IN THE DISTRICT COURT OF SOUTH AUSTRALIA
ACTION NO 1094 of 2005

Decision No 54 of 2015

ALISON MARIE WHITE
Plaintiff
-and-

WILLIAM SHANE SPITHAS
Defendant

REASONS FOR DECISION (NO 3) OF DISTRICT COURT MASTER NORMAN
EMAILED TO PARTIES ON 27 OCTOBER 2015

1 This was an application by the plaintiff following an examination summons hearing for an order that the defendant make weekly payments of the judgment sum awarded by Judge Soulio in these proceedings on 19 April 2013. However the defendant subsequently became bankrupt so the application is now limited to interest accruing on the judgment sum since the date of bankruptcy.

2 The application as amended was opposed so it came on for argument before me on 11 August 2015 when Mr G Finlayson of counsel appeared for the plaintiff and Mr S White of counsel appeared for the defendant. At the conclusion of the hearing I requested that counsel provide supplementary written submissions on issues of the interpretation of the *Bankruptcy Act 1966* (Cth). I heard these during a further argument on 12 October 2015 and received written submissions in reply from the plaintiff on 21 October 2015.

Background

3 The proceedings were instituted by the plaintiff on 11 July 2005 pursuant to s 9 of the *De Facto Relationships Act 1996* seeking a division of property. The parties had commenced a relationship in about March 1987 which lasted some 17 years although they lived apart during two periods. They had a child. They each brought some limited property to the relationship and acquired various items of real and personal property during its course. Section 9 of the *De Facto Relationships Act* was, at the time of separation, the relevant legislation seeking a division of property but that Act became the *Domestic Partners Property Act 1996* as and from 1 June 2007.

4 The action came on for trial before Judge Soulio on 26 May 2011, 27 May 2011 and 11 July 2011. On 13 March 2013 he published his reasons, finding that at the time of separation the parties were in a de facto relationship and that the court had jurisdiction. He found that the assets of the relationship were a house ($106,813.53), a half share of a business ($55,000) and cars ($30,000), totalling $191,813.53. He considered that a just and equitable division of the property

would result in the plaintiff being entitled to 70% of the calculated value of the identified assets, namely the sum of $134,269.47.

5 He accordingly ordered that the defendant pay a lump sum in that amount to the plaintiff, dismissed the defendant's counterclaim, and awarded judgment in the plaintiff's favour. He also ordered that the defendant pay the plaintiff's costs.

6 Later the plaintiff issued an examination summons. At the hearing the defendant said that he was working and was clearing $1,012 per week after tax. He did not have a house, business or car and his only assets were a small amount of furniture and about $1,300 in the bank. He was living in a two bedroom unit with his daughter who was at school.

7 Later he produced his 2013/14 tax returns and financial statements.

8 On 17 March 2015 the plaintiff applied (FDN 122) to have the matter brought back on and for orders inter alia for weekly payments until further order.

9 Subsequently advice was received that the defendant became bankrupt on 28 April 2015.

10 There has been a dispute as to the amount actually outstanding as at the date of the bankruptcy and the parties have provided affidavits and addressed some submissions on this issue but at the present time the matter for determination is limited to whether or not as a matter of law the interest accruing on the amount properly owing by the defendant is provable in his bankruptcy.

Submissions at the Hearing on 11 August 2015

Plaintiff's submissions

11 Mr Finlayson referred to s 82(3B) of the *Bankruptcy Act 1966* ("the Act") which relates to debts and liabilities provable in a bankruptcy. He acknowledged that the judgment debt itself was provable in the defendant's bankruptcy, so it was not pursued by the plaintiff, nor was interest accruing up to the date of the bankruptcy.

12 However, he submitted, the plaintiff was entitled under the proper interpretation of the Act to interest on the amount owing commencing on or after the date of the bankruptcy. This was a stated exception to the property vesting in the trustee in bankruptcy, he said. There were other exceptions including court or criminal fines, child support, *Higher Education Support Act 2003* ("HES Act") debts and orders under proceeds of crime legislation. The interest sought came within this category. It should accrue pursuant to r 260 at the Reserve Bank cash rate of 2.5% plus a premium which was 4% over the cash rate, he said.

Defendant's submissions

13 Mr White made oral submissions and also provided a written outline. He contended that the effect of s 58 of the Act was to render it incompetent for the plaintiff to enforce any remedy against the defendant.

