HIGH COURT OF AUSTRALIA

GUMMOW ACJ,
KIRBY, HAYNE, CALLINAN AND CRENNAN JJ

MICHAEL PELDAN (AS TRUSTEE OF THE BANKRUPT ESTATE OF RAYMOND KENNETH PINNA) & ANOR — APPELLANTS

AND

BERNADETTE ANDERSON (AS EXECUTOR OF THE ESTATE OF THE LATE DOROTHY RUTH PINNA) & ANOR — RESPONDENTS

Peldan v Anderson [2006] HCA 48
4 October 2006
B110/2005

ORDER

1. *Grant leave for the amended notice of contention dated 23 June 2006 to be filed out of time.*

2. *Allow the appeal to the extent necessary to vary order 2 made by Kiefel J on 25 August 2005 so that it reads:*

   "The orders of Jarrett FM made on 22 February 2005 be set aside, and in their place order that the application to the Federal Magistrates Court filed 20 August 2004 be dismissed."

3. *Appeal otherwise dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

D R Cooper SC with M D Martin for the appellants (instructed by Quinn & Scattini)

A J H Morris QC with L A Jurth for the respondents (instructed by Bennett Carroll)

CATCHWORDS

Peldan v Anderson

Bankruptcy − Transfers to defeat creditors − s 121(1)(a) of the *Bankruptcy Act* 1966 (Cth) ("the Act") − Transfers of property void against the trustee in bankruptcy if the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred − Where pursuant to s 121(9)(b) of the Act property that did not previously exist is taken to have been transferred for the purposes of s 121 of the Act − Where the bankrupt unilaterally severed a joint tenancy in Torrens title land held between himself and his wife who later died prior to his bankruptcy − Whether s 121(9)(b) of the Act operated so as to take the bankrupt to have transferred property to his wife − Whether that property would probably have become part of the transferor's estate in bankruptcy if the property had not been transferred.

Real property − Joint tenancy − Severance − Torrens system land − Unilateral severance of joint tenancy pursuant to s 59 of the *Land Title Act* 1994 (Q) − Effect of severance upon property of the bankrupt.

Statute − Statutory construction − Construction of pars (1)(a) and (9)(b) of s 121 of the Act where drafting reflects inconsistent assumptions − Whether possible to render those sub-sections capable of concomitant operation so as to give effect to the text and policy of the Act.

Bankruptcy Act 1966 (Cth), s 121.
Land Title Act 1994 (Q), ss 57, 59, 60.

1 GUMMOW ACJ, KIRBY, HAYNE, CALLINAN AND CRENNAN JJ. This is an appeal from a decision of the Federal Court of Australia[1] (Kiefel J) exercising its appellate jurisdiction in respect of a decision of the Federal Magistrates Court of Australia (Jarrett FM). Kiefel J allowed an appeal by the executors of the estate of Mrs D R Pinna against orders made upon an application under the *Bankruptcy Act* 1966 (Cth) ("the Bankruptcy Act") by the trustees of the bankrupt estate of Mr R K Pinna, the husband of Mrs Pinna. The trustees are the appellants in this Court and the executors are the respondents. The trustees seek orders with the effect of reinstating their success at first instance. However, for the reasons which follow, the appeal should be dismissed.

2 The fund in contention between the parties is the remaining one-half of the proceeds of sale of a property at Carindale in Brisbane ("the Carindale property") after the distribution of the other half to the trustees. The property was sold for $600,000 after a sequestration order was made against the estate of Mr Pinna on 21 April 2004. Mr and Mrs Pinna had purchased the Carindale property, which is land under the provisions of the *Land Title Act* 1994 (Q) ("the Land Title Act"), in 1995 and they were registered proprietors as joint tenants.

3 Mrs Pinna died on 12 January 2004. Other things being equal, the result would have been that, at the date of the sequestration order, some three months later, Mr Pinna enjoyed the entirety of the Carindale property as surviving joint tenant, and his full interest passed to the trustees. However, the respondents rely upon steps taken in 2003 whereby Mr Pinna unilaterally severed the joint tenancy. They say that, at the time of her death, Mrs Pinna was entitled to a one-half share in the Carindale property as tenant in common with her husband, and that this passed to her deceased estate and was not part of the bankrupt estate of Mr Pinna, so that the trustees are entitled to no more than one-half of the proceeds of sale.

