SUPREME COURT OF QUEENSLAND

CITATION:	*Brown v. Amor Holdings Australia Pty Ltd & Ors* [2006] QSC 393
PARTIES:	**CAIN DYLAN BROWN** (plaintiff) v **AMOR HOLDINGS AUSTRALIA PTY LTD** (defendant) and **GRANT HAROLD AMOR** (second defendant) and **CARL DENIS AMOR** (third defendant)
FILE NO/S:	BS 11065/04
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	15 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2006
JUDGE:	White J
ORDER:	**Application adjourned to a date to be fixed to be brought on on the giving of 3 days notice in writing.**
CATCHWORDS:	BANKRUPTCY – ARRANGEMENTS WITH CREDITORS WITHOUT SEQUESTRATION – SPECIAL PROVISIONS RELATING TO DEEDS OF ASSIGNMENT – Power of trustee to assign chose in action after conclusion of Part X deed of assignment *Bankruptcy Act* 1966 (Cth) ss 127, 184, 187, 116(1)(a), 214, 229(1), 231, 232 *Bride v Peat Marwick Mitchell* (1989) WAR 383, applied *Re: Bankrupt Estate of Cirillo; Ex parte Official Trustee in Bankruptcy* (1996) 136 ALR 607, applied *Foyster v ANZ Banking Group* [1999] NSWSC 300, applied *Re Morton ex parte Morton v Westpac Banking Corporation* (1987) 17 FCR 126, distinguished
COUNSEL:	D Clothier for the applicants/defendants A Crowe SC and with him J Stevens for the

respondent/plaintiff

SOLICITORS: Minter Ellison – Gold Coast for the defendants
Thynne & Macartney for the plaintiff

[1] **WHITE J:** This matter came before the court on an application by the three defendants to have the whole of the plaintiff's claim struck out and judgment entered or, alternatively, that certain paragraphs in the statement of claim be struck out, impliedly with leave to re-plead.

[2] The application to strike out the whole of the claim arises because the defendants contend that the plaintiff has no standing to sue them because any cause of action the subject of the claim was vested in the plaintiff's trustee pursuant to Part X of the *Bankruptcy Act* 1966 (Cth).

[3] The alleged claim arises in this way: in August 2002 the plaintiff in partnership with one Kenneth William Hickey entered into a contract to purchase the business of the first defendant. That business was as a panel beater and small repairer of motor vehicles. The second and third defendants are the directors of the first defendant and allegedly made representations about the worth and profitability of the business. The representations are alleged to have been made falsely and misleadingly. The plaintiff seeks damages at common law and pursuant to the *Trade Practices Act* 1974 (Cth).

[4] By their amended defence, the defendants join issue with those of the allegations with which they are able and set up the Deed of Assignment between the plaintiff and Mr Jason Bettles as trustee dated 30 June 2003, as depriving the plaintiff of standing to bring the proceedings. The administration of the plaintiff's estate was finalised on 22 March 2004 pursuant to s 232 of the Act. No dividend had been paid to the plaintiff's non-priority unsecured creditors. These proceedings were commenced in November 2004. Mr Bettles has not given an assignment of any causes of action to the plaintiff to enable him to institute proceedings nor did he disclaim the property. It is unlikely that the trustee was aware of the claim because it did not form part of the plaintiff's explanation for his financial failure in his Part X statement.

[5] On the day before the application came on for hearing the plaintiff sought to obtain the trustee's assignment to him of the causes of action in the claim. Mr Bettles had also been approached by the defendants to discuss purchasing for value the chose in action if it remained vested in the trustee. Mr Bettles required to be put in funds to seek the opinion of Senior Counsel.

[6] In *Foyster v ANZ Banking Group* [1999] NSWSC 300, Hidden J was prepared to grant an adjournment to allow a plaintiff in similar circumstances to investigate an assignment of a cause of action from his trustee. On the return date of this application I made rulings about the pleadings striking out certain paragraphs and giving leave to re-plead but adjourned the application to allow the plaintiff to regularise the proceedings if he were able and staying the proceedings until that occurred. I had formed the view that the chose in action vested in the plaintiff's trustee when he executed the Part X Deed of Assignment and it had not been re-vested in the plaintiff at the conclusion of the administration, contrary to the argument of the plaintiff.

