Federal Court of Australia

Aravanis (Trustee) v Twin Investors Pty Ltd, in the matter of the Bankrupt Estate of Kapp (Admissibility Ruling) [2021] FCA 899

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| File number: | NSD 853 of 2019 |
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| Judgment of: | **PERRAM J** |
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| Date of judgment: | 3 August 2021 |
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| Catchwords: | **EVIDENCE** – where evidence obtained by Official Receiver under *Bankruptcy Act 1966* (Cth) s 77C – where Applicants tendered transcript of Official Receiver’s examination – whether transcript admissible under *Bankruptcy Act 1966* (Cth) s 77C(3) and s 255(2) despite *Evidence Act 1995* (Cth) |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 77C, 81, 255  *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (Cth) sch 1  *Evidence Act 1995* (Cth) ss 81, 83, 87, 135, 136 |
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| Cases cited: | *Colonial Mutual Life Assurance Society Ltd v Donnelly* (1998) 82 FCR 418  *Rambaldi v Mullins (No 2)* [2016] FCA 977  *Re Morris; Ex parte Donnelly* (1997) 77 FCR 303  *Rothmore Farms Pty Ltd (in liq) v Belgravia Pty Ltd* [1999] FCA 598 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | General and Personal Insolvency |
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| Number of paragraphs: | 13 |
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| Date of hearing: | 28 July 2021 |
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| Counsel for the Applicants: | Mr A Combe |
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| Solicitor for the Applicants: | O’Neill Partners Commercial Lawyers |
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| Counsel for the First Respondent: | The First Respondent did not appear |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |
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| Counsel for the Third Respondent: | Mr R Glasson |
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| Solicitor for the Third Respondent: | Drayton Sher Lawyers |

ORDERS

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|  | | NSD 853 of 2019 |
| IN THE MATTER OF THE BANKRUPT ESTATE OF PHILIP JAMES KAPP | | |
| BETWEEN: | ANDREW ARAVANIS AND ALEXANDER CLARK AS TRUSTEES IN BANKRUPTCY OF THE BANKRUPT ESTATE OF PHILIP JAMES KAPP  Applicants | |
| AND: | TWIN INVESTORS PTY LTD ACN 608 534 505 AS TRUSTEE OF THE TWIN TRUST  First Respondent  MARYANN KAPP  Second Respondent  PHILIP JAMES KAPP  Third Respondent | |

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| order made by: | PERRAM J |
| DATE OF ORDER: | 3 August 2021 |

THE COURT ORDERS THAT:

1. Paragraphs 19 and 32 of the affidavit of Andrew Aravanis sworn 28 February 2020 and pages 1359-1480 of Exhibit AA-2 to that affidavit are admitted into evidence.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

**PERRAM J:**

1. The Applicants seek to rely upon §19 and §32 of the affidavit of Andrew Aravanis sworn 28 February 2020 (‘Second Aravanis Affidavit’) and pp 1359–1480 of Exhibit AA-2 to that affidavit, being a transcript of an examination of the Second Respondent conducted by two delegates of the Official Receiver under s 77C of the *Bankruptcy Act 1966* (Cth).
2. The examination occurred on 11 September 2019. The Applicants wish to rely upon various representations which, so the transcript records, the Second Respondent made during the examination. The Applicants say that these representations are material to the resolution of the issues in dispute as between the Applicants and the First and Third Respondents.
3. The Third Respondent objects to the Applicants being permitted to rely on this evidence on the basis, he says, that it is caught by the hearsay rule and that the relevant exception to that rule for admissions does not apply. Specifically, the Third Respondent argues that the Second Respondent was not a director of the First Respondent at the time of the examination and therefore lacked authority to speak on behalf of the First Respondent. Accordingly, so the argument runs, by virtue of s 83 and s 87 of the *Evidence Act 1995* (Cth), any representations made by the Second Respondent that are recorded in the transcript cannot be relied upon as evidence of an admission adverse to the First Respondent or the Third Respondent, assuming that any representations recorded in the transcript indeed amount to admissions.
4. In response, the Applicants assert that the transcript is admissible by operation of s 77C(3) and s 255(2) of the *Bankruptcy Act 1966* (Cth). These provisions are as follows:

**77C Power of Official Receiver to obtain information and evidence**

(1)  The Official Receiver may, by written notice given to a person, require the person to do one or more of the following:

(a)  give the Official Receiver information the Official Receiver requires for the purposes of the performance of the functions of the Official Receiver or a trustee under this Act;

(b)  attend before the Official Receiver, or an officer authorised in writing by the Official Receiver to exercise powers under this paragraph, and do one or both of the following:

(i)  give evidence relating to any matters connected with the performance of the functions of the Official Receiver or a trustee under this Act;

(ii)  produce all books in the person’s possession relating to any matters connected with the performance of the functions of the Official Receiver or a trustee under this Act;

(c)  produce all books in the person’s possession relating to any matters connected with the performance of the functions of the Official Receiver or a trustee under this Act.

It does not matter whether or not the person is a bankrupt or is employed in or in connection with a Department, or an authority, of the Commonwealth or of a State or Territory.

(2)  The Official Receiver or authorised officer may require the information or evidence to be given on oath, and either orally or in writing, and for that purpose may administer an oath.

(3)  Notes taken down and signed by a person who attends before the Official Receiver or an authorised officer under paragraph (1)(b), and the transcript of the evidence given by the person at the attendance:

(a)  may be used in evidence in any proceeding under this Act whether or not the person is a party to the proceeding; and

(b)  may be inspected:

(i)  by the person, without fee; and

(ii)  if the notes and evidence relate to matters concerning the bankruptcy of the person or of another person—by the trustee and a person who states in writing that he or she is a creditor, without fee; and

(iii)  by any other person on payment of the fee determined by the Minister by legislative instrument.

…

**255 Record of proceedings or evidence**

(1)  A transcript or electronic or magnetic recording that purports to be a record of proceedings under section 77C or 81, or of proceedings before a court, is to be taken to be a record of that kind, unless the contrary is proved.

(2)  The transcript or recording is admissible as evidence of the matters described by a person whose words are recorded in the transcript or recording, unless the Court, or a court in which the transcript is sought to be introduced, makes an order to the contrary.

(3)  The cost of preparing a transcript or recording is an expense of administration of the estate of the bankrupt or debtor to which the matters recorded relate.

1. It is clear that the transcript in question is a transcript to which s 77C(3) and s 255 apply. Accordingly, the parties’ contest on admissibility reduces to two issues:
2. Whether s 77C(3) and s 255(2) are determinative of the transcript’s admissibility or merely facultative. If they are determinative, the Applicants say the consequence is that the transcript should be admitted for all purposes.
3. If, on the other hand, they are merely facultative, the admissibility of the documents falls to be determined under the provisions of the *Evidence Act 1995* (Cth). On that hypothesis, the Applicants say that the transcript should be admitted under the exception to the hearsay rule for admissions contained in s 81 and s 87 of the Evidence Act, on the basis that the admissions were made by the Second Respondent, on behalf and with the authority of the First Respondent, in her capacity as a director of the First Respondent.
4. For the reasons which follow, the effect of s 77C(3) and s 255 is that the transcript is admissible not only against the Second Respondent but as against all parties (and would be so admissible even if the Second Respondent were not a party). Sections 77C(3) and s 255 render a transcript admissible notwithstanding the hearsay rule, subject to any order which the court may make to the contrary, for example under s 135 and s 136 of the Evidence Act. The Third Respondent did not invite me to make an order under s 135 or s 136 and sought only that the evidence be excluded on the basis that it was caught by the hearsay rule (which it is not, by reason of s77C(3) and s 255). I propose therefore to admit the evidence. Accordingly, it is not necessary to deal with the Applicants’ alternative argument that the evidence falls within the Evidence Act’s exception to the hearsay rule for admissions.
5. The Full Court (Wilcox, O’Connor and Sackville JJ) considered the operation of s 255 in *Colonial Mutual Life Assurance Society Ltd v Donnelly* (1998) 82 FCR 418 (‘*Colonial*’). This was an appeal from a decision of Beaumont J, *Re Morris; Ex parte Donnelly* (1997) 77 FCR 303, to which Counsel for the Applicants and Counsel for the Third Respondent referred in the present matter. Neither party referred to the Full Court’s decision in *Colonial*.
6. *Colonial* concerned a transcript under s 81(17) of the Bankruptcy Act. Section 255 applies to transcripts of examinations conducted under s 81 and also transcripts of examinations conducted under s 77C. Sections 81(17) and 77C(3) are relevantly in the same terms. The Full Court described the effect of s 255(2) in this way (at 434):

