ENFORCEMENT AND HOW TO FIND ASSETS

PRESENTATION: HUNTER VALLEY FAMILY LAW SEMINAR

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Sally is a member of the Law Council of Australia; Commercial Insolvency and Reconstruction Committee, Insolvency Practitioners Association of Australia; Representative on the ASIC Regional Insolvency Co-Ordination Unit and member of the Smaller Practice Issues Committee of INSOL International, International Association of Restructuring, Insolvency and Bankruptcy Professionals. Sally has also been appointed a Clinical Lecturer in Law at the University of Newcastle Legal Centre.

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1. INTRODUCTION

1.1 Every person who comes into my office with a Judgment for recovery is told the same thing. I could wallpaper my office many times over with successful claims and judgments which the client has been unsuccessful in recovering.

1.2 The reason for the lack of success in recovering debts judgment is not because I am a poor lawyer but because the court system the client and the debtor work against recovery.

1.3 We are all familiar with the delays in the court system. However during the course of litigation how often do practitioners update searches to ensure that properties have not been transferred during the course of the litigation or caveats lodged by parents and siblings, and mortgagees. I suspect none, because a large part of my practice is chasing assets that were in the hands of a company or individual prior to bankruptcy or liquidation and which have been transferred during the course of the litigation.

2. PRELIMINARY INVESTIGATIONS

2.1 Although my paper deals with recovering assets, one has to ascertain if there are assets against which the judgment can be enforced. At the beginning of the litigation enquiries must be made as to the likely prospect of success. Almost all litigation involves recovery of money in one form or another, whether it be in the Family Court, Workers Compensation, Industrial list, or the Commercial list. At the very minimum a case involving rights and declarations will ultimately have a costs order which will result in a monetary claim for recovery.

2.2 With an eye to recovery at the end of the matter whether it only be the costs or the whole claim, minimum enquiries should be conducted being:-

2.2.1 Purchasers Index Search in New South Wales and any other relevant States to ascertain whether any entity to the litigation has real property assets. If there are real property assets a further search should be conducted to ascertain the date and the amount of the purchase and the amount of the mortgage and whether it has been increased. If there is more than one mortgage or caveat then the quantum of those additional mortgages and caveats should be determined. It is not an accurate science but it does give the client an indication that there may be equity in the property at the end of the matter.

Usually the client has no caveatable interest so the only way of ascertaining any changes is to update property searches every couple of months during the course of the litigation to determine if there is a change of mortgagee or change of ownership of the property. If there is then an interlocutory action may be taken by way of asset preservation order or Section 37A Conveyancing Act.

My expertise is in insolvency law. I often have people phoning asking how they can protect their assets from litigation which has already commenced. I give them the same advice. I do not advise on how to protect assets but if the litigation has already commenced the assets cannot be protected.

2.2.2 ASIC Directors and Officers searches. This will determine what business interest the corporate entities and individuals may have. As with real property, if shares are being transferred then actions may be taken to preserve the shareholding in the name of the party who is being sued. Similarly if the company owns a business, lease or real estate and the business or property is sold, action may be taken to preserve the proceeds of the sale price.

2.3 In recent times I have been involved in many matters in which assets have been transferred during the course of litigation. My personal favourite is Mr Lee who, during the course of litigation with one of his creditors, transferred his real property to his wife. Justice Hamilton in the Supreme Court ordered the property be re-transferred under Section 37A Conveyancing Act. However not to be deterred Mr Lee then entered into Family Court Orders with Mrs Lee transferring the property to her. He did not disclose the creditor nor the Hamilton J Orders to the Family Court. The creditor did not update searches. It was only after bankruptcy that I had to tackle the void disposition.

Mr Mitchell is a famous bankrupt who, while we were updating the property searches of the related entity corporations owned by him refinanced all of the related entity properties and transported the money out of the country ultimately bringing it back through Queensland. The interlocutory proceedings brought an end to the whole of the matter and the whole proceedings were ultimately settled.

2.4 I would prefer if parties litigated the transfer issues during the course of litigation and were able to preserve a fund for the benefit of the judgment rather than proceeding to liquidation and/or bankruptcy and having to share the assets with other unsecured creditors including the Australian Taxation Office.

2.5. It is useful for the client to occasionally drive past the other party's premises whether it be real property or business to see if there are any signs for sale.

2.6. The best source of information about the recoverability of a debt or an asset is the client. Often the client has had a close personal relationship with the other party to the litigation and knows matters which have been told to the client which should be recorded for future use in the enforcement process, eg," I put all my money in the kids name".

3. <u>TIME LIMITS</u>

3.1 As with the litigation there are time limits with respect to enforcement. Section 17 Limitation Act 1969 (NSW) provides:-
"

(1) An action on a cause of action on a Judgment is not maintainable if brought after the expiration of a limitation period of 12 years running from the date on which the Judgment first becomes enforceable by the Plaintiff or by the person for whom the Plaintiff claims.

