FEDERAL COURT OF AUSTRALIA

Windoval Pty Ltd and Others v Donnelly

[2014] FCAFC 127

Jacobson, White and Gleeson JJ

11 August, 26 September 2014

Bankruptcy — Void transfers — Payments made to hinder or delay creditors — "Creditor" — Whether Commissioner of Taxation an impending creditor where amended tax assessment issued five years after payment made — Bankruptcy Act 1966 (Cth), s 121.

Practice and Procedure — New trial — When appropriate to order — Where error does not affect result of trial — Federal Court of Australia Act 1976 (Cth), s 28(1)(f).

Shortly prior to ceasing work and becoming insolvent, Mr Bonnell made a contribution of $5 million to his non-complying superannuation fund, after having received a private taxation ruling to the effect that contributions of that type would be tax deductible in certain circumstances, assuming they had been made for the purpose of making provision for superannuation benefits for Mr Bonnell. He then wound up the superannuation fund and immediately gifted the assets to the trustee company of his family trust (Windoval).

Mr Bonnell's trustee in bankruptcy however claimed that the payment to Windoval was void pursuant to s 121(1)(b) of the *Bankruptcy Act 1966* (Cth), as Mr Bonnell had acted with the proscribed purpose of hindering or delaying creditors, in particular the Commissioner of Taxation (the Commissioner). The primary judge found for the trustee in bankruptcy on the basis that Mr Bonnell knew it was very likely in the circumstances that the Commissioner would disallow the deductions that he intended to claim, such that he would be liable for a significant tax liability. The judge also found (incorrectly) that there was no evidence that Mr Bonnell would have used his position as controller of Windoval to ensure that such liability was satisfied.

A question arose first as to whether the primary judge's erroneous "no evidence" finding was a sufficient ground for a new trial to be ordered under s 28(1)(f) of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act). That provision conferred power generally on the Court to grant a new trial in any case in which there had been a trial, either with or without a jury, on any ground upon which it was appropriate to grant a new trial. Secondly, there was a further question as to whether the liability to pay tax in respect of the relevant income tax year, which crystallised when an amended tax assessment issued five years later, was an impending liability when the gift was made.

Held: (1) A new trial will not be ordered in a civil case pursuant to s 28(1)(f) of the FCA Act if the error in question cannot reasonably be supposed to have

affected the result of the trial, such there has been no substantial miscarriage of justice. [95]-[96]

Conway v The Queen (2002) 209 CLR 203; *Stead v State Government Insurance Commission* (1986) 161 CLR 141, applied.

Chamberlain v The Queen (No 2) (1984) 153 CLR 521, considered.

(2) The Commissioner was an impending creditor, and therefore a "creditor" within the meaning of s 121(1)(b) of the *Bankruptcy Act*, at the time the gift was made, as the private tax ruling did not apply in the circumstances. [158]

Trustees of the Property of Cummins (a bankrupt) v Cummins (2006) 227 CLR 278, applied.

Appeal from decision of Foster J, [2014] FCA 80, dismissed.

Cases Cited

Australian and Overseas Telecommunications Corporation Ltd v McAuslan (1993) 47 FCR 492.

Balenzuela v De Gail (1959) 101 CLR 226.

Barton v Deputy Commissioner of Taxation (1974) 131 CLR 370.

Chamberlain v The Queen (No 2) (1984) 153 CLR 521.

Chappel v Hart (1998) 195 CLR 232.

Clampett v Attorney-General (Cth) (2009) 181 FCR 473.

Conway v The Queen (2002) 209 CLR 203.

Cummins (a bankrupt), Trustees of the Property of v Cummins (2006) 227 CLR 278.

Greater Wollongong City Council v Cowan (1955) 93 CLR 435.

Mackay v Douglas (1872) LR 14 Eq 106.

Orr v Holmes (1948) 76 CLR 632.

Piddington v Bennett and Wood Pty Ltd (1940) 63 CLR 533.

Prentice v Cummins (No 5) (2002) 124 FCR 67.

PT Garuda Indonesia Ltd v Grellman (1992) 35 FCR 515.

R v Gibson (1887) LR 18 QBD 537.

R v M'Leod (1890) 11 LR (NSW) 218.

Russell, Ex parte; Re Butterworth (1881-82) LR 19 Ch D 588.

Stead v State Government Insurance Commission (1986) 161 CLR 141.

Weiss v The Queen (2005) 224 CLR 300.

Williams v Lloyd (1934) 50 CLR 341.

Yates v Federal Commissioner of Taxation (1998) 41 ATR 1096.

Appeal

BW Walker SC with *IS Young*, for the appellants.

BA Coles QC with *J Baird*, for the respondent.

Cur adv vult

26 September 2014

The Court

Introduction and overview

1 During the period from February 1999 to 30 June 1999 Mr David Neil Bonnell made contributions of approximately $5 million to the Bonnell No 2

Superannuation Fund (the Super Fund). The funds which Mr Bonnell contributed were derived from his legal practice during the financial year ending 30 June 1999.

2 The Super Fund was a "non-complying" superannuation fund established under the provisions of Subdiv AA of Pt III, Div 3 of the *Income Tax Assessment Act 1936* (Cth) (the Tax Act). Prior to making contributions to the Super Fund Mr Bonnell obtained a private ruling from the then Assistant Commissioner of Taxation to the effect that contributions to a non-complying superannuation fund were tax deductible in certain circumstances.

3 Mr Bonnell's evidence before the primary judge was that in about May 1999 he decided to "cease carrying on the business of providing tax advice". He gave evidence that he believed that this was sufficient to constitute a retirement for the purpose of receiving payment of his entitlements from the Super Fund.

4 On 1 July 1999 Mr Bonnell caused the Super Fund to be wound up. The assets were payable to him and he immediately gifted the whole of them, that is to say, the $5 million cash, to Windoval Pty Ltd (Windoval) in its capacity as trustee of the Bonnell Family Trust (the Family Trust).

5 Mr Bonnell's trustee in bankruptcy, Mr Max Christopher Donnelly sought a declaration that the transfer of the sum of $5 million to Windoval was void against him under s 121 of the *Bankruptcy Act 1966* (Cth).

6 The primary judge (Foster J) made the declaration that was sought. His Honour found that in making the impugned payment Mr Bonnell had the purpose proscribed by s 121(1)(b) of the *Bankruptcy Act* of hindering or delaying creditors, in particular the Commissioner of Taxation.

7 His Honour also found that the facilitating provision of s 121(2) was enlivened, so that Mr Bonnell's purpose was taken to be the proscribed purpose of defeating creditors. This was because his Honour found that it could be reasonably inferred from all the circumstances that at the time of the payment to Windoval, Mr Bonnell was, or was about to become, insolvent.

8 In making those findings the primary judge was very critical of the evidence given by Mr Bonnell and made extensive adverse credit findings expressed in strong terms.

9 His Honour's findings that the terms of s 121(1)(b) and (2) were satisfied, as well as his credit findings against Mr Bonnell, were largely informed by admissions made by Mr Bonnell in a memorandum written by him in January 2001, described in the primary judgment as the Leah Schmea Memorandum.

10 His Honour rejected Mr Bonnell's attempts to explain away the adverse effects of the admissions made by him in the Leah Schmea Memorandum. However, Mr Walker SC, who appeared for Windoval on the appeal, submitted that in addressing Mr Bonnell's evidence of his explanation, the primary judge wrongly stated the effect of Mr Bonnell's evidence on a critical matter.

