SUPREME COURT OF QUEENSLAND

CITATION:	*Southern Cross Mine Management PL v Ensham Resources & Ors* [2006] QCA 531
PARTIES:	**SOUTHERN CROSS MINE MANAGEMENT PTY LTD** ACN 082 767 548 (plaintiff) **v** **ENSHAM RESOURCES PTY LTD** ACN 011 048 678 (first defendant/respondent) **BLIGH COAL LIMITED** ACN 010 186 393 (second defendant) **IDEMITSU QUEENSLAND PTY LTD** ACN 010 236 272 (third defendant) **EPDC (AUSTRALIA) PTY LTD** ACN 002 307 682 (fourth defendant) **L.G. INTERNATIONAL (AUSTRALIA) PTY LTD** ACN 002 806 831 (fifth defendant) **KENNETH JOHN FOOTS** (first defendant added by counterclaim/appellant) **FOOTS PTY LTD** ACN 010 195 061 (second defendant added by counterclaim) **LITTLE DIGGER MINING LIMITED** ACN 096 110 717 (fourth defendant added by counterclaim) **NORMA AGNES FOOTS** (fifth defendant added by counterclaim) **KENNETH JOSEPH HILL** (third party to counterclaim) **KENNETH JOHN FOOTS** (fourth party to counterclaim)
FILE NO/S:	Appeal No 1768 of 2006 SC No 9548 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 December 2006

DELIVERED AT: Brisbane

HEARING DATE: 9 August 2006

JUDGES: Jerrard and Holmes JJA and Mullins J
Separate reasons for judgment of each member of the Court, Jerrard and Holmes JJA concurring as to the orders made, Mullins J dissenting

ORDER: **1. Appeal dismissed**
2. Leave granted to parties to make submissions on costs

CATCHWORDS: BANKRUPTCY – ADMINISTRATION OF PROPERTY – PROOF OF DEBTS – WHAT DEBTS PROVABLE – COSTS – trial judge gave judgment in favour of respondent against appellant – trial judge made further order for damages for $2,460,000 against appellant – appellant became bankrupt on presentation of own petition – judge heard submissions on costs as to whether leave should be granted to apply for a costs order under r 72(1) Uniform Civil Procedure Rules 1999 (Qld) ("UCPR"), which forbids a party from taking any further step in the proceedings against another party who becomes bankrupt, without the leave of the court – judge held an application for costs was either a legal proceeding or a fresh step in a legal proceeding and that leave of the Federal Court would be required for the application if it were "in respect of a provable debt" under s 58(3) *Bankruptcy Act 1966* (Cth) – judge held an order for costs made after the bankruptcy would not be provable in it and therefore s 58(3) did not apply and gave leave pursuant to UCPR r 72 – whether an order for costs made against the appellant, after the bankruptcy, would be a provable debt in bankruptcy because the judgment in the action in respect of which costs were incurred was given before bankruptcy and the judgment debt was provable

Bankruptcy Act 1966 (Cth), s 82(1)
Bankruptcy Act 1861 (UK)
Bankruptcy Act 1869 (UK) (32 & 33 Vict c 71), s 31
Common Law Procedure Act 1852 (UK), s 28
Common Law Procedure Act 1853 (UK)
Supreme Court of Judicature Act 1873 (UK)
Supreme Court of Judicature Act 1875 (UK)

Brind v Bacon (1813) 5 Taunt 183, considered
Community Development Pty Ltd v Engwirda Construction Co (1969) 120 CLR 455, considered
Coventry v Charter Pacific Corp Ltd (2005) 80 ALJR 132; [2005] HCA 67, considered
Holtby v Hodgson (1889) 24 QBD 103, considered
Re Duffield; Ex parte Peacock (1873) LR 8 Ch App 682, considered
Emma Silver Mining Company v Grant (1880) 17 Ch D 122, considered

Fraser Property Development Pty Ltd v Sommerfeld (*No 2)* [2005] 2 Qd R 404; [2005] QCA 242, considered
Glenister v Rowe [2000] Ch 76, considered
Green v Schneller (2001) 189 ALR 464; [2001] NSWSC 897, considered
In Re Newman; Ex parte Brooke (1876) 3 Ch D 494, considered
Melnik v Melnik (2005) 144 FCR 141; (2005) 221 ALR 577, considered
Re A Debtor, No. 68 of 1911 [1911] 2 KB 652, considered
Re Bluck; Ex parte Bluck (1887) 56 LJ QB 607, considered
Re British Gold Fields of West Africa [1899] 2 Ch 7, considered
Re The Onwood Building Society [1891] 2 QB 463, considered
Re Pitchford [1924] 2 Ch 260, considered
Re Pickering; Ex parte Thornwaite (1854) 5 De GM & G 367; 43 ER 912, considered
Re Weller; Ex parte Weller (1867) 17 LT 125, considered
Re William Hockley Ltd [1962] 1 WLR 555, considered
Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd & Ors [2006] QSC 007; SC No 9548 of 2002, 3 February 2006
Vint v Hudspith (1885) 30 Ch D 24, considered

COUNSEL: P J Dunning SC for the appellant
W Sofronoff QC SG, with A M Pomerenke, for the respondent

SOLICITORS: Conroy & Associates for the appellant
Allens Arthur Robinson for the respondent

[1] **JERRARD JA**: In this appeal Mr Foots argues that an order for indemnity costs, made against him after he became bankrupt, and made in proceedings in which judgment was given against him before he became bankrupt, is a provable debt in his bankruptcy. Accordingly, Mr Foots argues, by reason of s 58(3) of the *Bankruptcy Act 1966* (Cth) ("the Act") it was not competent for Ensham Resources, the party who obtained judgment against Mr Foots, either to commence any legal proceeding in respect of that provable debt – the costs – or to take any fresh steps in such a proceeding, without the leave of the Federal Court or the Federal Magistrates Court. Therefore, this Court should set aside the order for costs that was made against him without leave of either of those courts.

The facts

[2] The relevant facts can be stated shortly. On 26 August 2005 a learned judge in the Trial Division of this Court gave judgment in favour of Ensham Resources (and other parties not relevant to this appeal) against Mr Foots (and likewise other parties irrelevant to this appeal), and pronounced some orders. On 1 September 2005 the judge made further orders, giving judgment for Ensham against Mr Foots for damages in the sum of $2,460,000; Ensham was completely successful in the action and Mr Foots completely unsuccessful. On 15 September 2005 Mr Foots became bankrupt upon the presentation of his own petition, and on 22 November 2005 the

judge heard submissions as to costs, and as to whether the judge should grant leave to Ensham Resources pursuant to r 72(1) of the Uniform Civil Procedure Rules 1999 (Qld) ("UCPR") to apply for a costs order against Mr Foots. UCPR r 72(1) forbids a party to a proceeding from taking any further step in the proceeding against another party who becomes bankrupt, without the leave of the court; it is a quite separate requirement from s 58(3) of the Act. The judge considered Ensham Resource's application for a costs order was a further step in the proceeding.

[3] The learned judge also heard submissions on s 58(3) of the Act, which provides that a creditor may not, without the leave of the court (Federal Court or Federal Magistrates Court) commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding. The judge considered that the application for costs was either a legal proceeding or a fresh step in a proceeding, and that leave of the Federal Court would be required for the application if it were "in respect of a provable debt".

Argument on the Act

[4] The judge put the issue this way:

> "The issue for determination is whether an order for costs made against Mr Foots would be a debt or liability, future or contingent, to which he was subject at the date of the bankruptcy, or to which he may later become subject by reason of an obligation incurred prior to the bankruptcy." [1]

The learned judge held that it was established by authority that an order for costs made after the bankruptcy would not be provable in it, and the judge cited authority. For that reason the judge held s 58(3) inapplicable, and gave leave pursuant to UCPR r 72. On this appeal Mr Dunning SC, senior counsel for Mr Foots, argues that the judge erred in not following what the judge had described as a *dictum* of Lindley MR in *Re British Gold Fields of West Africa* [1899] 2 Ch 7. That dictum, if applied, would have the effect that an order for costs made against Mr Foots after the bankruptcy would be provable in it, because judgment in the action in respect of which the costs were incurred was given before bankruptcy, and the judgment debt was provable. Both parties to the appeal claimed support from the judgment of McPherson JA in *Fraser Property Development Pty Ltd v Sommerfeld* (*No 2)* [2005] 2 Qd R 404.[2]

[5] The manner in which the learned trial judge posed the issue for determination reflected the terms of s 82(1) of the *Bankruptcy Act*. It relevantly provides that:

> "...all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy."

In *Coventry v Charter Pacific Corp Ltd* (2005) 80 ALJR 132,[3] the joint judgment of Gleeson CJ and Gummow, Hayne and Callinan JJ wrote that s 82(1) identified the debts and liabilities that are provable in bankruptcy in terms that are very wide, and

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1 *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd & Ors* [2006] QSC 007 at [22]; SC No 9548 of 2002, 3 February 2006.

2 [2005] QCA 242; Appeal No 10072 of 2004, 15 July 2005.

3 [2005] HCA 67.

that it was readily apparent that s 82 of the current federal *Bankruptcy Act* had its origin in s 31 of the *Bankruptcy Act 1869* (UK) (32 & 33 Vict c 71).[4] Their Honours quoted from s 31 of the 1869 UK Act and, as Mr Sofronoff QC for the respondent submitted on this appeal, the critical definition of provable debts is relevantly identical in the current Act and the 1869 UK Act. For that reason, as in the argument in *Coventry*, both parties placed significant weight on an examination of 19th century English decisions said to bear on the proper construction of s 82(1), as well as on more modern UK and Queensland decisions.

[6] Mr Dunning did not argue that a costs order simpliciter, or the risk of one, was a contingent liability as described in s 82(1), but submitted the costs order was – on authority – of an incidental nature to a provable debt, which in this matter was either or both of the judgment debt and the claim for damages in the proceeding; the costs order, being incidental or attached to the provable debt, was itself provable. For his part Mr Sofronoff submitted that the appellant was correct to concede that there was no contingent or other liability to pay costs before the costs order was made, and that that was the end of the case. There had been no present debt or liability when bankruptcy intervened, and s 82(1) contained no reference to incidental or attached or possible liability.

[7] That submission left open to Mr Foots the argument that the costs order made after his bankruptcy was a future liability to which, at the date of his bankruptcy, he might become subject by reason of an obligation – the judgment for $2.4 million – incurred before the date of the bankruptcy. But the structure of s 82(1) requires that that potential liability be "contingent", and Mr Sofronoff relied on the construction of "contingent" in *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455.

