FEDERAL COURT OF AUSTRALIA

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

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| File number: |  |
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| Judgment of: | **RAPER J** |
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| Date of judgment: | 10 March 2023 |
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| Catchwords: | **BANKRUPTCY** – application by the trustee in bankruptcy (**trustee**) to recover a property or an interest in a property – whether the property, or interest in that property, is held on trust for the bankrupt estate – whether the presumption of advancement applies to the matrimonial home – whether the presumption has been rebutted – where title is placed in the wife’s name only – whether the trustee is entitled to relief under s 139DA of the *Bankruptcy Act 1966* (Cth) – whether the transfer of the property was an undervalued transaction or a transaction to defeat creditors and thus void against the trustee – application allowed in part |
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| Legislation: | *Bankruptcy Act 1924* (Cth) s 95  *Bankruptcy Act 1966* (Cth) ss 55, 77C, 120, 120(1), 120(7), 121, 121(1)(b), 121(2), 121(4), 121(9), 121(9)(a), 122, 139A, 139CA, 139D, 139D(2), 139D(3), 139DA, 139DA(a), 139EA, 139F, 267G, Div 4A  *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (Cth) Sch 1 item 20  *Corporations Act 2001* (Cth) s 588FA(3), 588FF  Explanatory Memorandum, Bankruptcy Amendment Bill 1987 (Cth)  Explanatory Memorandum, Bankruptcy Legislation Amendment (Anti-Avoidance) Bill 2005 (Cth)  *Succession Act 2010* (NSW)  *Supreme Court Act 1986* (Vic) ss 33KA, 33ZF |
|  |  |
| Cases cited: | *Airservices Australia v Ferrier* [1996] HCA 54; 185 CLR 483  *Birdseye v Sheahan* [2002] FCA 1319; 196 ALR 598  *Bosanac v Commissioner of Taxation* [2022] HCA 34; 96 ALJR 976  *Bryant (in their capacities as joint and several liquidators of Gunns Ltd (in liq) (recs and mgrs apptd) (ACN 009 478 148) v Edenborn Pty Ltd* [2020] FCA 715; 381 ALR 190  *Bryant v Badenoch Integrated Logging Pty Ltd* [2023] HCA 2  *Calverley v Green* [1984] HCA 81; 155 CLR 242  *Camm v Linke Nominees Pty Ltd* [2010] FCA 1148; 190 FCR 193  *Clarke v Great Southern Finance Pty Ltd (in liquidation)* [2014] VSC 569  *Combis (Trustee) v Spottiswood (No 2)* [2013] FCA 240; 11 ABC(NS) 407  *D Pty Ltd (in liq) v Calas* [2016] FCA 1409; 12 BFRA 151  *Great Investments Ltd and Others v Warner and Others* [2016] FCAFC 85; 243 FCR 516  *Griffin & Khatri v Milne & Anor* [2009] FMCA 680  *Jess (Trustee), in the matter of Lostitch (Bankrupt) v Lostitch* [2022] FedCFamC2G 342  *Lo Pilato v Kamy Saeedi Lawyers Pty Ltd* [2017] FCA 34; 249 FCR 69  *Mateo v Official Trustee in Bankruptcy* [2002] FCA 344; 117 FCR 179  *Mathai v Nelson* [2012] FCA 1448; 208 FCR 165  *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  *Permfox Pty Ltd, in the Matter of Chase v Official Receiver for Bankruptcy District of New South Wales* [2002] FCA 1564  *Pettitt v Pettitt* [1970] AC 777  *Re Jury; Ashton v Prentice* [1999] FCA 671; 92 FCR 68  *Richardson v The Commercial Banking Company of Sydney Limited* [1952] HCA 8; 85 CLR 110  *Sheahan v Birdeye* [2002] FMCA 41  *Silvia (Trustee) v Williams, in the matter of Williams (Bankrupt)* [2018] FCA 189  *Trustees of Property of Cummins (a bankrupt) v Cummins* [2006] HCA 6; 227 CLR 278  *Worrell v Pix* [2002] FMCA 93 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
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| Number of paragraphs: | 281 |
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| Dates of hearing: | 12–14 October 2022 |
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| Counsel for the applicant: | Mr D Edney |
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| Solicitor for the applicant: | Matthews Folbigg Solicitors |
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| Counsel for the respondent: | Mr R Marshall SC with Mr M Collins |
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| Solicitor for the respondent: | Adrian Holmes Law Services |

ORDERS

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|  | | NSD 1330 of 2021 |
| IN THE MATTER OF JAMES EDWARD MURRAY | | |
| BETWEEN: | ROBERT JOHN KITE AS THE TRUSTEE OF THE PROPERTY OF JAMES EDWARD MURRAY, A BANKRUPT  Applicant | |
| AND: | MELLISSA BEVERLEY MURRAY  Respondent | |

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| order made by: | RAPER J |
| DATE OF ORDER: | 10 March 2023 |

THE COURT ORDERS THAT:

1. By 6 April 2023, the parties are to confer and provide draft orders to the Associate to Justice Raper giving effect to these reasons including in relation to the question of costs of the proceeding.

2. If the parties cannot agree on the form of proposed orders as contemplated by Order 1:

(a) by 6 April 2023 they are each to provide the Associate to Justice Raper with a form of proposed orders giving effect to these reasons including in relation to the question of costs, and submissions, not exceeding five (5) pages in length; and

(b) the proceeding will be listed on a mutually convenient date for a case management hearing in order to resolve the form of orders.

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

REASONS FOR JUDGMENT

RAPER J

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## Introduction

1 The applicant, Robert John Kite (the **trustee**), is the trustee in bankruptcy of the estate of James Edward Murray (the **bankrupt**). The trustee was appointed on 25 September 2017 upon the filing by the bankrupt of a debtor’s petition pursuant to s 55 of the ***Bankruptcy******Act*** *1966* (Cth). Mellissa Beverley Murray (the **respondent**) is the wife of the bankrupt.

2 The trustee claims:

(a) a 50% beneficial interest in the property at 25B Serpentine Crescent, North Balgowlah, in the State of New South Wales (the **North Balgowlah property**), either on the basis of:

(i) Part VI, Division 4A of the Bankruptcy Act (the **s 139DA claim**); or

(ii) ordinary “purchase money resulting trust principles” (the **resulting trust claim**); or

(b) failing those, monetary claims secured by charge upon the North Balgowlah property in respect of the bankrupt’s cash applied towards the property’s purchase and as a result of transactions entered into between 11 April 2014 and 28 November 2014, pursuant to ss 120 and/or 121 of the Bankruptcy Act (the alternative **voidable transaction claims**).

## The Amended Application

3 By amended application filed on 14 October 2022, the trustee claims the following primary and alternative relief:

1. A declaration that the Respondent holds the legal title to 25B Serpentine Crescent, North Balgowlah (“**the Property**”) on trust for the Applicant and the Respondent in equal shares.

2. An order that the Respondent transfer a 1/2 interest in the Property to the Applicant.

3. An order pursuant to section 139A and/or section 139DA of the *Bankruptcy Act 1966* (Cth) (“**the Act**”) that the respondent transfer to the Applicant 50% of the Property.

4. In the alternative to the relied [sic] sought in prayers 1-3 above, a declaration that the Respondent holds the legal title to the Property on trust for the Applicant and the Respondent in the proportions to which the Respondent and James Edward Murray (“**the Bankrupt**”) contributed to the total purchase price of the Property.

5. In the alternative to the order sought in prayer 2 above, an order that the Respondent transfer to the Applicant the portion of the Property determined by the Court to be held on trust for the Applicant.

6. Further to the relief claimed in prayers 1 to 5 above, an order pursuant to section 66G of the *Conveyancing Act 1919* (NSW), that the Trustee and Erwin Rommel Alfonso (“**the 66G Trustees**”) be appointed as trustees for the sale of the Property.

7. An order that the Property immediately vest in the 66G Trustees as trustees for sale.

8. An order that the 66G Trustees be authorised and empowered to offer the Property for sale and to sell the Property by public auction with the power to fix a reserve price or alternatively to sell the property by private treaty at the best available price.

9. The 66G Trustees are empowered to make all necessary adjustments of rates and taxes on settlement of the sale of the Property.

10. The proceeds of sale of the Property are to be distributed in the following manner:

(a) First, to the 66G Trustees’ costs and expenses, including legal fees, valuation fees, agents fees and commission and any other expenses, of effecting the sale of the Property;

(b) Second, to the remuneration of the 66G Trustees with respect to the sale of the Property and disbursement of the proceeds thereof;

(c) Thirdly, to the mortgagee’s debt secured over the Property; and

(d) Finally, the balance of the proceeds of sale to the Trustee and the Respondent in equal shares or such other shares as the Court may determine.

11. Liberty to the parties to apply on two days’ notice with respect to any matter arising out of the sale of the Property or the distribution of the sale proceeds.

12. In the alternative to the relief sought in prayers 1-11 above a declaration that the payment of $252,690.13 to the Respondent from the sale proceeds of the Bankrupt’s interest in property [sic] known as unit 305/97 Boyce Road Maroubra, and unit 505/747 Anzac Parade, Maroubra, in the state of New South Wales is void against the Applicant pursuant to section 120 and/or section 121 of the Act.

13. In the alternative to the relief sought in prayers 1-11 above an order that the Respondent pay the Applicant the sum of $252,690.13.

14. An order that the Respondent pay interest on the amount in prayer 13 from 3 September 2018 at the rates provided for pursuant to s51 *Federal Court of Australia Act 1976* (Cth).

15. An order that the Respondent pay the Applicant’s costs of these proceedings.

16. An order that the Property be charged with the payment to the Applicant of any amount payable pursuant to prayers 13 and 14 above.

17. Such further or other order as the court sees fit.

(Emphasis in original.)

## Interaction between the respective claims

4 It was difficult, at hearing, to decipher the trustee’s position regarding his respective claims. The trustee’s position ultimately appeared to be as follows:

(a) the s 139DA claim was his primary claim; and

(b) there was no need to consider his resulting trust claim if he succeeded on his s 139DA claim where the Court declared a 50% interest.

5 However, it was unclear as to what the trustee’s position was with respect to maintaining the alternative voidable transaction claims.

6 For the reasons which follow (and to the extent that was necessary for all claims to be decided) my conclusions with respect to each claim are as follows:

(a) the trustee succeeds on his s 139DA claim but only to the extent of a 11% beneficial interest in the North Balgowlah property;

(b) the trustee does not succeed on his resulting trust claim; and

(c) in the alternative, the trustee succeeds on his voidable transaction claims.

## Agreed factual overview

7 The parties’ agreed chronological facts reveal the following.

8 In 1999, the bankrupt and the respondent began paying their earnings into and paying expenses out of joint bank accounts. In 2000, the bankrupt and the respondent were married. Until 2015, the bankrupt was the primary income earner and the respondent the primary carer of their children.

9 Over the years, the bankrupt and the respondent acquired several properties in New South Wales prior to the purchase of the North Balgowlah property, some jointly but some separately. Specifically:

(a) in 1999, the property known as 12 Austin Street, Fairlight and being folio identifier 1/841427 (the **Fairlight property**) was purchased for $637,000 in the names of the bankrupt and respondent jointly. The purchase monies were obtained from **Ms** Beverley **Dew** (the respondent’s mother) in the sum of $200,000 and by way of loan from Collins Securities. The Fairlight property was sold in May 2003;

(b) in 2002, the property known as 606 Sydney Road, Seaforth being folio identifier 19/9521 (the **Seaforth property**) was purchased in the sole name of the respondent. The Seaforth property was sold in April 2016;

(c) in 2005, the property known as Unit 305/97 Boyce Road, Maroubra being folio identifier 35/SP74405 (the **Boyce Road property**) was purchased in the sole name of the bankrupt. The Boyce Road property was sold in April 2014; and

(d) in 2008, the property known as Unit 505/747 Anzac Parade, Maroubra being folio identifier 63/SP79763 (the **Anzac Parade property**) was acquired with the bankrupt as 99% legal owner and the respondent as 1% legal owner. The Anzac Parade property was sold in September 2014.

10 The circumstances concerning the purchase of the Boyce Road and the Anzac Parade properties assume relevance in these proceedings because it is the proceeds of the sale of those properties which the trustee claims constitute a significant part of the relevant “financial contributions” for the purpose of the s 139DA(a) claim, which support his claim regarding his beneficial interest in the later purchase of the North Balgowlah property (described at [14] below), and which also form part of the basis for the voidable transaction claims. The other relevant transfers for the voidable transaction claims also included various payments between April and November 2014 towards the four mortgages on the Seaforth property (the **Seaforth Mortgages**).

11 In the period between the purchase of the Boyce Road and the Anzac Parade properties, in July 2007 the bankrupt borrowed funds in the amount of $75,875 through ABL Nominees Pty Ltd to invest in an agricultural investment scheme known as the “Great Southern 2007 High Value Timber Project” (**the** **Scheme**), which led to the bankrupt owing what ultimately came to be the primary debt in his bankruptcy, being some $305,499.06 (as at 18 October 2017), to the **Bendigo** and Adelaide **Bank** (**the Bendigo Debt**).

12 During the period up to the critical property transactions in 2014, the following events unfolded with respect to the Scheme: On 1 May 2009, Great Southern appointed a voluntary administrator. In August 2009, the bankrupt defaulted upon the Bendigo Debt, and demands were made upon him shortly afterwards to pay the Bendigo Debt in October and November 2009. Rather than pay the Bendigo Debt, the bankrupt participated in a class action from about 2010 challenging his liability for the underlying debt – no material further payments were ever made, such that the balance of the Bendigo Debt kept increasing from then onwards. The trial of that class action occurred between October 2012 and October 2013. Sometime between October 2013 and July 2014 or before, the bankrupt spoke to either his financial planner or advisor about the hearing of the class action, and was told that the hearing “hadn’t gone well”, “wasn’t going well” or that “it didn’t look good”.

13 On 11 April 2014, the net proceeds of sale from the sale of the Boyce Road property (totalling $330,211.31) were paid to a joint account operated by the bankrupt and the respondent ending in #4777 (**the** **Joint Account**). On 30 June 2014, **Apscore** International Pty Ltd (the bankrupt’s company) recorded accumulated losses of $6,243,566.46. On 23 July 2014, a settlement of the class action was reached, substantially providing for a confirmation of the group members’ loan obligations.

14 Then, a matter of days later, on 4 August 2014, the bankrupt and the respondent exchanged the contract for the purchase of the North Balgowlah property (the sale price was $1.8 million). Both the bankrupt and the respondent were named on the contract as purchasers. By sale settling on 9 September 2014, the bankrupt and the respondent sold the Anzac Parade property realising $110,310.05 of net proceeds, which were paid into the Joint Account.

15 The purchase settled on 28 November 2014, at which time title to the North Balgowlah property was taken solely in the respondent’s name (the reasons for which are addressed later in these reasons when considering the trustee’s resulting trust claim).

16 The purchase price, and the other costs of the purchase, were paid by way of:

(a) drawings totalling $197,773.86 from the Joint Account; and

(b) $1.7 million borrowed from the Commonwealth Bank by way of a loan in respect of which both the bankrupt and the respondent were principal borrowers.

17 In the period between April and November 2014, $54,916.27 was applied in payment of the Seaforth Mortgages (which was solely for the benefit of the respondent given that property was solely in her name).

18 After the drawings from the Joint Account put towards the heavily mortgaged North Balgowlah property and the Seaforth Mortgages, the Joint Account was essentially exhausted and the bankrupt was denuded of his assets. When the Bendigo Bank further called upon the Bendigo Debt after the conclusion of the class action the bankrupt pleaded poverty and sought time. The bankrupt was then ultimately sued and, after attempting to defend the proceedings brought against him, declared bankruptcy on 25 September 2017.

## Factual matters in dispute

19 The factual dispute concerns, *first*, the purported beneficial ownership of the Boyce Road and Anzac Parade properties, which the trustee submits to be the source of the funds used to purchase the North Balgowlah property.

20 In this respect, the trustee contends that the Boyce Road and Anzac Parade properties were beneficially owned in accordance with their legal title (namely by the bankrupt solely or substantially).

21 The respondent contends that, while the legal title should be accepted as reflecting beneficial title in respect of the Seaforth and North Balgowlah properties (that is, the properties where she was the sole legal owner), the legal titles should be disregarded in respect of the Boyce Road and Anzac Parade properties where the bankrupt was the sole or predominant owner, such that they should instead be viewed as beneficially owned by both her and the bankrupt equally.

22 The trustee contends that the respondent’s position should not be accepted, but even if it is accepted it does not change the conclusion that the bulk of the cash contributed to the purchase of the North Balgowlah property came from the bankrupt.

23 The factual dispute thereafter concerns the intention of the bankrupt as to the reason(s) for the sale of the Boyce Road and Anzac Parade properties and their intention regarding ownership of the North Balgowlah property.

## The evidence

24 A series of affidavits have been filed in the proceeding which are listed as follows:

(a) Mr Kite, the trustee, made on 17 December 2021;

(b) Mrs Murray, the respondent, made on 6 April 2022; and

(c) Mr Murray, the bankrupt, made on 6 April 2022.

25 Each of the witnesses were cross-examined.

26 With respect to Mr Kite, it was my observation that he answered the questions asked of him truthfully. The apparent purpose of his cross-examination was to reveal certain limitations in his evidence. *First,* as to the absence of evidence and assumption made by him as to when the bankrupt knew *when* the Supreme Court of Victoria would deliver its judgment in the class action. Mr Kite conceded, contrary to his evidence, that there was no evidence of the trial judge indicating “at the time” that the proceedings concluded on 24 October 2013 that judgement would be delivered on 25 July 2014. Rather, according to the judgment of Judd J (in relation to applications made by the class action group members under ss 33KA and 33ZF of the *Supreme Court Act 1986* (Vic): see *Clarke v Great Southern Finance Pty Ltd (in liquidation)* [2014] VSC 569 at [3]) Croft J notified the parties “shortly before 25 July 2014” of his Honour’s intention to deliver judgment on that day. *Secondly,* Mr Kite accepted that he had not: (a) undertaken a detailed analysis of the other accounts identified by him as being held by the respondent and the bankrupt; (b) taken into account the fact that in April 2016, the proceeds of the sale of the Seaforth property were used to repay the Seaforth Mortgages and reduce the mortgages over the North Balgowlah property; and (c) did not factor into his analysis the contributions made by Ms Dew.

27 The respondent gave evidence. Her cross-examination was relatively brief. Her responses were curt and largely without explanation. The respondent is tertiary educated, holding a Bachelor of Human Movement Studies, a Graduate Diploma of Education, a Graduate Certificate in Religious Education and a Masters in Education in Career Development. It was apparent that she had had involvement in and made many decisions as to how her and the bankrupt’s assets were held and their affairs structured. Indeed, it was the bankrupt’s evidence that the respondent would have, on her own, given instructions to their solicitors when purchasing one of the properties.