11 The relevant passages of the primary judgment upon which Mr Walker relied were at [91] and [149] of his Honour's reasons. In those passages the primary judge appears to have said that Mr Bonnell did not state in his affidavit evidence that he "would have" used his position as controller of the Family Trust to call back the money in the event that the Commissioner disallowed the deductions and issued an amended assessment. In particular, at [149], the primary judge said that there was "no evidence nor any suggestion that the bankrupt would have used his position as controller of Windoval, the BFT and the other relevant

entities to procure the necessary funds to pay the amount of tax assessed under any amended tax assessment in respect of the 1998-1999 Tax Year that might have been issued in the future".

12 Mr Walker pointed to a number of paragraphs of Mr Bonnell's affidavit evidence and a number of passages in the transcripts of Mr Bonnell's oral evidence which, in his submission, showed that the primary judge's "no evidence" finding was made in error.

13 The precise terms of that evidence are critical to the outcome of the appeal, but it is sufficient to say by way of introduction that there was evidence in Mr Bonnell's affidavit and in his answers to questions in cross-examination that he "would have" used his position as controller to recall the money in certain circumstances.

14 The first issue in the appeal is whether the primary judge failed to refer to the evidence upon which Mr Walker relies and, if so, whether his Honour's "no evidence" finding was an error of fact.

15 Related to this issue is the question of whether the error is a sufficient ground for a new trial to be ordered under s 28(1)(f) of the *Federal Court of Australia Act 1976* (Cth) (the Federal Court Act). This relief was sought orally at the hearing, and was not accompanied by a proposed further amended notice of appeal.

16 The second issue is whether the liability to pay tax in respect of the 1999 income tax year, that crystallised when an amended tax assessment issued, some five years after the gift to Windoval on 1 July 1999, was an "impending liability" when the gift was made: see *Barton v Deputy Commissioner of Taxation* (1974) 131 CLR 370 at 374 (Stephen J) (*Barton*). This argument turned largely upon the question of whether it was open to the Commissioner to withdraw the private ruling given to Mr Bonnell that the contributions were deductible.

17 A number of other issues were advanced in the written submissions but not addressed in oral argument. None of these alter the outcome of the appeal. Mr Walker informed the Court during the appeal that, as no notice was filed pursuant to s 78B of the *Judiciary Act 1903* (Cth), the applicants would not press an argument that the provisions of s 121 of the *Bankruptcy Act* were exhaustive and prevailed over s 37A of the *Conveyancing Act 1919* (NSW).

Legislation

The Bankruptcy Act, s 121

18 The relevant parts of s 121 of the *Bankruptcy Act* are subss (1) and (2) as follows:

> 121 Transfers to defeat creditors
>
> *Transfers that are void*
>
> (1) A transfer of property by a person who later becomes a bankrupt (the *transferor*) to another person (the *transferee*) is void against the trustee in the transferor's bankruptcy if:
>
> (a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and
>
> (b) the transferor's main purpose in making the transfer was:
>
> (i) to prevent the transferred property from becoming divisible among the transferor's creditors; or

(ii) to hinder or delay the process of making property available for division among the transferor's creditors.

Note: For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.

Showing the transferor's main purpose in making a transfer

(2) The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(b) if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent.

The Tax Act

19 Subdivision AA of Pt III, Div 3 [of the Tax Act] dealt with contributions to superannuation funds for the benefit of employees.

20 Section 82AAA(1) contained a number of relevant definitions including a definition of "eligible employee". It is unnecessary to set out that definition but it is sufficient to say that it extends to an employee of the taxpayer.

21 An "employee" was defined in s 82AAA(1) to mean a person who is employed by a taxpayer and who is (a) engaged in producing assessable income of the taxpayer or (b) a resident of Australia engaged in the business of the taxpayer.

22 Section 82AAC dealt with deductions for contributions to eligible superannuation funds for employees. That section is not relevant to this appeal.

23 Section 82AAE dealt with deductions for contributions to non-complying superannuation funds. It provided that a deduction is allowable under Subdiv AA in respect of an amount paid by a taxpayer as a contribution to a non-complying superannuation fund (as defined elsewhere in the Tax Act) for the purposes of making provision for superannuation benefits for an eligible employee, other than certain employees referred to in the section.

24 The Commissioner's power to issue amended assessments and the effect of private rulings is contained in Pt IV.

25 Section 170 deals with the power of amendment. Section 170(1) provides that the Commissioner may, subject to the section, at any time amend an assessment by making alterations or additions.

26 The effect of the remaining subsections of s 170 is to set a four-year limit on the power to amend an assessment but this is subject to certain exceptions including where the Commissioner is of the opinion there has been fraud or evasion, as to which there is no time limit on the power to issue an amended assessment.

27 Section 170BB (as it then stood) dealt with the effect of private rulings. The critical subsection for present purposes is s 170BB(3). The effect of that subsection was that, subject to certain other sections, if the Tax Act imposed tax in a higher amount than would be assessable under the private ruling, the assessment and the final tax payable must be in accordance with the private ruling.

The Taxation Administration Act

28 Section 14ZAU of the *Taxation Administration Act 1953* (Cth) (the Administration Act) dealt with the Commissioner's power to withdraw a private ruling.

29 Relevantly, s 14ZAU(2) provided that the Commissioner may withdraw a private ruling, either wholly or in part, without the consent of "the rulee", if the arrangement to which it related had not begun to be carried out.

Background facts

30 Mr Bonnell commenced practising as a solicitor in July 1987. He specialised in taxation law and appears to have conducted his own taxation advice business in the period from about September 1998 to May 1999.

31 On 1 September 1998 Mr Bonnell established the Super Fund as a non-complying superannuation fund. Windoval was appointed as trustee of the Super Fund.

32 On 29 September 1998 Mr Bonnell obtained the private ruling from the then Deputy Commissioner. The ruling was to the effect that the contributions he intended to make to the Super Fund would be tax deductible.

33 The terms of the private ruling are set out in full in the primary judgment at [52]. The assumptions on which the private ruling was given were recorded in it. They included an assumption that the contributions would be for the purpose of making provision for superannuation benefits for Mr Bonnell and that he would be "an employee at common law" of Windoval.

34 The private ruling was accompanied by explanatory notes which are set out at [54] of the primary judgment. The explanatory notes included a statement of how the ruling would be binding on the Commissioner. It is not necessary to repeat that statement.

35 The explanatory notes also included a statement as to when the ruling would not be legally binding. That statement was, relevantly, as follows:

> This ruling will not be binding on the Commissioner if … the arrangement you actually carried out was materially different from that which you described in your application.

36 On 9 November 1998 Mr Bonnell received a written opinion from Senior and Junior Counsel that the Commissioner could not apply the anti-avoidance provisions of Pt IVA of the Tax Act to the "scheme".

37 The primary judge observed at [56] of his reasons that the "scheme" in respect of which the opinion was given did not include making the challenged payment. Further, counsel were not asked to consider in the opinion the question of whether the contributions which Mr Bonnell intended to make to the Super Fund would be deductible. Rather, the opinion was confined to the question of the possible application of Pt IVA. However, as the primary judge went on to say at [56], counsel also said:

> … that, if a large lump sum contribution were made to an NCSF at a time which was just before the taxpayer was due to retire, with the consequence that, on retirement, he would receive back the amount of that contribution, it could be concluded that the contribution was not made for the purpose of providing retirement benefits.

