

BANKRUPTCY AND INSOLVENCY

**The Micawber principles:
When Bankruptcy and Family Law Collide**

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1. Introduction

Why is this paper called “The Micawber principles”? Mr Micawber, in Charles Dickens’ *David Copperfield* is the eternal optimist. His famous phrase “Something will turn up” is probably reflective of how many people end up bankrupt. Judge Driver in a case referred to in this paper described a bankrupt as Mr Micawber.

Bankruptcy issues frequently arise when parties separate - either contributing to the reasons for the separation or as an outcome of the separation. This paper provides a brief introduction to bankruptcy law and the interaction between bankruptcy law and family law. It then examines some of the tricky issues which arise, as well as the most recent cases. As the 2005 amendments to the *Family Law Act 1975* (Cth) (FLA) have not been heavily litigated, perhaps because many of the cases settle as the property pools are modest and trustees in bankruptcy are usually pragmatic and not funded for litigation with uncertain outcomes – the effect of these amendments is still not clear. This is an opportune time to look again at the intersection of bankruptcy and family law. Not only have there been some recent cases which change or challenge the assumptions lawyers have as to the effect of the 2005 amendments, but in 2019, the economic environment is uncertain and bankruptcies may increase in number and frequency because of falling house prices, stagnant incomes and a slow economy.¹

References to the sections of the FLA are given for married parties only. Similar provisions generally apply to de facto relationships caught by the FLA.

2. When can the Family Law Courts deal with bankruptcy matters?

There are several ways in which a family law court can deal with bankruptcy matters. These are:

2.1. Matrimonial causes under the FLA. The “matrimonial causes” were extended by the *Bankruptcy and Family Law Legislation Amendment Act 2005*. In addition, all States and Territories (except Western Australia) referred jurisdiction in de facto financial causes to the Commonwealth in 2009/10. The “de facto financial causes” are similarly worded, but not precisely the same as the “matrimonial causes”. Both include proceedings between parties to a marriage or de facto relationship and a trustee in bankruptcy for the other party.

Section 79 specifically provides, in relation to bankruptcy matters:

- (1) *In property settlement proceedings, the court may make such order as it considers appropriate:*
 - (a) *in the case of proceedings with respect to the property of the parties to the marriage or either of them--altering the interests of the parties to the marriage in the property; or*

¹ Shane Wright, “Seven graphs which show the Australian economy is not going well”, *The Age*, 7 June 2019; Briana Shepherd “Bankruptcy surge hits young families in WA and Queensland hardest”, *ABC News website*, 31 July 2018

- (b) *in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage--altering the interests of the bankruptcy trustee in the vested bankruptcy property;*
including:
- (c) *an order for a settlement of property in substitution for any interest in the property; and*
- (d) *an order requiring:*
- (i) *either or both of the parties to the marriage; or*
- (ii) *the relevant bankruptcy trustee (if any);*
- to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines....*
- (10) *The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a marriage (the **subject marriage**):*
- (a) *a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;*
- (aa) *a person:*
- (i) *who is a party to a de facto relationship with a party to the subject marriage; and*
- (ii) *who could apply, or has an application pending, for an order under s 90SM, or a declaration under s 90SL, in relation to the de facto relationship;*
- (ab) *a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject marriage;*
- (b) *any other person whose interests would be affected by the making of the order.*
- (10A) *Subsection (10) does not apply to a creditor of a party to the proceedings:*
- (a) *if the party is a bankrupt--to the extent to which the debt is a provable debt (within the meaning of the Bankruptcy Act 1966); or*
- (b) *if the party is a debtor subject to a personal insolvency agreement - to the extent to which the debt is covered by the personal insolvency agreement.*
- (11) *If:*
- (a) *an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and*
- (b) *either of the following subparagraphs apply to a party to the marriage: (i) when the application was made, the party was a bankrupt;*
(ii) after the application was made but before it is finally determined, the party became a bankrupt; and
- (c) *the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and*
- (d) *the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings; the court must join the bankruptcy trustee as a party to the proceedings*

2.2. The *Bankruptcy Act 1966* (Cth) (BA) gives jurisdiction to the Family Court by s 35(1) BA (and was amended in 2018 to include financial agreements):

If, at a particular time:

- (a) *a party to the marriage is a bankrupt; and*
- (b) *the trustee of the bankrupt estate is:*
- (i) *party to property settlement proceedings in relation to either or both the parties to the marriage; or*

- (ii) *an applicant under s 79A of the Family Law Act 1975 for the variation or setting aside of an order under s 79 of that Act in property settlement proceedings in relation to either or both of the parties to the marriage; or*
 - (iia) *an applicant for an order under s 90K(1) or (3) of the Family Law Act 1975 in relation to the setting aside of a financial agreement of the parties to the marriage; or*
 - (iii) *a party to spousal maintenance proceedings in relation to the maintenance of a party to the marriage;*
- then, at and after that time, the Family Court has jurisdiction in bankruptcy in relation to any matter connected with, or, arising out of, the bankruptcy of the bankrupt.*

A similar provision, s 35(1A), applies to de facto relationships. Section 35B applies to the Family Court of Western Australia.

2.3. The Federal Circuit Court has jurisdiction under the BA as well as under the FLA and can deal with a dispute exercising jurisdiction under both Acts.

3. Overview of bankruptcy law

3.1 When is bankruptcy an option and what other options are there under the BA?

Bankruptcy is an option for a debtor who is unable to pay their debts as and when they fall due. A debtor may file a debtor's petition. A creditor owed \$5,000 or more can file a creditor's petition.

A debtor filing for bankruptcy must file a Statement of Affairs at the same time, setting out such matters as their assets, liabilities, income and recent transactions and addresses. If a creditor's petition is accepted, the bankrupt has 14 days to file a Statement of Affairs from the date the sequestration order is made. The information in a Statement of Affairs can be helpful for the non-bankrupt spouse (as well as for the trustee).

A bankruptcy can end in one of two ways:

1. By discharge at the expiration of 3 years and 1 day after a Statement of Affairs is filed if no objection is lodged; or
2. By annulment. This cancels the bankruptcy. There are three ways this can happen:
 - 2.1. All debts, interest, charges, trustee's expenses and fees are paid in full; or
 - 2.2. The creditors accept a composition or arrangement; or
 - 2.3. A bankruptcy court makes an order annulling the bankruptcy.

Other options for the potential bankrupt under the BA besides bankruptcy are:

1. Declaration of intention to present a debtor's petition. This gives the debtor 21 days to look at options during which period the unsecured creditors cannot take action to recover their debts;
2. A debt agreement under Pt IX BA. The creditors agree to accept a share of money over a period of time which may be less than 100% of the debts. A debt agreement administrator helps

the debtor. Proposing a debt agreement is an act of bankruptcy. A debt agreement can only be proposed by a debtor if:

- The debtor's unsecured debts are less than \$115,733.80 as at 27 June 2019 (indexed amount);
 - The debtor's unsecured assets are less than \$231,467.60 as at 27 June 2019 (indexed amount);
 - The debtor's income is more than \$86,800.35 as at 27 June 2019 (indexed amount); and
 - The debtor must not have been bankrupt, proposed a personal insolvency agreement or made a debt agreement in the past 10 years.
3. A personal insolvency agreement ("PIA") which is more formal than a debt agreement. A controlling trustee is appointed and a majority of creditors, representing at least 75% of the dollar value of the voting creditors' debts, must approve it. There are no asset, debt or income thresholds. A PIA cannot be proposed if a PIA was made in the past 6 months. A PIA was formerly known as a Pt X agreement.

3.2 *What property vests in the trustee and what is exempt?*

Upon bankruptcy, the bankrupt's property vests in the trustee in bankruptcy under s 58 BA. There is a proviso to s 58 in s 59A which makes s 58 subject to an order under Pt VIII or VIIIAB FLA.

Furthermore, property which is exempt under s 116 BA does not vest. Exempt property includes:

- If, under a Pt VIII FLA order, the bankrupt was or is required to transfer that property to the spouse of the bankrupt (s 116(2)(q) BA). Section 116(2)(r) BA exempts transfers pursuant to property settlement orders under Pt VIIIAB FLA;
- Property held by the bankrupt on trust (s 116(2)(a) BA);
- Superannuation, although payments into superannuation made to defeat creditors can be clawed back under s 128B or 128C BA;
- Superannuation splits under Pt VIIIIB FLA;
- Most household goods;
- Motor vehicle which is a primary means of transport with equity of up to \$7,900 as at 27 June 2019 (this figure is indexed);
- Tools of trade worth up to \$3,750 as at 27 June 2019 (this figure is indexed);
- Property held by the bankrupt on trust;
- Property transferred under a maintenance order (s 123(6) FLA);
- Compensation for a personal injury or assets bought wholly or substantially with that compensation.

The right to take proceedings “for exercising all such powers in, over and 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 during the bankruptcy is generally a property right which vests in the trustee (s 116(1)(b)). Certain causes of action do not vest. A right to claim a property settlement under s 79 or s 90SM FLA is a personal right which does not vest in the trustee. Any property transferred to the bankrupt pursuant to a property settlement order which is not exempt (e.g. a superannuation split is exempt) vests in the trustee as after-acquired property (s 58(1)(b)).

Generally, creditors with debts which are provable in bankruptcy cannot continue to enforce their debts after bankruptcy. Debts provable in bankruptcy are defined in s 82(1) as:

All debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy are provable in his or her bankruptcy.

