IN THE COURT OF APPEAL OF NEW ZEALAND

CA206/2014
[2015] NZCA 118

BETWEEN	TRUSTEES EXECUTORS LIMITED Appellant
AND	THE OFFICIAL ASSIGNEE Respondent

Hearing:	18 March 2015
Court:	Randerson, Harrison and Wild JJ
Counsel:	C M Stevens and N D Chapman for Appellant M J Andrews, R D Garden and G E Slevin for Respondent P D McKenzie QC as counsel assisting the Court
Judgment:	17 April 2015 at 10:00 am
Reissued:	15 May 2015
Effective date of Judgment:	17 April 2015

JUDGMENT OF THE COURT

A The respondent's application for leave to adduce further evidence on appeal is granted.

B The appeal is allowed.

C The cross-appeal is dismissed.

D The declarations made in the High Court are set aside save for declaration (a).

E This Court declares that the KiwiSaver interests of the bankrupts do not vest in the respondent under ss 101 or 102 of the Insolvency Act 2006.

F The respondent must pay the appellant one set of costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] The principal issue in this appeal is whether the respondent (the OA) is entitled to the benefit of the KiwiSaver accounts of persons who are adjudicated bankrupt. The appellant (TEL) is the trustee of the KiwiSaver accounts of two bankrupts, Mr T and Mr H, who are the immediate focus of this appeal. However, the parties recognise that the resolution of the issue will affect many bankrupts who contribute to KiwiSaver schemes.

[2] The OA submitted in the High Court that:

(a) The KiwiSaver accounts were "property" for the purposes of ss 101 and 102 of the Insolvency Act 2006 (the IA).

(b) The balances in the bankrupts' KiwiSaver accounts at the date of adjudication and any additional sums accumulating during the period of their bankruptcy vested in the OA.

(c) The OA was entitled to access the funds held in the KiwiSaver accounts under the provisions of the KiwiSaver Act 2006 (the KSA), in particular sch 1 (the KiwiSaver Rules) that allow for early withdrawal of the funds in the case of "significant financial hardship".

[3] Ronald Young J accepted the OA's submissions on the first two issues but not on the third.[1] He found that the OA could not automatically access the KiwiSaver accounts under the early withdrawal provisions. The OA would have to wait until the accounts matured, typically when the bankrupts reached 65 years of age.[2]

[4] The Judge acknowledged that his findings were likely to be unsatisfactory and would be unattractive for all concerned.[3] He said legislative reform was clearly called for.

[5] The parties now accept the High Court's finding on the first issue. That is, that the funds held in the KiwiSaver accounts are "property" for the purposes of ss 101 and 102 of the IA. But TEL appeals against the second finding, submitting that s 127 of the KSA means that the funds do not vest in the OA. For her part, the OA cross-appeals, asserting that the High Court erred in determining that she cannot automatically access the funds under the early withdrawal provisions.

[6] The issues are therefore:

(a) Does the KiwiSaver interest of a bankrupt vest in the OA under ss 101 and 102 of the IA or is s 127 of the KSA effective to prevent vesting?

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1 *Official Assignee v Trustees Executors Ltd* [2014] NZHC 345 [High Court judgment].
2 KiwiSaver Act 2006, sch 1, cl 4 and New Zealand Superannuation and Retirement Income Act 2001, s 7.
3 At [111].

(b) Did the High Court err in finding that bankruptcy does not always constitute significant financial hardship under the early withdrawal provisions of the KSA?

[7] We record that we granted leave to the OA to file an updating affidavit dealing with the number of bankrupts with KiwiSaver accounts and the sums potentially at stake. We accepted this material on the footing that it was indicative background information.

Background facts

[8] In her updating affidavit, Ms Cox, the Deputy OA for New Zealand, deposed that, as at 26 January 2015, there were 5,559 bankrupts with KiwiSaver accounts with a total known value of over $27.3 million. The average value of these accounts is $6,070. Ms Cox further stated that 58 per cent of bankrupts with a KiwiSaver account are less than 50 years of age. She said that if the High Court judgment stands, the OA would have to wait in most cases at least 15 years before the OA would be entitled to access the KiwiSaver accounts when the bankrupt turns 65 years of age.

[9] One of the bankrupts, Mr T, has been a member of a KiwiSaver scheme since 2007 and was adjudicated bankrupt in June 2010 at the age of 25. His proofs of debt amounted to $26,254 although there may have been other unproved debts. There are no assets in the bankrupt estate other than Mr T's KiwiSaver interest amounting to $11,860.46 at the date of adjudication.

[10] The second bankrupt, Mr H, has been a member of a KiwiSaver scheme since January 2008. He was adjudicated bankrupt on 4 November 2010 at the age of 34. Claims notified by creditors amounted to a sum in excess of $32,000 although proofs of debt for only $9,583 were actually received. Mr H has no assets other than his

KiwiSaver account and a small tax refund. His KiwiSaver interest totalled $10,805.98 at the date of adjudication.[4]

[11] The issues before the High Court arose when the OA asked TEL to release the funds in the KiwiSaver accounts of the two bankrupts under the significant financial hardship provisions of the KSA. TEL refused to release the funds contending that the KiwiSaver interests of the bankrupts were not property and did not vest in the OA on their bankruptcy. TEL took the view that, in any event, the significant financial hardship provisions of the KSA would not permit the early release of the funds.

The key statutory provisions

[12] We will discuss the statutory framework in fuller detail below but, for present purposes, we set out the key sections of the IA and KSA relevant to the first issue.