38 On 30 November 1998 Mr Bonnell received a second written opinion about the possible application of Pt IVA from different Senior and Junior Counsel. They expressed the view that it would be "strongly arguable" that the Commissioner could not successfully apply Pt IVA. They said the Commissioner would attempt to move against arrangements such as this and would litigate the validity of them. In addition, they drew attention to the question of whether Mr Bonnell was truly an employee of Windoval.

39 On 26 March 1999 the Commissioner of Taxation issued a media release which stated that the Tax Office had placed an embargo on the issue of private binding rulings on employee benefit schemes. The media release also stated that the Tax Office would withdraw a range of advance opinions previously issued.

40 The Commissioner issued a further media release on 19 May 1999 about "aggressively marketed" employee benefit arrangements. The release stated that a Tax Office review had found that many of the schemes were contrived arrangements which, in the Tax Office's view, failed both at law and in their implementation.

41 The Commissioner's media release of 19 May 1999 was issued only a few days after an article published in *Business Review Weekly* on 14 May 1999. The author of the article stated that the promoters of the "Super Tax Dodge" scheme were relying on a legal loophole. The author also recorded that the Commissioner had said he would move against the arrangements. Moreover, the author recorded a remark said to have been made by Mr Bonnell that he did not propose to put any more clients into the non-complying superannuation schemes because the tax position was not clear enough to recommend their use.

42 Mr Bonnell was aware of the *Business Review Weekly* article. He accepted that he made the statement that he did not intend to put any more clients into the arrangements. However, he did not accept that he made the statement to the effect that the tax position was not clear enough. The primary judge considered that Mr Bonnell's refusal to accept that he had made this statement was an example of evidence that reflected adversely on his credit.

43 Mr Bonnell also accepted that he became aware of the Commissioner's media release of 19 May 1999 shortly after it was published. But he said he formed the view that it did not affect his entitlement to make tax deductible contributions to the Super Fund.

44 Mr Bonnell's evidence before the primary judge was that in May 1999 he decided to cease to carry on the business of providing tax advice. As mentioned earlier, he said he believed that all that was required for him to validly retire for the purposes of receiving his entitlements from the Super Fund was to cease to conduct the business of providing tax advice.

45 On 23 June 1999 Mr Bonnell received a letter from the Australian Taxation Office stating that in accordance with, inter alia, s 14ZAU of the Administration Act:

> … the Commissioner is considering the withdrawal of the Private Ruling, dated 29 September 1998, which is expressed to apply to David N Bonnell in respect of the year ended 30 June 2000.

46 Mr Bonnell testified that he interpreted this letter as not relating to the 1999 tax year, but as applying only to the year ended 30 June 2000. He replied to the ATO's letter and took issue with the Commissioner's entitlement to withdraw the private ruling. However, he did not mention his interpretation of the letter as being confined to the 2000 tax year.

47 As stated above, the total amount of Mr Bonnell's contributions to the Super Fund for the financial year ending 30 June 1999 was $5 million. The contributions were made from fees he earned in his tax advice business which he conducted from October 1998 to May 1999. The tax advice business included marketing employee benefit arrangements similar to the arrangements he entered into with Windoval.

48 As also stated above, on 1 July 1999 Mr Bonnell caused the Super Fund to be wound up. The winding up of the Super Fund was effected by a resolution dated 1 July 1999. The Super Fund immediately paid the sum of $5 million to Mr Bonnell who then immediately gave the $5 million to Windoval as trustee of the Family Trust.

Events occurring after 1 July 1999

49 On 17 July 2000 the Commissioner of Taxation issued Mr Bonnell with an assessment for the financial year ending 30 June 1999. The assessment was based on the income tax return lodged by Mr Bonnell. In issuing the assessment the Commissioner allowed Mr Bonnell's claimed deduction of $5 million for his contributions to the Super Fund.

50 Commencing in November 2000, substantial sums of money, which were apparently derived from the original contributions to the Super Fund, were disbursed in the purchase of certain property and investments. The payments were made by a number of entities that were controlled by Mr Bonnell. Those entities included Lawjag Pty Ltd (Lawjag) and Bondcall Pty Ltd (Bondcall) which were active respondents in the proceedings at first instance.

51 The payments included funds for the purchase by Ms Leah McKenzie, who was Mr Bonnell's de facto partner, of a house in Manly for $1.4 million. Ms McKenzie entered into the contract for the purchase of that property in November 2000. A new dwelling was constructed on the property at a cost of approximately $2 million. The construction costs were paid during the period from January 2001 to July 2005 by the active respondents and certain other entities controlled by Mr Bonnell.

52 On 26 January 2001 Mr Bonnell sent to Ms McKenzie the document described as the Leah Schmea Memorandum. We will refer to it in more detail later.

53 Mr Bonnell wrote another document containing various admissions. The document is referred to in the primary judgment as the "Gordian Knot" document. The document was undated but the primary judge said at [95] that Mr Bonnell claimed it was written in 2004. We will set out the relevant parts of the document later.

54 On 29 July 2004 the Deputy Commissioner of Taxation disallowed Mr Bonnell's claims for his contributions of $5 million to the Super Fund and issued an amended assessment for the financial year ending 30 June 1999. The amount of tax for which Mr Bonnell was assessed under the amended assessment was $4,531,915.

55 During the period from December 2004 to August 2008 Mr Bonnell was engaged in extensive litigation with the Deputy Commissioner of Taxation in relation to his objection to the amended assessment. Mr Bonnell was unsuccessful in the litigation. Mr Bonnell and Lawjag and Bondcall were also engaged in litigation during that period with Ms McKenzie who had ceased her de facto relationship with Mr Bonnell in April 2005.

56 On 10 September 2008 the Commissioner obtained a sequestration order against Mr Bonnell and Mr Donnelly was appointed as trustee of his estate.

The Leah Schmea Memorandum

57 The Leah Schmea Memorandum is set out in full at [60] of the primary judgment. The Memorandum commenced by stating that its purpose was to outline Mr Bonnell's various corporate and trust structures. The outline included

an explanation of the establishment of the Family Trust and the Super Fund and the role of Windoval as well as the contributions of $5 million to the Super Fund.

58 Importantly, Mr Bonnell went on in the Memorandum to give an explanation of why he took the step of winding up the Super Fund on 1 July 1999.

59 The Memorandum stated that on 1 July 1999 the trustee of the Super Fund, that is to say, Mr Bonnell as controller of Windoval, sat down to consider the utility of the Super Fund as a savings vehicle for him and he considered the following matters:

> The fact that the Commissioner would ultimately not allow my contributions to the NCSF as tax deductible and that therefore I would be unable to pay the tax.
>
> The fact that the law was likely to change and therefore further contributions were not advisable.
>
> The fact that as the Commissioner was likely to disallow deductions claimed by all my clients I would require substantial funds to run several test cases.
>
> On the basis of these matters the Trustee concluded that the fund had no utility as a superannuation fund for me. The Trustee therefore resolved to wind up the fund as at 1 July 1999 and pay to me all the assets and cash standing to the credit of the fund to me personally.
>
> I immediately made a gift of these assets and funds to Windoval Pty Limited as trustee for the Bonnell Family Trust.

