FEDERAL COURT OF AUSTRALIA

Gomez v Carrafa (Trustee) (No 3) [2019] FCA 1793

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| Appeal from: | *Carrafa v Gomez* [2019] FCCA 1188  |
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| File number: | VID 399 of 2019 |
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| Judge: | **ANASTASSIOU J** |
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| Date of judgment: | 11 November 2019 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** -appeal against order of Federal Circuit Court to dispose of assets – appeal dismissed  |
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| Legislation: | *Commonwealth of Australia Constitution Act* *Judiciary Act 1903* (Cth)  |
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| Cases cited: | *Gomez v Carrafa (Trustee) (No 2)* [2019] FCA 1750 *Gomez, In the matter of an application for leave to issue or file* [2019] HCATrans 185 *Gomez v The Honourable Justice Moshinsky Federal Court of Australia & Ors* [2019] HCATrans 22 |
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| Date of hearing: | 28 October 2019 |
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| Registry: |  |
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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: | 18 |
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| Appearance for the Appellant: | The appellant appeared in person by Ms Selvi Gomez with leave |
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| Counsel for the Respondent: | Mr T. Sowden |
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| Solicitor for the Respondent: | Zervos Lawyers |

ORDERS

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|  | VID 399 of 2019 |
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| BETWEEN: | IRWIN GOMEZAppellant |
| AND: | MICHAEL CARRAFA AS THE TRUSTEE IN BANKRUPTCY FOR THE BANKRUPT ESTATE OF KALAISELVIRespondent |

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| JUDGE: | ANASTASSIOU J |
| DATE OF ORDER: | 11 november 2019 |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant pay the respondents costs of and incidental to the appeal.

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

REASONS FOR JUDGMENT

Anastassiou J:

1. The appellant, Mr Gomez, seeks to overturn orders made by the Federal Circuit Court concerning the bankruptcy of his wife, Ms Gomez. I allowed Ms Gomez to appear on Mr Gomez’s behalf in this appeal.
2. For the reasons that follow the appeal is dismissed.

## Background

1. On 24 October 2019 in *Gomez v Carrafa (Trustee) (No 2)* [2019] FCA 1750 (**Gomez No 2**) I set out the background of the present appeal as follows (at [2]-[7]):

On 21 August 2014 a sequestration order was made against Ms Gomez’s estate. The bankruptcy notice was served on Ms Gomez on 10 June 2014 and came into effect due to her non-compliance on 2 July 2014. Shortly before 2 July 2014 Ms Gomez transferred her interests in two pieces of real estate and a sum of money to Mr Gomez.

The Trustee applied to the Federal Circuit Court for declarations and consequential orders under the Bankruptcy Act 1966 (Cth) to set aside these and other transactions. The application was allowed. See Carrafa v Gomez & Anor (No 3) [2016] FCCA 3139 (**the Primary Judgment**).

Mr Gomez appealed. The appeal was dismissed by Justice Moshinsky in Gomez v Carrafa (Trustee) [2018] FCA 201 (**the First Appeal**).

Mr Gomez sought special leave in the High Court. Special leave was refused on 15 August 2018: Gomez v Carrafa & Anor [2018] HCASL 225.

On 23 October 2018, following the unsuccessful special leave application in respect of the First Appeal, the Trustee applied to the Federal Circuit Court for orders concerning the sale and realisation of the bankrupt’s interest in certain properties. On 5 April 2019 in Carrafa v Gomez [2019] FCCA 1188 the Circuit Court made orders concerning the sale of the properties (**the Enforcement Judgment**).

On 23 April 2019 Mr Gomez filed a notice of appeal against the Enforcement Judgment.

1. I adopt the above definitions in the balance of this appeal.
2. On 22 August 2019, in Gomez No 2 I denied the appellant leave to amend his notice of appeal.
3. In the period this protracted litigation has been on foot at least ten applications concerning the relief granted in the Primary Judgment or relevant to the First Appeal or dismissal of applications to the High Court have been made by Mr Gomez in the original and appellate jurisdictions of the High Court. See *Gomez, In the matter of an application for leave to issue or file* [2019] HCATrans 185. In dismissing the tenth application, Justice Edelman said (*Gomez, In the matter of an application for leave to issue or file* [2019] HCATrans 185):

For broadly the same reasons that I have given in matter M86 of 2019, there is no arguable basis to this application. The application is vexatious and an abuse of process. It should be dismissed without an oral hearing pursuant to r 13.03.1 of the *High Court Rules 2004* (Cth).

