TRAILL & ASSOCIATES

7th ANNUAL NATIONAL PRACTICAL BANKRUPTCY CONGRESS

TAKING POSSESSION OF AND DEALING WITH PROPERTY

2 DECEMBER 2019

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Daniela founded Daniela Fazio Lawyers Pty Ltd in July 2015, a boutique law firm specialising in insolvency, debt recovery and mediation following 10 years working with Sally Nash of the then Sally Nash & Co Lawyers.

Daniela is a Solicitor admitted to practice in New South Wales as well as the Federal Courts in all States of Australia. Daniela is also a trained Mediator pursuant to the National Mediator Accreditation Scheme.

Holding significant experience acting for Trustees in Bankruptcy, Trustees for Sale, Liquidators, Court appointed Receivers, secured and unsecured creditors, bankrupts and debtors, Daniela offers proven success supporting corporate clients as well as lay clients to bring finality to all matters efficiently, cost effectively and expeditiously as possible.

Recently Daniela has received the highest accolades one may receive for her advocacy when she appeared before Justice Pembroke of the Supreme Court of New South Wales and Justice Morley of the Federal Circuit Court (Family Law Division).

In her spare time, Daniela is a passionate community advocate for mental health and a Speaker/ Ambassador for Beyondblue.

1. WHAT IS PROPERTY?

1.1 The word "property" is defined broadly in s5(1) of the Bankruptcy Act, 1966 ("the Bankruptcy Act") to mean:-

> ***"property"*** *means real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property."*

1.2 The focus of this paper will of course be with respect to real property, the ways in which possession may be obtained (ie, by court order or by agreement) so that the property (or interest thereof) which has vested in you as Trustees can be realized for the benefit of the unsecured creditors of the bankrupt estate (ie, by Court orders for sale, including the appointment of Trustees for Sale but also Agreements for Sale).

1.3 In determining which "method" a Trustee adopts for obtaining possession and sale will depend upon each individual bankrupt estate and careful consideration of what will bring about the highest return to the unsecured creditors of the bankrupt estate so as to satisfy the Trustee's duty under s19 of the Bankruptcy Act and particularly the duties to:-

> *"(1) The duties of the trustee of the estate of a bankrupt include the following:*
>
> *(f) taking appropriate steps to recover property for the benefit of the estate…*
>
> *(j) administering the estate as efficiently as possible by avoiding unnecessary expense;*
>
> *(k)exercising powers and performing functions in a commercially sound way."*

1.4 If it is appropriate in the circumstances that Court intervention is the only way the Trustee may be able to move forward in the bankrupt estate to realize property because it is evident that it is unlikely co-operation will be forthcoming by the bankrupt, any co-owner or third party stakeholders or such other reason, the Trustee must also consider which Court is more suitable. Is it the Supreme Court of whatever State you are in or is it the Federal Court or the Federal Circuit Court?

1.5 What about those estates you are administering where the bankrupt's interest in real property is otherwise known as "*matrimonial property*" (Arrrgggghh), suddenly you have to adopt an entirely different approach in family law land and hold on tight.

1.6 You might also have to deal with those "John, trial by jury Wilson" self-represented litigants, those litigants who say you never had an interest in the property to deal with because you (the Trustee) don't understand the Bankruptcy Act like they do, bankrupt's suffering from actual or claimed mental illness, bankrupts promising the Trustee that he or she will "shortly be raising funds" sufficient for an annulment, tenants occupying the property, animals and so the list goes on.

1.7 When I started working in insolvency almost 15 years ago now it was much more black and white to obtain an order for possession and sale. You just filed a Statement of Claim or a Summons (depending on the relief claimed) in the Supreme Court of your jurisdiction and you got the orders. If the real estate was outside of your jurisdiction, you just hired an agent to file the documents on your behalf in the correct jurisdiction.

1.8 But since then, life has become much more complicated. You can no longer use the same cookie cutter for each of your possession and sale matters and

of course, we have *Coshott* to thank (at least for the Full Court's) decision which now confirms the Trustee can combine his possession/ sale application with other issues he may need to be resolved, whether that be simply asking for directions under s30 or seeking an order pursuant to s146 of the Bankruptcy Act and the list goes on. As we will shortly see, you cannot simply tell the Court that you are entitled to possession and that's that. You as Trustees are officers of the Court and have fiduciary duties under general trust law to inform the Court of all of the facts and circumstances leading to such an application.

1.9 What about those situations where you as Trustees do go to the expense of preparing an application for possession, preparing the property ready for sale and then the mortgagee steps in and says thanks very much Trustee, we are now going to exercise our power of sale? How might you recoup some of those costs? Today we will explore some of your options in this respect.

2. GENERAL STEPS TO OBTAIN POSSESSION

2.1 The first step is for the Trustee to register a Caveat over the bankrupt's interest in the land so as to notify "the world at large" of the Trustees interest which has vested in him pursuant to ss58(1) and 116(1) of the Bankruptcy Act. These days the Caveat is registered via PEXA. My Caveat precedent has 25 steps and checks before you can safely tell your client the Caveat has been registered.

2.2 Then *O'Brien v Sheahan* [2002] FCA 1292 letters are usually sent to the bankrupt and any co-owner to preserve the Trustee's right to sell his interest in the property during the period he may do so pursuant to the Bankruptcy Act.

2.3 The short facts of *O'Brien and Sheahan* are as follows.

Immediately before commencement of bankruptcy, bankrupts owned their matrimonial home subject to two registered mortgages. The value of the property was close to the total amount secured by the mortgages.

The trustee directed the bankrupts to obtain appraisals of the property with a view to deciding whether any realisable "equity" was in it. Those appraisals confirmed the sale proceeds were unlikely to exceed amount owing under mortgages. The second mortgage was held by a close relative of bankrupts but despite the Trustees suspicions about the second mortgage, the trustee did not pursue his inquiries about whether it secured a genuine indebtedness. Instead, the trustee told the bankrupts that they could reside in the property while they discharged their obligations under the first mortgage. At the time of the bankruptcies the first mortgagee was about to exercise its power of sale but the bankrupts paid the arrears of moneys owing under the first mortgage and they also paid all instalments of principal and interest falling due under first mortgage. They also made further payments in reduction of principal. The bankrupt husband carried out substantial refurbishments. The bankrupt wife paid all rates and taxes.

