SUPREME COURT OF QUEENSLAND

CITATION:	*Colefax & Ors v National Australia Bank Ltd* [2018] QCA 244
PARTIES:	**ROBERT FOSTER COLEFAX** (first appellant) **IRENE LOUISE COLEFAX** (second appellant) **CHRISTOPHER MARK LEO COLEFAX** (third appellant) **v** **NATIONAL AUSTRALIA BANK LIMITED** ACN 004 044 937 (respondent)
FILE NO/S:	Appeal No 5458 of 2017 SC No 2070 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 71
DELIVERED ON:	28 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2017
JUDGES:	Fraser and Gotterson and Morrison JJA
ORDERS:	**Dismiss the appeal with costs.**
CATCHWORDS:	BANKRUPTCY – ADMINISTRATION OF PROPERTY – PROPERTY AVAILABLE FOR PAYMENT OF DEBTS – PROPERTY NOT DIVISIBLE AMONGST CREDITORS – PROPERTY HELD ON TRUST – GENERAL PRINCIPLES – where the first appellant executed mortgages over properties in his capacity as trustee of two trusts – where the mortgages were secured by guarantees and indemnities also executed by the first appellant as trustee of the trusts – where the first appellant was replaced by the second appellant as trustee of the trusts – where the first appellant was declared bankrupt upon his own debtor's petition – where it was agreed that the properties were not included as assets in the bankrupt estate of the first appellant – where the first appellant has been replaced by the second appellant as registered owner of one property – where the respondent submitted a proof of debt in the first appellant's bankruptcy for part of the amounts owing and received distributions from the trustee in bankruptcy – where the first appellant was discharged from bankruptcy – where the bank subsequently

demanded payment – where the third appellant replaced the second appellant as trustee of Trust No 2 – where the respondent bank sought possession of the properties – where the appellant submitted that the secured debts were discharged upon the discharge from bankruptcy of the first appellant – where the appellant alternatively submitted that the conduct of the bank in proving in the bankruptcy for the full amount of the first appellant's debt to the bank and accepting a dividend pursuant to that proof of debt amounted to an election by the bank to give up its security – whether the respondent bank had elected to abandon their security over the properties – whether the respondent's security was discharged under s 153 *Bankruptcy Act* 1966 (Cth)

Bankruptcy Act 1966 (Cth), s 5(1), s 90, s 116, s 153

Arkmill Pty Ltd v Tippers & Co Pty Ltd (2006) 58 ACSR 616; [2006] QSC 248, applied
Ex parte West Riding Union Banking Company; In Re Turner (1881) 19 Ch D 105, applied
Fordyce v Ryan [2017] 2 Qd R 240; [2016] QSC 307, cited
Ilhan v Seri [2012] FMCA 148, distinguished
Jowitt v Callaghan (1938) 38 SR (NSW) 512; [1938] NSWStRp 43, considered
Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jacques (No 2) [2017] 2 Qd R 456; [2016] QSC 242, cited
Re Morris; Ex parte Australian and New Zealand Banking Group Limited (1991) 29 FCR 1; [1991] FCA 168, distinguished
Re Rushton; Ex parte National Westminster Bank Ltd v Official Receiver [1972] Ch 197, cited
Re Plummer (1841) 1 Ph 56; [1841] EngR 1196, cited

COUNSEL: M Doyle for the appellants
J McKenna QC, with P E O'Brien, for the respondent

SOLICITORS: Bourke Legal for the appellants
Corrs Chambers Westgarth for the respondent

[1] **FRASER JA:** The appellants have appealed against orders made in the trial division upon the respondent bank's application that the bank recover possession of properties pursuant to the bank's mortgages over those properties.

Background

[2] The first appellant was registered as owner of land under the *Land Title Act* 1994 (Qld) known as the "Seven Springs Farm". He held the Seven Springs Farm as trustee of "Trust No 1". The first appellant was also registered as the owner of land known as the "Jumrum Properties". He held the Jumrum Properties as trustee of "Trust No 2". The first appellant in his capacity as trustee executed mortgages over both properties which secured obligations to the bank that the first appellant assumed in 2010: pursuant to a "Market Rate Facility" the bank advanced $1,100,000 to him, and that facility was secured by a guarantee and indemnity executed by the first appellant as trustee of Trust No 1 and Trust No 2; and pursuant to a "Flexiplus

Mortgage Facility", the bank advanced $600,000 to him, and that facility was secured by a guarantee and indemnity he executed as trustee of Trust No 1.

[3] On 28 March 2011, the first appellant was replaced by his wife, the second appellant, as trustee of both trusts but the first appellant then remained registered as owner of both properties. On 4 April 2011, the first appellant was declared bankrupt upon his own debtor's petition. It was an agreed fact that the Seven Springs Farm and Jumrum Properties were not included as assets in the bankrupt estate of the first appellant. In July 2011, the first appellant transferred the Jumrum Properties to the second appellant and she became the registered owner of them. On 8 November 2012, the bank submitted a proof of debt for $4,126,724.91 in the bankruptcy of the first appellant, which included $695,224.91 and $260,000 in respect of the amounts then claimed by the bank to be owing under the Flexiplus Mortgage Facility and the Market Rate Facility respectively. In the proof of debt, the bank answered "No" to the question, "do you hold any security?". The proof of debt was admitted in full. The bank received distributions from the trustee in bankruptcy totalling $19,947.34, which the bank applied against the amounts owing to the bank. The first appellant was discharged from bankruptcy on 5 April 2014.

