FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

CHEP Australia Ltd v Russo [2021] FedCFamC2G 27

File number(s):	MLG 425 of 2021
Judgment of:	**JUDGE MCNAB**
Date of judgment:	10 September 2021
Catchwords:	**BANKRUPTCY –** review of a registrar's decision – application to set aside sequestration order – hearing de novo – no proper basis to go behind the judgment which forms the basis of the bankruptcy notice – application for review dismissed – sequestration order made – applicant's costs to be taxed and paid from the estate of the respondent.
Legislation:	*Bankruptcy Act 1966* (Cth) s 52. *Federal Circuit Court of Australia Act 1999* (Cth) s 104. *Federal Circuit Court Rules 2001* (Cth) r 20.03.
Cases cited:	*Bechara v Bates* [2021] FCAFC 34 *Conlan v Mladenis* [2007] FCA 1129 *Ganesh v Dobrowolski* [2021] FCA 909 *Lowbeer v De Varda* [2018] FCAFC 115 *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28
Division:	Division 2 General Federal Law
Number of paragraphs:	37
Date of last submission/s:	19 August 2021
Date of hearing:	19 August 2021
Place:	Melbourne
Counsel for the Applicant:	Ms A Carruthers
Solicitor for the Applicant:	Law Squared
Solicitor for the Respondent:	Appearing in Person
Interested Party:	Harwood Andrews Lawyers

ORDERS

MLG 425 of 2021

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**CHEP AUSTRALIA LTD** Applicant
AND:	**DOMENICO RUSSO** Respondent

ORDER MADE BY:	**JUDGE MCNAB**
DATE OF ORDER:	**10 SEPTEMBER 2021**

THE COURT ORDERS THAT:

1. The application for review filed by the Respondent on 21 May 2021 be dismissed.
2. The estate of Domenico Russo be sequestrated under the *Bankruptcy Act 1996* (Cth).
3. The Applicant's costs be taxed and paid from the estate of the Respondent debtor in accordance with the *Bankruptcy Act 1966* (Cth).

Note: The form of the order is subject to the entry in the Court's records.

Note: This copy of the Court's Reasons for judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

Judge McNab:

INTRODUCTION

1 By an interlocutory application filed on 21 May 2021, the Respondent seeks, pursuant to s104 of the *Federal Circuit Court of Australia Act 1999* (Cth) ("the FCCA Act"), to review a decision of the Court (by Registrar's Order) made on 6 May 2021, where the Court ordered as follows:

> 1. The applicant have leave to amend paragraph 4 of the petition to substitute 27 January 2021 as the date of the commission of the act of bankruptcy.
>
> 2. Re-verification and re-service be dispensed with.
>
> 3. The estate of DOMENICO RUSSO be sequestrated under the Bankruptcy Act 1966.
>
> 4. The applicant creditor's costs fixed in the sum of $9,181.35 be 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 27 January 2021.
>
> The Court also notes that a consent to act as trustee signed by Alice Faye Ruhe has been filed under s156A of the Bankruptcy Act 1966.

2 By way of his application for review, the Respondent sought to review each of the orders set out in the sequestration order made by the Registrar, and sought orders that:

(1) the sequestration order be set aside;

(2) the creditor's petition be dismissed;

(3) there be no order as to costs, including that the Applicant "*take full responsibility of all their legal costs and alleged debt owing"*;

(4) the Court view the Respondent's affidavits and exhibits;

(5) the Applicant be required "*to compensate [the Respondent] for depression, stress and loss of reputation, and for the Court to determine the amount of the compensation*"; and

(6) in effect, if the matter was to proceed in person, the matter be transferred to the Parramatta Registry of this Court, or the matter otherwise proceed via Microsoft Teams.

3 However, by way of a minute of proposed orders sent to Chambers on 18 August 2021, the Respondent seeks final orders as follows:

> 1. The Court make order, to proceed interim application filed and served by the Respondent.

