SUPREME COURT OF QUEENSLAND

CITATION:	*Donkin v The Official Trustee in Bankruptcy & Ors* [2003] QSC 401
PARTIES:	**COLIN JOHN DONKIN** (plaintiff) **v** **THE OFFICIAL TRUSTEE IN BANKRUPTCY** (first defendant) and **DIGBY NICHOLAS BARTHOLOMEW ROSS** (second defendant) and **MRS L E QUIGG** (third defendant) and **INSOLVENCY AND TRUSTEE SERVICE AUSTRALIA** (fourth defendant)
FILE NO:	S251 of 2002
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	26 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2003
JUDGE:	Chesterman J
ORDER:	**1. Order that the action against the second, third and fourth defendants be struck out and that there be judgment for those defendants against the plaintiff.** **2. Order that the costs of the second and third defendants, and of the Commonwealth of Australia (which was served as though it was the fourth defendant) of and incidental to the action and this application be assessed on the indemnity basis and be paid by the plaintiff.** **3. Order that the second statement of claim be struck out and that the plaintiff pay the first defendant's costs of and incidental to the application to be assessed on the standard basis.**

4. **Order that the respondent not deliver any further statement of claim without applying to the court for leave to deliver such further pleading and on giving notice to the applicant.**

CATCHWORDS: BANKRUPTCY – TRUSTEES – POSITION AND DUTIES GENERALLY – scope of the trustee's duty to the estate – whether the Trustee in Bankruptcy had a duty to transfer assets

PROCEDURE - PLEADINGS- application to strike out statement of claim - where pleadings said to disclose no reasonable cause of action

Bankruptcy Act 1966 (Cth), s 60
Supreme Court of Queensland Act 1991 (Qld), s 81
Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules, Rule 376

Adsett v Berlouis (1992) 37 FCR 201
Couturier v Hastie [1852] 10 ER 1065
Cummings v Claremont Petroleum NL (1995-1996) 185 CLR 124
Daemar v Industrial Commission of New South Wales (No 2) (1990) 22 NSWLR 178
Draney v Barry [2002] 1 Qd R 145
Goldsborough Mort & Co Ltd v Carter (1914) 19 CLR 429
Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2003] 3 WLR 1617
Heath v Tang [1993] 1 WLR 1421
Re Collins; ex parte The Official Trustee in Bankruptcy (1986) 65 ALR 338
Re Kwok; ex parte Rummel (1981) 61 FLR 336
Re Lofthouse (2001) 107 FCR 151
Trendtex Trading Corporation v Credit Suisse [1982] AC 679
Wakim v HIH Casualty and General Insurance Ltd (2001) 111 FCR 58

COUNSEL: Mr RM Derrington for the applicant
Mr BA Blond for the respondent

SOLICITORS: Australian Government Solicitor for the first, second, third and fourth defendants/applicants

Mr B.A. Blond instructed by the respondent

[1] Some time in 1989 the plaintiff and his wife commenced an action in the Federal Court against AGC (Advances) Ltd ("AGC") to recover damages for contravention of s 52 of the *Trade Practices Act* 1974, and for negligence. In 1986 Mr and Mrs Donkin had borrowed a substantial sum of Swiss francs from AGC to refinance their hoteliers' business in Rockhampton. They suffered financially when the Australian dollar fell in value against the Swiss franc. On 9 August 1991 Beaumont J dismissed the proceedings against AGC. His Honour held that officers

of AGC had been negligent in failing to give Mr and Mrs Donkin advice that they could have hedged their loan to protect their position against currency fluctuations, or they could have put a 'stop-loss' order in place. The latter is an order to a bank to buy an amount of foreign currency to be delivered at a future date. The order is acted upon when the dollar reaches a predetermined level against the foreign currency. The effect of it is to convert a foreign currency loan into one for Australian dollars and so remove the exchange rate risk.

[2] However Beaumont J found that Mr and Mrs Donkin had not suffered any loss by reason of AGC's negligent failure to give the requisite information. His Honour found that had they been given the advice they would have put in place an order to buy Swiss francs when the dollar fell by ten per cent against that currency. This would have brought about an immediate loss of ten per cent of the value of their loan. As things turned out, because of further fluctuations in the relative value of the two currencies, Mr and Mrs Donkin would have been better off to have left their loan unhedged in Swiss francs than to have converted it into an Australian dollar loan at the predetermined exchange rate. Accordingly the action was dismissed with costs.

