

SUPREME COURT OF QUEENSLAND

CITATION: *Anderson & Anor v Peldan & Anor* [2004] QSC 335

PARTIES: **BERNADETTE MARIE ANDERSON & ROBYN JENNIFER MOLLEE**
(applicants)
v
MICHAEL PELDAN & MORGAN LANE
(respondents)

FILE NO/S: BS7073 of 2004

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 24 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 16 September 2004

JUDGE: Philippides J

ORDER: **The proceedings herein be struck out.**

CATCHWORDS: BANKRUPTCY - JURISDICTION – where claim brought in the Supreme Court on behalf of a deceased’s estate for a declaration that the estate was entitled to certain proceeds of sale of a property – where application brought by trustees in bankruptcy of the deceased’s husband in the Federal Magistrates Court claiming an entitlement to those proceeds – whether Supreme Court proceeding should be dismissed or stayed pending determination of the Federal Magistrates Court application – whether proceeding within the exclusive jurisdiction of the Federal Court or Federal Magistrates Court

Bankruptcy Act 1966 (Cth), s 5, s 27, s 31, s 121, s 122
Property Law Act 1974 (Qld), s 228

Denby (as T’ee in Bankruptcy of the Estate of S S Wing Tam)
[2002] QSC 117
Green v Schneller [2001] NSWSC 897
Sutherland v Brien (1999) 149 FLR 321
Scott v Bagshaw [2000] 99 FCR 573

COUNSEL: M Martin for the applicants
L Jurth for the respondents

SOLICITORS: Quinn & Scattini for the applicants
Klar & Klar for the respondents

PHILIPPIDES J:**The Application**

- [1] This is an application brought by the trustees in bankruptcy of the estate of Mr Raymond Kenneth Pinna (“the bankrupt”) for an order that the proceedings herein be struck out on the ground that there are proceedings pending in the Federal Magistrates Court which will ultimately determine issues between the parties and which raise claims in respect of which this court lacks jurisdiction. Alternatively, orders are sought to stay the within proceeding permanently or pending the determination of the Federal Magistrates Court proceeding. The application is resisted by the respondents, who are the joint legal personal representatives of the estate of Mrs Pinna, the late wife of the bankrupt.

Background Facts

- [2] The following matters are not in contention. In December 1995, the bankrupt and the deceased acquired as joint tenants a house at Carindale. In September 2003, the joint tenancy was severed upon the registration of a Form 1 Transfer, whereupon the deceased and the bankrupt became the registered owners of the property as legal tenants in common in equal shares and thereafter held the equitable interest in the property in equal shares. The bankrupt’s wife died on 12 February 2004 and thereafter the registered owners of the property as tenants in common were the bankrupt and the respondents. In March 2004, the property was sold to a third party for \$600,000.
- [3] On 21 April 2004, the applicants were appointed the trustees in bankruptcy of the estate of the bankrupt. Of the net proceeds of sale of the property, one half was paid to and held by the applicants in their capacity as trustees of the bankrupt’s estate and the other half (“the disputed sum”) was paid to the respondents on behalf of the deceased’s estate and is held pursuant to an undertaking in a solicitor’s trust account.
- [4] On 18 August 2004, the respondents commenced proceedings in this Court seeking a declaration that the deceased’s estate is entitled to the entire legal and equitable interest in the disputed sum. The Statement of Claim pleads, *inter alia*, the matters referred to above as not in contention. It also alleges that the joint tenancy in the property was severed in September 2003 either by the deceased and the bankrupt executing a Form 1 Transfer purporting to be a mutual severance or alternatively unilaterally by the bankrupt executing a Form 1 Transfer and causing it to be registered. (A copy of the latter document is annexed to the affidavit material. The consideration is expressed as “the unilateral severance of a joint tenancy pursuant to section 59(1) of the *Land Title Act 1994*.”) The Statement of Claim alleges that the estate of the deceased is entitled to the entire legal and equitable interest in the disputed sum. It is also alleged that the applicants on behalf of the estate of the bankrupt “assert an entitlement” to the disputed sum, but no further particulars are provided.
- [5] The applicants entered a conditional notice of intention to defend on the basis that the Federal Court has exclusive jurisdiction in respect of the proceeding.

- [6] On 20 August 2004, the applicants commenced proceedings in the Federal Magistrates Court seeking:
- (a) a declaration that the severance of the joint tenancy in the property was a transfer to defeat creditors pursuant to s 121 of the *Bankruptcy Act* 1966 (Cth) and/or alternatively an alienation pursuant to s 228 of the *Property Law Act* 1974 (Qld) and void as against the applicants;
 - (b) a declaration that the respondents hold the disputed sum on trust for the applicants;
 - (c) an order compelling the respondents to pay the disputed sum to the applicants.