> (a) Acceptance for unwitnessed Affidavit and Exhibits from the Applicant to the Respondent sent today at 12.19pm.
>
> (b) there is no ***Act of Bankruptcy 1966*** on alleged debt incurred by the Respondent.
>
> (c) insufficient evidence provided by the Applicant for the alleged debt incurred by the Respondent.
>
> (d) The Applicant, solicitor providing a misrepresentation under oath to rely on.
>
> (e) The applicant not providing an authorised letter/email accepting the unauthorised email.
>
> (f) The Respondent providing exhibits of the authorised email owned by Baby Blue Group.

4 The review relates to a bankruptcy notice issued to the Respondent in respect of a judgment debt of $29,537.25 which arose out of orders made by the Local Court of New South Wales on 23 June 2020 ("the bankruptcy notice"). The bankruptcy notice was issued on 8 July 2020.

5 This review proceeding is conducted as a hearing de novo and the Court begins afresh and exercises for itself any discretion decided or exercised by the Registrar: see r20.03 of the *Federal Circuit Court Rules 2001* (Cth); see also *Conlan v Mladenis* [2007] FCA 1129 at [4] – [5]. I also have regard to the principles set out by the Full Court in *Bechara v Bates* [2021] FCAFC 34 at [27]:

> 27. Thus, relevant to the matter before us, the following is, and has been since the mid-1990s, clear about the nature of a *de novo* hearing by way of review of a sequestration order in bankruptcy made by a registrar:
>
> > (a) The application for review leads to a hearing *de novo* of the creditor's petition.
> >
> > (b) The hearing (or rehearing) of the creditor's petition is not prosecuted by the debtor (applicant for review) but by the creditor in the proceeding in which the registrar's order was made.
> >
> > (c) The application for review is a demand that the claim for relief (the sequestration order) be heard by a judge.
> >
> > (d) The onus is upon the creditor to prosecute its petition. The only onus of the debtor/bankrupt against whose estate a sequestration order has been made is to prove either solvency or any other sufficient cause under s 52(2) of the *Bankruptcy Act 1966* (Cth).
> >
> > (e) An appreciation of the above considerations makes it evident that summary or default judgment terminating an application for review is highly likely to be misconceived and founded upon a misconception that the applicant for review has an onus to prosecute an application or to show error in the approach of the registrar.

BACKGROUND

6 The Applicant creditor is a business which includes services whereby pallets can be 'rented' by customers. The Respondent previously operated a company called Baby Blue Group Pty Ltd ("Baby Blue").

7 In or around June 2019, Baby Blue sought to open an account with the Applicant for the provision of pallets. The application for the account was completed by the Respondent and stated that Baby Blue had three employees. The Respondent provided a personal guarantee for the account, and the account was opened in or around October 2019. From that time, pallets were ordered on Baby Blue's account and were provided to Baby Blue at its business premises in Woolgoolga, New South Wales.

8 In February 2020, Baby Blue sought to close its account with the Applicant. The Respondent made several allegations, which are set out in greater detail below, in respect of certain orders made on Baby Blue's account, and said that those orders were unauthorised and fraudulent. The Applicant undertook an internal investigation into the Respondent's allegations and, in effect, found that the orders appeared to be made by an employee of Baby Blue, were sent from an email linked to Baby Blue, and the pallets were delivered to Baby Blue's business premises prior to the Respondent seeking to close the account with the Applicant.

9 The Applicant informed the Respondent that, prior to the account being closed, the pallets still retained by Baby Blue would have to be returned and all monies owed to the Applicant would have to be paid. Ultimately, in the absence of the return of the pallets or payment of the monies owed, the Applicant issued proceedings in the Local Court of NSW, in respect of the pallets, the monies owed by Baby Blue to the Applicant and the Respondent's personal guarantee in respect of Baby Blue's account.

10 Judgment was delivered in favour of the Applicant, and the judgment debt owed by the Respondent as a result of those proceedings forms the basis of the bankruptcy notice, as set out above.

