

## update

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## Friday Facts: Errors in bankruptcy notices – get your facts right

*In the cases of GR Finance Limited v Francis Waldron (2009) and GR Finance Limited v Josephine Waldron (2009), the Federal Magistrates' Court considered whether an error in the debt and interest claimed in two bankruptcy notices caused a substantial injustice to the debtor that could not be remedied by an order of the Court.*

The related cases concerned a judgment debt owed to the creditor by a married couple.

The bankruptcy notices in both cases did not comply with Section 41(2) of the *Bankruptcy Act 1966 Cth (Act)* as they were not in the form prescribed by the Regulations. The amount claimed in both bankruptcy notices was expressed to be the principal sum secured by the mortgage rather than the judgment debt. The interest claimed was also wrong and was calculated at the rate under the mortgage rather than the prescribed rate for a judgment debt in accordance with the rules of the New South Wales Supreme Court.

The creditor conceded that there were errors in the bankruptcy notices but argued that the errors in both cases were merely an overstatement of the amount due by the debtors.

The creditor sought to rely on section 41(5) of the Act, which provides that a bankruptcy notice is not invalidated by reason only that the amount specified in the notice exceeds the amount actually due, unless the debtor gives notice to the creditor that he or she disputes the validity of the notice within the time allowed for payment.

In both cases, the debtors failed to give notices to the creditor that they disputed the validity of the amount claimed.

The Court held that the amount claimed was not merely an overstatement, it was the wrong amount. The amount claimed in the bankruptcy notice was based on the terms of the mortgage, not the actual judgment debt obtained by the creditor.

The creditor also sought to rely on section 306(1) of the Act which provides that proceedings under the Act are not invalidated by a formal defect or irregularity, unless the Court is of the opinion that a substantial injustice has been caused by the defect or irregularity which cannot be remedied by an order of the Court.

The Court commented that there was no suggestion that the debtors had in this instance suffered a substantial injustice or prejudice by reason of the defects in the bankruptcy notices.

The Court stated that the critical question in these cases was whether the defects were merely formal defects or irregularities, or whether the errors were of such magnitude that the bankruptcy notices failed to meet the requirements made essential by the Act.

The Court held that the information contained in the bankruptcy notices did not

accurately set out the basis of the claims for interest.

The Court commented that whilst an overstatement of interest does not of itself invalidate a bankruptcy notice (in the absence of a notice by the debtor under section 41(5)), the information contained in the bankruptcy notices were not sufficient to enable the debtors to correctly identify or verify that there was an overstatement.

It was held that the errors were more than just a formal defect or irregularity. The bankruptcy notices failed to meet the purpose of the legislation by not providing sufficient information to enable the debtors to identify the correct amount owing by them.

Whilst a bankruptcy notice appears to be a straightforward form requiring payment by a certain date, it is important to ensure that all of the information contained in the bankruptcy notice is correct.

As these cases demonstrate, the consequences of an invalid bankruptcy notice are that the creditor will not only fail in their application but may also be liable for the costs incurred in defending the application.

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