Federal Court of Australia

Makhoul v State of New South Wales [2022] FCA 731

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| File number(s): |  |
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| Judgment of: | **HALLEY J** |
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| Date of judgment: | 23 June 2022 |
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| Catchwords: | **BANKRUPTCY** – disclaimer of interest in real property by trustee in bankruptcy pursuant to s 133(1) of *Bankruptcy Act 1966* (Cth) (**Act**) – application by co-owner of the property for order pursuant to s 133(9) of the Act for vesting of property in applicant subject to mortgage and caveat – no opposition to orders by any interested party – consideration of requisite factors making it just and equitable that order be made – application allowed |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 133 |
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| Cases cited: | *Aprile v State of Queensland, in the matter of Leftwich* [2021] FCA 471  *Australian New Zealand Banking Group Limited v State of Western Australia, in the matter of Raleigh* [2022] FCA 639  *Commonwealth Bank of Australia v Queensland, in the matter of Hewton* [2021] FCA 22 |
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| Sub-area: |  |
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| Number of paragraphs: | 45 |
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| Date of hearing: | 23 June 2022 |
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| Counsel for the Applicant: | Mr N Li |
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| Solicitor for the Applicant: | Thurlow Fisher Lawyers |
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| Counsel for the First Respondent: | The First Respondent submitted to any order of the Court, save as to costs |
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| Counsel for the Second Respondent: | The Second Respondent did not appear |
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| Counsel for the Third Respondent: | The Third Respondent did not appear |

ORDERS

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|  | | NSD 178 of 2022 |
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| BETWEEN: | ROSETTE MAKHOUL  Applicant | |
| AND: | STATE OF NEW SOUTH WALES  First Respondent  WESTPAC BANKING CORPORATION ACN 007 457 141  Second Respondent  YVONNE YOUSSEF MAKHOUL  Third Respondent | |

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| order made by: | HALLEY J |
| DATE OF ORDER: | 23 JUNE 2022 |

**THE COURT NOTES:**

1. The undertaking given by the applicant, through her counsel, to the Court and the second respondent that she will take all reasonable steps to have the property situated at 22 Fenwick Street, Yagoona, in the State of New South Wales (**Property**) listed for sale with a licensed real estate agent as expeditiously as the circumstances permit.

**THE COURT ORDERS THAT:**

1. Pursuant to s 133(9) of the *Bankruptcy Act 1966* (Cth), the one half (1/2) share as tenant in common of the Estate in Fee Simple for the Property (being the property described as Folio A/394405 situated at 22 Fenwick Street, Yagoona, in the State of New South Wales), disclaimed by the Bankruptcy Trustee of John Joe Makhoul and currently registered in the name of the State of New South Wales, vest in the applicant (Rosette Makhoul), subject to:
   1. any charges or Body Corporate debts relating to the Property imposed by Statute or otherwise including, but not limited to, any unpaid land tax, Body Corporate fees, Local Government rates and water and sewerage or similar charges;
   2. the mortgage to the second respondent (Westpac Banking Corporation) registered with dealing number AC527324G; and
   3. the caveat lodged by the third respondent (Yvonne Youssef Makhoul) with dealing number AD518612C.
2. Notice of these Orders are to be given by the applicant to each respondent and interested party, namely John Joe Makhoul and his former Trustee in bankruptcy.
3. No order as to costs.

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

REASONS FOR JUDGMENT

HALLEY J:

# INTRODUCTION

1. This is an application by the applicant, Rosette Makhoul (**Ms Makhoul**), for an order pursuant to s 133(9) of the *Bankruptcy Act 1966* (Cth) (**Act**) that the estate in fee simple in a property at Yagoona, New South Wales, vest in Ms Makhoul subject to the mortgage to the second respondent, Westpac Banking Corporation (**Westpac**), registered with dealing number AC527324G (**Mortgage**), and a caveat lodged by the third respondent, Yvonne Youssef Makhoul (**Mrs Makhoul**), registered with dealing number AD518612C (**Caveat**).
2. For the reasons that follow, I am satisfied that the order sought by Ms Makhoul should be made. Ms Makhoul relies on her affidavit, sworn 18 February 2022, and affidavits of her solicitor, Mr Gary George, sworn 5 May 2022 and 12 May 2022.

