

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Willi v Interprac Financial Planning* [2020] QCATA 104

PARTIES: **ALAN NEVILLE WILLI**
(appellant)

v

INTERPRAC FINANCIAL PLANNING

MICHAEL BUTLER

PATRICIA MARGARET DOUGLAS

MALCOLM MACKENZIE DOUGLAS
(respondents)

APPLICATION NO/S: APL292-19

ORIGINATING APPLICATION NO/S: MCDO 984/18 (Brisbane)

MATTER TYPE: Appeals

DELIVERED ON: 8 July 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Gordon

ORDERS: **The application for leave to appeal or appeal is dismissed.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHO MAY EXERCISE RIGHT – OTHER PERSONS ENTITLED – where an applicant brought a minor debt claim and then became a bankrupt on his own petition – where the trustee in bankruptcy elected to discontinue the minor debt claim and it was dismissed – whether the right of action vested in the trustee in bankruptcy – whether the bankrupt may appeal to the Appeal Tribunal

Bankruptcy Act 1966 (Cth), s 58, s 60, s 116

Bagshaw v Scott [2002] FCAFC 362

Cummings v Claremont Petroleum NL And Another (1996) 185 CLR 124

Jackson v Health Services Union [2015] FCAFC 188

REPRESENTATION:

Appellant: Self-represented

Respondent: Did not participate

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] This appeal has been brought by Alan Neville Willi against a decision of the tribunal to dismiss a minor civil dispute in which he claimed certain monies from two of the respondents to this appeal.
- [2] Mr Willi is an undischarged bankrupt and after his trustee in bankruptcy elected not to pursue the claim, it was dismissed.
- [3] In the usual case, under the *Bankruptcy Act 1966* (Cth) and the common law, the fact that Mr Willi was bankrupt and his trustee in bankruptcy elected not to pursue the claim would be fatal to it, and therefore also fatal to any appeal against its dismissal.
- [4] For this reason I have been asked to consider whether to dismiss the appeal on a preliminary consideration of it. This is under section 47 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act), which allows the Appeal Tribunal to bring an early end to a proceeding if it is (of relevance here) misconceived or an abuse of process.
- [5] But Mr Willi argues that his claim was outside the relevant provisions of the *Bankruptcy Act*. On that basis he says that the claim should have been allowed to proceed, and therefore his appeal ought to succeed to allow that to happen.
- [6] The main provisions of the *Bankruptcy Act* which affect this matter are sections 58, 60 and 116. Section 58(1) provides that when a debtor becomes a bankrupt the property of the bankrupt not being after-acquired property vests in the Official Trustee, or the registered trustee on appointment. Section 116 assists as to what is the property of the bankrupt. It is clear from the statute and from the common law that such property includes a right of action. But section 116(2)(g) excludes any damages or compensation for personal injury or wrong done to the bankrupt or any right to such damages or compensation.
- [7] Section 60 governs what happens to legal proceedings on bankruptcy. The relevant provisions are:

60 Stay of legal proceedings

...

- (2) An action commenced by a person who subsequently becomes a bankrupt is, upon his or her becoming a bankrupt, stayed until the trustee makes election, in writing, to prosecute or discontinue the action.
- (3) If the trustee does not make such an election within 28 days after notice of the action is served upon him or her by a defendant or other party to the action, he or she shall be deemed to have abandoned the action.

- (4) Notwithstanding anything contained in this section, a bankrupt may continue, in his or her own name, an action commenced by him or her before he or she became a bankrupt in respect of:
- (a) any personal injury or wrong done to the bankrupt, his or her spouse or de facto partner or a member of his or her family; or
 - (b) the death of his or her spouse or de facto partner or of a member of his or her family.

Note: See also subsection 5(6).

