FEDERAL COURT OF AUSTRALIA

Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904

Citation:	Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904
Parties:	**GAVIN CECIL GAINSFORD, SHIRISHKUMAR JIVAN KALIANJEE AND VINCENT TSIU MATSEPE AS JOINT TRUSTEES IN THE INSOLVENT ESTATE OF BARRY DEON TANNENBAUM v BARRY DEON TANNENBAUM**
File number:	QUD 216 of 2012
Judge:	**LOGAN J**
Date of judgment:	24 August 2012
Catchwords:	**PRIVATE INTERNATIONAL LAW** – bankruptcy and insolvency – cross-border insolvency – foreign insolvency proceedings – application for recognition of foreign 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 – individual's centre of main interests – presumption that individual's centre of main interests is "habitual residence" – application of presumption – individual not habitually resident in foreign jurisdiction – application for recognition of foreign main proceeding dismissed **PRIVATE INTERNATIONAL LAW** – bankruptcy and insolvency – cross-border insolvency foreign insolvency proceedings – application for recognition of 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 – individual's "establishment" – requirement for *inter alia* "place of operations" in foreign jurisdiction not satisfied – application for recognition of foreign non-main proceeding dismissed **BANKRUPTCY AND INSOLVENCY** – jurisdiction and powers of courts in bankruptcy – assistance to courts of other nations exercising an insolvency jurisdiction – bankrupt resident in Australia – letter of request from foreign court not a "prescribed country" for the purposes of s 29(2)(a) of the *Bankruptcy Act 1966* (Cth) – judicial

	discretion per s 29(2)(b) *Bankruptcy Act 1966* (Cth) – provision of assistance granted
Legislation:	*Bankruptcy Act 1924* (Cth) s 22 *Bankruptcy Act 1966* (Cth) ss 29, 81 *Corporations Act 2001* (Cth) ss 9, 416, 601CL *Cross-Border Insolvency Act 2008* (Cth) ss 6, 10, 13 *Vienna Convention on the Law of Treaties 1969* [1974] ATS 2, Art 32 *Federal Court (Bankruptcy) Rules* 2005 r 14.03 *Insolvency Act 1936* (South Africa) ss 16, 20, 23, 152
Cases cited:	*Ackers v Saad Investments Company Ltd (in liq)* (2010) 190 FCR 285 considered *Ayres v Evans* (1981) 56 FLR 235 cited *Basingstoke v Groot* [2007] NZFLR 363 cited *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] 3 WLR 689 cited *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 applied *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 cited *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 cited *Re Ayres; Ex parte Evans* (1981) 51 FLR 395 applied *Re Loy* 380 BR 154 (Bkrtcy ED Va 2007) considered *Re Stanford International Bank* [2011] Ch 33 not followed *Russell v Federal Commissioner of Taxation* (2011) 190 FCR 449 considered *Williams v Simpson* [2011] 2 NZLR 380 followed Ho, LC (General Editor), *Cross-Border Insolvency A Commentary on the UNCITRAL Model Law* (3rd ed, Globe Law and Business, 2012)
Date of hearing:	8 May 2012 14 May 2012
Place:	Brisbane
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	57
Counsel for the Applicants:	Mr P McQuade

Solicitor for the Applicants: Minter Ellison

Counsel for the Respondent: The Respondent appeared in person

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 216 of 2012**

IN THE MATTER OF INSOLVENT ESTATE OF BARRY DEON TANNENBAUM AND THE *CROSS-BORDER INSOLVENCY ACT 2008*

BETWEEN:	**GAVIN CECIL GAINSFORD, SHIRISHKUMAR JIVAN KALIANJEE AND VINCENT TSIU MATSEPE AS JOINT TRUSTEES IN THE INSOLVENT ESTATE OF BARRY DEON TANNENBAUM** **Applicants**
AND:	**BARRY DEON TANNENBAUM** **Respondent**

JUDGE: **LOGAN J**
DATE OF ORDER: **24 AUGUST 2012**
WHERE MADE: **BRISBANE**

THE COURT ORDERS THAT:

1. To the extent that the amended application claims relief:

   (a) under the *Cross-Border Insolvency Act 2008* (Cth), the application is dismissed; and

   (b) under s 29 of *the Bankruptcy Act 1966* (Cth), the Court provide aid in a matter of bankruptcy in respect of the respondent at the request of the South Gauteng High Court at Johannesburg in South Africa in the terms set out in this order.

2. The respondent is to file and serve on the solicitors for the applicants a statement of his affairs of the kind for which s 54 of the *Bankruptcy Act 1966* (Cth) provides within 14 days of the making of this order or within such further time as the Registrar may in writing allow upon application made by the respondent on notice to the applicants within that 14 day period.

3. The Registrar, pursuant to s 81 of the *Bankruptcy Act 1966* (Cth), summon Barry Deon Tannenbaum to attend for examination on oath under s 81 of the *Bankruptcy Act 1966* (Cth) before the Registrar or a Deputy Registrar about his examinable affairs (as defined in s 5 of the said Act) and that he bring with him to such examination for

production thereat such books as are within his possession which relate to his said examinable affairs.

4. The Registrar of the District Registry of Queensland of the Court pursuant to s 81 of the *Bankruptcy Act 1966* (Cth) summon Deborah Tannenbaum to attend for examination on oath under s 81 of the *Bankruptcy Act 1966* (Cth) before the Registrar or a Deputy Registrar about the examinable affairs (as defined in s 5 of the said Act) of Barry Deon Tannenbaum and that she bring with her to such examination for production thereat such books as are within her possession which relate to the examinable affairs (as defined in s 5 of the said Act) of Barry Deon Tannenbaum.

5. The Registrar, pursuant to s 81 of the *Bankruptcy Act 1966* (Cth), summon the examinees listed below (examinees) to attend for examination on oath under s 81 of the *Bankruptcy Act 1966* (Cth) before the Registrar about the examinable affairs (as defined in s 5 of the said Act) of Barry Deon Tannenbaum and that the examinees bring with them to such an examination for production thereat such books as are within the possession of the examinees which relate to the examinable affairs (as defined in s 5 of the said Act) of Barry Deon Tannenbaum.

Examinees

1. Australia and New Zealand Banking Group Limited, by its proper officer
2. Bartan Group Pty Ltd (in Liquidation) ACN 123 301 397, by the liquidator Trevor Mark Pogroske

6. For the purposes of this order, the term "Registrar" includes a Deputy Registrar, a District Registrar and a Deputy District Registrar.

