

SUPREME COURT OF QUEENSLAND

CITATION: *National Australia Bank Ltd v Palermo* [2017] QCA 118

PARTIES: **NATIONAL AUSTRALIA BANK LTD**
ABN 12 004 044 937
(applicant)
v
FRANK PALERMO
(respondent)

FILE NO/S: Appeal No 3279 of 2017
DC No 4267 of 2014

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: District Court at Brisbane – Unreported, 3 March 2017

DELIVERED ON: 6 June 2017

DELIVERED AT: Brisbane

HEARING DATE: 29 May 2017

JUDGE: Morrison JA

ORDERS: **1. The application to dismiss the appeal is granted.**
2. The respondent to the application is to pay the applicant’s costs, to be assessed on the standard basis.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – RIGHT OF APPEAL – WHO MAY EXERCISE RIGHT – where summary judgment was granted to the applicant as plaintiff in the proceedings below – where the respondent appealed that order – where the respondent is bankrupt – where the respondent’s trustee in bankruptcy has declined to participate in the proceedings, including the appeal – where the applicant contends that due to bankruptcy the respondent has no standing to bring an appeal – where the applicant therefore applies for the appeal to be dismissed – where the applicant also contends that the appeal should be dismissed for want of prosecution – where the respondent has failed to comply with the registrar’s directions as to the filing of documents – whether the appeal should be dismissed

Uniform Civil Procedure Rules 1999 (Qld), r 775

Cummings v Claremont Petroleum NL (1996) 185 CLR 124; [1996] HCA 19, followed

Giorgio and Giorgio v Commonwealth Bank of Australia [1998] QCA 270, followed

COUNSEL: M Trim for the applicant
The respondent appeared on his own behalf

SOLICITORS: Gadens Lawyers for the applicant
The respondent appeared on his own behalf

- [1] **MORRISON JA:** This is an application by the respondent to the appeal (**NAB**) to have the appeal dismissed on two grounds. The first is that the appellant (**Mr Palermo**) has no standing to bring the appeal filed on 31 March 2017 because he is an undischarged bankrupt. The second is that the appeal should be dismissed for want of prosecution under Rule 775(1) of the *Uniform Civil Procedure Rules 1999* (Qld) because Mr Palermo has not taken any steps to prosecute the appeal.

The proceedings below

- [2] Mr Palermo's appeal is against orders made by Andrews DCJ on 3 March 2017. Those orders gave summary judgment for NAB in their claim for moneys owed by Mr Palermo and his wife under three guarantees and a mortgage over land co-owned by them at Pacific Pines (**the Property**). More specifically, the orders were that Mr Palermo repay the money owed under the guarantees and deliver up possession of the Property pursuant to the mortgage.
- [3] The three guarantees and the mortgage secured funds loaned to Palermo Seafoods Pty Ltd by way of three loan facilities provided by NAB. Palermo Seafoods Pty Ltd had defaulted by not paying on time.
- [4] A summary of the proceedings is set out below:
1. In July 2012, NAB provided the first two loan facilities to Palermo Seafoods Pty Ltd. A third loan was provided in September 2012.
 2. The mortgage over the Property was granted in July 2012 as security for the loans. The three guarantees were provided as further security in August 2012, September 2012 and October 2012.
 3. On 9 April 2014, Palermo Seafoods defaulted on its obligation to make repayments. NAB demanded the amount outstanding but Palermo Seafoods, Mr Palermo and his wife failed to pay. A Notice of Exercise of Power of Sale and Demand for Possession was issued to Mr Palermo and his wife, with which they failed to comply.
 4. NAB commenced proceedings against Mr Palermo and his wife in October 2014. At that time Mr Palermo and his wife were legally represented, and a defence was filed for both defendants in November 2014. Pleadings closed and disclosure occurred.
 5. In September 2015, the legal representatives Mr Palermo and his wife were granted to leave to withdraw.
 6. Mr Palermo became bankrupt on 25 January 2016. In July 2016, the Federal Circuit Court granted leave to NAB to continue their proceedings against Mr Palermo despite his bankruptcy. That order was made under s 59(3) of the *Bankruptcy Act 1966* (Cth). In September 2016, Mr Palermo's trustee in bankruptcy was joined to the proceedings but indicated he would not defend the proceedings.

7. On 15 September 2016, Bowskill DCJ struck out the defence filed on behalf of Mr Palermo. There has been no appeal in respect of that order.
8. In November 2016, NAB advised Mr Palermo and his wife of their intention to apply for summary judgment. No response was received.
9. On 13 February 2017, an application for summary judgment was filed. Due to the orders made on 15 September 2016, Mr Palermo had no defence. Despite being served with the application materials on 17 February, neither Mr Palermo nor his wife filed any material in response to the application. Summary judgment for NAB was ordered on 3 March 2017.

