FEDERAL COURT OF AUSTRALIA

Official Assignee in Bankruptcy of the Property of Cooksley, in the matter of Cooksley v Cooksley [2017] FCA 1193

|  |  |
| --- | --- |
| File number: | QUD 449 of 2017 |
|  |  |
| Judge: | **LOGAN J** |
|  |  |
| Date of judgment: | 6 October 2017 |
|  |  |
| Catchwords: | **BANKRUPTCY** – person declared bankrupt by High Court of New Zealand – bankrupt in earning income in Australia – request by New Zealand High Court for aid of Federal Court of Australia to enable Australian income contribution to be made to administration of bankrupt’s estate in New Zealand – scope and purpose of policy against aiding foreign revenue claims considered – whether request for orders in aid could be characterized as attempt to enforce foreign revenue laws and therefore contrary to public policy – nature of letters of request – *Bankruptcy Act 1966* (Cth) s 29  **BANKRUPTCY** – orders in aid – letters of request – procedure to be followed – *Bankruptcy Act 1966* (Cth), s 29  **PRIVATE INTERNATIONAL LAW** – cross-border insolvency – application for recognition of foreign insolvency proceedings as foreign proceeding pursuant to the cross-border insolvency of the United Nations Commission on International Trade Law – whether assistance should be provided pursuant to the *Bankruptcy Act 1966* (Cth), s 29 – *Cross-Border Insolvency Act 2008* (Cth), s 6 and s 10 |
|  |  |
| Legislation: | *Bankruptcy Act 1966* (Cth) ss 5, 15, 18, 29, 303  *Cross-Border Insolvency Act 2008* (Cth) s 10  *Federal Court (Bankruptcy) Rules 2016* (Cth) r 14.03  Insolvency Act 2006 (NZ) ss 12, 47, 101, 102, 399, 401  Insolvency (Cross-border) Act 2006(NZ) s 8 |
|  |  |
| Cases cited: | *Ayres v Evans* (1981) 56 FLR 235  *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508  *Cunard Steamship Co Ltd v Salen Reefer Services AB* 773 F.2d 452 (2d Cir. 1985)  *Gainsford v Tannenbaum* (2012) 216 FCR 543  *McGowan v Migration Agents Registration Authority* (2003) 129 FCR 118  *Re Ayres; Ex parte Evans* (1981) 51 FLR 395  *Williams v Simpson* [2011] 2 NZLR 380 |
|  |  |
| Date of hearing: | 3 October 2017 |
|  |  |
| Registry: |  |
|  |  |
| Division: |  |
|  |  |
| National Practice Area: |  |
|  |  |
| Sub-area: |  |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 35 |
|  |  |
| Solicitor for the Applicant: | RBG Lawyers |
|  |  |
| Solicitor for the Respondent: | The Respondent did not appear |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | QUD 449 of 2017 |
|  | | |
| IN THE MATTER OF RODGER WAYNE COOKSLEY | | |
|  |  | |
| BETWEEN: | THE OFFICIAL ASSIGNEE IN BANKRUPTCY OF THE PROPERTY OF RODGER WAYNE COOKSLEY  Applicant | |
| AND: | RODGER WAYNE COOKSLEY  Respondent | |

|  |  |
| --- | --- |
| JUDGE: | LOGAN J |
| DATE OF ORDER: | 3 OCTOBER 2017 |

UPON THE APPLICANT, BY HIS AFFIDAVIT FILED HEREIN, UNDERTAKING TO THE COURT:

(a) That he will inform the Court of any changes in the status of the matter, or notify the Court of any foreign proceedings involving the Respondent of which he becomes aware;

(b) That all money or other property received by him in connection with the bankruptcy of the Respondent shall be applied in the due course of administration of the bankruptcy of the Respondent;

(c) That any matters of controversy in connection with the bankruptcy between the Applicant and any party resident in Australia shall be determined by this Court;

(d) That the Applicant submits to the jurisdiction of this Court in all such matters as aforesaid and agrees to abide by any order the Court may make subject to appeal;

(e) That the Applicant appoints RBG Lawyers to accept service on his behalf of any proceedings brought against him in relation to any matters of controversy as referred to in (c) above.

