DISTRICT COURT OF QUEENSLAND

CITATION:	*Thompson v Cyati* [2021] QDC 15
PARTIES:	**EMMA NARELL CATHRYN THOMPSON** (Applicant) v **JULENE FRANCES CYATI (as executor of the will of Francis Thompson, deceased)** (Respondent)
FILE NO/S:	1202/17
DIVISION:	Civil
PROCEEDING:	Application
DELIVERED ON:	11 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	29 January 2021
JUDGE:	Barlow QC DCJ
ORDER:	**The Court declares that this proceeding is stayed, until the applicant is discharged from bankruptcy, by operation of s 60 of the *Bankruptcy Act* 1966 (Cth).**
CATCHWORDS:	BANKRUPTCY – PROCEEDINGS IN CONNECTION WITH SEQUESTRATION – PETITION AND SEQUESTRATION ORDER – EFFECT OF BANKRUPTCY ON PROPERTY AND PROCEEDINGS – ACTIONS BY AND AGAINST BANKRUPT – ACTIONS BY OR ON BEHALF OF BANKRUPT – ACTION INSTITUTED BEFORE SEQUESTRATION – PARTICULAR CASES – Plaintiff filed application for family provision – Plaintiff subsequently became bankrupt – Whether family provision application is stayed by virtue of section 60(2) of the *Bankruptcy Act* 1966 (Cth) – Whether a family provision application is an action 'in respect of a personal wrong or the death of a family member' falling within subsection 60(4) of the *Bankruptcy Act*.
LEGISLATION:	*Bankruptcy Act* 1966 (Cth), s 58, s 60(2), s 60(3), s 60(4), s 60(5), s 116(1)(g), s 134(1)(j) *Succession Act* 1991 (Qld), s 41(1) *Uniform Civil Procedure Rules* 1999 (Qld), r 72, r 389(2)
CASES:	*Cox v Journeaux (No 2)* (1935) 52 CLR 713, cited *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124,

cited

Duckworth v Water Corporation [2012] WASC 30, considered

Foots v Southern Cross Mine Management Pty Ltd (2007) 234 CLR 52, cited

Garrett v Federal Commissioner of Taxation (2015) 233 FCR 226, cited

Griffiths v Civil Aviation Authority (1996) 67 FCR 301, not followed

Millane v President of the Shire of Heidelberg [1928] VLR 52, cited

Muir v Angeles [2020] NSWSC 1056, considered

Nowegijick v. The Queen (1983) 144 D.L.R. (3d) 193, cited

Nugawela v Deputy Commissioner of Taxation [2018] FCA 1457, considered

Owens v Comlaw (2006) 201 FLR 275, cited

Re Lofthouse (2001) 107 FCR 151, cited

Savage v Australian Unity Funds Management Ltd [2011] NSWCA 270, cited

Trustees Executors & Agency Co Ltd v Reilly [1941] VLR 110, cited

COUNSEL: Self-represented applicant

DJ Morgan for the respondent

SOLICITORS: Bridge Brideaux Porta for the respondent

[1] This proceeding is an application for an order that adequate provision be made for the applicant's maintenance and support out of her late father's estate.[1] As indicated by its court file number, it was commenced nearly four years ago. It has progressed very slowly. The last step in the proceeding was taken on 9 August 2019, when the applicant (Ms Thompson) filed an affidavit consequent on an order made by Koppenol DCJ on 19 July 2019. On 1 July 2020 the applicant was made bankrupt on her own petition.

[2] Before me on this occasions are two interlocutory applications. The first, by Ms Thompson, may broadly be described as seeking orders that the respondent (Ms Cyati, who is Ms Thompson's sister and the executrix of the estate) provide fuller details of the financial position of the estate and some ancillary orders. The second, by Ms Cyati, is for a declaration that the proceeding has been dismissed pursuant to a "guillotine" order made by Koppenol DCJ on 19 July 2019.

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1 Pursuant to the *Succession Act* 1991 (Qld), s 41(1).