14 At the conclusion of the hearing I raised with the parties whether they were able to refer me to any case law in relation to the arguments they had put concerning the proper interpretation of the Act and I directed that the plaintiff was to file her written submissions on this issue by 25 August and that the defendant was to file his written submissions by 15 September.

15 Because neither party complied with this timetable, I fixed a further hearing for oral submissions on 12 October 2015.

Submissions at the Hearing on 12 October 2015

Plaintiff's further submissions

16 Mr Finlayson referred to the provisions of s 82 of the Act which provided relief to bankrupts from those debts provable in a bankruptcy. There were exceptions, however, and he referred to *Coventry v Charter Pacific Corporation Ltd* [2005] HCA 67 where notwithstanding that the High Court found that a claim for misrepresentation associated with a contract or promise was provable, a similar representation to a third party not privy to the promise or contract was not provable and could be recovered notwithstanding the bankruptcy. He said that the plaintiff relied on the exception contained in sub-section 82(3B) which provided that a debt was not provable in a bankruptcy insofar as it consisted of interest accruing in respect of a period commencing on or after the date of bankruptcy on a debt provable in the bankruptcy. The subsection clearly distinguished between a debt and interest accruing on that debt but commencing on or after the date of bankruptcy. He had been unable to find any specific cases on point but said that the principles relating to the exception were well understood and were discussed in cases such as *Coventry*. In his submissions, the principal sum owing as at the date of bankruptcy was $111,726.49 and interest on this sum from that date was recoverable.

17 He argued that there was no cogent reason why the defendant ought to be given the benefit of funds which were, by order of the court, declared to be the plaintiff's property, and that Judge Soulio's order had never been challenged or appealed at any time. There was no ambiguity as to the terms of the judgment and the principles in *Livingspring Pty Ltd v Ng & Ors* [2007] VSC 9 applied. Since the date of bankruptcy the sum of $111,726.49 continued to accrue interest at 8.5%, or $26 per day, and as at 9 October 2015, 164 days had expired since bankruptcy so to that date the amount totalled $4,267.00.

18 The plaintiff sought an order for repayment by the defendant of the amount due in the sum of $50 per week.

Defendant's submissions

19 Mr White submitted that as the defendant was now bankrupt the *Bankruptcy Act* governed what would happen to his assets and liabilities. It also governed the issue of what, if any, contributions were to be made by the defendant into his bankrupt estate which might be used to pay for the trustee's fees and in satisfaction of his debts.

20 He referred to the broad policy of the *Bankruptcy Act* which as described by Gibbs CJ in *Storey v Lane* (1981) 147 CLR 549 at 566-567, provided for the orderly distribution of a bankrupt person's assets equitably amongst his legitimate creditors, namely those with provable debts, and with a view to allowing him a fresh start after his discharge. This policy had been stated in *Ex Parte Llynvi Coal & Iron Co, Re Hide* (1871) LR7 Ch 28, 31 per James LJ.

21 In most cases, Mr White said, debts were easy to prove and straight forward. In the present case, there had been a judgment prior to bankruptcy, plus interest to the date of bankruptcy, all of which were provable. He referred to s 82(1) of the Act which specified those particular debts which were or were not provable. Sub-sections 82(3), (3AA), (3AB)(a), (3AB)(b) and (3A) then specifically excluded certain debts as being provable in bankruptcy - for good public policy reasons. The important words in s 82(1) were - in relation to debts - that for a debt to be provable it must be incurred "before the date of bankruptcy".

22 In relation to interest, Mr White said that the defendant conceded that interest up to the date of the bankruptcy was certain or contingent upon the reducing balance of the judgment debt arising out of Judge Soulio's judgment. The costs of the proceedings were also provable in the bankruptcy, as this order had been made prior to the date of bankruptcy, even though those costs had not yet been quantified. He said that the trustee could make a reasonable estimation pursuant to s 82(4).

23 Mr White submitted that s 82(3B) specified that post-bankruptcy interest was not provable in the bankruptcy. Two questions were raised under this sub-section:

- First, what was its intent, and could the plaintiff seek to recover post-judgment interest as she was seeking to do in this case. He submitted that the sub-section gave legislative recognition to the common law rule about post-bankruptcy interest. This rule was that no proof should be allowed for interest accruing after the commencement of bankruptcy, even on interest bearing debts – Lord *King; Ex Parte Bennet* [1743] ER 48.

