Federal Court of Australia

Burrows v Macpherson and Kelley Lawyers (Sydney) Pty Ltd [2023] FCA 622

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| Appeal from: | *Burrows v Macpherson and Kelley Lawyer (Sydney) NSW* [2022] FedCFamC2G 1048 |
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| File number(s): |  |
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| Judgment of: | **JACKMAN J** |
|  |  |
| Date of judgment: | 13 June 2023 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – appeal against decision concerning application to set aside bankruptcy notice – whether application to set aside bankruptcy notice made in time – where application made more than 21 days from the date of delivery of bankruptcy notice to document exchange and last known address of person, but not more than 21 days from actual notice – construction of regulation 102 of the *Bankruptcy Regulations 2021* (Cth) – no “contrary intention” in the *Bankruptcy Act 1966* (Cth) in relation to the service of bankruptcy notices – date of delivery of bankruptcy notice is determinative, not date of receipt  **APPEAL AND NEW TRIAL** – where the primary judge made an adverse finding to the appellant in respect of an issue which was not in dispute – appeal should proceed as though the criticised reasoning of the primary judge did not exist – whether the appeal should be referred to a Full Court pursuant to s 25(1AA) of the *Federal Court of Australia Act 1976* (Cth) – no important question of law arises for determination and referral would prejudice the respondent |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 12, 30, 40, 41, 42, 43, 81A, 81G, 118, 139ZIE, 139ZM, 139 ZO, 139ZS, 139ZT  *Federal Court of Australia Act 1976* (Cth) s 25(1AA)  *Bankruptcy Regulations 1996* (Cth) reg 16.01  *Bankruptcy Regulations 2021* (Cth) reg 102 |
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| Cases cited: | *Abu-Amsha v Wagner* [2019] FCA 900  *ANZ Banking Group Ltd v James* [2016] FCA 332  *Bishop v Helps* (1845) 135 ER 857  *Burrows v Macpherson and Kelley Lawyers (Sydney) Pty Ltd* [2022] FedCFamC2G 1048  *Carantinos v Magafas* [2009] FCA 627  *Clyne v Deputy Commissioner of Taxation* (1982) 66 FLR 301  *Coco v The Queen* (1994) 179 CLR 427  *De Robillard v Carver* [2007] FCAFC 73; (2007) 159 FCR 38  *Deputy Commissioner of Taxation v Mutton* (1988) 23 NSWCR 104  *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87  *Fuller JR, Re Alford v Alford* [2017] FCA 782  *Howship Holdings Pty Ltd v Leslie* (1996) 41 NSWLR 542  *Kioa v West* (1985) 159 CLR 550  *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361  *Master Education Services Pty Ltd v Ketchell* [2008] HCA 38; (2008) 236 CLR 101  *Mbuzi v Favell (No 2)* [2012] FCA 311  *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153; (2021) 287 FCR 181  *Montero v Minister for Immigration and Border Protection* [2014] FCA 1096  *Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees* [1994] HCA 34; (1994) 181 CLR 96  *Re Ditfort; Ex Parte Deputy Commission of Taxation* [1988] FCA 490; (1988) 19 FCR 347  *Shephard v Chiquita Brands South Pacific Limited* [2004] FCAFC 76  *Skalkos v T & S Recoveries Pty Ltd* [2004] FCAFC 321; (2004) 141 FCR 107  *SZKNX v Minister for Immigration and Citizenship* [2008] FCA 67  *SZOBI v Minister for Immigration and Citizenship* [2010] FCA 1026  *Te v Minister for Immigration and Ethnic Affairs* [1999] FCA 111; (1999) 88 FCR 264  *Toyota Finance Australia Limited v Berro* [2022] FCA 497  *Vince (Trustee), Re Sopikiotis (Bankrupt) v Sopikiotis (No 2)* [2012] FCA 1298 |
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| Number of paragraphs: | 41 |
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| Date of hearing: | 7 June 2023 |
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| Counsel for the Applicant: | Mr D A Ward |
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| Solicitor for the Applicant: | Ms Burrows was self-represented. |
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| Counsel for the Respondent: | Mr D Neggo |
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| Solicitor for the Respondent: | Macpherson Kelley Pty Ltd |

ORDERS

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|  | | NSD 77 of 2023 |
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| BETWEEN: | ZALI BURROWS  Appellant | |
| AND: | MACPHERSON AND KELLEY LAWYERS (SYDNEY) PTY LTD ACN 127 962 298  Respondent | |

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| order made by: | JACKMAN J |
| DATE OF ORDER: | 13 june 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent’s costs.