[3] An appeal against that order was dismissed by a full Federal Court on 5 December 1991. In August 1995 Mr and Mrs Donkin sought leave to appeal, out of time and for a second time, on the basis that the trial judge had misapprehended the evidence about hedge contracts, foreign exchange contracts and 'stop-loss' orders. That appeal, too, was dismissed.

[4] Mr and Mrs Donkin were represented at the Federal Court trial by John Murphy & Co ("Murphy"), a firm of solicitors practicing in Rockhampton.

[5] On 16 May 1995 the respondent commenced an action against Murphy alleging negligence in his conduct of the Federal Court proceeding. The essence of the claim was that, had the plaintiff's cause been properly prepared and presented at trial he and his wife would have recovered substantial damages from AGC.

[6] The respondent delayed serving his writ on Murphy until 30 May 1996, three days short of a year after the institution of proceedings.

[7] On 6 October 1995 the respondent was adjudged bankrupt on the petition of AGC which was owed just under $2,000,000.

[8] On 22 May 1996 the solicitors acting for Murphy gave notice to the Official Receiver in Bankruptcy requiring it to elect whether to continue or to abandon the respondent's action. Section 60 of the *Bankruptcy Act* 1966 provides:

> '1. …
>
> 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 the notice of the action is served upon him by a

> defendant or other party to the action, he shall be deemed to have abandoned the action.
>
> 4. …'

[9] By letter of 3 June 1996 the Official Receiver replied to the notice of action. The Official Receiver wrote:

> 'I advise that pursuant to Section 60(3) of the *Bankruptcy Act* … the Trustee hereby advises that he elects not to continue action in respect of litiation [sic] as outlined in your letter.
>
> Please note, however, that the Trustee reserves the right to assign any interest he may have in any action Mr Donkin may have against your client.'

[10] Six weeks later, on 17 July 1996, the Official Trustee in Bankruptcy and the respondent became parties to a Deed of Assignment, the terms of which were:

> '1. The Official Trustee assigns to Mr Donkin the legal proceedings instituted against John Murphy & Co, a firm, to deal with as he wishes absolutely;
>
> 2. Mr Donkin agrees not to join with the Official Trustee in any of the said proceedings nor to require the Official Trustee to incur costs in relation to any of the said proceeding;
>
> 3. Mr Donkin agrees that he shall not institute any proceedings whatsoever against the Official Trustee nor join the Official Trustee with any of his officer, servants or agents acting in his name or on his behalf in any action whatsoever, seeking damages, awards, judgment, interest, costs including solicitor and client costs, charges, expenses, and any other liabilities whatsoever, as a direct or indirect result of the proceedings being taken or for any other matter;
>
> 4. The Official Trustee offers no warranty, expressed or implied, as to the merits or otherwise of the proceedings assigned and Mr Donkin agrees to take any action in regard to any or all of the proceedings at his own risk and expense;
>
> 5. Mr Donkin agrees that he requested the Official Trustee to prepare this deed as he is unable to pay a legal representative to do so and he is also unable to prepare the deed himself.'

[11] Gray J described the operation of s 60 in *re Lofthouse* (2001) 107 FCR 151 at 157-8:

> 'Section 60 is an adjunct to the scheme of the Act whereby the property of a bankrupt passes to the bankrupt's trustee consequent upon a sequestration order. By Section 58 of the Act, the property of a bankrupt vests forthwith in the Official Trustee … That section has

> the effect of vesting in the Trustee in bankruptcy all rights of action in pending proceedings commenced by the bankrupt. … Section 60 … operates to stay pending proceedings unless the trustee elects to prosecute or discontinue them. It also provides the machinery for a defendant or other party to a pending proceeding to force the making of an election. It is directed towards the protection of the bankrupt's creditors, by preventing the unnecessary dissipation of the assets of the estate in fruitless litigation. In my view, Section 60 also has the purpose of protecting a defendant … to a pending proceeding. A defendant … suffers an immediate detriment upon the plaintiff becoming a bankrupt. The detriment is that if the defendant … should be successful … and shall obtain an order that the plaintiff pay the costs … the order will be effectively unenforceable because of the bankruptcy.'

