Insolvency Law
Bulletin

Reviews of Sequestration Orders Part One — *Bechara* and the Constitutional Imperative

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In 2021, while the rest of us were hiding from COVID-19, the full court of the Federal Court, under the leadership of Chief Justice Allsop (perhaps working to the deadline of his retirement in early 2023), embarked upon a remarkable and incredibly helpful programme to resolve a number of contentious insolvency (particularly bankruptcy) principles[1] One major example is a collection of 3 separate decisions on the review of sequestration orders made by registrars. In these decisions the Chief Justice and the Full Federal Court comprehensively reinforced the "Constitutional imperative" for a *de novo* judicial rehearing of registrar decisions, and settled several long outstanding questions in respect of such reviews.

Making a sequestration order is an exercise of judicial power. The Constitution requires judicial power to be exercised by judicial officers, which does not include registrars. In practice, the Courts have established a "work around" by allowing powers delegated to registrars to be reviewed by a judge *de novo*.[2] Schedule 1 of the Federal Court (Bankruptcy) Rules 2016 — *Powers of the Court that may be exercised by a Registrar* — lists the power to make a sequestration order, among other orders. Hence, applications for sequestration orders are heard and determined by registrars in the Federal Court and in the Federal Circuit and Family Court. The same arrangement applies in relation to applications for company winding up orders in the Federal Court.[3] The Constitutional basis for this review is often forgotten by lawyers, as well as judges, which leads to significant complications and enormous costs and delays, as these cases demonstrate.

These decisions bear close consideration. Such reviews apply to any delegated federal judicial authority[4]. And as we will see, a small error can cause enormous delay and costs. Or as Aesop put it, a tiny gnat may take down a mighty lion.

Firstly, we will consider the full Federal Court's decision in *Bechara*[5]. In a subsequent article, we will review the decisions of the five-Judge full Federal Courts convened by Chief Justice Allsop in *Samsakopoulos*[6], and *Ghasemi/Khakasz*[7] to deal with remaining issues regarding the annulment of the bankruptcy, and the Trustee's remuneration and costs.

BECHARA — THE LAW OF REVIEWS REVIEWED

Background to a Perfect Storm

In *Bechara*, the Full Federal Court said that applications for review of registrar decisions should be heard:

> "as soon as reasonably practicable. This is *especially* so in bankruptcy, and even more so if it is a review of a sequestration order that changes the status of a debtor, enlivens powers of a trustee and brings about changes to property. Delay is not only prejudicial to the debtor or bankrupt, but also to the creditor and potentially to members of the public."[8]

When considered against the litigation history in *Bechara*, this encouragement for expedition is profound.

A Tortuous History

In *Bechara* a single creditor's petition took more than five years to be finally determined. During that period, any other creditors were prevented from enforcing their debts, whilst the trustee was effectively hamstrung from progressing the bankruptcy.

Ms Bechara (a solicitor) briefed Mr Bates (a barrister) but did not pay his fees. Mr Bates obtained judgments for approximately $128,000 and commenced bankruptcy proceedings.

- On 11 December 2015, Mr Bates served a bankruptcy notice. An application to set aside the bankruptcy notice was dismissed.
- On 7 April 2016 a creditor's petition was filed.
- On 5 July 2016, a sequestration order was made against Ms Bechara.
- On 25 July 2016, Ms Bechara filed an "interim application" which was "treated as an application for review of the registrar's decision"[9].
- By 8 December 2016 there had been what Allsop CJ described as "less than satisfactory" conduct of the application, in which "[d]eadlines came and went,

with little done to propound the detail of the case"[10]. A Federal Circuit Court Judge refused Ms Bechara's application for an adjournment, and dismissed the review application due to her non-appearance and non-compliance with the Court's directions[11].