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

REASONS FOR JUDGMENT

JACKMAN J

## Introduction

1. This is an appeal from the judgment of the primary judge in the Federal Circuit and Family Court of Australia (Division 2) in *Burrows v Macpherson and Kelley Lawyer (Sydney) NSW* [2022] FedCFamC2G 1048*.* In those proceedings, Ms Burrows applied to set aside a bankruptcy notice that was issued on 20 April 2022 **(Bankruptcy Notice**) on the application of Macpherson & Kelley Lawyers (Sydney) Pty Ltd **(MKL**). The bankruptcy notice demanded that Ms Burrows pay $130,000 to MKL, representing the amount of costs the District Court of New South Wales ordered Ms Burrows to pay to MKL on 28 February 2020.
2. At first instance, there was a dispute as to the merits of the grounds relied upon by Ms Burrows to set aside the Bankruptcy Notice. However, MKL also submitted that the Bankruptcy Notice was served on Ms Burrows on 24 May 2022, but she failed to apply to set aside the Bankruptcy Notice before the 21 days for compliance with its requirements had expired on 14 June 2022. For that reason, MKL successfully submitted that the Court did not have jurisdiction to consider Ms Burrows’ application to set aside the Bankruptcy Notice or to extend the time for compliance. In this appeal, Ms Burrows challenges the findings as to the service of the Bankruptcy Notice and the expiry of the time for compliance with it before Ms Burrows commenced proceedings (Grounds 1-6). In the event that those arguments are successful, Ms Burrows contends that sufficient grounds exist to set aside the Bankruptcy Notice (Grounds 7-10).

## The Reasoning of the Primary Judge

1. To the extent that it is relevant to the issues concerning service of the Bankruptcy Notice, the reasoning of the primary judge was as follows.
2. The Bankruptcy Notice identified Ms Burrows’ address as “L 1 299 Elizabeth St, Sydney, NSW, Australia”. MKL engaged Mr Khoury to serve the Bankruptcy Notice on Ms Burrows. In his affidavit of service, Mr Khoury said that at 9.00 am on 24 May 2022, he handed the Bankruptcy Notice to a person at Level 1, 299 Elizabeth Street, Sydney, during which he had the following conversation:

Mr Khoury: Can you accept service of these documents on behalf of Zali Burrows?

Person: Yes, I am authorised to accept and can pass them on to Ms Burrows.

Mr Khoury: May I have your name?

Person: “Vai”.

1. Mr Khoury also deposed to the following:

In accordance with Regulation 102 of the Bankruptcy Regulation 2021 (Cth), I placed the documents in a sealed envelope addressed to Zali Burrows and marked “Private & Confidential” and left them with the female at the Debtor’s last known business address.

1. In evidence given in cross-examination, Mr Khoury said he had placed the Bankruptcy Notice in the envelope and sealed the envelope before he arrived at Level 1, 299 Elizabeth Street, Sydney: [35].
2. The primary judge then referred to the evidence given by Ms Burrows relating to the circumstances in which Ms Burrows said she first received the Bankruptcy Notice:

On 16 June 2022 at 4.05 pm, an envelope containing documents was couriered to my residential address by Crisis Courier from Genesis Office that is located at 1, 299 Elizabeth Street Sydney NSW 2000. Genesis Office is a document exchange to send and receive documents for me. It is the usual course of business that Genesis Office couriers or express posts me documents sometime after they are received. Accordingly, I personally became aware of the Bankruptcy Notice after 21 days had lapsed from the date of service.

1. The primary judge said that Ms Burrows did not identify the documents that she said were contained in the envelope, and the email from Genesis Offices that was annexed to Ms Burrows’ affidavit only referred to Crisis Courier having left the parcel comprising one B4 envelope with mail at her front door. The primary judge noted that Ms Burrows appeared to intend to convey that the Bankruptcy Notice was included in the envelope that was delivered to her residence on 16 June 2022: [37]. However, the primary judge was not prepared to find that the envelope that was delivered to Ms Burrows’ address on 16 June 2022 was the envelope Mr Khoury deposed to having left at Level 1, 299 Elizabeth Street on 24 May 2022: [38]. The primary judge reasoned that if the envelope did in fact contain the Bankruptcy Notice, it was reasonable to expect that Ms Burrows would have so stated in her affidavit, and there was no evidence to explain why it took Genesis Offices 22 days to arrange to courier the envelope to Ms Burrows.
2. The primary judge found that the Bankruptcy Notice was left with a person at the premises situated at Level 1, 299 Elizabeth Street on 24 May 2022 (the **Premises**). The primary judge found that the Premises were used as a document exchange operated by an entity that traded under the name “Genesis Office” which, in its usual course of business, couriered or sent by express post to Ms Burrows, documents addressed to Ms Burrows that were left at the Premises: [50].
3. The primary judge referred to reg 102 of the *Bankruptcy Regulations 2021* (Cth) (**Regulations**), which provides relevantly:
4. Unless the contrary intention appears, if a document is required or permitted by the Act or this instrument to be given or sent to, or served on, a person (other than the Inspector–General, the Official Receiver or the Official Trustee), the document may be:

(a) sent by a courier service to the person at the address of the person last known to the person serving the document; or

(b) left, in an envelope or similar packaging marked with a person’s name and any relevant document exchange number, at a document exchange where the person maintains a document facility.

