FEDERAL COURT UNREPORTED JUDGMENTS
DICK (as trustee of the property of McINTOSH) v McINTOSH (A bankrupt)
Dick as Trustee in Bankruptcy v McIntosh [2001] FCA 1008
Q 7305 of 2001
FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY
BC200104325
8 May 2001, heard
31 July 2001, delivered

CATCHWORDS: BANKRUPTCY - application to Court to act in aid of a United Kingdom bankruptcy - power to act - relevant principles

Bankruptcy Act 1966 s29

Sykes & Co v Lagos Colonial Secretary and Davies [1891] AC 480 (PC) cited

Re Ayres, Ex parte Evans (1981) 51 FLR 395 applied

Ayres v Evans (1981) 56 FLR 235 (FC) applied

Radich v Bank of New Zealand (1993) 45 FCR 101 (FC) applied

Re a Debtor; ex parte Viscount of Royal Court of Jersey [1981] 1 Ch 384 cited
JUDGES: COOPER J
Cooper J:

The applicant is the trustee in bankruptcy of the respondent's bankrupt estate. The applicant was appointed by order of the High Court of Justice in London, England on 26 April 1999 and his appointment took effect from 21 June 1999.

The applicant obtained an order of Mr Registrar James of the High Court of Justice pursuant to s426 of the Insolvency Act 1986 (UK) ("the UK Act") seeking the aid of this Court to act in aid of, and be auxiliary to, the UK Court for the purpose of assisting in the realisation of the bankruptcy estate. Although the order was originally directed to the High Court of Australia, it was by order of Mr Registrar James amended on 7 December 1999 and directed to this Court. An original objection by the respondent as to the power of Mr Registrar James to make such an amendment was ultimately not pressed on the hearing of the application under s29 of the Bankruptcy Act 1966 (Cth) ("the Act") in this Court.

Pursuant to the request of the High Court of Justice, the trustee seeks orders under s29 of the Act. The making of any orders is opposed by the respondent. The grounds relied upon by the respondent are:

(a) the English sequestration order does not expressly say that it applies to immoveable property situated outside England;

(b) this Court has no jurisdiction over immovables located outside Australia which are owned by persons not party to the proceedings;

(c) there is no obligation to give assistance;

(d) there is evidence that the English Court was mislead into making the sequestration order by the petitioning creditor, the Society of Lloyd's ("Lloyd's"), deliberately suppressing evidence that no debt was due;

(e) no order for aid should be made by this Court until the allegation of misconduct by Lloyd's is determined;

(f) if, as a matter of discretion, aid is to be given then:

(i) the proceeds of any property realised should be held in trust in Australia pending determination of the allegation of misconduct against Lloyd's;

(ii) no order should be made which amounts to a sequestration order of the respondent's Australian assets;

(iii) no orders should be made having proprietary consequence unless specific property can be identified as Australian property of the respondent alone;

(iv) any order as to documents should reserve the right to refuse to produce documents on the grounds of legal professional privilege.

S29 of the Act, so far as relevant, provides:

29(1) [All Courts with jurisdiction] All Courts having jurisdiction under this Act, the Judges of these Courts and the officers of or under the control of those Courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy.

29(2) [Aid to external Territories, other countries] In all matters of bankruptcy, the Court:

(a) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and

(b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.

29(3) [Request for aid] Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in a matter of bankruptcy is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

...

29(5) ["Prescribed country"] In this section, "prescribed country" means:

(a) the United Kingdom, Canada and New Zealand;

(b) a country prescribed by the regulations for the purposes of this subsection; and

(c) a colony, overseas territory or protectorate of a country specified in para(a) or of a country so prescribed.