In simpler terms, a debt is provable "if there is a legally enforceable obligation upon which the debt is founded, being an obligation incurred before the date of bankruptcy" (*Agresta v Trustee of F Agresta a Bankrupt* [2015] FCA 463 at [30]; *Jones v DCT* (1998) 157 ALR 349). Judgment is not required for a proof of debt to be lodged. The bankrupt has no direct liability to the creditors after bankruptcy and the creditors no longer have a right of action for their debts (s 58(3)). Proceedings in respect of the non-payment of a provable debt, including to enforce payment, are stayed (s 60(1)(b) and (c)). Secured creditors usually rely on their security and do not prove in the bankruptcy, although they can choose to give up their security.

Child support and child and spousal maintenance debts receive special treatment in a bankruptcy. The creditor can prove in the bankruptcy, but enforcement proceedings outside of the bankruptcy can still continue (s 58(5A) BA). After being discharged from bankruptcy, a bankrupt is still liable for any child support and child and spousal maintenance debts (s 153(2)(c)) unless there is an order of the court. See *Segler v Child Support Registrar* [2009] FMCA 41; *Segler v Child Support Registrar (No 2)* [2011] FMCA 96.

4. Notice to bankruptcy trustees of FLA proceedings and notice of a bankruptcy to the Family Law Courts and parties

There are obligations on parties to FLA proceedings to notify a bankruptcy trustee of the proceedings, and obligations on bankrupts to notify the other parties to the FLA proceedings and the court of the bankruptcy as well as to notify their trustee in bankruptcy of the FLA proceedings.

There are also obligations in the FLA to notify creditors where there is no bankruptcy but the proposed court order or financial agreement may mean that the creditor will not be paid. These obligations are not covered in this paper.

A party to a marriage or de facto relationship or a party to a relevant case in relation to that marriage or de facto relationship (r 6.16 *Family Law Rules 2004* (FLR)) who is also a bankrupt or a debtor subject to a personal insolvency agreement must, under r 6.17, notify:

- (a) all other parties to the relevant case, in writing, about the bankruptcy or personal insolvency agreement;*
- (b) the bankruptcy trustee or the trustee of the personal insolvency agreement, as the case may be, about the relevant case in accordance with r 16.18;*
- (c) the court in which the relevant case is pending, in accordance with r 6.19.*

Notice to a trustee must be in writing and be given within 7 days, or as soon as practicable, after the date on which the party becomes both a relevant party and a bankrupt or debtor (r 6.18). The notice must attach a copy of the application starting the relevant case, response (if any) and any other relevant documents. The date and place of the next court event must be given.

A relevant party who is a party to bankruptcy proceedings must give notice of the bankruptcy proceedings to the court in which the relevant case is pending and the other party or parties to the case (r 6.20(1)). The notice must be in writing, be given within 7 days or as soon as practicable after the date on which the party becomes a party to bankruptcy proceedings, and state the date and place of the next court event in the bankruptcy proceedings (r 6.20(2)).

There are no similar rules in the *Federal Circuit Rules 2001*(FCCR). Although the FLR do not expressly apply (r 1.05(3)), the Federal Circuit Court may apply the FLR (r 1.05(2)).

5. Standing in FLA proceedings after bankruptcy

The trustee in bankruptcy is not automatically a party to property settlement proceedings. An action commenced by a person who later becomes bankrupt is stayed until the trustee elects in writing to prosecute or discontinue the action (s 60(2) BA). The election must be made within 28 days after notice of the action is served on the trustee (s 60(3)). If the trustee elects to continue FLA proceedings, what standing does the bankrupt have? And what if the trustee does not elect?

5.1 Standing of trustee

The trustee has standing to join the s 79 FLA proceedings if the conditions of s 79(11) FLA are met. The section provides:

- If:*
- (a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and*
 - (b) either of the following subparagraphs apply to a party to the marriage:*

- (i) when the application was made, the party was a bankrupt;
 - (ii) after the application was made but before it is finally determined, the party became a bankrupt; and
 - (c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and
 - (d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;
- the court must join the bankruptcy trustee as a party to the proceedings.

In *Bethke & Bethke* (2019) FLC 93-906 the Full Court rejected the argument by the bankrupt that his trustees in bankruptcy should not have been joined to the proceedings because the trial judge failed to consider whether joinder was in the creditors' best interests or it was equitable and just. The Full Court said that if the s 79(11) requirements were met, the court **must** join the trustees as a party to the proceedings. The only real question to be asked in the circumstances of this case was whether the requirements of s 79(11)(d) were met. The Full Court said (at [49]-[51]):

The requirements in s 79(11)(d) will ordinarily be easily satisfied because it is axiomatic that:

- a) *The interests of the bankrupt's creditors are affected if the size of the bankrupt's estate is less than the total amount owed to the creditors;*
- b) *The property of the bankrupt vests in the Trustee; and*
- c) *That property can either be increased or decreased as a result of an adjustment to the property of either the applicant or the respondent, held jointly or severally by the making of a property settlement order.*

In this case:

- a) *The Trustees' assessment of the appellant's direct financial contributions to the assets held jointly and severally by the parties was in the order of \$21,000;*
- b) *The appellant's creditors significantly exceeded his possible claim under s 79 of the Act. The primary judge was told one of the appellant's debts exceeded \$500,000 ...*
- c) *The appellant had forged a mortgage for \$385,000 which was registered against the property in the respondent's name. The respondent sought that the mortgage be set aside under s 106B of the Act in the proceedings for the property settlement order; and*
- d) *If the respondent was successful in the proceedings, the appellant's creditors in his bankruptcy were going to get less.*

The primary judge, in this case, was correct in making an order joining the Trustees as parties to the proceedings having been satisfied that "the interests of the bankrupt creditors may be affected" and that the low bar set by s 79(11)(d) of the Act had been comfortably cleared in this case.

The procedure for any third party to become a party to a case is either by being named as a respondent by one of the parties to the case, or by applying to intervene in a case. The first option is the simplest – if the third party consents to being joined. A party to a case may add another person as a party by amending the application to add the name of the person (r 6.03(2) FLR).

The procedure for adding a person under r 6.03(2) is set out in r 6.03(3):

- (a) *file an affidavit setting out the facts relied on to support the addition of the new party, including a statement of the new party's relationship (if any) to the other parties; and*

- (b) *serve on the new party:*
- (i) *a copy of the application, amended application, response or amended response; and*
 - (ii) *the affidavit mentioned in paragraph (a); and*
 - (iii) *any other relevant document filed in the case.*

Justice Cronin in *Pencious & Pencious* [2010] FamCA 605 took issue with the apparent simplicity of an earlier version of r 6.03. He said (at [1], [2], [4]):

...In my view it is not that simple.

The recipient of the application for joinder as well as all other parties to the litigation must be able to identify what material facts give rise to a cause of action against the party sought to be joined. Perhaps the practical test is whether the application would enable the party so joined or to be joined, to respond, in the sense of filing a defence to the claim.

After pointing to the jurisdictional basis upon which orders are sought (if they are), the application for joinder (or the person seeking to defend having joined a person) must be able to show that the rights of those persons may be affected by an issue in the case but also that participation is necessary to enable the court to determine all issues in the case.

He agreed with the Full Court in *B Pty Ltd and Ors and K* (2008) FLC 93-380 which said (at [43]):

However, the narrative or descriptive nature of evidence is often unsuited to formulate or particularise a cause of action against a third party. Something resembling a statement of claim will generally be necessary.

In the Family Court, a person who is not a party to a case who seeks to intervene in a case must comply with r 6.05 unless they are a person entitled to intervene without the court's permission. Some examples are given, such as a creditor under s 79(10) and the Attorney-General. The person must file a Notice of Intervention by Person entitled to Intervene and an affidavit:

- stating the facts relied on in support of the intervention; and
- attaching a schedule setting out the orders sought (r 6.06(2)).

The Registry Manager must fix a date for a procedural hearing (r 6.06(3)).

A party may apply to be removed as a party to a case by filing an Application in a Case (r 6.04).

The trustee is not obliged to join the proceedings and can seek to be dis-joined if they object to continuing. The trustee may not want to be a party after weighing up the costs of the proceedings as against the likely benefits, or lack of funding. However, a trustee may be a "necessary party" within r 6.02(1) as their "rights may be directly affected by an issue in a case". To succeed in a dis-joinder application, the trustee will need to be prepared to abide by the court's decision.

5.2 *Trustee elects to continue proceedings*

If a trustee elects to continue the s 79 proceedings, a bankrupt loses the right to make submissions regarding vested bankruptcy property. The bankrupt must seek the leave of the court to make

submissions (s 79(12)). Leave can only be granted in exceptional circumstances (s 79(13)). The bankrupt can, however, as of right, make submissions about property which has not vested, such as superannuation. These submissions will probably indirectly deal with vested property.

It is also possible that the trustee can elect to continue the s 79 proceedings under s 60(2) BA but not become a party and allow a creditor or for the bankrupt to continue the proceedings relying on s 134 and s 178 BA. For example, a creditor was allowed to continue the proceedings in *Vincent & Vincent and Anor* [2016] FCCA 227 which is discussed later in this paper. These options have not been fully explored.

In *Reua & Reua* [2008] FamCA 1038 Stevenson J found that there were "exceptional circumstances" within s 79(13) to enable the bankrupt to make submissions about vested bankruptcy property because:

1. Neither the wife nor the trustee opposed the granting of leave.
2. The husband sought relief in respect of non-vested property so he was a participant in the proceedings anyway.
3. The husband had knowledge of the circumstances in which many of the unsecured debts were incurred. Although the husband's evidence was useful to the court and the trustee, the bankrupt could have been a witness without being a party.

None of these seem to be "exceptional" circumstances in the sense otherwise used in the FLA.

5.3 *Trustee does not elect to continue the proceedings – the problem of s 60 BA*

The question of what happens if the trustee does not elect to continue the s 79 proceedings arose in *Sloan & Sloan* [2018] FamCA 610. The husband became bankrupt in February 2018. The trustee did not elect to continue the property and parenting applications instituted by the bankrupt prior to the bankruptcy.