7. The applicants may be represented at such examination of the examinable affairs of the respondent by counsel and/or by solicitor, and subject to s 81(10) and s 81(11) of the *Bankruptcy Act 1966* (Cth), the applicants, by counsel and/or solicitor, conduct the examination.

8. Each of the respondent and the other examinees summoned to appear in accordance with this order is to attend for examination from time to time as required by the Registrar.

9. There be liberty to apply to the applicants with respect to the orders as to the examinations, including the examination of other examinees.

10. The costs of the applicants of and incidental to this application and of the examinations be taxed as between solicitor and client and that when so taxed the applicants be at liberty to pay the same out of any moneys or property of the respondent received by the applicants.

11. Liberty to apply.

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

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
GENERAL DIVISION **QUD 216 of 2012**

IN THE MATTER OF INSOLVENT ESTATE OF BARRY DEON TANNENBAUM AND THE *CROSS-BORDER INSOLVENCY ACT 2008*

BETWEEN:	**GAVIN CECIL GAINSFORD, SHIRISHKUMAR JIVAN KALIANJEE AND VINCENT TSIU MATSEPE AS JOINT TRUSTEES IN THE INSOLVENT ESTATE OF BARRY DEON TANNENBAUM** **Applicants**
AND:	**BARRY DEON TANNENBAUM** **Respondent**
JUDGE:	**LOGAN J**
DATE:	**24 AUGUST 2012**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

1 Under the insolvency law of the Republic of South Africa, the respondent, Barry Deon Tannenbaum, is a bankrupt. He was made bankrupt by an order of the South Gauteng High Court at Johannesburg in South Africa (SA High Court) on 18 August 2009 pursuant to the *Insolvency Act 1936* (South Africa) (Insolvency Act) (the South African proceeding). Earlier, on 8 June 2009, that court had made an order for what is known as the provisional sequestration of his estate. The date of the final sequestration order was 18 August 2009. The applicants, Messrs Gavin Cecil Gainsford, Shirishkumar Jivan Kalianjee and Vincent Tsiu Matsepe were appointed by the SA High Court as the joint trustees of his insolvent estate.

2 The applicants seek the following relief in these proceedings:

(a) pursuant to the *Cross-Border Insolvency Act 2008* (Cth) (Cross-Border Insolvency Act) and the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (Model Law) as given force of law in Australia by s 6 of that Act:

(i) pursuant to Art 17, cl 2 of the Model Law, that the South African proceeding be recognised as a foreign main proceeding or, in the alternative, a foreign non-main proceeding;

(ii) pursuant to Art 21 of the Model Law:

A. the staying of execution against Mr Tannenbaum's assets, except with the leave of the court or the applicants' permission;

B. the entrusting to them of the administration or realisation of all of Mr Tannenbaum's assets in Australia;

C. orders permitting them as foreign representatives to examine witnesses, take evidence and obtain delivery of information concerning Mr Tannenbaum's assets, rights, obligations or liabilities;

D. related to that, an order that s 81 of the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) apply to any such examination as if the applicants were his trustees in bankruptcy and the applicants were the trustees of his bankrupt estate under that Act;

E. orders permitting them to exercise all powers available to a trustee in bankruptcy under the Bankruptcy Act;

F. an order that Mr Tannenbaum has all of the obligations that a bankrupt has under the Bankruptcy Act as if he were a bankrupt under that Act and as if the applicants were the trustees of his bankrupt estate under that Act;

G. various forms of ancillary relief directed to the stay of enforcement or execution proceedings in Australia against Mr Tannenbaum or his assets and the continuation of interim orders made with respect to the preservation of his assets; and, further or alternatively,

(b) pursuant to s 29 of the Bankruptcy Act and a related letter of request from the SA High Court to this Court, that:

(i) an examination be conducted by the District Registrar under s 81 of the Bankruptcy Act of Mr Tannenbaum, his wife, Mrs Deborah Tannenbaum, the Australia and New Zealand Banking Group Limited (ANZ Bank) in respect of Mr Tannenbaum's examinable affairs;

(ii) related orders for the production of documents by an examinee at any such examination;

(c) Mr Tannenbaum be ordered to furnish them with a statement of his affairs.

3 Mr Tannenbaum represented himself in the proceeding. In so doing, he displayed considerable insight into the issues at large. Those issues were the subject of detailed and helpful submissions by Mr McQuade of counsel who appeared for the applicants. Mr Tannenbaum opposed the making of any of the orders sought by the applicants.

BACKGROUND IN SOUTH AFRICA

4 The following facts are, save where another source is indicated, established by the evidence relied upon by the applicants.

5 Mr Tannenbaum was born in South Africa on 23 January 1966. He is a citizen of that country and has been issued with a South African passport. His evidence is that he cannot now locate that passport.

6 Between 2004 and 2009, Mr Tannenbaum raised funds in South Africa for the nominal purpose of their being invested in the local pharmaceutical industry. More particularly, investors made short term (8 to 12 weeks) advances to him for the purpose of enabling the purchase and importation into South Africa of pharmaceutical ingredients.

7 Mr Tannenbaum was the trustee of a trust named the Frankel Trust and in that capacity owned the issued capital of a South African incorporated company Eurochemicals (Pty) Ltd, which traded under the name Frankel Pty Ltd (Frankel). The Frankel Trust was settled in South Africa. Mr Tannenbaum was and remains its sole trustee. He was also the last active director of Frankel.

8 The funds were raised via a scheme which entailed the following, purported bases:

(a) Frankel conducted a business of the bulk importing of ingredients pre-ordered by South African pharmaceutical manufacturers;

(b) funds advanced to Mr Tannenbaum would, in turn, be advanced by him to Frankel; and

(c) each importation would yield a substantial profit to Frankel, thereby enabling it to repay Mr Tannenbaum and, in turn, him to be able to repay each advance and, as well, to pay a high return on it.

9 In total, Mr Tannenbaum received ZAR 3,298,924,803 (AUD 390,036,037) via this scheme between 2004 and 2009.

10 Contrary to these purported bases and, in fact:

(a) less than 0.05% of the funds advanced to Mr Tannenbaum were on loaned by him and used for the purpose of acquiring pharmaceutical ingredients;

(b) of the funds received by Mr Tannenbaum:

(i) some ZAR 44,822,098 was used by him for personal transactions with a substantial portion being spent on gambling;

(ii) he transferred some USD 31.7 million into an account held by Bartan Group Pty Ltd (Bartan), an Australian incorporated company, with the ANZ Bank (Bartan account);

(iii) he transferred some USD 14 million from the Bartan account to other entities controlled by him or to persons associated with him.

