

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 SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 Does subsec 58(3) of the *Bankruptcy Act 1966* (Cth) operate to impose a stay of enforcement of a judgment debt incurred by a bankrupt for the purposes of subsec 15(2) of the *Foreign Judgments Act 1991* (Cth)?

10 3 Can a judgment creditor '[wish] to enforce' a judgment in a foreign country for the purposes of subsec 15(1) of the *Foreign Judgments Act* in circumstances where it is not competent for the judgment creditor to enforce any remedy against the person or the property of the debtor by reason of subsec 58(3) of the *Bankruptcy Act*?

4 As to the first issue, the appellant contends that subsec 58(3) of the *Bankruptcy Act* does operate to impose a stay of enforcement for the purposes of subsec 15(2) of the *Foreign*

Judgments Act. A majority of the Court of Appeal of the Supreme Court of Victoria (Ashley and Priest JJA) erred in holding that the expression ‘any stay of enforcement of the judgment in question’ in subsec 15(2) of the *Foreign Judgments Act* refers only to a judicially ordered stay and does not comprehend the effect of subsec 58(3)(a) of the *Bankruptcy Act*.

5 As to the second issue, the appellant contends that a judgment creditor cannot wish to enforce a judgment in a foreign country for the purposes of subsec 15(1) of the *Foreign Judgments Act* in circumstances where it is not competent for the judgment creditor to enforce any remedy against the person or the property of the debtor by reason of subsec 58(3) of the *Bankruptcy Act*. Ashley and Priest JJA erred in holding or finding that in the events that had
10 occurred the first to third respondents were judgment creditors who wished to enforce a judgment in a foreign country for the purposes of subsec 15(1) of the *Foreign Judgments Act*.

Part III: Section 78B of the *Judiciary Act 1903*

6 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

7 The citation of the judgment of the Court of Appeal of the Supreme Court of Victoria is *Bennett v Talacko* [2016] VSCA 179. The judgment of the primary judge is reported as *Talacko (as executor of the estate of Helena Marie Talacko) v Talacko* [2015] VSC 624; (2015) 305 FLR 353.

20 **Part V: Facts**

8 Before World War II, Anna and Alois Talacko resided in what is now the Czech Republic. They owned several properties, including five properties in the centre of Prague, 0.8 hectares of land in suburban Kbely and 17.44 hectares of land on the outskirts of Prague at Řepy, a 368 hectare private forest plantation at Sucha, Slovakia, and an apartment building and adjacent vacant land in Dresden, Germany: Court of Appeal Reasons for Judgment (CA) [121].

9 In the years following World War II, the properties were seized by and vested in the state, both in Czechoslovakia and East Germany. Anna and Alois left Europe and settled in Australia: CA [122].

30 10 Anna and Alois Talacko had three children: Jan Emil Talacko (**J E Talacko**), Peter Talacko and Helena Talacko: CA [123].

11 J E Talacko was married to Judith Talacko, who is the appellant in this appeal: CA [124].

12 Peter Talacko was married to Margaret Talacko. Peter and Margaret Talacko had three children: Alexandra Bennett, Martin Talacko and Rowena Talacko: CA [125]. Peter and Margaret Talacko's children are the first to third respondents in this appeal.

13 Alois Talacko died in Melbourne in 1964, and Anna Talacko died in Melbourne in 1984: CA [126].

14 Peter Talacko died in 1995: CA [127].

15 After the revolution of 1989 ended communist rule in Czechoslovakia, J E Talacko, Peter Talacko and Helena Talacko became interested in reclaiming their deceased parents' properties: CA [128].

10 16 Helena Talacko and the wife and children of Peter Talacko subsequently alleged that the three siblings had reached an agreement to pursue such restitution together and to share the proceeds equally. J E Talacko denied that such an agreement had been reached: CA [129].

17 In September 1991, J E Talacko applied for restitution of the five properties in central Prague. At that time, a claim for restitution could only be made by a person who was both a resident and a citizen of the Czech Republic. J E Talacko satisfied these requirements. Peter Talacko and Helena Talacko did not. In March 1992, the five Prague properties were restored to J E Talacko, either wholly or in part: CA [130].

18 On 2nd October 1998, Helena Talacko and Peter Talacko's three children commenced Supreme Court of Victoria proceeding S CI 1998 07393 (the **1998 Proceeding**) against J E Talacko. Peter Talacko's widow and executrix, Margaret Talacko, was subsequently added as a plaintiff. The plaintiffs in the 1998 Proceeding claimed equitable relief against him on the basis that it had been agreed in March 1991 that the three children of Anna and Alois Talacko would share equally in the distribution of the properties: CA [132].