The High Court of Justice is a court of a prescribed country and the orders made by it were made under its bankruptcy jurisdiction. Upon the commencement of the respondent's bankruptcy, the bankrupt's estate as defined in the UK Act vested in her trustee in bankruptcy immediately upon his appointment taking effect: the UK Act, s306(1). The bankrupt's estate as defined by the UK Act includes "every description of property wherever situated...": the UK Act, s436. There is no requirement under the UK Act to specify the property to which the order attaches. Property of the respondent situate in Australia falls within the statutory definition for the purposes of the UK Act and is subject to the UK bankruptcy administration by her trustee in bankruptcy. The ground of opposition in para(a) is without merit.

The applicant seeks no orders from this Court in respect of property outside Australia. The ground of objection in para(b) is therefore irrelevant.

The vesting of the estate took place without any conveyance, assignment or transfer by operation of the UK Act: s306(2). In the case of real property situated outside the UK such property can only pass under the rules of private international law according to the laws of the place where the land is situate: Callender, Sykes and Co v Lagos Colonial Secretary and Davies [1891] AC 460 (PC). The applicant's entitlement to the respondent's Australian property falls to be determined under Australian law. Although the bankruptcy order made in respect of the respondent's property by the High Court of Justice in London will not be recognised in this Court as operating as an assignment of the respondent's Australian lands, the Court may act in aid under s29 of the Act to make those lands available to the trustee in bankruptcy to enable them to be realised for the benefit of the creditors in the foreign bankruptcy: Australian Mutual Provident Society v Gregory (1908) 5 CLR 615 at 623, 625, 628, 630; Radich v Bank of New Zealand (1993) 45 FCR 101 at 109, 115, 119.

S29(1) of the Act requires this Court to give all assistance that it can to a requesting Court if the conditions of the section are satisfied leaving with the Court a discretion as to what assistance ought to be given, including a discretion as to what, if any, conditions or undertakings are required as part of the providing of assistance: Re Ayres; Ex parte Evans (1981) 51 FLR 395 at 405-407 esp at 407 per Lockhart J; Ayres v Evans (1981) 56 FLR 235 (FC) at 240, 247, 254-255; Radich v Bank of New Zealand at 105, 118.

It is clear on the authorities that this Court is bound to exercise the jurisdiction under s29 of the Act in respect of the request made by the High Court of Justice, upon the conditions of s29 being made out on the material filed by the applicant, subject only to a residual discretion as to the nature and extent of the aid. The ground of objection, taken by the respondent in para(c) is too broad and not correct as made.

The respondent submits that there is misconduct on the part of Lloyd's such that the UK bankruptcy proceedings were hopelessly bad under their own proper law, or offend against some overriding principle of Australian public policy and thus aid should be refused. This submission is based on an observation of Goulding J in Re a Debtor; ex parte Viscount of Royal Court of Jersey [1981] 1 Ch 384 at 402 F-G cited with approval by Lockhart J in Re Ayres, Ex parte Evans at 591. There are a number of obstacles to the acceptance of this submission.

It is unnecessary to determine in the present proceedings whether it is open to this Court under s29(1) of the Act to scrutinize the requesting court's transactions or whether it is bound to recognise a bankruptcy order of a foreign bankruptcy Court falling within s29(5) of the Act and, subject to the discretion as to what aid ought to be given, to act upon it. However, it is to be noted that the observation of Goulding J was made in the following context (at 402 D-G):

Now I turn to the several objections made by the debtor to the institution and conduct of these particular proceedings against him in Jersey. I do not think that this court, when requested for aid under s122 of the Act of 1914, has any general duty to scrutinise the requesting court's transactions once it is satisfied that the case falls within the scope of the section. Farwell J said, in In re Osborn [1931-1932] B & CR 189, 194: "There not being any such conflict," ie conflict with a concurrent English bankruptcy, "I think this court is bound to give all the assistance that it can." Lord Lowry LCJ took the same view of the section in In re Jackson [1973] NI 67, preferring it to that expressed by Walsh J, in the Southern Irish case of In re Gibbons [1960] Ir Jur Rep 60, where he thought such provisions to be merely enabling and discretionary. I respectfully agree with Farwell J and Lord Lowry, while recognising that the court might have to refuse aid if it were proved that the anterior proceedings were hopelessly bad under their own proper law, or that they offended against some overriding principle of English public policy.

