FEDERAL COURT OF AUSTRALIA

Smith, in the matter of Reischl v Reischl [2020] FCA 1852

File number:	NSD 168 of 2020
Judgment of:	**FARRELL J**
Date of judgment:	16 December 2020
Date of publication of reasons:	22 December 2020
Catchwords:	**BANKRUPTCY AND INSOLVENCY –** application pursuant to s 35A of the *Federal Court of Australia Act 1976* (Cth) for review of sequestration order made by Registrar – where creditor's petition founded on a default judgment – whether Court should exercise discretion to go behind judgment – application dismissed.
Legislation:	*Bankruptcy Act 1966* (Cth) ss 44, 47, 52 *Federal Court of Australia Act 1976* (Cth) ss 35A, 37M, 37N *Federal Court Rules 2011* (Cth) r 36.08 *Federal Court (Bankruptcy) Rules 2016* (Cth) rr 4.06, 7.03
Cases cited:	*Ali v Retail Decisions Pty Ltd* [2012] FCA 1130 *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145 *Harris v Caladine* [1991] HCA 9; (1991) 172 CLR 84 *Palasty v Parlby* [2007] NSWCA 345 *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165 *Totev v Sfar* [2008] FCAFC 35; (2008) 167 FCR 193
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	General and Personal Insolvency
Number of paragraphs:	69
Dates of hearing:	29 October 2020 11 November 2020 16 December 2020

Counsel for the Applicants:	Mr M Klooster
Solicitor for the Applicants:	HBA Lawyers
Counsel for the Respondents:	The First Respondent appeared in person and appeared on behalf of the Second Respondent

ORDERS

NSD 168 of 2020

IN THE MATTER OF ROBERT AND JOSIE REISCHL

BETWEEN:	**CHRISTOPHER SMITH** First Applicant
	MARLIEN SMITH Second Applicant
AND:	**ROBERT REISCHL** First Respondent
	JOSIE REISCHL Second Respondent
ORDER MADE BY:	**FARRELL J**
DATE OF ORDER:	**16 DECEMBER 2020**

THE COURT ORDERS THAT:

1. The interim application filed by the first respondent on 30 July 2020 (**interim application**) be dismissed.
2. The applicants' costs of the interim application be paid from the estate of the first respondent in accordance with the *Bankruptcy Act 1966*.
3. Order 1 made on 11 November 2020 be vacated with effect from 5.00 pm on Wednesday, 16 December 2020.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

FARRELL J:

INTRODUCTION

1 Christopher and Marlien Smith (the **petitioning creditors** or the **Smiths**) filed a creditor's petition naming Robert Reischl and Josie Reischl (together the **Reischls**) as respondents on 20 February 2020 (**creditor's petition**). On 9 July 2020, in Mr Reischl's absence, Judicial Registrar Morgan ordered that Mr Reischl's estate be sequestered (**sequestration order**), that the date of the act of bankruptcy stated in the creditor's petition be amended to 28 January 2020 and that the Smiths' costs fixed in the sum of $7,329.85 be paid out of the bankrupt estate, among other orders. Judicial Registrar Morgan also noted that Sean Magnus Wengel consented to act as trustee.

2 These are reasons for orders made on 16 December 2020 dismissing an application filed by Mr Reischl on 30 July 2020 to review and set aside the orders made by Judicial Registrar Morgan on 9 July 2020, including the sequestration order.

PRINCIPLES

3 Section 35A(6) of the *Federal Court of Australia Act 1976* (Cth) (the ***Federal Court Act***) confers a power on this Court to review an exercise of power by a Registrar. For a delegation of power to a Registrar to be valid, the powers and functions of the Registrar must be subject to review by a Judge by way of a hearing *de novo* on questions of both fact and law as they exist when the judge reviews the order made by the Registrar.

4 The hearing *de novo* involves the exercise of original jurisdiction and the petitioning creditor, in the case of a creditor's petition, must start again and make out the petitioner's case: see *Totev v Sfar* [2008] FCAFC 35; (2008) 167 FCR 193 at [10] and [13] (Emmett J) relying on *Harris v Caladine* [1991] HCA 9; (1991) 172 CLR 84 at 95 and 124. Justice Emmett went on to explain (in *Totev v Sfar* at [14]-[15]):

> 14. Because the hearing of an application for review of a sequestration order is a hearing *de novo*, it would not be sufficient for the reviewing judge to be satisfied that the registrar made no error and simply to dismiss the application for review. The judge who hears the review application must hear the petition afresh and must be satisfied as to the matters referred to in s 52 of the *Bankruptcy Act*. Thus, the reviewing judge must herself or himself be satisfied with the proof of:
>
> - the matters stated in the petition;

- the service of the petition; and
- the fact that the debt or debts on which the petitioning creditor relies is or are still owing.

The reviewing judge must also exercise afresh the discretions conferred by s 52(2).

15. In particular, unless the *Bankruptcy Rules* are waived, the judge must have the affidavits referred to in r 4.06 of the *Bankruptcy Rules*, which must be sworn shortly before the hearing. Except in the case of a review on the same day as the sequestration order was made, the affidavits relied upon before the registrar would not satisfy r 4.06. In the absence of fresh affidavits, it would be necessary that compliance with the *Bankruptcy Rules* be waived.

5 Section 52 of the *Bankruptcy Act 1966* (Cth) relevantly provides as follows:

52 Proceedings and order on creditor's petition

(1) At the hearing of a creditor's petition, the Court shall require proof of:

(a) the matters stated in the petition (for which purpose the Court may accept the affidavit verifying the petition as sufficient);

(b) service of the petition; and

(c) the fact that the debt or debts on which the petitioning creditor relies is or are still owing;

and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor.

(1A) If the Court makes a sequestration order, the creditor who obtained the order must give a copy of it to the Official Receiver before the end of the period of 2 days beginning on the day the order was made.

(1B) Subsection (1A) is an offence of strict liability.

(2) If the Court is not satisfied with the proof of any of those matters, or is satisfied by the debtor:

(a) that he or she is able to pay his or her debts; or

(b) that for other sufficient cause a sequestration order ought not to be made;

it may dismiss the petition.

