FEDERAL CIRCUIT COURT OF AUSTRALIA

DEPUTY COMMISSIONER OF TAXATION v BURHALA (No.2) *[2016] FCCA 2241*

Catchwords:
BANKRUPTCY – Creditor's petition – whether debtor has departed Australia to defeat creditor – whether petition validly before the Court – matters in s.52(1) *Bankruptcy Act 1966* clearly made out – debtor electing not to attend for cross-examination – evidence clearly establishing creditor departed Australia with intent to defeat or delay creditor – no sufficient cause why Sequestration Order should not be made.

Legislation:
Bankruptcy Act 1966, ss.44, 43, 40, 52

Applicant:	DEPUTY COMMISSIONER OF TAXATION
Respondent:	FLORIN BURHALA
File Number:	MLG 160 of 2016
Judgment of:	Judge Burchardt
Hearing date:	10 August 2016
Delivered at:	Melbourne
Delivered on:	10 August 2016

REPRESENTATION

Counsel for the Applicant:	Mr Connard
Solicitors for the Applicant:	Deputy Commissioner of Taxation
Counsel for the Respondent:	Mr Bearman, Mr Purton

Solicitors for the Respondent: AUM Lawyers Pty Ltd

ORDERS

(1) A sequestration order be made against the estate of FLORIN BURHALA.

(2) The applicant creditor's costs, including reserved costs, be taxed and paid from the estate of the respondent debtor in accordance with the *Bankruptcy Act 1966*.

The Court notes that the date of the act of bankruptcy is 2 October 2015.

The court notes that a consent to act as trustee has been signed by Gess Michael Rambaldi and Andrew Reginald Yeo.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

No. MLG 160 of 2016

DEPUTY COMMISSIONER OF TAXATION
Applicant

And

FLORIN BURHALA
Respondent

REASONS FOR JUDGMENT

1. The Court has before it an amended Creditors Petition filed on 2 May 2016. That it amended the petition originally presented in January is not really of any significance for present purposes. The debt alleged in the Petition is some $3,794,093.91. The alleged act of bankruptcy is the respondent's departure from Australia on 2 October 2015 with intent to defeat or delay creditors. The respondent's Notice of Opposition filed on 8 July 2016 denies that the respondent left Australia to defeat or delay creditors and, therefore, effectively, asserts that no act of bankruptcy has taken place.

2. In order for a Sequestration Order to be presented, the first matter to be addressed is in s.44(1)(a) of the *Bankruptcy Act 1966* ('the Act'). There must be a debt, now in excess of $5,000, owing to the creditor. It is clear that the respondent is presently indebted to the Australian Taxation Office ('ATO') for over $3.7 million, as is apparent from the matters contained in the affidavit of Mr Zafiriou filed on 29 January 2016. There is no serious suggestion to the contrary. The next matter to be addressed are the matters in s.44(1)(b). As the applicant submits, the amended assessment constitutes a liquidated debt due in law and payable upon expiry of the prescribed period for payment, despite the respondent's objection. That submission is plainly correct.

3. So far as s.44(1)(c) is concerned, it is clear that the applicant left Australia within six months before the Petition was filed on 29 January 2016. The real issue, of course, in this matter is whether the respondent committed an act of bankruptcy. Section 43(1) requires that at the time of the act of bankruptcy, the debtor – and I read out subsections 43(1)(b)(i) and (ii):

> *"at the time when the act of bankruptcy was committed, the debtor:*
>
> *(i) was personally present or ordinarily resident in Australia;*
>
> *(ii) had a dwelling-house or place of business in Australia;…"*

4. Those are the subsections upon which the applicant relies. First, it is immediately apparent that the respondent was personally present in Australia before his departure. That fits in well with s.40(1)(c)(i) which reads, relevantly:

> *"If, with intent to defeat or delay his or her creditors:*
>
> *(i) he or she departs or remains out of Australia."*

5. Obviously at the point immediately when you do so, you are present in the country. That is sufficient to grant jurisdiction to make a Sequestration Order, but, secondly, the respondent had a business in Australia as the applicant's submissions point out, in my view correctly, at paragraph 11(c). The respondent is the sole company secretary of five proprietary limited companies and there is a requirement that the secretary must be ordinarily resident in Australia. Third, the respondent's departure card on October 2015 described him as an Australian resident. It is clear, therefore, that the requirements of s.43 are satisfied.

6. This brings us to the question of whether or not there was an act of bankruptcy. It is a matter of inference. I propose to read out para. 17 of the applicant's written submissions. These are the matters to which the applicant points and I should make it clear that, in my view, they are made out:

"(a) When the Respondent departed on 2 October 2015 from Australia he knew he had a significant liability to the Deputy Commissioner arising from the amended assessments for the financial years ended 30 June 2008 to 30 June 2012 (inclusive).

(b) At the time of his departure, the Respondent's objections to the assessment had been disallowed.

(c) The Respondent has remained out of Australia for longer than the 21-day period specified in his outgoing passenger card, and longer than the period suggested in correspondence from his solicitor. At the very least, this is evidence of delaying the Applicant as a creditor.

(d) Conflicting explanations have been given for the Respondent's departure overseas: the outgoing passenger cards states the purpose of his travel was business, while his solicitor has said it was to assist an elderly relative. These contradictory accounts render dubious the Respondent's explanation for his absence from Australia.

(e) No reliable evidence has been provided by the Respondent demonstrating why he left on 2 October 2015 and why he has remained away since.

(f) The Respondent's son left with him, and his wife and daughter subsequently departed Australia.

(g) The Respondent is aware that the Deputy Commissioner intends to take recovery proceedings in respect of the debt owed.

