TRAILL & ASSOCIATES

8th ANNUAL NATIONAL BANKRUPTCY CONGRESS

TAKING POSSESSION OF AND DEALING WITH REAL PROPERTY;
THE LATEST HOT SPOTS IN RELATION TO STRATA LEVY BANKRUPTCIES;

AND

LEASE DISPUTES

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Written and presented by
Daniela Naidenov, Solicitor Director

Daniela Fazio
LAWYERS PTY LTD

Level 13 | 111 Elizabeth Street | SYDNEY NSW 2000 **P**: +612 8005 3085

E: lawyers@danielafazio.com

Daniela is a Solicitor specialising in personal insolvency, with a particular passion concerning the interaction between bankruptcy and family law. Daniela is highly regarded amongst Bankruptcy Trustees for her commercial, yet firm approach.

Daniela founded Daniela Fazio Lawyers in 2015. Holding significant experience acting for Trustees in Bankruptcy, Liquidators, Trustees for Sale, Court appointed Receivers, secured 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 as expeditiously as possible.

Daniela is a Solicitor admitted to practice in New South Wales and a qualified Mediator pursuant to the National Mediator Accreditation System (NMAS), member of the NSW Law Society Panel of Mediators, the Resolution Institute and she is on the Australian Taxation Office external list of Mediators.

Daniela's career has accelerated over the last 5 years. She has the technical skill and knowledge which is well beyond her years. She has over 15 years of experience working in a niche area of the law which only a few know as well as she does.

In her spare time, Daniela is a passionate community advocate for mental health and a Speaker/ Ambassador for *Beyondblue.* As a result, Daniela and her firm have a tailored approach for managing those complex matters involving not only technical legal argument but concerns regarding the mental health of the opponents.

1. WHAT A YEAR IT HAS BEEN

1.1 Well, what a year it has been. As I reflect upon the commencement of the year, I recall the meeting I had with one of my Trustee clients where we sat and discussed the finalisation of a Deed of Agreement as between a Trustee in Bankruptcy and a third party who had agreed to sell its real property in Sydney and provide the funds to the Trustee so that the bankrupt estate could be annulled which we were working on late 2019. One of the amendments the third party's legal representative wanted to be made to the Deed was for provision concerning the Novel Coronovirus. I must admit, the Trustee and I had a little chuckle and we thought it was ridiculous that this virus that had been circulating in China (as we knew at the time) could impact upon the provisions of the Deed and thought it was highly unlikely Covid 19 would be declared a pandemic but nonetheless, the Trustee ultimately agreed to insert a provision in the Deed and lo and behold, that provision was ultimately called upon by the third party when it was having trouble selling in circumstances where it was obliged to sell no later than 31 March 2020.

1.2 I believe Covid 19 has encouraged many of the matters that have come across my desk to settle instead of proceeding to Court and as a result, I have spent much of the year drawing Settlement Agreements rather than instituting Court proceedings. However regrettably, there has still been a significant number of matters which have proceeded to Court (or will be in the coming days). Those matters can best be described as "multi- layered" applications, which might have an element of possession involved but the possession aspect is usually the easy part. Those possession applications that I come across are almost always intertwined with mental health considerations or family law considerations or mental health and family law, or mental health and strata law.

1.3 There is no doubt that these days there is no such thing as a “simple” possession application. The simplest possession applications are those where the bankrupt/ occupier vacate the premises upon the Trustee’s direction to vacate/ notice to vacate and send in the keys. Other than that, most times a possession application is an otherwise challenging task, hardly ever the default procedure it used to be.

1.4 So for today’s session I have been asked to take you through the recent possession cases, none are particularly ground breaking or set any new precedent (and are quite short) but they are useful to look at and demonstrate that despite Covid 19, life must go on and the Court will make orders for possession after carefully considering the evidence and the impact upon the evictee in light of what the Court is being asked to do during this declared pandemic.

1.5 I will then take you through some of the issues I have encountered this year with some of the matters I have been working on revolving around applications for possession with those elements of mental health and strata debts and hopefully assist you to put some procedures in place in your own practices concerning steps you may wish to take when dealing with regulated debtors with mental illness or what to do with the treatment of a strata debt and whether that debt should be treated as a secured creditor or not. If we have time, I will take you through the other area which has taken up much of my time this year concerning the legislation around commercial leases and what steps a landlord might need to take if the tenant applies for an exemption/ rent relief.

2. *SCOTT, IN THE MATTER OF LEE* [2019] FCA 1661 (9 October 2019)

2.1 This was a case just prior to the declaration of the Covid pandemic. The facts of this matter are quite simple.

2.2 These proceedings were heard in the Federal Court of Australia in Victoria and are quite vanilla in which they are straight forward orders for possession and for the appointment of the Trustee in Bankruptcy as Trustee for Sale of the real property, 50% of that property which had vested in the Trustee in Bankruptcy upon the date of bankruptcy.

2.2 The usual orders for the delivering up of vacant possession were made, the appointment of a Trustee for Sale and the appointment of the Trustee as attorney for the non-bankrupt co-owner for the purpose of effecting the sale.

2.3 The Trustee in Bankruptcy was appointed Trustee of one of the registered proprietor's bankrupt estate in November 2015. However, as is not too uncommon, the bankrupt alleged that his interest in the property, despite being a registered proprietor, was that he had no such interest in the property but the interest was in fact was that of his brothers. Consequently, the Trustee in Bankruptcy sought what I would call the usual declarations and consequential orders for the sale of the property, the Trustee was successful in the relief he sought.

2.4 The Court was satisfied that the bankrupt was the joint owner of the property notwithstanding his denial that he was not in fact the registered proprietor of 50% interest.

2.5 The Court was satisfied that the bankrupt's interest had vested in the Trustee pursuant to Section 58(1) of the Bankruptcy Act and therefore easily concluded that the Court could make orders against the bankrupt for vacant possession and that the Trustee in Bankruptcy ought to be appointed Trustee for Sale pursuant to Sections 30, 77 and 129 of the Bankruptcy Act.

2.6 With respect to the conclusion reached by the Court as against the non-bankrupt registered proprietor, the Court's considerations were different and of course no one can escape the Full Court's decision in *Coshott v Prentice* [2014]

FCAFC 88 (23 July 2014). Ultimately the Court was satisfied that the Judiciary Act and importantly Section 79 of that Act picked up the State Property Act which because this case was in Victoria was Part IV of the Property Law Act, 1958 (VIC).

