



## Attacking trusts

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You appoint a trustee in bankruptcy and you find that the bankrupt was the trustee of a discretionary trust. What issues need to be considered? Can the Trust assets be attacked?

### Indemnity

A trustee is liable for the debts of the trust, that it has incurred for and on behalf of the trust.

A trustee of a discretionary trust has the right to be indemnified, out of the assets of the trust, for liabilities it has incurred for and on behalf of the trust. It is important then to distinguish between the following:

- Assets of the trust;
- Assets of the bankrupt;
- Liabilities of the trust; and
- Liabilities of the bankrupt.

A trustee in bankruptcy should seek from the bankrupt and the trustee of the trust: copies of all documents relevant to the trust, including all bank statements, title deeds, loan and mortgage documents, company records (if relevant), rental receipts, cheques, invoices, wage records, transfer documents, settlement statements, tax returns and financial records.

Look for related transactions and uncommercial transactions and payments made to the bankrupt or on behalf of the bankrupt.

Did the bankrupt work for the trust? Has the bankrupt made gifts to the trust? Has the bankrupt taken the benefit of the activities of the trust?

### Sham

To be found to be a sham, the creation of the trust must be a disguise for a different and independent arrangement to which all parties agree.

It is essential to prove that the intention of all parties is different to those expressed in the trust. A very difficult assignment indeed. Proving that the bankrupt has control of the trust alone, will be insufficient.

### Sections 120 and 121

Did the bankrupt transfer any assets or make any payments to the trust in the last 5 years?

If so, was the bankrupt solvent at the time?

## Remuneration Skimming – Sections 139D and 139E

Property of an associated entity of the bankrupt may be attacked by the trustee in bankruptcy if the court is satisfied that the bankrupt supplied personal services to the entity, at a time when the entity was controlled by the bankrupt, and the bankrupt was paid less than an appropriate amount for those services.

### *Control: See section 5F*

By section 5F a person is taken to control an entity in relation to a matter only if:

- Nothing was undertaken inconsistent with the person's directions.
- Having regard to all circumstances, it may be reasonable to expect that no act would have been done then, in relation to that matter, by or on behalf of that entity.
- Mere advice in the proper performance of the functions attaching to his professional capacity or business relationship with the entity does not constitute control.

### *Associated Entity: See section 5A to 5E.*

A trust will be an associated entity where the bankrupt is (or is one of) the settlor, the appointor, the trustee or beneficiary.

Be sure to look carefully at the definition of beneficiary.

### **Section 139D**

The court may order property vest in the trustee in bankruptcy if the trustee satisfies the court that:

The bankrupt supplied personal services to the respondent entity during the examinable period before the end of the bankruptcy, when the bankrupt controlled the entity in relation to the supply of those services.

Personal services means services of a physical, intellectual or other kind supplied by the bankrupt whether or not as employee and whether or not the supply of those services by the bankrupt has discharged the obligations of the respondent entity to supply services.

The respondent entity acquired an estate in property as a consequence of the supply of personal services by the bankrupt.

The bankrupt was not paid or was underpaid.

The bankrupt used or derived benefit from the relevant property at times during the examinable period when it controlled the entity regarding that property.

### **Section 139E**

If the trustee satisfies the court that:

- the bankrupt supplied personal services to, for or on behalf of the respondent entity during the examinable period and before the end of the bankruptcy, when the bankrupt controlled the entity regarding the supply of those services;
- the bankrupt was not paid for those services or was underpaid for those services; and
- the entity's net worth at that particular time during the examinable period exceeded by a substantial amount its net worth had the services not been supplied, then the court has power to make an order

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### Resulting Trust

A resulting trust will be presumed where property is purchased and the legal title to the property is vested in someone other than the person who provided the purchase monies. The exception to this is where there is a presumption of advancement that the purchase monies were provided by way of gift.

A presumption of advancement will be presumed in the case of a husband and wife. See for example *Calverley -v- Green* (1984) 155 CLR 242, and in particular Gibbs CJ, at page 3 of the judgment, where he says as follows:

*“The presumption arises when a husband makes a purchase in the name of his wife, or a father in the name of his child.”*

### Constructive Trust

A constructive trust will arise where no trust has been declared either directly or indirectly, but where it would be a fraud for the title holder of the property to assert a beneficial ownership.

A constructive trust may exist in various circumstances. In recent times, the Courts have had cause to consider parties rights to property that has been the subject of defacto relationships. Whilst there has been a wide ambit of views from the Courts on when a constructive trust may result, it seems clear that the following propositions have been accepted:

- There must be some express or implied agreement, arrangement or understanding between the parties that the legal interest is held upon trust. Per Deane J, *Muschinski -v- Dodds* (1986) 160 CLR 583;
- The Court must have regard the actual intentions of the parties. Per Gibbs CJ, *Muschinski -v- Dodds*;
- In circumstances where the parties have, over the course of their relationship, pooled their finances, to the extent to which the pooled funds were the source of payment of mortgage installments, a Court may infer a constructive trust, as it would be unconscionable for one party to assert beneficial ownership over the other. See Mason, Wilson and Deane JJ in *Baumgartner -v- Baumgartner* (1987) 164 CLR 137.

Each case will turn on its facts.

The Courts will be hesitant to imply a constructive trust where the parties intentions, arrangements or understanding, is clear, and where a presumption of advancement may be inferred.

### Example 1

The bankrupt (B) is trustee of the Smith Family Trust (SFT). SFT owns a holiday unit at Hastings Street Noosa. Whilst the property is registered to SFT, the deposit was paid by B; the loan is in B's name, and all payments on the loan have been made by B.

The beneficiaries of the SFT are B, B's wife and B's children.

## What are the potential actions for recovery by the trustee in bankruptcy?

The arrangement seems to be a sham and a Court may make orders or declarations declaring the property to be property of B and divisible to the creditors of the bankruptcy.

The Court may order that there is a resulting trust in favour of B and may make orders or declarations declaring the property to be property of B and divisible to the creditors of the bankruptcy.

### Example 2

Assume the facts in example 1, but, the trustee is B's wife, the deposit was made from monies already existing in the trust and the mortgage was in the wife's name as trustee for the trust.

The property seems to be an asset of the trust and protected.

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