Federal Court of Australia

Arwon Finance Pty Ltd v Wilson [2021] FCA 1599

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| File number: | WAD 215 of 2021 |
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| Judgment of: | **BANKS-SMITH J** |
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| Date of judgment: | 16 December 2021 |
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| Catchwords: | **BANKRUPTCY** - whether leave should be granted to amend the creditor's petition to record that the creditor would proceed on the basis that its security was surrendered - leave granted |
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| Legislation: | *Bankruptcy Act 1966*(Cth) ss 33, 43, 44, 52 |
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| Cases cited: | *Arwon Finance Pty Ltd v Wilson* [2019] WASC 244*MacDonald v Official Trustee in Bankruptcy* [2001] FCA 140; (2001) 107 FCR 72*Valladares as executor of the estate of Sabrina Karen Andreazza v De Angelis* [2020] FCA 1865*Wilson v Arwon Finance Pty Ltd* [2020] WASCA 137*Wilson v Arwon Finance Pty Ltd* [2021] FCA 1052 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | General and Personal Insolvency |
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| Number of paragraphs: | 27 |
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| Date of hearing: | 16 December 2021 |
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| Counsel for the Applicant: | Mr VN Ghosh |
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| Solicitor for the Applicant: | Allens |
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| Counsel for the Respondent: | Mr J Sippe |
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| Solicitor for the Respondent: | Laird Lawyers |

ORDERS

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|  | WAD 215 of 2021 |
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| BETWEEN: | ARWON FINANCE PTY LTDApplicant |
| AND: | FRANK CULLITY WILSONRespondent |

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| order made by: | BANKS-SMITH J |
| DATE OF ORDER: | 16 DECEMBER 2021 |

THE COURT ORDERS THAT:

1. Pursuant to s 33(1)(b of the *Bankruptcy Act 1966* (Cth), leave be granted to the applicant to immediately file and serve an amended creditor's petition, substantially in the form annexed to the affidavit of Christopher Prestwich sworn 26 November 2021 and marked 'A'.

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

REASONS FOR JUDGMENT

BANKS-SMITH J:

1. The applicant, Arwon Finance Pty Ltd (**Arwon**) obtained judgment against the respondent, Mr Frank Wilson, in the Supreme Court of Western Australia. Arwon issued and served a bankruptcy notice on Mr Wilson and subsequently filed and served a creditor's petition. The petition has not been determined, and is listed for hearing on 3 February 2022.
2. Arwon is a secured creditor. It seeks to amend the petition to include a statement that it is willing to surrender the security for the benefit of the creditors generally and present its petition as if it were an unsecured creditor, pursuant to s 44(3) of the *Bankruptcy Act 1966*(Cth).
3. The application is granted, having regard to the following matters.

## History of debt

1. Arwon summarised the circumstances leading up to the issue of the bankruptcy notice as follows:

On 30 June 2014, Mr Wilson, the respondent, borrowed $13,267,650 from Arwon Finance Pty Ltd (**Arwon**), the applicant. Mr Wilson used the funds to invest in Indian sandalwood plantations through the Quintis Group.

Mr Wilson stopped making the required loan repayments after January 2017. After issuing a notice of demand in June 2017, Arwon commenced proceedings to recover the debt in the WA Supreme Court on 24 July 2017 (**Debt Proceedings**).

There was a trial in the Debt Proceedings on 29 and 30 April 2019. Judgment was entered for Arwon against Wilson in the amount of $13,991,596.57 plus interest on 24 July 2019 by Justice Kenneth Martin (**WA Supreme Court Judgment**).

Mr Wilson appealed the WA Supreme Court Judgment. The appeal was heard by the WA Court of Appeal on 9 June 2020 (**Appeal Proceedings**).

On 16 June 2020, Mr Wilson sued Arwon in the Supreme Court of Queensland (BS 6451 of 2020) for damages for the tort of conspiracy (**Conspiracy Proceedings**).

Mr Wilson's appeal in the Appeal Proceedings was dismissed on 31 August 2020.

