

SUPREME COURT OF QUEENSLAND

CITATION: *Denby (as T'ee in Bankruptcy of the Estate of S S Wing Tam)*
[2002] QSC 117

PARTIES: **STEPHEN LEONARD DENBY (AS TRUSTEE IN
BANKRUPTCY OF THE ESTATE OF STEPHEN SHU
WING TAM)**
(plaintiff)
v
CHUN WAI SHUM
(defendant)

FILE NO: S 5385 of 2001

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court

DELIVERED ON: 3 May 2002

DELIVERED AT: Brisbane

HEARING
DATES: 14 January and 6 February 2002

JUDGE: Muir J

ORDER: **Plaintiff's claim dismissed.**

Applicant plaintiff to pay the respondent defendant's costs of and incidental to the proceedings (including the costs of the respondent's claim and reserved costs, if any) to be assessed on the standard basis.

CATCHWORDS: *Acts Interpretation Act 1901 (Cth) s 15B*
Bankruptcy Act 1966 (Cth) s 5, s 27, s 31, s 122
Bankruptcy Legislation Amendment Act 1996 (Cth)
Federal Court of Australia Act 1976 (Cth)

Australian National University v Burns (1982) 64 FLR 166
Geia v Palm Island Aboriginal Council (1999) 152 FLR 135
Green v Schneller [2001] NSWSC 897
R v Clyne; ex parte Harrap (1941) VLR 200
Scott v Bagshaw [2000] 99 FCR 573
Sutherland v Brien (1999) 149 FLR 321

BANKRUPTCY – PREFERENCES – PROCEDURE –
application for summary judgment – cross-application for
dismissal for want of jurisdiction – whether proceedings are
“under or by virtue of” the Act – whether “exclusive

jurisdiction” of Federal Court or Federal Magistrates Court

PRACTICE – JURISDICTION – application for summary judgment – cross-application for dismissal for want of jurisdiction – whether proceedings are “under or by virtue of” the Act – whether “exclusive jurisdiction” of Federal Court or Federal Magistrates Court

COUNSEL: H Bowskill for the applicant/plaintiff
PA Looney for the defendant/respondent

SOLICITORS: Clarke and Kann for the plaintiff
Sciaccas Lawyers and Consultants for the defendant

- [1] The plaintiff, a trustee in bankruptcy, claims from the defendant \$48,000 “pursuant to s122 of the *Bankruptcy Act* 1966 (Cth), costs and interest ...”.
- [2] The defendant alleges that the proceedings are “under or by virtue of” the *Bankruptcy Act* 1966 (“the Act”) and thus within the exclusive jurisdiction of the Federal Court and the Federal Magistrates Court by operation of sections 5 and 27(1) of the Act.

The proceedings

- [3] In the statement of claim the plaintiff alleges that –
- (a) He is the Trustee in Bankruptcy of the Estate of a bankrupt person (“the bankrupt”);
 - (b) The bankrupt paid the defendant \$48,000 within six months of the presentation of the bankrupt’s debtor petition;
 - (c) The payment is void against the plaintiff as it had the effect of giving the defendant a preference priority or advantage over other creditors pursuant to s 122(1)(a) of the Act, was made by the bankrupt when insolvent and was a transfer of property pursuant to s 122(8)(a) of the Act.
 - (d) The plaintiff’s demand of the defendant for payment of the money has not been met.
- [4] The plaintiff made an application for summary judgment and the defendant made a cross-application to have the claim dismissed for want of jurisdiction. The applications came on for hearing on 14 January 2002. The matter was then adjourned in order to enable the plaintiff to adduce further evidence in response to matters raised by the defendant. On the resumed hearing on 6 February the plaintiff’s counsel advised that the plaintiff was no longer proceeding with its application. The defendant, however, persisted with his cross-application.

