HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

COLIN ADAMS APPELLANT

AND

MATTHEW LAMBERT RESPONDENT

Adams v Lambert [2006] HCA 10
4 April 2006
C11/2005

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 9 December 2004 and in their place order that:*

   (a) the appeal to that Court be allowed with costs; and

   (b) the orders of Gyles J made on 1 July 2004 be set aside.

3. *Remit the matter to a judge of the Federal Court of Australia for further hearing in accordance with the reasons of this Court.*

On appeal from the Federal Court of Australia

Representation:

D A Hassall for the appellant (instructed by Kinneally Miley)

No oral argument for the respondent (represented by Marler & Darvall)

CATCHWORDS

Adams v Lambert

Bankruptcy – Bankruptcy notice – Formal defect or irregularity – Interest due on judgment debt – Misdescription in notice of statutory provision under which interest claimed – Validity of notice.

Bankruptcy Act 1966 (Cth), ss 41(2), 306.
Bankruptcy Regulations (Cth), reg 4.02.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ. The issue in this appeal concerns the effect upon the validity of a bankruptcy notice of a misdescription of the statutory provision under which an amount of interest ($66.58) on a judgment debt was claimed. The bankruptcy notice referred to s 83A of the *District Court Act* 1973 (NSW). That section deals with interest up to judgment. The notice should have referred to s 85, which deals with interest after judgment. For reasons that will appear, the resolution of the issue turns on the application of s 306 of the *Bankruptcy Act* 1966 (Cth) ("the Act"), which provides that proceedings under that Act are not invalidated by a formal defect or an irregularity unless substantial injustice has been caused. There being no suggestion that any substantial injustice has been caused, the question is whether the error was a formal defect or an irregularity.

The facts

2 The appellant obtained judgment against the respondent, in the District Court of New South Wales, on 22 March 2004, in the amount of $54,000. That amount represented an agreed sum, being the balance of a loan together with interest and legal costs up to the date of judgment. On 1 April 2004, the appellant served on the respondent a bankruptcy notice claiming as a debt due and payable the amount of $54,066.58. That amount comprised the judgment debt of $54,000 plus interest from 22 March 2004 to 26 March 2004 (both dates inclusive) at the rate of 9 per cent per annum. It is not contended that the amount of interest claimed was erroneous. The date of 26 March 2004 was the date of issue by the Official Receiver of the bankruptcy notice.

3 The respondent failed to comply with the requirements of the bankruptcy notice within the time specified. On 27 May 2004, the appellant filed a creditor's petition alleging that such failure was an act of bankruptcy, and seeking a sequestration order against the respondent's estate. The matter came for hearing before Gyles J in the Federal Court of Australia on 1 July 2004. Gyles J found that the bankruptcy notice was invalid, and dismissed the petition[1]. He was bound by the decision of the Full Court of the Federal Court in the indistinguishable case of *The Australian Steel Company (Operations) Pty Ltd v Lewis* ("*Lewis*")[2] (a case in which Gyles J was part of a dissenting minority),

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1 *Adams v Lambert* [2004] FCA 928.

2 (2000) 109 FCR 33.

which was followed by the Full Court in *Marshall v General Motors Acceptance Corporation Australia*[3]. An appeal to the Full Court from the decision of Gyles J was dismissed[4].

4 In *Lewis*, the Full Court of the Federal Court was divided three (Black CJ, Heerey and Sundberg JJ) to two (Lee and Gyles JJ). All the members of the Full Court regarded the decision of this Court in *Kleinwort Benson Australia Ltd v Crowl*[5] as laying down the principles to be applied. There are conflicting decisions within the Federal Court about the application of those principles to various errors in bankruptcy notices. To the forefront of the appellant's submissions in the present appeal was the proposition that *Lewis* was wrongly decided, and that the minority conclusions in that case are to be preferred. For reasons that will appear, that proposition should be accepted. The decision in *Lewis* should be overruled.

5 The scope for error in a bankruptcy notice is as wide as the scope of the contents of such a notice. The cases provide examples of many different kinds and degrees of error. As Gyles J and the Full Court pointed out, there is no material difference between the error in the bankruptcy notice in this case and the error in the bankruptcy notice in *Lewis*. It seems to be a not uncommon mistake. An apparent source of confusion is the difference between pre-judgment interest and post-judgment interest. There is nothing to be gained by reviewing all the decisions in the Federal Court in recent years concerning different errors in bankruptcy notices. The error in this case is a convenient focus for an examination of the effect of s 306 of the Act. Because the error in the notice in this case is not materially different from the error in the notice in *Lewis*, success of the present appeal necessarily involves a conclusion that *Lewis* was wrongly decided. That may mean that a number of other decisions that followed *Lewis* and applied its reasoning to somewhat different errors were also incorrect, but those decisions are not directly under review.