(3) The Court may, if it thinks fit, upon such terms and conditions as it thinks proper, stay all proceedings under a sequestration order for a period not exceeding 21 days.

(4) A creditor's petition lapses at the expiration of:

(a) subject to paragraph (b), the period of 12 months commencing on the date of presentation of the petition; or

(b) if the Court makes an order under subsection (5) in relation to the petition—the period fixed by the order;

unless, before the expiration of whichever of those periods is applicable, a sequestration order is made on the petition or the petition is dismissed or withdrawn.

(5) The Court may, at any time before the expiration of the period of 12 months commencing on the date of presentation of a creditor's petition, if it considers it just and equitable to do so, upon such terms and conditions as it thinks fit, order that the period at the expiration of which the petition will lapse be such period, being a period exceeding 12 months and not exceeding 24 months, commencing on the date of presentation of the petition as is specified in the order.

BACKGROUND

6 The Court understands the background to the creditor's petition to be as follows.

Contract for purchase of Picton Property

7 The Smiths, together with Mrs Smith's parents, Petrus Daniel Zeeman and Heila Magdalena Zeeman (the **Zeemans**) (collectively, the **vendors**) entered into a contract dated 19 April 2017 pursuant to which the Reischls agreed to purchase the land identified as 32 The Grange, Picton, New South Wales (**Picton Property**) for the sum of $1,350,000 (**Contract**).

8 The executed Contract contained additional conditions, including additional condition 11 (**special condition**) which provided as follows:

> **11. Release of Deposit**
>
> 11a. In the event that the Vendor is purchasing another property the Purchaser agrees to release to the Vendor the deposit or so much of the deposit as is required for use by the Vendor as a deposit on the purchase of the other property or stamp duty payable on the purchase property. The Vendor warrants upon release of the deposit in accordance with the terms of this special condition such deposit will be paid only to the Trust Account of a Real Estate Agent, Solicitor/Licensed Conveyancer and/or the Office of State Revenue and shall not be further released without the consent of the Purchaser. The entering into of this Contract by the Purchaser shall be a full and irrevocable authority to the stakeholder to release such a deposit.

9 The Contract also provided as follows in relation to default by the purchaser:

> **9 Purchaser's default**
>
> If the purchaser does not comply with this contract (or a notice under or relating to it) in an essential respect, the vendor can *terminate* by *serving* a notice. After the *termination* the vendor can –
>
> 9.1 keep or recover the deposit (to a maximum of 10% of the price);
>
> 9.2 hold any other money paid by the purchaser under this contract as security for anything recoverable under this clause –
>
> 9.2.1 for 12 months after *termination*; or

9.2.2 if the vendor commences proceedings under this clause *within* 12 months, until those proceedings are concluded; and

9.3 sue the purchaser either –

9.3.1 where the vendor has resold the *property* under a contract made *within* 12 months after the *termination*, to recover –

- the deficiency on resale (with credit for any of the deposit kept or recovered and after allowance for any capital gains tax or goods and services tax payable on anything recovered under this clause); and
- the reasonable costs and expenses arising out of the purchaser's non-compliance with this contract or the notice and of resale and any attempted resale; or

9.3.2 to recover damages for breach of contract.

2019 statement of claim

10 On 26 September 2019, the vendors filed a statement of claim in the **District Court** of New South Wales (**2019 statement of claim**). The Smiths claimed $113,576.49 from the Reischls and the Zeemans claimed a further $35,895.90 or, in the alternative, damages. The vendors also sought interest and costs. The following matters were raised in the 2019 statement of claim.

11 On 19 April 2017, the vendors entered into the Contract with the Reischls. The date for completion of the sale of the Picton Property was 9 August 2017 (approximately 112 days after the date of the Contract).

12 Around 24 April 2017, the Smiths entered into a contract for the purchase of land at Colo Vale (**Colo Vale Property**) for the sum of $780,000. They paid a 5% deposit ($39,000) and the date for completion was 9 August 2017.

13 The Reischls were unable to complete the purchase of the Picton Property on 9 August 2017, the scheduled settlement date, or on the rescheduled settlement dates of 14, 29 and 31 August 2017. On 15 August 2017, the vendors caused to be served on the Reischls a notice to complete on or before 31 August 2017. The vendors terminated the Contract on 1 September 2017.

14 Around 1 September 2017, the vendor of the Colo Vale Property caused to be served on the Reischls a notice to complete the purchase of that property on or before 19 September 2017. The Smiths were unable to complete the purchase of the Colo Vale Property as a result of the Reischls' default under the Contract and were also unable to pay default interest at the rate of $358 per day. The vendor of the Colo Vale Property terminated that contact on 20 September

2017 and sought $52,845.51 from the Smiths. The Smiths paid that vendor $50,000 by way of compensation for their default.

15 The vendors entered into a second contract for the sale of the Picton Property to a third party on 10 August 2018 for $1,350,000. That sale was completed.

16 The deposit of $135,000 paid by the Reischls was forfeited to the vendors. After deduction of real estate agent fees, the Smiths received half of the net amount, being $48,937.50. The Smiths said that the amount of their loss or damage (taking into account, among other things, the deposit on the Colo Vale Property, legal fees, conveyancing fees and mortgage fees associated with cancelling the purchase of the Colo Vale Property) was in aggregate $142,293.

Judgment/order and bankruptcy notice

17 The creditor's petition at [4] states that the act of bankruptcy committed within six months of the presentation of the creditor's petition was the Reischls' failure either to comply with the requirements of a **bankruptcy notice** (BN 247833) served on them on 6 January 2020 by 27 January 2020 or to satisfy the Court that they had a counter-claim, set-off or cross demand equal to or more than the sum claimed in the bankruptcy notice of a kind that could not have been set up in the action in which the judgment referred to in the bankruptcy notice was obtained.

18 The bankruptcy notice was issued on 4 December 2019. It relied on a **judgment debt** pursuant to an order of the District Court made in proceedings 2019/00207375 (the **District Court proceedings**) entered on 7 November 2019 (**short minutes of order**) and the judgment entered on 3 December 2019 (**judgment/order**) for an aggregate amount of $165,541.12. The judgment/order attached to the bankruptcy notice indicates that the Reischls did not appear at the hearing at which the judgment debt was obtained. The judgment debt comprised a default judgment for $160,316.12 and a judgment for $5,225 in accordance with signed consent orders entered on 6 June 2019. The total debt amount claimed in the bankruptcy notice is $166,461.80, which includes $920.68 in interest accrued since the date of the judgment/order.