The relevant provisions of the *Bankruptcy Act*

- [5] Section 122(1) of the Act, which the claim and statement of claim identify as the provision of the Act under which the plaintiff’s claim is made, relevantly provides –
- “122 Avoidance of preferences**
- (1) A transfer of property by a person who is insolvent (the *debtor*) in favour of a creditor is void against the trustee in the debtor's bankruptcy if the transfer:

- (a) had the effect of giving the creditor a preference, priority or advantage over other creditors; and
- (b) was made in the period that relates to the debtor, as indicated in the following table.

...

- (5) If a transfer of property is set aside by the trustee in a bankruptcy as a result of this section, the creditor to whom the property was transferred may prove in the bankruptcy as if the transfer had not been made.”

- [6] The definition of bankruptcy in section 5(1) of the Act is -
“bankruptcy, in relation to jurisdiction or proceedings, means any jurisdiction or proceedings under or by virtue of this Act.”
- [7] Section 27(1) of the Act, which defines the jurisdiction of the Federal Court and Federal Magistrates Court by reference to the concept of “bankruptcy”, provides –
“27 Bankruptcy courts
 (1) The Federal Court and the Federal Magistrates Court have concurrent jurisdiction in bankruptcy, and that jurisdiction is exclusive of the jurisdiction of all courts other than the jurisdiction of the High Court under section 75 of the Constitution.”

“The Court” is defined in s 5(1) as meaning “...a Court having jurisdiction in bankruptcy under this Act.”

- [8] Sub-sections 31(1)(e) and (f) of the Act provide:
“In exercising jurisdiction under this Act, the Court shall hear and determine the following matters in open Court:
 ...
 (e) applications to set aside or avoid a charge, charging order, settlement, disposition, conveyance, transfer security or payment;
 (f) applications to declare for or against the title of the trustee to any property ...”

- [9] The concurrent jurisdiction of the Federal Court and the Federal Magistrates Court “in bankruptcy” is expressed by section 27(1) to be “exclusive of the jurisdiction of all other courts other than the jurisdiction of the High Court ...”. That jurisdiction is identified by section 5(1) as “any jurisdiction ... under or by virtue of this Act ...”.

The meaning of “under or by virtue” of the Act

- [10] The phrases “under” an Act or “under or by virtue” of an Act are ones which, like most, if not all, such expressions, derive their meaning from the context in which they are found.
- [11] Under is sometimes used in the sense of “pursuant to”¹ or “under the authority of”². The words “by virtue of” are also capable of meaning “pursuant to”, but may bear a more extended meaning.

¹ *R v Clyne; ex parte Harrap* (1941) VLR 200 at 201 and *Australian National University v Burns* (1982) 64 FLR 166 at 173.

- [12] The *Shorter Oxford Dictionary* provides the following meaning for the phrase “by virtue of” -
 “As a quality of things ... by the authority of, in reliance upon, in consequence of, because of”.
- [13] The *Macquarie Dictionary* 2nd Ed. gives the meaning –
 “by reason of: to act by virtue of authority conferred”
- [14] The words “by virtue of” have been held to mean, variously; “in pursuance of”, or “under”, “by force of” or “by authority of”³.
- [15] The composite phrase “under or by virtue of”, is a fairly traditional formulation in legislation⁴ and is sometimes used in substitution for “in pursuance of” or “under”.⁵
- [16] It seems to me that the subject phrase in the Act means “pursuant to”, in the sense of proceedings in pursuance of a specific provision in the Act authorising the proceedings. That conclusion is consistent with the view of the Court of Appeal in *Geia v Palm Island Aboriginal Council*.⁶
- [17] In *Geia* the Court considered an appeal by a bankrupt appellant whose claims for damages for breach of a contract of employment were dismissed by the judge at first instance on the basis that the action could be brought only by the appellant’s trustee in bankruptcy. The Court, in dismissing the appeal, concluded that such an action could be brought only by the trustee.
- [18] Although it was not argued that it lacked jurisdiction to consider the matter, the Court addressed the matter of jurisdiction,⁷ and in so doing remarked in respect of s 27 –
 “This provision, which came into the statute by the *Bankruptcy Legislation Amendment Act 1996 (Cth)* (No 44 of 1996), could on the face of it be argued to prevent courts, other than the High Court exercising jurisdiction under s 75 of the Constitution, from determining issues arising under the *Bankruptcy Act*. Strangely, the explanation given for the amendment when the relevant bill was introduced to parliament was that it was intended ‘to preserve a situation that creditor’s petitions are dealt with in the Federal Court’: see par 81 at 27 of the Explanatory Memorandum. Presumably the exclusive jurisdiction granted by s 27 covers matters other than creditors’ petitions and one would think that it would, properly construed, make many sorts of matters other than creditors’ petitions the exclusive province of the Federal Court ...
 The Federal Court plainly would have jurisdiction, under s 31(1)(f), to decide the issue which we are determining. But our decision and that made by the learned District Court judge are not in proceedings of a kind which are, by any specific provision of the *Bankruptcy Act*, required to be brought in the Federal Court. That Act does not give