Neither bankrupts heard anything further from the Trustee about his intentions in relation to the property for over 4 years. During that time the property increased in value and then the Trustee decided to sell the property.

The Trustee applied to the then Federal Magistrates Court for vacant possession and not surprisingly the bankrupts applied for declaratory and other relief. The Court ordered the Trustee to re-convey his interest back to the bankrupts (once discharged).

2.4 It is not uncommon in my practice for this *O'Brien v Sheahan* letter (or at least a version of it) to be sent multiple times throughout the process, depending on the bankrupts and any non-bankrupt co-owners intentions and conversations with the Trustee (as to sale/ annulment, etc). But at the very least, this letter should be sent to the bankrupt and any co-owner at least twice; once before registration of the Bankruptcy Application/ Transmission Application and then after registration of the Bankruptcy Application/ Transmission Application. It

would be useful to send this letter to the bankrupt and any co-owner at least once per year throughout the course of the bankruptcy.

2.5 It would seem appropriate at this junction that we now take a look at the recent decision of ***Carrafa v Chaplin, in the matter of the bankrupt estate of Michael Chaplin*** **[2019] FCA 415 (22 March 2019)** as this case neatly illustrates and affirms what can happen if the Trustee seeks to obtain possession of property by order of the Court when he/she hasn't adopted the *O'Brien v Sheahan* approach and additionally and very importantly what sort of evidence is necessary to be adduced in any possession application.

2.6 The question raised in this decision was whether the Trustee was entitled to an order for possession having regard to the dealings by the Trustee and the bankrupt in the course of the administration of the bankrupt estate.

The story of Mr Chaplin

2.7 Mr Chaplin was declared a bankrupt in July 2006 upon the making of a Sequestration Order and discharged automatically in 2009.

2.8 The house on the land was built under the bankrupt's supervision as an owner/ builder on land in Broomehill, Western Australia. No owner/ builder insurance was taken out at the time and it appears from the decision that no such insurance was taken out until 2016 (10 years after construction).

2.9 The bankrupt continuously occupied the property with his 2 children.

2.10 At the time the Sequestration Order was made the house on the land was structurally complete although cosmetic finishes such as painting had not yet been finished.

2.11 Mr Chaplin maintained the house on the land but as at the date of the hearing he could not remember exactly what work was done to the property since the Sequestration Order was made due to the passage of time.

2.12 Mr Chaplin was discharged from bankruptcy in 2009 but his interest in the property remained vested in the Trustee pursuant to s129AA(4) of the Bankruptcy Act because the Trustee issued the appropriate notice extending the revesting time for the property. Accordingly, the property continued to be administered by the Trustee in Bankruptcy notwithstanding the bankrupts discharge.

2.13 In 2016 the Trustees in Bankruptcy were able to become the registered proprietors of the land and take steps to realize the property for the benefit of the unsecured creditors of the bankrupt estate.

2.14 The now sole Trustee had agreed at some point that Mr Chaplin could remain in occupation of the property in order to maintain it whilst it was being marketed for sale. However at the hearing of the proceedings, the Trustees position was that that agreement had been terminated when the Trustee caused a Notice of Termination pursuant to the WA Residential Tenancies Act to be served on the bankrupt back in 2017 so that the bankrupt could deliver up vacant possession to the Trustee.

2.15 However when the time had expired for which the bankrupt was required to deliver up possession, the Trustee put the brakes on for reasons not apparent in the judgment and did not proceed at that time to commence an application for possession.

2.16 It wasn't until September 2018 that the Trustee commenced an application for unconditional possession pursuant to ss30, 77(1)(e) and 129(2) of the Bankruptcy Act, more than 12 years after the commencement of bankruptcy.

2.17 The Trustee was chastised for commencing such an application for possession when he did and by failing to put before the Court all of the relevant facts and circumstances which led to the filing of the application.

2.18 ***Question:*** ***What sort of evidence do you think would be prudent to put before the Court in circumstances where your application for possession contains these facts?***

2.19 The Court in refusing to make the orders sought by the Trustee said that the Trustees evidence failed to set out:-

- How Mr Chaplin came to be allowed to remain in occupation of the property since 2006;
- The nature and extent of the work completed by Mr Chaplin;
- Circumstances which led to the fact that owner/ builder insurance was unable to be obtained;
- The nature and extent of the work completed by Mr Chaplin;

2.20 The Court found 2 reasons why the Trustee's application should be dismissed.

2.21 The first was that the residential tenancy of the bankrupt hadn't been terminated in accordance with the Western Australian Residential Tenancies Act. In order for termination under that Act, it requires either the bankrupt to vacate and deliver up possession to the Trustee or an order from the Magistrates Court of Western Australia terminating the agreement. Neither of those events had occurred. For that reason the Trustee was not entitled to an order for vacant possession.

2.22 It wasn't until the morning of the hearing the Trustee put on supplementary submissions that in essence said, well if I have to comply with the Residential Tenancies Act and I haven't (because I don't have an order from the Magistrates Court of Western Australia) then the Court should and could make

such an order under the jurisdiction conferred by s79 of the Judiciary Act, 1903 (Cth) (“the Judiciary Act”). For a number of reasons the Court declined to entertain this very late submission by the Trustee. [Reasons included unfairness and the fact that any application for an order terminating the residential tenancy agreement must be made within 30 days after the date specified in the notice of termination as to when the tenant must deliver up vacant possession – the date in the termination notice here had long since passed.

2.23 Having made an agreement with the bankrupt to allow the bankrupt to remain in possession of the property, the Trustee then became subject to the Residential Tenancies Act. His Honour said at [26] of the decision that:-

> *“…The trustee, like any owner, must abide by residential tenancy legislation and is bound by equitable principles arising from dealings between the trustee and the bankrupt in the course of the administration.”*

2.24 The second reason why the Court dismissed the Trustee’s application was because the Trustee failed to disclose to the Court all of the relevant circumstances.

