THOMSON REUTERS

Update Summary

PLEASE CIRCULATE IMMEDIATELY!

UPDATE 239 **FEBRUARY 2020**

McDONALD, HENRY AND MEEK AUSTRALIAN BANKRUPTCY LAW & PRACTICE

P McQuade & M Gronow

Material Code 42475568
Print Post Approved PP255003/00398

Looseleaf Support Service

You can now access the current list of page numbers at: http://www.thomsonreuters.com.au/support/product-support.aspx?id=/mediaTree/58599. If you have any questions or comments, or to order missing pages, please contact Customer Care LTA ANZ on 1300 304 195 Fax: 1300 304 196 Email: Care.ANZ@thomsonreuters.com

Commentary

Commentary has been updated extensively in Parts VI and X of the Bankruptcy Act.

Form and nature of relief

Bell, Nettle, Gordon and Edelman JJ noted of a possibility that a trust might have been set aside under s 120 or s 121 would have been insufficient to sustain a caveat: *Boensch v Pascoe* [2019] HCA 49. See [120.0.30].

Transfer of property

Where the legal estate in the property held on trust by the bankrupt passes to the trustee of the estate of the bankrupt, it passes with all of the equitable interests that were impressed on it when it remained in the hands of the bankrupt, *ie* equitable interests of the bankrupt as well as equitable interests of the beneficiaries of the trust. See [120.1.05].

Property held upon trust

Kiefel CJ, Gageler and Keane JJ identified the fundamental nature of an equitable interest as something that "is not carved out of a legal estate but impressed upon it", and there is a recognition of the consistency with the objects of the *Bankruptcy Act 1966* (Cth) of the trustee of the bankruptcy estate automatically obtaining the legal estate in property held by the bankrupt in which the bankrupt has an equitable interest in order to better secure the realisation of that equitable interest for the benefit of creditors. See [120.1.10].

Main purpose

Thawley J: The motive for a person's conduct is the person's reason for engaging in it: *Shepard v Behman* [2019] FCA 1801. See [121.1.35].

Examples of income

The absence of an express exclusion in s 139L(1)(b) of the payments received by a bankrupt from a workers' compensation scheme tells against the contention that the payments made by the applicant under the WIRC Act are not income in

accordance with the ordinary concepts and usages of that term: *CXTB v Inspector-General in Bankruptcy* [2019] AATA 5194. See [139L.0.30].

Commentary has been updated in Bankruptcy Regulations chapter.

Regulation 13.03: Pseudonyms

It has been held that "at least at the creditor's petition stage, the name of the debtor must be made public and pseudonyms and acronyms cannot be used to identify the debtor", though in principles pseudonyms can be used so long as contact details are provided for the petitioning creditor's solicitors and indexed appropriately: *ACW v Du Bray* [2019] FCA 1075. See [RE13.03.10].

THOMSON REUTERS

Filing Instructions

PLEASE FILE IMMEDIATELY!

UPDATE 239 FEBRUARY 2020

McDONALD, HENRY AND MEEK AUSTRALIAN BANKRUPTCY LAW & PRACTICE

Before filing this update please ensure that Update 238 has been filed – check behind the tabcard Filing Instructions/Summaries at the back of Volume 3.

Material Code 42475568
Print Post Approved PP255003/00398

Looseleaf Support Service
You can now access the current list of page numbers at http://www.thomsonreuters.com.au/support/product-support.aspx?id=/mediaTree/58599. If you have any questions or comments, or to order missing pages, please contact Customer Care LTA ANZ on 1300 304 195 Fax: 1300 304 196 Email: Care.ANZ@thomsonreuters.com

Filing Instructions

1. Check the currency of your Service

Ensure Update 238 has been filed.

2. File your updating pages

To file this update, you will need to refer to the following table.
In your binder, navigate to the Tabcard noted in the Find Tabcard column. Remove the pages listed in the Discard old pages column, then replace the discarded pages with the newly issued pages as listed in the Insert new pages column. Ensure that you follow one Filing Instruction row at a time.

Find Tabcard	Discard old pages	Insert new pages
VOLUME 1		
Pt VI – Administration of Property	10-2455 – 10-2618	10-2455 – 10-2618
	10-5111 – 10-5210	10-5111 – 10-5210
Pt X – Personal Insolvency Agreements	17-3153 – 17-3158	17-3153 – 17-3158
VOLUME 2		
Federal Circuit Court of Australia Act 1999	26-105 – 26-106	26-105 – 26-106
	26-10051 – 26-10152	26-10051 – 26-10060
Bankruptcy Regulations 1996	40-4351 – 40-4352	40-4351 – 40-4352
	40-7151 – 40-7154	40-7151 – 40-7154
	40-9055 – 40-9058	40-9055 – 40-9058

Looseleaf Support Service

To see the current list of page numbers or check missing/misfiled pages, access a pdf containing the current list of page numbers for your service on the Looseleaf Support Center pages at: https://legal.thomsonreuters.com.au/support/ or Customer Care LTA ANZ on 1300 304 195 (Email: Care.ANZ@thomsonreuters.com).

inconsistent with the reasoning of Drummond J in *Bell Group* at [2535], considered that she was bound by *Alvaro* and concluded on the facts that there was no personal claim against the transferee: [229], [234].

In *Fiorino v Woodgate* [1994] FCA 181, proceedings were not commenced before the property was sold and the reasons do not identify that tracing was sought to be relied upon to found the relief claimed. Gummow J observed that the effect of s 120 is that a disposition (now transfer) of the type referred to in the section is voidable at the instance of a trustee from the time the title accrues, that is the date of the commencement of the bankruptcy: at [43]. Consequently, it was held that at the time the property was sold to third parties s 120 had operated to make ineffectual as against the trustee every step taken to pass the property by the transferee and the property was held upon trust for the trustee in bankruptcy. Upon sale by the transferee to a third party, the transferee comes under a personal liability to the trustee in bankruptcy to account, as moneys had and received, for proceeds of sale. That is, on the basis "that [the transferee] was selling something which [that person] had no title and that the trustee stood in the shoes of the true owner to maintain money had and received": also *Verge v Devere Holdings Pty Ltd (No 4)* (2010) 8 ABC(NS) 211; [2010] FCA 653 at [369] – [370] (McKerracher J). *Fiorino v Woodgate* is not referred to in *Alvaro*. The change in wording of s 120 since *Fiorino v Woodgate* is immaterial to the application of *Fiorino v Woodgate* to the current form of the provision: *Lo Pilato (Trustee) v Kamy Saeedi Laywers Pty Ltd* at [228].

In *Bell Group*, Drummond J considered that the commencement of bankruptcy brings about the avoidance of a transfer if the conditions in s 120(1) are satisfied, not the decision by a trustee to intervene and dealings by the transferee with the transferred property will only be valid in the period between the date the property is transferred and the commencement of the bankruptcy. His Honour noted that as a matter of practicality, unless the trustee challenges a transfer of property, the transfer will stand, though it will have been avoided by operation of the *Bankruptcy Act 1966* (Cth). His Honour was critical of reliance that had been placed in earlier decisions dealing with the *Bankruptcy Act* on authorities concerned with the Statute of Elizabeth (*13 Elizabeth c.5*), which he said differs from the avoidance of transfers under the *Bankruptcy Act 1966* (Cth): [2526] – [2535].

The distinction between the two statutes was also identified by Allsop J (as His Honour then was). The phrase "void against the trustee" in ss 120 and 121 after the amendments to the *Bankruptcy Act 1966* (Cth) in 1996 makes relevant the well-known learning of the phrase that the word "void" means voidable. In the case of bankruptcy, the transfer is void as from the date of accrual of the trustee's title, being the commencement of bankruptcy. In the case of the Statue of Elizabeth and its modern equivalents, the avoidance is prospective from the date of the avoidance: *O'Halloran v O'Halloran* [2002] FCA 1305 at [76]. In the reasons of the majority in *Alvaro*, there is no acknowledgement of the distinction or the implications of such distinction upon transfers that are "void" under either s 120 - 121. Allsop J, went onto consider the form of relief in the context of the transformation of funds into the form of property. It was noted that, until the avoidance of the transfer the property was owned by the transferee both legally and beneficially; if the property the subject of the transfer was in the hands of the transferee at the time of the commencement of the bankruptcy the transferee will be taken thereafter to hold the property to which the trustee is thenceforth entitled; if prior to the commencement of the bankruptcy, the property transferred had been paid away or sold, no personal remedy lies against the transferee as up until the commencement of bankruptcy (even after avoidance) the transferee is taken to have had full right and title to deal with the property; where avoidance of the transfer was made, but the property, the transfer of which is avoided, has been identifiably changed in form, equity will give relief, in its auxiliary jurisdiction and if the proceeds of the transfer can be identified in different property that property can be claimed, at least to represent the funds the subject of the transfer void against the trustee: [77] – [80].

Sutherland v Vale [2008] NSWSC 759 is an example of the impact upon the available relief of the approach taken by the court as to when a transfer is "avoided". Brereton J, on an application for removal of a caveat said by way of dicta that the caveat suffers from the defect that the provisions of ss 120 and s 121, to the effect that a relevant disposition is "void against the trustee", have been held to mean that the disposition is only voidable, and that the trustee

has no equitable interest (and therefore no caveatable interest) in the subject property unless and until the relevant court makes an order pursuant to the *Bankruptcy Act 1966* (Cth) setting aside the disposition and revesting the property in the trustee. Accordingly, His Honour said, that the mere assertion of a claim under ss 120 or s 121 is not sufficient to give a trustee a caveatable interest. The decision in *Martin v Official Trustee in Bankruptcy* [1990] TASSC 20; (1990) Tas R 65 was referred to. There, the applicant and the bankrupt were the registered proprietors of the property. The transfer of the bankrupt's interest in the property occurred on 8 April 1986 and the sequestration order was made on 4 March 1998. Green CJ, after identifying that the word "void" in s 120 means voidable, said that s 120 confers upon the respondent the statutory right to take steps to avoid the settlement (now transfer) but does not confer any estate or interest in the land on the respondent. In *Boensch v Pascoe* [2019] HCA 49 at [104], Bell, Nettle, Gordon and Edelman JJ said that the possibility that a trust with respect to real property might have been set aside under s 120 or s 121 would have been insufficient to sustain a caveat. Reference was made to the decision of *Amaca Enterprises Pty Ltd v Official Trustee in Bankruptcy* (unreported, Sup Ct of Vic, 30 September 1983) that held that the alleged right under s 121 to bring an action to set aside a transfer of land justified declining to order the removal of a caveat by the trustee in bankruptcy, and to contrary position held in *Martin v Official Trustee in Bankruptcy*. There was no analysis in the reasoning in *Boensch v Pascoe* as to when a transfer is avoided by operation of s 120 or s 121. It was noted by Bell, Nettle, Gordon and Edelman JJ that it is not to say that where there are reasonable grounds to conclude that a bankrupt has an extant beneficial interest in property held by the bankrupt on trust for another, the trustee in bankruptcy may not lodge a caveat to protect the interest of the trustee in bankruptcy "*pendente lite*" (while litigation is pending).

Where an interest in real property transferred prior to bankruptcy remains with the transferee, then either upon the reasoning that the "avoidance" occurs upon the trustee making an election to do so or alternatively, by the automatic operation of s 120 (if the conditions in s 120(1) are satisfied) and such "avoidance" takes effect upon the commencement of the bankruptcy, the transferee holds the property transferred on trust for the trustee in bankruptcy from the commencement of the bankruptcy. That provides a trustee in bankruptcy with a caveatable interest, being an estate or interest in land. Conversely, if the "avoidance" does not operate until determination by a court, then there is no caveatable interest until that determination is made.

Effect of a transfer being void

Where s 120(1) (s 121(1) or s 122(1)) operates the transfer of property that is void reverts to the transferor if it remains in the hands of the transferee when avoided, and it is the transferor's property that vests in the trustee. The trustee's title to the property will be no higher or better than that of the bankrupt: *Re Farnham* [1895] 2 Ch 799, at 808 (Lindley LJ); *NA Kratzmann Pty Ltd v Tucker, Liquidator of Reid Murray Developments (Qld) Pty Ltd (No 2)* (1968) 123 CLR 295, [1968] HCA 44, at 298 (CLR) (McTiernan, Taylor and Menzies JJ) *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71 at [43(e), (f) and (h)] (Lindgren J).

The trustee does not, however, obtain priority over a mortgagee where the mortgage was granted subsequent to the transfer: *Sanguinetti v Stuckey's Banking Co* [1895] 1 Ch 176; see also *Re Farnham* [1895] 2 Ch 799 at 808 (CA); *Re Fitzgerald; Ex parte Burns* (1986) 10 FCR 261; 63 ALR 623 and *Re Last; Ex parte Butterell* (1994) 124 ALR 219. Ancillary relief may be granted to ensure that the trustee obtains an effective remedy, such as an order that the transferee indemnify the trustee in respect of the amount payable under the mortgagee: *Verge v Devere Holdings Pty Ltd (No 4)* (2010) 8 ABC(NS) 211; [2010] FCA 653; *Verge v Devere Holdings Pty Ltd* (No 5) [2010] FCA 1452 at [43], [45] (McKerracher J).

Where the property transferred is a payment of money (s 120(7)(a), s 121(9)(a), s 122(8)) the "money" does not revert to the transferor bankrupt and consequently vest in the trustee when the transfer is avoided. The trustee's remedies will depend on the common law, such as for moneys had and received or s 30(1): *Re Ward; Thomas v L. G. Abbott & Co Ltd* (1950) 16 ABC 214 at 222 (Paine J); *Commissioner of Taxation (Cth) v Jaques* (1956) 95 CLR 223;

[1956] HCA 40, at 229 (CLR); *NA Kratzmann Pty Ltd v Tucker, Liquidator of Reid Murray Developments (Qld) Pty Ltd (No 2)* (1968) 123 CLR 295, [1968] HCA 44, at 298, 299 (McTiernan, Taylor and Menzies JJ).

Offer by transferee to pay difference between market value and consideration given

Having concluded the transfer is void, the court is not empowered to alter the impact of s 120(1) by ordering that the transfer is not void if the transferee paid to the trustee the difference between the market value of the property transferred and the consideration in fact given for the transfer: *Tyler v Thomas* (2006) 150 FCR 357; 3 ABC(NS) 773; [2006] FCAFC 6 (Branson, Bennett and Graham JJ).

Historically, a settlement was not avoided absolutely but only to the extent necessary to satisfy the debts of the bankrupt and the costs of the bankruptcy (*Re Sims; Ex parte Sheffield* (1896) 3 Mans 340; *Re Parry; Ex parte Salaman* [1904] 1 KB 129; *Carruthers v Peake* (1911) 55 Sol Jo 291; *Re Macdonald; Ex parte McCullum* [1920] 1 KB 205) and the trustees of the settlement are entitled as against the trustee in bankruptcy to a lien on the trust property for their proper expenses as trustees: *Merry v Pownall* [1898] 1 Ch 306 (costs of defending action to set aside settlement); cf *Re Butterworth; Ex parte Russell* (1882) 19 Ch D 588 (CA); *Mackay v Douglas* (1872) LR 14 Eq 106.

Ancillary relief

The general law and other statutory provisions supply the appropriate remedies for the relevant circumstances: *Commissioner of Taxation (Cth) v Jaques* (1956) 95 CLR 223; [1956] HCA 40, at 229 (CLR); *NA Kratzmann Pty Ltd v Tucker, Liquidator of Reid Murray Developments (Qld) Pty Ltd (No 2)* (1968) 123 CLR 295, [1968] HCA 44, at 298, 299 (CLR) (McTiernan, Taylor and Menzies JJ). Section 30(1)(b) of the *Bankruptcy Act 1966* (Cth) enables the court to make such orders including orders granting injunctions and other equitable remedies as the court considers necessary for the purpose of carrying out or giving effect to the *Bankruptcy Act 1966* (Cth).

Equity

Equity will assist the applicant in obtaining an effective remedy: *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372; 138 ALR 341 (Wilcox, Cooper and Moore JJ); *Verge v Devere Holdings Pty Ltd (No 5)* [2010] FCA 1452 at [43] (McKerracher J). Section 30(1)(b) enables the court to grant injunctions and other equitable remedies. This reflects the recommendation in the Clyne Committee Report at para 41 that the courts exercising bankruptcy jurisdiction should be given express power to grant equitable remedies.

In *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372; 138 ALR 341, Wilcox, Cooper and Moore JJ held that pursuant to s 121 of the *Bankruptcy Act 1966*, a disposition of property is avoided against a trustee from the date when proceedings to establish that fact are commenced. Dowsett J in *Worrell v Issitch* [1999] FCA 1452, said that by parity of reasoning it follows that under s 120 (former provision) had the same effect. In *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71 Lindgren J expressed a view that where the trustee elects to avoid the transfer, the trustee is entitled, for the purposes of identifying and realising the property of the bankrupt, to have the transfer treated as not having occurred, and the debtor as having continued to own the property following the transfer until it vests in the trustee.

In *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372; 138 ALR 341, Wilcox, Cooper and Moore JJ citing *Re Mouat* [1899] 1 Ch 831 at [427] said (as to the former provision):

1. Where there has been a disposition of property and the property has not been retained but had been transformed into other identifiable property or mixed with a property of a third party, the court will allow a remedy against the identified specific property in order to give the trustee in bankruptcy an effective remedy upon the avoidance of the property.
2. Where the property has altered in form, but remains in the hands of the donee, equity will allow the trustee in bankruptcy to claim the property in its altered form as property to which he or she is entitled, the original disposition by the bankrupt will be void against the trustee.

3. Where the property has been mixed with property of another person so as to constitute a mixed asset or a mixed fund it becomes necessary to look to equity in order to determine how the interests of the persons whose property has come into the mixed fund are to be ascertained and provided for.

In *Brady v Stapleton* (1952) 88 CLR 332; [1952] HCA 62 Dixon CJ and Fullagar J at p 337 cited Lord Ellenborough CJ in *Taylor v Plumer* 105 ER 721; (1815) 3 M & S 562:

> It makes no difference in reason or in law into what other form, different from the original, the change may have been made…for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money and mixed and confounded in a general mass of the same description. The difficulty which arises is such a case is a difficulty of fact and not of law.

And at p 338:

> Equities are not defeated if a trustee mixes trust moneys with his own moneys and with the mixture purchases a grey horse and a black horse or a grey horse alone. In such a case equity imposes a charge on the two horses or the one horse.

In *Clout v Anscor Pty Ltd* (2003) 1 ABC(NS) 44; [2003] FCA 326, Drummond J stated that on the basis of *Brady v Stapleton*, if it is impracticable to appropriate a specific severable part of a mixed fund to a person otherwise beneficially entitled to a part of the fund, equity imposes a charge on the entire fund in favour of the beneficiary. However, this was not an inevitable result.

Tracing

Tracing has been described in various ways, but it is a means of following the original property into other property. It does not, of itself, create any rights or a remedy: *Alesco Corp Ltd v Te Maari* [2015] NSWSC 469 at [130] to [141] (Hallen J) (Alesco); *Evans v European Bank Ltd* [2004] NSWCA 82; 61 NSWLR 75 at [134] (Spigelman CJ, with whom Handley and Santow JJ agreed).

The nature of tracing was explained by Lord Millett in *Foskett v McKeown* [2001] 1 AC 102 at 108 as follows:

> Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the nature of his interest in the original asset. (citations omitted)

As Lord Millett said at 127C "[t]he process of following and tracing …..are distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old".

Equity does not permit "money" to be traced into an overdrawn bank account, which remains overdrawn after the payment was credited to the bank account: Alesco at [140].

Moneys had and received

The principle for moneys had and received is referred to by Viscount Haldane LC in *Royal Bank of Canada v The King* [1913] AC 283 at 296 as follows:

> It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use.

The identification of a satisfactory doctrinal basis for the action, however, has been said to be a more difficult matter. Also, the difference between whether the personal claims are described

as "equitable" or as "common law claims" is not a difference of principle because although the claim for money had and received is a common law claim, it has equitable roots: *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; [2001] HCA 68, at [64], [83] – [89] (Gummow J); *Great Investments Ltd v Warner* (2016) 243 FCR 516; [2016] FCAFC 85, at [68] (Jagot, Edelman and Moshinsky JJ).

Where there is a transfer of property involving a payment of money which is void as against the trustee, so that in favour of the trustee the transferee is considered to have received money that belongs to the bankruptcy estate the trustee's remedy is to recover the money as money had and received to his or her use: transfer includes payment of money, s 120(7)(a) and s 121(9)(a); *Commissioner of Taxation v Jaques* (1956) 95 CLR 223; [1956] HCA 40, at 229 (Dixon CJ, Fullagar, Kitto and Taylor JJ); *Re Ward; Thomas v L G Abbott & Co* Ltd (1950) 16 ABC 214 at 222; *Marks v Feldman* (1870) LR 5 QB 275 at 281. In *Federal Commissioner of Taxation v Jaques*, a decision considering the preference provision in s 95 of the *Bankruptcy Act 1924* (Cth), it was said that an alternative approach was to apply to the court for an order for repayment, which is a remedy provided for by s 25 of the *Bankruptcy Act 1924* (Cth) (s 30(1)(b) of the *Bankruptcy Act 1966* (Cth)); *Lane v Federal Commissioner of Taxation (No 3)* [2018] FCA 1572 at [15], with respect to s 122.

The alternative approach, is that money transferred or money realised from the sale of property that is transferred after the commencement of the bankruptcy that is void, is held on trust by the transferee for the trustee in bankruptcy and the transferee has a personal obligation to account to the trustee for that money. That is, s 120 operates to make ineffectual every step taken by the bankrupt which would cause the beneficial interest in property to pass to the transferee, which as a result at the time of a sale of the property the transferee is trustee of the property for the trustee in bankruptcy. The trust arises from the interaction of s 120 and the general law. The transferee then becomes under a personal liability to account to the trustee in bankruptcy for, as moneys had and received, the proceeds of sale of the property on the basis that the transferee is selling something which he or she has no title and the trustee in bankruptcy stood in the shoes of the transferor as the true owner to maintain the money had and received claim: *Fiorino v Woodgate* [1994] FCA 181 at [47], [48] (Gummow J) citing *Brady v Stapleton* (1952) 88 CLR 332; [1952] HCA 62, at 334 and *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548 at 572; *Verge v Devere Holdings Pty Ltd (No 4)* (2010) 8 ABC(NS) 211; [2010] FCA 653 at [370] (McKerracher J).

Mortgages

Where the relevant transfer avoided is the granting of a mortgage that has been registered, an order may be made directing the transferee/mortgagee to effect the removal of the mortgage from the Land Titles Register. Where the mortgagee fails to comply with such an order, a further order may be made that an officer of the court may be appointed to execute the release of mortgage: *Lane v Oakley (No 2)* [2019] FCA 488, at [11] (Rangiah J).

Though such a power is not specifically provided for in s 30(1) of the *Bankruptcy Act 1966* (Cth), it has been held that the absence of such a specific power does not suggest a limitation on the provision: *Lane v Oakley (No 2)* [2019] FCA 488, at [11]; *Leroy as Trustee for the Bankrupt Estate of Shinton v Sun Sheet Metals (Qld) Pty Ltd* [2017] FCCA 2735, at [34].

Where it is possible for the mortgagee to effect the removal of the mortgage, an order will not be made for an officer of the court to effect removal first: *Sino-Resource Imp & Exp Co Ltd v Oakland Investment Group Ltd (No 2)* [2018] QSC 133, at [27]. Such an order may be made concurrently, contingent on the possibility of the mortgagee not effecting that removal.

Example:

Lane v Oakley (No 2) [2019] FCA 488

It was declared that registered and equitable mortgages were void as against the trustee pursuant to ss 120 and 121 of the *Bankruptcy Act 1966* (Cth): *Lane v Oakley* [2019] FCA 107.

To give the trustee an effective remedy the following orders were made with respect to the registered mortgage:

1. The respondent shall prepare and lodge with the Queensland Titles Registry office the documents necessary to effect the removal of any reference to the registered mortgage.
2. In the event that the respondent fails to comply with the above order:
    a. The applicant shall file and serve an affidavit deposing to such failure;
    b. The applicant shall prepare a Form 3 Release of Mortgage in respect of the registered mortgage for execution by a registrar of the Federal Court of Australia;
    c. A registrar of the Federal Court of Australia shall execute the Form 3 Release of Mortgage;
    d. The applicant's solicitor is authorised to lodge with the Queensland Titles Registry Office the executed Form 3 Release of Mortgage for registration.

Examples

- *Clout v Anscor Pty Ltd* (2003) 1 ABC(NS) 44; [2003] FCA 326

  Properties were purchased by Anscor and the respondents with commission money amounting to approximately $26.3 million received from the bankrupt. Drummond J declared that the payments of commission by the bankrupt to the respondent were void as against the trustee, pursuant to s 120. Drummond J, in considering whether the moneys received by Anscor and the respondents could be traced into the properties said:

  (a) Anscor moneys made up of avoided commissions, had been transformed into the identifiable property of the third party;
  (b) Where Anscor has not retained the commissions but they have been transformed into the identifiable property of a third party, equity would allow the respondent to claim the property in its altered form from a third party so long as the third party could not rely upon equitable principles protecting a bona fide purchaser for value;
  (c) The respondents were not so protected because each of them acquired interests in the relevant properties, which they still held, with moneys provided to them by Anscor with notice that the moneys had come from the commissions and had not given any value to Anscor for the moneys received.

  Consequently, the court made a declaration that the respondents held assets on trust for the trustee on the basis that the money used to purchase the assets could be traced to the commission moneys paid by the bankrupt. Appeal dismissed: *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71.

- *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372; 138 ALR 341

  Funds were lent to a company by the bankrupt and used to purchase property. The court declared that the disposition of such funds was void as against the trustee pursuant to s 121 and granted the trustee a charge over that property to secure repayment of the money and interest. Wilcox, Cooper and Moore JJ stated that "the minimum that equity requires is that the [property] be charged with the repayment of the [money] …".

- *Fodare Pty Ltd v Official Trustee in Bankruptcy* [2000] FCA 1721

  The court declared that property purchased by the applicant partly from moneys found to constitute a void disposition pursuant to s 120(1) be charged with the payment of such moneys to the trustee in bankruptcy. Lehane, Hely and Conti JJ said at [12], that *Official Trustee in Bankruptcy v Alvaro* recognises the entitlement in the trustee to a charge upon the property to secure payment of the judgment debt.

- *Worrell v Issitch* [1999] FCA 1452

  The bankrupt sold his property and the proceeds of sale were deposited into a bank account. This money was then used by the respondent to construct a house in her name in contemplation that the respondent would care for the bankrupt. The court declared that there was a settlement of property within the meaning of s 120(1). Consequently, the proceeds of sale were declared to be void as against the trustee in bankruptcy. The court ordered that the respondent account to the trustee in bankruptcy for the proceeds of sale. However, as the proceeds had been used to construct a house, Dowsett J, relying on the decision in *Official*

Trustee in Bankruptcy v Alvaro, declared that the trustee in bankruptcy was entitled to a charge over the house to secure payment. Dowsett J held that by parity of reasoning there was no basis for distinguishing between ss 120 and 121 for the purposes of the application of the principles for determining available relief: [62]. Appeal dismissed: *Issitch v Worrell* (2000) 172 ALR 586; [2000] FCA 477 (Spender, Drummond and Katz JJ).

- *Worrell v Issitch* [2001] 1 Qd R 570; [2000] QSC 146

  Holmes J at [9] held that s 99(2) of the *Property Law Act 1974* (Qld) was sufficiently wide to empower the sale of property subject to a charge such as that created by the order of Dowsett J. An application for an extension of time within which to appeal from the decision of Holmes J was refused: *Issitch v Worrell* [2000] QCA 304.

- *Lumsden v Snelson* [2001] FCA 83

  The bankrupt and the respondent were joint proprietors of a property. The bankrupt transferred his half interest in the property to the respondent. The respondent then sold the property. The proceeds of sale were used to purchase assets and shares for investment. The investment turned out to be a scam and therefore was worthless. The respondent argued that her half-share of the proceeds of the sale of the property was used in the purchase of the assets and the bankrupt's share had been invested. Goldberg J held at [22] that at the time the proceeds of sale were received the respondent was entitled to the whole of the proceeds and therefore could not assert that she purchased the asset out of her half share of the proceeds which is therefore immune from any accounting to the trustee or tracing.

  Consequently, Goldberg J made the following orders:

  1. The transfer of the bankrupt's interest in the property to the respondent is void as against the trustee in bankruptcy.
  2. All investments made by the respondent are held by her on trust for herself and for the bankrupt in equal shares.
  3. The asset purchased by the respondent is held by her on trust for herself and the bankrupt in equal shares.
  4. The respondent to execute all documents and do all acts necessary to transfer the assets to the trustee. Upon the transfer, the trustee shall sell them and shall account to the respondent for her equal share.

- *Andrew v Zant Pty Ltd (No 2)* (2005) 213 ALR 841; [2005] FCA 21

  The bankrupt provided the funds to purchase a property with the intention that the specific property be held by him on trust for his son. The transfer by the bankrupt of the property was declared void as against the trustee in bankruptcy in accordance with s 121 because the bankrupt had transferred the funds with the desire to delay or hinder the recovery of income tax not yet assessed. The court ordered that it was the property, rather than the cash provided by the bankrupt to purchase the property, which vested in the trustee in bankruptcy, as the bankrupt's main purpose was to acquire the property for his own benefit and to prevent his creditors from obtaining access to it: [2], [7].

- *Verge v Devere Holdings Pty Ltd (No 4)* (2010) 8 ABC(NS) 211; [2010] FCA 653; *Verge v Devere Holdings Pty Ltd (No 5)* [2010] FCA 1452

  Property which was transferred to the respondent had been sold to a third party. The court declared that both the transfer to the respondent and the transfer to the third party were void as against the trustee in bankruptcy. The court made ancillary orders with respect to transfers that were declared void to provide the applicants with an effective remedy. An order for indemnification was made in respect of any amount payable to any mortgagee of specified property.

- *Nelson v Mathai* (2011) 253 FLR 139; [2011] FMCA 686

  A number of transfers were challenged under s 121. Where money of the transferor was used to purchase real property in the name of another, it was held that such real property was, in substance, purchased by the transferor and transferred to the transferee and the applicant was entitled to recover the property. Alternatively, the applicant was entitled to recover the property as it was purchased entirely from the funds of the transferor and the

funds could be traced to that property: *Nelson v Mathai* (2011) 253 FLR 139; [2011] FMCA 686 at [118], [119] (Riethmuller FM); appeal dismissed: *Mathai v Nelson* (2012) 208 FCR 165; [2012] FCA 1448.

- *Lo Pilato v Kamy Saeedi Lawyers Pty Ltd* [2017] FCA 34

  The trustee sought to recover money from two entities to which the bankruptcy had transferred real estate within months prior to the bankruptcy. It was found that the transfer was void as against the trustee and a declaration was made to that effect. The property was sold to a bona fide purchaser for value before the proceeding was commenced. It was contended by the transferee that the trustee was not entitled to relief unless the proceeds of sale are traced into a derivative form, and no tracing claim was made on the pleadings or run at trial. The relief claimed, however, sought an account of all moneys derived from the sale of the property and for the payment to the trustee in bankruptcy of those moneys upon the taking of an account. Apart from the payout of the mortgage and the costs of the selling process, there was no evidence as to what happened to the remaining net proceeds of sale. Applying the reasoning in *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372; 138 ALR 341 as to the date and the consequence of avoidance of a transfer, it was held that the trustee had no personal claim against the transferees. On the evidence, there was no utility in making any further orders as to the relief sought by way of an account.
- *Pekar v Holden* [2017] FCA 596

  Despite the breadth of the power provided by s 30(1), it does not empower the court to make an order for sale of property where such an order would destroy the interest of a person who was not the bankrupt. An order may be made against a non-bankrupt under s 30(1), if that person had failed to comply with his or her obligation under the *Bankruptcy Act 1966* (Cth). The court may make an order under state legislation for the sale of property. It was declared that the bankrupt's interest in the property vests in the trustee in bankruptcy. The trustee was appointed as trustee for sale of the property. The bankrupt and a non-bankrupt person (respondent to the proceedings at first instance) were ordered to deliver vacant possession of the property to the trustee and remove all personal possessions by a specified date. It was ordered that the trustee pay 50% of the proceeds of sale to the respondent.
- *Leroy v Koutavas (No 2)* [2017] FCA 912

  The trustee claimed declarations of right against the bankrupt's former wife in respect of the bankrupt's interest as tenant in common in equal shares in residential property, sought the appointment of a trustee for sale of the property and removal of a caveat. It was declared that, the first respondent holds the title to the property on trust as to one half share as tenant in common for the benefit of the bankrupt estate and it was declared that the interest of the bankrupt vests in the trustee pursuant to s 58 of the *Bankruptcy Act 1966* (Cth). Further orders were made under state legislation removing the caveat and appointing trustees for sale of the property. Orders were made regarding the sale of the property and as to the distribution of the sale proceeds.
- *Woods v Ulusoylu* [2017] FCCA 935

  It was declared that transfers of property by payments from the bankrupt to the respondent representing the net proceeds of sale of a property became void as against the trustees in bankruptcy. There was no evidence as to the ultimate destination of the net proceeds after the transfers took effect. It was ordered that the respondent pay to the trustees that sum and interest thereon. Adapting the reasoning in *Westpac Banking Corp v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1; [2012] WASCA 157, it was held that the respondent's liability to pay the sum claimed by the trustee derives from the interaction of ss 120, 129 and the general law. The respondent received the proceeds of sale under a defeasible title and, from the commencement of the bankruptcy, held those proceeds as trustee for the applicants – such trust arising upon the interaction of s 120 and the general law. It was held, that the respondent is liable, as trustee, to account for those proceeds as moneys had and received and the trustees were entitled to the relief upon the basis that the net proceeds were still held

by the respondent. The court said that s 129 is thereby engaged so founding a liability for payment to the trustees and s 30 then authorises the making of an order for payment to the trustees: [243], [245], [261], [264].

Parties

The form and nature of the relief will determine who should be joined to the proceedings. Where the orders sought would directly affect the person's rights or liabilities they should be joined. The fact that allegations are raised about the conduct of a person does not establish that they ought to be joined. However, allegations about a bankrupt's conduct which, if established in criminal proceedings, would be sufficient to expose the person to a penalty or imprisonment, may be sufficient justification to have the person as a party: *Colonial Mutual Life Assurance Society Ltd v Donnelly* (1998) 82 FCR 418; 154 ALR 417 (O'Connor, Sackville and Wilcox JJ). Generally, where the relief sought would not directly affect the bankrupt's rights or liabilities the person will not be a necessary party: *Prentice v Cummins* (2002) 194 ALR 94; [2002] FCA 1140 (Sackville J).

Summary relief

The trustee (applicant) may seek summary relief under s 31A of the *Federal Court of Australia Act 1976* (Cth). While there is no doubt that the ability to obtain summary judgment has been lowered by s 31A, it remains a serious matter to finally determine the proceeding at an early stage. The applicant for summary judgment would need to establish only that the conclusion for which they contended is reasonable. A court will approach the application on the basis of considerable caution and that the affidavits of the respondent to the application will be accepted at trial, provided they are not inherently incredible and absent the opportunity for cross-examination: *Travaglini v Spencer* [2008] FCA 1618 at [11] – [13]; *Macks v Ekena Pty Ltd* (unreported, Fed Ct of Aust, Mansfield J, 23 September 1998) (considering the former rules, O 20, rr 1 and 2 of the *Federal Court Rules 1979*); *Pascoe v Boensch* [2009] FCA 1240 (Graham J), which considers the principles in the context of the *Federal Circuit Court of Australia Act 1999* (Cth), the *Federal Circuit Court Rules 2001* (Cth), the *Federal Court of Australia Act 1976* (Cth) and the *Federal Court Rules 2011*.

Injunction

Where a trustee is prepared to proffer a personal undertaking as to damages, an injunction may be sought restraining a respondent from disposing of property the subject of the application under either s 120 or s 121: *Wily v Anastasiou* (unreported, Fed Ct of Aust, Tamberlin J, 2 December 1998). The applicant applied for an order restraining the respondent from disposing, transferring or otherwise encumbering a sum being a portion of the sale proceeds of a property, pending further order. It was an originating application seeking interlocutory relief. The applicant was involved in litigation with the former husband of the respondent. It was alleged that the respondent had received a transfer of the husband's interest in the matrimonial home and transfer would be voidable at the instance of a trustee in bankruptcy upon the husband being made bankrupt. At the date of the hearing the applicant had not obtained a judgment against the husband. The judge said that where a Mareva type injunction (asset preservation order) is sought against a third party who is not shown to have set upon a course of frustrating the administration of justice, as between the claimant and the respondent, it requires a high degree of caution on the part of the court invited to make such an order. The applicant must show that if the relief is not granted then it is likely the proceeds of sale will be put beyond the reach of a trustee in bankruptcy: *Chiou v Wang* [2000] FCA 713 (Drummond J). A trustee applied for a Mareva type injunction, restraining the disposition of property. The judge said that there must be evidence of a prima facie case, in the sense of an arguable case, that the applicant will obtain judgment, and that there is a real risk that, unless restrained, the respondent will deal with the property so as to frustrate enforcement of that judgment. A court should grant the minimum relief possible: *Clout v Anscor Pty Ltd* [2000] FCA 727 (Drummond J); also see *Official Trustee in Bankruptcy v Dunwoody* [2004] FMCA 143 (Rimmer FM); *Leigh v Ghanem* [2004] FMCA 629 (Rimmer FM); *Donnelly v King* [2005] FMCA 192 (Raphael FM).

Cross-vesting/accrued jurisdiction

Hill J in *Ashton v Prentice* (unreported, Fed Ct of Aust, Hill J, 11 December 1998), said that the Jurisdiction of Courts (Cross-Vesting) Acts may be invoked to require a Registrar-General to alter the records of the title, to record the trustee as the registered proprietor of the property. However, since the decision of the High Court in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ), absent a valid cross-vesting scheme whereby State Jurisdiction is conferred on the Federal Court of Australia, the court can only look to its accrued jurisdiction to exercise a power under State legislation: *Re Smith* (1986) 161 CLR 217; 60 ALJR 508; 66 ALR 10; 10 Fam LR 769; [1986] FLC 91-732. The court must look to the proper construction of the legislation empowering directions to be given to the Registrar-General to alter records of title: *Turner v Official Trustee in Bankruptcy* (1999) 97 FCR 241 (O'Connor, Tamberlin and Mansfield JJ).

Jurisdiction of State courts

Subsequent to the decision of *Meriton Apartments Pty Ltd v Industrial Court (NSW)* (2008) 171 FCR 380; 6 ABC(NS) 370; [2008] FCAFC 172, it is suggested that an application could not be brought in a State court for relief under either s 120 or s 121 whether the relief sought directly invokes those provisions or indirectly invokes those provisions by way of a determination of an entitlement to a fund as occurred in *Sutherland v Brien* (1999) 149 FLR 321; [1999] NSWSC 155 (Austin J). Perram J, who was in the dissent, reviewed the history of s 27 and authorities which have considered that decision. His Honour considered *Sutherland v Brien* and disagreed with the conslusions of Austin J that the Supreme Court of New South Wales has jurisdiction to hear and determine an application as to the entitlement of parties to an amount held in trust even though the court would be required to consider the application of s 120. Although the legal issue to be determined in the proceedings related to the proper construction and application of a section under the *Bankruptcy Act 1966*, the proceedings themselves were not proceedings under or by virtue of the *Bankruptcy Act 1966*: ss 5, 27. The proceedings were to invoke the court's established jurisdiction to determine and declare rights to property and make orders as to its destination: *Sutherland v Brien* (Austin J). Muir J dismissed a trustee's claim in the Supreme Court of Queensland, under s 122, on the ground that it was not within the jurisdiction of the court. His Honour concluded that only the courts having jurisdiction as referred to in s 27 could exercise a power provided for in s 31(1), which was to be exercised in open court. Section 31(1)(e) refers to applications to set aside or avoid a charge, charging order, settlement, disposition, conveyance, transfer, security, or payment. Section 31(1)(f) refers to applications to declare for or against title of the trustee to any property. His Honour said the claim came within this section even though it did not specifically seek a declaration that the payment was void. In substance it was an application to set aside or avoid a disposition or payment: *Denby v Chun Wai Shum* (2002) 2 ABC(NS) 449; [2002] QSC 117 (Muir J).

In the Supreme Court of Queensland, Philippides J struck out a proceeding in which the plaintiffs sought a declaration as to the entitlement to a fund held on trust. The trustee in bankruptcy had contended the fund was the proceeds of the realisation of property which had been transferred prior to bankruptcy and liable to be set aside under s 121. Subsequent to the commencement of the proceeding in the Supreme Court the trustee commenced a proceeding in the Federal Circuit Court of Australia seeking relief under s 121. Philippides J held that the effect of a declaration in favour of the plaintiffs as to the entirety of the title to the disputed property would involve a finding "against the title of the applicant" to that property, arising inter alia as a consequence of the application of s 121. That is a matter falling within s 31(1)(f) as it is a claim to a declaration "against the title of the trustee to property" and outside the jurisdiction of the Supreme Court. If in reality the real issue to be determined is a claim under s 121 then that is also outside the jurisdiction of the Supreme Court (s 31(1)(e)). As the proceeding would be otiose upon the determination of the application in the Federal Circuit Court of Australia is no justification for merely staying the proceeding and the proceeding was struck out: *Anderson v Peldan* (2004) 183 FLR 354; 2 ABC(NS) 484; 212 ALR 291; [2004] QSC 335 (Philippides J).

In *Sanwick v Wily* [2009] NSWSC 86, Bryson AJ declared that a mortgage was void against the cross-claimant trustee under s 120(1). No reference was made to the jurisdiction of the court to make such declaration.

Claims in subsequent bankruptcy

Where a person who is a bankrupt again becomes bankrupt, s 59(1)(e) preserves the right of the trustee in the first bankruptcy to intervene rather than disentitling the subsequent trustee from intervening. If the trustee of the first bankruptcy has not elected to avoid the transfer then it remains valid in that bankruptcy estate. The trustee of the second bankruptcy may elect to treat the transfer as void and if the property is recovered, it would be available to creditors of that bankruptcy estate: *McIntosh v Linke Nominees Pty Ltd* (2008) 5 ABC(NS) 742; [2008] QSC 79; which was reversed on appeal on the question of assessment of damages as to breach of warranty, as to authority and construction of the terms of the guarantee and indemnity: *McIntosh v Linke Nominees Pty Ltd* [2008] QCA 275.

[120.0.32] Legal professional privilege

The rule of privileged communications between solicitor and client does not apply to communications made in furtherance of an improper purpose, including an abuse of process: *Perazzoli v BankSA (No 2)* [2016] FCA 260 at [210] (Perram, Foster and Murphy JJ). That includes a communication intended to assist the client in the commission of a crime, fraud or illegal purpose, even if the legal adviser is ignorant of the purpose for which the advice is being sought. Further, such privilege would not apply if the purpose of the communication was to frustrate the purpose of law itself, even if no crime or fraud was intended. The onus is on the party displacing the privilege to demonstrate some prima facie evidence of fraud or crime or illegal purpose. In assessing the purpose of the advice the court is entitled to consider the subsequent facts. A claim for legal professional privilege does not apply to communications regarding the restructuring of a person's affairs where the purpose of the communication is defeat the legitimate claims of creditors: *R v Dunwoody* (2004) 149 A Crim R 259; 2 ABC(NS) 199; 212 ALR 103; [2004] QCA 413 (McMurdo P, McPherson JA and Holmes J); *Aucare Dairy (Aust) Pty Ltd v Huang* [2017] FCA 746 at [53] to [55] (O'Callaghan J).

[120.0.35] Interest

The applicant is entitled to claim interest on a void transfer of property (or a void disposition under the former provision): *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372; 138 ALR 341 at 426 (FCR) (Wilcox, Cooper and Moore JJ); *Fodare Pty Ltd v Official Trustee in Bankruptcy* [2000] FCA 1721 (Lehane, Hely and Conti JJ).

[120.0.40] Superannuation

Sections 116, 128A–128D and 128N

Since the introduction of the exemption in s 116(2)(d)(iii)(A), an interest of a bankrupt (subject to s 116(5)) in a regulated superannuation fund is exempt property and is not divisible amongst the bankrupt's creditors. The question was whether a trustee in bankruptcy could utilise any of the avoidance provisions (either s 120 or s 121) or alternatively invoke the doctrine of relation back (combined effect of ss 58, 115 and 116) to challenge payments made prior to bankruptcy? The determination of this issue required a consideration of:

- The interaction between ss 116, 120 and 121 and the policy behind the provisions.
- Section 116, which refers to the term "interest" whereas ss 120 and 121 refer to a transfer of property.
- The concept of consideration.

The *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007* (Cth), introduced ss 128A–128D and 128N to enable trustees to recover superannuation contributions. These provisions apply to contributions made on or after 28 July 2006 and prior to bankruptcy with the intention to defeat creditors. These provisions are based on s 121 and enable recovery of contributions by a person who later becomes a bankrupt (s 128B) and contributions by a

third party for the benefit of a person who later becomes a bankrupt (s 128C). Section 116(2)(d) was amended to provide that the exemption is subject to ss 128B, 128C and 139ZU.

