JUDGMENT : Burnett FM. Federal Magistrates Court of Australia at Brisbane. . 18th April 2008

Introduction

1. The Applicants seek orders for the setting aside of a Bankruptcy Notice delivered upon each of them by the Respondent. They contend that the notice should be set aside because
   a. The judgment upon which the notice was founded was not a final judgment; and/or in the alternative
   b. They have a counterclaim set off or cross demand equal to or exceeding the judgment sum which they could not have set up in the action or proceeding in which the judgment order was obtained.

Background – The Legislative Scheme

2. The judgment relied upon was one entered by the Supreme Court of Queensland on 23 January 2008 for the sum of $536,745.80. It was obtained pursuant to section 31 of the *Building and Construction Industry Payments Act 2004* (Qld) (the BCIPA) following an adjudication process provided for under that Act.

3. To understand the Applicants' arguments it is necessary to have an appreciation of the BCIPA and the adjudication process provided by it.

4. The legislative scheme was carefully detailed in the Respondent's submissions. On its behalf it was submitted that the BCIPA creates an entirely new suite of statutory rights for persons who have undertaken to perform "*construction work*" under a "*construction contact*" and who have successfully gone through the adjudication process for which the BCIPA provides. The new rights include a statutory right to insist upon payment of an adjudicated amount (s.29(1)) and the ability to convert that right into an enforceable judgment in the event that payment is not made (s.31(1)). The rights are sui generis; their content is an ability to insist upon immediate payment of money, but they do not affect the rights which might exist outside the statutory regime (s.100(1)) and any party may still vindicate those rights by civil proceedings outside the statutory regime (s.100(2) and (3)).

5. Relevantly Part 2 of the BCIPA creates in a person who has undertaken construction work (or supplied related goods and services) an entitlement to "progress payments" whether or not the relevant contract makes provision for progress payments. Then, Part 3 of the BCIPA establishes a statutory procedure for the making of and responding to statutory "payment claims" and for the referral of disputed claims to a statutory adjudicator for decisions. If a claimant has successfully obtained an adjudicator's determination in its favour, the Respondent is obliged to pay the adjudicator an amount within a prescribed period (s.29) in default of which the claimant may obtain an adjudication certificate which may be filed as a judgment for a debt and may be enforced in a court of competent jurisdiction (ss.30 and 31).

6. Part 6 of the BCIPA contains an important provision which clarifies the relationship between the sui generis right to obtain payment of the adjudicated amount created under the BCIPA and rights which exist outside the statutory regime. The adjudication regime in Part 3 of the BCIPA does not affect a party's rights under the construction contract. All it does is finally determine the existence or otherwise of the statutory rights created by the BCIPA. A court may subsequently make the appropriate allowances (including restitution orders) based on whatever decision the court might make as to rights under the construction contract: (s.100). In effect, a disappointed party make sue to recover back any money it has paid.

7. An adjudicator's determination under the BCIPA once was, but is no longer, reviewable under the *Judicial Review Act 1991* (Qld). It seems, however that a disappointed Respondent may obtain relief from the Supreme Court by way of declaration or injunction if a particular adjudication determination does not meet the conditions which the BCIPA imposes as essential for the existence of a valid determination.[1] Otherwise, an adjudicator's decision may not be attacked or reviewed. The BCIPA also recognises the possibility of court proceedings setting aside the judgment obtained consequent upon the filing of the adjudication certificate, but imposes significant constraints on that course; s.31(4).

8. The BCIPA is modelled upon its New South Wales predecessor, *Building and Construction Industry Security of Payment Act* (1999) NSW. Similar legislation exists in other States of the Commonwealth although each model is subject to local variations. *Building & Construction Industry Security of Payment Act 2002* (Vic); *Construction Contracts (Security of Payments) Act 2004* (NT); and *Construction Contracts Act 2004* (WA).

9. I accept the Respondent's submissions concerning the scheme of the legislation as outlined above. In Annexure 2 to its submissions the Respondent detailed the scheme with greater particularity. However it is not necessary for present purposes to descend into such detail.

10. The object of the Act is to ensure that a person is entitled to receive, and is able to quickly recover, progress payments if the person undertakes to carry out construction work under a construction contact: (s.7). The object is achieved by granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments and establishing a procedure that involves the making of a payment claim by a person claiming the payment, the provision of a payment schedule by the person by whom the payment is payable, the referral of a disputed claim or unpaid claim to an adjudicator for a decision and the payment of the progress payment decided by the adjudicator: (s.8). The objects and purpose have been amplified by observations made by various courts concerning the purpose of the Act. In ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** *[2004] NSWCA 394;* (2004) 61 NSWLR 421 Hodgson JA said at 440-1:

[1] See ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** *[2004] NSWCA 394;* (2004) 61 NSWLR 421 and numerous decisions since following and/or starting Brodyn with approval, particularly in New South Wales.

"The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with a minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise... The procedure contemplates a minimum of opportunity for court involvement..."

11. In ***Roadtek, Department of Main Roads –v– Davenport and Ors***[2] McKenzie J noted at paragraph 16:

"...The Act prescribes tight time limits for the process of adjudication. It is essentially a summary process based on written information... Unless the parties extend time, the decision must be given within ten days of receipt of the Respondent's response or from the time one could have been received. Further, written submissions may be asked for by the adjudicator... The adjudicator may call a conference of the parties...and make an inspection... Any conference called must be held informally. Legal representation is excluded... The process is not conducive to resolving questions of fact that cannot be resolved on written submissions or in a conference or by inspection."

12. Einstein J in ***Brodyn Pty Ltd v Davenport***[3] referred to the legislation as: *"...A fast track interim progress payment adjudication vehicle."* and significantly, for present purposes, noted at [14]

"The vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator...cannot possibly, in the time available...give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator...by...denying the parties any legal representation... But primarily it is because the nature and range of issues legitimate to be raised...are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties' rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it has been forced to make through the adjudication determination procedures."

13. Of particular relevance to this debate are the observations of Chesterman J in ***Minimacs Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)***[4] where His Honour noted at paragraph 48,

"It is section 100 of the Act which makes an adjudication provisional and preserves the rights of parties to a building contract to recover monies payable pursuant to the contract or as a consequence of its breach and to recover any monies paid pursuant to an adjudication which legal proceedings were demonstrated were wrongly ordered."

14. In short the scheme of the BCIPA is to provide for a summary process of recovery of progress claims. That process is by way of adjudication provided for under the Act. Once the adjudication has been determined a certificate issues which can be registered as a judgment and enforced accordingly. Despite that process parties' common law rights are preserved and may be executed at any time, including in parallel with the adjudication process. However they constitute a separate and distinct process from those common law proceedings.