- Second, if there was a surplus in the bankrupt estate then interest might be allowed against the debtor once all other creditors were paid out – *Bromley v Goodere* (1743) 26 ER 49.

24 He said that the common law rule had its origin in earlier bankruptcy laws which excluded future debts from proof. Relief in bankruptcy only applied to accrued debts – *Mackenzie v Rees* (1941) 65 CLR 1 per Dixon J.

25 Correspondingly, he submitted, the debtor was not discharged from his liability for interest and it was therefore equitable that it should be deducted from the surplus before being handed over to the debtor – *Ex Parte Mills* (1793) 30 ER 643, *Re Lancaster* (1835) 2 Mont. & Ay. 300 at p305. Mr White also referred to *Re Paul & Gray Ltd* (1933) 33 S.R. (NSW) 295 at 300-303, where Harvey CJ in Eq, observed after full argument that it was the intention of the legislature that interest was to be paid according to the old common law rule in bankruptcy. It was provable up to the date of bankruptcy but not afterwards. If the debts and interests exhausted the assets, there was an end of it and the bankrupt was relieved from any further liability. However, if there were any surplus assets, interest was a continuing liability to be paid from the surplus.

26 *Re Low* (1899) 20 LR (NSW) B. & P. 17, *Richards (dec'd); Ex parte Lloyd* (1935) 8 A.B.C 37 at 46 and *Hyman, In re; Ex parte Law* (1930) 3 A.B.C 61 were also cited.

27 Under the common law of bankruptcy interest on an obligation was not admitted to proof but was deferred until all other debts had been paid and it was then payable out of the residue of the estate.

28 *Re Hyman* had been referred to in *Wakim v HIH Casualty & General Insurance Ltd* [2001] FCA 103 at [206] and was most recently referred to in *Edwards v Stocks* [2008] TASSC 12 per Crawford J (as he then was) where it was observed that interest was only payable out of the surplus and if there was no surplus, interest after bankruptcy could not be claimed from the debtor. There was no suggestion of any surplus in that case and that therefore the respondents and their estates were not liable to pay any interest that might have fallen due after the date of bankruptcy. Mr White particularly emphasised this passage.

29 Mr White submitted that the history of the common law rule and its statutory adoption had been discussed in detail by Dixon J in *Mackenzie v Rees* (1941) 65 CLR 1, 8-12. He submitted that the purpose and intent of s 82(3B) was to give legislative recognition to the above common law rule about post-bankruptcy interest. As a matter of bankruptcy practice, as confirmed by the above authorities, unless the defendant's bankruptcy had a surplus after payment out of all his provable debts – which was extremely unlikely in the present case – s 82(3B) rendered post-bankruptcy interest non-provable in the bankrupt's estate, and in the absence of a surplus it could not be claimed in the estate, nor paid out of the estate, nor could it be paid out of the property of the bankrupt after his discharge.

30 The conclusion from this analysis was that the plaintiff's application for any assessment of, or payment of, post-bankruptcy interest and/or garnishment off

from his wages for payment could not succeed and the application should be dismissed with costs.

Submissions in reply by the plaintiff

31 Mr Finlayson filed written submissions in reply on 21 October 2015. He referred to the decision of Crawford J in *Edwards v Stocks* [2008] TASSC 112 observing that his Honour had cited two propositions (with which the other members of the court agreed). However, he submitted, the latter of these, which provided that interest was only payable out of the surplus and that if there was no surplus interest after bankruptcy could not be claimed from the debtor, was plainly wrong, because it was directly at odds with ss 58(3) and 82 of the Act and the reasoning of the High Court in *Coventry* and in *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56. He said that the High Court in *Mackenzie v Rees* (1945) 61 CLR 1 was evenly divided and that case was authority only for the proposition that at that time damages in the nature of interest were not a claim upon a surplus in bankruptcy.

