

BETWEEN:

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

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and

ALEXANDRA BENNETT
First Respondent

and

MARTIN TALACKO
Second Respondent

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and

ROWENA TALACKO
Third Respondent

and

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

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SUBMISSIONS OF THE FIRST, SECOND AND THIRD RESPONDENTS

Part I: Certification

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

Part II: Issues

2. The following issues arise on the Appellant's grounds of appeal:
 - (a) First Issue: Does the denial by s 58(3)(a) of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) of the competence of a judgment creditor to enforce any remedy against the person or property of a bankrupt in respect of a provable debt constitute a "stay of enforcement of [a] judgment" for the purposes of s 15(2) of the *Foreign Judgments Act 1991* (Cth) (**FJ Act**)?
 - 10 (b) Second Issue: Does the description of a judgment creditor in s 15(1) of the FJ Act as one "who wishes to enforce" in a country an Australian judgment constitute a condition on the power of the Registrar issuing certification under that provision? If so, was the condition here satisfied?

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

3. The First to Third Respondents certify that they have considered whether a notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and consider that no such notice needs to be given.

Part IV: Facts

4. Adopting the abbreviations used in the Appellant's submissions, the First to Third Respondents elaborate on the Appellant's narrative of facts and chronology, as follows.

A. The 1998 Proceeding

5. After J E Talacko failed to transfer the relevant properties in accordance with the 23 February 2001 terms of settlement, the Plaintiffs in the 1998 Proceeding reinstated that proceeding in the Supreme Court of Victoria. On 24 April 2008, the Court determined that J E Talacko had breached the Terms. Under the Terms, this entitled the Plaintiffs to enter judgment for an order that J E Talacko pay the Plaintiffs equitable compensation for breaches of fiduciary duty.¹ Contrary to the

¹ *Talacko v Talacko* [2008] VSC 128 (Osborn J).

Appellant's summary, Osborn J did not at that time make an order requiring J E Talacko to pay equitable compensation to the Plaintiffs.²

6. On 24 November 2009, Kyrou J delivered judgment, in which his Honour relevantly held that the Plaintiffs were entitled to equitable compensation pursuant to the Terms.³ On 11 December 2009, Kyrou J made final orders requiring J E Talacko to pay to the First to Third Respondents, and to Helena Talacko, the total sum of €10,073,818 (the **Compensation Order**).⁴
7. On 18 March 2011, the Court of Appeal dismissed an appeal brought by J E Talacko against the final orders made by Kyrou J,⁵ and on 28 October 2011, this Court dismissed an application for special leave to appeal from that decision.⁶
8. On 16 September 2013, Kyrou J ordered that J E Talacko pay to the Respondents the amount of \$2,680,239 in respect of their costs.⁷
9. Each of the Compensation Order, the 28 October 2009 costs order of Wood AsJ⁸ and the 16 September 2013 costs order of Kyrou J⁹ remains unsatisfied.¹⁰

B. The Czech proceedings

10. On 12 May 2009, J E Talacko and two of his sons, David and Paul Talacko, executed three donation agreements by which J E Talacko agreed to transfer to David and Paul, by way of gift, all of J E Talacko's interests in the Czech properties which were in issue in the 1998 Proceeding, then pending before the Supreme Court.¹¹
11. On 4 November 2011, the First to Third Respondents commenced two court proceedings in the Czech Republic:
 - (a) proceeding No. 68C 139/2011, which was brought against David and Paul Talacko; and
 - (b) proceeding No. 49 EXE 2107/2011-73, which was brought against J E Talacko (the **Execution Proceeding**).

² Appellant's Submissions, [21]. The Appellant refers to *Bennett v Talacko* [2016] VSCA 179, [135] (Santamaria JA) (**CA Reasons**) [AB ##] for the proposition that Osborn J ordered J E Talacko to pay equitable compensation to the Plaintiffs. That was not accurate. However, nothing turns on this inaccuracy for the purposes of this appeal.

