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Friday, 05 November 2021

AMG 4080 AUSTRALIA : AN ORWELLIAN REALITY

ALL ANIMALS ARE CREATED EQUAL; SOME ARE MORE EQUAL THAN OTHERS[1]

THE AUSTRALIAN PARLIAMENT ; PUBLIC OFFICIALS PROTECTED BY THE ALLEGED ATTORNEY GENERALS INSTRUCTING THE LAW SOCIETIES OF AUSTRALIA

To: Parliament of Corporate Commonwealth of Australia
(Liquidator & Managing Controller Appointed)
Joint Committee on Corporations & Finance,
Standing Committee on Economics
Steve Georganas, MP, Deputy Chair, Senators O'Neil & Pratt
C/- Mr Mark Fitt, Secretary, PO Box 6100
Parliament House,
Canberra ACT 2600

To : Commissioner of Taxation
Trading as the Australian Taxation Office
(Liquidator and Managing Controller Appointed)
C/Senate Standing Committee on Economics
Mr Chris Jordan (A Bankrupt)
Parliament House
Canberra ACT 2600

Steve Georganas MP
Member for Adelaide
161 Main North Rd, Senate
Nailsworth, SA 5083

Senator Patrick
Level 2, 31 Ebenezer Place
Adelaide, SA, 5000

The Reserve Bank of Australia
(Liquidator and Managing Controller Appointed)
C/Senate Standing Committee on Economics, Mr Anthony Dickman (A Bankrupt)
Parliament House,
Canberra ACT 2600

Email : economics.sen@aph.gov.au : chris.jordan@ato.gov.au : secretary@rba.gov.au : : glencec@citizensparty.org.au : liam.ocallaghan@aph.gov.au : grace.finch@aph.gov.au : steve.georganas.mp@aph.gov.au : senator.patrick@aph.gov.au : senator.oneil@aph.gov.au : senator.pratt@aph.gov.au

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(Together hereinafter The Crown (Liquidator and Managing Controller Appointed)) (**The Crown**)

Cc; OenoViva Global, Australian People Future Fund, Al Khalidia Real Estate (AKRE) Capital, ProCapital Associates W.LL (ProCapital), ISD Banking

Dear Mesdames et Messieurs,

The Farce that is Fake Regulation in Australia[2] has been well ventillated : A copy of this communique will be used in International Courts and Tribunals with Jurisdiction to enforce and impose Sanctions on Public Officials comprising the three arms of Governments of Australia.

[1] Animal Farm ; 1945 George Orwell

[2] AMG 85 The Farce of Fake Regulation Royal Commission exposed Australia; March 2019

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CARBONHELIX

From: "Sadiqzai, Atia"
Date: 9 July 2020 at 9:31:09 am ACST
To: "Georganas, Steve (MP)"
Subject: Mr Andrew Garrett [DLM=Sensitive: Personal

Sensitive: Personal

Good morning,

As discussed previously, please see attached correspondence to Mr Andrew Garrett outlining that "As the Attorney-General is the First Law Officer of the Commonwealth, it is not appropriate for the Attorney-General to intervene or influence private proceedings or proceedings that are being contemplated. This Department is unable to assist you further in this matter and will not respond to any future correspondence from you on the issues you have raised."

Kind regards,

Assistant Adviser
***Office of the Hon Christian Porter MP** | Attorney-General*
Minister for Industrial Relations | Leader of The House

JUDICIARY ACT 1903 - SECT 56

Suits against the Commonwealth

(1) A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth:

(a) in the High Court;

(b) if the claim arose in a State or Territory--in the Supreme Court of that State or Territory or in any other court of competent jurisdiction of that State or Territory; or

(c) if the claim did not arise in a State or Territory--in the Supreme Court of any State or Territory or in any other court of competent jurisdiction of any State or Territory.

(2) For the purposes of paragraphs (b) and (c) of the last preceding subsection:

(a) any court exercising jurisdiction at any place in the capital city of a State, or in the principal or only city or town of a Territory, that would be competent to hear the suit if the Commonwealth were, or had at any time been, resident in that city or town, or in a particular area in that city or town, is a court of competent jurisdiction; and

(b) any other court is not a court of competent jurisdiction if its competence to hear the suit would depend upon the place where the Commonwealth resides or carries on business or at any time resided or carried on business.

Animal Farm is a satirical allegorical novella by George Orwell, first published in England on 17 August 1945.[3] [4]The book tells the story of a group of farm animals who rebel against their human farmer, hoping

[3] Bynum, Helen (2012). Spitting Blood: The History of Tuberculosis. Oxford University Press. p. xiii. ISBN 978-0199542055.
[4] "12 Things You May Not Know About Animal Farm". Metro. 17 August 2015. Retrieved 16 August 2018

to create a society where the animals can be equal, free, and happy. Ultimately, the rebellion is betrayed, and the farm ends up in a state as bad as it was before, under the dictatorship of a pig named Napoleon.

1945 was also the year of the creation of the United Nations upon cessation of Hostilities following the surrender of Germany under the command of yet another unbalanced but brilliant Narcissist and Pyscopath.

SCOTT MORRISON ; CHRIS KOURAKIS : MODERN DAY NAPOLEANS

We is me ; Mr Morrison's portrayal of Napoleon the Pig is worthy of an Oscar however he is, in reality, simply an example of a Narcissist and Pysopath in full flight : the Human Condition.

The Pork Barrelling practices of each major Political party and other issues remain unchallenged by the purported Attorney General 's Office or the Parliament of Australia.

The Queen, may God, and any other Deity capable of doing so, bless Her Majesty, acted in the Public Trust and the Public Interest exercising s61 of the Commonwealth of Australia Constitution Act and challenged the Australian Parliament by removing Government on 11th November 1975.

It is once again time for you (Government) to be removed for the Corruption and Chaos you have perpetuated.

Steve Georganas, I believe to be a Soul with integrity and possessing a good heart, posed « The questions » to the Attorney General on my behalf are not complex [5]:

Dear Attorney-General

I write to you on behalf of Mr Andrew Garrett of Nailsworth regarding a complex series of issues including Mr Garrett's allegation that he is the victim of "The Bethcar Strategy".

Mr Garrett has raised concerns with me with regards to events involving his business affairs since 1994 and the various paths that he covered during these times.

Given the intricacy of the numerous matters raised by Mr Garrett, I have requested that these matters be formatted and sent to our office so that these can be forwarded to you.

A copy of my constituent's email submission is enclosed for your information and records.

Mr Garrett is specifically requesting responses to the following questions.

1. Why haven't the resolutions of both houses been passed establishing the Judicial Misconduct and Incapacity Parliamentary Committee?
2. Why hasn't the responsible Minister published the PID Rules?
3. What steps have been taken to address and remedy ALRC 129?
4. What steps are being taken to hear and remedy the 10,000 submissions made by the public in respect to the Royal Commission into the Finance Sector?
5. What are the reasons for the Reserve Bank failing in its public duty to monetise the financial assets of OenoViva Capital Resources and the Australian People Future Fund?

I bring this matter to your attention and ask that you investigate the matters raised by Mr Garrett.

The Abject Failure of the Parliament to enforce their findings of Regulatory Fraud by inquiry through the Attorney General's Office has led to a systemic Collapse of Rule of Law that must be brought to the attention of other Nations; Our trading partners

[5] AMG 4009 : Chronology of Corruption of the Crown

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Until the 30th of April 2017, the Political Parties in power in the Commonwealth the States and Territories have been responsible following the resolution creating the Australian People Future Fund which relevantly provides for funding of regulation independent of Tax Revenues.

https://oenoviva-capital-resources.com/2020/07/30/resolution-of-ocr-board-of-trustees/

Discussion;

AMG;

1. Directed the attention of the Board of Trustees to the Notice to Admit Facts dated 1st July 2016 and annexures served on the Attorney Generals of the Commonwealth, the States and Territories of the Commonwealth of Australia (**"the Attorney Generals"**) and otherwise (**"Notices to Admit Facts"**) as referred to in his email to the Commonwealth Attorney General dated 19th March 2017and otherwise; AMG confirmed that at all relevant times he has relied upon all relevant laws including the Common Law being applied to Notices to Admit Facts and the failure of the Attorney Generals (Amongst Others) to deny those facts and dispute his conclusions as being admissions of Liability being the equivalent of Judgment Debt ("the Admitted Liabilities"), and

2. Presented a copy of the Income Tax Return for the Trust for the period YEJ 2016 and Quarterly Activity Statements for the Trust for the periods ending June 2016, September 2016, December 2016 and March 2017 that had been lodged with the Commissioner of Taxation as a consequence of s8 of *the Registration of Deeds Act* 1935 (SA) and the law applying to the calculation of post judgement interest arising from the Notices to Admit Facts, the Admitted Liabilities; AMG advised the Board that the quantum of the value of the liability of the Crown claimed by the Trust and now admitted by the Crown in accordance with the Common Law had initially been secured against assets of the Crown held pursuant to *the Commonwealth of Australia Constitution Act* 1900 (UK) (**"The Constitution"**) pursuant to s109 of the Constitution, and the Constitutions of the State of South Australia and the State of Victoria, and

3. Reviewed his findings in respect to;

    a. His submissions to the Royal Commission into Institutional Responses to complaints of Child sex abuse that were focused on Separation of Powers Issues avoided by the Royal Commission as an example of the Conduct AMG described as "the Bethcar Strategy", and

    b. the failure of the Crown to provide for the Fundamental "Right to Remedy" of the Citizens and Entities of the Commonwealth of Australia which had led to the collapse of the principles of Responsible Government and proper application of the law relating to Separation of Powers and Rule of Law provided for under the Constitution, *the Charter of the Commonwealth of Nations, the Charter of the United Nations, The Common Law* and all relevant treaties including (but not limited to) *Australian Treaty Series No 23* and *the UNCITRAL Covenant on International Bills of Exchange and Promissory Notes*, and

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    c. Abuse of the Public Trust given at Federation by Officers of the Crown, and

    d. Failure of the Three arms of Government to properly interpret the meaning of acting in the Public Interest

4. Reviewed the law as it applies to Taxation of Liquidated Damages in Australia and the moneys that would otherwise be due to the Commonwealth of Australia under various Taxation Acts were it not for the right of set off

5. Reviewed the need of the Trust to bring proceedings in the United Nations and the Supreme Court of Hong Kong as Courts with Common Law Jurisdiction that were NOT under the control of Officers of the Crown, and

6. Revisited Notices of Actual and Apprehended Bias served on Officers of the Crown and various applications for Public Interest Test Case Funding to bring the aforementioned proceedings, and

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5. Reviewed the need of the Trust to bring proceedings in the United Nations and the Supreme Court of Hong Kong as Courts with Common Law Jurisdiction that were NOT under the control of Officers of the Crown, and

6. Revisited Notices of Actual and Apprehended Bias served on Officers of the Crown and various applications for Public Interest Test Case Funding to bring the aforementioned proceedings, and

7. Expanded his recommendation to establish a Charitable Discretionary Trust to be known as the Australian People Future Fund **("APFF")** with the Citizens of the Commonwealth of Australia as the Primary and General Beneficiaries of that trust in order to provide for;

   a. The Human Right of Remedy to be funded by the assets of the APPFF which responsibility of Proper Government was currently being avoided by the Crown through the application of the Bethcar Strategy and the misapplication of the relevant law as referred to above and *the Bankruptcy Act* 1966 (Cth), *the Corporations Act* 2001 (Cth), *the Australian Human Rights Commission At* 1986 (Cth) and the other laws referred to in the Amended Notice of Constitutional Matters dated 15th December 2015 filed and served in VID 129 of 2015; *Andrew Garrett v Commissioner of Taxation*, and

   b. The establishment g of a Judicial Commission Board to be funded by the assets of the APFF rather than the assets of the Crown in order to develop;

      i. A Judicial College responsible for the training of all judicial officers of the Crown, and

      ii. A Judiciary Independent of the Crown in all courts and Tribunals of the Commonwealth of Australia, the States and Territories and Judicial Commission, and

      iii. A legal process to remove the criteria embodied in Statute that only Legal Practioners may become Judicial Officers which relevant clauses are to be replaced to be only graduates of the aforesaid Judicial College may become Judicial Officers, and

      iv. The Law Society of the Commonwealth of Australia to replace all State based Law Societies, and

      v. A process for Independent review of complaints against Judicial Officers and Executive Government Officers, and

      vi. Procedure independent of Agencies of the Crown to bring proceedings for corruption in its own Court, and

      vii. Legislation to cause the Judicial Commission Board to be responsible for and prevent any member of Executive Government and/or the Legislature in being involved in the Appointment of;

1. The Governor General of the Commonwealth of Australia, and
2. The Governors of the States and Territories, and
3. The Attorney Generals of the Commonwealth of Australia, the States and Territories of Australia, and
4. The Australian High Commissioner, and
5. Any officer of a Court or Tribunal established under the Constitutions of the Commonwealth of Australia and/or the States and Territories of Australia exercising Judicial or Quasi-Judicial Discretion

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viii. The funding of the legal process to amend all statutes establishing Agencies of the Crown whether Commonwealth, State or Territory to allow for;

1. the Judicial Commission to undertake review of all applications for Internal Review of the exercise of Executive Power whether Commonwealth, State or Territory Power, and

2. the APPF to be responsible for the appointment of the officers of the aforesaid Judicial Commission.

8. Discussed the resolution to;

a. Establish the APFF in the form of the Deed of Settlement tabled in the meeting *(see Annexure 1)* and declare that the Managing Trustee of the Trust is free of conflict of Interest in concurrently being the Managing Trustee of the APFF, and

b. Distribute 33% of the value of the secured assets of the Trust to the APFF set out in the Income Tax Return for the Year Ending June 2016 and subsequent Activity Statements lodged by the Trust in the alternative to relying on the right of set off as to damages against the Commissioner of Taxation and the Crown Generally, and

c. Declare

d. Draw an International Bill of Exchange **("the APFF IBOE")** in the amount of the Distribution specified above being $1,556,969,829,685 *(see Annexure 2)*

e. Secure the value of the APFF IBOE against the assets of the Crown including the Reserve Bank of Australia, and

f. distribute 33% of the rights of the Trust in respect to the Admitted Liabilities arising under the Notices to Admit Facts and secure those rights by registering a security interest of the Personal Property Security Act

g. Register the APFF as a charity with;

i. the Charities and Not For Profits Commission possibly as an Public benevolent Institution, and

ii. The United Nations

The Board of Trustees discussed the details above and resolved as follows;

Resolution of Board OVCR/APFF/30/04/2017 CHAIRMAN INITIALS:

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Resolutions of the Trust

Resolution No 1; It has been unanimously resolved and approved that the Managing Trustee is authorised by the Appointor and the Settlor of the APFF to be the Managing Trustee of the APFF at settlement being today's date 30th April 2017.

Resolution No 2: It has been unanimously resolved and approved, that the amount of $1,556,969,829,685 as valuable consideration expressed by way of drawing of International Bill of Exchange Serial Number; 61.00064/17 is donated to the APFF with immediate effect.

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Resolution No 3; It has been unanimously resolved and approved that a security interest in favour of the APFF is to be registered over the Trust and the Crown on the Personal Property Security Register as Charges in accordance with the provisions of *the Personal Property Security Act* 2009 (Cth) in order to secure the rights of;

1. The Trust to payment by the Crown and/or in the alternative Monetization by the Reserve Bank of Australia, and/ or other person, in accordance with law
2. The APFF to payment of the Value of the aforesaid International Bill of Exchange at Maturity by the Drawer and/or the Crown as the liable party

Resolution No 4; It has been unanimously resolved and approved that 33% of the rights of the Trust/Settlor to remedy against the Crown under all relevant laws and treaties are distributed to the APFF forwith with immediate effect.

Resolution No 5; It has been unanimously resolved and approved that the Settlor/ the Trust declare and affirm that the Settlor/the Trust have no further right or title to the value or rights set out in resolutions 1-4 and that those values/rights now vest solely in the Trustee of the APFF.