11 The sole shareholder of Bartan is another Australian incorporated company, Bardeb Nominees Pty Ltd (Bardeb). In turn, the shares in Bardeb are held solely by Mr Tannenbaum and his wife, Deborah.

12 Mr Tannenbaum was a director of Bartan from 3 January 2007 until 26 August 2009. He held the office of director in Bardeb from 22 December 2006 also until 26 August 2009.

13 Bartan was wound up by an order of the Supreme Court of New South Wales on 9 March 2010. The resultant report of 6 April 2010 as to Bartan's affairs is noteworthy for its paucity of information concerning the affairs of that company. It does though disclose the following:

(a) assets of AUD 586,523 (made up of AUD 150 in cash with the balance being investments in two other entities);

(b) contingent assets of some AUD 21 million.

14 Mr Tannenbaum left South Africa for Australia in mid-2007 with his wife and family. Initially after their arrival, they lived in New South Wales. They presently live in Queensland where he works as what he describes as an "insurance advisor". He states that he hold a licence issued by the Australian Securities and Investments Commission (ASIC) for this purpose.

15 According to Mr Tannenbaum, his assets presently comprise the following (in AUD amounts):

Cash at Bank	1,700.00
Funds in a Savings Account	113.00
Rental Bond	4,000.00
A Citizen Watch	300.00
Clothing	800.00
Computers	500.00

16 Again according to him, his liabilities comprise (also in AUD amounts):

Credit Cards Debt	90,000.00
Vehicle Finance	185,000.00
Rental Lease	3,150.00
"Family Loan"	60,000.00
"Friends' loans"	85,000.00
Electricity	853.00
Telephone	3,636.00
	(Balance of contract)
Tax (inferentially, personal Australian Tax)	"to be confirmed"
Car Rental	1,350.00

17 The "vehicle finance" item is described by Mr Tannenbaum as a "short fall" on a finance lease. He states that the vehicles concerned were returned within the past 24 months.

18 From this brief recitation of events in South Africa, transfer of funds to and within Australia and Mr Tannenbaum's claimed present financial position, it is not hard to see how many interrogative notes might sound in the minds of the applicants and those advising them in respect of the administration his South African insolvent estate. Without intending to be exhaustive, these interrogative notes include the conception and implementation of the scheme, related cash flows and resultant disposition of funds, including to entities in Australia controlled by him. Mr Tannenbaum's assertion in his submission that there are "glaring errors" in the creditors listed in the applicants' supporting material with most being

unknown to him served only to add yet further interrogative notes in relation to his insolvency. The applicants' interest in securing answers from him in relation to such matters is reflected in the relief sought, which includes seeking the conferral of authority to examine him, his wife Deborah, officials of the ANZ Bank and the liquidator of Bartan in Australia and to obtain the production of documents relevant to their administration from them.

19 Under the Insolvency Act and in South Africa:

(a) by s 20 and subject to exceptions for which that Act provides, Mr Tannenbaum's property as at the date of sequestration and such as may be acquired by or accrue to him during the period of his insolvent administration, vested in the applicants, upon their appointment in the South African proceedings;

(b) by s 23, Mr Tannenbaum is required:

(i) to keep a detailed record of all assets acquired by him from whatever source and, if required by the applicants, to remit in the last week of every month a statement verified by affidavit of the assets which he has acquired and the disbursements which he has made during the preceding month;

(ii) to assist the applicants in collecting, taking charge of or realising the assets which comprise his insolvent estate; and

(iii) to keep the trustee informed of his residential and postal address.

(c) by s 16, Mr Tannenbaum is required to complete a report as to his financial affairs.

20 According to the applicants, Mr Tannenbaum has failed to co-operate with them in their administration by disclosing details of his assets and liabilities. More particularly, he has failed to complete the required report as to his financial affairs. Neither has he kept the applicants informed of his residential and postal addresses.

21 Mr Tannenbaum disputes the allegation of non-co-operation. On closer examination, this dispute is not so much a denial of the applicants' allegation of non-co-operation as an assertion that he has not been permitted to co-operate on his own terms. Thus, he states that he has always co-operated with "the South African Authorities" and "with the lawyer allegedly acting for the trustees", "providing I have legal representation and costs paid for". He further states that he has received advice from his "Australian lawyer" (whose identity or

source of paid retainer is not specified) that an estimate of these costs is AUD 200,000.00. Somewhat incongruously with his assertion of co-operation, Mr Tannenbaum further maintains that he has never been officially notified either of his being made bankrupt in South Africa or of the applicants' appointment there as the trustees of his estate.

22 In South Africa, the applicants have to date made extensive investigations into Mr Tannenbaum's financial affairs, including the scheme described above. These investigations have included the examination, pursuant to s 152 of the Insolvency Act, of some 200 witnesses over 37 days. The applicants' investigations, including such examinations, are continuing. They assert, and the evidence before me gives ample basis for that assertion in terms of the interrogative notes which I have mentioned, that Mr Tannenbaum's failure to co-operate with them is hampering their administration of his insolvent estate and is not in the interests of the creditors of that estate.

23 The applicants' administration of Mr Tannenbaum's insolvent estate has included the institution of some 90 High Court proceedings in South Africa under the voidable disposition provisions of the Insolvency Act. In these proceedings the applicants seek the recovery of dispositions alleged to have been made without value or in ways that constitute voidable preferences. Thirteen of these proceedings are listed for trial. The earliest such trial listing is not until 24 July 2017. While, without any disrespect to South Africa, such a listing serves as a reminder that challenges for government in the provision of sufficient judicial resources for timely civil justice are not confined to Australia, the lead time entailed also underscores that there is utility in the applicants' desire to examine Mr Tannenbaum and to otherwise gather evidence beyond matters of public record in Australia.

CROSS-BORDER INSOLVENCY ACT

24 Subject to the Act, the Cross-Border Insolvency Act gives the Model Law the force of law in Australia (which is defined for the purposes of the Act to exclude the external territories of the Cocos Islands Territory and the Christmas Island Territory).

25 Before consideration can be given to whether the South African proceeding meets one or more of the substantive criteria specified in the Model Law to allow its recognition as either a foreign main proceeding or, alternatively, 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.

26 The criteria which comprise the status based conditions precedent are specified in Art 17, para 1 of the Model Law. As they relate to the present application, they are:

(a) the South African proceeding must be a "foreign proceeding" within the meaning of Art 2(a) – by virtue of Art 17, para 1(a);

(b) the applicants must be a "foreign representative" within the meaning of Art 2(d) – by virtue of Art 17, para 1(b); 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 – by virtue of Art 17, para 1(d).

