
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : IRON MOUNTAIN MINING LTD -v- K & L GATES
[2016] WASCA 166

CORAM : MARTIN CJ
MURPHY JA
MITCHELL JA

HEARD : 8 AUGUST 2016

DELIVERED : 27 SEPTEMBER 2016

FILE NO/S : CACV 152 of 2015

BETWEEN : IRON MOUNTAIN MINING LTD
Appellant

AND

K & L GATES
Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA

Coram : MASTER SANDERSON

Citation : IRON MOUNTAIN MINING LTD -v- K & L GATES
[No 2] [2015] WASC 373

File No : LPA 34 of 2014

Catchwords:

Legal costs - Where company paid director's costs of defending criminal proceedings pursuant to indemnity prior to director's plea of guilty - Where director declared bankrupt and company sought assessment of costs paid as a non-associated third party payer - Whether company entitled to seek costs assessment as a 'third party payer' - Effect of costs assessment sought by non-associated third party payer - Whether costs assessment and subsequent appeal a 'legal proceeding in respect of a provable debt' which cannot be commenced without the leave of a court exercising bankruptcy jurisdiction

Legislation:

Bankruptcy Act 1966 (Cth), s 58(3)

Corporations Act 2001 (Cth), s 199A, s 199C

Legal Profession Act 2008 (WA), s 253(1)(a), s 295, s 305

Result:

Appeal stayed until appellant obtains leave to commence and continue the appeal from a court exercising bankruptcy jurisdiction

Category: B

Representation:

Counsel:

Appellant	:	Mr M J McCusker AC QC
Respondent	:	Mr B W Ashdown

Solicitors:

Appellant	:	Coulson Legal
Respondent	:	Stewart Forbes

Case(s) referred to in judgment(s):

Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485
Coshott v Barry [2015] NSWCA 257; (2015) 91 NSWLR 1
Fraser v Commissioner of Taxation (1996) 69 FCR 99
Hudson v Sigalla [2015] FCAFC 140; (2015) 235 FCR 122
Iron Mountain Mining Ltd v K & L Gates [2015] WASC 291
Iron Mountain Mining Ltd v K & L Gates [No 2] [2015] WASC 373
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd [2010] HCA 19; (2010) 241 CLR 1
Melnik v Melnik [2005] FCAFC 160; (2005) 144 FCR 141
News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410
Note Printing Australia Ltd v Leckenby [2015] VSCA 105; (2015) 106 ACSR 147
Re McMaster; Ex parte McMaster (1991) 33 FCR 70

REASONS OF THE COURT:

Summary

1 Iron Mountain Mining Ltd (IMM) appeals against orders dismissing its application for an assessment of costs. IMM sought an assessment of the costs of defending criminal proceedings which it paid to the respondent and its predecessor (the law practice) on behalf of David Zohar. Mr Zohar is an undischarged bankrupt.

2 For the following reasons, the appeal should be stayed on the basis that IMM has not obtained leave required under s 58(3) of the *Bankruptcy Act 1966* (Cth) to commence these legal proceedings in respect of a provable debt in Mr Zohar's bankruptcy.

Background

3 IMM agreed to indemnify Mr Zohar 'to the fullest extent of the law' in respect of costs arising from legal proceedings connected to or arising from the takeover of Aluminex Resources Ltd (Aluminex) by IMM. Mr Zohar was a director of Aluminex and IMM. IMM's constitution also provided its officers with an indemnity against any liability incurred in their capacity as officer, including 'in defending any proceedings, whether civil or criminal'. Both indemnities were expressed to operate subject to s 199A of the *Corporations Act 2001* (Cth).

4 Section 199A(3)(b) of the *Corporations Act* relevantly provides that a company or related body corporate must not indemnify a person (whether by agreement or making a payment) against legal costs incurred in defending an action for a liability incurred as an officer of the company if the costs are incurred in defending or resisting criminal proceedings in which the person is found guilty. Section 199C of the *Corporations Act* relevantly provides that anything that purports to indemnify a person against a liability is void to the extent that it contravenes s 199A of that Act.