# BACKGROUND

1. On or about 13 May 2006, Ms Makhoul and her husband, John Makhoul (**Mr Makhoul**), purchased a property at 22 Fenwick Street, Yagoona in the State of New South Wales, being Folio Identifier A/394405 (**Property**), from the Public Trustee for the sum of $445,000, as joint tenants.
2. In order to purchase the Property, Ms Makhoul and Mr Makhoul borrowed $120,000 from Mr Makhoul’s mother, Mrs Makhoul. That amount was used to pay $44,500 for the 10% deposit on the purchase of the Property, and the balance was applied to the amount paid on settlement.
3. Ms Makhoul and Mr Makhoul also jointly borrowed $379,000 from Westpac to cover the balance of the purchase price, stamp duty, adjustments and other expenses needed to complete the purchase of the Property.
4. The loan made by Westpac was secured by the Mortgage.
5. In or about October 2007, Mrs Makhoul lodged the Caveat over the Property.
6. Ms Makhoul and Mr Makhoul moved into the Property after they purchased it and lived there for approximately two years. During that time, each contributed equally to the mortgage payments and household expenses.
7. In or about May 2008, Mr Makhoul’s business encountered significant financial difficulties and, due to those difficulties, Ms Makhoul and Mr Makhoul moved out of the Property.
8. After they had moved out of the Property, they commenced leasing the Property to tenants to help cover the mortgage payments.
9. On 9 May 2008, Mr Makhoul filed for bankruptcy. Mr Nicholas Malanos, of Worrells, was appointed Trustee of Mr Makhoul’s estate. Mr Makhoul was discharged from bankruptcy on 10 May 2011.
10. On 27 July 2021, Mr Makhoul received a letter from the Trustee of his estate attaching a Notice of Disclaimer of Onerous Property in relation to the Property.
11. On or about 28 September 2011, the State of New South Wales became the registered proprietor of the Property with Ms Makhoul and the State of New South Wales as tenants in common, in equal shares.
12. In about 2015, Ms Makhoul and Mr Makhoul separated.
13. In or about February 2021, the existing tenants at that time moved out of the Property and Mr Makhoul moved into the Property with his new partner.
14. When Mr Makhoul moved into the Property, he initially agreed with Ms Makhoul that he would pay her a rent of $500 per week. However, due to COVID-19, Ms Makhoul subsequently agreed that those payments could be reduced to $250 per week.
15. Ms Makhoul has been making payments under the Mortgage on a regular monthly basis since the Property was purchased. She has used the money that Mr Makhoul has paid to her as rent to assist in paying the Mortgage.
16. Ms Makhoul, however, has been struggling to keep up with payments under the Mortgage, and given the current state of the housing market, she now wishes to sell the Property.
17. She has been informed that the Property has an estimated value of between $1.12 million and $1.49 million.

# LEGAL PRINCIPLES

1. Generally speaking, an applicant for vesting orders under s 133(9) should show that the application has been brought against and served upon the relevant Crown entity and any other person with a relevant interest in the proceeding and that those parties have either not sought to appear in the proceedings or they do not oppose the vesting orders, and similarly, notice of the application should be given to the Trustee in bankruptcy: *Australian New Zealand Banking Group Limited v State of Western Australia, in the matter of Raleigh* [2022] FCA 639 at [25] (Banks-Smith J).
2. In *Commonwealth Bank of Australia v Queensland, in the matter of Hewton* [2021] FCA 22 (***Hewton***) at [20], Derrington J explained that on a hearing of an application pursuant to s 133(9) of the Act, an applicant should demonstrate:
3. the making of a valid application which has been brought against and served upon the relevant Crown entity and any other person with a relevant interest in the proceedings;
4. the giving of notice to the Trustee in bankruptcy;
5. on the substantive application for the making of an order pursuant to s 133(9):
   1. the existence of the land;
   2. the security holder’s interest in the land and its entitlement to enforce its security, if any;
   3. the bankruptcy of the registered owner or owners of the land;
   4. that the trustee in bankruptcy has disclaimed the relevant property pursuant to s 133(1) of the Act and has given notice of it to the registrar of titles as required by s 133(3);
   5. that the circumstances render it just and equitable that an order be made vesting the land in the security holder, and:
   6. there are no unusual circumstances which might militate against the making of the orders.
6. The applicant in *Hewton* was a security holder. In *Aprile v State of Queensland, in the matter of Leftwich* [2021] FCA 471 (***Aprile***) the applicant, as is the case here, was a co-owner of property subject to a mortgage.
7. Subsection 133(9) grants standing to a person who is under a liability not discharged by the Act in respect of the disclaimed property: *Aprile* at [16] (Derrington J).
8. In *Aprile*, Derrington J found, at [17], that matters which are relevant in determining whether it is just and equitable to make an order under s 133(9) on an application by a former co-owner include whether:
9. the applicant has a limited interest in the property as a whole and the title is split between the applicant and the Crown, being a circumstance to which the applicant did not voluntarily agree;
10. the applicant is burdened with the obligation of discharging a mortgage over the entirety of the property even though the applicant has only a half interest in it;
11. in the case that the title is vested in an applicant, it will remain subject to the mortgage such that the mortgagee’s interests will be protected;
12. neither the Crown nor the mortgagee opposes the making of the orders and the Trustee has no interest in the proceedings;
13. there are no other competing interests which might affect the making of the orders or claims to other security interests which might affect the proceeds of sale; and
14. the effect of the orders will be to allow for the applicant to sell the property, for the mortgagee to be paid out and the costs and expenses of sale to be paid, and for the applicant to recover the surplus, if any.

# CONSIDERATION

## Standing

1. Ms Makhoul remains liable under the Mortgage in respect of the disclaimed Property which has not been discharged by the Act, and I am satisfied that she therefore has standing to make the application.