It seems that Goulding J regarded his observations as only to be applicable to the exercise of a residual discretion upon proof that the anterior proceedings were hopelessly bad under their own proper law or were contrary to public policy.

In the present case there is nothing remotely approaching such proof. The respondent deposes that she became a member of Lloyd's in 1981 and remained a "Lloyd's name" until she resigned her membership in 1991. It would appear from the material that she was a member of syndicates managed by Cuthbert Heath Members Agency Ltd. The respondent has not appealed the bankruptcy order in the United Kingdom. The allegation of misconduct on the part of Lloyd's which her counsel relies upon as a ground to refuse aid or to defer the application until such time as the allegation is determined against Lloyd's is contained in a letter dated 15 March 1994 from the Cuthbert Heath Names Association to the respondent's solicitors Bell, Rapp & Partners. So far as is presently relevant, the letter states:

"Lloyd's is a regulatory body that administers the market under an Act of Parliament. A "Name" contracts with the Society of Lloyd's to become a Member of the Society and to abide by its rules. He then enters into an agency contract with this underwriting agents, the Members AGent [sic] who places him on a portfolio of Syndicates, and each of a number of Managing Agents who are responsible for running the Syndicates for him and other Names. A Syndicate is an annual venture, with each Syndicate member writing for himself; it is not joint and several, or corporate in nature.

This Association claims that the Society of Lloyd's has failed in its statutory regulatory duties by (a) failing to ensure that Syndicates either reserved adequately or stayed open once the true size of US Asbestos and Pollution liabilities became apparent and (b) allowed 20,000 new Names to join the Syndicates after 1980 without warning them of the liabilities they were inheriting (reckless concealment and misrepresentation).

Attached to the affidavit of the respondent is a copy of the statutory demand given under s268(1)(a) of the UK Act. That notice of demand sets out the basis of the debt claimed as follows:

1. By a Form of Acceptance duly completed and signed by the Debtor and returned to the Society of Lloyd's ("Lloyd's"), the Debtor, who is an underwriting member at Lloyd's irrevocably accepted the Settlement Offer in respect of the Debtor's 1992 and prior year's underwriting liabilities contained in the Settlement Offer Document sent to the Debtor in or about July 1996. In consideration for the mutual covenants and agreements and other good consideration contained therein the Debtor agreed to be bound by the terms and conditions set out in the Settlement Agreement ("the Settlement Agreement") between Lloyd's, the Debtor (as an "Accepting Name") and certain other stipulated parties.

2. Pursuant to the Settlement Agreement and in accordance with the Settlement Offer Document, the Debtor undertook to pay Lloyd's all amounts due in respect of the Debtor's Finality Statement.

3. In breach of the Settlement Agreement, the Debtor failed to make payments as required and the Debtor is therefore liable for the sum of 399,862.30 which represents the amount of the finality account 375,527 plus interest of 24,335.30 calculated at 2% over National Westminster Bank plc base rate from 1 October 1997 to date hereof.

4. On the 19June [sic] 1998 formal demand was made on the Debtor but the Debtor failed to make payment or secure or compound for it to the Creditor's satisfaction.

5. The said sum is unsecured and is payable immediately.

AND THE CREDITOR CLAIMS 399,862.30.

The respondent in her affidavit filed in this Court on 9 February 2001 admits that she signed the acceptance form referred to in para1 of the notice of demand set out above. At that time her solicitor was in possession of the letter dated 15 March 1994 from the Cuthbert Heath Names Association making the allegation of misconduct.

The material discloses to my satisfaction that the respondent compromised any claims which she may have had against Lloyd's in the Settlement Agreement she entered into with Lloyd's in 1996. The debt relied upon by Lloyd's to petition for bankruptcy was the contractual debt arising in 1996 by virtue of the operation of the terms of the Settlement Agreement.

