Federal Court of Australia

Smith v Trustee of the Property of Richard John Smith (a Bankrupt) [2023] FCA 300

|  |  |
| --- | --- |
| File number(s): | QUD 264 of 2022 |
|  |  |
| Judgment of: | **COLLIER J** |
|  |  |
| Date of judgment: | 4 April 2023 |
|  |  |
| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – application to declare Notice of Objection to Discharge invalid – consideration of s 149C of the *Bankruptcy Act 1966* (Cth) – whether Notice of Objection complied with s 149C of the Bankruptcy Act – whether Trustee provided reasons for objecting to discharge from bankruptcy – whether evidence provided |
|  |  |
| Legislation: | *Bankruptcy Act 1966* (Cth) |
|  |  |
| Cases cited: | *Fitz-Gibbon, in the matter of Fitz-Gibbon v Inspector General in Bankruptcy* (2001) 180 ALR 475;[2000] FCA 1677  *Inspector-General in Bankruptcy v Nelson* (1998) 168 ALR 340; [1998] FCA 684  *Prentice v Wood* (2002) 119 FCR 296; [2002] FCA 214  *Re Ansett; ex parte Ansett v Pattison* (1995) 56 FCR 526  *Re Hall* (1994) 14 ACSR 488;[1994] FCA 1319  *Van Reesema v Official Receiver*  (1983) 50 ALR 253 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Queensland |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
|  |  |
| Number of paragraphs: | 55 |
|  |  |
| Date of hearing: | 17 November 2022 |
|  |  |
| Counsel for the Applicant: | Mr N Derrington |
|  |  |
| Solicitor for the Applicant: | HopgoodGanim Lawyers |
|  |  |
| Counsel for the Respondent: | Mr S Russell |
|  |  |
| Solicitor for the Respondent: | SLF Lawyers |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | QUD 264 of 2022 |
|  | | |
| BETWEEN: | RICHARD JOHN SMITH  Applicant | |
| AND: | THE TRUSTEE OF THE PROPERTY OF RICHARD JOHN SMITH (A BANKRUPT)  Respondent | |

|  |  |
| --- | --- |
| order made by: | COLLIER J |
| DATE OF ORDER: | 4 April 2023 |

THE COURT DECLARES THAT:

1. Pursuant to section 30(1) of the *Bankruptcy Act 1966* (Cth) the Notice of Objection to the Applicant’s discharge of bankruptcy filed by the Respondent pursuant to section 149B and section 149C of the *Bankruptcy Act 1966* (Cth) and dated 14 January 2022 is invalid and of no force or effect.
2. Pursuant to section 30(1) of the *Bankruptcy Act 1966* (Cth) the Applicant was discharged from bankruptcy on 3 April 2022 pursuant to section 149(4) of the *Bankruptcy Act 1966* (Cth).

**THE COURT ORDERS THAT:**

1. The Respondent pay the Applicant’s costs to be taxed unless otherwise agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLLIER J:

1. Before the Court is an application filed by the applicant, Mr Richard John Smith (a bankrupt), on 22 July 2022 seeking the following relief:
2. A declaration, pursuant to section 30(1) of the *Bankruptcy Act 1966* (Cth), that the notice of objection to the Applicant’s discharge of bankruptcy filed by the Respondent pursuant to section 149B and section 149C of the *Bankruptcy Act 1966* (Cth) and dated 14 January 2022 (**First Notice of Objection**) is invalid and of no force or effect.
3. Further or alternatively to paragraph 1, a declaration, pursuant to section 30(1) of the *Bankruptcy Act 1966* (Cth), that the Applicant was discharged from bankruptcy on 3 April 2022 pursuant to section 149(4) of the *Bankruptcy Act 1966* (Cth).
4. A declaration, pursuant to section 30(1) of the *Bankruptcy Act 1966* (Cth), that the notice of objection to the Applicant’s discharge from bankruptcy filed by the Respondent pursuant to section 149B and section 149C of the *Bankruptcy Act 1966* (Cth) and dated 12 April 2022 (**Second Notice of Objection**) is invalid and of no force or effect.
5. A declaration, pursuant to section 30(1) of the *Bankruptcy Act 1966* (Cth), that the notice of objection to the Applicant’s discharge from bankruptcy filed by the Respondent pursuant to section 149B and 149C of the *Bankruptcy Act 1966* (Cth) and dated 10 May 2022 (**Third Notice of Objection**) is invalid and of no force or effect.
6. Costs.
7. Any further or other order that this Honourable Court considers appropriate.
8. The respondent, Mr Darryl Edward Kirk as the Trustee of Mr Smith in bankruptcy (**Trustee**), opposed the relief sought.

# background

1. On 27 March 2019 Mr Smith was made bankrupt.
2. On 2 April 2019 Mr Smith filed his Statement of Affairs in accordance with s 54 of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**). The automatic discharge date of Mr Smith’s bankruptcy pursuant to s 149(4) of the Bankruptcy Act was 3 April 2022, being 3 years from the date on which Mr Smith filed his Statement of Affairs.
3. On 14 January 2022 the Trustee filed a Notice of Objection to Mr Smith’s automatic discharge pursuant to s 149B and s 149C of the Bankruptcy Act **(First Notice of Objection**). The First Notice of Objection purported to extend the discharge date to 3 April 2027. The grounds on which the Trustee relied on in support of its objection were s 149D(1)(aa) and (ab) of the Bankruptcy Act, namely that any transfer was void against the trustee in the bankruptcy because of ss 120, 121 or 122 of the Act.
4. In summary, the First Notice of Objection provided as follows:

**Evidence**

Investigations conducted by the Trustee have identified a series of transactions entered by the Bankrupt to divest his personal estate of $903,528.50 shortly after the failure of his business. These funds were transferred to the Bankrupt's spouse for no consideration to defeat trade creditors of the business who held personal guarantees provided by the Bankrupt. The series of transactions identified were conducted with the assistance of his legal advisor.

