FEDERAL COURT OF AUSTRALIA

Kerr as trustee of the property of Janice Mary Kehlet (a bankrupt) v Kehlet [2019] FCA 1572

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| File number: |  |
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| Judge: | **ROBERTSON J** |
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| Date of judgment: | 26 September 2019 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY** – matrimonial home in sole name of wife – where in the period beginning 5 years before the commencement of the wife’s bankruptcy the wife transferred her interest in the matrimonial home to her husband – whether it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them – whether transferee (husband) gave consideration of less value than the market value of the property within the meaning of s 120 of the *Bankruptcy Act 1966* (Cth) – whether, as a consequence, the transfers were void against the trustee in the bankruptcy – whether the transferor wife’s main purpose in making the transfers was to prevent the transferred property from becoming divisible among her creditors or to hinder or delay the process of making property available for division among her creditors within the meaning of s 121 of the *Bankruptcy Act* – whether, as a consequence, the transfers were void against the trustee in the bankruptcy – in either case whether the trustee must pay to the transferee an amount equal to the value of the consideration that the transferee gave for the transfers  |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 5, 120, 121  |
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| Cases cited: | *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1980] 1 NSWLR 510*Mateo v Official Trustee in Bankruptcy* [2002] FCA 344; 117 FCR 179*Official Trustee in Bankruptcy v Lopatinsky* [2003] FCAFC 109; 129 FCR 234*Official Trustee in Bankruptcy v Mateo* [2003] FCAFC 26; 127 FCR 217*Peldan v Anderson* [2006] HCA 48; 227 CLR 471*Sandell v Porter* (1966) 115 CLR 666*Trustees of the Property of Cummins (A Bankrupt) v Cummins* [2006] HCA 6; 227 CLR 278  |
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| Date of hearing: | 19 September 2019 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | General and Personal Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 63 |
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| Counsel for the Applicant: | Mr S Golledge |
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| Solicitor for the Applicant: | HWL Ebsworth  |
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| Counsel for the Respondent: | Mr M Bennett |
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| Solicitor for the Respondent: | Whitfields Solicitors |

ORDERS

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|  | NSD 2249 of 2018 |
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| BETWEEN: | DAVID KERR AS TRUSTEE OF THE PROPERTY OF JANICE MARY KEHLET, A BANKRUPTApplicant |
| AND: | RAYMOND JOHN KEHLETRespondent |

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| JUDGE: | ROBERTSON J |
| DATE OF ORDER: | 26 September 2019 |

THE COURT ORDERS THAT:

1. Within seven days from the date of these orders, the parties are to send by email to my associate either an agreed form of orders or their competing orders to give effect to these reasons for judgment, including as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ROBERTSON J:

1. The applicant, as trustee of the property of Mrs Janice Mary Kehlet, the bankrupt, seeks the following relief:
2. A declaration that the transfer registered in NSW Land Registry Services on or about 18 June 2015 in dealing number AJ587708X of the land described in Certificate of Title Folio Identifier 1856/752015, being the land situated and known as 275 Beauchamp Road, Matraville NSW 2036, by Janice Mary Kehlet (**Bankrupt**) to the Respondent is void as against the Applicant pursuant to sections 120 and 121 of the *Bankruptcy Act* 1966 (Cth) (**Act**).
3. A declaration that the transfer registered in NSW Land Registry Services on or about 18 June 2015 in dealing number AJ587709V of the land described in Certificate of Title Folio Identifier 1856/752015, being the land situated and known as 275 Beauchamp Road, Matraville NSW 2036, by the Bankrupt to the Respondent is void as against the Applicant pursuant to sections 120 and 121 of the Act.
4. A declaration that the Applicant is entitled to be registered as the proprietor of the Property.
5. An order that the Respondent execute a transfer of the Property to the Applicant within 14 days after the date on which these orders are made, failing which a Registrar of this Court may sign a transfer of the Property for and on behalf of the Respondent, and such transfer signed by a Registrar of this Court shall be deemed to be duly executed by the Respondent.
6. An order that the Respondent pay the Applicant’s costs of and incidental this Application.
7. Mrs Kehlet was made bankrupt on 20 June 2016 when she presented a debtor’s petition to the Official Receiver which was accepted by the Official Receiver on that date. The date of commencement of the bankruptcy is that date, 20 June 2016.
8. The respondent is the husband of the bankrupt, Mrs Kehlet.
9. The dispute centres on the property at 275 Beauchamp Road, Matraville New South Wales (the **Matraville property**), which was acquired on 14 December 2011, when Mrs Kehlet became the sole registered proprietor by way of transfer, the purchase price being $961,000.
10. The property was bought for Mr and Mrs Kehlet to live in and they currently live there. The matrimonial relationship continues.
11. During the period from 14 December 2011 to 18 June 2015, the property was subject to a mortgage to the Commonwealth Bank of Australia (**CBA**) which secured Mrs Kehlet’s indebtedness to CBA. As at 18 June 2015, the amount outstanding under the loan was $774,425.71. The amount paid to CBA on that date to discharge the loan, including fees, accrued interest and adjustments, was $780,998.15.
12. On 14 May 2015, Mrs Kehlet completed a CBA discharge/refinance authority to arrange for the release of security and to provide instructions for disbursement of money. The discharge was required for the reason “Property Sold”, the sale price was stated as $1,300,000 and the anticipated settlement date was then stated to be 8 June 2015.
13. There is also in evidence a document signed by Mr Kehlet as borrower in respect of the property, the loan amount being $841,834. The lender, the mortgagee, was stated to be Pepper Finance Corporation Ltd (**Pepper**) (in its capacity as trustee of a trust).
14. On 18 June 2015 the two transactions in issue were completed.
15. The first transaction on that date was that Mrs Kehlet transferred for a consideration of $1 the fee simple of the property to herself and to her husband Mr Kehlet as joint tenants.
16. The second transaction on that date was that Mrs Kehlet and Mr Kehlet as joint tenants transferred to Mr Kehlet, for a consideration stated to be $650,000, the fee simple of the property.
17. On or about 18 June 2015, the CBA loan was discharged by payment of an amount of $780,998.15 from the funds advanced by Pepper to Mr Kehlet. As for the remainder of those funds, a “Reconciliation Statement” which appears to have been created by the Kehlets’ solicitors, in relation to “Your Sale to Kehlet”, records that: stamp duty of $24,750 was paid to the Office of State Revenue; bank cheque fees of $20 were deducted by Peppers; solicitors’ costs of $1,446.99 were “deducted from trust”’; and an amount of $27,223.71 was described as “Account balance in trust to be transferred to you”. There was argument about the last amount but, as will become apparent, that was a matter not in issue before me.
18. The trustee submitted that the respondent acquired title to the property as a result of an undervalued transaction or a transfer or transfers to defeat creditors. He relied on ss 120 and 121 of the *Bankruptcy Act 1966* (Cth).
19. Those provisions were in the following terms:

**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.

Note: For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.

*Exemptions*

(2) …

(3) …

 …

*Refund of consideration*

(4) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

 …

*Meaning of* ***transfer of property*** *and* ***market value***

(7) For the purposes of this section:

(a) ***transfer of property*** includes a payment of money; and

(b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and

(c) the ***market value*** of property transferred is its market value at the time of the transfer.

**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.

Note: For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.

*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.

*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.

…

*Refund of consideration*

(5) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

…

*Meaning of* ***transfer of property*** *and* ***market value***

(9) For the purposes of this section:

(a) ***transfer of property*** includes a payment of money; and

(b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and

(c) the ***market value*** of property transferred is its market value at the time of the transfer.

1. The following definitions in the *Bankruptcy Act* are also relevant:

**5 Interpretation**

 …

(2) A person is ***solvent*** if, and only if, the person is able to pay all the person’s debts, as and when they become due and payable.

(3) A person who is not solvent is ***insolvent***.