THE COURT ORDERS BY CONSENT THAT:

1. The Applicant’s appointment as Official Assignee in Bankruptcy of the Respondent and the vesting in him of all the Respondent’s Current Property (as defined in the Schedule to these orders) pursuant to section 101 of the *Insolvency Act 2006* (NZ) and After Acquired Property (as defined in the Schedule to these orders) pursuant to section 102 of the *Insolvency Act 2006* (NZ) is recognised in Australia;
2. Any and all Current Property and After Acquired Property located in, situated in or subject to the jurisdiction of Australia, is declared to be vested in the Applicant;
3. For the purpose of investigating, collecting and realising the Current Property and After Acquired Property of the Respondent in Australia, and collecting all other sums as may be collectible under the *Insolvency Act 2006* (NZ), the Applicant is empowered to exercise all powers as are conferred on a trustee in bankruptcy of the Respondent as if the Respondent were declared under the *Bankruptcy Act 1966* (Cth) on 5 May 2016 and the Applicant were the trustee of the property of the Respondent under that Act;
4. The powers referred to in the preceding paragraph shall include, but are not limited to:
   1. Such rights and powers as are available to a trustee in bankruptcy under Part V of the *Bankruptcy Act 1966* (Cth) for the purposes of investigating the affairs of the Respondent as if he was declared under the *Bankruptcy Act 1966* (Cth) on 5 May 2016 and the Applicant were the trustee of the property of the Respondent under that Act;
   2. Such rights and powers as are available to a trustee in bankruptcy under Part VI, Division 4 of the *Bankruptcy Act 1966* (Cth) for the purposes of collecting and realising property as if the Respondent was declared bankrupt under the *Bankruptcy Act 1966* (Cth) on 5 May 2016 and the Applicant were the trustee of the property of the Respondent under that Act;
   3. Subject to paragraph 5 of these Orders, such rights and powers as are available to a trustee in bankruptcy under Part VI, Division 4B of the *Bankruptcy Act 1966* (Cth) for the purposes of collecting contributions under section 147 of the *Insolvency Act 2006* (NZ) as if the Respondent was declared bankrupt under the *Bankruptcy Act 1966* (Cth) on 5 May 2016 and the Applicant were the trustee of the property of the Respondent under that Act, provided the contributions are assessed and payable on the same basis as income contributions are assessed and payable to a trustee in bankruptcy under Part VI, Division 4B of the *Bankruptcy Act 1966* (Cth);

5. The Respondent pay the Applicant income contributions as assessed by the Applicant under Part VI, Division 4B of the *Bankruptcy Act 1966* (Cth) in respect of the period of bankruptcy from 5 May 2016 by instalments in the sum of A$433.00 per month, such instalments to commence on 27 October 2017 and continue until paid in full;

6. The Respondent and any third party affected by these Orders shall have liberty to apply on notice to the Applicant to discharge or vary these Orders, or to seek directions hereunder;

7. The Applicant’s costs of this application are the Applicant’s costs in the administration of the bankrupt estate of the Respondent;

8. Liberty to apply.

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

REASONS FOR JUDGMENT

LOGAN J:

1. Mr Rodger Wayne Cooksley (Mr Cooksley) was made bankrupt in New Zealand on his own application on 5 May 2016, pursuant to the *Insolvency Act 2006* (NZ) (Insolvency Act). In New Zealand, the effect of s 101 of that Act was to vest all of Mr Cooksley’s property either in or outside New Zealand in the present applicant, who holds the office of Official Assignee in Bankruptcy in that country (Official Assignee).
2. Mr Cooksley is at present gainfully employed in Australia, in the Northern Territory. This Court has received a letter of request from the High Court of New Zealand (at Christchurch) to act in aid of it in the administration of Mr Cooksley’s bankrupt estate. The Insolvency Act (s 147) makes provision for a bankrupt to make income contributions to the Official Assignee for the benefit of his creditors. It is in that context that the assistance of this Court has been sought.
3. Upon the application coming on for its first case management hearing on 3 October 2017, its prior service on Mr Cooksley was proved. While recognising that the application entailed the exercise of discretionary powers, the parties, via the Official Assignee’s solicitors and a filed, mutually signed consent, consensually promoted the making of particular orders in the exercise of that discretion and on the basis of undertakings, detailed below, proffered by the applicant Official Assignee. At the time, I had the benefit of helpful oral and written submissions from Mr Rodgers, a member of the firm acting for the Official Assignee. Being persuaded that it was appropriate to make the orders sought, I made such orders on 3 October 2017 so as to facilitate the expeditious progression of the administration of Mr Cooksley’s bankrupt estate. I indicated at the time that I considered that the application raised a noteworthy point of contemporary, international insolvency practice which warranted other than brief, *ex tempore* reasons and that I would publish reasons for the making of the orders as soon as possible thereafter. These are those reasons.
4. In *Re Ayres; Ex parte Evans* (1981) 51 FLR 395 (*Re Ayres; Ex parte Evans)*, Lockhart J made orders under s 29 of the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) pursuant to letters of request from the High Court of New Zealand. An appeal against those orders was subsequently dismissed by the Full Court: *Ayres v Evans* (1981) 56 FLR 235 (*Ayres v Evans*). Since then, the provision in the Bankruptcy Act in respect of responsibility for the administration of the property of a bankrupt has been much amended. Further, the *Cross-Border Insolvency Act 2008* (Cth) (Cross-Border Insolvency Act) has been enacted. The present application is made under both s 29 of the Bankruptcy Act as well as under s 10 of the Cross-Border Insolvency Act.
5. As presently enacted, s 29 of the Bankruptcy Act provides:

