Official Trustee In Bankruptcy v James Andrew Baker, Art Holdings Pty Ltd, Goodglint Pty Ltd, Vestos Pty Ltd and Service and Property Pty Ltd [1994] FCA 1243 (5 August 1994)

FEDERAL COURT OF AUSTRALIA

OFFICIAL TRUSTEE IN BANKRUPTCY v. JAMES ANDREW BAKER, ART HOLDINGS PTY. LTD.,
GOODGLINT PTY. LTD., VESTOS PTY. LTD. AND SERVICE AND PROPERTY PTY. LTD.
No. NB72 of 1990
FED No. 530/94
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Bankruptcy

COURT

IN THE FEDERAL COURT OF AUSTRALIA
BANKRUPTCY DISTRICT OF THE STATE OF QUEENSLAND
GENERAL DIVISION
DRUMMOND J

CATCHWORDS

Bankruptcy - application by Official Trustee for declaration that art collection held by a corporate respondent was the property of the bankrupt - finding that one trust asserted by bankrupt to be the owner of the collection never existed - purported sale on behalf of that non-existent trust to a company ineffective to pass any title to company - settlors of other trusts, who merely gave effect to instructions of bankrupt, acted as agents of bankrupt in establishing those trusts - no trust where settlor retained complete control of and complete power of disposition over whole collection with the intention only of benefiting himself - where true intention was that bankrupt would retain full beneficial ownership, transfers of collection from company to company controlled by him were shams - application for relief in respect of proceeds of sale of accounting practice void as against Official Trustee under s. 121 Bankruptcy Act - "disposition" in s. 121 wide enough to cover transaction in which ultimate recipient of property originally owned by the bankrupt takes that property by the last of a number of dealings with it, which dealings can together be characterised as a discrete arrangement planned to achieve that objective.

Bankruptcy Act 1966 (Cth) - ss. 121, 139D, 139E, Part X
Income Tax Assessment Act 1936 - s. 264

Baker v Federal Commissioner of Taxation (1989) ATC 4660
Baker v Federal Commissioner of Taxation (1990) ATC 4025
Barton v Official Receiver (1984) 4 FCR 380.
Brady v Stapleton [1952] HCA 62; (1952) 88 CLR 322
In re Carter and Kenderdine's Contract (1897) 1 Ch. 776
Commissioner of Stamp Duties (Qld) v Jolliffe [1920] HCA 45; (1920) 28 CLR 178
Dalco v Federal Commissioner of Taxation (1988) 82 ALR 669
In re Farnham (1895) 2 Ch 799

In re Fasey (1923) 2 Ch 1
Re Fitzgerald (1986) 10 FCR 261
Hancock v Federal Commissioner of Taxation [1961] HCA 90; (1961) 108 CLR 258
Re Kastropil; Ex parte Official Trustee in Bankruptcy v Kastropil [1989] FCA 255; (1989) 33 FCR 135
Re La Rosa; Ex parte Norgard v Rocom Pty. Ltd. (1990) 21 FCR 270
Northumberland Insurance Ltd. (in liquidation) v Alexander (1984) 8 ACLR 882
Official Trustee in Bankruptcy v Arcadiou (1985) 8 FCR 4
Sharrment Pty. Ltd. v Official Trustee in Bankruptcy (1988) 18 FCR 449
Snook v London and West Riding Investments Ltd. (1967) 2 QB 786
Re State Public Services Federation; Ex parte Attorney-General (W.A.) [1993] HCA 30; (1993) 67 ALJR 577
Re Ward; Official Trustee v Dabnas Pty. Ltd. (1984) 3 FCR 112
Williams v Lloyd [1934] HCA 1; (1934) 50 CLR 341
Winter v Grady (1921) 21 SR (NSW) 686

HEARING

BRISBANE, 6-27 July 1992, 22 July and 4 August 1994
5:8:1994
Counsel for the applicant: C.E.K. Hampson QC and
P.J. Murphy

Solicitors for the applicant: Australian Government
Solicitor

Counsel for the second, third,

fourth and fifth respondents: P.D. McMurdo QC
Solicitors for the second, third,

fourth and fifth respondents: Hogan and Young

ORDER

THE COURT DECLARES THAT:
1. Each work of art of whatever type and description in the possession, disposition or control of the Respondents or any of them on 16 January, 1990 vested at that date in the Applicant as Trustee of the estate of the First Respondent pursuant to the provisions of the Bankruptcy Act 1966 and the Applicant now has vested in him as such Trustee each of these works of art which are presently in the power, disposition or control of the Respondents or any of them and, in addition, the Applicant also now has vested in him as such Trustee each work of art of whatever type and description and every other item of property presently in the power, disposition or control of the Respondents or any of them which was purchased or otherwise acquired by the Respondents or any of them with moneys, being the proceeds

of sale, hire or use of any work of art belonging to the First Respondent and to the Applicant as the said Trustee.

2. The Fourth Respondent holds the sum of $286,000.00 paid to the Fourth Respondent by or on behalf of the First Respondent's former partners in the accountancy practice in respect of the First Respondent's interest in that practice, together with any accretions thereto, and/or any property purchased with the said sum upon trust for the Applicant.

THE COURT ORDERS THAT:

1. The Respondents deliver up forthwith to the Applicant:

(a) each and every work of art of whatever type and description presently in the power, disposition or control of the Respondents or any of them which is a work of art that was in the possession, disposition or control of the Respondents or any of them on 16 January, 1990; and

(b) each and every work of art of whatever type and description presently in the power, disposition or control of the Respondents or any of them which was acquired by the Respondents or any of them since 16 January, 1990 with moneys being the proceeds of sale, hire or use of any work of art belonging to the Applicant as the said Trustee; and

(c) each and every sum of money comprising, and each and every chose in action representing, the proceeds of sale, hire or use of any work of art that was in the possession, disposition or control of the Respondents or any of them on 16 January, 1990 which sum of money and chose in action is presently in the power, disposition or control of the Respondents or any of them; and

(d) each and every item of property not being an item of property referred to in paragraphs (a), (b) or (c) of this order presently in the power, disposition or control of the Respondents or any of them which was acquired by the Respondents or any of them with moneys being the proceeds of sale, hire or use of any work of art belonging to the First Respondent and to the Applicant as the said Trustee.

2. The Respondents deliver up forthwith to the Applicant each and every catalogue, inventory, descriptive list, book or other document including sale or purchase records, invoices and computer discs in their power, custody or control containing particulars of the identity, name and provenance of each and every work of art and of its author's name referred to in Orders 1(a) and (b) and every document in their power, custody or control containing particulars identifying each sum of money, chose in action and item of

property referred to in Orders 1(c) and (d) PROVIDED that the Respondents may at their own expense at any time make and retain a copy of any such document.

3. The Respondents by themselves and by their servants and agents be restrained from:
(a) moving any of the said works of art from any location where such work of art is currently situated, housed, displayed or stored;
(b) selling, leasing, lending, encumbering or dealing in any way with any of the said works of art;
(c) transferring from one Respondent to another or to any third party any cash, book debt, valuable security or property of any description including any items of property referred to in Orders 1(c) and (d) which has been acquired by a Respondent by the sale, hire or use of a work of art described in Orders 1 (a) and (b);
(d) securing or encumbering in any way any of the said works of art and other property in the possession, disposition or apparent ownership of a Respondent, including any items of property referred to in Orders 1(c) and (d) which has been acquired by a Respondent by the sale, hire or use of a work of art described in Order 1(a) and (b);
(e) disposing of, parting with or altering in any way, any of the documents or records referred to in Order 2;
(f) hindering in any way the Applicant or his authorised servants or agents in taking possession of any work of art or other item of property pursuant to these orders;
(g) counselling or procuring anyone to do any of the things referred to in the preceding sub-paragraphs of this Order No. 3.

4. Judgment be entered for the Applicant against the Fourth Respondent in the sum of $286,000.00 together with interest pursuant to s. 52 the Federal Court Act at the rate of 10% per annum from 16 January, 1990 until the date of payment.

5. (a) An account be taken as against each of the Respondents as to all sums of money received by each of them from the sale, hire, exhibition or any other dealing whatsoever with the works of art referred to in Orders 1(a) and (b); and
(b) Each Respondent pay to the Applicant the amount found due as owing by that Respondent on the taking of this account, together with interest thereon at the rate of 10% per annum.

6. The Respondents do jointly and severally pay the Applicant's costs of and incidental to this action including all reserved costs to be taxed.

7. Any of the parties hereto have liberty to apply on the giving of three (3) days notice in writing including applying for directions concerning the manner of taking the account directed by Order 5.

8. The First Respondent attend and be orally examined as to the whereabouts, name, correct description and author's name of each and every work of art referred to in Orders 1(a) and (b) and the whereabouts of every sum of money and the whereabouts and correct description of every item of property referred to in Orders 1(c) and (d) ordered to be delivered by the Respondents to the Applicant at a time and place to be fixed by the District Registrar and that the First Respondent produce at such examination any books or documents (whether his or of any other Respondent) in his possession or power containing particulars relating to the whereabouts, name, correct description and author's name of each and every work of art, sum of money and other item of property ordered to be delivered by the Respondents to the Applicant.

NOTE: Settlement and entry of orders is dealt with in Rule 124 of the Bankruptcy Rules.

DECISION

DRUMMOND J This is an application by the Official Trustee as trustee in the bankruptcy of the first respondent, Mr. James Baker, for a declaration that a collection of art works currently in the possession of the third respondent ("Goodglint") and said to be worth over $3 million at the date of Baker's bankruptcy, 16 January, 1990, was then the property of Baker and so is now vested in the Official Trustee, or, alternatively, for orders under ss. 139D and 139E the Bankruptcy Act 1966 (Cth) ("the Act") in respect of Baker's activities as "curator" of the collection. The Official Trustee also seeks a declaration that a payment of some $286,000.00 to the fourth respondent ("Vestos") in respect of the sale of Baker's interest in an accounting practice is void as against the Official Trustee under ss. 120 or 121 of the Act.

2. Counsel for the Official Trustee submitted it was Baker who was at all times the full beneficial owner of the collection, irrespective of who had the legal title to it because it was he at all times who controlled all dealings in respect of the collection; it was also submitted that the transactions whereby the collection is said to have passed to Dacine Pty. Ltd., ("Dacine") then to Axegrowers Pty. Ltd. ("Axegrowers") (later renamed Art Holdings Pty. Ltd. ("Art Holdings")) and finally to Goodglint were shams or fraudulent dispositions. Counsel submitted that the ownership of the funds used to purchase art works for the collection was really irrelevant; the Official Trustee did not seek to advance any claim based upon the existence of a resulting trust or upon tracing Baker's own moneys into the purchase of particular art works. It is therefore not necessary to consider the submissions of senior counsel for the second to fifth respondents in relation to what he said, with justification, was the impossibility of identifying just what art works were bought with Baker's own

money, assuming I were to find that the "commissions" generated from Baker's tax avoidance activities belonged to Baker personally. This exercise may never be possible: even now, the tax investigators and the Official Trustee have not been able to trace exactly what became of these "commissions". However, I accept Baker's admission in cross-examination in the tax appeal that his tax avoidance activities in the late 1970s brought in about $1,000,000.00 which was "in a practical sense" represented by the art collection at the time of that appeal in mid 1989 (although allowance must be made for the fact that these "commissions" were also the source of some of the equity of Vestos, a Baker-controlled company, in the museum building at South Brisbane, of which Vestos was then the registered owner, and also for the fact that art works were bought by Baker throughout most of the 1980s from funds to which he had access in addition to these "commissions").

3. But the evidence relating to Baker's tax avoidance activities is still of importance here insofar as it is relevant to his credibility and to the assessment that has to be made of his intentions when he arranged for the establishment of the companies and trusts that he and the other respondents claim held the art from the late 1970s to the date of his bankruptcy.

Baker's tax avoidance activities

4. Baker is an accountant by training. From 1971 he had his own practice as a chartered accountant. He disposed of all save 1% of his interest in this practice in July 1985 and the 1% in 1987, although it appears that after July 1985 he acted on his own behalf as accountant to some clients while also having an extensive involvement with the development of the art collection. From 1977 until at least 1981, as an activity separate from his accountancy practice, he gave advice and assistance to some of his clients that enabled them, for a time, to avoid paying the income tax which they truly owed. For the purpose of his tax avoidance work, Baker maintained a number of companies, Sopala Pty. Ltd., Serula Pty. Ltd., Larchwood Pty. Ltd., Dalhouse Pty. Ltd. and Delline Pty. Ltd. ("the tax companies"). Each of the tax companies was the trustee of a discretionary trust. Baker was in complete control of both the tax companies and the trusts.

5. There was nothing sophisticated about the procedures Baker adopted and which were designed to enable his clients to avoid tax. Nor was there anything sophisticated either about the methods he employed to impede the Taxation Department investigation into these activities. A typical example of how Baker arranged to avoid tax on his clients' incomes and make money for himself is as follows: after discussions with the client, Baker would invent a "transaction" appropriate to the client's business. Although these "transactions" were varied and often complex, they followed the same general pattern. Essentially, Baker took a normal commercial transaction in which the client was involved with a customer and, in the books of the client, interposed one of his tax companies. Instead of reflecting a dealing direct with its customer, the client's books and records were written up and other documents, such as sales contracts, were created at Baker's instigation to show that the client dealt with the tax company at an artificially low price. Baker's tax company then purported to deal with the client's customer at a commercial rate. In each of the four specific transactions examined in evidence, which were accepted as typical of the activities in question, the client conducted business with its customers in the usual manner, without any regard for the role the tax company was supposedly playing in the transaction. The client's customers were usually quite unaware that they were supposed to be buying from Baker's tax companies. It was only if the customer was associated with the client that the customer was aware of any involvement by the tax company in the transaction. The customer made payment in the ordinary way to the client, who passed it over to the tax company; the full amount of that payment was then returned, less what Baker called a "commission", of between 5% and 15%, to the client by the tax company. The books of the tax company and the client which Baker caused to be prepared were written up in a way designed to give this payment the appearance of a capital receipt in the hands of the client. Baker acknowledged that the transactions occurred only on paper, with the prices charged by the client to

the tax company being chosen arbitrarily, as part of what he described as an "arithmetical exercise" designed to reduce the taxpayer's assessable income. Despite this, however, he still maintains that they were genuine commercial dealings.

