



Federal Court of Australia

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Cross v Rullo [2013] FCA 837 (16 August 2013)

Last Updated: 21 August 2013

FEDERAL COURT OF AUSTRALIA

Cross v Rullo [2013] FCA 837

Citation:	Cross v Rullo [2013] FCA 837
Parties:	DAVID CROSS v GIUSEPPE ANTHONY RULLO (ALSO KNOWN AS JOSEPH ANTHONY RULLO) AND PETER GOODIN (AS TRUSTEE OF THE PROPERTY OF GIUSEPPE ANTHONY RULLO, A DEBTOR)
File number(s):	VID 704 of 2013
Judge(s):	DAVIES J
Date of judgment:	16 August 2013
Catchwords:	BANKRUPTCY – Application by creditor to set aside personal insolvency agreement of debtor – Trustee held suspicions that certain debts not genuine – Application supported by Trustee – Application granted – Sequestration order made.
Legislation:	Bankruptcy Act 1966 (Cth), s 222
Cases cited:	<i>Wren v Mahony</i> [1972] HCA 5 ; (1972) 126 CLR 212 <i>Re Szeitz; Ex parte Countrywide Building Society Limited (in liquidation) v McVeigh</i> (1992) 36 FCR 428 <i>Re Mills Ex parte Lloyd's</i> (1997) 73 FCR 551

Date of hearing: 15 August 2013

Date of last submissions: 15 August 2013

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 19

Counsel for the Applicant: M LaPirow

Solicitor for the Applicant: Davies Moloney

Counsel for the Respondents: M Galvin

Solicitor for the Respondents: John Dunne & Associates

Counsel for the Second Respondent: M Lhuede

Solicitor for the Respondents: Piper Alderman Lawyers

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 704 of 2013

**BETWEEN: DAVID CROSS
Applicant**

**AND: GIUSEPPE ANTHONY RULLO (ALSO KNOWN AS JOSEPH
ANTHONY RULLO)
First Respondent**

**PETER GOODIN (AS TRUSTEE OF THE PROPERTY OF
GIUSEPPE ANTHONY RULLO, A DEBTOR)
Second Respondent**

JUDGE: DAVIES J

DATE OF ORDER: 16 AUGUST 2013

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The Personal Insolvency Agreement of Giuseppe Anthony Rullo (also known as Joseph Anthony Rullo) dated 14 February 2013 is set aside.
2. A sequestration order is made against the estate of Giuseppe Anthony Rullo (also known as Joseph Anthony Rullo).
3. The applicant's costs, including reserved costs, be taxed and paid from the estate of the respondent debtor, Giuseppe Anthony Rullo (also known as Joseph Anthony Rullo) in accordance with the [Bankruptcy Act 1966](#).

The Court notes that the date of the act of bankruptcy is 9 January 2013.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

VID 704 of 2013

BETWEEN: **DAVID CROSS**
 Applicant

AND: **GIUSEPPE ANTHONY RULLO (ALSO KNOWN AS JOSEPH**
 ANTHONY RULLO)
 First Respondent

PETER GOODIN (AS TRUSTEE OF THE PROPERTY OF
 GIUSEPPE ANTHONY RULLO, A DEBTOR)
 Second Respondent

JUDGE: **DAVIES J**

DATE: **16 AUGUST 2013**

PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1. This is an application pursuant to [s 222](#) of the [Bankruptcy Act 1966](#) (Cth) (“**the Bankruptcy Act**”) to set aside the Personal Insolvency Agreement entered into by the first respondent (“**Mr Rullo**”) and for a sequestration order to be made against him. The applicant (“**Mr Cross**”) is a creditor of Mr Rullo and brings the application in that capacity. The second respondent is the trustee (“**the Trustee**”) who supports the application. They contend that information has come to light since the Personal Insolvency Agreement was entered into, which has caused serious questions to be raised about Mr Rullo's affairs, and the validity of certain debts, and specifically a default judgment debt obtained by a company called Athena Commodities and Trading Ltd (“**Athena**”). Mr Rullo was represented by Mr Galvin of Counsel at the hearing who advised that Mr Rullo is insolvent and does not have the resources to defend the application and accordingly does not oppose the application.
2. The proposal put forward by Mr Rullo, and which the creditors by majority vote accepted, provided for Mr Rullo to make \$100,000 available for payment to his creditors to be contributed by Mr Rullo's parents. The Trustee recommended that proposal to the creditors because on the information available to him at the time, it provided a return to creditors of approximately three cents in the dollar, which was more than they would receive if Mr Rullo was placed into bankruptcy. Mr Rullo's statement of affairs listed thirteen unsecured creditors, with total debts owed to them of which \$2,365,482.95. Those creditors included Mr Cross for an

