



OENOVIVA



Form 18

r.41.05.2

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY No A67 of 2004.

BETWEEN;

AVERIL GAY GARRETT
The Applicant

&

ANDREW MORTON GARRETT ©®
The 2nd Applicant

&

EVAJADE P/L, ACN; 007 954 154
The 3rd Applicant

&

NATIONAL AUSTRALIA BANK LTD
The Respondent

THE APPLICANTS SUMMARY OF ARGUMENT

Dated; the 22nd September 2006.

ANDREW MORTON GARRETT ©®(Agent & Secured Party Creditor)
2nd & 3rd Applicants.
Managing Trustee of The Andrew Garrett Group of Companies
Managing Director of Evajade Pty Ltd & the Andrew Garrett Group of Companies.



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PART I : THE SPECIAL LEAVE QUESTIONS

1. Whether *Inglis v Commonwealth Trading Bank* (1971) 126 CLR 161 was correctly decided, and if so, whether (as many courts have regarded it, including the full court in the Case at Bar) it is authority for an inflexible rule, or a Strong rule of pre-disposition, that:
 - a. Where it is not disputed that there has been a default and that the power of sale (should it exist) is, in consequence, exercisable, and
 - b. Where the only original dispute is as to the amount of the secured debt due and owing, or as to the proper exercise of the power of sale, and
 - c. Where a dispute exists that the Cause of the Default was the breach of the Respondent in respect of the 1st & 2nd Contracts of Finance between the parties, and
 - d. Where the terms and conditions of the Bill Facilities Letter of Offer are unenforceable and the Power of Sale pursuant to the 1st & 2nd Registered Mortgages does not exist.
 - e. Where a misrepresentation of the Respondent as to the interest purportedly owed under the Bill Facility resulted in the discharge of injunctive orders.

The Court will not intervene to restrain the exercise of the power of sale unless the mortgagor brings into Court the amount claimed by the mortgagee as due and owing under the mortgage.

2. Whether the failure of the Full Court to consider and rule upon or alternatively to uphold the Registered Proprietor's contention that they had fully complied with the undertakings given to the Court as a Condition of relief, requires the Intervention of this Court in the administration of justice in the particular case.



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3. Whether the Default Rate set out at Item 12 & Clause 19 of all Bank Bill Facilities offered by National Australia Bank Ltd is a misrepresentation, unenforceable & a Breach of the Company's Duties to its Clients.

PART II : A BRIEF STATEMENT OF THE FACTUAL BACKGROUND

- 1 Since 4th December 1996 Andrew Garrett Wine Resorts Pty Ltd ("Resorts") has been the registered proprietor of the following real property registered under the provisions of the Real Property Act 1886 (SA) ("RPA") as to 23 undivided 26th parts in its capacity as trustee of the Springwood Park Unit Trust established by Declaration of Trust in June 1996 and comprises the land referred to in:
- 1.1. Certificate of Title Book Register Volume 5324 Folio 475;
 - 1.2. Certificate of Title Book Register Volume 5334 Folio 326;
 - 1.3. Certificate of Title Book Register Volume 5348 Folio 15 (Collectively known as "Springwood Park").
- 2 Averil Garrett has, since 4th December 1996 been the registered proprietor pursuant to the provisions of the RPA as to 3 undivided 26th parts of Springwood Park.
- 3 Springwood Park is encumbered by way of the following mortgages registered pursuant to the provisions of the RPA, General Principles of Equity and granted by Resorts and Averil Garrett, from (and until) the dates appearing:
- 3.1 First mortgage to N M Rothschild & Sons (Australia) Ltd (NMRA) registered number 8909699 registered on 19 June 2000 ("the Rothschild mortgage") that had been subrogated to the Trustees of the Andrew Garrett Family Trust on the 22nd December 2002.
 - 3.2 The Second mortgage to the NAB registered number 9374752 was produced on 28 June 2002 and Registered on the 24/07/2002 to secure a guarantee given by the Applicants for advances made by NAB under the Bill Facility Letter of offer dated 11/06/2004 ("The First Bill Facility") This mortgage was specifically given in substitution for Mortgage Number 7752654 and Besanko J. held that there was a triable as whether its is limited by the moneys purportedly advanced under that mortgage as a consequence of stamp duty savings to the registered proprietors represented by officers of NAB, The First Bill Facility was



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rolled over into a Second Bill Facility (Letter of Offer dated 3rd January 2003) secured by the same guarantee & mortgage.

- 3.3 An unregistered Equitable Mortgage was established on the 22nd December 2002 being the date that the Certificates of Title were lodged with the South Australian Lands Titles Office in favour of the Trustees of the Andrew Garrett Family Trust by NM Rothschild & Sons (Australia) under Power of Attorney of the Registered Proprietors
- 3.4 The Fourth Mortgage (3rd Registered Mortgage to the NAB registered number 9617285 was produced on 20/06/2003 and registered on 24/07/2003 In exchange for an advance of \$47,000. That the Stamping on the face of this mortgage (being an all moneys mortgage) served as constructive notice as to the limit amount of money owed by the Andrew Garrett Group of Companies under all of the securities to the Respondent at the time of Registration.
- 4 The terms & conditions of the 1st Contract of Finance between the Respondent & the Andrew Garrett Group were set out in an indicative letter of offer dated 29th January 2002 from the Respondent and Addressed to the Applicant.
- 5 That the respondent breached the terms of the 1st Contract of Finance in June of 2002.
- 6 The terms and conditions of the 2nd Contract of Finance were agreed between the parties on the payment of \$200,000 on the 20th October 2002 to KPMG (Victoria) as agent for the Respondent, Receivers & Managers of Tasvinum Pty Ltd.
- 7 That on the 31st December 2002 the respondent breached the 2nd Contract of Finance.
- 8 On 14th July, 2003 the Second Registered Mortgagee (NAB) served notices of demand on each of the Registered Proprietors demanding payment of the sum of \$2.1million. (Paragraph 7 of Reasons of Besanko J dated 2nd March 2004.)
- 9 On the 29th July 2003 the Respondent collected the certificates of Title of the Property from the Lands Titles office pursuant to the Fourth Mortgage.
- 10 On 27th August, 2003 it served notices of default under mortgage on each of the Registered Proprietors and demanding payment of the sum of \$2.1million (paragraph 8 Besanko J).



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- 11 On 29th October, 2003 the second Mortgagee brought summary proceedings (1506 of 2003) for possession of Springwood Park against the Applicants as Mortgagors.
- 12 The matter was heard before a Master of the Court,(paragraphs 1 to 13 of the Reasons of Besanko J, dated 2nd March 2004) sets out the circumstances in which the possession application was brought.
- 13 In December 2003, the Registered Proprietors by their solicitor wrote to NAB with a conditional offer to repay the moneys demanded by the mortgagee in the notices of demand (paragraph 9 of Besanko J) and
 - 13.1 Provide a discharge of the NAB Mortgages; and
 - 13.2 Accept a payment of \$2.25 million, being a sum in excess of the purported debt of \$2.1million plus interest and costs accrued under the terms of the Bill Facility dated 3 January 2003, in consideration of the said discharges of the First and Second NAB Mortgages.
 - 13.3 Enable the satisfaction of the condition for the finance of \$2.4 million from HG&R by insisting upon a substantially greater payment than the sum secured by the respective mortgages.
- 14 The second mortgagee (NAB) claimed that the mortgage was "all moneys" securing the total of at least \$7 million lent to the Companies in the Andrew Garrett Group of Companies (paragraph 6 of Besanko J) and refused to accept the offer and to discharge the mortgages.
- 15 On the 4th of February 2004 the Registered Proprietors commenced an action in the Supreme Court of South Australia (Action 127 of 2004) to appeal the order of possession and seeking declaratory & injunctive relief. The proceedings are summarised in paragraphs 14 to 23 of the Reasons of Besanko J.
- 16 On that date the Registered Proprietors appealed to a single judge of the Supreme Court (Besanko J.) from the order of the Master.
- 17 Besanko J's findings (for the purpose) and orders were summarised in paragraphs 24 to 54 of those Reasons.
- 18 The orders of Besanko J were made on 5th of March 2004.



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- 19 The Second Mortgagee (NAB) issued a Notice for Specific Directions on the 8th July 2004 seeking to discharge the orders of the 5th March 2004 and are summarised in the reasons of Besanko J dated 26th July 2004 paragraphs 1 to 18.
- 20 The orders were discharged by Besanko J and the reasons for his decision are summarised in paragraphs 19 to 23.
- 21 An application by the Registered Proprietors for leave to appeal (In so far as necessary) to the Full Court, and the appeal, was heard by the Full Court on the 14th September 2004.
- 22 The application for leave and the appeal were dismissed and the reasons were published on the 5th of November 2004.
- 23 The conclusion and orders of the full court are summarised in paragraphs 1 to 25 of those reasons.
- 24 The Interest Rate referred to by Besanko J, in the undertakings require as a condition of the order with injunction was that rate applicable under the Second Bill Facility exhibited in the affidavit of Timothy French dated 3rd of February 2004 (paragraphs 24&25 of his reasons) as being the applicable interest rate to be charged on \$2.1 million (paragraph 50 of his reasons)
- 25 The evidence before Besanko J was that the amount claimed by the Respondent under the Second Bill Facility (\$2.1 million) could have been paid in full in December 2003.
- 26 The Full Court held that the order was meant to refer to the Default Interest rate until trial (paragraphs 9 to 10 of the reasons of 5th November 2004).
- 27 The additional Facts not referred to by Besanko J or the Full Court are that the default interest rate is calculated by reference to clause 19 of the Second Bill Facility Letter of offer of the 3rd of January 2003 and Item 12 of the schedule as exhibited in the affidavit of Tim French dated 3rd of February 2004.
- 28 Clause 19 of the Second Bill Facility Letter of Offer provided;

"That in the event that the Drawer should fail to pay to the Bank the face value of any Bill either on its Maturity Date or upon the service of a notice of termination of Facility pursuant to clause 18 (which ever the case may be) the bank may debit to an account of the Drawer (whether opened by the Bank or the Drawer) with the face value of the Bill



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*and any costs and expenses and outgoings referred to in clause 22. The overdrawn balance of such account shall bear interest **calculated** in accordance with item 12 of the schedule from time to time"*

24 Item 12 of the Schedule of the Second Bill Facility Letter of Offer provided;

*"the default rate was the total of the Bank's Lending Indicator rate for base plus a customer margin of 1.5% per annum plus a default margin of 4.0% per annum **being** 14.6% per annum.*

25 The Base Bill Facility rates prevailing at the time of September 2003 are exhibited in the affidavit of Andrew Morton Garrett before Besanko J dated 19th August, 2004.