The sum of $903,528.50 comprised of the following:

1. $313,528.50 being the Bankrupt's 50% interest from the sale of the Broadbeach and Blue Mountain properties;

2. $15,000.00 being the Bankrupt's 50% interest of the balance of the deposit moneys for the Broadbeach property that was paid to his spouse;

3. $250,000.00 being the Bankrupt's entitlement from the RD Smith Trust that was provided to his spouse by way of a 'loan' by Faloda Pty Ltd as trustee of the RD Smith Trust ('Faloda');

4. $326,500.00 being the funds withdrawn by the Bankrupt from his Superannuation Account to his bank account and transferred to his spouse's superannuation account.

The Bankrupt and his spouse jointly owned two real properties located at 1205/157 Old Burleigh Road, Broadbeach, Queensland ('Broadbeach Property) and 23 Murphys Creek Road, Blue Mountain Heights, Queensland ('Blue Mountain Property') (together 'Properties'). The Commonwealth Bank of Australia (CBA) held a mortgage over both properties as security for loans owned jointly by the Bankrupt and his spouse.

Prior to the sale of the Properties the Bankrupt caused Faloda to payout the joint loan owed to CBA and subrogate into the first ranking security held by CBA over the Properties. This ensured that the Bankrupt via Faloda had a priority to the net sale proceeds over several creditors that had lodged caveats over his interest on the titles of the Properties.

The Properties were sold for $430,000 and $765,000 on 23 March 2016 and 20 April 2016 respectively. At settlement for both Properties, the Bankrupt's interest was paid to Faloda pursuant to its security and his spouse received her interest in full. No funds were paid to any of the caveat holders. The Bankrupt's spouse did not contribute towards the repayment of the debt jointly owed to Faloda.

On 23 March 2016, the Bankrupt provided instructions for the balance of the deposit funds for the Broadbeach Property of $30,000 to be paid to his spouse. The Bankrupt was entitled to receive 50% of these funds.

In April 2016, Faloda had cash of circa $315,000 and it owed the Bankrupt $284,130. The Bankrupt caused Faloda to loan his spouse $250,000 instead of paying the debt owed to him to defeat his personal creditors.

On 21 December 2016, the Bankrupt withdrew $84,000 from his First Choice

Wholesale Allocated Pension Account and transferred these funds to his spouse's Online Saver Heritage Bank account. His spouse spent $3,651.71 and transferred $80,348.29 to her superannuation fund held with Colonial First State. Upon withdrawal these funds would have become available to pay the Bankrupt's personal creditors but the transaction entered was intended to defeat personal creditors.

On 22 December 2016, the Bankrupt also withdrew $244,651.71 from his First Choice Wholesales Personal Super Account and deposited the funds into his Heritage bank account numbered 3901343 (BSB #: 638-080). On 23 December 2016, the Bankrupt transferred the $244,651.71 to his spouse's Colonial First State Super Fund account. Upon withdrawal these funds would have become available to pay the Bankrupt's personal creditors but the transaction entered was intended to defeat personal creditors.

The extent of these transactions is significant and the effect of the divestment is $903,528.50 that has been identified as transferred to the Bankrupt's spouse. When viewed in the context of the Bankrupt having received legal advice following the liquidation of his business, there is more than an inference that a calculated series of transactions occurred with the intent of protecting the Bankrupt's personal assets from trade creditors that had commenced recovery action under personal guarantees.

These transactions resulted in a total divestment of the asset base of the Bankrupt that otherwise would have been available as divisible assets of the Bankrupt's estate.

**Reasons**

Based on the outcome of the Trustee’s investigations, it appears that the series of transactions entered by the Bankrupt with the assistance of his legal advisor were designed to benefit his spouse for no consideration and to defeat his personal creditors.

The Bankrupt did not receive any consideration from his spouse for the benefit of $903,528.50 she received.

…

**Evidence**

Based on the outcome of the Trustee's investigations, it appears that the series of transactions entered by the Bankrupt with the assistance of his legal advisor were designed to transfer all his assets to his spouse to defeat his personal creditors mainly consisting of trade creditors who held person guarantees he provided.

The Bankrupt divested $903,528.50 from his personal estate leaving unpaid debts owing to his personal creditors.

1. On 17 March 2022 Mr Smith, through his solicitors, wrote to the Inspector-General in Bankruptcy and requested the Inspector-General review the First Notice of Objection pursuant to s 149K of the Bankruptcy Act on the basis that it was invalid and defective (**First Request for Review**). Mr Smith submitted in that correspondence that the First Notice of Objection should be declared invalid due to its failure to meet the requirements under s 149C(1)(b), or alternatively cancelled pursuant to s 149N(1)(b) and (c) of the Bankruptcy Act due to the factual and legal errors contained within the notice.
2. On 12 April 2022, prior to a response from the Inspector-General in relation to the First Request for Review and after the automatic discharge date, the Trustee filed a second Notice of Objection (**Second Notice of Objection**). The Second Notice of Objection also sought to extend the discharge date to 3 April 2027. Similar to the First Notice of Objection, the grounds relied on by the Trustee in the Second Notice of Objection were s 149D(1)(aa) and (ab) of the Bankruptcy Act.
3. On 19 April 2022 Mr Smith’s solicitors wrote to the Trustee stating:

The Second Notice appears to be intended to address some of the clear deficiencies in the previous notice of objection which was issued by your client on 14 January 2022 (**First Notice**).

