SUPREME COURT OF QUEENSLAND

CITATION:	*Brett Barry James Devine v State of Queensland* [2020] QSC 229
PARTIES:	**BRETT BARRY JAMES DEVINE** (plaintiff) **v** **STATE OF QUEENSLAND** (defendant)
FILE NO:	BS 6254 of 2019
DIVISION:	Trial Division
DELIVERED ON:	31 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2020
JUDGE:	Holmes CJ
ORDERS:	**1. Judgment in the action is given for the defendant.** **2. The plaintiff's application is dismissed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT: STAY OR DISMISSAL OF PROCEEDINGS – where the defendant applies for summary judgment pursuant to r 293(2) of the *Uniform Civil Procedure Rules* 1999 ('the Rules') or for the striking out of the statement of claim under r 171 of the Rules – where the defendant argues that the plaintiff has no real prospect of succeeding in his action – where the plaintiff cross-applies for the striking out of the defence – whether the plaintiff's application should be summarily dismissed BANKRUPTCY – ADMINISTRATION OF PROPERTY – CONTRIBUTION OF BANKRUPT AND RECOVERY OF PROPERTY – CONTRIBUTION OF BANKRUPT: AFTER ACQUIRED INCOME – INCOME OF BANKRUPT – WHAT CONSTITUTES INCOME – where the plaintiff sued the defendant for conversion of a ship in which he claimed rights of possession – where the plaintiff was an undischarged bankrupt at the time he purported to acquire the ship – where the defendant argues that the ship was 'after-acquired property' which, by virtue of ss 58 and 116 of the *Bankruptcy Act* 1966, was property divisible among creditors and vested in the trustee in bankruptcy – where the plaintiff argues that the ship should be characterised as 'income' for

	the purposes of Div 4B of Pt VI of the *Bankruptcy Act* 1966 which does not vest in the trustee – where the defendant argues that even if the ship is correctly characterised as income, it is property divisible among creditors under s 116 of the *Bankruptcy Act* 1966 – whether s 116 applies to income – whether the plaintiff has reasonable prospects of proving that the ship was received as income
	Bankruptcy Act 1966 (Cth), s 5(1), s 58, s 116, s 133, s 139L, s 139ZIHA *Shipping Registration Act* 1981 (Cth), s 36 *Uniform Civil Procedure Rules* 1999 (Qld), r 171, r 293(2)
	Davey v Dessco Pty Ltd & Anor [2017] VSC 744, cited *Di Cioccio v Official Trustee in Bankruptcy (as Trustee of the Bankrupt Estate of Di Cioccio)* (2015) 229 FCR 1; [2015] FCAFC 30, explained *Foley v Hill* (1848) 2 HL CAS 28, cited *Geia v Palm Island Aboriginal Council* (1999) 152 FLR 135; [1999] QCA 389, cited *Gittins v Field* (2018) 16 ABC(NS) 176; [2018] FCA 976, considered *Jakimowicz v Jackz* [2016] VSCA 42, cited *Re Gillies; Ex parte Official Trustee in Bankruptcy re Gillies* (1993) 42 FCR 571, applied *Re Hawkins; Ex parte Worrell* (1996) 71 FCR 371, cited *Weissova v The Official Trustee in Bankruptcy* (1986) 12 FCR 106, cited
COUNSEL:	L Bowden for the plaintiff M H Hindman, with G Sammon, for the defendant
SOLICITORS:	The plaintiff appeared on his own behalf Crown Law for the defendant

[1] The plaintiff in this action, Mr Devine, has sued the State of Queensland for conversion of a sunken ship, the "*Defender*", which he had intended to salvage and in which he claimed, in different capacities, rights of possession. In its Defence, the defendant pleaded that because the plaintiff was an undischarged bankrupt at the relevant time, the ship was "after-acquired property" which vested in the trustee of his estate, and the latter had disclaimed any transfer of it to the plaintiff. (The defendant did not contend that the cause of action in conversion was itself after-acquired property.) In his Reply, the plaintiff admitted his bankruptcy but denied that the *Defender* vested in the trustee because, he alleged, the ship was received by him as after-acquired income, not as property. He also alleged that any disclaimer was ineffective, because the trustee had failed to give necessary notice of it.

[2] The State of Queensland now applies for summary judgment pursuant to r 293(2) of the *Uniform Civil Procedure Rules* 1999, or for the striking out of the statement of claim under r 171, arguing that if the vessel had vested in the trustee, the plaintiff

had no right to it, and could have no right of action for its loss, so that his claim could not succeed. Rule 293(2) gives the court the discretion to give judgment for the defendant if it is satisfied both that the plaintiff has "no real prospect of succeeding" on his claim and that there is no need for the claim to be tried. The plaintiff cross-applies for the striking out of the Defence insofar as it relies on the alleged disclaimer by the trustee.

