

FEDERAL COURT OF AUSTRALIA

Kapila, in the matter of Edelsten [2014] FCA 1112

- Citation: Kapila, in the matter of Edelsten [2014] FCA 1112
- Parties: **IN THE MATTER OF GEOFFREY EDELSTEN;
SONEET R KAPILA IN HIS CAPACITY AS
TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF
GEOFFREY EDELSTEN APPOINTED UNDER
CHAPTER 11 OF THE BANKRUPTCY CODE (US) v
GEOFFREY EDELSTEN**
- File number: VID 519 of 2014
- Judge: **BEACH J**
- Date of judgment: 10 October 2014
- Catchwords: **BANKRUPTCY AND INSOLVENCY** – cross-border insolvency – US bankruptcy proceeding – application for recognition of foreign proceeding as either a foreign main proceeding or foreign non-main proceeding pursuant to the *Cross-Border Insolvency Act 2008* (Cth) and the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL) – individual debtor’s centre of main interest – presumption of “habitual residence” – recognition of US bankruptcy proceeding as foreign non-main proceeding under the Model Law – moratoria orders made under art 21 of the Model Law
- Legislation: *Bankruptcy Act 1966* (Cth)
Bankruptcy Regulations 1996 (Cth)
Corporations Act 2001 (Cth)
Cross-Border Insolvency Act 2008 (Cth)
Family Law Act 1975 (Cth)
Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law
- Cases cited: *Akers (As Joint Foreign Representative) v Saad Investments Co Ltd* [2013] FCA 738
Akers v Deputy Commissioner of Taxation (2014) 311 ALR 167
Akers v Saad Investments Company Ltd (in official liquidation) (2010) 190 FCR 285
Ayres v Evans (1981) 56 FLR 235
Gainsford v Tannenbaum (2012) 216 FCR 543
LK v Director-General, Department of Community Services

(2009) 237 CLR 582
Moore as Debtor-in-Possession of Australian Equity Investors v Australian Equity Investors [2012] FCA 1002
Radich v Bank of New Zealand (1993) 45 FCR 101
Williams v Simpson (No 5) [2011] 2 NZLR 380

Date of hearing: 10 October 2014

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 77

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Solicitors for the Respondent: Webb Korfiatis Commercial

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Solicitors for Ms Brynne Gordon (Interested Party): Acquaro & Co.

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Solicitors for Deputy Commissioner of Taxation (Supporting Creditor): Australian Taxation Office, Review and Dispute Resolution

Counsel for National Australia Bank (ABN 12 004 044 937) (Supporting Creditor): Mr S J Maiden

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Solicitors for Owners
Corporation 328892E2
(Supporting Creditor):

Mr C Moloney of Davies Moloney

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 519 of 2014

IN THE MATTER OF GEOFFREY EDELSTEN

**BETWEEN: SONEET R KAPILA IN HIS CAPACITY AS TRUSTEE IN
BANKRUPTCY FOR THE ESTATE OF GEOFFREY
EDELSTEN APPOINTED UNDER CHAPTER 11 OF THE
BANKRUPTCY CODE (US)**

Applicant

**AND: GEOFFREY EDELSTEN
Respondent**

JUDGE: BEACH J

DATE OF ORDER: 10 OCTOBER 2014

WHERE MADE: MELBOURNE

Upon the undertaking of the Commissioner of Taxation not to exercise any power under section 260-5 of Part 5-1 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) for the recovery of existing debts owed and payable by the First Respondent to the Commissioner of Taxation without the written consent of the Applicant or the Australian Representative or until further order.

THE COURT ORDERS THAT:

1. The Deputy Commissioner of Taxation be joined as the Second Respondent.
2. Pursuant to section 6 of the *Cross Border Insolvency Act 2008* (Cth) (the Act), Article 15 and clause 1 of Article 17 of the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law* (Model Law) and Rule 14.03 of the *Federal Court (Bankruptcy) Rules 2005* (Cth) (the Rules), the proceeding of the United States Bankruptcy Court, Southern District of Florida, Fort Lauderdale Division, Case No 14-19613-JKO, *Re: Geoffrey Edelsten*, relating to the First Respondent (the Foreign Proceeding), in which the Applicant was appointed as trustee in bankruptcy for the estate of the First Respondent, be recognised as a foreign proceeding, within the meaning of Article 2(a) of the Model Law.

3. Pursuant to section 6 of the Act and clause 2(b) of Article 17 of the Model Law, the Foreign Proceeding be recognised as a foreign non-main proceeding, within the meaning of Article 2(c) of the Model Law.
4. Pursuant to section 6 and Article 21(1)(e) of the Model Law, the administration and realisation of all of the First Respondent's assets located in Australia be entrusted to Mark Robinson of PPB Advisory, Level 46, MLC Centre, 19 Martin Place, Sydney NSW 2000 (the **Australian Representative**).
- 5 Pursuant to section 6 and Article 21 of the Model Law:
 - (a) except with the leave of the Court or with the Applicant's or the Australian Representative's written consent:
 - (i) the commencement, continuation or enforcement of any individual action or legal proceeding (including without limitation any arbitration, mediation, or any judicial, quasi judicial, administrative action, proceeding or process whatsoever) against the First Respondent or any of his assets, rights and obligations, be stayed;
 - (ii) the enforcement or execution of any judgment, order, or award against the First Respondent or his assets be stayed;
 - (iii) the right to transfer, encumber or otherwise dispose of any of the First Respondent's property be suspended;

to the same extent as would apply if each such stay or suspension arose under the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**);

For the avoidance of doubt:

- (iv) where no stay or suspension would arise under the Bankruptcy Act (either by operation of it or by Court order if made), no stay or suspension applies under this paragraph;
- (v) subject to the undertaking of the Commissioner of Taxation recorded above, order 5(a)(i) does not preclude or prevent the Commissioner of Taxation or the Deputy Commissioner of Taxation, their servants or agents, from exercising any power or taking any step which he or they may otherwise lawfully exercise or take under the laws of which the Commissioner of Taxation has the general administration, except for the powers and functions under Subdivision 255-A of Schedule 1 to

the *Taxation Administration Act 1953*, unless the exercise of power or the taking of such a step is precluded by automatic operation of any provision of the Bankruptcy Act;

- (b) the Australian Representative may, as he deems appropriate, examine witnesses, take evidence and obtain delivery of information concerning the First Respondent's assets, affairs, rights, obligations or liabilities.
6. Pursuant to section 6 of the Act and Article 21(1)(g) of the Model Law, subject to the provisions of the Bankruptcy Act, all powers normally available to a trustee in bankruptcy appointed under the provisions of the Bankruptcy Act, be made available to the Australian Representative.
7. The Second Respondent shall be entitled to a distribution from the First Respondent's assets in Australia equal to the *pari passu* amount that he would receive if he was entitled to prove for the debts owed by the First Respondent to the Commonwealth of Australia as an unsecured creditor in the Foreign Proceeding.
8. Each party and each creditor or person claiming to be a creditor of the First Respondent, and any other person affected by these orders, has liberty to apply on 3 business days' notice.
9. The costs of this proceeding be costs of the bankruptcy of the First Respondent, and accorded the same priority as costs of proceedings incurred by a trustee in bankruptcy appointed under the Bankruptcy Act.

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

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BANKRUPTCY FOR THE ESTATE OF GEOFFREY
EDELSTEN APPOINTED UNDER CHAPTER 11 OF THE
BANKRUPTCY CODE (US)
Applicant**

**AND: GEOFFREY EDELSTEN
Respondent**

JUDGE: BEACH J

DATE: 10 OCTOBER 2014

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 The applicant is the trustee in bankruptcy for the estate of the respondent, Geoffrey Edelsten (Edelsten), appointed under Title 11 of the United States Code (US Bankruptcy Code); Chs 7 and 11 thereof have been invoked in relation to Edelsten's estate.

2 The applicant applies for recognition in Australia of the United States Bankruptcy Court proceedings involving Edelsten under the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL) (the Model Law) which has been given the force of law in Australia by s 6 of the *Cross-Border Insolvency Act 2008* (Cth) (the Act). Alternatively, assistance is sought from the Court under s 29 of the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) pursuant to a letter of request from the United States Bankruptcy Court. By letter dated 3 October 2014 forwarded by the Honourable John K Olson, United States Bankruptcy Judge to the Federal Court of Australia, the United States Bankruptcy Court for the Southern District of Florida has requested assistance from this Court to act in aid of and auxiliary to the US Bankruptcy Court proceedings.

3 The applicant relies on affidavits of the applicant sworn 29 August 2014 and 7 October 2014, an affidavit of Amelia Smith, an employee solicitor of Arnold Bloch Leibler affirmed 9 October 2014, and an affidavit of Leon Zwier, a partner of Arnold Bloch Leibler,

sworn 9 October 2014. Mr Zwier has been appointed Special Australian Counsel under the authority of an order made by his Honour on 8 August 2014.

4 In addition to both the applicant and Edelsten being represented on this application, there were also appearances by the Deputy Commissioner of Taxation, the National Australia Bank Limited and Brynne Gordon, the present but separated spouse of Edelsten; further, there was an appearance on behalf of Owners Corporation 328892E2. Each of those parties did not oppose the substance of the orders being sought by the applicant, although some sought modifications thereto, which I will address later. The National Australia Bank Ltd was concerned to protect its position as a secured creditor. Ms Gordon sought to protect her position concerning any assets of Edelsten's estate in terms of any order that might be made in proceedings under s 79 of the *Family Law Act 1975* (Cth). The Deputy Commissioner sought modification to the orders to protect his position in relation to certain taxation debts and the anticipated exercise of coercive investigative statutory powers. I will deal with their positions later. The Deputy Commissioner also sought to be added as a party to the proceeding; I consider this to be appropriate.

Edelsten and his business dealings

5 Edelsten is an Australian citizen and has described his residence as Victoria, Australia. But he has significant property and business interests elsewhere, including the Dominican Republic and more substantially the United States.

6 In 2011, Edelsten entered into a joint venture with members of the Mawardi family to expand the Las Vegas fashion brand "Nurielle" owned by that family. Under the joint venture, Edelsten provided working capital. The scope of the business ventures between the Mawardi family and Edelsten expanded to include the development of casino properties in the Dominican Republic, the purchase and customisation of private aircraft, and the purchase and rehabilitation of apartment complexes in Ohio and Tennessee.

7 The business headquarters and mailing address for all of those business interests was 4142 North 28 Terrace, Hollywood, Florida. This is the address at which Edelsten maintained his US office.

8 Edelsten has described himself as owning stock and interests in various entities incorporated or established in the United States, the entities being:

- (a) 4142 N 28 Terrace LLC which operates a real estate investment business;

- (b) N770GE, LLC, which owns an aircraft as its single asset, and The N770GE Delaware Trust;
- (c) Atels Management LLC, which wholly owns Barrington Spring House, LLC, which owns a distressed apartment complex in Dayton, Ohio;
- (d) Dominican Republic Resort Management, LLC, which operates a hotel/condominium/real estate business;
- (e) The Nurielle Joint Venture Partnership; Nurielle, LLC; House of Nurielle Miami LLC; House of Nurielle.com LLC; and House of Nurielle LLC, all of which were involved in running the Nurielle fashion business;
- (f) Other companies incorporated in the United States whose function is unknown: Flash Gordon USA, LLC; Cinema Clothing USA LLC; Zera Casino and Hotel Management, LLC; Investments Australia LLC.

