

HIGH COURT OF AUSTRALIA

BRENNAN CJ,
GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

DENISE MARY CANNANE & ANOR

APPELLANTS

J CANNANE PTY LIMITED
(In Liquidation) & ANOR

RESPONDENTS

*Cannane v Cannane Pty Limited;
Cannane v Official Trustee in Bankruptcy as Trustee
of the Bankrupt Estate of Cannane
(S215-1996) [1998] HCA 26
7 April 1998*

ORDER

1. *Appeal allowed with costs.*
2. *Orders of the Full Court of the Federal Court set aside and in lieu thereof order that the appeals to that Court be allowed with costs, the Orders of Tamberlin J be set aside and in lieu thereof order that the present respondents' application for relief under s 565 of the Corporations Law be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

D M J Bennett QC with S J McMillan for the appellants (instructed by Ferrier & Associates)

P G Hely QC with J W J Stevenson for the respondents (instructed by Mallesons Stephen Jaques)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

HIGH COURT OF AUSTRALIA

BRENNAN CJ,
GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

ANDREW VINCENT CANNANE & ANOR

APPELLANTS

OFFICIAL TRUSTEE IN BANKRUPTCY
AS TRUSTEE OF THE BANKRUPT ESTATE
OF JOHN VINCENT CANNANE

RESPONDENT

7 April 1998
S216/1996

ORDER

- 1. Appeal allowed with costs.*
- 2. Orders of the Full Court of the Federal Court set aside and in lieu thereof order that the appeals to that Court be allowed with costs, the Orders of Tamberlin J be set aside and in lieu thereof order that the present respondent's application for relief under ss 120 and 121 of the Bankruptcy Act 1966 (Cth) be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

D M J Bennett QC with S J McMillan for the appellants (instructed by Ferrier & Associates)

P G Hely QC with J W J Stevenson for the respondent (instructed by Mallesons Stephen Jaques)

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CATCHWORDS

Cannane & Anor v J Cannane Pty Limited & Anor;
Cannane & Anor v Official Trustee in Bankruptcy as Trustee of the Bankrupt
Estate of John Vincent Cannane

Bankruptcy - Disposition of Property - Intention of bankrupt to use corporate vehicle owned by bankrupt for purchase of business for the purpose of a "back door listing" - Transfer of share in corporate vehicle to family members for nominal but adequate consideration in expectation of increase in value - Subsequent purchase of business by corporate vehicle and commensurate increase in value of share - Whether disposition of property for undervalue - Whether creditors entitled to the increased value of share - Whether intent to defraud creditors.

Corporations - Winding up - Undue preference - Disposition of property - Intention to use subsidiary corporate vehicle for purchase of business for the purpose of a "back door listing" - Transfer and issue of shares in corporate vehicle to family members of director for nominal but adequate consideration in expectation of increase in value - Subsequent purchase of business by corporate vehicle and commensurate increase in value of shares - Whether disposition of property for undervalue - Whether creditors entitled to the increased value of shares - Whether intent to defraud creditors.

Words and Phrases - "Acts of intent to defraud creditors".

Bankruptcy Act 1966 (Cth), ss 120, 121.

Corporations Law, s 565.

- 1 BRENNAN CJ AND McHUGH J. John Vincent Cannane was a director of Ausminco Holdings Ltd ("Ausminco"). Ausminco was indebted to banks which had lent it money the repayment of which was guaranteed by, inter alios, John Vincent Cannane ("John") and J Cannane Pty Limited ("JCPL"), a family company controlled by John. On 2 November 1990 the banks appointed receivers and managers to Ausminco and to one of its subsidiaries, Commercial and Domestic Finance Ltd ("CDF"). Then the banks called upon John and JCPL to pay under their guarantees. Each was called upon to pay more than \$6 million. Two notices of demand were served, the first on 22 February 1991; the second on 10 April 1991. It is common ground that neither John nor JCPL was able to pay the debt either when payment was demanded or at any later material time. On 28 May 1993, some time after the transactions next to be mentioned, a sequestration order was made against John. JCPL was ordered to be wound up on 8 June 1993. The Official Receiver of John's estate is the respondent in one of these appeals; JCPL and the liquidator of JCPL are the respondents in the other.
- 2 Ausminco and CDF between them owned all the issued shares in Carbon Consulting International Pty Ltd ("CCI"). John was a director of all three companies but he ceased to be a director of CCI on 12 December 1990. CCI's business was the provision of technical and testing services for the coal industry. In June 1990 John and a co-director, Aitken, proposed that Ausminco and CDF sell the shares in CCI to a listed public company in exchange for an allotment of sufficient shares in that company to give Ausminco a majority interest in the purchaser company. The proposal envisaged that CCI would thereby achieve what is commonly referred to as a "back door listing" on the stock exchange. The publicly listed company selected as the proposed purchaser was Mendolsohn Corporation Limited ("Mendolsohn").
- 3 The proposal was acceptable to Mendolsohn. After the receivers were appointed to Ausminco and CDF, the managing director of Mendolsohn informed them that there was an agreement that Mendolsohn should purchase the CCI shares. The Mendolsohn shareholders passed resolutions on 28 December 1990 approving a change of name subject to the satisfactory completion of the acquisition of the issued shares in CCI. John was appointed a director of Mendolsohn on 22 April 1991 and, on 2 May 1991, that company's name was changed to CCI Holdings Ltd ("CCIH").
- 4 Negotiations for the purchase of the CCI shares proceeded between CCIH and the receivers and their respective solicitors. They reached the point on 12 July 1991 where the solicitors for CCIH submitted to the receivers an executed form of agreement for the purchase of the CCI shares and a bank cheque for \$50,000 deposit. A letter from the Bank of Singapore confirming the availability of finance for the completion of the purchase was promised. On 26 July 1991, however, that offer of purchase was rejected and the bank cheque was returned. The CCI shares

were then sold by the receivers to Wisbeck Pty Ltd ("Wisbeck"), a shelf company owned by members of the Cannane family, which sold the CCI shares on to CCIH.

5 Until May 1991, the issued capital of Wisbeck consisted of two \$1 shares held by John and JCPL respectively. On or about 15 May 1991, John transferred his share to his son, Andrew, and JCPL transferred its share to John's wife, Denise. In each case the consideration for the transfer was stated to be \$1. A third share of \$1 was then issued to John's son, Richard. In the month before these events occurred, namely on 18 April, proceedings in the Supreme Court of New South Wales had commenced against John and JCPL for the enforcement of the guarantees they had given to the bank creditors of Ausminco and CDF.

6 In April 1991, it was obvious that John was in financial difficulties. During that month, he wrote to his accountant canvassing the desirability of using Wisbeck as the vehicle for acquiring the CCI shares and selling them on to CCIH. Amongst other advantages in this proposal, there was the opportunity to allocate some of the proceeds of sale of the CCI shares to JCPL as a management fee which could be set off for tax purposes against some tax losses that JCPL had accumulated. John was advised by his accountant that it would be "sensible for members of your family other than you to acquire any future assets that might arise". By disposing of his direct and indirect interests in Wisbeck, John prepared Wisbeck as a suitable vehicle for the acquisition of assets for the benefit of the members of his family.

7 At the time when the Wisbeck shares were acquired by Denise, Andrew and Richard, the finance that Wisbeck would need to complete the purchase of the CCI shares from the receivers had not been arranged, CCIH had not contractually bound itself to buy the CCI shares and, as the trial judge found, the prospect of any benefit flowing to Wisbeck was contingent on John continuing not only to promote the proposal to sell the CCI shares to CCIH but also to use Wisbeck for the purpose. By reason of these contingencies, the courts below have found that the value of each of the Wisbeck shares at the time of their transfer to Denise and John was no more than the \$1 price they each agreed to pay to JCPL and John respectively.

8 John's intention in transferring his Wisbeck share to Andrew and procuring JCPL to transfer its share to Denise and in procuring Wisbeck to issue a share to Richard was frankly stated by John in his evidence:

"You intended, did you not, [at the time of the transfers of the Wisbeck shares] that Wisbeck would be the vehicle by which the family in substance would acquire an interest in Mendolsohn?---Yes.

In the event that Mendolsohn bought the CCI shares?---Yes.

And that accordingly, in substance, as at the time these documents were signed you intended and contemplated that Wisbeck would be the vehicle by

3.

which through Mendolsohn the family acquired interest in CCI if everything came to pass as you had hoped?---Yes.

You certainly proposed to remain actively involved insofar as you could, promoting the successful culmination of that proposed deal?---Yes.

You certainly proposed to do, so far as you could, everything you could to ensure that the deal was delivered in substance into Wisbeck?---Yes.

It was not necessary was it for you to give, so far as you were concerned, your wife or Andrew any assurances to the effect that you would remain involved and that you would ensure that Wisbeck remained involved, was there?---No.

...

So far as you were concerned you understood that from the point of view of your wife and Andrew it went without saying?---Yes.

Because the whole point of transferring these shares from your name and the company's name, that is J Cannane Pty Limited to the names of your wife and son was to preserve for the family such interest as Wisbeck might ultimately acquire in the CCI acquisition?---Yes.

The reason you were concerned to transfer your share and to cause the company to transfer its share was that you had in contemplation the possibility of your bankruptcy?---Yes.

And the winding up of J Cannane Pty Limited?---Yes.

You were concerned to ensure that in the event that those unhappy events came to pass that neither the creditors of you or the company would get their hands on the shares in Wisbeck?---Yes.

You thought that the way to do that was to transfer the shares out of your name, out of the company's name into the names of members of your family?--Yes.

You did not contemplate, did you, that either Mrs Cannane or Andrew would play any active role in the business of Wisbeck?---Other than directors, no.

I think you said in your affidavit that at all material times it had been agreed between you and Mrs Cannane that the business of Wisbeck Pty Limited would be in substance entrusted to you?---The operations of it.

4.

Yes, the operation of the business?---Yes.

You did not see that situation changing after the transfer of these shares?---No.

And it did not, did it?---No."

In re-examination, he gave the following evidence:

"[W]hat was the wealth represented by those [Wisbeck] shares which you did not want your creditors or J Cannane Pty Limited's creditors to get their hands on?---The wealth would be the future accumulation that might happen in that company from that time forward because in my belief the company had no value at that time."

9 John's intentions were carried into execution. An agreement for the sale of the CCI shares by Ausminco and CDF to Wisbeck was entered into on 6 August 1991 and was subsequently varied on 20 August 1991. On 20 August 1991, Wisbeck accepted an offer by the Bank of Singapore to finance the purchase. The total consideration payable by Wisbeck was \$700,000 in exchange for the shares in CCI and a release by Ausminco of the net amount then owing to it by CCI. On the same day, Wisbeck sold the CCI shares to CCIH, the consideration being 10,000,000 ordinary shares in CCIH partly paid to 6c each and 500,000 fully paid shares having a par value of 20c each. A clause in the contract contained an acknowledgment "that the monetary equivalent of the consideration is \$700,000". At the time of the sale, a dividend of \$300,000 provided for in the accounts of CCI as at 30 June 1990 had not been paid. JCPL charged CCIH a negotiation fee for the purchase of the CCI shares and an amount to reimburse it for the costs outlaid. It was intended that, after the acquisition of CCI by CCIH, the latter company would issue further shares to be taken up by Wisbeck which would then sell those shares and repay the Bank of Singapore at least \$500,000 out of the proceeds of that sale within 6 months of the first borrowing from the Bank of moneys outlaid to purchase the CCIH shares.

10 After John's estate was sequestrated on 28 May 1993, the Official Receiver of John's estate applied to the Federal Court of Australia for a declaration that the transfer by John to Andrew of John's share in Wisbeck was void as a disposition of property with intent to defraud creditors pursuant to s 121 of the *Bankruptcy Act* 1966 (Cth)¹. After the order for the winding up of JCPL was made on 8 June 1993, the Liquidator of JCPL made a similar application in respect of the transfer by JCPL to Denise of JCPL's share in Wisbeck. The latter application was made

1 Section 121 was replaced by the *Bankruptcy Legislation Amendment Act* 1996 (Cth), s 3 and Sched 1, item 208.

5.

pursuant to s 565 of the Corporations Law which picks up and applies to corporations in liquidation the provisions of s 121 of the *Bankruptcy Act*. At the time when the Wisbeck shares were transferred, the relevant provisions of s 121 read as follows:

" (1) Subject to this section, a disposition of property, whether made before or after the commencement of this Act, with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith, is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in the bankruptcy."

