

Legalwise Presentation:

Recovering assets for and from a bankrupt's estate and trusts: Recent case update

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1. Introduction

- (a) There are a number of different ways that assets can be recovered from or for a bankrupt's estate or trust.
- (b) This paper is intended to provide:
 - (i) a recap of some of the common actions available for recovery and relevant defences or exclusions;
 - (ii) an update in respect of the ability to utilise these through an examination of three cases determined in 2023; and
 - (iii) an outline of issues for consideration when dealing with a claim for recovery, often by a bankruptcy trustee, or defending such a claim.
- (c) This paper supplements a presentation given for Legalwise in March 2024 and is not intended to recount all of the law and its nuances in this area. It's aim is to highlight matters for those facing or intending to bring recovery claims involving bankrupt estates or trusts¹.

2. Recap

- (a) These are common statutory avenues for recovering assets from, or for, a bankrupt's estate or trust²:
 - (i) section 120 Bankruptcy Act 1966 (Cth) (**Act**) – in respect of under valued transactions;
 - (ii) section 121 of the Act – in respect of transactions to defeat creditors;
 - (iii) section 122 of the Act – in respect of insolvent preferences;
 - (iv) section 128B and 128C of the Act – in respect of claims involving superannuation;
 - (v) section 172 *Property Law Act* 1968 (Vic) and other State or Territory equivalents³ in respect of intentional transactions to defeat creditors;
 - (vi) section 139ZQ and 139ZU of the Act – in respect of Official Receiver Powers.
- (b) Each of these is addressed briefly below by way of recap to identify the key requirements of each cause of action and possible defences or exclusions.
- (c) These statutory causes of action are often run in conjunction with personal claims, in light of the Bankruptcy Trustee stepping into the shoes of the bankrupt, including to establish a constructive or resulting trust and an entitlement to property or monies.

¹ The author wishes to thank Anastasia Stepanovic, Law Librarian at Sladen Legal for her initial research used in the preparation of this paper and accompanying presentation.

² This is not intended to be an exhaustive list of possible statutory causes of action.

³ For example section 37A *Conveyancing Act* 1919 (NSW)

3. Undervalued Transactions – section 120 Bankruptcy Act

- (a) Section 120 of the Act provides:

120 Undervalued transactions

Transfers that are void against trustee

- (1) *A transfer of property by a person who later becomes a bankrupt (the **transferor**) to another person (the **transferee**) is void against the trustee in the transferor's bankruptcy if:*
- (a) the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and*
 - (b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.*
- (b) Subsection 120(3A) sets out a rebuttable presumption of insolvency if the factors set out in that section are met.
- (c) However there are some exemptions which are:

Exemptions

- (2) *Subsection (1) does not apply to:*
- (a) a payment of tax payable under a law of the Commonwealth or of a State or Territory; or*
 - (b) a transfer to meet all or part of a liability under a maintenance agreement or a maintenance order; or*
 - (c) a transfer of property under a debt agreement; or*
 - (d) a transfer of property if the transfer is of a kind described in the regulations.*
- (3) *Despite subsection (1), a transfer is not void against the trustee if:*
- (a) in the case of a transfer to a related entity of the transferor:*
 - (i) the transfer took place more than 4 years before the commencement of the bankruptcy; and*
 - (ii) the transferee proves that, at the time of the transfer, the transferor was solvent; or*
 - (b) in any other case:*
 - (i) the transfer took place more than 2 years before the commencement of the bankruptcy; and*
 - (ii) the transferee proves that, at the time of the transfer, the transferor was solvent.*
- (d) There is also a time limitation in section 127(3) of the Act which requires any claim under this section to be brought within 6 years of the bankruptcy commencing.

4. Transactions to defeat creditors – section 121 Bankruptcy Act

- (a) Section 121 of the Act provides:

121 Transfers to defeat creditors

Transfers that are void

- (1) *A transfer of property by a person who later becomes a bankrupt (the **transferor**) to another person (the **transferee**) is void against the trustee in the transferor's bankruptcy if:*
- (a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and*
 - (b) the transferor's main purpose in making the transfer was:*
 - (i) to prevent the transferred property from becoming divisible among the transferor's creditors; or*
 - (ii) to hinder or delay the process of making property available for division among the transferor's creditors.*

...