The Gordian Knot document

60 The relevant passage of the Gordian Knot document is as follows:

> The assessment (for millions of dollars) I knew was coming. I never really believed that it wouldn't issue. When the actual fourth anniversary passed (and I hadn't properly researched the law) I actually thought they had missed. They hadn't. Back in January however I truly believed that it would issue and they would attack me and Leah through me.

The affidavit evidence

61 The relevant parts of Mr Bonnell's affidavit of 18 January 2013 are as follows:

> [39] I did not gift the funds to Windoval as trustee of the Bonnell Family Trust in order to put the money out of reach of any creditor in the event that I later became a bankrupt. In particular …
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> …
>
> e. Even in the worst case scenario that I was not allowed the deductions, and did not successfully appeal that disallowance, I knew that the tax would be roughly in the vicinity of $2.5 million. The money that was gifted to Windoval as trustee of the Bonnell Family Trust remained under my sole control and I would have called for money from the trust initially to pay the tax for the 1998/1999 tax year had I been assessed as being liable to do so in 2000 and not successfully appealed. It would have been a far more attractive proposition for me in 2000 to pay the tax and still retain the significant balance of money for my enjoyment than it would have been to go bankrupt; …
>
> …
>
> [109] Had the deductibility of the contributions to my NCSF been disallowed by the ATO at the outset then I would have been able to pay the tax I would have been assessed to pay at that time as there would have been sufficient

money available and within my control at that time to do so. To the extent that the money was not held in my personal name, but in the name of Windoval as trustee of the Bonnell Family Trust, the money remained under my sole control at that time. Just as I had made money available from the $5,000,000 sum held by Windoval to pay my ex-wife and had funded my NCSF Clients legal matters from those moneys. I would also have caused the money to be made available to pay the tax if I had been assessed to do so in 2000 and failed on an appeal.

[111] As the above factors eroded the cash that I had earned in the 1998/1999 tax year and subsequently gifted to Windoval, by the time of the amended assessment in 2004 I could no longer meet the tax liability created by it, which also included substantial interest and penalties. Had I been adversely assessed in 2000, and failed successfully to challenge that assessment, I would have had more than sufficient funds within my control to pay the tax liability created by that assessment and would have done so. With the erosion of funds on and from 2000 there was naturally going to be a point in time beyond which I would no longer have sufficient funds within my control to pay any tax liability arising from an adverse assessment. By the time of the amended assessment in 2004 I was well past that point.

Transcript

62 Our attention was drawn to two passages of the transcript of cross-examination before the primary judge. The most pertinent passage appears at page 86 of the transcript of 11 March 2013 as follows:

> HIS HONOUR: Well, I'm sorry. If you have difficulty understanding it, I think the best — I think it's clear enough to me, so if you have a difficulty, you should identify what the difficulty is, and then if you can answer it, having identified it, please do, and if you can't, well, we can see what we can do about that? ---
>
> MR BONNELL: Thank you. Thank you, your Honour. It's a compound question. Was I determined not to pay the tax? Well, I didn't believe I was obliged to. I didn't arrange my affairs so that I wouldn't be able to, and I didn't dissipate funds until after my original assessment. Up until then, I had spent no money, no significant money. I hadn't settled, I hadn't bought Manly. The funds were largely intact apart from ---
>
> HIS HONOUR: They were in the trust though. They weren't in your hands? ---
>
> MR BONNELL: Yes, but I had access to the funds and I would have caused the trust to pay the tax because if I had been assessed at that point, then it would have been clawed back under bankruptcy, so it would be futile not to pay the tax. So I would have paid the tax, fought the assessment, and then hoped to get the tax back.

63 The other relevant passage is at page 73 of the transcript as follows:

> MR COLES: … But you want to have his Honour believe that whatever else is — may have included from time to time, didn't include 1 July 1999. Is that right? ---
>
> MR BONNELL: No. If I had been assessed on — in May 2000 when I expected I would have been normally assessed, I would simply have paid the tax, I would not have gone bankrupt.

The primary judgment

64 The primary judgment recorded the issues which arose in the proceeding as follows:

> (1) Whether the bankrupt's main purpose in effecting the transfer of $5,000,000 from himself to Windoval on 1 July 1999 was to prevent the said sum of $5,000,000 becoming divisible amongst his creditors or to hinder or delay the process of making the said sum of $5,000,000 available for division amongst his creditors (s 121(1)(b) of the Bankruptcy Act).
>
> (2) Whether it can reasonably be inferred from all the circumstances that, at the time of the transfer of the said $5,000,000 on 1 July 1999, the bankrupt was, or was about to become, insolvent with the consequence that the bankrupt's main purpose is taken to be the purpose described in s 121(1)(b) of the Bankruptcy Act (s 121(2) of the Bankruptcy Act).
>
> (3) Whether the said transfer of $5,000,000 was made with intent to defraud the bankrupt's creditors (s 37A(1) of the Conveyancing Act).

65 His Honour set out the approach which he proposed to take to determine the answer to issue number one, that is to say, whether Mr Bonnell's main purpose was to hinder or delay creditors, as follows:

> [67] The process of discerning the true purpose and intent of the bankrupt as at 1 July 1999 involves assessing the direct evidence given by him as to his state of mind as at that date against other objective indications of that state of mind in order to make a judgment as to the true position. The Court is not bound to accept the direct evidence of the bankrupt but is entitled to weigh that evidence against other primary evidence and inferences to be drawn from that primary evidence in order to make a final judgment on the critical issue.

66 His Honour observed at [72] that it was not necessary to consider whether the impugned payment of $5 million could be traced into the hands of Lawjag, Bondcall or Ms McKenzie. The effect of his Honour's observations at [73] was that the application turned on whether Mr Donnelly succeeded in his claim under s 121 of the *Bankruptcy Act* or s 37A of the *Conveyancing Act*.

67 The primary judge's adverse credit findings against Mr Bonnell commence at [97] and continue to [118]. It is plain that his Honour comprehensively rejected Mr Bonnell as a witness of truth.

68 His Honour's critical findings about the effect of the Leah Schmea Memorandum appear at [119]. His Honour found that Mr Bonnell was endeavouring in the Memorandum to inform Ms McKenzie, who had by then been his de facto partner for almost a year, of the likelihood that in the near future, the Commissioner of Taxation would be pursuing him for a substantial sum of money as a result of transactions which he had carried out on 1 July 1999. His Honour continued:

> … I also find that the decision which the bankrupt made either on or shortly before 1 July 1999 to pay out the $5,000,000 of contributions which he had made to the BSF No 2 between February and June 1999 and the decision to wind up the BSF No 2 were both made in circumstances where, as at 1 July 1999, the bankrupt had a real apprehension that the Commissioner of Taxation would disallow the deductions which he intended to claim for the contributions which he had made to the BSF No 2 and that, as a result, he would be unable to pay the significant amount of tax that would be reassessed to him. These conclusions sensibly follow from a reasonable and fair interpretation of the words which appear at the beginning of the fifth paragraph under the heading "1 July 1999" in the Leah Schmea memorandum: "On the basis of these matters …".

69 The primary judge went on to find at [120]:

> I also infer that the gift to Windoval was made as the last step in his endeavour to put the $5,000,000 beyond the reach of the Commissioner of Taxation should the apprehensions felt by the bankrupt become reality.