19 On 23rd February 2001, the parties to the 1998 Proceeding entered into written terms of settlement in relation to the 1998 Proceeding. The terms required the transfer by J E Talacko of all rights, title and interest in certain properties to a person nominated by the plaintiffs in the 1998 Proceeding. The terms also required that J E Talacko would not deal with those properties otherwise than in accordance with the terms: CA [133].

20 The plaintiffs in the 1998 Proceeding alleged that J E Talacko did not transfer the relevant properties in accordance with the terms of settlement. In July 2005, the plaintiffs in the 1998 Proceeding reinstated the 1998 Proceeding: CA [134].

21 In April 2008, Osborn J of the Supreme Court of Victoria held that J E Talacko had breached the terms of settlement and ordered the payment of equitable compensation to the plaintiffs in the 1998 Proceeding for breach of fiduciary duties: CA [135].

22 On 12th May 2009, J E Talacko and his sons, David Talacko and Paul Talacko, executed three donation agreements by which J E Talacko agreed to transfer to David Talacko and Paul Talacko, by way of gift, certain properties in the Czech Republic: CA [136].

23 On 28th October 2009, Wood AsJ of the Supreme Court of Victoria made a costs order in the 1998 Proceeding requiring J E Talacko to pay the plaintiffs the sum of \$81,914.40: CA [137].

24 On 11th December 2009, Kyrou J of the Supreme Court of Victoria made final orders in the 1998 Proceeding against J E Talacko requiring him to pay the plaintiffs in the 1998 Proceeding the total sum of €10,073,818: CA [138].

10 25 On 4th November 2011, the first to third respondents in this appeal commenced two court proceedings in the Czech Republic: proceeding 49 EXE 2107/2011-73 against J E Talacko, seeking to enforce the orders of Kyrou J, and proceeding 68C 139/2011 against J E Talacko's sons, David Talacko and Paul Talacko, seeking to contest the effectiveness of the donation agreements: CA [141].

26 On 7th November 2011, J E Talacko was made bankrupt by order of North J of the Federal Court of Australia, upon the petition of the respondents in this appeal: CA [142].

27 On the request of the first to third respondents in this appeal, the Prothonotary of the Supreme Court of Victoria issued a document entitled 'Certificate of Finality of Judgments and Order' dated 4 July 2012 (the **First Certificate**) in purported reliance on sec 15 of the *Foreign Judgments Act*: CA [143]. The First Certificate stated, among other things, that the judgment and orders of Kyrou J were 'FINAL, BINDING AND ENFORCEABLE according to law' and that 'the said Judgment and Order have now passed into final, binding and enforceable effect'. It stated that various judgments and orders, including the judgment and orders of Kyrou J and the orders of Wood AsJ 'have also become FINAL, BINDING and ENFORCEABLE according to law': CA [145].

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28 On 10th December 2012, North J of the Federal Court of Australia made orders granting leave *nunc pro tunc* to the respondents in this appeal pursuant to subsec 58(3) of the *Bankruptcy Act* to, among other things, commence an application in the Supreme Court of Victoria Costs Court and continue to take further steps up to judgment against J E Talacko in certain proceedings in the Czech Republic, provided that no steps be taken to enforce any judgment against J E Talacko without the prior leave of the Federal Court of Australia in its bankruptcy jurisdiction: CA [147].

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29 On 3rd November 2014, J E Talacko died intestate: CA [153].

30 On 16th December 2014, the appellant in this appeal issued a summons in the 1998 Proceeding by which she applied for orders that she be appointed to represent the estate of J E Talacko for the purpose of conducting an application. The proposed application was for declarations that the Prothonotary of the Supreme Court of Victoria had exceeded his authority in issuing the First Certificate and that the First Certificate was invalid and be set aside, or alternatively for an order that the Prothonotary amend the First Certificate as the court deemed appropriate: CA [156].

31 On 4th February 2015, Daly AsJ of the Supreme Court of Victoria delivered a ruling and made orders in the 1998 Proceeding by which she dismissed the appellant's summons of 10 16th December 2014: CA [158].

32 On 18th February 2015, the appellant in this appeal filed a notice of appeal in the 1998 Proceeding against Daly AsJ's ruling and orders: CA [160].

