FEDERAL CIRCUIT COURT OF AUSTRALIA

CANNON & ANOR v STATEWIDE SECURED INVESTMENTS PTY LTD *[2017] FCCA 972*

Catchwords:
BANKRUPTCY – Interlocutory application for stay of sequestration order – interlocutory application dismissed.

Legislation:
Bankruptcy Act 1966, ss.37, 52(3)

Cases cited:
Statewide Secured Investments Pty Ltd v Cipcon Pty Ltd [2016] VCC 18

First Applicant:	JOHN GEORGE CANNON
Second Applicant:	WALTER CIPRIANI
Respondent:	STATEWIDE SECURED INVESTMENTS PTY LTD (ACN 004 682 517)
File Number:	MLG 2352 of 2016
Judgment of:	Judge Riethmuller
Hearing date:	5 May 2017
Date of Last Submission:	5 May 2017
Delivered at:	Melbourne
Delivered on:	5 May 2017

REPRESENTATION

The Applicants appeared In Person

Counsel for the Respondent: Ms Zambelli

Solicitors for the Respondent: Ashurt Australia

ORDERS

(1) The Applicants' interlocutory application for a stay of the sequestration order be dismissed.

(2) The costs of today be paid out of the estates of the Applicants in the sum as agreed or failing agreement to be taxed by the Registrar.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 2352 of 2016

JOHN GEORGE CANNON
First Applicant

WALTER CIPRIANI
Second Applicant

And

STATEWIDE SECURED INVESTMENTS PTY LTD
(ACN 004 682 517)
Respondent

REASONS FOR JUDGMENT
(Delivered extempore)

1. This is an application for review of a decision by the Registrar to make sequestration orders with respect to the applicants. Such reviews proceed by way of a de novo hearing.

2. The applicants were made bankrupt as a result of a judgment debt following a judgment of Judge Anderson of the County Court of Victoria, the reasons for which are set out in *Statewide Secured Investments Pty Ltd & Anor v Cipcon Pty Ltd & Ors* [2016] VCC 18. The amount of the debt at the time the bankruptcy notices were issued as a result of this judgment was $5,342,205.39.

3. The central issue in this case is whether or not the judgment debt is just and truly owing by the applicants, which necessarily requires the court to be asked to look behind the judgment of Judge Anderson in the County Court. No other points are taken in this matter.

4. It is apparent from the circumstances outlined that, if the judgment debt was of this figure or indeed anything more than at the very least a couple of hundred thousand dollars, it would be unable to be met by the applicants.

5. The whole case turns upon whether or not the applicants are able to have this Court look behind the judgment of Judge Anderson in order to determine whether or not the amount is just truly owing and, if they succeed on that application, having a finding made that the amount is not, in fact, owing. This is a common issue in bankruptcy proceedings, although usually as a consequence of judgments that are entered either as summary judgments or default judgments, not judgments on the merits after a trial. In this case, the trial ran from 18 January to 21 January 2016 and on 28 January 2016. The judgment was given on 10 March 2016. The judgment of Judge Anderson has not been the subject of an appeal to the Supreme Court of Victoria.

6. The case concerned transactions where a financier provided finance for a building development of multiple dwellings. The matter has a very long and complex history which is recounted in the first 20 pages of Judge Anderson's judgment, and I do not need to repeat that material for the purpose of today.

7. Today I am asked to make orders either staying or setting aside the Registrar's order pending a full argument being made by the applicants as to the basis upon which they say that this Court should look behind the judgment of Judge Anderson. I therefore approach the matter on the basis that this is an interlocutory application, effectively for a stay or injunction, pending the full application being heard. I therefore turn to consider whether or not what has been articulated by the applicants today is sufficient to show that there is an arguable point and, if so, that the balance of convenience warrants orders between now and September when full argument can be heard.

8. For the purpose of today, whilst I note that there are complex questions as to the extent to which I can make orders suspending the operation of the sequestration order or perhaps even setting it aside on an interim basis, particularly as a result of ss.37 and 52(3) of the *Bankruptcy Act 1966* (Cth), it seems to me that in the circumstances of this case for the reasons that follow, I do not ultimately have to deal with these

questions. I turn then to consider whether or not an arguable case has been articulated.

9. The applicants are representing themselves. Some hours were spent this morning discussing with them exactly why it is that they say that the judgment by Judge Anderson is in error, or has failed to deal with an issue that would be a defence or a proper basis for showing that they do not owe the judgment debt that his Honour found in the final orders that he made for the reasons that his Honour gave.

