

CLYNE

v.

THE DEPUTY COMMISSIONER OF TAXATION

JUDGMENT

(ORAL)

GIBBS C.J.  
MURPHY J.  
WILSON J.  
DEANE J.  
DAWSON J.

CLYNE

v.

THE DEPUTY COMMISSIONER OF TAXATION

This is an objection to the competency of an appeal brought by the appellant from a judgment of the Full Court of the Federal Court of Australia.

On 13 August 1982, a bankruptcy notice addressed to the appellant was issued at the request of the Deputy Commissioner of Taxation who claimed that a balance of \$334,825.67 was due to him under a final judgment obtained by him against the appellant in the Supreme Court of New South Wales on 11 March 1982. The appellant made application to the Federal Court for an order setting aside the bankruptcy notice, an adjournment of the proceedings and a determination for the purposes of s.41(7) of the Bankruptcy Act 1966 (Cth.) (as amended), that the court is satisfied that the appellant has a counter-claim, set-off or cross demand, of the kind referred to in s.40(1)(g) of that Act. The application came on before Lockhart J., who refused it, but nevertheless extended time for compliance with the bankruptcy notice until 25 October 1982. The appellant appealed to the Full Court of the Federal Court from the whole of the judgment of Lockhart J. That Court dismissed the appeal and ordered that the time for

2.

compliance with the bankruptcy notice be on or before 24 December 1982.

From that judgment, the appellant has appealed to this Court on two grounds; namely:

- "1. That the Federal Court of Australia should have held that a bankruptcy notice issued at the request of the respondent against the appellant on the 13th day of August 1982 was not based on a final judgment within the meaning of the Bankruptcy Act (Cth) 1966 (as amended), Sec. 40(1)(g).
2. That the Federal Court of Australia should have held that the provisions of Sec. 40(1)(g) aforesaid in so far as they empowered the Registrar of the Federal Court to fix the time for compliance with the said bankruptcy notice were and are an attempt to vest judicial powers in the said Registrar who is an administrative official and that the said provisions were and are for that reason unconstitutional and void pro tanto."

The Deputy Commissioner of Taxation has lodged an objection to the competency of the appeal.

By s.33(4) of the Federal Court of Australia Act 1976 (Cth.), it is provided as follows:

"Subject to sub-section (5), an appeal may be brought as of right from a final judgment of a Full Court of the Court given or pronounced

- (a) for the sum of \$20,000 or upwards; or
- (b) in any proceedings in which the matter in issue amounts to or is of the value of \$20,000 or upwards or which involve directly or indirectly a claim, demand or question to or respecting any property or any civil right

amounting to or of the value of \$20,000 or upwards."

It was conceded by the respondent that the judgment in question was a final judgment. The question for decision then is whether the proceedings involve, directly or indirectly, a demand to or respecting property amounting to or of the value of \$20,000 or upwards.

The bankruptcy notice was in the usual form.

Omitting formal parts, it read as follows:

"THEREFORE TAKE NOTICE that within fourteen days after service of this notice on you, excluding the day on which this notice is served on you, you are required -

(a) to pay the balance sum of \$334,825.67 so claimed by the judgment creditor to the judgment creditor

or

(b) to secure the payment of the sum referred to in the last preceding paragraph to the satisfaction of the Federal Court of Australia or the judgment creditor or compound the sum so specified to the satisfaction of the judgment creditor.

AND FURTHER TAKE NOTICE that if, within the period set out above, you fail either to comply with either of the abovementioned requirements of this notice or to satisfy the Federal Court of Australia that you have a counter-claim, set-off or cross demand equal to or exceeding the sum specified in paragraph (a) of this notice, being a counter-claim, set-off or cross demand that you could not have set up in the action in which the judgment was obtained, you will have committed an act of bankruptcy on which bankruptcy proceedings may be taken against you."

Clearly that notice is a demand and it is a demand

respecting the sum of \$334,825.67 which is claimed by the judgment creditor. Equally clearly that amount of money is property. So far there is no dispute.

However, the respondent, in submitting that the conditions laid down by s.33(4)(b) have not been satisfied, advanced three main arguments. First, it was said that the proceedings do not involve a demand respecting property amounting to the value of \$334,825.67, because the appellant was not shown to be prejudiced in that or any other amount by the judgment appealed from. The extent of prejudice which the judgment appealed against produces to the appellant is important when the question is: "What is the amount or value of the matter in issue?", as Barwick C.J. pointed out in Moller v. Roy (1975) 132 C.L.R. 622, at p.626, but it is not material when the question is whether the proceedings involve a demand to or respecting property of the requisite amount. And that is the question here. Secondly, the submission was that, although the bankruptcy notice itself could be said to be a demand respecting property exceeding \$20,000, the demand was not involved in any relevant sense in the proceedings. However, the very object of the proceedings was to set aside the notice, that is, to set aside the demand. Thirdly, it was submitted that the value of the demand depended on the amount of property

which the appellant has to satisfy it, a matter on which no evidence has been given. However, the section requires that there should be a demand respecting property of a particular amount or value. It is not the value of the demand, but the amount or value of the property in respect of which it is made, that is material.

The decision in The Chief Collector of Taxes of Papua and New Guinea v. Bayliss (1974) 131 C.L.R. 329 is quite distinguishable. There the claim of the creditor that the debtor was indebted to him was not involved in the judgment dismissing the bankruptcy petition. That judgment did not deny that the debt existed. The judgment in the present case, however, has the effect that the demand constituted by the bankruptcy notice remains effective.

Sections such as s.33(4) of the Federal Court of Australia Act lead to fine distinctions and anomalous results. However, the proceeding in the present case did involve a demand respecting property amounting to \$334,825.67 and the appeal was competent. The order will therefore be that the objection to competency will be overruled.