33 On 23rd February 2015, on the request of the first to third respondents in this appeal, the Prothonotary of the Supreme Court of Victoria issued a further document (the **Second Certificate**) in purported reliance on sec 15 of the *Foreign Judgments Act*, which stated that '[t]his certificate is an amendment and replaces in its entirety [the First Certificate]': CA [161].

34 On 8th May 2015, the appellant issued a fresh summons by which she sought to have the First Certificate and the Second Certificate revoked, declared invalid or set aside, in 20 addition to the making of a 'representative' order for the purposes of making the application: CA [166].

35 On 12th November 2015, Sloss J of the Supreme Court of Victoria ordered that the appellant in this appeal be appointed *nunc pro tunc* from 8th May 2015 to represent the estate of J E Talacko for the purposes of conducting an application for the orders set out in the summons dated 8th May 2015: CA [172]. On the same day, her Honour delivered reasons for judgment in respect of the application made by the summons dated 8th May 2015: CA [170]– [171].

36 On 4th February 2016, Sloss J of the Supreme Court of Victoria made final orders which, relevantly, declared invalid the First Certificate and the Second Certificate: CA [173].

30 37 On 2nd March 2016, the first to third respondents in this appeal filed an application for leave to appeal in the Court of Appeal of the Supreme Court of Victoria against certain of Sloss J's final orders, including those by which the First Certificate and the Second Certificate were declared invalid.

38 On 28th July 2016, the Court of Appeal of the Supreme Court of Victoria delivered reasons for judgment and made orders allowing the appeal.

Part VI: Argument

A Introduction

39 This appeal concerns the validity of two certificates issued by the Prothonotary of the Supreme Court of Victoria in purported reliance on subsec 15(1) of the *Foreign Judgments Act*. The certificates related to judgments given by that court against a person who was bankrupt at the time the certificates were issued.

10 40 The fundamental question in the appeal is whether a judgment creditor may apply for and obtain such a certificate in circumstances where the judgment debtor has been made bankrupt.

41 Subsection 58(3) of the *Bankruptcy Act* provides that, except as provided by that Act, after a debtor has become bankrupt, it is not competent for a creditor (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt, or (b) except with the leave of the court and on such terms as the court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

20 42 Subsection 15(1) of the *Foreign Judgments Act* provides that, subject to that section, where an application is duly made by a judgment creditor who wishes to enforce in a country a judgment that has been given in an Australian court, the registrar of the court must issue to the judgment creditor a certified copy of the judgment and a certificate with respect to the judgment containing certain prescribed particulars. Subsection 15(2) provides that an application may not be made until the expiration of any stay of enforcement of the judgment in question.

43 The first issue in the appeal is whether subsec 58(3) of the *Bankruptcy Act* operates to impose a stay of enforcement of a judgment debt incurred by a bankrupt for the purposes of subsec 15(2) of the *Foreign Judgments Act*.

44 The second issue is whether a judgment creditor can wish to enforce a judgment in a foreign country for the purposes of subsec 15(1) of the *Foreign Judgments Act* where it is not competent for the creditor to do so by reason of subsec 58(3) of the *Bankruptcy Act*.

B Subsection 58(3) of the *Bankruptcy Act*

30 45 Subsection 58(3) of the *Bankruptcy Act* is a key component in the general statutory scheme provided for by that Act. It plays a critical role in giving effect to the policies of modern bankruptcy law. See *Piccone v Suncorp Metway Insurance* (2005) 148 FCR 437 at 440.

46 The effect of bankruptcy is to divest a bankrupt of his or her property, to vest the property in a trustee (subsec 58(1)), and to make the property available for the payment of provable debts (subsec 116(1)). The right to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt is denied to creditors (subsec 58(3)). Property is defined to include property whether situate in Australia or elsewhere (subsec 5(1)). The debts and liabilities to which the bankrupt was subject become provable in the bankruptcy (subsec 82(1)). In substitution for the remedies which a bankrupt's creditors had against the property of the bankrupt, the creditors acquire a right to share equally and proportionately in the distribution of the bankrupt's estate (sec 108). The trustee is required to declare and distribute dividends amongst the creditors who have proved their debts (subsec 140(1)).

47 For the purposes of subsec 58(3), a distinction is drawn between the enforcement of a remedy against the person or the property of the bankrupt and the commencement or the taking of a fresh step in a legal proceeding. The bar imposed by subsec 58(3)(a) is absolute. That absolute bar applies only to the enforcement of remedies, as distinct from the commencement of legal proceedings or the taking of fresh steps in proceedings. Under subsec 58(3)(b), a judgment creditor may commence proceedings or take a fresh step in proceedings with leave of the court. See *Fraser v Commissioner of Taxation* (1996) 69 FCR 99 at 109, 111–12.

