Federal Court of Australia

Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority [2020] FCAFC 142

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| Appeal from: | *Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority* [2019] FCA 1412 *Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority (No 2)* [2019] FCA 1574 |
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| File number(s): | VID 1098 of 2019 |
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| Judgment of: | **O'CALLAGHAN, ANASTASSIOU AND ANDERSON JJ** |
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| Date of judgment: | 4 August 2020 |
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| Date of publication of reasons: | 19 August 2020 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – appeal from decision of primary judge confirming trustee’s decision to admit a proof of debt under s 104 of the *Bankruptcy Act 1966* (Cth) – no appellable error disclosed in primary judge’s reasons or manner in which hearing was conducted**PRACTICE AND PROCEDURE** – application for leave to appeal primary judge’s decision to dismiss interlocutory application for order restraining respondent’s solicitors from acting – decision not attended by sufficient doubt to warrant reconsideration on appeal  |
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| Legislation: | *Bankruptcy Act* *1966* (Cth) s 104*Civil Dispute Resolution Act* *2011* (Cth)*Evidence Act 1995* (Cth) ss 91, 136  |
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| Cases cited: | *Bahonko v Nurses Board of Victoria (No 3)* [2007] FCA 491*House v The King* (1936) 55 CLR 499*Nationwide News Pty Ltd v Rush* [2018] FCAFC 70  |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 31 |
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| Date of hearing: | 4 August 2020  |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondent: | Mr CR Brown |
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| Solicitor for the Respondent: | Harris Carlson Lawyers |

ORDERS

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|  | VID 1098 of 2019 |
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| BETWEEN: | JOHN SHAWAppellant |
| AND: | THE OFFICIAL TRUSTEE IN BANKRUPTCY VIC 1697/14/1 OF THE AUSTRALIAN FINANCIAL SECURITY AUTHORITYRespondent |

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| order made by: | O'CALLAGHAN, ANASTASSIOU AND ANDERSON JJ |
| DATE OF ORDER: | 4 AUGUST 2020 |

THE COURT ORDERS THAT:

1. The appellant have leave to file his application for leave to appeal out of time.
2. The application for leave to appeal the interlocutory orders of the primary judge made on 29 August 2019 is refused.
3. The appeal in respect of the orders made by the primary judge on 26 September 2019 is dismissed.
4. The appellant pay the respondent’s costs of the application for leave to appeal and of the appeal.

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

REASONS FOR JUDGMENT

(Revised from transcript)

THE COURT:

## Introduction

1. These reasons for judgment were delivered ex tempore at the hearing on 4 August 2020 and accompany the orders set out above.
2. The appellant appeals against interlocutory orders of the primary judge made on 29 August 2019 dismissing his application to restrain the respondent’s solicitors from acting in the proceeding. The appellant also appeals from the final orders of the primary judge made on 26 September 2019, which confirmed the decision of the respondent made in July 2019 to, in part, admit in the bankruptcy of the appellant’s bankrupt estate a proof of debt submitted to it by Yarranova Pty Ltd (**Yarranova**) and NewQuay Stage 2 Pty Ltd (**NewQuay**). (The primary judge otherwise dismissed the appellant’s originating application and ordered that the appellant pay the respondent’s costs as agreed or otherwise as taxed without prejudice to the right of the respondent to claim the costs as costs in the administration of the estate.)
3. The appellant, who is self-represented, filed a notice of appeal advancing the following litany of grounds of appeal:
4. The primary judge erred in finding that the role of the Official Trustee in appearing in a s 104 review of the Trustee’s decision to admit a creditor’s proof of debt initiated by the bankrupt should be purely adversarial (as opposed to conciliatory or neutral).
5. The primary judge failed to take into account authorities and the requirements of the Inspector-General Practice Directions, the *Bankruptcy Act* *1966* (Cth) (**Bankruptcy Act**), the *Civil Dispute Resolution Act* *2011* (Cth) (**Civil Dispute Resolution Act**), and a solicitors’ code of conduct in finding that there was no obligation on the Official Trustee and its solicitors to respond promptly and reasonably to reasonable requests from an opposing party or to try to prevent breaches of “the Act”.
6. The primary judge failed to take into account evidence or submissions or make an adequate enquiry to understand what was meant by the allegation that certain solicitors were “too close” to the Trustee or exerted undue influence over the actions of the Trustee.
7. The primary judge denied the appellant an opportunity to make submissions, and failed to take into account whether the overarching requirements that the Civil Dispute Resolution Act and the Bankruptcy Act imposed on the Official Trustee (and its solicitors) were breached when making costs orders.
8. The primary judge erred in finding that the incomplete proof of debt form submitted jointly by the two creditors claiming the same judgment debt was valid and complied with the requirements of the Bankruptcy Act.
9. The primary judge erred by allowing a proof of debt to be admitted in circumstances where the creditors’ claim for a judgment debt had already been paid in full by a non-obligated third party.
10. The primary judge erred and acted on the wrong principle in finding that the Trustee’s decision to admit the debt had to be either affirmed or reversed and did not consider whether the decision could or should be varied in accordance with the application.
11. The primary judge acted on the wrong principle and failed to properly establish whether the issues outlined in the s 104 application had been litigated to finality or, if they had, whether the issues could be re-examined in a s 104 hearing and erred in finding an abuse of process.
12. The primary judge misinterpreted the scope of the s 104 application and failed to properly establish or consider:
	1. whether “in truth and reality” a real debt existed, despite the “face value” of the judgment debts;
	2. whether the creditors had acted unconscionably, and if that would constitute sufficient grounds for the Trustee to go behind the judgment or vary its decision; and
	3. whether the Trustee’s decision to sell a property situate at Tivoli Road in South Yarra, Victoria should be affirmed, reversed or varied.
13. The reasons for judgment are inadequate, leaving the appellate court or appellant unable to properly determine what path of reasoning led to the key findings. The path of reasoning in finding that the issues identified were not sufficient to justify the court going behind the debts is not revealed, nor are all these specific issues themselves acknowledged, leaving the appellate court to guess what those issues might be.
14. The appellant was denied procedural fairness when:
	1. the primary judge allowed the respondent to tender previous judgments as evidence and has relied on those judgments in making findings of fact in contravention of s 91 of the *Evidence Act 1995* (Cth). There was error in dismissing the appellant’s objections to the admission into evidence of previous judgments by way of affidavit without any limitation on how those judgments could be relied upon;
	2. there was excluded reference to evidence and submissions without explanation in making findings;
	3. the primary judge did not allow the appellant adequate opportunity to respond to submissions or present an argument or refer to affidavit evidence;
	4. the primary judge erred by dismissing the appellant’s objections to the respondent’s affidavits and erred by accepting all of the respondent’s s 136 objections to the appellant’s affidavits or failing to rule on those objections; and
	5. the primary judge made speculative findings on the existence of a “treasury type function” to support the judgment, without any evidence or explaining how this would relate to the question of whether a real debt was due to the creditors.
15. The reasons for judgment contained numerous prejudicial characterisations and comments and indications of pre-judging issues based on inadmissible parts of judgments that could be construed as evidence of pre-judging, contempt or bias. The assertions that the appellant embarked on “vanity projects” and should be subject to vexatious litigant orders and other personal criticisms did not comply with the rules of natural justice and should be corrected in the court record.
16. The primary judge denied the appellant the opportunity to make submissions and failed to take into account whether the overarching requirements that the Civil Dispute Resolution Act and the Bankruptcy Act imposed on the Official Trustee (and its solicitors) were breached when making costs orders.

## Procedural background

1. The relevant background to these proceedings is set out in detail in the primary judge’s reasons for judgment in *Shaw* v *The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority (No 2)* [2019] FCA 1574 at [5]-[18] (***Shaw (No 2)***), and in our reasons for judgment in *Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority* [2020] FCAFC 136.
2. The grounds of appeal in this appeal overlap to a significant extent. For that reason, and in order to consider as best we can the grounds of appeal and the submissions advanced by the appellant, the principal grounds of appeal, properly characterised, can be summarised as raising the following two questions:
3. Did the primary judge fall into appellable error in dismissing the appellant’s interlocutory application to restrain the respondent’s solicitors from acting in this proceeding? For the reasons that follow, the answer to that question is “no”.
4. Did the primary judge fall into appellable error in confirming the respondent’s decision made in July 2019 to in part admit in the bankruptcy of the appellant’s bankrupt estate a proof of debt submitted to it by Yarranova and NewQuay, by otherwise dismissing the appellant’s originating application and ordering that the appellant pay the respondent’s costs? For the reasons that follow, the answer to that question is “no”.
5. The appellant filed detailed written submissions on 14 July 2020 and written submissions in reply on 30 July 2020. He also made oral submissions at the hearing on 4 August 2020. The respondent filed written submissions on 23 July 2020 and was represented by Mr CR Brown of counsel at the hearing.

