SUPREME COURT OF QUEENSLAND

CITATION:	*Stone v ACE-IRM Insurance Broking P/L* [2003] QCA 218
PARTIES:	**MICHELLE CORRINE STONE** (plaintiff/appellant) **v** **ACE-I.R.M. INSURANCE BROKING PTY LTD** ACN 010 596 700 (defendant/respondent)
FILE NO/S:	Appeal No 8623 of 2002 SC No 9209 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from an interlocutory decision
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2003
JUDGES:	McPherson JA, Holmes and McMurdo JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Order striking out the proceeding be set aside** **3. Respondent pay the appellant's costs of the appeal to be assessed** **4. The respondent be granted an indemnity certificate in respect of the appeal under the *Appeal Costs Fund Act***
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT - SUMMARY JUDGMENT - where appeal against order that proceedings be struck out- where proceedings commenced by appellant while a discharged bankrupt – where cause of action vested in trustee in bankruptcy – where appellant submits was equitable assignment of cause of action prior to commencing proceedings – whether equitable assignment of cause of action PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT - SUMMARY JUDGMENT - where limitation period has expired – where offer of legal assignment of cause of action

subsequent to commencement of proceedings – whether proceedings a nullity – whether proceedings can be remedied – whether court below erred in striking out proceedings

Bankruptcy Act 1966 (Cth), s 116
Queensland Supreme Court Rules (repealed) O 32
Uniform Civil Procedure Rules 1999 (Qld), r 371, r 375, r 376, r 378

Cameron v Cole (1943) 68 CLR 571, considered
Cockerill & Anor v Westpac Banking Corporation, unreported Federal Court of Australia, 9 March 1992, considered
Cox v Journeaux (No 2)(1935) 52 CLR 713, considered
Craig v Kanssen [1943] 1 KB 256, considered
Draney v Barry [2002] 1 Qd R 145, considered
Equus Financial Services Limited v Glengallen Investments P/L [1994] QCA 157, Appeal No 262 of 1993, 19 May 1994, considered
Francis v National Mutual Life Association of Australasia Limited [1999] 2 Qd R 355, distinguished
Hill v Luton Corporation [1951] 2 KB 387, applied
In re Pritchard [1963] Ch 502, considered
Ingall v Moran [1944] KB 160, considered
MacFoy v United Africa Co Ltd [1962] AC 152, considered
Metropolitan Bank Limited v Pooley (1885) 10 AppCas 210, considered
Pontin v Wood [1962] 1 QB 594, applied
Shillito v Bent [1973] VR 762, considered
Smart v Stuart (1992) 83 NTR 1, considered
Re Macks; ex parte Saint (2000) 204 CLR 158, applied
Thomas v National Australia Bank Limited [2000] 2 Qd R 448, considered
Wigan v Edwards (1973) 47 ALJR 586, considered

COUNSEL: Q Cregan for the appellant
R Bain QC, with D Pyle, for the respondent

SOLICITORS: Quinn Scattini for the appellant
Moray and Agnew for the respondent

[1] **McPHERSON JA:** I have had the advantage of reading the reasons of McMurdo J and I entirely agree with them.

[2] The right or cause of action for damages for negligence, which the appellant plaintiff Mrs Stone seeks to enforce against the respondent defendant Ace-IRM Insurance Broking Pty Ltd, may be assumed to have accrued at some time in the first half of 1996. She became bankrupt on 24 December of that year. Thereupon that cause of action vested in her trustee in bankruptcy pursuant to s 58(1) of the *Bankruptcy Act 1966* (Cth) and so became property divisible among her creditors under s 16(1)(a) of the Act. It remained so vested despite Mrs Stone's discharge

from bankruptcy on 24 December 1999. See *Pegler v Dale* [1975] 1 NSWLR 265; *Daemar v Industrial Commission of New South Wales (No 2)* (1990) 22 NSWLR 178.