26 The Customer Margin is exhibited in Item 9 of the Second Bill Facility Letter of Offer.

27 The Default Margin is exhibited in Item 12 of the Second Bill Facility Letter of Offer.

28 Upon the basis that the default interest payable was to be "calculated in accordance with item 12 of the schedule from time to time", the evidence showed that the rate was to be calculated was in accordance with the Annexed Table.

29 The Annexed Table is based upon the following evidence contained in ;

29.a the Affidavit of Timothy French dated 3rd of February 2004

29.b the Affidavit of Scott Evans dated 26th July 2004

29.c Reasons of Besanko J date 26th July 2004 paragraphs 4 to 11

30 Besanko J held that the applicants had not complied undertaking to pay default interest, but did not consider or rule upon the Applicant's contention that the rate had been deliberately miscalculated.

31 The Full Court confirmed that the terms of the undertaking required the payment of default interest as specified in the Second Bill Facility and upheld the finding of Besanko J that the undertaking to pay interest had not been complied with.

PART III : A BRIEF STATEMENT OF THE APPLICANTS' ARGUMENT

(A) Inglis was wrongly decided or has been wrongly understood



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32 Inglis v CTB (1971) 126 VLR 161 is not authority for any inflexible rule or Strong predisposition as formulated in Part I. paragraph 1 above.

33 Alternatively, if Inglis is authority for such an inflexible rule, it was wrongly decided, and ought to be reconsidered. Leave is sought to submit that Inglis should be overruled insofar as it stands as authority for such an inflexible rule. Especially in the light of the Trade Practices Act (1974) & the Corporations Act (2001)

34 The correct principle, it is submitted, is as follows:

34.a Where a mortgagor seeks to restrain the exercise of an admitted Power of Sale, it is seeking to restrain the exercise of a legal power or right: the contractual right to enter into possession of the mortgaged property, and to sell if in order to recover out of the proceeds the secured debt due & owing. Cf; Patterson v Mortgagee Finance Australia (Securities) Ltd CA (NSW) Unreported, 12 September 1990 per Powell JA (See Bryson J, "Restraining Sales by Mortgagees and a Curial Myth" (1993) II Aust. Bar Review I, at 14.

34.b The exercise of that legal power is subject to the contractual duties owed to the Mortgagor by the Mortgagee.

34.c The exercise of the legal power is subject to equitable Duties owed to the Mortgagor cp; Pendlebury v CML (1912) 13 CLR 676
Forsyth v Blundell (1973) 129 CLR 477
ANZ v Bangadilly Pastoral Co. (1978) 139 CLR 195
Commercial & General Acceptance Ltd v Nixon (1981) 152 CLR 491
 (and prior mortgagees). cp; Alliance Acceptance Co Ltd v Graham (1974) 10 SASR 220

34.d Whilst the maxim of equity that "the one who seeks equity must do equity" will have some relevant applications. Where the ground upon which the mortgagee seeks injunctive relief is that the mortgagee intends to exercise the admitted power of sale in a way that would constitute a breach of its equitable duties. (cp Hawkesbury Valley Developments Pty Ltd v Custom Credit Corp Ltd. Needham J, NSW (SC), Unreported 7th February 1990; cited by Bryson J. in II Aust. Bar Rev. at 8-9, the ordinary principles applicable to the grant of an interlocutory or final injunction will apply where other grounds are relied upon for intervention.



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PART III (cont)

34.e That the alleged Default was a Direct result of the breach of the 1st & 2nd Contracts of Finance by the Respondent.

34.f Thus, the mortgagors asserts as its ground of relief its statutory right (arguable or proven) of "redemption", the Court will consider

34.f.i The adequacy of any relevant legal remedy, and

34.f.ii The balance of Convenience

cp; Lloyd v Vickery & Dunlop (1873) 12 S.Ct.Rep. (Equity) 4

Bank of NSW v Tyson (1871) 2 S.ct.Rep. (Equity) 1, per Faucett J at 20 ff
(both cited by Bryson J. in II Aust. Bar Rev. at 10-12)

34.g The Correct principle is that the grant of (interlocutory) injunctive relief is discretionary, the proper exercise of which is dictated by the particular circumstances; and that while payment into Court of the sum prima facie due and payable is a relevant consideration and may be an appropriate condition of relief where the right to exercise the power of sale is not an issue, it is not an inflexible pre-condition for relief.

34.h Where the right to exercise the power of sale is disputed it is an inappropriate condition of relief.

35 In this case, it was relevant to the exercise of the discretion, but the Full Court failed to consider:

35.a That the conditions imposed by Besanko J. on the grant of the injunction (undertakings to pay arrears of interest and continuing interest) had been complied with by the applicants (see (b) below).

35.b That the change of circumstance between the initial grant in injunctive relief and the subsequent discharge of these orders was the service by NAB of a Notice pursuant to S. 55A, Law of Property Act, 1936(SA) in respect of a demand for \$1.5 million.

36 The only consequence of that event (assuming a valid Notice) was to trigger the right under the mortgage to exercise the power of sale.

37 However , it continued to be the Registered Proprietors' case that:



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PART III (cont)

37.a It & the Beneficial owners had a Statutory & Equitable right to redeem the mortgage

37.b That (at most) the mortgagee secured no more than \$1.5 million over Springwood Park; in other words, it was not an "all moneys" mortgage, which (as NAB claimed) secured all the debts of the Andrew Garrett Group of Companies amounting to an amount of approximately \$6,450,000. This was not a dispute merely as to the quantum due and owing; it was a dispute over the extent to which the mortgage secured the Registered Proprietors' debts.

That the Registered Proprietors had taken real and serious steps to exercise the statutory right of redemption, and had secured alternative letters of offer of finance in

37.c excess of \$73 million as evidenced before Besanko J in the Affidavit of Andrew Morton Garrett dated 26th August 2004.

37.d That no legal remedy was adequate to protect and vindicate the rights of redemption.

37.e That the balance of convenience strongly favoured the grant of an injunction:

37.e.i To enable the dispute over the extent of the security to be tried and determined;

37.e.ii To prevent irretrievable loss to the Applicants in the Loss of a viable right of redemption;

- Averil Garrett (49 years) the loss of the family home and the capital gains benefits along with the loss of a unique lifestyle. The beneficial interest held by the Andrew Garrett Family Trust as to 300,000 units of the 650,000 units & by the Andrew Garrett Super Fund as to 350,000 units on issue in the Springwood Park Unit Trust.
- Tom Garrett (17 years) the loss of the family home and the capital gains benefits along with the loss of a unique lifestyle. The beneficial interest held by the Andrew Garrett Family Trust as to 300,000 units of the 650,000 units & by the Andrew Garrett Super Fund as to 350,000 units on issue in the Springwood Park Unit Trust.



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PART III (cont)

- Nicholas Garrett (18 years) the loss of the family home and the capital gains benefits along with the loss of a unique lifestyle. The beneficial interest held by the Andrew Garrett Family Trust as to 300,000 units of the 650,000 units & by the Andrew Garrett Super Fund as to 350,000 units on issue in the Springwood Park Unit Trust.
- Andrew Garrett (48 years) the loss of the family home and the capital gains benefits along with the loss of a unique lifestyle. The beneficial interest held by the Andrew Garrett Family Trust as to 300,000 units of the 650,000 units & by the Andrew Garrett Super Fund as to 350,000 units on issue in the Springwood Park Unit Trust.
- The Andrew Garrett Family Trust as to 300,000 units issued in the Springwood Park Unit Trust
- Andrew Garrett Wine Resorts Pty Ltd being held in breach of duty as a trustee.
- Andrew Garrett Superannuation Fund as to 350,000 units issued in the Springwood Park Unit Trust
- Andrew Garrett as the 1st Defendant by Counterclaim in action 127 of 2004.
- Evajade Pty Ltd as the 2nd Defendant by Counterclaim in action 127 of 2004.
- Michael Cowan Garrett as the 3rd Defendant by Counterclaim in action 127 of 2004.
- Creditnetbank Internationale as the 1st Intervener in action 127 of 2004.

38 That further the equitable principle enacted in *Inglis v Commonwealth Bank* (1972) and *Harvey v McWatters* (ref) did not and does not require the conclusion that payment into court of the interest required by the undertakings and in compliance with those undertakings, the injunction should nevertheless be discharged because allegedly Valid S.55A Notices had been served and the full amount of the Debt claimed by the NAB should now be paid as the price for retaining the injunction.



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PART III (cont)

39 That the sole purpose of the respondent in causing the execution of the 4th Mortgage was to overcome the subrogation of the 1st Mortgage and the establishment of the 3rd mortgage by taking possession of the Certificates of Title.

(B) No Failure to comply with the undertakings

40 Upon the assumption confirmed by the Full Court (But disputed by the applicants) that the reference in Besanko J's Reasons of 2nd March 2004 and Order of the 5th of March the undertaking to

“pay into Court the interest falling due under the Bill Facility Letter of Offer”

is a reference to the payment of default interest pursuant to Clause 19 of the Second Bill Facility , the Applicants contend;

40.a That the proper interpretation of Clause 19 & Item 12 requires that a calculation of the interest rate from time to time according to the formula stated in item 12 prevails over the concluding words of Item 12. That is to say that the phrase “being 14.6%” is to be construed as a reference to a maximum rate of default interest but is otherwise subject to the calculation resulting from the formula set out.

40.b Thus the correct interpretation of the phrase “being 14.6%” is as a cap on the applicable rate from time to time.

40.c Upon this interpretation the applicable default interest rate for the sums to be paid into Court pursuant to the undertakings, properly calculated, amounted to average of just over 10% per annum compared with the actual charged of 16% per annum (See annexed table)

40.d The Trustees of the Andrew Garret Family Trust No 2 paid into court \$286,308.18 on behalf of the Registered Proprietors during that period or an overpayment of \$80,590.45 on the properly calculated default interest under clause 19.

40.e Further the inclusion of a “default margin” in the default interest is a penalty and unenforceable at law, consequently an inappropriate order for any judge to make when “moulding an order”.



