

FEDERAL CIRCUIT COURT OF AUSTRALIA

OWNERS OF STRATA PLAN 71241 v KERSWELL

[2020] FCCA 2296

Catchwords:

BANKRUPTCY – Creditor’s petition – grounds of opposition considered – part of the debt acknowledged by the debtor – no clear evidence of solvency or an off setting claim – sequestration order made.

Legislation:

Bankruptcy Act 1966 (Cth), s.52

Civil Procedure Act 2015 (NSW), s.101

Strata Schemes Management Act 2015 (NSW), ss.83, 85, 86

Applicant:	OWNERS OF STRATA PLAN 71241
Respondent:	KERRY GRETTON KERSWELL
File Number:	SYG 937 of 2020
Judgment of:	Judge Driver
Hearing date:	18 August 2020
Delivered at:	Sydney
Delivered on:	30 September 2020

REPRESENTATION

Counsel for the Applicant: Mr B J Skinner

Solicitors for the Applicant: Grace Lawyers

The Respondent appeared in person

ORDERS

- (1) A sequestration order is made against the estate of Kerry Gretton Kerswell.
- (2) The petitioning creditor's costs, including reserved costs, if any, be taxed and paid in accordance with the *Bankruptcy Act 1966* (Cth).
- (3) The Court notes that the date of the act of bankruptcy is 8 April 2020.
- (4) The Court notes that a Consent to Act as Trustee was signed by Andrew John Scott on 20 April 2020.
- (5) The Court notes the obligations on the applicant creditor to notify, enter and serve these orders in accordance with the *Federal Circuit Court (Bankruptcy) Rules 2006* (Cth).
- (6) Pursuant to s.53(3) of the *Bankruptcy Act 1966* (Cth), all proceedings under order 1 are stayed for a period of 21 days.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYG 937 of 2020

OWNERS OF STRATA PLAN 71241

Applicant

And

KERRY GRETTON KERSWELL

Respondent

REASONS FOR JUDGMENT

Introduction and background

1. By a creditor's petition presented on 20 April 2020, the applicant (the Strata Plan owners) seek to sequester the estate of the respondent (Mr Kerswell) by reason of Mr Kerswell's failure to comply with a bankruptcy notice served on him on 18 March 2020. The creditor's petition asserted the act of bankruptcy was committed on 9 April 2020 but I accepted at the trial of this matter that the correct date of the act of bankruptcy was 8 April 2020 and gave leave for the petition to be amended accordingly.
2. The petition asserts that Mr Kerswell owes the Strata Plan owners the amount of \$119,857.03 comprised of the following amounts:
 - a) \$47,139.11 for the balance of judgment which was obtained in the amount of \$47,139.11 on 6 December 2019 in the Local Court of New South Wales in proceedings number 2019/00112079 in respect to a cost order made in Supreme Court Case No 2018/00043810 (the Supreme Court Proceedings) the details of which are contained in Schedule A below;

Schedule A				
Periods	Days	Order sum	Interest rate	Balance
6 Dec 2019		\$47,139.11		
Total		\$47,139.11		\$47,139.11

- b) \$2,194.50 for the balance of judgment which was obtained in the amount of \$2,194.50 on 6 December 2019 in the Local Court of New South Wales in proceedings number 2019/0038439 in respect to a cost order made in the Supreme Court Proceedings the details of which are contained in Schedule B below.

Schedule B				
Periods	Days	Order sum	Interest rate	Balance
6 Dec 2019		\$2,194.50		
Totals		\$2,194.50		\$2,194.50

- c) \$17,345.43 for the balance of recovery expenses for which judgment was obtained in the amount of \$25,005.89 on 16 November 2017 in the Local Court of New South Wales in proceedings number 2015/00242761 (the Local Court Proceedings) (the Third Judgment) the details of which are contained in the schedule marked C to the petition;
- d) \$707.68 for the balance of post-judgment interest for the period 17 November 2017 to 20 April 2020 on the Third Judgment amount in the Local Court Proceedings pursuant to s.101 of the *Civil Procedure Act 2015* (NSW) (Civil Procedure Act), the particulars of which are contained in the schedule marked C to the petition;

- e) \$9,752.55 for the balance of recovery expenses for which judgment was obtained in the (the Fourth Judgment amount of \$9,752.55 on 22 March 2018 in the Local Court Proceedings Judgment) the details of which are contained in the schedule marked D to the petition;
 - f) \$1,488.47 for the balance of post-judgment interest for the period 23 March 2018 to 16 April 2020 on the Fourth Judgment amount in the Local Court Proceedings pursuant to s.101 of the Civil Procedure Act, the particulars the details of which are contained in the schedule marked D to the petition;
 - g) \$24,348.78 for unpaid strata levies and interest pursuant to ss.83, 85 and 86 of the *Strata Schemes Management Act 2015* (NSW) (Strata Schemes Management Act) for periods not claimed in the Local Court Proceedings up to but before the act of bankruptcy of 8 April 2020, the details of which are contained in the schedule marked E to the petition;
 - h) \$16,880.51 for expenses incurred in the recovery of unpaid levy contributions pursuant to s.86 of the Strata Schemes Management Act for the period not claimed in the proceedings and up to but before the act of bankruptcy on 8 April 2020, the details of which are contained in the schedule marked E to the petition.
3. The Strata Plan owners are unsecured creditors of Mr Kerswell.
 4. The petition is verified by the affidavit of Huynh Ngoc Tam Jolly Duong made on 20 April 2020 and included in the body of the petition.
 5. A Consent to Act as Trustee was signed by Andrew John Scott on 20 April 2020.
 6. The petition is supported by the affidavit of Caitlin Jane Anderson made on 24 March 2020, establishing service of the bankruptcy notice in compliance with substituted service orders made by this Court on 26 February 2020.
 7. A further affidavit by Ms Anderson made on 1 June 2020 verifies service of the creditor's petition. Further evidence of service of the

creditor's petition is provided by Ms Anderson in a further affidavit made on 24 June 2020.

