FEDERAL COURT OF AUSTRALIA

Madden v Official Trustee in Bankruptcy [2014] FCA 446

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| Citation: | Madden v Official Trustee in Bankruptcy [2014] FCA 446 |
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| Parties: | **ALEXANDER WILLIAM MADDEN v OFFICIAL TRUSTEE IN BANKRUPTCY and MAXWELL WILLIAM PRENTICE** |
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| File number: | NSD 866 of 2013 |
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| Judge: | **FARRELL J** |
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| Date of judgment: | 8 May 2014 |
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| Catchwords: | **BANKRUPTCY** – after-acquired property – construction of s 127 of the *Bankruptcy Act 1966* (NSW) – interest in property held on resulting trust for bankrupt – trustee became aware of interest after expiration of 20 year period – whether trustee making a “claim” – distinction between legal and equitable interests – whether trustee needed to take steps to perfect title – whether property had re-vested pursuant to s 127 – effect of failure to disclose interest to trustee – whether bankrupt owed fiduciary duties to trustee – whether an estoppel arose in favour of trustee  |
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| Legislation: | *Bankruptcy Act 1924* (Cth)*Bankruptcy Act 1966* (Cth)*Conveyancing Act 1919* (NSW)*Real Property Act 1900* (NSW)  |
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| Cases cited: | *Breen v Williams* (1996) 186 CLR 71*Burke v Stapleton* (1970) 120 CLR 664*Coshott v Coshott* [2013] FCA 907*Falloon v Madden* [2012] NSWSC 652*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41*Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165*R v McNeil* (1922) 31 CLR 76*Re Auzhair Supplies Pty Limited (in Liq)* [2013] NSWSC 1*Re Bulluss; Ex-parte Official Assignee* (1957) 18 ABC 83*Re Dakin* (1948) 14 ABC 186*Re Lehrain; Official Receiver (Trustee) v Frankston Timber Pty Ltd* (1975) 6 ALR 301*Re Orange; Ex-parte Jaques* (1958) 18 ABC 157*Re Quirk* (1968) ALR 53*Re Sabine* (1958) 18 ABC 188  |
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| Date of hearing: | 30 September 2013 |
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| Date of last submissions: | 30 September 2013 |
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| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Counsel for the Applicant: | Mr S White SC with Mr J King  |
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| Solicitor for the Applicant: | Abraham Legal  |
|  |  |
| Counsel for the First Respondent: | Mr S Golledge |
|  |  |
| Solicitor for the First Respondent: | TressCox Lawyers |
|  |  |
| Counsel for the Second Respondent: | Mr J T Johnson |
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| Solicitor for the Respondents: | Sally Nash & Co Lawyers |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 866 of 2013 |

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| BETWEEN: | ALEXANDER WILLIAM MADDENApplicant |
| AND: | OFFICIAL TRUSTEE IN BANKRUPTCYFirst RespondentMAXWELL WILLIAM PRENTICESecond Respondent |

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| JUDGE: | FARRELL J |
| DATE OF ORDER: | 8 May 2014 |
| WHERE MADE: | SYDNEY |

THE COURT DECLARES THAT:

 The applicant’s interest in certain land at Burraneer (**Woolooware Property**) referred to in *Falloon v Madden* [2012] NSWSC 652 is revested in him pursuant to s 127 of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) subject to the rights of any person other than the first respondent or the second respondent.

THE COURT ORDERS THAT:

1. The first ground of the application is dismissed.
2. The second respondent is restrained from taking any step to be registered under the *Real Property Act 1900* (NSW) as a proprietor of the Woolooware Property.

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

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| BETWEEN: | ALEXANDER WILLIAM MADDENApplicant |
| AND: | OFFICIAL TRUSTEE IN BANKRUPTCYFirst RespondentMAXWELL WILLIAM PRENTICESecond Respondent |

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| JUDGE: | FARRELL J |
| DATE: | 8 May 2014 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. By amended originating application filed on 12 June 2013, the applicant (**Mr Madden**) sought:
2. a declaration that the second respondent (**Mr Prentice**) is not trustee of Mr Madden’s estate in bankruptcy;
3. a declaration that a 50.5% interest in certain land at Burraneer (**Woolooware Property** and **Property**) acquired by Mr Madden under a resulting trust on 3 January 1995 is vested in him pursuant to s 127 of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) subject to the rights of any person other than the first respondent (**Official Trustee**) or Mr Prentice;
4. an injunction restraining the Official Trustee and Mr Prentice from taking any step to be registered under the *Real Property Act 1900* (NSW) (**Real Property Act**)as a proprietor of the Woolooware Property; and
5. pursuant to s 179(1) of the Bankruptcy Act, an inquiry into the conduct of the Official Trustee in relation to Mr Madden’s bankruptcy.
6. On 12 June 2013 Jagot J made orders stipulating that grounds one, two and three should be heard and determined separately to ground four and that ground four would be stood over until further order.
7. Shortly before the hearing in relation to grounds one to three, Mr Madden indicated that he would not be pressing the first ground for relief (which concerned the proper construction and operation of ss 181A and 184A of the Bankruptcy Act) and agreed that the Court should make an order dismissing that ground. At the hearing, Mr Madden indicated that he no longer pressed ground three insofar as it concerned the Official Trustee. Counsel for the Official Trustee was excused from the balance of the hearing and sought an order for costs to the date of the hearing. The award of costs will be the subject of submissions following judgement.
8. As more than 20 years having passed since Mr Madden became bankrupt on 10 April 1990 without the Official Trustee having made a claim on Mr Madden’s interest in the Woolooware Property, the question to be determined in these proceedings is whether s 127 of the Bankruptcy Act operates to:
	* + 1. preclude Mr Prentice from becoming the registered proprietor as tenant in common of the Woolooware Property and/or seeking an order for sale of the Woolooware Property so that he can distribute the proceeds of Mr Madden’s share among creditors of Mr Madden who have not been fully paid out and so that he can cover the costs, charges and expenses of the administration; and
			2. revest the interest in Mr Madden.
9. Unless otherwise indicated, all references to sections of an Act in these reasons are references to sections of the Bankruptcy Act.

