



**Avoiding property transactions made with the intention to
defraud creditors – principles and practice**

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What is the background and purpose of section 37A of the Conveyancing Act (NSW) and like provisions?

Whilst section 37A was added to the *Conveyancing Act 1919* (NSW) in 1931, the progenitor of the modern section dates back to the *Fraudulent Conveyances Act 1571* (13 Elizabeth I, c 4 & 5), referred to in the case law as the “Statute of Elizabeth” or the “Elizabethan Statute”.¹ The Elizabethan Statute was one of the earliest pieces of English legislation dealing with the avoidance of transactions for the benefit of creditors.

The strident tones of the preamble to the Elizabethan Statute give a vivid insight in to the mischief which the drafters considered needed to be addressed. A readable translation of the olde English drafting being:

For the avoiding of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, bonds, suits, judgments and executions, as well of lands and in tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore; which feoffments, gifts, grants etc have been and are devised and contrived of malice, fraud, covin, collusion or guile to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, etc; not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued.

Be it therefore declared, ordained and enacted, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken, only as against that person or persons, his or their heirs, successors, executors, administrators and signs of every of them, whose actions, suits, debts, etc; by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void,

¹ Notwithstanding that there was actually two Acts which dealt with trade and non-trade creditors.

frustrate, and of none effect, any pretence, color feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding.

Provided that this act or anything therein contained shall not extend to any estate or interest in land, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be, upon good consideration and bona fide, lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid.

The words of the statute give a very strong flavour of the assault which its drafters felt these types of conveyances represented to “society, law and justice”, noting in particular its statement that fraud was “more commonly used and practised in these days than hath been seen or heard of heretofore”. This sentiment was echoed in 1601 in *Twyne’s case*² where the Court of Star Chamber lamented that “*fraud and deceit abound in these days more than in former times*”, and resolved that “*all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud*”.³

Remarkably, the Statute of Elizabeth was apparently considered so effective in suppressing the overthrow of true and plain bargaining that, other than minor amendments, the relevant sections remained in force both in England and later in the colony and State of NSW for the next 340 years.

However, in 1924,⁴ revised wording was “substituted” by the *Law of Property (Amendment) Act 1924* (UK):

“(1) Save as hereinafter provided, every conveyance of property made whether before or after the commencement of this Act, with intent to defraud creditors, is voidable, at the instance of any person thereby prejudiced.

(2) This provision does not- (a) affect the operation of a disentailing assurance, or the law of bankruptcy for the time being in force; or (b) extend to any estate or interest in property conveyed for valuable consideration and in good faith, or upon good consideration and in good faith, to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.”

² (1601) 76 ER 809

³ May, Henry W. (Henry William) & Edwards, William Douglas, 1848- (1908). ‘*The law of fraudulent and voluntary conveyances: being a treatise on the statutes of Elizabeth against fraudulent alienations, and on the law of voluntary dispositions of property*’ (3rd ed. / by W. Douglas Edwards). Stevens and Haynes, London

⁴ *Law of Property (Amendment) Act 1924* (UK), Schedule 2, item 31; *Law of Property Act 1925* (UK), Part IX, s 172.

Then, in 1925, the Elizabethan Statute was formally repealed and replaced by section 127 of the *Law of Property Act* (UK), which differed only in minor respects from the 1924 wording.

New South Wales followed suit from 1 January 1931, with the coming into force of amendments which repealed the Elizabethan Statute and added section 37A to the *Conveyancing Act*, in relevantly identical terms to section 127 of the English Act:⁵

37A Voluntary alienation to defraud creditors voidable

(1) Save as provided in this section, every alienation of property, made whether before or after the commencement of the *Conveyancing (Amendment) Act 1930*, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.

(2) This section does not affect the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.

The legislation of all the Australian States contain similar provisions.⁶

Importantly, both the 1924 and 1925 wording were directed at conveyances “with intent to defraud creditors”, whereas the Elizabethan Statute had referred to dispositions made “to delay, hinder or defraud creditors”. However in *Marcolongo v Chen*⁷ (discussed in more detail later) the High Court of Australia confirmed firstly, that “defraud” in the replaced wording statute was and should be understood as if it read “delay, hinder or [otherwise] defraud”; and secondly, that the case law which had built up before the repeal and statement of the Elizabethan Statute into section 37A, remained relevant.

The revision of the language of the Elizabeth Statute made no changes to the purpose of the provision either. In an echo of *Twyne’s Case*, over four hundred years earlier, in *Hall v Poolman*,⁸ Palmer J observed:

The purpose of s 37A is to defeat fraud no matter by what device it is implemented. The reach of the section is not foreshortened by technical obstructions placed in the way of recovery proceedings in furtherance of the original fraudulent intent. The words of the section are of the widest possible application; they focus on the effect of what is done, not on the means by which it is done.

⁵ *Conveyancing (Amendment) Act 1930* (NSW), ss 2, 10 and Schedule.

⁶ *Civil Law (Property Act) 2006* (ACT), s 239; *Law of Property Act 2000* (NT), s 208; *Property Law Act 1974* (Qld), s 228; *Law of Property Act 1936* (SA), s 86; *Conveyancing and Law of Property Act 1884* (Tas), s 40; *Property Law Act 1958* (Vic), s 172; *Property Law Act 1969* (WA), s 89.