amount of \$368,454.41 and Athena for the amount of \$1,265,024. Athena's debt was the most substantial amount. The creditors' meeting was held on

14 February 2013 and the special resolution requiring Mr Rullo to execute the proposed Personal Insolvency Agreement was passed. Nine creditors, including Athena, voted in favour of the resolution. One creditor, Mr Cross, representing 17% in value of the creditors voting on the resolution, voted against the proposal. The Personal Insolvency Agreement was executed the same day and the Trustee received the \$100,000 for distribution to the creditors. On the same day, the Trustee sent a memorandum to creditors calling for proofs of debt to be lodged with the Trustee.

3. The Trustee's evidence was that he held suspicions about the validity of Athena's debt when he admitted Athena's claim to vote at the meeting of creditors. However, he allowed Athena to vote as he did not have evidence at the time to support a basis for rejecting the claim. The Trustee said that he became suspicious after receiving a copy of the agreement on which Athena had sued Mr Rullo and obtained judgement in default. In his words, "the terms of the Agreement did not appear to have any commercial sense to it".
4. Both Mr Cross and the Trustee contended that they have since (separately) obtained material from which the Court should draw the conclusion that there is not a real debt behind the default judgment that Athena obtained. Mr Cross has additionally claimed that there is reason to believe that some of the other creditors listed by Mr Rullo do not have genuine claims. His affidavit in support set out the basis for his belief. Mr Cross also has raised other matters before the Court which he relies on to impute, or at least to raise suspicion of, improper conduct on the part of the solicitor who acted for Athena in the debt recovery proceeding and another firm of solicitors in relation to Mr Rullo's debt arrangement.
5. Both Mr Cross and the Trustee relied on the line of authority that is open to the Court in its Bankruptcy jurisdiction (including in an application under [s 222](#) of the [Bankruptcy Act](#)) to look behind a judgment debt in an appropriate case to see whether there was behind it, in truth, a real debt: *Wren v Mahony* [1972] HCA 5; (1972) 126 CLR 212; *Re Szeitz; Ex parte Countrywide Building Society Limited (in liquidation) v McVeigh* (1992) 36 FCR 428 at 434 per Hill J. Both Mr Cross and the Trustee urged the Court to go behind the judgment debt and find that Athena is not, in fact, a creditor of Mr Rullo. Mr LaPirow of counsel for Mr Cross, however, properly submitted that the Court should not make findings without first giving Athena and the other affected persons the opportunity to be heard.
6. In the present case, there is insufficient material before the Court on which the Court could make any findings concerning the legitimacy of Athena's debt, if it was to go behind the judgment debt. That said, I do consider that the material presented before the Court does raise serious questions about whether there was proper basis in fact and law for the cause of action on which Athena sued Mr Rullo and obtained judgment in default.
7. On 27 March 2013, the Trustee received a formal proof of debt from Athena's solicitor. The Trustee then instructed solicitors Piper Alderman to advise him in relation to the admission of that claim. Piper Alderman's inquiries disclosed that Athena is a Hong Kong company that was incorporated on 9 December 2010, which was after the agreement upon which Athena sued in the Supreme Court of Victoria had been entered into, which bears the date of 1 March 2009. Piper Alderman sought an explanation from Athena's solicitor concerning the entry into the agreement by Athena prior to its existence. In response, Athena's solicitor sent a letter enclosing a document dated 1 March 2009 described as "Heads of Agreement" and three letters from Athena to Mr Rullo dated 23 February 2011, 7 March 2012 and 1 May 2012 respectively. The documents were not accompanied by any explanation from the solicitor.
8. Athena sued Mr Rullo in the Supreme Court of Victoria for breach of an agreement. It is pleaded in the Statement of Claim filed on 11 October 2012 that:

[3] By an Agreement dated 1 March 2009 ("the Agreement"), the plaintiff engaged the Defendant to procure investment capital for the Plaintiff. There were terms of the Agreement as follows:-

- a. The Defendant would procure and raise the sum of One Million Five Hundred Thousand Dollars on behalf of the Plaintiff to promote horticultural development in Victoria and New South Wales ("the Investment Capital");
- b. The Defendant would procure and raise the Investment Capital between 1 March 2009 and 31 March 2010 with a minimum sum of \$1,500,000.00 to be raised on or before 31 March 2010;







- c. The Plaintiff would pay to the Defendant a fee of Two Hundred and Fifty Thousand Dollars (\$250,000.00) such fee to be deducted from the Investment Capital raised pursuant to the Agreement.

[4] In breach of the Agreement the Defendant failed to procure the Investment Capital for the Plaintiff in the sum of One Million Five Hundred Thousand Dollars (\$1,500,000.00) or at all.

[5] On or about 7 March 2012 and 1 May 2012 the Plaintiff served Letters of Demand on the Defendant requiring payment of the Investment Capital.

[6] The Defendant has failed to comply with the Letters of Demand.

[7] As at the date of the Writ, the Defendant is and remains indebted to the Plaintiff in the sum of AUD\$1,250,000.00 being the Investment Capital amount less the amount due on the Defendant by way of commission.

9. The agreement that Athena's solicitor provided to the Trustee as the agreement sued is titled "*Fund Raising Agreement*". That agreement is dated 1 March 2009 and is expressed to be between Mr Rullo defined as the "Underwriter" and Athena. It appears to be signed by Mr Rullo and a director of Athena.
10. The Heads of Agreement dated 1 March 2009, on the other hand, are between a company called  **Dapal**  Limited (" **Dapal** "), a Hong Kong company, and Mr Rullo. The company search of  **Dapal**  disclosed no connection with Athena. The Heads of Agreement recorded the terms upon which the parties were to enter into a "Horticultural Development" for which Mr Rullo was to undertake a capital raising of not less than \$1.5 million for subscription in shares in a special purpose vehicle to be set up that the parties would use for their activities.
11. The letter dated 23 February 2011 from Athena to Mr Rullo is in the following terms:

We refer to our recent discussions as to the Memorandum of Understanding dated 1 March 2009.

We are pleased to advise that Athena Commodities & Trading Limited has now formally been registered and as such, we enclose Fundraising Agreement as negotiated for your consideration.

We confirm that the relevant terms of the agreement are as follows:

- You will procure investments in Athena in the amount of \$1,500,000.00 on or before 31 March 2012;
- You will be paid a commission of \$250,000.00 payable on 31 March 2012 for securing the investment capital.

Should you have any queries in relation to the above, please contact our office. Otherwise, we look forward to receiving an executed copy of the Fundraising Agreement and for a long and prosperous business relationship.

12. The letter dated 7 March 2012 from Athena to Mr Rullo is in the following terms:

We refer to the Fundraising Agreement executed 1 March 2011 and note that you have until the 31st of March in which to raise the \$1,500,000.00.

While we note your lack of interest in keeping with your obligations under this Agreement, this does not displace any legal liability that you have under this Agreement.



Please contact our office as a matter of urgency so that we can discuss your conduct as above.

13. The letter dated 1 May 2012 from Athena to Mr Rullo is in the following terms:

We refer to our previous letters on this matter and have confirmed that we have not received a reply. We demand the amount of \$1,250,00.00 payable immediately.

It is now certain that you have breached your obligations under the Agreement and as such, we will be instructing a local Australian lawyer to pursue you for the loss and damage.

You will hear from them shortly.

