

AUSTRALIA / JUDGMENT

McDonald v Young (No 2) [2012] FCAFC 161

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FEDERAL COURT OF AUSTRALIA

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McDonald v Young (No 2) [2012] FCAFC 161

Citation: McDonald v Young (No 2) [2012] FCAFC 161

Appeal from: Young, in the matter of Macryannis [2011] FCA 1272 and Young, in the matter of Macryannis (No 2) [2012] FCA 175

Parties: GEOFFREY DAVID MCDONALD v KATHRYN ANNE YOUNG

File number: NSD 2135 of 2011

Judges: EMMETT, MIDDLETON AND ROBERTSON JJ

Date of judgment: 16 November 2012

Date of last submissions: 1 November 2012

Legislation: Federal Proceedings (Costs) Act 1981 (Cth) s 6(1)

Federal Court Rules 1979 r 62.15

Federal Court Rules 2011 rr 40.03, 40.04

Place: Sydney

Division: GENERAL DIVISION

Category: No catchwords

Number of paragraphs: 9

Solicitor for appellant: Pure Legal

Solicitor for the respondent: Rockliffs Solicitors

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION NSD 2135 of 2011

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: GEOFFREY DAVID MCDONALD

Appellant

AND: KATHRYN ANNE YOUNG

Respondent

JUDGES: EMMETT, MIDDLETON AND ROBERTSON JJ

DATE OF ORDER: 16 NOVEMBER 2012

WHERE MADE: SYDNEY

THE COURT ORDERS
THAT:

1. The appeal be upheld in part.
2. Orders 4, 5 and 8 made by the primary judge in proceeding NSD 1955 of 2006 on 8 November 2011 be varied as follows:
 - a) in Order 4, the words "and without a deduction for costs, expenses or remuneration whether or not previously deducted" be deleted and replaced with the words "after deducting costs and expenses and remuneration determined in accordance with Order 7";
 - b) in Order 5, the word "otherwise" be inserted before the word "dismissed", such that the order will read "The Interim Application filed on 3 December 2009 by Geoffrey David McDonald as Trustee of the Bankrupt Estate of the late Christopher John Macryannis be otherwise dismissed"; and
 - c) in Order 8, the words "only out of the divisible assets of the Bankrupt Estate of the late Christopher John Macryannis" be deleted and replaced with the words "out of the Exempt Assets", such that the order will read "Any payment to the Trustee, Geoffrey David McDonald of costs incurred and remuneration in respect of dealing with exempt assets be paid out of the Exempt Assets".
3. The assets of the Chris Macryannis Family Trust be treated as Exempt Assets for the purpose of those orders.
4. The respondent pay 50 percent of the appellant's costs of the appeal, as agreed or taxed, plus disbursements, but excluding the costs of the further written submissions filed after the conclusion of the oral hearing on 11 May 2012.
5. There be no order as to costs in relation to the appellant's application filed on 28 May 2010 to set aside subpoenas and a notice to produce issued by the respondent.
6. The respondent be granted a costs certificate in respect of the appeal under s 6 of the Federal Proceedings (Costs) Act 1981 (Cth).

THE COURT DECLARES
THAT:

7. The costs incurred by the appellant and the remuneration payable to the appellant, in relation to the Exempt Assets, include remuneration and costs in relation to the appellant's application, in so far as it related to determining the persons entitled to distribution of the proceeds of the realisation of the Exempt Assets, but not otherwise.

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

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NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION NSD 2135 of 2011

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: GEOFFREY DAVID MCDONALD

Appellant

AND: KATHRYN ANNE YOUNG

Respondent

JUDGES: EMMETT, MIDDLETON AND ROBERTSON JJ

DATE: 16 NOVEMBER 2012

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 In our reasons of 24 September 2012, we referred to an application made by the Trustee to set aside subpoenas and a notice to produce issued by Mrs Young in connection with Mrs Young's Application. The Trustee contended that, since he was totally successful in that application, the primary judge should have ordered costs of that application in his favour. We observed that the primary judge did not appear to have given any reasons for not making an order for the costs of that application and that there was nothing to suggest that the Trustee had asked for an order for costs. In those circumstances, we did not consider that it was possible to find that there was any error on the part of the primary judge. The Trustee subsequently suggested that that conclusion may have been reached per incuriam, in that there was no dispute that the Trustee sought his costs of that application and that the primary judge reserved costs when disposing of the application.

2 The Trustee asserts that it is not in issue that, when giving her reasons of 2 March 2012 for refusing to order costs in favour of the Trustee, Young, in the matter of Macryannis (No 2) [2012] FCA 175, the primary judge did not mention or expressly deal with the reserved costs of the application to set aside subpoenas and notice to produce. The Trustee appealed against the failure of the primary judge to make an order for costs.

3 The Trustee now contends that it cannot be inferred that the primary judge intended to cover the question of the costs of the application to set aside subpoenas and the notice to produce. He points out that there was no mention of that application in her Honour's reasons of 2 March 2012.

4 The Trustee contends that the costs of the application to set aside subpoenas and the notice to produce should follow the event in accordance with rules 40.03 and 40.04 of the Federal Court Rules 2011 or under rule 62.15 of the Federal Court Rules 1979. The Trustee contends that the primary judge erred by failing to address the question of costs of the application to set aside and that the Full Court should now order that those costs be paid by Mrs Young.

5 In response, Mrs Young adverts to the written submissions made on 30 November 2011 on behalf of the Trustee. Those submissions stated that the costs being sought by the Trustee included "the interlocutory costs orders, which involved setting aside all subpoenas and notices to produce" issued at the request of Mrs Young. The submissions also contended that, if the Court were not in agreement with the Trustee's submissions as to costs, the Court should consider an order for the payment of a fixed percentage of the Trustee's costs of the entire proceeding.

6 In her reasons of 2 March 2012, the primary judge observed at [7] that the Trustee was seeking an order that Mrs Young pay his costs incurred in respect of Mrs Young's application on an indemnity basis, including reserved costs. Her Honour also observed at [7] that the costs sought by the Trustee included costs in relation to the hearing of the Trustee's interlocutory application to set aside subpoenas and notices to produce issued by Mrs Young in relation to Mrs Young's Application. Her Honour observed that the Trustee submitted that the Court was entitled to make separate orders in respect of reserved costs.

7 Mrs Young contends that, in those circumstances, the Court should conclude that her Honour intended, by her conclusion that there should be no order as to costs, that that conclusion applies equally to the costs of the application to set aside subpoenas and notices to produce.

8 In the circumstances, it is clear enough that her Honour did not overlook the costs of the application to set aside subpoenas and notices to produce and that her Honour intended that reserved costs relating to the application to set aside be governed by the conclusion that there should be no order as to costs. We are not persuaded that there was any error of principle on the part of the primary judge in reaching that conclusion.

9 Mrs Young also asks for an order under s 6 of the Federal Proceedings (Costs) Act 1981 (Cth) (the Act). Section 6(1) relevantly provides that, where an appeal to the Full Court of the Federal Court from a judgment of the Federal Court constituted by a single judge succeeds on a question of law, the court that heard the appeal may, on the application of a respondent to the appeal, grant to the respondent a costs certificate in respect of the appeal. The certificate that may be granted is a certificate stating that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the respondent in respect of the costs incurred by the respondent in relation to the appeal. In the circumstances, we consider that a certificate should be granted.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Emmett, Middleton and Robertson.

Associate:

Dated: 16 November 2012

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