Showing the transferor's main purpose in making a transfer

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

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

- (3) *Subsection (2) does not limit the ways of establishing the transferor's main purpose in making a transfer.*
- (b) Subsection 121(4A) sets out a rebuttable presumption of insolvency if the factors set out in that section are met.
- (c) The transfer will not be void if it falls within the provisions of section 121(4) which provides:

Transfer not void if transferee acted in good faith

- (4) *Despite subsection (1), a transfer of property is not void against the trustee if:*
- (a) the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and*
 - (b) the transferee did not know, and could not reasonably have inferred, that the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(b); and*
 - (c) the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.*
- (d) There is no time limitation which requires a claim to be brought under this section⁴.

5. Insolvent preferences – section 122 Bankruptcy Act

- (a) Section 122 of the Act provides:

⁴ Section 127(4) of the Act.

122 Avoidance of preferences

- (1) 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:
- (a) had the effect of giving the creditor a preference, priority or advantage over other creditors; and
 - (b) was made in the period that relates to the debtor, as indicated in the following table.

Periods during which transfers of property may be void	
Description of petition leading to debtor's bankruptcy	Period during which the transfer was made
1 Creditor's petition	Period beginning 6 months before the presentation of the petition and ending immediately before the date of the bankruptcy of the debtor
2 Debtor's petition presented when at least one creditor's petition was pending against a petitioning debtor or a member of a partnership against which the debtor's petition was presented	Period beginning on the commencement of the debtor's bankruptcy and ending immediately before the date of the bankruptcy of the debtor
3 Debtor's petition presented in any other circumstances	Period beginning 6 months before the presentation of the petition and ending immediately before the date of the bankruptcy of the debtor

- (b) The section will not capture however the following situations as set out in 122(2) of the Act:

(2) Nothing in this section affects:

- (a) the rights of a purchaser, payee or encumbrancer in the ordinary course of business who acted in good faith and who gave consideration at least as valuable as the market value of the property; or
 - (b) the rights of a person who is making title through or under a creditor of the debtor in good faith and who gave consideration at least as valuable as the market value of the property; or
 - (c) a conveyance, transfer, charge, payment or obligation of the debtor executed, made or incurred under or in pursuance of a maintenance agreement or maintenance order; or
 - (d) a transfer of property under a debt agreement.
- (c) Section 122(3) places the burden of proof on the person claiming to have the benefit of the transaction.
- (d) Certain assumptions are also stipulated in subsection 122(4) of the Act:

For the purposes of this section:

- (a) a transfer of property is taken to have been made in favour of a creditor if it is made in favour of a person in trust for the creditor; and

- (b) *a payment of tax, or of any other amount payable to the Commonwealth, or to the Commissioner of Taxation, under or because of an Act of which the Commissioner has the general administration, is taken to be made for consideration equal in value to the payment and in the ordinary course of business; and*
- (c) *a creditor shall be deemed not to be a purchaser, payee or encumbrancer in good faith if the transfer of property was made under such circumstances as to lead to the inference that the creditor knew, or had reason to suspect:*
 - (i) *that the debtor was unable to pay his or her debts as they became due from his or her own money; and*
 - (ii) *that the effect of the transfer would be to give him or her a preference, priority or advantage over other creditors.*
- (e) Protections are extended for payments in section 123 of the Act including:

123 Protection of certain transfers of property against relation back etc.

- (1) *Subject to sections 118 to 122 (inclusive) and sections 128B and 128C, nothing in this Act invalidates, in any case where a debtor becomes a bankrupt:*
 - (a) *a payment by the debtor to any of his or her creditors;*
 - (b) *a conveyance, transfer or assignment by the debtor for market value;*
 - (c) *a contract, dealing or other transaction by or with the debtor for market value; or*
 - (d) *any transaction to the extent of a present advance made by an existing creditor;*
- if:*
 - (e) *the transaction took place before the day on which the debtor became a bankrupt;*
 - (f) *the person, other than the debtor, with whom it took place, did not, at the time of the transaction, have notice of the presentation of a petition against the debtor; and*
 - (g) *the transaction was in good faith and in the ordinary course of business.*
- (f) Pursuant to section 123(2) of the Act the burden of proof to obtain this protection is placed upon the person who relies on the validity of the transaction.
- (g) The government also ensured protection from claw back of payment of any penalties or fines imposed by a court in respect to an offence against a law and pursuant to a maintenance agreement, as defined in the Act⁵.
- (h) There is also a time limitation in section 127(5) of the Act which requires any claim under this section to be brought within 6 years of the bankruptcy commencing.

6. Superannuation – sections 128B and 128C Bankruptcy Act

- (a) Sections 128B of the Act provides:

⁵ Section 123(4) and 123(6) of the Act.

