

# HIGH COURT OF AUSTRALIA

KIRBY J

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IN THE MATTER OF AN APPLICATION  
FOR A WRIT OF MANDAMUS AGAINST  
PETER CADDEN HEEREY & ORS

RESPONDENTS

EX PARTE STEPHEN GLENN HEINRICH

APPLICANT

*Re Heerey; Ex parte Heinrich*  
[2001] HCA 74  
8 October 2001  
A25/2001

## ORDER

*Application refused.*

### **Representation:**

No appearance for the respondents

The applicant appeared in person

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



1 KIRBY J. I have before me an application for an order nisi for the constitutional writ of mandamus directed to Justices Heerey, Branson and Lindgren, judges of the Federal Court of Australia ("the respondents").

### The background facts

2 The applicant for relief is Mr Stephen Heinrich ("the applicant"). He seeks the relief pursuant to the s 75(v) of the Constitution. There is no doubt that the respondents are "officers of the Commonwealth" within that paragraph of the Constitution. They are therefore amenable to the writ<sup>1</sup>.

3 The applicant asks that the writ issue to command the respondents to vary the order of Mansfield J made in the Federal Court in Adelaide on 6 September 2000 to "order an account of mutual dealings be taken as requested of them on 28 May 2001". An additional order is sought that all public examination proceedings involving the applicant be stayed until a full and complete account of the mutual dealings is taken.

4 The respondents constituted the Full Court of the Federal Court of Australia. On 28 May 2001 that Court unanimously dismissed the applicant's purported appeal from a judgment of Mansfield J. By his judgment, Mansfield J ordered that a sequestration order be made against the estate of the applicant. The judge appointed a registered trustee as trustee of that estate. That trustee has not been named as a respondent to these proceedings. Nor has the creditor that instituted the original bankruptcy proceedings against the applicant in the Federal Court been named as a respondent. That creditor was the Commonwealth Bank of Australia ("the Bank"). The named respondents have submitted to the orders of this Court.

5 The facts recounted in the respondents' reasons in the Full Court of the Federal Court indicate that the relief which the applicant sought in the Full Court, and now seeks to revive in these proceedings, was founded on s 86 of the *Bankruptcy Act* 1966 (Cth) ("the Act"). That section provides (with emphasis added):

#### **"Mutual credit and set-off**

- (1) Subject to this section, where there have been mutual credits, mutual debts or other mutual dealings between a person *who has*

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1 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 263; *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 123.

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*become a bankrupt* and a person claiming to prove a debt in the bankruptcy:

- (a) an account shall be taken of what is due from the one party to the other in respect of those mutual dealings;
  - (b) the sum due from the one party shall be set off against any sum due from the other party; and
  - (c) only the balance of the account may be claimed in the bankruptcy, or is payable to the trustee in the bankruptcy, as the case may be.
- (2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the person who has become a bankrupt or at the time of receiving credit from that person, he or she had notice of an available act of bankruptcy committed by that person."

6 The section appears in Pt VI of the Act ("Administration of Property"). It is within Div 1 of that Part ("Proof of Debts"). Its purpose is to provide for the accumulation of the net debts and liabilities of the bankrupt, incurred before the date of his or her bankruptcy. Before the respondents in the Full Court the applicant (through Mr Gargan who was permitted to represent him but who has not appeared today) made it clear that the taking of the account was sought for the purpose of establishing that a judgment of the Supreme Court of South Australia, made after a contested hearing in that Court between the Bank and the applicant, was wrong.

7 No appeal has been instituted from that judgment of the Supreme Court. It remains valid and in force. By s 118 of the Constitution, full faith and credit must be given to that judgment as the "judicial proceedings of [a] State". At the hearing in the Supreme Court between the Bank and the applicant, the applicant was represented by counsel. Mansfield J found that the applicant had enjoyed a proper opportunity in that Court to litigate the issues. He did not appeal from the judgment. He is now well out of time to do so.

#### The decision of the Full Federal Court

8 The difficulties facing the applicant's proceedings before the respondents in the Full Court were recognised by the respondents in their reasons for judgment.

9 First, s 86 of the Act has application only where a person has become bankrupt. The section therefore assumes the validity of the sequestration order against the bankrupt's estate. In the proceedings before the Full Court,

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Mr Gargan, for the applicant, made it clear that the applicant did not contest the order for sequestration of his estate. The respondents in the Full Court had to deal with the appeal before them on that basis.

10 Secondly, s 86 governs the administration of a bankrupt's estate. The Full Court was not concerned, as such, with the administration of the applicant's estate but with the purported appeal by him from the judgment of Mansfield J. Without setting aside that judgment for error, it would not have been competent for the respondents, exercising the appellate jurisdiction of the Federal Court in an appeal from a judgment of Mansfield J, to order the taking of an account under s 86 of the Act.

11 Thirdly, in any case, the appeal from the judgment of Mansfield J appears, on its face, bound to fail. His Honour had exercised a discretion under s 30(3) of the Act to decline an order for jury trial. The applicant contested that decision. However, no error was demonstrated in that exercise of discretion. His Honour had also declined to go behind the judgment of the Supreme Court of South Australia, upon the basis of which the bankruptcy notice had been served on the applicant in the first place. His Honour was bound to take that position.

12 The applicant had, therefore, committed an act of bankruptcy on 19 April 2000 when he failed to comply with the bankruptcy notice, either in time or at all. In the circumstances, the decisions of the primary judge and the Full Court disclose no error. Accordingly, the challenge to them was misconceived.