28 I note that the trustee’s case does not depend upon an acceptance or rejection of the respondent’s evidence. The trustee does not challenge her honesty but does submit that the Court should not “unreservedly accept” the respondent’s evidence as to long-ago events, and should look to the contemporary materials, objectively established facts, apparent logic of events and the respondent’s past examination before the Australian Financial Security Authority (**AFSA**) to best ascertain the truth. I am of the view that this is an appropriate approach to her evidence.

29 The bankrupt gave evidence and was cross-examined more extensively. The bankrupt’s responses were often difficult to understand, to reconcile with the evidence and inconsistent with other responses in his testimony. It appeared from my observation of the bankrupt during his evidence that the bankrupt wanted to ensure that to the extent that his wife may have deposed to conversations (different from his recollection) he did not want to contradict her but at the same time he sought to confuse the evidence and to not make any concession which he considered would assist the trustee’s case. It appeared implausible that a person who had conducted his own business for many years, held the position of a company director and employed 22 staff, would have such a limited recall as to his investment decisions and the structuring of his uncomplicated affairs.

30 In making findings regarding the bankrupt’s intention regarding the purchase and sale of the Boyce Road and Anzac Parade properties and his intention regarding the use of the proceeds of their sale and purchase of the North Balgowlah property, much turns upon his credit. I have, in this respect, formed a view adverse to his credit. I will, therefore, before setting out my findings as to the facts relevant to the present proceedings set out the discrepancies in the bankrupt’s evidence. It will explain why I formed this view in addition to my observations of his demeanour in the witness box.

31 Only one affidavit sworn by the bankrupt was filed in the respondent’s case. However, the bankrupt had been examined by the AFSA, almost a year before, on 5 May 2021 (the **examination**) pursuant to a s 77C notice for which he was required to answer all questions truthfully and not avoid any questions: s 267G of the Bankruptcy Act.

32 A consideration of the bankrupt’s answers to the questions under examination, his affidavit evidence and his oral evidence revealed the following.

33 Curiously, the bankrupt deposed in his affidavit to having a recollection of a number of conversations many years ago, which he claimed a year earlier under the examination, he had no recollection of. For example:

(a) The bankrupt stated under examination that he could not remember any specific discussions about the ownership of the Fairlight property, yet at [14] of his affidavit claims to recall conversations with the respondent discussing that the Fairlight property was to be solely owned by the respondent.

(b) The bankrupt claimed, under examination, that he could not remember anything about the mistake on the contract for the North Balgowlah property, including any specific conversation about changing the names on the contract yet at [51]–[52] of his affidavit the bankrupt says he recalls the mistake on the contract and having a conversation with the respondent about making sure it was changed and instructing his solicitor to change it.

34 Similarly, under examination, the bankrupt was unable to recall a number of important matters but now deposes to having such a recall. For example, the bankrupt was unable to recall, during the examination, why the legal title to the Boyce Road property was in his sole name and the Anzac Parade property split 99:1 between him and the respondent, or any conversations to that effect. The bankrupt also stated that the legal title may have been done this way “for an accounting reason” but was not sure what that reason might have been, only that he would have had advice from lawyers or accountants but could not recall any meetings in that regard.

35 The bankrupt then deposed in his affidavit, a year after the examination, that he recalled seeking his accountant’s advice for the best taxation benefits available from the investment properties, that a “financial advisor” had suggested he buy an investment property and that he and the respondent had discussed owning them together. The bankrupt conceded in cross-examination that he only remembered the gist of these conversations and identified that the “financial advisor” referred to was probably a finance broker by the name of Gerard Hanson who had advised him, along with another person from Bright Wealth, in relation to the Scheme – a fact he could not recall at the examination.

36 There were further inconsistences as between the bankrupt’s affidavit evidence, the examination and the evidence he gave under cross-examination as to the purported reason for the bankrupt divesting the only substantial assets in his name in 2014, namely the Boyce Road and Anzac Parade properties.

37 The bankrupt deposed in his affidavit that he sold the Boyce Road and Anzac Parade properties for the following four reasons:

* Payment for one of [his] daughter’s wedding
* Payment of the O’Donnell settlement
* Payment of an overseas trip for [Ms Dew]
* Payment of school fees.

38 Yet, the previous year when under examination, the bankrupt had given two reasons for the sales only, namely to pay Mr O’Donnell and to fund renovations of the Seaforth property.

39 Perhaps what was the most significant, was the bankrupt’s oral testimony under cross-examination regarding the circumstances leading to his business’ decline and the extent of the acuteness of his financial stress in 2014. It was my strong impression that the bankrupt was attempting to obfuscate from the obvious. As will be seen at [99]below, the bankrupt’s 18 July 2015 statutory declaration paints a very different picture from the one the bankrupt is now seeking to create (as he claimed under cross-examination) that his business suffered a “gradual” not sudden decline.

40 Finally, I found it very difficult to reconcile the bankrupt’s lack of apparent recall for why he purchased the Boyce Road and Anzac Parade properties, his confused recall regarding the obtaining of advice regarding them and the tax treatment of the properties. At the time, the bankrupt had only those two investment properties, he is a sophisticated business man. He has repeatedly structured his affairs in the most tax beneficial way he can for himself. The evidence regarding this finding and related findings are dealt with more fulsomely below.

#### Conclusions as to the bankrupt’s credit and findings

41 Not all of the inconsistencies in the bankrupt’s evidence have been reproduced above. I accept that in part, the inconsistencies may be explained by the passage of time since the relevant events and the fact that during the relevant period the bankrupt was no doubt under significant stress and distress given the demise of his business, the failure of the Scheme and the mounting debt associated with it. What they reveal is at the very least his evidence is unreliable in the absence of corroborative documentary evidence or where it was against his interest.

42 However, I am of the view, that by reason of these findings, and for the reasons dealt with more fully below at [136], that the bankrupt did sell the Boyce Road and Anzac Parade properties or at least used $197,773.86 from those sales in the purchase of the North Balgowlah property so as to secure those monies from creditors.

43 Ultimately, however, I have approached the evidence, largely in a manner consistent with that urged upon me by the trustee, on the following bases:

(a) the bankrupt’s and the respondent’s evidence largely concerned dealings and conversations, between eight and 17 years before deposing to their evidence, principally based on the fallibility of their own memory rather than contemporary records;

(b) the Court should place primary emphasis on the objective factual surrounding material and the inherent probabilities, together with the documentation tendered in evidence, rather than the asserted recollections of witnesses; and

(c) the trustee, necessarily by not having involvement in any of the underlying dealings giving rise to the proceedings, is not able to adduce direct evidence of those matters and the Court must take that into account when the respondent seeks to make something of the fact that the trustee has not been able to adduce direct evidence of those matters.

## Consideration

44 It is necessary to consider the evidence in some detail to resolve the questions at issue.

45 For the reasons which follow, it is my view that the Boyce Road and the Anzac Parade properties were beneficially owned in accordance with their legal title.

46 The agreed facts reveal a number of pertinent matters leading up to the purchase of the Boyce Road and Anzac Parade properties. *First*,the bankrupt and the respondent, from 1999, paid their earnings into and expenses out of joint bank accounts. *Secondly*, from the time that they were married until 2015, the bankrupt was the primary income earner and the respondent the primary carer of their children and working part-time. *Thirdly*,over the years they acquired several properties, some jointly and some separately. For example, their first property bought together in 1999, the Fairlight property, was purchased in both their names and then three years later, in 2002 the Seaforth property was purchased solely in the name of the respondent.

47 The respondent and the bankrupt both gave evidence to the effect that this change in position regarding ownership reflected the fact that the purchase monies for the Fairlight property were obtained from Ms Dew, in the sum of $200,000 (which the respondent stated was a loan to her only), as well as a loan from Collins Securities. The bankrupt gave evidence of an undated conversation he had with his solicitor requesting that “he draw up a loan agreement or document to protect” Ms Dew’s loan and annexed to his affidavit an unexecuted mortgage document which he “believe[d]” reflected the loan agreement.

48 In 1999, the respondent was then 24 years’ old and the bankrupt 44 years’ old. The bankrupt had previously been married with two daughters to that marriage.

49 The respondent gave evidence that she had expressed an intention in 1999, that the Fairlight property “[had] to be [her] house, as it will be bought with money from [her] mum” and had been “worried about any claim [the bankrupt’s] children might make if [he] own[ed] it, particularly if [he] die[s]”. The bankrupt deposed to there being various conversations between them in about 1999 and thereafter regarding the purchase and the respondent being concerned to secure her interest in the property so as to avoid any testamentary claim by the respondent’s daughters from his former marriage. It was their unchallenged evidence that she was unable to secure a loan by herself, as at that stage the respondent had only been working for a year and as a consequence the title was required to be in both their names.

50 According to the respondent, her and the bankrupt then decided to purchase a bigger home to live in and bought the Seaforth property and then sold the Fairlight property. When the Fairlight property was sold, the respondent gave evidence that the bank took most of the money from the sale and her mother’s loan was not repaid which she knew of at the time “and felt bad about it”.

51 When the Seaforth property was purchased, it was in both the respondent’s and the bankrupt’s names. It was their respective unchallenged evidencethat when the respondent initially saw the purchase contract it was in both their names and the respondent demanded a change. At some point, thereafter, at the respondent’s instigation, there was a change “in the name of the purchaser” to be solely hers. No evidence was adduced by either party of the contracts of sale, transfer documents nor loan documentation save for correspondence from L.G. Parker & Co solicitors in February 2002 to both the respondent and the bankrupt and in March 2002 to the respondent confirming settlement.

52 What this evidence reveals is that the respondent was intimately involved in the decisions regarding property ownership from the inception of their relationship and in particular concerning decisions regarding who would be placed on the title and what the effect of that would be, i.e., the respondent’s evidence was to the effect that with respect to the Fairlight and the Seaforth properties that she wanted them in her name for two reasons: (a) to reflect the contribution made by her mother; and (b) to preserve them from any claim made by the bankrupt’s children from his first marriage.

### The purchase of the Boyce Road and the Anzac Parade properties

53 By contrast, three years after the purchase of the Seaforth property, in 2005 the Boyce Road property was purchased with the bankrupt as sole legal owner and then in 2008 the Anzac Parade property was acquired with the bankrupt as 99% legal owner and the respondent as 1% legal owner. Relevantly, in the intervening period, between the purchases of these two properties, in July 2007, the bankrupt borrowed funds in the amount of $75,875, through ABL Nominees Pty Ltd, to invest in the Scheme. This uncontested sequence reveals that over the period from 2005 to 2008 the bankrupt was investing in a number of different ventures for which he held solely or substantially the title.

54 The purchase of these two properties is relevant to the ultimate dispute between the parties because part of the sale proceeds of these properties is, on the trustee’s case, said to form the contribution to the purchase of the North Balgowlah property. Therefore, the determination of the beneficial ownership of the Boyce Road and Anzac Parade properties is relevant to the trustee’s resulting trust claim against the North Balgowlah property, the trustee’s s 139DA claim as it is said to comprise the “direct or indirect” source of the financial contribution, and his ss 120 and 121 claims.

55 The contemporaneous documentary evidence relating to the purchase of both properties revealed that the bankrupt was represented by solicitors on both occasions, who it may be inferred acted upon his instructions and from which it can be inferred that to the extent his interest is reflected in the title of both properties, it reflected intentional thought and consideration. This is consistent with what the bankrupt said during the examination regarding how the title of the properties was determined, and that the bankrupt “would have” had advice from lawyers and accountants about determining the title of the properties (as outlined above at [34]).

56 The bankrupt was the sole mortgagor for the Boyce Road property. Whereas both the bankrupt and the respondent were mortgagors for the Anzac Parade property. Not much can be made of this as there was no contemporaneous mortgage documentation in evidence save for a letter from the bankrupt’s solicitor, dated 11 August 2005, to the solicitor for the vendor regarding the difficulties the bankrupt had had regarding obtaining finance and related delay. The bankrupt stated in the examination, in answer to questions regarding the mortgages of both properties, that “they were pretty much self-sufficient”.

57 Relevant to one’s consideration of what may be drawn from this documentary evidence is what may be drawn from past documentary evidence – as is evident from the purchase of the Fairlight and Seaforth properties, over time the bankrupt and respondent made conscious decisions putting the properties in their sole or joint names.

#### Tax treatment

58 Evidence of the tax treatment of the properties was limited and in my view does not support the conclusion for which the respondent contends, namely that the legal title of both properties should be disregarded and that both properties should be viewed as beneficially owned by both the respondent and bankrupt equally.

59 There is no evidence of the properties’ tax treatment at the time of acquisition. The only tax returns regarding the properties in evidence were for the financial years ending 30 June 2010 – 2017. Therefore, there were no returns until five years after the purchase of the Boyce Road property and two years after the purchase of the Anzac Parade property. Those tax returns revealed a 50/50 split in the rental income/loss for both properties. The bankrupt also provided a calculation from his accountant regarding the capital gain for the Boyce Road property (purportedly split as between the respondent and the bankrupt).

60 Ultimately, I am of the view that little can be gained from the evidence regarding the tax treatment of the properties for the following reasons. *First*,the respondent and the bankrupt gave scant (and partly inconsistent) evidence as to their treatment at all. *Secondly*, there were no contemporaneous tax return records in evidence. *Thirdly*, there was contemporaneous documentary evidence that in 2005 and later in 2008 that legal title remained predominantly in the bankrupt’s name. *Fourthly*, as late as 2013, when applying to refinance their existing mortgage on the Seaforth property, the bankrupt and the respondent, when relying on both properties as security for the loan, describe them as being owned in a manner consistent with their legal title.

61 There was affidavit and oral evidence, including cross-examination on this issue.

62 The respondent gave affidavit evidence regarding her and the bankrupt’s intention with respect to the Boyce Road and Anzac Parade properties to the effect that it was intended that they were to be held jointly by them. As will be revealed, this evidence was very scant in detail and comprised largely recall without supporting contemporaneous documentary evidence. This evidence must be assessed within the context of the objective facts revealed by the documentary evidence.

63 In the respondent’s affidavit, the respondent gave evidence of an undated conversation between herself and the bankrupt that the impetus of the “investment” activity was her idea to save money for the education of their own children (where by 2004 the respondent had had the first of their three children). By contrast, the bankrupt’s evidence was that it was his “financial advisor” who had suggested “[*he*] buy an investment property” (emphasis added). However, the bankrupt changed his evidence regarding the same under cross-examination.

64 The respondent gave evidence of a conversation in 2005 where the bankrupt told her that he had found a property but that the “first one” would need to be in his name so he could “negatively gear it”.

65 The respondent then deposed to the following, in three short paragraphs, regarding the processes associated with the purchase of both properties:

29. I recall signing new mortgage documents for both Sydney Road and unit 305 Anzac Parade. The builder provided two different specifications for colours carpet and other items. I reviewed these and made the selections to complete the building.

30. In 2006 I gave birth to our second child.

31. In about April 2008 James and I inspected unit 505 in Boyce Parade, Maroubra. We purchased it. I was registered as a 1% owner. I recall James told me “The bank requires your name on title.” After it was acquired I again I [sic] spent some of my time selecting the internal finishes that the builder made available and I arranged for the inclusion of an internal wall that converted the study nook into a small bedroom. We were using Infinity Properties to manage the unit and they arranged the tradesmen to complete the internal wall.

66 Under cross-examination, the respondent maintained that the legal title of both properties reflected professional advice for negative gearing purposes, the bankrupt’s income was higher and his income funded the mortgage.

67 The bankrupt deposed to the following regarding the purchase of the two properties, though there was cross-examination regarding paragraph [34] (dealt with below):

34. In about 2004 or 2005 I recall that Mellissa and I had a discussion in words to the effect:

*“My financial advisor has suggested that I buy an investment property. To do that there will be a need to use the equity from Sydney Road.”*

Mellissa said words to the effect:

*“Yes. We can own them together. It will be good to have investment property* [sic] *together.”*

35. We looked at buying two units in Maroubra off the plan. We saw a display unit together. Mellissa chose the colours and floor coverings. The two units were in the same complex but had different street addresses. They were purchased a couple of years apart because one took longer to build than the other.

36. The first unit purchased was apartment 305 in Anzac Pde Maroubra. This was in 2005. I cannot now recall exactly why my name only was on the contract. Annexed hereto from page 11-12 of the Exhibit and marked JEM 1 is a true copy of the settlement sheet noting the payout of the then mortgage over Seaforth so that it could be used as security for the purchase of the Anzac Parade property in my sole name.

37. …I recall seeking my accountant’s advice for the best taxation benefits available from the investment properties.

38. A second investment property was acquired by Mellissa and I at Boyce Road Maroubra in about 2008. Annexed at page 13-16 of the Exhibit marked JEM1 is a true copy of my solicitors settlement letter and settlement sheet.

(Emphasis in original.)

68 Despite the bankrupt deposing to having a conversation with his wife in which he stated that his “financial advisor” had suggested that he “buy” an investment property, the bankrupt changed his evidence under cross-examination claiming that he had not had a financial advisor, he remembered only having a “broker” and a “general conversation”. This was in stark contrast with what the bankrupt had said in the examination previously, where he had stated:

MR MULLETTE: And Boyce Road was purchased in your sole name, wasn’t it?

WITNESS: Yes, I believe so.

MR MULLETTE: And was there a particular reason for that?

WITNESS: I don’t remember, but there must have been, otherwise we wouldn’t have done it. So it would have been advice from the lawyers or from – from the accountants.

MR MULLETTE: Right. Without asking you to tell us what that advice was, do you have a specific recollection of receiving advice from any lawyer or accountant?

WITNESS: No. I don’t have a specific recollection of any meeting or none of that.

MR MULLETTE: Okay. And would it have been the case that Mellissa might not have been working at that stage in March 2005?

WITNESS: Don’t remember.

MR MULLETTE: Don’t remember? Okay. And the payment of the mortgage on Boyce Road, do you remember where those funds came from other than the rent?

WITNESS: Just the rent.

MR MULLETTE: Just the rent?

WITNESS: As far as I know.

MR MULLETTE: If there was a shortfall, because it probably was negatively geared for at least a while, wasn’t it?

WITNESS: I don’t remember.

69 In addition, as can be seen from the above exchange, the bankrupt also changed his evidence in his affidavit from that in the examination. In the examination he claimed to have “no specific recollection of any meeting” with any lawyer or accountant and had no memory of the reason for why the Boyce Road property was purchased in his name, but then in his affidavit, he claimed that he “recall[ed] seeking [his] accountant’s advice for the best taxation benefits available from the investment properties”. To then state under cross-examination repeatedly that he had no memory of whether he “negatively geared” the Boyce Road property, and to say he “didn’t believe” that he had received advice that he should negatively gear it seems unlikely. It is not as though the bankrupt had an extensive, complex property or investment portfolio. These were the only two “investment properties” he had at that time. The bankrupt was a company director, who managed a staff of 22 employees. He could not be said to be unsophisticated.

70 Both the respondent and the bankrupt deposed in their evidence to conversations in which they discussed the purchase of “investment properties” and that they would “own them together”. However, it is clear that regardless of whether these conversations occurred, what happened subsequently, displaces that intention: The properties were purchased either entirely or predominantly in the bankrupt’s name. I do not accept that despite this, it remained their “intention” that they be held jointly.

