

- The bankrupt and his son applied to Court for leave to intervene the petitioning creditor's application on the basis that the outcome of the application would directly affect them due to the possible surplus from the estate.

The issue before the Court was whether the bankrupt or his son had real interest in the outcome of the petitioning creditor's application based upon which they could be granted a leave to intervene.

After considering the following aspects, the Court granted leave to the bankrupt for the intervention but not to his son:

- The bankrupt's son's title had been transferred to the trustee, as such, he no longer held any legal or financial interest in the property which was previously in his name, and accordingly was not granted leave to intervene.
- A surplus in the bankrupt's estate seemed very likely. As such, the bankrupt would be affected by the outcome of the application.
- His Honour had established the bankrupt's sufficient real and direct interest in the outcome of the application as he had a contingent legal interest and a financial interest considering the surplus from the estate would be forwarded to him.

The above grant of leave to the Bankrupt confirms that although a non-party to a proceeding, the bankrupt holds the right to request a leave to intervene where he has both a financial and a contingent legal interest directly affected by a creditor's claim.

Land Tax: From Billionaires to Bankrupts

By Jarrad Pope

Particularly in respect of the current booming Sydney property market, land tax has become an increasingly important issue for investors. For those of us that can't afford a million dollar legal team that is.

Land tax, similarly to council rates, attaches to property rather than to an individual. Land tax is payable by all land holders in NSW aside from several exceptions, the most notable is the principle's place of residence exception. This exception exempts land owners from paying land tax if they claim the land in question as their primary residence. However, land owners are only allowed to claim one plot as their primary residence, although there are no size or value restrictions attached.

Consider the case of Harry Triguboff, Australia's 6th richest man with a net worth of approximately \$4.3 Billion. Harry, not content with his existing \$15 Million dollar Vaucluse mansion, decided to purchase his much envied neighbour's modest \$10 Million dollar property. He then proceeded to tear down the dividing fence between the two properties as well as adjusting the gardens to effectively turn two properties into one.

However, the Office of State Revenue (Represented by the Valuer-General) disagreed, arguing that Mr Triguboff could only have one property exempted from land tax, but not both. A quarrel of lawyers later (thanks Wikipedia), and the court ruled that Harry was indeed exempt from paying tax on his 'spare' house, netting Harry a saving of almost \$200,000. Don't get too excited though, the facts of the case were heavily in favour of Mr Triguboff, as he made frequent use of the spare house and treated it effectively as an extension of his home. It also helped that his big-screen TV was in his 'spare' house's study whilst the main house's study was entirely TV-deprived.

For those of us without millions in loose change to throw at teams of slick lawyers, there are some simpler things you can do to minimise your exposure to land tax. First of all, when buying an investment property make sure to get a land clearance certificate from either the Office of State Revenue or from one of their approved Client Service Providers. This certificate ensures that all land taxes have been paid and provides peace of mind that you won't receive any nasty surprises. Further, whilst the principle place of residence exception can be used by individuals for their home, no such exemption applies to companies- so don't think putting a parcel of land under your company's name will let you beat the taxman.

While not exactly commonplace, it is not unheard-of for Bankrupt's to own investment properties which vest with the Trustee upon Bankruptcy. Any such properties will of course be subject to land tax, which can impact on any distribution to creditors. It is also possible for Bankrupt's to offer their home and investment property jointly as security under a mortgage agreement, usually to fund their business ventures. Such arrangements can create a negative equity position in the investment property as the estimated sale proceeds are outweighed by the existing mortgage over the property. However, the Trustee may still endeavour to sell the property as any reduction in the principle of the mortgage would leave the Bankrupt's other property in a stronger equity position which the Trustee is able to realise for the benefit of the Bankrupt's creditors.

ON THE BEAM

Property, Nutri-Grain and Reality

By Schon G Condon RFD

I was speaking to a solicitor recently who, in conversation, indicated that he was working on two conveyances involving two half million dollar properties that were only 252 square meters in size! Our immediate mutual reaction was that the increase in property values can simply not keep going the way it is going. Subsequently, in a recent article I was reading there was a reference to the present property hikes being like the 'gorilla' in the famous video clip that no one sees until it's pointed out to them; lots of people are talking about it but there doesn't seem to be any real reaction.

There are clearly growing concerns that if you don't get in now, you will never be able to; but what if there are numerous people in the property game now who won't be able to remain in the market if interest rates rise? If this is the case and interest rates rise then there is most likely to be a number of properties placed on the market all at the same time. Such a potential avalanche coupled with the continued production of existing work in progress will quite likely see a significant reduction in value at least until the glut resides. The situation will also worsen if lenders impose penalties because the loan/asset ratio is out of kilter; potentially placing even more properties on the market.