(2) In the absence of proof to the contrary, the document is taken to have been received by, or served on, the person when the document would, in the due course of business practice, be delivered to that address or document exchange.

1. The primary judge found that the address of the Premises was the address of Ms Burrows that was last known to MKL as at 24 May 2022, being the day on which Mr Khoury left at the Premises the envelope containing the Bankruptcy Notice: [51]. The primary judge also found that Mr Khoury delivering the Bankruptcy Notice to the Premises constituted the provision of a courier service to MKL, and MKL engaging Mr Khoury to so deliver the Bankruptcy Notice to the Premises constituted MKL serving the Bankruptcy Notice by a courier service within the meaning of reg 102(1)(a): [51]*.*
2. The primary judge rejected an argument by Ms Burrows that there was no evidence that Mr Khoury brought to the attention of the person with whom he left the envelope the specific nature of the documents, saying that while that was factually true, reg 102(1)(a) did not contain any such requirement: [52]. The primary judge also rejected an argument that the circumstances in which Mr Khoury left the Bankruptcy Notice at the Premises were similar to the circumstances that led Lockhart J in *Clyne v Deputy Commissioner of Taxation* (1982) 66 FLR 301 to set aside a bankruptcy notice. In that case, an order was made permitting service of the bankruptcy notice by post, and the order provided that the service was to be deemed to have been effected “upon the expiration of fourteen (14) days from the date of posting the said documents pursuant to these orders”. Lockhart J found that there was no way the debtor could have known when the bankruptcy notice was posted and accordingly said it was not possible for the debtor to calculate the time by which he was required to comply with the bankruptcy notice. However, the Bankruptcy Notice in the present case required Ms Burrows to comply with it “within 21 days after service”, not after the date of posting, and the date of service pursuant to reg 102(1)(a) was 24 May 2022: [54]. Ms Burrows, however, purported to apply to set aside the Bankruptcy Notice by filing her application to set aside the Bankruptcy Notice on 21 June 2022, whereas the 21 day period expired on 14 June 2022.
3. The primary judge referred to the power which the Court has to extend the time for compliance with the requirements of a bankruptcy notice conferred by s 41(6A) of the *Bankruptcy Act 1966* (Cth) (the **Act**), which provides:

Where, before the expiration of the time fixed for compliance with a bankruptcy notice:

* 1. proceedings to set aside a judgment or order in respect of which the bankruptcy notice was issued have been instituted by the debtor; or
  2. an application has been made to the Court to set aside the bankruptcy notice;

the Court may, subject to subsection (6C), extend the time for compliance with the bankruptcy notice.

1. The primary judge observed that there is no “statutory grant of power to extend the time for compliance except in accordance with the requirements of s 41(6A) of the Act”, and that “the only possible source of authority for the order made by the primary Judge in the present case is s 41(6A)”: *Shephard v Chiquita Brands South Pacific Limited* [2004] FCAFC 76 at [48] (Sackville J). In light of the conclusion that the Bankruptcy Notice was served on Ms Burrows on 24 May 2022, and that Ms Burrows did not apply to set aside the Bankruptcy Notice by 14 June 2022, being the time fixed by the Bankruptcy Notice for compliance with its requirements, the primary judge concluded that the Court did not have power to set aside the Bankruptcy Notice: [56]. Accordingly, the primary judge dismissed Ms Burrows’ application to set aside the Bankruptcy Notice.
2. The primary judge then considered each of the grounds on which Ms Burrows relied, on the assumption that his Honour was incorrect in concluding that the Court did not have such power: [57]-[121]. The primary judge was not persuaded that the grounds relied upon by Ms Burrows had sufficient merit to justify an exercise of discretion in her favour pursuant to s 41(6A) of the Act to extend the time for complying with the requirements of the Bankruptcy Notice or to set it aside*.*