Our clients are not satisfied that the substance of the Second Notice is sufficient to addresses the material deficiencies in the First Notice. However, the substance of the Second Notice appears to be largely irrelevant in circumstances where the legislation does not permit the rectification of a deficient notice by way of a subsequent notice being issued on the same grounds.

Indeed, the legislation expressly prohibits such conduct. We refer in particular to section 149C(1)(a) of the Bankruptcy Act 1966 (Cth), which provides that a notice must not be issued on “a ground or grounds of a previous objection to the discharge that was cancelled”.

In the event that the Inspector-General elects to cancel the First Notice, our clients’ view is that the Second Notice will be liable to be set aside on the basis that:

1. the Second Notice does not comply with section 149C(1)(a); and

2. further or alternatively, the Second Notice amounts to an abuse of process.

The second ground arises from the Second Notice having been issued after 3 April 2022, being the date on which our client would have been discharged from bankruptcy if not for the defective First Notice having been issued. To the extent that your client has relied upon an extension of time brought about by a defective notice in order to issue a subsequent notice on the same grounds, that conduct is clearly incompatible with the procedure which is intended by the legislation.

1. On 6 May 2022 a delegate of the Inspector-General provided a preliminary review in respect of the First Request for Review and sought any further submissions from the Mr Smith and the Trustee. Relevantly, the delegate formed the preliminary view that:

* It is my preliminary review that the Inspector-General should conduct a review.
* Based on the evidence presently available to this office, my preliminary view is to **cancel** your decision to file objections under s149D(1)(aa) and s149D(1)(ab) of the Act.

1. In relation to the first ground of review (s 149D(1)(ab)) in the First Notice of Objection the delegate concluded:

Conclusion

I am of the view there is insufficient evidence to support the existence of the ground of objection set out in the Notice of Objection.

On this basis, it is my preliminary view that section 149N(1)(b) of the Act is met and section 149N(1A)(b) of the Act does not prevail, therefore the Inspector-General must cancel the objection on review.

(emphasis in original)

1. In relation to the second ground of objection (s 149D(1)(aa)) the delegate concluded:

Conclusion

It is my preliminary view that your Notice of Objection does not adequately set out the reason(s) for objecting on the ground of objection and does not justify the filing of the objection.

On this basis, it is my preliminary view that section 149N(1)(c) of the Act is met, therefore the Inspector-General must cancel the objection on review.

1. On 10 May 2022 the Trustee filed a further, third Notice of Objection (**Third Notice of Objection**). On this date, the Trustee withdrew the First Notice of Objection. As a result of the Trustee’s withdrawal of the First Notice of Objection, the First Request for Review was discontinued by the delegate of the Inspector-General.
2. The Third Notice of Objection provided extensive detail, which had not been articulated in the First and Second Notices of Objection. The Trustee in that notice relied on grounds pursuant to ss 149D(1)(ab) and (aa).
3. On 10 June 2022 Mr Smith, through his solicitors, wrote to the Inspector-General and requested a review of the Second Notice of Objection (**Second Request for Review**). In that correspondence, it was put to the Inspector-General that:

(a) the First Notice was never validly issued, such that it should have been treated as having never been issued. The reasons for this are addressed, in general terms, in the First Notice of Objection; and

(b) in circumstances where the First Notice has never had any legal effect, it would follow that our client should be treated as having been discharged from bankruptcy on the Automatic Discharge Date. The consequence would be that the Second Notice and the Third Notice are also invalid (having been issued after the Automatic Discharge Date).

1. On 8 July 2022 Mr Smith again wrote to the Inspector-General and requested a review of the Third Notice of Objection (**Third Request for Review**).
2. On 19 July 2022 the Trustee withdrew the Second Notice of Objection. As a result of the Trustee’s withdrawal of the Second Notice of Objection, the Second Request for Review was discontinued.
3. On 22 July 2022 the applicant filed this proceeding in the Federal Court of Australia.
4. On 6 September 2022 the Inspector-General completed the Third Request for Review. In summary, the delegate of the Inspector-General concluded:

**Decisions**

* I have decided pursuant to section 149K(5) of the *Bankruptcy Act 1966* (**the Act**) to review the Trustee’s decision to file the notice of objection on the grounds in section 149D(1)(ab) and section 149D(1)(aa) of the Act.
* I have decided to **confirm** the Trustee’s decision to file the notice of objection on the grounds under section 149D(1) and section 149[D](1)(aa) of the Act.

The effect of my decision pursuant to s 149N(3) of the Act is that Mr Smith will remain bankrupt until 3 April 2027 unless the objection is withdrawn by the trustee the bankruptcy is annulled or the decision of the Inspector-General is overturned by the Administrative Appeals Tribunal (**the Tribunal**) or the Court.

