SUPREME COURT OF QUEENSLAND

CITATION:	*Geor & Anor v Delaney* [2009] QCA 363
PARTIES:	**PHILLIP FREDERICK GEOR and JOHN RYAN** (plaintiffs/applicants) **v** **GREGORY WILLIAM DELANEY** (defendant/respondent)
FILE NO/S:	Appeal No 6122 of 2009 SC No 9127 of 1999 SC No 10564 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2009
JUDGES:	McMurdo P, Muir JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for extension of time refused with costs.**
CATCHWORDS:	PROCEEDING – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – TIME – DELAY SINCE LAST PROCEEDING – where primary judge refused applicants' applications for leave to proceed under r 389(2) *Uniform Civil Procedure Rules* 1999 (Qld) – where basis of both claims were debts provable in respondent's bankruptcy within the meaning of s 82 *Bankruptcy Act* 1966 (Cth) – where respondent, having been discharged from bankruptcy, was released from the debts by operation of s 153 of the Act – where, as a result of the operation of s 153, the applicants' claims against the respondent could not be pursued – whether application for extension of time within which to appeal should be granted in all the circumstances *Bankruptcy Act* 1966 (Cth), s 58(3), s 82(2), s 117(1), s 153(1), s 153(5) *Uniform Civil Procedure Rules* 1999 (Qld), r 389(2) *Deputy Commissioner of Taxation v Falzon* [2008] QCA 327, cited

COUNSEL: P W Hackett for the applicants
S Couper QC for the respondent

SOLICITORS: Quinn & Scattini for the applicants
Minter Ellison for the respondent

[1] **McMURDO P:** I agree with Muir JA's reasons for refusing the applicants' application for an extension of time. The application should be refused with costs.

[2] **MUIR JA:** The applicants in each of proceeding SC No. 9127/99 and SC No. 10564/99 apply for an extension of time within which to appeal against decisions made by a judge of the trial division of this Court dismissing an application by each applicant in his separate proceeding for leave to take further steps in the proceeding under r 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld). The learned primary judge dismissed both applications on the basis that the claim by each applicant in his proceeding was a debt provable in the respondent/defendant's bankruptcy within the meaning of s 82 of the *Bankruptcy Act* 1966 (Cth) ("the Act") and that the respondent, having been discharged from his bankruptcy, was released from the debts by operation of s 153 of the Act.

[3] It followed, in the primary judge's view, that the applicants' claims in their respective proceedings were doomed to fail and that it would be inappropriate to accede to the applications.

[4] Neither applicant appealed within the time limited by the *Uniform Civil Procedure Rules* 1999 (Qld) and may therefore appeal only if the time for filing a notice of appeal is extended. The draft notice of appeal filed with the application for extension of time in which to appeal contained only two grounds:

(a) The primary judge erred in finding that the applicants' claims gave rise to provable debts within the meaning of s 82(2) of the Act and therefore s 153 of the Act provided a complete defence to the claim;

(b) The primary judge erred in refusing to grant leave to proceed under r 389(2) of the *Uniform Civil Procedure Rules* 1999 (Qld).

[5] The first proposed ground of appeal was abandoned by the applicants' counsel at the commencement of the appeal. He substituted another to the effect that the rights of each applicant under any policy of insurance the bankrupt respondent had in respect of claims for breach of contract or negligence as a solicitor were not discharged by operation of s 153 of the Act and continued pursuant to s 117 of that Act and that the primary judge erred in not having any or any sufficient regard to such matters.

The statements of claim

[6] The statements of claim in each proceeding are, for all relevant purposes, identical. The allegations may be summarised as follows:[1]

(a) The respondent was a solicitor carrying on business in Queensland (1);

(b) The applicant responded to an advertisement by Delaneys, a firm name under which the respondent practised, in which Delaneys claimed that it offered first mortgage finance and provided excellent security (2) – (4);

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[1] The numbered references are to paragraphs in the statement of claim in SC No. 9127/99.