2.7 The Victorian Property Law Act gives the power to VCAT to appoint Trustees for the purposes of the sale of the land. VCAT may also order that land is sold by private sale or at auction, that an independent valuation of the land be undertaken and that the proceeds of the sale be divided, amongst other orders. So, if VCAT has the power to make those orders why are we here?

2.8 The answer is, a State Court does have jurisdiction to hear an Application under Part IV of the Property Law Act in proceedings commenced in such a Court if the issue of co-ownership of land arises in the course of that proceeding which in the Court's opinion, special circumstances exist which justify that Court hearing the Application. The words "special circumstances" is defined in Section 234C(4)(b) of the Property Law Act to mean "*circumstances in which the matter that is the subject of an Application is complex, or where that matter or a substantial part of that matter does not fall within the jurisdiction of the VCAT…*"

2.9 When Section 234C(4) and Section 234D and the associated provisions in Part IV of the Property Law Act are picked up pursuant to Section 79 of the Judiciary Act, it then empowers the Federal Court to make the orders which the VCAT is empowered to make under the Property Law Act. This issue of Section 79 of the Judiciary Act is not uncommon and it appears almost in every Application that has at least passed through my office for possession because my practice is that an Application for possession is made in either the Federal Court or the Federal Circuit Court.

3. *COMPLETE CREDIT ACQUISITIONS PTY LTD v SHERIFF* [2019] FCCA 3763

3.1 This is a Sydney Federal Circuit Court decision for the appointment of a Trustee pursuant to Section 50 of the Bankruptcy Act.

3.2 Section 50 of the Bankruptcy Act states:-

> *"50 (1) At any time after a bankruptcy notice is issued, or a creditor's petition is presented, in relation to a debtor, but before the debtor becomes a bankrupt, the Court may:*
>
> *(a) direct the Official Trustee or a specified registered trustee to take control of the debtor's property; and*
>
> *(b) make any other orders in relation to the property.*
>
> *(1A) The Court may give a direction or make an order only if:*
>
> *(a) a creditor has applied for the Court to make a direction; and*
>
> *(b) the Court is satisfied that it is in the interests of the creditors to do so; and*
>
> *(c) the debtor has not complied with the bankruptcy notice.*
>
> *(1B) If the Court directs a trustee to take control of the debtor's property, the Court must specify when the control is to end."*

3.3 The purpose of Section 50 of the Bankruptcy Act is to enable steps to be taken to preserve and protect the property of the debtor and to reduce the risk that the debtor's property is disposed of in a manner which renders it unavailable for distribution among the creditors after sequestration; see *Deputy Commissioner of Taxation v Clyne* [1983] 50 ALR 118.

3.3 In *Ewert v Martin* at paragraph 18 it is stated that the following prerequisites were required: -

"[18]…the first is, of course, that the debtor has not complied with a Bankruptcy Notice and the Creditors Petition has been presented. These matters have been satisfied in this case. Secondly, the creditor must seek directions as to the approximate expenses likely to be incurred by the Trustee pursuant to the appointment before sequestration, and that has occurred. Thirdly, a Trustee should be nominated and an Affidavit obtained consenting to act as such."

3.4 In *Deputy Commissioner of Taxation v Clyne*, Neaves J said of Section 50 of 545: -

> *"The Section is clearly a provision in aid of the creditors of a debtor who has already committed an act of bankruptcy and has a Creditor's Petition pending against him. It is a necessary and ancillary provision designed to enable appropriate steps to be taken to preserve and protect the property of a debtor so that, in the event of a Sequestration Order being made, that property will be available for distribution equitably amongst them in accordance with the statutory provisions contained in the Bankruptcy Act, 1966. That this is its purpose is reinforced by a consideration of the provisions contained in Section 50(2) with their emphasis on obtaining information concerning the debtor or his trade dealings, property or affairs."*

3.5 The structure of Section 50(1) is two-fold. It provides for a direction to a Trustee "*to take control of the property of the debtor*", and then, in a case where such a direction is made, for a Court also to "make such orders in relation to that property as the Court considers just"; see *Re Choi On On* [1985] 11 FCR 149.

3.6 The order made by the Court under Section 50 of the Act need not specify the actual property effected by the order.

3.7 In *Axess Debt Management Pty Ltd v Nottas* [2014] FCCA 2746 Simpson J demonstrated that the purpose of the section was so that the creditors could

preserve the status quo, particularly where there was evidence that assets were being disposed of.

3.8 Orders made under Section 50 continue in force despite the fact that the judgment debtor subsequently becomes bankrupt; see *Deputy Commissioner of Taxation v Clyne* [1983] 50 ALR 118.

3.9 In *Penning v Steel Tube Supplies Pty Ltd* [1988] 18 FCR 568 at 697 the Court found that "*no material distinction is to be drawn between the appointment by a Court of a Trustee to take control of debtor's property under Section 50 of the Bankruptcy Act, 1966 and the appointment by a Court of a Receiver to take possession of the property of a named person. In either case, and independently of whether there is an injunction requiring any particular person to deliver the goods into the control or possession of the Receiver or Trustee, any conduct without the sanction or authority of the Court which prevents or hinders the taking of control or entry into possession by Receiver or Trustee of the property the subject of the Court order, if done in knowledge of the Court order, would appear to constitute a contempt*".

3.10 This decision of *Complete Credit* concerned the application by Mr Daniel Juratowitch to the Federal Circuit Court in Sydney to be appointed Trustee pursuant to Section 50 of the Bankruptcy Act and to take control of all property as defined in Section 5 of the Bankruptcy Act of the Respondent, Ms Sheriff including but not limited to real property in Victoria. That property was to remain in the control of Mr Juratowitch until determination of the Creditor's Petition.

3.11 The brief facts of this matter were that the creditor, CCA were assigned a contract and the debt in November 2019 for which Ms Sheriff had guaranteed on behalf of a third party entity. That debt was pursued by CCA and default judgment was obtained against Ms Sheriff for almost $60,000. Following the judgment, Ms Sheriff made 3 payments totalling $1,800.

3.12 Thereafter a Bankruptcy Notice was issued and served on Ms Sheriff. She failed to comply with the terms of that Bankruptcy Notice which at the time were either pay the money owing or make arrangements with the creditors to do so within 21 days of being served with a Bankruptcy Notice. She committed an act of bankruptcy by failing to comply with the Bankruptcy Notice and a Creditor's Petition was subsequently filed with the Court.