There is no basis to contend, as the respondent does, that the High Court of Justice in London was mislead as to the existence and nature of the debt due. There is no suggestion in the material that the respondent has any basis to set aside the Settlement Agreement which she entered into with Lloyd's or that she has taken any steps to set aside the agreement. The material discloses no basis to refuse to act as a matter of discretion on the bankruptcy order or to adjourn the application to allow any proceedings to be brought by the respondent to relieve her from the consequences of the debt she contracted with Lloyd's under the Settlement Agreement in 1996.

The grounds of objection taken by the respondent in para(d), para(e) and para(f)(i) above are without merit.

This Court has power to appoint a receiver of the respondent's property in Australia in aid of the administration of her bankruptcy in the United Kingdom: Re Ayres; Ex parte Evans (1981) 51 FLR at 408-409; Ayres v Evans (1981) 56 FLR at 240, 247, 255. The extent of the power was considered by Drummond J, with whom Foster J agreed, in Radich v Bank of New Zealand. His Honour said (at 121-122):

The jurisdiction the Australian court has under s29(3) is a wide one. "Plainly one of the main uses of sections such as s29 (and s135 of the New Zealand Insolvency Act 1967) is to enable recourse to be had to a bankrupt's property in the country to the courts of which the request for aid is made": Re Ayres (supra) at 407-408. The Australian court is not limited in providing assistance to a foreign court to cases in which the Australian and the foreign court have powers that mirror each other. If there is a "matter of bankruptcy" within s29(3) before the foreign court, the Australian court, in response to a request for aid, can exercise any of the powers it has under the Bankruptcy Act if that same matter had arisen in Australia, being powers the exercise of which will provide assistance to the foreign court in the circumstances of the particular case:

"... the legislative scheme contemplates co-operation by Australian courts, and courts of external Territories [and of prescribed countries], in bankruptcy matters. There are obvious advantages in such a provision. The scheme envisages that, in the ordinary course of events, requests for aid will be made and honoured, subject to the need to modify these administrative arrangements to meet the circumstances of a particular case by imposing appropriate conditions or the like."

Clunies-Ross v Totterdell (1988) 20 FCR 358 at 361-362. The extent to which provisions like s29 enable the Australian court to go in assisting a foreign bankruptcy court is demonstrated by Re Waters; Ex parte Waters (1922) 22 SR (NSW) 269 at 273, where Street CJ considered that the New South Wales court could assist a foreign court, where the bankrupt was in contempt of an order of the foreign court requiring him to transfer his New South Wales land to the foreign trustee. Galbraith v Grimshaw (supra) does not I think assist the respondent. It is not authority against s29 being available to the appellant's New Zealand assignee as an aid to gathering in his Australian property: the Court there held that the Scottish trustee took that English property subject to prior claims that had arisen locally, in accordance with the rule of English law of general application to all assignments, that the assignee acquires his title subject to equities existing at the moment of acquisition. S117 of the Bankruptcy Act 1966, was said (at 511) by Lord Loreburn to affect procedure and not to enlarge

this rule of English law. Lord MacNaghten referred (at 511-512) to s118 of the 1883 Act, to which s29 of the 1966 Act is equivalent, saying that "the English Court, no doubt, is bound to carry out the orders of the Scottish Court" but that the Scottish Court could only claim the "free assets" of the bankrupt, ie, the assets in England with all the liabilities to which they were subject at the date of the Scottish sequestration. Under s29 the Australian court will, I think, assist a foreign trustee to gather in the "free assets of the bankrupt", even though it may not be prepared to recognise the trustee's title to those assets.

I do not accept that the power of the Court to vest property in a receiver is limited to the making of orders with respect to presently identifiable property or property which is beneficially owned solely by the respondent. The interest which the receiver would take in the "free assets", as stated in the citation above, is limited to the interest which the respondent held at the commencement of her bankruptcy subject to all the liabilities which attached to those assets. If there is any real dispute as to the identity of those assets, or the interests to which they are subject, the applicant, as trustee in bankruptcy, may apply to utilise the provisions of the Act to examine the respondent, or others, with respect to the property of the respondent, or, litigate the issue in this Court. That eventuality may be adequately covered by giving the applicant and respondent liberty to apply for further orders.