**Courts to help each other**

(1) All Courts having jurisdiction under this Act, the Judges of those Courts and the officers of or under the control of those Courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy.

(2) In all matters of bankruptcy, the Court:

(a) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and

(b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.

(3) Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in a matter of bankruptcy is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

(4) The Court may request a court of an external Territory, or of a country other than Australia, that has jurisdiction in bankruptcy to act in aid of and be auxiliary to it in any matter of bankruptcy.

(5) In this section, ***prescribed country means***:

(a) the United Kingdom, Canada and New Zealand;

(b) a country prescribed by the regulations for the purposes of this subsection; and

(c) a colony, overseas territory or protectorate of a country specified in paragraph (a) or of a country so prescribed.

1. New Zealand is, for the purposes of s 29 of the Bankruptcy Act, a “prescribed country”. The High Court of New Zealand is a court of that country which has jurisdiction in bankruptcy. It is that court which, via the letter of request, has requested this Court to act in its aid in relation to Mr Cooksley’s insolvency. There can therefore be no doubt that s 29(2)(a) of the Bankruptcy Act is engaged.
2. In *Re Ayres; Ex parte Evans* and by reference to earlier authority concerning predecessor analogues of s 29 of the Bankruptcy Act, Lockhart J observed (at 405):

The object of s. 29 is to enable all courts having jurisdiction under the Act, the courts of prescribed countries (including the United Kingdom, New Zealand and Canada ) and the courts of other countries having jurisdiction in bankruptcy to act in aid of and be auxiliary to each other in bankruptcy matters.

The section “does not create any new rights, but only creates new remedies for enforcing existing rights” (per Griffith C.J. who delivered the judgment of the High Court in *Hall v. Woolf*) (21). His Honour was speaking of s. 118 of the *Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52) (Imp.); but what he said applies also to s. 29 of the Act.