FOR AND ON BEHALF OF THE TRUST:
The Trustees of the Andrew Garrett Family Trust No 4, Trading as
OenoViva Capital Resources ABN 42 388 204 496:

____
Name: Mr. Andrew Morton Garrett
(Managing Trustee)
Australian Passport #N3926144 and United Kingdom Passport #538401308

Signed on this 30th April, 2017

Resolution of Board OVCR/APFF/30/04/2017 CHAIRMAN INITIALS:
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Australian Government
Australian Law Reform Commission

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Home » Publications » Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (IP 46) » 17. Executive Immunities

17. Executive Immunities

A common law principle

17.1 It is a fundamental tenet of the rule of law that no one is above the law. This principle applies to the government, its officers and instrumentalities: their conduct should be ruled by the law. AV Dicey wrote that the rule of law encompasses:

equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.[1]

17.2 In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual.[2]

17.3 While various statutes now provide for immunities for the executive arm of the Commonwealth in a wide range of specific contexts, these immunities should have no wider application than is necessary to achieve the specific legislative purpose.

17.4 This chapter considers immunities granted by statute to the executive arm of government. It discusses the source and rationale of the principle that executive immunities from legal liability should be limited; how this principle is protected from statutory encroachment; and when laws that give the executive a wide immunity may be justified.

17.5 The ALRC calls for submissions on two questions.

Question 17–1 What general principles or criteria should be applied to help determine whether a law that gives executive immunities a wide application is justified?

Question 17–2 Which Commonwealth laws unjustifiably give executive immunities a wide application, and why are these immunities not justified?

17.6 The executive historically had the benefit of the broad common law immunity of 'the Crown'.[3] However, that general immunity has been abrogated by statute in all states and territories.[4] For the federal government, crown immunity from suit was abolished by the *Judiciary Act 1903* (Cth)[5] ('*Judiciary Act*'), and arguably under section 75(iii) of the *Australian Constitution*.[6] Under ss 56 and 64 of the *Judiciary Act* the executive is, so far as possible, subject to the same legal liabilities as the citizen.[7]

17.7 Thus the Commonwealth of Australia now has no general Crown immunity from liability in tort or other civil actions and is subject to the same procedural and substantive laws as those which govern claims by one individual against another.[8] The Crown is also now subject to vicarious liability for the torts of its servants and agents, and may also have a non-delegable duty, to the same extent as an individual.[9]

17.8 Many statutes, however, provide an express immunity from liability arising out of certain functions or operations of government.[10] There is also a general presumption of statutory interpretation (which has been called 'a presumption of crown immunity from statute'[11]) that statutes were not intended to bind the Crown,[12] in the absence of clear words or necessary implication.[13] In 1990, the High Court in *Bropho v Western Australia* held that this presumption only provides limited protection to the government from liability under or control by statute. Contrary to some conflicting authority, the High Court emphasised that the presumption was simply a rule of statutory interpretation, and should not be elevated to any higher status.[14] It gives way to an express or implied intention that legislation binds the executive.[15] Where this rebuttable presumption applies and legislation is interpreted as not binding government, it may be said to give the executive a form of 'immunity' from laws which apply to ordinary citizens.[16]

17.9 However, this chapter is concerned only with express immunities from civil and criminal liability provided in Commonwealth statutes to the executive and its officers, employees, and agents.

17.10 An express immunity will often be qualified by a good faith requirement.[17] So for example, s 99ZR of the *National Health Act 1953* (Cth) provides:

> (1) ... neither the Commonwealth, the Chief Executive Medicare nor any person performing duty as a Customs officer or as a Departmental employee ... is liable for any act done in good faith by such a Customs officer, by the Chief Executive Medicare, or by such an employee in the performance of functions or duties, or the exercise of powers, under this Division.

[1] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, Third, 1889) 190.

[2] The issues in this chapter overlap considerably with those in Ch 16 on statutes authorising conduct that would otherwise be a tort.

[3] The term 'the Crown' refers to 'the government and its myriad components': Mark Aronson and Harry Whitmore, *Public Torts and Contracts* (LBC Information Services, 1982) 2, and following. This arises in the discussion of the history of Crown immunity and its abrogation. In contrast to the government, separate public authorities did not come within crown immunity: Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 215. Whether or not a government instrumentality is to be regarded as 'the Crown' may be significant on a purely procedural level of deciding who to sue: Aronson and Whitmore, 30.

[4] See further Aronson and Whitmore, above n 3, Ch 1.

[5] *Judiciary Act 1903* (Cth) ss 64, 56.

[6] Cf *Commonwealth v Mewett* (1997) 191 CLR 471.

[7] Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 4th ed, 2009) 176.

[8] *Maguire v Simpson* (1977) 139 CLR 362. See further Aronson and Whitmore, above n 3, 7.

[9] The Crown was not, at common law, vicariously liable for its servants' or officers' torts and also had no direct liability to its citizen: Sappideen and Vines, above n 3, 215. But the laws abrogating Crown immunity reverse that position. For example, the Commonwealth was held to have a non-delegable duty in negligence as a school authority to its pupils: *Commonwealth v Introvigne* (1982) 150 CLR 258.

[10] Immunities of non-government actors from liability in tort were considered in Ch 16.

[11] Australian Law Reform Commission, *The Judicial Power of the Commonwealth—A Review of the Judiciary Act 1903 and Related Legislation*, Discussion Paper No 64 (2000) [5.171]–[5.172].

[12] 'Generally speaking, in the construction of acts of parliament, the king in his royal character is not included, unless there be words to that effect': *R v Cook* (1790) 3 TR 519, 521 (Lord Kenyon). See also: *Attorney-General v Donaldson* (1842) 10 M&W 117, 124 (Alderson B); *Ex Parte Post Master General; In re Bonham* (1879) 10 Ch D 595, 601 (Jessel MR).

[13] *Province of Bombay v The Municipal Corporation of Bombay* [1947] AC 58; *The Commonwealth v Rhind* (1966) 119 CLR 584.

[14] *Bropho v Western Australia* (1990) 171 CLR 1, 15 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), 28 (Brennan J).

[15] Ibid 18–19.

[16] In modern times, with the increased outsourcing of governmental functions, the principle could provide protection to parties contracting with the Crown, but only where the application of statutory liability would impair the Crown's legal interests, or prevent the divestment of proprietary, contractual or other legal rights and interests of the Crown: *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, 36–37 [64]–[68] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[17] For example, the *Environmental Planning and Assessment Act 1979* (NSW) provides that a council issuing a planning certificate in respect of land 'shall not incur any liability in respect of any advice provided in good faith': *Environmental Planning and Assessment Act 1979* (NSW) s 149. Such a section would prevent a council incurring liability for negligent misstatement in a certificate, as had occurred in *Shaddock v Parramatta City Council* (1981) 150 CLR 225.

INVOKING INTERNATIONAL JURISDICTION

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2021] FCAFC 3

Appeal from:	*Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157
File number:	NSD 329 of 2020
Judgment of:	**ALLSOP CJ, PERRAM AND MOSHINSKY JJ**
Date of judgment:	1 February 2021
Catchwords:	**ARBITRATION** – international arbitration – applications for recognition and enforcement of awards of the International Centre for Settlement of Investment Disputes (ICSID) under s 35(4) of the *International Arbitration Act 1974* (Cth) ('*Arbitration Act*') **PRIVATE INTERNATIONAL LAW** – foreign state immunity – where foreign state respondent asserts sovereign immunity – interaction between s 9 of the *Foreign States Immunities Act 1985* (Cth) ('*Immunities Act'*) and the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the ICSID Convention) which is given the force of law by s 32 of the *Arbitration Act* – where s 9 of the *Immunities Act*

provides that a foreign state is immune from the jurisdiction of the courts of Australia in a proceeding – where s 10 of the *Immunities Act* provides that a foreign state is not immune in a proceeding in which it has submitted to jurisdiction whether by agreement or otherwise – whether by Art 54(2) of the ICSID Convention the foreign state respondent has agreed to submit itself to the jurisdiction within the meaning of s 10 of the *Immunities Act*

PUBLIC INTERNATIONAL LAW – foreign state immunity – interpretation of the ICSID Convention – whether the ICSID Convention excludes any claim for foreign state immunity in proceedings for the recognition and enforcement of an award – meaning of recognition and enforcement in Art 54 and execution in Art 55 – where Art 55 provides that nothing in Art 54 shall be construed as derogating from the law in force in any Contracting State in relation to immunity from execution

Legislation:

Foreign States Immunities Act 1985 (Cth) Pts II, IV; ss 3, 7, 9, 10

International Arbitration Act 1974 (Cth) Pt IV; ss 32, 34, 35

Judiciary Act 1903 (Cth) s 39B

Federal Court Rules 2011 (Cth) r 36.32

Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Opened for signature 10 June 1958. 330 UNTS 3 (entered into force 7 June 1959)

Convention on the Settlement of Disputes between States and Nationals of Other States. Opened for signature 18 March 1965. 575 UNTS 159 art 50, 51, 54, 55, 64. (entered into force 14 October 1966)

The Energy Charter Treaty. Opened for signature 17 December 1994. 2080 UNTS 95 art 26. (entered into force 16 April 1998)

UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended on 7 July 2006)

Vienna Convention on the Law of Treaties. Opened for signature 23 May 1969. 1155 UNTS 331 arts 4, 33. (entered into force 27 January 1980)

Cases cited:

Benvenuti & Bonfant v People's Republic of the Congo (Cour d'appel, Paris, 26 June 1981) 1 ICSID Reports 368; 108 Journal du Droit International 843

Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833; 117 FCR 424

Coulton v Holcombe [1986] HCA 33; 162 CLR 1

Lahoud v The Democratic Republic of Congo [2017] FCA 982

Liberian Eastern Timber Corporation (LETCO) v Liberia, (United States District Court for the Southern District of New York, 12 December 1986) 2 ICSID Reports 383

Micula v Romania [2020] UKSC 5; 1 WLR 1033

O'Brien v Komensaroff [1982] HCA 33; 150 CLR 310

Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; 211 CLR 476

PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission [2012] HCA 33; 247 CLR 240

Re McBain; Ex parte Australian Catholic Bishops Conference [2002] HCA 16; 209 CLR 372

Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal (Cour de cassation, 11 June 1991) 2 ICSID Reports 341; 118 Journal du Droit International 1005

TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia [2013] HCA 5; 251 CLR 533

Thiel v Federal Commissioner of Taxation [1990] HCA 37; 171 CLR 338

Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2) [2012] FCA 276; 201 FCR 535

University of Wollongong v Metwally (No 2) [1985] HCA 28; 60 ALR 68

Kronke H, Nacimiento P, Otto D, Port NC (Eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010)

Schreuer CH, *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press, 2009)

van den Berg AJ, *The New York Arbitration Convention of 1958* (Kluwer 1981)

Ex Debito Justitiae[6]

Acting on instructions from Chris Kourakis alleged Crown Solicitor, Lancione Partners acting on behalf of my Ex-Wife on the 15th December 2004 did not argue breach of contract and Fraud by National Australia Bank[7] nor did they argue overpayment and full compliance with orders for injunctive relief given by Besanko J dated 9th March 2004 also acting on instructions from the Crown Solicitor that were designed to run the plaintiff's out of cash-flow exacerbated by Mareva Orders also given by Besanko J on

[6] Annexure 1

[7] Annexure 2

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the instructions of Chris Kourakis against the Plaintifs preventing them from dealing with their assets given on the 4th August 2004.

Similarly the application for Special Leave to Appeal Argument lodged in A67 of 2004 has also never been heard by the Crown acting on instructions by Chris Kourakis.

All Administrative and Judicial decisions given in matters related to me have been nullities an jurisdictional error driven by the Crown Solicitor at the time and now Chief Justice, Chris Kourakis.

Fines Revenue as Tax Revenue

From: *andrew.garrett@australianpeoplefuturefund.org <andrew.garrett@australianpeoplefuturefund.org>*
Sent: *Wednesday, 3 November 2021 12:00 PM*
To: *'premier@sa.gov.au' <premier@sa.gov.au>; 'fines@sa.gov.au' <fines@sa.gov.au>; 'Scott Laidlaw' <scott@matthewmitchell.com.au>*
Cc: *'Steve.Georganas.MP@aph.gov.au' <Steve.Georganas.MP@aph.gov.au>; 'Senator.ONeil@aph.gov.au' <Senator.ONeil@aph.gov.au>; 'Senator.Patrick@aph.gov.au' <Senator.Patrick@aph.gov.au>; 'Senator.Pratt@aph.gov.au' <Senator.Pratt@aph.gov.au>; 'economics.sen@aph.gov.au' <economics.sen@aph.gov.au>*
Subject: *AMG 4056 GARRETT FAMILY REVENUE Fine Reference : AMC-20-2886 ; Decline to Pay from one pocket to another ; United Nations Trade Law; CALL INTERACTION REF; 20015817737 PART 2*
Importance: *High*

AMG 4056 GARRETT FAMILY REVENUE Fine Reference: AMC-20-2886; Decline to Pay from one pocket to another ; United Nations Trade Law; CALL INTERACTION REF; 20015817737

State of South Australia as Agent for the Crown
Care of the Alleged Premier: Mr Steven Marshall
Attn Fines Enforcement and Recovery Unit
Biller Code 4655450
Cc Scott Laidlaw, Matthew Mitchell Solicitors

Mr Marshall, Fines Payment Unit,

Please note self-Explanatory correspondence attached and set out below

Notice to Agent is Notice to Principal and Vice Versa; ***FINES REVENUE IS GENERAL REVENUE OF THE GARRETT FAMILY*** *as admitted by you; there seems little point to shifting money from one pocket to another of the Managing Controller and Liquidator appointed to the Crown; I decline to do so.*

SET OFF APPLIES IN ANY EVENT

Some, but not all the relevant Law in respect to Set Off is disclosed at Exhibits ***AMG 298 (Annexure 4), AMG 438 & AMG 441.***

Under the *Corporations Act 2001* section 553C(1) allows for set offs to be made when there have been mutual credits, debts or dealings between an insolvent company that is being wound up and a person who seeks to have a claim or debt admitted against the company.

A consideration of this has recently come to light in respect of an unfair preference claim. In the case of *Jetaway Logistics Pty Ltd (Recs and Mgrs Apptd) (in LIQ) v The DCT* [2008] VSC 397, Justice Robson of the Supreme Court of Victoria had to decide whether or not setting off fuel entitlements to a tax debt was an unfair preference and if it was not, whether or not 553C(2) applied, meaning that the DCT could not have the fuel set offs because they had notice that Jetaway was insolvent.

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3. Was there knowledge of the insolvency?

Robson J had to decide on the meaning of 'notice' for the purposes of 553C.

He accepted arguments from the DCT that 553C required actual notice not just a mere suspicion that Jetaway was insolvent. This has to be compared with the position under, say 588FG, which requires mere suspicion of insolvency.

To have had notice, the DCT argued they would have had to have known of at least one of the provisions set out in 459C(2) of the Corporations Act and they did not.

His Honour relied on the case of *Farrah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89 which held that negligent failure to make inquiries did not constitute actual knowledge.

Various facts proved that the DCT had a suspicion of insolvency and the evidence they did have only pointed to a temporary lack of cash flow. Consequently, there was insufficient knowledge by the DCT to constitute actual notice that Jetaway was insolvent. Robson J agreed with the DCT's submissions and held that there was insufficient evidence that the DCT did have notice that Jetaway couldn't pay its debts when they were due.

The issues confronting you have never been larger, on the grounds set out in the Public Interest Disclosure to Public Officials I have exercised hereditary discretionary public powers conferred under the Five Enactments and equitably set-off the amount you claim to be owed in Exhibit AMG 4056 against the money you admit being owed to me by You which is disclosed in AMG 4052.