11 A bankruptcy notice was issued on 8 July 2020 in respect of that judgment debt and was served on around 27 July 2020. The creditor's petition in these proceedings was filed on 12 March 2021.

12 Baby Blue was placed into liquidation by way of a winding up order on 24 March 2021.

13 The creditor's petition was ultimately heard by the Registrar of this Court on 6 May 2021, and the orders which are the subject of this review were made. The matter came before me on 19 August 2021, where the Applicant had Counsel appearing on its behalf, the Respondent appeared in person, and the Trustee in Bankruptcy was legally represented as an interested party.

GROUNDS OF OPPOSITION

14 In his Grounds of Opposition filed on 10 June 2021, the Respondent puts his grounds of opposition as follows:

> Domenico Russo, Respondent, intends to oppose the application, interim application, and petition on the following grounds:
>
> 1. CHEP Australia LTD, not following their own protocols, within CHEP's credit application form.
>
> 2. CHEP Australia LTD, accepting unauthorised name and email that are not listed within the credit application form.
>
> 3. National Risk Manager of CHEP Australia LTD, providing the details of the unauthorised individual, to which CHEP Australia LTD accepting transactions without any authorisation from Domenico Russo.
>
> 4. Sought orders made on the 6th of May 2021 by Law Squared sequestering an estate, which the estate is not owned by Domenico Russo, and not performing the proper search of the estate.
>
> 5. CHEP Australia LTD, and the applicant's lawyer(s) Law Squared using unnecessary powers, by way of service for Bankruptcy Act 1966 and certified judgment(s), to Baby Blue Group Pty Limited and Domenico Russo for an alleged debt not incurred by the Respondent(s).
>
> 6. CHEP Australia LTD, and the Applicants Lawyer(s) Law Squared, afflicting stress, depression, anxiety, recent pain, and suffering to Domenico Russo for unnecessary actions for alleged debt(s).
>
> 7. CHEP Australia LTD, and the Applicants Lawyer(s) Law Squared not producing proper exhibits before the Court(s) of any act of bankruptcy, and alleged debt occurred by Domenico Russo the Respondent.
>
> 8. CHEP Australia Ltd and Aaron Singh, illegally doing transactions under Baby Blue Group Pty Limited till the end of February 2020.
>
> (a) Baby Blue Group Pty Limited's warehouse vacating the premises between 21st of October 2019 to 7th of January 2020, and
>
> (b) New tenants took over the tenancy of Unit 4/16, Hawkes Drive, Woolgoolga NSW 2456 on 24th of January 2020.

15 On the basis of his opposition, the Respondent seeks final orders in the terms set out above.

16 The Applicant seeks to proceed with the creditor's petition, and seeks that the sequestration order made by the Registrar remain in place and that the Applicant's costs be taxed and paid with priority from the estate of the Respondent in accordance with the *Bankruptcy Act 1966* (Cth) ("the Bankruptcy Act").

CONSIDERATION

17 As set out above, on 24 May 2021, the Respondent filed an application for review of the Registrar's orders. Additionally, the Respondent sought orders that the Applicant be required to compensate him for depression, stress and loss of reputation, with the Court to determine the quantum of that compensation. The Respondent has filed four affidavits, those being on 21 May 2021, 7 June 2021, 16 June 2021 and 16 August 2021.

18 By his affidavit filed on 21 May 2021, the Respondent states that, on 19 December 2019, he was the victim of domestic violence and that, from about that time, he was a home-maker and carer for both of his children, who were both under three years old at the time. As a result of these events, on or around 3 January 2020, the Respondent deposes to putting Baby Blue "*on hold*" and says that he then noticed that "*all accounts in Woolgoolga had been illegally used and opened*". He then claims that there had been illegal use of Baby Blue's account with the Applicant, and that the use of the account in relation to 520 pallets supplied by the Applicant, was done without authorisation, and therefore fraudulently.