⁷ (2011) 242 CLR 546; [2011] HCA 3 at [19] – [20]

⁸ (2007) 215 FLR 243; [2008] NSWSC 1330 at [550].

The Elizabethan Statute was also the progenitor of similar provisions within Commonwealth insolvency legislation. Thus, in respect of personal insolvency, section 121 of the *Bankruptcy Act 1960* (Cth) provides:

Transfers to defeat creditors

Transfers that are void

- (1) A transfer of property by a person who later becomes a bankrupt (the transferor) to another person (the transferee) is void against the trustee in the transferor's bankruptcy if:
- (a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and
 - (b) the transferor's main purpose in making the transfer was:
 - (i) to prevent the transferred property from becoming divisible among the transferor's creditors; or
 - (ii) to hinder or delay the process of making property available for division among the transferor's creditors.

In corporate insolvency, section 588FE(5) of the *Corporations Act 2001* (Cth) states that, subject to the company being wound up and the transaction being after 23 June 1993, a transaction is voidable if:

- (a) it is an insolvent transaction of the company; and
- (b) the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company; and
- (c) the transaction was entered into, or an act done was for the purpose of giving effect to the transaction, during the 10 years ending on the relation-back day.

Whilst the Elizabethan Statute, section 37A and its analogues and the insolvency provisions have different wordings it can be seen that the underlying purpose of those provisions is to prevent a debtor using a transaction, which it is otherwise entitled to legally enter into, from using that transaction to prejudice those to whom it owes obligations either now or later.

What elements found a cause of action under the section?

Breaking down the words of section 37A, the following elements emerge, which the balance of this paper considers:

- a. there must have been *alienation*;
- b. it must be of *property*;

- c. such alienation of property must have been made with the *intention to defraud creditors*;
- d. the application to invoke the section must be made by a person thereby *prejudiced*.

Importantly, whilst in the context of the *Bankruptcy Act* and the *Corporations Act*, there is a further requirement that the transaction be made by a bankrupt of a company in liquidation, section 37A contains no requirement that the defendant be insolvent or bankrupt. Section 37A operates on a broader scale and is applicable to all transactions or “alienations”. In *Williams v. Lloyd*,⁹ all the members of the High Court treated the “intent to defraud creditors” in section 37A as capable of being established despite undoubted solvency at the time of the challenged alienation of property. Moreover, it has been established that, unlike its like provisions in the insolvency sphere, section 37A can operate to unwind a transaction which has been made pursuant to section 79 of the *Family Law Act 1975* (Cth) by consent: *Green v Schneller*.¹⁰

Nevertheless, the absence of insolvency, also means that the claimant may not have at its disposal the access to the transferor’s books and records, or the powers of examination which a liquidator or a Trustee in bankruptcy has.

Who has standing to bring a claim and what are the limitation periods?

Whilst the section describes the suit being brought by a “person thereby prejudiced”, as general proposition this has been interpreted to mean any person who is entitled to rank as a creditor may bring an action to avoid a disposition under section 37A.

However, in this sense a “creditor” is broadly interpreted. By the early 19th century there was nearly 300 years of judicial authority supporting the position that “creditor” was not to be understood as being confined to a person to whom a debt was presently due and owing, but was “*wide enough to include any person who has a legal or equitable right or claim against the grantor or settlor by virtue of which he is or may be entitled to rank as a creditor of the latter*”.¹¹

Moreover, a claimant could be considered to be a creditor under the Elizabethan Statute even though his or her claim was merely contingent, or was a claim for unliquidated damages in which judgment had not yet been delivered. Indeed in *Barling v Bishopp* [1860] EngR 934; (1860) 29 Beav 417; 54 ER 689, Romilly MR went so far as to say that “*the only thing the Court has to consider is whether the object was to defeat the creditors present or in futuro*”.¹²

⁹ (1934) 50 CLR 341, at pp 360-361, 372, 377

¹⁰ [2002] NSWSC 671; (2002) 29 Fam LR 346 at [84]

¹¹ May, Henry W. (Henry William) & Edwards, William Douglas, 1848- (1908). ‘*The law of fraudulent and voluntary conveyances: being a treatise on the statutes of Elizabeth against fraudulent alienations, and on the law of voluntary dispositions of property*’ (3rd ed. / by W. Douglas Edwards). Stevens and Haynes, London, a pp 43 and 102.

¹² Considered with approval by McPherson JA in *R v Dunwoody* (2004) 212 ALR 103; [2003] QCA 413 at [106]

Thus, the provision has implications for attempts at asset protection, since the relevant creditor's claim need not even exist at the time of the disposition. In *Barton v Deputy Federal Commission of Taxation*,¹³ Stephen J, noted that it was:

"...well established that conveyances may fall within that Statute, although there existed no creditors at the date of conveyance, so long as the intent to defeat future creditors be made out - *Mackay v. Douglas* (1872) LR 14 Eq 106 ; *Re Mackay* (1951) 16 ABC 18, at p 28. In *Ex parte Russell* (1882) 19 Ch D 588, in which Sir Richard Malins' decision in *Mackay v. Douglas* (1872) LR 14 Eq 106 was applied, the members of the Court of Appeal again referred to the Statute of Elizabeth as concerned with the protection of future creditors."¹⁴

In *Mackay v Douglas*, which Stephen J refers, Malins VC, found that the dispositions made by a man prior to going into a risky business venture fell foul of the Elizabethan Statute. The Vice Chancellor said:

Mr Douglas made the settlement, as I am perfectly satisfied, with the view that he was going into partnership in which he might become bankrupt or insolvent and utterly ruined; and therefore he did it with the view that he might be indebted, and the settlement in my opinion was fraudulent and void against creditors.