[13] Excluding parts not relevant for present purposes, ss 101, 102 and 105 of the IA state:

> **101 Status of bankrupt's property on adjudication**
>
> (1) On adjudication,—
>
> (a) all property (whether in or outside New Zealand) belonging to the bankrupt or vested in the bankrupt vests in the Assignee without the Assignee having to intervene or take any other step in relation to the property, and any rights of the bankrupt in the property are extinguished; and
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> (b) the powers that the bankrupt could have exercised in, over, or in respect of any property (whether in or outside New Zealand) for the bankrupt's own benefit vest in the Assignee.
>
> …
>
> **102 Status of property acquired during bankruptcy**
>
> (1) Between the commencement of bankruptcy and discharge of the bankrupt,—

[4] As we note later, not all of this would be available to his creditors if the Official Assignee (OA) were able to access these sums since the Crown contribution to Mr H's KiwiSaver account (including a "kick-start" payment of $1,000 and tax credits of $868.57 for 2009 and $1,042.86 for 2010) may not be withdrawn under the early withdrawal provisions.

(a) all property (whether in or outside New Zealand) that the bankrupt acquires or that passes to the bankrupt vests in the Assignee without the Assignee having to intervene or take any other step in relation to the property, and any rights of the bankrupt in the property are extinguished; and

(b) the powers that the bankrupt could have exercised in, over, or in respect of that property for the bankrupt's own benefit vest in the Assignee.

…

105 Effect of other laws

(1) Nothing in the Land Transfer Act 1952 restricts the operation of sections 101 to 104.

(2) Sections 101 to 104 do not affect the operation of any other law that prevents any property from vesting in the Assignee.

[14] As it now stands, s 127 of the KSA provides:[5]

127 Member's interest in KiwiSaver scheme not assignable

(1) Except as expressly provided in this Act, a member's interest or any future benefits that will or may become payable to a member under the KiwiSaver scheme must not be assigned or charged or passed to any other person whether by way of security, operation of law, or any other means.

(2) However, subsection (1) does not prevent a member's interest or any future benefits that will or may become payable to a member under the KiwiSaver scheme from being released, assigned, or charged, or from passing to any other person if it is required by the provisions of any enactment, including a requirement by order of the court under any enactment (including an order made under section 31 of the Property (Relationships) Act 1976).[6]

[15] The interrelationship of the provisions of the IA and the KSA lies at the heart of this appeal. Unless s 127(2) applies, s 127(1) prevents the KiwiSaver interest of a bankrupt from vesting in the OA. By virtue of s 105(2) of the IA, s 127(1) would have that effect notwithstanding ss 101 and 102 of the IA. However, the submission for the OA is that s 127(2) of the KSA means that the protection of the KiwiSaver interest that would otherwise be available under s 127(1) does not apply. The OA

5 Section 127 replaced s 196 of the KiwiSaver Act with effect from 1 December 2014 (by virtue of s 92 of the Financial Markets (Repeals and Amendments) Act 2013). However, there is no material difference between s 196 and the present s 127.

6 Clause 7 of sch 1 of the KiwiSaver Act imposes certain obligations on the manager of a KiwiSaver scheme that are consistent with s 127(2) but we do not consider this provision adds anything material to s 127(2) itself.

submits that ss 101 and 102 of the IA "require" the release or assignment of a bankrupt's interest in the KiwiSaver scheme. If that is so, the OA submits that s 127 of the KSA does not prevent any property from vesting in the OA.

The findings in the High Court

[16] A substantial part of the High Court judgment was concerned with TEL's argument that the bankrupt's interest in a KiwiSaver account was not "property" within the meaning of the IA. As noted, the Judge's finding to the contrary is no longer at issue.

[17] As to the interrelationship between the IA and the KSA, the Judge considered that the question was whether, in terms of s 105(2) of the IA, there was "any other law" in the KSA which prevented the property vesting in the OA. He noted that s 127(2) of the KSA authorised a member's KiwiSaver interest or future benefits under the scheme to be paid to another if it was required by any other enactment. The Judge found:[7]

> Thus, when considered as a whole, [s 127] of the KiwiSaver Act 2006 does not prevent property vesting in the Assignee. It limits the circumstances under which this can happen. If a statute or a court order requires a member's KiwiSaver interests to vest in another, then that will be done. [Section 127] is not therefore another law which prevents property from vesting in the Assignee. On the contrary, subs (2) permits vesting if required by law.

[18] Ronald Young J went on to reject TEL's argument that s 127(2) requires specific reference to the provisions of the KSA before a KiwiSaver interest could vest in the OA. He considered that the IA required all property to vest in the OA on bankruptcy. The Judge also rejected TEL's argument that there was a measure of circularity in the relevant provisions of the IA and the KSA. He concluded that:[8]

> When read as a whole, [s 127] does not in my view entail an absolute prohibition against vesting of a member's KiwiSaver interest. It permits members' interests or future benefits in another to be passed to another person if so required by law. Sections 101 and 102 require such a passing. Section 105(2) applies only to the operation of a law that prevents property from vesting in the Assignee. [Section 127] considered as a whole does not do that. It prevents vesting with exceptions where required by law, and ss

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7 High Court judgment, above n 1, at [70].
8 High Court judgment, above n 1, at [73].

> 101 and 102 entail such a requirement. I am therefore satisfied that ss 101 and 102 of the Insolvency Act 2006 apply to a bankrupt's KiwiSaver account.

[19] The High Court Judge also rejected TEL's submission that a bankrupt's KiwiSaver account could not vest in the OA because the KSA provides that the Act applies only to natural persons.[9] A submission by TEL that vesting of a bankrupt's interest in the OA would breach the KSA because it provides that a person can only be a member of one KiwiSaver scheme at a time was also rejected.[10]

[20] However, Ronald Young J did not accept the OA's argument that early withdrawal of the KiwiSaver funds from a bankrupt's account would always be available under the significant financial hardship provisions of the KiwiSaver Rules.[11] After careful analysis of these provisions, the Judge concluded that applications under those provisions were properly decided on an individual basis in the exercise of the discretion vested in the trustee of the relevant funds.

[21] For example, the Judge concluded that in Mr T's case, the alleviation of his financial hardship occurred at bankruptcy. Since he was relieved from the obligation to pay his debts, partial payment of his creditors would not have alleviated hardship through an inability to pay his debts. On the other hand, the Judge considered that Mr H's position might be different. Since the funds of his KiwiSaver account exceeded his proven debts, he might be in a position to have his bankruptcy annulled.

