

SUPREME COURT OF QUEENSLAND

CITATION: *Hodge v Perpetual Trustee Company Ltd & another* [2026]
QSC 129

PARTIES: **DAVID ROSS HODGE**
(applicant)
v
PERPETUAL TRUSTEE COMPANY LTD
ACN 000 001 007 AS TRUSTEE FOR ARGYLE
CAPITAL MANAGEMENT TRUST NO. 1
(first respondent)
and
NORTON ROSE FULBRIGHT
(second respondent)

FILE NO/S: BS No. 5622 of 2025

DIVISION: Trial Division

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 June 2026

DELIVERED AT: Brisbane

HEARING DATE: 21 May 2026 and 15 June 2026

JUDGE: Burns SJA

ORDER: **THE ORDERS OF THE COURT ARE THAT:**

- 1. The originating application filed on 8 December 2025 is set aside; and**
- 2. The applicant pay the respondents' costs of the proceeding to be assessed on the standard basis.**

CATCHWORDS: PROCEDURE – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – where the applicant is an undischarged bankrupt – where the applicant commenced a proceeding by way of Originating Application in which he sought to set aside a judgment of the Supreme Court of Queensland entered in 2017 – where the sequestration order was made against the applicant within a month of the entry of the judgment – whether the applicant's rights of action, if any, vested in his trustee in bankruptcy on the making of the sequestration order – whether the applicant has standing to bring the proceeding – whether, even if the applicant has standing to bring the proceeding, the application has any merit – whether the Originating Application should be set aside

Bankruptcy Act 1966 (Cth), s 5, s 58
Uniform Civil Procedure Rules 1999 (Qld), r 16, r 171, r 658,
 r 667, r 668

Agar v Hyde (2000) 201 CLR 552, applied
Clone Pty Ltd v Players Pty Ltd (in liq) (2018) 264 CLR 165,
 cited
Cummings v Claremont Petroleum NL (1996) 185 CLR 124,
 applied
Foots v Southern Cross Mine Management Pty Ltd (2007)
 234 CLR 52, applied
Freeman v National Australia Bank [2006] QCA 329, applied
General Steel Industries Inc v Commissioner for Railways
(NSW) (1964) 112 CLR 125, applied
IVI Pty Ltd v Baycrown Pty Ltd [2007] 1 Qd R 428; [2006]
 QCA 461, cited
Jonesco v Beard [1930] AC 298, cited
Markan v Bar Association of Queensland [2013] QSC 146,
 cited
Perpetual Trustee Co Ltd v Hodge & Anor [2017] QSC 268,
 related
Rockett v The Proprietors of "The Sands" Building Units
Plan No 82 [2002] 1 Qd R 307, cited
Stone v ACE-I.R.M. Insurance Broking Pty Ltd [2004] 1 Qd
 R 173, compared
Stubberfield v Paradise Grove Pty Ltd [2000] QCA 299, cited
Wentworth v Rogers (No 5) (1986) 6 NSWLR 534, cited

COUNSEL: The applicant appeared on his own behalf
 J R Hohl for the first respondent
 A Nicholas, with M Crane, for the second respondent

SOLICITORS: Corrs Chambers Westgarth for the first respondent
 Hall & Wilcox for the second respondent

- [1] Mr Hodge, who is an undischarged bankrupt, filed an originating application on 8 December 2025 by which he seeks, in one way or another, to impugn a judgment of this court entered against his wife and him in 2017.¹
- [2] After being ordered to do so,² Mr Hodge filed and served a statement of claim on the respondents – Perpetual Trustee Company Ltd and Norton Rose Fulbright – on 22 April 2026 where, it should be recorded, the relief claimed differs substantially from that which is sought in the originating application.
- [3] On 1 May 2026, each respondent filed an application to set aside or summarily dismiss the originating application and strike out the statement of claim,³ together

¹ *Perpetual Trustee Co Ltd v Hodge & Anor* [2017] QSC 268 (Daubney J).

² On 25 March 2026 (Muir J).

³ *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), rr 16(e) (to set aside the originating application), 658(1) (to summarily dismiss the originating application), and r 171 (to strike out the statement of claim).

with ancillary relief including costs.