[4] Between May 2015 and February 2016 the bank demanded payment from the first appellant of amounts of money claimed to be owing under the facilities, and of amounts claimed to be owing by the first appellant in his capacity as trustee of Trust No 1 and Trust No 2 under the guarantees securing those facilities, the Seven Springs Farm mortgage, and the Jumrum mortgage. As at 16 March 2017, the amounts the bank claimed to be owing were (Flexiplus Mortgage Facility) $867,219.21 plus interest of $2,163.04 and (Market Rate Facility) $420,745.42 with interest of $2,963.88 + $300 LSF. On 1 October 2016, the second appellant was replaced by the third appellant as trustee of Trust No 2. The second appellant remained the registered owner of the Jumrum Properties and the first appellant remained the registered owner of the Seven Springs Farm. At the time of the proceedings in the trial division each appellant was in possession of the properties.

[5] The trial judge accepted the bank's case for recovery of possession. There were amounts outstanding under the loan by the bank to the first appellant and pursuant to the guarantees executed by the first appellant as trustee of Trust No 1 and Trust No 2. These amounts were secured by the mortgages over the Seven Springs Farm and Jumrum Properties. Each mortgage provided that: for the purpose of securing to the bank the payment of the amount owing, "you" mortgaged to the bank all "your" estate and interest in the land described in this mortgage; "amount owing" was defined to cover "all money which … you owe the Bank, or will or may owe the Bank … including … under an agreement covered by this mortgage", "agreement covered by this mortgage" was defined to include an agreement between "you and the Bank …", "you" was defined as including the person named in the mortgage as mortgagor and that person's successors and transferees; and clause 20.1 of each mortgage permitted the bank on the occurrence of a default to seek to enforce the mortgages by taking possession of the subject property after giving proper notices as required by the mortgages and at law.[1] The bank was entitled to recover possession of the properties pursuant to s 78 of the *Land Title Act*

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[1] The bank also argued at trial that the new trustees were required to comply with the terms of the registered mortgages as transferees pursuant to s 63(1) of the *Land Title Act* 1994 (Qld).

1994 (Qld)[2] and pursuant to an express term of each mortgage. The order for possession should be made against the appellants, each of whom acknowledged being in possession of each of the mortgaged properties.

[6] The trial judge rejected arguments by the appellants that the secured debts were discharged upon the bankruptcy of the first appellant. The trust properties were outside the first appellant's bankruptcy; and although the mortgages over those properties secured the same debts that the first appellant owed the bank, the release of those debts upon the first appellant's discharge from bankruptcy did not affect the separate obligations of the trustees of Trust No 1 and Trust No 2 for the secured debts and liabilities. Nor could the bank's lodgement of the proof of debt as an unsecured creditor of the first appellant be taken to be an abandonment of the bank's rights to enforce the mortgages over the mortgaged properties.

Appeal Ground 1: The trial judge erred in holding that the first appellant's debts to the bank were not discharged by virtue of s 153 of the *Bankruptcy Act* 1966 (Cth).

Appeal Ground 2: The trial judge erred in failing to hold that the respondent had surrendered or abandoned the mortgages over the Seven Springs Farm and the Jumrum Properties.

[7] Appeal grounds 1 and 2 are primarily based upon interrelated statutory provisions, sections 153 and 90 respectively of the *Bankruptcy Act* 1966 (Cth). Before discussing those provisions, I will advert to the effect of other provisions which describe what property vests in a trustee in bankruptcy as property divisible amongst the creditors.

[8] Section 58(1)(a) of the *Bankruptcy Act* 1966 provides the general rule concerning property which is not acquired after the bankruptcy that, where a debtor becomes a bankrupt, "the property of the bankrupt … 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". The term "property" is very broadly defined in s 5(1) as meaning "real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property"; but the term used in s 58(1)(a), "the property of the bankrupt", is defined in s 5(1) (except in relation to provisions which are not presently relevant) as meaning "the property divisible among the bankrupt's creditors; and … any rights and powers in relation to that property that would have been exercisable by the bankrupt if he or she had not become a bankrupt". Section 116(1) provides a very broad description of property divisible among the creditors of the bankrupt. By s 116(1)(a), it includes, subject to the Act, "all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy" (s 116(1)(a)); but by s 116(2) sub-section (1) does not extend to certain property. Relevantly, the property divisible amongst the creditors does not include "property held by the bankrupt in trust for another person": s 116(2)(a).

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[2] Section 78(2)(c) empowers a mortgagee, "by a proceeding in a court of competent jurisdiction … obtain possession of the mortgaged lot", that power being in addition to other powers exercisable by the mortgagee (s 78(3)).