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3 (2003) 127 FCR 453.

4 *Adams v Lambert* [2004] FCAFC 322.

5 (1988) 165 CLR 71.

6 It should be added that, in his reasons in the present case, Gyles J noted that there were other aspects of the matter that would need to be considered if the attack upon the validity of the notice did not succeed[6]. That fact is relevant to the form of order that should be made by this Court.

The legislation

7 Section 40 of the Act provides that a debtor commits an act of bankruptcy if a creditor who has obtained against the debtor a final judgment has served on the debtor a bankruptcy notice under the Act and the debtor does not, within the time specified in the notice, comply with the requirements of the notice or satisfy the Court that he or she has a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt, being one that he or she could not have set up in the action in which judgment was obtained (s 40(1)(g)). Where a debtor has committed an act of bankruptcy, the Court may, on a petition presented by a creditor, make a sequestration order against the estate of the debtor (s 43).

8 Section 41 empowers an Official Receiver to issue a bankruptcy notice (s 41(1)). In practice, as in the present case, the notice will often be prepared by a creditor's lawyers, but some creditors may not be legally represented. The section provides:

> "(2) The notice must be in accordance with the form prescribed by the regulations."

9 In the form in which the Act stood at the time of the decision in *Kleinwort Benson Australia Ltd v Crowl*, s 41 provided that a bankruptcy notice "shall be in accordance with the prescribed form". There is no material difference between "shall" and "must". However, the prescribed form is different.

10 The relevant regulation is reg 4.02 of the Bankruptcy Regulations (Cth) ("the Regulations"), which is as follows:

> "(1) For the purposes of subsection 41(2) of the Act, the form of bankruptcy notice set out in Form 1 is prescribed.

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6 [2004] FCA 928 at [3].

(2) A bankruptcy notice must follow Form 1 in respect of its format (for example, bold or italic typeface, underlining and notes).

(3) Subregulation (2) is not to be taken as expressing an intention contrary to section 25C of the *Acts Interpretation Act 1901*.

Note Under section 25C of the *Acts Interpretation Act 1901*, where an Act prescribes a form, then, unless the contrary intention appears, strict compliance with the form is not required and substantial compliance is sufficient; see also paragraph 46(1)(a) of that Act for the application of that Act to legislative instruments other than Acts."

11 Form 1 appears in Schedule 1 to the Regulations. It is reproduced in full in the reasons of the majority in *Lewis*[7]. It is, of course, necessary to pay regard to the entire form. For present purposes, however, the following features are of particular importance. The form requires the amount of the debt claimed to be stated, and a copy of the judgment or order relied upon by the creditor is to be attached. The form states that the debtor is required, within a specified number of days after service of the notice, to pay to the creditor the amount of the debt or to make an arrangement to the creditor's satisfaction. It warns the debtor of the possibility of bankruptcy proceedings if the requirements of the notice are not complied with. It contains other information and warnings. The prescribed form includes a Schedule giving particulars of the creditor's claim. This Schedule includes the following item in column 1:

"3. If claimed in this Bankruptcy Notice, interest accrued since the date of judgments or orders (*see* Note 2, *below*)."

There is provision in column 2 for an amount to be included alongside item 3.

12 Note 2 to the Schedule is in the following terms:

"Note 2: Interest accrued (item 3 of the Schedule)

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7 (2000) 109 FCR 33 at 37-40.

If interest is being claimed in this Bankruptcy Notice, details of the calculation of the amount of interest claimed are to be set out in a document attached to this Bankruptcy Notice. The document must state:

(a) the provision under which the interest is being claimed; and

(b) the principal sum on which, the period for which, and the interest rate or rates at which, the interest is being claimed.

(NB: If different rates are claimed for different periods, full details must be shown)"

13 The evident purpose of the requirement to state the provision under which interest is being claimed is to assist the debtor to check the claim[8]. Nevertheless, as Kiefel J pointed out in her dissenting judgment in *Bendigo Bank v Williams*[9], such information is normally incomplete. It would tell a debtor who is represented by a lawyer something the lawyer would, or should, already know. It would set an unrepresented debtor upon a train of inquiry that, in most cases, would require further information in order to find the relevant rate of interest.

