



Let's (not) go shopping! Bankruptcy and after-acquired assets – November 2015

Key Summary

On bankruptcy, subject to certain exceptions, title to all of a bankrupt's assets immediately and automatically vests with their trustee in bankruptcy. One such exception is income earned post-bankruptcy - but what happens when a bankrupt buys an asset with their post-bankruptcy income? The Court has determined that all such assets then vest with the trustee in bankruptcy.

After acquired assets

One of the tasks of a trustee in bankruptcy (**Trustee**) during the administration of a bankrupt estate is to collect and then realise (i.e. sell) those assets in order to apply the funds towards the costs of the administration and payment of the admitted creditor claims made against the bankrupt estate.

Importantly, it is not just assets which the bankrupt owns as at the date of their bankruptcy which vest in the Trustee – 'after acquired assets' also vest in the Trustee (subject to the exceptions set out in s116(2) of the Bankruptcy Act).

After acquired assets are assets acquired by the bankrupt, or which have devolved on them, after the commencement of their bankruptcy and before their discharge. Such assets may have significant value, for example lotto or gambling winnings or prizes, gifts or assets received as a result of being the beneficiary of a deceased estate where the deceased passes away after the commencement of the bankruptcy.

Exceptions

The exceptions to this general vesting of assets are set out in s116(2) of the Bankruptcy Act. Broadly, they are assets which have been deemed by the legislature as being necessary for:

- a bankrupt's day to day living requirements;
- the earning of income by the bankrupt by their personal exertion; or

- a form of transport for the bankrupt.

Each of these exceptions is subject to certain value limitations. For example, a bankrupt can presently retain vehicles up to a total value of \$7,600¹.

In the case of income, while there is no limit to the amount which a bankrupt may earn, a bankrupt must pay to the Trustee half of the income they earn over the applicable threshold amount² until they are discharged from bankruptcy – these payments are commonly known as 'income contribution payments'.

The catch

If a bankrupt's income is below the applicable threshold, or they have otherwise made all required income contribution payments, is a bankrupt then free to do what they like with the balance of their income, without fear of creating an after acquired asset?

This question was considered by the Court in (*Di Cioccio v Official Trustee in Bankruptcy (as trustee of the bankrupt estate of Di Cioccio)* [2015] FCAFC 30.

Following the commencement of his bankruptcy, but prior to his discharge, Mr Di Cioccio purchased some shares. The shares were purchased using money Mr Di Cioccio had saved from income that he had earned after he had become bankrupt, but which was in an amount below the contribution threshold.

The Trustee asserted that the shares were after acquired property and, as such, title to the shares vested in the Trustee. As a consequence, the Trustee was of the view that the shares were

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available to be sold for the benefit of the creditors of the bankrupt estate.

Mr Di Cioccio argued that the shares did not rest, as they had been purchased using monies which were excluded pursuant to s116(2) of the Bankruptcy Act.

The Court agreed with the Trustee, and found that the shares were after acquired property in circumstances where the Bankruptcy Act deems that all after acquired property vests in the Trustee, unless it is of a kind which is specifically excluded under s116(2). Critically, the Court concluded that this was the only relevant issue. It did not matter if the asset was bought using income which a bankrupt is otherwise entitled to retain.

In coming to this conclusion, the Court commented that *[t]he Act may be read as encouraging a bankrupt to commence re-establishing themselves but, until discharged, the Act does not permit a bankrupt to commence acquiring all kinds of assets ...³.*

Mr Di Cioccio sought special leave to appeal the decision to the High Court, which was refused.

Conclusion

The Court's conclusion results in a bankrupt being required to double contribute –

Once for income earned, and then again if they purchase an after acquired asset. However, the Court's decision does not appear to have left any room for argument, particularly noting that the High Court were unmoved by the suggestion that the ruling creates such an outcome.

An amendment of the Bankruptcy Act will need to be made if it is in fact the case that the legislature did not intend to limit what assets a bankrupt may acquire with income in respect of which they have already paid all requisite income contribution payments.

However, until any such reform occurs bankrupts (and Trustees) should be carefully considering what is done with a bankrupt's income, as any asset not excluded under s116(2) automatically vests in the Trustee.

Notes

- 1 A bankrupt may hold a vehicle with a value greater than the threshold, as long as the equity held in the vehicle (i.e. the value less any finance amount) is no greater than the threshold.
- 2 The present income threshold for a bankrupt with no dependants is \$54,081.30 (after tax).
- 3 Di Cioccio at [32].

This article was prepared by Colin Brown, a partner in our insolvency and reconstruction team. We invite you to contact Colin, should you have any questions or require any further information about the matters discussed in this article.

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