C Section 15 of the *Foreign Judgments Act*

48 The *Foreign Judgments Act* was enacted to provide a framework for the enforcement of foreign civil judgments in the Commonwealth and for related purposes. It replaced existing State and Territory legislation which had governed the registration and enforcement of foreign civil judgments in State and Territory supreme courts. The regime for the registration and enforcement of foreign judgments under the *Foreign Judgments Act* relies on the application of the ordinary processes of the courts of the Commonwealth, the States and the Territories.

49 A related purpose of the *Foreign Judgments Act* is to provide for the issuing of certificates with respect to judgments obtained in Australian courts where the judgment creditor wishes to enforce the judgment in a foreign country. That purpose is given effect to by sec 15 of the Act.

50 Subsection 15(1) of the *Foreign Judgments Act* is expressed in mandatory terms: where an application is duly made by a judgment creditor who wishes to enforce in a country a judgment that has been given in an Australian court, the registrar of the court must issue to the judgment creditor a certified copy of the judgment and a certificate with respect to the

judgment. Subsection 15(1)(b) provides that the certificate must contain such particulars as are prescribed by the regulations or by rules of court.

51 Subsection 15(2) stipulates that an application under subsection 15(1) may not be made until the expiration of any stay of enforcement of the judgment in question.

52 The words 'where an application is duly made', which appear in subsec 15(1), are directed, at least, to the stipulation contained in subsec 15(2): that is, an application is not duly made if it is made before the expiration of any stay of enforcement of the judgment. So much is clear from the introductory words of subsec 15(1), which provide that that subsection is subject to sec 15 as a whole. The consequence of this is that the registrar's obligation to issue a certified copy of the judgment and a certificate is not enlivened if the application has
10 been made before the expiration of any stay of enforcement of the judgment.

53 Subsection 15(2) of the *Foreign Judgments Act* should be given a purposive construction. The purpose of the provision is to prevent a judgment creditor from applying for, and obtaining from the court, a certified copy of the judgment and a certificate, which may then enable the judgment to be enforced in a foreign country, whilst enforcement of the judgment is stayed.

54 In applying subsec 15(2), the question to be asked is whether enforcement of the judgment is stayed. Stayed simply means suspended by operation of law. It matters not how the stay is effected. Nor is it relevant whether the instrument giving rise to the stay uses the word 'stay'. A stay of enforcement might be described in manifold ways by the various
20 legislatures, courts and tribunals of the Commonwealth, the States and the Territories. It is the function of the instrument, rather than the nomenclature used, that will determine whether subsec 15(2) applies.

D The first issue: Does subsec 58(3) of the *Bankruptcy Act 1966* operate to impose a stay of enforcement of a judgment debt incurred by a bankrupt for the purposes of subsec 15(2) of the *Foreign Judgments Act*?

Analysis

55 Subsection 15(2) of the *Foreign Judgments Act* provides that an application for a certified copy of a judgment and a certificate with respect to the judgment under subsec 15(1) may not be made until the expiration of any stay of enforcement of the judgment.
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56 Nothing in the text of subsec 15(2) qualifies the words 'any stay of enforcement of the judgment in question'. The text does not expressly limit the provision to judicially ordered stays. It refers to 'any' stay of enforcement, which suggests a broad meaning. The words 'the

expiration of' do not confine the meaning of 'stay' to a judicial stay; stays imposed by statute may also expire.

57 In construing the relevant provisions of the *Bankruptcy Act* and the *Foreign Judgments Act*, it should be presumed that the legislature intended those provisions to operate rationally and sensibly together. The proper construction of subsec 15(2) of the *Foreign Judgments Act*, which prohibits an application for a certificate being made until the expiration of any stay of enforcement (whether pursuant to statute or court order), facilitates the rational operation of that provision together with subsec 58(3) of the *Bankruptcy Act*. Conversely, the judgment of the Court of Appeal would, if it stands, have the effect of enabling a judgment creditor to 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 subsec 58(3)(a). This would circumvent a fundamental objective of the scheme of the *Bankruptcy Act*. Further, it is inconceivable that a bar on enforcement mandated by an Act of the Commonwealth Parliament and directed in terms at a creditor does not operate as a stay of enforcement for the purposes of another Act of the Commonwealth Parliament and directed in terms at a judgment creditor. There is nothing to indicate that the quality of a bar should present no impediment to seeking a certificate, in contrast to the quality of, say, a temporary stay pending consideration of a possible appeal. The former is greater than, and includes, the impediment constituted by the latter.