4 In response, the trustees contend that the unilateral severance of the joint tenancy was a transaction by Mr Pinna which is void against them by operation of s 121 of the Bankruptcy Act. Kiefel J rejected that submission and the effect of her orders is that the respondents are entitled against the trustees to that one-half of the proceeds of sale which is held in trust pending the outcome of the litigation. Whilst the reasons for doing so depart from those of Kiefel J, the dismissal of the appeal by the trustees to this Court will preserve that outcome.

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1 *Anderson v Peldan* (2005) 146 FCR 361.

5 Before turning to the issues respecting s 121 of the Bankruptcy Act, something should be said respecting the unilateral severance. This was effected on 5 November 2003 by registration of a form of transfer executed by Mr Pinna pursuant to s 59(1) of the Land Title Act. In the absence of such a specific provision, the law as to unilateral severance by transfer to oneself of a joint interest had been unsettled[2]. Section 59(1) states:

> "A registered owner of a lot subject to a joint tenancy may unilaterally sever the joint tenancy by registration of a transfer executed by the registered owner."

The issues

6 The trustees' case is that the unilateral severance transaction constituted a "transfer of property" for the purposes of s 121(1) of the Bankruptcy Act within the extended sense provided for by s 121(9)(b). To understand this submission, it is necessary to set out s 121(1) together with s 121(9):

> "(1) A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor's bankruptcy if:
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> (a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and
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> (b) the transferor's main purpose in making the transfer was:
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> (i) to prevent the transferred property from becoming divisible among the transferor's creditors; or
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> (ii) to hinder or delay the process of making property available for division among the transferor's creditors.
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> ...

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2 See the Note by Professor Butt, (1992) 66 *Australian Law Journal* 286; New South Wales Law Reform Commission, *Unilateral Severance of a Joint Tenancy*, Report No 73, (1994), Ch 4.

(9) For the purposes of this section:

(a) ***transfer of property*** includes a payment of money; and

(b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and

(c) the ***market value*** of property transferred is its market value at the time of the transfer."

The trustees submit that the extinguishment of the rights of Mr Pinna and his wife as joint tenants and the simultaneous creation of new rights in them as tenants in common in equal shares, here by reason of the registration of the transfer under s 59(1) of the Land Title Act, answered the description required by par (b) of s 121(9).

7 To succeed, it is necessary also for the trustees to show that the two conditions in pars (a) and (b) of s 121(1) have been satisfied. There was no issue that Mr Pinna's main purpose could be taken to be that described in par (b). Section 121(2) provides that "if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent", then the main purpose of the transferor in making the transfer is to be taken to be that described in par (b) of s 121(1).

8 The controversy turns on whether par (a) of s 121(1) was satisfied. Kiefel J held that it was not[3]. The trustees' submission on their appeal to this Court can be reduced to the proposition that, in the events that happened (Mr Pinna's co-tenant predeceased him prior to his bankruptcy), it can be said that Mrs Pinna's interest in the property "would probably have" accrued to him by right of survivorship so as to render the entirety available to his creditors.

9 If this submission is well founded, it will be necessary to consider the amended notice of contention the respondents seek leave to file out of time. This claims that Kiefel J ought to have found that, if the transaction was void, the trustees were obliged by s 121(5) of the Bankruptcy Act to refund to the respondents the consideration given in respect of the transfer. That consideration

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3 (2005) 146 FCR 361 at 366-367.

is said to have had the same value as that of the interest as tenant in common which was created upon the severance[4].

10 Before considering the merits of these various submissions, it is convenient to say something more of the facts.

The facts

11 It is a curiosity of the facts of this case that, had the unilateral severance under s 59(1) been effected by Mrs Pinna, rather than Mr Pinna, on no basis could that have attracted s 121 so as to render the severance void against the trustees upon the bankruptcy of Mr Pinna. There would have been no transfer of property by the bankrupt as required by s 121.