Background Facts

15. In the instant case the BCIPA procedure has been completed. Both parties participated in the adjudication process and no complaint is made that there has been any irregularity in the conduct of that process entitling review in accordance with the limited principles permitting review. On 29 December 2007 the adjudicator decided that the Applicants were required to pay the Respondent the sum of $536,745.80. The Applicants did not pay that amount and on 11 January 2008 the Respondent obtained an adjudicators certificate as it was entitled to pursuant to section 30(1) of the BCIPA. Having obtained that "*adjudication certificate*" it was then filed in the Supreme Court of Queensland on 23 January 2008 in accordance with the requirements of section 31 of the BCIPA. By operation of section 31(1) of the BCIPA the adjudication certificate once filed as a judgment for a debt *"...may be enforced, in a Court of competent jurisdiction."*

16. The Respondent's submission is that there is now an enforceable judgment debt owed by the Applicants to the Respondent in the amount of $536, 745.80. It is in those terms submitted to be a "final judgment" for the purposes of s.40(1)(g).

17. On 19 February 2008 the Applicants commenced proceedings in the Supreme Court of Queensland claiming declaratory and other relief against the Respondent in respect of the contract. In the Statement of Claim the Applicants:
    a. alleged the adjudicator's decision overstated the amount payable by the Applicants to the Respondent by $173,664.87;
    b. claimed that the Respondent is liable to the Applicants for liquidated damages of $1,000 per day from 9 October 2007, which amounted to $131,000 as at 19 February 2008 and it continues to accrue;
    c. claimed that the Respondent is liable for $142,021,90 in additional costs for the Applicants to complete the contract works after taking them out of the Respondent's hands;
    d. claimed that the Respondent is liable for $197,559.40 for breach of contract relating to works that were allegedly not carried out in accordance with the contract;
    e. claimed declarations apparently intended to establish the true state of the liability between the two sides arising out of the performance of the contract; and then payment of the balance amount owed; and

[2] [2006] QSC 47
[3] [2003] NSWSC 1019 at paragraph 14
[4] [2007] QSC 333

f. also claimed declarations that the adjudicated amount contained overpayments and an order reducing the adjudicated amount.

18. Although it is contended by the Respondent that the pleading contains the legal solecism[5] it contends that even if these defects are regularised the commencement of that litigation does not provide any reason not to pay the existing judgment which constitutes an enforceable judgment debt in the amount of $536,745.80.

19. The Applicants contend otherwise. They assert,
a. the judgment is not a final judgment and/or alternatively
b. they have a counterclaim set off for a cross demand equal to or exceeding the judgment sum which they could not have set up in the action or proceeding in which the judgment was obtained.

Upon that basis it is submitted the notice should be set aside.

Final Judgment

20. The issue of bankruptcy notices is governed by s.41. It provides,

"41(1) [Bankruptcy Notices]

An Official Receiver may issue a bankruptcy notice on the application of a creditor who has obtained against a debtor:

(a) a final judgment...that:

(i) is of the kind delivered in paragraph 40(1)(g); and

(ii) ..."

21. Pursuant to s.40(1)(g) an act of bankruptcy is committed,

"if a creditor who has obtained against the debtor a final judgment..., has served on the debtor..., a bankruptcy notice under this Act and the debtor does not...satisfy the Court that he or she has a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt...that he or she could not have set up in the action or proceeding in which the judgment or order was obtained."

22. Section 40(3)(b) provides that for the purposes of s.40(1)(g)

"a judgment or order that is enforceable as, or in the same manner as, a final judgment obtained in an action shall be deemed to be a final judgment so obtained and the proceedings in which, or in consequence of which, the judgment or order was obtained shall be deemed to be the action in which it was obtained."

23. The Applicants submit the Respondent's judgment is not a "final judgment" by operation of s.40(3)(b) or at all.

Does a S.31 BCIPA judgment constitute a final judgment?

24. In their submissions the Applicants contend that for a judgment to satisfy the description "*final judgment or order*" the authorities impose a test requiring that a judgment or order make some "*final determination*" of the rights of the parties ***Re Riddell; Ex Parte Earl of Strathmore*** (1888) 20 QBD 512 at 516; ***Opie v Opie*** *[1951] HCA 47;* (1951) 84 CLR 362.

25. In ***Re Riddell*** the Bankruptcy Notice was premised upon a costs order made concurrently with an order dismissing the proceeding for want of prosecution. The Court of Appeal held the order was not a "final judgment". The debate in that case revolved about whether the order was a "*judgment*" as distinguished from an order. The reasoning of the Court in ***Riddell*** is distinguishable from the present case because of the limited scope of application provided under the then extant *English Bankruptcy Act*. The history of these matters was discussed by Drummond J in ***Re Gibbs; Ex Parte Triscott*** (1995) 65 FCR 80 by which authority I consider I should be guided.[6]

26. Likewise in ***Ex Parte Chinery*** (1884) 12 QBD 342 the Court of Appeal was considering the same issue as examined in *Re Riddell* and adopted the same approach in examining the question of whether a garnishee order constituted a final judgment.

27. That decision was applied by the High Court in ***Opie & Opie*** [1951] HCA 47; (1951) 84 CLR 362, a case where the arguments considered were whether or not a certificate certifying an amount due under a maintenance order was a "final judgment" for the purpose of issuing a Bankruptcy Notice. It was contended that such an order retained the characteristics of an order being one that could be varied, suspended or discharged and accordingly was not a 'final judgment'.

28. It appears that by then the terms of section 52(j) of the *Bankruptcy Act* [now section 40(1)(g)] had been amended to incorporate the term "final order" thus distinguishing the provision under consideration by the High Court from the earlier English decisions.

29. In resolving the issue Dixon and Williams JJ stated at 373 *"If the words "in the action or proceeding in which the judgment or order was obtained" mean, as we think they must mean, the action in which the judgment was obtained under the proceeding in which the order was obtained, they are decisive to show that the judgments to which section 52(j) refers are judgments in actions; and that, of course, accords with the construction placed on the provision judicially."*

[5] The Respondent contends the claim pleaded by the Applicant is an attempt to rely on section 100(3) to reduce the adjudicated amount which misconceives the function of section 100. In that regard it appears correct.

[6] At page 88.

30. The Applicants also referred to the authorities of ***Bozsan v Altrincham Urban District Council*** [1903] 1 KB 547 and ***Hall v The Nominal Defendant*** *[1966] HCA 36;* (1966) 117 CLR 423 which both discussed the meaning of "final order". However those authorities are of no real assistance in resolving the dispute in this case, namely whether the judgment is a '*final judgment obtained in an action*'. The first authority dealt with a judgment premised upon what was clearly an interlocutory order as did the second authority.