## Consideration

#### Leave to appeal the interlocutory orders of 29 August 2019

1. The appellant requires leave to appeal.
2. The respondent submits that the application for leave to appeal ought to be dismissed, as it was filed late and is out of time. As the appellant is self-represented, we will grant leave to the appellant to file his application out of time so that we may deal with the substance of the appellant’s application for leave to appeal from the primary judge’s order the subject of the interlocutory judgment.
3. The appellant contends that the respondent’s solicitors’ attitude was unnecessarily adversarial and not in accordance with their duties as officers of the court. The appellant further submits that the respondent’s solicitors obstructed the court and the appellant and that the respondent’s solicitors were “too close to the respondent and have been for too long” and have “acted in previous related proceedings for it”. The appellant further complains that the respondent’s solicitors provided inadequate responses to his requests for information. On these bases, the appellant submits that the primary judge ought to have restrained the respondent’s solicitors from acting further in the proceeding.
4. The applicable principles are well settled and were recently restated by the Full Court in *Nationwide News Pty Ltd v Rush* [2018] FCAFC 70 at [2]-[6] (Lee J; Allsop CJ and Rares J agreeing):

The starting point is that in exercising the power to grant leave, regard must be had to the statutory charge in s 37M(3) of the *Federal Court of Australia Act 1976* (Cth) (**Act**) that the power must be exercised or carried out in the way that best promotes the overarching purpose, being the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

Consistently with the facilitation of a *just* resolution, an applicant must usually show that: (a) in all the circumstances, the decision to be appealed is attended with sufficient doubt to warrant its reconsideration on appeal; and (b) supposing the decision to be wrong, substantial injustice would result if leave were refused: *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-399 (Sheppard, Burchett and Heerey JJ). The sufficiency of the doubt in respect of the decision to be appealed and the question of substantial injustice bear upon each other so that the degree of doubt which is sufficient in one case may be different from that required in another. It has also been said that the considerations are cumulative such that leave ought not be granted unless each limb is made out: *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* [2010] FCAFC 139; (2010) 81 ATR 36 at 38 [5] (Ryan, Stone and Jagot JJ); *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2017] FCAFC 98; (2017) 252 FCR 1 at 4 [3] (Jagot, Yates and Murphy JJ).

Additionally, consistent with the facilitation of a *quick, inexpensive and efficient* resolution is the principle which emerges from the oft-cited warning of Jordan CJ in *In re the Will of F. B. Gilbert (Deceased)* (1946) 46 SR (NSW) 318 at 323, that if a tight rein is not kept upon the interference with orders of judges at first instance in the exercise of discretion on a point of practice and procedure, the result will be ‘disastrous to the proper administration of justice’.

…

Even if it was reasonably arguable that the primary judge’s discretion miscarried, that would not, in and of itself, be a sufficient basis for the grant of leave.

(Emphasis in original.)

1. In our view, the primary judge’s decision is not attended with sufficient doubt to warrant reconsideration on appeal. We have reached this conclusion for the following reasons.
2. The primary judge identified the complaints made by the appellant concerning the respondent’s solicitors’ conduct in *Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority* [2019] FCA 1412 at [12]-[15]. His Honour identified that at the heart of the appellant’s complaint was the notion that the respondent’s solicitors were “too adversarial” or “have otherwise conducted themselves adversarially in circumstances where that is not the nature of the proceeding in which they are acting”. The primary judge rejected the appellant’s complaints as having no substance: ibid at [16]-[23].
3. The decision whether or not to restrain solicitors from acting is entirely discretionary. As Middleton J said in *Bahonko v Nurses Board of Victoria (No 3)* [2007] FCA 491 at [2]:

The Court’s jurisdiction to restrain a legal practitioner from acting in proceedings is an exceptional one and is discretionary. It must be exercised with appropriate caution and due weight must be given to the public interest in a litigant not being deprived of the legal practitioner of its choice without due or good cause.

