

SUPREME COURT OF QUEENSLAND

CITATION: *Commonwealth Bank of Australia v Jorgensen* [2011] QCA 376

PARTIES: **COMMONWEALTH BANK OF AUSTRALIA**
ACN 123 123 124
(applicant/respondent)
v
ALAN BRADLEY JORGENSEN
(respondent/applicant)

FILE NO/S: Appeal No 5282 of 2011
DC No 3552 of 2009

DIVISION: Court of Appeal

PROCEEDING: Application to Strike Out
Application for Extension of Time/General Civil Appeal

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 16 December 2011

DELIVERED AT: Brisbane

HEARING DATE: 14 November 2011

JUDGES: Margaret McMurdo P, Margaret Wilson AJA and Douglas J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The application for an extension of time to appeal is refused with costs, including reserved costs.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED – where the Commonwealth Bank of Australia made an application to summarily dismiss an application brought by Alan Bradley Jorgensen for an extension of time to appeal from an order of a District Court judge dismissing his application to set aside a default judgment obtained by the Bank – where the Bank alleged Mr Jorgensen was an undischarged bankrupt or alternatively his application had been abandoned under s 60(3) *Bankruptcy Act* 1966 (Cth) – whether the application for an extension of time to appeal should be granted
Bankruptcy Act 1966 (Cth), s 60, s 116, s 178
Cummings v Claremont Petroleum NL (1996) 185 CLR 124, [1996] HCA 19, cited

COUNSEL: C Conway for the applicant/respondent
The respondent/applicant appeared on his own behalf

SOLICITORS: Matthew J Farmer Solicitor for the applicant/respondent
The respondent/applicant appeared on his own behalf

- [1] **MARGARET McMURDO P:** This is an application by the Commonwealth Bank of Australia Ltd to summarily dismiss an application brought by Alan Bradley Jorgensen for an extension of time to appeal from an order of a District Court judge dismissing his application to set aside a default judgment obtained by the Bank. The grounds of the Bank's application are that Mr Jorgensen is an undischarged bankrupt pursuant to a sequestration order made against his estate on 11 July 2011 and therefore has no standing to institute or continue his application; alternatively, his application has been abandoned under s 60(3) *Bankruptcy Act* 1966 (Cth); alternatively, his application should be dismissed for want of prosecution.
- [2] At the hearing of the Bank's application on 14 November 2011, Mr Jorgensen was self-represented and appeared by telephone from Cairns. He sought a three week adjournment. He claimed that his estranged wife, in the course of a complex matrimonial dispute, had taken his computer containing all his business records. He emphasised he was only informed of the Bank's application the previous week and had insufficient time to prepare, especially in circumstances where he had no access to his business records because of his wife's actions. He claimed that if he had more time he could engage lawyers. This Court heard both parties' submissions on the adjournment application and on the Bank's application. The Court refused the application for an adjournment but, to ensure Mr Jorgensen was not prejudiced by his reasonably short notice of the Bank's application, this Court gave him leave to file and serve further written submissions, limited to five pages, within seven days and gave the Bank leave to file and serve written submissions in reply, limited to two pages, within two days of the receipt of Mr Jorgensen's submissions.
- [3] Mr Jorgensen filed his further submissions within time, although they were seven pages in length and he later corrected a typographical error. The Bank filed its two page response in accordance with the leave given. Mr Jorgensen subsequently sent further material to the Registrar but as this was filed without the Court's leave, the Court has not received that material. For the reasons that follow, it seems highly improbable that the further material could assist him in any case.
- [4] It is necessary to set out the history of the action to which Mr Jorgensen's application for an extension of time to appeal relates. On 8 December 2009, the Bank filed its claim and statement of claim against Mr Jorgensen in the District Court alleging it had paid \$69,960.00 into his home loan account with the Bank under a mistake of fact and that Mr Jorgensen owed a further \$24,245.00 under their loan agreement. The Bank claimed both amounts, together with interest and costs.
- [5] On 3 September 2010, the Bank entered default judgment against Mr Jorgensen. The following month, Mr Jorgensen applied to set aside that default judgment. On 22 October 2010, the primary judge dismissed his application. On 20 June 2011, he filed an application for an extension of time to appeal from the primary judge's order. His appeal was then about seven months out of time. On 21 June 2011, the Senior Deputy Registrar (Appeals) issued the parties with a timetable for the preparation of Mr Jorgensen's application. Mr Jorgensen did not comply with that timetable. On 11 July 2011, a sequestration order under the *Bankruptcy Act* was entered against Mr Jorgensen in the Federal Magistrates Court. On 8 August 2011,

his trustee in bankruptcy was issued with a notice under s 60(3) *Bankruptcy Act* informing him of Mr Jorgensen's application and to which the trustee has made no response within the time prescribed by s 60(3).

[6] The provisions of the *Bankruptcy Act* relied upon by the parties are:

"Part IV – Proceedings in connexion with bankruptcy

...

Division 4 – Effect of bankruptcy on property and proceedings

...

60 Stay of legal proceedings

...