128B Superannuation contributions made to defeat creditors—contributor is a person who later becomes a bankrupt

Transfers that are void

- (1) A transfer of property by a person who later becomes a bankrupt (the **transferor**) to another person (the **transferee**) is void against the trustee in the transferor's bankruptcy if:
- (a) the transfer is made by way of a contribution to an eligible superannuation plan; and
 - (b) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and
 - (c) the transferor's main purpose in making the transfer was:
 - (i) to prevent the transferred property from becoming divisible among the transferor's creditors; or
 - (ii) to hinder or delay the process of making property available for division among the transferor's creditors; and
 - (d) the transfer occurs on or after 28 July 2006.
- (b) Sections 128B(2) and (3) provide that the main purpose can be established if it can be reasonably inferred that the transferor was or was likely to become insolvent and that regard can be had to the pattern of contributions to superannuation prior to the bankruptcy to see if a transfer is out of character.
- (c) Section 128B(5) sets out the circumstances which provide a rebuttable presumption of insolvency.
- (d) Section 128C largely repeats the above provisions but for the circumstance where a third party makes the contribution to superannuation on behalf of the bankrupt.
- (e) It does however disregard a distribution payable upon the death of a spouse⁶ or another person⁷.
- (f) There is no time limitation for the Bankruptcy Trustee to bring a claim⁸.

7. Intent to defraud creditors – section 172 Property Law Act 1958 (Vic) and equivalents

- (a) Section 172 of the *Property Law Act 1958* (Vic) provides:

172 Voluntary conveyances to defraud creditors

- (1) *Save as provided in this section, every alienation of property made, whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.*
- (2) *This section shall not affect the operation of a disentailing assurance, or the law of bankruptcy or insolvency for the time being in force.*

⁶ Section 128C(2) of the Act.

⁷ Section 128C(5) of the Act.

⁸ Section 128D(1) of the Act.

- (3) *This section shall not extend to any estate or interest in property alienated for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the alienation, notice of the intent to defraud creditors.*
- (b) Similar provisions also exist in other State and Territory jurisdictions⁹.
- (c) Section 173 of the *Property Law Act 1958* (Vic) also provides:

173 Voluntary disposition with intent to defraud

Every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.

- (d) This differs from the provisions in the Act regarding transactions to defeat creditors as it requires proving an “intent” to defraud creditors, which in effect sets a more difficult evidentiary bar to overcome than the inferences needing to be established under similar provisions in the Act.
- (e) These provisions are often run as alternate causes of action parallel with claims under the Act¹⁰ or in combination with constructive or resulting trust claims.

8. Receiver Powers – for e.g. section 128E, 139ZQ, 139ZU Bankruptcy Act

- (a) The Official Receiver has powers granted by the Act to require:
 - (i) the preservation (freezing) of assets;
 - (ii) the transfer of assets;
 - (iii) the payment of assets.
- (b) For example, section 128E of the Act provides that the Official Receiver can issue a superannuation freezing notice to the trustee of a superannuation fund requiring it not to cash, debit, rollover, transfer or forfeit funds held save as set out in the Act for a period of 180 days.
- (c) Section 139ZQ of the Act provides that the Official Receiver can:

139ZQ Official Receiver may require payment

- (1) *If a person has received any money or property as a result of a transaction that is void against the trustee of a bankrupt under Division 3, the Official Receiver:*
 - (a) *if the Official Trustee is the trustee—on the initiative of the Official Receiver;*
or
 - (b) *if a registered trustee is the trustee—on application by the trustee;*
may require the person, by written notice given to the person, to pay to the trustee an amount equal to whichever of the following is applicable:
 - (c) *if:*
 - (i) *the transaction is void against the trustee under section 128B or 128C;*
and

⁹ Such as section 37A of the Conveyancing Act 1919 (NSW).

¹⁰ For example section 139D or 139E of the Act claims.

- (ii) *the transaction is by way of a contribution to an eligible superannuation plan for the benefit of a person (the **beneficiary**) who may or may not be the bankrupt; and*
 - (iii) *the beneficiary is a member of the eligible superannuation plan; whichever is the lesser of the following:*
 - (iv) *the money or the value of the property received;*
 - (v) *the beneficiary's withdrawal benefit in relation to the eligible superannuation plan;*
 - (d) *in any other case—the money or the value of the property received.*
- (d) Each of these powers can usually be exercised either on the Official Trustee's own initiative or at the request of a trustee in bankruptcy of an estate.
 - (e) Additional powers include ordering rolled over superannuation payments¹¹, charging property¹²,
 - (f) The Act also provides processes to enable such notices, orders or charges to be set aside¹³.

