS [17]). Indeed the true import of what senior counsel was saying is revealed by the statement adverted to in RS [11(iv)] and set out in paragraph 3 above: the best (i.e., most favourable to the respondent) finding available on the application then before the primary judge (namely, the first stage of the inquiry) was that "perhaps there's enough evidence to show that there is a matter that upon further inquiry might lead to a different result". Understood in this context, the "concession" does not take the matter further.

6. The latter point is supported by consideration of the reasoning and decision in *Commonwealth Bank v Jeans* [2005] FCA 978. In that case Hely J went further than treating the debtor's evidence as giving rise to an "open question" – Hely J expressly assumed, in favour of the debtor, that there was a *prima facie* case that "the debtor did not in fact sign" the relevant page of the guarantee and that there was expert evidence supporting that fact ([2005] FCA 978 at [12]). Despite making these assumptions, Hely J was of the view that the debtor had failed to make out any basis for going behind the judgment, since among other things there had been a fully contested hearing; the debtor had had a reasonable opportunity at that hearing to raise whatever grounds he wished to rely upon to resist the case against him; and the scope of the contest had been determined by the respective cases put forward by the parties ([2005] FCA 978 at [18] – [19]).

7. The references at RS [32] – [36] to other stages of the bankruptcy process do not advance the respondent's position. Nothing in the decisions relied upon suggest that the approach in *Corney* should not be followed. In fact, the majority of those decisions either cite, refer to or follow *Corney*.[3]

8. The respondent submits at RS [37] that *Wren v Mahony* (1972) 126 CLR 212 is "the only High Court decision on s 52 of the *Bankruptcy Act* 1966 (Cth)". This could be construed as a suggestion that there is some material difference between s 52 and equivalent bankruptcy legislation existing at the time of, and applied in, earlier decisions including *Corney,* such that *Wren* should be treated as the leading case. Any such suggestion is incorrect. There is no material difference between s 52 of the *Bankruptcy*

[3] See *Emerson & Anor v Wreckair Pty Ltd* (1992) 33 FCR 581 at 587; *Wenkart v Abigano* [1999] FCA 354 at [23]-[24]; *Katter v Melham* (2014) 319 ALR 646 at [69], [71]- [74], [79]; *Re McCollum; Ex parte the Bankrupt* (1987) 71 ALR 626 at 628-629; *Re Raymond; ex parte Raymond* (1992) 36 FCR 424; *Pollock v DFC of T* (1994) 94 ATC 4148 at [4155]; *Re Quatrovision Pty Ltd (In Liq) and the Companies Act 1961* [1982] 1 NSWLR 95 at 100; *Ilhan v Cvitanovic* (2009) 73 NSWLR 644 at 651.

Act and s 56(2)(a) of the *Bankruptcy Act* 1924 (Cth)[4], which was (as the Full Court observed at **J[53]; AB 369.13**) the comparable provision to s 52 and which was applied in both *Corney* and in *Petrie v Redmond* [1943] St R Qd 71 (see AS [35]).

9. In dealing with Ramsay's first ground of appeal at RS [51] – [62], the respondent fails to deal with, or even advert to, the critical feature in *Corney*, namely the distinction between going behind a default judgment and going behind a judgment obtained after a contested hearing.

10. Further, in RS [53] – [54] the respondent advances a proposition to the effect that to say that a court can do X in situations A, B or C does not mean that a court can do X in only those situations. This proposition fails to address or deal with Fullagar J's statement in *Corney* (at 356-7):

> If the judgment in question followed a full investigation at trial on which both parties appeared, the court will not reopen the matter unless a prima-facie case of fraud, collusion or miscarriage of justice is made out.

11. Contrary to the respondent's proposition, this statement, which has been cited many times in subsequent cases[5], makes clear that a court will not go behind a judgment given after a full investigation at trial on which both parties appeared except in the event that – or "unless", to use Fullagar J's word – there has been fraud, collusion or miscarriage of justice.

