FEDERAL COURT OF AUSTRALIA

Cheng v Zhang [2020] FCA 1859

Appeal from:	*Zhang v Cheng (No 2)* [2020] FCCA 507
File number:	NSD 333 of 2020
Judgment of:	**STEWART J**
Date of judgment:	23 December 2020
Catchwords:	**BANKRUPTCY** – creditor's petition – sequestration order – whether power to extend life of creditor's petition under s 52(5) of the *Bankruptcy Act 1966* (Cth) can be exercised retrospectively by invoking the slip rule – whether just and equitable to extend time – whether making of a sequestration order within the term of currency of the petition is a thing required or allowed to be done for the purposes of s 36(2) of the *Acts Interpretation Act 1901* (Cth) – whether sequestration order could be made after expiry of the period of 24 months from date of presentation of the creditor's petition when the last day fell on a Saturday despite s 52(4) of the *Bankruptcy Act 1966* (Cth) – appeal dismissed **PRACTICE AND PROCEDURE** – slip rule – whether use of rule to correct an accidental slip or omission – whether discretion to extend time before the creditor's petition would lapse could be exercised in only one way – where an order made under the slip rule invalid – whether power can be exercised on appeal to correct orders made by the Court below
Legislation:	*Acts Interpretation Act 1901* (Cth) s 36 *Bankruptcy Act 1966* (Cth) ss 27, 43, 52(4), 52(5) and 306 *Federal Court of Australia Act 1976* (Cth) s 28(1) *Federal Circuit Court Rules 2001* (Cth) rr 16.05(2)(d), 16.05(2)(h)
Cases cited:	*Emanuele v Australian Securities Commission* [1997] HCA 20; 188 CLR 114 *Endresz v Commonwealth* [2019] FCAFC 197; 273 FCR 286 *Flint v Richard Busutill & Co Pty Ltd* [2013] FCAFC 131; 216 FCR 375 *Minister for Immigration and Border Protection v Kumar*

	[2017] HCA 11; 260 CLR 367 *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28; 261 CLR 132 *Roskell v Snelgrove* [2008] FCA 427; 246 ALR 175 *Wren v Mahony* [1972] HCA 5; 126 CLR 212
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	General and Personal Insolvency
Number of paragraphs:	74
Date of hearing:	16 December 2020
Date of last submissions	18 December 2020
Counsel for the Appellant:	The appellant appeared in person with the assistance of an interpreter
Counsel for the First Respondent:	S Burchett
Solicitor for the First Respondent:	CSJ Legal
Counsel for the Second Respondent:	The second respondent did not appear

ORDERS

NSD 333 of 2020

BETWEEN:	**YE CHENG** Appellant
AND:	**MEI ZHANG** First Respondent
	OFFICIAL TRUSTEE IN BANKRUPTCY AS THE TRUSTEE OF THE BANKRUPT ESTATE OF YE CHENG Second Respondent

ORDER MADE BY:	**STEWART J**
DATE OF ORDER:	**23 DECEMBER 2020**

THE COURT ORDERS THAT:

1. The order of Judge Dowdy in the Federal Circuit Court of Australia on 8 March 2019 as varied by Judge Street on 6 and 9 March 2020 is further varied to limit the extension of the creditor's petition that was presented on 8 March 2018 to 7 March 2020.
2. The appeal is dismissed.
3. The appellant to pay the first respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STEWART J:

Introduction

1 This is an appeal from a judgment of the Federal Circuit Court in which a sequestration order was made against the estate of the appellant. I have concluded that the appeal should be dismissed. The following are my reasons for that conclusion.

The background to the underlying debt and sequestration order

2 The background to the underlying debt on which the sequestration order was made can be set out in brief terms.

3 In June, July and December 2016 the appellant executed acknowledgements of debt in favour of the first respondent arising from a joint venture that they had been involved in. Those debts were the debts underlying the judgment on which the sequestration order was ultimately made.

4 On 26 October 2017, default judgment was entered against the appellant in favour of the first respondent in the District Court of New South Wales. The judgment was in the sum of approximately $715,000 inclusive of costs.

5 On 2 November 2017, a bankruptcy notice was issued by the Official Receiver. The notice was served on the appellant on 13 November 2017.

6 On 8 March 2018, the first respondent filed a creditor's petition against the appellant in the Circuit Court. The creditor's petition relied on the default judgment against the appellant. The petition was served on the appellant on 19 March 2018.

7 On 20 March 2018, the appellant filed a notice of motion in the District Court to set aside the default judgment.

8 On 24 May 2018, the appellant filed a notice of opposition to the creditor's petition. The notice of opposition urged the Court to go behind the default judgment on the basis that "in truth and reality there is no debt".

9 On 8 June 2018, Dicker SC DCJ set aside the default judgment in the District Court. The first respondent applied for leave to appeal to the Court of Appeal against the judgment setting aside default judgment. That application was dismissed on 7 December 2018.