(2) *A Judgment of a Court of a place outside of New South Wales becomes enforceable for the purposes of this section on the date on which the Judgment becomes enforceable in the place where the Judgment is given.*

(3) *Sub section (2) does not apply to a Judgment of the Court of the Commonwealth not being a Court of a territory of the Commonwealth* "

3.2 In the course of litigating a matter parties become aware of the limitation periods, eg, 3 years Trade Practices Act, 6 years Common Law, 1 year Notice of Injury, etc.

3.3 A Bankruptcy Notice cannot be issued with respect to a judgment debt that is more than 6 years old.

3.4 Generally a debt is merged into the judgment which is given in favour of the judgment creditor. The inter-relationship of recovery of a judgment debt in circumstances where the 12 year period had expired was considered by the Full Court of the Federal Court in *O'Mara Constructions Pty Limited v Avery* (2006) FCAFC 55 in which it was determined that a creditors petition in bankruptcy, although based on a judgment debt more than 12 years old was still held to be enforceable upon the presentation of the Creditors Petition such as to give rise to a Sequestration Order.

3.5 Similarly, if the Judgment debt is unenforceable by reason of the Statute of Limitations it may not be a provable debt in a bankruptcy or in a corporate winding up.

4. FORM OF ORDERS

4.1 If a case is settled the form of the Order is important. I recommend two matters for consideration:-

4.2 If a Judgment is for a compromised amount the Judgment should be framed as follows:-

> *"1. Judgment for the Plaintiff in the sum of $100,000.00 inclusive of interests and costs.*
>
> *2. The Judgment in paragraph 1 is stayed in consideration of the defendant making the following payments to the plaintiff:-*
>
> *(Here insert instalment arrangement or lump sum arrangement to pay a compromised amount) "*

The purpose of these Terms of Settlement is so that the client, if the debt is compromised and if the judgment debt is not ultimately paid can proceed to bankruptcy or liquidation or file a Proof of Debt in either for the full amount of its debt, interests and costs.

4.3 A form of security might be pursued in consideration of the settled Judgment by way of example:

> *"In consideration of the Judgment in paragraph 1 being stayed the defendant hereby charges his property both real and personal with the Judgment in paragraph 1 pending payment by him"*

This will have the effect of giving the client a caveatable interest over real property. A consent to give a caveat might be added but a charging clause should be sufficient.

4.4 If an order is in a monetary sum and the party has assets or intent to pay the debt it is important to create a charge by use of the word

> *"The judgment in paragraph 1 is charged over the property at….OR all of my property including real property and personal property."*

4.5 A charging clause in a judgment order has the benefit of giving security or priority over other unsecured creditors. It is recognised in commercial transactions and is in order that I have obtained in the Federal Court *Fodare Pty v Official Trustee in Bankruptcy* (2000) FCA 1721

> *"That the property situated at 23 Racecourse Avenue Menageli Park being folio identifier 23/10718, be charged with the payment to the Official Trustee and Bankruptcy of the amount of the judgment, namely $120,057.18.*

also the Trustee of the property of O'Halloran in the matter of "O'Halloran v O'Halloran (2002) FCA 1305.

5. <u>INTEREST ON COSTS</u>

5.1 A claim for interest should always be made. Even though it is at the discretion of the Court. However, more importantly, a claim for interest on costs must be separately awarded.- *Timms v Commonwealth Bank of Australia (3) (2004) NSWCA 25.*

6. <u>POST JUDGMENT INTEREST IN SECTION 101 CIVIL PROCEDURES ACT</u>

6.1 Prior to 1 January 2007 the rate of interest is prescribed by Schedule 5 to the Rules was at 9%. From 1 January 2007 the rate of interest prescribed by Schedule 5 to the Rules is 10%.

7. <u>CIVIL PROCEDURE ACT 2005</u>

7.1 On **15 August 2005** the Civil Procedure Act 2005 ("UCPA") came into effect. At the same time the uniform Civil Procedures Rules 2005 were proclaimed.

7.2 It is meant to give uniformity to all Courts and common procedures for case management, hearings, judgments and transfer of proceedings.

7.3 The jurisdictions of each Local, District and Supreme Court remain substantially unchanged and the Supreme Court Act, District Court Act and Local Court Act remain in place including some of the Rules. Most of the Rules and Acts however have been repealed and replaced with the new Act and Rules.

7.4 The effect of the Act and Rules was to give a uniform civil procedure in all State courts in New South Wales ie; Local Court, District Court and Supreme Court.

7.5 Notwithstanding that intent the Court of Appeal retains the use of the old forms as does Probate and Corporations Law List matters.

8. WRITS OF EXECUTION

8.1 There are different types of Writs of Execution but the most common is to have the judgment creditor send the sheriff to take delivery of the property of the judgment debtor for it to be sold at public auction.