The wife posed two main arguments against the husband being able to continue the litigation. The first related to the effect of the bankruptcy vesting provisions in the light of the High Court decision of *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124, which went to the question of whether the husband's right to litigate had vested in the trustee and, in any event, whether the husband had sufficient interest in the subject matter of the litigation to give him standing. The second related to the operation of s 60 BA.

Section 58 BA provides that property held by the husband at the time of his bankruptcy, along with property acquired by him during the period of bankruptcy, vests in the trustee. The consequence is that, to the extent that a right to litigate may be considered to fall within the definition of property within s 5 BA, it vests in the trustee. The definition of "property" within the BA is broad, and:

Means real or personal property of every description, whether situate 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.

Justice Gill noted (at [8]) that the High Court majority found in *Cummings* that “the definition is not such as to capture all rights to litigate as aspects of property under the BA.” The High Court was dealing with an attempt to commence an appeal by two bankrupt litigants, who became bankrupt following the hearing of the case but prior to judgment being handed down. The questions in *Cummings* were:

1. Did the right to appeal vest in the Trustee?
2. Did the bankrupt have standing?

The husband relied upon cases dealing with the application of *Cummings* to family law litigation: *O'Neill & O'Neill* (1998) FLC 92-811 at [87] which discussed *Page & Page (No 2)* (1982) FLC 91-241 and *Reed & Reed; Grellman* (1990) FLC 92-105. In *Cummings*, the Full Court accepted the position of Frederico J in *Page* that the right to litigate a s 79 application is a personal right that does not pass to the trustee in bankruptcy. Justice Frederico specifically referred to the operation of s 60 BA and indicated that the provision did not stop a bankrupt from bringing or continuing proceedings under s 79 FLA. Applying *Cummings*, the Full Court in *O'Neill* stated (at [88]):

*Furthermore, the majority of the High Court in Cummings referred, without apparent disapproval, to the concept of “rights of action which do not pass to a trustee on bankruptcy because they are personal to the bankrupt and **do not affect the quantum of the bankrupt estate**” (emphasis added), Although there must be a question as to meaning of the words...just quoted, it would appear to remain good law that a bankrupt spouse may initiate and prosecute property settlement proceedings during the course of his or her bankruptcy – although any property acquired would have to vest in the trustee by virtue of s58(1)(b) of the BA (apart from the limited classes of property exempted under s116(2) of that Act).*

Reed, perhaps inconsistently with *Cummings*, supported the right to litigate at first instance due to the possibility of the fruit of a s 79 application outstripping what was to be recovered pursuant to the bankruptcy.

The wife relied upon *Guirguis v Guirguis and Official Trustee in Bankruptcy* (1997) FLC 92-726 (which predated and was considered in *O'Neill*) where the prospect of a surplus (consistently with *Cummings*) did not give standing to a bankrupt to pursue an appeal. She asserted that s 60 BA stopped the husband from conducting any proceedings other than proceedings in respect of property that, pursuant to s 116 BA, was not divisible among creditors, such as superannuation.

After considering the earlier cases, Gill J concluded (at [20]):

Subject to the caution expressed by the Full Court regarding the qualification as to affecting the quantum, this supports the notion that s 79 proceedings fall into the category of actions that do not vest in the trustee as they are personal to the bankrupt.

Justice Gill dealt with the wife's other arguments and concluded that the issue of standing identified in *Cummings* did not stifle the husband's proceedings, but more problematic for the husband's application was s 60 BA (at [26]) "from which a clear basis for the ending of the husband's application flows". Section 60 BA states:

- (1) *The Court may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit: ...*
 - (b) *stay any legal process, whether civil or criminal and whether instituted before or after the commencement of this subsection, against the person or property of the debtor:*
 - (i) *in respect of the non-payment of a provable debt or of a pecuniary penalty payable in consequence of the non-payment of a provable debt; or*
 - (ii) *in consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt; ...*
- (2) *An action commenced by a person who subsequently becomes a bankrupt is, upon his or her becoming a bankrupt, stayed until the trustee makes election, in writing, to prosecute or discontinue the action.*
- (3) *If the trustee does not make such an election within 28 days after notice of the action is served upon him or her by a defendant or other party to the action, he or she shall be deemed to have abandoned the action.*
- (4) *Notwithstanding anything contained in this section, a bankrupt may continue, in his or her own name, an action commenced by him or her before he or she became a bankrupt in respect of:*
 - (a) *any personal injury or wrong done to the bankrupt, his or her spouse or de facto partner or a member of his or her family; or*
 - (b) *the death of his or her spouse or de facto partner or of a member of his or her family. ...*
- (5) *In this section, **action** means any civil proceeding whether at law or in equity.*

The underlying point made for the wife was that the specific exclusions in s 60(4) BA, which do not include family law proceedings, implicitly meant that proceedings instituted under the FLA are not exempted from the operation of the provision. This understanding of the operation of s 60 BA was consistent with the analysis of Carew J in *Lincoln (Deceased) v Moore* [2016] FamCA 547 and by Cronin J in *Trent & Rowley* [2014] FamCA 447.

It was common ground between the parties that the trustee was on notice of the current proceedings but that 28 days had not passed since the trustee came to be on notice. The trustee appeared on 11 May 2018 to advise the Court that the trustee had not yet made an election to prosecute or discontinue the action commenced by the husband.

Justice Gill distinguished *Page*, (at [35]):

It may be observed that the Husband's s 79 application in Page was not on foot at the time of the bankruptcy, but post-dated it, meaning that s 60 of the Bankruptcy Act did not have operation in relation to the staying of those proceedings in any event. To the extent

that Justice Frederico’s assertion as to “continuing an application” was a reference to the operation of s 60 of the BA in the context of pre-existing proceedings, it constitutes obiter dicta.

Justice Gill concluded (at [39]):

The plain meaning of the language used in the section is to apply to all civil litigation (other than the exempted classes). Litigation that relates to matters other than property caught by the vesting provisions is not exempted. The provision has a blanket effect, other than in the limited specific exceptions set out at s 60(4).

Justice Gill explained the breadth of the impact of s 60 BA on FLA proceedings (at [40]-[42]):

Given the breadth of the definition of “action” this also has the apparent and unwelcome effect that proceedings under Part VII of the FLA relating to children are also included (save potentially to the extent that they constitute injunctive protections relating to a “wrong done to the bankrupt...or a member of his or her family.”) resulting in their being stayed by a bankruptcy. This effect of s 60 makes no sense and potentially undermines the well-being of children, without any corresponding benefit being conferred on creditors (if such benefit could be weighed against the welfare of a child).

However, absent a relevant exception, this is the effect of the language used in the provision.

The broad operation of s 60(2) and (3) means that in the event that the trustee has not made an election to prosecute the current proceedings, then they are first stayed and then abandoned. This, on its terms, includes all aspects of proceedings, including child-related proceedings.

However, in relation to the husband’s contempt application which he issued after he went bankrupt, Justice Gill found (at [43]) that it was not affected by s 60 BA. Further, as it was not a property right, it was able to continue.

Following the delivery of reasons further orders were made. The orders included a notation that Justice Gill had been advised by the parties that the trustee had made an election pursuant to s 60(2) BA following an order made by Justice Thawley of the Federal Court to extend the period of time available to the trustee to make that election. An order was made joining Mr G as Trustee of the property of Mr Sloan (a bankrupt) as Second Applicant in the proceedings.

In *Biddick & Etier* [2018] FamCA 744, s 60 BA was also a problem. In July 2018, the husband and the wife executed documents for property orders to be made by consent. Essentially, they each kept the property in their respective names and possession. The proposed orders included the following problematic provision, for which no power to make the order could be identified (at [6]):

That Ms Biddick immediately cease and desist in publishing (in any form) or verbalising defamatory statements that are directed or pointed or inferred at Mr Etier. That at all times information held by the parties by either of them remain confidential. That settlement between the parties confers that all legal disputes between the parties are settled and neither party will commence any proceedings against either party at any time.

A further problem was that the wife became bankrupt after the proceedings commenced. Section 60 BA was therefore relevant. Justice Gill referred to his earlier case of *Sloan* and noted (at [13]):

It should, however, be noted that Ms Biddick's right to litigate, insofar as it concerns 'property that will not form a part of the estate available for distribution to creditors, but rather will deal with interests that will lie with the bankrupt' remains, as Ms Biddick retains standing in relation to these aspects. Whether this will result in her recommencing proceedings remains to be seen.

The staying of the proceedings meant that absent the election by the trustee, the proposed consent orders could not be made and Ms Biddick's application was deemed to be abandoned. This meant that the proposed consent orders could not be made into orders. The matter was relisted for directions, to enable the husband to have the proceedings finally determined. Justice Gill noted the right of the wife to recommence FLA proceedings in relation to exempt property.

Justice Cronin in *Trent & Rowley* [2014] FamCA 447 referred to *Cummings* and said (at [1]):

A bankrupt's contingent interest in a surplus in his or her estate does not alone give a right or entitlement which would allow him or her to sue to enforce proprietary rights.

The majority in *Cummings* referred to the possibility that where a trustee declines to exercise their power to sue or to appeal against a judgment, the bankrupt may apply to a court (exercising BA jurisdiction) for an order under s 178 BA. Section 178 BA has now been repealed, but it stated:

- (1) *If the bankrupt, a creditor or any other person is affected by an act, omission or decision of the trustee, he or she may apply to the Court, and the Court may make such order in the matter as it thinks just and equitable.*
- (2) *The application must be made not later than 60 days after the day on which the person became aware of the trustee's act, omission or decision.*

Section 178 has been replaced by the much lengthier s 90-15 *Insolvency Law Reform Act 2016*(Cth) (ILRA) the relevant part of which commenced on 1 September 2017. The extent to which the old s 178 is preserved in the new provision is uncertain.² It may enable proceedings to be continued by a bankrupt or creditor instead of by the trustee if the trustee does not elect, or elects and does not want to take part in the proceedings.