9 In addition to his United States business ventures, Edelsten has been involved in a number of other ventures around the world. Edelsten has been a medical doctor and has generated most of his assets through the establishment and operation of a chain of luxury medical clinics, which he later sold for a net return of some \$28 million. His other investments included real estate in Australia, coal and mineral sands in Indonesia, medical-related enterprises, a fleet of rare automobiles, and intellectual property. Edelsten has interests in a number of special purpose Australian companies, some of which apparently have never operated.

10 Edelsten has been engaged in extensive litigation in the United States, most notably in respect of the disputes with the Mawardi family arising out of their business ventures. In addition, his United States assets include at least US\$32 million comprising asserted claims against the Mawardi family and holdings in various United States companies. His Australian assets appear smaller by comparison, primarily three property holdings valued at in excess of US\$3.5 million, plus shareholdings in various companies and potential claims against third parties. However, the size and value of many of his US assets have problematic valuations, particularly the valuation of his litigation claims and the valuation of his shares in private companies.

11 There is little in the way of direct evidence as to where Edelsten currently resides.

12 His voluntary petition presented to the US Bankruptcy Court on 9 January 2014 stated his address as 181 Exhibition Street, Melbourne. The location of Victoria, Australia was also stated in terms of a description of “count[r]y of residence or of the principal place of business”. Further, in a judgment given on 11 April 2014 by the United States Bankruptcy Judge Lawrence Walter in dealing with the transfer of proceedings from the Southern District of Ohio to the Southern District of Florida, it was stated that “Edelsten is a former medical

doctor who resides in Australia". I enquired of Edelsten's counsel where in the United States Edelsten resides when he travels to the United States. She did not have those instructions. The various versions of his statement of affairs did not disclose any real property or leasehold interest in the United States where he might reside. In terms of his statement of affairs, which was later modified to substantially increase the value of his personal property, the only real property that he disclosed were units 18A, 18C and 18D, 181 Exhibition Street, Melbourne. That is the only tangible evidence of his residence, whether in Australia or in the US, other than some evidence given by Ms Gordon.

13 As to Edelsten's residency, Ms Gordon, who swore an affidavit in this proceeding, deposed to the following matters:

- On 29 November 2009, Edelsten and Ms Gordon were married.
- Throughout their marriage, they lived under the same roof at apartment 1803/1804 and 1801 of 181 Exhibition Street, Melbourne.
- Apartments 1803 and 1804 were formerly two separate apartments, but they were joined to form a larger living space.
- Apartment 1801 was a separate apartment on the same floor.
- Throughout their marriage, they lived in the Melbourne apartments. Further, Edelsten also had offices in the basement of the building of the Melbourne apartments which he apparently leased.
- In December 2013, the marriage relationship between Edelsten and her broke down irretrievably. But despite the breakdown of the marriage, Edelsten and she continued to live in the Melbourne apartments.
- On or about 22 March 2014, Ms Gordon moved out of the Melbourne apartments, but Edelsten remained. Edelsten also apparently continued to attend his offices located in the basement level.
- Ms Gordon deposed to her belief that since separating, Edelsten still resided at the Melbourne apartments.
- Further, to her knowledge, Edelsten did not have any residence in the United States of America or anywhere else in the world other than Australia.
- On her evidence, Edelsten's habitual place of residence was Australia.

- Further, she deposed that based upon what Edelsten had told her during the marriage, as at the date of their separation she understood that Edelsten owned seven properties in Australia either directly or indirectly through various corporate vehicles, being:
 - (a) the Melbourne apartments (three properties), Melbourne, VIC;
 - (b) 101 Grange Road, Glenhuntly, VIC;
 - (c) 1705/98 Gloucester Street, Sydney, NSW;
 - (d) 22 Fifth Ave, Macquarie Fields, NSW;
 - (e) Condo 67 Palazzo Versace, Gold Coast, QLD.

I have set out the evidence as to residency because the factual matrix on that question is important for one issue that still remains live in this application, that is, whether the US Bankruptcy Court proceedings should be treated as “a foreign main proceeding” or “a foreign non-main proceeding” under the Model Law.

United States Bankruptcy Court proceedings

14 On 9 January 2014, Edelsten filed a voluntary petition under Ch 11 of the US Bankruptcy Code in the United States Bankruptcy Court, Southern District of Ohio. On 11 April 2014 the matter was transferred to the Southern District of Florida, which on 5 June 2014 ordered that a Ch 11 trustee be appointed to the estate of Edelsten. Chapter 11 of the US Bankruptcy Code deals with the reorganisation of a debtor’s affairs as distinct from Ch 7 of the Code which deals with the liquidation of a debtor’s affairs.

15 Also on 9 January 2014, Edelsten filed voluntary petitions under Ch 11 on behalf of two companies of which he was the sole shareholder. One company was Barrington Spring House, LLC and the other was a Delaware company, N770GE, LLC.

16 On 8 August 2014, the Ch 11 proceeding concerning Edelsten was converted to a Ch 7 proceeding; the applicant then became the Ch 7 trustee for Edelsten’s estate.

17 Further, on 8 August 2014 the United States Bankruptcy Court made orders granting the applicant the authority to bring this application in the Federal Court of Australia for recognition of the US Bankruptcy Court proceedings.