[8] In that case Engwirda Construction had petitioned as a creditor or contingent creditor of Community Development in an amount not less than $28,000, in respect of work done by Engwirda in the construction of a block of home units on land owned by Community Development. The contract price was $146,596.15 and Engwirda had been paid $129,064 as progress payments. A dispute had arisen as to whether Engwirda was entitled to an architect's final certificate, which the architect had declined to give, and Engwirda could have no further moneys owing under the contract unless it satisfied an arbitrator that it had done work to a value exceeding the payment it had received. The contract between them had a *Scott v Avery* clause making an award a condition of any obligation on the part of Community Development to pay. Engwirda said that extras had increased the price to $159,731.87, hence its claim for an amount of not less than $28,000.

[9] Kitto J, with whom Barwick CJ agreed, wrote that Engwirda was not a creditor in the sense of one to whom money was presently owing, because of the *Scott v Avery* clause, and so Engwirda's right to maintain the petition depended upon it being a contingent creditor. As to that, His Honour referred to the description Pennycuick J had given in *Re William Hockley Ltd* [1962] 1 WLR 555 of a contingent creditor as "a person towards whom, under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date".[5] Kitto J wrote:

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4 *Coventry v Charter Pacific Corp Ltd* (2005) 80 ALJR 132 at [27].

5 [1962] 1 WLR 555 at 558.

> "The importance of these words for present purposes lies in their insistence that there must be an existing obligation and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen. A building contract creates, as soon as it is entered into, an obligation upon the building owner to pay the contract price, either as a whole upon a future event or, more usually, by progress and final payments each of which is to be made on a future event. The event or events may not happen, but if and when one of them does happen the building owner, by force of the contractual obligation, must pay the builder a sum of money."[6]

His Honour continued:

> "So here, even if the work required by the contract has not yet been properly completed, the fact remains that the appellant is presently bound by the obligation of the contract to make the final payment if and when, according to a certificate of the architect or the award of an arbitrator, the time for payment has arrived. The respondent is therefore a contingent creditor of the appellant for the amount of that payment, whatever the amount may turn out to be."[7]

[10] Windeyer J agreed,[8] and also with the judgment of Owen J, who wrote:

> "In the present case the appellant was, at all material times, under a contractual obligation to pay to the respondent the amount, if any, which might be found by an arbitrator to be due to it under the building contract. Whether or not that obligation would ultimately result in the debt becoming payable by the appellant to the respondent was dependant upon a contingency, namely the making of the award in the respondent's favour by an arbitrator...In these circumstances I am of the opinion that the respondent was, at the date of the presentation of the petition, a contingent creditor of the appellant."[9]

[11] Mr Sofronoff stressed the description of an existing or contractual obligation in those judgments, out of which existing obligation a liability to pay a sum of money would arise on a future event that might or might not happen. He submitted that the language of s 82(1) was only apt to cover liabilities either presently existing or which might arise out of an existing obligation.

[12] Mr Dunning had eschewed, in his principal submission, the argument that the risk of an adverse costs order was a contingent liability which could satisfy the requirement of s 82(1).[10] However, in his reply he submitted that the prospect of a costs order might properly be characterised as a "contingent liability", that being in circumstances where the costs order made was incidental to a provable debt. Putting aside the historical support for the argument, which relies on the observations in *Re British Gold Fields of West Africa*, it depends for success on the conclusion that the costs order was a contingent liability at the date of Mr Foots'

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6 (1969) 120 CLR 455 at 459.
7 (1969) 120 CLR 455 at 459-460.
8 (1969) 120 CLR 455 at 460.
9 (1969) 120 CLR 455 at 461-462.
10 At transcript 47 and 53.

bankruptcy to which he might become subject "by reason of" an obligation incurred before the bankruptcy, namely an obligation to satisfy the (provable) judgment debt.

[13] On the facts it was very likely that a costs order would be made against Mr Foots, following the adverse judgment. The trial judge had made findings in August 2005, not challenged on this appeal, that Mr Foots' dealings with Ensham were thoroughly dishonest and that his evidence at the trial was untruthful, that substantially all of his evidence was a deliberate concoction, that he had continued his defence of Ensham's claims and prolonged the proceedings in wilful disregard of the known facts, that he should have known he had no chance of successfully defending the proceedings if the true facts were told, that he had concealed relevant facts and misrepresented others, and that had made a baseless allegation about the fact which was the central issue in the case. Apart from the possibility of a *Calderbank* offer,[11] or an earlier offer under the UCPR which bettered the judgment against Mr Foots, it was almost inevitable a costs order would be made against him on those findings.

[14] Nevertheless, the liability created by the costs order – and none existed until it was made – was one to which, at the date of Mr Foots' bankruptcy, he might become subject before his discharge "by reason of" the independent exercise of a discretionary judgment based on the result in the proceedings, the fact that there were proceedings, and on Mr Foots' conduct in those. It was not a liability to which he would potentially be subjected "by reason of" his obligation to pay $2.4 million to Ensham. That obligation had existed independently of the necessity for, and the fact of, proceedings to explain its existence to Mr Foots. I agree with the submission of Mr Sofronoff that the appellant accordingly offered no explanation as a matter of legal reasoning why a post-bankruptcy debt, which is incidental to, or attached to, or associated with, a pre-bankruptcy provable debt falls within any of the words of s 82.

19th century decisions

[15] In deference to the arguments of counsel, I shall refer to the extensive examination of case authority. In *Re Pickering; Ex parte Thornwaite* (1854) 5 De GM & G 367 [43 ER 912] one Thornthwaite brought an action against Pickering, which was referred to arbitration. The only question was whether there was a debt or no debt between the two traders and an award was made by the arbitrator in Thornthwaite's favour. Four days later Mr Pickering filed a declaration of insolvency and three days later judgment was signed, and costs taxed, for Mr Thornthwaite. Proof of the judgment sum and the costs of the award were admitted in the bankruptcy, and an appeal against that was dismissed. Knight Bruce LJ and Turner LJ respectively held that the award was a "good substratum of debt", and a "valid agreement for valuable consideration that the amount to be found due by the arbitrator should be the amount to be recovered in the action"; both their Lordships wrote that the award was more conclusive than a simple verdict would have been. Their reasoning was consistent with the approach taken in *Engwirda*.

[16] That decision was made when the *Bankruptcy Law Consolidation Act 1849* (UK) was current, as described in *Coventry v Charter Pacific Corp Ltd* at [25]. Mr Sofronoff referred to *Re Weller; Ex parte Weller* (1867) 17 LT 125, in which *Re Pickering* was distinguished. *Re Weller* was decided during the currency of the

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11 *Calderbank v Calderbank* [1976] Fam 93.

Bankruptcy Act 1861 (UK), and concerned an action in which a Mr Braun had sued Mr Weller, with whom he had then entered into an agreement that judgment would not be issued until 8 May 1866. On 1 May 1866 Mr Weller entered into a Deed of Composition assented to by his other creditors, but not Mr Braun, which was registered on 7 May. The next day Mr Braun signed judgment for his debt and costs. In a subsequent appeal in the Court of Appeal in Chancery, Turner LJ wrote that the costs "were in nowise due at the date of the execution of the deed, and the creditor could not have proved for them under a bankruptcy at that date"[12]; and that the case of *Ex parte Harding* had no bearing upon the present case because there the agreement was that whatever the arbitrator should award should be taken as the amount of the debt. Cairns LJ also wrote that the costs could not have been provable under a bankruptcy.

[17] That was a case where both the judgment and the costs were post bankruptcy. Mr Sofronoff relied on *Re Weller*, not for the result, but for what he described as a consistent method of reasoning, since in that matter there was no dispute that the primary debt was provable, it having arisen pre-composition, but the costs were not, having arisen post composition.

[18] *Re Duffield; Ex parte Peacock* (1873) LR 8 Ch App 682 was the first of the decisions under the *Bankruptcy Act 1869* (UK) to which the parties referred. In that case an action had been brought by the debtor for breach of contract and a verdict found for the defendants on 23 January 1873, under which they were entitled to their costs. On 27 January, before any further proceedings were taken, the debtor filed a petition for liquidation, and on 3 April the successful defendants signed a judgment and taxed their costs. They then levied an execution upon the debtor's goods for the full amount of the taxed costs, and were restrained by injunction granted by the registrar from proceeding further. The creditors appealed and succeeded on a ground not relevant to this judgment, namely that the debtor had not tendered to those creditors the amount of the composition, and accordingly they were entitled to execute for their taxed costs. The reasoning of the judges was that those taxed costs were otherwise a provable debt. G Mellish LJ wrote:

> "I am of opinion that when a verdict has been obtained, as here, before the liquidation proceedings are commenced, so that nothing remains except for the costs to be taxed and the judgment to be signed, there is either a debt or 'a liability to which the debtor or subject, incurred previously to the date of order of adjudication,' and that it is a claim provable in the bankruptcy;" [13]

A little later he added:

> "There was nothing to prevent [the creditor] from at once signing judgment and taxing his costs."[14]

[19] Regarding *Ex parte Peacock*, Mr Sofronoff contended it should be understood as the case where there had been an order for the payment of the costs, albeit not taxed, before the petition was filed. The recital of facts in the report does record that the trial took place on 23 January 1873 "when a verdict was found for the Defendants, under which they were entitled to their costs of the action." Accepting that, the

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12 (1867) 17 LT 125 at 126.
13 (1873) 8 LR Ch App 682 at 686.
14 (1873) 8 LR Ch App 682 at 686.

remarks by James LJ in that case may still assist Mr Foots. He wrote, of s 31 of the 1869 Act from which s 82(1) is copied, that:

> "I read it thus: 'All debts and liabilities, present and future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication.' That is the completion of that clause. Then commences another: 'or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts proveable in bankruptcy.' Any liabilities actually existing are provable under the first part, and liabilities coming into existence subsequently, by reason of a previous obligation, they are also proveable." [15]

That construction would let Mr Dunning escape the need to point to a contingent liability, and the issue would only be whether the almost unavoidable liability for costs that he faced was "by reason of" the obligations imposed by the judgment or the claim on which it was based. Even on that narrower view I am against him, for the reasons given earlier.

[20] This Court was also referred to *Re Newman; Ex parte Brooke* (1876) 3 Ch D 494. In that case Charlotte Brooke had sued William Newman for damages for injuries sustained at the hands of one of his servants, and got a verdict on 14 January 1876 for £50. On 26 April judgment was ordered for her with costs, and on 6 May Mr Newman filed a liquidation petition and a receiver was appointed. On 17 June Ms Brooke signed judgment for the £50 and for the taxed costs. On 3 July the Registrar perpetually restrained her from proceeding further upon her judgment. She appealed, successfully.