In *Ex parte Russell; Re Butterworth*, Jessel MR said:

The principle of *Mackay v Douglas*, and that line of cases, is this, that a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: "If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss." That is the very thing which the statute of Elizabeth was meant to prevent.¹⁵

More recently in *PT Garuda Indonesia Ltd v Grellman*¹⁶ at 523, the Full Federal Court cited with approval (at 515) the following passage from Lewis' *Australian Bankruptcy Law*:

The general principle may be stated that any dealing with property (other than by sale for a reasonable price) made with the object of putting it beyond the reach of present or future creditors comes within the definition of a fraudulent conveyance if the person concerned cannot immediately pay his debts **or anticipates some event which may render him unable to pay his debts in future**; such a dealing will be treated as fraudulent irrespective of the presence or absence of a conscious fraudulent intent on the part of the debtor if the necessary result of the dealing is to put the property beyond the reach of his creditors The word 'fraudulent' indeed has received an interpretation in bankruptcy matters somewhat wider than its ordinary use, and

¹³ (1974) 131 CLR 370

¹⁴ at p 374

¹⁵ However in *Williams v Lloyd* (1934) 50 CLR 341 at 372, the High Court found that where the transfers were as the result of the "persuasions of the wife of the bankruptcy" in respect of what she regarded as their current "hazardous" investment, that this was not caught by the section.

¹⁶ [1992] FCA 188; (1992) 35 FCR 515

it may be defined as equivalent to 'with an intention to deprive creditors of recourse against all or any of his assets'. [Emphasis added]

Notwithstanding those authorities it has been held that a completed bankruptcy from which the transferor has been discharged will defeat a claim because the absence of the election to avoid the transaction prior to the discharge from bankruptcy meant that the property in question is not divisible between the creditors and the creditors are no longer prejudiced in the relevant sense.¹⁷

Rather remarkably, despite the commencement of section 37A in 1931, whether or not a limitation period applies to a claim under that section is not settled. Whereas, with respect to a claim under section 121 of the *Bankruptcy Act*, section 127(4) expressly states that such application is not subject to a limitation period, since it can be brought "at any time", the *Conveyancing Act* is silent on the issue.

Traditionally, however, it was thought that limitations did not apply to a claim under the Elizabethan Statute but learned commentators have suggested that the claim is now subject to State legislative limitation periods.¹⁸

It may be however that it is arguable the claim remains outside the scope of those Acts.

This is because, under section 27(2) of the *Limitation Act 1969* (NSW) an action on a cause of action to recover land is not maintainable by a person if brought after the expiration of a limitation period of twelve years running from the date on which the cause of action first accrues to that person. Whereas under section 14(1), a cause of action to recover money recoverable by virtue of an enactment other than a penalty or forfeiture or sum by way of penalty or forfeiture has a limitation period of six years.

However, it may be arguable that an action under section 37A, for a declaration that a disposition of property by a third party is void, is not an action to "recover" either land or money by the claimant. The effect of a declaration is arguably not the "recovery" by the claimant of money or land by the claimant itself, but to use the language of Palmer J in *Hall v Poolman* to "restore the property to the person by whom it was alienated". This, together with the fact that it is not clear that the revision of the Statute of Elizabeth into section 37A was intended to in any way significantly change the position which had existed under the Elizabethan Statute, might tend in favour the view that no limitation period is applicable, however obviously this proposition is speculative.

¹⁷ *Griffiths v Falck* (2008) 200 FLR 278; [2008] NSWSC 998

¹⁸ McDonald, Henry and Meek, *Australian Bankruptcy Law and Practice*, 6th edition, at para. [121.0.15]; Michael Bennett *Using Trusts to Defeat Creditors: How Easy is it?*, 2007: <http://michaeljbennett.com.au/using-trusts-to-defeat-creditors-how-easy-is-it/>; cf Dr Garry Hamilton *Future creditors and "asset protection"* 2015: <https://www.linkedin.com/pulse/future-creditors-asset-protection-dr-garry-hamilton>

What constitutes an “alienation” for the purposes of the section?

“Alienation of property” within the meaning of section 37A has “the widest possible application” and “encompasses every conceivable means whereby property might be removed from the reach of a person’s creditors”: *Hall v Poolman*¹⁹. Further, the alienation in question need not occur solely by reason of the acts of the fraudulent debtor. As Palmer J in *Hall v Poolman* observed:

If a person acts collusively with a fraudulent debtor in such a way as to cause ownership of property to move, or to remain away, from the apparently passive debtor, there nevertheless has been an alienation of property for the purposes of the section. In this regard, s 37A of the *Conveyancing Act* is wider in reach than s 121(1) of the *Bankruptcy Act*, which catches only “a transfer of property by a person who later becomes a bankrupt”: cf *Official Trustee in Bankruptcy v Mateo* [2003] FCAFC 26; (2003) 127 FCR 217 at [61] per Wilcox J.

...