As the applicant recognised in his ninth application, persistent attempts to relitigate the same subject matter are capable of being characterised as vexatious. Under s 77RN of the *Judiciary Act 1903* (Cth), this court has the power, on its own initiative, to make a vexatious proceedings order. The point at which it should be considered whether to make such an order, and if so the terms of the order, has now well and truly been reached.

## Appeal grounds and submissions

1. The notice of appeal sets out the following grounds:

1. The 3rd respondent should not be allowed to possess and dispose of the applicant’s assets. This will render the remedy sought by the applicant’s application in the High court in the matter, for writ of mandamus against a judgment for jurisdictional errors, nugatory. The status quo cannot be reinstated if as a result of these jurisdictional errors, the lower court judgments are set aside in favour of the Applicant’s application.

2. The fact that in common law, when the status quo of the applicant cannot be maintained in the matter as a whole, in the event the applicant succeeds in the High Court proceedings was not taken into account.

3. Judge Burchardt’s decision was predominantly based on Justice Keane’s decision handed down on the 20th Feb 2019. The fact that a leave to appeal application has been filed in the High Court to appeal this interim decision of Justice Keane was not taken into account.

4. The Registrar’s decision to dismiss the application of constitutional matter filed in the matter.

5. Other consideration that have been put forward to Judge Burchardt have not been addressed:

a. The application of section 30a, 32 and 38e of the Judiciary Act, Section 75v of the commonwealth of Australia constitution; and

b. Interference in the proceedings of another court; and

c. Allowance of a vexatious proceedings by the respondent when complete relief is available in the High Court in the matter.

1. Following my dismissal of the amendment application, both parties filed submissions. The appellant’s submissions are as follows:

In contention to the Orders and Reasons of Judge Burchardt delivered on the 5th of April 2019 and to other relevant matters, the appellant relies on the following:

1. The respondent should not be permitted to take possession and disperse assets (in accordance with the Orders in the Matter MLG 3728 of 2018), given that there is no commitment by the High Court to endorse the decision handed down in the matter VID 1492 of 2018. There is an advertent attempt to avoid confirming “on the face of the record” that the judgement “is not handed down with sufficient doubt” or that there was “no reason to doubt [its] correctness”.

Just transfer or acquisition of property is enshrined in the Australian Constitution.

2. Section 51 of the Commonwealth of Australia Constitution Act specifies as follows:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

*(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.*

[emphasis in original]

3. The appellants have made many requests for a simple confirmation of the decision, yet the High Court has chosen to sidestep this, choosing to hide beneath the veil of “abuse of process” in an attempt to discharge the matter. It can only be assumed that the Court is trying to cover up grave jurisdictional errors that could potentially undermine the integrity of the judicial system if unearthed.

4. For instance, out of the many jurisdictional errors, the clearest error made in the judgement VID 1492 of 2018 related to an inclusion of a “hearsay” document into evidence. That is, a document that was predominantly used to formulate the judgement. This is a clear violation of Section 69. It is not acceptable that an appellate judge would be oblivious to this.

5. The omissions from the reasons clearly constitute as an “error of law on the face of the record”, and Certiorari should be issued to quash the decision, in the event the relevant Officer of the Commonwealth does not heed the gravity of the Mandamus.

6. It is no wonder that the High Court is not willing to confirm the correctness of the decision as they are fully cognisant that it is attended to with great doubt.

7. Ultimately it a question of how this is constitutionally justifiable, to allow jurisdictional errors to made, and take away someone’s property using an “abuse of process” discharge without properly attending to the issues in the matter according to law.

8. An application under Section 75(v) of the Constitution against an Officer of the Commonwealth for want of jurisdictional errors cannot be simply dismissed as “abuse of process” just because they do not have the capacity to deal with it.

How can any court deem the judgement to be fair and just when the applicant has been denied his Constitutional Right to the Rule of law?

9. As such the judgement has been left in a state of legal limbo.

1. The Trustee’s opposition to the appeal was set out in his submissions as follows:

1. The appellant seeks to set aside orders made by Judge Burchardt in which his Honour finally disposed of an earlier judgment of Judge Riley’s in *Carrafa v Gomez (No. 3)* [2016] FCCA 3139. The applicant appears to rely on proceedings brought in the High Court of Australia challenging Judge Riley’s decision on appeal to the Federal Court and in its original jurisdiction under section 75 of the Constitution as buttressing his grounds of appeal. He has previously sought a stay of Judge Burchardt’s orders in the High Court [citing *Gomez v Judge Burchardt* [2019] HCA Trans 116]. That proceeding was dismissed as an abuse of process. Her Honour Justice Gordon stated,

“This proceeding is yet a further attempt to relitigate the same issues which were concluded by this Court’s refusal to grant Mr Gomez special leave to appeal from the judgment of Moshinksy J”.

