Adams v Lambert (2006) 80 ALJR 679, 225 ALR 396

In 2002, Justice Gyles noted that a case before him exemplified 'the minefield that bankruptcy law has become for judgment creditors since the decision in *Australian Steel Co* [(2000) 109 FCR 33]'. In that full court decision, his Honour had been in dissent with Lee J.

In 2004, the issue came before his Honour again. His Honour duly applied *Australian Steel*, and the full court of the Federal Court duly dismissed the appeal. Now, the High Court has overruled *Australian Steel*, agreed with the analyses of the dissentients, and remitted the matter to Gyles J for final determination.

The High Court doesn't hear many appeals on defects in bankruptcy notices. The chastened creditor will usually wear the first instance defeat and start again. Fortunately for creditors, Mr Adams persisted and the High Court was prepared to grant leave, notwithstanding the likely absence of a contradictor. And, as things turned out, there was no oral argument from Mr Lambert.

The High Court gave its attention to defects in notices in 1955, when a Mr James took on that perennial creditor, the commissioner of taxation, and succeeded: see 93 CLR 631. In 1988, in *Kleinwort Benson Australian Ltd v Crowl*, it returned to the subject, this time allowing – over a strong and oft-cited dissent by Deane J – the creditor's appeal: see 165 CLR 71.

At first glance, the issue is a straightforward one. While the courts are mindful of the consequences of bankruptcy and have long insisted on strict compliance with the requisites of a notice, section 306(1) of the *Bankruptcy Act 1966* may allow relief upon consideration of whether the defect before the court has occasioned substantial injustice which is irremediable.

The authorities have long provided a test, namely whether the defect could reasonably mislead the recipient of the notice as to what was necessary to comply with it. Also, at least since *Crowl*, there has been separate test, whether the defect amounts to a failure to meet a requirement made essential by the Act.

It was the second test which provided the main difficulty identified by various full federal courts, including that in *Australian Steel*. The common factual problem to the full Federal Court cases and *Adams v Lambert* was the inclusion of an incorrect reference to the relevant statutory source for post-judgment interest. Prior to the High Court's judgment, this defect invalidated a notice.

As the court noted, 'the calculation of post-judgment interest is a well-known source of difficulty for some drafters of bankruptcy notices'. In the result, it came down firmly in favour of the minority in *Australian Steel*. The effect of the majority view, it said, was 'to attribute to the legislature an overwhelming preference for form over substance'.

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Where to now? Counsel appearing for creditors the victims of some defect or other in their notices will robustly urge their Honours' observation. Counsel appearing for debtors will no doubt observe that their Honours have made no change to the principles, they have merely disavowed the application of them by the Federal Court to a particular fact situation.

By David Ash