[7] At the instigation of the defendants the application was re-listed in the absence of any contact from the plaintiff about the assignment and heard on 24 August 2006. Mr Bettles again indicated to both parties that before he would contemplate assigning the chose in action he would require to be put in funds to obtain senior counsel's opinion as to his capacity to assign in the events that have occurred or a determination by the court that he may do so.

[8] On the adjourned hearing Mr Crowe SC who appeared with Mr J Stevens, who had appeared at the first hearing for the plaintiff, conceded that the chose in action remained vested in the trustee and could be assigned by him including to the plaintiff, *Re: Bankrupt Estate of Cirillo; Ex parte Official Trustee in Bankruptcy* (1996) 136 ALR 607 at 616. Mr D Clothier, who appeared for the defendants, submitted that the analogy between an administration under Part X and a bankruptcy is not exact in as much as once the administration is concluded it comes to an end, the trustee's powers are exhausted and he cannot assign any interest obtained by virtue of the administration, compared with a bankruptcy which has an interregnum period between discharge and finalisation.

[9] I have been provided with a compilation of the provisions of the *Bankruptcy Act* as they applied to this application by the solicitors for the defendants.

[10] The Deed of Assignment entered into between the plaintiff and his trustee on 30 June 2003 provided in operative clause 1

> "1. The debtor assigns to the trustee all the debtor's divisible property within the meaning of Part X of the Act, UPON TRUST, to deal with it in accordance with that Part for the benefit of the debtor's creditors. Any surplus of the divisible property, after paying in full the debts under this Deed together with the costs, charges and expenses of or incidental to the execution of the trusts of this Deed (including the remuneration and expenses of the trustee), shall be held by the trustee, UPON TRUST, for distribution to the debtor, the debtor's executors, administrators or assigns."

[11] Part X of the *Bankruptcy Act* concerns "Arrangements with creditors without sequestration". By s 187 "deed of assignment" means

> "… a deed … providing for the arrangement of the affairs of a debtor with a view to the payment, in whole or in part, of his or her debts".

By s 214(2)(a), a deed of assignment

> "…shall provide for the assignment of all the divisible property of the debtor for the benefit of his or her creditors …"

Section 229(1) vests the property in the trustee

> "Subject to this section, the due execution by a debtor of a deed of assignment that is entered into in accordance with this Part and complies with the requirements of this Part operates to vest in the

> trustee forthwith, upon the trusts and for the purposes of the deed, all the divisible property of the debtor."

"Divisible property" is defined in s 187(1) and

> "… in relation to a deed of assignment executed by a debtor, means the property … that would be divisible amongst his or her creditors under Part VI if he or she had become a bankrupt on that day."

[12] Section 116(1)(a) of the *Bankruptcy Act* which is in Part VI provides that subject to the Act

> "all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy … is property divisible amongst the creditors of the bankrupt."

"Property" is defined in Section 5 to mean

> "… real or personal property of every description, … and includes any estate, interest or profit, whether present or future, vested or contingent arising out of or incident to any such real or personal property."

Property encompasses any chose in action or damages for a tort, *Bride v Peat Marwick Mitchell* (1989) WAR 383 per Malcolm CJ at 391 and 393.

[13] The causes of action upon which the plaintiff purports to sue in these proceedings vested in his controlling trustee upon the execution of the Deed. The creditors were not paid in full. There was, therefore, no property held for the plaintiff pursuant to the terms of the Deed of Assignment. Section 232 of the *Bankruptcy Act* provides

> "(1) Where the trustee of a deed of assignment is satisfied that the divisible property of the debtor has, so far as is practicable, been realized and a final dividend has been paid to the creditors, he or she shall, upon request in writing by the debtor, furnish to the debtor a certificate signed by him or her to that effect."

