ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

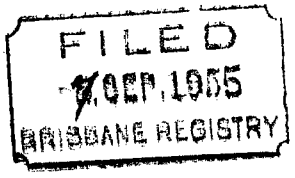
MARTIN

v.

R. S. EXTON & CO. PTY. LTD.

2/52

REASONS FOR JUDGMENT



Judgment delivered at SYDNEY

on Sixth day of September, 1955.

J. J Gourley, Govt. Print., Melb.

C.7163/51

MARTIN

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O R D E R

Appeal dismissed. Costs to be taxed and to be paid in the same manner as shall be ordered by the Supreme Court of Queensland with respect to the reserved costs of the application to that Court to set aside the bankruptcy notice.

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JUDGMENT

McTIERNAN J.

MARTIN

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JUDGMENT McTIERNAN J.

In my opinion this appeal should be dismissed with costs. The grounds of the appeal raise the question whether the respondent had an interest proportionate to the judgment debt upon which the bankruptcy notice is founded in the fund of £600, which the appellant had set aside for the benefit of his creditors and which was held in trust by his solicitor. If the respondent had such an interest, the judgment debt, so it was contended, would have been pro tanto satisfied before the issue of the bankruptcy notice and the bankruptcy notice would have been void because it was issued for an amount in excess of the debt due by the appellant to the respondent.

It was contended for the appellant that the respondent obtained the interest, mentioned above, under an arrangement made by the appellant and a number of his creditors for the liquidation of his debts. The evidence shows that the respondent appointed a representative to the committee of creditors constituted under the arrangement. The purposes of the committee were not clearly shown by the evidence. It was said that one of its purposes was to distribute rateably among the creditors the funds held by the appellant's solicitor upon trust for the creditor, and any other moneys paid by the appellant to that fund. In my opinion the appellant's contention as to the respondent's interest in the fund cannot be

sustained for the evidence shows in effect that it was always made clear on behalf of the respondent that, whatever its degree of participation in the arrangement, it would not claim any interest in the fund or give up its rights to take bankruptcy proceedings to enforce its judgment debt.

Next, it was contended that the respondent was estopped from denying that it claimed an interest in the fund. The estoppel arises, so it is said, from the conduct of the respondent, particularly from the respondent's omission to inform the appellant that it was not a party to the demand made by the creditor's committee on the appellant's solicitor to transfer the sum of £600 to the trust account of the Building Industry Credit Bureau. In my opinion this alleged omission could not lead the appellant to believe that the respondent in any way concurred in the demand, for the respondent at all material times disclaimed any interest in the fund, besides reserving its rights to take bankruptcy proceedings. This was well known to the appellant. The evidence shows that in fact at the meeting of the committee at which it was resolved to demand the moneys from the solicitor, the respondent's representative reaffirmed its attitude in respect of the fund and bankruptcy proceedings. In truth the respondent at no time put itself in a position which gave it any interest in the fund or represented to the appellant that it had done so.

The appellant, in my opinion, has failed to show that the bankruptcy notice was issued for an amount greater than the debt due by him to the respondent. The order of Mansfield S.P.J. is right.

The appeal should be dismissed with costs.

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JUDGMENT.

KITTO J.
TAYLOR J.

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JUDGMENT

KITTO J.
TAYLOR J.

This is an appeal from the dismissal by the Supreme Court of Queensland of an application to that Court, pursuant to sec. 18(1)(b) of the Bankruptcy Act 1924-1954, by a judgment debtor for an order setting aside a bankruptcy notice which had been served upon him at the instance of the respondent. The respondent had obtained final judgment against the appellant on 20th October 1954 in the sum of £1104:11:5 and the requirement of the bankruptcy notice was that this sum should be paid within eight days after service thereof.

The substantial ground upon which the appellant's application was made was that the sum specified in the notice exceeded the amount owing under the judgment, it being alleged that some part of the judgment debt had been discharged by payment before the issue of the notice on 26th January 1955. There may also have been implicit in the appellant's argument a contention - for what it is worth - that the respondent, on the one hand, had entered into a binding agreement with the appellant and some or all of his other creditors, on the other, that the judgment would not be enforced so long as the appellant continued to make specified payments to a trust account in the name of his solicitor for the ultimate benefit of his creditors.

