

Bar Speak

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bankruptcy - losing liberty as well as property

Bankrupts cannot rely upon the privilege against self incrimination to refuse to produce documents to their trustee or answer questions at a public examination, the Full Court of the Federal Court has affirmed by a three to nil majority.

In **Griffin - v - Pantzer**, the bankrupt was alleged to have misappropriated more than \$10 million from his employer. His trustee in bankruptcy wished to examine him about whether he had stolen from his employer and, if so, what had happened to the proceeds of the theft. He also required the bankrupt to give him his books and records.

The bankrupt sought orders that he was entitled to rely upon the privilege against self incrimination to refuse to produce the documents and answer the questions. He argued that there is no express abrogation of the privilege by ss. 77 and 81 of the Bankruptcy Act; that the bankrupt's obligation under s. 77 to give books and records to the trustee is qualified by the words "unless ... prevented by illness or other sufficient cause ..." and that those words allowed him to refuse to produce the books on the basis of an otherwise legitimate claim to privilege.

Allsop J, with whom Ryan and Heerey JJ agreed, undertook an extensive survey of the statutory provisions and cases since 1825. Three primary conclusions were reached.

First, the requirement in s. 77(1)(a) for a bankrupt to give to his trustee all books in his possession relating to his examinable affairs, abrogates the privilege against self incrimination. The above quoted reference to "other sufficient cause" relates to physical incapacity and does not preserve the bankrupt's right to rely upon the privilege.

Secondly, when a bankrupt is being publicly examined, s. 81(1B) of the Bankruptcy Act provides that a bankrupt may be required, by summons, to bring certain books to his examination. The Court held that the privilege against self incrimination did not permit the bankrupt to refuse to produce books covered by such a summons.

Thirdly, does the privilege allow a bankrupt to decline to answer questions put to him at the examination? The bankrupt argued that because s. 81(11AA) only refers to overriding the privilege with respect to questions that "might tend to incriminate" him, he could not be asked questions that actually would do so. The Court rejected this contention. No such distinction was to be drawn. The privilege is not available.

The decision does not definitively address two issues by which bankrupts may still try and restrict trustee's attempts to obtain incriminating information and then deal with it.

First, s. 81 says that in a public examination of a bankrupt, the Court or Registrar or Magistrate may allow to be put "such questions about ... [the bankrupt's] examinable affairs as the ... thinks appropriate." This appeal did not require the Full Court to identify how that discretion should be exercised. Guidance from a single Judge is found in *Re Gordon*.

Secondly, how may the trustee deal with documents given to him by a bankrupt under s. 77(1)(a)? The primary Judge placed restrictions upon the use to which the documents could be put. The Full Court wrote that the trustee may be bound to use them only for the purposes of the administration of the estate and discharge of duties under the Act. However, it was not necessary to decide the practical application of that proposition in this case. The Full Court did comment that those purposes might be broad and conceivably antithetical to the interests of the bankrupt in maintaining privilege or confidentiality.

The bankrupt is seeking special leave to appeal to the High Court.

A message from this? Bankruptcy threatens the liberty, as well as the property, of those engaged in criminal conduct.

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