FEDERAL COURT OF AUSTRALIA

Lucan (Trustee) v State of New South Wales, in the matter of the Bankrupt Estate of Williams [2022] FCA 751

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| File number(s): | NSD 157 of 2022 |
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| Judgment of: | **GOODMAN J** |
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| Date of judgment: | 29 June 2022 |
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| Catchwords: | **BANKRUPTCY** – application by trustee in bankruptcy for an order vesting an interest in real property to the trustee – property disclaimed by predecessor trustee – change in circumstances – just and equitable to make order |
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| Legislation: | *Bankruptcy Act 1966* (Cth)  *Corporations Act 2001* (Cth)  *Conveyancing Act 1919* (NSW) |
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| Cases cited: | *Commonwealth Bank of Australia v State of Queensland, in the matter of Hewton* [2021] FCA 22  *In the matter of Vision Forklifts Pty Ltd (in liq)* [2020] NSWSC 243  *National Australia Bank Ltd v New South Wales* [2009] FCA 1066; (2009) 260 ALR 115  *Walsh v State of Queensland* [2019] FCA 871; (2019) 369 ALR 725 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
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| Number of paragraphs: | 49 |
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| Date of hearing: | 16 June 2022 |
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| Counsel for the Applicant: | Ms C Hamilton-Jewell |
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| Solicitor for the Applicant: | Sullivan Fernan Lawyers |
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| Solicitor for the First Respondent: | Mr T Walls of New South Wales Department of Planning and Environment |
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| Counsel for the Second Respondent: | Dr C Moschoudis |
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| Solicitor for the Second Respondent: | Recoveries and Reconstruction Legal |

ORDERS

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|  | | NSD 157 of 2022 |
| IN THE MATTER OF THE BANKRUPT ESTATE OF CHRISTOPHER WILLIAMS | | |
| BETWEEN: | LUCAN IN HIS CAPACITY AS TRUSTEE OF THE BANKRUPT ESTATE OF CHRISTOPHER WILLIAMS  Applicant | |
| AND: | THE STATE OF NEW SOUTH WALES  First Respondent  ANDREW SCOTT IN HIS CAPACITY AS TRUSTEE OF THE BANKRUPT ESTATE OF ELLEN CLARA WILLIAMS  Second Respondent | |

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| order made by: | GOODMAN J |
| DATE OF ORDER: | 29 June 2022 |

THE COURT ORDERS THAT:

1. Pursuant to s 133(9) of the *Bankruptcy Act 1966* (Cth), one half share as tenant in common of the estate in fee simple for the property known as 47 Kearsley Selections Road, Kearsley in the State of New South Wales, being the property comprised in folio identifier 149/755259, vest in Aaron Kevin Lucan in his capacity as trustee of the bankrupt estate of Christopher Williams, subject to the caveat lodged by the second respondent with dealing number AM592288.

2. The applicant’s costs of this application be paid from the bankrupt estate of Christopher Williams.

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

REASONS FOR JUDGMENT

GOODMAN J

# INTRODUCTION

1 The applicant, who is the trustee of the bankrupt estate of Mr Christopher Williams, seeks an order pursuant to s 133(9) and/or s 30(1)(b) of the ***Bankruptcy******Act*** *1966* (Cth) that an interest in a **property** located at Kearsley vest in him, *qua* trustee.

2 The current registered proprietors of the property are the first respondent and Mrs Ellen Williams, as tenants in common in equal shares. The first respondent is the registered proprietor with respect to the interest in the property formerly held by Mr Williams, as a result of a disclaimer of that interest by a predecessor of the applicant. Mrs Williams continues as the registered proprietor of her interest in the property, despite being bankrupt, because the trustee of her bankrupt estate (the second respondent) has not taken steps to be recorded as the registered proprietor of that interest.

3 The application arises in unusual circumstances. The applicant’s predecessor disclaimed the property as onerous in circumstances where there was a secured creditor, National Australia Bank (**NAB**) with orders for possession of the property; and little likelihood of a return for unsecured creditors. The applicant now seeks a vesting order in circumstances where NAB has discharged its mortgage and there is a likelihood of a return for unsecured creditors if the property were part of the bankrupt estate of Mr Williams.

4 For the reasons set out below it is appropriate to make the vesting order.

# FACTUAL BACKGROUND

5 The facts set out below have been extracted from the unchallenged affidavit evidence of the applicant.

6 In about 1994, Mr Williams and Mrs Williams became the registered proprietors of the property.

7 Prior to 2006, NAB had a registered mortgage over the property and in 2006, it obtained orders for possession of the property.

8 On 20 March 2009, Mr Williams became bankrupt by dint of a sequestration order made that day and Mr Morgan Lane was appointed as the trustee of his bankrupt estate.