12 The Carindale property was the matrimonial home of Mr and Mrs Pinna. The memorandum of transfer pursuant to s 59(1) of the Land Title Act was executed on 11 September 2003 and, as indicated above, was registered on 5 November 2003. In the form in which it was ultimately lodged (following amendments to which it is not necessary to refer), the memorandum recorded the "[i]nterest being transferred" as a "ONE-HALF INTEREST IN FEE SIMPLE". Mr Pinna was described as both "transferor" and "transferee", and the consideration was expressed to be the unilateral severance of a joint tenancy pursuant to s 59(1) of the Land Title Act.

13 The transfer form was prepared by Mr Peter Klar of Klar & Klar, solicitors. He gave evidence that the issue of severance arose in the course of his taking instructions to prepare a will for Mr Pinna. This was to leave all his property to his wife in the first instance with a gift over.

14 Mr Pinna was born in 1923 and Mrs Pinna in 1925. Neither of them could be described as being in perfect health. Such little evidence as existed suggested that Mr Pinna had undergone open-heart surgery earlier in 2003, and that Mrs Pinna had been living with one kidney for about 40 years (although no evidence was led as to any underlying condition which caused this), and was

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4 Section 121(5) states:

> "The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee."

admitted to hospital for rehabilitation in November or December of 2003. Mr Klar gave evidence suggesting that the concern when he had been consulted on 11 September 2003 had been with the health of Mr Pinna. Mr Klar said that "the concern was that Mr Pinna would be the first to die, not Mrs Pinna".

15 The sequestration order was made on the petition of the Deputy Commissioner of Taxation. The financial affairs of Mr Pinna and those of his company, Pinnacle Engineering Pty Ltd, had been in a parlous condition for some time. Mr Pinna was personally liable to the Deputy Commissioner in respect of the default by the company of a payment agreement entered into on 16 April 2003 with respect to outstanding taxation debts, and also in respect of certain Director Penalty Notices issued against him. He was also liable upon substantial personal guarantees in respect of the company's debts. The trustees allege (and it appears not to have been disputed) that, at 11 September 2003, Mr Pinna's total liabilities amounted to $1,474,291.35. The only asset of any value was his interest in the Carindale property; the interest was valued at that date at $300,000.

16 The trustees commenced proceedings in the Federal Magistrates Court on 20 August 2004 seeking declarations that the severance was void against them. The proceedings were conducted rather informally and without the benefit of pleadings, so contributing to the somewhat disorganised and incomplete state of the evidence.

Cummins[5]

17 Something should be said here respecting the relationship of this case to the issues examined by this Court in *Trustees of the Property of Cummins (A Bankrupt) v Cummins*. There, the relevant transaction was a disposition by the bankrupt in favour of his wife of his joint beneficial interest in Torrens title property in New South Wales. In contrast to this case, the bankrupt was then left with no registered interest[6]. *Cummins* thus was not a case involving the unilateral severance of a joint tenancy under the New South Wales equivalent to s 59(1) of the Land Title Act[7]. In addition, in *Cummins* there was no issue as to

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5 *Trustees of the Property of Cummins (A Bankrupt) v Cummins* (2006) 80 ALJR 589; 224 ALR 280.

6 See *Prentice v Cummins* (2003) 134 FCR 449 at 459-460.

7 See *Real Property Act* 1900 (NSW), s 97.

whether s 121(1)(a) of the Bankruptcy Act was satisfied; the controversy concerned the "main purpose" of Mr Cummins within the meaning of s 121(1)(b). In particular, as this Court noted, there was no issue as to whether or how the transaction could answer the description of a "transfer of property"[8].

The unilateral severance of the joint tenancy

18 As previously indicated, the present litigation proceeded upon the premise that, if the unilateral severance of the jointure was a "transfer of property", this could only be by reason of par (b) of s 121(9) of the Bankruptcy Act. The result of the severance had been extinguishment of the interest of Mr Pinna and Mrs Pinna as joint tenants (including the incident of survivorship), and the creation of interests as tenants in common in the Carindale property.

