Ogbonna v CTI Logistics Ltd (No 7): Understanding the Importance of “Presently Payable” in Bankruptcy Proceedings

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Ogbonna v CTI Logistics Ltd (No 7) [2025] FCA 1125 (12 September 2025)

Just because you are vexatious, doesn’t mean you don’t (always) have an arguable case…

In this decision the Federal Court has allowed an appeal by a vexatious litigant against a 2022 sequestration order made against him because the petition debt was not “presently payable” at the relevant time. WA enforcement law imposed real pre-conditions on enforcing an older judgment, and those pre-conditions had not been met. The Court stood over the implications of its judgment including considerations affecting the trustee in bankruptcy who had been appointed just under 3 years.

Sequestration Order – Overview

A sequestration order is handed down by a Court against a debtor upon the successful hearing of a creditor’s petition. This has the effect of making a debtor bankrupt. The bankrupt's estate will be managed by a trustee, who will control the property and most financial affairs of the debtor, as well as deal with creditors. The trustee will either be a registered trustee who has filed a ‘consent to be appointed’ upon the making of a sequestration order, or otherwise the

Official Trustee in Bankruptcy will automatically become the trustee.

Facts:

In *Ogbonna v CTI Logistics Ltd (No 7)* [2025] FCA 1125 (12 September 2025) ("***Ogbonna***") the creditors obtained a judgment against the debtor in August 2015 being a fixed sum costs order against him on a failed unlawful discrimination claim. This unfortunately led to various further litigation (ending up in a total of 46 separate proceedings by the debtor, 21 of which involved the creditors and related parties) and so in 2019 the creditors started the bankruptcy process against him – no doubt hoping to bring the ongoing litigation to an end. A bankruptcy notice was issued in June 2019 which (perhaps unsurprisingly) led to further litigation to set aside the notice, as well as numerous other proceedings (including the vexatious litigant order in 2022) so that the final date for compliance was 29 November 2021, but Mr Ogbonna did not comply, so an act of bankruptcy occurred. The creditors filed their petition in May 2022, and on 20 September 2022 a sequestration order was made by the trial judge.

Thus, the act of bankruptcy, filing of the creditors' petition, hearing of the creditors' petition and sequestration order all took place more than six years after the order creating the judgment debt took effect. By that time, any action on the judgment was statute-barred under s 13(1) of the *Limitation Act 2005* (WA) ("**the Limitation Act**"), and enforcement was contingent on the Court granting leave under s 13(1) of the *Civil Judgments Enforcement Act 2004* (WA) ("**the Enforcement Act**"), calling attention to the phrase "presently payable". Unlike other states, which have a 12-year time limit for enforcement of judgments (eg s17 *Limitation Act 1969* (NSW)), in Western Australian the period is only 6 years.

Issue:

The issue in *Ogbonna* was therefore whether, at the date of the petition and at the hearing, the creditors were in fact creditors with a debt which was "payable either immediately or at a certain future time" under s 44(1)(b)(ii) of the *Bankruptcy Act 1966* (Cth) ("**the Bankruptcy Act**"), given that in WA more than six years had passed so an action on the judgment was statute barred and enforcement required prior leave.

Key Reasoning:

1. Section 44(1)(b)(ii) of the Bankruptcy Act requires a creditor who wishes to obtain a sequestration order to establish the existence of a debt which is payable either immediately or at a certain future time. The Court held that a bankruptcy court has "no authority to make a sequestration order in circumstances in which at the time the creditor presents the petition there is no debt 'owing' to the petition creditor or the debt is not 'due' and the debt is not payable either immediately or at a certain future time'" (at [21] per Feutrill J, citing *Udovenko v Mitchell* [1997] FCA 1312; 79 FCR 418 at 420 (Davies J, Forster J agreeing).