The plaintiff's case

[3] The Statement of Claim pleads that the *Defender* was owned by a man named Dick when it sank on 4 January 2016 in Ross Creek, Townsville. Maritime Safety Queensland gave Mr Dick a notice directing him to remove the ship. His insurer refused to undertake the vessel's salvage. According to the Statement of Claim, the plaintiff, who was an expert in salvage, made an oral agreement with Mr Dick that he would salvage the *Defender*, the consideration for the salvage services being the transfer of the ship, by way of a bill of sale signed by Mr Dick, to the plaintiff as full payment for his skill and services in advance of his undertaking the ship's salvage. A further term of the agreement was that the plaintiff would use his best efforts to restore the ship and put it back into service as he saw fit, probably as a sail training ship. "In the premises", the pleading alleges,

> "(a) the plaintiff salvor had the possession of *Defender* from on or about 5:30 pm on 29th February 2016 as a right of salvage, or as a franchise right of salvage, from Dick.
>
> (b) in the alternate [*sic*], the plaintiff by the salvage right contract was the bailee of the *Defender* from Dick, lawfully in possession or immediately entitled to her possession."

The defendant had, however, denied the plaintiff's right to possession of the *Defender* and acted inconsistently with his possessory interest, converting the ship to its own use.

[4] In particulars, the plaintiff alleged that the defendant was well aware of a common arrangement in the maritime industry by which a vessel owner transferred

> "…all its right and title in the vessel to a salvor such as the plaintiff…in consideration of the transferee Buyer undertaking the costs of salvage and retaining ownership of the vessel".

In what then seems to be an allusion to the present circumstances, it was said that this was irrespective of the inclusion of a "peppercorn" $1.00 as part of the consideration, for legal certainty. Asked to particularise the act of conversion, the plaintiff characterised it as the defendant's refusal to deal with him "as salvor title holder in possession". In his Reply, in response to the allegation that the *Defender* was after-acquired property, the plaintiff pleaded that the ship was transferred to or received by him as after-acquired income for salvage services rendered or to be rendered by him, and thus did not vest in his trustee.

[5] The pleading was supplemented for the purposes of this application by affidavits sworn by the plaintiff, Mr Dick and an acquaintance of the plaintiff, Mr Boucaut-Jones, who was principal of a not-for-profit training organisation which restored historic ships. The plaintiff deposed that he had been interested in acquiring the

Defender for some time; about a year before it sank he had asked Mr Dick how much he would sell it for. In his salvage business, he accepted payment in money and in goods salvaged. In those cases where he decided to take goods as payment or part payment, he required the title to them be transferred to him as part of his conditions of salvage, so that others would recognise him as owner and where he resold a vessel he would have proof of title. In this case, he had initially given Mr Dick a quote of $15,000-$20,000 for his salvage fee, but it was not accepted.

[6] The plaintiff deposed that he discussed with Mr Boucaut-Jones (as the latter confirmed in his affidavit) the prospect of restoring the *Defender* for use as a training ship. In consequence of those discussions, Mr Boucaut-Jones made Mr Dick an offer of $1.00 for the sale of the vessel to his organisation, with the plaintiff to undertake its salvage. However, the organisation was unable to continue with the purchase because the defendant required a prohibitive security bond before salvage could take place. The plaintiff informed Mr Boucaut-Jones that he would have the ship transferred to him to enable its salvage; Mr Boucaut-Jones' organisation could still assist with training and funding.

[7] According to his affidavit, the plaintiff duly obtained Mr Dick's agreement to transfer the *Defender* to him "as salvor with salvage rights from [Mr Dick]". The two met; Mr Dick signed the bill of sale, which is exhibited. It records the transfer from Mr Dick as seller to the plaintiff as buyer of all shares in the ship for the consideration of $1.00. The plaintiff deposes to having paid that sum. In his affidavit, the plaintiff characterises the transaction as his acceptance of the *Defender* as payment for his salvage services. This was, he says, in accordance with terms commonly imposed by those in the marine salvage industry, insurers and the state of Queensland

> "…where they bear the cost of the salvage in consideration of title to the vessel".

Indeed, according to the plaintiff, Mr Dick's salvage insurance company had required him to transfer title to the *Defender* to them before they would undertake salvage. He had done so by giving a Notice of Abandonment, but when the insurers declined to proceed, the title returned to Mr Dick "as is the custom". His (the plaintiff's) terms and condition of salvage were the same as the insurers', requiring transfer before salvage was undertaken.

