

AUSTRALIA / JUDGMENT

Papoutsakis v Tsiakis [2025] NSWSC 35

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Supreme Court

New South Wales

Medium Neutral Citation: Papoutsakis v Tsiakis [2025] NSWSC 35

Hearing dates: 7 February 2025

Date of orders: 11 February 2025

Decision date: 11 February 2025

Jurisdiction: Common Law

Before: Weinstein J

Decision: (1) The proceedings are summarily dismissed against the third defendant.

(2) The plaintiff is to pay the third defendant's costs of the proceedings and of the notice of motion.

Catchwords: CIVIL PROCEDURE – application for summary dismissal – where plaintiff is undischarged bankrupt – whether proceedings come within exception in s 116(2)(g) of Bankruptcy Act – no question of principle – where alleged injuries said to be caused by bankruptcy – not a category of exception – no standing – proceedings untenable – abuse of process – application granted for summary dismissal as against third defendant

Legislation Cited: Bankruptcy Act 1966 (Cth) ss 60, 116, 265

Uniform Civil Procedure Rules 2005 (NSW) r 13.4

Cases Cited: Agar v Hyde (2000) 201 CLR 552

Cappello v Homebuilding Pty Ltd [2024] NSWCA 88

General Steel Industries Inc v Commissioner for Railways (1964) 112 CLR 125

Kovarfi v BMT & Associates Pty Ltd (No 2) [2014] NSWSC 100

Papoutsakis v Dunn [2024] NSWCA 246

Papoutsakis v Scanlon [2024] NSWSC 562

Papoutsakis v Tenbenschel [2024] TASSC 13

Samootin v Shea [2010] NSWCA 371

Singh v Harrowell & Ors [2023] NSWSC 420

Category: Procedural rulings

Parties: Antonios Papoutsakis (Plaintiff)

Paul Scanlon (First Defendant)

Prime Capital Securities Pty Ltd (Second Defendant)

Steven Tsiakis (Third Defendant)

Representation: A Papoutsakis (Plaintiff) (Selfrepresented)

S Tsiakis (Third Defendant) (Selfrepresented)

File Number(s): 2023/361139

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JUDGMENT

1. This is a notice of motion brought by the third defendant in proceedings commenced by the plaintiff on 9 November 2023. The third defendant seeks the following relief:
 1. An order that the proceedings be summarily dismissed as against the third defendant.
 2. In the alternative, an order that the whole of the Statement of Claim filed on 9 November 2023 be struck out insofar as it is brought against the third defendant.
 3. An order that the plaintiff pay the third defendant's costs of the proceedings to date, including the costs of and incidental to the motion.
 4. In the alternative to order 3, costs of the motion.
 5. Such further or other order as the court thinks fit.
1. Both the plaintiff and the third defendant are unrepresented. The third defendant confirmed that he was seeking to have the claim dismissed on the basis that the plaintiff's claim cannot be maintained because he is an undischarged bankrupt and has no standing to bring the causes of action he alleges. He asserts that the causes of action are vested in the trustee of the plaintiff's bankrupt estate and thus the instant proceedings have no prospects of success and are an abuse of the process of this court.
2. On 14 May 2024, Elkaim AJ delivered a judgment summarily dismissing the proceedings against the fourth and fifth defendants: *Papoutsakis v Scanlon* [2024] NSWSC 562 ("Scanlon"). An appeal was dismissed as incompetent by Gleeson JA on 14 October 2024: *Papoutsakis v Dunn* [2024] NSWCA 246. The first and second defendants have never been served.

3. I observe that Brett J of the Supreme Court of Tasmania, on the application of the plaintiff's trustee in bankruptcy, refused an extension of time for the plaintiff to appeal against a decision of Holt AsJ refusing the plaintiff leave to file writs against some of the same defendants named in the present proceedings: *Papoutsakis v Tenbenschel* [2024] TASSC 13.
4. I do not repeat the history leading up to the matter which is set out in the judgments of Elkaim AJ and Brett J, and there was no evidence on those matters before me, although the plaintiff referred to what he perceived to be the unfairness leading up to and during his bankruptcy at some length in oral submissions.
5. The sole issue for determination is whether, pursuant to r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW), the claim ought to be dismissed. That rule provides:

13.4 Frivolous and vexatious proceedings

- (1) If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings—
 - (a) the proceedings are frivolous or vexatious, or
 - (b) no reasonable cause of action is disclosed, or
 - (c) the proceedings are an abuse of the process of the court,

the court may order that the proceedings be dismissed generally or in relation to that claim.

