CREDIT ISSUES

WOODGATE & CO.
Chartered Accountants
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IS YOUR ASSIGNMENT OF DEBT VALID?

Introduction

The judgment of Justice Jessup of the Federal Court of Australia in *Ozdil v Vrsecky (Trustee)* [2016] FCA 881 ("the Ozdil case") highlights the importance of ensuring that a debt has been legally assigned, prior to commencing bankruptcy or other legal proceedings. The Applicant had her bankruptcy annulled after providing uncontested evidence that she was never served with a notice of assignment of a debt owed by her. This was despite not filing her application until 20 months after being declared bankrupt. The debt was assigned by Westpac Banking Corporation ("Westpac") to Baycorp Collections PDL (Australia) Pty Ltd ("Baycorp").

Relevant facts

Prior to bankruptcy, in July 2013 legal proceedings against the applicant were filed in the Federal Magistrates Court of Australia, where Baycorp alleged that:

- the Applicant entered into a credit card contract with Westpac. Westpac then extended credit to the Applicant on the basis she paid interest at the rate published by Westpac and make minimum monthly repayments to Westpac;
- the Applicant failed to make the minimum repayments to Westpac and owed $12,196 to Westpac;
- pursuant to a deed dated 27 May 2008, Westpac assigned the contract and the debt to Baycorp;
- notice of the assignment of debt was purportedly given to the Applicant on 6 May 2009;
- subsequently the Applicant reduced the debt by making some payments to Baycorp;
- Baycorp issued a notice of default to the Applicant on 20 May 2013, demanding payment of the debt, plus interest;
- between 6 May 2009 to 8 July 2013, interest accrued on the debt, bringing the Applicant's indebtedness to $16,668 ("the outstanding amount"); and,
- despite the notice of default, the applicant failed or neglected to pay the outstanding amount.

The Applicant had 21 days to file a notice to defend Baycorp's allegations, which she failed to do. On 5 August 2013 default judgment was entered for $16,558, plus costs ("the default judgment").

On 21 November 2013 the Applicant was served with a Bankruptcy Notice which relied on the default judgment, plus post-judgment interest.

The Applicant failed to comply with the Bankruptcy Notice within the statutory time, thereby committing an act of

bankruptcy on 12 December 2013.

Baycorp then petitioned in the Federal Circuit Court for the Applicant's bankruptcy. A Sequestration Order was made on 5 August 2014.

The Applications

The Applicant sought an annulment of her bankruptcy pursuant to Section 153B of the *Bankruptcy Act 1966* (Cth) ("the Act"). She also applied under Section 30(1) of the Act to set aside the bankruptcy notice that led to the Sequestration Order.

The Applicant made four allegations to support her applications. The only allegation considered by the Court was that she not served with a notice of assignment of debt from Westpac to Baycorp.

Judgment

Justice Jessup upheld the Applicant's allegation that she was not served with a notice of assignment from Westpac to Baycorp. Accordingly, His Honour held that the Applicant was entitled to challenge the reality of the debt relied upon and which, pursuant to Section 153B of the Act, gave rise to the following issues:

1. what consequences did this have for the debt on which Baycorp sued the Applicant in the Federal Circuit Court; and,

2. could the Applicant now challenge the Bankruptcy Notice and/or the sequestration order as a result?

Under Section 134 of the *Property Law Act 1958* (Vic), the effective assignment of a debt requires "express notice in writing" of such an assignment to the debtor. All other Australian States and Territories have the same requirements, set out as follows:

- Section 205 of the *Civil Law (Property) Act 2006* (ACT);
- Section 12 of the *Conveyancing Act 1919* (NSW);
- Section 86 of the *Conveyancing and Law of Property Act 1884* (TAS);
- Section 15 of the *Law of Property Act 1936* (SA);
- Section 182 of the *Law of Property Act 2000* (NT);
- Section 20 of the *Property Law Act 1969* (WA); and,
- Section 199 of the *Property Law Act 1974* (QLD).

It is possible that, in an application to set aside a Bankruptcy Notice, a Court can go behind the judgment upon which the Bankruptcy Notice was based, if it is shown that the debt relied upon did not in fact exist. However, different considerations apply when the Bankruptcy Notice has expired.

Justice Jessup followed *Re Vella; Ex parte Seymour* (1983) 67 FLR 287 ("the Vella case"), where the debtor had failed to comply with the Bankruptcy Notice within the specified time period. The debtor later applied to have the judgment set aside, on which the notice was based, and also to have the Bankruptcy Notice set aside. In the Vella case, the underlying judgment was set aside, but not the Bankruptcy Notice, the Court concluding that the debtor committed an act of bankruptcy by failing to either comply with the Bankruptcy Notice or take appropriate action under Section 41(6A) of the Act. The act of bankruptcy was therefore still valid.

Justice Jessup therefore concluded, for the same reasons outlined in the Vella case, that it was too late for the Applicant to challenge the Bankruptcy Notice served on her.

However, Justice Jessup considered that the Sequestration Order would not have been made, had the Court been aware that the Applicant had not been provided notice of the assignment of debt.

The Court was troubled by the fact that the Applicant did not contest the proceedings that resulted in the default judgment, or appear on the return of the creditor's petition. The Applicant filed the current proceedings some 20 months after being declared bankrupt. In other circumstances, greater weight would have been placed by the Court on these factors. However, Justice Jessup concluded that proper legal notice of an assignment of debt struck so fundamentally at the intrinsic merits of the case for the sequestration of her estate, so as to persuade the Court to use its discretionary power to annul her bankruptcy.

Another consideration to keep in mind

Serving an appropriate notice of the assignment of debt is only one factor that creditors must consider when using legal proceedings to recover a debt. One must also consider statutory limitation periods.

The two main limitation periods are:

1. In most States and Territories, other than the Northern Territory where it is three years, the time limit to file legal proceedings to recover debts is generally six years from the date of last payment or when the debtor admitted the debt was owed, in writing; and,

2. for most States and Territories, other than Victoria and South Australia, where the time limit is 15 years, where judgment debts are obtained, the time limit is 12 years from date of judgment.

Conclusion

All States and Territories require express notice in writing to the debtor of any assignment of debt. Financial institutions are usually well appraised of these requirements. However, private financiers may not be as well informed. The ability to provide documentary evidence that the notice of assignment was provided to the debtor is also very important.

When considering an application to annul a bankruptcy under Section 153B of the Act, the Court is not limited to considering the facts that were before the Court at the time that the Sequestration Order was made. The Court may also consider the true facts that existed at the time that the Order made.

WOODGATE & CO.

Chartered Accountants

Business Recovery Services
Official Liquidators & Trustee in Bankruptcy

Level 8, 6 - 10 O'Connell Street, Sydney, NSW, 2000
GPO Box 882, Sydney, NSW, 2001
Telephone: (02) 9233 6088 Facsimile: (02) 9233 1616
www.woodgateco.com.au

Associated Offices: **Melbourne · Brisbane · Adelaide · Perth**