

AUSTRALIA / JUDGMENT

Re Hurt, D. v. Ex parte Hurt, D. [1987] FCA 437

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FEDERAL COURT OF

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BANKRUPTCY - registration as trustee —

accountants ~ importance of independence -

employee in firm of

relevant factors for

assessing ~ fee arrangements - further evidence required.

Bankruptcy Act 1966 sub-s.155(3A)

Bankruptcy Rules R.61A

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

ALR 521

RE: DAVID HURT EX PARTE: DAVID HURT

No. ART 1 of 1987

FRENCH J.

14 AUGUST 1987

PERTH

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18 AUG 1987

FEDERAL COURT OF

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IN THE FEDERAL COURT)

OF AUSTRALIA)

GENERAL DIVISION)

BANKRUPTCY DISTRICT)

OF THE STATE OF

WESTERN AUSTRALIA NO. ART 1 of 1987

Re : DAVID HURT

EX PARTE: DAVID HURT

Applicant

JUDGE MAKING ORDER: FRENCH J.

DATE OF ORDER: 14 AUGUST 1987

WHERE MADE: PERTH

THE COURT ORDERS

THAT:

The hearing of the motion be adjourned to Wednesday 19

August 1987 at 10.15 am.

Note: Settlement and entry of orders is dealt with in

Order 36 of the Federal Court Rules,

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EX PARTE: DAVID HURT

Applicant

CORAM: FRENCH J.

14 AUGUST 1987

REASONS FOR JUDGMENT

This is an application by David Hurt for registration as

a trustee under the Bankruptcy Act 1966.

The applicant, who resides in Australia, is 33 years of age and works as a chartered accountant. In 1975 he completed an associateship in accounting at the Western Australian Institute of Technology and graduated from that Institution with a Bachelor of Business degree. He was, admitted as a provisional member of the Australian Society of Accountants in February 1976, became an associate member in June 1978 and a full member on 14 August 1984.

He was registered under the Companies (Western Australia) Code as

a company auditor on 3 November 1982 and as a company liquidator

on 16 November 1982.

In 1975 he worked for 8 months from May to December for a chartered accountant, D.N. Allan, and undertook general

accounting functions, auditing, tax and insolvency work,

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In March 1976 he commenced employment with the accounting firm Hungerfords which later became, as it is today,

K.M.G. Hungerfords.

The applicant is the senior employee in the receivership and insolvency division of that firm.

His work since joining Hungerfords has involved the administration of both corporate and individual insolvencies. In his present capacity he supervises accountants and other employees of the firm in this area.

He is a person of good character as is attested to by the affidavits of Ross Stewart Norgard, a partner in KMG Hungerfords and Jonathan Meyer, a partner in the firm of solicitors, McPhee & Meyer, who has known him for some 5 years on a professional basis.

The Official Receiver has reported to the Court that the applicant possesses the requisite qualifications under sub-s.

155(3A) of the Bankruptcy Act, read with Rule 61A and Schedule 2 to the Bankruptcy Rules.

The Official Receiver interviewed him on 21 July 1987 and questioned him on various matters relevant to the discharge of

the duties of a trustee in bankruptcy. He was satisfied that the

applicant demonstrated a good working knowledge of the Act and a

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clear awareness of the responsibilities of a trustee appointed under it.

His enquiries also disclosed that the applicant has no criminal record. Nor is he an insolvent under administration.

I am satisfied on the evidence and in accordance with the requirements of sub~s.155(3A)(d) that the applicant is capable of performing the duties of a trustee and is otherwise a fit and proper person to be registered as such.

It is however the case that he is an émployee of the firm KMG Hungerfords and is not a partner in that firm.

The question arises whether his position with that firm will afford him the independence necessary to enable him to freely discharge his duties.

This question was addressed in a second affidavit sworn by Mr Norgard and filed on behalf of the applicant, in which he made the following statements:-

"3. Although David Hurt 1s not a partner of the firm of KMG Hungerfords, I can say that if he 1s registered as a Trustee he will be able to perform his duties to any creditors or other parties concerned in the performance of his trusteeship honourably = and independenty in respect of any administration in which he acts as Trustee.