[21] James LJ wrote that:

> "Certainly, under the old law damages in an action of tort were not a provable debt in bankruptcy until judgment had been signed. The old law at that remains, in my opinion, now exactly as it was. Unless judgment has been signed damages for a tort are not included in the second clause of the section commencing with the words 'save as aforesaid;' and when judgment for such damages is signed after the adjudication the amount of the judgment is not a debt or liability to which the bankrupt is subject at the date of the adjudication, or to which he has become subject afterwards by reason of any obligation incurred previously to the adjudication. The *ratio decidendi* of *Ex parte Peacock* was that the successful Defendant's costs of an action founded on contract, though not taxed till after adjudication, were within the second clause of sect. 31, and that case is no authority for the present, to which the first clause of the section clearly applies." [16]

[22] The reference to the second clause of s 31 of the 1869 Act is to the precursor of s 82(1). The manner in which James LJ distinguished the decision in *Ex parte Peacock* helps Mr Foots, because of the implication that it was because in that earlier case a contract was the cause of action in which the verdict was given before

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15 (1873) 8 LR Ch App 682 at 689.

16 (1876) 3 Ch D 494 at 496-7.

the petition and the judgment signed after, and the costs taxed after, that the taxed costs were provable in bankruptcy. Mellish LJ agreed with James LJ, writing that

> "It was clear law before the present Bankruptcy Act that there could be no proof for damages in action of tort until judgment had been signed, and I am of the opinion that the first clause of sect. 31 was intended to preserve the law in this respect as it was. And the costs, being a mere addition or appurtenance to the damages, must follow the same rule as that in which they are attached. In *Ex parte Peacock* the costs were those of a successful Defendant, and were not attached to anything else."[17]

[23] Mr Sofronoff submitted that those latter words did not support any gloss on the words of the Act, and that the decision was in accordance with the orthodox application of principle, namely that before there could be a provable debt there must be a liability. In the case of a claim for unliquidated damages for personal injuries, there was none until judgment, and the same for costs. That is true, subject to the reasoning of Lord James distinguishing *Ex parte Peacock*.

[24] In *Ex parte Peacock* the verdict had been obtained before liquidation, and the judgment signed and the costs taxed afterwards. The action in *Ex parte Peacock* was for breach of contract; in *Re Newman* it was in tort. In each the judgment was signed after the petition and in *Re Newman* the verdict and the order for judgment did not make a provable debt for the judgment sum or the costs; but in *Ex parte Peacock* the costs were a provable debt.[18] Since in both cases the verdict was obtained with judgment not signed before bankruptcy, the difference in outcome lies in the nature of the claim originally presented, unless Mr Sofronoff is correct on the point that the report of *Ex parte Peacock* implies that an order for costs *was* made before the bankruptcy.

[25] In *Vint v Hudspith* (1885) 30 Ch D 24 the plaintiff Mr Vint had filed a petition for his bankruptcy on 13 April 1882, from which he was discharged on 27 May 1882. Subsequently an action, which he had begun on 26 April 1880, was heard and dismissed on 27 April 1883, with costs. He appealed, arguing that his discharge relieved him from all liability, which he was under in respect of the costs of the action, contending that s 31 of the 1869 Act made the claim for costs a debt provable in his earlier bankruptcy, even though the hearing occurred after his discharge. Cotton LJ held the order for costs was proper, and could be recovered out of any property of Mr Vint which did not pass to the latter's trustee in bankruptcy. Lindley LJ doubted very much whether the possibility of having to pay costs was a provable debt, although remarking "[i]t may in some cases be a 'contingent liability'."[19] Mr Dunning relied on that observation by Lindley LJ, arguing that His Lordship returned to it in his judgment in *Re British Gold Fields of West Africa.*

[26] Mr Sofronoff referred to *In Re Bluck; Ex parte Bluck* (1887) 56 LJ QB 607, in which a plaintiff had filed a petition for bankruptcy during the hearing of an action, which continued in his name after the receiving order was made, and judgment with costs was entered for the defendant. They attempted to prove for the amount of the

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17 (1876) 3 Ch D 494 at 497.
18 (1873) 8 LR Ch App 682 at 686.
19 (1885) 30 Ch D 24 at 26 and 27.

costs. Cave J expunged the proof, remarking that he could not find there was any obligation incurred before the date of the receiving order:

[27] Cave J wrote that:

> "For it cannot be said that the mere bringing of an action puts the plaintiff under an obligation to pay costs if the action goes against him; that can only arise on judgment being given, and then, if the judgment is that he pay the costs, he becomes the debtor for the amount of the costs, whether ascertained then or afterwards, but he was under no obligation before that."[20]

He distinguished *Ex parte Peacock* as a case where the verdict was given before the petition. Mr Sofronoff contends that *In Re Bluck* was an example of the application of the principle that until an order is made to pay costs, there is no liability.

[28] In *Emma Silver Mining Company v Grant* (1880) 17 Ch D 122, in which judgment had earlier been obtained against a Mr Grant ordering that he account to a company for a secret commission received as its promoter,[21] the plaintiff company moved for judgment and costs of the trial. In the interval the defendant had presented a petition on 7 March 1879 for liquidation of his affairs, and been discharged on 19 April 1879. The motion for judgment and costs was heard on 29 July 1880, and the argument centred on the first paragraph of s 31 of the 1869 *Bankruptcy Act*, the precursor to s 82(2) of the *Bankruptcy Act 1966 (Cth)*, considered in depth in *Coventry v Charter Pacific Corporation Ltd.* Jessel MR was satisfied that the sum for which the agent had to account was not unliquidated damages, and in any event did arise from a contract, namely the contract of agency or promotion, and that the company had liberty to prove in the liquidation, apparently for the amount due to the company, and the costs. That result was consistent with the outcome in *Ex parte Peacock*, but the recorded argument and the reasons for judgment in *Emma Silver Mining Company v Grant* make no reference to the terms of the second paragraph of s 31 of 1869 Act, the equivalent of s 82(1) of the Act.

[29] Then came *Re British Gold Fields of West Africa*. In that case a number of share holders in a limited company had applied under s 35 of the *Companies Act 1862* (UK) for rectification of the register and repayment of the sums paid for their shares, on the grounds of misrepresentation in the prospectus. After two such applications had been heard and succeeded, the company was ordered to be wound-up. The other applicants took a summons in the winding-up for leave to proceed with their application, or for liberty to prove for the amounts sought to be recovered, and for their costs. The official receiver did not contest their right to be removed from the register and to prove for the amount paid for their shares, and an order for rectification was made accordingly, but the receiver refused to allow those applicants to prove for their costs. The receiver contended there could be no liability for costs until an order for payment was made, and that the costs had been incurred by the company since the beginning of the winding-up.

[30] The judgment of the Court of Appeal (Lindley MR and Rigby and Collins LJJ) upheld the decision that the taxed costs were a provable debt. In a short, reserved,

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20 (1887) 56 LJ QB 607.

21 The proceedings in which that order was made are reported in *Emma Silver Mining Company v Grant* (1879) 11 Ch D 918.

judgment they wrote that decisions on (what was by now s 37 of the *Bankruptcy Act 1883* (UK)) had established a number of reasonable and consistent rules. The first was described as follows:

> "If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise." [22]

[31] I interpolate that Mr Sofronoff submitted that no earlier judgment supported that general proposition. The judgment went on:

> "If, therefore, what is recovered is unliquidated damages 'arising otherwise than by reason of a contract, promise, or breach of trust', that sum is not recoverable unless judgment, or at least the verdict for it, has been obtained before adjudication, or now the receiving order; and if the sum recovered is not provable, neither are the costs of recovering it: *In re Newman; Re Bluck.* On the other hand, if what is recovered is provable, so are the costs of recovering it: see *Emma Silver Mining Co v Grant*."[23]

[32] I again interpolate, that that paragraph refers to what became both s 82(1) and s 82(2) of the Act. The decision in *Re Newman* had required that the judgment (and costs order) be signed before bankruptcy, for the damages and costs in an action in tort to be a provable debt, but otherwise I observe with respect that *Re Newman* was authority for the proposition for which it was cited. It is not so clear that *Emma Silver Mining Co v Grant* was authority for the other, and wider proposition, that if what is recovered is provable, so too are the costs of recovering it, because that proposition was not discussed in the reasons for judgment in the case, although it must have been assumed. That proposition is the one which the learned trial judge in the present appeal could not accept as accurate, because the judge considered that it conflicted with the subsequent decisions of *Glenister v Rowe* [2000] Ch 76 and *Fraser Property Developments Pty Ltd v Sommerfeld (No 2).*[24]

[33] Continuing with the judgment in *British Gold Fields of West Africa*, the quotations so far describe the position of a defendant who became bankrupt before adjudication or final orders. Their Lordships then considered the position of a plaintiff to whom that occurred.

> "But if an unsuccessful action is brought by a man who becomes bankrupt, then, if he is ordered to pay the costs, or if a verdict is given against him before he becomes bankrupt, they are provable: *Ex parte Peacock.* On the other hand, if no verdict is given against him and no order is made for payment of costs until after he becomes bankrupt, they are not provable. In such a case there is no provable debt to which the costs are incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy; nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy. This was the case of *Vint v Hudspith.*" [25]

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22 [1899] 2 Ch 7 at 11.
23 [1899] 2 Ch 7 at 11.
24 [2002] 2 Qd R 404.
25 [1899] 2 Ch 7 at 11-12.

[34] That description generally accords with the result and the obiter in those two cases, and the judgment in *Re British Gold Fields of West Africa* thus provides a rationalisation of differing outcomes, dependent on whether the bankrupt was the unsuccessful plaintiff or unsuccessful defendant before judgment is given. In any event, in that case their Lordships then went on to hold that the register having been rectified, the sums paid by the applicants were clearly provable debts, and the "costs of rectifying the register are costs of obtaining an order without which the debt cannot be recovered or admitted to proof. The costs are therefore properly added to the debts provable."[26] That reasoning and conclusion does not actually depend at all on any observations quoted from the earlier part of the judgment.

