

update

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Friday Facts: The effect of Bankruptcy on Proceedings

Quite often clients ask what the effect of bankruptcy is on legal proceedings. The answer is not always a simple one and can be difficult to determine in certain circumstances.

Section 60(2) of the Bankruptcy Act (Cth) 1966 (the "Act") provides that there is a stay of all litigation commenced by a bankrupt until the bankrupt's trustee elects in writing to prosecute or discontinue the claim. A defendant or party to the action may however force a trustee to elect whether or not to continue with the claim by serving a notice. The trustee has 28 days within which to make the election failing which it is deemed that the action has been abandoned.

There are however exceptions to section 60(2) which provide that the requirements do not apply to actions of a bankrupt for personal injury or wrong, the fruits of which are not available to the bankrupt estate and which the Act provides may be pursued uninterrupted. Thus for example a bankrupt is free to pursue a defamation claim or a claim for personal injury suffered.

Another unusual right is that of a bankrupt to object to planning permission given in relation to property. In most cases unless the planning permission can be established to have an effect on property of the bankrupt it is likely that the trustee will determine that they do not have an interest in the legal action taken by the bankrupt to object to the

planning permit obtained. These claims tend to be categorised as claims for personal rights of the bankrupt.

Any claim for debt or commercial losses will automatically pass to the bankrupt's trustee in bankruptcy. For example, recently in the case of *Murdaca v RAMS Mortgage Corporation Ltd*, the bankrupt – Murdaca – claimed that the mortgagee, RAMS, had breached its duty of care in the sale of his property and the Court decided the right to make that claim vested in the trustee in bankruptcy.

Finally, if there is any possibility that a claim is being brought by someone who may be bankrupt it is important that at the outset searches are undertaken to determine whether that is the case.

In many instances, cases run their course before it comes to the attention of a party that the individual is a bankrupt at which point a claim for legal costs incurred as a result of the bankrupt's actions ends up being a claim in the bankruptcy.

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