³ *Talacko v Talacko* [2009] VSC 579 (Order at AB ##).

⁴ CA Reasons, [138] (Santamaria JA) (Order at AB ##).

⁵ *Talacko v Talacko* [2011] VSCA 71.

⁶ *Talacko v Talacko* [2011] HCATrans 301.

⁷ *Talacko v Talacko* (2015) 305 FLR 353, [48] (Sloss J) (**SC Reasons**) [AB ##].

⁸ Order at AB ##.

⁹ Order at AB ##.

¹⁰ SC Reasons, [7] [AB ##]; CA Reasons, [149] (Santamaria JA) [AB ##].

¹¹ CA Reasons, [136] (Santamaria JA) [AB ##].

12. After obtaining the certificate issued on 4 July 2012 by the Prothonotary of the Supreme Court under s 15 of the FJ Act (the **First Certificate**),¹² the First to Third Respondents filed that certificate in the Execution Proceeding.¹³

C. Federal Court proceeding

13. On 10 December 2012, the Respondents, with the consent of J E Talacko's trustee in bankruptcy, sought and obtained a number of orders in the Federal Court of Australia concerning the taking of further steps in relation to the bankrupt estate of J E Talacko. Justice North relevantly made the following order:¹⁴

10 *Leave be granted nunc pro tunc from 7 November 2011 to the [Respondents in this appeal] pursuant to s 58(3) of the Bankruptcy Act 1966 (Cth) to continue to take further steps, including defending or pursuing any appeal, up to judgment against [J E Talacko] in the Petition proceedings that have been lodged in their names in the District Court of Prague on 4 November 2011 and which have been assigned numbers 49 EXE 2107/2011-73 [the Execution Proceeding] and 48 EXE 522/2012-75 [a proceeding brought by the Fourth Respondent] provided that no step be taken to enforce any judgment against [J E Talacko] without the prior leave of the Federal Court of Australia in its bankruptcy jurisdiction.*

Part V: Applicable legislative provisions

- 20 14. In addition to the Appellant's statement of relevant statutory provisions, the following provision is relevant to the argument in this case. It appears below in the form it took at the time of the hearings and decisions below. It has not been amended since then.

15. Section 60(1) of the *Bankruptcy Act 1966* (Cth) relevantly provides:

60 Stay of legal proceedings

(1) *The Court may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit:*

...

- 30 (b) *stay any legal process, whether civil or criminal and whether instituted before or after the commencement of this subsection, against the person or property of the debtor:*

¹² Affidavit of Stephen John Howells sworn 2 June 2014, at [43]-[44], Exhibit JGJ-6 to the Affidavit of Jonathan Guy Joseph sworn 16 December 2014 [AB ##].

¹³ SC Reasons, [21] [AB ##].

¹⁴ CA Reasons, [147] (Santamaria JA) [AB ##] (Order at AB ##).

(i) *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; or*

(ii) *in consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt;*

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and, in a case where the debtor is imprisoned or otherwise held in custody in consequence of the non-payment of a provable debt or of a pecuniary penalty referred to in subparagraph (i) or in consequence of his or her refusal or failure to comply with an order referred to in subparagraph (ii), discharge the debtor out of custody.

Part VI: Argument

First Issue - Introduction

16. Of course, this appeal involves questions of statutory construction arising out of s 15 of the FJ Act. By reference to the Appellant's grounds of appeal, there is a question of construction involving s 15(2) of the FJ Act and a further question of construction involving s 15(1) of the FJ Act.

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17. The first of two issues on the appeal speaks to the proper construction of s 15(2) of the FJ Act. Ultimately, the contention of the Appellant is that, during the bankruptcy of a judgment debtor, no valid certificate may be issued by the Prothonotary. As identified in her written submissions, the strands of the Appellant's reasoning may be summarised as follows:

(a) s 15(2) of the FJ Act should be given a purposive construction;¹⁵

(b) the text of s 15(2) does not expressly limit the provision to judicially ordered stays;¹⁶

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(c) in construing the relevant provisions of the Bankruptcy Act and the FJ Act, it should be presumed that the legislature intended those provisions to operate rationally and sensibly together;¹⁷

(d) 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 paragraph 58(3)(a) of the Bankruptcy Act.¹⁸

¹⁵ Appellant's Submissions, [53].

