

AUSTRALIA / JUDGMENT

Re: Smith, Peter, D. & Anor [1987] FCA 214

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CATCHWORDS

BANKRUPTCY - bankruptcy notice - extension of time for compliance - exercise of court's discretion - appeal from order creating judgment debt - appeal on technical points only.

Bankruptcy Act 1966 s.41(6A), (6C)

Re: Peter Donald Smith and Anor.

PINCUS J. BRISBANE 24 APRIL 1987

IN THE FEDERAL COURT OF AUSTRALIA ' GENERAL DIVISION) QLD BN377 of 1987

BANKRUPTCY DISTRICT OF THE SOUTHERN) DISTRICT OF THE STATE OF QUEENSLAND)

RE: PETER DONALD SMITH and PAUL DESMOND FORSYTH

Judgment Debtors

MINUTES OF ORDER

JUDGE MAKING ORDER: PINCUS J. DATE OF ORDER: 28 APRIL 1987 WHERE, MADE: BRISBANE

THE COURT ORDERS THAT:

1. The application for an extension of time for compliance filed on 27 March 1987 is dismissed;
2. The applicant pay the respondent's costs of and incidental to the application to be taxed.

NOTE: Settlement and entry of orders is dealt with in Rule 124 of the Bankruptcy Rules.

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IN THE FEDERAL COURT OF AUSTRALIA GENERAL DIVISION

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OLD BN377 of 1987

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BANKRUPTCY DISTRICT OF THE SOUTHERN DISTRICT OF THE STATE OF QUEENSLAND)}

RE: PETER DONALD SMITH and PAUL DESMOND FORSYTH

Judgment Debtors

PINCUS J. 28 APRIL 1987

EX TEMPORE, REASONS FOR JUDGMENT

In this matter, on 3 March 1987 an application was made for issue of a bankruptcy notice based upon a judgment obtained in the District Court on 13 February in the sum of 627,232.84, together with a certain amount of interest.

The judgment was obtained on an application to his Honour Judge Quirk asserting that there was no defence to an action brought in that court, and it related to the sale of the Commonwealth Hotel, Roma, effected by a contract made in July last year.

The evidence before me discloses that the contract was completed in October, but the stock was not paid for. The contract contemplated that the stock would either be valued or an agreement reached with respect to it, and the proceedings in the District Court were brought on the basis that an agreement had been reached. The judgment creditor was, of course, successful before his Honour Judge Quirk but an appeal has been launched in the Supreme Court.

The bankruptcy notice was served on 13 March 1987 and the last day for compliance was 27 March 1987, on which day application was made to this Court for an extension of time to comply with the notice; it now comes before me.

That application is based upon s.41(6A) of the Bankruptcy Act 1966 which reads as follows:

"Where, before the expiration of the time fixed by the Court or the Registrar for compliance with the requirements of a bankruptcy notice -

{a) proceedings to set aside the judgment or order in respect of which the bankruptcy notice was issued have been instituted by the debtor; or

(b) an application to set aside the bankruptcy notice has been filed with the Registrar, the Court may, subject to sub-section (6C), extend the time for compliance with the bankruptcy notice."

The provisions of subs. (6C) restrict the power of the Court to extend the time in a way which is relevant here. It is unnecessary to set out the terms of the subsection in full, but its effect is the Court is not entitled to extend the time if it is of the opinion that the proceedings to set aside the judgment have not been instituted bona fide or are not being prosecuted with due diligence. I do not hold either opinion set out under

subs.(6C) - that is, the proceedings relied on seem to me not to

fall within that provision. Those proceedings were instituted by a notice of appeal in the ordinary way and, although more perhaps might have been done to expedite the hearing of the appeal in the

Supreme Court, there is nothing before me to suggest that the appeal was instituted mala fide or that it is not being prosecuted with due diligence.

The question then arises whether under subs.(6A) I am required to extend the time for compliance. The provision uses the word "'may", which prima facie imports a discretion. The principal argument advanced by Mrs. Wolfe on behalf of the creditor, in opposition to the application for an extension, is that the appeal has no real substance. Having held, as I have, that the appeal has been instituted bona fide, it may be a possible view that that is the end of my consideration of the appeal. That is not, however, my view; I think I have a residual discretion.

The matter, which has been ably argued by Mr. Lee on behalf of the applicants, seems to depend upon two points, principally. Firstly, Mr. Lee says that his Honour Judge Quirk was wrong insofar as he held that the plaintiff before him could succeed on the basis of an agreement made on 15 January 1987, such agreement being unpleaded.

The second point which is made by Mr. Lee is that it would be argued that Judge Quirk was wrong insofar as he ignored the possibility that under the agreement, in the events which happened, the moneys did not become due until 90 days after 15 January 1987.

Without going into detail, it seems tome that the second point is very thin. The first point, however, is one which has concerned me. Although the particulars which were delivered somewhat extended the pleading, as I read it, it is a simple allegation that matters happened in accordance with the contract; it does not appear to me that that was the pleader's real case. I am not prepared to hold that there is no substance in the appeal. It is a delicate task to say anything about the merits of the appeal, in view of the fact that it is pending in another court, and I need go no further than that.

The reason why I hold, as I do, however, that the application should fail, is principally that the questions to be argued on appeal appear to me essentially of a technical character, there being, as Mrs. Wolfe said, no real dispute that some such sum as is claimed is owing.

The correspondence is not entirely clear, but the impression Tf have gained on the whole of the material is that the dispute about the value of the stock was of a peripheral kind and that the real purpose of the debtors was to gain some time. T think I am entitled to act upon that impression and to exercise my discretion against the applicants.

If they succeed in the Supreme Court, as they may do, and the judgment is set aside, then certain consequences in

favourable to them may follow in this Court. But they have not obtained any stay. As far as the law of this State is concerned, they are obliged to pay the money and it does not seem likely that they would get a stay.

If the appeal succeeds, they will be entitled to their money back, no doubt - having paid it, which they will have to do if they want to avoid bankruptcy.

Generalizing my reasons, it seems to me that, in a case where in substance the sum mentioned in the judgment is due, or some very similar sum, and the real questions raised in the appeal are merely technical, this Court should not, prima facie, extend time for compliance, although it may do so in particular circumstances. When I speak of "technical points", I have in mind, in the instant case, questions of a purely procedural character.

The application which was filed on 27 March 1987 for an extension of time for compliance is dismissed, with costs. That is, it will be ordered that the costs of and incidental to that application be taxed and paid by the applicants.

I certify that this and the 4 preceding paragraphs are a true copy, of the reasons for judgment given by His Honour

... of Mr Justice Pincus x

Associate Dated 27 April 1987

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