SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Beames* [2003] QSC 399
PARTIES:	**STATE OF QUEENSLAND** (plaintiff) v **DOUGLAS MACLEOD BEAMES** (defendant)
FILE NO/S:	SC No 7742 of 1999
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2003
JUDGE:	McMurdo J
ORDERS:	**1. The plaintiff have leave to proceed against the defendant pursuant to r 72 of the *UCPR;*** **2. Raj Khatri and Morgan Lane (as trustees of Douglas MacLeod Beames) be added as defendants;** **3. The plaintiff's application to strike out the counterclaim is dismissed;** **4. It is directed that:** **(a) A surveyor engaged by the plaintiff as an expert, and any professional colleague or assistant of his or hers, be granted such access to Lot 29 on RP 12574, County of Stanley, Parish of Bulimba ("Lot 29") as is needed for the purposes of carrying out surveys of the land, observing trenching works and preparing an expert report in relation to these proceedings;** **(b) Any survey pegs placed on Lot 29 by the surveyor not be removed by either party until completion of these proceedings;** **(c) If required, the surveyor engaged by the plaintiff may insert tank screws into the concrete on the perimeter of the house foundations located on Lot 29. These may not be removed by either party until completion of these proceedings;** **(d) A botanist engaged by the plaintiff as an expert be granted such access to Lot 29 as is needed for the purposes of determining changes in vegetation on the land and delineating the areas of marine influence,**

observing trenching works and preparing an expert report in relation to these proceedings;

(e) A geotechnical engineer engaged by the plaintiff as an expert, and any professional colleague or assistant of his or hers, be granted such access to Lot 29 as is needed for the purposes of determining how access will be gained to Lot 29, where trenches will be dug and carrying out trenching works and preparing an expert report in relation to these proceedings;

(f) The boundary fence of Lot 29 may be removed if necessary to gain access to Lot 29. If this is done, the plaintiff is to reinstate the fence to the condition it was in immediately before the access point was made as soon as reasonably possible after the trenching work has been completed; and

(g) The plaintiff is to give the defendant 24 hours written notice prior to anyone accessing Lot 29 in accordance with this order.

5. The costs of this application be reserved.

6. Liberty to apply.

CATCHWORDS: PRACTICE – JOINDER – where application for substitution of defendant's trustees in bankruptcy as defendants – where trustees in bankruptcy and defendant oppose substitution application – where proceeding concerns contest as to correct boundary of defendant's property – where defendant remains legal owner with equitable interest vested in trustees in bankruptcy – where defendant but not trustees in bankruptcy intends to contest plaintiff's claim – whether trustees in bankruptcy should be substituted or joined

BANKRUPTCY – EFFECT ON CAUSES OF ACTION – where application for striking out of counterclaim by defendant – where trustee in bankruptcy has not elected to prosecute counterclaim - where counterclaim deemed abandoned – whether deemed abandonment of counterclaim puts paid to cause of action involved within it – whether having regard to effect of deemed abandonment counterclaim should be struck out

Bankruptcy Act 1966 (Cth), s 58(2), s 58(3)(b), s 60, s 60(3), s 60(4), s 154
Uniform Civil Procedure Rules 1999 (Qld), r 171(1), r 72, r 72(2)

Beames v Leader [2000] 1 Qd R 347, cited
Bennett v Gamgee (1876) 2 Ex D 11, cited
Campbell v Metway Leasing Ltd [2001] FCA 1311, considered
Cousins v HTW Valuers (Cairns) Pty Ltd & Anor [2002] QSC 413, cited
Holmes v Goodyear Tyre & Rubber Co (Aust) Ltd (1984) 55

ALR 594, cited
Millane v Shire of Heidelberg [1928] VLR 52, considered
Re Gargan; ex parte Gargan (Federal Court, Drummond J 18 August 1995), cited
Re Kwok & Anor; ex parte Rummel (1981) 61 FLR 336, cited
Re Summerhayes & Anor; ex parte the Official Assignee (1890) 1 BC (NSW) 24, cited
Somerset v Esanda Finance Corporation Limited [1992] QCA 169, considered
Stobbart v Mocnaj & Ors (1996) 16 WAR 318, cited
Temsign Pty Ltd v Biscen Pty Ltd (1998) 146 FLR 176, cited
Theissbacher v MacGregor Garrick & Co [1993] 2 Qd R 223, considered
Worrell & Ors v Foodlink Ltd (1998) FCA 1814, cited

