Official Trustee In Bankruptcy v Waa
[2016] NTSC 69

PARTIES:	OFFICIAL TRUSTEE IN BANKRUPTCY v HAERUSIAH WAA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	68 of 2016 (21635799)
DELIVERED:	15 December 2016
HEARING DATES:	27 October 2016
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Jurisdiction of Courts – Whether the proposed proceedings alter the interest vested in Official Trustee by s 58 Bankruptcy Act – Whether this Court has jurisdiction to determine the Defendant's proposed claim.

Practice and Procedure – Order to join a party – Considerations for the making of an order – Order to continue matter commenced by Originating Motion as if commenced by Writ and consequential orders – Considerations for the making of an order – Application for substituted service – Requirements for the making of an order for substituted service.

De Facto Relationships – Adjustment of property interests – Whether declaration of property interests is required as a preliminary to an adjustment of property interests – Extension of time to make application – Desirability of hearing all the evidence before deciding whether to grant the extension.

Bankruptcy – Whether proceedings alter the interest fixed by s 58 Bankruptcy Act.

Bankruptcy Act (Cth), ss 27, 58
De Facto Relationships Act ss 12, 13, 14
Law of Property Act s 40.
Supreme Court Rules, rr 4.04, 4.05, 4.06, 4.07, 6.09, 9.02, 9.06. 13.02.

O'Neil v Acott (1988) 59 NTR 1;
Bishop v Bridgelands Securities Ltd (1990) 25 FCR 311;
Payne v Young (1980) 145 CLR 609;
Australian Consumer And Competition Commission v Launceston Superstore Pty Ltd [2013] FCA 297;
Knight v Beyond Properties Pty Ltd (No 2) (2006) FCA 192;
CBI Contractors Pty Ltd v Abbott (No 2) [2009] FCA 1129.

REPRESENTATION:

Counsel:

Plaintiff:	Mr George
Defendant:	Ms Dargan

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	Withnalls Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Official Trustee In Bankruptcy v Waa [2016] NTSC 69

No. 68 of 2016 (21635799)

BETWEEN:

Official Trustee In Bankruptcy
Plaintiff

AND:

Haerusiah Waa
Defendant

CORAM: MASTER LUPPINO

REASONS

(Delivered 15 December 2016)

[1] The proceedings in this matter were commenced by Originating Motion filed 28 July 2016. The Plaintiff is the Official Trustee In Bankruptcy ("Official Trustee") and the trustee of the bankrupt estate of Quentin Carlos ("Carlos").

[2] The Plaintiff seeks orders in respect of the sale of a certain property. That property is co-owned by the Defendant and Carlos and it was their former matrimonial home. The Defendant claims that she and Carlos were de facto partners within the meaning of the *De Facto Relationships Act* ("*DFR Act*").

[3] By summons filed 7 September 2016 the Defendant has, as a prelude to seeking orders for property adjustment in these proceedings, sought orders for the joinder of Carlos in his personal capacity[1], for the matter to proceed as if commenced by Writ and consequential orders, for substituted service of proceedings on Carlos and for an extension of time to bring her application pursuant to the *DFR Act*.

[4] The Defendant's summons was opposed by the Plaintiff and it was heard on 27 October 2016.

[5] There was considerable evidence by both parties as to negotiations entered into in an attempt to resolve these proceedings. Those negotiations included resolution of the Defendant's claimed entitlements to an adjustment of property interests and on the basis that the Defendant would make a payment to the Plaintiff representing the interest of Carlos in the property. A settlement in principle was arrived at which involved the Defendant paying a relatively nominal amount to the Plaintiff. The settlement failed as it could not be finalised as some requirements of the Plaintiff could not be satisfied, at least not without the involvement of Carlos.

[6] The Plaintiff then commenced the current proceedings. Despite that history, at the commencement of the hearing counsel for the Plaintiff raised a jurisdictional point. The Plaintiff's position is curious as the Plaintiff has essentially recognised the Defendant's entitlements in negotiations to date

[1] He was discharged from bankruptcy on 30 March 2013.

and as the Plaintiff commenced proceedings in this Court. Despite that, it now challenges the jurisdiction of this Court to hear and determine the Defendant's interest in the property in circumstances where the granting of the orders proposed by the Defendant would initiate the involvement of Carlos and could see the resolution of the formal impediments which prevented the settlement.

[7] Notwithstanding that, and as I thought it best to hear argument in respect of the jurisdiction question first, I invited counsel for the Plaintiff to commence.

[8] The jurisdictional argument in essence is that the Court has no jurisdiction to hear the matter due to the operation of sections 27 and 58 of the *Bankruptcy Act*.