# Background

1. Ms Margaret Falloon (**Ms Falloon**) was the registered proprietor of the Woolooware Property. She lived in a de facto relationship with Mr Madden at the time she completed its purchase on 3 January 1995. Mr Madden was discharged from bankruptcy under s 149(1) on 6 December 1998. Ms Falloon and Mr Madden married in December 1999 and Ms Falloon died on 31 July 2000, leaving two adult children from her prior marriage. Mr Madden’s son Michael was the executor of Ms Falloon’s estate.

## *Falloon v Madden*

1. The question of who owned the Woolooware Property was the subject of a judgment of Stevenson J in the Supreme Court of New South Wales rendered on 14 June 2012: *Falloon v Madden* [2012] NSWSC 652 (***Falloon***) and the background to that litigation is taken from Stevenson J’s reasons for judgment.
2. In proceedings commenced in 2010, Ms Falloon’s two adult children sought (among other things) a declaration against the executor of her estate that he held the Woolooware Property in trust for them as tenants in common in equal shares. The second proceedings were commenced by Mr Madden who sought a declaration that the executor held the Woolooware Property on resulting trust for Mr Madden alone.
3. Relevantly to the matters in contention, Stevenson J said at [135]-[162]:

135 My conclusion is that Bill [Mr Madden] and Margaret [Ms Falloon] contributed very nearly, but not quite equally to the purchase price [of the Woolooware Property]. I find that Margaret contributed $401,046.72 and that Bill contributed the balance, $408,953.28.

136 That is, Bill contributed 50.5 per cent, and Margaret 49.5 per cent.

137 It follows from these conclusions that a presumption arises that Margaret held, and her estate now holds, a 50.5 per cent interest in the Woolooware Property on a resulting trust for Bill.

138 There is no evidence to rebut that presumption, and I am not able to infer, in all the circumstances, that Bill intended to make a gift to Margaret of that part of the Woolooware Property to which he contributed.

139 A more likely explanation may be that Bill wanted to "park" his interest in the Woolooware Property in Margaret's name because of his bankruptcy and to avoid "after acquired" property becoming divisible amongst his creditors.

**Bill's Bankruptcy**

140 The resulting trust arose on settlement of the purchase of the Woolooware Property: that is 3 January 1995.

141 On that date, Bill was a bankrupt.

142 In my opinion, the equitable interest in the Woolooware Property arising by reason of the resulting trust to which I have referred was "after-acquired property" for the purposes of the *Bankruptcy Act* 1966 (Cth).

143 Section 58(1)(b) of the *Bankruptcy Act* provides that "after-acquired property" vests in the Official Trustee as soon as it is acquired. Subsection 58(6) provides that "after-acquired property" means property "that is divisible amongst the creditors of the bankrupt". In s 5 "property" is defined to mean real or personal property and "includes any estate [or] interest...to any such real or personal property". Section 116(1) of that Act provides that property "divisible amongst creditors" includes property acquired by the bankrupt "after the commencement of the bankruptcy and before his or her discharge".

144 It follows that the equitable interest in the Woolooware Property arising from Bill's contribution to the purchase price vested in the Official Trustee.

145 Mr Evans accepts that Bill's interest in the Woolooware Property remains vested in the Official Trustee, notwithstanding his subsequent discharge from bankruptcy: *Official Receiver v Schultz* (1990) 170 CLR 306; *Daemar v Industrial Commission of NSW (No 2)* (1990) 22 NSWLR 178; *Gosden v Dixon* (1992) 107 ALR 329; *Metherell v Public Trustee* [2010] WASC 205 at [4].

146 Bill asserts that all the creditors of his bankrupt estate (including the Commissioner of Taxation) have been paid. If that is so, it may be that, taking into account his equitable interest in the Woolooware Property, there is now a surplus in his bankruptcy, which should revert to him.

147 In these circumstances the parties agree that it may be necessary to join the Official Trustee to these proceedings to deal with this aspect of the matter.

148 The parties have invited me to publish a judgment giving reasons in respect of all other aspects of the matter, with a view to join the Official Trustee once those matters are decided.

149 I have agreed to this proposal. Accordingly, this aspect of the matter will be revisited once the views of the Official Trustee are known.

150 However, as I explain below, the fact that what would otherwise be Bill's equitable interest in the Woolooware Property has vested in the Official Trustee has an impact on his claim for reimbursement for various amounts he claims to have expended in relation to the property.

**Resulting trust - joint tenants or tenants in common?**

151 The question arises as to whether, in equity, Bill and Margaret held their interests in the Woolooware Property as joint tenants or as tenants in common.

152 As Margaret has died, the question is important because if she and Bill held their equitable interests in the Woolooware Property as joint tenants, Margaret's interest has now passed to Bill by operation of survivorship.

153 A case very similar to the present was considered the High Court in *Delehunt v Carmody* (1986) 161 CLR 464.

154 In that case a man, living in a de facto relationship with a woman, purchased a property in his own name in circumstances where he and the woman contributed equally to the cost of acquisition of the property.

155 Gibbs CJ (with whom the other members of the Court agreed) said: -

"Of course in the present case the property was not conveyed to the two persons who had contributed to the purchase price, but to only one of them. When a purchase is made in the name of one of two or more persons who contributed to the purchase price, and the relationship between the parties does not give rise to a presumption of advancement, the property will be held on a resulting trust for the persons who paid the price. Quite clearly, where the contributions to the purchase price have been in unequal shares the property will be held on a resulting trust for the contributors as tenants in common in proportion to the amounts which each contributed; *Calverley v Green* (1984) 155 CLR 242 at 246-7, 258; 56 ALR 483. There seems to be no authority which decides the precise question whether, when a resulting trust was raised in favour of purchasers who had contributed to the price in equal shares, the beneficial interest of the purchasers would have been that of joint tenants or tenants in common. However, it would seem to follow, by analogy with the case where conveyance is made to all contributors, that (apart from the effect of section 26 of the Conveyancing Act) they would be equitable joint tenants, and this conclusion is accepted as correct in Hanbury and Maudsley, *Modern Equity*, 12th ed (1985) at 254 and Ford and Lee, *Principles of the Law of Trusts* (1986), at 966".

