SUPREME COURT OF QUEENSLAND

CITATION:	*Daynes v CBD Central Pty Ltd & Ors* [2012] QSC 85
PARTIES:	**ADRIAN JOHN DAYNES** (first applicant) **PATRICK SHAUN WILSON** (second applicant) **v** **CBD CENTRAL PTY LTD ACN 117 928 391** (first respondent) **ANTON BERNARD CULE** (second respondent) **DAVID JOHN NAPIER** **(**third respondent) **CHRISTOPHER THOMAS BURGESS and GERALDINE ANN BURGESS** (fourth respondent) **TRENT ANDREW GOODWIN and KAHN SAMUEL MILLS** (fifth respondent) **CULE CONSTRUCTIONS PTY LTD ACN 130 191 669** (sixth respondent) **RAJENDRA KHATRI AND JASON BETTLES TRUSTEES OF THE BANKRUPT ESTATE OF ADRIAN JOHN DAYNES** (seventh respondent) (for application only) **IVOR WORRELL AND JASON BETTLES TRUSTEES OF THE BANKRUPT ESTATE OF PATRICK SHAUN WILSON** (eighth respondent) (for application only) **LANCE IVAN BROWN AS TRUSTEE OF THE LAGONDA TEN TRUST** (ninth respondent) (for application only)
FILE NO/S:	12130 of 2009
DIVISION:	Trial Division
PROCEEDING:	Interlocutory application
ORIGINATING COURT:	Supreme Court at Brisbane

DELIVERED ON:	5 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2011
JUDGE:	Martin J
ORDER:	**Application and cross-application adjourned to a date to be fixed.**
CATCHWORDS:	BANKRUPTCY – BANKRUPTCY COURTS – JURISDICTION AND POWERS OF COURT – GENERALLY – where the applicants in the substantive action are undischarged bankrupts – whether this Court has the power to grant leave to proceed against the applicants BANKRUPTCY – BANKRUPTCY COURTS – JURISDICTION AND POWERS OF COURT – GENERALLY – where the applicants in the substantive action are undischarged bankrupts – whether the substantive action should be dismissed *Bankruptcy Act* 1966, s 58(3) *Uniform Civil Procedure Rules* 1999, r 62, r 69(1)(b) *Anderson & Anor v Peldan & Anor* (2004) 212 ALR 291
COUNSEL:	M S Trim for the applicant, first, second, third and sixth respondents P J Roney SC for the cross-applicant ninth respondent W P Jiear (Solicitor) for the seventh and eighth respondents
SOLICITORS:	JHK Legal for the applicant, first, second, third and sixth respondents Lillas & Loel Lawyers for the cross-applicant ninth respondent Hynes Lawyers for the seventh eighth respondents

[1] The substantive action in this matter was commenced in 2009 by Adrian Daynes ("Daynes") and later joined by Patrick Wilson ("Wilson"). Messrs Daynes and Wilson alleged acts contrary to a partnership, breaches of directors' duties and oppressive conduct. They sought remedies in equity and under the *Corporations Act* 2001.

[2] Interlocutory proceedings were undertaken and pursuant to an order of this Court, $510,000 has been paid into solicitors' trust accounts awaiting the resolution of the dispute.

[3] In June and August of 2011 Wilson and Daynes (respectively) had trustees in bankruptcy appointed pursuant to debtor's petitions. On 19 August 2011 the solicitors for the first, second, third and sixth respondents ("the CBD parties") wrote

to the trustees pursuant to s 60(2) of the *Bankruptcy Act* 1966 requiring that the trustees make an election as to whether they intended to continue the proceedings.

[4] The seventh respondents ("the Daynes trustees") did not make an express election but contended that there had been an assignment to the ninth respondent of the causes of action. The eighth respondents ("the Wilson trustees") expressly elected not to continue the proceedings.

[5] It is common ground that the company the subject of the original action is no longer trading.

[6] The CBD parties now seek an order bringing this proceeding to an end and seek orders for the payment of moneys held in trust; or, in the alternative, an order that the matter be set down for trial.