The 20th century

[35] In *Re A Debtor, No. 68 of 1911* [1911] 2 KB 652, an order for a new trial had provided that the costs of the first trial should abide the event of the new trial. The plaintiff subsequently became bankrupt, but the bankruptcy was annulled before the new trial took place. The new trial resulted in a judgment for the defendant, and the plaintiff was ordered to pay the costs of the first trial, which had been taxed and the costs of the second, to be taxed. Regarding the costs of the first trial, the plaintiff argued that those related to a debt provable in his subsequent bankruptcy. Cozens-Hardy MR wrote that the distinction between what was and was not a provable debt was clearly stated by Lindley MR in both *Vint v Hudspith* and in *Re British Gold Fields of West Africa*, citing from the latter judgment the passages describing the position of an unsuccessful, bankrupted, plaintiff. Cozens-Hardy MR went on "I ask myself, at the date of the bankruptcy what order was there that the bankrupt should pay these costs? I find none."[27]

[36] He added that the order after the first appeal, that the costs of the first trial abide the event of the new trial, was not an order for payment of costs by the subsequently bankrupted plaintiff, and was not a judgment debt against him. Fletcher Moulton LJ agreed, and Buckley LJ added:

> "Every person who has the misfortune to be a party to pending litigation stands in a position in which he may be ordered to pay costs. Whether that is a possibility or a contingent liability I need not determine."[28]

Assuming it was, His Lordship went on:

> "[t]he question then is whether the debtor was subject to [that] contingent liability 'by reason of any obligation incurred before the date of the receiving order.'"[29]

and was unable to so find.

[37] His Lordship then agreed with Cave J in *Re Bluck*, that "[i]f a man brings an action he does not place on himself an obligation to pay the costs, that obligation arises when judgment is given against him."[30] That observation gives support to Mr Dunning, but the learned judge then went on:

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26 [1899] 2 Ch 12.
27 [1911] 2 KB 652 at 655.
28 [1911] 2 KB 652 at 657.
29 [1911] 2 KB 652 at 657.
30 [1911] 2 KB 652 at 657.

> "An obligation may arise in any one of various ways. It may arise by contract. It will arise if a judge makes an order against him. But in the latter case until judgment there is no obligation."[31]

That passage does not assist Mr Dunning.

[38] The respondent also relies on *In Re Pitchford* [1924] 2 Ch 260. In that case the plaintiff had sued, but a receiving order was made against the defendant before the hearing. The action was stayed, with liberty to restore, and the plaintiff lodged a proof in the defendant's bankruptcy. A County Court Judge reversed a receiver's decision rejecting that proof, and admitted it, and the plaintiff then lodged a further proof for his untaxed costs of the action, incurred before the date of the receiving order. The receiver rejected it, the plaintiff appealed, and the County Court Judge once again reversed the decision, and ordered that the proof of those costs be admitted, subject to taxation. On appeal Astbury J, referring to the decision in *Re British Gold Fields of West Africa*, said of the much quoted passage in that judgment that read:

> "If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of the sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise." [32] –

- that it meant costs for which the successful litigant had obtained an order.[33] He went on to hold that in the case then under appeal, there was no order of any sort or kind dealing either with the claim or with the costs of the action, and that it was "perfectly hopeless" to contend that the plaintiff could now ask that he be allowed to prove for a sum of costs in respect of which he had obtained no judgment and in respect of which there could be no taxation.[34]

[39] Lawrence J agreed with Astbury J's construction of the quoted passage in *Re British Gold Fields*, writing that the reference to a successful action must mean that judgment was pronounced in the plaintiff's favour for the sum claimed and for the costs of the action. He added that in *Re British Gold Fields of West Africa*, it was decided that those applicants should be allowed to prove for the costs incurred by them in obtaining an order in the winding-up for the rectification of the register of the company as, without such an order, their proofs could not have been admitted; consequently the costs were necessarily incurred in removing an impediment to the admission of their proofs. He added that no difficulty arose in that case in determining the right to costs or in ascertaining the amount of the costs, as both the application for rectification and the application to be admitted to proof were made in the winding-up, and the same court had full jurisdiction to deal with the whole matter. He then added the view that, unless and until an order for payment of costs was made, there could be no liability giving rise to a provable debt.[35]

[40] That reasoning in *Re Pitchford* certainly limited the effect of *Re British Gold Fields.* In *Glenister v Rowe* [2000] Ch 76, simplifying the facts, Mr Glenister was made bankrupt in June 1992, some seven years after Mrs Rowe began proceedings against

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31 [1911] 2 KB 652 at 657.
32 [1924] 2 Ch 260 at 266.
33 [1924] 2 Ch 260 at 266.
34 [1924] 2 Ch 260 at 268.
35 [1924] 2 Ch 260 at 270.

him, and at a time when those proceedings had been struck out, but after Mrs Rowe had lodged an appeal against that striking out. Mr Glenister was discharged from his bankruptcy before her appeal was allowed, and the Court of Appeal ordered Mr Glenister pay her costs up to June 1992. She made a statutory demand for the taxed costs, with interest, and he applied to set it aside.

[41] The Court of Appeal held that the crucial question was whether those costs were "a contingent liability" of his at the date of the bankruptcy in June 1992, a little over three years before the costs order was made. Section 382 of the *Insolvency Act 1986* was in similar terms to s 82(1) of the Act. Mummery LJ quoted the passages from *Re British Gold Fields of West Africa* describing the position of a bankrupted defendant, from in *Re A Debtor*, and from in *Re Pitchford*, and concluded that the claim for costs by Mrs Rowe was not a contingent liability of Mr Glenister at the date of the bankruptcy. Accordingly, Mrs Rowe could pursue her statutory demand. The other Lord Justices agreed with Mummery LJ, whose reasons[36] were that:

- Costs of legal proceedings are in the discretion of the court. Until an order for payment of costs is made there is no obligation or liability to pay them and no right to recover them.

- Once legal proceedings have been commenced there is always the possibility or a risk that an order for costs may be made against the party, and even in some circumstances against a non-party.

- The fact that an order for costs is a 'contingency' which may or may not happen at some stage in a proceedings does not make a claim that the court should exercise its discretion to make that order a contingent liability of the person against whom the order may ultimately be made. His Lordship summarised his reasons with the statement that there is no liability, contingent or otherwise, in the absence of a court order.

[42] Mr Dunning made the point that *Glenister v Rowe* was not a case in which the costs were claimed in respect of proof of a provable debt. That is so, but nothing in the reasons for judgment suggests that the result would have been different if that had been the case. He made the same point about the decision in *Fraser Property Developments Pty Ltd v Sommerfeld (No 2)*, and the further point that the reasons for judgment in that case do indeed imply that the decision there may have been different if the proceedings there were in respect of a provable debt.

[43] *Fraser Property Developments Pty Ltd v Sommerfeld (No 2)* involved a claim by the plaintiff building proprietor under a contract for construction of a house by the first defendant Sommerfeld, and in the action in the trial division in this Court the Burnett Shire Council was the third defendant, sued for failing to ensure that design plans, which it had passed, complied with the relevant Australian standard. The primary judge had ordered in August 2004 that Fraser Property Developments discontinue the proceedings in the Supreme Court and reinstitute the claim before the Commercial and Consumer Tribunal, and this Court reversed that decision on 29 April 2005. In the meantime Mr Sommerfeld had become bankrupt on 7 December 2004. This Court had reserved the decision as to costs on 29 April 2005, and the Burnett Shire Council applied for them. The question in *Fraser Property Developments Pty Ltd v Sommerfeld (No 2)* was whether that application by the

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[36] The reasons appear at [2000] Ch 76 at 84.

Council for its costs of the appeal (and of the application) was within the restriction imposed by s 58(3) of the Act.

[44] McPherson JA gave the judgment of the Court, noting that Sommerfeld was not at the date of his bankruptcy subject to any order to pay costs to the Council, and that it was settled by authority in England that the mere prospect of an order for costs against the bankrupt, or the contingency that it might be made, was not a liability provable in bankruptcy. His Honour cited from *Vint v Hudspith*, *Re British Gold Fields of West Africa*, and from *Glenister v Rowe*. He wrote that:

> "A potential or contingent liability for costs is not a provable debt unless an order for payment of those costs had been made before bankruptcy intervenes. As can been seen from *Glenister v Rowe* [2000] Ch 76, 84, the underlying reason is that costs of legal proceedings are in the discretion of the court; and until an order is made there is no obligation or liability to pay them."[37]

[45] He accordingly held that leave was not required under s 58(3)(b) because the application for costs was not a proceeding "in respect of a provable debt". Importantly for the appellant, His Honour then added:

> "The case is not one in which it can be said that there is a provable debt to which the order for costs is or would be incidental in the sense laid down in *Re British Gold Fields of West Africa*. The 'proceeding' instituted by Sommerfeld was not to recover a sum of money, but for an order that the plaintiff Fraser Property Developments discontinue its action in the Supreme Court and re-institute it before the Tribunal."[38]

[46] Each party in this appeal relies on the statement by McPherson JA in that case favourable to that party. The appellant likewise relies on the statements in all editions of *McPherson's Law of Company Liquidation*, in which the learned author cites *Re British Gold Fields of West Africa* for the proposition that the costs of a successful plaintiff in an action brought against an insolvent company prior to the commencement of the winding up are provable if the sum recovered is itself capable of being proved, but if not, neither are the costs. The case is cited for the further proposition that where the costs are those of a successful defendant in an action brought by the company, those are provable if the verdict was obtained or the order was made before the winding-up commenced. Those, and other text references were advanced in support of the Mr Dunning's argument that the decision under appeal reverses long settled principles applied in bankruptcy law. If it did, it was because in the twentieth and twenty-first centuries the courts have repeatedly emphasised the discretionary nature of an order for costs, as a reason the prospect of such an order was not a contingent liability.

Conclusion

[47] The appellant's position has some support from the decision in *Re Pickering; Ex parte Thornwaite*, decided before the UK legislation took the form from which s 82(1) of the Act was copied; some support from some of the reasoning in *Ex parte Peacock*, in which Mr Sofronoff contends there had clearly been an order for costs actually made, but not taxed, before the bankruptcy; from the result in *Emma Silver*

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37 [2005] 2 Qd R 404 at 408 at paragraph [12].

38 [2005] 2 Qd R 404 at 408 at paragraph [12].

Mining Company v Grant; from the statement in *Re British Gold Fields of West Africa* that "on the other hand, if what is recovered is provable, so are the costs of recovering it", which (accurately) claimed support from the actual decision in *Emma Silver Mining Co v Grant;* and from the observations by McPherson JA in *Fraser Property Developments v Sommerfeld (No 2).*

[48] In my opinion those supports are an inadequate basis to demonstrate a long established principle that costs ordered after bankruptcy are provable if judgment in the action in respect of which the costs were incurred was given before the bankruptcy, and if the judgment debt itself is provable. That proposition cannot sit with the language of s 82(1), and there are no unequivocal and authoritative examples of its application. The analysis and explanation of *Re British Gold Fields of West Africa* in *Re Pitchford* weakens it greatly as an authority for the broad proposition on which the appellant relies, which *Re British Gold Fields* had in turn relied on *Emma Silver Mining v Grant*, a decision which impliedly applied the proposition, but without considering it.