COUNSEL: R Douglas SC, with D Campbell, for the plaintiff
Defendant appeared on his own behalf
R Cowen (sol) for the trustees in bankruptcy
M Richardson (sol) for first mortgagee

SOLICITORS: Crown Solicitor for the plaintiff
Defendant appeared on his own behalf
Tucker & Cowen for the trustees in bankruptcy
Cartwrights Tebbett & Ostwald for the first mortgagee

[1] **McMURDO J:** These applications made by the plaintiff result from the defendant's bankruptcy. The plaintiff applies for the substitution of the defendant's trustees in bankruptcy as defendants and for the dismissal of the defendant's counterclaim. The plaintiff also seeks orders for the inspection of the real property the subject of this case.

[2] The defendant, Mr Beames, opposes the orders sought save for the orders for inspection.[1] The trustees, who are Mr Khatri and Mr Lane, oppose their joinder as defendants but do not oppose the other orders.

The Proceedings

[3] Mr Beames is the registered proprietor of land in East Brisbane, bounded by Norman Creek. The adjacent riparian land is the property of the State of Queensland. In 1997 a plan of resurvey was lodged by the defendant for registration under the *Land Titles Act* 1994. It represented that the defendant's land was larger than shown on the previous plans, due to a suggested alteration to the location of the boundary with Norman Creek. The Registrar of Titles refused to registrar the plan. His decision was set aside in this court under the *Judicial Review Act* 1991: see *Beames v Leader* [2000] 1 Qd R 347. The court there held that it was not for the Registrar to assess the respective merits of a dispute between Mr Beames and the State of Queensland as to the correct boundary, and that the Registrar was "wrong in not leaving the matter to the parties to fight it out themselves".[2]

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1 The defendant delivered written submissions to the Court but did not appear at the hearing

2 At 354

[4] The State brought these proceedings to have the correct boundary determined. The State's case is that Mr Beames has reclaimed land below the "original high water mark" and it seeks declarations that it is the owner of the land reclaimed and as to the true boundary. Mr Beames has counterclaimed. One of his claims is for a declaration that his resurvey plan correctly defines the boundary. In this, his counterclaim involves substantially the same issues as those arising in the claim which he is defending. He further counterclaims damages in amounts as totalling US$270M. The extensive matters pleaded in support of that part of his counterclaim are somewhat difficult to follow, but in all respects they seem to be premised upon his resurvey plan being accurate. Mr Beames sought summary judgment upon his counterclaim. He was unsuccessful at first instance and on appeal: see [2002] QCA 209.

Joinder of Trustees

[5] By s 58(3)(b) of the *Bankruptcy Act* 1966 (Cth) it is not competent for "a creditor … except with the leave of the court and on such terms as the court thinks fit, to commence any legal proceedings in respect of a provable debt or take any fresh step in such a proceeding". The trustees have recently suggested that the State requires such leave in order to prosecute its claim. I accept the submission for the State that leave is not required by this section. These are not proceedings in respect of a provable debt.

[6] The present impediment to the prosecution of the State's claim is r 72 of the *Uniform Civil Procedure Rules* 1999 which provides that if a party to a proceeding becomes bankrupt, a further step for or against the party may be taken only with the court's leave. It further provides by r 72(2) that if a party to a proceeding becomes bankrupt, the court may order the trustee of the party to be included or substituted as a party for the bankrupt. The State submits that the trustees should be joined, and by being substituted for Mr Beames rather than joined as additional defendants.

[7] As the registered proprietor Mr Beames remains the legal owner notwithstanding his bankruptcy because of s 58(2) of the *Bankruptcy Act*, which further provides that the equitable interest is vested in the trustees in bankruptcy. Mr Beames demonstrates an intention to contest the State's claim, notwithstanding his bankruptcy. The trustees appeared by their solicitor to submit that they should not be joined because they do not wish to contest the State's claim. In these circumstances, it seems to me that there is some utility in Mr Beames' remaining a defendant. It is likely that the Registrar of Titles would wish to have the certainty of a declaration against the registered proprietor before he took some step in relation to Mr Beames' plan of resurvey. And if the trustees are substituted for Mr Beames, it is likely that there would then be no controversy between the parties to these proceedings with the result that the claims for the declaratory relief could be refused: hence, the proceedings would have no utility.