5 In *Note Printing Australia Ltd v Leckenby*,¹ the Victorian Court of Appeal held that an agreement to indemnify would not contravene s 199A of the *Corporations Act* if it provided for payments to be made up until, and unless, a guilty verdict is reached and the agreement provides that there is an obligation to repay any such payments in the event of a guilty verdict. Unlike the deed in *Note Printing*, the indemnities in the present case do not provide for payment of amounts claimed as an indemnity

¹ *Note Printing Australia Ltd v Leckenby* [2015] VSCA 105; (2015) 106 ACSR 147 [65].

within any particular time. Nor, unlike the deed in *Note Printing*, is there express provision for repayment if it is established that the officer is not entitled to indemnity. However, IMM contends that the indemnities should be construed as obliging IMM to pay Mr Zohar's costs of defending criminal proceedings contingent on there not being a plea of guilty, with an implied obligation to repay if he is found guilty (appeal ts 2).

6 On 14 February 2014, Mr Zohar pleaded guilty to three offences against s 1309(1) of the *Corporations Act* committed as a director of Aluminex. The offences concerned giving to the Australian Securities Exchange information relating to the affairs of Aluminex which was, to Mr Zohar's knowledge, false or misleading in a material particular.

7 Prior to Mr Zohar's pleas of guilty, IMM had paid invoices totalling \$526,180.14 issued by the law practice in respect of legal costs incurred in defending the criminal proceedings. On the face of the invoices, the costs relate to the defence of the three charges of which Mr Zohar was convicted and earlier iterations of those charges² as well as three additional counts which were instituted on 4 September 2013 but discontinued on 14 February 2014. The contract for those legal services was between Mr Zohar and the law practice, and the invoices were directed to Mr Zohar. There was no contractual relationship between IMM and the law practice.

8 Following Mr Zohar's conviction of those offences, IMM commenced proceedings in the District Court of Western Australia seeking to recover amounts it had paid in respect of Mr Zohar's legal costs. In part, IMM contended that it was a term of the indemnities that they did not apply to legal costs incurred by Mr Zohar in defending or resisting criminal proceedings in which he was found guilty, and that Mr Zohar would repay any monies paid in respect of such costs. IMM relevantly claimed from Mr Zohar repayment of the full amount of the law practice's invoices.

9 On 24 November 2014, before the District Court proceedings were resolved, Mr Zohar was declared bankrupt pursuant to a debtor's petition and Jennifer Low consented to act as his trustee in bankruptcy. Ms Low's circular to creditors of 16 December 2014 indicated that it was unlikely

² Mr Zohar was initially charged with offences under s 1309(2) of the *Corporations Act* which had a lesser fault element of failing to take reasonable steps to ensure that the information was not false or misleading in a material particular.

that there would be sufficient funds to pay a dividend to the creditors of Mr Zohar's bankrupt estate. Mr Zohar remains an undischarged bankrupt.

Application for an assessment of costs

10 On 18 November 2014, IMM applied to the Supreme Court for an assessment of the bills for legal costs constituted by the law practice's invoices to Mr Zohar which IMM had paid. That application was purportedly made under s 295(3) of the *Legal Profession Act 2008* (WA), which provides:

A third party payer may apply to a taxing officer for an assessment of the whole or any part of a bill for legal costs payable by the third party payer.

11 A 'third party payer' is relevantly defined by s 253(1)(a) of the *Legal Profession Act* to mean a person other than the client of the law practice who:

- (i) is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client; or
- (ii) being under that obligation, has already paid all or a part of those legal costs[.]

Section 253(1)(b) and (c) distinguish between an 'associated third party payer' whose obligation is owed to the law practice (whether or not it is also owed to the client or another person) and a 'non-associated third party payer' who owes the obligation to the client or another person but not to the law practice. It is clear that, if IMM is a third party payer, it is a 'non-associated third party payer' for these purposes.

12 These provisions may be contrasted with the former provisions of the *Legal Practice Act 2003* (WA), under which a 'party charged' who could apply for a taxation of costs included 'a person who paid the bill to which the charge relates' as well as a 'person liable to pay or reimburse another for costs in a bill'.³ The current provisions clearly exclude persons who voluntarily pay another's legal costs from making an application for assessment of those costs.

