Federal Court of Australia

Commonwealth Bank of Australia v State of Western Australia, in the matter of Arbidans (a Bankrupt) [2020] FCA 1514

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| File number: | QUD 253 of 2020 |
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| Judgment of: | **JACKSON J** |
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| Date of judgment: | 20 October 2020 |
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| Catchwords: | **BANKRUPTCY** - disclaimer of real property under s 133 of the *Bankruptcy Act 1966* (Cth) - application under s 133(9) by mortgagee for vesting of bankrupt's property in mortgagee for the purpose of sale effect of disclaimer by trustee in bankruptcy - where mortgagee seeks to utilise powers as if mortgagee in possession - application successful |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 58, 133  *National Consumer Credit Protection Act 2009* (Cth) Schedule 1 (*National Credit Code*)  *Transfer of Land Act 1893* (WA) ss 106, 234 |
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| Cases cited: | *Australia and New Zealand Banking Group Limited v State of Queensland, in the matter of McFarlane (a Bankrupt)* [2017] FCA 696  *Commonwealth Bank of Australia v State of Queensland* [2019] FCA 1362  *ING Bank (Australia) Limited v State of Queensland, in the matter of Watson* [2017] FCA 411  *National Australia Bank Limited v State of New South Wales* [2014] FCA 298  *Re Middle Harbour Investments Ltd (in liq) (No 2)* [1977] 2 NSWLR 652  *St George - A Division of Westpac Banking Corporation v State of Western Australia* [2020] FCA 397 |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 25 |
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| Date of last submission/s: | 1 September 2020 (applicant)  18 September 2020 (first respondent) |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicant: | Ms B Sim |
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| Solicitor for the Applicant: | Gadens Lawyers |
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| Counsel for the Respondents: | Mr CG Mofflin |
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| Solicitor for the Respondents: | State Solicitors Office |

ORDERS

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|  | | QUD 253 of 2020 |
| IN THE MATTER OF MELLISA JANE ARBIDANS (A BANKRUPT) | | |
| BETWEEN: | COMMONWEALTH BANK OF AUSTRALIA (ACN 123 123 124)  Applicant | |
| AND: | STATE OF WESTERN AUSTRALIA  First Respondent  REGISTRAR OF TITLES  Second Respondent | |

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| order made by: | JACKSON J |
| DATE OF ORDER: | 20 OCTOBER 2020 |

THE COURT ORDERS THAT:

1. Pursuant to s 133(9) of the *Bankruptcy Act 1966* (Cth), the estate in fee simple in the following properties:
   1. the land situated at 4 Becker Court, South Hedland in the State of Western Australia more particularly described as Lot 3037 on Deposited Plan 213740 and being the whole of the land comprised in Certificate of Title Volume 1705 Folio 989;
   2. the land situated at 37 Newhaven Street, Mount Tarcoola in the State of Western Australia more particularly described as Lot 3172 on Plan 10496 and being the whole of the land comprised in Certificate of Title Volume 2217 Folio 912;
   3. the land situated at 6A Wood Avenue, Waroona in the State of Western Australia more particularly described as Lot 1 on Survey-Strata Plan 58507 and being the whole of the land comprised in Certificate of Title Volume 2721 Folio 671; and
   4. the land situated at 6B Wood Avenue, Waroona in the State of Western Australia more particularly described as Lot 2 on Survey-Strata Plan 58507 and being the whole of the land comprised in Certificate of Title Volume 2721 Folio 672,

(collectively the **Properties**) vest in the applicant for the purpose of the applicant exercising its powers as mortgagee under the *Transfer of Land Act 1893* (WA) and the following registered mortgages respectively:

* 1. Registered mortgage L455891;
  2. Registered mortgage L445924;
  3. Registered mortgage L506780; and
  4. Registered mortgage L506786,

(collectively the **Mortgages**).