[12] On 28 June 1996 the respondent delivered his statement of claim against Murphy which delivered its defence on 27 September. The defence included an objection in point of law to the respondent's claim on the ground that the right to sue had been destroyed by the Official Trustee's election of 3 June. The solicitors applied for judgment on that ground and on 14 November 1997 Demack J struck out the action and gave judgment for Murphy against the respondent. His Honour held that the letter of 3 June was an election made under s 60(2) to discontinue the action but if, by reason of the qualification that the Official Receiver reserved the right to assign his interest in the proceedings there was not an equivocal decision to discontinue, then the action had been abandoned pursuant to s 60(3). On either view the action had been abandoned or discontinued before the purported assignment which was therefore ineffective there being 'no action to assign.'

[13] On 31 May 2002, almost six years after the purported assignment, the plaintiff who is the respondent to this application, commenced a proceeding in the Supreme Court against the Public Trustee, two of its employees with whom he negotiated for the assignment and the 'Insolvency and Trustee Service Australia'. The fourth defendant has no separate existence. It is an agency of the Commonwealth of Australia, which was served with the claim. The statement of claim relevantly alleged:

- On 3 June 1996 the second and third defendants (the employees) elected not to continue the plaintiff's right of action against Murphy.

- On 17 July 1996 the defendants assigned the action to the plaintiff for a fee of $100.

- The effect of electing to discontinue the action before assigning it was to render the assignment ineffective.

- The employees were aware that the respondent was not legally represented at the time he negotiated for the assignment.

- Had the Deed of Assignment 'been correctly assigned' the respondent would have had a cause of action against Murphy which is pleaded at some length. The essence of it is that the solicitors failed to marshal evidence for the Federal Court trial to answer AGC's defence that properly advised the respondent would have adopted a stop-loss mechanism which, as things turned out, would have been more costly than leaving the loan unhedged. It is said that the case was lost because of that failure.

[14] The respondent claimed about $10,000,000 for damages and loss of profit and about $6,500,000 interest on those two components.

[15] It should be said that the manner in which the case against Murphy is pleaded appears to be nonsensical. The allegations are that the solicitors failed to secure evidence that:

> '(a) For offshore borrowers in the position of Donkin the most important stop-loss mechanism was a 'forward foreign exchange contract'.
>
> (b) 'Forward foreign exchange contracts' when used as a stop-loss mechanism do not involve conversion of the offshore loan to an onshore loan.
>
> (c) In consequence of (a) and (b) Exhibit 54 … which was AGC's expert calculation … was wrongly based.
>
> (d) …
>
> (e) Had forward foreign exchange contracts been used in hedging an offshore loan … in Swiss francs … Donkin would have been substantially advantaged over
>
> 1. his actual situation.
> 2. the situation as contented for by AGC viz converting the offshore loan to an onshore loan.'

[16] This appears to be a consequence of the fact that at the trial the debate about what followed from AGC's failure to advise about the availability and use of stop-loss orders was expressed in the jargon that became common in that class of litigation. It was said that the implementation of a stop-loss order brought the loan 'onshore' or converted an 'offshore loan' to an 'onshore loan'. The respondent's point in the statement of claim which I have summarised is that he should have been advised to protect his loan against a fall in the value of the Australian dollar by a forward foreign exchange contract which would not have brought the loan 'onshore'.

[17] This, as I say, is nonsense. The terms 'onshore' and 'offshore' are non-technical. They are a convenient way of describing whether the borrower's obligation to repay a foreign currency loan has had removed from it the risk associated with a decline in the value of the local currency. The respondent's obligation was always to repay the number of Swiss francs he borrowed. If the Australian dollar declined in value

he would need more of them to buy the requisite number of Swiss francs. In that sense his loan was always 'offshore'. A hedge contract, or a forward foreign exchange contract, would have allowed the respondent to buy the required number of Swiss francs for delivery at a future date (i.e. when the loan matured) at a price referable to the exchange rate at the time of the contract. This forward purchase of Swiss francs would have protected the respondent against further declines in the Australian dollar. Of course if the dollar increased in value against the Swiss franc he would not enjoy the gain because of his contract which had obliged him to buy at the fixed price.