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PART III (cont)

- 40.f** On the basis that the Default rate was unenforceable then the overpayment of interest during the relevant period was \$171,034.29 until the Mareva Order.
- 40.g** The overcharge of interest due under the Bill Facility by the Respondent was \$267,892.81 during the relevant period.
- 40.h** The Full Court failed to consider or to rule upon the contention of the Applicants that a proper application of Cl.19 of the Second Bill Facility resulted in the conclusion that in respect of the interest payable pursuant to the undertakings (including arrears) there had been an overpayment of some \$80,000 and overcharge by the respondent of \$267,000.
- 40.i** The Full Court failed to consider that the sole purpose of the Mareva Order made on the 26th July 2004 was to cause a default under the orders of Besanko J.
- 40.j** The Full Court failed to consider that there was a considerable surplus of security in respect of the Total Debt owed by the Andrew Garrett Group.
- 40.k** The subrogation of the 1st registered mortgage was not argued before the full court.
- 40.l** The establishment of the 3rd equitable mortgage was not argued before the full court.
- 40.m** The breaches of the 1st & 2nd Contracts of Finance were not argued before the Full Court.

(C) Deliberate Failure of the Administration of Justice

- 41** On the orders of Gray J dated the 4th August 2004;
 - 41.a** Evajade Pty Ltd was joined as the 2nd Defendant by Counterclaim
 - 41.b** Michael Garrett was joined as the 3rd Defendant by Counterclaim
- 42** From that date neither the 2nd or 3rd DCC has been served or been party to any hearings in the matter, consequently both parties and the parties for whom they act have been denied the opportunity to be heard because of a lack of notice.
- 43** The applicant relies upon the dicta of Griffith C.J. in the decision of Woods v The Sheriff of Queensland (1885) 6 QLJ at 163 at page 164 where his Honour said:



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"When an order is made ex parte the court or judge making it may, upon application of any person prejudicially affected by the order, review and if necessary discharge it. That is a rule of natural justice. But when a judgment or order is pronounced or made after hearing both sides it is a general rule that the court which pronounced the judgment or made the order cannot reverse or vary it."

"Since the appellant in fact had no notice of the hearing the court had inherent power to set the order aside. This power was a discretionary one but there was no reason to refuse the appellant's application."

Their Honours in finding that the court had such inherent power relied not upon the fact of the order being ex parte, but upon their finding that the court had power to relieve a party from the continued operation of an interlocutory order where after it was made new facts came into existence which rendered its enforcement unjust.

- 44** The decision of the full bench of the High Court in Taylor and Taylor (1979) FLC 90-674 is the leading authority on the inherent power of the Court, Stevens J. agreed with the judgment of Gibbs J, as he said

"The rule laid down by Chief Justice Griffith seems to me to be in accordance with justice and commonsense. It enables a court to set matters right where there has been a failure to observe an essential requirement of natural justice. The judgments of the majority of the court in Cameron v Cole also recognise the existence of an inherent power of the kind suggested."

- 45** It is also supported by his Honour's reference to the High Court decision in Cameron v Cole (1944) [68 CLR 571](#). For example, in that case Rich J. said at page 589:

*"It is a fundamental principal of natural justice applicable to all courts whether superior or inferior that a person against whom a claim or charge is made **must be given a reasonable opportunity of appearing and presenting his case**. If this principle be not observed the person affected is entitled ex debit justitiae to have any determination which affects him set aside; and a court which finds that it has been led to purport to determine a matter in which there has been a failure to observe the principle has inherent jurisdiction to set its determination aside."*



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He refers to the authority of *Craig v Kanssen* (1943) 1 KB at p 262.: in such a case there has been no valid trial at all.

(E) Undertaking as to Damages

46 On the 4th August 2004 at the time of making the Mareva orders the Respondent gave an undertaking as to damages to the Supreme Court of SA in the following form;

ORDER WITH INJUNCTION
UNDERTAKING

3/8/2008 2:16pm

1. The defendant, National Australia Bank Ltd, by counsel, undertakes to abide by any order the Court or a Judge may make as to damages in case the Court or a Judge shall hereafter be of the opinion that any person shall have sustained any loss or damage by reason of these orders and undertakings which the defendant ought to pay.

PART IV: THE REASONS WHY SPECIAL LEAVE SHOULD BE GRANTED

47 Special Leave Should be granted because:

47.a The circumstances in which payment into Court of the Sum claimed by the mortgagee to be due and owing is properly required as a condition of the grant of an injunction to restrain a mortgagee sale, merit review by this Court.

Patterson v Mortgage Finance Aust. (Securities) Ltd, CA (NSW), Unreported, 12 September 1990, per Kirby P., per Handley JA: cited by Bryson J in *11 Aust. Bar Rev.* at 15.

47.b Inglis v Cth Trading Bank (1971) 126 CLR 161 should be reconsidered, and insofar as it lays down an inflexible rule, or a strong rule of pre-disposition, it should be overruled. Insofar as it does not lay down any such rule, the correct principle should be formulated and explained

47.c This case is a suitable vehicle for the reconsideration of Inglis and its authoritative force: the Full Court dismissed the appeal on the ground that the Applicants had not complied with the conditions of initial relief, & that the Inglis rule became applicable.

Whether the conditions for relief had been complied with (as the Registered Proprietors' contended) or not (as NAB contended) it still remained to consider



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whether, nevertheless, the injunction should have been continued and upon what, if any, conditions.

47.d The Full Court failed to consider and to rule upon the contention of the Registered Proprietors that insofar as Clause 19 of the Second Bill Facility was incorporated by reference into the terms of the undertaking, that clause did not set a fixed rate for default interest, but rather required the application of a formula, subject to a maximum rate.

47.e This failure it is submitted will result in irretrievable loss to the applicants and others unless it is corrected.

47.f The Failure of the Administration of Justice has resulted in a Denial of Justice to Evajade, its shareholders and the beneficiaries of the Trusts for whom it acts.

47.g The Respondent has collected in excess of the moneys owed by the Andrew Garrett Group of entities to the extent of approximately AUD\$53,000,000 in respect of an acknowledged AUD\$6,450,000 debt since the 17th July 2003.

47.h This Case is in the Public interest as a suitable vehicle to conclusively reset authority in respect of

1. Misrepresentation of Banks Generally
2. Unenforceability of Default Interest.
3. Terms for injunctive Relief in respect of exercise of a right of Power of Sale

PART VI: AUTHORITIES, LEGISLATION & OTHER MATERIAL RELIED UPON

Inglis v Commonwealth Trading Bank (1971) 126 CLR 161

Bryson J. , "Restraining Sales of Mortgagees and a Curial Myth" (1993) 11 Aust. Bar Rev. 1

Trade Practices Act (1974)(C'th)

Corporations Act (2001)(C'th)

Law of Property Act (1936) (SA) S.55A

Real Property Act, (1886) (SA), ss 128,133,143,145



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Affidavits of AMG in 127 of 2004 Supreme Court of South Australia

The Court Record of Action 127 of 2004

Affidavits of AMG & Trial evidence in action 1767 of 2004

Clarkson vs. Mutual Life Association of Australasia (1879)

Anderson & Anor v Lockhart & Ors (1990) ANZ convR 225 ;(1990) Q convR 54-345

Fisher & Lightwood's, Law of Mortgage, Australian Edition

Wiseman v Westland (1826) 1Y & J 117 at 122; 148 ER 610 at 612.

Buckhurst's Case (2595) Moore KB 687;72 ER 713;

Smith v Chichester (1842); 2 Dr & War 393;

Clayton v Clayton (1930) 2 Ch 12 at 21.

Re Molton Finance Ltd (1968) Ch 325 at 333

section (s 7(1) of NSW Act,

s 18 of the Victorian Act

Harrington v Prince (1832) 3 B & Ad 170; 110 ER63

Head v Crealock (1874) 10 Ch App 22

Waldy v Gray (1875) LR 20 Eq 238

Default Interest

Holles v Wyse (1693) 2 Vern 290 ; 23 ER 787

Halifax (Marquis) v Higgens (1690) 2 Vern 134; 23 ER 694

Wallis v Smith (1882) 21 Ch D243

Seton v Slade (1802) 7 ves Jun 265 ; 32 ER 108.

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Cop Ltd (1915) AC 79 at 86.

Subrogation of 1st Mortgage



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State Bank of New South Wales v Geeport Developments Pty Ltd NSWSC (1999)

Real Property Act (186) section 143(3)

Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (In Liq) (1978) 141 CLR 335 at 348

Drew v Lockett (1863) 32 BNeav 499; 55 ER 196.

Dixon v Steel (1901) 2 Ch 602.

Pledge v Buss (1860) John 663; 70 ER 585; Pearl v Deacon (1857) 24 Beav 186; 53 ER 328

Halsbury's Laws of Australia at p185-540

The Laws of Australia at 15.3:15(15)

Re Equitable Mortgage

UTC Ltd(In Liq) v NZI Securities Australia Ltd(1991) 4 WAR 349

Russel v Russel (1783) 1 Bro CC 269; 28 ER 1121

Windella (NSW) P/L v Ronald James Hughes & 2 ors (1999) NSWSC 1129

Ghana Commercial Bank v Chandiram (1960) AC 732

Failure of Administration of Justice

Woods v The Sheriff of Queensland (1885) 6 QLJ

Taylor and Taylor (1979) FLC 90-674

Cameron v Cole (1944) 68 CLR 571

Craig v Kanssen (1943) 1 KB at p 262

Grimshaw v Dumblebar (1953) 1 All ER p 350

Wilkes and Wilkes (1981) FLC 91060

PART VII : ORAL ARGUMENT



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The Applicants seek to supplement this Summary by Oral Argument, and for this purpose the Applicant seeks leave to present oral argument.

- In his capacity as Managing Trustee of the Andrew Garrett Group of Trusts.
- Sole Shareholder and Managing Director/Sole Shareholder of the 2nd DCC (Evajade) and the Andrew Garrett Group of Trusts in his capacity as Trustee of the Andrew Garrett Family Trust No 3.