9 On 2 June 2009, NAB wrote to Mr Lane stating that the amount owing under NAB’s security was $612,306.60; and that NAB was not, at that time, taking action to realise the property. There followed correspondence between NAB and Mr Lane in relation to Mr Lane attending to the realisation of the property, including a proposal to seek orders pursuant to s 66G of the ***Conveyancing Act*** *1919* (NSW). However, this did not occur.

10 On 1 December 2009, Mr Nicholas Malanos replaced Mr Lane as trustee.

11 On 24 June 2011, NAB notified Mr Malanos that it would commence its own recovery action in relation to the property.

12 On 30 June 2011, Mr Malanos signed a disclaimer of the interest held by Mr Williams in the property. The disclaimer was made because NAB was a secured creditor and had obtained an order for possession; and Mr Malanos did not anticipate that there would be any surplus proceeds after NAB had sold the property and had applied the proceeds from the sale to satisfy the debt owed to it and the costs and expenses associated with the sale.

13 On 20 July 2017, Mrs Williams became bankrupt and the second respondent was appointed as her trustee in bankruptcy. As noted above, the second respondent has not become the registered proprietor in respect of Mrs Williams’s interest in the property. He has lodged a caveat over the property.

14 In November 2020, Mr Malanos passed away and on 30 April 2021, the applicant became (and remains) the trustee of Mr Williams’s bankrupt estate.

15 On 11 January 2021, NAB’s solicitors wrote to the Crown Solicitor’s office and the second respondent (and copied the applicant), indicating that the orders for possession of the property which NAB had obtained in 2006 had expired and that it had decided to discharge its mortgage over the property. NAB subsequently discharged its mortgage.

16 On 2 September 2021, NAB submitted a proof of debt to the applicant in an amount of $599,302.04.

17 On 22 April 2022, the second respondent filed an application in the Federal Circuit and Family Court of Australia seeking various orders, including an order pursuant to s 66G of the *Conveyancing Act* for the appointment of trustees for the sale of the property.

18 The bankrupt estate of Mr Williams presently has no known assets and has liabilities of $618,958.48 (including the unadjudicated amount of $599,302.04 in the NAB proof of debt).

19 The property is unencumbered and has an estimated value in the order of $825,000.

20 Neither respondent opposes the application. The applicant and the first respondent filed written submissions which were of considerable assistance to the Court.

# LEGAL FRAMEWORK

21 By reason of the disclaimer, the interest that Mr Williams formerly held in the property has reverted to the first respondent, subject to the power of the Court to make an order under s 133(9) of the Bankruptcy Act. Section 133 of the Bankruptcy Act provides, in so far as is presently relevant:

**133  Disclaimer of onerous property**

(1AA)  Where any part of the property of the bankrupt consists of:

(a)  land of any tenure burdened with onerous covenants; or

(b)  property (including land) that is unsaleable or is not readily saleable;

subsection (1) applies.

…

(1)  Subject to this section, the trustee may, notwithstanding that he or she has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation to it and notwithstanding, in the case of property the transfer of which is required by a law of the Commonwealth or of a State or Territory to be registered, that he or she has not become the registered owner of that property, by writing signed by him or her, at any time disclaim the property.

…

(2)  A disclaimer under subsection (1) or (1A) operates to determine forthwith the rights, interests and liabilities of the bankrupt and his or her property in or in respect of the property disclaimed, and discharges the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him or her, but does not, except so far as is necessary for the purpose of releasing the bankrupt and his or her property and the trustee from liability, affect the rights or liabilities of any other person.

…

(9)  The Court may, on application by a person either claiming an interest in, or being under a liability not discharged by this Act in respect of, disclaimed property, and after hearing such persons as it thinks fit, make an order, on such terms as the Court considers just and equitable, for the vesting of the property in, or delivery of the property to, a person entitled to it or a person in whom, or to whom, it seems to the Court to be just and equitable that it should be vested or delivered, or a trustee for that person.

22 Section 133(9) provides the Court with a discretion to make various orders concerning the vesting or delivery of disclaimed property. There are several conditions which must be satisfied before the discretion is enlivened:

(1) there must be disclaimed property;

(2) there must be an application by a person either: (a) claiming an interest in the disclaimed property; or (b) under a liability not discharged under the Bankruptcy Act in respect of the disclaimed property; and

(3) the Court must have heard such persons as it thinks fit.

23 If those conditions are satisfied, then the Court may make an order (on such terms as it considers just and equitable) for the disclaimed property to vest in *or* be delivered to: (1) a person entitled to it; *or* (2) a person in whom *or* to whom it seems to the Court to be just and equitable that it should be vested *or* delivered; *or* (3) a trustee for a person who satisfied (1) or (2).