Historical consideration

Official Trustee in Bankruptcy v Trevor Newton Small Superannuation Fund Pty Ltd

On an application for an interlocutory injunction brought by the Official Trustee in Bankruptcy against a trustee of a regulated superannuation fund, Madgwick J said the following (note this was an interlocutory application and was not a final decision on the merits):

1. The protection offered by s 116(2)(d)(iii)(A) is part of a broad policy actively encouraging individuals to provide for their own future and retirement. The legislative policy is that a person should not lose what he or she has bona fide managed to provide for retirement merely because the person becomes insolvent.
2. There is a need to draw a distinction between an interest and a payment into a fund. The exemption of the interest does not prevent the payment to a superannuation fund being caught by the relation back or avoidance provisions. Such a payment is a transfer of property. Sections 120 and 121 deal with transfers and s 116(2)(d)(iii)(A) deals with interests which have arisen as a result of a transfer and does not prevent a challenge under either s 120 or s 121. Section 116(2)(d)(iii)(A) only protects superannuation interests which have arisen out of transfers of property that are not caught by ss 120 and 121.
3. The promises and guarantees that the trustee of the superannuation fund pursuant to the trust rules and relevant legislation, as well as the management services, are not consideration for the contributions made by the bankrupt. The services were provided in return for the management fees and charges. The trustee of the fund is not a buyer in a commercial sense: *Official Trustee in Bankruptcy v Trevor Newton Small Superannuation Fund Pty Ltd* (2001) 114 FCR 160; 186 ALR 84; [2001] FCA 1267 (Madgwick J).

Benson v Cook – Full Court

The Full Court, in *Benson v Cook* (2001) 114 FCR 542; [2001] FCA 1684 (Beaumont, Kiefel and Hely JJ), when considering an application by a trustee in bankruptcy under the former s 120, considered whether trustees of funds had provided valuable consideration for contributions (by way of rollover). The bankrupt was entitled to the rollover. The dealings were at arm's length on ordinary commercial terms. Beaumont J at [70] concluded that the trustee of the fund had provided consideration which was not trivial or nominal. The dealings involved more than the constitution of a "bare" trust. In return for the premium, the fund's trustee promised the beneficiary that an assurance company would provide assurance cover. Kiefel J taking into account the broad effect of the arrangement looked to see whether the appellant's rights had been altered. In lieu of the money which the appellant had provided by way of the rollover, he was entitled to future rights with respect to the fund, and the rights, arising from the contracts with each separate fund's trustee. That included the return of the initial investment and an amount representing the moneys earned by the fund relative to that investment. That was something more than nominal consideration. Hely J (dissenting) was strongly of the view that the trustees of the funds did not provide valuable consideration. Even though they were more than bare trustees, the consideration must flow from the provisions of the terms of the relevant trust deeds. The trustees were not buyers in a commercial sense. The benefits which accrued to the appellant flowed from the terms of the trust deeds and not from the provision of valuable consideration for the acquisition of the policies. His Honour agreed with the conclusions made by Madgwick J in *Official Trustee in Bankruptcy v Trevor Newton Small Superannuation Fund Pty Ltd* (2001) 114 FCR 160; 186 ALR 84; [2001] FCA 1267 at 175 (FCR) at [40].

Benson v Cook – High Court

An appeal to the High Court of Australia was dismissed: *Cook v Benson* (2003) 214 CLR 370; 77 ALJR 1292; 53 ATR 195; 1 ABC(NS) 138; 198 ALR 218; [2003] HCA 36 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

The question considered by the High Court was whether the recipients were purchasers for valuable consideration. The majority (Gleeson CJ, Gummow, Hayne and Heydon JJ) considered the majority in the Full Court were correct in concluding that the payments were made in favour of purchaser for valuable consideration. The rights and benefits received for the contributions constituted valuable and substantial consideration: see [33]. The contributions were made in return for the undertaking by the trustees of the funds to pay death, retirement or other related benefits in accordance with the rules of the respective funds. The bankrupt received consideration in money's worth in return for the payments: see [36].

Neither the High Court of Australia nor the Full Court was required to determine whether the trustees of the funds provided consideration equal to market value.

The difficulty is the assessment of that value. The assessment process would include an analysis of the superannuation trust deed, including the obligations and remuneration of the trustee, and the benefits which accrue to the members of the fund. Ordinarily, a trustee of a fund would derive its remuneration from managing the fund. In broad terms the trustee would agree to hold the funds, invest the funds as authorised and return the fund (and increments thereon) to the member in accordance with the terms of the deed. The trustee, by the very nature of the trustee/beneficiary relationship, does not obtain any beneficial interest in the fund. The trustee is not free to deal with the fund as it wishes. The analysis of the High Court in respect of the "valuable consideration" concept supports a conclusion that the trustee of such a fund does provide market value for the contributions. The trustee gave commercial consideration of moneys worth in return for the payments. The trustee undertook to act in accordance with the terms of the trust deeds and to pay death, retirement or other related benefits in accordance with the rules of the respective funds.

[120.0.50] Sham

Definition of sham

> A "sham" is … something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive: *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449; 82 ALR 530 at 454 (FCR); 537 (ALR) (Lockhart J); *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; 79 ALJR 206; 211 ALR 101; [2004] HCA 55 at [46] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ); *Lewis v Condon* (2013) 85 NSWLR 99 at [58] (Leeming JA, with whom McColl JA and Sackville AJA agreed); *Traxys Europe SA v Balaji Coke Industry PVT Ltd (No 5)* (2014) 318 ALR 85 at [116] – [119] (Foster J); *Coshott v Prentice* (2014) 221 FCR 450; 12 ABC(NS) 149; 311 ALR 428; [2014] FCAFC 88 at [63] (Siopis, Katzmann and Perry JJ).

The purpose of a sham is "to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create": *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786; [1967] 2 WLR 1020; [1967] 1 All ER 518 at 802 (QB); 528 (All ER) (Diplock LJ).

The presence of an objective of deliberate deception indicates fraud and this warrants a need for caution in adoption of the term "sham": *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516; [2008] HCA 21 at [35], [36] (Gleeson CJ, Gummow and Crennan JJ); *Lewis v Condon* at [63]. An allegation of a sham has been said to be akin to an allegation of fraud and must be firmly alleged and cogently proved: *Traxys Europe SA v Balaji Coke Industry PVT Ltd (No 5)* (2014) 318 ALR 85, at [119]. The seriousness of the allegation mandates that a court act with care and caution before finding that a sham is established: *Coshott v Prentice* (2014) 221 FCR 450; 12 ABC(NS) 149; 311 ALR 428; [2014] FCAFC 88 at [64] (Siopis, Katzmann and Perry JJ).

A sham may develop over time (emerging sham) and may exist even where there was a validly constituted trust: *De Santis v Aravanis* (2014) 227 FCR 404; 13 ABC(NS) 1; 322 ALR 475;

[2014] FCA 1243 at [57] - [58] (Farrell J). A court will not easily find that a departure from the terms of an original legal arrangement constitutes a sham as the proper conclusion that may be drawn from the circumstances is that the parties have agreed by their conduct to a variation of the agreement by which they are bound.

Intention of parties

In determining whether a transaction is a sham, the central question is the intention of the parties: *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449; 82 ALR 530 at 453-458 (FCR) (Lockhart J); *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71 at [117] – [119] (FCAFC) (Lindgren J, with whom Wilcox and Moore JJ agreed).

There must be a common intention between the parties to the transaction to create legal rights and obligations different to that from those appearing in the documents. That is, the parties must intend the acts or documents are not to create the legal consequences that they appear to create: *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786; [1967] 2 WLR 1020; [1967] 1 All ER 518 at 802 (QB); 528 (All ER) (Diplock J); *Traxys Europe SA v Balaji Coke Industry PVT Ltd (No 5)* (2014) 318 ALR 85 at [119] (Foster J).

In *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516; [2008] HCA 21, Kirby J recognised the possibility of an exception to the element of common intention could exist where acts or documents are severable and the sham only applies to part of the transaction: at [148].

Intention – trust

For a trust to be found to be a sham, the relevant intention must be common to both the settlor and trustee. The intention of the settlor alone is insufficient: *Clout v Anscor Pty Ltd* (2003) 1 ABC(NS) 44; [2003] FCA 326 at [146], [169]; *Re Esteem Settlement* [2003] JLR 188 at [53]; *Shalson v Russo* [2005] Ch 281 at 342; *A v A* [2007] EWHC 99 (Fam) at [37] – [40]. Once a finding is made about the existence of the trust document, it cannot be a sham simply by reason of the person who had the benefit of it acted inconsistently as regard it at times: *Davies v Davies* [2012] FMCAfam 866 at [38] (per Altobelli FM).

If a settlor's undeclared intention that "trust" assets are to be treated as the settlor's own is not shared by the trustee, the trustee is entitled to regard assets as being held on trust and deal with them accordingly, irrespective of the demands made by the settlor. Accordingly, there is no basis on which a claim may be made that the settlement was a sham merely by reference to the unilateral intentions of the settlor: *Shalson v Russo* [2005] Ch 281 at 342.

The common intention requirement is most applicable to bilateral trust settlements (that is, where a settlor transfers property on trust to a separate and distinct trustee). The requirement loses its significance in instances of unilateral declaratory trusts (that is, where a settlor appoints himself or herself as trustee) as there is only one party to the transaction: *Official Assignee in Bankruptcy in the Property of Reynolds v Wilson* [2008] NZCA 122 at [41]; *Keach v Keach* [2011] FamCA 192 at [172.6].

Further, it has been contended the common intention requirement may not be required if the trustee merely went along with the "shammer" settlor not knowing or caring about what he or she was signing: *Midland Bank plc v Wyatt* [1997] 1 BCLC 242 at 245 (*Wyatt*); *Keach v Keach* [2011] FamCA 192 at [172.7].

Subsequent interpretations of *Wyatt* indicate that rather than dispensing with the common intention requirement, the court merely broadened the scope of "intention". *Wyatt* is now considered an authority for the proposition that recklessness or ignorance on the part of a trustee is tantamount to intention: *Official Assignee in Bankruptcy in the Property of Reynolds v Wilson* [2008] NZCA 122 at [39]. In *Official Assignee v Wilson*, the New Zealand Court of Appeal also proposed an alternative view of *Wyatt*, that it was an instance of unilateral declaratory trust as there was no transfer of property to a separate trustee: at [39].

In seeking to establish the existence of an emerging sham where there was a validly constituted trust, it must be established or shown that:

1. The essential elements of a sham are present. There must be a common intention that acts done, or documents, do not create legal rights and obligations which they give the appearance of creating. It is a strong finding which is to be made cautiously. The court cannot infer such intention if another inference is at least equally open. A wrongful act of a trustee could not, without the knowledge and approval of the beneficiary, give rise to an "emerging sham" which could disentitle the beneficiary to claim her or his interest.
2. All beneficiaries who would together be entitled to call for the trust to be brought to an end renounce their interest or otherwise terminate the trust while continuing the appearance of its existence: *De Santis v Aravanis* (2014) 227 FCR 404; 13 ABC(NS) 1; 322 ALR 475; [2014] FCA 1243 at [59], [62] (Farrell J).

Ascertainment of intention

Kirby J said that the "key to a finding of sham is the demonstration, by evidence or available inference, of a disparity between the transaction evidenced in the documentation (and related conduct of the parties) and the reality disclosed elsewhere in the evidence": *Raftland Pty Ltd v Federal Commissioner of Taxation* at [145]; *Traxys Europe SA v Balaji Coke Industry PVT Ltd (No 5)* (2014) 318 ALR 85 at [119] (Foster J).

In ascertaining the common intention, "[t]he courts must therefore test the intentions of [the] parties, as expressed in documentation, against their own testimony on the subject (if any) and the available objective evidence tending to show what that intention really was": *Raftland Pty Ltd v Federal Commissioner of Taxation* at [112] (Kirby J).

Not only is extrinsic evidence valid to determining intention, but where it is warranted the courts have grounds to ignore the primary documentary evidence and what it purports the parties' intentions to be. Evidence that parties have departed from the terms specified in their original agreement is not evidence of a sham as it does not show that they did not initially intend the agreement to be upheld according to those terms. Where this occurs and the parties do not alter the document, a sham can develop over time: *Raftland Pty Ltd v Federal Commissioner of Taxation* at [142], [149] (Kirby J).

The Full Court in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* made the following observations:

1. A round robin of cheques does not establish that the transaction is a sham even if no party has funds to meet the cheques.
2. Artificiality does not give rise to characterisation as a sham, nor does complexity.
3. A purported disposal of property, or creation of a debt, may be a sham where the parties intend and agree that there will be in fact no change in ownership, or no sum owing. The conduct of the parties may give rise to this inference.
4. The existence of an "inacceptable purpose" or an "ulterior purpose", such as an intention to shield assets from creditors or to avoid tax, does not result in a transaction being characterised as a sham: *Sharrment Pty Ltd v Official Trustee in Bankruptcy* at 453-458 (FCR); 537-538 (ALR): *Raftland Pty Ltd v Federal Commissioner of Taxation* at [149] (Kirby J).

Suspicious circumstances do not by themselves warrant characterisation as a sham, "it must be shown that the outward and visible form does not coincide with the inward and substantial truth": *Miles v Bull* [1969] 1 QB 258; [1968] 3 WLR 1090; [1968] 3 All ER 632 at 264 (QB); 636 (All ER) (Megarry J).

Evidence of an ulterior motive does not necessitate characterisation as a sham so long as it is intended to be legally effective: *Miles v Bull* [1969] 1 QB 258; [1968] 3 WLR 1090; [1968] 3 All ER 632 at 264 (QB) (Megarry J).

Examples

- *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786; [1967] 2 WLR 1020; [1967] 1 All ER 518

The plaintiff bought a car, paying part of the purchase price in cash and the balance financed by TI through a hire-purchase agreement. Four months later, after three payments to TI, the plaintiff wished to raise money from the car so he refinanced, selling his rights in the car to AF and signed a hire-purchase agreement with the defendant. The plaintiff paid two instalments and then fell into arrears. AF, as agents for the defendants, refused payment of arrears then seized the car and sold it. The plaintiff claimed there was a sham as the alleged cash price and initial payment on documentation with AF and the defendant were entirely fictitious, the car was misrepresented to be owned absolutely by AF and that the transaction was not a hire-purchase agreement but rather an unregistered loan on the security of the car. The plaintiff's claim was for damages as the defendants, by their agents AF, wrongfully seized and converted the car which they wrongfully sold. The primary judge found the refinancing operation to be a sham. However, there was an express finding that the defendants were not parties to the alleged "sham". On appeal (Lord Denning MR dissenting), the judgment was reversed due to lack of the defendants' awareness of the sham. Diplock LJ said that "for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating": at 802 (QB); 528 (All ER).

- *Donnelly v Edelsten* (1994) 49 FCR 384; 121 ALR 333; 13 ACSR 196

  Edelsten was the beneficial owner of a number of corporations forming the "VIP group". The appellant claimed that the VIP group and all of their transactions were a sham structure used by Edelsten to disguise his personal property and to make them unavailable to creditors upon bankruptcy.

  The salient question was whether the companies had been acquired or created with the agreement that they would be both legally and beneficially owned by Edelsten. The fact that the VIP group had not been treated by Edelsten as his own and used solely as a face for Edelsten's personal transactions led the court to conclude that they were not a sham: (Neaves, Ryan and Lee JJ).

- *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449; 82 ALR 530

  A Mr Wynard entered into a series of transactions four years prior to his death involving companies he controlled. The effect of these transactions was that he owed a liability to one of the companies for which he received no benefit. A company controlled by Mr Wynard purchased a property known as "The Chase" then later became the beneficiary of one of his family trusts to which the aforementioned liability was owed. "The Chase" was later sold and the respondent, the Official Trustee, upon death of Mr Wynard, claimed the proceeds from the sale as part of the bankrupt's estate.

  The primary judge found that the companies were to be treated as Mr Wynard's personal property and that their transactions were merely a sham intended to create the appearance of a debt to the family trust. On appeal the Full Court held that the transactions were not to be characterised as a sham. The evidence did not suggest any express arrangement or understanding that the transactions were not to take effect according to their terms and there was no basis for inferring the parties intended something different from what they in fact did. Furthermore the lack of commercial sensibility was not the basis for a finding of sham as "the dealings were between parties who were not at arm's length and in that context, the absence of commercial basis for their arrangements is not absurd": at 468 (FCR); 551 (ALR) (Beaumont J).

- *Sellers v One Step Plumbing & Concrete Pty Ltd* (2002) 190 ALR 716; [2002] FCA 478

  Held that the transfer of a property to acquaintances of the bankrupt for less than market value at a time where the transferor was fully aware that the bankrupts were insolvent was held to be a "sham" and a fraud upon the bankrupts' creditors. Weinberg J stated that the sale was a fraudulent transaction designed to enable the bankrupts to retain and continue to occupy their home: at [114].

- *Polimeni v Villacam Pty Ltd* [2003] VSC 86

  A document was drawn up to transfer shares in a company from A & G Polimeni into the possession of Donna Polimeni to prevent sequestration of the shares by the Commonwealth

Bank if A & G Polimeni went into bankruptcy. At the same time, undated transfers of shares back to A & G Polimeni were also drawn up and signed by both parties.

The court rejected the defendants' contention that the transfers to the plaintiff were a sham and should not be given effect by the court. The court found that it was clearly intended by the parties to pass property in the shares for the time being. That is, they were intended to do exactly what they appeared to do: at [74] (Osborn J).

- *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71

  Anscor solicited money from investors for a phony pyramid investment scheme known as "the Wattle Group". Amid concerns about the stop in the flow of money from the scheme due to the Australian Securities and Investments Commission issuing notices, the commissions earned from the group were used to set up the "Anscor Executive Superannuation Fund". The trustee of the Fund, PIAM, lent the total amount of the superannuation contribution back to Anscor at the direction of Anscor's directors. The Full Court held that the primary judge (Drummond J) was correct in characterising the establishment of the superannuation fund and subsequent transactions as a sham. The reasons for that finding were that none of the actors involved in it intended that the fund would in fact operate as a trust for the benefit of Anscor's staff. In rejecting the evidence of intention of the settlor the primary judge correctly considered that evidence in the context of the surrounding circumstances. Such factors included lending the entire amount back to Anscor and the trustee acting inconsistently with its duty as trustee of the fund. If the initial transaction was a sham, subsequent transactions flowing from this transaction are also a sham: at [97], [115] to [119], [120] to [124] (Lindgren J, with whom Wilcox and Moore JJ agreed).

- *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516; [2008] HCA 21

  A family controlled trust estate (E&M Unit Trust) that had incurred losses was acquired by three brothers for the purpose of setting off the profits earned through their building development company. A payment of $250,000 was made upon acquisition of the trust. The Raftland Trust Deed named the Herans and family as primary and secondary trustees and the E&M trustee as the tertiary beneficiary. Following the acquisition of E&M, the son of the original trustees removed himself as trustee and appointed Raftland Pty Ltd. The nomination of the trustee of the E&M Unit Trust as a beneficiary of the Raftland Trust was alleged to be a sham. Although the trustee of the E&M Unit Trust was presently entitled to the whole of the income of the Raftland Trust for the relevant years, no such income was distributed to them.

  The primary judge, Kiefel J's finding that the trust deed (naming the E&M trustee a tertiary beneficiary) as a sham was upheld on appeal. This finding was based on intention of both the Herans and the Thomaszes was that payment of $250,000 was a one-off payment to the beneficiaries of E&M and that their entitlement as tertiary beneficiaries was not intended to have legal effect.

- *Pierce v D'Cruz* [2010] FamCAFC 99

  At the conclusion of a 15-year marriage where a husband and wife could not agree on a property settlement, the wife sought to have several transactions set aside claiming a 50/50 share agreement was a sham. The alleged sham agreement named a third party, the father of the husband, as a beneficial owner in one half of their business.

  The primary judge shared the view that the agreement was a sham finding the agreement to be carried out with the intention of defeating an anticipated order of the court rather than with a genuine intention to share in the business. In coming to this conclusion the judge took into account the credit of the parties when asked to explain their dealings and subsequent conduct. This was upheld on appeal. The Full Court said that "there was no single incontrovertible fact which made the evidence for or against the genuineness of the agreement glaringly improbable and so in undertaking the balancing exercise her Honour was entitled to also take into account her findings in relation to credit": at [310].

- *Atia v Nusbaum* [2011] QSC 44

  A mother and son entered into several transactions whereby the mother lent the son large amounts of money over an extended period of time, secured against properties in the son's

name. The son sought to have the mortgage disregarded as a sham transaction. It was contended that the mortgages were a sham undertaken for the purposes of protecting the plaintiff's assets from claims by future partners or disgruntled patients. It was also contended that monies advanced by the defendant were gifts and that the defendant expressly said she would not enforce either mortgage. The mother contended she always intended them to be legally enforceable and expressed this to her son on multiple occasions. It was found that the mortgages were not a sham, considering the intention of the parties to be the deciding factor and that the mortgages were a legitimate way to secure debts owed by the son to the mother: at [58], [60] (Boddice J).

[120.1.02] Section 120(1): Transfer of property within five years

The transfer must take place in the period beginning five years before the commencement of the bankruptcy and ending on the date of bankruptcy: s 120(1)(a). This should be read together with s 120(3). Prior to the amendments introduced by the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (Cth) and where the transfer occurred two years prior to the commencement of the bankruptcy if the transferee could prove that at the time of the transfer that the transferor was not insolvent the transfer was not void. For transfers occurring from 31 May 2006 the period has been extended to four years if the transfer is to a related entity of the transferor: s 120(3)(a). The term "related entity" is defined in s 5(1) and is wide in its scope including a relative, a body corporate of which the person, or a relative of the person, is a director or a related body corporate of that body, beneficiary under a trust of which the person, or a relative of the person, is a trustee, a trustee under a trust under which the person, or a relative of the person, is a trustee and a member of a partnership of which the person, or a relative of the person, is a member.

Section 120(3A), another anti-avoidance provision, provides for a rebuttable presumption of insolvency at the time of transfer if the prescribed circumstances exist. That provision commenced in relation to transfers occurring on or after 31 May 2006: s 30(3) of the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006*.

[The next text page is 10-2501]

[120.1.05] Section 120(1): Transfer of property

Legislative change from "settlement" to "transfer"

The Explanatory Memorandum in respect of the *Bankruptcy Legislation Amendment Act 1996* states that it is important to note that the term now used is "transfer". Whereas case law in relation to previous legislation established that the term "settlement" carried with it connotations that the settlee would retain it, at least for some time after receiving it, (see eg *Williams v Lloyd* (1934) 50 CLR 341; [1934] HCA 1; *Re Pahoff; Ex parte Ogilvie* (1961) 20 ABC 17; *Trautwein v Richardson* (1941) 65 CLR 664).

Transfer

The word "transfer" should be given its ordinary meaning except to the extent that the meaning is extended by s 120(7): *Peldan v Anderson* (2006) 227 CLR 471; 80 ALJR 1588; 229 ALR 432; [2006] HCA 48 at 481. The meaning given to the word "transfer" in *The Macquarie Dictionary* is "to convey or remove from one place, person etc to another"; "to make over or convey; to transfer a title to land". Tracey J said (in the context of s 121(1)) that the ordinary and natural meaning is the conveying of a property right from one person to another as a result of an act performed by the transferor with the intention that the property would pass: *Camm v Linke Nominees Pty Ltd* (2010) 190 FCR 193; 8 ABC(NS) 459; [2010] FCA 1148 at [32].

A transfer includes:

1. the granting of a mortgage or charge (*Frost v Sheahan* (2012) 11 ABC(NS) 1; [2012] FCAFC 46 at [68], [69] (Finn, Cowdroy and Flick JJ); *Sutherland v Brien* (1999) 149 FLR 321; [1999] NSWSC 155 (Austin J); *Victorian Producers' Co-op Co Ltd v Kenneth* (1999) 1 ABC(NS) 198; [1999] FCA 1488 (Merkel J); *Schmierer v Smith (No 2)* [2004] FMCA 856 (Raphael FM)); *Peldan v Nurcombe* [2007] FMCA 266 at [17]; *Travaglini v Spencer* [2008] FCA 1618 at [15]);
2. a bill of sale (*Fletcher v Landgridge* [2002] FMCA 139 (Driver FM));
3. the forgiveness of a debt (*Jabbour v Official Receiver* [2002] FMCA 28 (Driver FM)); and
4. the severance of a joint tenancy (*Peldan v Anderson* (2005) 2 ABC(NS) 603; [2005] FMCA 142 (Jarrett FM)), in respect to an application under s 121. The decision was reversed on appeal: *Anderson v Peldan* (2005) 146 FCR 361; 3 ABC(NS) 133; 220 ALR 565; [2005] FCA 1179. (Note on 16 December 2005 special leave was granted to appeal to the High Court of Australia: *Peldan v Anderson* [2005] HCATrans 1034 (Gleeson CJ, Gummow and Kirby JJ).) The High Court dismissed an appeal by the trustee from the decision of Kiefel J exercising the appellate jurisdiction of the Federal Court of Australia: *Peldan v Anderson* (2006) 227 CLR 471; 80 ALJR 1588; 229 ALR 432; [2006] HCA 48 (Gummow ACJ, Kirby, Hayne, Callinan and Crennan JJ), and held that the severance of the joint tenancy effected by registration in reliance on s 59(1) of the *Land Title Act 1994* (Qld) was a transfer of property as the terms of s 121(9)(b) were met: at [30]. Upon registration of the instrument prior to the bankruptcy the other joint tenant became the owner of property that did not previously exist. An interest was acquired as tenant in common whereas previously the interest held was as a joint tenant (which included the right of survivorship). The interest as joint tenant was transferred into, or extinguished and replaced by, an interest as tenant in common. It was not necessary on the facts for the High Court to consider what was described as the broader question, namely the extent to which unregistered dealings by way of whole or partial alienation to the co-owner of an aliquot share in the jointure by one joint owner who later becomes a bankrupt is a transfer of property. On the facts, there was a unilateral severance effected by registration of a form of transfer executed by the bankrupt (before bankruptcy) pursuant to s 59(1) of the *Land Title Act 1994* (Qld). Section 59(1) provides:

   > A registered owner of a lot subject to a joint tenancy may unilaterally sever the joint tenancy by registration of a transfer executed by the registered owner.

Subsection (3) provides:

> On registration of the instrument of transfer, the registered owner becomes entitled as a tenant in common with the other registered owners.

The registration of the new instrument extinguished the interests as joint tenants and created an indefeasible title as tenants in common. The title of the registered proprietor comes from the fact of registration and it is the source of the title. Upon registration the particulars of the lot in the register are altered and a new and different indefeasible title for the lot is created: at [21]. In the Cummins bankruptcy the trustees sought to avoid, under s 121, a disposition in favour of the respondent by severance of the joint beneficial interest of the bankrupt. It was not contended in those proceedings that the transfer by the bankrupt of his interest in the property could not answer the description of a "transfer of property" for the purposes of s 121: *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 227 CLR 278; 3 ABC(NS) 814; [2006] HCA 6 at [23] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

5. That transfer of real property pursuant to a contract of sale occurs upon the registration of the instrument of title. It is upon registration that the legal title is transferred from the transferor to the transferee. The contract of sale regulates the conditions upon which that title is to be transferred. Upon execution of a contract of sale which is unconditional the purchaser obtains an equitable interest which is commensurate with the availability of specific performance or an ability to secure protection by an equitable remedy, including injunction: *Camm v Linke Nominees Pty Ltd* (2010) 190 FCR 193; 8 ABC(NS) 459; [2010] FCA 1148 at [40], [41] (Tracey J).
6. The bankrupt as a director of the company caused shares to be issued to the respondent which had the effect of diluting the interest held by the bankrupt. That issue was held to be a transfer within the meaning of s 120(7)(b). The effect of the issue was to divest the bankrupt of 50% of the total shareholding and for the respondent to acquire 50%. The bankrupt created or carved out from her or his own property, the shareholding, property which did not previously exist: *Verge v Devere Holdings Pty Ltd (No 4)* (2010) 8 ABC(NS) 211; [2010] FCA 653 (McKerracher J).

Transfer of property and payment

A transfer of property includes a payment of money: s 120(9)(a).

A payment refers to the passing of the ownership of the money and not the mechanics of the transaction: *Burns v Stapleton* (1959) 102 CLR 97; 20 ABC 46; [1959] HCA 34, at 104. The term payment has a wide meaning and includes a book entry. Where a payment is effected by cheque, the relevant date of payment is the day upon which the cheque is provided, not the date upon which the proceeds were made available through the banking transfer system, except when the person provided with the cheque is a bank: *KDS Construction Services Pty Ltd v National Australia Bank Ltd* (1986) 86 FLR 398, at 402. This is the date of payment even though when the cheque is given in payment it is a conditional payment, in the sense that it is honoured upon presentation. An adjustment of accounts may constitute a payment of money providing it is one made with the agreement of the relevant parties: *Combis (Trustee) v Spottiswood (No 2)* (2013) 11 ABC(NS) 407; [2013] FCA 240 at [18], [19] (FCA) (Logan J).

Transfer of property and presumptions of ownership

When considering whether "property" of the bankrupt was transferred, the following propositions ought to be considered:

1. Prima facie the beneficial ownership of real property is commensurate with the legal title: *Currie v Hamilton* [1984] 1 NSWLR 687 at 690.
2. The prima facie position may be displaced by a presumption of a resulting trust, or evidence of an express trust, or a constructive trust.
3. The presumption of a resulting trust may be displaced by a presumption of advancement.
4. A charge over an interest in property may be claimed by way of indemnity to secure a right of exoneration.

An estoppel may also operate to prevent recovery by a trustee, such as a proprietary estoppel. A transfer of property which merely acknowledges the existence of an equitable interest is not void: *Lin v Official Trustee in Bankruptcy* (2001) 187 ALR 220; [2001] FMCA 106 (Raphael FM); see also *Schmierer v Horan* (2004) 1 ABC(NS) 536; [2004] FMCA 16 (Driver FM); *McVeigh v Zanella* [2000] FCA 1890 (Weinberg J);*Jabbour v Sherwood* (2003) 1 ABC(NS) 246; [2003] FCA 529 (French J);*Lopatinsky v Official Trustee in Bankruptcy* (2003) 31 Fam LR 267; [2003] FCA 1256 (Moore J); *Rambaldi v Volkov* (2008) 7 ABC(NS) 25; [2008] FCA 1957.

The equity of the claimant, also, will not be defeated merely because the title has been passed to a trustee, as the trustee will take the title subject to the interests which existed at the date of bankruptcy: *Sonenco (No 77) Pty Ltd v Silvia* (1989) 24 FCR 105; 89 ALR 437; 13 Fam LR 511 at 112 (FCR) (Beaumont, Ryan and Gummow JJ); *Parianos v Melluish (Trustee)* (2003) 1 ABC(NS) 333; 30 Fam LR 524; [2003] FLC 93-130; [2003] FCA 190 (Jacobson J); *Rambaldi v Volkov* (2008) 7 ABC(NS) 25; [2008] FCA 1957 at [55]; *Boensch v Pascoe* [2019] HCA 49 at [4] (Kiefel CJ, Gageler and Keane JJ), [15], [94] (Bell, Nettle, Gordon and Edelman JJ).

In *Parsons v McBain* (2001) 109 FCR 120; 1 ABC(NS) 188; 192 ALR 772; [2001] FCA 376 (Black CJ, Kiefel and Finkelstein JJ) at [16] it was said, citing *Aguilar v Aguilar* (1820) 5 Madd 414; 56 ER 953 and *Shropshire Union Railways and Canal Co v The Queen* (1875) LR 7 HL 496, that the "equitable interest will not be defeated merely because the legal title has passed to a trustee in bankruptcy, for he stands in the shoes of the bankrupt, however, the interest may 'be defeated by, or may be made to defer to, later claims 'by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title'". Where there is no such conduct, the Court said "neither s 120 or 121 can have application to the transfer by the bankrupt to his wife, of the legal interest in property in which the wife holds the beneficial interest".

Another example is *Boensch v Pascoe* [2019] HCA 49. The bankrupt held an equitable interest in trust property deriving the power of exoneration. It was held by Kiefel CJ, Gageler and Keane JJ at [4] that where the legal estate in the property held on trust by the bankrupt passes to the trustee of the estate of the bankrupt, it passes with all of the equitable interests that were impressed on it when it remained in the hands of the bankrupt, equitable interests of the bankrupt as well as equitable interests of the beneficiaries of the trust, also at [15], [93], [94] (Bell, Nettle, Gordon and Edelman JJ).

Doctrine of exoneration

Overview

A transferee may seek to raise the doctrine or equity of exoneration to contend there was no transfer.

The equity of exoneration operates in this way: in the absence of agreement where property of a party (often called the surety) is mortgaged or charged in order to raise money for the benefit of another (often called the principal debtor), the surety has an interest in the property of the principal debtor whose property is to be regarded as primarily liable for the debt. The surety has a charge over the principal debtor's interest by way of an indemnity to secure the right of exoneration: *Parsons v McBain* (2001) 109 FCR 120; 1 ABC(NS) 188; 192 ALR 772; [2001] FCA 376; *Farrugia v Official Receiver in Bankruptcy* (1982) 58 FLR 474; 43 ALR 700 at 477 (FLR). This charge is not obliterated by the bankruptcy of the transferor and the transferor's trustees in bankruptcy take the property subject to the charge: *Farrugia v Official Receiver in Bankruptcy*. A transferee of property may argue that where the doctrine is applicable, they are entitled to be exonerated. It does not entitle the transferee to ownership of the property. The doctrine applies not just in cases where there is actual suretyship but also where the relationship is treated as one of suretyship: *Parsons v McBain* at [20].

The doctrine of exoneration often applies where property, for example, land, is owned between two or more individuals or entities as joint tenants. The joint tenants agree to mortgage the property to raise funds (or to secure repayment of moneys) for one or more, but not all of the joint tenants. The joint tenants who receive the benefit of the mortgage subsequently become bankrupt. On bankruptcy, the joint tenancy is severed and each holds as tenant in common. The

previous joint tenants who received no benefit from the mortgage are entitled to insist that the burden under the mortgage is thrown upon the estate or interest in the property which was owned by the joint tenants who received the benefit of the mortgage.

If a subsequent mortgage is given by one or more of the joint tenants, then there is a question of competing priorities. In determining the issue of competing priorities, equity seeks out that which on the whole is most meritorious: *Lapin v Abigail* (1930) 44 CLR 166 at 186. Priority in time is a fact to be considered, as is the right to call for the legal estate. The mere existence of a right to call for the legal title does not necessarily confer the best equity. Generally, if the court is looking to determine the most meritorious equity, it is that which results from the joint tenants who received the benefit of the mortgage repaying the prior secured debt out of their property over which the debt is secured prior to attending to payment of the later unsecured debt. There is little merit in equity in seeking to force the prior secured creditor to look to a co-mortgagor, who is in the position equivalent to that of a surety, so that the other co-mortgagors who receive the benefit may escape their true obligation and some portion of the interest in the property remains available to the subsequent secured creditor: *Caldwell v Bridge Wholesale Acceptance Corp (Aust) Ltd* (1993) 6 BPR 13539 at 13,546.

Whether any presumption

Before the doctrine of exoneration can be invoked, certain facts must exist which enable the court to draw an inference: *Re Berry (a bankrupt)* [1978] 2 NZLR 373 at 376. It is on this basis that it is often said that the doctrine of exoneration reflects the presumed intention of the parties: *Re Berry (a bankrupt)* at 376. However, this does not operate as a rebuttable presumption in the strict sense: *Hall v Hall* [1911] 1 Ch 487 (Warrington J at 499). The circumstances of each case must first be considered to determine whether the court can draw the inference which allows the transferee to rely on the doctrine of exoneration: *Paget v Paget* [1898] 1 Ch 470 at 474. Until an inference in favour of the transferee arises, there is no presumption for the transferor to rebut: *Paget v Paget* at 474. Further, in *Re Pittortou (Bankrupt); Ex parte Trustee of Property of Bankrupt* [1985] 1 All ER 285; [1985] 1 WLR 58 it was held that if the circumstances of a particular case do not justify the inference, or indeed if the circumstances negate the inference, that it was the joint intention of the joint mortgagors that the burden of the secured indebtedness should fall primarily on the share of that of them who was the debtor, then that consequence will not follow. This means that no presumption arises where the money is raised for the benefit of the transferee. In *Re Berry (a bankrupt)* at 378 (Richardson J), it was held that each case should be decided on its own facts and there are dangers in elevating approaches adopted in other fact situations into general principles and presumptions.

Application

The traditional application of the doctrine was to exonerate the estate of the wife from the debts of the husband. It was developed as a form of protection of property interests of wives against the legal and social dominance of husbands: *Official Trustee in Bankruptcy v Citibank Savings Ltd* (1995) 38 NSWLR 116 at 129 (Bryson J). Today the doctrine applies not only for the benefit of wives but also for husbands: *Dickson v Reidy* (2004) 2 ABC(NS) 491; 12 BPR 23201; [2004] NSWSC 1200. Further, the doctrine of exoneration is not confined to parties to a marriage. It has wider application: *Gutta v Ierino* [2010] WASC 402; *Parsons v McBain* (2001) 109 FCR 120; 1 ABC(NS) 188; 192 ALR 772; [2001] FCA 376. In *Caldwell v Bridge Wholesale Acceptance Corp (Aust) Ltd* (1993) 6 BPR 13539, a woman who was the joint proprietor of a housing unit with a married couple was held to be entitled to rely on the doctrine of exoneration.

The equity can apply to partly borrowed funds: *Farrugia v Official Receiver in Bankruptcy* (1982) 58 FLR 474; 43 ALR 700. It was held that where the joint property is charged partially for the benefit of the transferor alone and partly for the benefit of both the transferor and transferee and it is possible to apportion the principal between the two, the transferee is entitled to exoneration to the extent of what was borrowed and applied for the benefit of the transferor alone.

Elements

In *Parsons v McBain* (2001) 109 FCR 120; 1 ABC(NS) 188; 192 ALR 772; [2001] FCA 376 at [20], the court set out three pre-conditions to the application of the equity of exoneration:

1. A person must charge her or his property;
2. The charge must be for the purpose of raising money to pay the debts of another person or to otherwise benefit that other person; and
3. The money so borrowed must be applied for that purpose.

1. Charge over property

The doctrine of exoneration applies where a transferee pledges, mortgage or charges their property. The doctrine will have no application where the transferee has not charged her or his property: *Hunt v Peasegood* [1997] EWCA Civ 1589.

2. Purpose of raising money or to otherwise benefit another

This element raises two issues:

(a) The purpose of raising the money must be to benefit another; and
(b) The transferee must not obtain a benefit.

(a) Purpose of benefiting another person

The person who receives the benefit from the charge is usually described as the principal debtor. However, the doctrine may still apply where the purpose of the charge is that the money be paid to a third party at the direction of the principal debtor: *Dickson v Reidy* (2004) 2 ABC(NS) 491; 12 BPR 23201; [2004] NSWSC 1200.

The doctrine of exoneration depends on the intention of the parties. Intentions, like other facts, are to be inferred from circumstances and equity looks for, or infers, an intention as to who truly was intended to be principal and who would be surety. Contemporaneous agreements, arrangements and expressions of intention are the usual sources of evidence about the intentions of the parties: *Official Trustee in Bankruptcy v Citibank Savings Ltd* (1995) 38 NSWLR 116 at 129 (Bryson J). Intentions may also be inferred from the circumstances in which they acted.

(b) Transferee must not obtain benefit

If the transferee receives a benefit from the loan, the equity of exoneration may be defeated. For example, if the funds are applied to discharge the transferee's debts, the transferee cannot claim exoneration, at least in respect of the benefit received: *Parsons v McBain* (2001) 109 FCR 120; 1 ABC(NS) 188; 192 ALR 772; [2001] FCA 376 at [23].

In determining benefit, it must be asked "Who got the money?": *Parsons v McBain* at [23]. The benefit must be tangible and not too remote. The doctrine will not be defeated by a benefit which is incapable of valuation, and even if it were so capable, the value is unlikely to bear any relationship to the amount received by the principal debtor: *Parsons v McBain* at [24].

For example, putting money into a partnership business of the husband which would result in money to put food on the table and clothe the children was too remote to constitute a benefit: *Parsons v McBain*.

3. Money applied for purpose

Whether the money borrowed was applied for the purpose of benefiting the principal debtor is to be determined on the evidence.

Examples

- *Re Berry (a bankrupt) [1978] 2 NZLR 373*

  A husband and wife were registered as joint tenants of a house – the wife holding a 78% interest and the husband 22%. It was held that the husband and wife were held to be co-debtors and thus the doctrine of exoneration was not established. On the facts:

  1. The husband took the initiative in arranging for the overdraft and in the overdrawing that took place;

2. The husband was the prime mover and the wife's participation was at the husband's request;
3. The drawdown of the credit was made available for the husband's business purposes;
4. The wife's purpose was that the funds would become available for use in the business and in a broader way for the benefit of the family;
5. The husband was free to draw on the joint account in terms of the overdraft arrangement;
6. The purpose of the transaction or mortgage was to obtain a fixed term loan to pay out the secured overdraft facility which was repayable on demand. There was no basis for suggesting that the husband and wife intended that their rights and obligations inter se should be affected by the substitution of securities.

- *Farrugia v Official Receiver in Bankruptcy (1982) 58 FLR 474; 43 ALR 700*

  The husband and wife were joint tenants of a property. They borrowed $23,000 secured by a mortgage over the property. Part of this sum was applied for the husband and wife's joint purposes; part was applied for the husband's own purposes. The wife was entitled to be exonerated to the extent of what was borrowed and applied for the benefit of the husband alone.
- *Caldwell v Bridge Wholesale Acceptance Corporation (Aust) Ltd (1993) 6 BPR 13,539*

  The plaintiff and the Thomsons held a property as tenants in common. A mortgage was granted over the property in favour of the defendant and the money was advanced to the Thomsons entirely. The loan documents made it clear that the loan was only to the Thomsons and not the plaintiff. The mortgage described the plaintiff and the Thomsons as "the mortgagor" but only the plaintiff as "debtor".

  Cole J held at 13,544 that there was no reason, in principle, why an agreement between co-mortgagors that where funds are borrowed for the benefit of one mortgagor the portion of jointly owned property comprising his interest, is to be primarily liable to repayment of the debt and that any moneys provided by the other mortgagor were provided by way of loan, that equity should not give effect to such an explicit or implicit agreement.
- *Parsons v McBain (2001) 109 FCR 120; 1 ABC(NS) 188; 192 ALR 772; [2001] FCA 376*

  A property was held on trust by the husband for the wife and him equally. With the wife's consent, the husband mortgaged the property to secure repayment of money which he applied to his business. It was held that despite the expected income from the business supporting the family, the equity of exoneration was not defeated.
- *Dickson v Reidy (2004) 2 ABC(NS) 491; 12 BPR 23,201; [2004] NSWSC 1200*

  Nicholas J said that the fact the funds were raised and applied for the use of the wife without benefit to the plaintiff was sufficient to attract the doctrine. His Honour also said that the fact that funds were raised in one case by forging the plaintiff's signature on the mortgage document has no significance when deciding whether there is a right of exoneration with respect to the transaction. In all the circumstances the evidence supported an inference that the loan was spent on furtherance of the wife's interests: [34]. The circumstances included the following facts:
  a. The loan was arranged on the wife's initiative;
  b. The wife prevailed upon the plaintiff to join with her in providing the property as security;
  c. The plaintiff in agreeing to the wife's proposal intended to stand in the position of surety with understanding, as was the fact that the whole of it was for her use and benefit and not the plaintiff's. The discussion between the parties prior to as to the purpose of borrowing the monies was in substance to enable the wife to buy into a business. At the time the plaintiff and his wife had separated;
  d. The disposition of the funds was at the wife's direction and control;
  e. Subject to one exception, the plaintiff received no benefit.
- *Official Trustee in Bankruptcy v Cameron [2008] QSC 89*

The husband and wife were joint tenants of a property. They granted a mortgage over their home to secure borrowings which the husband applied to his optometry business. Upon bankruptcy, the husband's interest in the property vested in the Official Trustee in Bankruptcy. Daubney J held that there was a real and substantial triable issue as to whether the interest in the property held by the Official Trustee was subject to a charge: at [28].

Express trust

In *Pascoe v Boensch* (2008) 6 ABC(NS) 360; 250 ALR 24; [2008] FCAFC 147 at [19] – [22], the Full Court considered the principles relating to the voluntary constitution of a trust by way of declaration as follows:

1. Essential to the voluntary creation of an express trust, whether by transfer or declaration, is that there must be certainty of intention to create a trust, certainty as to the subject matter of the trust and certainty as to the objects (beneficiaries): also *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 at [7] (French CJ); *Byrnes v Kendle* (2011) 243 CLR 253; 85 ALJR 798; 279 ALR 212; [2011] HCA 26 [14] to [17] (French CJ), [49] to [60] (Gummow and Hayne JJ); *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588; 74 ALJR 862; 171 ALR 568; [2000] HCA 25 at [42] (Gaudron, McHugh, Gummow and Hayne JJ); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; [1988] HCA 44, at 147 (CLR); *Kauter v Hilton* (1953) 90 CLR 86; [1953] HCA 95 at 97 (Dixon CJ, Williams and Fullagar JJ); *Leahy v Attorney-General (NSW)* (1959) 101 CLR 611; *Federal Commissioner of Taxation (Cth) v Clarke* (1927) 40 CLR 246; [1927] HCA 49 at 282 to 284 (CLR).
2. Though there is no required formula the declarant must manifest an intention presently to create a relationship in respect to property which the law characterises as a trust. The intention must be one actually had and it must create an immediate operative trust: *The Commissioner of Stamp Duties v Jolliffe* (1920) 28 CLR 178 at 181. An intention that a trust be created at a later date will be ineffective to create a trust either at the time of the declaration or at that later date. The onus of proving an intention to create a trust is upon the person seeking to propound the trust.
3. The requirement of certainty of objects is tied to the supervision and control that the courts exercise over trusts.

