

AUSTRALIA / JUDGMENT

Ex parte Application by State Transport Authority [1987] FCA 194

Source: judgments.fedcourt.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

CATCHWORDS

Bankruptcy - Registrar in Bankruptcy - issue of bankruptcy notice - application to Court seeking order that Registrar issue bankruptcy notice forthwith - whether an "application" ~ is before the Court - nature of function of Registrar in issuing bankruptcy notice.

Bankruptcy Act 1966 ss.14(5),41(1),41(3) (b)

Bankruptcy Rules rr.5(1),5(2),7,8,102(1)

RE: EX PARTE APPLICATION BY STATE TRANSPORT AUTHORITY (FORMERLY KNOWN AS VICTORIAN RAILWAYS BOARD AND THE VICTORIAN RAILWAYS COMMISSIONERS)

NORTHROP J. 18 MARCH 1987 MELBOURNE

RECEIVED 2 4APR 1987

FEDERAL Cour AUSTRALIA. OF

PRINCIP REGISTRY

IN THE FEDERAL COURT OF AUSTRALIA)) EXERCISING FEDERAL JURISDICTION)))

IN BANKRUPTCY

BANKRUPTCY DISTRICT OF THE STATE OF VICTORIA

RE: EX PARTE APPLICATION BY STATE TRANSPORT AUTHORITY (FORMERLY KNOWN AS VICTORIAN RAILWAYS BOARD AND THE VICTORIAN RAILWAYS COMMISSIONERS)

COURT: NORTHROP J. DATE: 18 MARCH 1987

PLACE: MELBOURNE

EX TEMPORE REASONS FOR JUDGMENT

There is before the Court what is said to be an application to the Court seeking orders that the time for the making of the application be extended and a substantive order that the Registrar's decision to refuse to issue a bankruptcy notice, which decision is contained in the letter from the Registrar dated 13. January 1987 to the applicant's solicitors, be reviewed and the Registrar be ordered to issue the said bankruptcy notice forthwith. The document which is

said to be the application to the Court is headed:-

"IN THE FEDERAL COURT

GENERAL DIVISION

BANKRUPTCY DISTRICT OF THE STATE OF VICTORIA No. of 1986

RE: TERENCE RONALD KRUGER Judgment Debtor

EX PARTE: STATE TRANSPORT AUTHORITY (formerly known as Victorian Railways Board and The Victorian Railways Commissioners)

Judgment Creditor."

The application states that the application has been set down for hearing by the Court at 10.00 a.m. on 24 February 1987

and that the applicant intended to use an affidavit sworn by Robin John Broberg on 6 February 1987, that it was not

intended to adduce oral evidence and it was not intended to

serve the application on any person.

The State Transport Authority, although not called an applicant in the application, is to be treated as an applicant making an ex parte application to the Court. Its solicitor seeks to rely upon sub-section 14(5) of the Bankruptcy Act 1966 as conferring jurisdiction on this Court.

I read that sub-section:-

"14(5) An order or direction made or given, or an act done, by a Registrar or a Deputy Registrar under

this Act is subject to review on summary application to the Court."

The matter came on for hearing before me on 24 February 1987 and during the course of submissions a number of matters were raised. At the end of the submissions I reserved my decision on what I should do. Following further consideration I gave notice to the applicant's solicitors that I intended to relist the application for further hearing and that the Registrar in Bankruptcy should be given notice of the further hearing to enable him to appear and make submissions on a number of matters raised at the earlier hearing. Today, the Registrar appeared by counsel and I am

indebted to counsel for so appearing and making submissions.