The critical term for present purposes is "with intent to defraud creditors". Provisions of this kind, based on 13 Eliz I c 5², have been considered by the courts in various jurisdictions and it is clearly established that the party seeking to avoid a disposition of property has the onus of proving an actual intent by the disponent at the time of the disposition to defraud creditors³. The creditors whom the fraudulent disponent of property might intend to defeat need not be existing creditors; they may be future creditors⁴. The intent prescribed by s 121(1) is an

2 *Act against Fraudulent Deeds, Gifts, Alienations, etc* (1571) 13 Eliz I c 5, commonly referred to as the "Statute of Elizabeth". See *Re Kelly* (1932) 4 ABC 258 at 261; *P T Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 at 521-522.

3 *Williams v Lloyd; In re Williams* [1934] 50 CLR 341 at 372; *Re Barnes; Ex parte Stapleton* [1962] Qd R 231 at 237; *Ex parte Mercer; In re Wise* (1886) 17 QBD 290 at 298-299.

4 *Barton v Deputy Federal Commissioner of Taxation* (1974) 131 CLR 370 at 374; *P T Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 at 525-526; *In re Lane-Fox; Ex parte Gimblett* [1900] 2 QB 508 at 512; *Ex parte Russell; In re Butterworth* (1882) 19 Ch D 588 at 598-599.

intent to defraud *any* present or future creditors⁵. But, as the intent must accompany the disposition⁶, it must relate to the effect of disposing of property then existing.

11 A disposition made with fraudulent intent is nonetheless a disposition. It is not without legal effect. Dixon CJ and Fullagar J pointed out in *Brady v Stapleton*⁷ that "[t]he truth seems to be that, although the statute uses, and most emphatically uses, the word 'void', the courts have always treated a fraudulent assignment as effective unless and until a creditor or creditors intervene by levying execution or taking legal proceedings." But when the creditors (or the official receiver or liquidator⁸) intervene and the disposition is avoided, the property fraudulently disposed of becomes available for distribution among the then existing general body of creditors⁹.

12 Although the party impugning the disposition of property must show an actual intent to defraud creditors at the time of the disposition, the intent may be inferred¹⁰ from the making of a disposition which, to adopt the words of Lord Hatherley LC in *Freeman v Pope*¹¹, "subtracts from the property which is the proper fund for the payment of [the] debts, an amount without which the debts cannot be paid". The "proper fund" may consist in assets out of which future creditors as well as present creditors would be entitled to be paid a dividend in respect of what is owing to them. Therefore a subtraction of assets which, but for the impugned disposition, would be available to meet the claims of present and future creditors is material from which an inference of intent to defraud those

5 See s 6 of the *Bankruptcy Act* which provides:

"A reference in this Act to an intent to defraud the creditors of a person or to defeat or delay the creditors of a person shall be read as including an intent to defraud, or to defeat or delay, any one or more of those creditors."

6 *Ex parte Mercer; In re Wise* (1886) 17 QBD 290 at 299-300.

7 (1952) 88 CLR 322 at 333.

8 See *Williams v Lloyd; In re Williams* [1934] 50 CLR 341 at 362 per Starke J.

9 *NA Kratzmann Pty Ltd (in liq) v Tucker* [No 2] (1968) 123 CLR 295 at 299; *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 71 ALJR 1223 at 1230, 1232; 147 ALR 1 at 10, 13; *Noakes v Harvy Holmes* (1979) 26 ALR 297 at 304.

10 *Noakes v Harvy Holmes* (1979) 26 ALR 297 at 303.

11 (1870) 5 Ch App 538 at 541.

creditors might be drawn. Whether that inference should be drawn depends upon all the circumstances of the case.

- 13 If property be disposed of by sale and the sale price received by the disponor is equal to the true value of the property at the time of the disposition, the creditors have an undepleted fund against which to prove their debts. But if property is sold for an undervalue or is given away, that fact is relevant to the intent to be attributed to the disponor in disposing of the property¹². The value of property at the time of disposition may reflect, of course, the prospect of its future increase or decrease in value. But disposition of property at an undervalue is only a fact from which, dependent on the surrounding circumstances, an inference of fraudulent intent may be drawn. In *Williams v Lloyd; In re Williams*, a majority of the Court¹³ declined to draw that inference when the disponor was in a financially sound position and transferred property to his wife and children because his wife sought to have the family property preserved against the hazard of loss by her husband.

- 14 Section 121 is not enlivened merely by showing that the disposition has reduced the assets available to the creditors when the disponor is adjudicated bankrupt. It is the disponor's intent to deprive creditors of assets against which (or against the proceeds of which) they would otherwise be entitled to prove their debts that enlivens the operation of s 121. As Dixon CJ said in *Hardie v Hanson*¹⁴:

"The phrase 'intent to defraud creditors of the company' suggests that present or future creditors of the company will, if the intent is effectuated, be cheated of their rights."

- 15 In the present case, John intended to subtract the Wisbeck shares from the reach of present and future creditors. Equally, it is clear that John intended that the benefit of the CCI transaction should be attached to the Wisbeck shares. The Courts below have accumulated these intentions so as to find that John intended to subtract the Wisbeck shares, which would have had the benefit of the CCI transaction attached to them, from the reach of his present and future creditors. If that finding were upheld, the inference that the Wisbeck shares were subtracted from John's and JCPL's assets with the intent of defrauding their respective creditors would be easily drawn. A finding that the Wisbeck shares, at the time of disposition, would have or would be likely to have the benefit of the CCI transaction attached to them would be tantamount to a finding that they were sold

12 *Lloyds Bank Ltd v Marcan* [1973] 1 WLR 1387 at 1392; [1973] 3 All ER 754 at 761.

13 (1934) 50 CLR 341 at 372, 377, 378.

14 (1960) 105 CLR 451 at 456; see also *Cadogan v Kennett* (1776) 2 Cowp 433 at 434 [98 ER 1171 at 1172].

by John and JCPL for an undervalue with the intent of subtracting assets having that value from the funds available to their respective creditors.

16 But there is a fallacy in the reasoning. John's intention that the benefit of the CCI transaction should be attached to the Wisbeck shares was conditional; the benefit was to be attached to the Wisbeck shares only if those shares were beneficially owned by Denise, Andrew and Richard. He never intended that, absent their ownership of the Wisbeck shares, Wisbeck should have the benefit of the CCI transaction. Far from intending that the Wisbeck shares should be subtracted from his assets with the consequence that his creditors would lose the benefit of the CCI transaction, his firm intention was that the creditors should never become entitled to the benefit of the CCI transaction. The intention of subtracting the Wisbeck shares was not to cheat the creditors of the benefit of the CCI transaction but to provide the vehicle for conveying the benefit of the CCI transaction to Denise, Andrew and Richard when the benefit of that transaction could be taken.

17 Unlike *Noakes v Harvy Holmes*¹⁵, the facts of the present case do not support the inference that John and JCPL intended to deny to their respective creditors the benefit of assets to which they would have been entitled but for the impugned disposition. Accordingly, the finding that the Wisbeck shares were transferred by John to Andrew and by JCPL to Denise with the intent to defraud creditors must be set aside. The appeal must be allowed, the order of the Full Court of the Federal Court set aside, in lieu thereof the appeal to that Court should be allowed, the order of Tamberlin J set aside and the applications for relief under s 121 of the *Bankruptcy Act* and s 565 of the Corporations Law dismissed. The present respondents must pay the costs here and in the Courts below.

15 (1979) 26 ALR 297.

- 18 GAUDRON J. These appeals, which involve the meaning and application of s 121 of the *Bankruptcy Act* 1966 (Cth) ("the Act") and which arise out of the same set of facts, were heard together.

The facts

- 19 In early 1991, there was a prospect that John Vincent Cannane could acquire shares in Carbon Consulting International Pty Ltd ("CCI") either for himself or for such person or company as he cared to nominate. There was also a prospect that he could obtain shares in an existing public company which would acquire CCI and thus effect its "backdoor listing" on the stock exchange. Mr Cannane's original plan was for the CCI shares to be acquired by J Cannane Pty Limited ("JCPL"), a company which he controlled. However, he and JCPL were in serious financial difficulties. When the extent of those difficulties became apparent, Mr Cannane decided that the CCI shares should be acquired by Wisbeck Pty Ltd ("Wisbeck"), a company with two issued \$1.00 shares, one of which was owned by him and the other by JCPL. Wisbeck was, at that stage, indebted to JCPL in an amount considerably in excess of its assets.
- 20 Prior to 15 May 1991, Mr Cannane took a number of steps to bring about the backdoor listing of CCI. He also applied to the Bank of Singapore and obtained approval for finance for Wisbeck to buy the CCI shares. In consequence, Wisbeck paid the Bank an establishment fee of \$11,000 but, at that stage, took no other step in relation to the venture. Indeed, it was not then certain that the CCI shares would be sold to Mr Cannane or his nominee, although there was a clear expectation that that would occur.
- 21 On 15 May 1991, in furtherance of the CCI venture, JCPL transferred its share in Wisbeck to Denise Mary Cannane, Mr Cannane's wife and the appellant in the first matter. On the same day, Mr Cannane transferred his share to Andrew Vincent Cannane, his son and the appellant in the second matter. In each case, the transfer was made in consideration of a promise to pay \$1.00. As part of the overall arrangements effected that day, a third share in Wisbeck was issued to Mr and Mrs Cannane's other son, Richard Cannane. No question arises as to that third share.
- 22 It is not in issue that, so far as concerns Mr Cannane and JCPL, the purpose of the share transactions on 15 May 1991 was to ensure that Mr Cannane's family, rather than his and the company's creditors, would obtain the benefit of the CCI venture if it could be brought to a successful conclusion. Nor is it in issue that Mrs Cannane knew that that was their purpose and participated in the transaction to enable it to be achieved. However, Andrew Cannane entered into the transaction simply because his father asked him to, without inquiry as to its purpose or any associated circumstance.

- 23 On 20 August 1991, the CCI venture was brought to a successful conclusion with Wisbeck purchasing CCI shares with money lent by the Bank of Singapore and then selling them to a listed public company, CCI Holdings Ltd, in exchange for shares in the latter company. The venture proved profitable. However, Mr Cannane's and JCPL's financial difficulties remained. Mr Cannane was made bankrupt on 28 May 1993 and, on 8 June 1993, JCPL was wound up. In November of that year, the Liquidator of JCPL and the Trustee of Mr Cannane's bankrupt estate commenced proceedings in the Federal Court seeking to have the share transfers to Andrew and Mrs Cannane declared void.

Relevant legislative provisions

- 24 Until its amendment in 1996¹⁶, s 121 of the Act relevantly provided:
- "(1) Subject to this section, a disposition of property ... with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith, is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in the bankruptcy.
 - (2) Nothing in this section shall be taken to affect or prejudice the title or interest of a person who has, in good faith and for valuable consideration, purchased or acquired the property the subject of the disposition or any interest in that property.
 - (3) In this section, '**disposition of property**' includes a mortgage of property or a charge on or in respect of property."

Section 6 of the Act provides, as it has at all relevant times, that "[a] reference in [the] Act to an intent to defraud the creditors of a person or to defeat or delay the creditors of a person shall be read as including an intent to defraud, or to defeat or delay, any one or more of those creditors."

- 25 Section 565 of the Corporations Law incorporates s 121 of the Act into the law applicable to the winding up of a company. In May 1991, s 565(1) relevantly provided:

"A settlement ... or transfer of property ... by a company that, if it had been made ... by a natural person, would, in the event of his or her becoming a

16 By Sched 1, Item 208 of the *Bankruptcy Legislation Amendment Act* 1996 (Cth), s 121 was repealed and replaced with a new s 121.

bankrupt, be void as against the trustee in the bankruptcy, is, in the event of the company being wound up, void as against the liquidator."

History of the proceedings

26 At first instance, it was sought to have the share transfers declared void either under s 120 or under s 121 of the Act. It was held by Tamberlin J that the share transfers were void under s 121, but not under s 120. As there is no longer any issue with respect to s 120¹⁷, it is unnecessary to mention it further. So far as concerns s 121, his Honour found that "the share transfers were made with the intent, on the part of [Mr Cannane] and JCPL, that the fruit of any benefits which might accrue to Wisbeck and any consequential increase in value of the shares, as a result of the proposed transactions, should not fall into the hands of [their] creditors." In consequence, he held that they were made "with an intent to defraud, defeat or delay creditors as to any increased worth of the shares, within s 6 of the Act".

27 On the question whether, in terms of s 121(1), the transfers to Andrew and Mrs Cannane were "disposition[s] for valuable consideration in favour of ... person[s] who acted in good faith", Tamberlin J found that the shares in Wisbeck had no greater value than the price which they agreed to pay¹⁸. However, he concluded that neither Andrew nor Mrs Cannane had "acted in good faith" as required by s 121(1) of the Act. In Andrew's case, that finding was made on the basis that, by reason of his failure to inquire, it was to be taken that he participated in the transaction "to give effect to his father's intentions or purposes, whatever they may have been". And in Mrs Cannane's case, the finding was made on the basis that she "was aware of and privy to [her husband's] purpose".