2.25 In reaching this conclusion, the Court said that not only does a Trustee in bankruptcy have all of the fiduciary duties of a trustee under the general law, but a Trustee in Bankruptcy is also an officer of the Court when exercising powers and discretions. Accordingly, the Court said that the application brought by the trustee and the manner in which it was brought are both matters to which these duties apply.

2.26 As a Trustee in bankruptcy you are obliged to disclose *all* matters which may be relevant on an application; *Frost v Sheahan* [2008] FCA 1073 at [73]. More often than not these days, my Trustees supporting Affidavits for possession are reams of paper thick because more often than not, there is much more happening in the background rather than a straight possession application. My preference is to adduce all matters to the Court, the Court can then determine whether or not that material is relevant to the fact in issue.

2.27 The Trustee was criticized by the Court in the Chaplin case for failing to disclose to the Court in detail, all of the circumstances in which the bankrupt had been allowed to be in possession of the property for so many years even when there had been adjournment to allow the Trustee to flesh out his evidence in a manner which would satisfy the Courts concern. For one reason or another, the Trustee elected not to file any evidence to satisfy the Courts concern.

2.28 ***Question: What could the Trustee have done to avoid this disastrous outcome?***

- Relied on any *O'Brien v Sheahan* letters (if sent to the bankrupt) so that it was clear he could continue to live in the premises to maintain it on the clear understanding that such maintenance was in lieu of an occupation fee.

- Considered the Residential Tenancies legislation before entering into the agreement which he did with the bankrupt.

- Properly terminated the agreement.

- Included an order under s79 of the Judiciary Act for the agreement to be terminated as an order ancillary to the possession orders sought therein.

2.29 ***Question: So what lessons could be learned from Chaplin's case?:***

(1) Ensure any previous agreement as to possession is properly terminated before you are eligible to seek an order for possession.

(2) Always disclose all of the circumstances which bring the Trustee to make any application, not just in possession applications. If you put everything into evidence, the Court can then decide what is relevant and what is not.

Bankruptcy Application/ Transmission Application

2.30 So now let's go back to the second step in seeking orders for possession. Assuming the Trustee has determined the bankrupt holds his interest in the property beneficially and there is sufficient equity in a property registered to the bankrupt in some respect (whether it be an entire share or 50% or whatever it is) then the next step is to register him/ herself on title as to the bankrupts interest in the property in readiness for sale. This of course is done by way of Bankruptcy Application (in NSW) and Transmission Application in every other State or Territory.

2.31 To be able to register your Bankruptcy Application/ Transmission Application you need the relevant Form from LRS or equivalent, if there is a mortgage registered over the property you need the CoRD consent if the title is available electronically or else you need the mortgagee to produce the CT in the old fashion way. If there are Caveats, you either need a Withdrawal of Caveat from the Caveator or you need the Caveators consent to register the Bankruptcy Application. If you can't get a Withdrawal because the Caveator is refusing to deliver it up and they are refusing to consent, then you need to apply to the Registrar General for the issue of a Lapsing Notice.

2.32 Once the Bankruptcy Application is registered and you have sent your second round of *O'Brien v Sheahan* letters, then you are ready to issue a Direction to Vacate to the bankrupt and a Notice to Occupier on any other Occupier(s).

2.33 I choose to have my Trustees issue a Direction to Vacate to the bankrupt pursuant to s77(1)(e) of the Bankruptcy Act because failure by the bankrupt to comply with the Direction is a failure by a bankrupt to comply with his/ her duties under the Act is an offence to which can [MUST?] be referred to the Regulator for prosecution (or not) as it deems appropriate.

2.34 The Direction to Vacate and the Notice to Occupier goes to your process server to attempt personal service. Assuming service is effected, you allow the time set out in the Notices to expire + 3 more days and then you are ready to file your application for possession with the Court unless of course the recipient of your notice has delivered up the keys to the property to you and vacated the premises. If you are lucky enough for that to have occurred, you send a locksmith round to change the locks and you attend to complete your Inventory in accordance with the Bankruptcy Regulations, 1996 ("the Regulations").

2.35 Important to note: There is never any circumstance I would ever recommend my Trustees delay an eviction once it has been set by the Sheriff at the 11th hour. If the recipient of the Notice wants an extension of time to vacate, that person has 10 days after receipt of the Notice to appear in the possession proceedings (if they are not already a party) and can apply to the Court for a stay of the execution of the Writ. If the Trustee entertains such a request by the recipient of the notice and the recipient does not vacate when he or she says they will, the Trustee needs to start from scratch again and have another Notice to Vacate/ Direction to Vacate personally served. This will inevitably raise, what I say, is an unnecessary cost and expense of the bankrupt estate.

Filing your Application for possession

2.36 So now, after having issued the Direction to Vacate and Notices to Vacate, there has been no compliance by the bankrupt and the occupiers, no offers received from a friend or family member of the bankrupt to purchase your interest in the property, are you ready to file your application for possession?

2.37 The answer is, maybe. Before you file your application just double check your file to see whether there are any other matters that need to be closed off before hand or whether there are any other matters which you think are necessary to come to the Courts attention. For example, has the bankrupt been promising

he/ she could raise funds for an annulment since day 1 but for one reason or the other, there have been multiple delays whether it be the fact that funds are asserted to be coming from overseas, is the bankrupt is suffering from a mental illness which prohibits him/ her from dealing with their financial and legal affairs, does the bankrupt assert that personal injury compensation monies were used to purchase the whole or part of the property? Are there likely to be Family Law property claims? Each of these issues should be explored and consideration as to whether or not such matters are raised in your evidence so that the Court has the "whole picture" when determining whether or not to grant the orders you seek.

Where to file?

2.38 On the basis that you have satisfied yourself there are no other matters to be included in your possession application or there are matters to be disclosed to the Court, where should the Application be filed, the State Court or the Federal Court?

2.39 If your other matters are bankruptcy matters where the State Court does not have jurisdiction to determine bankruptcy matters, the best place for you to be is the Federal Courts.

2.40 If you think there is unlikely to be any opposition to your application and it really is just going to be a straight possession application, then start in the Supreme Court. In NSW possession orders can be obtained by default which can save time and money but if a bankruptcy matter does arise in those proceedings, they will need to be transferred to the Federal Court and the transfer alone will not only delay the proceedings but will be a much more expensive exercise for you.

