

SUPREME COURT OF QUEENSLAND

CITATION: *Wright and others v Nixon and another* [2015] QSC 357

PARTIES: **PATRICIA COLLEEN WRIGHT**
(first applicant)
and
KEITH ROBERT GEORGE WRIGHT
(second applicant)
and
ERIN EDITH PATRICIA WRIGHT
(third applicant)
and
TIMOTHY NOEL MICHAEL WRIGHT
(fourth applicant)
and
SHANNON DEIDRE KATHLEEN HARTSHORN (NEE WRIGHT)
(fifth applicant)
and
KERRI COLLEEN WRIGHT
(sixth applicant)
v
BRENDAN JOSEPH NIXON AND JOANNE EMILY DUNN AS THE TRUSTEES OF THE PROPERTY OF DANIEL PATRICK JOHN WRIGHT, A BANKRUPT
(respondents)

FILE NO: SC No 8569 of 2015

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 19 November 2015

DELIVERED AT: Brisbane

HEARING DATE: 19 November 2015

JUDGE: Atkinson J

ORDERS: **1. Paragraphs 1, 2, 3 and 5 of the Originating Application filed on 27 August 2015 be transferred to the Federal Court of Australia pursuant to s 6 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)*.**
2. Costs be costs in the proceeding.

CATCHWORDS: PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – CONCURRENT JURISDICTION OF DIFFERENT COURTS – TRANSFER OF PROCEEDINGS UNDER CROSS-VESTING LEGISLATION – SPECIAL FEDERAL MATTERS – where the applicants sought the transfer of the first applicant’s equitable interests in real properties held in the names of her children, being the other applicants, recognised by declaration of a resulting trust – where one of the children was bankrupt – where trustees in bankruptcy had been appointed and were the respondents to the application – where the parties had agreed that the matter should be transferred to the Federal Court of Australia – where no written notice had been given to the Commonwealth or Queensland Attorneys-General – whether the matter was a special federal matter – whether the matter was required to be transferred to the Federal Court of Australia

Bankruptcy Act 1966 (Cth) s 27

Judiciary Act 1903 (Cth) s 39B

Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 3(1), s 6

Australian Securities Commission v Marlborough Gold Mines Limited (1993) 177 CLR 485, applied

Fewin Pty Ltd v Burke [2015] NSWSC 1411, followed

Gorkowski v Turner [2014] VSC 200, referred to

Truthful Endeavour Pty Ltd v Condon as Trustee of the Bankrupt Estate of Rayhill [2015] FCAFC 70, followed

Turner v Gorkowski [2014] VSCA 248, followed

COUNSEL: JC Ashcroft for the applicants
NJ Shaw for the respondents

SOLICITORS: JKR Lawyers for the applicants
CLH Lawyers for the respondents

- [1] **ATKINSON J:** The applicants in this matter are a mother and a number of her adult children who sought to have the first applicant’s equitable interests in various real properties held in the names of those adult children recognised by the declaration of a resulting trust. One of the children is a bankrupt; trustees of the property of the bankrupt have been appointed and they are respondents to this application. They assert, and the applicants have now agreed, that this matter should be transferred to the Federal Court of Australia pursuant to section 6 of the *Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)* (‘Cross-vesting Act’). I shall give brief reasons as to why I will make the order that they seek.
- [2] Section 6 of the Cross-vesting Act provides that, if a matter for determination in a proceeding that is pending in the Supreme Court of a State is a special federal matter and the Court does not make an order under subsection 6(3) in respect of the matter, the Court must transfer the proceeding, in accordance with that section, to the Federal Court.

- [3] Subsection (3) does not apply in this case. It provides that this Court may order that the proceeding be determined in this Court if satisfied there are special reasons for doing so in the particular circumstances of the proceeding, other than reasons relevant to the convenience of the parties. Before making such an order, the Court must be satisfied that a written notice specifying the nature of this special federal matter has been given to the Attorney-General of the Commonwealth and the Attorney-General of the state where the proceeding is pending. No such notice has been given and it has not been agitated before me that there are special reasons for retaining this case in this Court in the particular circumstances of the proceeding. Accordingly, if I am satisfied that this is a special federal matter, I must transfer it to the Federal Court.
- [4] A special federal matter is defined in subsection 3(1) of the Cross-vesting Act. Subsection 3(1)(e) is pertinent to the application before me. It relevantly provides that a special federal matter includes:

*a matter that is within the original jurisdiction of the Federal Court by virtue of section 39B of the Judiciary Act 1903;
being a matter in respect of which the Supreme Court of a State ... would not, apart from this Act, have jurisdiction.*