9. Recent case – Aravanis (Trustee) v Kapp, in the matter of the Bankrupt Estate of Kapp¹⁴

9.1. Relevant facts

- (a) This case was determined after a number of earlier related cases and is actually the delivery of two determinations contemporaneously, which makes it an excellent case study for a number of issues that arise when seeking to recover assets for or from bankrupt estate.
- (b) Mr Kapp, a former solicitor, including at one stage as a managing partner of Andersen Legal, was bankrupted on his own petition, after proceedings had been commenced by the Commissioner of Taxation (**Commissioner**) to obtain sequestration orders against him for the in excess of \$4,000,000 that he owed to the Commissioner.
- (c) Mr Kapp had been married to for most of the relevant period Maryann Kapp (**Ms Kapp**), with whom he had two children.
- (d) Mr Kapp was a high income earner which resulted in his being able to access funding to acquire property. There had been a number of property acquisitions and disposal over the course of his marriage.
- (e) Mr Kapp became conscious of the exposure of his personal assets to creditors and the need to structure to protect his family home in particular from potential division amongst his creditors. As such he set up a family trust, ensured that the family home was placed in Ms Kapp's name and directed finances on behalf of the family.
- (f) On 18 May 2010 Mr Kapp transferred his 50% interest in an investment property in Leura to Ms Kapp.

¹¹ Section 139ZU of the Act.

¹² Section 139ZR of the Act.

¹³ See for example sections 129F and 139ZS of the Act.

¹⁴ [2023] FCA 702

- (g) On 31 July 2010 Mr Kapp entered into a payment arrangement with the Commissioner for approximately \$450,000.00 with three additional years tax liabilities not yet assessed due to non-lodgement of returns estimated to be about \$750,000.00.
- (h) By 30 August 2010, Mr Kapp had defaulted on the payment arrangement with the Commissioner.
- (i) In early 2011 Mr Kapp was diagnosed with a terminal health condition and his health deteriorated dramatically.
- (j) On 3 May 2011, the family purchased a family home in Turramurra in Ms Kapp's name using funds which included a bridging loan of \$230,700.00.
- (k) On 12 September 2011, Ms Kapp sold the Leura property and used part of the sale proceeds to pay out the bridging loan for the Turramurra purchase.
- (l) On 21 June 2013, Ms Kapp sold the Turramurra property and realised net profits of \$362,340.64.
- (m) On 23 August 2013, Ms Kapp purchased at Wahroonga a family home, funded in part by the proceeds of sale of the Turramurra property.
- (n) On 18 December 2013, the Commissioner, Ms Kapp and Mr Kapp entered into a Deed whereby the tax debt was acknowledged at about \$2,250,000.00 and Ms Kapp agreed to assume liability of the debt if there was a default by Mr Kapp and to grant a second mortgage over the Wahroonga property in support of that guarantee.
- (o) On 10 May 2017, the Commissioner commenced proceedings against Mr Kapp for a total debt of approximately \$4,400,000.00.
- (p) On 12 July 2017, the Commissioner obtained default judgement.
- (q) On 22 August 2018 the Commissioner issued a creditor's petition against Mr Kapp.
- (r) On 4 March 2019 Mr Kapp became bankrupt on his own petition.
- (s) On 22 July 2019 the Commissioner commenced proceedings against Ms Kapp to which Ms Kapp cross-claimed seeking relief from the deed on the basis she had entered into it under duress.
- (t) On 28 April 2020, the Kapps defaulted upon their loan agreement with the Commonwealth Bank of Australia.
- (u) On 13 June 2021, Ms Kapp signed as a third party payer a costs agreement with solicitors to represent Mr Kapp in proceedings brought by the Trustee, resulting in her paying \$110,000 of Mr Kapp's legal fees.
- (v) On 30 June 2021, Ms Kapp entered into a deed with the Commissioner for \$480,000.00 in full settlement of her obligations under the earlier deed and to resolve the proceedings against her.

- (w) The sale of the Wahroonga family home on 11 August 2021 and the realisation of the proceeds of sale was the subject of a claim by the bankruptcy trustee (**Trustee**).

9.2. Issues to be resolved Case#1 – Recovery of proceeds from sale of family home

- (a) The Trustee sought to recover \$232,433.60 from the Wahroonga sale proceeds either:
 - (i) through tracing the sale proceeds and then pursuant to section 121 of the Act or pursuant to section 37A of the *Conveyancing Act 1919* (NSW) (**Trustee Actions**); or
 - (ii) as a 50% beneficiary of a constructive trust or resulting trust (i.e. Mr Kapp's personal claims against Ms Kapp which the Trustee assumed as his agent upon bankruptcy) (**Personal Actions**).
- (b) Ms Kapp disputed the Trustee Actions and the Personal Actions and also asserted 2 defences being:
 - (i) Ms Kapp acted as a surety for Mr Kapp's debt to the Commissioner and she therefore has either a surety or an equity of exoneration in the proceeds of sale with the monies she paid to be reimbursed to her; and
 - (ii) The Trustees have already sued her once in separate proceedings and it is unreasonable that they have raised their claims in this case and not the previous one. As such Ms Kapp asserts that the Trustee should be estopped from their present claims (**Anshun estoppel**).