# PRECONDITIONS TO THE EXERCISE OF THE DISCRETION

## Disclaimer of property

24 As noted above, Mr Malanos disclaimed the interest of Mr Williams in the property on 30 June 2011. No challenge is made to the efficacy of that disclaimer.

## A person claiming an interest in the disclaimed property under a liability not discharged under the Act in respect of the disclaimed property

25 The jurisdiction conferred by s 133(9) is dependent upon a person claiming an interest in the disclaimed property, not the vindication of that claim: see ***Walsh*** *v State of Queensland* [2019] FCA 871; (2019) 369 ALR 725 at 733 [32] (Logan J).

26 The applicant claims that he has an interest in the property by dint of his position as the trustee of the bankrupt estate of Mr Williams and the operation of s 19 of the Bankruptcy Act. Section 19 imposes upon the applicant, *qua* trustee, a duty to *inter alia* determine whether the estate includes property that can be realised to pay a dividend to creditors (s 19(1)(b)); and to take appropriate steps to recover property for the benefit of the estate (s 19(1)(f)). The applicant submits that the property is now a valuable asset and, consistent with his duties, he claims that he has an interest in it.

27 The making of the claim is sufficient to satisfy this precondition (see *Walsh*, above). Had it been necessary to decide whether the applicant has an interest in the property, I would have decided that he did, for the following reasons.

28 *First*, the word *“interest”* is not defined in s 133 or elsewhere within the Bankruptcy Act. *Secondly*, the structure of s 133(9) is consistent with a broad concept of interest. In this regard, s 133(9):

(1) contemplates two classes of applicants:

(a) a person claiming an interest in the disclaimed property; and

(b) a person under a liability not discharged by the Act in respect of the disclaimed property; and

(2) it provides for the following kinds of orders:

(a) the vesting of the property in a person entitled to it (or their trustee);

(b) the delivery of the property to a person entitled to it (or their trustee);

(c) the vesting of the property in a person in whom it seems to the Court to be just and equitable that it should be vested (or their trustee); and

(d) the delivery of the property to a person to whom it seems to the Court to be just and equitable that it should be delivered (or their trustee).

29 Thus, s 133(9) contemplates that an order may be made, not only where an applicant is a person entitled to the property (or their trustee); but also where an applicant is a person in whom or to whom it seems to be just and equitable that the property should be vested or delivered (or their trustee). As the class of persons in whose favour an order may be made is not limited to persons entitled to the property, this suggests that the class of applicants who satisfy the criterion *“a person claiming an interest in the disclaimed property”* should not be narrowly construed.

30 *Thirdly*, the Bankruptcy Act imposes a duty on trustees to take steps to recover property for the benefit of the estate (s 19(1)(f) of the Bankruptcy Act).

31 Neither the researches of the applicant’s counsel and the first respondent’s solicitor, nor my own researches, have revealed a decision in which s 133(9) has been considered in circumstances where the applicant for a vesting order is a trustee (or the successor to a trustee) who earlier disclaimed the property. The absence of such decisions may be a product of the rarity of such a factual scenario. The more usual scenario involves a secured creditor as the applicant.

32 However, a similar result was reached in the context of the ***Corporations Act*** *2001* (Cth) by Gleeson J in *In the matter of* ***Vision Forklifts*** *Pty Ltd (in liq)* [2020] NSWSC 243, where his Honour made an order vesting in a liquidator the surplus funds from the sale of an asset previously disclaimed by that liquidator. In that case, his Honour was concerned with an application made pursuant to s 568F of the Corporations Act. Section 568F(1) provided, in so far as is presently relevant:

**568F  Court may dispose of disclaimed property**

(1)  The Court may order that disclaimed property vest in, or be delivered to:

(a)  a person entitled to the property; or

(b)  a person in or to whom it seems to the Court appropriate that the property be vested or delivered; or

(c)  a person as trustee for a person of a kind referred to in paragraph (a) or (b).

(2)  The Court may make an order under subsection (1):

(a)  on the application of a person who claims an interest in the property, or is under a liability in respect of the property that this Act has not discharged; and

(b)  after hearing such persons as it thinks appropriate.

…

33 The similarities between s 133(9) of the Bankruptcy Act and s 568F of the Corporations Act are obvious. Each provides as pre-conditions to the exercise of the discretion that: (1) there be disclaimed property; (2) there be an application by a person who claims an interest in the property, or who is under a liability in respect of the property that has not been discharged by the respective Act; and (3) the Court has heard such persons as it thinks appropriate.

34 In each provision, if the discretion has been enlivened, the Court may make orders for the disclaimed property to vest in or be delivered to the same categories of person. Whilst s 133(9) of the Bankruptcy Act allows for vesting in, or delivery to, a person where the Court forms the view that it is *“just and equitable”* that this occur and s 568F(1)(b) of the Corporations Act allows for such vesting in, or delivery to, a person where the Court considers it *“appropriate”* that this occur, the difference is not material, at least for present purposes.

