

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

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VICTORY FOR COMMON SENSE IN BANKRUPTCY NOTICES

by *Christopher Wood*

After a long period of uncertainty and competing Federal Court decisions, the High Court has resolved the operation of s.306 of the Bankruptcy Act 1966. In *Adams v Lambert* (2006) 225 ALR 396; [2006] HCA 10, the Court dealt with an appeal from a decision to dismiss a bankruptcy petition on the basis of a minor error.

The error considered by Gyles J at first instance was the incorrect provision concerning interest. His Honour considered himself bound by *The Australian Steel Company (Operations) Pty Ltd v Lewis* (2000) 109 FCR 33, a first instance decision of a special bench of five members convened for the purpose of resolving the issue. The High Court adopted the reasoning of the minority in that case.

The essential aspect of the High Court's reasoning was that s.306 of the Act was included for a specific purpose, which would not be given effect to if minor errors such as this were to invalidate bankruptcy notices. Section 306 of the Bankruptcy Act 1966 provides:

"Formal defect not to invalidate proceedings

- (1) Proceedings under this Act are not invalidated by a formal defect or an irregularity, unless the court before which the objection on that ground is made is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court.
- (2) A defect or irregularity in the appointment of any person exercising, or purporting to exercise, a power or function under this Act or under a personal insolvency agreement entered into under this Act does not invalidate an act done by him or her in good faith."

Although the High Court's decision moves away from the torturous exactitude imposed by some Federal Court authorities, it also serves as a reminder that the legislative framework calls for strict adherence to the forms and procedures for bankruptcy. As a practical matter, it is often useful not to claim interest in a bankruptcy notice. Errors in calculation, or in the completion of the form, often result in overstatement. Failing to claim interest in the bankruptcy notice does not rob the applicant of its entitlement: in the event that the sequestration order is made, the applicant is entitled to prove in the bankruptcy for the full amount of its claim including interest.

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CONSTITUTIONAL LAW – New South Wales v Commonwealth of Australia [2006] HCA 52: the Work Choices Case

The High Court by majority upheld the constitutional validity of the Work Choices legislation. The majority applied the constitutionally orthodox approach of the Engineers Case. Their Honours said:

“What was discarded in the Engineers' Case was an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the Constitution”.

Their Honours rejected the states' argument that the corporations power is limited by reference to a distinction between the external and internal relationships of corporations.

A law is a law with respect to foreign, trading or financial corporations if it singles out those corporations as the object of its statutory command or if it is directed to protecting those corporations from conduct intended and likely to cause loss or damage to the corporation.

By Tom Brennan

TORT – Nuisance – Removal of support – Damages: Roberts v Rodier [2006] NSWSC 282

Where a plaintiff claims relief in respect of the removal of support from adjoining land which causes damage to the plaintiff's land the cause of action is for breach of the duty of care under s 177 of the Conveyancing Act 1919. Campbell J confirmed that the provision, inserted in 2000, abolished the common law action for nuisance for this type of damage.

Roberts's case also discusses the general principles applicable to the assessment of damages in tort for property damage. On the facts, the plaintiff was only entitled to have her land restored to its pre-existing condition, even though that condition was defective.

By Gary Doherty

INTERNATIONAL LAW – Jones v Ministry of the Interior of Saudi Arabia [2006] 2 WLR 1424; [2006] UKHL 26: State immunity for torture

Once again the House of Lords has been called upon to consider the relationship between the State Immunity Act 1978 (UK) ('the Act') and the Torture Convention 1984 ('the Convention'). Though unlike the celebrated decision in *R v Bow Street Magistrate, Ex parte Pinochet (No 3)* [2000] 1 AC 147 which rejected claims of

immunity for torture as inconsistent with the Convention, Jones considered whether Saudi Arabia and its state officials were immune from civil claims commenced in the United Kingdom alleging torture. While the House unanimously upheld the claims of immunity under the Act, Lord Bingham of Cornhill and Lord Hoffman acknowledged a growing body of criticism of the continued recognition of state immunity under international law.

By Benjamin Kasep

RECEIVERS - White v Huxtable (2006) 57 ACSR 435; [2006] FCA 559: Receiver dealing with entity associated with appointor in respect of charged property

A mortgagee cannot exercise a power of sale in favour of itself. However, as this case reminds us, the position is different in the case of a receiver appointed under a charge, who proposes to sell a security asset to the appointor or an entity associated with the appointor. The court was prepared to give a direction under s 424 of the Corporations Act 2001 to the effect that it would not be unlawful for the receiver to enter into the proposed sale solely by reason of the relationship between the purchaser and the appointor. See also *Re Vartex Petroleum Industries Pty Ltd* (Unreported, NSWSC, Hodgson J, 17 August 1989); *Re One.Tel Networks Holdings Pty Ltd* (2001) 40 ACSR 83 and *Re Actwane Pty Ltd* [2002] NSWSC 572.

By Edmund Finnane

PRACTICE POINTS

Expert Witnesses in Common Law Actions

- An expert report should be a refined document.
- Generally speaking, the expert should not be provided with copies of the statements of lay witnesses; privilege in them may be waived.
- Instead, the expert should be given a set of relevant factual assumptions; namely, the facts the lawyer believes can be proved in due course at the trial.
- It is not the expert's role to be or be seen to be an advocate or "mouth piece" of a party.
- The perception of a bias is magnified by the wholly unsatisfactory practice of publishing to the opponent the expert's critique of the work of the opponent's expert. Such material should rather be used by counsel to cross examine the opponent's expert.

By John Graves SC

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