

COMMERCIAL CPD SEMINARS

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Ground Floor Auditorium, Monash University Law Chambers
555 Lonsdale Street, Melbourne VIC 3000

Session Two

INSOLVENCY – A SNAPSHOT OF TOPICAL ISSUES AND CURRENT CONCERNS FOR LITIGANTS

Recent developments in Bankruptcy and Family Law



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**Recent developments in Bankruptcy and Family Law:
Hankin & Nankervis [2018] FCCA 2075**

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1. A recent Federal Circuit Court decision challenges commonly held assumptions about the rights of a trustee in bankruptcy in property adjustment proceedings.
2. Historically there has been long standing tension between the rights of trustees in bankruptcy and the rights of the non bankrupt spouse in respect of matrimonial property.
3. The previously assumed position from cases like *Luxton v Luxton*¹ and *Page & Page (No 2)*² was that a trustee in bankruptcy did not have standing to seek a property adjustment pursuant to s 79 of the *Family Law Act 1975* (Cth) (FLA).
4. One rationale was that a trustee in bankruptcy did not answer the description of “a party to a marriage” for the purposes of s 79 of the FLA, or earlier provisions such as s 161 of the *Marriage Act 1958* (Vic).
5. In 2005 significant amendments were made to the FLA, including amendments giving a trustee in bankruptcy certain rights to participate in property settlement proceedings, and also a power of the court to order an adjustment against the trustee out of vested bankruptcy property.
6. What the 2005 amendments did not do, at least not expressly, was confer on a trustee in bankruptcy the right to seek an adjustment.
7. That brings me to the decision in *Hankin & Nankervis*.³
8. The facts of the case are somewhat involved.
9. By the time of the hearing, both the husband and the wife had been made a bankrupt and there was a dispute between the two trustees in bankruptcy as to the

¹ [1968] VR 540

² (1982) FLC 91-241

³ [2018] FCCA 2075

division of matrimonial property, in particular a property referred to in the judgment as Property A.

10. Property A had been purchased jointly by the husband and the wife, but had been transferred firstly into the wife's sole name, and then into the husband's sole name. After the husband became a bankrupt, the wife lodged a caveat claiming an equitable interest in the property. The husband's trustee in bankruptcy then sought and obtained a declaration that the legal and equitable interest in the property had vested in him from the Federal Court. The wife then filed an initiating application in the Federal Circuit Court seeking an injunction pursuant to s 114 of the FLA to stop the sale of Property A.
11. Upon the bankruptcy of the wife, her trustee in bankruptcy then elected to prosecute the action. The wife's trustees in bankruptcy were then joined to the action and applied to amend the initiating application to include a claim under s 79 of the FLA for a property adjustment.
12. The husband's trustee in bankruptcy and the wife's trustee in bankruptcy then agreed to a division of the proceeds from the sale of Property A, but sought court approval for the compromise.
13. It was in this context that Kelly J delivered a lengthy judgment: 55 pages considering over 60 authorities. One of the issues that his Honour considered was whether the right to seek a property adjustment was a right that could be exercised by the wife's trustee in bankruptcy.
14. On this question, Judge Kelly stated:⁴

For the reasons below, I consider it is clear that Ms Hankin's claim for an adjustment of property interests under s 79 vested in her trustees. From this it follows that, from the time of their appointment as trustees: (1) the property which vested in her trustees included a cause of action to seek an order for an adjustment of property interests in relation to the property of the marriage; (2) the chose in action which vested in the trustees included the right to share in any part of the settlement monies the subject of an order under s 79; (3) only her trustees had standing to continue and prosecute or discontinue such a proceeding.

⁴ at [121]

15. Judge Kelly stated:⁵

I consider that, prima facie, the rights embodied in an order made pursuant to ss 79 or 114 respectively would vest in the trustee in bankruptcy upon the making of those orders, where such orders were made after the commencement of, but before discharge from, bankruptcy.

16. Judge Kelly considered the decision in *Page & Page*, and the question of whether the cause of action for an adjustment of property interests under s 79 of the FLA was a personal cause of action that did not vest in the trustee. His Honour determined that the claim under s 79 of the FLA was not purely personal, and in so doing declined to follow *Page & Page*.
17. The decision represents a significant potential avenue for trustees seeking to recover property from non bankrupt spouses. It adds to the suite of other potential avenues which include claims under the avoidance provisions (ss 120 and 121 of the Act), the controlled entity provisions (Div 4A of Part VI), and claims under general equitable principles such as the principle in *Cummins v Cummins*.
18. But claims by trustees in bankruptcy under s 79 of the FLA are likely to give rise to very difficult questions in practice:
- (a) when will it be just and equitable to make an adjustment against a non bankrupt spouse and in favour of a trustee in bankruptcy - how is it possible to reconcile the competing interests of creditors and the non bankrupt spouse;
 - (b) what bearing would the absence of a breakdown in the relationship between the husband and the wife on the court's discretion;
 - (c) what adjustment would be appropriate where there are assets that are protected in a bankruptcy, such a superannuation;
 - (d) whether an adjustment is appropriate where some or all of the moneys that would be recovered would go to payment of the trustee's remuneration and expenses.

⁵ at [134]