[18] The case pleaded against Murphy therefore appears to have been hopeless. It focuses on an irrelevant side issue and not the real point of the case which was that he was better off by not taking action to protect his position when the dollar fell initially, as the trial judge held.

[19] By an application dated 27 June 2003 the first, second and third defendants to the action, and the Commonwealth of Australia, applied to the Supreme Court in Rockhampton for orders that the respondent's claim against the fourth defendant be struck out on the basis that it was not an entity known to law, and that the claims against the other defendants be struck out as not disclosing a cause of action and as being vexatious and an abuse of process. The application came before Dutney J on 22 August 2003. His Honour granted the respondent an adjournment for about five weeks on terms that the respondent pay the defendant's costs. The question whether those costs should be on the indemnity basis was reserved. By his written submission the respondent sought leave to amend the statement of claim 'even though the limitation period has expired' to allow the first defendant to be described as 'The Official Trustee in Bankruptcy' in place of its designation in the statement of claim and writ as 'The Public Trustee of the Insolvency and Trustee Service Australia.' Leave was given. The respondent's submissions do not identify any other amendment for which leave was sought.

[20] The matter was transferred to Brisbane in circumstances which gave rise to some disagreement and acrimony but which can be put to one side. On 29 September 2003 the respondent filed an amended claim and statement of claim. It names only one defendant, The Official Trustee in Bankruptcy. The claims against the named employees and the Commonwealth of Australia have been abandoned.

[21] The second statement of claim recites the respondent's business history and his borrowing in Swiss francs from AGC. It repeats the claims of AGC's negligent failure to advise how to reduce the exchange risk involved in borrowing a foreign currency, and rehearses the respondent's loss 'in that he failed to use a stop-loss mechanism …' The pleading goes on to describe the respondent's retention of Murphy to act for and advise him in relation to the loan.

[22] This statement of claim contains a new allegation which is that Murphy sought advice from senior counsel and from solicitors in Sydney who specialised in that kind of litigation, who advised him that the respondent's circumstances were such that they would not 'justify the commencement of an expensive action such as that contemplated in the letter of instruction …' The basis for that advice was the very point on which the respondent ultimately failed in the Federal Court. The respondent alleges he was not given this advice.

[23] It will be appreciated that this is a new and inconsistent case to that initially advanced and which still appears in the second statement of claim. The consequence of Murphy's failure to give this advice must be that the plaintiff commenced expensive litigation which was not justified given he had suffered no loss, or an insubstantial loss, by borrowing in a foreign currency, notwithstanding AGC's negligence. The loss flowing from that breach of retainer are the costs the respondent himself incurred in prosecuting his action and the costs he was ordered to pay AGC. It is a claim utterly inconsistent with the original claim that had Murphy prepared the action properly the respondent would have recovered very substantial damages.

[24] The inconsistency went unnoticed by the pleader. Counsel who appeared for the respondent on the application refused to accept it, but it is obvious that it cannot be ignored.

[25] There is a third theme in the statement of claim. It is an allegation that Murphy negligently advised the respondent how to respond to a demand for payment made upon him by AGC. This claim is not developed articulately in the statement of claim and it is difficult to know quite what is intended. It seems that the claim is that Murphy advised the respondent to pay the amount demanded not to AGC but into a separate bank account to await the outcome of the contemplated proceedings against AGC. Paragraph 17 pleads that by reason of the non-payment AGC issued a notice of demand and gave notice of the exercise of its powers of sale as mortgagee. Paragraph 28 pleads that as a consequence of the negligent advice the respondent 'was put in breach of the loan by AGC, was stripped of his income earning assets, was adjudged bankrupt, lost his business and commenced action which he should not have and would not but for the advices he did receive and advices he did not receive …'

[26] The amounts claimed are substantially similar to those claimed in the first statement of claim.