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Calculation of Interest Payable / Submissions to Lunn J 22nd December 2005 Action 127 of 2004

Amount	2003 July		2003 August		2003 September		2003 October		2003 November		2003 December	
	Annual Rate	Days due	Annual Rate	Days due	Annual Rate	Days due	Annual Rate	Days due	Annual Rate	Days due	Annual Rate	Days due
\$	2,100,000											
Base Bill Facility Rate	4.82%	10	4.82%	31	4.82%	30	4.83%	31	4.83%	30	4.84%	31
Customer Margin	1.5%		1.5%		1.5%		1.5%		1.5%		1.5%	
Default Margin	4.0%		4.0%		4.0%		4.0%		4.0%		4.0%	
Default Rate	<u>10.32%</u>		<u>10.32%</u>		<u>10.32%</u>		<u>10.33%</u>		<u>10.33%</u>		<u>10.34%</u>	
Normal Rate	6.32%		6.32%		6.32%		6.33%		6.33%		6.34%	
Interest Payable (based on clause 19)	\$ 5,937.53		\$ 18,406.96		\$ 17,812.60		\$ 18,424.19		\$ 17,829.86		\$ 18,442.03	
Interest Payable (Default Rate Unenforceable)	\$ 3,636.16		\$ 11,272.11		\$ 10,908.49		\$ 11,289.95		\$ 10,925.75		\$ 11,307.78	
Effective Rate of Interest Charged	15.27%		15.27%		15.27%		15.27%		15.27%		15.27%	
Overcharge												
Overpaid												
Base Bill Facility Rate	4.88%	31	4.90%	29	4.90%	31	4.90%	30	4.90%	31	4.90%	30
Customer Margin	1.5%		1.5%		1.5%		1.5%		1.5%		1.5%	
Default Margin	4.0%		4.0%		4.0%		4.0%		4.0%		4.0%	
Default Rate	<u>10.38%</u>		<u>10.40%</u>		<u>10.40%</u>		<u>10.40%</u>		<u>10.40%</u>		<u>10.40%</u>	
Normal Rate	6.38%		6.40%		6.40%		6.40%		6.40%		6.40%	
Interest Payable (based on clause 19)	\$ 18,513.37		\$ 17,352.33		\$ 18,549.04		\$ 17,950.68		\$ 18,549.04		\$ 17,950.68	
Interest Payable (Default Rate Unenforceable)	\$ 11,379.12		\$ 10,678.36		\$ 11,414.79		\$ 11,046.58		\$ 11,414.79		\$ 11,046.58	
Interest Charged												
Total Interest Charged			\$ 195,864.23	223	\$ 31,343.90	31	\$ 28,883.36	30	\$ 30,216.69	31	\$ 29,617.10	30
Effective Rate	15.27%		15.27%		17.57%		16.73%		16.94%		17.16%	16%
Overcharge			\$ 114,466.50		\$ 19,929.11		\$ 17,836.78		\$ 18,801.90		\$ 18,570.52	
Amount of Interest Paid pursuant to Orders of Besanko			\$ 195,864.23		\$ 31,343.90		\$ 28,883.36		\$ 30,216.69		Not Paid	
Total Overpayment			\$ 114,466.50		\$ 19,929.11		\$ 17,836.78		\$ 18,801.90		\$ 171,034.29	
Overcharge of Interest since refusal of payout offer from HG&R by NAB											\$ 267,892.81	



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CHRONOLOGY OF "SPRINGWOOD PARK" MORTGAGES

1. NAB first made approaches to Andrew Garrett to fund business development of the Sunburst and Braidwood Groups in January 2002 **(TAB1)**
2. In the process of advancing \$1.5 million to AGFT by NAB by way of Bill facility Letter of offer **(TAB 2)** a number of errors were made by the Bank Officers and Lawyers in obtaining an assignment of a Bank SA mortgage to provide security for the loan. This has resulted in a number of potential points of contention between the Trust and the NAB. These potential points are summarised in the following paragraphs.
3. These errors along with the conflict of interest and other breaches then coloured the relationship of the Bank with the Garrett Group as its client.
4. The Bank Bill facility Letter of offer for \$1.5 million to AGFT is guaranteed by AGFT, Andrew Garrett, Averil Garrett and Andrew Garrett Wine Resorts **(In its own capacity)** not as trustee of the Springwood Park Unit Trust **(NAB Point of Contention No 1)**
5. Clause 19 & Item 12 of the Bank Facility defining the default rate is a breach of trust, Breach of the Trade Practices Act (1974) and the duty of care to the client. **(NAB Point of Contention No 2)**
6. A historical search of the certificates of Title Volume 5324 / Folio 475 and copies of Certificates of Title are shown **(TAB 3)** as the property known as "Springwood Park" currently owned by Garrett Interests shows;
 - 5.1. Registration of Springfield Encumbrance on the 15th February 1996 over CT 4343/672
 - 5.2. Transfer of Titles to M.O.L.(Andrew Garrett Wine Resorts) Pty Ltd and Averil Garrett on 17th January 1997 from the prior registered proprietor John William Wylie in memorandum of Transfer 8213955.**(TAB 4)**



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- 5.3. Mortgage 8213956 was registered in favour of St George bank Ltd on the 17th January 1997. **(TAB 5)**
- 5.4. Mortgage 8909699 was registered in favour of N.M. Rothschild & Sons Australia on the 29th June 2000 **(TAB 8) (NAB Point of Contention No 3)**
- 5.5. There was a discharge of Mortgage 9374751 **(TAB 5)** of St George Bank Ltd mortgage 8213956 on the 24th July 2002. **(NAB Point of Contention No 4)**
- 5.6. A requirement of NAB was an executed Deed of Priority between NM Rothschild & NAB **(TAB 9)** over Springwood Park. This Deed correctly describes Mortgage 8213956 as being the registered security over the land known as Springwood Park dated 29 November 1996 over the correct Land but incorrectly describes Item 4 as the Bank's Security. **(NAB Point of Contention No 14)**
- 5.7. Mortgage 8213956 has never been assigned to NAB and was discharged **(TAB 5)**, as a result has no effect over Mortgage Number 8909699 **(NAB Point of Contention No 15)**
- 5.8. A copy of the Stamped deed of assignment of security **(TAB 6)** of the 21st June 2002. The security described was the Partially discharged mortgage 7752654 over CT 5132/961 between Bank SA , NAB and Andrew and Averil Garrett Personally and not as trustees for the Andrew Garrett Family Trust. The interest in the Land was discharged in 1996 **(NAB Point of Contention No 8)**
- 5.9. Discharge Number 8148915 **(TAB 19)** of various Bank SA Mortgages on the 26th July 1996 registered the discharge of these instruments including;
1. 7035163
 2. 7035164
 3. 7611978



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4. 7752654

(NAB Point of Contention No 20)

5.10. The personal covenants attributed to this mortgage cannot be assigned with this document as they relate to a complete different circumstance of Borrowing.

.(NAB Point of Contention No 9)

5.11. The money purported to be advanced by Bank SA at the time was a total of approximately \$344,000. **(NAB Point of Contention No 12)**

5.12. A copy of the Stamped memorandum of assignment of encumbrance of the 24th of June 2002 **(TAB 7)** being the partially discharged mortgage 7752654 was obtained from the Lands titles office, this document **incorrectly describes** the land subject of the encumbrance as;

The Whole of the Land comprised in certificate of Title Register Book Firstly Volume 5324 Folio 475, secondly volume 5344 Folio 326 & Thirdly Volume 5348 Folio 15.

(NAB Point of Contention No 10)

5.13. Mortgage 9374752 **(TAB 10)** was given in favour of NAB on 28th June 2002 and registered on 24/07/2002. It was a term of the mortgage that it was given in substitution for mortgage 7752654 **(TAB 17)** over CT 5132/961 to be effective only to assignment of stamp duty paid.

5.14. It was not effective to assign the Personal Covenants of the mortgage and nor was it effective to provide an interest in that Land as any interest in the land had been discharged on 23rd July 1996 **(TAB 19)**. **(NAB Point of Contention No 5)**



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- 5.15. The consideration of annexure A of Mortgage 9374752 is specifically limited to be security only for the payment to the Transferee of the moneys which are purported to be secured by the memorandum of mortgage dated 30/6/1994 from Andrew Garrett Wine Resorts Pty Ltd & Averil Gay Garrett . **(NAB Point of Contention No 11)**
- 5.16. Mortgage 9374752 does not give rise to an interest over any land. **(NAB Point of Contention No 13)**
- 5.17. On the 3rd of January a further \$600,000 was advanced to the Andrew Garrett Family Trust by way of Bill facility Letter of offer dated 3rd January 2003. **(TAB 13)**
- 5.18. Mortgage 9617285 **(TAB 14)** was then registered in favour of NAB with the Lands titles office on the 5th of July 2003 and taken unconscionably and unknown to the registered proprietors when the Bank had not advanced any funds to Andrew Garrett Wine Resorts Pty Ltd, Averil Garrett nor to the Unit holders of the Springwood Park Unit Trust. **(NAB Point of Contention No 6)**
- 5.19. The NAB sought to register the unregistered discharge of Mortgage 8909699 **(TAB 12)** on the 29th of September 2004 without the consent of the registered first mortgagee in order to advance its own position without regard to the interests of any other party including the Andrew Garrett Family Trust or the Registered Proprietors lodged unconscionably following order of possession dated July 26 2004. **(NAB Point of Contention No 7)**
- 5.20. On or about the 29th of May officers for NAB issued instruction to Simon Illsley to register a new mortgage over the Land known as Springwood Park being Mortgage 9617285 and stamp it to the full amount of the NAB debt at the time being \$6,465,000 on the 18th June 2003. **(NAB Point of Contention No 14)**



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- 5.21. On the 24th December 2002 NMR provided control of the Deed of Discharge and the original Duplicate mortgage 8909699 into the hands of Garrett International Investments Pty Ltd("GII"). An assignment in equity occurred as the funds for the payment of the Rothschild Debt (FREEHILLS) had been provided by GII and AGFT.
- 5.22. Upon the payout of NM Rothschild for all the debt owed to it by the Andrew Garrett Group of companies a deed of Release and amendment of NM Rothschild **(TAB 11)**. NAB is not a party to this deed **(NAB Point of Contention No 17)**
- 5.23. The lawyers for Rothschild have been requested to obtain execution of a deed of assignment which is currently declined and being reviewed.
- 5.24. On the 23rd of September 2004 GII executed a deed of assignment of the Duplicate mortgage and other securities to Evajade Pty Ltd as Trustee of the Andrew Garrett Family Trust No 2 in order to extinguish all intercompany loans **(TAB 15)**
- 5.25. Mortgage Number 8909699 is security for \$14 million in favour of Evajade **(NAB Point of Contention No 16)**
- 5.26. A historical Search of CT 5132/961 **(TAB 16)** and demonstrates that NAB has never held an interest in that Land and that discharge of Mortgage 7752654 was registered on the 2nd of August 1994. **(NAB Point of Contention No 18)**
- 5.27. The beginning of the errors of the NAB Staff occurred on 11th June 2002 when the officers of Bank SA faxed to NAB **(TAB 18)** at their request the Prime stamped security of the Bank SA mortgages being 7752654. **(NAB Point of Contention No 19)**