10 Arrangements were then made by the first respondent to have her proceeding in the District Court progress to hearing. In the meanwhile, on 8 March 2019 Judge Dowdy in the Circuit Court made an order extending the life of the creditor's petition to 8 March 2020. I will return to the particular circumstances of that order.

11 The hearing in the District Court of the first respondent's proceeding against the appellant took place on 2, 3 and 4 December 2019. On 28 February 2020 (although erroneously recorded in the reasons for judgment as 29 February 2020), Montgomery DCJ entered judgment for the first respondent against the appellant in the sum of approximately $860,000 and ordered that the appellant pay the first respondent's costs of the proceeding. The judgment was based on the three acknowledgements of debt referred to above.

12 On Friday 6 March 2020, the first respondent's creditor's petition against the appellant came on for hearing in the Circuit Court before Judge Street. The hearing was adjourned to Monday 9 March 2020 and an order was made varying the extension order made by Judge Dowdy on 8 March 2019 to extend the creditor's petition to that day. As before, I will return to the circumstances of that extension.

13 On 9 March 2020, the appellant filed a notice of appeal in the Court of Appeal against the judgment of Montgomery DCJ. The terms of that notice of appeal are relevant to ground 3 of the appeal before me, as will be seen.

14 Also on 9 March 2020, at the end of the hearing of the creditor's petition in the Circuit Court, Judge Street made the sequestration order against the appellant and delivered ex tempore reasons for judgment. His Honour also varied the order of 6 March 2020 which had varied the earlier order of Judge Dowdy on 8 March 2019 to extend the creditor's petition nunc pro tunc from 7 March 2019.

15 Leaving aside the question of the extension of the petition, to which I will return, the reasons for judgment identify that it had been argued on behalf of the appellant that the court should go behind the judgment of Montgomery DCJ in particular because a notice of appeal against the judgment had been filed and that there were reasonable prospects in the appeal. Judge Street rejected those contentions, dismissing the appellant's criticisms of the judgment as having no real prospect of success.

The grounds of appeal

16 The appellant relies on an amended notice of appeal which identifies the grounds of appeal against the sequestration order as follows:

> 1. The primary judge erred in finding at [4], [8]-[9] and [12]-[15] that there was power to make an order nunc pro tunc pursuant to s 52(5) of the *Bankruptcy Act 1966* (Cth) on a date more than 12 months from the date the creditors petition was filed had elapsed.
>
> 2. The primary judge erred in finding that the order made by Dowdy J on 8 March 2019 validly extended the term of the creditor's petition to 8 March 2020 within the meaning of s 52(5) of the *Bankruptcy Act 1966* (Cth) and ought to have found that there were no proceedings validly constituted before the primary judge at any time after midnight on 7 March 2019.
>
> 3. The primary judge erred in not finding that the Appellant had an arguable appeal from the orders giving effect to the decision of Montgomery DCJ dated 28 February 2020 and thereafter dismissing the creditor's petition on the basis that the Appellant had not demonstrated some other sufficient cause why a sequestration order should not be made.

17 It is convenient to deal with grounds 1 and 2 together as they both raise the question whether the creditor's petition had lapsed at the time that the sequestration order was made.

Relevant statutory provisions

18 The following are the relevant provisions of the ***Bankruptcy Act*** *1966* (Cth):

> **43 Jurisdiction to make sequestration orders**
>
> (1) Subject to this Act, where:
>
> (a) a debtor has committed an act of bankruptcy; and
>
> (b) at the time when the act of bankruptcy was committed, the debtor:
>
> (i) was personally present or ordinarily resident in Australia;
>
> (ii) had a dwelling-house or place of business in Australia;
>
> (iii) was carrying on business in Australia, either personally or by means of an agent or manager; or
>
> (iv) was a member of a firm or partnership carrying on business in Australia by means of a partner or partners or of an agent or manager;
>
> the Court may, on a petition presented by a creditor, make a sequestration order against the estate of the debtor.
>
> (2) Upon the making of a sequestration order against the estate of a debtor, the debtor becomes a bankrupt, and continues to be a bankrupt until:
>
> (a) he or she is discharged by force of subsection 149(1); or
>
> (b) his or her bankruptcy is annulled by force of subsection 74(1) or

153A(1) or under section 153B.

…

52 Proceedings and order on creditor's petition

…

(4) A creditor's petition lapses at the expiration of:

(a) subject to paragraph (b), the period of 12 months commencing on the date of presentation of the petition; or

(b) if the Court makes an order under subsection (5) in relation to the petition—the period fixed by the order;

unless, before the expiration of whichever of those periods is applicable, a sequestration order is made on the petition or the petition is dismissed or withdrawn.

(5) The Court may, at any time before the expiration of the period of 12 months commencing on the date of presentation of a creditor's petition, if it considers it just and equitable to do so, upon such terms and conditions as it thinks fit, order that the period at the expiration of which the petition will lapse be such period, being a period exceeding 12 months and not exceeding 24 months, commencing on the date of presentation of the petition as is specified in the order.