8.2 Section 109 UCPA states that the Writ of Execution *"binds the property and the goods as from the time the Writ is delivered to the Sheriff".* This has the affect of a Charge over the goods in favour of the sheriff and in theory (although not in practice) the judgment debtor is prevented from dealing with those goods. Consider the recent High Court decision of *Black and Garnock (2007) HCA 31.*

8.3 Writ of Execution has effect for 12 months and may be renewed after this time (Rule 39.20 and Section 116). It can be registered at the Land Titles Office over real estate.

8.11 There is also provision for a Writ of Delivery of Goods (Rule 39.3)(3) which must be supported by an Affidavit setting out the goods, any payments and the address where the goods can be found.

9. GARNISHEE ORDERS

9.1 Section 117 to 125 of the UCPA and Rules 39.34 to 39.43 deal with Garnishee Orders.

9.2 A Garnishee Order operates to attach debts due from the Garnishee (third party) to the judgment debtor only to the value of the judgment debt. This is usually for sub-contractors rather than employees and also for bank accounts or other financial institutions.

9.3 Wages Garnishees for wages and salary by way of Garnishee Order continues to have effect until the judgment debt has been paid (Section 119).

9.4 However if an instalment order is made the Garnishee Order acts to attach to the wage the amount of the instalment order not the whole

salary. In any event the whole salary is not able to be garnisheed as people still have to be left with money to live on and in each area there is a basic wage which can be obtained from the Local Court as to the minimum an employee is to retain.

9.5 Public Servants cannot have their wages garnisheed. Instead a Statutory Declaration is served on the pay master of the relevant government department in respect of the relevant Commonwealth Government Department. A wage garnishee will attach to New South Wales government employees but not Commonwealth (Section 119(4)). Section 75 of the *Public Service Act 1999* (Cth) sets out the procedure for garnisheeing a commonwealth public servant.

9.6 A wages garnishee must be paid within 14 days of the wage or salary being due (Section 120).

9.7 The third party garnishee must pay the money under the garnishee order directly to the judgment creditor (Section 123) but the garnishee can keep administrative expenses of $13.00 from each payment which is also part of the amount to be deducted from the judgment debt. (Section 123(5)) The $13.00 does not apply in relation to a garnishee/instalment order. (Rule 39.42 Schedule 3).

9.8 If a garnishee order is not complied with then action can be taken against the third party garnishee to recover the judgment debt from it. (Section 124).

10. CHARGING ORDERS

10.1 Sections 126 – 128 and Rules 39.44 and 39.45 deal with a procedure only available in the Supreme Court and District Court for a Charging Order. This is interesting but not used in practice.

10.2 The Notice of Motion for Charging Order and the form of Charging Order are forms 56 and 57.

10.3 The Charging Order acts similarly to a mareva order or asset preservation order by charging the interest in the property of the judgment debtor in the form of stocks and shares, bank deposits where they are held in the debtors name or any equitable interest in property.

10.4 The judgment creditor is entitled to the same rights as the judgment debtor and deals with the property charged other than in accordance with the directions of the judgment creditor.

11. APPOINTMENT OF RECEIVERS OR SEQUESTRATION OF PROPERTY

11.1 Only the Supreme Court has power to appoint a Receiver or Sequestration of property (Rule 40.1 – 40.4).

11.2 The appointment of a Receiver is regarded as a less extensive order then an Asset Preservation Order – See High Court *Cardile –v- LED Builders Pty Limited (1999)* 198CLR380.

12. APPLICATION TO PAY BY INSTALMENTS

12.1 The District Court and Local Court have power to order payment of a debt by instalments. It is rarely ordered in the Supreme Court.

12.2 Interest is to be paid in priority to the principal debt (Section 136 UCPA) to make the payment of judgment debts consistent with the banking and finance industry. This will make it difficult to calculate the amounts which are due and owing but it will also mean that it will be more difficult for the Court to determine what is a proper instalment order.

13. BANKRUPTCY PROCEEDINGS

13.1 A Bankruptcy Notice can be served whilst there is a judgment which execution has not been stayed. A Bankruptcy Notice is invalid if there is a stay of execution (ie an instalment order) granted before issue or before service of the Bankruptcy Notice (*Re- Giacomo ex part Boral Steel Limited (1983)* 68FLR106*)*.

13.2 A Bankruptcy Notice if interest is claimed must be under the new Act ie; Section 101 *Civil Procedures Act* and not under the previous Local Court, District Court, Supreme Court Acts, even though the judgment may have been entered under the earlier Acts.

13.3 The Bankruptcy Notice need not be personally served (Regulation 16 Bankruptcy Regulations). See *Drake v Stanton* [1999] FCA 1635 (5 November 1999), and *Theodor Silvas (a bankrupt) v The Official Trustee in Bankruptcy* [1997] 206 FCA (4 April 1997).