The legislation in more detail

[22] It is a feature of the IA and the KSA that each received the royal assent within two months of each other yet neither refers to the other in any material respect. The KSA received royal assent on 6 September 2006 and the relevant provisions came into effect on 1 December 2006.[12] The IA received royal assent on 7 November 2006 and came into effect on 3 December 2007.[13] There is nothing in relevant

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9 KiwiSaver Act, ss 4 and 6.
10 KiwiSaver Act, s 53(3).
11 KiwiSaver Act, sch 1, cls 10 and 11.
12 KiwiSaver Act 2006 Commencement Order 2006, cl 2(2).
13 Insolvency Act 2006 Commencement Order 2007, cl 2.

Parliamentary materials to assist on how each enactment was intended to relate to the other.[14]

[23] There are two other features of significance to the outcome of this appeal:

(a) The IA is legislation of general application while the KSA applies specifically to retirement savings.

(b) The IA has no specifically stated purpose whereas the KSA contains an express purpose statement.

[24] We now address each of the two enactments in turn.

The Insolvency Act

[25] The Insolvency Act 2006 replaced the Insolvency Act 1967. Although it has no specific purpose provision, the relevant purposes were identified during the passage of the Insolvency Bill 2006 through Parliament. At the First Reading of the Insolvency Law Reform Bill 2005, the Acting Minister of Commerce said:[15]

> The objectives were: to provide a predictable and simple regime for financial failure that can be administered quickly and efficiently without imposing unnecessary compliance and regulatory costs on its users and that does not stifle innovation, responsible risk-taking, and entrepreneurialism by excessively penalising business failure; to distribute the proceeds to creditors in accordance with their relative pre-insolvency entitlements; to maximise returns to creditors by providing flexible and effective methods of insolvency administration and enforcement that encourage early intervention when financial distress first becomes apparent; to enable individuals in bankruptcy to participate again fully in the economic life of the community; and to promote international cooperation in relation to cross-border insolvencies.

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[14] Mr Andrews noted that when the KiwiSaver Bill 2006 (21-3) was introduced, the clause dealing with what was then described as "serious financial hardship" excluded bankruptcy but this exemption was removed at the Select Committee stage. He accepted however, that little assistance could be gained from this change since the reasons for it were never explained in the Committee's report nor mentioned in Parliamentary debates.

[15] (21 February 2006) 629 NZPD 1318 (Hon Judith Tizard). The Insolvency Bill 2006 (14-3A) was formerly part of the Insolvency Law Reform Bill 2005 (14-2).

[26] These sentiments were echoed during the Third Reading by the Minister of Commerce:[16]

> These bills [including the Insolvency Bill] are designed to promote innovation, responsible risk-taking, and entrepreneurialism by not excessively penalising business failure. They are designed to distribute the proceeds to creditors in an equitable manner and in accordance with their relative pre-insolvency entitlements. They are designed to maximise returns to creditors by providing flexible and effective methods of insolvency administration and enforcement that encourage early intervention when financial distress first becomes apparent. They are designed to enable individuals in bankruptcy to participate fully again in the economic life of the community …

[27] The authors of *Heath and Whale on Insolvency* state:[17]

> Judicial comment through the latter part of the 20th century has made it clear that bankruptcy is not to be seen as a punitive process, but primarily to do the best for creditors that can be done out of bankrupts' property, and otherwise to give bankrupts an opportunity, after a period of time, to continue their lives free of the debts that caused the bankruptcy.

[28] As Mr Andrews for the OA pointed out, bankruptcy affects the legal status of a person and has important consequences. Some of these are referred to in s 7 of the IA: the bankrupt's property vests in the OA; the bankrupt is limited in business activities he or she can undertake; and the OA may be entitled to recover assets that the bankrupt has transferred before bankruptcy. Other significant consequences are that, in general, the bankrupt is entitled to an automatic discharge three years after the bankruptcy commences and is then released from responsibility for almost all debts provable in the bankruptcy.[18]

[29] The status of a bankrupt's property is set out in subpart (1) of pt 3 of the IA. We have already mentioned ss 101, 102 and 105. These provide for vesting in the OA of the bankrupt's property at the date of adjudication and all property acquired

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16 (26 October 2006) 634 NZPD 6171 (Hon Lianne Dalziel). The Third Reading speech also refers to "minor…consequential amendments made as a result of the enactment of the KiwiSaver Act" at the Committee stage. This reference is not relevant as it refers to s 274(2)(g) of the Insolvency Act 2006, which refers to the KiwiSaver Act in terms of obligations on the Assignee to pay preferential creditors (in this case, to pay employees of bankrupts the employer's contributions).

17 Paul Heath and Mike Whale *Heath and Whale: Insolvency Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) at [2–2].

18 Insolvency Act, ss 290 and 304.

by or passing to the bankrupt between the commencement of bankruptcy and the bankrupt's discharge. Under the Act "property" is widely defined as meaning:[19]

> … property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise.

[30] In terms of ss 101(1)(b) and 102(1)(b), the powers that the bankrupt could have exercised in respect of any property also vest in the OA. However, it is common ground that the OA has no greater powers under these provisions than those available to the bankrupt.

[31] Upon adjudication, a bankrupt has a general duty to assist the OA in the realisation of his or her property and the distribution of the proceeds among the creditors.[20] There are certain restrictions during bankruptcy such as the prohibition from entering business and the bankrupt may be required by the OA to contribute towards payment of the bankrupt's debts.[21] The IA provides that a bankrupt is automatically discharged from bankruptcy three years after the bankrupt files a statement of affairs at the commencement of the bankruptcy unless the OA or a creditor has objected to the discharge.[22] As noted, upon discharge, the bankrupt is released from all debts provable in the bankruptcy with some specific exceptions.[23]

[32] The IA also allows for an annulment of the adjudication of a bankrupt in certain circumstances including where the court is satisfied that the bankrupt's debts have been fully paid and that the OA's costs have been met.[24] The effect of an annulment is that all property of the bankrupt vested in the OA on bankruptcy and not sold or disposed of, revests in the bankrupt.[25] If there is no annulment, any property that has vested in the OA remains available to the OA despite the bankrupt's discharge.[26]

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19 Insolvency Act, s 3.
20 Insolvency Act, s 138.
21 Insolvency Act, ss 147 and 149.
22 Insolvency Act, s 290.
23 Insolvency Act, s 304.
24 Insolvency Act, s 309.
25 Insolvency Act, s 311.
26 *Official Assignee v Probert* HC Palmerston North CP216/90, 12 November 1990 at 6–7; aff'd *Probert v Official Assignee* CA328/90, 19 June 1992.