- On 3 March 2017, an application by Ms Bechara to reinstate her review application was also dismissed, the Court saying:

> "The difficulty for Ms Bechara is that she has never articulated her case. ... Nor was any evidence filed to satisfactorily explain that application."[12]

- On 17 May 2017, a renewed application for reinstatement of the review application was also dismissed — "if Ms Bechara was dissatisfied, she should appeal"[13].
- On 6 April 2018, almost a year later[14], the Federal Court (in its appellate jurisdiction) dismissed Ms Bechara's applications for leave/time to appeal the orders made on 8 December 2016, 3 March 2017, and 17 May 2017[15]. The Court held Ms Bechara was entitled to a *de novo* hearing, but this was subject to "ordinary case management principles"[16] including default judgment for non-compliance. Further, the Court held an applicant must "identify some basis on which the application for review is made"[17] and here:

> "The Court and the respondent remain completely in the dark as to the basis on which Ms Bechara sought review of the Registrar's sequestration order."[18]

- Ms Bechara then filed an application in the High Court, under s75(v) of the Constitution, for mandamus and certiorari to quash the orders made on 6 April 2018. This application raised the absence of a *de novo* hearing but was dismissed when the High Court (wrongly) accepted Mr Bates' argument that the appeal should have been to the Full Federal Court[19] instead.
- On 12 July 2019 a second Federal Court judge granted leave to appeal to the Full Federal Court, describing the *de novo* hearing argument as a "new argument . . . belatedly advanced"[20]. Allsop CJ's full Court disagreed[21]:

> "With respect, a Circuit Court judge sitting in bankruptcy should apprehend the correct approach to a review of a sequestration order of a registrar as explained by at least four Full Courts over the years".[22]

- On 26 July 2019 Ms Bechara's Notice of Appeal was filed, although this led to more litigation (security for costs granted in the sum of $5,000, and a notice of contention filed by Mr Bates).

Along Comes Allsop CJ

By 14 May 2020 Chief Justice Allsop had seized control of the runaway train. After conducting a **case management hearing** on 14 May 2020, his Honour delivered an eleven page judgment noting the "long and, to a degree, unfortunate history"[23] of the proceedings, in which the "merits of the underlying dispute . . . have almost been list in the mists of procedure and time"[24]. His Honour:

1. invited Ms Bechara to file a separate application under s 39B of the *Judiciary Act 1903* (Cth) challenging the original order dismissing her review;
2. queried whether the limitation period in s52(4) *Bankruptcy Act* had expired 2 years earlier; and
3. set out what should have happened on the review:

> ". . . it was for Mr Bates, as the creditor, to prosecute his creditor's petition before the Federal Circuit Court judge, and if Ms Bechara was unwise enough not to turn up to the hearing, the creditor's petition would be heard again in her absence. Instead, the application for review was dismissed for want of prosecution or failure to comply with a timetable when, at least arguably, she had no part to play until the evidence of the petitioning creditor, sufficient to engage s 52 of the Bankruptcy Act 1966 (Cth), was filed and relied upon. In other words, this case, somewhat sad in its history, throws up a fundamentally important point about bankruptcy practice in the Federal Circuit Court and in this Court."[25]

The stage was set. However, despite the emphasis on expedition, the Full Court's own hearing did not take place until 4 February 2021, although judgment was delivered promptly on 16 March 2021.

The Full Court and The Constitutional Imperative

The full Federal Court commenced by restating the "Constitutional imperative"[26] behind judicial review of a registrar's orders[27]:

> "The judicial power of the Commonwealth may only be exercised by judges of federal courts or other courts exercising federal jurisdiction and membership of a federal court is confined to judges appointed in accordance with s 72 of the Constitution. However, federal judicial power may be delegated to registrars if the power exercised by them is subject to review or appeal by a judge or judges of the court: *Harris v Caladine* [1991] HCA 9 . . . The opportunity for a review by way of hearing *de novo* is sufficient to satisfy that requirement: *Harris v Caladine* 172 CLR at 95, 123 and 164."

Their Honours accepted the "parasitic relationship" between delegated jurisdiction and a *de novo* hearing, "the existence of which is essential to the validity of the delegation."[28]

The Full Court considered this imperative clearly established "since the mid-1990s"[29]. From the Full Court's lengthy consideration, a number of principles may be extracted:

1. A registrar's order takes immediate and valid effect "as an order of the judges of the Court but on the basis that a judge may be asked to make an order in place of the exercise of delegated authority"[30].
2. The review:
   (a) "does not hinge, or focus, upon the error of the registrar. It is a hearing *de novo*, in which the matter is considered afresh on the evidence and on the law at the time of the review, that is, at the time of the hearing *de novo*."[31]
   (b) of a sequestration order "is not prosecuted by the debtor (applicant for review) but by the creditor in the proceeding in which the registrar's order was made"[32]. The "onus is upon the Creditor to prosecute its petition. The only onus of the debtor/bankrupt against whose estate a sequestration order has been made is to prove either solvency or any other sufficient cause under s 52(2) of the *Bankruptcy Act 1966* (Cth)"[33].
3. The review, and any order made by the judge, does not proceed as if no order had been made by the registrar[34].
4. If, on review, a judge makes a different order, then "the delegated exercise of power is undone or revoked and a decision by a judge is made in its place"[35]. That is, the Court "makes a new order to replace the registrar's order and does so in the exercise of the power of review"[36].
5. Therefore, judicial review "should be undertaken promptly" given the implications arising from a decision being reversed[37].
6. Further, "interim relief may be sought pending the outcome of the review"[38]. The Court did not explore what such relief might be, but any trustee would be troubled by application costs where "caution is to be exercised by a trustee in bankruptcy in incurring expenses where the validity of the sequestration order is in issue"[39].
7. There is little or no scope for summary disposal procedures[40]. Rather, "if the matter is hopeless, it should be heard and disposed of promptly at a final hearing"[41]. The Court cited *Zdrilic v Hickie*[42]:

   > "It is extremely difficult to contemplate any circumstance where the exercise of that right would constitute an abuse of process."

8. However, the Full Court held an application for review is still "subject to all proper procedural orders"[43] and to "legitimate procedural controls and proper case management techniques". Instead, the review should be heard "with despatch"[45]. This qualification may prove fertile ground for vexatious/litigious bankrupts[46].
9. Of course, not all reviews are the same. For instance, in an application for review by a "reluctant" debtor seeking to set aside a bankruptcy notice:

   > "The moving party for that rehearing is the debtor. If proper case management and default in compliance with orders or non-attendance give rise to questions of orders in default of appearance or want of prosecution of the defaulter's application, so much can be accepted."[47]

10. At the rehearing, if the Court concludes "that a sequestration order would have been appropriate at the date of rehearing, it dismisses the application for review leaving the registrar's order in place and the date of the debtor being made bankrupt as the date of the registrar's order and preferably, for the sake of good order, confirms or affirms the registrar's order."[48]

The Outstanding Complexities — Sequestration Orders

The Full Court accepted "there are some complexities and difficulties yet to be fully and certainly resolved"[49] in applying the Constitutional imperative. Their Honours identified three such matters[50]:

1. Whether a Creditor's Petition can go stale before a review is determined — the issue which divided the Full Federal Court in *Totev v Sfar*[51];
2. Whether the Court hearing the review can instead/also annul the bankruptcy under s 153B of the *Bankruptcy Act* — the issue which divided the full court in *Hadjimouratis*[52]; and
3. Whether the Court has power[53] to apportion responsibility for the trustee's costs (as the Full court did in *Flint*[54]).

The Court did not need to decide the second and third issues, which were considered in 2 separate cases which we will examine in a separate article. Whether the petition against Ms Bechara had become stale is considered further below.

However before that, the Full Court in *Bechara* had to apply the Constitutional imperative to Ms Bechara's application for review of the sequestration order against her.

The Constitutional Imperative in Bechara

Because Ms Bechara had filed an application for review (though using the wrong form)[55], nothing further was required from her:

> "No affidavit in support was needed. The application, once filed, engaged the Constitutional imperative to hear afresh the creditor's petition."[56]

Therefore:

- "the true applicant (the prosecutor of the creditor's petition) in the hearing *de novo* was Mr Bates"[57].
- Ms Bechara's failure to file evidence and submissions "did not relieve Mr Bates of his responsibility to prosecute the hearing *de novo* of his creditor's petition"[58].
- Without a rehearing, the judge "could not affirm the exercise of delegated authority by the registrar in making the sequestration order."[59]
- The "orders made on 8 December 2016 and on 3 March 2017 were thus vitiable with jurisdictional error and, subject to discretionary considerations"[60], were liable to be set aside.
- However, Ms Bechara's Notice of Appeal was incompetent (seeking to appeal orders made by a judge in the appellate jurisdiction[61]). Fortunately (following Chief Justice Allsop's rather helpful suggestion in the 2020 case management judgment) her application under s39B of the *Judiciary Act* allowed the Full Court to find a "fundamental error" (ie no rehearing), so the orders were liable to be set aside.