2.41 I must say that in the last 4 ½ years I have only commenced 1 application for possession in a State Court, all others have been commenced in the Federal

Courts by reason of either assertions of upcoming annulments, family law proceedings, etc and I do a lot of possession work.

Section 79 Judiciary Act, 1900

2.42 We now know that a Trustee in making an application for possession/ partition orders can now rely upon s79 of the Judiciary Act and ss27 and 30 of the Bankruptcy Act when bringing such an application to the Federal Courts rather than the State Courts.

2.43 The High Court in *Rizeq v Western Australia* [2017] HCA 23 with respect to s79 of the Judiciary Act said at [63]:-

> *"…the section fills a gap in the law governing the actual exercise of federal jurisdiction which exists by reason of the absence of State legislative power. The section fills that gap by picking up the text of a State law governing the exercise of State jurisdiction and applying that text as a Commonwealth law to govern the manner of exercise of federal jurisdiction. The section has no broader operation."*

2.44 What is important to remember is that if you rely on a State Act to give you a remedy, such as in *Chaplin* the Trustee relied upon the WA Residential Tenancies Act, then you must comply with the terms of that Act, ie, what did that Act say with respect to termination? You need to follow the requirements of that particular Act.

2.45 It is appropriate then now to consider the second case on your list, that is the decision of ***Weston (Trustee), in the matter of Jeffery v Jeffery*** **[2019] FCA 554.**

2.46 The *Jeffrey* decision is an illustration of how the law is applied in the Federal Court when seeking orders for possession and sale otherwise only usually

available pursuant to State legislation and succinctly sets out the principles to apply.

Brief facts

2.47 This case concerned an application for orders for sale and possession of land in South Australia jointly held by the Trustee and the non-bankrupt spouse.

2.48 Additionally, the case concerned water allocation rights, to which 50% of same had vested in the Trustee by virtue of the bankrupt's bankruptcy. Those water entitlements did not run with the land in a proprietary sense.

2.49 Those water entitlements are quite valuable and there is a market for them.

2.50 Mr Jeffreys was made bankrupt by sequestration order in December 2016. The Trustee (Paul Weston) was the Trustee of Mr Jeffreys bankrupt estate after having been transferred the estate pursuant to s181A of the Bankruptcy Act in November 2017 after replacing 2 prior trustees.

2.51 The Trustee relied on s79 and 80 of the Judiciary Act, ss27 and 30, 77(1) of the Bankruptcy Act. He also relied on the Law of Proper Act, 1936 (SA) with respect to the proposed order for sale. Additional orders were sought to secure vacant possession, for the facilitation of the sale and the preservation and application of the sale proceeds.

2.52 The bankrupt and the co-owner opposed the orders sought by the Trustee on the basis of hardship and the fact that they asserted they had made an offer to the Trustee "to pay the debt." The co-owner submitted that she ran a successful hairdressing business from an outbuilding on the property and that if the Trustee were to take possession, she would have no means of supporting her husband and their 3 children. There is no ground of "hardship" relevant in the LP Act, much the same as there is no ground of "hardship" in the Conveyancing Act concerning s66G.

2.53 The mortgagee appeared and was granted audience and then joined as a party to the proceedings on the basis that the mortgagee did not want the Trustee to take possession, they wanted to "*guard its right as a secured creditor to manage the sale of the land in accordance with the terms of its security."* The mortgagee later on made no formal application and no longer opposed the Trustees application.

2.54 The Respondents written submissions were prepared by their former solicitor (at the time of the hearing their solicitor had passed away) and submitted that the Court had no jurisdiction to bring about his application to the Court.

2.55 The submissions summarily provided that:-

> *"(1) jurisdiction is vested in the Federal Court of Australia by s39B(1A) of the Judiciary Act with respect to any matter in which the Commonwealth is seeking an injunction or declaration;*
>
> *(2) the Trustee is not the Commonwealth and the matter may therefore be distinguished from Australian Securities and Investments Commission v Edensor Nominees Pty Ltd [2001] FCA 1;*
>
> *(3) the originating application is made in respect of a matter "arising out of and exclusively governed by" a State law (namely the LP Act) and there is no corresponding provision in a Commonwealth statute;*
>
> *(4) the LP Act defines the word "court" to mean the Supreme Court of South Australia and the District Court of South Australia;*
>
> *(5) the Federal Court does not fall within the definition of a "court" for the purposes of the LP Act, and even if it did "State jurisdiction cannot be conferred on the Federal Court."*

2.56 The Court rejected the most part of the Respondents submissions and concluded that the Court does have jurisdiction in the matter and the power to

make the orders sought by the Trustee may be reached by 2 alternate paths of reasoning.

2.57 Those alternate paths were that: -

(1) The Federal Court has original jurisdiction pursuant to s22 of the Federal Court Act to determine matters completely and finally. To the extent that the constitution permits, the Court has jurisdiction in respect of matters not otherwise within its jurisdiction that are associated with matters in respect of which the jurisdiction of the Court is invoked pursuant to s32(1) of the Federal Court Act.

Section 39B(1A)(c) of the Judiciary Act provides that the original jurisdiction of the Federal Court includes jurisdiction in any matter arising under any laws made by the Parliament (subject to certain exceptions which didn't apply in this case).

The Court looked to the Trustees duties, functions and powers which included consideration of s19, 109, 140, 134 of the Bankruptcy Act and said, well the Bankruptcy Act is a law made by the Parliament in respect of the Trustees interest in the property, being an interest that owes its existence to a law of the Parliament and held that the Trustee did have the capacity to commence the proceedings in respect of the land by virtue of s19, 58(1), 116(1) and 134(1) of the Bankruptcy Act.

In the exercise of federal jurisdiction, the Court must look to ss79 and 80 of the Judiciary Act to supply the law.

(2) Secondly, the Court confirmed it had jurisdiction to determine the entire proceedings because the Trustee sought orders under ss30 and enforcement of the bankrupt's obligations under s 77 of the Bankruptcy Act.