27 As to these conditions precedent:

(a) The South African proceeding is a "foreign proceeding" within the meaning of Art 2(a) of the Model Law. That is because it is a judicial proceeding in respect of a debtor, Mr Tannenbaum in which, pursuant to a law relating to insolvency, the Insolvency Act, his estate and affairs are subject to the control and supervision of a foreign court, the SA High Court. The nature of that proceeding is "collective" in the sense that it deals with and adjusts the claims in that jurisdiction of all of his creditors. Its existence and the orders made in it in relation to Mr Tannenbaum are presumptively proved, as Art 16 of the Model Law permits, by certificates given for the purposes of Art 15, para 2 of that Model Law. This presumption constitutes prima facie evidence: *Ackers v Saad Investments Company Ltd (in liq)* (2010) 190 FCR 285 at [56] (*Ackers v Saad Investments*). That presumptive proof is not contradicted by any other evidence. Mr Tannenbaum asserted that there is a proceeding in South Africa to set aside his bankruptcy. He offered no evidence to support this assertion, much less proof that his bankruptcy there had been set aside.

(b) The applicants are "foreign representatives". Their appointment in the SA proceeding is also presumptively proved (Art 15, para 3) by certificate. Mr Tannenbaum's claim

not to have been officially told of their appointment does not constitute a rebuttal of this presumption.

(c) In respect of individuals and for the purposes of Art 4 and Art 17, para 1(d) of the Model Law, this Court is designated as the court of competent jurisdiction by s 10(a) of the Cross-Border Insolvency Act.

28 In short then, the applicants have satisfied each of the status based conditions precedent.

29 The procedural conditions precedent are found in Art 17, para 1(c) of the Model Law and in s 13 of the Cross-Border Insolvency Act and r 14.03 of the *Federal Court (Bankruptcy) Rules 2005* (Bankruptcy Rules).

30 Article 17, para 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". The application is accompanied by the requisite certificates, which constitute the presumptive proofs mentioned above. The application is also accompanied by the requisite (Art 15, para 3) statement from the applicants identifying all foreign proceedings in respect of Mr Tannenbaum of which they are aware. They are not aware of any other proceedings. There is no evidence of any insolvency proceeding in any other foreign country in respect of Mr Tannenbaum.

31 Collectively, s 13 of the Cross-Border Insolvency 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 foreign representative:

(a) all proceedings under the Bankruptcy Act in respect of the debtor;

(b) any appointment of a receiver (within the meaning of s 416 of the *Corporations Act 2001* (Cth) (Corporations Act)), or a controller or a managing controller (both within the meaning of s 9 of that Act), in relation to the property of the debtor; and

(c) all proceedings under Ch 5, or s 601CL, of the Corporations Act in respect of the debtor.

32 Rule 14.03 further requires that the parties to the application be the foreign representative as applicant and the debtor as respondent. Yet further, this rule requires that the application be accompanied by an interim application seeking directions as to service. Each of these procedural conditions precedent has been satisfied and the application has been served as required. In particular, Mr Tannenbaum has neither been made a bankrupt under the Bankruptcy Act nor are there proceedings pending in Australia directed to that end.

33 The substantive criteria which must be satisfied for a foreign proceeding to be recognised are set out in Art 17, para 2 of the Model Law. It is there provided:

> 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.

34 In turn, Art 16, para 3 of the Model Law provides:

> 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.

35 In the circumstances of this case, the question becomes whether, in respect of Mr Tannenbaum, South Africa is, in terms of the Model Law, the "centre of the debtor's main interests" (COMI)? One basis upon which the applicants seek to demonstrate that it is South Africa is via reliance upon the presumption found in Art 16, para 3 of the Model Law. The presumptions found in that paragraph of the Model Law are not exhaustive of the manner in which COMI may be proved but their very presence indicates that they are intended to represent a convenient, common readily ascertained touchstone. Thus the Model Law proceeds on the basis that, in the absence of proof to the contrary, in the case of corporate debtors their COMI will be their registered office and in the case of individual debtors, their place of habitual residence will be presumed to be their COMI. Necessarily, the further questions which arise are where is Mr Tannenbaum's place of habitual residence and is there proof that that his COMI is other than at this place?

36 The expression "centre of the debtor's main interests" (COMI) is not defined in the Cross-Border Insolvency Act, which, as Rares J notes in *Ackers v Saad Investments* at [30], is

a matter of deliberate legislative choice. Neither is COMI defined within the Model Law itself. That our Parliament has chosen to adopt for Australia a model developed under United Nations auspices for the purpose of multilateral adoption suggests and regard to the Explanatory Memorandum confirms that Parliament's intention both with respect to the interpretation of the expression COMI and of the Model Law generally was that they would be interpreted in harmony with international legal norms and with meanings given to that expression and that law in other adopting countries.

37 Reaching that conclusion in that way gives due recognition to the reminder offered by Dowsett J (Edmonds J agreeing in this regard) in *Russell v Federal Commissioner of Taxation* (2011) 190 FCR 449 at [26] to [30], by reference *to Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 and *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52, that, even where an international convention or model law is adopted by Parliament in an Australian enactment, that enactment and the adopted convention or model law must be interpreted in accordance with Australian principles of statutory construction. It is via the application of those principles that the end of harmonious interpretation emerges. It is likewise via those principles that it would be permissible to have regard to general principles for the interpretation of such international instruments set out in the *Vienna Convention on the Law of Treaties 1969* [1974] ATS 2 and, via Art 32 of that convention, to *United Nations Commission on International Trade Law* (UNICTRAL) preparatory work in respect of the Model Law.

Unlike the present case, *Ackers v Saad Investments* was a case where the debtor concerned was a corporation. So far as corporations are concerned, the authorities discussed by Rares J in *Ackers v Saad Investments* provide ample authority for his Honour's observation (at [32]) that, "the question as to what is a COMI is by no means settled". That observation was made in 2010 but, as the more recent discussion in Ho, LC (General Editor), *Cross-Border Insolvency A Commentary on the UNCITRAL Model Law,* (3rd ed, Globe Law and Business, 2012) at p 452 to p 459 (Ho's Model Law Commentary Text), of later authority in relation to corporate debtors in the United States (where the Model Law has been transposed into their Bankruptcy Code and which has thus far proved to be the busiest Model Law jurisdiction) reveals, the observation remains true of the position in relation to corporate debtors. The following are, by reference to pertinent US authority, identified in Ho's Model Law

Commentary Text (at p 456 to p457) as "evolving issues" in United States corporate debtor Model Law jurisprudence:

(a) At what time along the continuum should/must COMI be determined?