In determining the intention from the language of the parties a court may consider the nature of the transaction and the circumstances, including commercial necessity: *Kauter v Hilton* (1953) 90 CLR 86; [1953] HCA 95, at 100 (CLR); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; [1988] HCA 44 at 121 (CLR); *Walker v Corboy* (1990) 19 NSWLR 382 at 397; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588; 74 ALJR 862; 171 ALR 568; [2000] HCA 25 at [34] (CLR); *Byrnes v Kendle* (2011) 243 CLR 253; 85 ALJR 798; 279 ALR 212; [2011] HCA 26, at [49] (CLR); *Pascoe v Boensch* (2008) 6 ABC(NS) 360; 250 ALR 24; [2008] FCAFC 147 at [28]. Often in family dealings there may be imprecision of language or expression, which might be expected: *Herdegen v Federal Commissioner of Taxation (Cth)* (1988) 20 ATR 24; 84 ALR 271 at 277.

Subsequent conduct may also be considered in determining whether or not there was an intention to create a trust: *McEvoy v McEvoy* (2012) 8 ASTLR 389; [2012] NSWSC 1494 at [3]; *Reitano v Reitano* [2012] NSWSC 1127 at [23], [25] (Pembroke J); *Stillisano v Adami* [2010] SASC 351 (White J).

If the issue relates to an express trust then conduct or acts of the alleged trustee subsequent to the date of the contended declaration of trust may be admitted against, but not for, the alleged trust where the alleged trustee contends there is no trust: *Herdegen v Federal Commissioner of Taxation (Cth)* (1988) 20 ATR 24; 84 ALR 271 at 276 to 277.

For the creation of an express trust with respect to an interest in land, consideration needs to be given to the law of the State or Territory in relation to a requirement of a memorandum of writing signed by the declarant to be an effective declaration of trust: *Property Law Act 1974* (Qld), s 11; *Conveyancing Act 1919* (NSW), s 23C(1).

Where it may be necessary to interpret a deed of trust to determine whether, and to what extent, property may be held on trust, it is well established that the rules of construction of contracts also apply to trust instruments: *Byrnes v Kendle* (2011) 243 CLR 253; 85 ALJR 798; 279 ALR 212; [2011] HCA 26 at [102], [103] (Heydon and Crennan JJ); *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431; [2015] NSWCA 156 at [83] to [87] (Gleeson JA, with whom Meagher and Leeming JJA agreed at [1], [156]).

Constructive trust

A transferee may seek to raise a defence that the property was held on constructive trust for the transferee. It may be argued that the spouse or de facto transferee contributed directly to the fund used to acquire the property or alternatively there was a common intention that the transferee have an interest in the property. To support that argument, it is necessary for the transferee to allege that there was conduct which was unconscionable or otherwise of a character to attract the intervocation of equity. Muir JA in *Williams v Peters* [2010] 1 Qd R 475; (2010) 232 FLR 98; [2009] QCA 180 at [23], said that a common intention constructive trust requires proof of a real intention by each party that he or she or it would be the owners of the relevant property, and that this intention was acted upon by the beneficiary to her or his detriment. Evidence of conduct after the transaction in question can be relevant in ascertaining the common intention: *Draper v Official Trustee in Bankruptcy* (2006) 156 FCR 53; 236 ALR 499; [2006] FCAFC 157 at [30]; *Rambaldi v Volkov* (2008) 7 ABC(NS) 25; [2008] FCA 1957 at [38] per Ryan J. That is whether a constructive trust exists is assessed by the circumstances existing at the time the property was purchased or acquired though events after its acquisition are not irrelevant: *Huen v Official Receiver* (2008) 6 ABC(NS) 288; [2008] FCAFC 117 at [78]. As Bennett J said, a constructive trust will not be imposed where there is a "vacuum of evidence": *Foley v Foley* (2007) 38 Fam LR 71; [2007] FamCA 584 at [71] per Bennett J.

Prior to the decision of the Full Court in *Parsons v McBain* (2001) 109 FCR 120; 1 ABC(NS) 188; 192 ALR 772; [2001] FCA 376 (Black CJ, Kiefel and Finkelstein JJ), it was considered that the bankruptcy of a spouse or de facto will not generally of itself operate to give rise to any unconscionability which requires the intervention of equity. In the absence of unconscionability towards the spouse or de facto transferee, by the bankrupt owner, the competition is between the creditors of the owner and the "innocent" spouse or de facto. A court will be reluctant to declare a constructive trust to commence before the transfer of property where there is no dispute between the bankrupt spouse or de facto and the innocent spouse or de facto. To do otherwise would interfere with the administration and bankruptcies generally: *Re Popescu* (1995) 55 FCR 583 (Einfeld J); *Re Osborn; Ex parte Trustee of Property of Osborn v Osborn* (1989) 25 FCR 547; 91 ALR 135 (Pincus J); *McBain v Parsons* [2000] FCA 935 (Heerey J); *McVeigh v Zanella* [2000] FCA 1890 (Weinberg J).

This line of authority has now been disapproved by the Full Court in *Parsons v McBain* (2001) 109 FCR 120; 1 ABC(NS) 188; 192 ALR 772; [2001] FCA 376 (Black CJ, Kiefel and Finkelstein JJ); applied *Official Trustee in Bankruptcy v Lopatinsky* (2003) 129 FCR 234; 1 ABC(NS) 271; 30 Fam LR 499; [2003] FCAFC 109 (Jacobson, Lee and Whitlam JJ). The Full Court rejected the notion that a "common intention constructive trust" comes into existence when so declared. There does not need to have been a curial declaration or order before equity will recognise the prior existence of a constructive trust. A court's declaration of the existence of the trust recognises rather creates the trust: *Muschinski v Dodds* (1985) 160 CLR 583 at 614; *Giumelli v Giumelli* (1999) 196 CLR 101; 73 ALJR 547; [1999] HCA 10 at 112 (CLR) (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); *Shepard (Trustee) v Behman* [2019] FCA 1801 at [97] (Thawley J). In conclusion the Full Court said that the decision of *Re Osborn; Ex parte Trustee of Property of Osborn v Osborn* (1989) 25 FCR 547; 91 ALR 135 (Pincus J), could not be followed.

Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them (or in joint names) it may be inferred that it was intended that each spouse should have a one-half interest in the property regardless of the amounts contributed by them: *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 227 CLR 278; 3 ABC(NS) 814; [2006] HCA 6 at [70] – [71] (Gleeson CJ, Gummow,

Hayne, Heydon and Crennan JJ); *Rangott v Sharp* [2007] FMCA 324 at [25] – [28] (Mowbray FM); appeal dismissed *Sharp v Rangott* (2008) 167 FCR 225; [2008] FCAFC 45; *Official Receiver v Huen* [2007] FMCA 304 (Lucev FM); *Pascoe v Nguyen* (2007) 5 ABC(NS) 351; [2007] FMCA 194; appeal dismissed *Nguyen v Pascoe* [2007] FCAFC 181; *Foley v Foley* (2007) 38 Fam LR 71; [2007] FamCA 584 per Bennett J; *Turner v Wallace* [2017] FCCA 3044 (Judge Reithmuller).

Atkinson J, in a summary judgment application, also concluded that a constructive trust comes into existence when there is the common intention as to the beneficial interest. The court may declare or construe the existence of a trust, but the declaration does not create the trust. Section 116(2)(a) specifically excludes from divisible property, property held on trust by the bankrupt for another person. Alternatively, if there must be unconscionable denial of the defendant's equitable interest before a constructive trust arises, then a denial of the defendant's interest by a trustee in bankruptcy would be sufficient to give rise to a constructive trust. A trustee takes property subject to all liabilities and equities which affect it in the bankrupt's hands. It would be unconscionable for the trustee to deny those interests: *Clout v Markwell* (2001) 1 ABC(NS) 177; [2001] QSC 91 (Atkinson J).

Resulting trust

A transferee of a property from the bankrupt for which there was no apparent consideration given for the transfer may contend, in an application by a trustee to avoid the transferee, that the bankrupt held the property on a resulting trust for the transferee. For example, it may be contended that the transferee paid the consideration for the purchase of the property where it was not intended to make a gift or advance of the money or property to the bankrupt. Muir JA in *Williams v Peters* [2010] 1 Qd R 475; (2010) 232 FLR 98; [2009] QCA 180 at [23], said that a resulting trust can only arise in favour of a party making the relevant payment and it arises when the court can discern an intention by that party to retain its interest in the sum paid.

A presumption of a resulting trust may operate in three factual circumstances:

1. Property is conveyed at law, but the entire beneficial ownership in the property is not disposed of.
2. The property has been conveyed at law, on the basis which initially disposes of the entire beneficial interest, but at a later time equitable obligations attaching to the property fail or are set aside. For example, the payment of money to a person for a specific purpose that fails.
3. Where a person provides the purchase price of the property, which is conveyed into the name of the bankrupt: *Calverley v Green* (1984) 155 CLR 242; 59 ALJR 111 at 246–247 (CLR). In such circumstances there is an absence of consideration by the person who has the legal title: *Napier v Public Trustee (WA)* (1980) 55 ALJR 1; 32 ALR 153 at 158 (ALR).

There are relevantly two presumptions (of a resulting trust and of advancement) which are applicable to determine the beneficial ownership of the property. They operate to place the burden of proof on the person seeking to rebut the presumption: *Nelson v Nelson* (1995) 184 CLR 538; 70 ALJR 47 at 547 (CLR). In either case the presumption may be rebutted by evidence of the actual intention of the transferor or person providing the money at the time of the purchase: *Nelson v Nelson* at 547, 574 (CLR); *Caverley v Green* at 251, 262 (CLR). Evidence of intention of the relevant party or parties may be drawn from contemporaneous statements of intention, subsequent admissions or inferred from facts as to subsequent dealings and of surrounding circumstances of the transaction: *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 227 CLR 278; 3 ABC(NS) 814; [2006] HCA 6 at [65]; *Draper v Official Trustee in Bankruptcy* (2006) 156 FCR 53; 236 ALR 499; [2006] FCAFC 157 at [30]; *Rambaldi v Volkov* (2008) 7 ABC(NS) 25; [2008] FCA 1957 at [37] (Ryan J).

Where two or more persons have contributed in unequal shares and the property is purchased in joint names, there is in the absence of a relationship that gives rise to a presumption of advancement, a presumption that the property is held by the purchasers in trust for themselves

in the proportions in which they contributed the purchase money: *Trustees of the Property of Cummins (A Bankrupt) v Cummins* at [55]; *Caverley v Green* at 258–259 (CLR).

In the context of a marital relationship, the High Court in *Trustees of the Property of Cummins (A Bankrupt) v Cummins*:

1. At [67] said to fix upon equal proportions in which the purchase moneys were provided for the calculation of beneficial interests in property would produce a distorted and artificial result, at odds with practical and economic realities.
2. At [68] referred to the decision of Mason and Brennan JJ in *Caverley v Green* at 259 (CLR) where their Honours referred to the statement of Lord Upjohn in *Pettitt v Pettitt* [1970] AC 777 that, where spouses contribute to the acquisition of a property then, in absence of contrary evidence, it is taken that they intended to be joint beneficial owners. Their Honours said that those remarks reflected a notion that both spouses may contribute to the purchase of assets through their marriage and they would wish those assets to be enjoyed together for their joint lives and by the survivor when they were separated by death.
3. At [71] – [72] the court referred to and applied the reasoning expressed by Professor Scott's work, *The Law of Trusts*, that:
    (a) It was often purely accidental circumstance whether money of the husband and the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labour to the various expenses of the household.
    (b) In circumstances where a husband and wife purchase a matrimonial home, each contributing to the purchase price and the title is taken in the name of one of them, it may be inferred that it was intended that each of the spouses should have one-half interest in the property regardless of the amounts contributed by them.

    The court said that such reasoning applies with added force where the title was taken in joint names of the spouses. There is no occasion for equity to fasten upon the registered interest held by joint tenants a trust obligation representing differently proportionate interests as tenants in common: *Draper v Official Trustee in Bankruptcy* (2006) 156 FCR 53; 236 ALR 499; [2006] FCAFC 157 at [30]; *Rambaldi v Volkov* (2008) 7 ABC(NS) 25; [2008] FCA 1957 at [38] per Ryan J.

    However, it is the circumstances of each case that must considered. The intention or conduct of the parties to the marriage may be inconsistent with joint ownership in equal proportions: *Official Trustee in Bankruptcy v Brown* [2011] FMCA 88 at [18], [19], [30] – [32]; *Kerr as trustee of the property of Kehlet (a bankrupt) v Kehlet* [2019] FCA 1572 at [21] (Robertson J). One relevant factor is whether there is evidence of the husband and wife having ever regarded the property as anything other than their family home in which each held an interest equivalent according to their contributions: *Foley v Foley* (2007) 38 Fam LR 71; [2007] FamCA 584 at [68] per Bennett J.

In England, the approach is encapsulated in the judgment of Lord Walker and Lady Hale in *Jones v Kernott* [2012] 1 AC 776; [2012] 1 All ER 1265; [2011] 3 WLR 1121; [2011] UKSC 53 at [25], where it was said that the "time has come to make it clear … that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares. The presumption is that the parties intended a joint tenancy both in law and in equity. But that presumption can of course be rebutted by evidence of a contrary intention, which may more readily be shown where the parties did not share their financial resources".

In respect of certain relationships equity presumes that any benefit which was provided for one party at the cost of the other has been provided by way of advancement. It is then presumed that the equitable interest follows the legal title. Such presumption is drawn in a relationship of father and child (*Caverley v Green* at 247 (CLR)) and is capable of being drawn in a

relationship of mother and child (*Nelson v Nelson* at 548–549, 574, 585 (CLR)). Although the categories are not closed presently, the presumption of advancement of a wife by the husband has not been matched by a presumption of a husband by the wife: *Trustees of the Property of Cummins (A Bankrupt) v Cummins* at [117].

This presumption or inference may be rebutted by evidence of a contrary intention: *Huen v Official Receiver* (2008) 6 ABC(NS) 288; [2008] FCAFC 117 at [55].

Where the presumption of advancement is rebutted the resulting trust is "affirmed" or "presumed" and it is the resulting trust, and not an express trust, which is enforced by the court: *Nelson v Nelson* at 547–548, 576 (CLR); *Caverley v Green* at 251–252 (CLR); *Brown v Brown* (1993) 31 NSWLR 582 at 589D–590B. The presumption of advancement is either a sub-rule of, or an exception to, the presumption of a resulting trust: *Nelson v Nelson* at 576; *Napier v Public Trustee (WA)* (1980) 55 ALJR 1; 32 ALR 153 at 158; *Brown v Brown* at 589E–589F.

The onus is upon the person who seeks to rebut the presumption of advancement: *Nelson v Nelson* at 547–549; *Caverley v Green* at 247, 251–252.

Proprietary estoppel

Although, reference is made to the term "proprietary estoppel" in *Commonwealth v Verwayen* (1990) 170 CLR 394; 64 ALJR 540; 95 ALR 321; [1990] HCA 39, Mason CJ described estoppel as "a label which covers a complex array of rules spanning various categories" and "titles such as promisory estoppel, proprietary estoppel and estoppel by acquiescence" and is "intended to serve the same fundamental purpose namely 'protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted': at 409; referred to in *Sidhu v Van Dyke* (2014) 251 CLR 505; 88 ALJR 640; [2014] HCA 19, at [1] (CLR) (French CJ, Kiefel, Bell and Keane JJ). These various categories identify different characteristics in which an equitable estoppel will operate.

Emmett AJA (with whom McColl JA agreed at [1]) said that the fundamental purpose of equitable estoppel is to protect a person who acts to his or her detriment from the detriment that would flow from resiling from a promise or representation. The detriment or harm required to ground an estoppel can be any material disadvantage, so long as it is substantial. The relief granted may require the taking of active steps by the representor or promisor, including the performance of the promise or representation or the performance of the expectation generated by the promise or representation. It is the conduct of the promisee or representee that is induced by the promise or representation that is the foundation for equitable intervention. It is actual reliance by the promisee or representee on the state of affairs so created that gives rise to an equitable estoppel. The question is whether the conduct of the promisee or representee was so influenced by the promise or representation that it would be unconscionable for the promisor or representor to resile from the promise or representation. The promise or representation need not be the sole or predominant cause of the course of action or inaction engaged in by the promisee or representee. It is only necessary to establish that the belief was a contributing cause: *Priestley v Priestley* [2017] NSWCA 155 at [134] – [137], [164].

In the case of promisory estoppel it has been described as an equity that binds the holder of the legal right who induces another to expect that the right will not be exercised against her or him and for a proprietary estoppel, the equity binds an owner of property or an interest in property who induces another to expect that an interest in the property will be conferred on her or him: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; 62 ALJR 110; [1988] HCA 7 at 420 (CLR) (Brennan J). The New South Wales Court of Appeal has said that unlike a proprietary estoppel, a promisory estoppel is negative in substance and is an equitable restraint on the enforcement of the promisor's rights: *Saleh v Romanous* (2010) 79 NSWLR 453; [2010] NSWCA 274 at [74] (Handley AJA, with whom Giles JA and Sackville AJA agreed) (special leave refused [2011] HCATrans 101); *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728; 285 ALR 311; [2011] NSWCA 348 at [93]. In *Ashton v Pratt* (2015) 88 NSWLR 281; 318 ALR 260; [2015] NSWCA 12 at [108] (Bathurst CJ, with whom McColl JA agreed, Meagher AJA agreeing in separate reasons); *Nock v Maddern* [2018] NSWCA 239 at [35] (White JA, with whom Leeming JA and Sackville AJA agreed).

In *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 Priestley JA at 610F, 612D (with whom Kirby P agreed at 585C) referring to proposition five in in *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 at 472 (Priestley JA, with whom Hope and McHugh JJA agreed) identified in broad terms that for there to be an estoppel in equity there must be the creation of encouragement by a party (representor) in another (representee) of an assumption that a contract will come into existence or a promise be performed, or an interest granted to the representee by the representor or a transaction carried out between the representor and representee, and reliance on that by the representee in circumstances where the departure from the assumption by the representor would be unconscionable.

An assumption as to a legal relationship may be an assumption that there is no legal relationship: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; 62 ALJR 110; [1988] HCA 7 at 420 (CLR) (Brennan J).

It is necessary to identify carefully firstly, the relevant assumption or expectation which has been created or led by the conduct of the party the subject of the estoppel claim, secondly reliance on that assumption or expectation and thirdly, the detriment occasioned by such reliance. In the context of the facts the court will determine whether it is against good conscience to depart from the assumption or expectation, which is addressed at the time the party wishes to do so: *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728; 285 ALR 311; [2011] NSWCA 348 at [72] (Meagher JA, with whom Macfarlan JA agreed).

An estoppel by representation does not arise unless the representation is clear and unequivocal: *Nock v Maddern* [2018] NSWCA 239 at [52] (White JA, with whom Leeming JA and Sackville AJA agreed). Courts in Australia have shown a reluctance to uphold claims of equitable estoppel where parties with commensurate bargaining positions are engaged in arm's length dealings regulated by express contractual provisions: *Settlement Group Pty Ltd v Purcell Partners (firm)* [2013] VSCA 370 at [47] – [49] (per Maxwell P); *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 587 (Kirby P), 621 (Rogers AJA).

In a family context, the informality of promises or representations is not a barrier to enforcement in equity: *Richardson v Lindsay* [2019] NSWCA 148 at [32] (Macfarlan JA, Gleeson and White JJA agreeing).

Overview

Proprietary estoppel may prevent the owner of an interest in property, including a bankrupt and a trustee in bankruptcy as her or his successor, from asserting rights against another party whom the bankrupt had allowed or encouraged to deal with that interest, or act in relation to that property, as if the latter had rights to the property.

A proprietary estoppel binds the owner of the property who induces another to expect that an interest in the property will be conferred upon them: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; 62 ALJR 110; [1988] HCA 7 at 420 (CLR) (Brennan J). In *Giumelli v Giumelli* (1999) 196 CLR 101; 73 ALJR 547; [1999] HCA 10 at [6] the plurality said the equity "which founded the relief obtained was found in an assumption as to the future acquisition or ownership of property which had been induced by representations upon which there had been detrimental reliance by the plaintiff. This is a well recognised variety of estoppel as understood in equity and may found relief which requires the taking of active steps by the defendant" referred to in *Sidhu v Van Dyke* (2014) 251 CLR 505; 88 ALJR 640; [2014] HCA 19 at [2] and [82] (CLR) (French CJ, Keifel, Bell, Keane JJ, with Gageler J agreeing at [89]); *Ashton v Pratt* (2015) 88 NSWLR 281; 318 ALR 260; [2015] NSWCA 12 at [108] (per Bathurst CJ, with whom McColl JA agreed, Meagher AJA agreeing in separate reasons). The conduct of the representee induced by the representor is the foundation of the equitable intervention. The estoppel serves to vindicate the expectations of the representee against a party who seeks unconscionably to resile from an expectation that he or she has created: *Priestley v Priestley* [at] [134] – [137] (Emmett AJA, with whom McColl JA agreed at [1]); *Sidhu v Van Dyke* at [58], [77] (French CJ, Keifel, Bell, Keane JJ, with Gageler J agreeing at [89]); *Riches v Hogben* [1985] 2 Qd R 292 at 301; approved in *Giumelli v Giumelli* at [35].

The estoppel may arise by encouragement or acquiescence. Estoppel by encouragement may occur where the owner of the interest in the property encourages expenditure by some

representation, such as a promise, that the claimant will receive an interest by way of benefit in return. Estoppel by acquiescence may arise where the owner of the interest by acquiescence induces the expenditure by the claimant in the expectation that an interest in the property will be conferred: *Re Lofthouse* [2013] VSC 341 at [40] – [42] (Derham ASJ); *Priestley v Priestley* at [7] – [8] and [10] – [14] where Macfarlan JA discusses the origin of the two distinct lines of authority and the elements thereof, but note reasoning of Emmett AJA at [129] – [137], with whom McColl JA agreed at [1].

McPherson J in *Riches v Hogben* [1985] 2 Qd R 292 at 300-301 described this as an equity of expectation. His Honour said that the critical element is the conduct of the party after making the representation in encouraging the other party to act upon it. That is what makes it unconscionable to deny the right which the other party has been led to expect. It is the conduct of that other party in acting upon the expectation that invites the intervention of equity: judgment varied on appeal *Riches v Hogben* [1986] 1 Qd R 315.

It is essential for any representee to establish the adequacy of the assurance or promises. This involves careful identification of the nature of the assurance or promise. That will then be assessed in the circumstances of the case to determine whether an estoppel is established. Whether the assurance or promise is reasonable to found an estoppel involves a consideration of whether it is certain. It is not necessary, however, that the assurance or promise be sufficiently certain, or precise, as would be required to found a contract: *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247; [2016] NSWCA 105, at [186] – [189] (Gleeson JA, with whom Beazley P and Leeming JA agreed). It is also essential for the representee to establish actual reliance upon the expectation created or encouraged and detriment in so doing. Such an expectation created or encouraged need not be the sole inducement operating in the mind of the representee. It is the conduct of the representee induced by the party creating the expectation which is "the very foundation for equitable intervention". In terms of the estoppel it then becomes unconscionable for the party creating the expectation to resile from such expectation: *Sidhu v Van Dyke* (2014) 251 CLR 505; 88 ALJR 640; [2014] HCA 19 at [58], [61], [71] – [73] (CLR) (French CJ, Keifel, Bell, Keane JJ, with Gageler J agreeing at [89]); *Priestley v Priestley* at [134] – [137], [164].

Measure of relief

For proprietary estoppel the remedy is founded upon the understanding of the parties and the expectation that has been encouraged. Whereas, the remedy for an equitable estoppel is concerned with what needs to be done in order to avoid the detriment to the party who has relied upon the assumption and induced by the party estopped: *Harrison v Harrison* [2013] VSCA 170 at [138] (Harper and Tate JJA and Garde AJA). As stated by Nettle JA in *Donis v Donis* (2007) 19 VR 577; [2007] VSCA 89 at 582, "*prima facie the estopped party can only fullfill his or her equitable obligation by making good the expectation which he or she has encouraged*". That party is bound in conscience to make good the expectation that a proprietary interest will be conferred which a party has relied upon to her or his detriment. That position will "yield" to the individual circumstances of the case, such as when the expectation or assumption is uncertain or extravagant or out of proportion to the detriment suffered. The facts of each case will ultimately determine the way in which the equity will be satisfied. McPherson J (as he then was) said that the relief granted in equity may take the form of restitution, but is capable of extending to require the estopped party to fulfil the expectation created: *Riches v Hogben* [1985] 2 Qd R 292 at 300; *Sidhu v Van Dyke* (2014) 251 CLR 505; 88 ALJR 640; [2014] HCA 19 at [79] – [86] (CLR) (French CJ, Keifel, Bell, Keane JJ, with Gageler J agreeing at [89]). A helpful analysis of the relevant principles was undertaken in the reasons of Handley JA in *Sullivan v Sullivan* [2006] NSWCA 312 at [11] – [32] and in *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 84 at [55] – [68] (with whom Allsop P and Giles JA agreed); *Priestley v Priestley* [160] – [167].

Family Law Act 1975 (Cth)

It is not uncommon for a person to become bankrupt not long after entering into a property settlement under s 79 of the *Family Law Act 1975* (Cth) or entering into a financial agreement under Pt VIIIA of that Act. There is an increasing trend to recognise the legitimate interests of

a spouse or defacto. The Family Court of Australia property orders may be varied or set aside on application under s 79A of the *Family Law Act 1975*. A financial agreement may be set aside by order of the court: s 90K. A trustee in bankruptcy is a person who has locus standi to make such application. The issue is whether the transfers pursuant to the Family Court orders or a financial agreement can be challenged under either s 120 or s 121. There is an apparent disparity between the protection of the legitimate interests of a party to the marriage and the protection of creditors against the manipulation of s 79 of the *Family Law Act 1975* and financial agreements to alienate property to defeat the legitimate interests of creditors.

Section 79 orders

A transfer pursuant to s 79 orders was considered by the Full Court in *Official Trustee in Bankruptcy v Mateo* (2003) 127 FCR 217; 1 ABC(NS) 1; 202 ALR 571; 30 Fam LR 122; [2003] FLC 93–128; [2003] FCAFC 26 (Wilcox, Branson and Merkel JJ) which upheld the decision at first instance but on different grounds: *Mateo v Official Trustee in Bankruptcy* (2002) 117 FCR 179; 188 ALR 667; 28 Fam LR 499; [2002] FCA 344 (Tamberlin J). The relevant principles from the reasoning of the Full Court are:

1. Wilcox J:
    (a) There is support for the view that the effect of a transfer order under s 79 is to vest in the beneficiary of the order an equitable interest in the property to be transferred. A subsequent transfer is of a bare legal interest, the market value of which is nil. A transfer giving effect to such an order would never be void against the transferor's estate. The market value of the property is nil.
    (b) There are in effect two transfers. The first is the transfer of the equitable interest pursuant to the s 79 order and the second is the transfer of the legal title. Any application to set aside the transfer would have to assert the order of the Family Court of Australia is void.
    (b) His Honour approached the issue of consideration on the basis that what was required is consideration of a contractual nature. In that context past consideration is not generally sufficient.
    (b) The divesting of property pursuant to an order of the Family Court of Australia and that lies outside the reach of ss 120 and 121.
    (b) The appropriate course is to make an application under s 79A of the *Family Law Act 1975* to vary or set aside the orders. On such an application it will be necessary for the applicant to satisfy the Family Court of Australia that:

        > there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including a failure to disclose relevant information), the giving of false evidence or other circumstance.

    A failure to disclose creditors or that one of the parties was insolvent is a relevant factor in such an application.
2. Branson J:
    (a) It is unlikely that the legislature intended s 121 to render void an order, or part thereof, of the Family Court of Australia calculated to achieve a proper balance between the competing interests of the parties to a marriage, the children of the marriage and third party creditors.
    (b) An alteration of the interests of the parties to a marriage in property by the court order does not constitute "[a] transfer of property by a person … to another person" within the meaning of s 121(1). The interests of the parties to the marriage were altered by operation of the terms of the order itself. The order vested in the wife the husband's beneficial interest in the property.
    (c) Subsequent to the orders the husband's remaining interest in the property was "merely formal".

(d) The nature of the power given by ss 79 and 79A and the language of s 121 are inconsistent with a legislative intention that s 121 should have any operation in respect of an order made under s 79 or in respect of any transfer pursuant to such an order.

(e) The complexity of the factors which are required to be considered under s 79 renders the notion of identification of the value of the consideration given by a party to the marriage unrealistic. It is likely that the "consideration" is used in the *Bankruptcy Act 1966* in the common law contractual sense with the result that any "past consideration" is to be disregarded.

(f) The remedy, if any, available is to make an application to the Family Court of Australia under s 79A of the *Family Court of Australia Act 1975* (Cth).

3. Merkel J:

(a) The consent orders altered the interests in the matrimonial home of the husband and the wife by transferring the equitable interest, and interest of the husband, to his wife. For the purposes of ss 120 and 121 the transfer of the equitable interest and interest in the home was pursuant to the orders of the Family Court of Australia and not "by the bankrupt". For the purposes of ss 120 and 121 there was not "a transfer of property by a person who later becomes bankrupt" to another person.

(b) The subsequent transfer of the bare legal interest has little relevance. The legal interest would be held on trust by the husband and trust property does not form part of the husband's divisible property. The value of the legal interest was nil.

(c) Once it is recognised that s 79 orders do not fall within the terms of ss 120 and 121 it is imperative that the judges and judicial officers exercising the power to make orders under s 79 are aware of the potential for such orders to operate to the detriment of arm's length creditors.

The members of the Full Court concluded that an order under s 79 of the *Family Law Act 1975* had the effect of transferring the equitable estate and interest in the property to the person in whose favour the order was made. This was the conclusion expressed by the Full Court in *Jones v Daniel* (2004) 141 FCR 148; 2 ABC(NS) 435; 212 ALR 588; 32 Fam LR 481; [2004] FLC 93-196; [2004] FCAFC 278 (Hill, Moore and Allsop JJ); *Oliver v Malanos* (2011) 199 FCR 136; 9 ABC(NS) 599; 285 ALR 141; [2011] FCA 1354 at [60], [61] (Cowdroy J).

Therefore, even though the transfer of the bare legal title pursuant to the order of the Family Court of Australia did not occur prior to bankruptcy or the trustee has perfected her or his legal estate under s 58 by registration, the trustee will still take the property subject to the interests held by the party in whose favour the Family Court order was made. The interest that person obtains in the property may be enforced despite the intervention of bankruptcy of the other party: *Daniel v Daniel* (2004) 32 Fam LR 160; [2004] FLC 93-187; [2004] FCA 648 at [33] (Emmett J); affirmed on appeal: *Jones v Daniel* (Hill, Moore and Allsop JJ).

The effect of the reasoning of the members of the Full Court in *Official Trustee in Bankruptcy v Mateo* (2003) 127 FCR 217; 1 ABC(NS) 1; 202 ALR 571; 30 Fam LR 122; [2003] FLC 93–128; [2003] FCAFC 26, is that a trustee must apply under s 79A of the *Family Law Act 1975* to challenge transfers of property pursuant to orders made by the Family Court under s 79 as there is no transfer within the meaning of s 120 or s 121.

Section 79A relevantly provides in part that:

1. An application may be made by a person who is affected by an order made by a court under s 79: s 79A(1). A trustee in bankruptcy is taken to be a person whose interests are affected by the order when either a party to the marriage was bankrupt at the date of the order or after the order was made, the party to the marriage became bankrupt: s 79A(5).
2. Where the court is satisfied that there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance, the court may in

the exercise of its discretion, vary the order or set aside the order. If the court considers it appropriate, another order may be made under s 79 in substitution for the order set aside. There are other grounds prescribed by s 79(1).

The concluding words of s 79A(1) provide that even if a miscarriage of justice is established the court retains a discretion as to whether or not to set aside or vary the orders. The applicant bears the onus of establishing not only that there is a miscarriage of justice, but also that the court ought to exercise the discretion to set aside or vary the s 79 orders.

A miscarriage of justice may occur in circumstances where the parties to the marriage fail to notify a party who may be affected by the orders or fail to properly disclose all the liabilities or obligations of a party to the marriage or of the insolvency of a party: *Official Trustee in Bankruptcy v Mateo* (2003) 127 FCR 217; 1 ABC(NS) 1; 202 ALR 571; 30 Fam LR 122; [2003] FLC 93–128; [2003] FCAFC 26 (Wilcox, Branson and Merkel JJ); *Official Trustee in Bankruptcy v Donovan (No 2)* (1996) 20 Fam LR 802; *Official Trustee in Bankruptcy v B* (2005) 35 Fam LR 17; [2005] FamCA 1163. That duty is encapsulated in rr 13.01 and 13.04 of the *Family Law Rules 2004* (Cth). The expression "any other circumstances" is wide enough to encompass a situation in which an order is made in the absence of a party: *Allesch v Maunz* (2000) 203 CLR 172; [2000] HCA 40 at [25]; *Child Support Registrar v Nixon* (2007) 36 Fam LR 571; [2007] FamCA 32 .

The Full Court in *Official Trustee in Bankruptcy v Donovan* at 816-817, emphasised the obligation of full disclosure of third party interests to the court and the responsibility of notification to third parties. Where the collection of debt may be affected by the terms of the orders there is a clear obligation to notify third parties. That obligation is not discharged by simply placing material before the court as to the existence of the third party.

A factor which ought to be given significant weight in the exercise of the discretion to set aside the orders is a failure of a party to the marriage to notify a person affected by the orders: *Child Support Registrar v Nixon* at [47].

Some of the factors the court may take into account in the exercise of the discretion to set aside the orders are:

1. The delay in commencing the s 79A proceeding.
2. The assets, liabilities and contributions of the parties to the marriage.
3. The circumstances of the parties since the making of the orders.
4. Hardship.
5. The circumstances surrounding the making of the s 79 orders, particularly if they were by consent. Such circumstances include the failure to disclose all the liabilities and notify third parties and whether such conduct was deliberate: *Official Trustee in Bankruptcy v B* [2005] FamCA 1163; (2005) 35 Fam LR 17 at [151] – [169]; *Lasic v Lasic* (2007) 5 ABC(NS) 584; [2007] FamCA 837.

If the order is set aside, then the court may consider in the exercise of the discretion making, an order under s 79.

Where a party to the marriage is bankrupt the court has power to make an order altering the interests of the trustee in bankruptcy in the property vested in her or him as a result of the bankruptcy: s 79(1)(b) and s 59A *Bankruptcy Act 1966* (Cth). The trustee may be ordered to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, a settlement or transfer of property: s 79(1)(d). Such an order may result in creditors of the bankruptcy estate receiving less by way of dividend if no such order was made. Where the trustee in bankruptcy is a party to the proceedings then except with the leave of the court, the bankrupt party to the marriage is not entitled to make submissions to the court in connection with any vested bankruptcy property in relation to the bankrupt party: s 79(12). In order to be granted leave the bankrupt party must establish that there are exceptional circumstances: s 79(13). However, there may be property which has not vested in the trustee about which a bankrupt may make submissions. One example is superannuation of the bankrupt or a property exempted pursuant to s 116(2) of the *Bankruptcy Act 1966* (Cth).

In doing so, the court is required to consider all the factors prescribed by s 79(2) and 79(4) and, so far as they are relevant, s 75(2). There are generally five stages to the proper consideration of an application for property adjustment:

(1) Having regard to the breakdown of the marriage, if any, it is just and equitable to consider the alternation of the parties interests in their property.
(2) Identification of the property, liabilities and financial resources of the parties at the time of the hearing.
(3) The relevant contributions of the parties within the meaning of s 79(4)(a) - 79(4)(c) must be identified and weighed against each other.
(4) The matters in s 79(4)(d) - 79(4)(g), and in particular paragraph (e) which takes up by reference to 75(2) the matters referred to in that sub-section, must be considered and a determination made as to what, if any, alternation should be made to the entitlements of the parties earlier assessed on account of contribution.
(5) The court must be satisfied in all the circumstances that it is just and equitable to make the order that is proposed: *Higginson v Higginson* [2013] FamCA 80 at [91] (Aldridge J). The court has a wide power to make orders under Pt VIII: s 80. That includes orders directed to a bankrupt if the trustee in bankruptcy is a party to the proceeding before the court or to a debtor under a Personal Insolvency Agreement if the trustee under that agreement is a party to the proceeding: s 80(5).

The Family Court has jurisdiction in bankruptcy in relation to a matter connected with, or arising out of, the bankruptcy of the bankrupt if at a particular time a party to the marriage is bankrupt and the trustee of the bankrupt's estate is a party to property settlement proceedings in relation to either or both of the parties to the marriage or is an applicant under s 79A proceedings of the *Family Law Act 1975* (Cth) for variation or setting aside of the order made under s 79 in property settlement proceedings in relation to either or both of such parties or is a party to spousal maintenance in relation to the maintenance of the party to the marriage: s 35(1) *Bankruptcy Act 1966* (Cth). Jurisdiction is given to the Family Court in relation to proceedings involving a defacto relationship: s 35(1A). Also, where a matter is transferred to the Family Court that court has jurisdiction to determine the proceeding: ss 35(2), 35A(4) *Bankruptcy Act 1966* (Cth). Subject to Chp 1 of the *Family Law Rules 2004* (Cth) Pt 26.1 of those rules apply to bankruptcy matters in the Family Court.

The amendments have by s 75(2)(ha) given legislative recognition to the obligation of the Family Court or a Judge of the Federal Circuit Court of Australia to consider the impact of any order on the ability of a creditor to recover debt "as far as that effect is relevant". However, there is no statutory guidance as to how that impact is to be measured or taken into account. Creditors are not given any special priority. The sub-section does not require that the court take into account the affect of the orders on the trustee's ability to recover any outstanding remuneration, costs and charges, although a trustee would be a person whose interest may be affected by an order: s 79(10). The s 75(2) factors are considered in the context of the party to the marriage and not a trustee in bankruptcy of one of those parties.

Examples

Lasic v Lasic (2007) 5 ABC(NS) 584; [2007] FamCA 837

The court ordered that the wife pay to the only creditor the liability outstanding with a charge on the wife's assets until payment. On the basis of such an order the trustee would not be able to recover the remuneration, costs and expenses of the estate.

Trustee for the Bankrupt Estate of Lasic v Lasic (2009) 232 FLR 121; 7 ABC(NS) 130; [2009] FamCAFC 64

The Full Court granted the appeal and cross-appeal and held that any order setting aside or varying consent orders requires an adjustment of property by payment of a monetary sum or transfer of property by the wife to the trustee. The making of an order that payment be made directly to a creditor was not within power. Upon bankruptcy, the creditors' rights were converted into a right to prove and participate in any dividend. The creditor did not retain an independent right to enforce the judgment nor to receive payment: [207], [209], [211].

Lemnos v Lemnos (2007) 6 ABC(NS) 446; 38 Fam LR 594; [2007] FamCA 1058

The non-bankrupt wife received a 50% interest in a house property registered in the name of her husband on the basis of the principled in *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 227 CLR 278; 3 ABC(NS) 814; [2006] HCA 6. The debts in the estate were $6m. The Deputy Commissioner of Taxation was the largest creditor. The court found that it was appropriate for the husband to satisfy the debt to the Deputy Commissioner of Taxation from his own resources. The trustee contended that there should be an adjustment in favour of the trustee of some 100% and that even with that adjustment there would still be a very substantial loss occasioned to creditors. The court noted that the *Family Law Act 1975* does not elevate the status of creditors above the other considerations required to be considered under s 75(2).

Trustee of the Property of Lemnos v Lemnos (2009) 223 FLR 53; 6 ABC(NS) 465; [2009] FamCAFC 20

The Full Court allowed the appeal.

Thackray and Ryan JJ said that they were unable to accept that the husband's conduct came within either of the exceptions enunciated by Baker J in *Re Kowaliw* (1981) FLC 91-092: [243]. The husband's conduct was not designed to diminish the value of the matrimonial assets. To the contrary it was designed to increase the matrimonial assets. It was concluded that the primary judge's discretion miscarried when his Honour failed to provide for the wife to share in any penalties that may be imposed by the Commissioner of Taxation. The primary judge also appeared to have given no consideration to the significance of the fact that the wife had enjoyed benefits flowing from income deductions. This was a necessary matter for the primary judge to have considered alongside the finding that the wife was not complicit in the husband's conduct: [246].

Coleman J held that the primary judge's approach in concluding that the husband ought to satisfy the debt to the Commissioner of Taxation from his own resources before having regard to s 75(2)(ha) was in error: [176]. The primary judge had already decided the issue which that section directed him to consider. The primary judge was required to consider s 75(2)(ha) before determining what order ought to be made. Coleman J also said that for the primary judge to rely upon the "size of the debts to the creditors" of the husband to offset any entitlement to a s 75(2) adjustment on the part of the wife was not an appropriate approach. Nor was it appropriate to decline to make any "further adjustment in favour of the trustee" on the basis that doing so would, "work an injustice and hardship upon the wife" in ways which his Honour did not particularise: [177]. Thackray and Ryan JJ also held that for the reasons expressed by Coleman J, the outcome determined by the primary judge was outside the range of reasonable discretion: [292]. Their Honours considered that this may have been due to the disproportionate weight given to the wife's lack of complicity in the husband's conduct and having given inadequate weight to the fact that the wife had benefited from that conduct: [292].

Reua v Reua [2008] FamCA 1038

The proceedings were for settlement of property. The husband and his trustee in bankruptcy were respondents. The wife sought orders to the effect that she retain all of the property which she holds and that she take all of the property vested in the husband's trustee in bankruptcy. That would have resulted in the wife receiving all of the property and the husband and the trustee would receive nothing, and the unsecured creditors of the husband would not receive a dividend from the bankruptcy estate. The court found that the husband had not engaged in conduct which was designed to minimise the effective value or worth of the matrimonial assets and that the wife played an active administrative role in the parties' business activities.

It was held that an outcome which results in the payment of unsecured creditors; a reflection of the wife's greater contributions and an adjustment in her favour pursuant to s 75(2), is just and equitable.

West v West (2007) 6 ABC(NS) 214; [2007] FMCAfam 681

The trustee in bankruptcy sought to resist the application by the non-bankrupt spouse that she be awarded the sole ownership of the matrimonial home, which was held jointly. The court ordered that the trustee in bankruptcy transfer the bankrupt's interest in the home to his wife and ordered that the wife be paid 95% of the bankrupt's superannuation. On such orders the

remuneration, costs and charges of the trustee would not be paid. The court expressed a view that the orders proposed by the trustee would not result in any payment to creditors but only the remuneration, costs and charges of the trustee and such orders were not appropriate in the circumstances of the case.

Worsnop v Worsnop (No 2) (2007) 6 ABC(NS) 525; 39 Fam LR 202; [2007] FamCA 1315

The Commissioner of Taxation intervened in a property settlement. There was a substantial amount owed by the husband for outstanding tax which exceeded the value of the matrimonial property. The court found that the wife neither knew nor ought to have known of the facts and circumstances giving rise to that tax obligation. The court found that the intervenor's claim as a creditor is not given priority and there is no provision in the *Family Law Act 1975* which would support such a priority. In assessing what orders are just and equitable the court will address the weight which is to be given to the particular aspects of s 79(4) (which incorporates s 75(2)) and in doing so the court will give weight to the fact that the outstanding tax debt is a debt to the Crown. The effect of the orders was that, upon sale of the matrimonial home, 50% of the net proceeds be paid to the Commissioner of Taxation.

Federal Commissioner of Taxation v Worsnop (2009) 6 ABC(NS) 559; [2009] FamCAFC 4

The appeal and cross-appeal from the decision of the primary judge was dismissed. The Federal Commissioner of Taxation (Commissioner) had sought an order that the wife sell the matrimonial home and the whole of the net proceeds of sale be paid to the Commissioner in partial satisfaction of the outstanding tax liabilities of the husband. The Full Court held that the decision of the primary judge was not outside the parameters of a reasonable exercise of discretion. The Full Court recognised, as did the primary judge, that the Commissioner is in a position distinguishable from that of a commercial creditor; commercial creditors have a choice to whom they extend credit.

Zachary v Zachary [2008] FMCAfam 1209

As to a bankruptcy entered before the commencement of the 2005 amending legislation (18 September 2005), there was no jurisdiction in the court to deal with the property that had vested in a trustee in bankruptcy of a party to the marriage. The amending legislation did not give the court power to deal with property other than "vested property". Property coming into possession of a trustee as a result of the operation of other provisions of the *Bankruptcy Act 1966* which does not fall within the definition of "vested property", is not able to be dealt with: applied by *Townend v Townend* [2008] FMCA 1610 and [2008] FMCAfam 1298.

Nelson v Perry [2011] FMCAfam 239

The proceedings involved a trustee in bankruptcy of a bankrupt husband. The trustee, in the course of the administration, paid from the property of the estate remuneration and expenses in the administration of the estate. The bankrupt's spouse claimed that the moneys paid out to the trustee should have been kept in trust pending the outcome of family law proceedings commenced against the bankrupt husband as the remuneration and expenses were paid from "vested property". The court held that it was appropriate that the trustee in bankruptcy receive payment for the reasonable remuneration and expenses incurred in the administration of the estate.