Service of bankruptcy notice

19 Attempts to effect personal service on the Reischls of the bankruptcy notice and related documents were made:

(a) on 12 December 2019, at an address in Minto, New South Wales; and

(b) on 6 December 2019, at an address in Ingleburn, New South Wales,

being the last known addresses for the Reischls. Copies of the bankruptcy notice, short minutes of order, judgment/order and a document issued by the Australian Financial Security Authority warning that "you may be declared bankrupt" were left in sealed envelopes addressed to the Reischls in letterboxes at those addresses on those dates.

20 By an affidavit of service sworn on 7 January 2020, Douglas O'Connor, a licensed process server, deposes that he spoke with Mr Reischl via mobile phone on 6 January 2020 before leaving a sealed envelope containing the documents in the letterbox at the Ingleburn address. Mr Reischl said that he was assisting friends and family affected by bushfires and he would not be able to meet on that date. Mr O'Connor told Mr Reischl about the nature of the documents and that he would leave the documents in the letterbox at the Ingleburn address. Mr Reischl said that that would be acceptable and he would receive the documents when he attended the property the following morning.

21 The Reischls did not respond to the bankruptcy notice.

Service of the creditor's petition and notice of appearance

22 Patrick John Haklany is a solicitor employed by HBA Lawyers, the solicitors for the petitioning creditors. By his affidavit sworn on 9 June 2020, Mr Haklany deposed to an email sent to Mr Reischl on 26 February 2020 attaching the following documents:

(a) Covering letters to Robert and Josie Reischl;

(b) The creditor's petition;

(c) An affidavit of search sworn by Mr Haklany and filed on 20 February 2020;

(d) The affidavit of service of the bankruptcy notice sworn by Mr O'Connor which was filed on 21 February 2020;

(e) A consent to act as trustee signed by Mr Wengel and filed on 25 February 2020; and

(f) An affidavit of search filed and sworn by Mr Haklany on 25 February 2020.

In his affidavit sworn on 9 June 2020, Mr Haklany also provided evidence of attempts made by a process server to serve the creditor's petition on the Reischls personally at a Douglas Park address on 21 and 23 March 2020.

23 Mr Haklany also deposed to receiving an email from Mr Reischl on 19 March 2020 attaching a notice of appearance, a notice stating **grounds of opposition** dated 18 March 2020 and

Mr Reischl's supporting affidavit sworn on 19 March 2020. Those documents were filed on 24 March 2020.

24 The grounds of opposition were (as written):

> 1. No notice was given to the Respondent of a court date set in the Supreme Court where the applicant obtained judgement against the respondent.
>
> 2. I strongly dispute the claim and believe the Judgment order leading to the Bankruptcy Petition was wrongfully obtained.

25 In his affidavit sworn on 19 March 2020, Mr Reischl said (as written):

> RR1.
>
> Regardless of matters preceding the Applicants Petition, as this matter is of the utmost importance affecting the respondents lives, I swear on oath that I was not given any notification or made aware, totally unaware of a court date 3 December 2019 set in the Supreme Court where the applicant obtained judgement against the respondent and where the respondent swears he would have appeared to defend the matter and explained to the court the circumstances contesting the matter.
>
> RR2.
>
> I dispute the applicants claim as factually wrong in many counts in documents preceding this court date of 24 March 2020.
>
> I believe the Judgement order leading to the Bankruptcy Petition was wrongfully obtained. The true history available to be brought to the courts attention on the respondents behalf defending against the applicants claims will support the respondents position.

26 The Reischls did not appear at the hearing before Judicial Registrar Morgan on 9 July 2020 at which the sequestration order was made.

APPLICATIONS FOR INTERIM RELIEF AND REVIEW

27 In his affidavit made on 29 July 2020 in support of his application filed on 30 July 2020 seeking review of the sequestration order, Mr Reischl said (as written):

> 3. Registrar Morgan adjudicated on the presentation of the Creditors Petition solely, whilst defendant's defence was not heard due to illness and inability to appear in medically impaired state (Notices sent to the Court by email even if they were not in the proper form)
>
> 4. The applicant says on oath he was not bankrupt at the time and claims the applicants Petition filed to be erroneously sought and a Cross Claim may be Ordered.
>
> 5. The applicant intends to show the Creditors Petition & claim as unjust and hence the applicant was not bankrupt as the Petition claimed.
>
> 6. The applicant is commencing Proceedings to Set Aside the underlying Judgement in the Lower Court. Upon further investigation, the applicant

> believes not to owe the Petitioning Creditor anything, hence the applicant could not have caused an act of bankruptcy.

28 Annexed to Mr Reischl's affidavit were:

(a) A copy of the orders made by Judicial Registrar Morgan on 9 July 2020; and

(b) A copy of an email sent by Mr Reischl to the Federal Court's NSW Registrar Support inbox on Wednesday, 8 July 2020 at 11.56 am, copied to the solicitors for the petitioning creditors. In the email, Mr Reischl thanked Judicial Registrar Morgan for adjourning the hearing of the creditor's petition on 2 July 2020 and pointed out that, in his affidavits and attachments provided to the Court on 11 and 24 June 2020 and further correspondence on the morning of 2 July 2020, he had asked that the matter be adjourned to a reasonably suitable date after a medical procedure which he was to undergo on 9 July 2020.

29 Mr Reischl also filed an interim application on 30 July 2020 in which he sought a stay of the orders made on 9 July 2020 pursuant to r 36.08 of the *Federal Court Rules 2011* (Cth) or s 52(3) of the *Bankruptcy Act*.

30 On 14 August 2020, by consent of the petitioning creditors, the Court made an order pursuant to s 35A(6) of the *Federal Court Act* suspending the operation of the sequestration order made by Judicial Registrar Morgan on 9 July 2020 on the condition that Mr Reischl prosecutes the application for review and the interim application with due despatch. The Court also made timetabling orders and listed the review application for hearing on Thursday, 1 October 2020 at 2.15 pm. On 28 September 2020, the Court made orders for the conduct of the hearing of the review application by electronic means.

