

AUSTRALIA / JUDGMENT

Re: Bowen, Howard, J.E. [1987] FCA 347

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IN THE FEDERAL COURT OF AUSTRALIA

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IN THE FEDERAL COURT OF AUSTRALIA

GENERAL DIVISION BANKRUPTCY DISTRICT

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OF THE STATE OF NEW SOUTH WALES) No. W. 48 of 1985

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AND THE AUSTRALIAN CAPITAL)

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Es HOWARD JOHN ERNEST BOWEN

Bankrupt

ORDER

Judge Making Order: Gummow, J.

Where Made: 12 May 1987

Date of Order: 12 May 1987

The Court Orders that:

(1) The application for discharge from
bankruptcy be dismissed.(2) The applicant pay the costs of the objecting
creditor.Note: Settlement and entry of orders is dealt with in
Bankruptcy Rule -124.

~ 7 JUL 1987

FEDERAL COURT OF

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IN THE FEDERAL COURT OF AUSTRALIA
GENERAL DIVISION BANKRUPTCY DISTRICT
No, W. 48 of 1985
OF THE STATE OF NEW SOUTH WALES
AND THE AUSTRALIAN CAPITAL
TERRITORY -
RE: HOWARD JOHN ERNEST BOWEN
Bankrupt
CORAM: Gummow, J.
DATE OF ORDER: 12 May 1987

REASONS FOR JUDGMENT

This is an application for discharge under section 150 of the Bankruptcy Act by the bankrupt who became bankrupt on his own petition on 25 January 1985. It is opposed by the Commissioner of Taxation. A report of the Official Receiver on behalf of the Official Trustee in Bankruptcy dated 24 February 1987 discloses that three proofs of debt have been lodged against the estate and admitted for a total of \$99,700. They comprise first, accountancy fees of \$661; secondly an amount of \$56,126.78 which is owing to the Commonwealth in respect of income tax for the years 1980 to 1984 and which is made up of

various integers to which the counsel for the bankrupt drew

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attention; and thirdly, a sum of \$42,912 owed to H.J.E. Bowen Pty Limited which I shall compendiously describe as a family company of the bankrupt. No dividend has been paid to creditors and there are presently sufficient funds to enable a

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dividend of 4 cents in the dollar to be paid.

The bankrupt is a medical practitioner employed by the aforementioned H.J.E. Bowen Pty Limited and presently receives a weekly net wage of some \$400. He is a married man aged 43 years with three children aged 8, 10 and 12 years. They are partially dependant on him for support. Affidavit and oral evidence was given as to the present financial situation of the bankrupt and his wife. Counsel for the bankrupt conceded that it was appropriate to have regard on this application to the financial position of the bankrupt's wife and it appears that in respect of the year ending 30 June 1986 Mrs Bowen returned a taxable income of \$29,859. This comprised amongst other components a gross salary of \$20,263.70 paid by the company Highgate Gardens

Pty Limited. Highgate Gardens Pty Limited appears to act as trustee of the Bowen family trust. H.J.E. Bowen Pty Limited was incorporated to take advantage of the approval by the Australian Medical Association of medical practitioners, to put it colloquially, incorporating their practices. I refer to paragraph 2 of the bankrupt's affidavit

as sworn in these proceedings on 5 May 1987.

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. The application is 'opposed by the Commissioner of Taxation and evidence tendered today shows that the indebtedness in respect of the income tax claims includes a component of some \$13,000 for what was described as primary tax in dispute and some \$41,000 in respect of what was described as penalty tax. The applicant, since becoming bankrupt, has contributed the following amounts to his estate: first, in 1985, \$300 was paid in monthly instalments of \$50 each; in 1986 \$1200 was paid in monthly instalments of \$100 each; in 1987 continuing payments have been made of \$100 per month. The bankrupt obtains the weekly wage to which I have referred from his conduct of his profession as a medical practitioner in

Orange. He says in paragraph 16 of the affidavit to which I

referred that he seeks a discharge for the following reasons:

(a) The debt now owed to the Deputy Commissioner of Taxation consists primarily of additional tax for late payment which accrued in the circumstances outlined above, which circumstances were the result of advice from

his former accountants.