## Grounds 1 and 2

1. Grounds 1 and 2 challenge the reasoning of the primary judge at [37]-[38] to the effect that the evidence was insufficient for a finding that the envelope that was delivered to Ms Burrows’ address on 16 June 2022 was the envelope containing the Bankruptcy Notice which Mr Khoury deposed to having left at the Premises on 24 May 2022.
2. While there is some ambiguity in the way in which Ms Burrows expressed herself in her affidavit, the primary judge correctly observed that Ms Burrows intended to convey that the Bankruptcy Notice was included in the envelope that was delivered to her residence on 16 June 2022. Moreover, it appears to have been common ground at the hearing at first instance that that was the effect of Ms Burrows’ evidence. Counsel for Ms Burrows submitted at the outset of the hearing that Ms Burrows said that she did not get the Bankruptcy Notice until 16 June 2022, and counsel for MKL did not dispute that proposition, saying in answer to a question from the primary judge that it was no part of his case that Ms Burrows received actual notice on 24 May 2022 and that he would not be cross examining her about that: T3.1-17. Mr Neggo on behalf of MKL properly conceded that no issue was raised by MKL in the Court below as to Ms Burrows having actually received the Bankruptcy Notice before 16 June 2022. Mr Ward on behalf of Ms Burrows submits, and I accept, that in the absence of any challenge from the cross-examiner to the frankness and completeness of Ms Burrows’ evidence, it was incumbent on the trial judge, if his conclusion that Ms Burrows had not been frank and complete was to play a role in his decision adverse to Ms Burrows, to make the challenge himself: *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361 at [75] (Heydon, Crennan and Bell JJ). Further, as counsel for Ms Burrows submits, and I accept, the Court in hearing this appeal should proceed as though the trial judge’s reasoning which has been criticised did not exist: *Kuhl* at [77]. Accordingly, in my view, it is appropriate to find as a fact that Ms Burrows did receive the envelope containing the Bankruptcy Notice on 16 June 2022, given that that is the unchallenged evidence.
3. However, for the reasons which follow, that finding is not sufficient to disturb the orders made by the primary judge, which depend upon the correctness on the primary judge’s application of reg 102 of the Regulations to the question of when the Bankruptcy Notice was served on Ms Burrows.

## Grounds 3 to 6

1. Grounds 3 to 6 challenge the primary judge’s finding that the Bankruptcy Notice was served on Ms Burrows on 24 May 2022, rather than on 16 June 2022, and the consequential reasoning of the primary judge that the Court thus did not have power to set aside the Bankruptcy Notice or extend the time for compliance with the Bankruptcy Notice.
2. In mounting that challenge, Ms Burrows faces the very substantial obstacles of two Full Court decisions against her, and seven decisions at first instance which have unhesitatingly followed the construction of reg 102 and its predecessor which were adopted in those Full Court decisions, over a period of almost twenty years. That phalanx of authority has never been doubted in any judicial reasoning.
3. At one time, service of a bankruptcy notice had to be effected on the debtor by delivering to the debtor personally a copy of the bankruptcy notice, unless substituted service was otherwise ordered by the court: see *Re Ditfort; Ex Parte Deputy Commission of Taxation* [1988] FCA 490; (1988) 19 FCR 347 at 358 (Gummow J). However, reg 16.01 of the *Bankruptcy Regulations 1996* (Cth) (the **1996 Regulations**) provided as follows:

(1) Unless the contrary intention appears, where a document is required or permitted by the Act or these Regulations to be given or sent to, or served on, a person (other than a person mentioned in regulation 16.02), the document may be:

(a) sent by post, or by a courier service, to the person at his or her last-known address; or

(b) left, in an envelope or similar packaging marked with the person’s name and any relevant document exchange number, at a document exchange where the person maintains a document exchange facility; or

(c) left, in an envelope or similar packaging marked with the person’s name, at the last-known address of the person; or

(d) personally delivered to the person; or

(e) sent by facsimile transmission or another mode of electronic transmission:

(i) to a facility maintained by the person for receipt of electronically transmitted documents; or

(ii) in such manner (for example, by electronic mail) that the document should, in the ordinary course of events, be received by the person.

(2) A document given or sent to, or served on, a person in accordance with subregulation (1) is taken, in the absence of proof to the contrary, to have been received by, or served on, the person:

(a) in the case of service in accordance with paragraph (1)(a) or (b) – when the document would, in the due course of post or business practice, as the case requires, be delivered to the person’s address or document exchange facility; and

(b) in the case of service in accordance with paragraph 1(c), (d) or (e) – when the document is left, delivered or transmitted, as the case requires.