19 The following provisions of the *Acts **Interpretation Act** 1901* (Cth) are also relevant:

36 Calculating time

(1) A period of time referred to in an Act that is of a kind mentioned in column 1 of an item in the following table is to be calculated according to the rule mentioned in column 2 of that item:

Calculating periods of time

Item	**Column 1** **If the period of time:**	**Column 2** **then the period of time:**
…	…	…
2	is expressed to begin at, on or with a specified day	includes that day.

…

(2) If:

(a) an Act requires or allows a thing to be done; and

> (b) the last day for doing the thing is a Saturday, a Sunday or a holiday;
>
> then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday.
>
> Example: If a person has until 31 March to make an application and 31 March is a Saturday, the application may be made on Monday 2 April.

20 It is to be noted that the text of s 36(2) of the Interpretation Act was amended in 2011, however the amendment is not to be understood as having changed the meaning of the provision; rather its purpose was to use a clear style in keeping with modern drafting conventions: *Minister for Immigration and Border Protection v* ***Kumar*** [2017] HCA 11; 260 CLR 367 at [20] per Bell, Keane and Gordon JJ. The result is that authorities dealing with the prior wording are still relevant.

Grounds 1 and 2: the extension and lapsing of the creditor's petition

Detailed facts

21 As indicated, the first respondent's creditor's petition against the appellant was filed in the Circuit Court on 8 March 2018. That is accordingly the date of the "presentation of the petition" as referred to in s 52(4) of the Bankruptcy Act.

22 It is uncontroversial, although it was not conscious to the minds of the parties at the time, that the petition was accordingly due to expire at midnight on 7 March 2019: item 2 of the schedule to s 36(1) of the Interpretation Act (quoted at [19] above) and ***Roskell*** *v Snelgrove* [2008] FCA 427; 246 ALR 175 at [43] per Lindgren J.

23 On Thursday 7 March 2019, emails passed between the solicitors of the parties in which they erroneously noted that the petition was "due to expire tomorrow, 8 March 2019" and agreed to jointly request Judge Dowdy, the docket judge, to make an order extending the petition for a further 12 months. Thus, at 3:58pm on 7 March 2019, the first respondent's solicitor wrote to Judge Dowdy's associate, copying the email to the appellant's solicitor, as follows:

> We note that our client's Creditor's Petition is due to expire on 8 March 2019, and we are instructed to seek an order from His Honour that the petition be extended for a further 12 months.
>
> We advise that the Respondent has also consented to the above proposed order to be sought.

24 On 8 March 2019, Judge Dowdy's associate replied to the parties including as follows:

> You did not provide any form of draft order, and left it very late to raise this issue and

> having regard to the press of business over the last two days, your email has just come to his Honour's attention, …
>
> Nevertheless, the below order has now been made in Chambers this afternoon.

25 On that day, that is, 8 March 2019, the following order was made by his Honour:

> Order pursuant to s 52(5) of the *Bankruptcy Act 1966* (Cth) that the period at the expiration of which the Creditor's Petition filed herein on 8 March 2018 will lapse be extended to 8 March 2020.

26 On Monday 11 March 2019, Judge Dowdy's associate wrote to the parties as follows:

> Further to the correspondence of Friday last, his Honour regards it as appropriate to note as follows:
>
> 1. He made the extension order on Friday afternoon having regard to the fact that it was expressed to be by consent and the unwonted urgency and pressure caused by the lateness of the request for the extension order, and without an opportunity to consider whether or not such extension order was valid and effective;
>
> 2. Whilst it is not his Honour's role to advise the parties, there would appear to be a respectable/good argument that the extension order is not effective: see *Roskell Snelgrove* (2008) 246 ALR 175 at 182 [43] and that the Creditor's Petition in fact expired at midnight on 7 March 2019;
>
> 3. At any final hearing of the Creditor's Petition his Honour will need to be satisfied that it was in truth validly extended in accordance with the consent order of 8 March 2019.

27 On 20 December 2019, the first respondent's solicitor wrote to Judge Dowdy's associate advising that judgment in the principal proceeding in the District Court was listed for 28 February 2020 and asking for the creditor's petition to be listed in the Circuit Court "between 28 February and 9 March 2020".

28 On 2 March 2020, the first respondent's solicitor wrote again to Judge Dowdy's associate advising that on 28 February 2020 the District Court had entered judgment in favour of the first respondent (i.e., the petition creditor) and asking "to have the petition heard on 6 March 2020".

29 On 6 March 2020, the matter came before Judge Street in the Circuit Court. After argument, his Honour made the following orders:

> **ORDERS**
>
> (1) The Court varies order 1 made on 8 March 2019 by extending time before expiry of the petition up to and including 9 March 2020 pursuant to s 52(5) of the *Bankruptcy Act 1966* (Cth) and s 36(2) of the *Acts Interpretation Act 1901* (Cth).
>
> (2) The matter is fixed for hearing at 9:30am on 9 March 2020 before Judge Street.
>
> (3) Leave is granted to the applicant to file and serve any further affidavit evidence

and or submissions on which the applicant wishes to rely by 5:00pm on 6 March 2020.