(c) After such contact, Delaneys provided the applicant with promotional material which made representations about Delaneys' first mortgage security business (4) & (5);

(d) By the promotional material, Delaneys held itself out as a firm of solicitors experienced in advising on, negotiating and documenting investments secured by first registered mortgage and made representations concerning the way it carried on its mortgage lending business (6);

(e) In reliance on the advertisement and promotional material, the applicant retained the respondent to act as his solicitor in a first mortgage security loan transaction (7);

(f) Express terms of the retainer included obligations on the part of the respondent and it was also the respondent's duty to: conduct appropriate creditworthiness and credit history searches; conduct searches to ascertain the historical value of the property proposed as security; engage a duly qualified and skilled registered valuer to value such property; only agree to advance up to 70 per cent of a duly made valuation and pay to the applicant any moneys advanced by him on first registered mortgage security after written notice from the applicant that he wished to withdraw from the loan transaction; and duly advise the applicant (8).

(g) At a meeting prior to Christmas 1997, an employee of the respondent, Mr Moore (9):

(i) Informed the applicant that Delaneys were organising a loan of 1.5 million dollars to Club Capricornia Lifestyle Village Pty Ltd ("Club Capricornia") and that the applicant "had an opportunity of contributing to that loan" (10);

(ii) Made a number of representations as to the manner in which Delaneys conducted its first mortgage security business and the enquiries made by Delaneys in respect of Club Capricornia and the property intended to be used as security for the proposed loan ("the statements") (11);

(h) In reliance on the statements, the applicant paid $300,000 into Delaneys' trust account on or about 22 December 1997 (14);

(i) On 24 December 1997, the applicant, by Delaneys, advanced to Club Capricornia the sum of $300,000 as part of a total advance of $1,292,000 secured by first registered mortgage (15);

(j) Club Capricornia defaulted in the repayment of the moneys advanced on or about 24 December 1998 (16);

(k) As a result of such default, the applicant lost $300,000 and interest pursuant to the first registered mortgage on and from 24 December 1998 (17);

(l) The applicant's loss "was caused by the breach by [the respondent] of the retainer and duty" in that the respondent (18):

(i) Failed to conduct necessary and appropriate searches which would have revealed that the subject property had been acquired by Club Capricornia in 1997 for $440,000 and that a creditor had commenced proceedings against Club Capricornia and the Guarantor on or about November 1997 claiming in excess of one million dollars;

(ii) Searches would have revealed that Club Capricornia and the Guarantor were in default of their respective obligations to a named creditor on and after 4 June 1997;
(iii) Failed to engage a registered valuer with appropriate skill and expertise;
(iv) Failed to ascertain Club Capricornia's ability to make the payments due under the first mortgage;
(v) Advanced to Club Capricornia in excess of 70 per cent of the conservative valuation of the subject property; and
(vi) Advised the applicant of the matters referred to in paragraph 11 of the statement of claim in the circumstances particularised in sub-paragraphs (a) to (f)

(m) On 4 May 1999 the applicant gave 30 days written notice to the respondent that he wished to withdraw from the first registered mortgage and $300,000 together with interest thereby became due and owing by the respondent to the applicant on 4 June 1999 (19) & (20);
(n) In breach of the retainer, the respondent refused to pay the moneys demanded (21); and
(o) The applicant claimed $300,000 damages for breach of contract and/or negligence together with interest.

[7] The alleged express terms of the retainer corresponded precisely with the alleged extent of the respondent's duty. The alleged breaches of duty and breaches of the retainer were also the same except that the failure to pay the $300,000 and interest after demand was alleged only to be a breach of contract.

Other relevant circumstances

[8] There were 16 contributors to loans totalling $1,500,000 made to Club Capricornia organised by the respondent and secured by a first mortgage over the land. Each investor commenced a proceeding against the respondent in 1999 (except for one Mrs Lane who commenced her proceeding in 2004) in either the Supreme, District or Magistrates Court, depending on the quantum of the claim.

[9] It appears to have been contemplated by the firm of solicitors acting for all contributors, apart from Mrs Lane, that a case in the District Court in which Mr Lowndes was the plaintiff, would serve as a test case. There were some discussions between the solicitors for the applicants and the solicitors for the respondent in that respect, but the respondent at no time agreed to the proposal.

[10] On 4 April 2008 Mr Lowndes was given leave to proceed with his District Court claim notwithstanding that there had been a delay in excess of more two years without a step having been taken in the proceeding.

[11] The respondent was declared bankrupt on 19 January 2001.

[12] The applicants did not obtain leave to proceed against the respondent's trustee in bankruptcy and the respondent was discharged from bankruptcy on 20 January 2004.

Relevant provisions of the *Bankruptcy Act* 1966 (Cth)

[13] Sections 58(3), 82(2), 117(1) and 153(1) and (5) of the *Bankruptcy Act* 1966 (Cth) relevantly provide:

"58(3) Except as provided by this Act, after a debtor has become a

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 and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

…

82(2) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy.