Debrossard v Official Trustee in Bankruptcy [2011] FamCA 648

On the application of the Official Trustee, consent orders were set aside and the wife sought to have the orders reinstated. The wife was in necessitous circumstances. The court said a relevant factor to consider was the effect of the proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that is relevant. The court ordered that the major asset, the matrimonial home, be sold and after discharging the mortgages the net proceeds of the sale be paid 60% to the wife and 40% to the Official Trustee.

Financial Agreement

The *Family Law Amendment Act 2000* (Cth) introduced the financial agreement regime under Pt VIII of the *Family Law Act 1975* for the first time, by the insertion of Pt VIIIA. The intention of those amendments is to enable persons to enter into agreements which deal with

property and spousal maintenance and avoid the necessity of court proceedings: *Black v Black* (2006) 36 Fam LR 680 at [110]. No express part of Pt VIIIA authorised the institution of proceedings pursuant to s 90K to set aside a financial agreement where there were no pending proceedings between the parties to the financial agreement. At the commencement of this regime, a third party was not authorised to institute proceedings to set aside the agreement: *Australian Securities & Investments Commission v Rich* (2003) 181 FLR 181; 31 Fam LR 667; [2003] FamCA 1114.

In 2005, the *Bankruptcy Act 1966* and the *Family Law Act 1975* were amended by the *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth), which came into effect during 2005. That amending Act relevantly:

1. Amended the definition of "maintenance agreement" in s 5(1) of the *Bankruptcy Act 1966* to exclude a financial agreement within the meaning of the *Family Law Act 1975*. That amendment applied to bankruptcies current on or after commencement of that amendment, namely 15 April 2005. The Revised Explanatory Memorandum explained that the purpose of this amendment is to ensure that financial agreements cannot be used to defeat the claims of creditors and to ensure that trustees can use the "clawback" provisions to recover property transferred prior to bankruptcy under such an agreement: [18]. A new act of bankruptcy was introduced, which applies to debtors who become insolvent as a result of one or more transfers of property in accordance with a financial agreement: s 40(1)(o).
2. Amended s 90K of the *Family Law Act 1975* to enable third parties to set aside a financial agreement on the grounds set out in the amended provision. One such ground is that either party to the agreement entered into the agreement for the purpose, or purposes that included the purpose, of defrauding or defeating creditors of the party; or with reckless disregard of the interests of a creditor or creditors of the party: s 90K(1)(aa).

Before 15 April 2005, "maintenance agreement" was defined to include a financial agreement under the *Family Law Act 1975*. The exclusion in s 120(2)(b) (and s 123(6)) at that time included financial agreements. However, subsequent to commencement of the amendment to s 123(6) by insertion of the preface "Subject to section 121", introduced by the *Bankruptcy Amendment Act 1987* (Cth), there was never an exclusion or exception for a "maintenance agreement" under s 121. The Parliament at that time determined not to preserve from invalidity, fraudulent dispositions of property made with the intent to defraud creditors, the terms then used in s 121, to which the defence did not apply.

There is no requirement for registration in court of an agreement: s 105(2A). A valid financial agreement must comply with the provisions of ss 90B (agreements before marriage), 90C (agreements during marriage), 90D (agreements after divorce order made) and 90G. A valid financial agreement may be enforced by order of the Family Court. The effect of a valid financial agreement by operation of ss 90B, 90C or 90D of the *Family Law Act 1975* is to oust the jurisdiction of the Family Court to hear an application for property adjustment or spousal maintenance unless the provisions of s 90F(1A) apply with the exception of proceedings involving a trustee in bankruptcy: s 71A; *Black v Black* (2006) 36 Fam LR 680.

Financial agreements are subject to the same principles of law and equity which govern ordinary contracts: *Black v Black* at [95].

The Federal Court and the Federal Circuit Court have the jurisdiction under either s 120 or s 121 to determine whether a specific transfer of property made pursuant to a financial agreement is void as against the trustee in bankruptcy. There is no requirement that a trustee first apply to the Family Court to terminate the financial agreement: *Combis v Jensen* (2009) 179 FCR 150; 7 ABC(NS) 189; [2009] FCA 778 at [50], [53], [56] – [56] (Collier J); *Sutherland v Byrne-Smith* [2011] FMCA 632 at [20] – [24] (Driver FM). Ryan J in *Rambaldi v Volkov* (2008) 7 ABC(NS) 25; [2008] FCA 1957 declared void a transfer of property made pursuant to a financial agreement.

Upon an application being made under s 120 or s 121 of the *Bankruptcy Act 1966* to avoid a transfer of property pursuant to the terms of a financial agreement, the difficulty in assessing the value of the consideration alluded to by the Full Court in *Official Trustee in Bankruptcy v Mateo* (2003) 127 FCR 217; 1 ABC(NS) 1; 202 ALR 571; 30 Fam LR 122; [2003] FLC 93–128; [2003] FCAFC 26 (Wilcox, Branson and Merkel JJ) in respect to s 79 orders is also present. It is likely that there will be a term of such financial agreement that each party has relinquished, surrendered or disclaimed her or his rights to pursue orders under s 79 of the *Family Law Act 1975*. If an election by a party or parties to the marriage to proceed with a financial agreement is a relinquishment, waiver or surrender of the s 79 rights, then what is the value of that relinquishment, waiver or surrender for the purpose of assessing consideration provided by the transferee for s 120 or s 121?

It is important to address this question in the context of first, the purpose or object of ss 120 and 121 and second, the amendments to the definition of "maintenance agreement" by the *Bankruptcy and Family Law Legislation Amendment Act 2005* in the context of the decisions which preceded those amendments such as *Official Trustee in Bankruptcy v Mateo* (Wilcox, Branson and Merkel JJ); *Official Trustee in Bankruptcy v Lopatinsky* (2003) 129 FCR 234; 1 ABC(NS) 271; 30 Fam LR 499; [2003] FCAFC 109 (Lee, Whitlam and Jacobson JJ), and *Australian Securities & Investments Commission v Rich* (2003) 181 FLR 181; 31 Fam LR 667; [2003] FamCA 1114.

In balancing the competing interests of creditors and the family, Parliament, by the *Bankruptcy and Family Law Legislation Amendment Act 2005*, amended the term "maintenance agreement" for the purpose of providing that a specific transfer pursuant to such a financial agreement may be challenged under the *Bankruptcy Act 1966* regime. Paragraph 165 of the Explanatory Memorandum in dealing with the amendment to the term "maintenance agreement" stated:

> A financial agreement can be made before or during the marriage or following separation. It is a binding agreement dealing with the distribution of property in the event of the marriage breaking down. It may also provide for the maintenance of either party to the marriage or their children. Financial agreements do not require approval of the court. Nor do they have to be registered with the court. They can only be set aside by the court in circumstances similar to those applying in contract law (such as fraud and undue influence). For these reasons, it is not appropriate that property transferred pursuant to such an agreement is excluded from the property available to creditors.

At the time of the amending legislation, the decisions of the members of the Full Courts in *Official Trustee in Bankruptcy v Mateo* and *Official Trustee in Bankruptcy v Lopatinsky* had considered the term "consideration", which appears in ss 120 and 121, was to read in the ordinary legal and commercial understanding of that term and would be construed in the sense that commercial people would understand them.

In *Official Trustee in Bankruptcy v Lopatinsky*, Whitlam and Jacobson JJ said at 249 (FCR):

> The purpose of the existing s 120 is no different from its predecessors here and in the United Kingdom. Relevantly, it is to prevent properties, including the matrimonial home, from being transferred to related parties to the disadvantage of the bankrupt's creditors. Disadvantage will occur if the property is transferred for no consideration or for less than market value. Thus unlike its predecessors, the existing section requires the Court to determine the value of the consideration: see *Victorian Producers' Co-operative Co Ltd v Kenneth* (1991) 1 ABC(NS) 198 at [11] per Merkel J.
>
> There is nothing in s 120(5) to suggest that the Parliament intended that the term "consideration" in s 120(1)(b) is to be read in anything other than its legal sense. Plainer words would have been required: see *Official Trustee in Bankruptcy v Mitchell* at 368. Moreover, it would be inconsistent with the observations of Wilcox J and Branson J in *Official Trustee in Bankruptcy v Mateo* to proceed upon the basis that "consideration" could be something less than the ordinary legal and commercial understanding of that term.

Indeed, it would be inconsistent with the statutory purpose of the section which is designed to protect creditors to hold that the Parliament intended to enable a transferee to provide something less than the well-established definition of "consideration".

Section 120(5) makes that very assumption. The intention of the legislation in s 120(5) must have been to ensure that matters which might otherwise be thought to have constituted good consideration at common law would have no value for the purposes of determining whether there was an advantage to creditors in the impugned transaction.

In our view, it is clear from the above analysis that the Parliament in enacting the 1996 amendments proceeded on the basis reflected in the history of this section that it was to be understood as commercial people would construe it.

When an application is made under either s 120 or s 121 to set aside a specific transfer pursuant to a financial agreement, the consideration given for the transfer is to be measured in the ordinary legal and commercial understanding of that term and would not be approached on the basis of what order may have been made if the transferee had elected to make an application for orders under s 79 of the *Family Law Act 1975*, which requires the court to take into account factors which are not of a commercial nature. If that was to be the intention of Parliament, it could have been provided for in the amending legislation.

In *Re Azoulay; Ex parte Andrew* (1989) 90 ALR 37; 13 Fam LR 547, Gummow J considered an application under the pre-1996 ss 120 and 121 provisions by a trustee, seeking to avoid a transfer in 1981 of the husband's interest in a property to the wife. It was contended by the wife that the dealing was protected by s 123(6) as a dealing pursuant to a maintenance agreement which had been approved by a court under the provisions of s 87 of the *Family Law Act 1975*.

Before dealing with the decision the following facts are relevant. By a contract dated 1 June 1981, the bankrupt and his wife transferred a property to the wife's father, which was registered in July 1981. By deed poll dated 17 May 1981, the wife's father declared that he held the property in trust for his daughter, the wife. The deed recited that the whole of the purchase moneys had been provided to the father by his daughter, and the land was transferred to him merely as trustee. The property was sold in 1984 to a third party. After payment of the transaction costs the balance of the proceeds were paid to the wife, (the daughter), at her direction. On 20 December 1982, more than seven months after the making of the sequestration order in respect to the estate of the bankrupt, an order was made approving a deed, bearing the same date, between the husband (bankrupt) and the wife. The deed recited that the parties desired to have crystallised once and for all, all financial matters in dispute between them and the parties covenanted and agreed "in accordance with the terms and conditions contained in the deed of 19 August 1982". The 19 August 1982 deed was between the bankrupt, the wife, the wife's father and a fourth party. It provided in part that the bankrupt was to execute in favour of the wife a formal maintenance agreement under the provisions of the *Family Law Act 1975* containing provisions in or to the effect of those set out in the schedule hereto and join in and do all things necessary to obtain approval of the court to such agreement under that Act. It was a term of the schedule provided that the bankrupt waived all rights and interest in favour of the wife in respect to the property. Both parties covenanted that in consideration of the foregoing, each party agrees to waive all rights present and future that each may have against the other under the *Family Law Act 1975*, and to seek approval thereunder to a maintenance agreement pursuant to s 87 of that Act.

One of the questions for determination by the court was, did the husband make a disposition or incur an obligation under or in pursuance of the deed as to protect the respondents from any claim in respect to the property the subject of the application? Section 123(6), as it then was at the time of the application, provided that "Nothing in this Act invalidates, in any case where a debtor becomes bankrupt, a conveyance, transfer, charge disposition, assignment, payment or obligation executed, made or incurred by the debtor, before the day on which the debtor becomes a bankrupt, under or in pursuance of a maintenance agreement or maintenance order". Gummow J, in holding that the bankrupt husband did not make a disposition or incur an obligation within the meaning of s 123(6) by waiving his rights under Pt VIII of the *Family*

Law Act 1975, said at [26] that:

> It readily may be conceded that in some circumstances a waiver, surrender or disclaimer of rights may amount to a "disposition" of rights: see *Buchanan v IRC* [1957] 2 All ER 400 at 402. But, as I have indicated in dealing with the first question, there is nothing of substance to support the submission for the second respondent that what was "waived", surrendered or disclaimed were legal or equitable rights or interests of any kind which the husband, the bankrupt, had retained in the property after the registration of the transfer and the making of the declaration of trust by the transferee, the first respondent. What took place was, as counsel described it, "something once and for all". As I have indicated, the subject matter of the "waiver" was, more likely, "rights" to seek a favourable exercise of the discretionary powers over property matters given to courts under the *Family Law Act 1975*. I have referred to s 79 of the *Family Law Act 1975*. Counsel for the applicant submitted in my view correctly, that whatever the subject matter of the "waiver", that which his client sought in this Court to attack under the relevant provisions of the bankruptcy legislation was the registered transfer of the property, neither more or less. Whether or not, on approval of the December 1982 Deed, the bankrupt, by force of Pt VIII of the *Family Law Act 1975*, gave up what might otherwise have been "rights" under that legislation, was not to the point. The applicant was not seeking in these proceedings to undo any consequences which had flowed under Pt VIII of the *Family Law Act 1975*.

When considering the value of consideration in *Official Trustee in Bankruptcy v Lopatinsky*, Whitlam and Jacobson JJ noted at 250 (FCR) that there was no express agreement that proceedings would not be maintained for an adjustment of property rights under the *Family Law Act 1975* and then said as to the issue of an implied forbearance:

> We agree that, standing on its own, the evidence of the conversation provides, at best, a slender basis for the inference drawn by his Honour. However, it seems to us to be unnecessary to decide whether his Honour was correct in drawing this inference because in our opinion, the approach which the primary judge took was based upon a view of what constituted consideration and the value of it which a majority of the Full Court in *Official Trustee in Bankruptcy v Mateo* held to be incorrect.
>
> This is clear from the findings made by the primary judge which we have set out at [59] and [60] above. Those passages indicate that his Honour endeavoured to value "consideration" provided by Mrs Lopatinsky upon the basis of her financial and non-financial contributions to the marriage in accordance with the criteria referred to in s 79 of the *Family Law Act 1975*.
>
> The short answer to this appeal is therefore that the primary judge's view of the value of the consideration given by Mrs Lopatinsky depended on factors which cannot provide a basis for assessing the value of the consideration which was given.

The trial judge had endeavoured to approach the concept of value of the "consideration" upon the basis of financial and non-financial contributions to the marriage in accordance with the criteria referred to in s 79 of the *Family Law Act 1975*. Whitlam and Jacobson JJ said that the value of the alleged forbearance of the wife depended on factors which cannot provide a basis for assessing the value of the consideration which was given. An alleged forbearance of proceedings under s 79 cannot be valued as if an application had been made under that provision to either the Family Court or the Federal Circuit Court.

In *Combis v Jensen (No 2)* (2009) 181 FCR 178; 7 ABC(NS) 465; [2009] FCA 1383, Collier J struck out paragraphs of a defence and cross-claim which alleged as consideration given for the transfer of previous financial and non-financial contributions to the marriage and a forbearance or relinquishment to seek property orders under the *Family Law Act 1975*, which relied upon as the value of the consideration the previous financial and non-financial contributions to the marriage. Those factors could not provide a basis for assessing the value of the consideration given for the transfer: *Sutherland v Byrne-Smith* [2011] FMCA 632 at [26], [27] (Driver FM).

Onus

Where there is a close spousal relationship between the alleged transferor and the transferee, the onus may pass to the alleged transferee to displace a prima facie inference from contemporaneous documents and actions of the transferor as to the ownership and transfer of property. In *Prentice v Boyle* (2010) 8 ABC(NS) 372; [2010] FMCA 681 at [22], Smith FM said in circumstances where the spouse alleged that property the subject of the trustee's application was always held by her and not the bankrupt transferor, the evidentiary onus passed to the spouse to displace a prima facie inference. His Honour also said that where there is a close spousal relationship, it is appropriate to examine closely the evidence of the conversations and transactions relied upon by them. The fallibility of memory as to spoken words particularly in the context of any inducement to tailor evidence, whether consciously or unconsciously, to prevent property becoming available to a spouse's creditors is a factor that may be taken into account by the court: at [23].

Transfer set aside

If a transfer is declared void under either s 120 or s 121, the property devolves upon the trustee in bankruptcy and it remains open to a party to the marriage, subject to any required extension of time to bring proceedings, to apply under the *Family Law Act 1975* for orders under s 79.

If such orders are made in respect to the property, then that property no longer is property which vests in the trustee under the estate and is not divisible amongst the bankrupt's creditors: ss 59A and 116(2)(q).

[120.1.10] Section 120(1): "Of property"

For the definition of "property", see s 5. Property is broadly defined and includes personal property such as a chose in action: *Fuller v Beach Petroleum NL* (1993) 43 FCR 60; 117 ALR 235 (Gummow, Hill and Whitlam JJ).

The execution of a deed of guarantee by debtors is something which resulted in the transferor becoming the owner of choses in action which did not previously exist: s 120(7). The creation of those choses in action by the execution of a guarantee or an interest in property by execution of a mortgage is property of the kind referred to in s 120: *Sutherland v Brien* (1999) 149 FLR 321; [1999] NSWSC 155 (Austin J). The forgiveness of a debt (chose in action) is a transfer of property: *Jabbour v Official Receiver* [2002] FMCA 28 (Driver FM).

Property held upon trust

Property held by a bankrupt in trust for another does not vest in a trustee in bankruptcy: ss 5(1), 58, 116(2)(a) where the bankrupt has no beneficial interest in that property: *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth of Australia* (2019) 368 ALR 390; [2019] HCA 20 (Carter Holt Harvey) at [25], [26] (Kiefel CJ, Keane and Edelman JJ); *Boensch v Pascoe* [2019] HCA 49 at [4] (Kiefel CJ, Gageler and Keane JJ), [15], [87] (Bell, Nettle, Gordon and Edelmann JJ). Where the bankrupt held a beneficial interest in the trust property that property will vest in the trustee in bankruptcy subject to the equities (and trust) to which it was subject in the hands of the bankrupt: at [4] (Kiefel CJ, Gageler and Keane JJ), [15], [93], [102] (Bell, Nettle, Gordon and Edelman JJ). It was stated by Bell, Nettle, Gordon and Edelman JJ that there needs to be a valid beneficial interest, being a vested or (subject to the applicable laws of remoteness of vesting) contingent right or power to obtain some personal benefit from the trust property: at [15]. Kiefel CJ, Gageler and Keane JJ identified the fundamental nature of an equitable interest as something that "*is not carved out of a legal estate but impressed upon it*", and there is a recognition of the consistency with the objects of the *Bankruptcy Act 1966* (Cth) of the trustee of the bankruptcy estate automatically obtaining the legal estate in property held by the bankrupt in which the bankrupt has an equitable interest in order to better secure the realisation of that equitable interest for the benefit of creditors: [4]. Where the property held on trust is real property, then by reason of s 58(2) until the trustee in bankruptcy can obtain legal title by registration, what vests is the equitable estate. The legal estate, once registered in the name of the trustee in bankruptcy, will pass with all equitable interests that were impressed on the legal estate when it was in the name of the bankrupt: at [5] (Kiefel CJ, Gageler and Keane JJ), [94] (Bell, Nettle, Gordon and Edelman JJ). Ordinarily, the

burden of proving the absence of such beneficial interest is on the bankrupt: at [93] (Bell, Nettle, Gordon and Edelman JJ). On the facts, the bankrupt had a beneficial interest to the extent of the right to retain the property as security for the satisfaction of the right of indemnity as trustee and "[*b*]*y reason of that beneficial interest, an estate in the property vested forthwith in equity in Mr Pascoe pursuant to s 58 of the Bankruptcy Act 1966 subject to a subtrust on terms of the Boensch Trust but permitting Mr Pascoe to exercise the right of indemnity*": at [102] (Bell, Nettle, Gordon and Edelman JJ).

A trustee in bankruptcy cannot invoke s 120 (or s 121) to avoid a transfer of property held in trust for another by a person who later becomes a bankrupt so that such trust property vests in the trustee in bankruptcy. In the absence of such transferee having a beneficial interest in the trust property, such property is not property for the purposes of s 120 (or s 121) as it was not property of the bankrupt and if the transfer is avoided the property would not vest in the trustee in bankruptcy as it is not property which is divisible among the creditors of the estate: ss 5(1), 58, 116(2)(a).

As stated by Lindgren J (with whom Wilcox and Moore JJ agreed at [1] (FCR)) in *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71, at [42] (FCR) "Since property held on trust by the bankrupt does not vest in the trustee in bankruptcy, he or she cannot recover it: there is no question of the trustee in bankruptcy recovering it and holding it on the same trust". Although, it is noted that Wilcox and Moore JJ said that it was necessary to propound the eleven propositions concerning the application of s 120 as Lindgren J did at [43], His Honour, Lindgren J, considered that s 120 does not vest property in the trustee in bankruptcy; it makes transfers of property void as against a trustee in bankruptcy: at [43](e) to (h). His Honour said that the vesting of the property is provided elsewhere in the *Bankruptcy Act 1966* (Cth), namely ss 58, 115, 116 and 5(1). If there is a transfer of property by a trustee that is declared void by the court pursuant to s 120 it will not vest in the trustee in bankruptcy by reason of s 116(2)(a). Consistent with the scheme of the *Bankruptcy Act 1966* (Cth) in *Parsons v McBain* (2001) 109 FCR 120; 1 ABC(NS) 188; 192 ALR 772; [2001] FCA 376, at [17] (FCR) (Black CJ, Kiefel and Finkelstein JJ) the court held on the facts of the case that neither s 120 nor s 121 can have application to the transfer by the bankrupt to his wife, of the legal interest in property in which the wife holds the beneficial interest.

A trustee has a right of indemnity out of the assets of the trust in respect of expenses properly paid or liabilities properly incurred in the undertaking of the trust which are not a breach of the trustee's duty: *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346; 83 ALJR 1034; 258 ALR 612; [2009] HCA 32, at [43] (CLR) (French CJ, Gummow, Hayne, Heydon and Bell JJ). The "right", which may more strictly be described as a power, may be sourced in statute, or as an express term in a deed of trust or equitable implication, and to the extent of that power, the trust rights are "no longer property held in the interests of the beneficiaries of the trust": Carter Holt Harvey at [28], [30] (Kiefel CJ, Keane and Edelman JJ), at [80], [81] (Bell, Gageler and Nettle JJ). Gordon J said that the "right of exoneration and the proprietary interest generated in the fund means that the 'trust property' in which the trustee has an interest ceases to be aptly described as property 'held on trust' but instead is property of the trustee subject to the limitations as to use": *Carter Holt Harvey* at [173]; *Boensch v Pascoe* at [2], [4] (Kiefel CJ, Gageler and Keane JJ), [15], [87] (Bell, Nettle, Gordon and Edelman JJ).

The indemnity takes the form of a right exercisable retrospectively by way of recoupment for expenses properly made by the trustee and prospectively by way of exoneration for liabilities properly incurred in the course of the trust business. The value of the power of exoneration, like the power of reimbursement, may decrease by "netting-off reciprocal obligations" to the extent to which the trustee has incurred a duty to increase trust funds: *Boensch v Pascoe* at [9] (Kiefel CJ, Gageler and Keane JJ); *Carter Holt Harvey* at [31] (Kiefel CJ, Keane and Edelman JJ); *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 397, 398 (Brooking J); *Australian Securities and Investments Commission v Letten (No 17)* [2011] FCA 1420; (2011) 286 ALR 346 at [14] – [20] (Gordon J); *Park v Whyte (No 2)* [2018] 2 Qd R 413 at [186], [187] (Jackson J); *Staatz v Berry (No 3)* [2019] FCA 924 at [204] (Derrington J). For the purposes of enforcement, the right of indemnity operates as a charge, lien or a proprietary

interest in the trust property: *Carter Holt Harvey* at [32] (Kiefel CJ, Keane and Edelman JJ); *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319; *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360; 54 ALJR 87; 27 ALR 129 at 367 (Stephen, Mason, Aickin and Wilson JJ). The High Court in *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226; 72 ALJR 243; 151 ALR 1; [1998] HCA 4, preferred to regard it as a proprietary right constituting a beneficial interest enjoying priority over the beneficial interests of the beneficiaries. Bell, Gageler and Nettle JJ identified that it is not "a charge or lien comparable to a synallagmatic security interest over property of another" and it "arises edogenously as an incident of the office of trustee in respect of the trust assets": Carter Holt Harvey at [83]. In *Octavo Investments Pty Ltd v Knight* at 367 the right of indemnity was also said to be a beneficial interest in the trust assets. In *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* at [43] it was said that the right is supported by a lien which amounted to a proprietary interest. Such interest applies to the whole of the assets of the trust except those assets, if any, which under the terms of any deed of trust the trustee is not authorised to use for the purposes of carrying on the business. To the extent to which the right of indemnity exists at the date of bankruptcy it vests in the trustee in bankruptcy and becomes part of the bankruptcy estate, and the "nature and character" of the power of exoneration, that is exercisable only to pay trust creditors, is not altered in the hands of the trustee in bankruptcy: ss 5(1), 58(1) and 116(1)(a): Carter Holt Harvey at [34], [35] (Kiefel CJ, Keane and Edelman JJ); *Re Matheson; Ex parte Worrell* (1994) 49 FCR 454; 121 ALR 605 at 459 (FCR) (Spender J); *De Santis v Aravanis* (2014) 227 FCR 404; 13 ABC(NS) 1; 322 ALR 475; [2014] FCA 1243 at [79], [104] (Farrell J).

In *Octavo Investments Pty Ltd v Knight* the corporate trustee of a trading trust, Coastline Distributors Pty Ltd ("Coastline"), made payments from the trust assets to an associated company, Octavo, at a time when the trust had incurred substantial losses. Within six months of those payments a winding up application was filed upon which an order for the winding up of Coastline was made. The liquidators sought to have declared void the payments to the related company pursuant to s 293 of the *Companies Act 1961-1975* (Qld) and s 122 *Bankruptcy Act 1966* (Cth), which at that time applied to company liquidations.

The critical question was whether the right of indemnity of Coastline against that part of the trust assets comprising the payments to the related company could be described as "property divisible amongst the creditors" of Coastline, within the meaning of s 116. The joint judgment of the members of the Court said that the "principles naturally lead to the conclusion that the beneficial interest which, by way of subrogation, the creditors whose claims arise from the carrying on of the business have in the assets held by a bankrupt trustee form part of the property of the bankrupt estate divisible amongst the creditors." The Court also said that the definitions in s 5(1) of "property" and "the property of the bankrupt" include such a beneficial interest: at 367 to 368. The Court went on to make an observation that as the trustee's interest in the property amounts to a proprietary interest that is sufficient to render the bald description as trust property inadequate. It is not property held solely for the benefit of the beneficiaries of the trust. The Court went on to say that passing to the trustee in bankruptcy of the trustee's interest in the trust estate, even if that is all that passes, is sufficient to attract the operation of s 122 of the *Bankruptcy Act 1966* (Cth) and it follows from the entitlement of a trustee in bankruptcy to exercise the bankrupt's right of indemnity that the creditors of the trust business may have resort to the assets of the trust to the extent of the liabilities incurred by the trustee: at 366 to 367.

Applying the reasoning of the Court in *Octavo Investments Pty Ltd v Knight*, for there to be a transfer of property, by the trustee of a trust, who later becomes bankrupt:

1. There must have existed at the date of the relevant transfer a right of indemnity for liabilities incurred or expenses made by the trustee, which were properly incurred or paid. It is the existence of such interest that renders the bald description as trust property inadequate. It is not property held solely for the benefit of the beneficiaries of the trust; and

2. There must exist at the date of bankruptcy such right of indemnity. That is, there are trust creditors of the trust business that may have resort to the assets of the trust to the extent of the liabilities properly incurred or expenses properly paid by the trustee of the trust.

On the facts of the case it was considered unnecessary to determine whether or not upon a transfer of property being declared void, the legal title to the property passes to the trustee in bankruptcy, as the legal title to all company property, including trust property, remains with the company in a winding up: at 371. This is subject to the terms of the deed of trust.

The passing to the trustee in bankruptcy of the trustee's beneficial interest, it was said, is sufficient to attract the operation of s 122 and that provision applies in the case of an individual trading trustee to render void as against the trustee in bankruptcy a payment out of the trust property in circumstances which have the effect of giving the payee a preference, priority or advantage over other creditors: at 371.

In the context of the present form of s 120 the "property" transferred is the legal estate of the property impressed with the beneficial interest held in the trust property by reason of the right of indemnity. It is that transfer which may be declared void. Upon such a declaration being made then a court may make ancillary orders to provide the trustee in bankruptcy with an effective remedy: see [120.0.30].

For whose benefit are the recovered funds held

Derrington J, in *Lane v Federal Commissioner of Taxation (No 3)* [2018] FCA 1572 considered the issue as to whether, on the recovery of funds under s 122 the trustee in bankruptcy held them for the benefit of all of the creditors of the estate of the bankrupt, or for "trust creditors" only, being creditors whose debts arose as a result of dealings with the bankrupt in the capacity as trustee of the trust. The funds had been paid from a trust of which the bankrupt was a trustee to meet a demand in respect of the trust's taxation liabilities. Noting that there is much uncertainty that exists as to the use to which proceeds recovered as preference payments can be put where the original payment arose from the trustee's exercise of the trustee's right of exoneration, His Honour concluded that the funds recovered are subject to the obligation to use them in the manner required of the original funds, being for the purposes of discharging trust debts: [31] – [32]. That is consistent with reasoning in Carter Holt Harvey at [35], [40], [44] (Kiefel CJ, Keane and Edelman JJ), [92], [94], [96] (Bell, Gageler and Nettle JJ)).

Where a transfer of trust property, impressed with a beneficial interest held in that property by reason of a right of indemnity, is avoided under either s 120 or s 121 and the property exists in specie at the commencement of the bankruptcy it will vest in the trustee in bankruptcy by operation of ss 5(1), 58(1) and 116(1) of the *Bankruptcy Act 1966* (Cth), subject to any exceptions given to third parties. Upon the transfer being avoided the transferee will hold the property in trust for the trustee in bankruptcy, and if the transferee sells the property after the commencement of the bankruptcy, will be accountable to the trustee in bankruptcy for the proceeds as money had and received: see [120.0.30]. The property held in specie that vests in the trustee in bankruptcy, vests subject to the equities (and trust) to which it was subject in the hands of the bankrupt and will be available to meet creditors whose debts were incurred by the bankrupt in acting as trustee (**trust creditors**). The proceeds received from the transferee for which the transferee is to account will also be received by the trustee in bankruptcy subject to those equities as such proceeds are the product of, or a substitute for, the trust property that was transferred.

Where the trustee in bankruptcy seeks to obtain ancillary relief to obtain an effective remedy, that relief is provided for by s 30(1)(b) and the general law. When the relief sought is a proprietary remedy against the transferee or a third party such as a consequence of the process of tracing then the property recovered being a product of, or a substitute for, the trust property will be held by the trustee in bankruptcy subject to to the equities (and trust) to which it was subject in the hands of the bankrupt and as such it will be available to meet the claims of trust creditors: see [120.0.30] "***Ancillary Relief***"; *Brady v Stapleton* (1952) 88 CLR 332 at 337 (Dixon CJ and Fullagar J).

Joint account

When a joint account is opened at a bank, the account holders share a chose in action which is owed to them jointly: *Russell v Scott* (1936) 55 CLR 440; [1936] HCA 34, at 448 (CLR: Starke J), 450 (CLR: Dixon and Evatt JJ), 457 (CLR: McTiernan J): *Re Worthbrook Pty Ltd* [2017] NSWSC 1036 at [28] (Brereton J). If the bank is to discharge its obligation, it must act in accordance with an authority which the joint owners have given. The scope of the authority, however, as between the joint account holders need not be the same as the scope of the authority given to a bank: *West v Mead* [2003] NSWSC 161, at [81] (Campbell J).

Where funds have been drawn from a joint account, there are three possibilities as to who is entitled to the funds:

1. Each person is beneficially entitled to half the amount in the account. This is the prima facie position. This is only displaced by actual evidence that the parties intended to deal with the account in another manner: *Fodare Pty Ltd v Official Trustee in Bankruptcy* [2000] FCA 1388 at [21] (Lehane, Hely and Conti JJ). Starke J in *Russell v Scott* (1936) 55 CLR 440; [1936] HCA 34 at 448 to 449 concluded that a person who deposits money in a bank in a joint account vests the right to the debt or the chose in action in the persons in whose names it is deposited, and it carries with it the legal right to title by survivorship. This is subject to the existence of a resulting trust which is a question of intention.
2. Each person is entitled to a share proportionate to the respective contributions.
3. Each person could draw on the account for her or his benefit up to the full amount of the account and would own beneficially any assets purchased.

Which alternative is applicable to the facts or circumstances, involves the determination of the intention of the parties from the surrounding circumstances: *Re Reid* (1998) 85 FCR 452 (Heerey J); *Croton v The Queen* (1967) 117 CLR 326 at 334, 338–339; *West v Mead* [2003] NSWSC 161 at [70] – [82]; *Abeyratne v Latour* [2009] FMCA 688 at [51], [52]; *Re Worthbrook Pty Ltd* [2017] NSWSC 1036 at [29] – [35]. (Brereton J). Where one of the joint owners of a joint account has used some or all of the money in the account to buy an item for themselves, the item would generally belong to the joint owner, and not to the joint owners jointly: *Re Bishop (Decd)* [1965] Ch 450; [1965] 1 All ER 249; [1965] 2 WLR 188 at 256 (All ER); *Re Reid* (1998) 85 FCR 452; *Slade v Shepard* [2013] FCCA 1237 at [17] – [21] (Judge Altobelli).

Where a joint account is held on terms that either could draw on the account and there is no accounting of whose is what, such circumstances are supportive of the following:

1. The funds held in the joint account are joint property both at law and in equity;
2. A chattel purchased by one for that person's benefit or an investment in that person's own name will be held legally and beneficially by that person as there is no equity which would displace the legal ownership of that person: .

This is particularly so where the joint holders are husband and wife: *Re Reid* (1998) 85 FCR 452.

Brereton J said in *Re Worthbrook Pty Ltd* [2017] NSWSC 1036 at [35]:

> ..where a joint account mandate requires only one signature, and in the absence of an express of implied limitation, then each account holder is entitled to draw on the account for his, her or its own purposes, and to retain the money withdrawn – and any property purchased with it – as his, her or its own beneficial property, without incurring liability to account to the other. In this case, nothing appears that would limit the right of either joint holder to draw for its own purposes on the joint accounts. There is no reason to treat the joint accounts as anything other than a pooling of funds on which either was at liberty to draw for its own purposes.

Examples

Fodare Pty Ltd v Official Trustee in Bankruptcy [2000] FCA 1388

Prior to entering bankruptcy, the bankrupt procured Fodare Pty Ltd to purchase a property. The Official Trustee's case was that the funds used to purchase the property were the bankrupts and

therefore the acquisition of the property involved a disposition of the bankrupt's property that was void under s 120. The Official Trustee sought to have that settlement declared void as against the trustee in bankruptcy under s 120. The property in question was paid for by a deposit of $20,000 made by the bankrupt's company, and a payment of $177,737.09 made from an account held jointly by the bankrupt and her son. It was declared at first instance that the purchase of the property represented a settlement void as against the Official Trustee.

The bankrupt argued that she had no beneficial interest in the property and therefore had not entered into a transaction that could be voided under s 120. It was contended that she lacked a beneficial interest in the money paid from the joint account, as it was held on trust for nominated relatives and friends.

The bankrupt's evidence on this point was not accepted and there was no other relevant evidence of how the parties wanted ownership of the joint account to be divided. Without such evidence, the prima facie position was that the money paid out of the account was owned in equal shares, and one half of the funds applied to the purchase was void against the Official Trustee.

Clark v Reid (1998) 85 FCR 452

Mr Reid was charged with offences under the Corporations Law, and bail was set at $50,000. The money was required to be paid by a surety. To satisfy this condition, the bail was met by his wife with funds obtained from their joint account. Mr Reid subsequently became a bankrupt, and as the $50,000 remained in court, the trustee sought to recover the $50,000 under s 120.

The trustee was unsuccessful, as the surrounding circumstances evidenced a clear intention that the funds were to be paid only by Mrs Reid. The dominant factor was that the rules around bail meant that Mrs Reid had to meet bail herself. Mrs Reid's purpose in obtaining the bank cheque was identified to the bank at the time. She took physical possession of the bank cheque, paid it to the court and obtained a receipt in her name. An arrangement whereby Mr Reid was meeting bail himself would have been not only seriously unlawful, but quite possibly a criminal conspiracy. The purpose of withdrawal was for Mrs Reid to acquire an asset in her name, being the chose-in-action constituted by the bail deposit. The prima facie position that the funds were applied jointly was inappropriate when there were clear and objective indicators of intention.

Abeyratne v Latour [2009] FMCA 688

A bankrupt and her husband were the joint registered proprietors of their home. When the property was sold, the proceeds were deposited into a bank account in the sole name of the bankrupt. The trustee conceded that half of the funds were beneficially owned by the bankrupt's husband.

Upon selling their home, the couple moved in with their daughter with whom they resided. After moving in, a payment of $10,000 was made to their daughter from the bank account. They then decided that the current living arrangements were too cramped, and planned to build a bungalow on their daughter's property. A few months before construction commenced, another payment was made to their daughter from the bank account for $68,000.

The trustee sought to have both of these payments voided under s 120. The bankrupt's husband gave oral evidence to the effect that his wife had a gambling problem, and that it was in fact him that directed the payments to his daughter, such that they represented payments from his beneficial half share to the bank account. This was rejected. The evidence of a gambling problem was vague, and the oral evidence contradicted objective factors such as his failure to put the money in his name. This precluded departure from the prima facie assumption that the money was paid by him and his wife jointly. Something more than the assertions of the owners as to what their intent was at the time is needed in order to rebut the prima facie position that funds are applied jointly.

Historical – "settlement of property"

The following cases were decided under previous legislation but may have some relevance to the current subs (1). The previous subs (1) applied only to a settlement of property of which a settlor was at the time of the settlement possessed, or of some estate or interest of a settlor,

present or future, vested or contingent, in property then existing, and did not apply to a settlement by anticipation of property which may or may not have come into existence at some future time: *Franklyn v Danby* (1886) 12 VLR 863. But see now subs (7) below for the extended meaning of transfer.

The settlement is limited to the settlor's own property, or property in which the settlor has a beneficial interest. The fact that a director treats company funds as being his, to be used for any purpose he considers appropriate, does not lead to the conclusion that the corporate funds are moneys which the director was entitled to use as his own: *Re Ansett; Ex parte Pattison* (unreported, Fed Ct of Aust, Northrop J, 25 March 1998); *Fodare Pty Ltd v Official Trustee in Bankruptcy* [2000] FCA 1388 (Lehane, Hely and Conti JJ).

A settlement, made with the sanction of the Divorce Court, of damages recovered by a husband against a co-respondent was not a settlement of "property", because such damages were not the property of the husband: *Re Stephenson* [1897] 1 QB 638.

Premiums paid within the period mentioned in subs (1) on a life policy taken out and settled by the assured outside such period were not the subject of a "settlement". The whole of the premiums were paid to keep up the policy and no proportionate part of the money payable under the policy was represented by the payment of any particular premium: *Re Harrison; Ex parte Whinney* [1900] 2 QB 710 (CA).

Where a husband mortgaged Torrens Title land to his wife with a recital that was given "in consideration of" the wife "forbearing to sue" it was held that the mortgage of Torrens land was capable of being a "settlement" within the meaning of the section and further upon the evidence it was held that any presumption that the wife forbore from enforcing the debt to her because she was given a security was rebutted: *Re Hyams* (1970) 19 FLR 232. See also *Re Windle (Bankrupt)* [1975] 1 WLR 1628; [1975] 3 All ER 987, which was followed in *Official Trustee in Bankruptcy v Mitchell* (1992) 38 FCR 364; 110 ALR 484; 16 Fam LR 87 (Burchett, French and Einfeld JJ).

In *Lyford v Commonwealth Bank of Australia* (1995) 130 ALR 267; 17 ACSR 211; 13 ACLC 900 (Nicholson J), there is a detailed discussion as to whether or not a "charge" was a disposition of property. A floating charge was held not to be a disposition of property but a fixed charge was. A charge which was at the same time a floating charge and a fixed charge was a disposition of property only in so far as it was expressed to be a fixed charge.

In *Re Doyle; Ex parte Brien* (1993) 41 FCR 40; 112 ALR 653 (Burchett J), it was stated that whatever the effect of a sequestration order on the bankrupt's immovable property situated in a foreign country, it would be a long step into an area controlled by that country's laws for the Federal Parliament to legislate for the title of a third person to real property in that country, settled on that person by someone who had subsequently become bankrupt, to be avoided by the trustee in bankruptcy. This decision includes a full ranging discussion of the authorities both judicial and by way of commentary on the principles of Private International Law as they apply to bankruptcy.

[The next text page is 10-2551]

[120.1.17] Section 120(1)(a): "Less value than the market value"

Overview in historical context

See s 120(7)(c) below which defines market value as "market value at the time of transfer".

The current form of s 120 is intended to overcome the decision in *Barton v Official Receiver* (1986) 161 CLR 75; 60 ALJR 556; 66 ALR 355; 4 ACLC 533; [1986] HCA 44 (Gibbs CJ, Mason, Wilson and Dawson JJ); *Victorian Producers' Co-op Co Ltd v Kenneth* (1999) 1 ABC(NS) 198; [1999] FCA 1488 (Merkel J).

The term is intended to refer "to the value of the property concerned if it were disposed of to an unrelated purchaser bidding in the market on an ordinary commercial basis for the kind of property disposed of, without any kind of discount or incentive to purchase being offered. The expression is not intended to include a situation where the property was being disposed at a 'fire sale' at discounted prices because of some immediate need on the part of the owner to liquidate part of his or her assets". Where there are differing opinions as to the market value "if it were transferred for an amount less than the lowest amount in the range, the transfer would be at undervalue, for the purposes of the section".

Historically, the former term "valuable consideration" considered by the High Court in *Re Barton; Ex parte Official Receiver* (1983) 76 FLR 223; 52 ALR 95 was consideration which had a real and substantial value and not one which was merely nominal, trivial or colourable. This consideration was to be of a commercial nature: *Cook v Benson* (2003) 214 CLR 370; 77 ALJR 1292; 53 ATR 195; 1 ABC(NS) 138; 198 ALR 218; [2003] HCA 36 at [31] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

In *Re Osborn; Ex parte Trustee of Property of Osborn v Osborn* (1989) 25 FCR 547; 91 ALR 135 at 550 (FCR), 138 (ALR), Pincus J held that the use of the word "colourable" seems to imply consideration which is non-commercial or not bona fide and it is of such kind as would not be agreed in an arm's length transaction. Atkinson J, in a summary judgment application, expressed a view that this is no longer the test. Non-commercial consideration may be consideration for the purposes of determining whether market value has been given for a transfer. Therefore, in respect of the creation of a common intention constructive trust, the provision of domestic services or support and comfort would be consideration, the value of which, may be taken into account in determining whether in fact market value was given for the transfer: *Clout v Markwell* (2001) 1 ABC(NS) 177; [2001] QSC 91 (Atkinson J). Tamberlin J also accepted that a wife's contribution and work in a joint enterprise, comprising the marriage and raising of a family, may be taken into account in determining the consideration provided for a transfer of property: *Mateo v Official Trustee in Bankruptcy* (2002) 117 FCR 179; 188 ALR 667; 28 Fam LR 499; [2002] FCA 344 (Tamberlin J); decision upheld on appeal but on different grounds: *Official Trustee in Bankruptcy v Mateo* (2003) 127 FCR 217; 1 ABC(NS) 1; 202 ALR 571; 30 Fam LR 122; [2003] FLC 93–128; [2003] FCAFC 26 (Wilcox, Branson and Merkel JJ); *Worrell v Pix* [2002] FMCA 93 at [26] – [28] (Driver FM). Moore J, following the approach of Tamberlin J, said that a transfer of property effected as part of a settlement of the rights of a spouse on failure of a marriage can be for valuable consideration. The spouse refrained from asserting the rights that may have been available under the *Family Law Act 1975* (Cth). However, Wilcox and Branson JJ, as members of the Full Court, hearing the appeal from the decision of Tamberlin J in *Mateo v Official Trustee in Bankruptcy* (2002) 117 FCR 179; 188 ALR 667; 28 Fam LR 499; [2002] FCA 344, said that it is likely the term "consideration" (when dealing with s 120 subsequent to the 1966 amendments) is used in the *Bankruptcy Act 1966* in the common law contractual sense and past consideration is to be disregarded: *Official Trustee in Bankruptcy v Mateo* (Wilcox, Branson and Merkel JJ). This concept was confirmed by the Full Court in *Official Trustee in Bankruptcy v Lopatinsky* (2003) 129 FCR 234; 1 ABC(NS) 271; 30 Fam LR 499; [2003] FCAFC 109 (Lee, Whitlam and Jacobson JJ). That Full Court said that the financial and non-financial contributions to the marriage of a type referred to in s 9 of the *Family Law Act 1975* did not constitute valuable consideration: [100] – [102]. This is consistent with the approach taken by Pincus J in *Re Osborn; Ex parte Trustee of Property of Osborn v Osborn* (1989) 25 FCR 547; 91 ALR 135 (Pincus J), in respect of the former provision. Any other

approach will create uncertainty or ambiguity in both the identification of the consideration provided and the determination of the market value of such consideration. It would not have been the intention of legislature to create uncertainty or ambiguity. If other forms of benefits were to be taken into account as components of the consideration, then that could have easily been identified by the legislature. This approach does not diminish the proper claims or rights by parties to a marriage or defacto relationship, particularly in respect to a claim that the property, or an interest therein, transferred was held on constructive trust by the transferor for the transferee. As the bare legal right is of no value to the transferor, the transferee does not have to provide consideration.