13.5 A Creditors Petition is a prescribed form and must be verified as to each of its four paragraphs. Usually paragraphs 1, 2 and 3 by the client but not the solicitor and paragraph 4 by a search to ascertain as to whether or not there has been any application to set aside the Bankruptcy Notice.

13.6 The Creditors Petition once filed must be personally served.

13.7 The debt must be more than $2,000.00 and a final Affidavit of Debt is required on the day of the hearing as well as a search to show that the person isn't already bankrupt or the subject of a debt agreement.

13.8 Bankruptcy proceedings can be commenced in either the Federal Court or the Federal Magistrates Court.

Section 50 of the *Bankruptcy Act* gives the right to have an appointment of an early Receiver. (1) At any time after a bankruptcy

notice is issued, or a creditor's petition is presented, in relation to a debtor, but before the debtor becomes a bankrupt, the Court may:

(a) direct the Official Trustee or a specified registered trustee to take control of the debtor's property; and

(b) make any other orders in relation to the property.

(1B)
If the Court directs a trustee to take control of the debtor's property, the Court must specify when the control is to end.

14. PROPERTY

14.1 The definition of “property“ in the Bankruptcy Act is wide:

> *Property means real or personal property of every description, whether situated in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property”*

14.2 Fundamental to the statutory regime of Bankruptcy and Family Law is the concept of “property”. Each Act has a similar definition.

14.3 The definition of “property” in the Family Law Act is

> *“In relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or revision.”*

14.4 Assets of the bankrupt vests in the trustee in bankruptcy at the date of bankruptcy but also after acquired assets vest during the term of the bankruptcy ie. before the bankrupt is discharged (section 58(2) of the Bankruptcy Act)

14.5 Section 79(1)(b) and (c) of the Family Law Act provide

> “*(1) In property settlement proceedings, the court may make such order as it considers appropriate:*
> *(b) In the case of proceedings with respect to vested bankruptcy property in relation to the bankrupt party to the marriage – altering the interest of the bankruptcy trustee in the vested bankruptcy properties: including*
> *(c) An order for settlement of property in substitution for any interest in the property”*

14.6 Examples of property are:

- Interest in real estate
- Chattels
- Cash-Bank accounts
- Antiques and value art works, wine collections, but not usually personal belongings which are exempt
- Motor Vehicles in excess of about $6,000.00
- Shares, including listed and in private companies
- Interest in an undistributed deceased estate
- Choses in action
- Rights to enforce judgments, appeals, costs.

14.7 It is important to note that income is not property all though there is a requirement under the bankruptcy act for income contribution assessments to be made and for a bankrupt to make contributions to his trustee from his income. Trust and superannuation assets do not vest.

14.8 It is important to know that all property vests and section 116 contains a lengthy definition of property divisible amongst creditors. That property is set out in section116(1) and the exemptions of property which do not vest are set out in section 116(2).

14.9 Section 116 of the Bankruptcy Act

> *(1) Subject to this Act:*
>
> *(a) all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge;*
>
> *(b) the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his or her own benefit at the commencement of the bankruptcy or at any time after the commencement of the bankruptcy and before his or her discharge;*
>
> *(c) property that is vested in the trustee of the bankrupt's 's estate by or under an order under section 139D or 139DA; and*
>
> *(d) money that is paid to the trustee of the bankrupt's 's estate under an order under section 139E or 139E;*

14.10 Section 115 of the Bankruptcy Act sets out a table of when bankruptcy commences. It is usually from the first available act of

bankruptcy within six months of sequestration order or can be upon the filing and acceptance of a debtor's petition, the date varies upon the event.

14.11 Bankruptcy commences from the act of Bankruptcy. See *Corke v Corke and the Official Trustee in Bankruptcy* (1994) 17 FamLR 698 Full Court, Federal Court, Lockhart J (with whom Black CJ and Beazley J agreed).

14.12 In August 1987 the wife committed an act of bankruptcy and in November 1987 she executed a maintenance agreement which was registered under section 86 of the Family Court Act requiring her to transfer to the husband her interest in the matrimonial home. She did not do so and was ultimately discharged from bankruptcy in 1990.

14.13 In 1991 the Official Trustee became registered by transmission as proprietor of her interest in the home and husband bought proceedings claiming an interest.

14.14 The Official Trustee in Bankruptcy sought to set aside the wife's transfer to the husband on the basis that it was a sham. That application succeeded at first instance.

14.15 It should be noted that the first instance application was by was of intervener by the Official Trustee in Bankruptcy in the Family Court, he first having commenced proceedings under the then section 120 of the Bankruptcy Act in the Federal Court and had them transferred to the Family Court pursuant to section 35A of the Bankruptcy Act. Accordingly the appeal was not to the Full Court of the Family Court but to the Full Court of the Federal Court.