THE COURT NOTES THAT:

(1) The solicitor for the respondent on behalf of the respondent consented to the adjournment of the matter for hearing at 9:30am on 9 March 2020 and consented to the order extending time before expiry of the petition and confirmed that no issue as to the validity of the same will be raised at the final hearing.

30 His Honour delivered ex tempore reasons for judgment which were published in writing on 23 April 2020. They relevantly included the following:

(1) Counsel for the applicant (now the first respondent) submitted that the period of time is one to which sub-s 36(2) of the *Acts Interpretation Act 1901* (Cth) has application, and that by reason of that subsection the Court has power to extend the period of time in respect of lapsing up to and including 9 March 2020 (that was apparently on the basis that 7 March 2020 was a Saturday).

(2) The Court accepted that submission "consistent with the principles identified in *Roskell* at [44] to [47] and *Minister for Immigration and Border Protection v Kumar* [2017] HCA 11."

31 The matter came back before Judge Street on Monday 9 March 2020. At the end of the hearing, his Honour made the following orders:

THE COURT ORDERS THAT:

1. Order 1 made on 6 March 2020 is varied so as to extend time *nunc pro tunc* from 7 March 2019.

2. A sequestration order is made against the estate of Ye Cheng.

3. The petitioning creditor's costs be paid out of the bankrupt estate in accordance with the priority to which they are entitled in an amount to be agreed or taxed.

4. The Court makes an order under s 52(3) *Bankruptcy Act 1966* (Cth) staying all proceedings under the sequestration order for a period of 21 days.

THE COURT NOTES THAT:

1. The act of bankruptcy occurred on 4 December 2017.

32 His Honour delivered ex tempore reasons for judgment which were published in writing on 25 March 2020. Relevantly, the reasons for judgment include the following:

(1) Counsel for the respondent (i.e., now the appellant) submitted that the extension of the petition by Judge Dowdy on 8 March 2019 was of no effect because the petition had already expired the previous day.

(2) Counsel drew attention to the fact that the order had not been made nunc pro tunc and submitted that the slip rule could not apply.

(3) Counsel's submissions were rejected on the basis that the Court has ample jurisdiction pursuant to s 27 of the Bankruptcy Act and also taking into account s 306 to deal with issues of irregularity or form. The Court did not accept that it was a jurisdictional requirement that the order must be made prior to the expiry of the 12 month period. Since there was an application made for an extension before the expiry (being the email to Judge Dowdy's associate on 7 March 2019), the Court found that it had jurisdiction to make an order nunc pro tunc extending the time.

(4) The mere fact that Judge Dowdy had not expressed his order to be an order nunc pro tunc from 7 March 2019 is not a basis why the order made on 8 March 2019 should be regarded as invalid.

(5) The Court referred to the discussion of nunc pro tunc orders by Toohey J at 131 and Kirby J commencing at 152 in *Emanuele v Australian Securities Commission* [1997] HCA 20; 188 CLR 114.

(6) The Court was satisfied that, in the circumstances of the case, it was just and equitable to make the order nunc pro tunc extending time in respect of the application that was made to the Court on 7 March 2019.

(7) It was noted that counsel for the respondent submitted that s 36(2) of the Interpretation Act did not apply. It was held that in respect of the period concerning the expiration or lapsing of the petition on its face, that is a thing to be done within the meaning of s 36(2) of the Interpretation Act.

(8) The Court reasoned that it is clear that it is a thing to be done which falls within s 36(2) of the Interpretation Act and, accordingly, the Court has power to make the order that was made on 6 March 2020 extending time up to and including, taking into account the weekend, Monday 9 March 2020.

The validity of the nunc pro tunc order

33 The first question in the appeal is whether Judge Street had the power to make order 1 on 9 March 2020. That order had the effect of varying order 1 on 6 March 2020 which in turn varied

the order of Judge Dowdy on 8 March 2019 so that it operated nunc pro tunc from 7 March 2019. That order as varied on 6 and then 9 March 2020 would thus be in the following terms:

> Order pursuant to s 52(5) of the *Bankruptcy Act 1966* (Cth) that the period at the expiration of which the Creditor's Petition filed herein on 8 March 2018 will lapse be extended nunc pro tunc from 7 March 2019 up to and including 9 March 2020.

34 After an exhaustive review of the authorities, it was decided by the Full Court in *Endresz v Commonwealth* [2019] FCAFC 197; 273 FCR 286 that the slip rule may be exercised in circumstances where an independent discretion must be exercised by the Court, such as under s 52(5) of the Bankruptcy Act, provided that proper attendance to the matter (had the error not occurred) could only have resulted in the discretion being exercised in one way: at [80]-[81] per Rares and Markovic JJ and [146] per Charlesworth J endorsing *Flint v Richard Busutill & Co Pty Ltd* [2013] FCAFC 131; 216 FCR 375 at [46].