S61 OF THE CONSTUTION

Pursunat to the Notice of Seizure of Collateral under s123 of *the Personal Property Security Act* 2009 (Au) and appointment of Managing Controller s61 has been an undisputed hereditary asset of the Andrew Garrett Family Branch of the Garrett Family and Matters Family since the 1st June 2019.

As the Head of the Andrew Garrett Family Branch of the Garrett Family and Matters Family I am, and/or my licensees, heirs successors and assigns, the only person with standing to speak on behalf of Australia.

FAILURE TO FILE A DEFENCE IN DCCIV-2003-1666; *The Crown v Andrew Garrett* CONSENT TO ORDERS TO SET ASIDE DEFAULT JUDGEMENT

Lancione Partners acting on instructions of Chris Kourakis failed to file a defence that no debt was owed to the Commissioner of Taxation appearing on the corrected Running Balance of Account.[8]

The Commissioner of Taxation failed to consent to orders setting aside the Default Judgment since 2008 and interference in AAT proceedings by Chris Kourakis[9]

A mongrel bunch of bastards; The small businesses being crushed by the Australian Tax Office[10]

Kind Regards,

AUSTRALIA

RESERVE BANK
OF AUSTRALIA

OENOVIVA CAPITAL RESOURCES

Common
The Crown
Attorney General
The Commonwealth
of Nations
Seal

Signature: ______________________________

Name / Title: Mr. Andrew Morton Garrett

CEO/ Chairman/ Managing Trustee of the Boards of Trustees of the Andrew Garrett Family Trust No 4 trading as OenoViva Capital Resources, and the Australian People Future Fund, The Crown Attorney General to Commonwealth of Nations, Managing Controller and Liquidator appointed to the Crown (Liquidator and Managing Controller Appointed)

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[8] Annexure 3

[9] Annexure 4 AMG 144 - AMG 173, AMG 1498 – AMG 1539

[10] AMG 3717

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ANNEXURE 1

EXHIBIT AMG 1697

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6 *Clone Pty Ltd v Players Pty Ltd (in Liq)* (2018) 264 CLR 165 at 184 [2].
7 In any event, each of the Summons (AB1:11), the Application for Judicial Review at (AB1:28) and the application filed on 1 August 2018 (AB1:47), in the endorsements, also invoked the Court's inherent jurisdiction.
8 *New South Wales v Kable* (2014) 252 CLR 118 at 133 [32].
9 See, eg, *Hadkinson v Hadkinson* [1952] P 285 at 288.
10 *New South Wales v Kable* (2014) 252 CLR 118 at 132-3 [30].

Setting aside a judgment or decree for a fundamental defect and want of jurisdiction

5. One of the other accepted "discrete grounds" for setting aside perfected orders is where there has been a fundamental defect in the proceeding or want of jurisdiction. In the relatively rare circumstances where this ground is established, a party aggrieved by the judgment is entitled to have it set aside "*ex debito justitiae*" — meaning *as of right* rather than in the exercise of a general discretion.

6. There is no reason why r 242 of the Supreme Court Civil Rules 2006 should not be understood as the provision, in the rules, by which applications may be made by an affected person who is entitled to have an order of the Court set aside *ex debito justitiae* in the inherent jurisdiction of the Court. That plainly falls within the concept of setting aside of orders where "the justice of the case so requires"; indeed it is the quintessential case where the "justice of the case" requires the setting aside of orders.[7]

8. It is well established that the orders of a State Supreme Court, being orders of a superior court of record, are "valid until set aside".[8] That means that, unless and until such orders *are* set aside, they operate as orders of the Court and are treated as having full effect, including for the purposes of the law of contempt.[9] Although superior courts are sometimes referred to as courts of "unlimited jurisdiction", there is in Australia no such thing as a court with truly unlimited jurisdiction;[10] it thus is perfectly natural, and meaningful, to speak of the Supreme Court of a State acting in excess or want of jurisdiction, even though its orders will still be valid unless and until set aside.

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9. The judgment of Rich J in *Cameron v Cole* has often been cited in connection with the proposition that the orders of superior courts are valid until set aside. His Honour said:[11]

11 (1944) 68 CLR 571 at 590-91. (Emphasis added.)
12 [1943] 1 KB 256.
13 (1979) 143 CLR 1 at 7-8.

Second, if in the course of a purported trial a fundamental irregularity has occurred which prevents it from being a trial at all, the decision of the Court is either void or voidable. It is settled by the highest authority that the decision of a superior court, even if in excess of jurisdiction, is at the worst voidable, and is valid unless and until it is set aside (Baron Martin advising the House of Lords in *Scott v Bennett*; *Revell v Blake* (where Blackburn J draws the distinction between a superior and an inferior court in this respect). I am unable to feel any doubt that the Federal Court of Bankruptcy is a superior court. The language of Lord Greene MR, in *Craig v Kanssen*,[12] where he says that "a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside," is correct as an abstract proposition; but since the order before his Lordship was one of a superior court, the expression is somewhat misleading, and his statement that the distinction is "between proceedings or orders which are nullities and those in respect of which there has been nothing worse than an irregularity" fails, I venture to think with all submission, to meet the actual facts of the case. This is true enough in the case of an inferior court (*In re the Affairs of Hart*); but in the case of a superior court the distinction is between irregularities so fundamental as to create an unconditional right, *ex debito justitiae*, to have the judgment set aside, and non-fundamental irregularities as to which the court has a discretion. Since the case before the Master of the Rolls was one of the former type, although no exception can be taken to his Lordship's actual conclusion, his criterion was, with all deference, somewhat inaptly expressed.

10. Rich J thus accepted that, in the case of orders made by a superior court which are made without jurisdiction (ie, those affected by "fundamental" irregularities), a person affected is entitled to have them set aside *ex debito justitiae*, whereas in the case of other regularities (ie, those not going to jurisdiction; not "fundamental") the court has a discretion whether or not to set them aside. Rich J confirmed that distinction, although he pointed out that it is potentially misleading, in connection with a superior court of record, to refer to the category of orders affected by fundamental irregularities as "nullities" because the orders of superior courts of records are valid unless and until set aside. The judgment of Rich J was discussed by Gibbs J in *Taylor v Taylor*[13] and was described as "particularly important."

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11. The following passage from the High Court decision in *Brennan v Brennan* adopts the same dichotomy between "fundamental" and other irregularities:[14]

[14] (1953) 89 CLR 129 at 134 (Williams ACJ, Webb and Kitto JJ). See also *R v Pettigrew* [1997] 1 Qd R 601 at 609 (Fitzgerald P).
[15] (2017) 316 FLR 159 at [98]-[114].
[16] (2001) 165 FLR 390, particularly at [17]-[22], [28]-[47].
[17] [1963] Ch 502 at 523-4.

But a judgment or order of a superior court having authority to determine its own jurisdiction, however fundamentally impeachable it may be, is not void but voidable and is valid and effective unless and until it is set aside. In a superior court the question is not whether the judgment or order is void or voidable but whether the flaw complained of is a mere irregularity which leaves the court with a discretion whether to set aside the judgment or order or not or is a fundamental miscarriage which prevents the trial being a real trial at all so that the person prejudiced is entitled *ex debito justitiae* to have the judgment or order set aside. A judgment or order effected by fundamental miscarriage is often referred to as a nullity, but if it is a judgment or order of a superior court that does not mean that it is void but only that it can be disregarded by the person against whom it operates in the sense that if the person in whose favour it has been made seeks to enforce it the former is entitled, as we have said, to have it set aside *ex debito justitiae*: *Ex parte Williams* (1934) 51 CLR 545 at 550; *Cameron v Cole* (1944) 68 CLR 571 at 585.

12. The passage would appear to equate matters that would result in "nullities" in the case of inferior courts (ie, irregularities that "prevent the trial being a real trial at all") with "fundamental miscarriages" of the kind which, in the case of superior courts of record, entitle a person to have the order set aside *ex debito justitiae*.

13. Useful discussion of the topic is to be found in the judgment of Refshauge ACJ in *Commonwealth v Davis Samuel Pty Ltd (No 11)*[15] and in the judgment of Austin J in *Brown v DML Resources Pty Ltd (No 4)*,[16] albeit that it needs to be appreciated the latter discussion focussed, understandably, upon the particular situation relevant to the facts of that case of an application to set aside orders *ex debito justitiae* based upon an asserted denial of procedural fairness.

14. Both Refshauge ACJ and Austin J referred to the judgment of Upjohn LJ in *In re Pritchard (decd); Pritchard v Deacon*.[17] Upjohn LJ identified three categories of cases in which a person affected by the order of a superior court was entitled, upon

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application, to have it set aside *ex debito justitiae*. The two most relevant of those categories, each of which fairly describes the present case, were:[18]

[18] [1963] Ch 502 at 523-4. It may be noted that the irregularity in *Finnegan v Cementation Co Ltd* [1953] 1 QB 688 seems to have been rather more "technical" in nature than the failures to comply with the statutory requirements for commencing the Tribunal and Supreme Court proceedings in the present case.
[19] *R v Janceski* (2005) 64 NSWLR 10; *R v Morais* (1988) 87 Cr App R 9.
[20] (1975) 10 SASR 128.
[21] (1975) 10 SASR 128 at 134. (Emphasis added.)

(ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings.
(iii) Proceedings which appear to be duly issued but fail to comply with a statutory requirement: see, for example, *Finnegan v Cementation Co Ltd* [1953] 1 QB 688.

15. At least in circumstances such as those raised by the appellant in the present case, the critical distinction — between fundamental irregularities going to jurisdiction and other irregularities that do not result in a want of jurisdiction — is essentially the same for superior courts and inferior courts; it is the *effect* of the order being made beyond jurisdiction that is different. In the case of inferior courts, orders made without jurisdiction may (at least ordinarily) be treated as invalid *ab initio*.[19] In the case of superior courts, orders made without jurisdiction are not "invalid" or "nullities", but will be "voidable as of right" (ie, the effected party is entitled, on application, to have them set aside *ex debito justitiae*) while orders affected by other irregularities are only voidable in the exercise of the court's discretion.

16. In *R Moore & Sons Regd v De Biasi*,[20] a the senior judge of the Local Court had refused to try a matter referred to that Court by an order of the Supreme Court (Walters J), on the basis that the order referring the matter to the Local Court had been made without jurisdiction. Walters J held that his order had been made within jurisdiction. However, in *obiter dicta*, Walters J said:[21]

> Quite apart from what I have already said, it seems to me, with all respect to the learned Senior Judge, that once the order for the transfer of the action to the Local Court had been sealed with the seal of the Supreme Court and had been received into the Local Court, it was not for the Judge to go behind the order, to inquire into the circumstances in which it was made, or to rule upon its validity. Nor do I think that he should have refused to try the action. If the Judge had any doubt about the validity of the order, by reason of want of jurisdiction on my part, the proper course for him to have adopted would have been to stay or adjourn the action, so that he, or anyone of the parties, might raise the question of jurisdiction in this Court. 7

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17. This passage makes clear that the orders of the Supreme Court are to be treated as valid but that, if an order is made beyond jurisdiction, the Supreme Court itself may set it aside. This is confirmed by this passage cited by Walters J from the judgment of Lord Cockburn in *Blades v Lawrence*:[22]

[22] (1874) LR 9 QB 374 at 376. (Emphasis added.)
[23] (2007) 69 NSWLR 327
[24] (2007) 69 NSWLR 327 at [93]-[94], [99] (discussing *Cameron v Cole*),

There was an order of the superior court, affirming on the face of it that it emanated from the superior court, and was made by the authority of the court or judge. The only course, therefore, for the judge of the London court was to obey the order. Had there been on the facts any question; if, for instance, it had appeared that the judge's clerk had affixed the signature without any authority whatever, the judge of the London court might have applied to the superior court to set the order aside: but it clearly was not competent to the judge, on his own motion, to determine the validity or invalidity of the order bearing the proper authentication on its face; his only course was either to obey it or to get it set aside by application to the superior court.

18. The power of the Court to set aside orders on the basis of fundamental defect and want of jurisdiction plainly is not limited to orders that have not been "perfected". The cases draw no distinction between "perfected" and "unperfected" orders. Moreover, the example given by Lord Cockburn — an order of the Court signed by a judge's clerk without any authority — serves as a reminder that there are various ways a superior court order (valid on its face and merely voidable) might be made without jurisdiction, and starkly illustrates the potential consequences of a doctrine that would treat perfected orders made without any jurisdiction as somehow incapable of being set aside by the Court from which they issued.

19. The entitlement of an affected party to have the order of a superior court, made without jurisdiction, set aside on application *ex debito justitiae* was referred to in *Deveigne v Askar*.[23] Although that case involved the District Court of New South Wales, an inferior court, the judgment identified the relevant difference between inferior and superior courts.[24] Where the jurisdiction of the court was not properly invoked, that results in the order of an *inferior* court being a true "nullity", and results in the order of a superior court (even though not a true "nullity") being liable to be set aside *ex debito justitiae*.

20. In *Luka v Lake Macquarie City Council* , Bignold J of the New South Wales Land and Environment Court (a superior court of record) referred to *Cameron v Cole* and

Taylor v Taylor, to which reference has been made above, and quoted the following passage from the judgment of Lord Diplock, for the Privy Council, in *Isaac v Robertson*:25

25 [2001] NSWLEC 193; 117 LGERA 117 at [24].
26 [1997] NSWLEC 47.
27 [2005] NSWSC 669 at [48].
28 See, eg, *Craig v Kanssen* [1943] KB 256; *Antoine v Barclays Bank plc* [2018] 4 WLR 67 (Ch D) at [115.5] ("[w]here the irregularity in the order is such as to undermine the whole proceedings …"), aff'd in *Antoine v Barclays Bank plc* [2019] 1 WLR 1958 (CA) at 1970 [31]; *Firman v Ellis* [1978] 1 QB 886 at 914 (Ormrod LJ); *In re Pritchard (decd); Pritchard v Deacon* [1963] Ch 502 at 509 (Wilberforce J), 523-4 (Upjohn LJ).
29 [1943] KB 256.
30 (2001) 165 FLR 390 at [43]-[44].

The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind: what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the orders he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside save that specifically it includes orders that have been obtained in breach of rules of natural justice.

21. Bignold J then added:26

In my opinion if the Council can successfully establish that the Court Orders were relevantly made "without jurisdiction" that would constitute a defect sufficient to entitle it, *ex debito justitiae*, to have those orders set aside.

22. Similarly, in *van den Braak v Chegwidden*, Nicholas J spoke of "the common law right to relief *ex debito justitiae* from a judgment or award made without jurisdiction".27

23. The position expounded above is broadly supported by numerous English authorities.28 However, some caution may need to be exercised in relation to their use, for two reasons. First, as was explained by Rich J in *Cameron v Cole*, the use of terminology (especially "nullity") in some of the English cases — particularly *Craig v Kanssen*29 and cases which refer to it — is apt to mislead. Secondly, as was explained by Austin J in *Brown v DML Resources Pty Ltd (No 4)*,30 there are aspects

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of the judgment of Lord Denning in *MacFoy v United Africa Co Ltd*31 (which is referred to in many English authorities) that are not consistent with the law as stated in *Cameron v Cole*.32

31 [1962] AC 152.
32 See also *Isaacs v Robertson* [1985] AC 97 at 102-3 (Lord Diplock) and *In re Pritchard (decd); Pritchard v Deacon* [1963] Ch 502 at 520 (Upjohn LJ), where the terminology used by Lord Greene MR was criticised.
33 *Supreme Court Act 1935* (SA), s 48(1).

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Form 18 r.41.05.2

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY No A67 0f 2004.

BETWEEN;

AVERIL GAY GARRETT
The Applicant

&

ANDREW MORTON GARRETT©®
The 2nd Applicant

&

EVAJADE P/L, ACN; 007 954 154
The 3rd Applicant

&

NATIONAL AUSTRALIA BANK LTD
The Respondent

THE APPLICANTS SUMMARY OF ARGUMENT

Dated; the 22nd September 2006.