Market value

Approach by the court

The court's task is twofold:

1. Identify as precisely as one can, the consideration, if any, which was in fact given for the transfer of property; and
2. If consideration was given, to determine whether the value of the consideration at the time of the transfer was less than the market value of the property.

Spencer v Commonwealth formulation of "market value"

There is nothing in either s 120 or s 121 to suggest the formulations of "market value" expressed in *Spencer v Commonwealth* (1907) 5 CLR 418; 14 ALR 253 and *Commonwealth v Arklay* (1952) 87 CLR 159 are not applicable to the determination of market value for the purpose of these statutory provisions: *Sellers v One Step Plumbing & Concrete Pty Ltd* (2002) 190 ALR 716; [2002] FCA 478 (Weinberg J); *Tyler v Thomas* (2006) 150 FCR 357; 3 ABC(NS) 773; [2006] FCAFC 6 at [45] per Branson J, [200] – [202] per Graham J.

To arrive at the market value the court looks to determine the value in the context of a willing transferor and transferee, willing to trade, but neither of them so anxious to do so that the parties would overlook any ordinary business consideration. However, Conti J said that it is not essential that "market value" must be capable of translation into an ascertainable monetary equivalent: *Rodgers v Schmierer* (2003) 1 ABC(NS) 100; [2003] FCA 386 at [42] (Conti J). Graham J said that the function of the court is, if the evidence allows, to assign a precise market value to the property transferred: *Tyler v Thomas* (2006) 150 FCR 357; 3 ABC(NS) 773; [2006] FCAFC 6 at [204].

The market value test was stated in *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259; 242 ALR 383; [2008] HCA 5 at [51], in this way:

> Value is determined by forming an opinion as to what a willing purchaser will pay and a not unwilling vendor will receive for the property (*Spencer v Commonwealth* (1907) 5 CLR 418; 14 ALR 253). In determining that value, there must be attributed to the parties a knowledge of all matters that affect value. Those matters will include the predicted impact of future events as well as the experience of the past and the rates of return on other investments. As Isaacs J pointed out in *Spencer v Commonwealth* ((1907) 5 CLR 418; 14 ALR 253 at 441 (CLR)): "We must further suppose both to be perfectly acquainted with the land, and cognisant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, *of a rise or fall for what reason soever* in the amount which one would otherwise be willing to fix as the value of the property." (emphasis added)

Determination of precise consideration in the context of the market value

The requirement of s 120(1)(b) is that the consideration be less than market value of the property. The precise value of the consideration given (s 120(4)) may, but not necessarily, be determined before the court declares that the transfer of property is void: *Victorian Producers' Co-op Co Ltd v Kenneth* (1999) 1 ABC(NS) 198; [1999] FCA 1488 (Merkel J); *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71 at [36] (FCAFC) (Wilcox, Moore and Lindgren JJ).

Consideration

Overview

There are two broad concepts to the term "consideration" in s 120(1)(b):

1. The term "consideration" in s 120(1)(b) is to be read in the ordinary legal and commercial understanding of the term: *Official Trustee in Bankruptcy v Mateo* (2003) 127 FCR 217; 1 ABC(NS) 1; 202 ALR 571; 30 Fam LR 122; [2003] FLC 93–128; [2003] FCAFC 26 (Wilcox, Branson and Merkel JJ); *Official Trustee in Bankruptcy v Lopatinsky* (2003) 129 FCR 234; 1 ABC(NS) 271; 30 Fam LR 499; [2003] FCAFC 109 at [94] – [96] (Lee, Whitlam and Jacobson JJ).
2. When valuing the "consideration" the factors taken into account must have such legal and commercial character: *Official Trustee in Bankruptcy v Lopatinsky* (2003) 129 FCR 234; 1 ABC(NS) 271; 30 Fam LR 499; [2003] FCAFC 109 at 250 (FCR), [101], [102]. For example, factors which are in the past cannot be taken into account unless they are pursuant to pre-existing promises. In *Official Trustee in Bankruptcy v Lopatinsky*, Whitlam and Jacobson JJ at 250 (FCR) held that previous financial and non-financial contributions to the marriage did not constitute consideration given for the transfer and were not factors which could provide a basis for assessing the value of a forbearance to seek property orders under the *Family Law Act 1975* (Cth); *Combis v Jensen (No 2)* (2009) 181 FCR 178; 7 ABC(NS) 465; [2009] FCA 1383 at [43].

Past consideration

Past consideration is to be disregarded: *Official Trustee in Bankruptcy v Dunwoody* (2005) 2 ABC(NS) 565; [2005] FMCA 354 (Rimmer FM). The only significant exception to that rule arises where there is an earlier express or implied promise: *Official Trustee in Bankruptcy v Mateo* (2003) 127 FCR 217; 1 ABC(NS) 1; 202 ALR 571; 30 Fam LR 122; [2003] FLC 93–128; [2003] FCAFC 26 at [108] (Wilcox, Branson and Merkel JJ); *Abeyratne v Latour* [2009] FMCA 688 at [63] (Riley FM). In respect of an agreement for the transfer of property pursuant to which the transferee promises (consideration) to provide services or property in the future, then the court may look at the value of the services or property in fact provided subsequent to the agreement to determine the value of the consideration: *Rodgers v Schmierer* (2003) 1 ABC(NS) 100; [2003] FCA 386 (Conti J). The promise to accommodate the bankrupt indefinitely could be consideration for the transfer: *Abeyratne v Latour* [2009] FMCA 688 at [65] – [71] (Riley FM).

Consideration given by transferee

The consideration must be given by the transferee and not by a third party who is not a party to the relevant transaction: *Tyler v Thomas* (2006) 150 FCR 357; 3 ABC(NS) 773; [2006] FCAFC 6 at [113], [230] (Branson, Bennett and Graham JJ).

Consideration need not reach the transferor

However, the consideration need not reach the transferor, so long as the consideration comes from the transferee: *Rodgers v Schmierer* (2003) 1 ABC(NS) 100; [2003] FCA 386 at [41] (Conti J).

Section 121A – consideration given to a third party

Section 121A applies to transactions where the consideration, or part thereof, was given by the transferee to a third party. That section was introduced as part of the anti-avoidance provisions by the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (Cth). It applies to transfers on or after 31 May 2006: s 30(3). The provision enables the trustee to recover the consideration from the third party who received the consideration. Where the consideration, or part thereof, is given by the transferee to a third party, s 120 applies as if the giving of the consideration to the third party were a transfer by the transferor of the property constituting the consideration. If the giving of the consideration to the third party is void against the trustee, then the trustee has the same rights to recover the property constituting the consideration as the trustee would have if the giving of the consideration had actually been a transfer by the transferor of the property constituting the consideration.

Consideration may be either a benefit or detriment

Consideration will often be a benefit provided by the transferee, but it may be a detriment undertaken by the transferee at the request of the transferor: *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71 at [40] (FCAFC) (Wilcox, Moore and Lindgren JJ).

Value of consideration

Under s 120 the applicant trustee has the onus of establishing that consideration given for the transfer was less than the market value of the property transferred.

The value of consideration must be assessed on an objective basis, not dependent on any special value which the transferor may have subjectively placed on the consideration. It is the consideration in fact given for the transfer which is to be valued: *Sutherland v Brien* (1999) 149 FLR 321; [1999] NSWSC 155 (Austin J); *Victorian Producers' Co-op Co Ltd v Kenneth* (1999) 1 ABC(NS) 198; [1999] FCA 1488 (Merkel J); *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71 at [48], [66] (FCAFC) (Wilcox, Moore and Lindgren JJ).

In *Thomas v Tyler*, Raphael FM, on the facts of the case, did, pursuant to FMCR r 15.09, appoint a court appointed expert to value the property. There was a wide discrepancy in the valuations sought to be relied upon by the parties: *Thomas v Tyler* [2004] FMCA 864; *Thomas v Tyler (No 2)* (2005) 2 ABC(NS) 593; [2005] FMCA 342; *Thomas v Tyler (No 3)* [2005] FMCA 506 as to amendment to costs order; an appeal from the decision of the learned Federal Circuit Court Judge was dismissed: *Tyler v Thomas* (2006) 150 FCR 357; 3 ABC(NS) 773; [2006] FCAFC 6 (per Branson and Graham JJ; Bennett J dissenting), wherein the members of the Full Court discussed the principles that ought to be applied in determining whether the court should appoint a court appointed expert.

Forbearance to sue

See para 84.13 of the Explanatory Memorandum to the *Bankruptcy Legislation Amendment Act 1996*. Note the provisions of subs (5) below which specifically exclude some traditional considerations but note that "forbearance to sue" is not mentioned. With regard to this the Explanatory Memorandum at para 84.14 says "[f]orbearance to sue has always been regarded by the law as good consideration. Such forbearance will, under the Act as proposed to be amended by the Bill, have to be looked at in the likely value of the chose in action". See generally *Re Hyams* (1970) 19 FLR 232; *Lyford v Commonwealth Bank of Australia* (1995) 130 ALR 267; 17 ACSR 211; 13 ACLC 900 (Nicholson J).

In respect of any forbearance to sue, the value of a promise is affected by the conditions upon which that forbearance was given. Austin J, in considering the value of consideration provided by debtors to an administrator (of the deed of company arrangement) to continue the administration, concluded that the administrators consideration was on nominal value. The administrator accepted a guarantee and mortgage, which was subsequently increased, to ensure the deed of company arrangement continued, and that the company was not immediately placed into liquidation. The transfers of property by the debtors was declared void under s 120(1): *Sutherland v Brien* (1999) 149 FLR 321; [1999] NSWSC 155 (Austin J); applied by Merkel J in *Victorian Producers' Co-op Co Ltd v Kenneth* (1999) 1 ABC(NS) 198; [1999] FCA 1488 (Merkel J).

The value of an agreement to forbear from recovering a debtor's indebtedness will be closely linked to the "value" of the chose in action. For example, if a mortgage was provided for past and future advances, one may look at the likelihood of recovery of the existing indebtedness at the date the mortgage was granted, to assist in the determination of the value at least of the forbearance to sue in respect of the existing indebtedness. If at the time of the granting of the mortgage there was a substantial indebtedness, and the likelihood of collection from the mortgagor at that time was less than the value of the security, a court will readily conclude that the consideration granted by the mortgagee was less than the market value of the security: *Victorian Producers' Co-op Co Ltd v Kenneth* (1999) 1 ABC(NS) 198; [1999] FCA 1488 (Merkel J); *Zohar v Hicks* [2002] FMCA 308 at [43] (Bryant CFM). *Lopatinsky v Official*

Trustee in Bankruptcy (2002) 29 Fam LR 274; [2002] FLC 93-119; [2002] FCA 861 (Moore J) and on appeal *Official Trustee in Bankruptcy v Lopatinsky* (2003) 129 FCR 234; 1 ABC(NS) 271; 30 Fam LR 499; [2003] FCAFC 109 at [108] – [109] (Lee, Whitlam and Jacobson JJ).

Services provided

The value of services provided may be assessed by evidence of the value of the services in the market: *Clout v Anscor Pty Ltd* (2003) 1 ABC(NS) 44; [2003] FCA 326 (Drummond J), upheld on appeal *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71 (Wilcox, Moore and Lindgren JJ).

Shares in a private company and minority interest

The valuation of a minority interest in a privately owned company broadly involves firstly, the identification of the method of valuation and secondly, whether a discount for the minority holding ought to apply and if so the extent thereof. An example of the approach to such a valuation for the purposes of s 120 is that of Heerey J in *Re Weeden (A Bankrupt)* [2008] FCA 1597.

Section 120(4)

The ordinary order upon declaring the transfer void is for a re-conveyance to the trustee: *Sellers v One Step Plumbing & Concrete Pty Ltd* (2002) 190 ALR 716; [2002] FCA 478 (Weinberg J). It is only in exceptional cases that the court would not make that order: *Thomas v Tyler (No 2)* (2005) 2 ABC(NS) 593; [2005] FMCA 342 (Raphael FM); *Thomas v Tyler (No 3)* [2005] FMCA 506 as to amendment to costs order.

The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee. This section reinforces the policy behind the provision which is to enable the trustee to recapture the amount of the shortfall in the consideration and not to go further by requiring the transferee to pay more than the market value at the time of the transfer: *Anscor Pty Ltd v Clout (Trustee)* (2004) 135 FCR 469; 1 ABC(NS) 558; [2004] FCAFC 71 at [39] (FCAFC), obiter (Wilcox, Moore and Lindgren JJ).

This requirement is not activated until the transferee, against whom a transfer has been held to be void against the trustee in bankruptcy of the transferor, has specifically raised the issue: *Sheahan v Frost (No 2)* [2011] FCA 686 at [17] (Mansfield J) considering s 121(5).

If it is likely that the valuation of the consideration is likely to be difficult or disputed then this issue should be included in the relief sought in the application. Mansfield J in *Sheahan v Frost (No 2)* at [17], observed that, in practical terms, the evidential burden will be on the party who wishes to establish the value of the consideration. If a trustee wishes to assert that there was no consideration, the onus will be on the trustee to prove that state of affairs as it is the trustee who asserts it. His Honour tentatively expressed the view that once the evidence is adduced, if the issue is as to the value of the consideration given, the legal onus of proof is upon the transferee but if the issue is whether consideration was given at all the legal onus of proof is upon the trustee.

In *Kerr as trustee of the Property of Kehlet (a bankrupt) v Kehlet (No 2)* [2019] FCA 1786 (Robetson J) it was ordered that pursuant to ss 120(4) and s 121(5), the trustee in bankruptcy pay from the proceeds of sale of the property by the trustee to the respondent the amount of the consideration provided for the transfer by the transferee and that such amount may be applied to discharge any existing mortgage registered on the title to the property.

Driver FM in *Schmierer v Horan* (2004) 1 ABC(NS) 536; [2004] FMCA 16, gave the respondent the opportunity to pay an amount of money to avoid having the property, the subject of the transfer, sold. There was only a small amount in issue. Raphael FM considered that the type of order made by Driver FM was within the court's power but considered that type of order was exceptional: *Thomas v Tyler (No 2)* (Raphael FM). The Full Court in *Tyler v Thomas* said the court is not empowered to alter the impact of s 120(1) by ordering that the transfer is not void if the transferee paid to the trustee the difference between the market value of the property transferred and the consideration in fact given for the transfer: *Tyler v Thomas* (2006) 150 FCR 357; 3 ABC(NS) 773; [2006] FCAFC 6 (Branson, Bennett and Graham JJ).

Section 120(5)

For the purpose of s 120, subs (5) proscribes a number of matters which it deems to have no value as consideration. They generally relate to the relationship between parties, such as love and affection or promise to marry. Subsection (5)(e) was introduced by the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (Cth) and applies to transfers after 31 May 2006. The granting by the transferee of the right for the transferor to live at the transferred property has no value as consideration if the transferee is a spouse of the transferor. There is an exception where the grant relates to transfer or settlement of property or an agreement under the *Family Law Act 1975*.

[120.1.40] Section 120(1): "Becomes a bankrupt"

The transfer must be by a person who "becomes a bankrupt". If the transfer is pursuant to an order of the court affecting interest in property it is not a transfer by a person who later becomes bankrupt. In effect it is the order which transfers the interest in the property: *Official Trustee in Bankruptcy v Mateo* (2003) 127 FCR 217; 1 ABC(NS) 1; 202 ALR 571; 30 Fam LR 122; [2003] FLC 93–128; [2003] FCAFC 26 (Wilcox, Branson and Merkel JJ). For example transfers as a consequence of an order of the Family Court of Australia, under legislation dealing with de facto property matters or in equity, will not be a transfer by the person who subsequently becomes bankrupt.

Historically, these words were held to mean "commits an available act of bankruptcy": *Fawcett v Fearne* (1844) 6 QB 20; 115 ER 8; *Clough v Samuel* [1904] 2 KB 769 at 455 (KB) (CA). See also *Re Hart; Ex parte Green* [1912] 3 KB 6 at 16 (CA). However, it was held by the Full Court of the Federal Court of Australia that the expression makes it clear that the words are used in the subsection to mean when a person is made bankrupt either by the making of a sequestration order against his estate or following the presentation of his own petition: *Florance v Andrew* (1985) 58 ALR 377 (Fisher, Lockhart and Jenkinson JJ).

Under the former legislation, it was noted that the date when a settlement comes into operation is not necessarily the date which the document creating the settlement bears, nor the date on which it was executed: *Re Williams; Ex parte Lloyd* (1933) 6 ABC 58.

See also *Corke v Corke* (1994) 48 FCR 359; 121 ALR 320; 17 Fam LR 698 (Black CJ, Lockhart and Beazley JJ).

[120.1.45] Section 120(1): "Void as against the trustee in the bankruptcy"

See commentary at [120.0.30].

As to the costs of the trustee in bankruptcy of applications to avoid, see *Re Tetley; Ex parte Jeffrey* (1896) 66 LJQB 111; *Re Hobbins; Ex parte Official Receiver* (1899) 6 Mans 212; *Re Dickison* (1877) 2 NZ Jur NS 207.

[120.2.15] Section 120(2)(d): Application

The kind of transfer to which this paragraph applies is prescribed in reg 6.09 of the *Bankruptcy Regulations 1996* (Cth).

[120.3.05] Section 120(3)(b): "The transferor was solvent"

Section 5

Section 5(2) provides that a person is solvent if, and only if, the person is able to pay all the person's debts as and when they become due. The Explanatory Memorandum states at para 84.19 that "another feature of the proposed test of insolvency is that it requires a consideration of the debtor's income, as well as asset position … A person will be insolvent at a particular time if his or her income, as well as assets, are insufficient to meet his or her liabilities".

The Full Court in *Whitton v Regis Towers Real Estate Pty Ltd* (2007) 161 FCR 20; 5 ABC(NS) 294; [2007] FCAFC 125 when considering an appeal with respect to s 121, said that the

element of paying debts "out of the debtor's own money" no longer appears in the definition of "solvency" and "insolvency" in s 5(2) and 5(3); *McBain v Palffy* (2009) 7 ABC(NS) 103; [2009] FCA 260 at [9] – [15].

Presumption

Section 120(3A) provides a presumption of insolvency in the prescribed circumstances. That provision was introduced by the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (Cth) and applies to transfers on or after 31 May 2006: s 30(3).

The applicant trustee has the onus of establishing the pre-conditions to the operation of the presumption, being the failure of the transferor to maintain the usual or proper books, accounts and records or having kept such books, accounts or records, has not maintained them.

Historical approach

The following cases were decided under previous legislation providing for the avoidance of settlements and where the notion of solvency was provided for as the ability "to pay his debts without the aid of the property comprised in the settlement". See s 120 of the *Bankruptcy Act 1966* as it was prior to 16 December 1996.

An avoidance takes effect only from the time when the title of the trustee in bankruptcy accrues. As appears from the section itself, the onus of proving that the settlor was at the time of making the settlement solvent is upon the person who claims under the settlement: *Re Trautwein* (1944) 14 ABC 61; affd on appeal to the High Court *Trautwein v Richardson* [1946] ALR 129. Under the provisions of the *Bankruptcy Act 1924* (Cth), it was held that in the administration of the estate of a deceased person in bankruptcy, a settlement was avoided as from the date of the administration order: *Re Brown* (1950) 15 ABC 74.

A life interest reserved by the transfer (*Re Lowndes; Ex parte Trustee* (1887) 18 QBD 677) or a provision therein that the transferor should have the power at any time to raise a sum greater than her or his debts at the time of the transfer out of the transferred funds (*Re Baker* [1936] 1 Ch 61) should be taken into account in estimating the settlor's solvency.

In determining whether the transferor at the time he made the transfer was able to pay all his debts without the aid of the property comprised in the transfer, the court held that federal income tax in respect of income derived by a person during a period antecedent to his death imposed by an Act passed during his lifetime, although not assessed or otherwise ascertained during his lifetime is after his death a "debt due by the deceased person": *Re Brown* (1950) 15 ABC 74.

In determining whether the transferor was "solvent", the value of the implements of his trade and of the goodwill of his business was not, if he was intending to continue his business, to be taken into account; if that value were to be taken into account, semble, it could only be such a value as would be realised at a forced sale: *Re Butterworth; Ex parte Russell* (1882) 19 Ch D 588; *Re McLeod* (1885) 3 NZLR (SC) 223; doubted in *Re Smith; Ex parte Official Receiver* (1929) 1 ABC 186 at 189.

Where the transfer is of property which is subject to a mortgage, and the transferor covenants in the transfer to pay the mortgage debt, the transfer may be avoided if the transferor is unable to pay both the mortgage debt and his other debts: *Re Conibeer; Ex parte Huxtable* (1876) 2 Ch D 54 (CA).

Solvency at the time of making the transfer must be absolutely established: *Re Doughty Bros; Ex parte Official assignee* (1895) 6 BC (NSW) 2; *Re Brown* (1950) 15 ABC 74.

The test is objective and contingent liabilities for tort as well as contractual contingent liabilities are to be considered in assessing the ability of the transferor to pay all his debts: *Re Saebar* [1972] Qd R 107; 18 FLR 317; *Re Hyams* (1970) 19 FLR 232.

[120.3A.10] Section 120(3A): Meaning of "solvency" and "insolvency"

Refer to [5.2.05] and [5.10.05].

[120.6.05] Successors in title

Historically, a similar provision appeared in the former s 120(7) with respect to dispositions of property and in s 94(4) of the *Bankruptcy Act 1924* (Cth) where the term "bona fide" was used.

Onus of proof

A trustee bears the overall onus under s 120 to avoid a transfer of property.

McKerracker J when considering where the onus lies in establishing the element of "good faith" under s 120(6) identified by reference to the passage in *Andrew v Zant Pty Ltd* (2004) 213 ALR 812; [2004] FCA 1716 at [20] (Hill J) that even if the onus lies on the trustee, there may be a shifting onus if the facts concerning the transfer are within knowledge of the transferee and not the trustee.

Good faith

The term "good faith" means conduct without knowledge that any fraud or preference contrary to the statute is intended: *Verge v Devere Holdings Pty Ltd (No 4)* at [305] (McKerracher J).

Torrens System

If real property or an interest in real property has not been acquired by a person in good faith and for consideration that was at least as valuable as the market value, an order may be made under s 120 against that person avoiding the transfer. Such order is irrespective of the indefeasibility of the Torrens System title by registration, as the right which is established under s 120 is enforceable by personal action against the registered owner or proprietor and is an action in personam: *Verge v Devere Holdings Pty Ltd (No 4)* at [354] (McKerracher J).

Declaring a prior transfer void cannot affect the title of a mortgagee, as the Torrens System of registration "is not a system of registration of title but a system of title by registration": *Breskvar v Wall* (1971) 126 CLR 376; [1971] HCA 70 at [385] (Barwick CJ); *Re Fitzgerald; Ex parte Burns* (1986) 10 FCR 261; 63 ALR 623 at [624] (Pincus J). There was no issue that the mortgage was granted in good faith and for valuable consideration: former s 120(7). Pincus J made a declaration declaring the transfer by the bankrupt as void against the applicant, acting in his capacity as trustee of the estate of the bankrupt, and included a reservation that the declaration does not affect the title or interest of the registered mortgagee.

[120.7.05] Section 120(7): "Property that did not previously exist"

As far as the authors are aware, this is a concept that was previously unknown to the law. Paragraph 84.10 of the Explanatory Memorandum states that:

> [a]nother important change is that provided for in proposed s 120(7) whereby when a person does something which results in another person becoming the owner of property whether or not it previously existed, the person as a result of whose actions the property came into being will be taken to have transferred property to the person who owns it.

Thus, where a person creates an interest in property, for example, by allowing a mortgage or charge to be created over it, the person will be taken to have transferred property, for the purposes of the section. In *Peldan v Anderson* (2006) 227 CLR 471; 80 ALJR 1588; 229 ALR 432; [2006] HCA 48 at [26] the High Court (Gummow ACJ, Kirby, Hayne, Callinan and Crennan JJ) said that the provisions which appear in ss 120(7), 121(9)(b) and 122(8) would be expected to have the same meaning. Refer to commentary at [121.3.05].

In *Verge v Devere Holdings Pty Ltd (No 4)* (2010) 8 ABC(NS) 211; [2010] FCA 653 McKerracher J held that an issue of shares in a company was a transfer of property within s 120(7)(b). The result and purpose of the issue of shares was to divest the bankrupts of 50% of the total shareholding and for the recipient of the issued shares to acquire that 50% shareholding: [378], [384].

[The next text page is 10-2601]

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.

Note: For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.

[Subs (1) am Act 33 of 2006, s 3 and Sch 1 item 11]

Showing the transferor's main purpose in making a transfer

(2) The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(b) if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent.

Other ways of showing the transferor's main purpose in making a transfer

(3) Subsection (2) does not limit the ways of establishing the transferor's main purpose in making a transfer.

Transfer not void if transferee acted in good faith

(4) Despite subsection (1), a transfer of property is not void against the trustee if:

(a) the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and

(b) the transferee did not know, and could not reasonably have inferred, that the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(b); and

(c) the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.

[Subs (4) am Act 57 of 2007, s 3 and Sch 2 item 8; Act 33 of 2006, s 3 and Sch 1 item 12]

Rebuttable presumption of insolvency

(4A) For the purposes of this section, a rebuttable presumption arises that the transferor was, or was about to become, insolvent at the time of the transfer if it is established that the transferor:

(a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or

(b) having kept such books, accounts and records, has not preserved them.

[Subs (4A) insrt Act 33 of 2006, s 3 and Sch 1 item 13]

Refund of consideration

(5) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

What is not consideration

(6) For the purposes of subsections (4) and (5), the following have no value as consideration:

(a) the fact that the transferee is related to the transferor;

(b) if the transferee is the spouse or de facto partner of the transferor—the transferee making a deed in favour of the transferor;

(c) the transferee's promise to marry, or to become the de facto partner of, the transferor;

(d) the transferee's love or affection for the transferor;

(e) if the transferee is the spouse, or a former spouse, of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*;

(f) if the transferee is a former de facto partner of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*.

[Subs (6) am Act 144 of 2008, s 3 and Sch 2 items 27 and 28; Act 115 of 2008, s 3 and Sch 2 items 16 and 17; Act 33 of 2006, s 3 and Sch 1 item 15]

Exemption of transfers of property under debt agreements

(7) This section does not apply to a transfer of property under a debt agreement.

Protection of successors in title

(8) This section does not affect the rights of a person who acquired property from the transferee in good faith and for at least the market value of the property.

Meaning of ***transfer of property*** *and* ***market value***

(9) For the purposes of this section:

(a) ***transfer of property*** includes a payment of money; and

(b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and

(c) the ***market value*** of property transferred is its market value at the time of the transfer.

[Subs (9) am Act 57 of 2007, s 3 and Sch 2 item 9]

[S 121 am Act 144 of 2008; Act 115 of 2008; Act 57 of 2007; Act 33 of 2006; subst Act 44 of 1996, s 3 and Sch 1 item 208]

SECTION 121 COMMENTARY

[121.0.0] Overview

The purpose of this provision is to recover transfers of property by a person who later becomes a bankrupt, where the main purpose of the transfer was to defeat creditors and the property would probably have become part of the estate or would have been available to creditors if the property had not been transferred. This provision enables the property to be recovered for the benefit of creditors generally and to enable a rateable distribution amongst creditors.

[121.0.10] General note

Historical

The history of the fraudulent disposition provision (and the previous s 121) can be traced to the *Fraudulent Conveyances Act 1571* (13 Eliz I, c 5) and has been explained in *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515; 107 ALR 199 at 521 (FCR) (Wilcox, Gummow and von Doussa JJ) and *Cannane v J Cannane Pty Ltd (in liq)* (1998) 192 CLR 557; 72 ALJR 794; 153 ALR 163; 27 ACSR 603; [1998] HCA 26 at 573–574 (CLR) (Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ).

1996 Amendments

This section which was substituted by item 208 of Sch 1 to the *Bankruptcy Legislation Amendment Act 1996*, applies to bankruptcies for which the date of the bankruptcy is on or after 16 December 1996 (see item 457 to the Schedule). Hill J said that s 121 in its present form covers more or less the same area as the section it replaced, although, if anything, it is now framed in such a way as to make it rather easier for a trustee to succeed than was earlier the case: *Ashton v Prentice* (unreported, Fed Ct of Aust, Hill J, 23 October 1998). The High Court has said that the current form of the provision is more broadly drawn: *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 227 CLR 278; 3 ABC(NS) 814; [2006] HCA 6 at [21] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). Sackville J in *Prentice v Cummins (No 5)* (2002) 124 FCR 67; 51 ATR 400; [2002] FCA 1503 had cause to analyse the differences between the current and former provision and his Honour considered that there were some important differences:

1. The current s 121(2) makes no reference to the transfer of property by the debtor "with the intent to defraud creditors". The section refers to the transfer of property where the "transferor's main purpose" was to prevent the property becoming divisible among the transferor's creditors or to hinder or delay the process of making that property available for division among the creditors.

2. The former section required proof that the transferor had "an actual intent" at the time of the disposition. There was no requirement to establish that that was the transferor's sole or dominant intent. The present section requires the applicant to establish that the debtor's "main purpose" was as described in s 121.
3. The current s 121(2) specifically "provides a means by which it can be 'taken' that the debtor's main purpose was to prevent, hinder or delay the process of making property available for division among the transferor's creditors". The section does not limit the ways in which the main purpose may be established.

See ss 77C - 77F and 77AA above which allow the Official Receiver to obtain information and evidence and s 139ZQ under the provisions of which the Official Receiver may, by notice, recover moneys or other property to which this section relates. Section 139ZS gives the court power to set aside a s 139ZQ notice, but only upon being satisfied that the subdivision does not apply to the person on the basis of the alleged facts and circumstances set out in the notice. On the other hand failure to comply with the notice is an offence punishable by imprisonment for a period not exceeding six months: s 139ZT(1).

As to the general principles, see *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372; 138 ALR 341 (Wilcox, Cooper and Moore JJ).

2006 Amendments

The ability of trustees to recover under s 121 property transferred by a person before becoming bankrupt was strengthened by the amendments to that section introduced by the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (Cth). Those amendments apply to transfers on or after 31 May 2006: s 30(3). Section 121A, which was also introduced by that legislation, enables the trustee to recover consideration paid to a third party in respect of a transfer of property from the transferor who becomes bankrupt to the transferee.

[121.0.15] Limitations

An action under s 121 with respect to a transfer of property may be commenced by the trustee at any time: s 127(4).

Historically, under the statute 13 Eliz I, c 5, there was no limitation period for the avoidance of a fraudulent disposition. However, the Statute of Limitations barred the right to recover the settlement after the lapse of six years. It is a legal right to avoid the deed and no equity arises from mere delay to enforce it: *Re Maddever* (1884) 27 Ch D 523. An interesting situation arises in that the rights of creditors under the various State Limitation Acts will be subject to the various limitations as from the date of the conveyance but the trustee may commence an action under this section at any time (s 127(4)) in the case of a person becoming a bankrupt after 1 February 1981.

[121.0.20] Acts superseded

As far as bankruptcy is concerned, this section supersedes 13 Eliz, c 5 and the provisions of certain State Acts such as s 37A of the *Conveyancing Act 1919* (NSW); s 172 of the *Property Law Act 1958* (No 6344) (Vic); s 86 of the *Law of Property Act 1936* (SA) as amended; s 86 of the *Property Law Act 1969* (WA); s 40 of the *Conveyancing and Law of Property Act 1884* (Tas) as amended; and s 46 of the *Mercantile Act 1867* (Qld). Generally on this subject see *May on Fraudulent and Voluntary Dispositions of Property*, *Kerr on Fraud and Mistake*, "The Cheats Charter?" (1975) 91 LQR 86 and "Voluntary Conveyances to Defraud Creditors" (1975) 91 LQR 317.

[121.0.25] Applicability to other parts of the Act

The provision may apply under a Pt X administration if that is a term of the Personal Insolvency Agreement: s 188A(2)(j).

[121.0.27] Interaction with s 266(3)

Section 266(3) is an offence provision. The section provides that a person who has become a bankrupt:

(a) within 12 months before the presentation of the petition on which, or by virtue of the presentation of which, the person becomes a bankrupt;
(b) has disposed of, or created a charge on any property, with an intent to defraud creditors

is guilty of an offence and is punishable, upon conviction, by imprisonment for a period of not exceeding three years.

The term "intent to defraud the creditors of a person or to defeat or delay creditors of a person" is to be read as including an intent to defraud, or to defeat or delay, any one or more of those creditors: s 6. Holmes J, in *R v Dunwoody* (2004) 149 A Crim R 259; 2 ABC(NS) 199; 212 ALR 103; [2004] QCA 413 (McMurdo P, McPherson JA and Holmes J), said the term as it appears in s 121 (referring to the former provision) is not necessarily to be replicated to s 266(3) and in particular the term "creditors" in s 266(3) is not necessarily to be construed as liberally as s 121. Her Honour concluded that a demand in the nature of an unliquidated claim for damages (which would not be provable in a bankruptcy) was not a creditor for the purposes of s 266(3).

The offence provision is an important consideration:

1. When considering whether a transfer, which is void under s 121, may involve the committing of an offence by the bankrupt.
2. When a person is considering the restructure a person's affairs.

There are a number of important differences between s 121 and s 266(3). In particular, the amendments introduced on 16 December 1996 introduced a number of material changes to s 121: refer to commentary at [121.0.10]. Section 121 focuses on the bankrupt's main purpose in making the transfer as distinct from showing an intent by the bankrupt to defeat or delay creditors. The main purpose may be inferred in the circumstances set out in s 121(2). Clearly, in the context of this issue alone not every transfer declared void under s 121 will mean the bankrupt may have committed an offence under s 266(3).

McMurdo P, when considering an appeal against a conviction under s 266(3) said, obiter, that clients who are aware only of a general possibility that someone, someday, might sue them, are entitled to seek advice to lawfully organise their affairs to protect their assets without detracting from the administration of justice: *R v Dunwoody* (2004) 149 A Crim R 259; 2 ABC(NS) 199; 212 ALR 103; [2004] QCA 413 at [52] (McMurdo P, McPherson JA and Holmes J). Holmes J said that a move to protect assets against bankruptcy at a time when an individual has no existing creditors and only an undetermined action for personal injuries against her or him, will not, without more, satisfy the elements of s 266(3); or that an intention to that effect will amount to a criminal intent: at [125].

[121.0.30] Issues

The following are the issues, or elements, that will arise in an application under s 121:

1. That there was a transfer of property, by a person who later becomes a bankrupt. There is a definition of the expression "transfer of property" in s 121(9).
2. That 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: s 121(1)(a).
3. That the transferor's main purpose was to prevent the transferred property becoming divisible among the transferor's creditors or to hinder or delay the process of making such property available.
4. Alternatively, that it can reasonably be inferred from all the circumstances, at the time of the transfer, that the transferor was, or was about to become, insolvent. The transferor's main purpose in making the transfer for the purposes of s 121(1)(b) can then be reasonably inferred.
5. That the consideration if any, given for the transfer was not at least as valuable as the market value of the property s 121(4)(a). "Market value" is defined in s 121(9)(c) as the market value at the time of transfer.
6. That the transferee did not know or could not have reasonably inferred that the transferor's main purpose was as prescribed: s 121(4)(b).

7. That the transferee could reasonably have inferred that at the time of the transfer, the transferor was, or was about to become, insolvent: s 121(4)(c).

Onus of proof

Trustee's onus

The trustee has the overall onus of proof: *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372; 138 ALR 341 at 417 (FCR), 381 (ALR) (Wilcox, Cooper and Moore JJ); *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515; 107 ALR 199 at 527–528 (FCR) (Wilcox, Gummow and von Doussa JJ). In *Zant Pty Ltd* (2004) 213 ALR 812; [2004] FCA 1716, at [20] Hill J as one of eight propositions of law observed that if the facts are within the knowledge of persons other than the trustee (and in particular where the transferor is dead) a very slight degree of proof should be sufficient to shift the burden. McKerracker J, when considering where the onus lies in establishing the element of "good faith" under s 120(6) referred to the passage in *Andrew v Zant Pty Ltd* (2004) 213 ALR 812; [2004] FCA 1716 at [20] (Hill J) (*Zant*) as an observation that there may be a shifting onus if the facts concerning the transfer are within knowledge of the transferee and not the trustee. The existence of the shifting onus was also referred to in *Cummins v Trustees of the Property of Cummins* (2004) 2 ABC(NS) 136; 56 ATR 519; 209 ALR 521; [2004] FCAFC 191 at [92] (Carr, Tamberlin and Lander JJ) (*Cummins*) in the context of considering the issue as to whether there was sufficient evidence as to the bankrupt's main purpose. Both Zant and Cummins referred to the decision of *Michael v Thompson* (1984) 20 VLR 548 at 552 or 553. The decision of *Cummins* was reversed on appeal: *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 227 CLR 278; 3 ABC(NS) 814; [2006] HCA 6 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

The High Court said at [34] as to a case founded upon inferences in establishing the main purpose, that a trustee must establish that the circumstances appearing in the evidence gave rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability. In drawing the inferences from the primary facts, the court would have regard to the seriousness of the allegations and the gravity of the consequences of any adverse findings. One of the authorities cited by the High Court was *Girlock (Sales) Pty Ltd v Hurrell* (1982) 149 CLR 155 at 161–162. A passage therein cited from *Holloway v McFeeters* (1956) 94 CLR 470 at 480–481 is informative of the principle:

> You need only circumstances raising a more probable inference in favour of what is alleged…where direct proof is not available it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is conjecture.

Standard of proof

The applicable standard of proof is the balance of probabilities. In applying that standard, the court may take into account the factors listed in s 140(2) of the *Evidence Act 1995* (Cth), which includes the gravity of the matters alleged. In *Bringinshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34 at 361–362 (CLR) Dixon J was considering the common law position, however, similar considerations apply through s 140(2): *Rambaldi v Mullins (No 2)* (2016) 14 ABC(NS) 352; [2016] FCA 977 at [35] (Murphy J).

Section 121(2)

The Full Court in *Re Jury* (1999) 92 FCR 68; [1999] FCA 671 at [55] said that the phrase "if it can reasonably be inferred from all the circumstances that…the transferor was…insolvent", is not synonymous with "if the transferor was insolvent". As a matter of ordinary language this provision leaves open the possibility that it may be also reasonably inferred that the transferor was solvent. It is sufficient if the inference of insolvency is reasonably open. The Full Court then described the availability of drawing that inference from the primary facts in this way:

> An analogy is the leaving of a case to a civil jury. If it can reasonably be inferred from all the circumstances that the defendant was negligent, or that the publication complained of

was defamatory of the plaintiff, then the matter must go to a jury. Nevertheless the jury is not required to draw the relevant inference, and may not do so.

Buchanan J (Marshall and Tracey JJ considering it not necessary to decide) expressed a reservation as to whether such statement correctly reflects the intention of s 121(2). His Honour said that the question which arises for determination is not whether there might be a matter, which could, as a matter of law, be left in the hands of a civil jury but whether the trial judge whose task it is to apply s 121(2) to be satisfied, as a matter of reasonable inference, and having regard to all the circumstances, that it should be concluded the transferor was, at the time of the transfer, insolvent or about to become insolvent: *Whitton v Regis Towers Real Estate Pty Ltd* (2007) 161 FCR 20; 5 ABC(NS) 294; [2007] FCAFC 125 at [25].

The time at which the conclusion under s 121(2) is to be directed is at the time of the transfer, however, that does not mean a court can ignore matters which occur after the time of the transfer: *Re Chase; Permfox Pty Ltd v Official Receiver* [2002] FCA 1564 at [95] (Allsop J, as he then was); *Brown v Mikulski* [2016] FCCA 683 at [45] (Judge Driver) applied.

Section 121(4)

Hill J in *Ashton v Prentice* (unreported, Fed Ct of Aust, Hill J, 23 October 1998) proceeded upon the basis that the trustee must prove the negative of the defences (s 121(4), 121(5) and 121(6)). His Honour, did not finally determine whether the proper position is that upon proof of the first three matters, the onus shifts to a transferee to prove the matters of the defence (a recipient in good faith and for market value and that the transferee could not reasonably infer that at the time of the transfer, the transferor was, or was about to become, insolvent).

On appeal, the Full Court, after referring to Hill J's reasons, said:

> Having considered the matter, it is our view that, on its proper construction, the burden under the subsection is on the transferee. In that connection, we draw particular attention to the fact that one of the three matters dealt with in the subsection is the transferee's own state of knowledge about a matter at a particular time. The allocation to a party of the burden of persuasion in connection with matters depending upon his or her state of knowledge is a commonplace and if, as we think it is, it be proper to conclude that the burden of persuasion with respect to one of three matters dealt with in s 121(4) was intended to be on the transferee. It seems to follow inevitably that the same result was intended with respect to other two matters:
>
> *Re Jury; Ashton v Prentice* (1999) 92 FCR 68; [1999] FCA 671 at [67]; *Rambaldi v Volkov* (2008) 7 ABC(NS) 25; [2008] FCA 1957 at [52] (Ryan J); *Charan v Gleeson* [2012] FCA 236 at [33], [34] (McKerracher J); *Lo Pilato v Kamy Saeedi Laywers Pty Ltd* [2017] FCA 34 at [204] (Katzmann J).

[121.1.03] Section 121(1): "property would probably have become ... available to creditors"

The High Court (Gummow ACJ, Kirby, Hayne, Callinan and Crennan JJ) in *Peldan v Anderson* (2006) 227 CLR 471; 80 ALJR 1588; 229 ALR 432; [2006] HCA 48 at [32] – [48] considered the meaning of s 121(1)(a) in the context of a transfer under s 121(9)(b) and concluded that the acceptable construction is that the phrase "the property" in the opening words of s 121(1)(a) should be construed as signifying the property in the hands of the transferor prior to the act which is taken to be the "transfer". This involves treating the words "the property" in s 121(1)(a) in a special sense to give to s 121(1) an extended operation as required by s 121(9)(b). The High Court then set out the paragraph as if read in this manner, as follows:

> (1) A transfer or 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 [in the hands of the transferor prior to the act taken to be the transfer] would probably have become part of the transferor's estate or would probably have been available to creditors if the property [in the hands of the

transferee after the act taken to be the transfer] had not been [taken to have been] transferred … (Insertions are to ensure the paragraph is not at odds with s 121(9)(b).)

The effect of this construction is to shift the emphasis of the inquiry and to focus not upon whether the "transferred property" would have become part of the transferor's estate in bankruptcy, but upon whether that result would have occurred in respect of the transferor's "property" as defined in s 5(1) out of which the newly created property has been "carved".

On the facts considered in *Peldan v Anderson* (2006) 227 CLR 471; 80 ALJR 1588; 229 ALR 432; [2006] HCA 48, the High Court concluded that this construction required attention on what would probably have happened to the undivided interest as joint tenant and it must be shown that that interest "would probably have become part of of the transferor's estate or would probably have been available to creditors", if the property had not been taken by s 121(9)(b) to have been transferred. That interest would never have become part the bankrupt estate as upon bankruptcy there is a severance of a joint tenancy and the unity of title is destroyed. The trustee would have no claim to the whole of the proceeds of sale of the property.

[121.1.05] Section 121(1): "transfer of property" … to hinder or delay

The section focuses on a "transfer of property" and the transferor's "main purpose" in making the transfer. The purpose must be to either prevent the property from becoming divisible among the transferor's creditors or to hinder or delay the process of making property available for division among the transferor's creditors. Refer below at [121.3.05] and [121.2.10].

Commentary applicable under former legislation

The following cases were decided under previous legislation which was designed to avoid fraudulent dispositions of property but they may be of some use in relation to the question of hindering or delaying "the process of making property available". "Property available for the payment of debts" is provided for in Pt IV, Div 3 of the Act of which this section is a part.

The onus of proving intent to defraud and that a disposition is, at least, in the first instance, on the applicant: *Cannane v J Cannane Pty Ltd (in liq)* (1998) 192 CLR 557; 72 ALJR 794; 153 ALR 163; 27 ACSR 603; [1998] HCA 26 at 556–567 (CLR) (Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ); *Official Trustee v Marchiori* (1983) 69 FLR 290 (Fisher J). That case was decided relying on the principle enunciated in *Michael v Thompson* (1984) 20 VLR 548. That principle and its inter-relationship with s 140 of the *Evidence Act 1995* (NSW) is discussed in *Ramirez v Sandor's Trustee* (unreported, Sup Ct, NSW, Young J, 23 April 1997). For a consideration of the principles relevant to the construction of this section in relation to the proof of intent to defraud and of the reason why this section unlike the previous ss 120 and 122 does not give any right to prove or claim a dividend see *PT Garuda Indonesia Ltd v Grellman* (1994) 48 FCR 252; 120 ALR 641 (Lockhart J).

The fraud must be actual. There is no such thing as legal fraud as distinct from actual fraud. A transaction which is honest in fact, which transgresses no law and by which no one is injured, cannot be held to be fraudulent: *Union Bank of Australia Ltd v Paton* (1897) 8 QLJ 28 (Griffith CJ); and see *Federal Grocery Co v Noble* (1896) 22 VLR 318. Actual fraud, that is an actual intention to defeat or defraud creditors, must be established, and whether the existence of such an intent should be inferred from the circumstances is a question of fact: *Re Barnes; Ex parte Stapleton* [1962] Qd R 231 at 131. See also *Official Trustee in Bankruptcy v Mitchell* (1992) 38 FCR 364; 110 ALR 484; 16 Fam LR 87 (Burchett, French and Einfeld JJ).