The parties

[7] The first respondent ("CBD Central") was established in January 2006 with three shareholders and directors, namely Daynes, the second respondent ("Cule") and the third respondent ("Napier"). Both Cule and Napier remain as directors and shareholders of CBD Central. In or about late 2007, Daynes sold 15 of his initial 100 shares in CBD Central to the fourth respondent ("the Burgesses") and 15 shares to the fifth respondents ("Goodwin and Mills"). The Burgesses and Goodwin and Mills have not taken any part in the action or this application.

[8] In about the middle of 2009 Daynes offered his remaining 70 shares to Wilson as security for $250,000 and sought to have them transferred to Wilson in or about July 2009. The transfer was registered on 30 October 2009 but Daynes did not consent to it and Wilson did not agree to the conditions imposed, Both Daynes and Wilson have claimed, in the original proceeding, that the shares held by Wilson were therefore reconveyed to Daynes in about March 2010.

[9] One of the businesses CBD Central carried on was property development. The sixth respondent ("Cule Constructions") is a company which built a development for CBD Central. That development is the subject of the original proceeding. Cule is a shareholder in Cule Constructions.

[10] The ninth respondent ("Brown") is not a party to the original proceedings but only this application and the cross-application.

The substantive action

[11] In about the end of 2005 or early 2006 Daynes discussed with Cule and Napier the possible development of a property at Fairfield. The contents of that discussion are in issue. Daynes and Wilson allege that Daynes, Cule and Napier talked about forming a partnership. The CBD parties deny that and assert that there was never any such discussion but that there was an intention formed to create a company. In January 2006 CBD Central was registered and, after obtaining finance, purchased the Fairfield property from Daynes. Another property was purchased by CBD Central, again after obtaining finance, in Moorooka. The finance came primarily from Daynes, Cule and Napier.

[12] In their most recent amended defence, the CBD parties assert that Daynes failed to make any further financial contribution to the running of CBD Central from about January 2009 and, thus, forced Napier and Cule to make extra contributions in order that the company could be maintained. In a meeting held in June 2009 CBD Central resolved that it would enter into a contract with the State of Queensland to build housing on the Moorooka land and sell the houses and land to the State at the conclusion of that project. That contract was entered into on or about 18 June 2009.

[13] The CBD parties alleged that, at a directors' meeting on 23 July 2009, Daynes was removed as a director of CBD Central because of his failure to properly act as a director, and to pay his share of expenses and so on. Daynes claims that he should not have been removed.

[14] After considering quotes from other companies, CBD Central, through Napier, entered into a contract with Cule Constructions to build the houses on the Moorooka land. That development has been completed and the land and buildings conveyed to the State of Queensland.

[15] In March 2010, the Fairfield property owned by CBD Central was sold at auction. CBD Central now has no business or trading interests.

Issues in dispute

[16] The two matters that arise from the pleadings are:

(a) Daynes and Wilson allege that there was a partnership which was conducted through the identity of CBD Central. That is denied by the CBD parties who assert that the company was the sole means by which the business was transacted.

(b) Daynes and Wilson assert that there have been breaches of fiduciary duties or, alternatively, that Daynes has been oppressed.

Interlocutory proceedings

[17] In May 2010, A Lyons J made a number of orders by consent. They included orders that:

(a) Daynes and Wilson were to cause $100,000 to be paid into the Trust Account of Lillas & Loel Laywers;

(b) The CBD parties were to cause $410,000 to be paid into the Trust Account of McDonald Phillips Lawyers; and

(c) A series of orders with respect to the filing and service of affidavits.

[18] Further steps were taken in the proceedings. Disclosure was completed. Extensions of time were granted for the filing of affidavits and further pleadings. There was correspondence among the parties in early 2011 about the signing of a request for trial date. On 22 June 2011 the eighth respondents were appointed as trustees in bankruptcy for Wilson and on 1 August 2011 the seventh respondents were appointed as trustees in bankruptcy for Daynes. The eighth respondents elected to discontinue the proceedings in September 2011. The seventh respondents were asked by the CBD parties if they intended to discontinue the proceedings. Other than an email sending what is described as a "deed of assignment", no response was received from the seventh respondents.