1. In *Skalkos v T & S Recoveries Pty Ltd* [2004] FCAFC 321; (2004) 141 FCR 107, the Full Court comprising Sundberg, Finkelstein and Hely JJ held in relation to reg 16.01(2) that the words “proof to the contrary” did not permit proof of non-receipt, as opposed to non-delivery: [25]. As to the words “unless the contrary intention appears” in reg 16.01(1), the Full Court held that a contrary intention must appear from the Act or the 1996 Regulations or from some other legislation, and cannot appear from assertions such as the likely inaccuracy or change of a “last-known address” of people under financial pressure: [29]. The Full Court held that a contrary intention does not appear from the propositions (despite their accuracy) that non-compliance with a bankruptcy notice is an act of bankruptcy available to found a bankruptcy petition (paraphrasing s 40(1)(g) of the Act), that an act of bankruptcy must be specifically and clearly proved, that there is no requirement in reg 16.01 of the 1996 Regulations that if the letter is returned marked “Not known at this address” or “Return to sender” that fact must be disclosed to the Court, and that the regulation does not distinguish between a last-known address that is relatively current and one that is long out of date: [29]. The Full Court said that reg 16.01 contemplates the possibility of something less than actual receipt by the person to be served, and it was probably considered that public convenience would be promoted by that provision, and that its advantages would greatly outweigh the inconvenience which, in some few cases, might possibly arise from it: [29], citing Tindal CJin *Bishop v Helps* (1845) 135 ER 857 at 862 (being a passage quoted by the High Court in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87). The Full Court expressed the view that the fact that in some cases reg 16.01 can produce harsh results, does not constitute a contrary intention for the purposes of reg 16.01(1). The Full Court observed that several of the factors relied upon wrongly assumed that it was open to a debtor to prove non-receipt of the notice: namely, that an alleged debtor who did not receive the notice would not become aware of it until served with a petition, at which stage it would frequently be too late to do anything; that the effect of the regulation is that once the letter is posted the onus is on the debtor to prove that he did not receive it, which onus may be difficult to discharge; and that the issue on a bankruptcy petition based on a bankruptcy notice is whether the debtor has failed to pay the debt notwithstanding having been given a last chance, and should not become a credit issue as to whether or not the notice ever came to the notice of the debtor: [29]. The Full Court confirmed that the mode of service for which reg 16.01(1)(a) provides was available for the service of the bankruptcy notice (contrasting the position of service of a bankruptcy petition), and accordingly the question was whether the bankruptcy notice in that case was sent by post to the debtor’s last-known address: [31].
2. In *De Robillard v Carver* [2007] FCAFC 73; (2007) 159 FCR 38, a Full Court comprising Moore, Conti and Buchanan JJ held that reg 16.01(2) permits proof of a different date of delivery (or perhaps non-delivery), although it does not permit reliance simply on alleged non-receipt, citing *Skalkos*: at [46] (Buchanan J, with whom Moore and Conti JJ agreed at [1]). Buchanan J (with whom Moore and Conti JJ agreed) observed that before the introduction of reg 16.01 bankruptcy notices were required to be served personally unless an order for substituted service was made, and the introduction of reg 16.01 removed the need for personal or substituted service; however, a strict approach to the satisfaction of the elements of service remained appropriate: [67].
3. I am grateful for the research of Mr Neggo, counsel for MKL, who cites in his submissions a number of cases in this Court which have followed *Skalkos*: *Carantinos v Magafas* [2009] FCA 627 at [5] (Perram J); *Mbuzi v Favell (No 2)* [2012] FCA 311 at [26]-[27] (Collier J); *Vince (Trustee), Re Sopikiotis (Bankrupt) v Sopikiotis (No 2)* [2012] FCA 1298 at [21] (Bromberg J); *ANZ Banking Group Ltd v James* [2016] FCA 332 at [34] (Katzmann J); *Fuller JR, Re Alford v Alford* [2017] FCA 782; (2017) 252 FCR 168 at [71] (Perry J); and *Abu-Amsha v Wagner* [2019] FCA 900 at [33] (Banks-Smith J).
4. Mr Neggo on behalf of MKL submits, and I accept, that the adoption of the substance of the former reg 16.01 in the new reg 102 supports the conclusion that it was intended that the new regulation would operate consistently with the judicial interpretation of the old regulation: *Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees* [1994] HCA 34; (1994) 181 CLR 96 at [20] (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Te v Minister for Immigration and Ethnic Affairs* [1999] FCA 111; (1999) 88 FCR 264 at [29]-[30] (Sackville, North and Merkel JJ). If a different construction of reg 102 were intended, then it would be expected that in amending the regulations that intention would have been expressed clearly, for example by inserting a rule or regulation requiring that bankruptcy notices be served personally.
5. Mr Neggo also draws attention to the decision in *Toyota Finance Australia Limited v Berro* [2022] FCA 497 at [38]-[46], in which Burley J reached the same conclusion that reg 102 applies to the service of bankruptcy notices, but without citing *Skalkos.*
6. Mr Ward advances two lines of argument in an endeavour to demonstrate that that body of authority (and specifically the Full Court’s decision in *Skalkos*) is wrong. *First*, Mr Ward submits that if the proper construction of reg 102(2) is that evidence of when Ms Burrows received, or had actual notice of, the Bankruptcy Notice is irrelevant to the question of when service was effected, then the Act manifests a “contrary intention” (as contemplated by reg 102(1)) concerning what needs to be done in order to serve a bankruptcy notice, namely a “contrary intention” that service of a bankruptcy notice be effected so as to bring it to the actual notice of the debtor. The *second* line of argument, in the alternative, is that the proper construction of reg 102(2) is that it permits an individual to prove that a document was not in fact received on a particular date or was not given actual notice of it.