9.3. Court finding Case #1

- (a) Perram J found that:
 - (i) \$230,700.00 of the Leura funds could be traced to the Wahroonga sale proceeds and that this amount should be treated as a proportion of the total value of the asset (i.e. 9.55% of which Mr Kapp had a 50% interest being 4.775%)¹⁵;
 - (ii) Mr Kapp made the transfer of the Leura property to Ms Kapp for the main purpose of defeating creditors, although a subsidiary purpose was to provide for his family¹⁶;
 - (iii) at the times of the placement of the Turramurra and Wahroonga properties in Ms Kapp's name Mr Kapp was insolvent and the main purpose of placing the properties in Ms Kapp's name was to defeat Mr Kapp's creditors¹⁷;
 - (iv) there was not a common intention to create a constructive trust between the parties for their mutual benefit¹⁸;
 - (v) Ms Kapp was not entitled to a right of exoneration against the claim of the trustee for the \$480,000 she paid to the Commissioner for Mr Kapp's

¹⁵ At [79].

¹⁶ At [133].

¹⁷ At 177.

¹⁸ At [156] - [159].

tax liabilities as the deed she signed stated she was only able to claim a right of exoneration on the payment in full of Mr Kapp's tax liabilities. Ms Kapp had only paid part of those liabilities and as such the terms of the deed precluded her making this claim¹⁹;

- (vi) Ms Kapp was entitled as a surety to a charge over Mr Kapp's property for the \$110,000 she paid in Mr Kapp's legal fees. As such whilst the Trustee was entitled to \$58,900.20 from the sale proceeds of Wahroonga, Ms Kapp was entitled to \$110,000.00, meaning the whole of Mr Kapp (and therefore the Trustee's) interest in the sale proceeds is charged for Ms Kapp²⁰.
 - (vii) No Anshun estoppel arises as the Trustee did not act unreasonably in failing to advance their claims in the earlier proceedings²¹.
- (b) The Trustee in effect lost the case and the court considered that the Trustee needed to pay Ms Kapp's costs for this case.

9.4. Further relevant facts

- (a) On 1 November 2013 the Twin Trust was settled.
- (b) This was a discretionary trust of which the beneficiaries were Ms Kapp and the children of Mr and Ms Kapp. There had been various trustees, all of which were controlled by Mr Kapp.
- (c) For these proceedings Mr Kapp was the trustee.
- (d) On 1 December 2013, Mr Kapp ceased to be a beneficiary of the Twin Trust.
- (e) Up until 1 July 2015 Mr Kapp worked as a solicitor and post that date he worked as a consultant for Corrs as well as a director or consultant for a number of other companies.
- (f) Proceeds from Mr Kapp's personal exertions in his roles were paid into the Twin Trust.
- (g) The Twin Trust owned 2 properties, one in Main Beach, Queensland and the other in Swan Bay, New South Wales. Both were sold and proceeds are held in solicitor's trust accounts pending resolution of these proceedings.

9.5. Issues to be resolved Case #2 – Recovery from family trust

- (a) The Trustee sought:
 - (i) declarations of a constructive or resulting trustee over the Main Beach and Swan Bay sale proceeds;
 - (ii) relief pursuant to section 139D and 139E of the Act in respect of payments made to the Twin Trust by third parties for Mr Kapp's services;

¹⁹ At [201].

²⁰ At [210].

²¹ At [211].

- (iii) relief under section 120 or 121 of the Act in respect of payments made to the Twin Trust by third parties for Mr Kapp's services or relief under section 37A of the *Conveyancing Act 1919* (NSW).
- (b) The Twin Trust submitted that the Trustee had failed to engage in the tracing exercise that their claim required in order to successfully prosecute it and as such the Court should not find that an amount was payable by it to the Trustee.

