

FRANZ BOENSCH AS TRUSTEE OF THE BOENSCH TRUST v PASCOE (S216/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2018] FCAFC 234

Date of judgment: 20 December 2018

Special leave granted: 21 June 2019

On 23 August 2005 a sequestration order was made against Mr Franz Boensch, whereupon Mr Scott Pascoe became the trustee in bankruptcy of Mr Boensch's bankrupt estate. Mr Boensch's bankruptcy came after one of his creditors had sought it for nearly two years.

Mr Boensch was the trustee of a trust ("the Trust"), the property of which was commercial premises ("the Property") at which Mr Boensch operated a mechanical workshop. The Trust had been created in August 1999, by a memorandum of trust executed by Mr Boensch and his former wife. Its beneficiaries were the former couple's two children. A detailed deed of trust was not executed until March 2004.

Six days prior to the making of the sequestration order, Mr Boensch lodged a caveat over the Property forbidding the registration of any instruments which were not in accordance with the Trust. On 25 August 2005 however Mr Pascoe, in accordance with his usual practice in respect of bankrupt estates, lodged a caveat of his own over the Property ("the Caveat"). He did so in the belief that whatever interest Mr Boensch had in the Property had vested in him (Mr Pascoe) as the trustee of Mr Boensch's bankrupt estate. Mr Pascoe also believed that the Trust had been created with the intention of putting the Property beyond the reach of Mr Boensch's creditors and that the Trust consequently would be void under s 121 of the *Bankruptcy Act 1966* (Cth).

Between November 2005 and August 2008, Mr Boensch made three formal requests to Mr Pascoe to remove the Caveat. After declining to accede to those requests, Mr Pascoe eventually let the Caveat lapse in September 2009. That was after a series of legal proceedings pursued by Mr Pascoe (in the midst of which was an unsuccessful application to this Court for special leave to appeal, *Pascoe v Boensch & Anor* [2009] HCASL 61) had come to an end. In those proceedings Mr Pascoe had sought, but failed, to establish that Mr Boensch was insolvent in 1999 and that the Trust was created for the purpose of putting the Property beyond the reach of Mr Boensch's creditors. In allowing the Caveat to lapse, Mr Pascoe also had recently decided that any right of indemnity out of the Trust assets to which he was entitled would be worth little. (From at least November 2005, Mr Pascoe had thought that Mr Boensch had such a right of indemnity for loan repayments and rates paid on the Property.)

In 2012 Mr Boensch commenced Supreme Court proceedings against Mr Pascoe, seeking compensation under s 74P(1) of the *Real Property Act 1900* (NSW) on the basis that Mr Pascoe did not have reasonable cause to lodge or maintain the Caveat. On 10 December 2015 Justice Darke dismissed the

proceedings. His Honour held that Mr Boensch's ownership interest in the Property had vested, subject to the terms of the Trust, in Mr Pascoe as trustee in bankruptcy by virtue of s 58(1)(a) of the *Bankruptcy Act*. As equitable owner of the Property, Mr Pascoe had a caveatable interest in it. Therefore it could not be said that Mr Pascoe had lodged the Caveat, or had failed to withdraw it upon request, without reasonable cause.

The Full Court of the Federal Court (Besanko, McKerracher and Gleeson JJ) unanimously dismissed an appeal by Mr Boensch. (Section 7(5)(a) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) required that such an appeal, involving matters arising under the *Bankruptcy Act*, be made to the Full Court of the Federal Court.) Their Honours held that Justice Darke was correct to hold that Mr Pascoe had a caveatable interest which was adequately described in the Caveat and that that conclusion sufficed for the dismissal of Mr Boensch's claim. The Full Court considered it unnecessary to decide whether Mr Boensch had a right of indemnity out of the Trust's assets, which had vested in Mr Pascoe and which in turn was an interest that could support the Caveat.

The grounds of appeal include:

- The Full Court erred when it concluded that any caveatable interest in the Property held by Mr Boensch, as the trustee of the Trust, vested in Mr Pascoe, as the trustee in bankruptcy of Mr Boensch, upon the making of a sequestration order against the estate of Mr Boensch by operation of s 58(1) of the *Bankruptcy Act*.
- The Full Court erred when it concluded Mr Pascoe, accordingly, held a caveatable interest in the Property of the type which he had identified in his caveat.

Mr Pascoe has filed a notice of contention, the grounds of which include:

- The Full Court should have found that Mr Boensch did not discharge his onus of proving that Mr Pascoe at material times had no caveatable interest in the Property, in circumstances where Mr Boensch:
 - a) had incurred liabilities in the performance or administration of the Trust; and
 - b) did not disprove that immediately before Mr Pascoe's appointment as trustee of his bankrupt estate, he had a proprietary interest in the Property by reason of an entitlement to be indemnified for the abovementioned liabilities (both by way of reimbursement and exoneration) out of the assets of the Trust.