[3] Before I was able to consider the substance of the applications, Mr Morgan of counsel, appearing for Ms Cyati, submitted that, if the proceeding has not been dismissed, it is stayed by operation of s 60(2) of the *Bankruptcy Act* 1966 (Cth), as a consequence of Ms Thompson's bankruptcy. Therefore, he submitted, the parties cannot proceed with their respective applications and the court cannot make any orders. Alternatively, he submitted, the proceeding is stayed by operation of r 72 of the *Uniform Civil Procedure Rules* 1999 (Qld) and, although the court has a discretion under that rule to permit the parties to take further steps, it should not do so.

[4] If the proceeding has been dismissed, one might think that there is no proceeding on foot that could be stayed under either of those provisions. However, where there is a dispute as to whether the proceeding has, in fact, been dismissed, that question may be determined on an interlocutory application within the proceeding, as the respondent seeks to do in this proceeding. If s 60 or r 72 applies, then neither party may take a step in the proceeding, including by making such an application.

[5] This may be an example of the classic chicken and egg conundrum. I have concluded that it is appropriate, before dealing with the two applications, to consider whether the proceeding falls within the ambit of s 60 and is therefore stayed. If that is the case, then there is no need to consider either application (indeed, the court cannot consider them).

[6] The right to claim provision is not a chose in action or other species of property that vests in the trustee in bankruptcy. Rather, it is a personal or bare right of action that falls outside the scope of s 58 of the *Bankruptcy Act*.[2]

[7] Subsection 60(2) provides that an action commenced by a person who subsequently becomes a bankrupt is, upon his or her becoming a bankrupt, stayed until the trustee makes an election, in writing, to prosecute or discontinue the action. Subsection (5) defines "action" as meaning any civil proceeding, whether at law or in equity.

[8] On the face of those provisions, it appears that Ms Thompson's application was stayed upon her bankruptcy. However, in a strongly reasoned judgment in the Full Court of the Federal Court,[3] Cooper J (with whom Spender J agreed) held that an "action", for the purposes of s 60, did not include proceedings that were not concerned with property of the bankrupt. More recent decisions, though, including of appellate courts, have held that an "action" as defined is not confined to proceedings connected with "property" that is vested in the trustee under s 58, at least where there is some connection between the action and the estate, including that the consequences of the action may be favourable to the estate.[4]

[9] Although a family provision application is personal to the applicant and does not form a *chose in action* that is property of the bankrupt's estate, if a judgment were given in such an application, ordering that further provision be made for the applicant, money or other property acquired by the bankrupt consequent upon the judgment would be after acquired property that would be property of the estate.[5]

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2 *Muir v Angeles* [2020] NSWSC 1056, [57] and the cases referred to.

3 *Griffiths v Civil Aviation Authority* (1996) 67 FCR 301.

4 In particular, *Owens v Comlaw* (2006) 201 FLR 275, 285 [42] (VSCA).

5 *Muir v Angeles* [2020] NSWSC 1056, [58]; *Menzies v Marriott* [2009] VSC 345, [46]; *Collicoat v McMillan* [1999] 3 VR 803, [51]; *McLeod v Johns* [1981] 1 NSWLR 347.

[10] It has been found repeatedly that the stay imposed by s 60(2) applies to an action commenced by a bankrupt in his or her capacity as trustee of property.[6] In *Duckworth v Water Corporation*,[7] Edelman J comprehensively reviewed the history of the section and the preceding bankruptcy law as it concerned actions by a bankrupt. His Honour concluded that s 60(2) appears to have been an intentional break from the earlier English approach of limiting the stay to actions concerning the property of the estate and it applies to a much broader range of actions, including (as was the issue before his Honour) actions by the bankrupt in the capacity of trustee of the relevant property.[8] His Honour's reasoning supports the view that s 60(2) applies to all actions other than those specifically excluded from its purview by s 60(4).

[11] Similarly, other judges have found that the definition of "action" in s 60(5) is such that there is no requirement that there be a connection between the proceeding and the bankrupt's estate; the only connection required is that the bankrupt commenced the action before becoming bankrupt.[9]

[12] However, the stay applied by s 60(2) only applies "until the trustee makes election … to prosecute or discontinue the action."