13 In response to IMM's application for an assessment the law practice contended that IMM was not a third party payer for the purposes of the *Legal Profession Act*. That question was determined as a preliminary issue by a registrar. The registrar decided that IMM was a third party payer, on the basis that it was under a legal obligation, pursuant to the

³ Section 228(2) of the *Legal Practice Act*.

indemnities, to pay Mr Zohar's legal costs which continued until he pleaded guilty to the charges on 14 February 2014.⁴

14 Dissatisfied with the registrar's decision, the law practice appealed under O 60A r 4 of the *Rules of the Supreme Court 1971* (WA). We note that O 60A r 4 has, at all material times, provided that r 4 does not apply to an order or decision of a registrar when acting as a taxing officer.⁵ An application for assessment under s 295(3) of the *Legal Profession Act* is made to a taxing officer. However, no issue was taken in these proceedings as to the competence of the appeal to the master. As the grounds of appeal and notice of contention do not raise the issue, it is unnecessary to consider it further.

15 The master allowed that appeal on 6 October 2015, essentially for the reason that the time at which the existence of the legal obligation must be determined is the time of the hearing of the application for assessment and, once Mr Zohar pleaded guilty, the indemnities fell away and IMM could not be regarded as a third party payer. The master also accepted a submission that the effect of Mr Zohar's conviction was to render the indemnities 'automatically void ab initio'.⁶ The master allowed the appeal and dismissed IMM's application for an assessment of costs.

The appeal to this court

16 IMM appeals against the master's orders dismissing its application for an assessment of costs.

17 IMM's primary ground of appeal is that the master erred in holding that IMM was not a third party payer on the ground that s 199C(2) of the *Corporations Act* rendered the indemnities void ab initio. IMM contends that the master should have held that, on a proper construction of the indemnities, IMM was under a legal obligation to pay the legal costs incurred by Mr Zohar in his defence but with the qualification that he would be obliged to repay them if he was found guilty. So construed, the indemnities would not contravene s 199A of the *Corporations Act* or be rendered void by s 199C(2) of that Act.

18 It emerged in oral submissions that neither IMM nor the law practice seriously contended that the indemnities should be construed in a way that

⁴ *Iron Mountain Mining Ltd v K & L Gates* [2015] WASC 291 [32] - [34].

⁵ At the time the appeal was made to the master, this limitation was contained in O 60A r 4(6)(c) of the Rules. Since 27 November 2015 (when the rule was amended to provide for appeals to generally be heard by a judge rather than a master), the limitation has been found in O 60A r 4(3)(c) of the Rules.

⁶ *Iron Mountain Mining Ltd v K & L Gates [No 2]* [2015] WASC 373 [19] - [24].

rendered them void. To the contrary, both parties accepted that the indemnities should be construed such that they complied with the conditions of validity enunciated in *Leckenby* - namely as requiring IMM to pay the fees only up until Mr Zohar was found guilty and, in that event, requiring Mr Zohar to refund the fees to IMM. So, neither party contended on appeal that the indemnities were 'void ab initio' as the master had found. Further, as neither party challenged the correctness of the decision in *Leckenby*, it is unnecessary to consider that question in this appeal. Of course, this court should follow that decision in relation to the proper interpretation of s 199A and s 199C of the *Corporations Act* unless satisfied that it is plainly wrong.⁷

19 A critical issue is whether s 295(3) read with s 253(1)(a) of the *Legal Profession Act* required the relevant obligation to exist at the time of the payment or at the time of the application for assessment of costs. IMM contended that the obligation only had to exist at the time of payment, and that the indemnities were properly construed as providing for an obligation to pay Mr Zohar's legal costs at the time (prior to the plea of guilty) when payment was made. The law practice contended that the obligation had to be extant at least at the time the application for an assessment of costs was made and, at that time, IMM was not obliged to pay Mr Zohar's legal costs because he had been found guilty of the charges.