32 Mr Finlayson accepted Mr White's submissions as to the history of the Common Law Rule as set out by Dickson J in *Mackenzie* but said that the history could only reflect the statutory adoption of the common law position which had pre-dated the insertion of s 82(3B) of the Act. At the time of *Mackenzie*, he said, the definition of provable debt was contained in s 81 of the then *Bankruptcy Act* (1924-1933) and the provisions for payment of surplus were contained in s 118 and release from debts in s 121. At that time, the question of interest arising after bankruptcy was not dealt with expressly in the statute. However the subsequent amendment to the bankruptcy legislation by the insertion of s 82(3B) in the current Act directly and expressly altered the basis upon which the explanation of Dixon J in *Mackenzie* rested. Since that insertion, which excluded post-bankruptcy interest from the definition of provable debt, the adoption by Dixon J of the comments in *Re Paul & Gray Ltd* had been overruled by statute. Subsequent to the amendment post-bankruptcy interest was neither provable nor released upon discharge, as the discharge was expressly dependent upon its status as a provable debt. The sub-section affected the reinstatement of the earlier common law view and Mr Finlayson submitted that the decision of the majority of the High Court in *Foots* was to be preferred and was binding. He set out the relevant paragraphs of that decision and also referred to the construction of s 82 by Gleeson CJ, Gummow, Hayne and Callinan JJ in *Coventry*.

33 He concluded by observing that *Edwards v Stocks* had been decided without consideration of the reasoning and authority of *Coventry* and *Foots*, it was decided *per incuriam*, it was plainly wrong, and it ought not to be followed. In contrast, both *Foots* and *Coventry* were directly binding upon the court and *Coventry* ought to be followed as to the effect of s 58(3) of the Act and both cases with respect to s 82 as a whole.

Issue for determination

34 The issue for determination is whether or not as a matter of law interest accruing after the date of bankruptcy on an amount owing at the time of a bankruptcy is provable.

35 It was agreed at the hearing on 12 October 2015 (T10) that the question of the quantum of the debt owing as at the date of the defendant's bankruptcy would be deferred for further argument if this became necessary.

Consideration

36 The Act provides for the orderly distribution of an insolvent person's assets equitably amongst the legitimate creditors, namely those with provable debts, but with a view to allowing the bankrupt a fresh start after discharge. In his reasons in *Storey v Lane* (1981) 147 CLR 549 at 566-567 Gibbs CJ observed:

> "An essential feature of any modern system of bankruptcy law is that provision is made for the appropriation of the assets of the debtor and their equitable distribution amongst his creditors, and for the discharge of the debtor from future liability for his existing debts…"

37 Section 58 of the Act provides a general rule as to the vesting of property upon bankruptcy. Sub-section (1) says:

> (1) Subject to this Act, where a debtor becomes a bankrupt:
>
> (a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; …
>
> *(remainder of sub-section (1) omitted)*

38 Sub-section (3) provides:

> (3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:
>
> (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or …
>
> *(remainder of sub-section (3) omitted)*

39 Section 82 of the Act identifies debts provable in bankruptcy. It was analysed by the High Court in *Coventry v Charter Pacific Corporation Limited* [2005] HCA 67. Sub-section (1) identifies the debts and liabilities that are provable in bankruptcy in terms that are very wide:

> (1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an

> obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.
>
> *(sub-sections 1A-3A omitted)*

40 Sub-section (8) amplifies the width of the provision by making plain that no narrow meaning is to be given to the references in the section to liability.

41 Sub-section (1A) extends the debts provable in bankruptcy to include some particular kinds of obligations: obligations arising under maintenance agreements or maintenance orders.

42 Sub-sections (2), (3), (3AA), (3A) and (3B) identify certain kinds of liability that are not debts provable in bankruptcy.

43 Sub-section (3B), which is relevant to the present argument, provides:

> (3B) A debt is not provable in a bankruptcy in so far as the debt consists of interest accruing, in respect of a period commencing on or after the date of the bankruptcy, on a debt that is provable in the bankruptcy.

44 The High Court examined several nineteenth century English decisions said to bear on the contraction of s 82. These were also referred to by Mr White in his submissions. He contended that the common law as it evolved obtained legislative recognition in s 82(3B).

45 The early cases had also been considered by Dixon J (as he then was) in the 1941 decision of *Mackenzie v Rees.*

46 The first was Lord King; *Ex Parte Bennet* (Lord Hardwicke). Dixon J observed in *Mackenzie* that since that decision no proof should be allowed for interest accruing after the commencement of the bankruptcy, even upon interest bearing debts.

47 Dixon J wrote, citing *Bromley v Goodere,* that even if there were a surplus then intermediate interest might be allowed as against the debtor, and if according to the tenor of the obligation a debt bore interest, then the debtor could not claim the surplus until interest occurring after the commencement of the bankruptcy had been met thereout.