1. On the vesting of each of the Properties in the applicant pursuant to s 133(9) of the *Bankruptcy Act* the applicant:
   1. may, but is not bound to, deal with each of the Properties as if it were exercising its powers as mortgagee in possession under the *Transfer of Land Act* and each of the respective Mortgages, including exercising the right to sell the estate in fee simple of each of the Properties in exercise of its power of sale and all its other respective rights under each of the Mortgages;
   2. for the purpose of selling the estate in fee simple of each of the Properties in the exercise of its power of sale, is not required to serve:
      1. a notice of default or demand whether under s 88 of the *National Credit Code*, being Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth) or otherwise; and
      2. a notice pursuant to s 106 of the *Transfer of Land Act*;
   3. is entitled to calculate the entirety of each of the debts secured and owing pursuant to each of the Mortgages as including all monies that would have been secured respectively by each of the Mortgages had the Trustee in Bankruptcy of the bankrupt estate of Ms Mellisa Jane Arbidans not disclaimed the Properties, and to deduct and retain for its own absolute use and property such amount from any respective proceeds of sale of the Properties as if it were money secured by the respective mortgage (including the costs of this application and all costs properly incurred in selling, and incidental to the respective sale of each of the Properties);
   4. must apply the respective proceeds of sale from each of the Properties as follows:
      1. first, in payment of any statutory charges affecting the associated property, which the relevant statute provides are payable in priority to the applicant;
      2. secondly, in payment of all costs, charges and expenses properly incurred by the applicant as incidental to the sale, or any attempted sale, or otherwise of the associated property;
      3. thirdly, to the extent that the proceeds of sale arise from each of the respective Properties, in discharge of the debt owed to the applicant by Ms Mellisa Jane Arbidans as secured by each of the respective Mortgages;
      4. fourthly, in payment of any subsequent mortgages (if any);
   5. must, after any sale of the Properties provide an account of its payments and receipts to:
      1. the Trustee in Bankruptcy of the bankrupt estate of Ms Mellisa Jane Arbidans;
      2. Ms Mellisa Jane Arbidans;
      3. the Registrar of the Court; and
      4. the respondents;
   6. must pay into the Court in this proceeding, the surplus (if any) arising from the sale of the Properties.
2. There is no order as to costs against either of the respondents.

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

REASONS FOR JUDGMENT

JACKSON J:

1. In this application, Commonwealth Bank of Australia Ltd seeks orders in relation to the vesting of real property which has been disclaimed by the trustee in bankruptcy of Mellisa Jane Arbidans. The respondents are the State of Western Australia and the Western Australian Registrar of Titles. They do not oppose the application. For the following reasons, the orders sought will be made.

## Background

1. Ms Arbidans is the registered proprietor of four parcels of land, one in each of South Hedland and Mount Tarcoola, and two in Waroona. All of those localities are in Western Australia.
2. In September 2010 the bank and Ms Arbidans entered into an agreement for her to borrow money. In October 2010 the bank advanced $465,000 under that loan agreement and a loan account was created. Ms Arbidans' repayment obligations under the agreement were secured by mortgages over the South Hedland and Mount Tarcoola properties. These were executed and registered with the Western Australian land titles office, Landgate, in October 2010.
3. In December 2010, mortgages over the two properties in Waroona were executed in favour of the bank. It is not clear why; there is no evidence, for example, linking the giving of those mortgages to some variation in the loan agreement I have just mentioned. But nothing turns on that. Each of the mortgages over the four properties that are the subject of this proceeding were 'all monies' mortgages, so the two mortgages over the Waroona properties secured repayment of money borrowed under that loan agreement.
4. In June 2012 the bank and Ms Arbidans entered into another agreement for her to borrow money. The total amount agreed to be lent was $838,000. Three loan accounts were created in relation to this loan agreement, one of which is not the subject of this proceeding. A total of $623,000 was advanced via the other two accounts. Ms Arbidans' repayment obligations under the second agreement were secured by mortgages over all four properties, as well as a fifth property in Girrawheen, Western Australia. In May 2013 the second agreement was varied so that the mortgage over the Girrawheen property was released; the bank does not seek any order in relation to that property in this proceeding.
5. On 22 January 2019 Ms Arbidans presented a debtor's petition for bankruptcy. Paul Nogueira of Worrells was appointed her trustee in bankruptcy. Mr Nogueira did not register the transmission of the properties to him under s 234 of the *Transfer of Land Act 1893* (WA) (***TLA***), so Ms Arbidans remained registered proprietor and his interest in the properties was equitable only: see *Bankruptcy Act 1966* (Cth) s 58(2).
6. Also in January 2019, repayments on two of the loan accounts ceased, and in February 2019 the last repayment was made in relation to a third loan account. As at 10 August 2020, those three loan accounts were in arrears by approximately $91,030. The remaining (fourth) account is not relevant to this proceeding.
7. On 6 March 2019 Mr Nogueira purported to serve notices of disclaimer of each of the four properties in South Hedland, Mount Tarcoola and Waroona, on the basis that they were burdened with onerous covenants. I say 'purported to serve' because he did not comply with one of the requirements for service until 30 September 2019. I will describe that further below when I come to consider the effectiveness of the notices.
8. The bankruptcy is undischarged. As at 10 August 2020, Ms Arbidans owed the bank approximately $996,826, with interest, fees and costs continuing to accrue.

