

COURT OF APPEAL

**MARGARET McMURDO P
FRASER JA
McMEEKIN J**

**Appeal No 8073 of 2016
SC No 683 of 2015**

ALEXIA MARGARET WARREN

Appellant

v

**QUEENSLAND LAW SOCIETY INC
SHERRY JANETTE BROWN
WILLIAM THOMAS HOURIGAN
GLENN ASHLEY FORSTER
MICHAEL CRAIG DRINKALL
DEBORAH YUMIN MOK**

Respondents

BRISBANE

TUESDAY, 18 OCTOBER 2016

JUDGMENT

THE PRESIDENT: This matter has a history. The appellant, Ms Alexia Warren, is a former solicitor. On 15 January 2016, a judge of the Trial Division dismissed her appeal against the appointment of receivers to her legal practice under s 531 *Legal Profession Act 2007* (Qld) and granted the receivers' application for orders requiring her to deliver up regulated property and information needed to access electronic devices. She filed an appeal from those orders in this

Court. On 5 February 2016, she was declared bankrupt and on 18 March 2016 the trustee in bankruptcy indicated his intention to abandon that appeal.

The matter was mentioned before me on 22 March 2016 when Ms Warren stated that she was appealing the Federal Circuit Court's sequestration order to the Federal Court of Australia. I stayed the appeal in this Court pending the outcome of her appeal from the sequestration order. The matter was next listed before me on 10 June 2016, when it became clear that Ms Warren had not complied with orders for progressing her appeal in the Federal Court and she remained an undischarged bankrupt. Over robust contrary submissions from Ms Warren, I dismissed her appeal with costs, relying on s 60 *Bankruptcy Act* 1966 (Cth): see *Warren v Queensland Law Society Inc & Ors* [2016] QCA 154.

That same day, Ms Warren applied to the Trial Division to have the order of 15 January 2016 set aside for fraud and, under r 72 *Uniform Civil Procedure Rules* 1999 (Qld), leave to proceed. On 12 July 2016, another Trial Division judge refused that application under s 60: see *Warren v Queensland Law Society Inc & Ors* [2016] QCA 154. After referring to *Quazer v Secure Funding Pty Ltd* [2010] QCA 251 [27]; s 60 *Bankruptcy Act*; and the trustees election not to prosecute the action, her Honour determined that, where litigation was stayed by Commonwealth legislation, it would not be appropriate to grant leave to Ms Warren to take further steps in the action. The judge also rejected the contention that her action was, under s 60(4) *Bankruptcy Act*, a "personal injury or wrong done to her". Her Honour held that Ms Warren's claim to have a judgment set aside for fraud, did not fall within the exception in s 60(4), relying on Dixon J's observations in *Cox v Journeaux [No 2]* (1935) 52 CLR 713, 721. For those reasons, the judge refused the application for leave under r 72 and ordered that the entire proceeding be stayed unless and until Ms Warren's trustees in bankruptcy elected to continue with it or filed a notice of discontinuance. The judge also ordered Ms Warren pay the costs of and incidental to the application to be assessed.

On 9 August 2016, Ms Warren filed an appeal from those orders in this Court. She seeks orders allowing the appeal, setting aside the Trial Division orders of 12 July 2016 and instead seeks orders granting her application for leave to take a step in the proceeding and her costs of the application below and of this appeal.

Her grounds of appeal traverse seven pages. She contends first that the judge erred by failing to apply s 699(1) and s 710(b) *Legal Profession Act* as the Queensland Law Society did not have authority under those provisions to defend her application, and its lawyers have no right of appearance or locus standi. Her second contention is that the judge misapplied s 60(2) and (4) *Bankruptcy Act*, *Quazer*, *Cox v Journeaux* and my decision in *Warren*. She further contends that the judge failed to apply various other provisions of the *Legal Profession Act* and Rules and erred in receiving into evidence a copy of a letter from her trustee in bankruptcy. She contends that, even if her trustee's consent was required for her to succeed in her application for leave to proceed, the trustee was required to make reasonable enquiries and there was no evidence that it had done so. She contends that she was an Australian legal practitioner holding an unrestricted principal practising certificate current to 30 June 2015 and to find to the contrary was a personal wrong against her, so that she could pursue her action against the respondents to this appeal under s 60(4). She submits that the appointment of receivers in her case was an invalid exercise of power and a breach of statutory duty. Finally, she contends the decision below was manifestly unjust and incorrect.

Today, during oral submissions, she handed up a 15 page outline of submissions in support of her appeal. Those submissions did not address the threshold issue raised by the respondents today, which is whether Ms Warren should have leave to proceed under r 72 and that without that leave, the appeal is incompetent. Finally, after this was pointed out to her several times, she applied for leave to proceed under r 72 if required, noting that her primary position was that leave was not required. She said that the respondents' breach of her statutory rights in appointing receivers when she had a practicing certificate was a wrong within s 60(4) *Bankruptcy Act*, and that the

interests of justice required leave to be given as a substantial wrong was done to her in the court below not receiving certain evidence.

There are profound difficulties with her contentions. This appeal is a “proceeding” under r 72 and, as she is an undischarged bankrupt, the appeal is incompetent unless she first obtains leave to proceed under r 72. Without the consent of her trustee in bankruptcy to bring this appeal, s 60 *Bankruptcy Act* may have the effect that this Court does not have power under r 72 to give such leave to proceed, unless the action comes within the exception to s 60(4): see *Quazer* at [27]. As the primary judge appreciated, applying Dixon J’s observations in *Cox v Journeaux*, s 60(4) applies only where the damages sought in the proceedings are to be estimated by immediate reference to pain felt by the bankrupt in respect of his or her mind, body or character. It does not relate to property rights such as those arising out of the appointment of receivers to her legal practice, no matter how personally aggrieved she, a bankrupt, may feel about the actions of others concerning those property rights. Any rights relating to her property are currently vested in her trustee, who, it seems clear, does not wish to proceed with this appeal: see also *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124, 137 – 138, 148; and *Oliver v Samios Plumbing Pty Ltd* [2016] QCA 236 [3].

Even accepting this Court has power to give leave to proceed under r 72, in the circumstances here, where Ms Warren has not established that the trustee has or would consent to the litigation, I do not consider that leave to proceed should be given. For those reasons, I would refuse the application for leave to proceed and dismiss the appeal with costs.

FRASER JA: I agree.

McMEEKIN J: I agree.

THE PRESIDENT: The order is that the application for leave to proceed is refused. The appeal is dismissed with costs. A transcript is required. Adjourn the Court.