48 It was observed that a debtor was not discharged from his liability to interest so it was therefore found to be equitable that it should be deducted from the surplus before being handed over to him - *Ex Parte Mills.*

49 In *Ex Parte Kensington, Re Lancaster* Sir George Rose wrote that the rule that interest stopped at the bankruptcy was not a rule of law or equity, it was the practice in bankruptcy, adopted for convenience, as any other course might lead to many difficulties.

50 In *Re Low, Ex Parte Low,* Walker J decided that under the enactments of New South Wales, intermediate interest must be paid on interest bearing debts out of a surplus.

51 In *Re Hyman* Lukin J followed and applied *Re Low*.

52 In *Re Paul v Gray Ltd,* Harvey CJ held that it was the intention of the Federal legislature that interest was to be paid according to the old common law rule in bankruptcy.

53 However, significantly, *Mackenzie v Rees* concerned the *Bankruptcy Act 1924-1933,* where the provisions for payment of surplus were contained in s 118 and the release from debts was referred to in s 121. At this time the question of interest arising after bankruptcy was not dealt with expressly in the legislation. Dixon J wrote, after considering *Re Low, Re Paul v Gray* and *Re Hyman,* that:

> "… a bankruptcy under the Federal Act is governed by the principle of administration which allows no proof for interest accruing or to accrue after sequestration unless and until a surplus is found to exist, and then allows creditors to claim upon the surplus for interest accruing since sequestration upon interest-bearing debts."
>
> "The principle that stops interest upon debts for the purpose of proof upon assets, so that the rights of creditors may be equitably adjusted, but allows it to run on as a claim upon the surplus had long received statutory recognition and to some extent expression… but the *Commonwealth Bankruptcy Act* contains no such provisions. Indeed some difficulty may be felt in reconciling the operation of the principle as part of the law of bankruptcy with the express language of some provisions of the act. But it is possible, I think, to give effect to both the principle and to the form in which the legislation is cast by treating the principle as one determining the order in which debts are to be discharged in the course of administration; that is by accepting the more modern view that the rule is one of justice and convenience as opposed to the earlier view that it depended upon the exclusion of future interest from proof and also from the release or discharge given to the debtor."
>
> "… the wide language of sec. 81 (1) may be taken as covering intermediate interest, so that it is not altogether excluded as a claim against the assets and, at the other end, sec. 118 may be regarded as conferring upon the debtor a right to the surplus only after intermediate interest has been paid."

54 Subsequent to 1966, however, the legislation considered in *Mackenzie* was repealed and the provisions of s 82(3B) came into force.

55 The plaintiff's submission is that this amendment to the legislation directly and expressly alters the basis upon which Dixon J's explanation in *Mackenzie* rests. It is contended that the insertion into the Act of s 82(3B) now excludes post-bankruptcy from the definition of provable debt and overrules by force of legislative effect the *obiter* comments in *Re Paul v Gray* which had been adopted by Dixon J. The plaintiff's submission is that although prior to s 82 (3B) post-bankruptcy interest was provable in the modern intermediate common law sense described by Dixon J, since its enactment it is neither provable nor released

upon discharge. This is because discharge is expressly dependent upon its status as a provable debt.

56 In the plaintiff's submission s 82(3B) has affected the reinstatement of the earlier common law view referred to by Dixon J that the proposition "depended upon the exclusion of future interest from proof and also from the release or discharge given to the debtor".

57 This is in contrast to the defendant's position that the section gives legislative recognition to the common law rule.

58 In considering the contrasting submissions of the parties, therefore, it is important to consider the two more recent High Court decisions, namely *Coventry* and *Foots*.

59 In *Coventry* the appellant had been made bankrupt in 1994 and was discharged in 1997. In 1994 Charter Pacific commenced proceedings against him. The claim involved set off and an issue that arose by reason of the limitations on the type of debts that were provable in a bankruptcy. Coventry argued that any claim was a provable debt in bankruptcy and therefore he was not personally liable for the debt even though the cause of action arose before his bankruptcy and the judgment was entered after his discharge. An issue arose during the appeal as to the effect of s 82.