71 *First*, the respondent gave clear evidence that the reason for the change was so that the bankrupt could obtain a negative gearing benefit. I accept that this is what happened. I do not accept the bankrupt’s evidence that the properties were not purchased in his name for “negative gearing” purposes. If negative gearing was the “intention” then it is clear that the respondent and the bankrupt intended that he own the property to obtain a tax minimisation benefit. *Secondly*,I do not accept that the true intention was that it be held “50/50”. It is not consistent at all with the respondent’s conduct with respect to other properties. If she had had that intention, she would have required that she be on the title (in a manner reflecting her intention) as she required with other properties. The bankrupt conceded that if the Boyce Road property had intended to be held equally, the title could have been in both their names equally. The respondent tendered no contemporaneous documentary evidence to support her position. *Thirdly*,with respect to the purported conversation that arose in the bankrupt’s affidavit (at [34]) his evidence was entirely unreliable. The bankrupt conceded that this evidence was incorrect in other material respects as set out at [34]–[35] and [67]–[69] above, and as such I have significant doubts about its accuracy. *Fourthly*,the bankrupt claimed, under cross-examination, that he intended the investment to be “for his kids”. This does not align with the investment being for them to hold together jointly and even if it did, by reason of my view as to his credibility, I do not accept it was the reason.

72 Ultimately, I am not persuaded by the respondent’s nor the bankrupt’s evidence in the face of the documentary evidence and a consideration of their past and future conduct: The evidence revealed that the bankrupt and the respondent made deliberate, conscious decisions, where they were represented by solicitors on each occasion with respect to acquisitions and their title. Each of them were involved in the process and the respondent had been vocal in the past (regarding the Fairlight and Seaforth properties) to ensure (if possible) that certain properties were in her name. In the context of the first of these transactions, the bankrupt had received advice from someone that it would be wise for him to purchase an investment property that he would own solely, on account of the negative gearing benefits. It was uncontroversial that the bankrupt’s income was significantly higher than the respondent’s at the time, which is consistent with the same. Both the Anzac Parade and Boyce Road properties were acquired in a manner consistent with that intention.

73 I hold the same view with respect to the acquisition of the Anzac Parade property for the same reasons, noting additionally: *First*, the apparent agreement between the bankrupt and the respondent that the respondent would only take a 1% interest so as to retain the maximum negative gearing benefit while satisfying the lender’s requirement. *Secondly*,this course was consistent with that involving both the Boyce Road property purchase and the bankrupt’s sole participation in the Scheme. *Thirdly*, all three investments were undertaken with tax minimisation partly in mind. *Fourthly*,the respondent’s evidence was largely consistent with that of the trustee’s case, whereby the respondent’s scant evidence revealed that it was necessary for her to be on the Anzac Parade property’s title due to a requirement of “the bank” (extracted at [65] above); the respondent agreed that she knew she would only take a 1% interest in the property and it was based on professional advice, agreed it was her understanding that the reason for the title being put in this way was because it would maximise the negative gearing benefits for the benefit of the bankrupt and where the respondent agreed that if she and the bankrupt had intended to be 50/50 owners instead of 99/1 owners, they could have easily registered the property’s title on that basis instead.

74 Accordingly, for these reasons, it is my view that the Boyce Road and the Anzac Parade properties were beneficially owned in accordance with their legal title.

### The sale of the Anzac Parade and Boyce Road properties

75 As set out at [13] above, the agreed facts revealed that:

(a) on 11 April 2014, the net proceeds of sale from the sale of the Boyce Road property (totalling $330,211.31) were paid to the Joint Account; and

(b) on 9 September 2014, the bankrupt and the respondent sold the Anzac Parade property realising $110,310.05 of net proceeds, which were paid into the Joint Account.

76 An important issue, on the trustee’s case, was *why* the properties were sold given as at 2014, they were the only substantial assets in the bankrupt’s name.

77 The respondent gave no affidavit evidence as to the circumstances of the sale of the two properties. She was not cross-examined at all about *why* they were sold. The only cross-examination relating to their sale was that the respondent conceded that the proceeds of their sale was deposited into the Joint Account.

78 As referred to above at [37], in the bankrupt’s affidavit evidence, he deposed that the circumstances in which the Boyce Road and Anzac Parade properties were sold were:

* Payment for one of [his] daughter’s wedding
* Payment of the O’Donnell settlement
* Payment of an overseas trip for [Ms Dew]
* Payment of school fees.

79 The respondent and the bankrupt advanced no evidence that any payments of the kinds referred to above were made from the proceeds of the Boyce Road and Anzac Parade properties. Whilst there is a reference to a “Wedding Payment” in the bank statements, the respondent and the bankrupt did not provide further evidence to substantiate that this payment was made from the sale proceeds of the properties.

80 Under cross-examination, the bankrupt disputed that the reasons for their sale were because he was in a hard place financially despite conceding that was what he had said in the examination and that it was the truth. Inconsistently, as referred to above at [36]–[38], the bankrupt had claimed in the examination that they were sold to pay for renovations and to pay his former business partner, Mr O’Donnell. For the reasons which follow, I do not find his explanation for their sale at all satisfactory.

81 With respect to the alleged “renovations”, the bankrupt provided no plausible evidence as what the renovations comprised, when they were to occur, whether the bankrupt did in fact carry them out and what they cost. To the extent that there was any evidence, the bankrupt claimed in his affidavit evidence that renovations were made to the North Balgowlah property in 2016 (two years after the sale of the two assets). The Boyce Road property was sold in April 2014, the contract for the North Balgowlah property was not entered into until August 2014, four months after its sale and where in the examination the bankrupt conceded the renovation would have had to have been for the Seaforth property.

82 In the examination, the bankrupt stated the reason the Boyce Road and Anzac Parade properties were sold in 2014 was because he and the respondent “needed renovation money” and he needed to pay Mr O’Donnell roughly $240,000 (which as will be seen below at [88] was $225,000). The bankrupt said he and the respondent did not intend to sell the investment properties at that time but he was “pushed into a hard place”.The bankrupt stated that even with selling the properties he did not have enough money to pay Mr O’Donnell so he borrowed $100,000 from Ms Dew and in exchange he signed over his shares in Apscore to Ms Dew.The bankrupt could not recall how much the renovation cost but said it was at least more than a $100,000.

83 During cross-examination, the bankrupt confirmed what he had previously said about being “pushed into a hard place”, however, there was no further questioning by the trustee as to the bankrupt’s previous contention that the sale of the Boyce Road and Anzac Parade properties was effected in order to pay Mr O’Donnell and cover renovation costs or that it was for the reasons he deposed to in his affidavit (see above at [37] and [78]).The bankrupt only said later during cross-examination that the proceeds of the properties went to “other things” and did not concede that any of the monies were used to fund the purchase of the North Balgowlah property.

84 Based on this evidence, it is not consistent with the bankrupt’s contention of the purpose of the sale of the Boyce Road and Anzac Parade properties that a large amount of those proceeds went towards the purchase of the North Balgowlah property (rather than as the bankrupt contends, towards renovations).

85 Further, I am not convinced that the sale of the Boyce Road and Anzac Parade properties was for the purpose of repaying Mr O’Donnell pursuant to the O’Donnell settlement.

86 There was very limited contemporaneous evidence as to the terms of settlement and the payments made to Mr O’Donnell. The parties accepted that by way of **Deed** of settlement, the bankrupt settled litigation commenced by Mr O’Donnell against Grand Canyon Technologies Pty Limited (**GCT**), Apscore and the bankrupt.

87 At the time the Deed was drawn up, Mr O’Donnell and the bankrupt were directors and shareholders of GCT. Mr O’Donnell remained a shareholder of Apscore but ceased to be a director in December 2000. The bankrupt was then a shareholder and the sole director of Apscore.

88 The terms of the settlement provided that, by way of the following instalments, GCT was to repay the debt of $225,000 to Mr O’Donnell (for which Apscore guaranteed and indemnified the payments):

(a) $10,000 within 28 days of executing and exchanging counterparts of the Deed;

(b) $50,000 on or before 17 May 2013;

(c) $50,000 on or before 17 May 2014;

(d) $55,000 on or before 17 May 2015;

(e) $60,000 on or before either (whichever was the latest date):

(i) 17 November 2015; or

(ii) The date on which Mr O’Donnell fully released GCT in respect of the prescribed “Security Interest” (created by the GCT Security Deed) and then registered the release on the Personal Properties Securities Register (**PPSR**); or

(iii) The date on which Mr O’Donnell fully released Apscore in respect of the prescribed “Security Interest” (created by the Apscore Security Deed) and then registered the release on the PPSR.

89 The bankrupt agreed that the settlement reflected in the draft settlement deed was the settlement struck, such that he owed (through Apscore and GCT) money to Mr O’Donnell.

90 If one accepts that the ultimate settlement comprised the above terms, the respondent tendered no contemporaneous evidence of any of the payments in fact being made throughout the relevant period. Further, Mr Murray conceded that Apscore had a continuing liability to pay the instalments to Mr O’Donnell as at 30 June 2014.

91 Rather for the reasons which follow, it is my view that the sale of the two properties occurred in 2014 to fund the North Balgowlah property and shield the bankrupt’s assets from creditors. A combination of the following considerations leads to this view: the plight of the class action, the status of the bankrupt’s finances and the events leading up to the purchase of North Balgowlah reveal the same.

### The class action

92 As referred to above at [11], alongside the bankrupt’s investments in property above, the bankrupt became involved in the Scheme, which led to the bankrupt owing the Bendigo Debt. Relevantly, during the period up to the critical property transactions, in addition to the matters referred to at [12] above, after the bankrupt’s default on 20 October 2009, the bankrupt received a Notice of Demand from the Bendigo Bank which stated that he owed $76,664.32 and that the Bank “may issue legal proceedings against [him] without further notice”. Then on 16 November 2009, the bankrupt received a “Credit Listing – Final Warning” from the Bendigo Bank (which at the time of the examination the bankrupt had no recollection of receiving but did not dispute receipt).

93 The parties agreed to the following relevant fact as to the state of the bankrupt’s knowledge: Sometime between October 2013 and July 2014 or before the end of the case, the bankrupt spoke to either his financial planner or advisor about the hearing of the class action, and was told that the hearing “hadn’t gone well”, “wasn’t going well” or that “it didn’t look good”.

94 The bankrupt accepted under cross-examination that regardless of what anyone told him “at any time” that he “always knew there was, at least, a risk that [he] could lose … the class action”, and further:

MR EDNEY: But once you were told, “It doesn’t look good,” whenever the exact date must have been, you would have appreciated that that risk was substantial, can’t put a number on it but substantial?---What was substantial?

Sorry. The risk of losing, the risk that it could be a loss?---Yes.

95 Accordingly, the bankrupt must have known, at least by July 2014, that he was likely to have to repay the Bendigo Debt. This is a significant fact that has bearing on the bankrupt’s state of mind when he purchased the North Balgowlah property in early August, a month later.

### The status of the bankrupt’s business in the 2014 financial year

96 In addition, at this very time when the bankrupt knew of the failed class action, on 30 June 2014, the bankrupt’s business Apscore recorded accumulated losses of $6,243,566.46.

97 During the bankrupt’s cross-examination, it was my impression that he sought to downplay the extent of his business’ stressors and financial problems in 2014. This, in turn, revealed serious questions as to why in the face of a significant loss in the class action and his business failing, he would denude himself of his only assets and purchase a new heavily mortgaged property.

98 The trustee tendered Apscore’s Financial Reports for the 2015 and 2017 financial years. They revealed the following:

(a) a loss of $218,852.90 in 2014 and $126,178.68 in 2015;

(b) a substantial decline in salaries and wages, $432,799.76 in 2014 and $125,258.10 in 2015; and

(c) substantial loans from Apscore to the bankrupt in 2012, 2013 and 2014 to the value of $523,150.57.

99 What was particularly telling was the bankrupt’s description in 2015 in a statutory declaration as to the reasons for his company’s decline and the suddenness and acuteness of it. He declared, on 18 July 2015, the following:

… **Last year** my company’s largest client, a mining services electrical contractor in Perth, suddenly and without notice cancelled a multi-million dollar development contract. As a result we have been haemorrhaging revenue and staff ever since. That company is down to two full time staff from 22 last year…

I have also been caught with a credit card debt slightly in excess of $126,000. I have negotiated pay down arrangements, which includes some debt relief, with 2 of the banks and I am currently in negotiations with the other two banks…

I believe that the Courts have now confirmed that I owe to the Bendigo and Adelaide Bank a considerable amount of money…

I do not want to be forced into bankruptcy but at this stage of my life there is only so much I can afford to do.

(Emphasis added.)

100 The reference to “[l]ast year” was accepted by the bankrupt to be 2014. It is clear from the 2015 Financial Statement that there was a substantial decline in wages and salaries in his business from 2014 to 2015. Further, the bankrupt’s tax returns indicated a decline in his “allowances/ earnings/ tips/ director’s fees” from $60,000 in the 2014 financial year to $37,000 in the 2015 financial year.

101 It is important to understand “when” in 2014 the financial stressors became apparent to the bankrupt. It was put to the bankrupt that the loss of the major client was in late 2013 or before the middle of 2014. The exchange was as follows:

MR EDNEY: Well, having been shown that and doing the best you can to recall, would you accept that the loss of your major customer occurred, probably, actually about late 2013 or before the middle of financial year ’14?---I recall it being gradual, though. I mean, it was just a cutdown [sic]. So eventually, they just stopped doing business with us.

It’s over the course of the 2014 financial year it’s winding down, correct?---Yes, from memory, yes.

And by the end of the 2014 financial year, it is – if not totally, it is at least mostly wound down, correct?---I’m not sure, but yes.

Okay. Not sure, but you definitely don’t have a – you don’t have any recollection that would mean you can say I’m wrong. Does that make sense?---Yes.

Sorry, it makes sense, or you agree with me, or both?---I agree with you, but I don’t have any recollection that would dispute that, no.

102 Regardless, the bankrupt ultimately accepted that over the course of the 2014 financial year his business had “significantly wound down”.

103 At the same time, the bankrupt owed his former business partner Mr O’Donnell $225,000 arising from the negotiated settlement of litigation (see above at [88]).

104 The respondent accepted under cross-examination that she was aware in mid-2014 that the bankrupt’s business had shrunk massively from having 22 employees to two, that the bankrupt had lost a major customer and was under significant financial stress. Her evidence was as follows:

MR EDNEY: You were aware – there is a time – and I put to you that it’s about mid-2014 – where James’ business had – I will say collapse but then I will clarify what I mean. It had shrunk massively. It had gone from being 22 employees to two?---Yes.

You remember that happened? He had lost his major customer; correct?---Yes.

He was – I will put in somewhat usual terms – under significant financial stress; correct?---Yes.

And at the time those things occurred, you have previously given evidence under examination that you recall him being […] incredibly low because of his difficult financial position. If you don’t recall that, tell me, and I can take you to it?---No, I recall.

Okay. But that’s the truth, isn’t it?---Yes.

And that was at about the time that you were buying what I will call the North Balgowlah property, wasn’t it?---Yes. Yes.

So you were aware at this time that he had at least […] sufficient financial difficulties that it was making him incredibly low?---Yes.

You would have appreciated that that meant there was a real risk that creditors could one day be coming knocking for anything in James’ name; correct?---Yes.

And that meant that allowing James’ name to go on the title to the North Balgowlah property put it at risk to claims by those creditors, didn’t it?---Well, it could, yes. I can say that.

And that’s the main reason why you made sure that it was in your name at the end of the day and not both names?---No, that is not the reason.

### The purchase of the North Balgowlah property

105 The undisputed facts, set out above at [14]–[16], reveal that on about 4 August 2014, the bankrupt and the respondent entered into a contract to purchase the North Balgowlah property for $1.8 million, with both of them named on the contract as purchasers. The purchase price, and the other costs of the purchase, were paid by way of:

(a) drawings totalling $197,773.86 from the Joint Account; and

(b) $1.7 million borrowed from the Commonwealth Bank by way of a loan in respect of which both the bankrupt and the respondent were principal borrowers, and

(c) the purchase settled on 28 November 2014, at which time title to the North Balgowlah property was taken solely in the respondent’s name.

#### The mortgage documentation

106 On 5 November 2014, the Commonwealth Bank loan to the bankrupt and the respondent for the purchase of the North Balgowlah property was approved.

107 The Commonwealth Bank **loan application** showed that the bankrupt and the respondent were approved to borrow $1.7 million from the Commonwealth Bank comprising the bulk of the $1.8 million purchase price for the North Balgowlah property.

108 The loan application demonstrates the asset pool of the bankrupt and the respondent around the period between 29 October 2014 (the date recommended by the bank officer) and 5 November 2014 (the date approved by the bank officer). There were only three accounts comprising the bankrupt and the respondent’s savings listed on the loan application: a National Australia Bank (**NAB**) account with a balance of $8,000 (for which no account number was provided) and two Commonwealth Bank accounts – an account ending in #1660 with a balance of $174.18 and the Joint Account with a balance of $116,374.59 (consistent with the bank statement in evidence as at 4 November 2014). This is what the bankrupt and the respondent had represented to the Commonwealth Bank were their accounts at the time leading up to the purchase of the North Balgowlah property.

109 Accordingly, the respondent’s submission that there were numerous accounts for which the trustee needed to consider when analysing the bankrupt’s contributions to the purchase of the North Balgowlah property is not consistent with this contemporaneous documentary evidence. This is particularly so given that the documentation from the 2013 refinance application reflected the same picture (extracted at [122] below).

110 In relation to the the respondent’s equity in the Seaforth property, the loan application demonstrates that around the period between 29 October and 5 November 2014, the bankrupt and the respondent had four existing mortgages over the Seaforth property with the Commonwealth Bank. The Commonwealth Bank valued the Seaforth property as worth $2.25 million and the total balance owing on the mortgages was $1,659,149. The respondent’s equity was therefore $590,851 at that time.

#### How was the purchase of the North Balgowlah property funded?

111 A live dispute between the parties was whose funds were used to purchase the North Balgowlah property.

112 The evidence revealed that, as set out above, that apart from the Commonwealth Bank loan, the sole source of drawings totalling $197,773.86 used for the purchase came from the Joint Account.

113 The trustee tendered the statements of the Joint Account for the period between 22 January 2014and 3 October 2017.

114 The opening balance in the first Statement of Account was $1,156.47 and the closing balance for the last Statement of Account was $286.96.

115 A review of the statements of the Joint Account reveals that the only significant deposits and withdrawals from that account over the period between 22 January 2014and 3 October 2017 were, *first*, the deposits associated with the sale of the Boyce Road and the Anzac Parade properties and *secondly*, the withdrawals for the purchase of the North Balgowlah property. I note there was a transfer of $60,000 from the Joint Account titled “Loan to Apscore” but there was no specific evidence or submission with respect to it from either party.

