



Commercial Dispute Resolution Newsletter

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Rivkin and the long arm of Bankruptcy Law

Peter Harkin, head of CBP's insolvency group, has been working on a high profile case that illustrates the significant powers available to Trustees in Bankruptcy.

Who hasn't seen a film in which at least one of the characters tries to move money into the Bahamas or some other tax haven? Can the police stop the deal before it goes through? The sub-text is that unless the transaction is stopped, those monies will never be recovered.

The Trustee of Rene Rivkin's Bankrupt Estate, Anthony Warner and his partner, Steven Kugel, of CRS Warner Kugel, found themselves dealing with real life events where monies had already left for more exotic climes. Rene Rivkin set up a number of British Virgin Island companies and moved funds offshore to the tax havens of Switzerland and Jersey.

Rivkin further complicated matters by placing the funds in the name of a corporate entity, which did not, on the face of it, have any connection with him. The 'owner' of the monies in question (over \$3 million) was a Jersey entity acting as a trustee for the British Virgin Island company.

During 2007, the Trustee and CBP's insolvency group, using the examination powers available under the *Bankruptcy Act*, sought and obtained extensive documentation from Rivkin's associates including his former solicitor, accountants and family members.

The Trustee was swamped with documentation. Through the use of CBP's electronic document management system and the careful examination of witnesses (both in public and in private) we were able to develop an understanding of what Rivkin had done with his money.

The evidence and material distilled by the Trustee led him to conclude that Rivkin had a real interest in Jersey which was worthy of further investigation.

The first step in the process of trying to get those monies back for creditors was for the Trustee to have his appointment approved in the United Kingdom. Most of the nations that make up the Commonwealth have treaty arrangements in place which allow for mutual recognition of other Court's orders, provided the orders in question are regarded as enforceable in the country to which the request is made.

The English Courts had no difficulty in recognising Anthony Warner's appointment as the Trustee of

Rivkin's Bankrupt Estate. Once appointed in England, the Trustee, in conjunction with our English affiliate firm, was able to obtain access to information which confirmed our suspicions that Rivkin's assets, were in part, held in Jersey.

Similar recognition provisions apply in Jersey but the problem there is that a trustee in bankruptcy's powers are significantly narrower than they are here. Further, because of the British Virgin Island connection, the financial institution in question was demanding the Trustee first get control of the British Virgin Island company, wind it up, obtain a grant of probate in Jersey (on the basis that Rivkin had died) and only then, would it consider releasing the funds to the Trustee.

We believed that the process would at best, be problematic, costly and take several years to undertake.

In conjunction with the Trustee's Jersey Advocate and English lawyers, we launched three applications. The first was to freeze Rivkin's assets in Jersey and then to obtain discovery from the financial institutions of what monies were held there for him. The second was to obtain from the Australian Federal Court, a Letter of Request addressed to the Jersey Courts requesting that the Trustee be appointed in Jersey and the third was that the Jersey Courts not require the Trustee to obtain a grant of probate of Rivkin's estate.

In December 2007, having heard argument, Justice Gyles of the Australian Federal Court issued

a Letter of Request to the Jersey Courts to the effect that Anthony Warner be appointed the Trustee of Rivkin's Estate in Jersey, and that he have full authority to realise and deal with all of Rivkin's property situated in Jersey.

The third application was heard on 9 January 2008, when the Royal Court of Jersey handed down its decision, accepting our submission that the Trustee did not need a grant of probate to be appointed Trustee and ordering that he be given full control of the monies held in Rivkin's Jersey accounts.

In coming to its decision the Full Bench of the Court said:

"We have read carefully the most helpful affidavit of Peter Harkin, an insolvency lawyer, who is the senior partner in his firm's insolvency practice, and it is quite clear from this expert's opinion the world wide property of Rivkin vests in the Trustee. We are fully satisfied that the Trustee has all the duties and powers under Australian Law to administer the worldwide property of Rivkin."

This recovery will see a sizeable dividend paid to Rivkin's creditors, something which those who follow high profile bankruptcies could consider to be a rare event.

The case shows that, at least in this instance, the powers and investigative tools available to a trustee in bankruptcy are such that, despite careful planning, it is increasingly hard for an individual to hide assets from his creditors. If a trustee is tenacious, as in this account, he or she has the tools

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available to unravel some of the most complicated structures.

The investigations of the Trustee and CBP in this matter continue.

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JusticeLink - Electronic filing of applications, submissions and pleadings

The paper industry won't be happy. Lawyers and judges generate a blizzard of paper documents every day, all needing filing, sorting and indexing for later retrieval. But even the legal profession was bound to step into the computer and telecommunications age sooner or later. The growth in internet usage around the world has increased significantly in the last decade which has enabled a number of jurisdictions to allow parties to file documents electronically.