156 Section 26 of the *Conveyancing Act* 1919, to which Gibbs CJ referred provides: -

"(1) In the construction of any instrument coming into operation after the commencement of this Act a disposition of the beneficial interest in any property whether with or without the legal estate to or for two or more persons together beneficially shall be deemed to be made to or for them as tenants in common, and not as joint tenants. "

157 The enactment of s 26 of the *Conveyancing Act* removed the presumption, formerly made in equity, that if two people advanced purchase money in equal shares they intended to be joint tenants of the land purchased.

158 Section 26 did not, in terms, apply to the facts in *Delehunt v Carmody* (and is not, in terms, engaged by the facts in this case) for the reason that there is no "instrument" disposing of the beneficial interest in the relevant property.

159 However, in *Delehunt v Carmody* Gibbs CJ concluded that the enactment of s 26 affected the relevant equitable presumption in circumstances of equal contribution.

160 Thus Gibbs CJ said: -

"If equity follows the law, it will follow the rules of law in their current state. Where, as a result of following the law, a beneficial joint tenancy would formerly have been created, now a beneficial tenancy in common will (in New South Wales) come into existence. In other words, although s 26 of the Conveyancing Act has no direct application to the present case, its indirect effect is to require it to be held that there was a resulting trust for the purchasers in an interest of the same kind as that which would have resulted if the land had been conveyed to them at law, ie as tenants in common."

161 It follows, in my opinion, that whether the contributions made by Margaret and Bill are to be regarded as equal or not equal, the result is that, in equity, they held the Woolooware Property as tenants in common.

162 It follows that, although Margaret has now died, Bill has not acquired her interest in the Woolooware Property by survivorship.

## Reactivation of Mr Madden’s bankruptcy

1. On 18 July 2012, the Official Trustee wrote to Mr Madden saying that due to “material issues [which] arise from recent court proceedings that you are involved in, the bankruptcy matter is now being re-activated.” The letter informed Mr Madden that on 2 July 2012 Mr Prentice had consented to act as trustee to administer the bankruptcy. For the reasons mentioned at [3] above, the question of whether Mr Prentice is trustee of Mr Madden’s bankrupt estate is not now in contention in these proceedings.
2. On 15 August 2012 a notice of appearance was filed in the *Falloon* proceedings on behalf of Mr Prentice. The file number on the notice of appearance bears a date of 2011: it therefore appears that Mr Madden commenced the proceedings under which he made his claim to the Woolooware Property more than 20 years after he became bankrupt and at a time when the Official Trustee was unaware of his claim.

## Section 127(1)

1. The dispute in this Court relates to the operation of s 127(1). Section 127(1) provides:

**127  Limitation of time for making claims by trustee etc.**

1. 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.
2. Section 5 of the Bankruptcy Act defines “property of the bankrupt” (insofar as relevant in these proceedings) as follows:

***the property of the bankrupt*** , in relation to a bankrupt means:

1. Except in subsections 58(3) and (4):
	* + - 1. the property divisible among the bankrupt’s creditors; and
				2. any rights and powers in relation to that property that would have been exercisable by the bankrupt if he or she had not become a bankrupt; …
2. There is no definition of “claim” in the Bankruptcy Act.

# Submissions

1. The Official Trustee provided written submissions, but none related to the operation of s 127(1).

## Mr Madden’s submissions

1. Mr Madden submits that section 127(1) has two limbs which operate after the expiration of the 20 year term. The first limb bars the trustee from making a “claim” to any “property” of the bankrupt after 20 years and under the second limb the property is “deemed to be vested in the bankrupt” subject to any relevant third party rights. Mr Madden relies on *Re Quirk* (1968) ALR 53 (***Re Quirk***), affirmed on appeal to the High Court in *Burke v Stapleton* (1970) 120 CLR 664 (***Burke v Stapleton***).
2. Mr Madden says that correspondence from Mr Prentice or his representatives since July 2012 points to a clear intention by Mr Prentice to set up a claim in the *Falloon* proceedings by intervening and seeking a judicial sale of the Woolooware Property. Mr Madden says this would require Mr Prentice to become registered as to the 50.5 per cent stake; this requires “the concurrence of” another person or “the aid of [a] court” to overcome Mr Madden’s opposition within the concept of a barred “claim” considered by Kitto J at 669 of *Burke v Stapleton*:
3. On 25 July 2012 an email was sent on behalf of Mr Prentice to the solicitors for Mr Madden which said:

It is my understanding that whilst Mr Madden may have been released from a personal liability to the proved creditors in his bankrupt estate in accordance with the provisions of s.153 of the *Bankruptcy Act 1966* (‘the Act’) when he was discharged by operation of s.149 of the Act, the proved creditors (the largest of which being the Deputy Commissioner of Taxation) had not been paid in full. Accordingly, those creditors are entitled to be paid from any assets in Mr Madden’s bankrupt estate which now include his 50.5% interest in the Woolooware property, as referred in the above judgment.

1. On 1 August 2012, in a letter from Mr Prentice’s office to Mr Madden’s solicitor, the following was said (as written):

It appears at this stage that Mr Prentice will be seeking leave to join the proceedings with a view to realising Mr Madden’s 50.5% interest in the Woolooware property or in the alternative receiving sufficient from Mr Madden and/or a third party, to pay out the proved creditors.

1. A letter dated 16 April 2013 from Mr Prentice’s solicitors to the solicitors for Ms Falloon’s two adult children made the following suggestion:

Whether or not the add-backs and costs [claimed by Mr Madden and an occupation fee claimed by the two adult children in the *Falloon* proceedings] have been determined it seems to us that there is no reason why there should not be an order for judicial sale of the Woolooware property. We assume that Mr Madden, whether or not he succeeds in his current proposed Originating Process should also agree to that course.