19 His affidavit of 7 June 2021 relates to significant health issues that he alleges he has experienced.

20 His affidavit of 16 June 2021 states that, on 18 May 2019, he filled out Baby Blue's supply application with the Applicant. That application is exhibited and shows that the company had three employees. A clear copy of the application is found at exhibit JLW1 which is annexed to the affidavit of Ms Wilcock, filed by the Applicant on 12 March 2021. The Respondent claims that, on 7 January 2020, he sent written notice in respect of Baby Blue vacating the business premises in Woolgoolga to the landlord. He further claims that on 24 January 2020, new tenants took over the premises in Woolgoolga, and that between 21 October 2019 and 7 January 2020, Baby Blue was on hold and vacating the property.

21 He says that on 27 September 2019, an employee committed fraud by using the Respondent's name and signature to apply for tenancy at a rental property in Woolgoolga. That employee is alleged to have "*committed illegal transactions…accepted by CHEP*

Australia Ltd without any authorisation". That employee is said to have used a personal Gmail account to order the pallets without authorisation.

22 By his affidavit filed on 16 August 2021, the Respondent says that employee was never employed by Baby Blue, and instead assisted Baby Blue and was supplied with a business email address and mobile phone monitored by Baby Blue.

23 The Applicant relies primarily on an affidavit of Ms Sandra Tadros filed on 13 August 2021. Ms Tadros is employed by the Applicant as a Bad Debt Recovery Specialist, and her affidavit is based on her knowledge and belief as well as on the information she has obtained from the business records of the Applicant.

24 Ms Tadros deposes that the Respondent was a Director of Baby Blue and that the company completed an application with Applicant, together with a personal guarantee, in May 2019. Baby Blue's account was opened in or around October 2019, and Ms Tadros deposes that the debt, which is the subject of the bankruptcy notice in these proceedings, relates to:

(1) unpaid invoices issued by the Applicant to the Respondent between December 2019 and April 2020;

(2) compensation in relation to 586 pallets which have not been returned to the Applicant;

(3) hire charges on 586 pallets between April 2020 and May 2020;

(4) legal costs; and

(5) interest.

25 Ms Tadros deposes to having checked the Applicant's records in the period in which there was a business relationship between the Applicant and Baby Blue, and says that the Baby Blue employee (who is said by the Respondent to have ordered pallets without authorisation) ordered pallets on behalf of the company, referring to the precise account number and the email address used. She also deposes that all of the pallets were delivered to an address nominated as the business premises in Baby Blue's application with the Applicant. Ms Tadros states at [6(b)] of her affidavit that:

> b. […] during the period 5 November 2019 until November 2019, various pallets were ordered on behalf of the Company by Mr Singh using Mr Singh's Email Address (November 2019 Orders). Invoices were issued to the Company for the November 2019 Orders and were duly paid by the Company.

26 The following events then occurred:

(1) on 10 February 2020, an email was sent by the Respondent to the Applicant asking for the Baby Blue account to be closed;

(2) on the same day, an email was sent by the Applicant to the Respondent stating that, before the account could be closed, the business would need to return all pallets and pay all outstanding fees owed to the Applicant. The evidence before me is that an order of 30 pallets was placed on 12 February 2020 and delivered to the company on 14 February 2020;

(3) on 14 February 2020, an email was sent from the Respondent to the Applicant saying that Baby Blue had stopped trading in Woolgoolga and that transactions after 9 January 2020 were not authorised by him. The Respondent had not, at any time prior to 14 February 2020, informed the Applicant that there was any change in Baby Blue's status or location; and

(4) on 20 February 2020 an email was sent to Baby Blue by the Applicant confirming there was a "*pending closure*" block of the account, but that the charges and return/compensation for the outstanding pallets, had to be remitted to the Applicant before the account could be closed.