[8] Having completed the transaction with Mr Dick, the plaintiff set about seeking media interest and government support for taking the *Defender* to Tasmania as a training ship and tourist attraction. According to his affidavit, the ship was worth millions to him as a working ship. However, officers of Maritime Safety Queensland denied him access to the vessel on the basis that the transfer was not effective or, if it was, that the ship had vested in his trustee in bankruptcy. That was so even though he

> "..had possession as salvor and as titleholder by payment in kind, or 'as contra' in the words of the salvage trade".

[9] Mr Dick in his affidavit said that he had been the registered owner of the *Defender*, but in 2003 had transferred ownership to his son, who was then registered in the

Australian Register of Ships in his place. In January 2016, when the sale to Mr Boucaut-Jones' organisation fell through, the plaintiff

> "…offered to proceed in his own name under his own business as salvor to comply with the Removal notice with the ship 'as is where is' as payment for her salvage. He wanted *Defender* transferred to him as payment received by him. He offered a further $1.00 in money as a backup to make sure the salvage agreement was enforceable by contract law and to be sure the transfer would be registered in Canberra as the form referred to a money amount. In return [Mr Dick] agreed to hand over a signed Bill of Sale form and possession of the ship to him as the salvage right holder, with [Mr Dick's] consent to his immediate possession as salvor."

Not surprisingly, there seems to have been some difficulty about registering the transfer of ownership, and Mr Dick deposed that subsequently, at the plaintiff's request, another bill of sale was completed, this time showing his son as the registered owner and seller. Exhibited to the plaintiff's affidavit is a copy of the registration certificate dated 15 March 2016, certifying that the *Defender* is registered under the *Shipping Registration Act* 1981 (Cth) with him shown in the Register as its owner.

The pleading as to the disclaimer

[10] The Defence does not admit any binding oral agreement between Mr Dick and the plaintiff, but says that if there were one, and the plaintiff acquired the *Defender* through the bill of sale, it became after-acquired property and, by virtue of s 58 of the *Bankruptcy Act* 1966 (Cth), immediately vested in the trustee of his estate. The trustee had disclaimed the transfer under s 133 of the *Bankruptcy Act*. It was not necessary for him to obtain the leave of a court to disclaim the transfer, because the contract to acquire property in the ship was an "unprofitable contract" within the meaning of s 133(5A) of the *Bankruptcy Act*.

[11] The Reply alleges that any disclaimer by the trustee in bankruptcy was ineffective because the *Defender* was not after-acquired property, and the trustee had failed to comply with s 133(3) of the *Bankruptcy Act* by giving notice of the disclaimer to the officer with the function of registering the transfer of ships.

The relevant provisions of the Bankruptcy Act

[12] "Property" is defined in s 5(1) of the *Bankruptcy Act* as meaning, unless the contrary intention appears,

> "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".

[13] Section 58(1) provides that, subject to the Act, the bankrupt's property vests in his or her trustee. In particular, s 58(1)(b) provides that after-acquired property vests in the trustee as soon as it is acquired. For the purposes of the provision, s 58(6) defines "after-acquired property" as

> "property that is acquired by … the bankrupt on or after the date of the bankruptcy, being property that is divisible amongst the creditors of the bankrupt".

[14] Part VI of the *Bankruptcy Act* is titled "Administration of Property". Section 116 appears in Div 3, "Property available for payment of debts". The provision identifies what is property divisible amongst a bankrupt's creditors, and includes in sub-s 1(a)

> "…all property that … has been acquired by [a bankrupt] after the commencement of the bankruptcy and before his or her discharge…".

Section 116(2) creates some exceptions to s 116(1) for particular types of property, including, for example, household property, property held on trust and, in s 116(2)(g), damages, compensation and rights of action for personal wrongs or injuries. Sub-sections 116(2)(n), 116(2D) and s 116(3) in combination exclude from the application of s 116(1) property acquired using "protected" money, which includes compensation or damages within s 116(2)(g).

[15] Division 4 of Pt VI deals with realisation of property. Section 133(1) in that Division permits the trustee of a bankrupt's estate to disclaim property in writing, whether or not he or she has become its registered owner. The disclaimer then operates to determine the bankrupt's rights, interests and liabilities in respect of the disclaimed property. Pursuant to s 133(3), where any transfer of the property disclaimed would, under Commonwealth or State law, require registration, the trustee must give notice of the disclaimer as soon as practicable to the officer with the function of registering transfers.