“Alienation” includes taking steps to frustrate recovery of property under s 37A. It would defeat the purpose of the section if property, once removed from creditors’ reach, could be kept permanently out of their reach by the collusive defensive acts of a third party, even though those acts could not have been undertaken by the fraudulent debtor. Section 37A therefore empowers the Court to declare void the acts of a collusive third party calculated to maintain the fraudulent alienation, and the Court may order the third party to re-transfer the property.²⁰

Nor does it matter that the “alienation of property” is the result of a complex series of steps. Drummond J in *Official Trustee in Bankruptcy v Baker* (unreported, FCA, 5 August 1994) in the following passage approved by the Full Court of the Federal Court in *Caddy v McInnes* (1995) 131 ALR 277:

[W]hen one person intends to pass his property to another in order to deprive actual creditors or identifiable potential creditors of timely recourse to the property and he does that in what, as a matter of fact, can be identified as a single transaction, it does not matter whether the transaction comprises a single step, e.g., an assignment of the property directly from disponor to donee or whether, as here, a number of steps involving persons additional to the original disponor and the person he intends to be the ultimate recipient of his property are involved: the term 'disposition' is wide enough to cover both kinds of transaction. It is true that a disposition of property will occur immediately the owner divests himself of a right in that property by transferring it or by diminishing his interest in the property, e.g. by encumbering it. But the ordinary meaning of 'disposition' is, according to the Shorter Oxford English Dictionary, 'arrangement (of affairs, measures etc.), especially for the accomplishment of a purpose or plan'. The term used in its ordinary sense is apt to describe the accomplishment of a plan by the implementation of a number of separate steps all taken to achieve the planned objective.

¹⁹ *Supra* at [550]

²⁰ at [551] and [553]

What is an “intention to defraud” and when this can be inferred?

What constitutes an “intention to defraud” has recently been considered by the High Court of Australia in *Marcolongo v Cher*²¹ which has been recognised as the “leading authority in Australia on the modern iterations of the Elizabethan Statute.”²²

Prior to that decision it was unclear whether s 37A required an “actual” or “predominately” fraudulent intent or purpose to deprive creditors of their rights or fruits of their rights and that the provision required an “element of dishonesty”.²³

In *Agusta Pty Ltd v Provident Capital Ltd*,²⁴ a decision subsequent to *Marcolongo*, Barrett JA, with whom Campbell JA and Sackville AJA agreed, considered that the High Court in *Marcolono*, approved what was said on the subject of “intent” by Blanchard J and Wilson J in *Regal Castings*,²⁵ and Barrett JA went on to state:

“..it is not necessary to show that the alienor wanted creditors to suffer a loss, or that it was his purpose to cause loss; but that it is necessary to show the existence of an intention to hinder, delay or defeat creditors and that the debtor has in that sense accordingly acted dishonestly. The two members of the New Zealand Supreme court also said that if the alienor knew that his conduct would inevitably cause loss to creditors then it was right to hold that he intended to defraud creditors and it should be immaterial that this was not his purpose.”²⁶

Thus, on the authority of *Marcolongo* at [26], there is a requirement for an “actual intent” but ordinarily the existence of that fact will be by way of inference.²⁷ The High Court went on to indicate that intent can be inferred from the evidence as a question of fact. Thus it is not necessary to prove “the actual content of the relevant person’s mind”.²⁸

In *Commissioner of Taxation v Oswal and Anor (No 6)*²⁹ at [66] Gilmour J set out the “various circumstances in which it is recognised that the Court will move readily to infer the existence of the requisite intention” as follows:

²¹ (2011) 242 CLR 546; [2011] HCA 3

²² *Commissioner of Taxation v Oswal and Anor (No 6)* 339 ALR 560 at [61] per Gilmour J

²³ see, *Cannane v J Cannane Pty Ltd (in liquidation)* (1988) 192 CLR 557; [1988] HCA 26

²⁴ [2012] NSWCA 26

²⁵ [2008] NZSC 97; [2009] 2 NZLR 433 at 456-457

²⁶ at [86]

²⁷ see *Commissioner of Taxation v Oswal and Anor (No 6)* 339 ALR 560 at [62] per Gilmour J

²⁸ *Puglia v Basol* [2005] NSWSC 1271 at [12] cited in *Commissioner of Taxation v Oswal and Anor*

(No 6) 339 ALR 560 at [63] per Gilmour J

²⁹ (2016) 339 ALR 560; [2016] FCA 762

1. The “natural and probable consequences” of the disposition is the defeat or delay of creditors;
2. The alienation is made voluntarily;
3. The alienation is made in favour of a family member; and
4. The alienation is made in haste or proximately to one or more events indicating financial stress on the part of the disponor.

In *Marcolongo* the High Court was concerned with a voluntary alienation. The plurality observed “*it was easier to infer a dishonest intention if the conveyance were voluntary than if it were made for consideration*”³⁰, citing a passage from *Lloyds Bank Ltd v Marcan* [1973] 1 WLR 1387 at 1390-1391 wherein Russell LJ said:

"I am not sure what is meant by a perfectly innocent defeat, hindrance or delay. It must be remembered that in every case under this section the debtor has done something which in law he has power and is entitled to do: otherwise it would never reach the section. If he disposes of an asset which would be available to his creditors with the intention of prejudicing them by putting it, or its worth, beyond their reach, he is in the ordinary case acting in a fashion not honest in the context of the relationship of debtor and creditor. And in cases of voluntary disposition that intention may be inferred. ... The intention of Mr Marcan is perfectly plain: the lease to his wife was designed expressly to deprive the bank of the ability to obtain the vacant possession to which the bank plainly attributed value, and to diminish to that extent the strength of the bank's position as creditor. To take that action at that juncture, in my judgment, was, in the context of relationship of debtor and creditor, less than honest: it was sharp practice, and not the less so because he was advised that he had power to grant the lease. It was, in my judgment, a transaction made with intent to defraud the bank within section 172, and would have been within the [Elizabethan Statute]."

