

AUSTRALIA / JUDGMENT

Re Middleton, C.M. & Anor [1987] FCA 24

COURT

IN THE FEDERAL COURT OF AUSTRALIA

Source: judgments.fedcourt.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Source record

~

Bankruptcy ~- application to annul bankruptcy under s.154(1)(a) of Bankruptcy Act 1966 - whether sequestration order "ought not to have been made".

CATCHWORDS

RE: COLIN MAXWELL MIDDLETON AND MARIE MICHELLE MIDDLETON

No. W1353 of 1986

Beaumont, J.

Sydney

4 February 1987.

LY] x2

ao 52] YED

[i] = STELI82

\u iy

TM pRADST AL Sedat 08

\ \ wISTRALES,

"Pa OIEAL

%

we

IN THE FEDERAL COURT OF AUSTRALIA

GENERAL DIVISION

BANKRUPTCY DISTRICT OF NEW SOUTH WALES

No. W1353 of 1986

AND THE AUSTRALIAN CAPITAL TERRITORY

RE: COLIN MAXWELL MIDDLETON and

MARIE MICHELLE MIDDLETON

MINUTES OF ORDER

Judge making order: Beaumont, J.

Date order made: 4 February 1987

Where made: Sydney

THE COURT ORDERS

1.

THAT:

2.

Note:

Application dismissed

Costs reserved.

Settlement and entry of orders is dealt with in
Bankruptcy Rule 124.

2.

appear and Wilcox J. made a sequestration order.

The affairs of the applicants are complex and it is not possible, at this stage, to indicate, in specifics, their assets and liabilities. A number of partnerships are involved and the applicants did not attend at the hearing of their application - they were represented by counsel and solicitor, although it should be noted that the applicants live in Tamworth and that Mr. Middleton's father, who lives on the central coast is seriously ill. However, it is common ground that in about June 1986, the applicants forwarded to their accountant, Mr. McCarthy, details of their liabilities and gave Mr. McCarthy instructions to pay certain liabilities out of funds then paid by the applicants into his firm's trust account. There is a dispute between the applicants and Mr. McCarthy as to the precise terms of his retainer. The applicants say that they directed Mr. McCarthy to pay the petitioning creditor the amount owed to it under its judgment. On the other hand, Mr. McCarthy says that his retainer was more general. According to him, his instructions were to pay all creditors who were pressing for payment so far as the funds entrusted to him would permit. Unfortunately, Mr. McCarthy, who also lives in Tamworth, was not available to give oral evidence and, as has been said, the applicants were not able to come to Sydney for the hearing. In the result, it is not possible to resolve this conflict of evidence. However, for reasons which will be given, even if I were to accept the applicants' version of events, it would not follow that the present application would

IN THE FEDERAL COURT OF AUSTRALIA

GENERAL DIVISION

BANKRUPTCY DISTRICT OF NEW SOUTH WALES No. W1353 of 1986

AND THE AUSTRALIAN CAPITAL TERRITORY

RE: COLIN MAXWELL MIDDLETON and

MARIE MICHELLE MIDDLETON

CORAM: Beaumont, J.

DATED: 4 February 1987

REASONS FOR JUDGMENT

The applicants, Mr. & Mrs. Middleton, were made bankrupt by a sequestration order made on 4 November 1986. They now seek to annul their bankruptcies on the ground that the sequestration order "ought not to have been made" (Bankruptcy Act 1966), s.154(1)(a)).

Ry its petition for a sequestration order dated 29 September 1986, WEA Records Pty. Limited, trading as Warner Home Video, claiming a debt owed by the applicants in the sum of \$3,284.91 due under a final judgment, alleged that the applicants had committed an act of bankruptcy on 29 July 1986 by their failure to comply with a bankruptcy notice served on them on 8 July 1986. The petition was returnable on 4 November 1986. On

that date, although they had been served, the applicants did not succeed.

It is submitted on behalf of the applicants that, for the purposes of s.154(1)(a), the sequestration order "ought not to have been made" and their bankruptcies annulled accordingly because, if Wilcox J. had known of the applicants' instruction to Mr. McCarthy to pay the petitioning creditor's debt, no sequestration order would have been made but, rather, the petition would have been adjourned to enable the debt to be paid.

It is common ground that the debt owed to the petitioning creditor was not paid by Mr. McCarthy until some time after the sequestration order was made.

In my opinion, the application should be refused. It may be accepted that the discretion conferred by s.154(1)(a) is a wide one (see the examples given by Halsbury 4th ed. Vol.3, para.454; cf. *Re Anasis*; *Ex parte Total Australia Limited* (1985) 63 A.L.R. 493). In *Re Griffiths* (1892) 3 B.C. (N.S.W.) 6, Manning J. said (at p.9) that the words "ought not to have been made" mean not only upon the case as disclosed at the time, but as it would have been disclosed had all the true facts, as shown in the application for annulment, been before the judge on the making of the order. His Honour later said that if an offer had been made to pay all creditors an order would not have been made and, further, if that position is established by the fact of payment, the adjudication in bankruptcy should have been annulled

4.

(at p.10). In *Bleez v. Fopp* (1911) 13 C.L.R. 324, a notice under

the Insolvency Act 1861 (S.A.) required payment of a judgment debt within a specified period and stated that in default of payment insolvency proceedings would be taken was served on the debtor. Negotiations took place between the representatives of the parties with a view to a settlement. A tender of the amount of the debt was made to the creditor personally and he refused to accept the money. Some weeks later an adjudication of insolvency against the debtor was obtained by the creditor. The Full Court of the Supreme Court of South Australia reversed the order of the

Court of Insolvency and annulled the adjudication. The High

Court refused special leave to appeal.

In my opinion, both these cases are distinguishable here. In the present case, not only was no tender of the judgment debt made to the creditor but the evidence, so far as it goes, suggests that at the time of commission of their act of bankruptcy, the applicants were unable to pay their debts as they fell due. The entrustment by the applicants of the future conduct of their financial affairs to Mr. McCarthy is consistent with a situation of insolvency on their part. It follows, in my view, that even if the applicants had instructed Mr. McCarthy to pay the judgment debt owed to the petitioning creditor, the petition would not necessarily have been adjourned by Wilcox J. On the contrary, if the true facts had been revealed to his Honour on 4 November 1986, it is probable that an application to

adjourn the petition would have been refused and that a

5.

sequestration order would have been made in any event. The

position would no doubt have been different if, on that date, the applicants had been in a position to adduce evidence to the satisfaction of Wilcox J. that they were then able to pay all their debts as they fell due. The applicants were not in that position then and, indeed, are not able to adduce satisfactory

evidence of their solvency to-day.

The application will be dismissed. This dismissal is, of course, without prejudice to any future application for

annulment made on the ground specified in para.(b) of s.154(1).

I certify that this and the preceding "ou / (4) pages are a true copy of the

Reasons for Judgment herein of his Honour Mr. Justice Beaumont.

SS [a i / , A/ Associate

Dated: 4 February 1987

Counsel and Solicitors Mr. G. Underwood instructed by

for Applicants: Messrs Everingham, Solomons & Co., Tamworth, by their City agents Messrs Marshall Marks.

Date of hearing: 4 February 1987

Date Judgment Delivered: 4 February 1987

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/1987/1987FCA0024.pdf>

CASE PAGE <https://chat.esheria.ai/case-law/australia/re-middleton-c-m-and-anor-1987-fca-24-1987>

Prepared on 29 October 2026 · Esheria