- [4] For the reasons that follow, Mr Hodge does not have standing to bring this proceeding, and that is sufficient to put an end to it. Indeed, even if Mr Hodge had standing, this proceeding – whether as framed in the Originating Application or as subsequently pleaded – is devoid of merit and ought to be set aside in any event.

Background to the 2017 judgment

- [5] Mr and Mrs Hodge were the directors and shareholders of Mackay Spare Parts (Trading) Pty Ltd (“**Trading**”), a company through which they conducted a vehicle spare parts business at Mackay. In November 2000, Challenger Managed Investments Ltd (“**Challenger**”) agreed to make available to Trading a cash advance facility of up to \$504,000. This was evidenced by a Deed of Loan dated 21 November 2000 between Challenger as lender and Trading as borrower. On the same day, Mr and Mrs Hodge guaranteed the performance of Trading’s repayment obligations under a Deed of Guarantee and Indemnity and executed a mortgage over properties they owned in Mackay to secure the money owing under the facility. The mortgage was duly registered over the titles.
- [6] Trading was wound up in April 2004 on the application of the Deputy Commissioner of Taxation. However, prior to that – on 31 October 2003 – Mackay Spare Parts Pty Ltd (“**MSP**”) was incorporated, with Mrs Hodge as its director. MSP assumed the conduct of the business and the obligations under the facility. As to this, the trial judge remarked:

“It is abundantly clear on the material before me that this new company, MSP, was operated by [Mr and Mrs Hodge] and simply assumed the complete operation of the business which had previously been conducted under the name of Trading. I accept the submission by counsel for [Perpetual] that this substitution and effective takeover of the business by MSP bore all the hallmarks of what is colloquially known as a ‘phoenix activity’.”⁴

- [7] The term of the loan facility subsequently expired and, in early 2007, Mr and Mrs Hodge sought to borrow \$1 million through MSP for a term of five years. The purpose of the loan was said to “refinance [the] existing ... loan of \$504,000 and provide funds on Commercial Line of Credit facility for future investment purposes”.
- [8] On 17 April 2007, a Supplementary Deed of Loan was executed, naming Challenger as lender, MSP as borrower, and Mr and Mrs Hodge as mortgagors and guarantors. The original Deed of Loan, mortgage and guarantee were to remain in full force and effect except as varied. Again, according to the trial judge:

“It is obvious that the phoenix-like substitution of MSP for Trading had not been picked up by the financier. The recitals were erroneous insofar as they purported to refer to MSP as being the “Borrower” which executed the Deed in November 2000.”⁵

⁴ *Perpetual Trustee Co Ltd v Hodge & Anor* [2017] QSC 268, [11].

⁵ *Ibid*, [23].

- [9] Subsequently, a further sum of \$496,000 was drawn down on the facility, to bring the total amount advanced by Challenger to \$1 million. MSP continued to pay interest on the full amount of the moneys owing to Challenger.
- [10] The loan was not repaid by its maturity date of 1 May 2012, and MSP was wound up on 24 January 2014, again on the application of the Deputy Commissioner of Taxation. Perpetual came to hold the rights in respect of the loan facility as well as the mortgage through a series of transfers and assignments concluding in July 2014. Mr and Mrs Hodge and MSP were formally notified about the transfer of rights by notices dated 28 July 2014.

The 2017 Judgment

- [11] A proceeding was commenced against Mr and Mrs Hodge by Perpetual in 2014. It went to trial in September 2017 and the judgment now under challenge was handed down on 17 November 2017. In that regard, Daubney J gave judgment for Perpetual against Mr and Mrs Hodge under the Deed of Guarantee and Indemnity dated 21 November 2000 and ordered that it recover possession of the mortgaged properties pursuant to the mortgage security granted the same day. Perpetual was represented in that proceeding by the second respondent, the firm Norton Rose Fulbright.
- [12] An appeal to the Court of Appeal later lodged by Mrs Hodge was struck out for want of prosecution by Mullins P on 16 December 2022, no steps having been taken to prosecute it. The properties were subsequently sold.