[49] Accordingly, I agree with the learned trial judge that costs, ordered against Mr Foots after his bankruptcy, would not be a provable debt in it, even though incurred in proceedings in respect of a provable debt and in which judgment had been pronounced before bankruptcy.

[50] It is necessary to mention one other matter, relevant to the manner in which the appellant has expressed the grounds of appeal. Those plead as follows:

> "1. The learned judge erred in holding that an order for costs made against the appellant in the proceedings below would not be a debt or liability, present or future, certain or contingent, to which he was subject at the date of his bankruptcy, or to which he may later become subject by reason of an obligation incurred prior to the date of his bankruptcy, within the ambit of sub-s 82(1) of the *Bankruptcy Act*.
>
> 2. Consequently, the learned judge erred in granting leave pursuant to *UCPR* 72(1) for the respondent to take a step against the appellant, and thereby erred in making, as a consequence, an order for costs in favour of the respondent against the appellant upon the grant of leave."

[51] That was the only ground on which the appellant attacked the grant of leave pursuant to UCRP r 72(1). Mr Dunning did not advance the argument this Court suggested was available to Mr Foots, when hearing an application that Mr Foots provide security for costs on the appeal.[39] That argument was that the reference to a provable debt could be construed as a reference to the judgment debt for damages of $2,460,000 in favour of Ensham, and that the application for a costs order was a fresh step in the legal proceedings already in existence between Mr Foots and Ensham, and in respect of the provable debt constituted by the judgment. Mr Dunning preferred to argue the substantive point that leave ought to have, been refused under UCPR r 72(1) because the costs sought, if ordered, would be claims

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[39] *Southern Cross Mine Management PL v Ensham Resources & Ors* [2006] QCA 211; Appeal No 1768 of 2006, 16 June 2006.

provable in the current bankruptcy[40], and Mr Sofronoff argued in his submission that the proceedings in respect of a provable debt are the proceedings "for what you're seeking to prove, in this case, for costs."[41]

[52] The only relevance that the argument not advanced has is that it accords with the result and reasoning in *Melnik v Melnik* (2005) 221 ALR 577,[42] and the cases relied on therein, including *Green v Schneller* (2001) 189 ALR 464,[43] and with an observation in the joint judgment in *Coventry v Charter Pacific Corporation Ltd*, from which Mr Dunning claimed some support. In *Coventry* a Mr Michael Coventry was one of the appellants, and against whom Charter Pacific had claimed at trial for damages for misrepresentations, misleading and deceptive conduct and/or breaches of contract.[44] Michael Coventry had been made bankrupt shortly before the date fixed for oral argument of the appeal in the High Court. His trustee in bankruptcy did not appear when the matter was called on there, and did not avail himself or herself of the opportunity extended to the trustee to make submissions in writing. His appeal was dismissed for want of prosecution.[45] Charter Pacific applied in the High Court for an order for costs against Michael Coventry, and the reasons in the joint judgment remark that:

> "An order for costs could not be made against Michael Coventry if the claim which Charter Pacific made against him, as one of the Coventry Trustees, was a proceeding in respect of a provable debt."

[53] The joint judgment added that no substantial argument had been advanced on the hearing of the appeal on issues relevant to a potential costs order against Michael Coventry, and so no order was made; Mr Dunning contends that the statement quoted supports his reliance on *Re British Gold Fields of West Africa*. In my respectful opinion, the quoted statement applies s 58(3)(b) in exactly the way the appellant (and respondent) chose not to urge this Court to do, on this appeal; that is, by treating the application for costs as a fresh step in a legal proceeding in respect of the provable debt constituted by the claim Charter Pacific made against Michael Coventry for damages.

[54] I would dismiss the appeal, and give leave to make submissions on the costs.

[55] **HOLMES JA:** I have read the reasons for judgment of Jerrard JA and gratefully adopt his Honour's analysis of the issues. I am indebted to him for his careful review of the cases. I agree with his conclusion and wish only to add some comments as to the context in which the 19th century authorities were decided.

[56] The enactment of the *Supreme Court of Judicature Acts* (UK) of 1873 and 1875, and the *Rules of the Supreme Court* made under the latter Act, marked a significant turning point in two respects: as to how costs were awarded in common law actions and as to the point at which judgment took effect. Before those enactments, any plaintiff who recovered damages had a statutory right, extending back almost six

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40 At transcript 28 of the argument on appeal.
41 At transcript 93 of the argument.
42 [2005] FCAFC 160; QUD 209 of 2004, 16 August 2005.
43 [2001] NSWSC 897; SC No 331 of 2001, 16 October 2001.
44 *Coventry v Charter Pacific Corp Ltd* (2005) 80 ALJR 132 at [12].
45 (2005) 80 ALJR 132 at [16] and [73].

centuries to the Statute of Gloucester,[46] to recover the costs of his writ (liberally interpreted as extending to all the costs of his suit).[47]

> "And their entry, where the plaintiff is entitled to them, is quite of course and a matter of form, in which the jury cannot exercise any discretion." [48]

Later statutes[49] gave the defendant equivalent rights in any case where the plaintiff would have had costs if he had succeeded, but instead was non-suited or had a verdict against him. Where

> "any verdict happened to pass, by lawful trial against the plaintiff, the defendant in every such action … shall have judgment to recover his costs against the plaintiff".

[57] Essentially, then, costs followed the event, that event being, in the usual case, the jury's verdict; they were not subject to any exercise of discretion by judge or jury. (The system was not without complication: various statutes dealt with how costs were awarded where parties were successful on some but not all issues,[50] while others removed the right to recover costs in small debt actions.)[51] In practice, costs tended to be conflated with the damages recovered in the action and thus dealt with in the jury's verdict. Indeed, a practice developed whereby the jury identified in its verdict how much of the quantum was for costs, the trial judge then deciding whether to award a further sum.[52]

[58] Change came when the *Rules of the Supreme Court* were introduced by schedule to the *Judicature Act* 1875, commencing in operation on 1 November 1875. Order 55, Rule 1 gave the court a discretion as to costs, but there was a proviso concerning cases tried by jury; then, costs were still to follow the event, unless on application made at the trial "for good cause shown" the court otherwise ordered. (That rule was broadened slightly in 1883, removing the requirement to make the application for a different order at the trial.) The proviso excepting jury trials from the general judicial discretion remained part of the relevant rule until it was amended in 1929.[53]

[59] The other significant change effected by the 1875 *Supreme Court Rules* was as to the date from which a judgment took effect. Previously, under the *Common Law Procedure Act* 1852, after a jury verdict, the judge's associate would make up a *postea* (a minute setting out the issues in, and result of, the trial) which was given to the successful party. If that party wished, he could waive his claim to costs and issue execution after 14 days; but if he wanted his costs he had to have them taxed by the taxing Master. It was not until taxation of costs was completed and the Master's allocatur issued for the result that final judgment could be signed, by inserting an entry to that effect in the judgment book. That delay in signing judgment had this significance: under the Rules made under s 223 of the *Common*

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46 6 Edw 1 c 1.

47 Hullock: *Law of Costs* (2nd Ed) 1810.

48 Marshall: *The Law of Costs*, London, 1860, page 2, citing *R v Fall* 1 QB 636.

49 23 Hen 8 c 15 and 4 Jac I c 3.

50 Marshall: *The Law of Costs*, pages 1-3.

51 *County Courts Act* 9 & 10 Vict c 95

52 Gray: *A Treatise on the Law of Costs*, London, 1853 at page 3.

53 The amendment was made to the Supreme Court Rules in that year pursuant to s 50 of the *Supreme Court of Judicature (Consolidation) Act* 1925.

Law Procedure Act, the judgment was "entered of record" when signed, and it took its effect from that date.[54]

[60] That state of affairs changed under the *Supreme Court Rules*, which from 1875 permitted the judge at trial to direct judgment to be entered, although he could also adjourn the case or leave the parties to move for judgment.[55] (That situation was changed again by an amendment to the *Rules* in 1892, which required the Judge to direct judgment to be entered.) And although the judgment was still entered, it was now the date of its being pronounced which was significant. Order 41, R 2 was in these terms:

> "Where any judgment is pronounced by the court or a judge in court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date".

[61] With that background in mind, it is convenient now to consider the 19th century cases. Before turning to those which Jerrard JA has discussed, it is worth first mentioning *Brind v Bacon*,[56] as illustrative of the attitude to costs under bankruptcy legislation early in the century.[57] There, an argument arose as to whether the bankrupt who was discharged by his bankruptcy from liability to his guarantor under a bill of exchange was also freed from liability for the costs of an action brought on the bill. According to the brief report,

> "Mansfield, C.J. and Heath, J., the only judges present, agreed that the costs must follow the debt, and that it was impossible to separate them …".

[62] Moving to the cases discussed here, *Re Pickering; Ex parte Thornwaite*[58] had the distinguishing feature that the parties agreed that judgment would be entered for the amount found by the arbitrator, and that his finding would be binding on them. Given that agreement, the arbitrator's award did not depend on the signing of the judgment for its effect. *Re Weller; Ex parte Weller*[59] involved a judgment by default, the defendant having withdrawn his plea, rather than a jury verdict. The plaintiff was nonetheless entitled, by virtue of the *Statute of Gloucester*, to his costs, once he recovered damages. Under s 28 of the *Common Law Procedure Act* 1852, where his writ of summons was specially endorsed, he could sign final judgment for the amount endorsed with a sum for costs to be fixed by the taxing Masters. But until that judgment was signed giving him damages, the statutory entitlement to costs did not exist; and because in *Re Weller* judgment was signed after the execution of the deed of composition, there was no entitlement to costs as at its date.

[63] *Re Duffield; Ex parte Peacock*,[60] in contrast, did involve a jury verdict upon which, under the statutes of Henry VIII and James I, the defendant's entitlement to costs arose upon the giving of the verdict; it was reasonable, therefore, to regard that

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54 *Regulae Generales* Hilary Term 1853 r 56; Trinity Term 1853 r 32

55 Order 36, Rule 39.

56 (1813) 5 Taunt 183.

57 It was decided under the statute 49 Geo. 3.c. 121 s 8, which gave a bankrupt discharge from demand by a surety who had paid a debt on his behalf.

58 (1854) 43 ER 912.

59 (1867) 17 LT 125.

