Wilson, Frances (REPS)

From: Purcell John [John.Purcell@cpaaustralia.com.au]
Sent: Thursday, 8 July 2004 6:14 PM
To: Committee, LACA (REPS)
Cc: Hartcher Judy; Lang Liz
Subject: Bankruptcy Legislation Amendment (Anti-Avoidance and Other Measures) Bill 2004

Dear Gillian,

I would like to confirm that I have reviewed and can confirm as fully correct that part of the Transcript of Meeting 5 July 2004 relating to CPA Australia's presentation to the Committee.

It is noted that a commitment was made at the Hearing (see pages LCA 30-31) to provide information on cases dealing with s 121 of the Bankruptcy Act 1966.
A case highly on point is that of *Cannane v Cannane Pty Ltd; Cannane v Official Trustee in Bankruptcy* [1998] HCA, 192 CLR 557.
Whilst the Majority of the High Court justices allowed an appeal from the Federal Court of Australia setting aside an application for relief under s 121, the case serves to illustrate the legal principle or rule that s 121 will only apply where there is an intent to defraud creditors or deny creditors the benefit of assets to which they would have been entitled but for the challenged disposition. The case is all the more useful to an understanding of the radical and wide reaching scope of the draft Bill as it deals with the importance (though evidentially difficult) of establishing intent around the impugned transaction or disposition. The following extracts are illustrative of both the circumstances under which s 121 will apply and the examination of motive which would be radically altered under the draft Bill's proposed powers and approach to accepted burden of proof:

para 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."

para16. The intention of subtracting the - - - 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 - - - transaction to (family members) when the benefit of that transaction could be taken.

para 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 above per Brennan CJ and McHugh J

para. 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.*

The above per Gaudron J

para 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 first[43]. 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.*

The above extract from Gummow J's decision is particularly illustrative of the type of arrangement intended to benefit family members that would potentially be attacked under the draft Bill's powers. To reiterate the thrust of CPA Australia's submission, the development of such powers is contrary to the accepted structure of bankruptcy law and should only be pursued against a narrow basis of proven abuse.

Whilst the above is a brief analysis I hope that it is of value within the timeframe for concluding the Inquiry.

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