70 His Honour also referred to evidence given by Mr Bonnell in proceedings in the Supreme Court, upon which Mr Bonnell was cross-examined in the present proceedings, to support the finding that Mr Bonnell believed that the Commissioner would disallow the deduction and that, as a consequence, he might be made bankrupt. His Honour said:

> [110] The bankrupt was then cross-examined about certain evidence which he had given in the Supreme Court proceedings. In those proceedings, when asked the following question:
>
> > And you did that [gave the $5,000,000 to Windoval], didn't you, to ensure or to make it as hard as possible for the tax man ever to collect the tax on the residue of the $5 million.
>
> [111] His answer to that question was:
>
> > I saw it as a prudent plan, yes.

The relevant parts of his Honour's reasoning and findings appear at [112] and [123]-[124].

71 The primary judge also took into account Mr Bonnell's inability to explain the statement he had made in the Gordian Knot document (see [125]).

72 His Honour's ultimate findings of fact were as follows:

> [126] In the end, I am satisfied that, as at 1 July 1999, when the bankrupt caused Windoval to make entries in its books effecting the payment to him personally of $5,000,000 as a retirement benefit, when he caused Windoval immediately thereafter to wind up the BSF No 2 and when he then directed Windoval to treat the $5,000,000 which it still held in its books as a gift from the bankrupt personally to Windoval, in its capacity as the trustee of the BFT, the bankrupt believed that it was very likely that the Commissioner of Taxation would, in due course, disallow the deductions which he intended to claim for the total amount of contributions made by him to the BSF No 2 during the 1998-1999 Tax Year (viz $5,000,000) and, as a consequence, require him to pay, in addition to the tax which might otherwise be payable, approximately half of the $5,000,000.
>
> [127] I find that the bankrupt turned his mind to these matters either on or immediately before 1 July 1999 and took the steps which he took on 1 July 1999 with these matters in mind and with the intention of putting the $5,000,000 in question beyond the reach of the Deputy Commissioner of Taxation and, for that matter, beyond the reach of any other creditors who might come knocking (eg former clients who were dissatisfied with the advice which they had received from the bankrupt).

73 The factual findings effectively determined the result of the case but his Honour went on to consider the effect of the leading authorities including the decision of the High Court in *Trustees of the Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278.

74 His Honour also referred to the following passage from the judgment of Sackville J in the *Cummins* matter at first instance, see *Prentice v Cummins (No 5)* (2002) 124 FCR 67 at [99]:

> … a transferor may have the requisite purpose if assets are given away at a time when he or she is aware of an impending liability, but one which has not yet crystallised into an existing indebtedness: *Barton v Deputy Commissioner of Taxation* (citation omitted) at 374 per Stephen J (where the impending liability related to a taxation debt which would come into existence only once an assessment had issued).

75 His Honour went on to apply that dictum in the following passage of his reasons:

> [145] I have found that, as at 1 July 1999, the bankrupt well appreciated that the tax deductions which he intended to claim in respect of the 1998-1999 Tax Year for the contributions which he had made in that year to the BSF No 2 were likely to be disallowed and that, if he were to divest himself of his superannuation benefits held in the BSF No 2, in the event that amended assessments were issued by the Commissioner of Taxation, he would not have sufficient funds at his disposal to pay the additional tax assessed. Because the funds would be in the care of entities which were controlled by him, he would nonetheless have access to and control over the funds. This does not mean, however, that the bankrupt would have exercised that control on and after 1 July 1999 in order to procure funds to pay an additional tax debt of the order of $2.5 million. The dictum of Sackville J at 91 [99] of *Prentice v Cummins* is apposite.

76 The application of Sackville J's dictum in the present matter is then further explained by the primary judge at [146]-[147]. Those paragraphs contain his Honour's findings that Mr Bonnell had the purpose proscribed by s 121(1)(b) of the *Bankruptcy Act* as follows:

> [146] I find that, in making the challenged payment, the bankrupt had the requisite purpose, namely, to defeat or hinder his creditors within the meaning of s 121(1)(b) of the Bankruptcy Act. The primary focus of his attention was the Commissioner of Taxation whom he considered to be likely to become a creditor of him at some time in the future. The fact that the Commissioner did not, in fact, issue a revised taxation assessment until 29 July 2004 does not matter at all.
>
> [147] The funds given to the BFT and intended to be moved on to other entities controlled by him could be used for his benefit and for the benefit of his family and associates while at the same time be kept beyond the reach of his creditors. In particular, the funds would be beyond the reach of the Commissioner of Taxation.

77 His Honour then considered Mr Donnelly's submission that Mr Donnelly was also entitled to rely on s 121(2) so as to obtain the benefit of the statutorily deemed proscribed purpose under s 121(1)(b) by reason of the transferor's insolvency.

78 His Honour found at [152] that Mr Donnelly was entitled to succeed under s 121(2). His Honour's reasons for that finding are encapsulated in [149] as follows:

> [149] The applicant's case on insolvency is a simple one: He says that, whatever may have been the quantum of other debts due and payable by the bankrupt as at 1 July 1999 and even if the Court were to accept that all of those other debts were able to be discharged as and when they became due and payable, the actions of the bankrupt on 1 July 1999 which resulted in his divesting himself of the entire benefit held for him in the BSF No 2 inevitably meant that he was thereafter insolvent or, at the very least, about

> to become insolvent. There was no evidence nor any suggestion that the bankrupt would have used his position as controller of Windoval, the BFT and the other relevant entities to procure the necessary funds to pay the amount of tax assessed under any amended tax assessment in respect of the 1998-1999 Tax Year that might have been issued in the future. The mere fact that he could have done so is not to the point.

79 The statement in the abovementioned quote that there was no evidence or suggestion that Mr Bonnell would have used his position to procure the necessary funds is to be read with his Honour's observations in [91] of his judgment as follows:

> [91] In his affidavit, the bankrupt went on to explain that the BFT remained under his sole control in 1999 and he could have called the money back had he received an amended taxation assessment which survived challenge by him. He did not say that he would have called the money back in order to meet his increased tax liabilities.

The principles upon which a new trial may be ordered

80 The amended notice of appeal sought the setting aside of the orders of the primary judge and orders dismissing Mr Donnelly's claims. During the hearing of the appeal, however, Mr Walker indicated that if the appellant succeeded on the first ground, it would seek a retrial.

81 Section 28(1)(f) of the Federal Court Act confers power on the Court to grant a new trial in any case in which there has been a trial, either with or without a jury, on any ground upon which it is appropriate to grant a new trial.

82 The power contained in s 28(1)(f) is not expressed to be subject to the proviso which governs appeals against convictions by a jury in a criminal trial under state legislation. The proviso is to the effect that even if the appellate court is of the opinion that the point raised in the appeal might be decided favourably to an appellant, it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred: see *Weiss v The Queen* (2005) 224 CLR 300 at [9], [44]-[45].

83 Nevertheless, as the High Court has observed, in construing the language of s 28(1)(f) of the Federal Court Act, what constitutes a ground appropriate for granting a new trial can only be understood by reference to the history of the law concerning the grant of new trials: *Conway v The Queen* (2002) 209 CLR 203 at [5].

84 The plurality in *Conway* (Gaudron ACJ, McHugh, Hayne and Callinan JJ) went on to say at [6] that to construe s 28(1)(f) as authorising the dismissal of an appeal on the ground that no substantial miscarriage of justice has actually occurred gives effect to the long established common law rule that a new trial is not ordered where an error of law, fact, misdirection or other error has not resulted in any miscarriage of justice.

