



HIGH COURT OF AUSTRALIA

13 December 2019

FRANZ BOENSCH AS TRUSTEE OF THE BOENSCH TRUST v SCOTT DARREN
PASCOE
[2019] HCA 49

Today the High Court unanimously dismissed an appeal from a judgment of the Full Court of the Federal Court of Australia concerning whether property held by a bankrupt on trust for another vested in the bankrupt's trustee in bankruptcy.

Relevantly, s 5(1) of the *Bankruptcy Act 1966* (Cth) defines "the property of the bankrupt" as including "the property divisible among the bankrupt's creditors", from which s 116(2)(a) excludes "property held by the bankrupt in trust for another person". Section 58 of the *Bankruptcy Act* vests "the property of the bankrupt" in the bankrupt's trustee in bankruptcy, but further provides that, where a Commonwealth, State or Territory law requires registration of a transmission of property and enables a trustee in bankruptcy to be registered as owner, the property vests only in equity, until compliance with the requirements of the law. Section 90 of the *Real Property Act 1900* (NSW) is such a State law.

The appellant (Mr Boensch) and his former wife were registered as joint proprietors in fee simple of a property subject to the *Real Property Act* ("the Rydalmere property"). Mr Boensch claimed that, some four years before he was served with a bankruptcy notice, he and his former wife had executed a memorandum of trust over the Rydalmere property and that, later, they executed a deed of trust confirming the settlement upon him as trustee for their children. A transfer of their joint estate to Mr Boensch alone was then executed, but not registered at that time. Thereafter, a sequestration order against Mr Boensch was made, and the respondent (Mr Pascoe) was appointed as his trustee in bankruptcy. Two days later, Mr Pascoe lodged a caveat against dealings over the Rydalmere property, claiming a "Legal Interest pursuant to the *Bankruptcy Act 1966*" in accordance with his usual practice. On advice from counsel, he also instituted proceedings for relief under s 120 or s 121 of the *Bankruptcy Act*, which were ultimately dismissed after a determination that the trust was validly constituted.

Mr Boensch instituted proceedings in the Supreme Court of New South Wales for compensation under s 74P(1) of the *Real Property Act*, alleging that Mr Pascoe had lodged, and later refused or failed to withdraw, the caveat without reasonable cause. The primary judge, and the Full Court of the Federal Court on appeal, held that, upon the making of a sequestration order against a bankrupt who holds property subject to the *Real Property Act* on trust, s 58 of the *Bankruptcy Act* vested the property in equity in the trustee in bankruptcy subject to the trust. In turn, the primary judge and Full Court held that the Rydalmere property vested in equity in Mr Pascoe on that basis, and that the existence of that caveatable interest sufficed to dismiss Mr Boensch's claim for compensation according to the test of "reasonable cause" laid down in *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1990) 21 NSWLR 459. By grant of special leave, Mr Boensch appealed to the High Court.

In dismissing the appeal, the High Court unanimously held that, provided a bankrupt has a valid beneficial interest in trust property (whether vested or contingent), that property will vest in the trustee in bankruptcy under s 58 of the *Bankruptcy Act*, subject to equities in favour of third parties; and that, where the property is subject to the *Real Property Act*, it vests forthwith in

equity in the trustee in bankruptcy, who may then apply to be registered as legal proprietor, although he or she will continue to hold the estate or interest subject to such equities. In the circumstances, the Court determined that Mr Boensch had a beneficial interest in the Rydalmere property to the extent of his right of indemnity; and, by reason of that interest, an equitable estate in the Rydalmere property vested forthwith in Mr Pascoe, who thus had a caveatable interest. There being no cause to depart from the *Beca Developments* test, the Court unanimously concluded that Mr Pascoe did not lodge or maintain the caveat without reasonable cause.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*