3.13 The Creditor's Petition was to be heard on 4 February 2020 and according to my investigations of the Federal Law Search a Sequestration Order was indeed made on 4 February 2020 by a Registrar of the Federal Circuit Court. During the course of the solicitor's enquiries, the solicitor's clerk discovered that one of the properties that Ms Sheriff's husband indicated that he was taking steps to refinance to pay the debt owed to CCA he discovered that that property was listed for private sale and then had subsequently been sold, notwithstanding the fact that discussions were taking place between the clerk and the debtor's husband about the purported refinancing of the property.

3.14 As you could imagine, it was on discovering that the property had been sold that CCA became concerned as the representations that were being made by Ms Sheriff's husband (who had her relevant authority) concerning the property was inconsistent with the property being sold. Given the conduct of Ms Sheriff, through her husband, there was a real concern that when the substantive application was to come before the Court and if a Sequestration Order was to be made that there would not be property available for distribution to the creditors. From that point CCA filed their Application in a Case which was amended to preserve the remaining property for the creditors. Of course, CCA were seeking to preserve the property of Ms Sheriff so that when the substantive application was to come before the Court in February then there would be property available in the event that a Sequestration Order was made for a distribution to the creditors.

3.15 There was no issue that the creditors adequately satisfied the requirements of Section 50(1A)(a) of the Bankruptcy Act. There was no issue concerning the validity of the Bankruptcy Notice or that the time for compliance with the Bankruptcy Notice had expired. Therefore, the Court was satisfied the Bankruptcy Notice was properly issued and that Ms Sheriff failed to comply with the Bankruptcy Notice by the requisite date. The Creditor's Petition was filed and there was no response filed by Ms Sheriff in relation to this Application. Now the Court was satisfied on the evidence that Ms Sheriff's conduct was sufficient to justify the making of orders to preserve and protect her property so that real property and/or funds or other assets would be available for distribution to creditors at the appropriate time, if the Court were to make a Sequestration Order. Therefore, orders were made under Section 50 to preserve that situation.

4. ***KERR AS TRUSTEE OF THE PROPERTY OF JANICE MARY KEHLET (A BANKRUPT) V KEHLET (NO 2) [2019] FCA 1786***

4.1 These proceedings are more in the nature of a voidable transaction claim by the Trustee which I know my learned colleague Mr Mullette will take you through after this session, but in summary the Trustee was successful and obtaining a declaration from the Court that a certain transfer of property was void as against the Trustee by operations section 120 and 121 of the Bankruptcy Act.

4.2 The Court made ancillary orders which provided for the transfer of the property from the Respondent to the Applicant Trustee. In consideration of the transfer the Trustee was ordered to pay to the transferee the sum of $780,998.15, being the amount equal to the value of any consideration that the transferee gave for the transfer that is void against the trustee.

5. **SCOTT (TRUSTEE) v CARTER [2020] FCCA 979**

5.1 This decision concerns the application by a Trustee in Bankruptcy for orders for possession of real property sought pursuant to s30 and 77 of the Bankruptcy Act made in the period upon which I believe NSW were still in covid lockdown.

5.2 Aside from being a possession application, I think this decision is useful because it shows how the Court may deal with an application in the absence of a respondent who is on notice of the application and the hearing date.

5.2 The hearing was determined on an ex parte basis in circumstances where there was no appearance at the hearing by the respondent because regrettably, she had been called into work because someone had called in sick. How many times have we heard an excuse or a submission such as this or the common submission that the respondent seems to suffer a mental health condition which only arises on the morning of the dice a bankruptcy matter is listed for hearing?! There are many mornings where like many of you, I don't want to get out of bed and face the day but I can assure you that you and I would be severely punished and possibly seek professional sanctions against us if we decided not to come to work on any particular day.

5.3 Thankfully in this case, the Court did it not except this to be a reasonable excuse of the Respondent thus why the matter was heard on an ex parte basis. It should be noted that the Court was willing to hear from the respondent via telephone link so the respondent didn't need to take out such a huge chunk of her time to appear in Court.

5.4 The Court was satisfied with the trustees evidence and it was satisfied that it had power under section 27 of the Bankruptcy Act to make the orders sort. The Court was also satisfied that compliance with the uniform Civil Procedure rules 2005 bracket NSW bracket had been complied with . Although not specifically

spelled out in the decision, in New South Wales a writ of possession is required to be issued by the Sheriff and the law which governs Writs is the UCPR.

5.5 The usual orders for possession were successfully obtained by the Trustee although the orders were stayed for a period of 28 days to allow the respondent further time to refinance and it appears from paragraph 8 of the decision that in so granting a stay the Court is conscious of making such an order for possession in a health crisis that we are presently facing and said:-

> *"[8] The Court is conscious, of course, in making such an order of the impact of the current health emergency and the Court notes the consent of the applicant that the orders the Court has granted, be stayed."*

5.6 The presiding Judge in this matter was Judge Humphreys and I can speak from my personal experience of appearing before Judge Humphreys in March this year. I appeared in those proceedings for the Trustee in Bankruptcy wherein we sought an order for possession but we also asked the Court for directions as to whether it was appropriate to proceed with an order for possession in circumstances where the bankrupt suffered bipolar and had recently under gone Electro Convulsive Therapy.

5.7 I should say that the proceedings were commenced prior to the coronavirus being declared a pandemic and the administration of the bankruptcy was ongoing for some time.

5.8 His Honour made it very clear that notwithstanding the fact we are in the middle of a pandemic, the Court in this case indicated that it was likely to award the Trustee possession on the next occasion (this being the first occasion it was before Court) unless the bankrupt could annul the bankruptcy as he fore-shadowed.

5.9 Between this Court date and the following Court date the bankrupt was successful in obtaining the approval of his creditors for a section 73 composition but it was very interesting to see that Judge Humphreys really called upon the bankrupt and his medical advisor, being a psychiatrist to clearly outline why it was the case the bankrupt was unable to either instruct legal representation or appear himself in the matter.

5.10 It is my experience that the Federal Courts are stricter with requiring the appointment of a legal guardian to a person with an incapacity more so than the State Courts.