### The construction of reg 102(1)

1. Mr Ward developed the first line of argument by pointing out that the consequence of *Skalkos* is that the law regards a debtor as having been “served” with a bankruptcy notice by its delivery to the debtor’s last known address, even where the debtor remains completely ignorant of the existence of the bankruptcy notice and hence of the claims contained in it. If that state of ignorance lasts for 21 days or more (see s 41(2A) of the Act), then the debtor will commit an act of bankruptcy (see s 40(1)(g) of the Act) without ever knowing that he or she was in jeopardy of doing so. A debtor, it is submitted, may be in that position by reason of hospitalisation, itinerant work, seeking refuge from domestic violence, eviction by a landlord, marital breakdown, or for myriad other reasons.
2. Mr Ward submits that the Full Court’s reasoning as to there being no “contrary intention” in relation to the service of a bankruptcy notice contains five errors. *First*, Mr Ward submits that the Full Court did not examine any provision of the Act to ascertain whether the statute manifested a “contrary intention” as to the manner in which a bankruptcy notice could be served. *Second*, Mr Ward submits that the two decisions upon which the Full Court relied for its conclusion did not support it. *Third*, it is submitted that the Full Court wrongly drew support from the dictum of Tindal CJ in *Bishop*, which was said to be question-begging as to the true intention of the legislature, and concerned a very different statutory regime dealing with notices of objection to enrolment of voters in a parish, which was treated as a “very special” provision concerning service. *Fourth*, Mr Ward submitted that the Act manifests a “contrary intention” by endowing debtors with certain rights, the exercise of which depend upon the debtor being served with the bankruptcy notice in the ordinary common law sense of “service”, namely bringing the document to the person’s actual notice, and in the absence of service in the sense of actual notice, those statutory rights were illusory. Those rights include the right to invalidate the bankruptcy notice on the ground of misstatement of the amount claimed to be due (s 41(5)), the right to invoke the Court’s discretion to extend time for compliance with the bankruptcy notice (s 41(6A)), the right to a deemed extension of time for compliance with the bankruptcy notice (s 41(7)), the right to invoke the Court’s discretion to set aside the bankruptcy notice (ss 30(1)(b), 41(6A), (7)), the right to comply with the bankruptcy notice by making particular forms of payment (s 42(1)), and the right to prevent enlivenment of the Court’s jurisdiction to make a sequestration order by complying with the bankruptcy notice and thereby avoiding commission of an act of bankruptcy (ss 40(1)(g), 43(1)(a)). *Fifth*, Mr Ward submits that the Full Court in *Skalkos* was wrong to describe the outcome merely as producing “harsh” results because it is said that the effect is to deprive debtors of rights, being the very rights that the Act confers upon them.
3. Despite the able way in which the argument was advanced by Mr Ward, I am unable to accept these submissions. A bankruptcy notice is a document which the Act contemplates will be “served”: see in particular ss 40(1)(g), 41(2A). The provisions referred to in the argument advanced on behalf of Ms Burrows, namely ss 30, 40, 41, 42 and 43 of the Act, do not make any reference to personal service of bankruptcy notices or actual receipt of a bankruptcy notice by the debtor, as distinct from the unqualified reference to service generally. Those provisions do not deal with the mode of service, that being a matter left to the Regulations. As I have mentioned above, it used to be the case that personal service of bankruptcy notices was required unless the Court made an order for substituted service. But there is nothing in the former reg 16.01 or the present reg 102 which indicates any intention of reviving any requirement of personal service. The argument as to the exercise of rights by the debtor which depend upon the debtor’s receipt of actual knowledge of a bankruptcy notice was substantially similar to the argument raised and rejected in *Skalkos*, particularly the argument recorded in *Skalkos* at [28(a)] as to the commission of an act of bankruptcy by non-compliance with a bankruptcy notice within 21 days from the date of service, and the argument recorded at [28(d)] as to an alleged debtor who did not receive the notice not becoming aware of it until served with a petition, at which stage it would frequently be too late to do anything. In my view, it is wrong to contend that the construction of reg 16.01 adopted in *Skalkos* deprives debtors of rights. That construction does identify a date from which periods of time begin to run, and opens up as no more than a possibility that one reason why that period may run without any action being taken is that the debtor did not receive actual notice of the bankruptcy notice. That outcome represents a clear decision by the legislature as to how to strike a balance between, on the one hand, protecting the interests of debtors, and, on the other hand, providing creditors with a rule of convenience, no doubt taking into account the common experience that judgment debtors can be difficult to locate. The potential for “harsh results” seems to me to be an apt way of describing the possible position of a debtor who has not received actual notice of the bankruptcy notice, despite the creditor adopting the rule of convenience provided by reg 102.
4. I am unable to ascertain any provision of the Act or Regulations, or any element of the general character of that legislation, which manifests a contrary intention to reg 102(1) in relation to the service of bankruptcy notices. Nor is a contrary intention manifested on the basis that, if the presumption created by reg 102 were undisturbed, the procedure established by the Act’s sections would not work appropriately, or the relevant sections would operate in a way which clearly the legislature did not intend: see *Deputy Commissioner of Taxation v Mutton* (1988) 23 NSWCR 104 at 108 (Mahoney JA).
5. Mr Ward also submitted that *Skalkos* should be distinguished by reason of changes in the statutory language since it was decided. Reliance was placed on the amendment effected by s 41(2A) of the Act, whereby the primary legislation emphasises the concept of service, rather than leaving that to the prescribed form of bankruptcy notice. Mr Ward also relies on the change in syntax from reg 16.01(2) of the 1996 Regulations to reg 102(2) of the Regulations of the expression “in the absence of proof to the contrary”. I do not think either aspect of this argument makes any material difference to the applicability of the reasoning in *Skalkos* to reg 102.