(Citations omitted.)

1. We respectfully agree.
2. The appellant has failed to demonstrate that the exercise of the discretion of the primary judge was founded on error: see *House v The King* (1936) 55 CLR 499. The appellant has failed to identify error on the part of the primary judge concerning the manner in which the primary judge exercised the discretion. The appellant has failed to establish that the primary judge’s discretion miscarried.
3. In those circumstances, leave to appeal must be refused. There is no sufficient doubt to warrant a reconsideration on appeal of the primary judge’s decision.

#### Appeal from the orders of 26 September 2019

1. We now turn to the second principal question which we have identified earlier in these reasons – namely, did the primary judge fall into appellable error in confirming the respondent’s decision made in July 2019 to in part admit in the bankruptcy of the appellant’s bankrupt estate a proof of debt submitted to it by Yarranova and NewQuay, by otherwise dismissing the appellant’s originating application and ordering that the appellant pay the respondent’s costs
2. There is no appellable error disclosed in the primary judge’s reasons by which the primary judge rejected the appellant’s contention that the proof of debt of Yarranova and NewQuay was not owed, or was defective or invalid.
3. The primary judge (in *Shaw (No 2)* at [53]-[56]) rejected the appellant’s submissions that the court should look behind the costs order upon which the debt the subject of the proof of debt was founded. The primary judge found that there was no evidence beyond the barest assertions that the costs orders were the product of fraud, collusion or a miscarriage of justice such that the court might doubt the reliability of the proof of the existence of the debt that was the foundation for the proof of debt.
4. The primary judge found that the appellant had not produced any evidence sufficient to elicit any real doubt that Yarranova and NewQuay were owed the debt upon which the proof of debt was founded. The primary judge observed correctly that this was at least the fifth occasion on which the appellant had sought to convince a court to go behind the costs orders and had failed.
5. We find no error in the primary judge’s reasons for refusing to exercise the discretion to go behind the existing costs orders. Accordingly, the second question is answered no.
6. We now turn to the remaining grounds.

#### Ground 10

1. We reject the appellant’s submission that the primary judge’s reasons are inadequate and do not enable the court or the appellant on appeal to discern the primary judge’s reasons for arriving at the orders which he made. Accordingly, we reject ground 10.

#### Grounds 11 and 13

1. There is no substance to these grounds, which allege that the appellant was denied procedural fairness and was unable to make submissions and put his case to the judge.
2. The transcript of the hearing (at 31-35) demonstrates that the primary judge ruled on the appellant’s objections mostly on the grounds of relevance. Following ruling on the first series of objections as to relevance, the appellant conceded that the balance of his objections were on the same footing and accepted the same ruling would apply to those objections. The transcript further discloses (at 29) and the primary judge’s reasons record (*Shaw (No 2)* at [23]-[24]), that the primary judge considered the objections raised and, where appropriate to do so, limited the use to which the relevant passages of evidence may be put under s 136 of the *Evidence Act 1995* (Cth). As a consequence, all of the appellant’s affidavit material was accepted in evidence.
3. The transcript of the hearing and the primary judge’s reasons disclose that the appellant was afforded an opportunity to put on evidence and make submissions. The appellant filed six affidavits and several written submissions in support of his application. The appellant made further extensive oral submissions over several hearings. It is plain that the primary judge gave the appellant every opportunity to be heard and to put the arguments that he wished to make in support of his application.
4. It follows that there was no denial of procedural fairness in the manner in which the primary judge dealt with the appellant’s application. Accordingly, grounds 11 and 13 are rejected.

#### Ground 12

1. There is nothing in the submissions of the appellant which could found a proper allegation of apprehended bias or bias by the primary judge. For this reason, ground 12 must be rejected.

## Disposition

1. Accordingly, the court will make orders refusing leave to appeal against the orders made by the primary judge on 29 August 2019.
2. The court will also dismiss the appeal from the primary judge’s orders in respect of the application under s 104 of the Bankruptcy Act, there being no appellable error disclosed in the primary judge’s reasons or in the manner in which the primary judge conducted the hearing.
3. The appellant should pay the respondent’s costs of and incidental to the application for leave and of the appeal.

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| I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices O’Callaghan, Anastassiou and Anderson. |

Associate:

Dated: 19 August 2020