The applicant offers certain undertakings based upon those considered by Lockhart J as appropriate in Re Ayres; Ex parte Evans. Those undertakings I consider sufficient to protect the interests of the respondent and any third party who claims to be affected by the orders made.

The applicant seeks that Mr Gregory Moloney a registered trustee in Australia be appointed trustee in bankruptcy of the estate of the respondent. Such a request, in my view, is misconceived. There is no suggestion that a further sequestration order be made or that there be a separate bankruptcy in Australia under the administration of Mr Moloney as trustee in bankruptcy. S29 of the Act does not provide for the granting of a second sequestration order and to do so would be contrary to the decision of the Full Court in Radich v Bank of New South Wales. The proper course to act in aid is to appoint Mr Moloney as receiver without security of the property of the respondent, being divisible property within the meaning of s116 of the Act, with power to take possession of, and to sell, such property.

Any question of legal professional privilege which may arise in relation to the provision of documents under s29 of the Act can be determined at the time, if at all, such a claim is made, having regard to the relevant circumstances against which the claim is to be determined.

No discretionary ground of objection pressed by the respondent in para(f) above persuades me that this Court should refuse the aid sought by the applicant.
ORDER:
Subject to the following undertakings to the Court being given by the applicant himself, or by his counsel that:

(a) All money or other property received by the applicant as trustee in bankruptcy of the property of the bankrupt under or pursuant to these orders shall be applied by him in due course of administration of the bankruptcy in England.

(b) Any matters in controversy in connection with the bankruptcy between the applicant and Gregory Michael Moloney as receiver of the respondent's property in Australia and persons resident in Australia shall be determined by this Court.

(c) The applicant submits to the jurisdiction of this Court in all such matters as aforesaid and abides by any order the Court may make subject to appeal; and

(d) The applicant shall appoint a solicitor or firm of solicitors in this country to accept service on his behalf of any proceedings brought by Gregory Michael Moloney, as receiver, or by persons resident in Australia in connection with the said bankruptcy as aforesaid

the Court orders that:

1. Gregory Michael Moloney, upon his consenting in writing to act as receiver, be appointed receiver without security of the divisible property, within the meaning of s116 of the Bankruptcy Act 1966 (Cth), of Ann Capper McIntosh situate within Australia with authority to take all necessary steps to4 obtain possession of and to sell the same and to receive the proceeds thereof, and, to do all such acts and things as may be necessary or expedient for the purposes of giving full force and effect hereto.

2. Gregory Michael Moloney be authorised to remit money received by him under these orders to the applicant as trustee in bankruptcy in whom the estate of the bankrupt Ann Capper McIntosh is vested pursuant to s306 of the Insolvency Act 1986 (UK) after payment of any encumbrances on the said property and of the costs, charges and expenses that may be incurred in the exercise of any of the powers hereby conferred or otherwise hereunder.

3. Gregory Michael Moloney be authorised to appoint, if necessary, solicitors in Australia to advise or assist him in the discharge of his duties hereunder.

4. The costs of the applicant of and incidental to this application including reserved costs be taxed as between solicitor and client and that when so taxed Gregory Michael Moloney be a liberty to pay the same out of any moneys of the bankrupt in Australia received by Gregory Michael Moloney.

5. The applicant and the bankrupt be at liberty to apply to this Court on seven days notice for any consequential or ancillary orders or directions in this matter as may be necessary.

6. The applicant serve a sealed copy of this order on the bankrupt as soon as possible hereafter.

Counsel for the applicant: A Julian-Armitage
Solicitors for the applicant: Primrose Couper Cronin Rudkin
Counsel for the respondent: S Lee
Solicitors for the respondent: Rapp Yarwood