ANDREW MORTON GARRETT ©®(Agent & Secured Party Creditor)
2nd & 3rd Applicants.
Managing Trustee of The Andrew Garrett Group of Companies
Managing Director of Evajade Pty Ltd & the Andrew Garrett Group of Companies.

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PART I : THE SPECIAL LEAVE QUESTIONS

1. Whether Inglis v Commonwealth Trading Bank (1971) 126 CLR 161 was correctly decided, and if so, whether (as many courts have regarded it, including the full court in the Case at Bar) it is authority for an inflexible rule, or a Strong rule of pre-disposition, that:
    a. Where it is not disputed that there has been a default and that the power of sale (should it exist) is, in consequence, exercisable, and
    b. Where the only original dispute is as to the amount of the secured debt due and owing, or as to the proper exercise of the power of sale, and
    c. Where a dispute exists that the Cause of the Default was the breach of the Respondent in respect of the 1st & 2nd Contracts of Finance between the parties, and
    d. Where the terms and conditions of the Bill Facilities Letter of Offer are unenforceable and the Power of Sale pursuant to the 1st & 2nd Registered Mortgages does not exist.
    e. Where a misrepresentation of the Respondent as to the interest purportedly owed under the Bill Facility resulted in the discharge of injunctive orders.

    The Court will not intervene to restrain the exercise of the power of sale unless the mortgagor brings into Court the amount claimed by the mortgagee as due and owing under the mortgage.

2. Whether the failure of the Full Court to consider and rule upon or alternatively to uphold the Registered Proprietor's contention that they had fully complied with the undertakings given to the Court as a Condition of relief, requires the Intervention of this Court in the administration of justice in the particular case.

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3. Whether the Default Rate set out at Item 12 & Clause 19 of all Bank Bill Facilities offered by National Australia Bank Ltd is a misrepresentation, unenforceable & a Breach of the Company's Duties to its Clients.

PART II : A BRIEF STATEMENT OF THE FACTUAL BACKGROUND

1 Since 4th December 1996 Andrew Garrett Wine Resorts Pty Ltd ("Resorts") has been the registered proprietor of the following real property registered under the provisions of the Real Property Act 1886 (SA) ("RPA") as to 23 undivided 26th parts in its capacity as trustee of the Springwood Park Unit Trust established by Declaration of Trust in June 1996 and comprises the land referred to in:

1.1. Certificate of Title Book Register Volume 5324 Folio 475;

1.2. Certificate of Title Book Register Volume 5334 Folio 326;

1.3. Certificate of Title Book Register Volume 5348 Folio 15 (Collectively known as "Springwood Park").

2 Averil Garrett has, since 4th December 1996 been the registered proprietor pursuant to the provisions of the RPA as to 3 undivided 26th parts of Springwood Park.

3 Springwood Park is encumbered by way of the following mortgages registered pursuant to the provisions of the RPA, General Principles of Equity and granted by Resorts and Averil Garrett, from (and until) the dates appearing:

3.1 First mortgage to N M Rothschild & Sons (Australia) Ltd (NMRA) registered number 8909699 registered on 19 June 2000 ("the Rothschild mortgage") that had been subrogated to the Trustees of the Andrew Garrett Family Trust on the 22nd December 2002.

3.2 The Second mortgage to the NAB registered number 9374752 was produced on 28 June 2002 and Registered on the 24/07/2002 to secure a guarantee given by the Applicants for advances made by NAB under the Bill Facility Letter of offer dated 11/06/2004 ("The First Bill Facility") This mortgage was specifically given in substitution for Mortgage Number 7752654 and Besanko J. held that there was a triable as whether its is limited by the moneys purportedly advanced under that mortgage as a consequence of stamp duty savings to the registered proprietors represented by officers of NAB, The First Bill Facility was rolled over into a Second Bill Facility (Letter of Offer dated 3rd January 2003) secured by the same guarantee & mortgage.

3.3 An unregistered Equitable Mortgage was established on the 22nd December 2002 being the date that the Certificates of Title were lodged with the South Australian Lands Titles Office in favour of the Trustees of the Andrew Garrett Family Trust by NM Rothschild & Sons (Australia) under Power of Attorney of the Registered Proprietors

3.4 The Fourth Mortgage (3rd Registered Mortgage to the NAB registered number 9617285 was produced on 20/06/2003 and registered on 24/07/2003 In exchange for an advance of $47,000.That the Stamping on the face of this mortgage (being an all moneys mortgage) served as constructive notice as to the limit amount of money owed by the Andrew Garrett Group of Companies under all of the securities to the Respondent at the time of Registration.

4 The terms & conditions of the 1st Contract of Finance between the Respondent & the Andrew Garrett Group were set out in an indicative letter of offer dated 29th January 2002 from the Respondent and Addressed to the Applicant.

5 That the respondent breached the terms of the 1st Contract of Finance in June of 2002.

6 The terms and conditions of the 2nd Contract of Finance were agreed between the parties on the payment of $200,000 on the 20th October 2002 to KPMG (Victoria) as agent for the Respondent, Receivers & Managers of Tasvinum Pty Ltd.

7 That on the 31st December 2002 the respondent breached the 2nd Contract of Finance.

8 On 14th July, 2003 the Second Registered Mortgagee (NAB) served notices of demand on each of the Registered Proprietors demanding payment of the sum of $2.1million. (Paragraph 7 of Reasons of Besanko J dated 2nd March 2004.)

9 On the 29th July 2003 the Respondent collected the certificates of Title of the Property from the Lands Titles office pursuant to the Fourth Mortgage.

10 On 27th August, 2003 it served notices of default under mortgage on each of the Registered Proprietors and demanding payment of the sum of $2.1million (paragraph 8 Besanko J).

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11 On 29th October, 2003 the second Mortgagee brought summary proceedings (1506 of 2003) for possession of Springwood Park against the Applicants as Mortgagors.

12 The matter was heard before a Master of the Court,(paragraphs 1 to 13 of the Reasons of Besanko J, dated 2nd March 2004) sets out the circumstances in which the posession application was brought.

13 In December 2003, the Registered Proprietors by their solicitor wrote to NAB with a conditional offer to repay the moneys demanded by the mortgagee in the notices of demand (paragraph 9 of Besanko J) and

13.1 Provide a discharge of the NAB Mortgages; and

13.2 Accept a payment of $2.25 million, being a sum in excess of the purported debt of $2.1miilion plus interest and costs accrued under the terms of the Bill Facility dated 3 January 2003, in consideration of the said discharges of the First and Second NAB Mortgages.

13.3 Enable the satisfaction of the condition for the finance of $2.4 million from HG&R by insisting upon a substantially greater payment than the sum secured by the respective mortgages.

14 The second mortgagee (NAB) claimed that the mortgage was “all moneys” securing the total of at least $7 million lent to the Companies in the Andrew Garrett Group of Companies (paragraph 6 of Besanko J) and refused to accept the offer and to discharge the mortgages.

15 On the 4th of February 2004 the Registered Proprietors commenced an action in the Supreme Court of South Australia (Action 127 of 2004) to appeal the order of posession and seeking declaratory & injunctive relief. The proceedings are summarised in paragraphs 14 to 23 of the Reasons of Besanko J.

16 On that date the Registered Proprietors appealed to a single judge of the Supreme Court (Besanko J.) from the order of the Master.

17 Besanko J’s findings (for the purpose) and orders were summarised in paragraphs 24 to 54 of those Reasons.

18 The orders of Besanko J were made on 5th of March 2004.

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19 The Second Mortgagee (NAB) issued a Notice for Specific Directions on the 8th July 2004 seeking to discharge the orders of the 5th March 2004 and are summarised in the reasons of Besanko J dated 26th July 2004 paragraphs 1 to 18.

20 The orders were discharged by Besanko J and the reasons for his decision are summarised in paragraphs 19 to 23.

21 An application by the Registered Proprietors for leave to appeal (In so far as necessary) to the Full Court, and the appeal, was heard by the Full Court on the 14th September 2004.

22 The application for leave and the appeal were dismissed and the reasons were published on the 5th of November 2004.

23 The conclusion and orders of the full court are summarised in paragraphs 1 to 25 of those reasons.

24 The Interest Rate referred to by Besanko J, in the undertakings require as a condition of the order with injunction was that rate applicable under the Second Bill Facility exhibited in the affidavit of Timothy French dated 3rd of February 2004 (paragraphs 24&25 of his reasons) as being the applicable interest rate to be charged on $2.1 million (paragraph 50 of his reasons)

25 The evidence before Besanko J was that the amount claimed by the Respondent under the Second Bill Facility ($2.1 million) could have been paid in full in December 2003.

26 The Full Court held that the order was meant to refer to the Default Interest rate until trial (paragraphs 9 to10 of the reasons of 5th November 2004).

27 The additional Facts not referred to by Besanko J or the Full Court are that the default interest rate is calculated by reference to clause 19 of the Second Bill Facility Letter of offer of the 3rd of January 2003 and Item 12 of the schedule as exhibited in the affidavit of Tim French dated 3rd of February 2004.

28 Clause 19 of the Second Bill Facility Letter of Offer provided;

"That in the event that the Drawer should fail to pay to the Bank the face value of any Bill either on its Maturity Date or upon the service of a notice of termination of Facility pursuant to clause 18 (which ever the case may be) the bank may debit to an account of the Drawer (whether opened by the Bank or the Drawer) with the face value of the Bill

*and any costs and expenses and outgoings referred to in clause 22. The overdrawn balance of such account shall bear interest **calculated** in accordance with item 12 of the schedule from time to time"*

24 Item 12 of the Schedule of the Second Bill Facility Letter of Offer provided;

*"the default rate was the total of the Bank's Lending Indicator rate for base plus a customer margin of 1.5% per annum plus a default margin of 4.0% per annum **being** 14.6% per annum.*

25 The Base Bill Facility rates prevailing at the time of September 2003 are exhibited in the affidavit of Andrew Morton Garrett before Besanko J dated 19th August,2004.

26 The Customer Margin is exhibited in Item 9 of the Second Bill Facility Letter of Offer.

27 The Default Margin is exhibited in Item 12 of the Second Bill Facility Letter of Offer.

28 Upon the basis that the default interest payable was to be "calculated in accordance with item 12 of the schedule from time to time", the evidence showed that the rate was to be calculated was in accordance with the Annexed Table.

29 The Annexed Table is based upon the following evidence contained in ;

29.a the Affidavit of Timothy French dated 3rd of February 2004

29.b the Affidavit of Scott Evans dated 26th July 2004

29.c Reasons of Besanko J date 26th July 2004 paragraphs 4 to 11

30 Besanko J held that the applicants had not complied undertaking to pay default interest, but did not consider or rule upon the Applicant's contention that the rate had been deliberately miscalculated.

31 The Full Court confirmed that the terms of the undertaking required the payment of default interest as specified in the Second Bill Facility and upheld the finding of Besanko J that the undertaking to pay interest had not been complied with.

PART III : A BRIEF STATEMENT OF THE APPLICANTS' ARGUMENT

(A) Inglis was wrongly decided or has been wrongly understood

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32 Inglis v CTB (1971) 126 VLR 161 is not authority for any inflexible rule or Strong pre-disposition as formulated in Part I. paragraph 1 above.

33 Alternatively, if Inglis is authority for such an inflexible rule, it was wrongly decided, and ought to be reconsidered. Leave is sought to submit that Inglis should be overruled insofar as it stands as authority for such an inflexible rule. Especially in the light of the Trade Practices Act (1974) & the Corporations Act (2001)

34 The correct principle, it is submitted, is as follows:

34.a Where a mortgagor seeks to restrain the exercise of an admitted Power of Sale, it is seeking to restrain the exercise of a legal power or right: the contractual right to enter into possession of the mortgaged property, and to sell if in order to recover out of the proceeds the secured debt due & owing. Cf; Patterson v Mortgagee Finance Australia (Securities) Ltd CA (NSW) Unreported, 12 September 1990 per Powell JA (See Bryson J, "Restraining Sales by Mortgagees and a Curial Myth" (1993) II Aust. Bar Review I, at 14.

34.b The exercise of that legal power is subject to the contractual duties owed to the Mortgagor by the Mortgagee.

34.c The exercise of the legal power is subject to equitable Duties owed to the Mortgagor cp; Pendlebury v CML (1912) 13 CLR 676
Forsyth v Blundell (1973) 129 CLR 477
ANZ v Bangadilly Pastoral Co. (1978) 139 CLR 195
Commercial & General Acceptance Ltd v Nixon (1981) 152 CLR 491
(and prior mortgagees). cp; Alliance Acceptance Co Ltd v Graham (1974) 10 SASR 220

34.d Whilst the maxim of equity that "the one who seeks equity must do equity" will have some relevant applications. Where the ground upon which the mortgagee seeks injunctive relief is that the mortgagee intends to exercise the admitted power of sale in a way that would constitute a breach of its equitable duties. (cp Hawkesbury Valley Developments Pty Ltd v Custom Credit Corp Ltd. Needham J, NSW (SC), Unreported 7th February 1990; cited by Bryson J. in II Aust. Bar Rev. at 8-9, the ordinary principles applicable to the grant of an interlocutory or final injunction will apply where other grounds are relied upon for intervention.

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PART III (cont)

34.e That the alleged Default was a Direct result of the breach of the 1st & 2nd Contracts of Finance by the Respondent.

34.f Thus, the mortgagors asserts as its ground of relief its statutory right (arguable or proven) of "redemption", the Court will consider

34.f.i The adequacy of any relevant legal remedy, and

34.f.ii The balance of Convenience

cp; Lloyd v Vickery & Dunlop (1873) 12 S.Ct.Rep. (Equity) 4

Bank of NSW v Tyson (1871) 2 S.ct.Rep. (Equity) 1, per Faucett J at 20 ff
(both cited by Bryson J. in II Aust. Bar Rev. at 10-12)

34.g The Correct principle is that the grant of (interlocutory) injunctive relief is discretionary, the proper exercise of which is dictated by the particular circumstances; and that while payment into Court of the sum prima facie due and payable is a relevant consideration and may be an appropriate condition of relief where the right to exercise the power of sale is not an issue, it is not an inflexible pre-condition for relief.

34.h Where the right to exercise the power of sale is disputed it is an inappropriate condition of relief.

35 In this case, it was relevant to the exercise of the discretion, but the Full Court failed to consider:

35.a That the conditions imposed by Besanko J. on the grant of the injunction (undertakings to pay arrears of interest and continuing interest) had been complied with by the applicants (see (b) below).

35.b That the change of circumstance between the initial grant in injunctive relief and the subsequent discharge of these orders was the service by NAB of a Notice pursuant to S. 55A, Law of Property Act, 1936(SA) in respect of a demand for $1.5 million.

36 The only consequence of that event (assuming a valid Notice) was to trigger the right under the mortgage to exercise the power of sale.

37 However , it continued to be the Registered Proprietors' case that:

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PART III (cont)

37.a It & the Beneficial owners had a Statutory & Equitable right to redeem the mortgage

37.b That (at most) the mortgagee secured no more than $1.5 million over Springwood Park; in other words, it was not an "all moneys" mortgage, which (as NAB claimed) secured all the debts of the Andrew Garrett Group of Companies amounting to an amount of approximately $6,450,000. This was not a dispute merely as to the quantum due and owing: it was a dispute over the extent to which the mortgage secured the Registered Proprietors' debts.

That the Registered Proprietors had taken real and serious steps to exercise the statutory right of redemption, and had secured alternative letters of offer of finance in

37.c excess of $73 million as evidenced before Besanko J in the Affidavit of Andrew Morton Garrett dated 26th August 2004.

37.d That no legal remedy was adequate to protect and vindicate the rights of redemption.

37.e That the balance of convenience strongly favoured the grant of an injunction:

37.e.i To enable the dispute over the extent of the security to be tried and determined;

37.e.ii To prevent irretrievable loss to the Applicants in the Loss of a viable right of redemption;

- Averil Garrett (49 years) the loss of the family home and the capital gains benefits along with the loss of a unique lifestyle. The beneficial interest held by the Andrew Garrett Family Trust as to 300,000 units of the 650,000 units & by the Andrew Garrett Super Fund as to 350,000 units on issue in the Springwood Park Unit Trust.