35 It is to be noted that under r 16.05(2)(h) of the *Federal Circuit Court Rules 2001* (Cth), the court may vary or set aside a judgment or order after it has been entered if, relevantly, "there is an error arising in the judgment or order from an accidental slip or omission". Thus, the slip rule is available in the Circuit Court.

36 The relevant circumstances on 7-8 March 2019 included the following. The parties and Judge Dowdy were under the erroneous impression that the creditor's petition would lapse on 8 March 2019, rather than at midnight on 7 March 2019. The parties were agreed that an order should be made extending life of the petition for a further 12 months. On 7 March 2019 the parties jointly asked Judge Dowdy to do that. Judge Dowdy was satisfied that the conditions for the exercise of power under s 52(5) to extend the petition for that period of time were satisfied, i.e., that he "considers it just and equitable to do so".

37 In those circumstances, there can be no reasonable doubt that had the true position that the petition was to lapse at midnight on 7 March 2019 been conscious to the parties and had been brought to the attention of Judge Dowdy on that date, if he had been able to do so Judge Dowdy would have extended the petition for a further 12 months on that date. Also, if the true position had only been brought to the attention of Judge Dowdy on 8 March 2019, or if having been aware of it or 7 March 2019 he had not been able to make orders until 8 March 2019, and, further, the availability to the Court of the power to make the extension order nunc pro tunc from 7 March 2019 had been conscious to the parties or to Judge Dowdy, his Honour would have made the order nunc pro tunc from 7 March 2019.

38 Thus, there was no error by Judge Street in varying Judge Dowdy's order of 8 March 2019 to make it effective nunc pro tunc from 7 March 2019. That was a proper application by Judge Street of the slip rule in circumstances where it was clear that absent the accidental error Judge Dowdy would only have exercised his discretion by making the extension order effective from 7 March 2019.

39 However, there is a problem that was overlooked by Judge Street which is that Judge Dowdy, and therefore Judge Street in varying the order of Judge Dowdy, did not have the power to extend the petition to 8 March 2020. The petition could only be extended for a period "not exceeding 24 months commencing on the date of the presentation of the petition", which was thus to midnight on 7 March 2020. The question that then arises is, what is the effect of the invalid extension to 8 March 2020?

40 It seems to me that that question is also properly answered, or resolved, by the application of the slip rule or r 16.05(2)(d) of the Circuit Court Rules which provides that the court may vary or set aside a judgment or order after it has been entered if it does not reflect the intention of the court. Clearly, the intention of Judge Dowdy in extending the petition on 8 March 2019 was to extend it for a further 12 months, being the maximum allowable period, but not to invalidly extend it beyond that.

41 Under the broad powers that this Court has in the appeal under s 28(1) of the *Federal Court of Australia Act 1976* (Cth), including to vary the judgment appealed from and to make such order, as, in all the circumstances, it thinks fit, this Court can further vary the order of 8 March 2019 extending the petition to midnight on 7 March 2020. I am satisfied that that is an order that I should make. In any event, the lack of power to extend the petition to the extra day would not have the effect of invalidating the order extending the petition over all the preceding days; it is only the extension to the extra day that would be invalid.

The validity of the extension to 9 March 2020

42 On 6 March 2020, Judge Street purported to extend the petition to 9 March 2020. His Honour did so with reference to s 52(5) of the Bankruptcy Act and s 36(2) of the Interpretation Act in his reasons for judgment of that day. His Honour reasoned (at [19]) that the making of the sequestration order within the term of currency of the petition is a thing to be done which falls within s 36(2) and, accordingly, the Court had power to make the order that was made on 6 March 2020 extending time up to and including 9 March 2020.

43 It was accepted in this Court by counsel for the first respondent that his Honour erred in considering that the Court had power to extend the petition beyond the period of 24 months from the date that it was presented. There is plainly no such power in s 52(5) of the Bankruptcy Act which is expressly to the opposite effect, and, equally, s 36(2) of the Interpretation Act gives no power. The real question is whether by reason of the automatic application of s 36(2) the life of the petition was extended to 9 March 2020. That is to say, if his Honour is correct that s 36(2) had application in the particular circumstances then the sequestration order could validly be made on 9 March 2020. Conversely, if s 36(2) had no application, the sequestration order could not be validly made on that date.

44 The principal authority relied on by the first respondent on the application of s 36(2) is the judgment of Lindgren J in *Roskell*. In that case, the initial period of 12 months of the creditor's petition in the Federal Magistrate's Court (as the Circuit Court was then still named) ended on 25 April 2006 which was a public holiday, Anzac Day ([43]-[44]). Although the hearing of the creditor's petition had occurred some nine months earlier, on 12 August 2005, decision on the petition had been delayed by Driver FM pending the outcome of a case in the High Court that could have had a bearing on the decision ([13], [19]). That High Court judgment was ultimately delivered on 4 April 2006 so orders were made by Driver FM on 11 April 2006 requiring any further affidavits and written submissions to be filed by 26 April 2006, i.e., the day after the petition was due to lapse unless extended ([15]-[16]).