14.16 Lockhart J did not have to determine the sham issue. He determined that the act of bankruptcy occurred prior to the date of the Family Court orders and therefore in equity the property was vested in the trustee.

> *"The trustee in bankruptcy is generally bound by the equities which affect the bankrupt; so that if a third party has an equitable interest in property, the law protects that property and the property passes to the Official Trustee, but it is 'clogged with all the equitable conditions which attach to it".*

14.17 The transfer by the wife to the husband pursuant to the Family Court orders was set aside and the property vested in the trustee in bankruptcy for the benefit of all unsecured creditors. The husband was unable to lodge a proof of debt because he was not such an unsecured creditor.

15. JOINT PROPERTY

15.1 Upon the making of a Sequestration Order, or acceptance of a Debtor's Petition, there is an automatic severance of any joint tenancy which may exist in relation to that property between the bankrupt and the third party (usually a spouse). Prior to the recent law it had been held that once property has vested in the Trustee, the Family Court cannot make orders as the spouse does not own the property *Re: Bedford; Ex Parte Official Receiver* [1968] 12FLR 309. With the changes to the *Family Law Act* all vested bankruptcy property is to be dealt with in the Family Court.

15.2 In general terms, the non-bankrupt spouse and the Trustee will then hold property as tenants in common in equal shares unless the non-bankrupt spouse can either persuade the Trustee that his or her contribution (financial or non-financial) to the acquisition of the property is greater than that of the bankrupt or that the enhancements to the value of the property brought about by renovations or repairs are attributable to value provided by the non-bankrupt spouse or alternatively satisfy the court in a partition action that the equities be in different proportions, eg. 80/20 (s.66G Conveyancing Act, 1919 (NSW)).

15.3 The foregoing is consistent with the principle that a Trustee in Bankruptcy gets no better title to any "property" than the bankrupt.

15.4 In *Peldan v Anderson* [2006] HCA 48 (4 October 2006) the High Court considered the issue of whether or not, a transmission of property upon death to the co-joint tenant was a void transfer of property under section 120/121 of the Bankruptcy Act. The High Court found it was not. The short facts of the matter are that the bankrupt, prior to bankruptcy unilaterally severed a joint tenancy in Torrens Title land held between himself and his wife. His wife died prior to his bankruptcy. The Trustee asserted that pursuant to sections 121(1) a; 121 9 (b), of the Bankruptcy Act the bankrupt had transferred property which was void against his Trustee in bankruptcy because that property would probably have become part of the bankrupt's estate had it not been transferred.

16 EXONERATION

16.1 The law of exoneration is accepted in a bankruptcy context most recently by the Full Court or the Federal Court in *Parsons v McBain (2002)192ALR772* stated to be

> *"20" The equity of exoneration is an incident of the relationship between*
> *surety and principle debtor.*
>
> *"21" An equity of exoneration operates in the nature of "a charge upon the estate of the principal debtor by way of indemnity for the purpose of enforcing against the estate the right which (the*

> *beneficiary) has, as between (the beneficiary) and the principal debtor to have that estate resorted to first for the payment of the debt"*

The effect of the equity of exoneration is that were co-owners (usually husband and wife) mortgage their property so that money can be borrowed for the benefit of one of them eg. the husband's business, the other has an interest in the property which is primarily liable to pay the debt and has an entitlement to charge against the others property upon payment of that debt.

16.2 The fact that monies are raised and applied for the use of one party of the marriage without benefit to the other is sufficient to attract the doctrine of exoneration.

16.3 On 14 December 2004 Nicholas J in the Supreme Court of New South Wales in *Phillip Ashley Dickson v Geoffrey Philip Reidy (2004) NSW SC 1200* considered the position of a wife forging her husbands signature in relation to a mortgage and the vesting of the real property in her Trustee in bankruptcy. The husband succeeded in an action against the Trustee and was exonerated against the Trustee's interest in the property. The Court found in favour of the husband against the Trustee in Bankruptcy that each of the loans made by the wife were for her own benefit and her interest in the property which had vested in Mr Reidy as her Trustee in Bankruptcy was charged to secure the exoneration in favour of the husband.

16.4 Fundamental to the statutory regime of Bankruptcy and Family Law is the concept of "property". Each Act has a similar definition.

17. IMPERFECT TRUST

17.1 As trust assets do not vest in a trustee in bankruptcy under section 116(2) of the Bankruptcy Act equally imperfect trust assets vest. If a declaration of trust was never effected then the asset vests in the owner and on bankruptcy on his trustee in bankruptcy.

17.2 In *Rambali v Reese* [2007] FMCA 408 Federal Magistrate Burchardt held that land vested in the trustee in bankruptcy under section 58 of the Bankruptcy Act. It was asserted by a company associated with a friend of the bankrupt that the house property was held in a trust. The "*Vornreeves* Family Trust No.1" and "Vornreeves Family Trust No 2" were each set out by different deeds of settlement on 11 October 1996 by ashelf company created as trustee of each trust. It was not in fact incorporated until 22 November 1996 ie. after the date of creation of each trust. In 1997 it was asserted that the bankrupts assets including the house property were transferred to the No 1 trust.