² *Stroud’s Judicial Dictionary of Words and Phrases*, 5th ed, Vol 5, p2711

³ *Words and Phrases, Permanent Edition*, West Publishing Co, 1658 to date, Vol 5A, p840

⁴ *Words and Phrases* Vol 43 pp 151-152; *Stroud’s Judicial Dictionary of Words and Phrases* 5th ed, Vol 4.

⁵ *Stroud’s Judicial Dictionary of Words and Phrases*, 5th ed, Vol 4, p2119

⁶ (1999) 152 FLR 135.

⁷ At 140-141.

the Federal Court power to dismiss an action brought in a State court by a bankrupt, purporting to exercise a cause of action which the *Bankruptcy Act* vests in the trustee.”

- [19] The explanatory memorandum in respect of the Bill introducing the *Bankruptcy Legislation Amendment Act 1996* (Cth) (which enacted section 27 in its present form) stated that it was “intended to preserve the situation that creditors’ petitions be dealt with in the Federal Court” and further noted that –
- “Bankruptcy matters will still be able to be dealt with by the Supreme Courts of the States and the Northern Territory under the *Jurisdiction of Courts (Cross-Vesting) Act 1987* in appropriate cases.”
- [20] As the relevant provision of the Act are not without ambiguities regard may be had to the explanatory memorandum as an aid to construction⁸
- [21] In *Sutherland v Brien*⁹ the issue for determination was whether arrangements made with the administrator of a company by a director and his wife were void against their trustees in bankruptcy under section 120 of the *Bankruptcy Act*. As in *Geia*, neither party contended that the court lacked jurisdiction to deal with the matter but the question of jurisdiction, having been drawn to the court’s attention, required determination. Austin J, in concluding that the matter was not one within the exclusive jurisdiction of the Federal Court, observed –
- “Here the proceedings arise out of claims to a fund held in a trust account. The proceedings have been brought for a determination of those claims and for orders as to the payment of the fund. Although the legal issue to be determined in the proceedings relates to the proper construction and application of a section of the *Bankruptcy Act*, the proceedings themselves are not ‘proceedings under or by virtue of’ the *Bankruptcy Act*. Rather, they are proceedings which invoke the Court’s well-established jurisdiction to determine and declare rights to property and make orders as to its destination. Consequently, these proceedings do not fall within the definition of ‘bankruptcy’ in relation to jurisdiction or proceedings, and do not fall within the ‘jurisdiction in bankruptcy’ which s 27(1) vests exclusively in the Federal Court. Proceedings of the present kind may be contrasted, for example, with a petition by a creditor for a sequestration order against the estate of a debtor, where the Court exercises a statutory jurisdiction conferred by s 43 of the *Bankruptcy Act*.”
- [22] There is a question however of what role, if any, s 31(1) plays in defining matters within the exclusive jurisdiction of the Federal Court or Federal Magistrates Court.
- [23] *Sutherland v Brien* was referred to in the reasons of the Full Court of the Federal Court in *Scott v Bagshaw*¹⁰ where it was distinguished on the basis that it was not a case, unlike the one before the Full Court, which fell within section 31(1)(f) of the Act. In *Scott* the appellant trustee of a family trust sought a declaration that properties were charged in his favour. The first respondent was a bankrupt, the

⁸ *Acts Interpretation Act 1901* (Cth) Section 15B

⁹ (1999) 149 FLR 321.