35 In *Vision Forklifts* a liquidator gave a notice of disclaimer of a forklift which had an estimated value of $20,000 and in respect of which a creditor held a registered security interest securing a debt of $19,054.17. Subsequently, the creditor sold the forklift and there were surplus funds of $6,635.44. That surplus was paid by the creditor to the liquidator. The estimated creditor claims in the liquidation were in the order of $1.4 million. At [8]-[10], Gleeson J stated:

8. [Section 568F(1)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s568f.html) of the [Corporations Act](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/) provides that the Court may order that disclaimed property vest in, or be delivered to (a) a person entitled to the property, or (b) a person in or to whom it seems to the Court appropriate that the property be vested or delivered, or (c) a person as trustee for a person of a kind referred to in pars (a) or (b).

9. The Court may make an order under [s 568F(1)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s568f.html) on the application, among others, of a person who claims an interest in the property: [s 568F(2).](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s568f.html) **The liquidator, on behalf of the company, answers that description**.

10. There being a surplus arising upon the exercise of the security holder’s power of sale in respect of the forklift, **the person in whom it is appropriate that the surplus from the disclaimed property be vested, is the liquidator of the company which was the owner of the property up until the time the disclaimer took effect**.

(emphasis added)

## Hearing from such persons as the Court thinks fit

36 The first respondent (being the registered proprietor in respect of the interest formerly held by Mr Williams) and the second respondent (being the trustee of the estate of Mrs Williams, which holds the other half-interest in the property) are each parties to the proceeding and each participated in the hearing. As noted above, neither opposes the making of the orders sought by the applicant.

37 I am not convinced that it was necessary that Mr Williams be given the opportunity to address the Court but I am satisfied in any event that he was afforded an opportunity to do so. The evidence establishes that Mr Williams was given notice of the proceeding and the hearing and that he was served with a copy of the application and supporting materials as well as the written submissions of the applicant and the first respondent.

38 I am satisfied that all appropriate parties have been heard or afforded the opportunity to be heard.

## Conclusion as to the preconditions to the exercise of the discretion

39 For the reasons set out above, I am satisfied that the pre-conditions to the exercise of the discretion are satisfied and thus that the discretion is enlivened.

# THE EXERCISE OF THE DISCRETION

40 I turn now to the exercise of the discretion.

41 The making of the vesting order sought by the applicant would be just and equitable for the following reasons.

42 *First*, prior to the disclaimer, the interest in the property formerly held by Mr Williams vested in Mr Malanos, *qua* trustee of the bankrupt estate of Mr Williams.

43 *Secondly*, whilst Mr Malanos did disclaim that interest, he did so in circumstances where it appeared that the property would be onerous to the bankrupt estate. There is no suggestion that Mr Malanos acted otherwise than properly and in accordance with his duties as trustee in the circumstances which then obtained.

44 *Thirdly*, there has been a change in circumstances, and in particular the change in NAB’s status from a secured to an unsecured creditor, which means that it now seems likely that a sale of the property would enable payment of a dividend to the creditors of the bankrupt estate of Mr Williams. If the vesting order were made, then the estate would have an asset with a value in the order of $412,500 (being one half of $825,000) and liabilities in the order of $619,000. Even allowing for the costs of the sale of the property, council rates and other amounts payable in respect of the property; and the costs of administration of the estate, there would likely be a significant return to creditors.

45 *Fourthly*, the taking of steps to recover property for the benefit of the bankrupt estate of Mr Williams in the present circumstances is consistent with the exercise by the applicant of his duty under s 19(1)(f) of the Bankruptcy Act.

46 *Fifthly*, if an order were not to be made, then creditors of the bankrupt estate of Mr Williams would likely receive no dividend; and the first respondent would receive a windfall gain which is an undesirable outcome: see *National Australia Bank Ltd v New South Wales* [2009] FCA 1066; (2009) 260 ALR 115 at [24] (Rares J); *Commonwealth Bank of Australia v State of Queensland, in the matter of Hewton* [2021] FCA 22 at [22] (Derrington J).

47 *Finally*, neither respondent opposed the application.

# CONCLUSION

48 An order should be made that one half share as tenant in common of the estate in fee simple for the property known as 47 Kearsley Selections Road, Kearsley in the State of New South Wales, being the property comprised in folio identifier 149/755259, vest in the applicant in his capacity as trustee of the bankrupt estate of Christopher Williams, subject to the caveat lodged by the second respondent.

49 It is appropriate that the applicant’s costs be paid from the bankrupt estate of Mr Williams.

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| I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Goodman. |

Associate:

Dated: 29 June 2022