SHERIDANS
CHARTERED ACCOUNTANTS

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Creating better futures

Sheridans' View

After–Acquired Property of the Bankrupt – Update

In the recent case of *De Santis v Aravanis [2014] FCA 1243*, which was an appeal to the Federal Court of Australia heard in May 2013 with judgement not given until 21 November 2014, Justice Farrell held that property acquired by a bankrupt with after–acquired income does not vest in the trustee.

The concept of after–acquired property is set out in Section 58 of the Bankruptcy Act. This section provides that property acquired by the bankrupt while they are still bankrupt vests in the trustee i.e. it is divisible amongst the bankrupt's creditors. However, case law supports the conclusion that after–acquired income remains vested in the bankrupt. The question then arises as to what happens to property that is purchased by the bankrupt with after–acquired income?

Justice Heenan in *Rodway v White [2009] WASC 201* pointed out the "incongruity" in treating after–acquired property as belonging to the trustee, yet maintaining that after–acquired income does not. There is not such a clear distinction between income and property. In general terms, income is received as money, which is itself property. When income is paid into a bank account, this represents a different form of property, being the chose in action against the bank for repayment of the monies deposited.

Justice Heenan also considered the effect of the "exempt money" provisions of Section 116 of the Bankruptcy Act, which allow for certain types of money received by a bankrupt to be protected, even when converted into property. For instance, where a bankrupt receives an award of damages in respect of a personal injury, and acquires a house with this money, both the damages payment and also the house are protected. Despite these considerations, in that matter Justice Heenan concluded that shares acquired by the bankrupt with post bankruptcy income was after–acquired property, and that the shares vested in his trustee.

Justice Farrell in the recent case of De Santis appears to take a different concluding view:

> *"[95] .. taken to its extreme, the argument that property acquired with income earned by a bankrupt vests in the trustee means that although the Bankruptcy Act permits a bankrupt to earn income, it does not permit the bankrupt to acquire any property with that income. The obvious injustice of that situation was accepted in Kitson v Hardwick (1872) LR 7 CP 473...*
>
> *[98] Having regard to the views of the Full Court in Meriton Apartments I consider that I would be bound to find that any property acquired by a bankrupt with after–acquired income does not vest in the trustee in bankruptcy..."*

This position was not viewed to limit the scope of Section 58 and Section 116 of the Bankruptcy Act but instead as avoiding injustice. The query now arises as to whether an undischarged bankrupt can buy back his share of the family home from the trustee using after-acquired income. Perhaps yes, according to this recent authority.

FOREWORD

For Want of a Nail

For want of a nail the shoe was lost.

For want of a shoe the horse was lost.

For want of a horse the rider was lost.

For want of a rider the message was lost.

For want of a message the battle was lost.

For want of a battle the kingdom was lost.

And all for the want of a horseshoe nail.

Proverb

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Sheridans' View

ASIC's continuing help for employees

ASIC reported in December 2014 that it had recently exercised its wind up powers to appoint liquidators to nine abandoned companies to assist former employees of these companies, owed in excess of $310,000, to gain access to the Fair Entitlements Guarantee ("FEG") scheme.

In the whole of 2014, ASIC used its new powers obtained in 2013 to appoint liquidators to 32 companies that owed a total of 99 employees more than $1.4 million in entitlements.

See Issue 27 of Sheridans' View.

Frequently Asked Questions

(i) I'm a shareholder of an insolvent company in liquidation. Will I get my share capital back?

Unlikely. Shareholders rank behind creditors in a liquidation. However, you can probably realise a capital loss in due course.

(ii) What are the consequences of bankruptcy?

- Your name and other details are permanently on the public NPII register.
- You may find it difficult to obtain further credit.
- Your name will be on a commercial credit reference database for up to 5 years, or longer.
- You may not be released from some types of debts.
- Your employment may be affected.
- Secured creditors can still repossess an asset if there is a default in payment.
- You might find it hard to rent and connect utilities without paying a bond.

Recent Assignments

- **Administration or liquidation of:**
  - A residential property builder
  - A manufacturer of water tanks and equine products
  - A bar and restaurant in Perth CBD
- **Personal insolvency administrations, including those involved with:**
  - Bricklaying
  - Outback Jacks Bar & Grill franchise
  - Donut King and Michel's Patisserie franchises
  - Specialised aluminium welding
- **Informal insolvency advice to various businesses, including those involved in property investment, wholesale butchering and retail**
- **Litigation support, including:**
  - Preparation of an Account of Profits for Supreme Court proceedings regarding an alleged breach of employment contracts
  - Assistance to directors in defending the ATO's statutory indemnity under Section 588FGA of the Corporations Act 2001
  - Assistance with identifying relevant entities and assets of the parties in a Family Court matter
  - Assistance with the quantification of the parties' asset pool in Family Court matters
  - Investigations and sundry advice regarding various Family Court matters

EDITORIAL

The Broken Windows Theory

Do you have any broken windows in your business?

The Broken Windows Theory is a criminological theory of the norm-setting and signalling effect of urban disorder and vandalism on additional crime and anti-social behaviour.

The theory originated in 1982 from criminologists George Kelling and James Wilson, who suggested that minor disorder, like vandalism, acted as a gateway to more serious crime. Kelling and Wilson thought that focusing on smaller offences, often referred to as "quality-of-life" crimes, would cause a decrease in the number of violent crimes and other seriously undesirable incidents.

When he was mayor of New York, Rudy Giuliani adopted an aggressive approach to law enforcement, focusing on what would once have been considered minor offences, to send a message that criminal behaviour of whatever sort would not be tolerated. Graffiti was washed nightly from subway cars, subway turnstile jumpers were arrested and rubbish was regularly picked up.

Giuliani's strategy bore fruit. Crime rates in New York dropped faster than in any other major city in the country. In his 2000 book "The Tipping Point", Malcolm Gladwell describes the broken window theory as follows: *"If a window is broken and left unrepaired, people walking by will conclude that no one cares and no one is in charge. Soon, more windows will be broken, and the sense of anarchy will spread from the building to the street on which it faces, sending a signal that anything goes."*

In business, the broken windows theory has become recognised as influential and seen to act in a similar epidemic way as crime. When small things start going wrong, these flaws can escalate and be a sign of a weak company or poor management style. Management needs to take care of the small problems such as slow email responses, inappropriate language or poor manners. All organisations have "broken windows" in one form or another.

So how do you fight the problem of broken windows? Vigilance. You have to stay plugged in. As a manager, you can never retreat to your office and hope for the best. You need to be involved with your people. You need to spend part of your time in the trenches with them, getting rid of all the obstacles that stop them from doing their work effectively. You need to build teams that notice and fix broken windows on their own.

It is very easy to let these things drift. We tend to think that it's just a little problem, we will fix it later. We tend to think it won't get any worse. But it can, and it often does. Do you want to build a great team? Do you want to do good work? Do you want to be a part of a great business? Start by fixing the broken windows.

DID YOU KNOW?

Apple Inc., the world's second-largest information technology company by revenue after Samsung Electronics, was founded on April Fool's Day 1976 by Steve Jobs, Steve Wozniak and Ronald Wayne. Wayne subsequently sold his share of the company back to Jobs and Wozniak for $800 (that share would have been worth approximately US$35 billion today). Apple currently earns US$300,000 per minute.

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