[33] Finally, we note that the IA contains provisions that enable the OA to seek a court order cancelling "irregular transactions".[27] These provisions would enable the OA to recover, for example, payments made by a bankrupt into a KiwiSaver account that would constitute dispositions to the prejudice of creditors made by the bankrupt while insolvent.[28]

The KSA

[34] Section 3 of the KSA sets out the purpose of the Act and provides for the establishment of KiwiSaver schemes:

> **3 Purpose**
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> (1) The purpose of this Act is to encourage a long-term savings habit and asset accumulation by individuals who are not in a position to enjoy standards of living in retirement similar to those in pre-retirement. The Act aims to increase individuals' well-being and financial independence, particularly in retirement, and to provide retirement benefits.
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> (2) To that end, this Act provides for schemes (KiwiSaver schemes) to facilitate individuals' savings, principally through the workplace.

[35] Members are automatically enrolled in a KiwiSaver scheme on commencing new employment or may opt in at any time.[29] Minimum contribution rates are required for employees and their employers.[30] The "member's interest" comprises three elements:[31]

> (a) The member's own financial contributions;[32]
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> (b) The employer's financial contribution where applicable;[33] and

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27 Insolvency Act, s 206–209.
28 See Insolvency Act, s 206(1)(d) and subpart 6 of pt 6 of the Property Law Act 2007.
29 KiwiSaver Act, ss 9, 10 and 33.
30 KiwiSaver Act, ss 64–66 and sch 1, cl 3.
31 Defined by the KiwiSaver Act, s 3.
32 In the case of an employed person, a fixed proportion is deducted from wages or salary: KiwiSaver Act, s 64(1).
33 KiwiSaver Act, s 64(1).

(c) The initial "kick-start" payment by the Crown of $1,000 and annual tax credits.[34]

[36] Critically, a member's KiwiSaver interest is effectively "locked-in" to the KiwiSaver scheme.[35] Subject to specific exceptions which we discuss below, it is not accessible until members reach the KiwiSaver "end payment date". For most purposes this will be when the member turns 65.[36] In the event of the member's death, the value of the member's interest is payable to his or her personal representative.[37]

[37] Subpart 2 of pt 4 of the Financial Markets Conduct Act 2013 has recently introduced strict governance obligations for "managed investment schemes" which include KiwiSaver schemes. Such schemes must be registered under the Act and must have a licensed manager and supervisor whose duties are specified.[38] Section 128 imposes additional requirements for KiwiSaver schemes. Amongst other things, the scheme must provide that contributions are allocated on an individual basis and the purpose of the scheme must be to provide retirement benefits "directly to individuals".[39] Any such scheme:[40]

> … must, accordingly, restrict redemptions, withdrawals and the provision of benefits in respect of a member's accumulation (including in the way the trust deed is applied) to those permitted under the KiwiSaver scheme rules under the KiwiSaver Act 2006.

[38] These provisions reinforce the clear Parliamentary intention to lock in savings for the future benefit of individual members and to permit early withdrawals only in carefully constrained circumstances. The new regime also emphasises the responsibilities placed on managers and supervisors in the administration of schemes such as KiwiSaver.

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34 KiwiSaver Act, ss 4 and 226; and Income Tax Act 2007, s MK1.
35 KiwiSaver Act, sch 1, cl 4.
36 KiwiSaver Act, sch 1, cl 4.
37 KiwiSaver Act, sch 1, cl 9.
38 Financial Markets Conduct Act 2013, s 127.
39 Financial Markets Conduct Act, ss 128(1)(b) and 128(1)(e).
40 Financial Markets Conduct Act, s 128(1)(c).

[39] The rules permitting withdrawal from a KiwiSaver scheme are tightly prescribed in sch 1 of the KSA. Those relevant for present purposes are cases of significant financial hardship which includes that arising from serious illness. Other withdrawals are permitted to enable a member to purchase a first home and transfers to foreign schemes may be permitted, for example, on permanent emigration from New Zealand.[41]

[40] The rules permitting withdrawal in the case of significant financial hardship and serious illness are directly associated with the personal circumstances of the member. Clauses 10 and 11 of sch 1 of the KSA provide:

> **10 Withdrawal in cases of significant financial hardship**
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> (1) If the manager (in the case of a restricted KiwiSaver scheme) or the supervisor (in the case of any other KiwiSaver scheme) is reasonably satisfied that a member is suffering or is likely to suffer from significant financial hardship, the member may, on application to that manager or supervisor in accordance with clause 13, make a significant financial hardship withdrawal in accordance with this clause.
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> (2) The amount of that significant financial hardship withdrawal may, subject to the manager's approval (in the case of a restricted KiwiSaver scheme) or the supervisor's approval (in the case of any other KiwiSaver scheme) under subclause (3), be up to the value of the member's accumulation less the amount of the Crown contribution (disregarding any positive or negative returns for the purpose of calculating the amount of the Crown contribution) on the date of withdrawal.
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> (3) The manager (in the case of a restricted KiwiSaver scheme) or the supervisor (in the case of any other KiwiSaver scheme)—
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> (a) must be reasonably satisfied that reasonable alternative sources of funding have been explored and have been exhausted; and
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> (b) may direct that the amount withdrawn be limited to a specified amount that, in the opinion of the manager (in the case of a restricted KiwiSaver scheme) or the supervisor (in the case of any other KiwiSaver scheme), is *required to alleviate the particular hardship*.
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> **11 Meaning of significant financial hardship**
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> (1) For the purposes of these rules, significant financial hardship includes significant financial difficulties that arise because of—

[41] KiwiSaver Act, sch 1, cls 8 and 14.