Nonetheless, the High Court cautioned that:

“Evidence that the conveyance was voluntary does not replace the requirement of proof of intent by a distinct category where constructive fraud, with notions of constructive knowledge or notice as understood in equity, would suffice for the application of s 37A. Rather, the evidence is that species which has sufficient weight to entitle the fact finder to decide an issue (here the necessary intent) in favour of the moving party, although the fact finder is not obliged to do so and other evidence given may be decisive to the contrary.”³¹

In *Joanne Elizabeth Young v Josephine Aapa Smith*³², Sackar J stated:

³⁰ at [25]

³¹ at [25]

³² [2015] NSWSC 400

[37] It is not necessary, for the purposes of s 37A, that there be actual proof that the alienator had in his mind an intention to defraud creditors; the court can attribute to the alienator the requisite fraudulent intent if, from all the surrounding circumstances, it appears that the effect might be expected to be, or has in fact been, to defeat creditors: *Re Trautwein; Richardson v Trautwein*(1944) 14 ABC 61 at 75 per Clyde J, cited with approval by the Full Court of the Federal Court of Australia in *PT Garuda Indonesia Ltd v Grellman*(1992) 35 FCR 515 at 523. The relevant intention need not be a predominant or sole intention; *Marcolongo v Chen* at [57] and [58]. As Heydon J pointed out in *Marcolongo v Chen*, the section does not postulate a mixture of motives from which there must be extracted a predominant intention to defraud: *Marcolongo v Chen* at [25]

[38] *Noakes v J Harvy Holmes & Son* (1979) 37 FLR 5 concerned a transfer of shares where the inevitable result of the transfer was to defeat any attempt at the execution of a judgment. Brennan J (Deane and Fisher JJ agreeing) applied at 10–11 the principle articulated by Lord Hatherley LC in *Freeman v Pope* (1870) LR 5 Ch 538 at 541:

...in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the Statute.”

In terms of the timing of the relevant intention, the critical period is the period leading up to the date of the transfer and the critical mind is that of the transferor.³³ However where that transferor is a corporate entity, the critical mind is that of the person controlling the company's actions in effecting the transfer.³⁴

What defences are available and who bears the onus of proof?

Chiefly, s 37A of the *Conveyancing Act* affords a defence to purchasers who are found to be *bona fide* purchasers for value without notice. In particular, section 37A(3) protects *bona fide* transactions for value.

³³ *Royal v El Ali* [2016] FCA 782

³⁴ *Ibid* at [205] citing *Marcolongo v Chen* (2011) 242 CLR 546; [2011] HCA 3 at [64] (Heydon J)

At first blush, there may appear to be ambiguity as to who bears the onus of 'proving' the s 37A(3) defence; that is, whether a party must prove its ingredients or, alternatively, another party must disprove. Accordingly, in 2012, Pembroke J remarked:

"The issue as to where the onus of proof lies in connection with the defence of *bona fide* purchaser for value without notice under Section 37A(3) is sometimes contentious."³⁵

However in *In Wentworth v Rogers* [2004] NSWCA 430 the NSW Court of Appeal gave guidance on this issue. Hodgson JA, with whom Santow & Hislop JJA agreed, said:

"64 Even if an alienation made with intent to defraud creditor is shown, s 37A(3) provides that the section does not extend to interests "alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors". In *Huynh v. Helleh Holdings Pty. Limited* [2001] NSWSC 1162, Hamilton J held that the onus was on the person seeking relief to prove lack of good faith, or notice of the intent to defraud, relying particularly on *P.T. Garuda Indonesia Limited v. Grellman* [1992] FCAFC 188; (1992) 35 FCR 515.

65 However, that case concerned s.121 of the Bankruptcy Act, which at the relevant time was in the following terms:

121(1) Subject to this section, a disposition of property, whether made before or after the commencement of this Act, with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith, is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in the bankruptcy.

(2) Nothing in this section shall be taken to affect or prejudice the title or interest of a person who has, in good faith and for valuable consideration, purchased or acquired the property the subject of the disposition or any interest in that property.

(3) In this section, "disposition of property" includes a mortgage of property or a charge on or in respect of property.

66 It is clear that the Court in that case was considering the onus of proof as to good faith of the donee (35 FCR at 527), which is dealt with in s.121(1), and not the good faith of any person who may for the time being hold the property, referred to in s.121(2). **Under s.121(1), the onus is on the party seeking to avoid the transaction to show, inter alia, the element**

³⁵ *B v U* [2012] NSWSC 1416 at [11] per Pembroke J

required by the phrase commencing "not being". However, if that onus is discharged, I think the onus under s.121(2) would lie on the person asserting its protection; and I think the same is true of s.37A(3) of the *Conveyancing Act*.