19 That view of the matter accords with historical understandings of the nature of a jointure at common law. Joint tenants were generally regarded as together composing one single owner, each being seised *per my et per tout* and consequently having nothing to convey to the other[9]. However, in *Wright v Gibbons*[10], Dixon J doubted that this proposition could be regarded as an unqualified truth, because "the aliquot share of each [joint tenant] existed in contemplation of law as a distinct and ascertained proprietary interest" for the purposes of alienation, including alienation to a co-owner.

20 Be that as it may, the Carindale property was land the title to which was provided by the Queensland Torrens title legislation, the Land Title Act. In such a case, the interests as joint tenants were extinguished by registration of a new instrument which created an indefeasible title as tenants in common. This is because, notwithstanding that the Land Title Act (like cognate statutes in other States) uses the language of "transfer", title is comprised by the record contained in the register. A lot or an interest in a lot "passes" by registration of an instrument (s 60)[11]. The title of the registered proprietor comes from the fact of

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8 (2006) 80 ALJR 589 at 595 [24], fn 19; 224 ALR 280 at 286.

9 See *Wright v Gibbons* (1949) 78 CLR 313 at 323, 331; *Williams on Real Property*, 21st ed (1910) at 140.

10 (1949) 78 CLR 313 at 333.

11 *Breskvar v Wall* (1971) 126 CLR 376 at 385-387, 400.

registration, and it is this which is the source of the title rather than what Windeyer J contrasted as "a retrospective approbation of ... a derivative right"[12].

21 In the ordinary case, registration under the Land Title Act involves all the rights, powers, privileges and liabilities of the transferor in relation to the lot vesting in the transferee, upon registration of an instrument of transfer of a lot or an interest in a lot (s 62(1)). However, s 59(1) operates in a different situation. Section 59(1) confers upon a registered owner of a lot subject to joint tenancy the right unilaterally to sever the jointure upon registration of an appropriately executed instrument of transfer. Here, the instrument accepted for registration was a transfer from Mr Pinna to himself. Nevertheless, upon registration, the particulars of the lot in the freehold land register are altered and a new and different indefeasible title for the lot is created (see ss 37, 38). Each tenant in common is entitled to request the Registrar to create a "separate indefeasible title for the interest of each owner by including a separate set of particulars in the freehold land register for the interest of each owner" (s 57).

22 Section 59(1) of the Land Title Act was relied upon to effect the severance, and registration occurred. Accordingly, it is unnecessary and inappropriate to consider a broader question. This concerns the extent to which unregistered dealings by way of whole or partial alienation to a co-owner of an aliquot share in the jointure (in the manner discussed in detail by Dixon J in *Wright v Gibbons*[13] and by Deane J in *Corin v Patton*[14]) by one joint owner who later becomes bankrupt may constitute a "transfer of property" for the purposes of s 121 of the Bankruptcy Act. That question may be left for another day.

Section 121(9)(b) of the Bankruptcy Act

23 In its present form, s 121 was enacted by the *Bankruptcy Legislation Amendment Act* 1996 (Cth) ("the 1996 Act"). The relationship of s 121 to its forebears was considered in *Cummins*[15]. The section impugns transactions which

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12 *Breskvar v Wall* (1971) 126 CLR 376 at 400. See also the observations of Rich J in *Wright v Gibbons* (1949) 78 CLR 313 at 326.

13 (1949) 78 CLR 313 at 330-333.

14 (1990) 169 CLR 540 at 572-577.

15 (2006) 80 ALJR 589 at 594 [21]-[22]; 224 ALR 280 at 285. See also *P T Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 at 521-522.

answer the description of a "transfer of property". This expression will bear its ordinary meaning, save to the extent that this is expanded by s 121(9)[16]. The term "transfer of property" also appears in s 120 ("Undervalued transactions") and s 122 ("Avoidance of preferences"). Further, these sections contain definitional provisions which were introduced by the 1996 Act and are in identical terms to s 121(9)[17].

