

FEDERAL COURT OF AUSTRALIA

Robson as former trustee of the estate of Samsakopoulos v Body Corporate for Sanderling at Kings Beach CTS 2942 (No 2) [2021] FCAFC 190

Appeal from: *Body Corporate for Sanderling at Kings Beach v Samsakopoulos (No 2)* [2020] FCCA 1909

File number: QUD 234 of 2020

Judgment of: **ALLSOP CJ, MARKOVIC, DERRINGTON, COLVIN AND ANASTASSIOU JJ**

Date of judgment: 1 November 2021

Catchwords: **PRACTICE AND PROCEDURE** - whether appropriate for further order to determine amount of any loss or damage caused by trustee's conduct - where trustee retained possession of property of second respondent after dismissal of creditor's petition by Federal Circuit Court - where Full Court on appeal determined dismissal of creditor's petition eradicated second respondent's bankruptcy status and set aside sequestration order - where no consequential order made to justify trustee's continuing possession of property after dismissal of creditor's petition - where no steps taken by trustee to return property until hearing of appeal - whether adequate explanation provided by trustee as to delay in re-vesting property - no further order made

Cases cited: *Robson as former trustee of the estate of Samsakopoulos v Body Corporate for Sanderling at Kings Beach CTS 2942* [2021] FCAFC 143

Division: General Division

Registry: Queensland

National Practice Area: Commercial and Corporations

Sub-area: General and Personal Insolvency

Number of paragraphs: 22

Date of last submissions: 2 September 2021 (Applicant)

Date of hearing: Determined on the papers

Counsel for the Applicant: Mr GJ Handran QC with Mr GW Dietz

Solicitor for the Applicant: Moore Lawyers

Counsel for the First Respondent: The First Respondent did not appear

Counsel for the Second Respondent: The Second Respondent did not appear

ORDERS

QUD 234 of 2020

BETWEEN: **WILLIAM ROLAND ROBSON AS FORMER TRUSTEE OF
THE BANKRUPT ESTATE OF VICTORIA
SAMSAKOPOULOS**
Applicant

AND: **BODY CORPORATE FOR SANDERLING AT KINGS
BEACH CTS 2942**
First Respondent

VICTORIA SAMSAKOPOULOS
Second Respondent

ORDER MADE BY: **ALLSOP CJ, MARKOVIC, DERRINGTON, COLVIN AND
ANASTASSIOU JJ**

DATE OF ORDER: **1 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. There be no further order in the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

- 1 A registrar of the Federal Circuit Court exercising delegated judicial power made a sequestration order in respect of the estate of Ms Victoria Samsakopoulos. Mr William Roland Robson was appointed as trustee and commenced the administration. Ms Samsakopoulos sought review of the registrar's order by a judge. On review by a Circuit Court judge, the creditor's petition was dismissed. Mr Robson then sought orders for Ms Samsakopoulos and the petitioning creditor to pay the costs of the administration in such proportion as the Court thinks appropriate. The Circuit Court judge dismissed the application.
- 2 Mr Robson sought leave to appeal to this Court and orders as to payment of his remuneration, costs and expenses in conducting the administration pursuant to the sequestration order made by the registrar. Leave to appeal was granted. Orders were made for the petitioning creditor to pay Mr Robson's reasonable remuneration, costs and expenses until the hearing of the review application by the Circuit Court judge with the remuneration to be capped at \$30,000 plus GST: *Robson as former trustee of the estate of Samsakopoulos v Body Corporate for Sanderling at Kings Beach CTS 2942* [2021] FCAFC 143 (subsequent paragraph references are to these reasons).
- 3 It was also determined in the appeal that the legal consequence of the dismissal of the creditor's petition by the Circuit Court judge was that the status of Ms Samsakopoulos as a bankrupt was eradicated and that the sequestration order should be set aside: at [24] (Allsop CJ, Markovic and Derrington JJ agreeing). Therefore, upon the dismissal of the creditor's petition, the legal foundation for the administration came to an end. It followed that thereafter Mr Robson had no basis to continue to hold the property of Ms Samsakopoulos.
- 4 During the hearing of the appeal it became clear that Mr Robson had retained possession of the property of Ms Samsakopoulos pending the outcome of the proceedings. This course was not supported by any order of the Court nor by any provision of the *Bankruptcy Act 1966* (Cth). It was, in effect, the exercise of a self-help remedy in circumstances where Mr Robson had failed in his application to the Circuit Court and sought orders in the appeal that would have seen payment of his remuneration and the costs and expenses of the nullified administration out of the property of Ms Samsakopoulos. In consequence, Ms Samsakopoulos was held out of her

property for a considerable period of time by Mr Robson without any legal basis for the adoption of that course.