## Formal matters on the service of the application

1. Ms Makhoul has made a valid application pursuant to s 133(9) which has been brought against and served upon:
2. the first respondent, the Crown in right of New South Wales (**Crown**) as tenant in common in equal shares of the Property with Ms Makhoul;
3. Westpac as the registered mortgagee with the benefit of the Mortgage; and
4. Mrs Makhoul as a person who contributed to part of the purchase price of the Property and who has lodged the Caveat.
5. The Crown has entered a submitting appearance.
6. Mrs Makhoul consents to the orders being made, and the Trustee has indicated that it does not wish to be heard in relation to the application made by Ms Makhoul.
7. Westpac has indicated that it is willing to consent to the proposed orders sought by Ms Makhoul with respect to her vesting application on the basis that the orders do not seek to interfere with its rights with respect to the Property and subject to the Property being immediately placed on the market for sale, upon the orders being made.
8. In order to address Westpac’s requirement that it gives consent only on the basis that the Property be immediately placed on the market for sale, the applicant has agreed to provide an undertaking, through her counsel, to the Court and to Westpac that she will take all reasonable steps to have the Property listed for sale with a licensed real estate agent for sale of the Property as expeditiously as the circumstances permit. I am satisfied that that undertaking addresses the qualification placed by Westpac on its consent.
9. Further, I am advised by counsel for Ms Makhoul that his instructing solicitor has been notified by Westpac that they are content with that form of undertaking, and that it addresses their concern that the Property be immediately placed on the market for sale, upon the orders being made.

## Formal matters on the hearing of the application

1. I am satisfied that the Real Property search for the Property annexed to Mr George’s second affidavit confirms the existence of the land, Ms Makhoul’s interest as a tenant in common of the Property and the existence of Mrs Makhoul’s Caveat over the Property.
2. I am also satisfied that the extract from the National Personal Insolvency Index annexed to Ms Makhoul’s affidavit confirms Mr Makhoul’s bankruptcy.
3. I note that the letter recording the Trustee’s disclaimer of Mr Makhoul’s interest in the Property and dealing AG525612M, giving effect to the disclaimer, are also annexed to Ms Makhoul’s affidavit.

## The circumstances that render it just and equitable that an order be made vesting the Property in the applicant

1. I am satisfied, for the reasons advanced by Mr Li of counsel in his written submissions for Ms Makhoul, that it is just and equitable that an order be made vesting the Property in Ms Makhoul.
2. *First*, Ms Makhoul now has a limited interest in the Property as a whole and the title is split between her and the Crown as tenants in common in equal shares. Ms Makhoul’s current co-ownership as tenants in common in equal shares with the Crown, was a circumstance to which Ms Makhoul did not voluntarily agree.
3. *Second*, Ms Makhoul and Mr Makhoul were joint borrowers of a $379,000 loan from Westpac, secured by the Mortgage. Ms Makhoul continues to make repayments on that loan. Ms Makhoul is burdened with the obligation of discharging a mortgage over the entirety of the Property, even though she has only a half interest in it and is currently unable to meet all her obligations under the Mortgage. If the order is not made, it would accord the Crown an “unmerited windfall”, to adopt the words of Derrington J in *Hewton* at [22].
4. *Third*, if title is vested in Ms Makhoul, it will remain subject to any mortgage such that Westpac’s interest will be protected.
5. *Fourth*, neither the Crown nor Westpac oppose the making of the orders, and the Trustee does not wish to be heard in the proceedings.
6. *Fifth*, the only other competing interest which might affect the making of the orders is Mrs Makhoul’s potential interest as a beneficiary of a resulting trust, reflecting her contribution to the purchase price of the Property. However, Mrs Makhoul does not oppose the relief being sought.
7. *Sixth*, there are no other known claims to the Property by any other person or entity of a security interest in the Property. I am satisfied that the making of the orders is unlikely, therefore, to prejudice third parties. Mr Makhoul’s bankruptcy occurred in 2008 and Mr Makhoul was discharged from bankruptcy in 2011. Any of Mr Makhoul’s other creditors prior to his bankruptcy and the vesting of the Property in the Trustee would, in those circumstances, likely be statute barred from recovering their debt. Hence, any hypothetical unregistered security interests over the Property would no longer secure any indebtedness.
8. *Seventh*, the effect of the orders will be to allow for Ms Makhoul to sell the Property, for Westpac to be paid out, and the costs and expenses of the sale to be paid, and for Ms Makhoul to recover any surplus.
9. *Finally*, I am satisfied that there are no unusual circumstances which might militate against the making of the orders.

# DISPOSITION

1. An order is to be made pursuant to s 133(9) of the Act that the one half share as tenant in common of the estate in fee simple in the Property that had been disclaimed by the Trustee and currently registered in the name of the State of New South Wales vest in the applicant, subject to the Mortgage and the Caveat.
2. All parties have agreed that there should be no order as to costs.

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| I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Halley. |

Associate:

Dated: 23 June 2022