31. The Applicant submitted that in this case the adjudication was not of the character of a final determination of the rights of the parties but rather had an interlocutory character. It was submitted that by reason of the following that non-binding quality was apparent:
    a. First an adjudication under the BCIPA which required a payment of a progress claim "on account" did not finally determine any rights at all. In particular it was submitted by Mr Freeburn on their behalf that the whole regime of the BCIPA was to give an entitlement to progress payments and provide a mechanism to ensure that disputes concerning the amount of such progress payments be resolved with a minimum of delay.[7] Progress payments were the only focus of BCIPA and they themselves were only payments on account of a liability that would finally be determined otherwise;[8]
    b. Second the scheme of the BCIPA was "a pay now, argue later" scheme with the time for final adjustment of rights and remedies being later.[9] Accordingly it was submitted the remedy provided by BCIPA was an "on account" remedy.
    c. Thirdly it was submitted that the extension of the remedy to persons who "claim" to be entitled to a progress payment reinforces the view that the right to make a payment under the BCIPA is not even dependent upon their being a valid progress claim.
    d. Fourth it was submitted that it is well established that payment claims made pursuant to the BCIPA lead to a statutory remedy which is independent of, and unrelated to, any contractual obligations between the parties. Accordingly that means that whatever payments might be secured pursuant to the BCIPA are subject to the contractual and other legal rights of the parties. [10]
    e. Fifth, the procedure under the BCIPA contemplates a minimum of opportunity for court involvement including very short time frames which in effect provide for a summary procedure.[11]
    f. Sixth, there are limited rights of appeal even if the adjudicator errs.[12]

32. The Applicant submitted that if it was truly of an interlocutory nature it would not be a final judgment.

33. In support of the proposition that a bankruptcy notice could not be founded on an interlocutory judgment the Applicant particularly relied upon the decision in ***Re Ryan; Ex parte Ryan v Jupiter's Management Limited*** (1992) 38 FCR 127 at 132.

34. In ***Re Ryan*** the debtor had successfully obtained a judgment against the creditor for damages for personal injury. The creditor paid the judgment debt. In the meantime it successfully prosecuted an appeal against the debtor and succeeded in obtaining an order that the debtor repay the judgment sum and costs. The debtor failed to repay the sum. A bankruptcy notice issued and the debtor asserted a cross demand based on its second proceeding saying it could not have been set up in the actual proceeding in which the judgment was obtained.

35. The Applicants' relied particularly upon remarks by His Honour Justice Spender at 132 that
    "*As was pointed out in argument, if submission on behalf of the judgment creditor in this regard were correct, it would mean that a bankruptcy notice could be founded on an order for costs at an interlocutory stage of an action,...A possible consequence would therefore be the person could be made bankrupt notwithstanding there was an action on foot, likely to succeed, and in respect of which the judgment would be likely to be very much greater than the amount of costs order made in an intermediate stage of the action.*"

36. The Respondent submitted that the Applicants' reliance upon that statement is misconceived as:
    a. The passage referred to in *Re Ryan* is obiter dicta; and
    b. The decision in *Re Ryan* is contrary to other authority binding this Court.

37. In oral argument Mr Bond submitted the issue for determination by His Honour in *Re Ryan* was articulated at page 128 where His Honour noted the issue as
    "*...whether the cross demand on which Mrs Ryan wishes to rely is a cross demand that she "could not have set up in the action or proceeding in which the judgment or order was obtained.*"

38. This was restated by His Honour at page 131.

39. Following an examination of the various authorities His Honour determined the issue stating at page 134,
    "*My view of section 40(3)(b) is that while is does extend to the category of judgments or orders on which a bankruptcy notice can be founded, it does not apply to judgments or orders that are interlocutory in character or which lack the quality of determining some question between litigants in an ultimate sense. As the other sub paragraphs of section 40 indicate, it is necessary that by the judgment or order, a previously existing liability of a*

[7] ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** *[2004] NSWCA 394;* (2004) 61 NSWLR 421 at 411
[8] ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** at [51].
[9] ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [96] and ***Energetech Australia v Sides Engineering Pty Ltd*** [2005] NSWSC 1143.
[10] See section 5 BCIPA.
[11] See ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** *supra* at [51].
[12] See ***Brodyn Pty Ltd t/a Time Cost and Quality v Davenport*** *supra.*

person to another is established and also that the defendant has had the opportunity of setting up a counterclaim, set off or cross demand...It is clear that the repayment order was made in proceedings which were related to but distinct from the original proceedings. The appeal against the judgment entered in the District Court might have been part of the original proceedings but in my view the repayment order was not. The repayment order was made in the court's inherent jurisdiction and duty to do "complete justice between the parties."

40. Accordingly, His Honour concluded *"...The claim or demand for damages for personal injuries could not have been set up in the action or proceedings in the Court of Appeal in which the judgment or order, being the repayment order, was obtained."*.

41. It follows from an analysis of His Honour's reasoning that the passage relied upon by the Applicant was obiter and did not form part of the ratio of the authority.

42. I accept Mr Bond's submission on this point is correct. It follows that His Honour's observations at page 132 do not bind me in the resolution of this case. Whilst His Honour's observations constitute relevant dicta I do not consider I should adopt them for reasons which follow.

43. Further Mr Bond submitted that the obiter dicta observations made in *Re Ryan* and sought to be relied upon are contrary to binding authority. Although the submissions were contended for in the context of costs orders the real question concerned whether the orders in question had an interlocutory character or the quality of determining some questions between litigants in an ultimate sense. He relied upon three sources of authority in support of his submissions:

    a. In ***Foots v the Southern Cross Mine Management Pty Ltd*** (2007) 241 ALR 32 at 42 the High Court concluded that a costs award is not the expression of anything which resolves a pre-existing right or liability and that an order for costs is itself the source of the legal liability to pay them.[13] In that case the debate focussed on whether or not a costs order made after the appellant became bankrupt nevertheless fell within section 82(1) of the *Bankruptcy Act*. The resolution of that issue required determination of the status of a costs order;

    b. In any event the matter had been expressly resolved by earlier binding authority. Mr Bond referred to ***Goldberg v Morrow***.[14] In that case Crennnan J sitting as a Full Court on appeal from a decision of a Federal Magistrate considered the issue of whether or not a costs order was a "final order" determined that it was so. In deciding the application against the applicant Her Honour followed the approach of Drummond J in ***Re Gibbs; Ex Parte Triscott***.[15] An appeal from that decision was dismissed by the Full Court of the Federal Court; see ***Gibbs v Triscott*** [1996] FCA 895 (Ryan, Whitlam and Keifel JJ). In *Re Gibbs* His Honour Justice Drummond examined the history of the provision. He considered the term "final order" gave section 40(1)(g) wider application than the earlier provisions that operated only by reference to "final judgment". At page 92 His Honour stated,
    "The only limitations on whether an order is a final one are those to be gathered from the words of the section, viz, apart from those judgments or orders treated as final ones by section 40(3), the order must be made by a court or tribunal in a proceeding between the person who later issues the bankruptcy notice and the person served with it; the order must give rise to an obligation on the part of the person to be served with the bankruptcy notice to pay a sum of money certain in amount so that the debtor will know what it has to tender to satisfy that obligation when served with a bankruptcy notice and it must be final in the sense that it finally disposes of the matter with which it deals, even though it does not dispose of the action or the proceeding in which it was made; it must also be able to be enforced by execution. An application in action for an interlocutory injunction until trial or earlier order is, in my opinion, a proceeding within section 40(1)(g); if an order for costs of such an application is made, that will conclude the question who is to bear those costs and such an order is, in my opinion, a final order in the proceeding for the purposes of section 40(1)(g). An order for costs made on the dismissal of a complaint for a summary offence is, if it can be enforced by a process of execution, also a final order in a proceeding. So is an order for costs of an adjournment of the hearing of an interlocutory proceeding in an action."

    c. Likewise Mr Bond referred me to a decision of this Court in ***Cushway v Cushway***[16] in which the decision of ***Re Ryan*** was distinguished.