Under the provisions of s 37A of the *Conveyancing Act 1919* (NSW) it was held that the intention of an insolvent person in granting a lease of their home to his wife to defeat and delay his creditors was not an intention to defraud his creditors and the lease was not voidable at the instance of his trustee in bankruptcy: *Re Cummins* (1951) 15 ABC 185.

Fraudulent intent on both sides should be expressly proved, unless the assignee gave no consideration (and past consideration is enough) or unless the intent is capable of being inferred from all the surrounding circumstances: *Twyne's Case, Smith's LC*, (12th ed), Vol 1, p 1; *Freeman v Pope* (1870) LR 5 Ch App 538; *Re Jackson* (1889) 10 LR (NSW) L 307 at

314; *Re Deane; Ex parte Official Assignee; Deane (Respondent)* (1906) 6 SR (NSW) 580; and see *Re Wise; Ex parte Mercer* (1886) 17 QBD 290; *Re Holland* [1902] 2 Ch 360; *Williams v Lloyd* (1934) 50 CLR 341; [1934] HCA 1; *Cadogan v Kennett* 98 ER 1171; (1776) 2 Cowp 432 per Lord Mansfield.

Repayment of misappropriated funds by a debtor to his previous employer was made partly by a payment of money and partly by the transfer of real estate. The transaction involving the real estate was set aside as being void under this section, the creditor as regards that part of the repayment not acting in good faith. The court also discussed the concepts of valuable consideration and good faith and whether illegal conduct negatives good faith. The effect of payment by bank cheque was also considered: *Grellman v PT Garuda Indonesia Ltd* (1991) 29 FCR 26; 101 ALR 135 (Hill J); confirmed on appeal *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515; 107 ALR 199 (Wilcox, Gummow and von Doussa JJ); followed in *World Expo Park Pty Ltd v EFG Australia Ltd* (1995) 129 ALR 685 (Fitzgerald P, Pincus JA and Derrington J). For a general discussion by the Full Court, see *Cannane v Official Trustee in Bankruptcy* (1996) 65 FCR 453; 136 ALR 406 (Beaumont, Hill and Lehane JJ).

However, if facts have come to the attention of the respondent to an application under this section which cause doubts as to whether or not the debtor may have committed fraud on the one hand or may be innocent on the other, the respondent cannot deliberately avoid an inquiry as to the proper import of the facts: *Re Abrahams; Ex parte Thomas* (unreported, Fed Ct of Aust, Einfeld J, 22 January 1988). A transferee, having subordinated her or his knowledge of and judgment in the matter to the transferor (bankrupt) cannot, in taking the benefit of the transaction, be in a better position than the transferor would be if he or she was acting for himself or herself. "The cocoon in which she placed herself cannot avail her when the mortgage is impugned under s 120 or s 121": *Official Trustee v Pastro* [1999] FCA 1631 (Finn J); affd on appeal *Pastro v Official Trustee in Bankruptcy* [2000] FCA 744 (Lehane, Ryan and Branson JJ).

As to where the disponee is a corporation, see article, "Bankruptcy – Fraudulent Dispositions – Disponee a Corporation" 46 ALJ 653; see also the meaning of "intent to defraud"47 ALJ 365–367.

If fraudulent intent be established a disposition may be set aside even if for valuable consideration (*Re Tetley; Ex parte Jeffrey* (1896) 66 LJQB 111, affd ibid at 321; *Holmes v Penney* 69 ER 1035; (1856) 3 K & J 90; 26 LJ Ch 179; *Harman v Richards* 68 ER 847; (1852) 10 Hare 81. As to adequacy of consideration, see *Re Johnson* (1881) 20 Ch D 389 at 397; affd *Re Johnson* (1882) 51 LJ Ch 503; *Re Gillo; Ex parte Dollar* (1891) 8 Mor 157; *Re Cranston; Ex parte Cranston* (1892) 9 Mor 160; and as to marriage being a sufficient consideration to support an ante-nuptial settlement, see *Bulmer v Hunter* (1869) LR 8 Eq 46; *Re Pennington; Ex parte Pennington* (1888) 5 Mor 268; *Official Trustee in Bankruptcy v Mitchell* (1992) 38 FCR 364; 110 ALR 484; 16 Fam LR 87 (Burchett, French and Einfeld JJ)); subject however to the rights of parties who gave valuable consideration in ignorance of such intention: *Kevan v Crawford* (1877) LR 6 Ch D 29; *Re Johnson* (1881) 20 Ch D 389 at 397; affd *Re Johnson* (1882) 51 LJ Ch 503 and see *Clough v Samuel* [1904] 2 KB 769.

Where there is a present consideration, wholly or in part, knowledge by the assignee of the fraudulent intent on the part of the debtor must be shown: *Pennell v Reynolds* 142 ER 974; (1861) 11 CBNS 709, approved *Re Cranston; Ex parte Cranston* (1892) 9 Mor 160 at 168. It is essential to show that the assignee concurred in the fraudulent intent of the assignor, that is, that he accepted a conveyance of the property with the full knowledge that the sole reason which induced the assignor to convey it was to delay, hinder or defeat creditors: *Re Fasey; Ex parte Trustees* [1923] 2 Ch 1 at 9; and see *Re Walters; Ex parte Official Assignee* (1898) 19 LR (NSW) B & P 1 at 2; *Re Barnes; Ex parte Stapleton* [1962] Qd R 231.

The word "defraud" was designed to reproduce the words "hinder, delay or defraud" in the Statute of Elizabeth and was not intended to be confined to cases of fraud in the ordinary modern sense of that word, ie, as involving actual deceit or dishonesty. It carries the meaning of depriving creditors of timely recourse to property which would otherwise be applicable for their benefit. The transferee of property had to establish not merely that the property had been

conveyed to him for valuable consideration and in good faith but that he was a person not having at the time of the conveyance notice of the transferor's intent to defraud creditors; "notice" included constructive notice: *Lloyd's Bank Ltd v Marcan* [1973] 1 WLR 339; [1973] 2 All ER 359; affd *Lloyd's Bank Ltd v Marcan* [1973] 1 WLR 1387; [1973] 3 All ER 754.

On applications by the trustee of the estate of a bankrupt and by the liquidator of a company which the bankrupt had controlled, it was held that a disposition of shares by each of those entities were dispositions in fraud of creditors. The disponees were clearly purchasers who had not acted in good faith. However, an essential element of the dispositions was, in each case, missing in that it could not be said that the "end and purpose" of the dispositions was necessarily the retention of the shares disposed of for the benefit of the disponees. There is a discussion of the valuation of shares in private companies: *Cannane v Official Trustee in Bankruptcy* (1996) 65 FCR 453; 136 ALR 406 (Beaumont, Hill and Lehane JJ). A declaration was sought that a trustee was the trustee of a bare trust, the sole beneficiary of which was the bankrupt. The trustee was a professional trustee and there was in existence a trust deed. Once it was accepted that the deed of trust was not a sham, what was alleged is that because the bankrupt exercised a remarkable degree of control and direction, it necessarily followed the trustee, which generally observed that direction, held assets upon trust for the bankrupt. Control is not necessarily to be equated with ownership, particularly equitable ownership. Where the bankrupt was not named as a beneficiary and the trustee was a professional trustee a court would not lightly infer that it was acting in breach of trust: *Wily v Fuller* [2000] FCA 1512 (Hill J).

There must be evidence that there were creditors in existence at the date of the disposition whose debts remained unpaid, or that, although there were no such debts, all the surrounding circumstances showed that the settlement was made with the view of hindering or delaying future creditors from recovering their debts, or that the disposition was made at a time when the bankrupt was about to embark on a hazardous or risky business with a view to placing the property beyond the reach of any possible future creditors: *Re Butterworth; Ex parte Russell* (1882) 19 Ch D 588; *Lloyd v Blumenthal* (1884) 5 LR (NSW) Eq 99 and cf *Payne v McDonald* (1908) 6 CLR 208 at 211, 213; *Perpetual Executors Ltd v Wright* (1917) 23 CLR 185 at 193, 198; *Re Mackay* (1951) 16 ABC 18. Section 121 is concerned with an intention to defraud any present or future creditors, it is not concerned with the realisation of that intention. If the requisite intent exists at the time of the disposition in relation to a person not already a creditor, it is immaterial whether or not that person in fact later becomes a creditor: *Ebner v Official Trustee in Bankruptcy* (1999) 91 FCR 353; 161 ALR 557; [1999] FCA 110 (Sackville, Finn and Kenny JJ).

Dispositions of property are not void unless the disponor resorts thereto for his own benefit, so that the transaction is a mere cloak for retaining a benefit in some form or another for himself; a mere preference of one creditor over another does not necessarily bring the case within this section even though it was intended to defeat other creditors: *Alton v Harrison* (1869) LR 4 Ch App 622 at 626; *Glegg v Bromley* [1912] 3 KB 474 at 479, 492; *Re Lloyds Furniture Palace Ltd* [1925] Ch 853 at 862; *Re Kelly; Ex parte Young; Victorian Producers Co-op Co Ltd (Respondents)* (1932) 4 ABC 258; *Re Trautwein; Ex parte Official Receiver* (1941) 12 ABC 52; (affd by HC *Trautwein v Richardson* (1941) 65 CLR 664 (note)); *Re Trautwein* (1944) 14 ABC 61 (affd on appeal to HC *Trautwein v Richardson* [1946] ALR 129). See *Official Trustee v Marchiori* (1983) 69 FLR 290 (Fisher J). And where a creditor knows or has good grounds to suspect that he would have sufficient assets to pay all his creditors in full, the mere preference of one creditor over another does not amount to an intention to defraud: *Re Sarflax Ltd* [1979] 2 WLR 202; [1979] 1 All ER 529.

An agreement not to register a bill of sale is a factor which may be taken into account in determining whether there is an intention to defeat creditors in which case it may be rendered void under this section: *Re Mandel; Ex parte Gibson* (1936) 10 ABC 17. This case was distinguished in *Re Peninsula Services Pty Ltd (in liq)* (1987) 91 FLR 4 in which it was held that an unregistered mortgage over Torrens title land should not be taken as indicating an intention to defraud creditors.

Where a debtor assigns his whole property as security for a past debt only and if such an assignment is for the benefit of some only of the creditors to the exclusion of others, it necessarily defrauds those excluded: *Re Wood* (1872) LR 7 Ch 302 at 306.

Where an obvious settlement had been made by a husband on his wife but where both were liable for the debts which were all partnership debts, the settlement was not "with intent to defraud": *Re Pezzi* (unreported, Vic Ct of Insolvency, Norris J). A transfer of real property by a husband to his wife under an agreement in respect of which consent orders were made by the Family Court during the period of relation back was held not to be void under s 121 as it was a transfer made in good faith and for valuable consideration: *Re Sabri; Ex parte Brien* (1996) 137 FLR 165 (Chisholm J).

For a full discussion of this section, see *Official Trustee in Bankruptcy v Alvaro* (1996) 66 FCR 372; 138 ALR 341 (Wilcox, Cooper and Moore JJ).

[121.1.15] Section 121(1): Relation back

Commentary applicable under former legislation

See also notes to s 115 at [115.0.10].

A transfer, to which this section relates, can be attacked by a trustee although made more than six months before the presentation of a petition: *Re Harrison; Ex parte Jay* (1880) 14 Ch D 19; *Re Bowes; Ex parte Jackson* (1880) 14 Ch D 725; *Re Walker; Ex parte Black* (1884) 26 Ch D 510; *Williams v Lloyd* (1934) 50 CLR 341; [1934] HCA 1. But a transfer which is merely void as being an act of bankruptcy cannot be set aside unless made within such period of six months: *Mercer v Peterson* (1868) LR 3 Ex 104; *Allen v Bonnett* (1870) LR 5 Ch App 577; *Jones v Harber* (1870) LR 6 QB 77; *Re Bamford; Ex parte Games* (1879) 12 Ch D 314.

[121.1.25] Section 121(1): "creditors"

The term "creditors" includes one or more creditors and existing and future creditors: s 6; *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 227 CLR 278; 3 ABC(NS) 814; [2006] HCA 6 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) at [28] – [32]; *Duus v Dalvella Pty Ltd (No 3)* [2008] FCA 546 at [41]; *Holden v Santosa* (2011) 9 ABC(NS) 107; [2011] FMCA 251 at [28], [29] (Hartnett FM); *Donnelly v Windoval Pty Ltd* (2012) 11 ABC(NS) 359; [2012] FCA 943 at [70] (Foster J); *Donnelly v Windoval Pty Ltd* (2014) 11 ABC(NS) 658; [2014] FCA 80 at [140] (Foster J).

Section 121(1)(a) does not require a creditor (actual or foreseen) at the time of the transfer to be one of the creditors proving (or capable of proving) in the bankruptcy of the transferor: *Nelson v Mathai* (2011) 253 FLR 139; [2011] FMCA 686 at [26] (Riethmuller FM).

[121.1.35] Section 121(1): Purpose

Main purpose

The relevant purpose is to prevent the transferred property from becoming divisible amongst the transferor's creditors or to hinder or delay that process: s 121(1)(b). "Purpose" is an intention to achieve a particular result. It is not "motive": *Donnelly v Windoval Pty Ltd* (2012) 11 ABC(NS) 359; [2012] FCA 943 at [74] (Foster J); *Donnelly v Windoval Pty Ltd* (2014) 11 ABC(NS) 658; [2014] FCA 80 at [144] (Foster J). The motive for a person's conduct is the person's reason for engaging in it: *Shepard v Behman* [2019] FCA 1801 at [118] (Thawley J).

The relevant purpose of the transferor must be that person's "main purpose". The term "main" is not defined. The relevant dictionary definition is "chief; principal; leading". It does not have to be the sole purpose and therefore a transfer will be caught if the transferor also had other purposes in mind: *Prentice v Cummins (No 5)* (2002) 124 FCR 67; 51 ATR 400; [2002] FCA 1503 (Sackville J); although the decision was reversed on appeal the Full Court did not disagree with the learned trial judge on this issue: *Cummins v Trustees of the Property of Cummins* (2004) 2 ABC(NS) 136; 56 ATR 519; 209 ALR 521; [2004] FCAFC 191 (Carr, Tamberlin and Lander JJ); the decision of the Full Court was reversed on appeal: *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 227 CLR 278; 3 ABC(NS) 814; [2006] HCA 6 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

A trustee may seek to establish the main purpose by either:

1. Direct evidence.
2. By admission.
3. The circumstances appearing in the evidence give rise to a reasonable and definite inference that the transferor had the main purpose.
4. Section 121(2).

A trustee may resort to modes of proving the transferor's main purpose other than by resort to the presumption under s 121(2): s 121(3). An attempt by a transferee to establish that the transferor had a purpose in making the transfer which is not the "main purpose", would not render unavailable the reasonable inference of insolvency required to support the presumption created by s 121(2): *Re Jury* (1999) 92 FCR 68; [1999] FCA 671 at 82 (FCR); *Sheahan v Frost* (2011) 5 BFRA 501; [2011] FCA 356 at [116] (Mansfield J).

Purpose inferred

The trustee will ordinarily seek to persuade the court that the main purpose can be inferred from the surrounding circumstances at the time of the transfer or by reliance on s 121(2). If that provision is relied upon, the trustee may, by other means, also seek to prove the relevant purpose: *Re Jury* (1999) 92 FCR 68; [1999] FCA 671 (Ryan, Heerey and Katz JJ); *Sheahan v Frost* (2011) 5 BFRA 501; [2011] FCA 356, (Mansfield J); *Donnelly v Windoval Pty Ltd* (2014) 11 ABC(NS) 658; [2014] FCA 80 (Foster J).

Where main purpose is sought to be established by inference, the question of the transferor's purpose is an objective one decided by inference against all the relevant circumstances: *Marchesi v Apostoulou* (2007) 5 ABC(NS) 131; [2007] FCA 986 at [81] (Jessup J); *Combis (Trustee) v Spottiswood (No 2)* (2013) 11 ABC(NS) 407; [2013] FCA 240 at [63] (FCA) (Logan J). A trustee must establish that the circumstances appearing in the evidence gave rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability. In drawing the inferences from the primary facts, the court would have regard to the seriousness of the allegations and the gravity of the consequences of any adverse findings: *Trustees of the Property of Cummins (a Bankrupt) v Cummins* (2006) 227 CLR 278; 3 ABC(NS) 814; [2006] HCA 6 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1, at 5 (Dixon, Williams, Webb, Fullagar and Kitto JJ); *Re Day* (2017) 91 ALJR 262; 340 ALR 368; [2017] HCA 2 at [15], [18] (Gordon J); s 140(2) *Evidence Act 1995* (Cth).

Surrounding circumstances

A court could infer from the surrounding circumstances (independently of s 121(2)) that the transferor had the relevant main purpose. For example, where a debtor transfers a property without sufficient assets to meet her or his debts, it could be readily inferred that the debtor had the requisite main purpose.

A transferor may have the main purpose even if the transferor has no creditors, or is able to satisfy all the creditors, at the date of the transfer. The class of creditors to which the provision is directed includes existing and impending creditors. There is no requirement that there be a plurality of creditors: *Trustees of the Property of Cummins (a Bankrupt) v Cummins*. A relevant factor may include the transferor being alerted to the importance of holding assets in another person's name due to business risks: *Turner as Trustee of the Bankrupt Estate of Wallace v Wallace* [2017] FCCA 3044 at [88] (Judge Reithmuller).

In *Prentice v Cummins (No 5)* (2002) 124 FCR 67; 51 ATR 400; [2002] FCA 1503 at 100 (FCR), the factors which the primary judge identified in all the circumstances as establishing that the transferor had the requisite main purpose were:

1. Knowledge of incurring very substantial tax liabilities, contingent only upon issuing an assessment.
2. Knowledge that the assessments would be issued once it became known the income tax returns had not been lodged.
3. Voluntary divestiture of virtually all of the transferor's assets.

4. The assets retained were not sufficient to meet those tax obligations, if the assessments were issued.
5. The transferor saw the transfers as increasing the chances that the assets would be protected from any claims made against the transferor: *Donnelly v Windoval Pty Ltd* (2012) 11 ABC(NS) 359; [2012] FCA 943 at [71] – [72] (Foster J).

There was evidence that attention had been given to s 121 of the *Bankruptcy Act 1966* (Cth). At trial the respondent wife, by her counsel, identified several alternative explanations for the transactions, one of which was to alleviate the transferor of matrimonial difficulties. Another was to provide for the transferor's wife and children. Third, it was submitted the transfers were made with the apprehension that the High Court may change the law relating to the liability of counsel in negligence.

When determining the obligation of the transfer to meet tax obligations upon the issuing of assessments, it was acceptable for the primary judge to consider and take into account the returns lodged after the date of the transfer in determining the likely obligation for earlier years. The High Court said that the state of the returns was not too remote as to be incapable of throwing light upon the level of receipts of the transferor's earlier practice: *Trustees of the Property of Cummins (a Bankrupt) v Cummins* at [50]. In *Rambaldi v Volkov* (2008) 7 ABC(NS) 25; [2008] FCA 1957 at [49], Ryan J found that the main purpose established by reason of the proximity of the entering into of the financial agreement under the *Family Law Act 1975* (Cth) and the issue of a summons for final judgment in an action against the bankrupt. His Honour said that it was significant that within a month of entering into the financial agreement, the bankruptcy occurred upon presentation of a debtor's petition.

The main purpose was established when a person with limited means had commenced litigation having been informed of the risks of an adverse order for costs which he understood and transferred a property before the trial: *Holden v Santosa* (2011) 9 ABC(NS) 107; [2011] FMCA 251 at [27], [28] (Hartnett FM).

In *Donnelly v Windoval Pty Ltd* (2014) 11 ABC(NS) 658; [2014] FCA 80, Foster J found the relevant purpose where the primary focus of the bankrupt's attention was the Commissioner of Taxation whom the bankrupt considered to be likely to become a creditor at some time in the future. It was found that the bankrupt appreciated certain tax deductions he had claimed were likely to be disallowed and in the event amendment assessments were issued he would not have sufficient funds to pay the additional tax assessed: at [145], [146]. His Honour said that the funds given to another entity by the bankrupt and intended to be moved onto other entities controlled by the bankrupt could be used for the benefit of the bankrupt, his family and associates while at the same time be kept beyond the reach of his creditors and in particular the Commissioner of Taxation: [147].

The Full Court in *Zreika v Royal* [2019] FCAFC 82 at [90] (Besanko, Farrell and O'Callaghan JJ) identified by way of example referring to *Cannane v J Cannane Pty Ltd (In Liq)* (adapting the statement to the present form of s 121), that:

(d) a substraction of assets which, but for the impugned transfer, would be available to meet the claims of present and future creditors is material from which an inference of the main purpose may be drawn;
(e) if property is transferred at an undervalue or is given away, that is a fact relevant to the main purpose of the transferor in transferring the property, although that is only one fact from which, dependent on the surrounding circumstances, an inference may be drawn as to the main purpose.

Insufficient assets to meet liabilities

Where a debtor transfers a property without sufficient assets to meet her or his debts, it could be readily inferred that the debtor had the requisite main purpose: *Prentice v Cummins (No 5)* (2002) 124 FCR 67; 51 ATR 400; [2002] FCA 1503 (Sackville J); decision reversed on appeal: *Cummins v Trustees of the Property of Cummins* (2004) 2 ABC(NS) 136; 56 ATR 519; 209 ALR 521; [2004] FCAFC 191 (Carr, Tamberlin and Lander JJ). The majority (Carr and Lander JJ) said there was insufficient evidence adduced to show that, by the transfers, the

bankrupt had denuded himself of assets sufficient to pay his supposed tax liability: at [108], [126]. On appeal the High Court said that what had been required for the trustees to succeed at trial was that the circumstances appearing in the evidence gave rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability, that, in making the transactions the bankrupt had the "main purpose": *Trustees of the Property of Cummins (a Bankrupt) v Cummins* at [33]. The High Court said, in reversing the decision of the Full Court, that it is in the highest degree unlikely that a junior counsel with an insubstantial practice would obtain favourable recommendation for the appointment of senior counsel. It was also unlikely that a senior counsel would be able to maintain two sets of chambers: at [45]. It was appropriate for the trial judge to have used the gross receipts and net business income of later years as they were not so remote as to be incapable of throwing light on the level of receipts from the earlier practice as senior counsel: at [49]: *Scott v Page* [2003] FMCA 439 at [40] (McInnis FM).

In *Andrew v Zant Pty Ltd* (2004) 213 ALR 812; [2004] FCA 1716 at [93] (Hill J) the court found there was a main purpose to delay or hinder the recovery of income tax not yet assessed, in respect of years for which the transferor did not lodge income tax returns: note as to the form of orders.

In *Marchesi v Apostoulou* (2007) 5 ABC(NS) 131; [2007] FCA 986 at [90] – [92], Jessup J held that the relevant main purpose was established in these circumstances: first, there were large tax assessments; second, the timing of the transfers just after the transferor had knowledge of the assessments; third, the claims consequent upon the issue of the assessments had the potential to diminish the capacity of the transferor to provide for his children which was one transferor's priorities; and fourth, failure to call an accountant who, it was contended, provided accounting advice to the transferor to restructure his affairs. However, the fact that a person is about to enter into a risky business and may be exposed to contingent liabilities in the future does not mean that the person is "about to become insolvent": *Jessup (Trustee) v Mountain View Farm* [2002] FCA 312 (Spender J).

Knowledge of claims

From looking at all the surrounding circumstances. An illegitimate purpose may be capable of being inferred from those circumstances, and may be reasonably inferred if the transfer was made at a time when the transferor knew of claims personally against her or him and where it is apparent that the transferor was concerned to protect property against those claims: *Worrell v Pix* [2002] FMCA 93 (Driver FM).

Section 121(2)

The deeming provision has nothing to do with purpose: *Marchesi v Apostolou* at [95] (Jessup J). It is not a presumption which can be displaced by evidence: *Lo Pilato v Kamy Saeedi Laywers Pty Ltd* [2017] FCA 34 at [158] – [162] (Katzmann J).

For definitions of "solvent" and "insolvent" see s 5(2) and (3). The Full Court in *Whitton v Regis Towers Real Estate Pty Ltd* (2007) 161 FCR 20; 5 ABC(NS) 294; [2007] FCAFC 125 said that the element of paying debts "out of the debtor's own money" does no longer appear in definitions of solvency and insolvency in s 5(2) and (3): *Lo Pilato (Trustee) v Kamy Saeedi Lawyers Pty Ltd* at [163].

The subsection requires three questions to be answered as a matter of objective fact: first, what were the transferor's debts; second, when did they fall due; and third, could the transferor pay those debts as and when they fell due: *Marchesi v Apostolou* at [95] (Jessup J); *Donnelly v Windoval Pty Ltd* (2012) 11 ABC(NS) 359; [2012] FCA 943 at [79], [82] (Foster J).

If s 121(2) is sought to be used to establish the purpose then the trustee need not prove the transferor was in fact insolvent, or was about to become insolvent, at the time of the transfer. The trustee need only prove that it is reasonable to infer that the transferor was insolvent or about to become insolvent, for example by the existence of a real risk of a judgment: *Scott v Page* [2003] FMCA 439 at [50] (McInnis FM); *Schmierer v Smith (No 2)* [2004] FMCA 856 (Raphael FM); *Lo Pilato v Kamy Saeedi Laywers Pty Ltd* [2017] FCA 34 at [162] (Katzmann J). Where there was a contract for the sale of land Katzmann J, noted that the question of the

date of the transfer was not free from doubt, followed *Camm v Linke Nominees Pty Ltd* (2010) 190 FCR 193; 8 ABC(NS) 459; [2010] FCA 1148 (Tracey J) and determined that the relevant date is the date of registration of the memorandum of transfer: [177]–[185]. The fact that a person is about to enter into a risky business and may be exposed to contingent liabilities in the future does not mean that the person is "about to become insolvent": *Jessup (Trustee) v Mountain View Farm* [2002] FCA 312.

In *Re Jury* (1999) 92 FCR 68; [1999] FCA 671 at [55], the Full Court said that:

> The statutory provision, as a matter of ordinary language, leaves open the possibility that it may be also reasonably be inferred that the transferor was solvent. In other words, it is sufficient if the inference of insolvency is reasonably open. An analogy is the leaving of a case to a civil jury. If it can reasonably be inferred from all the circumstances that the defendant was negligent, or that the publication complained of was defamatory of the plaintiff, then the matter must go to a jury. Nevertheless the jury is not required to draw the relevant inference, and may not do so.

Buchanan J (Marshall and Tracey JJ expressing no view on this issue but otherwise concurring) in *Whitton as Trustee of the Estate of Rose v Regis Towers Real Estate Pty Ltd (in administration)* at [25], expressed reservations about the last three sentences of the decision of the Full Court in *Re Jury* (1999) 92 FCR 68; [1999] FCA 671 and whether that correctly reflects the intention and language of s 121(2). His Honour was unable to agree with the view of the Full Court if what their Honours meant by the analogy, was that something must be regarded as established for the purposes of s 121(2) if it is not so unreasonable that a civil jury could not be trusted with the issue. That on the difficulties, his Honour said, with that view is that leaving a matter to a civil jury is no dispositive. A civil jury may not draw the possible inference but decide to the contrary. The finding of inference for the purpose of s 121(2) may be determinative of one element of an important issue. His Honour said that he would hesitate to put too much weight on "such a slender reed". The question which falls for consideration is not whether there might be a matter which could, as a matter of law, be left in the hands of a civil jury, but whether the trial judge whose task it is to apply s 121(2) is satisfied, as a matter of reasonable inference, and having regard to all the circumstances, that it should be concluded that the transferor was, at the time of the transfer, insolvent or about to become so. On the facts, his Honour said that the suggested inference was too much tenuous to be regarded as reasonably open on any test and it was only guesswork and speculation. Buchanan J also considered the meaning of "solvency" and "insolvency" and said that the definitions of solvency and insolvency in s 5(2) and (3) do not contain the term "out of the debtor's own property". His Honour applied the reasoning of Palmer J in *Lewis v Doran* (2004) 184 FLR 454; 208 ALR 385; 50 ACSR 175; 22 ACLC 1009; [2004] NSWSC 608 at [116] and the Court of Appeal in *Lewis v Doran* (2005) 219 ALR 555; 54 ACSR 410; 23 ACLC 1666; [2005] NSWCA 243 at [109] – [112], which dealt with s 95A of the *Corporations Act 2001* (Cth), to the definitions which appear in s 5(2) and (3).

Section 121(4A) provides a presumption of insolvency in the prescribed circumstances. That provision was introduced by the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (Cth) and applies to transfers on or after 31 May 2006: s 30(3). The applicant trustee has the onus of establishing the pre-conditions to the operation of the presumption, being the failure of the transferor to maintain the usual or proper books, accounts and records or having kept such books, accounts or records, has not maintained them.

Commentary applicable under former legislation

If persons take from a man or woman who is in difficulties a deed of assignment of substantially the whole of her or his property which has the effect of withdrawing and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void under the bankruptcy law. It is fraudulent as well as void whatever may have been the view of those who were engaged in the transaction, that it might have been the best thing for the debtor, or that it might afford an effectual way of paying the creditors: *Re Sinclair; Ex parte Chaplin* (1884) 26

Ch D 319 at 331; *Re Hirth; Ex parte Trustee* [1899] 1 QB 612; *Re Slobodinsky; Ex parte Moore* [1903] 2 KB 517; *Re David and Adlard* [1914] 2 KB 694; *Re Goldburg; Ex parte Silverstone* [1912] 1 KB 384; and see also *Re Prior; Ex parte Trustee* [1921] B & CR 198 (CA); *Re Simms* [1930] 2 Ch 22.

[121.2.10] Section 121(2): Meaning of "solvency" and "insolvency"

Refer to [5.2.05] and [5.10.05].

[121.3.05] Section 121(3): "transfer"

The expression "transfer of property" will bear its ordinary meaning, save to the extent that it is expanded by s 121(9). The provisions which appear in ss 121(9)(b), 120(7) and 122(8) would be expected to have the same meaning: *Peldan v Anderson* (2006) 227 CLR 471; 80 ALJR 1588; 229 ALR 432; [2006] HCA 48 at [23], [24], [26] (Gummow ACJ, Kirby, Hayne, Callinan and Crennan JJ). As to "transfer" refer to [120.1.05]. Like s 120(7), s 121(9) provides that a transfer of property includes:

(a) a payment of moneys; and
(b) circumstances where a person who does something that results in another person becoming the owner of property that did not previously exist.

That provision operates to treat person A, who did something which resulted in person B becoming the owner of property that did not previously exist, as having transferred "the property" to B. The word "previously" indicates that the property did not exist prior to the act of A which results in B becoming the owner of it. The act of A is to be regarded as the "transfer of property" and the property that did not previously exist it taken to be the "transferred property": *Peldan v Anderson* at [25]. In most instances the "transferred property" is "carved out" of existing property but s 121(9)(b) has operation when that does not occur. The registration of an instrument effecting a unilateral severance of a joint tenancy under s 59(1) of the *Land Title Act 1994* (Qld) satisfied s 121(9)(b) as the other joint tenant became "the owner of property that did not previously exist". An interest as tenant in common was acquired whereas previously there was an interest as joint tenant: *Peldan v Anderson* at [30]. The provision requires the doing of something by a person to result in another person becoming the owner of property. More is required than a mere link between the doing of something and the outcome. The doing of something must bring about the outcome. The outcome has to arise as an effect of the relevant action: *Re Rose* [2006] FCA 1553 at [157], [166] – [170] (Graham J); upheld on appeal *Whitton v Regis Towers Real Estate Pty Ltd* (2007) 161 FCR 20; 5 ABC(NS) 294; [2007] FCAFC 125.

Commentary applicable under former legislation

For a discussion of the meaning of the word "disposition" as it was used in this section as previously enacted, see judgment of Street CJ in Eq in *Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)* [1974] 1 NSWLR 254. A payment to the respondent not the fact that it was made by way of loan was what constituted a disposition of property under this section: *Re Barton; Ex parte Official Receiver* (1983) 76 FLR 223; 52 ALR 95 (affd on appeal by *Barton v Official Receiver* (1986) 161 CLR 75; 60 ALJR 556; 66 ALR 355; 4 ACLC 533; [1986] HCA 44 (Gibbs CJ, Mason, Wilson and Dawson JJ)).

[121.4.05] Section 121(4): "consideration", "market value", "in good faith"

The elements in subs (4) are cumulative: *Re Jury* (1999) 92 FCR 68; [1999] FCA 671 at 84 (FCR).

As to the terms "consideration" and "market value", refer to [120.1.17]. Section 120(6) deems certain prescribed circumstances which relate to the relationship between the parties to not be consideration, for example love and affection, promise to marry and the fact that the transferor is related or is a spouse of the transferor. Subsection (5)(e) was introduced as part of the anti-avoidance provision by the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006*. It applies to transfers from 31 May 2006: s 30(3).

If the consideration was paid to a third party then reference should be made to s 121A. Section 121A applies to transactions where the consideration, or part thereof, was given by the

transferee to a third party. That section was introduced as part of the anti-avoidance provisions by the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* and applies to transfers on or after 31 May 2006: s 30(3). The provision enables the trustee to recover the consideration from the third party who received the consideration. Where the consideration, or part thereof, is given by the transferee to a third party, s 121 applies as if the giving of the consideration to the third party were a transfer by the transferor of the property constituting the consideration. If the giving of the consideration to the third party is void against the trustee, then the trustee has the same rights to recover the property constituting the consideration as the trustee would have if the giving of the consideration had actually been a transfer by the transferor of the property constitution the consideration.

Good faith

Hill J applied the meaning of "good faith" as considered by the Full Court in *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515; 107 ALR 199 (Wilcox, Gummow and von Doussa JJ). In the context of the former s 121, "good faith" meant without notice of any fraud or preference contrary to the statute, or whether the transferee was privy to the fraud. The same notion can be carried into the present provision save that the notions of fraud or preference have been substituted by the notions contained in s 121(4)(b) and perhaps the notion of solvency in s 121(2): *Ashton v Prentice* (unreported, Fed Ct of Aust, Hill J, 23 October 1998).

Under s 121(4) the transferee must take the transfer without knowledge of the transferor's main purpose or could not have reasonably inferred that the transferor had that relevant main purpose and that person must not reasonably have inferred that the transferor was at the time of the transfer about to become insolvent.

The use of the term "reasonably" imputes an objective test, applied to the knowledge that the transferee in fact had at the time.

Commentary applicable under former legislation

This subsection displaces the effect of *Re Gunsbourg* [1920] 2 KB 426, and *Re Dombrowski; Ex parte Trustee* [1923] B & CR 32. A bankrupt who, prior to the bankruptcy and with the purposes described in subsection (1) above, disposes of assets, passes to the disponee, whether ignorant of the purpose or not, a title to such assets which is valid until set aside. If, before proceedings are taken to set aside the disposition, the disponee sells the assets to a bona fide purchaser for value, and the proceeds of sale cannot be traced in the disponee's hands he cannot be made personally liable to pay to the trustee of the bankrupt the value of the assets transferred to him: *Brady v Stapleton* (1952) 88 CLR 332; [1952] HCA 62. As to procedure and parties generally, see *Noakes v J Harvey Holmes & Son* (1979) 37 FLR 5.

An arrangement for a bank to advance money to a bankrupt's daughter and son-in-law to finance the building of a house for themselves and made by the bankrupt with the intention of putting her available assets beyond the reach of her creditors was held to be a fraudulent disposition within the meaning of this section as it was previously enacted. The meaning of the word "disposition" was discussed particularly in relation to circumstances where assets are settled by a third party but on behalf of the bankrupt: *Caddy v McInnes* (1995) 58 FCR 570; 131 ALR 277 (Beaumont, Whitlam and Tamberlin JJ).

[121.5.05] Section 121(5): Payment by trustee

The trustee must pay the transferee an amount equivalent to the value of any consideration paid by the transferee. See commentary on s 120(4) at [120.1.17].

[The next text page is 10-2651]

insurance. The trustee contended that the monthly payments (Benefits) were income and the applicant contended that the Benefits are "property" and a not divisible amongst creditors by reasons of s 116(2)(g). Central to the applicant's contention was the proposition that s 116(1) is "an exhaustive statement of every form of property that is available to the trustee to pay dividends" and the "only source of statutory power to make money divisible pursuant to the Act". Therefore, it was contended that where money (as property) falls within s 116(2)(g) then it cannot, by the operation of Div 4B Pt VI become divisible among a bankrupt's creditors by any other statutory mechanism. The court rejected the applicant's contentions.

The definition of "income" is qualified in two ways, by inclusion in s 139L(1)(a) and the exclusion by s 139L(1)(b). The enactment of a provision expressly excluding the Benefits from the definition of "income" would be an obvious drafting device by which an intention to exclude the Benefits from Div 4B of Pt VI might be made clear. The absence of an express exclusion in s 139L(1)(b) of the Act tells against the asserted implication that Div 4B not operate on the Benefits in accordance with its terms. An express or implied exclusion is necessary because, as the applicant properly concedes, the Benefits would otherwise fall within the ordinary meaning of the word and be captured by Div 4B and, also, because "the provisions contained in that Division are not made subject to any other provision of the Act": [48]. The extent that the Benefits fall within the definition of income in s 139L, they are not divisible among the applicant's creditors because they are so defined. The regime established by Div 4B of Pt VI "approaches a code" and s 116 is expressed to be subject to the *Bankruptcy Act 1966* (Cth): [62] – [64]. Section 140 has a wide meaning so as to include property divisible among creditors within the meaning of s 116, and money received by the trustee by the operation of provisions having nothing to do with the vesting or realisation of the bankrupt's property, including provisions such as s 139P and s 139S: [65].

CXTB v Inspector-General in Bankruptcy ***[2019] AATA 5194***

The applicant, as an employee, made an injury claim which is governed by the *Victorian Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (WIRC Act). That Act provides an entitlement for compensation to a worker if there is caused to them an injury out of, or in the course their employment. After notification of the acceptance of the claim was received, the applicant presented a debtor's petition and the Official Trustee became the trustee in bankruptcy. An income contribution assessment was made by the Official Trustee, which included as income the payments received pursuant to the injury claim. Upon an application for review of the Income Contribution Assessment to the Inspector-General, the applicant's liability to make an income contribution was reduced. The issue for determination is whether payments received by the applicant following acceptance of the Work Cover claim constituted income within the meaning of s 139L(1) of the *Bankruptcy Act 1966* (Cth).

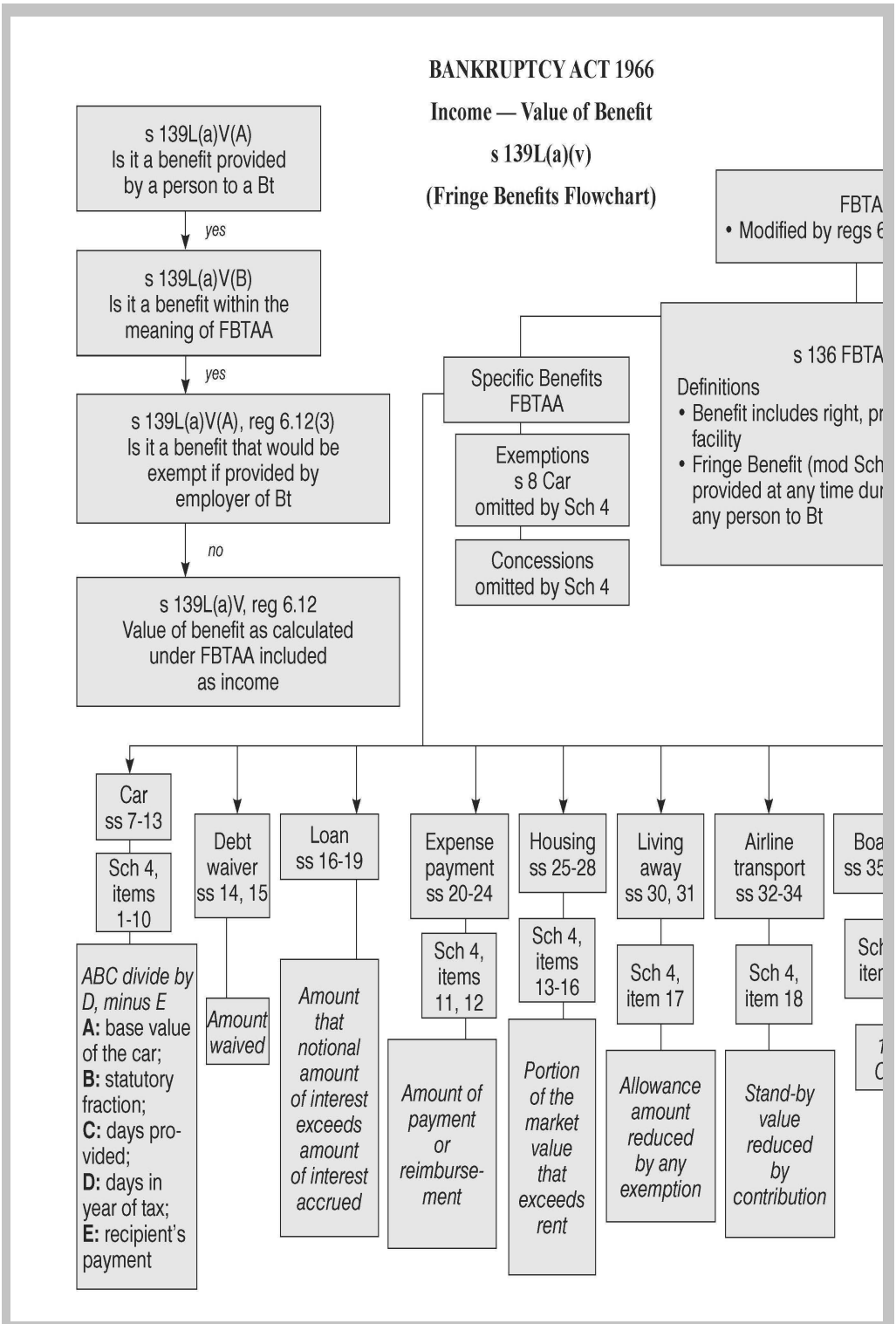
Held, that the payments were income within the meaning of s 139L(1). The applicant's injury claim was for weekly compensation payments for loss of earnings arising from an incapacity to work by reason of the injury. There was no evidence of the claim being on the basis of pain or suffering, non-economic loss or other common law rights. There was a regular periodicity of payment. When the pay advice was created for each pay period, income tax was deducted from the payments and a net figure was calculated, and the applicant's income tax return included the aggregate of gross payments received as income. The absence of an express exclusion in s 139L(1)(b) of the payments received by a bankrupt from a workers' compensation scheme tells against the contention that the payments made by the applicant under the WIRC Act are not income in accordance with the ordinary concepts and usages of that term.

[139L.0.35] Expenses in deriving income

Section 139L does not expressly provide that expenses incurred in deriving the income are to be deducted except for s 139L(1)(a)(vii). That provision recognises that expenses necessarily incurred (other than of a capital nature) in deriving the money or benefits received as a result of work done or services performed by the bankrupt are to be deducted in determining the income of the bankrupt.

In *Newcombe v Inspector-General in Bankruptcy* (2004) 85 ALD 402; [2004] AATA 1320 at [43] – [44], Deputy President DG Davis said that this subsection provided an indication that the concept of income is intended to involve making a deduction for expenses necessarily incurred in connection with the bankrupt's work or services, but not a deduction for expenses of a capital nature. Depreciation is an expense of a capital nature and is not deducted to determine the bankrupt's income.

[139L.0] Section 139L(a)(v) — Income — Value of benefit


BANKRUPTCY ACT 1966
Income — Value of Benefit
s 139L(a)(v)
(Fringe Benefits Flowchart)
s 139L(a)V(A)
Is it a benefit provided by a person to a Bt
yes
s 139L(a)V(B)
Is it a benefit within the meaning of FBTAA
yes
s 139L(a)V(A), reg 6.12(3)
Is it a benefit that would be exempt if provided by employer of Bt
no
s 139L(a)V, reg 6.12
Value of benefit as calculated under FBTAA included as income
FBTA
• Modified by regs 6
s 136 FBTA
Definitions
• Benefit includes right, pr facility
• Fringe Benefit (mod Sch provided at any time dur any person to Bt
Specific Benefits FBTAA
Exemptions s 8 Car omitted by Sch 4
Concessions omitted by Sch 4
Car ss 7-13
Sch 4, items 1-10
ABC divide by D, minus E
A: base value of the car;
B: statutory fraction;
C: days provided;
D: days in year of tax;
E: recipient's payment
Debt waiver ss 14, 15
Amount waived
Loan ss 16-19
Amount that notional amount of interest exceeds amount of interest accrued
Expense payment ss 20-24
Sch 4, items 11, 12
Amount of payment or reimbursement
Housing ss 25-28
Sch 4, items 13-16
Portion of the market value that exceeds rent
Living away ss 30, 31
Sch 4, item 17
Allowance amount reduced by any exemption
Airline transport ss 32-34
Sch 4, item 18
Stand-by value reduced by contribution
Boa ss 35
Sch iter

139M Derivation of income

(1) Income is taken to be derived by a bankrupt for the purposes of this Division even though it is not actually received by the bankrupt because:

(a) an amount is deducted from it, or it is wholly or partly otherwise applied, under a law of the Commonwealth, of a State or of a Territory; or

(b) it is reinvested, accumulated or capitalised; or

(c) it is dealt with on behalf of the bankrupt or as the bankrupt directs.