[13] A trustee only has power, under s134(1)(j), to "bring, institute or defend any action or other legal proceeding *relating to the administration of the estate.*" The purpose is to assist the trustee's ability to get in and preserve the property of the bankrupt, for distribution among the creditors.

[14] An action for provision does not relate to the administration of the estate because it is not property of the estate. The trustee has no standing in such an action and therefore has no power to prosecute or to discontinue such an action. Therefore the trustee cannot make either election under s 60(2).

[15] A trustee who cannot make such an election will not do so within 28 days of service of notice of the action on him or her. (In this case, the trustee, after being given notice of the proceeding, responded that he did not "intend on participating in the court proceedings and will abide by any order of the court." That, of course, does not amount to an election under s 60(2).) In that circumstance, the trustee is deemed to have "abandoned the action" – s 60(3). Abandonment of an action is clearly different to electing to discontinue the action.

[16] Although subs (2) provides that the action is stayed until the trustee makes an election, if the trustee does not make an election and the action is therefore deemed abandoned by the trustee, it might be implied that the stay is then lifted, so the bankrupt can continue with the action. It is not within the purpose of the Act, or s 60, to render an injustice to the bankrupt by preventing the bankrupt from maintaining a personal action that is not property of the estate. On the other hand,

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6 *Re Lofthouse* (2001) 107 FCR 151, [2001] FCA 25; *Duckworth v Water Corporation* [2012] WASC 30, (2012) 261 FLR 185; both cited with apparent approval (*obiter*) in *Fletcher v Westpac* [2012] WASCA 154, [15]. See also *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124, 136.

7 *Duckworth v Water Corpoation* [2012] WASC 30; (2012) 261 FLR 185, [65]-[81].

8 Even though property held by a bankrupt in trust for another person is not part of the bankrupt's estate: *Bankruptcy Act*, s 116(2)(a).

9 *Garrett v FCT* (2015) 233 FCR 226, [16]-[37]; *Nugawela v Deputy Commissioner of Taxation* [2018] FCA 1457, [13]-[15]. Both followed *Lofthouse* and *Duckworth*, after analysing all the decisions, including *Griffiths*.

subs (2) does not say that the action is stayed until the trustee makes an election or is deemed to have abandoned the action.

[17] In *Muir v Angeles* at [113] to [120], Hallen J considered the effect of a deemed abandonment under subs (3), reviewing several cases on that issue. It is clear that the abandonment predominantly and immediately affects the trustee: having abandoned the action, it is unlikely that the trustee could later elect to continue it. However, the bankrupt's cause of action remains. "There is no bar to the trustee commencing a fresh proceeding on the same cause of action or a bankrupt, on discharge, doing so whether [*scil.* where] there has been no determination of the issues."[10]

[18] Similarly, in *Savage v Australian Unity Funds Management Ltd*,[11] Young JA said that, where an action is abandoned under s 60(3), the court ought not to dismiss it, because to do so would be to prevent the bankrupt from re-litigating the question once he or she became free to do so. It seems that the bankrupt becomes "free to do so" on discharge from bankruptcy.[12]

[19] "Abandonment" of a proceeding by a trustee therefore does not have the effect of terminating the proceeding. Colvin J's description of the effect of abandonment, which I respectfully adopt, is worthy of repetition here.[13]

> The abandonment meant that the bankrupt as the applicant in the proceedings could take no further step in those proceedings that was inconsistent with the abandonment and there could be an application to dismiss the proceedings for want of prosecution: *Cole v Challenge Bank Limited* [2002] FCAFC 200 at [16]. However, the abandonment itself did not operate as a dismissal of any underlying cause of action and it is a separate question in each particular case whether there ought to be a dismissal and what order as to costs may be made consequent upon the abandonment effected by the statute: see *State of Queensland v Beames* [2003] QSC 399; [2004] 2 Qd R 99. The deemed abandonment was no bar to the commencement of the fresh proceedings: *Primelife Corporation Limited v Bufalo* [2008] FCA 1742 at [36]. However, the bankrupt must demonstrate that he or she has standing to commence such proceedings: *Cummings v Claremont Petroleum NL* [1996] HCA 19; (1996) 185 CLR 124 at [131] (being an appeal from the decision in *Fuller & Cummings v Beach Petroleum NL* (1993) 43 FCR 60, cited in *Primelife* at [35]). There is no standing where the subject matter of the proceedings is an interest in property that forms part of the sequestrated estate or a liability in respect of a debt that is provable if established: *Cummings* at [137]-[138] and *McCallum v Federal Commissioner of Taxation* (1997) 75 FCR 458.
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> Further, as I have noted, the abandonment operated irrespective of whether the subject matter of the Original Proceedings or the Original Proceedings themselves formed part of the property of the bankrupt estate. It did not depend upon the authority of the trustee to administer the estate extending to the subject matter of the Original Proceedings.