17 The respondents relied upon s 120 at first instance, and in the Full Court and in a notice of contention filed in this Court. However, the issue was not pressed in this Court.

18 In his reasons for judgment, his Honour stated that he was "not satisfied that the shares ... were transferred at or for a greater amount than their true value on [the date of transfer]." However, the matter proceeded in the Full Court on the basis that his Honour found that the shares "were worth not more than the [one dollar] which was promised to be paid" ((1996) 65 FCR 453 at 464), that being the clear import of Tamberlin J's finding that the fact that the CCI venture was a prospect "did *not* confer any more than a nominal value on the undertaking of the company and therefore on the shares in Wisbeck as at mid-May 1991."

- 28 Andrew and Mrs Cannane each appealed from the decision of Tamberlin J to the Full Court of the Federal Court. By majority (Beaumont and Hill JJ, Lehane J dissenting), their appeals were dismissed. They now appeal to this Court.

Intention to defraud

- 29 In the Full Court, Beaumont and Hill JJ took the view that, as Mr Cannane knew that it was possible that he would be made bankrupt and JCPL would be wound up, and, as his admitted object "was to quarantine the shares in [his] family's name and beyond the reach of ... creditors"¹⁹, the only conclusion open to Tamberlin J was that "the object of the transfers was to put the shares beyond the reach of creditors"²⁰. Their Honours treated that object as an intent to defraud for the purposes of s 121 of the Act. On the other hand, Lehane J took the view that the object of putting the shares beyond the reach of creditors did not, of itself, constitute an intention to defraud. Rather, in his Honour's view, it was necessary for there to be an intention to deplete the assets available for creditors, or to render the assets less accessible or less advantageous²¹. And as the creditors were not entitled to the CCI shares, there was, in his Honour's view, no intention to defraud²².
- 30 It is notoriously difficult to provide an exhaustive statement as to what is involved in the concepts of "fraud" and "intent to defraud". "Fraud" involves the notion of detrimentally affecting or risking the property of others, their rights or interests in property, or an opportunity or advantage which the law accords them with respect to property. Conversely, it is not fraud to detrimentally affect or risk something in or in relation to which others have no right or interest or in respect of which the law accords them no opportunity or advantage. And there is no intent to defraud if the person in question believes that others have no right or interest in or in relation to the property concerned and that the law accords them no opportunity or advantage with respect to that property.

19 *Cannane v Official Trustee* (1996) 65 FCR 453 at 469.

20 (1996) 65 FCR 453 at 469.

21 (1996) 65 FCR 453 at 476.

22 (1996) 65 FCR 453 at 476.

31 It is to be remembered that the operation of s 121(1) depends on the intent of the bankrupt or, where it is applied in a company winding up, the intent of the company concerned. What is in issue in each case is, as Dixon J said in *Williams v Lloyd; In re Williams*²³, a "real intent". And as Starke J observed in the same case, "[f]raud ... is not to be presumed"²⁴. That is not to deny that it may take very little to justify a finding of fraud or intent to defraud for the purposes of s 121(1) of the Act if the person or company concerned disposes of assets when facing financial difficulties. Even so, the real intent must be ascertained.

32 In the present case, the intention of Mr Cannane and JCPL with respect to the share transfers was not to detrimentally affect the assets then available for the payment of his or its debts or to prejudice or risk the right or interest of creditors in the fund constituted by those assets, or any opportunity or advantage which the law accorded them with respect to that fund. Rather, in each case, their intention was to ensure that the fund was not enhanced by the inclusion of the CCI shares or the assets to be derived from those shares in the event that the CCI venture was brought to a successful conclusion.

33 The creditors had no right or interest in or in relation to the CCI shares and the law accorded them no opportunity or advantage with respect to them unless Mr Cannane, JCPL or one or more companies in which one or other or both were shareholders later acquired those shares. In my view, the creditors were no more defrauded by the steps taken to ensure that they did not obtain any such right, interest, opportunity or advantage than they would have been if Mr Cannane had simply let the CCI venture lapse. More to the point, it cannot be said that the steps taken by Mr Cannane and JCPL were taken with intent to defraud for there is nothing to suggest that they believed that their creditors had any right or interest in or in relation to the CCI shares or that the law accorded them any opportunity or advantage with respect to them.

34 There being no intent to defraud on the part of either Mr Cannane or JCPL, no question arises as to the good faith of Andrew and Mrs Cannane.

Conclusion

35 The appeals should be allowed and, in each case, the orders of the Full Court set aside. In lieu of those orders, the appeals to the Full Court should be allowed and, in each case, the orders of Tamberlin J set aside. And in lieu of the orders of

23 (1934) 50 CLR 341 at 372.

24 (1934) 50 CLR 341 at 361.

14.

Tamberlin J, each of the applications to the Federal Court should be dismissed with costs.

36 GUMMOW J. These two appeals were heard together, as they were in the Full Court of the Federal Court²⁵. They give rise to a common question concerning the construction of the provision with respect to fraudulent dispositions made by s 121 of the *Bankruptcy Act* 1966 (Cth) ("the Bankruptcy Act") as it stood before the substitution of a fresh s 121 by the *Bankruptcy Legislation Amendment Act* 1996 (Cth). In particular, the appeals turn upon the application to the somewhat unusual facts of the phrase "with intent to defraud creditors", properly construed.

37 The inclusion of s 121 in the Bankruptcy Act followed the recommendation in 1962 in par 173 of the Report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth ("the Clyne Committee"). Paragraph 173 of the Clyne Committee's Report was as follows:

"Fraudulent Dispositions"

173. Under the Statute 13 Eliz c 5, enacted in 1570 but now to be found in various Property Law Acts passed in England and in the several States, fraudulent dispositions were liable to be set aside at the instance of any person thereby prejudiced. The Committee considers that, where a fraudulent disposition has been made by a debtor who subsequently becomes bankrupt, the trustee of the estate should have the power, at any time, subject to exceptions in favour of persons who have dealt with the bankrupt in good faith, to have it set aside for the benefit of the estate of the bankrupt."

The Elizabethan statute (13 Eliz I c 5) (Eng) provided that transfers of property for the purpose of delaying, hindering or defrauding creditors or others of their lawful debts were "to be clearly and utterly void, frustrate and of none effect" provided that the statute did not extend to transfers of property "upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons ... not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid".

38 At the relevant time, s 121 of the Bankruptcy Act stated:

"(1) Subject to this section, a disposition of property, whether made before or after the commencement of this Act, with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith, is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in the bankruptcy.

25 *Cannane v Official Trustee in Bankruptcy* (1996) 65 FCR 453; 136 ALR 406.

(2) Nothing in this section shall be taken to affect or prejudice the title or interest of a person who has, in good faith and for valuable consideration, purchased or acquired the property the subject of the disposition or any interest in that property.

(3) In this section, '**disposition of property**' includes a mortgage of property or a charge on or in respect of property."

39 Although s 121(1) uses the term "void as against the trustee in the bankruptcy", the disposition in question, if otherwise completed, stands until the trustee intervenes²⁶. The Elizabethan statute had been so interpreted that the mere preference of one creditor over another or others did not attract its operation²⁷. However, s 121 of the Bankruptcy Act is to be read with s 6 thereof. This provides that a reference in the Bankruptcy Act to an intent to defraud the creditors of a person or to defeat or delay the creditors of a person is to be read as including an intent to defraud, or to defeat or delay, any one or more of those creditors. An intention to defeat future creditors is sufficient to enliven s 121, and if this be made out, it is no answer that at the date of the disposition of property the disponent had no creditors²⁸.

40 The making of a disposition to which s 121 would apply may also amount to the commission of an act of bankruptcy²⁹. Further, dispositions which were void

26 See *Brady v Stapleton* (1952) 88 CLR 322 at 333-334, 341-342; *Noakes v Harvy Holmes & Son* (1979) 26 ALR 297 at 303.

27 *P T Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 at 525; 107 ALR 199 at 208-209.

28 *Barton v Deputy Federal Commissioner of Taxation* (1974) 131 CLR 370 at 374.

29 This follows from s 40(1)(b) of the Bankruptcy Act which at the relevant time for this litigation stated:

"(1) A debtor commits an act of bankruptcy in each of the following cases:

...

(b) if in Australia or elsewhere:

(i) he makes a conveyance, transfer, settlement or other disposition of his property or of any part of his property;

(ii) he creates a charge on his property or on any part of his property;

(Footnote continues on next page)

under various State and Territory legislation which reproduced the substance of the Elizabethan statute were void also against trustees in bankruptcy or receivers lawfully appointed³⁰. The result is that decisions upon this legislation, as well as those concerning the commission of disputed acts of bankruptcy, may bear upon the construction of s 121.

41 By proceedings brought in the Federal Court of Australia, it was sought to set aside the share transfers effected by two instruments of transfer dated 15 May 1991 as fraudulent dispositions to which s 121 of the Bankruptcy Act applied. The subject of each transfer was a \$1 share in Wisbeck Pty Ltd ("Wisbeck"), the second appellant in each appeal. Each transfer was for a stated consideration of \$1. The transfer at stake in the first appeal was by J Cannane Pty Limited ("JCPL") to the first appellant in the first appeal, Mrs Cannane. JCPL was the principal Cannane family company, the shareholders and directors of which were Mr John Vincent Cannane ("Mr Cannane") and Mrs Cannane. The other transfer was by Mr Cannane to Mr Andrew Cannane, the first appellant in the second appeal and the son of Mr and Mrs Cannane. At the time of the transfer he was 18 years old. The shares transferred represented the whole of the issued capital of Wisbeck. At the same time as the transfers of shares took place, a further share in Wisbeck was allotted to Mr Richard Cannane, another son of Mr and Mrs Cannane. No issue arises with respect to that share.

42 Mr Cannane for some time had been a director of Carbon Consulting International Pty Ltd ("CCI") and was interested in achieving a "back-door" stock exchange listing for CCI. The business of CCI was the provision of technical and testing services to the coal industry. On 18 April 1991, two banks instituted proceedings to recover large sums from Mr Cannane and JCPL. They subsequently recovered judgment in June 1992 in the sum of \$6,948,188.21. In broad terms, the steps taken in May 1991 with the shares in Wisbeck had the result that when the listing was achieved the wealth that was generated was enjoyed not by Mr Cannane or JCPL but by other members of his family. On 21 August 1991, CCI Holdings Ltd ("CHL") made a stock exchange announcement that it now owned 100 per cent of CCI and that CHL was to issue to Wisbeck 10 million shares at 6 cents (with the balance to be credited from the Share Premium Reserve) and 500,000 shares at 20 cents.

(iii) he makes a payment; or

(iv) he incurs an obligation;

that would, if he became a bankrupt, be void as against the trustee".

30 *Williams v Lloyd; In re Williams* (1934) 50 CLR 341 at 362-363. See also *Brady v Stapleton* (1952) 88 CLR 322 at 328-329, 339-340.

43 Mr Cannane was made bankrupt on 28 May 1993. On 8 June 1993, JCPL was wound up by order of the Supreme Court of New South Wales. The provisions of s 121 of the Bankruptcy Act were incorporated by reference in the insolvent administration of JCPL by s 565 of the Corporations Law as it then stood³¹.

44 On the application of JCPL and its liquidator, a judge of the Federal Court (Tamberlin J) declared that the transfer by JCPL to Mrs Cannane was a disposition of property with intent to defraud creditors and was void against the liquidator of JCPL pursuant to s 565 of the Corporations Law. Upon application by the trustee in Mr Cannane's bankruptcy, Tamberlin J declared that the transfer by Mr Cannane to Mr Andrew Cannane was a disposition of property with intent to defraud creditors and void against the trustee pursuant to s 121 of the Bankruptcy Act. In each case, his Honour gave consequential relief³².

45 By majority (Beaumont and Hill JJ; Lehane J dissenting), the Full Court dismissed appeals against these declarations and orders. These appeals are brought against the orders of the Full Court.

46 In the Federal Court there was a dispute as to the valuation to be attributed to the shares on 15 May 1991. However, all members of the Full Court upheld the view taken of the expert evidence by the primary judge³³. This outcome is not challenged in this Court by the respondents. The result is that, for the purposes of the appeals in this Court, each of the shares in Wisbeck is to be treated as having had no more than its face value when transferred on 15 May 1991.

47 On 15 May 1991 there were no presently subsisting legal obligations which would achieve an increase in the value of the shares. Nevertheless, there was what Lehane J identified as the "clear prospect"³⁴ that Mr Cannane would be able, in

31 With effect from 23 June 1993, s 565(1) was amended with the effect of limiting the application of s 121 to transactions preceding the commencement on that date of Pt 5.7B of the Corporations Law. The amendment was made by s 104(a) of the *Corporate Law Reform Act 1992* (Cth).