Mr Wilson did not pay the judgment debt.

On 11 January 2021, Arwon issued bankruptcy notice number N251056 to Mr Wilson in relation to the unpaid judgment debt of $15,210,590.47 (**Bankruptcy Notice**). The Bankruptcy Notice was served on 13 January 2021.

On 4 February 2021, Mr Wilson applied to set aside the Bankruptcy Notice under sections 40(1)(g) and 41(7) of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) and rule 3.02 of the *Federal Court (Bankruptcy) Rules 2016* (Cth) (**Bankruptcy Rules**) based on offsetting claims said to arise from the Conspiracy Proceedings (**Set Aside Application**).

On 1 September 2021, Justice McKerracher dismissed Mr Wilson's application on the basis that Mr Wilson's offsetting claims could have been set up in the Debt Proceedings.

(footnotes omitted)

1. I adopt Arwon's defined terms and add that the decisions referred to by Arwon as the WA Supreme Court Judgment, the Appeal Proceedings and the Set Aside Application are *Arwon Finance Pty Ltd v Wilson* [2019] WASC 244, *Wilson v Arwon Finance Pty Ltd* [2020] WASCA 137 and *Wilson v Arwon Finance Pty Ltd* [2021] FCA 1052 respectively.

## Application for leave to amend creditor's petition

1. The Bankruptcy Notice referred to the amount of the unpaid judgment debt ($13,991,596.57) plus interest, resulting in an unpaid total debt of $15,210,590.47.
2. On 18 September 2021, Arwon filed and served Mr Wilson with a creditor's petition, seeking a sequestration order under s 43 of the *Bankruptcy Act*.
3. Section 44 of the *Bankruptcy Act* provides the conditions on which a petition may be presented against a debtor:

**Conditions on which creditor may petition**

(1) A creditor's petition shall not be presented against a debtor unless:

(a) there is owing by the debtor to the petitioning creditor a debt that amounts to the statutory minimum or 2 or more debts that amount in the aggregate to the statutory minimum, or, where 2 or more creditors join in the petition, there is owing by the debtor to the several petitioning creditors debts that amount in the aggregate to the statutory minimum;

(b) that debt, or each of those debts, as the case may be:

(i) is a liquidated sum due at law or in equity or partly at law and partly in equity; and

(ii) is payable either immediately or at a certain future time; and

(c) the act of bankruptcy on which the petition is founded was committed within 6 months before the presentation of the petition.

(2) Subject to subsection (3), a secured creditor shall, for the purposes of paragraph (1)(a), be deemed to be a creditor only to the extent, if any, by which the amount of the debt owing to him or her exceeds the value of his or her security.

(3) A secured creditor may present, or join in presenting, a creditor's petition as if he or she were an unsecured creditor if he or she includes in the petition a statement that he or she is willing to surrender his or her security for the benefit of creditors generally in the event of a sequestration order being made against the debtor.

(4) Where a petitioning creditor is a secured creditor, he or she shall set out in the petition particulars of his or her security.

(5) Where a secured creditor has presented, or joined in presenting, a creditor's petition as if he or she were an unsecured creditor, he or she shall, upon request in writing by the trustee within 3 months after the making of a sequestration order, surrender his or her security to the trustee for the benefit of the creditors generally.

(6) A secured creditor to whom subsection (5) applies who fails to surrender his or her security when requested to do so by the trustee in accordance with that subsection is guilty of contempt of court.

