

Setting the record straight on bankruptcy notices

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IN A CRITICAL DECISION FOR all bankruptcy matters, the High Court has unanimously restored some sanity to what must be done to create a valid bankruptcy notice.

In *Adams v Lambert* [2006] HCA 10 (4 April 2006) the petitioning creditor claimed interest in a judgment debt served on a debtor. The interest totalled \$66.58 and was correctly calculated, but critically, the notice referred to the incorrect section of the *District Court Act* entitling interest to be claimed. Instead of s.85 (which deals with post-judgment interest, the notice referred to interest under s.83A (pre-judgment interest). Based on an earlier (majority) full Federal Court decision in *Australian Steel v Lewis* (2000) 109 FCR 33, the trial judge (Gyles J, who had been part of the minority in *Australian Steel*) felt bound to declare the notice defective and dismiss the creditor's petition. The matter wound its way up to the High Court which delivered a unanimous judgment on 4 April 2006.

Importantly, the full court overruled *Australian Steel v Lewis*, holding it was wrongly decided and "placed undue emphasis on the imperative

terms of the Act and Regulations" (at [29]) and that its effect was to "attribute to the legislature an overwhelming preference to form over substance. That should not be done" (at [34]).

Their Honours held that such legalism flew in the face of the Act itself, which by s.41(5) excused an overstatement of the debt claimed in the notice, and by s.306 excused

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formal defects or irregularities. Section 306 had been found in *Kleinwort Benson v Crowl* (1988) 165 CLR 71 to validate a notice which substantially understated the debt owing. So how could two small letters which everyone agreed had not misled or confused anybody invalidate an entire bankruptcy notice that in all other respects complied with the Act and Regulations?

With respect, the High Court's decision is a triumph for commonsense over legalism. It is a step back from the abyss of technicality that was threatening to undermine or at least seriously impede the efficient operation of the *Bankruptcy Act* for all creditors.

All of which is to say that the test for setting aside a bankruptcy notice is arguably now more difficult. Prior to this decision, any defect was fatal. So, when will a bankruptcy notice now be defective? What is the new test for the level of error which will cause a notice to be set aside?

The High Court focused on s.306, the 'save all' provision of the *Bankruptcy Act*. The court found that the salvation available under s.306 consists of a

two-stage test:

□ Is the defect a formality or irregularity?

□ If so, has the defect caused substantial injustice which cannot be remedied by court order?

For the first step, the High Court held that the test is to be applied looking at s.306 in the context of the whole Act, including the role to be played by bankruptcy notices within

Lewis v Steel (Gyles and Lee J) who found that the mere misdescription of a statutory basis for interest in a bankruptcy notice (where there remains no prospect for the debtor to be misled) could not have been intended by Parliament to be a substantive defect so as to exclude s.306.

The High Court's decision takes some of the pressure off when drafting bankruptcy notices. Nevertheless, it is essential that notices continue to be prepared carefully to ensure that the debtor is not misled. What will (or could, or did?) mislead debtors will become the touchstone for applications to set aside bankruptcy notices. This will depend upon each case, the nature and extent of the defect, and no doubt also the nature, background and capacity of the debtor as well. □

Sandra Day O'Connor for AIJA conference

What type of justice system can we afford?

A FORMER JUSTICE OF THE United States Supreme Court, the Hon Sandra Day O'Connor, will be guest speaker at the Australian Institute of Judicial Administration's annual conference to be held in Adelaide this year from 15 to 17 September. The conference will focus on affordable justice.

Conference organisers say the high cost of litigation has become a significant impediment to access to justice, and the conference will be asked to consider what type of justice system we can afford in 2006.

The conference will seek to identify and consider issues relevant to the cost of litigation

from the viewpoint of litigants, the legal profession, government, and courts and tribunals. Topics include:

- getting serious about the causes of delay and expense in the criminal justice system;
- third party funding of litigation;
- measuring court performance – a qualitative approach;
- costs and the legal profession;
- alternative approaches to delivering justice; and
- making justice more accessible and affordable.

For further information and registrations visit the AIJA website at www.aija.org.au. □