32 Tamberlin J also determined that there had been no settlement to which s 120 of the Bankruptcy Act applied as it stood at the time. In this Court there is no live issue concerning s 120.

33 (1996) 65 FCR 453 at 473; 136 ALR 406 at 422, 423.

34 (1996) 65 FCR 453 at 474; 136 ALR 406 at 423.

conjunction with others, and as proved to be the case, to bring this about³⁵. It was the subsequent substantial increase in the value of the shares in Wisbeck which, no doubt, led to the applications by the trustee and the liquidator.

48 However, Tamberlin J was not satisfied that the shares in Wisbeck could be valued "on the assumption of a continuing involvement by [Mr Cannane] and Cannane interests in the transaction" and emphasised that, on 15 May 1991, "it was in the unfettered discretion and volition of [Mr Cannane] and JCPL as to whether the transaction would be completed using [Wisbeck] or some other legal entity or person".

49 The detailed findings of fact by the primary judge were reproduced by Beaumont and Hill JJ³⁶. The primary judge found:

"that the share transfers were made with the intent, on the part of [Mr Cannane] and JCPL, that the fruit of any benefits which might accrue to Wisbeck and any consequential increase in value of the shares, as a result of the proposed transactions, should not fall into the hands of creditors of [Mr Cannane] and JCPL".

Mr Cannane gave oral evidence and in his re-examination there was the following exchange:

"[COUNSEL] Do you recall that you conceded that the reason for the transfer of the two shares in Wisbeck on 13 or 15 May 1991 was so that neither your creditors nor [JCPL's] creditors as the then shareholders would be able to get their hands on the shares in [Wisbeck]? The question that I ask is, what was the wealth represented by those shares which you did not want your creditors or [JCPL's] creditors to get their hands on?---The wealth would be the future accumulation that might happen in that company from that time forward because in my belief the company had no value at that time."

50 The gist of the facts is sufficiently conveyed as follows by Lehane J³⁷:

"Each transfer was made with the object, on the part of the transferor, of putting the share beyond the reach of creditors. Each was made at a time

35 cf *Gorton v Federal Commissioner of Taxation* (1965) 113 CLR 604 at 623-624, 626; *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 360, 368, 380-381, 422-423.

36 (1996) 65 FCR 453 at 457-463; 136 ALR 406 at 408-413.

37 (1996) 65 FCR 453 at 474; 136 ALR 406 at 423-424.

when the financial ruin of the transferor was a clear and immediate prospect. At the time when the transfers were made, there was also a clear prospect that Mr Cannane would be able to bring about an acquisition by Wisbeck, directly or indirectly, of shares in [CCI], using for the purpose money to be borrowed by Wisbeck. Equally, there was a prospect that Mr Cannane could, if he chose, bring about an acquisition of the CCI shares, directly or indirectly, by someone other than Wisbeck: for example, Mrs Cannane or a company newly incorporated or acquired for the purpose. Wisbeck, at the time of the transfers, had no legal rights in relation to the CCI shares; particularly, it had no right to require Mr Cannane to seek to acquire the shares for it or even to require Mr Cannane, should he arrange the acquisition of the CCI shares, to do it so as to cause Wisbeck to be the acquirer. ... [N]either [the trustee nor the liquidator] would have had cause for complaint had Mr Cannane simply given up any attempt to acquire the shares in CCI or if, instead of arranging an acquisition by Wisbeck, he had instead arranged one by Mrs Cannane or a new company."

51 Counsel for the respondents accepted in argument before this Court that s 121 could have had no application to the transfers of the shares in Wisbeck if Mr Cannane had chosen a person or corporation other than Wisbeck to take up the shares issued by CHL.

52 Counsel also accepted that the mere intention to put property outside the reach of creditors was not sufficient. What was sufficient was that intention where the disponor was moved by the wish to deny to creditors what at the time of the dispositions the disponor is "convinced the property will be worth at the [time of the disponor's] bankruptcy". Here, the "only reason" for selling the two shares in Wisbeck was the intention of Mr Cannane to "inject value" into Wisbeck and his wish that the shares be outside the control of creditors in those circumstances.

53 Counsel for the appellants countered that these submissions misconstrued Mr Cannane's intention and therefore the operation of s 121 by stating that intention only in part. Further, the appellants contended that, where the full present value of property is received by the disponor from the donee, an intention by the disponor to prevent creditors of the disponor obtaining in the future value which they would never have obtained if the disposition had not taken place denies to the disposition the character of one made "with intent to defraud" creditors within the meaning of s 121(1).

54 The expression "with intent to defraud" does not have any universal connotation applicable in all statutory contexts in which it is found³⁸. However, the appellants properly relied upon a passage in the judgment of Dixon CJ in

38 See *Balcombe v De Simoni* (1972) 126 CLR 576 at 582-583.

*Hardie v Hanson*³⁹. This case arose under s 281 of the *Companies Act* 1943 (WA) and concerned the personal responsibility of a director for the debts or other liabilities of a company whose business had been carried on in the course of the winding-up "with intent to defraud creditors of the company or creditors of any other person". Dixon CJ said⁴⁰:

"The phrase 'intent to defraud creditors of the company' suggests that present or future creditors of the company will, if the intent is effectuated, be cheated of their rights. An intent to defraud creditors has been described, for the purposes of bankruptcy legislation, as an intent by deceit to deprive creditors of something to which they are entitled".

In the same case, Kitto J said that the onus lay on the liquidator⁴¹:

"to prove affirmatively that the carrying on of the company's business during the relevant fifteen months was characterized by an intent - which in the circumstances means an intent on the part of [the director] - to defraud creditors of the company. An actual purpose, consciously pursued, of swindling creditors out of their money had to be established against [the director] before a declaration under the section could be made."

55 The appellants contend that within the meaning of s 121 of the Bankruptcy Act there was no intent by Mr Cannane or JCPL (whose intent has been identified throughout the litigation as that of Mr Cannane) to cheat present and future creditors of their rights with respect to the two shares in Wisbeck. The full present value thereof was received at the time of the transfers and the increased value of the shares in the hands of the transferees at the time of the later bankruptcy and liquidation was the result of other activities. If the shares had remained in the hands of Mr Cannane and JCPL, he would not have continued with the use of Wisbeck as the vehicle to take up the shares issued by CHL. Had the status quo continued up to the time of the bankruptcy and the liquidation, the two shares in Wisbeck that were still held by Mr Cannane and JCPL would have been worth no more than the value received at the time of their transfer.

56 It should be accepted that, in the sense of the phrase used by Dixon CJ in *Hardie v Hanson*, the present or future creditors of Mr Cannane and JCPL were entitled to the two shares in Wisbeck. However, they had no "entitlement" in respect of the acquisition by Wisbeck of the shares in CHL which later were taken

39 (1960) 105 CLR 451.

40 (1960) 105 CLR 451 at 456.

41 (1960) 105 CLR 451 at 463.

up by Wisbeck after the achievement of the "back-door" listing. Mr Cannane's intention on 15 May 1991, when the two share transfers in question were made, had been to arrange, if he could, for the "back-door" listing and to use Wisbeck as a "vehicle" in relation thereto. This course was to be followed only on the basis that neither he nor JCPL remained a shareholder of Wisbeck. The consequence was that the transfers were not made with an intention to deprive creditors of Mr Cannane and JCPL of anything to which they were "entitled".

- 57 If the matter be analysed in this way, as in my view it should be, the proper characterisation is that given by Lehane J in the following passage⁴²:

"The intention that the shares should be put out of the reach of creditors is not itself necessarily an intention that creditors be defrauded; nor is an intention to direct to Wisbeck an opportunity to which creditors had no entitlement, so as to increase, after the transfers (and all going well), the 'wealth' represented by the Wisbeck shares."

- 58 It may be conceded that, if the disposition in question is made with intent to defraud creditors, within the meaning of s 121(1) of the Bankruptcy Act, the existence of a second or further intention may not be inconsistent with the first⁴³. However, that is not this case. Here, properly considered, there was not the intention of which s 121(1) speaks. The burden of Mr Cannane's evidence and the finding by the primary judge was that the shares in Wisbeck were transferred to his wife and son as a step in the subsequent injection of value into the shares and the provision of valuable assets to his family. The litigation was decided in the Federal Court favourably to the trustee and the liquidator by a reformulation of that intention so as not to conform to the evidence. The reformulation of Mr Cannane's intention was achieved by approbation of so much thereof as involved the intention to place the shares in the hands of Mr Cannane's wife and son and thereby beyond the reach of creditors of Mr Cannane and JCPL, and by reprobation of the balance of his intention. This was the taking of these steps only to ensure that the wealth he and JCPL otherwise would not have derived, would be derived by the transferees of the shares.

- 59 It follows that the appellants have made out their case that s 121(1) did not apply to the transfers. The consequence is that the issues under s 121(2) with respect to the position of Mrs Cannane and Mr Andrew Cannane which were debated on the appeals do not arise.

42 (1996) 65 FCR 453 at 476; 136 ALR 406 at 426.

43 See *Barton v Deputy Federal Commissioner of Taxation* (1974) 131 CLR 370 at 375.

23.

60 Each appeal should be allowed with costs and the orders of the Full Court set aside. In place thereof, each appeal to the Full Court should be allowed with costs, the orders of Tamberlin J set aside and the application to the Federal Court dismissed with costs.

61 KIRBY J. These appeals come from a decision of the Full Court of the Federal Court of Australia⁴⁴ which, by majority, affirmed orders entered by the primary judge⁴⁵ adverse to the appellants.

62 The appeals concern the meaning of two phrases in s 121(1) of the *Bankruptcy Act* 1966 (Cth)⁴⁶ ("the Act"), viz., "with intent to defraud creditors" and "acted in good faith". Although the circumstances of the case were, by common consent, unique if not strange, the issues raised are important for the administration of the law governing the recovery of dispositions of property allegedly made to defraud creditors.

63 In the Federal Court, the proceedings represented by the two appeals were heard together. Although there are some points of difference between them it is convenient, in this Court, to treat them in the same way.

Insolvent debtors dispose of a family company

64 It is essential to have a full understanding of all of the background facts in order to appreciate the conclusion to which the primary judge and majority of the Full Court came. There was no real dispute about the facts⁴⁷. It is their classification which is in contest. Although I will confine myself to the principal events, my narrative will be better understood if it is read with the fuller statement of facts set out in the reasons of the judges in the Federal Court.

65 Mr John Cannane and a company which he controlled, J Cannane Pty Limited ("JCPL") were, until 15 May 1991, the sole shareholders in a Cannane family company, Wisbeck Pty Ltd ("Wisbeck"). On that date, the two shares in Wisbeck were transferred for a consideration of \$1 each in the circumstances giving rise to this litigation. Mr John Cannane's share was transferred to one of his sons, Mr Andrew Cannane. JCPL's share was transferred to

44 *Cannane v Official Trustee* (1996) 65 FCR 453 per Beaumont and Hill JJ; Lehane J dissenting.

45 *J Cannane Pty Ltd (In Liq) v Cannane; Re John Vincent Cannane; Ex parte Official Trustee in Bankruptcy*, unreported, Federal Court of Australia, 25 August 1995 per Tamberlin J.

46 The section has since been repealed and replaced. See *Bankruptcy Legislation Amendment Act* 1996 (Cth), s 3 and Sched 1, Pt 1, item 208.

47 See (1996) 65 FCR 453 at 456 per Beaumont and Hill JJ. In the Full Court the majority extracted a large section from the findings of Tamberlin J at first instance (at 457-463). Lehane J (dissenting) agreed to the statement of facts contained in the joint reasons of Beaumont and Hill JJ. See (1996) 65 FCR 453 at 473.

Mr John Cannane's wife (and Andrew's mother), Mrs Denise Cannane. At the same time, a new share in Wisbeck was allotted to Mr Richard Cannane, Andrew's brother. No question has arisen in these proceedings concerning Mr Richard Cannane's interest.

66 Mr John Cannane had, since 1978, been a director of three relevant companies: Ausminco Holdings Limited ("Ausminco"), Carbon Consulting International Pty Limited ("CCI") and Commercial and Domestic Finance Limited ("CDF"). CDF was a wholly owned subsidiary of Ausminco. Ausminco and CDF together owned all of the shares in CCI. CCI's business involved the provision of technical and testing services to the coal industry. Mr John Cannane aspired to achieve a "back-door listing" for CCI on the Australian Stock Exchange. The proposed vehicle for that objective was Mendolsohn Corporation Limited ("Mendolsohn"). That company later changed its name to CCI Holdings Limited ("CCIH"). The objective became "complicated"⁴⁸ by the fact that, on 2 November 1990, receivers and managers were appointed to both Ausminco and CDF by banks which had lent large sums to Ausminco. Such loans were guaranteed by Mr John Cannane and JCPL, amongst others.