67 The case of *Michael v. Thompson* [1894] VicLawRp 107; (1894) 20 VLR 548, referred to in *Garuda*, suggests the contrary; although there is no reference in that case to the statutory provision there under consideration. Authority in favour of the view that the onus under s.37A(3) lies on the person seeking its protection is the following dictum by Parker J in *Glegg* at 492:

The only remaining point is, I think, that which was argued under the statute of 13 Eliz. c. 5. Now the scheme of that statute is this: By it all conveyances and assignments made with intent to hinder and delay creditors are rendered void against all creditors hindered or delayed by their operation. There is, however, a proviso for the protection of a purchaser for good consideration without notice of the illegal intention. In the authorities which deal with the statute it is not always clear whether the judges are dealing with the operative part of the Act or with the proviso. The illegal intent under the operative part is a question of fact for the jury or the judge sitting as a jury. On the one hand the want of consideration for the conveyance or assignment is a material fact in considering whether there was any illegal intent, but it is not conclusive that there existed any such intent. In the same way consideration was by no means conclusive that there was no illegal intent. When, however, one comes to deal with the proviso, it is quite clear that any person relying on the proviso must prove both good consideration and the fact that he had no notice of the illegal intent.

This was quoted in approval in *Marcan* at 345.

68 This view was also consistent with the view favoured by the weight of authority that, in the application of the doctrine of bona fide purchase of a value, the onus of proof lies on the purchaser: *Meagher Gummow & Lehane Equity* (4th Ed) [8-300]."

[Emphasis added]

In *Royal v El Ali* at [217], Davies J held that the party relying on the defence under s 37A(3) bears the onus of proving that the subsection applies citing *Wentworth v Rogers* in support of that proposition. Moreover, as noted in *Royal v El Ali* at [217] the person a relying on that defence must also so that they purchased the property in good faith and that at the time of transfer they did not have notice of an intention to defraud.

To what extent is the transaction avoided?

In terms of relief, the Elizabethan Statute declared that a transaction caught by the Act “to be clearly and utterly void, frustrate, and of none effect”. However, the Courts had always interpreted that as meaning that the transaction was *voidable* at the suit of the prejudiced party rather than void ab initio. This was explained by noted by Barrett J in *Green v Schneller* as follows:

Section 37A works on the basis that the alienation sought to be impugned has taken effect and, unless reversed by reference to the section itself, will stand indefinitely. This was recognised by Dixon CJ and Fullagar J in their joint judgment in *Brady v Stapleton* [1952] HCA 62; (1952) 88 CLR 322. Their Honours quoted with approval extracts from a number of older cases, including as follows:

“Again, in *Harrods Ltd v Stanton*, Bailhache J said: ‘But in my opinion until a deed of gift is set aside the donee under the deed of gift is the true owner of the goods comprised therein. It is true that the donee has a defeasible title, but unless and until the deed of gift is set aside the title is a good title’. In the same case McCardie J said: ‘It was an actual gift from himself to his wife and she therefore became the owner of the goods, though it is clear that her title was subject to defeasance upon an application by the creditors of her husband under 13 Eliz 1 c.5 as being in fraud of creditors’ [(1923) 1 KB at p.521]”.

A person taking under a disposition susceptible to attack under an equivalent of s.37A was seen by Dixon CJ and Fullagar J as acquiring “a title, albeit a defeasible title”. The defeasibility arises from proof of the matters to which the section directs attention. Absent defeasance by reference to those subsequently proved matters, the alienation is in all respects effective. The section and the defeasance it effects do not seek to undermine or impugn the process by which the alienation was effected. They are concerned solely with causing the relevant property to be restored to the person by whom it was alienated.³⁶

One of the important aspects of s 37A of the *Conveyancing Act* is that it applies equally to, for example, real property and personal property. However, the Elizabethan statute which it replaced dates from a time long before notions of infeasibility of title under the Torrens system. Thus in order to have continued effect against land in modern Australia, the concept of indefeasibility – a pillar of the Torrens system – must be ‘accommodated’ within the notion that a transaction for land, whilst registered is “voidable”.

As Lord Wilberforce *Frazer v Walker*³⁷ made clear, as a general proposition indefeasibility of title means that registration provides a registered proprietor with immunity from adverse claims, unless specifically exempted. However, his Lordship said:

³⁶ at [25] and [26]

³⁷ [1967] 1 AC 569 at 655

First, in following and approving in this respect the two decisions in *Assets Co Ltd v Mere Roihi*, and *Boyd v Wellington Corpn*, their lordships have accepted the general principle, that registration under *the Land Transfer Act, 1952*, confers on a registered proprietor a title to the interest in respect of which he is registered which is (under s 62 and s 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant.

Therefore, it has been necessary for the courts to confirm that the Elizabethan Statute (particularly c 5) and, later, s 37A (and its jurisdictional equivalents) permit an *in personam* exception to indefeasibility. Where this not so, it would be impossible for a court to grant relief to a party seeking it.