- (2) The court may receive evidence on the hearing of an application for an order under subrule (1).
1. It is only in the clearest of cases that a court will make an order pursuant to r 13.4: *Cappello v Homebuilding Pty Ltd* [2024] NSWCA 88 at [4] per Kirk JA, citing *Agar v Hyde* (2000) 201 CLR 552 at [57] and *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125 at 130.

Evidence

1. Before me, the third defendant relied on his affidavit affirmed on 5 December 2024. For present purposes, the most significant item contained in that affidavit is an extract from the National Personal Insolvency Index. That document confirms that a sequestration order was made on 21 May 2018 and the plaintiff became a bankrupt on that day. He will be due for discharge on 31 July 2026. The plaintiff's trustee is Mr Tenbenschel, who was the defendant in the Tasmanian proceedings before Brett J. The plaintiff is thus an undischarged bankrupt. This accords with the facts found by both Elkaim AJ and Brett J. The plaintiff did not dispute the authenticity or correctness of that document and agreed that he was currently an undischarged bankrupt.

2. The plaintiff relied on his affidavit sworn on 5 December 2024 and made written and oral submissions. In his affidavit, the plaintiff makes allegations which appear to allege negligence and fraud against the third defendant. He appears to rely on s 116(2)(g) of the Bankruptcy Act 1966 (Cth) as permitting him to maintain the proceedings.
3. In addition, I admitted into evidence an email dated 6 February 2025 from the plaintiff's trustee Mr Tenbenschel, which copied in the plaintiff and third defendant. Neither objected to that document being marked as an exhibit. That document confirms that the plaintiff is an undischarged bankrupt, due for discharge in July 2026. Mr Tenbenschel says that he has not given his consent to the plaintiff to commence proceedings "in respect of rights of action which vested in me on 21 May 2018". He expresses the view that the plaintiff has no standing to initiate the instant proceedings. Mr Tenbenschel's opinion is, of course, not determinative.

Consideration

1. The relevant law was set out by Kunc J in *Singh v Harrowell & Ors* [2023] NSWSC 420 at [85] [90]:

"85 The property of a bankrupt is vested in their trustee by operation of s 58 of the Bankruptcy Act 1966 (Cth):

'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.
- (6) In this section, after acquired property, in relation to a bankrupt, means property that is acquired by, or devolves on, the bankrupt on or after the date of the bankruptcy, being property that is divisible amongst the creditors of the bankrupt.'

86 Section 5(1) of the Bankruptcy Act defines "Property" under the Act to mean:

'[R]eal or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property.'

87 This broad definition of "Property" in s 5(1) includes choses in action: *Samootin v Shea* [2010] NSWCA 371 at [74] (Campbell JA; Beazley and Hodgson JJA agreeing).

88 Section 116(1)(b) of the Bankruptcy Act provides:

'116 Property divisible among creditors

(1) Subject to this Act:

...

(b) the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his or her own benefit at the commencement of the bankruptcy or at any time after the commencement of the bankruptcy and before his or her discharge; and

...

is property divisible amongst the creditors of the bankrupt.'

89 Therefore, by operation of ss 58(1) and 116(1)(b) of the Bankruptcy Act, any chose in action that accrues to a bankrupt is property divisible among the creditors and vested in the trustee. This, however, is subject to several exceptions in s 116(2) of the Bankruptcy Act. Property that falls under an exception is not divisible among the bankrupt estate's creditors, and therefore is not vested in the trustee. Consequently, it is a right which may be exercised by the bankrupt. Section 116(2)(g) includes:

'(2) Subsection (1) does not extend to the following property:

...

(g) any right of the bankrupt to recover damages or compensation:

(i) for personal injury or wrong done to the bankrupt, the spouse or de facto partner of the bankrupt or a member of the family of the bankrupt; ...

and any damages or compensation recovered by the bankrupt (whether before or after he or she became a bankrupt) in respect of such an injury or wrong or the death of such a person;'

90 The question is therefore whether the pleaded cause of action falls under the relevant exception. In *Samootin v Shea* [2010] NSWCA 371 at [79], Campbell JA expounded the test as follows, in a passage which I respectfully adopt:

'The test of whether a cause of action seeks "damage or compensation ... for personal injury or wrong" has been held to be "... whether the damages or part of them are to be estimated by immediate reference to pain felt by the bankrupt in respect of his mind body or character and without reference to his rights of property": *Cox v Journeaux* (1935) 52 CLR 713 at 721 per Dixon J (applying in the Australian statutory context, *Wilson v United Counties Bank Ltd* [1920] AC 102 at 111 and 128–133, which was in turn applying *Erle CJ in Beckham v Drake* (1849) 2 HLC 579 ; 9 ER 12113 at 604, 1222), applied in *Daemar v Industrial Commission of NSW* (1988) 12 NSWLR 45 at 55–56 per Kirby P (with whom Clarke JA agreed); *Mannigel v Hewlett Phelps* [1991] NSWCA 186 at 2 per Handley JA (with whom Meagher JA agreed and Kirby P agreed "generally"); *Arnoya Holdings Pty Ltd v Metway Leasing Ltd* [1999] NSWCA 120 at [16] per Sheller JA (with whom Powell and

Beazley JJA agreed). In *Faulkner v Bluett* (1981) 52 FLR 115 at 119 Lockhart J said:

"The common thread running through these cases is that where the primary and substantial right of action is direct pecuniary loss to the property or estate of the bankrupt, the right to sue passes to the trustee notwithstanding that it may have produced personal inconvenience to the bankrupt ... Where the essential cause of action is the personal injury done to the person or feelings of the bankrupt the right to sue remains with the bankrupt."

1. In this case, the plaintiff says that s 116(2)(g) of the Bankruptcy Act permits this action, as it is an action for personal injury.
2. I observe that the Statement of Claim, which is opaque and very difficult to understand, says the following at [19]:

"As a result the plaintiff as guarantor was made bankrupt and has suffered both mentally and physically as a result of the fraudulent and negligent acts of the defendants (sic) misconduct."

1. Like Elkaim AJ (see Scanlon at [10][11]), I asked the plaintiff if his personal injuries were caused by the bankruptcy and its effects. The plaintiff was unequivocal in his response that it was the bankruptcy which caused his illnesses. That being the case, s 116(2)(g) does not provide an exception which permits the plaintiff to pursue his action against the third defendant: see *Samootin v Shea* [2010] NSWCA 371 at [79] per Campbell JA and *Kovarfi v BMT & Associates Pty Ltd (No 2)* [2014] NSWSC 100 at [32][33] per Campbell J.
2. The plaintiff also relied on ss 265 and 60(3) of the Bankruptcy Act as exceptions which permit him to commence the proceedings without the consent of his trustee. Section 265 deals with offences when a bankrupt fails to disclose property. It provides:

265 Failure of bankrupt or debtor to disclose property etc.

- (1) A bankrupt:
 - (a) shall fully and truly disclose to the trustee all of the property of the bankrupt, and its value;
 - (b) shall fully and truly disclose to the trustee particulars of any disposition of property made by him or her within the period of 2 years immediately preceding the date on which he or she became a bankrupt;
 - (c) shall not refuse or fail to comply with a direction by the trustee to deliver to the trustee property in the possession of the bankrupt, being all or part of the property of the bankrupt;
- (ca) shall fully and truly disclose to the trustee such information about any of the bankrupt's conduct and examinable affairs as the trustee requires;
- (d) shall not refuse or fail to tell the trustee where the books (including books of an associated entity of the bankrupt) relating to the bankrupt's examinable affairs may be found;

- (e) shall not refuse or fail to comply with a direction by the trustee to deliver to the trustee books (including books of an associated entity of the bankrupt) that are in the possession of the bankrupt and relate to any of the bankrupt's examinable affairs;
- (f) shall not omit any material particular from a statement relating to any of the bankrupt's examinable affairs;
- (g) shall, if he or she knows that a person has lodged a proof of debt in the bankruptcy that is false, forthwith inform the trustee of the fact; and
- (h) shall give to the trustee a full and proper explanation of any loss or depreciation of any of his or her assets or part of any of his or her assets that occurred within the period of 2 years immediately preceding the date on which he or she became a bankrupt.

Penalty: Imprisonment for 1 year.

(1A) A bankrupt is taken to have complied with paragraph (1)(a), (b) or (ca) if he or she has fully and truly disclosed to the best of his or her knowledge and belief as required by that paragraph.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A) (see subsection 13.3(3) of the Criminal Code).

- (2) A bankrupt shall be deemed to have complied with paragraph (1)(b) in respect of any property if he or she shows that that property has been disposed of in the ordinary way of his or her business or in meeting the ordinary expenses of his or her family.

Note: See also subsection 5(6).

- (3) A bankrupt shall not, with the intention of obtaining the consent of his or her creditors or any of them to any matter relating to any of the bankrupt's examinable affairs, make a false representation or commit any fraud.

Penalty: Imprisonment for 5 years.