[3] As well as providing in s 116(1)(a) that all property of the bankrupt is divisible among the bankrupt's creditors, s 116(1)(b) of the *Bankruptcy Act* provides that the capacity "to take proceedings for exercising all such powers in, over or respect of property as might have been exercised by the bankrupt for his or her benefit at the commencement of the bankruptcy", or at any time after it "and before his or her discharge", is also property so divisible. The action by Mrs Stone against Ace is not within the terms of that provision if for no other reason than that it was commenced on 21 October 2001, which was after her discharge from bankruptcy on 24 December 1999. By implication, it would follow that she was then free to commence those proceedings without regard for the impact of s 116(1)(b).

[4] The right or cause of action for damages against Ace nevertheless remained vested in Mrs Stone's trustee. The question thrown up by the appeal is whether in these circumstances she can validly institute and maintain an action in her own name in respect of it. It is a question not of bankruptcy law but one that concerns the general law and the practice and procedure of the Queensland Supreme Court.

[5] The notion that a person may by action enforce rights of property vested in another is no doubt a surprising one. On occasions when it has been presented, courts have generally been moved to strike out or stay the proceedings as an abuse of process. See *Metropolitan Bank Limited v Pooley* (1885) 10 App Cas 210 and other authorities referred to in the reasons of McMurdo J, as well as *Daemar v Industrial Commission (No 2)* (1990) 22 NSWLR 178. No doubt it is a consequence that would ordinarily follow in an application in circumstances of that kind; but, whether or not such proceedings will be struck out or stayed is a matter for the court's discretion, which, except in clear cases, must be sparingly exercised: *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125, 129-130.

[6] Unlike many other instances of this nature, Mrs Stone's trustee here is agreeable to her pursuing her claim against Ace subject to his receiving the proceeds, if any, of the litigation after payment of her costs, for distribution among her creditors in accordance with s 109 of the Act, with any surplus being remitted to her. That is a satisfactory arrangement, which ensures that the trustee's statutory duty is duly performed. Mrs Stone's solicitors have made an arrangement for securing their costs out of that fund if it is recovered.

[7] Why, then, should the action be struck out? The answer of the defendant Ace is, first, that the cause of action was and is vested in the trustee and not in her; and, secondly, that the action commenced by Mrs Stone on 21 October 2001 therefore is and always was a "nullity". As to the first of these submissions, Mrs Stone's response is, wholly or in part, that, given the opportunity to do so, she will succeed in establishing an equitable assignment to her by the trustee of the chose in action which is the subject of the proceedings; as to the second, I have already said that I agree with the reasons of McMurdo J. The concept of some proceedings being a "nullity" has always been a difficult one, and is essentially inconsistent with the principle that the Court retains control of all proceedings commenced within its jurisdiction. Since the Judicature Act, it has exercised that control by deciding as a matter of discretion whether or not those proceedings should be struck out or stayed

as an abuse of process. Statute apart, courts should not be readily disposed to condemn proceedings as a "nullity", whatever in law that may mean, because it removes the discretion which they have and exercise over their own process.

[8] In *Cox v Journeaux (No 2)* (1935) 52 CLR 713, 720, Dixon J said that a litigant is entitled to submit for determination according to the due course of procedure a claim which he believes he can establish, although its foundation may in fact be slender. His Honour continued:

> "It is only when to permit it to proceed would amount to an abuse of jurisdiction, or would clearly inflict unnecessary injustice upon the opposite party that a suit should be stopped".

In the present case, Mrs Stone has, if she succeeds in establishing her pleaded case against Ace, what appears to be a viable and not wholly implausible claim. Its success appears to depend primarily on whether her version of the advice alleged to have been given by Ace's representative is accepted. The only injustice that Ace will suffer is the not uncommon disadvantage of being sued by a plaintiff who, although not bankrupt, may possibly turn out not be wealthy enough to discharge an order for costs against her if the action fails. But impecuniosity alone has seldom been a sufficient basis for staying an action by an individual resident within jurisdiction. In this context, Mrs Stone's past bankruptcy is largely, if not entirely, collateral and, certainly so far as Ace is concerned, a purely accidental circumstance or event. It is a matter which does not and ought not to attract the court's power and discretion to peremptorily terminate the action brought by her against the defendant.