18 As to the known creditors of Edelsten, most of them are based in either Australia or the United States, although there are some creditors elsewhere, for example the Dominican Republic. As at April 2014, Mr Edelsten had identified 3 secured creditors, 2 mortgages held

by Australian banks and one held by his mother, one priority tax creditor for Australian taxes and 38 unsecured creditors of which 15 were located in the United States. As at today's date, although the matter is unclear, 16 unsecured creditors are located in the United States and 18 unsecured creditors are located in Australia. Of the largest 20 unsecured creditors, 12 are located in the United States, 5 in Australia, 2 in the Dominican Republic and one in Singapore.

Cross-Border Insolvency Act

19 The Act and the Model Law provide for the fair and efficient administration of cross-border insolvencies.

20 A foreign representative may apply to an Australian court for recognition of a foreign proceeding. See art 15.1 which provides:

Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

There are two types of foreign proceedings: (a) foreign main proceedings - these are proceedings in a foreign State where the debtor has the "centre of [his] main interests"- and (b) foreign non-main proceedings. Relevant definitions for those terms are contained in art 2 of the Model Law, paras (a), (b), (c) and (f) as follows:

Article 2

Definitions

For the purposes of the present Law:

- (a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of the present article;
- ...
- (f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.
- ...

Article 16, cl 3 also relevantly provides:

Article 16

Presumptions concerning recognition

3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

21 Article 16, c13 provides that, in the absence of proof to the contrary, for an individual, the habitual residence of the individual is presumed to be the centre of the debtor's main interests. I will return to this later.

22 If certain matters are established, the foreign proceeding must be recognised, unless recognition would be manifestly contrary to the public policy of Australia. So much is provided for in art 6 and art 17 which provide:

Article 6

Public policy exception

Nothing in the present Law prevents the court from refusing to take an action governed by the present Law if the action would be manifestly contrary to the public policy of this State.

Article 17

Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:
 - (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
 - (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
 - (c) The application meets the requirements of paragraph 2 of article 15;
 - (d) The application has been submitted to the court referred to in article 4.
2. The foreign proceeding shall be recognized:
 - (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.
3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

23 A proceeding is to be recognised as a foreign main proceeding if it is taking place in the foreign State where the debtor has the centre of his main interests. Upon recognition of a

foreign main proceeding, certain moratoria are imposed automatically in relation to the debtor and his estate. These are contained in art 20.

24 A proceeding is to be recognised as a foreign non-main proceeding if it takes place in a foreign State where the debtor has an establishment. An establishment, as I have set out earlier, is a place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. Upon recognition, the Court may, at the request of the foreign representative, impose moratoria. This is provided for in art 21, but is discretionary. This may be contrasted with art 20, which upon recognition of a foreign main proceeding imposes certain moratoria automatically.

25 Where a proceeding is recognised as a foreign main proceeding or a foreign non-main proceeding, the Court may grant relief at the request of the foreign representative as provided for in art 21:

Article 21

Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
 - (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;
 - (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
 - (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;
 - (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
 - (e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
 - (f) Extending relief granted under paragraph 1 of article 19;
 - (g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.
2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the

court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under the present article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Conditions – status and procedural

26 Before consideration can be given to whether the US Bankruptcy Court proceedings meets one or more of the substantive criteria specified in the Model Law to allow its recognition as either a foreign main proceeding or a foreign non-main proceeding, a number of conditions precedent must be satisfied. These conditions precedent fall into two broad categories:

- (a) status-based criteria; and
- (b) procedural criteria.

27 The conditions precedent contained in s 13 of the Act, arts 15.2 and 17.1 and also the *Federal Court (Bankruptcy) Rules 2005* (Cth) (Bankruptcy Rules) have been usefully summarised by Logan J in *Gainsford v Tannenbaum* (2012) 216 FCR 543 (*Gainsford*) at [24]-[33].

28 The criteria which comprise the status-based conditions precedent are specified in art 17, cl 1 of the Model Law. As they related to the present application, they are:

- (a) the US Bankruptcy Court proceedings must be a “foreign proceeding” within the meaning of art 2(a)
- (b) the applicant must be a “foreign representative” within the meaning of art 2(d); and
- (c) this Court, as the court to which the application has been “submitted”, must be one to which art 4 of the Model Law refers.

29 The procedural conditions precedent are found in art 17, cl 1(c) of the Model Law, s 13 of the Act and r 14.03 of the Bankruptcy Rules.

30 Article 17, cl 1(c) of the Model Law provides that the application for recognition must be accompanied by the certificates mentioned in or otherwise meet the evidentiary requirements of art 15, para 2, with respect to proof of a “foreign proceeding” and the appointment of a “foreign representative”.

31 Collectively, s 13 of the Act and r 14.03 of the Bankruptcy Rules require that in addition to the certificates and statement mentioned in art 15 of the Model Law, the material supporting the application must include a statement identifying such of the following as are known to the applicant:

- (a) all proceedings under the Bankruptcy Act in respect of the debtor;
- (b) any appointment of a receiver or a controller or a managing controller in relation to the property of the debtor; and
- (c) all proceedings under chapter 5 or s 601CL of the *Corporations Act 2001* (Cth) in respect of the debtor.

Only element (a) is relevant for present purposes.

Satisfaction of conditions to recognition

32 In my opinion, each of the conditions required to recognise the United States Bankruptcy Court proceedings under the Model Law have been satisfied:

- The United States Bankruptcy Court proceedings is a “foreign proceeding” within the meaning of art 2(a), and the applicant is a “foreign representative” within the meaning of art 2(d).
- The application for recognition is accompanied by evidence of the existence of the United States Bankruptcy Court proceedings and the appointment of the applicant as trustee.
- There is sufficient evidence for recognition of the United States Bankruptcy Court proceedings as a “foreign non-main proceeding”. I will return to this issue shortly as it is contentious as to whether I should recognise the proceedings as a “foreign main proceeding” or a “foreign non-main proceeding”.
- The applicant has identified all proceedings in respect of Edelsten that are known to the applicant, as required by art 15(3) of the Model Law and s 13 of the Act. The applicant’s affidavits have summarised the proceedings in the United States between the Mawardi family and Edelsten and also made reference to other proceedings of which the applicant is aware.