85 Their Honours said at [6] that, historically, the common law may have made an exception to the miscarriage of justice proviso in cases where evidence was wrongly admitted in a criminal trial. But they continued by stating that, even if it did, the High Court and the Federal Court have recognised that the exception no longer has a part to play in the administration of criminal justice in cases where a statute gives a general right of appeal against a conviction. Their Honours explained this conclusion by tracing the remedies for setting aside a conviction at common law.

86 It is plain that in tracing this history, the plurality in *Conway* drew upon the authorities which dealt with the remedies that were available in both criminal and civil appeals. So much is clear from their Honours' consideration of the decision of the Court for Crown Cases Reserved in *R v Gibson* (1887) 18 QBD 537.

87 In *R v Gibson* evidence was wrongly admitted in a criminal trial. Lord Coleridge CJ said at 540-541 (in a passage set out in *Conway* at [19]):

> It is clear that a verdict so obtained in a civil case would not formerly have been allowed to stand, because until the passing of the Judicature Acts the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial, because the Courts said that they would not weigh evidence. Where, therefore, such evidence had gone to the jury a new trial was granted as a matter of right.

88 The plurality in *Conway* then considered, at [21]ff, a number of Australian authorities which departed from, or called into question, the proposition stated by Lord Coleridge.

89 Of particular importance in the present case is the observation made in *Conway* at [27] that it is difficult to accept Lord Coleridge's statement that where, in a civil trial, inadmissible evidence had gone to the jury, a new trial was granted as a matter of right. They pointed out that the statement is inconsistent with the view expressed by Dixon CJ in *Balenzuela v De Gail* (1959) 101 CLR 226 at 234-235.

90 In that passage of his judgment Dixon CJ suggested that the true view is that at common law it was necessary to grant a new trial unless the Court felt some reasonable assurance that the error of law at the trial:

> … whether in a misdirection or wrongful admission or rejection of evidence or otherwise was of such a nature that it could not reasonably be supposed to have influenced the result …

91 The plurality in *Conway* also observed at [28] that Lord Coleridge's statement in *R v Gibson* is inconsistent with the longstanding practice in civil cases at common law in New South Wales. Their Honours referred to *R v M'Leod* (1890) 11 LR (NSW) 218 at 231-232 and *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533 at 563 (per Evatt J) to support that proposition.

92 The conclusion which the plurality reached in *Conway* at [29], after an extensive review of the authorities, was that notwithstanding Lord Coleridge's statement in *R v Gibson*, it was "clear enough" that at common law a new trial would not be ordered in a civil case if the error, *whatever it was*, could not reasonably be supposed to have affected the result of the trial.

93 This conclusion informed their Honours' view as to the proper construction of the power conferred by s 28(1)(f) of the Federal Court Act as follows in *Conway* at [36]:

> … This power is expressed in wide terms and should be given a liberal construction. It is a power that must, of course, be exercised judicially. But there is nothing unjudicial, arbitrary or capricious in refusing to order a new trial when, although error has occurred, no miscarriage of justice has occurred. The common law courts applied such a rule in civil proceedings for more than a century. The King's Bench and the Court for Crown Cases Reserved applied it in criminal cases for a long period until 1887 when it was held in *Gibson* that the rule did not

> apply where evidence had been wrongly admitted. The Judicial Committee applied it in criminal appeals and applications for leave to appeal against criminal convictions. And this Court applied it in appeals from the Australian Capital Territory before the enactment of the *Federal Court of Australia Act*.

(Footnotes omitted.)

94 Their Honours also referred at [38] to the observations of Gibbs CJ and Mason J in *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 529 and to those of Deane J at 615. The observations made by their Honours in *Chamberlain (No 2)* as to the proper construction of s 28(1)(f) are to the same effect as those of the plurality in *Conway*.

95 *Conway* and *Chamberlain* were both criminal cases but it is plain that the construction of s 28(1)(f) given by their Honours applies equally to civil cases heard without a jury (cf *Clampett v Attorney-General (Cth)* (2009) 181 FCR 473 at [50]ff). Indeed, it would be extraordinary if it were otherwise since s 28(1)(f) is concerned with the power to grant a new trial in any case in which there has been a trial "either with or without a jury".

96 There is no definition of "trial" in the Federal Court Act but it is defined in Sch 1 to the *Federal Court Rules 2011* (Cth) to include any hearing other than an interlocutory hearing. It is clear that this is the sense in which the term "trial" is used in s 28(1)(f) of the Act. At the risk of stating the obvious, this reinforces the construction of s 28(1)(f) given in *Conway* and makes it plain that the "no miscarriage of justice" exception applies to civil trials heard by a judge without a jury.

An alternative approach to the grant of a new trial: Stead's case

97 A particular example of instances in which it may be appropriate to order a new trial occurs where a party has been the subject of a denial of procedural fairness which affects the entitlement of a party to make submissions on an issue of fact.

98 In *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145, a unanimous decision of the High Court, Mason, Wilson, Brennan, Deane and Dawson JJ stated the principle which applies in such cases. Their Honours said that where this occurs:

> … especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the rules of natural justice could have made no difference.

99 Their Honours went on in *Stead* at 145-146 to say:

> … when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial on an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial.

100 Finally, their Honours said at 147 that the conclusion they had reached was reinforced by the judgment of Dixon CJ in *Balenzuela v De Gail*.

101 The applicability of the principle stated in *Stead* was considered by a Full Court of the Federal Court in a negligence action in which the trial judge had expressed adverse views of the evidence of a psychiatrist upon the basis of a

diagnostic manual which was a standard reference work in the field. However, in making that finding, the trial judge made use of a part of the manual that was not properly before him: *Australian and Overseas Telecommunications Corporation Ltd v McAuslan* (1993) 47 FCR 492.

102 All of the members of the Court accepted that the rule in *Stead* is a very strict one: see at 496 per Burchett J; at 516 per Miles J; at 519 per ML Foster J. However, the majority judges (Miles J and Foster J) observed, at 516 and 519, that the rule is not absolute.

103 Miles J expressed his qualification to the automatic application of the rule at 516 as follows:

> The rule, although enunciated in *Stead* in strong terms, is not absolute. With respect, I do not take the High Court to be saying that, where there is a denial of opportunity of making submissions on a question of fact, a new trial must be ordered unless there is no possibility that a new trial would make any difference. That would be to impose an unrealistically heavy burden on a respondent, as it is difficult to imagine circumstances in which all possibility of a different result must be excluded. The concept is surely one of reasonable possibility. That is to say, unless the respondent shows that there is no reasonable possibility that a new trial would bring about a different result, the denial of natural justice must result in a new trial.

104 Foster J said at 519:

> There can be no doubt that this rule is a very strict one. However, it is not to be applied automatically. The overriding question must always remain whether the breach had any bearing on the outcome of the case. No doubt the party seeking to uphold a decision claimed to have been vitiated by such a breach must shoulder a heavy burden. He must satisfy an appellate court that the result of the trial would necessarily have been the same notwithstanding the breach.

105 The majority judges in *McAuslan* declined to order a new trial. They found, at 516 and 520, that if the portions of the manual to which the trial judge had referred had been excluded from him, it would have made no difference to the result of the trial.

106 Although their Honours did not refer to s 28(1)(f) of the Federal Court Act, it is apparent that the application of the rule is *Stead* turns upon similar considerations to those that inform the question of whether the ground which is relied upon is one which demonstrates that it is appropriate to grant a new trial. That is to say, the “it would have made no difference” exception is analogous to the “no miscarriage of justice” proviso which informs the exercise of the jurisdiction under s 28(1)(f).