[16] Division 4B of Pt VI is headed "Contribution by bankrupt and recovery of property". The objects of the Division are to require a bankrupt deriving income during the bankruptcy to pay contributions towards his or her estate and to enable the recovery of money and property for the benefit of the estate.[1] Essentially, the scheme of the Division is that the trustee assesses the income that a bankrupt is expected to derive during a contribution assessment period and if it exceeds an "actual income threshold amount" (determined according to a formula,[2] and variable according to the number of the bankrupt's dependants[3]), the bankrupt is liable to pay contributions to the trustee.[4]

[17] Section 139L defines "income" in Division 4B by giving it "its ordinary meaning", subject to qualifications. Those qualifications are that a number of specified forms of benefits and payments are said to be income whether or not they come within the ordinary meaning of the term "income",[5] and that others are said not to be income even if they do come within the term's ordinary meaning.[6] The benefits and payments falling in the first (included) group are all in monetary form, with the exception of

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1 Section 139JA.
2 Set out in s 139S.
3 Section 139K.
4 Section 139P.
5 Section 139L(1)(a).
6 Section 139L(1)(b).

> "…(v) The value of a benefit that:
>
> (A) is provided in any circumstances by any person (the ***provider***) to the bankrupt; and
>
> (B) is a benefit within the meaning of the *Fringe Benefits Tax Assessment Act 1986*…"

Under the *Fringe Benefits Tax Assessment Act* 1986, fringe benefits can take the form of the use of a car,[7] a debt waiver,[8] a loan,[9] payment of expenses,[10] housing,[11] a living-away-from-home allowance,[12] or provision of board.[13]

The submissions as to the plaintiff's rights to the Defender

[18] The plaintiff's argument was complicated by the fact that he characterised his right to possession of the *Defender*, entitling him to maintain a claim in conversion, in a number of different ways. According to the Statement of Claim, it was a right of salvage, and the particulars refer to the plaintiff as "salvor title holder in possession". Similarly, Mr Dick refers in his affidavit to giving the plaintiff possession of the ship "as the salvage right holder", with consent to his "possession as salvor", while the plaintiff speaks in his affidavit of the ship being transferred to him "as salvor with salvage rights from [Mr Dick]". Those references suggest rights short of ownership: to perform the salvage, and to possess the vessel for that purpose. The alternative proposed in the Statement of Claim was that the plaintiff was the ship's bailee by virtue of the contract. In submissions, it was suggested that, on the evidence, the salvage contract involved the transfer of the ship as a form of security in the plaintiff's favour.[14] It was also submitted that the ship constituted a gain which the plaintiff had derived in the course of a profit-making enterprise. A gain made outside the ordinary course of carrying on business or resulting from a "one-off" transaction could, it was argued, nonetheless be income: *FCT v Myer Emporium Ltd*.[15]

[19] In the Reply and in submissions, it was further proposed that the *Defender* should be regarded as income received by the plaintiff pursuant to a contract with Mr Dick for the performance of work in the form of the salvage operations. The "ordinary meaning" of the term "income", it was contended, was sufficiently broad to include the transfer of an asset by way of remuneration.

[20] The plaintiff relied on a decision of French J (as his Honour then was) sitting at first instance in the Federal Court in *Re Gillies; Ex parte Official Trustee in Bankruptcy v Gillies*[16] (discussed later in these reasons) for the proposition that after-acquired income did not vest in the Official Trustee. Reference was also made to s 139ZIHA

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7 Section 7.
8 Section 14.
9 Section 16.
10 Section 20.
11 Section 25.
12 Section 30.
13 Section 35.
14 Which was a puzzling submission, because there was no existing or anticipated indebtedness which it might secure.
15 (1987) 163 CLR 199 at 209.
16 (1993) 42 FCR 571.

of the *Bankruptcy Act*, which forms part of the supervised account regime in Div 4B. Under that regime, any monetary income a bankrupt receives must be deposited to a single account, with the trustee supervising any withdrawals. Section 139ZIHA prohibits a bankrupt to whom the regime applies from entering a "non-monetary income receipt arrangement" without the consent of the trustee. That allusion showed, the plaintiff argued, that Div 4B contemplated that income could be received in other than monetary forms.

[21] The defendant submitted, with reason, that if the plaintiff became the owner of the *Defender*, he could not be the ship's bailee, nor could his rights of salvage be those of a salvor. If he became the ship's owner, any lesser rights, whether as salvor or as bailee, were subsumed or ceased to exist. The *Defender* became after-acquired property within the meaning of s 58(1)(b), being property divisible amongst the plaintiff's creditors by virtue of the definition in s 116(1)(a), when the plaintiff paid the $1.00 consideration, agreed to the obligations under the contract and obtained ownership of the vessel. It was consideration for those contractual obligations, not income. Mr Dick was not the plaintiff's employer; the plaintiff had carried out no work on the ship at the time of the transaction which purported to transfer it to him; and his payment of $1.00 for it and execution of the bill of sale were not consistent with its being received as income. This was a one-off transaction; it did not have the characteristics of periodicity or recurrence, hallmarks of income.