…

117(1) Where:

(a) a bankrupt is or was insured under a contract of insurance against liabilities to third parties; and

(b) a liability against which he or she is or was so insured has been incurred (whether before or after he or she became a bankrupt);

the right of the bankrupt to indemnity under the policy vests in the trustee and any amount received by the trustee from the insurer under the policy in respect of the liability shall, if the liability has not already been satisfied, be paid in full forthwith to the third party to whom it has been incurred.

…

153(1) Subject to this section, where a bankrupt is discharged from a bankruptcy, the discharge operates to release him or her from all debts (including secured debts) provable in the bankruptcy, whether or not, in the case of a secured debt, the secured creditor has surrendered his or her security for the benefit of creditors generally.

Note: The operation of this section in relation to accumulated HEC debts and semester debts under the *Higher Education Funding Act 1988* is affected by section 106YA of that Act.

...

153(5) Where a bankrupt has been discharged from a bankruptcy, all proceedings taken in or in respect of the bankruptcy shall be deemed to have been validly taken."

The applicants' contentions

[14] Counsel for the applicants conceded that, as a result of the operation of s 153 of the Act, the applicants' claims against the respondent could not be pursued. Nevertheless, it was appropriate, he submitted, that each proceeding be permitted to continue so that the applicants' respective claims against the respondent's professional indemnity insurer and the quantum of those claims could be established.

[15] Submissions were made to the following effect. The right of the respondent to indemnity under the respondent's policy of professional indemnity insurance ("the

Policy") vested in his trustee in bankruptcy by operation of s 117(1)(b) of the Act. The discharge of the respondent did not bring about the divesting of that right and the trustee was able to recover from the insurer the moneys which would have been recoverable by the applicants from the respondent were it not for the operation of s 153(5) of the Act.

Consideration of the new proposed ground of appeal

[16] Even if it is assumed for present purposes that any right of indemnity remained of value after the respondent's discharge and release from the applicants' claims by operation of s 153, it does not follow that leave to proceed should be granted.

[17] It was conceded by counsel for the applicants that the claims in each proceeding could not be sustained against the respondent. It follows that the respondent was not a necessary, or indeed an appropriate, party to any proceeding prosecuted with a view to recovering moneys from the insurer and that the granting of leave to proceed under r 389(2) would be inappropriate.

[18] Counsel for the applicants relied on a number of cases in which the Court had joined the insurer of a defendant. But, unsurprisingly, in none of those cases was it apparent that the plaintiff had no cause of action against the defendant.

[19] There are other difficulties with the applicants' new proposed ground of appeal. There is no evidence of the rights and obligations under the Policy. There is no evidence even of the existence of the Policy but as the respondent appears to have been practising as a solicitor, as principal, at relevant times it is reasonable to assume that a professional indemnity policy existed. The applicants' arguments assumed that the insurance the respondent was required to have as a solicitor would extend to indemnify him against claims in respect of the mortgage lending business carried on by him but the evidence before this Court does not make it possible to determine whether that assumption was justified.

[20] The right vested in the trustee in bankruptcy is "the right of the bankrupt to indemnity under the policy". Any amount received by the trustee from the insurer under the Policy in respect of the liability "shall, if the liability has not already been satisfied, be paid … to the third party to whom it has been incurred." But no right of indemnity was established prior to the respondent's discharge from bankruptcy or thereafter. There is, as yet, so far as this Court is aware, no claim against the insurer. It is thus only possible to speculate about whether a claim made after this length of time would be recognised by the Policy. There is also a question of whether any relevant limitation period has expired. The moneys claimed in proceeding SC No. 9127/99 were alleged to have become due and owing in June 1999. The loss in proceeding SC No. 10564/99 was alleged to have been sustained in December 1998.

[21] If a claim against the insurer is to be pursued, the respondent's trustee in bankruptcy would be an obvious party, if not the obvious plaintiff. Yet it was not sought to join the trustee as a party and the trustee was not a party to the applications before the primary judge. This was despite the solicitors for the respondent suggesting in writing to the applicants' solicitors that the trustee should be a party to the proceedings if any relief was to be sought against him. Nor did the application at first instance proceed on the basis of any stated proposal to join either the trustee or the insurer. It is not apparent from the evidence that any issue exists between the

trustee and the insurer or between the applicants and the trustee or the insurer. That is another reason for declining to grant an extension of time within which to appeal.