33 The applicant has complied with the notification requirements specified in the Bankruptcy Rules and as I have previously ordered. In accordance with my interim orders

made on 3 September 2014, the applicant's solicitors published a notice of filing of application for recognition of foreign proceedings in *The Age* and *The Australian* newspapers on 9 September 2014; the affidavit of Amelia Smith affirmed 9 October 2014 deposes to that and other necessary notifications to creditors generally.

34 The question that arises is whether recognition should be given to the US Bankruptcy Court proceedings as a foreign main proceeding or a foreign non-main proceeding. That issue turns on where Edelsten has or had "the centre of [his] main interests" at the relevant time (see art 2(b)). This issue is also informed by the presumption set out in art 16, cl 3.

Centre of main interests

35 The Model Law does not stipulate the relevant date for determining the centre of main interests of the debtor. On one view, it might be said that this is to be determined at the time the Court is called upon to make a decision giving recognition to the foreign proceeding (see *Moore as Debtor-in-Possession of Australian Equity Investors v Australian Equity Investors* [2012] FCA 1002 (*Moore*) at [18] per Emmett J) or at the time the recognition application is filed (see *Gainsford* at [44] per Logan J). Some support might be gleaned for these timeframes from the language of art 17, cl 2 which uses the present tense of "if it is taking place in the State where the debtor has the centre of its main interests" (para (a)) and "if the debtor has an establishment" (para (b)); perhaps the use of the present tense in art 16, cl 3 may also be so consistent. Further, the language of the definitions of "Foreign main proceeding" and "Foreign non-main proceeding" in art 2 are also supportive of looking at the present time frame. But equally, the use of the present tense in art 17, cl 2 may just be seen as a requirement that the foreign proceeding is to be *current* at the time of the recognition proceeding and that one should not read too much into what might merely be seen as a neutral verb tense.

36 Contrastingly, it has been suggested that the relevant date is to be gleaned from the requirements of art 15 and that so considered, the relevant date should be the commencement of the foreign proceeding. Having regard to the evidence required to accompany an application for recognition under art 15 and the relevance accorded to the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding may be seen to be the more relevant date. See the *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, January 2014 published by the UN (UN Guide) at [159]. On 18 July 2013,

UNCITRAL at its 973rd meeting recommended that the UN Guide “be given due consideration, as appropriate, by... judges...”. I am not obliged to consider the UN Guide; moreover, art 31 of the Vienna Convention on the Law of Treaties has little application to it. Nevertheless, it is useful in its explanations and recitation of the relevant history. I have also had reference to the *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*, March 2014 published by the UN (UN Judicial Guide) which has also been of assistance. I should say for completeness that little help is gained by analysing the history, as has been elegantly explained by Heath J in *Williams v Simpson (No 5)* [2011] 2 NZLR 380 at [31]-[32].

37 There are advantages in using the date of the commencement of the foreign proceeding. Not only might it be justified by the language and requirements of art 15, but it injects certainty and uniformity of approach. The date of the application for recognition in a particular jurisdiction at a particular time may be a chance event taking place perhaps years later. What happens if in a particular case the “centre of main interests” has been aligned to a debtor’s principal place of business? That business may cease on the commencement of the foreign proceeding. If the time for assessment is on the filing of the recognition application, recognition could not be given. What happens if the foreign proceeding is in the US and over the course of the following 3 years, different recognition applications are made at different times in 3 different jurisdictions that have adopted the Model Law? And let us assume that the debtor has moved around and changed activities and circumstances over time since the commencement of the foreign proceeding. Is it suggested that it is appropriate to have a diversity of outcome on each recognition application based on the centre of main interests fluctuating at the different times? The foreign proceeding may then be variously treated in different jurisdictions at different times as a “foreign main proceeding”, a “foreign non-main proceeding” or a proceeding that is neither. Further, such diversity of outcomes is produced by the activities and movements of the debtor *post* the commencement of the foreign proceeding. Why should the operation of the Model Law in relation to the recognition of the foreign proceeding be so dependent upon such collateral, ad hoc and adventitious movements of the debtor *post* the commencement of the foreign proceeding?

38 I do not see how such diversity of outcomes based upon such ephemeral debtor movements and activities, in essence after the event, provides “effective mechanisms for dealing with cases of cross-border insolvency” or promotes “[c]ooperation between the courts”, “[g]reater legal certainty” or “[f]air and efficient administration of cross-border

insolvencies” within the meaning of the preamble to the Model Law. Is such diversity of outcomes what is meant by art 8 when it stipulates that “[i]n the interpretation of the present Law, regard is to be had... to the need to promote uniformity in its application...”? I doubt it.

39 My preference is to consider this question as at the date of the commencement of the foreign proceeding, but I cannot say that *Moore* and *Gainsford* are plainly wrong. Accordingly, I will assess the position now. But in any event, even if I were to use the earlier timeframe, that would not change my ultimate conclusions; they may even be fortified.