24 Paragraph (b) of s 121(9) provides that A "is taken" to have transferred to B property that "did not previously exist" if A "does something" which results in B becoming the owner of the property. Thus, par (b) expands the concepts at the heart of s 121 beyond their natural meaning. It is expressed in similar terms to the former s 160M(6) of the *Income Tax Assessment Act* 1936 (Cth)[18], which was the subject of the litigation in *Hepples v Federal Commissioner of Taxation*[19]. Section 160M(6) consistently attracted the description "obscure"[20]. That same adjective also appropriately describes par (b) of s 121(9) of the Bankruptcy Act.

25 It is important to recall that "property" for the purposes of the Bankruptcy Act must be understood as including "any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to" real or personal property of any description (s 5(1)). As noted above, par (b) of s 121(9) operates to treat person A, who did something which resulted in person B becoming the owner of property that did not "previously" exist, as having transferred "the property" to B. In its natural sense, the word "previously" indicates that the property did not exist prior to the act of A which results in B

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16 Australia, House of Representatives, Bankruptcy Legislation Amendment Bill 1996 (Cth), Explanatory Memorandum at [84.8].

17 See s 120(7) and s 122(8) respectively.

18 Section 160M(6) relevantly provided:

> "A disposal of an asset that did not exist (either by itself or as part of another asset) before the disposal, but is created by the disposal, constitutes a disposal of the asset for the purposes of this Part ..."

19 (1992) 173 CLR 492.

20 See *Commissioner of Taxation v Cooling* (1990) 22 FCR 42 at 61; *Hepples v Commissioner of Taxation* (1990) 22 FCR 1 at 11; (1992) 173 CLR 492 at 505, 546.

becoming the owner of it. The act of A which produces the result that B becomes the owner of that property is to be regarded as the "transfer of property". Upon an ordinary reading, the corollary of this is that the property that did not previously exist is taken to be the "transferred property".

26 As remarked earlier in these reasons, provisions in the terms of s 121(9) appeared at the same time as s 120(7) and s 122(8) of the Bankruptcy Act. It is to be expected that the sub-section has the same meaning in each provision. In the Explanatory Memorandum to the House of Representatives upon the Bill for the 1996 Act, it was said at [84.10] of the inclusion of the provision in the undervalued transactions provision (s 120) that:

> "where a person creates an interest in property, for example by allowing a mortgage or charge to be created over it, the person will be taken to have transferred property, for the purposes of the section".

Other examples were given, including the conferral of a trademark or patent licence. Further instances would include the grant of a lease over freehold property and a declaration of a trust over property vested in the "transferor". In all of these cases, the same act both creates the property in question and vests it in the other person.

27 In other cases to which the sub-section would apply, the creation of property will occur at a later time. Instances of this relate primarily to the diversion of future property (necessarily constituting property that did not previously exist) from coming into the hands of the person who later becomes bankrupt. This may occur by the assignment, whether absolutely or by way of charge, of property such as future income[21], royalties yet to be earned[22], and damages which may be recovered in pending litigation[23]. (Consideration is required for the assignment to be effective[24], but that issue is dealt with by s 121(4) of the Bankruptcy Act.) In such cases, the assignment operates

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21 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9.

22 *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385.

23 *Glegg v Bromley* [1912] 3 KB 474.

24 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 24-25.

immediately upon acquisition by the assignor and vests the property in the assignee[25].

28 However, in all these cases (and it is not suggested that the examples are exhaustive), the property that did not previously exist is "carved out" of "property" which is held, or which comes to be held, by the person who later becomes bankrupt.

29 It is here that the first issue on the appeal arises. The interest of Mrs Pinna as tenant in common of the Carindale property cannot be said to have been "carved out" of any property of her husband. If anything, it represented the transmogrification of *her* prior interest as joint tenant. What was "carved out", in a loose sense, from both Mr Pinna's and Mrs Pinna's prior interest as joint tenants was the right of survivorship.

30 However, upon registration of the transfer executed by Mr Pinna pursuant to s 59(1) of the Land Title Act, Mrs Pinna became "the owner of property that did not previously exist". She acquired an interest as tenant in common in the Carindale property whereas previously she had held an interest as joint tenant in the Carindale property (which included the right of survivorship). That interest as joint tenant was transformed into, or extinguished and replaced by, the interest as tenant in common. Accordingly, the terms of par (b) of s 121(9) were met because, by Mr Pinna registering the transfer unilaterally severing the joint tenancy, he did something by dint of which he was taken to have transferred the interest as tenant in common to Mrs Pinna.