[9] I agree with the orders proposed by McMurdo J. The appeal should be allowed with costs to be assessed, and the order striking out proceedings no 9209/01 in the Supreme Court should be set aside. I agree that there should be a certificate under the *Appeal Costs Funds Act*. I would, however, make no order as to the costs of the hearing at first instance.

[10] **HOLMES J:** I agree with the reasons for judgment of McPherson JA and McMurdo J and the orders they propose.

[11] **McMURDO J:** This is a plaintiff's appeal against an order that the proceedings be struck out under r 293. The basis for that decision was that when the proceedings were commenced, the appellant was not entitled to any of the pleaded causes of action, with the consequence, it was held, that the proceedings were a nullity.

[12] The respondent was an insurance broker, whose clients included the appellant and her late husband, Mr Leslie Stone. In 1995, they conducted a resort business at Airlie Beach. The appellant says that she and Mr Stone asked the broker's employee for advice as to the suitability of their existing life insurance policies. She alleges that bad advice was given by the broker. In particular, she says that the broker advised that the term "accidental death" in policies upon the life of Mr Stone meant "death by any cause". In early 1996, Mr Stone was diagnosed with cancer and he died on 11 June 1996. The policies upon his life did not insure for death by cancer. The appellant alleges that had proper advice been given, alternative insurance would have been obtained, the proceeds of which were lost to her as "the sole beneficiary to any policy of insurance held by Leslie Stone at that time".[1] On

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[1] Statement of claim, para 8.

12 October 2001, she commenced these proceedings claiming damages against the respondent broker for $1 million "for breach of contract and/or breach of duty and/or negligence by the Defendant". The respondent filed its Notice of Intention to Defend on 27 February 2002. There was nothing in that pleading which indicated the flaw in the appellant's case upon which the respondent was given summary judgment. That matter was first pleaded by the Amended Defence, filed on 26 June 2002, which was shortly after the expiry of six years from Mr Stone's death. The respondent then pleaded that the appellant had no standing to bring the claim, because any entitlement to the causes of action had vested in her trustee in bankruptcy, when she was made bankrupt on 24 December 1996. It was further pleaded that this entitlement remained in the trustee, notwithstanding the appellant's discharge from bankruptcy on 24 December 1999, and that there had been no assignment of the rights of action by the trustee to her.

[13] Upon appeal, it was conceded that any relevant rights of action had vested in the appellant's trustee, and that they did not revest in her upon her discharge from bankruptcy. But the appellant contends that there was an equitable assignment by the trustee to her which pre-dated the commencement of proceedings or, alternatively, that the proceedings could be saved by a subsequent assignment.

[14] Proceedings commenced by the equitable assignee of a legal chose in action will not be struck out as a nullity, although the assignor is not joined and no notice of the assignment has been given: *Equus Financial Services Limited v Glengallen Investments Pty Ltd* (Appeal No 262 of 1993, 19 May 1994), *Thomas v National Australia Bank Limited* [2000] 2 QdR 448. The learned primary judge, his Honour the Chief Justice, rejected the appellant's submission that she had become an equitable assignee prior to the suit's commencement as a result of correspondence between her solicitors and the trustee in July and August 2000. On 6 July 2000, the appellant's solicitors wrote to the trustee informing him that they proposed to act for the appellant in her then proposed proceedings, and enquiring whether the trustee "would seek to make a claim in relation to such an action" or if he would "hold no interest in any results". The solicitors were informed by a representative of the trustee on 7 August 2000 that although the trustee was not "prepared to run the action", he would claim an interest in the proceeds. The next day, the solicitors wrote to the trustee, saying that before they accepted a retainer to conduct these proceedings, they "would need to be satisfied that [their] fees would be protected" and asking for the trustee's acceptance of a certain level of charges. On 9 August 2000, the trustee replied, saying that any proceeds of the action, less the costs of the action, would "be available for the creditors of the former bankrupt". On 10 August, he wrote again to the solicitors, saying that if the proposed proceedings were successful, and "monies become payable to the trustee", he would have no objection to the solicitors' deducting their reasonable fees from those funds. On 14 August, the solicitors wrote that "the purpose of our letter of 10 August 2000 was to ascertain whether you considered or would agree that the fees contemplated in our retainer were reasonable", to which the trustee replied on 17 August that they appeared to be reasonable. In none of the correspondence was there sought from the trustee any assignment of the rights of action, and nor did the trustee indicate that he would give one. There appears to have been a common misunderstanding that the appellant could sue in her own name without any assignment from the trustee. The evidence below indicated that there were some telephone discussions between the solicitors and the trustee's representative, but other than the solicitors' diary note of one of those discussions, the content of those discussions was not revealed.

