SUPREME COURT OF QUEENSLAND

CITATION:	*Fraser Property Developments P/L v Sommerfeld & Ors* [2005] QCA 242
PARTIES:	**FRASER PROPERTY DEVELOPMENTS PTY LTD** ACN 101 644 026 (plaintiff/first respondent) **v** **ROBERT PETER SOMMERFELD** (first defendant/second respondent) **SYDNEY BALE** (second defendant/third respondent) **BURNETT SHIRE COUNCIL** (third defendant/appellant)
FILE NO/S:	Appeal No 10072 of 2004 SC No 290 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	Judgment delivered 29 April 2005 Further Order delivered 15 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	19 April 2005
JUDGES:	McPherson and Williams JJA and Philippides J Separate reasons for further order of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for an order for the costs of appeal granted** **2. Respondent to the appeal Robert Peter Sommerfeld to pay the costs of the appellant Burnett Shire Council of the appeal and of and incidental to the application made by him on 2 August 2004**
CATCHWORDS:	PROCEDURE – COSTS – unsuccessful respondent to appeal declared bankrupt – appellant sought costs of application and appeal – whether application for costs within restrictions of s 58(3) *Bankruptcy Act* 1966 (Cth) – whether appeal, submission on appeal or order amount to a fresh step within s 58(3) – whether costs are a "provable debt" within s 58(3) *Bankruptcy Act* 1966 (Cth), s 58, s 60, s 82 *Uniform Civil Procedure Rules* 1999 (Qld), r 72

Australian Securities and Investments Commission v Loiterton (2004) 50 ACSR 693, cited
British Gold Fields of West Africa, Re [1899] 2 Ch 7, considered
Glenister v Rowe [2000] Ch 76, considered
Vint v Hudspith (1885) 30 Ch D 24, considered

COUNSEL: P H Morrison QC, with R Ashton, for the appellant
No appearance for the respondents

SOLICITORS: Barry & Nilsson for the appellant
No appearance for the respondents

[1] **McPHERSON JA:** After hearing submissions on appeal on 19 April 2005, this Court on 29 April 2005, gave judgment in *Fraser Property Developments Pty Ltd v Sommerfeld, Bale and Burnett Shire Council* [2005] QCA 134 allowing the appeal and setting aside the order of the Supreme Court made on 22 October 2004. In the reasons for judgment delivered on 29 April we reserved our decision as to the incidence of costs arising out of the order on the appeal.

[2] It will be recalled that the plaintiff Fraser Property Developments Pty Ltd was the building proprietor under a contract for construction of a house by the first defendant Sommerfeld. He engaged the second defendant Bale, who claimed to be an engineer, to design footings and slab for the building. In doing so he, or so it is alleged in the action, failed to design them with proper care and in accordance with the relevant Australian standards. In the action that ensued in the Supreme Court against the defendants, the third defendant Burnett Shire Council was sued for failing to see that the design plans which it passed complied with the requisite standard or that Bale was a registered professional engineer.

[3] In the appeal to this Court, we reversed the decision of the primary judge made on the application of Sommerfeld on 2 August 2004 under s 40(1) of the *Commercial and Consumer Tribunal Act 2003* that Fraser Property Developments discontinue its proceedings in the Supreme Court and re-institute its claim before that Tribunal. We did so on the basis, expressing it broadly, that what the Council did in approving the house plans was expressly and specifically excluded from the statutory jurisdiction of the Tribunal.

[4] In the meantime, the first defendant Sommerfeld had become bankrupt, which happened when he presented a debtor's petition on 7 December 2004. He did not appear and was not represented on the appeal. The order of the Supreme Court, which was set aside when the appeal was allowed on 29 April 2005, had been made on 22 October 2004 and the notice of appeal against it was lodged on 18 November 2004, which was before the bankruptcy took place. No election to prosecute or discontinue the action has since been made by Sommerfeld's trustee pursuant to s 60(2) of the *Bankruptcy Act 1966* despite some inquiries on behalf the Council. It was, of course, not his action to prosecute or discontinue but one that was brought against him and others including the Council by the plaintiff Fraser Property Developments.