[22] In any event, even if the *Defender* were income, it remained property for the purposes of ss 58 and 116 of the *Bankruptcy Act*. For that proposition, reliance was placed on statements made by the Full Federal Court in *Di Cioccio v Official Trustee in Bankruptcy (as Trustee of the Bankrupt Estate of Di Cioccio)*.[17] Again, more will be said about that decision later.

The disclaimer argument

[23] The defendant contended that the transfer had been disclaimed by the trustee, so that any rights which the plaintiff might have had in the ship were determined. The plaintiff responded that the purported disclaimer was invalid, because s 36 of the *Shipping Registration Act* 1981 required that any transfer of ownership of a ship be registered as soon as possible. The transfer of the *Defender* to the plaintiff was registered, but the trustee had not given notice of the disclaimer to the relevant authorities. The *Shipping Registration Act*, like the Torrens system legislation, was designed to give certainty by registration; it should be concluded that the failure to give the necessary notice rendered steps taken subsequently in relation to the vessel – in this instance, the disclaimer – invalid.

[24] In fact, the issue of the trustee's failure to give notice of the disclaimer seems something of a distraction. If the *Defender* vested in the trustee, the plaintiff had no right to it, and hence no right of action in respect of it,[18] whether it was disclaimed or undisclaimed. If the trustee had no interest in the transfer of the ship, he had nothing to disclaim, and the disclaimer was consequently ineffective, independent of the want of notice.

Vesting of after-acquired income - Re Gillies and Di Cioccio

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17 (2015) 229 FCR 1.

18 *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124 at 134, 136.

[25] After-acquired income of a bankrupt has long been regarded as not vesting in the trustee. In *Re Gillies*, French J reviewed the statutory developments in that regard. Section 101 of the *Bankruptcy Act* 1924 had provided for the trustee to apply to the court to recover part of the bankrupt's income, which had led to the inference that income did not vest in the trustee.[19] In the *Bankruptcy Act* 1966, s 131 expressly provided that a bankrupt receiving income was entitled to retain it, although the trustee could apply to the court for part of the income to be paid for the benefit of creditors. The provision was repealed, though, by the *Bankruptcy Amendment Act* 1991, the same amending Act which inserted Div 4B. French J recorded that the Explanatory Memorandum relating to the relevant Bill spoke of the difficulty for trustees in having to apply for an order, and expressed the intention of imposing a liability to contribute from income. There was no suggestion, his Honour noted, that the amendments were intended to have the result of vesting after-acquired income in the trustee.

[26] In his Honour's view, although there was no longer an equivalent of s 101 of the 1924 Act, and s 131 no longer existed in the 1966 Act as amended,

> "…the scheme of Div 4B rests on the continuing assumption that the income of the bankrupt does not vest in the trustee".[20]

That was so notwithstanding that the definitions in s 58 and 116 of after-acquired property were wide enough to include income. The legislative scheme was inconsistent with those provisions applying to after-acquired income; Div 4B was akin to a code on dealing with after-acquired income. The extrinsic material did not suggest any change in the approach to after-acquired income which would make it property vesting in the trustee.

[27] As a result of that reasoning, French J concluded that funds which the bankrupt in that case had accumulated from his income did not vest in the trustee. His Honour expressed the view in *obiter dicta* that assets bought with after-acquired income would, unless they fell within an excluded category in s 116(2), constitute property divisible among creditors. French J's construction in *Gillies* of the relevant provisions has been approved and applied in a number of subsequent decisions, [21] including that of the Court of Appeal in *Geia v Palm Island Aboriginal Council*.[22]

[28] The defendant's short answer to the plaintiff's case was that *Re Gillies* had been overtaken by the decision of the Full Federal Court in *Di Cioccio*. In that case, the appellant had acquired shares using income which fell below the threshold amount requiring contribution. The issue was whether the shares were after-acquired property. The appellant contended that there was a conflict between Div 4B, on the one hand, and ss 58(1)(b) and 116, on the other, which should be resolved by giving Div 4B primacy. The Full Court rejected that contention, saying this:

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19 *Federal Commission of Taxation v Official Receiver* (1956) 95 CLR 300 per Williams J at 315.

20 At 576-577.

21 *Randall v Deputy Commissioner of Taxation* (2008) 174 FCR 441; *Re Sharpe; Ex parte Donnelly* (1998) 80 FCR 536; *Meriton Apartments Pty Ltd v Industrial Court of New South Wales* (2008) 171 FCR 380; *Combis v Harding* (2014) 12 ABC(NS) 398; *Gittins v Field* (2018) 16 ABC(NS) 176; *Davey v Dessco Pty Ltd & Anor (Bankruptcy)* [2017] VSC 744.