31 By an affidavit filed by Mr Reischl on 28 August 2020, Mr Reischl said the following:

> 5. The respondent alleges the Creditors Petition to have been formed on incorrect historical facts causing an injustice to the respondent. The amount arrived at and claimed in the Creditors Petition (some $160K+) filed in Federal Court 20 Feb 2020, came after the applicant consolidated another claim in the District Court 14 Feb 2020, following a default judgement obtained in the District Court 7 Nov 2019 in the respondents absence (some $75k), obtained from the filing of an original Statement of Claim in the Local Court 30 Nov 2018 while the respondent (purchaser) was overseas and more than some 12 months after the applicant (vendor) terminated a property contract because the 1st respondent (purchaser) couldn't complete. The respondent further alleges additional prior demands and claims also to be derived on a misapprehension as to the facts.
>
> 6. It seems to the respondent, that in the original property contract the foundation

> to this matter, where the purchaser did concede to forgo the whole of the deposit ($135k), the applicants were misinformed as to the range of the parts of the contract relied upon where there was no express clauses or determinations in the contract as to early release of deposit and what or how many properties the vendor can commit to purchasing meantime before the contract settles or doesn't and further misconception that all responsibility for their ill conceived risky actions of spending can allegedly fall on the purchaser and hence the validity and question of their original claim suing for what constitutes damages in this case. The vendor never made it known in writing of what their intention was, never asked for amendments to the contract before settlement due date, only made noise after delayed settlement fell over and vendor terminated contract when purchaser received funds and still wanted to settle, that property it was then resold within 12 months of the first contract not settling for the same amount, the vendor got to keep the deposit, the vendor then took no action until over 12 months after contract collapsed.
>
> 7. The applicants Solicitors implied in much later post termination of contract that the respondent was aware of the applicant/vendor's intentions, however the respondent was at no time aware, nor given written instruction, nor asked any time earlier to alter the contract.
>
> 8. The respondent believes not to owe the Creditor what is claimed & materially did not cause an act of bankrupt.
>
> 9. Obviously there is a lot more to the story and the respondent intends to bring more evidence.

32 Written submissions were filed by the parties ahead of the hearing set down for 1 October 2020. Mr Reischl also filed an affidavit made on 11 September 2020 which the Court understands to be in the nature of submissions, the main thrust of which was that the facts set out in the statement of claim were not supported by the Contract.

33 The petitioning creditors appeared at the hearing on 1 October 2020 by their counsel, Mr Klooster. Mr Reischl appeared in person. Mr Reischl was not available at 2.15 pm. He appeared at around 2.20 pm. At 2.14 pm he filed (without leave) an affidavit dated 1 October 2020 to which were annexed:

(a) A document headed "Statement of Claim" endorsed with the seal of the **Local Court** of New South Wales on 30 November 2018 naming the Smiths as plaintiffs and the Reischls as defendants pursuant to which the Smiths claimed damages of $74,803 plus costs for the Reischls' defaults for failure to complete the purchase of the Picton Property pursuant to the Contract. That document will be referred to as the **2018 statement of claim**.

(b) A document headed "**Notice of Motion**" in the District Court proceedings dated 29 September 2020 in which Mr Reischl seeks to have the judgment/order set aside. It also seeks orders that Mr Reischl have 28 days in which to file a defence, the judgment

debt be stayed until the application to set aside the judgment/order is decided and that the application for a stay be heard on an urgent, ex parte, basis. The document does not contain evidence that it had been filed but the "Details" of that annexure are said to be a true copy of the notice of motion to set aside default judgment and defence by affidavit submitted to the District Court at 2.21 pm on 30 September 2020.

(c) A document headed "Addendum to affidavit of Robert Reischl" with a subheading of "Draft to Defence" (**Draft Defence**).

34 In the Draft Defence Mr Reischl said:

(a) He was unable to settle the purchase of the Picton Property in August 2017 or after several extensions of time with the result that the vendors terminated the contract in September 2017 and kept the deposit of $135,000. Mr Reischl understood that it was to cover reasonable costs.

(b) The vendors sold the Picton Property within 12 months for the same amount as in the Contract.

(c) In October 2018, the Smiths' solicitors demanded damages of over $70,000 "pursuant to a clause of the contract which seems to reflect extra costs incurred as by interest, land taxes and the like, however the vendors were claiming losses incurred by them attempting to purchase another property".

(d) Mr Reischl tried to "sort this out" during November 2018, highlighting the "time for claim" and its "unreasonableness" in the circumstances of "which [he] had no prior knowledge as nothing was written in the original contact where this would be [his] responsibility and vendor had already kept $135,000 deposit".

(e) The 2018 statement of claim was filed in the Local Court on 30 November 2018 by the Smiths' solicitors of which Mr Reischl "had no idea as [he] had already left for overseas 28 Nov 2018 through to 9 Jan 2019".

(f) "Throughout 2019 the claim went to the District court & where [Mr Reischl] missed early hearing listings but then was never made aware of any listing dates seeking orders/judgments in the District Court or the vendor's solicitors attempting to move the matter to the Supreme [Court]."

(g) Mr Reischl was "heavily engaged" in moving his business from Minto to Ingleburn during mid to late 2019. He engaged lawyers but could "not afford high fees & lost momentum".

(h) Mr Reischl "believed from the original contact [he] would be buying the property from 1 party (vendor) yet mid 2019 the claimant got another party (their parents) onto their claim who were also apparently attempting to buy property at the time and the claim amount more than doubled".

(i) Mr Reischl was "not in a position to challenge at that time" even though he "knew & believed the claim to be wrongful". He did not file a defence because "end November 2019, thru to early January 2020" he was "mostly helping in the community fighting fires". He further says that he "was never provided with a listing date" so that he "had no knowledge that the matter was listed in Nov 2019" so that it was "impossible" for him to "attend court". He says that he "ought not have been allowed to go to a default judgement 7 Nov 2019".