1. Mr Madden says the fact that the Official Trustee was not aware of the existence of Mr Madden’s interest in the Property before the expiration of the 20 year period is irrelevant to the operation of s 127(1); the terminology “shall not be made” in s 127(1) indicates that there is no role for discretion and no relevance of any breach of a relevant duty, or unfairness, in construing this provision.

## Mr Prentice’s submissions

1. Mr Prentice says that s 127 does not, at least in equity, deprive him as trustee of Mr Madden’s bankrupt estate from receiving the fruits of a judicially ordered sale of the Woolooware Property.

### Counsel’s concession

1. In *Falloon* at [145], Stevenson J records the following:

145 Mr Evans accepts that Bill's interest in the Woolooware Property remains vested in the Official Trustee, notwithstanding his subsequent discharge from bankruptcy: *Official Receiver v Schultz* [1990] HCA 45; (1990) 170 CLR 306; *Daemar v Industrial Commission of NSW (No 2)* (1990) 22 NSWLR 178; *Gosden v Dixon* (1992) 107 ALR 329; *Metherell v Public Trustee* [2010] WASC 205 at [4].

1. Mr Prentice says that this concession was made after the 20 years period had expired and is binding on Mr Madden for all purposes.

### Section 66F argument

1. Mr Prentice says that as Mr Madden’s only interest in the Property is equitable, it does not require registration to perfect its vesting in the Official Trustee and Mr Prentice because s 66F of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**) recognises ownership in equity in possession by a tenant in common. Section 66F(1) provides:

***Co-ownership*** means ownership whether at law or in equity in possession by two or more persons as joint tenants or as tenants in common; and ***co-owner*** has a corresponding meaning and includes an incumbrancer of the interest of a joint tenant or tenant in common.

1. He relied on *Re Quirk* per Gibbs J at 57 (see [34] below) and *Burke v Stapleton* per Menzies J at 670-671 (see [35] and [29] below). Mr Prentice says that the Court can order judicial sale without vesting the legal estate: see *Coshott v Coshott* [2013] FCA 907, albeit that the bankruptcy in that case was within the 20 years period. Further, because of the express terms of s 66F, as a co-owner with a vested interest, there is nothing to prevent Mr Prentice from seeking relief under s 66G of the Conveyancing Act; that is the exercise of a right incident to the vested right to the property, not a claim to the property and it explains why the notice of appearance might be filed by Mr Prentice in the *Falloon* proceedings. Section 66G relevantly provides:

**66G Statutory trusts for sale or partition of property held in co-ownership**

1. Where any property (other than chattels) is held in co-ownership the court may, on the application of any one or more of the co-owners, appoint trustees of the property and vest the same in such trustees, subject to incumbrances affecting the entirety, but free from incumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.
2. He submitted that this is a point of distinction from *Re Dakin* (1948) 14 ABC 186, *Re Bulluss; Ex-parte Official Assignee* (1957) 18 ABC 83; *Re Orange; Ex-parte Jaques* (1958) 18 ABC 157 and *Re Sabine* (1958) 18 ABC 188, all cases where the trustee had not become registered as the proprietor and where s 98(3) of the *Bankruptcy Act 1924* (Cth) (**Bankruptcy Act 1924**) was found to bar a claim by the trustee after 20 years.
3. Mr Prentice concedes that at no time has the interest of either the Official Trustee or Mr Prentice been recorded on the title of the Woolooware Property and that no action was taken with respect to the interest within the twenty year period. As Mr Madden made no required disclosure to the Official Trustee, Mr Prentice says s 129AA has no operation to revest the equitable interest in the Woolooware Property arising from the resulting trust in Mr Madden.

### Fiduciary duty and estoppel arguments

1. Mr Prentice says the Official Trustee would have been entitled to take over conduct of the *Falloon* litigation under s 60(2) of the Bankruptcy Act, had he been told of Mr Madden’s interest as Mr Madden was obliged to do under s 77(1)(f) of the Bankruptcy Act. Mr Prentice submitted that Mr Madden had a positive fiduciary duty to disclose the nature of his interest in the property and claimed that Mr Madden deliberately or negligently refrained from doing so in the knowledge that as an undischarged bankrupt his interest would vest in the Official Trustee. Since Mr Madden owed the Official Trustee, and Mr Prentice as his successor, a fiduciary duty to disclose his interest in the Property, Mr Madden maintained the *Falloon* proceedings subject to his fiduciary duty to the Official Trustee; indeed, that is the only basis on which he could have had standing.
2. Further, Mr Prentice submitted that Mr Madden represented by his silence that there was no property to be divided among his proved creditors who relied on that representation and suffered loss and damage: Mr Madden is estopped from asserting he maintained the *Falloon* proceedings on his own behalf and not on behalf of the Official Trustee. Because Mr Madden breached his equitable obligation to the Official Trustee, the Court ought not act in a manner to advantage Mr Madden to the detriment of the bankrupt estate: *R v McNeil* (1922) 31 CLR 76 (***R v McNeil***)at 100; *Re Auzhair Supplies Pty Limited (in Liq)* (***Re Auzhair***)[2013] NSWSC 1.
3. Mr Prentice says that as a result, the limitation period provided for in s 127(1) had no relevance.

# Consideration

1. The interpretation of s 127(1) contended for by Mr Madden summarised at [16] reflects the summary of the effect of s 98(3) Bankruptcy Act 1924 by Menzies J in *Burke v Stapleton*  at 671:

It seems to me that the subsection, recognizing (1) that land, being the property of the bankrupt, has become vested in the trustee by virtue of the Act, and (2) that the trustee may not have perfected his title so he may still be in the position of having to make a claim thereto, provides that (1) no such claim shall be made after twenty years and (2) the land claimed, which was nevertheless vested in the trustee by or under the *Bankruptcy Act*, should, after twenty years, revest in the bankrupt or those claiming through the bankrupt. This reading of the subsection affords no support for the appellants’ case. The section, although it operates of itself to revest land, the title to which is still outstanding, makes no provision for the trustee transferring land to which he has a complete title.