There was a significant downturn in property prices in the early 90's which saw houses in western Sydney come off by around 15 percent, and in some areas only for a very short period, but some harbour side properties lost close to 50 percent of their previous sale price and took much longer to recover! Whilst the situation did recover slowly there were many that lost significantly because they were unable to carry all of their investments through the period of downturn. With this impact still fresh on the mind, I received a form letter from my then bank advising that they had decided to circulate to all of their customers later in the 90's, indicating that under no circumstances would they approve funding for the purchase of any single bed-sit apartments in Sydney, as they had formed the opinion that the market in this particular product had overheated and the properties we no longer adequate as either security or an investment.

Moving on however, back in December of 2004 there was a graphic designer by the name of Chris Doyle who whilst pouring his breakfast cereal one morning discovered that one of the cereal pieces bore an uncanny resemblance to E.T., the extra-

terrestrial from the 1982 movie. Seeing an opportunity and not wanting to prevent an avid fan from having the possibility of owning it, the piece of cereal was promptly put on EBay for sale, and it ultimately sold for \$1035. Meanwhile one of the daily papers went out and spent around \$7 to purchase a whole packet and found more than 30 similar E.T. look alike grains. Just like our real estate people didn't take the time to properly research, analyse and plan on a longer term basis.

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Reality has a bad habit of catching up with everyone one day. As prices continue to rise the likelihood of a correction increases. Why? Because people who own property see what sales are being achieved in the market and put their own properties on the market to release the overstated value they contain. The more properties on the market the lower the prices will go. Yes, one day prices are likely to recover, but if you know people who really must invest in property in the immediate term, then please help them to ensure that they can afford to carry it through the bad times, regardless of what the cost is.

Asset Protection, Transferring Assets to Spouse

By John Jolly

It is not uncommon, working in an insolvency environment, to be asked whether you can transfer assets to your spouse prior to the lodgement of a Debtors Petition. Similarly, it is also not uncommon to see assets transferred to a spouse prior to an

Level 6, 87 Marsden Street, Parramatta
PO Box 1418 Parramatta 2124
Email: enquiries@condon.com.au
Phone: 1300 939 129

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individual being declared bankrupt by a third party under a Sequestration Order.

So, are these assets protected from being seized and sold by a Bankruptcy Trustee? The answer is no, in some circumstances.

Following his or her appointment, the Bankruptcy Trustee will investigate all pre-insolvency transfers where the Trustee believes that the transfer may have been carried out to defeat payment being made to creditors.

To enable the Trustee to void the transaction, the Trustee must first:

1. identify the transaction;
2. identify the other party to the transaction;
3. prove that the transaction occurred within a specific time period, or while the bankrupt was insolvent;
4. prove that the transaction was either under value or had the required intention; and
5. show that the transaction did not involve protected property.

The Trustee can review and potentially overturn a transaction completed within the last 4 years if the other party to the transaction is related to the bankrupt. This means that transactions occurring in the period 4 years before the commencement of the bankruptcy are automatically void if they involve related parties, defined as 'related entities' in the Bankruptcy Act.

Some transfers of property will not be void. The Bankruptcy Act provides protection to payments of tax, payments under family law agreements and payments under Part IX debt agreements.

A transfer is exempt if it is:

- 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;
- d) a transfer of a kind described in the regulations of the Bankruptcy Act; or
- e) transfers made under Maintenance Agreements or Orders made in relation to the Family Court.

The Family Court would need to overturn the original maintenance order before the trustee will be able to make any recovery under this section. It is difficult for any Trustee to convince the Family Court that it should overturn its own decision in order to allow the trustee to recover assets from an ex-spouse.

The court will usually look to the trustee to provide some evidence on insolvency at the time of the transfer.

The Bankruptcy Act provides a presumption of insolvency if the debtor did not keep proper records of their financial affairs

during that period. That presumption is rebuttable, i.e. it may be disproved by positive evidence of solvency. This may be difficult if there are truly no records on the financial affairs of the bankrupt.

Should a person be considering bankruptcy, or if they believe that they may be subject to a Sequestration Order in the future, their best options would be to seek assistance from a solicitor experienced in the bankruptcy sector, or alternatively from a registered trustee.

Payroll Tax – The Submerged Risk for a Growing Business

By John Burke

As a business grows it could find itself liable for payroll tax. You can become liable for payroll tax when your payroll reaches \$750,000 per annum (2014 – 2015 financial year). However the threshold is also calculated monthly. So you can become liable as soon as your payroll reaches \$61,644 in a 30 day month.

If you pay wages and salaries to employees in another state, then the threshold is calculated based on wages and salaries paid in NSW as a proportion of the total wages and salaries paid in Australia. For example if 75% of your total wages are paid in NSW then you are entitled to 75% of the threshold.

The threshold is also calculated on a group basis. If two or more entities are obliged to be grouped, then the total of the wages and salaries paid by the group is used to calculate the payroll tax but only with one threshold. The grouping provisions extend beyond just holding company and subsidiaries. Grouping can apply where there are common employees or common control. Common shareholders can also result in a group. There are numerous combinations of circumstances that can make up a group. You should have your accountant identify the risks you may be exposed to for your particular business.