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- 5.28. NAB collected the original Certificates of Title of the property known as Springwood Park pursuant to Mortgage 9617285 (**TAB 20**) and collected them around July 2003. At best NAB has only advanced \$47,000 against this mortgage.
- 5.29. It may be possible that this amount could be subject to Equitable SET OFF against moneys owed by the Defendant to the Second Plaintiff. (**NAB Point of Contention No 21**)

**OUTLINE OF SECOND PLAINTIFF'S SUBMISSIONS
FOR HEARING ON 15 DECEMBER 2004¹**

1. The second plaintiff ("Mrs Garrett") applies to set aside the order for possession over the property known as Springwood Park in favour of the NAB².
2. Mrs Garrett, submits:
 - 2.1 The terms of the first NAB mortgage expressly limit the amount secured by that mortgage by reference to an earlier BankSA mortgage (the Arranmore mortgage) and in doing so exclude any other amount.
 - 2.2 The earlier BankSA mortgage was not security over land at the time of entry into the first NAB mortgage. Mrs Garrett had not had

¹ This outline adopts the terminology of documents as set out in the agreed book of documents.

² Application dated 8.11.04.



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any interest in the Arranmore property for approximately 6 years, as the property had been transferred to unrelated parties.

2.3 It follows that the first NAB mortgage is not a security over land for any debt whatsoever. The NAB was incapable of obtaining any better rights than those enjoyed by BankSA under the discharged Arranmore mortgage.

2.4 It further follows that since the first NAB mortgage was security over land for no debt, it could not be used as a basis for a possession order.

2.5 Mrs Garrett seeks a determination on these issues as preliminary points which disposes of all issues with respect to the first NAB mortgage.

2.6 As a consequence, if determined in her favour, the order for possession should be set aside under R84.12.

3. The application primarily concerns construction of the meaning of the relevant terms of the first NAB mortgage. Ascertaining the meaning and effect of the relevant term in the first NAB mortgage involves a construction of the entire document and those executed contemporaneously with it, which includes evidence of surrounding circumstances – the factual matrix of the transaction³. Parole evidence is admissible to prove the true nature of the transaction⁴.

Mrs Garrett's position

4. In entering into the arrangements with the NAB, Mrs Garrett had no real understanding of the meaning or effect of the legal documents she has signed for the NAB. Mrs Garrett obtained no direct benefit from the transaction and has little knowledge of the circumstances in which the

³ *Codelfa Construction Pty Ltd v State Rail Authority for New South Wales* (1982) 149 CLR 337

⁴ *Gurfinkel v Bentley Pty Ltd* (1966) 116 CLR 98



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transactions were undertaken. She signed the documents requested by the NAB and upon direction from her husband.⁵

BankSA

5. Prior to dealing with the NAB, the Garrett's personal banker was BankSA. The NAB made representations to the Garretts to induce them to conduct their business and private banking, which included representations that stamp duty could be saved in taking over the Garretts' private banking affairs.
6. In 1996 the Garretts moved from their former residence at 9 Woodley Road, Glen Osmond ("Arranmore") to Springwood Park residence at Mt Barker Road, Leawood Gardens.⁶ The BankSA mortgage over the Arranmore property was discharged at least in so far as the land was concerned and BankSA took a mortgage over the Springwood Park property.
7. The NAB agreed to advance \$1.5 million by way of a bill facility⁷. The first NAB mortgage was entered into contemporaneously with that bill facility and assignment of the Arranmore mortgage. Amounts owed by the Garrett's to BankSA were secured by the BankSA Springwood Park mortgage. This was the only mortgage of real property owned by Mrs Garrett that BankSA could have enforced.

Assignment of Arranmore Mortgage

8. By Deed of Assignment and Transfer of Debt and Security the NAB took an assignment of the Arranmore mortgage. The NAB chose not to take an assignment of any other mortgage. The NAB, and not the Garretts, determined which mortgage it wanted assigned to it by BankSA. This appears to have been done by reference to the amount of stamp duty paid on mortgages in favour of BankSA.

⁵ Averil Garrett affidavit 4.2.04 action 127/04

⁶ Averil Garrett affidavit 8.11.04 action 127/04 paras 3-6

⁷ Although approx only \$344,000 was paid to BankSA.



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9. At the time of assignment, the Arranmore mortgage was not registered and did not represent or effect any interest in any land. As a matter of law, the NAB by virtue of that assignment could not obtain an interest in land. No interest in land was assigned to it by BankSA.
10. The NAB was aware that the Arranmore mortgage did not represent any interest in land⁸.
11. One of the registered proprietors of Springwood Park that entered into the first NAB mortgage, Andrew Garrett Wine Resorts Pty Ltd, was also not a party to the Arranmore mortgage, nor the deed of assignment. BankSA never had any rights as against it under the Arranmore mortgage. As a matter of law the NAB could not obtain any rights as against it upon assignment of the Arranmore mortgage.
12. In entering into the first NAB mortgage, the mortgagors did not intend for that mortgage to make Springwood Park a security for all of the monies advanced by the NAB to the Garretts personally or Mr Garrett's business interests⁹. NAB contends the first NAB mortgage secures those debts as an "all monies mortgage"¹⁰.
13. Evidence suggests that the NAB did not intend for the first NAB mortgage to be an all monies mortgage¹¹. This evidence also suggests why the NAB took a second mortgage when it would not have been necessary to do so if, as it contends, the first mortgage properly secured "all monies"¹².
14. The NAB made representations to the Garretts as to stamp duty savings that could be effected¹³ and prepared the relevant documents for them to

⁸ The title documents for the Arranmore property show the mortgage to BankSA as having been registered on 26 July 1996. The first NAB mortgage referred to the Arranmore mortgage as discharged.

⁹ Affidavits of Andrew Garrett 2.12.03 action 1506/03, 4.2.04 action 127/04 para 11 and Averil Garrett 2.12.03 action 1506/03 para 6.

¹⁰ Para 7 NAB defence action 127/04 and Andrew Garrett affidavit 2.1.04 action 1506/03 para 5 and exhibit AMG4. The NAB rejected an offer by the Garretts to pay \$2,250,000 for a discharge of the Springwood Park mortgages – Beissel affidavit 2.1.04 action 1506/03 exhibit RKB7.

¹¹ Internal NAB memorandum dated 21 March 2003 in which it is stated that Springwood Park "only secures Garrett's personal debts totalling \$2.10m."

¹² Internal NAB memorandum dated 21 March 2003 in which it is also stated that "we [NAB] can not limit our potential reliance on this property as security . . ."

¹³ NAB defence para 10.2



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sign. The NAB did so in a manner that was rushed. In doing so several errors were made:

- 14.1 The memorandum of transfer of the Arranmore mortgage (an unregistered document) incorrectly describes the land over which the Arranmore mortgage was registered as Springwood Park.
 - 14.2 The memorandum of transfer further incorrectly describes the Arranmore mortgage as being given by Resorts and Mrs Garrett whereas it was in fact given by Mr & Mrs Garrett.
 - 14.3 The deed of priority between, inter alia, the NAB and NM Rothschild & Sons (Australia) Limited ("Rothschild") defines the NAB security as being BankSA's mortgage over Springwood Park and not BankSA's mortgage over Arranmore.
15. The meaning of the words "security" and "secured by" in clause (2(b) of the first NAB mortgage were intended by the parties to mean security over land. This is the ordinary and prime meaning of the term "security" in the context of a mortgage over land¹⁴. The NAB dictated the terms of the first NAB mortgage and intended to use the words "secured by" and "security" in the sense of creating rights over land in favour of the NAB.
16. The NAB required rights over the land in order to give it priority over all unsecured creditors in the event of insolvency of the mortgagors of Springwood Park. Having rights over Springwood Park (as opposed to personal covenants only against Mrs Garrett) was the only way the NAB could satisfy the 'acid test' for its security¹⁵. To construe 'security' in these circumstances as conferring less than a proprietary interest would be meaningless to protect the bank's position.

¹⁴ *Batchelor & Co Pty Ltd v Websdale* [1962] NSW 1441; Butterworths Australian Legal Dictionary page 1058; Sykes EI and Walker S, *The Law of Securities*, 5th Edition, The Law Book Co Limited 1993, pages 5 and 12; Tyler ELG and Others, *Fisher and Lightwood's Law of Mortgage*, Australian Edition, Butterworths 1995 page 11.

¹⁵ Sykes *ibid* at page 19.



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17. Registration of a mortgage under section 128 of the Real Property Act has the effect of creating a separate statutory charge over the land¹⁶. The mortgage of Real Property Act land is an interest in land¹⁷. Such a mortgage is a proprietary right which gives the secured creditor absolute priority in insolvency of the debtor. Personal covenants supporting the obligation to pay do not give such priority.
18. The proprietary rights and interest created by the registered mortgage are treated differently from personal obligations and covenants¹⁸ and they are independent of each other¹⁹.
19. The NAB chose to take an assignment of a mortgage from BankSA that did not, and could not, represent any interest in Springwood Park. Therefore there was no debt 'secured' by that mortgage. Accordingly the first NAB mortgage, expressly limited to the amount of debt 'secured' by the Arranmore mortgage, does not 'secure' any debt. Mrs Garrett could not be in default of the first NAB mortgage by failing to repay monies²⁰, and the order for possession should not stand.