[9] The admitted fact that none of the properties were included as assets in the first appellant's bankrupt estate is consistent with the recognition of beneficial interests in those provisions of the *Bankruptcy Act* 1966. When the first appellant was made bankrupt, the Seven Springs Farm and the Jumrum Properties were owned by the first appellant as trustee. To take the Seven Springs Farm as an example, the first appellant held that property as trustee under Trust No 1, a discretionary trust created by a deed of settlement. In *Fordyce v Ryan*,[3] Jackson J held that the interests of an object under a discretionary trust do not vest in a trustee in bankruptcy. In any event, in this case a clause of the deed of settlement expressly excluded the trustee from "all or any benefits whatsoever under this Trust".[4] It was not contended that the trustee of Trust No 1 (the first appellant) held any beneficial interest in that trust or that the trustee of Trust No 2 (initially the first appellant and subsequently the second appellant) held any beneficial interest in that trust.

[10] Section 90(1) provides that the entitlement of a secured creditor to prove the whole or a part of his or her secured debt in the debtor's bankruptcy is in accordance with the succeeding provisions of Division 1 of Part VI of that Act and not otherwise. The balance of s 90 provides:

> "(2) A secured creditor who surrenders his or her security to the trustee for the benefit of creditors generally may prove for the whole of his or her debt.
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> (3) A secured creditor who realizes his or her security may prove for any balance due to him or her after deducting the net amount realized, unless the trustee is not satisfied that the realization has been effected in good faith and in a proper manner.
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> (4) A secured creditor who has not realized or surrendered his or her security may:
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> (a) estimate its value; and
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> (b) prove for the balance due to him or her after deducting the value so estimated.
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> (5) A secured creditor to whom subsection (4) applies shall state particulars of his or her security, and the value at which he or she estimates it, in his or her proof of debt."

[11] Section 153(1) of the *Bankruptcy Act* 1966 provides that, subject to that section, "where a bankrupt is discharged from a bankruptcy, the discharge operates to release him or her from all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his or her security for the benefit of creditors generally". Section 153(3) relevantly provides that the bankrupt's discharge "does not affect the right of a secured creditor … to realize or otherwise deal with his or her security:

> (a) if the secured creditor has not proved in the bankruptcy for any part of the secured debt–for the purpose of obtaining payment of the secured debt;

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3 [2017] 2 Qd R 240.

4 Deed of Settlement, cl 11. The clause allowed an exception for trustees' fees, charges and remuneration. That is irrelevant for present purposes.

> (b) if the secured creditor has proved in the bankruptcy for part of the secured debt–for the purpose of obtaining payment of the part of the secured debt for which he or she has not proved in the bankruptcy."

[12] Because s 153(3) reflects and implements provisions in s 90, the term "secured creditor" must bear the same meaning in both provisions.

[13] Section 5(1) defines the term, "secured creditor, in relation to a debtor," as meaning "a person holding a mortgage, charge or lien on property of the debtor as a security for a debt due to him or her from the debtor." (The bank's mortgages took effect as charges on the land pursuant to s 74 of the *Land Title Act* 1994 (Qld).) The expression "property of the debtor" is not defined. By s 5(1), the definitions apply unless the contrary intention appears.

[14] Under appeal ground 2, the appellants argued that the conduct of the bank in proving in the bankruptcy for the full amount of the first appellant's debt to the bank and accepting a dividend pursuant to that proof of debt amounted to an election by the bank to give up its security. This was submitted to follow because, under s 90 of the *Bankruptcy Act* 1966, a secured creditor is entitled to prove for the whole of the secured debt only upon surrendering the security; if a secured creditor wishes to avoid the surrender of the security the secured creditor must either not lodge a proof of debt or adopt one of the other available courses of action under s 90. The appellants relied upon Jessell MR's statement in *Moor v Anglo-Italian Bank*:[5]

> "In bankruptcy, if a secured creditor wants to prove, he must do one of three things: he may give up his security altogether and prove for the full amount, or he may get his security valued and prove for the difference, or he may sell and realize his security and then prove for the difference. If, without doing either of the latter two things, he proves for the full amount, as he cannot prove for the full amount and receive a dividend except on the theory of giving up the security, he shews by that an intention to give up his security; and, if he so proves and receives a dividend or votes, he shews pretty conclusively that he has finally elected to give up his security and take his dividend; in other words, having two funds to resort to, the bankrupt's general estate, so as to get a dividend on the whole amount of his debt, or his security, he elects to take the bankrupt's estate, and in that way gives up his security."

[15] *Moor v Anglo-Italian Bank* was applied in *Surfers Paradise Investments Pty Ltd (in liq.) v Davoren Nominees Pty Ltd*.[6] That case was decided with reference to a provision applicable in company liquidations (s 554E(3) of the *Corporations Act* 2001 (Cth)) which corresponds with s 90 of the *Bankruptcy Act* 1966. The Court held that a secured creditor of a company in liquidation had elected to surrender a security by lodging with the liquidator a proof of debt for the full amount of the debt, whilst disclosing that it held a mortgage to which it attributed no value, and by receiving from the liquidator, banking, and retaining the proceedings of a dividend cheque calculated on the basis of the insolvent company's total indebtedness to the secured creditor.

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5 (1879) 10 Ch D 681 at 689-90.

6 [2004] 1 Qd R 567.

[16] For the following reasons there was no such election by the bank in relation to either of its mortgages.