The issues on this application

[19] The issues which arise on this application are as follows:

(a) Does this Court have power to grant leave to proceed against Daynes and Wilson and, if so, should it?

(b) Should the proceedings commenced by Daynes and Wilson be dismissed?

(c) What order as to costs should be made?

(d) Should the sums paid into the trust accounts of the firms of solicitors be paid out and, if so, to whom?

The cross-application

[20] By the cross-application, Brown seeks to be joined as a party by being substituted as an applicant in the substantive action pursuant to rr 62 and 69(1)(b) of the *Uniform Civil Procedure Rules* ("UCPR").

Leave to proceed

[21] So far as is relevant, r 72 of the UCPR provides:

> "(1) If a party to a proceedings becomes bankrupt, …, a person may take any further step in the proceeding for or against the party only if—
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> (a) the court gives the person leave to proceed; and
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> (b) the person follows the court's directions on how to proceed."

[22] Subrule 1 of r 72 is expressed to apply subject to the *Bankruptcy Act* 1966.

[23] Section 58(3) of the *Bankruptcy Act* 1996 provides, so far as is relevant, that:

> "(3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:
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> …
>
> (b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding."

[24] The "Court" in s 58 of the *Bankruptcy Act* 1966 is either the Federal Court or the Federal Magistrates Court.[1]

[25] The provisions of the *Bankruptcy Act* 1966 override the UCPR so far as proceedings in respect of a "provable debt" are concerned. An issue arises, then, as to whether or not the application by the CBD parties is caught by this provision and thus requires that they seek leave from one of the courts covered by s 58.

The assignment

[26] On 10 June 2011, Brown, in his capacity as trustee of the Lagonda Ten Trust executed a "Deed of Assignment of Chose in Action" and paid $5,000 to Daynes. Daynes also executed the deed on that day.

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[1] s 27 *Bankruptcy Act* 1966 (Cth).

[27] The deed recites that Daynes is indebted to Brown as trustee in the amount of $386,771. This amount is said to arise pursuant to a Deed of Acknowledgment made on 1 June 2008 between, on the one hand, Daynes and Dajak Pty Ltd as trustee for The Daynes Family Trust, and on the other, Brown as trustee for the Lagonda Ten Trust. The deed purports to assign from Daynes to Brown all of Daynes' right, title and interest in the actions set out in the deed. "Actions" is defined to mean:

> "any and all claims that [Daynes] has or may have against any person, including but not limited to CBD Central Pty Ltd, ACN 117 928 391, Anton Bernard Cule, David John Napier, Christopher Thomas Burgess, Geraldine Ann Burgess, Trent Andrew Goodwin, Kahn Samuel Mills and Cule Constructions Pty Ltd ACN 130 191 669 (the Defendants in Supreme Court Proceedings BS12130 of 2009) and GE Mortgage Solutions Ltd ACN 070 797 894, David John Napier and Napier Financial Services Group ACN 010 298 263 (the Plaintiff and Second and Third Defendants by Counterclaim respectively in proceedings BS6385 of 2009) which may lawfully be assigned."

[28] In clause 3.4 of the deed, Brown "acknowledges and agrees that some causes of action are not assignable at law and accordingly, takes pursuant to this Deed only those causes of action which may be assigned."

[29] At some point in the proceedings there was a question as to whether or not the deed had been stamped. It appears that that is no longer in issue.

[30] The amended statement of claim is some 28 pages long. The most appropriate way of outlining the claims that are alleged to have been assigned to Brown is by referring to the relief sought in the statement of claim. Some of the relief sought appears to be more in the nature of interlocutory relief with respect to, for example, making the books and records of CBD Central available to the applicants in the proceedings. The substantial relief sought is:

(a) A declaration that Cule and Napier, and Cule Constructions hold any profit or gain or interest in the proceeds of the development contract, and any proceeds of sale of any other asset of CBD on trust for CBD or are liable to an account for profits.

