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Our ref: RAB  
Your ref:

6 July 2004

Gillian Gould  
Committee Secretary  
House of Representatives Committee on Legal and Constitutional Affairs  
Parliament House  
CANBERRA ACT 2600 Fax. 6277 4773

Dear Ms Gould,

**BANKRUPTCY LEGISLATION AMENDMENT (ANTI-AVOIDANCE AND OTHER MEASURES) BILL 2004-07-06**

I appeared before you this morning in the Standing Committee. The Hon Bronwyn Bishop MP asked for information about Section 139ZQ Notices.

The attached article is by a solicitor who does a lot of recovery litigation for NSW trustees and has considerable expertise in this area.

Yours faithfully,



RICHARD BRADING  
PRINCIPAL SOLICITOR

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# Section 139ZQ Notices

## ~ do they have a future?

by Sally Nash, Sally Nash & Co, Solicitors, Sydney

I have never been a fan of the section 139ZQ Notice. Reluctantly, however, I have concluded that they are an extremely useful tool for a trustee to use for the following reasons:

- a. If prepared properly, the Notice has the same effect as a Statement of Claim.
- b. The onus is on the recipient of the Notice to apply to set it aside and, whilst there is no time limit under the Act in which this can be done, the Notice can set out a time frame, which I recommend to be 28 days.
- c. Importantly, the Notice gives rise to a charge which is a registrable charge at the Land Titles Office and which entitles the trustee to a bare power of sale.

### HISTORY

The purpose of section 139ZQ is to provide an administrative and simple mechanism whereby the trustee can require payment of money or transfer of property where the trustee alleges that the transfer is void.

It is far easier and cost effective for a trustee to have the Official Receiver issue a section 139ZQ Notice than it is to make application to the Court for declarations that a transfer of property is void under sections 120 and 121 of the *Bankruptcy Act* 1966.

There is no prescribed form.

### FACTS AND CIRCUMSTANCES

The Notice must set out the facts and circumstances which the Official Receiver considers support the allegations that the transfer is void. The Notice should contain all the facts and support the allegations. It is usually only issued after enquiries, including the use of section 77A and 77C Notices and public examinations, have been completed.

The Official Receiver will not issue a section 139ZQ Notice without sufficient cause being disclosed in the Notice. The Official Receiver will require the trustee to provide a statement setting out the steps taken by the trustee to recover the monies and the facts and documents which support the issue of the

Notice. If there is an application to the Federal Court to set aside the Notice, the Official Receiver should file a Submitting Appearance and not become involved in the matter. The trustee should conduct the litigation.

The following matters should be provided in the Notice:

- (a) The full name of the bankrupt;
- (b) The date of bankruptcy. If it resulted from a Creditor's Petition then the date of judgment, the date on which the act of bankruptcy was committed and the date the petition was filed should also be specified.
- (c) The date of the alleged void payment.
- (d) A statement describing how the money was paid, e.g., cash, cheque or telegraphic transfer.
- (e) The source of the money should be set out.
- (f) Details of any borrowings by the bankrupt.
- (g) The date of purchase of any real estate purchased by the bankrupt.
- (h) If the bankrupt has filed a Statement of Affairs, the date the bankrupt states was the first time he/she became aware of being unable to pay debts as they fell due.
- (i) A detailed description of the transaction which gave rise to the debt or the transaction which gave the benefit to the other party.
- (j) A full and complete statement as to why, at the time of the transaction, the bankrupt was insolvent. If the person has been declared bankrupt on the application of a petitioning creditor, it is useful to contact the solicitors for that creditor to find out the dates of letters of demand and what information was provided at the time of those demands and at the time of issue and service of the Statements of Claim.
- (k) The value of any real estate, where possible, should be by way of proper valuation and not by real estate estimate or client estimate.

- (l) A time for payment should be stated.
- (m) The fact that the payment is to be used to pay the debts of the bankrupt. If the transfer is considerably more than the known debts of the bankrupt, only an amount sufficient to pay the debts and costs of administration should be claimed.

### REQUIREMENT FOR PAYMENT

It is my view that the Notice should contain a time for payment, e.g. seven, 14, 21 or 28 days after service of the Notice.

### REVOKE OR AMEND

The Official Receiver may at any time revoke or amend the Notice. This would include extending the time for compliance with the Notice by agreement with the recipient but if such agreement is not forthcoming, the recipient *must* make application to the Federal Court for such extension of the time. The reason for this is the sanction set out in section 139ZT which makes it a criminal offence punishable by six months, imprisonment for not complying with the Notice.

If, however, the recipient of the Notice is a corporation the sanction is not imprisonment. Section 4B of the *Crimes Act* (Cth) prescribes the maximum penalty to be imposed on a corporation, which I believe is currently set at \$15,000.

In practice few practitioners apply for the extension as usually the Official Receiver and Trustee allow extensions. The criminal sanction is not taken seriously.

Although paragraph 139ZQ(4) does not provide an express power for extending the Notice, it is my view that the use of the word "amend" enables the Official Receiver to amend the time for compliance with the Notice by providing a further letter in writing. It should be noted that this power is given only to the Official Receiver and not to the Trustee, although payment is required to be made to the Trustee.