# SUBMISSIONS

1. Mr Smith submitted, in summary:

* The First Notice of Objection does not comply with s 149C(1)(b)-(c).
* There must be ‘more than a recitation of the s 149D ground’ purported to be relied upon by the Trustee in the First Notice of Objection; *Prentice v Wood* (2002) 119 FCR 296; [2002] FCA 214 at [20].
* The ‘reason’ in support of the ground of objection merely repeats the ground and does not provide a reason distinct from the ground of objection.
* The Notice of Objection was required to demonstrate some evidence or material on which the Trustee could establish an intention to defeat creditors, yet does not refer to any material.
* The present notice is devoid of any particularity required to warrant the extension of bankruptcy. Further, the degree of particularity is to be answered with reference to the First Notice of Objection rather than how the applicant has responded to the notice.
* Despite the level of technicality involved in the applicant’s argument, the legislative requirements of a notice of objection to bankruptcy are ‘not hard’. Those requirements have not been met in this case and the Court ought to determine that the First Notice of Objection is invalid on this basis.
* The proposition that a mere statement of material facts is sufficient to discharge the onus of providing evidence of those facts ought to be rejected.

1. The Trustee submitted, in summary:

* The purpose of a notice of objection is to put the bankrupt in a position in which he is able to respond to the notice based on the material relied upon by the Trustee. The First Notice of Objection fairly puts the applicant in such a position and adequately refers to the material relied upon by the Trustee.
* The applicant’s correspondence to the Inspector-General indicates that the applicant was aware of the material relied upon by the Trustee.
* That a notice is not perfectly drafted, does not render it immediately invalid.
* The applicant does not complain of any inadequacy on the substantive grounds relied upon by the Trustee. This is of particular note given other litigation in this Court.
* A natural reading of the words “evidence or other material” in s 149C(1)(b) of the Bankruptcy Act extends to statements of facts which make out the matters giving rise to the ground. It would be an unusual reading of the Bankruptcy Act to require the Trustee to refer to, for example, a transfer form as evidence rather than asserting the fact of the transfer of property.

# RELEVANT LEGISLATION

1. It is convenient to set out the relevant provisions of Pt VII of the Bankruptcy Act referrable to discharge of bankruptcy. Section 149 provides:

**Automatic discharge**

(1) Subject to section 149A, a bankrupt is, by force of this subsection, discharged from bankruptcy in accordance with this section.

(2) If:

(a) the bankrupt became a bankrupt before the commencement of section 27 of the *Bankruptcy Amendment Act 1991*; and

(b) immediately before the commencement of that section, either:

(i) paragraph 149(3)(c) of the *Bankruptcy Act 1966* as amended applied in relation to the bankrupt; or

(ii) an order under subsection 149(8) or (12) of the *Bankruptcy Act 1966* as amended was in force in relation to the bankrupt;

the bankrupt is discharged at the end of the period of 3 years from:

(c) the date on which the bankrupt filed his or her statement of affairs; or

(d) the date of commencement of that section;

whichever is the later.

(3) If the bankrupt became a bankrupt before the commencement of section 27 of the *Bankruptcy Amendment Act 1991*, and subsection (2) does not apply in relation to the bankrupt, the bankrupt is discharged at:

(a) the end of the period of 3 years from the date on which the bankrupt filed his or her statement of affairs; or

(b) the commencement of that section;

whichever is the later.

(4) If the bankrupt becomes a bankrupt after the commencement of section 27 of the *Bankruptcy Amendment Act 1991*, the bankrupt is discharged at the end of the period of 3 years from the date on which the bankrupt filed his or her statement of affairs.

1. Sections 149A, 149B, 149C and 149D of the Bankruptcy Act refer to objections to discharge, and provide as follows:

**149A Bankruptcy extended when objection made**

1. If an objection to the discharge of a bankrupt has taken effect in accordance with section 149G, then, unless the objection is withdrawn or cancelled, the reference in whichever of subsections 149(2), (3) and (4) applies in relation to the bankrupt to the period of 3 years from the date on which the bankrupt filed his or her statement of affairs is taken to be a reference to the prescribed number of years from the prescribed date.
2. For the purposes of subsection (1):

(a) the prescribed number of years is:

(i) if the objection was made on a ground, or on grounds that included a ground, referred to in paragraph 149D(1)(ab), (ac), (ad), (d), (da), (e), (f), (g), (h), (ha), (ia), (k) or (ma)—8 years; or

(ii) in any other case—5 years; and

(b) the prescribed date is:

(i) if the objection was made on a ground, or on grounds that included a ground, referred to in paragraph 149D(1)(a) or (h)—the date on which the bankrupt returned to Australia; or

(ii) in any other case—the date on which the bankrupt filed his or her statement of affairs.

(3) If the objection is withdrawn or cancelled:

(a) the objection is taken never to have been made; and

(b) if:

(i) the period specified in whichever of subsections 149(2), (3) and (4) applies in relation to the bankrupt has ended; and

(ii) no other objection against the discharge of the bankrupt is in effect;

the bankrupt is taken to be discharged under section 149 immediately the objection is withdrawn or cancelled.

**149B Objection to discharge**

(1) Subject to the following provisions of this Subdivision, at any time before a bankrupt is discharged from bankruptcy under section 149, the trustee may file with the Official Receiver a written notice of objection to the discharge.

(2) The trustee of a bankrupt’s estate must file a notice of objection to the discharge if the trustee believes:

(a) that doing so will help make the bankrupt discharge a duty that the bankrupt has not discharged; and

(b) that there is no other way for the trustee to induce the bankrupt to discharge any duties that the bankrupt has not discharged.

**149C Form of notice of objection**

(1) A notice of objection must:

(a) set out the ground or each of the grounds of objection, being a ground or grounds set out in subsection 149D(1) but not being a ground or grounds of a previous objection to the discharge that was cancelled; and

(b) refer to the evidence or other material that, in the opinion of the trustee, establishes that ground or each of those grounds; and

(c) state the reasons of the trustee for objecting to the discharge on that ground or those grounds.