A preliminary issue immediately arises as to whether there is any application before the Court. This is based upon the absence of any serial number being given to the application itself. The application is said to be a Court document but there is nothing to show in what capacity it has been used and just what it is. It is a piece of paper which has got no identifying serial number on it at all. The Bankruptcy Act and Rules do make provision for applications and the relevant rule is rule 102. That rule, by sub-rule

(1) provides:-

"102(1) Subject to the Act and to this rule, an application to the Court that is not required to be made by petition shall be instituted by filing an application, in accordance with Form 45."

ee

The form of the application presently before the Court

complies with that, but Form 45 does not set out what should be in the title to the application. In order to ascertain

that, one must turn to rule 5, sub-rule (1) which provides:-

"5(1) A document filed with, or issued by the office of a Registrar in Bankruptcy in relation to a proceeding instituted in the Court shall be intitled in accordance with Form 1."

Form 1 to the Rules prescribes the title to be used. It

includes a provision for a serial number or identification number to be inserted. By way of interest, a similar provision is prescribed in relation to documents before the Registrar himself, see rule 5(2) and Form 2. In ail cases it is necessary that there be on the document the serial or identifying number by which the matter can be recognised and

acted upon.

In the present case, there is nothing to show that the documents were infact filed with the Registrar and although I refused leave to the applicant to call oral evidence as to what occurred, I am prepared to accept, for the purposes of these reasons, that the documents were in fact given to the Registrar and somehow came before the Court. But in my opinion, a consideration of them discloses that they do not comply with the requirements of the Act and the Rules and therefore, in law, there is nothing before the Court on which to act. Accordingly, I propose to refuse the application on that ground.

In so doing, I want to make it clear that the procedures proposed by the applicant, here called the judgment creditor, do raise very difficult and important questions. They have been discussed during the course of submissions, both on 24 February and today. One of the more important ones is the question of what is the nature of the duty or powers of the Registrar when a person applies to the Registrar for the issue of a bankruptcy notice. This question involves a

consideration of the nature of the office of the Registrar in Bankruptcy which has been discussed in a number of authorities; the nature of the powers or duties conferred by rule 7 and rule 8 of the Bankruptcy Rules and the forms to those rules, as well as section 41 and in particular sub-section (1) and sub-section (3) of the Bankruptcy Act, and in particular paragraph (b) of sub-section (3). Prima facie it appears that provided an application for the issue of a bankruptcy notice is in the required form and, as in this case, is based upon a certificate of the judgment or order under the seal of the Court or under the hand of an officer of the Court, being the judgment debt upon which the bankruptcy notice is founded, see rule 7, sub-rule (2), paragraph (iii), and, looking at the form of the application for the bankruptcy notice, "the application states that execution of the final judgment or order had not been stayed at the time of the making of this application," the question is raised whether the Registrar

has any power to refuse to issue the bankruptcy notice.

Generally see *Re Moss; Ex parte Tour Finance Ltd.* (1969) 13

F.L.R. 101 and *Re Maddox; Ex parte The Debtor* (1979) 24

A.L.R. 279. Compare *Re The Bankruptcy Act 1966; Ex parte*

Commercial Banking Co. of Sydney Ltd. (1979) 23 A.L.R. 522 and *Re Application by Coast Securities No. 9 Pty. Ltd.; Ex*

parte Prapnell (1985) 7 F.C.R. 293 where the question under

consideration, although relevant, was, apparently, not considered. It is quite clear that a bankruptcy notice of itself has no effect. It is to be served upon the judgment debtor; it may never be served upon the judgment debtor; if it is served, the judgment debtor is able to apply to the Court to have the bankruptcy notice set aside. As against this, it should be remembered that under paragraph (b) of sub-section (3) of section 41, a bankruptcy notice shall not be issued in relation to a debtor if at the time of the application for its issue, execution of the judgment or order

to which it relates has been stayed.

If the Court is able to express an opinion on proceedings such as those which were attempted in the present case at which no other party has been added, either the Registrar or the debtor, it could lead to difficulties if subsequently the debtor seeks to challenge the bankruptcy notice on the very point on which the Court has expressed an

opinion.

ee

Further, what is being sought in the present

application is an order directing the Registrar to do

something, namely to issue a bankruptcy notice. Yet the person to whom the order is sought to be directed had not been joined as a party to those proceedings, and the question of whether, in those circumstances, a Court should hear and determine the application does, of itself, give rise to

difficulties.