8. Further evidence of the various debts due to the Strata Plan owners is given by Ms Anderson in an affidavit made on 29 July 2020. Updated affidavits of search and debt were provided at the trial of this matter on 18 August 2020.
9. On 31 July 2020, the Strata Plan owners issued a Notice to Produce to Mr Kerswell seeking documents having a bearing on his financial circumstances. Mr Kerswell's response to the Notice to Produce was tendered. I received it and it became Exhibit R1.
10. Mr Kerswell filed a Notice of Grounds of Opposition to the creditor's petition on 23 June 2020. That document is somewhat discursive and in narrative form but at a directions hearing on 20 July 2020, I identified three issues from it which the parties adopted. These are:
 - a) an assertion by Mr Kerswell that there is no debt due to the Strata Plan owners or alternatively that the debt is overstated;
 - b) an assertion that Mr Kerswell is solvent; and
 - c) an assertion that Mr Kerswell has a cross-claim against the Strata Plan owners which is another reason why the Court should not make a sequestration order.
11. Mr Kerswell also sought to have the solicitors for the Strata Plan owners restrained from acting for them in this matter, on the basis that there was an alleged conflict of interest. At the trial, Mr Kerswell elected not to pursue that application on the basis that he could contend that the involvement of that firm is a further reason for the Court not to make a sequestration order. The issue was dealt with in oral submissions in that manner.
12. Mr Kerswell's opposition to the creditors petition is supported by his affidavits made on 22 June 2020, 13 July 2020, 26 July 2020, 29 July 2020, 13 August 2020 and a further affidavit also made on 13 August 2020.

13. Mr Kerswell filed an outline of submissions on 3 August 2020. Mr Duong made a further substantial affidavit on 5 August 2020 responsive to the Notice of Grounds of Opposition, in particular the assertion that there is no debt or that the debt was overstated.
14. Mr Kerswell has also engaged in a substantial amount of email correspondence with my associate and the Court registry. That correspondence related to procedural issues and I have not considered it otherwise in relation to the issues to be resolved on the petition.

Consideration

15. I am satisfied that the formal requirements for the making of a sequestration order have been met. The remaining question is whether Mr Kerswell has established a reason for the Court not to make a sequestration order.
16. Mr Kerswell asserts that he is solvent. In addition to the property the subject of the strata levies dispute, he claims to have cash of approximately \$69,000, an interest in an amount of approximately \$300,000 held by solicitors for the executors of his mother's deceased estate, a 35 per cent interest in other assets of his mother's estate which interest he estimates to be worth \$2 million, land worth \$500,000 in the southern highlands and another property in the upper Hunter Valley. Mr Kerswell acknowledged that he owes the Strata Plan owners the sum of \$49,334.27 and was willing to pay that amount into court or directly to the solicitors for the Strata Plan owners but that offer was rejected. The veracity of that offer has thus not been tested. The real difficulty with Mr Kerswell's claim of solvency is that there is no available evidence to establish it. He did not provide the documents sought in the Notice to Produce and his response to that Notice by email consisted of generalised assertions. His affidavit evidence is likewise based on assertions. I am not satisfied that Mr Kerswell has established solvency.
17. Neither am I satisfied that Mr Kerswell has an offsetting claim against the Strata Plan owners which would provide a reason for the Court not to make a sequestration order. Again, the offsetting claim is based on bare assertions. Mr Kerswell is dissatisfied with the books and records of the Strata Plan and would no doubt have remedies available to him

under state law should he wish to pursue them. There is nothing to indicate, however, that Mr Kerswell has taken any steps in an appropriate state jurisdiction to test his assertions.

18. Mr Duong deals with the financial records of the Strata Plan in his affidavit made on 5 August 2020. I accept his evidence.
19. Likewise, the involvement of the Strata Plan owners' solicitors in these proceedings does not provide a reason for the Court to refrain from making a sequestration order. The solicitors are alleged to have benefited from irregularities in the financial affairs of the strata body but those irregularities are merely assertions.

Conclusion

20. I am satisfied that Mr Kerswell committed the act of bankruptcy asserted in the petition, as amended by leave granted by me. I am also satisfied of the other matters of which s.52(1) of the *Bankruptcy Act 1966* (Cth) requires proof.
21. Mr Kerswell has failed to persuade me that there is any reason for the Court to refrain from making a sequestration order.
22. I will make the sequestration order sought in the petition and consequential orders.
23. I do not rule out the possibility that Mr Kerswell has access to funds and may wish to avoid bankruptcy by paying or otherwise settling the debt. He appears to hold a bank account with the Commonwealth Bank which on 3 August 2020 had a credit balance of \$69,700. In March 2020 he appears to have paid out a loan due to the Bendigo Bank, resulting in the discharge of a mortgage. He claims other assets. I will order that proceedings under the sequestration order be stayed for 21 days.

I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 30 September 2020