44. I consider I am bound by those authorities referred to by Mr Bond particularly the decision in ***Re Gibbs***. I am satisfied a costs order is a "*final order*" for the purposes of section 40(1)(g) and that the decision in ***Re Ryan*** is distinguishable and does not bind me on the issue of whether or not a costs order is a final order. By extension I consider that provided a judgment has the quality of determining some questions between the litigants in an ultimate sense it constitutes a final order for the purposes of s.40(1)(g) by operation of s.40(3)(b).

45. However to focus upon the status of costs orders is a distraction from the issue at hand, namely whether a statutory judgment provided for by the BCIPA constitutes a final order.

46. In my view it is. The question to be resolved is whether the statutory scheme intends that outcome. If it does then any judgment premised upon such scheme is a final judgment: ***Opie v Opie*** *(supra)* and ***Re Ryan; Ex parte Ryan*** *(supra)* at 133. As earlier discussed the scheme of the BCIPA clearly contemplates that in the prescribed

[13] See paragraphs 35 and 36.
[14] [2005] FCA 1038
[15] (1995) 65 FCR 80
[16] [2005] FMCA 512

circumstances an adjudication outcome will be the subject of an adjudication certificate which may be filed as a judgment and enforced. The plain meaning of that language is that it be a final judgment.

47. Finally the Applicants submitted that the adjudication, which they submitted could not even be described as a decision of an administrative tribunal, cannot, by virtue of registration, be an exercise of judicial power which finally determines the rights of the parties in respect to all outstanding matters as between them. They submitted this was a prerequisite for the issue of a bankruptcy notice.

48. The Respondents addressed this argument by reference to the decision of Drummond J in ***Re Gibbs: Ex Parte Triscott*** *(supra)*. It is clear from that authority that the judgment may be relied upon despite it not disposing of the proceeding in which it was made.[17]

49. As the Applicants' submission on this point is inconsistent with the decision in *Re Gibbs*, I reject it.

50. I accept the Respondent's submission that the judgment entered pursuant to s.31 of the BCIPA constitutes a final judgment despite it not being a judgment based on a curial determination and it not being a judgment that will finally dispose of the proceeding.

Obtained in an action

51. To support a bankruptcy notice the final judgment must be 'obtained in an action'. The Applicant submitted that in the instance of adjudication provided for under the BCIPA it could not be regarded as an action or proceeding as the whole procedure is confined in time, confined in nature of the arguments and confined in the basis upon which the adjudication can be challenged. Additionally the adjudication procedure does not contemplate that evidence be given and permit any right to challenge or test evidence or to cross examine. Additionally the adjudicator may only consider five specific matters.[18]

52. In any event the Respondent's submission in response to the Applicant's contention on this point is relatively straightforward. It submits that pursuant to section 31(1) of the BCIPA an adjudicator's certificate may be "filed as a judgment for a debt, and may be enforced, in a court of competent jurisdiction". It was submitted that this directly answers the requirements of section 40(3)(b) of the *Bankruptcy Act* and accordingly is a final judgment in an action for the purposes of section 40(1)(g). It was submitted that the certificate is not merely deemed to be a judgment, it is one.[19] Accordingly the indicia relied upon by the Applicant have no bearing on the resolution of this issue.

53. In ***Opie v Opie*** *(supra)* their Honours observed the legislation then under consideration provided that the judgment may be enforced in any manner in which a final judgment in an action may be enforced. To that end the legislation under consideration appears to have incorporated a provision in terms similar to section 40(3)(b) of the *Bankruptcy Act*. In that context their Honours noted,

"It is unnecessary to decide whether the issue of a Bankruptcy Notice is a method of enforcing a judgment. Assuming that it is the provisions [of the Act providing a judgment entered pursuant to it may be enforced in any manner in which a final judgment in an action may be enforced] could not determine the meaning of a final judgment for the purposes of section 52(j) of the Bankruptcy Act and the judgment could not be enforced by the issue of a Bankruptcy Notice unless it is a final judgment within the meaning of that sub section."

54. The inclusion of section 40(3)(b) of the *Bankruptcy Act* now clearly addresses the concern identified by their Honours in ***Opie v Opie***. As noted above their Honours could not determine from the relevant legislation that the judgment entered was a final judgment obtained in an action. Accordingly they determined that the judgment under the relevant Act was not an order. However for present purposes Section 40(3)(b) now cures that deficiency.

55. It is because of the expression of s.31(1) of the BCIPA when read with s.40(3)(b) of the Bankruptcy Act that I consider that the judgment in question is deemed a final judgment.

56. Further the Respondent submitted that quite apart from the operation of section 40(3)(b) of the *Bankruptcy Act* the BCIPA judgment would be regarded as a final judgment on first principles because it finally resolved the question of the existence and quantum of the statutory right to payment created by the BCIPA. It was submitted that a distinction must be drawn between the statutory rights created by the BCIPA and other rights (including contractual rights that might otherwise exist). It was submitted that despite the fact that the BCIPA judgment does not finally determine the rights arising outside the BCIPA it does not diminish the fact that it does finally determine some rights namely the right to statutory payment under the BCIPA. To that end it constitutes a final judgment in that action. I accept this submission as correct. Such is consistent with the objects of the BCIPA particularly the object expressed to ensure a person is able to recover progress payments and the scheme designed to achieve that object: s.7 and s.8(b)(iv). Indeed to afford the meaning contended for by the Applicant would so significantly undermine that scheme it would render any successful adjudication outcome nugatory.

[17] At p 92.

[18] See section 26(2) of the BCIPA.

[19] See Family Court Rules 038,R43(3) considered in ***Re McGregor, McGregor v Clancy & Triado Pty Ltd*** [1991] 100 ALR 431, a decision which was criticised in ***Re Gibbs; Ex Parte Triscott*** (1995) FCR80 at 87G 288A per Drummond J; upheld on appeal in ***Gibbs v Triscott*** (unreported Federal Court of Australia), NOQG188 of 1995, 16 October 1995 per Ryan, Whitlam & Keel JJ. A further ground of distinction from the rule considered in ***Re McGregor*** is that BCIPA requires a further step of filing in the court before the adjudicator's certificate becomes a judgment.

57. Finally the Respondent submitted that in any event there is limited ability for the Court to go behind the judgment on which a bankruptcy notice is founded. The foundation of the debt in the present case lies in the proof of the facts referred to in section 29(1) of the BCIPA. The Respondent acknowledged that if there were substantial reasons for thinking the BCIPA scheme had not been followed to obtain a valid adjudication decision such circumstances might well enliven the court's discretion as explained by the High Court in ***Wren v Mahony***.[20] While such is the case in this instance no such doubt arises. Accordingly there are no substantial reasons for doubting whether there is in truth and reality a debt due to the judgment creditor.

"In the action or proceeding"

58. The Applicants submit that the adjudication procedure cannot be regarded as an "action or proceeding". They submit the procedure is confined in time, confined in the nature of the arguments, confined in the basis upon which the adjudication can be challenged. To highlight the lack of a conventional action or proceeding the Applicants point to the procedure not contemplating the giving of evidence, the testing of any evidence by cross examination and the statutory limit on matters to be considered by the adjudicator as provided for by section 26(2) of the BCIPA.