First issue — The no evidence finding

107 Mr Coles QC, who appeared for Mr Donnelly, submitted that the statement in the primary judgment at [149] that there was no evidence or suggestion that Mr Bonnell would have procured the necessary payment was merely an encapsulation of the case put by Mr Donnelly as the applicant in the case below. He relied on the prefatory words of [149] to support that submission.

108 Mr Coles went on to submit that his Honour did address, and take into account, the evidence in Mr Bonnell’s affidavit and the evidence in the transcript to which we have referred. He pointed in this regard to the observation of the primary judge at [145] that the funds would be in the care of entities that were controlled by Mr Bonnell who would have access to and control of those funds.

109 We reject Mr Coles' submissions of an absence of error on the part of the primary judge. With respect, it seems plain to us from the words used by his Honour at [91] and [149] that he had accidentally overlooked the evidence of Mr Bonnell on which Mr Walker relies.

110 To accept Mr Coles' submission would lead to the conclusion that the description of the applicant's case said to have been given by his Honour at [149] was wrong. It could not have been the applicant's case below that there was no such evidence. Plainly there was. It therefore seems clear to us that [149], especially when read in light of [91], was an incorrect statement of the evidentiary position. Mr Coles' submission was not supported by reference to anything put to the primary judge.

111 We do not consider that this conclusion is altered by his Honour's observations in [145]. The observation that Mr Bonnell would have access to and control over the funds is followed by the statement that this does not mean that he "would have exercised that control" to procure payment of the tax debt of $2.5 million. That seems to us to be a finding of fact which, on its face, does not take into account Mr Bonnell's evidence of what he would have done.

112 The view we have therefore reached is that the appeal is to be approached upon the basis that the learned primary judge made an error of fact, analogous to the type discussed in the authorities in *Conway*, namely a wrongful rejection of evidence. The effect of it is that the primary judge's findings were made on an incomplete consideration of the whole of the record.

113 Errors of this type are sometimes made in the judicial process and no undue criticism is intended of the primary judge. No one is immune from error and it is possible that our conclusion is itself based upon too strict a reading of the terms of his Honour's judgment.

114 But in any event we are satisfied that the error we have identified is not a ground upon which it is appropriate to grant a new trial. There are three reasons for this. Each of them leads to the inescapable conclusion that there is nothing unjudicial in refusing to order a new trial because no miscarriage of justice has occurred.

115 The first reason is the very qualified nature of the evidence in the affidavit and the transcript. Nowhere in that evidence did Mr Bonnell say that he would have caused the Family Trust to pay the tax in any situation in which it may be the subject of an assessment or an amended assessment. In particular, he did not give evidence that as at 1 July 1999 he had the capacity to, and intended to, convey and manage Windoval and the other entities in a way which would enable him to call back the funds at any time during the four-year period in which an amended assessment may issue.

116 Rather, Mr Bonnell's statements in his affidavit as to what he would have done are all directed to the hypothetical situation of an assessment, or a disallowance of the deduction in 2000. The statement in [109] of his affidavit about a disallowance "at the outset" is to the same effect. That is to say, it speaks to his stated intention in respect of the possible disallowance of the deduction in his original assessment in 2000. It does not contain a statement of what he would have done in the event of an amended assessment, disallowing the deduction, which could have been issued at any time during the ensuing four years.

117 The evidence recorded in the transcript to the effect that he would have caused the Family Trust to pay the tax if it had been assessed "at that point" is to the same effect.

118 What was required, at very least, to demonstrate that a miscarriage of justice has occurred was unqualified evidence as to Mr Bonnell's intention at the time of the transfer, that is to say 1 July 1999, that he retained the capacity to and that he intended to, and would have, procured the Family Trust to pay the tax in any circumstances in which a valid assessment, or valid amended assessment, may issue. The evidence on which he now relies does not rise to that level.

119 It may be that the evidence need not be sufficient to meet the common law test for the reception of fresh evidence stated by Dixon CJ in *Orr v Holmes* (1948) 76 CLR 632 at 641 and *Greater Wollongong City Council v Cowan* (1955) 93 CLR 435 at 444. But the evidence which was overlooked had to be of sufficient probative value to influence the decision. Mr Bonnell's evidence fell well short of that standard.

120 Second, it is not sufficiently clear that the evidence on which the appellants now rely is evidence as to Mr Bonnell's actual state of mind as at 1 July 1999. It is true that any evidence of this type will be retrospective. But what was required was a clear statement, of course made after the event, as to his state of mind on 1 July 1999. The evidence now relied upon is not expressed as such a statement. In contrast, the primary judge found that a fair and reasonable interpretation of the Leah Schmea Memorandum was that it described Mr Bonnell's "real apprehension" as at 1 July 1999.

121 Evidence of what a person would have done if certain risks eventuated is fraught with difficulties. The evidence is necessarily hypothetical: *Chappel v Hart* (1998) 195 CLR 232 at [32]. It is open to a court to disbelieve evidence found to be tainted by hindsight, even in the absence of cross-examination: *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 581, 587-588 (Samuels JA).

122 Evidence of this type is now excluded in certain instances under the *Civil Liability Act 2002* (NSW), s 5D(3)(b). It was admissible in the present case but was of insufficient probative value by reason of the extent to which it was a purely retrospective statement that may well have been tainted by hindsight.

123 Third, the primary judge's critical finding against Mr Bonnell turned not so much on his credit finding as upon his Honour's view of the fair and proper interpretation of the Leah Schmea Memorandum. This is evident from his Honour's findings at [119] and [120] which we have set out above.

124 The same conclusion is also evident from his Honour's observation at [115] that the statements made by Mr Bonnell in the Leah Schmea Memorandum were "damning admissions".

125 It is true that his Honour gave considerable weight in his credit findings to Mr Bonnell's attempts to disown the content of the Leah Schmea Memorandum and the "unintelligible" and verging on "farcical" explanations given by Mr Bonnell as to why he wrote it: see at [116]-[118].

126 But ultimately his Honour's criticism of that evidence merely reinforced the conclusion which his Honour reached that the Leah Schema Memorandum was to be interpreted in the terms in which it was written. That Memorandum was made at a point closer in time to the relevant events, uninfluenced by

Mr Bonnell's perception of his interests in the litigation, and contained admissions as to Mr Bonnell's state of mind that were not consistent with an intention to recall the funds from Windoval.

127 The primary judge's finding that Mr Bonnell had a real apprehension as at 1 July 1999 that the Commissioner would disallow the deductions and that, as a result, he would be unable to pay the sum of approximately $2.5 million in tax is the only rational explanation that can be given to the words in the Leah Schmea Memorandum.

128 Mr Walker conceded that the admissions made by Mr Bonnell were, and would be on any retrial, powerful evidence against Mr Bonnell. It may be true that his Honour's credit findings were, in some respects, made without regard to the evidence of what Mr Bonnell said he "would have" done. But we do not consider that any oversight on his Honour's part as to the existence of that evidence addresses the force of the admissions which ultimately provided the basis for his Honour's critical factual findings.

129 It follows that any error made by his Honour as to the existence of the evidence now relied upon cannot reasonably be supposed to have affected the result of the trial. If error occurred, no miscarriage of justice has resulted and it is not appropriate to grant a new trial: *Conway* at [36].