[27] The case against the Official Trustee, the only remaining defendant, is set out quite shortly. Paragraphs 30-40 plead the history of the respondent's action against Murphy, the Deed of Assignment, the Official Trustee's election and the order of Demack J striking out the action. The pleading continues:

> '41. Donkin, to the knowledge of the defendant, was self represented at all material times.
>
> 42. The defendant professes competence and has experience in matters involving the action of a bankrupt and any chose of action of a bankrupt.
>
> 43. The defendant well knew that Donkin relied upon its advices and guidance in the circumstances and well knew or should have known that Donkin required the defendant to assign the action against Murphy.
>
> 44. The defendant was in breach of a duty of care it owed to Donkin in the circumstances. It did not:-

(a) within the period of 28 days aforesaid elect to prosecute the action … or
(b) within the period of 28 days … validly assign the right to prosecute the action … or alternatively
(c) within the period of 28 days or at any time while the cause of action or chose in action against Murphy could be commenced, properly assign the said action … or any chose of action Donkin had against Murphy
(d) prepared and forwarded the correspondence of 3 June 1996 without taking into account the effects of Section 60(3) of the *Bankruptcy Act* … upon Donkin's action against Murphy and/or any chose in action Donkin had against Murphy
(e) Drafted and engrossed a deed executed on the 17 (July) 1996 without taking into account the effects of Section 60(3) … upon Donkin's action against Murphy.

45. As a consequence of such breach of duty … Donkin has lost the opportunity to be successful in (his) action against Murphy …'

[28] The applicant submits that the statement of claim should be struck out on a number of grounds. It is pointed out that the respondent no longer advances a case against the second, third or fourth defendants (which in any event does not exist) and the action against them must be dismissed. The applicant also points to the fact that the second statement of claim advances two causes of action which do not appear in the first statement of claim. The additions were first made in October 2003, more than twelve years after Murphy's alleged negligence caused the respondent to suffer loss when Beaumont J gave judgment for AGC. UCPR 376 appears to prescribe the circumstances in which an amendment may be made to include a new cause of action in a proceeding after the expiration of a limitation period. The court may give leave to make the amendment if it is appropriate and if the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief is already claimed in the proceeding.

[29] In my opinion the 'new' causes of action do not arise out of the same facts or substantially the same facts as the original claim. It is true that two of the claims arise out of the respondent's Swiss franc loan and his unsuccessful attempt to recover damages from AGC. To that extent the facts out of which the two claims arise are the same but there is a fundamental difference between a claim for damages against a solicitor for not securing success in litigation because he did not get a trial equipped with the necessary evidence, and a claim that the respondent should have been advised not to commence proceedings because he had not suffered loss. The cases are mutually exclusive and the essential facts necessary to prove one are destructive of the other. They do not arise out of the same facts but out of very different facts.

[30] The third cause of action is not connected to the failed litigation. It arises out of negligent advice as to the manner in which the respondent should have conducted his commercial relationship with AGC. It stands apart from Murphy's retainer to prosecute the action or to recover the loss suffered in consequence of borrowing Swiss francs. It does not arise out of that transaction at all.

[31] By a curious decision, *Draney v Barry* [2002] 1 Qd R 145, *UCPR* 376 is deprived of any real purpose. It was held that the circumstances identified in *UCPR* 376 are not the only ones in which leave may be given to amend a pleading to add a cause of action out of time. It seems that both s 81 of the *Supreme Court of Queensland Act* 1991 and *UCPR* 375 would allow such an amendment, at least where the interests of justice demand that a good defence under the limitation legislation should be withdrawn from a defendant.

[32] For present purposes the circumstances which would justify leave to make such an amendment can be disregarded. The respondent never applied for leave to make the amendments which appear in the second statement of claim. Mr Blond's submission that Dutney J gave such leave is clearly wrong.

[33] The consequence is that the respondent has made substantial amendments without leave and has purported to deprive the applicant of a good limitation defence. For this reason alone the amendments should be disallowed.

[34] It is obvious that the second statement of claim is embarrassing in the technical sense. The respondent cannot assert in the same pleading the inconsistent pleas that Murphy should not have brought the action, and should have prosecuted it effectively.