- Tom Garrett (17 years) the loss of the family home and the capital gains benefits along with the loss of a unique lifestyle. The beneficial interest held by the Andrew Garrett Family Trust as to 300,000 units of the 650,000 units & by the Andrew Garrett Super Fund as to 350,000 units on issue in the Springwood Park Unit Trust.

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PART III (cont)

- Nicholas Garrett (18 years) the loss of the family home and the capital gains benefits along with the loss of a unique lifestyle. The beneficial interest held by the Andrew Garrett Family Trust as to 300,000 units of the 650,000 units & by the Andrew Garrett Super Fund as to 350,000 units on issue in the Springwood Park Unit Trust.

- Andrew Garrett (48 years) the loss of the family home and the capital gains benefits along with the loss of a unique lifestyle. The beneficial interest held by the Andrew Garrett Family Trust as to 300,000 units of the 650,000 units & by the Andrew Garrett Super Fund as to 350,000 units on issue in the Springwood Park Unit Trust.

- The Andrew Garrett Family Trust as to 300,000 units issued in the Springwood Park Unit Trust

- Andrew Garrett Wine Resorts Pty Ltd being held in breach of duty as a trustee.

- Andrew Garrett Superannuation Fund as to 350,000 units issued in the Springwood Park Unit Trust

- Andrew Garrett as the 1st Defendant by Counterclaim in action 127 of 2004.

- Evajade Pty Ltd as the 2nd Defendant by Counterclaim in action 127 of 2004.

- Michael Cowan Garrett as the 3rd Defendant by Counterclaim in action 127 of 2004.

- Creditnetbank Internationale as the 1st Intervener in action 127 of 2004.

38 That further the equitable principle enacted in Inglis v Commonwealth Bank (1972) and Harvey v McWatters (ref) did not and does not require the conclusion that payment into court of the interest required by the undertakings and in compliance with those undertakings, the injunction should nevertheless be discharged because allegedly Valid S.55A Notices had been served and the full amount of the Debt claimed by the NAB should now be paid as the price for retaining the injunction.

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PART III (cont)

39 That the sole purpose of the respondent in causing the execution of the 4th Mortgage was to overcome the subrogation of the 1st Mortgage and the establishment of the 3rd mortgage by taking possession of the Certificates of Title.

(B) No Failure to comply with the undertakings

40 Upon the assumption confirmed by the Full Court (But disputed by the applicants) that the reference in Besanko J's Reasons of 2nd March 2004 and Order of the 5th of March the undertaking to

"pay into Court the interest falling due under the Bill Facility Letter of Offer"

is a reference to the payment of default interest pursuant to Clause 19 of the Second Bill Facility , the Applicants contend;

40.a That the proper interpretation of Clause 19 & Item 12 requires that a calculation of the interest rate from time to time according to the formula stated in item 12 prevails over the concluding words of Item 12. That is to say that the phrase "being 14.6%" is to be construed as a reference to a maximum rate of default interest but is otherwise subject to the calculation resulting from the formula set out.

40.b Thus the correct interpretation of the phrase "being 14.6%" is as a cap on the applicable rate from time to time.

40.c Upon this interpretation the applicable default interest rate for the sums to be paid into Court pursuant to the undertakings, properly calculated, amounted to average of just over 10% per annum compared with the actual charged of 16% per annum (See annexed table)

40.d The Trustees of the Andrew Garret Family Trust No 2 paid into court $286,308.18 on behalf of the Registered Proprietors during that period or an overpayment of $80,590.45 on the properly calculated default interest under clause 19.

40.e Further the inclusion of a "default margin" in the default interest is a penalty and unenforceable at law, consequently an inappropriate order for any judge to make when "moulding an order".

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PART III (cont)

40.f On the basis that the Default rate was unenforceable then the overpayment of interest during the relevant period was $171,034.29 until the Mareva Order.

40.g The overcharge of interest due under the Bill Facility by the Respondent was $267,892.81 during the relevant period.

40.h The Full Court failed to consider or to rule upon the contention of the Applicants that a proper application of Cl.19 of the Second Bill Facility resulted in the conclusion that in respect of the interest payable pursuant to the undertakings (including arrears) there had been an overpayment of some $80,000 and overcharge by the respondent of $267,000.

40.i The Full Court failed to consider that the sole purpose of the Mareva Order made on the 26th July 2004 was to cause a default under the orders of Besanko J.

40.j The Full Court failed to consider that there was a considerable surplus of security in respect of the Total Debt owed by the Andrew Garrett Group.

40.k The subrogation of the 1st registered mortgage was not argued before the full court.

40.l The establishment of the 3rd equitable mortgage was not argued before the full court.

40.m The breaches of the 1st & 2nd Contracts of Finance were not argued before the Full Court.

(C) Deliberate Failure of the Administration of Justice

41 On the orders of Gray J dated the 4th August 2004;

41.a Evajade Pty Ltd was joined as the 2nd Defendant by Counterclaim

41.b Michael Garrett was joined as the 3rd Defendant by Counterclaim

42 From that date neither the 2nd or 3rd DCC has been served or been party to any hearings in the matter, consequently both parties and the parties for whom they act have been denied the opportunity to be heard because of a lack of notice.

43 The applicant relies upon the dicta of Griffith C.J. in the decision of Woods v The Sheriff of Queensland (1885) 6 QLJ at 163 at page 164 where his Honour said:

"When an order is made ex parte the court or judge making it may, upon application of any person prejudicially affected by the order, review and if necessary discharge it. That is a rule of natural justice. But when a judgment or order is pronounced or made after hearing both sides it is a general rule that the court which pronounced the judgment or made the order cannot reverse or vary it."

"Since the appellant in fact had no notice of the hearing the court had inherent power to set the order aside. This power was a discretionary one but there was no reason to refuse the appellant's application."

Their Honours in finding that the court had such inherent power relied not upon the fact of the order being ex parte, but upon their finding that the court had power to relieve a party from the continued operation of an interlocutory order where after it was made new facts came into existence which rendered its enforcement unjust.

44 The decision of the full bench of the High Court in Taylor and Taylor (1979) FLC 90-674 is the leading authority on the inherent power of the Court, Stevens J. agreed with the judgment of Gibbs J, as he said

"The rule laid down by Chief Justice Griffith seems to me to be in accordance with justice and commonsense. It enables a court to set matters right where there has been a failure to observe an essential requirement of natural justice. The judgments of the majority of the court in Cameron v Cole also recognise the existence of an inherent power of the kind suggested."

45 It is also supported by his Honour's reference to the High Court decision in Cameron v Cole (1944) 68 CLR 571. For example, in that case Rich J. said at page 589:

"It is a fundamental principal of natural justice applicable to all courts whether superior or inferior that a person against whom a claim or charge is made ***must be given a reasonable opportunity of appearing and presenting his case****. If this principle be not observed the person affected is entitled ex debit justitiae to have any determination which affects him set aside; and a court which finds that it has been led to purport to determine a matter in which there has been a failure to observe the principle has inherent jurisdiction to set its determination aside."*

He refers to the authority of Craig v Kanssen (1943) 1 KB at p 262.: in such a case there has been no valid trial at all.

(E) Undertaking as to Damages

46 On the 4th August 2004 at the time of making the Mareva orders the Respondent gave an undertaking as to damages to the Supreme Court of SA in the following form;

ORDER WITH INJUNCTION
UNDERTAKING

3/8/2006 2:16pm

1. The defendant, National Australia Bank Ltd, by counsel, undertakes to abide by any order the Court or a Judge may make as to damages in case the Court or a Judge shall hereafter be of the opinion that any person shall have sustained any loss or damage by reason of these orders and undertakings which the defendant ought to pay.

<u>PART IV: THE REASONS WHY SPECIAL LEAVE SHOULD BE GRANTED</u>

47 Special Leave Should be granted because:

47.a The circumstances in which payment into Court of the Sum claimed by the mortgagee to be due and owing is properly required as a condition of the grant of an injunction to retrain a mortgagee sale, merit review by this Court.

<u>Patterson v Mortgage Finance Aust.</u> (Securities) Ltd, CA (NSW), Unreported, 12 September 1990, per Kirby P., per Handley JA: cited by Bryson J in II Aust. Bar Rev. at 15.

47.b <u>Inglis v Cth Trading Bank</u> (1971) 126 CLR 161 should be reconsidered, and insofar as it lays down an inflexible rule, or a strong rule of pre-disposition, it should be overruled. Insofar as it does not lay down any such rule, the correct principle should be formulated and explained

47.c This case is a suitable vehicle for the reconsideration of <u>Inglis</u> and its authoritative force: the Full Court dismissed the appeal on the ground that the Applicants had not complied with the conditions of initial relief, & that the <u>Inglis</u> rule became applicable.

Whether the conditions for relief had been complied with (as the Registered Proprietors' contended) or not (as NAB contended) it still remained to consider whether, nevertheless, the injunction should have been continued and upon what, if any, conditions.

47.d The Full Court failed to consider and to rule upon the contention of the Registered Proprietors that insofar as Clause 19 of the Second Bill Facility was incorporated by reference into the terms of the undertaking, that clause did not set a fixed rate for default interest, but rather required the application of a formula, subject to a maximum rate.

47.e This failure it is submitted will result in irretrievable loss to the applicants and others unless it is corrected.

47.f The Failure of the Administration of Justice has resulted in a Denial of Justice to Evajade, its shareholders and the beneficiaries of the Trusts for whom it acts.

47.g The Respondent has collected in excess of the moneys owed by the Andrew Garrett Group of entities to the extent of approximately AUD$53,000,000 in respect of an acknowledged AUD$6,450,000 debt since the 17th July 2003.

47.h This Case is in the Public interest as a suitable vehicle to conclusively reset authority in respect of

1. Misrepresentation of Banks Generally
2. Unenforceability of Default Interest.
3. Terms for injunctive Relief in respect of exercise of a right of Power of Sale

<u>PART VI: AUTHORITIES, LEGISLATION & OTHER MATERIAL RELIED UPON</u>

Inglis v Commonwealth Trading Bank (1971) 126 CLR 161

Bryson J. , *"Restraining Sales of Mortgagees and a Curial Myth" (1993)* II Aust. Bar Rev. I

Trade Practices Act (1974)(C'th)

Corporations Act (2001)(C'th)

Law of Property Act (1936) (SA) S.55A

Real Property Act, (1886) (SA), ss 128,133,143,145

Affidavits of AMG in 127 of 2004 Supreme Court of South Australia

The Court Record of Action 127 of 2004

Affidavits of AMG & Trial evidence in action 1767 of 2004

Clarkson vs. Mutual Life Association of Australasia (1879)

Anderson & Anor v Lockhart & Ors (1990) ANZ convR 225 ;(1990) Q convR 54-345

Fisher & Lightwood's, Law of Mortgage, Australian Edition

Wiseman v Westland (1826) 1Y & J 117 at 122; 148 ER 610 at 612.

Buckhurst's Case (2595) Moore KB 687;72 ER 713;

Smith v Chichester (1842); 2 Dr & War 393;

Clayton v Clayton (1930) 2 Ch 12 at 21.

Re Molton Finance Ltd (1968) Ch 325 at 333

section (s 7(1) of NSW Act,

s 18 of the Victorian Act

Harrington v Prince (1832) 3 B & Ad 170; 110 ER63

Head v Crealock (1874) 10 Ch App 22

Waldy v Gray (1875) LR 20 Eq 238

Default Interest

Holles v Wyse (1693) 2 Vern 290 ; 23 ER 787

Halifax (Marquis) v Higgiens (1690) 2 Vern 134; 23 ER 694

Wallis v Smith (1882) 21 Ch D243

Seton v Slade (1802) 7 ves Jun 265 ; 32 ER 108.

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Cop Ltd (1915) AC 79 at 86.

Subrogation of 1st Mortgage

State Bank of New South Wales v Geeport Developments Pty Ltd NSWSC (1999)

Real Property Act (186) section 143(3)

Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (In Liq) (1978) 141 CLR 335 at 348

Drew v Lockett (1863) 32 BNeav 499; 55 ER 196.

Dixon v Steel (1901) 2 Ch 602.

Pledge v Buss (1860) John 663; 70 ER 585; Pearl v Deacon (1857) 24 Beav 186; 53 ER 328

Halsbury's Laws of Australia at p185-540

The Laws of Australia at 15.3:15(15)

Re Equitable Mortgage

UTC Ltd(In Liq) v NZI Securities Australia Ltd(1991) 4 WAR 349

Russel v Russel (1783) 1 Bro CC 269; 28 ER 1121

Windella (NSW) P/L v Ronald James Hughes & 2 ors (1999) NSWSC 1129

Ghana Commercial Bank v Chandiram (1960) AC 732

Failure of Administration of Justice

Woods v The Sheriff of Queensland (1885) 6 QLJ

Taylor and Taylor (1979) FLC 90-674

Cameron v Cole (1944) 68 CLR 571

Craig v Kanssen (1943) 1 KB at p 262

Grimshaw v Dumblebar (1953) 1 All ER p 350

Wilkes and Wilkes (1981) FLC 91060

PART VII : ORAL ARGUMENT

The Applicants seek to supplement this Summary by Oral Argument, and for this purpose the Applicant seeks leave to present oral argument.

- In his capacity as Managing Trustee of the Andrew Garrett Group of Trusts.
- Sole Shareholder and Managing Director/Sole Shareholder of the 2nd DCC (Evajade) and the Andrew Garrett Group of Trusts in his capacity as Trustee of the Andrew Garrett Family Trust No 3.

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Calculation of Interest Payable / Submissions to Lunn J 22nd December 2005 Action 127 of 2004

$	Amount 2,100,000	2003 July Annual Rate	Days due	2003 August Annual Rate	Days due	2003 September Annual Rate	Days due	2003 October Annual Rate	Days due	2003 November Annual Rate	Days due	2003 December Annual Rate	Days due
Base Bill Facility Rate		4.82%	10	4.82%	31	4.82%	30	4.83%	31	4.83%	30	4.84%	31
Customer Margin		1.5%		1.5%		1.5%		1.5%		1.5%		1.5%	
Default Margin		4.0%		4.0%		4.0%		4.0%		4.0%		4.0%	
Default Rate		10.32%		10.32%		10.32%		10.33%		10.33%		10.34%	
Normal Rate		6.32%		6.32%		6.32%		6.33%		6.33%		6.34%	
Interest Payable (based on clause 19)		$ 5,937.53		$ 18,406.36		$ 17,812.60		$ 18,424.19		$ 17,829.86		$ 18,442.03	$ 96,852.58
Interest Payable (Default Rate Unenforcable)		$ 3,636.16		$ 11,272.11		$ 10,908.49		$ 11,289.95		$ 10,925.75		$ 11,307.78	$ 59,340.25
Effective Rate of Interest Charged		15.27%		15.27%		15.27%		15.27%		15.27%		15.27%	
Overcharge													
Overpaid													

	2004 January Annual Rate	Days due	2004 February Annual Rate	Days due	2004 March Annual Rate	Days due	2004 April Annual Rate	Days due	2004 May Annual Rate	Days due	2004 June Annual Rate	Days due
Base Bill Facility Rate	4.88%	31	4.90%	29	4.90%	31	4.90%	30	4.90%	31	4.90%	30
Customer Margin	1.5%		1.5%		1.5%		1.5%		1.5%		1.5%	
Default Margin	4.0%		4.0%		4.0%		4.0%		4.0%		4.0%	
Default Rate	10.38%		10.40%		10.40%		10.40%		10.40%		10.40%	
Normal Rate	6.38%		6.40%		6.40%		6.40%		6.40%		6.40%	
Interest Payable (based on clause 19)	$ 18,513.37		$ 17,352.33		$ 18,549.04		$ 17,950.68		$ 18,549.04		$ 17,950.68	$ 205,717.73
Interest Payable (Default Rate Unenforcable)	$ 11,379.12		$ 10,678.36		$ 11,414.79		$ 11,046.58		$ 11,414.79		$ 11,046.58	345
Interest Charged			$ 195,864.23	223	$ 31,343.90	31	$ 28,883.36	30	$ 30,216.69	31	$ 29,617.10	30
Total Interest Charged												$ 315,925.28
Effective Rate	15.27%		15.27%		17.57%		16.73%		16.94%		17.16%	16%
Overcharge			$ 114,466.50		$ 19,929.11		$ 17,836.78		$ 18,801.90		$ 18,570.52	$ 189,604.81
Amount of Interest Paid pusuant to Orders of Besanko			$ 195,864.23		$ 31,343.90		$ 28,883.36		$ 30,216.69		Not Paid	$ 286,308.18
Total Overpayment			$ 114,466.50		$ 19,929.11		$ 17,836.78		$ 18,801.90			$ 171,034.29

Overcharge of Interest since refusal of payout offer from HG&R by NAB $ 267,892.81

CHRONOLOGY OF "SPRINGWOOD PARK" MORTGAGES

1. NAB first made approaches to Andrew Garrett to fund business development of the Sunburst and Braidwood Groups in January 2002 **(TAB1)**

2. In the process of advancing $1.5 million to AGFT by NAB by way of Bill facility Letter of offer **(TAB 2)** a number of errors were made by the Bank Officers and Lawyers in obtaining an assignment of a Bank SA mortgage to provide security for the loan. This has resulted in a number of potential points of contention between the Trust and the NAB. These potential points are summarised in the following paragraphs.