9.6. Court finding Case #2

- (a) Perram J found that:
 - (i) there was no common intention and as such no constructive trust arose²²;
 - (ii) in any event the Trustee had not traced any payments made by Mr Kapp or at his behest into the Twin Trust into the sale proceeds for the Main Beach or Swan Bay properties and as such this would cause the Trustee's claim to fail²³;
 - (iii) Mr Kapp's intention in using the Twin Trust was to frustrate the Commissioner's claims²⁴;
 - (iv) as Mr Kapp was not a beneficiary there was no mutual benefit accruing to give rise to a constructive trust²⁵;
 - (v) in any event the Trustee also had not traced any payments made by Mr Kapp or at his behest into the Twin Trust to the sale proceeds of the Main Beach and Swan Bay properties;
 - (vi) in removing himself as a beneficiary there was no intention to leave him with a beneficial interest in the contributions he caused to be made and as such the Court as unable to accept that there could be a resulting trust²⁶;
 - (vii) the Court accepted that Mr Kapp's services were provided on behalf of the Twin Trust²⁷, that he controlled that trust for a specified period²⁸ and that he was not paid for his services²⁹;
 - (viii) the Court also accepted that the monies paid into the Twin Trust were used to service loans for the acquisition of the Main Beach and Swan Bay properties³⁰ and that Mr Kapp derived a benefit from this by way of an income stream from Main Beach and use of the Swan Beach property as a holiday house³¹;
 - (ix) when tracing the funds from the Twin Trust to the properties acquired the Court could only be satisfied that only \$151,250.01 or 35.94% of the

²² At [228].

²³ At [s229].

²⁴ At [224].

²⁵ At [228].

²⁶ At [235].

²⁷ At [250].

²⁸ At [254].

²⁹ At [256].

³⁰ At [257] – [259].

³¹ At [260] – [261].

Swan Bay sale proceeds could be traced into the properties³² and as such both section 139D and section 37A of the Conveyancing Act (NSW) 1919 were enlivened in the Trustee's favour.

- (b) The Court found in respect of other payments for Mr Kapp's personal exertions that section 120 and section 121 were available but the Trustee had failed to demonstrate that the monies paid into the Twin Trust could be traced to the Main Beach and Swan Bay properties, which resulted in their case failing³³.
- (c) Each party was ordered to pay their own costs.

10. Recent Case – Kite (Trustee), in the matter of Murray³⁴

10.1. Relevant Facts

- (a) In 1999, James Edward Murray (**Mr Murray**) and Mrs Murray began paying into joint bank accounts earnings and paying expenses out of the joint bank accounts.
- (b) In 2000 Mr Murray married Mrs Murray.
- (c) Over the years Mr and Mrs Murray acquired several properties, some jointly and some separately.
- (d) In July 2007 Mr Murray borrowed funds from Bendigo and Adelaide Bank to invest in the Great Southern 2007 High Value Timber Project.
- (e) On 1 May 2009, Great Southern appointed a voluntary administrator. Mr Murray stopped paying the Bendigo loan and joined a class action which was not heard until 2013.
- (f) On 23 July 2014 the class action was settled resulting in confirmation of the group members loan obligations.
- (g) On 28 November 2014, Mrs Murray purchased the North Balgowlah property with funds from a joint bank account and a loan from CBA.
- (h) On 25 September 2017, Robert Kite (**Mr Kite**) was appointed trustee in bankruptcy of Mr Murray.
- (i) Mr Kite submitted that proceeds of the sale of these earlier acquired properties and payments towards the mortgages for the properties constitute the financial contributions for the purpose of section 139DA of the Act which support a claim by him of a beneficial interest in the North Balgowlah property.

10.2. Issues to be resolved

- (a) Mr Kite claimed and the court was asked to determine:
 - (i) whether Mr Kite as trustee had a 50% beneficial interest in the property at North Balgowlah either on the basis of section 139DA of the Act or as a purchase money resulting trust; or

³² At [284].

³³ At [329] and [330]

³⁴ [2023] FCA 198

- (ii) monetary claims secured by charge upon the North Balgowlah property in respect of Mr Murray's money applied towards the property's purchase and other transactions pursuant to section 120 or 121 of the Act.