(b) Equitable compensation and damages for breach of a duty by Cule and Napier, and in respect of which Cule Constructions was knowingly concerned.

(c) An account of profits or benefits derived by Cule, Napier and Cule Constructions by reason of their breaches of duty and other conduct.

(d) Damages and an account of profit pursuant to s 1317H of the *Corporations Act*.

(e) Interest on damages or a profit accounted for.

[31] Other matters sought under the heading of "Relief Sought" may not actually be relief properly so described. For example, paragraph 86 under the heading "Relief Sought" states: "This proceeding is a civil proceeding within the meaning of section 1323 of the Corporations Act."

Can this Court determine the validity of the assignment?

[32] Mr Roney SC, for Brown, submitted that it was unnecessary for me to determine whether the assignment was efficacious because I did not have to be satisfied of that in order to grant Brown's application to be joined. That, it was said, was something which could be determined at trial.

[33] It was submitted by Mr Jiear, on behalf of the Daynes trustees, that this Court could not determine whether the assignment was effective (assuming it was otherwise effective) to transfer Daynes' causes of action to Brown. This arises from a submission that Daynes' bankruptcy commenced on 4 April 2011, that is, before the deed was executed. If that is correct, then Daynes had no property to transfer.

[34] There is evidence that Daynes failed to comply on or before 4 April with the requirements of a bankruptcy notice. Section 115(2) of the *Bankruptcy Act* 1966 renders that the date on which Daynes' bankruptcy is deemed to have commenced. It would appear, then, that Daynes had no ability to transfer the property the subject of the assignment. But that is not a decision this court can make.

[35] In *Anderson v Peldan*[2] Philippides J considered the application of ss 27, 31, 121 and 131 of the *Bankruptcy Act* 1966. Her Honour said:

> [10] Section 27(1) of the Bankruptcy Act provides:
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> > The Federal Court and the Federal Magistrates Court have concurrent jurisdiction in bankruptcy, and that jurisdiction is exclusive of the jurisdiction of all courts other than the jurisdiction of the High Court under section 75 of the Constitution.
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> The meaning of "jurisdiction in bankruptcy" is informed by the definition of "bankruptcy" in s 5(1) of the Act which provides that "bankruptcy, in relation to jurisdiction or proceedings, means any jurisdiction or proceedings under or by virtue of this Act".
>
> [11] The concurrent jurisdiction of the Federal Court and the Federal Magistrates Court "in bankruptcy" is thus expressed by s 27(1) to be "exclusive of the jurisdiction of all other courts other than the jurisdiction of the High Court …" and that jurisdiction is identified by s 5(1) as "any jurisdiction … under or by virtue of this Act …".
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> [12] Counsel for the respondents placed particular reliance on *Sutherland v Brien*.[3] The issue for determination in that case was whether arrangements made by a director and his wife with the administrator of a company were void against their trustees in bankruptcy under s 120 of the Act. Austin J held that the matter was not one within the exclusive jurisdiction of the Federal Court, stating (at 323):
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> > Here the proceedings arise out of claims to a fund held in a trust account. The proceedings have been brought for a

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2 (2004) 212 ALR 291.

3 (1999) 149 FLR 321.

> determination of those claims and for orders as to the payment of the fund … the proceedings themselves are not "proceedings under or by virtue of" the Bankruptcy Act. Rather, they are proceedings which invoke the Court's well-established jurisdiction to determine and declare rights to property and make orders as to its destination. Consequently, these proceedings do not fall within the definition of "bankruptcy" in relation to jurisdiction or proceedings, and do not fall within the "jurisdiction in bankruptcy" which s 27(1) vests exclusively in the Federal Court.

