

Article

Dispute Resolution & Insolvency



The Implications of Bankruptcy: Barry Decision Provides Insights into Corporate and SMSF Affairs

By Helene Chryssidis

As seen in *the matter of an application by Barry* [2024] FCA 13 (**Barry**), bankruptcy can have a ripple effect on the management of corporations and a superannuation entity. *Barry* serves as a warning of the importance of understanding the far-reaching implications of bankruptcy. It also demonstrates the Court's ability to make orders validating actions in circumstances where a bankrupt acts bona fide and without the intention to defeat creditors.

Summary of facts

The matter of *Barry* concerned two plaintiffs who were directors of two entities. One entity acted as the trustee of a SMSF. The other entity acted as a trustee of a trust fund. During their involvement in these entities, the trust acquired assets, including an investment unit located in Queensland (**Property**).

Both members became bankrupt. Arising from their bankruptcy, the plaintiffs ceased to be directors of the two entities as undischarged bankrupts are disqualified from managing corporations and from acting as responsible officers of a trustee of a superannuation entity.¹

The plaintiffs received advice from external advisors that they should roll over the benefits held in the SMSF into an industry superannuation fund and wind down the SMSF.

Acting on this advice, the plaintiffs took steps to sell the **Property**, being the SMSF's principal asset. A contract for sale was ultimately signed by the plaintiffs and exchanged with respect to the sale of the **Property**. However, by

¹ Corporations Act 2001 (Cth) s 206B(3) (Corporations Act); Superannuation Industry (Supervision) Act 1993 (Cth) s 120(1) (SISA).

signing the contract for the sale of the **Property**, the plaintiffs committed an offence as they were disqualified from managing the two entities and from acting as responsible officers of a superannuation entity.

Immediately after realising their mistake or "misapprehension", the plaintiffs filed urgent proceedings in the Federal Court. In summary, relying on the provisions contained in the *Corporations Act and the Superannuation Industry (Supervision) Act 1993* (Cth), the plaintiffs sought (amongst other things):

1. Orders granting them leave to act as directors of the two entities in order to give effect to the sale of the **Property**, and to wind up the SMSF.
2. A declaration to the effect that any act, matter or thing that they had done or purported to do in their capacity as officers of the two entities since becoming undischarged bankrupts was not invalid.

Findings by the Court

The Court considered the plaintiffs intentions behind the orders and concluded that they were acting *bona fide* and without intending to defeat creditors. The Court was satisfied that the plaintiffs either "*unwittingly or labouring under misapprehension of the legal position took steps to sell the Property but did not take such steps dishonestly.*"

Ultimately, the Court made orders sought by the plaintiffs under the *Corporations Act* and the *Superannuation*

Industry (Supervision) Act 1993 (Cth). The Court did not consider the orders to be contrary to the public interest, nor did it risk any contraventions of the *Corporations Act* and the *Superannuation Industry (Supervision) Act 1993* (Cth).

The Court further ordered an extension of time to allow the plaintiffs to “*settle on the sale of the property, roll over their member benefits and lodge all necessary documents to comply with financial reporting requirements and to bring the fund to an end.*”

Takeaways

Barry helps demonstrate the importance of obtaining advice and understanding the implications of bankruptcy on managing your corporate and SMSF affairs. It also highlights that there may be avenues available through the Court for persons acting bona fide to continue to assist in certain SMSF actions and to ensure that a SMSF remains compliant.



MORE INFO

Helene Chryssidis Director

p: +61 8 8124 1847

helene.chryssidis@dwft.au

DW Fox Tucker Lawyers

L14, 100 King William Street, Adelaide, SA 5000

p: +61 8 8124 1811 e: info@dwft.au dwfoxtucker.com.au

COMMERCIAL | CORPORATE | DISPUTES | FAMILY | INSOLVENCY | TAX | HOSPITALITY | IP | PROPERTY | ENERGY | RESOURCES
EMPLOYMENT | WORKERS COMPENSATION | SELF INSURANCE | RISK MANAGEMENT | INSURANCE | WILLS | ESTATE PLANNING

Disclaimer: The information contained in this communication does not constitute advice and should not be relied upon as such. Professional advice should be sought prior to any action being taken in reliance on any of the information.