



Précis Paper

Vesting of Property upon Bankruptcy and Advocates Immunity

Ivan Griscti (Barrister) and Tony Cavanagh (Solicitor) discuss the Supreme Court of New South Wales' (Harrison AsJ) decision in *Drake v Wight & Strickland Lawyers* [2015] NSWSC 1090 which considered an action in negligence against a law firm and an application for summary dismissal of this claim. Mr Griscti and Mr Cavanagh acted for the successful defendant solicitors, Wight & Strickland Lawyers.

Discussion Includes

- Grounds for Summary Dismissal
- Vesting of property upon Bankruptcy
- Assigning cause of action
- Advocates Immunity

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Vesting of Property upon Bankruptcy and Advocates Immunity

1. In this edition of BenchTV, Ivan Griscti (Barrister) and Tony Cavanagh (Solicitor) discuss the Supreme Court of New South Wales' (Harrison AsJ) decision in *Drake v Wight & Strickland Lawyers* [2015] NSWSC 1090 which considered an action in negligence against a law firm and an application for summary dismissal of this claim. Mr Griscti and Mr Cavanagh acted for the successful defendant solicitors, Wight & Strickland Lawyers.

Procedural History

2. The underlying case related to the sale and repurchase by the plaintiffs, Mr and Mrs Drake, of a property in Rouse Hill. The Drakes had funded their repurchase of the property with the help of a Ms Badman who subsequently sought to rescind the agreement alleging undue influence.
3. That led to the proceedings before Young CJ in Eq (*Badman v Drake* [2008] NSWSC 1366) in which the gift of the property to the Drakes was set aside and equitable compensation was ordered against them. The defendants to the 2015 proceedings, Wight & Strickland, were acting as the lawyers for the Drakes in *Badman* [2008].
4. In 2009, the Drakes were declared bankrupt and were discharged from bankruptcy in 2012.
5. In 2015, the plaintiffs filed an amended statement of claim against Wight & Strickland seeking damages in negligence for the advice the law firm allegedly provided to proceed with a defence of the claim and that the plaintiffs had a reasonable prospect of success in the earlier litigation.

The Arguments Advanced by the Defendant in the Motion for Summary Dismissal

6. The defendant sought an order pursuant to rules 13.4(1) or 14.28(1) of the *Uniform Civil Procedure Rules 2005* (NSW) that the proceedings be summarily dismissed. The rules provide:

REGULATION 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).*

REGULATION 14.28:

Circumstances in which court may strike out pleadings

- (1) *The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading:*
- (a) *discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, or*
 - (b) *has a tendency to cause prejudice, embarrassment or delay in the proceedings, or*
 - (c) *is otherwise an abuse of the process of the court.*
- (2) *The court may receive evidence on the hearing of an application for an order under subrule (1).*

7. The defendant argued 3 grounds on which the plaintiff's claims were doomed to fail in their motion for summary dismissal:
- i. The plaintiffs had no standing to sue as a result of being declared bankrupt notwithstanding their subsequent discharge of bankruptcy
 - ii. The claims were statute barred
 - iii. The defence of advocate's immunity

i. Bankruptcy

8. The question for the court in relation to this ground was whether any potential action the plaintiffs possessed against the defendants, upon discharge from bankruptcy, divested from the trustee and re-vested in the plaintiffs.
9. *Kovarfi v BMT & Associates Pty Ltd (No 2)* [2014] NSWSC 100 was cited by Harrison AsJ as authority for the proposition that any cause of action that vested in the trustee during bankruptcy does not divest following the discharge of bankruptcy. Furthermore, on an examination of the correspondence that was exchanged between the plaintiffs and their trustee in bankruptcy, it was clear that the trustee had never assigned any cause of action to the plaintiffs. As a result, the pleadings were incompetent and this was a sufficient reason to have the proceedings dismissed.

ii. Statute Barred

10. The defendant was unsuccessful in relation to their second ground that the claims were statute barred pursuant to the *Limitations Act 1969* (NSW). Ultimately, Harrison AsJ referred to *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 for the proposition that limitation questions should not be decided in interlocutory proceedings (which this hearing to determine summary dismissal was) except in the "clearest of cases". It was arguable that the 6 year limitation period specified in s 14 of the *Limitation Act* had already expired prior to the commencement of the proceedings. However, it was also arguable that an extension be granted given the alleged gross negligence of the defendant and the difficult circumstances faced by the plaintiffs e.g. their bankruptcy and old age.

iii. Advocate's Immunity

11. The protection offered by the immunity to lawyers from suit is said to exist "only where the particular work is so intimately connected with the conduct of the case in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to hearing" per *Giannarelli v Wraith* (1988) 165 CLR 543 at [560] and *Donnellan v Woodland* [2012] NSWCA 433. In Harrison AsJ's view, the advice allegedly given by Wight & Strickland to defend Ms Badman's claim involved court proceedings already commenced against the Drakes prior to the defendant's involvement. This sort of advice was characterised to be advice, although not at hearing, but which so affected the conduct of the hearing of the case that it was subject to the immunity. In fact, one of the rationales for the advocate's immunity was the desirability of the finality of litigation and the perception that it is not appropriate for courts other than appeal courts to look back on a case and see whether they got it right. The presenters argue that had this matter proceeded, it would have been necessary to re-examine the prior hearing in some detail. Therefore, the plaintiffs' proceedings could not succeed due to advocate's immunity and thus the proceedings could also be dismissed on this ground.

Implications

12. As a result of the defendant successfully arguing that the pleadings were irreparably incompetent as a result of the plaintiff's lack of standing due to their bankruptcy and the defence of advocate's immunity, the proceedings were summarily dismissed.
13. *Drake* has limited long term significance beyond reaffirming the principle that an action does not divest from a trustee in bankruptcy on discharge and revest in the former bankrupts and in providing an axiomatic example of advocate's immunity.

BIOGRAPHY

Ivan Griscti

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Ivan practiced as a solicitor for fifteen years before coming to the Bar in 2001. He practices mainly in insurance and financial services litigation, with a focus on professional indemnity, construction, directors and officers, public and product liability. He is a member of AILA and was a long serving member of the education committee.

Tony Cavanagh

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Tony has been practicing law since 1984. He is currently the leader of the Dispute Resolution and Litigation Law Group at Mullane and Lindsay Solicitors and his clients include a number of general and indemnity insurers. He was Conjoint Lecturer in Industrial Law at the Faculty of Law at the University of Newcastle, and continues to lecture occasionally for final year students.

BIBLIOGRAPHY

Focus Case

Drake v Wight & Strickland Lawyers [2015] NSWSC 1090

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_10-08-2015_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/55c28243e4b0a51fc30eec5f>

Cases

Badman v Drake [2008] NSWSC 1366

Donnellan v Woodland [2012] NSWCA 433

Giannarelli v Wraith (1988) 165 CLR 543

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

Wardley Australia Ltd v Western Australia [1992] HCA 55; (1992) 175 CLR 514

Legislation

Limitation Act 1969 (NSW)

Uniform Civil Procedure Rules 2005 (NSW)