1. The creditor's petition served by Arwon stated that Arwon held security over Mr Wilson's property, and estimated the value as being between $0 and $7 million. On that basis, it can be seen that Mr Wilson's debt exceeded the value of the security by at least approximately $8.2 million.
2. On 14 October 2021 Mr Wilson filed a notice of opposition to the creditor's petition with two grounds:
	1. that the security is valued at over $22 million, exceeding the judgment debt; and
	2. that there is other sufficient cause to dismiss the petition under s 52(2) of the *Bankruptcy Act* because the damages sought in the Conspiracy Proceedings exceed the judgment debt and the Conspiracy Proceedings are likely to succeed.
3. On 2 November 2021, Arwon filed an affidavit of Mr John Louden (general counsel for the Quintis Group, which includes Arwon) in these proceedings that annexed a proposed amended creditor's petition, amended to include a statement that Arwon was willing to surrender the security for the benefit of the creditors generally and present its petition as if it were an unsecured creditor, and stated that Arwon would seek leave to amend the creditor's petition pursuant to s 33(1)(b) of the *Bankruptcy Act*.
4. On 26 November 2021, Arwon filed its application to amend the creditor's petition. The proposed amended petition was annexed to the affidavit of Mr Christopher Prestwich and contained two proposed changes:
	1. the sentence estimating the value of the security be deleted; and
	2. a statement be included that 'The applicant creditor is willing to surrender this security for the benefit of creditors generally if a sequestration order is made against the respondent debtor'.

## The power to amend

1. By s 33(1)(b) of the *Bankruptcy Act*, the Court may at any time allow the amendment of any written process, proceeding or notice under that Act.
2. It is established that the s 33(1)(b) power may be exercised to allow the amendment of a creditor’s petition, including amendments directed to overcoming omissions to comply with s 44(2) and (3): *MacDonald v Official Trustee in Bankruptcy* [2001] FCA 140; (2001) 107 FCR 72 at [24] (Drummond, Whitlam and RD Nicholson JJ); and *Valladares as executor of the estate of Sabrina Karen Andreazza v De Angelis* [2020] FCA 1865 at [29] (White J).

## Reason for amendment

1. Arwon seeks to amend the creditor's petition to present its petition as if it were an unsecured creditor by including the statement that Arwon is willing to surrender its security for the benefit of creditors generally in the event of a sequestration order being made against the debtor.
2. Arwon submitted that the security is over Mr Wilson's interest in Sandalwood plantations, which are approximately six years old, in Queensland and the Northern Territory; and that Sandalwood plantations are typically harvested at around 15 years. The nature of Sandalwood plantations means that it may not be possible to sell the asset immediately or prior to maturity.
3. Arwon considers that the security is illiquid; will be difficult and expensive to value before maturity; and that its value does not justify it seeking to assert its security interest.
4. Having regard to what it described as those commercial reasons, it seeks to amend the petition. I accept that there is uncertainty as to the value of the security.
5. For completeness, I note that Arwon rejects Mr Wilson's assertion that the security is worth more than $22 million. Counsel for Mr Wilson noted that Mr Wilson rejects Arwon's description of the nature of the property the subject of the security. It is not necessary to resolve these matters for the purpose of today's application.

## Consideration

1. Although through his counsel Mr Wilson did not oppose the orders sought, counsel said that Mr Wilson considered the application should properly be determined by the Court in its discretion.
2. The amendment sought will not delay these proceedings. Arwon's surrender of the security may have the benefit that it will narrow the scope of the expert evidence that Arwon says it will present at the hearing of the creditor's petition.
3. There has been minimal delay in Arwon's application to amend the creditor's petition, notice of the proposed amendment having been given to Mr Wilson shortly after Mr Wilson indicated that he contested the value of the security. The amendment application was brought promptly.
4. There is no evidence of any relevant prejudice to Mr Wilson by the amendment. Mr Wilson has not sought to file any affidavits or make submissions as to any prejudice on this application.
5. Arwon's surrender of the security does not prejudice other creditors. Nor does it have a detrimental effect on other litigants or undermine the confidence in the administration of justice: *Valladares* at [43].
6. While Arwon initially elected to present the creditor's petition as a secured creditor, it now seeks to present it as if it were an unsecured creditor. While this represents a change of its position, I am not satisfied that there is any reason why Arwon should be prevented from doing so in all of the circumstances.
7. For these reasons I am persuaded that it is appropriate to exercise the s 33(1)(b) discretion in favour of the applicant.
8. There will be orders accordingly.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Banks-Smith. |

Associate:

Dated: 16 December 2021