67 In November 1990, Mendolsohn wrote to the receiver of Ausminco to confirm that it had an agreement with Ausminco and CDF to buy all of the issued capital in CCI. The consideration was to be \$4 million to be paid wholly in shares in the company. In December 1990, JCPL applied for a \$2 million facility from the Bank of Singapore to enable it to purchase CCI from the receiver of Ausminco. In the same month, Mr John Cannane was removed from his office as a director of CCI. In January 1991, Mendolsohn made a cash offer of more than \$1 million to the receiver of Ausminco for the shares in CCI together with nearly \$500,000 for the repayment of inter-company loans between CCI and Ausminco. Soon afterwards there commenced the transactions which give rise to the present problem.

68 On 5 February 1991, JCPL made an application to the Bank of Singapore for a loan of \$1.3 million to help cover the purchase of CCI. JCPL also sought an additional loan of \$900,000 to refinance mortgages over a home in Clifton Gardens, Sydney, where the Cannane family lived. On 22 February 1991, both Mr John Cannane and JCPL received demands from the bank creditors which had appointed the receivers to Ausminco, in respect of loans guaranteed by Mr John Cannane and JCPL. Those demands were for repayment of approx \$6.6 million. On 10 April 1991, Mr John Cannane and JCPL received further demands from the banks for approx \$6.8 million. On 18 April 1991, they were each served with a summons, issued out of the Supreme Court of New South Wales, by which those banks claimed recovery of the latter sum. Clearly, at least by this time, Mr John

48 (1996) 65 FCR 453 at 456 per Beaumont and Hill JJ.

Cannane and JCPL were facing "financial ruin". That fate was "a clear and immediate prospect"⁴⁹. It is against this background that the longstanding ambition of Mr John Cannane to acquire a substantial interest in the issued share capital of CCI, and the steps which then ensued, must be understood. It was Mr John Cannane who wished to achieve the "back-door listing". It was he who procured JCPL's application for finance to the Bank of Singapore. He thereby arranged for Mendolsohn to acquire the shares in CCI using the proceeds of an allotment of shares, in itself for interests associated with him (initially JCPL and ultimately Wisbeck), to finance the purchase.

69 It was after the banks' demands, in early April 1991, that Mr John Cannane decided to use Wisbeck, rather than JCPL, as the company which was to obtain the benefit of the proposed acquisition of the CCI shares. On 2 April 1991, Mr John Cannane wrote to his accountant:

"I am near to concluding the deal to buy CCI and would like to bounce a few ideas of (sic) you ...

For the purchase of CCI my preferred position would be to acquire the shares in Denise's name or [a] company controlled by her. My thoughts are:

- A. As Wisbeck P/L has no real purpose in life, and it's (sic) only asset is a few shares ... and a ... liability to [JCPL], we could sell/transfer the shareholding to Denise and my son. This could then be the vehicle to buy the shares in CCI. It would save setting up a new company. Alternatively I could put the CCI shares into Denise's name, however there is (sic) tax problems with dividends being assessable at top personal rates.
- B. Assuming Wisbeck purchases shares in CCI I would propose [JCPL] would charge a management fee for managing the investment. This would flow (sic) income from Wisbeck and utilise [JCPL] tax losses.
- C. As Wisbeck has no funds I would propose [JCPL] would lend the funds to Wisbeck."

The letter went on to describe the acquisition transaction which was contemplated. It invited the accountant's advice. The mention of Wisbeck in this letter was the first time that reference had been made to this company. The advice given by the accountant is unknown. However, Mr John Cannane went ahead with the transaction, using Wisbeck. At the time this happened, it was common ground that

49 (1996) 65 FCR 453 at 474 per Lehane J.

neither Mr John Cannane personally, nor JCPL, had any ability to repay the sum the subject of the demands earlier notified by the banks.

70 On 17 April 1991, the Bank of Singapore approved the cash advance to Wisbeck to provide funds for the purchase of CCI shares. The loan was for \$2.2 million. The sum of \$1.3 million was for the purpose of acquiring from the receiver of Ausminco the entire shareholding in CCI. The balance was to be allocated to refinancing the mortgages over the property at Clifton Gardens. An internal memorandum of that bank, received into evidence, stated:

"Following discussions with his taxation advisors Cannane has requested a change in the structure of the loan for the purchase of the CCI shareholding by interposing a shelf company (Wisbeck Pty Ltd) as the Borrower and holder of the CCI shareholding".

The Bank of Singapore approved the proposed change. These steps coincided with the commencement of the proceedings in the Supreme Court of New South Wales previously mentioned.

74 On 22 April 1991, Mr John Cannane was appointed a director of Mendolsohn, although to that stage no contract had been concluded with that company. On 2 May 1991, Mendolsohn changed its name to CCIH. On 13 May 1991, Mr John Cannane, on the letterhead of JCPL, wrote to his accountant asking him to give effect to the "restructuring" of Wisbeck. The letter enclosed two share transfers and instructions to issue the additional share in Wisbeck to Mr Richard Cannane. Pursuant to this letter, by a transfer dated 15 May 1991, Mr John Cannane disposed of his share in Wisbeck to his son Andrew for the stated consideration of \$1. On the same date, JCPL transferred its share in Wisbeck to Mrs Cannane for the same consideration.

72 The task of the Federal Court in the present proceedings was to characterise the disposition by Mr John Cannane and JCPL of their property in Wisbeck. Was it done with intent to defraud their creditors? Or, was it a disposition for valuable consideration in favour of persons who had acted in good faith? The Official Trustee in Bankruptcy of the Estate of Mr John Cannane, JCPL (by then in liquidation) and its liquidator (the respondents), successfully contended in the Federal Court that the necessary intent to defraud creditors was established and that neither Mr Andrew Cannane nor Mrs Cannane could repel the consequent avoidance of the transaction because neither could show that theirs was "a disposition ... in favour of a person who acted in good faith".

Findings of the primary judge

73 Mr John Cannane gave evidence that he had no intention to defraud his creditors or those of JCPL⁵⁰. However, such assertions can rarely be accepted at face value. Correctly, the primary judge set about the task of ascertaining the relevant intent by examining all of the facts. He adopted a similar approach in testing the proposition advanced for both Mr Andrew Cannane and Mrs Cannane (the appellants) that they had each "acted in good faith".

74 Much of the contest at trial (and some in the appeal to the Full Court) concerned the contention, on the part of the respondents, that the disposition of the shares in Wisbeck to Mr Andrew Cannane and to Mrs Cannane was not "for valuable consideration". An additional submission of the respondents, based on s 120 of the Act, was that there had been a "settlement" of property on the appellants which was recoverable. Neither of these issues has troubled this Court. They were decided by all of the judges in the Federal Court contrary to the submissions of the respondents. Although the latter finding was challenged by a notice of contention, the contest was abandoned. For the purpose of the appeal, it may be accepted that, at the time of the disposition of the shares in Wisbeck belonging to Mr John Cannane and JCPL to Mr Andrew Cannane and Mrs Cannane respectively, those shares were worthless, the debts of Wisbeck far outweighing either its assets or any prospects (other than those raised by these transactions). Accordingly, the consideration of \$1 promised for each of the shares was "valuable consideration".

75 Notwithstanding the payment of "full value in every sense"⁵¹ for the shares, the primary judge concluded that the necessary intent to defraud the creditors had been established. He said⁵²:

"It is clear from the evidence that the share transfers were made with the intent, on the part of [Mr John Cannane] and JCPL, that the fruit of any benefits which might accrue to Wisbeck and any consequential increase in value of the shares, as a result of the proposed transactions, should not fall into the hands of creditors of [Mr John Cannane] and JCPL. I therefore find

50 Affidavit of J V Cannane, para 114.

51 (1996) 65 FCR 453 at 464 per Beaumont and Hill JJ.

52 *J Cannane Pty Ltd (In Liq) v Cannane; Re John Vincent Cannane; Ex parte Official Trustee in Bankruptcy*, unreported, Federal Court of Australia, 25 August 1995 at 53 per Tamberlin J.

that the transfers were made by them with an intent to defraud, defeat or delay creditors as to any increased worth of the shares within s 6 of the Act".

The primary judge also found that neither Mr Andrew Cannane nor Mrs Cannane had "acted in good faith" in the requisite sense. The result was that the transfers of the shares were void as against the respondents. Declarations were made to that effect. Orders were made for the correction of the register of Wisbeck and to restrain the present appellants from dealing in the shares.

Decision of the Full Court

76 In the Full Court, Beaumont and Hill JJ determined the two issues still relevant (the intent to defraud and whether the purchasers had acted in good faith) adversely to the appellants. Lehane J, on the other hand, held that the transfers of the two shares in Wisbeck to Mr Andrew Cannane and Mrs Cannane were not dispositions of property with intent to defraud creditors and thus were not, within s 121 of the Act, void as against the respondents. On the subsidiary question, Lehane J agreed with the majority that Mrs Cannane was not a person who had acquired the property acting in good faith. He expressed doubt that the relevant want of good faith on the part of Mr Andrew Cannane had been shown. However, having regard to his primary conclusion that the intent to defraud creditors had not been demonstrated, he did not need to explore that issue further.

77 The majority explained their conclusion on the issue of intent to defraud by reference to their understanding of the purpose of s 121 and its history. That history may be traced to the Statute of Elizabeth (13 Eliz I, c 5)⁵³. The majority accepted that "full consideration" had been paid for the shares but expressed the opinion that, in some circumstances, a disposition for full consideration could nonetheless fall within s 121 of the Act⁵⁴. That opinion, not now contested, led their Honours to the conclusion that whether or not the requisite intent was established was "a question of fact to be determined having regard to all circumstances"⁵⁵. On this factual evaluation, the majority were of the opinion that admissions made by Mr John Cannane during cross-examination provided the foundation upon which it was open to the primary judge to conclude that the requisite intent existed at the relevant time (15 May 1991), on the part of the

53 Traced in *P T Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515.

54 (1996) 65 FCR 453 at 468.

55 (1996) 65 FCR 453 at 468.

relevant person, being the person who owned one of the shares transferred and controlled the company (JCPL) which owned the other⁵⁶.

78 It is therefore worth repeating the passage in the evidence of Mr John Cannane upon which their Honours relied⁵⁷:

"Because the whole point of transferring these shares from your name and the company's name, that is [JCPL,] to the names of your wife and son was to preserve for the family such interest as Wisbeck might ultimately acquire in the CCI acquisition? - Yes.

The reason you were concerned to transfer your share and to cause the company to transfer its share was that you had in contemplation the possibility of your bankruptcy? - Yes.

And the winding up of [JCPL]? - Yes.

You were concerned to ensure that in the event that those unhappy events came to pass that neither the creditors of you or the company would get their hands on the shares of Wisbeck? - Yes.

You thought that the way to do that was to transfer the shares out of your name, out of the company's name [and] into the names of members of your family? - Yes.

So what I want to suggest to you, Mr Cannane is that your whole object in orchestrating these transfers of shares was to quarantine the shares in your family's name and beyond the reach of your creditors? That is right, is it not? - I'd like a definition of quarantine.

Place the shares beyond the reach of your creditors? - Yes.

And that there was no other reason that you would effect these share transfers or procure that the company effect the share transfers, was there? - At that time, no".

56 (1996) 65 FCR 453 at 469.

57 The passage is cited at (1996) 65 FCR 453 at 469.

79 Lehane J reached a different conclusion upon the meaning of s 121. Drawing upon an opinion of Dixon CJ⁵⁸, his Honour concluded that an intent by deceit to deprive creditors necessitated "cheating creditors of their rights or depriving [them] of something to which they are entitled"⁵⁹. Lehane J accepted that the creditors of Mr John Cannane and of JCPL were entitled to the value of the shares in Wisbeck. However, they were not entitled to the opportunity to acquire, or direct the acquisition of, shares in CCI. The transfers of the shares in Wisbeck did not, of themselves, operate to defraud creditors. Nor did the subsequent acquisition by Wisbeck of the shares in CCI or the part played in that acquisition by Mr Cannane⁶⁰:

"I cannot see why Mr Cannane's intention, at the time the transfers were made, to arrange, if he could, for the acquisition by Wisbeck of the CCI shares converted the transfers into dispositions the effect of which was to deprive creditors of something to which they were 'entitled'".

Because, in Lehane J's opinion, the intention that the shares should be put out of the reach of creditors was not proof of an intent to defraud those creditors, there was no cheating. The creditors had no entitlement to the "wealth" represented by the Wisbeck shares, where that wealth had accrued after the transfers.