(b) The majority of primary tax owing to the Deputy Commissioner of Taxation was paid on 29 December 1983 and 13 June 1984.

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. (c) Being a bankrupt medical practitioner, particularly in a small country town like Orange were many potential patients and most business contemporaries are aware of. his bankruptcy, "has caused a great deal of

psychological pressure and has inhibited the

growth of the practice.

(d) The difficulties of carrying on practice as a medical practitioner while a bankrupt has caused and is causing stress in his marriage, in his family life, and has adversely affected his health.

Counsel for the bankrupt developed those reasons in his submissions. He says, and it appears not to be in dispute, that the bankrupt in the years 1977 to 1983 relied on the advice of his accountants as to certain income tax minimisation schemes and that this led to the engagement by the bankrupt in certain arrangements which were, as to their effect, disallowed by the Commissioner. Further, after the minimisation arrangements had been shown to be ineffective from the point of view of the Commissioner it appears that subsequent offers or negotiations for compromise by the Commissioner were not accepted by the bankrupt, and that he did so in reliance upon the advice tendered to him by his

accountants. It is submitted for the bankrupt that this is of ee

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not. a case of deliberate concealment of assets or of fraudulent evasion of responsibility.

The entertainment of an application for discharge has been said to involve looking beyond the interests of the applicant and the applicant's creditors and .to involve

consideration of the interests of the public and commercial morality. It has also been said that a decision under section

150(9) is one in which the Court has a wide unfettered discretion, *Re Maher* (1985) 61 ALR 592.

It is submitted for the bankrupt that it is not his case that the amounts to which I have referred as having been paid since the bankruptcy are the only feasible amounts that could have been paid. It is said that, in view of the circumstances as to his engagement in the tax minimisation schemes, the applicant was delivered into his present position essentially by acting upon the advice of others, and it is said that whilst there is the primary tax of some \$13,981 at the heart of the case, the Court should treat somewhat

differently that component of the Commissioner's debt which represents the so called penalty tax payments.

In my opinion, taking into account all that has been said on behalf of the applicant, a case for discharge has not been made out. In particular, I should emphasise that even if

it were appropriate for the Court to have regard to the public

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interest as to the \$13,981 representing primary tax, and to Place somewhat less importance on the other component of the Commissioner's claim, it would nevertheless still be, in my opinion, not a case for a discharge. s t

In my view, it is not compulsive of any conclusion in favour of discharge, that the applicant acted as he did upon professional advice. The fact is that, at least, \$13,981 is owing in respect of the primary tax and that the applicant does not make a case that the amounts he has paid were the only feasible amounts that he could have paid. There has been some discussion before me as to whether it would be appropriate in this case to order a discharge but on conditions involving, inter alia, the making of payments in specified amounts by the taxpayer. However, having heard what has been submitted by both the bankrupt and on behalf of the Commissioner on this subject, I am satisfied that no effective condition could be imposed which would satisfactorily and realistically deal with the sum for primary tax, let alone for the balance of the tax that is owing. Accordingly, the application is dismissed. The applicant will pay the costs of

the objecting creditor.

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I certify that this and the six(6) preceding pages are a true copy of the' Reasons for Judgment of his Honour Mr Justice Gummow.

Associate: Muh fa~Ls .

Date: . 12 May 1987

Counsel and Solicitor for Applicant:

Counsel and Solicitors for the Objecting Creditor:

Mr Bluett appeared on behalf of the Official Receiver's Office.

Date of Hearing:

Date of Judgment:

Mr S.G. Finch instructed by D.J. Ironside.

Mr M.R. Aldridge

instructed by The Australian Government Solicitor

12 May 1987 12 May 1987

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