22 (1999) 152 FLR 135.

> "Section 116(2) of the Act does not expressly refer to property representing income previously derived by an undischarged bankrupt or, for that matter, to property acquired by an undischarged bankrupt using property representing income previously derived by an undischarged bankrupt below the actual income threshold amount applicable to that bankrupt. The question of construction is whether one can discern from the scheme of the Act such an exemption?
>
> The answer is no. As we have seen, ss 58 and 116 are concerned with property, not with the character of property as income or capital. The items of property able to be acquired and retained by an undischarged bankrupt are specified. If an item of property (for example, shares) is not listed in s 116(2) then it is caught by s 116(1) and is divisible amongst the bankrupt's creditors. What role then, if any, does Div 4B have to play in determining the property that is divisible amongst the bankrupt's creditors, and does it, as the appellant contends, conflict with ss 58(1)(b) and 116? Again, the answer is none."[23]

[29] The Court then considered the objects of, and definition of income in, Div 4B and went on to say

> "These provisions do not address what is, or what is not, the property of the bankrupt divisible amongst the bankrupt's creditors. The provisions are directed to different concepts. There is no conflict between Div 4B of Pt VI of the Act, and s 58(1)(b) in Div 4 of Pt IV and s 116 in Div 3 of Pt VI of the Act…"[24]

The shares vested in the trustee because although the bankrupt was entitled to retain income derived below the actual income threshold amount, Div 4B said nothing about how those funds might be spent. Sections 58 and 116 provided that after-acquired property vested in the bankrupt's trustee unless it were of a kind specified in s 116(2).

[30] The appellant in *Di Cioccio* submitted that there would be an anomaly if a credit balance in a bank account which represented income below the actual income threshold amount immediately vested in the trustee. In this context, reference was made in the judgment to *Foley v Hill*[25] (in which money held in a bank account was characterised as representing a loan by customer to banker). In response to the appellant's argument, the Court pointed to s 134(1)(ma) of the Act, which permitted a trustee to make allowance out of the estate to the bankrupt, as providing relief in that situation. The supervised account regime in Div 4B permitted the trustee to determine whether the bankrupt could make withdrawals; the relevant provision suggested that the section 134 "safety valve" operated regardless of whether the account balance was below the actual income threshold amount. And although a credit balance would constitute after-acquired property under s 116(1), that was not the end of the matter; if it were intended, for example, to be used to buy tools of trade it might fall within the s 116(2)(c) exception of being "property…for use… in earning income by personal exertion".

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23 (2015) 229 FCR 1 at [33] – [34].
24 At [37].
25 (1848) 2 HL Cas 28.

The application of Di Cioccio in this case

[31] The defendant relied on *Di Cioccio* to argue that even if the *Defender* were to be regarded as income, since it did not fall within any exemption in s 116(2), it remained property divisible amongst creditors within s 116(1) and vested in the trustee. The broad statement in *Di Cioccio* that ss 58 and 116 were not concerned with whether property was income or capital, and that any property not within s 116(2) was caught by s 116(1), would seem to support that argument. Yet the decision does not seem to have been treated in case law or commentary as authority for the proposition that after-acquired income not subject to a s 116(2) exception is property divisible among creditors.

[32] The editors of the authoritative bankruptcy work, *McDonald, Henry and Meek Australian Bankruptcy Law & Practice*,[26] do not cite *Di Cioccio* as authority for anything beyond the proposition that property acquired using after-acquired income, whether below the actual income threshold amount in Div 4B or not, constitutes property divisible amongst creditors, unless it falls within a s 116(2) exception.[27] Consistently with that view, the Victorian Full Court in *Jakimowicz v Jacks,*[28] considering equitable rights acquired by a bankrupt with protected money, distinguished *Di Cioccio* because, the Court said, in the latter case the income used to buy the shares was not within any of the exemptions in s 116(2), and as the income was not protected, the shares it was used to buy were not protected either. Nothing was said (or needed to be said) about any wider effect of the case.