10.3. Court finding

- (a) Raper J found that:
 - (i) the only factual dispute between the parties in respect of the section 139DA of the Act claim was in respect of whether the acquisition of North Balgowlah property was a direct or indirect result of financial contributions made by the bankrupt during the relevant period³⁵;
 - (ii) the evidence establishes that Mrs Murray acquired the North Balgowlah property as a direct or indirect result of financial contributions by Mr Murray³⁶, including his earning being for a large portion the sole contributing source of funds for the joint bank account and sale proceeds of earlier properties being banked into that account;
 - (iii) Mr Murray, *in the lead up to his bankruptcy, structured his affairs ...in such a way as to fund the accumulation of an asset in the name of Mrs Murray and where he has used or derived a benefit from the property at a time or times during the examinable period*³⁷;
 - (iv) there was no evidence led to satisfy the Court that circumstances existed mitigating against an order as required by section 139F of the Act³⁸;
 - (v) Mr Murray contributed 11% of the purchase price of the North Balgowlah property and as such that amount would be what Mr Kite was entitled to recover³⁹;
 - (vi) Mr Kite had not provided any evidence as to the extent of Mr Murray's contributions to the North Balgowlah property mortgage to persuade the court to increase the amount recoverable⁴⁰;
 - (vii) there was no resulting trust as that was not the actual intention of the parties⁴¹. As a result of this finding the presumption of advancement did not come into consideration;
 - (viii) the section 121 of the Act claim was made out⁴².
- (b) The Court also commented that the presumption of advancement may not carry much weight these days given the numerous ways spouses now deal with property⁴³.

³⁵ At [163].

³⁶ At [186].

³⁷ At [201].

³⁸ At [202].

³⁹ At [209].

⁴⁰ At [210].

⁴¹ At [222].

⁴² At [235].

⁴³ At [221].

11. Recent Case – Roufeil as Trustee of the Bankrupt Estate of Tarrant v Tarrant Enterprises P/L⁴⁴

11.1. Relevant facts

- (a) On 20 December 2007, Tarrant Enterprises Pty Ltd (**Company**) as trustee of the of the MRT Family Trust purchased a penthouse in Wollongong with a loan from the National Australia Bank Ltd (**NAB**).
- (b) From 21 July 2015 to 29 August 2016, 27 amounts totalling \$194,290.00 were transferred by electronic funds transfer from a bank account held by Mr Mervyn Ross Tarrant (**Mr Tarrant**) to an account of the Company for the purposes of payment of a loan to NAB.
- (c) On 25 November 2011 Mr Tarrant was banned from providing financial services for seven years.
- (d) On 8 September 2016, Mr Tarrant was made bankrupt through sequestration orders and Mr Roufeil appointed as trustee in bankruptcy (**Roufeil Trustee**).

11.2. Issues to be resolved

- (a) This appeal was required to determine:
 - (i) whether payment to a company bank account by Mr Tarrant was a 'transfer of property' for the purposes of section 120 or 121A of the Act; and
 - (ii) whether any of the defences raised applied.
- (b) The Defences included:
 - (i) whether Regulation 31 of the *Bankruptcy Regulations 2021* (Cth)(**Regulation 31**) applies to exempt the transaction as a transfer of property under section 120 of the Act;
 - (ii) was the proceeding an abuse of process by the Roufeil Trustee;
 - (iii) whether there would be double recovery by the Roufeil Trustee preventing the Court from granting the relief sought; and
 - (iv) whether Mr Tarrant had a valid right of set-off against the Roufeil Trustee resulting in no money being payable.

11.3. Court finding

- (a) Abraham J relying on the reasons of Perram J in *Federal Commissioner of Taxation v Rozmar*⁴⁵ found that:
 - (i) the concept of 'payment of money' as a 'transfer of property' referred to a banking transaction in which value from one bank account is transferred to another⁴⁶

⁴⁴ [2023] FCAFC 142

⁴⁵ [2010] FCA 324

⁴⁶ At [35].

- (ii) section 120 does not only apply to a 'transfer of property' in a strict legal sense. The definition of that expression is in s120(7)(a) expressly includes the "payment of money: and it is that latter concept in its ordinary and natural meaning which is to be applied⁴⁷; and
 - (iii) the elements of section 120 of the Act were satisfied.
- (b) In respect of the defences the Court found:
- (i) Regulation 31 provides that:

"For the purposes of section 120(2)(d) of the Act, a transfer is of the kind to which subsection 120(1) of the Act does not apply if the costs of recovering the transferred property would, in the opinion of the trustee in the transferor's bankruptcy, be likely to exceed the value of the property to the transferor's creditors."
 - (ii) The relevant time for consideration as to whether the costs will exceed the recover is at the time of commencement of proceedings and the Company has failed to demonstrate that the Roufeil Trustee formed that opinion⁴⁸.
 - (iii) there was no abuse of process by the Roufeil Trustee as it had correctly abandoned its reliance on the administrative section 139ZQ notice issued by the Official Receiver seeking recovery of the \$194,290.00 and proceeded on the basis of the contested hearing of the issues⁴⁹;
 - (iv) there was no immediate issue of double recovery and the process of proving up a debt for a distribution would require the Roufeil Trustee to then consider this issue⁵⁰; and
 - (v) there is no mutuality of parties to establish a right of set-off under section 86 of the Act as the Company is subject to recovery proceedings from the Roufeil Trustee and the Company also has a claim against Mr Tarrant. These being two different parties and claims⁵¹.
- (c) The Court referenced the High Court case of *Metal Manufacturers Pty Ltd v Morton*⁵² in respect of the set-off claim as analogous to the corporate legislative interpretation approach.