¹⁰ [2000] 99 FCR 573.

second respondent, the bankrupt's wife and the third respondents were the first respondent's trustees in bankruptcy. The primary judge ordered that the proceedings be stayed for want of jurisdiction.

- [24] In its reasons the Court noted that the pleadings made no reference to any section of the Act and that judgment could be given without reference to any such section. After observing that the nature of the claim was "one to realise an equitable charge" the Court said - ¹¹

"However, the undoubted effect of an order being made in the terms sought by the appellant would be that a declaration would be made against the title of the third respondents. Upon the third respondents becoming trustees, the title to the properties (and subsequently to the money representing part of the properties) became vested in them: subs 58(1) and s 132 of the Act. The consequence of any such order must therefore be that it would have a necessary adverse effect on the title of the third respondents to the extent that it established title in the appellant. That is a matter that falls within the jurisdiction in bankruptcy."

- [25] Earlier it was said that section 31(1)(f) -
 "... elucidates what the drafter of the provision had in mind as falling within 'bankruptcy' in s 27(1) as defined in s 5(1) of the Act. ... [s 31(1)(f) was then set out] It is apparent from the provision that the drafter of it intended that applications having that stated effect would be encompassed within the concept of jurisdiction in 'bankruptcy'".

- [26] In *Green v Schneller*,¹² it was necessary to determine whether the Supreme Court of New South Wales had jurisdiction to grant leave to proceed under section 58(3)(b) of the Act. Barrett J concluded that the court lacked jurisdiction and, in so doing, offered the following analysis of *Scott v Bagshaw* and *Sutherland v Brien* -

"Austin J held that nothing in the Bankruptcy Act precludes the exercise in such cases of the well established jurisdiction of courts other than those mentioned in s 27(1) "to determine and declare rights to property and make orders as to its destination". But that undoubted general jurisdiction will yield to any aspect of the jurisdiction for determination and declaration of such rights which the Bankruptcy Act itself places in the hands of s 27(1) courts. In *Scott v Bagshaw* (above), the Full Federal Court noted that among the matters so placed in the hands of those courts is 'applications to declare for or against the title of the trustee to any property'. Because this is one of the matters s 31(1) of the Act requires 'the Court' to hear in open court, it is identified as a matter within the definition of 'bankruptcy' and thereby seen to be within s 27(1). That aspect of the general jurisdiction 'to determine and declare rights of property and to make orders as to its destination' which entails 'applications to declare for or against the title of the trustee to any property' is accordingly reposed in s 27(1) courts alone."

¹¹ At 577.

¹² [2001] NSWSC 897.

- [27] On one view of s 31(1) the approach in *Scott v Bagshaw* attaches to an essentially procedural provision a significance never intended by the Legislature.
- [28] Unlike sub-paragraphs (e) and (f), some of the sub-paragraphs of s 31(1) deal with procedural matters rather than substantive matters which may arise “under or by virtue of” the Act. For example, s 31(1) (g), (i) and (k) provide –
- “(g) applications for the committal of a person to prison or for the release from prison of a person committed to prison;
 - (i) applications for the trial of questions of fact with a jury and the trial of those questions;
 - (k) summary trials under Part XIV.”

The Act makes no provision for trial by jury and the powers of the Federal Court in that regard are to be found in s 40 of the *Federal Court of Australia Act 1976*.