[5] Section 58(3) of the *Bankruptcy Act 1966* provides that, after a debtor has become bankrupt, it is not competent for a creditor:

> "(a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
> (b) except with the leave of the Court … to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding".

The question in this case is whether an application by the Council for an order for its costs of the appeal and of the application is within the restriction imposed by s 58(3) of the Act.

[6] It is plain that the order for costs sought by the Council is not affected by s 58(3)(a) of the Act. The Council is not at this stage seeking to enforce any remedy against the person or property of the bankrupt Sommerfeld. Nor has the Council commenced any legal proceeding against him either at all or in respect of any provable debt. It may, however, be that, by appealing against the order made on 22 October 2004, the Council took "a fresh step" in the action brought against it and others; but that step, if any, was taken on 18 November 2004 before Sommerfeld became bankrupt on 7 December 2004. The same is true if, as I think it is, the relevant "proceeding" for this purpose was Sommerfeld's application for an order requiring Fraser Property Developments to discontinue its claim in the Supreme Court and re-institute it before the Tribunal. That application was made on 2 August 2004 and, as already mentioned, determined by the order made on 22 October 2004.

[7] On the footing that the "proceeding" was Sommerfeld's application to the Supreme Court for an order to that effect, the first question is whether, by making submissions to this Court in support of the appeal against the order on that application, the Council took a fresh step in that proceeding. No authority has been found suggesting that mere argument in support of an appeal amounts to taking a "fresh step" in the proceeding. I am disposed to the view that it is not. The order of the court allowing the appeal may conceivably be a fresh step in the proceeding; but it was taken not by the "creditor", if that was what the Council was, but by this Court, and so is not within the prohibition imposed by s 58(3)(b).

[8] The question remains whether making an order for costs amounts or would amount to a "fresh step" in that proceeding and if so, whether, it is taken "in respect of a provable debt" within the meaning of s 58(3)(b) of the Act. Which debts are provable in bankruptcy is governed by s 82 of the Act. Under s 82(1) they include all debts and liabilities present, future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy:

> "… or to which he … may become subject before his … discharge by reason of an obligation incurred before the date of the bankruptcy ..."

[9] Sommerfeld was not at the date of his bankruptcy subject to any order to pay costs to the Council. It might be said that having instituted the proceeding to compel removal of the action into the Tribunal, he thereby incurred a liability to pay the costs of an appeal by the Council if, as proved to be the case here, it was successful. But quite apart from the possibly limiting effect of s 82(8), it is settled by authority in England that the mere prospect of an order for costs against the bankrupt, or the contingency that it might be made, is not a liability provable in bankruptcy.

[10] The authorities go some way back in time. In *Vint v Hudspith* (1885) 30 Ch D 24, 27, Lindley LJ said that he doubted "very much" whether the possibility of having to pay costs is a provable debt, although it might in some cases be a contingent liability. An opportunity for his Lordship to expand on his views arose in *Re British Gold Fields of West Africa* [1899] 2 Ch 7, which concerned an order for costs in favour of a shareholder for the rectification of the share register and for repayment by the company of a sum paid for the shares. The proceedings were initiated before winding up (which was the equivalent of bankruptcy for present purposes), but were not successfully completed until after it took place. In delivering the judgment of the Court of Appeal, Lindley MR said ([1899] 2 Ch 7, 11) that if an action was brought against a person, who afterwards became bankrupt, to recover a sum of money, and the action was successful, the costs were regarded as an addition to the sum recovered and so provable if the debt was provable "but not otherwise". If the sum recovered is not provable, said his Lordship, "neither are the costs of recovering it". Speaking of a case in which no verdict is given and no order was made for payment of costs until after bankruptcy, Lindley MR continued (at p 12):

> "In such a case there is no provable debt to which the costs are incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy; nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy. This was the case of *Vint v Hudspith*."