(a) *a member's inability to meet minimum living expenses*; or

(b) a member's inability to meet mortgage repayments on his or her principal family residence resulting in the mortgagee seeking to enforce the mortgage on the residence; or

(c) the cost of modifying a residence to meet special needs arising from a disability of a member or a member's dependant; or

(d) the cost of medical treatment for an illness or injury of a member or a member's dependant; or

(e) the cost of palliative care for a member or a member's dependant; or

(f) the cost of a funeral for a member's dependant; or

(g) the member suffering from a serious illness.

(2) In this section, serious illness has the meaning given to it by clause 12(3).

(emphasis added)

[41] The rules provide that significant financial difficulties may arise, amongst other things, from the serious illness of a member. If so, a withdrawal may be permitted up to the value of the member's accumulation.[42] "Serious illness" is defined as meaning:[43]

… an injury, illness or disability–

(a) that results in the member being totally and permanently unable to engage in work for which he or she is suited by reason of experience, education, or training, or any combination of those things; or

(b) that poses a serious and imminent risk of death.

[42] A member's application for a withdrawal must be made in a form required by the relevant manager or supervisor of the scheme and must include a completed statutory declaration in respect of the member's assets and liabilities.[44] A member may be required to provide evidence of the facts necessary to establish a right of withdrawal.[45] In the case of withdrawal on the grounds of serious illness, the

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42 KiwiSaver Act, sch 1, cl 12(2).
43 KiwiSaver Act, sch 1, cl 12(3).
44 KiwiSaver Act, sch 1, cl 13(1) and (1B).
45 KiwiSaver Act, sch 1, cl 6.

manager or supervisor may require that any medical matter be verified by medical evidence and may also require that any other documents or information produced in support of the application be verified by oath or statutory declaration.[46]

[43] In terms of cl 10, if the manager or supervisor is reasonably satisfied that a member is suffering or is likely to suffer from significant financial hardship, the member may make a withdrawal on that ground. The amount of the withdrawal is subject to the approval of the manager or supervisor but may be up to the value of the member's accumulation (the total contributions by the member and the employer) but does not include the amount of the Crown contribution.

[44] Clause 10(3) is significant for two reasons. First, the manager or supervisor must be reasonably satisfied that reasonable alternative sources of funding have been explored and have been exhausted. Second, the manager or supervisor has the power to direct that any withdrawal be limited to a specified amount that, in his or her opinion, is "required to alleviate the particular hardship".[47]

[45] While, as Mr Andrews pointed out, the definition of significant financial hardship in cl 11 is not exhaustive, the seven specific categories identified all focus on the personal circumstances of the particular member or the member's dependants.

[46] The OA contends that a bankrupt member would automatically qualify for a withdrawal on the grounds of cl 11(1)(a), the member's inability to meet minimum living expenses. To the contrary, Mr Stevens for TEL and Mr McKenzie QC as counsel to assist the Court, submit that the phrase "minimum living expenses" is inapt to include a bankrupt's general creditors in an insolvency. We deal with this issue in our analysis below.

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46 KiwiSaver Act, sch 1, cl 13(2).

47 It appears that the amount that may be withdrawn under cl 12 in the case of "serious illness" of a member may not be a matter over which there is a discretion vested in the manager or supervisor – see cl 12(2).

First issue – does the KiwiSaver interest of a bankrupt vest in the OA under ss 101 and 102 of the IA or is s 127 of the KSA effective to prevent vesting?

The rival contentions

[47] Mr Stevens submitted that s 127 prevented a bankrupt's interest from vesting in the OA on and during bankruptcy. The essence of his argument was that the protection of a member's KiwiSaver interest was expressed in strong language in subs (1); any exception to that protection would need to be by express language. If the OA's interpretation of the legislation were accepted, the outcome would be so unworkable that it could not have been intended by Parliament. The OA's interpretation would be contrary to the purpose of the KSA and inconsistent with a general statutory policy to protect superannuation funds and state-provided benefits. Finally, Mr Stevens submitted that, if necessary, TEL relied on the maxim *generalia specialibus non derogant*: s 127 of the KSA was a specific provision in a specific act relating to KiwiSaver interests which should prevail over the IA as a general enactment affecting all property of the bankrupt.

[48] Mr Andrews supported the High Court judgment, contending that the IA vested all property of the bankrupt in the OA unless another enactment specifically excluded such vesting. It was not necessary for s 127(2) of the KSA to refer expressly to the IA in order to create an exception to the protection of the alienation of KiwiSaver interests otherwise provided by s 127(1). The OA's interpretation was consistent with the purpose of the IA and would not result in unworkable consequences. Finally, the maxim *generalia specialibus non derogant* has no application.

Analysis

[49] It is axiomatic that the meaning of an enactment is to be ascertained from its text and in the light of its purpose.[48] In determining purpose, the court may have regard to both the immediate and general legislative context, as well as the social, commercial and other objectives of the enactment.[49] Where there is an apparent

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[48] Interpretation Act 1999, s 5.

[49] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

inconsistency between two enactments, the court must strive to find a construction that reconciles the enactments.[50]

[50] Finally, it is a well-established principle of construction that where a statutory provision is susceptible to different meanings, the court is likely to prefer an interpretation that will be practical and sensible.[51] Putting that another way, it is unlikely Parliament would have intended an outcome that is unworkable or ineffective. This last principle assumes substantial importance in the present case since, for reasons we later set out, we have concluded that even if the bankrupt's KSA interest does vest in the OA, the funds would be locked in and could not generally be accessed by the OA until the member reaches the age of 65.

[51] Addressing first the language of the relevant provisions, we accept Mr Stevens' submission that s 127(1) of the KSA is expressed in emphatic terms: a member's interest must not be assigned, charged or passed to any other person whether by way of security, operation of law or any other means "except as *expressly provided* in this Act" (emphasis added). Mr Andrews accepted that, but for s 127(2), this provision would be effective to prevent vesting of the member's KiwiSaver interest in the OA.