[17] Before the occurrence of either of the events relied upon by the appellants as an election, the second appellant had become the registered owner of the Jumrum Properties as trustee of Trust No 2 and the mortgagor under the mortgage over those properties. Section 15(1) of the *Trusts Act* 1973 (Qld) provides that upon the appointment of a new trustee, "the instrument of appointment vests, subject to the provisions of any other Act, the trust property in the persons who become and are the trustees as joint tenants without any conveyance, transfer or assignment". The condition in s 15(1) was fulfilled in relation to the Jumrum Properties when the second appellant was registered as the transferee of the lots comprising those properties. By s 60(1) of the *Land Title Act* 1994 (Qld), a lot or an interest in a lot "may be transferred by registering an instrument of transfer for the lot or interest". Section 62 of the same Act provides that "all the rights, powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee" upon registration of the transfer of a lot or an interest in a lot. Section 63(1) provides that "[i]f a lot, or an interest in a lot, subject to a registered mortgage is transferred, the transferee is liable … to comply with the terms of the mortgage and the terms implied by an Act; and… to indemnify the transferor against liability under the mortgage and under this or another Act."

[18] Accordingly, in relation to the Jumrum Properties after registration of the transfer, although the bank retained contractual rights against the first appellant upon the mortgage covenants, the facilities, and the guarantee, the bank held security only over property owned by the second appellant upon trust. Even disregarding the fact that the second appellant held that property upon trust for another person, the bank did not hold any security over "property of the debtor" in terms of the definition of "secured creditor". For that reason alone, the bank was not a "secured creditor" after the registration of the transfer to the second appellant of the Jumrum Properties, there could be no scope for the application of s 90, and the appellants' argument based upon section 90 that the bank elected to surrender the Jumrum mortgage must fail.

[19] The bank argued that the same results followed in relation to the Seven Springs Farm as a result of the operation of s 15(1) of the *Trusts Act* 1973 (Qld) and s 63(1) of the *Land Title Act* 1994 when the second appellant replaced the first appellant as trustee on 28 March 2011. Section 15(1) of the *Trusts Act* 1973 (Qld) operated to vest the Seven Springs Farm in the second appellant "subject to the provisions of any other Act". In *Lanai Unit Holdings Pty Ltd v Mallesons Stephen Jacques (No 2)*,[7] Jackson J considered that the proviso in s 15(1) would except from automatic vesting, a legal interest in land held under the *Land Title Act* 1994 (Qld). The bank submitted that s 63(1) operated even though the first appellant remained registered as owner of the Seven Springs Farm. This argument faces the obstacles that s 63(1) imposes an obligation to comply with the terms of a mortgage and the terms implied by an Act only upon "the transferee" and only if a lot, or an interest in a lot, subject to a registered mortgage "is transferred". By s 60(1), a lot or an interest in a lot "may be transferred by registering an instrument of transfer for the lot or interest". No transfer of the lots comprising the Seven Springs Farm to the second appellant was registered, so she did not become a "transferee" of those lots. The first appellant alone remained registered as owner and mortgagor. The bank's argument to the

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7 [2017] 2 Qd R 456 at [35].

contrary was based upon the practical inconvenience of the inevitable delay in registration and the circumstance that s 63, unlike s 62, does not expressly condition its operation upon registration of the transfer. Those arguments do not justify disregard of the requirement in the application of sections 62 and 63 for registration of a transfer in s 60(1).

[20] I note also that the bank remained a creditor of the first appellant and it did not become a creditor of the second appellant. That is so even if, which was not established in this case, the first appellant incurred his liability to the bank under the mortgages in circumstances giving the first appellant a right to be indemnified out of the trust property. In such a case, the bank would be entitled to be subrogated to the first appellant's entitlement to the indemnity, but that would not create the relationship of creditor and debtor between the bank and the replacement trustee: *Arkmill Pty Ltd v Tippers & Co Pty Ltd*.[8]

[21] But the bank was not a "secured creditor" in relation to the Seven Springs Farm or the Jumrum Properties within the meaning of that term in its context in s 90, for the different reason that, because the first appellant did not hold a beneficial interest in the trusts upon which either the properties were held, they were not "property of the debtor".

[22] The appellants argued that the expression "property of the debtor" in the definition of "secured creditor" comprehended the bare legal title and extended beyond that to the beneficial interest held by the first appellant on trust because the definition of "property" comprehended every description of real property and interest incident to any such real property. The breadth of the term "property" does not justify disregard of the qualifying words "of the debtor". The content to be ascribed to those qualifying words may be influenced by the context in which the defined term "secured creditor" is used in s 90. It is a premise of s 90 that the property over which the secured creditor holds security would be divisible amongst the creditors in the bankruptcy were it not for that security. That is reflected in the provisions for partial proofs of debt in ss 90(3) and (4), but it appears most clearly from the terms of 90(2): a surrender of the security would not benefit creditors generally unless the secured property were property divisible amongst the creditors. A surrender of security over property that is held by the bankrupt "on trust for another person" would merely provide a windfall benefit to that other person, the trust beneficiary. That is plainly not within the legislative purposes.

