CITATION:	*McNamee & Anor v McNamee & Anor* [2024] NTSC 96
PARTIES:	CLINTON BLAKE MCNAMEE (AS LITIGATION GUARDIAN FOR LORNA JENNIE PASCOE) And TIARNI MCNAMEE (AS LITIGATION GUARDIAN FOR LORNA JENNIE PASCOE) v MITCHELL KENT MCNAMEE and MITCHELL MACKENZIE HERRETT (AS TRUSTEE OF THE BANKRUPT ESTATE OF MITCHELL KENT MCNAMEE)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-01009-SC and 2022-01010-SC
DELIVERED:	19 November 2024
HEARING DATE:	22 August 2024
JUDGMENT OF:	Luppino AsJ

CATCHWORDS:

Practice and Procedure – Application for dismissal of Counterclaim by Defendant for want of prosecution –Bankruptcy of Defendant subsequent to commencement of proceedings – Stay of proceedings by virtue of s 60(2) *Bankruptcy Act 1966* (Cth) – Notice to Trustee in Bankruptcy pursuant to s 60(3) *Bankruptcy Act 1966* (Cth) requiring the Trustee in Bankruptcy to elect to prosecute the Counterclaim – Requirements for a valid notice pursuant to s 60(3) of *Bankruptcy Act 1966* (Cth) – Whether Trustee in Bankruptcy validly elected to prosecute the Counterclaim – Requirements for a valid election – Whether appropriate to dismiss the Counterclaim for want of prosecution in the event of a failure by the Trustee in Bankruptcy to elect to prosecute the Counterclaim – Dismissal for want of prosecution is in the discretion of the Court – Factors relevant to the exercise of the discretion.

Bankruptcy Act 1966 (Cth), ss 60(2), 60(3).
Guardianship of Adults Act 2016 (NT), s 20
Supreme Court Rules 1987 (NT), rr 4.07, 24.01, 24.02, 24.05(a), 53.

Aware Industries Ltd v Robinson (1997) 75 FCR 600.
Freeman v Joiner [2005] FCAFC 149.
Frigger v Rowe Bristol Lawyers Pty Ltd [2020] WASC 5.
Holmes v Goodyear Tyre & Rubber Co (Aust) Ltd (1984) 73 FLR 88.
Muir v Angeles 2020 NSWSC 1056.
Nugawela v Commissioner of Taxation [2018] FCA 1458.
Re Collins; Ex parte Official Trustee in Bankruptcy v Bracher **(**1986) 10 FCR 209.
Re Lofthouse (2001) 107 FCR 151.

REPRESENTATION:

Counsel:

Plaintiffs:	R Sanders
First Defendant:	D McConnel SC
Second Defendant:	No appearance

Solicitors:

Plaintiffs:	Ward Keller Lawyers
First Defendant:	Piper Grimster Jones
Second Defendant:	No Appearance

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McNamee & Anor v McNamee & Anor [2024] NTSC 96

No. 2022-01009-SC and 2022-01010-SC

BETWEEN:

CLINTON BLAKE MCNAMEE (AS LITIGATION GUARDIAN FOR LORNA JENNIE PASCOE)

First Plaintiff

And

TIARNI MCNAMEE (AS LITIGATION GUARDIAN FOR LORNA JENNIE PASCOE)

Second Plaintiff

v

MITCHELL KENT MCNAMEE

First Defendant

And

MITCHELL MACKENZIE HERRETT (AS TRUSTEE OF THE BANKRUPT ESTATE OF MITCHELL KENT MCNAMEE)

Second Defendant

CORAM: Luppino AsJ

REASONS

(Delivered 19 November 2024)

[1] These two proceedings have been consolidated by order made on 7 October 2022. Both proceedings were commenced by Originating Motion filed on 19 April 2022 seeking orders for possession. In the case of file 2022-01009-SC, possession was sought in respect of a residential property (the Land). The relief sought in that proceeding was pursuant to the summary process in Order 53 of the *Supreme Court Rules 1987* (NT) (the SCR). The other proceeding sought an order for possession of a motor vehicle (the Vehicle).