[52] Given the strong language of s 127(1), we consider that divestment of a member's KiwiSaver interest is not "required by the provisions of any enactment" in terms of s 127(2) unless the enactment expressly provides for the vesting in a third party of the member's interest in a KiwiSaver scheme. As Mr McKenzie submitted, the word "it" in s 127(2) refers back to a member's interest, or any future benefits payable under the KiwiSaver scheme. It is that specific interest which another enactment must require to be released or passed to that other person. We are satisfied that ss 101 and 102 of the IA are stated in general terms and do not expressly require the vesting of a member's interest in a KiwiSaver scheme. It follows that the member's interest is not "required" to pass to the OA in terms of

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50 *Terranova Homes and Care Ltd v Faitala* [2013] NZCA 435, (2013) 10 NZELR 849 at [26].

51 JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 329 citing *Director-General of Education v Morrison* [1985] 2 NZLR 430 (CA) at 435 and *Official Assignee v Noonan* [1988] 2 NZLR 252 (CA) at 255.

s 127(2). It also follows that s 127(1) prevents the member's interest from vesting in the OA under s 105(2) of the IA.

[53] Our interpretation is supported by the specific reference in s 127(2) to an exemption from alienation by court orders under any enactment, including an order made under s 31 of the Property (Relationships) Act 1976. This Act enables the court to make orders in relation to a "superannuation scheme entitlement" in the context of relationship property disputes. The definition of such a scheme under s 2 of the Property (Relationships) Act is sufficiently wide to include a member's interest in a KiwiSaver scheme. Although we accept that the reference in s 127(2) to the making of such orders is not exclusive, it is a statutory indicator that the legislature intended that any derogation from the clear language of s 127(1) in the case of a superannuation scheme such as KiwiSaver should be clearly and expressly provided for in some other enactment.

[54] The interpretation we prefer is also supported by the express statutory purpose of the KSA. The objective of the KSA is to encourage a long-term savings habit and the accumulation of funds that will increase the wellbeing and financial independence of individuals, particularly in retirement. There is nothing in the KSA to suggest that a purpose of the legislation is to accumulate funds for the benefit of creditors in the event of the member's bankruptcy. If that were the case, the important social and economic purposes of the KSA would be undermined and the burden of providing for the welfare of individuals would fall back on the state.

[55] Mr Stevens submitted that the interpretation advanced by TEL was supported by other statutory enactments that demonstrate a statutory policy of protecting superannuation entitlements and benefits provided by the state. He pointed, for example, to s 84 of the Social Security Act 1964 which provides that, subject to the provisions of certain specified enactments,[52] no benefit shall be capable of being assigned or charged or of passing to any other person by operation of law. This provision was considered by Cook J in *Official Assignee v Attorney-General*.[53] He

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[52] The Family Benefits (Home Ownership) Act 1964, the Child Support Act 1991, the Student Loan Scheme Act 2011 and ss 82 and 179(5) of the Social Security Act 1984.

[53] *Official Assignee v Attorney-General* [1982] 2 NZLR 746 (HC).

accepted that this provision and other similar enactments then in force meant that the benefits or entitlements at issue were protected and did not pass to the OA.[54]

[56] We have reviewed various enactments cited to us and accept that there are several provisions which protect specific benefits or entitlements from alienation.[55] However, each enactment must be considered in its own context and in the light of the language adopted in each case. Only slight assistance is to be gained from other enactments of this kind in interpreting the legislation with which this appeal is concerned.

[57] We do not overlook Mr Andrews' point that the purpose of the IA should also be taken into account, particularly the objective of achieving a proper return for creditors. However, s 105(2) specifically recognises that other enactments might prevent the vesting in the OA of a bankrupt's property that would otherwise occur. We are satisfied that s 127 of the KSA has that effect.

[58] Mr Andrews also referred us to Blanchard J's judgment in *Official Assignee v NZI Life Superannuation Nominees Ltd*.[56] In that case, the OA sought to recover the interest of two bankrupts in a superannuation scheme under the then Superannuation Schemes Act 1976.[57] A provision in the scheme's trust deed provided for the forfeiture of the member's benefits in the scheme in the event of bankruptcy and permitted the scheme's trustee to apply the funds for the benefit of the bankrupt. It was held that the member's interest constituted property that would normally pass to the OA upon the member's bankruptcy. That was because a provision of the type at issue would ordinarily be treated as void as against the OA. However, the provision at issue was not void as it was authorised by regulations made under the Superannuation Schemes Act.

[59] The decision in *NZI Life* turned on the terms of the trust deed and the relevant regulations. But it is of interest in two respects. First, it recognised that specific

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54 At 748.

55 For example, s 123 of the Accident Compensation Act 2001, s 48 of the Friendly Societies and Credit Unions Act 1982, s 9(2)(d) of the Joint Family Homes Act 1964 and s 89(1) of the War Pensions Act 1954.

56 *Official Assignee v NZI Life Superannuation Nominees Ltd* [1995] 1 NZLR 684 (HC).

57 Since repealed.

enactments could override the general vesting of a bankrupt's property in the OA. Second, Blanchard J held that, if the benefits were vested in the OA, access to those funds before the time the bankrupt would be entitled to them under the trust deed would not be available to the OA unless the scheme's trustee exercised its discretion to permit early withdrawal under the deed. This point is relevant to the second issue we discuss shortly.

[60] We conclude that the interest of a bankrupt member of a KiwiSaver scheme does not pass to the OA. We reach the same conclusion in respect of any KSA funds accumulating for the benefit of the member during bankruptcy. In reaching this conclusion it has not been necessary to place any specific reliance on the maxim *generalia specialibus non derogant* although the fact that the KSA has a confined focus and purpose is a factor in our assessment.

[61] In view of our conclusion, it is not strictly necessary to consider the second issue but we do so since our conclusion about the OA's ability to access a bankrupt's KiwiSaver interest supports our conclusion on the first issue.