In addition to that, the question has been raised as to whether, where the Registrar has refused to issue a bankruptcy notice, that constitutes an order or direction or an act done by a Registrar within the meaning of sub-section

14(5) of the Act.

There seems no doubt that in a case like this, if

the Registrar refuses to issue a bankruptcy notice, he may

well be liable to a writ of mandamus issued by this Court, or the decision upon which that refusal is based could be made the subject of review under the Administrative Decisions

(Judicial Review) Act 1977, but these matters need not be

considered further.

All these matters which I have mentioned so far go to the very foundation of the operation of the Bankruptcy Act, the position of the Registrar in Bankruptcy, the

relationship between the Registrar and the Court and what should be done in a case like this.

These are all matters

which would need to be considered if the matter comes on for

ow

hearing before the Court. This leaves aside altogether what might be said to be the merits of the case, whether in this case or not the judgment debt relied upon has been stayed or not. I have not heard submissions on that point on behalf of the Registrar. It may well be that the Registrar is placed in a difficult position in making submissions on the merits

raised by that matter. He could be seen as either supporting

the creditor or the debtor, depending on what submissions he makes. In any event, whatever view the Court expresses, or the Registrar expresses for that matter, those views cannot bind the debtor who has not been heard. As I said earlier, the mere fact of the Court expressing an opinion on those

Matters could be embarrassing in subsequent proceedings in

which the debtor is a party.

Although I propose to refuse the application at the present time, I indicated during the course of argument that there was nothing to prevent the State Transport Authority from either renewing or making a fresh application to the Registrar for the issue of a bankruptcy notice, or taking out an application under sub-section 14(5) seeking orders of review against the Registrar. The State Transport Authority would need to determine whether it would take the risk of proceeding ex parte or not, or upon notice, or upon making the Registrar a party to that application. If it does join the Registrar as a party, the Court will then be in a position of expecting submissions to be made both by the applicant and by the Registrar on all these questions. To

expedite time, that could possibly be done if the matter came

cay

before the Court as presently constituted, in that the submissions already made, which will be transcribed, could be repeated, but giving the parties leave to add any further submissions or lead any further evidence desired to be made

or led at the hearing of that application.

What I have said in this case so far goes to some fundamental matters of practice in the office of the Registrar in Bankruptcy. It affects also the practice of this Court and it is important that this is an area that should be clarified sometime or other. I see grave difficulties in deciding or expressing a view on any of those matters on the proceedings instituted by what I have held to be an invalid document.

There being nothing before the Court, I refuse the application.

I certify that this and the eight (8) preceding pages are a true copy of the reasons for judgment herein of the Honourable Mr. Justice R.M. Northrop.

Associate .. <hamu.?. AQWiOD.... ; 18 March 1987

Date of Hearing Judgment Delivered . :

Counsel for State Transport Autnsrity

Solicita Transpor

Counsel for Registrar in Bankruptcy :

Signed . Sha. 2. Ladacw

18 March 1987

ATTACHMENT A

FR: DM PAPTE APPLICATION BY STATE TRANSPORT AUTHORITY {PORMERLY KNOWN AS VICTORIAN - RAILWAYS BOARD AND THE VICTORIAN RAILWAYS COMMISSIONERS)

18 MARCH 19987

18 MARCH 1937 MR. T. IRLICHT

MESSRS. IRLICHT & BROBERG, 414 LONSDALE STREET, MELBOURNE. VIC. 3000

Mm. R. BOADEN

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/1987/1987FCA0194.pdf>

CASE PAGE <https://chat.esheria.ai/case-law/australia/ex-parte-application-by-state-transport-authority-1987-fca-194-1987>

Prepared on 26 October 2026 · Esheria