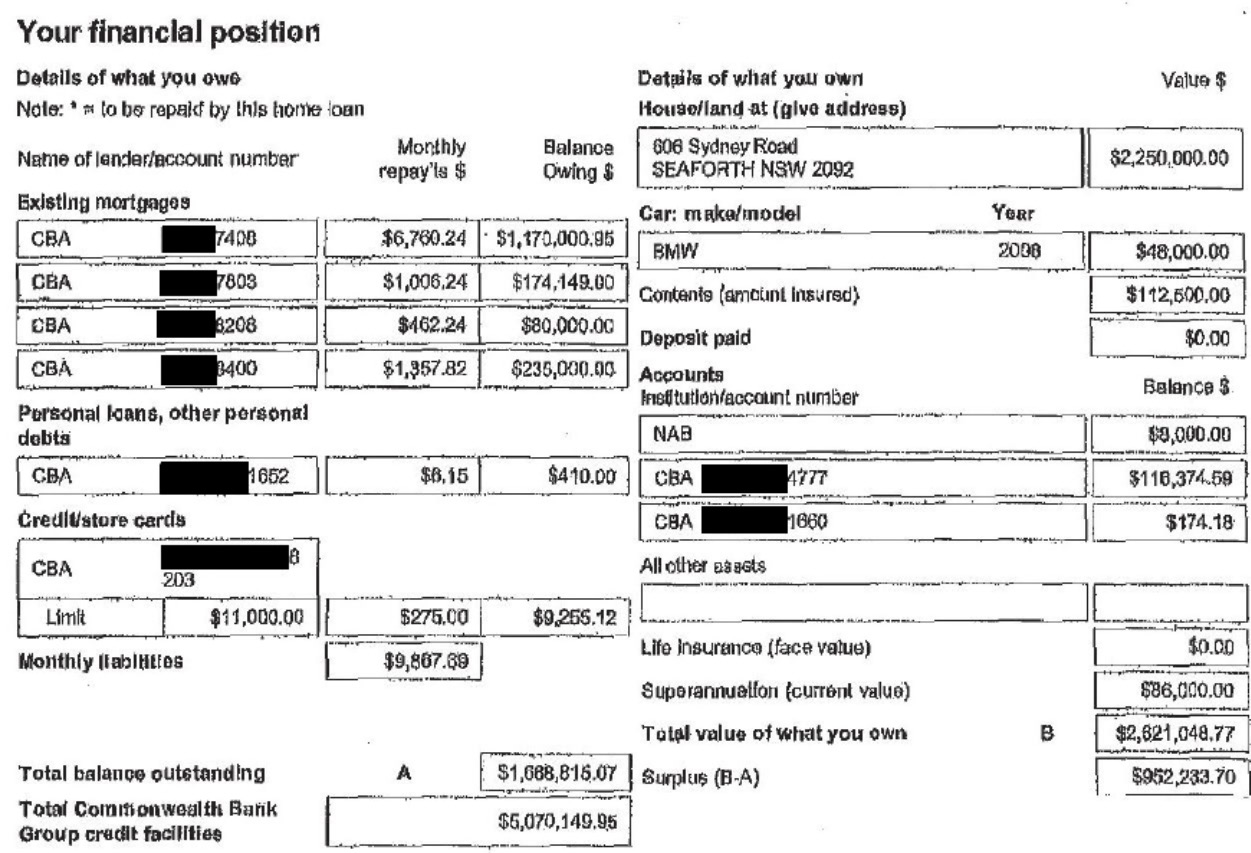
116 It was agreed that on 11 and 14 April 2014, funds from the sale of the Boyce Road property were deposited into the Joint Account in the sum of $330,067.31 (comprising $316,211.31 on 11 April 2014 and $13,856 on 14 April 2014).

117 It was also agreed that on 9 and 11 September 2014, funds from the sale of the Anzac Parade property were deposited into the Joint Account in the sum of $110,310.05 (comprising $63,393.05 on 9 September 2014 and $46,917 on 11 September 2014).

118 The parties agreed that ultimately $197,773.86 was contributed to the purchase of the property, which included legal fees and other expenses.

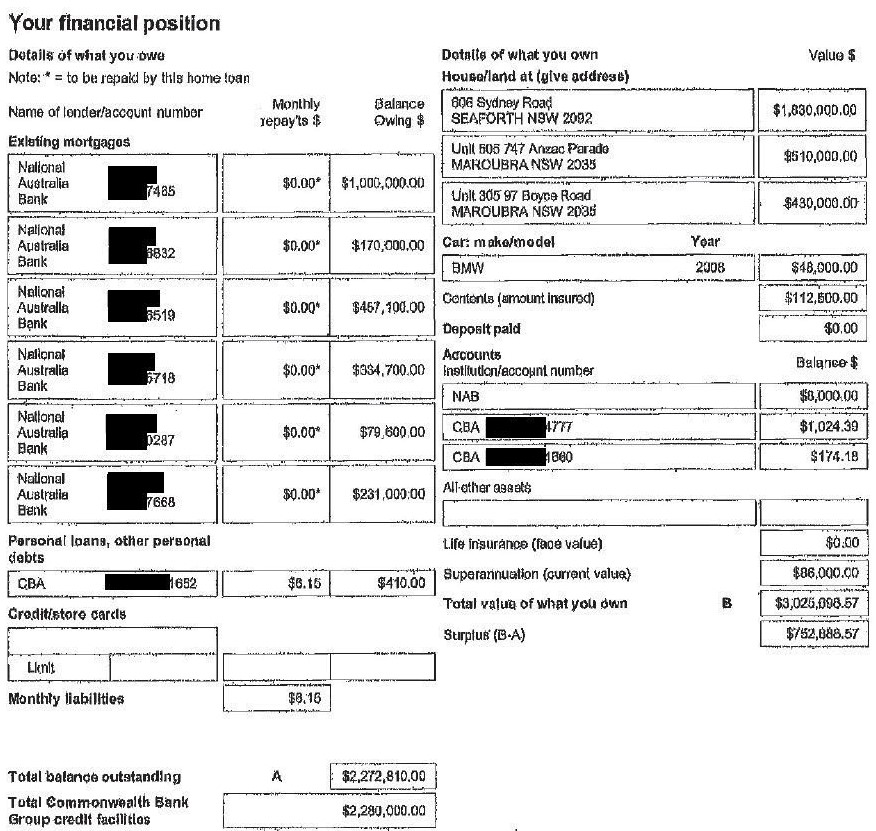
119 The respondent conceded under cross-examination that in the lead up to the sales of the Boyce Road and the Anzac Parade properties, so between 2012 and 2014, the bankrupt’s drawings from his business comprised the majority of the marital income and funded all the mortgages of their properties. The respondent accepted that the proceeds of sale of the Boyce Road and the Anzac Parade properties were paid into the Joint Account. Similarly, the bankrupt conceded, under cross-examination that the primary source of cash flowing into the marriage came from the bankrupt’s business and both their earnings went into the Joint Account.

120 Whilst the respondent and the bankrupt held at least two other savings/transactional accounts (an account with the NAB and a Commonwealth Bank account ending in #1660), it was clear from the 2014 loan application, that to the extent that they held any cash assets they were as contained in the Joint Account. They had represented to the Commonwealth Bank, around late October 2014, as part of their application for the North Balgowlah property that their entire cash assets were $124,548.77, as reflected in this snapshot from the loan application:



121 Accordingly, I find that as at the time of them applying for the 2014 mortgage and the completion of the purchase of the North Balgowlah property the funds came from the Joint Account and there were no other substantial funds available in other accounts.

122 What was telling was if one looked back a year before to the bankrupt’s and the respondent’s “financial position” representations with respect to their 2013 refinance application:



123 It reveals the same, the bankrupt and the respondent had minimal cash reserves (and aside from the Joint Account the balance of the other two saving/transaction accounts was the same): Their combined assets comprised the Boyce Road, Anzac Parade and Seaforth properties.

#### The evidence of the respondent and bankrupt regarding intention

124 The respondent gave the following evidence with respect to the purchase of the North Balgowlah property. The respondent gave evidence of the fact that her mother had moved into the Seaforth property with them in 2012, her mother had lent the respondent and the bankrupt another $200,000 to pay for renovation works on that property; and by 2014 her mother had found it difficult to negotiate the stairs in their house.

125 This is consistent with the respondent’s previous conduct concerning the Fairlight and Seaforth properties, that there was an intention by both the respondent and the bankrupt that the North Balgowlah property would be solely owned by the respondent.

126 The respondent gave evidence that again (as with the Seaforth property), it was she that identified where the contract for the purchase of the North Balgowlah property was incorrectly in both their names and that she told them that she “need[ed]” the property in her name.

127 The respondent referred to the fact that at the time of the sale of the Seaforth property her and the bankrupt had paid her mother $100,000 “which [she] believed reflected the unpaid interest on the original and second loan”.

128 Both the respondent and the bankrupt gave evidence of discussions which prompted the bankrupt to take steps to amend the contract. The bankrupt deposed as follows:

Lindsay Parker acted on the purchase of North Balgowlah. I recall the contract for the purchase had Mellissa and me as the purchasers. I discussed this with Melissa in words to the following effect:

She said: “*This house must be in my name. If something happens to you I do not want to have your daughters claiming against it I don’t trust them.*”

I said “*Of course. Your mum will have her granny flat safe from any of that if it is in your name. She has put so much money in.*”

She said: “*Exactly.*”

(Emphasis in original.)

129 The respondent gave unchallenged evidence of a discussion at the same time as follows:

The contract for the purchase of Serpentine Cresent [sic] had both James’ name and my Name [sic] as the purchaser. James and I spoke about this in words to the following effect:

“*James, we have done this again, I need the property in my name.*”

James replied in words to the effect:

“*Yes, you are right, we must have missed it, we must change it.*”

Later James told me: “*I sent an email to Lindsay Parker instructing him to change the contract into your name.*”

(Emphasis in original.)

130 The bankrupt then sent an email to his solicitor, copied to the respondent, on 3 September 2014, stating the following:

…it appears that there has been a mistake made by me in the agreement to purchase the [North Balgowlah property]. It was always intended that the house would be in the name of [the respondent] alone not mine as well. Please affect the necessary documentation to have this matter fixed.

131 This email was sent almost three months before the sale completed on 28 November 2014.

132 Both the respondent and the bankrupt gave evidence that the preparation of the contract in both names and their signing of it was an oversight and a mistake respectively.

133 Six days after the bankrupt’s email to his solicitor, on 9 September 2014, settlement for the sale of the Anzac Parade property occurred. Proceeds of sale and deposit and the balance of the deposit, totalling $110,310.05, were paid into the Joint Account.

#### The beneficial ownership of the North Balgowlah property: Was it a mistake?

134 I accept that it was a mistake and that the bankrupt and the respondent intended that the North Balgowlah property be in the respondent’s name only.

135 I accept the respondent’s evidence, identified above, as to her intention regarding ownership of the North Balgowlah property and that she mistakenly signed the contract in both names. I accept her evidence on the basis that her conduct was consistent with her past conduct regarding the purchase of the Fairlight and Seaforth properties. The respondent had maintained a course of conduct where she had agitated for or obtained legal and beneficial title over the matrimonial home. The respondent maintained under cross-examination that it was a mistake and I accept her evidence. I accept also her evidence as to the reasons for why she intended the property to be in her name.

136 I also find that it was the bankrupt’s primary intention to place the North Balgowlah property in the respondent’s name and that it was mistake when the contract was entered into in both names. However, I am of the view that the bankrupt’s motivations for his wife holding legal title were different to those of the respondent and were to prevent the purchase monies and those monies paid towards the Seaforth Mortgages from becoming divisible to creditors.

137 For almost 10 years until 2014, the bankrupt had owned outright or substantially two properties in his own name. The bankrupt over that period had solely paid the mortgages on the Anzac Parade and Boyce Road properties. The bankrupt had been the sole contributor on the mortgages to the then marital home, the Seaforth property. As a consequence, up until the purchase of the North Balgowlah property the bankrupt had held two substantial assets in his name and had contributed solely to their growth. In the 2013 refinance application, as extracted at [122] above, the bankrupt had represented the Boyce Road and Anzac Parade properties’ combined worth to be $940,000 and the Seaforth property being worth $1,830,000. Accordingly, the bankrupt substantially owned assets (without accounting for the mortgages in all properties) in his own name, of not insignificant value when compared to the value of the Seaforth property. As at 30 June 2014 the bankrupt’s business was in financial peril and he was aware of the substantial debt he owed arising from the failed class action. Both the bankrupt and the respondent were aware of the significant financial strain the bankrupt was under. The respondent described the bankrupt at this point as being “incredibly low”. There was no change in circumstances between 4 August and 3 September 2014 to otherwise bring about the change. It reveals the “mistake”.

138 Furthermore, it was a “mistake’ in my view because the bankrupt intended that the relevant transfers were made by the bankrupt (including being put towards the purchase of the North Balgowlah, being intended to be in the respondent’s name) to defeat his creditors. This inference can be drawn from all of the evidence above but also because the only contribution made to the purchase of the North Balgowlah property was by the bankrupt as a result of the sale of the two properties that were in his name or substantially in his name and for which he had solely contributed towards. This fact contrasts with the circumstances in which the previous matrimonial homes were purchased. There was no evidence that the bankrupt had made any direct contribution at the time of purchase of a like kind previously.

139 There was also something very unusual about the conduct of the bankrupt and the respondent at this time – where despite them not having sold their current home, they would embark on a very risky exercise of purchasing another significant asset (with a mortgage of $1.7 million, almost 95% of the value of the property) at a time when the bankrupt’s business was in decline, he was under significant financial stress and he was aware of demands being made on the Bendigo Debt from the Bendigo Bank.

140 I do not accept the bankrupt’s denials as to him being motivated to shield the proceeds of these substantial assets from creditors. I found the bankrupt to be an unimpressive witness for the reasons identified above.

### The contributions made by the bankrupt to the Seaforth Mortgages in 2014

141 The trustee relies on the following purported amounts paid from the Joint Account to the Seaforth Mortgages between 11 April and 28 November 2014 as forming part of the bases for his voidable transaction claims (as extracted from [24(b)(ii)] of his statement of claim):

|  |  |  |  |
| --- | --- | --- | --- |
| **Amounts Paid from Joint Account to Seaforth Mortgage**  **11 April 2014 to 28 November 2014** | | | |
| **Date** | **Loan Account** | **Amount** | **Total** |
| 28 April 2014 | 769837408 | 4,869.72 |  |
|  | 769837803 | 1,070.25 |  |
|  | 769838400 | 977.99 |  |
|  | 769837208 [sic] | 332.93 | 7,250.89 |
| 27 May 2014 | 769837408 | 4,712.06 |  |
|  | 769837400 | 946.44 |  |
|  | 769837803 | 701.37 |  |
|  | 769837208 | 322.19 | 6,682.06 |
| 27 June 2014 | 769837408 | 4,869.13 |  |
|  | 769838400 | 977.99 |  |
|  | 769837803 | 724.75 |  |
|  | 769837208 | 332.93 | 6,904.8 |
| 28 July 2014 | 769837408 | 4,712.06 |  |
|  | 769838400 | 946.44 |  |
|  | 769837803 | 701.37 |  |
|  | 769837208 | 322.19 | 6,682.06 |
| 27 August 2014 | 769837408 | 4,869.13 |  |
|  | 769838400 | 977.99 |  |
|  | 769837803 | 724.75 |  |
|  | 769837208 | 332.93 | 6,904.8 |
| 29 September 2014 | 769837408 | 4,869.13 |  |
|  | 769838400 | 977.99 |  |
|  | 769837803 | 724.75 |  |
|  | 769837208 | 332.93 | 6,904.8 |
| 27 October 2014 | 769837408 | 4,712.06 |  |
|  | 769838400 | 946.44 |  |
|  | 769837803 | 701.37 |  |
|  | 769837208 | 322.19 | 6,682.06 |
| 27 November 2014 | 769837408 | 4,869.13 |  |
|  | 769838400 | 977.99 |  |
|  | 769837803 | 724.75 |  |
|  | 769837208 | 332.93 | 6,904.8 |
| **Total** |  | **$54,916.27** | **$54,916.27** |

(Emphasis in original.)

142 The trustee asserts, and the respondent did not dispute, for the purposes of each of his claims, that the amounts comprise, in fact, contributions made by the bankrupt to the Seaforth Mortgages.

143 The evidence revealed that the claimed amounts were in fact drawn from the Joint Account to the Seaforth Mortgages.

144 The respondent and the bankrupt admitted the following, that until 2015: (a) the income from the bankrupt’s business was the primary source of the marital income; (b) the bankrupt admitted that whilst the Seaforth property was in the respondent’s name, the mortgage was paid out of the Joint Account and his income comprised the primary source of funds for paying that mortgage; (c) the respondent admitted that the Seaforth Mortgages were primarily serviced by the bankrupt’s income.

145 For these reasons, I find that the pleaded contributions made from the Joint Account to the Seaforth Mortgage in 2014 were contributions made by the bankrupt.

### The s 139DA claim

#### The operation of s 139DA of the Bankruptcy Act

146 Division 4A concerns orders which may be made with respect to property of an entity controlled by a bankrupt or from which the bankrupt derived a benefit. A trustee may, at any time within six years after the date of the bankruptcy, apply to the Court for an order under this division “in relation to any entity”: s 139A. However, despite the application being “in relation to an entity”, the Division contemplates orders being made with respect to the property of an entity other than a natural person (s 139D) as well as a natural person (s 139DA).

147 Section 139DA provides:

If, on an application under section 139A for an order in relation to a respondent entity that is a natural person, the Court is satisfied that:

(a) during the examinable period, the entity acquired an estate in particular property as a direct or indirect result of financial contributions made by the bankrupt during that period; and

(b) the bankrupt used, or derived (whether directly or indirectly), a benefit from, the property at a time or times during the examinable period; and

(c) the entity still has the estate in the property;

the Court may make an order of a kind referred to in subsections 139D(2) and (3), whether or not the bankrupt has ever had an estate in the property.

148 Subsections 139D(2) and (3) provide as follows:

(2) The Court may, by order, vest in the applicant:

(a) the entity’s estate in the whole, or in a specified part, of the property; or

(b) a specified estate in the whole, or in a specified part, of the property, being an estate that could, by virtue of the entity’s estate in the property, be so vested by or on behalf of the entity.

(3) The Court may make an order directing:

(a) the execution of an instrument;

(b) the production of documents of title; or

(c) the doing of any other act or thing;

in order to give effect to an order under this section made on the application.

149 The examinable period, referred to at s 139DA(a) (extracted above at [147]) is defined under s 139CA as:

**139CA Definition of examinable period**

(1) For the purposes of this Division, the examinable period is:

(a) in the case of an application for an order in relation to a related entity of the bankrupt—the period beginning:

(i) if, at a time or times during the period of 1 year beginning 5 years before the commencement of the bankruptcy, the bankrupt became insolvent—at that time, or at the first of those times, as the case may be; or

(ii) in any other case—4 years before the commencement of the bankruptcy;

and ending on the day on which the application is made; or

(b) in any other case—the period beginning:

(i) if, at a time or times during the period of 3 years beginning 5 years before the commencement of the bankruptcy, the bankrupt became insolvent—at that time, or at the first of those times, as the case may be; or

(ii) in any other case—2 years before the commencement of the bankruptcy;

and ending on the day on which the application is made.