12. Next, at RS [55] – [62] the respondent argues for a broad construction of the expression "miscarriage of justice", which would apparently extend to a miscarriage of justice extraneous to the forensic process. *First*, this construction is inconsistent with the ordinary natural meaning of the relevant words of s 52 of the *Bankruptcy Act*. As noted

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[4] A copy of section 56 is attached to these submissions.

[5] See for example *Simon v O'Gorman Pty Ltd & Anor* (1979) 27 ALR 619 at 633; *Re David; Ex parte Lahood* (1979) 27 ALR 306 at 308; *Udovenko & Ors v Mitchell* (1997) 79 FCR 418 at 421; *Miles v Shell Company of Australia* (1998) 156 ALR 133 at 136; *Taylor v Taylor* [1999] FCA 270 at [23]; *Seymour v Housing Guarantee Fund Ltd* [1999] FCA 1441 at [9]; *National Australia Bank v Freeman* [2002] FCA 244 at [14] (approved on appeal in [2003] FCAFC 200); *Commonwealth Bank of Australia v Jeans* [2005] FCA 978 at [15]; *Toumazou v Housing Guarantee Fund Ltd* [2006] FCA 1292 at [4]; *Smith v Abbott Stillman and Wilson* [2007] FCA 1256 at [30]; *Xu v Wan Ze Property Development (Aust) Pty Ltd (in liq)* (2014) 315 ALR 523 at [60]; *Khouzame v All Seasons Air Pty Ltd* [2014] FCA 1319 at [11]; *Yarranova Pty Ltd v Shaw (No 2)* [2014] FCA 616 at [69]; *Katter v Melhem (No 2)* (2014) 319 ALR 646 at [72]; *Di Iorio v Wagener* [2015] FCA 524 at [20]; *Nadarajapillai v Naderasa* [2016] FCA 502 at [25].

in AS [25], where the creditor's petition is supported by a judgment the Court's discretion under s 52 is whether to accept the judgment as satisfactory proof of the debt. It follows that the question for the Court is whether the judgment itself should not have been obtained; if not, a final judgment from another Court (at least if given after a full investigation at trial) will stand as proof of the debt.

13. *Secondly*, if, or to the extent that, there is any uncertainty in relation to this construction (and it is submitted there is not) the principle of finality in litigation is part of the common law framework in which the power conferred by s 52 should be considered (see AS [45] and the cases there cited). It follows that the statutory discretion conferred by s 52 should be construed in a manner giving primacy to a final judgment given after a contested hearing.

14. *Thirdly*, the appellant's construction is consistent with the construction given to the statutory discretion by numerous courts over the years.[6] It is also consistent with the natural meaning of Fullagar J's statement in *Corney* set out in [10] above, the language of which points directly towards instances of impeaching the obtaining of the judgment.

15. In dealing with the appellant's second ground, the respondent attempts to explain *Wren* as being outside the ambit of an ordinary default judgment. However, this submission is difficult to reconcile with RS [37] where it is accepted (correctly) that "judgment was entered against Mr Wren based on his default in failing thereafter to plead to the statement of claim". In any event, the critical point for present circumstances is that there had not been a full investigation at trial. The same point applied in *Wren*, as was clear from Barwick CJ's observation at 225:

> There had been no more in the Supreme Court than a contest at a pleading stage of the action. No more could have been decided than a question of law.

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[6] See AS [26] – [27]; see also *In Re Flatau; Ex Parte Scotch Whiskey Distillers Ltd* (1888) 22 QBD 83 at 85 per Lord Esher; *In re Hawkins; Ex parte Troup* [1895]1 QB 404 at 409 per Lord Esher and at 412 per Lopes LJ.

BANKRUPTCY.

No. 37 of 1924.

An Act relating to Bankruptcy.

[Assented to 8th October, 1924.]

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

PART I.—PRELIMINARY.

Short title.

1. This Act may be cited as the *Bankruptcy Act* 1924.

Commencement.

2. This Act shall commence on a day to be fixed by proclamation.

Parts.

3. This Act is divided into Parts as follows:—

committed by the debtor in the course or for the purpose of the proceedings preliminary to the execution of the deed, in cases where he is prohibited from so doing by the provisions of Part XI. or Part XII. of this Act.

(2.) If the petitioning creditor is a secured creditor, he must, in his petition, N.S.W. s. 7.