1. There is no dispute that when Mr Madden’s interest in the Woolooware Property arose on 3 January 1995, he was an undischarged bankrupt and accordingly it constituted “after-acquired property” as defined in s 58(6) of the Bankruptcy Act, and s 58(1)(b) operated to vest Mr Madden’s interest in the Woolooware Property in the Official Trustee, as no other person had been appointed as Mr Madden’s trustee at that time. The areas of dispute are the related issues of:
2. whether it is necessary for Mr Prentice to make a “claim” in relation to Mr Madden’s interest in the Woolooware Property so as to perfect his title to it; or
3. whether, having regard to the nature of that interest as “co-ownership”, s 66F operates to recognise the vested interest of the Official Trustee as “perfected”; and
4. if Mr Prentice must make a “claim” to perfect his title to the Woolooware Property, whether the second “limb” of s 127(1) operates so that Mr Madden’s interest in the Woolooware Property “revests” in him.

## What is a “claim”?

1. *Re Quirk* and *Burke v Stapleton* were decided under the statutory predecessor of s 127(1), s 98(3) of the Bankruptcy Act 1924,which related to claims by the trustee in bankruptcy to an estate or interest in land. Section 98(3) was set out in the judgement of Menzies J in *Burke v Stapleton* at 670:

After the expiration of twenty years after the date of the sequestration of the estate of a bankrupt, no claim shall be made by the trustee of the estate, to any estate or interest in any land which is part of the property of the bankrupt, and that estate or interest shall, subject to the rights (if any) of any person in possession of the land, be deemed to be vested in the bankrupt or any person claiming through or under him, as the case may be.

1. Section 127(1) of the Bankruptcy Act and s 98(3) of the Bankruptcy Act 1924 are relevantly the same, except that s 127 relates to all “property” of the bankrupt, not an estate or interest in land alone: see *Re Lehrain; Official Receiver (Trustee) v Frankston Timber Pty Ltd* (1975) 6 ALR 301 at 305 per Sweeney J.
2. In *Re Quirk*, the trustee became registered proprietor of land owned by the bankrupts within one year after the sequestration order was made. More than 20 years later, the bankrupts’ executrices sought a declaration that the official receiver had no estate or interest in the land and that any such estate or interest in the land vested in them as executrices of the bankrupts’ estates.
3. In *Re* Quirk, Gibbs J considered what a “claim” is at 57:

The word “claim” as a noun is defined in the *Shorter Oxford English Dictionary* as follows: “(1) A demand for something as due; an assertion of a right to something. (2) Right of claiming; right or title (to something).”

In the context of sub-s. (3), the second group of meanings is not appropriate, for the subsection provides that no claim shall be made, and not that the trustee shall have no claim. The distinction is important, for when the subsection says that no claim shall be made by the trustee, it suggests that what is barred is positive action to demand or enforce a right, rather than that a right already acquired is divested. …

It would be a rather surprising result, and one out of harmony with the scheme of the *Bankruptcy Act*, if, at the expiration of twenty years, the trustee abruptly became disentitled to the land, notwithstanding that he had perfected his title to it, and that third persons had not and could not have acquired rights in it, and that the creditors had not been paid in full. However, in my view this is not the effect of the subsection. “Demand” perhaps best expresses the meaning of “claim” in the subsection, and what is intended is that the trustee shall not be able after twenty years to do anything to obtain a proprietary interest in land which is not completely vested in him, as, for instance, by requiring the bankrupt to execute a conveyance, or by seeking to become registered proprietor of the land. If he has already perfected his title to the land, he need not make a claim to it, for it is already his. He is allowed twenty years to make his claim to the land, but once he has acquired the land the subsection does not oblige him to turn it into money within the twenty-year period on pain of being divested of it.

…its effect is to prevent a trustee from doing anything active to enable him to obtain a title to land the property of the bankrupt after twenty years from sequestration, but not to prevent him from retaining a title which has already been perfected.

1. This view was supported by Menzies J (with whom Barwick CJ and Windeyer J agreed) at 670:

The decisive facts seem to me to be that the official receiver is not making, and has no reason now to make, any claim to the land. The land is fully his by virtue of the transmission of the title to his predecessor. The official receiver is doing no more than resisting the appellants’ present claim to the land … The official receiver took the necessary steps to get in the title to the land and so became the owner in law of the land already vested in him by s. 60. Henceforward, the title of the official receiver for the time being was complete and there was no claim to be barred by s. 98.

1. It was also supported by Kitto J (with whom Owen J agreed) at 667-669:

… The meaning cannot be that every assertion of a title by the trustee after the period, formal or casual, in court or out, is to be treated as a breach of the Act. The sense of the provision is that the trustee shall be disentitled to succeed in a claim; and a right to succeed in a claim is necessarily a right in proceedings between adversaries. The reference to the making of a claim to an estate or interest in any land must therefore necessarily be a reference to the setting up, in proceedings in which the title to an estate or interest in land is in question, of a right as against another person to have effect given in respect of that particular item of property to the vesting for which s. 60 in general terms provides.

This construction gives sub-s. (3) as a whole the familiar operation of a statute of limitation barring first a remedy based upon title and then the title itself …

… It is true that as things are, the present official receiver (trustee) … [needs] to obtain registration of the transmission to him [from the old trustee] before being able to give a transfer of the bankrupts’ estate or interest upon realization; but he can obtain the registration by his own unilateral action and the purely administrative action of the Registrar-General. In order to make the general vesting of the property under s. 60 effective in regard to the estate or interest in question he needs neither the concurrence of any other person nor the aid of any court or tribunal to overcome any person’s opposition. In particular, he is in a position to deal with the estate or interest in the ordinary course of administering the bankrupt estates, without having to obtain any relief in proceedings against the appellants such as he would require, for example, if the estate or interest stood registered in their names or in the names of their testators and they challenged his right to it.

