FEDERAL COURT OF AUSTRALIA

Central Coast Council v Armstrong [2019] FCA 1613

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| File number: | TAD 44 of 2018 |
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| Judge: | **KERR J** |
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| Date of judgment: | 27 September 2019 |
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| Legislation: | *Bankruptcy Act 1966* (Cth) s 133(9)  *Local Government Act 1993* (Tas) Div 11, s 137 |
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| Cases cited: | *National Australian Bank Ltd v New South Wales* [2009] FCA 1066; 182 FCR 52 |
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| Date of hearing: | 2 August 2019 and 20 September 2019 |
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| Date of last submissions: | 26 August 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
|  |  |
| Category: | No Catchwords |
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| Number of paragraphs: | 35 |
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| Counsel for the Applicant: | Mr O’Rafferty |
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| Solicitor for the Applicant: | Mr G Williams of Glynn Williams Barrister and Solicitor |
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| Counsel for the First Respondents: | Brian George Armstrong appeared in person |
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| Counsel for the Second Respondents: | The Second Respondents did not appear |
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| Counsel for the Third Respondent: | The Third Respondent filed a submitting notice |

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| **Table of Corrections** |  |
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| 1 October 2019 | In Declaration 1, the word “proceedings” has been replaced with “proceeding”. |

ORDERS

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|  | | TAD 44 of 2018 |
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| BETWEEN: | CENTRAL COAST COUNCIL  Applicant | |
| AND: | BRIAN GEORGE ARMSTRONG AND SHEREE NICOLE ARMSTRONG  First Respondents  ANDREW REGINALD YEO AND GESS MICHAEL RAMBALDI  Second Respondents  STATE OF TASMANIA  Third Respondent | |

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| JUDGE: | KERR J |
| DATE OF ORDER: | 27 SEPTEMBER 2019 |

THE COURT ORDERS THAT:

1. Pursuant to s 133(9) of the *Bankruptcy Act 1966* (Cth), the property at 4 Turners Beach Road, Turners Beach in Tasmania as is more particularly described in Certificate of Title Volume 8179 Folio 1 vest in the Central Coast Council for the purposes of sale by the Central Coast Council of the property for unpaid rates and otherwise in accordance with the provisions of s 137 of the *Local Government Act* *1993* (Tas).
2. Any money received on the sale of that land is to be applied by the Central Coast Council as follows:
   1. firstly – in paying the costs of the sale and any other costs incurred in proceeding under Division 11 of *the Local Government Act* *1993* (Tas);
   2. secondly – in discharging any liabilities to the Central Coast Council and the Crown in right of the State of Tasmania in respect of the land, the money, if it is insufficient to discharge the liabilities in full, being applied between the Council and the Crown in the same proportions as the respective liabilities bear to the total amount of the liabilities combined;
   3. thirdly – in discharging any liabilities secured by registered mortgages, encumbrances or charges;
   4. fourthly – in discharging any other mortgages, encumbrances and charges of which the Council has notice; and
   5. fifthly – in payment to the previous owners of the land.
3. The Central Coast Council serve, in accordance with these reasons, any caveator with an interest recorded on the title with a copy of these reasons and a copy of the Court’s orders within 14 days of the publication of these reasons.

**THE COURT DECLARES THAT:**

1. The Applicant’s cost of this application have been incurred by it in proceeding under Division 11 of the *Local Government Act 1993* (Tas).

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

REASONS FOR JUDGMENT

KERR J:

1. By an originating application dated 16 October 2018 the Applicant, the Central Coast Council (**Council**) sought orders that:

1. Pursuant to Section 133(9) of the Bankruptcy Act that the property at 4 Turners each Road, Turners Beach in Tasmania and as more particularly described in Certificate of Title Volume 8179 Folio 1 do vest in the Applicant for the purposes of sale by the Applicant of the property for unpaid rates and otherwise in accordance with the provisions of the Local Government Act (Tas) 1993.

2. Such further or other order as the Court deems fit.

1. Brian George Armstrong and Sheree Nicole Armstrong are named in that application as the First Respondents. Andrew Reginald Yeo and Gess Michael Rambaldi are named as the Second Respondents.
2. I am satisfied by the affidavit of Mr Shane Marshall, assistant bailiff, sworn 10 December 2018 that the Council’s application was served on Ms Armstrong on 6 December 2018. She has elected to take no part in these proceedings.
3. Brian George Armstrong was also served. He entered an address for service and has taken part in these proceedings.
4. The Council’s application was supported by an affidavit of William Hutcheson sworn on 16 October 2018. In his affidavit Mr Hutcheson deposes that he is employed by the Applicant with oversight and management responsibilities for the collection of rates levied against properties. He deposes that the Council is seeking a “vesting order in a property disclaimed in a bankruptcy by the Trustees so that the land can be sold to recover unpaid rates”.
5. He deposes that the First Respondents had at all material times been the registered proprietors of the property at 4 Turners Beach Road, Turners Beach in Tasmania (**the Property**), on which a petrol station which had fallen into disrepair had formerly operated.
6. He deposes:

The last occasion on which rates were paid on the property in full was for the financial year 2008-2009. Annexure "WH3" to this affidavit shows a history of rate payment and non-payment since the First Respondents became owners of the property. This indicates that from 2008 the collection of rates was referred to TCS, Tasmanian Collection Services, a debt collection agency retained by the Council. The last payment against rates was on the 19th April 2013, an amount of $17.99 with annual rates there since all unpaid. As at the date of this affidavit the rate amount owing is $30,140.36

1. Exhibited to Mr Hutcheson’s affidavit is correspondence dated 30 April 2018 sent by Mr Andrew Reginald Yeo of Pitcher Partners to the Department of Primary Industries, Parks, Water and Environment of the sate of Tasmania. Mr Yeo’s e-mail, as exhibited, advises that Brian George Armstrong, born 26 August 1973, became bankrupt on 3 November 2016 and Sheree Nicole Armstrong, born 5 April 1976, became bankrupt on 1 September 2016.
2. Both had been made bankrupt pursuant to sequestration orders made in the Federal Circuit Court of Australia.
3. Mr Yeo advised in that correspondence that he and Gess Michael Rambaldi had been appointed trustees of the bankrupts’ estates. Mr Yeo’s correspondence annexed certified copies of his and Mr Rambaldi’s Certificates of Appointment. The annexed copies reveal they were jointly appointed as trustees of Brian George Armstrong’s estate on 3 November 2016 and of Sheree Nicole Armstrong’s estate on 1 September 2016.
4. Mr Yeo’s e-mail further advises:

As discussed, my investigations to date indicate there appears to be minimal equity in the property located at 4 Turners Beach Road, Turners Beach, Tasmania 7315 (the property), more particularly described in the Certificate of Title Volume Number 8179, Folio Number 1. Enclosed is the Title Search for your reference. Given there is minimal equity at this stage, I do not intend to deal with the property.

Pursuant to s.133 of the Bankruptcy Act 1966 (BA), a trustee can disclaim property which is not cost effective to deal with or pursue. I have considered material provided to me by various parties and taken into account the value of the property, monies owed to the secured creditor and other factors regarding the bankrupt estates' interest in the property, and have determined it will not be cost effective for me to deal with the property. Given these factors, I have disclaimed the property on commercial grounds.

I provide notice to you of this disclaimer pursuant to section 133 (3) of the [*Bankruptcy Act* 1996 (Cth)].

1. I am satisfied that although they have not been formally served, the Trustees have been provided with notice of these proceedings and do not oppose the Council’s application: see Annexure A to the Affidavit of Glynn Williams sworn 7 March 2019.
2. I proceed on the basis that legal position is that upon the sequestration of their respective estates, the respective interests of Brian George Armstrong and Sheree Nicole Armstrong in the Property, by operation of law, automatically vested in their respective trustees in bankruptcy. Their sequestrations having occurred on different dates the first event severed their former joint interest in the Property. Their respective trustees (notwithstanding their common identity in the present case) accordingly acquired their former interest(s) in the Property as a tenant in common with the other in equal shares.
3. Upon their trustees’ respective disclaimer of those vested interests, the bankrupts’ former but now severed estates escheated to the Crown in right of the State of Tasmania in fee simple but subject to the provisions of the *Bankruptcy Act 1966* (Cth) (the **Bankruptcy Act**).
4. Having regard to the operation of the Bankruptcy Act, it is only the interest of the bankrupt in any estate that goes out of existence in the escheat: *National Australian Bank Ltd v New South Wales* [2009] FCA 1066; 182 FCR 52 at [23], [27]-[29].
5. A circumstance where a third party has a charge over property prior to its escheat will entitle the Court to make orders pursuant to s 133(9) of the Bankruptcy Act on terms as it considers just and equitable for the vesting of the disclaimed property in a person in whom it seems to the Court to be just and equitable for it to be vested.
6. Because the bankrupts’ respective former estates in the Property had escheated to the Crown in right of Tasmania, I advised the parties appearing at the first directions hearing that the State of Tasmania was a necessary party to this proceeding.
7. On 2 August 2019 I ordered that:

1. The Applicant have leave to join the State of Tasmania as a Respondent to this proceeding.

2. The Applicant serve a copy of its originating application and a copy of these orders on the State of Tasmania no later than 4.00 pm on Friday 9 August 2019.

3. Any party wishing to make further submissions advise the associate to Justice Kerr by 4.00 pm on Friday 13 September 2019.