[9] Those sections are now reproduced.

> **27 Bankruptcy courts**
>
> (1) The Federal Court and the Federal Circuit Court have concurrent jurisdiction in bankruptcy, and that jurisdiction is exclusive of the jurisdiction of all courts other than:
>
> (a) the jurisdiction of the High Court under section 75 of the Constitution; or
>
> (b) the jurisdiction of the Family Court under section 35 or 35A of this Act.
>
> (2) To avoid doubt, subsection (1) does not:
>
> (a) confer jurisdiction in a criminal matter; or

(b) exclude the jurisdiction of a court of a State or Territory under the Judiciary Act 1903 in a criminal matter relating to this Act.

58 Vesting of property upon bankruptcy--general rule

(1) Subject to this Act, where a debtor becomes a bankrupt:

(a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and

(b) after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.

(2) Where a law of the Commonwealth or of a State or Territory of the Commonwealth requires the transmission of property to be registered and enables the trustee of the estate of a bankrupt to be registered as the owner of any such property that is part of the property of the bankrupt, that property, notwithstanding that it vests in equity in the trustee by virtue of this section, does not so vest at law until the requirements of that law have been complied with.

(3)-(6) Omitted.

[10] The Plaintiff's argument commences with the proposition that the effect of section 58 of the *Bankruptcy Act* is that when a person is made bankrupt the property of the bankrupt vests in the Official Trustee. That is plainly correct. The evidence confirms that Carlos was made bankrupt on 29 March 2010. The argument proceeds with the assertion that the Defendant's proposed claim will have the effect of varying the interest of the Plaintiff fixed by section 58 of the *Bankruptcy Act*. Further, by reason of section 27

of the *Bankruptcy Act*, only the Federal Court or the Federal Circuit Court has jurisdiction to decide that.

[11] No authorities were cited by counsel for the Plaintiff in support of this submission, indeed unusually neither party cited any authorities throughout the whole hearing. Although I accept that this Court does not have any jurisdiction by reason of section 27 of the *Bankruptcy Act*, I do not agree that the proposed claim of the Defendant operates to vary the Plaintiff's vested interest. I think this Court retains jurisdiction to determine the respective interests of de facto partners pursuant to section 13 of the *DFR Act* even if one of the de facto partners is or becomes a bankrupt. Once it is determined, that is the interest which vests by reason of section 58 of the *Bankruptcy Act*. That is essentially the principle the Plaintiff seems to have accepted by participating in settlement negotiations with the Defendant. The determination of property interests by this Court, where one of the de facto partners is a bankrupt, does not alter the vesting pursuant to section 58 of the *Bankruptcy Act* as whatever interest Carlos has after such an adjustment remains vested in the Plaintiff. There is nothing in the *Bankruptcy Act* which prevents that. There is nothing in the *Bankruptcy Act* which states that determination of an issue regarding the interest of a bankrupt in a property must be in accordance with the *Bankruptcy Act* only.

[12] In my view the Court has jurisdiction in the matter.

[13] Counsel for the Plaintiff also argued that the relief proposed to be claimed by the Defendant, as set out in the Defendant's supporting affidavit[2], is in the nature of a declaration pursuant to section 12 of the *DFR Act*. Section 12 of the *DFR Act* is now reproduced together with sections 13 and 14 as they are also relevant to these reasons.

> **12 Declaration of interests in property**
>
> (1) In any proceedings between de facto partners with respect to existing title or rights in respect of property, a court may declare the title or rights, if any, that a de facto partner has in respect of the property.
>
> (2) A court may make orders to give effect to a declaration under subsection (1), including orders as to possession.
>
> (3) An order under this section is binding on the de facto partners, but not on any other person.
>
> **13 Application for order for adjustment**
>
> (1) A de facto partner may apply to a court for an order under this Division for the adjustment of interests with respect to the property of the de facto partners or either of them.
>
> (2) An application may be made under subsection (1) whether or not an application for any other remedy or relief has been made, or may be made, under this Act or any other Act or law.
>
> **14 Time limit for making application**
>
> (1) Subject to subsection (2), where de facto partners have ended their de facto relationship, an application under section 13(1) must be made before the expiry of a period of 2 years beginning with the day after that on which the relationship ended.
>
> (2) A court may grant leave to a de facto partner to make an application under section 13(1) at any time after the period allowed by subsection (1) if the court is satisfied that greater hardship would be caused to that partner by

[2] On the basis that the Defendant seeks an order that her affidavit stands as pleadings.

refusing leave than would be caused to the other partner by granting it.