- At the time the chapter 15 petition is filed seeking recognition?
- At the time the court determines the petition for recognition?
- At the time the foreign proceeding is commenced?
- May/must the debtor's activities at an earlier time be considered?

(b) Can a debtor's COMI shift?

(c) May the situs of the foreign representative be considered in determining COMI and, if so, under what circumstances?

(d) Where does the COMI lie of a debtor whose assets, operations and parties in interest are truly internationally dispersed?

(e) Is the debtor's COMI its "nerve centre" and what constitutes the same?

Fortunately, it is not necessary to answer all of these questions to resolve this case.

38 The opportunity thus far for the judicial consideration of the application of the Model Law to individual debtors has been less frequent than in respect of corporate debtors. There is though a valuable exposition concerning the application of the Model Law to individuals in the judgement of Heath J in *Williams v Simpson* [2011] 2 NZLR 380 (*Williams v Simpson*). The facts of that case were these. Mr Simpson was a Lloyd's Name who had the misfortune to encounter the liability which that underwriting investment can entail. He was made bankrupt in England. Long before then and on retirement from practice in England as a psychiatrist, he had moved to New Zealand. He considered himself a New Zealand resident although he spent a lesser part of each year in England to enjoy the cricket and to visit more distant relations. He had a school-aged daughter in New Zealand. The English trustee of his insolvent estate believed that he had secreted assets in New Zealand. He made application to New Zealand's High Court under that country's legislation adopting the Model Law for the recognition in New Zealand of the English bankruptcy proceeding either as a foreign main proceeding or as a foreign non-main proceeding.

39 In *Williams v Simpson*, at [42], Heath J commenced his analysis of the term "habitual residence" by noting that the term was well known in international law. By way of example, His Lordship looked to New Zealand authority which had considered the term as it appeared in the context of the locally adopted *Hague Convention on the Civil Aspects of Child Abduction* (Abduction Convention). Heath J saw no reason why the statement made by the New Zealand Court of Appeal concerning that term in the Abduction Convention in *Basingstoke v Groot* [2007] NZFLR 363 (CA) should not be applied. In that case the New Zealand Court of Appeal had stated that the inquiry as to "habitual residence" was a "broad factual one, taking into account such factors as settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the State and to any other state (both in the past and currently), the degree of assimilation into the State (including living and schooling arrangements), and cultural, social and economic integration".

40 The like conclusion is open by reference to Australian authority. Here, too, it has been recognised that the term "habitual residence" has a long history of usage in international conventions over which time a settled body of law internationally has developed concerning its meaning. So much is clear from the leading Australian authority concerning the term "habitual residence" as it appears in the Abduction Convention as legislatively adopted for Australia, *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 (*LK v Director-General, Department of Community Services*). In that case, the High Court observed (at [21] to [25]):

> 21 The expression "habitual residence", and its cognate forms, have long been used in international conventions, particularly conventions associated with the work of the Hague Conference on Private International Law. Although the concept of habitual residence was used in a Hague Convention (on civil procedure) as long ago as 1896, and has since been frequently used in other Hague Conventions, none of those instruments has sought to define the term. Rather, as one author has put it, the expression has "repeatedly been presented as a notion of fact rather than law, as something to which no technical legal definition is attached so that judges from any legal system can address themselves directly to the facts". Thus the Explanatory Report commenting on the Abduction Convention said that "the notion of habitual residence [is] a well-established concept in the Hague Conference, which regards it as a question of pure fact, *differing in that respect from domicile*".
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> 22 To approach the term only from a standpoint which describes it as presenting a question of fact has evident limitations. The identification of what is or may be relevant to the inquiry is not to be masked by stopping at the point of describing the inquiry as one of fact. If the term "habitual residence" is to be given meaning, some criteria must be engaged at some point in the inquiry and they are to be found in the ordinary meaning of the composite

expression. The search must be for where a person resides and whether residence at that place can be described as habitual.

23 Having regard, however, to the stated determination to eschew definition of the expression in its use in the Abduction Convention, and other instruments derived from the work of the Hague Conference, it would be wrong to attempt in these reasons to devise some further definition of the term intended to be capable of universal application. Rather, it is sufficient for present purposes to make two points. First, application of the expression "habitual residence" permits consideration of a wide variety of circumstances that bear upon where a person is said to reside and whether that residence is to be described as habitual. Secondly, the past and present intentions of the person under consideration will often bear upon the significance that is to be attached to particular circumstances like the duration of a person's connections with a particular place of residence.

24 Use of the term "habitual residence" to identify the required connection between a person and a particular municipal system of law amounts to a rejection of other possible connecting factors such as domicile or nationality. In particular, it may be accepted that "habitual residence" has been used in the Abduction Convention (as it has been used in other instruments) "[t]o avoid the distasteful problems of the English concept [of domicile] and the uncertainties of meaning and proof of subjective intent". It was said in the nineteenth century that the notion that lies at the root of the English concept of domicile is that of permanent home. But it was soon recognised that domicile, in English law, is "an idea of law". Thus, in considering acquisition of a domicile of choice, questions of intention loomed large, and the relevant intention had to have a particular temporal quality (an intention to reside permanently or at least indefinitely). Use of "habitual residence" in the Abduction Convention rather than domicile as the relevant connecting factor entails discarding notions like the revival of domicile of origin and the dependent domicile of a married woman which marked the English law of domicile. More importantly for present purposes, use of "habitual residence" in preference to domicile entails discarding the approach of the English law of domicile which gave questions of intention a decisive importance in determining whether a new domicile of choice had been acquired.

25 It may well be said of the term "habitual residence", as it was of the expression "domicile", that "if you do not understand your permanent home ... no illustration drawn from foreign writers or foreign languages will very much help you to it". Yet it may be accepted that "[h]abitual residence, consistent with the purpose of its use, identifies the center of a person's personal and family life as disclosed by the facts of the individual's activities". Accordingly, it is unlikely, although it is not necessary to exclude the possibility, that a person will be found to be habitually resident in more than one place at the one time. But even if place of habitual residence is necessarily singular, that does not entail that a person must always be so connected with one place that it is to be identified as that person's place of habitual residence. So, for example, a person may abandon a place as the place of that person's habitual residence without at once becoming habitually resident in some other place; a person may lead such a nomadic life as not to have a place of habitual residence.

[emphasis added] [Footnote references omitted]

41 Like Heath J in *Williams v Simpson*, I see no reason why, in respect of individual debtors, the ascertainment of "habitual residence" should be ascertained in any way different to the way it is approached here in respect of other international instruments in which the expression is used such as the Abduction Convention.