[23] These considerations suggest that in the context in which the term "secured creditor" is used in s 90, and consistently with s 116(2)(a), the undefined expression "property of the debtor" in the definition of "secured creditor" does not comprehend property held by the bankrupt on trust for another person.

[24] That construction accords with authorities to which the bank referred. In a case pre-dating the first English Bankruptcy Act, *Re Plummer*,[9] Lord Lyndhurst described the applicable principle upon which the subsequent Acts were generally modelled:

> "For the principle of the bankrupt laws is, that all creditors are to be put on an equal footing, and, therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property

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8 (2006) 58 ACSR 616 (McMurdo J, as McMurdo JA then was).

9 (1841) 1 Ph 56.

> he holds belonging to the bankrupt; but, if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realise the security, provided he does not altogether receive more than 20s in the pound."

[25] That principle was applied in *Ex parte West Riding Union Banking Company*; *In Re Turner*.[10] In that case, two owners of a leasehold interest in a mill as tenants in common mortgaged their respective interests in the lease to the bank as security for the borrowings of one of them. Upon the bankruptcy of the borrower, a question arose whether the bank could prove in the bankruptcy for the whole amount of its debt without giving credit for the security given by both leaseholder owners. It was held by Bacon CJ and affirmed in the Court of Appeal (Jessell MR, Baggallay LJ and Lush LJ) that the bank could not prove against the borrower's estate without either giving up the security (thereby increasing the estate by its value) or deducting its value. Jessell MR, with whose reasons Lush LJ agreed, quoted Lord Lyndhurst's statement in *Re Plummer* and succinctly re-stated the principle: "A man is not allowed to prove against a bankrupt's estate and to retain a security which, if given up, would go to augment the estate against which he proves".[11] The High Court has referred to that decision with approval in different contexts in *Savage v Union Bank of Australia Ltd; Whitelaw v Union Bank of Australia Ltd*[12] and *Harvey v The Commercial Bank of Australia Limited*.[13]

[26] Significantly for present purposes, the same principle was held to be applicable in a case governed by the English *Bankruptcy Act* 1914, in which the definition of "secured creditor" ("a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor…") is materially indistinguishable from the definition in the *Bankruptcy Act* 1966. In *Re Rushton; Ex parte National Westminster Bank Ltd v Official Receiver*,[14] a husband and wife mortgaged to the bank property they held on trust for themselves as joint tenants, as security for their debt. The husband was made bankrupt. Goff J, Foster J agreeing, applied *Ex parte West Riding* in affirming a decision made in the County Court that the bank, without surrendering its security over the joint tenancy, was entitled to put in a proof only for half of the amount owing to it. Goff J stated that:

> "If A mortgages his property to secure his own debt and then declares himself a trustee of the property for B, then it appears to me that in A's bankruptcy that is not a security on the property of the debtor, because it has become the property of B. Conversely, if A, being a bare trustee for B, mortgages the property to secure B's debt and B becomes bankrupt, that is a security on the property of the debtor: see *Ex Parte Connell*, where the mortgages were made by individual partners but they held in trust for the firm and it was held that in proving against the joint estate, that is, the partnership estate, the mortgagees must value their security, because one had to take

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10 (1881) 19 Ch D 105 at 113.
11 (1881) 19 Ch D 105 at 112.
12 (1906) 3 CLR 1170 at 1183 – 1186 (Griffith CJ), 1193 – 1194, (Barton J), 1195 (O'Connor J).
13 (1937) 58 CLR 382 at 387 (Starke J) and 390 (Dixon J, Rich J agreeing).
14 [1972] Ch 197.

> notice of the fact that there was a trust of the property for the partnership."[15]
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> "But … the principle was held still applicable in the *West Riding Case* … [I]n any case, apart from any such principle, the same conclusion appears to me to be reached as a matter of language if you answer the question propounded by the definition section: Whose property was mortgaged? The joint property of the debtor and his wife. And is that the property of the debtor as to his interest therein? It seems to me it plainly is."[16]
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> "I therefore find nothing in principle or authority to sway me from a conclusion which appears to be plain common sense."[17]

[27] Goff J's analysis reflects the recognition of beneficial interests in the relevant provisions of the bankruptcy legislation and, in the context of a provision to the same effect as s 90 of the *Bankruptcy Act* 1966, equates the effect of a security over property held by the bankrupt "on trust for another person" with the "security on the estate of a third person" to which Lord Lyndhurst referred in *Re Plummer*.