The submissions

- [7] The applicants submitted that the within proceedings as pleaded are of no utility, in that the statement of claim does not set out any issue in the nature of the dispute between the parties. The applicants accepted that it is only in the event of declarations sought by it in the Federal Magistrates Court application being made that the respondents would be disentitled to the disputed sum. Counsel for the applicants stated that the applicants seek primarily to challenge the relevant transaction severing the joint tenancy pursuant to s 121 of the *Bankruptcy Act* and argued that in order to adjudicate upon all issues between the parties, the claim arising under s 121 would need to be determined, and that this court had no jurisdiction to determine that matter. It was thus contended that the current proceedings ought to be dismissed as they constitute an abuse of process or that they should be stayed until determination of the proceeding in the Federal Magistrates Court.
- [8] The respondents on the other hand submitted that the proceedings arise out of a claim to funds held in a trust account, the entitlement to which is in dispute and that the proceedings merely seek a determination of that claim and a declaration as to the legal and equitable interest in those funds. It was argued that the proceedings herein are proceedings which invoke the Court's jurisdiction to determine and declare rights to property and to make orders as to its destination. The respondents argued that the cause of action pleaded in the Statement of Claim is not a proceeding "under or by virtue of" the Act, and accordingly, the proceedings are not within the exclusive jurisdiction of the Federal Magistrates Court.
- [9] The respondents contended that the applicants are not prevented from raising issues under both s 121 of the *Bankruptcy Act* and s 228 of the *Property Law Act* by way of defence or counter-claim in the within proceedings and that no prejudice to the applicants arises in that regard. It was thus submitted that it could not be shown that the proceedings were instituted in so inappropriate a forum that their continuation would be oppressive and vexatious, an abuse of process or other than in the interests of justice.

Should the proceedings be dismissed or stayed?

- [10] Section 27(1) of the *Bankruptcy Act* provides:

“The Federal Court and the Federal Magistrates Court have concurrent jurisdiction in bankruptcy, and that jurisdiction is exclusive of the jurisdiction of all courts other than the jurisdiction of the High Court under section 75 of the Constitution.”

The meaning of “jurisdiction in bankruptcy” is informed by the definition of “bankruptcy” in s 5(1) of the Act which provides that “bankruptcy, in relation to jurisdiction or proceedings, means any jurisdiction or proceedings under or by virtue of this Act”.

- [11] The concurrent jurisdiction of the Federal Court and the Federal Magistrates Court “in bankruptcy” is thus expressed by s 27(1) to be “exclusive of the jurisdiction of all other courts other than the jurisdiction of the High Court ...” and that jurisdiction is identified by s 5(1) as “any jurisdiction ... under or by virtue of this Act ...”.
- [12] Counsel for the respondents placed particular reliance on *Sutherland v Brien*¹. The issue for determination in that case was whether arrangements made by a director and his wife with the administrator of a company were void against their trustees in bankruptcy under s 120 of the Act. Austin J held that the matter was not one within the exclusive jurisdiction of the Federal Court, stating (at 323):

“Here the proceedings arise out of claims to a fund held in a trust account. The proceedings have been brought for a determination of those claims and for orders as to the payment of the fund. ... the proceedings themselves are not ‘proceedings under or by virtue of’ the *Bankruptcy Act*. Rather, they are proceedings which invoke the Court's well-established jurisdiction to determine and declare rights to property and make orders as to its destination. Consequently, these proceedings do not fall within the definition of ‘bankruptcy’ in relation to jurisdiction or proceedings, and do not fall within the ‘jurisdiction in bankruptcy’ which s 27(1) vests exclusively in the Federal Court.”

- [13] However, Austin J did not, in considering the question of the jurisdiction in bankruptcy, have regard to what role if any was played by s 31 of the Act in defining matters within the exclusive jurisdiction of the Federal Court or Federal Magistrates Court. That was a matter considered by the Full Court of the Federal Court in *Scott v Bagshaw*.²
- [14] Subsections 31(1)(e) and (f) of the Act provide:

“(1) In exercising jurisdiction under this Act, the Court shall hear and determine the following matters in open Court:

- ...
 (e) applications to set aside or avoid a charge, charging order, settlement, disposition, conveyance, transfer security or payment;
 (f) applications to declare for or against the title of the trustee to any property ...”

¹ (1999) 149 FLR 321.

² [2000] 99 FCR 573.

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

- [15] The Full Court in *Scott v Bagshaw* emphasised that s 27(1) falls to be understood in its context and that s 31(1) elucidates what the drafter of the provision had in mind as falling within ‘bankruptcy’ in s 27(1) as defined in s 5(1) of the Act. The Full Court stated that it was apparent from s 31(1) that the drafter of it intended that applications having that stated effect would be encompassed within the concept of jurisdiction in bankruptcy. The Full Court distinguished *Sutherland v Brien* on the basis that it did not concern a case, such as that in *Scott v Bagshaw*, which fell within s 31(1)(f) of the Act.
- [16] *Scott v Bagshaw* concerned proceedings whereby the appellant trustee of a family trust sought a declaration that properties were charged in his favour. The first respondent was a bankrupt, the second respondent was the bankrupt’s wife and the third respondents were the first respondent’s trustees in bankruptcy. The proceedings were ordered to be stayed for want of jurisdiction. The Full Court in *Scott* noted that the nature of the claim was “one to realise an equitable charge”. The pleadings made no reference to any section of the Act and it was possible for judgment to be given without reference to any such section. However, as the Court stated (at 577):