45 Without mentioning any extension of the petition, judgment was delivered by Driver FM on 6 June 2006 dismissing the petition on the merits ([18], [25]). That judgment was appealed, and Jacobson J in this Court allowed the appeal ([20]). His Honour raised a new point, being the lapsing of the petition that had not been considered by Driver FM or argued before him, and remitted the matter to the Federal Magistrate's Court for that Court to determine whether it had power to make a sequestration order (i.e., the lapsing issue) and, if so, whether such an order should be made ([25]).

46 On remittal, Driver FM made an order on 16 April 2007 pursuant to s 52(5) of the Bankruptcy Act and the slip rule that "the petition filed on 26 April 2005 be extended until 25 April 2007" and that the debtor's estate be sequestrated ([1]). In Driver FM's reasons for judgment it was explained that the steps required of the parties (i.e., to file any further affidavits and submissions on or before 26 April 2006) were to be taken up to a date after the 12 month period elapsed and that it would have made no sense to make those orders if the creditor's petition

was not to be extended ([29]). On that basis, his Honour justified the application of the slip rule in extending the petition for a further period of 12 months ([31]).

47 There was then a second appeal, the judgment in which is the judgment of Lindgren J under discussion. His Honour identified as the second issue arising in the appeal whether there had been an accidental slip or omission as found by Driver FM for the purposes of the slip rule ([36]). In the context of answering that question his Honour accepted as correct a submission by counsel who made submissions on behalf of the debtor (i.e., the appellant) that "the period of 12 months commencing on the date of presentation of the petition" was a "period … allowed by an Act for the doing of anything" within s 36(2) of the Interpretation Act because it was a period allowed by the Bankruptcy Act for the making of an order by the court under s 52(5) of that Act ([47]). The relevance of that submission was that counsel argued that the learned Magistrate had been incorrect in saying that the parties had been required to file evidence and submissions on a date after the petition had lapsed because even on that date, by the operation of s 36(2), they could have applied for an extension of the petition ([46]).

48 Ultimately, Lindgren J concluded that there had been an error (of omission) in the learned Magistrate's orders of 11 April 2006, being the accidental failure to extend the petition, with the result that the slip rule had been available on remittal ([57]). It was also concluded that the learned Magistrate had the power to extend the life of the petition by the order made on 16 April 2007 with retrospective effect ([58]). Thus, the appeal was dismissed ([60]).

49 Two observations can be made about the judgment in *Roskell*.

50 First, it is not at all clear that the reasoning at paragraph [47] with regard to the application of s 36(2) to an application to extend the life of a creditor's petition under s 52(5) is part of the rationes decidendi. It appears to have been obiter dictum, which is indicated by the characterisation of the point as "interesting" ([44]), which appears to be the primary explanation for why it was dealt with in the judgment, and that it ultimately led nowhere, forming no part of the ultimate reasoning and conclusion on the question of whether the slip rule was available (see [52]-[53]). The point in issue was whether Driver FM considered or understood 26 April 2006 to be the day after the petition lapsed (he did), and not whether an extension order could still actually have been made on that day because of the operation of s 36(2) (it could).

51 All that said, I am satisfied that his Honour's conclusion that s 36(2) of the Interpretation Act is applicable to an order to extend the life of a creditor's petition under s 52(5) of the Bankruptcy Act is correct for the reasons that his Honour gave. I also note that that conclusion has been referred to with apparent approval by the High Court in *Kumar* at [24] (fn 37) per Bell, Keane and Gordon JJ and [29] (fn 43) per Gageler J.

52 Secondly, and most pertinently for present purposes, the judgment does not deal with the question which is presented in the present case, namely whether s 36(2) of the Interpretation Act applies to the making of a sequestration order under s 43(1) of the Bankruptcy Act. That question in turn raises the question of the application of s 36(2) to s 52(4) of the Bankruptcy Act.

53 Under s 43(1) of the Bankruptcy Act, the court may make a sequestration order against the estate of the debtor "on a petition presented by a creditor". Clearly, if the petition has lapsed at the time that the order is sought to be made then it cannot be made as there is at that time no "petition presented by a creditor". Section 43(1) is not a provision that "requires or allows a thing to be done" by a particular date ("the last day") within the meaning of s 36(2) of the Interpretation Act. It merely sets as one of the requirements for the making of a sequestration order that there be a creditor's petition.

54 In that sense, s 43(1) of the Bankruptcy Act is similar to the provision of the *Migration Regulations 1994* (Cth) dealt with in *Kumar*. That provision required that when the application for a particular visa was made, the applicant had to be the holder of a particular class or subclass of visa ([4]). It was held that no time limit was imposed expressly or by necessary implication under the governing Act and regulations on the making of an application for the visa. Therefore, s 36(2) of the Interpretation Act did not apply to assist the applicants who made their visa applications on a Monday and their previous relevant visas had expired the preceding day: [24]-[25] per Bell, Keane and Gordon JJ and [31]-[33] per Gageler J.

