



TAYLOR WOODINGS

## NEWS FLASH

December 2009

### Taylor Woodings Trustees Succeed In Equitable Charge Challenge

#### Porter & Anor v Bonariggo & Anor [2009] VSC 500

This case provides an interesting and thorough examination of the law of equitable charges and liens and how they may be applied in bankruptcy. In particular the case highlighted the parties' intentions regarding the giving of security over property and provides sound judicial guidance on the point.

#### The Case in Summary

Following our appointment as Trustees we lodged a caveat over a commercial property in Melbourne owned by the Bankrupt ("the Property") to protect the Estate's interest on behalf of creditors. The Property at that time had been sold by the mortgagee but had yet to settle. After careful analysis of the mortgagee's sale process, the Trustees consented to settlement taking place and the surplus proceeds of sale ("the Proceeds") being paid into Court for determination as to how the Proceeds should be distributed. Pursuant to section 19 of the *Bankruptcy Act 1966* the Trustees had a duty to make an application to recover their vested interest in the Proceeds on behalf of creditors.

The Bankrupt's grandfather made claim to the entire Proceeds at Court claiming an equitable charge over the whole Proceeds or alternatively an equitable lien based on purported discussions in 2002 between the Bankrupt, her ex-spouse and her grandfather. Additionally, he contended that the Trustees' claim should be subordinated to the grandfather's claim.

The Bankrupt's family law lawyer also claimed a portion of the proceeds pursuant to an equitable charge agreement executed by the Bankrupt shortly before bankruptcy.

Following an unsuccessful mediation during June 2008 a three day hearing was held in Melbourne over a year later in September 2009. Nearly two years after the case began His Honour Justice Vickery made orders on 13 November 2009 in favour of the Trustees stating that the Bankrupt's grandfather had no equitable charge or lien or any other equitable interest in the Proceeds and awarding half the proceeds to the Trustees as claimed.

#### More information

For more information please contact:

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#### What Constitutes an Equitable Charge

His Honour provides interesting judicial guidance regarding satisfactory creation of equitable charges and observed that:-

- An equitable charge is created when property is expressly and constructively made liable to the discharge of a debt and the charge confers on the chargee a right of realisation by judicial process;



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- An equitable charge is distinguished from a purely contractual agreement giving rise to no proprietary right;
- Whether a particular set of circumstances gives rise to an equitable charge will depend on the intention of the parties, ascertained objectively from the language used by the parties in the instrument in light of the circumstances;
- The instrument must indicate the parties' intention that the relevant property should constitute a security; and
- Section 53 of the *Property Act 1958* (Vic) requires an equitable charge to be in writing and signed by the person creating the interest.

### What Constitutes an Equitable Lien

His Honour also considered the features and operation of equitable liens and observed that:-

- An equitable lien is a right against property (real or personal) of another, which arises automatically by implication of equity to secure discharge of actual or potential indebtedness;
- An equitable lien does not depend on either contract or possession;
- Equitable liens differ from equitable charges mainly in the mode of creation - an equitable lien arises by operation of law, under a doctrine of equity as part of a scheme of equitable adjustment of mutual rights and obligations; and
- An essential feature for imposition of an equitable lien is that solid and substantial justice requires it.

### Conclusion

This case presented the Trustees with an interesting and ultimately successful case in defeating claims of an equitable charge and lien against a Bankrupt Estate's vested property. His Honour's key reasoning in rejecting the grandfather's claims was that:-

- The facts evidenced in the case did not show that it was intended that there was to be security granted by way of right of sale, nor could such a right be inferred;
- That an equitable charge must be in writing and discussions cannot constitute an enforceable equitable charge;
- By applying the principles of established law for equitable charges it was not shown that an equitable charge was created by the oral agreement and written documentation between the Bankrupt, her ex-spouse and her grandfather; and
- The facts evidenced in the case fell outside the settled principles which govern the creation of a proprietary interest as an equitable lien - principally that the grandfather did not gain or retain any interest in the Property as consideration for the funds advanced by him.

### Reference

For a full copy of the judgment of His Honour Justice Vickery please click on the following link: <http://www.austlii.edu.au/au/cases/vic/VSC/2009/500.html>.

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## How Taylor Woodings can assist

Taylor Woodings has extensive experience with personal insolvency assignments including involuntary and voluntary bankruptcy as well as Personal Insolvency Agreements. Across all appointments, we work hard to find practical solutions to the challenging situations that we face with the desired aim of maximising returns for all stakeholders.

Some of our recent formal personal insolvency appointments include:

- Trustees of the Bankrupt Estate of well known paparazzi photographer, Jamie Fawcett.
- Trustees of the Bankrupt Estate a high income earning medical practitioner.
- Trustees of a Personal Insolvency Agreement of a Sydney property developer.
- Trustees on a range of bankruptcies on the petition of Australia's major banks.

## Confidential discussion

If you wish have a confidential discussion about any aspect of bankruptcy or other personal insolvency administrations or issues raised in this newsletter, please contact Jason Porter or Ian Francis our Registered Bankruptcy Trustees.

*Disclaimer:*

*This newsletter has been provided for information purposes only. You should not take action on its contents without seeking accounting and/or legal advice.*

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