

AUSTRALIA / JUDGMENT

Re Gazzoli, D.N. [1987] FCA 59

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CATCHWORDS

Bankruptcy - application for an order of discharge - large debts with little or no contribution - Bankrupt for little more than half the statutory period - chance more more remunerative employment - unexplained interest component in income tax return of wife - exercise of discretion to

discharge.

Bankruptcy Act 1966 ss.150(1)(c), 149(2)(b)

Re Kersten (1986) 65 A.L.R. 372

RE: DAVID NICHOLAS GAZZOLI No. W.617 of 1985

Jackson J. Sydney 17 February 1987

IN THE FEDERAL COURT OF AUSTRALIA GENERAL DIVISION

BANKRUPTCY DISTRICT OF THE STATE OF

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) No. W.617 of 1985 NEW SOUTH WALES AND THE AUSTRALIAN)

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CAPITAL TERRITORY

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RE: DAVID NICHOLAS GAZZOLI Debtor CORAM: Jackson J. DATE: 17 February 1987 PLACE: Sydney REASONS FOR JUDGMENT JACKSON J.

The applicant was made bankrupt upon his own petition on

10 July 1985 and now applies under s.150(1) of the Bankruptcy Act

1966 for an order of discharge. No public examination of the bankrupt has been held and the basis on which the jurisdiction of the Court to make an order of discharge is invoked is s.150(1)(c), namely that more than twelve months has elapsed

Since the date of the bankruptcy.

The application for an order of discharge is opposed by the Deputy Commissioner of Taxation who is a creditor of the bankrupt's estate in the sum of \$200.00 in respect of unremitted tax instalment deductions in respect of the year ended 30 June 1983 and \$15,963.65 in respect of unremitted tax instalment

deductions in respect of the following year. There is also a

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claim for additional tax for late payment in the sum of

\$4,459.54.

Prior to the bankruptcy the bankrupt had been engaged in the hotel business. He had operated a leasehold hotel in Alexandria prior to September 1981 and from the sale of that had received net proceeds of approximately \$20,000.00. In November 1981 he and his father became directors and equal shareholders in Pijili Pty. Ltd. which in March 1982 purchased the freehold of a hotel at Surry Hills for \$470,000.00, an amount provided primarily by a first mortgage of \$360,000.00 by the Hooker Property Trust and also by a second mortgage to the ANZ Banking Group Limited of \$40,000.00, repayment of which was guaranteed by

the bankrupt.

That hotel was unprofitable and in October 1984 the first mortgagee entered into possession of the property which was sold for \$440,000.00. The first mortgage was discharged in full from those proceeds but there was a shortfall on the second

mortgage.

In the interim, namely in October 1982, the bankrupt, his father and one Anthony Smith purchased the goodwill, leasehold and fixtures and fittings of the Willoughby Hotel at Willoughby for \$404,000.00. It had been intended that another

man, Joseph Williams, would be a fourth equal partner in the

venture but Williams died just before settlement.

The full price of \$404,000.00 was provided by ANZ Banking Group Limited and Tooth & Co. Limited, each of which provided \$202,000.00. To secure the advance by ANZ Banking Group Limited, it was given mortgages over Smith's house property at Cammeray, a house at North Sydney and a home unit at Nelson Bay owned by the bankrupt's father and also a house at Lindfield

owned by the bankrupt.

The bankrupt has deposed to the fact that the bank realised a total of \$495,000.00 from the realization of those securities and also that there remains a shortfall due to the bank of \$196,855.00.

The security which Tooth & Co. Limited held for its loan was a charge over the leasehold of the Willoughby Hotel together with a bill of sale over the business assets. Apparently in May 1984 Tooth & Co. Limited entered into possession of the hotel, and allowed the partnership \$257,000.00 for the goodwill and furniture.

Tooth & Co. Limited claims to have a balance due to it of \$81,179.04.

The creditors of the estate, in addition to the Deputy Commissioner of Taxation, Tooth & Co. Limited and the bank, were

in the sum of approximately \$35,379.80.

The Official Trustee's report provided pursuant to s.150(3) does not draw attention to any of the matters referred to in s.150(6).

This is a case where the bankrupt incurred very large debts in respect of which he has made for practical purposes no contribution whatsoever. He has been bankrupt for only a little more than half the period of three years provided for by s.149(2)(b). His reason for seeking to be discharged from bankruptcy at this point is that if he were not bankrupt he might be able to obtain more remunerative employment than he presently has and also generally advance himself within the hotel industry in New South Wales. He is at present working for Kenbar Pty. Ltd. as the hotel manager of the Excelsior Hotel at Surry Hills and has a gross income of \$250.00 per week, and has the use of a company car. Kenbar Pty. Ltd. is a company controlled by his wife's mother and in which his wife is a shareholder. The rental of the house in which he and his family are living is \$170.00 per week and it is obvious that prima facie there is very little money to spare. It should be noted, however, that the bankrupt's

wife's income tax return for the year ended 30th June 1986 showed

that she had derived interest in the amount of \$3,683.00 in that year, a matter which the bankrupt was unable to explain in his oral evidence. The bankrupt also gave evidence that from time to time his wife's mother has assisted in payment of some of the

larger obligations such as school fees,

He has deposed to the fact that he believes his prospects of obtaining other employment within the hotel industry in New South Wales, which is his sole field of experience, is diminished due to the fact of his bankruptcy. Whilst one can readily enough accept that the fact of bankruptcy is unlikely to assist in finding employment the bankrupt has not attempted to obtain any employment since bankruptcy other than that which he presently has.

The bankrupt also contends that as a result of his experience of the financial difficulties working for the two hotel businesses he has developed asthma for which he has to use a ventolin inhaler on a regular basis. There is no medical evidence on this question and I am not prepared to treat that as

a relevant factor.

The question which then arises is whether in the exercise of the discretion conferred by s.150 (see generally *Re Kersten* (1986) 65 A.L.R. 372 at 378-381) I should accede to the application for an order of discharge.

I appreciate the hardship which may be suffered by the bankrupt and his family in the present case. I am not satisfied, however, that the case is one where I should make an order of discharge. I am, in that regard, particularly influenced by the

very significant excess of liabilities over assets, by the fact

that one of the debts unpaid is a debt for group tax and also by the fact that I am not satisfied that the effect of an order of discharge now would be significantly to benefit the family of the bankrupt.

The application is refused.

For the reasons

I hereby certify that the preceding paragraphs of the Reasons for an Order of his Honour

Mr. Justice JACKSON

Associate Judge

Date: 7-2-7

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