## Does Mr Prentice need to make a claim?

1. Mr Madden submits that Mr Prentice’s action in filing a notice of appearance in the *Falloon* proceedings indicates that Mr Prentice is not in a position to deal with the interest in the Woolooware Property in the ordinary course of administering the bankrupt’s estate without the aid of a court and that amounts to making a “claim” as envisaged by Kitto J in *Burke v Stapleton* at 669.
2. Mr Prentice says that he does not need to make a “claim” because of Counsel’s concession: see [20], and the s 66F argument: see [22]-[25]. Both of these arguments should be rejected; I consider that Mr Prentice does need to make a “claim” to Mr Madden’s share of the Woolooware Property.
3. Counsel’s concession was made in different proceedings and in my opinion it does not prevent Mr Madden from making submissions about the proper interpretation of s 127(1) in this Court. It is not in dispute that Mr Madden’s interest in the Woolooware Property constituted “after-acquired property” and that it did not revest in Mr Madden upon his discharge from bankruptcy in 1998. While the word “remains” used in [145] of *Falloon* may be ambiguous, the cases cited in that paragraph are ones where the sequestration order was made less than 20 years before the Official Trustee’s claims were made and fell for consideration by the court, so they do not address the impact of s 127(1). In any event, such a concession could not overcome the express terms of s 127(1). Most importantly, even taken at its highest, the concession is not to the point for the reason given by Kitto J in *Burke v Stapleton* at 667:

At the outset it should be observed that the first provision of the subsection does not provide, as the terms of the notice of motion would suggest, that after the twenty-year period the trustee shall “have” no claim to any estate or interest in land which is property of the bankrupt. What is denied to the trustee in terms is the right to “make” a claim to the estate or interest.

This point was also made by Gibbs J in *Re Quirk* at 57: “the subsection provides that no claim shall be made, and not that the trustee shall have no claim”.

1. In relation to the s 66F argument, it is true that s 66F of the Conveyancing Act recognises both legal and equitable co-ownership in possession. However, any application for judicial sale under s 66G, which might correctly be categorised as an incident of co-ownership, can only follow from an established equitable interest in possession in co-ownership. To establish the existence of an equitable interest, whether vested or contingent, it is necessary first to establish the nature and extent of the interest and in my view that requires the holder of the equitable interest to make a claim to it in order to “perfect” his or her title to it in the sense suggested by *Burke v Stapleton*. This is in contrast to a person who is registered as the proprietor of land under the Real Property Act. That said, there may even be an issue with the registered title of a co-owner where the equitable interests are not co-extensive with the legal interests (for instance, because of differential contributions to purchase price by the registered co-owners) if the extent of the equitable interest has not been established by the 20th anniversary of the bankruptcy.
2. In the facts of this case, Mr Madden has brought proceedings which have resulted in a determination in the Supreme Court of New South Wales which recognises the interest which he has arising from his contribution to the purchase price of the Woolooware Property at a time when he was an undischarged bankrupt. While Mr Madden’s failure to give notice to the Official Trustee of his interest in the Woolooware Property makes it tempting, as a matter of justice to unpaid proven creditors, to lean towards an interpretation that this means that Stevenson J would be in a position, without a claim made by Mr Prentice, to declare that Mr Prentice has a vested interest in the Property which enables him to make orders for judicial sale, it cannot be the correct position.
3. First, it would mean that no bankrupt could, after 20 years, rely on s 127 to establish his or her title to property and that is inconsistent with the nature of s 127 as a limitation provision recognised by Kitto J in *Burke v Stapleton* at 668. Indeed, had Mr Madden not commenced his claim in the *Falloon* proceedings in 2011, neither the Official Trustee nor Mr Prentice would have been in a position to do so, since that would unarguably amount to a “claim” in relation to Mr Madden’s interest in the Woolooware Property in contest with the beneficiaries of Ms Falloon’s estate and the trustee plainly could not make that claim under s 127(1).
4. Second, there are remaining issues in *Falloon* to be determined concerning the exact extent of Mr Madden’s interest having regard to the outstanding claims relating to “add backs”, “costs” and “occupancy fees” and Stevenson J has indicated that he wishes to understand the trustee’s position in relation to these issues. However it is difficult to envisage that any contention by the trustee would not amount to making claims to the “property of the bankrupt” as contemplated by s 127(1), otherwise the trustee’s presence serves no purpose.
5. Last, I do not think that the role of Mr Prentice in the *Falloon* proceedings can properly be characterised as in the same nature as a registered owner of land repelling claims made by another person, as in *Burke v Stapleton*. Rather, Mr Prentice’s claims are in the nature of getting in property vested in the Official Trustee in 1995, a claim which s 127(1) says “shall not be made” more than 20 years after a person became bankrupt.

## Fiduciary duty and estoppel arguments

1. I do not consider that these arguments, which turn on Mr Madden’s failure to disclose his interest in the Woolooware Property as he was undoubtedly required to do under s 77 of the Bankruptcy Act, have merit.
2. Section 77(1)(f) of the Bankruptcy Act imposes an obligation on a bankrupt to “disclose to the trustee, as soon as practicable, property that is acquired by him or her, or devolves on him or her, before his or her discharge, being property divisible among his or her creditors”. This obligation is part of the regime under the Bankruptcy Act which enables the trustee to get in assets which are available to satisfy debts owed to proved creditors of the bankrupt and therefore one which benefits the creditors and allows for efficient administration of the bankruptcy.
3. Counsel for Mr Prentice submitted that the failure to observe an obligation to disclose after-acquired property, in a context where s 58(1)(b) of the Bankruptcy Act vested Mr Madden’s interest in the Woolooware Property in the Official Trustee, amounted to a breach of a fiduciary duty. Counsel did not, however, take the Court to any authority which would support the proposition that the relationship of bankrupt to trustee and creditor is fiduciary in character.
4. In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97, Mason J discussed the circumstances in which a fiduciary relationship may be found to exist (footnotes incorporated into text):

… it is important in the first instance to ascertain the characteristics which, according to tradition, identify a fiduciary relationship. As the courts have declined to define the concept, preferring instead to develop the law in a case by case approach, we have to distil the essence or the characteristics of the relationship from the illustrations which the judicial decisions provide. In so doing we must recognize that the categories of fiduciary relationships are not closed (*Tufton v. Sperni* [1952] 2 T.L.R. 516, at p. 522; *English v. Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93, at p. at 110).