A certificate thus furnished does not, of itself, re-vest the divisible property in the debtor, *Foyster v ANZ Banking Co* at para 25. There is no certificate exhibited to the material nor any statement that one was sought or furnished. Mr Bettles deposes that a search of the National Personal Insolvency Index reveals that as at 22 March 2004 the plaintiff was no longer subject to the provisions of Part X of the *Bankruptcy Act*. The following notation appears:

> "Result s 232 Assignment completed"

[14] The question then is whether the trustee has power to assign the causes in action for value? That is, does a trustee of a debtor's property under a Part X assignment have any continuing role after the administration has come to an end. Specific provisions of the Act relating to bankrupts apply to Part X deeds of assignment modified as

necessary as if "the trustee of the deed were the trustee in his or her bankruptcy". Subsection 232(3)(c) provides relevantly that a reference to the end of the bankruptcy "shall be read as a reference to the end of the deed of assignment". Finally, subsection 231 (5) provides

> "If, after taking into account the prescribed modifications and the provisions of subsection (3), a provision specified in subsection (2) or (4) is incapable of application in relation to a deed of assignment, or the trustee of such a deed, as the case requires, or is inconsistent with this Part, that provision does not so have application."

[15] Section 127 in Part VI is a provision which applies by virtue of s 231 to Part X deeds of assignment. It provides that after the expiration of 20 years from the date on which a person became a bankrupt a claim shall not be made by the trustee to any property of the bankrupt and that property shall be deemed to be vested in the bankrupt or a person claiming through or under him.

[16] Section 129AA which applies by virtue of s 231 to a Part X deed of assignment causes any property vested in the trustee which was disclosed in the statement of affairs which remains vested immediately before the revesting time to become revested in the bankrupt at the revesting time. The revesting time is six years from discharge. Such property then ceases to be subject to the 20 year rule in s 127. The subject chose in action was not disclosed by the plaintiff in his statement of affairs. Accordingly s 129AA will not apply.

[17] By s 231(4) Part VIII applies to deeds of assignment. Section 184 is in Part VIII. It provides that a trustee, if not previously released by the court, is released at the end of seven years from the date on which the fact that the administration of the estate was finalised is entered into the National Personal Insolvency Index.

[18] Mr Clothier referred to the decision of Spender J in *Re Morton ex parte Morton v Westpac Banking Corporation* (1987) 17 FCR 126 as supporting his submission that there must be a finalisation of the Part X arrangement and that the trustee became *functus officio* on the entry of the conclusion of the administration in the National Personal Insolvency Index. But *Morton* was a very different case where a secured creditor sought to amend the estimate of its security after the terms of the composition had been completed and the obligations under the deed fully discharged and a certificate furnished by the trustee to the debtor. The creditor's application arose in circumstances where the debtor, after the trustee's certificate was furnished, sold property the subject of the security for a much higher value than expected by the secured creditor. Spender J refused the application concluding at p 131

> "Quite simply, it is still, as it always was, in the public interest that there be an end to litigation. There must, in my view, be a time when the process of insolvency comes to an end, and the subject of it can start anew."

[19] Nonetheless, it is unattractive to conclude that property remains vested in the trustee but that he may not exercise the powers given to him by the legislation to sell it so as to benefit the creditors. That the legislature intended Part X arrangements to be treated in the same way as bankruptcies for many purposes is plain. Sections 127

and 129AA expressly apply to Part X arrangements. The application of those provisions is not inconsistent with Part X so as to require them to have no application. If they were not to apply after the certificate of completion of the deed or the entry into the Index that could easily have been provided for in the legislation.

[20] I am accordingly of the view that

(i) The chose in action the subject of the within proceedings is property which is vested in Mr Jason Bettles, the plaintiff's trustee.

(ii) The trustee has a residual power to deal with that property notwithstanding the conclusion of the administration.

(iii) The trustee may assign that property for value including to the plaintiff.

(iv) If it is necessary to state, the trustee holds any proceeds of the sale of the property for the benefit of those creditors whose claims were not satisfied.

[21] Because of the unwillingness of the trustee to act without reassurance the parties should have an opportunity to approach him with any proposal which they may care to make. In that circumstance it is appropriate to adjourn the application to allow that to take place.

[22] The orders are to adjourn the application to a date to be fixed to be brought on on the giving of three days notice in writing.