ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

LOWBEER V DE VARDA [2018] FCAFC 115

Federal Court of Australia, Full Court, Reeves, Farrell Colvin JJ, 24 July 2018

Dismissing creditor's petitions based on certificates of taxation and costs order paid by certain congregation and therefore no more debt was due or payable.

Key words: Bankruptcy, Federal Court of Australia, Creditors, Sequestration Order, Congregation

1. In this case, Lowbeer sought sequestration orders against Rabbi TovLev and Mr De Varda on the basis that they had not paid two certificates of taxation quantifying an order for costs, totalling $75,950. Sequestration orders were made by Rares J in Mr Lowbeer's favour on 11 March 2014. However, the Federal Circuit Court dismissed the orders on the principal ground that the costs the subject of the 2014 costs order had been paid by the Strathfield and District Hebrew Congregation (the Congregation) and therefore there was no debt that was due and payable. Lowbeer appealed to the Full Court of the Federal Court.

2. It was common ground in the court below that the costs in question had been met by the Congregation. However, for Mr Lowbeer, it was said that the Congregation had paid the costs in recognition of an obligation to indemnify Mr Lowbeer. On that basis, it was submitted that the Congregation was subrogated to the rights of Mr Lowbeer and there was still a debt due by Rabbi TovLev and Mr De Varda to Mr Lowbeer. The primary judge found that there were substantial reasons to question whether the certificates of taxation represented a true debt due to Mr Lowbeer. His Honour held that in truth and reality there was no debt due to Mr Lowbeer because the costs had been incurred by the Congregation and not Mr Lowbeer.

3. The dispute between Lowbeer, the Congregation's auditor, and the respondents had been ongoing since 2013. Supreme Court proceedings had been brought by Rabbi TovLev, Mr De Varda and others which were unsuccessful. Costs orders had been made in favour of the directors of the Congregation and Lowbeer. These were allegedly unpaid and sequestration orders were successfully sought, then appealed, then reinstated. It was common ground in this appeal that the assessed amount of the Supreme Court costs order was paid out of the bankrupt estates of Mr De Varda and another original plaintiff, Mr Cliffe. Further sequestration orders were sought because the 2014 costs orders were made after the sequestration orders in respect of the estates of Rabbi TovLev, Mr De Varda and Mr Cliffe.

4. The appeal raised difficult issues of subrogation and petitions for bankruptcy. Subrogation is an equitable doctrine, whilst bankruptcy is a creature of statute (at [95]):

> …the subrogation claim advanced by Mr Lowbeer depends upon the application of an equitable doctrine. It is a claim of a kind that acts upon the conscience of both the party to an indemnity arrangement and a third party. Although subrogation has been held to confer all the rights and remedies of the party indemnified, it does so by operation of equitable principles. There remains a question of statutory construction as to whether the relevant provisions in the Bankruptcy Act include a party seeking to exercise the statutory right to present a creditor's petition by invoking the equitable doctrine of subrogation and standing in the shoes of a creditor who has been indemnified.

5. Subrogation is not the same as assignment, so that whilst an assignee can bring a petition for bankruptcy, the Congregation in this case did not bring the petition as an assignee (at [96]). The act of bankruptcy relied upon was a failure to comply with a bankruptcy notice issued in respect of a judgment for costs in favour of Mr Lowbeer (at [98]-[99]):

> It was foundational to the submissions advanced in support of the appeal that the Congregation could cause the issue of the bankruptcy notice in the name of Mr Lowbeer in the exercise of its rights of subrogation. As we have noted, subrogation operates to allow an indemnifier who has performed the obligation to indemnify to stand in the shoes of the indemnified party. Historically, an assignee of a judgment debt by operation of law could not cause a bankruptcy notice to issue: *Re Goldring; Ex parte Harper* (1888) 22 QBD 87. The bankruptcy legislation was amended to provide that any person entitled to enforce a final judgment shall be deemed to be a creditor and is entitled to issue a bankruptcy notice (see s 40(3)(d)). However, that change in the law does not mean that a party exercising a right of subrogation (in this case the Congregation) can issue a bankruptcy notice in the name of the indemnified party (Mr Lowbeer) and seek sequestration orders on the basis of a failure to comply. It may be entitled to proceed in its own name to obtain a sequestration order based upon a failure to comply with a bankruptcy notice in respect of the judgment. However, that would depend upon whether it was entitled to enforce the judgment even though it was given in favour of Mr Lowbeer: *Abigroup Ltd v Abignano* [1992] FCA 567; (1992) 39 FCR 74 at 87.

6. The appeal was dismissed on grounds that held that there was no subrogation and that a party who has not paid the amount required by the indemnity is not subrogated (at [69]). That being so, it was not necessary for the court to reach a final view on the jurisdictional issue whether the Congregation can issue a bankruptcy notice and obtain sequestration orders based upon a failure to comply with the notice in the exercise of a right to subrogate.

IMPLICATIONS

This is a technical issue which appears to have arisen in relation to an unincorporated association engaged in an internal dispute.

VIEW THE CASE

This case may be viewed at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC//2018/115.html

The cases at first instance may be viewed at: *Lowbeer v TovLev* [2013] FCCA 1813 and, where the costs order was made, *Tov-Lev v Lowbeer (No 2)* [2014] FCA 379.

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