20 IMM also advances an alternative ground of appeal, contending that s 199A has no application to the costs incurred in defending the 'three original charges' under s 1309(2) of the *Corporations Act* or the three discontinued charges of which Mr Zohar was not found guilty. IMM says that, although this alternative contention was raised before the master, he did not refer to or deal with it. The law practice responds to this ground with a notice of contention to the effect (explained in oral and written submissions) that s 199A applies to the costs of the whole of any 'criminal proceedings' in which Mr Zohar was found guilty of any charge.

21 The law practice's notice of contention also asserts that IMM's application for an assessment of costs (and by inference this appeal) is stayed by operation of s 58(3) of the *Bankruptcy Act*.

⁷ *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

Nature of an assessment of costs payable by a non-associated third party payer

22 Section 295(9) and s 295(10) of the *Legal Profession Act* respectively make different provision for the assessment of costs on the application of an associated and non-associated third party payer. In the case of an associated third party payer, s 295(9)(c) requires the law practice to participate in the costs assessment process and provides that the law practice is taken to be a party to the assessment and is bound by the assessment. By contrast, while s 295(10)(c) also requires the law practice to participate in and be a party to the assessment of costs on the application of a non-associated third party payer, it does not provide for the law practice to be bound by that assessment.

23 In that context, s 295(10)(d) of the *Legal Profession Act* provides:

despite any other provision of this Division, the assessment of the costs payable by the non-associated third party payer does not affect the amount of legal costs payable by the client to the law practice.

24 The assessment process culminates in the taxing officer certifying the amount of disputed costs allowed and the costs of the costs assessment under s 305(1) of the Act. Section 305(2) provides that, subject to s 299(2)(c) and s 308 (which are not presently material), a certificate is binding on the parties to the costs assessment. By the language 'despite any other provision of this Division', s 295(10)(d) of the Act qualifies the operation of s 305(2) to the extent that, read with s 295(10)(c)(ii) of the Act, it would otherwise render a costs assessment, sought by a non-associated third party payer, binding on the law practice. Under s 305(3), a certificate bears interest, and may be enforced against any person liable to pay, as if it were a judgment of the Supreme Court for the payment of the amount mentioned in the certificate.

25 The purpose and effect of the assessment process is to quantify the amount the third party payer is obliged to pay in respect of legal costs. The assessment provisions operate upon, but do not create, the obligation to pay legal costs. The subject matter of the assessment under s 295(3) is the amount of legal costs 'payable by' the third party payer. In the case of a non-associated third party payer, the obligation to pay costs is owed to the client or another person, rather than to the law practice. The assessment of the bill payable by the non-associated third party payer expressly does not affect the amount payable by the client to the law practice. Section 295(10)(a)(i) of the *Legal Profession Act* expressly

preserves the client's capacity to also apply for an assessment of the amount of costs payable by the client to the law practice.

26 In this manner the provisions of the *Legal Profession Act* address the situation which may commonly arise where, for example, a lessee or mortgagor agrees to pay the legal costs incurred by the lessor or mortgagee in securing the preparation of legal documentation. The fact that the client of the law practice may be prepared to pay a law practice more than would be assessed by a taxing officer does not prevent the third party from applying for an assessment to limit the costs they have to pay pursuant to the obligation owed to the client or other person to whom the obligation may be owed.

27 The legal effect of the taxation certificate sought by a non-associated third party would be to determine the amount of legal costs payable by the non-associated third party to the client (or other person to whom the obligation is owed). In circumstances where the law practice's invoices have already been paid, the outcome of the assessment would be to quantify the amount (if any) refundable by the client (or other person) to the non-associated third party in a way that is binding on both of them, but not the law practice.

28 In this case IMM contends, amongst other things, that Mr Zohar is under a contractual obligation in relation to the charges for which Mr Zohar was convicted, to refund the total amount it has paid for costs, and not merely to refund the difference between the paid amount and any taxed amount. As noted below, IMM's subjective purpose in seeking an assessment of costs appears to be to assert, as against the law practice, an alleged pecuniary entitlement to the difference between the costs paid and costs taxed.

When must the payment obligation exist?