(j) In summary, Mr Reischl says:

> M) There is no clause written into the original contract which specifically states that the vendor is/will buy another property tied to settlement of first property.
>
> N) It was never discussed and my understanding from the selling agent was the vendor had somewhere they would be moving to.
>
> O) There might have been certain expectations, but I can't be held responsible for what else vendor/s do before any contract settlement is achieved and they are in receipt of sale funds of first property no matter if they intend on buying 1 property or 2 or 3.
>
> P) As is, I already lost the opportunity to own said property and lost $135,000 in deposit to the vendor in the process which should have compensated them for additional expenses etc, so this further later claim could only be seen as a further punitive claim and should have never been allowed.
>
> Q) Conclusion is that I do not owe the vendor/plaintiff what is claimed.

35 The Smiths accepted that they would not be prejudiced if the hearing were adjourned (save as to costs) to allow them time to address the evidence filed by Mr Reischl without leave, rather than pressing a submission that it should not be received, having regard to the nature of the proceeding.

36 The hearing of the Reischls' application was stood over to 29 October 2020 and orders were made extending the operation of the stay of the sequestration order until 4 pm on Friday, 30 October 2020. Mr Reischl was required to pay the Smiths' costs thrown away by reason of the adjournment. Further orders were made granting Mr Reischl until 15 October 2020 to file further evidence, the Smiths until 22 October 2020 to file further evidence and Mr Reischl leave to file further evidence in reply and any further submissions by 12 noon on 26 October 2020. The Smiths were to file any further submissions by 12 noon on 28 October 2020.

37 On 15 October 2020, Mr Reischl filed a further affidavit made on that date in which he relevantly said (emphasis in the original):

> 2.0 The thrust of the prosecution lays not in the various reasons and claims by both parties to the time line in finally hearing of the respondent's defence to the Statement of Claim, but to the validity of the applicant's actual original Claim and ensuing Claims and Orders derived upon those claims allegedly falsely forcing the respondents bankruptcy.
>
> 2.1 It is prudent to mention documents by Affidavit, as to the respondent's more recent illness where received and sealed by the Federal Court.
>
> 2.2 Since the applicant attempts to paint the respondent in a worst bad picture throughout the time line and the respondent accedes to certain difficulties and omissions on both sides, ***howeve***r, again the respondent states his prosecution of the matter is the legality/validity of claims leading to the present circumstances.
>
> 3.0 As to challenging the applicants claim for damages after the applicant kept the $135,000.00 deposit and resold the property for the same advertised amount within 12 months and then seeking claim for damages et al, more than 12 months after the applicant terminated the contract with the respondent, which ***the respondent had absolutely no awareness of at the time of construction of the contract or the signing of the contract, was not specifically included as a clause to the contract, but was brought at a much later time and pursued over 12 months later after the termination notice and breach contract occurred***, allegedly applying a vague and remote interpretation of a contract clause.
>
> 3.1 Below extract from earlier letter 27 Nov 2018 sent to applicant's solicitors:
>
> "At no time, as you keep referring to, was I aware of what your clients were or were not doing/purchasing etc. prior to our settlement....."
>
> 4.0 In support to the above, the respondent refers to:
>
> 4.1 Taylor v Caldwell, where Blackburn J reasoned that the rule of absolute liability only applied to positive, definite contracts, not to those in which there was an express or implied condition underlying the contract.
>
> 4.2 *Hadley v Baxendale* (1854) 9 Ex 341 [156 ER. 145], 16:

38 Mr Reischl filed a further affidavit dated 26 October 2020 which the Court understands to be in the nature of submissions, which relevantly state as follows:

> I Robert Reischl say, in simple terms in this instance , the bankruptcy against the first respondent was obtained through the applicants Creditors Petition which was obtained because of a Statement of Claim , however the Statement of Claim was erroneously derived from alleging interpretation of certain sections of 'the' Contract (19 April 2017) between the parties.
>
> I say, it is a known that Courts will only enforce an agreement or contract when it is clear that both parties have agreed upon a set of terms. This is why written contracts are very important and considerations of great importance affecting the performance

> and outcomes of the contract must be clearly written into the contract, such as in Section 2 of the Contract and not left vague and obscure as in 9.3.2
>
> Normally a deposit is kept in escrow with the deposit holder, unless stated otherwise by writing in the contract or changed by variation to a contract where both parties are fully aware and agree.
>
> Something as important as the vendor/s of a property making the purchaser of his/her property aware of the vendor/s intending to immediately enter into a purchase agreement subject to the complete of that contract, has to be stated at the start of the contract, not argued at the unforeseeable end of a contract.
>
> In this instance the vendor/s entered into contract/s only 5 days (24 April 2017, [SoC, P5, 10.0]) and is alleging obscure section 9.3.2 of the contract. I verily believe this would ordinarily apply to damages derived from such as extra interest, taxes, insurances and such costs. Not costs and losses related to intended purchases of 1, 2 or more properties not written or advised at the beginning of the contract and not giving any opportunity to address such prior to completion or termination.
>
> After already incurring the loss of a substantial deposit this further claim is seen as misapplied forcing a huge additional and penalty, previously unknown not written into the contract and therefore unenforceable.

39 The Smiths filed further submissions on 28 October 2020.

40 At the hearing on 29 October 2020 the petitioning creditors relied on the following:

(a) The bankruptcy notice dated 4 December 2019;

(b) The creditor's petition filed on 20 February 2020;

(c) Affidavits of service of the creditor's petition sworn by Mr Haklany on 9 June 2020 and 7 September 2020. The Smiths also relied on the fact that Mr Reischl filed a notice of appearance and participated in the proceedings.

(d) Affidavits verifying the creditor's petition sworn by Mr Smith, on 1 July 2020 and 7 September 2020.

(e) Affidavits of debt sworn by Mr Smith on 8 July 2020, 7 September 2020 and 28 October 2020 verifying that an amount of $165,639 plus costs remained outstanding after the acknowledged receipt of payments of $5,250 (including GST) on 15 April 2020, $10,000 on 16 April 2020 and $3,000 on 17 April 2020.

(f) Affidavits of final search sworn by Mr Haklany on 8 July 2020, 7 September 2020 and 28 October 2020.

(g) An affidavit sworn by Mr Wengel on 22 September 2020. Mr Wengel deposes to the fact that Mr Reischl has not filed a Bankruptcy Form incorporating a statement of affairs, notwithstanding that a request was made on 16 July 2020 and this is required to be completed within 14 days after Mr Reischl was notified of the sequestration order.

