

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

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Outline

- Recap - avenues for recovering assets
- Recent cases
- Matters to consider when seeking to recover from a bankrupt estate or trust



Recap – avenues for recovery

Common avenues for recovery



Recap – avenues for recovery

- Undervalued transactions (s120)
- Transfers to defeat creditors (s121)
- Insolvent preferences (s122)
- Superannuation (s128B and 128C)
- Intent to defraud creditors (s172 Property Law Act 1958 (Vic) & other equivalents)
- Official Receiver powers (s139ZQ and s139ZU)

Recap – common avenues for recovery

Undervalued transactions: §120 Bankruptcy Act

- Transfer is void if is in period 5 years prior to bankruptcy and transferee gave no consideration or consideration that was less than market value
- Exemptions exist
- Limitation period – 6 years



Recap – common avenues for recovery

Transfers to defeat creditors: s121 Bankruptcy Act

- Transfer is void if the *main purpose* in making the transfer was to prevent the property from becoming divisible among creditors or to hinder or delay the process of making property available for division
- Defence – good faith and no inference insolvent
- No limitation period

Recap – common avenues for recovery

Insolvent preferences: s122 Bankruptcy Act

- Transfer is void if gives a preference and is within specified time period
- For e.g. 6 months prior to creditor's petition
- Exemptions
- Protections s123





Recap – common avenues for recovery

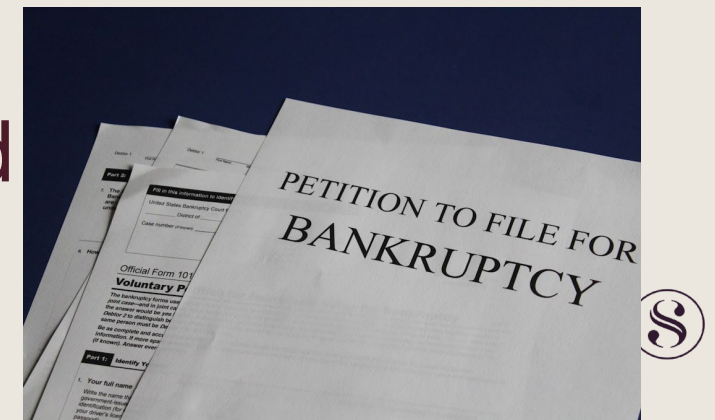
Superannuation: s128B and 128C Bankruptcy Act

- A transfer to an eligible super plan is void if it would have been available for division among creditors and the *main purpose* of the transfer was to defeat such division amount creditors.
- Needs to occur after 27 July 2006.
- No time limitation

Recap – common avenues for recovery

Intent to defraud creditors: S172 Property Law Act 1958 (Vic) & ors

- Every alienation of property made with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.
- Defence - valuable consideration and in good faith or good faith no notice of the intent to defraud
- Operative from 15 October 2007.





Recap – common avenues for recovery

Official Receiver Powers

Super Freezing Notices for 180 days - s128E

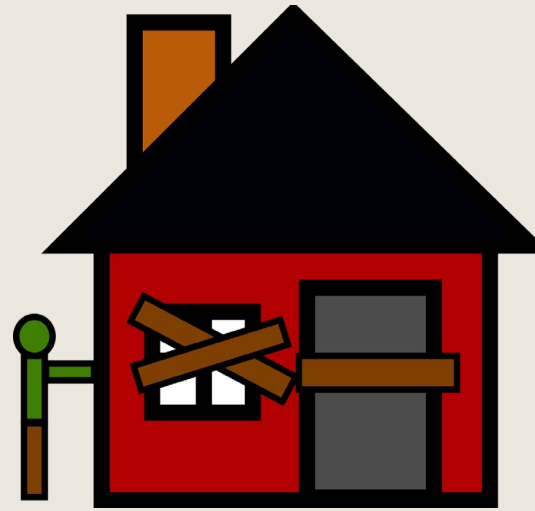
Payment Notice - s139ZQ

Charge property – s139ZR

Order payment - s139ZU

Recent Cases

Recent cases relating to ability to recover assets from or for a bankrupt's estate or trust



Recent cases

Aravanis (Trustee) v Kapp, in the matter of the bankrupt estate of Kapp [2023] FCA 702