(1A) Paragraph (1)(c) does not apply to a ground specified in paragraph 149D(1)(ab), (d), (da), (e), (f), (g), (h), (ha), (ia), (k) or (ma).

(2) A notice of objection is not invalid merely because it does not state the ground or grounds of objection precisely as set out in subsection 149D(1) provided that the ground or grounds can reasonably be identified from the terms of the notice.

**149D Grounds of objection**

1. The grounds of objection that may be set out in a notice of objection are as follows:

…

(aa) any transfer is void against the trustee in the bankruptcy because of section 120 or 122;

(ab) any transfer is void against the trustee in the bankruptcy because of section 121;

…

1. Materially, sections 120, 121 and 122 of the Bankruptcy Act refer, in summary, to transfers that are void against the Trustee for reasons of undervalued transactions, transfers used to defeat creditors, and transactions made for the avoidance of preferences. Those provisions are set out as follows:

**120 Undervalued transaction**s

*Transfers that are void against trustee*

(1) A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor’s bankruptcy if:

(a) the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and

(b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.

…

**121 Transfers to defeat creditors**

*Transfers that are void*

(1) A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor’s bankruptcy if:

(a) the property would probably have become part of the transferor’s estate or would probably have been available to creditors if the property had not been transferred; and

(b) the transferor’s main purpose in making the transfer was:

(i) to prevent the transferred property from becoming divisible among the transferor’s creditors; or

(ii) to hinder or delay the process of making property available for division among the transferor’s creditors.

…

**122 Avoidance of preferences**

(1) A transfer of property by a person who is insolvent (the ***debtor***) in favour of a creditor is void against the trustee in the debtor’s bankruptcy if the transfer:

(a) had the effect of giving the creditor a preference, priority or advantage over other creditors; and

(b) was made in the period that relates to the debtor, as indicated in the following table.

…

1. I also note those sections of the Bankruptcy Act which concern the Inspector-General’s power to review Notices of Objection. In particular, s 149N provides:

**Decision on review**

1. On a review of a decision, if the Inspector-General is satisfied that:

(a) the ground or grounds on which the objection was made was not a ground or were not grounds specified in subsection 149D(1); or

(b) there is insufficient evidence to support the existence of the ground or grounds of objection; or

(c) the reasons given for objecting on that ground or those grounds do not justify the making of the objection; or

(d) a previous objection that was made on that ground or those grounds, or on grounds that included that ground or those grounds, was cancelled;

the Inspector General must cancel the objection.

(IA) An objection must not be cancelled under subsection (1) if:

(a) the objection specifies at least one special ground; and

(b) there is sufficient evidence to support the existence of at least one special ground specified in the objection; and

(c) the bankrupt fails to establish that the bankrupt had a reasonable excuse for the conduct or failure that constituted the special ground.

For this purpose, ***special ground*** means a ground specified in paragraph 149D(1)(ab), (d), (da), (e), (f), (g), (h), (ha), (ia), (k) or (ma).

(1B) In applying subsection (1A), no notice is to be taken of any conduct of the bankrupt after the time when the ground concerned first commenced to exist.

(2) The cancellation does not take effect until:

(a) the end of the period within which an application may be made to the Administrative Appeals Tribunal for the review of the decision of the Inspector‑General; or

(b) if such an application is made—the decision of the Tribunal is given.

(3) If the Inspector‑General is not satisfied as mentioned in subsection (1), the Inspector‑General must confirm the decision.

# CONSIDERATION

1. The issue in dispute between the parties is narrow, namely the construction of s 149C of the Bankruptcy Act and its application to the First Notice of Objection. At the hearing the parties were joined on the issue that the only matter for decision by the Court was the First Notice of Objection. This is because the parties agreed that if the Court determined that the First Notice of Objection was invalid and no force or effect, the subsequent notices are invalid and Mr Smith ought to be declared discharged from his bankruptcy.

## Legal requirements of s 149C of the Bankruptcy Act

1. As a general proposition, the power of a trustee in bankruptcy to extend a bankrupt’s period of bankruptcy by way of a notice of objection is significant: *Prentice v Wood* (2002) 119 FCR 296;[2002] FCA 214 at [19]; *Van Reesema v Official Receiver*  (1983) 50 ALR 253 at 260. In the present case the First Notice of Objection purported to extend Mr Smith’s period of bankruptcy for a further period of 5 years. The Court in *Fitz-Gibbon, in the matter of Fitz-Gibbon v Inspector General in Bankruptcy* (2001) 180 ALR 475;[2000] FCA 1677noted:

[14] It is well established that the policy of the bankruptcy legislation is to strike a balance between the orderly winding up of the bankrupt’s estate for the benefit of creditors and freeing the bankrupt from accumulated liabilities so that he or she can make a fresh state. Both aspects of this policy can be seen in the requirements of s 149C of the Act. The section provides that a notice of objection must not only refer to a ground of objection (in accordance with s 149D) but must also state the reasons for objecting to the discharge on that ground….

1. It is not in dispute that the legislation required the Trustee to state the reasons for his objection to the discharge of Mr Smith’s bankruptcy: *Prentice* at [20]; *Re Ansett; ex parte Ansett v Pattison* (1995) 56 FCR 526 at 530. The Court observed in *Prentice* in relation to those requirements under s 149C(1)(b) that:

[16] Section 149C(1)(b) requires the notice to “refer to” the evidence or other material that, in the opinion of the Trustee, establishes the ground on which the notice is based. If the notice refers to that material, then par (b) will have been complied with, even though it may subsequently emerge that the evidence or other material particularised did not exist, or for some other reason was insufficient or ineffective to establish the ground relied upon.