10. The central theme of the argument is to the effect that the plaintiff in those proceedings had in some way been engaged in dealings that were either misleading or in breach of statutory requirements to do with the business arrangements between it and other businesses. These arguments focused on: arrangements by the financier to on-sell its mortgage business and arrangements between it and another entity referred to as "Banksia"; questions relating to a prospectus that may have been issued relating to Banksia; and questions as to whether or not other conduct of one of the witnesses for the plaintiff in the proceedings before Judge Anderson would indicate that the witness had engaged in dishonourable or misleading conduct in other spheres that may well have affected his credibility before Judge Anderson. Further allegations were raised as to whether or not rules or regulations administered by ASIC or the Commissioner of Taxation had also been breached by the plaintiff.

11. Ultimately, however, all of these allegations relate to business transactions or dealings between the financier and other entities or government organisations that do not appear to me, on any of the versions given this morning in argument, to relate in any sense directly to the applicants in this case, nor the proceedings that were before Judge Anderson, save to the extent that it is possible that some of these allegations, if true, may have had some impact upon the credibility of one of the witnesses who gave evidence before Judge Anderson.

12. It is argued that the applicants ought not to have been found to be liable for interest payable on the debts for the money that they had borrowed or guaranteed when borrowed by their company. This was articulated at some length by them and ultimately appears to hinge upon an argument that, when a deed was entered into at one point to continue

pursuing the development (when there had already been a Supreme Court judgment entered against the applicants and the company with respect to primary debt), the effect of this deed was that no further interest would be payable. This argument strikes two very significant problems. First, clause 6 of the deed appears on the face of it to preserve the ongoing rights of the creditor under the mortgage agreement, and thereby to ensure that interest does continue to accrue. Secondly, this issue was certainly articulated before Judge Anderson, and the question of whether or not interest should be charged was dealt with at length by his Honour in his judgment from para.101 onwards. Nothing that has been argued before me this morning, even assuming that evidence will ultimately be forthcoming to provide a sound evidentiary basis for the arguments, persuades me that there is an arguable case that interest did not continue to accrue and was not owing on the transaction.

13. In any event, even if I were to be wrong in this regard, it is clear that the primary debt, the subject of the Supreme Court judgment (even without further interest) which was acknowledged in the proceedings before Judge Anderson (see para.90 of the judgment), less the amount of the sale proceeds from the various units or dwellings that were sold, comes to a debt of in excess of $2.16 million. That amount could not, on the material and arguments before me, be met by the bankrupts. The argument at that point shifted to an argument that the financier, Statewide, had failed in its obligations as a mortgagee in possession to take reasonable steps to realise the properties and apply the money against the debt, as a result of which significant interest accrued over some six years. In isolation, the statement that it would take six years for a mortgagee in possession to realise a property attracts attention and concern. However, this was no simple transaction, nor did it involve the simple repossession of a completed bungalow in the suburbs. This involved a long-term building project which had considerable difficulties.

14. This issue was articulated before Judge Anderson. Judge Anderson sets out a number of the difficulties that were placed in the way of realising the value from the properties, and in particular at para.109 onwards his Honour sets out a list of the number of times and dates that the builders' registration was suspended and then reinstated, and the

arguments relating to whether or not that would impact upon sale, particularly having regard to the question of whether or not the properties were owner/builder properties, the insurance, and warranty and the like. Ultimately, his Honour was not persuaded that these matters provided a basis for either a counterclaim or suspending any further interest, or not allowing any further interest to be claimed under the mortgage agreements. How clearly this was articulated to his Honour is not entirely clear from the judgment, which is no criticism of his Honour, given the nature of the case and the clarity with which his Honour has dealt with the complex matters in his judgment.

15. It seems to me that, the basis of his Honour's reasons, and having regard to the statements made today as if they were able to be supported by evidence, there is no material to show that these properties could reasonably have been realised by sale at earlier dates, nor any evidentiary basis to show that the properties were, in fact, sold at an undervalue. Indeed, even the last example given, which was that properties were going to be sold at an undervalue and that the first applicant's wife purchased them at auction at a very low price, is again demonstrative of a case against the applicant: clearly the properties were being auctioned, and there were no bidders other than his wife seeking to purchase these properties. As a general proposition, properties auctioned on the open market will be considered to have realised a market value. In any event, the matters appear to have been dealt with by Judge Anderson. To the extent that these issues were not fully and carefully articulated before Judge Anderson, they would not be matters able to be the subject of further proceedings, at the very least as a result of an *Anshun* estoppel. These issues ought to have been fully litigated before Judge Anderson if they were to be raised at all.

