



Express law fast track information for clients

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Substance over form

In a joint decision the High Court (7-0) has found that a bankruptcy notice is not invalidated by a minor error in identifying the particular provision under which interest is claimed.

In doing so the Court confirmed that failure to comply with a statutory requirement will not necessarily render an action (such as incorrectly filling out a form) invalid, even where the relevant provision uses the term 'must'. Regard needs to be had to the context and purpose of the provision to decide whether a failure to comply with a statutory requirement leads to invalidity.

Adams v Lambert

High Court of Australia, 4 April 2006 [\[2006\] HCA 10](#)

In the case before the High Court, the amount of post-judgment interest on the judgment upon which the bankruptcy notice was based was correctly calculated, but the bankruptcy notice mistakenly cited former section 83A of the *District Court Act 1973* (NSW) which dealt with interest prior to judgment, instead of former section 85 which allowed interest post-judgment. The prescribed form of bankruptcy notice said that the notice must state the provisions under which interest is being claimed.

The High Court found that the majority decision of the Full Court of the Federal Court (3-2) in *Australian Steel Company (Operations) v Lewis* that such an error rendered the notice invalid because there was a failure to meet a requirement made essential by the Act, had been wrongly decided. The High Court said that section 306 of the *Bankruptcy Act 1966* could be applied in such cases. That section allows a court to excuse a 'formal defect or an irregularity', unless substantial injustice has been caused.

The High Court emphasised, at [26], that section 306 needed to be read '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'. Hence, an error or a deficiency in a bankruptcy notice should be assessed only after a consideration of the legislative purpose of the Act and an evaluation of the significance or importance of the error or deficiency in the circumstances of the case.

The High Court said that '... the fact that the requirement is expressed by the use of the term "must" is not conclusive'. The Court said at [34] that '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'. The Court has remitted the proceedings to the Federal Court for further hearing.

Apart from issues concerning bankruptcy law, the case raises important issues of general statutory interpretation.

- In interpreting the notice itself, the Court stated at [21] 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*, “[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*’. The Court used this principle to decide that it was clear that the claim in the notice was for post-judgment interest.
- As to the word ‘must’, the statutory form of bankruptcy notice (Note 2 to the Schedule of the Act in Form 1) provides that a document attached to the notice *must* state the provisions under which interest is being claimed. But the Court said at [14] that 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’.
- The Court noted at [26] that the question whether the mistake was a formal defect or an irregularity ‘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* 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’”.

These important principles of statutory interpretation are relevant across Commonwealth legislation.

Text of the decision is available at: http://www.austlii.edu.au/au/cases/cth/high_ct/2006/10.html

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