[11] What was said by Lord Lindley there has since been followed and applied in a number of English decisions, of which the most recent is *Glenister v Rowe* [2000] Ch 76. There the creditor Mrs Rowe sued her solicitor Glenister for negligence and breach of trust. The action was struck out by Millett J in 1991, but an appeal against that order succeeded in 1995 after Glenister had been made bankrupt in 1992. He was discharged from bankruptcy in 1995 shortly before the Court of Appeal allowed Mrs Rowe's appeal with costs later taxed at some £15,000. Applying what was said in *Re British Gold Fields of West Africa*, the Court of Appeal held that the order for costs against Glenister was not a debt provable in bankruptcy and so was enforceable after his discharge. The English bankruptcy legislation (s 382 of the Act of 1986), although now differing slightly from s 82 in Australia, has been altered in the direction of admitting debts that would previously not have been provable. Nevertheless, Mummery LJ, with whom the other Lords Justices agreed, said ([2000] Ch 76, 84):

> "(3) The fact that an order for costs (a) creates an obligation to pay money and (b) is a contingency in legal proceedings is not sufficient, however, to make a claim that the court should exercise its discretion to make such a order a 'contingent liability' of the person against whom such an order may ultimately be made. It is accepted that before an order is made there is no present liability to pay. Nor can there be a future liability: there is no certainty that the court will exercise its discretion to make such an order. If, as some of the authorities hold, a contingent liability must arise out of an existing or underlying liability, no such liability can exist simply by reason of a claim for costs made in a writ, summons, application or notice of appeal to the judge or to the Court of Appeal."

Among those authorities, was *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455.

[12] The principle applies in the present case. A potential or contingent liability for costs is not a provable debt unless an order for payment of those costs has been made before bankruptcy intervenes. As can be seen from *Glenister v Rowe* [2000] Ch 76, 84, the underlying reason is that costs of legal proceedings are in the discretion of the court; and until an order is made there is no obligation or liability to pay them. On this footing the Council could not prove its debt or claim for its costs of the appeal in the present case or of the proceedings below. It is not a "provable debt" within the meaning of s 58(3)(b). Leave of the Court (which means the Bankruptcy Court, now the Federal Court) is not required under s 58(3)(b) because, even if it is "a fresh step", it is not in a proceeding "in respect of a provable debt". The case is not one in which it can be said that there is a provable debt to which an order for costs is or would be incidental in the sense laid down in *Re British Gold Fields of West Africa*. The "proceeding" instituted by Sommerfeld was not to recover a sum of money, but for an order that the plaintiff Fraser Property Developments discontinue its action in the Supreme Court and re-institute it before the Tribunal. The Council as the third defendant opposed the making of that order, and it has been successful on appeal. Its right to obtain an order for the costs of the appeal or of the proceedings in the Supreme Court is not obstructed by s 58(3)(b) of the *Bankruptcy Act*. This view accords with the decision of Bergin J in *Australian Securities and Investments Commission v Loiterton* (2004) 50 ACSR 693, 735, in which her Honour applied *Re British Gold Fields of West Africa* [1899] 2 Ch 7, at 11-12.

[13] It may be added that rule 72(1) of the *Uniform Civil Procedure Rules* of Queensland provides that if a party to a proceeding becomes bankrupt, a person may take any further step in the proceedings "for or against the party" only if "the court" gives the person leave to proceed. The "court" in this context refers to a State court. I do not know that this can be reconciled in constitutional terms with the provisions of s 58(3)(b) of the *Bankruptcy Act*; but rule 72(3) expressly makes it subject to the *Bankruptcy Act*. It is in any event not necessary to determine the point because it is not suggested that the Council has obtained leave from any court in Queensland to take a step against Mr Sommerfeld in these proceedings.

[14] For the reasons given, in my opinion the Council's application for an order for the costs of the appeal should be granted. The Court should therefore order that the respondent to the appeal Robert Peter Sommerfeld pay the costs of the appellant Burnett Shire Council of the appeal and of and incidental to the application made by him on 2 August 2004.

[15] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of McPherson JA. There is nothing I can add thereto; I agree with the order proposed.

[16] **PHILIPPIDES J:** I agree with the reasons for judgment of McPherson JA and with the order proposed.