[14] Mr George submitted that any declaration made pursuant to section 12 of the *DFR Act* only binds the de facto partners and not third parties, such as the Official Trustee. On that basis it was submitted that the Defendant's proposed claim was futile in any case.

[15] However on my reading of the *DFR Act*, the Defendant is not required to obtain a declaration pursuant to section 12 as a prelude to, or even in conjunction with, an application for an adjustment of property interests under section 13. Nor do I think that the Defendant is proposing to seek such a declaration. I think it is apparent from her affidavit that the Defendant seeks an adjustment under section 13 of the *DFR Act*. That section is not constrained in the same way as section 12 in respect of the rights of a third party.

[16] Having dealt with these preliminary issues, I turn to the Defendant's application for orders for joinder of Carlos, for the matter to proceed as if commenced by Writ, for affidavits to be utilised in lieu of pleadings, for substituted service on Carlos and lastly for an extension of time to make a claim pursuant to the *DFR Act*.

[17] Substituted service is empowered by rule 6.09 of the *Supreme Court Rules* ("*SCR*") which is set out hereunder.

6.09 Substituted service

(1) Where for any reason it is impracticable to serve a document in the manner required by this Chapter, the Court may order that, instead of service, such steps be taken as it specifies for the purpose of bringing the document to the notice of the person to be served.

(2) Where the Court makes an order under subrule (1), it may order that the document be taken to have been served on the happening of a specified event or on the expiry of a specified time.

(3) The Court may make an order under subrule (1) notwithstanding that the person to be served is out of the Territory or was out of the Territory when the proceeding commenced.

[18] I think the evidence of the Defendant is sufficient to satisfy me that, assuming I order the joinder of Carlos, it is impracticable to effect the personal service as is otherwise required by the *SCR*. The evidence is that the Defendant has not had any contact with Carlos for approximately eight years. She is only aware of his last known address in Western Australia from information provided by the Plaintiff. She only knows of one family member of Carlos, his brother, whom she met once while on holiday in Brisbane in 2007. She does not have any contact details for the brother and does not even know if still resides in Brisbane. Evidence from the Plaintiff reveals that the Official Trustee's office has not had contact with Carlos since 9 July 2015 and that attempts to contact Carlos by telephone since that date have been unsuccessful.

[19] The proposed method of substituted service in this case is advertisements in the main newspaper circulating both in Darwin and in Perth. Before an order for substituted service will be made the Defendant must also satisfy me that the proposed method of service would, in all probability, be effective to

bring knowledge of the proceedings to Carlos[3]. On the evidence presented I think the proposed arrangements satisfy that and there are certainly no other apparent options to achieve that.

[20] Whether the proceedings should be ordered to proceed as if commenced by Writ very much ties in with whether Carlos should be joined. If joinder is ordered then there is a dispute such that it is appropriate to proceed as if by Writ.

[21] As can be seen from rules 4.04, 4.05 and 4.06 of the *SCR*, the Originating Motion process is intended to be used in limited circumstances, and particularly where there will be no substantial dispute of fact such that neither pleadings nor discovery would be required. Those rules are set out below.

> **4.04 When writ required**
>
> Except as provided by rules 4.05 and 4.06, a proceeding shall be commenced by writ.
>
> **4.05 When originating motion required**
>
> A proceeding shall be commenced by originating motion:
>
> (a) where there is no defendant to the proceeding;
>
> (b) where by or under an Act an application is authorized to be made to the Court; or
>
> (c) where required by this Chapter.

3 *O'Neil v Acott* (1988) 59 NTR 1.

4.06 Optional commencement by originating motion

A proceeding may be commenced by originating motion where:

(a) it is unlikely that there will be a substantial dispute of fact; and

(b) for that reason it is appropriate that there be no pleadings or discovery.

[22] Rule 4.07 is the rule pursuant to which the Defendant applies and that provides as follows:

4.07 Continuance as writ of proceeding by originating motion

Where a proceeding in which there is a defendant is commenced by originating motion but ought by or under an Act or this Chapter to have been commenced by writ, or might in the opinion of the Court more conveniently continue as if commenced by writ:

(a) the Court may order that the proceeding continue as if it had been commenced by writ and may, in particular, order that any affidavit already filed in the proceeding shall stand as pleadings, with or without liberty to a party to add to those pleadings or to apply for particulars of the pleadings or that pleadings be served between the parties, and that the parties have discovery of each other; and

(b) by virtue of that order, the proceeding shall be taken to have been duly commenced for all purposes on the day the originating motion was filed.

[23] The rule empowers the Court to order that any affidavit filed in the proceeding may stand as pleadings. The Court also has the power to supplement that by further pleadings and particulars or to order discovery if necessary.

