FEDERAL COURT OF AUSTRALIA

Rahman v Lombe [2018] FCA 457

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| Appeal from: | *Lombe (Trustee) in the matter of Rahman (Bankrupt)* [2017] FCCA 750 |
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| File number: | NSD 691 of 2017 |
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| Judge: | **GLEESON J** |
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| Date of judgment: | 5 April 2018 |
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| Catchwords: | **BANKRUPTCY & INSOLVENCY** – whether to grant leave to appeal – whether Federal Circuit Court of Australia judgment attended by sufficient doubt as to warrant its reconsideration – leave to appeal denied, appeal dismissed |
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| Legislation: | *Constitution* s 77(iii)  *Bankruptcy Act 1966* (Cth) s 146  *Federal Court of Australia Act 1976* (Cth) ss 24, 24(1A)  *Supreme Court Act 1970* (NSW) |
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| Cases cited: | *Avetmiss Easy Pty Ltd v Australian Skills Qualifications Authority* [2014] FCA 507  *Barnet (Trustee), in the matter of Zhang (Bankrupt) v Zhang* [2017] FCA 924  *Decor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 844; (1991) 33 FCR 397  *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2011] FCAFC 89; (2011) 281 ALR 38  *Rickus v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2010] FCAFC 16; (2010) 265 ALR 112  *Roufeil (Trustee), in the matter of Jarvie (Bankrupt)* [2015] FCA 232  *Sampson (Trustee), in the matter of Condon (Bankrupt)* [2016] FCA 312  *Sekigawa v Minister for Immigration and Border Protection* [2016] FCA 127 |
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| Date of hearing: | 15 March 2018 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | General and Personal Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 25 |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondent: | Mr S Golledge |
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| Solicitor for the Respondent: | HWL Ebsworth Lawyers |

ORDERS

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|  | | NSD 691 of 2017 |
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| BETWEEN: | MOHAMMAD TABIBAR RAHMAN  Appellant | |
| AND: | DAVID JOHN FRANK LOMBE  Respondent | |

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| JUDGE: | GLEESON J |
| DATE OF ORDER: | 5 APRIL 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.

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

REASONS FOR JUDGMENT

GLEESON J:

1. The appellant (“Mr Rahman”) appeals from a judgment of the Federal Circuit Court of Australia (“FCCA”) delivered on 20 April 2017: *Lombe (Trustee) in the matter of Rahman (Bankrupt)* [2017] FCCA 750. On that occasion, the FCCA judge made the following orders:

(1) The application by Mr Rahman that I recuse myself from hearing this matter be refused.

(2) Pursuant to s.146 of the *Bankruptcy Act 1966* (Cth) the Applicant, as Trustee of the bankrupt estate of Mohammad Tabibar Rahman (the Bankrupt), distribute a dividend to those creditors who have proved their debts in the bankrupt estate of the Bankrupt in accordance with Division 5 of Part VI of the Act as if the Bankrupt had filed a statement of affairs and those creditors had been stated to be creditors in it.

(3) The interim application by Mr Rahman filed on 30 December 2016 be dismissed.

(4) The Trustee’s costs of and incidental to this application are to be paid out of the Bankrupt’s estate in accordance with s.109 of the *Bankruptcy Act 1966* (Cth).

1. The respondent (“Mr Lombe”) is the trustee in bankruptcy of Mr Rahman’s bankrupt estate.
2. Mr Lombe filed a notice of objection to competency of the appeal out of time. The grounds of the notice are:

1. The Appellant:

(a) was not a party to the proceedings at first instance;

(b) was not affected by any of the orders made by the trial judge

so that the appeal is incompetent unless the Appellant seeks and is granted leave to appeal. If such an application is made, the Respondent will oppose the grant of leave.

1. The purpose of the rules providing for notice of objection to competency is to minimise the expenditure of resources on incompetent appeals. In the circumstances of this matter, I do not consider that any useful purpose will be served by dealing with the notice at the same time as the appeal. Accordingly, I have disregarded the notice except to note that it put Mr Rahman on notice of Mr Lombe’s contention that he requires leave to appeal.