13 Fourthly, the respondents in their reasons in the Full Court pointed out that, before another judge of the Federal Court (O'Loughlin J), the applicant had sought, without success, to establish that he had a counterclaim, set-off or cross-demand against the Bank. O'Loughlin J found that the applicant had failed to allege or establish that he had repaid the moneys advanced to him by the Bank. No application for leave to appeal from the order that followed that decision was before the Full Court. The respondents were only concerned with the purported appeal from the judgment of Mansfield J.

#### Reasons for refusing to issue mandamus

14 Before me the applicant asked not only for an order nisi for mandamus but also for an order absolute, pursuant to O 55 r 1(4) of the High Court Rules. I shall, however, treat his application as one for an order nisi. The principle governing the issue of orders nisi is not in doubt. An order nisi should be granted

if the applicant demonstrates a prima facie or arguable case<sup>2</sup>. For a number of reasons I have concluded that this application must be refused.

15 First, there are procedural problems. The applicant has not named a respondent with an interest to contradict his claims. The most obvious of the possible respondents for that purpose, his trustee, has not been named. Nor has the Bank been named as a party or given notice so that it could consider applying to intervene. The party or parties with an interest to resist the relief sought by the applicant are not, therefore, before this Court. To that extent, the proceedings are irregular. In a proper case, a defect of this kind could be cured by adjournment and a direction to join the interested party or parties who could act as contradictor. Similarly, a bare writ of mandamus would not avail the applicant whilst the judgment of the Federal Court stood unaltered. However, this defect might also be cured by appropriate amendment which the applicant might be allowed in an otherwise proper case. I will not, therefore, treat these considerations as decisive.

16 Secondly, the applicant has not sought special leave to appeal to this Court from the judgment of the Full Court of the Federal Court which he challenges. Special leave is required by s 33(3) of the *Federal Court of Australia Act* 1976 (Cth). Pursuant to that sub-section, no appeal may be brought to this Court from a judgment of the Federal Court of Australia unless this Court "gives special leave to appeal". Instead of seeking special leave, to engage the appellate jurisdiction of this Court, the applicant has proceeded in the original jurisdiction of this Court by way of the constitutional writ of mandamus.

17 Although this Court has the jurisdiction to provide that relief against the respondents, and the power to do so if the other requirements of law are fulfilled, ordinarily, in a case of a judgment of a federal court, where an appellate facility is available, this Court will, as a matter of discretion, refuse to issue a constitutional writ. It will do so where the applicant has failed, or omitted, to engage the appellate jurisdiction as provided by s 73 of the Constitution. This approach is taken to ensure that parties, with rights to seek special leave to appeal, do not, without good reason, bypass the primary means envisaged by the Constitution for the correction of alleged judicial error nor circumvent the legislative arrangements that have been adopted requiring that special leave first be obtained in appeals to this Court<sup>3</sup>.

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2 *Re Brennan; Ex parte Muldowney* (1993) 67 ALJR 837 at 840; 116 ALR 619 at 624; *Re Australian Nursing Federation; Ex parte Victoria* (1993) 67 ALJR 377 at 382; 112 ALR 177 at 183.

3 *Federal Court of Australia Act* 1976 (Cth), s 33(3); cf *Judiciary Act* 1903 (Cth), ss 35, 35A.

18 In *Re Carmody; Ex parte Glennan*<sup>4</sup>, I pointed out that, although no hard and fast rule can be laid down, where the application for a constitutional writ is made without invoking an available appellate right, the writ may be regarded as premature if the party's complaint should properly have been prosecuted first as an appeal. The invocation of the original jurisdiction of this Court under s 75(v) of the Constitution was refused in *Glennan* as a matter of discretion. The same approach should be adopted here. No other approach would uphold the constitutional scheme and the statutory procedures for special leave which are a protection for litigants generally, as well as for this Court. Were any other approach to be adopted, every party, dissatisfied with a decision of federal judges or magistrates, might seek to engage the original jurisdiction of the Court under s 75(v) of the Constitution, asserting actual or constructive failure on the part of those judicial officers to exercise their jurisdiction in accordance with law, thereby circumventing the statutory requirements of special leave.

19 Thirdly, in any case, mandamus pursuant to s 75(v) of the Constitution is, on current doctrine, not available for substantive errors of law as such, even a gross error of law, on the part of the officer of the Commonwealth concerned. It is only available for errors of jurisdiction<sup>5</sup>.

20 Mandamus is available to correct an actual or constructive failure on the part of a public official to carry out a duty imposed on that official by law. Mandamus is also available to compel the correct exercise of jurisdiction where an improper exercise is shown which is wholly ineffective. On the face of things, there were no such failures on the part either of Mansfield J or of the respondents constituting the Full Court in this case. I concede that the dividing line between errors of jurisdiction and errors within jurisdiction is often hard to define precisely<sup>6</sup>. However, if anything, the complaints of the applicant against the respondents are of the latter kind of error. Under the current authority of this Court, such errors are not amenable to the constitutional writs, including mandamus.

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4 (2000) 74 ALJR 1148 at 1156 [37]; 173 ALR 145 at 156.

5 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 61 [41], 81 [142]; 176 ALR 219 at 231, 258.

6 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 226-229 [78]-[86]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 927-928 [211]-[212]; 179 ALR 238 at 290-291.

Conclusion and order: application refused

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When, finally, I look back and examine the matters which the applicant wishes to raise, they all appear to be unarguable, at least in the present proceedings. No error of law has been shown that would attract the writ of mandamus. Accordingly, the applicant has demonstrated no reasonably arguable case. It follows that his application must be refused.