6. In the four year period 1977-1981, over $1,000,000.00 was received by the tax companies by way of such "commissions". Baker acknowledged that no tax returns have ever been lodged by any of the tax companies or the trusts of which they were trustees.

7. In 1986 the Commissioner of Taxation issued amended assessments against Baker personally in respect of these "commissions" received during the 1978-1981 financial years. With penalties, his total assessment for this period was increased from some tens of thousands of dollars assessed on his original returns to $2,231,259.00. Baker appealed against these assessments. On 7 July, 1989, Pincus J dismissed Baker's appeal, holding that the "transactions" between clients, tax companies and clients' customers were not genuine commercial dealings and that the "commissions" were in truth fees earned by Baker for his services in assisting the clients to reduce their taxable incomes. See Baker v Federal Commissioner of Taxation (1989) ATC 4660. His Honour's decision was upheld on appeal: see Baker v Federal Commissioner of Taxation (1990) ATC 4025. Baker still asserts that he personally received no fees or payments for his role in devising and arranging these transactions and that the "commissions" represented profits made by the tax companies as a result of the activities I have described. The findings of Pincus J, approved by the Full Court, cannot resolve for present purposes the question whether the "commissions" were the income of Baker personally. However, I have no hesitation in rejecting Baker's evidence that they were genuine commercial transactions and in coming to the same conclusion as Pincus J.

8. There were no genuine commercial dealings underlying any of the "transactions" in respect of which the commissions were received. No sales ever took place between the clients and the tax companies and the tax companies and the clients' customers. The tax companies did nothing to earn any payment from the clients. Baker's activities were in large part confined to preparing false documents to create the appearance that transactions had occurred which had never taken place. Because there was no commercial basis upon which the tax companies were entitled to payment from the client, the "commissions" were, in reality, payments by the various clients to Baker for Baker's own services, although the payments were, at Baker's direction, made to his tax companies, rather than to him personally. But they were always his own income receipts. Counsel for the second to fifth respondents disclaimed any desire to submit otherwise.

9. Baker had a standing arrangement with Westpac whereby the bank would return cheques drawn on accounts of his tax companies to him after they had been paid. Despite what he had to say in cross-examination, I am satisfied this arrangement was made at Baker's behest to complicate the task of any one interested in tracking what had been done. These cheques and most of the records of the tax companies were deliberately disposed of by Baker between 1980 and 1982. He claims that what he did was done in the exercise of his powers as principal of the trusts to appoint new trustees to all of the trusts associated with the tax companies. In 1980 and 1981 First Olbap Pty. Ltd. ("First Olbap"), a Melbourne company under the control of one Lockyer, who was later to attract a degree of prominence for his role in the "bottom of the harbour" tax evasion scheme, was appointed by Baker to be the new trustee of all of the trusts. All the ledgers, trust deeds, cheques, bank statements and other business records relating to the trusts, of which the tax companies were trustees, including all records of the transactions which formed part of Baker's tax consultancy work, were given, so Baker says, to First Olbap when he appointed it trustee. In 1982, Baker says he again used his power as principal of the trusts to appoint Threekeal Pty. Ltd. ("Threekeal"), an English company, as trustee of these trusts, in lieu of First Olbap, and all of the trusts' business records were then, so Baker claims, sent to Threekeal in the United Kingdom. He can produce minutes purporting to

record these changes he says he made in the trustee. But that is the only documentation he says he now has concerning the affairs of his tax companies and their associated trusts. Baker claims that these changes of the trustees were designed to preserve the privacy and confidentiality of the affairs of the tax companies and his clients. He ultimately acknowledged that the changes were made to ensure that the documents relating to the affairs of the trusts of which his tax companies were trustees would disappear, never to be seen again by anyone, including the Taxation Department. I do not accept Baker's assertion that he was unaware of Lockyer's involvement in "bottom of the harbour" schemes. It was I think this involvement that made Lockyer's company attractive to Baker as the initial replacement trustee. While I accept that his association with Lockyer ceased once the news broke of the latter's involvement in "bottom of the harbour" schemes, I infer that this and the appointment of the U.K. based Threekeal was due to a desire on Baker's part to minimise, so far as possible, the risk of attention being drawn to his own affairs as a result of the investigation into Lockyer's activities. It is unnecessary to make any finding whether Baker in fact went to the trouble of parcelling up the documents and sending them to the U.K.. There is only his word that he did this. He may have simply destroyed them himself. But the result is the same: his intention that no one would see these documents has been achieved.

10. The picture created by the evidence is one of a series of paper transactions created by Baker for his clients which Baker undoubtedly, and the clients probably, knew would not withstand scrutiny by the Taxation Department. That is why Baker went to considerable trouble to dispose of all useful documentation relating to the trusts. It also explains why some of the clients were prepared to forfeit their claims to the reduction in their income tax once the Taxation Department questioned the transactions and reassessed them to additional tax.

Baker's awareness of the risk of a personal tax reassessment
11. Baker claims that he first became aware of the Taxation Department's interest in him personally in July or August 1985, when he received a notice issued under s. 264 the Income Tax Assessment Act 1936 directed to himself and others. Prior to that date, he and the other respondents' case is that ownership of the art collection had twice changed hands in bona fide sales for value. Baker also says that, during the interviews he had with tax investigators in August and September 1985, he did not consider the prospect of an assessment being made against him personally and that he had not even considered the possibility of such an assessment being made before he actually received the notices in May 1986.

12. His evidence here, as on every other matter he deals with which is not confirmed by credible evidence independent of his own evidence, is unacceptable. From the time they commenced in the latter part of 1981, Baker was well aware of the Taxation Department's audits of his clients' affairs. He was present at a number of them. In early 1982, he was twice interviewed by Hannan and Cosgrove, two tax investigators, in the course of an audit into Wilgreen Pty. Ltd. ("Wilgreen"), one of his tax avoidance clients. During the second of these interviews, on 30 March, 1982, they told Baker that they regarded the "commissions" as fees for his services and, as such, assessable as his personal income. In response, Baker denied that and claimed that any moneys which came into his hands as a result of the commissions received by his tax companies did so by way of loans from those companies. On 15 July, 1982, a notice under s. 264 the Income Tax Assessment Act 1936 was issued in respect of the tax companies and Passero Pty. Ltd. ("Passero") (another of Baker's companies) requiring details of the trusts, the bank accounts, accounting records and tax returns of the tax companies and the associated trusts. By this time, however, Baker had acted to replace all the tax companies as trustees of the relevant trusts with either First Olbap or Threekeal. Whatever Baker actually did with the documents relating to the affairs of the trusts, they were then already well beyond the reach of the Department. Baker responded to the s. 264 notice of July 1982 with a letter dated 6 August, 1982 in which he advised of these changes of trustees. He continued:

"We are seeking to have copies of the trust deeds made available by trustees which were appointed to the trusts subsequent to the above companies and will supply these to you as soon as they become available.
We are not aware whether returns of income were lodged in respect of the above trusts but can confirm that this did not occur through our office. We have enquired of the trustees who assumed trusteeship from the above companies whether they have lodged or have available for lodgment any returns, and await their reply. ...
Information for reconstruction of the books of the various trusts has not been available and we have requested the replacement trustees to provide us with necessary information. We assume that such information would be in their possession and await their reply."

13. I am satisfied that Baker never made any such enquiries and that he adopted this pretence of being helpful, secure in the knowledge that the records with which the Taxation Department was concerned would never be obtainable by it, in order to delay and confuse the investigation. This was no isolated attempt by Baker to mislead and confuse the tax investigators. By way of further example of deliberate dissembling by Baker, the evidence shows that in the course of the 1982 audit into his client, Wilgreen, the investigators put to him that the transactions entered into by Wilgreen as a result of Baker's advice were devoid of any commercial reality. They made inquiries concerning "Fisher Trading Co.", the payee of cheques issued by Wilgreen, and were told by Baker that it was a "legitimate trader operating from New South Wales". This was false: Baker claimed in cross-examination that even though Serula Pty. Ltd. ("Serula"), one of his tax companies, had no employees and no business apart from its use by Baker in his tax avoidance activities, "Fisher Trading Co." was one of a number of "divisions" of Serula. But he did not mention this so-called connection between "Fisher Trading Co." and Serula to the tax investigators. This response can only have been made to mask Serula's and thus Baker's involvement in the tax avoidance transactions.

14. The Bakers acquired their family home at Mt. Cotton Road, Capalaba in 1974. Originally it was owned by Mr. and Mrs. Baker as joint tenants. Subsequently, by a Memorandum of Transfer dated 20 August, 1981 and stamped in February 1982, but not produced for registration until 23 November, 1982, Baker transferred his own interest in the property to JAB Investments Pty. Ltd. ("JABI") as trustee for the J.A. Baker Family Trust. His wife remained on the title as owner of her half interest. The timing of the execution and stamping of the transfer corresponds closely to the start of the Departmental audits into Baker's clients. Baker denies the transfer related to the audits. He claims that his interest in the property was transferred to JABI in accordance with a practice which he adopted in the late 1970s of holding all personal and family assets in the names of entities which did not engage in commercial operations in order to protect those assets from the risks occasioned by the vicissitudes of commerce. I do not accept that the subjection of the family home to this policy was unrelated to the audits: it appears that they were the catalyst for the transfer. Despite Baker's assertion to the contrary, I think that his principal reason for making this arrangement with respect to the home was to protect it against what he then saw as a possible tax liability to which he was exposed as a result of his tax avoidance activities.

15. Notwithstanding his evidence to the contrary, I am satisfied that prior to undertaking his tax avoidance activities, Baker, an experienced accountant, was aware of the risks inherent in instigating those fraudulent activities, including the risk of being personally assessed on the proceeds thereof. I am also satisfied that by the latter part of 1981, Baker was well aware of the Taxation Department's interest in the transactions his clients had entered into as a result of his

advice. By no later than this, Baker must have realised that an investigation into his affairs and those of his companies was likely and that, if it took place, there was a real possibility of amended assessments being issued against him personally. His concerns at this happening can only have been increased by what took place at his interviews with the tax investigators in early 1982, by the reassessments of various of his clients in 1982 and 1983, by the issue of the first s. 264 notice in July 1982, by the further interviews in late 1982, by the issue of the second s. 264 notice in July 1985 and by the third round of interviews in late 1985. But despite his concerns he long remained confident that he had so arranged things that he would retain control of all his assets, including the art collection: as late as March 1987 he was telling Westpac that his "affairs are so arranged that no assets are held in his name, nor is he personally a shareholder or beneficiary in any of the companies which he manages ... and this he states has been the case for many years. In any case litigation could continue for many years before he is declared a bankrupt, if the Taxation Department proceeds this far." The art collection

16. For the purposes of running the case, the Official Trustee identified the art works which were in Goodglint's possession at the date of Baker's bankruptcy on 16 January, 1990, and which the Trustee claims, as the "X", "Y", "Z", "A", "B" and "C" collections. The "X" collection comprises four works which the Official Trustee alleges were acquired by Baker prior to 1 July, 1981; the "Y" collection comprises 41 works alleged to have been acquired prior to November 1983; the "Z" collection comprises at least 386 works also said to have been acquired prior to November 1983. The "A" and "B" collections are made up of 89 and 869 works respectively acquired in the period November 1983 to July 1985 and July 1985 to January 1990 respectively. The "C" collection comprises at least 107 works in the collection in January 1990, but the acquisition dates of which are unknown to the Official Trustee.

Initial ownership of the art collection - the "X", "Y" and "Z" collections
17. Baker did not begin collecting art works seriously until the late 1970s. He says (and it is the other respondents' case also) that the collection has been held in various discretionary trusts since 1977. He claims it was then that he set up the Modern Art Trust, which he says owned the collection as trustee from 1977 until late 1983. The Official Trustee does not accept that this trust ever existed.

18. The first time it was referred to by name in the course of dealings between Baker and the other respondents and the Taxation Department and the Official Trustee appears to have been in pleadings filed in this action by the respondents. The tax investigator, Walsh, said that the first time he heard of a trust that could possibly be the Modern Art Trust was in an affidavit lodged in the 1989 tax appeal by Baker in reply to an affidavit by Ms. Sikorski, another tax investigator, which was filed the Friday before the Monday start to the hearing of that appeal. The question who owned the collection was not an issue of central importance in the tax appeal: those proceedings were concerned with identifying just what moneys Baker had received by way of income for himself. But in her affidavit, Ms. Sikorski recorded how she had obtained records from various art dealers of purchases of art by Baker personally; she said that, for the 1981 financial year, he had spent $172,830.00 in this way. She also referred to him having a private art collection insured in his name. In his affidavit in reply, Baker adopted an exhibit, "JAB29", and specifically disputed Ms. Sikorski's evidence that he personally had purchased any art; he said that all these purchases were "made by me on behalf of an Art Trust under the trusteeship of JAB Investments Pty. Ltd., a company under my control". He went on to describe the nature of this trust. He was then most concerned to show that he did not personally own the art collection. Yet he did not identify the particular trust which he claimed owned it.

19. No trust deed relating to the Modern Art Trust nor any of that trust's records have ever been produced. Baker says that as the trust's activities were not such as to require it to lodge tax returns, no financial records were maintained. However, he says that he kept a loose-leaf binder which contained handwritten details of each work in the collection. Baker may well have started and maintained a catalogue of acquisitions and disposals of art once he began to collect seriously. Given the details recorded in the current computer catalogue of acquisitions and exhibitions dating back before 1981, which Baker says was created from this handwritten ledger after he says Dacine became trustee of the collection in November 1983, it is apparent that some such records were kept prior to that date. But cataloguing one's collection is something that many private collectors with more than a few pieces must commonly do. That such a record may well have been kept by Baker from the late 1970s provides no proof at all that the collection was then owned by a trust rather than by Baker personally.