(h) An affidavit sworn by Mr Haklany on 1 October 2020 and Exhibit PH-1. Mr Haklany deposed as follows:

(i) The 2018 statement of claim and the 2019 statement of claim relate to essentially the same proceedings, albeit that they took place in three different courts. Contrary to Mr Reischl's evidence, he was made aware of listing dates in the District Court and **Supreme Court** of New South Wales in March 2019 and November 2019, relying on correspondence set out in Exhibit PH-1.

(ii) The 2018 statement of claim commenced proceedings in the Local Court; it was served on Mr Reischl on 10 December 2018 personally (see affidavit of Tomislav Gajic in Exhibit PH-1). Default judgment was entered on 4 February 2019. That default judgment was set aside by consent orders entered on 6 June 2019 and Mr Reischl agreed to pay the Smiths' costs thrown away, being the amount of $5,225 referred to in the consent orders. That amount of $5,225 is included in the judgment/order and is not itself a default judgment. The consent orders were in response to Mr Reischl's motion to set aside the default judgment and were the subject of correspondence with Mr Reischl in May and June 2019 referred to in Exhibit PH-1. Mr Reischl appeared in the Local Court when that order was made on 6 June 2019 and he told the Registrar that he understood the short minutes of order and that he was required to pay the sum of money.

(iii) The consent orders made on 6 June 2019 also provided for the Smiths to file an application in the Supreme Court seeking that the proceedings be transferred to that jurisdiction.

(iv) In July 2019, the Smiths' lawyers corresponded and had conversations with Mr Reischl concerning an amended summons for transfer of the proceedings and two directions hearings in the Supreme Court in August 2019. Mr O'Connor swore an affidavit of service of a summons and a revised summons on Mr Reischl on 11 July 2019.

(v) On 2 August 2019, Mr Haklany attended at the Supreme Court where Darke J made orders that the Smiths file and serve a statement of claim by 18 August 2019 and that the matter be stood over in the real property list until 30 August 2019. On 7 August 2019, Mr Haklany had a conversation with Mr Reischl in which he advised Mr Reischl of the orders made by Darke J and enquired whether Mr Reischl had yet paid the costs order made on 6 June 2019.

Mr Reischl indicated that he had not, but he would be "in a position to do so on Friday".

(vi) The 2019 statement of claim was served on Mr Reischl on 30 September 2019 (see the affidavit of Douglas O'Connor sworn on 2 October 2019 in Exhibit PH-1).

(vii) Mr Haklany attended the District Court on 14 October 2019 at which District Registrar Howard made orders that "The Defendants … file and serve their Defence to the Statement of Claim by no later than 18 October 2019" and "costs be reserved", that the matter be listed in the Direction Case Management List on 7 November 2019, that the Smiths were to notify the Reischls and if the Reischls do not appear on 7 November 2019, judgment be entered for the Smiths.

(viii) On 4 November 2019, Mr Haklany sent Mr Reischl an email with the subject line "Christopher Smith & Ors – v – Robert & Josie Reischl – District Court of New South Wales Proceedings 2019/301468" which stated as follows (salutations excluded):

> We refer to the above matter.
>
> On 14 October 2019, we attended the District Court of New South Wales for a directions hearing before Judicial Registrar Howard. We note that you were not in attendance on this day and that the Court Officer made attempts to contact you.
>
> We further note that you are in receipt of the Statement of Claim filed on 26 September 2019 and served on you on 30 September 2019.
>
> Judicial Registrar Howard made orders 1 and 3 of the attached Short Minutes of Order on 14 October 2019. The parties will be required to attend on a further directions hearing on 7 November 2019 at the District Court of NSW (John Maddison Tower) at 9:30am.
>
> You are on notice that our clients will seek that the Court enter judgment against the Defendants on this date.
>
> It is recommended that you engage legal representation if you have not already done so.

(i) An affidavit sworn by Mr Smith on 21 October 2020 and Exhibit CS-1 which is a copy of the Contract.

41 Mr Reischl relied on his affidavits identified above.

42 Issues raised at the hearing on 29 October 2020 will be dealt with below. At the hearing, the Court noted that Mr Reischl had not notified his creditors of the hearing in accordance with r 7.03 of the *Federal Court (Bankruptcy) Rules 2016* (Cth). It was also not clear who his creditors are, since he had not filed a statement of affairs nor provided evidence as to his solvency. The Court stood the hearing over to 11 November 2020 to allow Mr Reischl time to identify his creditors and advise them of the hearing should they wish to appear.

43 On 11 November 2020, Mr Reischl indicated that he had had difficulty finding out how to contact his creditors and did not allow himself enough time to make the notifications. The Court determined to further adjourn the hearing to 16 December 2020 to allow Mr Reischl time to notify his creditors and to provide evidence as to whether or not the special condition appeared in the version of the Contract which he had been given before the time came to execute the Contract. This was an issue Mr Reischl raised clearly at the hearing on 29 October 2020. Mr Reischl indicated that he would obtain evidence from the relevant real estate agent. Mr Reischl was also allowed a further opportunity to provide evidence as to his solvency, a matter not addressed in evidence which he had filed up to that point. The Court pointed out that there was no evidence that Mr Reischl had filed the Notice of Motion in the District Court and that was not a matter in his favour. Mr Reischl indicated that he understood those matters. He was given three weeks to file further evidence.

44 Prior to the hearing on 16 December 2020, Mr Reischl filed submissions and advised the Court that his creditors were as follows and that they had been notified of the hearing:

(a) $27,000 outstanding on a credit card with a limit of $30,000 with monthly payments of approximately $600.

(b) An electricity account for approximately $800 per quarter.

(c) Council rates of approximately $2,400 per annum.

(d) Finance on a car he has purchased with approximately $35,000 outstanding on a purchase price of $106,000, with payments of $580 per month.

(e) A mortgage of $830,000 on a home with a value of approximately $1.25 to $1.3 million.