[28] The appellants argued that this construction of "secured creditor" was inconsistent with *Re Morris; Ex Parte Australian and New Zealand Banking Group Limited*,[18] which was followed and applied in *Ilhan v Seri*.[19] That argument did not take into account the different context in which the defined term was used in those cases. They were concerned with s 44 of the *Bankruptcy Act* 1966, which specifies conditions upon which a creditor may petition for bankruptcy: a secured creditor is deemed to be a creditor only to any extent by which the amount of the debt exceeds the value of the security, a secured creditor may present a petition as if the secured creditor were an unsecured creditor by including in the petition a statement of willingness to surrender the security for the benefit of creditors generally in the event of a sequestration order being made, and where a petitioning creditor is a secured creditor particulars of the security must be set out in the petition. In *Re Morris*, Beaumont J carefully confined his conclusions to the meaning of "secured creditor" in the context of s 44.[20] After referring to the wide definition of "property" and the absence of any definition of "property of the debtor", Beaumont J held that it followed from the fact that the mortgage was validly granted over property of which the debtor was one of the registered proprietors that the ANZ Bank should be regarded as a secured creditor "for present purposes". He remarked that if the debtor became a bankrupt, the position would be governed by other provisions, including s 116(2)(a), and he added that the expression "property of the bankrupt" was a technical one and that "special concept" did not assist in the resolution of the question about s 44. Similarly, in *Ilhan v Seri*, after stating that the debtor had the legal title to the property and the definition of "property" in the *Bankruptcy Act* 1966 was "so broad that even a 'dry legal title' to property is 'property' within the meaning of s 5", Riethmuller FM stated that "s 44 does nothing to restrict that broad statutory definition"[21] and that the "restrictions which mirror equity's traditional

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15 [1972] 1 Ch 197 at 202.
16 [1972] 1 Ch 197 at 207.
17 [1972] 1 Ch 197 at 207.
18 (1991) 29 FCR 1 (Beaumont J).
19 [2012] FMCA 148 (Riethmuller FM).
20 (1991) 29 FCR 1 at 3.
21 [2012] FMCA 148 at [28].

protection of equitable interests come about through the operation of s 116 which limits the property that is divisible among the creditors by providing a definition of 'divisible property' which excludes 'property held by the bankrupt in trust for another person'".[22]

[29] Neither case is an authority upon the meaning of "secured creditor" in s 90. It is not necessary to consider the correctness of either decision, but I note that they are consistent with statements in *Savage v The Union Bank of Australia*.[23] Griffith CJ considered that the principle in *West Riding Union Bank Co* "has never been applied to the case of a petitioning creditor"[24] and O'Connor J referred to that principle as a rule "relating to proof after insolvency had taken place" and as having "no necessary application to a case in which we are dealing with the preliminary conditions which must be observed before a petitioning creditor can make his debtor insolvent".[25]

[30] Ultimately the issue raised by appeal ground 2 turns upon the construction of section 90. For the reasons I have given, in that context the expression "property of the debtor" in the definition of "secured creditor" should be construed as not comprehending property held by the debtor on trust for another person. It follows that the bank was not a "secured creditor" to whom s 90 applied in relation to either of the mortgages. It follows that appeal ground 2 is not established.

[31] It is necessary here to advert to the appellants' argument that the bank was a "secured creditor" in respect of whom s 90 applied because the charge created by the bank's mortgages extended to the first appellant's beneficial interest in the Seven Springs Farm and the Jumrum Properties constituted by his right to be indemnified out of the assets of Trust No 1 and Trust No 2 against liabilities he incurred in running the trust businesses. This point was not pleaded or litigated at the trial. The bank objected to the appellants being permitted to raise it for the first time on appeal.

[32] A trustee has a statutory right of reimbursement[26] and an equitable right of indemnity secured by a lien[27] over the trust property for expenses reasonably incurred by the trustee in the execution of the trust. The properties were admittedly trust property. Otherwise the appellants' argument necessarily depended upon these propositions: the first appellant as trustee incurred liabilities in the execution of the trusts (which, the appellants contended, included the first appellant's liability to repay the money secured by the mortgages); he was entitled to be indemnified against those liabilities out of the trust property; the mortgages comprehended a charge over the first appellant's right of indemnity; and the bank was therefore a "secured creditor". None of those propositions were advanced in the trial division. The focus of the arguments upon that topic in this appeal concerned the proposition that the first appellant incurred liabilities in the execution of the trusts. The appellants referred[28] to an affidavit by the first appellant in which he mentioned "the unprofitability of my business and investment activities". The affidavit does not appear to have been intended to establish and it does not establish that the first appellant

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22 [2012] FMCA 148 at [29].
23 (1906) 3 CLR 1170.
24 (1906) 3 CLR 1170 at 1183.
25 (1906) 3 CLR 1170 at 1195.
26 Section 72 of the *Trusts Act* 1973 (Qld).
27 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319.
28 Amended reply para 6(f), footnote 6.

incurred the obligations secured by the mortgages, or any other liability, in the execution of either the trusts. Other evidence suggests that the first appellant did not incur any such liability: the first appellant stated in his statement of affairs that he did not have any debts owed to him, and the trusts did not owe him any wages, loans or other money;[29] and the summary of the assets in the bankrupt estate in the trustee's report to creditors of 20 April 2016 does not include any reference to the first appellant's right of indemnity.

[33] It is apparent that the appellants' new argument raises factual questions which were not litigated. I would therefore uphold the bank's submission that the appellants should not be permitted to raise it for the first time on appeal. The appeal must be decided without reference to the postulated right of indemnity.

[34] I would add that it should not be assumed that the bank would be a "secured creditor" if it were proved that the first appellant held a lien over the trust property securing an entitlement to be indemnified for liabilities incurred in the execution of the trust. Upon the face of it, any such lien would have passed to the trustee in bankruptcy as property divisible amongst the first appellant's creditors[30] (or only the trust creditors[31]), but that would not produce the result that the mortgaged properties were themselves property divisible amongst the creditors that vested in the trustee in bankruptcy.[32] However, because the point was not litigated it is not necessary to express any conclusions about these matters.