5 In those circumstances, the Court determined that Mr Robson should be given an opportunity to provide any explanation to the Court for the delay in re-vesting the property of Ms Samsakopoulos. It was also determined that he should be invited to show cause as to why there should not be a consequential order requiring him to pay to Ms Samsakopoulos the amount of any loss or damage caused by being held out from her property after the dismissal of the creditor's petition and why there should not be an inquiry undertaken by a registrar of the Court acting as a referee to determine that amount.

6 Provision was made for Mr Robson to file any affidavit and submissions and for Ms Samsakopoulos to file any response. Mr Robson has done so. Ms Samsakopoulos appeared on her own behalf in the appeal. The time for her to file any response expired on 16 September 2021 without the filing of any material. In those circumstances, these reasons deal with the question whether there should be any consequential order to determine the amount of any loss or damage.

Summary of outcome

7 For the following reasons there should be no further order. The material before the Court does not indicate any need for the making of such an order. Should Ms Samsakopoulos consider that there has been material loss or damage that she has suffered she would still be able to pursue any claim in that regard by separate proceedings should she wish to do.

The explanation proffered by Mr Robson

8 In the reasons for decision on the appeal, the Court found as follows (per Colvin J, other members of the Court agreeing):

- (1) On 11 December 2019 (almost six months after the creditor's petition was dismissed), Mr Robson brought an application in the Circuit Court in which he sought orders for payment of the Trustee's remuneration in the sum of \$53,104.98 (including GST), an order for an indemnity out of the assets of Ms Samsakopoulos to the extent that she was ordered to be liable for a proportion of the remuneration and subject to the indemnity an order that the Trustee 'forthwith cause the legal title in the assets of the former bankrupt estate ... held by [the Trustee] to be transferred to [Ms Samsakopoulos]': at [133].

- (2) On 15 July 2020, the application by Mr Robson was dismissed: at [137].
- (3) Thereafter, no order was sought or made concerning the return of property to Ms Samsakopoulos: at [139].
- (4) In the 23 months between when the creditor's petition was dismissed and the hearing of the appeal, Mr Robson continued to hold the property of Ms Samsakopoulos, including the two residential units, the Qantas shares and the bank accounts: at [140].
- (5) Mr Robson only took steps to return the keys to the residential units after the hearing of the appeal: at [140].
- (6) Mr Robson 'retained control of the property of Ms Samsakopoulos even though (a) the creditor's petition had been dismissed without any consequential order justifying [Mr Robson] continuing to hold and administer the property; and (b) [Mr Robson] had been unsuccessful in his application for an order that he be allowed an indemnity to be met out of the property of Ms Samsakopoulos to the extent of a proportionate liability for [his] costs ... In that significant respect, the necessary consequence of the orders made by the Circuit Court was disregarded by the Trustee': at [140].

9 Having regard to these findings, consideration was given to the orders that should be made. At [281], it was said:

After the decision was made to dismiss the creditor's petition, there was no basis upon which [Mr Robson] could continue the administration. [Mr Robson] sought no consequential order as to provision for remuneration, costs and expenses or for re-vesting assets. In circumstances where the Trustee has, without authority, retained control of the assets of Ms Samsakopoulos for some 23 months since the dismissal of the creditor's petition, there is no reasonable basis upon which such an order may now be considered. In a different case, it may be appropriate for a trustee, in circumstances where a sequestration order is made by a registrar and then overturned on review to seek and obtain orders that would allow for an orderly return of property and for provision to be made for the costs of doing so to be met by the creditor or the debtor or in proportions as between them. However, in the present case, principally by reason of the conduct of [Mr Robson], no such order should be made. The result is that after the dismissal of the creditor's petition [Mr Robson] had no authority to continue with the administration. The sequestration order of the registrar was overtaken by the order dismissing the petition. Thereafter, the lawfulness of the [Mr Robson's] possession of the property of Ms Samsakopoulos came to an end and [he] was obliged to immediately return that property.

10 Then at [285]-[286], it was said:

In the events which have occurred, in order to ensure the unqualified return to Ms Samsakopoulos of her property, there should be consequential orders under s 104(3) to that effect. In cases such as the present case, it is to be expected that the Trustee will seek such consequential orders as may be necessary to effect the return of

property and, to the extent necessary and appropriate, to validate or authorise the acts of the Trustee in conducting and completing the administration. [Mr Robson] has not followed that course in the present case. Therefore, Ms Samsakopoulos has been held out of her property for a very considerable period.