[33] More directly relevant is the decision of J Forrest J in *Davey v Dessco Pty Ltd & Anor*.[29] The case concerned the bankrupt's right to sue for fees for legal services he had rendered. His Honour does not seem to have regarded *Di Cioccio* as deciding that income could be s 116(1) property; instead he concluded that because a bankrupt was entitled to retain his income, he equally retained his right of action for income earned during the bankruptcy. *Di Cioccio* was mentioned in footnotes only as authority for the proposition that the right to retain income was subject to the Div 4B contribution regime. [30]

[34] On the other hand, in *Gittins v Field*, [31] Charlesworth J, in the Federal Court, agreed with counsel that the apparent width of what was said in *Di Cioccio* presented some difficulties in applying *Re Gillies*. The bankrupt in *Gittins* sought to rely on the reasoning in *Di Cioccio* to argue that s 116 rather than Div 4B determined the status of monthly payments which were benefits under income protection insurance. Those benefits met the statutory descriptions of both property and income. The bankrupt argued that because the benefits fell within the exemption in 116(2)(g) (as compensation for personal injury) they were not property divisible amongst his creditors, and s 116(2) was to be given primacy over Div 4B.

[35] Charlesworth J noted that s 116 was expressed to be subject to the Act, and the Div 4B regime was close to a code. The proposition in *Di Cioccio* that amounts

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26 Thomson Reuters 6th Edition Eds PP McQuade and MGR Gronow.
27 See for example the discussion at [139L.0.25].
28 [2016] VSCA 42.
29 [2017] VSC 744.
30 At [32].
31 (2018) 16 ABC(NS) 176.

representing income standing to a bankrupt's credit in a bank account would vest in the trustee would leave little work for the income contribution scheme and appeared, her Honour said, to entail

> "…an unexplained departure from the historical position that the income of a bankrupt does not vest in the trustee".[32]

The relevant part of the reasoning in *Di Cioccio* was properly to be regarded as *obiter*, because the trustee's claim in that case was limited to assets acquired with income. Her Honour concluded that the benefits were income as defined in s 139L and were not divisible amongst the bankrupt's creditors; there was no occasion, therefore, to have regard to s 116(2).

[36] I agree with Charlesworth J that *Di Cioccio* presents difficulties for the application of *Re Gillies*. The statement that Div 4B plays no part in the determination of what property is divisible among creditors under s 116 seems on its face a rejection of the reasoning in *Re Gillies*, that the Division's scheme was inconsistent with the application of s 116 to income. The rejection in *Di Cioccio* of any distinction between income and capital for the purposes of ss 58 and 116, combined with the statement that any property not within s 116(2) is caught by s 116(1), would also seem to suggest the application of s 116(1) to after-acquired income, at odds with French J's conclusion. Yet one would expect that if some major departure from the reasoning and result in *Re Gillies* were intended, that would have been said, given the volume of judicial approval of the case over the years.

[37] The Court's view in *Di Cioccio* that, although a bankrupt was entitled to retain income derived below the actual income threshold amount, such income as represented by a credit in a bank account was after-acquired property also seems, at first blush, at odds with the conclusion in *Re Gillies* that accumulated after-acquired income did not vest in the trustee. However, there is nothing in *Re Gillies* to indicate in what form the funds under consideration there were held. Although there was in *Di Cioccio* no explicit statement to this effect, I infer from the reference to *Foley v Hill* that the Court proceeded on the basis that an account credit representing income would be after-acquired property in the form of a chose in action acquired with that income. At a time when most remuneration is received by way of bank deposit, and few people would hold their income, however received, in hard currency, that approach would seem to have significant implications for the conventional approach that a bankrupt's income and rights in relation to it are protected; and as Charlesworth J observed in *Gittins*, it would leave little work for Div 4B. But if my analysis is correct, the court in *Di Cioccio* did not in this part of its judgment say that the income itself was property divisible amongst creditors.

[38] There is obiter of the Court of Appeal of this State in *Geia v Palm Island Aboriginal Council*[33] as to the correctness of French J's conclusion in *Re Gillies* that income did not vest in the trustee.[34] I propose to adhere to the view, widely accepted in the cases, that a bankrupt is entitled to retain his or her income, subject to the obligation to contribute. I would not accept the defendant's submission that *Di Cioccio* has the

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32 At [59].
33 (1999) 152 FLR 135.
34 At 137.

effect of dooming the plaintiff's action to failure, whether the *Defender* is after-acquired income or not.

The ship as after-acquired income or property

[39] However, I do not consider that the plaintiff has any real prospect of establishing that the ship was after-acquired income governed by Div 4B.

[40] I can quickly dispose of a number of the plaintiff's proposed characterisations of his possession of the ship, because they could not on any view be consistent with receipt of after-acquired income. If the ship were held by him as security or under a bailment, his rights were limited and conditional, and it could not be regarded as income in his hands. If under the contract he had acquired no more than a right to possession of the ship for the purposes of salvage, again he had only a transient entitlement inconsistent with its being received by him as income. The ship itself could not be characterised as a profit or gain, although conceivably a gain might be made from its employment or realisation. (It does not seem, however, to have been the plaintiff's intention to use or sell it for profit.)