[15] On the evidence before his Honour, it appeared clearly enough that the rights of action had not been assigned to the appellant by the time she commenced the proceedings. Upon appeal however, the appellant sought to adduce further evidence. It was a short affidavit sworn by the appellant's (former) trustee in bankruptcy in these terms:

> "1. I am an official trustee and was the trustee of the bankrupt estate of the appellant.
>
> 2. I refer to the correspondence between Quinn and Scattini and my offices which was conducted over the period of July and August 2000.
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> 3. At the time of that correspondence I was of the opinion that I had assigned the claim to Michelle Stone the appellant on terms set out in that correspondence."

The affidavit takes the matter no further: the effect of his dealings with the appellant's solicitors is not determined by what he believes was their effect.

[16] In the hearing below, there was also reliance upon a letter from the trustee to the solicitors written the day before that hearing, ie on 20 August 2002. In that letter, the trustee wrote:

> "I refer to your letters of 20 August 2002 and advise that pursuant to section 135(b) of the Bankruptcy Act 1966, I agree to sell the rights associated with action number QLD 4538/96/8 for the sum of one dollar, or the gross proceeds of any settlement or judgement order by the court in respect of this matter, whichever is the greater.
>
> I agree, subject to my review and approval, for such reasonable legal fees and expenses to be deducted from those funds.
>
> The balance of those funds are to be remitted to me for distribution to creditors in accordance with section 109. Any surplus funds after the distribution to creditors, will be remitted to Michelle Corrine Stone."

[17] The primary judge refused the appellant an adjournment, which the Reasons for Judgment record was sought so that the appellant's then counsel could "properly explore, in his client's interest, any significance in the current sale offer (a reference to the letter of 20 August 2002) and revamp the pleadings as appropriate." His Honour said that an adjournment would be futile and unfair to the respondent "in circumstances where, the plaintiff being bankrupt, the defendant cannot be effectively indemnified in respect of its additional costs incurred through any such adjournment." In fact, the plaintiff had been discharged from bankruptcy in December 1999. The futility of the adjournment came from his Honour's conclusion that the proceeding was a nullity, incapable of revival by any reliance upon the offer contained within the August 2002 letter.

[18] Although the trustee's letter of 20 August 2002 does not evidence an assignment prior to the suit's commencement, it does provide the basis for a case that the rights of action have since been assigned, at least in equity, to the appellant. On one view, it evidences an assignment effective on the date of the letter. An alternative view is that it is an offer to assign. I would have thought that such an offer has been unequivocally accepted by the appellant's prosecution of this appeal, notified to the

trustee who has sworn the affidavit to assist the appeal. It is, however, unnecessary to decide whether there is as yet an effective assignment. If, contrary to the decision below, the proceedings are not a nullity but they can be remedied by an assignment to the appellant, there is at least a sufficient prospect of that assignment as to warrant the proceedings being kept alive to enable the appellant to remedy them.

