

SUPREME COURT OF QUEENSLAND

CITATION: *Storry v Weir* [2023] QCA 4

PARTIES: **VENETIA LOUISE STORRY**
(applicant)
v
JONATHON DAVID WEIR
(respondent)

FILE NO/S: Appeal No 4681 of 2022
DC No 589 of 2022

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: District Court at Brisbane – Unreported, 25 March 2022
(Porter KC DCJ)

DELIVERED ON: 12 January 2023

DELIVERED AT: Brisbane

HEARING DATE: 15 December 2022

JUDGES: Mullins P

ORDERS: **1. Application filed on 6 December 2022 dismissed.**
2. Costs reserved.

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – where the applicant became a bankrupt when a sequestration order was made against her estate in the Federal Circuit and Family Court of Australia (Division 2) – where the sequestration order was based on the judgment ordered against the applicant in the Magistrates Court for a motor vehicle property damage claim – where an application to the District Court for extensions of time to appeal against the judgment and an order made in the Magistrates Court refusing a stay of that judgment was dismissed on the basis that the applicant was bankrupt – where the applicant applied to the Court of Appeal for leave to appeal the District Court decision – where the applicant had appealed to the Federal Court against the sequestration order – where the Court of Appeal stayed the application until the outcome of the appeal against the sequestration order was determined – where the applicant filed an application for an order that the stay order be lifted and the application be heard under s 60(4) of the *Bankruptcy Act 1966* (Cth) and the proceeding be cross-vested to the Federal Court – where at the hearing of this application there was no current appeal of the sequestration order but the applicant foreshadowed bringing such a proceeding –

whether the stay order should be lifted and the proceeding should be cross-vested to the Federal Court

Cox v Journeaux [No 2] (1935) 52 CLR 713; [1935] HCA 48, cited

Storry v Weir [2022] FCA 362, related

Storry v Weir [2022] FCA 794, related

Storry v Weir [2022] FCA 1484, related

Storry v Weir (No 2) [2022] FCA 1360, related

Weir v Storry [2022] FedCFamC2G 183, related

COUNSEL: The applicant appeared on her own behalf
P C M Van Grinsven for the respondent

SOLICITORS: The applicant appeared on her own behalf
SLF Lawyers for the respondent

- [1] **MULLINS P:** Ms Storry became a bankrupt when a sequestration order was made against her estate on 18 March 2022 by his Honour Judge Egan in the Federal Circuit and Family Court of Australia (Division 2) (FCFCOA): *Weir v Storry* [2022] FedCFamC2G 183. The petitioning creditor was Mr Weir who is the respondent to this proceeding. Although the proceeding was commenced by notice of appeal filed on 22 April 2022, Ms Storry is seeking to appeal against the order of his Honour Judge Porter KC made in the District Court of Queensland exercising its appellate jurisdiction on 25 March 2022. Under s 118(3) of the *District Court of Queensland Act 1967* (Qld), an appeal to this Court from the exercise by the District Court of its appellate jurisdiction can proceed only with the leave of this Court. The proceeding should therefore not be referred to as an appeal, but as an application for leave to appeal.
- [2] Mr Weir was the owner of a vehicle which was involved in a collision with a vehicle driven by Ms Storry. Mr Weir (through his insurer) sued Ms Storry in the Magistrates Court for the property damage caused to his vehicle. Ms Storry cross-claimed for property damage and associated costs.
- [3] On 4 December 2020 Acting Magistrate Smith gave judgment in the trial of the Magistrates Court proceeding. Judgment was given in favour of Mr Weir on his claim for \$39,506.86 comprising \$13,396.06 for claim, \$22,741.52 for costs, \$3,086.62 for interest and \$282.66 for witness expenses and Ms Storry's claim was dismissed. Ms Storry subsequently applied in the Magistrates Court for a stay of the judgment. That stay was refused by Acting Magistrate Turra on 7 December 2021. On 18 March 2022 (the day on which the bankruptcy petition was before the FCFCOA) Ms Storry applied urgently to the District Court in proceeding number 589 of 2022 for an extension of time to appeal against the decision of Acting Magistrate Turra and the decision of Acting Magistrate Smith in respect of which notices of appeal had been filed in the same proceeding on 11 and 17 March 2022 respectively. It was that application for extensions of time that was before Judge Porter KC on 25 March 2022.
- [4] Mr David Clout is the trustee in bankruptcy of Ms Storry's estate. On 23 March 2022 the trustee elected to discontinue proceeding number 589 of 2022. On the basis that proceeding fell within s 60(2) of the *Bankruptcy Act 1966* (Cth) (the Act),