2.58 The Court said, whichever path you adopt, the Court is exercising federal jurisdiction and as such, the laws to be applied are those identified by ss79 and 80 of the Judiciary Act.

2.59 Because there was no law of the Commonwealth that established an alternate regime by which the co-owner of land may obtain orders for the sale of the whole of the land so that the co-owners interest in the land could be converted into money, adopting s79 of the Judiciary Act brings the LP Act within the meaning of the provision because that Act establishes a regime by which the respective rights of two or more persons having an interest in the land may be identified, contested and adjusted.

2.60 The Court then discussed the Full Courts decision in *Coshott v Prentice* [2014] FCAFC 88 but I will assume everyone here knows that decision back to front by now so I will not discuss. The takeaway for the purposes of this paper from the decision of *Coshott v Prentice* is that whilst s30 of the Bankruptcy Act did not confer power on the Court to make the order for sale, the power was conferred by the law of the State in which the Court was sitting in accordance with s79 of the Judiciary Act.

2.61 The Court did not make orders for partition because he did not see any practicality in doing so but he did make the orders for sale. He also made the orders for vacant possession after giving considerable weight to the fact that the bankrupt had been on notice of the Trustees wish to sell his interest in the land since 2017 and also because the bankrupt and the co-owner indicated that they were resentful of the consequences of the bankrupts bankruptcy and so may not be minded to co-operate with the steps that are to be taken to effect an orderly sale of the property.

3. ***Shaw as Trustee of the bankrupt estate of Nguyen v Vu*** & ***Anor*** [2019] FCCA 1451 (31 May 2019)

3.1 One of the advantages as I mentioned earlier about commencing your proceedings in a Federal Court rather than a State Court is that you are then within the realm of a Court with bankruptcy jurisdiction and so your claim for possession or orders for partition can be brought with another bankruptcy

action, rather than having to start 2 separate pieces of litigation in different jurisdictions.

3.2 This brings me to discuss the last case on your list, which is the decision of Judge Manousaridis delivered in May this year and that is the decision of ***Shaw as Trustee of the bankrupt estate of Nguyen v Vu*** & ***Anor*** [2019] FCCA 1451 (31 May 2019).

3.3 That case concerned an application by the Trustee in Bankruptcy of Mr Nguyen for declaratory and other relief in relation to real estate in St John's Park and payments made in relation to the acquisition of that property.

3.4 The Trustee had calculated that the bankrupt held a 61.75% interest in the property notwithstanding the fact that he was registered on the title as tenant in common with his mum as to 1/100 share.

3.5 A calculation was provided by the Trustee in his evidence to support how he had determined the bankrupts interest in the property equated to a 61.75% interest and included the fact that it was claimed by the Trustee, that the bankrupt contributed $540k odd towards the purchase price and the fact that he serviced the mortgage he and his mum were granted the finance to purchase the property.

3.6 As I was reading this and in particular the claim that the mortgage repayments by the bankrupt amounted to a legal interest, I was a little confused because I have never known mortgage repayments by a person who is obligated to pay the mortgage (irrespective of the interest noted on the title) but pursuant to the loan agreement with the financier to mean that person has a greater interest in the property because each mortgagor is required to pay the mortgage, ie, they are doing no more than they are obligated to do by the terms of the loan agreement.

3.7 Instead, my mind went directly to the right to contribution. Both at law and in equity that rationale was described by Kitto J in *Albion Insurance Co Ltd v Government Insurance Office (NSW)*[15] :

> *"as one of natural justice" which ensures "that persons who are under co-ordinate liabilities to make good the one loss (eg sureties liable to make good a failure to pay the one debt) must share the burden pro rata."*

3.8 In *Mahoney v McManus* [17], Gibbs CJ (with whom Murphy and Aickin JJ agreed) said that:

> *"the doctrine of contribution is based on the principle of natural justice that if several persons have a common obligation they should as between themselves contribute proportionately in satisfaction of that obligation. The operation of such a principle should not be defeated by too technical an approach".*

3.9 If a Court finds in favour of a person who has made greater mortgage repayments under the doctrine of contribution, it is usual that a charging order is made as against the property.

3.9 However in this case the Trustee said that the payment of the purchase price and the mortgage repayments by the bankrupt gave rise to a resulting trust in which mum came to hold 61.75% of her legal interest in the property as trustee for the bankrupt, that interest now having been vested in the Official Trustee pursuant to s58 of the Bankruptcy Act.

3.10 The Trustee also had an alternative argument. That alternative argument was that the Trustee claimed the purchase price contributed towards the property of $540k odd was void under s120 of the Bankruptcy Act and as a result, the Trustee is entitled to a charging order over the property to secure repayment of the $540k.

3.11 Although mum was represented in the proceedings, mum filed no material in answer to the Trustees claim and at the hearing her solicitors accepted that the bankrupt held a 61.75% interest in the property and did not otherwise wish to participate in the hearing. Wow! How often does this happen? Never!! On that basis mum was excused from further participating but as a matter of prudence and, as submitted by Counsel for the Trustee, if not necessity, the Trustee requested he prove his entitlement to the orders which he seeks and I think this was the appropriate course to take in circumstances where the Trustee has fiduciary duties to the bankrupt estate and he is an officer of the Court.

3.12 So Counsel for the Trustee proceeded accordingly and made submissions as to why the bankrupt's interest in the property was 61.75%. The evidence of the Trustee included a sensible calculation of how he determined the bankrupts interest was 61.75%. An alternative calculation (which came to the same sum) was drawn pursuant to the authority of *Calverley v Green [*1984] HCA 81 and again, that calculation looked very sensible to me, being a simple mathematical equation.

3.13 The Trustee relied on the principals enunciated in *Calverley v Green* with respect to his claim based on resulting trust but the Court wasn't convinced Calverley v Green had been interpreted in accordance with the judgment.