- (4) A person who, after the presentation of a petition on which, or by virtue of the presentation of which, he or she becomes a bankrupt:
 - (a) conceals, removes, disposes of or deals with any part of his or her property to the value of \$20 or more;
 - (b) conceals a debt due to or by him or her;
 - (c) conceals, parts with, destroys, mutilates, falsifies, alters or makes a false entry in, or omits a material particular from, a book (including a book of an associated entity of the person) affecting or relating to any of the person's examinable affairs;
 - (d) attempts to account for any part of his or her property by falsely stating that he or she has incurred a loss or expense;

- (e) otherwise than in the ordinary way of his or her business, disposes of, or gives security over, property that he or she has obtained on credit and for which he or she has not paid; or
- (f) prevents the production of a book (including a book of an associated entity of the person) affecting or relating to any of the person's examinable affairs;

commits an offence and is punishable, upon conviction, by imprisonment for a period not exceeding 1 year.

- (5) A person who, after the presentation of a petition on which, or by virtue of the presentation of which, he or she becomes a bankrupt, either alone or jointly with another person:

- (a) obtains property by fraud; or
- (b) incurs any debt or liability by fraud;

commits an offence and is punishable, upon conviction, by imprisonment for a period not exceeding 5 years.

- (6) Subsections (4) and (5) extend to an act or omission done or made after the commencement of this Act where the petition was presented before the commencement of this Act but do not apply to an act or omission done or made after the person by whom it was done or made has been discharged from the bankruptcy or after his or her bankruptcy has been annulled.
 - (7) A person who has become a bankrupt after the commencement of this Act and, within 12 months before the presentation of the petition on which, or by virtue of the presentation of which, he or she became a bankrupt, has done any of the things specified in any of paragraphs (4)(a) to (f) or paragraph (5)(a) or (b), whether before or after the commencement of this Act, commits an offence and is punishable, upon conviction, by imprisonment for a period not exceeding the maximum period of imprisonment applicable to the doing of that thing under subsection (4) or subsection (5), as the case may be.
 - (8) A person who has become a bankrupt and, within 2 years before he or she became a bankrupt and after the commencement of this Act, has contracted a debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation, after taking into consideration his or her other liabilities (if any), of being able to pay the debt, commits an offence and is punishable, upon conviction, by imprisonment for a period not exceeding 1 year.
 - (9) It is a defence to a charge under this section (not being a charge under paragraph (1)(c) or (e) or subsection (3), (5) or (8)) if the defendant proves that the act or omission to which the charge relates was done or made without intent to defraud any of his or her creditors.
1. Nothing in that section assists the plaintiff. Section 60 of the Bankruptcy Act, which deals with stays of proceedings and related matters, provides:

60 Stay of legal proceedings

- (1) The Court may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit:
- (a) discharge an order made, whether before or after the commencement of this subsection, against the person or property of the debtor under any law relating to the imprisonment of fraudulent debtors and, in a case where the debtor is imprisoned or otherwise held in custody under such a law, discharge the debtor out of custody; or
 - (b) stay any legal process, whether civil or criminal and whether instituted before or after the commencement of this subsection, against the person or property of the debtor:
- (i) in respect of the nonpayment of a provable debt or of a pecuniary penalty payable in consequence of the nonpayment of a provable debt; or
 - (ii) in consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt;

and, in a case where the debtor is imprisoned or otherwise held in custody in consequence of the nonpayment of a provable debt or of a pecuniary penalty referred to in subparagraph (i) or in consequence of his or her refusal or failure to comply with an order referred to in subparagraph (ii), discharge the debtor out of custody.

- (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.
- (4) Notwithstanding anything contained in this section, a bankrupt may continue, in his or her own name, an action commenced by him or her before he or she became a bankrupt in respect of:
- (a) any personal injury or wrong done to the bankrupt, his or her spouse or de facto partner or a member of his or her family; or
 - (b) the death of his or her spouse or de facto partner or of a member of his or her family.

Note: See also subsection 5(6).

(4A) Notwithstanding paragraph (1)(b), this section does not empower the Court to stay any proceedings under a proceeds of crime law.

- (5) In this section, action means any civil proceeding, whether at law or in equity.

1. Nothing in s 60, and in particular s 60(3) assists the plaintiff. I observe that he commenced the instant proceedings more than 5 years after the sequestration order.

2. Contrary to the plaintiff's submissions, no exception applies which permits him to bring the action against the third defendant.

Conclusion

1. The plaintiff has no standing to bring the proceedings because he is an undischarged bankrupt. The proceedings are therefore untenable and an abuse of process. I will therefore make the primary order sought by the third defendant.
2. I make the following orders:
 1. The proceedings are summarily dismissed against the third defendant.
 2. The plaintiff is to pay the third defendant's costs of the proceedings and of the notice of motion.

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