Under the *Sloan* line of authority some earlier cases where the trustee chose not to intervene would have been decided differently. If the bankrupt is the applicant even in parenting proceedings, unless the trustee elects to continue the proceedings, the bankrupt's application is deemed to be abandoned. The non-bankrupt spouse may still be able to continue the proceedings if they have

² "Decision Time", S Mulette (last viewed on 13 July 2019) at <https://www.matthewsfolbig.com.au/news/insolvency-restructuring-debt-recovery/decision-time/>

filed a Response and will become the applicant (r 10.11(3) FLR). The respondent will become the applicant. The bankrupt may need to try to re-file and the BA does not prevent this.

5.4 *Creditor's standing*

The standing of a creditor to be a party to FLA proceedings is less clear than that of the trustee and the bankrupt. Section 58(3) BA states:

Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

- (a) *to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or*
- (b) *except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such proceeding.*

The limited role of creditors to continue or institute proceedings after bankruptcy was discussed in *Fraser v Commissioner of Taxation & Official Trustee* [1996] FCA 1801, where Beaumont J said (at [42]):

The point is that there is no scope for any role to be played by individual creditors acting on their own initiative; if litigation is to be instituted with a view to the recovery of assets, it is the trustee's function and responsibility to be the dominus litis and thus entirely in charge of the litigation to the exclusion of individual creditors. In other words, the relevant scheme of the legislation specifically that of s 58(3), is that individual creditors have no right to decide to pursue, or not pursue, the assets of the bankrupt with a view to the satisfaction of individual debts

A creditor is entitled to be a party to s 79 proceedings if the creditor may not be able to recover their debt if a s 79 order is made (s 79(10)(a)). Section 79(10) does not apply to a creditor if the debtor is bankrupt and the debt is a provable debt or covered by a PIA (s 79(10A)).

However, in *Vincent & Vincent and Anor* [2016] FCCA 227 Judge Riethmuller allowed the creditor to join the proceedings as the beneficiary of the trustee in circumstances where the trustee in bankruptcy had elected not to join the proceedings (unless funded). He said (at [13]; [20]):

Ordinarily the trustee in bankruptcy is the appropriate person to bring or defend proceedings. It is open to the court to direct the trustee to do so. However, there is a practical problem if the trustee is not in funds and the creditors cannot fund the suit. In such a situation it would be unjust to the creditors not to allow them to represent themselves and pursue the suit for the benefit of the trust estate (indirectly for their even benefit). Whilst such an exercise is unusual, it is open if the justice of a particular case demands. To hold otherwise would allow impecuniosity (potentially caused by the bankrupt) to deny a significant creditor a remedy.

(...)

I am satisfied that on the present material the Intervenor has a prima facie case that the husband's property or part thereof should not be settled on the Wife under s 79 of the Family Law Act 1975. Significantly, this is not a case where the Intervenor is pursuing a claim, rather she is now defending the bankrupt estate against a claim by the Wife.

Another example, similar to *Vincent*, arose in *Van Dyke v Lo Pilato, in the matter of Sidhu* [2016] FCA 1347. Justice Katzmann in the Federal Court granted leave to the largest creditor of the bankrupt estate to commence proceedings under s 79A FLA on the basis that she entered into undertakings:

1. to hold the benefit of any order made in the s 79A proceedings for the trustee in bankruptcy on behalf of the bankrupt estate of Mr Sidhu;
2. to consent to any application by the trustee in bankruptcy to be joined as a party to those proceedings; and
3. if no such application is made, to notify the trustee in bankruptcy of final orders made in those proceedings.

Justice Katzmann explained why she granted leave to the creditor (at [30]):

Here, Ms Van Dyke does not seek any undue advantage over other creditors. The purpose of her application and, if it succeeds, the effect of her action under s 79A is to augment the bankrupt estate for distribution between all creditors. Ms Van Dyke has given an undertaking to facilitate this course. The willingness of an applicant to enter into an undertaking to hold the benefit of any order made in the Family Court proceedings on behalf of the bankrupt estate has been held to render proceedings of that kind in the interests of “the general body of creditors”...

Other factors she considered to be relevant were:

- It was preferable that the trustee in bankruptcy bring the action, but the trustee did not propose to do that unless he was put in funds and there was no evidence that this would occur;
- The trustee did not oppose the granting of leave;
- The creditor had no opportunity to make submissions in the Family Court against the making of a proposed consent orders;
- The creditor had a *prima facie* case for the exercise of the court’s discretion in her favour;
- The creditor had standing as a “person affected by” the consent orders – she was a creditor when the orders were made.

The above cases can, perhaps be explained in part, by the preference of a court for there to be a contradictor rather than the proceedings be undefended.

The inability of the Family Court to order that a payment be made directly to an unsecured creditor of a bankrupt was made clear in *Trustee for the bankrupt estate of Lasic & Lasic* (2009) FLC 93-402. The Full Court understood the trial Judge’s concern that if the husband’s entitlement was paid to the trustee, the creditor Mr M would receive nothing. Reluctantly, the Full Court concluded that ordering a direct payment by the wife to Mr M was not within the trial Judge’s power.

6 Clawback powers – how this impacts FLA proceedings

The property in the bankrupt estate may be expanded by the trustee in bankruptcy taking action to seek, for example, the recovery of property transferred prior to the date of bankruptcy by a spouse (who is later bankrupted) to a non-bankrupt spouse. Any property clawed back is declared property of the bankrupt (and is part of the bankrupt estate) under s 58(1) BA.

The trustee can rely on the following claw-back provisions for recovery of property under the FLA and the BA:

1. Section 106B FLA – A court may set aside an instrument or disposition made to defeat an existing or anticipated order or which is likely to defeat any such order;
2. Section 120(1) BA - A transfer by the bankrupt is void against the trustee if within 5 years of the start of the bankruptcy and there was no consideration or it was less than the market value of the transfer;
3. Section 120(3) BA - A transfer is not void against the trustee if it occurred more than 2 years before the start of the bankruptcy and the transferee proves that at the time of the transfer, the transferor was solvent;
4. Section 120(5) BA - A transfer relying on a family relationship, marriage or de facto relationship, promise to marry or partner and love or affection as consideration is not a transfer for market value consideration;
5. Section 121 BA - A transfer is void if the main purpose was to defeat creditors (s 121(1)(b)). The main purpose is taken to be the purpose in s 121(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 (s 121(2));
6. Section 122(1) BA - A transfer of property by a person who is insolvent (the *debtor*), in favour of a creditor, is void against the trustee in the debtor's bankruptcy if the transfer:
 - had the effect of giving the creditor a preference, priority or advantage over other creditors; and
 - was made within a certain period, usually 6 months before the bankruptcy commenced
7. Sections 128B and 128C BA - Superannuation contributions made on or after 28 July 2006 may be clawed back if the contributions were intended to defeat creditors.

The BA provisions above must be read subject to the protection given to certain transactions, such as those for market value, under s 123 BA.

The trustee can also rely on back-dating of the commencement date of bankruptcy, usually to the earliest act of bankruptcy within 6 months of the date on which the creditor's petition was presented or the sequestration order was made (s 115 BA). For example, under s 40(1)(o) BA, if the debtor becomes insolvent as a result of one or more transfers of property in accordance with a financial agreement under the FLA to which the debtor is a party, this is an act of bankruptcy. The trustee

may be able to apply under the BA to set aside the transfer made pursuant to the agreement, although the transfer was otherwise made prior to the time limits in s 120, 121 or 122 BA.

A case which seems to have had a revival recently, in that it has been referred to and followed is *Trustee of the Property of John Daniel Cummins v Cummins* [2006] HCA 6. In 2000, Mr Cummins, a Queen's Counsel, had not submitted a tax return for 45 years. He went bankrupt and shortly afterwards he and his wife separated. At issue was a transfer of his 50% interest in the former matrimonial home as a joint tenant, 13 years prior to the bankruptcy.

The wife's argued that even if the transfer was void under s 121 BA, she beneficially owned a portion of the bankrupt's legal interest by way of a resulting trust arising from her contributions to the purchase and construction costs.

The High Court rejected the wife's argument and found that even after the transfer of the husband's 50% legal interest, he still had a 50% beneficial interest. The High Court said (at [71]):

The present case concerns the traditional matrimonial relationship. Here, the following view expressed in the present edition of Professor Scott's work [The Law of Trusts, 4th ed (1989), Vol 5, 5443 at 197-198] respecting beneficial ownership of the matrimonial home should be accepted:

"It is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labor to the various expenses of the household. It is often a matter of chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase."

The High Court rejected the wife's arguments that equity should intervene to displace the doctrine of resulting trust and override the joint tenancy which was formerly registered on the title. This was primarily because the parties had lawyers acting for them who probably advised the parties of the option of registering the property as tenants in common. Instead, the parties chose a joint tenancy with the prospect that one party would take the whole property upon the death of the other by way of survivorship. Further evidence that the wife did not have a two-thirds rather than a half interest in the home was that she paid stamp duty on the whole of the half interest when it was transferred to her in 1987, not on the one-third interest which she was arguing was the only part she did not beneficially own.

Cummins sits uncomfortably with the principles of trust law and has, until recently, not been given much credence. Perhaps a case where the just result required some twisting of the law of trusts?

There are many case examples of clawback transactions. *Turner as Trustee of the Bankrupt Estate of Wallace v Wallace* [2017] FCCA 3044 has a family law flavour, although Judge Riethmuller in the Federal Circuit Court was exercising BA jurisdiction.