58 The phrase 'any stay of enforcement' in subsec 15(2) of the *Foreign Judgments Act* should therefore be construed as comprehending the absolute bar on enforcement imposed by subsec 58(3)(a) of the *Bankruptcy Act*.

The Court of Appeal's error

59 The majority judges in the Court below, Ashley and Priest JJA, held that the phrase 'any stay of enforcement of the judgment in question' in subsec 15(2) of the *Foreign Judgments Act* refers only to a judicially ordered stay (CA [7] per Ashley JA, CA [108] per Priest JA).

60 None of the reasons proffered by Ashley JA for this conclusion (CA [8]–[12]) justifies his Honour's narrow construction of the phrase.

61 First, Ashley JA observed that the status of a judgment, including its enforceability having regard to whether a stay has been ordered, is precisely the kind of information available to the Prothonotary, because the court record will disclose the position. His Honour stated that, on the other hand, the Prothonotary might well not know of any statutory or other preclusion against execution which might exist (CA [8]).

62 These observations overlook the provisions of subsec 15(2) of the *Foreign Judgments Act*, which are the provisions sought to be construed. The stipulation in subsec 15(2) is directed to the judgment creditor's application, and not to the issuing of a certified copy of the judgment and certificate by the court. It is the application that is, under subsec 15(2), prohibited from being made before the expiration of any stay of enforcement of the judgment. It is difficult to conceive why the actual or likely knowledge of the registrar of a court should have any bearing on the construction of a provision which in certain circumstances proscribes a judgment creditor from making an application.

10 63 Secondly, Ashley JA stated that the phrase 'the expiration of any stay' is redolent of a judicially ordered stay (CA [9]). That statement collapses under the weight of his Honour's own acknowledgment, which is plainly correct, that a statute might prescribe something which could be described as a stay and which might also expire in certain prescribed circumstances (CA [9]).

64 Thirdly, his Honour stated that it is unnecessary to 'distort' the apparent meaning of subsec 15(2) of the *Foreign Judgments Act* to ensure that subsec 58(3) of the *Bankruptcy Act* has full effect (CA [10]). No distortion of the meaning of the words 'any stay of enforcement' is required to support a conclusion that those words comprehend the effect of para 58(3)(a). According to its ordinary meaning, the phrase 'any stay of enforcement of the judgment in question' simply refers to a circumstance in which enforcement of the judgment is stayed, whether by court order, statute or otherwise.

20 65 Fourthly, Ashley JA held that para 58(3)(a) of the *Bankruptcy Act* does not apply to an application made under subsec 15(1) of the *Foreign Judgments Act* (CA [11]). However, whether an application under subsec 15(1) constitutes enforcement of a remedy for the purposes of para 58(3)(a) (a question not raised by this appeal) is not relevant to whether the words 'any stay of enforcement' in subsec 15(2) comprehend a stay imposed by statute. The two questions are discrete.

30 66 Fifthly, Ashley JA stated that a requirement in the applicable court rules that a certificate state 'that the proceeding is at an end except for enforcement of the judgment' supports the conclusion that the stay of enforcement to which subsec 15(2) refers is a judicially ordered stay. His Honour also stated that a requirement in the court rules that an affidavit be filed 'deposing to such information as will enable the certificate to be granted' does not support an argument that the affidavit should state a circumstance which would preclude rather than enable a certificate to be granted (CA [12]).

67 It is difficult to perceive how either of those requirements under the rules of the Supreme Court of Victoria supports a conclusion that the phrase ‘any stay of enforcement’ as used in a Commonwealth statute refers only to a judicially ordered stay. What those rules require the Prothonotary of the Supreme Court of Victoria to state in a validly issued certificate cannot be pertinent to construction of the words ‘any stay of enforcement’ as they appear in subsec 15(2) of the *Foreign Judgments Act*.

68 The requirement for an affidavit to be filed deposing to such information as will enable the certificate to be granted simply means that the judgment creditor must inform the registrar, by means of an affidavit, of those matters which are relevant to the issuing of the certificate. Presumably, those matters would include whether the application is being made before the expiration of any stay of enforcement of the judgment in question. In any event, the requirements relating to the filing of an affidavit under the rules of the Supreme Court of Victoria cannot be relevant to construction of the words ‘any stay of enforcement’ in subsec 15(2) in the *Foreign Judgments Act*.