[17] The notice refers to material on which the Trustee relies in establishing the s 149D(1)(f) ground. The notice asserts that assessments of $47,751.86 for the 1996/97 CAP Year due on 17 May 1997, and $40,588.52 for the 1997/98 CAP Year due on 17 May 1998 remain outstanding. If those were the facts, then the ground on which the notice is based would be made out. Whether a notice complies with s 149C should be apparent on the face of the notice. There is no occasion prior to any review of the Notice of Objection to examine the correctness or sufficiency of the material which the Trustee has identified as being the material which establishes the ground relied upon as that does not bear upon the validity of the notice.

[18] It was open to Mr Wood to seek a review of the Trustee's decision to issue the notice on the basis that no assessments had been issued by the Trustee as described in the notice. If the reviewing authority was satisfied that there was insufficient evidence to support the existence of the s 149D(1)(f) ground, the objection must be cancelled: s 149N(1)(b). However, the fact that the Trustee referred to assessments which were never made as establishing the ground on which the notice was based is not a factor which goes to the validity of the notice. Whether the reviewing authority would be satisfied that there was insufficient evidence to support the ground of objection if the true facts were established is a different question.

1. The Court continued in *Prentice* in relation to s 149C(1)(c):

[20] Section 149C(1)(c) requires the notice to state the reasons for objecting to the discharge on the ground relied upon: *Re Ansett; ex parte Ansett v Pattison* (1995) 56 FCR 526 at 530 per Olney J. There must be more than a recitation of the s 149D ground: *Re Hall* [1994] 14 ACSR 488 at 493. Section 149C makes it clear that a Trustee filing a Notice of Objection to Discharge **must have reasons** for doing so, in addition to being satisfied that the evidentiary material establishes one or more permissible grounds. One of the grounds on which the Inspector-General may cancel the objection is if the reasons given for objecting on that ground do not justify the making of the objection (s 149N(1)(c)).

[21] In *Inspector-General v Nelson* (1998) 86 FCR 67 at 78 a Full Federal Court said that in order to "keep a person bankrupt" beyond the ordinary period, a trustee would need to have reasons directed to achievement of a purpose of the law of bankruptcy. The existence of a permissible ground supported by sufficient evidence is a threshold; there must also be reasons **justifying** the making of the objection in the particular case.

…

[24] A notice is liable to cancellation if the reasons given for objecting on the ground specified in the notice do not justify the making of the objection, but a notice is not invalidated on that account. However, the passage relied upon in the notice does not state reasons for objecting to the discharge on the ground assigned. Rather, it simply records the consequence of an objection having been made, it being a consequence which is of equal application to all the grounds specified in s 149D. Section 149C(1)(c) is not a requirement that the Trustee state the reason or reasons for objecting to a bankrupt's discharge; rather it specifies the more particular requirement that the Trustee give the reason or reasons for objecting to the discharge of the bankrupt on the ground or grounds set out in the notice. The mandatory requirement of s 149C(1)(c) is to enable the bankrupt to know the answer to the question "why are you objecting on this ground to my discharge?" The so-called "reason" does not relate to the ground relied upon, hence it is not a reason for objecting to the discharge on that ground.

(emphasis in original)

1. It follows that the reason or reasons of a Trustee must be of sufficient substance so as to enable a bankrupt to understand the objection and its basis, and respond accordingly.
2. In *Re Hall* (1994) 14 ACSR 488;[1994] FCA 1319 the applicant sought declarations including that a notice of objection to his discharge from bankruptcy was invalid, and that by force of s 149 of the Bankruptcy Act the applicant was discharged from bankruptcy. The notice of objections stated (at [5]):

“I, James Albert Huppatz, Registered Trustee ..... object to the discharge of Peter Arthur Ray Hall ..... from bankruptcy ..... on the following grounds:

1. That the bankrupt has after the date of the bankruptcy continued to manage a corporation as mentioned in section 91A of the Corporations Law without having been given leave to do so under section 229 of that Law.

The bankrupt has, since the date of bankruptcy continued to manage Yandall Pty. Ltd., a company of which he was a director and of which his spouse is a director and which is his employer. From information provided by the bankrupt and his accountant it appears that the financial affairs of the bankrupt and the company are intermingled.

2. That the bankrupt has failed, whether intentionally or not, to disclose to the trustee a liability of the bankrupt that existed at the date of the bankruptcy.

Claims have been received from the State Bank Card Centre for $8,934.23 and A.M. Security Pty. Ltd. for $91,761.76 but such debts were not disclosed on the Statement of Affairs filed by the bankrupt."

1. Justice Branson observed that these grounds of objection were grounds set out in s 149D of the Bankruptcy Act. However her Honour noted the contention of the applicant that the notice of objection failed to refer to evidence or other material which in the opinion of the trustee established the grounds of objection, and further failed to state the reasons of the trustee for objecting to the discharge on those grounds. Her Honour found, in summary as follows.
2. In relation to the first ground of objection, the assertion that the bankrupt had, since the date of the bankruptcy, continued to manage a corporation did no more than identify the relevant corporation. The assertion was not itself a reference to evidence or other material upon which an opinion could be based. The assertions that the bankrupt was once a director of that company, that his spouse continued to be a director of the company, and that the company was his employer, by themselves took the matter no further (at [22]). Justice Branson continued:

23. Where a notice of objection sets out a ground of objection based on sections 91A and 229 of the Corporations Law, section 149C(1)(b) of the Bankruptcy Act requires at the least, in my view, reference to the evidence or other material that in the opinion of the trustee or Official Receiver establishes that the bankrupt has during a relevant period acted as a director or promoter of a corporation or been in any way concerned in or taken part in the management of the corporation. In the circumstances of this case the notice of objection might have been expected to contain a reference to evidence or other material capable of establishing that the applicant had continued after his bankruptcy to be engaged in the making of decisions with respect to the corporation in a way indicative of control of the corporation

1. The notice of objection should put the bankrupt in a position where he or she can identify, and if necessary search out, the evidence or other material relied upon for the purpose of the objection (at [25]). Her Honour continued:

25. …Only if the bankrupt is in a position to do this can he or she sensibly determine:-

(a) whether to make representations to the party who filed the notice of objection concerning such evidence or the use made of it;

(b) whether it would be appropriate to seek a review to allow the accuracy of such evidence or other material to be challenged;

(c) whether, on any review, the weight accorded to such evidence or other material should be questioned;

(d) whether there may be answering evidence or material which might fruitfully be sought out for the purposes of any review.

1. In relation to the second ground of objection, her Honour referred to the ground and continued:

29. It may be noted that the above passage does not make it clear whether it is alleged that one claim for $8,934.23 has been received from the State Bank Card Centre or whether a number of claims of the aggregate value of $8,934.23 has been received. The same lack of precision exists with respect to the reference to A.M. Security Pty Ltd. The respective forms of the claims allegedly made are not identified. No reference is made to the dates of the alleged claims. Nothing is referred to which could found an opinion that such claims reflect liabilities of the applicant that existed at the date of the bankruptcy.

30. I conclude that the notice of objection does not sufficiently refer to the evidence or other material that, in the opinion of the trustee, establishes the second ground of objection referred to in the notice as required by section 149C(1)(b) of the Act.

1. Accordingly her Honour concluded that neither ground of objection satisfied the requirements of s 149C(1)(c) of the Bankruptcy Act, and that the notice of objection was ineffective to avoid the discharge of bankruptcy of the applicant pursuant to s 149 of the Bankruptcy Act.
2. In *Re Ansett; ex parte Ansett v Pattison* (1995) 56 FCR 526 it was not in dispute that the relevant notice of objection filed by the respondent referred to the evidence or other material that, in the opinion of the respondent, established the ground relied upon. The notice included the following paragraph:

On 27 October 1992 I issued an assessment pursuant to Section 139W(1) of the Act requiring the bankrupt to pay an amount of $42,346 by instalments of $5,293.25 on the 15th day of each month.

On 12 November 1992 I received an amount of $5,293.25 from the bankrupt.

On 10 December 1992 the bankrupt made a request to the Inspector General in Bankruptcy pursuant to Section 139ZA of the Act to review the assessment.

On 18 February 1993 the Inspector General issued an amended assessment and on 2 March 1993 I advised the bankrupt that pursuant to Section 139ZG an amount of $8,621.15 was due and payable on or before 5.00pm on Friday 5 March 1993. This amount has not been paid.

1. Justice Olney observed that this paragraph asserted facts which the respondent believed to be true and which in the opinion of the respondent established the ground of objection referred to in the notice. The respondent submitted that the reason for the objection was contained in the sentence:

"This amount has not been paid".

1. His Honour observed :

8. The applicant's failure to pay the amount of a liability under s 139ZG is the ground upon which the respondent gave notice of objection. Proof of that failure was necessary in order to establish the ground. ***The fact that payment had not been made was part of the evidence which established the ground upon which the respondent relied. Taken at its face value, the notice of objection does no more than set out the ground of objection and refers to the evidence that in the respondent's opinion established that ground.*** Clearly s 149C(1)(a) and (b) were complied with ***but there is nothing in the notice which can be regarded as a statement of the reasons for objecting to the discharge on the ground relied upon***.

(emphasis added)

1. Accordingly his Honour concluded that the notice to the applicant of 10 March 1993 did not state the reasons of the respondent for objecting to the applicant's discharge on the ground relied on.
2. The Full Court of the Federal Court considered this legislation in *Inspector-General in Bankruptcy v Nelson* (1998) 168 ALR 340; [1998] FCA 684. In that case the Court considered a decision of the Administrative Appeals Tribunal set aside a decision of the Inspector-General and directed him to cancel an objection of the trustee of the bankrupt estate of the applicant to discharge of the bankrupt. Relevantly the Court said:

The policy of the current bankruptcy legislation is that, *prima facie*, a bankrupt is entitled to the benefit of a discharge by operation of law. The sections dealing with objections to discharge are consistent with this policy. By requiring that a notice of objection must not only set out the ground or grounds of objection and refer to the evidentiary material relied upon in support, but also state the "reasons" for objecting, s 149C makes it clear that a trustee filing such a notice must have reasons for doing so, in addition to being satisfied that the evidentiary material establishes one or more permissible grounds…

… In fact, although ss 149B-149D do not indicate what will be "sufficient reasons", as distinct from "permissible grounds", to support an objection, s 149N (1) (set out earlier) provides that on review of a trustee's decision to object the Inspector-General must cancel the objection if, *inter alia*, he is satisfied that the reasons given by the trustee for objecting "do not justify the making of the objection". Thus, far from giving rise to a *prima facie* right to object, the existence of a permissible ground supported by sufficient evidence is a threshold: there must also be reasons justifying the making of the objection in the particular case.