16. The argument then also turned to the question of whether or not the judgment is in favour of the proper plaintiff on the basis that Statewide, the first named plaintiff in the proceedings before Judge Anderson, had transferred the mortgages to the second-named plaintiff, Permanent Custodians. Both plaintiffs were in the proceedings. There is transcript of argument before his Honour as to the reasons for which plaintiff would be the appropriate plaintiff and, ultimately, the formal orders were given dividing the debt between the two plaintiffs that

were on the record. It appears to me that these issues have been dealt with by Judge Anderson and, in any event, there is nothing to indicate a loss to the defendants as it is not suggested that they were being pursued by any other entity and, indeed, the entities who were on the record and secured the judgment were those who were registered on title.

17. It may well be the case that the importance of having Statewide as a party to the proceedings lay more in the desire of the applicants before me to run their counterclaims and other arguments as to the conduct of Statewide whilst it was the mortgage owner prior to the transfer to Permanent Custodians, so that they were not left in the position of running arguments only against Permanent Custodians who may not have been the person with the conduct of the matter at the time that the relevant events occurred.

18. The argument then turned to the question of whether or not a company, Holdco, was the appropriate plaintiff on the basis that Holdco was, on a document from 2004 shown to be the sole shareholder of Statewide. This confuses the difference between shareholding and title holding. Statewide is a corporation and has its own separate legal entity. The fact that another corporation may be its only shareholder does not collapse its legal entity into that of Holdco. This argument has no merit.

19. In the circumstances, it appears to me that, at best, the applicants have an argument that it may be that the credibility of a witness would be affected had further material been available to place before Judge Anderson. On reading his Honour's judgment as a whole, it is difficult to see that the core problems the applicants faced before Judge Anderson would have been affected to such a degree as to result in there not being a considerable judgment debt beyond any assets that they suggest that they hold. Indeed, even in submissions, the second applicant before me indicated that it was accepted there would be some judgment debt, just not in the order of magnitude of that the subject of the bankruptcy notice.

20. As a result, I am not persuaded at this point, even assuming that there will ultimately be an evidentiary basis for all of the things that have been put to me in argument – that is, taking the applicants' case as its

absolute highest – that the applicants have articulated what could reasonably be called an arguable case with respect to an application to look behind the judgment of Judge Anderson.

21. I turn then to consider the balance of convenience. In this case, there is a significant judgment debt. It is said that there has been a proof of debt by the ATO against one of the applicants and that the other has not lodged returns for some time and that there has been a proof of debt by Westpac with respect to a credit card.

22. The first applicant seeks to have the sequestration order set aside or in some way stayed to allow him to provide a personal guarantee in support of a business operated by his wife with respect to a caravan park. It seems to me that this would simply further expose him to liability and, potentially, create a greater group of creditors that will be affected by his apparent insolvency than exists at present. It is not a transaction that is likely to improve his position, although it is likely to improve his wife's position. He also explains that he and his wife have two houses with mortgages, one in which they lived, one which is tenanted. They are jointly owned. In the time between now and when the matter can be heard by me at length it does not appear to me that there is any real risk of the trustee reaching a point of forcing the sale of those properties, given that the applicant's wife is a joint owner, but there is a real risk to the trustee in their obligations of preserving the assets of the bankrupt if they are not able to take control to the extent reasonably possible to ensure the preservation and proper management of those assets.

23. In the circumstances of this case, I am therefore neither persuaded that there is an arguable case, nor that, with respect to the first applicant, the balance of convenience favours orders that would impinge upon the trustee carrying out the trustee's duties in the usual fashion.

24. With respect to the second applicant, nothing has been articulated that would indicate any loss or damage to him in the intervening period if there are no orders altering the current sequestration order.

25. I note further that if the sequestration order is ultimately set aside the Court has the discretion to either set it aside or annul the bankruptcy under the Act. As was mentioned in argument, I have previously set

aside orders rather than annulling bankruptcies (where appropriate to do so) and if the sequestration order is set aside the applicants would not be liable for the costs of the trustee in managing the estate.

26. It seems to me that these factors mean that appropriate orders can be made in due course and that this does not weigh in favour of some form of setting aside of the registrar's order or restriction upon the trustee's conduct pending the review hearing.

27. As a result, I therefore decline to make any interim or interlocutory orders with respect to the operation of the sequestration order made by the trustee. I will adjourn the matter to the date that is set for the hearing of the application.

I certify that the preceding twenty-seven (27) paragraphs are a true copy of the reasons for judgment of Judge Riethmuller

Associate:

Date: 20 June 2017