29 It appears to us that s 253 and s 295 of the *Legal Profession Act* do require the existence of an extant obligation to pay at the time the assessment application is made under s 295(3) of that Act, because:

1. The right to make an application is conferred on a person who is a third party payer at the time of making the application. Section 253 defines 'third party payer' in terms which require the inquiry as to the existence of the payment obligation to be made at that time. Rather than referring to a person who was under an obligation when the costs were paid, s 253(1)(a)(ii) refers to a person who 'being under that obligation, has already paid all or

part of those legal costs'. That language contemplates that a person may be under an obligation for the purposes of the Act even after payment is made,⁸ and requires such an obligation to remain in existence (but for the fact that payment has already been made) in order for the person to be a third party payer.

2. There would be no point to an assessment of costs which determines the amount payable pursuant to an obligation which no longer exists at the time of the assessment, and which would not exist even if payment had not been made. So in the present case, if the law practice is correct in saying that IMM is no longer obliged to indemnify Mr Zohar in respect of any costs paid because of his conviction and Mr Zohar is obliged to reimburse IMM in respect of all amounts paid, there could be no utility in determining the amount that would have been payable prior to his conviction. Conversely, if IMM is correct in its assertion that it has a continuing obligation to pay Mr Zohar's costs in respect of the charges of which he was not convicted, and no right to a refund from Mr Zohar in respect of that portion of the costs, assessment of those costs would serve the purpose of defining the extent of IMM's obligation and the extent of its entitlement to a refund from Mr Zohar (if any).
3. The same analysis holds true even if the third party payer is an associated third party payer because the relevant obligation is owed to the law practice (perhaps amongst others). If at the time assessment is sought there is no extant obligation owed to the law practice (for a reason other than the fees having been paid) assessment would serve no purpose. If the fees have not been paid, assessment would not define the extent of the third party's obligation to pay the law practice because there is no extant obligation to pay. If some or all of the fees have already been paid assessment would not define the extent of any entitlement to a refund from the law practice. The extent of that refund will be governed by the law of restitution and could be expected to be an entitlement to refund of either all or none of the moneys paid.
4. It would be incongruous for the taxing officer to issue a certificate of assessment, enforceable as a judgment of the court, in respect of an amount which was not (for reasons other than it had been paid) payable at the time the certificate is issued.

⁸ See also s 295(4) of the *Legal Profession Act*, which provides for an application for an assessment of costs 'payable' by a third party payer to be made 'even if the legal costs have been wholly or partly paid'.

30 These considerations lead us to favour the construction of s 253(1) advanced by the law practice.

IMM's motivation in seeking an assessment

31 IMM contends that it is not seeking to enforce any remedy against Mr Zohar. IMM says that it only seeks to have its legal costs, which it has paid to the law practice on Mr Zohar's behalf, assessed. IMM submits that it is merely seeking to enforce, as against the law practice, its statutory right conferred by s 295(3) of the *Legal Profession Act*. IMM contends that there is an implied statutory obligation in the *Legal Profession Act* for the law practice to repay any overpaid amount to the non-associated third party payer.

32 IMM's submission that there is an implicit statutory obligation for the law practice to repay costs which it has received in excess of the assessed amount to a non-associated third party payer is inconsistent with the express terms of the Act. The provisions to which we have referred make it clear that the assessment certificate resulting from an application by a non-associated third party payer is not binding on the law practice and does not affect the amount payable by the client to the law practice.

33 The only objective utility in an assessment of costs on the application of a non-associated third party payer is to determine the amount of costs payable by the third party payer in respect of the obligation owed to the client or other person. The assessment thereby quantifies the amount which the third party must pay in order to discharge that obligation. If an amount in excess of the amount assessed has already been paid, the effect of the assessment will be to quantify the amount of the refund to which the third party is entitled from the person to whom the obligation is owed. To the extent that IMM seeks an assessment to secure payment of any overcharged amount from the law practice, as opposed to Mr Zohar, its reasons for pursuing the application are misconceived. That misconception may explain why IMM asserts, contrary to its interests, that Mr Zohar is not obliged to repay all the costs it paid on its behalf as a consequence of his conviction (as the law practice contends) but is only obliged to repay the costs which IMM paid in respect of the charges of which he was convicted. That contention, if pressed and accepted, would reduce the amount of IMM's entitlement to repayment from Mr Zohar. Presumably, IMM has adopted that position in the mistaken belief that it will enhance its prospects of obtaining an assessment which will give IMM rights as against the law practice whereas, in fact, the only rights it would obtain from an assessment are rights as against Mr Zohar.