130 Assuming the primary judge to have made the error to which we have referred, we do not consider the error to have had any bearing on the outcome of the case. We are satisfied that the result of the trial would have been the same notwithstanding the error: *Stead* at 145-146; *McAuslan* at 516, 519, 521.

Issue 2 — No impending liability

131 The appellants attack the finding made by the primary judge that the Commissioner of Taxation was an impending creditor, and therefore a creditor within the meaning of s 121(1)(b) of the *Bankruptcy Act*.

132 His Honour's reasons for that finding were of mixed fact and law. They turn upon his finding at [126] that Mr Bonnell believed that the Commissioner would disallow the deduction and upon his Honour's application at [136]-[141] of the principles stated in *Cummins*.

133 Importantly, the primary judge said at [140] that *Cummins* is authority for the proposition that the term "creditors" in s 121(1) encompasses future creditors and that the relevant debt need not be owing as at the date of the disposition; it is sufficient if the debt is impending.

134 That statement accurately encapsulates the principles stated by the High Court in *Cummins* at [30]-[32] which drew upon the observations made by Stephen J in *Barton* at 374 and reiterated by Sackville J in *Cummins* at first instance.

135 Mr Walker did not contest any of that jurisprudence. Nevertheless, he contended that the liability to the Commissioner was not impending in the sense stated in those authorities. The gravamen of this submission, in the written submissions, and at least initially in Mr Walker's oral address, was put on two bases. First, that *Cummins* was distinguishable on the facts, and, second, that the Commissioner was bound by the private ruling which he could not withdraw.

136 There are a number of reasons why these submissions must be rejected.

137 Subject only to the question of the status of Mr Bonnell's private ruling, the decision in *Cummins* is not distinguishable from the present case.

138 In *Cummins*, the bankrupt was aware at the time of the impugned transactions that he had incurred very substantial liabilities to the Commissioner, contingent only upon the Commissioner issuing assessments, and that the Commissioner would issue assessments once the bankrupt's delinquency became known: see the findings made by Sackville J at [137]-[138] set out by the primary judge in the present case at [142].

139 It is true that unlike the bankrupt in *Cummins*, Mr Bonnell had two opinions from Senior and Junior Counsel, but neither of the opinions was unqualified, and neither of them actually dealt with the question of whether the deductions were allowable at all, let alone in the circumstances in which Mr Bonnell was intending to make the contributions and deal with them.

140 In any event, the short answer to the attempt to distinguish *Cummins* is that in the present case the primary judge found at [126] that Mr Bonnell believed it was very likely that the Commissioner would disallow the deduction.

141 That finding was fully open to the primary judge for the reasons we have given in addressing the first ground of appeal. The position in the present case is indistinguishable from the findings made by Sackville J in *Cummins* at first instance at [137]-[138] to which we have referred.

142 It is therefore incorrect to say that the Commissioner was not an impending creditor in the sense explained by Stephen J in *Barton* or by the High Court in *Cummins*.

143 Indeed, subject only to the question of the effect of the private ruling, the written submissions of Mr Bonnell fail to engage with the principle that the term "creditors" in s 121(1) is not confined to a person to whom a debt is owing.

144 The authorities make it sufficiently clear that the relevant intent to defeat creditors may be established even though there are no existing creditors at the date of the disposition: *Barton* at 374, *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 (Wilcox, Gummow and von Doussa JJ) at 525-526, citing *Mackay v Douglas* (1872) LR 14 Eq 106; *Ex parte Russell; Re Butterworth* (1882) 19 Ch D 588.

145 That statement of principle was made in relation to the *Statute of Elizabeth 1571* (UK) 13 Eliz c 5 which is the source of s 37A of the *Conveyancing Act*. But there is no reason to suggest that decisions under the Elizabethan Statute and its analogues are not equally applicable in considering the proper construction of s 121 of the *Bankruptcy Act*: see *PT Garuda* at 522.

146 It is true that in *Williams v Lloyd* (1934) 50 CLR 341 an application under the *Conveyancing Act* failed where there were no creditors in existence at the date of the transactions. But the reasons of Dixon J at 372 make it plain that this was because the plaintiff was unable to establish, in all the circumstances, that the necessary intent existed: see also *Cummins* at [40].

147 In the present case, as we have said, the primary judge was satisfied that Mr Bonnell had the necessary intent on 1 July 1999. That is sufficient to dispose of the second ground of appeal.

The effect of the private ruling

148 Mr Walker relied upon the provisions of s 170BB of the Tax Act and s 14ZAU of the Administration Act to support his submission that there was no impending liability because, so it was contended, there was no liability at all.

149 Mr Coles informed us that this submission was not raised before the primary judge. Mr Coles did not go on to submit that the point was not open on appeal. But in any event we are of the view that the point is without substance.

150 The relevant question is not whether the Commissioner had power to withdraw the private ruling, but whether the ruling was binding upon the Commissioner in the light of the arrangements that Mr Bonnell actually carried out.

151 The explanatory notes to the private ruling stated in plain terms that the ruling would not be binding on the Commissioner if the arrangement that Mr Bonnell actually carried out was materially different from that which he described in his application.

152 We were not taken to the details of the arrangement that was described in the application for a private ruling. In particular, there was nothing to suggest that Mr Bonnell informed the Commissioner in his application that he intended to contribute a substantial amount of money to the Super Fund and "retire" very shortly after having done so.

153 Moreover, the ruling was expressly given on a number of assumptions, including the assumption that the contribution would be made for the purpose of making provision for superannuation benefits for Mr Bonnell.

154 That was a question of fact and was, in any event, subject to the ability of the Commissioner to rely on Pt IVA to defeat the availability of the deduction even if it satisfied the terms of s 82AAT.

155 It is not clear whether the primary judge was required to answer that question. The applicability of the private ruling seems to have been dealt with in the context of whether Mr Bonnell had the necessary intention to hinder or delay creditors for the purpose of s 121 of the *Bankruptcy Act*: see the primary judge's statement of the issues at [62], reproduced above at [64].

156 Nevertheless, it is clear that the primary judge was of the view that Mr Bonnell faced serious difficulties in maintaining that the contributions met the conditions upon which the private ruling was given. In particular his Honour drew attention at [56]-[57] to the qualifications stated in the joint opinions of counsel. Those qualifications included the making of a large lump sum contribution immediately before the taxpayer was due to retire.

157 That difficulty is not overcome by pointing to the decision of the Administrative Appeals Tribunal in *Yates v Federal Commissioner of Taxation* (1998) 41 ATR 1096. The observations of the Tribunal at [13] as to the irrelevance of the time at which the contribution was made turned upon the facts of that case including the Commissioner's failure to rely upon Pt IVA.

158 In any event, in the present case, the proposition that the Commissioner was bound by the private ruling and that it applied in all the circumstances to Mr Bonnell cannot be maintained. This is because it amounts to a collateral attack on the finality of the assessment.

159 The assessment was issued on 29 July 2004. Mr Bonnell's objections failed and he was unsuccessful in the various proceedings brought by him prior to his bankruptcy.

160 That is a complete answer to the submissions put on behalf of the appellants.

Conclusion

161 The appeal must be dismissed with costs.

Orders accordingly

Solicitors for the appellants: *Deutsch Miller*.

Solicitors for the respondent: *Church & Grace*.

SARAH SOMERSET