- This case involved 2 x applications by trustee:
 - s120 and 121 Bankruptcy Act or 37A Conveyancing Act 1919 (NSW) – sale property;
 - Alternate constructive or resulting trust over proceeds
 - s139D – payment for services – to family trust

Recent cases

Aravanis (Trustee) v Kapp, in the matter of the bankrupt estate of Kapp [2023] FCA 702

Key dates – s120 and 121 claim; trust claim

- Kapp and Maryann marry
- 2010 Kapp transferred to wife, Maryann 50% interest in Leura property
- 2015 Maryann purchased Turramurra family home using bridging loan of \$230,700

Recent cases

Aravanis (Trustee) v Kapp, in the matter of the bankrupt estate of Kapp [2023] FCA 702

- 2011 Maryann sold Leura property and paid out from proceeds \$230,700 bridging loan for Turramurra
- June 2013 Maryann sold Turramurra with net proceeds \$362,000
- Sept 2013 Maryann purchased Wahroonga property using proceeds from Turramurra



Recent cases

Aravanis (Trustee) v Kapp, in the matter of the bankrupt estate of Kapp [2023] FCA 702

- Non-compliance with tax obligations
- Terminal health diagnosis
- Payment plans with ATO
- Deed with ATO – guaranteed by Maryann
- Default and recovery action
- Multiple proceedings



Recent cases

Aravanis (Trustee) v Kapp, in the matter of the bankrupt estate of Kapp [2023] FCA 702

Court held:

Maryann liable to pay 4.775% of sale proceeds from Turramurra payable; breach of 121 and 37A.

No constructive or resulting trust

No valid exoneration claim – but Maryann surety of Kapp's debts \$110,000.



Recent cases

Aravanis (Trustee) v Kapp, in the matter of the bankrupt estate of Kapp [2023] FCA 702

Claim – Constructive / resulting trust or 139D/E

- Family trust created – Twin Trust
- 2013 Kapp ceased to be beneficiary
- Kapp provided services under Kappfam which for a period was trustee of Twin Trust. Kapp not paid.
- Some benefits received.



Recent cases

Aravanis (Trustee) v Kapp, in the matter of the bankrupt estate of Kapp [2023] FCA 702

Court held:

- Trustee not satisfactorily traced proceeds to trust.
- 35.94% of Swan Bay property sale proceeds payable to trustee up to \$151,250.01.
- Each party pay own costs.

Recent cases

Kite (Trustee), in the matter of the Murray [2023] FCA 198

- This case was an application to recovery property held on resulting trust for bankrupt estate
- s139DA of Bankruptcy Act relief sought
- s120 Bankruptcy Act claim
- Presumption of advancement argued



Recent cases

Kite (Trustee), in the matter of the Murray [2023] FCA 198

- **Court held:**
- Trustee can recover 11% interest in property pursuant to 139DA
- No resulting trust
- Trustee alternatively succeeds on 120 / 121 claims.

Recent cases

Roufeil as Trustee of the Bankrupt Estate of Tarrant v Tarrant Enterprises as trustees for the MRT Family Trust [2023] FCAFC 142

Appeal on:

- whether transfers of money from company were void pursuant to s120 or s121 of the Bankruptcy Act
- whether defence by reason of reg 31 of the Bankruptcy Regulations or set-off
- whether existed an agreement to forbear



Recent cases

Roufeil as Trustee of the Bankrupt Estate of Tarrant v Tarrant Enterprises as trustees for the MRT Family Trust [2023] FCAFC 142

Court held:

- Payments of money through banking system were transfers of money pursuant to s120 or s121
- No defence by reason of reg 31 of the Bankruptcy Regulations or set-off available
- No agreement to forbear

Matters to consider

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



Recent cases

Considerations

- Selection of cause of action
 - Stand in shoes of bankrupt (e.g. constructive or resulting trust)
 - Statutory (e.g. 120, 121 Bankruptcy Act)
- Evidentiary burden and difficulty
 - Inference of insolvency
 - Intent to defraud



Recent cases

Considerations

- Standing
- Tracing
- Insolvency
- Good faith / Knowledge of insolvency
- Equity of exoneration
- Presumption of advancement



Recent cases

Considerations

- Leave to proceed
- Purchase of action(s) from Bankruptcy Trustee



Questions?



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