42 Adopting this approach, Mr Tannenbaum is not habitually resident in South Africa. That country was once his place of habitual residence but it is no longer. Neither he nor his family has lived in that country since 2007. That was well before he was made bankrupt in that jurisdiction. On the evidence, it may reasonably be inferred and I do infer that he made a deliberate decision to quit that country in 2007. He and his family have lived in Australia ever since. It may very well be that his decision to quit South Africa was inherently bound up with a desire not in the future to be dealt with under the law of that country in respect of his involvement in the scheme described and a related desire to enjoy the benefits of proceeds repatriated to Australia. It is not necessary in this proceeding conclusively to determine whether or not or to what extent he has enjoyed the proceeds but there is no doubt on the evidence that substantial funds sourced from South Africa were transferred to Australian entities controlled by he and his wife. It is no coincidence that his and his wife's association with these Australian entities commenced at our about the same time as they quit South Africa. The result is that it is no longer and was not when this application was filed in April this year Mr Tannenbaum's habit to reside in South Africa. Though he seems to have had a residual association with the scheme until 2009, that association was from Australia, not as a resident of South Africa.

43 Mr Tannenbaum attributes a telephone response by him to a commercial agent making inquiries on the applicants' behalf that he did not have a permanent address and requesting that all communications be directed to his Sydney solicitor to deceit (of an unspecified nature) on the part of the agent. On the evidence, Mr Tannenbaum has been less than candid with the applicants and those making inquiries here on their behalf with precisely where in Australia he and his family have lived from time to time. That particular absence of candour is not though to be equated with continuing habitual residence in South Africa; rather it suggests an intention to the contrary. Further, in his oral evidence, Mr Tannenbaum also attributed a secretiveness concerning his whereabouts to his receipt of death threats. Having regard to the nature of the scheme with which he was involved, I did not find this incredible and I accept it. His statement to the commercial agent that he did not have a permanent

address in Australia needs to be viewed in light of his receipt of such threats and his disposition not readily to co-operate with the applicants. An inference arising from the ASIC and other evidence concerning Bartan is that Mr Tannenbaum initially lived and worked in New South Wales and, having regard to Australian Business Name and his own affidavit evidence now he lives with his family in and works from Queensland. Without revealing his current, Queensland address, it is not possible to be more precise than that. He and his family have not though, as in the example given in the passage quoted from *LK v Director-General, Department of Community Services*, abandoned South Africa, only to lead an existence so nomadic as not to be habitually resident in Australia by the time when the present application was filed. That he has chosen to retain his South African citizenship and not to seek enrolment on an Australian electoral roll is relevant but by no means determinative. There is nothing to suggest that he is not and has not since 2007 been lawfully resident in Australia. He continues to hold the office of trustee of the Frankel Trust and has South African issued life and endowment policies. Neither the holding of that office nor those assets make him an habitual resident of South Africa. On the whole of the evidence, the conclusion which I reach is that, at the very latest, if not already by 2009, he was habitually resident in Australia as at the time this application was filed and remains so.

44 I have focussed upon the position as at the time when the application to this Court, was filed, rather than some anterior time, first and foremost because Art 16, para 3 of the Model Law uses the present tense. It also coincides with the focal point adopted by Heath J in *Williams v Simpson* for determining habitual residence. That is not to exclude reference to an individual debtor's historical position. Indeed, reference to that may be critical in determining whether the present residential position is "habitual". The scope for factual inquiry is broad and, though a debtor's subjective intention is not irrelevant, the conclusion as to habitual residence must be reached after an objective examination of the whole of the evidence.

45 As had their counterparts in *Williams v Simpson*, the applicants relied upon a decision of a United States Bankruptcy Court, *Re Loy* 380 BR 154 (Bkrtcy ED Va 2007) to, as I understood the submission, to rebut the presumption as to habitual residence or at least to indicate the evidence upon which a conclusion as to habitual residence might permissibly be based. In that case and on the basis that a debtor's COMI should be readily be ascertainable by third parties, the court looked to factors such as the location of the debtor's primary assets, the location of the majority of his creditors and the jurisdiction whose law would apply to

most disputes concerning his debts. The difficulty about this is that it looks to a past with which Mr Tannenbaum seems to me to have done his level best to sever connection. Objectively, he did this not for the purpose artificially of creating the façade of a COMI other than South Africa but for the purpose of indefinitely living and working in Australia. His presence in Australia is neither transient nor contrived for the purpose of avoiding the consequence of his COMI being found to be South Africa. The presumption is not rebutted.

46 As for the proposition that a debtor's COMI must be readily ascertainable by third parties, the authorities in relation to which are collected and discussed by Rares J in *Ackers v Saad Investments* at [34] to [49], it is important to recall that the only criterion readily ascertainable by a third party which is specified in the Model Law is the registered office of a corporate debtor. The equivalent in respect of an individual debtor is habitual residence. An alternative equivalent which might perhaps have been chosen in respect of individuals would have been citizenship or nationality but, even with this, dual nationality would for individuals have presented problems of COMI identification akin to a corporate debtor which has a registered office in one jurisdiction but its "nerve centre" in another. That is to say nothing of problems which would arise in respect of those who are citizens of one country but choose quite lawfully, to reside in another. Further and more fundamentally, to treat criteria which go to how a debtor presents its/him/her self to the outside world as a factor carrying determinative weight, as opposed to being relevant, in the determination of COMI would be to violate the principles of interpretation which I have set out above. The Model Law does not, in terms, make criteria readily ascertainable by third parties determinative in the objective test for the identification of COMI which it posits. At most and then only in respect of corporations, it creates a presumption based on the debtor's registered office. Axiomatically, ascertainment "habitual residence" may entail the reception of facts which, though relevant, are not readily ascertainable by third parties. In *Williams v Simpson* a third party might perhaps readily have been able to ascertain that Mr Simpson had a school aged daughter by a search at the Registrar-General's office. However, had that daughter not been living with him, as opposed to with a wife from whom he was estranged and had he little or no contact with each of them, such facts might also be relevant but they would not be readily ascertainable by a third party. In this case, ownership of property is readily ascertainable by a search at the Titles Office but rental of residential property is not. For individuals, and, in the final analysis for corporations, the inquiry as to COMI must remain a broad, factual one.

47 It follows from this that I must dismiss so much of the applicants' application as seeks the recognition of the South African proceeding as a foreign main proceeding.

48 The applicants' alternative, Model Law based application was that the South African proceeding should be recognised as a foreign non-main proceeding. For this purpose, it was submitted that Mr Tannenbaum had an "establishment" in South Africa. Having regard to Art 17, para 2(b) and Art 2(f) of the Model Law, for the proceeding to be so recognised he must prove that Mr Tannenbaum:

(a) has a "place of operations" in South Africa;

(b) there carries out a non-transitory economic activity; and

(c) does so with human means or goods or services.