> *"The parties agreed that the onus of proving the intention to create a trust lies upon the respondent….it is accepted that there may be*

> *an evidentiary onus upon the applicant to rebut the presumption of a declaration of trust. There is no doubt that the respondent executed the declaration of trust in 1997, nor to my mind is there any doubt that at least part of the intention of the respondent in making that declaration of trust was to alienate the property at least to an extent, so that he could defeat in the matrimonial claims "so far as I can see the only corporate activity conducted on behalf of TBD Pty Ltd. was the payment of funds by way of statutory fees….the respondent never took any steps to transfer title until very late in the day. This was plainly done in 2004 as an after thought in light of the possibility of these proceedings or similar proceedings."*

17.3 In the decision of *Hyhoni Holdings Pty Ltd. v Leroy* [2002] NSWSC 624, at first instance, Young CJ observed

> *"However, difficult questions of fact not infrequently arise where a person, despite that declaration continues to exercise personal dominion over the so called trust property….and when that occurs it is very difficult question for equity to determine whether the trust exists or not".*

17.4 In *Rambali v Reeves*, His Honour found that the bankrupt was neither intentionally dishonest or wilfully misleading, that he intended to transfer the property to the trust but that for at least ten years he did not divest himself of his beneficial interest in the property and that "*declaration of trust did not achieve what it purported to achieve, namely the disposition of the respondent's beneficial interest in favour of TBD Pty Ltd. I find that the interest remains vested in the respondent".*

Accordingly, in bankruptcy the property vested in the trustee in bankruptcy and he was able to obtain that declaration.

17.5 Interestingly, *Rambali v Reeves* did not consider the lengthy Victorian dispute of *Marchesi v Apostolou* which has had a checkered history. The most recent decision (after rehearing at the direction of a Full Court) determined that the gift of real property by the bankrupt by way of trust was an imperfect gift and when he was declared bankrupt the real property vested in his trustee in bankruptcy. See *Marchesi v Apostolou* [2007] FCA 986.

17.6 *Marchesi v Apostolou* dealt with three titles of land. When Mr Apostolou was declared bankrupt he claimed that the properties were held in a trust for him. It is true that on 8 October 1987 Mr Apostolou executed a document in the following terms:-

> "*I Andrew Vasalou, also known as Andreas Vassiliou of 18 St Kilda Road, St Kilda in the state of Victoria make the following gift to a family trust known as the Vassiliou family trust.*

Gifted certain properties

1. *10 Claremont South Kilda*
2. *18 St Kilda Road, St Kilda*
3. *5/3 Alfirston Street, Earlwood*

I hereby state that: I make gift all of the above properties together with chattels fittings and accessories titles (if any) to the family trust named above with no consideration."

17.7 Valuations were prepared and transfers were executed. However the stamp duty on each transfer was never paid. His solicitor wrote requested Mr Vassiliou to "*forward a cheque for $16,000.00 so that we can attend to payment on assessment issues*". The stamp duty was never paid and the properties remained registered to the bankrupt notwithstanding the declaration of trust. The trust mortgaged the properties and secured the properties for borrowing made to the trustee.

17.8 Jessup J referred to the principles in *Milroy v Lord* (1862) 4 De G F & J 264 and the judgment Mason CJ and McHugh J in *Corin v Patton* (1990) 169 CLR 540 at 559:

> "*Accordingly, we conclude it is desirable to state that the principle is that, if an intending donor of property has done everything which is necessary for him to have done effect a transfer of legal title, then equity will recognise the gift. So long as the donee is equipped to achieve the transfer of legal ownership, the gift is complete in equity." "Necessary used in this sense mean necessary to effect a transfer. From the view point of the intending donor, the question is whether what he has done is sufficient to enable a legal transfer to be effected without further action on his part.*
>
> *The test is a twofold one. It is whether the donor has done all that is necessary to place the vesting of the legal title within the control of the donee and beyond the recall or invention of the donor. Once that stage is reached and the gift is complete and effective in equity, the equitable interest in the land vests in the donee and, that being so, the donor is bound in conscious to hold the property as trustee for the donee pending the vesting of the legal title."*

17.9 Mr Vassiliou during the term of the creation of the trust was in dispute with the Deputy Commissioner of Taxation but ultimately settled his dispute and paid the debt due in March 1989. However in 1987 when Mr Vassiliou created the trust he was being confronted by a claim by the Deputy Commissioner of Taxation of about $160,000.00. Notwithstanding the payment of the Deputy Commissioner of Taxation it was clear that the intended transfer of properties to the trust was at a time when there was a dispute with the ATO.