27 The evidence of Ms Tadros discloses that the Applicant undertook an internal investigation into the Respondent's claims about fraudulent use of the Baby Blue account. The result of the investigation, as deposed to by Ms Tadros, was that the company who provided services on behalf of the Applicant in relation to the supply of pallets, Lindsay Transport Australia ("Lindsay Transport"), provided information that Lindsay Transport had only dealt with orders placed by the personal email of the Baby Blue employee. The effect of that is that Baby Blue had only ever placed orders via the personal email of the employee, including all of those orders that were paid for by Baby Blue and where it is not suggested that they were ordered fraudulently.

28 Ms Tadros further states that the Respondent made assertions regarding the use of Baby Blue's account. However, no supporting material, police report or other such documentation was received by the Applicant from the Respondent in respect of those assertions.

29 As set out above, on 23 June 2020, judgment was delivered and orders made in the Local Court of NSW in favour of the Applicant against the Respondent in the amount of $29,537.25,

inclusive of costs. By way of her affidavit, Ms Tadros deposes to having received the Applicant's records and confirms that, at the time of making her affidavit:

(1) the pallets provided to the Company have not been returned;

(2) no payment has been received by the Applicant in relation to the judgment debt; and

(3) no application to set aside the judgment has been served upon the Applicant.

30 Ms Tadros also notes that, on 24 March 2021, Baby Blue was placed into liquidation by reason of a winding up order being made in the Supreme Court of Victoria.

31 A judgment, such as that delivered in the Local Court of NSW in this matter, is usually taken to be determinative of a debt owed. However the power of Court to go behind a judgment was considered at length in *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28. In *Lowbeer v De Varda* [2018] FCAFC 115, under the heading 'general principles concerning proof of petitioning creditor's debt', the Full Court (per Reeves, Farrell and Colvin JJ) set out a summary of the relevant case law at [53] – [57] as follows:[1]

> 53. On the hearing of a creditor's petition, the court has a statutory duty to be satisfied for the purposes of s 52 of the *Bankruptcy Act 1966* (Cth) as to the existence of the petitioning creditor's debt. Therefore, on such an application, a judgment or order is never conclusive of the existence of a debt. Rather, the court must decide whether to accept the judgment or order as proof of the debt or to go behind the judgment or order (sometimes described as a discretion). Usually, a determination after a contested hearing will provide a practical guarantee of reliability that will mean that the court will not go behind the judgment or order. The court looks with suspicion on consent judgments and default judgments. However, all depends upon the circumstances. If the court is persuaded to go behind the judgment or order then it will investigate the debt upon which the creditor's petition is based. For a creditor's petition to be dismissed on the basis that in truth and reality there is no debt behind the judgment, there must first be a proper basis to exercise the discretion to go behind the judgment and then an assessment that, in truth and reality, there is no debt. These are separate questions that might be determined separately. As to these matters, see the judgment of Kiefel CJ, Keane and Nettle JJ in *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28 at [16], [37]-[38], [65]-[71].
>
> 54. The test or standard to be applied in deciding whether to accept a judgment order as proof of the debt for the purposes of a petition for sequestration orders has been variously expressed.
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> 55. In *Petrie v Redmond* [1943] St R Qd 71 at 75-76, Latham CJ (with whom Rich and McTiernan JJ agreed) said that "special circumstances" must be established. In *Corney v Brien* (1951) 84 CLR 343 at 347, the plurality quoted with approval a passage in *In re a Debtor* [1929] 1 Ch 125 at 127 in which it was said that the court may, "upon a prima-facie case being shown, go behind a judgment for the purpose of satisfying itself" that there was a real debt (see also Fullager J in *Corney v Brien* at 356-357).

[1] See also *Ganesh v Dobrowolski* [2021] FCA 909 at [67] – [68] per Moshinsky J.