60 (1873) 8 LR Ch App 682.

entitlement as at the least creating an obligation, giving rise to a debt once the costs were taxed. The appellant's reliance on it is misplaced because of the different context in which it was decided; the defendant had a statutory right to his costs, rather than their being, as here, the subject of an exercise of discretion.

[64] *In Re Newman; Ex parte Brooke*[61] is harder to understand in its temporal context, because it post-dated O 41, r 2. It was decided in August 1876, when the new *Supreme Court Rules* had been in force for some nine months; but they do not appear to have played any part in the decision. Instead, attention seems to have focused entirely on whether the terms of s 31 of the *Bankruptcy Act* 1869 (which provided that demands in the nature of unliquidated damages other than those arising from a contract or promise were not provable) effected any change in the law as it stood under earlier statutes.[62] It was held that the "old law" continued to prevail, so that a successful plaintiff in a tort action could not prove for his or her damages unless judgment had been signed before the order resulting in bankruptcy. But given that the trial judge in Miss Brooke's tort action had actually ordered judgment to be entered for damages and costs, that conclusion does rather seem to have overlooked the significance of O 41, r 2, in giving the judgment, once entered, effect from the date of that order. It is conceivable that the court in *Newman* might not have regarded the order that judgment be entered as amounting to pronouncing judgment within the meaning of the rule; at any rate, no argument appears to have been advanced about that, or about the effect of the rule generally.

[65] Certainly, the decision in *Newman* sits uneasily with the Court of Appeal's conclusion 13 years later in *Holtby v Hodgson*.[63] There the plaintiff wanted to garnishee damages for which the defendant had obtained a verdict. The trial judge had directed that judgment should be entered, but it had not been signed or entered. An argument that there was no existing debt at the time the garnishee proceedings were instituted, merely a verdict in an action for unliquidated damages, received short shrift from Lord Esher MR, with whom the other members of the court agreed. He explained the difference between the old practice and the situation obtaining under O 41, r 3 (as it now was as a result of amendments to the Rules in 1883). Under the latter:

> "… from the moment when the judge has pronounced judgment, and entry of the judgment has been made, the judgement is to take effect, not from the date of the entry, but from the date of its being pronounced; it is an effective judgment from the day when it is pronounced by the judge in court."[64]

[66] The result in *Vint v Hudspith*[65] is unsurprising, given that the defendants obtained their judgment with costs after both the unsuccessful plaintiff's bankruptcy and his discharge from it. In *Re Bluck; Ex parte Bluck*[66] the verdict, judgment and costs post-dated the bankruptcy; the observation was made that a plaintiff's obligation to pay costs, if unsuccessful, could not arise on the mere bringing of an action.[67]

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61 (1876) 3 Ch D 494.

62 A number of insolvency Acts had been passed in the reign of Queen Victoria: 1 & 2 Vic c 110, 1838; 12 & 13 Vic c 106, 1849; 24 & 25 Vic c 134, 1861.

63 (1889) 24 QBD 103.

64 At p 107.

65 (1885) 30 Ch D 24.

66 (1887) 56 LJQB 607.

67 At p 608.

[67] In *Emma Silver Mining Company v Grant*[68] Jessel MR had previously made findings[69] as to the defendant's status as a promoter of the plaintiff company, as to the amount he had received as secret profits, and as to the amount for which he was accountable to the company with interest. The company then sought to prove for the amount found, interest and costs with a declaration that the whole amount was incurred by means of fraud or breach of trust. It was successful, with the minor amendment that it was, by the terms of the judgment, given "liberty to go in and prove" rather than having its claim admitted to proof. An argument made on the basis of *In Re Newman*, that the damages had been recovered in a tort action for fraud and misrepresentation, and thus were not provable. was rejected, Jessel MR finding that the money due was not unliquidated damages and did arise from the contract he had entered. No separate consideration appears to have been given to the costs aspect.

[68] One comes then to the decision in *Re British Gold Fields of West Africa,*[70] given in the last year of the century. The applicants sought rectification of the company register under s 35 of the *Companies Act* 1862; it had been held in *Re The Onwood Building Society*[71] that such an application could be made with the leave of the court after the winding up had commenced. Section 35 enabled orders to be made for rectification, and also for payment of the costs of the application and any damages sustained by the party aggrieved. An order was made, uncontested, for rectification. It seems, from a reference to the applicants' "taxed costs", that their costs were also the subject of an order. The Court of Appeal held that the demand for the return of the money paid was not a claim for unliquidated damages, and the sums paid by the applicants were provable debts. The costs of rectifying the register were costs necessary to obtaining the order and were "properly added to the debts provable".

[69] Under s 35, however, those costs were at the discretion of the court which made the rectification order. Lindley MR, delivering the judgment of the Court of Appeal, does not offer any explanation of how they could constitute a present or contingent liability at the date of the winding-up, rather reciting what were described as the rules established by earlier bankruptcy cases. That recitation contains no acknowledgment of the way in which the *Judicature Act* 1875 and the rules made under it had changed the incidence of costs.

[70] The first of the rules was that where a plaintiff succeeded in an action brought against someone who later became bankrupt "the costs are regarded as an addition to the sum recovered and to be provable if that is provable". The second was that if what was recovered was unliquidated damages "arising otherwise than by reason of a contract, promise or breach of trust" it was not provable[72] unless a verdict or judgment had been given before bankruptcy, and if it was not provable, nor were the costs of recovering it. The third was that where an unsuccessful defendant became bankrupt, the costs were provable only if a verdict or costs order had been made before bankruptcy; if no verdict or order was given until after bankruptcy, there was

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68 (1880) 17 Ch D 122.

69 Reported at (1879) 11 Ch D 918 (but no order for payment had been made or judgment pronounced).

70 (1899) 2 Ch 7.

71 (1891) 2 QB 463.

72 The word used in the judgment is "recoverable" but since the judgment speaks of recovered damages, it seems probable that "provable" was meant.

"no provable debt to which [they were] incident", and there was no obligation or contingent liability to which the bankrupt was subject as at the date of bankruptcy.

[71] It is difficult to understand quite what state of affairs Lindley MR had in mind in the first of those propositions. Was he, as Mr Dunning SC for the appellant contends, saying that the costs of obtaining judgment for a provable debt are always provable? Or, was he, as Astbury J suggests in *Re Pitchford*,[73] referring only to the situation where a costs order is made, allowing for the possibility that in an action where leave to proceed has been given, it may be made after bankruptcy?

[72] Mr Dunning's contention as to the effect of the first rule appears more consistent with the second rule, which seems not to require a costs order, but merely, in order to render damages recovered and the costs associated provable, that judgment, or at least a verdict, has been obtained before bankruptcy. Although *Newman* was cited for that proposition, the second rule in fact expands on anything decided in that case: in *Newman* there had been both a verdict and an order that judgment be entered, yet neither the judgment sum nor the costs were provable. But the view that a verdict would suffice accords with the third rule: that a verdict given for the defendant before bankruptcy would create a provable debt in respect of costs, notwithstanding the absence of any costs order at the date of bankruptcy.

[73] Whatever be the correct understanding of the rules in *British Gold Fields*, it seems clear that their rationale depends on a view of costs as taking the colour of the claim whose litigation gives rise to them and being, in effect, an inevitable extension of the outcome obtained by the successful party. That view is manifest in references to costs as an "addition" to the sum recovered and as "incident" to a provable debt. The approach reflects that in *Brind v Bacon*: that the costs of an action are inseparable from the debt for which it was brought.

[74] Lindley MR's formulation of the rules has, as Mr Dunning pointed out, regularly been replicated in works on insolvency. That process seems to have begun with Lord Lindley's own *Treatise on the Law of Companies*[74] in which the *British Gold Fields* rules, described as "well settled"[75] are set out without further commentary.[76] But the *British Gold Fields* approach to costs, as "incident" or "attached" to a provable debt must, I think, be regarded as a product of the strong influence of earlier cases, decided at a time when success did enliven a statutory entitlement to costs, so that there was little cause to distinguish between the claim and the costs of winning it. To some extent, that view still held good for jury verdicts at the time when *British Gold Fields* was decided, because the party who obtained the verdict retained a statutory right to costs under the *Rules*, subject to displacement by a contrary order. But it is not, as Jerrard JA has explained, an approach which sits well with 20th and 21st century authority, and the fundamental change, in the awarding of costs, to exercise of discretion. Nor is it readily reconciled, as he points out, with the terms of s 82(1). I do not think it should now prevail.

[75] For those reasons I would agree with Jerrard JA, and with the learned trial judge, that in the absence of any order before bankruptcy, the costs in this case were not a provable debt.

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73 [1924] 2 Ch D 260.

74 London, Sweet & Maxwell Ltd, 1902.

75 Page 1003.

76 Page 1008.

[76] **MULLINS J:** The appellant, Mr Foots, appeals against the orders made by the learned primary judge on 3 February 2006 in *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd & Ors* [2006] QSC 7. By those orders the respondent, Ensham Resources Pty Ltd, was granted leave to proceed against the appellant pursuant to r 72 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*") and the appellant was ordered to pay the respondent's costs of the respondent's counter-claim against the appellant on an indemnity basis.

[77] The respondent (as first defendant in the proceeding) had sued the appellant (as first defendant added by counter-claim). On 1 September 2005 the primary judge gave judgment for the respondent against the appellant on the counter-claim for damages in the sum of $2,460,000. On 15 September 2005 the appellant became bankrupt upon the presentation of his own petition. The orders which are the subject of this appeal were therefore made subsequent to the date of the appellant's bankruptcy. The issue before the primary judge and on this appeal was whether an order for costs of the counter-claim made against the appellant would be a provable debt within the meaning of s 82(1) of the *Bankruptcy Act* 1966 (Cth) ("the Act").

Decision of the primary judge

[78] The primary judge held at paragraph [23] of the reasons that an order for costs made subsequent to the appellant's bankruptcy would not be provable in his bankruptcy, in reliance on *Glenister v Rowe* [2000] Ch 76 ("*Glenister*") which the primary judge noted was referred to with approval by the Court of Appeal in *Fraser Property Developments Pty Ltd v Sommerfeld (No 2)* [2005] 2 QdR 404, 407-408 [11]-[12] ("*Sommerfeld*"). The primary judge held that to the extent that remarks in the judgment in *Re British Gold Fields of West Africa* [1899] 2 Ch 7 ("*British Gold Fields*") suggested that, in some circumstances, where a debt provable in bankruptcy, has been ordered to be paid by the bankrupt, the costs of obtaining the order should be added to the provable debt, that view should be disregarded in favour of *Glenister* and *Sommerfeld*.