Recently, the NSW Attorney General officially launched JusticeLink, an online judicial network allowing lawyers and judges to engage in some court hearings and proceedings over the internet.

JusticeLink, a \$48 million cutting-edge computer system, will shortly be introduced into the

District Court of NSW, allowing lawyers, prosecutors, judges and magistrates to conduct procedural hearings online.

Cutting out court appearances for preliminary procedural arguments and directions will hopefully make the system more efficient, saving time and money, Attorney-General John Hatzistergos said.

We are promised that JusticeLink "*once completed will be a significant milestone in the evolution of court case management, dramatically reducing the justice system's reliance on paper copies of documents. This streamlined system will greatly assist in the handling of serious criminal cases in New South Wales, cases that often pass through more than one court before being finalised. It will enable electronic case files to be transferred safely and seamlessly from the Local Court to the higher jurisdictions of the District Court or Supreme Court*", Mr Hatzistergos said.

While trials and committal hearings will continue to be held in courtrooms, simple procedural matters to be decided online will cut the need for parties to attend court.

Mr Hatzistergos said:

"Traditionally, quite a few court appearances could be required to decide procedural matters before the hearing or trial could begin,... JusticeLink will allow prosecutors and defence lawyers to log into a bulletin board, where they will type their arguments. The judge will be alerted to their posts by

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email and be able to log in and make determinations in real time. While the time-honoured traditions of our legal system will remain intact, JusticeLink will streamline the process, saving an enormous amount of time and money."

JusticeLink has been successfully trialled in the Supreme Court of NSW, where it saved 167 court appearances. It is to be rolled out to the District Court shortly and is expected to be operating in every criminal and civil court across NSW by 2009.

Mr Hatzistergos said JusticeLink will also be used by law firms to "e-file" motions and evidence, enabling all the parties to proceedings to pull up information at the touch of a button.

Within 12 months, the computer system is expected to be operating in every criminal and civil court in NSW, including 160 local courts.

It is hoped that in future, these filing systems will save courts and more importantly, the client an enormous amount of time and money. If the documents are filed electronically it will be more efficient to maintain electronic case management systems where documents, video and other forms of media can all be stored and viewed as one bundle of documents. This will also make it possible for the court and parties to access certain filed documents and track the progress of the case through one online system.

Litigation is a potentially expensive process. CBP will continue to be an active participant in any process

that reduces cost and increases efficiency for our clients. At this stage, it appears that this initiative of the NSW court system, has potential to do both.

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Adopting misleading representations made by others

The recent case of *ACCC v Seven Network Limited* [2007] FCA 1505 should serve as an important reminder for any company that passes on representations from a third party. In this case, the Federal Court was asked to consider the liability of a broadcaster under the *Trade Practices Act* after the Seven television network had adopted representations as its own which were made by individuals featured on one of its programs.

Facts

In October 2003 a segment was aired on the television program Today Tonight regarding a 'mentoring' program called "*Wildly Wealthy Women*". The program was run by Dymphna Boholt and Sandra Forster and was also advertised on a web site run by a company called Universal Prosperity Pty Limited.

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The segment featured a number of statements by Ms Boholt and Ms Forster regarding their achievements and the benefits of the program. The segment also featured further comments by a reporter from *Today Tonight* and opening and closing remarks from a compere. A follow up segment was run in January 2004 covering similar ground.

The Australian Competition and Consumer Commission (**ACCC**) commenced proceedings against a number of entities associated with Seven Network Limited who were licensed to broadcast the program, Ms Boholt, Ms Forster and Universal Prosperity alleging that they had breached the statutory prohibition on misleading and deceptive conduct contained within the *Trade Practices Act*. The ACCC sought, amongst other things, declarations and orders restraining the further publication of the alleged representations.

Findings

The Court found that the segments conveyed a number of representations, including:

- Participants in the mentoring program would become wealthy
- Ms Boholt owned in excess of 60 properties
- Ms Forster had purchased over \$1,000,000 worth of property, and
- Ms Forster was a millionaire.

The Court held that the Seven Network Associated Companies had not made a number of the representations. The basis for this finding is discussed

below. However, the Court was required to consider whether the representations adopted by those companies were misleading.

Ms Boholt, Ms Forster and Universal Prosperity settled with the ACCC prior to the hearing of the matter. Shortly after reaching this agreement Ms Boholt and Ms Forster filed affidavits stating that the representations were false. This evidence was not challenged.