> In *Ramsay Health Care* at [20], the plurality quoted with apparent approval a passage from *Wren v Mahony* (1972) 126 CLR 212 at 224-225 in which Barwick CJ said that the discretion to accept the judgment as proof is not well exercised where there are "substantial reasons" to go behind it, but in an earlier passage (also quoted in *Ramsay Health Care* at [42]), Barwick CJ referred to going behind a judgment "where reason is shown".
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> 56. The plurality in *Ramsay Health Care* accepted the argument for the respondent that the Court should go behind a judgment where "sufficient reason is shown for questioning whether behind the judgment there is in truth and reality a debt due to the petitioning creditor": at [37]-[38]. Edelman J in a separate judgment supporting the result referred to authorities where courts exercising bankruptcy powers had been "extremely cautious" before going behind a common law judgment: at [108]-[109]. His Honour said that "in the absence of some evidence of fraud, collusion, or miscarriage of justice, a court exercising bankruptcy jurisdiction will rarely have substantial reasons to investigate whether the debt which merged in the judgment is truly owed": at [111].
>
> 57. However, there appears to be no magic in any of these formulations. As Fullager J said in *Corney v Brien* at 356, "[n]o precise rules exist as to what circumstances call for an exercise of the power". That is because in each case there must be a contextual consideration as to whether, for the purposes of s 52 of the *Bankruptcy Act*, the debt has been proven. In all cases, it must be borne in mind, as was stated by the plurality in *Ramsay Health Care* at [55], that:
>
> > The scrutiny required by s 52 as to whether there is, in truth and reality, a debt owing to the petitioning creditor serves to protect the interests of third parties, particularly other creditors of the debtor. It is of critical importance to appreciate that such persons were not parties to the proceedings that resulted in the judgment debt. It has long been recognised that their interest in being paid their debts in full should not be prejudiced by the making of a sequestration order in reliance on a judgment debt which does not reflect the true indebtedness of the debtor to the petitioning creditor …

32 I accept that the proper approach this Court should take is to first determine whether it is persuaded that there is a proper basis to exercise its discretion to go behind the judgment, and if it is, whether or not, in truth and reality, there is a debt owed.

33 In my the view there is no proper basis to go behind the judgement which forms the basis of bankruptcy notice and the creditor's petition, as the evidence shows that:

(1) the Respondent opened an account on behalf of Baby Blue with the Applicant and represented to the Applicant that Baby Blue had three employees;

(2) the Respondent gave a personal guarantee in respect of Baby Blue's account with the Applicant;

(3) Baby Blue sought and received pallets, as ordered by one of Baby Blue's employees, by way of the account Baby Blue had with the Applicant between June 2019 and February 2020;

(4) the pallets were delivered to Baby Blue's business premises, which remained rented by Baby Blue until after the conclusion of the business relationship between the Applicant and Baby Blue;

(5) the Applicant was not aware that Baby Blue had ceased trading at those premises until notice was given on 14 February 2020; and

(6) the pallets received by Baby Blue have not been returned, and the monies owed to the Applicant have not been paid.

34 Whilst the Applicant has experienced upheaval through family violence, dealing with Family Court of Australia proceedings involving his children, and ill-health, it is significant that he did not defend the proceedings in the Local Court of NSW, where those proceedings resulted in the judgement debt. The Court is of the view that there is no proper basis to go behind the judgment, and therefore the judgment debt that resulted from orders made by the Court in relation to that judgment.

35 Subsection 52(1) of the Bankruptcy Act states:

> (1) At the hearing of a creditor's petition, the Court shall require proof of:
>
> (a) the matters stated in the petition (for which purpose the Court may accept the affidavit verifying the petition as sufficient);
>
> (b) service of the petition; and
>
> (c) the fact that the debt or debts on which the petitioning creditor relies is or are still owing;
>
> and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor.

36 The Court is satisfied that the Applicant has proved the matters set out in s52(1) of the Bankruptcy Act, and the Court will make a sequestration order against the estate of the Respondent.

CONCLUSION

37 For these reasons, orders shall be made dismissing the Applicant's review of the Registrar's decision in this matter and a sequestration order will be made against the Respondent's estate. An order will also be made for the Applicant's costs of these proceedings to be taxed and paid from the sequestered estate, pursuant to the provisions of the Bankruptcy Act.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment of Judge McNab.

Associate:

Dated: 10 September 2021