31 The respondents denied that Mrs Pinna's interest was "property that did not previously exist". In written submissions relying upon remarks of Dixon J in *Wright v Gibbons*[26], they submitted that Mrs Pinna's interest did previously exist as a potential aliquot share and that that interest merely "crystallized upon severance". However, for the reasons given previously, that submission pays insufficient regard to the effect of the Land Title Act and to what Rich J described as the "innovation effected by the new or Torrens system"[27].

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25 *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 27 per Dixon J citing *In re Lind; Industrials Finance Syndicate Ltd v Lind* [1915] 2 Ch 345.

26 (1949) 78 CLR 313 at 330-331.

27 *Wright v Gibbons* (1949) 78 CLR 313 at 326.

Reading s 121(1)(a) and s 121(9)(b) together

32 Having established that events falling within par (b) of s 121(9) have occurred, the next issue on this appeal is presented. This concerns the reading of that provision with par (a) of s 121(1). The step treated by par (b) of s 121(9) as having taken place assumes that character "[f]or the purposes of this section". Paragraph (a) of s 121(1) asks whether "the property", had it not "been transferred", would probably have either become part of the bankrupt's estate or been available to creditors.

33 A difficulty then arises in the following way: (i) s 121(9)(b) takes "property that did not previously exist" to be the transferred property; further, the provision applies to situations (such as the present case) where the bankrupt "does something" which results in the creation of that property; (ii) when par (a) of s 121(1) speaks of "the property", the natural reading requires this to be construed as referring to the property which has been transferred under the transfer which is void against the trustee in bankruptcy; and (iii) the use of the subjunctive in par (a) ("if the property had not been transferred") indicates a supposition that the described occurrence is contrary to fact; it presupposes that there was no transfer, and asks what in that situation would have happened to "the property".

34 These factors taken together produce an apparent conundrum in applying par (b) of s 121(9) for the purposes of par (a) of s 121(1). This is that, if the act which is taken to have transferred the property did not occur, the "property that did not previously exist" *ex hypothesi* would never have come into existence, and so could never "probably have become" part of the bankrupt's estate. A similar problem is posed by par (b) of s 121(1), where the phrase "the transferred property" appears in terms. In that paragraph, if the expression "the transferred property" is construed as referring to the property taken to have been transferred, which did not come into existence until the occurrence of the act which is taken to have transferred it, how could the transferor's main purpose be to prevent *that property* from becoming divisible among the creditors?

35 Paragraphs (a) and (b) of s 121(1) both assume that the transferred property was, prior to the transfer, *capable as a matter of fact* of becoming part of the bankrupt estate. Section 121(1)(a) therefore involves the assumption that the transferred property had an antecedent existence to the transfer, or would have come into existence had the transfer not been made. On the other hand, s 121(9)(b), as discussed earlier in these reasons, assumes that the property which "did not previously exist" would not have come into existence if the act which is

taken to have transferred it had not occurred. In this way the two paragraphs are in conceptual and linguistic contrariety.

36 These textual and conceptual difficulties manifest a failure in the drafting of s 121(9)(b) adequately to grapple with the conceptual nature of the elements in pars (a) and (b) of s 121(1) and their interaction. This problem does not arise with s 120 or s 122, even though definitional sub-sections identical to s 121(9)(b) are used. This is because, in dealing with undervalued transactions and preferences, those sections do not employ language which requires identification of the "transferred property" in the way that s 121(1)(a) does when dealing with transfers to defeat creditors.

37 In the examples given of the operation of par (b) of s 121(9) where the "property that did not previously exist" may be "carved out" of the transferor's property, it is impossible discretely to identify the "transferred property" in the hands of the transferor prior to it being vested in the other person. Where the transferor grants a long lease to an associate, the leasehold interest cannot be identified as part of the transferor's freehold estate prior to the grant. Nor can the interest of a beneficiary under a trust be identified prior to the trust being declared; where the whole legal and beneficial interest in property is united in one owner, there is no separate beneficial interest in existence[28].