5.11 My argument to try and have a Tutor appointed on behalf of a Plaintiff in Supreme Court of NSW litigation was unsuccessful. I should say, the Plaintiff was no stranger to litigation and had litigated at the time with the Trustees in Bankruptcy on approx. 8 occasions at the time. It is believed that the wife of the Plaintiff (who could not commence proceedings due to her bankruptcy) was the mastermind behind the litigation so each time the matter came before the Court, it was either the wife of the Plaintiff who addressed the Court because the Plaintiff was ïll" or a solicitor who would come on and off the record pretty quickly.

5.12 My argument was that if the Plaintiff is suffering from depression or such other illness as claimed by the wife which impairs his ability to manage his own affairs then technically, pursuant to Regulation 7.13 of the Uniform Civil Procedure Rules, 2005 ("UCPR") the Plaintiff may be "*a person under legal incapacity*" as defined in the UCPR. The definition of a "*person under legal incapacity"* in the UCPR is:-

> *"person under legal incapacity includes a person who is incapable of managing his or her affairs."*

5.13 Importantly, a person who is under legal incapacity may not commence or carry on proceedings except by his Tutor; Regulation 7.14 of the UCPR. A person may become the tutor of a person under legal incapacity without the need for any formal instrument of appointment or order of the Court. However, unless the Court orders otherwise, the tutor of a person under legal incapacity may not commence or carry on proceedings **except by a solicitor**; Regulation 7.14(2) UCPR.

5.14 The position in the Federal Courts is different. When Mr X was before the Federal Court (Judge Street) on the Creditors Petition which was presented by the Trustees in Bankruptcy who successfully obtained an indemnity costs order against him in the earlier Supreme Court proceedings), Mr X first did not appear at the hearing of the CP (he was sitting at the back of the Court room). Instead, he sent along his wife. His Honour did not accept that Mr X was unwell suffering from depression to attend the hearing on the evidence before him. Mr X was called from the back of the Court room and was called to answer His Honour from the Bar Table. He was eventually made a bankrupt.

5.15 In the Federal Courts, where there is a legal incapacity, a Litigation Guardian may be appointed.

5.16 Rule 11.08 of the FCC provides:-

> *Person who needs a litigation guardian*
> *(1) For these Rules, a person needs a litigation guardian in relation to a proceeding if the person does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding.*
> *(2) Unless the Court otherwise orders, a minor in a proceeding is taken to need a litigation guardian in relation to the proceeding.*

5.17 Rule 11.09 of the FCC provides:-

> ***Starting, continuing, defending or inclusion in proceeding***
> *(1) A person who needs a litigation guardian may start, continue, respond to or seek to be included as a party to a proceeding only by his or her litigation guardian.*
> *(2) The litigation guardian of a party to a proceeding:*

(a) must do anything required by these Rules to be done by the party; and

(b) may do anything permitted by these Rules to be done by the party.

11.10 Who may be a litigation guardian

A person may be a litigation guardian in a proceeding if he or she is an adult and has no interest in the proceeding adverse to the interest of the person needing the litigation guardian.

11.11 Appointment of litigation guardian

(1) The Court may, at the request of a party or of its own motion, appoint or remove a litigation guardian or substitute another person as litigation guardian in a proceeding in the interests of a person who needs a litigation guardian.

(2) A person becomes a litigation guardian if he or she consents to the appointment by filing an affidavit of consent in the proceeding.

(3) The Court may remove a litigation guardian at the request of the litigation guardian.

5.18 ***The Owners of Strata Plan 58041 v Temelkovski*** **[2014] FCCA 2962 (19 December 2014)**

5.19 The Temelkovski decision concerned the question around whether at the time the creditors petition was served on the debtor, whether that debtor was a person who needed a litigation Guardian as defined by r11.15(1) of the Federal Circuit Court Rules, 2001 and if she did and she wasn't afforded the opportunity to obtain one, should the Sequestration order be set aside or the bankruptcy annulled? This case really highlights some of the lessons that we solicitors need to be reminded of when presenting a Creditors Petition to the Court because the outcome (if we choose to turn a blind eye) can be disastrous for the Trustee who at the end of the day may miss out on his remuneration.

5.20 Concerned a 76 year who migrated to Australia from Macedonia in the middle of the 1960's. Ms Temelkovski had worked in factories in the 1970's but when she had her children (2 daughters) she was primarily the homemaker. Ms Temelkovski had no formal education in Australia and her English was poor.

5.21 After Ms Temelkovski divorced from her husband, she purchased the unit the subject of the proceedings and she remained living there (at least until the time

of the hearing). She purchased the unit from her own resources and the unit was unencumbered. She lived in the unit with her daughter, Mary.

5.22 Mary was appointed Ms Temelkovski's attorney pursuant to a general power of attorney in 2007.

5.23 According to Mary Ms Temelkovski was in poor health. 7 years prior to the proceedings Ms Temelkovski suffered renal failure and now had type 1 diabetes. About 3 years ago Mary Temelkovski noticed her mother started to forget things and showed signs of confusion and paranoia. Mary **Temelkovski** arranged for Ms **Temelkovski** to be assessed by a specialist in aged health, a psychogeriatrician. On 14 February 2012 a psychologist, a psychogeriatrician, and a neuropsychologist interviewed Ms **Temelkovski**. In a letter dated 14 February 2012, the psychologist reported that Ms **Temelkovski** "*presented as acutely psychotic with prominent thought disorder and paranoid delusions*".

5.24 The Owners Corporation recovered a judgment against Ms Temelkovski for $7,502.63 and that judgment was the subject of the Bankruptcy Notice, which was served pursuant to Regulation 16 (by Post).

5.25 The Trustee commenced to take steps towards possession of the property and that included the issue of a Notice to Vacate. It was the Notice to Vacate that came to Mary's attention and sent her on a flurry to attempt to resolve the matter.

5.26 This decision was a decision that I was personally involved in an at the time I know I didn't think the complaint by the attorney of the bankrupt was anything more then the usual Excuses such as mum doesn't speak very good English she didn't understand what was happening, why is strata making me bankrupt? It's really from this decision in 2014 that I've been hypervigilant whenever a strata bankruptcy and because of the issues in this case which I will take you to I tend to really stressed to trustees the importance of investigating those complaints which are made by a debtor who is made bankrupt by strata. it is not the case in any bankruptcy but here I'm speaking specific in relation to those

strata bankruptcies that a trustee can simply skim over the issues without properly considering the complaints of the bankrupt. it may very well be that the bankruptcy complaints are empty but it is your duty 2 properly assess the complaints and ultimately the decision as to how you deal with the matter is up to you but in my opinion you must investigate and listen to the complaints of the bankrupt if they dispute there are grounds upon which they were made bankrupt which are not grounds outlined in the Bankruptcy Act.

