

AUSTRALIA / JUDGMENT

Re Hatcher, K.L. [1987] FCA 608

COURT

lack of particularity - non-attendance by trustee at
court hearing

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

Source record

,

=

JUDGMENT No. boa/ ab-

BANKRUPTCY - application for annulment - unsecured creditors paid
in full - outstanding trustee's remuneration - trustee's report -
lack of particularity - non-attendance by trustee at court hearing
- duties of trustee - fixing of remuneration by creditors after
payment in full - need to apply to Registrar to fix remuneration -
marginal assistance to Court by trustee - no costs order made.

Bankruptcy Act 1966 s.109, s.156A, s.154

Re: Daff and Daff Ex parte: The Bankrupts (Unrep. Toohey J.
9/9/85)

Re: Tarvydas Ex parte: The Bankrupt (Unrep. Toohey J. 22/11/85)

Re: Scott (1975) 6 ALR 558

Lamb v Registrar in Bankruptcy for the State of Victoria (1984) 56
ALR 521

RE: KENNETH LESLIE HATCHER

EX PARTE: KENNETH LESLIE HATCHER

No. 560 of 1985

FRENCH J.

PERTH

6 NOVEMBER 1987

IN THE FEDERAL COURT

OF AUSTRALIA

GENERAL DIVISION

BANKRUPTCY DISTRICT

OF THE STATE OF

WESTERN AUSTRALIA

No. 560 of 1985

RE: KENNETH LESLIE HATCHER

Applicant

EX PARTE: KENNETH LESLIE HATCHER

The Bankrupt

MINUTE OF ORDER

JUDGE MAKING ORDER: FRENCH J.

DATE OF ORDER: 6 NOVEMBER 1987

WHERE MADE: PERTH

THE COURT ORDERS
THAT:

1. The application is adjourned to 7 December 1987 at
9.30 am.

2. Each party to bear their own costs to date.
Note: Settlement and entry of orders is dealt with
Rule 124 of the Bankruptcy Rules.
in

IN THE FEDERAL COURT
OF AUSTRALIA
GENERAL DIVISION

)
)
)
BANKRUPTCY DISTRICT)
OF THE STATE OF)
WESTERN AUSTRALIA)
NO. 560 OF 1985
RE: KENNETH LESLIE HATCHER
Applicant
EX PARTE: KENNETH LESLIE HATCHER
The Bankrupt
CORAM: FRENCH J.
6 NOVEMBER 1987

REASONS FOR JUDGMENT

On 9 December 1985 Kenneth Leslie Hatcher became a
bankrupt pursuant to a sequestration order made on that day by
Toohey J.

The order was made on the petition of Custom Credit Corporation Limited. The act of bankruptcy
relied upon to ground the petition was failure to comply with a bankruptcy notice served on 16
April 1985, which made demand for payment of \$4,675.78,
being an amount due under a judgment of the Local Court of
Western Australia.

Kevin Gustav Karlson, having signed a consent to act as trustee, become trustee of the bankrupt
estate pursuant to

sub-s.156A(3) of the Bankruptcy Act 1966.

His creditors having now been paid in full, Mr Hatcher applies to the court for an order that the bankruptcy be annulled pursuant to para. (a) or (b) of sub-s.154(1) of the Act.

Section 154 provides in the relevant parts:-

"154(1) Where the Court is satisfied -

- (a) that a sequestration order ought not to have been made or, in the case of a debtor's petition, that the petition ought not to have been presented or ought not to have been accepted by the Registrar; or
- (b) that the unsecured debts of the bankrupt, being debts that have been proved in the bankruptcy, have been paid in full or the

bankrupt has obtained a legal acquittance of them,
the Court may make an order annulling the bankruptcy.

- (2) Where a bankruptcy is annulled under this section, all sales and dispositions of property and payments duly made, and all acts done, by the trustee or any person acting under the authority of the trustee or the Court before the annulment shall be deemed to have been validly made or done but, subject to sub-section (3), the property of the bankrupt still vested in the trustee vests in such person as the Court appoints or, in default of such an appointment, reverts to the bankrupt for all his estate or interest in it, on such terms and subject to such conditions, if any, as the Court orders.

The creditor's petition was issued out of this court on 15 August 1985, returnable for hearing on 14 October 1985. It was served on the bankrupt on 4 September 1985 and came before the Registrar in Bankruptcy on 14 October at which time it was adjourned to 11 November.

It was then further adjourned to hearing before the Registrar on 25 November. On that date Mr Hatcher filed an affidavit in which he said that he had been endeavouring to obtain finance to pay out the petitioning creditor in full. He had then realised on a term deposit in the amount of \$1,220.00 and arranged to sell his motor vehicle through Value Cars in Cannington. He said that a buyer had been arranged for the vehicle and the purchase price arrived at was about \$3,000.00. He therefore sought a further 14 day adjournment. That was granted and the matter was adjourned through to 9 December. On that day the petition was referred by the Registrar to Toohey J. who made the sequestration order.

