

AUSTRALIA / JUDGMENT

Frigger v Trenfield (No 4) [2020] FCA 797

COURT

FEDERAL COURT OF AUSTRALIA

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Frigger v Trenfield (No 4) [2020] FCA 797

File number: WAD 141 of 2019

Judge: JACKSON J

Date of judgment: 5 June 2020

Legislation: Bankruptcy Act 1966 (Cth) s 30

Cases cited: Frigger v Trenfield [2019] FCA 1746

Frigger v Trenfield (No 2) [2019] FCA 2009

Date of hearing: 5 June 2020

Registry: Western Australia

Division: General Division

National Practice Area: Commercial and Corporations

Sub-area: General and Personal Insolvency

Category: No Catchwords

Number of paragraphs: 10

Counsel for the Applicants: The applicants appeared in person

Counsel for the Respondent: Mr SD Majteles

Solicitor for the Respondent: Carles Solicitors

ORDERS

WAD 141 of 2019

BETWEEN: ANGELA CECILIA THERESA FRIGGER

First Applicant

HARTMUT HUBERT JOSEF FRIGGER

Second Applicant

AND: KELLY-ANNE TRENFIELD

Respondent

JUDGE: JACKSON J

DATE OF ORDER: 5 JUNE 2020

THE COURT ORDERS
THAT:

1. The applicants have leave to rely upon the amended statement of charge filed on 26 May 2020.
 2. On or before 12 June 2020, the applicants must file and serve any affidavits and an outline of written submissions, such submissions not to exceed 7 pages, in opposition to the respondent's interlocutory application for discovery dated 2 June 2020.
 3. The respondent's interlocutory application dated 2 June 2020, insofar as it relates to orders for discovery, will be dealt with on the papers.
 4. On or before 6 July 2020, the parties must serve on each other a list of each deponent of an affidavit whom the party requires to attend the hearing for the purposes of cross-examination.
 5. The affidavits of any deponent who is the subject of a notification referred to in paragraph 4 above who does not make themselves available for cross-examination at the trial will not be received into evidence without the leave of the Court.
 6. The hearing presently listed on 27 to 31 July 2020 will be confined to the issues that arise out of paragraphs 1, 2, 4-13, 16 and 17 of the third amended originating application filed on 25 January 2020.
 7. Costs in relation to today's case management hearing will be costs in the cause.
- Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.
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REASONS FOR JUDGMENT

(edited from the transcript)

JACKSON J:

1 This proceeding concerns a dispute over whether certain assets are part of the bankrupt estates of the applicants. The applicants claim that they are not because, at the time of their bankruptcy, the assets were held on trust on the terms of a superannuation fund known as the Frigger Super Fund. The assets in dispute include the funds in two bank accounts with the Bank of Queensland, and a portfolio of shares administered through Commonwealth Securities Ltd (CommSec). I have described the issues in the proceeding in detail in *Frigger v Trenfield* [2019] FCA 1746 and *Frigger v Trenfield* (No 2) [2019] FCA 2009. The trial of the matter has been fixed for five days, commencing on 27 July 2020.

2 The orders the applicants will seek at trial include orders under s 30 of the Bankruptcy Act 1966 (Cth) requiring the respondent, their trustee in bankruptcy Kelly-Anne Trenfield, to pay losses which have been said to have been suffered by the Frigger Superannuation Fund in connection with a hold imposed on one of the Bank of Queensland accounts, and a freeze on the CommSec share portfolio. Directions requiring the provision of affidavits and particulars of the losses claimed have previously been made. On 20 April 2020, the second applicant, Hartmut Frigger, swore an affidavit which quantifies the claims for those losses. The claim in respect of the Bank of Queensland accounts is a total of \$1,083,091, which appears to relate to losses in connection with what is said would have been the use of funds in one of the accounts for conservative share investments (the amount of money that was in the other Bank of Queensland account is small and is not the subject of any claimed loss). The claim in relation to the CommSec account is for a

capital loss of approximately \$785,000 said to have been caused, broadly speaking, by the inability to trade on what the applicants say is, and would have continued to have been, an active day trading account. That loss is calculated for the purposes of the affidavit as at 16 April 2020.