The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf *Phipps v. Boardman* [1967] 2 A.C. 46, at p. at 127), viz., trustee and beneficary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions “for”, “on behalf of” and “in the interests of” signify that the fiduciary acts in a “representative” character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

1. I do not consider that the obligation imposed by s 77(1)(f), or the fact that s 58(1)(b) vests property of the bankrupt in the trustee in bankruptcy, establishes the characteristics of a fiduciary relationship, even though the failure by a bankrupt to observe his or her obligations under s 77(1)(f) is serious and can result in trustees and creditors not having access to funds to which they are entitled to satisfy proved debts and fund administration costs. I accept Mr Madden’s submission that Australian law does not recognise positive fiduciary duties of the sort identified by Mr Prentice. In *Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165 at 198, McHugh, Gummow, Hayne and Callinan JJ wrote, quoting Gaudron and McHugh JJ in *Breen v Williams* (1996) 186 CLR 71:

In this country, fiduciary obligations arise because a person has come under an obligation to act in another’s interest. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.

1. As I have found that the failure to disclose the interest in the Woolooware Property in accordance with s 77(1) did not give rise to a fiduciary obligation, I find that Mr Madden did not conduct the *Falloon* litigation subject to such an obligation.
2. Nor do I consider that Mr Madden’s silence is an adequate basis for Mr Prentice to claim that Mr Madden should be estopped from denying that he conducted the *Falloon* litigation on behalf of his bankrupt estate rather than on his own behalf. Again, Counsel for Mr Prentice did not take the Court to any authority to found this claim, which amounted to a simple assertion. I accept Mr Madden’s submission that Mr Prentice has not made out the elements of an estoppel.
3. Both of these arguments were a stepping stone to Mr Prentice’s argument that the Court ought not to act in a manner to the disadvantage of the bankrupt estate by finding that s 127(1) operates to bar claims to Mr Madden’s interest in the Woolooware Property. Mr Prentice cited in submissions *R v McNeil* at 100 in which Isaacs J said (emphasis in the original):

The position may be shortly stated. Where a Court of equity finds that a legal right, for which it is asked to give a better remedy than is given at law, is barred by an Act of Parliament, it has no more power to remove or lower that bar than has a Court of law. *But where equity has created a new right founded on its own doctrines exclusively, and no Act bars that specific right, then equity is free.*

1. Mr Prentice also cited *Re Auzhair*, in which Brereton J undertook a detailed consideration of the impact of statutes of limitations on equitable claims.
2. The Bankruptcy Act sets down a detailed regime relating to bankruptcy. The limitation period of 20 years in s 127(1) is long and s 129AA now prescribes shorter periods for a trustee to deal with property of the bankrupt before it revests in the bankrupt where the bankrupt has disclosed its existence: see [58] below. The methodology employed by s 127(1) of barring “claims” (a term of broad import) and deemed revesting of the bankrupt estate in the bankrupt is inconsistent with a legislative intention to permit the trustee to make claims to property which formed part of the bankrupt estate after the 20 year period, however those claims arise. It is undoubtedly inappropriate that Mr Madden failed to disclose his interest in the Woolooware Property during the 20 year period prescribed by s 127, and Stevenson J clearly had concerns about whether purchase of the Woolooware Property in the name of Ms Falloon was designed to avoid the consequences of Mr Madden’s interest being “after-acquired property”: see *Falloon* at [139]. However, that consequence was clearly foreseeable in the context of the subject matter of the Bankruptcy Act. The Bankruptcy Act deals with the consequence of the failure to disclose property of the bankrupt, depending on its circumstance, by prescribing offences set out in ss 263 and 265 and not by setting out exceptions to the limitation period, which was a course open to Parliament.
3. Further, contrary to Mr Prentices’s submission, s 60(2) of the Bankruptcy Act would not have authorised Mr Prentice to take over the *Falloon* action commenced by Mr Madden in 2011 since s 60(2) applies to actions commenced before a person becomes bankrupt. Mr Prentice submitted that Mr Madden had no authority in 2011 to commence the *Falloon* proceedings, presumably on the basis that the claim to the interest in the Woolooware Property remained vested in the trustee. In submissions, Mr Prentice noted that as Mr Madden did not disclose his interest in the Woolooware Property to his trustee in bankruptcy, s 129AA(2) did not revest the Property in Mr Madden nor had either of the Official Trustee or Mr Prentice disclaimed their interest in the Property.
4. However, more than 20 years having passed since Mr Madden became bankrupt, it was not open to the trustee to commence those proceedings and the right to that property is, under s 127(1) “deemed to be vested in the bankrupt”, that is, the section “operates of itself to revest land, the title to which is still outstanding”: see *Burke v Stapleton* at 671 per Menzies J quoted at [29] above.
5. In submissions which arose out of argument at the hearing, Counsel for Mr Prentice contrasted s 127(1) with s 129AA and suggested that s 129AA was intended to overcome effective “lock up” of a person’s assets because they remained vested in the trustee.
6. Section 129AA provides as follows:

**129AA Time limit for realising property**

(1) This section applies only to:

(a) property (other than cash) that was disclosed in the bankrupt’s statement of affairs; and

(b) after acquired property (other than cash) that the bankrupt discloses in writing to the trustee within 14 days after the bankrupt becomes aware that the property devolved on, or was acquired by, the bankrupt.

In this subsection, ***cash*** includes amounts standing to the credit of a bank account or similar account.

(2) If any such property is still vested in the trustee immediately before the revesting time, then it becomes vested in the bankrupt at the revesting time by force of this section.

(3) Initially, the ***revesting time*** for property is:

(a) for property disclosed in the statement of affairs—the beginning of the day that is the sixth anniversary of the day on which the bankrupt is discharged from the bankruptcy; and

(b) for after-acquired property that is disclosed before the bankrupt is discharged from the bankruptcy—the beginning of the day that is the sixth anniversary of the day on which the bankrupt is discharged; and

(c) for after-acquired property that is disclosed after the bankrupt is discharged from the bankruptcy—the beginning of the day that is the sixth anniversary of the day on which the bankrupt disclosed the property to the trustee.