Unsurprisingly, the Court considered the representations said to have been made by the Seven Network Companies to be false. Specifically, the Court found that:

- Ms Boholt did not own 60 properties at the time the representation was made,
- Contrary to the representation that Ms Forster had purchased over \$1M worth of property without using any of her own money, at the time the representations were made she had no interest in any property whatsoever,
- Instead of being a millionaire, as at 31 October 2003 Ms Forster had assets to the value of approximately \$65,000. By the time of the second segment, 30 January 2004, Ms Forster's assets had increased by between \$5,000 and \$55,000.

Adoption of representations made by others

The importance of the decision is that it demonstrates that in some circumstances a company may be liable for misleading and deceptive conduct in respect of representations made by third

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parties. This is not limited to media reports, but may apply to any communication that includes representations made by third parties.

The ACCC argued that, even though the majority of the representations were made directly by Ms Boholt and Ms Forster, the Seven Network Companies had adopted them. The Court agreed and held that the companies, via the reporter, had adopted the various representations made in the segments.

In spite of the fact that some statements were prefixed by words such as "*they claim*", it was held that when consideration was given to the segment as a whole, it appeared that the reporter was adopting the representations. The Court considered that the various laudatory statements by the reporter, such as: "*knowledgeable pair*", "*property guru*" and "*shrewd investment*" overtook the earlier cautious language.

Disclaimers

Both of the segments featured disclaimers from the compere at the beginning and conclusion of the segments. For example, at the conclusion of the October 2003 segment the compere states:

"Too good to be true? Well we'll be following the scheme's progress to let you know."

The Court considered that there were two broad categories of representations made in the segments. Firstly, those relating to the financial success of Ms Boholt and Ms Forster and secondly,

representations as to the benefits of the mentoring program.

In relation to the first set of representations the Court held at paragraph 31:

"As a matter of overall impression, the scepticism injected by the compere does not overcome the strength of the representations made by the reporter. The disclaimer did not detract from the Wildly Wealthy Women representations. When the first episode is viewed as a whole, the ordinary and reasonable viewer would consider those representations to have been made by the Seven Licensees."

In relation to the mentoring program representations the Court held at paragraph 32:

"... The 'disclaimer' or 'bookends' of the compere make it clear that the Seven Licensees were not themselves representing that participants in the Mentoring Program would become wealthy or millionaires through investing in property. Those claims were made by the women. Viewed as a whole, the representation made by the Seven Licensees in the first episode was that the women's claims as to the Mentoring Program would be tested. I accept that the note of caution and disassociation of the compere made it clear that the Seven Licensees were not themselves conveying acceptability of the Mentoring Program."

This highlights the importance of ensuring that the wording of any disclaimer is clear. In the present case, the disclaimer did not express any scepticism in relation

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to the representation as to the financial success of Ms Boholt and Ms Forster. It is conceivable that the Seven Network Companies may have escaped liability if the disclaimers had also cast doubt on those claims.

Consequences of findings

Although much will turn on the individual scenario, several important lessons arise from this case. In circumstances where you are publishing or passing on representations of a third party it is important to:

- (a) ensure that those representations are not misleading or deceptive,
- (b) given the potential difficulty in satisfying yourself in respect of (a) make it clear that the representations are those of another and are not adopted as the truth by you, and
- (c) ensure that any disclaimers included are prominent enough to dispel any potential adoption of the representation.

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Upcoming seminar: Executive Employment Contracts

On 8 April 2008, the Workplace Relations Team will be holding a breakfast seminar on Executive Employment Contracts. This practical seminar will focus on the meaning and drafting of this most fundamental of employment agreements.

The seminar will be presented by CBP Partner, Sam Ingui and follows the seminar presented on 27 February 2008 by Kristen Lopes, entitled Recruitment and Hiring: Minimising Cost and Legal Issues.

Further details on the seminar will be emailed shortly.

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Profile

Jeffrey Collins



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Jeffrey Collins is a senior associate in the Commercial Dispute Resolution Division having joined CBP in October 2007. Jeff has expertise in general commercial litigation, arbitration and alternate dispute resolution, including building references, having practiced as a barrister in Sydney for a number of years.

Jeff has acted in a large number of matters including appeals to the Court of Appeal in NSW, the full bench of the Australian Industrial Relations Commission and the High Court. Presently Jeff is part of the CBP team litigating a large and complex contract dispute concerning the development of a mining project in Victoria.

Prior to becoming a lawyer, Jeff enjoyed a varied and interesting career path having worked as an electrician, a firefighter, an adviser to a Federal Government Minister and a consultant on government affairs.

In his spare time Jeff enjoys relaxing when he can, otherwise he is generally entertaining his two young daughters.

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