## Remedy sought

1. The bank now wishes to enforce its mortgages over the four subject properties in order to seek to recover the amounts owing to it. As will be explained shortly, it seeks orders of the court under s 133(9) of the *Bankruptcy Act* in order to be able to do so. If made, the orders will vest each of the properties in the bank, and will authorise it to sell the properties as if it were acting as mortgagee in possession.
2. The orders will require the bank to apply the proceeds of any sale: first, in payment of any statutory charges which have priority; second, in payment of the banks' costs, charges and expenses properly incurred as incidental to the sales or any attempted sales of the properties; third in discharge of Ms Arbidans' debt to the bank; and fourth in payment of any subsequent mortgages (in fact there are none). The bank will be required to give an account of its payments and receipts to interested persons including Ms Arbidans, Mr Nogueira, the court and the respondents, and to pay any surplus proceeds into court.

## Principles

1. The bank needs those orders because the effect of the disclaimer of the properties by the trustee in bankruptcy is that the fee simple escheats to the Crown in the right of the State. This occurs in respect of both the legal title which Ms Arbidans had as registered proprietor and the equitable interest that Mr Nogueira had as trustee in bankruptcy: *Australia and New Zealand Banking Group Limited v State of Queensland, in the matter of McFarlane (a Bankrupt)* [2017] FCA 696 at [17] (Derrington J) (***McFarlane***). As a result, the bank's rights against Ms Arbidans, the registered proprietor who granted the mortgages over the properties, no longer allow it to enforce the mortgages over the land, and (subject to an argument I will mention briefly below) it has no right to enforce the mortgages against the State: *National Australia Bank Limited v State of New South Wales* [2014] FCA 298 at [9] (Perram J) (***NAB v NSW***). So the bank seeks the intervention of the court under s 133 of the *Bankruptcy Act*.
2. Section 133 relevantly provides:

**133 Disclaimer of onerous property**

(1AA) Where any part of the property of the bankrupt consists of:

(a) land of any tenure burdened with onerous covenants; or

(b) property (including land) that is unsaleable or is not readily saleable;

subsection (1) applies.

…

(1) Subject to this section, the trustee may, notwithstanding that he or she has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation to it and notwithstanding, in the case of property the transfer of which is required by a law of the Commonwealth or of a State or Territory of the Commonwealth to be registered, that he or she has not become the registered owner of that property, by writing signed by him or her, at any time disclaim the property.

…

(2) A disclaimer under subsection (1) or (1A) operates to determine forthwith the rights, interests and liabilities of the bankrupt and his or her property in or in respect of the property disclaimed, and discharges the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him or her, but does not, except so far as is necessary for the purpose of releasing the bankrupt and his or her property and the trustee from liability, affect the rights or liabilities of any other person.

