



Précis Paper

Setting Aside Voidable Transactions

Discussion includes the *Bankruptcy Act* and asset protection and fraudulent behaviour. This is an important session for everyone.

Discussion Includes

- Section 37A of the *Conveyancing Act 1919* (NSW) and equivalent provisions in the *Bankruptcy Act 1966* (Cth);
- In what circumstances will transactions be set aside?
- What intention has to be present to make a transaction voidable?
- Is asset protection a proper motive for transferring assets?
- Does the intention to defraud creditors have to be the sole intention behind a transaction?

Précis Paper

Setting Aside Voidable Transactions

1. In this edition of BenchTV, Mr James Sheller (Barrister) and Mr Ian Benson (Solicitor) present on transactions that may be voided, where property is transferred to intentionally defraud creditors. Mr Sheller discusses this with particular reference to the Supreme Court of Australia's (Sackar J) decision in *Young v Smith* [2015] NSWSC 400 in which Mr Sheller acted as Counsel for the plaintiff.

Material Facts of *Young v Smith* [2015] NSWSC 400

2. The three key parties to the litigation are as follows: Les Young, Joanne Young (former wife of Les Young) and Josephine Smith (current partner of Les Young). Mr Young had informally placed his former wife, Ms Young, in charge of a hotel he owned after the breakdown of their marriage. A dispute arose in which Mr Young alleged to police that she was stealing money. It was later found that Mr Young was dishonest in his allegations, in respect of which Joanne sued for malicious procurement of a search warrant, false arrest and joined with family law proceedings (*Young v Young & Anor* [2013] NSWSC 330). As a result, Ms Young was awarded more than \$3 million in damages. When she attempted to claim her damages, Mr Young attempted to divest himself of his assets by executing a transfer of his Pyrmont property to Ms Smith.
3. Ms Young sought to have the transfer set aside under s 37A of the *Conveyancing Act 1919* (NSW), whereby the court may set aside a transaction if it is satisfied that the person transferring the property has done so with the intent to defraud creditors. The section is noted as follows:

SECTION 37A:

Voluntary alienation to defraud creditors voidable

- (1) *Save as provided in this section, every alienation of property, made whether before or after the commencement of the Conveyancing (Amendment) Act 1930, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.*
 - (2) *This section does not affect the law of bankruptcy for the time being in force.*
 - (3) *This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.*
4. An equivalent provision can be found in s 121 of the *Bankruptcy Act 1996* (Cth), which permits bankruptcy trustees to have transactions set aside if someone on the cusp of bankruptcy,

hides or transfers assets out of the potential bankrupt estate. Mr Sheller notes that whilst both Acts would have applied in the case of *Young v Smith*, a necessary element for s 121 *Bankruptcy Act 1996* (Cth) to apply is for the transferor of the asset to be in bankruptcy.

5. Mr Sheller notes that there is an exception under s 37A(3) of the *Conveyancing Act*, which permits alienation of property to a purchaser where it is done in good faith and without notice of an intent to defraud creditors.
6. The defence raised by Ms Smith was that she had entered into an agreement with Mr Young some 13-14 years prior, that Ms Smith would own any future property purchased between them to the effect that Ms Smith held equitable title to the property.

Operation of s 37A of the *Conveyancing Act 1919* (NSW)

7. Section 37A broadly operates to apply in circumstances where someone in financial trouble is attempting to hide assets from creditors. Mr Sheller discusses the definition of 'defraud' in this context, which he states to mean no more than an intent designed to hinder, frustrate, delay or conceal assets from prospective creditors.
8. The High Court in *Marcolongo v Chen* [2011] HCA 3 found that s 37A and its equivalents should be given a liberal interpretation. There is no need for the person seeking to set aside a transaction to demonstrate that the transaction was done with a predominant, dominant or substantial intention to defraud creditors. It is sufficient if the intention to defraud creditors is one of many intentions, albeit there being innocent alternative explanations for the transfer.
9. Mr Sheller notes that s 37A is not restricted to existing creditors and includes future creditors. In *Jew v Holloway* [2013] VSCA 260, the plaintiff sought damages for physical abuse by the defendant who had transferred his assets without consideration. It was found that at the time of the transfer, the defendant was conscious of the likelihood of a personal injury claim being brought and this was sufficient to qualify the prospective plaintiff as a future creditor.
10. Mr Sheller also notes that where a person, who goes into business and borrows money, starts giving away unsecured assets, despite there being no 'clouds on the horizon', the courts may intervene even in the absence of present or known creditors.
11. Sackar J found that both the transfer itself and the purported agreement between Mr Young and Ms Smith were entered into with an intent to defraud creditors within the meaning of s 37A. His Honour concluded that this finding was inescapable considering Mr Young was aware of the possibility of bankruptcy proceedings against him at the time of the transfer, Mr Young failed to refer to the agreement with Ms Smith on a number of prior occasions against

his interests, and Mr Young clearly anticipated the possibility of future Family Court proceedings at the time of the agreement, amongst other considerations. Accordingly, both the transfer and agreement were voidable and Mr Young's interest in the property vested with his trustee in bankruptcy.

Implications

12. In summary, Mr Sheller notes that courts will generally intervene where there has been an asset given away, at a time when the transferor is in financial strain, to a person that is closely connected, such as family, for no consideration.

BIOGRAPHY

James Sheller

Barrister, New Chambers, Sydney.

James Sheller was admitted as a Lawyer in 1994 and called to the NSW Bar in 2004. He has written extensively on the *Civil Liability Act 2002* (NSW) and often presents for CLE seminars including a presentation last year: Update on damages under s 15B of the *Civil Liability Act 2002*. He is entitled to practise in all Australian jurisdictions and does so in a broad range of legal areas.

Ian Benson

Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Focus Case

Young v Smith [2015] NSWSC 400

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_13-04-2015_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/55262215e4b0fc828c995626>

Cases

Young v Young & Anor [2013] NSWSC 330

Marcolongo v Chen [2011] HCA 3

Jew v Holloway [2013] VSCA 260

Legislation

Conveyancing Act 1919 (NSW)

Bankruptcy Act 1996 (Cth)