45 None of the identified creditors appeared at the hearing on 16 December 2020.

46 Mr Reischl did not file evidence:

(a) Supporting his statement of the amount of the liabilities referred to above, his income or any expert valuation supporting his suggested value of his home;

(b) As to whether he had filed the Notice of Motion or progressed a defence to the 2019 statement of claim.

(c) Concerning the form of the version of the Contract that had been provided to him before he executed the Contract.

47 The Smiths filed submissions on 15 December 2020 and an affidavit sworn by Mr Haklany on 10 December 2020 deposing that he had made searches with the District Court in relation to all proceedings between the Smiths and the Reischls which confirmed that no Notice of Motion had been filed in the District Court.

CONSIDERATION

48 The Court accepts that the evidence relied on by the Smiths at the hearing on 29 October 2020 establishes that the formal requirements under ss 44(1), 47 and 52(1)(a) and (b) of the *Bankruptcy Act*, r 4.06(3) of the *Federal Court (Bankruptcy) Rules 2016* (Cth) are met. The Court told the Smiths that it would not require further evidence of searches and debt.

49 Having regard to s 52(1)(c), the evidence discloses that $18,250 has been paid by Mr Reischl of the judgment/order of $166,461.80 and Mr Reischl confirmed that he had made no further payments at the hearing on 16 December 2020. Mr Reischl nonetheless disputes that the remaining amount of the judgment/order is owing in truth and justice.

50 In *Ali v Retail Decisions Pty Ltd* [2012] FCA 1130 at [17]-[20], Bromberg J set out relevant principles as follows:

> 17. On the hearing of a creditor's petition, proof of the debt is required by s 52(1)(c) of the *Bankruptcy Act 1966* (Cth) ("the Bankruptcy Act"). The existence of a judgment is prima facie evidence of a debt: *Wolff v Donovan* (1991) 29 FCR 480, 486 (Lee and Hill JJ). However, a court has a discretion to go behind the judgment to determine whether it is founded on a real debt because "a sequestration order should not be made on the petition of a person who is not a real creditor": *Joossé v Commissioner of Taxation* (2004) 137 FCR 576 at [3] (North and Finkelstein JJ).
>
> 18 If the court exercises its discretion to look behind the judgment, the court can no longer accept the judgment as proof of the debt and must determine whether there is "in truth and reality a debt due to the petitioning creditor": *Wren v Mahony* (1972) 126 CLR 212 at 224-225 (Barwick CJ); *Wolff* at 486 (Lee and Hill JJ).
>
> 19 There is thus a two stage process which needs to be followed. As a first step the court considers whether it should go behind the judgment. It will more readily look behind the judgment where the judgment was obtained by default than where it was

> obtained following a hearing on the merits: *Wolff* at 486 (Lee and Hill JJ). The question at that stage is whether there is substantial reason for questioning whether there is a debt: *Joossé* at [6] (North and Finkelstein JJ). If the court determines that there is, it will then move to the second stage of a full consideration of the facts to determine whether there is a debt.
>
> 20 At the first stage, it is the respondent to the petition who bears the tactical onus of demonstrating that a basis exists for going behind the judgment, however, the overall onus of proof that the debt exists always remains with the petitioning creditor: *Wolff* at 487.

51 The Court understands Mr Reischl's evidence and written and oral submissions to be in essence as follows.

52 *First,* the special condition on which the Smiths rely was not contained in the version of the Contract he received, albeit that he does not contest that he signed the Contract which contained that condition when he was "under pressure" to exchange the contract and pay the deposit. Mr Reischl acknowledged that the page of the Contract containing the special condition is initialled by him. When asked why this issue had not been raised clearly in his evidence before the hearing on 29 October 2020, he replied that it was raised in his evidence and he had only recently recognised the connection between the special condition and cl 9.3.2 of the Contract on which the Smiths relied in the 2019 statement of claim. He said he could not afford to sustain the costs of legal representation to enable him to seek out these issues. In his written submissions filed on 15 December 2020, Mr Reischl submitted that when he was advised on 1 September 2017 that funds were released to him, he asked the real estate agent to chase the Smiths as the Reischls were now in a position to settle and he indicated that he would pay extra costs as interest, but the agent was advised that the Picton Property was no longer for sale.

53 *Second*, Mr Reischl submitted that cl 9.3.2 of the Contract is not intended as a "broad brush" pecuniary damages clause, but rather it is intended to apply to extra interest, rates and taxes or losses incurred in a future resale of the Picton Property at a lower price. He is not liable for consequential losses relating to the Colo Vale Property because the loss is too remote having regard to the principles in *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145. Mr Reischl pointed out that the Picton Property was sold under a contract dated 10 August 2018, within 12 months of termination of his Contract and for the same amount as he had agreed to pay under the Contract. The Court understands Mr Reischl to be suggesting that cl 9.3.1 of the Contract was the avenue by which a claim could be made since the Picton Property was sold within a year of "termination" of the Contract.

54 *Third*, Mr Reischl submitted that the Smiths entered into the contract for the purchase of the Colo Vale Property within five days after entering into the Contract with the Reischls. The Reischls were not told of the Smiths' intention to do that and had they been told they would not have entered into the Contract if they had been told.

55 *Fourth*, Mr Reischl says that he was not aware of the hearing on 7 November 2019 at which the default judgment which forms part of the judgment/order was given. He says he was moving his business between locations at that time.

56 *Fifth*, Mr Reischl explained his failure to file evidence of the kind referred to at [46] above, on the basis that he had been distracted by adverse events which had recently occurred in the lives of three of his close friends. He had understood from the hearing on 11 November 2020 that it was not necessary for him to file the Notice of Motion in the District Court so he had "sat on it" in those circumstances. He had made contact with the real estate agent but had not received any evidence from him. His written submissions indicated that he had tried to contact his "conveyancing solicitor" but she is ill and has ceased practising. He had "tried to get something organised" with a representative of Australian Allied Mortgages concerning his income but that is "behind due". However, he says that he has a regular income for 2021 of "about $200-$250,000".

57 I determined not to exercise my discretion to go behind the judgment/order for the following reasons:

58 *First*, Mr Reischl has not pursued action to have the judgment/order set aside with any vigour since it was made over a year ago.