20. The explanation Baker gives for the absence of the Modern Art Trust trust deed and ledger is that they were destroyed by the flooding which occurred at the Museum of Contemporary Art ("MOCA"), i.e., his business and gallery premises in Melbourne Street, South Brisbane, on Anzac Day 1989. Some of Baker's business records undoubtedly were damaged in this flood; some may have been destroyed. But I do not accept that the reason for Baker's inability to produce clear documentary evidence of the existence, prior to 1983, of the Modern Art Trust was this flood. In his evidence in the tax appeal in mid 1989, Baker, when cross-examined about his belated disclosure that there was an "Art Trust" that was the owner of the collection, said he had searched for the Art Trust deed, which he then suggested was held in the archives of his former accountancy firm, but it could not be found. He did not mention the flood of a few months earlier.

21. The only documentary support for Baker's evidence as to the existence of the Modern Art Trust is contained, firstly, in some of his own handwritten notes seized by a Deputy Official Receiver in 1990 under a search warrant. The Federal Court judgment confirming the Taxation Department's reassessment of Baker personally to pay over $2,000,000.00 in tax was delivered in July 1989. The possibility that he would soon be bankrupt was then a very real one. I am not prepared to infer from the entries in these notes that they were prepared when Baker suggests, i.e., in mid 1984, round about the date of the last entry. They appear on their face to be a summary of events said to have taken place prior to preparation of the notes rather than notes prepared to map out action to be taken in the future. Baker may only have prepared them after the decision in July 1989 when it would have been clear to him that any trustee in bankruptcy would be particularly interested in the collection. The evidence comprising these notes comes only from Baker: I am prepared to make a no more precise finding as to their date of preparation than that he prepared them at some time prior to execution of the warrant.

22. Secondly, there is the evidence of an art dealer, Mr. Ray Hughes. Hughes has been a good friend of Baker's for a long time. Although he recalls Baker speaking in 1979 of the collection, then stored at his home, being available for loan to public galleries, Hughes is not certain whether he first heard of the Modern Art Trust before September 1981; it was from then that Hughes for a time made out some invoices for art purchases by Baker to the Modern Art Trust. I consider that Hughes' best recollection is that Baker:

"... did not ever really tell me how to invoice him and I would, at this time, randomly invoice him in the name of `Modern Art Trust' ... `JAB' which was the name of the drawer appearing on most cheques which I received in payment of invoices of art purchased by the First Respondent (i.e., Baker), `James Baker' or even `J.B.' ..."

23. Hughes' invoice books for the relatively short period of about a year record a number of purchases in the name of the "Modern Art Trust". But there is no consistent pattern and purchases written up to the Modern Art Trust are interspersed with purchases by Baker recorded in the other ways Hughes mentions. There was no doubt some mention by Baker to Hughes at this time, i.e., late 1981, of his intention to expand the already very large collection which he had specially housed in a gallery in his home and to make it publicly accessible. Baker probably mentioned the name "Modern Art Trust" to Hughes in this context, but only in the course of general statements as to his future intentions for the collection. He may well have then had in mind the possibility that he might establish a trust at some future date that would hold the collection for public exhibition. It was this kind of comment that I think probably led Hughes to write up invoices intermittently to "Modern Art Trust" for a relatively short time. This all took place at a time when Baker's accountancy practice was yielding him a very substantial income, in large part due to his tax avoidance activities. Then, he may well have liked to contemplate the prospect of becoming at some time in the future the founder or benefactor of a public art gallery. However, things changed when the Taxation Department started to take an interest in his activities: Baker began to pursue a course of action designed to put the collection, by then very valuable, beyond the reach of the Taxation Department, a potential major creditor. I do not think Hughes' evidence provides any confirmation of the respondents' contention that there existed in late 1981 a Modern Art Trust the trustee of which was the owner, rather than Baker personally, of the collection.

24. With the exception of Hughes, the other gallery owners stated that they only issued receipts for works purchased by Baker in the name of Baker personally. Mr. Bacon said he sold only a few pictures to Baker before November 1983, which he always invoiced to him personally, without complaint; Baker never suggested to him that the purchases be invoiced to a trust or other entity. Mr. Watters sold a substantial number of works to Baker from about 1981 up to and after 1987 (when Baker opened his Museum of Contemporary Art at South Brisbane); he always invoiced Baker personally "as he did not tell us to do otherwise". Watters does recall that early in the piece, Baker mentioned that he was buying for a "foundation". But his evidence does not indicate whether Baker was saying he was then buying for an existing "foundation" or only buying with a view to the art going into a foundation he was then intending to set up. He also recalled Baker saying in this context "that he was able to collect in the manner that curators would like to collect, but because he wasn't beholden to trustees he was able to go ahead. He was collecting in depth ..." He also said that he then just took Baker to be a private collector. Another dealer, Mr. Pollard, who sold extensively to Baker from 1979, always invoiced Baker personally, in accordance with his practice, because Baker never asked him to invoice another entity. He too recalls Baker discussing his intention for the large art collection to be preserved and not sold and to be available to the public (although one such assurance was given by Baker to ensure Pollard would sell him a particularly desirable personal collection of Pollard's, in December 1981). There is nothing in the evidence of these dealers that supports Baker's claim that all the art was owned, at any time in the period from about 1977 to November 1983, by JABI as trustee of the "Modern Art Trust".

25. Thirdly, the work "The Priest" is recorded as being from the "Collection of Modern Art Trust, Brisbane" in the catalogue of the 1982 Sydney Biennale. Apart from Hughes' invoices, this is the sole instance that the respondents can point to of the Modern Art Trust being identified anywhere as the owner of any of the art works, very many in number in 1982. The relevant exhibition loan agreement records Baker himself as the "Lender"; the catalogue refers to the Modern Art Trust because, where the loan agreement calls for the "Exact form of lender's name for exhibition label and catalogue", the Modern Art Trust is referred to. However, in the catalogue for the "Vox Pop - Into the 80s" Exhibition at the National Gallery of Victoria and in the relevant loan agreement dated 14 October, 1983 this same picture is identified as belonging to "James Baker" of Brisbane. All the other works from the collection appearing in public exhibitions when, according to Baker, they

were owned by the Modern Art Trust, are catalogued or recorded in the relevant loan agreements as the property of "Private Collection" or "James Baker". This lone reference to the "Modern Art Trust" in 1981-2, at a time when Baker was probably contemplating the possibility of his collection being held, and made publicly accessible, by some sort of foundation at some time in the future, provides no evidence sufficient to prove the existence then of a trust that was the owner of the collection. Rather does Baker's lack of consistency in having all his exhibition loans at this time identified as owned by the Modern Art Trust point to his not then having actually got around to vesting his collection in a trust.

26. Mrs. Baker, who separated from Baker in 1988, has never heard of the Modern Art Trust, although she was aware of the family trust and of various of its activities. But she does recall being told by him some time before they separated in 1988 that the collection was held on trust for the National Gallery and the Queensland Gallery; this was in the context of a discussion as to what would happen to the collection if Baker died. However, none of the respondents, including Baker, has ever suggested that the collection or any part of it was ever in fact held in trust for the Queensland State or the National public gallery (although Baker did have these, and other public, galleries named as members of the class of beneficiaries eligible to benefit under the terms of the Dacine Trust and the Contemporary Art Trust, two discretionary trusts that he established in 1983 and 1985, respectively). Mrs. Baker also said she never really understood, despite various discussions with Baker over the years about his art- related activities, exactly how the collection was held:

"... And then whatever dealings he did with the art, apart
from buying and selling pieces of art, so far as the
collection is concerned, whether it was held by a company on
a trust or on some other thing, by himself in trust for
somebody, you never understood exactly what those sort of
dealings were?---No.
All right. You did not know - even the office, 123 - you
knew that he owned the office at 123 Charlotte Street?---
Yes.
Somehow or other?---Yes.
But you did not know how he owned it?---I knew that we owned
that building, or the family company owned that building, or
he owned that building ..."

27. Mrs. Baker's general attitude was that she was satisfied with what Baker did so long as they had sufficient funds available to do the things they wanted to and beyond that, she seems to have taken little interest in the organisation of the family's financial affairs. Although the Bakers did not divorce until 1989, little turns on the fact that the collection did not figure in the property arrangements then made. The arrangements were agreed between the two of them, amicably, without legal advice; Mrs. Baker received substantial benefits, including the home and other properties, that seem to have satisfied her: it was agreed that she would have "the domestic things which (she) had maintained and so on" and she said she did not think she had any entitlement to the art collection then housed in MOCA, which Baker was running.

28. There is no entry in any of the books of JABI, which was, on Baker's evidence, the main source of the funds for the purchase of art on behalf of the Modern Art Trust, that confirms that its funds were expended in acquiring any art work for the Modern Art Trust. Nor are there any entries in the books of JABI recording purchases of art by it, save for a series of entries under the account "additions to property" in its general ledger for 1978/1979 that list payments to various art dealers totalling $42,510.00. Although it is clear that these works were not bought on behalf of the Baker

Family Trust, the way these purchases are dealt with in the company's books for later years up to 1981/82 is such as to leave it otherwise unclear on whose behalf those purchases were made by JABI. I am not prepared to find, on the basis of these entries, that these purchases were made in the 1979 year by JABI on behalf of an unidentified trust: it may be that these entries really record that the art in question was purchased by that company on behalf of Baker himself. There is the same absence of evidence in the books of Baker's other companies, Runcorn Pty. Ltd. ("Runcorn") and Passero, which he said also provided funds for the purchase of art for the Modern Art Trust. This is in contrast to the position from November 1983, when Baker claims the collection was transferred from the Modern Art Trust to the Dacine Trust and later, to the Contemporary Art Trust. Funds for the purchase of art from November 1983 to January 1990 came through Venmere Pty. Ltd. ("Venmere") and then Vestos. In the books of both these companies, Baker ensured that accounts were maintained in the name of the trustee of the collection at the relevant time, Dacine and then Axegrowers (later renamed Art Holdings), which recorded all purchases and sales of art, even though there is no mention in the books of the relevant trust.

29. By late 1981, Baker was aware of the Taxation Department investigation into a number of his clients; by mid 1982, not only had he been served with s. 264 notices in respect of his tax companies, but he had also been informed by Messrs. Hannan and Cosgrove during the Wilgreen audit that they regarded the commissions with which a lot of the art was purchased as his personal income. It was in this period that Baker divested himself of his interest in the family home at Capalaba, the transfer being executed in late 1981, about the time the client audits commenced, although it was not registered until late 1982, not long after his tax audit interviews in relation to the tax companies took place. It was suggested by the respondents that, in these circumstances, it is unlikely that Baker would have waited until November 1983 to divest himself of ownership of the by then very valuable collection, if he still owned it himself. I do not think that the respondents' point is sufficient to deprive the other considerations to which I have referred, viz., Baker's general lack of credibility and the absence of any clear documentary or other proof, independent of Baker, of its existence, of their cogency as indicators that there never was a Modern Art Trust on whose behalf the collection was in fact held. Moreover, the Taxation Department investigation, initially only into the affairs of the client companies, moved slowly. It commenced with audits of those companies in late 1981. In February and March 1982, Baker was interviewed about his role in these activities and what he personally got from them. In July 1982, he received the first s. 264 notice directed to his own tax companies. By this time Baker had disposed of all their documents. He knew this would impede any investigation into his own affairs. It may in fact have done so for a couple of years: it was not until about July 1985 that the investigation focused explicitly on Baker, his wife and JABI when a further s. 264 notice was issued with respect to their activities in the period 1978 to 1984. He was interviewed at length in August and September 1985. Amended assessments for the years 1978 to 1981 were only issued to him in May 1986. It may well be that in the early 1980s Baker did not feel under any urgent pressure to take steps to try to put his art collection beyond the reach of creditors, notably the Taxation Department, and did not decide to do this until it was clear that the investigation into him personally would proceed.

30. The only candidate the respondents have put forward as owner of the collection prior to November 1983 is JABI as trustee of the Modern Art Trust. For the reasons given, I reject the respondents' case and hold that such a trust never existed.

31. I am satisfied that the art collection which Baker accumulated up to November 1983 (the residue of which as at 16 January, 1990 comprises the "X", "Y" and "Z" collections) was never at any time prior to November 1983, trust property, but was rather Baker's own personal property which he built up with the proceeds of his tax avoidance activities and of his accountancy practice and other moneys available to him, including the funds of JABI, Runcorn and Passero. I think the

true position is that throughout, Baker simply used whatever funds he controlled through his control of these companies to add to the collection, which he always owned in his own right.

32. According to Baker, on 24 November, 1983 the collection was sold for value by JABI, as trustee of the Modern Art Trust, to Dacine, as trustee for the Dacine Trust. Since I have found that it was Baker and not JABI who had title to the whole collection at that time, Baker's attempt to have these companies effect such a sale transaction was ineffectual to give Dacine any claim to the collection in the form it took in November 1983 and any right to sell what remained of that collection to Axegrowers in July 1985; that being so, Goodglint could not have acquired in January 1990 any title to the "X", "Y" and "Z" collections, i.e., to what then remained of the November 1983 collection when Axegrowers (by then renamed Art Holdings) purported to gift it to Goodglint. All those art works have always been the personal property of Baker. Title to all of the works in the "X", "Y" and "Z" collections that remained in the overall collection at the date of Baker's bankruptcy then passed to the Official Trustee.