60 In their joint reasons, Gleeson CJ, Gummow, Hayne and Callinan JJ considered at [4] what were the debts provable in bankruptcy as provided in s 82:

> "If it is not a debt provable in the bankruptcy, discharge from bankruptcy does not operate to release the bankrupt from the claim and, subject to any question of limitation of actions, the claim can be pursued against the former bankrupt after discharge. Moreover, s 58(3) of the Bankruptcy Act 1966 (Cth) (the Bankruptcy Act) does not prevent the claimant, during the bankruptcy, from commencing a legal proceeding in respect of the claim or enforcing any remedy against the person or the property of the bankrupt in respect of that claim. The subsection denies such competency to a creditor only in respect of 'a provable debt'."

61 Their Honours observed at [21] that:

> "Subsection (2) which is at the centre of this appeal is, therefore, an exception to an otherwise broadly drawn definition of debts provable in bankruptcy."

62 In the subsequent case of *Foots v Southern Cross Mine Management Pty Ltd*, the High Court determined that a costs order made against a bankrupt was not a provable debt in his bankruptcy, which had occurred prior to the costs order being made. Although judgment had been given against the bankrupt, the final determination of the costs had not been made. He argued, unsuccessfully, that the costs order was a provable debt.

63 The court at [9]-[12] made two observations concerning s 82:

"[9] Two aspects of s 82 should be noticed at once. First, not all of the debtor's debts and liabilities are provable in bankruptcy. Notably, the classes of provable debts are narrower than those encompassed by s 553 of the Corporations Act 2001 (Cth) as regards corporate insolvency; the most obvious omission is of claims in the nature of unliquidated damages which arise 'otherwise' than by reason of a contract, promise or breach of trust (s 82(2)). It was that sub-section which was at stake in Coventry v Charter Pacific Corporation Ltd; the Court held that a statutory claim for unliquidated damages for misleading or deceptive conduct, which induced the claimant to contract not with the bankrupt but with a third party, was not a provable debt and might be pursued after discharge.

[10] Section 82 limits provable debts both by subject-matter, in that they must answer the statutory descriptions, and temporally, in that they must arise before (not after) bankruptcy. At first glance, neither criterion is fulfilled in the present case: this particular costs order was incurred after bankruptcy, and the appellant was under no obligation to pay those costs beforehand.

[11] A second aspect of s 82 flows from the first. Contrary to the appellant's submissions, there is no express or implied textual support for the notion of a debt being provable if it is incidental to, or consequent upon, a debt which is itself provable. Those debts which are provable are spelled out by the section: matters falling outside those categories are not provable.

[12] With respect to the Bankruptcy Act 1869 (UK) ("the 1869 Bankruptcy Act"), a forerunner of the Australian legislation, James LJ remarked in Ex parte Llynvi Coal and Iron Co In re Hide:

> 'Every possible demand, every possible claim, every possible liability, except for personal torts, is to be the subject of proof in bankruptcy, and to be ascertained either by the Court itself or with the aid of a jury. The broad purview of this Act is, that the bankrupt is to be a freed man — freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind.'

That statement was repeated with approval as applicable to the Bankruptcy Act 1898 (NSW) by AH Simpson CJ in Eq in Rickard v Caldwell. But in considering s 82 of the Bankruptcy Act the proposition respecting the 'broad purview' of the legislation obscures the controlling force of the current statutory description of what is and is not provable in bankruptcy. For example, in addition to the matters dealt with in that portion of s 82 which has been set out above, s 82 also excludes from proof such amounts as those payable under the Higher Education Support Act 2003 (Cth) and under proceeds of crime legislation."

64 The court further observed at [61]-[64]:

"[61] Contrary to what appears to have influenced the reasoning in this case of Mullins J, what was said in the joint judgment in Coventry respecting the utility when construing s 82(2) of the Bankruptcy Act and s 31 of the 1869 Bankruptcy Act and its judicial interpretation does not control the present case.

[62] In Coventry relevance of legislative history and prior case law lay in the exposition of the terms of the present legislation, not otherwise. The particular issue concerned the content of the phrase 'arising otherwise than by reason of a contract'; a matter of textual exposition upon which earlier authorities were of significant assistance. However, in the present case the appellant points to statements which at best sit uneasily with the statutory