1. In the subsequent appeal to the Full Court, *Ayres v Evans*, each of Northrop J (at 247) and McGregor J (at 254) was of the view that, in those cases to which it applied, the presence of the verb, “shall” in s 29(2)(a) of the Bankruptcy Act, in contrast to the verb, “may” in s 29(2)(b) of that Act, indicated that the Court was bound to exercise the insolvency assistance jurisdiction there conferred but that the type of assistance which would be granted remained a matter for the exercise of a judicial discretion. In the exercise of the Court’s original jurisdiction, I consider that those views are binding on me. Authority from other jurisdictions, mentioned below, in relation to this longstanding assistance feature of international insolvency law jurisdiction puts the rendering of assistance in less imperative terms by stating that generally the jurisdiction will be exercised favourably. As *Ayres v Evans* nonetheless allows that, even where s 29(2)(a) of the Bankruptcy Act is applicable, the type of remedy to be granted remains a matter for the exercise of discretion, this difference may be more apparent than real in practice.
2. As I observed in *Gainsford v Tannenbaum* (2012) 216 FCR 543 at [57] (*Gainsford v Tannenbaum*), s 29 of the Bankruptcy Act has a lengthy provenance, not just in Australian bankruptcy law but also and hardly by coincidence in that of the United Kingdom and of other jurisdictions of British heritage, notably including for present purposes New Zealand. In turn, provisions such as s 29 are in part declaratory of the common law position that there is an ideal of universality of application with respect to bankruptcy proceedings: *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 at [14] to [20] (*Cambridge Gas*). In *Gainsford v Tannenbaum*, at [57], I expressed my agreement with the view of Heath J in *Williams v Simpson* [2011] 2 NZLR 380 at [82] (*Williams v Simpson*), in respect of the New Zealand equivalent of s 29, that the common law position as described for the Judicial Committee by Lord Hoffman in *Cambridge Gas* should inform the exercise of the discretion under s 29 of the Bankruptcy Act.
3. A feature of the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law* (Model Law), as adopted for Australia by s 6 of the Cross-Border Insolvency Act, is that it is expressly not intended to limit the jurisdiction otherwise possessed by this Court to assist courts of other nations exercising an insolvency jurisdiction: see Art 8 and also Art 25 and Art 26 of the Model Law.
4. One factor which, in *Re Ayres; Ex parte Evans* (at 407), Lockhart J regarded as relevant in deciding to make orders in responses to the letters of request in that case was that both New Zealand and Australia had “in essence the same sections in their bankruptcy legislation relating to requests by the courts of one country for the aid of the courts of the other country”. That remains the position. The Model Law has also, for New Zealand, been adopted by s 7 of the *Insolvency (Cross-border) Act 2006* (NZ) (Insolvency (Cross-border) Act). The present New Zealand analogue of s 29 of the Bankruptcy Act is s 8 of the Insolvency (Cross-border) Act, which goes further than s 29 in that it also extends to corporate insolvencies.
5. Such commonality of insolvency provision was likewise regarded as relevant by Heath J in In *Williams v Simpson*, at [74]. Referring to the jurisdiction to act in aid of the courts of another country in respect of insolvencies, his Lordship identified comity as one basis upon which relief might be fashioned, adding, “At least in countries with similar provisions to s 8, the Court will generally exercise its discretion in favour of giving assistance, unless there is some compelling reason not to do so.” He explained, at [75], what “comity” in this regard entailed by reference to *Cunard Steamship Co Ltd v Salen Reefer Services* *AB* 773 F.2d 452 (2d Cir. 1985) in which the Second Circuit of the US Court of Appeals held:

… the granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities ... . It has long been established that foreign trustees in bankruptcy were granted standing as a matter of comity to assert the rights of the bankrupt in American courts ... . Although the early cases upheld the priority of local creditors’ attachments ... the modern trend has been toward a more flexible approach which allows the assets to be distributed equitably in the foreign proceeding.

This explanation well accords with the notion, expounded in the advice of the Judicial Committee in Cambridge Gas, that a provision such as s 29 of the Bankruptcy Act, is in part declaratory of the common law. It also accords with the self-evident purpose of the Model Law. The long recognised importance of affording assistance, of “comity”, is, if anything, even greater in modern times when advances in science and technology have made the transfer of funds across international borders an almost instantaneous process and have also made the cost of international travel ever less expensive and thus more accessible. In relation to New Zealand, there is the added consideration that it is a feature of the closeness of Trans-Tasman relations between our respective countries that our respective citizens may live and work in each country virtually without restriction. The factual background to the present case is an exemplar of this.

1. As to the other foundation for the application, s 10 of the Cross-Border Insolvency Act materially provides:

**Courts competent to perform functions under Model Law**

The following courts are taken to be specified in Article 4 of the Model Law (as it has the force of law in Australia) as courts competent to perform the functions referred to in the Model Law relating to recognition of foreign proceedings and cooperation with foreign courts:

(a) if the functions relate to a proceeding involving a debtor who is an individual--the Federal Court of Australia; …