80 On the "good faith" issue, the majority determined, based upon answers given by Mrs Cannane in her evidence, that she had "full notice of her husband's intention that the shares in Wisbeck should be put beyond the reach of creditors"⁶¹. Although acknowledging that Mr Andrew Cannane was in a different category, being at the time an 18 year old student who signed the share transfer simply because he was asked to do so by his father, their Honours held that such conduct amounted to turning a blind eye to the purposes of the transaction. Were any other view of s 121 adopted, the majority considered that it would constitute "The Cheat's Charter" making it "too easy to defeat the just claims of creditors and to avoid the intention of Parliament"⁶².

58 In *Hardie v Hanson* (1960) 105 CLR 451 at 456 in turn applying *R v Ingham* (1859) Bell 181 at 185; 169 ER 1221 at 1222.

59 (1996) 65 FCR 453 at 476 per Lehane J.

60 (1996) 65 FCR 453 at 476 per Lehane J.

61 (1996) 65 FCR 453 at 470 per Beaumont and Hill JJ.

62 *The Official Trustee v Marchiori* (1983) 69 FLR 290 at 297-298 per Fisher J adopted by the majority at (1996) 65 FCR 453 at 470.

- 81 By their appeals to this Court, Mr Andrew Cannane and Mrs Cannane challenge each of these determinations. They assert that the transferors did not have the requisite "intent to defraud creditors". Moreover, they, as the disponees, had given "valuable consideration" and had "acted in good faith".

The Act, its history and purpose

- 82 The provision in question is s 121 of the Act. Relevantly, it read:

"121(1) Subject to this section, a disposition of property ... with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith, is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in the bankruptcy.

(2) Nothing in this section shall be taken to affect or prejudice the title or interest of a person who has, in good faith and for valuable consideration, purchased or acquired the property the subject of the disposition or any interest in that property".

By s 6 of the Act, a reference to "an intent to defraud ... creditors" or to defeat or delay them is to be "read as including an intent to defraud, or to defeat or delay, any one or more of those creditors".

- 83 Although the respondents' claim based on s 120 of the Act was rejected, it is useful, by way of comparison, to note the terms of that section. Relevantly, it provided:

"120(1) A settlement of property ... not being:

- (a) a settlement made ... in favour of a purchaser ... in good faith and for valuable consideration; ...

is, if the settlor becomes a bankrupt and the settlement came into operation ... within 2 years before, the commencement of the bankruptcy ... void as against the trustee in the bankruptcy".

- 84 As to the disposition by JCPL and the claim by the liquidator of that company against Mrs Cannane, the relevant provision is s 565(1) of the Corporations Law. In May 1991, s 565(1) provided that a transfer of property by a company that:

"if it had been made ... by a natural person, would, in the event of his or her becoming a bankrupt, be void as against the trustee in the bankruptcy, is, in the event of the company being wound up, void as against the liquidator".

In this way, the Corporations Law imports the operation of bankruptcy law⁶³. It was not suggested that there was any applicable point of distinction between the position of Mr John Cannane and that of JCPL.

85 Section 121 was introduced, for the first time in federal bankruptcy law, following the report on the review of bankruptcy law by the Clyne Committee⁶⁴. Its provenance is explained in that report⁶⁵. It was traced to the Statute of Elizabeth in England. It was also reflected in the *Property Law Acts* subsequently passed in England and in the several States of Australia. Prior to 1966, the *Bankruptcy Act* 1924 (Cth) dealt with "fraudulent conveyances" in a different way. It classified the making of a "fraudulent conveyance" as an act of bankruptcy⁶⁶. In this, prior to the enactment of the present Act, Australian statute law had followed the approach of the English statutes⁶⁷.

86 The source and origin of all the English legislation was the Statute of Elizabeth (13 Eliz 1, c 5). That enactment contained within it the ideas which persist to this day in Australian law and give rise to the issues in these appeals. Thus, the Statute provided that transfers of property for the purpose of delaying, hindering or defrauding creditors of their lawful debts were "to be clearly and utterly void, frustrate, and of none [e]ffect". However, it also provided that such consequences should not extend to transfers of property:

"upon good Consideration and *bona fide* lawfully conveyed or assured to any Person or Persons ... not having at the Time of such Conveyance or Assurance to them made, any Manner of Notice or Knowledge of such Covin⁶⁸, Fraud or Collusion as is aforesaid".

87 It is a common experience of life that, in the face of the prospect of bankruptcy, persons affected will quite frequently endeavour to put their assets out

63 For the application of the Corporations Law s 565 see *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 71 ALJR 1223; 147 ALR 1.

64 Commonwealth of Australia, *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth*, (1962) ("Clyne Committee Report").

65 Clyne Committee Report, par 173 ("Fraudulent Dispositions").

66 *Bankruptcy Act* 1924 (Cth), s 52(b); cf the Act, s 40(1)(b).

67 *Bankrupt Law Consolidation Act* 1849 (Imp), s 67; *Bankruptcy Act* 1861 (Imp), s 70; *Bankruptcy Act* 1883 (Imp), s 4(1)(b); *Bankruptcy Act* 1914 (Imp), s 1(1)(b).

68 A secret agreement between two or more persons designed to defraud another.

of the reach of creditors. Often they will attempt to do so with the assistance of their spouses, family members or other trusted persons with whom they are connected. To discourage such conduct or to redress it when it occurs, statutes in our legal tradition, since the Statute of Elizabeth, have provided for the avoidance of such transactions once the purpose of defrauding or delaying creditors is proved. They have also added a proviso to exempt transfers of property which may be shown to have qualities entitling them to such exemption. Relevantly, those qualities required proof that good consideration was given and that the property was lawfully conveyed bona fide, that is, with good faith. It is not so remarkable that these concepts should have survived more than 400 years. They represent the endeavour of the law to afford recoupment by creditors of impermissible dispositions but protection of those dispositions deemed proper and innocent of a fraudulent design.

- 88 Prior to the enactment of s 121 of the Act, State law in Australia reproduced in substance the provisions of the Statute of Elizabeth⁶⁹. The statutes were read, in the context of insolvency, as protecting the position of trustees in bankruptcy or receivers⁷⁰. In this indirect way, the jurisprudence which had gathered around the Statute of Elizabeth, the successive English Acts and Australian State laws, came to influence the approach of the courts to the meaning and operation of s 121, once it was enacted in terms which reflected the history which had gone before it.

Intent to defraud creditors - competing approaches

- 89 As evident in the reasoning of the Full Court, there has been something of a divergence in the approaches taken by Australian judges to the requirements of s 121, by which, to secure avoidance of a disposition of property, the trustee (or liquidator) must prove that the disposition was made "with intent to defraud creditors". At one end of the spectrum, expressing the theory of the section, is a view of the section requiring very considerable rigour in the establishment of "an actual intention to defeat or defraud creditors"⁷¹. Perhaps the strongest statement of this approach is that of Kitto J, in this Court, in *Hardie v Hanson*⁷². Although

69 See eg *Conveyancing Act* 1919 (NSW), s 37A; *Property Law Act* 1958 (Vic), s 172; *Law of Property Act* 1936 (SA), s 86; *Property Law Act* 1969 (WA), s 89; *Mercantile Act* 1867 (Q) s 46; *Conveyancing and Law of Property Act* 1884 (Tas), s 40.

70 *Williams v Lloyd*; *In Re Williams* (1934) 50 CLR 341 at 362-363.

71 *Re Barnes*; *Ex parte Stapleton* [1962] Qd R 231 at 237 per Gibbs J.

72 (1960) 105 CLR 451.

expressed in a somewhat different context⁷³, the approach was embraced by the appellants before this Court. Kitto J there said⁷⁴:

"[T]he onus lay on the respondent to prove affirmatively that the carrying on of the company's business ... was characterised by an intent ... to defraud creditors of the company. An actual purpose, consciously pursued, of swindling creditors out of their money had to be established against the appellant before a declaration under the section could be made. It was not enough for the respondent to prove that the appellant acted with blameworthy irresponsibility, knowing that he was gambling (in effect) with his creditors' money as well as his own, and with much more of their money than of his. ... [W]ith what intent he pursued it is the question ... In whatever terms his conduct may be condemned, his intent is not, I think, to be described as an intent to defraud the creditors"⁷⁵.

90 The other theory of the section is that expressed by the authors of *Lewis' Australian Bankruptcy Law*⁷⁶. Before this litigation, their opinion had been approved in a decision of the Full Federal Court⁷⁷. Writing of the then operation of s 52(b) of the *Bankruptcy Act* 1924 (Cth), the authors said:

"The general principle may be stated that any dealing with property (other than by sale for a reasonable price) made with the object of putting it beyond the reach of present or future creditors comes within the definition of a fraudulent conveyance if the person concerned cannot immediately pay his debts or anticipates some event which may render him unable to pay his debts in future; such a dealing will be treated as fraudulent irrespective of the presence or absence of a conscious fraudulent intent on the part of the debtor if the necessary result of the dealing is to put the property beyond the reach of his creditors. Typical examples are transfers of property to the debtor's wife, transfers to a trustee to hold for the debtor, and transfers to one or a group of creditors to stave off threatened action. The word 'fraudulent' indeed has received an interpretation in bankruptcy matters somewhat wider than its

73 Of carrying on the business of a company with intent to defraud creditors contrary to the *Companies Act* 1943 (WA), s 281.

74 (1960) 105 CLR 451 at 463-464.

75 His Honour expressed disapproval of the dictum of Lord Maugham in *In Re William C Leitch Brothers Ltd* [1932] 2 Ch 71.

76 4th ed (1955) at 45-46.

77 *Garuda* (1992) 35 FCR 515 at 523.

ordinary use, and it may be defined as equivalent to 'with an intention to deprive creditors of recourse against all or any of his assets'".

- 91 In the present appeals both the judges in the majority⁷⁸ and the dissenting judge⁷⁹ set out the foregoing quotation, referred to the decision in *Garuda* and accepted that, so far as it went, it provided a useful statement of principle. However, all of them acknowledged that the duty of the court was to apply the language of the section⁸⁰ as understood when read against the background of the extended statutory lineage and to promote the achievement of its apparent purpose.

Intent to defraud creditors - general principles

- 92 From a reflection upon the terms of the section and a review of the authorities, a number of general propositions may be stated concerning the way in which s 121 of the Act is intended to operate:

1. The object of the section, expressed generally, is to prevent insolvent debtors dealing with their property to the prejudice of creditors⁸¹. Although it is true that the ultimate duty of a court is to apply the section according to its terms, that task may be assisted, in a provision of this kind, by having regard to relevant decisions on the Statute of Elizabeth and the many other like provisions which trace their origins to that Statute⁸². Those decisions may then be reconsidered in light of the way in which it is presumed that the Act was intended to operate to achieve its expressed purposes.
2. It is clear from the provisions of s 121 that a disposition of property by a debtor, alone, is not sufficient to attract the operation of the section. There must be a coincident intention of the specified kind to put the disposition at risk of avoidance. That intention must be "with" the disposition, in the sense that it accompanies it. The sequence of events must be a "disposition of property", subsequent bankruptcy (or in the case of a company, winding up) and a demand by the trustee or liquidator against whom the disposition is, by law, avoided. The intent must be that of the person disposing of the property. When recourse is had to previous decisions on the same or analogous

78 (1996) 65 FCR 453 at 466 per Beaumont and Hill JJ.

79 (1996) 65 FCR 453 at 474-475 per Lehane J.

80 (1996) 65 FCR 453 at 467, 475.

81 *In Re Simms* [1930] 2 Ch 22 at 34; cf *Garuda* (1992) 35 FCR 515 at 526.

82 *Williams v Lloyd*; *In Re Williams* (1934) 50 CLR 341 at 362-363; *Official Trustee v Mitchell* (1992) 38 FCR 364 at 368.

provisions, it is not always clear whether the courts were addressing the operative provision of s 121(1), the exception for good faith dispositions for valuable consideration within that sub-section, or the proviso now expressed in s 121(2)⁸³.

3. Proof of the intention of a person presents notorious difficulties in every area of the law where it is encountered⁸⁴. Even when the distinction between intention and motive is kept in mind, knowledge of subjective intention will ordinarily, or often, be reserved to the person whose interests may be so affected that an assertion, one way or the other, cannot necessarily be accepted at face value. That is why, at least in a provision such as s 121, it is not necessary to establish that the transferor of the property in question actually had in mind an intention to defraud creditors if the effect of what that person did would reasonably be expected to have such a consequence⁸⁵. Courts will therefore infer the intention in issue, deciding it as a question of fact⁸⁶. This does not mean that the intention so derived is one imputed by the law. It is not a fiction. It is the real intention of the transferor decided objectively rather than upon protestations of innocence on the part of the debtor or outraged accusations on the part of suspicious creditors⁸⁷.
4. In order to decide whether the requisite intent existed at the relevant time, and whether the disposition was made with that intent, the decision-maker must look at all the circumstances surrounding the impugned transaction⁸⁸. As the cases show, it is often a feature of transactions susceptible to avoidance that the debtor has disposed of property to a close family member or trusted friend, usually, a spouse⁸⁹. However, the recipient of the disposition is no more conclusive of the "intent" in question than is the

83 As pointed out in *Garuda* (1992) 35 FCR 515 at 522; cf *Glegg v Bromley* [1912] 3 KB 474 at 492.

84 *Peters v The Queen* (1998) 151 ALR 51; *Cutter v The Queen* (1997) 71 ALJR 638 at 647-648; 143 ALR 498 at 510-511.