(*a*) state that he is willing to give up his security for the benefit of the creditors in the event of a sequestration order being made against the debtor ; or

(*b*) give an estimate of the value of his security, in which case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated, in the same manner as if he were an unsecured creditor.

(3.) If the petitioning creditor is a secured creditor he shall, upon application being made by the trustee or official receiver within the prescribed time after the making of a sequestration order, and upon payment of the estimated value stated in his petition, give up his security to the trustee or official receiver for the benefit of the creditors.

Proceedings and order on creditor's petition.

E.B.A., s. 5. N.S.W., s. 8. Vic., ss. 52, 57–64, 67, 69. S.A., ss. 70–78. Q., ss. 52–65. W.A., s. 7. Tas., ss. 7, 74 (1).

56.—(1.) A creditor's petition shall be verified by his affidavit, or the affidavit of some person on his behalf having knowledge of the facts, and shall be served in the prescribed manner.

(2.) At the hearing, the Court—

(*a*) shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of them ; and

(*b*) if satisfied with the proof, may make a sequestration order in pursuance of the petition.

(3.) If the Court—

(*a*) is not satisfied with the proof of the petitioning creditor's debt, or of the service of the petition, or of the act of bankruptcy ; or

(*b*) is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made,

it may dismiss the petition.

(4.) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, or the sum ordered to be paid, the Court may, if it thinks fit, stay or dismiss the petition, on the ground that an appeal from the judgment or order or a motion for a new trial is pending.

(5.) Where the debtor appears on the petition, and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court requires for payment to the petitioner of any debt which may be established against the debtor in due course of law, and

of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as is required for trial of the question relating to the debt.

(6.) Where proceedings are stayed, the Court may, by reason of the delay caused by the stay of the proceedings or for any other cause it thinks just, make a sequestration order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been so stayed.

Debtor's petition and order thereon.
E.B.A., s. 6.
N.S.W., s. 9.
Vic., s. 45.
S.A., s. 86.
W.A., s. 8.
Q., ss. 40–43.

57. A debtor's petition shall allege that he is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing of any declaration of inability to pay his debts, and the Court shall thereupon make a sequestration order:

Provided, however, that the Court may, if it thinks fit, refuse to make a sequestration order if the unsecured liabilities of the petitioning debtor are under Fifty pounds.

Costs of sequestration.
Vic., s. 56.
Q., s. 67.
S.A., s. 110.

58.—(1.) The creditor on whose petition any sequestration order is made shall at his own cost prosecute all proceedings in the sequestration until after the close of the first meeting of creditors.

(2.) The trustee shall reimburse the creditor, out of the estate of the bankrupt, the taxed costs incurred by the creditor in any such proceedings.

Withdrawal of petitions.
E.B.A., ss. 5, 6.
W.A., s. 7.

59. A petition, whether presented by a creditor or by a debtor, shall not, after presentation, be withdrawn without the leave of the Court.

Effect of sequestration order.
N.S.W., s. 10.
Vic., s. 166.
Q., ss. 75, 86.
S.A., s. 126.
Cf. E.B.A., ss. 7, 18.
W.A., s. 9.
Tas., s. 11.

60.—(1.) Upon sequestration the property of the bankrupt shall vest in the official receiver named in the order, and shall be divisible among the creditors of the bankrupt in accordance with the provisions of this Act.

(2.) After sequestration, except as directed by this Act, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, or shall commence or take any fresh step in any action or other legal proceeding, unless with the leave of the Court and on such terms as the Court imposes.

(3.) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security.

Second bankruptcy.
E.B.A., s. 39.
N.S.W., s. 10.

61.—(1.) In the event of a second or subsequent sequestration order being made against an undischarged bankrupt, any property acquired by him since the making of the former sequestration order which at the date when the subsequent petition was presented had not been distributed amongst the creditors in the last preceding bankruptcy, shall (subject to any disposition thereof made by the official receiver or trustee in that bankruptcy without knowledge of the presentation of the subsequent petition, and subject to any order made under paragraph (*c*) of sub-section (11.) of section sixty-nine of