But was there any point allowing the creditor's petition to be reheard? Was any rehearing out of time pursuant to s 52(4) of the Bankruptcy Act?

Stale chips: does a creditor's petition go stale waiting for a review?

In *Totev v Sfar*[62], the Full Federal Court was divided as to whether a creditor's petition became stale when remitted for rehearing more than 24 months after it had been filed.

However, in *Bechara*, Allsop CJ and the Full Court unanimously held that time did not continue to run because an order had already been made:

> "The mere bringing of the application for review does not invalidate, revoke or suspend the exercise of that delegated authority . . . [W]hile that review is pending the delegated authority by which the registrar made the order (in the present case the sequestration order) remains in existence and so too the order made in its exercise."[63]

Then, when the rehearing occurs, either:

1. "the application for review will be dismissed and the exercise of delegated authority will remain operative. The Court may make this clear by affirming the order of the registrar."[64]; or alternatively
2. if the petition is dismissed "that order will be made, and the sequestration order set aside . . ."[65].

Either way, a sequestration order had been "made on the petition" before the time limit expired, and the petition did not become stale[66].

Discretion

The application before the Court (ie the s39B(1) *Judiciary Act* application suggested by Chief Justice Allsop) was discretionary. The Court was satisfied this discretion should be exercised, quashed the decisions dismissing the review application and remitted the matter for rehearing of the creditor's petition "as soon as possible"[67].

Postscript — Bechara

What period would one think would be reasonable for a rehearing to take place "promptly"; "with despatch" and "as soon as possible"?

As it happened, it took a further 8 separate (albeit COVID-19 affected) hearing days (plus a further costs hearing), 3 reported decisions (and a further costs judgment)[68], and 7 months before finally, 5½ years after the creditor's petition was filed, and almost 5 years after the review application was dismissed, on 15 October 2021 the sequestration order made against Ms Bechara on 5 July 2016 was . . . affirmed. The entire 5 years of litigation to the High Court and back had achieved absolutely no change in the bankrupt status of Ms Bechara.

In the process there were some significant practical issues which the Federal Circuit Court (as it then was) rehearing the petition had to consider. These included:

- whether Ms Bechara was obliged to comply with the Court's rules[69] — she was[70];
- the consequences of failure to comply with the rules — the Court had discretion not to allow Ms Bechara to appear or be heard; to refuse to consider grounds of objection not properly raised; and to not require strict proof of matters not in any notice[71];
- whether Mr Bates had fully complied with the requirements of the Bankruptcy Rules — he had not[72]; and
- whether his failure invalidated the proceedings — it did not; s306 *Bankruptcy Act* could cure the defects so they were not "other sufficient cause" why a sequestration order should not be made[73].

The Moral of the Story

In Aesop's fable of the Gnat and the Lion, a tiny gnat bites a powerful lion, causing the lion to claw and scratch itself to defeat in its attempts to catch the gnat. How the miniscule may fell the mighty!

If Allsop CJ's *Bechara* tells us anything, it is that the tiny and forgotten Constitutional imperative can potentially frustrate, delay and undermine Australia's bankruptcy system, at extraordinary cost in delay and money to everyone involved — parties, Courts, trustees, and the creditors sidelined whilst this imperative is invoked.

A moral, and a question, arise.

The Moral: Tell it to the Judge

Firstly, if trouble is on the horizon, the parties **and the registrar** should ask for the creditor's petition to be heard by a Judge. In a separate judgment the Court held:

> "If for some reason known to the applicant or the delegate it is not appropriate for the application to be determined by the exercise of delegated judicial power then that is a matter that should result in the application being referred to a judge for determination (without any prior exercise of delegated judicial power)."[74]

This is sage advice. Of course it will not always be "known" in advance. And what will make it "not appropriate" for a registrar to hear a petition? A dispute? A history of litigation? A self-represented party?

A Question of Discretion

But what of review applications unconstitutionally dismissed? May a bankrupt years later resuscitate the application citing the Constitutional imperative? Perhaps in the midst of bitterly contested voidable transaction litigation, potentially undermining the entire bankruptcy[75]? If so, as we will see in our next article, there may be significant costs considerations for all parties.