59. The Applicants sought to support their contentions by reference to analogies including,
- Maintenance agreements under section 87 of the *Family Law Act*;
- Money orders against garnishees;
- Orders under section 546 of the *Crimes Act* (Vic) for compensation; and
- Demonstrating instances where procedures have not constituted an "action or proceeding" for the purposes of section 40(1)(g).

60. It submitted that a final judgment was therefore inevitably the result of the exercise of judicial power and the act of registration itself was not sufficient to elevate its status.

61. In their submissions the Respondents contended there was no requirement that the judgment or order be regarded as an exercise of the judicial power of the Commonwealth. I agree that this submission states the law. It follows that the fact that the judgment following the adjudication has not itself involved the exercise of judicial power does not deny the adjudication procedure the characterisation of "action or proceeding".

62. The Respondents submitted the term "proceeding" for the purposes of the Bankruptcy Act is sufficiently broad to encompass the adjudication proceeding. In support of its submission they relied upon the observations of Madgwick J in ***Chen v Bannerman*** [2001] FCA 160 where at para [4] His Honour observed there,

"There is no warrant to give "proceeding" such a narrow meaning that it could not encompass the process of an application for Supreme Court assessment of a solicitor's costs plus registration of the result and assessment in the local court. A "proceeding" is contemplated to be something different from an "action" and it is a term apt to have a much wider meaning. The two stage process can clearly be regarded as "the proceeding in which the judgment was obtained".[21]

63. Both section 4(2) and section 25(4) of the BCIPA plainly reveal the intention of the Act that when an adjudicator embarks upon deciding an adjudication application he is conducting a proceeding. The consequence of the adjudication procedure is the issue of its adjudication certificate which in turn may be filed as a judgment for debt and enforced in a court of competent jurisdiction.

64. I consider that given the legislative framework governing the adjudication process it can be characterised as a "proceeding" for the purposes of section 40(1)(g) and that it is such a proceeding.

65. For the Applicants it was submitted in response to the Respondents' submissions on this point that this Court ought be guided by the decision of the High Court in ***Cheney v Spooner*** *[1929] HCA 12;* (1928) 41 CLR 532 and in particular the observations of the Court at 536-537 that "*a "proceeding"...is merely some method permitted by law for moving a court or judicial officer to some authorised Act, or some Act of the court or judicial officer*".

66. In that case the court was considering the term proceeding where it was used in section 16 of the *Federal Service and Execution of Process Act*.

67. In his judgment Starke J stated, "*A civil proceeding, I apprehend, includes any application by a suitor to a court in its civil jurisdiction for its intervention or actions.*"

68. The judgment of Starke J outlined the terms of section 16.

69. It appears with respect to the Applicant that the judgment is largely confined to the terms of section 16 of the *Service and Execution of Process Act* (1901-1924). I do not consider it binds me in respect of the meaning to be applied for the purposes of section 40(1)(g) of the *Bankruptcy Act*. In ***Foodland Associated Limited v John Weekes Pty Ltd*** (1988) ALR 709 a broad application was applied to the term "proceeding" in the context of a procedure conducted by the Registrar of Trademarks. The situation appears analogous to an application and supports an

[20] [1972] HCA 5; (1972) 126 CLR 212.

[21] In that case the judgment creditor relied upon a judgment debt stemming from a judgment of the local court obtained by way of registration of an assessment by an officer of the Supreme Court of New South Wales of the creditor's costs. What was an issue was the capacity of the debtor to set up a prospective cross claim against assessed costs on account of a failure by the creditor to account for monies received in the course of conducting a conveyancing transaction on the debtor's behalf.

equally broad approach in this instance. In my view that broad approach should be adopted in respect of section 40(1)(g).

Policy considerations

70. The Applicants contended that on a policy basis the application should succeed. They contend the process is one sought to be used by the Respondents for the purpose of execution and enforcement of a debt. In particular it was submitted that the issue of a bankruptcy notice under the *Bankruptcy Act* is not a process of execution or enforcement of a judgment and that the scheme of the *Bankruptcy Act* is to stop unremunerative trading and is not a debt recovery procedure.[22]

71. Whilst I accept the merit of the Applicants' arguments on this point the issue achieves greater significance once an act of bankruptcy has occurred. Until a notice remains unanswered questions concerning the purpose for which the process has been engaged generally do not arise. Clearly the policy matters raised are significant in the context of a sequestration application. However until the making of such an application and the engagement of the debtor in such an application matters relevant to solvency are generally known only to the debtor and in such circumstances a creditor is within its rights to proceed on the prima facie premise that non payment of a debt, particularly if it is of a significant quantum, is occasioned by issues related to solvency. In circumstances where a creditor does not or cannot know of a debtor's true financial position it is difficult to see how it can be said that the use of the *Bankruptcy Act* is in breach of its policy.

72. Further and in any event I agree with the Respondents' contentions that the Respondents issue of the bankruptcy notice is consistent with the policy of both the *Bankruptcy Act* and with the BCIPA. The policy of the BCIPA is that a sectio 31 judgment should be paid. Equally the policy of the *Bankruptcy Act* is that a judgment can be enforced as a final judgment can found a bankruptcy notice.

73. In this case there is an enforceable final judgment. It follows that the bankruptcy notice may be founded upon it and to that end I am satisfied that the issue of the notice is in accordance with the broad policy of the *Bankruptcy Act*.

Counterclaim set off or cross demand

74. The Applicant submits that in any event the notice should be set aside because the Court can be satisfied of:
    a. the existence of a counterclaim set off or cross demand equal to or exceeding the amount of the adjudication; and
    b. such counterclaim set off or cross demand could not have been raised in the initial proceeding.

Counterclaim setoffs or cross demands equal to or exceeding the amount of the adjudication

75. Section 41(7) of the Act permits the debtor to apply to the Court for an order to set aside the bankruptcy notice on the ground that the debtor has such a counterclaim setoff or cross demand as is referred to in section 40(1)(g). The application must be made before the expiration of the time fixed for compliance with the requirements of the Bankruptcy Notice.

76. In this case the application was made within time. However it was supported by only one affidavit being the affidavit of the Applicant's solicitor. In due course further affidavits were filed. However those affidavits were filed contrary to Rule 3.02 and 3.03 of the *Federal Magistrates Court (Bankruptcy) Rules 2006*. Such a failure constitutes a formal defect or irregularity; ***Hubner v ANZ Banking Group Limited*** [1998] FCA 1779.

77. Section 57 of the *Federal Magistrates Act 1999* (Cth) provides that proceedings are not invalidated by an informal defect or an irregularity unless the Court is on the opinion that a substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the Court. It further provides that the Court may make an order declaring that the proceeding is not invalid by reason of a defect which is considered to be formal by reason of an irregularity.