4. I am able to assure the Court on behalf of myself and other partners of KMG Hungerfords that they,

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and also those who should join the firm as partners in the future, will not interfere nor do they intend to interfere or direct Mr. Hurt in the conduct of any bankruptcy matter, nor will they subject Mr. Hurt to any influence in deciding to give or withhold his consent to act as a Trustee in any particular case,

5. I am a Trustee in Bankruptcy and I understand what is required by law of a Trustee. I and my partners (two of whom are registered liquidators) are very much aware of the need for a Trustee to be able to perform his duties impartially and independently, without fear or favour from his employers.
6. Mr Hurt will, if he is registered as qualified to act as a Trustee, be in a position to make all decisions relating to the administration of estates, what work should be done by him, the manner in which it should be done, when it should be done, the time within which it should be completed and the staff which he may use to do it."

The question of the position of an employee trustee was addressed by the Full Court in *Lamb v Registrar in Bankruptcy for the State of Victoria* (1984) 56 ALR 521.

There the registration of a trustee was cancelled by a Judge at first instance under sub~s.155(2).

The trustee was a partner in a firm of accountants when registered, had become an employee in another firm. The application for cancellation was brought by the Registrar on the basis that he thereby lacked the appearance of being an independent person able to exercise independent judgment and that there was potential for a conflict between his duties as trustee and as an employee.

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The Full Court allowed the appeal and held that employee status did not automatically disqualify a person from office as a trustee under the Act.

Smithers ACJ, with whom Northrop J. agreed, accepted that there were grounds upon which it might be thought

employee status was incompatible with the nature of the office of trustee.

However, his Honour rejected as erroneous in law, the proposition that an employee is necessarily a person not qualified

to act as a trustee within the meaning of s.155 of the Act.

It does not necessarily follow, he held, that a registered trustee who becomes an employee thereby surrenders to

his employer his independence in relation to the performance of

his duties as a trustee.

Nevertheless it is evident from the judgment that the circumstances of the trustee's employment must be carefully considered on their merits. The following factors are relevant to

such an assessment:-

1. That the proposed trustee will not be subject to direction from his employer as to the performance of his work as a trustee - including directions as to the manner in which the work will be done and decisions to be taken in the exercise of discretion as a trustee.

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2. That the employer understands and accepts' the requirement for the trustee's independence and

undertakes to respect it.

3. That the arrangements in respect of disposition of the trustee's fees should be such as to reflect his independence - an arrangement under which trusteeship fees are paid by the trustee to his employers, may be evidence of loss of independence and raise questions of the propriety of his conduct as a trustee.

4. That both trustee and employer are aware of possible conflicts of interests between the duties of the trustee as such and his duties as an

employee.

General or vague undertakings by the employer and/or the prospective trustee will not be sufficient to satisfy the Court

that there has been a careful consideration and acceptance of the

practical problems which can arise.

In Lamb (supra) Smithers ACJ was concerned with a decision to cancel a trustee's registration and, as appears from the judgement at 530, saw an onus resting on the Registrar to show

in such a case, that the trustee had surrendered his

independence :-

„...on the evidence it does not appear that the employee will not have the necessary independence. Until or

unless it does appear that the trustee has surrendered his independence he still remains a person qualified to

act as trustee within the meaning of s.155(1) and (2).

I consider, however, that in an application for registration the onus is upon the applicant to persuade the Court

that he has all the qualities necessary for registration and, if

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he be an employee, that the circumstances of his employment are such that he will be able to discharge the duties of his office

without fear, favour or affection.

The applicant has not addressed the question of independence in his affidavit. It is one of the partners in the

firm which employs him that has done so.

I have no difficulty in accepting what he says, and so far as it goes, it is satisfactory. It indicates an acceptance by the employer of the need for the applicant's independence and freedom from internal control in relation to the conduct of estates which he may be administering. It reflects a commitment to administrative arrangements which will enable the applicant to

exercise that independence.

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I am reinforced in the acceptance of that evidence by the fact that the deponent, Mr Norgard, is himself a registered trustee and that two of his partners are registered company

liquidators,

In view of the Full Court's decision however, I consider that before finally making a determination on this application, I should hear some evidence about what, if any, arrangements have been made with respect to trusteeship fees received by the applicant and his understanding of circumstances

which, by reason of his employment, might give rise to a conflict

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requiring him to decline to accept appointment as a trustee in any particular case.

I will give the applicant the opportunity to adduce that further evidence at short notice before making any order.

I certify that this and the preceding seven (7) pages are a true and correct copy of the Reasons for Judgement herein of His Honour Mr Justice French.

Associate: Deine h WIS- pate: 14 Prt 1487.

Counsel for the Applicant: Miss F. Davis

Solicitors for the Applicant: McPhee & Meyer Mr F. O'Driscoll for the Official Receiver

Date of Hearing: 10 August 1987

Date of Judgment: 14 August 1987

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