# Background facts

1. Mr Rahman was made bankrupt by an order of the Federal Magistrate Court of Australia (“FMCA”) on 19 July 2012: *Dubs v Rahman* [2012] FMCA 664. An appeal against the sequestration order was dismissed: *Rahman v Dubs (No 2)* [2012] FCA 1081. An application for special leave to appeal to the High Court of Australia from the judgment of this Court was dismissed: *Rahman v Dubs* [2013] HCASL 23. In dismissing the application for special leave to appeal, Kiefel and Gageler JJ said, relevantly:

3. On 5 October 2012, the Federal Court of Australia (Flick J) dismissed an appeal from the sequestration order. His Honour reviewed the reasons of Raphael FM, because the applicant's grounds of appeal were difficult to comprehend, but found no appealable error in them. His Honour held that Raphael FM was under no duty not to proceed because the applicant had given a notice under s 78B of the *Judiciary Act* 1903 (Cth), since the notice failed to identify any constitutional matter. The applicant's assertion that it was not competent for the Commonwealth Parliament to enact the *Bankruptcy Act* 1966 (Cth) or make provision for bankruptcy notices and sequestration orders lacked foundation. Claims of fraud and criminal acts did not advance the applicant's appeal and were, in any event, without merit.

4. There is no reason to doubt the correctness of the decision of the Federal Court. An appeal to this Court would enjoy no prospects of success. Special leave is refused.

# Does Mr Rahman require leave to appeal?

1. Mr Lombe submitted that Mr Rahman requires leave to prosecute the appeal for the following two reasons:
2. insofar as the notice of appeal seeks to challenge the decision of the FCCA judge on the recusal application, that was an interlocutory judgment and no appeal from such judgment lies to this Court unless “the Court or a Judge gives leave to appeal”; and
3. the appellant was not a party to the proceeding below although he participated at the final hearing of the FCCA to a limited extent (having departed before the s 146 application was considered.
4. Mr Rahman’s notice of appeal asserts a right of appeal under s 24 of the *Federal Court of Australia Act 1976* (Cth). His written submissions were difficult to follow but I did not detect any attempt to engage with Mr Lombe’s contention that leave to appeal was required. In oral submissions, Mr Rahman firmly rejected the possibility that he may require leave to appeal.
5. As to Mr Lombe’s first reason, by s 24(1A) of the Federal Court Act, an appeal “shall not be brought from a judgment … that is an interlocutory judgment unless the Court or a Judge gives leave to appeal”. An interlocutory judgment is one which does not decide the merits of the underlying dispute: *Avetmiss Easy Pty Ltd v Australian Skills Qualifications Authority* [2014] FCA 507 at [4]. I accept that the FCCA judgment is an interlocutory judgment to the extent that it concerns Mr Rahman’s recusal application. Accordingly, I accept Mr Lombe’s contention that Mr Rahman requires leave to appeal from that part of the judgment.
6. As to (2), in *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* [2011] FCAFC 89; (2011) 281 ALR 38 at [32] and [33] (“*Fortress Credit*”), the Full Court said:

[32] A person who was not a party to a cause can obtain leave to appeal from orders made in the cause. A person who, without being a party, is either bound by an order, or is aggrieved by it, or is prejudicially affected by it, or is sufficiently interested in it can appeal, but only with leave. It does not require much for such a person to obtain leave (see *In re Securities Insurance Co* [1894] 2 Ch 410 at 413–414). Leave to appeal is given, as a rule, if the person applying, though not a party to the proceeding, might properly have been made a party (see *Cuthbertson v Hobart Corporation* (1921) 30 CLR 16 at 25).

[33] For example, leave to appeal may be given to a person who had not been heard and who was a potential beneficiary under a will (*Re Markham; Markham v Markham* (1880) 16 Ch D 1). Further, the recipient of a subpoena, being subject to a court order, has standing to apply for leave to appeal against a trial judge’s refusal of a request for pseudonym orders, and such a refusal is an order against which an appeal can be brought (see *Witness v Marsden* (2000) 49 NSWLR 429; *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at [62]). The witness has a direct interest in the matter sought to be challenged.

1. On behalf of Mr Lombe, it was submitted that Mr Rahman was neither a necessary nor a proper party to the application for orders under s 146 of the *Bankruptcy Act 1966* (Cth).
2. Section 146 provides:

Where a bankrupt has failed to file a statement of his or her affairs as required by this Act, the Court may, on the application of the trustee, upon such terms as it thinks fit, order that distribution of dividends amongst the creditors who have proved their debts shall proceed in accordance with this Division as if the bankrupt had filed a statement of his or her affairs and those creditors had been stated to be creditors in it.