¹⁶ *English Scottish and Australian Bank Limited v Phillips* (1937) 57CLR 302 at 321

¹⁷ *Zafiroopoulos v Recchi* (1978) 18 SASR 5; *Consolidated Trust Co Ltd v Naylor* (1936) 55 CLR 423

¹⁸ *English* at 321

¹⁹ Duncan WD and Willmott L, *Mortgages Law in Australia*, 2nd Edition, The Federation Press 1996, page 6, Tyler *ibid* at page 111. Contrast with *PT Limited v Maradona* (1991) 25 NSWLR 643 and *French v Queensland Premier Mines Pty Ltd* [2004] VSC 294 in which the mortgage assigned was registered over land.

²⁰ whether or not monies were admitted to be owed



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ANNEXURE 3

If undelivered return to
PO Box 908
Albury NSW 2640



THE TRUSTEE FOR ANDREW GARRETT FAMILY TRUST
1 131 ROYAL ST
EAST PERTH WA 6004
000876 049



Australian Government
Australian Taxation Office

Statement no: Interim
Account no: 78 761 760 976
Statement date: 17 Oct 08

Enquiries Call: 13 28 66 Visit: www.ato.gov.au	Account payout figure #	
	Statement closing balance	\$14,548.57 CR
	Estimated general interest charge	\$0.00
	Total payable if paid on 07 Nov 08:	\$0.00

Insolvency - running balance account (RBA) statement

This statement shows transactions and interest for the period 01 Jul 08 to 17 Oct 08

Process date	Effective date	Description of transactions	Debits \$	Credits \$	Balance \$
01 Jul 08		STATEMENT OPENING BALANCE			82,020.43

Details of transactions relating to prior periods not listed on previous RBA Statements

06 Oct 08	20 Feb 01	Amended self assessed amount(s) for the period ended 31 Dec 00 - goods and services tax - cancellation	7,500.00		89,520.43
06 Oct 08	29 Oct 01	Amended self assessed amount(s) for the period ended 30 Sep 01 - goods and services tax		7,500.00	82,020.43
06 Oct 08	13 Aug 01	Amended self assessed amount(s) for the period ended 30 Jun 01 - goods and services tax		7,500.00	74,520.43
06 Oct 08	13 Aug 01	Amended self assessed amount(s) for the period ended 30 Jun 01 - goods and services tax - cancellation	7,500.00		82,020.43

Raelene Vivian
Deputy Commissioner of Taxation

002252

Page 1 of 4
NAT 2031-7.2004

Australian Taxation Office

PAYMENT SLIP - 60

THE TRUSTEE FOR ANDREW GARRETT FAMILY TRUST

ATO code 0000 0246 06

Account No. 78 761 760 976

Amount paid \$

Australian Taxation Office
Locked Bag 1936
ALBURY NSW 1936

EFT code 78761 760 976 4860



<78761760976> < > < 000000> 24600< >



OENOVIVA

THE TRUSTEE FOR ANDREW GARRETT FAMILY
TRUST

Statement no:
Account no:

Interim
78 761 760 976

Process date	Effective date	Description of transactions	Debits \$	Credits \$	Balance \$
06 Oct 08	29 Oct 01	Amended self assessed amount(s) for the period ended 30 Sep 01 - goods and services tax - cancellation	7,500.00		89,520.43
06 Oct 08	20 Feb 01	Amended self assessed amount(s) for the period ended 31 Dec 00 - goods and services tax		7,500.00	82,020.43
07 Oct 08	13 Aug 01	Amended self assessed amount(s) for the period ended 30 Jun 01 - goods and services tax		7,500.00	74,520.43
07 Oct 08	29 Oct 01	Amended self assessed amount(s) for the period ended 30 Sep 01 - goods and services tax		7,500.00	67,020.43
07 Oct 08	10 May 01	Amended self assessed amount(s) for the period ended 31 Mar 01 - goods and services tax		9,127.00	57,893.43
07 Oct 08	11 Nov 02	Amended self assessed amount(s) for the period ended 30 Sep 02 - goods and services tax		7,500.00	50,393.43
07 Oct 08	01 Aug 03	Amended self assessed amount(s) for the period ended 30 Jun 03 - goods and services tax		7,500.00	42,893.43
07 Oct 08	29 Jul 02	Amended self assessed amount(s) for the period ended 30 Jun 02 - goods and services tax		7,500.00	35,393.43
07 Oct 08	25 Nov 03	Amended self assessed amount(s) for the period ended 30 Sep 03 - goods and services tax		7,500.00	27,893.43
07 Oct 08	20 Feb 01	Amended self assessed amount(s) for the period ended 31 Dec 00 - goods and services tax		7,500.00	20,393.43
07 Oct 08	28 Feb 03	Amended self assessed amount(s) for the period ended 31 Dec 02 - goods and services tax		7,500.00	12,893.43
07 Oct 08	28 Feb 02	Amended self assessed amount(s) for the period ended 31 Dec 01 - goods and services tax		7,500.00	5,393.43
07 Oct 08	28 Apr 03	Amended self assessed amount(s) for the period ended 31 Mar 03 - goods and services tax		7,500.00	2,106.57 CR
07 Oct 08	02 Mar 04	Amended self assessed amount(s) for the period ended 31 Dec 03 - goods and services tax		6,619.00	8,725.57 CR
17 Oct 08	29 Apr 02	Amended self assessed amount(s) for the period ended 31 Mar 02 - goods and services tax		5,823.00	14,548.57 CR
17 Oct 08		STATEMENT CLOSING BALANCE			14,548.57 CR



OENOVIVA

THE TRUSTEE FOR ANDREW GARRETT FAMILY
TRUST

Statement no:
Account no:

Interim
78 761 760 976

Process date	Effective date	Description of transactions	Debits \$	Credits \$	Balance \$
06 Oct 08	29 Oct 01	Amended self assessed amount(s) for the period ended 30 Sep 01 - goods and services tax - cancellation	7,500.00		89,520.43
06 Oct 08	20 Feb 01	Amended self assessed amount(s) for the period ended 31 Dec 00 - goods and services tax		7,500.00	82,020.43
07 Oct 08	13 Aug 01	Amended self assessed amount(s) for the period ended 30 Jun 01 - goods and services tax		7,500.00	74,520.43
07 Oct 08	29 Oct 01	Amended self assessed amount(s) for the period ended 30 Sep 01 - goods and services tax		7,500.00	67,020.43
07 Oct 08	10 May 01	Amended self assessed amount(s) for the period ended 31 Mar 01 - goods and services tax		9,127.00	57,893.43
07 Oct 08	11 Nov 02	Amended self assessed amount(s) for the period ended 30 Sep 02 - goods and services tax		7,500.00	50,393.43
07 Oct 08	01 Aug 03	Amended self assessed amount(s) for the period ended 30 Jun 03 - goods and services tax		7,500.00	42,893.43
07 Oct 08	29 Jul 02	Amended self assessed amount(s) for the period ended 30 Jun 02 - goods and services tax		7,500.00	35,393.43
07 Oct 08	25 Nov 03	Amended self assessed amount(s) for the period ended 30 Sep 03 - goods and services tax		7,500.00	27,893.43
07 Oct 08	20 Feb 01	Amended self assessed amount(s) for the period ended 31 Dec 00 - goods and services tax		7,500.00	20,393.43
07 Oct 08	28 Feb 03	Amended self assessed amount(s) for the period ended 31 Dec 02 - goods and services tax		7,500.00	12,893.43
07 Oct 08	28 Feb 02	Amended self assessed amount(s) for the period ended 31 Dec 01 - goods and services tax		7,500.00	5,393.43
07 Oct 08	28 Apr 03	Amended self assessed amount(s) for the period ended 31 Mar 03 - goods and services tax		7,500.00	2,106.57 CR
07 Oct 08	02 Mar 04	Amended self assessed amount(s) for the period ended 31 Dec 03 - goods and services tax		6,619.00	8,725.57 CR
17 Oct 08	29 Apr 02	Amended self assessed amount(s) for the period ended 31 Mar 02 - goods and services tax		5,823.00	14,548.57 CR
17 Oct 08		STATEMENT CLOSING BALANCE			14,548.57 CR



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ANNEXURE 4

ANDREW GARRETT ©® TM



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24 October 2008

**Mr. Jason Lim,
Deputy Registrar,
Administrative Appeals Tribunal
Perth Registry,
Level 5, 111 St Georges Terrace,
Perth, WA, 6000
Fax; 08 9327 7299
cc; Joe Giacco; joe.giacco@ags.gov.au**

CASE 2008/2152 & 2008/3509

Andrew Garrett v Inspector General in Bankruptcy

Dear Sir,

I refer to the aforementioned matters that have are set down for hearing/directions on the 29th October 2008 in the Perth Registry.

I wish to advise the Tribunal that since my last appearance before the Learned Senior Member a number of events of significance have occurred;

1. Up until the 17th of October 2008, in my capacity as Trustee of the Andrew Garrett Family Trust I have obtained confirmation of tax credits/ to the Account of the Trust as set out in the spreadsheet annexed hereto of \$98,246.00. A further credit of \$9,610.00 in General Interest Charges is also yet to be confirmed.
2. I was bankrupted in respect of a default judgment in an amount of \$72,329.70 in favour of the Australian Taxation Office (ATO) that was handed down on the 11th February 2008 in the District Court of South Australia DCCIV-1666-2003. (see annexed) I was unrepresented in this action as at the date of the judgment debt.
3. The judgment debt was given on the basis of a purported tax liability in my hands as Trustee of the Andrew Garrett Family Trust. The effective date of the tax credits set out in Clause 1 predates the Judgment debt; that is to say that as at the date of the Judgment debt no money was owed to the ATO by me in either my personal or Trust Capacity.
4. As at the date of the default judgment the running account balance will show that the Trust was in credit in an amount of in excess of \$25,000 rather than debit of \$72,329.70.
5. On this basis I have briefed counsel in South Australia to agree consent orders with the ATO to set aside the default judgment and make application to the Federal Court to annul the Sequestration Order made against me of the 24th September 2004. This application will incorporate evidence of solvency as at the date of the order and the Default Judgment.
6. As a consequence of the Tax Credits that I knew were on foot I did not lodge the application for legal aid under section 69 of the AAT Act (1975) until Monday of this week (I finalised the last credit on the 17th of October 2008). It is a factor in the assessment of Legal Aid/Financial Assistance that the Attorney General considers the likely prospects of success; the credits significantly enhance those prospects.
7. I can now advise that I have engaged the services of Mr Kevin Dundo of Q Legal, Level 4, 105 St Georges Terrace, Perth to act for me with respect to the application for legal aid and in the aforementioned matters. He is unavailable to attend on the 29th of October 2008.
8. I also flag that, subject to advice, it is likely that I will seek to join the actions in my capacity as Trustee of the Andrew Garrett Family Trust as well as being the applicant in my personal capacity.