5.27 Rule 11.15(1) of the FCC provides: -

> *"11.15 Service*
>
> *(1) A document required to be served by hand on a person who needs a litigation guardian must be served:*
> *(a) on the person's litigation guardian for the proceeding; or*
> *(b) if there is no litigation guardian—on a person who is entitled under subrule 11.12(1) to be the person's litigation guardian for the proceeding; or*
> *(c) if there is no-one under paragraph (a) or (b)—on an adult who has the care of the person.*
> *(2) For paragraph (1)(c), a superintendent or other person in direct charge of a hospital or nursing home is taken to have the care of a person who is a patient in the hospital or nursing home.*

5.28 The proceedings commenced by way of 2 applications. The first was in the name of the debtor for a review of the sequestration order made 15 February 2013 by a Registrar of the Court against the estate of Ms Temelkovski and for an order that the time for filing the application for review be extended (because the application was made outside of the 21 day time limit). The second application was also in the name of Ms Temelkovski for an order annulling her bankruptcy.

5.29 An Application for Review of a Sequestration Order is a hearing de novo. Therefore what the court does is ignores the fact that a sequestration order has been made and basically run a brand new hearing and ensure that the creditor has satisfied the requirements of s52(1) and (2) of the Bankruptcy Act:-

BANKRUPTCY ACT 1966 - SECT 52
Proceedings and order on creditor's petition
(1) At the hearing of a creditor's petition, the Court shall require proof of:
(a) the matters stated in the petition (for which purpose the Court may accept the affidavit verifying the petition as sufficient);
(b) service of the petition; and
(c) the fact that the debt or debts on which the petitioning creditor relies is or are still owing;
and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor.
…
(2) If the Court is not satisfied with the proof of any of those matters, or is satisfied by the debtor:
(a) that he or she is able to pay his or her debts; or
(b) that for other sufficient cause a sequestration order ought not to be made;
it may dismiss the petition.

5.30 At the hearing on 28 July 2014, counsel for the trustee, to his credit, raised the question of whether, given the material that was filed in support of Ms Temelkovski 's applications, a litigation guardian should be appointed for Ms Temelkovski . After hearing evidence and submissions, I ordered, pursuant to r.11.11 of the FCC Rules, that Mary Temelkovski be appointed litigation guardian of Ms Temelkovski.

5.31 The fact that in in February 2012 Ms Temelkovski suffered from the conditions described in the psychology report does not necessarily mean she suffered from those conditions in December 2012 when she was served with the creditor's petition. It was however open to the Court to infer, as it did infer, that Ms Temelkovski's mental condition in December 2012 from Ms Temelkovski 's mental condition that existed at other points in time by relying on the presumption of fact identified by Wigmore in the following passage X):

> *A condition of mental disease is always a more or less continuous one, either in latent tendency or in manifest operation. It is therefore proper, in order to ascertain the fact of its existence at a certain time, to consider its existence at a prior or a subsequent time. The degree of continuity varies infinitely in various cases, and hence there can be little certainty in the inference from one period to another. Nevertheless, since it can never be known beforehand to what variety the case in question belongs in this respect, the facts of prior and subsequent*

> *existence cannot be absolutely known beforehand to be relevant. Much must depend on the type of insanity, as preliminarily indicated by the person's conduct at the time in question. There is also a further element of uncertainty in criminal cases in that the accused has a strong motive to feign insanity after the act charged; and thus particular scrutiny is required in weighing the evidence of an accused person's subsequent insane conduct.*
>
> *In spite, however, of these uncertainties and difficulties, courts are today universally agreed that both prior and subsequent mental conditions, within some limits, are receivable for consideration; stress being always properly laid on the truth that these conditions are merely evidential towards ascertaining the mental condition at the precise time of the act in issue.*

- J H Wigmore, *Evidence in Trials at Common Law*, 3rd ed, Little Brown & Co., Boston, 1940, Vol 2 § 233 page 26. This passage was quoted with approval by Edmonds J in *Owners – Strata Plan No. 23007 v Cross, in the matter of Cross* [2006] FCA 900 at [68]

5.32 The Court found that:-

1. Ms Temelkovski did not understand when she was served with the creditor's petition the nature and possible consequences of the proceedings that had been initiated against her by the filing of the creditor's petition.

2. Ms Temelkovski did not and does not have the ability to instruct any advisor with sufficient clarity to enable the advisor to understand the situation and to advise her appropriately.

3. In my opinion, therefore, at the time she was served with the creditor's position, Ms Temelkovski was a person who did not understand the nature and possible consequences of the proceedings that were initiated against her by the filing of the creditor's petition that was served on her; and she was not capable of adequately conducting, or giving adequate instructions for the conduct of the proceeding. In short, Ms Temelkovski was a person who needed a litigation guardian. That being the case, the creditor's petition had to be served on one of the classes of persons specified in r.11.15(1) of the FCC Rules. That did not

occur. The creditor's petition, therefore, was not served in accordance with the FCC Rules.

4. The Court was not satisfied that the Creditors Petitoin was properly served or that she now owed any of the debt to the Owners Corporation (as she had subsequently paid the debt) all that remained outstanding was the legal costs.

5. On the question of whether the bankruptcy ought to be annulled or the sequestration order set aside:-

[113] The evidence, therefore, shows that the trustee was on notice, early in the administration of the bankruptcy, and the trustee in fact believed, that he could not deal with Ms Temelkovski, and Ms Temelkovski was not in a position to engage in the proceedings. These matters too, however, may not be sufficient to tilt the balance in favour of Ms Temelkovski, for the trustee may nevertheless have been obliged to continue to act in the way he did. But was he so obliged? In my opinion, he was not."

6. The Trustee should have gone to Court earlier and sought orders under s30:-

[114]. Once the trustee was on notice that Ms Temelkovski could not handle her affairs, and in particular, could not engage in the proceedings, and that the relationship with Mary Temelkovski had broken down, the trustee could have considered applying to the Court for an order under s.30(1) of the Act compelling Ms Temelkovski to do that which she was required to do under the Act, the most pressing thing being Ms Temelkovski 's completing a statement of affairs, as required by s.54 of the Act. Had the trustee done that, in all likelihood Ms Temelkovski 's need for a litigation guardian would have been exposed, and the trustee himself could have applied for an order that a litigation guardian, other than Mary Temelkovski , be appointed. And had that occurred, it may well be that the litigation guardian that would have been appointed would have uncovered and then advanced the grounds on which I have held a sequestration order ought not to have been made against Ms Temelkovski 's estate."