The chronology of events was:

- On 7 October 2004 the bankrupt executed transfers to transfer his half share in each of the Sandringham and Robina properties to the respondent for 'natural love and affection'. Only the Sandringham transfer was registered.
- On 10 April 2013 the Sandringham property was sold by the non-bankrupt spouse for \$2.1 million, and the proceeds of sale of approximately \$1 million were paid to the non-bankrupt spouse.
- On 29 April 2013 the bankrupt signed another transfer for his half share of the Robina property to the respondent for "natural love and affection". This transfer was registered on 8 June 2013.
- On 20 March 2014 the bankruptcy occurred.
- In April 2014, in a statement of affairs the bankrupt said that he had made no transfers or gifts in the last five years.

The primary claim of the trustee with respect to the Robina property was that it was transferred without consideration. Relying on *Trustee of the Property of Cummins (a bankrupt) v Cummins* [2006] HCA, Judge Riethmuller said that where a husband and wife purchase a matrimonial home, each contributing to the purchase price, it may be inferred they each intended to have a half interest. Judge Riethmuller found that the interest in the Robina property registered in the name of the bankrupt was not held on trust for the non-bankrupt spouse. 'Natural love and affection' was not sufficient consideration to be a defence under s 120 BA. The claims by the wife of constructive trust and resulting trust were rejected.

There was no evidence of any other consideration at the time of this transfer. The transfer was therefore prima facie void against the trustee, subject to any defence that the non-bankrupt spouse may have had under the section.

With respect to the Sandringham property s 121 was primarily relied upon by the trustee. It also arose as an alternative claim with respect to the Robina property if the view was taken that the Robina property was gifted in 2004 when the first transfer (which was never lodged) was executed. Robina was the parties' holiday home and later became their retirement home.

It was argued by the wife in the alternative to the constructive trust and resulting trust claims that the Robina property was gifted or transferred in equity to the non-bankrupt spouse in 2004 when transfers were signed and stamped. The 2004 transfer was never lodged. It was not a case where a gift could be said to be completed at law as the transfer was not registered at the titles office. The bankrupt had given the signed transfers to the solicitor acting for both the bankrupt and the non-

bankrupt spouse. The evidence suggested that the solicitor was nonetheless acting as agent of the bankrupt, awaiting his instructions with regard to the transfers. The donor therefore had not done all that was required to put the matter outside of his control and therefore in equity it was no more than an imperfect form of gift (*Corin v Patton* [1990] HCA 12; (1990) 169 CLR 540).

Judge Riethmuller considered the position if he was in error. What result would flow under s 121 BA if the first transfer was a perfected gift of the Robina property to the non-bankrupt spouse or created a beneficial interest for the non-bankrupt spouse?

Judge Riethmuller had no doubt that, but for the transfers to the non-bankrupt spouse, the bankrupt's shares in the Sandringham and Robina properties would have been part of the bankrupt's estate.

The crucial question under s 121 BA was whether "the main purpose in making the transfer was to prevent the transferred property from becoming divisible among the transferor's creditors". In simple terms, was the property gifted to the non-bankrupt spouse to ensure it was not an asset of the bankrupt should he be sued or sequestrated by his creditors? It was for the trustee to prove the main purpose of the transfers. The trustee did not have the benefit of the presumption in s 121(2) as on the evidence it did not appear that the bankrupt was, at the time of the transfers in 2004, either insolvent or about to become insolvent.

Judge Riethmuller noted a number of important surrounding facts (at [88]):

1. *The original purchases were in joint names.*
2. *The parties had by this point appeared to have joined their finances with respect to the properties, even transferring the Brighton property to the bankrupt as part of the transactions when funding the Sandringham property.*
3. *The bankrupt had arranged the dubious loan with the SP Bookmaker, which was then taken up as a debt to his company.*
4. *The company's debts exceeded its assets by \$1.48m as at June 2008.*
5. *At around the time of the transfers the bankrupt executed guarantees for refinancing of significant sums.*
6. *At the time of the transfers the financial situation of the company was such that it had defaulted on its finance arrangements, and had large amounts of unsold excess stock.*
7. *The business was in dispute with the bankrupt's former business partner leading to litigation in VCAT before payment was agreed.*
8. *The bankrupt was in dispute with a son who was part of the business.*
9. *The bankrupt had been alerted by his solicitor to the importance of holding assets in the respondent's name due to business risks.*

Foreshadowing that a FLA claim might be made Riethmuller J tried to bring the litigation to an end by discouraging such a claim. He said (at [93]):

Given the age of the respondent and bankrupt, and the nature and length of the marriage, it is difficult to see how the respondent would obtain more than 50% of the assets if any adjustment were to be made under s.79 of the Family Law Act, in any event. The respondent already has a 50% interest in the properties, and therefore unlikely to be able to show it was just and equitable to make orders under s.79: see Stanford v Stanford [2012] HCA 52.

In an earlier case reported as [2016] FCCA 9634, a 2004 transfer of the bankrupt's interest in a Brighton property was set aside under s 121 BA.

In the case of liquidations there are clawback provisions in the *Corporations Act 2001* (Cth) (CA). *D Pty Ltd (in liquidation) v Calas (Trustee) in the matter of D Pty Ltd (in liq)* [2016] FCA 1409 is a recent example.

On 7 December 2012, the Family Court made orders by consent. The husband was to pay \$500,000 into a trust account in the name of the wife. The initial \$300,000 was from the sale proceeds of a property owned by C Pty Ltd with the balance to be paid from the sale of a property owned by D Pty Ltd. The husband was associated with both companies. The wife said that he had de facto control if he was not the director. The orders signed by the parties were different from those made by the Court.

On 10 July 2014, the wife applied in the Family Court to enforce the orders. The wife became bankrupt on 9 August 2014. On 22 August 2014, D Pty Ltd was placed into liquidation. The Family Court in *Megalos & Katsaros* [2015] FamCA 1094 gave the wife's trustee in bankruptcy leave under s 471B CA to pursue and continue the enforcement action, declared that the property owned by D Pty Ltd was charged with satisfaction of the husband's obligations under the consent orders and that all monies received by the liquidator in relation to the sale of the property owned by D Pty Ltd were held on trust for the benefit of the wife's trustee in bankruptcy. The liquidator brought proceedings in the Federal Court and argued that when the husband and wife agreed to settle their FLA proceedings with terms which included the giving of a charge over the property owned by D Pty Ltd, that this amounted to an unreasonable director-related transaction within s 588FDA CA.

The Federal Court found that the liquidator was unable to make out all of the elements of s 588FDA. Justice Moshinsky considered that if s 588FDA had been satisfied, he would not have set the transaction aside, but would have transferred the proceedings to the Family Court. A case dealing with s 588FDA and financial agreements is *Kirjuna (as Liquidator of ET Family Pty Ltd) v Taouk* [2015] FCA 424.

The *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019*³ was reintroduced into Federal Parliament on 4 July 2019 and will extend s 588FDA with the objective of combatting creditor-defeating dispositions. It had lapsed with the calling of the last federal election.

Section 106B FLA is also available to the trustee. It is generally considered to be easier for a trustee to succeed under s 106B FLA than under s 120, 121 or 122 BA.

In *Roberts and Ors & Pedrana & Ors* [2013] FamCA 224 a s 106B order was made in favour of the wife and the husband's trustee. A disposition to the husband's parents of \$280,000 was set aside and \$50,000 of it was payable to the wife and the balance to the trustee.

7. Dealing with unsecured debts under the FLA

A family law court has power to alter the interests of a bankruptcy trustee in the vested bankruptcy property (s 79(1)(b)). In making determinations under s 79 (property) or s 82 (maintenance), s 75(2)(ha) FLA requires the Court to consider:

... the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant.

However, the interests of creditors are only one factor amongst many to be considered under s 75(2) and their interests are not given more or less weight than the other s 75(2) factors. The interests of a bankruptcy trustee or unsecured creditors do not arise elsewhere in the s 79 process unless they are entitled to be considered as "legal and equitable interests" to be determined by the court under s 79(1) (see *Stanford v Stanford* (2012) FLC 93-518). Doubt has been cast by the Full Court of the Family Court on whether unsecured liabilities are "interests" (e.g *Bevan & Bevan* (2013) FLC 93-545 and *Layton & Layton* [2014] FamCAFC 120). Despite this doubt, in many cases where neither party is bankrupt, the parties and the court agree that certain debts be deducted from the gross property pool when calculating the property available for division between the parties in line with *Biltoft & Biltoft* (1995) FLC 92-614. In cases where a party is bankrupt the interests of the trustee may be protected by applying *Biltoft. Commissioner of Taxation & Worsnop* (2009) FLC 93-392 and *Trustee of the Property of G Lemnos & Lemnos* (2009) FLC 93-394 are examples of the application of s 75(2)(ha). *Worsnop* is discussed later in this paper.

The extent to which s 75(2)(ha) covers the interests of a trustee as opposed to a creditor may, however, may be re-considered following the Full Court decision of *Bloomfield & Grainger and Anor* (2015) FLC 93-677, which is also discussed later in this paper.

In *Biltoft & Biltoft* (1995) FLC 92-614 the Full Court looked at the position of unsecured creditors saying (at p 82,124):

³ See Jason Harris "The Combatting Illegal Phoenixing Bill 2019" 22 July 2019 <https://australianinsolvencylaw.com/2019/07/22/the-combatting-illegal-phoenixing-bill-2019/>

A general practice has developed over the years that, in relation to applications pursuant to the provisions of s 79, the Court ascertains the value of the property of the parties to a marriage by deducting from the value of their assets the value of their total liabilities. In the case of encumbered assets, the value thereof is ascertained by deducting the amount of the secured liability from the gross value of the asset... Gibbs J. (as he then was) pointed out at p 355 [in Ascot Investments] that the Court "must take the property of a party to the marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it". Where the assets are not encumbered and moneys are owed by the parties or one of them to unsecured creditors, the Court ascertains the value of their property by deducting from the value of their assets the value of their total liabilities, including the unsecured liabilities...