14. Piper Alderman wrote to Athena's solicitor on 17 June 2013 identifying a number of discrepancies in Athena's claim and bringing to the attention Athena's solicitor that the claim as pleaded in which default judgment was entered was inconsistent with the documents that the solicitor had provided to the Trustee in response for an explanation as to why the Fund Raising Agreement appeared to have been entered into by Athena before that company was even incorporated. The letter sought a response and advised that failing the provision of a credible explanation, the Trustee reserved the right to approach the Court for directions and/or to terminate the Personal Insolvency Agreement on the ground that the Trustee had been misled as to the existence of Athena's claim.
15. The solicitor responded by way of letter dated 25 June 2013 in which he advised that he also acted for  **Dapal** . He advised that the Heads of Agreement was a document drawn by the parties themselves "which explains the irregularities" in that document. As to the Fund Raising Agreement, the solicitor wrote:

"In relation to the Fund Raising Agreement we are instructed that the original agreement between the parties was not in fact reduced to writing but was a verbal agreement between our client promoter and Mr Rullo. We are advised that these discussions arose during the course of Mr Rullo developing the Nadia Cherry Royale Plum and the parties attempted to subsequently reduce the agreement to writing without the benefit of legal advice. At the time that those oral negotiations and agreements occurred, our client, Athena was not incorporated, but we are instructed that it was subsequently incorporated at the time the oral agreement was reduced to writing. We have further instructed that in that written agreement the parties to that agreement elected to insert the date upon which the oral agreement was made rather than the date upon which it was reduced to writing."

The letter concluded:

"Whilst it is acknowledged that there are a number of inconsistencies in both the

agreements and correspondence and that in particular the correspondence could have been drafted with greater specificity, we are instructed that this is merely a reflection [of] parties' efforts to reduce into writing the intent of the undertaking and to address various issues arising from that undertaking subsequent to the agreement being breached.

In the circumstances our client maintains its entitlement to the amounts due to it under these agreements.”

16. That explanation was neither adequate nor satisfactory. In my view, the Trustee is properly justified in his concern about the legitimacy of Athena's judgment debt. In my view, there are serious questions as to the validity of Athena's judgment debt and its entitlement to prove as an unsecured creditor.
17. I am troubled by the additional matters on which Mr Cross relies. The evidence is very sketchy and inferential in nature but does show connections between Athena and some of the other unsecured creditors. The evidence does not permit any view to be formed as to whether there was anything improper but equally so I could not, on the material, dismiss the allegations made by Mr Cross as fanciful or frivolous or lacking in foundation. Given the nature of the allegations, there is a public interest in a proper investigation into Mr Rullo's affairs, which cannot be done under the debt arrangement.
18. In the circumstances, I consider that I have the power under [s 222\(1\)\(e\)](#) of the [Bankruptcy Act](#) to make an order setting the Personal Insolvency Agreement aside: *Re Mills Ex parte Lloyd's* (1997) 73 FCR 551 at 559 per Merkel J. I am satisfied that there is warrant to set aside the Personal Insolvency Agreement under this ground. The Trustee had suspicions about the legitimacy of Athena's debt before the meeting at which the Personal Insolvency Agreement was voted on, but at the time had no evidence which justified rejecting Athena as a creditor entitled to vote. On receiving the formal proof of claim from Athena, the Trustee took steps to confirm Athena's debt. The responses from Athena's solicitor were unsatisfactory and inadequate and far from rebutting the Trustee's suspicions gave the Trustee proper and justifiable cause for suspicion. Furthermore suspicions have been raised about other debts and the circumstances of the debt arrangement. As Mr Rullo does not object to the orders sought and no other creditor has appeared to oppose the making of the orders, I consider in all the circumstances that the Personal Insolvency Agreement should be set aside.
19. Accordingly, the Personal Insolvency Agreement will be set aside and a sequestration should be made. Mr Cross seeks an order that his costs of the application should be paid from the fund held by the Trustee for the purposes of the Personal Insolvency Agreement. Reliance was placed on the Court's broad power under [s 32](#) of the [Bankruptcy Act](#) to make orders as to costs and also [s 222\(A\)](#) of the [Bankruptcy Act](#) which gives the Court the power to make such other orders as the Court thinks fit. Essentially the basis of the application was the fact that Mr Cross was the applicant for the orders. However, the usual order for costs of an applicant in setting aside a debt arrangement is that those costs are made costs in the bankruptcy. I am not persuaded that any different order should be made.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:

Dated: 16 August 2013

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