4. Subject to Order 5, the matter be relisted for 10.15 am on 20 September 2019.

5. If the State of Tasmania has filed only a submitting appearance and no party has advised that it wishes to make further submissions by 4.00 pm on Friday 13 September 2019, the relisted hearing of 20 September 2019 shall be vacated and the application heard and determined on the papers.

1. On 6 August 2019 the State of Tasmania filed a notice submitting to any order the Court might make and advising that it did not want to be heard on the question of costs.
2. The Council filed written submissions.
3. The matter was then relisted for hearing on 20 September 2019, Brian George Armstrong having advised that he wanted to make oral submissions.
4. When the matter came for hearing, Brian George Armstrong was self-represented. He made oral submissions. I intend no disrespect to him, but I did not take his submissions to go greatly to the substance of the matter before the Court. His submissions did not take issue with the fact of his bankruptcy, nor did he take issue with his having had rates outstanding in respect of the Property.
5. However, the bankrupt did assert that he could not be liable for those rates because there was no contract between him and the Council upon which he could have been held indebted.
6. That proposition is plainly untenable, rates being a statutory burden on the Property.
7. Brian George Armstrong’s other contentions were focussed not on the merits of the Council’s application but on his personal status. He asked that he not be identified by the Court as Mr Armstrong. He submitted that “Mr” was the lowest rank in the military and that he was not a member of the military. I need not accept the premise of that submission to do him the courtesy in these reasons of referring to him exclusively by his given and family names.
8. There was otherwise no opposition to the Council’s application.
9. In that regard I should however note that the certificate of title reveals a mortgage in favour of the Australian and New Zealand Banking Group (**ANZ**).
10. I am satisfied that ANZ has written the Council to advise (a) that the amount of indebtedness under the mortgage the caveat secures is $269,042.00 and (b) that ANZ waives any requirement for service on it the basis that, if the property becomes vested in it, the Council will sell the property reasonably promptly with due regard to ANZ’s interests as mortgage, including forwarding to it the residual proceeds of sale after deduction of the outstanding rates and Crown debts relating to the land (Annexure 6 and 18 to the Affidavit of Mr Hutcheson).
11. The certificate of title also reveals certain caveats. The caveators other than the trustees have not been served with any notice of this application. Any orders the Court makes therefore will need to take into account their potential interests.
12. As I have previously noted, a circumstance whereby a third party has a charge over property prior to its escheat remains afoot and will entitle the Court to make orders pursuant to s 133(9) of the Act on terms as it considers just and equitable for the vesting of the disclaimed property in a person in whom it seems to the Court to be just and equitable for it to be vested.
13. In the circumstances of the evidence before me I am satisfied that it is just and equitable that respective former interests of the bankrupts be vested in the Council. I am satisfied that prior to such vesting each was an interest as a tenant in common but on vesting those estates become re-joined such that the Council will receive the Property as sole proprietor.
14. I will order that pursuant to s 133(9) of the Bankruptcy Act that the property at 4 Turners Beach Road, Turners Beach in Tasmania and as more particularly described in Certificate of Title Volume 8179 Folio 1 vest in the Central Coast Council for the purposes of sale by the Central Coast Council of the property for unpaid rates and otherwise in accordance with the provisions of s 137 of the *Local Government Act* *1993* (Tas).
15. To secure the interests of those not made parties to this proceeding I will order, consistently with the provisions of s 139 of that Act, that any money received on the sale of land is to be applied by the Council as follows:
    1. firstly – in paying the costs of the sale and any other costs incurred in proceeding under Division 11 of *the Local Government Act* *1993* (Tas);
    2. secondly – in discharging any liabilities to the Central Coast Council and the Crown in right of the State of Tasmania in respect of the land, the money, if it is insufficient to discharge the liabilities in full, being applied between the Council and the Crown in the same proportions as the respective liabilities bear to the total amount of the liabilities combined;
    3. thirdly – in discharging any liabilities secured by registered mortgages, encumbrances or charges;
    4. fourthly – in discharging any other mortgages, encumbrances and charges of which the Council has notice; and
    5. fifthly – in payment to the previous owners of the land.
16. For the avoidance of doubt, I will also declare that the Applicant’s cost of this application have been incurred by it in proceeding under Division 11 of the *Local Government Act 1993* (Tas).
17. Having regard to the fact that there appear to be caveators with interests recorded on the title that have not been served, I would also order that the Central Coast Council serve a copy of my reasons and copy of the Court’s orders upon the respective caveators, which service may be by post if a postal address is known, or electronically by email if an electronic address is known, so that those persons may advance such claims as they may be entitled to having regard to the priorities set out above.

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| I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kerr. |

Associate:

Dated: 27 September 2019