69 The reasoning of Priest JA also fails to justify a construction of the words ‘any stay of enforcement’ in subsec 15(2) of the *Foreign Judgments Act* as referring only to a judicially ordered stay.

70 His Honour stated that, by its terms, subsec 58(3) of the *Bankruptcy Act* does not operate as a stay, but ‘merely provides that once a debtor becomes a bankrupt it is not “competent” to “enforce any remedy” against him or her, or against his or her property, with respect to a provable debt’ (CA [88]). His Honour suggested that the meaning of the expression ‘any stay of enforcement’ in subsec 15(2) of the *Foreign Judgments Act* does not admit of much in the way of sustained argument or deep analysis. His Honour reasoned that, when construed in the context of the statute as a whole, as a matter of ordinary language the ‘stay’ referred to ‘comprehends only a judicially imposed stay (or similar)’ (CA [108]).

71 Priest JA sought to attach significance to the fact that para 58(3)(a) of the *Bankruptcy Act* provides that ‘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’, rather than stating that enforcement of such a remedy is ‘stayed’. By focusing on the language used in subsec 58(3) of the *Bankruptcy Act*, Priest JA gave insufficient regard to the provision’s purpose and function. Subsection 58(3) does not use the word ‘stay’. However, as noted above, a purposive approach should be taken to construction of subsec 15(2) of the *Foreign Judgments Act*. So long as the effect of the relevant statutory provision or order is to impose a stay of

enforcement, the absence of the word 'stay' will not be relevant to determining whether subsec 15(2) applies.

72 Indeed, there is no difference in substance between a statutory provision or order which provides that it is not competent for a creditor to enforce a judgment debt (the terms of para 58(3)(a) of the *Bankruptcy Act*) and a statutory provision or order which provides that enforcement of a judgment debt is stayed, given that the only person who can enforce the judgment debt is the judgment creditor.

73 Priest JA also fell into error by reasoning that '[a]lthough the judgment creditor is not competent to enforce the judgment debt, its enforcement is not altogether shut out, since
10 ample powers of enforcement remain in the hands of the trustee (albeit that those powers must be exercised consonantly with the constraints imposed by the *Bankruptcy Act*)' (CA [108]). His Honour stated (CA [111]):

At the time that the applications for the certificates were made the compensation judgment was enforceable as an order of the Supreme Court in the sense that it had not been set aside or judicially stayed. Once the sequestration order was made, the judgment did not cease to be enforceable. Indeed, subject to the provisions of the *Bankruptcy Act*, the compensation judgment remained enforceable as, at the very least, a debt provable in the bankruptcy. ... The provisions of s 58(3)(a) of the Act simply meant that it was not
20 'competent' for the judgment creditors to themselves enforce any remedy against the person or the property of the bankrupt in respect of that provable debt, the enforcement of any such debt being the responsibility of the trustee.

74 With respect, these passages misstate the effect of bankruptcy. As referred to above, upon the making of a sequestration order, all of the debts and liabilities to which the bankrupt was subject become provable in the bankruptcy, and a creditor's right of action against the debtor is converted into a right to prove and share in the distribution of the bankrupt's estate. It is not correct that powers to enforce those debts remain in the hands of the trustee: the powers of the trustee do not include a power to enforce the bankrupt's debts. To the contrary, the role of the trustee is to recover the assets of the bankrupt and to distribute dividends equitably and rateably amongst the creditors who have proved their debts. This does not
30 constitute enforcement.

75 Nor was it correct for Priest JA to find that, at the times that the applications for the certificates were made, the judgments in question were enforceable. When the judgment creditors applied for the certificates, the judgment debtor was bankrupt. By operation of para 58(3)(a) of the *Bankruptcy Act*, the judgments were thus unable to be enforced.

76 If the majority judges were correct in holding that the phrase ‘any stay of enforcement’ in subsec 15(2) of the *Foreign Judgments Act* refers only to judicially ordered stays, an application for the issue of a certificate under subsec 15(1) would not be prohibited where the judgment debtor was bankrupt unless a court had ordered that enforcement of the judgment was stayed. However, such an order would be otiose, and thus would not be made, by reason of the absolute bar on enforcement under para 58(3)(a) of the *Bankruptcy Act* (which, it may be noted, has effect upon the making of a sequestration order). Accordingly, if the Court of Appeal is correct in its construction of subsec 15(2), a creditor who wished to enforce in a foreign country a judgment given by an Australian court would never be inhibited from applying for and obtaining a certificate under subsec 15(1) where the judgment debtor had been made bankrupt. This would circumvent a key objective of the scheme of the *Bankruptcy Act*, which cannot have been the intended effect of subsec 15(2).