Second issue – did the High Court err in finding that bankruptcy does not always constitute significant financial hardship under the early withdrawal provisions of the KSA?

The OA's case

[62] If, contrary to our view, the bankrupt member's KiwiSaver interest does pass to the OA upon bankruptcy, the ability of the OA to gain access to the KiwiSaver funds before the bankrupt reaches 65 years depends upon the application of the early withdrawal rules in sch 1 of the KSA. Mr Andrews submitted that the High Court Judge was wrong to find that the bankruptcy of a KiwiSaver member did not invariably result in significant financial hardship for the purposes of cls 10 and 11 of sch 1 of the KSA. Counsel disputed the conclusion reached by the Judge that the examples listed in cl 11 illustrate that significant financial hardship is focused on an inability to meet the basics of life including food, shelter and medical care.[58] The significant financial difficulties identified included illness or health reasons, as well

[58] High Court judgment, above n 1, at [90].

as significant financial obligations such as mortgage repayments. These were, counsel submitted, merely illustrations since the matters listed were not an exhaustive list. It is not the events themselves that are important but rather the results: that is, significant financial hardship or significant financial difficulties.

[63] Mr Andrews further submitted that bankruptcy is a status resulting from a failure to meet the member's financial obligations under cl 11(1)(a). As he put it, payment of one's due debts is a component of one's minimum living expenses. The OA's submission is that the payment of minimum living expenses includes the expenses required to meet the legal obligations of the bankrupt including those owed to creditors. The effect of adjudication in bankruptcy is to transfer to the OA those obligations and all property from which they might be met.

[64] Alternatively, Mr Andrews submitted that bankrupts are subject to a number of statutory restrictions, both within the IA and in other enactments. Many of these have a significant detrimental financial effect on the bankrupt. They include restrictions on certain business activities, disqualification from the holding of certain offices or occupations; potential liability to contribute to his or her debts during bankruptcy, curtailment of access to services for goods on credit terms and the fact that a bankrupt is not released from liability for his or her debts until discharged from bankruptcy.

[65] Mr Andrews disputed the Judge's conclusion that the trustee of a KiwiSaver scheme would have to be satisfied that the member was suffering or was likely to suffer significant financial hardship.[59] He also challenged the Judge's finding that, if so satisfied, the trustee would still have a discretion as to the release of funds. Relevant to that question is whether the payment would alleviate, in whole or in part, the suffering resulting from serious financial hardship. Mr Andrews submitted that the significant financial hardship suffered by a bankrupt would not be alleviated until all creditors were paid. A trustee would only be justified in limiting the amount of the withdrawal if the OA were to apply for withdrawal of a greater sum than was necessary to pay the creditors. It followed, in counsel's submission, that a trustee did

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[59] Now a manager or supervisor.

not have a discretion as to whether the withdrawal should be permitted or the amount of the withdrawal.

[66] Addressing TEL's argument that bankruptcy alleviates significant financial hardship by relieving bankrupts from responsibility for their debts, Mr Andrews submitted that bankrupts are not discharged from their debts until they are discharged from bankruptcy. He agreed with the Judge that in cases where a recovery from a bankrupt's KiwiSaver interest would be sufficient to enable the bankrupt to obtain an annulment through paying creditors in full, the significant financial hardship suffered by the bankrupt would be alleviated by the annulment. In such a case, an early withdrawal might be available and the OA may have the ability to obtain access to the bankrupt's KiwiSaver interest.

Analysis

[67] We do not accept the submissions advanced on the OA's behalf. First, we are satisfied that cls 10 and 11 of sch 1 of the KSA are directed to the personal circumstances of individual members of a KiwiSaver scheme We agree with the Judge that the legislature contemplated that early withdrawal would be permitted where significant financial hardship arises through the inability to meet the basic necessities of life. That is illustrated by an examination of the seven matters listed in cl 11(1), which are largely compassionate grounds for early withdrawal. They are all directed at basic needs such as the ability to meet minimum living expenses, the mortgage payments on the family home, the costs of medical treatment and other care for the member and his or her dependants, and the contingency of the serious illness of the member. We accept these are not expressed as an exhaustive list but the section gives a clear guide to the kind of circumstances the legislature had in mind.

[68] We do not agree that the reference to "minimum living expenses" was intended to embrace paying a bankrupt's general creditors. By no stretch could living expenses be regarded as including, for example, trade creditors of a bankrupt or other creditors who had supplied goods or services to the bankrupt beyond those needed for basic living expenses. The use of the term "minimum" demonstrates a

statutory intention to limit withdrawals to meet the basic necessities of everyday living. We accept that bankruptcy will ordinarily result in some of the forms of hardship the OA described, but we do not accept that Parliament intended that early withdrawal could be permitted to address hardship of that type.

[69] Secondly, we agree with the Judge that the KSA envisages that the manager or supervisor of each KiwiSaver scheme must address any application for early withdrawal on its individual merits. The manager or supervisor must first be satisfied under cl 10(1) that the member is suffering or is likely to suffer significant financial hardship. If that is established, the manager or supervisor must be reasonably satisfied under cl 10(3)(a) that reasonable alternative sources of funding have been explored and have been exhausted. Finally, the manager or supervisor may direct the amount that may be withdrawn "to alleviate the particular hardship".[60]

[70] The steps that the manager or supervisor must take involve a mixture of factual determinations and the exercise of discretion. The important point is that the manager or supervisor must have regard to the circumstances of each individual member. The OA's proposition that bankruptcy would invariably oblige the manager or supervisor to permit early withdrawal would run counter to the duties of the manager or supervisor and would fetter the discretion they are obliged to exercise individually.