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10 *Freeman v Joiner* [2005] FCAFC 149, [14].

11 [2011] NSWCA 270, [17], citing *Millane v President of the Shire of Heidelberg* [1928] VLR 52; *Holmes v Goodyear Tyre & Rubber Co (Aust) Ltd* (1984) 73 FLR 88.

12 *Millane v President of the Shire of Heidelberg* [1928] VLR 52, 53.

13 *Nugawela v Deputy Commissioner of Taxation* [2018] FCA 1457, [15]-[16]. See also *Garrett v FCT* (2015) 233 FCR 226, [34].

[20] Thus, the potential for injustice to which I referred above is reduced by the fact that the cause of action remains on foot and can be continue to be prosecuted by the bankrupt when later able to do so, after her discharge from bankruptcy. The abandonment is only abandonment of the proceeding by the trustee. The proceeding itself remains on foot. A further order, dismissing it, would be necessary to stop the proceeding entirely. As there has been no election under subs (2), the stay under subs (1) continues to operate, but it will end upon the bankrupt's discharge. At that time the bankrupt may continue the proceeding (subject, of course, to the effect of any rules of court and any need, under those rules, to obtain leave to proceed).

[21] Mr Morgan also submitted that the stay is designed to protect defendants to actions brought by a bankrupt, so that the bankrupt could not continue an action in which, if the defendant was successful, it would have no realistic prospect of recovering costs from the bankrupt. There is support for that proposition in some authorities.[14] Indeed, a plurality in the High Court has said that, if the defendant in an action by a bankrupt were to succeed during the term of the bankruptcy, then an order for costs against the bankrupt would have the effect of increasing the amount of the debts provable in the bankruptcy.[15] However, that is not necessarily correct, as the High Court has since held that a judgment for costs made after bankruptcy is not provable even if the bankrupt had lost an action before bankruptcy so that such an order was very likely.[16]

[22] Therefore, if an action were one (such as a family provision application) that is not part of the estate property and the bankrupt were able to pursue it and did so unsuccessfully, a judgment that the bankrupt pay costs would not increase the debts payable from the estate, as it would be a post-bankruptcy debt, not a provable debt falling within s 82(1). The defendants would have six years in which to enforce the judgment, thus not being subject to the "monstrous" disadvantage referred to by Edelman J.[17] In any event, defendants in that position may be able to seek security for costs before the bankrupt proceeds.

[23] But all of this is really beside the point if the action is stayed under the section, as the bankrupt could not continue and cause the other parties to incur further costs.

[24] Another issue that I raised in the course of the hearing is whether one of the exceptions in s 60(4) applies to a family provision application. On the wording of that subsection, such an application may be an action "in respect of any personal … wrong done to the bankrupt" or, perhaps more likely, an action "in respect of … the death of … a member of his or her family." It may be arguable that a family provision application concerns a "wrong" – a failure to provide for the person's proper maintenance and support – that also is in respect of the testator's death. I have found no decision in which a court has considered directly whether a family provision application is within the purview of either paragraph of subs (4).

[25] In Hallen J's recent carefully reasoned decision in *Muir v Angeles*,[18] his Honour concluded that a cross-claim for provision under the equivalent statute in New

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14 *Re Lofthouse*, [19], with which Edelman J agreed in *Duckworth*, [43]-[45].
15 *Cummings v Claremont Petroleum NL*, 138.
16 *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, [65]-[67].
17 *Duckworth*, [43], citing *Want v Moss* (1889) 10 LR (NSW) 274, 279.
18 [2020] NSWSC 1056, [91].