### The construction of reg 102(2)

1. The second, and alternative, line of argument advanced on behalf of Ms Burrows concerns the words in reg 102(2) of the Regulations, “in the absence of proof to the contrary”, and it is submitted that those words permit Ms Burrows to prove that she did not in fact receive the Bankruptcy Notice until 16 June 2022. Mr Ward submits that the presumption that receipt or service took place at a particular time can be rebutted by proof that receipt or service did not in fact take place at that particular time. Mr Ward submits that reg 102(1) treats as interchangeable whether a document is “given” or “served”, pointing out that reg 102(1)(a) uses the phrase “last known to the person serving the document” as applying to all three concepts in the preamble of “given or sent to, or served on”. Mr Ward submits that the word “service” is undefined and therefore bears its ordinary meaning of personal service, which means that the document in question must come to the notice or attention of the person for whom it is intended: see *Howship Holdings Pty Ltd v Leslie* (1996) 41 NSWLR 542 at 544B (Young J). Mr Ward submits that a debtor can rebut the presumption that he or she was served with a bankruptcy notice at a particular time by proving that he or she received actual notice of it at a different time, or not at all. To the extent that there is any ambiguity in reg 102(2), Mr Ward submits that that ambiguity should be resolved in favour of a construction that preserves fundamental common law rights: *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). Mr Ward then relies upon the fundamental rule of the common law doctrine of natural justice that a person is entitled to know the case sought to be made against him or her, and to be given an opportunity of replying to it: *Kioa v West* (1985) 159 CLR 550 at 582 (Mason J). Accordingly, it is submitted that any ambiguity in reg 102(2) should be resolved in favour of a construction that preserves a debtor’s entitlement to know what debt the creditor alleges he or she owes, and hence to dispute the debtor’s claims by the statutory means provided. Further, Mr Ward points to the amendment to the Act set out in s 41(2A) and also to the alteration in syntax from the previous reg 16.01(2) to the new reg 102(2), in particular the location of the phrase “in the absence of proof to the contrary”, which has now been moved to the beginning of reg 102(2). As with the first line of argument, I am unable to see that any significance attaches to those changes.
2. Further, it is said that the reasoning in *Skalkos* on this point contains four errors. *First*, it is said that the Full Court’s reliance on *Fancourt* was erroneous because the provision considered in *Fancourt* made no mention of “receipt” of the document in question, as distinct from “delivery”*. Second*, it is said that the other authorities relied on by the Full Court concerned provisions modelled on similar provisions to that considered in *Fancourt*. *Third*, it is said that the Full Court in *Skalkos* did not advert to the principle of resolving ambiguity in favour of the construction that preserves fundamental common law rights. *Fourth*, it is said that the Full Court in *Skalkos* wrongly regarded the purpose of reg 16.01(2) as being to provide a date certain from which periods of time commenced to run, whereas it is argued that the fundamental purpose of service is to ensure that the contents of the document come to the notice of the person for whom it is intended.
3. I am unable to accept these submissions, recognising again the skill with which they were developed. Regulation 102(2) does refer to the document being taken to have been received by, or served on, the relevant person, but these are clearly expressed as alternatives, the applicability of which will depend upon whether the relevant substantive provision uses the concept of receipt or the concept of service. The reference in reg 102(2) to “served on” plainly relates back to the reference to “served on” in reg 102(1). Similarly, the reference in reg 102(2) to “received by” is a reference back to “given to” in reg 102(1), as Mr Ward acknowledged. The provisions dealing with bankruptcy notices (particularly ss 40(1)(g) and 41(2A) of the Act) require that the debtor be “served” with the notice. By contrast, there are many provisions in the Act which adopt the concept of “giving” notice: see, for example, ss 12(2C), 118(5), (6) and (8), 81A(2), 81G(2), 139ZIE(1), (3) and (6), 139ZM(1A), 139ZO, 139ZS(1A) and 139ZT. Accordingly, the concept of service is the relevant concept in reg 102(1) and (2) in relation to bankruptcy notices. Regulation 102(2) does not create any requirement for personal service where there is no such requirement in reg 102(1) or in the substantive provisions dealing with bankruptcy notices to which reg 102 is to be applied. The use of the word “serving” in the phrase “last known to the person serving the document” in reg 102(1)(a) is slightly inelegant shorthand for “giving, sending or serving” the document, but does not have the effect of conveying equivalence of meaning or interchangeability of “giving” and “serving” the document, when read naturally in the context of reg 102 as a whole. Moreover, the Regulations should be placed in their statutory context and construed consistently with the Act under which they were made: *Master Education Services Pty Ltd v Ketchell* [2008] HCA 38; (2008) 236 CLR 101 at [19] (Gummow ACJ, Kirby, Hayne, Crennan and Kiefel JJ). The Act clearly distinguishes between provisions requiring notice to be “given” and those requiring notice to be “served”, and that distinction was clearly intended to be preserved by reg 102.
4. The discussion in *Skalkos* was focused on delivery by post as a means of service, that being a permitted method of service under reg 16.01(1)(a). Similarly, *Fancourt* concerned a statutory presumption (unless the contrary was proved) as to when delivery by post was deemed to have been effected. The analysis in *Skalkos* made clear that it was delivery, not receipt, that was determinative of service of a bankruptcy notice, and the word “delivered” is still used in reg 102(2). That reasoning remains applicable to the present case, although the Bankruptcy Notice in this case was not delivered by post. The Full Court in *De Robillard* at [46] confirmed that reg 16.01(2) permits proof of a different date of delivery (or perhaps non-delivery), although it does not permit reliance simply on alleged non-receipt, citing *Skalkos*. In my view, that is also the proper construction of reg 102(2). It is the date of delivery of a bankruptcy notice which is determinative. In the present case, there was no evidence of delivery on any date other than 24 May 2022, the relevant act of delivery being the sending of the Bankruptcy Notice by a courier service to the person at the address of the person last known to the person serving the documents. In my view there is no ambiguity in the proper construction of reg 102(2), and therefore no occasion to invoke the principle that ambiguity should be resolved in favour of a construction that preserves fundamental common law rights. While the issue of a bankruptcy notice has the potential to affect adversely an individual’s interests, the legislature has clearly chosen not to require personal service of a bankruptcy notice.
5. In my view, the reasoning in *Skalkos* is entirely correct and applicable to reg 102 in the context of service of a bankruptcy notice. Even if I had not been of that view, I am certainly not persuaded that *Skalkos* is “plainly wrong”, which would require a strong conviction as to the incorrectness of the earlier decision, having regard also to whether the earlier decision rested on principle carefully worked out and whether the earlier decision has been otherwise acted upon: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153; (2021) 287 FCR 181 at [2]-[14] (Allsop CJ).