Arguments on the appeal

[79] In order to deal with the arguments that were put forward on this appeal, it is necessary to refer to the judgment of the Court of Appeal in *British Gold Fields*. It was delivered by Lindley MR who set out the rules that were described as being established by decisions on s 37 of the *Bankruptcy Act* 1883 (UK) (46 & 47 Vict c 52) ("the 1883 English Act") at 11-12:

> "If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise.
>
> If, therefore, what is recovered is unliquidated damages 'arising otherwise than by reason of a contract, promise, or breach of trust,' that sum is not recoverable unless judgment, or at least a verdict for it, has been obtained before adjudication, or now the receiving order; and if the sum recovered is not provable, neither are the costs of recovering it: *In re Newman; Re Bluck*. On the other hand, if what is recovered is provable, so are the costs of recovering it: see *Emma Silver Mining Co. v. Grant.*

> If the action against a person who becomes bankrupt is unsuccessful, no costs become payable by him or out of his estate, and no question as to them can arise. But if an unsuccessful action is brought by a man who becomes bankrupt, then, if he is ordered to pay the costs, or if a verdict is given against him before he becomes bankrupt, they are provable: *Ex parte Peacock*. On the other hand, if no verdict is given against him and no order is made for payment of costs until after he becomes bankrupt, they are not provable. In such a case there is no provable debt to which the costs are incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy; nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy. This was the case of *Vint v. Hudspith*." (*footnotes omitted*)

[80] Mr Dunning of Senior Counsel who appeared for the appellant argued that neither *Glenister* nor *Sommerfeld* in any way detracted from the rules set out in *British Gold Fields* on when costs of an action against a party ordered subsequent to the party's bankruptcy would be provable as an incident of the debt which was otherwise provable against the party and to which the costs order related. It was submitted that both *Glenister* and *Sommerfeld* were cases concerning orders for costs in relation to a legal proceeding which was not in respect of a provable debt and that there was nothing in the reasons for judgment in either case that suggested that those decisions were meant to confine the rules set out in *British Gold Fields* as to when costs could be treated as an incident of a provable debt.

[81] The main argument of the appellant on the appeal was that the primary judge erred in not applying the relevant rule set out in *British Gold Fields* which would have resulted in the costs order being treated as a provable debt on the basis of being an addition to the judgment for damages given on 1 September 2005 which itself was a provable debt in the appellant's bankruptcy.

[82] The respondent's argument was based on the construction of s 82(1) of the Act. Mr Sofronoff of Queen's Counsel who appeared with Mr Pomerenke of counsel submitted that the order for costs was not a provable debt within the meaning of s 82(1) of the Act, as the order for costs was not made until after the date of the appellant's bankruptcy. That meant there was no debt or liability of the appellant for those costs at the date of bankruptcy and they were not a contingent liability as that expression is understood in the light of the authoritative statement in *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455, 459 as to the nature of an obligation that is owed to a contingent creditor. The respondent argued that there was no basis found within s 82(1) of the Act for incorporating the *dicta* in *British Gold Fields* in construing s 82(1) of the Act.

Coventry v Charter Pacific Corporation Ltd

[83] The approach to the construction of s 82(1) of the Act is critical to this appeal. A similar issue arose in *Coventry v Charter Pacific Corporation Ltd* (2005) 80 ALJR 132 ("*Coventry*") in relation to the approach to the construction of s 82(2) of the Act.

[84] The matter for determination by the High Court in *Coventry* was whether a statutory claim for unliquidated damages for misleading or deceptive conduct of the bankrupt which induced the claimant to make a contract with a third party (and not with the

bankrupt) was a debt provable in the bankruptcy. The bankrupt had become bankrupt and had been discharged from bankruptcy, before being sued for damages by the claimant. The outcome depended on whether the claim was caught by the exclusion found within s 82(2) of the Act:

> "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy."

The court was unanimous in holding that the exception in s 82(2) of the Act did apply to the claim against the bankrupt and that the claimant could pursue the claim for damages, notwithstanding the bankruptcy. There is a stark contrast, however, in the approach to the construction of s 82(2) of the Act between the joint reasons given by Gleeson CJ, Gummow, Hayne and Callinan JJ and that of Kirby J who delivered a separate judgment.

[85] The joint reasons (at 138-139[22]) referred to the origin of s 82 of the Act in s 31 of the *Bankruptcy Act* 1869 (UK) (32 & 33 Vict c 71) ("the 1869 English Act"). The joint reasons (at 140[28]) identified one notable difference between s 82 of the Act and s 31 of the 1869 English Act which was not relevant for the purpose of the appeal in *Coventry* (and is not relevant for the purpose of this appeal). That difference was that the demands in the nature of unliquidated damages which were not to be provable in bankruptcy were confined in the 1869 English Act to demands "arising otherwise than by reason of a contract or promise", but that was extended by the 1883 English Act to demands arising by reason of breach of trust which is reflected in the current wording of s 82(2) of the Act.

[86] The joint reasons referred (at 138[22]) to the argument of both parties on the appeal based on an examination of 19th century English cases that were relied on to construe s 82(2) of the Act, but noted the relevance of the set-off provisions which were found in s 39 of the 1869 English Act (on which s 86 of the Act is based) which applied where there had been mutual dealings between the bankrupt and another person "proving or claiming to prove a debt" in the bankruptcy. The joint reasons then noted (at 141[34]):

> "The set-off cases therefore cast light upon what debts are provable in bankruptcy. And what an examination of the 19th century cases will reveal is that the set-off provisions were used to extend the reach of debts provable in bankruptcy by giving to the expression "demand in the nature of unliquidated damages arising … by reason of a contract or promise" a more ample operation than the words might at first have been thought to suggest."

[87] After analysing relevant 19th century English cases, the joint reasons (at 144[50]) suggested two reasons for why the understanding gleaned from those cases of s 31 of the 1869 English Act should be carried over to the construction of s 82(2) of the Act. They were that the text of s 82 (like its legislative ancestors) showed that not all claims are provable in bankruptcy and that some content must be given to s 82(2) of the Act and that any amplification or extension of the content to be given to s 82(2) was to be fixed by reference to the operation of other provisions of the statute, and particularly the set-off provisions of s 86 of the Act. The joint reasons concluded on this aspect (at 144[51]):

> "It is against the background provided by these 19th century English cases that the Australian cases must be considered. Not only is the

> drafting of the relevant provisions of the *Bankruptcy Act 1966* for all practical purposes identical to the statutory language considered in those cases, there is the same need to work out the relationship between the provision for what debts are provable in bankruptcy (s 82) and the provision for set-off (s 86)."

[88] On the substantive issue that was the subject of the appeal in *Coventry*, the joint reasons concluded from the analysis of decided cases that some claims are not within the reach of the Act and stated (at 147[70]):

> "Although consideration of the application of the set-off provision required the inclusion, within the class of debts provable in bankruptcy, of those claims for unliquidated damages for fraudulent misrepresentation which had induced the making of a contract between the bankrupt and the claimant, the words of the section were not and are not to be stretched to encompass every other kind of claim which a person may have against the bankrupt."

[89] The joint reasons concluded (at 147[71]) that as the claim in that matter was a statutory claim for misleading or deceptive conduct which induced the party misled to make a contract with a party other than the bankrupt, it was therefore a claim arising otherwise than by reason of a contract. The joint reasons then acknowledged that, by contrast, claims for unliquidated damages for misleading or deceptive conduct inducing the making of a contract with the bankrupt are claims arising by reason of a contract and are therefore provable. The joint reasons acknowledged that the result in *Coventry* was therefore anomalous (at 147[72]), but explained:

> "But the anomaly of the result stems ultimately from adopting the language used in the 1869 English Act without making any later accommodation not only for the provision of statutory causes of action of the kind at issue in this case but also for the differential outcomes revealed so long ago by the decisions in *Jack v Kipping* and *Re Giles*."

[90] Kirby J directly addressed what was described as the dilemma in construing a statutory provision that was taken from earlier provisions (at 148[77]):

> "Should the re-enacted statutory language simply be given its historical meaning? Or, as an Australian law of contemporary application, should the courts struggle to find a new principle in the language chosen, given that such language is of daily application in countless circumstances of claims against bankrupts arising throughout Australia for which, if possible, the law should provide a clear, simple and modern rule of ready application?"

Kirby J did not accept the approach to statutory interpretation that attributed to the legislators in 1966 the intentions of their parliamentary predecessors who had enacted earlier Australian Federal and English predecessor enactments. Kirby J adopted the following approach (at 153 [113]):

> "However, in the ultimate, it is the duty of a court, asked to give meaning to legislation that continues to operate, to give that meaning as best it can, having regard to the contemporary legal setting in which the law applies. Necessarily, this obliges a court to endeavour to give meaning to a provision such as the exception stated in s 82(2) of the *Bankruptcy Act* in a way that will advance sensibly the

> purpose and policy of that subsection as it is expected to operate in the contemporary setting of bankruptcy law in Australia."

[91] In applying that approach, Kirby J considered the general policy of bankruptcy law and had recourse to analogous law on equivalent provisions in Canada and New Zealand and concluded (at 158[143]) that the test to decide whether a demand in the nature of unliquidated damages arises "by reason of a contract [or] or promise" or otherwise is afforded by considering the cause of action relied upon by the plaintiff. On that approach Kirby J reached the same conclusion as the other members of the court.

[92] The respective approaches to the construction of s 82(1) of the Act favoured by the appellant and the respondent on the current appeal reflect the two approaches in *Coventry*. The Act in its current manifestation has been the subject of much amendment and reform since it was enacted. Despite the changes that have been made to the Act and the opportunity for changes, s 82(1) of the Act continues to reflect closely what was enacted as s 31 of the 1869 English Act. Amendments to the Act have not rendered the origins and authorities on the predecessor enactments of s 82(1) as irrelevant. I therefore consider that it is a proper approach to consider authoritative 19th century English decisions on s 31 of the 1869 English Act (and its successors) in construing s 82(1) of the Act.