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ANDREW GARRETT ©® TM



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9. As a consequence of the aforementioned paragraphs I do not wish to consume the tribunal's valuable time and resources unnecessarily. I am happy to attend personally on the 29th however I would be seeking the following orders;

- a. That Case 2008/2152 is adjourned until the end of January 2009 for Directions
- b. That Case 2008/3509 is adjourned until the end of January 2009 for Directions
- c. That for each case the parties have liberty to apply.

10. I ask that the Tribunal confirm the aforementioned orders sought by correspondence.

Yours Sincerely

Andrew M Garrett©®,
personally and in my capacity as Sole Trustee of AGFT



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Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

ADMINISTRATIVE APPEALS TRIBUNAL)
) No 2008/2152
 GENERAL ADMINISTRATIVE DIVISION)

Re ANDREW GARRETT

Applicant

And INSPECTOR GENERAL IN
 BANKRUPTCY

Respondent

REASONS FOR DECISION

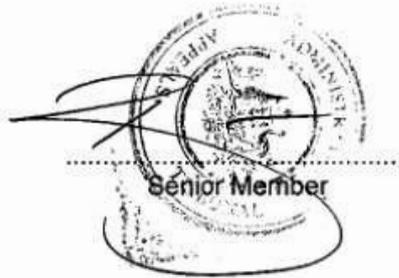
18 September 2008 Mr A Sweidan, Senior Member

1. In the course of a directions hearing held by the Tribunal in this application on 6 August 2008 the Tribunal directed that a number of summonses to witnesses issued at the request of the applicant on 23 July 2008 be revoked and that the applicant's request for a number of further summonses to be issued to various parties be refused.
2. The applicant has requested the Tribunal to furnish him with a statement in writing of the Tribunal's reasons for its decision.
3. The Tribunal's reasons for decision are provided in the attachment.



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CATCHWORDS

Practice and procedure – issue of summonses – revocation of summonses issued – refusal of application to issue other summonses – extension of time application – persons summonsed to give evidence concerning substantive application for review – such evidence not directly relevant to extension of time application as Tribunal not required to conduct merits review on hearing of application for extension of time

LEGISLATION

Bankruptcy Act 1966 (Cth), s149K(5), s149P(3), s149P(4), s149(D)(1)(j), s149(D)(1)(ma), s149(D)(1)(ha), s149(D)(1)(i), s149(D)(1)(da), s149(D)(1)(e), s149(D)(1)(l), s 149(D)(1)(b), and s149(D)(1)(n).

Administrative Appeals Tribunal Act 1975 (Cth), s 29(1), s 29(2) and s40

CASES

Castallano v Inspector General in Bankruptcy (1998) 51 ALD 254

Cosco Holdings Pty Ltd v FCT (1997) 37 ATR 432;

Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344

Re Bird and Military Rehabilitation and Compensation Commission (2006) 91 ALD 691

Re Moore and Military Rehabilitation and Compensation Commission (2006) 90 ALD 417

Re Perpetual Trustee Co (Canberra) Ltd and CMR for ACT Revenue (1993) 29ALD 817

Re Sam Mercorella Pty Ltd and Australian Apple and Pear Corp (1987) 12 ALD 520

REASONS FOR DECISION

18 September 2008

Mr A Sweidan, Senior Member

THE APPLICATION

1. The applicant, Andrew Garrett ('the Bankrupt') has applied, by an application dated 16 May 2008 for an extension of time for lodging an application for a review of a decision of the respondent dated 18 December 2007.

RELEVANT LEGISLATION

2. Pursuant to paragraph 149K(1)(b) of the *Bankruptcy Act 1966 (Cth)* ('the Act'), the Inspector-General may review a decision of the trustee to file a notice of



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objection if requested to do so by a bankrupt for reasons that appear to the Inspector-General to be sufficient to justify such a review.

3. Pursuant to subsection 149K(5) of the Act, within 60 days after the request is lodged, the Inspector-General must:

- 3.1 decide whether to review the decision; and
- 3.2 if the Inspector-General decides to review the decision - make his or her decision on the review.

4. If the Inspector-General considers there are not reasons sufficient to justify such a review he or she may refuse the request. In that case, in accordance with 149P of the Act, written notice must be given setting out the decision together with the evidence or other material relied on and reasons.

5. Subsections 149P(3) and (4) of the Act provide that notice must be provided to the bankrupt stating that if the bankrupt is dissatisfied with the decision, an appeal may be made to the Administrative Appeals Tribunal pursuant to subsection 29(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act"). Any such application must be made within 28 days of receipt of the letter of decision of the Inspector-General: subsection 29(2) of the AAT Act.

6. Subsection 29(7) of the AAT Act provides that the Tribunal may, upon an application in writing, extend the time for the making of an application for review of a decision if the Tribunal is satisfied that it is reasonable in all the circumstances to do so.

FACTS

7. On 24 September 2004 the applicant was declared bankrupt. Peter Macks, a chartered accountant with the firm PPB, was appointed trustee of the Bankrupt's estate ("the Trustee").



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8. On 23 October 2007, the Trustee filed a Notice of Objection to Discharge ("the Objection") pursuant to section 149B of the Act. The Trustee based the Objection on 10 grounds specified in section 149D of the Act.

9. On 11 November 2007, the Bankrupt requested the respondent to review the decision of the Trustee to file the Objection ("the Request for Review").

10. On 18 December 2007, the respondent wrote to the Bankrupt to notify him of his decision to cancel the Objection based on the grounds specified in paragraphs 149D(1)(j) and 149D(1)(ma) of the Act and of his decision to refuse to review the Objection on each of the eight other grounds specified in paragraphs 149D(1)(ha), 149D(1)(i), 149D(1)(da), 149D(1)(d), 149D(1)(e), 149D(1)(l), 149D(1)(b), 149D(1)(n) of the Act ("the Decision").

11. The effect of the Decision is that the Bankrupt will remain bankrupt and be due for discharge on 23 November 2012, being eight years from the date on which the Bankrupt filed his Statement of Affairs.

12. The respondent sent a copy of the Decision to the Bankrupt at his PO Box address on 18 December 2007. The Bankrupt claims that he received a copy of the decision on 7 January 2008.

13. If the Bankrupt's evidence of date of receipt is accepted the last day for the Bankrupt to seek a review of the Decision by the Tribunal was 4 February 2008.

14. The Bankrupt applied, by an application dated 16 May 2008, for an extension of time for lodging an application for a review of the Decision. The Bankrupt is three and a half months late in his application. However if the letter containing the Decision was received in the ordinary course of post (see section 29 of the *Acts Interpretation Act 1901*) then the Bankrupt is some five months late.

EXTENSION OF TIME

15. The Tribunal when considering whether to grant or refuse an extension of time pursuant to s 29(7) of the AAT Act has repeatedly applied the principles



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formulated by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at 348-350 which are as follows:

- (a) *the prescribed period of 28 days is not to be ignored. Indeed, it is a prima facie rule that proceedings commenced outside that period will not be entertained. It is a precondition to the exercise of discretion in his favour that the applicant for extension show "an acceptable explanation of the delay" and that it is "fair and equitable in the circumstances" to extend time;*
- (b) *consideration of the other action taken by the applicant is relevant to the question of whether an acceptable explanation for the delay has been furnished;*
- (c) *any prejudice to the respondent including any prejudice in defending the proceedings occasioned by the delay is a material factor militating against the grant of an extension;*
- (d) *....mere absence of prejudice is not enough to justify the grant of an extension....public considerations often intrude;*
- (e) *the merits of the substantial application are properly to be taken into account; and*
- (f) *considerations of fairness as between the applicants and other persons otherwise in a like position are relevant."*

ISSUE OF SUMMONSES

16. Prior to the directions hearing held by the Tribunal in this application on 6 August 2008 the Tribunal had on the application of the applicant issued summonses to a number of parties which summonses were issued pursuant to the provisions of s 40 of the AAT, and required those parties to attest and give evidence at the hearing of the applicant's extension of time application.

17. Subsequent to the issue of those summonses ("the first summonses") the applicant requested that further summonses be issued to a number of other witnesses. Those further summonses ("the second summonses") had not been issued at the time of the directions hearing.

DIRECTIONS HEARING

18. At the directions hearing the applicant confirmed, in response to questions from the Tribunal, that the persons to whom the first summonses had been addressed as well as the persons to whom the second summonses were addressed



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were required by the applicant to attend to give evidence on matters relating to the merits of the applicant's review application. The Tribunal informed the applicant that the Tribunal, when considering whether to grant an extension of time, would not be undertaking a merits review of the respondent's decision in relation to which the applicant's substantive application for review had been lodged although the Tribunal would take the apparent merits of the substantive application into account as one of the factors to be considered in determining the application for an extension of time.

19. The Tribunal then made orders directing that the first summonses be revoked and that the applicant's application to issue the second summonses be refused.

LEGISLATION AND CASE LAW

20. The power of the Tribunal to issue summonses is contained in s 40 of the AAT Act. That section reads, relevantly, as follows:

"40 Powers of Tribunal etc.

- (1) *For the purpose of reviewing a decision, the Tribunal may:*
 - (a) *take evidence on oath or affirmation;*
 - (b) *proceed in the absence of a party who has had reasonable notice of the proceeding; and*
 - (c) *adjourn the proceeding from time to time.*

Summons

- (1A) *Subject to subsection (1B), for the purposes of the hearing of a proceeding before the Tribunal, the member presiding at the hearing, the Registrar, a District Registrar or a Deputy Registrar may summon a person to appear before the Tribunal at that hearing:*
 - (a) *to give evidence; or*
 - (b) *to give evidence and produce any books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons; or*
 - (c) *to produce any books, documents or things in the possession, custody or control of the person or persons named in the summons that are mentioned in the summons.*
- (1B) *A summons under subsection (1A) may require a person to appear at a directions hearing to produce books, documents or things instead of at the hearing before the Tribunal.*
- (1C) *A person (other than a presidential member, a senior member or an authorised member) who, under subsection (1A), may summon a person to appear before the Tribunal must not refuse a request to do*



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so unless the refusal is authorised by a presidential member, a senior member or an authorised member."