59 He did not participate effectively in the proceedings in the Local Court, the District Court or the Supreme Court leading up to the judgment/order being entered on 7 November 2019, despite evidence that he was served with the 2018 statement of claim, the summons in the Supreme Court in July 2019 and the 2019 statement of claim. On 4 November 2019 he was told by email from Mr Haklany of the likelihood of a default judgment being entered if he did not appear on 7 November 2019. Mr Reischl has offered no adequate explanation for his failure to file a defence to the 2019 statement of claim by 18 October 2019 or his failure to appear at the hearing on 7 November 2019.

60 Even in the face of the proceedings in this Court, Mr Reischl mailed the Notice of Motion to the District Court only on 30 September 2020. When it was returned to him for non-payment

of the prescribed fee, he has still done nothing to pursue having the judgment/debt set side. Mr Reischl said that he had understood that filing that Notice of Motion was not significant based on discussion at the hearing on 11 November 2020. That submission is not well founded. To the contrary, the transcript of those proceedings demonstrates that, having regard to the fact that Mr Reischl is not legally represented, at that hearing I emphasised to Mr Reischl his need to demonstrate that the judgment/order is not in truth a debt due by him and that the fact that he had not successfully filed anything with the District Court was not in his favour. Mr Reischl indicated that he understood that.

61 Mr Reischl's approach to the District Court proceedings, including his failure to pay the amount of $5,225 for the Smiths' costs thrown away pursuant to the consent order made on 6 June 2019 (which was not a default order and it was made in his presence), his failure to file a defence in a timely way and the fact Mr Reischl has significantly delayed taking any action to seek to have the judgment/order set aside are significant factors in my decision not to go behind the judgment as is the fact that Mr Reischl has paid $18,250 toward the judgment/order under arrangements made in April 2020 to discharge the whole amount. Further, despite repeated opportunities to provide evidence supporting his factual claims that the special condition was not in the version of the contract that was given to him before the Contract was signed and he was not told of the Smiths' intention to enter into the contract for the Colo Vale Property, facts which, if established, might afford a defence to the 2019 statement of claim upon which the default judgment is based, he has not done so. All of those factors lead me to doubt that Mr Reischl has a bona fide claim which should be pursued by going behind the judgment/order.

62 Further, without going behind the judgment/order, the prospects of the District Court now setting aside the judgment/order must be regarded as very low having regard to:

(a) Mr Reischl's approach to the litigation in the Local Court, the Supreme Court and the District Court and the time that has now passed since the judgment/order was entered.

(b) His prospects of success in the substantive matter.

(i) In *Palasty v Parlby* [2007] NSWCA 345, the New South Wales Court of Appeal accepted that consequential losses may be claimed in this type of context. That is, where the vendor in an original contract for sale of land has entered into a subsequent contract in reliance on a deposit paid on the original contract. While it is true that the facts of *Palasty v Parlby* are likely the converse of the claims

in this case (that is, the purchaser refused to enter into a contract with an equivalent of the special condition but was expressly told that the vendor had other commitments), the existence of the special condition is a foundation for the Smiths' claim for consequential loss.

(ii) The Smiths were not required to plead the special condition in cl 11a, only the material facts giving rise to consequential loss, which they did by way of the pleading concerning the contract to purchase the Colo Vale Property. There is likely merit in the Smiths' claim that they were entitled to elect to proceed under cl 9.3.1 or 9.3.2 of the Contract in pursuing their claims. Further, the Zeemans were vendors named in the Contract so the fact that they were plaintiffs in the 2019 statement of claim is entirely explicable, contrary to Mr Reischl's claim.

(iii) Whether or not Mr Reischl was aware of the special condition or its implications when he signed the Contract, he must be taken to have been aware that he was signing a document which was intended to effect legal relations and to have known that it contained contractual terms. In the absence of an intention to mislead him, duress or mistake, it is immaterial that he had not read the document and the Smiths do not have to show that due notice had been given of that term: see *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165.

63 Accordingly, the Court is satisfied that the balance of the judgment/debt order (after taking account of $18,250 paid by Mr Reischl earlier this year) is an amount greater than $5,000 and it remains owing.

64 Mr Reischl has not provided evidence of his solvency, despite being alerted to the need to demonstrate it.

65 At the hearing on 16 December 2020, Mr Reischl asked for more time to provide evidence of the matters set out at [46] above on the basis that he had been distracted because his "closest friend" had lost his father a week and half ago, his "next best friend" had had a massive heart attack and his "next best friend" was in a road accident with a learner driver and it "nearly killed him".

66 Mr Reischl's explanation for his failure to participate in the District Court proceedings in late 2019 was that he was moving the location of his business. While that was undoubtedly important, it is not an adequate explanation for failing to address legal proceedings in a timely

way. The bankruptcy notice was served on 6 January 2020, but Mr Reischl did nothing about it because he gave priority to fighting bushfires in circumstances where there is no evidence that his own home or business was in jeopardy. The creditor's petition was presented on 20 February 2020. Since the review application was first before me on 14 August 2020, Mr Reischl has been given considerable indulgence in relation to filing evidence. While the life experiences of his friends in recent times calls on sympathy, it is not an adequate explanation for Mr Reischl's failure to file relevant evidence is these proceedings.

67 Given the priorities which Mr Reischl has demonstrated repeatedly, I had no confidence that Mr Reischl would give sufficient attention to the provision of necessary evidence in a timely way than he had to date. Having regard to the strictures of ss 37M and 37N of the *Federal Court Act* for the efficient, cost effective and just conduct of proceedings, it was necessary to refuse Mr Reischl more time.

68 The Court is not satisfied that Mr Reischl is able to pay his debts as they fall due or that there is any other reason why it would be appropriate to dismiss the creditor's petition.

CONCLUSION

69 Having regard to all of these matters, the Court is not satisfied that it should set aside the orders made by Judicial Registrar Morgan on 9 July 2020. Accordingly, the interim application for review of those orders should be dismissed with the usual order as to costs. I note that an amendment was made to the order for costs made on 16 December 2020 under the slip rule. I also determined that the stay on the sequestration order made under s 35A(6) should be dissolved with effect at 5 pm on 16 December 2020 (that is, order 1 made on 11 November 2020 was vacated with effect from that time).

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Farrell.

Associate: 

Dated: 22 December 2020