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

- [17] *Scott v Bagshaw* and *Sutherland v Brien* were explained in the following passage by Barrett J in *Green v Schneller*:³

“Austin J [in *Sutherland*] decided that s 27(1) did not vest in the courts to which it refers exclusive jurisdiction in respect of every question turning upon the interpretation and application of the Bankruptcy Act. That must be so. When persons become bankrupt, it is necessary for courts to determine all types of questions about the consequences. Many of those questions will depend for their answers on the provisions of the *Bankruptcy Act*. One class of such questions relates to the nature of the rights of persons to property. Austin J held that nothing in the *Bankruptcy Act* precludes the exercise in such cases of the well established jurisdiction of courts other than those mentioned in s 27(1) “to determine and declare rights to property and make orders as to its destination”. *But that undoubted general jurisdiction will yield to any aspect of the*

³ [2001] NSWSC 897 at [22].

jurisdiction for determination and declaration of such rights which the Bankruptcy Act itself places in the hands of s 27(1) courts. In Scott v Bagshaw ... the Full Federal Court noted that among the matters so placed in the hands of those courts is 'applications to declare for or against the title of the trustee to any property'. Because this is one of the matters s 31(1) of the Act requires 'the Court' to hear in open court, it is identified as a matter within the definition of 'bankruptcy' and thereby seen to be within s 27(1). That aspect of the general jurisdiction 'to determine and declare rights of property and to make orders as to its destination' which entails 'applications to declare for or against the title of the trustee to any property' is accordingly reposed in s 27(1) courts alone." (emphasis added)

- [18] Both parties relied on *Denby (as T'ee in Bankruptcy of the Estate of S S Wing Tam)*⁴, as supporting their respective submissions concerning the jurisdiction of this court. *Denby* concerned a claim brought in the Supreme Court by a trustee in bankruptcy alleging that a payment made to the defendant was void as against it pursuant to s 122 of the Act. The application in that case did not expressly seek a declaration under s 31(1)(f) or make application to avoid a disposition under s 31(1)(e), but rather sought repayment of money by the defendant, relying primarily on the operation of s 122 of the Act. While Muir J doubted that such a claim, not being a claim for a declaration, came within s 31(1)(f), his Honour found that the application seeking repayment of money on the basis that the payment was void under s 122 of the Act was *in substance* one to set aside or avoid a disposition or payment and as such came within s 31(1)(e) and was therefore not within this court's jurisdiction.
- [19] But of course the approach taken by Muir J applies equally to a claim made by a trustee in bankruptcy pursuant to s 121 if it can be characterised in substance as one to set aside or avoid a disposition or conveyance within s 31(1)(e) of the Act or as one which seeks a declaration for or against the title of the trustee to any property within s 31(1)(f) of the Act.
- [20] The respondents in this proceeding claim an entitlement to the entire legal and equitable interest in the disputed sum, notwithstanding the pleaded assertion by the applicants to an entitlement and seek a declaration accordingly. On one view the pleaded assertion of the applicants' entitlement can be said not to raise a sufficient cause of action as to the nature of the dispute between the parties. But that is a matter that could be remedied by further particulars and the submissions made by both counsel leave no doubt that the pleaded assertion concerning the applicants claimed entitlement to the disputed sum is understood as being based, *inter alia*, on a claim that the transaction severing the joint tenancy is void pursuant to s 121 of the Act.
- [21] The effect of a declaration in favour of the respondents as to the entirety of the title to the disputed property, would involve a finding "against the title of the applicants" to that property, arising *inter alia* as a consequence of the application of s 121. That is a matter falling within s 31(1)(f) of the Act in that it can be said to concern a

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[2002] QSC 117.

claim to a declaration “against the title of the trustee to property” and outside this Court’s jurisdiction.

- [22] However, even if that conclusion cannot be drawn given the limited nature of the pleading as to the applicants’ claimed entitlement, there is another basis on which the proceeding ought to be struck out.
- [23] The proceeding in this Court is in reality a futility without the determination of the applicants’ claim pursuant to s 121, presently the subject of the application brought in the Federal Magistrates Court. That claim by the applicants to a declaration that the transfer severing the joint tenancy is, *inter alia*, void pursuant to s 121 of the Act as against the applicants, is not one within the jurisdiction of this Court to entertain. That is because that claim is in substance one to avoid the transaction whereby the joint tenancy was severed and is thus in substance one to avoid “a disposition or conveyance”. As such it concerns a matter within s 31(1)(e) of the Act and concerns the exercise of jurisdiction “under or by virtue” of the Act.
- [24] It follows that that application brought by the applicants in the Federal Magistrates Court cannot be raised by way of counterclaim in these proceedings as it is not within the jurisdiction of this Court. The determination of the application in that Court will determine the real issues of dispute between the parties. It was not submitted that there are any other matters that would remain for determination. Accordingly, the proceedings in this Court will be otiose upon the determination of the application in the Federal Magistrates Court and there can be no justification for merely staying the within proceeding.
- [25] In the circumstances, I order that the within proceeding be struck out. I shall hear submissions as to costs.