[24] The circumstances by which these proceedings were commenced have necessarily resulted in affidavits being utilised to date. The Plaintiff however argues against dispensing with pleadings. The Plaintiff submits that the affidavit filed by the Plaintiff in support of the Originating Motion is an

insufficient substitute for a pleading of the Plaintiff's case as it does not disclose a cause of action nor does it seek to remedy. I disagree regarding the former. As to the latter, I think the Originating Motion sufficiently sets out the remedy that the Plaintiff seeks. Although I accept that a pleading should ordinarily specify the relief sought[4] that does not need to be strictly applied in the circumstances of this case. The lack of a prayer for relief can be readily rectified either by an amendment, by supplementary pleadings, by particulars or supplementary affidavits.

[25] The Plaintiff also submits that the Defendant's remedy and cause of action is not clear from the affidavit material filed by the Defendant. It is true that there is no prayer for relief by the Defendant. That arises as the Defendant has not filed any process other than affidavits. It is true also that the Defendant's Summons does not set out the substantive remedy she seeks as would occur in the prayer for relief in an originating process or in a pleading. That is no doubt due to the focus of the Defendant's Summons being on the necessary interlocutory orders. This is a very technical objection. In any case I am not convinced that the remedy the Defendant seeks is not apparent from her affidavit but if that were to be the case, again that can be rectified by amendment, by supplementary pleadings, by particulars or supplementary affidavits. That alone therefore is not sufficient reason to decline the requested order.

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4 Rule 13.02(1)(c) of the *SCR*.

[26] As to the claim that the nature of the relief sought by the Defendant is not apparent from her affidavit, although it is true that there is nothing in the affidavit akin to a prayer for relief in the Defendant's affidavit, the affidavit sets out evidence that is clearly relevant to proceedings seeking an adjustment of property interests pursuant to section 13 of the *DFR Act*. I would have thought that thereby the nature of the relief sought was apparent, even if not specifically set out. The object of a pleading is to inform the other party of the case it has to meet. The Defendant's affidavit sufficiently achieves that. In any case, again any perceived shortcoming can be cured by an amended summons or alternatively supplementary material.

[27] Although ordinarily in this Court where there is a factual dispute, including specifically in the case of proceedings under the *DFR Act*, the pleading process is utilised, if the matter is to proceed as if commenced by Writ I am prepared to allow the affidavits to stand as pleadings. That will also save costs in respect of what appears to be a straightforward dispute. I will in any case hear the parties as to whether any supplementary documents need to be filed.

[28] The rules which are relevant to the application for Carlos to be joined as a party are rules 9.02 and 9.06 of the *SCR*. They provide as follows:

9.02 Permissive joinder of parties

(1) Two or more persons may be joined as plaintiffs or defendants in a proceeding:

(a) where:

(i) if separate proceedings were brought by or against each of them, a common question of law or fact would arise in all the proceedings; and

(ii) all rights to relief claimed in the proceeding (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions; or

(b) subject to subrule (2), where the Court, before or after the joinder, gives leave to do so.

(2) The Court shall not give leave under subrule (1)(b) unless it is satisfied that the joinder:

(a) will not embarrass or delay the trial of the proceeding;

(b) will not prejudice a party; or

(c) is not otherwise inconvenient.

9.06 Additional, removal, substitution of party

At any stage of a proceeding the Court may order that:

(a) a person who is not a proper or necessary party, whether or not he was one originally, cease to be a party;

(b) any of the following persons be added as a party:

(i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated on; or

(ii) a person between whom and a party to the proceeding there may exist a question arising out of, or relating to or connected with, a claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding; or

(c) a person to whom paragraph (b) applies be substituted for one to whom paragraph (a) applies.

[29] Whether a party should be joined pursuant to the above rules remains a discretionary matter[5]. The discretion is generally unconfined save that in the case of the discretion in rule 9.02(1)(b), the factors enumerated in rule 9.02(2) must be taken into account.

[30] On its wording rule 9.02(1)(a) has no application in the current matter and specifically in respect of sub-rule 9.02(1)(a)(ii) on the authority of *Payne v Young*[6].