55 However, there is an important distinguishing feature in the provisions of the Bankruptcy Act. It is s 52(4). That is to say, s 43(1) is not to be read in isolation. It is necessary to have regard to all the relevant interrelated provisions in answering the question whether there is a "last day" (as referred to in s 36(2)) for the making of a sequestration order which is allowed by s 43(1). Section 52(4) provides, in effect, for the lapsing of a creditor's petition after 12 months from when it was presented unless one of two things occurs, namely:

(1) the court makes an order under subsection (5) extending the petition (for a period not exceeding 24 months from when the petition was presented); or

(2) a sequestration order is made on the petition or the petition is dismissed or withdrawn.

56 The "necessary implication" (*Kumar* at [25]), or "implication" (*Kumar* at [30]), of s 43(1) read together with s 52(4) of the Bankruptcy Act is thus that the "last day" for the making of a sequestration order on a creditor's position is 12 months from when the petition was presented or the period fixed by an order of court under s 52(5) (being no more than 24 months from when the petition was presented). Thus, with reference to s 36(2) of the Interpretation Act, if the last day for the making of a sequestration order is a Saturday, a Sunday or a holiday, then the order may be made on the next day that is not a Saturday, a Sunday or a holiday.

57 In the present case, the last day for the making of the sequestration order was Saturday, 7 March 2020. Therefore, s 36(2) of the Interpretation Act operated so as to allow such an order to be made on Monday 9 March 2020.

58 I have considered whether it might be said that the "last day" for the making of the sequestration order in the present case was set by an order of court and not by the Bankruptcy Act, and thus not by "an Act" as required by s 36(2) of the Interpretation Act, with the result that s 36(2) does not apply. I have, however, concluded that that analysis would not be correct. The reason for that conclusion is that the lapsing of the petition is brought about not by the court order but by the operation of s 52(4)(b) of the Bankruptcy Act "at the expiration of … the period fixed by the order". It is the lapsing of the petition that requires (or allows) the sequestration order to be made up until the last day fixed by the order of court.

Conclusion on grounds 1 and 2

59 For the above reasons, it was open to the Circuit Court to make a sequestration order on 9 March 2020 notwithstanding that the period of 24 months after the presentation of the creditor's petition expired on 7 March 2020. Grounds 1 and 2 of the amended notice of appeal must accordingly be dismissed.

Ground 3: the finality of the judgment

60 By ground 3, the appellant contends that he had an arguable appeal against the orders of Montgomery DCJ with the result that there was "other sufficient cause" why a sequestration order ought not to be made (within the meaning of s 52(2)(b) of the Bankruptcy Act).

61 In the Circuit Court the appellant relied on his notice of appeal in the Court of Appeal against the judgment of Montgomery DCJ to contend that there was sufficient doubt in the correctness of that judgment to amount to sufficient cause not to make a sequestration order. The notice of appeal in the Court of Appeal set out the following grounds of appeal:

> 1. The primary judge [erred] in finding that there was consideration given for the First Acknowledgment dated 16 June 2016 and Second Acknowledgment dated 6 July 2016.
>
> 2. The primary judge erred in finding that there was consideration given in relation to the Third Acknowledgment dated 20 December 2016.
>
> 3. The primary judge erred in finding at J[61]-[62] that the respondent's pleaded claim did not require her to establish adequate consideration had been given for the First Acknowledgment and Second Acknowledgment.
>
> 4. The primary judge erred in finding at J[63]-[64], [92] and [94] that is was not necessary for the respondent to plead the bona fide claim which she alleged was being compromised as consideration for the Third Acknowledgment.
>
> 5. The primary judge erred in finding at J[101] that the respondent had a genuine and honest belief that as at the time of signing the First Acknowledgment, Second Acknowledgment and/or Third Acknowledgment that she had a honest and genuine belief that she had a claim against the Applicant.

62 Judge Street saw no basis to go behind the judgment of Montgomery DCJ ([22], [24] and [31]). His Honour held that none of the postulated grounds of appeal properly addressed the findings in respect of consideration that were identified in paragraphs [78], [84], [86], [110], and [111] of the judgment of Montgomery DCJ and on that basis concluded that the grounds of appeal "have no real prospect of success" ([28]). On that basis his Honour was not persuaded that there was sufficient cause why a sequestration order ought not to be made ([29]).

63 His Honour also reasoned that the judgment debt was obtained as a result of a contested hearing and based on findings made by the learned trial judge that, on the face of the trial judge's reasons, were clearly open in the context of the underlying acknowledgements that were put in evidence and the underlying agreement between the two shareholders that was put into evidence ([31]).