The Full Court then set out some limitations on this principle (at p 87,127):

Notwithstanding the general practice which has developed, the Court has indicated that it may properly determine not to take into account or to discount the value of an unsecured liability in certain circumstances. Such liabilities would include but are not limited to a liability which is vague or uncertain, if it is unlikely to be enforced or if it was unreasonably incurred.

The Full Court concluded in relation to the general rule (at p 82,128-9):

The rule is not absolute, is not prescribed by the statute and there are a number of well recognised exceptions.... There is no requirement that the rights of an unsecured creditor or a claim by a third party must be considered and dealt with prior to the Court making an order under s 79, nor is there a rule of priority as between a creditor claimant and a spouse. Those rights, however, cannot be ignored. They must be recognised, taken into account and balanced against the rights of the spouse.... There is an obligation on both parties to disclose any significant creditors or any significant claim against either of them by a third party. If, as a result of the order of the Court in the property proceedings, the ability of a creditor or claimant to recover his or her debt or claim is likely to be affected, notice of the Family Court proceedings must be given to that creditor or claimant. He/she may then intervene in the Family Court proceedings and either seek a stay of those proceedings or some appropriate order which recognises his/her rights.

The Full Court of the Family Court in *Puddy & Grossvard* (2010) FLC 93-432 was clear that both s 79(10)(a) and s 75(2)(ha) refer to debts which are uncontroversial.

There is a history of the Family Court being concerned to ensure that revenue authorities, such as the Australian Taxation Office and State Revenue Offices, are paid (eg. *Chemaisse & Chemaisse* (1988) FLC 91-915). Priority has been given to tax debts over the interests of the non-bankrupt spouse and other unsecured creditors (*Hannah & Hannah; Tozer & Tozer* (1989) FLC 92-052). However, Coleman J in *Lemnos & Lemnos* (2009) FLC 93-394 considered that the Australian Taxation Office no longer had priority over other creditors due to the *Insolvency (Tax Priorities) Legislation Amendment Act 1993*. Among other amendments, s 123(5) BA was deleted. This section protected payments of tax. The trial Judge, Le Poer Trench J, for different reasons, agreed. He said (cited at [127] of the Full Court's judgment):

I have some concern with the outcome of this case insofar as the creditor principally to lose out in this case is the Australian Tax Office and therefore the tax payers of this land. The question should realistically be asked why the wife should ultimately prosper at the expense of the public purse. The answer so far as I am concerned is that the Family Law Act as now

standing provides for that to be the outcome in appropriate cases. The legislation does not elevate the status of creditors to a ranking above the other considerations.

Although not a bankruptcy case, *Commissioner of Taxation & Worsnop* (2009) FLC 93-392 illustrates the application of s 75(2)(ha). The Commissioner of Taxation appealed against an order that the former matrimonial home be sold and, after the costs of sale, the proceeds be divided equally between the wife and the Commissioner. The only substantial asset was the home worth \$4.75 million. There was conflicting evidence as to the wife's knowledge of the husband's tax avoidance but the trial Judge accepted that the wife did not know. The trial Judge made no adjustment in favour of the wife for s 75(2) factors although she had the primary care of 4 children aged between 1¼ and 13 years and this affected her earning capacity. Her s 75(2) factors were offset against the husband's indebtedness to the ATO as a factor in the Commissioner's favour under s 75(2)(ha).

In balancing the competing claims of the wife against the Commissioner, the Full Court found that the trial Judge clearly appreciated the critical features of the exercise, and said (at [86]):

In our view, the Commissioner of Taxation is in a position distinguishable from that of a commercial creditor. Commercial creditors have a choice about to whom they extend credit. On the other hand, the position of the Commissioner as a creditor of taxpayers is of a completely different origin. The onus is on taxpayers to make full and proper disclosure to the Commissioner of Taxation. The Commissioner does not extend credit at all, but becomes a creditor by virtue of the conduct of the affairs of the taxpayer. As seen, Rose J gave "...much weight to the fact that the outstanding tax indebtedness of the husband is a debt to the Crown and implicitly there is a public interest issue", though he also recognised that the Commissioner had no priority over the wife's claims.

8. How are the interests of a trustee in bankruptcy relevant to s 79 FLA?

The 2005 Act did not give the trustee the right to institute proceedings under the FLA. Section 79 gives a right *in personam* and this does not vest in the trustee (*Page & Page* (No 2) (1982) FLC 91-241; *Reed and Reed*; *Grellman (Intervener)* (1990) FLC 92-105; *Audet v Audet*; *Official Trustee in Bankruptcy (Intervener)* (1995) FLC 92-607). The trustee may, if proceedings have already been instituted, be able to continue the s 79 proceedings. It then has other options, such as to make a claim under s 106B FLA to claw back property or seek that the Court exercise jurisdiction outside its usual jurisdiction on a cross-vested or accrued basis. In *Doisy v Wilmont-Doisy* [2009] FamCAFC 14 the Full Court confirmed that there is jurisdiction for the court to make a declaration under s 78 FLA in favour of a third party, in that case the husband's second wife.

Unless the non-bankrupt spouse issues FLA proceedings or FLA proceedings have already commenced at the time of the bankruptcy, a trustee trying to increase the property available to the creditors is left only with the option of claims under the BA, including equitable claims.

In the reported cases the non-bankrupt spouse is generally more successful in claiming that property which has vested in the trustee should be transferred to the non-bankrupt spouse than the

trustee of the non-bankrupt spouse in claiming against or even retaining all the vested bankruptcy property. The s 75(2) factors favour the non-bankrupt spouse and the trustee rarely improves its position.

A significant problem for the trustee is whether the bankrupt is willing to co-operate with the trustee. The bankrupt's evidence can be essential to maximise the assessment of contributions in favour of the bankrupt (and therefore the trustee) and minimise the assessment of s 75(2) factors in favour of the non-bankrupt spouse. A bankrupt may be either totally unco-operative or very co-operative, perhaps motivated by vengefulness or by a desire to achieve an annulment of their bankruptcy.

Many of the reported cases involve debts where the total is much greater than the gross property pool, so there is no prospect of them all being paid in full and no opportunity for the bankrupt to achieve an annulment (e.g. *Johnson & Johnson* [1999] FamCA 369; *Trustee of the Property of Lemnos & Lemnos* (2009) FLC 93-394; *Commissioner of Taxation & Worsnop* (2009) FLC 93-392). An interesting but unresolved question is whether the overwhelming size of the liabilities relative to the value of the gross property pool does, or should, influence the court in determining whether it is just and equitable to make an order and if so, what order. In many cases reference is made by the court to there being little or no prospect of payment to creditors at all or in full.

9. Rights of creditors vs trustees in bankruptcy to set aside financial agreements

Section 90K(1)(aa) states that one of the grounds where a financial agreement may be set aside is:

a party to the agreement entered into the agreement:

- (i) *for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or*
- (ii) *with reckless disregard of the interests of a creditor or creditors of the party.*

The ability of a trustee in bankruptcy to set aside a financial agreement after the husband was discharged from bankruptcy was considered by the Family Court in *Official Trustee in Bankruptcy & Galanis* [2014] FamCA 832 and by the Full Court of the Family Court in *Official Trustee in Bankruptcy & Galanis* (2017) FLC 93-760.

The matrimonial cause under consideration in *Galanis* was (eab) of s 4 FLA which gives the court power to deal with "third party proceedings (as defined in s 4A) to set aside a financial agreement."

The trustee argued that it had standing to bring the proceedings as it was a "government body" within s 4A(1)(b)(iii) which provides:

(1) For the purposes of paragraph (eab) of the definition of matrimonial cause in subsection 4(1), third party proceedings means proceedings between:

- (a) any combination of:*

- (i) the parties to a financial agreement; and...*
- (b) any of the following:*
 - (i) a creditor*
 - (iii) a government body acting in the interests of a creditor;*

being proceedings for the setting aside of the financial agreement on the ground specified in paragraph 90K(1)(aa).

The trial judge, Rees J, found that the Official Trustee was not a government body but a statutory trustee. She also found that it would be completely anomalous if one category of trustee (the Official Trustee) were advantaged by the right to make an application under the FLA where another trustee, who was not the Official Trustee, did not have that right.

The trustee also argued that the matter was a “matrimonial cause” within s 4(1)(cb) being:

- (cb) proceedings between:*
 - (i) a party to a marriage; and*
 - (ii) the bankruptcy trustee of a bankrupt party to the marriage;*
- with respect to any vested bankruptcy property in relation to the bankrupt party, being proceedings:*
- (iii) arising out of the marital relationship ...*

Although the husband was discharged from bankruptcy under s 149(1) BA and the bankruptcy had ended, the bankrupt still had some ongoing obligations to the trustee. The trustee retained the right to make claims against the bankrupt in certain circumstances, limited by s 127(1) BA:

After the expiration of 20 years from the date on which a person became a bankrupt, a claim shall not be made by the trustee in the bankruptcy to any property of the bankrupt, and that property shall, subject to the rights, if any, of a person other than the trustee in respect of the property, be deemed to be vested in the bankrupt, or a person claiming through or under him or her, as the case may be.