¹⁶ Appellant's Submissions, [56].

¹⁷ Appellant's Submissions, [57].

18. On the First Issue – the proper construction and scope of s 15(2) of the FJ Act – the First to Third Respondents join issue as follows:

- (a) first, as elaborated upon at paragraphs [20]-[25], below, the First to Third Respondents contend that a stay of enforcement of a judgment has a settled, technical, legal meaning – viz., a stay operates directly on an order or judgment and not, in contrast, on the party who might otherwise seek enforcement of that judgment;
- (b) second, further or alternatively, as elaborated upon at paragraphs [26]-[29], below, the First to Third Respondents contend that s 58(3)(a) of the Bankruptcy Act does not in its terms operate as a stay of enforcement of a judgment; and
- (c) third, as elaborated upon at paragraphs [30]-[33], below, the First to Third Respondents contend that, in any event, s 58(3) of the Bankruptcy Act does not bear upon the proper construction of s 15(2) of the FJ Act; further, the construction for which they contend does not circumvent any objective of the scheme of the Bankruptcy Act.

19. There is one final matter to raise in this introduction to the First Issue. The analysis of the Appellant in her written submissions begins with the provisions of the Bankruptcy Act, then turns to the provisions of the FJ Act, and then asserts as a proposition of construction that s 15(2) should be given a purposive construction. That is an unstable framing for the First Issue. That framing diverts attention away from the relevant statutory text; and may tend to invite *a priori* assumptions focused upon, or at least premised on, the provisions and objectives of the Bankruptcy Act.

The denial of a judgment creditor's competence to enforce any remedy against the person or property of a bankrupt under s 58(3)(a) of the Bankruptcy Act is not, within the meaning of s 15(2) of the FJ Act, a "stay of enforcement of [a] judgment"

20. Section 15(2) of the FJ Act provides that an application may not be made for certification under s 15 in respect of an Australian judgment “until the expiration of any stay of enforcement of the judgment in question”. It is clear enough that the purpose of s 15(2) is to prevent a judgment creditor from applying for, and obtaining from the court, certification under s 15 during such time as the relevant judgment is subject to a stay of enforcement. However, the expression “stay of enforcement” is not itself defined and so falls to be construed in light of orthodox principles of statutory construction.

¹⁸ Appellant's Submissions, [64].

21. The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to mean.¹⁹ The language which has actually been employed in the legislative text is the surest guide to ascertaining the intention of the legislature.²⁰ Where, in framing a statutory provision, the Parliament has chosen to use a legal technical term, the term should be presumed to bear that meaning unless its context indicates a different meaning.²¹ For instance, in *Brett v Barr Smith*, Isaacs J observed that: “It is a cardinal rule of interpretation that technical words must have their legal effect unless the contrary is made perfectly clear.”²²
- 10 22. The term “stay of enforcement of a judgment” is a composite expression which describes a single concept. It has a settled legal technical meaning. The critical, characteristic feature of a stay of enforcement of a judgment, as understood in that legal technical sense, is that such a stay operates directly on an order or judgment; and not, in contrast, on the party who might otherwise seek its enforcement.
- 20 23. In *Whan v McConaghy*, four Justices of this Court drew a distinction between a stay of execution, and the grant of bail to an individual following his or her conviction and sentence, which grant authorises that person to be at liberty notwithstanding the operation of the sentence. Drawing a distinction between a stay of execution and a bail order, their Honours observed that “[a] stay of execution, as its name implies, operates directly on the judgment or order the subject of the stay” and, in doing so, “interfere[s] with the operation of the order”.²³ To similar effect, in *P Aker Flowerbulbs Pty Ltd v Coulter*, Weinberg J said that “a stay of [execution] is an order of a court that has the effect of suspending the operation of an earlier judgment or order.”²⁴

¹⁹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

²⁰ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

²¹ *Attorney-General (NSW) v Brewery Employés’ Union of New South Wales* (1908) 6 CLR 469, 531 (O’Connor J); *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585–586 [45] (the Court).