78. In their written submissions the Respondents contended that the general admissibility of the material should weigh heavily in resolving the discretionary issue in favour of excluding the material. This matter was debated during the course of argument and ultimately resolved by the delivery of later material dealing with the qualifications of that person whose opinion was in issue. With respect to the Respondents no substantive matter of prejudice was raised nor pressed. In the circumstances I consider it appropriate to waive the failure to comply with the rules and consider the later material filed by the Applicants.

79. The issue of late admission of material having been resolved the real question for determination is whether that material is sufficient to establish the existence of a counterclaim, setoff or cross demand. The requirements of section 41(7) require the Court to be satisfied that there is sufficient substance such that the claim should be heard and determined in the usual way without being forced to comply with the Bankruptcy Notice or commit an act of bankruptcy. The test requires the Court to be satisfied that the Applicants have a 'prima facie' case, a 'fair chance of success' or that they are 'fairly entitled to litigate' and/or have a 'genuine' or 'bona fide' claim. In ***Re Glew; Glew v Harrowell*** [2003] FCA 373 Lindgren J enunciated the various tests as follows:

> *"9. There are authorities suggesting that Glew and Tresidder must satisfy me of the following interrelated and sometimes overlapping matters:*
>
> ** that they have a "prima facie case", even if they do not adduce evidence which would be admissible on a final hearing making out that case (**Ebert v The Union Trustee Co of Australia Ltd** [1960] HCA 50; (1960) 104 CLR*

[22] See Lewis, "Australian Bankruptcy Law", Rose, 10th edition, at 1.

*346 ("Ebert") at 350; **Re Brink; Ex parte Commercial Banking Company of Sydney Ltd** (1980) 44 FLR 135 ("Brink") at 141; **Gomez v State Bank of NSW Ltd** [2002] FCAFC 101 at [17], [18]);*

* *that they have "a fair chance of success" or are "fairly entitled to litigate" the claim: Brink at 141; **Re Gould; Gould v Day** [1999] FCA 1650 at [27], [28]; **Re Capsanis; Capsanis v The Owners - Strata Plan** 11727 [2000] FCA 1262 at [11]); and*
* *that they are advancing a "genuine" or "bona fide" claim (Re **Capsanis; Capsanis v The Owners - Strata Plan 11727** [2000] FCA 1262 at [11]).*

*It may be that the first and second formulations are intended to cover the same ground. In Brink Lockhart J treated (at 141) the reference to a "prima facie case" in **Ebert** as a reference to "a fair chance of success".*

*10 In **Brink** Lockhart J said (at 141) that the Court is not required to "undertake a preliminary trial of the counter-claim, set-off or cross demand". But, clearly, the application of the criteria above requires the Court to make some kind of preliminary assessment, though obviously not to determine the counter-claim, set-off or cross demand finally. And in **Guss v Johnstone** (2000) 171 ALR 598, Gleeson CJ, Gaudron, McHugh, Kirby and Callinan JJ stated (at 606):*

"[40] The state of satisfaction referred to in s 40(1)(g), and s 41(7), involves weighing up considerations as to the legal and factual merit of the claim relied upon by the debtor, and the justice of allowing the bankruptcy proceedings to go ahead or requiring them to await the determination of the claim."

11 Plainly, in order to "satisfy" the Court for the purposes of par 40(1)(g), the debtor is not required to prove, as on a final hearing, the asserted entitlement to recover from the creditor. Accordingly, evidence tendered on an application to set aside is to be tested for admissibility, not as if the proceeding were one in which the debtor's claim was being finally determined, but by reference to the question whether the Court should be satisfied that the debtor has a claim deserving to be finally determined.

12 Perhaps little more can usefully be said than that a debtor must satisfy the Court that there is sufficient substance to the counter-claim, set-off or cross demand asserted to make it one which the debtor should, in justice, be permitted to have heard and determined in the usual way, rather than be forced to comply with the bankruptcy notice by payment or to commit an act of bankruptcy."

80. It seems plain that the standard is not unduly onerous. Indeed Stundberg J noted in ***Re Fernando del Vecchio Judgment Debtor; Ex Parte; Alex Lewenberg***[23] referring with approval to the decision of Northrop J in ***Re Doherty***[24] that the Court should adopt a benevolent construction to the initial affidavit. Later in His Honour's decision Justice Stundberg accepted that a precise quantification of the claim was not required.

81. The Applicants have commenced proceedings in the Supreme Court. A copy of the claim and Statement of Claim was exhibited in this application. Their claim involves the following elements:

a.	Mistakes in the adjudication amounting to overpayments	$112,643.82
b.	Mistakes in the adjudication amount to overpayments	$45,833.34
c.	Liquidated damages at the contract rate of $1,000 per day from 10 October 2007 until the issue of the claim on 19 February 2008 (131 days)	$131,000.00
d.	Further liquidated damages at the same rate until practical completion (not yet achieved) being 23 February 2008 until 14 March 2008 (24 days)	$24,000.00
e.	Further work to be done for the balance of the work taken out of the Respondent's hands under the contract (i.e. $391,163.92 cost to complete, less $262,052.10 value of work taken out of Respondent's hands)	$129,110.82
f.	Defective work	$179,599.43
g.	TOTAL:	$622,187.41

82. The Applicant submits that the Supreme Court proceedings are not frivolous or vexatious and there is no suggestion that the claims are not genuine. Further it is submitted that there is no suggestion on the part of the Respondent that the claims do not raise an arguable or prima facie case. It is submitted that the matter to which this Court should look is whether it is just that the claim should be determined before the bankruptcy proceedings are allowed to continue, or; in other words whether it is a claim which is proper and reasonable to litigate.[25] It was submitted that a preliminary assessment could not fail to find that there is sufficient substance to the cross claims.

83. I agree with Mr Bond that the present formulation of a claim is questionable. It appears plain from the terms of section 100 of the BCIPA that the aggrieved parties common law rights remained intact and unaffected by the adjudication outcome; section 100(1). Further, that in any common law action the adjudication outcome is to be taken into account by the making of appropriate orders, including restitution if appropriate; section 100(3). In the present context the Applicant ought to have pleaded the contract, the breaches and its consequent damages and sought restitution in respect of the adjudication outcome (which by inference rejected the Applicant's contentions at first instance). Despite the solecism involved in the pleading the heads of damage are readily identified.

23 [1995] FCA 1660.
24 [1993] FCA 492
25 McDonald Henry & Meek at 2621; ***Re Glew; Glew v Harrowell*** [2003] FCA 373 [10] – [12] per Lindgren J.

84. In support of those heads the Applicants relied upon affidavits sworn by themselves, Darcy James Cheshire the incoming contractor, and Jeffrey Arthur Jepsen a representative of the project superintendent. Mr Jepsen's affidavit was subsequently supplemented by a further affidavit addressing his qualifications.

85. At the outset of the application it was contended by the Respondent that irrespective of the tests articulated by their Counsel the Applicants' evidence was not sufficient to meet any of those demands. Technical deficiencies in that evidence were identified. The Applicants informed the Court of evidence it would lead to address those deficiencies if leave were granted. Leave was granted and the Applicants undertook to file further material. Accordingly the application proceeded on the premise that deficiencies in evidence could be addressed. The Respondent contended that despite the admission of that later evidence an examination of the Applicants' claims would still leave a significant shortfall between the quantum of the judgment and the quantum of any arguable counterclaim set off or cross demand.