In *Bechara* the Court held that "[t]he **opportunity** for a review" satisfies the constitutional imperative[76]. If so, can the Court exercise a discretion **not** to allow the rehearing? This sounds inconsistent with the imperative, but take an application filed out of time[77]. Any extension of time[78] will require the Court's discretion. If refused, how has the imperative been satisfied? Is it because the applicant had the 'opportunity' to file an application? Could the Court refuse to reinstate a (wrongly) dismissed review application on the same basis? Was the reinstatement application an 'opportunity' for review that satisfied the imperative?

In Aesop's fable, the successful (but boastful) gnat flies into a web and is eaten by a spider. It might be optimistic (and problematic) to wish for such a fate for the Constitutional imperative. However Chief Justice Allsop's foible should remind all practitioners of the power of the Constitutional imperative. Unfortunately, at least one subsequent review application has already failed to apply the Constitutional imperative[79], suggesting that this fable may need regular retelling.

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Footnotes

1. Apart from the 3 full court decisions the subject of these articles; see for instance *C Pty Ltd v Sommer* [2021] FCAFC 87 (the extent of the court's jurisdiction **not** to set aside bankruptcy notices); *Nobarani v Mariconte* [2021] FCAFC 96 (setting aside bankruptcy notices for abuse of process); *Davidson v Official Receiver* [2021] FCAFC 73 (limitation periods in relation to statutory notices for voidable transactions under s 139ZQ of the *Bankruptcy Act 1966*; *Markel Syndicate Management Limited v Taylor as Liquidator of Heading Contractors Pty Ltd (In Liquidation)* [2021] FCAFC 1 (intersection between director insurance, insolvent trading and bankruptcy); *Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd v Metal Manufactures Pty Limited* [2021] FCAFC 228 (set off in relation to unfair preferences, in which his Honour wrote the judgment with which the Court agreed, and which "comprehensive" judgment was approved by the High Court — see *Metal Manufactures Pty Limited v Morton* [2023] HCA 1; 296 ALJR 69 at [3]; [70]); *Pitman v Commissioner of Taxation* [2021] FCAFC 230 (reviews of tax decisions by bankrupts — lead judgment written by her Honour Davies J; *Ritson v Commissioner of Police (NSW)* [2021] FCAFC 208 (appeals against (and inability to suspend) sequestration orders).
2. See Federal Court of Australia Act 1976, s 35A(5); *Harris v Caladine* [1991] HCA 9; 172 CLR 84.
3. Schedule 2 of the Federal Court (Corporations) Rules 2000 — *Powers of the Court that may be exercised by a Registrar. See Deputy Commissioner of Taxation v ASIC* [2013] FCA 623.
4. The statutory basis for a review applies to all decisions of registrars exercising delegated authority as set out in s 35A(5) *Federal Court of Australia Act 1976* (Cth) *and* section 256(1) of the *Federal Circuit and Family Court of Australia Act (2021)* (Cth) (formerly s 104(2) of the *Federal Circuit Court Act 1999* (Cth)).
5. *Bechara v Bates* [2021] FCAFC 34 (Allsop CJ; Markovic & Colvin JJ)
6. *Robson as former trustee of the estate of Samsakopoulos v Body Corporate for Sanderling at Kings Beach CTS 2942* [2021] FCAFC 143; 286 FCR 494
7. *Porter as former trustee of the estates of Ghasemi and Kakhsaz v Ghasemi* [2021] FCAFC 144; 286 FCR 556
8. *Bechara v Bates* [2021] FCAFC 34, per Allsop CJ, Markovic and Colvin JJ at [176] (emphasis in original). See also *Kimber v The Owners Strata Plan No. 48216* [2017] FCAFC 226; on appeal from *Kimber v the Owners Strata Plan no 48216* [2016] FCA 1090 at [82]; cited in *Bechara v Bates* [2021] FCAFC 34, per the Court, at [82].
9. *Bechara v Bates (No 2)* [2020] FCA 659 per Allsop CJ at [3].
10. *Id.* at [6].
11. *Bates v Bechara* [2016] FCCA 3489, per Nicholls J — As regards Ms Bechara's non-appearance pursuant to