The applicant appealed Justice Gordon’s decision and on 11 September 2019 that appeal was summarily dismissed by Justice Nettle as were all extant appeals and proceedings brought by the applicant in the High Court challenging Judge Riley’s decision in *Carrafa v Gomez (No. 3)* [2016] FCCA 3139. All proceedings in the High Court having been dismissed the stated grounds for this appeal, such as they are, have fallen away.

2. The submissions filed by the applicant provide no basis for setting aside the orders of Judge Burchardt. Indeed the applicant appears to be more concerned with attacking the decision of the High Court in dismissing his application for leave to appeal the decision of Moshinski J. By this proceeding the applicant is once again seeking to reagitate matters that have now been well traversed and determined in the Federal Circuit Court, the Federal Court and the High Court. It is accordingly an abuse of process and ought to be summarily dismissed under r. 26 of the Federal Court Rules.

1. The appellant’s grounds of appeal and his written and oral submissions do not disclose any discernible basis in law for impugning the orders of the primary judge. Rather, his submissions appear to be directed to the appellant’s grievances concerning his various applications and appeals in the High Court. Given the evident lack of basis for the appeal in this Court I respectfully echo the observations of Justice Edelman referred to above.
2. The issues raised in this appeal may be summarised as follows:
3. Whether the Federal Circuit Court should make orders concerning a subject matter about which there were applications pending in the High Court;
4. That Judge Burchardt failed to consider sections 30(a), 32 and 38(e) of the ***Judiciary Act*** *1903* (Cth) and s 75(v) of the *Commonwealth of Australia* ***Constitution*** *Act*; and
5. The reliance on hearsay evidence in the Federal Circuit Court.
6. The first contention in opposition is no longer material. There are not now any applications pending in the High Court which were live at the time of Enforcement Judgment. With the exception of this proceeding, the appellant appears to have exhausted his ability to agitate his opposition to the vesting of the property of his bankrupt wife in the Trustee. In any event, this basis of opposition proceeds on an incorrect legal footing. See *Gomez v The Honourable Justice Moshinsky Federal Court of Australia & Ors* [2019] HCATrans 22. Commencing an appeal does not effect a stay from the orders appealed from as of right.
7. Sections 30(a) and 32 of the *Judiciary Act* both concern the appellate jurisdiction of the High Court and are of no relevance to this appeal nor the Enforcement Judgment. Section 38(e) of the *Judiciary Act* and section 75(v) of the Constitution both concern the exclusive jurisdiction of the High Court in matters in which, for example, an officer of a federal court is a respondent to an application for a writ of mandamus or prohibition.
8. In relation to the admission of hearsay evidence, the appellant’s notice of appeal and submissions do not provide any detail as to the evidence that was admitted, on what basis it is said to be hearsay, or how such evidence is said to be material. This ground also has no merit.
9. The contentions advanced in paragraphs 1, 2 and 3 of the Appellant’s Outline of Submissions do not accord with the Appellant’s Grounds of Appeal. There is no reference in the Grounds of Appeal to s 51 of the Constitution. Further, the contention in paragraph 1 of the Submissions is recast when compared with the first ground of appeal to now express a quite different contention. The first ground of appeal contended essentially that the appellant’s rights to a remedy in the then pending application to the High Court would be rendered nugatory if a stay was not granted. The contentions in paragraphs 1 and 3 of the Outline now contend that a stay should be granted because the High Court has not given a commitment to endorse the decision of the court below.
10. The contentions in paragraph 1 are misconceived in a number of respects. First, they proceed on the premise that the High Court is in some way to “endorse” or “affirm” a decision by a lower court. This is not correct. As the procedural history above demonstrates, the appellant has made a number of applications to the High Court which have been dismissed. Further, it goes without saying that it is not within the proper function of this court to opine upon the manner in which the High Court considered and disposed of the appellant’s applications to that court.
11. Finally, the reference to s 51 of the Constitution is irrelevant to this appeal. The Constitutional power of the Commonwealth to make laws with respect to the acquisition of property on just terms was not an issue raised before Judge Burchardt, nor so far as I understood the appellant’s oral submissions before the High Court and, as I have said, was not raised as a ground of appeal in this Appeal. Accordingly, the reference to s 51 of The Constitution is misconceived and irrelevant.

## Disposition

1. The appeal is dismissed with costs.

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| I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Anastassiou. |

Associate:

Dated: 11 November 2019