3.14 Judge Manousouridis said at [19]:-

> "*In relying on these principles the Trustee appears to have assumed that money paid in discharging a mortgage that has been granted to secure a loan with which to acquire a property is equivalent to paying the purchase price for the property. The Trustee goes further and assumes that any payment made in connection with the purchase price of property, such as the payment of stamp duty and legal fees, and any monetary liability incurred to fund the purchase of a property, are to be treated as payments of the purchase price. These assumptions, however are incorrect…"*

3.15 What His Honours Mason and Brennan JJ in *Calverley v Green* did say at [20] was:-

> *"It is understandable but erroneous to regard the payment of mortgage instalments as payment of the purchase price of a home. The purchase price is what is paid in order to acquire the property; the mortgage instalments are paid to the lender from whom the money to pay some or all of the purchase price is borrowed."*

3.16 Therefore, his Honour concluded that those costs the bankrupt had expended for the payment of stamp duty and other costs associated with the acquisition of the property could not be regarded as payment of the purchase price of the property. Further, in the absence of evidence to the contrary, those payments could not by themselves support the creation of any resulting trust.

3.17 The Judge said the only payments that could result in a resulting trust are those monies the bankrupt provided in his character as a purchaser. To this end, the only payments His Honour found were capable of being characterised as payments of the purchase price of the property was the deposit of $84k and a payment made by the bankrupt towards the purchase totalling approximately $87,000.00.

3.18 As a consequence, His Honour found that the bankrupt alone provided the purchase price for the property and no contributions were made from mum!! The presumption which must flow then is that the bankrupt did not intend to confer any beneficial benefit at all on mum. **Question: What do you think this means??** It means that the bankrupt and mum hold their legal interest in the property under a resulting trust but the sole beneficiary is the bankrupt, ie, the bankrupt has the 100% beneficial interest in the property! Oh no!!! But because the Trustee only sought a 61.75% interest and not an interest described as "not less than 61.75%, all the Judge could do in the circumstances was grant that 61.75% interest and not any greater than the Trustee had claimed.

3.19 With respect to the alternate claim by the Trustee pursuant to s120 of the Bankruptcy Act, although the Judge didn't need to consider same because he granted the principal relief sought by the Trustee, he did say the alternate relief had some difficulties and that the Trustee was not entitled to relief based on s120 of the Act. We don't have time to go through that here today but Bob and I will be going through this in the intensive workshop tomorrow for those attending.

3.20 The orders the Trustee sought with respect to s66G were ultimately made.

State Court v Federal Court

4. ***Trustees of the property of Shane L Fuz (Bankrupt) in the matter of Shane L Fuz (Bankrupt) v NSW Trustee and Guardian*** [2019] FCA 1311 (21 August 2019) (Matthews Folbigg case)

4.1 This next decision concerns an application made by the Trustee pursuant to s66G of the Conveyancing Act in the Federal Court rather than the State Court. On the face of the judgment, it looks as though it could have been a case filed in either Court very easily but it was ultimately filed in the Federal Court. [NB/ an initiating application in the Supreme Court for an individual is $1,143.00 whereas the fee in the Federal Court is $1,585.00].

Brief Facts

4.2 Mr Fuz was declared bankrupt by way of sequestration order in 2012. At that time, Mr Fuz and his wife were the joint registered proprietors of real estate in Nowra. However upon the date of bankruptcy, the joint tenancy was severed.

4.3 Unfortunately in 2015 Mrs Fuz died but she did leave a Will. The beneficiaries of her Will were her 4 children.

4.4 No application for Probate had been made for reasons which are not set out in the judgment. Nonetheless, the bankrupt continued to live in the property after his wife died.

4.5 In 2016 one of their sons was declared bankrupt.

4.6 This year the Trustees sought orders pursuant to s66G of the Conveyancing Act in the Federal Court so that the property could be sold and 50% of the net proceeds of sale could become available for the creditors of the bankrupt estate.

4.7 The majority of the case looks at the limited circumstances upon which an application under s66G would be refused. The Court said that this was a case where there is reason for the Court to exercise its discretion conferred by s66G of the Conveyancing Act. They said that in the absence of an order for sale, the indebtedness of the bankrupt could not be satisfied either in whole or in part. But by granting the orders, monies would also become available to the trustees to call for formal proofs of debt.

4.8 The trustees of the bankrupt estate were granted the orders they sought.

5. ***Petrie, Trustee of the property of Aitken (bankrupt) v Aitken & Ors*** [2019] FCCA 16 (16 January 2019)

5.1 This is another "*John, trial by jury case"* and raises the issue of the jurisdiction of the Court; not that the Court doesn't have the power to make an order possession and sale of the property as the Trustee sought but whether or not the Court has jurisdiction to hear and determine an application under the Bankruptcy Act at all. The decision also addresses the issue of representation by a non-lawyer, which is quite useful. It is that basis upon which I will discuss the case rather than the old Queen of Australia argument, which I will leave to you to amuse yourselves in your own time.

Brief facts:

5.2 In February 2017 upon the making of a sequestration order the Trustee was appointed Trustee of Mr Peter Aitken's bankrupt estate. The second respondent in these proceedings was Ms Judith Aitken, the wife of the

bankrupt. The third respondent was Mr Henry Aitken (97 years old), the father of the bankrupt.

5.3 As at the date of bankruptcy, the bankrupt and his wife were the registered proprietors of one parcel of land and the bankrupt was the sole proprietor of the adjoining parcel of land.

5.4 The bankrupts 97 year old father lived in the property solely registered to the bankrupt (8A) and he did not pay any rent for occupying that property.

5.5 The Application in a Case filed by the respondents, challenged the jurisdiction of the Court and no, not pursuant to s79 of the Judiciary Act but sought orders that:-

> *"1. The Trustee make answer of the validity of the bankruptcy order in light of evidence of presumption against the authority known as the Queen of Australia.*
>
> *2. The Trustee establish the jurisdiction of the Court to proceed under the said Queen of Australia in light of the fifth and second clause of the Commonwealth of Australia Constitution Act 1900.*
>
> *3. That no matter may proceed until jurisdiction is established in light of the submissions and the referenced documents placed before the applicant, and subsequently filed, that have not been denied."*

5.6 With respect to the appearance of a non lawyer on behalf of a party to the proceedings, the bankrupt wanted a Mr Piccinin to appear for him in the proceedings.