38 It may be observed that the difficulty under discussion here appears not to arise where a person directs a creditor or trustee to make payment of future rents, profits or distributions to a third party, and this mandate falls short of an assignment to that third party[29]. Such items would be "property" for the purposes of s 121 of the Bankruptcy Act within the sense of "profit ... arising out of or incident to" property owned by the person who later becomes bankrupt (s 5(1)). Here, the act of the person who later becomes bankrupt does not create "the property" which comes to be transferred to the third party; that property, and this is the critical distinction, comes into existence by reason of other circumstances. In such a case, the "transferred property" *can be identified* prior to the third party becoming the owner of it (although not prior to the act of the transferor in giving the mandate). However, it is unlikely that par (b) of s 121(9) was designed to have such a special and limited operation.

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28 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 463; *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (In liq)* (2005) 220 CLR 592 at 606 [30].

29 See *Comptroller of Stamps (Vict) v Howard-Smith* (1936) 54 CLR 614 at 623-624.

39 By a process of construction, is it possible properly to resolve the contrariety identified above and render sub-ss (1) and (9) of s 121 capable of sensible concomitant operation in those other cases referred to previously, namely, where there is a direct "carve-out" of property? May the words "the property" in the opening words of par (a) of s 121(1) be construed as referring to something other than "the property that did not previously exist"? We now turn to examine whether this construction is properly open.

40 In *Project Blue Sky Inc v Australian Broadcasting Authority*[30], McHugh, Gummow, Kirby and Hayne JJ emphasised that apparent conflict must be alleviated as far as possible by an adjustment in the meaning of the two provisions to give best effect to their purpose and text. That exhortation applies the more forcefully where the two provisions are found in the same section and the second provision is said in terms to operate "for the purposes of" the first.

The trustees' construction of s 121(1)

41 In submissions in reply, counsel for the trustees submitted that the words "the property" in par (a) of s 121(1) should be understood as referring to the property in the hands of the transferee prior to the deemed transfer, here the prior interest of Mrs Pinna as joint tenant in the Carindale property. This would result in s 121(1)(a) being read as follows:

> "(1) A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor's bankruptcy if:
>
> (a) the property [in the hands of the transferee prior to the act taken to be the transfer] would probably have become part of the transferor's estate or would probably have been available to creditors if the property [in the hands of the transferee after the act taken to be the transfer] had not been [taken to have been] transferred ..." (bracketed words inserted).

This construction assumes both that the transferee's interest would probably have come to the transferor, and that an act of the transferor resulted in a

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30 (1998) 194 CLR 355 at 381-382 [70]-[71].

transformation of that interest. There is unlikely to be any circumstance in which this could come to pass, apart from the severance of a jointure. With respect to the severance of jointures, the outcome would be capricious, depending upon the identity of the party effecting the severance and the temporal sequence of death and survivorship and the intervention of bankruptcy. Further, such a reading of the statute could not apply to the "carve-out" examples discussed in the Explanatory Memorandum and earlier in these reasons. The reading of s 121(1)(a) proffered by the trustees is bespoken for this particular case, but should not be accepted.

The construction adopted in the Federal Court

42 Kiefel J recognised the difficulties referred to above, and propounded a criterion said to give effect to the meaning of par (a) of s 121(1). This was in the following terms[31]:

> "[B]ut for the acts undertaken by the bankrupt, would the property held by the bankrupt before the acts were undertaken probably have remained available to creditors?"

Kiefel J regarded the words "the property", not as the "transferred property", but as the property held by Mr Pinna before the relevant acts. However, this formulation departs substantially from both the structure and the terms of par (a). It should not be accepted.

43 Counsel for the respondents described this construction (which he did not embrace) as looking not to the interest in Blackacre which was created, but to the extent to which the value of Blackacre was diminished by the transaction. Kiefel J may have been attracted by the concept of "subtraction of assets" referred to by Brennan CJ and McHugh J in *Cannane v J Cannane Pty Ltd (In liq)*[32]. This is a distraction. What was under consideration in *Cannane* was whether it was appropriate to draw an inference that a debtor had intent to defraud creditors within the meaning of the earlier form of s 121. It was in that context that their Honours referred to the dictum of Lord Hatherley LC in

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31 (2005) 146 FCR 361 at 366.

