

AUSTRALIA / JUDGMENT

Re Temple, N.P. [1987] FCA 30

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IN THE FEDERAL COURT OF AUSTRALIA

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IN THE FEDERAL COURT OF AUSTRALIA

GENERAL DIVISION

BANKRUPTCY DISTRICT OF NEW SOUTH WALES No. B4535 of 1986

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AND THE AUSTRALIAN CAPITAL TERRITORY

RE: NEVILLE PATRICK TEMPLE

MINUTES OF ORDER

Judge making order: Beaumont, J.

Date order made: 5 February 1987

Where made: Sydney

THE COURT ORDERS

THAT:

1. The application by the debtor, Mr. Neville Patrick Temple, to set aside bankruptcy notice No. 4535 of 1986 be dismissed.

2. The time for compliance with such notice be extended for a period of 14 days.

3. The applicant pay the judgment creditor's costs.
Note: Settlement and entry of orders is dealt with in Bankruptcy Rule 124.

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IN THE FEDERAL COURT OF AUSTRALIA

GENERAL DIVISION

BANKRUPTCY DISTRICT OF NEW SOUTH WALES No. B4535 of 1986

AND THE AUSTRALIAN CAPITAL TERRITORY

RE: NEVILLE PATRICK TEMPLE

CORAM: Beaumont, J.

DATED: 5 February 1987

REASONS FOR JUDGMENT

The applicant, Mr. Temple, has applied to set aside a bankruptcy notice served on him on 20 November 1986 by his former partner, Mr. Wily. Mr. Wily claims that the sum of \$9027.25 together with interest is due by the applicant to him under a final judgment obtained in the District Court on 30 July 1986. The background to the matter is as follows. By articles of partnership dated 12 November 1984 the judgment creditor and the applicant agreed that they had commenced to carry on business as chartered accountants in partnership as from 1 July 1984. By clause 10 of that agreement, the applicant was entitled to receive as his share of the profits of the partnership "such sum of money as is equal to the amount calculated in accordance with the formula set forth in the Schedule hereto." By that Schedule, the share of profits payable to the applicant with respect to the year 30 June 1985 "shall be equal to the proportion that...(\$48,000) bears to the profits as disclosed in

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{certain] profit and loss statements for the year ended 30 June 1984" subject to certain specified adjustments not here material. A dispute having arisen as to the amount of the share of profits payable to the applicant, the matter was orally referred by the parties to arbitration. The arbitrator, Mr. Winlaw, by his award dated 28 February 1986, for the reasons he then gave, determined that the division of profits payable for the relevant period to the applicant and the judgment creditor respectively was

\$23,349.00 and \$153,274.

The judgment creditor sued on the award in the District Court and, as has been said, obtained default judgment against

the applicant on 30 July 1986.

The applicant now seeks to challenge the award and, in doing so, seeks to go behind the default judgment. It is submitted on his behalf that the award is liable to be set aside for a number of errors of law said to appear on the face of the award.

The principal argument advanced on behalf of the applicant was that the arbitrator erred in law in failing to write back into the relevant profit and loss statements certain amounts paid by way of salary to the judgment creditor. In my opinion, no error of law has been demonstrated in this respect. The question is one of construction of the provisions of the

Schedule. In its terms, the Schedule makes the applicant's

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entitlement dependent upon the profits which were in fact disclosed in the profit and loss statement, even if, as was the case, those statements were not prepared until after 12 November

1984. There is no suggestion here that these statements were vitiated by fraud or collusion or bad faith in any relevant sense. It is true that the arbitrator expressed the opinion that, if appropriate, he was empowered to amend the profit and loss statements so as to reflect a true and fair view of the affairs of the entity concerned. However, in respect of the item now in question, namely, a suggested adjustment in respect of the judgment creditor's salaries, the arbitrator considered that, on the merits, no adjustment was necessary. It follows, in my view, that no relevant error of law has been demonstrated in this regard. In other words, I think that as a matter of construction of the Schedule, the arbitrator arrived at the correct legal result, that is to say, that the applicant's share of profits was to be determined, in the absence of bad faith, by reference to the profit and loss statements taken at their face

value.

Then it was said that the arbitrator also erred in law by failing to deal with the question of costs before him with the result, it was argued, that the award was liable to be set aside on that ground alone. In my opinion, any such failure did not vitiate the award. The appropriate relief to be granted by the court in such a situation is not to set aside the award but to

order that the matter of costs be remitted to the arbitrator (see

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Commercial Arbitration, Sharkey Dorte, at pp.256-7).

I propose to dismiss the application but to extend time for compliance with the Bankruptcy notice for a further period of

14 days.

I certify that this and the

preceding three (3) pages are a true copy of the Reasons for Judgment herein of his Honour Mr. Justice Beaumont.

- Associate Dated: 5 February 1987 Counsel and Solicitors Mr. D.J. Russell instructed by for Applicant: Messrs Paul V. Wakim & Co. Date of hearing: 5 February 1987

Date Judgment Delivered: 5 February 1987

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