H. C. OF A. 1907.

MOY v. BRISCOE & CO. LTD.

Solicitor, for the appellant, *A. H. Jones.*

Solicitors, for the respondents, *Perkins, Stevenson & Co.*

C. A. W.

Cons *Frank, Re; Ex parte Piliszky* (1987) 16 FCR 396

Appl *Aliem v DCT (Qld)* 76 ALR 137

[HIGH COURT OF AUSTRALIA.]

LILA ELIZABETH BAYNE . . . . APPELLANT;

AND

BAILLIEU AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1907.

MELBOURNE, *Sept.* 9.

Griffith C.J., Barton and O'Connor JJ.

Insolvency—Order nisi for sequestration based on judgment for costs of prior action—Appeal pending to High Court from prior judgment—Adjournment of insolvency proceedings.

After notice of appeal to the High Court from a judgment dismissing an action with costs, the defendants in the action, having in a subsequent action recovered judgment for the costs, presented a petition for sequestration of the plaintiff's estate, the act of insolvency being failure to comply with a debtor's summons founded on the judgment and to satisfy a writ of *fieri facias* issued upon it.

It was not suggested that the debtor had any estate, or that the judgment creditor would obtain any advantage from the sequestration other than putting difficulties in the way of prosecuting the appeal.

Held, that an order of sequestration ought not to have been made, but that the petition should have been either adjourned until after the hearing of the appeal or dismissed.

An order absolute for sequestration having been made under these circumstances, and the prior judgment having, on appeal to the High Court, been discharged, an application was made to the Supreme Court to annul the sequestration.

Held, that the application ought to have been granted, notwithstanding that the judgment for the costs was still standing.

Judgments of *Hood* J. and of *Hodges* J. reversed.

APPEAL by special leave from two orders of the Supreme Court.

An action having been brought by Lila Elizabeth Bayne and her sister Mary Bayne against Arthur Palmer Blake and William Riggall for certain breaches of trust, judgment was on 6th December 1905 given by *Holroyd* J. for the defendants with costs. The costs were afterwards taxed and allowed at £628 14s. 4d., and on the 20th December a debtor's summons was issued against the two plaintiffs for these costs.

On 21st December 1905, Miss L. E. Bayne duly gave notice of appeal to the High Court from the judgment of 6th December 1905. On 23rd December 1905 a writ was issued by Messrs. Blake & Riggall against the two Misses Bayne for the taxed costs above referred to. On 4th January 1906 the debtor's summons of 20th December 1905 was served on Miss L. E. Bayne. On 26th January 1906 final judgment was signed for the amount of the taxed costs. A writ of *fieri facias* issued on this judgment was on 5th February 1906 returned wholly unsatisfied.

On 6th February 1906 an order *nisi* was obtained by Messrs. Blake & Riggall for the sequestration of the estate of Miss L. E. Bayne, based on the judgment of 26th January 1906 and the writ of *fieri facias* issued thereon, and the debtor's summons of 20th December 1905 and on failure to comply therewith. This order *nisi* was on 22nd February 1906 made absolute by *Hood* J., and Arthur Sydney Baillieu was appointed assignee. No creditors other than Messrs. Blake & Riggall proved in the estate of Miss L. E. Bayne.

On 8th March 1906 the sum of £50 was paid into the High Court by Miss L. E. Bayne as security for the costs of the appeal from the judgment of 6th December 1905. On the hearing of that appeal on 17th June 1906, the appeal was allowed, and the judgment of 6th December 1905 was ordered to be discharged: *Bayne* v. *Blake* (1). From that judgment of the High Court Messrs. Blake & Riggall subsequently obtained leave to appeal to the Privy Council.

On 30th May 1907 a motion was made by Miss L. E. Bayne to the Supreme Court to set aside or annul the order absolute for sequestration of 22nd February 1906, notice of the motion having

(1) 4 C.L.R., 1.

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been given to A. S. Baillieu. *Hodges* J., who heard the motion, refused to set aside or annul the order absolute, but, with the assent of A. S. Baillieu, he stayed all proceedings under the order absolute until further order.

On 10th June 1907 Miss L. E. Bayne obtained special leave to appeal to the High Court from the order absolute of 22nd February 1906, and from the judgment of *Hodges* J. of 30th May 1907. The respondents to the appeal were the assignee in insolvency, A. S. Baillieu, and Messrs. Blake & Riggall.

Agg (with him *Ah Ket*), for the appellant. Notice of appeal to this Court from the judgment of 6th December 1905 having been given, and that appeal being *bonâ fide*, the order *nisi* for sequestration should not have been made absolute, but should at least have been adjourned until after the hearing of the appeal: *Ex parte Heyworth*; *In re Rhodes* (1); *In re Bayne* (2). The real object of the insolvency proceedings was, not to obtain a distribution of the appellant's assets, but to prevent her proceeding with the appeal, and therefore the order for sequestration should not have been made absolute: *In re Smart & Walker*; *Ex parte Hill* (3); *Ex parte Bourne*; *In re Bourne* (4).

Mann, for the respondent, A. S. Baillieu.

McArthur, for the respondents, Messrs. Blake & Riggall, did not oppose the setting aside of the orders appealed from on grounds which did not reflect on the conduct of his clients.

GRIFFITH C.J. The proceedings for the sequestration of the estate of the appellant were begun after she and her sister had given notice of appeal to this Court from a judgment of the Supreme Court adverse to them, and were founded upon that judgment. While that notice of appeal was still pending, but before the appellant had given security for the costs of the appeal, the insolvency proceedings were pressed on, with the result that the order of sequestration—one of the orders now appealed from—was made by *Hood* J., but, as Mr. *McArthur* tells us, nothing was done under that sequestration after the

(1) 14 Q.B.D., 49.
(2) 25 A.L.T., 176.
(3) 20 V.L.R., 97.
(4) 2 G. & J., 137.

appeal to this Court was completely instituted. Subsequently an application was made to *Hodges* J. to annul the order of sequestration, based practically on the circumstances I have pointed out. He refused to do so. Without saying that under all circumstances proceedings for sequestration founded upon a judgment, from which notice of appeal to this Court has been given must fail, it is sufficient in this case to say that, in the absence of any evidence that the appellant had an estate which the respondents desired to have administered in the Insolvency Court, they must fail. There is no evidence on that point at all. Upon the facts I have stated it appears to me, and I think to my brothers, that the order for sequestration ought not to have been made, but the motion should properly have been adjourned or perhaps dismissed. That being so, this Court on appeal can reverse the order for sequestration. Again, on the application to *Hodges* J., the same materials having been brought before him, he ought to have annulled the sequestration, but he did not.

Another point was suggested by Mr. *McArthur*, which might raise a formal objection to the second appeal, but has nothing in it of substance, viz., that his clients were not formally made parties to the motion to annul the sequestration. It is very arguable whether they were necessary parties. The official assignee was the only formal party, but it is not denied that Mr. *McArthur's* clients were the only creditors, and their solicitor represented the official assignee. Under all the circumstances I think the appeal should be allowed and the orders appealed from reversed.

BARTON J. I concur.

O'CONNOR J. I concur.

Appeal allowed. Orders appealed from reversed. Respondents Blake & Riggall to pay costs of appeal.

Solicitor, for appellant, *Frank S. Stephen.*

Solicitors, for respondents, *Rigby & Fielding*; *Blake & Riggall.*

B. L.