[2] Both proceedings were commenced by Litigation Guardians on behalf of Lorna Jennie Pascoe (Lorna) who lost legal capacity during the course of the background events. The Litigation Guardians are two of Lorna's children. They are also Lorna's financial guardians appointed by the Northern Territory Civil and Administrative Tribunal pursuant to section 20 of the *Guardianship of Adults Act 2016* (NT) on 21 December 2021. The First Defendant is also a child of Lorna.

[3] Based on the affidavit evidence and the First Defendant's Defence and Counterclaim, although much remains in dispute, the background facts are that Lorna commenced construction of a home on the Land. She engaged a

builder but that builder did not complete the construction. The First Defendant claims that he sourced the Land, assisted arranging the plans, assisted in engaging and contracting the builder, dealt with matters after the building contract was terminated and project managed the completion of the home. The First Defendant alleges that was all part of an agreement made with Lorna that in lieu of payment for his services (including payment of a finder's fee for sourcing the Land), he would be permitted to reside in the completed home on a non-exclusive basis, for six years at no cost. In relation to the Vehicle, the First Defendant claims that Lorna gifted the Vehicle to him.

[4] After the Plaintiffs were appointed as financial guardians they gave notice to the First Defendant requiring him to give up possession of the Land and the Vehicle. The First Defendant did not comply and the Plaintiffs then commenced the two proceedings. The Plaintiffs proceeded on the application for possession of the Land by way of the summary process pursuant to Order 53 of the SCR. The First Defendant opposed the application on the basis of the alleged agreement entered into with Lorna.

[5] That application was heard and decided on 21 October 2022. The Court determined that if there was an agreement made between Lorna and the First Defendant, it was only a contractual licence. As a licence is not a proprietary interest, the First Defendant had no entitlement to remain in possession of the Land. The First Defendant's remedy was limited to a claim for damages for breach. The Court therefore made the order for

possession in favour of the Plaintiffs and gave directions for the continuation of the contractual claim.

[6] The First Defendant then appealed that decision. The Court of Appeal overturned the decision at first instance essentially because the Order 53 process is intended to be a summary process to be utilised only where there was no real issue to try. The Court of Appeal was of the view that the question of whether the First Defendant had an interest enforceable in equity resulting from the agreement allegedly made with Lorna was arguable and therefore there was a real issue for trial.

[7] The Court of Appeal remitted the matter to the Court with an order pursuant to rule 4.07 of the SCR that the proceedings continue as if commenced by Writ.

[8] The First Defendant, while self-represented, filed a Defence and Counterclaim on 14 October 2022. As is commonly the case with unrepresented parties, that document does not comply with pleading rules and principles. It contains excessive facts and it is difficult to distill the material facts from the contents. It is in effect a 36 page statement but what is apparent is that the Defence and Counterclaim, in the case of the Land, is based on the agreement the First Defendant alleges he made with Lorna. It is for the value of the services the First Defendant claims to have provided. The amount of the Counterclaim is in excess of $420,000 plus GST, interest, penalty interest and further unspecified expenses. In respect

of the Vehicle, the First Defendant alleges that the Vehicle was gifted to him by Lorna.

[9] The current application is the Plaintiffs' Summons filed 7 August 2024 primarily seeking the dismissal of the First Defendant's Counterclaim for want of prosecution. The application is made pursuant to the Court's inherent jurisdiction. The Court has power pursuant to rules 24.01 and 24.02 of the SCR to dismiss proceedings for want of prosecution in set circumstances, but the Court's inherent jurisdiction beyond those circumstances is preserved by reason of rule 24.05(a) of the SCR.

[10] The evidence supporting the application is the affidavit of Teresa Lydia Hall made 24 July 2024 and that of James William Stuchbery made 7 August 2024. That evidence is unchallenged. There was no evidence by either Defendant.

