

INSOLVENCY LAW JOURNAL

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Aspects of trading trusts – Peter Agardy

This article reviews selected aspects of trading trusts. A corporate trading trustee does not, by reason of its position as trustee, own any assets in its own right. It holds assets in trust. A creditor dealing with a trading trust may not know that the company is trustee of a trust. But even if the creditor does know that it is dealing with a trading trust, is that creditor as well protected as if it were dealing with the company in its own right? The answer is no. Even though a trustee has a right of indemnity against trust assets, there is no guarantee for creditors that they can have access to that indemnity. There may be an attempt to block the right of indemnity, or the trustee may lose the right because of its conduct. Even if there is an ultimate ability to call on the right of indemnity, there is work to be done to achieve recovery. The creditor could be distracted if the trustee is replaced, although replacement of a trustee does not alter the basic rights of the creditor. This paper reviews the circumstances in which a trustee can be replaced as trustee and the circumstances in which it is appropriate to appoint a receiver of the trust assets. The extent to which a liquidator of a trustee company can charge remuneration against the assets of the trust activates an analysis of the nature of the right of indemnity. Finally, this article looks at the special position of directors of trustee companies and their potential exposure to personal liability for debts of the trustee. 7

Recent amendment to section 197 – is it acceptable? – Lang Thai

The majority decided in *Hanel v O'Neill* that directors of trustee companies could be held personally liable to discharge the debts incurred by a company pursuant to s 197(1) of the *Corporations Act 2001* (Cth). On 18 November 2005, legislation was passed to amend s 197(1); this was to overturn the decision. This article evaluates other relevant cases and argues that the recent amendment to s 197 is unsatisfactory as it leaves potential for abuse by directors of certain trustee companies. The article suggests further reform to the section and to this end, suggests ways for s 197 to reconcile with other parts of corporate law, such as insolvent trading and directors' duties. 22

The effect of sequestration on the solvent spouse of an insolvent debtor under South African insolvency law – Professor AL Stander and Frances Hannah

Section 21(1) of the *Insolvency Act 1936* (South Africa) provides that the separate estate of one of two spouses who are married out of community of property shall, upon sequestration of the estate of the other (insolvent) spouse, vest in the trustee of that insolvent estate. All the property of the spouse whose estate has not been sequestrated also vests in this person as if it were property of the sequestrated estate. The section empowers the trustee to deal with such property accordingly, but subject to the further statutory provisions contained in s 21, designed to protect the legitimate interests of the solvent spouse. Section 21 has been under serious criticism. A recently popular argument is that the section is unconstitutional. However, it was decided in *Harksen v Lane NO* 1998 (1) SA 300 (CC) that the provisions of this section are not invalid for being unconstitutional. Another view is that the interests of the insolvent estate are sufficiently protected by the impeachable dispositions specified in ss 26-31 of the *Insolvency Act*. Still, many serious problems are experienced and a number of changes and proposals for change are under discussion. 37

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