(4) If the trustee, before the current revesting time, gives the bankrupt a written notice (an ***extension notice***) stating that a later revesting time applies to particular property, then that later time becomes the ***revesting time*** for that property.

(5) There is no limit on the number of extension notices that the trustee may give (either generally or in relation to particular property).

(6) The time specified in an extension notice must be either:

(a) a specified time that is not more than 3 years after the current revesting time; or

(b) a time that is reckoned by reference to a specified event (for example, the death of a life tenant), but is not more than 3 years after the happening of that event.

(7) Any property that becomes vested in the bankrupt under this section thereupon ceases to be subject to section 127.

1. Counsel for Mr Prentice noted that s 129AA provides a regime which establishes defined periods in which the trustee must act following disclosure of assets by a bankrupt. If the trustee does not act during those periods, then s 129AA(2) operates to vest the disclosed property in the bankrupt and under s 129AA(7), s 127 expressly does not apply to property that revests in the bankrupt under s 129AA. Counsel suggested that as the Official Trustee only came to know of Mr Madden's interest in the Woolooware Property in 2012 when Stevenson J rendered his judgement in *Falloon*, there may be an argument available that a six year time period would run from the date the trustee became aware of the interest in which the trustee might make claims, as s 129AA was introduced in 2002 and is therefore a later provision than s 127(1). This argument was not fully developed as the issue arose in argument at the hearing and not in submissions.
2. The Explanatory Memorandum to the *Bankruptcy Legislation Amendment Bill 2002* (Cth), by which s 129AA was included in the Bankruptcy Act, explains the purpose of s 129AA and its intended interaction with s 127 as follows:

**Time limit for realising property**

134 Under proposed new subsection 129AA, to be inserted by item 81, there will be an initial period specified within which a trustee is to realise property.

135 The proposal specifies that, in relation to property disclosed by the bankrupt on the statement of affairs, and to after-acquired property disclosed within 14 days of the debtor becoming aware of it, the revesting time will be 6 years from the date of discharge of the bankrupt (paragraph (3)(b)). For after-acquired property disclosed after discharge, the revesting time will be 6 years from the date on which the bankrupt discloses the property to the trustee (paragraph (3)(c)).

136 The trustee readily will be able to extend the revesting time by up to 3 years in cases where realising the property is not practicable before the original revesting time. A simple example is the case where a trustee is unable to sell an interest in a house property because that interest is subject to a life tenancy; it will often be the case that the trustee has no practical option but to wait for the life tenant to die**.**

137 The new provisions will encourage trustees to realise assets within a reasonable time frame and discourage undue delays in the administration of an estate.

138 Proposed new subsection 129AA(7) provides that section 127 (which allows a trustee to claim property for up to 20 years) will not apply in respect of any property that revests in the bankrupt pursuant to section 129AA. This will ensure that the trustee cannot rely on section 127 to claim particular property that has revested in the bankrupt. Section 127 would still apply in respect of property which either was not disclosed by the bankrupt on the statement of affairs or was ‘after-acquired’ property which was not disclosed, in writing, by the bankrupt to the trustee.

139 By transitional provision item 219, the amendment made by item 81 will apply to all bankruptcies, including those that ended before commencement. However, for that latter group, the initial revesting time is to start on the sixth anniversary of commencement, instead of the sixth anniversary of the date of discharge

1. Having regard to item 138 of the Explanatory Memorandum and to the decisions in *Re Quirk* and *Burke v Stapleton*, I conclude that:
2. Mr Madden had an obligation under s 77 of the Bankruptcy Act to disclose his interest in the Woolooware Property at all times since at least January 1995, albeit that the proportion in which he holds it was only definitively determined by Stevenson J in June 2012.
3. 20 years having passed without disclosure, the effect of s 127(1) is that Mr Madden’s interest in the Woolooware Property was deemed to revest in him in April 2010. Both the Official Trustee and Mr Prentice were barred by s 127(1) from making any claim to the Woolooware Property after 10 April 2010.
4. *Re Quirk* and *Burke v Stapleton* are authority that if a trustee becomes a registered proprietor of land within the 20 years period, then s 127(1) would not have the effect of revesting that perfected title in the bankrupt. Section 129AA will now define the period in which the trustee must realise the asset where that section applies because of disclosure by the bankrupt in accordance with that provision.
5. Whether or not the circumstances under which the Official Trustee came to know about Mr Madden’s interest in the Woolooware Property in June 2012 amounted to “disclosure” to his trustee in bankruptcy, s 129AA had no operation because the 20 year period in s 127(1) had expired before any disclosure was made.
6. I accept the conclusion reached in McDonald, Henry & Meek, *Australian Bankruptcy Law and Practice* (Lawbook Co., subscription service) at [127.0.15] (update 148) in relation to the application of s 127(1):

 Under the subsection the trustee appears to be barred, even though the bankrupt never disclosed the existence of the property to him or her, and to be left to his or her remedies in respect of offences under ss 263, 265 and 268.

1. The effectiveness of the regime for dealing with administration of bankrupt estates depends on the forthrightness of those who become bankrupt; non-disclosure of assets in a timely way is a serious matter. As Mr Madden’s silence has effectively deprived his bankrupt estate of the benefit of his interest in the Woolooware Property, I commend consideration of pursuing Mr Madden in relation to any offences for which he may be liable under the Bankruptcy Act.

# Conclusion

1. For the reasons at [3], I will dismiss the first ground of the application.
2. I will make a declaration that Mr Madden’s interest the Woolooware Property is revested in him pursuant to s 127 of the Bankruptcy Act 1 subject to the rights of any person other than the first respondent or the second respondent.
3. I will stand the matter over to a time convenient to counsel to address the issue of costs and to advise the Court of the course now proposed in relation to ground four.

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| I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell. |

Associate:

Dated: 8 May 2014