[13] However, Austin J did not, in considering the question of the jurisdiction in bankruptcy, have regard to what role if any was played by s 31 of the Act in defining matters within the exclusive jurisdiction of the Federal Court or Federal Magistrates Court. That was a matter considered by the Full Court of the Federal Court in *Scott v Bagshaw*.[4]

[14] Section 31(1)(e) and (f) of the Act provides:

> (1) In exercising jurisdiction under this Act, the Court shall hear and determine the following matters in open Court:
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> …
>
> (e) applications to set aside or avoid a charge, charging order, settlement, disposition, conveyance, transfer security or payment;
>
> (f) applications to declare for or against the title of the trustee to any property …

"The Court" is defined in s 5(1) as meaning "… a Court having jurisdiction in bankruptcy under this Act".

[15] The Full Court in *Scott v Bagshaw* emphasised that s 27(1) falls to be understood in its context and that s 31(1) elucidates what the drafter of the provision had in mind as falling within "bankruptcy" in s 27(1) as defined in s 5(1) of the Act. The Full Court stated that it was apparent from s 31(1) that the drafter of it intended that applications having that stated effect would be encompassed within the concept of jurisdiction in bankruptcy. The Full Court distinguished *Sutherland v Brien* on the basis that it did not concern a case, such as that in *Scott v Bagshaw*, which fell within s 31(1)(f) of the Act.

[16] *Scott v Bagshaw* concerned proceedings whereby the appellant trustee of a family trust sought a declaration that properties were charged in his favour. The first respondent was a bankrupt, the

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4 (2000) 99 FCR 573.

second respondent was the bankrupt's wife and the third respondents were the first respondent's trustees in bankruptcy. The proceedings were ordered to be stayed for want of jurisdiction. The Full Court in *Scott* noted that the nature of the claim was "one to realise an equitable charge". The pleadings made no reference to any section of the Act and it was possible for judgment to be given without reference to any such section. However, as the court stated (at 577):

> … the undoubted effect of an order being made in the terms sought by the appellant would be that a declaration would be made against the title of the third respondents. Upon the third respondents' becoming trustees, the title to the properties (and subsequently to the money representing part of the properties) became vested in them: ss 58(1) and 132 of the Act. The consequence of any such order must therefore be that it would have a necessary adverse effect on the title of the third respondents to the extent that it established title in the appellant. That is a matter that falls within the jurisdiction in bankruptcy.

[17] *Scott v Bagshaw* and *Sutherland v Brien* were explained in the following passage by Barrett J in *Green v Schneller*:[5]

> Austin J [in *Sutherland*] decided that s 27(1) did not vest in the courts to which it refers exclusive jurisdiction in respect of every question turning upon the interpretation and application of the Bankruptcy Act. That must be so. When persons become bankrupt, it is necessary for courts to determine all types of questions about the consequences. Many of those questions will depend for their answers on the provisions of the Bankruptcy Act. One class of such questions relates to the nature of the rights of persons to property. Austin J held that nothing in the Bankruptcy Act precludes the exercise in such cases of the well established jurisdiction of courts other than those mentioned in s 27(1) "to determine and declare rights to property and make orders as to its destination". *But that undoubted general jurisdiction will yield to any aspect of the jurisdiction for determination and declaration of such rights which the Bankruptcy Act itself places in the hands of s 27(1) courts. In* Scott v Bagshaw *... the Full Federal Court noted that among the matters so placed in the hands of those courts is "applications to declare for or against the title of the trustee to any property".* Because this is one of the matters s 31(1) of the Act requires "the Court" to hear in open court, it is identified as a matter within the definition of "bankruptcy" and thereby seen to be within s 27(1). *That aspect of the general jurisdiction "to determine and declare rights of property and to make orders as to its destination"*

5 (2001) 189 ALR 464 at 469 [22].

> *which entails "applications to declare for or against the title of the trustee to any property" is accordingly reposed in s 27(1) courts alone.* [Emphasis added]

[18] Both parties relied on *Denby (as trustee in bankruptcy of the estate of S S Wing Tam) v Shum*,[6] as supporting their respective submissions concerning the jurisdiction of this court. *Denby* concerned a claim brought in the Supreme Court by a trustee in bankruptcy alleging that a payment made to the defendant was void as against it pursuant to s 122 of the Act. The application in that case did not expressly seek a declaration under s 31(1)(f) or make application to avoid a disposition under s 31(1)(e), but rather sought repayment of money by the defendant, relying primarily on the operation of s 122 of the Act. While Muir J doubted that such a claim, not being a claim for a declaration, came within s 31(1)(f), his Honour found that the application seeking repayment of money on the basis that the payment was void under s 122 of the Act was *in substance* one to set aside or avoid a disposition or payment and as such came within s 31(1)(e) and was therefore not within this court's jurisdiction.