Mr Palermo's Appeal

- [5] The orders made on 15 September 2016 which struck out Mr Palermo's defence, have not been appealed. The current appeal concerns only the orders made on 3 March 2017. At the hearing before this court, Mr Palermo's bankruptcy was identified as a key issue in the application to strike out his appeal, and which would affect his ability to appeal at all. When Mr Palermo became bankrupt his property vested in his trustee in bankruptcy. Any interest he held in the Property transferred to his trustee. It has long been settled that when a person's property becomes that of their trustee in bankruptcy, the bankrupt person no longer has a right to bring proceedings in respect of that property. The claim which Mr Palermo seeks to defend relates directly to the Property. When he became bankrupt, the claim became one in which Mr Palermo no longer had an interest. The High Court explained this in *Cummings v Claremont Petroleum NL*:

“a bankrupt has *no right* to bring or prosecute proceedings to protect, enhance or add to the property of which he has been divested on bankruptcy”.¹

- [6] This Court examined that principle in *Giorgio and Giorgio v Commonwealth Bank of Australia* [1998] QCA 270. That involved a summary judgment obtained by a mortgagee against a mortgagor, who had become bankrupt some time before the judgment. The bankrupts sought a stay of execution pending an appeal. This court said:²

“In *Cummings v. Claremont Petroleum N.L.* (1996) 185 C.L.R. 124, at 135-136, Sir Gerard Brennan C.J. and Justices Gaudron and McHugh, said that “a bankrupt has no right to bring or prosecute proceedings to protect, enhance or add to the property of which he has been divested on bankruptcy”.

Here the property in question is the equity of redemption, as it is commonly called, of the defendants as mortgagors in their registered land.

The land being registered, it has the consequence that the legal title, of course, remains in the defence and, by virtue of s.58(2) of the Bankruptcy Act 1966, it continues to rest there until a transmission is entered up in favour of the trustee in bankruptcy. So far as it appears, that step has not yet been taken by the trustee in this case.

Nevertheless, as s.58(2) itself acknowledges, the whole of the equitable interest in that equity of redemption has now passed to and devolved upon the trustee in bankruptcy. The defendants are left, at

¹ (1996) 185 CLR 124 at 135-136, emphasis added.

² Per McPherson JA, 2.

most, with only the bare legal title. It is said that a bare legal title is sufficient to support this application; but, on an application for a stay like this, we are bound to look at more than simply the form of the matter and to consider the substance.

The substance is that if any beneficial interest in the land survives at all at this juncture, then it is vested in the trustee in bankruptcy and not in the defendants. If, therefore, there is a beneficial right to possession of the land and premises, then it is the trustee and not the defendants who are entitled to it.

The defendants, consequently, have no right of property sufficient to support this application or to invoke the intervention of this Court to protect it pending appeal. Indeed, if what is said in *Cummings v. Claremont* is applied here as it must be, the defendants do not have, it may be, even a right to appeal because the property they seek to protect was divested from them on their bankruptcy.”

- [7] Similarly, in this case Mr Palermo’s rights to his equity of redemption in the Property vests in his trustee. Consequently, Mr Palermo has no standing to bring the current appeal. While Mr Palermo’s trustee has standing to bring the appeal, the trustee has indicated he has no intention to do so. In light of that, the application to have the appeal dismissed for lack of standing must be granted.

Want of Prosecution

- [8] As a second ground for their application, NAB also argued that Mr Palermo’s appeal should be struck out because he has not yet taken a step in prosecuting his appeal.³ This ground need not be explored in detail.
- [9] On 3 April 2017 the Registrar made directions for the filing of documents in the appeal. Mr Palermo was required to provide an outline of argument, list of authorities and draft record book index by 26 April 2017. These steps were not taken, however Mr Palermo asserts that he applied to the registry to have the registrar prepare the appeal record book.⁴
- [10] Mr Palermo also asserted at the hearing that the reason steps were not taken was because of a letter received from NAB’s legal representatives on 19 April 2017 which explained Mr Palermo’s lack of standing and asked Mr Palermo to sign a Memorandum of Agreement to Dismissal of Appeal, which was attached. The failure to respond to that letter or take steps in prosecuting the appeal was because of a misunderstanding of the letter and the appeal process generally. This kind of non-compliance, involving steps outstanding by a little more than one month, might not be sufficient to justify dismissal for want of prosecution. There is, however, no need to determine this question, because of the consequences of Mr Palermo’s lack of standing.
- [11] In the circumstances, the application succeeds. The orders are:
1. The application to dismiss the appeal is granted.
 2. The respondent to the application is to pay the applicant’s costs, to be assessed on the standard basis.

³ See R 775(1) *Uniform Civil Procedure Rules* 1999 (Qld).

⁴ Mr Palermo was unable to produce the document which made that application at the hearing.