3. These errors along with the conflict of interest and other breaches then coloured the relationship of the Bank with the Garrett Group as its client.

4. The Bank Bill facility Letter of offer for $1.5 million to AGFT is guaranteed by AGFT, Andrew Garrett, Averil Garrett and Andrew Garrett Wine Resorts **(In its own capacity)** not as trustee of the Springwood Park Unit Trust ***(NAB Point of Contention No 1)***

5. Clause 19 & Item 12 of the Bank Facility defining the default rate is a breach of trust, Breach of the Trade Practices Act (1974) and the duty of care to the client. ***(NAB Point of Contention No 2)***

6. A historical search of the certificates of Title Volume 5324 / Folio 475 and copies of Certificates of Title are shown **(TAB 3)** as the property known as "Springwood Park" currently owned by Garrett Interests shows;

   5.1. Registration of Springfield Encumbrance on the 15th February 1996 over CT 4343/672

   5.2. Transfer of Titles to M.O.L.(Andrew Garrett Wine Resorts) Pty Ltd and Averil Garrett on 17th January 1997 from the prior registered proprietor John William Wylie in memorandum of Transfer 8213955.**(TAB 4)**

5.3. Mortgage 8213956 was registered in favour of St George bank Ltd on the 17th January 1997. **(TAB 5)**

5.4. Mortgage 8909699 was registered in favour of N.M. Rothschild & Sons Australia on the 29th June 2000 **(TAB 8) (NAB Point of Contention No 3)**

5.5. There was a discharge of Mortgage 9374751**(TAB 5)** of St George Bank Ltd mortgage 8213956 on the 24th July 2002. **(NAB Point of Contention No 4)**

5.6. A requirement of NAB was an executed Deed of Priority between NM Rothschild & NAB **(TAB 9)** over Springwood Park. This Deed correctly describes Mortgage 8213956 as being the registered security over the land known as Springwood Park dated 29 November 1996 over the correct Land but incorrectly describes Item 4 as the Bank's Security. **(NAB Point of Contention No 14)**

5.7. Mortgage 8213956 has never been assigned to NAB and was discharged **(TAB 5)**, as a result has no effect over Mortgage Number 8909699 **(NAB Point of Contention No 15)**

5.8. A copy of the Stamped deed of assignment of security **(TAB 6)** of the 21st June 2002. The security described was the Partially discharged mortgage 7752654 over CT 5132/961 between Bank SA , NAB and Andrew and Averil Garrett Personally and not as trustees for the Andrew Garrett Family Trust. The interest in the Land was discharged in 1996 **(NAB Point of Contention No 8)**

5.9. Discharge Number 8148915 **(TAB 19)** of various Bank SA Mortgages on the 26th July 1996 registered the discharge of these instruments including;

1. 7035163
2. 7035164
3. 7611978

4. 7752654

(NAB Point of Contention No 20)

5.10. The personal covenants attributed to this mortgage cannot be assigned with this document as they relate to a complete different circumstance of Borrowing. **.(NAB Point of Contention No 9)**

5.11. The money purported to be advanced by Bank SA at the time was a total of approximately $344,000. **(NAB Point of Contention No 12)**

5.12. A copy of the Stamped memorandum of assignment of encumbrance of the 24th of June 2002 **(TAB 7)** being the partially discharged mortgage 7752654 was obtained from the Lands titles office, this document **incorrectly describes** the land subject of the encumbrance as;

The Whole of the Land comprised in certificate of Title Register Book Firstly Volume 5324 Folio 475, secondly volume 5344 Folio 326 & Thirdly Volume 5348 Folio 15.

(NAB Point of Contention No 10)

5.13. Mortgage 9374752 **(TAB 10)** was given in favour of NAB on 28th June 2002 and registered on 24/07/2002. It was a term of the mortgage that it was given in substitution for mortgage 7752654 **(TAB 17)** over CT 5132/961 to be effective only to assignment of stamp duty paid.

5.14. It was not effective to assign the Personal Covenants of the mortgage and nor was it effective to provide an interest in that Land as any interest in the land had been discharged on 23rd July 1996 **(TAB 19). (NAB Point of Contention No 5)**

5.15. The consideration of annexure A of Mortgage 9374752 is specifically limited to be security only for the payment to the Transferee of the moneys which are purported to be secured by the memorandum of mortgage dated 30/6/1994 from Andrew Garrett Wine Resorts Pty Ltd & Averil Gay Garrett . **(NAB Point of Contention No 11)**

5.16. Mortgage 9374752 does not give rise to an interest over any land. **(NAB Point of Contention No 13)**

5.17. On the 3rd of January a further $600,000 was advanced to the Andrew Garrett Family Trust by way of Bill facility Letter of offer dated 3rd January 2003. **(TAB 13)**

5.18. Mortgage 9617285 **(TAB 14)** was then registered in favour of NAB with the Lands titles office on the 5th of July 2003 and taken unconscionably and unknown to the registered proprietors when the Bank had not advanced any funds to Andrew Garrett Wine Resorts Pty Ltd, Averil Garrett nor to the Unit holders of the Springwood Park Unit Trust. **(NAB Point of Contention No 6)**

5.19. The NAB sought to register the unregistered discharge of Mortgage 8909699 **(TAB 12)** on the 29th of September 2004 without the consent of the registered first mortgagee in order to advance its own position without regard to the interests of any other party including the Andrew Garrett Family Trust or the Registered Proprietors lodged unconscionably following order of possession dated July 26 2004. **(NAB Point of Contention No 7)**

5.20. On or about the 29th of May officers for NAB issued instruction to Simon Illsley to register a new mortgage over the Land known as Springwood Park being Mortgage 9617285 and stamp it to the full amount of the NAB debt at the time being $6,465,000 on the 18th June 2003. **(NAB Point of Contention No 14)**

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5.21. On the 24th December 2002 NMR provided control of the Deed of Discharge and the original Duplicate mortgage 8909699 into the hands of Garrett International Investments Pty Ltd("GII"). An assignment in equity occurred as the funds for the payment of the Rothschild Debt (FREEHILLS) had been provided by GII and AGFT.

5.22. Upon the payout of NM Rothschild for all the debt owed to it by the Andrew Garrett Group of companies a deed of Release and amendment of NM Rothschild **(TAB 11).** NAB is not a party to this deed **(NAB Point of Contention No 17)**

5.23. The lawyers for Rothschild have been requested to obtain execution of a deed of assignment which is currently declined and being reviewed.

5.24. On the 23rd of September 2004 GII executed a deed of assignment of the Duplicate mortgage and other securities to Evajade Pty Ltd as Trustee of the Andrew Garrett Family Trust No 2 in order to extinguish all intercompany loans **(TAB 15)**

5.25. Mortgage Number 8909699 is security for $14 million in favour of Evajade **(NAB Point of Contention No 16)**

5.26. A historical Search of CT 5132/961 **(TAB 16)** and demonstrates that NAB has never held an interest in that Land and that discharge of Mortgage 7752654 was registered on the 2nd of August 1994. **(NAB Point of Contention No 18)**

5.27. The beginning of the errors of the NAB Staff occurred on 11th June 2002 when the officers of Bank SA faxed to NAB **(TAB 18)** at their request the Prime stamped security of the Bank SA mortgages being 7752654. **(NAB Point of Contention No 19)**

5.28. NAB collected the original Certificates of Title of the property known as Springwood Park pursuant to Mortgage 9617285 **(TAB 20)** and collected them around July 2003. At best NAB has only advanced $47,000 against this mortgage.

5.29. It may be possible that this amount could be subject to Equitable SET OFF against moneys owed by the Defendant to the Second Plaintiff. **(NAB Point of Contention No 21)**

OUTLINE OF SECOND PLAINTIFF'S SUBMISSIONS
FOR HEARING ON 15 DECEMBER 2004[1]

1. The second plaintiff ("Mrs Garrett") applies to set aside the order for possession over the property known as Springwood Park in favour of the NAB[2].

2. Mrs Garrett, submits:

   2.1 The terms of the first NAB mortgage expressly limit the amount secured by that mortgage by reference to an earlier BankSA mortgage (the Arranmore mortgage) and in doing so exclude any other amount.

   2.2 The earlier BankSA mortgage was not security over land at the time of entry into the first NAB mortgage. Mrs Garrett had not had

[1] This outline adopts the terminology of documents as set out in the agreed book of documents.
[2] Application dated 8.11.04

any interest in the Arranmore property for approximately 6 years, as the property had been transferred to unrelated parties.

2.3 It follows that the first NAB mortgage is not a security over land for any debt whatsoever. The NAB was incapable of obtaining any better rights than those enjoyed by BankSA under the discharged Arranmore mortgage.

2.4 It further follows that since the first NAB mortgage was security over land for no debt, it could not be used as a basis for a possession order.

2.5 Mrs Garrett seeks a determination on these issues as preliminary points which disposes of all issues with respect to the first NAB mortgage.

2.6 As a consequence, if determined in her favour, the order for possession should be set aside under R84.12.

3. The application primarily concerns construction of the meaning of the relevant terms of the first NAB mortgage. Ascertaining the meaning and effect of the relevant term in the first NAB mortgage involves a construction of the entire document and those executed contemporaneously with it, which includes evidence of surrounding circumstances – the factual matrix of the transaction[3]. Parole evidence is admissible to prove the true nature of the transaction[4].

Mrs Garrett's position

4. In entering into the arrangements with the NAB, Mrs Garrett had no real understanding of the meaning or effect of the legal documents she has signed for the NAB. Mrs Garrett obtained no direct benefit from the transaction and has little knowledge of the circumstances in which the

[3] *Codelfa Construction Pty Ltd v State Rail Authority for New South Wales* (1982) 149 CLR 337
[4] *Gurfinkel v Bentley Pty Ltd* (1966) 116 CLR 98

transactions were undertaken. She signed the documents requested by the NAB and upon direction from her husband.[5]

BankSA

5. Prior to dealing with the NAB, the Garrett's personal banker was BankSA. The NAB made representations to the Garretts to induce them to conduct their business and private banking, which included representations that stamp duty could be saved in taking over the Garretts' private banking affairs.

6. In 1996 the Garretts moved from their former residence at 9 Woodley Road, Glen Osmond ("Arranmore") to Springwood Park residence at Mt Barker Road, Leawood Gardens.[6] The BankSA mortgage over the Arranmore property was discharged at least in so far as the land was concerned and BankSA took a mortgage over the Springwood Park property.

7. The NAB agreed to advance $1.5 million by way of a bill facility[7]. The first NAB mortgage was entered into contemporaneously with that bill facility and assignment of the Arranmore mortgage. Amounts owed by the Garrett's to BankSA were secured by the BankSA Springwood Park mortgage. This was the only mortgage of real property owned by Mrs Garrett that BankSA could have enforced.

Assignment of Arranmore Mortgage

8. By Deed of Assignment and Transfer of Debt and Security the NAB took an assignment of the Arranmore mortgage. The NAB chose not to take an assignment of any other mortgage. The NAB, and not the Garretts, determined which mortgage it wanted assigned to it by BankSA. This appears to have been done by reference to the amount of stamp duty paid on mortgages in favour of BankSA.

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[5] Averil Garrett affidavit 4.2.04 action 127/04
[6] Averil Garrett affidavit 8.11.04 action 127/04 paras 3-6
[7] Although approx only $344,000 was paid to BankSA

9. At the time of assignment, the Arranmore mortgage was not registered and did not represent or effect any interest in any land. As a matter of law, the NAB by virtue of that assignment could not obtain an interest in land. No interest in land was assigned to it by BankSA.

10. The NAB was aware that the Arranmore mortgage did not represent any interest in land[8].

11. One of the registered proprietors of Springwood Park that entered into the first NAB mortgage, Andrew Garrett Wine Resorts Pty Ltd, was also not a party to the Arranmore mortgage, nor the deed of assignment. BankSA never had any rights as against it under the Arranmore mortgage. As a matter of law the NAB could not obtain any rights as against it upon assignment of the Arranmore mortgage.

12. In entering into the first NAB mortgage, the mortgagors did not intend for that mortgage to make Springwood Park a security for all of the monies advanced by the NAB to the Garretts personally or Mr Garrett's business interests[9]. NAB contends the first NAB mortgage secures those debts as an "all monies mortgage"[10].

13. Evidence suggests that the NAB did not intend for the first NAB mortgage to be an all monies mortgage[11]. This evidence also suggests why the NAB took a second mortgage when it would not have been necessary to do so if, as it contends, the first mortgage properly secured "all monies"[12].

14. The NAB made representations to the Garretts as to stamp duty savings that could be effected[13] and prepared the relevant documents for them to

---

[8] The title documents for the Arranmore property show the mortgage to BankSA as having been registered on 26 July 1996. The first NAB mortgage referred to the Arranmore mortgage as discharged.

[9] Affidavits of Andrew Garrett 2.12.03 action 1506/03, 4.2.04 action 127/04 para 11 and Averil Garrett 2.12.03 action 1506/03 para 6.

[10] Para 7 NAB defence action 127/04 and Andrew Garrett affidavit 2.1.04 action 1506/03 para 5 and exhibit AMG4. The NAB rejected an offer by the Garretts to pay $2,250,000 for a discharge of the Springwood Park mortgages – Beissel affidavit 2.1.04 action 1506/03 exhibit RKB7.

[11] Internal NAB memorandum dated 21 March 2003 in which it is stated that Springwood Park "*only secures Garrett's personal debts totalling $2.10m.*"

[12] Internal NAB memorandum dated 21 March 2003 in which it is also stated that "*we [NAB] can not limit our potential reliance on this property as security . .* "

[13] NAB defence para 10.2

sign. The NAB did so in a manner that was rushed. In doing so several errors were made:

14.1 The memorandum of transfer of the Arranmore mortgage (an unregistered document) incorrectly describes the land over which the Arranmore mortgage was registered as Springwood Park.

14.2 The memorandum of transfer further incorrectly describes the Arranmore mortgage as being given by Resorts and Mrs Garrett whereas it was in fact given by Mr & Mrs Garrett.

14.3 The deed of priority between, inter alia, the NAB and NM Rothschild & Sons (Australia) Limited ("Rothschild") defines the NAB security as being BankSA's mortgage over Springwood Park and not BankSA's mortgage over Arranmore.