85 *Re Trautwein; Richardson v Trautwein* (1944) 14 ABC 61 at 75 per Clyde J; *Garuda* (1992) 35 FCR 515 at 523-524.

86 *Re Barnes; Ex parte Stapleton* [1962] Qd R 231 at 237 per Gibbs J; *Garuda* (1992) 35 FCR 515 at 523-524.

87 *Garuda* (1992) 35 FCR 515 at 523-524.

88 *Williams v Lloyd; In Re Williams* (1934) 50 CLR 341 at 372.

89 *Noakes v Harvy Holmes* (1979) 26 ALR 297.

adequacy of the consideration afforded⁹⁰. These, and like, facts are the building blocks upon which the decision about the "intent" will ultimately be derived from all of the evidence. Obviously, the fact that the transferor is shown not to have been in a sound financial position at the time of the disposition of property in question will commonly be a prerequisite to the operation of the section, for otherwise an intent to defraud creditors will not so readily be inferred⁹¹. In judging what that "intent" was, a court is entitled to ask itself: what was the purpose of placing the property at such a time in another's name? If that purpose was to defeat creditors, the trustee (or liquidator) will be in a strong position to establish that the section attaches⁹².

5. It is not necessary for the section to apply to establish that the intent to defraud creditors was the sole intent of the debtor⁹³. Nor is it necessary to demonstrate that the debtor intended to defraud all of the creditors as a class⁹⁴. An intention to defeat future creditors will be sufficient⁹⁵. However, that intention must be shown to exist *with* the disposition of the property in question.
6. The burden of showing that the requisite intention exists lies upon the trustee (or receiver) who is asserting that the disposition, otherwise valid on its face, is void as against him or her⁹⁶. It will often be the case, as here, that the "intent" will be contested. Because the evaluation of the evidence and elucidation of intention commonly require the exercise of judgment which

⁹⁰ *Barton v Official Receiver* (1986) 161 CLR 75 at 79, 86.

⁹¹ *Williams v Lloyd; In Re Williams* (1934) 50 CLR 341 at 371-372; *Noakes* (1979) 26 ALR 297 at 303; *Garuda* (1992) 35 FCR 515 at 524.

⁹² *Trautwein v Richardson* [1946] ALR 129 at 133 per Dixon J; *Caddy v McInnes* (1995) 58 FCR 570 at 581-582.

⁹³ *Garuda* (1992) 35 FCR 515 at 526-527; *Caddy v McInnes* (1995) 58 FCR 570 at 583.

⁹⁴ Section 6 of the Act applies to remove this consequence.

⁹⁵ *Garuda* (1992) 35 FCR 515 at 526.

⁹⁶ *Noakes* (1979) 26 ALR 297 at 303 per Brennan J cited in *Garuda* (1992) 35 FCR 515 at 524.

may be affected by the impression that witnesses make, appellate courts will ordinarily defer to the primary judge's estimate and judgment⁹⁷.

Arguments of the appellants

93 Between the parties, there was much common ground not only about the relevant facts but also about the applicable law. The appellants accepted that the mere fact that a disposition was for full consideration did not necessarily take it outside s 121. It was not contested that Mr John Cannane's intent was to ensure that his wife and son received the wealth that he and his company could have received but, in the event, did not. It was agreed that neither Mr John Cannane nor JCPL received any interest in the CCI shares. In the events which occurred, such interest was acquired by Wisbeck, controlled by that time by Mr Andrew Cannane and Mrs Cannane.

94 The arguments for the appellants were beguilingly simple. The disposition attacked in these proceedings had not put the shares in Wisbeck *qua* shares beyond the reach of the creditors. Those shares had been fully paid for at their value at the time of the dispositions. The only intent of Mr John Cannane, and therefore of JCPL, was to prevent the creditors obtaining wealth which they would never have acquired anyway, without affirmative action on his part. Affirmative action would have exhibited a concern for the creditors' position which he could not be obliged to evince. All that he had done was to use, as a convenient vehicle for his transactions, a valueless shelf company which, by chance, had been owned by him and JCPL. He could equally have chosen another shelf company having no such connection. Had he done so the trustee (and the liquidator) would have had no claim. To "defraud" creditors, it was necessary to deprive them of something which they otherwise would have had. But, on the facts of this case, the evidence was overwhelming that the creditors would not have had the assets in the shares in CCI. They could not be "defrauded of" assets which did not belong to Mr Cannane or JCPL and did not belong to Wisbeck until after Wisbeck had been sold for full value to the appellants.

95 For the appellants, it was argued that the basic error of the majority in the Full Court lay in divorcing the disposition (which was conceded) and the intention to prevent creditors receiving an asset (which was admitted by Mr Cannane). These events had been looked at in isolation. It was submitted that the "intent to defraud creditors" was missing because, at the time of the transfer, full value had been given for the Wisbeck shares. They did not become valuable until later, and then only by the action of Wisbeck controlled, in the eye of the law, by its new owners.

97 *Official Trustee v Mitchell* (1992) 38 FCR 364 at 372-373.

Intent to defraud creditors - conclusions

- 96 I pay tribute to the ingenuity of the appellants' arguments. However, in my view, they were rightly rejected in the Federal Court. To adopt the construction urged by the appellants would not only ignore the language of s 121 but also undermine the achievement of the broad purpose, protective of creditors, which the Parliament clearly envisaged. The broad approach to the ascertainment of an "intent to defraud creditors", favoured by the Full Court in this case and in the earlier decision in *Garuda*, is correct. The narrower approach requiring proof of an intention to "swindle" creditors of their entitlements is not appropriate to s 121. Adopting such an approach would seriously undermine the section's effectiveness.
- 97 Mr John Cannane clearly intended that, if he were to become bankrupt (or if JCPL were to be wound up), the creditors at that time should not have available to them the shares in Wisbeck for whatever they were *then* worth. His intention (and thus the intention of JCPL) was to deprive the creditors of something to which they would, at that time, be entitled, namely the then value of the Wisbeck shares. In this sense, his intention was to defeat future creditors, that is, creditors in the future. Viewed in this way, there is no inconsistency with the remarks of Dixon CJ in *Hardie v Hanson*⁹⁸ referred to by Lehane J.
- 98 The assertion that Mr John Cannane could have effected the acquisition of CCI otherwise than by using the vehicle of Wisbeck is irrelevant. What is relevant is his intention at the moment of the disposition of his and JCPL's interests in Wisbeck. Neither is it relevant that Wisbeck had no legal right to acquire the CCI shares or to require Mr John Cannane to acquire those shares for it as at 15 May 1991. In fact, Mr Cannane intended and expected that the shares in CCI would be acquired by Wisbeck and that the value of those shares would substantially increase as a result. That was the intent he had at the moment of the disposition of the interests which he and JCPL then held in Wisbeck. By his own evidence, at that point, he intended that his creditors, and those of JCPL, be deprived of the benefit of the increase in the value of Wisbeck as a consequence of the steps he was then intending to pursue and clearly contemplated.
- 99 There was thus the coincidence of the three conditions necessary for the attachment of s 121. These were: the impending bankruptcy of Mr John Cannane (and the winding up of JCPL); the disposition of property which, at that time, Mr Cannane and JCPL owned; and, the reason or purpose of putting such property outside the reach of the creditors. Clearly enough, the shares were not sold for the purpose of receiving the \$1 promised for each of them. They were sold with the intention of thereby rendering Wisbeck, which would otherwise have been amenable to the trustee (or liquidator), beyond their reach. What enlivens the

98 (1960) 105 CLR 451 at 456.

operation of s 121 is a disposition of property with a particular object which renders it likely that, at the point of a subsequent bankruptcy (or winding up), it will deprive creditors of entitlements which would otherwise belong to them if the disposition of property had not taken place. One might ask, why did Mr John Cannane and JCPL dispose of their property in Wisbeck? The only reason that they sold their shares was the soundly based apprehension that, if they did not do so and proceeded with the transactions involving Wisbeck that followed, the creditors, through the trustee (and receiver), would have rights of which Mr John Cannane and JCPL intended to deprive them. To the complaint that, had Mr John Cannane been aware or advised by his accountant that the course upon which he was embarking would engage s 121 of the Act he would not have disposed of the property in Wisbeck (nor would JCPL) but would have used another shelf company as a vehicle, the answer is clear. What might have been is not what was. The only disposition which occurred was that involving the sale of the shares in Wisbeck. It is the intention which existed at the moment of that disposition which has to be determined. Having regard to the course of dealings which occurred, the correspondence with Mr Cannane's accountant, and the answers given in evidence, the requisite "intent" existed "with" the specified "disposition of property". They were all of a one. Any other interpretation of what occurred would be artificial.

- 100 The finding of the primary judge was therefore correct. The majority in the Full Court were right to reject the appellants' attack on that finding. The challenges to that part of the Full Court's decision fail.

Acting in good faith - applicable principles

- 101 The appellants then argued that, notwithstanding the foregoing, they were entitled to escape s 121(1) on the basis that the dispositions in question were for valuable consideration and that they were persons "who acted in good faith". In this Court, it was accepted for the appellants that they carried the burden of establishing that they had "acted in good faith". What meaning should be ascribed to that phrase?

1. The words "good faith" and "acted in good faith" appear in many statutes in virtually all countries of the common law. It would be erroneous to suggest that a single meaning could be adopted, indifferent to the particular statutory context. It has been remarked that, putting it broadly, the words "good faith", or their Latin equivalents, have received "two divergent meanings"⁹⁹. The first is a broad or subjective view which requires enquiry into the actual state

⁹⁹ *Siano v Helvering* 13 F Supp 776 at 780 (1936) cited in *Mid Density Developments v Rockdale MC* (1993) 44 FCR 290 at 298. See also *South Australia v Clark* (1996) 66 SASR 199 at 230; *Municipality of Bhiwardi v Kailash Sizing Works* (1974) 2 SCC 596 at 599.

of mind of the person concerned, irrespective of the causes which produce it. The second involves the objective construction of the words by the introduction of such concepts as an absence of reasonable caution and diligence. The particular interpretation apt to the use of the words in a given legislative context will depend on the decision-maker's elucidation of the purpose of the legislature. Thus, a phrase in a taxing statute excusing "failure in good faith to observe and comply with the requirements of" specified laws has been held to involve something more than the state of mind of the taxpayer¹⁰⁰:

"Three years and a tax universal to his trade call, in our opinion, for some curiosity. No attempt to satisfy that curiosity smacks to us too much of the ostrich and proportionately too little of good faith".

Many cases emphasise this rudimentary proposition that the meaning of a slippery phrase such as "acted in good faith" depends almost entirely on its particular statutory setting¹⁰¹.

2. Two contextual indications demonstrate that, in s 121 of the Act, the "good faith" referred to involves an investigation of objective facts and not solely the elusive subjective state of mind of the disponee of the property in question. The first is a verbal point. It is necessary for the disponee to be a person "who *acted* in good faith". Thus, there is a requirement to demonstrate some conduct which is coloured by the requisite "good faith". This verbal point is given further emphasis by contrasting the language in s 121(1) of the Act with that in s 120(1)(a). More fundamentally, the context of the legislation suggests an objective rather than a purely subjective meaning. "The one great object" of the Statute of Elizabeth, which is the source from which s 121 of the Act is derived, is declared to be "to prevent debtors from dealing with their property in any way to the prejudice of their creditors"¹⁰². Likewise, the "primary aim of all the successive Bankruptcy Acts ... is to obtain an equal distribution of the debtor's assets among his creditors"¹⁰³. In such a context, to establish a derogation from the achievement of those

¹⁰⁰ *Siano* 13 F Supp 776 at 781 (1936) per Clark J; cf *Rabia Bai v Custodian General of Evacuee Property* AIR (48) 1961 SC 1002 at 1006-1007.

¹⁰¹ *Official Trustee v Mitchell* (1992) 38 FCR 364 at 371; *Mid Density Developments v Rockdale MC* (1993) 44 FCR 290 at 299.

¹⁰² *Kerr on Fraud and Mistake*, 6th ed (1929) at 220 cited in *Garuda* (1992) 35 FCR 515 at 526.