[8] On the other hand there is some point in the joinder of the trustees. It is their property which is potentially affected. The State should have the benefit of a determination which binds them as well as Mr Beames. They are appropriate parties to the proceedings. If that involves some difficulty in relation to costs, then their response to the claim would affect the prospect of their being ordered to pay the State's costs or of their incurring substantial costs of their own.

[9] Accordingly, there should be an order for the addition, but not the substitution, of the trustees as defendants.

Counterclaim

[10] Section 60 of the *Bankruptcy Act* provides in part as follows:

> "(2) An action commenced by a person who subsequently becomes a bankrupt is, upon his 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."

[11] Accordingly, the counterclaim was stayed once Mr Beames became bankrupt. Further, the State informed his then trustee by letter of 25 June 2002 of the existence of the counterclaim. No election within s 60(3) having been made, the counterclaim is deemed to have been abandoned. That has long been conceded by the present trustees. None of the counterclaim is within those types of claim, described in s 60(4), which are outside the operation of s 60(3).

[12] The State seeks an order that the counterclaim be struck out with costs, on the bases that should simply follow to record the effect of its abandonment or, in the alternative, pursuant to r 171(1) of the *Uniform Civil Procedure Rules* (again) in consequence of the abandonment. This raises a question as to the effect of an abandonment pursuant to s 60(3).

[13] There is extensive authority for the proposition that the abandonment puts paid to the particular proceeding but not to the right of action: *Bennett v Gamgee* (1876) 2 Ex D 11; *Re Summerhayes & Anor; ex parte the Official Assignee* (1890) 1 BC (NSW) 24; *Re Kwok & Anor; ex parte Rummel* (1981) 61 FLR 336; *Re Gargan; ex parte Gargan* (Federal Court, Drummond J, 18 August 1995) which was upheld on appeal: unreported Davies, Lockhart and Foster JJ, 4 November 1995); *Stobbart v Mocnaj & Ors* (1996) 16 WAR 318 at 323; *Temsign Pty Ltd v Biscen Pty Ltd* (1998) 146 FLR 176 at 187; *Worrell & Ors v Foodlink Ltd* (1998) FCA 1814; *Campbell v Metway Leasing Ltd* [2001] FCA 1311 and (in this court) *Cousins v HTW Valuers (Cairns) Pty Ltd & Anor* [2002] QSC 413 (Jones J). In some of these cases there is a discussion of two decisions of the Court of Appeal which are said to be authority to the contrary. In my view however they should not be so understood.

[14] The first is *Somerset v Esanda Finance Corporation Limited* [1992] QCA 169 in which the court was constituted by Fitzgerald P, McPherson JA and Demack J. That decision concerned the disposition of certain appeals which had been lodged prior to the appellant's bankruptcy. On the day after she was made bankrupt, the solicitors for the respondent wrote to the Official Trustee notifying him of the actions which were the subject of the appeals and of the existence of the appeals and requesting him to make an election pursuant to s 60. The Official Trustee elected not to prosecute the appeals before there was an attempt to deal with the appellant's

rights by some deed of assignment. In the judgment of the court at page 7 it was said:

> "In such circumstances, by the operation of s 60, action 4727 of 1987 was deemed to have been abandoned. Of course, that being so, the appeals in that action did not survive. When the Deed of Assignment was executed, there was nothing to assign."

By this the court concluded that the subject matter of the purported assignment, being the rights of appeal, did not exist because of the abandonment of the appellate proceedings. The decision is no authority for the proposition that an abandonment by s 60 puts paid to any underlying cause of action.