²² (1919) 26 CLR 87, 92–93, cited recently in relation to the cognate doctrine as to the interpretation of legal technical terms in contracts, in *ACN 074 971 109 Pty Ltd (as Trustee for the Argot Unit Trust) v National Mutual Life Association of Australasia Ltd (No 2)* (2013) 41 VR 476, 493–494 [51] (Nettle and Neave JJA, Robson AJA agreeing on this point); see also (1919) 26 CLR 87, 97 (Higgins J) (“Statutes which make law must *primâ facie* be treated as using technical words in their technical sense”).

²³ (1984) 153 CLR 631, 638 (Mason, Murphy, Wilson and Deane JJ).

²⁴ (2004) 140 FCR 410, 418 [40].

24. A stay of enforcement of a judgment interferes with the operation of an order by denying the availability of the ordinary mechanisms of enforcement in respect of it.²⁵ Enforcement is a legal process in the same action as that in which the party applying for enforcement obtained judgment.²⁶ Just as a stay of proceedings operates to hold the relevant proceeding in abeyance by taking away from the action “its inherent ability to go forward”,²⁷ and so only derivatively prevents the parties from taking further steps until the stay is lifted, a stay of enforcement takes away the inherent ability to go forward of an action in which a judgment has been given, and only derivatively prevents a party from taking steps to enforce that judgment by denying the availability of enforcement processes.

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25. In contrast, s 58(3)(a) of the Bankruptcy Act operates directly on, relevantly, a judgment creditor, by denying that person’s competence to enforce a remedy. It is neither expressed to, nor does it as a matter of law, operate “directly on” a court order or judgment. It does not interfere with the operation of a court order, in the sense described by this Court in *Whan v McConaghy*. It lacks a characteristic feature of a stay of enforcement of a judgment.

Section 58(3)(a) of the Bankruptcy Act does not in terms operate as a stay of enforcement of a judgment

26. Section 58(3) of the Bankruptcy Act provides as follows:

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(3) *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.*

27. According to the natural and ordinary meaning of the terms employed by Parliament in s 58(3)(a), that provision does not in terms operate to impose a stay of enforcement in respect of a judgment or order of a court. As Priest JA observed

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²⁵ *Pollack v Commissioner of Taxation* (1991) 32 FCR 40, 56 (Gummow J); *Re Hughes; Ex parte Westpac Banking Corporation* (Unreported, Federal Court of Australia, Merkel J, 27 November 1997); *Tatlers.com.au Pty Ltd v Davis* (2006) 203 FLR 473, 481 [25] (Barrett J); *Australian Beveridge Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374, 382-383 [26]-[34] (Beazley JA).

²⁶ *Re a Company* [1915] 1 Ch 520, 525 (Lord Cozens-Hardy MR).

²⁷ See *Lambert v Mainland Market Deliveries Ltd* [1977] 2 All ER 826, 834 (Lawton LJ); see also *ROFA Sport Management AG v DHL International (UK) Ltd* [1989] 2 All ER 743, 747 (Neill LJ, Ralph Gibson and May LJJ agreeing).

below, “by its terms s 58(3)(a) of the *Bankruptcy Act* does not impose a *stay* of enforcement. Rather, s 58(3)(a) merely provides that it is not *competent* for a *creditor to enforce* any remedy.”²⁸

