Section 30 of the Bankruptcy Act

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What problems can't section 30 of the *Bankruptcy Act 1966* (Cth) ("**the Act**") solve? Very few, if the recent Federal Circuit Court ("**FCC**") decision of *Barnden (As Trustee for the Bankrupt Estate of Cooper) v Dunn & Anor* [2016] FCCA 2349 ("**Cooper**") is correct. In *Cooper* the FCC considered an application made by a trustee in bankruptcy, for the sale of a bankrupt's jointly owned real property.

Sometimes a 'fast game is a good game' and, in an economical 8 paragraphs, the FCC in *Cooper,* determined that:

- It had jurisdiction to hear the matter under s 27 as a bankruptcy matter;
- The Trustee's application under section 66G of the *Conveyancing Act 1919* (NSW) ("**66G**") was unnecessary because:
- The powers in s 30 of the Act were "ample to provide for the realisation of the divisible property of the bankrupt, be it real or equitable and **whether jointly owned or not**" (at [3], emphasis added).In support of this last proposition, reference was made to the Full Federal Court's decision in *Coshott v. Prentice* [2014] FCAFC 88, at [92]-[93] ("***Coshott***").

Section 30 provides for the Court's general powers to "decide all questions" in any bankruptcy and "make such orders" as are necessary to give effect to the Act in any bankruptcy. It has been held to be of broad application, and the reference of the FCC to *Coshott* included the observation that section had been used to give the Court the power to make orders against a bankrupt for the sale of a property, when the bankrupt is not complying with their obligations under the Act (*Coshott* at [94]).

However, the Full Federal Court in *Coshott* went on to explore the limits of s 30, finding that the general power in s 30 "does **not** extend to the making of orders for the sale of property which is co-owned by a person who is not the bankrupt thereby destroying their rights in that property." (*Coshott* at [100], emphasis added).

Rather, where the property was jointly owned, the trustee was stuck with the same rights the bankrupt had against the co-owner. Therefore instead of s 30, the Full Federal Court in *Coshott* relied on section 66G. Even though this is a state piece of legislation, it was picked up and made applicable in the Federal Court (and the Federal Circuit Court) in bankruptcy matters, by section 79 of the *Judiciary Act 1903* (Cth) ("**the Judiciary Act**"), where the property was jointly owned.

The Court in *Coshott* determined that section 66G of the *Conveyancing Act* could be used by

the Federal Court, as section 79 of the *Judiciary Act*, enables courts exercising "federal jurisdiction to provide remedies afforded otherwise under State law in the exercise of State jurisdiction": *Coshott* at [111].

However one of the implications of applying s 66G in *Coshott* was that the Court was required to appoint **two** trustees, not one, as the court had done (and as the FCC did in *Cooper*).

Unfortunately for trustees, the wings of section 30 were clipped by the Full Federal Court in *Coshott*, although the Full Court left open the question of whether or not the trustee in bankruptcy could be one of the 2 trustees for sale.

In *Cooper,* the Trustee raised section 66G in his submissions, however the FCC determined that section 66G "has limitations and constraints… which do not sit neatly with the trustee's obligations, powers and duties under the Act" (at [2]).

The FCC's expansive view of section 30 in *Cooper,* to make an order for the sale of property owned by both a bankrupt and non-bankrupt, appears to be inconsistent with the more narrow determination of the Federal Court in *Coshott*, and must be viewed as doubtful, at least. This is not to say that s 30 may not be used in circumstances where the bankrupt is the sole owner, or indeed joint owner with another bankrupt.

S 30 the Superpower remains a breakfast food of champion trustees!

To read the decision in *Cooper* click here.(link is external)

If you would like more information or advice in relation to insolvency, restructuring or debt recovery law, contact Bonnie McMahon, or a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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