40 There is no express definition in the Model Law of “centre of main interests”.

41 But art 16 contains a rebuttable presumption on this question based upon the debtor’s habitual residence.

42 Let me address some general principles on this question.

43 As Rares J has explained in *Akers v Saad Investments Company Ltd (in official liquidation)* (2010) 190 FCR 285 at [46]-[53], the purpose of the rebuttable presumption is to provide a convenient means of dispensing with formal proof, but to leave the way open for the Court to find that on the evidence, the contrary is the case. The drafters of the Model Law adopted the device of providing various rebuttable presumptions to facilitate the imperative required in art 17, cl 3. Article 17, cl 3 provides:

An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

Cross-border insolvencies give rise to complex but time sensitive problems for the courts and jurisdictions in which a transnational insolvent’s estate is located. The Court cannot permit recognition proceedings under the Model Law to descend into unnecessarily distracting and prolonged debates as to where an individual’s centre of main interests might be. Otherwise the situation could arise where the assets of the debtor were under his control or not otherwise administered consistently with the objectives of the Model Law whilst the debates proliferated and lingered (*Akers v Saad* at [48]).

44 The purpose of the presumption in art 16 is to facilitate deciding recognition at the earliest possible time in accordance with art 17, cl3. Undoubtedly the more complex the debtor’s transnational dealings, the more difficult the task of the Court to determine recognition. But the presumption facilitates an expeditious determination.

45 In terms of the presumption, the concept “habitual residence” in the case of an individual is not defined in the Model Law.

46 The concept “habitual residence” has been used in many international conventions and other instruments. To treat it as presenting just a question of fact is attractive, but wrong. First, its use and content must be read in the light of the specific convention being considered and its context. Second, objective criteria derived from or implicit in such a context may need to be identified so that the conclusionary composite phrase can be applied to the facts. Third, the composite phrase may usefully be divided in the first instance, although ultimately the whole phrase must be construed and applied. Where does the insolvent reside? A wide variety of circumstances may bear upon that question. Is that residence habitual? Again, a wide variety of circumstances may bear upon that question. Past and present intentions of the insolvent may bear on such questions. Such intentions may manifest themselves in terms of the duration of connection or residence with a particular place. But intention is not to be given controlling weight (see *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 (*LK*) at [28]). Moreover, an insolvent’s intentions may be ambiguous.

47 It is also possible that a transnational insolvent may lead such a nomadic life so as not to have a habitual residence (see *LK* at [25]).

48 One useful practical test may be to identify the centre of a person’s personal and family life (as disclosed by the individual’s activities) and to align that centre with the concept of habitual residence (cf *LK* at [25]), but care needs to be taken.

49 In my view, one can be confident in saying that Edelsten’s habitual residence is not the United States, but that does not mean to say that his habitual residence is Victoria. As I say, for some individuals, their ambulatory behaviour may indicate that they have no habitual residence anywhere.

50 Not without some hesitation, I am inclined to the view, contrary to the submissions of the applicant, that Edelsten’s habitual residence is in Victoria, Australia. It is the residential address he has given when asked. Further, even in recent US proceedings, he has so asserted. Moreover, he owns real property in Victoria, but not in the US. Further, he has not disclosed in his statement of affairs filed in the US Bankruptcy Court proceedings any freehold or leasehold residential property interest. Moreover, his now estranged wife has given evidence which carries considerable weight on this question, at least until March of this year,

supporting Victoria as his place of habitual residence. Further, if I assess this issue as at the commencement of the US Bankruptcy Court proceedings, then the position is fortified.

51 But that does not conclude the enquiry as to Edelsten's "centre of [his] main interests". The presumption contained in art 16, cl 3 may be rebutted. The question is whether it has been rebutted in this case.

52 The applicant has submitted that the presumption has been rebutted. It is said that Edelsten's recent major business dealings were in the United States and that the Court may consider that these are sufficient to be ascertainable by third parties, creditors and potential creditors, so that the United States is to be regarded as Edelsten's centre of main interests.

53 In terms of principle, the centre of main interests is where the debtor conducts the administration of the debtor's interests on a regular basis (*Moore* at [20] per Emmett J). In making a determination, the court must have regard to the need for the centre of main interests to be ascertainable by third parties, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what the debtor will be perceived to be doing by an objective observer. It is important also to have regard to the need, if the centre of main interests is to be ascertainable via third parties, for an element of permanency.

54 To state these principles is not greatly illuminating. Their generality conceals rather than reveals practical criteria that may inform the question. But no doubt factors to consider (as the UN Guide discusses at [147]) for a natural person would include:

- the location of the debtor's books and records;
- the location where financing was organised;
- the location of the debtor's principal assets or operations;
- the location of the debtor's principal bank or other principal lender;
- the location of the debtor's employees or agents;
- the location of any administration, payroll, accounts payable or cash management activity relating to the debtor's business;
- the location of any taxation authority relevant to the debtor's income from personal exertion and taxation thereon;

- the location of the majority of creditors; one has to evaluate though the relative significance and weighting of variables such as number, value, whether secured or not, and whether present or future, certain or contingent in comparing the relative differences in two or more jurisdictions; only intuitive synthesis or impressionistic assessment rather than quantitative evaluation and precision may be practicable in evaluating the position as between two or more jurisdictions.

55 In applying these principles and criteria to the facts, I am not satisfied that the presumption has been rebutted. True it is that Edelsten now has and had as at the commencement of the US Bankruptcy Court proceedings many creditors and various business ventures in the US. But many of the more tangible assets and definitive creditors, secured, unsecured and regulatory in nature appear to be Australian based.

56 Alternatively, even if the art 16 presumption did not arise, assuming that Edelsten did not have a habitual residence anywhere, I am not convinced that Edelsten's centre of main interests is the United States. Edelsten's creditors, multifarious litigation and entrepreneurial activities are spread over numerous jurisdictions. He is a transnational insolvent. I cannot say with confidence that the US particularly should be so identified now or at the time of commencement of the US Bankruptcy Court proceedings.