(h) The Respondent's solicitor (who had been acting in respect of the recovery proceedings and in respect of the Part IVC proceedings in the AAT) withdrew on 1 December 2015 from acting in the former, but not the latter, demonstrating that the Respondent is able to remain in contact with his solicitor in respect of matters in respect of which it is convenient for him to do so.

(i) A forwarding address was not provided by the Respondent, nor by his solicitor when he withdrew from representing the Respondent. The Respondent has acted so as to make it impossible for the Applicant to establish his whereabouts: at no stage in the period under consideration did he provide an address at which he could be contacted. The first time an address was provided was when the respondent served his affidavit in reply in July 2016. The one address in Romania for the Respondent which the Applicant was able to ascertain (from documents

> *lodged for his dogs to travel) was the one to where the petition and other documents were sent - but these documents were returned to sender (affidavit of Aimee O'Brien sworn 25 July 2016).*

(j) Properties associated with the Respondent and his family have recently been sold.

> *(k) Substantial amounts of cash (some apparently being the proceeds of sale of the properties recently sold) have been transferred overseas (Zafiriou affidavit 25 July 2016, paras 22 to 26 and exhibits AZ-83 to AZ-90).*

(l) On 1 October 2015, the Respondent executed a financial agreement, allegedly pursuant to s 90C of the Family Law Act 1975 (Cth) giving up any claim to any interest he may have had in the matrimonial home (Zafiriou affidavit 25 July 2016, para 27 and exhibit AZ-90).

(m) The Respondent resigned as a director of a newly created company (AUM Lawyers Proprietary Limited) in November 2015, having only been appointed as director in September 2015.

(n) The addresses of a number of entities that the Respondent remains a director or shareholder of have recently been updated to give as the debtor's address the address of his brother in Heidelberg.

(o) On 5 January 2016, BMA Lawyers Pty Ltd, (a company of which the debtor was a director) was voluntarily wound up."

7. I have taken that paraphrase because it sets out in summary form a number of matters of which I am completely satisfied on the materials and it saves me the trouble of going through them seriatim myself. I additionally referred to the matters to which I referred yesterday which can be summarised as the respondent's deliberate failure to return to Australia for this hearing when he had told the Court that he would in fact so return. The respondent's written submissions point to what is said to be Mr Burhala's honest and reasonable explanation for his non-return, both for this hearing and more generally. I have made it clear I do not accept his reasons for non-return yesterday. He bought a ticket on 8 June 2016 to return on 1 September 2016 and that speaks for itself.

8. Paragraph 14 of the affidavit of Mr Mete filed in support of the application in a case on 5 August 2014 is, in my view, essentially consistent with this conclusion. It reads as follows:

> *"At about the time that I received the letter referred to in the preceding paragraph, I was instructed by Mr Burhala that a settlement conference had been scheduled for 29 July 2016. I was instructed by Mr Burhala to not do any further work on the bankruptcy matter or to respond to the letter from the ATO until after the settlement conference had taken place. That was because it was likely that any settlement of the AAT proceedings would be likely to resolve these proceedings."*

9. In other words, Mr Burhala appears to have made a conscious choice simply not to participate in these proceedings. Mr Burhala already knew, because I had told his counsel so on 27 May 2016, that I would give his affidavit little weight, if any, if he was not here. The phrase I think I used from the transcript is that I would not pay a lot of regard to his affidavit. He has chosen not to be here. I do not, therefore, propose to pay any regard to his affidavit. He has had his opportunity to convince me of his veracity and has declined it. I note, likewise, Ms Tania Burhala's affidavit, which was read, is also of no weight and I note that it was not mentioned in the submissions I think filed by the respondent.

10. Taking the materials overall, and notwithstanding the seriousness of the matter, I am comfortably satisfied that the respondent did indeed depart Australia with intend to defeat or delay the ATO creditor.

11. Having thus established that the Petition was validly before the Court, I turn to s.52(1) of the Act. The Petition and Amended Petition are both verified by the affidavits contained within them. Service is not in issue. The debt is still due. The most recent affidavit of Mr Zafiriou deposes to that and there is also the affidavit of search filed by Edward Cummings. It is quite plain, therefore, that the matters required to be proved by s.52(1) are satisfied and this, then, enables the Court to have the discretion to make the Sequestration Order.

12. Section 52(2), of course, does give qualification where either (a) the debtor is able to pay their debts or (b) that there is other sufficient cause why a Sequestration Order not be made. Of course, even if those matters are established, the Court retains a discretion as to whether or not to make a Sequestration Order. Unless I misunderstand the matter, no arguments were put by counsel for the respondent on this matters. Mr Burhala's affidavit, to which, as I have said, I do not propose to pay

regard, deposes to repaying loans which Mr Zafiriou's material suggests would be very large. He asserts baldly that he would be able to pay whatever ATO debt he is ultimately found to have.

13. It is quite clear, on any view, that the respondent has not proven he can pay his debts, including the enormous ATO one, as and when due, nor has he even hinted at any other sufficient cause as to why a Sequestration Order should not be made. Indeed, he has simply not sought to put in play the terms of s.52(2). In these circumstances it is clear the Court should exercise the discretion in s.52(1) to make a Sequestration Order. Subject to submissions, I propose to make the usual order that the Sequestration Order issue, that the costs of the petition be paid out of the estate of the bankrupt in accordance with the Act. I would be minded to note that the date of the act of bankruptcy was 2 October 2005 and that the trustee, Gess Michael Rambaldi, has consented to act.

14. I do note, however, that during the currency of the submissions made at an earlier point, Mr Connard pointed to the capacity of the Court, pursuant to s.52(3) of the Act, to order a stay of up to 21 days and, subject to submissions, I would be minded to make an order in those terms as well.

I certify that the preceding fourteen (14) paragraphs are a true copy of the reasons for judgment of Judge Burchardt

Date: 1 September 2016