

IN THE HIGH COURT OF AUSTRALIA.

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MILLAR AND OTHERS

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V.

LEBER

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REASONS FOR JUDGMENT.

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Delivered at Sydney  
on Monday, 21st August, 1944.

MILLAR & ORS. v. LEBER

21st August 1944.

JUDGMENT.

LATHAM C.J.: This is an appeal from an order of sequestration made against the appellants. The ground of the order was failure to comply with a bankruptcy notice issued in respect of a judgment to the amount of £65; altogether the amount owing to the petitioning creditor was £284.

The failure to comply with the bankruptcy notice was established and, therefore, there was ground for making the order of sequestration.

The learned Judge, Judge Lukin, on the 30th April 1942 granted a stay of proceedings under Regulation 9 of the Debtor's Relief Regulations made under the National Security Act. This regulation provides: "Where....it is proved to the satisfaction of the Court that the inability of the debtor to pay his debts is due to circumstances attributable to the war, the Court (including the Court of Bankruptcy) may in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, at any time stay the proceedings under the petition for such time and subject to such conditions as the Court thinks fit."

His Honour Judge Lukin applied that provision and granted a stay for twelve months.

At the end of the twelve months the proceedings were adjourned and one of the adjournments was upon the defendants' undertaking to endeavour to sell their properties prior to the 15th June 1943. Nothing has happened and it is now contended that the order of sequestration should be set aside, or, alternatively, at least that a stay should be granted by this Court under the Regulation.

The grounds of appeal are that the defendants are really solvent, that war conditions still operate and that war conditions are responsible for the condition of the defendants.

As to the first point, that the defendants are really solvent that depends upon estimates as to the value of equities of redemption of various properties, the principal one of which - said to have been worth at one time £47,000 to £50,000 - is in the possession of the mortgagee and it appears, therefore, that default has been made in payment of interest. The contention that the defendants are solvent is based upon estimates and speculation and

there was evidence, which the learned Judge was at liberty to accept, which fully entitled him not to act upon the basis that the defendants were solvent. If the defendants are solvent there should be no difficulty - and by solvent in this connection I mean really able to pay their debts upon reasonable realisation - in making arrangements with the creditors.

As to the other point, that war conditions are still operating, in the real estate market that is undoubtedly the case, but the question of the weight to be attached to such considerations in a particular case is remitted to the absolute discretion of the Court under regulation 9 and upon an appeal the Court should not disturb the exercise of the discretion unless it was shown that weight had been given to irrelevant matters or that the Court had omitted to take into account matters that were relevant.

Accordingly, it would not be proper for the Court upon this appeal merely to look at the matter again and substitute its own discretion for the discretion of the learned Judge unless it was shown that the learned Judge had acted upon a wrong principle, taken into account irrelevant matters or excluded matters that were relevant. His Honour said that "the creditors must be considered as well as the debtors and it would be unfair to creditors to say that the hearing of the petition should be stayed for an indefinite time; it may be for months, perhaps for years, in the hope that something might turn up to help the debtors. I do not propose to accede to any request that this should be done. After a lapse of two years, I do not see why creditors should stand by until all prospect of getting something from the debtors was gone", and His Honour was of opinion that the position of the debtors was becoming worse as time proceeded.

In this Court a suggestion has been made that a stay should be granted upon condition that payment of the debt is made, in the hope that the real estate market will improve. The creditor has rights and prima facie he is entitled to the order which has been made.

All the other matters mentioned depend upon the exercise of the discretion of the Court.

In my opinion it has not been shown that the Judge has acted wrongly in any respect and therefore the appeal should be dismissed with costs.

ORDER: Appeal dismissed with costs, including any reserved costs, to be paid out of the Estate.

IN THE HIGH COURT OF AUSTRALIA)  
NEW SOUTH WALES REGISTRY )

No. 21 of 1944

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JUDGMENT

STARKE J. I agree with the decision of the learned Judge below.

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JUDGMENT

WILLIAMS J.: I agree with the judgment of the Chief Justice and have nothing further to add.