(3) If a trustee disclaims property whose transfer must be registered under a law of the Commonwealth or of a State or Territory of the Commonwealth, the trustee must give notice of the disclaimer as soon as practicable to the officer who has the function of registering the transfer.

…

(9) The Court may, on application by a person either claiming an interest in, or being under a liability not discharged by this Act in respect of, disclaimed property, and after hearing such persons as it thinks fit, make an order, on such terms as the Court considers just and equitable, for the vesting of the property in, or delivery of the property to, a person entitled to it or a person in whom, or to whom, it seems to the Court to be just and equitable that it should be vested or delivered, or a trustee for that person.

(10) Subject to subsection (11), where an order vesting property in a person is made under subsection (9), the property to which it relates vests forthwith in the person named in the order for that purpose without any conveyance, transfer or assignment.

(11) Where:

(a) the property to which such an order relates is property the transfer of which is required by a law of the Commonwealth or of a State or Territory of the Commonwealth to be registered; and

(b) that law enables the registration of such an order;

the property, notwithstanding that it vests in equity in the person named in the order, does not vest in that person at law until the requirements of that law have been complied with.

…

1. A disclaimer under s 133(1) is effective to determine both the legal title and equitable rights of the bankrupt, and the equitable title of the trustee in bankruptcy in the property where, as here, the trustee's title was never registered: *ING Bank (Australia) Limited v State of Queensland, in the matter of Watson* [2017] FCA 411 at [17]‑[20] (Derrington J) (***Watson***). It is now considered orthodox that despite the apparent extinguishment of the rights of the registered proprietor which occurs under s 133(2), the fee simple which is subject to the mortgage continues to exist and the rights of the mortgagee continue to have sufficient existence to ground an application for a vesting order under s 133(9): *NAB v NSW* at [8]‑[9]; *McFarlane* at [18]‑[19]; *Watson* at [23]‑[26]; *St George - A Division of Westpac Banking Corporation v State of Western Australia* [2020] FCA 397 at [22] (Banks‑Smith J) (***St George v WA***). A mortgagee such as the bank here is 'a person claiming an interest in … disclaimed property' within the meaning of s 133(9): *McFarlane* at [20]; *Watson* at [28]. On an application by such a person for vesting of the property, the court must be satisfied, after hearing such persons as it thinks fit, that the person is entitled to the vesting of the property, or that it is just and equitable that the property should be vested in the person (or a trustee for the person): s 133(9)

## Who should be heard?

1. As I have said, the respondents are the State and the Registrar of Titles. The State has filed brief written submissions which say that it makes no submission about the application, other than one point about the disposition of any excess proceeds of sale which I will deal with below. No submissions were filed expressly on behalf of the Registrar, but since the State Solicitor's Office represented both respondents it can be inferred that the Registrar takes the same position as the State.
2. Ms Arbidans is not a respondent and she does not need to be, since her interest in the property vested in Mr Nogueira when she became a bankrupt (*Bankruptcy Act* s 58(1)(a)), albeit only her interest in equity (s 58(2)). If effective (see below) the disclaimers determine forthwith her rights, interests and liabilities and her property in the subject land: s 133(2). Mr Nogueira could conceivably be entitled to be heard, save that he has, of course, disclaimed the property. In any event, he has indicated that he does not wish to be joined as a party. Applications of this kind are frequently determined without the bankrupt or the trustee in bankruptcy being joined as parties: e.g., *McFarlane*; *Watson*.
3. Other than the bank's mortgages, some utility easements and Registrar's caveats (which appear to notify the disclaimers), there is no interest registered on the title for any of the properties. The evidence does not disclose any other persons who have an interest in being heard.