[19] But of course the approach taken by Muir J applies equally to a claim made by a trustee in bankruptcy pursuant to s 121 if it can be characterised in substance as one to set aside or avoid a disposition or conveyance within s 31(1)(e) of the Act or as one which seeks a declaration for or against the title of the trustee to any property within s 31(1)(f) of the Act.

[20] The respondents in this proceeding claim an entitlement to the entire legal and equitable interest in the disputed sum, notwithstanding the pleaded assertion by the applicants to an entitlement and seek a declaration accordingly. On one view the pleaded assertion of the applicants' entitlement can be said not to raise a sufficient cause of action as to the nature of the dispute between the parties. But that is a matter that could be remedied by further particulars and the submissions made by both counsel leave no doubt that the pleaded assertion concerning the applicants claimed entitlement to the disputed sum is understood as being based, inter alia, on a claim that the transaction severing the joint tenancy is void pursuant to s 121 of the Act.

[21] The effect of a declaration in favour of the respondents as to the entirety of the title to the disputed property, would involve a finding "against the title of the applicants" to that property, arising inter alia as a consequence of the application of s 121. That is a matter falling within s 31(1)(f) of the Act in that it can be said to concern a claim to a declaration "against the title of the trustee to property" and outside this court's jurisdiction.

[22] However, even if that conclusion cannot be drawn given the limited nature of the pleading as to the applicants' claimed

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6 [2002] QSC 117; BC200203759.

> entitlement, there is another basis on which the proceeding ought to be struck out.
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> [23] The proceeding in this court is in reality a futility without the determination of the applicants' claim pursuant to s 121, presently the subject of the application brought in the Federal Magistrates Court. That claim by the applicants to a declaration that the transfer severing the joint tenancy is, inter alia, void pursuant to s 121 of the Act as against the applicants, is not one within the jurisdiction of this court to entertain. That is because that claim is in substance one to avoid the transaction whereby the joint tenancy was severed and is thus in substance one to avoid "a disposition or conveyance". As such it concerns a matter within s 31(1)(e) of the Act and concerns the exercise of jurisdiction "under or by virtue" of the Act.
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> [24] It follows that that application brought by the applicants in the Federal Magistrates Court cannot be raised by way of counter-claim in these proceedings as it is not within the jurisdiction of this court. The determination of the application in that court will determine the real issues of dispute between the parties. It was not submitted that there are any other matters that would remain for determination. Accordingly, the proceedings in this court will be otiose upon the determination of the application in the Federal Magistrates Court and there can be no justification for merely staying the within proceeding.

[36] I respectfully agree with her Honour's reasoning. The efficacy of the assignment is relevant to both the application and the cross-application. If Brown was not bankrupt at the time of executing the assignment, then he has a case (I put it no higher than that) for being joined as a party to the substantive action. I considered whether I could proceed on the basis that I would make the assumption that there was no impediment raised by the operation of the *Bankruptcy Act* 1996, and then consider the arguments against its validity put by Mr Trim. That course does not commend itself – even if I found that the assignment failed for the reasons advanced against it, that would still fall within the description of a declaration "for or against the title of the trustee of any property"[7] and thus be within the exclusive jurisdiction of the federal courts referred to above.

Conclusion

[37] This is a matter which should be resolved as soon as practicable, but it is not one which this Court can fully deal with until the bankruptcy issues have been determined.

[38] The application and cross-application are adjourned to a date to be fixed. I will hear the parties on what other orders should be made.

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7 See s 31(1)(f) of the *Bankruptcy Act* 1996.