12. Matters to consider when seeking to recover from or for a bankrupt estate or trust

- (a) The following matters all require consideration when considering commencing or defending recovery proceedings against or for a bankrupt estate.
 - (i) selection of cause of action and the ability to prove up each of the elements required in order to prove that cause of action. Some important pre-commencement planning requires an understanding of each of the

⁴⁷ At [37].

⁴⁸ At [50].

⁴⁹ At [45].

⁵⁰ At [51].

⁵¹ At [54].

⁵² [2023] HCA 1 at [18]

- elements (and the standards to reach) to be met to successfully advance that cause of action;
- (ii) the type of claim to be made, in particular whether it”
 - (A) is a personal action – that is the trustee stands in shoes of bankrupt (e.g. constructive or resulting trust); or
 - (B) a statutory right of action (e.g. 120, 121, 122 Bankruptcy Act etc).
 - (iii) what is the evidentiary burden and the level of difficulty in proving any assertions being made. For example:
 - (A) if you are not the bankruptcy trustee but you are trying to assert the trustee’s knowledge or opinion at a point in time (such as in the Roufeil case) what do you have to prove this; or
 - (B) do you have to show ‘intent to defraud’ as required by section 172 of the *Property Law Act 1958* (Vic) or only a ‘main purpose’ to defeat creditors as required by section 120 of the Act;
 - (b) The lower the evidentiary burden the easier to persuade a court of that viewpoint as was identified in *Kite (Trustee) in the matter of Murray (A Bankrupt)* at [251] as discussed above.
 - (c) inference of insolvency – evidence still needs to be lead to establish insolvency or that it is appropriate to infer insolvency.
 - (i) the test being able to pay debts as an when they fall due;
 - (ii) however either expert evidence or sufficient evidence to convince a court of insolvency is required to be provided in any trial;
 - (iii) the availability of rebuttable presumptions of insolvency should not be forgotten – but also consider if the presumption can be rebutted when preparing any cause of action;
 - (d) Who is the party with standing to bring an action or raise a defence:
 - (i) some causes of action are statutory actions only available to the trustee in bankruptcy including section 120, 121, 139D of the Act; whereas
 - (ii) other causes are open to any creditor to bring to set aside a transaction including section 172 of the *Property Law Act 1958* (Vic) or its other State and Territory equivalents;
 - (iii) defences may only be available to the correct parties such as the need for mutuality to able to assert a set-off defence under section 86 of the Act; and
 - (iv) finally also consider the operation of section 100-5(1) of *Insolvency Practice Schedule (Bankruptcy)* where a trustee may assign any right to sue that is conferred by the Act. If the right is assigned, then ta reference to the trustee in the Act in relation to an action is taken to be the person to whom the right is assigned. Purchase of action from Bankruptcy Trustee;

- (e) there needs to be effective tracing of monies where equitable remedies, such as relief as beneficiaries of a constructive or resulting trust, are sought. Ineffective or failure to trace funds into existing assets will see a failure of that cause of action to obtain relief.
- (f) where a recipient can demonstrate acting in good faith or with no knowledge of insolvency or not being in a position where they should have inferred insolvency then a defence can usually be made out to claims where this is an issue. However this requires:
 - (i) an understanding of what was publicly available information at the time of the receipt; and
 - (ii) an understanding of what was personally known to the recipient at the time of receipt.
- (g) in order to defend claims for recover and assert rights such as an equity of exoneration an understanding of the full set of events and circumstances between the parties otherwise the ability to claim for contribution, exoneration or as a surety can be lost;
- (h) the same reasoning as above also applies to the presumption of advancement, which admittedly is a much narrow form of defence but needs to be considered ahead of commencement of proceedings to determine if a viable cause of action is actually available;
- (i) occasionally parties forget that there is a need to seek leave to proceed with any claims once a trustee is appointed, especially if seeking to assert personal claims against the bankrupt estate; and additionally

13. Conclusion

- (a) As should be apparent from this paper there are a multitude of issues that need to be considered and addressed when recovering assets from or for a bankrupt estate or trust.
- (b) The case law indicates that successful outcomes are achieved when sufficient investigation and evidence gathering has occurred to put before a court the evidence necessary to determine the matter.

5 March 2024.