33. I do not, however, accept that any transaction of sale of the kind Baker refers to took place in November 1983. What he contends occurred is this: in November 1983, Dacine as trustee of the Dacine Trust paid the $500,000.00 purchase price of the collection by accepting a bill drawn for that sum on it by the vendor, JABI as trustee of the Modern Art Trust. $500,000.00 was the price which Baker himself fixed. Liability on the bill was then discharged by a series of transactions involving the Rekab Unit Trust, a trust controlled by Baker: after the bill was accepted, JABI subscribed for 500 units in the Rekab Unit Trust, each at $1.00, with a $999.00 premium, but in truth worthless. JABI's application for units in the Rekab Trust was not produced. The bill was then endorsed by JABI to the trustee of that trust, Lattoria Pty. Ltd. ("Lattoria"), as consideration for the issue to it of these units. Nothing was produced from the records of either Lattoria, the Rekab Trust or JABI evidencing the issue of these units. On the same day, Lattoria endorsed the bill back to Dacine. Baker's theory was that this created a debt from Dacine to the trust. This debt was released a week later. This release, said to be under seal (and necessarily so, because Dacine did not give any consideration for the release), was not produced either. At one stage in this litigation, Baker appears to have forgotten his admissions in his evidence in the tax appeal that he, for all practical purposes, controlled JABI, Dacine and Lattoria; he initially denied that proposition in the present proceedings. But in cross-examination, he acknowledged that he was in effective control of all the entities associated with this cyclical endorsement of the bill and that it was always his intention that liability on the bill would be discharged in a manner which did not require any actual payment, thus confirming Mr. Calabro's opinion that the Rekab units were valueless.

34. The Court has been inundated with a mass of material, including the books of various of the companies with which Baker is or has been associated, which it was submitted should be accepted as providing proof of many transactions. But there is an almost complete absence of documentary proof of the sale now in question ever having taken place. There is no satisfactory evidence even of the existence of the trust on whose behalf the sale is said to have been made, just the deed establishing the trust on whose behalf the purchase was said to have been made; the Dacine Trust deed, convincingly dated by duty stamping, is in evidence. On its face, this evidences the creation of the Dacine Trust on 8 March, 1983 by the settlement on the trusts in the deed of $5.00 by a Valerie Johnson. Baker acknowledges that no contract of sale was ever drawn up in respect of this transfer and that no valuation of the collection was sought to fix the $500,000.00 "sale price". No minutes of JABI or of Dacine recording a decision to sell and to buy the collection have been produced. No documents relating to the involvement of the Rekab Unit Trust in the transaction were produced. Nor was any exchange of letters between vendor and purchaser produced. The only documentation Baker said he clearly recalled as having been drawn up was a bill of exchange in the sum of $500,000.00 drawn by JABI on Dacine, which, so Baker claimed, acted both as evidence of

and consideration for the sale. Even this bill has not been produced. The whole tale depends on Baker, a person devoid of credibility. The only documents in evidence that are said to provide proof of this complex transaction involving the sale of an art collection, which in November 1983 must have then been worth many hundreds of thousands of dollars, are some notes in Baker's own hand. He claims he made these notes in late 1983 or early 1984. His evidence is uncorroborated. In my opinion, they cannot be dated more accurately than that they were prepared by Baker at some time prior to their seizure under warrant in 1990.

35. Baker claims that his reasons for transferring the collection to Dacine were that, by the end of 1983, he considered that the records maintained by the Modern Art Trust were not sufficiently sophisticated to cope with the expanding collection and that, in the future, it would be necessary to maintain a double entry accounting system. Another reason he gave for the sale was that the activities of JABI as trustee for the J.A. Baker Family Trust, established in 1970, were beginning to wind down. Further, he said that the trust deed for the Modern Art Trust was outdated, having been based on an office precedent which had by then been superseded. Baker says that, given these three considerations, he decided the simplest solution was to transfer the collection to a new trust. In cross-examination, he acknowledged that none of these so-called considerations in any way made it necessary to sell the art to Dacine in 1983 and vest it in a new trust. In my opinion, Baker devised the notion that the collection had been sold to Dacine to protect it from potential claims, should the Taxation Department be able to make out a case against him personally. The collection was, in November 1983, his own property. By then a number of his tax clients had been reassessed in respect of the sham transactions he had created. He was well aware that it was likely that he would also be reassessed. In November 1983, the collection was substantial in size and value. It appears that a large number of those works remain in the collection, although it has not yet been possible for the parties to agree on all the pictures in this category. Baker must have known that bankruptcy was a real possibility, at least from the latter part of 1981 when he must have contemplated the possibility of amended assessments being made on him for very large amounts of tax and penalties, and that at least this part of the collection was thus at risk of being lost to him. Baker well knew that upon him becoming bankrupt, his trustee in bankruptcy would have a clear claim to all those works. Baker I think therefore invented a sale by a different "owner" in November 1983, viz., the trustee of the Modern Art Trust, to provide an argument for denying access to the collection, in the form it was in November 1983, to any trustee in bankruptcy, should the Taxation Department ultimately reassess and then bankrupt him. The complexity of the transaction which he claims was used to effect the transfer was designed to give the appearance of a transfer for value that might be enough to defeat his creditors, who were limited primarily to the Taxation Department.

36. In my view (if I were to ignore the conclusion I have reached that there was no sale of trust assets in November 1983 by JAB Investments as trustee of the Modern Art Trust because there never was a Modern Art Trust), it would still be farcical for the Court to treat what Baker, and he alone, has had to say about this episode as requiring serious examination and evaluation to see if a finding should be made on his uncorroborated say-so that a sale took place of the art in 1983 that is valid as against the Official Trustee.

The "A" Collection

37. As I have said, so much of the art collection as existed in November 1983 and which continued in existence under the control of Art Holdings on 16 January 1990, i.e., the "X", "Y" and "Z" collections, then vested in the Official Trustee upon Baker becoming bankrupt. It now becomes necessary to identify the owner of what is referred to in the statement of claim as the "A" collection, i.e., the additions to the collection bought in the period November 1983 to July 1985 when the respondents contend all the art works - those in the collection in November 1983 and those acquired in the ensuing 20 months - were owned by Dacine as trustee of the Dacine Trust.

38. Art works additional to those in the collection in November 1983 were acquired by Baker, with payment being made by Venmere, another company controlled by Baker, between November 1983 and July 1985. There is then said by the respondents to have been a further sale of the collection by Dacine as trustee of the Dacine Trust, to Axegrowers (i.e., Art Holdings), as trustee of the Contemporary Art Trust. The Official Trustee asserts that all the art works acquired between November 1983 and July 1985 and which remained in Art Holdings' control at the date of Baker's bankruptcy were also Baker's own property and so then vested in the Official Trustee.

39. Baker's income from his tax avoidance activities had ceased by November 1983. Funds for the acquisition of the "A" collection appear to have come largely from the sale of some of the art works that Baker had accumulated up to November 1983 and from funds said to be available to Dacine as trustee of the Dacine Trust. Dacine did not maintain any bank accounts itself: another Baker-controlled company, Venmere, made all the payments to gallery owners for the acquisition of the works bought in the period November 1983 to July 1985, from the general pool of funds available to it. Venmere's books contain details of receipts and disbursements said to be on account of Dacine's art buying and selling activities as trustee of the Dacine Trust. The funds received by Venmere, which it used to buy art in this 20 month period, (purchases which the respondents claim were made for the Dacine Trust), include a particular sum of $250,000.00. This was part of the distribution of $700,000.00 made to Mrs. Baker on 29 June, 1984 by JABI as trustee of the J.A. Baker Family Trust from the capital profits realised by that Trust from the sale of certain real estate. There is in evidence a document described as a minute of the meeting of Mr. and Mrs. Baker, directors of JABI, as trustee of the Family Trust, in which the resolution for this distribution is recorded. Mrs. Baker is said to have lent this money to Dacine, interest free, to buy art. There is a record in Dacine's ledger in respect of this sum as a loan by Mrs. Baker to Dacine. She certainly signed a letter drawn up by Baker, addressed to Dacine and dated 21 June, 1984, in which she advised Dacine of her intention to make this loan and in which she wished "the Trusteeship the best of success in its endeavours". But she has no recollection of receiving $700,000.00 or any other sum from the Family Trust or from the sale of the properties in question. She has no recollection either, of ever giving or lending Dacine a quarter of a million dollars of what is said to have been her money. Her understanding of things is summed up in the following exchange:

"Can we assume, therefore, that your husband if there was
any money distributed from the trust, he was the one who got
it?---I guess we have to assume that."

40. Mrs. Baker is later said to have given away what the books of Dacine and the other documentation prepared by Baker show as her right to repayment on demand of $250,000.00 in cash, by taking payment of the $250,000.00 from Dacine in the form of a bill she drew on Dacine and accepted by it on 4 July, 1985; she then gifted this bill to Axegrowers the same day, when Baker organised what is said to be the sale for value of the collection by Dacine to Axegrowers as trustee of the Contemporary Art Trust, yet another trust he set up. This "gift" was recorded in another letter dated 4 July, 1985, prepared by Baker and signed by Mrs. Baker. However, she has no recollection of this transaction either and admitted she did not understand the significance of the letter when she read it in the witness box. She did not recollect ever knowing of a company called Axegrowers. She said that, so far as she knew, she never had a quarter of a million dollars to dispose of.

41. I accept what Mrs. Baker says about all this. The view I have formed is that she is unaware of ever engaging in these actions with respect to the $250,000.00: it is not a case of her having forgotten matters that she once knew of. Even if it is accepted that Mrs. Baker did acquire a legal entitlement to $700,000.00 from the proceeds of the sale of the trust properties, her lack of any knowledge of relevant matters I think shows that she never in fact loaned $250,000.00 of those

moneys to Dacine and never made a gift to that value to Axegrowers. If Mrs. Baker ever had any inkling that she was making an interest-free loan of a large amount of her moneys and later effectively abandoning her right to repayment of those same moneys, as is recorded in or effected by the documents Baker prepared and got her to sign, I do not think she would now be completely ignorant of a quarter of a million of her own moneys passing through her hands in these ways. Even though she was at the relevant times living in affluent circumstances, she could not have forgotten her generosity with respect to such a large sum of money if the loan and gift transactions that Baker caused to be documented ever in truth took place. I do not accept that the loan and gift transactions in which it is said by the respondents Mrs. Baker participated ever occurred. That Baker caused documents including business records of Dacine to be prepared to suggest otherwise does not require a different conclusion. The transactions recorded in these documents do not even qualify to be called shams: they neither camouflage real but different transactions from those recorded in the documents nor a real but different relationship from that of benefactor and recipient of generosity between Mrs. Baker on the one side and Dacine and then Axegrowers on the other: there never was any relationship at all, nor any transactions of any relevant kind, between her and either company. The reality is that this $250,000.00 was simply used by Baker to augment his collection. This is what he intended to do from the moment he got access to these funds on the sale of the trust properties in mid 1984. His fabrication of documents designed to suggest that Mrs. Baker first loaned her $250,000.00 to Dacine and then gifted her rights with respect to recovery of that sum to Axegrowers when no such transactions ever took place has the result in my opinion that Baker unlawfully appropriated that money to his own use rather than that he borrowed it from Mrs. Baker. The "A" collection was acquired by Baker in this way - using this $250,000.00 and whatever other moneys he had access to, including funds from the sale of works in the collection.

42. That the collection, including the art works acquired in the period November 1983 to July 1985 when the respondents say Dacine owned it as trustee of the Dacine Trust, remained throughout Baker's own property is further evidenced in my view by the nature of the structure Baker set up to hold the collection in this period.

43. Both Dacine and the Dacine Trust were, on Baker's own admission, controlled "in a practical sense" by him. Either in his capacity as principal or by reason of the control he had over Dacine, Baker acting alone could revoke or vary any of the trusts or powers in the deed and declare any new trusts or powers of the trust fund (cl. 9.2); he could appoint new beneficiaries and pay them the whole or any part of the capital and income of the fund (cl. 6); he could replace the trustee (cl. 9.3); he could distribute all or part of the capital and income of the trust fund to any beneficiary - who included himself - or he could accumulate all or any part of the income of the fund (cll. 3.2 and 5); he could dispose of the whole or part of any trust property (cl. 10). He could terminate the trust at any time by appointing a new termination date (cl. 7). When he exercised his powers as principal and when the trustee (under his control) exercised its powers, both were free to act at their absolute discretion (cll. 9.1. and 9.3). An illustration of the practical extent of the power Baker had in respect of this trust and of his attitude towards using that power is provided by his action in 1985 in appointing Thalia Pty. Ltd. ("Thalia") (another company Baker admitted he controlled) as trustee in lieu of Dacine for a six day period to avoid a large amount of stamp duty on the transfer of some Dacine shares, and in then re-appointing Dacine as trustee. The discretions to deal with trust property that were vested in Baker and his wife as joint trustees of the J.A. Baker Family Trust under the deed of 1 July, 1970 were much more restrictive than those that Baker personally had in respect of the Dacine Trust. The trustees of the Family Trust had no power to accumulate income; instead, it automatically vested in the beneficiaries in equal shares at the end of each year if the trustees did not exercise this discretion to distribute each year's income differently (cl. 3); although they could alter the form in which the trust capital was held from time to time (cl. 5(j)), the trustee could not distribute any trust capital before the trust's fixed termination date (cl. 2), save to advance

a beneficiary, while a minor (cl. 5(h)); their power to vary the trust deed was subject to the agreement of the settlor (Baker's mother). It is apparent from his evidence that Baker was well aware that his powers in respect of this trust were "much more restricted" than those he had under the Dacine Trust deed. The Dacine trust deed is said to be a deed pursuant to which a permanent art collection was held. The Dacine deed is in my opinion quite inappropriate to give effect to such a purpose. It does not contain any rules or guidelines by reference to which the collection is to be developed or decisions on acquisitions to or disposals from the collection are to be made. It does not even mention the art collection. While Baker, his wife and children are described as "secondary beneficiaries" in the trust deed, various public art galleries in Australia are described as "primary beneficiaries"; however, there was never any distribution of any of the income or capital assets of this trust to any of those galleries. Nor were any of these galleries even told that they might possibly expect to benefit under this trust. (The same applies to the Contemporary Art Trust Baker set up on 3 July, 1985.) In view of what Baker has had to say about wanting to build up a permanent collection which would be accessible to the public but which he did not own, it might be thought that it could more appropriately have been vested in him or in some entity under his control as the trustee of a charitable trust. But such a trustee would be answerable to the Court at the suit of the Attorney-General for his administration of the trust: that would never have suited Baker's purpose of retaining full personal control himself. The extreme flexibility the Dacine Trust deed confers on the trustee and the principal, especially when the one person effectively controls both, serves to show that this deed was designed to achieve something different from the establishment of a trust as a home for a permanent art collection. The deed is tailor-made in my view to facilitate the person who is both principal under the deed and the controller of the trustee, dealing with the trust property as he pleases, in exactly the same way in which he would be free to deal with it if it were his own personal property. This is what I think Baker intended. That Baker intended he would be free to deal as he pleased with the collection while it was supposedly the subject of the Dacine Trust is further confirmed by the fact that the public galleries, the only potential beneficiaries of this trust who were not Baker's wife or children, never knew that they were named in the trust deed as beneficiaries; for all practical purposes there was no one likely to challenge any decision Baker made either as principal of the trust or controller of the trustee.