¹⁰³ *Kerr on Fraud and Mistake*, 6th ed (1929) at 221 cited in *Garuda* (1992) 35 FCR 515 at 526.

important objectives, it is necessary for a disponent of property to demonstrate something more than an absence of bad faith or a failure to advert to faith at all. The appellants laid emphasis upon the opinion of Kekewich J in *Mogridge v Clapp*¹⁰⁴ suggesting that "good faith", in an analogous context, could be best defined "so far as it is necessary or safe to define it ... by saying that it is the absence of bad faith - of *mala fides*". In some statutory contexts it might indeed be helpful to think in such terms. As the appellants pointed out, that decision was affirmed by the English Court of Appeal. However, in that Court, a somewhat different view was taken of the phrase. Kay LJ remarked¹⁰⁵:

"Good faith in that connection must mean or involve a belief that all is being regularly and properly done."

This affirmative obligation, rather than simply an absence of bad faith, fits more comfortably with the words of s 121(1) of the Act and with the achievement of their apparent purpose. To the extent that earlier decisions of the Federal Court have reflected the difference of emphasis evidenced in the primary and appellate decisions in *Mogridge* - some decisions stressing the absence of notice of fraud¹⁰⁶; others the need affirmatively to demonstrate a belief that all was regularly and properly done¹⁰⁷ - I prefer the latter view.

3. Upon this approach, so-called "wilful blindness"¹⁰⁸ to a transaction amounting to a fraud upon, or preference against, creditors will clearly deprive the conduct of the disponent of the requisite character of action in good faith. A deliberate abstention from inquiry about the purpose and consequence of a transaction may, in particular circumstances, amount to such a lack of "good faith" as to take the disposition of property outside the

104 [1892] 3 Ch 382 at 391.

105 [1892] 3 Ch 382 at 401.

106 *Re Hyams; Official Receiver v Hyams* (1970) 19 FLR 232 at 256 per Gibbs J.

107 *Marchiori* (1983) 69 FLR 290 at 297-298.

108 *R v Crabbe* (1985) 156 CLR 464 at 470; cf *Pereira v Director of Public Prosecutions* (1988) 63 ALJR 1 at 3; 82 ALR 217 at 219-220; *Chaman Lal v State of Punjab* AIR (57) 1970 SC 1372; Lanham, "Wilful Blindness and the Criminal Law", (1985) 9 *Criminal Law Journal* 261.

exempting provision¹⁰⁹. Whilst it is true that "honest ineptitude"¹¹⁰, even amounting to negligence¹¹¹, may not, on the particular facts, deprive the action of a donee of the quality of "good faith" necessary to attract the exemption, meaning must be given to s 121 which prevents the section becoming a "Cheat's Charter"¹¹². It would be absurd, and obviously destructive of the achievement of the objects of this particular section if a donee could advance the protection of its interest by the simple expedient of omitting enquiries which honest conduct and reasonable prudence would suggest to be necessary. This is why explanations of the section, and its equivalents, in terms of the need for a conclusion of "actual deceit or dishonesty"¹¹³ go too far. They do not conform to authority, ignore the actual language of the Act and undermine the achievement of its purposes.

4. Proof of the quality of the actions of the donee is normally dependent upon inferences to be derived from all of the relevant facts. Declarations of the donee's intent cannot usurp the function of the court to decide its quality. Sometimes it will be possible, on the particular facts proved, to show affirmatively that a donee knew that the disposition of property of which it was the beneficiary constituted a fraud or a preference¹¹⁴. If the recipients of the proceeds of the disposition of property can be shown to be privies to the fraud or preference, it will readily be inferred that they have not acted in good faith¹¹⁵. On the other hand, where it is shown that the donee has given full value for the property disposed of, the inference will more easily be accepted that the donee "acted in good faith" and is entitled to claim that the disposition is within the exception provided by the section. All that the section requires, relevantly, is that such disposition be for "valuable consideration". As in the present case, that may be no more than a nominal sum the payment of which imposes no real burden on the donee. The provision of "valuable consideration" is not, alone, enough. The added

109 See *The Zamora (No 2)* [1921] 1 AC 801 at 812.

110 *Mid Density Developments v Rockdale MC* (1993) 44 FCR 290 at 300.

111 *Lego Australia Pty Ltd v Paraggio* (1993) 44 FCR 151 at 171.

112 Langstaff, "The Cheat's Charter?", (1975) 91 *The Law Quarterly Review* 86 at 92-96.

113 *Lloyds Bank Ltd v Marcan* [1973] 1 WLR 1387 at 1392; [1973] 3 All ER 754 at 760.

114 *Re Hyams; Official Receiver v Hyams* (1970) 19 FLR 232 at 256; *Official Trustee v Mitchell* (1992) 38 FCR 364 at 372.

115 *Re Barnes; Ex parte Stapleton* [1962] Qd R 231 at 240; *Caddy v McInnes* (1995) 58 FCR 570 at 587.

requirement that the donee should be a person "who acted in good faith" makes it clear that cases will exist where valuable consideration, and even full value, is paid yet, the requisite intent being missing, the disposition falls outside the exception. The language and purpose of s 121 denies acceptance of the appellants' submission that the mere fact that full value was paid "in every sense" makes it impossible to say that they did not act in good faith.

Acting in good faith - conclusions

102 In the evidence, the positions of Mrs Cannane and of Mr Andrew Cannane were different. Originally, there was no appeal against the finding that Mrs Cannane had not been shown to have acted in good faith in purchasing the share in JCPL. By leave, at the hearing before this Court, Mrs Cannane was permitted to amend her notice of appeal to challenge that finding.

103 The foundation for the conclusion of the Full Court in Mrs Cannane's case was that she had full notice of her husband's intention that the shares in Wisbeck should be put beyond the reach of the creditors of both Mr Cannane and of JCPL. In response to her husband's suggestion that this should be done on "professional advice" and "in our best interests", Mrs Cannane had said that this was a "good idea"¹¹⁶. The Full Court stated its conclusions about her case succinctly¹¹⁷:

"She was aware that demands had been served upon her husband and CCI and that legal proceedings had commenced. She was aware of the possibility of bankruptcy or liquidation and the consequences thereof. She wished to ensure that the shares in the company would not be lost to the family. On no view could it be said of her that she was a purchaser in 'good faith'".

104 It was argued that Mrs Cannane's knowledge and acquiescence in the professional advice referred to amounted to no more than an acceptance that her husband did not have to conduct his future business affairs so as to benefit his creditors. That may be true, stated as a general proposition. But where the question is the character, for the purposes of s 121 of the Act, of a disposition of property otherwise within the section, the intent of the donee is squarely raised by the need to determine whether he or she acted in good faith. The respondents did not suggest that these were cases of "wilful blindness" on the part either of Mrs Cannane or Mr Andrew Cannane, in the sense that either had deliberately

¹¹⁶ *J Cannane Pty Ltd (In Liq) v Cannane; Re John Vincent Cannane; Ex parte Official Trustee in Bankruptcy*, unreported, Federal Court of Australia, 25 August 1995 at 56-57 per Tamberlin J.

¹¹⁷ (1996) 65 FCR 453 at 470.

abstained from asking questions which a person might be expected to ask out of ordinary prudence. So far as Mrs Cannane was concerned, the respondents' case was that her intent at the critical time was precisely that which the section was designed to discourage, namely the placing of the property disposed of, whatever its worth or future worth, outside the reach of the creditors.

105 In addition to the considerations mentioned by the majority in the Full Court, other evidence supports the conclusion which their Honours reached. The evidence establishes that Mrs Cannane knew that the banks were claiming between \$6 million and \$7 million from her husband and his company. She knew that neither he nor the family possessed sufficient assets to meet a judgment in that amount. She realised that if the proceedings of the banks could not be defended successfully, the assets of the family would be wiped out. She could foresee the possibility that her husband would become bankrupt and, by inference, that his company, JCPL, would be wound up. In these circumstances, the character of the disposition in which she participated was nothing less than to ensure that the share in Wisbeck, for what it was worth or then became worth, would not be lost to the Cannane family in the event of any such bankruptcy or liquidation. Relevantly, the quality of Mrs Cannane's actions was therefore imprinted with the intent of her husband. With such intent it could not affirmatively be shown that she had "acted in good faith" in receiving the disposition of the Wisbeck share, even though she paid valuable, indeed full although trivial, consideration for it. The Full Court was right to so conclude¹¹⁸. Her appeal therefore fails.

106 Mr Andrew Cannane's position is distinguishable. The distinction was recognised by the Full Court¹¹⁹. At the time of the transfer of his father's share in Wisbeck to him, he was a young student. According to Mr John Cannane's evidence, he simply told Andrew that there was "an opportunity for us to do a commercial deal" and that he would like Mrs Cannane, Andrew and his brother Richard to "own the company", Wisbeck. He then told him to "please sign the transfer". Mr Andrew Cannane proceeded to do so. In his affidavit, Mr Andrew Cannane deposed to no clear recollection of the precise words which his father had said to him before requesting him to sign the transfer. However, he acknowledged that his father "often said" words to the effect "I've got a document here mate for you to sign, would you please sign it"¹²⁰. He could not be certain as to whether those words, or other words, were said prior to signing the transfer by which Mr John Cannane disposed of his share in Wisbeck to his son. Mr Andrew

118 Lehane J expressed his agreement on this point. See (1996) 65 FCR 453 at 473.

119 (1996) 65 FCR 453 at 470 per Beaumont and Hill JJ. Lehane J reserved his opinion in relation to Mr Andrew Cannane. See (1996) 65 FCR 453 at 473.

120 Affidavit of Mr Andrew Vincent Cannane, par 6.

Cannane was not relevantly cross-examined on his evidence nor was Mr John Cannane cross-examined on his recollection of his conversation with his son.

107 The majority in the Full Court concluded that Mr Andrew Cannane had made "no inquiries of the circumstances and turned a blind eye to the purpose or the effect of the transaction"¹²¹. It was not questioned that, if Mr Andrew Cannane had known some facts but had withheld enquiry, this could take him outside the exception. However, for Mr Andrew Cannane, it was complained that, not only did this approach extend "wilful blindness" beyond the authorities but it involved unfairness because such a proposition had not been put directly to him¹²² and so should not have been concluded against him.

108 There may be some substance in these complaints. I do not believe that the position of Mr Andrew Cannane is to be decided by reference to the principle of "wilful blindness". His was not a case, on the evidence, where a donee receiving property sought to put himself in a protected position by failing to ask questions or omitting to make enquiries which reasonable prudence would have suggested to be necessary. In Mr Andrew Cannane's case, the proper conclusion, on the uncontradicted evidence, was that of a lack of the relevant intention or action to reflect it. He was certainly not shown to have acted in bad faith. But he did not affirmatively establish that he had "acted in good faith". It is that obligation, the verb "acted" and the purpose of the phrase understood in its context, which took Mr Andrew Cannane outside the protection of the exception which he invoked. He simply did his father's bidding. Were it otherwise, a person facing bankruptcy or a corporation facing liquidation could immunise their position by choosing as donee of property a person incapable of understanding, or incompetent or unwilling to question, the transfer of property. If this became a general rule, it would sanction the selection of mere ciphers to receive the property of the bankrupt (or of an insolvent corporation) so as to attract the exception within the section. It is necessary that the donee should have the relevant good faith and act on that basis.

109 Obviously, if a child of tender years were simply to do as a parent instructed, thereby perpetrating a fraud upon creditors, the conduct of the child would take its quality from the intent of the parent¹²³. For Mr Andrew Cannane, it was argued that his case was distinguishable on the ground that he was, at the relevant time, legally an adult so that his conduct was his own and not that of his father. I do not agree. In the uncontested facts, Mr Andrew Cannane, living as a student in the

121 (1996) 65 FCR 453 at 470.

122 Referring to *Browne v Dunn* (1893) 6 R 67.

123 *Marchiori* (1983) 69 FLR 290 at 297-298.

family home, simply did as his father told him. The nature of his intention must therefore be taken from his father's intention which was to place the share in Wisbeck in Andrew's name so that it would be beyond the reach of the father's creditors. The absence of an affirmative and different state of mind on the part of Mr Andrew Cannane made it impossible for him to establish, on the facts of this case, that he had "acted in good faith". Put another way, it made it impossible for him to demonstrate that what he had done had been "regularly and properly done" as the law required if the exception were to apply to him¹²⁴.

- 110 It is upon this basis that I would affirm the conclusion which the majority of the Full Court reached. Any other approach to the section would make it "too easy to defeat the just claims of creditors and to avoid the intention of Parliament"¹²⁵. The appeal by Mr Andrew Cannane was therefore also properly dismissed.

Orders

- 111 It follows that the appeals to this Court of Mrs Cannane and of Mr Andrew Cannane should be dismissed with costs.

¹²⁴ *Mogridge v Clapp* [1892] 3 Ch 382 at 401 per Kay LJ.

¹²⁵ *Marchiori* (1983) 69 FLR 290 at 298 per Fisher J cited (1996) 65 FCR 453 at 470.