(2) For the purposes of subparagraphs (1)(a)(i) and (b)(i), a rebuttable presumption arises that a bankrupt became insolvent at a time during the period referred to in the relevant subparagraph if it is established that the bankrupt:

(a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor’s business transactions and financial position; or

(b) having kept such books, accounts and records, has not preserved them.

150 Accordingly, the section will apply where an application is made under s 139A for an order in relation to a respondent entity who is a natural person and the Court is satisfied that:

(a) during the examinable period (defined under s 139CA), the entity acquired an estate in property;

(b) the acquisition was a direct or indirect result of financial contributions made by the bankrupt during that period;

(c) the bankrupt used, or derived (whether directly or indirectly) a benefit from, the property at a time or times during the examinable period; and

(d) the respondent entity still has the estate in the property.

151 The provision requires, as identified in the preceding sub-paragraph (c), that the bankrupt must have during the examinable period “derived” a benefit at a time or times. The benefit may be direct or indirect. Section 139D was amended in 2006 and s 139DA mirrored that amendment when it was introduced at the same time to expand the meaning of “benefit” to be “direct or indirect”: cf ***Birdseye v Sheahan***[2002] FCA 1319; 196 ALR 598 at [60]–[63].

152 In considering whether or not to make an order under s 139D or s 139DA, the Court is required, under s 139F to take account of:

(a) the nature and extent of any estate that any other person or entity has in the property and any hardship that the order might cause that other person or entity; and

(b) the respondent entity’s current net worth and any hardship the order might cause the respondent entity’s creditors.

153 There has been very limited judicial consideration of Div 4A, Pt VI: *Dwyer v Ross* [1992] FCA 20; 34 FCR 463 at 468–469 per Davies J (in the context of an application for interlocutory restraining orders); *Sheahan v Birdeye* [2002] FMCA 41 reversed on appeal in *Birdseye v Sheahan* per Carr J (regarding s 139D); ***Griffin*** *& Khatri v Milne & Anor* [2009] FMCA 680 (regarding s 139DA) and *Jess (Trustee), in the matter of* ***Lostitch*** *(Bankrupt) v Lostitch* [2022] FedCFamC2G 342 (regarding s 139DA and where the “benefit” derived by the bankrupts was their ability to reside at the house: at [101] and [104]).

154 The purpose of Div 4A is to prevent bankrupts from being able to structure their affairs in such a way as to have assets owned by third parties such that they are shielded from creditors but still practically enjoyed by the bankrupt. In that respect, the **Explanatory Memorandum** concerning the Bankruptcy Amendment Bill **1987** (Cth) explained the problem to be solved when Div 4A was first introduced as follows, at [305]:

The proposed Division 4A will permit to be treated as part of the bankrupt estate property, to the acquisition of which by a third party the bankrupt has materially contributed, directly or indirectly, but which is in the hands of a company, partnership, trust, or another person with whom the bankrupt is associated. The proposed Division will address the problem posed by persons who become bankrupt (and who will eventually obtain a release from their debts) whilst enjoying all the trappings of wealth. …

Frequently the bankrupt will have extensive assets at his or her disposal, notwithstanding the fact that he or she is a bankrupt. Commonly, the property will be made available to the bankrupt by a company, a trust, a partnership *or some other person,* which, although having an independent existence in law, *is in fact the alterego* [sic] *of the bankrupt*. The entity acts in effect at the dictation of the bankrupt. The asset position or wealth of the entity has come about because of the physical or mental exertion of the bankrupt. The bankrupt may or may not at any time have owned the property which the entity owns. The bankrupt may or may not have some formal legal relationship with the entity as an employee, a director, a shareholder, a partner, a beneficiary under a trust, or in some other capacity.

(Emphasis added.)

155 The Explanatory Memorandum 1987 identifies the “situations” which the proposed Div 4A was “to be used to attack” as, at [306]–[308]:

…

* an entity has property which has been acquired, either directly or indirectly, by the physical or mental exertion of the bankrupt;
* the entity is an alter ego of the bankrupt;
* the entity makes available, or may at some future time at the instance of the bankrupt make available, property to the bankrupt. Thus whilst the bankrupt may hold little or no property whatever in his or her own name, he or she has contributed to it and has the use or potential use of it as if it were his or her own property.

307. **It has become increasingly common to encounter insolvent individuals who have access to (but not necessarily any legal or equitable interest in) property which is sheltered in a private company or family trust, *or in the name of another person*. Usually such arrangements are established with a view to tax minimisation, or for family, matrimonial or succession reasons. However such arrangements are equally useful in the event of insolvency…**

308. The facility with which income or capital may be disguised as the income or capital of, say, a trust, whilst an individual may still enjoy unfettered use of the income or capital, lends itself to abuse in the event of a bankruptcy. It is not uncommon for an individual to employ the bankruptcy process, not as a shield against his or her importunate creditors, but as a sword to strike them down through the stay on civil action that is available under section 58 and the release from debts that arises upon discharge from bankruptcy pursuant to section 153. At the same time the individual is able to preserve intact assets, which have the guise of being property of a family trust, company or other third party, but the use of which is enjoyed by the bankrupt.

(Emphasis added.)

156 However, the original Div 4A did not include a specific section regarding orders “relating to the property of a natural person” (as contained now in s 139DA). The Bankruptcy Act was amended in 2006 to include this provision: *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* (Cth), Sch 1, item 20. The **Explanatory Memorandum** to the Bankruptcy Legislation Amendment (Anti-Avoidance) Bill **2005** (Cth)*,* described the purpose of extending Div 4A of Pt VI to “natural persons” as follows:

12. Division 4A of Part VI of the Act allows the trustee to obtain property in certain circumstances from an ‘entity’ that, during the ‘examinable period’, was ‘controlled’ by the bankrupt and benefited from his or her personal services. The purpose of the provision is to allow the trustee to recover a bankrupt’s property in the situation where that property is disguised as an asset of a trust, company or the like.

13. The current definition of ‘entity’ in the Act would theoretically allow these provisions to apply to natural persons. However, the provisions could not logically operate in that way. **For example, the provisions could not apply to the situation where the non-bankrupt spouse acquires an estate in property, (or the value of the non-bankrupt spouse’s interest in property increases) as a result of the bankrupt’s financial contributions and the bankrupt uses or derives a benefit from that property.** This is because the bankrupt does not provide ‘personal services’ to, does not ‘control’, and does not receive any remuneration from, the non-bankrupt spouse.

14. The amendments proposed by this Bill will extend these provisions to natural persons. The policy underlying these amendments is that just as a person can hide their own assets in a trust or company, they can do so by placing them with a spouse or other relative or associate.

(Emphasis added.)

#### The claim

157 The trustee contends that the Court should exercise its discretion and make an order pursuant to ss 139A and/or 139DA of the Bankruptcy Act (contained within Div 4A) and order that the respondent transfer to the trustee 50% of the interest in the North Balgowlah property or, alternatively, the respondent transfer the portion of the North Balgowlah property determined by the Court to be held on trust for the trustee.

158 As set out when dealing with the relevant principles concerning the operation of s 139DA above at [150], the trustee must satisfy the following elements:

(a) during the examinable period (under s 139CA), the entity (here the respondent) acquired an estate in property;

(b) the acquisition was a direct or indirect result of financial contributions made by the bankrupt during that period;

(c) the bankrupt used, or derived (whether directly or indirectly) a benefit from, the property at a time or times during the examinable period; and

(d) the entity (here the respondent) still has the estate in the property.

159 The trustee contends that all the requirements of s 139DA of the Bankruptcy Act are met in respect of the North Balgowlah property given that:

(a) the respondent acquired her estate in the North Balgowlah property approximately three years before the commencement of the bankrupt’s bankruptcy (from 25 September 2013), such that it was within the relevant “examinable period”;

(b) the respondent acquired that estate as a result of financial contributions made by the bankrupt during the relevant examinable period, being:

(i) the contribution from the Joint Account to the cash component of the property’s purchase price and associated expenses; and

(ii) the bankrupt’s contribution as a joint borrower on the loan of $1.7 million used to fund the balance of the purchase price;

(c) it is admitted that the bankrupt used or derived a benefit from the North Balgowlah property during the examinable period (it becoming, and remaining to this day, his home); and

(d) the respondent still owns the North Balgowlah property.

160 Accordingly, according to the trustee, the only real question is what (if any) order the Court should make in exercise of its discretion pursuant to s 139DA.

161 The relevant pleaded “contribution” for the purpose of s 139DA(a), comprises:

The monies required for the purchase of the North Balgowlah Property were provided:

(a) By a sum of $90,000 (“**the Deposit**”) paid on 28 July 2014 as a deposit from funds held in a joint account in the name of the Bankrupt and Ms Murray with the Commonwealth Bank of Australia, being account ending in #777 (“**the Joint** **Account**”);

(b) By a further sum of $100,000 (“**the Settlement Sum**”) paid on 28 November 2014 at settlement from the Joint Account;

(c) By legal fees in the sum of $4,473.86 (“**the Legal Fees**”) paid from the Joint Account;

(d) By funds borrowed jointly by the Bankrupt and Ms Murray from the Commonwealth Bank of Australia (“**CBA**”) in the sum of $1,699,850 (“**the CBA** **Loan**”).

(Emphasis in original.)

162 In the agreed chronology, the parties agreed that the total sum comprised $197,773.86.

163 Accordingly, for the purpose of satisfying the elements of s 139DA, putting aside the issue of discretion, the only factual dispute between the parties concerns the second element, namely whether the acquisition of North Balgowlah was a direct or indirect result of financial contributions made by the bankrupt during that period.

#### Whether the respondent acquired the estate as a direct or indirect result of the bankrupt’s contribution

164 The trustee gave evidence that he undertook an analysis of the Joint Account during the period of the above-mentioned property transactions, which is extracted as follows:

56. From my Investigations, the following table summarises the source and application of funds deposited to the Joint Account during the period 11 April 2014 to 28 November 2014:

|  |  |  |  |
| --- | --- | --- | --- |
| **Bankrupt Estate of James Edward Murray**  **Source and Application of Funds in CBA Joint Account**  **11 April 2014 to 28 November 2014** | | | |
| Opening Balance 11 April 2014 |  |  | **$7,900.75** |
| **Deposits** |  |  |  |
| Settlement Proceeds of Boyce Road Property (100% Bankrupt) |  |  | $330,067.31 |
| Settlement Proceeds of Anzac Parade Property |  |  | $110,310.05 |
| - Bankrupt (99%) | $109,206.95 |  |  |
| - Ms Murray (1%) | $1,103.10 |  |  |
| Deposits from Ms Murray |  |  | $19,097.70 |
| Deposits from Apscore International Pty Limited |  |  | $72,000.00 |
| **TOTAL DEPOSITS** |  |  | **$531,474.56** |
|  |  |  |  |
| **Withdrawals** |  |  |  |
| North Balgowlah Property in respect of deposit; settlement proceeds, legals and tiles |  |  | $197,473.86 |
| Mortgage payments in respect of the Seaforth Property |  |  | $54,916.27 |
| Mortgage payments in respect of the Anzac Parade Property |  |  | $9,448.28 |
| Transfers to Apscore |  |  | $81,000 |
| Other expenditure of the Bankrupt and Ms Murray |  |  | **$181,845.26** |
| Balance of Joint Account as at 28 November 2014 |  |  | **$14,827.14** |

57. The total amounts deposited to the Joint Account during the Joint Account [sic] during the period 11 April 2014 to 28 November 2014 were therefore $531,474.56. This included all funds used to purchase the North Balgowlah Property and pay the Seaforth Mortgage during this period, both of which properties were registered in Ms Murray’s sole name. Of this sum:

(a) $511,274.26 (96.2%) came from the Bankrupt, from his income and the sale of his interests in the Boyce Road Property (100%) and Anzac Parade Property (99%);

(b) $20,200.80 (3.8%) came from Ms Murray, in respect of her income ($19,097.70) and 1% interest in the Anzac Parade Property ($1,103.10).

58. From my Investigations and review of the bank statements in respect of the Joint Account, during the period 11 April 2014 to 28 November 2014, other than for an amount of $20,200.80 from Ms Murray’s income, and her share of the funds from the Anzac Parade Property, it was the Bankrupt’s funds that were used to meet the initial costs for the purchase of the North Balgowlah Property, and also to continue to service the mortgage to the Seaforth Property.

165 The trustee submitted that, in short, his analysis revealed that virtually all of the funds in the Joint Account between the deposit of the Boyce Road property proceeds and the last withdrawal for the North Balgowlah property purchase were sourced from the bankrupt, being either:

(a) proceeds of sale of the Boyce Road or Anzac Parade properties; or

(b) borrowings from the bankrupt’s company, Apscore (though in practice these drawings were cancelled out by repayments to that company such that they are of limited real significance).

166 I accept this as an accurate description of the evidence and find as such.

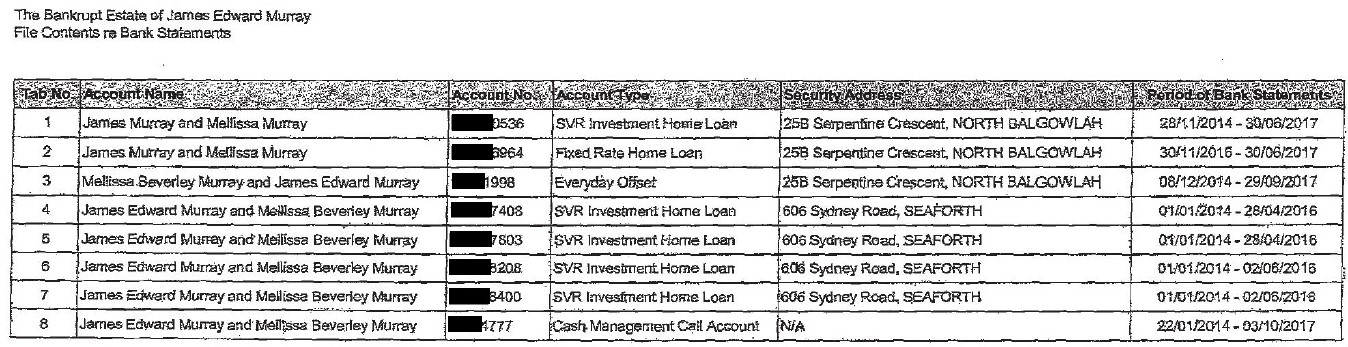
167 In addition, the evidence established, in essence, all or virtually all (depending upon how one accounts for drawings from the Joint Account) of the cash contribution to the North Balgowlah property’s purchase was sourced from the sale of the bankrupt’s properties. Also, a further $54,916.27 was applied in payment of the Seaforth Mortgages (that is, solely so as to benefit the respondent). After those drawings, the Joint Account was essentially exhausted and the bankrupt had been denuded of his assets.

168 With respect to the trustee’s analysis, the respondent submitted that this was “artificial” and does not “present anything like the full picture”. The respondent also criticised the trustee attempting to put on a “running balance style analysis for a marriage”. The respondent relied upon ***Silvia*** *(Trustee)* ***v Williams****, in the matter of Williams (Bankrupt)* [2018] FCA 189, in which there were at least five accounts and money was moving between each of those accounts. In this decision, the respondent submits it was “impossible to work out what had gone on and who was more favourable than the other”. The respondent submits that the same problem arises in this case.

169 The respondent contends that the claim under s 139DA must fail where no financial contribution by the bankrupt has been adequately identified (given it is claimed to have been made from a long standing joint account).

170 The respondent concedes that the cash portion of the purchase price of the North Balgowlah property was $197,773.86 paid from the Joint Account. The respondent does not dispute that the funds in the Joint Account were jointly held, but claims that by reason of the funds coming from that account, the contributions were a payment in equal parts by the bankrupt and the respondent. The balance of the purchase funds was obtained by way of a joint borrowing of $1.7 million from the Commonwealth Bank (see above at [16]). The respondent submits the trustee’s failure to identify the relevant “financial contribution” by the bankrupt for the purpose of s 139DA(a) arises from it selectively focusing on eight months of transactions from one joint account (namely the Joint Account). On the respondent’s submission, the correct approach is for the trustee to adduce evidence of all joint accounts over all periods and identify all deposits and all expenses, and which party deposited funds and which party benefited from any payments from the account. Thus, the respondent submits in order to determine who obtained a greater benefit from the joint accounts, it would be necessary to review the entire history of credits and debits to those accounts as a single transaction, with an ultimate calculation as to who received more benefit.

171 The respondent identified several joint accounts (apart from the Joint Account) that were purportedly ignored by the trustee, despite being in the trustee’s evidence. The trustee conceded in cross-examination that he did not request documents from the NAB, despite knowing that the bankrupt had banked with the NAB and that the NAB funded the purchase of the investment properties and the Seaforth property before the 2013 refinance with the Commonwealth Bank. The accounts to which the respondent refers were those listed on the first page of the annexure to the trustee’s affidavit (extracted below) containing the bundle of bank statements for accounts operated by the bankrupt and the respondent from January 2014 to October 2017. The majority of these accounts were home loan accounts. The only other transactional account is the account ending in #1998 (**#1998 Joint Account**)which was the offset account for the North Balgowlah property, and into which the trustee conceded that the respondent deposited the surplus proceeds from the sale of the Seaforth property in April 2016.



172 For the following reasons, I reject the respondent’s submission.

173 *First*,for the reasons articulated above, I have found that:

(a) to the extent that is necessary, the Boyce Road and Anzac Parade properties were beneficially owned in accordance with their legal title;

(b) the proceeds of both properties were paid into the Joint Account; and

(c) the proceeds of both properties comprised monies which were used to purchase the North Balgowlah property.

174 *Secondly*,when considering the respondent’s claims regarding the absence of proof of contribution by the bankrupt (noting the contribution may be direct or *indirect*), the evidence identified above reveals that the respondent and the bankrupt had very limited cash reserves (see above at [120]–[123]). Until 2015, their marital income was sourced primarily from the bankrupt’s income. To the extent that the respondent’s attack is articulated as a criticism of the trustee not “attempt[ing] to explain why he limited his analysis of [the bankrupt’s and respondent’s] joint accounts to one single account for a period of 8 months where he is aware of at least 8 joint accounts…having been used by [the bankrupt and the respondent] for more than 20 years”, such an attack appears to be a smoke screen. The evidence revealed that the relevant Joint Account was the only account that contained any substantive assets. The loan application and 2013 refinance application revealed the same. The only significant injection of funds into their pool of assets was from the sale of the Boyce Road and Anzac Parade properties. The only significant withdrawal out of that account was for the North Balgowlah property purchase.

175 *Thirdly*,the respondent’s reference to the existence of the other joint accounts is distracting but not compelling. These accounts consisted of home loan accounts and otherwise the #1998 Joint Account which was the offset account for the North Balgowlah property. As I have found above (at [108] and [120]), the respondent and bankrupt represented to the Commonwealth Bank as part of their loan application, in the period between 29 October 2014 and 5 November 2014 that there were only three accounts comprising the bankrupt and the respondent’s savings listed and where the Joint Account comprised the bulk of their savings. This picture was entirely consistent with their financial position from the previous year, as set out in their 2013 refinance application where they had limited cash savings and the bulk of the assets were listed as the Seaforth, Boyce Road and Anzac Parade properties.