In his affidavit filed in support of his application for annulment, Mr Hatcher explained that the proposed vehicle sale had not proceeded and that he had approached many sources of finance to raise the funds necessary to pay out Custom Credit. All of these approaches were unsuccessful. He says that his then solicitor was instructed to appear in court on 9 December to apply for a further adjournment, but that he did not appear. The

sequestration order, he said, was made without his appearance or representation.

At the time that the order was made he was earning, he said, more than enough to meet his immediate liabilities as they fell due and his assets at that stage were far in excess of his liabilities.

The trustee opposed the application for annulment. He made a report to the Court in which he alleged that Mr Hatcher was "uncooperative and reluctant to comply with his requirements as a Bankrupt".

His obligation to prepare this report is imposed by sub-rule 57(3) of the Bankruptcy Rules. By sub-rule (4) the court is entitled to have regard to it upon the hearing of the application.

Unlike the report prepared pursuant to sub-s.150(3) in the case of an application for discharge, the report on an annulment does not have prima facie evidentiary effect (cf. sub-s.150(12)).

It is nevertheless an important document, the role of which, in these proceedings, is analogous to that of the s.150 report.

Given its importance it is necessary that where the trustee alleges unsatisfactory conduct on the part of a bankrupt, he should do so with particularity so that the bankrupt is put on notice of the matters he has to meet - *Re: Daff and Daff Ex parte*:

The Bankrupts (unrep. Toohey J. 9/9/85), *Re: Tarvydas Ex parte: The Bankrupt* (Unrep. Toohey J. 22/11/85)

menen ree ww

eer eee

In my opinion the report initially filed by the trustee did not meet minimum requirements of particularity. That deficiency was exacerbated by the trustee's failure to appear in person or by counsel on the first hearing of the application in this court. Instead he sent an employee of the firm of chartered

accountants of which he is a member to appear in his stead.

It must be emphasised that the trustee's duties as an officer of this court are personal to him. Although he may employ assistance necessary to their discharge, they are ultimately

non-delegable. - see generally *Lamb v Registrar in Bankruptcy* for

the State of Victoria (1984) 56 ALR 521.

It will sometimes be that the discharge of these

responsibilities is unremunerative or uneconomic.

That however is a burden to be borne by those who

voluntarily assume the office of trustee.

At the critical point in the administration of an estate where the bankrupt applies for discharge or annulment, it is the

trustee himself or properly instructed counsel who should appear.

In this case the trustee did, at the request of the court, file a supplementary report which he misdescribed as a "Supplementary Report Pursuant to Section 150 of the Bankruptcy

Act, 1966", but which condescended to significantly greater detail

than its predecessor.

Hatcher gave evidence in relation to the report but was

not cross-examined by counsel for the trustee.

When asked by the court whether the trustee saw any question of public interest standing against the grant of the annulment, counsel responded that he did not believe so. As it emerged the only real ground of opposition from the trustee was

that part of his remuneration remains unpaid.

I turn now to the detail of the supplementary report and

the evidence of the bankrupt in relation to it.

Upon his appointment following the sequestration order the trustee wrote to Mr Hatcher by letter dated 13 December 1985 asking him to provide a statement of affairs. Despite numerous requests this was not forthcoming until 14 February 1986. According to Hatcher he spent a lot of time over that period

endeavouring to raise funds to pay out his creditors.

On 18 February 1986 his then solicitors remitted the sum of \$1,200.00 to the trustee. At the time Hatcher wanted the trustee's permission to go to Singapore. The trustee imposed the condition that the amount of \$1,200.00 which represented an estimate of the costs of the administration of the estate, should

be paid first.

Numerous requests for further contributions were made.

According to Hatcher, he had difficulty in earning money because of his bankruptcy. On 20 June the trustee wrote to his

solicitors and advised that he intended to realise his assets

which included the matrimonial home.

Two payments, one of \$2,500.00 and one of \$1,826.00 were made in July and on 15 July Hatcher advised the trustee that the balance of funds necessary to pay creditors 100 cents in the

dollar and the cost of administration would be paid by 16 July.

In the event nothing happened until after a further

threat to realise on the matrimonial home.

Hatcher claims that he sent in two further payments, one of \$1,299.00 and one of \$2,800.00, but the trustee says that he did not receive these.

Their dispute on that point does not seem to have been resolved and Hatcher produced no independent evidence to establish

that these two payments had in fact been made.

On 24 October a further sum of \$258.23 was remitted to the trustee.

On 27 November, following an approach by the trustee to Mrs Hatcher with a view to the sale of the family home, Hatcher's brother-in-law, Mr Makin, contributed the sum of \$4,212.54 to the estate.

The initial report filed by the trustee indicated that

Hatcher had 3 creditors, they being:-

(a) Custom Credit Corporation (including costs) \$6,152.23

(b) R & I. Bank \$ 989.74 {c) Health Services Credit Union \$ 355.27 \$7,497.24

His claimed assets amounted in value to \$92,896.00.