44. Ms. Johnson, who was an employee of Baker's and who did not give evidence, created the Dacine Trust in March 1983 by settling $5.00 on the trusts declared in the deed. She was the settlor of a number of trusts that Baker caused to be established and which he admitted he controlled. Given Baker's acknowledgments of his pervasive control of all the various entities involved and given that the Dacine Trust was set up at Baker's instigation and his explanations in cross-examination why this Trust was set-up, the reality is that the settlor acted at his behest, not to give effect to any intention of her own when she set up the trust, but to give effect instead to Baker's own instructions, i.e., to his own intentions. In my opinion, she acted merely as Baker's agent when she executed the Dacine Trust deed dated in March 1983.

45. There may be an argument that, having regard only to the provisions of the trust deed and quite apart from Baker's actual intentions, the degree of control exercisable by Baker, the true settlor of the trust, over the trust property by virtue of his position as principal of the trust and controller of the trustee is such as to prevent any trust arising. In some jurisdictions in the United States, the reservation by the settlor of a trust of a power to revoke the trust coupled with the reservation of extensive powers of control over the trustee's administration of the trust are regarded as making the trust illusory and void. See The Law of Trusts, 4th Ed., Scott, Vol. 1A, para. 57.2. However, the editor comments at p. 140: "The trend of the modern authorities is to uphold an inter vivos trust no matter how extensive may be the powers over the administration of the trust reserved by the settlor." But the flexibility that these trust arrangements conferred on Baker has evidentiary significance in revealing Baker's real intent when he caused Ms. Johnson to set up this trust.

46. Having decided in 1983 that it was time to put the art collection into a trust, the existence of which he would be able to clearly prove, Baker was concerned not to shut it up in a restrictive way. He wanted the same freedom for himself to deal with the art collection how he chose, as he had hitherto, as its full beneficial owner. I consider that from November 1983 Baker intended, as between outsiders and the art collection, that the art would, so far as he could ensure it, be beyond the reach of his creditors by being a trust asset. But co-existent with this intention was an intention by Baker, as between himself and the collection, to be the unfettered owner of it; the trust was only set up by Baker in March 1983 to be available for use by him when he considered the time was ripe to do so, to prevent outsiders interfering with his ability to exercise complete control over the collection. He never intended to divest himself, in relation to the art collection, of any of the proprietary interests, capacities and powers that an absolute owner has with respect to his goods.

47. Before an arrangement will be recognised in equity as amounting to a trust, there must be an intention on the part of the person responsible for bringing into existence the arrangements in question that they will amount to a trust. Even though a person purports in express terms to settle property on particular trusts, if that person's intention is to benefit only himself, equity will not recognise that as a sufficient intent to give rise to a trust. An illustration of this principle is provided by the law governing assignments by debtors of their property to "trustees" for the benefit of their creditors. Such an assignment that does not comply with Part X the Bankruptcy Act 1966 may or may not amount to a trust recognised by equity:

"The question always is - was it intended by the debtor that the creditors should be actual beneficiaries and that the trusts should not be revocable by him or was the arrangement merely for his personal convenience and for his own benefit - a mandate to the named trustee as agent of the debtor principal which was revocable by the debtor ... The distinction was expressed by Turner V-C, in Smith v Hurst [1852] EngR 625; (1852) 10 Hare 30 at 47; [1852] EngR 625; 68 E.R. 826 at 833:

Cases appear to me to result in this, that in cases of deeds vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered or modified by the party who has created the trust (i.e., in the absence of an express power of revocation); but that in the cases of deeds purporting to be executed for the benefit of creditors, the question whether the trusts can be revoked, altered or modified depends upon the circumstances of each particular case. It is difficult, at first sight, to see the distinction between the two classes of cases; for in each of the classes a trust is purported to be created, and the property is vested in the trustee; but I think the distinction lies in this: in cases of trust for the benefit of particular persons, the party creating the trust can have no other object than to benefit the persons in whose favour the trust is created, and the trust being well created the property in equity belongs to the cestui que trust as much

as it would belong to them at law if the legal interest had been transferred to them; but in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the Court there has to examine the circumstances for the purpose of ascertaining what was the true purpose of the deed ..."

48. See Jacob's Law of Trusts, 5th Ed., pp. 77-78. Even though a person by the use of clear, express language purports to make himself or another trustee of property for a third person (as Baker, as the true settlor of the Dacine discretionary trust, purported to do), evidence that the settlor's actual intention was to retain complete control and a complete power of disposition over the whole of the property in question will prevent any trust arising. See, e.g., Commissioner of Stamp Duties (Qld) v Jolliffe [1920] HCA 45; (1920) 28 CLR 178 at 181 and Winter v Grady (1921) 21 SR (NSW) 686.

49. Baker's intentions as the true settlor of the Dacine Trust were, in my opinion, insufficient to amount to an intention to create an arrangement which the law will recognise as a valid trust.

50. Even if Dacine held the legal title to the "A" collection, it was Baker who acquired it for himself with the moneys belonging to Mrs. Baker and to Venmere which were available to him. There being no valid trust of which Dacine was trustee when Baker caused moneys of others to be used to buy art in Dacine's name, he was in reality buying those art works for himself through his agent, Dacine. Baker was always the beneficial owner of the "A" collection also.

The "B" collection

51. The question now arises whether it was Baker or Art Holdings as trustee of the Contemporary Art Trust who owned the "B" collection. The respondents say that the entire collection was held by Art Holdings, as trustee for the Contemporary Art Trust, from July 1985 to 20 January, 1990 and that it was that company which acquired the "B" collection during that period as trustee for that trust. On 4 July, 1985, three weeks before the issue of the s. 264 notice directed to Baker, his wife and certain of his companies, the art collection was transferred yet again, purportedly by way of sale for value, by Dacine to Axegrowers (later renamed Art Holdings). The steps Baker then implemented in an attempt to pass title to the collection in the form it was in on 4 July, 1985 to Axegrowers were ineffective to achieve that: the property in the collection was in Baker, not Dacine. Dacine had nothing to sell as trustee of the Dacine Trust to Axegrowers; the "X", "Y", "Z" and "A" collections remained Baker's property up to the date of his bankruptcy.

52. For the four and a half years from July 1985 to January 1990, all transactions concerning the art collection were recorded in Art Holdings' books. Like Dacine before it, Art Holdings did not have a bank account, so that initially Venmere and, after May 1986, Vestos, another of the companies Baker controlled, acted as "banker" for Art Holdings. All sales and acquisitions of art were recorded in a running account maintained between Art Holdings and Venmere and then Vestos. The respondents rely on this documentation to support the argument that it was truly Art Holdings who, from July 1985 to January 1990, owned the collection, and, in particular, the acquisitions made in this period that the Official Trustee has called the "B" collection.

53. Baker sought to effect a transfer of the collection from Dacine to Art Holdings in July 1985 in this way: however, consideration for the transfer of the collection by Dacine to Art Holdings was again said to have been effected by means of a bill of exchange, drawn by Dacine on 4 July, 1985 in

the sum of $700,000.00 on Art Holdings, and accepted by it. This bill was subsequently endorsed back to Art Holdings through the Rekab No. 2 Unit Trust in a manner virtually identical to that which occurred when Dacine purchased the collection. No cash or anything else of value changed hands in connection with what is said by the respondents to be a further sale for value of the art collection: it was Baker's intention that the bill would not be presented for payment by any holder, all entities which he controlled. On the same date, 4 July, 1985, Mrs. Baker drew the bill for $250,000.00, to which I have referred, on Dacine, the dealings with which bill are said by the respondents to have eliminated her right to repayment of the loan made back in June 1984 by Mrs. Baker to Dacine.

54. Notwithstanding the care he took with respect to the preparation of the documentation and of the records of Venmere and Vestos to which I have referred, Baker is vague as to the reason for this transfer of July 1985. In evidence, he said that the sale occurred on the advice of his Sydney solicitor, a Mr. Fisher (who was not called to give evidence) and was somehow occasioned by the imminent introduction of capital gains tax. However, this experienced accountant could not further explain what capital gains tax advantages may have flowed from transferring ownership of the collection other than by saying: "I knew at the time what it was about and I just don't remember all the details now." In the course of his cross-examination in the tax appeal, he gave quite different evidence about this transfer: he was specifically asked by Pincus J whether there was any tax-related reason for the sale of the collection and his response was to the effect that he was not aware of any. In further cross-examination during the tax appeal, the reason Baker gave for setting up the new trust was as follows:

"Apart from evasion of creditors, did it have any other
purpose or not?---No, other than as I say my habit of
holding things in trust.
Habit and evasion of creditors is the answer?---Yes."

55. Baker now denies that the transfer was motivated by a desire to evade creditors or to disguise the ownership of the collection, pointing to the fact that all the books, both of Dacine and of Art Holdings and the records of the transfer between the two companies have been clearly maintained. In this respect, this transfer stands in marked contrast to the earlier transfer that Baker says took place from the trustee of the Modern Art Trust to Dacine. Baker denies that there is any connection between the transfer of the collection and the Taxation Department audit, claiming that the s. 264 notice came "out of the blue", without any prior warning. I do not, however, accept his latest explanation for the reason for the transfer. While Baker may not have received any official notification of the impending investigation, it is unlikely to have come as a complete surprise. I consider that the evasion of creditors and the desire to protect the collection from adverse claims, notably claims that would result from action by the Taxation Department against Baker personally which he was then very much concerned about, were, as Baker acknowledged in evidence in the tax appeal, the two chief reasons for this transfer in July 1985. It was intended by Baker to conceal the true position, viz., that he remained full owner of the collection.

56. His intentions in causing the Contemporary Art Trust to be set up on 4 July, 1985 and in seeking to set up a transaction of sale of the collection by Dacine to Art Holdings were the same as the intentions he had when he set up the Dacine Trust and then sought to pass title to the collection to Dacine as trustee for that trust in November 1983. The Contemporary Art Trust deed is in the same terms as the Dacine deed (save that the Art Gallery of South Australia is added to the list of primary, but unadvised, beneficiaries). The wide nature of the powers Baker had under the Contemporary Art Trust deed is further evidence of his intention to retain sole personal and absolute control of the collection, just as he had done previously. Under it, Baker was principal of the trust, and was also effectively in full control of the trustee. According to the trust deed, the

settlor of this trust was Ms. Burgess, at the time another employee of Baker's. He gave some evidence suggesting that she exercised a range of discretions independently of him in various of her capacities, e.g., as a director of certain of Baker's companies. However, I am satisfied by her evidence, supported as it is by various admissions by Baker, that at all times she acted only in accordance with Baker's directions, sometimes general, sometimes specific. In settling $5.00 on Axegrowers to establish the Contemporary Art Trust, Ms. Burgess' role was identical with that of Ms. Johnson as settlor of the Dacine trust, i.e., she acted as Baker's agent. Baker confirms this. When asked in the tax appeal why the Contemporary Art Trust was set up, he said:

"For me it was easier to think about setting up a new trust
than varying one. I cannot justify that. It is the way I
did it."

57. For the same reasons I have given for holding that the steps Baker took in an attempt to set up the Dacine Trust were ineffective to establish a valid trust, I consider that his attempt to set up a trust under the name the "Contemporary Art Trust" was ineffective to achieve such a purpose. The "B" collection was, like the "A" collection, simply purchased in the name of Art Holdings by Baker for himself with any moneys available to him from any source, including the funds of his companies. He was the beneficial owner of the "B" collection at the date of his bankruptcy.

The "C" collection

58. It remains to consider the question of the ownership of the "C" collection. This group of works makes up the balance of pictures transferred to Goodglint on 31 January, 1990 that are not included in the "X", "Y", "Z", "A" or "B" collections because the Official Trustee, who devised these classifications for the purpose of the action, has been unable to identify when they were acquired, although they were in the collection in January 1990.

59. So far as the evidence reveals, this group of works was treated by Baker in exactly the same way as the works which the Official Trustee identifies as the "X", "Y", "Z", "A" and "B" collections. All the pictures in all six of these groupings were transferred to Goodglint in the circumstances I mention later in these reasons to protect them from the claim of the Taxation Department, Baker's major creditor. The evidence indicates that this group of works was also dealt with by Baker in the same way as all the other works: they were listed in the computer catalogue which Baker established and maintained from the early 1980s along with all the other works in the collection until well after his bankruptcy, e.g., about 25 of them, including John Armstrong's "Bag Rack", Firth-Smith's "Untitled (Grey-green, Orange)", Richmond's "Leaning Form" and Taylor's "Incantation", were listed in that catalogue in the form it took on 19 September, 1985; the same 25 pictures are still listed in the catalogue in one or both of the forms it was in on 8 January, 1990 and on 24 September, 1990. The pictures in this grouping by the Official Trustee do not appear to have been differentiated by Baker in any way from the other works in the catalogue.

60. In my view, this group of pictures was simply part of the corpus of the collection of which Baker was, at the time of his bankruptcy, the beneficial owner. They, too, vested in the Official Trustee on 16 January, 1990.

Sales of works in the "X", "Y", "Z", "A", "B" and "C" collections after Baker's bankruptcy

61. After his bankruptcy, Baker arranged for the sale of some works from the collection. The title to all these works was, however, then in the Official Trustee. Baker must account to the Official Trustee. I will hear argument on which of the other respondents should also account in respect of these sales: this will depend upon whether any of the other respondents actually received the proceeds of the sales either to hold on behalf of Baker or to use for their own purposes.