Joinder of Mr Zohar as a respondent to the appeal

34 At least in relation to costs incurred in defending charges of which Mr Zohar was not convicted, the assessment would quantify the amount of legal costs which IMM is obliged to pay. The effect of the assessment would thereby be to quantify the amount which may be refundable by Mr Zohar to IMM, as a payment in excess of that required by the indemnities. Therefore, Mr Zohar is a necessary party to the proceedings as a person whose rights are directly affected by the determination.⁹ While Mr Zohar is taken to be a party to the assessment proceedings by operation of s 295(10)(b)(ii) of the *Legal Profession Act*, he was not joined as a respondent to this appeal. If leave is obtained under s 58(3)(b) of the *Bankruptcy Act*, Mr Zohar (who would ordinarily remain liable for any debt due to IMM until repayment or the discharge of his bankruptcy) should be joined as a respondent to this appeal and he and his trustee in bankruptcy given an opportunity to be heard before the appeal is determined.

35 We have concluded above that s 253 and s 295 of the *Legal Profession Act* do require the existence of an extant obligation to pay at the time the assessment application is made under s 295(3) of that Act. That conclusion as to the proper construction of the *Legal Profession Act* does not adversely affect Mr Zohar's interests.

36 We have considered whether this conclusion as to the proper construction of the *Legal Profession Act* requires the appeal to be dismissed in any event, and whether that could be done conformably with the requirements of the *Bankruptcy Act* and procedural fairness at this time. In our view, it is not appropriate to do so, for three reasons:

1. Applying the provisions of the *Legal Profession Act* requires a conclusion to be reached as to the proper construction and effect of the indemnities. The submissions advanced in this court did not focus closely on the precise manner in which the rights and obligations created by the indemnities should be understood.
2. Construing the indemnities so as to give rise to an obligation for Mr Zohar to repay the amounts paid to the law practice on his behalf would adversely affect his interests. The court should not make any final determination of that matter without Mr Zohar

⁹ *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; (2010) 241 CLR 1 [131]; *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 524 - 525.

being joined as a party to the appeal and being given an opportunity to be heard on that question.

3. The construction point does not dispose of IMM's argument that it is entitled to an assessment of costs so far as they relate to charges of which Mr Zohar was not convicted. IMM's submissions in that regard are at least arguable in relation to the three discontinued charges on the indictment.¹⁰

37 These matters should not be resolved without giving Mr Zohar an opportunity to be heard. At this stage, we cannot conclude that the appeal should be wholly dismissed.

Terms of the Bankruptcy Act

38 Section 58(3) of the *Bankruptcy Act* provides:

Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

- (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
- (b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

39 Provable debts are defined by s 82(1) of the *Bankruptcy Act* to be:

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

40 Any obligation by Mr Zohar to repay to IMM amounts of legal costs which IMM has paid would be a provable debt. To the extent that the terms of the indemnities required repayment of the amounts after Mr Zohar pleaded guilty, the obligation arose at least by the time the pleas were entered on 14 February 2014. Relevantly, for present purposes, to the extent that IMM paid more than was required under the indemnities as assessed pursuant to a certificate issued under s 305 of the *Legal Profession Act*, any obligation to repay would have been incurred at the time the payment was made. In either case, the obligation for Mr Zohar to

¹⁰ Work done after the three discontinued charges were added to the indictment was the subject of invoices dated 1, 3 and 18 October 2013.

refund money to IMM would have arisen before the date of Mr Zohar's bankruptcy on 24 November 2014.

- 41 In those circumstances, s 58(3) of the *Bankruptcy Act* operates to prevent IMM from taking any fresh step in the assessment application or instituting this appeal without leave, if the application or appeal are 'legal proceeding[s] in respect of a provable debt'.