British Gold Fields

[93] Prior to the winding up of the subject company in *British Gold Fields*, the applicants who were shareholders in the subject company had brought applications to have their names removed from the register and for repayment of the sums they had paid for their shares on the ground of misrepresentation in the prospectus. After the company was ordered to be wound up, the official receiver accepted that the applicants were entitled to the rectification of the register by removing their names as shareholders and therefore giving them the right to prove in the winding up for the repayment of the sums paid for their shares. The official receiver opposed the applicants proving for their costs of the applications against the company, on the ground that the company was insolvent. The judge at first instance held that the applicants were entitled to add their taxed costs to their respective debts and to prove for them in the winding up. The official receiver appealed on the ground that the costs did not come within s 37 of the 1883 English Act. The Court of Appeal upheld the order made by the judge at first instance on the basis that the costs of the applications (even though no order for those costs against the company had been made prior to the commencement of the winding up) were provable as an addition to the debts that the applications had enabled to be proved. Lindley MR stated at 12:

> "An application under s. 35 of the Companies Act, 1862, to rectify the register and for a return of money paid is not a claim for unliquidated damages. It is a claim for two things, namely, first, for the removal of an impediment which prevents the demand for a return of the money from being successful; and, secondly, it is a demand for the repayment of a liquidated sum, and not for unliquidated damages. The register having been rectified, the sums paid by the applicants are clearly provable debts, and the costs of rectifying the register are costs of obtaining an order without which these debts cannot be recovered or admitted to proof. The costs are therefore properly added to the debts provable."

[94] It is clear from the judgment in *British Gold Fields* that Lindley MR took the opportunity to summarise decisions that had dealt with the circumstances when costs of a proceeding against a bankrupt could be a provable debt under s 31 of the 1869 English Act, even though all of the rules that were set out in the judgment were not necessary to dispose of the issue in *British Gold Fields*. As the analysis of the 19th century English decisions undertaken in the respective judgments of Jerrard JA and Holmes JA in this matter show, there was authority (although not all consistent) to support the rules set out in *British Gold Fields*.

[95] The issue that arose for decision in *British Gold Fields* was not identical to that which arose in this appeal. The difference is that in *British Gold Fields* there was not a judgment obtained against the company prior to the commencement of the winding up, but litigation had commenced against the company which had the consequence of enabling the applicants to prove as a debt against the company the amount that was claimed in the litigation. The general statement made by Lindley MR that covered the issue in *British Gold Fields* that, where what is recovered is provable, the costs of recovering it are provable (even if the order for costs is made after the date of bankruptcy) has application to the facts on this appeal. That general statement was supported by the order made by Jessel MR in *Emma Silver Mining Company v Grant* (1880) 17 ChD 122, 130. The trial of that action had preceded the bankruptcy of one Albert Grant. He had been found liable to pay the company that he promoted the amount which he had fraudulently received from the vendor who sold a mine to the company and which was not disclosed by him to the company together with interest. After bankruptcy, the company moved for judgment and Jessel MR found that the sum received by Grant for which he was liable to account arose from a contract of agency that existed between the company and him and ordered that there be judgment against the trustee in bankruptcy of Grant which gave the company liberty to go in and prove in the bankruptcy for the amount that was found to be due by Grant to the company and interest and the costs of the trial.

[96] It was not suggested in *British Gold Fields* that the taxed costs in respect of the proceeding that had been brought prior to the commencement of the winding up that enabled a debt to be proved against the company even though a costs order was not made prior to the winding up was a contingent liability at the date of winding up. The rationale for allowing the costs of the proceeding that has resulted in the provable debt is that the costs were incidental to proving that debt and should therefore themselves be provable. That can be seen as a logical and fair result. Successor provisions in bankruptcy legislation to that which was considered in *British Gold Fields* have not endeavoured to address specifically the issue of costs of a proceeding in the various circumstances covered by *British Gold Fields*. The legislation was enacted in the light of the authorities that had applied s 31 of the 1869 English Act and provisions modelled on that Act for determining when the costs of a proceeding involving a bankrupt could be a provable debt.

[97] The respondent sought to rely on observations made in *Re Pitchford* [1924] 2 Ch 260 ("*Pitchford*") as qualifying the rules set down in *British Gold Fields*. The issue in *Pitchford* was the entitlement of a creditor to prove for the costs of a proceeding which was stayed after the debtor's date of bankruptcy at the request of the creditor who elected to prove the claim as a debt in the bankruptcy. It was the effect of that election by the creditor that resulted in each of the members of the court holding that the creditor could not prove for the costs. In any case, because the creditor's

action had been stayed, the action was not successful in establishing that the debt was provable. Notwithstanding the observations made by the members of the court, the result in *Pitchford* did not modify any of the rules set out in *British Gold Fields.*

[98] That there might be a greater discretion involved in whether to award costs in a proceeding in modern times than in the 19th century does not displace the application of the rules set out in *British Gold Fields.* When the outcome of the application of the rules depends on an order for costs being made after the date of the debtor's bankruptcy, the discretion must be exercised in favour of costs being ordered, before the rules apply. The favourable exercise of the discretion to order costs does not weaken the link between the underlying provable debt and the order for costs in those circumstances where, in accordance with *British Gold Fields*, the basis for the costs being a provable debt in bankruptcy is that they are incidental to the provable debt.

Glenister* and *Sommerfeld

[99] *Glenister* was concerned with an order for costs of an appeal in favour of Mrs Rowe against Mr Glenister. The appeal had been brought by Mrs Rowe against an order made in 1991 striking out her action against her solicitor Mr Glenister. Her claim had been for declarations, accounts, payment orders and damages in relation to claims that Mr Glenister had misappropriated Mrs Rowe's assets. A bankruptcy order was made against Mr Glenister in 1994. He was discharged from bankruptcy on 24 June 1995. The costs order in relation to Mrs Rowe's appeal was made on 25 July 1995. After taxing the costs, Mrs Rowe issued a statutory demand on 3 December 1997 for the taxed costs and interest. Mr Glenister was successful in obtaining an order setting aside that statutory demand on the basis that it was in respect of a bankruptcy debt. The Court of Appeal in *Glenister* allowed the appeal unanimously, holding that the claim for costs by Mrs Rowe was not a contingent liability of Mr Glenister at the date of his bankruptcy.

[100] The leading judgment in the Court of Appeal was given by Mummery LJ. Reliance was placed on *British Gold Fields*, but on the rules concerning the position where an unsuccessful action is brought by a person who becomes bankrupt, and, in particular, that aspect dealt with in *British Gold Fields* at 12:

> "…if no verdict is given against him and no order is made for payment of costs until after he becomes bankrupt, they are not provable. In such a case there is no provable debt to which the costs are incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy; nor are they a contingent liability to which he can be said to be subject at the date of this bankruptcy."

[101] *Glenister* was not concerned with the application of the rule set out in *British Gold Fields* where the costs of an action ordered after bankruptcy are treated as an addition to the sum recovered against the bankrupt where that sum is a provable debt. Nothing in the reasons for judgment in *Glenister* allows an inference to be drawn that, if the case before the Court of Appeal had concerned an order for costs made after bankruptcy in relation to a proceeding where judgment had been recovered against the bankrupt prior to bankruptcy, the Court of Appeal would not have treated the costs order as an incident of the provable debt, in accordance with the rules set out in *British Gold Fields.*

[102] In *Sommerfeld* the plaintiff was the owner under a contract for the construction of a house by Mr Sommerfeld. In the Supreme Court the plaintiff sued Mr Sommerfeld as the first defendant, the engineer who designed the footings and slab for the house as the second defendant and the local council as the third defendant. On 22 October 2004 on the application of Mr Sommerfeld the primary judge made an order that the plaintiff discontinue its proceedings in the Supreme Court and re-institute its claim before the Commercial and Consumer Tribunal. Notice of appeal by the council was lodged on 18 November 2004. Mr Sommerfeld became bankrupt on 7 December 2004. Mr Sommerfeld did not appear when the council's appeal was argued in the Court of Appeal. The Court of Appeal gave judgment on 29 April 2005 allowing the appeal and setting aside the order of the Supreme Court made on 22 October 2004. The council applied for an order for costs of the appeal and of the application which was the subject of the appeal against Mr Sommerfeld.

[103] McPherson JA (with whom the other members of the court agreed) referred to *British Gold Fields* as authoritative on the issue of when an order for costs made against a bankrupt after the date of bankruptcy is provable or not provable. McPherson JA (at 408[12]) distinguished the matter that was before the Court of Appeal in *Sommerfeld* from a case where the order for costs would be incidental to a provable debt:

> "The case is not one in which it can be said that there is a provable debt to which an order for costs is or would be incidental in the sense laid down in *Re British Gold Fields of West Africa*. The "proceeding" instituted by Sommerfeld was not to recover a sum of money, but for an order that the plaintiff Fraser Property Developments discontinue its action in the Supreme Court and re-institute it before the Tribunal. The Council as the third defendant opposed the making of that order, and it has been successful on appeal. Its right to obtain an order for the costs of the appeal or of the proceedings in the Supreme Court is not obstructed by s. 58(3)(b) of the *Bankruptcy Act*."

[104] On the facts that were before the court in *Sommerfeld*, the Court followed *Glenister*. The statement made by McPherson JA (at 408[12]):

> "A potential or contingent liability for costs is not a provable debt unless an order for payment of those costs have been made before bankruptcy intervenes."

was not a statement of general application, but a statement made in the context of that case where the order for costs was made in relation to a legal proceeding which was not in respect of a provable debt.

[105] *Sommerfeld* in no way detracted from the rules set down in *British Gold Fields* but, in fact, treated them as authoritative, including the specific rule on which the appellant in this matter seeks to rely.

Conclusion

[106] On the basis that the origin and history of s 82(1) of the Act justifies reference to the *dicta* in *British Gold Fields* including the specific rule on which the appellant relies and which was treated as being authoritative in *Sommerfeld*, I respectfully disagree with the decision of the learned primary judge to disregard the *dicta* in *British Gold Fields*. Applying that *dicta* has the effect that the order for costs that was sought

against the appellant would be a provable debt (as incidental to the judgment sum ordered against the appellant on 1 September 2005). That means that the order for costs could not be made in this Court without the respondent first obtaining the leave of the Federal Court or the Federal Magistrates Court under s 58(3) of the Act. The respondent's application that the applicant pay its costs of the counter-claim to be assessed on the indemnity basis should be entertained by this Court only if the respondent obtains the leave under s 58(3) of the Act to make the application.

[107] I would therefore allow the appeal; set aside the orders 1 and 2 of the learned primary judge made on 3 February 2006; order that the respondent's application for leave to proceed under r 72 of the *UCPR* and for the costs of the counter-claim be adjourned to a date to be fixed, subject to the respondent obtaining the leave under s 58(3) of the Act to make the application; and order that the respondent pay the appellant's costs of the appeal and of the hearing before the learned primary judge on 16 and 22 November 2005 to be assessed.

[108] Although I have reached a different conclusion than Jerrard JA as to the outcome of this appeal, I wish to add that I agree with his Honour's observations on why the appellant's argument based on *British Gold Fields* gains no support whatsoever from paragraph [73] of the joint reasons in *Coventry* at 147.