- (5) In this section, *action* means any civil proceeding, whether at law or in equity.
- [8] Clearly the type of action referred to in section 60(4) is for damages or compensation for personal injury or wrong done to the bankrupt as referred to in section 116(2)(g).
- [9] Mr Willi argues that his claim before the tribunal was within this exception. To see whether this submission succeeds, it is necessary to understand the nature of the claim brought by Mr Willi in the tribunal. It is also helpful to recite what happened to the claim.
- [10] His claim in MCDO 984/18 (Brisbane) was brought as a ‘minor debt claim’, that is to say a claim to recover a debt or liquidated demand of money. In the claim, which was filed on 10 July 2018, he asked that Patricia Douglas be ordered to pay him \$5,365.50 plus interest, plus the filing fee and service fee. This was for financial planning work done for Mrs Douglas. The work that was done was listed in an invoice issued to Mrs Douglas on 9 November 2017 by ‘InterPrac Financial Planning Pty Ltd’ and other named companies seemingly trading as ‘InterPrac’. Mrs Douglas filed a response to the claim stating that Mr Willi was only acting as agent for InterPrac, and that she had paid InterPrac and therefore she did not owe Mr Willi any money. The response attached a letter from InterPrac confirming this.
- [11] The claim started off as a simple one therefore, where the issue was whether Mr Willi was personally entitled to any payment for services from Mrs Douglas and if so whether in paying InterPrac she had fulfilled any such obligation to make payment.
- [12] Mr Willi then applied to amend the claim by adding InterPrac as a respondent. Mr Willi’s claim against InterPrac was for the same amount on the basis that InterPrac had ‘unlawfully deducted from my existing clients Brokerage Report’. That amendment was permitted, and was completed by Mr Willi on 4 February 2019,¹ and an order was made by the tribunal on 4 March 2019 formally adding InterPrac as a respondent to the claim.
- [13] By that time, on his own petition, on 4 January 2019 Mr Willi became a bankrupt. As can be seen from section 60(2) this would have the effect of staying the claim before the tribunal unless it was for damages or compensation for personal injury or

¹ Although the amended application form was late in complying with the tribunal’s directions it was accepted by the tribunal.

wrong done to the bankrupt. On 30 May 2019 a trustee in bankruptcy was appointed.

- [14] On 8 May 2019 an Adjudicator heard MCDO 984/18 and decided that it had no merit. It was not dismissed that day because Mr Willi wanted to check whether some amounts were accounted for, so an order was made that day allowing him 14 days to do this and to inform the tribunal whether he wanted it to be restored for a further hearing. If not, the order said that MCDO 984/18 was to be dismissed without further notice to the parties.
- [15] On 24 May 2019 Mr Willi indicated that he wanted to restore MCDO 984/18 and so it was listed for hearing on 20 August 2019. Then both InterPrac and Mrs Pearson applied to the tribunal for it finally to be dismissed. And on 14 August 2019 the tribunal heard from Mr Willi's trustee in bankruptcy that the trustee wanted MCDO 984/18 to be discontinued. The listing on 20 August 2019 was vacated and the file was referred to the Adjudicator who heard MCDO 984/18 on 8 May 2019 and before whom it was part-heard.
- [16] Prior to the Adjudicator's final decision about what to do with MCDO 984/18, Mr Willi provided the tribunal with detailed submissions as to why it should not be dismissed. In the light of the applications to dismiss, the bankruptcy, and the trustee's wish to discontinue, the Adjudicator dismissed it on the papers. This was on 28 August 2019.
- [17] In his submissions in this appeal,² Mr Willi argues that the requirements of fairness override the provisions of the *Bankruptcy Act*, that he is bankrupt because of a dispute with his neighbours, and that the trustee in bankruptcy behaved badly and he has complained about this. Of more relevance, he argues that section 60(4) of the *Bankruptcy Act* should be read widely and since he was intentionally deprived of the payment that he was entitled to and the events damaged him personally, the claim should be allowed to proceed.
- [18] The fact is however, that his claim was not of a type contemplated by section 60(4) of the *Bankruptcy Act*. It was purely a monetary claim arising out of his endeavours in his work providing financial planning services and was not for compensation or damages for personal injury or wrong done to Mr Willi. Further, the claim was in debt not in damages. Even the claim against InterPrac added by amendment was for debt, because Mr Willie was saying InterPrac should have paid him the fees he had earned. If there had been such a claim for compensation or damages for personal injury or wrong done to Mr Willi, the tribunal would probably have had no jurisdiction to hear it anyway.³
- [19] In the circumstances, the right of action represented by the claim did vest in the trustee in bankruptcy under section 58 of the *Bankruptcy Act*. This means that when the trustee elected to discontinue the claim, the tribunal was right to dismiss it.
- [20] However, this is an appeal. In the circumstances, can the bankrupt bring an appeal, or is it right to dismiss an appeal as being misconceived or an abuse of process?