1. The applicant trustee read two affidavits and tendered three volumes of documentary material.
2. On behalf of the respondent, Mrs Kehlet affirmed two affidavits and Mr Kehlet affirmed one affidavit.
3. Mr Kehlet was cross-examined. Mrs Kehlet was also cross-examined.
4. The first issue to be resolved is as to the intention of Mr Kehlet and of Mrs Kehlet at the time the Matraville property was acquired in December 2011.
5. In *Trustees of the Property of Cummins (A Bankrupt) v Cummins* [2006] HCA 6; 227 CLR 278 at [65] it was said that evidence of subsequent statements of intention, not being admissions against interest, are inadmissible, but that evidence of facts as to subsequent dealings and of surrounding circumstances of the transaction may be received.
6. As at the time the Matraville property was acquired, I find that Mrs Kehlet intended to, and did, acquire the Matraville property in her own name. I find that each of Mr Kehlet and Mrs Kehlet intended that Mr Kehlet would have no legal or beneficial interest in the Matraville property. These findings are based not only on the contemporaneous documentary material, particularly the contract of sale to Mrs Kehlet, her statement of assets and liabilities which she created in 2015 for the purpose of submission to CBA and the tax returns of Mrs Kehlet and of Mr Kehlet, but they are based also on the oral evidence given by each of Mr Kehlet and Mrs Kehlet in the course of the hearing.
7. By way of example, Mr Kehlet accepted in cross-examination that it was his intention that the Matraville property was purchased and held in a way that meant that no claim could be made against it by anyone making a claim against him. Mr Kehlet wished to be able to say that he did not have any interest in the Matraville matrimonial property or the Queensland properties against which anyone making a claim against him in respect of his separate commercial business could pursue a claim. He accepted that he had no interest in either the matrimonial home or any of the Queensland properties in Mrs Kehlet’s name.
8. Mrs Kehlet accepted in cross-examination that she and her husband agreed, at least at about the time of her acquisition of the Matraville property, to keep Mr Kehlet’s business separate from the Matraville property. Mrs Kehlet accepted that her intention was, when the Matraville property was purchased, that in the event that there was a claim by someone who had been injured or suffered loss and damage as a result of an incident in Mr Kehlet’s business, and made a claim against him, they could not thereby obtain access to or make a claim against the Matraville property. She wanted to be in a position to say that whatever claim the third party had against Mr Kehlet, that third party would have no access to or claim against the Matraville property or the Queensland properties.
9. I note Mrs Kehlet’s answers in cross-examination that the Matraville property was separate from Mr Kehlet’s business but that Mr Kehlet always had a half share or an equal partnership in the Matraville property. However, in light of the substance of Mrs Kehlet’s other oral evidence, and the documentary material to which I have referred at [21] above, I do not accept that this generalisation shows that Mr Kehlet held a beneficial interest in the Matraville property.
10. The purchase price of the Matraville property in 2011 was, as I have said, $961,000, the majority of which was financed by a loan to Mrs Kehlet from CBA for $768,800, to which I have referred at [6] above. Additional amounts were paid at the time of settlement, as deposed to by Mr Kehlet, but the evidence does not show the source of those amounts. The proportion attributable either to Mrs Kehlet or to Mr Kehlet is unknown.
11. The value of the work done or the monetary amounts paid by Mr Kehlet after 2011 were not sufficient to overcome or qualify this evidence.