15. The meaning of the words "security" and "secured by" in clause (2(b) of the first NAB mortgage were intended by the parties to mean security over land. This is the ordinary and prime meaning of the term "security" in the context of a mortgage over land[14]. The NAB dictated the terms of the first NAB mortgage and intended to use the words "secured by" and "security" in the sense of creating rights over land in favour of the NAB.

16. The NAB required rights over the land in order to give it priority over all unsecured creditors in the event of insolvency of the mortgagors of Springwood Park. Having rights over Springwood Park (as opposed to personal covenants only against Mrs Garrett) was the only way the NAB could satisfy the 'acid test' for its security[15]. To construe 'security' in these circumstances as conferring less than a proprietary interest would be meaningless to protect the bank's position.

[14] *Batchelor & Co Pty Ltd v Websdale* [1962] NSWR 1441; Butterworths Australian Legal Dictionary page 1058; Sykes EI and Walker S, *The Law of Securities*, 5th Edition, The Law Book Co Limited 1993, pages 5 and 12; Tyler ELG and Others, *Fisher and Lightwood's Law of Mortgage*, Australian Edition, Butterworths 1995 page 11.

[15] Sykes *ibid* at page 19.

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17. Registration of a mortgage under section 128 of the Real Property Act has the effect of creating a separate statutory charge over the land[16]. The mortgage of Real Property Act land is an interest in land[17]. Such a mortgage is a proprietary right which gives the secured creditor absolute priority in insolvency of the debtor. Personal covenants supporting the obligation to pay do not give such priority.

18. The proprietary rights and interest created by the registered mortgage are treated differently from personal obligations and covenants[18] and they are independent of each other[19].

19. The NAB chose to take an assignment of a mortgage from BankSA that did not, and could not, represent any interest in Springwood Park. Therefore there was no debt 'secured' by that mortgage. Accordingly the first NAB mortgage, expressly limited to the amount of debt 'secured' by the Arranmore mortgage, does not 'secure' any debt. Mrs Garrett could not be in default of the first NAB mortgage by failing to repay monies[20], and the order for possession should not stand.

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[16] *English Scottish and Australian Bank Limited v Phillips* (1937) 57CLR 302 at 321
[17] *Zafiropoulos v Recchi* (1978) 18 SASR 5; *Consolidated Trust Co Ltd v Naylor* (1936) 55 CLR 423
[18] *English* at 321
[19] Duncan WD and Willmott L, *Mortgages Law in Australia*, 2nd Edition, The Federation Press 1996, page 6, Tyler *ibid* at page 111. Contrast with *PT Limited v Maradona* (1991) 25 NSWLR 643 and *French v Queensland Premier Mines Pty Ltd* [2004] VSC 294 in which the mortgage assigned was registered over land.
[20] whether or not monies were admitted to be owed

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ANNEXURE 3

If undelivered return to
PO Box 908
Albury NSW 2640

Australian Government
Australian Taxation Office

THE TRUSTEE FOR ANDREW GARRETT FAMILY TRUST
1 131 ROYAL ST
EAST PERTH WA 6004
000876 049

Statement no: **Interim**
Account no: **78 761 760 976**
Statement date: **17 Oct 08**

Enquiries
Call: 13 28 66
Visit: www.ato.gov.au

Account payout figure #

Statement closing balance	$14,548.57 CR
Estimated general interest charge	$0.00
Total payable if paid on 07 Nov 08:	**$0.00**

Insolvency - running balance account (RBA) statement

This statement shows transactions and interest for the period 01 Jul 08 to 17 Oct 08

Process date	Effective date	Description of transactions	Debits $	Credits $	Balance $
01 Jul 08		STATEMENT OPENING BALANCE			82,020.43

Details of transactions relating to prior periods not listed on previous RBA Statements

Process date	Effective date	Description of transactions	Debits $	Credits $	Balance $
06 Oct 08	20 Feb 01	Amended self assessed amount(s) for the period ended 31 Dec 00 - goods and services tax - cancellation	7,500.00		89,520.43
06 Oct 08	29 Oct 01	Amended self assessed amount(s) for the period ended 30 Sep 01 - goods and services tax		7,500.00	82,020.43
06 Oct 08	13 Aug 01	Amended self assessed amount(s) for the period ended 30 Jun 01 - goods and services tax		7,500.00	74,520.43
06 Oct 08	13 Aug 01	Amended self assessed amount(s) for the period ended 30 Jun 01 - goods and services tax - cancellation	7,500.00		82,020.43

Raelene Vivian
Deputy Commissioner of Taxation

002252

Page 1 of 4
NAT 2031-7.2004

Australian Taxation Office **PAYMENT SLIP - 60**

THE TRUSTEE FOR ANDREW GARRETT FAMILY TRUST

ATO code 0000 0246 06
Account No. **78 761 760 976**
Amount paid $

EFT code 78761 760 976 4860

Australian Taxation Office
Locked Bag 1936
ALBURY NSW 1936

<78761760976> < > < 000000> 24600< >

OENOVIVA

CARBONHELIX

THE TRUSTEE FOR ANDREW GARRETT FAMILY TRUST	Statement no:	Interim
	Account no:	78 761 760 976

Process date	Effective date	Description of transactions	Debits $	Credits $	Balance $
06 Oct 08	29 Oct 01	Amended self assessed amount(s) for the period ended 30 Sep 01 - goods and services tax - cancellation	7,500.00		89,520.43
06 Oct 08	20 Feb 01	Amended self assessed amount(s) for the period ended 31 Dec 00 - goods and services tax		7,500.00	82,020.43
07 Oct 08	13 Aug 01	Amended self assessed amount(s) for the period ended 30 Jun 01 - goods and services tax		7,500.00	74,520.43
07 Oct 08	29 Oct 01	Amended self assessed amount(s) for the period ended 30 Sep 01 - goods and services tax		7,500.00	67,020.43
07 Oct 08	10 May 01	Amended self assessed amount(s) for the period ended 31 Mar 01 - goods and services tax		9,127.00	57,893.43
07 Oct 08	11 Nov 02	Amended self assessed amount(s) for the period ended 30 Sep 02 - goods and services tax		7,500.00	50,393.43
07 Oct 08	01 Aug 03	Amended self assessed amount(s) for the period ended 30 Jun 03 - goods and services tax		7,500.00	42,893.43
07 Oct 08	29 Jul 02	Amended self assessed amount(s) for the period ended 30 Jun 02 - goods and services tax		7,500.00	35,393.43
07 Oct 08	25 Nov 03	Amended self assessed amount(s) for the period ended 30 Sep 03 - goods and services tax		7,500.00	27,893.43
07 Oct 08	20 Feb 01	Amended self assessed amount(s) for the period ended 31 Dec 00 - goods and services tax		7,500.00	20,393.43
07 Oct 08	28 Feb 03	Amended self assessed amount(s) for the period ended 31 Dec 02 - goods and services tax		7,500.00	12,893.43
07 Oct 08	28 Feb 02	Amended self assessed amount(s) for the period ended 31 Dec 01 - goods and services tax		7,500.00	5,393.43
07 Oct 08	28 Apr 03	Amended self assessed amount(s) for the period ended 31 Mar 03 - goods and services tax		7,500.00	2,106.57 CR
07 Oct 08	02 Mar 04	Amended self assessed amount(s) for the period ended 31 Dec 03 - goods and services tax		6,619.00	8,725.57 CR
17 Oct 08	29 Apr 02	Amended self assessed amount(s) for the period ended 31 Mar 02 - goods and services tax		5,823.00	14,548.57 CR
17 Oct 08		**STATEMENT CLOSING BALANCE**			**14,548.57 CR**

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THE TRUSTEE FOR ANDREW GARRETT FAMILY TRUST	Statement no:	Interim
	Account no:	78 761 760 976

Process date	Effective date	Description of transactions	Debits $	Credits $	Balance $
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07 Oct 08	29 Oct 01	Amended self assessed amount(s) for the period ended 30 Sep 01 - goods and services tax		7,500.00	67,020.43
07 Oct 08	10 May 01	Amended self assessed amount(s) for the period ended 31 Mar 01 - goods and services tax		9,127.00	57,893.43
07 Oct 08	11 Nov 02	Amended self assessed amount(s) for the period ended 30 Sep 02 - goods and services tax		7,500.00	50,393.43
07 Oct 08	01 Aug 03	Amended self assessed amount(s) for the period ended 30 Jun 03 - goods and services tax		7,500.00	42,893.43
07 Oct 08	29 Jul 02	Amended self assessed amount(s) for the period ended 30 Jun 02 - goods and services tax		7,500.00	35,393.43
07 Oct 08	25 Nov 03	Amended self assessed amount(s) for the period ended 30 Sep 03 - goods and services tax		7,500.00	27,893.43
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17 Oct 08	29 Apr 02	Amended self assessed amount(s) for the period ended 31 Mar 02 - goods and services tax		5,823.00	14,548.57 CR
17 Oct 08		**STATEMENT CLOSING BALANCE**			**14,548.57 CR**

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ANNEXURE 4

ANDREW GARRETT©® TM

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Mr. Jason Lim,
Deputy Registrar,
Administrative Appeals Tribunal
Perth Registry,
Level 5, 111 St Georges Terrace,
Perth, WA, 6000
Fax; 08 9327 7299
cc; Joe Giacco; joe.giacco@ags.gov.au

24 October 2008

CASE 2008/2152 & 2008/3509

Andrew Garrett v Inspector General in Bankruptcy

Dear Sir,

I refer to the aforementioned matters that have are set down for hearing/directions on the 29th October 2008 in the Perth Registry.

I wish to advise the Tribunal that since my last appearance before the Learned Senior Member a number of events of significance have occurred;

1. Up until the 17th of October 2008, in my capacity as Trustee of the Andrew Garrett Family Trust I have obtained confirmation of tax credits/ to the Account of the Trust as set out in the spreadsheet annexed hereto of $98,246.00. A further credit of $9,610.00 in General Interest Charges is also yet to be confirmed.
2. I was bankrupted in respect of a default judgment in an amount of $72,329.70 in favour of the Australian Taxation Office (ATO) that was handed down on the 11th February 2008 in the District Court of South Australia DCCIV-1666-2003. (see annexed) I was unrepresented in this action as at the date of the judgment debt.
3. The judgment debt was given on the basis of a purported tax liability in my hands as Trustee of the Andrew Garrett Family Trust. The effective date of the tax credits set out in Clause 1 predates the Judgment debt; that is to say that as at the date of the Judgment debt no money was owed to the ATO by me in either my personal or Trust Capacity.
4. As at the date of the default judgment the running account balance will show that the Trust was in credit in an amount of in excess of $25,000 rather than debit of $72,329.70.
5. On this basis I have briefed counsel in South Australia to agree consent orders with the ATO to set aside the default judgment and make application to the Federal Court to annul the Sequestration Order made against me of the 24th September 2004. This application will incorporate evidence of solvency as at the date of the order and the Default Judgment.
6. As a consequence of the Tax Credits that I knew were on foot I did not lodge the application for legal aid under section 69 of the AAT Act (1975) until Monday of this week (I finalised the last credit on the 17th of October 2008). It is a factor in the assessment of Legal Aid/Financial Assistance that the Attorney General considers the likely prospects of success; the credits significantly enhance those prospects.
7. I can now advise that I have engaged the services of Mr Kevin Dundo of Q Legal, Level 4, 105 St Georges Terrace, Perth to act for me with respect to the application for legal aid and in the aforementioned matters. He is unavailable to attend on the 29th of October 2008.
8. I also flag that, subject to advice, it is likely that I will seek to join the actions in my capacity as Trustee of the Andrew Garrett Family Trust as well as being the applicant in my personal capacity.

Unit 1/131 Royal Street, East Perth, Western Australia, 6006
FACSIMILE 08 8121 5136 MOBILE 0424 324 135

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ANDREW GARRETT©® TM

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9. As a consequence of the aforementioned paragraphs I do not wish to consume the tribunal's valuable time and resources unnecessarily. I am happy to attend personally on the 29th however I would be seeking the following orders;
   a. That Case 2008/2152 is adjourned until the end of January 2009 for Directions
   b. That Case 2008/3509 is adjourned until the end of January 2009 for Directions
   c. That for each case the parties have liberty to apply.
10. I ask that the Tribunal confirm the aforementioned orders sought by correspondence.

Yours Sincerely

Andrew M. Garrett

Andrew M Garrett©®,
personally and in my capacity as Sole Trustee of AGFT

Unit 1/131 Royal Street, East Perth, Western Australia, 6006
FACSIMILE 08 8121 5136 MOBILE 0424 324 135
Email agarrett@holy-grail.com.au

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Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

ADMINISTRATIVE APPEALS TRIBUNAL	)	
	)	No 2008/2152
GENERAL ADMINISTRATIVE DIVISION	)	

Re	ANDREW GARRETT
	Applicant
And	INSPECTOR GENERAL IN BANKRUPTCY
	Respondent

REASONS FOR DECISION

18 September 2008 Mr A Sweidan, Senior Member

1. In the course of a directions hearing held by the Tribunal in this application on 6 August 2008 the Tribunal directed that a number of summonses to witnesses issued at the request of the applicant on 23 July 2008 be revoked and that the applicant's request for a number of further summonses to be issued to various parties be refused.

2. The applicant has requested the Tribunal to furnish him with a statement in writing of the Tribunal's reasons for its decision.

3. The Tribunal's reasons for decision are provided in the attachment.

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Senior Member

CATCHWORDS

Practice and procedure – issue of summonses – revocation of summonses issued – refusal of application to issue other summonses – extension of time application – persons summonsed to give evidence concerning substantive application for review – such evidence not directly relevant to extension of time application as Tribunal not required to conduct merits review on hearing of application for extension of time

LEGISLATION

Bankruptcy Act 1966 (Cth), s149K(5), s149P(3), s149P(4), s149(D)(1)(j), s149(D)(1)(ma), s149(D)(1)(ha), s149(D)(1)(i), s149(D)(1)(da), s149(D)(1)(e), s149(D)(1)(l), s 149(D)(1)(b), and s149(D)(1)(n).

Administrative Appeals Tribunal Act 1975 (Cth), s 29(1), s 29(2) and s40

CASES

Castallano v Inspector General in Bankruptcy (1998) 51 ALD 254

Cosco Holdings Pty Ltd v FCT (1997) 37 ATR 432;

Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344

Re Bird and Military Rehabilitation and Compensation Commission (2006) 91 ALD 691

Re Moore and Military Rehabilitation and Compensation Commission (2006) 90 ALD 417

Re Perpetual Trustee Co (Canberra) Ltd and CMR for ACT Revenue (1993) 29ALD 817

Re Sam Mercorella Pty Ltd and Australian Apple and Pear Corp (1987) 12 ALD 520

REASONS FOR DECISION

18 September 2008 Mr A Sweidan, Senior Member

THE APPLICATION

1. The applicant, Andrew Garrett ('the Bankrupt') has applied, by an application dated 16 May 2008 for an extension of time for lodging an application for a review of a decision of the respondent dated 18 December 2007.

RELEVANT LEGISLATION

2. Pursuant to paragraph 149K(1)(b) of the *Bankruptcy Act 1966* (Cth) ('the Act'), the Inspector-General may review a decision of the trustee to file a notice of

objection if requested to do so by a bankrupt for reasons that appear to the Inspector-General to be sufficient to justify such a review.

3. Pursuant to subsection 149K(5) of the Act, within 60 days after the request is lodged, the Inspector-General must:

3.1 decide whether to review the decision; and

3.2 if the Inspector-General decides to review the decision - make his or her decision on the review.

4. If the Inspector-General considers there are not reasons sufficient to justify such a review he or she may refuse the request. In that case, in accordance with s 149P of the Act, written notice must be given setting out the decision together with the evidence or other material relied on and reasons.

5. Subsections 149P(3) and (4) of the Act provide that notice must be provided to the bankrupt stating that if the bankrupt is dissatisfied with the decision, an appeal may be made to the Administrative Appeals Tribunal pursuant to subsection 29(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act"). Any such application must be made within 28 days of receipt of the letter of decision of the Inspector-General: subsection 29(2) of the AAT Act.