[35] This leaves for consideration the claim made in the first statement of claim, and repeated in the second pleading, now brought against the applicant pursuant to the leave which Dutney J did give. The applicant seeks to have this claim dismissed. There are obvious difficulties in the respondent's formulation of the claim. For a start there are no facts pleaded which could conceivably give rise to a duty of care owed by the Official Trustee to a bankrupt to preserve, for the benefit of the bankrupt, existing legal proceedings or the chose in action on which they were based. If the claim against Murphy had any value it should have been realised for the creditors, not the bankrupt. Only if the recovery produced a sum greater than the total of the debts owed by the respondent in his bankruptcy could it be said that he had an interest in the prosecution of the claim. No such contention is advanced in the second statement of claim. S 60 confers upon a trustee in bankruptcy a discretion whether or not to continue with proceedings begun by the bankrupt. As *Lofthouse* shows the discretion is to be exercised having regard to the interests of the creditors. The respondent's case is that the defendant owed him a duty to assign an action for upward of $10,000,000 for a consideration of $100, to the detriment of the creditors. No facts are pleaded which might support such an unusual case.

[36] It may be accepted that a trustee in bankruptcy owes the creditors, and the bankrupt, a duty to be careful in the performance of his functions and that, should he not display the requisite standard of care he may be liable for a loss occasioned by his default. A full Federal Court in *Adsett v Berlouis* (1992) 37 FCR 201 explained the matter in these terms (208-209):

> 'A trustee under the general law must exercise judgment so as to save the estate unnecessary expenditure of money … A trustee in a bankruptcy is in no different position. The discharge of a public duty imposed by the Act is to be performed conformably with the requirements of that duty, but also conformably with the trustee's obligation to administer the estate in such a manner as to maximise

> the return from estate assets, and thereby to maximise satisfaction of the creditors' claims and any possible surplus for the bankrupt. We adopt, as a correct statement of the duty of a trustee and the proper manner of its performance, the words of *Smithers J in Mannigel v Aitken* …
>
> > "In the case of bankruptcy the trustee is in charge of the assets of the bankrupt and those assets are to be applied for the benefit of the creditors and if there be any surplus for the benefit of the bankrupt. It is clear that the minimum standard required of the trustee is that he shall handle the assets with a view to achieving the maximum return from the assets to satisfy the claims of the creditors and to provide the best surplus possible for the bankrupt. Obviously a great deal of discretion and judgment is required to be exercised by the trustee. It was said by Rogerson J in *Re Ladyman* … that the standard of conduct required of the trustee will ordinarily be the standard required of a professional man and perhaps higher …"
> >
> > Where an order is sought that the trustee be removed and to make good the losses suffered by the estate, it must be established that the trustee has been guilty of a breach of duty to act "diligently and prudently" in regard to the business of the trust … According to Halsbury's Laws of England (3rd ed.) Vol. 39 p. 967 … the trustee is bound to execute the trust with fidelity and reasonable diligence and ought to conduct its affairs in the same manner as an ordinary prudent man of business would conduct his own affairs. But beyond this he is not bound to adopt further precaution."

[37] Einfeld J summarised the position in *Wakim v HIH Casualty and General Insurance Ltd* (2001) 111 FCR 58 at 93 in these terms:

> 'The scope of the trustee's duty to the estate is to act as an ordinary prudent person of business would in the circumstances. *Mannigel* described the standard as that required of a professional man or woman or perhaps higher. This standard requires of the trustee good faith and reasonable diligence in the performance of its functions, including to take 'appropriate steps to recover property for the benefit of the estate'.

[38] The case which the respondent propounds against the defendant is extraordinary. It is that the Trustee in Bankruptcy had a duty to transfer an asset, said to be very valuable, for a nominal consideration, to the bankrupt and thereby remove it from the bankrupt estate which it is a trustee's duty to realise for the benefit of the creditors. The assignment was absolute in its terms. The respondent would have been free to deal with the proceeds of the action as he wished.

[39] Very special facts indeed would be necessary to establish the existence of such a duty in a trustee in bankruptcy. No factual basis of any kind is pleaded for the existence of the duty.