[31] The general discretion in 9.02(1)(b), read with 9.02(2), has no enlivening pre-requisites. *Bishop v Bridgelands Securities Ltd*[7] ("*Bishop*"), dealt with the equivalent of rule 9.02 of the *SCR* in the Federal Court Rules. The Federal Court Rules did not contain an equivalent of rule 9.02(2) of the *SCR* and hence the discretion there was found to be totally unconfined. The Court set some general principles to guide the exercise of the Court's discretion and relevantly to the current case said:-

1. The Court should take whatever course seems to be most conducive to a just resolution of the dispute between the parties, but having regard to the desirability of limiting, so far as practicable, the costs and delay of the litigation[8];

5 *Bishop v Bridgelands Securities Ltd* (1990) 25 FCR 311.
6 (1980) 145 CLR 609.
7 (1990) 25 FCR 311.
8 This overlaps with rule 9.02(2)(a) and (c).

2. Leave ought not be granted unless the court is affirmatively satisfied that joinder is unlikely to result in unfairness to any party[9];

3. Regard must be had to practical matters, for example if there are such differences between the evidence of the parties, that may make it inexpedient to join the claims[10].

[32] Relevantly in respect of the third guiding principle in *Bishop* and rule 9.02(2)(c), in *Australian Consumer And Competition Commission v Launceston Superstore Pty Ltd*,[11] the Federal Court considered other cases which set guiding principles relevant to the exercise of discretion. Citing *Knight v Beyond Properties Pty Ltd (No 2)*[12], the Court said, that "the inconvenience of a respondent having to participate in a hearing in which a substantial number of issues and a substantial part of the evidence would be of no concern of theirs, must be weighed against the inconvenience to an applicant of having to prove the common aspects of its claims in separate proceedings."

[33] The approach required to be taken by a Court exercising the discretion was set out in *CBI Contractors Pty Ltd v Abbott (No 2)*[13] where the Federal Court said:

> The Court's task in giving leave is to identify the advantages and disadvantages to the parties as a whole in terms of the efficient use of the Court's resources, having regard to the commonality of issues

9 This overlaps with rule 9.02(2)(b).
10 This overlaps with rule 9.02(2)(c).
11 [2013] FCA 297.
12 (2006) FCA 192.
13 [2009] FCA 1129.

raised by each claim and to the Court's ability to case manage the proceedings so as to minimise disadvantages.

[34] I respectfully agree and adopt that approach.

[35] The evidence reveals that there is some common factual substratum between the relief which each of the current parties seek, or propose to seek. The proceedings commenced by the Plaintiff relate to a property which will likely be the property which will be the subject of an adjustment order pursuant to the *DFR Act*. Overall the evidence which each party currently relies on is very different, owing to the different relief which each party seeks. That may change depending on whether the Plaintiff were to abide the Court's decision in respect of the adjustment of property interests or whether it would take an active part in those proceedings.

[36] Although the Plaintiff submitted very little in respect of this aspect, it could be said that it is unfair or prejudicial to the Plaintiff to permit the joinder of Carlos as the Plaintiff likely could not contribute anything to that dispute. Countering that however is the evidence that the Plaintiff has had extensive involvement in that aspect of the matter by discussions and negotiations with the Defendant to date. Moreover, Carlos may not show any interest in the proceedings as he has nothing to gain given his bankruptcy. In that event the sort of inconvenience to the Plaintiff contemplated by the authorities, assuming also that the Plaintiff does not simply abide the Court's decision on the *DFR Act* adjustment, would be significantly reduced.

[37] The Plaintiff may simply decide to abide the decision of the Court in respect of the Defendant's claim under the *DFR Act* and seek to only be heard on the application pursuant to section 40 of the *Law of Property Act* once the adjustment of property interests has been determined. The alternative would be for the Defendant to commence fresh proceeding but with a stay of the current proceedings pending the determination of those fresh proceedings. That would achieve the same result but would likely incur more costs and some delay would necessarily result.

[38] After weighing up all relevant considerations, I am of the view that it is appropriate that the Defendant be given leave to join Carlos. In turn the matter should proceed as if commenced by Writ and the affidavits may stand as pleadings. For the reasons I have set out above, I will also make the order for substituted service that the Defendant seeks.

[39] As to the extension of time for the Defendant to make her claim, the power of the Court to extend the time is in section 14 of the *DFR Act*. It is an entirely unconfined discretion. In that situation it is preferable that the Court hears the entirety of the evidence and deals with that issue concurrently with the substantive issues. Where the power to extend a limitation period is based on an unconfined discretion, the evidence relevant to the extension is usually intertwined in the overall factual matrix. In that case it is preferable to deal with the question as part of the substantive case rather than on a preliminary basis.

[40] In summary, the Defendant will have leave to join Carlos, the proceedings are to continue as if commenced by Writ and the affidavits filed to date are to stand as pleadings and there will also be an order for substituted service in terms of paragraph four of the Defendant's Summons.

[41] I will hear the parties as to consequential orders and costs.