28. The distinction between that which s 58(3)(a) effects, and a stay of enforcement, also emerges from a consideration of the context of that provision. Section s 60(1)(b) of the *Bankruptcy Act* provides expressly that a court exercising jurisdiction under that Act may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit, “stay any legal process ... against the person or property of the debtor ... in respect of the non-payment of a provable debt” (s 60(1)(b)(i)). In that way, s 60(1)(b) provides specifically for the power of a court to make an order of the kind contemplated by s 15(2) of the FJ Act; namely, an order staying (and therefore operating on or interfering with) the legal process of enforcement.²⁹
29. As to s 58(3)(b), in *Wardle v Agricultural & Rural Finance Pty Ltd (No 3)* Sackville AJA (with whom McColl and Barrett JJA agreed) correctly held as follows:³⁰

... [the defendant] *continued as a party to the proceedings after his bankruptcy. Section 58(3) of the Bankruptcy Act 1996 (Cth) imposed restrictions on the steps available to a creditor, but that provision did not operate as an automatic stay of the proceedings against [the defendant]; compare s 60(1)(b) of the Bankruptcy Act.*

In context, their Honours’ reference to s 58(3) must be understood as a reference to s 58(3)(b) of the *Bankruptcy Act*. The First to Third Respondents submit that, by analogy, just as s 58(3)(b) of the *Bankruptcy Act* does not operate as a stay of proceedings, s 58(3)(a) of the *Bankruptcy Act* does not operate as a stay of enforcement of a judgment debt.

Consideration of different legislative schemes does not advance the analysis

30. Contrary to the Appellant’s submission,³¹ s 58(3) of the *Bankruptcy Act* does not bear upon the proper construction of s 15(2) of the FJ Act. While it has been held that Parliament should be presumed, in certain cases, to have intended the provisions of different statutes to operate rationally and sensibly together, that principle of statutory construction does not operate at large. Rather, it applies in circumstances in which the provisions which fall for interpretation by a court belong to what have

²⁸ CA Reasons, [108] (original emphasis) [AB ##]. See, too, *Coventry v Charter Pacific Corporation Limited* (2005) 227 CLR 234, 238 [4] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

²⁹ The differing operations of s 58(3)(a), and s 60, is analysed in *Baker v Paul* (2012) 83 NSWLR 364, 379 [49]–[51] (Slattery J).

³⁰ (2013) 303 ALR 298, 312 [64].

³¹ Appellant’s Submissions, [57].

variously been described as “inter-related statutes”,³² “several statutes making up a legislative scheme”,³³ “separate but related legislation”³⁴ or an “overlapping legislative scheme”.³⁵

31. The Bankruptcy Act and the FJ Act are distinct legislative enactments, operating in their respective spheres and according to their own terms. The Appellant’s submissions, in effect, advance an idea of a desirable policy (asserted to be a harmonious operation together of s 58(3) of the Bankruptcy Act and s 15(2) of the FJ Act), impute it to the legislature, and then characterise it as a statutory purpose of Parliament in enacting s 15(2). Reasoning of that kind is not permissible in properly construing the terms of s 15(2).³⁶

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The Court of Appeal’s judgment is not inconsistent with the purposes of the Bankruptcy Act

32. If, contrary to the First to Third Respondents’ submission, it is relevant to the proper construction of s 15(2) of the FJ Act to consider its interaction with legislative schemes such as the Bankruptcy Act, it is submitted that the judgment of the Court of Appeal does not have the effect of permitting the circumvention of a fundamental objective of the scheme of the Bankruptcy Act (in permitting a judgment creditor to obtain certification under s 15(1) in respect of an Australian judgment notwithstanding that the judgment debtor is a bankrupt).³⁷

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- (a) First, applying for, and obtaining, certification under s 15(1) of the FJ Act does not *ipso facto* constitute the enforcement of a judgment debt. The Appellant does not seek to dispute that holding of the Court of Appeal, below.³⁸
- (b) Secondly, it is not lawful for a creditor to do something which s 58(3) of the Bankruptcy Act provides it is not competent for that person to do.³⁹ Section 58(3)(a) continues to operate according to its terms in respect of a judgment creditor, whether or not there has been an exercise of power under s 15 of the FJ Act. Obtaining certification under the FJ Act does not permit a judgment creditor to do something which it is unlawful for him or her to do,

³² *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719, 722 (Kirby P).