Judge Porter KC considered the effect of the trustee's decision to discontinue the application meant the proceeding was brought to an end by operation of law and his Honour stated he would regularise that by ordering that the application be dismissed. Judge Porter KC also ordered Ms Storry to pay Mr Weir's costs of the application for extensions of time on the standard basis.

- [5] In the amended notice of appeal filed on 20 April 2022, Ms Storry purports to appeal against the whole of the orders of the District Court on the basis that Judge Porter KC erred in failing to take into consideration s 60(4) of the Act and erred in dismissing the application instead of applying s 60(2) of the Act which provides for a statutory stay of the application.
- [6] The matter came before me on 9 June 2022. I was informed that Ms Storry had appealed Judge Egan's order. I stayed the application in this Court until the outcome of Ms Storry's appeal against the sequestration order was determined.
- [7] The fact that Ms Storry currently remains a bankrupt has had consequences for her in relation to her dealings with the Office of Fair Trading, but that is not a subject matter for the application for leave to appeal against Judge Porter KC's orders.
- [8] The matter came before me again on 15 December 2022 on an application filed by Ms Storry on 6 December 2022 for an order that the application currently under a stay order be heard under s 60(4) of the Act and the proceeding transferred under s 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld) (the Cross-vesting Act) to the Federal Court of Australia. The application also sought an alternative order for the matters raised by Ms Storry in her supporting affidavit and submissions concerning the Office of Fair Trading to be determined as a judicial review application. I rejected the possibility of that suggested course of action during the hearing of the application. Any application in respect of decisions made by the Office of Fair Trading that are justiciable under the *Judicial Review Act 1991* (Qld) should be commenced in the Trial Division of the Supreme Court of Queensland. Ms Storry sought to rely on the power given to this Court under s 61(2) of the *Supreme Court of Queensland Act 1991* (Qld) to argue that her claim against the Office of Fair Trading be either remitted to the Trial Division or disposed of by this Court. The submission was misconceived, as there was no proceeding in this Court properly commenced against the Office of Fair Trading by Ms Storry. Ms Storry's adding the name of the Office of Fair Trading as a second respondent to the application filed on 6 December 2022 without bringing an application for the Office of Fair Trading to be joined as a party to the application for leave to appeal did not result in a proceeding in this Court against the Office of Fair Trading.
- [9] It appears that Ms Storry wishes to lift the stay which I ordered on 9 June 2022, so that she can pursue her submission that Judge Porter KC was in error in applying s 60(2) of the Act, when Ms Storry asserts that s 60(4) of the Act applies. It does not appear, though, that she wants this Court to determine her argument based on s 60(4) of the Act, as if the stay is lifted, she wishes to have the application for leave to appeal against Judge Porter KC's orders cross-vested to the Federal Court.
- [10] Mr Weir opposes the application filed on 6 December 2022 and seeks an order that it be dismissed and an order that his costs be paid from Ms Storry's estate as agreed, and failing agreement, to be assessed.

