

**PROTECTING YOUR FEES  
FROM YOUR CLIENT'S INSOLVENCY**

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**A seminar presented by Counsel of Gordon & Jackson's List**

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## PROTECTING YOUR FEES IN YOUR CLIENT'S INSOLVENCY

Gordon & Jackson's List

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### Preferences

- *Bankruptcy Act 1966 (C'th)*
  - s.122 – transfer of property (including payment)  
void against trustee in bankruptcy – usually during  
6 months before petition
- *Corporations Act 2001 (C'th)*
  - ss. 588FA, 588FC, 588FE & 588FF
  - voidable transaction (including payment)

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### Elements of claim for preference

- Payment / transaction
- To creditor
- Insolvent
- Effect of preference

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## Defences

- Good faith
  - *Bankruptcy Act 1966* (C'th), s.122(2)
  - *Corporations Act 2001* (C'th), s.588FG(2)

## Protective techniques

- 1 Payment in advance
- 2 Payment by third party
- 3 Retainer

## Technique 1 – Payment in Advance

- Bankruptcy – payment
- Corporations – transaction
  
- *Legal Profession Act 2004* (Vic)
  - \* s.3.3.2.: definition of trust money includes money received on account of legal costs in advance of providing the services
  - \* s.3.3.13: must deposit trust money into Trust Account
  
- *Legal Profession Regulations 2005* (Vic)
  - \* r.3.3.34: may withdraw trust money if bill given & no objection within 7 days. Effect: lawyer becomes creditor of client

Case 1:

*Higgins v GS Enterprises Pty Ltd (in liquidation)*  
(1988) 7 ACLC 410

- Federal Court – Forster, Kelly & Neaves JJ
  - \$15,000 placed in trust account on account of costs
  - Transferred from trust (services already provided)
  - Solicitor ordered to disgorge (including counsel's fees)

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Case 2:

*VR Dye & Co v Peninsula Hotels Pty Ltd (in liquidation)*  
[1999] 3 VR 201

- Supreme Court of Victoria: Winneke P, Tadgell & Ormiston JJ
  - Accountant paid fees on account pending performance
  - Money paid into trust account
  - Accountant issued invoice and drew fees
  
  - Liquidator failed to recover as preference
  - "Transaction" was not drawing down of money but payment with right to withdraw
  - Ultimate effect
  - Distinguished Higgins

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Technique 2. Payment by third party

- May be effective if solvent third party who has no debtor/creditor relationship with the debtor
- *Bankruptcy Act 1966* (C'th)
  - s. 122, transfer of property by a debtor to a creditor
  - *Re Stevens* (1929) 1 ABC 90
- *Corporations Act 2001* (C'th)
  - s. 588FA(1): transaction is an unfair preference given by a company to a creditor
  - s.9: "transaction" - wide definition
  - *Re Emanuel (No 14)* (1997) 147 ALR 281

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### Technique 3. Fixed fee retainer

- Paid in advance (not held in trust)
- *Horsburgh v Keen*  
(unreported, County Court of Victoria, Ostrowski J, 17 March 1997)
  - Retainer upheld
  - Purpose of payment not to discharge existing debt but to induce lawyer to provide services
- Seek Law Institute guidance ?

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### Parri Passu principle and fees

- Theory: preferences disgorged and creditors share equally
- Practice: recoveries often absorbed by remuneration and liquidator's expenses
  - *Pegulan Floor Coverings v Carter* (1997) 24 ACSR 651
    - Defence that payment would be absorbed by liquidator's remuneration and expenses, with no benefit to creditors
    - Doyle CJ held benefit to creditors more general
  - *Hall v Poolman* (2007) 65 ACSR 123
    - Ordered inquiry into conduct of liquidator

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### Conclusion

- Unlikely that *Higgins* will be followed
- Suggestion in *Peninsula Hotels* that court would afford better protection for lawyers who receive money in trust on account of future costs and disbursements
- Guiding principle:
  - avoid becoming a creditor
  - payments should be for new services rather than reduction or payment for existing debt
- Suggest express agreement with client that permitted to withdraw from trust account when work completed (subject to trust account rules)

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