57 However, I am of the view that Edelsten's recent business dealings in the United States is sufficient, at least, to constitute an "establishment" in the United States. There is sufficient evidence for recognition of the US Bankruptcy Court proceedings as a "foreign non-main proceeding". But as I say, I am not satisfied that there is sufficient evidence to conclude that the US Bankruptcy Court proceedings is a "foreign main proceeding". Accordingly, in terms of the orders that I propose to make, which I will discuss with counsel later, the recognition that I propose giving to the US Bankruptcy Court proceedings is as a "foreign non-main proceeding".

Article 21 relief

58 The applicant seeks an order under art 21 of the Model Law that the administration and realisation of all Edelsten's assets located in Australia be entrusted to Mr Mark Robinson of PPB Advisory as the Australian representative. Mr Robinson is an experienced insolvency practitioner based in Sydney. Mr Robinson has filed a consent to act as a designated person. In my view, his appointment is appropriate. The applicant also seeks an order under art 21 of the Model Law that relevantly imposes moratoria on proceedings against Edelsten and his

property, enforcement of judgments, and dealings in property; an order is also sought giving the Australian representative the right to examine witnesses, take evidence and obtain information. Generally speaking, those orders are appropriate.

59 In my view, the applicant does not seek any moratorium that extends in scope beyond what would be available under the Bankruptcy Act, including the limitations imposed by s 58 of the Bankruptcy Act. I intend by the orders that I will make later this afternoon to put beyond doubt that the moratoria will be confined to the automatic limitations that are provided for in the Bankruptcy Act; the moratoria are not intended to go any further. I will deal with the more specific arguments of the Deputy Commissioner of Taxation on this point later.

60 It is appropriate to consider art 21, cl 3 of the Model Law which provides:

Article 21

Relief that may be granted upon recognition of a foreign proceeding

...

3. In granting relief under the present article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceedings or concerns information required in that proceeding.

61 The assets to which the relief relates are the assets of Edelsten in Australia. In my view, those assets should be administered in the US Bankruptcy Court proceedings as it is efficient for there to exist a single mechanism for the distribution of Edelsten's assets in accordance with the orders of the United States Bankruptcy Court and the US Bankruptcy Code, which relevantly resembles Australian law apart from one matter dealing with what has been described colloquially as "the revenue rule" which I will address later. Under both laws, there are procedures for the distribution of assets among creditors that are designed to treat all creditors similarly "situated" in a similar way. Further and significantly for present purposes, the United States Bankruptcy Court in the present proceedings has made orders allowing foreign creditors including the Deputy Commissioner of Taxation to file claims, prove claims and participate in the US Bankruptcy Court proceedings. Australian creditors will be entitled to prove in the US Bankruptcy Court proceedings by filing proofs of claim which will entitle them to rank *pari passu* with other creditors of their particular class.

62 In my view, on the material before me, and given that the declaration that I will make is to recognise the US Bankruptcy Court proceedings as a foreign non-main proceeding, art 21, cl 3 is satisfied. I do not need to address art 21, cl 2 at the present time as the

applicant has not presently sought orders for distribution. But if there is a doubt, I should say that I am also satisfied that the interests of creditors in Australia are adequately protected by the orders that I propose to make, particularly in light of the US Bankruptcy Court's recognition thereof (see [61]). Further, I am generally satisfied as to the matters in art 22, cl 1.

63 Generally, I am disposed to make the orders sought by the applicant, but before hearing from the parties on their precise form, I should address some other matters.

Deputy Commissioner of Taxation

64 The Deputy Commissioner is a substantial creditor of Edelsten.

65 The evidence discloses the following:

- On 8 July 2014, the Deputy Commissioner obtained judgment in the Supreme Court of Victoria against Edelsten in the sum of \$4,515,423.32 for an outstanding tax liability as at that date together with interest and costs.
- On 21 August 2014, the Deputy Commissioner served a bankruptcy notice on Edelsten requiring him to pay \$4,536,722. Edelsten failed to comply with that notice, but the Deputy Commissioner is yet to file a creditor's petition relying upon an available act of bankruptcy being non-compliance with the bankruptcy notice under s 40(1)(g).
- On or about 6 October 2014, the Deputy Commissioner issued an amended notice of assessment to Edelsten assessing him to a further \$4,767,493.09 in tax. As at 8 October 2014, Edelsten was indebted to the Commissioner in the sum of \$9,518,189.90.
- The Deputy Commissioner is also carrying out an audit of the affairs of Edelsten and his related entities and expects that by December 2015 amended assessments will have issued to Edelsten assessing him to additional tax and penalties of up to \$4,612,519.
- Upon the issue of these assessments, the Deputy Commissioner expects that Edelsten will have Australian taxation liabilities totalling approximately \$14,130,000 or more.

I should state at this point that that puts the Deputy Commissioner in an enhanced position, in terms of size at least, as one of the major creditors of Edelsten.

66 The Deputy Commissioner was generally supportive of the applicant's application. However, the Deputy Commissioner sought additional orders to protect his interests as a local creditor. He was also concerned to ensure that any stay be expressed so as not to curtail the exercise of the Deputy Commissioner's coercive investigative statutory powers.

67 One issue of concern to the Deputy Commissioner was the "revenue rule". The rule is a US judicial concept that applies to preclude US courts from entertaining suits and claims by foreign governments for payment of foreign tax debts. It has its genesis in an earlier rule of public international law that claims by or on behalf of a foreign state to recover taxes are unenforceable.