5.7 Mr Piccinin was not a solicitor but one could say, he came from the same school of thoughts concerning the bankrupts belief as to the invalidity of his

bankruptcy by virtue of his belief in the Queen of Australia. [Mr Piccinin had once assisted a litigant by the name of Harry Hopes albeit, unsuccessfully.]

5.8 The Court looked at the legislative framework for which Mr Piccinin could represent the bankrupt in these proceedings, specifically at s44 of the Federal Circuit Court of Australia Act, 1999 ("FCCA") which says:-

> *"Representation*
> *A party to a proceeding before the Federal Circuit Court of Australia is not entitled to be represented by another person unless:*
>
> *(a) under the Judiciary Act 1903 , the other person is entitled to practise as a barrister or solicitor, or both, in a federal court; or*
>
> *(b) under the regulations, the other person is taken to be an authorised representative; or*
>
> *(c) another law of the Commonwealth authorises the other person to represent the party."*

5.9 The respondents relied on s44(c) FCCA because they said the Bankruptcy Act, specifically s308(c) and (d) applied. Those sections provide:-

> *"Representation of corporation etc.*
> *Subject to this Act, for the purposes of this Act:*
> *(a) a corporation may act by any person duly authorized in that behalf by the corporation;*
> *(b) a partnership may act by any of its members or a duly authorized agent;*
> *(c) a person of unsound mind may act by a person authorized or empowered by law to act for him or her; and*
> *(d) any person may act by his or her agent duly authorized in that behalf."*

5.10 An Affidavit of the bankrupt was relied upon in the proceedings. That Affidavit contained evidence as to:-

(a) the giving of a Power of Attorney to Mr Neil Piccinin by each Respondent (3 Powers of Attorney were annexed, one for each Respondent).

The Powers of Attorney stated:

> *"…2. I authorise my attorney, subject to clause 3, to on my behalf anything that I may lawfully authorise an attorney to do.*
>
> *3. This power of attorney is subject to the following conditions, limitations, of exclusions:*
>
> *This power of attorney is limited to making enquiry and presenting information, with reference to validity of the bankruptcy order and jurisdiction, and acting for the donor in the court proceedings under application of Natasha Petrie, acting as bankruptcy Trustee of Peter Aitken…"*

(b) A doctors certificate for Henry Aitken (the father) for his inability to attend Court due to the infirmity and fragility of age.

(c) Further there was reliance on a letter from a consultant psychiatrist, Dr SD Febbo dated 1 March 2018 [some 3 weeks or so before the hearing) relating to Peter Aitken's mental affirmity as follows:-

> *"I have been Mr Aitken's treating psychiatrist since November 2016. Mr Aitken suffers from a major depressive disorder with associated anxiety in the context of significant psychosocial stressors, in particular court processes."*

> The medical evidence in this case failed to establish that any of the Respondents (the bankrupt and the father) to whom the medical evidence related are of unsound mind for the purposes of s308(c) of the Bankruptcy Act. There was no evidence as to the incapacity of Mrs Aitken.

5.11 The Court disagreed with the Respondents interpretation of s308 of the Bankruptcy Act and found that s308(c) and (d) of the Bankruptcy Act do not provide a basis for any person to act or appear as a non lawyer advocate for a person in bankruptcy proceedings and it is plain that the intention of s308(c) and (d) of the Bankruptcy Act is to allow agents to file papers on behalf of a bankrupt, and deal with administrative issues, not to allow a person who is a non-lawyer to appear in Court on behalf of a bankrupt.

5.12 Accordingly, it was held that Mr Piccinin had no right to appear either by reason of s308(c) and (d) of the Bankruptcy Act and no exception under s44 of the FCCA Act applied. Instead, it was held that the Court did have jurisdiction to hear the Trustees application.

5.13 **What is the take away from this case?**

Often, it is the case that self-represented litigant’s, on the day of the hearing, suffer from a bout of depression and/or anxiety. A medical certificate is not enough if that litigant wants to rely on that certificate as a means of being granted an indulgence of the Court. Instead, what is required is sworn evidence pertaining to that medical condition; for example, *Luck v Chief Executive Officer of Centrelink* [2015] FCAFC 75 [48]-[49].

5.14 The critical question to be addressed is whether, and if so, why the medical condition prevents the person from attending Court or participating effectively in any Court hearing.

5.15 Evidence as to why a person may be medically unfit to attend Court proceedings must be given by a medically qualified person.

6. ***Beadle in her capacity as Trustee of the bankrupt estate of Nyoni v Nyoni & Anor*** [2019] FCCA 1723 (20 June 2019).

6.1 The next case on your list is this one of *Beadle*. It is a straight possession application in WA and a nice succinct judgment by Justice Street.

6.2 The only thing I will say about this case is that once you get the orders made for possession, if you need to take steps to enforce the Writ pursuant to their Civil Judgments Enforcement Act, 2004, it can be difficult to find someone in the NSW Registry and the WA registry who understand that the Federal Court actually does have the power to require the Sheriff to issue the Writ in WA but that's all I will say about this now. I will however be talking through in more detail at the full day workshop ways that my firm has been successful in getting WA to act upon an order made in the Federal Court (NSW Registry).

Caveats

7.1 Sometimes in preparing your application for possession you discover that there is a caveat or various caveats asserting interests by way of charges on the land, etc. It is your duty to investigate the validity of those Caveats, usually by first calling for the charging documents or any other such documents to support the claim.

7.2 In the event no such withdrawal of caveat is forthcoming and/or no evidence to support it, you might consider asking the Registrar General to issue a Lapsing Notice. Of course, this could act a double edged sword. If the caveator, within the time frame wishes to have his/ her caveat extended, he/ she may apply to the Supreme Court. This means you will be involved in a hearing and Court process you might otherwise have wished to avoid. Sometimes it is unavoidable.

7.3 My preference before listing a property for sale is to have all of the Caveats removed or be in possession of Withdrawals, in readiness for settlement. However now we have PEXA and Caveats and Withdrawals must be lodged via PEXA after 1 July 2019. At best, all you can get now is an agreement from the caveator confirming they will withdraw their caveat or you could create a PEXA workspace and ask the caveator to join.