62. The evidence also indicates that part of the proceeds of the sales of works made after Baker became bankrupt was used by Baker to purchase further art works. The title to these newly-purchased works, insofar as they remain in the collection, is in the Official Trustee. Insofar as works which have been bought from the proceeds of sale of other works after the commencement of Baker's bankruptcy but have themselves now been resold, Baker, and any other respondent involved in such sales, must account to the Official Trustee in respect of those sales.

63. There are other aspects of Baker's activities which it is necessary for me to deal with since I have found support in the evidence relating to these activities for the views I have formed and already mentioned in concluding that Baker throughout was the beneficial owner of the entire art collection, notwithstanding his convoluted attempts to create a different picture.

Bankruptcy and the transfer of the collection to Goodglint in 1990

64. The transfer of the collection by Art Holdings to Goodglint took place on 31 January, 1990, i.e., after the commencement of Baker's bankruptcy. Given that I have found that the "X", "Y", "Z", "A", "B" and "C" collections were then Baker's own property and so vested in the Official Trustee on 16 January, 1990, this transfer of 31 January, 1990 was ineffective to confer any title to the collection on Goodglint: Art Holdings had nothing to transfer to Goodglint by way of art works. But an examination of the circumstances in which this transfer occurred is relevant to the assessment of Baker's intentions with respect to the collection prior to that date.

65. In 1987, the Commissioner of Taxation filed a creditor's petition against Baker. However, this petition was stayed pending the outcome of the tax appeal. The judgment of the Full Court upholding Pincus J's decision in the tax appeal was delivered on 20 December, 1989, by which time the creditor's petition had gone stale. The practical effect of the decision of the Full Court was that Baker's bankruptcy was inevitable. Rather than wait for the Commissioner to present another petition, Baker determined to enter bankruptcy on his own petition, after first restructuring his affairs. Immediately the decision of the Full Court was known, Baker consulted his solicitor, Mr. Quentin George, to prepare for his impending bankruptcy.

66. George referred Baker to Dr. O'Hare, a consultant to George's firm. O'Hare did not give evidence. Together, Baker and O'Hare devised a detailed plan of action. Notes made by Baker during his meetings with O'Hare are in evidence. The plan of action formulated by O'Hare and Baker, as indicated by these notes, involved, firstly, appointing new directors to all companies. In his discussions with O'Hare, Baker jotted down some names of people, including George and his partner Mr. Whitton, who might be suitable persons to be the replacement directors. However, he ultimately decided that his children, Elizabeth Baker and Nathan Baker, should be the directors of the new corporate trustee that would hold the collection and that a Ms. Jones and a Mr. Black, two employees of Baker's, would be the directors of the remainder of the companies in the group. After about four months, Nathan and Elizabeth Baker replaced Ms. Jones and Black as the directors of all these other companies. Neither Nathan nor Elizabeth Baker had any commercial experience and both were engaged in full time university study. However, in Baker's mind, their lack of experience and their study commitments made them eminently suitable to be directors, as it was always his intention to maintain effective control of the collection and the various companies. The new directors were merely his puppets: at their public examination in Baker's bankruptcy in December 1990, neither Nathan nor Elizabeth Baker had any awareness of many of the companies of which they had been directors for some time.

67. Secondly, the plan called for Baker to "set up new companies and trusts". Baker says that he initially intended merely to resign as a director of Art Holdings and to appoint new directors in his stead. It was, according to Baker, O'Hare who suggested that the collection should be transferred to

a new trust, a course objected to by Baker. However, O'Hare explained the significance of the "examinable period" under the Bankruptcy Act and that the transfer of the collection to a new trust was prudent in order to protect the collection against any possible claim by the Official Trustee of Baker's estate in bankruptcy. This accurately states the reason for structuring the transaction in the way they did.

68. Thirdly, Baker was to establish residence in Sydney and file his debtor's petition there. Between them, O'Hare and Baker worked out details of the steps Baker should undertake in order to "acquire" this new residence. I do not accept Baker's explanation that his move to Sydney and his filing his petition there was motivated by a desire to avoid any possibility of any questions concerning the administration of his estate being determined by Pincus J, out of concern that Pincus J would not give him a fair hearing. It is noteworthy that Pincus J dealt with various interlocutory matters in this application, some having a substantial impact on Baker's ability to deal with the collection, without objection by Baker. I consider that Baker's move to Sydney and his filing his petition there were designed to disassociate himself from the collection, in appearance at least, in the hope that if the estate were administered in Sydney, the Official Trustee would be less likely to make a claim against the collection, which remained in Brisbane.

69. Finally, the assets were to be transferred to the new entities. The transfer was to be effected using the powers vested in Art Holdings as trustee of the Contemporary Art Trust, to appoint the new corporate trustee as a beneficiary of the Contemporary Art Trust, and then to distribute to the new trustee, in its capacity as beneficiary, all trust assets, save for one painting, selected by Baker, which would be retained by the Contemporary Art Trust, to ensure that trust did not fail for want of assets. Drafts of the resolutions, minutes and letters required to give effect to the transfer were produced by O'Hare and provided to Baker for his comments. Amendments were made to the drafts by Baker and O'Hare in consultation. Nathan and Elizabeth Baker played no significant role in planning the restructure, although it was the respondents' case as pleaded that Baker had nothing to do with it, that it was all arranged by the two children on advice from Q.D. George, Hillhouse and Co., "which is privileged". It was Baker who, after obtaining his children's agreement to act as directors, told them to make an appointment to see his solicitor. O'Hare did not seek any input from Nathan and Elizabeth Baker or obtain instructions from them. He simply told them of the structure that had been agreed between himself and Baker. By the time they saw O'Hare, the form of the transaction had been finalised and the documentation prepared; it merely awaited execution. In the course of their second meeting with O'Hare, Elizabeth and Nathan Baker signed the necessary documentation to take office as directors of Goodglint and to make Snowdare Pty. Ltd. ("Snowdare"), a company in which they were the shareholders, Goodglint's shareholder. The bill of Q.D. George Hillhouse and Co. for advising in relation to the restructuring was addressed to Baker personally under cover of a letter which read: "Dear Jim, ... Costs of acting on your behalf in relation to the incorporation of Goodglint and restructuring."

70. Despite Baker's evidence to the contrary, I find that the entire restructure was planned and co-ordinated entirely by Baker in association with O'Hare, and was executed under Baker's instructions.

71. The resolutions of Art Holdings approving the distribution of the trust fund to Goodglint and the deed of transfer were signed by Ms. Jones and Black, who had been appointed the directors of Art Holdings when Baker resigned on 6 January, 1990. Similarly, Ms. Jones and Black signed letters from Art Holdings to Service and Property Pty. Ltd. ("Service and Property") directing Service and Property to henceforth hold on behalf of Goodglint any works that were, at the time of transfer, bailed to Service and Property, and letters from Service and Property to Art Holdings and Goodglint confirming its receipt and acknowledgment of that direction. All these actions occurred on 31

January, 1990, i.e., after the commencement of Baker's bankruptcy. I find that when Black and Ms. Jones executed these documents, they did so on Baker's instructions and in accordance with the plan of action he had devised with O'Hare in yet another attempt to ensure that the Taxation Department would not, through Baker's bankruptcy, be able to have recourse to the art collection to satisfy Baker's tax debts.

Baker's control over the company group

72. Baker's role in the companies has not changed at all notwithstanding his bankruptcy. It is he who effectively runs the companies now, just as he did before. Before his bankruptcy, Baker did not seek advice or input from any of his co-directors, who were merely "there to make up the numbers". Both before and after his bankruptcy, Baker planned, devised and negotiated all transactions and ensured that all necessary steps were taken to effect them and merely told the directors, whether Mrs. Baker, his children or his employees, of the general nature of the transaction and its effect. At no stage were any formal company meetings ever conducted. Where minutes were required, they were prepared by Baker and merely signed by the relevant directors. Since Baker's bankruptcy, Elizabeth and Nathan Baker have been, in varying degrees, involved in the operations of Goodglint and the collection; but their role is limited to the performance of tasks of the kind done by employees rather than by directors. Elizabeth Baker acknowledges that from the time she became a director, Baker's decisions in relation to the companies, the trusts, the art collection and financial matters have always been followed and will continue to be followed "presuming he retains his sanity". Both before and after his bankruptcy, Baker exercised absolute control over all of the companies in the group. He conducted all negotiations and business dealings of a substantive nature, both with Westpac and with all other third parties. It was Baker who alone conducted the negotiations and made the arrangements with Bridge Finance in 1990 to obtain a $350,000.00 loan for Vestos that was necessary to rationalise the group's position, temporarily at least, with Westpac, which was secured over six paintings from the collection. It was Baker who conducted all dealings with the insurance agent over matters arising from the flood of the Melbourne Street property; despite not holding any formal office with the company, it was Baker who, as a "former director", attested to the seal of Art Holdings on the deed of release in respect of the insurance claim.

73. Prior to bankruptcy and until Black left his employment in the latter half of 1990, Baker says he relied on Black to control the day-to-day operations of the company group. However, Black's role in this regard was entirely as a subordinate to Baker in that he operated within the confines of either general or specific directions issued by Baker. He did not, in any real sense, exercise any control over the companies.

74. As well as exercising complete control over the companies in the group, Baker acted and continues to act as the curator of the collection, with sole and absolute dominion over it. He plans and shapes the collection, personally deciding which works to sell and which it is necessary to retain in order to maintain the integrity of the collection; it is he who decides on acquisitions for the collection. It was he who decided which paintings to sell, what price to sell for and how to apply the proceeds. Baker acknowledges that he has retained this function notwithstanding his bankruptcy. He says "it would be neither possible nor responsible to abandon it".

Arrangement of Group Finances

75. Neither the applicant nor any of the respondents attempted to examine exhaustively Baker's business and financial affairs. Attention was confined at the hearing to those entities which either held the art collection or provided services in respect of the collection. The evidence suggests that Baker, at various times, was engaged in a number of different commercial dealings, not explored at the hearing. But in the latter part the 1980s loan funds from Westpac were a major source of group funding. During the latter part of the period July 1985 to January 1990, the roles within the group

were clearly defined, at least so far as notations in company records are concerned, with Art Holdings holding the collection, Service and Property attending to the administrative matters as a service company and Vestos being the owner of the premises in which the collection was housed and the source of the funds needed by both Art Holdings and Service and Property to carry on their operations. In 1987 the collection was moved from Baker's home at Capalaba to a building, then recently purchased by Vestos, in Melbourne Street, South Brisbane where the works were placed on public display in what Baker called the Museum of Contemporary Art. The roles of these companies continued after Art Holdings was replaced by Goodglint as the holder of the collection on 20 January, 1990; the only difference after that being that Service and Property took over the role of "financier" from Vestos.

76. Baker operated all the companies he controlled as a group, freely transferring funds between them according to the particular needs of the time, even though each company was the trustee of a separate trust. All such transfers of funds were recorded in the inter-company loan accounts. This group method of control was reflected in Westpac's files where Vestos, Service and Property and (prior to 1988 when control passed to Mrs. Baker thus removing it from the group) Venmere, were also treated as a group on the basis of information provided by Baker. For example, cash flow projections produced for Westpac by Baker in December 1990 were consolidated projections for the "MOCA Group", including Goodglint, Vestos and Service and Property, the latter having by then taken over the role of group "banker", leaving Vestos with the function of group property holder.

77. In early 1989, Vestos began to experience financial difficulties. These worsened as the MOCA premises at South Brisbane failed to sell; by the latter part of the year Westpac, having provided substantial further funding to Baker in September 1989 to enable Vestos to buy premises at Petrie Terrace to house the collection although South Brisbane had failed to sell, began applying considerable pressure on Baker to reduce Vestos's debt. By November 1989 Baker's position with the bank was "precarious" and he was requested to reduce the Vestos debt as a matter of urgency. By December 1989, Westpac was refusing to assist Baker with further funding he needed to complete the refurbishing of the Petrie Terrace property: he was told that it was "imperative" that he rely on "his own funds received from the sale of art works". In January 1990, the bank informed Baker that it had reduced the limit of its assistance and that the debt in the Vestos account had to be cleared and Service and Property's overdraft had to be brought back within its $20,000.00 limit forthwith.

78. Although neither of the trustees of the collection in this last period, Art Holdings then Goodglint, was under any legal obligation to repay the debt owed by Vestos to Westpac, from about early 1988 sales of works from the art collection arranged by Baker were the chief source of funds used to meet the indebtedness of his companies, Vestos and Service and Property, to Westpac and the interest payments associated therewith. Art sales continued to be the primary source of funds for the group right through until mid 1990, when an injunction granted in the present proceedings at the request of the Official Trustee prevented the further application of proceeds from the realisation of art work to reduce the indebtedness of the group. On the cash flow projections for the "MOCA Group" (which Baker identified as comprising the Vestos Property Trust, the Service and Property Trust and the Contemporary Art Trust) provided to Westpac by Baker in December 1990, the sale of art was to account for around 85% of the total funds expected to be received by the group in 1991, to be reduced to around 75% in 1992. Apart from brief mentions of the sale of education books and the sale of a Mercedes Benz, the only source of funds mentioned in Westpac's internal memoranda from 1987 until 1992 are the sale of art works and the sale of the Melbourne Street property.

79. All sales of art from July 1985 to January 1990 were recorded in the running account maintained between Venmere, then Vestos, on the one side and Art Holdings, on the other side. The proceeds of each sale were posted to the account of the relevant trustee with the group "banker", thereby improving the trustee's position vis-a-vis the "banker". All art purchases by Venmere and then by Vestos up to January 1990 were recorded as inter-company loans or more accurately inter-trust loans to Art Holdings in the books of the relevant companies. But the position is different after January 1990, i.e., after Goodglint is said to have become the trustee of the collection: for the period July 1985 to January 1990 pretty full documentation is available, in the form of the records and books of account of Art Holdings, Venmere, Vestos and Service and Property, in respect of the activities of these various companies, including records of the activities of Art Holdings in buying and selling art works through Venmere and Vestos. This is in sharp contrast with the lack of relevant documentation prior to November 1983 and after January 1990. As to the latter period, Baker has not had any books prepared for Goodglint: all there is "so far as (he) knows" is just a mass of invoices. He could give no reason for this failure, although he would not accept the suggestion that it was a deliberate exercise to make it more difficult for any outsider to unravel Goodglint's activities.