Standing

- [13] On the eve of the hearing on 21 May 2026, it emerged that Mr and Mrs Hodge had each been made bankrupt by a sequestration order dated 13 December 2017, less than a month after Daubney J's judgment. On the making of a sequestration order, the property of a bankrupt vests in the trustee⁶ and, in Mr Hodge's case, that trustee is Ms Moira Carter. The expressions "property" and "the property of the bankrupt" are defined broadly.⁷ The definitions are certainly wide enough to capture whatever right of action, if any, Mr Hodge has in respect of the 2017 judgment. It follows that any such right vested in Ms Carter as his trustee on the making of the sequestration order in December 2017, and it remains vested in her. Indeed, if there was any doubt about that proposition, reference need only be made to the decision of the High Court in *Cummings v Claremont Petroleum NL* where it was authoritatively decided that a bankrupt has no right to bring or prosecute proceedings to protect, enhance or add to the property of which he or she has been divested on bankruptcy.⁸
- [14] It follows that Mr Hodge can have no relevant interest in a proceeding such as this, any such interest being property vested in his trustee.⁹ When confronted with this reality at the hearing, Mr Hodge accepted he is an undischarged bankrupt. He submitted, however, that he had been transparent about his position, that annulment

⁶ *Bankruptcy Act 1966* (Cth), s 58(1).

⁷ *Bankruptcy Act 1966* (Cth), s 5.

⁸ (1996) 185 CLR 124, 135–136.

⁹ *Freeman v National Australia Bank* [2006] QCA 329, [10], [15]; *Stubberfield v Paradise Grove Pty Ltd* [2000] QCA 299, [11]-[13].

proceedings are on foot in the Federal Court, and that his trustee has been notified of this proceeding. None of that assists him. His bankruptcy has not been annulled, it stands. Even if it were annulled, or he were discharged, the right of action would remain vested in his trustee. Although it is in theory possible for Ms Carter to assign that right to Mr Hodge (and thereby permit him to continue this proceeding), that must in the circumstance of this case be so remote a possibility as to be regarded as fanciful. It is certainly not a possibility which is supported by the limited evidence on the point which is before the court.¹⁰

- [15] Mr Hodge has no standing to bring this proceeding. That conclusion is, by itself, a sufficient reason to set it aside.

The merits

- [16] There is, however, authority for the proposition that the court should nevertheless go on to consider the merits of Mr Hodge's claims in case his trustee does decide to lend her name to the proceeding.¹¹ Given how remote that possibility is, however, I intend to do so briefly.
- [17] Before I do so, I record that the power under UCPR r 16(e) to set aside an originating process should only be exercised in the clearest of cases. It is a power that is materially different in consequence to, for example, the power under UCPR r 171 to strike out a claim or statement of claim which, when exercised, will not put an end to the proceeding unless leave to replead is refused.¹² However, when the court orders that an originating process be set aside under UCPR r 16(e), the proceeding is summarily terminated. Given such a dire consequence, the respondents must positively demonstrate why Mr Hodge should be deprived of "the customary tribunal which deals with actions of the kind he brings".¹³ Unless this onus is discharged to a high level of certainty, Mr Hodge ought not to be denied the opportunity to place his case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes¹⁴ but, for the following reasons, I have no doubt the respondents have on this application discharged that onus to the requisite degree of certainty.
- [18] The originating application seeks to set aside the 2017 judgment on the ground that it was obtained by fraud (UCPR r 667(2)(b)) or, alternatively, because of newly discovered facts (UCPR r 668(1)). Consequential relief in the form of declarations, an order that the title to the security properties be restored, an order reinstating the struck-out appeal (even though Mr Hodge was not an appellant), compensation and costs are also sought. As earlier noted (at [2]), the statement of claim advances materially different complaints and, it must be said, is very much focussed on the making of allegations against Perpetual rather than Norton Rose Fulbright. Among those allegations are claims that Perpetual lacked standing to bring the original enforcement proceeding, that there were defects in the security documents, that there were irregularities in the enforcement action taken on the faith of the judgment and

¹⁰ See Third Affidavit of Daniel Paul Byrne filed by leave on 21 May 2026, paragraph 4 and exhibit "DPB-3". Cf. *Stone v ACE-I.R.M. Insurance Broking Pty Ltd* [2004] 1 Qd R 173.