² Dated 19 June 2020.

³ Apart from some special jurisdiction, the tribunal in its minor civil disputes jurisdiction can only hear a claim for the recovery of a debt or liquidated demand of money or a claim arising out of a contract between a consumer (as defined) and a trader (as defined), or between a trader and another trader.

[21] Firstly, there is a technical defect in the application for leave to appeal. This arises from the fact that the trustee had authority to elect to discontinue MCDO 984/18 because the right of action in the claim vested in the trustee. Section 46 of the QCAT Act permits an applicant to withdraw a claim in the way stated by the rules. This right must extend to those standing in the shoes of an applicant like the trustee in bankruptcy. Rule 57A of the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) requires an approved form to be used for a withdrawal. Section 61 of the QCAT Act permits the tribunal to waive compliance with a procedural requirement. Although the order dismissing MCDO 984/18 did not expressly waive the requirement to use the approved form to withdraw a claim, it was probably waived by implication. On that basis, section 46(3) of the QCAT Act would preclude an appeal without leave. It reads:

(3) If an applicant withdraws an application or referral, the applicant can not make a further application or referral, or request, require or otherwise seek a further referral, relating to the same facts or circumstances without leave of the tribunal.

[22] By section 142(3)(a) of the QCAT Act, an appeal from a decision in a minor civil dispute requires the Appeal Tribunal's leave, and section 143(1) requires an application for such leave. It is clear that following a withdrawal of the claim it is not possible to apply for such leave without also applying for permission to do so under section 46(3), which has not been done.

[23] The tribunal ought not to stand by such technicalities.⁴ But there is a stronger reason why the appeal should not be permitted to proceed, and this is because Mr Willi has no *locus standi* to bring the appeal itself.

[24] The effect of a bankruptcy on an appeal was considered by the High Court in *Cummings v Claremont Petroleum NL And Another* (1996) 185 CLR 124. The circumstances were not exactly the same as Mr Willi's however, because in *Cummings* the bankrupt wished to appeal against a judgment which had diminished his assets, whereas Mr Willi is a claimant who wishes to enlarge his assets. Despite this, the question of principle decided by the High Court is relevant to Mr Willi's appeal. The High Court in *Cummings* decided that since the bankrupt's assets had vested in the trustee, the bankrupt had no *locus standi* to bring an appeal against an order in those proceedings because he has no interest in them.⁵

[25] Mr Willi's interest in the subject matter of MCDO 984/18 has vested in his trustee in bankruptcy. Therefore if Mr Willi were to be successful in the claim he would merely be recovering assets which had vested in his trustee in bankruptcy. He has no interest in those assets and therefore by analogy with *Cummings* he is not entitled to bring the appeal.

[26] It also seems to be the case that any right to appeal itself vests in his trustee and is therefore lost to the bankrupt.⁶

⁴ Section 28(3)(d) of the QCAT Act.

⁵ *Cummings*, [13].

⁶ Federal Court of Appeal in *Bagshaw v Scott* [2002] FCAFC 362, [36], an approach approved thirteen years later in the same court in *Jackson v Health Services Union* [2015] FCAFC 188, [39].

Conclusion in the appeal

- [27] Because of his bankruptcy, the appeal against the dismissal of Mr Willi's claim on 28 August 2019 is misconceived or an abuse of process. The appeal is dismissed under section 47 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).