[11] The evidence reveals that the First Defendant became bankrupt by sequestration order made on 23 August 2023 and the Second Defendant was appointed as the Trustee of the Bankrupt Estate. By letter dated 25 June 2024, the Plaintiffs' lawyers gave the Second Defendant notice pursuant to section 60(3) of the *Bankruptcy Act 1966* (Cth) (the Act) requiring the Second Defendant to make an election whether to prosecute or discontinue the Counterclaim. In respect of the Vehicle, the Second Defendant was asked to confirm whether the Second Defendant asserted any proprietary interest in the Vehicle. That letter summarised the proceedings and the

procedural history in great detail and in respect of the Counterclaim, insofar as it related to the Land, noted that the fees and other expenses claimed by the First Defendant was divisible property which had vested in the Second Defendant by the bankruptcy.

[12] Section 60(2) and (3) of the Act provide as follows:-

> **60 Stay of legal proceedings**
>
> (2) An action commenced by a person who subsequently becomes a bankrupt is, upon his or her becoming a bankrupt, stayed until the trustee makes election, in writing, to prosecute or discontinue the action.
>
> (3) If the trustee does not make such an election within 28 days after notice of the action is served upon him or her by a defendant or other party to the action, he or she shall be deemed to have abandoned the action.

[13] Lawyers representing the Second Defendant responded by email dated 22 July 2024 asserting that "*..the trustee does not abandon any claims*". By further email from the Second Defendant's lawyers dated 24 July 2024, they advised that they were reviewing all of the materials for the purposes of advising the Second Defendant and indicated that they required six weeks for that purpose. It is odd that the Second Defendant required that much time given he had been appointed as the Trustee in Bankruptcy nearly 12 months before.

[14] The Plaintiffs' Summons was first mentioned before me on 8 August 2024 when I directed that the Second Defendant be given notice of the Plaintiffs' contentions and I adjourned the hearing so that the Second Defendant had

an opportunity to be heard on the Summons. I also ordered the joinder of the Second Defendant and gave directions for service.

[15] When the matter resumed on 22 August 2024 there was no appearance by the Second Defendant. The evidence shows that there was no correspondence from, or on behalf of, the Second Defendant since the email from his lawyers of 24 July 2024, at least until 7 August 2024.

[16] The 28 day period provided by section 60(3) of the Act elapsed on or about 24 July 2024. The six week period requested in the email from the Second Defendant's lawyers dated 24 July 2024 elapsed on or about 4 September 2024. Therefore, to the date of these reasons, the Second Defendant has had more than the time requested by his lawyers.

[17] Mr McConnel appeared for the First Defendant only and chose not to argue the question of the validity of the Plaintiffs' notice or of the Second Defendant's election. The absence of a contradictor is not optimal as both of those issues were contentious.

[18] The requirements for a valid notice pursuant to section 60(3) of the Act were discussed in *Muir v Angeles*[1] (*Muir*). I have no doubt that the notice is effective and valid in respect of the Land component of the Counterclaim for the reasons set out below but there are some concerns in relation to the Vehicle component of the Counterclaim. The notice may be ineffective in that respect as, unlike the notice in respect of the Land, the letter was not

[1] 2020 NSWSC 1056.

as unequivocal as to whether it was a notice pursuant to section 60(3). That is because the letter asked the Second Defendant to confirm whether he asserted any proprietary interest in the Vehicle and sought a response within 28 days, which is the period specified in section 60(3). The notice may have been phrased in that way as the First Defendant's pleading in respect of the Vehicle may be more appropriately described as a Defence than a Counterclaim.

[19] A valid notice is the start of the process leading to an election pursuant to sections 60(2) and (3) of the Act. Section 60(2) provides that an "*action*" commenced by a person who subsequently becomes a bankrupt is stayed until the trustee in bankruptcy makes an election to prosecute or discontinue the action. A counterclaim is an action for this purpose. Section 60(3) then sets out the steps that can be taken to force a trustee to make an election. It allows the "*other party*" to the action, the Plaintiffs in this case, to give notice of the action to a trustee and then, unless the trustee makes an election in writing to prosecute the action within 28 days, the trustee is deemed to have abandoned the action.