[19] Accordingly, the critical question is whether these proceedings are a nullity. For present purposes, it must be assumed that the causes of action have merit. Although the causes are likely to have accrued at different times, in each case it would appear to have accrued prior to the appellant becoming a bankrupt on 24 December 1996. Thereafter, they were vested in her trustee in bankruptcy by reason of s 116 of the *Bankruptcy Act* 1966 (Cth). They were the trustee's property, and absent any assignment from the trustee, the appellant had no standing to commence or prosecute them. The proceedings as and when commenced by her were liable to be struck out as an abuse of process: *Metropolitan Bank Limited v Pooley* (1885) 10 AppCas 210; *Cox v Journeaux (No 2)* (1935) 52 CLR 713; *Shillito v Bent* [1973] VR 762. In none of those cases were the proceedings characterised as a nullity, but nor was there a suggestion that, after its commencement, the plaintiff had obtained or was likely to obtain the necessary standing to sue. However, in *Cockerill v Westpac Banking Corporation* (unreported, Federal Court of Australia, 9 March 1992), Drummond J struck out proceedings commenced by an undischarged bankrupt, saying that:

> "(*Metropolitan Bank Ltd v Pooley*) is clear authority for the proposition that a bankrupt who sues after bankruptcy on a cause of action that vested in his trustee upon bankruptcy has no standing to maintain the action … (and that) … Proceedings instituted by an applicant who at the time has no standing to institute them are incurably a nullity. See *Ingall v Moran* [1944] KB 160 at 164-165 and *Minister of State for the Interior v R T Company Pty Ltd & Ors* (1961) 107 CLR 1 at 7."

[20] That passage was cited with approval by Ambrose J *Francis v National Mutual Life Association of Australasia Limited* [1999] 2 QdR 355 at pp 356-357 which in turn was cited in the judgment below.

[21] It seems surprising that these days some proceedings could still be described as a nullity. There was a time when courts were more often called upon to decide whether some defect in the commencement or conduct of proceedings was so serious as to render them a nullity, or instead it was to be regarded as an irregularity, capable of remedy. For example, in *MacFoy v United Africa Co Ltd* [1962] AC 152 the Privy Council had to decide whether a statement of claim, delivered during a court vacation and therefore inconsistently with the relevant rules of court, was only voidable as an irregularity or instead void as a nullity. The relevant rules, relevantly identical with the then English rules, had provided that non-compliance with them should not render any proceedings void unless the court so directed. The judgment was delivered by Lord Denning, who, after explaining that the discretion under that rule had been held to apply to proceedings which were voidable, but not to those which were a nullity, remarked that "no court has ever attempted to lay down a decisive test for distinguishing between the two".[2] There had developed a considerable body of cases in which defective proceedings had been put into one

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[2] At p 160.

category or the other: see, eg, those discussed in *Craig v Kanssen* [1943] 1 KB 26. Many judgments had admitted the difficulty in distinguishing between an irregularity and a nullity.[3] In *In re Pritchard* [1963] 1 Ch 502, Lord Denning MR strongly protested the continued use of this distinction, saying at pp 516-517:

> "We were referred to many cases on nullity and irregularity. They are most confusing because of the loose way in which the word 'nullity' is used: and the sooner it is put in its proper place the better.
> …
> (At p 517) The only true cases of nullity that I have found are when a sole plaintiff or a sole defendant is dead … or non-existent … and I would like to see the word 'nullity' confined to those cases in future."

His was a dissenting judgment, but he was able to subsequently claim that the outcome in that case brought about a change in the rules in England.[4] The new rule provided, in effect, that where anything had been done or left undone contrary to the requirements of the rules, the failure to comply with the rules should be treated as an irregularity and should not nullify the proceedings or any step taken in them. An identical change was made to the Queensland Supreme Court Rules in 1965.[5] The same provision is now found in r 371.

[22] Yet it is said that some proceedings are still nullities, because their defect is due to something other than non-compliance with the rules of court: there are still proceedings which are "not only bad, but incurably bad" to use Lord Denning's description in *MacFoy*. The flaw in the present proceedings, when commenced, did not come from any breach of the rules, but from the plaintiff's mistaken claim to ownership of the causes of action. Many suits are wrongly commenced and prosecuted, including those where the plaintiff fails to establish an entitlement to the subject matter of the proceedings. Yet, it would seem surprising if, for example, a plaintiff who sued for recovery of property or for damage to it, but who ultimately is held to lack the necessary interest, could be said to have commenced and prosecuted a nullity. It is necessary then to examine the authorities cited in *Cockerill* and *Francis* for the proposition that in this particular context, which is where a bankrupt or former bankrupt sues upon a cause which vested in the trustee, the proceedings are from the outset an incurable nullity.