[35] Under appeal ground 1, the appellants argued that because the bank did not fall within the exception in s 153(3) of the *Bankruptcy Act* 1966, s 153(1) operated to release the first appellant from the debts secured by the mortgages. It followed, in the appellants' submission, that there was no extant default of either mortgage with reference to which the bank was entitled to claim possession of either secured property.

[36] As I have mentioned, the term "secured creditor" bears the same meaning in ss 90 and 153(3). Because that term does not comprehend a creditor whose debt is secured over property held by the bankrupt on trust for another person, no implication arises from s 153(3) that the discharge of the bankrupt has any effect upon such a security. In such a case, the provisions of the *Bankruptcy Act* 1966 reveal no rationale for confining the bank's rights after the discharge of the bankrupt to the cases identified in s 153(3). A bankrupt's debt secured by a mortgage over property held by the bankrupt in trust for another person is analogous to a bankrupt's debt secured by a mortgage over a third party's property by way of guarantee. In the latter case, the release of the debt owed by the bankrupt by operation of s 153(1) ordinarily would have no effect upon the secured creditor's rights to realise or deal with the security. Jordan CJ explained the effect upon a guarantor of the discharge of guaranteed debt upon discharge from bankruptcy under the *Bankruptcy Act* 1924 (Cth):

> "Since the very purpose of a contract of guarantee is to secure the obligee in the event of the principal obligor being or becoming

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29 Statement of Affairs pp 165 (Question 31), and 178 – 179 (Questions 44D).

30 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360.

31 See *Commonwealth of Australia v Byrnes & Ors* [2018] 320 FLR 118.

32 *Savage v Union Bank of Australia Ltd; Whitelaw v Union Bank of Australia Ltd* (1906) 3 CLR 1170; *Commonwealth of Australia v Byrnes & Ors* (2018) 320 FLR 118 at [35].

> unable or unwilling to discharge his obligation, the fact that, by reason of a sequestration order, the principal obligation is no longer enforceable against the principal obligor by the ordinary machinery of the common law or that, by reason of an order of discharge, he is released from his personal liability, has never been regarded as operating to release a guarantor from liability; and it is now expressly provided by statute that an order of discharge shall not so operate: Bankruptcy Act, 1924, s. 121(2). In such a case, the fact that the obligation has ceased to exist as a personal obligation binding the obligor himself does not annihilate its operation for all purposes. It continues to exist as the source of a right to obtain payment out of certain assets, just as, upon the death of the obligor, although any personal obligation on his part comes to an end, the obligation continues as the source of a right to obtain payment out of his assets. In neither case does the fact that the personal liability of the debtor has come to an end operate to discharge any guarantor of the debt.
>
> No doubt a contract of guarantee may expressly provide that all existing liabilities of the guarantor shall be released if the debtor shall become bankrupt or if he shall die; and any such stipulation would be binding. But intention to make so unusual and remarkable a provision would not be inferred from other than reasonably clear words; and it could not be inferred from the mere fact that the guarantee took the form of a guarantee to pay what might be 'due' or 'owing' by the debtor."[33]

[37] That analysis is applicable by analogy to a mortgage over property held by a bankrupt on trust for another person. In this case, the bank's mortgages do not contain any provision from which it might be inferred that the security is unenforceable if the mortgagor is made bankrupt or the mortgagor's personal liability is discharged upon release from bankruptcy.

[38] Under the terms of each facility, the bank could cancel the facility or reduce the facility limit to zero at any time,[34] in which event the full amount of facility was payable to the bank.[35] The appellants admitted,[36] and it was an agreed fact,[37] that on 16 June 2011 the bank cancelled each facility. By the deed of guarantee and indemnity dated 3 February 2010, which the first appellant executed in his capacity as trustee of each of the trusts and by which he guaranteed his own obligations as the customer under each facility, the first appellant guaranteed that "the customer will pay [the bank] all the amounts which the customer owes [the bank] at any time". The expression "amounts which the customer owes [the bank]" is defined, counter-intuitively, not only to include amounts which are currently due and payable, but also all past advances: "all amounts which at that time [the bank] has advanced". Furthermore, the guarantee provides that "You are liable to [the bank]

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33 *Jowitt v Callaghan* (1938) 38 SR (NSW) 512 at 518-520. Footnotes omitted.

34 Market Rate Facility, cl 2(a), Flexiplus Mortgage Facility cl 3.9.

35 Market Rate Facility, cl 4.1(c) and (d) and cl 23(c) ("final repayment date"); Flexiplus Mortgage Facility, cl 3.9(c), definition of "total owing".

36 Amended defence of the defendants, para 1.

37 Statement of Claim, paras 28 and 30.

under this guarantee even if the customer … is ever incapacitated."[38] And the word "You" is defined in a way that comprehends both the person named as the guarantor (the first respondent) and successors of the guarantor. Finally, the guarantee provides that "Your obligations" (which comprehends the obligations of the first appellant as trustee and the obligations of the successors of the first appellant as trustee) "are not affected by anything that might otherwise affect them under the law relating to sureties including… [amongst many other matters] [if] the customer or any other person is ever incapacitated". The word "incapacitated" is defined to include being "insolvent" (which is defined to include "bankrupt") or "subject to any legal limitation or disability".