Conclusion

77 For these reasons, the absolute bar on enforcement imposed by para 58(3)(a) of the *Bankruptcy Act* operates to impose a stay of enforcement for the purposes of subsec 15(2) of the *Foreign Judgments Act*.

78 Subsection 15(2) of the *Foreign Judgments Act* thus operated to prohibit the judgment creditors from applying for the certificates under subsec 15(1) after the judgment debtor had been made bankrupt.

79 Accordingly, the applications for the certificates were not ‘duly made’ for the purposes of subsec 15(1), and the Prothonotary had no power to issue the certificates.

E The second issue: Can a judgment creditor ‘[wish] to enforce’ a judgment in a foreign country for the purposes of subsec 15(1) of the *Foreign Judgments Act* in circumstances where it is not competent for the judgment creditor to enforce any remedy against the person or the property of the debtor by reason of subsec 58(3) of the *Bankruptcy Act*?

Analysis

80 Subsection 15(1) of the *Foreign Judgments Act* provides for the issuing of a certified copy of a judgment and a certificate with respect to the judgment ‘where an application is duly made by a judgment creditor who wishes to enforce in a foreign country a judgment that has been given in an Australian court’.

81 The expression ‘who wishes to enforce’ should be construed as importing an entitlement to enforce. It cannot have been the intention of Parliament that a person may apply for a certificate under subsec 15(1) of the *Foreign Judgments Act* where the person

merely desires to enforce a judgment in a foreign country but is prohibited from doing so. There must be no impediment to enforcement by that person under Australian law.

82 This construction of subsec 15(1) is supported by subsec 15(2), which specifically provides that an application may not be made until the expiration of any stay of enforcement.

83 At the times when they requested the certificates, there was an absolute bar on the enforcement of any remedy against the person or the property of the bankrupt by operation of para 58(3)(a) of the *Bankruptcy Act*. Because the phrase ‘who wishes to enforce’ surely imports an entitlement or capacity to enforce, the judgment creditors were not in law persons who wished to enforce a judgment in a foreign country within the meaning of subsec 15(1) of the *Foreign Judgments Act*.

10

The Court of Appeal’s error

84 Ashley and Priest JJA accepted that the judgment creditors had no entitlement to enforce the judgment by reason of para 58(3)(a) of the *Bankruptcy Act*. Their Honours also accepted the possibility that the judgment creditors might, in reliance on the certificates, enforce the judgment contrary to para 58(3)(a). Ashley JA stated that there might be enforcement action by the judgment creditors, reliant upon one or other certificate, which could trigger the operation of para 58(3)(a) and so deny the judgment creditors the competence to proceed (CA [26]). Priest JA stated that para 58(3)(a) would be engaged if there was an endeavour to compel observance of the judgment in question (CA [93]).

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85 However, Ashley and Priest JJA also found that the judgment creditors who applied for the certificates did ‘[wish] to enforce’ the judgment in a foreign country (CA [22], [26], [103]). Ashley JA found that this was ‘clear’ (CA [22]). Priest JA stated that the applicants ‘[u]ndoubtedly’ wished to enforce the judgment (CA [103]).

86 Ashley JA stated that the circumstance that there were various steps which would have to be successfully undertaken before there could be any such enforcement did not mean that the relevant wish was not present (CA [22]). His Honour further stated that the fact that the judgment creditors sought to rely on the first certificate in proceedings in the Czech Republic confirmed their wish to enforce the judgment (CA [22]). However, the majority judges did not otherwise refer to any evidence in support of their finding that the judgment creditors did ‘[wish] to enforce’ the judgment.

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87 Priest JA’s conclusion that the judgment creditors undoubtedly wished to enforce the judgment when they applied for the certificates is contradicted by his Honour’s own finding that the purpose of the applications was recognition of the judgment by the Czech courts. His Honour stated that the applications for the certificates were ‘not “to enforce any remedy

against the person or the property of the bankrupt in respect of a provable debt”, but simply to have a judgment of the Supreme Court “recognised” in a foreign jurisdiction’ (CA [90]). Priest JA elaborated upon this by stating that, as he understood the evidence, ‘the purpose of the obtaining the Prothonotary’s certificates is to have the compensation judgment recognised in the Czech Republic’ (CA [93]).