[41] Putting to one side those suggestions of some lesser right, I turn to consider the case on the basis that there was a transfer of ownership. For that purpose, I assume a genuine and effective transaction, disregarding for present purposes the complication of Mr Dick's earlier transfer to his son. The most obvious difficulty standing in the way of the plaintiff's establishing that the transfer of ownership represented remuneration is the sheer implausibility of a ship's being regarded as income within that term's "ordinary meaning", for the purposes of Div 4B.

[42] The reference in s 139ZIHA to "non-monetary income" does not assist greatly. The expanded definition of income in s 139L extends to benefits under the *Fringe Benefits Tax Assessment Act* which are not necessarily monetary in nature, but they do not include capital assets. And even accepting that chattels might in some circumstances be received as income, a ship is a very different proposition. Division 4B's object of requiring payment of contributions from income does not sit well with the notion of the Division's extending to income in the form of large illiquid capital assets. As the Full Court of the Federal Court noted in *Weissova v The Official Trustee in Bankruptcy,*[35] in considering whether the transfer of an interest in real property constituted receipt of income for the purposes of s 131, as it stood prior to repeal, the difficulty which would arise should a contribution order be sought in respect of the property

> "…serve[d] only to reinforce the difficulty in seeking to characterise the vesting of the property…as a receipt of income…"[36]

The same may be said here. I do not consider that the transfer of the ship could reasonably be characterised as the receipt of income within the "ordinary meaning" of the term "income".

[43] Secondly, the evidence on which the plaintiff relies does not support, and indeed runs counter to, his bald assertion in the Reply and his affidavit that he received the

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35 (1986) 12 FCR 106.

36 At 112.

ship as income. The transaction proceeded in a manner appropriate to a sale, not a payment of income. As the defendant points out, the facts that there was monetary consideration for the transfer (which was not expressed to include remuneration) and that it was recorded in the form of a bill of sale between seller and buyer are strongly against the plaintiff's argument. As the defendant also submits, the fact that this was a single transaction is atypical of income receipt; although the want of periodicity and recurrence is not necessarily decisive for the purposes of s 139L: *Re Hawkins; Ex parte Worrell*.[37]

[44] Thirdly, the very variety of explanations the plaintiff has offered in pleadings, affidavits and submissions for what the transaction represented suggests some artificiality in the most advantageous characterisation for it, as remuneration for the salvage work. But the notion of transferring the ownership of property as remuneration for work to be done on it post-transfer makes very little sense. While it is conceivable that a salvor might receive part of the salvage goods as payment for the salvage of a greater whole, here, the entire subject matter of the salvage, the *Defender*, was transferred. Having transferred the ship, Mr Dick could expect no benefit from the contemplated work, other than that he was no longer liable to do it.

[45] In fact, the offer Mr Dick said that he accepted was that in exchange for the ship, the plaintiff would, in his name and through his business, comply with the removal notice. In oral submissions the plaintiff's counsel described the consideration for the contract as Mr Dick's release from his obligations to the defendant, which had given him the notice. That is consistent with the plaintiff's description in his affidavit of terms commonly imposed, and the arrangement alleged in particulars, by which the salvor bore the cost of the salvage in return for receiving title to the vessel. The effect of the evidence is that the plaintiff took the *Defender* off Mr Dick's hands in exchange for the latter's parting with ownership of the ship, and the work to be done thereafter was not to be done for Mr Dick.

[46] The plaintiff's assertions that he received the ship as income are at odds with the documentary evidence, the practical effect of the transaction, Mr Dick's account of it, and the plaintiff's own explanations of it. The overwhelming conclusion is that the *Defender* was not transferred to the plaintiff as remuneration for the salvage work that he was going to do, but pursuant to a transaction by which, for a nominal monetary consideration, he received a capital asset, the ship, assuming its attendant liabilities in the form of the obligation to remove it and the financial burden of doing so. On that basis, the *Defender* on its transfer to the plaintiff vested as after-acquired property in the trustee, who preferred to disclaim the transaction rather than assume the obligation of removal. Whether the disclaimer was effective does not matter.

[47] Because I do not consider that the ship can reasonably be characterised as income according to that term's ordinary meaning for the purposes of s 139L and because the plaintiff has little prospect of establishing that he did receive it as income, I conclude that he has no real prospect of succeeding in his action, and there is no need for a trial of it. His cross-application for the striking out of the defence must, correspondingly, be dismissed. The defendant should have judgment.

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37 (1996) 71 FCR 371 at 377.

[48] The orders are:

1. Judgment in the action is given for the defendant
2. The plaintiff's application is dismissed

I will hear the parties as to costs.