- [5] Section 39B of the *Judiciary Act 1903* (Cth) provides that the Federal Court of Australia has original jurisdiction, *inter alia*, in any matter arising under any laws made by the Parliament other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter. That satisfies the requirement that the matter is within the original jurisdiction of the Federal Court. Section 27 of the *Bankruptcy Act 1966* (Cth) both confers jurisdiction on the Federal Court and the Federal Circuit Court and ousts the jurisdiction of this Court except with regard to criminal issues in matters concerning bankruptcy.
- [6] If the matter were only governed by the words of those statutes, there would be a genuine question to be determined as to whether or not this case does fall within the exclusive jurisdiction of the Federal Court in bankruptcy matters; however, that matter has been put beyond real dispute by decisions made by Supreme Courts in Victoria and New South Wales, and by the Federal Court. Accordingly, the decision in *Australian Securities Commission v Marlborough Gold Mines Limited*¹ is applicable to this issue: that is, that uniformity of decision in the interpretation of Commonwealth legislation is a sufficiently important consideration to require that a Judge should not depart from an interpretation placed on such legislation by another Australian intermediate appellate Court unless convinced that that interpretation is plainly wrong.
- [7] The decisions to which I earlier referred of the other courts commence with the decision of the Court of Appeal of the Supreme Court of Victoria in *Turner v Gorkowski*² where their Honours Justices Neave and Santamaria, in overturning a first instance decision, held:

Although the matter is not without difficulty, we consider that his Honour should have held that the proceeding was a “special federal matter.” We reach that conclusion because it was necessary for the trustee in bankruptcy to rely on the

¹ (1993) 177 CLR 485 at 492.

² [2014] VSCA 248.

*sequestration order made under the Bankruptcy Act and the title conferred on him as a consequence of that order to resist Mrs Gorkowski's claim. Although his title was not "a defence" to Mrs Gorkowski's claim, s 58 of the Bankruptcy Act, which vested the property of the bankrupt in him, was the basis on which the proceedings had to be brought against him. The onus lay on Mrs Gorkowski to establish her interest in the property, which the trustee claimed was vested in him. This was not a case where the bankruptcy was simply "lurking in the background" to the proceedings.*³

- [8] That case was essentially on all fours with the case before me, and so, unless I were convinced it was plainly wrong, it ought to be followed in this case. I am not so convinced and therefore it should be followed.
- [9] For completeness, I should say that subsequent to that decision, there was a decision of the Full Court of the Federal Court in *Truthful Endeavour Pty Ltd v Condon as Trustee of the Bankrupt Estate of Rayhill*,⁴ where, in obiter, the same principles were applied. Unfortunately, it appears that the Court was not referred to the decision of the Court of Appeal of the Supreme Court of Victoria in *Turner v Gorkowski*, but rather to the first instance decision, which had by then been overturned. There is quite a lengthy criticism of the first instance decision; I assume the Judges of that Court must have been unaware that the decision had been overturned, as there is no reference to the Court of Appeal decision.
- [10] The principle has also been dealt with in the Supreme Court of New South Wales in *Fewin Pty Ltd v Burke*,⁵ a decision made on 25 September 2015 by a single Judge of the Supreme Court of New South Wales. That decision also refers to the first instance decision in *Gorkowski v Turner*⁶ which had been overturned by the Court of Appeal of the Supreme Court of Victoria, and the criticism of it found in *Truthful Endeavour*. The Judge refers to the fact that neither party drew the Judge's attention to the decision of the Victorian Court of Appeal in *Turner v Gorkowski*, although the Judge found it for herself. That judgment does say that the Court of Appeal of the Supreme Court of Victoria did not refer to the Federal Court decision in *Truthful Endeavour*. One might have expected that the Full Court of the Federal Court would have referred to the Victorian Court of Appeal decision in its decision in *Truthful Endeavour*. The reason that the Victorian Court of Appeal did not refer to *Truthful Endeavour* was because the decision in the Victorian Court of Appeal was handed down well before even argument was heard in the Full Court of the Federal Court in *Truthful Endeavour*.
- [11] Fortunately, I have had the advantage of counsel, who have referred me to all of those decisions and I think it is appropriate for this Court to follow the principles set out by the Court of Appeal of the Supreme Court of Victoria in *Turner v Gorkowski*, which were also applied by the Full Court of the Federal Court in *Truthful Endeavour* and in the Supreme Court of New South Wales in *Fewin Pty Ltd v Burke*. Accordingly, I order that paragraphs 1, 2, 3 and 5 of the originating application filed on 27 August 2015 be transferred to the Federal Court of Australia pursuant to section 6 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and that costs be costs in the proceeding.

³ Ibid at [41].

⁴ [2015] FCAFC 70 ("*Truthful Endeavour*").

⁵ [2015] NSWSC 1411.

⁶ [2014] VSC 200.