

# A plank in the wreck - a benevolent construction of a debtor's notice

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The recent Federal Court of Australia decision of *The Owners – Strata Plan No 14120 v McCarthy (No 2)* [2016] FCCA 2017, demonstrates the dangers of errors in a bankruptcy notice.

In *McCarthy*, the Court found that when a debtor disputes the validity of a bankruptcy notice on the ground of a misstatement of the amount claimed, the debtor's notice does not need to identify the misstatement with complete precision to render the bankruptcy notice invalid.

Section 41(5) of the *Bankruptcy Act 1966*, states that a bankruptcy notice is not invalid if it claims an amount greater than the amount the creditor is entitled to, unless the debtor gives notice to the creditor within the time for payment that the debtor disputes the validity of the notice on the grounds of the misstatement.

To satisfy the requirements of s. 41(5), a debtor's notice must do more than simply assert that the amount specified in the bankruptcy notice exceeds the amount due. It must provide sufficient information to enable the creditor to identify what is the alleged misstatement.

In *McCarthy*, the creditor had obtained 3 judgments against the debtor. The creditor issued a bankruptcy notice based on 2 of the judgments it had obtained against the debtor. The bankruptcy notice misstated the amount due by \$51.29. The basis of the misstatement was a failure to properly credit payments previously made by the debtor. The debtor gave notice within time to the creditor that she disputed the bankruptcy notice. However, the debtor's notice did not specify the amount of the misstatement, it merely identified that there was an error in the accounting in the bankruptcy notice.

Upholding the decision of the judge at first instance, the Court in *McCarthy* found that the identification of the error in the accounting raised by the debtor was sufficient to alert the creditor to the misstatement for the purposes of s. 41(5) of the *Bankruptcy Act 1966* and to invalidate the bankruptcy notice.

*McCarthy* illustrates that care must be taken when preparing a bankruptcy notice. Courts do not look kindly upon a party taking unmeritorious advantage of minor points, but a debtor's notice which invalidates a bankruptcy notice can be a low bar to leap for a debtor.

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[Previous article](#) [Next article](#)