17.10 The gift from Mr Vassiliou to the trust failed and the property had not been transferred to the trustee of the trust. Therefore the asset remained vested in Mr Vassiliou at this bankruptcy and each of the properties vested in the trustee in bankruptcy upon the making of the sequestration order.

18 TRUSTEE HAS RIGHT OF INDEMNITY AGAINST THE TRUST ASSETS

18.1 If a trust is asserted the creditors of the trust are entitled to be indemnified from the trust assets.

18.2 For recent discussion consideration should be given to *Toyama Pty Ltd v Landmark Building Developments Pty Ltd.; Landmark Building Developments Pty Ltd v Staislaus Anthony Carrol & Anor* (No 2) [2007] NSWSC 55 (9 February 2007). The Trustee also has a lien for costs and expenses.

19. WINDING UP APPLICATION

19.1 The Corporations Act 2001 and the Uniform Corporations Rules govern procedures for winding up of corporations in Australia.

19.2 Winding up of a company can be in the Federal Court or the Supreme Court (NSW). The act and rules apply equally to each Court. In theory (although not in practice) the Court procedures should be identical.

19.3 The Corporations Act requires that ASIC be notified of the winding application having been filed within 24 hours of the application being filed. There is no rule requiring proof that notification as part of the winding up evidence. However, the Registrar will require evidence that ASIC has been notified.

19.4 There is no rule requiring an Affidavit of Debt to be filed but the Registrar requires one.

19.5 There is also no rule requiring an updated ASIC corporations search. The rules require an ASIC search to be filed with the Originating Process for winding up and it must not be more than 7 days old. However, as the hearing is usually 4 weeks after filing the current Registrar require an up to date ASIC search.

19.6 As with bankruptcy the Court can appoint a provisional Liquidator over the company assets to protect the Creditors.

19.7 Winding up proceedings can be contested on the ground of solvency or on the ground of a disputed debt if leave is granted under 459S of the

Corporations Act. *See Evans & Tate Premium Wines Pty Ltd v Australian Beverage Distributors* (2005*) NSW SC186*

19.8 The Court will not usually entertain an application with respect to a disputed debt because the Statutory Demand process has been held to be a code and Section 459G and 459H of the Corporations Act require that a Statutory Demand which is disputed or to which a set off applies the subject of an application which must be filed and **served within 21 days of service of the demand.** *(See David Grant & Co Pty Ltd v Westpac Banking Corporations (1995) 184CLR265).*

19.9 Section 109X of the Corporations Act requires service either by leaving it or by posting it to the registered office or delivery to a Director of the company. Posting is construed under Section 29 of the Commonwealth Acts Interpretation Act 1901 being delivery in the ordinary cause of post. (See *Lane Cove Council v GEEBUNGPolo Club Pty Ltd (2) (2002) 41ASCR15).*

19.10 The application to set aside the demand must be made with a supporting Affidavit. The supporting Affidavit must relate to the genuine dispute or Cross Claim and must disclose facts that there is a genuine dispute. *(See Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund (1996) 70FLR452).*

19.11 Whilst the initial Affidavit may be supplemented by subsequent Affidavit outside the 21 days period no additional ground can be disclosed in the further Affidavit. (See *Super & Scope Data Systems v BDO Nelson Parkhill (2003) NSWSC137).*

19.12 Cross Examination is limited and only with leave. The Court treats the application as if it were an Interlocutory Application as the Court only has to determine if there is a genuine dispute on genuine grounds. It does not have to determine the dispute. *(Mibor Investments Pty Ltd v Commonwealth Bank of Australia (1994) 2VR290).*

19.13 In New South Wales, the case genuinely followed is *McLelland CJ in Eyota Pty Ltd v Hanave Pty Ltd (1994) (12ACSR785)* which requires *"a plausible contention requiring investigation, and raises much the same sort of consideration as the serious question to be trialled criterion which arises on an application for an interlocutory injunction or for the extensional removable Caveat".*

19.14 In New South Wales, the Supreme Court is becoming tired of 459G Applications and is now making indemnity costs orders *see Rainbow & Nature Pty Ltd v Bronson & Jacobs Pty Ltd (2006) NSWSC217.*

20. CONVEYANCING ACT 1919 - SECT 37A

20.1 The section enables a creditor to make an application to have the transfer of property set aside where there is an intent to defraud creditors. Section 37A of the *Conveyancing Act* was the forerunner to Section 121 of the *Bankruptcy Act*.

*"**Voluntary alienation to defraud creditors voidable***
37A Voluntary alienation to defraud creditors voidable

(1) Save as provided in this section, every alienation of property, made whether before or after the commencement of the Conveyancing (Amendment) Act 1930 , with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.