³³ *Shaw v Yarranova Pty Ltd* (2006) 15 VR 289, 308 [73], [76] (Neave JA, Eames JA agreeing).

³⁴ *Maroondah City Council v Fletcher* (2009) 29 VR 160, 177 [85] (Warren CJ and Osborn AJA).

³⁵ *Commissioner of State Revenue v Abbotts Exploration Pty Ltd* (2014) 48 WAR 300, 336 [161] (Buss JA, Newnes JA agreeing).

³⁶ See *Australian Education Union v Department of Education and Children’s Services* (2012) 248 CLR 1, 14 [28] (French CJ, Hayne, Kiefel and Bell JJ).

³⁷ Appellant’s Submissions, [57].

³⁸ CA Reasons, [26] (Ashley JA) [AB ##], [90]–[93], [104] (Priest JA) [AB ##].

³⁹ *Re Spratt; ex parte Wilde* (1986) 10 FCR 544, 545 (Pincus J), a proposition not disturbed on appeal in *Wilde v Spratt* (1986) 13 FCR 284.

and so does not permit any circumvention of the Bankruptcy Act. If a risk were apprehended that a judgment creditor intended to enforce a judgment debt against the foreign property of a bankrupt, an injunction could issue to restrain such threatened conduct, even though it may occur outside Australia.⁴⁰ The Bankruptcy Act makes ample provision to ensure that the scheme which it erects is not defeated.

- 10 33. The present case illustrates the point. As the proceeding before North J on 10 December 2012 and his Honour's order of that date make clear, the First to Third Respondents remain constrained by s 58(3) of the Bankruptcy Act in respect of their proceedings in the Czech Republic. The First to Third Respondents' purpose in deploying the certificates is not, for such time as J E Talacko's bankruptcy remains undischarged, to enforce the Compensation Order.⁴¹ Given J E Talacko's bankruptcy, the prosecution by the First to Third Respondents of the Execution Proceeding is intended to result in the Compensation Order (and associated costs order) first being *recognised* in the Czech Republic. That is, the First to Third Respondents do not for the time being seek execution of the Compensation Order as such, but rather a favourable judgment or judgments susceptible of execution.⁴² The Court of Appeal found, and the Appellant does not dispute, that obtaining recognition of the Compensation Order does not compel observance of it.⁴³

20 Conclusion

34. The statutory denial of a judgment creditor's competence to enforce any remedy against the person or property of a bankrupt under s 58(3)(a) of the Bankruptcy Act is not a "stay of enforcement of [a] judgment" within the meaning of s 15(2) of the FJ Act. The Appellant's submissions in respect of the first ground of appeal should be rejected.

D. Section 15(1) of the FJ Act is no impediment to the First to Third Respondents obtaining certification

35. The Appellant submits that the certificates were invalidly issued because the First to Third Respondents could not, in the circumstances, be said to have "[wished] to

⁴⁰ *Bankruptcy Act 1966* (Cth), s 30(1).

⁴¹ Transcript of Proceedings before North J, 10 December 2012, P10:17–19, Exhibit JGJ-4 to the Affidavit of Jonathan Guy Joseph sworn 16 December 2014 [AB ##]; Affidavit of David Paul Phelan sworn 22 December 2014, [22], [29], [30] [AB ##].

⁴² CA Reasons, [30], [37] (Ashley JA) [AB ##], [99] (Priest JA) [AB ##].