> text. In like vein, in Sons of Gwalia, this Court affirmed the primacy of the statutory text, freed from what were shown to be anachronistic 19th century judicial accretions.
>
> [63] But what of the submission that the correctness of British Gold Fields has been assumed in the enactment of s 82 of the Bankruptcy Act and its predecessor, s 81 of the Bankruptcy Act 1924 (Cth)? In R v Reynhoudt, Dixon CJ said that:
>
> > 'the view that in modern legislation the repetition of a provision which has been dealt with by the courts means that a judicial interpretation has been legislatively approved is, I think, quite artificial.'
>
> Notwithstanding the appellant's submissions, that artificiality is all the more apparent when the judicial exposition in question is more a gloss than an interpretation of a particular text.
>
> [64] Of course, this Court is not permitted to 'arrive at [its] own judgment as though the pages of the law reports were blank'. In Coventry, that is why in their joint judgment, Gleeson CJ, Gummow, Hayne and Callinan JJ turned to the earlier authorities to give content to, and to elucidate the meaning of, the current statute. However, to the extent that it concerns the proof of a costs order made after bankruptcy, the decision in British Gold Fields neither gives content to, nor elucidates, s 82 of the Bankruptcy Act. Rather, what was said in that case is at odds with the natural and ordinary meaning of the legislation. In that regard, it should no longer be followed in Australia."

65 These paragraphs are significant.

66 First, the court found that it was clear that not all of a debtor's debts and liabilities were provable in a bankruptcy. It was found to be notable that the classes of provable debts were narrower than those in the *Corporations Act*, and that provable debts were limited by subject matter by the provision.

67 Secondly the court found that there was neither an express or implied textual support for the notion of a debt being provable if it was incidental to or consequent upon a debt which was itself provable.

68 It observed that the debts which were provable were spelled out by the section and the matters falling outside those categories were not provable.

69 The fact that interest might be incidental to a debt does not result in it being given the same status as the debt; rather, what is significant is what the legislation specifically spells out.

70 Section 82(3B) is clear in its terms: although debts generally are provable in a bankruptcy, and cannot be pursued outside the bankruptcy, interest accruing after the date of bankruptcy is not provable and can be pursued by the creditor.

71 In support of his argument Mr White relied on *Edwards v Stocks* [2008] TASSC 12. In that case the Judge at first instance was faced with the question of what use might be made of contractual interest owed post-bankruptcy when assessing equitable damage in a *Hungerfords* type claim. He awarded damages for a period to the date of bankruptcy and an amount representing interest.

72 On appeal, Crawford J (as he then was) at [41] cited two propositions with which the other judges, Slicer and Blow JJ, agreed. The first (described by Mr Finlayson as "the positive proposition") was that against the bankrupt a creditor was entitled to receive out of any surplus of the bankrupt estate interest for the period from the date of the bankruptcy to the payment of the provable debt before any such surplus was payable to the bankrupt. His Honour cited some of the earlier cases and *Mackenzie v Rees* in this regard. The second (described by Mr Finlayson as "the negative proposition") was that the interest was only payable out of the surplus and if there was no surplus, then interest after the bankruptcy could not be claimed from the debtor. Notably, his Honour did not cite any authority for this second proposition.

73 The plaintiff is this case does not take issue with the positive proposition. In this regard Mr Finlayson has cited *Heinrich (Bankrupt)* [2006] FCA 718 and *Midland Montagu Australia Ltd v Harkness* (1994) 35 NSWLR 150, where McLelland CJ in Eq stated that this proposition was "overwhelmingly supported by the authorities".

74 However in my view the negative proposition is, as contended by Mr Finlayson, directly at odds both with the provisions of the legislation and with the reasoning of the High Court in *Coventry* and *Foots*. With the greatest respect, the court's finding in *Edwards* that interest was payable only in qualified circumstances (namely if there was a surplus in the estate) appears to be inconsistent with the legislation and the High Court's reasoning in these cases. This court is bound by the High Court and the intention of the legislation is clear.

75 In the result I have formed the following view and make orders and directions as follows:

Orders and directions

1 I find that post-bankruptcy interest is not provable against the defendant's bankrupt estate, irrespective of whether or not his bankruptcy has a surplus, so that the plaintiff can in any event recover interest from the defendant at the court rate based on the debt owed to her as at the date of the defendant's bankruptcy.

2 I fix a directions hearing on **Tuesday 10 November 2015 at 12.00 noon** to enable the parties to address the question of costs of and incidental to the plaintiff's application, as to the proper sum upon which interest is to apply, and as to the quantum of the payments to be made on a weekly basis by the defendant.

Counsel for the plaintiff: *Mr G Finlayson*
Solicitors for the plaintiff: *Diaspora Legal*

Counsel for the defendant: *Mr S White*
Solicitors for the defendant: *White Berman*