(2) A reference in this Division to the income that a bankrupt is likely to derive during a contribution assessment period includes a reference to income that the bankrupt has derived during that period.

(3) A reference in this Division to income derived by a bankrupt during a contribution assessment period includes a reference to income so derived in respect of work done or services performed by the bankrupt before that period or work to be done or services to be performed by the bankrupt after that period.

[S 139M insrt Act 9 of 1992, s 25]

SECTION 139M COMMENTARY

[139M.0.10] General note

Section 131 of the *Bankruptcy Act 1966* and s 101 of the *Bankruptcy Act 1924* spoke of the bankrupt being "in receipt of" income as did the various English statutes. The concept of "deriving" income and the provisions of this section render obsolete the notion that a bankrupt is not in receipt of income until he or she actually receives it, nor is it any longer necessary that there be an existing and continuing state of affairs. Such authorities as *Re Shine* [1892] 1 QB 522; *Federal Commissioner of Taxation (Cth) v Official Receiver* (1956) 95 CLR 300; and *Falstein v Official Receiver* (1962) 108 CLR 523, are no longer relevant apart from historically.

The term "derived" is defined in s 139K and means earned, derived or received from any source, whether within Australia or not.

By way of example, a barrister who was assessed for income tax purposes on a cash basis, derived an income in the year in which the fees were received or deemed to have been received but not necessarily the year in which the fees were earned: *Re Sharpe; Ex parte Donnelly* (1998) 80 FCR 536 (Lockhart J).

139N Income varied by income tax payments and refunds and child support payments

(1) The income that is likely to be derived, or was derived, by a bankrupt during a contribution assessment period:

(a) is taken to be reduced by:

(i) any amount that the bankrupt pays or is likely to be liable to pay, or paid or was liable to pay, as the case may be, during that period in respect of income tax (but not including any amount that is in respect of a provable debt); and

(ii) [Repealed]

(iii) if the bankrupt pays or is likely to be liable to pay, or paid or was liable to pay, as the case may be, during that period an amount for the support of a child pursuant to a maintenance agreement entered into under the *Family Law Act 1975* or under a maintenance order—so much of that amount as does not exceed the maximum amount that, but for that agreement or order, the bankrupt could be, or could have been, liable to pay during that period in respect of child support under the *Child Support (Assessment) Act 1989*; and

(b) is taken to be increased by any amount that the bankrupt receives or is likely to receive, or received or was entitled to receive, as the case may be, during that period as a refund of income tax.

[Subs (1) am Act 131 of 2002, s 3 and Sch 1 item 89; Act 44 of 1996, s 3 and Sch 1 item 252–254]

(2) A refund is not taken into account under paragraph (1)(b) if it relates to a year of income that ended before the date of the bankruptcy.

[Subs (2) insrt Act 131 of 2002, s 3 and Sch 1 item 90]

(3) If a refund relates to a year of income that commenced before, but ended after, the date of the bankruptcy, then it is taken into account under paragraph (1)(b) only to the extent that the refund is attributable to the part of the year of income after the date of bankruptcy. For this purpose, the refund is apportioned on a time basis.

[Subs (3) insrt Act 131 of 2002, s 3 and Sch 1 item 90]

[S 139N am Act 131 of 2002; Act 44 of 1996; insrt Act 9 of 1992, s 25]

SECTION 139N COMMENTARY

[139N.0.10] General note

It was held under s 101 of the *Bankruptcy Act 1924* that amounts deducted by an employer as instalments of income tax retained their status as income but the employee was not in receipt of them until he or she actually received them in her or his hands: *Federal Commissioner of Taxation (Cth) v Official Receiver* (1956) 95 CLR 300.

The amendments effected to this section by items 252 - 254 of Sch 1 to the *Bankruptcy Legislation Amendment Act 1996* apply to all bankruptcies current on or after 16 December 1996 but they do not affect any assessment made before that date.

The combined income, during a contribution assessment period, which a bankrupt is likely to derive or has derived is to be reduced by the amount that the bankrupt paid or is likely to pay in respect of income tax (which includes the Medicare levy: s 139K, and child support): s 139N(a)(i). The income tax deducted does not include any amount which is in respect of a provable debt. The income is taken to be increased by an amount the bankrupt received or is likely to receive during the period as a refund of income tax.

If a trustee makes an income contribution assessment pursuant to either s 139L(1)(a)(i) or s 139Y, the income assessed does not necessarily equate with the assessable income for income tax purposes. Under s 139Y the bankrupt is deemed to have received or likely to receive remuneration, in excess of that which the bankrupt actually receives or will receive. For income tax purposes, the bankrupt will not have paid or be likely to pay income tax on the deemed income. By utilising an interposing vehicle or attempting to avoid the income contributions provisions, the bankrupt may be exposed to a higher income contribution than if the income was derived personally: *Re Ellis; Ex parte Jefferson* (unreported, Fed Ct of Aust, Drummond J, 17 February 1995).

There are four alternative methods provided for the calculation of the deduction in respect to the income that is likely to be derived or was derived during the contribution assessment period:

(a) an amount the bankrupt pays in respect of income tax during the period;
(b) any amount that the bankrupt is likely to be liable to pay during the period in respect of income tax;
(c) any amount that the bankrupt paid during the period in respect of income tax;
(d) any amount that the bankrupt was liable to pay during the period in respect of income tax.

The provision does not specify the circumstances when the respective methods should be used. This will not be difficult for an employed person on a wage or salary. It will become more complicated when a person is self employed or receives income over and above a wage or salary. The obligation to pay income tax and the time when a debt for income tax arises is discussed at [82.1.112]. The person may also be required to pay income tax on a quarterly basis under the Pay As You Go instalment system which commenced on 1 July 2000: *Taxation Administration Act 1953* (Cth), Pt 2-10 Div 45 of Schedule 1.

Deputy President DG Davis expressed the view that a calculation of a bankrupt's after-tax income should be made by reference to the bankrupt's liability for income tax and not the income tax actually paid, provided the approach is used consistently in successive years. The approach of assessing the deduction on amounts actually paid may be appropriate for employees from whose salary PAYE deductions are made: *Newcombe v Inspector-General in Bankruptcy* (2004) 85 ALD 402; [2004] AATA 1320 at [35].

[The next text page is 10-5201]

Subdivision D – Liability of bankrupt to pay contributions

139P Liability of bankrupt to pay contribution

(1) Subject to section 139Q, if the income that a bankrupt is likely to derive during a contribution assessment period as assessed by the trustee under an original assessment exceeds the actual income threshold amount applicable in relation to the bankrupt when that assessment is made, the bankrupt is liable to pay to the trustee a contribution in respect of that period.

(2) Subject to section 139Q, if the income that a bankrupt is likely to derive during a contribution assessment period as assessed by the trustee under an original assessment does not exceed the actual income threshold amount applicable in relation to the bankrupt when that assessment is made, the bankrupt is not liable to, but may if he or she so wishes, pay to the trustee a contribution in respect of that period.

[S 139P insrt Act 9 of 1992, s 25]

SECTION 139P COMMENTARY

[139P.0.10] General note

Regulation 6.14 provides for modes of payment of contributions. Regulation 6.15 provides for contributions where a bankrupt dies.

A trustee is to monitor payment of contributions to ensure the liability is discharged and if necessary, take appropriate steps to recover contributions that remain unpaid after the time for payment has expired: r 42-190 *Insolvency Practice Rules (Bankruptcy) 2016*.

[139P.1.05] Section 139P(1): After-acquired property

It has been decided that income over and above the amount which a bankrupt is required to pay to the trustee under this section and which is accumulated is not after-acquired property which vests in the trustee. The bankrupt is entitled to offer it to her or his creditors when proposing under s 73 a composition in satisfaction of the debts. If that income is used to acquire property, within the meaning of s 5(1), then as after-acquired property it will vest in the trustee in bankruptcy pursuant to s 58(1)(b), unless it is exempt under s 116(2): *Di Cioccio v Official Trustee in Bankruptcy* (2015) 229 FCR 1; 12 ABC(NS) 524; [2015] FCAFC 30 (Edmonds, Gordon and Beach JJ). A bankrupt has an obligation under s 77(1)(f) to disclose such property to her or his trustee as soon as practicable.

139Q Change in liability of bankrupt

(1) If the income that a bankrupt is likely to derive, or derived, during a contribution assessment period as assessed by the trustee under a subsequent assessment exceeds the actual income threshold amount applicable in relation to the bankrupt when the subsequent assessment is made, the bankrupt is liable to pay to the trustee a contribution in respect of that period.

(2) The liability of the bankrupt under subsection (1) in respect of a contribution assessment period is in substitution for any liability of the bankrupt in respect of that period under subsection 139P(1) or under any previous application of subsection (1) of this section and has effect despite subsection 139P(2).

(3) If the income that a bankrupt is likely to derive, or derived, during a contribution assessment period as assessed by the trustee under a subsequent assessment does not exceed the actual income threshold amount applicable in relation to the bankrupt when the subsequent assessment is made:

(a) the bankrupt is not liable to, but may if he or she so wishes, pay to the trustee a contribution in respect of that income; and

(b) any liability that the bankrupt had under subsection 139P(1) or under subsection (1) of this section to pay a contribution in respect of that period is extinguished.

[S 139Q insrt Act 9 of 1992, s 25]

SECTION 139Q COMMENTARY

[139Q.0.10] General note

Regulation 6.14 of the *Bankruptcy Regulations 1996* (Cth) provides for modes of contributions. Regulation 6.15 of the *Bankruptcy Regulations 1996* (Cth) provides for contributions where a bankrupt dies.

139R Liability not affected by subsequent discharge

Any liability of a bankrupt under section 139P or 139Q is not affected by his or her discharge from bankruptcy after the making of the assessment that gave rise to the liability.

[S 139R insrt Act 9 of 1992, s 25
Cross-reference: *Bankruptcy Regulations 1996*: reg 6.18 provides that a bankrupt who remains liable under s 139R in respect of a contribution that is due and unpaid after discharge must give notice in writing to the trustee of any change in particulars.]

139S Contribution payable by bankrupt

The contribution that a bankrupt is liable to pay in respect of a contribution assessment period is the amount worked out in accordance with the formula:

$$\frac{\text{Assessed income} - \text{Actual income threshold amount}}{2}$$

where:

Assessed income means the amount assessed by the trustee to be the income that the bankrupt is likely to derive, or derived, during the contribution assessment period.

Actual income threshold amount means the actual income threshold amount assessed by the trustee to be applicable in relation to the bankrupt when the assessment is made.

[S 139S insrt Act 9 of 1992, s 25]

139T Determination of higher income threshold in cases of hardship

(1) If:

(a) the trustee has made an assessment of a contribution that a bankrupt is liable to pay to the trustee for a contribution assessment period; and

(b) the bankrupt considers that, if required to pay that contribution, he or she will suffer hardship for a reason or reasons set out in subsection (2);

the bankrupt may apply in writing to the trustee for the making of a determination under this section for that period.

(2) The reasons are as follows:

(a) the bankrupt or a dependant of the bankrupt suffers from an illness or disability that requires on-going medical attention and the supply of medicines, and the bankrupt is required to meet a substantial proportion of the costs of that medical attention or those medicines from his or her income;

(b) the bankrupt is required to make payments from his or her income to meet the cost of child day-care to enable the bankrupt to continue in employment or other work;

(c) the bankrupt is living in rented accommodation that is not provided by:

(i) the Commonwealth, a State or a Territory; or

(ii) an authority of the Commonwealth, a State or a Territory; or

(iii) a local government authority;

and the bankrupt is required to pay the cost of that accommodation wholly or mainly from his or her income;

(d) the bankrupt incurs substantial expense in travelling to and from the bankrupt's place of employment or other work, whether by public transport or otherwise;

(e) the spouse of the bankrupt, or another person residing with the bankrupt, who ordinarily contributes to the costs of maintaining the bankrupt's household has become unable to contribute to those costs because of unemployment, illness or injury;

(f) any other reason prescribed by the regulations.

[Subs (2) am Act 44 of 1996, s 3 and Sch 1 item 255]

(3) The trustee must not make a determination under this section unless the bankrupt provides satisfactory evidence of the bankrupt's income and expenses, and any other matters on which the bankrupt relies to establish the reasons for the application.

(4) The trustee must decide the application as soon as practicable, and in any event not later than 30 days, after the day on which the application is received.

(5) If the trustee does not make a decision on the application within that period of 30 days, the trustee is taken to have made a decision at the end of that period refusing the application.

(6) If the trustee is satisfied that the bankrupt will suffer hardship if required to pay the contribution, the trustee may determine that, for the purposes of the application of section 139S in relation to the bankrupt in respect of the contribution assessment period, the actual income threshold amount that was applicable in relation to the bankrupt when the assessment was made is taken to have been increased to such amount as the trustee determines.

(7) If the trustee is not satisfied that the bankrupt will suffer hardship if required to pay the contribution, the trustee must refuse the application.

(8) If the trustee makes a determination under subsection (6), the trustee must make such assessment under section 139W as is necessary to give effect to the determination.

(9) The trustee must give written notice to the bankrupt:

(a) setting out the trustee's decision on the application; and

(b) referring to the evidence or other material on which the decision was based; and

(c) giving the reasons for the decision.

(10) The notice must include a statement to the effect that the bankrupt may request the Inspector-General to review the decision.

(11) A contravention of subsection (10) in relation to a decision does not affect the validity of the decision.

(12) The trustee's decision under this section is reviewable under Subdivision G in the same way as an assessment made by the trustee.

[S 139T subst Act 131 of 2002, s 3 and Sch 1 item 91; am Act 44 of 1996; insrt Act 9 of 1992, s 25]

SECTION 139T COMMENTARY

[139T.0.10] General note

A new s 139T was inserted by the *Bankruptcy Legislation Amendment Act 2002* (Cth), which applies to contribution assessment periods which commenced on and from 5 May 2003.

The reasons for the hardship must be one of the matters prescribed by s 139T(2). The matters specifically prescribed by that provision refer to a financial burden in the nature of expenditure of the bankrupt: *Milson v Official Receiver in Bankruptcy* [2004] AATA 275 at [18]; *Newcombe v Insolvency and Trustee Service Australia* [2007] AATA 1755 at [24].

Subdivision E – Provision of information to trustee

139U Bankrupt to provide evidence of income

(1) A bankrupt must, as soon as practicable, and in any event not later than 21 days, after the end of a contribution assessment period, give to the trustee:

(a) a statement:

(i) setting out particulars of all the income that was derived by the bankrupt during that contribution assessment period; and

(ia) setting out particulars of all the income that was derived by each dependant of the bankrupt during that contribution assessment period; and

(ii) indicating what income (if any) the bankrupt expects to derive during the next contribution assessment period; and

(iii) indicating what income (if any) the bankrupt expects each dependant of the bankrupt to derive during the next contribution assessment period; and

(b) such books evidencing the derivation of the income referred to in subparagraph (a)(i) as are in the possession of the bankrupt or the bankrupt can readily obtain.

Penalty: Imprisonment for 6 months.

[Subs (1) am Act 131 of 2002, s 3 and Sch 1 items 92 and 93]

(2) The particulars that a bankrupt is required to include in a statement given to the trustee under subparagraphs (1)(a)(i) and (ia) are all the particulars that are known to the bankrupt and any particulars that the bankrupt can readily obtain.

[Subs (2) am Act 131 of 2002, s 3 and Sch 1 item 94]

(3) Without limiting the generality of paragraph (1)(b), the books that a bankrupt is required to give to the trustee under that paragraph in respect of a contribution assessment period include:

(a) if the bankrupt received from his or her employer one or more pay slips or other documents evidencing salary or wages paid to him or her by that employer during that period—that document or each of those documents; and

(b) any copy of a group certificate or payment summary (within the meaning of section 16-170 in Schedule 1 to the *Taxation Administration Act 1953*) in the possession of the bankrupt that relates in whole or in part to that period; and

(c) any statement provided to the bankrupt by an ADI or other financial institution that shows periodic payments made during that period to an account kept by the bankrupt (either alone or jointly with any other person) with that institution; and

(d) any notice of assessment issued to the bankrupt under the *Income Tax Assessment Act 1936* in respect of a year of income in which that period is included; and

(e) if the bankrupt is in receipt of a pension, allowance or other benefit under a law of the Commonwealth, of a State or of a Territory—any letter or other document sent or given to the bankrupt by the Department or authority that administers the legislation or scheme under which the benefit is provided.

[Subs (3) am Act 179 of 1999, s 3 and Sch 11 item 3; Act 48 of 1998, s 3 and Sch 1 item 19; Act 170 of 1995, s 3 and Sch 2 items 54 and 55]

[S 139U am Act 131 of 2002; Act 179 of 1999; Act 48 of 1998; Act 170 of 1995; insrt Act 9 of 1992, s 25]

139V Power of trustee to require bankrupt to provide additional evidence

If the trustee has reasonable grounds to suspect that:

(a) any particulars set out in the statement given by the bankrupt under subsection 139U(1) are false or misleading in a material respect; or

(b) any material particulars have been omitted from that statement;

then, for the purpose of enabling the trustee to decide whether the particulars set out in the statement are correct, the trustee, by written notice given to the bankrupt, may require the bankrupt to give to the trustee within a specified period of not less than 14 days such information or books as are specified in the notice.

[S 139V insrt Act 9 of 1992, s 25]

Subdivision F – Assessments of income and contribution

139W Assessment of bankrupt's income and contribution

(1) As soon as practicable after the start of each contribution assessment period in relation to a bankrupt, the trustee is to make an assessment of the income that is likely to be derived, or was derived, by the bankrupt during that period, of the actual income threshold amount that is applicable in relation to the bankrupt when the assessment is made and of the contribution (if any) that the bankrupt is liable to pay in respect of that period under section 139S.

[Subs (1) am Act 44 of 1996, s 3 and Sch 1 items 256 and 257]

(2) If at any time, whether during or after a contribution assessment period, any one or more of the following paragraphs applies or apply:

(a) the trustee is satisfied that the income that is likely to be derived, or was derived, by the bankrupt during that period is or was greater or less than the amount of that income as assessed by the last preceding assessment in respect of that period;

(b) the base income threshold amount increased or decreased after the making of the last preceding assessment in respect of that period and before the end of that period;

(c) the trustee is satisfied that the number of the bankrupt's dependants increased or decreased after the making of the last preceding assessment and before the end of that period;

the trustee is to make a fresh assessment of the income that is likely to be derived, or was derived, by the bankrupt during that period, of the actual income threshold amount that is applicable in relation to the bankrupt when the assessment is made and of the contribution (if any) that the bankrupt is liable to pay in respect of that period.

[Subs (2) am Act 80 of 2004, s 3 and Sch 6 item 2; Act 44 of 1996, s 3 and Sch 1 items 258 and 259]

(3) The powers of the trustee under subsection (2) may be exercised on the trustee's own initiative or at the bankrupt's request, but the trustee is not required to consider whether to exercise those powers at the bankrupt's request unless the bankrupt satisfies the trustee that there are reasonable grounds for the trustee to do so.

(4) As soon as practicable after the making of an assessment the trustee must give to the bankrupt written notice setting out particulars of the assessment and informing the bankrupt about the possibility of a variation under section 139T.

[Subs (4) am Act 131 of 2002, s 3 and Sch 1 item 95]

[S 139W am Act 80 of 2004; Act 131 of 2002; Act 44 of 1996; insrt Act 9 of 1992, s 25
Cross-reference: *Bankruptcy Regulations 1996*: reg 6.17 details conditions, format and procedure for a certificate of outstanding contribution to be given to a bankrupt by the trustee in relation to assessments under s 139W(1), (2) or (4).]

SECTION 139W COMMENTARY

[139W.0.10] General note

In order for "income" to be assessable under s 139W(1), it must satisfy two tests:

1. The income must fall within the broad definition of income as expanded by s 139L; and
2. It must be derived or likely to be derived by the bankrupt:

Inspector-General in Bankruptcy v McGushin (2009) 178 FCR 27; 7 ABC(NS) 178; [2009] FCA 662 at [38], [42], [43] (McKerracher J).

Section 139WA was inserted by the *Bankruptcy Legislation Amendment Act 2002* (Cth) and applies to contributions periods which begin on or after 5 May 2003. The new provision is intended to make it clear that an assessment may be made during or after the assessment period and even though the bankrupt has been discharged from bankruptcy.

The amendments, apart from the amendment to s 139W(2)(b) effected to this section by items 256 - 258 of Sch 1 of the *Bankruptcy Legislation Amendment Act 1996*, apply to each bankrupt for whom the date of the bankruptcy was on or after 16 December 1996. The amendment to s 139W(2)(b) by item 259 of the Schedule applies to all bankruptcies current on or before that date.

For a provision as to the certificate, see reg 6.17 of the *Bankruptcy Regulations 1996*.

Prior to 16 December 1996 the *Bankruptcy Act 1966* did not allow the making of an original assessment with respect to a contribution period after the expiry of the period, on the basis of income actually derived, or deemed to have been derived in the period. Section 139W(1) authorised a prospective assessment of income likely to be derived in the period. As of 16 December 1996 there were a number of amendments, (ss 139K and 139W) but there is still room to debate whether s 139W(1) authorises assessments after the contribution assessment period. It is possible by inserting "or was derived" in s 139W(1) did no more than bring that provision in line with s 139M(2) without changing the basic notion, that a timely assessment is required of prospective income. That fact that no change was made to s 139P (which imposes a liability) which is expressed in terms of "income that a bankrupt is likely to derive" may support that view: *Challen v Bendeich* [1999] FCA 845.

139WA No time limit on making assessment

(1) An assessment under section 139W (including a fresh assessment referred to in subsection 139W(2)) for a contribution assessment period may be made at any time, including:

(a) a time after the end of the contribution assessment period; or

(b) a time after the bankrupt is discharged.

(2) For the purpose of applying subsection (1), a reference in this Division to a bankrupt includes a reference to a former bankrupt.

[S 139WA insrt Act 131 of 2002, s 3 and Sch 1 item 96]

139X Basis of assessments

(1) In making an assessment of the income that is likely to be derived, or was derived, by a bankrupt during a contribution assessment period the trustee may have regard to any information provided by the bankrupt or any other information in the trustee's possession.

(2) If the trustee considers that any information provided by the bankrupt is or may be incorrect, the trustee may disregard that information and may make an assessment on the basis of what the trustee considers to be the correct information.

[S 139X insrt Act 9 of 1992, s 25]

139Y Trustee may regard bankrupt as receiving reasonable remuneration

(1) If:

(a) the bankrupt is engaging or has engaged during a contribution assessment period in employment or other work or in activities that resemble employment or other work; and

(b) the bankrupt does not receive or did not receive any remuneration in respect of the employment, work or activities or receives or received remuneration that is less than the remuneration (in this subsection called the ***reasonable remuneration***) that:

(i) in the case of employment where an industrial instrument prescribes rates or minimum rates of salary or wages for the employment—might reasonably be expected to be or to have been received by the bankrupt in respect of the employment by virtue of the industrial instrument; or

(ii) in any other case—might reasonably be expected to be or to have been received by a person who engaged in similar employment, work or activities where there was no relationship or other connection between that person and the person for whom the employment, work or activities were carried out;

then, for the purpose of making an assessment, the trustee may determine that the bankrupt receives or received the reasonable remuneration in respect of the employment, work or activities.

[Subs (1) am Act 54 of 2009, s 3 and Sch 5 item 19; SLI 50 of 2006, reg 3 and Sch 32]

(2) If:

(a) the bankrupt enters or entered during a contribution assessment period into any transaction that might reasonably be expected to produce or to have produced income; and

(b) the bankrupt does not derive or did not derive any income from the transaction or derives or derived income that is less than the income (in this subsection called the ***reasonable income***) that might reasonably be expected to be or to have been derived if the transaction were or had been entered into at arm's length;

then, for the purpose of making an assessment, the trustee may determine that the bankrupt derives or derived the reasonable income from the transaction.

[S 139Y am Act 54 of 2009; SLI 50 of 2006; insrt Act 9 of 1992, s 25]

SECTION 139Y COMMENTARY

[139Y.0.05] General note

The assessment is to be issued as soon as possible after all necessary information has been made available: r 42-185 *Insolvency Practice Rules (Bankruptcy) 2016*.

[139Y.0.10] Assessing income

There are two relevant considerations in assessing income. First, the bankrupt is engaged in employment or other work activities that resemble employment or work and second, the bankrupt did not receive any remuneration or received less than what the provision identifies as reasonable remuneration. This requires an objective assessment of what is a reasonable expectation for the level of remuneration which the bankrupt would have received had they undertaken work for an unrelated employer: *Aston v Barnet in her capacity as trustee of the property of Aston* [2019] FCCA 2523 at [19] (Judge Altobelli).

There is a distinction drawn as to the remuneration received by the bankrupt and what might be expected to have been received, that is by a hypothetical person engaged in similar employment or work activities in an arm's length relationship. When assessing the hypothetical remuneration, it is necessary to take into account factors pertinent to the bankrupt. The bankruptcy itself may adversely impact on the bankrupt's remuneration for the particular work being undertaken: *Re Nelson* (1994) 35 ALD 113. Other factors may include age and health.

Consideration may be given to skills and work undertaken prior to bankruptcy as a measure of the skills possessed and whether they were being employed during the period of bankruptcy: *Pattison v Schiffer* [2007] FMCA 319 at [59] (O'Dwyer FM).

139Z If bankrupt claims not to be in receipt of income

(1) If a bankrupt:

(a) does not provide information about whether he or she is likely to derive, or derived, income or a particular class of income during a contribution assessment period; or

(b) claims not to be likely to derive, or not to have derived, any income or a particular class of income during a contribution assessment period;

but the trustee has reasonable grounds for believing that the bankrupt is likely to derive, or derived, income, or income of that class, during that period, then, for the purpose of making an assessment, the trustee may determine that the bankrupt is likely to derive, or derived, income, or income of that class, during that period and may also determine the amount of that income.

(2) Without limiting the matters that a trustee may take into account for the purpose of making an assessment as mentioned in subsection (1) in respect of a contribution assessment period, the trustee may have regard to any employment or other work or other income-producing activities that were engaged in by the bankrupt before that period and may determine whether the bankrupt is likely to engage, or to have engaged, in similar employment, work or other income-producing activities during that period.

[S 139Z insrt Act 9 of 1992, s 25]

SECTION 139Z COMMENTARY

[139Z.0.10] General note

If the trustee makes a bona fide effort to assess the income contribution of a bankrupt on the information available, it will be difficult for a bankrupt to allege that the income contribution is invalid: *Re Ellis; Ex parte Jefferson* (unreported, Fed Ct of Aust, Drummond J, 17 February 1995). The bankrupt may, of course, seek to have the assessment reviewed by the Inspector-General.

[The next text page is 10-5301]

(ii) included an incorrect and material particular in that declaration.

[Subs (5) am Act 11 of 2016, s 3 and Sch 1 items 80 and 81; Act 12 of 1980, s 174 and Sch item 3; Act 12 of 1980, s 117(d)]

(6) The Court must not make an order under subsection (5) unless it is satisfied that it would be in the interests of the creditors to do so.

[Subs (6) am Act 12 of 1980, s 174 and Sch item 1]

(7) The Court must not make an order under subsection (5) unless the application for the order is made before all the obligations that the personal insolvency agreement created have been discharged.

[Subs (7) am Act 12 of 1980, s 174 and Sch item 1]

Ancillary orders

(8) If the Court makes an order under subsection (1), (2) or (5), the Court may make such other orders as the Court thinks fit.

(9) An order under subsection (8) may be an order directing a person to pay another person compensation of such amount as is specified in the order. This subsection does not limit subsection (8).

[Subs (9) am Act 12 of 1980, s 174 and Sch item 3; Act 122 of 1970, s 11]

Application for sequestration order

(10) The trustee or a creditor may include in an application under subsection (1), (2) or (5) an application for a sequestration order against the estate of the debtor. If the Court, on the first-mentioned application, makes an order under this section setting the personal insolvency agreement aside, it may, if it thinks fit, immediately make the sequestration order sought.

[Subs (10) insrt Act 12 of 1980, s 117(e)]

(11) The making of an application by the trustee or a creditor for a sequestration order under this section is taken, for the purposes of this Act, to be equivalent to the presentation of a creditor's petition against the debtor, but the provisions of subsection 43(1), sections 44 and 47, subsections 52(1) and (2) and Part XIA do not apply in relation to such an application.

Court may dispense with service on debtor of notice of application

(12) The Court may, if it thinks fit, dispense with service on the debtor of notice of an application by the Inspector-General, the trustee or a creditor under this section, either unconditionally or subject to conditions.

[S 222 am Act 11 of 2016; subst Act 80 of 2004, s 3 and Sch 1 item 142; am Act 131 of 2002; Act 44 of 1996; Act 119 of 1987; Act 12 of 1980; Act 122 of 1970

Cross-reference: *Bankruptcy Regulations 1996*:

- reg 10.11 requires an applicant for a s 222(1), (2), (5) or (10) order to give a copy of the order to the Official Receiver within 2 days of the making of the order; and
- reg 13.03 and Sch 8 item 27 prescribe the information to be entered on the National Personal Insolvency Index in relation to s 222.

Cross-reference: *Federal Circuit Court (Bankruptcy) Rules 2016*:

- r 2.01 stipulates that an application under s 222 for an order setting aside a personal insolvency agreement must be commenced by filing an application in accordance with Form B2;
- r 2.01 stipulates that an application under s 222 (as applied by s 76B), for an order setting aside a composition or scheme of arrangement, must be commenced by filing an application in accordance with Form B2; and

- Pt 10 applies to an application under s 222 for an order setting aside a personal insolvency agreement and an application under s 222 (as applied by s 76B) for an order setting aside a composition or scheme of arrangement.

Cross-reference: *Federal Court (Bankruptcy) Rules 2016*:

- r 2.01 stipulates that an application under s 222 for an order setting aside a personal insolvency agreement must be commenced by filing an application in accordance with Form B2; and
- r 2.01 stipulates that an application under s 222 (as applied by s 76B), for an order setting aside a composition or scheme of arrangement, must be commenced by filing an application in accordance with Form B2; and
- Pt 10 applies to an application under s 222 for an order setting aside a personal insolvency agreement and an application under s 222 (as applied by s 76B) for an order setting aside a composition or scheme of arrangement.]

SECTION 222 COMMENTARY

[222.0.05] General note

The *Bankruptcy Legislation Amendment Act 2004* (Cth) commenced 1 December 2004. The Act applies to personal insolvency agreements entered into after that date: items 210 and 213. That Act repealed s 222 and replaced the provision with one which gives the court extremely wide powers to set aside the personal insolvency agreement which ought to be exercised cautiously in the context of the objectives of Pt X: *Osborne v Gangemi* (2011) 9 ABC(NS) 257; [2011] FCA 1252, at [43] (FCA) (Bromberg J). The court may set aside the agreement if it is satisfied that for any reason the agreement ought to be set aside: s 222(1). In essence the provision amalgamates the powers of the court that previously existed under ss 222 and 239. The court may, under s 222C, terminate the agreement if satisfied that: (i) the debtor has failed to carry out or comply with the agreement; (ii) the agreement cannot proceed without injustice or undue delay; or (iii) for any other reason the agreement ought to be terminated. For the first and second grounds the court must not make an order terminating the personal insolvency agreement unless it is also satisfied that it is in the interests of creditors to do so.

The decisions dealing with the former provisions will be of assistance when considering applications under s 222 in its new form: *Westpac Banking Corp v Hingston (No 2)* (2010) 117 ALD 552; [2010] FCA 1116 at [42] & [83] (Cowdroy J).

To put this provision in context, s 222 provides the court may set aside a personal insolvency agreement (PIA); s 222A enables a trustee of a PIA to terminate a PIA; s 222B enables creditors to terminate a PIA and s 222C provides that a court may terminate a PIA. The elements of s 222 focus on the circumstances in which the PIA was entered into or terms of the PIA: *Khera v National Australia Bank Ltd* (1996) 71 FCR 133 at 146 (Lockhart and Hill JJ), 147 (Tamberlin J) considering former s 239(2). Whereas, s 222A - 222B relate to the performance of the terms of the PIA. Also, pursuant to s 222D the PIA is terminated by the occurrence of an event or circumstance of which the agreement itself provides that it is to terminate. These provisions also apply to a post-bankruptcy composition or scheme of arrangement under Pt IV Div 6, with such modifications, if any, prescribed by the *Bankruptcy Regulations 1996* (Cth): s 76B. There are no prescribed modifications.

There are three principal grounds on which to set aside the personal insolvency agreement under s 222 which are as follows:

1. Unreasonableness of the terms of the agreement or that the agreement is unlikely to benefit creditors or for any other reason the agreement ought to be set aside: s 222(1)(d) and (e). A variety of factors can lead to a court having the state of satisfaction required by s 222(1)(d), including the relative size of the debts owing and the proposal, the nature of the relationship between the debtor and the creditors who voted in favour of the PIA, whether the circumstances call for a greater opportunity to inquire into the debtor's affairs, and the closeness of the vote, particularly if

influenced by creditors who are not at arm's length from the debtor and the inadequacy of the return to creditors: *Moss v Gunns Finance Pty Ltd (In liq)* (2018) 16 ABC(NS) 325; [2018] FCAFC 185 (Gleeson, Lee and Banks-Smith JJ) at [12]; *Deputy Commissioner of Taxation v Zappia* [2019] FCA 2152 (Jagot J). In s 222(1)(e), "for any other reason" denotes the grant of a wide power to a court to set aside a PIA, particularly given that there are no specified limits circumscribing the discretion: *Moss v Gunns Finance Pty Ltd (In liq)* at [13]. Bromberg J said that s 222(1)(d) requires a practical common sense approach to the exercise of the discretion bearing in mind that this provision calls for a global assessment of the kind that creditors are called upon to make themselves when considering the proposal contained in the personal insolvency agreement. His Honour said that a fundamental question will be whether and to what extent the composition on offer will likely be improved upon if the debtor was bankrupt. The principal factor in making that assessment is the likely extent to which creditors may properly be satisfied that the proposal on offer reflects a fair and honest attempt by the debtor to address her or his debt. The amount available for distribution under the proposal is a significant factor. This is measured in the context of the circumstances where the affairs of the debtor ought to be investigated. Where the benefit to unsecured creditors is negligible and the discrepancy between that benefit and the amount of the total indebtedness of the debtor is substantial, that in itself may be cause for the court to set aside the personal insolvency agreement: *Osborne v Gangemi* (2011) 9 ABC(NS) 257; [2011] FCA 1252 at [43] – [47] (FCA) (Bromberg J). Unreasonableness is not determined solely in some formulaic manner: *James Legal Pty Ltd v Milanos (No 2)* [2018] FCCA 2796, at [63], [64] (Nicholls J). Fundamental to the process provided by Pt X (which is commenced by the debtor executing a s 188 authority), is the involvement of properly informed and properly identified creditors: *Moss v Gunns Finance Pty Ltd (In liq)* at [101], [102]. If this does not occur then the PIA may be set aside: [63], [107]. A trivial amount offered under the proposal together with a need to investigate the affairs of the debtor may be sufficient: *Boston Management Services Pty Ltd v O'Donnell* [2017] FCCA 957 at [27] (Judge Cameron); *Lerinda Pty Ltd v Thornton* (2015) 13 ABC(NS) 34; [2015] FCCA 1436, at [30], [32] (Jarrett J). A failure to give notice to a creditor whose vote is significant and who could have canvassed matters at the meeting of creditors, including the nature of the relationship between the debtor and creditors, in the context of a trivial dividend impacts upon the determination of reasonableness, and the interests of creditors: *Australia and New Zealand Banking Group Ltd v Shilton* [2015] FCCA 1783, at [33], [34] (Hartnett J). Serious questions raised in relation to antecedent transactions as well as transactions and relationships with admitted creditors may be sufficient for the purposes of s 222(1)(d) or on the basis that the dividend is derisory: *RDN Developments Pty Ltd v Shtrambrandt* (2012) 262 FLR 464; [2012] FMCA 437 (Whelan FM). The "wishes" of creditors who may be referred to as "disinterested judges in their own commercial well-being" are relevant in determining reasonableness, and the interests of creditors generally: *James Legal Pty Ltd v Milanos (No. 2)* at [126]. Davies J set aside a personal insolvency agreement under s 222(1)(e) where there was insufficient material to support the debtor/creditor relationship of a party who voted in favour of the proposal and there was a public interest in a proper investigation into the debtor's affairs: *Cross v Rullo* (2013) 11 ABC(NS) 532; [2013] FCA 837. In the context of a small dividend to creditors a personal insolvency agreement was not set aside in circumstances where there would not be a demonstrable benefit to creditors, after significant delay and expenditure of time and effort in the administration by the trustee who would be unremunerated in respect to the administration. This was in the context of application of the principle that a large deficiency of assets over liabilities and minimal or no dividend to creditors are not of themselves sufficient grounds to set aside a personal insolvency agreement: *Ifx Markets Ltd v Rappaport* (2009) 7 ABC(NS) 543; [2009] FMCA 893 at [50], [51] (Driver FM).Cowdroy J set aside a post-bankruptcy composition where the dividend was very small compared to the size of the debts of the bankrupt. The

discrepancy between the indebtedness of creditors to the amount proposed to be paid to creditors may not be of itself cause to set aside the composition but the presence of other factors may warrant that order, such as the recommendation of the trustee, the contents of the report of the trustee, creditors may receive more in a bankruptcy scenario and the lack of time to investigate the bankrupt's affairs: *Westpac Banking Corp v Hingston (No 2)* (2010) 117 ALD 552; [2010] FCA 1116 at [97], [98].

2. Non-compliance with Pt X, however, there must be substantial non-compliance: ss 222(2) and (3).
3. False or misleading information given by the debtor; the controlling trustee has omitted a material particular from the declaration under s 189A(3) or included an incorrect particular in the statement to be provided under s 194A(5); or the trustee has omitted a material particular from the declaration under s 215A or included an incorrect particular: s 222(5). An order is not to be made under s 222(5) unless the court is satisfied that it would be in the interests of creditors to do so: s 222(6). Judge Cameron in *Voukidis v Anastasopoulos* [2019] FCCA 3397, at [122] expressed the view that in s 255(5)(d) the word "false" connotes a wilful or deliberate falsehood and the word "misleading" is to be understood in the same way as meaning deliberately misleading. The court cannot make an order under s 222(5) unless the application is made before all the obligations that the personal insolvency agreement created have been discharged. That includes making the final payment to creditors by way of dividend: *Westpac Banking Corp v Hingston (No 2)* (2010) 117 ALD 552; [2010] FCA 1116 at [35] – [43] (Cowdroy J). A certificate under s 232(1) is prima facie evidence that the obligations under a PIA have been discharged: s 232(2). That certificate is not determinative of the question of whether all the obligations created by the PIA have been discharged. That question is to be determined as a matter of construction of the PIA: *Hingston v Westpac Banking Corp* (2012) 200 FCR 493, at [20]. (Greenwood, McKerracher and Nicholas JJ).

An example of this is *National Australia Bank v Cranney* [2011] FMCA 169 (Smith FM) where it was held that an omission in a Statement of Affairs as to a debtor's liabilities constituted "material particulars". A failure to disclose "substantial assets", including stock or the proceeds thereof and plant and equipment was a material omission, which may have had an effect on creditors' votes. The omission supports the need for there to be further investigations, which might increase the return to creditors: *Lerinda Pty Ltd v Thornton* (2015) 13 ABC(NS) 34; [2015] FCCA 1436, at [28], [29] (Jarrett J). A large discrepancy in the income disclosed in the debtor's statement of affairs was found to be a material particular: *Palmer v Delic* [2014] FCCA 2637 at [18], [19] (Judge Emmett).

An important feature of s 222 is the power of the court to make an order as it thinks fit: s 222(8). The court may make an order directing a person to pay another person compensation: s 222(9). The Revised Explanatory Memorandum states that this provision is to allow the court to make orders where necessary to place the parties in the position in which they would have been had they not entered into the agreement. The trustee or a creditor may include in the relief a sequestration order against the debtor: s 222(10).

In *Macks v Vandenberg* [2011] FMCA 325, Lindsay FM noted that there is no specific provision in s 222 nor in any other part of the *Bankruptcy Act 1966* which provides a creditor or a trustee with an opportunity of seeking a sequestration order in circumstances where a Personal Insolvency Agreement has been terminated by its own terms as opposed to being set aside.

The court will still have a discretion whether or not to set aside the personal insolvency agreement.

Other than for s 224, the consequences of termination of a personal insolvency agreement (PIA) are not provided for in the *Bankruptcy Act 1966* (Cth). Where a PIA is terminated by the court, s 222C(3) empowers the court to make ancillary orders and if sought by the trustee or a creditor s 222C(5) empowers the court to make a sequestration order . None of s 222A (termination by the trustee), s 222B (termination by creditors) or s 222D (termination by

occurrence of terminating event) contains such powers nor any express provision concerning how a trustee must deal with property or moneys in his or her hands at the time the agreement is terminated. For example, is a trustee of the PIA entitled to continue to rule on proofs of debt after termination or pay a dividend to creditors when one has been declared; is the trustee entitled to remuneration; who is entitled to the any surplus proceeds held by the trustee, particularly where there may have been a contribution by a third party towards the pool to be distributed to creditors. Further, s 276 makes a person who knows a PIA has been set aside or terminated liable for conviction, to a penalty for each day on which a person continues to act as trustee under the PIA except for acts "confined to taking steps as were necessary for the protection of the property of the debtor". A number of these issues, in the context of the effect of termination, were considered by Farrell J in *Warner v Mayfair Ltd* (2015) 13 ABC(NS) 108; [2015] FCA 441. The issues were answered by Farrell J on an application for directions brought by the former trustee of the PIA, as follows:

1. It was accepted that the court had jurisdiction under the *Bankruptcy Act 1966* (Cth) to give the directions to the trustee in relation to the duties and powers in completing the role as trustee. Alternatively, it was accepted that the court had jurisdiction under the *Trustee Act 1925* (NSW) in relation to the exact nature of the trusts on which the trustee holds the property having regard to the terms of the PIA and the consequences which from that: [26].
2. The effect of termination will be dependent on the terms of the PIA: [73]. The beneficial entitlement to residual funds at the time a PIA is terminated is determined having regard to the source of the funds and, where the funds have been contributed by third parties, the terms of agreement including the extent to which they incorporate relevant provisions of the *Bankruptcy Act 1966* (Cth): [77]. There is no prohibition on the terms of a PIA creating obligations which endure despite termination of the agreement: [63], [69], [71]. These may include to whom the trustee is to pay the residual property or any financial contribution that was made under the PIA.
3. It would not be consistent with Pt X of the *Bankruptcy Act 1966* (Cth) for the PIA to provide that the trustee, after termination of the agreement, is to continue to get in the property of the debtor with a view to its disbursal to creditors, adjudicate on proofs of debt or declare and pay dividends to creditors. They are primary functions subject to the statutory scheme and such powers and duties cease upon termination: [70].
4. Once a PIA is set aside or terminated without release of debts, the creditors' recourse for payment of the debt is to the debtor or the debtor's trustee in bankruptcy: [92].

The notion inherent in s 76B and s 222 in providing for the setting aside of composition or scheme of arrangement under Pt IV Div 6 is that on one hand the former bankrupt will be restored to his or her pre-composition position as a bankrupt, and the creditors, on the other hand, will be restored to their position as creditors of the bankrupt estate of the debtor. An order under s 222(8) as applied by s 76B, together with s 30(1)(b) that reflects such restoration serves to protect the interests of the creditors: *Hingston v Westpac Banking Corp* (2012) 200 FCR 493 at [118], [125] and [127] to [129] (Greenwood, McKerracher and Nicholas JJ). A court which sets aside a composition or scheme of arrangement is not bound to make such remedial orders and may instead make a second sequestration order under s 222(10): *Mouglalis v Bendigo and Adelaide Bank Ltd* (2017) 250 FCR 92; [2017] FCAFC 47 at [5], [10] (Besanko J), [21] (Logan J). This reasoning would also apply to s 222C(5).

Where the composition or scheme of arrangement are terminated by the court the annulment continues to operate subject to remedial orders that may be made under s 222C(3) and s 30, which includes a power to make orders to restore the status quo just prior to the passing of the special resolution by creditors accepting the bankrupt's proposal: reasoning in *Hingston v Westpac Banking Corp*. There, however, is no equivalent provision where the composition or scheme of arrangement are terminated pursuant to ss 222A, 222B or 222D. Termination does not involve setting aside the proposal, the creditors' special resolution or the annulment, but the court has power under s 30(1) to make remedial orders reversing the effects of the

annulment: *Whitton v Perovich* [2016] FCA 595 at [123], [124] (Rangiah J), appeal dismissed, (the appeal did not deal with this issue): *Perovich v Whitton (No 2)* (2016) 250 FCR 272; [2016] FCAFC 152.

[The next text page is 17-3201]

Principal legislation	Number	Date of assent/gazettal/ registration	Date of commencement
Federal Circuit Court of Australia Act 1999	**193 of 1999**	**23 Dec 1999**	**23 Dec 1999**

This legislation (formerly titled *Federal Magistrates Act 1999*) has been amended as follows:

Amending legislation	Number	Date of assent/gazettal/ registration	Date of commencement
Trade Legislation Amendment Act (No 1) 2016	31 of 2016	23 Mar 2016	Sch 2 item 18: 1 May 2016 (F2016N00005)
Marriage Amendment (Definition and Religious Freedoms) Act 2017	129 of 2017	8 Dec 2017	Sch 3 item 30: 9 Dec 2017
Legislation Amendment (Sunsetting Review and Other Measures) Act 2018	78 of 2018	24 Aug 2018	Sch 1 items 13 and 14: 25 Aug 2018
Public Sector Superannuation Legislation Amendment Act 2018	80 of 2018	24 Aug 2018	Sch 1 item 15: 1 Jan 2020
Family Law Amendment (Family Violence and Other Measures) Act 2018	97 of 2018	31 Aug 2018	Sch 1 item 25: 1 Sep 2018

[The next text page is 26-501]

Schedules

Schedule 1 – Personnel provisions relating to Judges

Note: See section 9.