⁴³ CA Reasons, [30] (Ashley JA) [AB ##], [93] (Priest JA) [AB ##].

enforce” the Compensation Order in the Czech Republic.⁴⁴ That submission appears to be premised on the following propositions:

- (a) first, the description of a judgment creditor in s 15(1) of the FJ Act as one “who wishes to enforce” in a country an Australian judgment constitutes a condition on the power of the Registrar of a court to issue certification under that provision; and
- (b) second, a judgment creditor cannot “[wish] to enforce” in a country an Australian judgment if that person is not at the time that application is made under s 15(1) competent to enforce any remedy against the person or property of the judgment debtor.

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Each proposition should be rejected, for the following reasons.

The power of the Registrar to issue certification under s 15(1) in respect of a judgment is not conditioned on whether the applicant “wishes to enforce” the judgment in a foreign country for the purposes of s 15(1) of the FJ Act

36. The First to Third Respondents submit that an applicant’s “wish to enforce” in a country a judgment given in an Australian court is not a condition on the Registrar’s power to issue such certification.
37. Parliament may make any event, fact or circumstance a condition upon the occurrence or existence of which the jurisdiction of an administrator shall depend.⁴⁵
- 20 38. In determining whether a criterion is a jurisdictional fact, or whether a criterion that is alleged to be a jurisdictional fact is an objective, or subjective, criterion, it is relevant to consider any inconvenience which may arise as a result of adopting a particular construction.⁴⁶ The inconvenience, or “disfunctionality”, of a construction has been held to be a “powerful consideration” in this regard.⁴⁷
39. In the *Malaysian Declaration Case*, French CJ observed that:

When a criterion conditioning the exercise of statutory power involves assessment and value judgments on the part of the decision-maker, it is

⁴⁴ Appellant’s Submissions, [80]–[93].

⁴⁵ See *Parisiennne Basket Shoes v Whyte* (1938) 59 CLR 369, 391 (Dixon J).

⁴⁶ *Ibid*; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55, 72 [91]–[92] (Spigelman CJ, Mason P and Meagher JA agreeing). See also *Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456, 466 (Black CJ, dissenting); *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297, 303 (the Court) noting that the matter should have been disposed of by the Full Court of the Federal Court “in the manner indicated” in the dissenting judgment of Black CJ.

⁴⁷ *QBE Insurance (Australia) Ltd v Miller* (2013) 67 MVR 322; [2013] NSWCA 442, [28]–[29] (Basten JA, Ward JA and Young AJA agreeing).

*difficult to characterise the criterion as a jurisdictional fact, the existence or non-existence of which may be reviewed by a court.*⁴⁸

Similarly, in *Timbarra Protection Coalition Inc v Ross Mining NL*, Spigelman CJ stated that:

*One of the considerations put forward against a conclusion that the factual reference is a jurisdictional fact, is that the obligation to prepare a species impact statement is triggered by a formulation requiring the exercise of a broad judgment on a matter of potentially significant disputation ... The fact that a matter of judgment of this character is involved does suggest that it is less likely to be intended by parliament to be an objective fact, because it is, characteristically, a matter on which reasonable minds may differ.*⁴⁹

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40. It is submitted that the rationale underlying the observations of each of French CJ and Spigelman CJ is relevant not only to the determination whether a criterion that conditions the exercise of a statutory power is a subjective, rather than objective, criterion, but whether it is a condition on power at all.
41. The expression “wishes to enforce”, and the words that follow, describe the state of mind of a prospective applicant under s 15(1) of the FJ Act.
42. Determining the existence of such a state of mind as a matter of objective fact may be difficult. Further, any assessment of whether an applicant has that state of mind at the time an application under s 15 is made would be an evaluative exercise, involving issues of degree in respect of which opinions may reasonably differ.
43. More importantly, significant inconvenience could arise in the operation of the FJ Act if the expression “wishes to enforce” constituted a condition on the Registrar’s power to issue certification. Considered in light of the FJ Act as a whole, s 15 provides for a formal process whereby the certainty, authenticity and authority of an Australian judgment may be assured or promoted. That process would be materially impaired if formal certification issued under s 15(1) of the FJ Act (which in many cases will speak to a final order of an Australian superior court) were amenable to being declared invalid at a later date because it is contended that the applicant did not in fact possess the appropriate state of mind at the time the person applied. It would make uncertain and contingent that which is intended by the Parliament to be authoritative and final.