[20] A valid notice pursuant to section 60(3) of the Act requires two things. Firstly, a document which amounts to a notification. Secondly, service of that notice upon the trustee in bankruptcy. It is the giving of that notice in that way which causes the 28 day period to commence to run. It is therefore

irrelevant whether the Second Defendant already knew of the action. The proper question is whether notice of action has been served.[2]

[21] Both *Muir* and *Aware Industries Ltd v Robinson*[3] discussed what constitutes sufficient notice. In those cases the Court said that the provision of details of an action alone is not sufficient. That was because the purpose of the notice is to alert the trustee in bankruptcy to the need to consider whether to prosecute or abandon the action. Therefore the notice must contain sufficient information to draw the trustee's attention to the fact that time for the making of an election had commenced to run.

[22] Factors going to the validity of a notice include whether the notice states that it is given pursuant to section 60 of the Act, whether it recites the existence of the proceedings, whether it is given by the "*other party*" to the proceedings, whether it requires the trustee to make an election in writing within 28 days and, lastly, whether it specifies that in default the action would be deemed to be abandoned.

[23] Having regard to the foregoing, I am satisfied that the notice was also sufficient in respect of the Vehicle. Importantly, the letter set out the mutually exclusive positions which would apply depending on the Second Defendant's election. They were firstly, if the Second Defendant agreed that the Vehicle was gifted to the First Defendant, as the Plaintiffs disputed

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2 *Muir v Angeles* 2020 NSWSC 1056; *Aware Industries Ltd v Robinson* (1997) 75 FCR 600.

3 (1997) 75 FCR 600.

that, the Second Defendant would need to be joined to the proceedings so that those issues could be litigated. The alternative position was that if the Second Defendant did not accept the First Defendant's assertion as to a gift, then the Plaintiffs would be entitled to apply for summary judgment.

[24] A deemed abandonment following the failure to make an election is only an abandonment of the action by the trustee. It is not an extinguishment of the cause of action.[4] It does not prevent the trustee commencing fresh proceedings for the same cause of action.[5] Nor does it prevent the bankrupt from doing so on discharge.[6]

[25] The Plaintiffs argued that the email from the Second Defendant's lawyers of 22 July 2024, even if read alone and more so if read with the email of 24 July 2024, renders the Second Defendant's response ineffective as an election for the purposes of section 60 of the Act. In consequence, it was submitted, the Counterclaims are deemed abandoned.

[26] The Plaintiffs' submission was based on *Re Collins; Ex parte Official Trustee in Bankruptcy v Bracher*[7] (*Re Collins*), *Re Lofthouse*[8] and *Holmes v Goodyear Tyre & Rubber Co (Aust) Ltd*[9] (*Holmes*).

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4 *Re Collins; Ex parte Official Trustee in Bankruptcy v Bracher* (1986) 10 FCR 209.

5 *Re Collins; Ex parte Official Trustee in Bankruptcy v Bracher* (1986) 10 FCR 209.

6 *Muir* at para 113 and *Freeman v Joiner* [2005] FCAFC 149.

7 (1986) 10 FCR 209.

8 (1984) 55 ALR 594.

9 (1984) 73 FLR 88.

[27] In *Re Collins*, proceedings had been commenced by the bankrupt before the sequestration order was made. The solicitors who had been handling that matter for the bankrupt requested the Official Receiver authorise them to continue the action on behalf of the bankrupt. The Official Receiver agreed to do so. Subsequently, the solicitors for the defendant in those proceedings (i.e., of the "*other party*" for the purposes of section 60(3)) gave notice requiring an election. The Official Receiver's response recited that "… *[the solicitor for the bankrupt] was authorised… to prosecute the action*." It was held that the letter did ".. *evince a clear election made by the trustee to prosecute the action*..". I note that was found to be the case notwithstanding that the election was not expressed precisely in terms of the language of section 60(3) of the Act.

[28] In *Holmes*, the trustee also authorised the bankrupt's solicitors to pursue a claim in terms which would have amounted to a valid election but then added that the authorisation was "… *only on the basis that there are no funds required to be expended by the bankrupt estate in respect of the litigation* …". The qualification as to costs was held to render the election ineffective.

[29] A different result based on the same principle as in *Holmes* arose in *Re Lofthouse*. There, after making an otherwise clear election to continue proceedings, the trustee added that the matter "..*will be reviewed once I am in a position to properly assess these proceedings*." Gray J decided that could not be construed as a qualification in the same way as the condition

as to costs was construed in *Holmes*. Rather, it was simply a statement that the trustee intended to further consider whether he would allow the proceedings to continue.