## Were the disclaimers effective?

1. On or about 6 March 2019, Mr Nogueira executed a 'Disclaimer of Onerous Property' stating that pursuant to s 133 of the *Bankruptcy Act* and as trustee of Ms Arbidans' bankrupt estate he disclaimed each of the subject properties, describing them as property that was burdened with onerous covenants. Land which is subject to the enforcement of financial obligations against it is burdened with onerous covenants within the meaning of the section, so the description was correct: see *McFarlane* at [15]; *Watson* at [15]. It appears from the evidence that the original notice of 6 March 2019 had been given to the bank at around that date.
2. I have, however, adverted to an issue about service: it is that Mr Nogueira initially served the notice on the Titles Registry Office of Queensland. That was, of course, not 'the officer who has the function of registering the transfer' of any of the properties who was required to be notified under s 133(3), as the properties are in Western Australia. It appears that the mistake was discovered around 30 September 2019, because on that date Mr Nogueira executed an identical notice and served it on Landgate. Section 133(2) determines the rights, interests and liabilities of the bankrupt in the disclaimed property and discharging the liability of the trustee 'forthwith'. It has been held consistently with this that registration of the disclaimer on the title is not necessary for it to be effective: *Commonwealth Bank of Australia v State of Queensland* [2019] FCA 1362 at [4] (Logan J).
3. In any event nothing turns on it, as the disclaimer was effective in respect of each property by 1 October 2019 at the latest. On that day Registrar's caveats were lodged on each title, which can be inferred to contain notice of the disclaimer served on Landgate the day before.

## Is it just and equitable that the properties should be vested in the bank?

1. Ms Arbidans owes the bank nearly $1 million. The bank had effective first ranking securities over the four subject properties to secure that indebtedness. Ms Arbidans is a bankrupt so unless the bank can enforce those securities it is unlikely that it will be able to recover the debt.
2. It is arguable that despite all that is said above, the bank is still entitled to enforce the mortgages against the land: see *Watson* at [30], citing *Re Middle Harbour Investments Ltd (in liq) (No 2)* [1977] 2 NSWLR 652. But in view of the uncertainty about that, it is just and equitable to make the vesting orders anyway, subject to appropriate conditions, to remove any doubt about the bank's power to enforce the securities: *Watson* at [31].

## Terms on which vesting is to occur

1. The court may make the vesting order on such terms as it considers just and equitable: s 133(9). The bank proposes orders authorising but not requiring it to deal with the properties as if it were exercising its powers as mortgagee in possession under the *TLA*, including a power of sale. The orders would exempt the bank from serving notices of default under the *National Credit Code* (being Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth)) or s 106 of the *TLA*. That is appropriate, as such notices would be redundant here.
2. I have summarised the other terms of the proposed orders above. They are also appropriate as they will mean that all interested parties will receive an account of the bank's payments and receipts, and that any surplus proceeds after paying out the bank will be paid into court so that they can then be disbursed to Mr Nogueira or otherwise as appropriate. The issue raised in the State's written submissions which I have mentioned above is that in other cases of this kind, any surplus proceeds have been ordered to be paid to the trustee in bankruptcy or, if there is no trustee appointed at the relevant time, to the State. The State acknowledges that there are other cases, however, where any surplus proceeds have been ordered to be paid into court, as is proposed here. The State accepts that it is open to the court to make such orders here.
3. In *St George v WA*, where it appears the issue was contested more vigorously than it is here, Banks‑Smith J held (at [28]‑[29]) that it was appropriate to pay any surplus proceeds into court. Her Honour reasoned that since the trustee in bankruptcy, who was best placed to assess the question, had disclaimed the properties, the question of what to do with surplus proceeds was likely to be academic. But if the proceeds were paid into court the question of their disposal could be fully ventilated and the trustee in bankruptcy could decide whether it was worthwhile to participate in that, including from a costs point of view. In my view, the same reasoning applies here, and in light of the respective attitudes of the bank and the State, orders as proposed by the bank (with minor edits) should be made.

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| I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson. |

Associate:

Dated: 20 October 2020