IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S216 of 2019

ON APPEAL FROM THE FULL COURT
OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

FRANZ BOENSCH AS TRUSTEE OF THE BOENSCH TRUST

Appellant

And:

SCOTT DARREN PASCOE

Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

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Part I: Certification for the internet

1. We certify this Outline of Oral Argument as suitable for publication on the internet.

Part II: Outline of the propositions the appellant will advance in oral argument

Issue 1: Whether a legal interest in Rydalmere vested in Mr Pascoe under s. 58(1)(a).

2. The starting point is the caveat (AFMB-1/117) and Trust (AFMB-1/29, 31, 87) which lie at the heart of this case. The caveat claimed, by the words, "Legal interest pursuant to the *Bankruptcy Act*", with its reliance *only* on the sequestration order but *not* any Trust documents, *Mr* Boensch's estate as a joint tenant in Rydalmere unencumbered by the Trust over it. See SC [1], [3], [7], [9], [11], [18], [27]-[30], [38]. Mr Pascoe did not ever claim *Mrs* Boensch's (residual) bare legal estate as the other joint tenant.

3. The *ratio* in the primary judgment is at SC [103]-[108]. It relies on the findings at SC [97]-[102] and the principle enunciated in *Ritchie* and *Lewis*: see SC [99]-[101].

4. The Full Court upheld this approach (FC [101]-[106]) but, we contend, it is wrong. It is contrary to the principle enunciated in *Scott v Surman* at 402, a principle upheld in *Carter* at [25]-[36]; [94], citing *Scott v Surman*. Accordingly, the principle in *Scott v Surman* remains good law and should be applied in this case. See AS [38]-[39].

5. The finding that a bare legal interest subject to the Trust vested in Mr Pascoe under s. 58(1)(a) of the *Bankruptcy Act* due to the making of a sequestration order is wrong. It should be reversed on the authority of *Carter* (a corporate trustee case) and *Scott v Surman*; the principle in *Carter* should be extended to an individual bankrupt trustee.

Issue 2: Whether a right of indemnity in Rydalmere vested in Mr Pascoe under s. 58(1)(a).

6. Mr Pascoe pleaded an equitable interest in Rydalmere due to a right of indemnity: Defence [7(e)]. But he did *not* conduct such a case at trial. See his written opening (AFMB-2/763 at [111]: a *possible* right of indemnity in Rydalmere vested in him) and affidavit identifying *various possible inconsistent* rights of indemnity (AFMB-2/502 at [64], [74]-[76], [106]-[107], [117]-[119]). Darke J did not take it seriously: SC [50], [110], [129]; nor the Full Court: FC [142]-[158]. Mr Boensch answered it with a "mutually beneficial arrangement" under which he said he paid the outgoings on Rydalmere in consideration for his (*and* his children's) rent-free occupation of it ever since the inception of the Trust. See FC [143], [153]; AFMB-1/124, answers at Q.4, Q.19; Q.38; AFMB-2/521 at Tpp.3.31; 9.50; 10.1-11.6; 17.25-20.50; 28.8-30.2; 32.5-.28; and AFMB-2/677 at Tpp.158.4-.9; 174.25-.34; 208.19-.44; 212.32-213.10.

7. Mr Pascoe does *not* assert a right of indemnity in his Notice of Contention. He alleges that Mr Boensch failed to disprove something which he never sought to establish. See SC [50], [110], [129]; FC [150]-[156]; AS [45]-[50]; AR [26]-[35]. But the existence of a right of indemnity cannot be determined for the reasons given at FC [155] and also for our further reasons given at AS [47]-[50]; [52]-[54]; AR [26]-[35].

8. Mr Pascoe claimed *no* right of indemnity in the caveat. See FC [142] (which drew a distinction between the caveat and the Defence with "*nevertheless*"), [158]. Thus, he did *not* claim under s. 74F(1) what he was defending under s. 74P(1). Mr Pascoe does not challenge this in his Notice of Contention. Thus, the existence of a *possible* right of indemnity is quite irrelevant for purposes of s. 74P(1). His fallback claim of a right of indemnity should be rejected for reasons in FC [155]; AS [41]-[54]; AR [26]-[35].

9. Mr Boensch relies in answer to the allegation of a right of indemnity on, firstly, the existence of the oral "mutually beneficial arrangement"; secondly, the fact that its proof depends entirely on his credit; thirdly, the fact that no finding was made about his credibility: FC [155]; fourthly, the fact that it is far too late to prove it now; fifthly, the principle in *Carter* at [31] that proof of that arrangement in an appropriate amount will completely negate ("net-off") a right of indemnity: AS [47]-[48]; AR [26]-[35].

Issue 3: Whether Mr Pascoe had a caveatable interest within the meaning of s. 74F(1).

10. If our contentions on Issues 1 *and* Issue 2 are upheld, Mr Pascoe held *no* caveatable interest in Rydalmere. If our contentions on *either* Issue 1 *or* 2 are *not* upheld, a bare legal interest subject to the Trust in Rydalmere vested in Mr Pascoe on Issue 1 *or* an equitable interest referable to a right of indemnity vested in him on Issue 2. In that event, Mr Pascoe *had* a caveatable interest. However, the mere existence of a legal estate or interest, or an equitable estate or interest, in Rydalmere, is of no assistance to Mr Pascoe if our contentions on Issue 4 *or* Issue 5 are upheld. If a bare legal estate or interest in Rydalmere vested in Mr Pascoe subject to the Trust, it is worthless as divisible property of Mr Boensch: see cll. 21-48, 61-66 of the Deed of Trust (AFMB-1/31, 37, 42); and *Re Stansfield DIY Wealth Pty Ltd* at [16]-[19]. Mr Pascoe conceded (AFMB-2/515 [119(a)]) that, *if* a right of indemnity ever did exist, it was *not* worth maintaining the caveat for in the face of Mr Boensch's lapsing notice: AS [58]-[60].