## SERVICE OF NOTICE

It is my view that the Notice should be personally served on an individual because of the criminal sanction contained on 139ZT. A company should be served in accordance with the Corporations Law, 1991. A copy of the Notice is to be served on the trustee as well as the bankrupt. Subsection 139ZQ(5) is mandatory and these Notices *must* be sent. However, there does not appear to be any sanction in the section if it is overlooked and in my view it would not invalidate the issue or the service of the Notice. If the point were raised in an objection it is my view that a Judge of the Federal Court would have power to treat the matter as formal only.

Interestingly there is no time limit specified for service on the bankrupt nor the recipient, nor the trustee and obviously this can be done at any time, but one assumes a reasonable time and my view is that such service should be after service of the Notice on the recipient.

There is also no time limit on the validity of a Notice. A Bankruptcy Notice is valid only for a period of six months. The Creditor's Petition is only valid for a period of 12 months. There is no limit on the time for which a section 139ZQ Notice is valid. This is relevant in relation to section 139ZR as issue of the Notice permits the lodgment of a charge over the property.

## TRANSFER OF PROPERTY

Most of the Notices issued under section 139ZQ deal with the transfer of property, usually between family or spouses for no consideration or for too little consideration. Accordingly, it is open to the trustee to require re-transfer to him of the property.

## PROPERTY OR DEBT

If the Notice is not complied with, the trustee can sue on the Notice in the relevant Court, e.g., in NSW, Local Court up to \$40,000, District Court up to \$250,000 and Supreme Court over \$250,000. The trustee can then take normal recovery action in relation to the debt – such action being by way of writ of execution, garnishee, bankruptcy or winding up. There is no defence to such a claim if the Notice has not been set aside.

## CHARGE OVER PROPERTY – POWER OF SALE

A charge over property is created on the issue of a section 139ZQ Notice. Property is not defined and is, in my view, not limited to real property but could be a motor vehicle or other plant and equipment. If it is real property, the charge can be noted on the title by the filing of a form of Request; if it is on other

items of equipment, it can be registered at REVS for a motor car and in the Miscellaneous Deeds Register at the Land Titles office for other chattels. If it is over a company's property, it can be noted at the ASIC as a statutory charge.

The charge over property does not have priority over an existing mortgage, lien, charge or other encumbrance of an associated entity or any other entity, if the Court is satisfied that such other encumbrance arose from an arms length transaction for value.

Thus, it is not the case that the charge takes priority over the rights of a mortgagee, e.g., Westpac or Commonwealth Bank who has provided funds in the normal course of lending.

Upon registration of the charge, the trustee has a power to sell subject to any charges or mortgages which have priority. The proceeds of sale are then applied in a normal manner with the first mortgagee, and second mortgagee being paid in priority to the trustee.

Interestingly subsection 139ZR(6) gives the power of sale to the trustee and not to the Official Receiver, but subsection (4) gives the right of registration of the charge to the Official Receiver and not the trustee.

To enable the power of sale to be effected, it will also be necessary to have the bankrupt or the bank produce the Certificate of Title to the Land Titles Office for registration of the charge.

## OBTAINING ORDER FOR POSSESSION

Once the charge has been registered and the power of sale arises, it may be necessary to obtain an order for possession from the Federal Court or the Supreme Court.

The Supreme Court Rules contain a procedure for an order for possession to be made being by way of Statement of Claim. An order for possession is obtained and the Court Sheriff is instructed by the Court to take possession of the property. This involves changing locks and removing furniture and private possessions of the occupiers. It also involves notifying each of the occupiers at the premises of the trustee's intention to take possession.

## OBTAINING CERTIFICATE OF TITLE

If the property is unencumbered, the Certificate of Title may be held by the recipient of the benefit and it may be necessary to obtain an order that the Certificate of Title be produced for the purpose of registration of your charge. At the same time it may be useful to obtain an order for possession.

As a general rule, if the Certificate of Title is held by a bank or financial institution, the document will be produced at the Land Titles Office upon payment of a production fee for registration of your charge.

## POWER OF COURT TO SET ASIDE NOTICE – COURT PROCEDURES

The Court has power to set aside a Notice but such application should be made prior to the time for compliance with the Notice.

It is my view that such application should be listed before the Duty Judge for an extension to be given until further order in the application or until seven (7) days after determination of the application. Alternatively, if the first mention date is fairly soon after issue, such orders can be made by consent on the first return date.

Normally, when an application is filed in Sydney, it is heard on a Tuesday before the Registrar who may refer the matter to a Judge or a Federal Magistrate. More usually, however, a timetable is set for the preparation and filing of the Affidavits and any cross application.

## FREEDOM OF INFORMATION ACT – ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW ACT)

Both Acts apply to the decision to issue a 139ZQ Notice.

Accordingly it would also be open to an applicant to apply under the ADJR Act to injunct the enforcement of the section 139ZQ Notice and for orders declaring it invalid.

## GENERAL

The Court might never have to determine the validity of the section 139ZQ Notice or the charge because the trustee should in each case file a Cross Claim seeking each of the declarations and orders pursuant to section 120, 121 and 122 of the *Bankruptcy Act*. This becomes the substantive application before the Court which the Court then determines. In determining such matters, the Court will grant to the trustee an equitable charge securing the trustee's interest. Such orders have been made in the two Full Court decisions of:

- a. *Official Trustee v. Alvaro* [1996] 66 FCR 374.
- b. *Fodare Pty Ltd v. Official Trustee in Bankruptcy* [2000] FCA 1388.

Sally Nash