1. The Official Assignee’s affidavit evidence addresses the requirements found in r 14.03 of the *Federal Court (Bankruptcy) Rules 2016* (Cth) in respect of the seeking by a foreign representative of recognition of a foreign proceeding under Art 15 of the Model Law. In the circumstances of the present case, the proof of most of these requirements followed as a matter of New Zealand bankruptcy law once the filing of a debtor’s application to be adjudged a bankrupt and related statement of affairs by Mr Cooksley was proved.
2. The Official Assignee’s evidence includes such documents as signed by Mr Cooksley and filed with that Official. Provision for the filing of such an application by a debtor is made by s 12 of the Insolvency Act. The effect of s 47 of that Act is that Mr Cooksley became bankrupt upon the filing of that application. He was at that time and to adopt the terminology of that section “automatically adjudicated bankrupt”. The vesting effect of s 101 of the Insolvency Act has already been mentioned. After, acquired property also vests in the Official Assignee during the period of the bankruptcy: s 102, Insolvency Act.
3. From this it follows that the Official Assignee is, for the purposes of the Cross-Border Insolvency Act and in terms of the Model Law, a “foreign representative” and Mr Cooksley’s New Zealand bankruptcy is a “foreign proceeding”. The requirements for the Model Law recognition of the New Zealand bankruptcy are therefore met.
4. The evidence also establishes that there are no proceedings at all pending either in this Court or the Federal Circuit Court against Mr Cooksley, much less any Australian bankruptcy proceeding. As the Bankruptcy Act now stands, these are the only Australian courts which may exercise jurisdiction in respect of a matter arising under that Act. It is also established by due search that there is no extant Australian bankruptcy in respect of Mr Cooksley.
5. Regard to Mr Cooksley’s statement of affairs discloses that he is a New Zealand citizen and the holder of a current New Zealand passport. He also retains the services of an Auckland based accounting adviser. The principal creditor in his insolvency is the Crown in right of New Zealand in respect of a student loan debt in that country dating back to 1998. Each of the other debts disclosed, save for a modest credit card debt and an amount owed in respect of a motor vehicle appear to be owed to New Zealand based creditors.
6. Over the last five years, Mr Cooksley has lived in a number of different locations in the Northern Territory. Inferentially, he has chosen in recent years to follow a residentially itinerant existence in the Northern Territory so as to take up employment opportunities. Looking at the deductions from income disclosed in his statement of affairs, he presently lives in rented accommodation. He has a partner who is also employed but they have no children. Mr Cooksley’s mother remains in New Zealand. She has been nominated by him in his statement of affairs as an alternative contact for him.
7. The Official Assignee has neither sought the recognition of the New Zealand bankruptcy as a “foreign main proceeding” for the purposes of the Cross-Border Insolvency Act and in terms of the Model Law nor is any such recognition consensually promoted. Equally, Mr Cooksley does not assert that New Zealand is no longer his country of habitual residence. The operation and application of the Model Law in the case of individuals is by no means straightforward, as I endeavoured to highlight in *Gainsford v Tannenbaum*. It is not necessary in this case to reach any concluded view on the subject of “foreign main proceeding”. It is by no means clear that New Zealand should be regarded as Mr Cooksley’s country of former habitual residence. If anything, it rather looks as if the New Zealand bankruptcy should be regarded as the foreign main proceeding. Indeed, on the evidence, it is the *only* bankruptcy proceeding.
8. Given the large debt owed to the Crown in right of New Zealand, Mr Rodgers very properly raised for consideration the question of whether to afford any assistance at all either under the Bankruptcy Act or the Cross-Border Insolvency Act would be to enforce a foreign revenue law. He submitted, and the Australian bankruptcy law position is, in light of the Full Court’s affirmation in *Ayres v Evans* of the view expressed by Lockhart J in the original jurisdiction, that the affording of assistance under s 29 should not be regarded as one for the enforcement of a foreign revenue law. I can see no reason why the like conclusion should not follow in respect of the alternative basis upon which assistance is sought in this case namely, under the Cross-Border Insolvency Act. It is therefore immaterial that the particular New Zealand law provenance of the student loan debt was not explored in submissions. Its description in the statement of affairs, while suggesting that it is a Crown debt, does not suggest that it is in the nature of a taxation liability, as opposed to a liability resulting from a loan advance or perhaps a payment on behalf of a student to an educational institution by way of an expenditure of public funds pursuant to statute. Yet further, other creditors are also disclosed, none of whom is an emanation of the Crown in right of New Zealand. The Crown in right of New Zealand is just one of a number of creditors who will receive a dividend from the bankrupt estate after insolvency administration expenses are met.
9. For completeness, I should add that I have also considered whether, even if the student loan debt were not to be regarded as a taxation debt, the present application should nonetheless be refused, because it is a means of enforcing foreign statutory obligations. That was not the subject of any submission. The reasoning both in the original jurisdiction and on appeal in *Ayres v Evans* would seem to me to tell against any such basis for refusal. In the circumstances, it is not necessary further to explore the question.
10. New Zealand’s Official Assignee for the Southern Region, Mr Russell Fildes of Christchurch, has particular responsibility for the administration of Mr Cooksley’s bankrupt estate. It is not by coincidence that the letter of request has issued from the High Court of New Zealand’s Christchurch Registry. Under New Zealand law, each Official Assignee (and subordinate Assignees) is an officer of the High Court of New Zealand: s 399(2), Insolvency Act. The name in which, under New Zealand law (s 401(1), Insolvency Act), an Official Assignee is permitted to sue has been adopted for the purposes of the present application. It is both appropriate and convenient for the applicant to be so described, for that removes any need for an amendment of the applicant party as a consequence of a change in the holding of the office. A like procedure is now adopted in the practice of the Court in relation to the naming of a Minister of State or Secretary to a Department of State as a party.
11. Mr Fildes has, in his official capacity, given by affidavit the following undertakings to the Court in support of the application:

(a) That he will inform the Court of any changes in the status of the matter, or notify the Court of any foreign proceedings involving the Respondent of which he becomes aware;

(b) That all money or other property received by him in connection with the bankruptcy of the Respondent shall be applied in the due course of administration of the bankruptcy of the Respondent;

(c) That any matters of controversy in connection with the bankruptcy between the Applicant and any party resident in Australia shall be determined by this Court;

(d) That the Applicant submits to the jurisdiction of this Court in all such matters as aforesaid and agrees to abide by any order the Court may make subject to appeal;

(e) That the Applicant appoints RBG Lawyers to accept service on his behalf of any proceedings brought against him in relation to any matters of controversy as referred to in (c) above.

1. The inspiration for these undertakings is, as Mr Rodgers highlighted in his submissions, to be found in the orders which came to be made in *Re Ayres; Ex parte Evans*. Undertakings of this kind remain relevant and apt insofar as assistance is sought in reliance upon s 29 of the Bankruptcy Act. The Model Law does not make any express provision for the offering of undertakings as either a condition of recognition or as a condition precedent to the making of any particular orders as a sequel to recognition. Nonetheless, that such undertakings are given is not irrelevant to the exercise of a discretion as to the relief to grant under that jurisdictional foundation.
2. In *Re Ayres; Ex parte Evans* the New Zealand bankrupt had property in Australia namely, an interest in a deceased estate. The assistance sought was the appointment of a receiver in respect of that property. In the result, Lockhart J considered that the Australian official receiver ought to be appointed to fulfil that role. That was because, “The official receiver is more familiar with local law and practice, is present here and in a better position to execute the orders to be made. He is an officer of the Commonwealth under the control of this Court (see the definition of “officer” in s 5 (1) and also s 15 (2)) so there is no bar to his appointment” (at 408). In that case, the Official Assignee sought just such an appointment. In the present case, he does not, for reasons which follow.
3. At the time when *Re Ayres; Ex parte Evans* was decided and as the references by Lockhart J to the then provisions of the Bankruptcy Act bear out, each Australian official appointed as an Official Receiver was an officer of the Commonwealth subject to the control of the Court. As that Act then stood, there was no entity, corporation sole or otherwise, known as the Official Trustee. That entity came into existence by later amendment and is presently constituted as a body corporate (s 18 of the Bankruptcy Act). In *McGowan v Migration Agents Registration Authority* (2003) 129 FCR 118 at [26] Branson J remarked of the expression as used in s 75(v) of the Constitution, and on the basis of prior authorities to which she there referred, that they “favour the view that a body corporate cannot be an “officer of the Commonwealth””. I respectfully agree. There is no basis for concluding that the like expression as used in the definition of “officer” in s 5 of the Bankruptcy Act should be any differently construed. Thus the Official Assignee’s submission that the Official Trustee as presently constituted is not an “officer”, as defined, because it is not an “officer of the Commonwealth” should be accepted.
4. The Bankruptcy Act continues to make provision for the appointment of individuals as Official Receivers: s 15(1). Official Receivers exercise the powers, and perform the functions, of the Official Trustee: s 18(8). Each individual appointed as an Official Receiver is an “officer of the Commonwealth”. But Official Receivers are no longer expressed to be under the control of the Court. The present position is that an act undertaken by an Official Receiver may be reviewed by the Court (s 15(5)), via an application made pursuant to s 303 of the Bankruptcy Act. Only in this sense are Official Receivers subject to the Court’s “control”. A more apt contemporary description is that an Official Receiver is, on application, answerable to the Court for his actions. Whether or not that change is a reform is moot, as the present case may highlight, but it is a change from the position which prevailed at the time when *Re Ayres; Ex parte Evans* was decided.