In *Marcolongo* the plurality of the High Court having noted that 37A should be liberally construed, said at [21]:

There is one relevant qualification where, as here, the subject matter is a contract for the sale of land under the provisions of the RP Act which has been completed and the transfer registered. In *Regal Castings Ltd v Lightbody*, a majority of the Supreme Court of New Zealand held that the indefeasibility provisions of the Torrens system allowed for the enforcement against the registered proprietor of *in personam* remedies given by the Elizabethan Statute and its local representative. The contrary was not contended for on the present appeal. The view taken in New Zealand had earlier been accepted by Hogg, and Kerr, in their works on the Torrens system.”³⁸

In *Regal Castings*, to which the High Court referred, the Supreme Court of New Zealand, per Elias CJ cited a passage from Kerr’s *The Australian Lands Titles (Torrens System)* (1927), wherein it is stated:

“It is the universal opinion that the Torrens Statutes do not prevent the operation of the Statute 13 Elizabeth, c5. If however the voluntary transferee has become registered as proprietor, it becomes necessary to obtain a vesting order from the Court and a rectification of the Register Book. This is achieved by the Court declaring in effect that the transferee is a trustee of the land. Of course, a volunteer registered proprietor can confer a good title on a purchaser for value without fraud.”³⁹

In the same case, Blanchard and Wilson JJ said at [78]:

³⁸ at [20] to [21]

³⁹ at [19]

“There is nothing inconsistent with the Torrens system in upholding an *in personam* claim in these circumstances against the registered interest of the trustees as successor to Mr Lightbody. The necessary elements of the *in personam* jurisdiction are thus satisfied.”

An example of the way this can be achieved comes from a case determined earlier this year under the Victorian equivalent of section 37A, the Supreme Court of Victoria made the following orders:⁴⁰

Pursuant to s 172 of the *Property Law Act 1958* [i.e. the equivalent of s 37A], the execution and registration of transfer of land dealing number AN14948H between the first defendant and the second defendant dated 4 October 2017 in respect of the property located at [xxxx] more particularly described in Certificate of Title Volume [xxxx] is void.

Within 14 days of the date of this order, the second defendant shall provide to the plaintiff's solicitors:

- (a) a duly signed transfer of land by which the second defendant conveys the ...Property to the first defendant and the second defendant as joint proprietors; and
- (b) the duplicate certificate of title...Property.

If the second defendant fails to comply with paragraph [2] of these orders, pursuant to s 103(1) of the Transfer of Land Act 1958, the fifth defendant is directed to do the following:

- (a) to cancel folio of the Register Volume [xxx] Folio [xxx] containing the land in [xxx]
- (b) to create a new folio of the Register and Certificate of Title for the land in Lot [xxx] (New Folio);
- (c) record the first defendant and the second defendant as the joint registered proprietors of the New Folio;
- (d) produce a Certificate of Title for the New Folio and deliver it to the plaintiff's solicitors, who shall be entitled to retain the Certificate of Title until further order.

A slightly different approach was taken at first instance by Hamilton J in the *Marcolongo* litigation, which is also of interest since it was a land transaction which could not be unwound without interference with the rights of third parties, in particular Westpac, a registered mortgagee became so after the impugned transfer.

The facts are, in brief, that Mrs Marcolongo sued a company, Lym International Pty Ltd (**Lym International**) and Mr Chen. The suit was on the basis that on 31 July 2006 Lym International executed a contract to sell property and land to Mr Chen for \$15 million and transfer the property (**contract of sale**). The contract of sale did not come into effect until 15 August 2006, when Mr Chen executed the contract of sale. It was settled on the same day. On settlement, Mr Chen mortgaged the subject property to the Westpac. The claim in the proceeding was

⁴⁰ *Prior v Lakic* [2017] VSC 255 per Digby J

that the contract of sale ought to be set aside as having been entered into by Lym International with the intention of defrauding creditors in breach of s 37A.⁴¹

Mrs Marcolongo was a potential creditor of Lym International and she pleaded that at the date of transfer (15 August 2006) the consequence of the transfer was to denude Lym International of any assets which could satisfy a judgment obtained by Mrs Marcolongo in proceedings in the District Court.⁴² Hamilton J found that the alienation of property by Lym International was done with an intent to defraud creditors.⁴³

Bearing in mind supervening events, including the grant on settlement of a mortgage over the subject property to the Westpac Bank and the expenditure of funds by Mr Chen on the subject property, Hamilton J in addition to the orders referred to above, also called for further submissions on relief to be granted, to deal with the interest of Westpac and other third parties.⁴⁴

On 18 March 2009, Hamilton J declared that the property in question was held on trust for the transferor, ordered that the transfer be set aside and, further, that Mr Chen forthwith execute a transfer of the units in favour of Lym International and do all things and take all other steps necessary to recover the units to Lym International, *subject to the mortgage to Westpac and to existing tenancies*. Further, Hamilton J ordered that in the event that Mr Chen failed to comply with that order, then the Registrar was to be appointed to execute on behalf of Mr Chen the documents required to be executed by Mr Chen.⁴⁵

What complicated matters is that Mr Chen defaulted under the Westpac mortgage. Westpac appointed receivers and managers of the property.⁴⁶ This was significant as running parallel to Mrs Marcolongo's proceedings was a separate set of proceedings whereby it was alleged by Lym International that the 15 August 2006 transfer was procured by Mr Chen's breach of fiduciary duties.⁴⁷ The New South Wales Court of Appeal dismissed this appeal but changed the mechanism for reconveyance of property.⁴⁸ The effect of the change meant that Westpac was potentially exposed to taxation for having to sell units which were 'surplus' to the discharge of the mortgage. This occurred because no mechanism was contemplated for