[23] One of those cases was *Minister of State for Interior v R T Company Pty Ltd* (1961) 107 CLR 1. The Minister commenced proceedings to recover moneys for the use and occupation of premises or mesne profits, but before the Commonwealth had obtained possession of the premises. By the time the suit was brought on for hearing however, the Commonwealth had had possession for some years. Taylor J dismissed the suit upon the basis that the plaintiff was not entitled to the cause of action sued upon as at the date of his writ. These days, rules of court commonly permit plaintiffs to sue upon causes of action arising after the issue of proceedings: see, eg, r 376(2) of the *Uniform Civil Procedure Rules*. But absent such a rule, it had long been held that a plaintiff could not sue upon a cause accruing after the

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3 See, eg, *Fry v Moore* (1889) 23 QBD 395, where Lindley LJ said at p 398 that he would "not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so."

4 See *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 at p 734.

5 By the amendment to the then O 93 r 17, as noted in *Perez v Transfield (Qld) Pty Ltd* [1979] QdR 444.

issue of proceedings. In *Wigan v Edwards* (1973) 47 ALJR 586, Mason J at p 596 explained why:

> "To succeed a plaintiff must establish his cause of action at the date of the plaint, for that is the origin of the action. An amendment dates back to the original filing of the plaintiff (see *Sneade v Wotherton Baryts and Lead Mining Co Ltd* [1904] 1 KB 295, at p 297, per Collins MR). It is for this reason that a plaintiff cannot, in the absence of statutory authority, amend the proceedings without the consent of the defendant by adding a cause of action which has accrued to him since the commencement of the action (*Eshelby v Federate European Bank Ltd* [1932] 1 KB 254). And in the absence of such authority an amendment, if allowed, must be regarded as asserting a cause of action existing at the date of the writ."[6]

But Taylor J had to deal with a submission that the Minister's position was different, because once he had entered into possession, he was deemed by a legal fiction to have been in possession from when his right to possession arose. Could this fiction of relation back, permit the plaintiff to assert that his cause of action had accrued at the commencement of the proceedings, given that there was an entitlement to possession, but not actual possession, at that point? Taylor J held that this relation back did not assist the plaintiff and that it remained the case that his cause of action had not accrued upon commencement. He saw the case as:

> "… analogous to that which has arisen in cases where a plaintiff has, before actual grant of administration, commenced proceedings as an administrator. Notwithstanding that upon grant the administrator's title relates back to the death of the deceased whom he represents it has been consistently held that this element of retroactivity is incapable of sustaining a writ issued before grant (*Chetty v Chetty*[7]; *Ingall v Moran*[8]; *Hilton v Sutton Steam Laundry*[9]; and *Finnigan v Cementation Co Ltd*[10])."[11]

Taylor J did not describe the proceedings which he had tried as a nullity. It seems to me that his decision is an example of a case which failed because the cause of action had not accrued at the commencement of proceedings, before the modern procedural rules which permit a plaintiff to sue upon a subsequently accruing cause.

[24] In *Cockerill*, Drummond J also cited *Ingall v Moran*, the effect of which appears from the passage cited in the previous paragraph. In that case, the description nullity was used. However, two matters may be noted in relation to *Ingall v Moran*. The first is that, again, it is a case which seems to turn upon the then requirement of the rules of procedure that a plaintiff's right to sue must have accrued at the commencement of the suit. Secondly, the correctness of *Ingall v Moran* as authority to the effect that an action by a person claiming to be an administrator but

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6 Walsh and Gibbs JJ, each agreeing that the cause of action there had not accrued prior to the commencement of proceedings, although Gibbs J inclined to the view that the then r 104(b) of the *District Court Rules* 1968 (Qld) permitted an amendment to add a cause of action accruing after the commencement of the suit.

7 [1916] 1 AC 603, at p 608.