7. The inability of Ms Temelkovski to take any action in the proceedings without a litigation guardian, the Trustee's being on notice that

Ms Temelkovski could not handle her affairs, and the availability to the trustee of the option of approaching the Court to obtain orders compelling Ms Temelkovski to complete a statement of affairs, and the consequent likelihood of the Court appointing a litigation guardian for Ms Temelkovski – tilted the balance in favour of the Court extending the time for the filing of the application for review, and setting aside the sequestration order, rather than making an order annulling the bankruptcy. This mean that the Trustee was unable to recover the $89k worth of costs and remuneration he had incurred.

Conclusion:-

5.33 The Sequestration Order made on 15 February 2013 ought not to have been made because the creditor's petition was not served in accordance with the FCC Rules. The creditor's petition was not properly served because, although the creditor's petition was personally served on Ms Temelkovski, at the time she was served Ms Temelkovski was a person who needed a litigation guardian. The creditor's petition, therefore, should have been, but was not, served in the manner required by r.11.15(1) of the FCC Rules.

5.34 Ms Temelkovski was not at fault in not filing an application for review of the sequestration order within the 21day period prescribed by r.2.03 of the Bankruptcy Rules. That is so because at that time she was a person who needed a litigation guardian and r.11.09(1) of the FCC Rules prevented Ms Temelkovski from taking any step in the proceedings without a litigation guardian.

5.35 An order setting aside the sequestration order should be made rather than an order annulling Ms Temelkovski 's bankruptcy because the trustee was in a better position than Ms Temelkovski to minimise the costs and effort the trustee incurred and expended during the administration of the bankruptcy.

5.36 This question again arose in March this year on one of my possession applications.

5.37 Mr A was involved in a long term relationship with his partner for many years. He was a person who enjoyed a good job with the Commonwealth Bank. He was a smart man. He owned a small unit in Queensland. However when his relationship with his partner failed, so too did Mr A's mental health.

5.38 Mr A was made bankrupt. My client was appointed his Trustee in Bankruptcy.

5.39 The Trustee had spent lots of time trying to reach agreement with the bankrupt for him to vacate the property but to no avail.

5.40 I was asked to act for the Trustee because he felt I would best understand and tailor the matter specific to the bankrupt's mental incapacity.

5.41 I was informed by the Trustee that the bankrupt suffered bipolar, anxiety and depression. I knew I needed to correspond with the bankrupt in a slightly different manner that I would otherwise usually do.

5.42 My initial day 1 letter to the bankrupt gently directed the bankrupt to the financial support helpline offered by Beyondblue:-

> ***"Emotional Support***
>
> *Understandably, your bankruptcy may be causing you mental health challenges at this difficult time. Based on your Statement of Affairs we note that you are presently unemployed and receiving a disability pension. Research shows that job or financial loss, including bankruptcy can increase your risk of health issues, such as depression and anxiety. However, there are practical steps you can take to regain a sense of control over your current situation.*
>
> *We <u>enclose</u> a booklet developed by Beyondblue designed to assist people affected by difficult financial times. It contains practice tips and details about where to get help."*

5.43 This letter may or may not have been the reason why the bankrupt phoned me many a times, particularly leading up to Court events so that we could try and work towards an agreement.

5.44 I knew from my first telephone conversation with Mr A that something was not quite right. He was calm and conciliatory one minute and then the next he was in a state where he did not want to comprehend what I was saying. He would often threaten that he was the subject of a Mental Health Order in which case I would always tell him I would no longer be able to speak with him but his Manager. He would then tell me there wasn't any such mental health order in place.

5.45 Neither I or the Trustee are accredited medical specialists. Whilst I knew something wasn't quite right with Mr A, I had no idea whether that was his personality or whether he was affected by a mental health condition. What was the Trustee to do? The administration of the estate was not able to progress in the circumstances. We thought it best to ask the Court what should be done and whether it was appropriate in the circumstances to pursue a possession application (the mental health issue being the main reason why we approached the Court in the manner we did).

5.46 An Application was made to the Federal Circuit Court for orders and declarations, including an order that:-

> *"That the Court direct the Applicant Trustee as to how to proceed with the administration of the Respondent's bankrupt estate in circumstances where there are concerns as to the Respondent bankrupt's mental capacity. In the event that the Court is minded to direct the Applicant Trustee to take possession of the Respondent bankrupt's property for the benefit of the unsecured creditors of the bankrupt estate then the Applicant Trustee seeks the following orders…"*

5.47 At the directions hearing His Honour Judge Humphreys directed that:-

> *"The Court notes that it will communicate with Dr X, the Respondents medical practitioner, seeking advice as to whether or not the Respondent is fit to participate in these proceedings…*

Direct the Respondent, within the next 48 hours, to send to Dr X a signed authority for him to release information and opinion to the Court in relation to the Respondent, in these proceedings."

6. *QUIN AS TRUSTEE OF THE BANKRUPT ESTATE OF PHILIP CHILL* [2020] FCCA 2652 (23 September 2020)

6.1 This case concerns the distribution of a first and final dividend pursuant to s146 of the Bankruptcy Act.

6.2 Provides a useful summary of the law. Can be read in own time.

7. STRATA LEVY DISPUTES

7.1 Who here believes that a levy forms a charge on the lot and it gives the owners corporation priority over other creditors in the bankruptcy of a lot owner?

7.2 It is not the case. While it's true that if a lot is sold and there are levies outstanding at the date of sale, both the vendor and purchaser are liable jointly and severally to pay the levies, this is because of statutory provisions in the Strata Schemes Management Act 2015 rather than the lot being charged with the amount of an outstanding levy.

7.3 In bankruptcy land, outstanding levies and legal costs/ other expenses incurred prior to the date of bankruptcy gives the Owners Corporation the right to lodge a Proof of Debt in the bankrupt estate. It does not give an Owners Corporation a right to recover all outstanding levies and expenses from the proceeds of sale. Why do I say this? Because of s82 of the Bankruptcy Act.