49 On this subject also, I have the benefit of a survey of overseas authority, the same authorities as were relied upon by the applicants, by Heath J in *Williams v Simpson* at [51] to [61]. Because I agree with that survey, I propose to set out the passage concerned in full:

> [51] In *Shierson v Vlieland-Boddy* the English Court of Appeal considered whether the debtor had his centre of main interests or an establishment in the United Kingdom.
>
> [52] The EC Regulation defines the term "establishment" in the same terms as it is defined in New Zealand. The EC Regulation is interpreted in light of a report prepared for the purpose of the earlier European Convention, known as the Virgos-Schmit Report. This report was available to those who prepared the Model Law and is a document that I consider I am entitled to take into account in determining the meaning of the term "establishment", for the purposes of the Act.
>
> [53] The Virgos-Schmit report describes a "place of operations" as one from which "economic activities are exercised on the market (that is, externally), whether the said activities are commercial, industrial or professional". The authors added that the emphasis on economic activity using human resources demonstrated a need "for a minimum level of organization". A "certain stability" is required.
>
> [54] In *Shierson v Vlieland-Boddy*, Chadwick LJ was prepared to uphold the first instance Judge's conclusion that the letting and managing of a single unit in England as "a multi-let business premises" was sufficient to bring Mr Vlieland-Boddy within the definition of "establishment". Longmore LJ agreed with Chadwick LJ's conclusion, as did Sir Martin Nourse. All three Judges took the view that while the premises appeared to be in the name of another entity, they were satisfied, on the evidence, it was possible to infer that other entity was acting as "a front or nominee" for the debtor.

[55] In *Re Ran*, the question was whether an Israeli bankruptcy should be recognised as either the main or non-main proceeding, under ch 15 of the US Bankruptcy Code. In doing so, the Fifth Circuit of the US Court of Appeals considered whether Mr Ran had an "establishment" in the United States under the equivalent definition of that term in ch 15 of the US Bankruptcy Code.

[56] In considering the meaning of the term "establishment" the Fifth Circuit said:

> [12] Our conclusion is … supported by a plain language reading of Ch 15, which notes that a foreign nonmain proceeding can exist where a debtor "*has* an establishment". 11 USC s 1502(2) (**emphasis added**). Likewise, s 1502(2) refers to an establishment as "any place of operations where the debtor *carries* out a nontransitory activity". Id. s 1502(2) (**emphasis added**). The use of the present tense implies that the court's establishment analysis should focus on whether the debtor has an establishment in the foreign country where the bankruptcy is pending at the time the foreign representative files the petition for recognition under Ch 15. See Mark Lightner, *Determining the Center of Main Interest Under Ch 15*, 17 J. Bankr L & Prac 5, Art 2 (2209).
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> So in order for Ran to have an establishment in Israel, Ran must have (1) had a place of operations in Israel and (2) been carrying on nontransitory economic activity in Israel at the time that [the Israeli bankruptcy receiver] brought the petition for recognition in the United States. Neither Ch 15 nor its legislative history explain what it means for a debtor to have "any place of operations" or to have "been carrying on nontransitory economic activity" in a location. See H R Rep No 109–31(I), at 107, *reprinted in 2005* USCCAN at 170 (mentioning only that the definition was taken from Model Law for Cross-Border Insolvency Article 2). However, the Model Law for Cross-Border Insolvency and the sources from which it emanates provide guidance concerning what it means for a debtor to have an establishment in a location.

[57] In *Ran*, the possibility of some lesser test being required in respect of a human debtor, as opposed to a corporate one was considered. After referring to the UNCITRAL Guide to Enactment of the Model Law (the Guide) and the thrust of the Virgos-Schmit Report, the Court said:

> [12] … The mere presence of assets in a given location does not, by itself, constitute a place of operation. … In the context of corporate debtors, there must be a place of business for there to be an establishment. *Re Bear Stearns*, 374 BR at 131; *see also* Daniel M Glosband, *SPhinX Ch 15 Opinion Misses the Mark*, 25 Am, Bankr Inst J 44, 45 (Dec/Jan 2007). Equating a corporation's principal place of business to an individual debtor's primary or habitual residence, a place of business could conceivably align with the debtor having a secondary residence or possibly a place of employment in the country where the receiver claims that he has an establishment. *See* 11 USC s 1516(c) (equating a corporate debtor's registered office with the habitual residence in the case of an individual). At the time [the Israeli bankruptcy receiver] filed his petition for recognition, Ran possessed neither a secondary residence nor place of employment in Israel.

> The provision of the US Bankruptcy Code that equates a corporate debtor's registered office with the habitual residence of a human debtor is replicated in art 16(3) of the New Zealand legislation.

[58] In this context, two decisions in the Bear Stearns litigation are instructive. At first instance, Judge Lifland, in the Bankruptcy Court of the Southern District of New York, declined to recognise a provisional liquidation in the Cayman Islands as either a main or non-main proceeding. In discussing the meaning of the term "establishment", the Judge equated it with "a local place of business", holding that the purely administrative functions of the hedge fund that took place in the Cayman Islands were insufficient to constitute "an establishment" in that jurisdiction. Interestingly, despite making it clear that "the discretionary and flexibility attributes of case law under [the now repealed] s 304 of the Bankruptcy Code [was] misplaced", the Judge held that the provisional liquidators were not without remedy because there was an ability to seek some relief from US Courts. Judge Lifland referred specifically to the ability to commence an "involuntary case" under either ch 7 or ch 11 of the US Bankruptcy Code. The Judge referred to s 303(b)(4) of the Bankruptcy Code, in saying that the foreign representative was "not left remediless upon nonrecognition".

[59] Judge Lifland's views were upheld on appeal by the District Court, in which Judge Sweet found that [auditing] activities and preparation of incorporation papers performed by a third party did not, in plain language terms, constitute "operations" or "economic activity" by" those responsible for managing the Funds. To similar effect, the District Court relied on the fact that the hedge funds "had no assets in the Cayman Islands at the time of filing", to support the conclusion that non-main recognition was inappropriate.

[60] In referring to those authorities, I make it clear that neither they nor I are attempting to define the scope of possible activities that would suffice to demonstrate the existence of an individual debtor's establishment in a particular location. For example, in *Ran*, the Court of Appeals made it clear, in its conclusion, that it was not attempting to define the scope of possible activities that would suffice to demonstrate either the existence of an individual debtor's centre of main interests or an establishment in a particular location.