80. The respondents rely on this post November 1983-pre January 1990 documentation to answer the claim by the Official Trustee that the art collection remained throughout Baker's own property and the claim by the Trustee that the transactions recorded in the various company's books and in the other documents relating to the July 1985 and January 1990 transfers are shams intended to conceal this. I have explained why I think all the art work remained Baker's personal property up to the commencement of his bankruptcy. It is, however, desirable that I also deal with this "sham" argument.

Whether the transactions were shams
81. The Official Trustee's alternative submission is that the transactions by which the art collection was acquired by Dacine, Art Holdings and Goodglint, the Official Trustee not acknowledging that the Modern Art Trust existed, were shams and therefore devoid of legal effect. Since I have found that there was no Modern Art Trust and thus no acquisition of title to the collection by Dacine in November 1983, the "sham" question can arise only with respect to the acquisitions of the "A" and "B" collections and the transfers of the whole collection from Dacine to Art Holdings and from that company to Goodglint.

82. Whether a document, transaction or series of transactions that on the face of things create or record the creation of rights and obligations is a "sham" in the legal sense of the word depends on whether the "acts done or documents executed by the parties to the `sham' ... are intended by them to give to third parties or to the Court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create". Snook v London and West Riding Investments Ltd. (1967) 2 Q.B. 786 at 802. After referring with approval to this statement and to other authorities, Lockhart J, with Foster J agreeing, in Sharrment Pty. Ltd. v Official Trustee in Bankruptcy (1988) 18 FCR 449, said, at 454:

"A `sham' is therefore, for the purposes of Australian law,
something that is intended to be mistaken for something else
or that is not really what it purports to be."

83. This statement has been applied in Re State Public Services Federation; Ex parte Attorney-General (W.A) [1993] HCA 30; (1993) 67 ALJR 577 per Toohey J at 593; Dalco v Federal Commissioner of Taxation (1988) 82 ALR 669 at 670-1, subsequently reversed by the High Court [1990] HCA 3; (168 CLR 614) but not in this respect and Re La Rosa; Ex parte Norgard v Rocom Pty. Ltd. (1990) 21 FCR 270 at 277-80.

84. It is no answer to a charge that a document or a transaction comprising or recorded in a series of documents is a "sham" to show only that each document has the effect that it purports to have. In Sharrment, supra, at 454-5, Lockhart J said:

"... the artificiality of the transaction does not give rise to its characterisation as a sham or to the characterisation of the constituent documents as a sham so long as each document `had the effect that it purported to have', and so long as none of the documents purported `to do something different from what the parties had agreed to do'..." (emphasis added)

85. The significance of this qualification that a document or a transaction may still be a sham even though each relevant document has its purported effect is illustrated by what Windeyer J said in Hancock v Federal Commissioner of Taxation [1961] HCA 90; (1961) 108 CLR 258 at 301-2:

"It is one thing to say that the substance and nature of a genuine transaction are determined by the form in which it is cast. It is quite another to suppose that going through a form makes a pretended transaction real. An ostensible gift that was made only so that the subject of the gift might be at once given back may not, it seems to me, really cause a change of ownership even momentarily. And, in some cases, probably the same might be said of an exchange of cheques."

86. In his Honour's opinion, what would otherwise be a fully effective gift may be nullified by an intention on the part of donor and donee that there was to be no change in the ownership of the property: a document that purports to make a gift to someone may be effective in its terms to do just that. Yet it will be regarded as a sham if the parties to the gift all along had an intention to bring about a situation inconsistent with there in fact being any gift.

87. In Sharrment, Lockhart J, at 456, recognised that the inability of the party challenging a transaction as a sham to identify the real transaction said to be obscured by the sham transaction will support the inference that the disposal of property or other transaction in issue is itself the real transaction and not a sham. However, it is not essential to show, before a transaction can be struck down as a sham, that it conceals another and different transaction. In Northumberland Insurance Ltd. (in liquidation) v Alexander (1984) 8 A.CLR 882, Clarke J, at 888-9, said:

"These authorities emphasise, as do many others, that it is the intention of the parties to the transaction which determines the question whether the act or document was intended to be operative according to its tenor or whether it was simply a facade or a disguise. It is not essential, in my view, that the facade disguise another and different transaction. It is enough if it creates an appearance that the contractual relationship between parties is different from the actual relationship."

88. Lockhart J, who cited this passage with approval in Sharrment at 454, expressed the same notion at 455:

"... a purported disposal of property, and by analogy a purported creation of a debt, may be a sham where donor and donee (or lender and debtor) do not intend to give effect to the transaction, it being agreed between them that there

will be no change in the legal and beneficial ownership of
the property."

89. It is the actual intentions of the relevant parties that must be ascertained in deciding whether a transaction is a sham. See Sharrment at 456 and 467 and La Rosa, supra, at 278-9.

90. The questions for determination are whether the documents and transactions that Baker instigated had the legal effect which they purport on their face to have and, if so, whether Baker as the person who was effectively in control of each company and trust intended a situation to exist different from that which the documents on their face were appropriate to bring about. The onus is on the Official Trustee to prove the existence of such intentions. A high standard of proof is required of the Official Trustee in this regard.

91. When confronted with the proposition that a transaction is a sham that cloaks some other and different transaction, courts pay close attention to the documentation said to comprise or record the sham transaction to see if the relevant parties to the challenged transaction intended the documents to have the legal effect they purport to have: the Court will not lightly infer that documents do not reflect the true intention of the parties. See Sharrment at 461.

92. The difficulty with giving any respect to the documentation relating to the transfers of the collection in 1985 (and 1990) or to the entries in the books of Venmere and Vestos, the group "bankers" to Dacine and Art Holdings, relating to the dealings with art works, is that they were all prepared by or at the direction of Baker. He was throughout the period 1985 to 1990 (as well as prior to and after that period) concerned to frustrate the tax investigation into his affairs, to defeat the claim made on him for tax payable in respect of his avoidance activities and to preserve the art collection he had built up. To those ends, he set up an intricate structure of companies and trusts over all of which he exercised sole effective control. In June 1987 he solemnly declared he held all his personal effects, including his wrist watch, on trust although he continued to enjoy the full use of them:

"By June 1987, by 10 June 1987, the position was that you
did not - apart from your clothing, you did not have any
assets or property at all; is that so?---Yes.
You had, I think on that day, made your last declaration of
trust or transfer of property by way of trust in the way of
some personal effects - well, what were some of them - yes,
there was a watch and a few other things, you know - you
know what I am referring to; I do not have the document in
front of me?---Yes, I know what you're referring to.
You know what - - -?---Yes.
- - - you are referring to. Now that, at that stage, meant
you only clothes left; would that be so?---Yes - yes.
Yes. So any - I mean, you would not have been able to pay
for a pie, really, at that time; would that be the
situation? If you went in and ordered a meal somewhere, you
could not have paid the, because you did not have any
assets. You would have had to get a loan from a company or
something of this kind?---Yes.
Mm?---Yes.
And you had done that deliberately, had not you?---Yes.
You deliberately put yourself in that position; and why had
you done that? I mean, you had good legal advice, did not

you, that you were going to win the tax case?---Yes.
Well, why did you make certain you put all of these assets somewhere else?---I'm just trying to remember - what was it, 1986, was it, 1987?
'87?---'87.
I am saying that - that was 10 June 1987?---I think it was just following the pattern that had been established for years that all the family assets were held by family trusts, regardless."

93. Occasionally, the complexities he has set up are such that he has forgotten to stick to the story he really wants to adopt - I have referred to his different explanations to Pincus J and to myself for his transfer of the collection to Art Holdings in 1985. He is a person who has been prepared to fabricate documents and company records on a substantial scale for his own pecuniary advantage in carrying on his tax avoidance activities. He has disposed of company records to impede official investigations into his unlawful activities. He lied persistently to those investigators and sought in other ways to mislead them. He has also given untrue evidence to this Court on a number of occasions in an attempt to mislead it as to his own liability to income tax and as to his ownership of the art collection: well prior to the hearing of the tax appeal, Pincus J ordered that Baker file an affidavit "setting out in detail the facts relating to" certain transactions referred to in particulars provided by the Commissioner of his reassessment of Baker to further tax. The affidavit Baker swore in obedience to Pincus J's direction is full of deliberately misleading statements. For example, in describing transaction No. 14, one of the typical transactions to which the tax appeal hearing was confined, which he said yielded his company Serula a profit as a result of Serula buying fabricated steel products from his tax client, Magna Constructions, then selling them to that client's own customers, Electric Power Transmissions and Westinghouse Pty. Ltd., and then subscribing for capital in a company controlled by the directors of Magna Constructions, he included in his "details of the transactions" the following statement:
25/3/81 Payment by Electric Power
Transmission Pty. Ltd. to
Serula Pty. Ltd. for
fabrication of steel
products" $229,847."
94. The true facts were that Electric Power Transmissions paid this sum by cheque to Magna, which endorsed it over to Serula in circumstances in which Baker agreed Electric Power Transmissions may have been wholly unaware of Serula's role in the matter. Baker's statement in his affidavit about this was not an innocent elision of these events into the payment he deposed to.

95. Moreover, he treats documentation of the kind relied on by the respondents, who say that it should be given the same consideration that records kept by an ordinary commercial organisation are commonly given by courts, as mere ploys to conceal his activities. I have referred to the examples of this that are provided by the documentation he drew up and had his former wife sign and which are said to prove an interest free loan by her to Dacine of $250,000.00 in 1984 and then a gift by her of that same amount to Art Holdings in 1985. His attitude that when it suits his interests the company records prepared by him or at his direction are a smoke screen and have nothing to do with actually reflecting what is going on is well demonstrated by the way he dealt with what he recorded in the books of Service and Property and then of Vestos, as loans to himself, on which he lived. These "loans" ended up totalling over $500,000.00. Both companies carried on business solely as trustees for certain trusts. Although all the books of these companies were not examined in evidence, through 1989-1990, Service and Property provided him with the funds to pay, e.g., the rent on his flat in Sydney, repairs to the Mercedes he drove (which was leased by Vestos) and various cash amounts. It also paid his Mastercard account:

"... you did have the price to buy a pie because you could use the Mastercard?---Yes.
You did not in fact have any money; you only had your clothes as we said yesterday. But in fact, you had access to a Mastercard?---Yes.
Okay. And in fact for the, whatever the period was there, there was $11,037.42 spent on the Mastercard?---Yes."

96. All these payments were written up in Service and Property's books as loans to Baker. By 30 June, 1990, the books showed Baker as owing over $35,000.00 to this company on his loan account. This amount was then transferred out of Service and Property's books to Baker's loan account with Vestos. The opening balance for the 1989/90 year in the loan account with this company is a balance owing by Baker of $430,230.00 at 1 July, 1989. During the next 12 months, Vestos paid Baker's costs of fighting the tax case through to the Full Court of over $56,000.00, gave him cash of over $4,000.00, paid lease payments on the Mercedes and other amounts for Baker. The balance of his loan account with Vestos, according to the books he caused to be written up on 30 June, 1990, had increased to $540,968.00. He did not write this off in Vestos's books as a bad debt although he had never made any attempt to repay any of this indebtedness or his indebtedness to Service and Property to which I have referred. The books show that it was instead transferred to another of Baker's companies, the dormant and asset-empty Telminco Pty. Ltd. ("Telminco"). His explanation for this is as follows:
"What was the reason for transferring the debit balance of your loan account with the Service and Property Trust from 30 June 1990 over to the Vestos ledger?---It was a piece of housekeeping that I - I did with no other basis than to leave the two operating companies, Service and Property in the first case, and then in the second state move, which is about the next entry (sic), Vestos, and I suppose the best word to describe what I was doing was to "park" the amounts in Telminco Finance until something could be worked out what to do with them to write them off, because I was - because I was bankrupt, there was no point in leaving them in the company books and they had to be written off somehow, and I did it this way. It could have been written off in the individual trusts, but it would have left them with a deficit. So I just couldn't work out how to deal with it."
97. He is speaking here about so called loans he caused his companies to make for him to meet his living and other personal expenses over a long period before his bankruptcy.

98. Another reason emerged later in his cross-examination, for him writing off these "loans" to himself in this way. He used what he called consolidated group accounts which he prepared in support of the frequent requests, many of them successful, which he made to Westpac for funding for Vestos. This exchange took place:

"... So in fact if the balance sheet, if they wanted to see a balance sheet of Vestos - by putting this over to Telminco, which had no assets at all, $540,000 would be removed as indebtedness of - as far as Vestos was concerned?---Yes.
But that did not enter your head; is that right?---I'm sorry?
Was that a reason you did it, or not? Did that - the

relationship - - -?---It may have been.
May have been. Well, is that the only reason that may have operated with you other than what you call it, just doing housekeeping and preferring not to have it in Vestos?---I can't think of another reason.
Cannot think of any other reason, right. Now, one of the interesting things about it is that if you had companies in a group, what you say might be right. But these were not companies in a group, were they; these are trusts that we are talking about here. They are individual trusts, constituted by separate trust deeds. Is not that so?---Yes.
And you thought it was all right to amalgamate, as it were, the inter-trust situation too; consolidate the inter-trust accounts?---Yes.
You thought that was in order, did you?---Yes."