The Notice of Contention

[22] The respondent filed a notice of contention in which it was contended that the decision at first instance should be affirmed on the basis that the "respondent was materially prejudiced by the delay in that a progressive medical condition had caused the memory of relevant events of Mr Moore, an important witness, to become poor." It is further contended that the primary judge should have found that the prejudice was not reduced because the respondent or his solicitors had had an opportunity to take a signed statement at an early stage of proceedings.

[23] The delay in prosecuting the proceedings has been inordinate. The proceedings were commenced in 1999 and defences were filed in that year. Leave to proceed was granted in the Lowndes District Court proceeding on 4 April 2008. On 27 March 2006 the respondent's solicitors informed the applicants' solicitors in writing that there has never been any agreement "to conducting the Lowndes proceeding first, leaving other cases … in abeyance."

[24] Prior to the making of the application before the primary judge, the most recent step in each proceeding was the tender of a request for trial dated under cover of a letter from the applicants' then solicitors dated 7 September 2006. Prior to the application in the Lowndes matter the last step in each proceeding was an application in March 2005 for leave to proceed and the joinder of another defendant.

[25] The applications before the primary judge were not filed until 21 November 2008. Even the decision at first instance refusing leave to proceed did not engender any sense of urgency. The primary judge's decision was given on 11 February 2009. The application before this Court was filed on 10 June 2009, more than three months late. This, and the inordinate delay in the proceeding, without taking into account any prejudice flowing to the respondent as a result of Mr Moore's deteriorating memory in consequence of his Parkinson's disease, are further reasons why this Court should be reluctant to extend time. The applicants' principal difficulties though are, as explained earlier: the applicants have no claim against the respondent; it is not clear that there is as yet any issue between the trustee and the applicants or between the trustee and the insurer and no claims against either the trustee or the insurer have been formulated.

Conclusion

[26] For the above reasons I would order that the applicants' application for an extension of time be refused with costs.

[27] **McMEEKIN J:** The primary judge refused the applicants (the plaintiffs in the proceedings) leave to proceed after a delay in taking a step for more than two years.[2] He held that but for the futility of the proceedings, the respondent having an unimpeachable defence in his view, he would have allowed the proceedings to go on. The original basis advanced by the applicants for the proposed appeal was that the primary judge erred in his assessment of the prospects of that defence. It is now conceded that he did not, but a new and different ground is sought to be argued and leave is sought, only in the course of argument of the application, to add that ground.

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[2] See r 389(2) *Uniform Civil Procedure Rules* 1999 (Qld).

[28] As Muir JA has explained in his reasons, which I have had the advantage of reading in draft, the applicants' contention, as finally advanced, is that leave to appeal should be granted more than three months out of time to enable the applicant to pursue a right, the existence of which is in significant contest and the value of which is indeterminate on the present materials, against a party not before the court, in proceedings that relate to events now 10 years or more in the past, the determination of those proceedings depending on the assessment of recollections of conversations in respect of which one party has a demonstrably failing memory.

[29] I am conscious of the sense of grievance that the applicants might well feel. Their cause of action concerns the conduct of a solicitor whom they allege failed in his duty and by which conduct they claim to have lost considerable sums of money. The long delays that have occurred, now with the consequence of the loss of their cause without their day in court, might well not be attributable, or significantly attributable to them, but rather again they might perceive that to be attributable to the neglect of solicitors (and, I should say, not those on the record). From their perspective the legal profession has not guarded their interests well.

[30] However the question for this Court is whether it is in the interests of justice, balancing the considerations on both sides of the case, that the appeal be allowed to proceed. Factors relevant to that enquiry are the adequacy of the applicants' explanation for their delay in applying, whether the respondent is prejudiced by the delay, and the merits of the proposed application.[3]

[31] Here the excuse for the delay is not compelling. The applicants did not think to take timely advice as to what their rights might be in relation to the decision they wish to impugn. There is evidence of prejudice to the respondent. And, most significantly, the merits are in doubt. In my view the relevant considerations are all one way.

[32] I agree with the reasons and order proposed by Muir JA.

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[3] *Deputy Commissioner of Taxation v Falzon* [2008] QCA 327 at [7] citing *Queensland Trustee Ltd v Fawckner* [1964] Qd R 153 at 163-164; *Horne v Commissioner of Main Roads* [1991] 2 Qd R 38.