[71] Thirdly, we accept Mr Stevens' submission that the use of a bankrupt's KiwiSaver interest to pay creditors would not ordinarily alleviate financial hardship experienced by the bankrupt. Upon adjudication, all proceedings to recover any debt provable in the bankruptcy are halted. Proceedings already commenced may only be continued with the leave of the Court.[61] In the ordinary course, the bankrupt will be discharged after three years and he or she will be relieved from any liability to creditors. If the OA were to apply the bankrupt's KiwiSaver interest to the payment of creditors, the bankrupt's hardship would not be alleviated since that would have already occurred in most cases by virtue of his or her adjudication. Given the average KiwiSaver balance for bankrupts is only a little over $6,000, it is reasonable

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60 KiwiSaver Act, sch 1, cl 10(3)(b).
61 Insolvency Act, s 76.

to infer that, in most cases, the amount of the KiwiSaver interest is unlikely to be sufficient to satisfy all the bankrupt's creditors and to pay the OA's costs so as to secure an annulment of the bankruptcy.

[72] Our analysis of the early withdrawal provisions of the KSA demonstrates a clear statutory intention to restrict a member's right to early withdrawal to carefully prescribed circumstances focusing on the personal circumstances of each member and their dependants. That is consistent with the general objective of locking in member's funds until the end payment date of 65 years or the member's earlier death. This conclusion is also supported by the overall statutory purpose of encouraging long-term savings habits and increasing the financial independence of KiwiSaver members in their retirement.

[73] Nowhere in the KiwiSaver Rules is there any indication that early withdrawal of KiwiSaver funds might be permitted in order to pay a bankrupt's general creditors. Rather, the relief of financial hardship is directed to personal circumstances: the payment of minimum living expenses, meeting the mortgage payments on a member's family home, the payment of medical and related expenses for the member and dependants, and relief in the event of the member's serious illness as defined.

[74] Even if the OA were entitled to apply for any early withdrawal of a bankrupt's KiwiSaver interest, we are satisfied that, in most cases, the payment would not alleviate the member from financial hardship. Rather, it would alleviate the hardship suffered by his or her creditors from whom the bankrupt is already protected by virtue of the adjudication. In these circumstances, early withdrawal would not be available under the KiwiSaver Rules.

[75] The result is that even if the bankrupt's KiwiSaver interest vested in the OA (which we do not accept), early withdrawal would not be available and the OA would be unable to realise the KiwiSaver interest until the member turned 65.

[76] TEL has raised several other difficulties of a practical nature should the OA's submission be accepted. These include, for example, the fact that a trustee such as

TEL would have to run, for the long term, two separate sets of accounts, one for the OA's interest in the member's KiwiSaver account and one for the member's contributions after discharge from bankruptcy. Difficulties could also arise in relation to investment strategy. Would the trustee be obliged to accept instructions separately from the OA and from the member in respect of their separate interests? Finally, if the bankrupt's interest were to vest in the OA, the bankrupt would lose the right to apply during bankruptcy for early withdrawal of funds in the case of serious illness. Assuming any funds had not already been withdrawn to pay creditors, the seriously ill bankrupt would be dependent upon the goodwill of the OA to apply on his or her behalf. It is most unlikely that Parliament would have intended such a perverse outcome.

[77] Mr McKenzie also pointed to another anomaly which would follow if the OA's argument were accepted. The Crown's contribution to the KiwiSaver scheme would vest in the OA yet Parliament has made it clear that the Crown contribution was to remain for the benefit of the member in retirement.[62] Mr Andrews' response that the OA could disclaim the Crown contribution as onerous property under s 117 of the IA is unconvincing.

[78] Mr Andrews accepted that Parliament is presumed to intend that legislation be workable and effective. He agreed there would be administrative difficulties if the OA's argument were correct. However, he argued that if the OA had to wait in most cases until the bankrupt reached 65, a number of adverse consequences would follow. For example, he submitted that many of the corporate creditors might no longer exist and some personal creditors might no longer be alive. Second, while the OA does administer two other types of long-term assets, these are very different in nature to the KiwiSaver interests and occur less frequently. Third, the value of the assets represented by the KiwiSaver fund might be significantly diminished, both in terms of real purchasing power and due to the impact of administrative costs and investment risks. Mr Andrews submitted that these risks would be diminished or eliminated if the OA were automatically entitled to early withdrawal on the grounds of significant financial hardship. In those circumstances, the creditors would benefit from an early payment.

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[62] See, for example, cl 10 of sch 1 which excludes the Crown contribution from early withdrawal.

[79] We are not persuaded that the practical difficulties identified by Mr Andrews support the OA's interpretation. They have no bearing on the issue of whether the bankrupt has suffered significant financial hardship. We are satisfied that the OA would not be entitled to rely on the early withdrawal provisions for significant financial hardship.

Conclusion

[80] Our analysis supports the conclusion that the KiwiSaver interest of a bankrupt does not vest in the OA. We have reached that conclusion based on the text of the two enactments, the relevant statutory purposes and the inherent unlikelihood that Parliament would have intended any vesting of the bankrupt's interest in a KiwiSaver scheme to result in the OA being left with an impracticable and ineffective remedy. Unless the legislation compels no other alternative, Parliament should not be taken to have intended that the OA and creditors would in most cases have to wait for as long as 15 years before being able to access a bankrupt's KiwiSaver funds or for a substantially longer period. T's case is illustrative; he was only 25 at the date of adjudication so he will not reach the age of 65 for 40 years.

[81] We record our thanks to all counsel but particularly to Mr McKenzie who took over the role as counsel assisting the Court at a late stage in circumstances known to and understood by the Court.

Result

[82] The respondent's application for leave to adduce further evidence on appeal is granted.

[83] The appeal is allowed.

[84] The cross-appeal is dismissed.

[85] The declarations made in the High Court are set aside save for declaration (a).[63]

[86] This Court declares that the KiwiSaver interests of the bankrupts do not vest in the respondent under ss 101 or 102 of the Insolvency Act 2006.

[87] The respondent must pay the appellant one set of costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

Solicitors:
DLA Piper, Wellington for Appellant
Crown Law Office, Wellington for Respondent

[63] That the Bankrupts' KiwiSaver Interests, including rights, interests and claims of every kind relating to the Bankrupts' KiwiSaver Interests, are property for the purposes of the Insolvency Act 2006.