(2) This section does not affect the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors. "

The Supreme Court is the "Court" prescribed as the relevant Court for the purpose of matters under the *Conveyancing Act*. In my view only the Supreme Court has power to deal with applications under Section 37A *Conveyancing Act*. **Voluntary alienation to defraud creditors voidable**

20.2 It can be used by a creditor where there has been a transfer of real estate and examples of where the Supreme Court have had no hesitation in making the orders, notwithstanding the Family Court orders are:

- *Langdon -v- Gruber (2001)* NSWSC276; Austin J found that the transfer made under the *Family Law Act* was made with the intent to defraud creditors notwithstanding at the date of the transfer litigation by the creditor had not been commenced.

- In *Green -v- Schneller (2002)* NSWSC671 Barrett J considered a transfer under the *Family Law Act* directed between the husband and the wife and had no hesitation in setting aside the orders.

20.3 Justice Bergin in *Nick Houvardis -v- George Zaravinos & Anor (2003)* NSWSC387 (confirmed on appeal) set aside three transfers of property between the husband and the wife, notwithstanding the fact that George Zaravinos had entered into the transfers under Family Court

orders and had been made bankrupt. Leave of the Federal Court of Australia was given to Nick Houvardis as a creditor on terms that should he be successful in having the transfer of properties set aside under Section 37A the properties would vest in the Trustee in bankruptcy and be available for the benefit of all of the unsecured creditors.

21. ASSET PRESERVATION ORDERS

21.1 An Asset Preservation Order restrains a Defendant or Third Party from disposing of assets where there is a perceived risk that they will dissipate, sell, transfer, move assets in an attempt to frustrate enforcement of a judgment.

21.2 It may be ordered before the commencement of proceedings in which case an undertaking to commence proceedings will be made but this is rare.

21.3 Usually it is during or at the commencement of the proceedings and usually it is ex parte but the Court is loath to order ex parte injunctions.

21.4 An undertaking for damages is usually required.

21.5 The two matters which must be proven are:

(a) The making out of a good prima facie cause of action against the Defendant

(b) Demonstrating that there is a risk of disposing of assets to frustrate the execution on judgment eg; a for sale sign or a lapsing of a caveat.

21.6 There is no prescribed form of order although the Federal Court Rules do have a practice note 10 dealing with Anton Piller Orders. In the Federal Court there is also a protocol for dealing with urgent matters and the need for an urgency Affidavit. In the Supreme Court there is a daily duty judge.

21.7 The Local Court has no jurisdiction to order these types of injunctions and the District Court has a limited jurisdiction as an order in aid of a specific proceeding against parties to proceedings but not in relation to third parties.

21.8 The relevant High Court case is *Cardile -v- LED Builders Pty Limited (1999)* 198CLR380.

21.9 It should be noted that a Mareva Order gives rise to rights in personam and not in rem and there is no legal basis for lodging a caveat or registering a charge over real estate. This legal principal is always

disregarded and it is my practice to lodge a request at the LPI on real estate which is the subject of an Asset Preservation Order.

21.10 In framing the orders in relation to the Asset Preservation Order the amount needs to be sufficient to cover the claim and any costs order.

21.11 If the assets have in fact already been removed then an Asset Preservation Order is not the appropriate course you would have to move under a different provision and possibly apply to have the person made bankrupt as an available Act of Bankruptcy to have the assets preserved.

21.12 Even if the assets are preserved the case still has to been proven which may not be easy [See *Vasil -v- National Australia Bank Limited (1999)* 46NSLR207. The Court of Appeal considered the issue of privilege against self incrimination where Mr Vasil was alleged to have used a number of aliases in defrauding a number of banks. A large sum of money was required to be paid into the Supreme Court where it lay pending various banks making claims against it. Mr Vasil went to gaol and was made a bankrupt.

The bank in that matter obtained an ex parte order requiring Vasil to deliver to the bank an affidavit identifying all bank accounts held in his name and nine other aliases and an inventory of al property owned or controlled by him. Without complying with the order Vasil appealed for a discharge of the order on the ground that in infringed his privilege against self incrimination. The appeal was allowed but the order could have been amended to require delivery of that information in a sealed envelope not to the bank but to the Court.

22. **PROCEEDS OF CRIME ORDERS**

22.1 In *Crown Diagnostic v Sood (2) (2006) FMCA 265 and Rayner & Other v Ollis (2007) FMCA 1160* consideration was given to the interrelationship of the Bankruptcy Act and Criminal Assets Recovery Act 1990 (NSW) and proceeds of Crime Act 2002 (Cth). The latter has relevance for recovery of all assets.

22.2 A restraining order under section 10 of the Criminal Assets Recovery Act 1990 relates to the property of the defendant at the date of the order. There power to award an assets forfeiture order which forfeits all or some of the defendants interest in property to the Crown. There is no need to prove the derivation of the assets. It is simply necessary to prove that it is more probable then not that the person in previous six years was engaged in “serious crime related activity”.

22.3 It is possible that all the assets of a party are vested in equity in the Crown by reason of orders under the above Acts.

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