32 (1998) 192 CLR 557 at 566 [12].

Freeman v Pope[33] regarding the notion of the "proper fund" out of which debts to creditors are to be discharged. Although in broad terms that notion of a "proper fund" finds expression in s 121(1)(a), it is the words of that section rather than a loose concept of "subtraction of assets" which must be applied. This is especially the case where, because new property has been created, such a subtraction could only refer to the value of property, not the property itself. Value is the concern of s 121(4), not s 121(1).

Acceptable construction

44 Where s 121(9)(b) is relied upon, the phrase "the property" in the opening words of s 121(1)(a) should be construed as signifying "the property in the hands of the transferor prior to the act which is taken to be the transfer". This removes from the operation of s 121(1)(a) the assumption that it is existing property which is being transferred. It involves treating the words "the property" in s 121(1)(a) in a special sense to give to s 121(1) an extended operation as required by s 121(9)(b).

45 The acceptable construction is best illustrated by setting out the paragraph as if it read in this manner:

> "(1) A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor's bankruptcy if:
>
> (a) the property [in the hands of the transferor prior to the act taken to be the transfer] would probably have become part of the transferor's estate or would probably have been available to creditors if the property *[in the hands of the transferee after the act taken to be the transfer]* had not been [taken to have been] transferred ..." (bracketed words inserted).

The italicised words are appropriate because it would be at odds with s 121(9)(b) for the subjunctive clause to read "if the property in the hands of the transferor prior to the deemed transfer had not been deemed to be transferred".

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33 (1870) 5 Ch App 538 at 541, where the forebear of s 121, Statute 13 Eliz c 5, was under consideration.

Section 121(9)(b) expressly states that the property which is deemed to have been transferred is the "property that did not previously exist".

46 The effect of the acceptable construction is to shift the emphasis of the inquiry in s 121(1)(a), and to focus not upon whether the "transferred property" would have become part of the transferor's estate in bankruptcy, but upon whether that result would have obtained in respect of the transferor's "property" (as defined in s 5(1)) out of which the newly created property has been "carved".

47 Consistently with *Project Blue Sky*, the above construction gives s 121(1)(a) a degree of sensible operation in cases of the kind where it evidently was designed to operate, namely, where the property that did not previously exist is "carved out" of property of the person who later becomes bankrupt. Such an outcome is consistent with the indications of legislative purpose seen in the Explanatory Memorandum to which reference has been made.

Analysis of the trustees' case

48 The above construction does not assist the trustees in this appeal. It requires attention to what would probably have happened to Mr Pinna's undivided interest as joint tenant in the Carindale property. It must be shown that that interest "would probably have become part of the transferor's estate or would probably have been available to creditors", if property had not been taken by s 121(9)(b) to have been transferred. However, that interest could never have become part of his bankrupt estate. As was accepted by this Court in *Cummins*[34], it is established that the onset of bankruptcy works a severance of a joint tenancy[35]. Upon sequestration, unity of title is destroyed. On this basis, all that fell into the bankrupt's estate was an interest as tenant in common in the Carindale property. The trustees would have no claim to the whole of the proceeds of sale of the Carindale property as they seek in this litigation.

Conclusion and orders

49 The trustees have not established that upon its construction s 121 of the Bankruptcy Act could apply in the circumstances of this case. The appeal must

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34 (2006) 80 ALJR 589 at 593 [14]; 224 ALR 280 at 283-284.

35 See the authorities and texts discussed in *Re Francis; Ex parte Official Trustee* (1988) 19 FCR 149.

fail and it is unnecessary to consider further issues debated in argument, in particular, those arising on the foreshadowed amendment to the notice of contention filed by the respondents. Leave nevertheless should be given for this amended notice of contention to be filed out of time.

50 The orders of Kiefel J should be varied by adding to order 2 an order that the application to the Federal Magistrates Court be dismissed and by correcting the misstatement in order 2 as to the date when the orders of the Federal Magistrates Court were made. Otherwise, the appeal to this Court should be dismissed with costs.