In determining whether a trustee in bankruptcy could initiate proceedings against a discharged bankrupt at any time prior to the expiration of 20 years after bankruptcy, Rees J considered the Explanatory Memorandum to the 2005 amendments to the FLA and the BA and concluded that the term “bankrupt party” in s 4(1)(b) FLA did not mean a party to a marriage who had been discharged from bankruptcy and said (at [49], [52]):

The emphasis appears to be on closing off the avenue, which may have previously existed, that allowed a debtor to alienate property using a financial agreement so as to make that property unavailable, to his or her trustee in bankruptcy, for the payment of creditors. ...

If the legislature intended that the provisions of the Act would apply to give jurisdiction to the Family Court of Australia to deal with proceedings between a party to a marriage and the trustee in bankruptcy of a discharged bankrupt, then those words could have been included.

Justice Rees dismissed the trustee's application and ordered that the trustee pay the wife's costs on a solicitor/client basis.

The Full Court in *Official Trustee in Bankruptcy & Galanis* (2017) FLC 93-760 agreed with Rees J and noted (at [457]):

As we pointed out at the commencement of these reasons, and as was accepted by the parties, in this case the Official Trustee can pursue its claim against the wife in other courts without any need to set the agreement aside. What is in issue in this case is whether the Court has jurisdiction in determine the trustee's claim to set the financial agreement aside.

The Full Court contrasted the position of Australian Securities & Investments Commission (ASIC) with the Official Trustee. ASIC is a Commonwealth entity for the purposes of the *Public Governance, Performance & Accountability Act 2013*. Under s 18AA BA the Official Trustee is expressly not a Commonwealth entity.

Since *Galanis*, the *Civil Law & Justice Legislation Amendment Act 2018* amended the BA, to clarify that the Family Court has bankruptcy jurisdiction when a trustee in bankruptcy applies to set aside a financial agreement. The amended version of s 35 BA is set out earlier in this paper. Section 90K FLA was not, however, amended.

The question of the ability of a creditor and the trustee in bankruptcy to set aside a financial agreement was also considered by the Full Court in *Grainger & Bloomfield* (2015) FLC 93-677. The wife was bankrupt, but the trustee was not a party to the proceedings. Two months before going bankrupt, the parties to the marriage entered into a financial agreement and the wife transferred her interest in a property to the husband. For a court to have jurisdiction in proceedings to set aside the agreement under s 90K(1)(aa), the Full Court said that the proceedings must be between the parties to the agreement and either a creditor of one of those parties or "a government body acting in the interests of a creditor". It was not contended before the Full Court that the Official Trustee was within the definition of "a government body" in s 4A FLA.

The Full Court concluded that Ms Bloomfield had standing as a creditor to apply under s 90K(1)(aa) FLA to set aside the agreement, and also under s 90K(3) FLA to seek ancillary orders (subject to a grant of leave under s 58(3)(b) BA). The creditor could not rely on other s 90K grounds. The Full Court agreed with Cassidy J that the creditor did not have standing to seek orders under s 90G(1). The trustee's rights weren't an issue in the appeal.

This decision has significant impact for creditors and for couples where one spouse is bankrupt. The rights of a creditor to apply to set aside a financial agreement were confirmed by the Full Court of the Family Court to survive a bankruptcy. The trustee cannot rely on the FLA, but must take action under the BA (although s 35 BA has been amended since, to at least partially, rectify this gap).

10. Wider impact of *Grainger*

The impact of *Bloomfield & Grainger* may be broader than the obvious one on the rights of trustees with respect to financial agreements. A narrow reading of “creditor” for the purposes of s 90K(1)(aa) may extend to a narrow reading of “creditor” for the purposes of s 75(2)(ha). This narrow reading is supported by the fact that creditors and trustees generally each have specific provisions which apply to them in the FLA, for example s 79(10) and (11).

The assumption has generally been made that the court should take into account the interests of trustees in bankruptcy under s 75(2)(ha). There is no other obvious reference to their interests in s 75(2). Section 79(11) enables a trustee to apply to join the proceedings, but if their interests are of no relevance to the court, why would a trustee do that? If a narrow reading of s 75(2)(ha) is accepted and the interest of trustees are not to be considered, the trustee is limited to arguing equitable interests under s 79(10), the contribution-based entitlements of the bankrupt, s 106B claims and trying to bring BA claims.

In the future, unless there is legislative reform to expand s 75(2)(ha) to expressly cover trustees, trustees may do worse than they have in the past.

11. Costs issues and bankruptcy in FLA proceedings

Cases involving bankruptcy often increase the costs of the proceedings. There may be three parties or more, and the bankrupt is usually unrepresented thus increasing the length of hearings and making negotiated settlement of issues on an interim and final basis less likely. There may be other third parties besides the trustee in bankruptcy, such as liquidators, or directors and family members. The same restrictive legislative position applies where a party is bankrupt (s 117 FLA) but in practice costs orders are more commonly made in favour of and against third parties than between spouses.

In *Megalos & Katsaros Pty Ltd* [2017] FamCA 734, which was heard and delivered subsequent to the related proceedings of *D Pty Ltd (in liq) v Calas (Trustee) in the matter of D Pty Ltd (in liq)* [2018] FCA 1409, discussed earlier in this paper, the liquidator of C Pty Ltd and D Pty Ltd was ordered to pay costs to the wife’s trustee in bankruptcy and the bankrupt wife. The liquidators argued that the determination of costs should be delayed until the determination of the liquidator’s s 79A application. Justice Benjamin questioned why the liquidator had not made the s 79A application earlier because if the substantive consent orders were set aside, then the 2015 proceedings, for which costs were sought by the trustee, was moot. Justice Benjamin considered that regardless of the outcome of the s 79A proceedings, the factors on which those proceedings were based were in the knowledge of the parties in the s 79A proceedings. Furthermore, there was a possibility that more parties would join or re-join the proceedings. He considered it appropriate not to postpone the determination of the costs applications.

The trustee was in essence seeking orders against non-parties. The Full Court of the Federal Court held that the Family Court had jurisdiction to make an order against a liquidator who was a non-party in *Brent v Gough* [1992] FCA 267. The liquidators conceded that there was jurisdiction, but argued that the discretion should not be exercised.

Party-party costs orders were made in favour of the trustee and the bankrupt wife. The claims for indemnity costs failed.

In *West & West* [2007] FamCA 681 the trustee had difficulty obtaining co-operation from the bankrupt. The wife offered to pay the primary debt of about \$8,000 but not the costs of about \$60,000. O'Sullivan FM found the costs were disproportionate to the debt and the property pool although the costs were calculated to include both the petitioning creditor's costs and the trustee's costs. Including the costs as part of the debts reduced the net pool by almost 25%. The trial judge was not referred to any authority that required the interests of the trustee to be taken into account, but only the interests of the creditors. He did not distinguish between the petitioning creditor's costs and those incurred by the trustee. He ignored the order that the bankrupt pay the petitioning creditor's costs of the bankruptcy proceedings. He found the trustee in bankruptcy was not a "creditor" within s 75(2)(ha). The trustee didn't recover anything from creditors or its own fees and costs. The wife was given leave to seek a costs order against the trustee.

Just as orders for costs are rare in the Family Court, so are orders for security for costs. They are made under s 117 and the factors listed in s 117(2A) must be considered. Justice Butler in *Brown and Brown; Eley and Henty (Interveners)* (1991) FLC 92-265 ordered that the husband and the wife each provide \$750 as initial security and gave the trustee liberty to make further applications for security for costs.

12. Case law update

Deputy Commissioner of Taxation v Vasiliades [2015] FCA 412

In 2002 Mr Vasiliades signed a contract which permitted him to nominate his wife as the purchaser of a property at 3 Towers Road Toorak. The purchase price was \$4.6 million. In 2011, the Commissioner of Taxation commenced an audit of Mr Vasiliades' affairs. In June 2014, the property was sold. The Commissioner of Taxation successfully sought freezing orders for the net proceeds of sale in [2014] FCA 1250.

The Deputy Commissioner of Taxation sought judgment against Mr Vasiliades in default, or alternatively, summary judgment. He also sought declaratory orders against Mr and Mrs Vasiliades that the net proceeds of sale in an account in the name of Mrs Vasiliades, which were subject to the freezing order, were held on trust for the benefit of Mr Vasiliades. Mr Vasiliades owed

over \$30 million for income tax, general interest charges, administrative penalties and shortfall interest charges.

The Commissioner submitted that Mr Vasiliades had an equitable interest in the net proceeds of sale of the property registered in the name of Mrs Vasiliades by virtue of a presumed or resulting trust. The purchase was funded partly by a joint loan to Mr and Mrs Vasiliades of \$3.925 million and partly by contributions of money by them. The dwelling on the property was demolished and in 2005 a new family home constructed, financed by further joint loans. More joint borrowings were made against the property, and when the property was sold, the net proceeds of about \$5.4 million were paid to Mrs Vasiliades. There was a dispute as to how much the parties had each contributed to a property which the parties had owned jointly prior to the Towers Road property. The parties had drawn down significant equity from the Towers Road property by way of joint loans from 2012 onwards, from about the time the Commissioner issued amended assessments.

Justice Pagone accepted that the legal ownership of the property was intended to be, and was, for the benefit of both parties jointly. The property was purchased by funds from joint loans making them both contributors to the purchase. He relied upon *Calverley v Green* [1984] HCA 81. The proceeds of sale were, therefore, held in part on behalf of Mr Vasiliades. Justice Pagone made declarations that Mr Vasiliades had an equitable interest in the property to the extent of about \$2.7 million and Mrs Vasiliades held that amount for him.

Matech & Matech (No 2) [2018] FamCA 1029

Some years after the parties entered into a s 90B financial agreement, and whilst the parties were in an intact marriage, the husband became bankrupt. His bankruptcy was discharged by effluxion of time, two years before the parties separated.