14 The requirement in question is established by three levels of prescription. Sub-section 41(2) of the Act states that a bankruptcy notice must be in the form prescribed by the regulations. Regulation 4.02 states that, for the purposes of sub-s 41(2), the form set out in Form 1 is prescribed. Note 2 to the Schedule in Form 1 states that a document attached to the notice must state the provisions under which interest is being claimed. The use of the word "must" is significant, but it should be kept in perspective. A prescription as to a form to be followed will normally be expressed in language of obligation rather than of permission. That is the idea of a form. Such a prescription raises the question to be considered in the present case; it does not answer it.

15 One potential kind of error in a bankruptcy notice is dealt with expressly by s 41. It is probably the most likely, and most significant, form of error: overstatement of the amount owed by the debtor. The way in which the Act

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8 *The Australian Steel Company (Operations) Pty Ltd v Lewis* (2000) 109 FCR 33 at 45.

9 (2000) 98 FCR 377 at 404.

deals with such an error is not directly relevant in this case, but it is part of the legislative context, and gives an indication of the legislative purpose. The section relevantly provides:

> "(5) A bankruptcy notice is not invalidated by reason only that the sum specified in the notice as the amount due to the creditor exceeds the amount in fact due, unless the debtor, within the time allowed for payment, gives notice to the creditor that he or she disputes the validity of the notice on the ground of the misstatement.
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> (6) Where the amount specified in a bankruptcy notice exceeds the amount in fact due and the debtor does not give notice to the creditor in accordance with subsection (5), he or she shall be deemed to have complied with the notice if, within the time allowed for payment, he or she takes such action as would have constituted compliance with the notice if the amount due had been correctly specified in it."

Section 306

16 The act of bankruptcy identified in s 40(1)(g) of the Act depends upon service on a debtor of "a bankruptcy notice under [the] Act". Bearing in mind the consequences which the Act attaches to such a notice, the courts have long insisted upon "strict compliance with the requisites of a bankruptcy notice"[10] if it is to be valid, subject, of course, to the express provisions of s 41. At the same time, bankruptcy legislation in the United Kingdom[11] and Australia[12] has also, for a long time, contained a provision of a kind which is now found in s 306 of the Act. That section provides, so far as presently relevant:

> "(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

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10 *James v Federal Commissioner of Taxation* (1955) 93 CLR 631 at 644.

11 *Bankruptcy Act* 1869 (UK), s 82; *Bankruptcy Act* 1914 (UK), s 147.

12 *Bankruptcy Act* 1924 (Cth), s 7.

caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court."

17 It is well settled that a bankruptcy notice is a proceeding under the Act[13]. In *Kleinwort Benson Australia Ltd v Crowl*[14] there was an understatement, rather than an overstatement, of the amount owing by the debtor. The error arose from a miscalculation of interest on a judgment. The interest was understated by some $23,000. That was treated by this Court as a formal defect or irregularity within s 306, and the error was held not to have invalidated the notice.

18 In its application to a bankruptcy notice, s 306 assumes the possibility of some failure to comply with a statutory requirement; that is, some defect or irregularity. In the present case, if there had been no failure to comply with a requirement of the Act and Regulations, there would be no issue as to the effect of s 306. In the event of such a failure, it must be asked whether the defect or irregularity is a formal defect or irregularity within the purview of s 306. If it is, then it becomes necessary to consider whether substantial injustice has been caused by the defect or irregularity, and whether the injustice cannot be remedied by an order of the court. The questions whether the defect or irregularity is a formal defect or irregularity, and whether substantial injustice has been caused and cannot be remedied, are separate and distinct, the latter question arising only if the former is answered in the affirmative. It may be accepted that, if a defect could cause substantial injustice, it may not easily be classified as a formal defect or irregularity. But the absence of claimed injustice does not conclude the separate question that arises under s 306 about whether the defect or irregularity is a formal defect or irregularity. Neither in *Lewis* (where the provision under which the interest was being claimed was stated to be s 101 of the *Supreme Court Act* 1986 (Vic) whereas it should have been s 100(7) of the *Magistrates' Court Act* 1989 (Vic)) nor in the present case was it suggested that substantial injustice had been caused by the defect or irregularity.

19 It is necessary to say something more about the error in the bankruptcy notice in this case. The calculation of post-judgment interest is a well-known

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13 *Pillai v Comptroller of Income Tax* [1970] AC 1124 at 1131; *Kleinwort Benson Australia Ltd v Crowl* (1988) 165 CLR 71 at 77.