8 [1944] 1 KB 160.

9 [1946] 1 KB 65.

10 [1953] 1 QB 688.

11 At p 7.

who has in fact obtained no grant is a nullity, has recently been doubted in this Court.[12]

[25] As Angel J remarked in *Smart v Stuart* (1992) 83 NTR 1 at 7, the term "nullity" is a difficult one, because of its connotations of voidness. In the present case, there is, after all, a real proceeding: a claim and statement of claim has been sealed and issued. Had the appellant obtained a judgment in this proceeding, that judgment would not be a nullity: *Cameron v Cole* (1943) 68 CLR 571; *Re Macks; ex parte Saint* (2000) 204 CLR 158. In *Cameron v Cole*, McTiernan J said at 598-599:

> "Where a court is a superior court of record having general jurisdiction, it is impossible to treat any of its orders as a nullity. It may determine conclusively its own jurisdiction and whether the court determines it correctly or not, its order is valid."

In the same case, Rich J[13] said at 590:

> "It is settled by the highest authority that the decision of a superior court, even if in excess of jurisdiction, is at worst voidable, and is valid unless and until it is set aside."

It may not now be correct to regard the Supreme Courts of the States as being courts of general jurisdiction: see *Re Macks; ex parte Saint* (2000) 204 CLR 158 at pp 211-212. But in the same case, Gleeson CJ cited with approval the above passage from the judgment of Rich J in *Cameron v Cole*, in which Rich J also said, at pp 590-591:

> "I am unable to feel any doubt that the Federal Court of Bankruptcy is a superior court. The language of Lord Green MR, in *Craig v Kanssen*,[14] where he says that 'a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside,' is correct as an abstract proposition; but since the order before his Lordship was one of a superior court, the expression is somewhat misleading, and his statement that the distinction is 'between proceedings or order which are nullities and those in respect of which there has been nothing worse than an irregularity'[15] fails, I venture to think with all submission, to meet the actual facts of the case. This is true enough in the case of an inferior court (*In re the Affairs of Hart*[16]); but in the case of a superior court the distinction is between irregularities so fundamental as to create an unconditional right, *ex debito justitiae*, to have the judgment set aside, and non-fundamental irregularities as to which the court has a discretion."

[26] It is then difficult to regard proceedings as a nullity in the sense that they are void whilst recognising that they can be the subject of a judgment which is valid unless and until set aside. To the extent that the expression is useful, it can only refer to a proceeding which is defective in a way which the court with its various powers,

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12 See *Thomas v National Australia Bank Limited* at p 458 per Pincus JA, who commented that the decision of this Court in *Noble v State of Victoria* [2000] 2 QdR 154 may throw doubt upon its authority, so far as this State is concerned.

13 Latham CJ agreeing.

14 (1943) 1 KB, at p 262.

15 (1943) 1 KB, at p 258.

16 (1943) 169 LT 60.

including those conferred by its particular rules of procedure, cannot cure. If there is an apparent remedial power under the procedural rules, the defect is curable and the proceeding should not be described as a nullity. It is the extent of the remedial power which defines what can be remedied, rather than the remedial powers being qualified by a characterisation of something as a nullity, according to what was said in other contexts and under different procedural rules. In the course of argument, Mr Bain QC, who led Mr Pyle for the respondent, submitted that *Wigan v Edwards* was itself an example of a proceeding which would be a nullity, but for the operation of r 375(2). That is to demonstrate that the categories of case fitting the description are affected by the content of the procedural rules. So, where the rules of court permit a defectively endorsed writ to be cured by an appropriate statement of claim, the writ is not a nullity, and it is effective as the commencement of proceedings for the purposes of the operation of a limitation period: *Hill v Luton* Corporation [1951] 2 KB 387; *Pontin v* Wood [1962] 1 QB 594.