12. I reject the respondent’s submission that he always held the beneficial interest in one half of the Matraville property. I reject the respondent’s submission that Mr Kehlet and Mrs Kehlet held the beneficial interest equally, at the time of the acquisition of the Matraville property, by reason of their so-called “common intention”. I reject the submission that the respondent and Mrs Kehlet always intended to hold half the Matraville property, that is, that Mr Kehlet had the so-called “common intention” at all relevant times.
13. I find that between 2012 and 2014 Mrs Kehlet was the registered owner of four investment properties in Queensland as well as the Matraville property. The Queensland properties were income earning during that period and they had all been financed in whole by advances from CBA. The rental income was not distributed to either Mrs Kehlet or Mr Kehlet but was deployed in payment of the interest payments that accrued on the finance facilities that had funded their purchase. The rental income was paid directly into an account of Mrs Kehlet and then there was a direct debit arrangement in place that withdrew money from that account and paid that money into mortgage accounts to meet monthly mortgage payments. In the middle of 2014 the rental returns from the Queensland properties began to diminish and this meant that Mrs Kehlet commenced to fall behind in the monthly payments.
14. In relation to Mrs Kehlet’s solvency, her evidence was that between August 2014 and June 2015 when the transfer of the Matraville property was made, her financial situation was not improving and she was slipping further and further behind in her monthly payments. After the first failure to meet the monthly payments in or about August 2014, Mrs Kehlet did not catch up completely or bring all of the mortgage accounts back into balance. Mrs Kehlet accepted that from August 2014 onwards CBA continued to charge interest on her loans and that, despite her best efforts, she could not meet those payments.
15. After the sale of the Matraville property, Mrs Kehlet continued to be behind in her monthly payments to CBA in respect of other liabilities and obligations, and that was never made good. Although Mrs Kehlet gave evidence that she was told, by a representative of the bank, that “we can work something out” and that she had faith that she was in safe hands, she understood that she was not being given any assurances.I find that Mrs Kehlet was not being released from the obligation to pay the money due to CBA each month. I accept her evidence that if, at any time between August 2014 the end of 2015, she could have made good the amounts owing that had not been paid, she would have done that. Ultimately, CBA commenced proceedings towards the end of 2015 to recover possession of the Queensland properties and recover the outstanding mortgage debt.
16. I turn first to consider s 120, undervalued transactions.
17. It was common ground that the value of the Matraville property as at the date of the transfers was $1,300,000.
18. The transfers of the Matraville property were by a person, Mrs Kehlet, who later became a bankrupt. As to transfers by joint tenants, see *Peldan v Anderson* [2006] HCA 48; 227 CLR 471.
19. For a transfer to be void against the trustee, first it must take place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy: s 120(1)(a). This requirement is plainly satisfied in relation to the transfers. The respondent did not contend otherwise.
20. The issue becomes whether the relevant transferee, Mr Kehlet, gave consideration of less value than the market value of the property: s 120(1)(b).
21. In *Official Trustee in Bankruptcy v Lopatinsky* [2003] FCAFC 109; 129 FCR 234 at [94] and [96], Whitlam and Jacobson JJ explained:

There is nothing in s 120(5) to suggest that the Parliament intended that the term “consideration” in s 120(1)(b) is to be read in anything other than its legal sense. Plainer words would have been required: see *Official Trustee in Bankruptcy v Mitchell* at 368. Moreover, it would be inconsistent with the observations of Wilcox J and Branson J in *Official Trustee in Bankruptcy v Mateo* to proceed upon the basis that “consideration” could be something less than the ordinary legal and commercial understanding of that term. Indeed, it would be inconsistent with the statutory purpose of the section which is designed to protect creditors to hold that the Parliament intended to enable a transferee to provide something less than the well-established legal definition of “consideration”.

…

In our view, it is clear from the above analysis that the Parliament in enacting the 1996 amendments proceeded on the basis reflected in the history of this section that it was to be understood as commercial people would construe it. Thus, in applying s 120(1)(b) the first step is to identify the consideration which was actually given. The second step if consideration was given, is to determine whether its value was less than the market value of the property transferred: see *Sutherland v Brien* (1999) 149 FLR 321 at [20] per Austin J.

The reference to *Official Trustee in Bankruptcy v Mateo* is to [2003] FCAFC 26; 127 FCR 217.

1. The respondent accepted that *Mateo* at [66] per Wilcox J and [108] per Branson J showed that past consideration was not relevant to the transfers.
2. In my view, the transfers of the Matraville property proceeded on a misconception, perhaps stemming from certain advice given to Mr Kehlet by a mortgage broker, which was that Mr Kehlet had a beneficial 50 percent interest in the property.
3. Taking the two transfers together, as executed at the same time by the same parties in respect of the same property, the transferee Mr Kehlet acquired the whole legal and beneficial interest in the Matraville property where he had no interest before and gave consideration of less value than the market value of the Matraville property, that market value being $1,300,000. The precise figure representing the value of the consideration was not in issue before me as the relief claimed did not extend to that precise amount: in the respondent’s pleaded defence, at [10], the consideration given for the second transfer is said to be $780,000 and in Mr Kehlet’s affidavit it is said to be $809,668.85.
4. In my view, it remains open to consider the overall transaction as constituting one “transfer of property” in these circumstances, notwithstanding that in *Mateo* Wilcox J at [61] and Branson J at [106] were critical of the reasoning of the primary judge in *Mateo v Official Trustee in Bankruptcy* [2002] FCA 344; 117 FCR 179. There Tamberlin J had said, at [23]-[24], in relation to consent orders in the Family Court through to the completion of the transfer of the interest by the husband, that it was artificial to “isolate one individual component of the transaction as in itself comprising the transfer”, rather than to “look at the overall transaction which has been implemented”. In the present case, as I have said, there were two contemporaneous transfers by the same parties in respect of the same property.
5. No exemptions are available under s 120(2). Nor are the exceptions in s 120(3) available, given that the transfers took place less than 2 years before the commencement of the bankruptcy.
6. The trustee accepts that by virtue of s 120(4) he must pay to the transferee respondent, Mr Kehlet, an amount equal to the value of any consideration that the transferee gave for the transfer that is void against the trustee.
7. The result is that the Matraville property must be reconveyed to (the estate of) Mrs Kehlet and that the trustee must pay an amount to Mr Kehlet, being an amount equal to the value of the consideration he gave for the transfer that is void against the trustee. On this analysis, taking the two transfers as one, that is the amount referred to at [39] paid in respect of the second transfer plus an amount of $1 paid in respect of the first transfer.
8. The case was, however, pleaded as involving two transfers. I would not regard that method of pleading as excluding my preferred analysis, which treats the two transfers as one. If I am wrong in that conclusion, an alternative analysis, treating the two transfers as if they were separate, is as follows. The first transfer, from Mrs Kehlet to herself and Mr Kehlet as joint tenants for $1, was of the bare legal title to the Matraville property, which is to say that following the first transfer, and before the second, the entire property was held by Mr and Mrs Kehlet on a bare trust for Mrs Kehlet: see *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1980] 1 NSWLR 510 at 521 per Hope JA. This conclusion flows from the lack of any intention on Mrs Kehlet’s part to make a gift to Mr Kehlet of any valuable property by this transfer, or otherwise to alter the existing proportions in which the property was beneficially held: this is consistent with only nominal consideration being payable and the misconception that Mr Kehlet already had a beneficial interest in the property.
9. Whether this is to be regarded as a resulting trust or an express trust is not presently material. The first transfer therefore would not be void as the bare legal title had no value. Mr and Mrs Kehlet became, at law, joint tenants. The second transfer was, by those joint tenants to Mr Kehlet, of the entire legal and beneficial interest in the Matraville property with a value of $1,300,000, and the value of consideration he gave for that transfer was, again, the same amount, within the range I have explained at [39] above.
10. Here again, the result would be that the Matraville property must be reconveyed to (the estate of) Mrs Kehlet and that the trustee must pay to Mr Kehlet an amount equal to the value of the consideration that he gave for the transfer that is void against the trustee. On this analysis, the $1 paid in respect of the first transfer (which is not void against the trustee, at least by reason of s 120(1)) would not form part of the consideration.
11. On either analysis, I do not accept the respondent’s case that what was ultimately transferred to Mr Kehlet was only a half interest in the property. I therefore do not accept that the value of the consideration Mr Kehlet gave for the transfer was not “consideration of less value than the market value of the property” so that the transfer was not void against the trustee.