86. Each of the pleaded heads has to be examined in turn.

Defective Works

87. John Cavanah swore that upon the Respondent's removal from the site it was evident that the Respondent had performed some of the works defectively. The defects were particularised in a schedule attached to the Statement of Claim and alleged to have a rectification cost of $197,559.40. Clearly Mr Cavanah's evidence on these matters is hearsay. However he relies upon the evidence provided by others as to the extent of defects and the quantum of rectification costs. Barry James Cheshire the managing director of Cheshire Contractors Pty Ltd sought to address issues of defects and quantum in his affidavits. His company was engaged to undertake both the completion and rectification works. The affidavit material was sketchy and did not descend into particulars. At paragraph 13 of his affidavit filed 10 March 2008 he swore that he and Jeff Jepsen prepared a schedule of works which had not been completed by the Respondent and prepared a price for those works. That occurred in November 2007. In paragraph 14 he swore that there was an agreement concerning the price and scope of incomplete works reached on 10 December 2007 but that rectification works were ongoing. He swore that he agreed to continue to attend to those works but only on the condition that they were paid on a day work basis. The evidence of Mr Cavanah was supported by Jeffrey Arthur Jepsen who acted as superintendent of the works on behalf of Lambert & Rehbein, an engineering and project management firm. From their evidence it appears that the schedule attached to the Statement of Claim was prepared. I am happy to proceed on the premise that the Statement of Claim including its schedule was prepared on instructions and that the matters contained in the schedule reflect the opinions of Mr Jepsen and Mr Cavanah. To be meaningful the costings alleged in the schedule must have been premised upon an assessment of both the completion works and rectification works required to achieve the contractual outcome. Having regard to the general nature of the contract works and the issues between the parties evident from the adjudication material exhibited to the affidavit of Mr Thirgood this claim is not extraordinary.

88. Sketchy as it is, but adopting a benevolent view, it satisfies me that there is a genuine or bona fide claim of sufficient substance in the cross demand which the Applicant should in justice be prepared to have heard and determined in the usual way.

Balance of Works to complete Contract

89. For reasons expressed above concerning defective works I am also satisfied that there is sufficient substance to the Applicant's claims concerning this head.

Liquidated Damages

90. The Applicants contend for liquidated damages. The alleged date of completion was 9 October 2007. The works were not completed by that time and despite engagement of another contractor remained incomplete as at 20 February 2008, the date of Mr Cavanah's affidavit. The Statement of Claim alleges liquidated damages at the agreed rate of $1,000 per day from 10 October 2007 until 19 February 2008 ($131,000). It claims for ongoing liquidated damages at least until 14 March 2008 (the date of the Applicant's submissions). In the present context and premised upon the adjudication material I am content to accept that as with the other heads there is a genuine or bona fide claim of sufficient substance in this issue to make the issue of liquidated damages one which the Applicants should in justice be permitted to have heard and determined in the usual way.

Mistakes in the Adjudication

91. The Statement of Claim also alleges mistakes in the adjudication relating to overpayments. Two sums are alleged totalling $158,477.16.

92. The first head concerning $112,643.82, in essence, is premised upon an error made by the adjudicator in considering the contract works. It is not well expressed but it appears from paragraph 8 of the Statement of Claim that the Applicants assert the scope of works were varied by reducing the works but that when the adjudicator considered the payment claim he effected his assessment on the basis of the original scope of works rather than the varied scope of works. Likewise a claim appears to be made in respect of a misapprehension of the scope of works concerning No Fines Concrete claim in respect of which an amount of $45,833.34 was made.

93. As noted above despite the evidence on these matters being somewhat thin I am inclined to adopt a benevolent view of the evidence in respect of the claims. Contractual claims of that kind in construction claims are notoriously complex involving a detailed consideration of extensive documentary material including contracts, specifications and drawings. In my view that sort of material would not be necessary to satisfy a Court that there is sufficient

substance to the demand. In the circumstances I am satisfied there is sufficient substance to the demand and there is in fact a genuine or bona fide claim, I consider that the Applicant should in justice be permitted to have heard and determined in the usual way.

94. It follows from my assessment of the claims that there were available at the time the adjudication process commenced genuine or bone fide claims which then had a value of $530,187.41.[26]

Counterclaim setoffs or cross demands which could have been set up in the adjudication proceedings

95. Finally for the Applicants to succeed it is also necessary for them to demonstrate that they have a counterclaim, setoff or cross demand that they could not have set up in the action or proceeding in which the judgment or order was obtained.

96. The Applicants submit that for the most part the claims the subject of the Supreme Court proceedings could not have been raised in the adjudication because the payment schedule in response to the payment claim was required to be served on or before 19 November 2007. It was submitted that it was not possible for practical reasons to raise the claims with respect to liquidated damages, the cost of rectifying defective work or the additional cost that would have been incurred in having the works completed because none of those matters had been known or had crystallised at the time of the adjudication under the BCIPA. By way of example the Applicants contended that it could not have raised by the due date for delivery of the payment schedule particulars of liquidated damages, damages associated with completion costs or rectification costs.

97. It was submitted on their behalf that for the most part the claims could not have been raised in the adjudication because the payment schedule in response to the payment claim was required to be served on or before 19 November 2007. In particular reliance was placed upon evidence by Mr Cavanah that, "*It was not possible for us to raise claims with respect to liquidated damages, the cost of rectifying defective work or the additional cost that Leanne and I would incur in having the works completed at the time of the adjudication under the provisions of the Building and Construction Industry Payments Act 2004 (Qld) because none of those matters were known or had crystallised at the time.*"

98. It was asserted that "amounts which definitely could not have been raised" included liquidated damages, additional completion costs and defective works.

99. The Applicants' written submission did not address the first two matters contended for in paragraphs 7 to 14 of their Statement of Claim, being the alleged incorrect reference by the adjudicator to the incorrect scope of works.

100. For the Respondents it was contended that matters pleaded in paragraphs 7 to 14 of the Statement of Claim related to the adjudication itself and concerned the substance of the decision made in the adjudication. I agree with their submission that self evidently insofar as the facts might, if true, establish an entitlement to a claim, the claim could have been set up by the Applicants in the adjudication proceedings.[27] What appears to be contended for by the Applicants is that the adjudicator erred in his consideration of the contract at the heart of the dispute. Clearly disputes of that kind could have been set up in the adjudication following which the judgment was obtained. In fact they were as I have noted. The Applicant quite properly conceded this matter in the course of argument. It follows from my view that the alleged mistakes in the adjudication amounting to over payments totalling $158,477.16 cannot be relied upon for the purposes of section 40(1)(g).

101. The remaining three heads are also premised upon the Applicants' claim that those matters were not known to the Applicants or had crystallised at the time of the adjudication.