64 In *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28; 261 CLR 132, Kiefel CJ, Keane and Nettle JJ (at [68]) explained that for the purposes of s 52 of the Bankruptcy Act, a judgment may usually be taken to be sufficient evidence of a debt in that a judgment against a debtor in favour of a creditor obtained after a trial is, generally speaking, a reliable indication of the true state of indebtedness as between the creditor and debtor. It was reasoned that a Bankruptcy Court will in those circumstances usually have no occasion to investigate whether

the judgment debt is a true reflection of the real debt. The words of Barwick CJ in *Wren v Mahony* [1972] HCA 5; 126 CLR 212 at 224-225 that the court's discretion to accept the judgment as satisfactory proof of the debt "is not well exercised where *substantial reasons* are given for questioning whether behind that judgment there was in truth and reality a debt due to the petitioner" (emphasis added) were adopted and applied ([20], [65] and [72]). The judgment of Edelman J (at [111]) was to similar effect.

65 Thus, the point boils down to whether Judge Street erred in not finding that the notice of appeal gave rise to "substantial reasons" to go behind the judgment of Montgomery DCJ and not concluding that there was sufficient cause not to make the sequestration order.

66 The paragraphs of the judgment of Montgomery DCJ to which Judge Street referred identify the consideration given for the acknowledgements of debt and meet grounds 1 to 4 of the notice of appeal. Ultimately it was the third acknowledgment of debt on which the judgment was based. In addition to those paragraphs, Montgomery DCJ reasoned that the consideration flowing from the plaintiff to the defendant in the making of the acknowledgement of debt included both her forbearance from prosecuting her bona fide claim based on the defendant's wrongful conduct and her clear entitlement to repayment by the defendant of a personal loan of $50,000 ([56]-[57]). His Honour held that the acknowledgement of debt implicitly identifies the subject of the consideration of forbearance ([62]). There is nothing before me which even raises any real question with regard to the correctness of his Honour's findings, let alone that they are so questionable as to give rise to substantial reason to doubt the judgment debt.

67 With regard to ground 5, the defendant (being the appellant in this proceeding) challenged the notion that the third acknowledgement of debt expressed accord and satisfaction on the basis that, relevantly, there was no "bona fide" dispute which could have been compromised ([77(2)]). His Honour rejected that contention on the basis that there was an admitted personal debt for $50,000 and the acknowledgement of debt was expressed to be by the appellant personally ([78]). His Honour held that the acknowledgement of debt clearly acknowledges the plaintiff's claim and expresses personal liability for the defendant's part in the failure to fulfil a written business agreement made by his company ([78]). His Honour made a number of factual findings with regard to the defendant's wrongful conduct all of which provide a basis for the plaintiff's honest belief that she had claims against the defendant at the time of the making of the acknowledgement of debt ([101]). As with grounds 1 to 4, there is nothing before me to suggest that his Honour's conclusions were incorrect.

68 In brief, I am not satisfied that there is any error in the primary judge's reasons for not finding any substantial reason to doubt the reality of the debt relied on by the petitioning creditor and in that sense "go behind the judgment". To put the point differently, there is no error in the primary judge's conclusion that the appeal grounds had "no real prospect of success". There were thus no substantial reasons for questioning whether behind the judgment there was in truth and reality a debt due to the plaintiff.

69 Ground 3 in the appeal must accordingly be dismissed.

Adjournment application

70 At the commencement of the hearing of the appeal the appellant applied orally for the hearing to be adjourned. The basis for the adjournment was that the appellant said that he had received Part C of the appeal book from the first respondent only the previous day and had not had enough time to read all of it. In that regard, the appellant also indicated that he was disadvantaged in trying to deal with Part C (which is one lever arch folder of single-side printed paper) in the short space of time made available to him because of his poor English-language skills. After hearing the appellant's application I ruled that I would allow the hearing to progress but if during the hearing the appellant was prejudiced by some reference that the first respondent's counsel made to Part C of the appeal book then I would give further consideration to the adjournment application. It is to be noted that the appellant had the assistance of an interpreter provided by the Court in presenting his submissions, and the interpreter was also available to assist if required in interpreting any of the documents.

71 During the course of oral argument, counsel for the first respondent made barely any reference to Part C of the appeal book. In oral reply to counsel for the first respondent, the appellant did not identify any prejudice that he faced by not having had Part C of the appeal book at an earlier time. Those considerations are sufficient for the dismissal of the adjournment application. There are, however, two further considerations which further justify and explain the dismissal of the application.

72 The first is that the appellant in any event had access to all the documents that were included in Part C of the appeal book all along – nothing in Part C was new and all of it was in any event reflected in the Part B index that had been prepared on behalf of the appellant a long time previously. The second is that it was the appellant's responsibility to prepare Part C of the appeal book which responsibility was taken over by the first respondent only because not long

before the hearing the appellant had become unrepresented and indicated that he was not in a position to prepare Part C of the appeal book.

73 In the circumstances, there was no merit to the adjournment application.

Conclusion

74 In all the circumstances, the appeal must be dismissed with costs.

I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:

Dated: 23 December 2020