[40] It is doubtful whether there is such a cause of action as the respondent pleads. Such remedy as a bankrupt needs to ensure that a good cause of action which he had instituted before bankruptcy is prosecuted for the benefit of the bankrupt estate is afforded by s 178 which allows the bankrupt to apply to the court to review the trustee's decision to discontinue the proceedings, or allow them to be abandoned pursuant to s 60(3). There is no doubt that a decision by a trustee pursuant to s 60 is reviewable. In *Cummings v Claremont Petroleum NL* (1995-1996) 185 CLR 124 at 138-9 Brennan CJ, Gaudron and McHugh JJ said:

> 'A bankrupt's contingent interest in a surplus does not give him an interest which would allow him to sue to enforce proprietary rights … When a trustee declines to exercise his power to sue … the bankrupt may apply to the court under Section 178 … and the court is empowered to make such order "as it thinks just and equitable". That jurisdiction has long been exercised by the courts charged with the supervision of administrations in bankruptcy. If it was just and equitable that an action should be brought … Lord Eldon … held that –
>
> "The court would say … that the bankrupt cannot sue, the law supposing that he has no interest in the property, yet that is not to be acted upon to the effect of gross injustice. Therefore, if he can give security for the costs, the Lord Chancellor will order the assignees to permit him to use their names, to enable him to recover the property … The bankrupt therefore is without any ground of complaint."
>
> The cases were reviewed by Hoffmann LJ in *Heath v Tang* where his Lordship said that, … a bankrupt might apply to the court for an order compelling the trustees to lend his name to the bringing of an action … the court's discretion is at large and is to be exercised in the particular circumstances of each case. … The court would be unlikely to permit the bankrupt to pursue his personal interests, insofar as they are not coincident with the due administration of the estate by the trustee, at the expense of the creditors.'

[41] In giving the judgment of the Court of Appeal in *Heath v Tang* [1993] 1 WLR 1421 Hoffmann LJ said:

> 'The rule that the bankrupt could not sue on a cause of action vested in his trustee was enforced with such rigour that he could not even bring proceedings claiming that the intended defendant and the trustee were colluding to stifle a claim due to the estate and which, if recovered, would produce a surplus. But in any case in which he was aggrieved by the trustee's refusal to prosecute a claim he could apply to the judge having jurisdiction in bankruptcy to direct the trustee to bring an action, or to allow the bankrupt to conduct proceedings in the name of the trustee. The jurisdiction of the bankruptcy judge to give such directions is now conferred by statute.' (1423)

[42] Having reviewed the older cases, referred to by the High Court, Hoffman LJ concluded (1424):

> 'Thus the supervision of the insolvency administration by the bankruptcy judge protects the bankrupt from injustice which might otherwise be caused by his inability to bring proceedings outside the bankruptcy jurisdiction.'

[43] The considerations that:

> (a) a statutory discretion is conferred upon a trustee in bankruptcy to decide whether or not to continue proceedings begun by a bankrupt
>
> (b) the discretion is to be exercised for the protection of the creditors and to prevent dissipation of the bankrupt estate
>
> (c) the court can review the exercise of discretion and compel a trustee to continue proceedings in cases where it is just, having regard to the interests of the bankrupt and the creditors, to do so

make it unlikely that the duty of care postulated by the respondent would exist.

[44] The respondent faces another problem. It is by no means clear that had the assignment occurred before the action was discontinued or abandoned by the operation of s 60 that it would have been valid. The subject matter of the assignment was 'the legal proceedings instituted against John Murphy & Co' by the respondent. If by this description the parties intended to transfer the right to conduct the legal proceedings without at the same time transferring the underlying chose in action which gave rise to the suit the assignment would be void. It would amount to 'trafficking in litigation' because it would involve the prosecution of a suit by someone who had no genuine legal or commercial interest in it. See *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 694 per Lord Wilberforce. In the same case Lord Roskill said (703):

> 'Where the assignee has by the assignment acquired a property right and the cause of action was incidental to that right, the assignment was held effective. … It was not necessary for the assignee always to show a property right to support his assignment. He could take an assignment to support and enlarge that which he had already acquired as, for example, an underwriter by subrogation … I cannot agreed with the learned Master of the Rolls … when he said in the instant case that "the old saying that you cannot assign a "bare right to litigate" is gone." I venture to think that that remains a fundamental principle of our law. But it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of a claim of another and to that extent takes an assignment of that claim … is entitled to enforce that assignment …'

[45] On this supposition the respondent lost nothing by reason of the defendant's election not to preserve the action. The assignment which would, on that postulation, not have been affected by the loss of the action pursuant to s 60, would

nevertheless have been void. The respondent would not have lost anything of value by reason of s 60 bringing the action to an end.