176 *Fourthly*,the respondent did not assist me by reference to authorities or the evidence as to why, in the context of the operation of s 139DA, the trustee has the purported obligation to conduct such a burdensome historical exercise in a case like this.

177 Reference was made by the respondent to ***Richardson*** *v The Commercial Banking Company of Sydney Limited* [1952] HCA 8; 85 CLR 110, in which the High Court considered the issue of running accounts in the context of a preference claim under s 95 of the *Bankruptcy Act 1924* (Cth) (now reflected in s 122 of the Bankruptcy Act) and the need to consider all deposits and withdrawals as being part of a single transaction.

178 However, the respondent did not take the Court to any authority that applied the principles in *Richardson* to a case akin to the present case and it was not apparent as to why it was applicable in these circumstances. The context in which the High Court (in both *Richardson* and the like case ***Airservices*** *Australia v Ferrier* [1996] HCA 54; 185 CLR 483) refers to the necessity of reviewing the history of transactions was for the purpose of not limiting the analysis to the immediate effect of individual payments where there is a running account between an insolvent party and a goods and service provider (such as the bank in *Richardson* and the Civil Aviation Authority in *Airservices*): see *Richardson* at 133, *Airservices* at 502, 504–505. I do not accept that the reasoning is applicable in a case of this kind.

179 Further, the respondent submitted that a purported useful analogy comprised how transactions in running accounts are considered under s 588FA(3) (“unfair preferences”) of the ***Corporations Act*** *2001* (Cth). This provision was recently considered by Jagot J in *Bryant v Badenoch Integrated Logging Pty Ltd* [2023] HCA 2, where at [7] her Honour refers to *Airservices* in describing s 588FA(3) as “a statutory embodiment of the “running account principle” which has long been part of insolvency law in Australia”. However, consistent with the above conclusion regarding the respondent’s reliance on *Richardson*,I was not persuaded that this is a useful analogy at all. I accept the submission of the trustee, that if there were such a requirement, any married couple who pooled their resources would be able to avoid a voidable transaction claim and I am of the view that the same would apply to a s 139DA claim. Further, there was not in fact any keeping of accounts. The respondent accepted the same in evidence: There was no evidence of any intention to create a debt and therefore no balancing of accounts in the relevant legal sense.

180 Further, even if I am wrong and such an account was required, I am satisfied, by reason of the findings above that, on the balance of probabilities, that the balance of account was in favour of the bankrupt for the reasons set out at [244]below.

181 This is particularly so given the respondent provided no examples of other transactions to evince the conclusion that the trustee’s picture was inaccurate. Without evidence to the contrary, I do not accept that the trustee has failed to satisfy the requirements of s 139DA(a).

182 There is nothing within the legislation stipulating such a broad ranging historical inquiry being required of the trustee. It would appear antithetical to the purpose of the provision for a respondent (who possesses the knowledge) to be able to sit on his or her hands and provide no evidentiary basis contesting the soundness of the trustee’s account and requiring a trustee to undertake such an onerous historical account. If the respondent had identified for me specific transactions which revealed inadequacy in the trustee’s account that might have given rise to a questioning of the evidence. However, this did not happen.

183 *Fourthly*,to the extent that the respondent points to anything, it is the allegation that the trustee ignored the respondent’s unspecified contributions over time including the sale of the Seaforth property (two years after the purchase of the North Balgowlah property). The respondent sought to rely, without particularity, to *Silvia v Williams* per Wigney J. However, the circumstances of that case are very different from here. It did not involve a claim under s 139DA. The relevant reasoning (noting I was not taken specifically to any part of the reasoning) appeared to arise in the context of a claim under s 120. The case involved the husband and wife using separate bank accounts, not only pooled finances. Here, by contrast, it is clear that there was a clear nexus between the proceeds of the sale of the Boyce Road and Anzac Parade properties and the purchase of the North Balgowlah property, given their size, the proximity in time between the receipt of those monies and the purchase of the North Balgowlah property and the fact that the monies were deposited into and transferred out of the one account.

184 This failure to account for the Seaforth property, the respondent contends, meant there was a failure to acknowledge that prior to the bankrupt’s bankruptcy, the respondent sold a property for which, on the respondent’s contention, she was the undisputed sole beneficial and legal owner, and then deposited all of the proceeds of the sale (minus sale costs) into joint accounts held by the bankrupt and the respondent.

185 I am of the view that what occurred with the sale proceeds of the Seaforth property two years later cannot be taken into account in this case because it occurs a significant time after the acquisition of the North Balgowlah property. The proceeds did not form part of the purchase price. Further, the respondent and the bankrupt led no evidence as to there being any nexus between the purchase of the North Balgowlah property and the sale of the Seaforth property. There was no evidence of any intention, arrangement, promise or agreement that the proceeds of the Seaforth property, two years after the purchase of the North Balgowlah property, were in effect to offset any benefit the respondent had derived from the sale proceeds of the Boyce Road and Anzac Parade properties. There was limited and conflicting evidence from the bankrupt and the respondent as to the reasoning for the lacunae between the purchase of the North Balgowlah property and the sale of the Seaforth property: The bankrupt deposed that the Seaforth property had been difficult to sell while the respondent deposed that the “real estate market had gone off and so [she] waited to maximise the sale price”. In any event, this evidence was insufficient in the face of what occurred at the time of the purchase.

186 Accordingly*,* it is my view that the evidence establishes that the respondent acquired the North Balgowlah property as a direct or indirect result of financial contributions made by the bankrupt.

187 The next question is then whether I should exercise my discretion and make an order under s 139DA. In order to determine whether I should do this, it is necessary to first determine the nature of the discretion.

#### The nature of the discretion

188 Since the inception of Div 4A, and prior to the inclusion of s 139DA, the Division has contained s 139F which requires that the Court “shall” take into account the interests of third parties (that have (a) an “estate” in the property and/or (b) are a creditor of the respondent entity) when considering whether to exercise its discretion.

189 When Div 4A was first proposed, the Explanatory Memorandum 1987 explained its purpose in this way:

Proposed section 139F – Court to take account of interests of other persons

324. Proposed section 139F will ensure that the making of an order under section 139D (expropriating an associated entity of particular property) or under section 139E (diverting to the trustee part or all of the net worth of the associated entity) occurs only where undue hardship is not occasioned thereby to third party interests.

325. Proposed subsection 139F(1) provides that the Court, in considering whether or not to make an order under section 139D (‘Order relating to property of entity’) shall take account of any other proprietorial interests in the subject property and any hardship that may be caused to the holder of such an interest as a result of the making of an order under section 139D (paragraph 139F(1)(a)). The Court shall also consider the net worth of the entity and any hardship that the making of the order might cause to the creditors of the entity. Thus if the result of the expropriation order was to make the entity insolvent (in terms of a deficiency of other assets over genuine liabilities) then the Court may decline to make an order under section 139D and might, instead, make a money order under section 139E the result of which would be to leave the entity solvent.

326. Proposed subsection 139F(2) will apply where the order sought is pursuant to section 139E (‘Order relating to entity’s net worth’). In such an event the Court shall take account of the entity’s current net worth and whether the making of the order (thereby reducing the entity’s net worth) would cause hardship to the entity’s creditors.

190 There has been no amendment to s 139F since its inception, save to ensure its application to applications under ss 139DA and 139EA when those provisions were introduced in 2006.

191 Contrary to the trustee’s urging, the combined effect of ss 139DA and 139F, reveals that the Court has been bestowed a broad discretion to make an order, but where its exercise must be consistent with the object and purpose of the Division and the Bankruptcy Act as a whole including that the Court must (but is not confined to only) take into account:

(a) the nature and extent of any estate that any other person or entity has in the property and any hardship that the order might cause that other person or entity; and

(b) the respondent entity’s current net worth and any hardship the order might cause the respondent entity’s creditors.

192 The trustee submitted that, properly construed, the provisions in Div 4A contemplate that the Court “will” make an order once the criteria of s 139DA of the Bankruptcy Act are met, subject to the interests of third parties or whether it would be unconscionable for the trustee to bring his claim (based on ordinary principles of equity). If the trustee’s submission is correct, the practical question for the Court to determine is *what* order to make, rather than *whether* it should make an order. The trustee says this is so for the following four reasons.

193 *First*, the wording of the Bankruptcy Act itself purportedly supports the trustee’s submission. Aside from the essential criteria in s 139DA, the only other considerations are contained in s 139F. Section 139F, the trustee contends, is focused solely on the potential impact of an order on third parties, not the respondent entity. Neither s 139F, nor any other provision in the Bankruptcy Act, invites a general consideration of the “subjective justice” of making an order, or any other wide-ranging inquiry in the dealings between the bankrupt and the respondent entity. Had the legislature intended for such broad considerations to be a necessary part of making an order, it could and would have said so, rather than expect the Court to proceed unguided. For example, the legislature could have added to the considerations contained within s 139F “such other considerations as the Court sees fit”, or words to that effect.

194 *Secondly*, the interpretation of other anti-avoidance insolvency provisions contained in other pieces of legislation purportedly support the trustee’s construction. The trustee used s 588FF of the Corporations Act as an example. According to the trustee, s 588F provides, similar to s 139DA, that the Court “may” make a number of alternative orders upon being satisfied of preconditions. *Thirdly*, the fact that the exercise of powers under Div 4A is conditioned upon narrow and specific grounds suggests that those grounds must be established for an order to be made. *Fourthly*, the purported legislative purpose of Div 4A is submitted to support the trustee’s construction. On the trustee’s submission, the purpose of Div 4A is to benefit trustees in bankruptcy to resolve what was as a matter of policy seen to be an unsatisfactory state of affairs. Division 4A could not achieve that goal if it were read to include an open-ended discretion without any relevant considerations beyond s 139F.

195 Contrary to the trustee’s submission, a review of the entirety of Div 4A reveals the following regarding the discretion: It is a broad discretion that must be exercised judicially to the extent that it achieves the purpose of the provision. Sections 139DA and 139F do not operate in such a way that once the elements of s 139DA are satisfied the Court “must” make an order of the kind referred to in ss 139D(2) and 139D(3). It is clear from the use of the word “may” in s 139DA that it is intended to confer a discretion. Both ss 139D and 139DA operate in parallel depending on whether the order relates to the property of an entity or a natural person. Under s 139D(2) the Court “may” make orders that the entity’s estate in, or a specified part of, the property vest in the trustee. The Court “may” also make orders directing the execution of an instrument, the production of documents of title or the doing of any other act or thing to give effect to an order under the section: s 139D(3). There is nothing in the words of s 139DA nor within Div 4A to suggest that the word “may” takes on a different meaning other a discretion to make or not make orders of the kind referred to in ss 139D(2) and 139D(3). Indeed, the fact that s 139F(1) commences with the phrase “[i]n considering whether or not to make” an order under s 139D or s 139DA bespeaks this broad discretion, save that in considering whether or not to do so account must be taken of the factors identified in s 139F.

196 To the extent that the trustee relied upon authorities construing the ambit of the discretion under s 588FF, I do not accept that this is an analogous provision and in any eventthere are a number of authorities which take a different view from those relied upon by the trustee, as to whether s 588F(1) confers a discretion, or, rather, a jurisdiction: *Great Investments Ltd and Others v Warner and Others* [2016] FCAFC 85; 243 FCR 516 at [141] (whilst noting that ultimately they did not consider it necessary to decide the issue); *Bryant (in their capacities as joint and several liquidators of Gunns Ltd (in liq) (recs and mgrs apptd) (ACN 009 478 148) v Edenborn Pty Ltd* [2020] FCA 715; 381 ALR 190 at [204]–[207]; *D Pty Ltd (in liq) v Calas* [2016] FCA 1409; 12 BFRA 151 at [68] (noting the authorities cited therein).

197 Further, the respondent appeared to submit, that as part of the Court’s broad discretion (not limited to the matters under s 139F) that the Court could take into account matters relevant to the respondent, including her purported contribution to the North Balgowlah property and the effect of any vesting of the estate on her debt obligations. This in effect was a submission that the Court should take into account any effect of any order on her and the potential hardship *she* may suffer. I do not accept, within the operation of the legislative scheme, that the discretion includes any consideration of the respondent’s interest and/or hardship. Neither party cited any authority for the proposition that the respondent’s interest and/or hardship should be taken into account nor why within the context of the legislative scheme it would be relevant. To the extent that the two Federal Circuit and Family Court of Australia authorities *Griffin* and *Lostitch* are relied upon, I am of the view that they are incorrect. Itdoes not appear that in either case that Court was assisted by any detailed submissions as to the scope of their Honours’ discretion, taking into account the legislative purpose. It is clear that the factors in s 139F apply equally to orders made against entities under s 139D as to natural persons under s 139DA. I do not accept the hardship faced by a commercial entity who has benefitted from a bankrupt’s contribution is relevant to the exercise of the discretion. In the same way, I do not accept that an individual respondent’s interest as opposed to the interest of the respondent’s creditors is relevant.

#### Should the discretion be exercised in this case?

198 For the following reasons, I am of the view that the Court’s discretion should be exercised to make an order under s 139DA.

199 *First*, the discretion should be exercised, given the evident purpose of Div 4A is to achieve exactly what has occurred in this case. The Division’s purpose is to provide another way, other than by operation of ss 120 and 121, to prevent bankrupts from being able to structure their affairs in such a way so as to materially contribute (directly or indirectly) to the acquisition of assets by third parties such that they are shielded from creditors but are still practically enjoyed by the bankrupt.

200 To the extent that the respondent relies on the fact that the North Balgowlah property came to be registered in her sole name for reasons of succession planning rather than to defeat creditors, even if that were accepted, it would not take the arrangement outside of what Div 4A was designed to capture. As addressed above at [155], the Explanatory Memorandum 1987 specifically identified arrangements which could be unwound by this provision including those “established with a view to tax minimisation, or for family, matrimonial or succession reasons”. The intention of Div 4A being to include the capture of property placed in the name of a non-bankrupt spouse, was reinforced by the Explanatory Memorandum 2005, which added the current section 139DA to the Act, and specifically identified one of the purposes of that section to be to ensure that Div 4A could be applied to property held by non-bankrupt spouses (there being concerns that Div 4A’s previous drafting was not well suited to that purpose) (see above at [156]).

201 The purpose of Div 4A is to target precisely what has occurred in this case: The bankrupt, in the lead-up to his bankruptcy, structured his affairs (for whatever subjective reason) in such a way as to fund the accumulation of an asset in the name of the respondent and where he has used or derived a benefit (direct or indirect) from the property at a time or times during the examinable period.

202 *Secondly*,the respondent has led no evidence to satisfy me that the circumstances under s 139F arise in this case. The respondent made no submission, nor called any evidence, that either of those factors was present in this case. There is no suggestion that any other person has any estate in the North Balgowlah property, there was no evidence of the respondent’s net worth and there is similarly no suggestion that granting the trustee an interest in the North Balgowlah property would cause any hardship to the respondent’s creditors.

203 *Thirdly*,I do not accept, for the reasons identified above that the respondent’s interest and/or any purported hardship are relevant factors to be taken into account in the exercise of the Court’s discretion. In any event, the respondent led no evidence of any hardship she would suffer should any order under s 139DA be made. There was no evidence of the respondent’s financial circumstances, the extent to which there was any mortgage outstanding on the North Balgowlah property nor what effect, if any, any of the numerous possible orders that could be made by the Court would have on her circumstances.

204 *Fourthly*,to the extent that the respondent made submissions regarding the “utility” in making any vesting order with respect to the portion of the North Balgowlah property referrable to that contribution, given the mortgage, the respondent led no evidence as to the contributions of the respondent or the bankrupt to the mortgage since 2014 nor the status of the current mortgage.

205 *Fifthly*,I would exercise my discretion to make the order regardless of any finding regarding whether the contribution made by the bankrupt to the purchase of the North Balgowlah property was an attempt to shield the bankrupt’s assets from creditors or not. However, given my finding that it was such an attempt this is an additional factor which may be taken into account.

206 *Sixthly*,to the extent that the respondent contends that the trustee is seeking a better outcome for unsecured creditors than would have been the case if the North Balgowlah property had not been purchased at all, given the increase in the value of the property, the respondent led no expert or other evidence to make good this bald submission. In any event, creditors do, through interest or recognition of the capital appreciation, obtain the benefit. Further, there was no valuation report or other evidence as to what the increase has been.

#### Appropriate orders

207 The trustee claimed, while an argument could be made for vesting the entirety (or at least the majority) of the bankrupt’s interest in the North Balgowlah property in the trustee, it sought an order vesting 50% of the bankrupt’s interest pursuant to s 139DA. Given that the respondent’s estate is subject to the property’s mortgage, the practical effect of that order would give the trustee 50% of the “equity” in the property, with the mortgage to the Commonwealth Bank to be repaid (and so the respondent freed of the mortgage debt) as first priority should the property need to be sold.

208 I do not accept the trustee’s claim that he would be entitled to vesting of the entirety nor 50% of the respondent’s interest. The trustee contended that this 50% interest was justified by reason of the bankrupt’s contribution to the cash component of the North Balgowlah property’s purchase price and associated expenses, his contribution as a borrower on the loan used to fund the balance of the purchase price and the benefit the bankrupt derived from his use during the examinable period of it: It becoming and remaining his home.

209 Turning firstly to the bankrupt’s contribution of the North Balgowlah property’s purchase price, I note, by reason of my findings at [173]–[206] that the bankrupt contributed $197,773.86of the $1.8 million purchase price, comprising approximately 11% of the purchase.

210 The trustee has not proved his case as to why the bankrupt’s interest should be increased by reason of the bankrupt being a borrower on the loan to fund the purchase of the North Balgowlah property. As I have already noted, the trustee provided no evidence of the extent, if any, of the bankrupt’s contribution to the North Balgowlah property’s mortgage.

211 Lastly, to the extent that the trustee relies on the fact of the North Balgowlah property being in the bankrupt’s name during the examinable period, it was not in dispute that the relevant examinable period was from 25 September 2013 (four years before the commencement of the bankruptcy) to 25 September 2017 (the date of the bankruptcy), this being the minimum examinable period. The evidence established that the bankrupt and the respondent moved into the North Balgowlah property six months after the sale of the Seaforth property (when the tenants had moved out) roughly after the last rental payment was made on 28 September 2016. Accordingly, at most, the bankrupt resided in the property for a year prior to the bankruptcy. I remain of the view, that despite this benefit, the vesting of 11% of the North Balgowlah property in the trustee remains appropriate.

212 As a consequence, I accept the alternative submission of the respondent that the appropriate order would be to make part of the North Balgowlah property vest in the trustee, which was referrable to the bankrupt’s cash contribution. Whilst I note the respondent’s submission that no cash contribution has been established due to the lack of sufficient running account evidence, for the reasons outlined above, I am satisfied that a cash contribution has been established and in the circumstances, in the exercise of my discretion, the order be that 11% of the North Balgowlah property vest in the trustee.