2. As the judgment was from WA, enforcement was governed by the Enforcement Act. Under s 13(1) of the Enforcement Act, once 6 years have passed since the judgment

took effect, the creditor must first obtain the Court's leave before any enforcement order (as defined in s 17 of the Enforcement Act) can be made. Under s 12 of the Enforcement Act, no enforcement order may be made after 12 years.

3. On the facts, no leave had been obtained, so any right to make an enforcement order depended on a further judicial decision. Therefore, the debt was not presently payable for the purposes of s 44(1)(b)(ii) of the Bankruptcy Act. The creditors had only a contingent means of enforcement, so the debt was not presently payable for s 44(1)(b)(ii) purposes.

4. In *O'Mara Constructions Pty Ltd v Avery* [2006] FCAFC 55, the Court held a judgment creditor able to execute on a judgment remains a "creditor" for the purposes of ss 43 and 44 and to prove in the bankruptcy. However, the position in *Ogbonna* was different. Under the Enforcement Act, "leave of the court must be obtained" after six years and "an enforcement order cannot be made at all" after twelve years. On the petition date the respondents "did not have a right to execute" and had only a "contingent not immediate or certain future means of extracting payment". The reasons state that a "mere contingent right to execution" does not permit a creditor to present a petition under s 44(1)(b)(ii).

Read the full judgment of *O'Mara Constructions Pty Ltd v Avery* [2006] FCAFC 55:

https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2006/2006fcafc0055

5. The Court rejected the argument of the creditors that the leave-after-six-years mechanism is analogous to a stay of execution and that, where execution is stayed, the judgment debt nevertheless remains payable until it was incapable of enforcement (*i.e.* 12 years). That aligned with *Re Pollack; Ex parte Deputy Commissioner of Taxation* [1991] FCA 651, which stated that a stay "does not, of itself … deprive the judgment debt of its character as … payable immediately" and that the debt "remained payable". But *Ogbonna* involves more than a stay: WA law required a grant of leave to make any enforcement order once six years had passed, and on the facts the respondents "had not sought or been granted leave". The Court emphasised there was "more", because an action on the judgment was statute-barred and the debt was not enforceable "presently or at a certain future time". Therefore, there was no present right to execute, and the creditor held only "a contingent not immediate or certain future means of extracting payment", so the debt was not presently payable under s 44(1)(b)(ii).

Read the full judgment of *Re Pollack; Ex parte Deputy Commissioner of Taxation* [1991] FCA 651:

https://www.fedcourt.gov.au/file-store/Judgments/Federal%20Court/Single%20Court/1991/1991FCA0547/1991FCA0547.pdf

6. Timing is critical. Timing is assessed at presentation and at the hearing. The test applies

> at the time the petition is presented. A sequestration order cannot be made if the debt is not "payable either immediately or at a certain future time". Here the respondents "did not have a right to execute" and were therefore not creditors entitled to present the petition. Ultimately, the primary judge lacked authority to make the sequestration order.

This case matters because it confirms you cannot use bankruptcy to sidestep a Limitation Act issue in the event there is a grey area between a judgment debt being enforceable and being statute barred. A judgment debt must be enforceable to proceed to bankruptcy and if a grant of leave is required before the debt will become enforced, then there is no present right to execute, and the debt is not "presently payable" under s 44(1)(b)(ii).

And spare a thought for the Official Trustee in Bankruptcy who had been administering an estate for 3 years, only to have the basis of the appointment undermined. Because of the significant impact of the sequestration order being set aside after such a long period, the Court stood the matter over to consider what order should be made. As at the date of this article no further orders appear to have been made in the proceedings.

Our insolvency, restructuring, and debt recovery team specialises in guiding clients through bankruptcy proceedings. We advise creditors on the full spectrum of bankruptcy matters, from initiating bankruptcy proceedings and filing creditor's petitions, to navigating sequestration orders and managing the complexities of enforcement.

Read the full judgment of *Ogbonna v CTI Logistics Ltd (No 7):* https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2025/2025fca1125

If you would like more information or advice in relation to insolvency, restructuring or debt recovery law, contact a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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