⁴¹ *Lym International Pty Ltd v Chen; Marcolongo v Lym International Pty Ltd* [2009] NSWSC 98 at [1] to [5] per Hamilton J

⁴² *Ibid* at [68]

⁴³ *Ibid* at [182]

⁴⁴ *Ibid* at [183]

⁴⁵ *Lym International Pty Ltd v Westpac Banking Corporation* [2011] NSWSC 927 at [3] to [5] per Brereton J

⁴⁶ *Ibid* at [12]

⁴⁷ *Ibid* at [2]

⁴⁸ *Ibid* at [6]

Westpac withholding funds or property until the taxation liability had crystallised. Although Mrs Marcolongo's proceedings did not have orders which produced such a complicated result, it is obvious that such an outcome could similarly occur with relief granted pursuant to s 37A. Ultimately the High Court set aside the orders of the Court of Appeal, but the Marcolongo case serves as a cautionary tale of the difficulties associated with attempting to undo transfers of land.

Two final matters of principle are worth noting. First despite a person having an intention to defraud creditors, it is not until the alienation is attacked and it is set aside that it is "voidable". This means that the act of the transfer of real property does not, itself, constitute an ineffective alienation. In *Regal Castings* Elias CJ explained at [20] to [22]:

"[20] An alienation made with fraudulent intent is an effective alienation, notwithstanding the emphatic language of 13 Eliz c 5 that it is "void". That consequence is made more explicit in modern statutory treatment such as s 60 by which such alienations are "voidable at the instance of the person thereby prejudiced". Only creditors or those claiming through them can attack such alienation under s 60. It remains effective until a creditor succeeds in having it set aside. The form of the consequential orders then to be made will depend on the circumstances. In many cases it will not be appropriate to obtain a reconveyance of the property. A usual form of order is that the transferee must do all things necessary to make the property available for satisfying the claims of the creditors, and only so far as the alienation is voidable under s 60 (the extent to which creditors are prejudiced).

[21] An application under s 60 to set aside an alienation of property is not a claim in rem. It does not assert "encumbrances, liens, estates, or interests", such as would amount to an attack on the title obtained through registration contrary to s 62 of the Land Transfer Act. It is not properly described as an "action for possession, or other action for the recovery of any land", such as would be in conflict with s 63(1). Nor is it an application to the court attacking the registered title under the fraud exception contained in s 63(1)(c). An application for remedy under s 60 of the Property Law Act 1952 in respect of the conveyance of land transfer land with intent to defraud creditors does not assert defect in title. The principles of indefeasibility, in protection of the title created by registration, are not engaged by the statutory remedy under s 60 by which the registered proprietors can be compelled to provide satisfaction to the creditors, including by reconveyance of the property, declaration of trust in respect of it, or appointment of receivers for it. These remedies are granted against the registered proprietors personally. As the Court of Appeal explained in *C N and N A Davies v Laughton*:

"... indefeasibility of title does not interfere with the personal obligations of a registered proprietor, and the principle that contracts, or trusts, or any personal equity can be enforced against the registered proprietor merely serves to indicate the limits of the doctrine."

[22] In *Frazer v Walker*, the Privy Council made it clear that the principle that a registered proprietor is immune from adverse claims, except as specifically excepted, "in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in

law or in equity, for such relief as a Court acting in personam may grant". Section 60 of the Property Law Act 1952 provides foundation in law for such a claim. Recourse to it does not, in my view, conflict with the provisions of the Land Transfer Act."

Secondly, whilst the statute speaks of the transaction being voidable, the extent of the avoidance can vary. In *Regal Castings*, Elias CJ said:

"A usual form of order is that the transferee must do all things necessary to make the property available for satisfying the claims of the creditors, and only so far as the alienation is voidable under s 60 **(the extent to which creditors are prejudiced)**."⁴⁹

[Emphasis added]

In the context of ss 120 and 121 of the *Bankruptcy Act*, it seems to be accepted that the transaction is avoided only so far as necessary to satisfy the debts of the insolvent estate and is otherwise left alone, meaning that the transferee takes the benefit.

An interesting example of this arose in *Low v Barnet (Trustee); In the Matter of Mathai*,⁵⁰ where Mr Mathai had transferred two properties to family members which were held to be the subject of a voidable transaction under s 121 but the debts of the Bankrupt Estate were satisfied by realisation of only one of those properties, meaning the trustee did not need to require the conveyance of the second property to herself the orders of the Court that they be so conveyed. This meant that ultimately despite being voidable the remaining property remained registered to the family members of Mr Mathai.

Given the remarks of Elias CJ, it would appear that similar considerations apply with respect to section 37A, however the issue may raise greater difficulties in a section 37A proceeding, since the extent of prejudice to "creditors" rather than just the person bringing the suit may be unknown.

⁴⁹ at [20]

⁵⁰ [2015] FCA 1386

Conclusions

In summary, section 37A and its analogues in insolvency legislation, despite their ancient origins, remain relevant and, in particular circumstances, can be a powerful tool. It has been repeatedly said on high authority that interpretation of section 37A should be broad and liberal, and the decision in *Marcolongo* has clarified issues relating to intention. This liberal construction potentially means that transactions entered into long before the creditor in question is prejudiced can be unwound. They are worth keeping in mind.

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