In our view, this provision was intended to make the transcript of evidence admissible as evidence not merely of the words spoken by the examinee, but of the matters described by the examinee in his or her evidence. If there were any doubts that this was the intended effect of the subsection, they are resolved by the Explanatory Memorandum accompanying the 1996 Bill [by which s 255 was inserted]. The Memorandum (par 182.2) states that the:

“*provision is designed to overcome the common law rules excluding hearsay evidence*, and to enable evidence given at examinations and recorded interviews to be put on the record in proceedings in a court without the need for witnesses to repeat their account of events.”

This does not mean that the contents of a transcript of a s 81 examination are automatically admissible in subsequent proceedings. First, s 255(2) itself provides that the court in which the transcript is sought to be introduced may make an order to the contrary. Secondly, s 255(2) must be read together with s 81(17). As we have said, s 81(17) is intended, in part, to impose a restriction on the use to which a s 81 transcript can be put in subsequent proceedings. Thus the apparently broad terms of s 255(2) must be qualified so as to make a s 81 transcript admissible (subject to the power of the court to make an order to the contrary) only in proceedings under the *Bankruptcy Act* to which the examinee is a party.

(Emphasis added)

1. For the reason given in the previous paragraph, the Full Court’s description of the effect of s 81(17) is equally applicable to s 77C(3).
2. The upshot of the Full Court’s decision is that there were two limitations to the admissibility of a transcript to which s 255 applies. First, it could only be used in a proceeding to which the examinee was a party. Secondly, the admissibility was not ‘automatic’ but was subject to the Court’s discretion under s 255(2) to make ‘an order to the contrary’.
3. Murphy J dealt with each of these limitations in *Rambaldi v Mullins (No 2)* [2016] FCA 977 (‘*Rambaldi*’). His Honour explained at [67] that the first limitation was removed by the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (Cth) (‘the AA Act’). By item 3 of Sch 1, the AA Act amended s 81(17) to omit the words ‘in which the person is a party’ and substitute the words ‘whether or not the person is a party to the proceeding’. By item 2 of Sch 1, the AA Act enacted s 77C(3) which, like its cousin s 81(17), included the words ‘whether or not the person is a party to the proceeding’. The consequence, as Murphy J explained, is that a transcript to which the provisions apply is ‘admissible, whether or not the examinee is a party to the proceeding, and against “all parties”’: *Rambaldi* at [69], citing *Rothmore Farms Pty Ltd (in liq) v Belgravia Pty Ltd* [1999] FCA 598 at [9] per Mansfield J.
4. The second limitation is a broader one. It appears that Murphy J viewed the issue of whether or not to make ‘an order to the contrary’ as a question of whether to make an order under s135 or s 136 of the Evidence Act: *Rambaldi* at [70]. His Honour did not suggest that those provisions furnished the only kinds of order which a court might make in an exercise of its discretion to constrain the admission of evidence under s 255(2). It is not necessary to decide what other kinds of order might be made because, as I have explained, the Third Respondent sought only an order that I exclude the evidence on the basis that it engages the hearsay rule and does not fall within the hearsay exception for admissions. The authorities to which I have referred foreclose such an argument – the hearsay rule does not defeat the admissibility of a transcript to which s 255 and s 77C(3) of the Bankruptcy Act apply.
5. Accordingly, §19 and §32 of the Second Aravanis Affidavit and pp 1359–1480 of Exhibit AA-2 will be admitted into evidence.

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| I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perram. |

Associate:

Dated: 3 August 2021