Federal Court of Australia

Grant v Green & Associates Pty Ltd [2021] FCA 934

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| File number: | NSD 518 of 2021 |
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| Judgment of: | **WIGNEY J** |
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| Date of publication of judgment: | 10 August 2021 |
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| Catchwords: | **BANKRUPTCY** – application to set aside bankruptcy notice on the grounds of defects – whether defects in bankruptcy notice were merely formal defects – where debt specified in notice overstated the amount owing – where wrong address of creditor appeared in notice – where wrong address for service of documents on the creditor appeared in notice – where overstatement of debt not merely a formal defect for purposes of s 306 of the *Bankruptcy Act 1966* (Cth)because notice of the overstatement was given in accordance with s 41(5) of the *Bankruptcy Act* – where other errors immaterial to validity of notice – notice set aside |
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| Legislation: | *Bankruptcy Act 1966* (Cth), ss 41(5), 41(6A), 306 |
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| Cases cited: | *Adams v Lambert* (2006) 228 CLR 409; [2006] HCA 10  *Bonds Industries Ltd v Sing* [1999] FCA 1055  *Croker v Commissioner of Taxation* (2005) 145 FCR 150; [2005] FCA 127  *Foote v Mid-West Finances Pty Ltd* (1997) 78 FCR 306  *Hussain v King Investment Solutions Pty Ltd* (2006) 153 FCR 428; [2006] FCA 905  *Kleinwort Benson Australia Ltd v Crowl* (1988) 165 CLR 71  *Menniti v ACN 116 746 859 Pty Ltd* [2019] FCCA 1856  *Re Florance, Ex Parte Turimetta Properties Pty Ltd* (1979) 28 ALR 403  *Re Wimbourne; Ex parte the Debtor* (1979) 24 ALR 494  *Seovic Civil Engineering Pty Ltd v Groeneveld* (1999) 87 FCR 120  *Skouloudis v St George Bank Ltd* (2008) 173 FCR 236; [2008] FCA 1765  *Walsh v Deputy Commissioner of Taxation* (1984) 156 CLR 337 |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | General and Personal Insolvency |
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| Registry: | New South Wales |
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| Number of paragraphs: | 34 |
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| Date of hearing: | 2 August 2021 |
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| Counsel for the Applicant: | The applicant appeared in person |
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| Solicitor for the Respondent: | Mr D Green of Green & Associates Solicitors |

ORDERS

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|  | | NSD 518 of 2021 |
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| BETWEEN: | NEREZ GWYNNETH GRANT  Applicant | |
| AND: | GREEN & ASSOCIATES PTY LTD  Respondent | |

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| order made by: | WIGNEY J |
| DATE OF ORDER: | 10 August 2021 |

THE COURT ORDERS THAT:

1. Bankruptcy notice 252687 issued on 29 April 2021 and served on the applicant be set aside.

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

REASONS FOR JUDGMENT

(Delivered *ex tempore*, revised from transcript)

WIGNEY J:

1. The applicant in this matter, Ms Nerez **Grant**, has applied to set aside a bankruptcy notice which was served on her by the respondent, **Green** & Associates Pty Ltd. The basis of the application is that the bankruptcy notice has three defects. For its part, Green concedes that the notice contained those three defects. It submits, however, that they are formal defects that do not invalidate the notice by reason of the operation of s 306 of the ***Bankruptcy Act*** *1966* (Cth).
2. It is necessary, before addressing the respective arguments concerning the defects, to provide some background and detail of the history of the matter to date.
3. The bankruptcy notice was issued by the official receiver on 29 April 2021. Ms Grant was named as the debtor and an address for her in Killcare, New South Wales, was specified. The creditor was identified as Green, trading as Green & Associates Solicitors, and a street address for Green in Potts Point was specified. The total debt was specified as being $27,802.87, being the amount of a final judgment or order which was attached to the bankruptcy notice.
4. The attached order was a sealed order of the Local Court of New South Wales which ordered Ms Grant to pay Green the sum of $27,802.87. The order specified Green’s address in the same terms as in the bankruptcy notice. The bankruptcy notice required Ms Grant to pay Green the amount of the debt claimed or to make arrangements to Green’s satisfaction for settlement of the debt within 21 days of service of the bankruptcy notice. The bankruptcy notice then specified that payment of the debt could be made to Ms Grant at her Killcare address. That was an obvious error. That obvious error was repeated later in the bankruptcy notice, where details were given of the address at which the creditor, Green, would accept service of legal documents. The detail provided there was again Ms Grant’s name and Killcare address.
5. The bankruptcy notice was served on Ms Grant on 13 May 2021. The 21-day period specified in the notice accordingly expired on 3 June 2021.
6. On 2 June 2021, Ms Grant filed an application in this Court seeking an order that the bankruptcy notice be set aside. An affidavit in support of the application sworn by Ms Grant was also filed on that day. The application and supporting affidavit specified that the basis of the claim that the notice be set aside was that the bankruptcy notice contained three defects.
7. The first defect was said to be that the debt specified in the bankruptcy notice was incorrect because it did not take into account the fact that the amount of $1,113.29 had been deducted from Ms Grant’s account and applied towards the judgment debt by operation of a garnishee order which had been made by the Local Court. The second defect was said to be that the notice incorrectly specified that the debt could be paid to Ms Grant at her address, not to Green at its address. The third defect was that the bankruptcy notice incorrectly stated that the creditor, Green, would accept service of legal documents at Ms Grant’s address, not Green’s address.
8. On the day that Ms Grant’s application was filed, 2 June 2021, a registrar of the Court made an order pursuant to s 41(6A) of the Bankruptcy Act that the time for compliance by Ms Grant with the requirements of the bankruptcy notice be extended to 4.00 pm on 13 July 2021.
9. Subsection 41(6A) of the Bankruptcy Act provides as follows:

(6A) Where, before the expiration of the time fixed for compliance with a bankruptcy notice:

(a) proceedings to set aside a judgment or order in respect of which the bankruptcy notice was issued have been instituted by the debtor; or

(b) an application has been made to the Court to set aside the bankruptcy notice;

the Court may, subject to subsection (6C), extend the time for compliance with the bankruptcy notice.

1. It would appear to be common ground that the order made by the registrar pursuant to s 41(6A) of the Bankruptcy Act was made by virtue of the fact that Ms Grant had filed her application to set aside the bankruptcy notice within the 21 day period. Ms Grant did not separately apply for an order pursuant to s 41(6A) and there was no hearing before the registrar or other participation by the parties in respect of the making of the order.
2. On 8 June 2021, Ms Grant’s application and her supporting affidavit were served on Green. The application and supporting affidavit were therefore served within the time for compliance with the bankruptcy notice as extended by the registrar.
3. On 13 July 2021, Ms Grant’s application to set aside the bankruptcy notice was listed for hearing before another registrar of the Court. That registrar ordered that the time for compliance with the bankruptcy notice be further extended “to and including the next court date,” and that, on Ms Grant’s application, the matter be referred to a judge’s docket.
4. As was noted earlier, Green does not dispute that the bankruptcy notice contains the three defects which Ms Grant’s application and supporting affidavit identified. He contends, however, that they are formal defects that do not invalidate the notice by virtue of or by operation of s 306 of the Bankruptcy Act.
5. Section 306 of the Bankruptcy Act provides as follows:

**306 Formal defect not to invalidate proceedings**

(1) Proceedings under this Act are not invalidated by a formal defect or an irregularity, unless the court before which the objection on that ground is made is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court.

(2) A defect or irregularity in the appointment of any person exercising, or purporting to exercise, a power or function under this Act or under a personal insolvency agreement entered into under this Act does not invalidate an act done by him or her in good faith.

1. It is convenient to first address the defect relating to the overstatement of the debt. The other two defects can then be dealt with together.
2. The question whether the defect relating to the overstatement of the debt is a formal defect which can be cured or overcome by application of s 306 of the Bankruptcy Act hinges on the application of s 41(5) of that Act to the facts of this case.
3. Subsection 41(5) of the Bankruptcy Act provides as follows:

(5) A bankruptcy notice is not invalidated by reason only that the sum specified in the notice as the amount due to the creditor exceeds the amount in fact due, unless the debtor, within the time fixed for compliance with the notice, gives notice to the creditor that he or she disputes the validity of the notice on the ground of the misstatement.

