Article Information

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To injunct, or not to injunct? That is the question ...

The Federal Circuit and Family Court of Australia recently granted an urgent ex parte injunction, arising from an application by a trustee under Division 4A of the *Bankruptcy Act 1966 (Cth)* (Act), to restrain a trustee of a discretionary trust from dealing with property and potentially exercising powers of appointment to remove a trustee or appoint a new trustee to a discretionary trust.

Takeaways

- A trustee may use an ex parte injunction as a tool to restrain dealing in property which may adversely impact the interests of creditors.
- The onus is on a trustee, in seeking an ex parte injunction, to establish:
  - an arguable case for relief
  - that there is a real risk, if an injunction was not granted, of subsequent judgments in favour of the trustee being unsatisfied, and
  - the balance of convenience favours making such orders.

Background

A husband and wife were made bankrupt on 19 October 2021 and the trustee was appointed to their bankrupt estates on 29 April 2022. The bankrupts provided a statement of affairs to the trustee on 16 June 2022.

In his statement of affairs, the bankrupt indicated that he was renting an apartment (apartment 701) from his business partner. He also stated that he was not paying rent, did not have any interest in real estate and was not currently (or had not been in the last five years) involved in a trust as a trustee, beneficiary or unit holder.

The trustee had reason to believe that the information provided by the bankrupt was either incorrect or false. The trustee wrote to the bankrupt seeking clarification with particular regard to the bankrupt's involvement in directorships and trusts. The bankrupt responded that he had been a director of "250 East Pty Ltd" and three other companies. He also stated that he had "been a shareholder and director of companies appointed to be trustee but was unable to recall receiving any benefits as a consequence of such positions" (refer to [11]). However, counsel for the trustee submitted that this answer was unlikely to be true given the bankrupt would have received some form of interest from his relationship with a discretionary trust (known as the "East Terrace Trust") or corporate entities related to it.

The second respondent, which was also the initial corporate trustee of the East Terrace Trust, acquired land for the purposes of developing a multi-story residential complex, consisting of two towers. The second respondent transferred a 40% interest in the land to the fourth respondent in November 2016. Thereafter, the second and fourth respondent entered into a joint venture to develop the land together. The joint venture agreement indicated that each corporate entity would be entitled to receive a penthouse on each tower. Counsel for the trustee submitted that the statement of affairs completed by the bankrupt, in which he acknowledged his residential address as apartment 701, was a reference to one of the penthouses referred to in this joint venture. The fact that the bankrupt provided his business partner as a contact person for him, at apartment 702, evidenced that the joint venture had been executed.

After his sequestration order had been made the bankrupt, as appointor of the East Terrace Trust, removed the second respondent as trustee of the East Terrace Trust and appointed the first respondent, 250 East Property Pty Ltd, as the new trustee of the East Terrace Trust.

The trustee consequently sought various injunctions restraining the bankrupt and various entities related to him, including the East Terrace Trust from dealing with apartment 701.

Decision

Counsel for the trustee relied on Division 4A of the Act to support the submission that apartment 701 should vest in the trustee. Section 139A of the Act authorises a trustee to apply to court, within six years after the date of bankruptcy, for orders in respect of "respondent entities". Section 139CA of the Act defines the "examinable period" as a period which allows applications to be made in respect of respondent entities in the five years prior to the making of any sequestration order. This engages s 139D of the Act which provides for orders relating to the property of entities other than a natural person.

Counsel for the trustee led evidence that indicated the bankrupt had supplied services to one or all of the entities named in the application. This was evidenced by his description as a consultant in the East Terrace project and from permit applications made for the development. However, the bankrupt received no renumeration (or substantially less than he was entitled to) in respect of the development. The bankrupt also benefited from property controlled by a respondent entity that he controlled during the examinable period, namely his residence at apartment 701. Therefore, it was argued that the elements of s 139D(1)(b)-(c) of the Act were satisfied.

The court held that the prejudice to the bankrupt was "slight" given that the penthouse was "obviously not going anywhere" (refer [36]) and the case was to return to court in a comparatively short time. The court also held that the trustee had established an arguable case for relief and there was a real risk that, if the injunction was not granted, any subsequent judgment in the Trustee's favour would remain unsatisfied. The court further held that the balance of convenience favoured the making of an order for an ex parte injunction under s 140 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth). An adequate undertaking in damages was also necessary to protect third parties who may be affected by the making of such an injunction or may incur expense in complying with it.

In his reasons, Brown J accepted that there was a real risk that the bankrupt, who was the appointer of the East Terrace Trust, could appoint or remove a new trustee who would cause the apartment to vest in a third party. There also was a concern that if the bankrupt had prior knowledge of the application, he would most likely be able to defeat its purpose. Such an outcome would "potentially disadvantage any creditors of [the bankrupt], whose interests [the trustee] is obliged to protect" (refer [41]) and because it would also result in the bankrupt estate facing an "unwarranted expense to recover it" (refer [14]).

Read the full decision