88 The only evidence that his Honour cited in support of that finding was a statement by the judgment creditors’ former counsel that what one of the Czech proceedings was ‘aimed at is seeking to have recognised and then, according to law, enforced the judgment’ (CA [98]–[99]). Priest JA stated that ‘[c]ounsel for the applicants made it plain that the applicants
10 desired to have the compensation judgment – expressed in money terms – recognised in the Czech Republic’ (CA [100]). However, his Honour failed to observe that this statement by counsel also referred to the Czech proceedings seeking to have the judgment ‘according to law, enforced’.

89 Priest JA concluded by stating (CA [103]): ‘For the sake of completeness, I should observe that I can see no incongruity between the words of s 15(1) of the *Foreign Judgments Act* – in particular, “where an application is duly made by a judgment creditor *who wishes to enforce ...*” – and a conclusion that the application for the certificates was not to “enforce a remedy” within s 58(3)(a) of the *Bankruptcy Act*. Undoubtedly, the applicants wished to enforce the compensation judgment (if only to prove it as a debt in the bankruptcy).’

90 There is indeed an incongruity between Ashley JA’s finding that the judgment creditors wished to enforce the judgment when they applied for the certificates (CA [103]) and his Honour’s finding that the purpose of the certificates was not to enforce any remedy but simply to have the judgment recognised (CA [90]). His Honour’s suggestion that the judgment creditors wished to enforce the judgment ‘if only to prove it as a debt in the bankruptcy’ also, with respect, misconceives the effect of bankruptcy. As noted above, upon the making of the sequestration order, the rights of the judgment creditors to enforce against the person or property of the bankrupt were converted into a right to prove and share in the distribution of the bankrupt’s estate. They were then prohibited from enforcing the judgment against the bankrupt by the absolute bar on enforcement imposed by subsec 58(3)(a) of the
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30 *Bankruptcy Act*.

Conclusion

91 Given that they had no entitlement to enforce the judgment by reason of the absolute bar imposed by subsec 58(3)(a) of the *Bankruptcy Act*, the judgment creditors who applied for

the certificates were not persons who 'wished to enforce' a judgment for the purposes of subsec 15(1) of the *Foreign Judgments Act*.

92 The judgment creditors were thus not entitled to apply for the certificates, and the Prothonotary had no power to issue them.

93 The Court should allow the appeal and set aside the orders made by the Court of Appeal.

Part VII: Legislation

94 The following provisions are relevant to the argument in this case. They appear below in the form they took at the time of the hearings and decisions below. They have not been materially amended since then.

95 Section 58(3) of the *Bankruptcy Act 1966* (Cth) provides:

Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

- (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
- (b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

96 Section 15 of the *Foreign Judgments Act 1991* (Cth) provides:

- (1) Subject to this section, where an application is duly made by a judgment creditor who wishes to enforce in a country a judgment that has been given in an Australian court, the registrar of the court must issue to the judgment creditor:
 - (a) a certified copy of the judgment; and
 - (b) a certificate with respect to the judgment containing such particulars, including:
 - (i) the causes of action to which the judgment relates; and
 - (ii) the rate of interest (if any) payable on any amount payable under the judgment;
- as are prescribed by the regulations or by Rules of Court.
- (2) An application may not be made until the expiration of any stay of enforcement of the judgment in question.
 - (3) Nothing in subsection (1) prevents a fee being imposed in respect of the issue of documents referred to in that subsection.

Part VIII: Orders sought

97 The appellant seeks the following orders:

- (a) The appeal be allowed.
- (b) The Orders of the Court of Appeal of the Supreme Court of Victoria made in proceeding S APCI 2016 0024 be set aside.
- (c) In lieu thereof:
 - (i) the appeal to the Court of Appeal of the Supreme Court of Victoria is dismissed;
 - (ii) the first to third respondents pay the costs of the appellant in proceeding S APCI 2016 0024.
- (d) The first to third respondents pay the appellant's costs of this appeal.

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Part IX: Time estimate

98 The appellant would seek no more than 2 hours for the presentation of the appellant's oral argument.

15th December 2016

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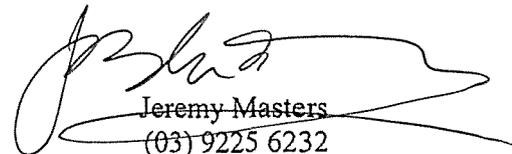
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