

AUSTRALIA / JUDGMENT

Re Hibbard, N.K. v. Ex parte Playroom Pty Ltd [1987] FCA 776

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

IN THE FEDERAL COURT OF AUSTRALIA GENERAL DIVISION

BANKRUPTCY DISTRICT OF THE SOUTHERN DISTRICT OF THE STATE OF QUEENSLAND

JUDGMENT No. 3B).

to a

ww

QLD P1606 of 1987

~~

RE: NORMAN KINGSLEY HIBBARD EX PARTE: PLAYROOM PTY. LTD.

v7) F&ar Tag a\ ae GTM oN 4, \ MINUTES OF ORDER JUDGE MAKING ORDER: PINCUS J. DATE
OF ORDER: 18 DECEMBER 1987 WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1.

The petition for sequestration will be adjourned generally, with liberty to either party to apply to have the matter listed on reasonable notice, provided that if no such application is made in the meantime, the case shall be listed for mention on Monday, 21 March 1988 at 9.30 a.m.

Costs of today be the petitioning creditor's costs in the proceedings.

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

iad

IN THE FEDERAL COURT OF AUSTRALIA) GENERAL DIVISION

~

QLD P1606 of 1987

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

RE: NORMAN _ KINGSLEY HIBBARD EX PARTE: PLAYROOM PTY. LTD.

PINCUS J. 18 DECEMBER 1987

EX TEMPORE REASONS FOR JUDGMENT

This is a creditor's petition for a sequestration order based upon a judgment in the Supreme Court of Queensland given on 18 September 1987 in a sum slightly in excess of \$1 million. The judgment debtor has instructed his solicitors to appeal and they have set the processes of appeal in train. However, there seems to have been some dilatoriness, which is referred to below. The judgment debtor says that the petition should be adjourned pending the resolution of the appeal, and the creditor, of course, says a

sequestration order should be made now.

The first question is: what is the proper principle to be applied? In a somewhat similar case, namely, *Re Lewin and*

Glasson; *ex parte Milner* (1986) 67 A.L.R. 591, I said in effect

that differences between our statute and that which was in force

in England when *Ex parte Heyworth*. In *re Rhodes* (1884) 14 Q.B.D.

49 was decided bore upon that question.

However, since *Re Lewin and Glasson*, the Full Court has had the opportunity to discuss the matter in the case of *Ahern v. Deputy Commissioner of Taxation* (unreported, 15 September 1987). There, the petitioning creditor was the Deputy Commissioner, who had obtained judgment for income tax, provisional tax and additional tax in a very large sum. An application was made for adjournment of bankruptcy proceedings; that was refused, but the Full Court on appeal set the sequestration order aside and made

certain other directions.

At p.21 their Honours said:

"It is also well established that in general a court exercising jurisdiction in bankruptcy should not proceed to sequester the estate of a debtor where an appeal is pending against the judgment relied on as the foundation of the bankruptcy proceedings provided that the appeal is based on genuine and arguable grounds."

The reasons then refer to authority, including *Ex parte Heyworth*.

In *re Rhodes*.

Mr. Lyons, for the creditor, appeared to suggest that I should not, perhaps, follow the principle laid down by the Full

Court but should follow my own previous decision. He hesitated, however, to expound the basis of that submission and it seems to me clear that I should apply what the Full Court has said. The questions, therefore, are three: firstly, are there genuine and arguable grounds; secondly, if there are, is there any special circumstance in the case to take it outside the general rule laid down by the Full Court; thirdly, if there is not, should any order be made designed to give the creditor protection.

As to the first question, whether there are genuine and arguable grounds, I am of opinion, clearly enough, that there are. Mr. Lyons submitted that the appeal will probably fail. One is hesitant in expressing an opinion on such a point; It is a delicate task, particularly when the nature of the appeal has been argued only briefly. I feel obliged, however, to say that I should have thought the appeal has its difficulties. Nevertheless, I am of the view that there are arguable grounds

which may be described as genuine, and that that is so appears simply from a reading of the careful reasons which were given.

The second question, then, is whether there is any circumstance taking the case outside the general rule. A number of matters were relied upon by Mr. Lyons. He said that the appeal records had not been prepared, nor ordered. That seems to be so, and apparently the reason is that, although money has been provided, the solicitor for the judgment debtor has not taken the necessary steps.

The second point made by Mr. Lyons was that, on the evidence, the position of the creditor might well be in jeopardy, because the debtor may be insolvent. It is not possible for me to assess the state of solvency of the debtor on the material I have, but he plainly has a serious liquidity problem.

The third point made by Mr. Lyons is that nothing is offered to show that the creditor will suffer no prejudice if the petition is adjourned. That seems to me a point well taken, but it is, of course, common enough that prejudice is suffered by adjournment of a petition.

I should add, however, that there is nothing before me to suggest that the debtor is attempting to spirit assets away, pending the resolution of the appeal. If there were such evidence, that might well constitute an exceptional circumstance,

and indeed is a means of reconciling the actual result in *re Lewin* and *Glasson* with the rule as laid down by the Full Court.

Mr. Lyons also referred to the fact that there was an attempt to evade service of the bankruptcy notice. That is a matter which, in my opinion, should be taken into account against the debtor, but does not seem to me of sufficient weight to take

the case outside the general rule.

Mr. Bland, for the debtor, said from the bar table that it was intended to order the appeal record immediately, and that any risk as to excessive delay could be met by adjourning the case

generally, rather than to a specific date, with liberty to restore

it.

I have some concern about cases of this sort, in that it can operate unfairly to a petitioning creditor, to require it, in general, to wait until the resolution of appeal proceedings.

During that period its chance of recovery may deteriorate greatly.

However, if one simply asks the question, does this case appear to fall within the general rule, the answer, in my opinion, must be yes. It is, speaking broadly, an ordinary case where a genuine appeal against a judgment has been brought which, if successful, may extinguish the judgment debt. Nothing relied upon by Mr. Lyons seems to me to be strong enough to take the case outside the

general rule.

I therefore propose to accede to the application for adjournment, and to do so in the way suggested by Mr. Bland. That is, the petition for sequestration will be adjourned generally, with liberty to either party to apply to have the same listed on reasonable notice, but with the proviso that, if no such application is made in the meantime, the case shall be listed for mention on Monday, 21 March 1988, at 9.30 a.m., before me, I select that date simply as being three months away, approximately. By then, the progress of the matter in the Supreme Court should be better known. I propose to make the costs of today the

petitioning creditor's costs in the proceedings.

I certify that this ends the 4 paragraphs

ster. tee car F-55957 eros :

Associat

Dated {¢ December F&F

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/1987/1987FCA0776.pdf
CASE PAGE	https://chat.esheria.ai/case-law/australia/sequestrationorder-court-unknown--6a46eed6258e2a8706e531ff

Prepared on 25 October 2026 · Esheria