The husband asserted that he had contingent liabilities under s 82(4) BA to the wife under the financial agreement. He said they were debts provable in his bankruptcy, the wife's rights merged in his discharged bankruptcy and his liability to the wife had been discharged.

Judge Baumann rejected this argument:

- There was no evidence that the husband had told his trustee he had contingent liabilities to the wife.
- The contingent liability was not capable of estimation as at the date of bankruptcy and the financial agreement had no force and effect without a separation declaration under s 90DA FLA.
- Bankruptcy was not a terminating event so as to terminate the agreement under s 90J FLA.

Merrill & Burt [2018] FamCA 609

Justice Berman in the Family Court rejected the wife's argument that the Court should not be satisfied that it was just and equitable for an order to be made that alters the parties' property interests under s 90SM(1) FLA. Relying on *Stanford & Stanford* (2012) FLC 93-518, the wife contended that notwithstanding their 26 year relationship, the parties made a conscious decision (prior to the husband's bankruptcy several years earlier from which he was discharged) to transfer ownership and control of the assets of the relationship to the wife because of the husband's concern that the wife and children were "financially secure".

The wife argued (at [61]) that:

It would be an affront to public interest if a person in the husband's position was able to obtain financial protection afforded by the Bankruptcy Act and represent to the world at large that he is unable to pay his lawful debts while at the same time benefiting from and being able to recover property kept from his creditors which should have been available to meet his debts.

The husband denied that the transfer of property in late 2009 was the first step leading up to his voluntary bankruptcy in 2010 and highlighted the transparency of the transfers and that no action was taken by his trustee in bankruptcy under the BA in relation to the transactions.

Justice Berman concluded (at [93]) that the separation of the parties represented a "severance of the mutuality of the marital relationship". Until then there had been the opportunity for consensual change to the arrangements in recognition of the changing circumstances of the family. It was therefore just and equitable to alter the parties' interests in property.

Needham & Trustees of the Bankrupt Estate of Needham (2017) FLC 93-777

The wife appealed against orders which gave her 68% of the net proceeds of sale of the former matrimonial home valued at \$3 million.

The parties were married for 14 years, aged in their early 70s and had two adult children together. The husband also had one child from a previous relationship and the wife had two other children. By the time of the trial the parties had been separated for seventeen years, which was one of the unusual features of this case. It was the wife's evidence that she and the husband had come to an "understanding" that she would retain the jointly owned home, on the conditions she maintained the property, looked after the children (including the husband's two children) and their needs and made no further claim for any of the husband's money.

On 16 February 2015 the husband was declared bankrupt. His trustees became respondents in the proceedings. It was agreed at the time of trial that the trustees' total claim against the bankrupt estate of the husband was approximately \$3.4 million. The husband's bankruptcy occurred as a

result of the husband's actions after the parties separated, when he was working in the Middle East. The husband ceased employment with a particular firm, which ultimately commenced action against him claiming he sought to divert clients from that firm to another firm. Judgment was eventually made against the husband in the sum of \$7 million.

The wife was not cross examined with respect to her assertion that, from the time of separation, she paid for the children's clothing, dental and medical bills and attended to their emotional, social and physical needs. This occurred, without contribution from the husband, until each of them acquired full time employment or moved out. The husband paid some school fees.

The Full Court agreed with the wife that the fact that the husband paid for two of his three children to attend boarding school (the oldest child was an adult at separation), did not give her an "enhanced opportunity to engage in her professional practice" as she had the sole care of five children, with such demands not diminished by two of those children attending boarding school.

The Full Court concluded in relation to the trial judge's decision (at [25]-[27]):

Having regard to the reasons, it is clear that his Honour was in error in not giving appropriate consideration and weight to the following factors:

- a) *The wife contributed almost solely to the children's welfare post separation;*
- b) *While the husband did pay school fees for the parties' children, this was a minor contribution in contrast to the overwhelming responsibility of that of the wife; and*
- c) *The husband made no contribution to the property other than the wife having the sole use of a jointly owned house*

It is not possible to ascertain from the reasons how the judge arrived at the figure of 63 per cent especially as he described the wife's contributions as substantial. The basis of the move from qualitative to quantitative is not only impossible to discern, but the outcome is not reflective of the unchallenged evidence as to the respective contributions of the parties.

That evidence required a far greater percentage be attributed to the wife by reason of her post separation contributions.

The wife argued that the trial judge erred by including her own personal and post-separation assets totalling about \$40,000 in the pool. The trustees did not seek to include them. The Full Court agreed with the wife, saying (at [34]):

The order made by the judge provided the Trustees with the sum of \$12,555 on account of the wife's personal assets. Although it was open to the judge to compile a pool including assets acquired by the wife post separation it was not correct in the circumstances of this case to give the Trustees a share of them. This figure represents 32 per cent of assets to which the husband made little or no contribution, and cannot be justified. Instead, those assets should be considered in the context of the wife's current circumstances as part of a decision addressing the s 75(2) matters. This ground must also succeed.

The Full Court rejected the wife's argument that there was non-disclosure by the husband and inadequate investigation of the property of the husband, which warranted an adjustment in her favour.

It said (at [44]-[45]):

The Trustees contended that “the application of fairness and equity demands that any adjustment in the wife’s favour should be minimal.” In response to the wife’s complaint that the Trustees had failed to properly investigate the husband, it was submitted by the Trustees:

36. *In summary in respect to the issue of disclosure, it was submitted that further enquiry would have been a futility having regard to the fact that it was a difficult estate that included overseas investigations in circumstances where the husband was wholly uncooperative. The practicality of further investigation, it was argued, also had to be seen in the context of the investigators having limited funds available to pursue such investigations.*

We accept this submission, and indicate that it is sufficient if all reasonable enquiries are made taking into account the particular circumstances, and the need for proportionality.

The Full Court agreed with the wife that the s 75(2) adjustment made by the trial judge was inadequate but said that if her contribution-based entitlements increased significantly from 63% then 5% was adequate. The Full Court accepted that the parties made equal contributions during their relationship and accepted the wife’s evidence about her contributions post-separation. It re-exercised the discretion and gave the wife 75% for contributions and 5% for s 75(2) factors but, consistent with the orders sought by the Trustees the costs of sale were to be borne equally by the Trustees and the wife, and the wife had the conduct of the sale.

Weston v McAuley [2017] FCCA 1

This case is of interest because it gave reverence to *Trustee of Cummins v Cummins* (2006) 227 CLR 278, a case which is often criticised and rarely followed.

Judge Driver found that the title reflected the parties’ intentions and that there was no resulting trust in favour of the bankrupt. The wife was entitled to retain 95% of the net proceeds of sale of the property in accordance with her entitlements on the title. This was contrary to the conclusion in *Cummins* where the husband retained his 50% interest.

The history of the purchase was relevant but complicated. The parties married in 1965 and bought their first property in 1973. The history showed that the couple purchased land at various times in joint names or singularly, and supported an inference that the couple intended that they both should benefit from the properties collectively but did not support an inference that the couple intended any particular property would benefit both of them equally.

Judge Driver accepted the wife’s evidence that she regarded the Cremorne property as security for her future because of previous strains in the marriage. However, she also acted inconsistently in permitting her husband to use that property as security for his business activities.

Judge Driver said (at [91]):

The bankrupt may have been a good accountant but he was a poor businessman. He acted in the manner of Mr Micawber. For her part, Mrs McAuley attempted, not very successfully, to follow the maxim of the long suffering Mrs Micawber: experientia docet. With the benefit of hindsight, Mrs McAuley was foolish to facilitate his activities.

Judge Driver held that (at [94]) the concessions made by Mrs McAuley under cross-examination did not establish that she and the bankrupt abandoned their mutual intention that the property should be Mrs McAuley's. There was a partial retreat, to the extent of five per cent, and, generally, Mrs McAuley and her husband accepted that the advancement of Mrs McAuley would be burdened both as to the five per cent legal title in favour of the bankrupt and the business overdraft.

Judge Driver found that (at [96]) that contrast to the outcome in *Cummins*, there was no resulting trust in favour of the bankrupt and Mrs McAuley was entitled to retain 95% of the net proceeds of the sale of the property.

The trustee was aggrieved not just about the outcome of the sale of the property but also the process by which the proceeds of the sale found their way into the hands of Mrs McAuley and were substantially spent. However, the trustee consented to the sale of the property on the understanding or condition that the proceeds of the sale would be held in a solicitor's trust account while any competing claims to the proceeds were resolved. That did not happen because, unbeknownst to the trustee, the parties' son who was a solicitor acted on the sale for the bankrupt and his mother and disbursed the proceeds of the sale to them from his trust account. Judge Driver accepted his evidence that he was unaware of his father's bankruptcy at the time he agreed to act and, on becoming aware, he was extremely angry and ceased to act for his father. He was not prevented from continuing to act for his mother and one could readily understand the moral pressure he felt to continue to assist her. He acted on express instructions from his mother to disburse the proceeds of the sale.

He was entitled (and probably obliged) to act on those instructions. He had not given any undertaking to the trustee to retain the proceeds of the sale. Neither had the bankrupt or Mrs McAuley. No adverse conclusion was drawn about the role played by the parties' solicitor son Lachlan McAuley.

Mrs McAuley was entitled to receive 95% of the net proceeds of the sale of the property, so the claim by the trustee failed.

Conclusion

There has been a recent flurry of cases dealing with the rights of trustees, creditors and non-bankrupt spouses. The rights of trustees arising from the 2005 amendments may be even less than they first appeared. Trustees, creditors, bankrupts and non-bankrupt spouses need to be creative in

their thinking and their strategy and conscious of the wording of both the BA and the FLA. Trustees must be hoping that, in the words of Charles Dickens' Mr Micawber: "Something will turn up". Maybe it has, in the revival of *Cummins*.

4.

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