7.4 In the Supreme Court decision of ***Sijabat v Cussen*** [2018] NSWSC 847 the Trustees in Bankruptcy of Cosimo and Elizabeth Gasparre filed a Summons seeking orders for the removal of caveats registered over land which had now vested in the Trustees by 2 defendants and compensation.

7.5 One of the caveats claimed an interest by way of a charge by virtue of an agreement between the caveator and the bankrupts. The caveator said there was an agreement to pay all legal fees owing “from the proceeds of sale of subdivided property. That caveat was registered less than a month before the Trustees appointment.

7.6 The second caveat also claimed an interest by virtue of a charge pursuant to an agreement between that caveator and the bankrupts. That agreement was to pay all professional accounting and financial service fees owing from the proceeds of sale of the subdivided property. That Caveat too was registered less than a month before the Trustees appointment.

7.7 Each caveator refused to withdraw their caveats despite the Trustees request and offers to put the proceeds of sale of the property into a trust account pending determination of each caveators claims.

7.8 The Trustee submitted that the caveats were invalid because an interest in the proceeds of sale is not an interest in the land itself and also because the caveats affected the interest of both registered proprietors.

7.9 The defendants submitted that there was no urgency at the time the proceedings were commenced and therefore were commenced prematurely.

They said lapsing notices could've been issued and the matter proceeded on that basis.

7.10 The Court found in favour of the Trustee and held that it was not unreasonable for the Trustee to have commenced the proceedings in circumstances where, at the time the proceedings were commenced, settlement was expected to occur the following week. However with respect to the caveators conduct and refusing to provide a withdrawal of caveat and to have the proceeds of sale held in trust pending determination of their claim, the Court said their conduct was unreasonable. The Trustee was awarded costs on the indemnity basis as against the caveators.

7.11 The maintenance of the caveats in the face of challenges to their validity and the Trustees proposal for sale proceeds to be placed into a trust account was itself unreasonable.

Possession by way of Deed

8.1 There are a number of benefits of entering into a Deed with a co-owner or friend of the bankrupt instead of commencing an application for possession. These include costs, control of the outcome rather than having a Court decide how the matter shall end, inclusion (for co-owners). Like seeking orders for possession in the Federal Courts, you can also include in your Deed other matters such as annulment issues, proof of debt issues, etc. Having a Deed means that you have 12 years to enforce its terms should the matter go off the rails, particularly those deeds entailing a payment arrangement over a number of years.

8.2 Some of the things to do before you enter into a Deed with a third party is:-

- Check the General Register of Deeds maintained by the Registrar General of NSW to ensure there is no trust deed registered (NSW) so that you know the bankrupts interest recorded on the title is his/ her beneficial interest and not that as a Trustee. Also check the Statement

of Affairs and direct him/ her under s77(1)(e) of the Bankruptcy Act to confirm same.

- Check the accuracy of when payment is likely to occur before you enter into the Deed. No point entering into the Deed if there are no funds forthcoming.

- Consider whether you need to comply with any real property disclosure laws if you are selling the real estate (ie, NSW requirements – no need to disclose if selling to co-owner but need to disclose if selling to third party)

- Who is going to register the Transfer and Bankruptcy Application (if the Trustee is not on title?) Put onus back on purchaser – too many problems I have seen of late where the Trustee agrees to do so but for some reason or the other, he cannot and the process is delayed.

- Think about incorporating s 66G type orders for sale in the event payment isn't made by a certain date - to avoid having to go to Court and getting these orders if the other party refuses or cannot comply.

- I don't believe (and I know many of you wont agree with me) that you can sell your interest to the bankrupt pursuant to the doctrine of redemption (which applies to mortgagees and mortgagors). It doesn't matter how you want to say this can be done, in my opinion the bankrupts interest is vested in you (unless you disclaim it).

Universal distributing principal

9.1 I've had a special request from a Trustee to mention the Universal Distributing Principal today and how to try and negotiate "better" outcomes for Trustees

when dealing with secured creditors who jump in and want to take possession and the entire net proceeds of sale after you have done all the leg work, even so far as obtaining orders for possession despite putting the mortgagee on notice of your intention to do so.

9.2 Lets recap then and then briefly look at what exactly the Universal Distributing Principle is. It was shortly stated in the High Court decision of *Stewart v Atco Controls Pty Ltd (In Liquidation)* [2014] HCA 15 at paragraph 22 as:

> *"A secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up without the liquidator's costs and expenses, including remuneration, of creating that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor."*

9.3 The High Court in *Stewart v Atco Controls Pty Ltd (In Liquidation)* [2014] HCA 15 at paragraph 23 held:

> *"To use the language of Deane J in Hewett v Court [24], it might be said that a secured creditor would be acting unconsciously in taking the benefit of the liquidator's work without the liquidator's expenses being met. However, such a conclusion is avoided by the application of the principles stated in Universal Distributing."*

9.4 How do you apply this principal?

9.5 The Trustee claims a lien against the property for his outstanding remuneration, costs and expenses concerned with taking steps to realise the property. The Trustee is akin to a liquidator and based on the *Universal Distributing Principle* and the High Court decision of *Stewart v Atco Controls Pty Ltd (In Liquidation)* [2014] HCA 15 (7 May 2014) such a lien is akin to a charge <u>which takes priority over a secured creditor's charge.</u>

9.6 You write to the mortgagee. You tell the mortgagee what steps you have attended to in accordance with your duty under s19 of the Bankruptcy Act to preserve the property and realise it. For example, I usually set out something like:-

"In accordance with the duties imposed upon our client and set out in Section 19 of the Bankruptcy Act, our client has taken steps towards realising each of the above properties for the benefit of the unsecured creditors in the bankrupt estate. Such steps include: -

1. *Considering the likely equity available for the benefit of the unsecured creditors which included: -*

    a) *Instructing a valuer to provide a valuation report;*

    b) *Considering the balance of the mortgage debt due to your client.*

2. *Commencing an Application for partition and possession orders in the Federal Circuit Court of Australia.*

3. *Maintaining the building insurance over each property.*

4. *Obtaining vacant possession of the property by agreement with the former tenant without the requirement for obtaining a formal order for possession thereby significantly increasing any return to creditors.*

5. *Attending to engage an agent to attend at the property for cleaning and maintenance."*