[30] The Plaintiffs argued that the statement "*..the trustee does not abandon any claims*" was ineffective as an election for the purposes of section 60(3) as it did not evince a clear election to prosecute the action.

[31] I do not agree. First, there is no prescribed form of election. Matters of form such as expressing an election in the negative are not determinative. Secondly, although not expressed in positive terms, the language used is consistent with section 60(3) of the Act in that it refers to the claim not being abandoned. Thirdly, the options in section 60(2) are limited to a trustee either prosecuting or discontinuing the action. Even if an election is expressed in negative terms, in my view, given that there are only two options, stating an intention that the trustee did not abandon any claims is another way of saying that the trustee intends to prosecute all claims. In my view, the meaning and the intention to be conveyed is the same. It satisfies the requirement of a clear intention to prosecute the action.

[32] The Plaintiffs also submitted that the Second Defendant's stated intention to review the matter as stated in the second email from the Second Defendant's lawyers was a qualification which also rendered the election ineffective on the basis of *Holmes*. I do not agree. One important difference between the current case and *Holmes* and *Re Lofthouse*, is that

the statement of the intention to review the matter was in a separate, albeit proximate, email. In my view, that is a stronger position in terms of the principle in *Re Lofthouse* in negating that as a qualification or a reservation of rights. In any case, following *Re Lofthouse* the second email from the Second Defendant's lawyers is not a qualification rendering the election ineffective. Whether or not a valid election was made turns only on the terms of the first email from the Second Defendant's lawyers.

[33] For these reasons I consider that the Second Defendant has made a valid election. Had I found that the Second Defendant's election was ineffective, the Plaintiffs submitted that the appropriate, and usual course in that case was for the Counterclaims to be dismissed for want of prosecution. In making that submission the Plaintiffs relied on *Muir* as well as *Nugawela v Commissioner of Taxation*[10] and *Frigger v Rowe Bristol Lawyers Pty Ltd*[11] the latter, it was submitted, being authority for the proposition that although the decision to dismiss for want of prosecution will depend on all the circumstances, such an order would almost certainly be granted. That was a strong point in my view.

[34] The First Defendant submitted that whether or not the proceedings should be dismissed for want of prosecution was a discretionary matter. That is clearly correct. Mr McConnel submitted that if I found the election to be ineffective, that I should not order dismissal for a number of reasons.

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10 [2018] FCA 1458 at para 110.

11 [2020] WASC 5 at para 4.

Those were mostly based on what could still occur, for example, the First Defendant applying for a review of the Second Defendant's decisions, the Second Defendant applying for an extension of time to make an election or the Second Defendant assigning the cause of action in the Counterclaims to the First Defendant.

[35] Other than to acknowledge those factors as at least arguable on the question of the exercise of the discretion, I do not expect that I would have placed much weight on such speculative considerations and, as far as I am aware, none of those possible occurrences actually eventuated.

[36] Other than to make those general comments in respect of those remaining issues, as I have found that the election is effective, it is not necessary to decide those matters.

[37] As a result of my finding that the Second Defendant has made a valid election, as the election is irrevocable, the options for the Second Defendant are now limited to prosecuting the Counterclaims or to formally discontinue them.

[38] As the Second Defendant has now had, by default, much more than the time requested by his lawyers in the email of 24 July 2024, to avoid any further delays it is incumbent on the Second Defendant to now prosecute the proceedings in a timely fashion. I am critical of the Second Defendant’s apparent inactivity in respect of the proceedings post 24 July 2024, exacerbated by reason that the sequestration order was made on 23 August

2023, well over a year ago. The Second Defendant has had ample time to acquaint himself with the proceedings and to determine how to proceed.

[39] When the matter was converted to a proceeding as if commenced by Writ, the Court of Appeal made no orders for pleadings or for the affidavits to stand as pleadings. Given the state of the Defence and Counterclaim I think a properly pleaded version should be filed and served. A Statement of Claim, in consolidated form, should first be filed and served.

[40] I will also hear the parties as to these ancillary orders and on the question of costs.