[27] In *Francis v National Mutual Life Association*, Ambrose J considered that the provisions of the then O 32 of the *Rules of the Supreme Court* did not permit the plaintiff to amend to rely upon an assignment which post-dated the commencement of the suit. The present case does not involve the correctness of that decision, for it is the *Uniform Civil Procedure Rules* which must be considered, and in particular the extensive power of amendment conferred by rr 375 and 376. In *Draney v Barry* [2002] 1 QdR 145, Pincus JA (at p 155) and Thomas JA (at p 165) recognised the width r 376(5) and its more extensive operation than O 32 of the former *Rules of the Supreme Court*. They held that there was a power to give leave to amend in cases where the amendment had at least a potential impact upon a limitation period defence beyond the specific cases the subject of sub-r (2), (3) and (4) of r 376.

[28] In the matter the subject of this appeal, the cause of action had accrued at the commencement of the proceedings, and there is no application to add or substitute a party. It may be noted that the rule specifically permits the addition or substitution of a plaintiff, after the expiry of the limitation period, as did the previous rules at least in "special circumstances".[17] Accordingly the rules permit the present problem to be remedied by the exercise of the court's discretion to substitute or add the trustee as plaintiff, with his or her consent. It is necessary for the appellant to plead the facts which entitle her to judgment, including, in this case, her specific entitlement to the causes of action that come from their being assigned to her. That requires some amendment of the statement of claim, which at least arguably, might be made without leave: r 378. But if leave is required, it is an amendment which is permissible if the court considers that appropriate: rr 375(1) and 376(5).

[29] Of course, if the appellant had to start again, those proceedings would be, at least very probably, statute-barred. But that is not to deny the validity of the original proceedings for the purpose of the commencement of an action within time although when commenced, they were defective and were susceptible to being struck out. As the appellant's position can be remedied by an assignment and an appropriate amendment to her pleading, the case is analogous to those of a defective endorsement cured by an effective statement of claim delivered beyond the limitation period: the proceeding, although commenced wrongly in her name, is, once it is remedied, effective as a proceeding commenced within time.

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[17] See *UCPR* r 69 and formerly RSC O 3 r 11, and *Hayward v Darling Downs Aircraft Services Pty Ltd* (1993) 2 QdR 153.

[30] In the present case, the appellant would appear to have a strong basis for obtaining leave, if required, to amend to plead an entitlement as the assignee of the trustee in bankruptcy, notwithstanding the expiry of any relevant limitation period. She commenced the proceeding upon what are the same causes of action, comfortably within any limitation period. The proper purposes of limitation periods[18] would not be defeated by her being permitted to go forward. Moreover, the respondent raised the problem by amending its pleading only after the expiry of the limitation period, and had it done so earlier, the problem might have been rectified within that period, although it is impossible to say upon the present material whether the respondent chose to wait until any limitation period expired before commencing this attack upon the proceedings. His Honour refused an application to adjourn the hearing, which was sought to permit any appropriate amendment to be formulated. As I have mentioned, that adjournment was refused because it was considered a futile course, given that the proceedings were a nullity. In my respectful opinion, the proceedings were wrongly characterised as such: they were indeed curable by an appropriate amendment, and the exercise of his Honour's discretion miscarried because of that characterisation, and also because of the apprehension that the appellant remained an undischarged bankrupt and could not meet the costs of the adjournment. In my view, the adjournment should have been granted to permit the appellant to formulate an appropriate amendment after, if necessary, doing anything necessary to effect an assignment to her from the trustee. If the appellant, given the opportunity, cannot obtain an effective assignment and appropriately amend her proceeding, it would be open to the respondent to then apply again for it to be struck out. As it seems to me that there is at least a real prospect that the appellant will be able to remedy the matter, the appeal should be allowed and the order striking out the proceeding should be set aside. I would order that the respondent pay the appellant's costs of the appeal to be assessed. There should be a certificate under the *Appeal Costs Fund Act*. But for the matter of the trustee's letter of the day before the hearing, the respondent's application should have succeeded below, and had the adjournment been granted by the primary judge, the appellant would have been ordered to pay the costs of it. Accordingly I would make no order as to the costs of the hearing below.

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18 *Taylor v Brisbane South Regional Hospitals Health Authority* (1996) 186 CLR 541 at pp 551-553.