1. There is no requirement under the Bankruptcy Act that the bankrupt be named as a respondent to an application under s 146: *Roufeil (Trustee), in the matter of Jarvie (Bankrupt)* [2015] FCA 232 at [12]; *Sampson (Trustee), in the matter of Condon (Bankrupt)* [2016] FCA 312 at [12]; *Barnet (Trustee), in the matter of Zhang (Bankrupt) v Zhang* [2017] FCA 924 at [28].
2. Mr Lombe did not submit that a bankrupt will never be a proper party to a s 146 application. However, he submitted that Mr Rahman was not a proper party in circumstances where there is no dispute that Mr Rahman did not file a statement of affairs. Mr Lombe submitted that an order under s 146 merely facilitates the due administration of the bankrupt estate in the absence of a statement of affairs, but does not affect the substantive rights of the creditors or of the bankrupt.
3. Having regard to *Fortress Credit,* I accept Mr Lombe’s contention that Mr Rahman requires leave to appeal from order 2.
4. Mr Lombe’s submissions did not separately address the other orders made by the FCCA judge. Order 3 amounts to a summary dismissal of Mr Rahman’s “Interim application, notice of filing and hearing”. It is plain from [89] of the FCCA judge’s reasons that her Honour did not deal with the substance of the application. Order 3 is therefore an interlocutory judgement from which leave to appeal is required. Order 4, dealing with the question of costs, is also an interlocutory judgment from which leave to appeal is required: see *Rickus v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2010] FCAFC 16; (2010) 265 ALR 112 at [101].

# Should leave to appeal be granted?

1. Leave to appeal will not be granted where a decision is attended by insufficient doubt to warrant its reconsideration: *Decor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 844; (1991) 33 FCR 397 at 398-399; *Sekigawa v Minister for Immigration and Border Protection* [2016] FCA 127 at [12].
2. Counsel for Mr Lombe, Mr Golledge, accepted that Mr Rahman’s submissions could be treated as submissions in support of an order for leave to appeal.
3. Mr Rahman filed written submissions which were largely unintelligible. As I understand them, these submissions may be summarised as follows:
4. the Commonwealth lacks legislative power to vest Federal courts with jurisdiction over bankruptcy;
5. all decisions of Federal Court judges in relation to bankruptcy are in turn “wrong and nullity [sic] and must be annulled”, being made in excess of jurisdiction contrary to s 77(iii) of the Constitution and the “States Court Act” (presumably meaning the *Supreme Court Act 1970* (NSW));
6. in turn, the sequestration order made against his estate in *Dubs v Rahman* [2012] FMCA 664, upheld on appeal in *Rahman v Dubs (No 2)* [2012] FCA 1081 (special leave application dismissed in *Rahman v Dubs* [2013] HCASL 23), is invalid; and
7. the FCCA judge in *Lombe (Trustee) in the matter of Rahman (Bankrupt)* [2017] FCCA 750 therefore erred in making the orders subject of the present appeal both as her Honour lacked jurisdiction and as Mr Rahman is not a bankrupt.
8. Orally, Mr Rahman made rambling submissions which were largely incoherent. As far as I could understand them, Mr Rahman’s oral submissions included the following main contentions, none of which identify any particular error in the FCCA judge’s judgment:
9. he is not bankrupt;
10. the judges of the Federal courts who have purported to exercise bankruptcy jurisdiction against him have acted in excess of jurisdiction by exercising State jurisdiction contrary to s 77(iii) of the Constitution; and
11. Mr Lombe is not validly appointed as Mr Rahman’s trustee in bankruptcy.
12. Mr Rahman’s submissions were heartfelt and included serious allegations of misconduct against Mr Lombe, Mr Golledge and various judges. Mr Rahman plainly considers that he has been mistreated by the course of events that has followed upon the making of a sequestration order against his estate.
13. However, I am satisfied that there is no merit in Mr Rahman’s case.
14. Mr Rahman is plainly bankrupt and the documents before me demonstrate that Mr Lombe is Mr Rahman’s trustee in bankruptcy.
15. There is no reason to doubt the FCCA’s jurisdiction to make the orders against which Mr Rahman wishes to appeal. None of the matters raised by Mr Rahman raise any doubt about the correctness of those orders.
16. In particular, s 77(iii) of the Constitution has nothing to do with the jurisdiction of Federal courts. Rather, it confers power upon the Commonwealth Parliament to make laws investing State courts with federal jurisdiction. The *Supreme Court Act 1970* (NSW) likewise does not affect the FCCA’s jurisdiction in this case.
17. In those circumstances, Mr Rahman is not entitled to leave to appeal. Accordingly, the appeal is dismissed.

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

Associate:

Dated: 5 April 2018