## Grounds of objection

1. First, ground 1 referred to s 149D(1)(aa) of the Bankruptcy Act, which in turn refers to transfers void against the trustee because of ss 120 or 122. Section 120 applies, *inter alia*, to transfers of property by the bankrupt in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of bankruptcy, for which the transferee gave either no consideration or inadequate consideration. Section 122 applies, *inter alia*, to transfers of property by a person who is insolvent in favour of a creditor which had the effect of giving the creditor a preference over other creditors, and which was made in the period defined by the section.
2. A ground of objection pursuant to s 149D(1)(aa) requires both reasons and evidence.
3. The notice of objection must put the bankrupt into a position where he or she can identify, and if necessary search out, the evidence or other material relied upon for the purpose of the objection. The material under the heading “Evidence” in the First Notice of Objection refers to “a series of transactions entered by the Bankrupt to divest his personal estate of $903,528.50”, and further stated that those transactions occurred “shortly after the failure of his business”. There is material of some detail set out under this heading. However:

* There is an unfortunate conflation of speculation (for example: “there is more than an inference that a calculated series of transactions occurred”), reasons as claimed by the trustee (although I have concerns about this issue, to which I will shortly turn) and references to transactions, financial positions and events which could be categorised as evidence. It is difficult to separate the evidence from the reasons and speculation on the part of the trustee.
* The respondent submitted that, where a notice of objection attached a pleading setting out material facts in support of the trustee’s claim and identified the pleading as containing evidence or other material relied upon to establish the ground, the bankrupt could hardly be heard to complain that they were not in a position to identify and seek out the evidence or other material relied on to establish the ground of objection. In my view this submission is flawed. While the paragraphs under the heading “Evidence” set out facts as claimed by the trustee, allegations of “fact” are not evidence. It is a fundamental proposition that where facts are pleaded, evidence may be called ***about*** those facts. Further, while on the case before me I am not able to conclusively define the meaning of “other material” for the purposes of s 149C(1)(b) of the Bankruptcy Act, I consider dubious (at best) the proposition that “other material” in this context is capable of meaning unsubstantiated allegations of fact, or speculative comment.

1. More specifically, in relation to whether the statements set out under the heading “Evidence” are such that the bankrupt could identify and, if necessary, search out the evidence or other material relied upon for the purpose of the objection, I have concluded that that “Evidence” does not. In particular:

* The “series of transactions” is not clearly identified.
* The timing of this “series of transactions” is not clearly identified, in particular when they all occurred and whether they occurred within the 5 years prior to the commencement of the bankruptcy. An example of this uncertainty concerned funds in the amount of $326,500.00 which the trustee stated were withdrawn by the bankrupt from his superannuation account to his bank account and transferred to his spouse’s superannuation account.
* While the trustee made such allegations as the failure of the bankrupt’s spouse to contribute towards repayment of debts, or that a loan was made to the spouse rather than paying the debt owed to the bankruptcy, there was no evidence identified by the trustee relevant to the issue of consideration for transfers of property, and whether those transfers were for no consideration or less than market value.
* The trustee stated that the “series of transactions” identified were conducted “with the assistance of his legal advisor”, however this statement was not particularised to identify the legal advisor in question or the nature of the “assistance” allegedly provided.

1. Further, I am not satisfied that the “reasons” identified by the trustee are “reasons” within the meaning of s 149C(1)(c) of the Bankruptcy Act. The trustee’s stated reasons were two-fold, namely:

* The series of transactions were designed to benefit the bankrupt’s spouse for no consideration and to defeat his personal creditors, and
* The bankrupt did not receive any consideration from his spouse.

1. These “reasons” are, fundamentally, a replication of the ground itself on which the trustee relies. However as Olney J explained in *Ansett*:

… The mere existence of an available ground does not automatically give rise to an extension of the bankruptcy. To achieve that end the trustee must give notice setting out the ground he relies upon, the evidence which establishes that ground and the reason why he objects to the discharge on that ground. ***The latter requirement suggests that the trustee must address the relevance of the bankrupt's conduct in relation to the ground of objection in the context of the administration of the estate and to make a judgment as to whether that conduct provides a basis or reason for the bankruptcy to be extended.*** Further, the trustee is required to expose his reasoning in the notice.

(emphasis added)

1. In my view the First Notice of Objection does not state reasons of the trustee for objecting to the applicant’s discharge on the basis of ground 1.
2. Second, ground 2 referred to s 149D(1)(ab) of the Bankruptcy Act, which in turn refers to transfers void against the trustee because of ss 121. Section 121 applies, *inter alia*, to transfers of property by the bankrupt to another person where that property probably would have become part of the transferor’s estate or would have been available to creditors if the property had not been transferred, and the main purpose of the transfer was to prevent or hinder the property being available for division among the creditors.
3. A ground of objection pursuant to s 149D(1)(ab) requires only evidence.
4. Plainly, the evidence on which the trustee relies for this ground is inadequate. Indeed aside from an assertion of an intention on the part of the bankrupt to defeat his creditors, the only “evidence” is the reference to the bankrupt “divest[ing] $903,528.50 from his personal estate leaving unpaid debts.”
5. I further note that the “evidence” of ground 2 is virtually identical to the “reasons” preferred for ground 1. Why this is the case is entirely unclear.
6. Finally, even assuming that it is reasonable to read the First Notice of Objection as a whole, and take into consideration evidence set out earlier in the notice referable to ground 1, to ground 2, the deficiencies in that “evidence” to which I have already referred are such that ground 2 is non-compliant.

# CONCLUSION

1. For the reasons I have expressed, the First Notice of Objection was invalid. The applicant is entitled to the declarations he has sought.
2. Costs follow the event.

|  |
| --- |
| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier. |

Associate:

Dated: 4 April 2023