The trustee received funds totalling \$10,323.95 in the estate. Of that, \$7,497.24 was applied to pay creditors in full.

The balance went to pay bank charges of \$56.02, Rule 179 fees of \$165.78 and trustee's fees of \$2,500.00.

Trustee's fees initially claimed at \$2,501.20 were taxed and approved in the amount of \$1,742.67.

On 19 June 1987 the trustee called a meeting of the creditors, all of whom had been paid out in full. At that meeting

the following resolution was passed:-

®*That the remuneration of the Trustee, his Partners and staff hereby be approved for the period from 19th December 1986 and up to and including the 19th June, 1987 in the sum of \$1,337".

His outstanding fees, pursuant to that resolution, stand at \$575.87.

The position of the trustee with respect to his remuneration is compromised in this case by his failure to apply the proceeds of the estate to that expense of its administration before paying a final dividend to the creditors. Indeed s.109(1)(a) of the Bankruptcy Act imposes upon him an obligation to dispose of the proceeds according to the priorities there set out. But this was not done in respect of his fees.

I am not satisfied in fact that what took place on 19 June 1987 was a meeting of creditors given that all "creditors"

had been previously paid in full.

In the circumstances I am not prepared to hold that the trustee is entitled to the particular figure claimed. Of course

he is entitled to a reasonable remuneration, whether or not the creditors fix it - *Mayne v Jaques* (1960) 101 CLR 169.

There is a facility provided by s.162 of the Act whereby the trustee can apply to the Registrar to fix the remuneration. This, I think, is the course the trustee should have taken and should now take in respect of remuneration for the period from 19

December 1986.

Insofar as the application relies upon para. (a) of sub-s.154(1), it can be readily disposed of.

10.

The words of para. (a) are of wide import but require the matter to be considered having regard only to the facts as they existed upon the date when the sequestration order was made. Facts which have come into existence since that date cannot be considered for the purpose of seeing whether the order ought to

have been made - Re: Scott (1975) 6 ALR 558 at 559.

In this case there was an outstanding debt owing to Custom Credit Corporation Limited and that debt had not been paid,

notwithstanding the issue of a bankruptcy notice.

It is unfortunate that arrangements put in train by the bankrupt to attempt to satisfy the debt were unsuccessful.

That misfortune does not however render the original sequestration order one which ought not to have been made.

Insofar as the application relies upon para.(a) of sub-s.154(1), it cannot succeed.

Turning to para. (b) of sub-s. 154(1), it is evident that the necessary factual ground has been made out, namely that the unsecured debts of the bankrupt have been paid in full

although a significant period elapsed before that position was achieved.

There is no time specified in the statute beyond which a court may not order annulment, even where there has been

delay in satisfying the claims of creditors.

11.

It is plain that his bankruptcy has been a source of great personal irritation to Hatcher, exacerbated by personality differences and friction between him and the trustee and his staff.

It is, I think, at best a marginal case for annulment and had Hatcher had the benefit of legal advice he might well have brought an application for discharge instead. However, in my opinion, subject to the question of the trustee's fees, there is no reason from the creditors' point of view or from the stand- point of public interest or commercial morality why this saga

should be allowed to continue.

I am prepared in this case to annul the bankruptcy subject to the payment of reasonable remuneration to the trustee for work done since 19 December 1986. Remuneration should be fixed by the Registrar and I think a period of one month is sufficient time in which to enable the trustee to apply to the Registrar for that purpose. I will therefore adjourn the application for a period of one month and if at the end of that time the remuneration has been determined by the Registrar and the fees paid, then I will make the annulment order. It will be up to the trustee to diligently prosecute his application for fixing of remuneration. Should he fail to take reasonable steps in that regard, subject to hearing from the parties, I will be inclined to

order the annulment in any event.

12.

On the question of the costs of the application I am of the view that each party should bear his own. The trustee opposed the application, but beyond the provision of the statutory report, gave virtually no assistance to the court.

By reason of the inadequacy of his first report and his non-appearance except by an employee, the first hearing was substantially a waste of time. In the circumstances I think the

parties stand on the same footing on the question of costs and should bear their own.

I certify that this and the preceding eleven (11) pages are a true copy of the Reasons for Judgment of his Honour

Justice French.

Associate: —elorte WRAL pate = \Jovenryas (98)

The Applicant appeared on his own behalf.

Counsel for the Trustee: Mr R. Davis

Solicitors for the Trustee: Keall Brinsden

Dates of Hearing: 26 and 30 October 1987

Date of Judgment: 6 November 1987

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/1987/1987FCA0608.pdf>

CASE PAGE <https://chat.esheria.ai/case-law/australia/re-hatcher-k-l-1987-fca-608-1987>

Prepared on 24 October 2026 · Esheria