¹¹ *Stubberfield v Paradise Grove Pty Ltd* [2000] QCA 299, [13].

¹² *Markan v Bar Association of Queensland* [2013] QSC 146, [38].

¹³ *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129-130.

¹⁴ *Agar v Hyde* (2000) 201 CLR 552, [57].

that the respondents engaged in misleading or deceptive conduct by representing “they had enforceable rights under the loan and mortgage”.

- [19] The power to set aside a perfected judgment on the ground of fraud under UCPR r 667(2)(b) requires proof of actual fraud. It must be distinctly alleged and established by strict proof. Mere suspicion of fraud will not be enough. It must be shown by admissible evidence that the successful party (here, Perpetual) was responsible for a fraud which so taints the judgment under challenge that it must be set aside.¹⁵ However, the evidence advanced by Mr Hodge – four separate affidavits were relied on to support his claim – is wholly inadequate to support such a serious charge.
- [20] Mr Hodge has otherwise particularised some eleven “acts of fraud” but none of that which is there alleged could properly found an exercise of the discretion to set aside the 2017 judgment for fraud. For example, he complains of errors in the description of the mortgaged land in the loan documents, but no such error could affect the trial judge’s conclusion that Perpetual recover possession pursuant to the mortgage. Elsewhere, Mr Hodge asserts that his counterclaim was in some way “omitted from trial consideration”, but the record shows that was not the case. Mr Hodge also seeks to challenge findings that were open to the trial judge on the evidence or to raise matters which must have been known at the trial. Other complaints are directed to enforcement steps which were taken after the judgment was handed down and could not possibly support any claim that the judgment itself was obtained by fraud. Shortly stated, no viable challenge is advanced against either respondent.
- [21] Mr Hodge’s alternative reliance on r UCPR r 668(1)) is no more promising. That rule permits the court to relieve a party from an order where facts have arisen since the order was made, or where facts are discovered afterwards that, had they been discovered in time, would have entitled the party to a different order. An application under the first limb proceeds on the footing that the order was rightly made when it was made, whereas an application under the second is governed by the principles that apply to fresh evidence on an appeal, so that the new facts must be such as would have produced a different result, and must be facts that could not, by reasonable diligence, have been discovered in time.¹⁶ Mr Hodge’s material satisfies neither limb. Nothing he identifies as arising since the 2017 judgment was handed down could have entitled him to be relieved of the orders and the balance of what he asserts was either known or with reasonable diligence could have been known while the proceeding was on foot.
- [22] It follows that, even if Mr Hodge had standing, the originating application would be set aside as devoid of merit. The statement of claim discloses no reasonable cause of action and is, in any event, frivolous, vexatious and an abuse of process. It would on that footing be liable to be struck out, although, because the proceeding will be terminated, no separate order regarding the pleading is necessary.

¹⁵ *Jonesco v Beard* [1930] AC 298, 301-303; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 536, 538-539; *Clone Pty Ltd v Players Pty Ltd (in liq)* (2018) 264 CLR 165, [55].

¹⁶ See *Rockett v The Proprietors of “The Sands” Building Units Plan No 82* [2002] 1 Qd R 307, [13]-[15]; *IVI Pty Ltd v Baycrown Pty Ltd* [2007] 1 Qd R 428, [18].

Disposition

- [23] Mr Hodge has no standing to bring the originating application, and it is set aside on that ground. Had he standing, it would be set aside as devoid of merit.
- [24] Each respondent sought costs on the standard basis. The feature that Mr Hodge is an undischarged bankrupt is not an impediment to the making of a costs order against him.¹⁷ The respondents were put to the expense of responding to a hopeless proceeding years after the judgment in question was entered. Mr Hodge should pay their costs of the proceeding, to be assessed on the standard basis.
- [25] There will be orders that: (1) the originating application filed on 8 December 2025 is set aside; and (2) the applicant pay the respondents' costs of the proceeding to be assessed on the standard basis.

¹⁷ *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, [67].