14 (1988) 165 CLR 71.

source of difficulty for some drafters of bankruptcy notices. The difficulty is sometimes avoided by refraining from including interest in the debt upon which the bankruptcy notice is based[15]. In this case, however, the calculation of interest was correct. Furthermore, the bankruptcy notice made it plain, in express terms, that the interest claimed was post-judgment interest. The document attached to the notice in compliance, or purported compliance, with the regulations was in the following terms:

Interest Calculation

(See Note 2:- Interest accrued (Item 3 of the Schedule) on page 5)

Details of calculation of interest claimed:

(a) Interest is claimed pursuant to section 83A of the *District Court Act 1973*. The current rate of interest as at the date of preparation of this notice is 9% pa.

(b) Judgment was entered against Matthew Lambert in the District Court of New South Wales at Sydney on 22 March 2004 for the sum of $54,000.00 including interest and costs.

(c) Interest is being claimed for the period 22 March 2004 to 26 March 2004 (both dates inclusive).

Summary of Interest Calculation

Date from	Date to	Number of Days	Judgment Debt	Interest Rate %	Daily Increase	Interest Amount
22.03.04	26.03.04	5	$54,000.00	9	$13.32	$66.58

20 Paragraph (b) made it clear that the judgment of $54,000 included pre-judgment interest. Paragraph (c), together with the Summary of Interest Calculation, showed that the claim for interest covered five days, commencing on 22 March 2004, which was shown as the date of judgment. The amount claimed was $66.58. It was obvious that the claim was for post-judgment interest.

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15 *Kleinwort Benson Australia Ltd v Crowl* (1988) 165 CLR 71 at 85.

21 In *Wright v Australia & New Zealand Banking Group Ltd*[16], Beaumont J pointed out that it is a well settled principle of construction that a written instrument must be construed as a whole, and that, as Dixon CJ and Fullagar J said in *Fitzgerald v Masters*[17], "[w]ords may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency". A striking example of the application of a cognate principle of statutory construction is to be found in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[18]. If a question had arisen in the present case as to whether, considered as a whole, the bankruptcy notice was claiming pre-judgment or post-judgment interest, the answer would be clear. That is not the precise question that arises. Rather, the question is whether the notice complies with the requirements of the Act. Even so, the consideration that, on the true construction of the notice as a whole, it is clear that the claim is for post-judgment interest, is part of the context in which s 306 is to be applied.

The argument for the appellant

22 Counsel for the appellant attempted to persuade the Court that there was here no defect or irregularity. First, he argued that the error was in a document attached to the notice, and not in the notice itself. This argument fails. The document is part of the notice. Next, he said, the "provision" referred to in Note 2 was sufficiently identified by a reference to the *District Court Act*, and the reference to s 83A should be disregarded as mere surplusage. That argument is unpersuasive. The entire *District Court Act* is not a "provision". The requirement of Note 2 would not be satisfied by referring merely to the *District Court Act*. The drafter of the notice was right to suppose that reference to a section of the *District Court Act* was required. The problem is that the wrong section was identified. Next, it was argued that s 41(2) of the Act is to be read in the light of s 25C of the *Acts Interpretation Act* 1901 (Cth); that substantial compliance with requirements as to a form is all that is necessary; and that here there was substantial compliance. The difficulty is that in a case such as the present, where there is a specific requirement to state a provision, it is not

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16 [2001] FCA 386.

17 (1956) 95 CLR 420 at 426-427.

18 (1981) 147 CLR 297.

substantial compliance to state a different provision. In such a case, the problem cannot be avoided by looking at the form as a whole and observing that, like the curate's egg, it is bad only in part. At the same time, the kind and degree of error involved is relevant to a consideration of s 306.

Formal defect or irregularity

23 The appellant's principal argument turns upon s 306 of the Act. Accepting that the misdescription of the provision under which post-judgment interest was claimed, by referring to s 83A of the *District Court Act* rather than s 85, was a defect or irregularity, and noting that it caused no substantial injustice, is it a formal defect or irregularity within the meaning of s 306?