South Wales was stayed because, as he held, the definition of "action" in subs (5) was broad enough to encompass such an action. That is clearly correct, with respect, but his Honour did not consider whether such an action may fall within the ambit of subs (4). Rather, his Honour said at [92], "There is no suggestion that the claim in the Defendant's Cross-Summons falls within any of the exceptions" and assumed that to be the case. It becomes necessary for me now to consider whether a family provision application is not stayed because it falls within subs (4).

[26] Looking at paragraph 4(a), a family provision application is undoubtedly personal to the applicant, as the authorities have made clear. Failure of a deceased family member to make adequate provision for the applicant may well be seen as a "personal wrong". Such a construction would be consistent with the fact that such an application is personal to the applicant and does not form part of the bankrupt's property divisible among his or her creditors.

[27] However, I do not consider it correct to describe a failure to make adequate provision for a person as a "wrong" against that person. The entitlement to seek an order arises where a person dies and "in terms of the will or as a result of the intestacy provision is not made from the estate for the proper maintenance of the deceased's spouse, child or dependent."[19] Whether an order is made depends on the court being satisfied of that jurisdictional question and then the exercise of the court's discretion.[20] Feelings of grievance or wrong on the part of the applicant are irrelevant.

[28] Paragraph (4)(a) encompasses an action for damages for personal injury or other wrong that gave rise to "pain felt by the bankrupt in respect of his mind, body or character and without reference to his rights of property."[21] An application for further provision is not an action of such a nature. Consequently, the application does not fall within the exception in paragraph (4)(a).

[29] Looking at paragraph (b), the phrase "an action … *in respect of* … the death of … a member of his or her family" may be open to a very broad construction. A family provision application certainly arises from the death of a family member, as it is only the person's death and the provisions of the will (or the person's intestacy) that give rise to the right to seek further provision under the *Succession Act*. Subject to context and contrary indication, the words "in respect of" connote "the widest possible meaning of any expression intended to convey some connexion or relation between two subject-matters."[22] They import such meanings as 'in relation to', 'with reference to' or 'in connection with'.[23]

[30] Thus paragraph (b) could be seen as extending to a family provision application. Given the very wide meaning that courts have given to the phrase "in respect of", it can be seen that a claim for provision out of a deceased's estate may be in respect of the family member's death. There is a clear connection between the claim in the

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19 *Succession Act* 1981 (Qld), s41(1).

20 *Coates v National Trustees Executors & Agency Co Ltd* (1956) 95 CLR 494.

21 *Cox v Journeaux (No 2)* (1935) 52 CLR 713, 721.

22 *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111 per Mann CJ, quoted in *Powers v Maher* (1959) 103 CLR 478 at 484-485 per Kitto J; *Technical Products Pty Ltd v State Government Insurance Office (Queensland)* (1989) 167 CLR 45, 47.

23 *Nowegijick v. The Queen* (1983) 144 D.L.R. (3d) 193, 200; adopted by Toohey J in *Smith v Commissioner of Taxation* (1987) 164 CLR 513, 533.

action and the death of the family member: the latter is a necessary precursor to the former.

[31] That construction may be supported by an apparent distinction between the expression in this paragraph and the similar (but not identical) expression in s 116(1)(g), by which "any right of the bankrupt to recover damages or compensation … in respect of … the death of … a member of his or her family" is excluded from property divisible among the bankrupt's creditors. The distinction is that, in s 116(1)(g) the exclusion is limited to a "right to recover damages or compensation," while in s 60(4)(b) it is simply an action "in respect of" a death. The latter paragraph is not, on its face, limited to an action for damages or compensation and therefore could extend to an application for further provision (a judgment for which, of course, is neither damages nor compensation).