[15] The second case is *Theissbacher v MacGregor Garrick & Co* [1993] 2 Qd R 223, where the plaintiff's action was deemed abandoned by her trustee in bankruptcy before that bankruptcy was annulled. The question was whether the annulment of the bankruptcy effectively restored the abandoned proceedings. By a majority (Pincus JA and White J, Fitzgerald P dissenting) it was held that they were so restored. That conclusion turned upon the effect or otherwise of s 154 of the Act and it was unnecessary for the court to consider the present point. However, in the joint judgment of Pincus JA and White J, there are some *obiter* remarks which have been understood as saying that a deemed abandonment under s 60 puts paid not only to the proceedings but to the cause of action itself. That passage is at p 230:

> "That conclusion makes it unnecessary to deal with the other arguments raised, but we propose briefly to state our views about the principal additional point on which Mr Fleming relied. This was that the deemed abandonment under s 60(3) does not destroy the trustee's right to pursue the action absolutely, but has some lesser effect. Although the point does not seem to have been dealt with in any case to which we were referred or which we have found, we express the view that the argument should not succeed. It seems improbable that the legislature intended so minor a result as that in some unspecified way the trustee's right to pursue the case should be interrupted rather than terminated."

Their Honours were there rejecting the submission that the deemed abandonment "does not destroy the trustee's right to pursue *the action* absolutely, but has some lesser effect". As I read this passage, the reference to "the action" is in the sense of the particular proceeding rather than of the underlying right of action. Notably, their Honours said that no authority was cited or found upon the point although the headnote shows that several of the cases cited in para [13] of these reasons were cited to them in argument. This confirms my understanding of the relevant remarks. In my view then many of the decisions since *Theissbacher* have involved some misunderstanding of what the majority there said. I note that in *Campbell v Metway Leasing Ltd*, Katz J interpreted this passage from *Theissbacher* as I do.

[16] Accordingly, the deemed abandonment of this counterclaim has not destroyed any cause of action underlying it. Once that is recognised then there is at least a potential for a striking out or dismissal of the counterclaim to have an impact going beyond that from s 60. In *Millane v Shire of Heidelberg* [1928] VLR 52, Irvine CJ was asked to dismiss an action in these circumstances, i.e. where the trustee had

elected to abandon the proceedings. He was concerned that the dismissal could be pleaded in bar as *res judicata* and he therefore declined to dismiss it. His decision was applied by Shepherdson J in *Holmes v Goodyear Tyre & Rubber Co (Aust) Ltd* (1984) 55 ALR 594 at 598. It is not entirely clear that the order sought here, which is the striking out of the counterclaim, would give rise to a *res judicata.* For example, a judgment dismissing proceedings for want of prosecution, being an interlocutory order, does not give rise to a *res judicata.*[3] It is unnecessary however to explore that further. If the striking out or dismissal of the counterclaim as the plaintiff now seeks would put paid to the causes of action involved within it, then it is an order which goes well beyond the effect of a deemed abandonment of the counterclaim, yet it is that deemed abandonment which is said to require the making of the order. Alternatively, if it has no effect beyond that of the deemed abandonment, the order serves no purpose. Because part of the counterclaim is effectively the inverse of the plaintiff's claim, there is a risk that the orders sought on the counterclaim would also put paid to a defence of the plaintiff's claim. The counterclaim, being abandoned, causes no burden to the plaintiff and there is no practical advantage to the plaintiff from its being struck out, except that it might well put paid to the case that the resurvey plan is accurate, and the plaintiff does not presently suggest that such a case is unarguable.

[17] In these circumstances I decline to strike out the counterclaim. There remains an outstanding question as to the costs of that counterclaim, which could be determined absent an order striking it out. However, as the plaintiff's claim will continue against Mr Beames and his trustees, it is appropriate that the costs of the counterclaim be determined at the same time as the court determines the costs upon the plaintiff's claim.

Order for Inspection of Property

[18] The plaintiff seeks a number of orders to the end that various experts be permitted to go on to the land for purposes such as surveying. There is no opposition to these orders and there will be orders to that effect in accordance with the plaintiff's draft.

Conclusion

[19] The plaintiff has leave to proceed against the defendant pursuant to r 72, and the trustees will be added as defendants. The plaintiff's application to strike out the counterclaim is dismissed. There will be orders in terms of paragraphs 5 and 6 of the plaintiff's draft entitled "Primary Orders Sought". There will be liberty to apply.

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3 *Spencer Bower Turner and Handley, The Doctrine of Res Judicata* (3rd ed 1996) at 35 and the cases there cited.