[39] Thus the liabilities of the first appellant extended to all of the amounts which the bank had in the past advanced under each facility, regardless of whether the first appellant was bankrupted. Those liabilities were secured by each of the mortgages. Under the Seven Springs mortgage, for example, the memorandum of common provisions provided that the named mortgagor was in default if the mortgagor did not pay the "amount owing" when due for payment (which in this case occurred upon the cancellation of the facility in June 2011); clause 20 provided that if after the mortgagor is in default for more than one day and the bank had given the mortgagor the specified 31 days default notice, the whole amount owing became payable on demand and, if that was not paid within seven days, the bank was entitled to enforce the mortgage by doing any one or more of the identified actions "in addition to anything else the law allows the Bank to do as mortgagee". The specified actions included suing the mortgagor for the amount owing and taking possession of the property. The additional things the law allowed the bank to do as mortgagee included applying for possession under s 78(2)(c)(i) of the *Land Title Act* 1994 (Qld).

[40] The relevant purposes of the *Bankruptcy Act* 1966 are given full effect in this case, as in the case where a bankrupt's debt is secured by a mortgage over the property of a third party, by construing s 153(1) as operating to release the bankrupt from his or her personal liability whilst leaving intact the entitlement of the creditor to enforce its property rights according to the tenor of the mortgage. Appeal ground 1 fails.

Appeal ground 3: the trial judge erred in finding that the appellants were in default under the terms of the mortgages, or that the second and third appellants were in default of the Seven Springs Farm mortgage in circumstances where the first appellant was registered as proprietor of the Seven Springs Farm.

Appeal ground 4: the trial judge erred in finding that all relevant notices of default pursuant to the Seven Springs Farm mortgage had been served in circumstances where it was not pleaded or proved that notice of default under the Seven Springs Farm mortgage had been served on the second appellant or the third appellant.

Appeal ground 5: the trial judge erred in finding that the second appellant was in default pursuant to the Seven Springs Farm mortgage in circumstances where no default of the second appellant was pleaded against the second appellant or the third appellant in the amended statement of claim.

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38 Guarantee, cl 4.

[41] In relation to the first contention in appeal ground 3 (that the trial judge erred in finding that the appellants were in default under the terms of the mortgages), the appellants argued that the only debts secured by either mortgage were debts of the first appellant which had been discharged by operation of s 153(1) of the *Bankruptcy Act* 1966. That argument fails for the reasons given in relation to appeal ground 1.

[42] Otherwise appeal grounds 3, 4 and 5 concern only the mortgage over the Seven Springs Farm. The premise of these grounds is that orders for possession of the Seven Springs Farm should not have been made against the second and third appellants because it was not alleged (appeal ground 5) or proved (appeal ground 3) that the second and third appellants were in default under the Seven Springs Farm mortgage and it was not alleged or proved (appeal ground 4) that the bank served the second and third appellants with a notice of default under that mortgage.

[43] Those points were not taken by the appellants in the trial division. Because they concern matters upon which the bank might have adduced evidence if the points were taken, I would uphold the bank's contention that the appellant should not be permitted to take them for the first time upon appeal.

[44] In any event these grounds of appeal could not succeed. It is the first appellant who is and at all material times was the registered owner and mortgagor of the Seven Springs Farm and the first appellant was in default under that mortgage. As the appellants acknowledged,[39] notices of default were served upon the first appellant. Accordingly, the bank was entitled to possession of the Seven Springs Farm as against the first appellant. Any right to possession held by the second appellant or the third appellant necessarily derived from the right to possession of the first appellant as owner of the Seven Springs Farm, but his rights were qualified by the bank's mortgage. Once the first appellant lost his right to possession upon default and after service upon him of any necessary notices, the second and third appellants lost any right to possession they had possessed. It follows that the bank was entitled to possession of the Seven Springs Farm property as against the second and third appellants, without serving any notice of default upon them.

[45] The appellants' only argument to the contrary of that analysis relied upon the meaning of the word "you" in the Seven Springs Farm mortgage. Clause 19(a) of that mortgage provides that "You are in default if … you do not pay the amount owing when due for payment" and clause 20.1 requires the bank to serve a notice of default upon "you". The definition of "you" comprehends the "successors" of "the person … named in this mortgage as mortgagor". The appellants argued that the second appellant became such a "successor" upon her being appointed to replace the first appellant as trustee of Trust No 1. That argument cannot be accepted. A "successor" of the named mortgagor is a person who succeeds the named mortgagor as mortgagor. For the reasons already given in relation to appeal ground 2, the appointment of the second appellant as trustee of Trust No 1 did not have that effect in the absence of registration of the second appellant as owner of the Seven Springs Farm.

Orders

[46] I would dismiss the appeal with costs.

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[39] Appellants' Outline of Argument paragraph 31.

[47] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[48] **MORRISON JA:** I agree with the reasons of Fraser JA and the orders his Honour proposes.