24 The composite expression "a formal defect or an irregularity", in its application to a bankruptcy notice, conveys a meaning with elements of both inclusion and exclusion. A failure to comply with a requirement, to be found in the Act, imposed by reference to the regulations as to information to be furnished by the notice, is a defect or irregularity. So, in *Kleinwort Benson Australia Ltd v Crowl*, an erroneous statement of the amount of interest owing on a judgment debt was a defect or irregularity. What is excluded from the section is a defect or irregularity of such a nature that, reading s 306 in the context of the whole Act, it is not "a formal defect or an irregularity". What kind, or degree, of defect is to be regarded as having such a nature?

25 In some cases the answer to that question may be easy. In others, a difficult question of judgment may be involved. The matter for judgment was identified by this Court in *Kleinwort Benson Australia Ltd v Crowl*[19]. In that case, the majority[20] contrasted the concept of a formal defect or irregularity with a defect or irregularity that renders a bankruptcy notice a nullity that cannot be saved by s 306. To describe a defect as merely formal, or to describe a notice as a nullity, is, of course, to state a conclusion, rather than the reason for reaching that conclusion. Even so, it is necessary to identify the question that arises for judgment. The majority, referring to *James v Federal Commissioner of*

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19 (1988) 165 CLR 71 at 79-81.

20 Mason CJ, Wilson, Brennan and Gaudron JJ.

Taxation[21], and *Pillai v Comptroller of Income Tax*[22], summarised the exclusionary aspect of the meaning of "a formal defect or an irregularity" by saying[23]:

> "The authorities show that a bankruptcy notice is a nullity if it fails to meet a requirement made essential by the Act, or if it could reasonably mislead a debtor as to what is necessary to comply with the notice."

26 The question of construction raised by the words "a formal defect or an irregularity" is one to be decided by reading s 306 in the context of the whole Act, informed by the general purpose of the legislation, and the particular purpose of the provisions relating to bankruptcy notices. It is similar to the question that, in former times, would be explained by asking whether a statutory requirement was mandatory or directory. In *Project Blue Sky Inc v Australian Broadcasting Authority*[24] it was said: "A better test ... is to ask whether it was a purpose of the legislation that an act done in breach of [a] provision should be invalid ... In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'".

27 If, as in the present case, what is in question is an error in the form of a misdescription of a statutory provision, then a consideration of the general purpose of the Act, and the particular purpose of the legislative scheme relating to bankruptcy notices, leads readily to a conclusion that if the error could reasonably mislead a debtor as to what is necessary to comply with the notice it is not merely a formal defect or irregularity. Any error is capable of misleading somebody about something. When the respondent saw the bankruptcy notice in this case he may well have concluded that s 83A was the section of the *District Court Act* dealing with post-judgment interest. In that respect, he would have been misled. When Mr Crowl read the bankruptcy notice in his case, he might have been given the temporary satisfaction of believing that his debt was $23,000

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21 (1955) 93 CLR 631 at 644.

22 [1970] AC 1124 at 1135.

23 (1988) 165 CLR 71 at 79.

24 (1998) 194 CLR 355 at 390-391, quoting *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24.

less than was in fact owing. In that respect, he would have been misled. (A debtor who receives a notice involving an overstatement of a kind expressly relieved against by s 41(5) of the Act might receive a very unpleasant surprise). What this Court regarded as relevant to s 306, however, was misleading a debtor about what is necessary to comply with the notice. That kind of misleading, the Court said, takes an error outside the concept of a formal defect or irregularity. However, that is not the full extent of the exclusion.

28 The other exclusionary aspect of the expression "a formal defect or an irregularity" in s 306 was said to consist in a failure to meet a requirement made essential by the Act. Here again, the word "essential", in its application in a particular case, involves a conclusion. If a requirement is made essential by the Act, then a failure to meet that requirement is not a formal defect or an irregularity within the meaning of s 306. Whether a requirement is made essential is to be decided by a process of statutory construction undertaken in the manner described above. The majority in *Lewis* regarded the error in that case as involving a failure to meet a requirement made essential by the Act.

29 To describe an error or a deficiency in a bankruptcy notice as involving a failure to meet a requirement made essential by the Act is to state a conclusion reached after a consideration of the legislative purpose and an evaluation of the significance or importance of the error or deficiency in the circumstances of the case. That question is not answered by observing that there has been a failure to meet a requirement. In this respect, the majority in *Lewis* placed undue emphasis on the imperative terms of the Act and Regulations. If there were no failure to meet a requirement, there would be no defect or irregularity. Furthermore, as noted earlier, the fact that the requirement is expressed by the use of the term "must" is not conclusive. How otherwise might a requirement as to form be expressed[25]?