1. Service of an application to set aside a bankruptcy notice on the basis of the overstatement of the debt can constitute a notice under s 41(5) of the Bankruptcy Act, even if there is no express reference to s 41(5) in the application itself: *Hussain v King Investment Solutions Pty Ltd* (2006) 153 FCR 428; [2006] FCA 905 at [20].
2. If notice of an overstatement of the debt in a bankruptcy notice has been given in accordance with s 41(5) of the Bankruptcy Act, the overstatement renders the bankruptcy notice invalid, whether or not the overstatement could reasonably mislead the debtor: see ***Seovic*** *Civil Engineering Pty Ltd v Groeneveld* (1999) 87 FCR 120 at 132; *Skouloudis v St George Bank Ltd* (2008) 173 FCR 236; [2008] FCA 1765 at [22]-[27]; see also *Croker v Commissioner of Taxation* (2005) 145 FCR 150; [2005] FCA 127 at [16]. In those circumstances, s 306 of the Bankruptcy Act has no application.
3. Ms Grant contended that she had given Green notice of the overstatement in accordance with s 41(5) of the Bankruptcy Act. That was because she had filed her application within the 21-day period specified in the bankruptcy notice and, critically, she had served the application and supporting affidavit on Green within the period for compliance with the bankruptcy notice as extended by the registrar pursuant to s 41(6A) of the Bankruptcy Act. It follows, in Ms Grant’s submission, that the bankruptcy notice is therefore invalid, the overstatement of the debt in the bankruptcy notice not having been disputed by Green.
4. Green, however, contended that Ms Grant had not given notice of the overstatement in accordance with s 41(5) of the Bankruptcy Act. That was said to be because Ms Grant’s application was not served “within the time fixed for compliance with the notice,” as required by s 41(5). The expression “time fixed” is defined in s 5 of the Bankruptcy Act as meaning “the period specified in the notice (as required by subsection 41(2A))”. In Green’s submission, that definition does not encompass or include any extension of the time fixed for compliance by order of the Court pursuant to s 41(6A) of the Bankruptcy Act.
5. Green submitted that that construction of s 41(5) of the Bankruptcy Act was supported by the following passage in *Seovic* concerning the object of s 41(5) (at [37]):

This construction of s 41(5) of the *Bankruptcy Act* is supported by policy considerations. The object of a debtor’s notice under s 41(5) is to inform the creditor that the debtor disputes the bankruptcy notice and does so on the ground of a misstatement contained in that notice. The point of the notice is to draw to the creditor’s attention the misstatement, thereby giving the creditor the opportunity to consider, for example, whether the bankruptcy notice should be withdrawn and a fresh notice, correcting the misstatement, issued. If the creditor is given no hint in the notice as to the nature of the misstatement, there is a considerable risk that the debtor will be able to take unmeritorious advantage of minor errors (such as the small mistake in the present case) and that unnecessary and wasteful litigation will eventuate. It is no answer to say that the creditor can ask for particulars, since the debtor would not be obliged to give any until after litigation had been instituted. Indeed, a debtor wishing to take advantage of the technicalities of the law of bankruptcy might be well­advised to say as little as possible for as long as possible about the true nature of the alleged misstatement in the bankruptcy notice.