### The resulting trust/presumption of advancement claim

#### Operation of resulting trusts and the presumption of advancement

213 There was no dispute between the parties as to the relevant principles to be applied when approaching the claim of a resulting trust: Where one person funds all or part of the purchase of a property (funder) but enables registration in another’s name (registered owner), the property is presumed to be held on trust for the funder (to the extent of their proportionate contribution to the purchase price): ***Calverley v Green***[1984] HCA 81; 155 CLR 242 at 246–247. This principle was expressed recently by the High Court in this way, “[a] trust of a legal estate in property taken in the name of another is taken to “result” to the person who advances the purchase money”: ***Bosanac*** *v Commissioner of Taxation* [2022] HCA 34; 96 ALJR 976 at [12] (per Kiefel CJ and Gleeson J). Further, it is presumed that where there are two borrowers of a loan which contributes to the purchase price, each are taken to have contributed half the borrowed funds: *Calverley v Green* at 251 (per Gibbs CJ), 257–258 (per Mason and Brennan JJ), 267–268 (per Deane J).

214 The presumption may be rebutted by evidence from which it may be inferred that there was *no* intention on the part of the person providing the money to have such interest in the property held on trust for him or her: *Bosanac* at [13] (per Kiefel CJ and Gleeson J). Such a presumption cannot prevail over actual intention as established by the overall evidence, including evidence of the intention of each party: *Bosanac* at [13] (per Kiefel CJ and Gleeson J). The presumption of advancement allows an inference as to the intention drawn from the fact of certain recognised relationships and the direction of the transfer – such as husband to wife, parent to child: *Bosanac* at [14] (per Kiefel CJ and Gleeson J).

215 As to the question of intention, it is entirely one of fact manifested by the person or persons who contributed funds towards the purchase of the property: *Bosanac* at [32] (per Kiefel CJ and Gleeson J).

216 The presumption of a resulting trust is a presumption of fact, described by Gageler J, as functionally akin to a civil onus of proof which will (*Bosanac* at [64]):

… yield to an actual intention to the contrary found on the balance of probabilities as an inference drawn from the totality of the evidence. The weight to be given to the fact of a contribution having been made to the purchase price in drawing an inference as to actual intention will vary according to the totality of the circumstances of the case.

217 There are no special rules governing the proof of intention nor predetermined weight to be given to any factor: *Bosanac* at [66] (per Gageler J).

218 Justices Gordon and Edelman described the presumption of a resulting trust as arising where there is a “paucity of evidence as to an intention to declare a trust” (*Bosanac* at [105]), which cannot prevail over “actual intention”, being the objective manifestation of intention, established by the overall evidence (*Bosanac* at [111], quoting *Pettitt v Pettitt* [1970] AC 777 at 823 per Lord Diplock).

219 The presumption of advancement is not strictly a presumption, but is better understood as providing “the absence of any reason for assuming that a trust arose” and where it too may be rebutted by evidence of actual intention: *Bosanac* at [15] (per Kiefel CJ and Gleeson J), [65] (per Gageler J), [115] (per Gordon and Edelman JJ).

220 In response to modern day criticism of the presumption, Kiefel CJ and Gleeson J observe (*Bosanac* at [21]–[22]):

20. It is the concern of the courts to determine what was intended when property was purchased or transferred. It may once have been the case that evidence capable of rebutting the presumptions was not available. That is unlikely to be so today, especially in the context of dealings as between spouses where the relationship has been of sufficient length to permit a court to observe how the spouses have dealt with property as between themselves and managed their affairs. This evidence may take many forms, but it has always been understood that the strength of the presumptions will vary from case to case depending on the evidence.

21. The presumption of advancement, understandably, is especially weak today. In *Pettitt*, Lord Hodsonconsidered that when evidence is given it will not often happen that the presumption will have any decisive effect. In the same matter, Lord Upjohn considered that given both presumptions are but a mere circumstance of evidence, they may readily be rebutted by comparatively slight evidence.

(Footnotes omitted.)

221 What is very clear from the High Court’s reasoning is that, despite the continued recognition of these presumptions, they may not carry much weight given the numerous ways spouses now deal with property such that inferences contrary to the presumptions may be readily drawn: *Bosanac* at [31] (per Kiefel CJ and Gleeson J). Such presumptions are weak presumptions, able to be rebutted by slight evidence: *Bosanac* at [22] (per Kiefel CJ and Gleeson J) and [102]–[110] (per Gordon and Edelman JJ).

#### The resulting trust claim

222 I do not accept the trustee’s claim of a beneficial interest in the North Balgowlah property by reason of there being a purported resulting trust. Whilst I accept that a presumption may arise by reason of the bankrupt’s contribution to the purchase of the North Balgowlah property, and by him being a joint borrower on the loan contributing to its purchase, I am satisfied that this was not the actual intention of the bankrupt and the respondent: It is my view that the bankrupt and the respondent intended that the respondent be the sole owner of the North Balgowlah property. I rely on my earlier reasoning with respect to the bankrupt’s intention for the transactions, his credibility, the entire circumstances leading to the purchase of and sale of the Anzac Parade and Boyce Road properties, the class action, the status of the bankrupt’s and his business’ financial position in 2014, the circumstances of the purchase of the North Balgowlah property, the monies used for its purchase and the timing of its purchase.

223 It is my view that it is clear on the evidence that the bankrupt intended to provide the payments towards the purchase price of the North Balgowlah property and towards the Seaforth Mortgages because of his desire to prevent that transferred property from becoming divisible among his creditors. The fact that he intended the North Balgowlah property to be placed in the respondent’s name to preserve it from creditors does not mean that he did not intend for her to be the legal and beneficial owner.

224 I accept the respondent’s submission in part, that in addition to the bankrupt seeking by the purchase to protect the proceeds of sale of his two investment properties (the Boyce Road and Anzac Parade properties) (which was disputed by the respondent), the bankrupt also maintained a recent course of conduct (though for different reasons), agreed with the respondent, as can be seen from the purchase of the prior marital home at Seaforth, that the respondent was to be the beneficial owner of the North Balgowlah property, as reflected from the legal title, which was for succession planning reasons and by reason of Ms Dew making contributions to the purchase of the Fairlight property (the initial matrimonial home) and subsequently making another contribution to the renovations of the Seaforth property.

225 I am also of the view that the trustee has not proved, through the use of the respondent’s evidence, that the bankrupt’s and respondent’s intention was otherwise. For the reasons set out above, it is my view that the respondent’s evidence establishes that her intention was that the bankrupt’s provision of contributions to the purchase of the North Balgowlah property and the Seaforth Mortgages was to assist her as the legal and beneficial owner of both of those properties.

226 The trustee is not able to rely on the respondent’s evidence given under her examination, where she said that she and the bankrupt owned the North Balgowlah property together. I accept the respondent’s submission that the trustee’s reliance on the answers she gave to questions asked in her examination is of little assistance to the Court in understanding the relevant intention *at the time* the North Balgowlah property was purchased, given the imprecision in the questioning. I also accept the respondent’s submission that there were numerous other references in the her examination where her answers were entirely consistent with her evidence in this proceeding (including that the Fairlight property was considered her property, the respondent and the bankrupt put the Seaforth property in her name to avoid testamentary claims and protect Ms Dew’s position (and likewise for the North Balgowlah property) and the distinction between the Boyce Road and Anzac Parade properties and their family home was due to Ms Dew’s interest in the properties by virtue of the loans she provided.

227 It is my view, that despite the fact of the bankrupt and the respondent intending that they would ultimately live in the North Balgowlah property, their mixing of finances and the fact of them both being primary debtors on the loan, the purchase reflected a history of property being legally and beneficially owned by the respondent, evidenced by the deliberate steps taken to ensure the property was in the respondent’s name, consistent with the past intention that the Fairlight and Seaforth properties were intended to be owned beneficially by the respondent. I accept the submission of the respondent that the intention for the respondent to legally and beneficially own the North Balgowlah property also must be understood in the context of (a) Ms Dew’s financial loan contributions (to the Fairlight property’s purchase price and to renovations at the Seaforth property) and (b) the concern that, if the bankrupt passed away, their marital home could become part of the bankrupt’s testamentary estate and subject to a claim by the bankrupt’s daughters under the *Succession Act 2010* (NSW).

228 The trustee further submits that the Court should find that there was an intention by the bankrupt and the respondent to buy and own the North Balgowlah property *together*, with both on title, evidenced by entering into the contract in *both* of their names. For the reasons identified at [134] above, I regard the signing of the contract for sale of land by both the respondent and the bankrupt as being a mistake.

229 The Court need only look at the actual intentions of the parties (as established by the evidence) to rebut the presumption of a purchase money resulting trust, as observed by Kiefel CJ and Gleeson J in *Bosanac,* at [13]:

The presumption can be rebutted by evidence from which it may be inferred that there was no intention on the part of the person providing the purchase money to have an interest in land (or other property) held on trust for him or her. The presumption cannot prevail over the actual intention of the party paying the purchase price as established by the overall evidence, and where more than one person pays the purchase price, as here, regard is necessarily had to evidence of each of their intentions.

230 I am satisfied that the intentions of the bankrupt and the respondent rebut the presumption of a purchase money resulting trust and there is no need to consider whether any presumption of advancement arises.

### The voidable transaction claims

#### Operation of s 121

231 Section 121 of the Bankruptcy Act concerns transfers to defeat creditors and provides as follows:

*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.

*Rebuttable presumption of insolvency*

(4A) For the purposes of this section, a rebuttable presumption arises that the transferor was, or was about to become, insolvent at the time of the transfer if it is established that the transferor:

(a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor’s business transactions and financial position; or

(b) having kept such books, accounts and records, has not preserved them.

*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.

*What is not consideration*

(6) For the purposes of subsections (4) and (5), the following have no value as consideration:

(a) the fact that the transferee is related to the transferor;

(b) if the transferee is the spouse or de facto partner of the transferor—the transferee making a deed in favour of the transferor;

(c) the transferee’s promise to marry, or to become the de facto partner of, the transferor;

(d) the transferee’s love or affection for the transferor;

(e) if the transferee is the spouse, or a former spouse, of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*;

(f) if the transferee is a former de facto partner of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975* or the *Family Court Act 1997* (WA).

*Exemption of transfers of property under debt agreements*

(7) This section does not apply to a transfer of property under a debt agreement.

*Protection of successors in title*

(8) This section does not affect the rights of a person who acquired property from the transferee in good faith and for at least the market value of the property.

*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.

(Emphasis in original.)

232 Under s 121, a transfer of property by a person who later becomes a bankrupt to another person is void against the trustee in the transferor’s bankruptcy if 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: s 121(1)(a).

233 The trustee must establish:

(a) that the relevant transactions each comprised “transfers of property” from the bankrupt to the respondent, within the meaning of s 121(9);

(b) the property would probably have become part of the bankrupt’s estate or would probably have been available to creditors if the property had not been transferred;

(c) that the transferor’s (here the bankrupt’s) main purpose was that set out in s 121(1)(b);

(d) alternatively, that it can be reasonably inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become insolvent: s 121(2).

234 An answer to such a claim may be that, despite the trustee satisfying the requirements of s 121(1), there has been consideration given by the transferee under s 121(4). However, the burden of establishing the same rests on the transferee: ***Re Jury****; Ashton v Prentice* [1999] FCA 671; 92 FCR 68 at [67].

235 For the following reasons I find that the trustee’s s 121 claim is made out.

#### Were there “transfers of property” from the bankrupt to the respondent?

236 The first question to be resolved, as to whether relief under ss 120 or 121 is available, is whether there has been a relevant “transfer of property”. As stated by the High Court in ***Peldan*** *v Anderson* [2006] HCA 48; 227 CLR 471at [23]:

In its present form, s 121 was enacted by the *Bankruptcy Legislation Amendment Act 1996* (Cth) (the 1996 Act). The relationship of s 121 to its forebears was considered in *Cummins*. The section impugns transactions which answer the description of a “transfer of property”. This expression will bear its ordinary meaning, save to the extent that this is expanded by s 121(9). The term “transfer of property” also appears in s 120 (Undervalued transactions) and s 122 (Avoidance of preferences). Further, these sections contain definitional provisions which were introduced by the 1996 Act and are in identical terms to s 121(9).

(Footnotes omitted.)

237 To the extent that there appeared to be a dispute with respect to this limb, it was for the same bases as relied upon with respect to the claim under s 120 dealt with below, namely the respondent submitted that:

(a) the transfers *into* the Joint Account are the relevant transfer not those *from that* account;

(b) the trustee has not established that there was in fact a transfer from the bankrupt to the respondent given the purported lack of evidence as to the status of the running account;

(c) the transfer of funds from the Joint Account to the Seaforth Mortgages was not a transfer from the bankrupt to the respondent but a “joint transfer by both of them” reducing their joint liability under the loans; and

(d) the transfers to the vendor of the North Balgowlah property could be no more than half of the amount.

238 Neither party provided me with much assistance as to what constitutes a “transfer” under either s 120 or s 121, nor application of those principles to each section and each category of transfer.

239 The expression “transfer of property”, as used in these provisions, bears its ordinary meaning (*Peldan* at [23]): The conveyance of a property right from one person to another as a result of an act performed by the transferor with the intention that the property would pass: ***Camm*** *v**Linke Nominees Pty Ltd* [2010] FCA 1148; 190 FCR 193at [32].As recognised by Tracey J in *Camm*, at [34], the words read into s 121(1)(a) direct attention to “the act taken to be the transfer” and require the identification of the property which had been in the hands of the transferor prior to that act being taken. The reach of the expression “transfer of property” is very broad. It includes the transfer of property in the form of cash (s 121(9)(a)) or the conveyance of a property right and also encompasses an act that leads to both the creation of a property right and its transfer simultaneously: *Peldan* at [25], [28]–[31].

240 It is my view that both sets of transfers (as from the Joint Account to the Seaforth Mortgages and the transfers to the vendor of the North Balgowlah property) were “transfers” from the bankrupt to the respondent which would be caught by ss 120 and 121.

241 I accept the trustee’s argument in response to the respondent’s claim regarding the “balance of accounts issue”. Here it is clear from a review of the Joint Account that the monies from the sale of the Boyce Road and Anzac Parade properties were used for the purchase of the North Balgowlah property (a property held beneficially and legally by the respondent). It is also clear that those monies were transferred into the Joint Account and then used to service a loan for a property owned by the respondent (being the Seaforth property).

242 I do not accept the respondent’s arguments that the “transfer of funds” could not fall within the broad definition of “transfer of property” which included the “payment of money” (s 121(9)(a)). I accept the submission of the trustee that reading the relevant provisions (ss 120(1), 120(7), 121(1), 121(9)) down in the manner suggested by the respondent would not be consistent with the purpose of both provisions. As the trustee submits, where a married couple pools their resources and do so for longer than the bank keeps bank statements, it would be impossible to bring a voidable transaction claim against a married couple in like circumstances to the bankrupt and respondent if the respondent’s contentions were accepted.

243 The respondent accepted, under cross-examination, that she and the bankrupt never tried to keep accounts between them of who had paid for what and who would owe the other for having paid for a particular expense out of the Joint Account – they just pooled their assets. Accordingly, on the trustee’s submission, which I accept, the respondent’s contention of a running account is unfounded as there was no running account or balance because there was no intention to create a debt, namely a legal relation.

244 In any event, even if I were wrong regarding the lack of a need for the balancing of the account, I am satisfied that on the balance of probabilities the account balance was in favour of the bankrupt: This is based on the evidence that the vast majority of earnings came from the bankrupt (by his income and loans from Apscore). In addition, as I have found above, the proceeds from the sale of the Boyce Road and the Anzac Parade properties were from property which the bankrupt owned solely or substantially (contrary to the respondent’s submission). Further, Ms Dew’s loan to the respondent was stated by the respondent to not be a joint loan but a loan only to the respondent so does not factor into this balance of accounts.

#### Would the property have been available or probably available to creditors?

245 As stated by Logan J in *Combis (Trustee) v Spottiswood (No 2)* [2013] FCA 240; 11 ABC(NS) 407 at [55], the resolution of the question of whether the property would have been available or probably available to creditors requires that the Court make “a predicative value judgment as to what probably would have been the fate of the transferred property”.

246 The **relevant transfers** in question were pleaded, at [24] of the statement of claim to be:

…[T]he following amounts were paid towards Ms Murray’s purchase of the North Balgowlah Property, in addition to the purchase of tiles for the North Balgowlah property:

|  |  |  |
| --- | --- | --- |
| **Amounts Paid from Joint Account to Respondent’s Purchase of North**  **Balgowlah Property** | | |
| **Date** | **Description** | **Amount** |
| 28 July 2014 | Deposit on North Balgowlah | 90,000.00 |
| 28 November 2014 | Settlement Sum | 100,000.00 |
| 28 November 2014 | Legal fees | 4,473.86 |
| 13 November 2014 | Tiles | 3,300.00 |
|  | **Total** | **$197,773.86** |

…[T]he following amounts were paid towards the Seaforth Mortgage:

|  |  |  |  |
| --- | --- | --- | --- |
| **Amounts Paid from Joint Account to Seaforth Mortgage**  **11 April 2014 to 28 November 2014** | | | |
| **Date** | **Loan Account** | **Amount** | **Total** |
| 28 April 2014 | 769837408 | 4,869.72 |  |
|  | 769837803 | 1,070.25 |  |
|  | 769838400 | 977.99 |  |
|  | 769837208 [sic] | 332.93 | 7,250.89 |
| 27 May 2014 | 769837408 | 4,712.06 |  |
|  | 769837400 | 946.44 |  |
|  | 769837803 | 701.37 |  |
|  | 769837208 | 322.19 | 6,682.06 |
| 27 June 2014 | 769837408 | 4,869.13 |  |
|  | 769838400 | 977.99 |  |
|  | 769837803 | 724.75 |  |
|  | 769837208 | 332.93 | 6,904.8 |
| 28 July 2014 | 769837408 | 4,712.06 |  |
|  | 769838400 | 946.44 |  |
|  | 769837803 | 701.37 |  |
|  | 769837208 | 322.19 | 6,682.06 |
| 27 August 2014 | 769837408 | 4,869.13 |  |
|  | 769838400 | 977.99 |  |
|  | 769837803 | 724.75 |  |
|  | 769837208 | 332.93 | 6,904.8 |
| 29 September 2014 | 769837408 | 4,869.13 |  |
|  | 769838400 | 977.99 |  |
|  | 769837803 | 724.75 |  |
|  | 769837208 | 332.93 | 6,904.8 |
| 27 October 2014 | 769837408 | 4,712.06 |  |
|  | 769838400 | 946.44 |  |
|  | 769837803 | 701.37 |  |
|  | 769837208 | 322.19 | 6,682.06 |
| 27 November 2014 | 769837408 | 4,869.13 |  |
|  | 769838400 | 977.99 |  |
|  | 769837803 | 724.75 |  |
|  | 769837208 | 332.93 | 6,904.8 |
| **Total** |  | **$54,916.27** | **$54,916.27** |

(Emphasis in original.)