The appellant is a building contractor and in October 1954 it became apparent that he was in financial difficulties. At that time he was engaged in executing an extensive building contract for the Queensland Housing Commission. This contract called for the erection of a large number of cottages and appears to have entitled the appellant to receive payments from

time to time of seventy-five per centum of the value of completed work. But his creditors were pressing him and the intervention of bankruptcy would have prevented him from completing this contract. At that time the claims of his creditors, or of his substantial creditors, were said to amount to nearly £7000 and on 20th October a conference of these creditors, which was called at the instance of the appellant's solicitor, took place. This was not intended by the appellant to constitute a meeting of his creditors for the purposes of the Bankruptcy Act; the invitation to the respondent to attend stipulated that it was not so intended and intimated that it had been convened in an endeavour "to make an arrangement whereby Mr. Martin can pay all his creditors in full as early as practicable".

At the meeting, which was stated expressly to be without prejudice to the rights of any individual creditor, a committee was nominated to investigate the affairs of the debtor but it is not suggested that the discussion which took place resulted in any binding agreement between the parties present or any of them. Subsequently, on 22nd November 1954, a further meeting was held when a proposal was made by the appellant that if his creditors would permit him to carry on with his work under his building contract he would undertake to pay into the trust account of his solicitor the sum of £200 out of each payment received upon the completion of each cottage. Whatever was the attitude of the general body of his creditors it is quite clear that two of them, including the respondent, did not assent to this proposal and it is not suggested that they did at this stage. But it is alleged that at a further meeting held on 25th November 1954 their assent was forthcoming. This was denied by the respondent and the conflict of evidence on this point constituted the outstanding issue between the parties. Upon the evidence the learned trial judge was not satisfied that the respondent on that date became a party to any such agreement as alleged.

It is convenient at this stage to mention that on 7th December 1954 the appellant paid £200 to the credit of the trust account of his solicitor and on 22nd December a further sum of £400 was so paid. These payments were, it is said, paid in pursuance of the agreement alleged to have been made on 25th November and not otherwise. But the fact that they were made does not establish, or indeed tend to establish, that an agreement had been antecedently made; they may have been made in the mistaken belief that an agreement had been concluded, or what is more likely, they may have been made for the purpose of demonstrating the appellant's good faith in the matter and in the hope that his creditors would ultimately decide to permit him to carry on. At a later stage, on 21st January 1955, the total of these sums was paid to the Building Industry Credit Bureau at the request of one Miles who was the Assistant Secretary of that Bureau and also a member of the committee which had been nominated on 14th October. This request purported to emanate from the committee, upon which at that time the respondent was represented, but it was made without the assent of the respondent and, indeed, after its representative had informed the members of the committee, at a meeting on 19th January 1955, that it had resolved to take proceedings in bankruptcy and would not be a party to any such request. During the week preceding this meeting the respondent's solicitor had informed the appellant's solicitor that bankruptcy proceedings were contemplated and, either, that such proceedings would be taken unless at the meeting of 19th January sufficient reasons should appear for not taking them, or, that a final decision would be made in the light of that meeting whether or not they should be taken. It seems that the members of the committee, other than the representative of the respondent, were moved to ask the appellant's solicitor to pay the sums in question to the Bureau after they learnt that the respondent had decided to take bankruptcy proceedings. Their intention was to secure the sum of £600 so that it might be held for payment to

the official receiver in the event of a sequestration order being made and it is clear that, at the request of Miles, the respondent's representative agreed to delay the issue and service of a bankruptcy notice until Miles should have made his request.

The contention that part of the judgment debt had been paid before 26th January 1955 rests primarily upon the allegation that the appellant and his creditors had on 25th November 1954 concluded an agreement of the general nature already referred to. To support this allegation the respondent sought to establish that the functions of the committee nominated in October were somewhat wider than those with which the respondent was prepared to admit they were then charged. Apart from the functions of investigating the affairs of the appellant generally there seems to be little doubt that as late as 22nd November 1954 they were to concern themselves with the question whether the Housing Commission would be prepared to extend the time for performance of the appellant's contract with it and with ascertaining the amounts already due under the contract. Further, it seems to have been a matter of no little importance for them to ascertain the value of the appellant's stock in hand and work in progress. The latter was, if possible, to be ascertained by obtaining the valuation of an independent architect. In addition it was, according to the evidence of the appellant's solicitor, the function of the committee to devise, if possible, a scheme whereby the appellant's liabilities could be liquidated. But in view of the progress of events it is unnecessary to consider whether this was so or not for the proposal for payment came from the appellant himself and it was a matter for the creditors to consider.