- (2) An action commenced by a person who subsequently becomes a bankrupt is, upon his or her 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 notice of the action is served upon him or her by a defendant or other party to the action, he or she shall be deemed to have abandoned the action.
- (4) Notwithstanding anything contained in this section, a bankrupt may continue, in his or her own name, an action commenced by him or her before he or she became a bankrupt in respect of:
- (a) any personal injury or wrong done to the bankrupt ...

...

- (5) In this section, *action* means any civil proceeding, whether at law or in equity.

...

Part VI – Administration of property

...

Division 3 – Property available for payment of debts

...

Subdivision A – General

...

116 Property divisible among creditors

...

- (2) Subsection (1) does not extend to the following property:

...

- (g) any right of the bankrupt to recover damages or compensation:
- (i) for personal injury or wrong done to the bankrupt,

...

and any damages or compensation recovered by the bankrupt (whether before or after he or she became a bankrupt) in respect of such an injury or wrong ...;

...

Part VIII – Trustees

...

Division 4 – Control over trustees

...

178 Appeal to Court against trustee's decision etc

- (1) If the bankrupt ... is affected by an act, omission or decision of the trustee, he or she may apply to the Court, and the Court may make such order in the matter as it thinks just and equitable.
- (2) The application must be made not later than 60 days after the day on which the person became aware of the trustee's act, omission or decision."

- [7] In his original submissions Mr Jorgensen contended:
 "... [I]t is patently clear and well settled in Law, that under Sect 178, Sect 60(b)(4) and Sect 116(2), that [he] has every right to continue on with this Appeal (made before any sequestration Order was made), alone on the basis that this Appeal is not 'Property' in the meaning of the Bankruptcy Act (and therefore excluded), because it is a 'personal issue' (involving reputation and standing etc) and not 'money' which the Trustee can divide up amongst the creditors."
- [8] In his most recent submissions he added that he was appealing to the Federal Court of Australia from the Federal Magistrate's sequestration order and he contended he had compelling grounds. He claimed the Bank has an internal file which would show that it went back on the word of one of its managers, given to Mr Jorgensen in the midst of the global financial crisis, that if he paid arrears the Bank would not demand repayment of his home loan. This file would show he had a good defence to the Bank's claim in the District Court action and would allow him to annul his bankruptcy.
- [9] Mr Jorgensen has had a great deal of time to establish any defence he might have to the Bank's District Court action brought in December 2009, but he has not done so. In any case, he is presently a bankrupt so that under s 60(2) *Bankruptcy Act*, even if he were granted an extension of time in which to appeal, his appeal would be stayed until his trustee in bankruptcy elected in writing to prosecute his appeal. The failure of his trustee to elect within 28 days to either prosecute or discontinue Mr Jorgensen's application means the trustee is deemed to have abandoned it: s 60(3). Mr Jorgensen contends that he is entitled to pursue his application in this Court under s 60(4)(a). But the Bank's District Court action does not fall within the exceptions listed in s 60(4). The action relates to specific money sums either paid to him by mistake or arising out of his contractual arrangements with the Bank. And nor does s 116 assist Mr Jorgensen as it concerns the distribution of a bankrupt's property. In any case, the Bank's action does not concern any right listed in the exceptions in s 116(2). Mr Jorgensen has not applied for an order under s 178 to compel his trustee to pursue Mr Jorgensen's application for an extension of time to appeal and he has produced no evidence demonstrating that the trustee's decision (by omission) to not prosecute his application was anything other than prudent.
- [10] The critical, insurmountable difficulty for Mr Jorgensen is that, as a bankrupt, he has no standing to appeal from a judgment of the kind entered against him: *Cummings v Claremont Petroleum NL*.¹ It follows that Mr Jorgensen has no

¹ (1996) 185 CLR 124, 137-138; 148.

standing to apply for an extension of time to appeal as any extension would be inutile. The Bank should not be forced to incur further unnecessary costs in defending proceedings brought by a party without standing, especially as it seems highly unlikely it would be able to recover those costs from Mr Jorgensen. Further, the effect of s 60(2) and (3) is that his application is deemed abandoned.

- [11] Mr Jorgensen contends that his application should not be dismissed but simply remain stayed, pending the outcome of his appeal to the Federal Court from the sequestration order. I can see no reason why his application should remain in this Court, even though stayed, whilst he has no standing to bring it and it is deemed abandoned. If he is ultimately successful in having the sequestration order set aside, and he obtains persuasive evidence to support his application for an extension of time to appeal from the District Court order, he can bring a fresh application. The dismissal of the present application is because of Mr Jorgensen's bankrupt status; the application has not been determined on its merits. In these circumstances it is unnecessary to consider the Bank's contention that Mr Jorgensen's application should be struck out for want of prosecution. His application for an extension of time to appeal must be dismissed with costs including reserved costs.

ORDER:

The application for an extension of time to appeal is refused with costs, including reserved costs.

- [12] **MARGARET WILSON AJA:** I agree with the order proposed by the President and with her Honour's reasons for judgment.
- [13] **DOUGLAS J:** I agree with the reasons of the President and the order proposed by her Honour.