[Sch 1 heading subst Act 165 of 2012, s 3 and Sch 1 item 323, with effect from 12 Apr 2013]

Part 1 – Appointment of Judges

[Pt 1 heading subst Act 165 of 2012, s 3 and Sch 1 item 324, with effect from 12 Apr 2013; insrt Act 163 of 2007, s 3 and Sch 1 item 11, with effect from 26 Sep 2007]

1 Appointment of Judges

(1) [Appointed by Governor-General]
A Judge is to be appointed by the Governor-General by commission.

(2) [Requirements to be appointed]
A person is not to be appointed as a Judge unless he or she has been enrolled as a legal practitioner (however described) of:

(a) the High Court; or

(b) a Supreme Court of a State or Territory;

for at least 5 years.

(3) [Must not be over 70 years of age]
A person must not be appointed as a Judge if he or she has attained the age of 70 years.

(4) [Term expires at age 70]
The appointment of a Judge is to be for a term expiring upon his or her attaining the age of 70 years.

(5) [Chief Judge full-time]
The Chief Judge holds office on a full-time basis.

(6) [Full-time or part-time]
A Judge (other than the Chief Judge) holds office on a full-time basis unless the Judge's commission of appointment specifies that the Judge holds office on a part-time basis.

(7) [Meaning: appointment]
A reference in this clause to the ***appointment*** of a Judge is to be read as including:

(a) a reference to the appointment of a person who holds office as a Judge (other than the Chief Judge) to the office of Chief Judge; and

(b) a reference to the appointment of a person who holds office as Chief Judge to an office of Judge (other than the Chief Judge); and

(c) a reference to the appointment of a person who holds office as a Judge on a part-time basis to another office of Judge on a full-time basis; and

(d) a reference to the appointment of a person who holds office as a Judge on a full-time basis to another office of Judge on a part-time basis.

Note: Section 72 of the Constitution sets out requirements relating to the appointment and tenure of Judges.

[Cl 1 am Act 165 of 2012, s 3 and Sch 1 items 325–331, with effect from 12 Apr 2013]

1A Assignment of Judges to Divisions

The Governor-General may:

(a) assign a Judge (other than the Chief Judge) to one of the Divisions either:

(i) in the commission of appointment of the Judge; or

(ii) at a later time, with the consent of the Judge; and

(b) vary any such assignment, with the consent of the Judge.

Note: A Judge (including the Chief Judge) who is not assigned to either Division of the Federal Circuit Court of Australia may exercise the powers of the Federal Circuit Court of Australia in either Division (see subsection 12(3C)).

[Cl 1A am Act 165 of 2012, s 3 and Sch 1 item 332–335, with effect from 12 Apr 2013; insrt Act 55 of 2009, s 3 and Sch 17 item 16, with effect from 1 Jul 2009]

2 Style

Chief Judge

(1) The Chief Judge is to be styled "Chief Judge *(name)*".

Other Judges

(2) A Judge (other than the Chief Judge) is to be styled "Judge *(name)*".

[Cl 2 subst Act 165 of 2012, s 3 and Sch 1 item 336, with effect from 12 Apr 2013]

3 Oath or affirmation of office

(1) [Oath or affirmation of office]

Before proceeding to discharge the duties of his or her office, a Judge must take an oath or affirmation in accordance with the form set out in whichever of subclause (3) or (4) is applicable.

(2) [Who oath or affirmation taken before]

The oath or affirmation must be taken before:

(a) the Governor-General; or

(b) a Justice of the High Court; or

(c) a Judge of the Family Court; or

(d) a Judge of the Federal Court; or

(e) another Judge of the Federal Circuit Court of Australia.

Oath

(3) This is the form of oath for the purposes of subclause (1):

I, ... , do swear that I will well and truly serve in the office of (*Chief Judge or Judge of the Federal Circuit Court of Australia, as the case requires*) and that I will do right to all manner of people according to law without fear or favour, affection or ill-will. So help me God!

Affirmation

(4) This is the form of affirmation for the purposes of subclause (1):

I, ... , do solemnly and sincerely promise and declare that I will well and truly serve in the office of (*Chief Judge or Judge of the Federal Circuit Court of Australia, as the case requires*) and that I will do right to all manner of people according to law without fear or favour, affection or ill-will.

[Cl 3 am Act 165 of 2012, s 3 and Sch 1 items 337–339, with effect from 12 Apr 2013]

Part 2 – Terms and conditions of Judges

[Pt 2 heading subst Act 165 of 2012, s 3 and Sch 1 item 340, with effect from 12 Apr 2013; insrt Act 163 of 2007, s 3 and Sch 1 item 12, with effect from 26 Sep 2007]

Division 1 – Terms and conditions of serving Judges

[Div 1 heading subst Act 165 of 2012, s 3 and Sch 1 item 341, with effect from 12 Apr 2013; insrt Act 163 of 2007, s 3 and Sch 1 item 12, with effect from 26 Sep 2007]

4 Outside work

(1) [No outside work incompatible with Ch III]

A Judge must not engage in paid work outside the duties of the Judge's office if that work is incompatible with the holding of a judicial office under Chapter III of the Constitution.

(2) [Not to work in legal practice]

A Judge must not:

(a) engage in work as a legal practitioner; or

(b) engage in work as an employee of, or consultant to, a legal practice.

(3) [Doctrine of constitutional incompatibility]

This clause does not, by implication, limit the application to a Judge of any doctrine of constitutional incompatibility.

(4) [Meaning: paid work]

In this clause:

paid work means work for financial gain or reward (whether as an employee, a self-employed person or otherwise).

[Cl 4 am Act 165 of 2012, s 3 and Sch 1 items 342–344, with effect from 12 Apr 2013]

5 Remuneration

(1) [Determination of remuneration]

A Judge is to be paid such remuneration as is determined by the Remuneration Tribunal.

(2) [Subject to Remuneration Tribunal Act 1973]

Subclause (1) has effect subject to the *Remuneration Tribunal Act 1973*.

(3) [Repealed]

(4) [Meaning: remuneration]

In this clause:

remuneration has the same meaning as in Part II of the *Remuneration Tribunal Act 1973*.

Note 1: Subsection 3(2) of the *Remuneration Tribunal Act 1973* provides that a reference in Part II of that Act to ***remuneration*** is to be read as including a reference to annual allowances.

Note 2: Under subsection 7(4) of the *Remuneration Tribunal Act 1973*, the Remuneration Tribunal may determine any matter significantly related to the remuneration of Judges.

[Cl 5 am Act 165 of 2012, s 3 and Sch 1 items 345–347, with effect from 12 Apr 2013]

6 Leave

A Judge has the recreation leave entitlements that are determined by the Remuneration Tribunal.

[Cl 6 am Act 165 of 2012, s 3 and Sch 1 item 348, with effect from 12 Apr 2013]

7 Resignation from office

(1) [Resignation in writing]
A Judge may resign his or her office by writing under his or her hand delivered to the Governor-General.

(2) [When resignation takes effect]
The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

[Cl 7 am Act 165 of 2012, s 3 and Sch 1 item 349, with effect from 12 Apr 2013]

8 Other terms and conditions

(1) [Determination by Governor-General]
A Judge holds office on such terms and conditions (if any) in relation to matters not covered by this Act as are specified in a written determination made by the Governor-General for the purposes of this subclause.

(2) [Determination must be tabled]
The Minister must cause a copy of a determination under subclause (1) to be tabled in each House of the Parliament.

(3) [Determination may be disallowed]
Either House may, following a motion upon notice, pass a resolution disallowing the determination. To be effective, the resolution must be passed within 15 sittings days of the House after the copy of the determination was tabled in the House.

(4) [When determination takes effect]
If neither House passes such a resolution, the determination takes effect on the day immediately after the last day upon which such a resolution could have been passed.

[Cl 8 am Act 165 of 2012, s 3 and Sch 1 item 349, with effect from 12 Apr 2013]

9 Removal from office

A Judge must not be removed from office except by the Governor-General, on an address from both Houses of the Parliament in the same session, praying for his or her removal on the ground of proved misbehaviour or incapacity.

[Cl 9 am Act 165 of 2012, s 3 and Sch 1 itm 350, with effect from 12 Apr 2013]

Division 2 – Disability and death benefits

[Div 2 insrt Act 163 of 2007, s 3 and Sch 1 item 13, with effect from 26 Sep 2007]

9A Certification of retired disabled Judges

(1) [Request for certification]
If:

(a) a Judge retires; and

(b) the Judge has not attained the age of 70 years;

the Minister may be requested to certify that the Judge is a retired disabled Judge.

(2) [What Minister must do]
On receiving the request, the Minister must:

(a) if the Minister is satisfied that the retirement was due to permanent disability or infirmity—certify that the Judge is a retired disabled Judge; or

(b) otherwise—refuse to so certify.

(3) [Application to review]
If the Minister refuses to so certify, application may be made to the Administrative Appeals Tribunal for review of the refusal.

[Cl 9A am Act 165 of 2012, s 3 and Sch 1 items 351–355, with effect from 12 Apr 2013; insrt Act 163 of 2007, s 3 and Sch 1 item 13, with effect from 26 Sep 2007]

9B Pensions for retired disabled Judges

(1) [Entitlement to pension]
A retired disabled Judge is entitled to a pension until:

(a) he or she attains the age of 70 years; or

(b) he or she dies;

whichever happens first.

Annual rate of pension

(2) The annual rate of the pension is 60% of the annual rate of salary the Judge would have been entitled to from time to time if he or she had not retired.

(3) [Pension must not be reduced]
However, the rate of the pension must be reduced by the amount of any pension or retiring allowance:

(a) payable to the Judge, whether under a law or otherwise, out of money provided in whole or in part by the Commonwealth, a State or a Territory (other than a Commonwealth superannuation contribution the Judge was entitled to under a determination under subclause 8(1)); and

(b) payable to the Judge by reason of prior judicial service, or prior judicial service and any other service.

(4) [Calculating annual rate of salary]
For the purposes of subclause (2), the annual rate of salary is the annual rate of remuneration determined under clause 5:

(a) excluding any allowances that are paid in lieu of any other entitlement; and

(b) if any arrangements have been entered into for any amount of the annual rate of remuneration (other than an allowance covered by paragraph (a)) to be provided in the form of another benefit—including that amount.

When pension is due and payable

(5) The pension is due daily, but is payable on the days on which salary payments are made to Judges.

Safety, Rehabilitation and Compensation Act 1988

(6) For the purposes of Division 3 of Part II of the *Safety, Rehabilitation and Compensation Act 1988*:

(a) the pension is taken to be a pension payable to the Judge under a superannuation scheme; and

(b) the Judge is not required to pay superannuation contributions to that scheme.

[Cl 9B am Act 165 of 2012, s 3 and Sch 1 items 356–361, with effect from 12 Apr 2013; insrt Act 163 of 2007, s 3 and Sch 1 item 13, with effect from 26 Sep 2007]

9C Superannuation for retired disabled Judges

(1) [Entitlement to superannuation contribution]
A retired disabled Judge who has not attained the age of 65 years is entitled to a Commonwealth superannuation contribution until:

(a) he or she attains the age of 65 years; or

(b) he or she dies;

whichever happens first.

(2) [Amount of contribution]
The amount of the Commonwealth superannuation contribution is the amount of the Commonwealth superannuation contribution (if any) the Judge would have been entitled to from time to time, under a determination under subclause 8(1), if he or she had not retired.

(3) [When contribution payable]
The Commonwealth superannuation contribution is to be made by payments on the days on which salary payments are made to Judges.

[Cl 9C am Act 165 of 2012, s 3 and Sch 1 items 362–365, with effect from 12 Apr 2013; insrt Act 163 of 2007, s 3 and Sch 1 item 13, with effect from 26 Sep 2007]

9D Death benefits

(1) [Entitlement to death benefit]
A payment is payable under this section if:

(a) a Judge, or a retired disabled Judge, who has not attained the age of 65 years dies; and

(b) the Judge leaves one or more eligible spouses or eligible children.

Amount

(2) The amount of the payment is the amount of the Commonwealth superannuation contribution (if any) the Judge would have been entitled to, under a determination under subclause 8(1), during the period in subclause (3) if:

(a) the Judge had neither died nor retired before the end of that period; and

(b) the amount of the Commonwealth superannuation contribution the Judge was entitled to under that determination did not change during that period.

(3) [Amount of benefit]
The period in this subclause is the period:

(a) beginning on the day on which the Judge died; and

(b) ending on the day on which the Judge would have attained the age of 65 years.

Beneficiaries

(4) The ***beneficiaries*** in respect of the payment are each eligible spouse and eligible child the Judge leaves.

(5) [One beneficiary]
If there is only one beneficiary in respect of the payment, the payment is payable to the beneficiary.

(6) [More than one beneficiary]
If there is more than one beneficiary in respect of the payment, the payment is payable to the beneficiaries in the proportions (totalling 100% of the amount of the payment) the Minister considers appropriate, having regard to the respective circumstances of each beneficiary.

Note: For review of decisions under subclause (6), see subclause (10).

Beneficiaries—eligible children

(7) If the payment (or a proportion of the payment) is payable to an eligible child, the Minister may, in writing, direct that:

(a) some or all of the payment or proportion be paid to a specified person for the benefit of the child (including for the support or education of the child); or

(b) if the Minister is satisfied that, by reason of special circumstances, it is desirable to do so in the interests of the child—some or all of the payment or proportion be spent in a specified manner for the benefit of the child.

Note: For review of decisions under subclause (7), see subclause (10).

(8) [Request for direction]
The Minister may be requested to give a direction under subclause (7) in respect of an eligible child.

(9) [What Minister must do]
On receiving an application, the Minister must:

(a) if he or she is satisfied that he or she should make a direction in respect of the child—give such a direction; or

(b) if he or she is not so satisfied—refuse to give such a direction.

Note: For review of decisions under paragraph (9)(b), see subclause (10).

Applications for review

(10) Application may be made to the Administrative Appeals Tribunal for review of the following:

(a) a decision by the Minister under subclause (6);

(b) a direction by the Minister under subclause (7);

(c) a refusal by the Minister under paragraph (9)(b) to give a direction.

[Cl 9D am Act 165 of 2012, s 3 and Sch 1 items 366–368, with effect from 12 Apr 2013; insrt Act 163 of 2007, s 3 and Sch 1 item 13, with effect from 26 Sep 2007]

9E Relationship definitions

*Meaning of **eligible spouse***

(1) For the purposes of this Act, subclauses (2), (3) and (4) set out the 3 circumstances in which a person is an ***eligible spouse*** of a Judge, or a retired disabled Judge, who dies.

(2) [Circumstance 1]
A person is an ***eligible spouse*** of a Judge who dies if the person had a marital or couple relationship with the Judge at the time of the death of the Judge.

(3) [Circumstance 2]
A person is an ***eligible spouse*** of a retired disabled Judge who dies if:

(a) the person had a marital or couple relationship with the Judge at the time of the Judge's death; and

(b) the marital or couple relationship began:

(i) before the Judge retired; or

(ii) before the Judge attained the age of 60 years.

(4) [Circumstance 3]
A person is an ***eligible spouse*** of a Judge, or a retired disabled Judge, who dies if:

(a) the person had previously had a marital or couple relationship with the Judge; and

(b) the person did not, at the time of the Judge's death, have a marital or couple relationship with the Judge but was legally married to him or her; and

(c) in the Minister's opinion, the person was wholly or substantially dependent upon the Judge at the time of the Judge's death; and

(d) in the case of a marital or couple relationship that began after the Judge retired—the marital or couple relationship began before the Judge attained the age of 60 years.

Note: For review of decisions under paragraph (4)(c), see subclause (9).

Meaning of ***marital or couple relationship***

(5) For the purposes of this Act, a person had a ***marital or couple relationship*** with another person at a particular time if:

(a) the person had been living with the other person as the other person's husband, wife, spouse or partner for a continuous period of at least 3 years up to that time; or

(b) both:

(i) the person had been living with the other person as the other person's husband, wife, spouse or partner for a continuous period of less than 3 years up to that time; and

(ii) the Minister, having regard to any relevant evidence, is of the opinion that the person ordinarily lived with the other person as the other person's husband, wife, spouse or partner on a permanent and bona fide domestic basis at that time;

whether or not the person was legally married to the other person.

Note 1: Subclause (7) lists some of the evidence relevant to subparagraph (5)(b)(ii).

Note 2: For review of decisions under subparagraph (5)(b)(ii), see subclause (9).

(6) [Commencement of relationship]

For the purposes of this Act, a marital or couple relationship is taken to have begun at the beginning of the continuous period mentioned in paragraph (5)(a) or subparagraph (5)(b)(i).

(7) [Relevant evidence of relationship]

For the purpose of subparagraph (5)(b)(ii), relevant evidence includes, but is not limited to, evidence establishing any of the following:

(a) that the person was wholly or substantially dependent on that other person at the time;

(b) that the persons were legally married to each other at the time;

(ba) the persons' relationship was registered under a law of a State or Territory prescribed for the purposes of section 2E of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section;

(c) that the persons had a child who was:

(i) born of the relationship between the persons; or

(ii) adopted by the persons during the period of the relationship; or

(iii) a child of both of the persons within the meaning of the *Family Law Act 1975*;

(d) that the persons jointly owned a home which was their usual residence.

*Meaning of **living with** a person*

(8) For the purposes of this Act, a person is taken to be ***living with*** another person if the Minister is satisfied that the person would have been living with that other person except for a period of:

(a) temporary absence; or

(b) absence because of special circumstances (for example, absence because of the person's illness or infirmity).

Note: For review of decisions under subclause (8), see subclause (9).

Applications for review

(9) Application may be made to the Administrative Appeals Tribunal for review of a decision by the Minister under paragraph (4)(c), subparagraph (5)(b)(ii) or subclause (8).

[Cl 9E am Act 129 of 2017, s 3 and Sch 3 item 30, with effect from 9 Dec 2017; Act 165 of 2012, s 3 and Sch 1 items 369–382, with effect from 12 Apr 2013; Act 46 of 2011, s 3 and Sch 2 item 598, with effect from 27 Dec 2011; Act 134 of 2008, s 3 and Sch 2 items 5–10, with effect from 1 Jan 2009; insrt Act 163 of 2007, s 3 and Sch 1 item 13, with effect from 26 Sep 2007]

9F Meaning of eligible child

(1) [Meaning: eligible child]

For the purposes of this Act, a person is an ***eligible child*** of a Judge, or a retired disabled Judge, who dies if:

(a) the person:

(i) has not attained the age of 18 years; or

(ii) has attained the age of 18 years but has not attained the age of 25 years and is receiving full-time education at a school, college or university; and

(b) one of the following applies:

(i) the person is a child or adopted child of the Judge;

(ia) the person is a child of the Judge within the meaning of the *Family Law Act 1975*;

(ii) in the Minister's opinion, the person was wholly or substantially dependent on the Judge at the time of the Judge's death;

(iii) in the Minister's opinion, the person would have been wholly or substantially dependent on the Judge but for the Judge's death.

(2) [Application to review]

Application may be made to the Administrative Appeals Tribunal for review of a decision by the Minister under subparagraph (1)(b)(ii) or (iii).

[Cl 9F am Act 80 of 2018, s 3 and Sch 1 item 15, with effect from 1 Jan 2020; Act 165 of 2012, s 3 and Sch 1 items 383–387, with effect from 12 Apr 2013; Act 134 of 2008, s 3 and Sch 2 item 11, with effect from 1 Jan 2009; insrt Act 163 of 2007, s 3 and Sch 1 item 13, with effect from 26 Sep 2007]

9G Appropriation

The following are to be paid out of the Consolidated Revenue Fund, which is appropriated accordingly:

(a) pensions under clause 9B;

(b) Commonwealth superannuation contributions under clause 9C;

(c) payments under clause 9D.

[Cl 9G insrt Act 163 of 2007, s 3 and Sch 1 item 13, with effect from 26 Sep 2007]

Division 3 – Remuneration of a Judge not to be diminished

[Div 3 heading subst Act 165 of 2012, s 3 and Sch 1 item 388, with effect from 12 Apr 2013]

9H Remuneration of a Judge not to be diminished

(1) [Remuneration not diminished]
The remuneration of a Judge is not to be diminished during his or her continuance in office.

(2) [Meaning: diminished, remuneration]
In subclause (1):

diminished has the same meaning as in paragraph 72(iii) of the Constitution.

remuneration has the same meaning as in paragraph 72(iii) of the Constitution.

[Cl 9H am Act 165 of 2012, s 3 and Sch 1 items 389 and 390, with effect from 12 Apr 2013; insrt Act 163 of 2007, s 3 and Sch 1 item 13, with effect from 26 Sep 2007]

[Div 3 insrt Act 163 of 2007, s 3 and Sch 1 item 13, with effect from 26 Sep 2007]

Part 3 – Acting Chief Judge

[Pt 3 heading subst Act 165 of 2012, s 3 and Sch 1 item 391, with effect from 12 Apr 2013; insrt Act 163 of 2007, s 3 and Sch 1 item 14, with effect from 26 Sep 2007]

10 Acting Chief Judge

(1) [Minister may appoint]
The Minister may appoint a Judge to act as Chief Judge:

(a) during a vacancy in the office of Chief Judge; or

(b) during any period, or all periods, when the Chief Judge is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

(2) [Repealed]

(3) [Chief Magistrate not assigned to a Division]
For the purposes of this Act, a person who is acting as Chief Judge under subclause (1) is taken not to be assigned to either Division of the Federal Circuit Court of Australia.

Note: A Judge who is not assigned to either Division of the Federal Circuit Court of Australia may exercise the powers of the Federal Circuit Court of Australia in either Division (see subsection 12(3C)).

[Cl 10 am Act 165 of 2012, s 3 and Sch 1 items 392–396, with effect from 12 Apr 2013; Act 46 of 2011, s 3 and Sch 2 items 599 and 600, with effect from 27 Dec 2011; Act 55 of 2009, s 3 and Sch 17 item 17, with effect from 1 Jul 2009]

[The next text page is 27-1]

Division 3 – Registered trustee ceasing to be trustee of an estate

[Div 3 subst F2016L01926 of 2016, s 4 and Sch 1 item 54; SR 76 of 1997, reg 15]

8.50 Notice of removal of trustee of estate

(1) This regulation applies if the trustee of a regulated debtor's estate is removed from the office of trustee of the estate by the Court or by the creditors.

(2) Notice must be given in writing to the Official Receiver stating the name of the trustee, the fact and the date of the removal and whether the removal was by the Court or the creditors.

(3) The notice must be given:

(a) in the case of removal by the Court—by the applicant to the Court for the removal, as soon as practicable after the making of the order for removal; or

(b) in the case of removal by the creditors—by the new trustee of the regulated debtor's estate appointed by the creditors under section 90-35 of Schedule 2 to the Act, as soon as practicable after the appointment.

(4) An offence against this regulation is an offence of strict liability.
Penalty: 1 penalty unit.

[Reg 8.50 insrt F2016L01926 of 2016, s 4 and Sch 1 item 54]

8.55 Notice of finalisation of administration and entry on the Index

(1) The trustee of a regulated debtor's estate must, within 5 working days of finalising the administration of the estate, give notice in writing of the finalisation to the Official Receiver.
Penalty: 1 penalty unit.

(2) The Official Receiver must promptly enter on the Index the fact that the administration of an estate has been finalised, where:

(a) the Official Receiver receives notice under subregulation (1); or

(b) the estate was administered by the Official Trustee.

(3) An offence against subregulation (1) is an offence of strict liability.
Penalty: 1 penalty unit.

[Reg 8.55 insrt F2016L01926 of 2016, s 4 and Sch 1 item 54]

Editor's note: Regulation 8.11A has been repealed. The following commentary relates to the repealed provision, and is retained because it may be of assistance in construing the replacement provisions.

8.11A Costs of taxation [Repealed]

[Reg 8.11A rep SLI 287 of 2010, reg 3 and Sch 1 item 2; insrt SR 255 of 2002, reg 3 and Sch 1 item 13]

REGULATION 8.11A COMMENTARY

[RE8.11A.10] General note

For a discussion of the operation of former reg 8.11A, see *Wenkart v Pantzer* (2005) 223 ALR 384; [2005] FCA 1572 at [48] – [54] (reversed on other grounds: *Pantzer v Wenkart* (2006) 153 FCR 466; 4 ABC(NS) 607; [2006] FCAFC 140). Branson J there considered that "the costs of the taxation" in reg 8.11A went "beyond the cost of paying the fee for taxation and include also the costs of preparing the detailed bill of costs and proper costs, if any, of attending the hearing of the taxation", so that the trustee would be precluded from claiming these costs and remuneration from the person requesting the taxation if the trustee's claim for remuneration were reduced by 15% or more on taxation: (2005) 223 ALR 384; [2005] FCA 1572 at [50] (reversed on other grounds: *Pantzer v Wenkart* (2006) 153 FCR 466; 4 ABC(NS) 607; [2006] FCAFC 140). Her Honour also considered that it was implicit in reg 8.11A that if the claim for remuneration was not reduced by at least 15%, the trustee was entitled to claim "remuneration and costs in respect to work properly undertaken by him or her in relation to the taxation including the preparation of the detailed bill of costs": (2005) 223 ALR 384; [2005] FCA 1572 at [53] (reversed on other grounds: *Pantzer v Wenkart* (2006) 153 FCR 466; 4 ABC(NS) 607; [2006] FCAFC 140).

[The next text page is 40-5051]

Division 2 - Information to be entered on the Index

13.03 What information is to be entered on the Index?

(1) Subject to this regulation, the following information is to be entered on the Index:

(a) in respect of each creditor's petition, bankruptcy, debt agreement under Part IX of the Act, personal insolvency agreement, administration under Part XI of the Act or order under section 253E of the Act, occurring or made on or after the commencement date — information of the kind specified in Schedule 8, to the extent applicable;

(b) the information on BIOS in respect of bankruptcies (including completed bankruptcies);

(c) in respect of each registered trustee or controlling trustee (other than the Official Trustee):

(i) the trustee's full name, and any alias;

(ii) the trustee's business address (including, where applicable, the postal address) and telephone number;

(iii) a statement or summary of any conditions applying to the person's entitlement to practise as a registered trustee;

(iv) the date on which details in respect of the trustee are entered on the Index;

(v) the date (if any) of termination of the trustee's registration as a trustee;

(d) in respect of each applicant for registration as a trustee:

(i) the applicant's full name, and any alias;

(ii) the applicant's business address (or, if none, his or her residential address);

(iii) the applicant's occupation;

(iv) the date on which details in respect of the applicant are entered on the Index;

(e) in respect of each debtor specified in subregulation (3):

(i) the debtor's full name, and any alias;

(ii) the debtor's address;

(iii) the debtor's occupation (if any);

(iv) the date on which details in respect of the debtor are entered on the Index;

(f) information that, under these Regulations, the Official Receiver:

(i) receives for entry on the Index; or

(ii) is required to enter on the Index;

(g) information concerning a creditor's petition (including details of any orders made in relation to the petition, or the withdrawal of the petition).

[Subreg (1) am SR 256 of 2004, reg 3 and Sch 1 item 12; SR 76 of 1997, reg 20]

(1A) In relation to a matter mentioned in paragraph (1)(a), a document described in an item in Schedule 8 must be given to the Official Receiver by the person mentioned in column 4 of the item within the period mentioned in column 5 of the item.

[Subreg (1A) insrt SR 76 of 2003, reg 3 and Sch 1 item 10]

(1B) Item 13 of Schedule 8 applies in relation only to a bankruptcy dated 4 May 2003 or earlier.

[Subreg (1B) insrt SR 76 of 2003, reg 3 and Sch 1 item 10]

(2) Paragraph (1)(a) is taken to apply also to bankruptcies that:

(a) occurred before the commencement date; and

(b) were not completed before the commencement date.

(3) For the purposes of paragraph (1)(e), the following debtors are specified:

(a) a debtor whose property is subject, by reason of a direction of the Court under paragraph 50(1)(a) of the Act, to the control of the Official Trustee or a registered trustee;

(b) a debtor who signed an authority under subsection 188(1) of the Act;

(c) subject to subregulation (5), in the case of a deceased debtor — where a petition for an order for the administration of the debtor's estate has been presented under Part XI of the Act;

(d) a debtor who has applied to the Court under subsection 253E(1) of the Act for an order staying all or any proceedings under a petition.

(4) In the application of paragraph (3)(c) (concerning certain deceased debtors) to paragraph (1)(e), the information to be entered is the information that applied in respect of the debtor immediately before his or her death.

(5) Subregulation (1) applies subject to:

(a) any decision of the Inspector-General under paragraph 13.04(3)(a); and

(b) any order or direction of the Administrative Appeals Tribunal on an application under regulation 13.05.

(6) If an entry on the Index contains information that is, in the opinion of the Official Receiver, in any particular:

(a) contrary to, or inconsistent with, a decision, order or direction of a kind mentioned in subregulation (5); or

(b) out of date, inaccurate or misleading;

the Official Receiver must correct the entry without delay.

[Subreg (6) am SR 76 of 1997, reg 20]

[Reg 13.03 am SR 256 of 2004; SR 76 of 2003; SR 76 of 1997]

REGULATION 13.03 COMMENTARY

[RE13.03.10] Pseudonyms

It has been held that "at least at the creditor's petition stage, the name of the debtor must be made public and pseudonyms and acronyms cannot be used to identify the debtor", though "there is no reason in principle why a pseudonym cannot be used for the petitioning creditor's name, so long as contact details are provided for the petitioning creditor's solicitors" in what "is entered in the index as required by reg 13.03(1)(a) and Sch 8": *ACW v Du Bray* [2019] FCA 1075, at [52], [53], [54] (Wigney J).

13.04 Application for certain information not to be on the Index

(1) Subject to subregulation (4), a person who is a debtor or bankrupt may apply in writing to the Inspector-General for information in respect of the person:

(a) not to be entered on the Index, on the ground that the entry of the information would jeopardise, or be likely to jeopardise, the person's safety; or

(b) on the Index to be removed on the ground that:

(i) its inclusion jeopardises, or is likely to jeopardise, the person's safety; or

(ii) it is inaccurate or misleading; or

(c) on the Index to be corrected on the ground that it is inaccurate or misleading.

Note: Under subregulation (4), an application cannot be made for the removal of information in respect of a person's name or date of birth.

[Subreg (1) am SR 278 of 1996, reg 8]

(2) The application must specify the ground relied and contain, or have with it, full particulars in support of the ground.

Example:
A person may rely on a court order (such as a domestic violence order) to show that publication of the information in question would jeopardise, or be likely to jeopardise, the person's safety.

(3) The Inspector-General must, without delay:

(a) decide an application; and

(b) give notice in writing to the applicant of:

(i) the decision and the reasons for it; and

(ii) the applicant's right, if aggrieved by the decision, to apply under regulation 13.05 to the Administrative Appeals Tribunal for review of the decision.

(4) An application or a decision must not be made under this regulation to remove from the Index any of the following items of information in respect of a person:

(a) the person's name;

(b) the person's date of birth.

[Reg 13.04 am SR 278 of 1996]

REGULATION 13.04 COMMENTARY

[RE13.04.10] Power to correct NPII record

"The grounds on which the power can be exercised to correct the NPII record are limited to the circumstances set out in reg 13.04." *James v Inspector-General in Bankruptcy* [2019] AATA 5171, at [34] (Member D K Grigg). In order for the correction power under reg 13.04(1)(c) to be exercisable, it must be shown that the relevant information is inaccurate or misleading, but there is no additional requirement to show that it is also incorrect: *James v Inspector-General in Bankruptcy* [2019] AATA 5171, at [37]-[39] (Member D K Grigg). There is no discretion involved in the exercise of the power under reg 13.04(1)(c), and indeed, reg 13.03(6)(b) (as to which see above) requires the Official Receiver ("OR") to correct an entry on the NPII register without delay if, in the opinion of the OR, it is out of date, inaccurate or misleading: *James v Inspector-General in Bankruptcy* [2019] AATA 5171, at [40] (Member D K Grigg). It is beyond the power of the OR (or on review the Administrative Appeals Tribunal) under either Regulation to decide to record a date on the NPII that is inaccurate, for example to give relief to a bankrupt who says he/she filed their statement of affairs on a particular date when it was not in fact received then by the OR; the power to give such relief lies solely with the Federal

Circuit Court or Federal Court under s 33A of the Act: *James v Inspector-General in Bankruptcy* [2019] AATA 5171, at [41]-[48] (Member D K Grigg).

13.05 Application to the AAT

A person who made an application under subregulation 13.04(1) and who is aggrieved by a decision under paragraph 13.04(3)(a) in respect of the application may apply to the Administrative Appeals Tribunal for review of the decision.

[The next text page is 40-7201]

[37], Smith FM found that a bankruptcy notice that had been emailed to the debtor had been validy served. See also *Council of the New South Wales Bar Assn v Archer* (2012) 259 FLR 376; [2012] FMCA 81 at [30], [52] – [64] (Lloyd-Jones FM); *Hill v Lyons* [2013] FCCA 1760, at [4], [8] – [10], [22] (Judge Burnett).

For service by electronic means to be effective under reg 16.01(1)(e)(ii), however, it must be "in such a manner … that the document should, in the ordinary course of events, be received by the person". Thus, a bankruptcy notice was held not to have been served under reg 16.01(1)(e)(ii) by being emailed to the debtor's solicitor in circumstances where he had not said he had instructions to accept service and said shortly after receiving the email that he did not have such instructions, and there was no evidence that the solicitor had subsequently forwarded the notice to his client the debtor: *National Australia Bank Ltd v Elgammal* [2014] FCCA 828, at [8] – [10] (Judge Raphael). On the other hand, service by emailing the bankruptcy notice to the debtor's solicitors may be effective under reg 16.01(1)(e) where, "in the circumstances of [the] case", the court can be satisfied that the notice was served "in such a manner" that it "should, in the ordinary course of events, be received by the debtor": *Noonan v BMW Australia Finance Ltd* [2013] FCCA 2222, at [40] – [43] (Judge Whelan), citing *Mulherin v Quinn Villages Pty Ltd* (2012) 269 FLR 474; [2012] FMCA 1063 at [19] (Burnett FM).

Where a bankruptcy notice is served by email, it is acceptable for the bankruptcy notice to be in one attachment to the email and the judgment required to be annexed to it in another attachment to the same email: *Sibonna Nominees Pty Ltd v Vouzas* [2014] FCCA 224, at [34] – [38] (Judge Whelan); see also *Curtis v Singtel Optus Pty Ltd* (2014) 225 FCR 458; 12 ABC(NS) 320; [2014] FCAFC 144, at [13] – [19], [43] – [57] (Mansfield, Gleeson and Beach JJ) (where the controversy was over whether the notice was properly issued with the judgment "attached". Any defect constituted by the bankruptcy notice and the judgment being in separate annexures to the same email would in any event be a defect that could be cured by s 306: *Sibonna Nominees Pty Ltd v Vouzas* [2014] FCCA 224, at [39] (Judge Whelan); see also, however, *Curtis v Singtel Optus Pty Ltd* (2014) 225 FCR 458; 12 ABC(NS) 320; [2014] FCAFC 144, at [43] – [67] (Mansfield, Gleeson and Beach JJ) (a case concerning issue rather than service of the bankruptcy notice with the judgment "attached").

Note that in *Curtis v Singtel Optus Pty Ltd* (2014) 225 FCR 458; 12 ABC(NS) 320; [2014] FCAFC 144, at [48] – [49], Mansfield, Gleeson and Beach JJ, considered that reg 16.01 "arguably permitted" the electronic issue of a bankruptcy notice, because "issuing requires an external act such as giving or sending", though they thought that electronic issue was in any event permitted by ss 3(b), 5, 8, 9, and 11 of the *Electronic Transactions Act 1999* (Cth): see also commentary at [40.1.156], [41.2.13] and [RE4.02.15].

Service of copy bankruptcy notice

It has been held that service of a photocopy of an issued and sealed bankruptcy notice is sufficient to satisfy ss 40(1)(g) and 41(2) (as well as regs 4.01, 4.02 and 16.01), and that if serving a photocopy notice did constitute a defect, it was curable under s 306: *Mineo v Etna* (2009) 176 FCR 74; [2009] FCA 337 at [22] – [32] (Gordon J). This was consistent with reg 16.01(e) permitting service by facsimile transmission or email: *Mineo v Etna*, above, at [16], [27]. It had been held under previous legislation that a copy of a bankruptcy notice was not a bankruptcy notice, and that service of a photocopy notice was insufficient to satisfy the requirements of the then applicable provisions which required service of a duplicate original of the notice that was stamped and signed: *Re Stec; Ex parte Scragg* (1997) 75 FCR 377; 155 ALR 173 (von Doussa J); *Re De Ieso* (1978) 45 FLR 396; 24 ALR 701; *Re Hatchett; Ex parte Shell Co of Australia Ltd* (1985) 11 FCR 118; 71 ALR 291; *Re O'Sullivan; Ex parte Bank of New Zealand* (1991) 30 FCR 112; 102 ALR 206.

On the other hand, under the current (post-2010) legislation, in *Nash v Thomas* (2012) 204 FCR 415; 128 ALD 347; [2012] FCA 693, Finn J considered that service by email (as to which see above) of a draft of the issued bankruptcy notice that was itself "not stamped, numbered or signed" was not service for s 40(1)(g) purposes, because "the Act and the Regulations properly construed make it an essential requirement of the effective service of 'a bankruptcy notice

under [the] Act' that the notice itself be an original or a copy of that actually issued by the Official Receiver (or by an authorised delegate)": *Nash v Thomas* (2012) 204 FCR 415; 128 ALD 347; [2012] FCA 693 at [24]. What had to be served was a copy of the notice as issued and actually provided to the creditor by the Official Receiver: *Nash v Thomas* (2012) 204 FCR 415; 128 ALD 347; [2012] FCA 693 at [24], [27]. Since what had been served was not "a bankruptcy notice under the Act", there was no defect or error that could be cured by s 306(1): *Nash v Thomas* (2012) 204 FCR 415; 128 ALD 347; [2012] FCA 693 at [28].

Personal service, including where debtor will not take documents

There is no requirement that documents served not be in a sealed or closed envelope: *Moore v Wilson* [2006] FCA 79 at [22] (Mansfield J).

Personal service under the previous equivalent of reg 16.01(1)(d) was held not necessarily to require a person to be physically handed the document being served with a clear statement of the nature of the document being served if the person refuses to take it and moves away to avoid taking possession of the document, provided the court is satisfied the person understood that he or she was being served with a document of the nature being served: *Re Wong; Ex parte Robinson* [1995] FCA 805 (Sackville J). It is sufficient, in a case where the person being served refuses to take actual corporeal possession of the document, for the process server to inform the person of the nature of the process or document being served and leave it before or near the debtor so that the debtor has unimpeded access to the document: *Re Ditfort; Ex parte Deputy Commissioner of Taxation (NSW)* (1988) 19 FCR 347; 83 ALR 265 at 360 (per Gummow J). Merely throwing the documents to be served into a courtyard of a property apparently occupied by the person being served in circumstances where the person may well not have seen the documents and may well not have heard the process server's statement calling the person's attention to the documents being served has been held not to be sufficient service of a bankruptcy notice under reg 16.01(1)(d).

Delivery by a person other than the creditor or creditor's agent

It was in *Lazar v Seccombe* (2005) 3 ABC(NS) 727; [2005] FCA 1652 at [26] – [27] that Jacobson J doubted whether proof that a bankruptcy notice left with the debtor's secretary was in fact passed on to him was sufficient to constitute personal service of the notice under reg 16.01(1)(d), "the proper construction of" which "is that the creditor must personally deliver the bankrutpcy notice". Nevertheless, service under reg 16.01(1)(d) could presumably be effected by someone acting on behalf of the creditor, such as a process server, and the notice being left with someone at the debtor's address and passed on to them may well constitute service at their last known address under reg 16.01(1)(a) or (c), as discussed above, though in *Hacker v The Owners - Strata Plan No 17572* [2005] FCA 1936 at [36] – [39] (Emmett J), a contention that a process server delivering bankruptcy notices to the debtors' last known address constituted delivery "by a courier service" within the meaning of reg 16.01(1)(a).

Service in precincts of court

Service of a bankruptcy notice in the foyer of a building adjacent to the court building was held not to be service within the precincts of the court: *Re O'Sullivan; Ex parte Commonwealth Bank of Australia* (1995) 57 FCR 145; 129 ALR 295 (Lindgren J). "… [I]t is not the law that service of any process within the precincts of a court will always be a contempt of that court and, even if it were, it does not follow that a real service would be set aside": *Re O'Sullivan; Ex parte Commonwealth Bank of Australia* (1995) 57 FCR 145; 129 ALR 295 (Lindgren J); *Re Elkateb* (2001) 187 ALR 479; [2001] FCA 1527 (Stone J); *Matheson v Scottish Pacific Business Finance Pty Ltd* (2005) 3 ABC(NS) 227; [2005] FCA 670 at [11] (Kiefel J); *Mitzev v Foxman (No 2)* [2008] FMCA 405 at [10]; *Murphy v Sharples* [2008] FMCA 1118 at [14] – [15].

Substituted Service

Substituted service orders may be made pursuant to s 309(2) of the Act. Even if a substituted service order has been made, a document can still be served under one or more of the means set out in reg 16.01, "unless the contrary intention appears": *Skalkos v T & S Recoveries Pty*

Ltd (2004) 141 FCR 107, [2004] FCAFC 321, at [29]-[31] (Sundberg, Finkelstein and Hely JJ); *Bobos v DCT* [2019] FCA 1910, at [85]-[90] (Markovic J).

[RE16.01.15] Evidence of non-receipt of documents by debtor

It has been held that, since service pursuant to reg 16.01 can take place upon performance of one or more of the methods there prescribed, evidence on behalf of the debtor (or presumably any other person being served under reg 16.01) to the effect that he or she did not receive the document does not negate service, in the absence of the document being returned undelivered or other evidence of non-delivery: *Skalkos v T & S Recoveries Pty Ltd* (2004) 141 FCR 107; 3 ABC(NS) 51; 213 ALR 311; [2004] FCAFC 321 at [25] – [26], [39] (Sundberg, Finkelstein and Hely JJ); applying *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 95–97. Non-delivery of the document to be served is distinct from non-service: *Skalkos v T & S Recoveries Pty Ltd* at [25] – [26] (Sundberg, Finkelstein and Hely JJ). The Full Court in *Skalkos v T & S Recoveries Pty Ltd* at [25] – [26] did not consider it necessary to determine whether the words "in the absence of proof to the contrary" in reg 16.01(2) are "restricted to proof that the document was delivered on a date other than that on which it would have been delivered in the due or ordinary course of post", or whether they "permit proof that the document was not delivered" at all, because in that case there was no evidence of either late or non-delivery. See also commentary at [40.1.295]. Under the previous Australian provisions, it was held that service of a bankruptcy notice is not proved by proof of posting if the notice is shown to have been returned unclaimed: *Lombard Australia Ltd v Mohrwinkel* (1973) 1 ACTR 57; 21 FLR 277.

16.02 Documents for the Inspector-General, the Official Receiver or the Official Trustee

(1) Unless the contrary intention appears, where a document is required or permitted by the Act or these Regulations to be given or sent to, or filed or lodged with, the Inspector-General, the Official Receiver or the Official Trustee, the document must:

(a) be posted to, or delivered at:
  (i) in the case of a document for the Inspector-General — the office of the Inspector-General; or
  (ii) in the case of a document for the Official Receiver or the Official Trustee — the office of the Official Receiver; or

(b) sent by facsimile transmission:
  (i) in the case of a document for the Inspector-General — to a facility maintained by the Inspector-General for receipt of facsimile transmissions; or
  (ii) in the case of a document for the Official Receiver or the Official Trustee — to a facility maintained by the Official Receiver for receipt of facsimile transmissions; or

(c) sent by another mode of electronic transmission (for example, by electronic mail):
  (i) in the case of a document for the Inspector-General — to the office of the Inspector-General; or
  (ii) in the case of a document for the Official Receiver or the Official Trustee — to the office of the Official Receiver.

[Subreg (1) am SR 76 of 1997, reg 27]

(2) Where subregulation (1) applies, the document is taken to be received, filed or lodged only when the document (or, where applicable, a copy of it) is actually received by, or on behalf of, the Inspector-General or the Official Receiver (as the case requires).

[Reg 16.02 am SR 76 of 1997]

16.03 Inventory by trustee taking possession of, or attaching, property

Where, under the Act, a trustee takes possession of, or attaches, the property of a bankrupt, debtor or deceased person, the trustee must, as soon as is reasonably practicable:

(a) make, sign and date an inventory of the property; and

(b) give a copy of the inventory to any person who has custody of the property or part of the property.

16.03A Document filed by Inspector-General or Official Receiver — fee not payable

A fee is not payable by the Inspector-General or the Official Receiver in respect of an application to, or the filing of a document in, the Court.

[Former reg 16.05 reloc and renum SR 255 of 2002, reg 3 and Sch 1 item 20]

[The next text page is 40-9151]