7.4 There is no "dilemma" concerning the issue and payment of strata levies but there is a perceived dilemma.

7.5 Strata seem to think they are entitled to paid their debt the subject of a provable debt on settlement of the sale of the real estate. To do so would be inconsistent with the Trustees duties under the Bankruptcy Act.

7.6 Strata levies incurred before the date of bankruptcy – subject to provable debt.

7.7 Strata levies incurred after the date of bankruptcy – to be paid from settlement.

7.8 Priority costs are paid in accordance with s109(1) of the Bankruptcy Act.

7.9 Section 82 of the Bankruptcy Act states:-

> *"Debts provable in bankruptcy*
> *(1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy [emphasis added], or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy."*

7.10 An important thing to note here is that if the owners corporation has incurred legal and other levy recovery fees (known as section 80 expenses) then the purchaser is not liable to pay them. It is just the post bankruptcy outstanding strata levies that should be paid on settlement and no more.

7.11 All that should be paid on settlement are:-

(a) Registered mortgagee (chargee)
(b) Outstanding council and water rates
(c) Strata levies incurred after the date of bankruptcy
(d) Real estate agents commission/ marketing expenses
(e) Trustee's fees
(f) Section 109 priority payments
(g) Unsecured creditors, including the owners corporation.

7.12 What happens where the Owners Corporation is the petitioning creditor? Do they get priority for their entire debt?

7.13 The answer is, it depends on the order (if any). It may be so that the owners corporation may be entitled to priority for its costs incurred in the Creditors Petition proceedings but priority cannot be granted for any costs whatsoever where the costs have not been taxed.

7.14 Section 109 of the Bankruptcy Act provides:-

> *"109 Priority payments*
> *(1) Subject to this Act, the trustee must, before applying the proceeds of the property of the bankrupt in making any other payments, apply those proceeds in the following order:*
> *(a) first, in the order prescribed by the regulations, in payment of the* ***taxed costs of the petitioning creditor*** *and the costs, charges and expenses of the administration of the bankruptcy, including the remuneration and expenses of the trustee and the costs of any audit carried out under section 70- 15 or 70-20 of Schedule 2";*

7.15 Regulation 6.01 of the Bankruptcy Regulations, 1996 provides:-

> *"Priority payments under section 109 of the Act--prescribed matters*
>
> *(1) Payment of proceeds of the property of a bankrupt under paragraph 109(1)(a) of the Act is to be in the order set out in Schedule 3.*
> *(2) For the purposes of item 5 of Schedule 3:*
> *(a) a reference to the petitioning creditor is taken to include a reference to a petitioner whose petition has not been proceeded with because of the acceptance of the debtor's petition; and*
> *(b) paragraph (a) applies irrespective of whether the debtor's petition was referred to the Court under subsection 55(3B) of the Act or, if the petition was so referred, the outcome of the reference."*

7.15 BANKRUPTCY REGULATIONS 1996 - SCHEDULE 3

> *"Paragraph 109(1)(a) of the Act--order of payment of first priority debts (regulation 6.01)*
>
> *1. Realisations charges payable under the Bankruptcy (Estate Charges) Act 1997*
> *1A. If the Official Trustee transfers the administration of the bankruptcy to a registered trustee:*

(a) the remuneration set out in Division 3.2 of the Fees and Remuneration Determination that is payable to the Official Trustee; and
(b) the reimbursement set out in regulation 16.08 that is payable to the Official Trustee.

2. Expenses reasonably incurred by or on behalf of the trustee:
(a) in protecting all or part of the bankrupt's assets; or
(b) in carrying on, in accordance with the Act, a business of the bankrupt; or
(c) by way of an advance made to the trustee of the bankrupt's estate for payment of properly incurred expenses of the estate for any proper purpose (other than remuneration of the trustee)

3. Other fees, costs, charges and expenses payable by the trustee in administering the bankrupt's estate

4. Where:
(a) a creditor has deposited an amount in accordance with an order made under section 50 of the Act; and
(b) the amount, or part of the amount, has been used for meeting the expenses referred to in that regulation;
the amount, or part of the amount, that has been so used

*5. The **taxed costs of the petitioning creditor**, the administrator of the estate of a deceased person or the applicant under Part X of the Act for a sequestration order and, if a petitioning creditor under Part X of the Act also applied for an order under Division 5 or 6 of Part IX of the Act, **any taxed costs of the creditor in respect of the application** **

6. The trustee's lawful remuneration

7. Where the creditors, or a majority of them, have approved payment of out-of-pocket expenses incurred by a member of the committee of inspection--those expenses, to the extent that the trustee of the bankrupt's estate allows them as being fair and reasonable

8. Costs of any audit carried out under section 70-15 of Schedule 2 to the Act

** Note: For the extended application of item 5, see subregulation 6.01(2).”*

7.16 What are some of the practical steps a Trustee in Bankruptcy could do?

- Require the petitioning creditor to get the costs taxed.
- Reach agreement; query whether reaching an agreement then means the costs assume priority under s109 or whether the creditor ranks as an ordinary unsecured creditor.
- Refer to article of Mark Findlay.

7.17 Ordinary costs (as admitted by the Trustee in Bankruptcy) are subject to the payment of a dividend and such a dividend is paid pari pasu with all of the other unsecured creditors of the bankrupt estate.

Option : Pay to strata the entire amount the subject of the s184 certificate to enable the settlement to proceed without delay and put them on notice that you will demand that portion of the payment relating to pre-bankruptcy debt to be repaid immediately after settlement. Issue a s129 Notice for that difference immediately after settlement.

8. LEASE DISPUTES

COVID 19 and commercial/retail leases

8.1 Since March 2020, state and federal Governments alike have rushed legislation through to provide relief to tenants effected by reduced business as a result of the pandemic.

8.2 On 7 April 2020, the Prime Minister announced the National Cabinet's Code of Conduct for commercial tenancies ("the Code") and on 24 April 2020, the NSW Government enacted the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* ("the Regulation"). The Regulation was amended on 3 July 2020 and on 23 October 2020 the Regulation was repealed and named by *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020* ("the No 2 Regulation").

8.3 The purpose of the Code is to impose a set of good faith leasing principles to be applied to the negotiation of amendments to existing leasing arrangements for commercial tenancies in circumstances where the tenant is an eligible business for the purpose of the Commonwealth Government's JobKeeper programme.