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⁴⁸ *Plaintiff M70/2011 v Minister for Immigration and Citizenship (Malaysian Declaration Case)* (2011) 244 CLR 144, 179 [57].

⁴⁹ (1999) 46 NSWLR 55, 72 [88]-[89] (Spigelman CJ, Mason P and Meagher JA agreeing).

44. To the extent that an applicant's "[wish] to enforce" a judgment is relevant, it is manifested by the fact of the judgment creditor's application. No more stringent requirement is imposed.

45. The expression "who wishes to enforce in a country a judgment that has been given in an Australian court" is not verbal surplusage. The reason for its presence in s 15(1), and its legal effect, is easily explained. Absent those words, or words to equivalent effect, the provision would not in terms be confined to applications by judgment creditors in respect of judgments given in Australian courts (because the definition of "judgment creditor" is not tied to any one jurisdiction). Indeed, the chapeau to s 15(1) could, consistently with its proper construction, be rephrased as follows:

Subject to this section, in respect of a judgment that has been given in an Australian court, where an application is duly made by a judgment creditor, the Registrar of the court must issue to the judgment creditor:...

Parliament's choice of phrasing is preferable. It does not start with two restrictive clauses, and thus has greater clarity.

Section 58(3)(a) of the Bankruptcy Act does not intersect with s 15(1) of the FJ Act

46. Even if, properly construed, s 15(1) of the FJ Act does condition the Registrar's power to issue certification under that section on whether the applicant "wishes to enforce" in a country a judgment that has been given in an Australian court, it is clear from the text and structure of s 15 that the expression "who wishes to enforce" does not import a requirement that the applicant be either competent or entitled to enforce the judgment in question.

47. Section 15(2) expressly provides for circumstances in which an application "may not be made"; that is, the circumstances in which a prospective applicant is not entitled to apply for certification under s 15(1), and in which a Registrar will therefore have no power to issue certification. Section 15(1) applies "[s]ubject to this section". Section 15(2) should be taken to be an exhaustive statement of the circumstances in which a judgment creditor's entitlement to apply under s 15(1) is denied so far as those circumstances pertain to the enforcement of a judgment. Parliament turned its mind to those disentitling circumstances and in s 15(2) has expressly provided for them. As previously submitted, the denial by s 58(3)(a) of the Bankruptcy Act of the competence of a judgment creditor to enforce a remedy against the person or property of a judgment debtor does not engage the bar imposed by s 15(2) of the FJ Act. Section 58(3)(a) of the Bankruptcy Act can have no further work to do, so far as an applicant's entitlement to apply for certification under s 15 of the FJ Act is concerned.

The First to Third Respondents “[wished] to enforce” the judgment debt in respect of which they sought certification under the FJ Act

48. Finally, the First to Third Respondents submit that, insofar as it may be relevant to the Prothonotary’s exercise of power under s 15(1), at the time they applied for the certificates, they *did* wish to enforce the judgment debt. With respect, Ashley JA and Priest JA were correct to find that the First to Third Respondents “[wished] to enforce” the judgments notwithstanding any impediment posed by the Bankruptcy Act.⁵⁰ As Ashley JA observed, the fact that there were various steps which would have had to be successfully undertaken by the applicants before any enforcement of the relevant judgments could take place “does not mean that the relevant wish was not present”.⁵¹

Part VII: Argument on notice of contention or cross-appeal

49. Not applicable.

Part VIII: Time estimate

50. The First to Third Respondents estimate that they will require one hour for the presentation of their oral argument.

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⁵⁰ CA Reasons, [22], [26] (Ashley JA), [103] (Priest JA) [AB ##].

⁵¹ CA Reasons, [22]; see also [103] (Priest JA) [AB ##].