1. I am unable to accept Green’s submission concerning the construction of s 41(5) of the Bankruptcy Act.
2. While there is apparently no authority on the point raised by Green, or at least no authority was drawn to my attention, the better view would appear to be that the words “within the time fixed for compliance with the notice” in s 41(5) of the Bankruptcy Act includes or encompasses the time fixed for compliance with the notice as extended by any order made by the Court under s 41(6A). While a bankruptcy notice may specify a time period of 21 days, that period can extended by order of the Court pursuant to s 41(6A). If the time for compliance is extended by order of the Court, the time fixed for compliance with the notice becomes that extended period for all purposes, including for the purposes under s 41(5) of the Bankruptcy Act.
3. I am unable to see how the observations of the Full Court in *Seovic* upon which Green relied assists its argument. Even accepting that the object of a debtor’s notice under s 41(5) of the Bankruptcy Act is as stated in *Seovic*, the giving of that notice within a period extended by the Court pursuant to s 41(6A) would still allow the creditor to, for example, consider withdrawing the notice before any unnecessary or wasteful litigation was embarked on.
4. It follows that in the particular circumstances of this case, Ms Grant gave Green notice of the overstatement in accordance with s 41(5) of the Bankruptcy Act.
5. The result is that the bankruptcy notice is invalid by reason of that overstatement, irrespective of whether the overstatement could reasonably mislead or have misled Ms Grant. Section 306 of the Bankruptcy Act has no application to such a defect. Such a defect is not a mere formal defect. It follows that the bankruptcy notice must be set aside.
6. It is, in these circumstances, unnecessary to consider in detail the merits of the parties’ respective arguments concerning the other two defects. A “formal defect or irregularity” for the purposes of s 306 of the Bankruptcy Act is a defect that could not reasonably mislead the debtor: see *Kleinwort Benson Australia Ltd v Crowl* (1988) 165 CLR 71 at 82; *Adams v Lambert* (2006) 228 CLR 409; [2006] HCA 10 at [25]-[27].
7. That question is to be approached objectively. It is not a question of whether the debtor was or was not, in fact, misled. The Court can, however, look at facts extraneous to the notice itself to determine whether the debtor served with the bankruptcy notice could be misled: see *Re Wimbourne; Ex parte the Debtor* (1979) 24 ALR 494 at 499; cited with approval in *Re Florance, Ex Parte Turimetta Properties Pty Ltd* (1979) 28 ALR 403 at 409.
8. Ms Grant relied on a number of authorities which she contended supported the proposition that a bankruptcy notice that specified the wrong address for the payment of a judgment debt is fundamentally defective. Those authorities were: *Walsh v Deputy Commissioner of Taxation* (1984) 156 CLR 337; *Menniti v ACN 116 746 859 Pty Ltd* [2019] FCCA 1856; ***Bonds*** *Industries Ltd v Sing* [1999] FCA 1055 and *Foote v Mid-West Finances Pty Ltd* (1997) 78 FCR 306 at 307.
9. It is doubtful that those or any other authorities support the proposition that s 306 of the Bankruptcy Act cannot apply to an error in specifying the address for payment of the debt. Some of the cases relied on by Ms Grant were decided prior to the amendment of the Bankruptcy Act in 1996 and hinge on the previous wording of s 41(2) of the Act. They may not, therefore, be able to be safely relied on in this context: see *Bonds* at [14]-[15]. Indeed, in *Bonds* itself, which related to a mistake in the details of the address at which the debt could be paid, Emmett J said (at [17]) that the relevant question was: “could the bankruptcy notice in question reasonably mislead a debtor as to what is necessary to comply with it?” Emmett J did not hold that any error in the bankruptcy notice concerning the specification of the address at which the debt would necessarily invalidate the notice.
10. In this case, the errors in the bankruptcy notice concerning the creditor’s address were fairly obvious. It is difficult to imagine that any reasonable debtor would not immediately realise that the specified address was an error and would appreciate that the debt was required to be paid at the creditor’s address. Importantly, Green’s address was correctly noted earlier in the notice. The annexed order of the Local Court of the New South Wales also correctly specified the same address. A reasonable debtor in Ms Grant’s position would have realised that it was at that address that the debt could be paid.
11. As important as the specification of the correct address at which the debt could be paid may be, I am unable to accept that the incorrect address details in the bankruptcy notice in this case were objectively capable of misleading the debtor, Ms Grant, about what was necessary in terms of complying with the bankruptcy notice. As I have said, the errors were fairly obvious, and Ms Grant could readily have been able to ascertain Green’s correct address from earlier in the bankruptcy notice, and from the annexure to the bankruptcy notice, had she wished to comply with the notice or serve any legal documents.

**CONCLUSION AND DISPOSITION**

1. It follows that, but for the defect relating to the overstatement of the debt in the bankruptcy notice, I would not have set aside the bankruptcy notice and would have applied s 306 of the Bankruptcy Act. The notice must, however, be set aside by reason of the overstatement of the debt and the fact that Ms Grant gave notice of that overstatement in accordance with s 41(5) of the Act.

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| I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney. |

Associate:

Dated: 10 August 2021