

AUSTRALIA / JUDGMENT

Re Bachmann, C. v. Ex parte Doran, E. [1987] FCA 496

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CATCHWORDS

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Bankruptcy - creditors petition — debtor able but unwilling to pay

debts - whether sequestration ought to be made - costs.

Bankruptcy Act 1966 ss.40(1)(d)(i), 52(2)

Re: CLEMENS BACHMANN Ex parte: ETHEL DORAN

No. P. 368 of 1987

Sweeney J. Sydney 3 July, 1987

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IN THE FEDERAL COURT OF AUSTRALIA GENERAL DIVISION

BANKRUPTCY DISTRICT OF THE STATE OF NEW SOUTH WALES AND THE

AUSTRALIAN CAPITAL TERRITORY

No. P. 368 of 1987

RE: CLEMENS BACHMANN

EX PARTE: ETHEL DORAN

THE COURT: Sweeney J.

PLACE Sydney

DATE

3 July, 1987

MINUTES OF ORDER

THE COURT ORDERS THAT:

The petition be dismissed. Debtor to pay petitioning creditor's costs of and incidental to petition up to 17 June 1987 when the debtor's affidavit

was served on the petitioning creditor and that the

petitioning creditor pay the debtor's costs of and incidental .

to the petition thereafter.

Note: Settlement and entry of orders is dealt with

in Order 36 of the Federal Court Rules.

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RE: CLEMENS BACHMANN

EX PARTE: ETHEL DORAN

THE COURT: Sweeney J.

PLACE : Sydney

DATE : 3 July, 1987 7

EX TEMPORE JUDGMENT

This is a creditor's petition by Ethel Doran, the creditor, against Clemens Bachmann, the debtor, in which the creditor alleged that the debtor was just and truly indebted to her in the sum of \$16,839.65, being the amount due under the final judgments recovered in the District Court at Sydney on the 31st day of May 1982, together with interest thereon at 10 per cent per annum on reducing balances from time to time and costs taxed pursuant to such judgment, the consideration for such debt being wages, overtime and holiday pay due to the creditor for work done for the

debtor.

The act of bankruptcy alleged in the petition was that the debtor within six months before the presentation of the petition

committed the following act of bankruptcy, namely that on 5

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September 1986 execution having been issued against him under process of the District Court of New South Wales certain of his

~ property, namely yellow Falcon station sedan number MDMN-407, was

held by the sheriff for 21 days.

The act of bankruptcy alleged is said to be within the terms of section 40(1)(d)(i) of the Bankruptcy Act 1966 which I shall

call the Act, which reads as follows:

"A debtor commits an act of bankruptcy in each of the following cases -

(d) if ~

{i) execution has been issued against him under process of a court and any of his property has, in consequence,

either been sold by the sheriff or held by the sheriff for 21 days".

By affidavit sworn on 20 February 1987 the creditor purported to verify the petition by deposing that the statements set out in paragraphs 1, 2 and 3 of the petition were within her

own knowledge true.

A further affidavit was relied upon in support of the petition, that of Paul Le Gay Brereton, her solicitor, also sworn on 20 February 1987, which purports to set out the history of the steps taken in execution of the judgment. This affidavit is open to the criticism that appropriate verification of an act of bankruptcy such as is alleged in this case should be provided by the person with first-hand knowledge of the facts such as the

sheriff or one of his officers.

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By notice of intention to oppose the petition, dated 30 April 1987, the debtor claimed to be "solvent and able to pay his debts ~

as and when they fall due", obviously seeking to bring himself

within the judgment in *Re Sarina ex parte Wollondilly Shire*

Council, (1980) 43 FLR 163 and before the Full Court 48 FLR 372.

In that case the debtor was shown to be able but unwilling to-pay his debts and it was held that he was entitled to the benefit of section 52(2) of the Act which provides that if the court is satisfied by the debtor that he is able to pay his debts it may

dismiss the petition. The notice of opposition did not raise any other ground.

The debtor relied upon his own affidavit sworn on 10 May 1987 in the first part of which he set out the fact that he refused to pay the balance of the debts which he owed to the creditor and gave his reasons for this attitude which it is unnecessary to reproduce. Paragraphs 16 and 18 of his affidavit, which dealt with his ability to pay, stated as follows -

"16. I state that for the above reasons, I refuse to pay the debts to the creditor. I am in a position to pay such debts and set out my assets and liability below:-

a. Half share in house at 15 Georges River Road, Croydon, \$40,000.00.

- b. Laundromat business and freehold of a property at 153 Rawson Street, Auburn, \$80,000.00.
 - c. Laundromat businesses at Stanmore, Ashfield and Auburn, \$80,000.00.
 - d. Motor vehicle, \$3,000.00.
18. I advise the Court that I am solvent and am able to pay my ordinary debts in the ordinary course of my business but refuse to pay the creditors debt for the above reasons".

The debtor was cross-examined on these paragraphs but in my

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opinion he has discharged the onus which rests upon him and the

petition should be dismissed.

He has sufficient assets to enable him to obtain funds quite quickly on the security of his properties. The discretion conferred upon the court by section 52(2) of the Act should in my

opinion be exercised by dismissing the petition and I do so.

On the question of costs, in Sarina's case at first instance the debtor was ordered by pay the petitioner's costs up to and including the proceedings before the Court on 28 April 1980 when it first appeared that the debtor was able to pay his debts, see 45 FLR 167. The debtor appealed against the order for costs made

against him and the Full Court dismissed that appeal.

Consistently with the authority of Sarina I order that the debtor pay the petitioning creditor's costs of and incidental to the petition up to 17 June 1987 when the debtor's affidavit was served on the petitioning creditor and that the petitioning creditor pay the debtor's costs of and incidental to the petition

thereafter.

I certify that this and the preceding three (3) pages are a true copy of the Judgment herein of the Honourable Mr. Justice Sweeney

Dated: 3 July, 1987

Associate

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P.

368 of 1987

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Counsel for the petitioning creditor: Mr P. Brereton

Solicitors for the petitioning

creditor:

Counsel for the debtor:

Solicitors for the debtor:

Date of hearing:

3 July,

Duncan Baron & Co

Mr S. Torrington

Sally Nash & Co

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