Operation of s 58(3) of the *Bankruptcy Act*

- 42 The purposes of s 58(3) of the *Bankruptcy Act* have been described by the Full Court of the Federal Court of Australia in the following terms:¹¹

The purposes are to assist in the orderly administration of the insolvent estate by protecting a bankrupt, and the property of the erstwhile debtor (as now vested in the trustee), against the enforcement of remedies. This is done by enabling the court to supervise the handling of claims through the procedure of proof of debt (administered by the trustee or liquidator), by ensuring that the assets of the estate are not expended on costs in a multiplicity of litigation, and by ensuring that no one creditor gets an advantage over the others. (citations omitted)

- 43 Section 58(3) distinguishes between enforcing a remedy against the person or property of a bankrupt, and commencing or taking a fresh step in a legal proceeding. The absolute bar imposed by s 58(3)(a) has been construed so as to apply only to the enforcement of remedies, including extra-curial remedies, as distinct from the institution of legal proceedings and their maintenance up to the point of the recovery of judgment. The institution and maintenance of such proceedings will not be subject to the constraints imposed by s 58(3) of the *Bankruptcy Act* if leave is granted.¹²

- 44 Both the application for assessment of costs and this appeal are legal proceedings for the purposes of s 58(3) of the *Bankruptcy Act*. Therefore, any restraint in the present case must derive from s 58(3)(b) and depend on whether the legal proceedings are properly characterised as being 'in respect of' a provable debt.

¹¹ *Hudson v Sigalla* [2015] FCAFC 140; (2015) 235 FCR 122 [25].

¹² *Fraser v Commissioner of Taxation* (1996) 69 FCR 99, 111 - 112; *Coshott v Barry* [2015] NSWCA 257; (2015) 91 NSWLR 1 [83]. In the latter case at [85], the court seems to have regarded the filing of a taxation certificate under the *Legal Profession Act 1987* (NSW) as a legal proceeding for this purpose, although the point did not ultimately require determination.

45 The phrase 'in respect of' in s 58(3)(b) has been given a wide meaning which promotes the purposes of the Act.¹³ In the present case the connection between the provable debt and the legal proceedings is clear. The objective purpose of the legislative provision for the assessment of costs is to quantify the legal costs payable by a non-associated third party payer to a client. The practical effect of the certificate of assessment in the present case would be to quantify the amount refundable by Mr Zohar to IMM (at least in relation to costs relating to charges of which he was not convicted, for which IMM says there is no contractual right to a refund) in a manner binding on Mr Zohar and IMM, but not the law practice. That connection is not lost because IMM asserts a subjective purpose of pursuing recovery against the law practice, which is not a purpose provided for in the *Legal Profession Act* nor a purpose which the assessment is capable of achieving. Recognising such a connection as sufficient promotes the purposes of the *Bankruptcy Act*, particularly the purpose of ensuring that the assets of Mr Zohar's estate are not spent on defending legal proceedings. In our view, the proceedings in respect of the assessment application, and this appeal which takes its character from those primary proceedings, are in respect of a provable debt.

46 Therefore, the proceedings in the assessment application were continued, and this appeal was instituted, contrary to s 58(3)(b) of the *Bankruptcy Act*. As this court does not have bankruptcy jurisdiction under s 27 of the *Bankruptcy Act*, it is not 'the Court' as defined in s 5(1) which may give leave under s 58(3)(b) of that Act. It is appropriate for this court to stay this appeal until such time as IMM obtains leave under s 58(3)(b) of the *Bankruptcy Act*.

Orders

47 For these reasons, the appropriate order is that this appeal be stayed until such time as IMM obtains leave to commence and continue the appeal from the Federal Court of Australia or the Federal Circuit Court of Australia.

¹³ *Re McMaster; Ex parte McMaster* (1991) 33 FCR 70, 72, approved in *Fraser* (112 - 113); see also the discussion of authority in *Melnik v Melnik* [2005] FCAFC 160; (2005) 144 FCR 141 [28] - [47].