

JUDGMENT NO. 851, 88

IN THE FEDERAL COURT OF AUSTRALIA )  
 )  
QUEENSLAND DISTRICT REGISTRY )  
 )  
GENERAL DIVISION )

No. QG344 of 1988

On appeal from a single Judge of  
the Federal Court of Australia

BETWEEN:

ALAN GEORGE SKYRING

Appellant

AND:

DEPUTY COMMISSIONER OF TAXATION  
OF THE COMMONWEALTH OF AUSTRALIA

Respondent

THE COURT: SHEPPARD, WILCOX and HARTIGAN JJ.  
PLACE : BRISBANE  
DATE : 6 DECEMBER 1988



REASONS FOR JUDGMENT

SHEPPARD J.: This is an appeal brought against an order made by a Judge of this Court on 3 October last. The order dismissed an application made by the appellant, Mr. Skyring, for the review of the decision of a Deputy Registrar of the Court. The Deputy Registrar declined to accept an affidavit sought to be filed by the appellant on 14 September 1988. In the affidavit of Mr. Skyring purported to set up a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment, being a counter-claim, set-off or cross demand that he could not have set

up in the action in which the judgment was obtained.

There is no question but that the appellant has been served with a bankruptcy notice, the date of service being early in September 1988. The notice is a 28 day notice and is based upon a judgment said to have been recovered by the Deputy Commissioner of Taxation in Queensland in the sum of \$23,335.01. The notice was in a usual form and required the appellant, who is named as the debtor, to pay the sum of \$23,335.01 to the Deputy Commissioner of Taxation or to secure the payment of the sum referred to to his satisfaction or to the satisfaction of this Court and set out the consequences of failure to comply.

The provision upon which the appellant relied was subsec. 41(7) of the Bankruptcy Act 1966, which provides that where, before the expiration of the time fixed for compliance with the requirements of a bankruptcy notice has filed with the Registrar an affidavit to the effect that he has a counter-claim, set-off or cross demand of the kind mentioned and the Court has not, before the expiration of that time, determined whether it is satisfied that the debtor has a counter-claim, set-off or cross demand, that time shall be deemed to have been extended, immediately before its expiration, until and including the day on which the Court determines whether it is so satisfied.

The Registrar took the view that the affidavit, which the appellant attempted to file, was not an affidavit which complied with the section and, acting under rule 134(2) of the Bankruptcy Rules, declined to accept it.

The application for review to his Honour was made pursuant to subsec. 14(5), and his Honour, as I have indicated, upheld the Registrar's decision. The affidavit has annexed to it a document headed "Statement of Claim" in which substantial sums of money are said to be owing to him and further unspecified sums of money are also said to be due to him. None of these, however, appears to be claimed to be owing by the Deputy Commissioner of Taxation except one which appears in paragraph 4 of the affidavit and is described as "Taxation Commissioner: as claimed". Nothing else is said about it, but the appellant told us this morning that it was intended to refer to the amount of the judgment debt which the Deputy Commissioner has against the appellant.

The appellant informed us that he has taken steps to set aside that judgment. He applied unsuccessfully to a Master of the Supreme Court of Queensland and the Master's decision was apparently upheld on appeal. There are, as we understand, proceedings pending in the High Court to test these decisions but they, of course, have nothing to do with these proceedings.

Our only task is to determine whether or not the Deputy Registrar and the learned primary Judge fell into error in refusing to accept the affidavit. None of the amounts claimed in the statement of claim, which forms part of the affidavit, can have any relevance to this case, except the one item which refers to the Taxation Commissioner, because none is claimed against him. That which is claimed against him does not specify an amount. The words "as claimed" are the only words which are used, and in any event there is no indication in the affidavit of

there being any claim by way of counter-claim, set-off or cross demand against the Deputy Commissioner, nor any statement that any such counter-claim, set-off or cross demand could not have been set up in the action in which the judgment was recovered.

In my opinion, the affidavit plainly did not comply with subsec. 47(1). The Deputy Registrar was correct in refusing to accept it and the Judge correct in refusing to disturb the Deputy Registrar's decision.

There is a question in my mind whether the order appealed against is an interlocutory order. I do not think it necessary to decide that question this morning because in any event, it seems clear to me that the appeal, if it lies as of right, must be dismissed, and that is the order which I would propose.

WILCOX J.: I agree.

HARTIGAN J.: I agree with the orders proposed by the learned presiding Judge and with the reasons which he has expressed.

SHEPPARD J.: The order of the Court is that the appeal be dismissed.

(Discussion ensued in relation to costs.)

The Court orders that the appellant pay to the Deputy Commissioner of Taxation his costs of the appeal. The Court makes no order on the Deputy Commissioner's notice of motion

filed on 29 November 1988.

I certify that this and the *4* preceding  
pages are a true copy of the reasons for  
judgment herein of the Court

*Susan Hutchison*

Associate

Dated 6 DECEMBER 1988

For the Appellant:

Mr. A.G. Skyring in person

Counsel for the Respondent:

Mr. P. Hack

Solicitor for the Respondent:

Australian Government  
Solicitor

Place of Hearing:

Brisbane

Date of Hearing:

6 December 1988