[61] The difficulties inherent in identifying an "establishment" for an individual debtor were recognised in the Guide. That publication suggested that enacting States might wish to exclude from the scope of application of the Model Law insolvencies that related to natural persons residing in an enacting State, whose debts had been incurred predominantly for personal or household purposes (as opposed to commercial or business purposes) or those that related to non-traders. Those observations reflect the fact that UNCITRAL is primarily concerned with trade and the need, for economic reasons, to provide workable mechanisms to resolve cross-border insolvencies involving trading entities with assets or liabilities in different states.

[Footnote references omitted]

50 Though in *Williams v Simpson* Heath J took into account the background to the development of the European Community Insolvency Regulation, in which the concepts of COMI and "establishment" are also found, he was conscious (at [32]), as I am, that COMI is employed in that regulation for a different purpose than in the Model Law. In the former it is employed for the purpose of determining in which European Community jurisdiction an insolvency proceeding which will control a debtor's assets throughout the European Community may be commenced whereas in the latter all that COMI does is govern whether a foreign insolvency proceeding may be recognised. This distinction is not, with respect, evident in *Re Stanford International Bank* [2011] Ch 33 at [54], a case relied upon by the applicants (and note the trenchant criticism of that case in Ho's Model Law Commentary Text at p 200 to p 204).

51 As with Art 16, para 3 in relation to "habitual residence", Art 17, para 2(b) and Art 2(f) in their respective references to and definitions of "establishment" use the present tense. It is quite possible that an individual debtor might have a present habitual residence in one jurisdiction and an "establishment" in another. The two need not coincide. This case may well offer an example of that so far as the past is concerned. Though Mr Tannenbaum quit South Africa in 2007 to reside in Australia, as trustee of the Frankel Trust he continued from here his involvement with the scheme in South Africa until 2009. After that year though, his business operations in South Africa ceased. Though assets remain there, now subject to insolvency administration, and though, as mentioned, he also holds life insurance and endowment policies there, these are residual, passive investments. He does also seem to have South African based legal advisers but these seem to be concerned with the winding up in insolvency of his former activities rather than with the continuing conduct of business there. Mr Tannenbaum no longer has a place of operations in South Africa. In short, there is no present "establishment" in South Africa.

52 It follows from this that it is not possible for the South African proceeding to be recognised as a "foreign non-main proceeding".

53 The circumstances of the present case may well highlight a deficiency or at least a gap in the Model Law in relation to individual debtors. Particularly in a case where large amounts have been raised from creditors and retained by the borrower rather than deployed as the lender expected, the incentive for a debtor to quit the jurisdiction where those funds have

been raised removing some or all of those funds in so doing may be a strong one. A lag might then occur between when the absence of the debtor and the funds is detected and when proceedings for insolvency are taken and a sequestration order is made. Never in history has there been facility for rapid international travel and even more rapid transfer of funds between jurisdictions. By the time that a debtor is made insolvent in one jurisdiction and Model Law recognition proceedings commenced in another, the debtor may have established habitual residence in that other jurisdiction. Yet further, the same imperative that occasioned the departure of debtor and funds from the former jurisdiction may have lead to the termination by that debtor of any establishment in the former jurisdiction. As the Model Law stands and as this case and *Williams v Simpson* highlight, it may not then be possible for the foreign insolvency proceeding to be recognised in the jurisdiction where the debtor is now resident, no matter how spectacular may be the insolvency in the other jurisdiction.

54 Be this as it may, it does not at all follow from the conclusion that the South African proceeding cannot be recognised under the Model Law as adopted by the Cross-Border Insolvency Act that the applicants and their appointer, the SA High Court are left without the prospect of any Australian assistance in respect of the insolvency administration. So much was recognised by the applicants in their alternative claim for relief.

ASSISTANCE ON REQUEST?

55 The applicants' alternative claim for relief is based upon a Letter of Request from the SA High Court dated 26 March 2012 and the jurisdiction conferred on this Court by s 29 of the Bankruptcy Act. It is a feature of the Model Law as adopted for Australia by the Cross-Border Insolvency Act that it is expressly not intended to limit such jurisdiction as this Court otherwise has to extend assistance to courts of other nations exercising an insolvency jurisdiction: see Art 8 and also Art 25 and Art 26.

56 In *Re Ayres; Ex parte Evans* (1981) 51 FLR 395 at 405 (*Re Ayres*), Lockhart J described the jurisdiction conferred by s 29 of the Bankruptcy Act as having the object of courts exercising jurisdiction in bankruptcy acting in aid of and being auxiliary to one another. South Africa is not a "prescribed country" for the purposes of s 29 but s 29(2)(b) of the Bankruptcy Act allows the extending of assistance to courts which exercise a bankruptcy jurisdiction. The extending of any such assistance calls for the exercise of a judicial discretion in light of the object of the section. Section 29 of the Bankruptcy Act has a lengthy

provenance in the insolvency law of Australia and the United Kingdom: see, for example, s 22(1) of the *Bankruptcy Act 1924* (Cth) (repealed) and *Ayres v Evans* (1981) 56 FLR 235 at 239-240 per Fox J; at 244-247 per Northrop J and at 254-255 per McGregor J. In turn, s 29 and its cognates have, in part, a declaratory quality in that, at common law, there is an ideal of universality of application with respect to bankruptcy proceedings: *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] 3 WLR 689 at [14] to [20] (*Cambridge Gas*). In *Williams v Simpson* at [82], Heath J opined that the common law position as described for the Judicial Committee by Lord Hoffman in *Cambridge Gas* should inform the exercise of the discretion under the New Zealand equivalent of s 29 of the Bankruptcy Act. I respectfully agree with this approach to the exercise of such a discretion.

57 The request made of this Court by the SA High Court is directed to the provision by Mr Tannenbaum of a statement of affairs and to the conduct of examinations and production of documents by him and others. The provision of assistance of this kind will not embarrass any Australian bankruptcy administration with respect to Mr Tannenbaum. There is none. His disposition not to co-operate with the applicants is manifest. Also manifest are the interrogative notes which I have described above. In my opinion, the case for the provision by the Court of assistance of the kind sought is compelling. There is ample power under s 29(3) of the Bankruptcy Act to grant that assistance. The Bankruptcy Act makes provision for the provision of a statement of affairs by a bankrupt and for just this kind of examination and production of documents. I propose therefore to make orders directed to these ends by way of assistance to the SA High Court and that court's appointees, the applicants in respect of the administration of Mr Tannenbaum's insolvent estate.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 24 August 2012