21. It is clear that the power of the Tribunal to issue a summons is discretionary and an application may be refused. The general principles relating to the issue of subpoenas by a court are applicable to the issue of a summons by the Tribunal;

Cosco Holdings Pty Ltd v FCT (1997) 37 ATR 432;

Re Moore and Military Rehabilitation and Compensation Commission (2006) 90 ALD 417.

22. Although s 40 of the Act does not contain specific power to revoke amend or vary a summons issued by the Tribunal it has been held in a number of cases that the Tribunal may revoke amend or vary a summons if good reason is shown:

Re Perpetual Trustee Co (Canberra) Ltd and CMR for ACT Revenue (1993) 29ALD 817;

Re Bird and Military Rehabilitation and Compensation Commission (2006) 91 ALD 691;

23. The Tribunal notes that in *Bird supra* it was held that a summons should be refused if it was not issued for legitimate forensic purpose or was too general.

TRIBUNAL'S REASONS FOR REVOKING FIRST SUMMONSES AND REFUSING ISSUE OF SECOND SUMMONSES

24. In this case the Tribunal is not required to investigate further on an application for extension of time than to see whether the applicant's case has an obvious weakness or is unlikely to succeed – *Re Sam Mercorella Pty Ltd and Australian Apple and Pear Corp* (1987) 12 ALD 520.

25. While the Tribunal is required as held in *Hunter Valley Developments* (*supra*) to consider the merits of the substantive application and take same into account



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when determining an application for extension of time the authorities make it clear that the Tribunal is not required to make any definitive finding on the merits of the case for the purpose of the application for an extension of time. It is only required to ascertain whether there is some worthwhile case which stands behind the application for an extension of time and which could be agitated by the applicant with respect to the substantive application for review:

Mercorella (supra)

Castallano v Inspector General in Bankruptcy (1998) 51 ALD 254

26. In the Tribunal's view it follows that the Tribunal, when dealing with an extension of time application, is not required to issue summonses and hear evidence from summonsed witnesses where that evidence relates solely to the substantive application for review and the Tribunal is of the view that it should exercise its discretion not to do so.

27. The Tribunal having come to this view determined that the first summonses should be revoked and the application to issue the second summonses should be refused for the reasons stated above.

I certify that the 27 preceding paragraphs are a true copy of the reasons for the decision herein of Mr A Sweidan, Senior Member

Signed: 

Associate

Date of Hearing	6 August 2008
Date of Decision	6 August 2008
Reasons for Decision	18 September 2008
Applicant	Self-Represented
Counsel for the Respondent	Mr J Giacco
Solicitor for the Respondent	Australian Government Solicitor



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FORM 1

FDN

IN THE DISTRICT COURT OF SOUTH AUSTRALIA

No 1666 of 2003

BETWEEN

DEPUTY COMMISSIONER OF TAXATION

Plaintiff

&

GARRETT; ANDREW MORTON

Defendant

CONSENT ORDERS

<p>Date of document:</p> <p>Filed by the Defendant Andrew Morton Garrett © ® in his capacity as Sole Trustee of the Andrew Garrett Family Trust.</p>	<p>Monday, 27 October 2008</p> <p>Unit 1/131 Royal Street, East Perth, WA 6004</p> <p>Phone; 0424 324 135 Fax; 08 8121 5136 E-mail; agarrett@holy-grail.com.au</p>
<p>Date and time of filing or transmission:</p>	



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CONSENT ORDERS

The Plaintiff and the Defendant consent to the following orders;

1. That Action DCCIV-1666-2003 is re-opened.
2. That Andrew Morton Garrett is joined as 1st Cross Claimant in his capacity as sole Trustee of the Andrew Garrett Family Trust.
3. That the Default Judgment of the 11th February 2004 given by the Deputy Registrar in favour of the Plaintiff in the amount of \$72,349.47 is set aside.
4. That each Party bear their own costs.

Dated;

Dated;

.....
For The Australian Tax Office

.....
Andrew Morton Garrett ©® in his
capacity as sole Trustee of the
Andrew Garrett Family Trust
ABN; 78 761 760 976

The Court orders;

1. That Action DCCIV-1666-2003 is re-opened.
2. That Andrew Morton Garrett is joined as 1st Cross Claimant in his capacity as sole Trustee of the Andrew Garrett Family Trust.
3. That the Default Judgment of the 11th February 2004 given by the Deputy Registrar in this action in favour of the Plaintiff in the amount of \$72,349.47 is set aside.
4. That each Party bear their own costs.

[Signed].....
Deputy Registrar

Dated;



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andrew.garrett@taggc.com.au

From: Tavolaro, Vincent <Vincent.Tavolaro@ags.gov.au>
Sent: 12 May 2015 17:42
To: 'Andrew Garrett'
Cc: NAbrams@moray.com.au; fcahill@altiuspartners.com.au
Subject: RE: MLG 177 of 2015 [DLM=For-Official-Use-Only]

I refer to your email dated 8 May 2015, sent at 12:46pm.

You seek a statement of reasons pursuant to section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) of our client's refusal to:-

- 1.1. Consent to the default judgment entered on 11 February 2004 in the District Court of South Australia proceeding No. DCCIV-2003-1666 being set aside; and
- 1.2. Consent to the annulment of your bankruptcy.
2. Reasons for decision may only be obtained in respect of a decision to which the ADJR Act applies. The Commissioner's refusal to consent to setting aside the default judgment in question and consent to the annulment of your bankruptcy are not decisions to which the ADJR Act applies. They are not decisions of an administrative character made under an enactment.
3. Further, even if the refusal to consent to setting aside the default judgment in question and consent to the annulment of your bankruptcy are decisions to which the ADJR Act applies, pursuant to section 13(11) and paragraph (f) of Schedule 2 to the ADJR Act the Commissioner is not obliged to give reasons in respect of:

decisions in connection with the institution or conduct of proceedings in a civil court....

We note that you have previously made a request for a statement of reasons under the ADJR Act in relation to an earlier decision by our client refusing to consent to setting aside the default judgment in question. We refer to our letter dated 27 October 2014 responding to that request.

Vincent Tavolaro

Senior Executive Lawyer
 Australian Government Solicitor
 T 03 9242 1359 F 03 9242 1215
 vincent.tavolaro@ags.gov.au
 Find out more about AGS at <http://www.ags.gov.au>

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From: Andrew Garrett [mailto:andrew.garrett@taggc.com.au]
Sent: Friday, May 08, 2015 12:46 PM
To: Tavolaro, Vincent
Cc: NAbrams@moray.com.au; fcahill@altiuspartners.com.au
Subject: Re: MLG 177 of 2015 [DLM=For-Official-Use-Only]

The communicate set out below is an administrative decision. Pursuant to the provisions of the *Administrative Decisions Judicial Review Act 1977 (Cth)* I request your client provide the reasons for that refusal on or before the 15th May 2015 or such other time frame allowed for by the Act

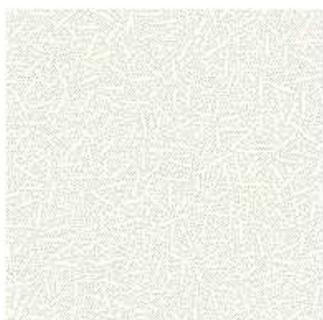


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The decision of the Legal Services Commissioner dated 30th April 2015 deposited in my affidavit dated 7th May 2015 advises that your client has not assisted the LSC in its investigations. A review of court files conducted by me reveals that the Commissioner has not yet brought proceedings against Cahill. It is my intention to apply for orders of certiorari and mandamus against your client on the 15th May 2015 and orders under s179 of the Bankruptcy Act that the commissioners conduct and that of the trustees is investigated.

Sent from my iPhone

On 8 May 2015, at 12:26 pm, Tavoraro, Vincent <Vincent.Tavoraro@ags.gov.au> wrote:



Our client does not consent to:-

1. Setting aside the Default Judgment in proceeding DCCIV-2003-1666 entered on 11 February 2004.
2. Annulment of your bankruptcy.

Vincent Tavoraro

Senior Executive Lawyer

Australian Government Solicitor

T 03 9242 1359 F 03 9242 1215

vincent.tavoraro@ags.gov.au

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From: andrew.garrett@taggc.com.au [<mailto:andrew.garrett@taggc.com.au>]

Sent: Thursday, May 07, 2015 4:41 PM

To: Tavoraro, Vincent; Norman Abrams; fcahill@altiuspartners.com.au; chris.jordan@ato.gov.au

Subject: MLG 177 of 2015

Dear Sirs,

By way of service please note the attached

Mr Jordan & Mr Tavoraro

My affidavit attached at p 228 - p 230 sets out a copy of the Default Judgment given in DCCIV-2003-1666 as you know that resulted in the issuing of a Bankruptcy Notice at pages 223 227 that was then the subject of the Creditors Petition filed by your client in AZ 90 of



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2014 at p 212 – 222 that resulted in the sequestration order given the matter that was then known as ADG 90 of 2004.

As you know by force of s129AA of *the Bankruptcy Act 1966* (Cth) the assets of the Bankrupt Estate automatically reverts I me on the 6th Anniversary from discharge which was the 22nd April 2015/

The standing to set aside the Default Judgment once again vests with me, I was also reappointed as the Trustee of the Andrew Garrett Family Trust on the 21st October 2014 though I observe the chose in action against the Commissioner in this regard was assigned to me on the 30th November 2013 by the then trustee of the Andrew Garrett Family Trust

I advised the court on the 27th April 2015 that I would be seeking the court to go behind the Default Judgment given in DCCIV-2003-1666; the Summary Judgment given in respect to the Andrew Garrett Family Trust on the 8th August 20014 in SCI-2013-02968 is the subject of an application for extension of time to appeal

Mr Jordan, I seek your consent to an order setting aside the Default Judgment given in DCCIV-2003-1666 on the 11th February 2004; I also seek your consent to an order annulling my Bankruptcy and setting aside the Sequestration order annexed hereto.

In the absence of that consent I will seek that judgment on the 15th May 2015 before the Honourable Reithmuller J in MLG 177 of 2015; *Cahill v Garrett* in which proceeding you are the supporting creditor.

Andrew Garrett

Chief Executive Officer/ Winemaker

The Andrew Garrett Group of Companies (TAGGC)

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