[32] While this appears arguable, the history of the sections, including the construction of s 60(4) adopted by the High Court in *Cox v Journeaux (No 2)*, leads to the conclusion that there is not intended to be any real distinction between the two paragraphs. Subsection 60(4) complements s 116(1)(g) in order to make it clear that an action for damages or compensation is not stayed by s 60(2).[24]

[33] Also, while the death of a family member is a necessary precursor to an application for further provision, such an application is really in respect of the estate and the applicant, not in respect of the death of the family member.

[34] Paragraph (b) has historically been held to refer to an action under such provisions as Part 10 of the *Civil Proceedings Act* 2011 (Qld), for damages for wrongful death of a family member *(Lord Campbell's Act* proceedings). That appears to be its limit. I conclude that it does not extend to an application for family provision.

[35] In *Duckworth v Water Corporation*,[25] Edelman J analysed the subsection and the history of the common law of bankruptcy that led to its enactment, although not in the context of a family provision application. His analysis appears to support my conclusion that a family provision application does not fall within the subsection.[26]

[36] Therefore, having particular regard to the context of the history and location in the Act of the section, I conclude that a family provision application does not fall within the ambit of s 60(4).

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24 See the analysis of the history of these paragraphs undertaken by Allsop P (with whom Campbell and Young JJA agreed) in *Moss v Eaglestone* (2011) 257 FLR 96, in which his Honour described these paragraphs as cognate provisions.

25 *Duckworth v Water Corporation* (2012) 261 FLR 185, [2012] WASC 30, [85]-[87]. His Honour referred particularly to *Daemar v Industrial Commission (NSW)* (1988) 12 NSWLR 45, 55, *Cox v Journeaux (No 2)* (1935) 52 CLR 713, 721 and *Faulkner v Blewett* (1981) 52 FLR 115, 123.

26 Although I respectfully disagree with Edelman J's characterisation of the words in the phrase "personal injury or wrong" in paragraph (a) as a paregmenon, as they do not have the same root or derivation. This is a word that, I must admit, I had not previously come across and had to investigate. It does not appear in the Macquarie Dictionary or the Concise Oxford English Dictionary. It is defined in the complete Oxford English Dictionary as "derived", or "words conjoined which are derived one of another," giving the example of "discreet" and "discretion". There may be a more modern usage meaning cognate words (that is, words allied in nature or quality, although not necessarily of the same origin) used together. It is only if that were the case that the phrase might (somewhat inaccurately) be described, in modern terms, as a paregmenon. I accept, however, that they are cognate terms.

[37] The result is that this proceeding is stayed by operation of s 60. That stay remains in place because the trustee has not made an election under subs (3) and therefore he (but not the bankrupt) is deemed to have abandoned the proceeding. However, the proceeding remains on foot for the potential benefit of the applicant. There has been no application to dismiss it for want of prosecution and one must wonder whether there is much likelihood, at this stage, of any such application being successful.

[38] Mr Morgan did submit that it would be most unfair to keep the proceeding on foot pending Ms Thompson's discharge from bankruptcy, so the proceeding should be dismissed, as Hallen J did in *Muir v Angeles*. However, in that case, the bankrupt had not expressed any interest in continuing with the family provision application.[27] That is not the case here: Ms Thompson has made clear that she wishes to continue the proceeding after her discharge. I do not consider it appropriate, in this case, to dismiss the proceeding at this stage.

[39] When Ms Thompson is discharged from bankruptcy the stay under s 60 will be at an end. At that time, she may have to apply for leave to proceed if no step has been taken in the proceeding for more than two years,[28] but that is not a matter with which I am currently concerned.

[40] It is unnecessary for me to consider the effect of the stay under rule 72. That stay applies even to actions that are not stayed by s 60, but in that case the court has a discretion to allow a party to take further steps in the proceeding. I do not need to consider the exercise of that discretion given my conclusion that s 60 applies.

[41] As the proceeding remains stayed, it is not open to the parties to proceed with their respective applications. What happens to the proceeding will have to await the end of Ms Thompson's bankruptcy.

[42] For the sake of clarity, I shall declare that this proceeding is stayed by operation of s 60.

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27 *Muir v Angeles* [2020] NSWSC 1056, [121].

28 *UCPR*, r 389(2).