12. Although unnecessary to do so in light of my conclusions, I next consider s 121, transfers to defeat creditors. Counsel for both parties invited me to resolve this issue in any event.
13. There seems to be no dispute that the property would probably have become part of the transferor’s, Mrs Kehlet’s, bankrupt estate or would probably have been available to creditors if the property had not been transferred: see s 121(1)(a) and also the respondent’s defence, at [21] and [26].
14. The next step is to apply s 121(1)(b) when read with s 121(2). These provisions are to the effect that: the transfer of property is void against the trustee if the transferor’s main purpose in making the transfer was to prevent the transferred property from becoming divisible among the transferor’s creditors or to hinder or delay the process of making property available for division among the transferor’s creditors; and the transferor’s main purpose in making the transfer is taken to be that purpose “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.”
15. I have no difficulty in concluding that at the time of the transfers Mrs Kehlet was, or was about to become, insolvent. In her statement of affairs dated 14 June 2016, around 1 year after the transfers, Mrs Kehlet stated that she owed nearly $4,000,000 to the Commonwealth Bank secured by mortgages over properties described as “3 Houses and 5 Townhouses” located in “Moranbah and Dysart” but that the value of those properties was $950,000. Mrs Kehlet did not declare any other substantial assets.
16. There is also in evidence a document prepared by Mrs Kehlet around the time of the transfers stating that the total amount of her liabilities was $4,431,473.54 and her assets, treating the real property assets (including the Matraville property) as entirely owned by her, were $3,520,000.
17. Mrs Kehlet’s direct evidence, which I have summarised at [29]-[30] above, was to the effect that by the time of the transfers, and despite her best efforts, Mrs Kehlet was in default on amounts owed to CBA, was slipping further and further behind in her monthly payments, and could not meet the ongoing interest amounts that continued to be charged. This position did not change after the transfers.
18. It was put on behalf of the respondent that Mrs Kehlet was not insolvent in part because Mr Kehlet assisted her many times by making repayments towards her loans and mortgage obligations in the period between June 2014 and March 2015. That evidence does not establish that Mrs Kehlet was able to pay all her debts as and when they became due and payable. If anything, it suggests the opposite and that Mr Kehlet was doing no more than helping Mrs Kehlet to manage the shortfall.
19. It was then put on behalf of the respondent that Mrs Kehlet’s evidence was that her only creditor was CBA and she had been told by an officer of that bank that she did not need to continue to pay interest. I do not accept that this was the substance of the evidence. Interest continued to accrue. As counsel for the respondent accepted, that statement did not remove the legal obligation on Mrs Kehlet to pay the interest in due course. Nor did it remove the legal obligation to pay the interest as it fell due: I am not satisfied on the evidence that CBA covenanted not to sue, even temporarily, or otherwise agreed to a binding moratorium, such that amounts charged for interest could be regarded as not having become due and payable.
20. The respondent relied on *Sandell v Porter* (1966) 115 CLR 666 at 670 to the effect that insolvency is a question of fact to be decided as a matter of commercial reality in the light of all the circumstances. The difficulty here for the respondent is that, as I have explained, all the circumstances show that Mrs Kehlet was not able to pay all her debts, as and when they became due and payable.
21. I find that as early as August 2014, but at least by June 2015, Mrs Kehlet was not able to pay all her debts, as and when they became due and payable. She therefore was, or was about to become, insolvent at the time of the transfers.
22. It was put on behalf of the respondent that it could not be found that Mrs Kehlet intended to defeat a creditor because she undertook the transfers with the consent of CBA, which had to consent to the discharge of their mortgage, and that the procedure was undertaken at the direction of CBA. The transfers were done in conjunction with the creditor, it was submitted.
23. The overwhelming difficulty with this submission is the deeming provision in s 121(2), which as I have explained deems the transferor to have the relevant purpose “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.”
24. In my opinion the transfers were void against the trustee in the transferor’s, Mrs Kehlet’s, bankruptcy.
25. Despite the submissions on behalf of the respondent, s 121(4) is not available to defeat the conclusion that the transfer is void against the trustee. This is because the cumulative requirements could not be met, in particular paragraph (a) of s 121(4), that is “the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property”. That requirement was not met for the reasons already given in respect of s 120. I also find that the respondent, Mr Kehlet, has not discharged his onus of proving that he “could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent”: s 121(4)(c).
26. The issue then revolves around s 121(5), the requirement that the trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for the void transfer. Here again, the precise figure was not in issue before me as the relief claimed did not extend to the precise amount of the consideration.
27. I will hear the parties as to the appropriate orders to be made to give effect to these reasons. The parties should endeavour to agree on the amount the trustee must pay to the transferee, Mr Kehlet, as the amount equal to the value of the consideration he gave for the void transfer. The parties are to send to my associate, within seven days from the date of these orders, either an agreed form of orders or their competing orders, including as to costs.

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| I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson. |

Associate:

Dated: 26 September 2019