

Bankruptcy and Trust Claims Place Numerous Parties Onboard a Sinking Matrimonial Vessel

The recent Family Court case of **Roberts [2013] FamCA 224** considered the competing interests of:

- the husband;
- the husband's Trustee in Bankruptcy on behalf of his creditors;
- the husband's parents (who it was accepted had advanced substantial funds to their son); and
- the wife.

The focus of the financial dispute was an investment unit in the husband's sole name in relation to which he had:

- late in the marriage and without notifying his wife, drawn down on the mortgage loan facility and paid the bulk of that money to his parents thereby extinguishing most of the equity in the property; and then
- after the Family Court proceedings had commenced, sold the property realising only minimal net proceeds.

The husband's parents sought to resist the demands of the husband's bankruptcy trustee and the wife that they repay the funds paid to them.

The parents claimed an equitable interest in the property on the basis that their advancing of the funds to the husband enabling him to buy the property was intended by them to mean that he held his sole legal proprietorship of that property as a trustee for their beneficial interest.

As there was no documentation in relation to this alleged trust, the dispute focussed on whether a trust could be construed from the parties' actions.

In order to do so the husband and his parents were forced to rely on their sworn evidence about the facts surrounding the advance of funds to establish the existence of either an implied or constructive trust.

If the payment to the parents survived the Court's scrutiny, both the matrimonial pool and the husband's bankrupt estate would have consisted of virtually nothing.

Both the trustee and the wife relied on S 106B of the Family Law Act to set aside the husband's disposition of the borrowed mortgage funds which he had paid to his parents.

The dispute raised the following issues:

- the parents were forced to rely on establishing a 'trust' relationship to justify their entitlement to be repaid the funds they had advanced to their son because:
 - a 'gift' would not quarantine the funds from the matrimonial asset pool to be shared between the wife and the husband's trustee; and
 - an unsecured 'debt' would not distinguish the parents from the husband's other creditors.
- did the husband in drawing down against the mortgage attempt to defeat the claims of his wife and/or the trustee of his bankrupt estate; and
- if it did, upon setting aside that transaction how should the proceeds be divided between the wife and the trustee as the proportion of the available matrimonial assets that she received would determine the balance the trustee would receive on the husband's behalf to distribute between his creditors.

The Judge did not accept that the evidence of the husband or his parents established the existence of a trust, deciding that the advance amounted to a gift.

The Judge set aside the husband's disposition of the money to his parents and directed them to refund the entire sum immediately.

That sum represented the bulk of the matrimonial assets which were then available to be divided between the wife and the trustee (standing in the shoes of the husband) on the basis of the usual family law principles of 'contributions' and 'needs'.

However the Judge acknowledged that the husband's parents' advance was a substantial gift to their son and consequently concluded that he had made a greater contribution than the wife to the matrimonial pool which should accordingly be divided 60/40 in favour of the husband (effectively his creditors) which no doubt provided cold comfort to his creditors who would remain substantially out of pocket and his parents who were totally out of pocket.