247 The respondent contended the following:

(a) if there was a transfer from the bankrupt to the respondent, the transfer was effectively refunded prior to the bankrupt’s bankruptcy when the respondent transferred funds into the #1998 Joint Account in April 2016 from the surplus sale proceeds from the Seaforth property;

(b) even if there was a relevant transfer, it could not be said that the monies transferred out of the Joint Account (#4777) by the bankrupt between July and November 2014 would have otherwise been available to the bankrupt’s creditors if it had not been transferred. This is because between November 2014 and his bankruptcy (commencing in September 2017), considerable funds were required for the joint household expenses of the bankrupt and the respondent; and

(c) having regard to the use of the Joint Account, there is not sufficient evidence to show that if the funds had remained in that account they would probably have been unspent by September 2017 when the bankrupt became bankrupt.

248 The respondent’s submissions appear to proceed on an incorrect footing: That if the respondent and/or the bankrupt chose to dissipate the assets in the period leading up to the bankruptcy, this was sufficient to defeat a claim under this provision. No authority was provided by either party to assist me as to the purpose of s 121 nor particularly why it includes this element. Further, the respondent relied upon no authority to support her submissions in the preceding paragraph of these reasons. I do not accept the foundation for the respondent’s submission. It appears that the intent of s 121(1)(a) was to provide some fetter on the kinds of circumstances, more complex than here, where there has been a “transfer of property”, which as I have identified is very broad in its import.

249 Authorities have recognised that the reach of s 121 includes the very circumstances of this case – where the relevant “property” was money transferred on a number of occasions to be applied to the purchase of a residential property: *Mathai**v Nelson* [2012] FCA 1448; 208 FCR 165 at [79]. I do not see there to be any reason why s 121 does not apply to “property” in the form of money transferred on a number of occasions for a purchase of a property and the servicing of a loan on a mortgage for which the respondent held beneficial and legal title.

250 The transfers were used for the purchase of real property in the respondent’s name and to service an existing loan on the current matrimonial home for which the respondent held title. I do not accept the respondent’s submission that in the circumstances the monies would not have or would probably not have been available to creditors.

#### Can it reasonably be inferred that at the time of transfer the bankrupt was insolvent or about to be?

251 The trustee submits that s 121(2) only requires that the finding of insolvency “can reasonably be inferred from all the circumstances” – that is a lower standard of proof than requiring the Court to actually find the bankrupt was insolvent, instead only requiring that the inference of insolvency be reasonably open: *Permfox Pty Ltd, in the Matter of Chase v Official Receiver for Bankruptcy District of New South Wales* [2002] FCA 1564 at [94] (per Allsop J (as his Honour then was)). As the Full Court explained in *Re Jury*at [55]:

In our view the phrase in s 121(2), “if it can reasonably be inferred from all the circumstances that … the transferor was … insolvent”, is not synonymous with “if the transferor was insolvent”. The statutory provision, as a matter of ordinary language, leaves open the possibility that it may also reasonably be inferred that the transferor was solvent. In other words, it is sufficient if the inference of insolvency is reasonably open. An analogy is the leaving of a case to a civil jury. If it can reasonably be inferred from all the circumstances that the defendant was negligent, or that the publication complained of was defamatory of the plaintiff, then the matter must go to a jury. Nevertheless the jury is not required to draw the relevant inference, and may not do so.

252 As identified by Katzmann J in ***Lo Pilato*** *v Kamy Saeedi Lawyers Pty Ltd* [2017] FCA 34; 249 FCR 69at [163],the concepts of “solvency” and “insolvency” can be described in the following way:

163. A person is solvent only if the person is able to pay all his or her debts when they become due and payable; if not, the person is insolvent: *Bankruptcy Act*, s 5(2) and (3). A person is not insolvent, however, merely for want of immediate access to cash to pay off the debts. Speaking of the position under the *Bankruptcy Act 1924-1950* (Cth) (the predecessor of s 120 of the current Act) (the 1924 Act), Barwick CJ explained in *Sandell v Porter* (1966) 115 CLR 666 at 670:

Insolvency is expressed in s. 95 as an inability to pay debts as they fall due out of the debtor’s own money. But the debtor’s own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time — relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor.

The conclusion of insolvency ought to be clear from a consideration of the debtor’s financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor’s inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.

164. If anything, the omission of the words “from his own money” from the definition of solvency in the current Act reinforces this position. It is also consistent with the position under the *Corporations Act 2001* (Cth) where the definitions of solvency and insolvency are the same and underwent the same amendment (see s 95A). In *Lewis v Doran* (2004) 184 FLR 454 at [116], which was approved on appeal, Palmer J held that:

[Section] 95A requires the court to decide whether the company is able, as at the alleged date of insolvency, to pay all its debts as they become payable by reference to the commercial realities. If the court is satisfied that as a matter of commercial reality the company has a resource available to pay all its debts as they become payable then it will not matter that the resource is an unsecured borrowing or a voluntary extension of credit by another party.

165. On appeal (*Lewis v Doran* (2005) 219 ALR 555), Giles JA (with whom Hodgson and McColl JJA agreed) said at [109]:

Particularly when the limiting words are no longer part of the test, there is no compelling reason to exclude from consideration funds which can be gained from borrowings secured on assets of third parties, or even unsecured borrowings. If the company can borrow without security, it will have funds to pay its debts as they fall due and will be solvent, provided of course that the borrowing is on deferred payment terms or otherwise such that the lender itself is not a creditor whose debt cannot be repaid as and when it becomes due and payable. It comes down to a question of fact, in which the key concept is *ability* to pay the company’s debts as and when they become due and payable.

(Original emphasis.)

166. This approach has been applied to the assessment of solvency and insolvency under the *Bankruptcy Act* (*Whitton v Regis Towers Real Estate Pty Ltd* (2007) 161 FCR 20 at [35]-[38] per Buchanan J; Marshall and Tracey JJ agreeing at [1]). As the statutory definition in the *Corporations Act* is the same, there is no reason in principle why the approach should be any different.

253 I accept the trustee’s submission (and about which the respondent took no issue) that s 121(2) is satisfied by reason of:

(a) the bankrupt’s admission under examination that it was “probably the case” that after the sale of the Boyce Road and Anzac Parade properties that he had no significant financial assets in his name;

(b) under cross-examination, when taken to his statutory declaration sworn in July 2015, by which he attested to his inability to pay the Bendigo Debt, the bankrupt accepted that he would have been in a no better position if that demand had been made in December 2014 (than in July 2015) or even the day after the North Balgowlah property purchase went through. Therefore, it can be inferred by this that the bankrupt accepted he was not able to pay the Bendigo Debt the day after the North Balgowlah property was purchased; and

(c) the bankrupt accepted that, by way of the transfers giving rise to these proceedings, he divested himself of his remaining assets and left himself entirely unable to pay a long-standing debt that he no longer had any realistic prospect of evading (that being the case, regardless of what the bankrupt subjectively appreciated).

254 Accordingly, I am of the view that it can be reasonably inferred that the bankrupt was insolvent or about to be insolvent at the time of the relevant transfers.

#### Whether there was consideration for the transfers

255 The trustee submits, and I accept, that under s 121, unlike s 120, he does not bear the onus of proving there was no consideration. As to whether there has been consideration by the transferee under s 121(4), must be established by the transferee: *Re Jury* at [67]. For the reasons set out below with respect to s 120, I do not accept that the respondent gave consideration for the transfers.

#### The bankrupt’s main purpose

256 For the reasons set out above, I am of the view that the trustee has satisfied the Court of the requirements of s 121(2) and therefore I do not need to make any findings as to the applicability of s 121(1)(b). However, for completeness if it were necessary, I am of the view for the following reasons that the Court could find such transfers to have been made by the bankrupt with the main purpose of putting his assets out of the reach of creditors, such that they are void against the trustee pursuant to s 121(1) given that is the rational inference in circumstances where the bankrupt is divesting his main remaining wealth to purchase or support a mortgage of property solely in the respondent’s name just after his hopes of evading the Bendigo Debt had collapsed.

257 The trustee submitted that even if the Court was against him with respect to s 121(2), the evidence established nonetheless that the bankrupt’s actual subjective intention was to prevent, or hinder or delay, the property being divisible amongst the bankrupt’s creditors. In relation to subjective intention the trustee relied on his written submissions with respect to his resulting trust argument:

a. As explored at some length in cross-examination, the Bankrupt’s financial position had significantly deteriorated by about mid-2014 – his business had lost its main customer and was making ongoing losses; he knew that the Great Southern class action “hadn’t gone well” and/or “didn’t look good”, and he was under “significant financial pressures”;

b. The Respondent was similarly aware of the Bankrupt’s financial stress, with it being to such an extent that he was “incredibly low” as a result of it - for that reason, she appreciated there was a real risk that creditors could one day come for any asset in the Bankrupt’s name;

c. That being the context that the decision to cause the North Balgowlah Property’s title to be taken in the Respondent’s name was settled upon (there having been no mistake at the time of the contract itself), the obvious inference is that that is precisely why the change occurred;

d. While it may well be that a further benefit of the change was that it would frustrate claims by the Bankrupt’s daughters, [sic]

(Footnotes omitted.)

258 In order for the trustee to succeed on the basis of s 121(1)(b), the trustee must prove that the bankrupt’s main purpose arising from the “circumstances appearing in the evidence” give “rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability”: *Trustees of Property of Cummins (a bankrupt) v Cummins* [2006] HCA 6; 227 CLR 278 at 292. As essayed by Katzmann J in *Lo Pilato* at [155]:

… In deciding whether the inference should be drawn from the primary facts, it is necessary to take into account the seriousness of the allegation and the gravity of the consequences, even though Mr Adzic is not a party to the proceeding: *Cummins* at 292; *Evidence Act 1995* (Cth), s 140. Here the allegation is tantamount to one of fraud, where “clear or cogent or strict proof” is necessary: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171. In such a case the reasonable satisfaction of the Court is not to be reached by “inexact proofs, indefinite testimony, or indirect inferences”: *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

259 Whilst it is unnecessary for me to decide the bankrupt’s main purpose, I would conclude that the bankrupt’s main purpose for the impugned transfers was actuated by a desire to prevent, hinder or delay the process of making the property available for division amongst his creditors.

260 I have significant misgivings about the bankrupt’s evidence and the circumstances surrounding the transfer are highly suspicious. I have given consideration to the seriousness of the allegation and the gravity of the circumstances. For the reasons outlined above, I found the bankrupt not to be a credible witness. I have considered the entirety of the circumstances leading up and during the course of the relevant transactions and I am of the view that the bankrupt’s main purposes for the transferring of the property was the preservation of those assets from his creditors.

#### Operation of s 120

261 Given my findings with respect to the s 139DA claim, the resulting trust claim and the s 121 claim, there is no necessity for me to consider the s 120 claim, but in the event that I am wrong with respect to those other claims, I will briefly note my reasons with respect to this alternate claim.

262 Section 120 of the Bankruptcy Act, titled undervalued transactions, provides:

*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) Subsection (1) does not apply to:

(a) a payment of tax payable under a law of the Commonwealth or of a State or Territory; or

(b) a transfer to meet all or part of a liability under a maintenance agreement or a maintenance order; or

(c) a transfer of property under a debt agreement; or

(d) a transfer of property if the transfer is of a kind described in the regulations.

(3) Despite subsection (1), a transfer is not void against the trustee if:

(a) in the case of a transfer to a related entity of the transferor:

(i) the transfer took place more than 4 years before the commencement of the bankruptcy; and

(ii) the transferee proves that, at the time of the transfer, the transferor was solvent; or

(b) in any other case:

(i) the transfer took place more than 2 years before the commencement of the bankruptcy; and

(ii) the transferee proves that, at the time of the transfer, the transferor was solvent.

*Rebuttable presumption of insolvency*

(3A) For the purposes of subsection (3), a rebuttable presumption arises that the transferor was insolvent at the time of the transfer if it is established that the transferor:

(a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor’s business transactions and financial position; or

(b) having kept such books, accounts and records, has not preserved them.

*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.

*What is not consideration*

(5) For the purposes of subsections (1) and (4), the following have no value as consideration:

(a) the fact that the transferee is related to the transferor;

(b) if the transferee is the spouse or de facto partner of the transferor—the transferee making a deed in favour of the transferor;

(c) the transferee’s promise to marry, or to become the de facto partner of, the transferor;

(d) the transferee’s love or affection for the transferor;

(e) if the transferee is the spouse, or a former spouse, of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*;

(f) if the transferee is a former de facto partner of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975* or the *Family Court Act 1997* (WA).

*Protection of successors in title*

(6) This section does not affect the rights of a person who acquired property from the transferee in good faith and by giving consideration that was at least as valuable as the market value of the property.

*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.

(Emphasis in original.)

263 The purpose of s 120 was concisely described by the Full Court in *Official Trustee in Bankruptcy v* ***Lopatinsky***[2003] FCAFC 109; 129 FCR 234 at [92]:

The purpose of the existing s 120 is no different from its predecessors here and in the United Kingdom. Relevantly, it is to prevent properties, including the matrimonial home, from being transferred to related parties to the disadvantage of the bankrupt’s creditors. Disadvantage will occur if the property is transferred for no consideration or for less than market value. Thus, unlike its predecessor, the existing section requires the Court to determine the value of the consideration given: see *Victorian Producers’ Co-Operative Co Ltd v Kenneth* (1999) 1 ABC (NS) 198 at [11] per Merkel J.

264 Accordingly, subs 120(1) provides that a transfer of property by a person (who later becomes bankrupt) to another person is void against the trustee in the transferor’s bankruptcy if:

(a) the transfer took place in the period beginning five 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.

265 A transfer of property includes a payment of money: s 120(7).

#### The s 120(1) claim

266 The trustee contends that the bankrupt’s funds were transferred to the respondent, by applying them to the purchase of the North Balgowlah property and also to the Seaforth Mortgages, in circumstances where the bankrupt received no consideration for those transfers (i.e. without obtaining any beneficial interest in any property in return). The trustee accepted that the onus was on him to establish inadequacy of consideration.

267 Here the relevant property was money transferred on the occasions identified at [246] above.

268 As I have found above, $197,773.86 was paid towards the purchase price for the North Balgowlah property and $54,916.27 was paid towards the Seaforth Mortgages from the Joint Account between 11 April and 28 November 2014.

269 The parties agree that the relevant questions requiring determination with respect to this claim comprise:

(a) Does the transfer of funds from one joint account to another account constitute any relevant transfer as between the bankrupt and the respondent for the purposes of s 120(1)?

(b) What is the property that was transferred for the purposes of s 120(1)?

(c) Did the respondent give consideration for the transfer, and if so, how much consideration did she give?

270 For the reasons identified with respect to s 121, I am of the view that there have been relevant transfers for the purpose of s 120(1).

271 The respondent contends that even if the Court were satisfied that the relevant transfers constituted a transfer of property, the trustee has not demonstrated that the respondent gave no consideration or consideration of less value than market value for that transfer of property. The respondent submits specifically that “marital contribution” (including caring for children) can constitute valid consideration: citing *Worrell v Pix* [2002] FMCA 93 at [26]–[28], citing *Mateo v Official Trustee in Bankruptcy* [2002] FCA 344; 117 FCR 179. This submission appears entirely incorrect. While the appeal of the primary judge’s decision (*Official Trustee in Bankruptcy v Mateo* [2003] FCAFC 26; 127 FCR 217) was dismissed, Wilcox J observed, (at [71]), although in dissent, but with whom Branson J on this issue agreed (at [108]), that marital contributions cannot amount to consideration of equal or greater market value for the transfer of property where (1) it cannot be attributed value (at [65]) and (2) past consideration does not constitute valid consideration (except where there is an express or implied earlier promise to pay) (at [66]).

272 Further, as referred to above at [263], Whitlam and Jacobson JJ in *Lopatinsky* at [92], considered, in a decision which post-dated those relied upon by the respondent, what the Court is required to consider under s 120, including, unlike the provision’s predecessor, whether there was no consideration or for less than market value. This requires the Court to determine the value of the consideration. Their Honours went on to find that the term “consideration” should not be construed to mean anything other than in its legal sense, at [93]–[96], extracted as follows:

93. In carrying out this task, the Court is to treat as having “no value as consideration” the matters referred to in s 120(5)(a)-(d). Some of them, such as a promise to marry, would have been recognised as “valuable consideration” under the previous enactment: see *Official Trustee in Bankruptcy v Mitchell* (1992) 38 FCR 364.

94. 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”.

95. Section 120(5) makes that very assumption. The intention of the legislation in s 120(5) must have been to ensure that matters which might otherwise be thought to have constituted good consideration at common law would have no value for the purposes of determining whether there was any disadvantage to creditors in the impugned transaction.

96. 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.

97. The primary judge at [39] proceeded upon the correct basis that Mrs Lopatinsky's contribution to the marriage could not be regarded as consideration for the transfer because it would have constituted past consideration: see *McVeigh v Zanella* [2000] FCA 1890 per Weinberg J.

273 The respondent relied upon no authority to displace this reasoning.

274 The respondent further relies on the fact of the later surplus funds received from the sale of the Seaforth property being deposited into the #1998 Joint Account as evidence which she submitted would constitute valid consideration.

275 However, I accept the submission of the trustee that there would need to be consideration in the ordinary contractual sense to support this contention, namely that the respondent and the bankrupt had agreed beforehand to buy the North Balgowlah property and that the respondent would pay the bankrupt back by depositing the surplus from the Seaforth property sale into a joint account.

276 The respondent put on no evidence as to any agreement or promise between the bankrupt and the respondent that the prospective proceeds of sale from the Seaforth property would constitute future consideration for the bankrupt’s contribution to the purchase of the North Balgowlah property. In fact the evidence shows, from the examination, not only was there no such agreement, the bankrupt described the benefit which he obtained as comprising “*family life, assistance bringing up the kids*” (emphasis added), which for the reasons identified above does not constitute consideration.

277 For these reasons, if it were necessary to do so, I would find that the respondent provided no consideration for the transfer and accordingly the s 120 claim is made out.

## Conclusion

278 In summary for these reasons, I have found:

(a) the trustee succeeds on his s 139DA claim but only to the extent of a 11% interest in the North Balgowlah property;

(b) the trustee does not succeed on his resulting trust claim; and

(c) in the alternative, the trustee succeeds on his voidable transaction claims.

279 I accept that the precise orders to be made by the Court depend on the findings I have made and may require election by the trustee. To that end, as I foreshadowed at the hearing, I will make orders for the parties to confer and to provide proposed orders to my Associate, within four weeks of the date of the publication of these reasons giving effect to the findings I have made and in relation to the relief which should be granted as well as the question of costs of the proceeding.

280 If the parties cannot agree on any aspect of the proposed orders they should, by the same date, each submit a version of the proposed orders together with submissions, not exceeding five pages in length. The Court will then, if necessary, list the matter at a later date to resolve any differences which arise with respect to the proposed orders.

281 I make orders accordingly.

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| I certify that the preceding two hundred and eighty-one (281) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Raper. |

Associate:

Dated: 10 March 2023