When you do reach the threshold, the payroll tax rate is 5.45% of the total wages and salaries.

In addition to wages and salaries, payroll for payroll tax purposes can include:

Allowances	Fringe benefits
Apprentice and trainee wages	Salary sacrifice
Bonuses and commissions	Shares and options
Contractor and consultant wages	Superannuation
Director's fees and other payments	Termination payments
Employment agency contracts	Third party payments

Especially when dealing with contractors, you should obtain professional advice because of the various specific circumstances which are covered by Revenue Rulings from the Chief Commissioner.

As with most NSW State taxes, a director can be made personally liable if served with a compliance notice for an unpaid state tax due by a company of which they are, or were, a director when the company became liable. A director has 21 days after service to pay the outstanding tax, reach an agreement with the Commissioner, or put the company in liquidation or in voluntary administration.

The message is; if your business is growing, put some red flags in place that will alert you and your accountant if a potential payroll tax liability may be looming over the horizon.

AFSA Enforcements

By Joanne El-Haddad

Bankruptcy Trustees are required to report any evidence of an alleged offence committed by a Bankrupt against the Bankruptcy Act. Trustees need to ensure that potential offences are referred as soon as possible in order to ensure that prosecution is possible. Offences proven to be committed can lead to fines or even imprisonment.

Offences can be difficult to pursue. However, according to the Australian Financial Security Authority ("AFSA"), the most common offences that lead to finding the guilt of bankrupts include the failure of individuals to complete and file their Statement of Affairs with the Official Receiver, conceal or remove property, make false declarations and leave Australia without the consent in writing of their trustee.

AFSA recently released prosecution outcomes in their September 2014 Newsletter Personal Insolvency Regulator, an example of the prosecutions are listed below:

Disposing of property prior to bankruptcy.

Mr Riddell (the Bankrupt), sold a property a few months prior to his Bankruptcy and received a total of \$150,000 surplus proceeds from the sale. The Bankrupt was questioned about the sale and stated that he intended to pay his debts with a portion of the funds but the funds were subsequently taken by the Australian Taxation Office. He was then requestioned and his story changed stating that he thought that his debts were dealt with prior to receipt of the funds and the surplus from the sale of the property were transferred to his spouse. After pleading not guilty, he was convicted and sentenced by the Magistrate to a two (2) month jail sentence.

False declaration, failure to disclose income and travelling overseas without Trustee's consent.

Mr Casset (the Bankrupt), failed to declare all his aliases, income earned and omitted a bank account on his Statement of Affairs. The Bankrupt also travelled overseas without the

Trustee's consent. The Magistrate hearing the case sentenced the Bankrupt to four (4) months imprisonment to be released on a self-recognizance in the sum of \$5,000 and be on good behaviour for 2 years.

Obtaining credit and monies without disclosing Bankruptcy.

Mr Panther (the Bankrupt), was convicted and sentenced to 19 months of imprisonment, to be released on a recognizance after serving 6 months for obtaining credit totalling to \$18,579 and an additional \$275,000 to produce boat moulds for a couple without disclosing that he was an undischarged Bankrupt. During the sentencing, the Judge stated that Bankruptcy laws were used to protect the community from persons who have demonstrated the inability to manage their finances.

Bankrupts' Right to Intervene as a Non-Party to a Proceeding

By Hiteshi Dekhtawala

In a recent Federal Magistrate's Court Decision, *Low v Barnet (Trustee); In the Matter of Mathai [2014] FCA 728 (04 July 2014) (Foster J)*, it was affirmed that a bankrupt will be granted leave to intervene as a non-party to proceedings between a creditor and a trustee if they have both a financial interest in seeing the proceedings properly defended and a contingent legal interest directly affected by a creditor's claim.

The facts and the circumstances of the case were as follows:

- The bankrupt was made bankrupt pursuant to a sequestration order made against him.
- During his investigations, the bankruptcy trustee established that there were 2 properties in which the bankrupt held interest prior to the date of his bankruptcy and these were transferred to numerous related entities in order to defeat creditors.
- One of the two properties was transferred amongst others, to the bankrupt's son ("The Son").
- The trustee applied to the Court under section 121 of the Bankruptcy Act, 1966 ("The Act") against the bankrupt and the related entities. The trustee was indemnified in the proceedings by the petitioning creditor.
- Subsequent to the discharge of the bankrupt, the Court decided in favour of the trustee and ordered that the legal title in the 2 properties be transferred to the trustee.
- The petitioning creditor subsequently applied to Court for orders that after paying amounts required under section 109 (1) (a) and 82 of the Act, the trustee distribute to her the whole amount of all property and expenses recovered or realised in the administration of the bankrupt's estate; or alternatively such proportion of the property and expenses recovered or realised that the Court considered just and equitable.