

AUSTRALIA / JUDGMENT

Johnson, K & D. [1987] FCA 57

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IN THE FEDERAL COURT OF AUSTRALIA

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CATCHWORDS

BANKRUPTCY - application for annulment - meaning of

"sequestration order ought not to have been made" -

distinction between facts existing at time of sequestration

order and facts later coming into existence - exercise of

discretion to annul the bankruptcy.

Bankruptcy Act 1966 ss.52(2)(a), 154(1)(a).

Re Scott (1975 6 A.L.R. 558

Re Griffiths; Ex parte Huntley (1892) 3 B.C. (N.S.W.) 6

RE; KENNETH JOHNSON and DIANNE JOHNSON

NO. W 1746 OF 1986

Jackson J.

Sydney

5 February 1987

IN THE FEDERAL COURT OF AUSTRALIA

GENERAL DIVISION

BANKRUPTCY DISTRICT OF THE STATE OF

NEW SOUTH WALES AND

THE AUSTRALIAN CAPITAL TERRITORY

RE

CORAM: JACKSON J.

DATE: 5 February 1987

PLACE: Sydney

No. W 1746 of 1986

KENNETH JOHNSON and

DIANNE JOHNSON

Applicants

MINUTES OF ORDER

THE COURT ORDERS
THAT:

1. The bankruptcies brought about
order made in the case of each
be annulled.
24 November 1986,

Note:

Settlement and entry of orders
124 of the Bankruptcy Rules.
by the sequestration
of the applicants on
1s dealt with in Rule
IN THE FEDERAL COURT OF AUSTRALIA
GENERAL DIVISION
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)
)
BANKRUPTCY DISTRICT OF THE STATE OF) No. W 1746 of 1986
)
NEW SOUTH WALES AND)
)
)
THE AUSTRALIAN CAPITAL TERRITORY
RE: KENNETH JOHNSON and
DIANNE JOHNSON
Applicants
CORAM: JACKSON J.
DATE: 5 February 1987
PLACE: Sydney

REASONS FOR JUDGMENT

The applicants are husband and wife who have at all material times carried on a business in partnership involving the supply of parts and installation of equipment associated with the conversion of motor vehicles to the use of gas as

fuel.

2.

The applicants were made bankrupt by a sequestration order made on 24 November 1986. They were not present or represented at the hearing of the creditor's petition which led to the making of the sequestration order, and it may be that their lack of diligence in that regard in relation to their own affairs was contributed to by the fact that on 16 August 1986 the male applicant had suffered relatively serious injuries in a motor accident. Whatever be the reason for the failure of the applicants to oppose the making of the sequestration order, I am satisfied that if the applicants had placed before the court on that occasion the true facts as to their financial situation, those facts would have demonstrated

that, in terms of s.52(2)(a) of the Bankruptcy Act 1966, the applicants were then able to pay their debts.

In these circumstances the applicants, relying on s.154(1)(a) of the Bankruptcy Act, applied for an order annulling their bankruptcies. s.154(1)(a) provides relevantly that:-

Where the court is satisfied "that a sequestration order ought not to have been made", the court may make an order annulling the bankruptcy.

As Lucas J. said of the part of s.154(1)(a) to which

I have referred in *Re Scott* (1975) 6 A.L.R. 558 at 559:-

"And it has been remarked that these are words of wide import and one test which has been applied from time to time is that the matter should be considered as if all the true facts as shown in the application for the annulment had been before the court when the sequestration order was made."

See too *Re Griffiths; ex parte Huntley*, (1892) 3 B.C. (N.S.W.)

6. In *Re Scott* (supra) Lucas J. drew a distinction between facts existing at the time of the making of the sequestration order but not then before the court and facts later coming into existence.

In the present case the relevant facts fall into the former category, and I am satisfied that the case is one falling within the relevant part of s.154(1)(a). The question which then arises is whether I should exercise the discretion conferred by s.154(1)(a) in favour of the bankrupts. In this regard it seems to me that the applicants have been relatively cavalier in their treatment of the proceedings in the Local Court leading to the judgment debt and in this court. At the same time, however, I think it likely that the serious injuries from which the male applicant suffered have probably played a part in leading to the making of the sequestration orders. I propose to exercise my discretion in favour of annulling the bankruptcies and I shall hear the parties as to the appropriate form of order.

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