6. Subsection 29(7) of the AAT Act provides that the Tribunal may, upon an application in writing, extend the time for the making of an application for review of a decision if the Tribunal is satisfied that it is reasonable in all the circumstances to do so.

FACTS

7. On 24 September 2004 the applicant was declared bankrupt. Peter Macks, a chartered accountant with the firm PPB, was appointed trustee of the Bankrupt's estate ("the Trustee").

8. On 23 October 2007, the Trustee filed a Notice of Objection to Discharge ("the Objection") pursuant to section 149B of the Act. The Trustee based the Objection on 10 grounds specified in section 149D of the Act.

9. On 11 November 2007, the Bankrupt requested the respondent to review the decision of the Trustee to file the Objection ("the Request for Review").

10. On 18 December 2007, the respondent wrote to the Bankrupt to notify him of his decision to cancel the Objection based on the grounds specified in paragraphs 149D(1)(j) and 149D(1)(ma) of the Act and of his decision to refuse to review the Objection on each of the eight other grounds specified in paragraphs 149D(1)(ha), 149D(1)(i), 149D(1)(da), 149D(1)(d), 149D(1)(e), 149D(1)(l), 149D(1)(b), 149D(1)(n) of the Act ("the Decision").

11. The effect of the Decision is that the Bankrupt will remain bankrupt and be due for discharge on 23 November 2012, being eight years from the date on which the Bankrupt filed his Statement of Affairs.

12. The respondent sent a copy of the Decision to the Bankrupt at his PO Box address on 18 December 2007. The Bankrupt claims that he received a copy of the decision on 7 January 2008.

13. If the Bankrupt's evidence of date of receipt is accepted the last day for the Bankrupt to seek a review of the Decision by the Tribunal was 4 February 2008.

14. The Bankrupt applied, by an application dated 16 May 2008, for an extension of time for lodging an application for a review of the Decision. The Bankrupt is three and a half months late in his application. However if the letter containing the Decision was received in the ordinary course of post (see section 29 of the *Acts Interpretation Act 1901*) then the Bankrupt is some five months late.

EXTENSION OF TIME

15. The Tribunal when considering whether to grant or refuse an extension of time pursuant to s 29(7) of the AAT Act has repeatedly applied the principles

formulated by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348-350 which are as follows:

> "(a) *the prescribed period of 28 days is not to be ignored. Indeed, it is a prima facie rule that proceedings commenced outside that period will not be entertained. It is a precondition to the exercise of discretion in his favour that the applicant for extension show "an acceptable explanation of the delay" and that it is "fair and equitable in the circumstances" to extend time;*
>
> (b) *consideration of the other action taken by the applicant is relevant to the question of whether an acceptable explanation for the delay has been furnished;*
>
> (c) *any prejudice to the respondent including any prejudice in defending the proceedings occasioned by the delay is a material factor militating against the grant of an extension;*
>
> (d) *....mere absence of prejudice is not enough to justify the grant of an extension....public considerations often intrude;*
>
> (e) *the merits of the substantial application are properly to be taken into account; and*
>
> (f) *considerations of fairness as between the applicants and other persons otherwise in a like position are relevant."*

Issue of Summonses

16. Prior to the directions hearing held by the Tribunal in this application on 6 August 2008 the Tribunal had on the application of the applicant issued summonses to a number of parties which summonses were issued pursuant to the provisions of s 40 of the AAT, and required those parties to attest and give evidence at the hearing of the applicant's extension of time application.

17. Subsequent to the issue of those summonses ("the first summonses") the applicant requested that further summonses be issued to a number of other witnesses. Those further summonses ("the second summonses") had not been issued at the time of the directions hearing.

Directions Hearing

18. At the directions hearing the applicant confirmed, in response to questions from the Tribunal, that the persons to whom the first summonses had been addressed as well as the persons to whom the second summonses were addressed

were required by the applicant to attend to give evidence on matters relating to the merits of the applicant's review application. The Tribunal informed the applicant that the Tribunal, when considering whether to grant an extension of time, would not be undertaking a merits review of the respondent's decision in relation to which the applicant's substantive application for review had been lodged although the Tribunal would take the apparent merits of the substantive application into account as one of the factors to be considered in determining the application for an extension of time.

19. The Tribunal then made orders directing that the first summonses be revoked and that the applicant's application to issue the second summonses be refused.

LEGISLATION AND CASE LAW

20. The power of the Tribunal to issue summonses is contained in s 40 of the AAT Act. That section reads, relevantly, as follows:

> *"40 Powers of Tribunal etc.*
>
> *(1) For the purpose of reviewing a decision, the Tribunal may:*
>
> *(a) take evidence on oath or affirmation;*
>
> *(b) proceed in the absence of a party who has had reasonable notice of the proceeding; and*
>
> *(c) adjourn the proceeding from time to time.*
>
> *Summons*
>
> *(1A) Subject to subsection (1B), for the purposes of the hearing of a proceeding before the Tribunal, the member presiding at the hearing, the Registrar, a District Registrar or a Deputy Registrar may summon a person to appear before the Tribunal at that hearing:*
>
> *(a) to give evidence; or*
>
> *(b) to give evidence and produce any books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons; or*
>
> *(c) to produce any books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons.*
>
> *(1B) A summons under subsection (1A) may require a person to appear at a directions hearing to produce books, documents or things instead of at the hearing before the Tribunal.*
>
> *(1C) A person (other than a presidential member, a senior member or an authorised member) who, under subsection (1A), may summon a person to appear before the Tribunal must not refuse a request to do*

so unless the refusal is authorised by a presidential member, a senior member or an authorised member."

21. It is clear that the power of the Tribunal to issue a summons is discretionary and an application may be refused. The general principles relating to the issue of subpoenas by a court are applicable to the issue of a summons by the Tribunal;

Cosco Holdings Pty Ltd v FCT (1997) 37 ATR 432;

Re Moore and Military Rehabilitation and Compensation Commission (2006) 90 ALD 417.

22. Although s 40 of the Act does not contain specific power to revoke amend or vary a summons issued by the Tribunal it has been held in a number of cases that the Tribunal may revoke amend or vary a summons if good reason is shown:

Re Perpetual Trustee Co (Canberra) Ltd and CMR for ACT Revenue (1993) 29ALD 817;

Re Bird and Military Rehabilitation and Compensation Commission (2006) 91 ALD 691;

23. The Tribunal notes that in *Bird* supra it was held that a summons should be refused if it was not issued for legitimate forensic purpose or was too general.

TRIBUNAL'S REASONS FOR REVOKING FIRST SUMMONSES AND REFUSING ISSUE OF SECOND SUMMONSES

24. In this case the Tribunal is not required to investigate further on an application for extension of time than to see whether the applicant's case has an obvious weakness or is unlikely to succeed – *Re Sam Mercorella Pty Ltd and Australian Apple and Pear Corp* (1987) 12 ALD 520.

25. While the Tribunal is required as held in *Hunter Valley Developments* (supra) to consider the merits of the substantive application and take same into account

when determining an application for extension of time the authorities make it clear that the Tribunal is not required to make any definitive finding on the merits of the case for the purpose of the application for an extension of time. It is only required to ascertain whether there is some worthwhile case which stands behind the application for an extension of time and which could be agitated by the applicant with respect to the substantive application for review:

Mercorella (supra)

Castallano v Inspector General in Bankruptcy (1998) 51 ALD 254

26. In the Tribunal's view it follows that the Tribunal, when dealing with an extension of time application, is not required to issue summonses and hear evidence from summonsed witnesses where that evidence relates solely to the substantive application for review and the Tribunal is of the view that it should exercise it's discretion not to do so.

27. The Tribunal having come to this view determined that the first summonses should be revoked and the application to issue the second summonses should be refused for the reasons stated above.

I certify that the 27 preceding paragraphs are a true copy of the reasons for the decision herein of Mr A Sweidan, Senior Member

Signed: ....

Associate

Date of Hearing	6 August 2008
Date of Decision	6 August 2008
Reasons for Decision	18 September 2008
Applicant	Self-Represented
Counsel for the Respondent	Mr J Giacco
Solicitor for the Respondent	Australian Government Solicitor

FORM 1

FDN ……………………..

IN THE DISTRICT COURT OF SOUTH AUSTRALIA

No 1666 of 2003

BETWEEN

DEPUTY COMMISSIONER OF TAXATION

Plaintiff

&

GARRETT; ANDREW MORTON

Defendant

CONSENT ORDERS

Date of document: Filed by the Defendant Andrew Morton Garrett © ® in his capacity as Sole Trustee of the Andrew Garrett Family Trust.	Monday, 27 October 2008 Unit 1/131 Royal Street, East Perth, WA 6004 Phone; 0424 324 135 Fax; 08 8121 5136 E-mail; agarrett@holy-grail.com.au
Date and time of filing or transmission:	

OENOVIVA

CARBONHELIX

CONSENT ORDERS

The Plaintiff and the Defendant consent to the following orders;

1. That Action DCCIV-1666-2003 is re-opened.
2. That Andrew Morton Garrett is joined as 1st Cross Claimant in his capacity as sole Trustee of the Andrew Garrett Family Trust.
3. That the Default Judgment of the 11th February 2004 given by the Deputy Registrar in favour of the Plaintiff in the amount of $72,349.47 is set aside.
4. That each Party bear their own costs.

Dated; Dated;

....

For The Australian Tax Office

Andrew Morton Garrett ©® in his capacity as sole Trustee of the Andrew Garrett Family Trust
ABN; 78 761 760 976

The Court orders;

1. That Action DCCIV-1666-2003 is re-opened.
2. That Andrew Morton Garrett is joined as 1st Cross Claimant in his capacity as sole Trustee of the Andrew Garrett Family Trust.
3. That the Default Judgment of the 11th February 2004 given by the Deputy Registrar in this action in favour of the Plaintiff in the amount of $72,349.47 is set aside.
4. That each Party bear their own costs.

[*Signed*.. Dated;

Deputy Registrar

OENOVIVA

CARBONHELIX

andrew.garrett@taggc.com.au

From:	Tavolaro, Vincent <Vincent.Tavolaro@ags.gov.au>
Sent:	12 May 2015 17:42
To:	'Andrew Garrett'
Cc:	NAbrams@moray.com.au; fcahill@altiuspartners.com.au
Subject:	RE: MLG 177 of 2015 [DLM=For-Official-Use-Only]

I refer to your email dated 8 May 2015, sent at 12:46pm.

You seek a statement of reasons pursuant to section 13 of the *Administrative Decisions (Judicial Review) Act* 1977 ('the ADJR Act') of our client's refusal to:-

1.1. Consent to the default judgment entered on 11 February 2004 in the District Court of South Australia proceeding No. DCCIV-2003-1666 being set aside; and

1.2. Consent to the annulment of your bankruptcy.

2. Reasons for decision may only be obtained in respect of a decision to which the ADJR Act applies. The Commissioner's refusal to consent to setting aside the default judgment in question and consent to the annulment of your bankruptcy are not decisions to which the ADJR Act applies. They are not decisions of an administrative character made under an enactment.

3. Further, even if the refusal to consent to setting aside the default judgment in question and consent to the annulment of your bankruptcy are decisions to which the ADJR Act applies, pursuant to section13(11) and paragraph (f) of Schedule 2 to the ADJR Act the Commissioner is not obliged to give reasons in respect of:

> decisions in connection with the institution or conduct of proceedings in a civil court….

We note that you have previously made a request for a statement of reasons under the ADJR Act in relation to an earlier decision by our client refusing to consent to setting aside the default judgment in question. We refer to our letter dated 27 October 2014 responding to that request.

____

Vincent Tavolaro
Senior Executive Lawyer
Australian Government Solicitor
T 03 9242 1359 **F** 03 9242 1215
vincent.tavolaro@ags.gov.au
Find out more about AGS at http://www.ags.gov.au

From: Andrew Garrett [mailto:andrew.garrett@taggc.com.au]
Sent: Friday, May 08, 2015 12:46 PM
To: Tavolaro, Vincent
Cc: NAbrams@moray.com.au; fcahill@altiuspartners.com.au
Subject: Re: MLG 177 of 2015 [DLM=For-Official-Use-Only]

The communique set out below is an administrative decision. Pursuant to the provisions of the Administrative Decisions Judicial Review Act 1977 (Cth) I request your client provide the reasons for that refusal on or before the 15th May 2015 or such other time frame allowed for by the Act

The decision of the Legal Services Commissioner dated 30th April 2015 deposed in my affidavit dated 7th May 2015 advises that your client has not assisted the LSC in its investigations. A review of court files conducted by me reveals that the Commissioner has not yet brought proceedings against Cahill. It is my intention to apply for orders of certiorari and mandamus against your client on the 15th May 2015 and orders under s179 of the Bankruptcy Act that the commissioners conduct and that of the trustees is investigated.

Sent from my iPhone

On 8 May 2015, at 12:26 pm, Tavolaro, Vincent <Vincent.Tavolaro@ags.gov.au> wrote:

Our client does not consent to:-

1. Setting aside the Default Judgment in proceeding DCCIV-2003-1666 entered on 11 February 2004.
2. Annulment of your bankruptcy.

____

Vincent Tavolaro
Senior Executive Lawyer
Australian Government Solicitor
T 03 9242 1359 **F** 03 9242 1215
vincent.tavolaro@ags.gov.au
Find out more about AGS at http://www.ags.gov.au

From: andrew.garrett@taggc.com.au [mailto:andrew.garrett@taggc.com.au]
Sent: Thursday, May 07, 2015 4:41 PM
To: Tavolaro, Vincent; Norman Abrams; fcahill@altiuspartners.com.au; chris.jordan@ato.gov.au
Subject: MLG 177 of 2015

Dear Sirs,

By way of service please note the attached

Mr Jordan & Mr Tavolaro

My affidavit attached at p 228 - p 230 sets out a copy of the Default Judgment given in DCCIV-2003-1666 as you know that resulted in the issuing of a Bankruptcy Notice at pages 223 227 that was then the subject of the Creditors Petition filed by your client in AZ 90 of

2014 at p 212 – 222 that resulted in the sequestration order given the matter that was then known as ADG 90 of 2004.

As you know by force of s129AA of *the Bankruptcy Act* 1966 (Cth) the assets of the Bankrupt Estate automatically revests I me on the 6th Anniversary from discharge which was the 22nd April 2015/

The standing to set aside the Default Judgment once again vests with me, I was also reappointed as the Trustee of the Andrew Garrett Family Trust on the 21st October 2014 though I observe the chose in action against the Commissioner in this regard was assigned to me on the 30th November 2013 by the then trustee of the Andrew Garrett Family Trust

I advised the court on the 27th April 2015 that I would be seeking the court to go behind the Default Judgment given in DCCIV-2003-1666; the Summary Judgment given in respect to the Andrew Garrett Family Trust on the 8th August 20014 in SCI-2013-02968 is the subject of an application for extension of time to appeal

Mr Jordan, I seek your consent to an order setting aside the Default Judgment given in DCCIV-2003-1666 on the 11th February 2004; I also seek your consent to an order annulling my Bankruptcy and setting aside the Sequestration order annexed hereto.

In the absence of that consent I will seek that judgment on the 15th May 2015 before the Honourable Reithmuller J in MLG 177 of 2015; *Cahill v Garrett* in which proceeding you are the supporting creditor.

Andrew Garrett
Chief Executive Officer/ Winemaker
The Andrew Garrett Group of Companies (TAGGC)

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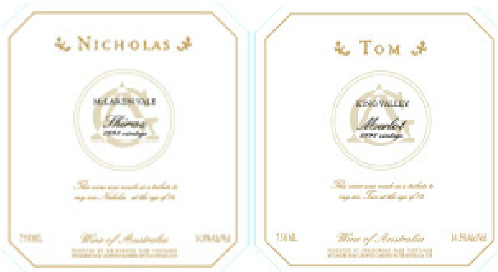

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