102. Clearly events giving rise to those claims predated 9 November 2006. The Statement of Claim pleads that the Respondent failed to bring the works to practical completion by 9 November 2007. Liquidated damages would have commenced to run from that date. Further the Statement of Claim alleges that by notice in writing dated 9 November 2007 the Applicants' recovered possession of works from the Respondents. At that time it is alleged and the evidence supports the fact that the works remained incomplete. The failure to bring the works to completion by the due date and the defective performance of the work appeared to have founded the entitlement to terminate under the contract. The payment schedule issued under the BCIPA was not served until 19 November 2007, ten days after the Applicants recovered possession of the works. It is well settled that the Applicants need only consider causes of action which a debtor was entitled to plead up to the time a judgment which are capable of amounting to a counter claim of the kind referred to in section 40(1)(g); see ***Re Deen; Ex Parte Deen v Muller*** (1995) 58 FCR 441. Equally it is beyond controversy that the question of whether or not a counter claim, setoff or cross demand could be set up as a matter of law and not of practicalities with section 40(1)(g) not being concerned with personal or practical reasons why proceedings were not brought; see ***Jensen v Queensland Law Society Inc*** (2004) FCA 1630 at para 50 per Keifel J; special leave refused because of insufficient prospects in ***Jensen v Queensland Law Society Inc*** [2005] HCATrans 796 per Gummow and Kirby JJ.

103. In this case the claims in respect of incomplete and defective works together with the claim for liquidated damages were clearly open to be advanced in the adjudication.

[26] The present quantum of liquidated damages includes later assessing damages which to the hearing of this application totalled $121,000 from the date of time for delivery of the payment schedule of the adjudication to that later date.

[27] The material before the adjudicator included the Applicants' response to progress claim #4 [Affidavit Russell Thirgood Annexure RJT-1 at tab 11]. In correspondence from Lambert & Rehbein addressed to the Respondent dated 25 October 2007 they raised the matters alleged at paragraphs 6 to 9 (the over claim on the redesigned retaining wall) and at paragraphs 10 to 13 (the over claim related to the negative variation related to the supply of no fines concrete). In addition the matter of liquidated damages was also raised.

104. Section 18(3) of the BCIPA enables respondents to a payment claim to set up in its payment schedule any reason for withholding payment. Each of the above matters could have been raised for that purpose. Section 24(2)(c) of the BCIPA enables a respondent to include in the adjudication response any submission which they chose to include provided it was included in the payment schedule. Finally section 26 (2)(b) of the BCIPA obliges the adjudicator to consider the payment schedule and all submissions properly made.

105. The Respondents contend that there was no legal impediment to the Applicants taking advantage of the procedures available under the BCIPA to set up all the presently contested counter claims, setoffs or cross claims before the adjudicator. In particular it was submitted
    a. that the Applicants did in fact agitate their claim for liquidated damages in the adjudication proceedings including a claim that those damages continued to accrue;
    b. the Applicants referred in their adjudication submissions to the fact that the work had been taken out of the Respondent's hands and would be completed by another contractor;
    c. an analysis of the Applicants' payment schedule, adjudication submissions and Mr Cavanah's statutory declaration demonstrates that at least 6 of the 20 alleged defects itemised in schedule 8 of the Statement of Claim were specifically referred to by the Applicants in the course of the adjudication;
    d. schedule A to the Statement of Claim particularises some of the alleged defects by reference to photographs and reports dated prior to 19 November 2007; and
    e. the Applicants recorded in their payment schedule in the adjudication proceedings that "*[s]ubsequent events have indicated significant misleading and deceptive conduct by the contractor in suggesting the works claimed in progress claim 4 have been done to specification in a good and workmanlike manner*."

106. I accept the Respondent's submissions in that regard and that those contentions are supported by the evidence as is submitted.

107. It follows that in my view there was no legal impediment to the Applicants setting up in the adjudication those matters which are now the subject of the Supreme Court proceedings.

108. It was further submitted by the Applicants that in any event it suffered from an inability to obtain evidence in time for the adjudication. In ***Nath v Clipway Pty Ltd*** [1999] FCA 625 the Court cited with approval the observations of Drummond J at first instance who stated,
    "*There is a long line of authority which establishes, in the context of section 40(1)(g) of the Bankruptcy Act 1966 (Cth), that considerations personal to a debtor which prevent him, as a matter of practical reality, from pursuing a cross claim in proceedings in which a judgment is given on which a bankruptcy notice is founded, do not constitute circumstances which entitle the debtor to characterise such a cross claim as one which could not have been set up in the action or proceeding in which the judgment was obtained.*"

109. More pointedly in ***Vicini, Re; EA Sealey & Co, Ex p*** (1982) 64 FLR 323 at 327 Fisher J noted,
    "*The fact that (the debtor) was in the circumstances unable to pursue (the claim) because of an inability to bring witnesses and evidence before the Court at that time in no way assists him to establish that as a matter of law he was unable at the time to set up the counter claim.*"

110. It follows in this case that the Applicants' claims concerning their inability to address the practical issues associated with prosecuting a possible claim in the proceedings do not bear upon the matter required to be established under section 40(1)(g) namely that they "*could not have set up*" that claim in the action or proceeding in which the judgment was obtained.

111. Finally and further to the last point it was submitted on behalf of the Applicants that they were unable to quantify their damage in time for the adjudication and that because of that matter they were outside the type of claim contemplated under section 40(1)(g). In answer to that submission the Respondents contend that an inability to quantify damage in time for the adjudication is not sufficient; ***Re Del Vecchio; Ex Parte Lewenberg*** *(supra)*.

112. As earlier noted, Stundberg J in adopting the observations of Northrop J in *Re Doherty* generally considered a benevolent approach should be adopted in considering the material necessary to support a claim under section 40(1)(7) namely a counter claim, setoff or cross demand of the kind which could not be set up as required by section 40(1)(g). Later in his decision he expressly stated that he did not consider "precise quantification" was required. There appears to be no logical reason why the observations made by His Honour in that case should not apply equally to an assessment of a counter claim, setoff or cross demand whether it be for the purposes of establishing one was available or as is sought to do in this case, that one was not available.

113. It follows in my view that the absence of a capacity to precisely quantify the various heads of damage contended for by the Applicants in its cross demand as at the time when it was required to engage in the adjudication is not sufficient to establish an incapacity to set up a counter claim, set off or cross demand in the actions of providing for the purpose of s.40(1)(g).

Conclusion

114. The Applicants seek orders to set aside a bankruptcy notice founded upon a judgment obtained under s.31(1) of the BCIPA.

115. I find the judgment was a final judgment for the purposes of s.40(1)(g) of the Act. The judgment was one obtained in an action or proceeding for the purposes of s.40(1)(g).

116. The matters the Applicants raise by way of cross claim were matters that could have been served in the proceeding in which the judgment was obtained. In fact they were claimed although unsuccessfully.

117. As a matter of policy there is no reason why a judgment under the BCIPA should not be the subject of a bankruptcy notice.

ORDERS

(1) That the Application be dismissed.

(2) That in default of application by the Applicants within seven (7) days of this order, the Applicants pay the Respondents' costs of and incidental to this application to be assessed.

Mr P. Freeburn SC and Mr C.D. Coulsen instructed by Deacons Lawyers
Mr J.K. Bond SC and Mr D.S. Piggott instructed by McCullough Robertson Lawyers