- [11] The stay that was ordered on 9 June 2022 will end when the proceedings which Ms Storry has pursued in the Federal jurisdiction to have the sequestration order set aside are determined. At the hearing on 15 December 2022, there was no current proceeding of that nature extant, but Ms Storry foreshadowed bringing a proceeding in the Full Court of the Federal Court which would be for that purpose. I therefore proceeded on the basis that the point has not yet been reached where all appeals against the sequestration order have been determined.
- [12] All proceedings which Ms Storry has brought to date in the Federal jurisdiction have been unsuccessful. She was unsuccessful in *Storry v Weir* [2022] FCA 362 in applying for interim orders to stay the sequestration order made by Judge Egan. Her appeal against the making of the sequestration order was then dismissed by Thomas J on 7 July 2022: *Storry v Weir* [2022] FCA 794. Ms Storry then made a further application seeking a stay of the sequestration order in connection with an application to set aside the judgment of Thomas J dismissing her appeal against the making of the sequestration order on the basis it was obtained by fraud. In a lengthy decision given on 15 November 2022 that traversed each of the allegations, Thomas J concluded that none of the grounds raised by Ms Storry addressed or satisfied the requirements which must be met in the exercise of the jurisdiction to set aside the judgment dismissing her appeal on 7 July 2022: *Storry v Weir (No 2)* [2022] FCA 1360. Ms Storry then sought to file an application to challenge the dismissal of her application to set aside the judgment given on her appeal. Logan J concluded on 30 November 2022 that the Federal Court had no jurisdiction to entertain an application for leave to appeal against the judgment given on 15 November 2022 and that the Registrar should be directed not to accept the notice of appeal for filing: *Storry v Weir* [2022] FCA 1484.
- [13] Ms Storry is concerned about the circularity of the proceedings, in that her application for leave to appeal against Judge Porter KC's orders are stayed in this Court, but she has not made any progress with her appeals in the Federal jurisdiction against the sequestration order based on Acting Magistrate Smith's judgment, as the courts in that jurisdiction have proceeded on the basis that she did not successfully appeal against Acting Magistrate Smith's judgment and that she is unlikely to be successful in this Court with her application for leave to appeal. See *Storry v Weir* [2022] FCA 794 at [57]-[62]. There is no impediment to the Federal Court's reaching a conclusion about the prospects of success of the proceeding in this Court for the purpose of dealing with the matters in the Federal Court relating to the sequestration order.
- [14] Until Ms Storry has exhausted all avenues that she proposes to pursue in the Federal jurisdiction, there is no point in this Court's considering her application for leave to appeal against Judge Porter KC's orders which were made on the basis that Ms Storry was bankrupt. The application for the stay to be lifted to enable Ms Storry's argument based on s 60(4) of the Act must be dismissed. It is therefore not necessary to consider Ms Storry's argument for why s 60(4) of the Act applied to except her application for extensions of time in the District Court from s 60(2) of the Act. The argument that she puts forward in her submissions that she has suffered a wrong, as a result of the appointment of a receiver over her real estate trust account due to her bankruptcy which triggers the operation of s 60(4) misunderstands the effect of s 60(4) of the Act. That provision allows a bankrupt to continue with litigation that was on foot before becoming bankrupt in respect of any personal injury or wrong done to the bankrupt. The test for "personal injury or

wrong” is “whether the damages or part of them are to be estimated by immediate reference to pain felt by the bankrupt in respect of [the bankrupt’s] mind, body or character and without reference to [the bankrupt’s] rights of property”: *Cox v Journeaux [No 2]* (1935) 52 CLR 713 at 721. The subject matter of the proceeding before Acting Magistrate Smith was a property damage claim and cross-claim and did not involve any personal injury or wrong done to Ms Storry.

- [15] It is therefore unnecessary to consider Ms Storry’s application to cross-vest this proceeding to the Federal Court, as Ms Storry has not succeeded with her application to have the stay ordered on 9 June 2022 lifted.
- [16] The question arises as to what costs order should be made. Even though Ms Storry is bankrupt, she has brought an application in this Court and is therefore exposed to an order for costs being made against her. The rationale that applies to proceedings in the Federal Court connected with the making of the sequestration order where costs may be ordered to be paid from a bankrupt’s estate does not apply to the proceeding in this Court. Mr Weir sought an order for costs in terms similar to those made in the proceedings brought by Ms Storry in the Federal Court, but without providing authority for so doing in this Court. In those circumstances, costs should be reserved.
- [17] The orders that I will make are:
1. Application filed on 6 December 2022 dismissed.
 2. Costs reserved.