The Housing Commission did not signify its willingness to extend the time for performance of the appellant's obligations under his contract until 7th December. This was done orally at a conference at which the appellant's solicitor informed

the Commissioner for Housing that, provided satisfactory arrangements could be made with the Housing Commission, the major creditors of the appellant were prepared to permit him to continue with his contract. That this was not the only matter of concern to the respondent is reasonably apparent from the detailed affidavit of this same witness. Speaking of the meeting of 25th November, he said that the respondent's representative informed those present that the respondent was "now prepared to enter with the other creditors into an arrangement on the basis of the offer" referred to but that it "required the said committee to satisfy itself on certain matters relating to the said contracts between" the appellant and the Housing Commission. What the "certain matters" were does not appear from this affidavit but it is reasonably clear that they included not only the question of the extension of time but also, at least, the other matters with which on 22nd November it was apparent upon other evidence the committee was intended to concern itself. The respondent's evidence is to the effect that it did not on 25th November 1954 signify its approval to the suggested arrangements either unconditionally or otherwise. On the contrary it alleges that its representative clearly intimated to those present that a prerequisite condition to any agreement on its part was a written communication from the Housing Commission extending the time for completion of the appellant's contract and that it would be prepared to review the position after information on the matters above-mentioned had been provided. No such written communication was forthcoming until 14th January 1955 and much of the information on the other matters referred to was not provided. It will be seen that the two bodies of evidence concede that there were matters or factors outstanding on 25th November 1954 and they differ substantially only in so far as one asserts that the respondent agreed to the proposal but "required the said committee to satisfy itself on certain matters relating to the said contracts" between the appellant and the Housing Commission, or,

subject to satisfactory arrangements being made with the Housing Commission, whilst the other asserts that it refused to assent to the proposal until information on a number of matters had been provided and considered. The learned trial judge thought it probable that the respondent did not bind itself and expressed the view that the appellant's solicitor had misunderstood the discussions of 25th November 1954. There was, in our view, ample room for this conclusion upon the evidence. Indeed consideration of the evidence disposes us to think that the discussions between the appellant and his creditors never passed beyond the stage of negotiation and though a proposal was made by him it was not accepted. It is true that until a late stage it was not categorically rejected; its final acceptance or rejection awaited consideration of those matters which were still outstanding on 25th November 1954. To hold, as alleged by the appellant's solicitor, that the respondent bound itself unconditionally on that date and merely "required the committee to satisfy itself on certain matters" would, we think, be highly artificial for the "matters" related to the provision of information consideration of which was obviously considered by the respondent to be relevant to a decision whether it would agree or not. Moreover such a finding would be inconsistent with the statement made by the same witness to the Commissioner of Housing on 7th December 1954 that "provided satisfactory arrangements could be made with the said Housing Commission the major creditors .... were prepared to permit the said applicant to continue with the said contract". In all the circumstances we are of the opinion that the finding that the respondent did not become a party to any such agreement as alleged must stand.

But even if the view were taken that such an agreement was made it by no means follows that the bankruptcy notice should be set aside. On that view the payments which were

made to the solicitor's trust account did not necessarily constitute a payment of any sum to the respondent. The moneys so paid were to be held, it was said, for the purpose of paying future dividends to the assenting creditors, or "for future distribution among the creditors should they so direct", or, for future distribution among the creditors pro rata at the discretion of the said committee". Some witnesses said that there was to be no distribution until the fund in hand was sufficient to pay a dividend of 2/- in the pound. It is difficult to see how evidence of this nature could lead to the conclusion that the payments made to the solicitors' trust fund amounted to a pro rata payment to or for the account of the appellant. But in view of the conclusion which has already been expressed it is unnecessary to say more on this point.

The subsequent payment of the sum of £600 to the Bureau was also relied upon to establish a pro rata payment to the respondent but it is sufficient to say that this payment was not made at the request of the respondent nor did the recipient receive any part of it on the respondent's account or with its authority.

The final point made by the appellant was that the conduct of the respondent in undertaking to refrain from serving a bankruptcy notice until after Miles had made a request for payment of the last-mentioned sum to the Bureau, and with knowledge that it would be made, amounted to a representation that Miles had its authority to demand and receive part of the sum in question on its account. Alleging then that the appellant made the payment to the Bureau upon the faith of that representation, it is contended that the respondent is estopped from asserting otherwise. In our view the evidence does not support this contention. In the circumstances the respondent was entitled to procure the issue and service of a bankruptcy notice as and when it thought fit and the fact that it refrained from doing so until

Miles had made a request that the payment should be made cannot be construed as a representation that the request was made on its behalf or with its authority. But even if the respondent should be regarded as estopped from denying that it was a party to the request for such payment this would not avail the appellant. The payment could not have operated to place the Bureau in any different position with respect to the appellant and to his creditors from that formerly occupied by the appellant's solicitors and, upon the view we have formed concerning the discussions of 25th November 1954, nothing had occurred which could be regarded as payment to any of the creditors.

For the reasons given we are of the opinion that the appeal should be dismissed.