Issue 4: Precisely what estate or interest in Rydalmere did Mr Pascoe claim in the caveat?

11. The caveat is at AFMB-1/117: see par 2 above. In SC [3], [106], [109], Darke J found that Mr Pascoe claimed both a legal *and* an equitable interest in Rydalmere by Mr Pascoe's adoption of the generic phrase: "Legal interest pursuant to the *Bankruptcy Act 1966*". The Full Court did *not* accept this interpretation of what was claimed at FC [142] and [158]. It found that Mr Pascoe did *not* claim a right of indemnity in the caveat. In SC [106], [109], Darke J employed a *subjective test* for determining the interest claimed in the caveat, by his reliance on what Mr Pascoe *intended* to claim. We contend that this subjective test for interpreting the interest claimed in the caveat is wrong and that an *objective* test of construing the caveat's language is the correct test. The result of these overlapping findings is that Mr Pascoe claimed a bare legal interest subject to the Trust but he did *not* claim any right of indemnity. See AS [62].

12. AS [62]-[63] complain about the finding at FC [108] that Mr Pascoe was entitled to claim inconsistent *legal* interests in Rydalmere. That approach gives the caveator the right to claim *inconsistent legal interests*, depending on changes in the circumstances between lodgment of the caveat and defence of it under s.74P(1). The requirement in s. 74F(1) to particularise the interest claimed in the caveat must preclude inconsistent interests being claimed *after* the caveat lapses in determining a claim under s.74P(1). The approach taken in FC [108], permitting the caveator to claim *inconsistent legal interests* in defending the caveat under s. 74P(1), is erroneous and should be reversed.

Issue 5: What is the correct test posed by s. 74P(1) of "without reasonable cause"?

13. The test of without reasonable cause posed by s. 74P(1) (SC [89]-[96]) is enunciated in *Bedford Properties* at 108.C-109.B. It received approval in *Beca Developments* at 462.F; 469.F-470.C, 472.G-473.A, 474.F-475.B; 476.G, 478C-480.B; *Natuna* at [195]; *Mahendran* at [52]; and *Brogue Tableau* at 43 [49], [51], [55]; 48 [80]-[84].

14. In *Brogue Tableau*, Pullin JA at 42-43 [46]-[51], esp. [47], citing *Taylor*, said that "*[s. 140] might appear to introduce an entirely objective condition*". In *New Galaxy Investments* at [15]-[16], Basten JA citing *Taylor* made similar observations. Section 74P(1) poses *an objective test of reasonableness*. The test in s. 74P(1) paragraphs (a) and (c) concern lodging, refusing or failing to remove a caveat upon request, and the test in s.74P(1) paragraph (b) concerns procuring a caveat to lapse. See AS [67]-[68].

15. Section 74P(1) must be interpreted by reference to its text, its context in Part 7A of the *Real Property Act,* and its legislative purpose of providing a regime for awarding compensation for the loss suffered in consequence of the unreasonable imposition or removal of a statutory injunction on the Registrar-General which a caveat constitutes: see *J & H Just (Holdings)* at 552.D, 557.A, 557.E, 559.G; *Black v Garnock* (2007) 230 CLR 438 at 442 [7]. Only *one* limb of s. 74P(1) needs to be satisfied to establish a liability to pay compensation because the paragraphs in s.74P(1) are joined by "or".

16. *Taylor* at 464 [1]-[4] and 466-467 [10]-[13] found that s. 151A(5)(c) of the *Workers Compensation Act* postulates an objective test for permitting a further claim for compensation to be made. That objective test is to be determined by the court based upon objective facts and circumstances rather than the subjective state of mind of the injured person. AS [69]-[71] contend that, when due regard is had to the text of s.74P, its context in Part 7A of the *Real Property Act* and its statutory purpose, the test in s.151A(5)(c) is an analogue for an objective test of "reasonable cause" in s. 74P(1).

17. Section 74P(1) poses an entirely *objective test of the reasonableness* of the relevant conduct and it pays due regard to the objective facts and circumstances at the relevant dates, as determined by the court hearing the compensation claim under s. 74P(1). The test treats as irrelevant the subjective belief of the caveator. Years of case law to the contrary (*Beca Developments* is its high watermark) is no excuse for not properly interpreting s. 74P(1): see *Weiss v The Queen* (2005) 224 CLR 300 at 305 [9].

Issue 6: Did Mr Pascoe lodge the caveat "without reasonable cause" under s. 74P(1)(a)?

18. Lodgment of the caveat was unreasonable. Firstly, Mr Pascoe knew about the Trust over Rydalmere and threw caution to the wind in reliance on advice of the petitioning creditor's lawyers. Secondly, he held stamped trust documents evidencing the Trust. Thirdly, he was aware the Boensch children were its only beneficiaries. Fourthly, he did not arm the lawyers with all *his* information about the Trust. Fifthly, he conceded there was no evidence of insolvency of Mr Boensch when the Trust was created six years earlier by Mr *and* Mrs Boensch or of an imminent transfer of Rydalmere at the date of his appointment. Sixthly, he *only* claimed an estate in fee simple under a usual practice for making such claims. See SC [11]-[30]; *New Galaxy Investments* [2017] NSWCA 153 at [121], [329], [341]; AS [17]-[23], [73]-[84]; and AR [11], [14]-[16].

Issue 7: Did Mr Pascoe unreasonably refuse or fail to remove the caveat under s. 74P(1)(c)?

19. We will develop our arguments on Issue 7 at AS [85]-[89] and AR [17]-[25] orally.

9 October 2019

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