3 It has become apparent that a difficulty which the court and the parties face, in relation to the CommSec portfolio aspect of the claim at least, is that quantifying the alleged losses depends upon the value of the portfolio as at whatever the date of the calculation is. The applicants wish to update the calculation as close as possible to the date of trial. They may also wish to add additional hypothetical trades to the claim. The respondent argues that if that is to occur, it needs sufficient notice of the update to the claim for it to prepare its response, so there should be a cut-off date fixed in the near future. Alternatively, the trial at the end of July should not deal with the alleged losses, which should only be determined after the court decides the question of whether the bank account and share portfolio form part of the bankrupt estates.

4 Unless the applicants are prepared to accept a date after which they cannot claim, it will not be possible to fix the amount of the losses at trial. The reality is that if the outcome of the trial is a determination to the effect that the Frigger Superannuation Fund is free to trade in the shares in the CommSec portfolio, only from the time when the applicants' ability to trade in the shares resumes will it be possible to quantify the full amount of the alleged losses. There is every prospect that an order to that effect, if it is made, will be made after a period during which judgment on the application is reserved and there could, therefore, be further delay in connection with the quantification of the claim. In order to update the amount of the losses, if the court determines that would be appropriate, the parties would have to return to conduct a further trial as to the quantum of the claim, at least in relation to the CommSec portfolio, after having already agitated that issue up to a certain date in the main trial.

5 In my view, that would not be an efficient use of the resources of the parties or the court. I have considered whether it might be possible to separate the CommSec portfolio aspect of the claim from the claim which pertains to the alleged use that would have been made of the funds in the Bank of Queensland account, so that the latter can be heard in July. But on the face of Mr Frigger's affidavit as filed, the court cannot be confident that there is sufficient separation between the two claims to mean that they could be heard at different times without inefficiency.

6 The applicants press for the trial at the end of July to include a hearing in relation to the losses they claim. They point out that they have been involved in long-running litigation, including this proceeding, and wish to have finality in that litigation as soon as possible. It may be accepted that that is a legitimate and understandable aim for the applicants to have. However as I have explained, I do not consider that hearing questions of share trading losses in July is going to give that finality in any event, because (on the applicants' case) losses will continue to accrue after trial until judgment is delivered and may be the subject of a further claim and further hearing. In my view, it is only likely to lead to inefficiency and duplication in work on the part of all involved if the share trading claim then needs to be updated.

7 I acknowledge that some work has already been done in connection with the claim for damages in accordance with previous directions of the court. However, that work will not be wasted. The applicants have made it clear that regardless of the outcome on questions of the beneficial ownership of the relevant assets, they will be pursuing a claim for damages against the respondent in connection with their inability to trade in these shares.

8 I have considered whether or not it would occasion any substantial prejudice to the applicants to split away the issue of loss. I do not consider that it will. If the outcome of that trial is that the applicants become free to use the funds in the Bank of Queensland accounts or trade the shares in the CommSec portfolio, then the prejudice that will be suffered by any subsequent delay in assessing such losses as are claimable will be minimal. By then they will be losses suffered in the past.

9 For those reasons, I consider the most efficient course, and the course that the Court will take, is to confine the hearing of the matter as presently listed for the end of July to the issues that arise out of the paragraphs of the originating application which do not claim losses (other than relatively minor losses pertaining to alleged wrongs in connection with orders made in the Supreme Court of Western Australia and certain caveats). The paragraphs in question are set out in the orders made today. The applicants expressed concern that the five days presently listed for trial at the end of July may not be fully utilised if the claims for losses are excised from that trial. However given the number, scope and variety of detail inherent in the matters that will remain to be determined in that trial, it is likely that the time will be utilised efficiently in any event.

10 Nothing said in these reasons should be taken to be confirmation that if the court finds that the Bank of Queensland accounts or the shares in the CommSec portfolio are assets of the Frigger Superannuation Fund, that will inevitably result in orders with the effect that the applicants have the ability to trade in or deal with those assets. While it may be expected that the applicants will submit that such orders should follow inevitably on such findings, the court's position is reserved, so that any presently unforeseen matter which might stand between those findings and orders can be dealt with appropriately at the time of judgment.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jackson.

Associate:

Dated: 10 June 2020

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