8.4 The Regulation was enacted on 24 April 2020 to give effect to the Code by: -

- Prohibiting and regulating the exercise of certain rights of landlords relating to the enforcement of certain leases during the COVID-19 pandemic period, and

- Requiring, in response to the COVID-19 pandemic, that landlords and tenants renegotiate the rent and other terms of those leases in good faith having regard to the leasing principles set out in the Code, before any legal enforcements action of the terms of those commercial leases can be commence.

8.5 On 3 July 2020, amendments were made to the Regulation, with the intention of providing further clarity and guidance based on industry lobbying ("the Amended Regulation"). The amendments included: -

- Amendments that clarified that it was Parliament's intention that the Regulation apply to impacted lessees not all lessees. For example, clause 6(5) of the Regulation was amended to refer to an 'impacted lessee' rather than a 'lessee'.

- The insertion of new clauses 7(3A) and (3B), which require impacted lessees to provide lessors with a statement to the effect that the lessee is an impacted lessee and evidence that the lessee is an impacted lessee. If the impacted lessee does not provide such a statement and evidence of their impacted status, the lessor is deemed to have complied with these requirements; and

- The insertion of new clause 11 that clarifies the new evidentiary requirements extend to renegotiations that commenced but were not completed before the amendments commenced. Under the Retail Regulation, the requirements do not extend to a matter for which a retail tenancy claim has been made pursuant to section 71 of the *Retail Leases Act 1994*. Under the Commercial Regulation, they do not expend to proceedings which have commenced in a Court.

Key Measures:

- Tenants eligibility for rent relief i.e. qualifies for JobKeeper and has turnover in 2018/2019 financial year of lease than $50 million (including internet sales);

- Prohibited actions that the landlords cannot do during the prescribed period: including:-
    - eviction of the tenant from the premises;
    - exercising a right of re-entry to the premises;
    - recovery of the premises;
    - distraint (or seizure) of goods;
    - forfeiture or possession;
    - termination;
    - damages;
    - requiring a payment of interest on, or a fee or charge related to the unpaid rent;
    - recovery of the whole or part of a security bond (including a bank guarantee);
    - performance of obligations by the tenant or any other person pursuant to a guarantee under the commercial lease; or
    - any other remedy otherwise available to a landlord against a tenant at common law or under legislation.

- Obligation to renegotiate rent and other terms to commercial leases; and

- Mediation and dispute resolution mechanism

On 23 October 2020 the Regulation was repealed and remade by *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020*.

What has changed?

The Updated Regulations incorporate the provisions of the Earlier Regulations, subject to a number of amendments that are summarised below:

- **Prescribed Period:** The prescribed period is now 24 April 2020 to 31 December 2020. With the Updated Regulations now expiring on 25 April 2021, it is conceivable could be further extended.

- **Prescribed Action:** A landlord must not 'during the prescribed period' take any prescribed action against an impacted lessee on the ground of a breach of the impacted lease occurring during the prescribed period due to:
    - a failure to pay rent or outgoings; or
    - the business operation under the lease not being open for business during the hours specified in the lease.

  The introduction of the words 'during the prescribed period' has the effect that any prescribed action to be taken by a landlord must be delayed until after the prescribed period expires.

  The restrictions imposed on landlords in respect of not taking any 'prescribed action' during the prescribed period have been amended to confirm that such restrictions are only in respect of an 'impacted lease', and not all leases.

  If any renegotiation is commenced by a landlord and an impacted lessee does not participate in such negotiations, or fails to produce evidence that they are an impacted lessee, it would appear that the landlord may then take a 'prescribed action' such as calling on a bank guarantee.

- **Rent relief:** Any request for renegotiation of rent and other terms of the lease:
    - must commence within 14 days of receiving the request from the other party, or any other period agreed between the parties. Whilst a timeframe has been imposed for commencement of such negotiations there is still no timeframe imposed to reach any agreement; and
    - cannot be in respect of any period where rent relief has already been provided. This will prevent tenants seeking further relief in respect of any relief previously negotiated between the parties.

- **Ongoing negotiations:** To avoid any doubt:

- a renegotiation that commences under the Updated Regulations, but is not concluded before the expiry of the prescribed period, may be continued and concluded after the expiry of the Updated Regulations; and
- any renegotiation under the Earlier Regulations that commenced, but was not concluded before the commencement of the Updated Regulations, may continue. This will of course give rise to parties proving that such negotiations did indeed commence.

What has not changed?

- **$50m and JobKeeper eligibility:** An 'impacted lessee' must still be an SME and qualify for JobKeeper, however the 'impacted lessee' must re-establish eligibility and produce evidence that the lessee is an 'impacted lessee'.
- **Rent relief:** In renegotiating the rent applicable during the prescribed period, the parties must still have regard to the economic impacts of COVID-19 and the leasing principles in the National Code of Conduct.
- **Non COVID-19 related prescribed action allowed:** Nothing prohibits a landlord from taking prescribed action on grounds not related to the economic impacts of the COVID-19 pandemic.
- **Parties must attempt mediation before Landlord can enforce:** A landlord may not seek to recover possession of premises under an impacted lease, terminate an impacted lease or exercise or enforce any other right of the landlord under an impacted lease unless and until the Small Business Commissioner has certified in writing that mediation offered to be conducted by the Small Business Commissioner has failed to resolve the dispute and given reasons for the failure.
- **No increase in rent:** As a reminder, rent payable under an impacted lease must not be increased during the prescribed period other than rent, or any component of rent, determined by reference to turnover.

Sneakerboy Retail Pty Ltd trading as Sneakerboy v Georges Properties Pty Ltd [2020] NSWSC 996 The decision relates to an application by the tenant for relief against forfeiture, following termination of a retail lease on 25 March 2020.

There is nothing novel in the way the decision was made, but does have some interesting commentary on the impact of the COVID-19 pandemic on leasing arrangements, including as a result of the National Mandatory Code of Conduct announced by the National Cabinet (**National Code**) on 7 April 2020 and the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) (**NSW Regulation**) being passed on 24 April 2020.

Sneakerboy Retail Pty Ltd trading as Sneakerboy v Georges Properties Pty Ltd (No 2) [2020] NSWSC 1141 - A Practical Application of the NSW COVID-19 Regulation and Leasing Regime. This decision relates to the Court applying various aspects of the NSW COVID-19 leasing regime and provide interesting insight into the way in which the Court dealt with the unique circumstances.