[46] If the assignment were intended to be of the underlying chose in action and the parties chose infelicitous language to describe the property being assigned, then the assignment would not have been affected by the operation of s 60. There is a distinction as Demack J pointed out, between the two. See *re Kwok; ex parte Rummel* (1981) 61 FLR 336 at 334 and *re Collins ex parte; The Official Trustee in Bankruptcy* (1986) 65 ALR 338. If the chose in action had been transferred to the respondent he could have continued the proceedings or, if they were discontinued or abandoned he could have issued fresh proceedings so long as he was within time. No doubt he would have had to pay the costs incurred by Murphy in the first proceeding but there would have been no *res judicata*.

[47] If that was what the parties intended the order made by Demack J could have been averted by pointing this out to his Honour. On this postulation the loss of the right to sue Murphy was not a consequence of the trustee's exercise of the powers given by s 60 but by the respondent's own failure to appreciate the situation and recommence his own action.

[48] The respondent's discharge from bankruptcy has not resulted in the chose of action, being the claim against Murphy, in reverting to his ownership. See *Daemar v Industrial Commission of New South Wales (No 2)* (1990) 22 NSWLR 178 at 184-5.

[49] The statement of claim is deficient in the respects I have identified and must be struck out. The applicant seeks to put an end to the action altogether and asks for summary judgment. It points to the considerations I have just discussed which make it extremely doubtful that the law will recognise the duty of care which is the basis of the respondent's case. It is clear that summary judgment should not be given for a defendant unless the plaintiff's claim can be seen to be absolutely hopeless. Even a glimmer of hope that a plaintiff may be able to make out a case is sufficient to prevent the entry of judgment. Badly pleaded though the case has been; doubtful as the law appears to be to support the claim, it is just possible that there are facts which can be ascertained and pleaded which might support an arguable case for breach of duty against the applicant. Subject to conditions the respondent should be allowed an opportunity to present a case, if it can be done intelligibly.

[50] The applicant relies as well upon the terms of the release found in cl 3 of the deed, by which the respondent not to institute any proceedings against the applicant as a result of the assignment of the proceedings 'or for any other matter'.

[51] If the deed were extant this would be a complete defence to the respondent's claim. The respondent has, however, an answer to this argument. It is that the deed is void and of no effect because the subject matter of the assignment did not exist. The closest analogy is to the cases at law which decided that if, unknown to the parties at the time of contracting, the specific subject matter of their agreement did not exist then no contract came into force. The leading case is, of course, *Couturier v Hastie* [1852] 10 ER 1065. Another case is *Goldsborough Mort & Co Ltd v Carter* (1914) 19 CLR 429. It is different, of course, where the terms of the contract imply a promise by one of the parties that the subject matter of the contract does exist. See

McRae v Commonwealth Disposals Commission (1951) 84 CLR 377. In such a case the contract is valid and the promisor liable for damages.

[52] A recent decision of the Court of Appeal, *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] 3 WLR 1617 appears to have reinstated the law concerning common mistake and concluded that where parties contract on the basis of a common mistake as to the subject matter of their contract the contract is void. The mistake must be shared by both parties and must relate to facts as they existed at the time the contract was made. If the mistake renders the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist the contract will be void. See at 1642-3. It seems to me, therefore, that the deed was arguably void and the release of no effect.

[53] Accordingly I decline to enter judgment for the applicant. The orders I propose to make should bring some clarification to the action and whether the respondent intends to pursue it.

[54] I order that the action against the second, third and fourth defendants be struck out and that there be judgment for those defendants against the plaintiff. I order that the costs of the second and third defendants, and of the Commonwealth of Australia (which was served as though it was the fourth defendant) of and incidental to the action and this application be assessed on the indemnity basis and be paid by the plaintiff. Those parties should never have been joined as is evident from the second statement of claim. I order that the second statement of claim be struck out and that the plaintiff pay the first defendant's costs of and incidental to the application to be assessed on the standard basis. There has been an element of vexation in the plaintiff's conduct of the proceedings. To avoid further instances I order that the respondent not deliver any further statement of claim without applying to the court for leave to deliver such further pleading and on giving notice to the applicant.