68 The concern of the Deputy Commissioner was that in the United States, such a rule might be used against him to deny his claim or admission to proof. Australian Courts recognising this difficulty have previously made orders to protect the Deputy Commissioner against such an eventuality. See for example *Akers (As Joint Foreign Representative) v Saad Investments Co Ltd* [2013] FCA 738 per Rares J; relevant findings were not disturbed on appeal (*Akers v Deputy Commissioner of Taxation* (2014) 311 ALR 167; [2014] FCAFC 57). The United States Bankruptcy Court has sought to protect the Deputy Commissioner's rights in this case by making orders permitting foreign creditors including the Deputy Commissioner to file claims in the US proceeding and also providing that such claims will be treated and rank *pari passu* with other general unsecured creditors. Nevertheless, the Deputy Commissioner has also requested similar protection and recognition in relation to the orders sought in the present application. The form of the proposed orders now addresses that concern.

69 The other issue relates to the form of proposed order 5 dealing with the stay and whether its text went beyond the Model Law and s 58 of the Bankruptcy Act. The Deputy Commissioner asserted that the words in parenthesis "including without limitation any arbitration, mediation or any judicial or quasi-judicial, administrative action, proceeding or process whatsoever" in subpara (i) of order 5(a) of the proposed orders went beyond the text of art 21 of the Model Law. The Deputy Commissioner contended that art 21 was principally confined to legal proceedings. I am not inclined to accept that submission. The text does not say so. Moreover, the UN Guide indicates that "measures initiated by creditors outside the court system" [181] were also envisaged. Next it was said that some support could be gleaned for his interpretation by reference to a decision of the Full Court of this Court. It was

said that in *Akers v Deputy Commissioner of Taxation* (supra), Allsop CJ, with whom Robertson and Griffiths JJ agreed, held that the stay under art 20 (automatic) or art 21 (ordered) of the Model Law did not affect the Commissioner's power of attachment under s 260-5 of Sch 1 to the relevant legislation. This decision was said to stand for the broader proposition that art 21 was narrower in scope than the words included in the parenthesis to proposed order 5(a)(i). I do not necessarily agree with what has been sought to be drawn from that case, but in any event it is unnecessary to resolve this issue.

70 The proposed orders that embody the stay are now appropriately limited. It is my intention that they be limited so as to be coextensive with the operation of the automatic moratoria provisions of the Bankruptcy Act. Accordingly, it is my intention that the orders will impose no greater restraint upon the Deputy Commissioner than if Edelsten was made bankrupt under the Bankruptcy Act and with the administration of his estate taking place under the Bankruptcy Act. Dr Oren Bigos, counsel for the applicant, pointed out that the orders reflected or were also intended to reflect s 16 of the Act. Of course, s 16 deals with a foreign main proceeding rather than a foreign non-main proceeding, but the thrust of his point was that the orders in relation to the present case concerning a foreign non-main proceeding would reflect a similar limitation.

71 The Deputy Commissioner raised a concern as to whether the moratoria orders also went beyond s 58 of the Bankruptcy Act and into the territory that might otherwise require individual adjudication under s 30 of the Bankruptcy Act. In my view, that issue should no longer be of concern as I intend that any orders that I make will limit order 5 in such a way that it will be coextensive with the *automatic* moratorium provisions provided for in the Bankruptcy Act, and not extend into an area which would otherwise normally require individual adjudication in specific known circumstances.

Brynne Gordon

72 Ms Gordon has proceedings pending in the Family Court of Australia seeking orders under s 79 of the *Family Law Act 1975* (Cth). Ms Gordon opposed the application for recognition of the US Bankruptcy Court proceedings as a "foreign main proceeding", but she did not oppose recognition of such proceedings as a "foreign non-main proceeding". As is apparent from what I have already said, I have determined to recognise the US Bankruptcy Court proceedings as a "foreign non-main proceeding" only. Ms Gordon originally also opposed any orders that would restrain her from conducting her Family Court proceedings or

inhibiting the Family Court's power to deal ultimately with the assets of Edelsten if an order were to be made under s 79 of the *Family Law Act*. In my view, the present form of the proposed orders now accommodates her concerns.

National Australia Bank Limited

73 The National Australia Bank Limited appears as a secured creditor. As such, its position was that in terms of the orders to be made, any stay resulting from such orders should not extend in scope beyond what would otherwise be the appropriate scope arising under s 58 of the Bankruptcy Act. Subsection 58(5) of the Bankruptcy Act provides that nothing in s 58 affects the right of a secured creditor to realise or otherwise deal with its security. Given the form of the orders that I propose to make, in my view, the Bank's position is adequately protected by the form of orders, so that it is not so constrained in enforcing its security (as is reflected in s 58(5)).

Assistance to United States Bankruptcy Court

74 The Court's assistance has also been sought under s 29 of the Bankruptcy Act pursuant to the letter of request from the United States Bankruptcy Court (see [2]). The United States is a prescribed country under that section (see reg 3.01 and the table thereto of the *Bankruptcy Regulations 1996* (Cth)).

75 This Court can act in aid of a foreign court under s 29 of the Bankruptcy Act. That is not in doubt. Further, the Court's powers to make the necessary ancillary orders are wide (*Ayres v Evans* (1981) 56 FLR 235 and *Radich v Bank of New Zealand* (1993) 45 FCR 101). Moreover, the Model Law does not limit the Court's powers under s 29 of the Bankruptcy Act providing that no inconsistency of the type referred to in s 21 of the Act arises. There is no relevant inconsistency generally (see arts 7, 9, 25 and 26) or in this particular case (the orders sought are co-extensive with those that could be made and that I will make under art 21).

76 In my view, given the orders that I propose to make under the Act and the Model Law, no further order is necessary under s 29 of the Bankruptcy Act. The orders that I make will adequately deal with the matters that have been sought under the letter of request.

Conclusion

77 I will make orders in the terms discussed with counsel.

I certify that the preceding seventy-seven (77) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate:

Dated: 16 October 2014