30 The misdescription of the relevant section of the *District Court Act* was not capable of misleading the respondent as to what he had to do to comply with the notice. This is not a matter of dispute. The question is whether the

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25 In a different statutory context "must" will sometimes require an imperative interpretation: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1009 at 1014 [16], 1024 [70], 1035 [136], 1040 [173], 1046 [208]; 215 ALR 162 at 166-167, 180, 196, 203, 211.

misdescription involved a failure to meet a requirement made essential by the Act. On the true construction of the Act, is it essential that there be no misdescription of the relevant section? Is it the purpose of the legislation that any slip, such as giving a reference to the statutory provision governing pre-judgment interest when what is intended is a reference to the provision governing post-judgment interest, should invalidate the notice? Is this so no matter how clear it might be from other parts of the notice that the claim is for post-judgment interest?

31 Section 306, in its application to bankruptcy notices, makes it plain that some instances of non-compliance with the requirements as to the form of a notice will not invalidate the notice. The practical significance of an error or deficiency could vary according to the circumstances of each particular case. Errors or deficiencies in compliance with requirements as to form may involve questions of degree as well as of kind. At the same time, the decision in *Kleinwort Benson Australia Ltd v Crowl* shows that an error may be covered by s 306 even though it involves a substantial misstatement of an amount of money. It was essential that the bankruptcy notice state the amount claimed. Was it essential that the amount be correct? Section 41(5) made it clear that an overstatement, even a large overstatement, would not necessarily invalidate the notice. This Court concluded that it was not the legislative purpose that a substantial understatement should necessarily invalidate the notice. That is to say, accurately stating the amount of interest owing was not a matter of such importance that error necessarily resulted in invalidity. In the present case, overstatement or understatement of the amount of post-judgment interest owing would not necessarily have invalidated the notice. That is part of the context in which legislative purpose is to be considered in deciding whether the reference to s 83A rather than s 85 was fatal.

32 In *Lewis*[26], Gyles J accurately identified the question as whether correct completion of the form prescribed by the regulations in every respect is a requirement made essential by the Act. Bearing in mind that, in the present case, the error could not have misled the respondent as to what it was necessary to do in order to comply with the requirements of the notice, it is difficult to understand how, consistently with *Kleinwort Benson Australia Ltd v Crowl*, the respondent could succeed without an affirmative answer to that question. In their

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26 (2000) 109 FCR 33 at 70.

dissenting reasons in *Lewis*, Lee J and Gyles J both gave a detailed account of the 1996 amendments to the Act and Regulations. It is unnecessary to repeat what they said in that respect. Lee J concluded[27]:

> "Properly construed, the Act and Regulations do not express an intention to create a new regime of strict compliance imposed on a judgment creditor issuing a bankruptcy notice. The tenor of the Act and Regulations is not consistent with that conclusion. An attempt has been made to recast the process of issue of a bankruptcy notice in terms more understandable to a judgment debtor, but the essential requirements of a bankruptcy notice remain as they have been stated by bankruptcy legislation over many years."

33 Lee J also said[28]:

> "It cannot be correct that amendments to the Act that left undisturbed s 41(5) and (6) which state that a notice that demands payment of a sum that is unjustified or excessive is only invalid if a debtor gives notice within a prescribed period, introduced a new regime in respect of bankruptcy notices under which a judgment debtor could have such a notice set aside where the amount claimed is due in fact and there is no prospect that the debtor could be misled as to the steps to be taken to comply with the notice. The amending Act could not have contemplated that a mistaken citation of the source of entitlement to claim interest would be a substantive defect or irregularity in the notice so as to exclude the operation of s 306 of the Act."

34 That view of the legislative purpose is persuasive. The effect of the majority view in *Lewis* is to attribute to the legislature an overwhelming preference for form over substance. That should not be done. Given that s 306 relieves against the invalidating consequences of some mistakes in the preparation of bankruptcy notices, the mistake that was made in this case falls within its terms.

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27 (2000) 109 FCR 33 at 66.

28 (2000) 109 FCR 33 at 68.

35 The appeal should be allowed with costs. The orders of the Full Court of the Federal Court of Australia should be set aside. In place of those orders it should be ordered that the appeal from the decision of Gyles J be allowed with costs and that the orders of Gyles J of 1 July 2004 be set aside. The proceedings should be remitted to a judge of the Federal Court of Australia for further hearing in accordance with the reasons of this Court. It will be for that judge to decide upon the appropriate orders as to the costs of the proceedings before Gyles J.