### Other isses

1. Ms Burrows also makes an application for this appeal to be referred to a Full Court pursuant to s 25(1AA) of the *Federal Court of Australia Act 1976* (Cth). Mr Ward relies upon *Montero v Minister for Immigration and Border Protection* [2014] FCA 1096, although in that case Logan J observed at [8] that the application was not opposed. Mr Ward also relies upon *SZKNX v Minister for Immigration and Citizenship* [2008] FCA 67, in which Tracey J at [9] referred a matter to a Full Court in view of the complex and novel argument which was advanced, observing also that there was no right of appeal from the Court constituted by a single Judge. Mr Ward points out that an order referring the matter to a Full Court may be made even where a single judge of the Court has commenced to exercise appellate jurisdiction: *SZOBI v Minister for Immigration and Citizenship* [2010] FCA 1026 at [6] (Bromberg J). In that case, Bromberg J observed at [8] that two relevant factors in exercising the discretion were whether an important question of law arose for determination, and whether there was any prejudice to either party or to the disposition of the appeal.
2. In my view, there would be no utility in referring the matter to a Full Court. The substance of the language used in reg 102 has already been considered by two Full Courts by reference to the substantially similar language used in reg 16.01, and there is no conflict between those judgments requiring further guidance by another Full Court. The decision in *Skalkos* has been followed many times over almost twenty years, without any judge of this Court expressing any doubt concerning the reasoning in it. Further, referring the matter to a Full Court would inevitably lead to further delay and expense in this litigation. In my view, that constitutes substantial prejudice to MKL. Further, in my view it would be an unwarranted use of the resources of this Court to require two (or possibly four) additional judges to hear and decide the appeal. Accordingly, I refuse the application for referral to a Full Court.

## Grounds 7 to 10

1. It is common ground that Grounds 7 to 10 do not arise unless the Court finds that the primary judge did have power to set aside the Bankruptcy Notice. As I am of the view that the primary judge correctly concluded that there was no such power, given the lapse of 21 days from service of the Bankruptcy Notice without an application having been made by Ms Burrows to set aside the Bankruptcy Notice, there is no need to consider Grounds 7 to 10. Nor is there any need to deal with the issue of the appropriate form of relief in the event of the appeal being allowed.

## Conclusion

1. Accordingly, the appeal should be dismissed, and the appellant should be ordered to pay the respondent’s costs.

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| I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman. |

Associate:

Dated: 13 June 2023