- [29] Despite these considerations and the content of the second reading speech, I have concluded, with respect, that the approach in *Scott v Bagshaw* and *Sutherland v Brien* ought be followed. Although dicta in *Geia* might suggest a contrary conclusion the Court did not have the benefit of argument on the point and was not alerted to the problem posed by the introductory words of s 31(1).
- [30] When the Act first came into force the definition of “the Court” was as it is now, “a Court having jurisdiction in Bankruptcy under this Act”. The definition of “bankruptcy” has also remained unaltered.
- [31] Section 27(1) provided –
- “The Courts having jurisdiction in bankruptcy are –
 - (a) The Federal Court of Bankruptcy.
[State Supreme Courts, or where appropriate, State Insolvency Courts, were then listed]
 - (h) the Supreme Court of the Northern Territory of Australia”

An amending Act in 1976 substituted the Federal Court for the Federal Court of Bankruptcy.

- [32] The introductory words of s 31(1), “In exercising jurisdiction under this Act, the Court ...”, have remained unaltered, as has s 31(1)(f). Section 31(1)(e) is substantially in its original form but the words “a charge, charging order” have been added.
- [33] By the Bankruptcy Legislation Amendment Act 1996, s 27 was amended to introduce the notion of exclusive jurisdiction. The section then provided –
- “(1) The Federal Court has jurisdiction in bankruptcy, and that jurisdiction is exclusive of the jurisdiction of all courts other than the jurisdiction of the High Court under section 75 of the Constitution.”
- [34] Immediately prior to the 1996 amendment, in my view, it was already implicit in s 31(1) that a court hearing a matter within s 31(1)(e) or (f) would be “exercising jurisdiction under (the) Act.” The reference to “the Court” in s 31(1) was a reference to one of the courts listed in s 27 as “having jurisdiction in bankruptcy”. Jurisdiction in bankruptcy meant “jurisdiction ... under and by virtue of this Act”.

- [35] Prior to the 1996 amendment, I consider that there would have been little doubt that only the courts listed in s 27 could exercise jurisdiction in respect of the matters within s 31(1)(e) and (f).
- [36] An alternative approach is to regard s 31(1) as applying to the matters listed in the sub-section but only where they are before a court exercising jurisdiction under the Act. That is, where an application meeting the description in (1)(e) or (f) is made pursuant to a specific authority contained in a section of the Act. A difficulty with this approach though, is that in 1966 there were no specified procedures in the Act for setting aside or avoiding settlements, dispositions etc or for the making of declarations as to the title to property of trustees in bankruptcy.
- [37] Also such a construction would also give rise to the curious result that a court hearing matters within s 31(1) (e) or (f) would be required to hear such matters in open court if the proceedings were expressly authorised by a section of the Act but not otherwise.
- [38] The 1996 amendment, by providing that “the Federal Court has jurisdiction in bankruptcy” and by making that jurisdiction exclusive, left the Federal Court with the jurisdiction in bankruptcy it possessed before the amendment but removed such jurisdiction from all other courts. That jurisdiction encompassed the matters in s 31(1)(e) and (f). In this case the application does not expressly seek a declaration under section 31(1)(f) or make application to avoid a disposition under s 31(1)(e). Rather, the application claims the repayment of money by the defendant and relies on the operation of section 122 of the Act as one of the matters establishing a right to repayment.
- [39] I doubt that such a claim, not being a claim for a declaration, comes within s 31(1)(f). In my view, however, it is in substance an application to set aside or avoid a disposition or payment. As such the matter is within s 31(1)(e) and is not within this Court’s jurisdiction.
- [40] For the above reasons I order that the applicant plaintiff’s claim be dismissed. I have heard submissions on costs and see no reason why costs should not follow the event. I order that the applicant plaintiff pay the respondent defendant’s costs of and incidental to the proceedings (including the costs of the respondent’s claim and reserved costs, if any) to be assessed on the standard basis.