In those circumstances, it is appropriate for this Court to consider the making of orders that will redress Ms Samsakopoulos for her loss and damage in not having access to her property since the dismissal of the creditor's petition. There are perhaps three sources of power for the making of such orders.

11 Mr Robson submits that there has been confusion about the relief that he sought in the Circuit Court. He maintains that by the application that he brought in the Circuit Court and the relief that was sought on appeal, he did seek orders for the return of the property of Ms Samsakopoulos. He also says that he reasonably believed that orders were required to be made by the Court to provide for the return of property to Ms Samsakopoulos.

12 There has been no confusion about the relief that was sought by Mr Robson. As has been noted, the reasons on appeal noted that he had sought orders for the return of property. However, those orders were sought conditionally. They contemplated that Mr Robson would hold the property until his remuneration, costs and charges were paid and to the extent necessary there would be sale of that property to enable that to occur.

13 As explained in the reasons, the course followed by Mr Robson was not justified as a matter of principle. Further, even if he believed, after the creditor's petition was dismissed, that he could maintain such a position, he was obliged to act promptly. Then, once his application was refused by the Circuit Court his claim had been finally determined adversely. From that point on, to retain the property was to disregard the determination made by the Circuit Court. If Mr Robson believed it was necessary to obtain an order to return the property he should have brought an unconditional application to effect the return. It was not the case (as was submitted on his behalf) that the next occasion to seek orders for the return of the property was on the hearing of the appeal.

14 Nevertheless, on the affidavit evidence of Mr Robson, we accept that he took steps to obtain legal advice as to the course to follow and that he acted on the basis of that legal advice. We also observe that there was a degree of uncertainty as to the legal position, at least up until the outcome of the application in the Circuit Court for orders as to remuneration was known. There were also complexities associated with the proper accounting for the period when there was a sequestration order in place. We also accept that the extent of delay in the hearing of the appeal

is a matter that was not foreseen by Mr Robson when he received advice to the effect that orders as to the property should be sought in the appeal.

The position in relation to the property

15 Mr Robson has deposed that as at the date of the order dismissing the creditor's petition, the only property of Ms Samsakopoulos that was in his possession or under his control was:

- (1) the legal title to a residential unit at Kings Beach;
- (2) a set of keys to a residential unit at Moonee Ponds; and
- (3) the sum of \$9,417.77.

16 As to the Kings Beach unit, he says that Ms Samsakopoulos re-took control of the Kings Beach unit from August 2019 and was receiving all of the rental income from the property. All rental proceeds from the unit were redirected to Ms Samsakopoulos from 8 August 2019. Mr Robson also deposes to concerns about a significant amount of transfer duty that might have been levied if the property was transferred without a court order and who would be responsible for the payment of any such duty. He explains the steps taken in that regard.

17 As to the Moonee Ponds unit, Mr Robson says that although legal title was never transferred to him, it was unclear as to who was liable for body corporate fees, rates and utilities that had accrued during the period that a sequestration order had been in place and liability that might arise as a result of water leaks from the property. He also says that the property was uninhabitable and Ms Samsakopoulos resided with her mother at her mother's property. He deposes on information and belief that Ms Samsakopoulos moved to her mother's home to care for her mother, that there is no mortgage on her mother's home and there has been no rent paid by Ms Samsakopoulos. He says 'I understood that Ms Samsakopoulos would not suffer any prejudice if that property was not returned to her until an order of the court was obtained'.

18 As to the Qantas shares, Mr Robson deposes that they were never transferred into his name and only two dividend payments totalling \$555.00 were paid to him.

19 As to superannuation benefits, Mr Robson says that they were remitted to Ms Samsakopoulos on 21 November 2018.

20 Therefore, he says that it is only the balance of the funds held in the bank account that have not been available to Ms Samsakopoulos for a considerable period.

21 Mr Robson also deposes to the taking of prompt steps to return the property to Ms Samsakopoulos since the hearing of the appeal.

Conclusion

22 On the evidence before the Court: (a) an adequate explanation has been provided for the course that was followed by Mr Robson; and (b) any loss and damage that may have been suffered by Ms Samsakopoulos would be of an order that would not justify further inquiry by a registrar. We express no concluded view as to whether the explanation provided is a complete answer as a matter of law to any claim that may be advanced by Ms Samsakopoulos. However, we are satisfied, having regard to the explanation provided, that no substantive purpose would be served by the making of any further order. For those reasons, Mr Robson has shown cause as to why no order for further inquiry should be made.

I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop, and Justices Markovic, Derrington, Colvin and Anastassiou.

Associate:

Dated: 1 November 2021