5. Another later change is the enactment of the Cross-Border Insolvency Act. In adopting the Model Law, that Act envisages that a foreign representative in respect of a recognised foreign proceeding may (not must) directly be appointed to exercise particular powers in Australia: Art 19(1)(b). In the present case, what is sought by the Official Assignee and consensually promoted is the ordering of the payment and related collection and receipt of a particular income contribution. Though it once did not, Australian bankruptcy law, as with that of New Zealand, now makes provision (see Div 4B of the Bankruptcy Act) for the payment of income contributions by a bankrupt for the benefit of creditors and for a related provision of information and determination of the required contribution. As it happens, the Official Assignee has chosen to assess the periodic contribution which Mr Cooksley ought to make from his income by reference to the amount that he would be required to contribute were he to have been made bankrupt in Australia. It is by reference to this amount that the parties have come to a consensual position as to the contribution which ought to be ordered. That amount is not in excess of that which would have been applicable had Mr Cooksley been made bankrupt in Australia. Neither s 29 of the Bankruptcy Act nor the Cross-Border Insolvency Act dictates that there must be any symmetry of income contribution. Even so, it will hardly work an injustice or inflict unwarranted hardship on Mr Cooksley that the amount he has to pay is no greater than that which he would have had to pay had he been made bankrupt in Australia.
6. The Official Assignee has procured the consent of an Australian registered trustee to act as a receiver if the Court determines that such an appointment is necessary. I do not consider that such an appointment is either necessary or even desirable. The amount of the agreed income contributions is, in a relative sense, modest (A$433.00 per month). It is neither in Mr Cooksley’s interest nor that of his creditors that it be diminished both by the New Zealand statutory fees of the Official Assignee as well as the fees of a receiver. The Official Assignee will be able to call on the services of solicitors well experienced in Australian bankruptcy law if necessary in the administration of the order in respect of the collection and payment of the income contribution, as his present representation attests. In any event, it is difficult to envisage any great difficulty here, given that all that is entailed is the making of an income contribution, which would readily lend itself to a standing electronic transfer authority as between Mr Cooksley, his bank and the Official Assignee.
7. For these reasons, I do not propose to appoint a receiver. Because of that, it is unnecessary further to explore whether, in the present absence of express statutory control by the Court, an Official Receiver could have been directly appointed to undertake that role, other than on the basis of a consent by that official. I am inclined to the view that an Official Receiver could not have been so appointed. In relation to international insolvency practice, that may very well be a derogation from the position which prevailed at the time when *Re Ayres; Ex parte Evans* was decided. As against that and as noted, the Cross-Border Insolvency Act envisages that recognised foreign representatives may directly be empowered to undertake particular functions in Australia. These could include the functions of a receiver. Even so, that might not always be apt and neither might it always be possible to find a registered private trustee who is ready and willing to undertake that role. Bankruptcies entailing modest recoveries of income or property might be just such a case. In short, the loss of control over Official Receivers may well have removed a “fail-safe”.
8. I accept that s 29 of the Bankruptcy Act and s 10 of the Cross-Border Insolvency Act provide ample authority for the making of the orders consensually promoted.
9. The Official Assignee’s appointment (as a foreign representative) and the New Zealand bankruptcy (as a foreign proceeding) should be recognised in Australia, as should the vesting effect under New Zealand law in respect of property and after acquired property. That is so even though no particular property is disclosed in Mr Cooksley’s statement of affairs.
10. For the purposes of facilitating the administration of the recognised proceeding by the Official Assignee, particularly including the collection and receipt of the agreed income contribution, that official should be empowered to exercise all powers as are conferred on a trustee in bankruptcy as if Mr Cooksley had been declared a bankrupt under the Bankruptcy Act on 5 May 2016 and the Official Assignee were the trustee of the property of Mr Cooksley under that Act. That empowerment should expressly extend to those powers which would be exercisable by a trustee under Div 4B of the Bankruptcy Act.
11. The promoted orders appropriately make provision for an application to the Court, on notice to the Official Assignee, either by Mr Cooksley or an affected third party in respect of the operation of the orders. It is agreed by the parties and appropriate to order that the costs of the present application should be the Official Assignee’s costs in the administration of the bankrupt estate of Mr Cooksley.

|  |
| --- |
| I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 6 October 2017