99. He lived off what are said to be borrowings by him from the trust funds of these two companies which he controlled, accumulating what the books he caused to be prepared show as an indebtedness to Vestos on a "loan" account that totalled over $540,000.00 by mid 1990. Yet it is clear that prior to, as well as after, his bankruptcy he never intended to repay what he had written up as "loans" to himself: he had as far back as 1987 sought to achieve the position that he was without means, that he owned nothing except the clothes he wore (while nevertheless having access to a car, a credit card, holidays and other trappings of personal affluence). He did not intend the books of the various companies which he caused to be prepared to reflect what had actually been going on, at least so far as they touched on his use of company funds for his personal needs and in relation to the art collection. They were instead merely camouflage to conceal the true position, at least so far as they recorded dealings with respect to the art collection and his personal expenses: Baker was taking funds available to his companies as he needed them for his own purposes without ever intending to repay them. He was simply misappropriating them, not borrowing them. Writing them up as loans to himself in the companies' books does not alter this.

100. The fact that Venmere and Vestos may have engaged in a whole range of commercial transactions, e.g., the buying of real property, the making and carrying out of contracts for the renovation of that property and the paying of wages to employees for services rendered, which were perfectly genuine dealings carried out under the authority of the person who controlled those companies, Baker, and written up by appropriate notations in the companies' books, does not mean that they do not stand as legally valid transactions because other transactions took place which were also documented in the books and other records of both these companies but in ways which concealed the true nature of what actually occurred. For example, the fact that Baker caused Vestos to make payments for his benefit in respect of his living expenses, which he had written up in the books as "loans" to him, does not mean that they should be so regarded when Baker's intention in causing the company to make the payment was that it would never be repaid and that what he did was not borrow but misappropriate. Nor does the fact that purchases and sales of art were written up in the books of Venmere and Vestos as having been made on behalf of the trustees of the Dacine Trust and the Contemporary Art Trust mean that they must be so characterised when there is clear evidence that Baker, as the person who controlled both companies and caused the transactions of sale and purchase to be made, intended that those transactions would be carried out on his own behalf and not on behalf of either trust, even though at the same time, Baker caused entries to be made in the companies' books that were accurate reflections of other transactions into which the companies had truly entered.

101. In Sharrment, the Official Trustee's case was that W had, by a complicated series of transactions in 1979, turned payments by him of $420,000.00 to two of his companies into an apparent debt of $420,000.00 owing by him to his family trust; in 1980 the trustee of that trust purchased a property, largely with funds of $442,000.00 that came from two other W-controlled companies in what was said to include repayment by W to the trust of this $420,000.00 debt. The Trustee contended that the whole series of transactions was a sham with the result that the property was beneficially owned by W and so passed to the Official Trustee. W had died and it was his family who resisted the Official Trustee's claim to the property. They argued, firstly, that there was no sufficient evidence that the $442,000.00 of purchase moneys that came from the two W-controlled companies was W's own money rather than that of his companies; secondly, that even if W owned these funds, the transactions were equally open to the inference, in the circumstances of the particular case, that W's intention was to benefit his family at his own expense rather than (as the Official Trustee contended) to put his assets beyond the reach of the Tax Commissioner, who W must have identified prior to his death as a major potential creditor. The Court accepted both these arguments and rejected the Official Trustee's claims.

102. This case is quite different from Sharrment. Here Baker gave evidence and there is a mass of information before me that has enabled me to find that Baker's intention from November 1983 on was to so arrange things that they would give to outsiders the appearance that the art collection was held in trust by Dacine, and then by Art Holdings, on certain trusts, when the reality was that the collection remained in the full beneficial ownership of Baker personally. This case can be sharply contrasted with Sharrment, where there was no evidence as to W's intentions when he entered into the transactions impugned as shams other than the evidence provided by the transactions themselves and where there was evidence from which the Court was able to infer that a possible explanation for W's actions was a desire to benefit his family at his own expense.

103. There is no difficulty in identifying the real transactions cloaked by what are said to be the sham transactions. Insofar as Baker caused the purchases in the period November 1983 to July 1985 of the group of works, the residue of which forms the "A" collection, to be recorded in the books of Venmere as purchases on behalf of Dacine, the transactions so evidenced were shams designed to give the appearance to outsiders that Dacine, whose sole business was as trustee of the Dacine Trust, was the owner of those works for that trust when in truth the works so recorded in Venmere's books were purchased by Baker for himself, with any moneys, including those of Venmere, to which he had access. The same position obtains in relation to the "B" collection. Insofar as Baker, in the period November 1983 to January 1990, caused the sale of works from the group, the residue of which comprises the "X", "Y" and "Z" collections, to be recorded as sales by Venmere and Vestos on behalf of, first, Dacine as trustee of the Dacine Trust and then on behalf of Art Holdings as trustee of the Contemporary Art Trust, the transactions so evidenced were shams, the reality being that all those sales were sales made by Baker from his own property on his own behalf. Insofar as Baker caused documents to be prepared in connection with the purported transfers in July 1985 of the collection by Dacine to Art Holdings to suggest that the latter became the legal owner of the collection as trustee for the Contemporary Art Trust, that transaction was a sham insofar as Baker's true intention was that Art Holdings would acquire legal title to the collection not as trustee for the Contemporary Art Trust but rather for Baker personally. The same holds true for the transfer of 31 January, 1990 of the collection from Art Holdings to Goodglint.

Claims based on ss. 139D and 139E

104. The Official Trustee sought to pursue these claims against the corporate respondents only as an alternative to his claim to the art collection, which he has established. It is therefore unnecessary to consider these other claims.

Claims in respect of proceeds of sale of accountancy practice
105. In addition to the claims in respect of the art collection, the Official Trustee also claims the sum of $286,000.00 from Vestos, the fourth respondent, pursuant to ss. 120(2) and 121 the Bankruptcy Act. This approximates to the total amount of the agreed price that Baker was to receive for the sale of his interest in his accountancy practice to his three former partners.

106. The Official Trustee's case as pleaded was that the dispositions that were void were Baker's transfers to his partners of the totality of his interest in his accounting practice. Even though the partners gave value for this property the dispositions would still be void under s. 121 of the Act if Baker made these dispositions with the intention of defrauding the Taxation Department as a potential major creditor and if the partners, at the time of the transfers, knew of the fraud: In re Fasey (1923) 2 Ch 1 at 9. But the Official Trustee made no attempt to prove the latter point. Instead, the case that the Official Trustee litigated at trial was that the transfer over to Vestos, arranged by Baker, of the debts due to him by his former partners in respect of his sale to them of his interest in the practice was a fraudulent disposition, with the result, so the Official Trustee says, that the payment of $286,000.00 which Vestos received from the incoming partners in September 1988 belongs to the Official Trustee. The respondents contested this argument; they also submitted that the transactions of 1 July, 1984, 1 July, 1985, 2 June, 1986 and 1 December, 1986, which all related in one way or another to Baker's sale of his interest in the practice, were valid transactions which stood against the Official Trustee. It is the last-mentioned issue that I will deal with first.

107. At the end of June 1984, Baker held a 60% interest in the accountancy practice while his partners, Mr. Schmidt and Mr. Doyle, held 30% and 10% respectively. Baker was becoming more and more involved in building up his art collection and he was then concerned, for reasons already canvassed, to put his assets, including the collection, beyond the reach of claims he expected to be made against him by the Taxation Department. On 1 July, 1984, he transferred a 20% interest in the partnership to Mr. Haworth and a further 10% to Mr. Doyle. Haworth only part-paid Baker on that date; Baker agreed to give him time to pay the outstanding $80,000.00.

108. On 1 July, 1984 the following series of transactions, all orchestrated by Baker, occurred: Baker drew a bill for $80,000.00 in respect of the unpaid $80,000.00 on Haworth, who accepted it. This bill was then endorsed by Baker to Vanallen Pty. Ltd. ("Vanallen"), a company controlled by Baker, in consideration of Vanallen issuing to Baker 80 "C" class shares each at $1.00 with a $999.00 premium. The issue of these shares was authorised by a directors' meeting on 1 July, 1984, the minutes of which are signed by Baker. Mr. Johnson, a Deputy Official Receiver who has conducted an investigation into the activities of Baker and his companies in connection with this case, gave uncontradicted evidence that Vanallen did not carry on any business. For the reasons given by Mr. Calabro, the accountant called by the Official Trustee, the Vanallen shares that Baker had issued to himself were, for practical purposes, always valueless. Vanallen then endorsed the bill to Venmere, which endorsed it back to Haworth; at the same time as his liability as acceptor of the bill was cancelled in this way, Haworth entered into a loan facility agreement with Venmere to pay Venmere $80,000.00 over five years at an agreed rate of interest. Haworth was unaware of the intermediate endorsements of the bill and Baker did not explain to him what was done in this regard. All he was concerned with was having time to pay whoever Baker directed him to pay in respect of his acquisition of this interest in the practice.

109. At the start of the day on 1 July, 1984, Baker, who was concerned that a large claim might be made against him by the Taxation Department and who did not want to have any assets in his name to which the Taxation Department could have recourse, owned an asset worth $80,000.00, viz., the debt due to him by Haworth. Before the end of the day, he caused a sequence of transactions to be executed that resulted in him divesting himself of ownership of that asset, but remaining in control

of it through his control of Venmere. The bill for $80,000.00 which Haworth accepted was never intended to be presented for payment and the Vanallen shares that Baker got were valueless. Calabro gave unchallenged evidence that this sequence of transactions served no commercial purpose. Nothing of value changed hands between any of the participants in the events of 1 July, 1984 save that Baker transferred to Haworth his interest in the practice and Haworth paid someone some of the purchase price and agreed to pay the $80,000.00 balance over time at Baker's direction. In my opinion, Baker arranged for transfer of the ownership of Haworth's indebtedness from himself to Venmere in an attempt to put this asset of his beyond the reach of his major potential creditor, the Taxation Department, while retaining control of it through his control of Venmere. A transfer by a person of his assets to a company made in order to put his assets beyond the reach of his creditors but to keep them in his control, through his control of the company, was set aside in In re Fasey, supra, as a fraudulent conveyance: see particularly pp 13-14. It does not in my opinion make any difference that the transaction of 1 July, 1984 by means of which Baker achieved the same purpose was made up of several steps rather than being done by way of a direct transfer.

110. For a transaction to constitute a "disposition" of property within the meaning of that term in s. 121 and in s. 120(8) of the Act, property must pass from a disponor to a disponee in circumstances in which the donor contemplates "the retention of the property in some sense ... and not its immediate dissipation or consumption" - per Dixon J in Williams v Lloyd [1934] HCA 1; (1934) 50 CLR 341 at 375. See Barton v Official Receiver (1984) 4 FCR 380. To this extent, the section requires that a gloss be added to the ordinary meaning the term bears. The assignment or forgiveness of a debt can be a "disposition of property" within s. 120 and s. 121 of the Act: Re Ward; Official Trustee v Dabnas Pty. Ltd. (1984) 3 FCR 112 at 116. The wider meaning of the term "disposition" favoured by Wilcox J in Re Ward, supra, at 117 has not yet gained acceptance - see e.g. Re Kastropil; Ex parte Official Trustee in Bankruptcy v Kastropil [1989] FCA 255; (1989) 33 FCR 135 - although it received the support in obiter dicta of Sweeney and Fisher JJ in Barton, supra, at 386 and 387. The question that arises here is whether what Baker brought about on 1 July, 1984 by way of transferring Haworth's indebtedness to him over to his company Venmere, by means not of a direct assignment but by a series of steps designed to distance himself from ownership of that asset, can be regarded as a "disposition" of the debt by Baker to Venmere or whether it is only each individual step that Baker caused to be taken to achieve his objective that can amount to a "disposition" within the section.

111. The term was adopted by the Parliament in 1966 to widen the reach of ss. 120 and 121 beyond that of their precursors: Barton, supra, at 387, 393; Official Trustee in Bankruptcy v Arcadiou (1985) 8 FCR 4 at 10. Even if an element of retention on the part of the recipient is required before a passing of property to him from another can amount to a "disposition of property" within the statute, I consider that when 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 disponee 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. In view of the purpose of s. 121 of the Act, there is no justification for saying that the term "disposition" cannot encompass a discrete

arrangement, no matter how complex, planned by a debtor to put his property beyond the reach of his creditors or for saying that the concept of a "disposition" can extend no further than the first step that can be characterised as a divestiture or diminution by the disponor of his interest in the property in question in the execution of that arrangement.

112. The disposition comprising the passing on 1 July, 1984 by Baker of the right to deferred payment by Haworth of the $80,000.00 to Venmere was made by Baker, as I have found, with the intention of putting this asset beyond the reach of the Taxation Department, whom Baker then identified as his major future creditor, even though it was not then one of his existing creditors, while retaining personal control of that asset. Baker's control of Venmere was sufficient to fix it with knowledge of Baker's fraudulent intention, so even if it were arguable that Venmere gave value for the right to payment of the $80,000.00, with interest, by Haworth, that is enough to bring the transaction within the section. See In re Fasey, supra, at 9. That particular disposition is therefore void as against the Official Trustee.

113. Upon Baker becoming bankrupt, this disposition being void as against the Official Trustee, the property in the debt of $80,000.00 would have then reverted to Baker and it would have been that property that vested in the Official Trustee: In re Farnham (1895) 2 Ch 799 at 808, 810. What the trustee takes, on avoidance of a disposition, is the bankrupt's title to the property, as at the date of commencement of the bankruptcy, i.e., in the condition it then was, but subject to all bona fide interests acquired in that title by others after the impugned disposition took place. See s. 121(2) and In re Carter and Kenderdine's Contract (1897) 1 Ch 776. After 1 July, 1984 but before Baker's bankruptcy occurred, there were other dealings with the property that comprises Haworth's indebtedness of $80,000.00. If as a result of these subsequent dealings, rights arose with respect to that item of property in others that are good against the Official Trustee, the fact that the disposition on 1 July, 1984 by Baker of his right to payment by Haworth of the $80,000.00 would be void against the Official Trustee as from the date of his bankruptcy cannot divest those others of the rights so arising: see s. 120(7) and Re Fitzgerald (1986) 10 FCR 261. The question now is whether Baker's subsequent dealings with Haworth's indebtedness of $80,000.00 in June 1986 and December 1986 created rights good against the Official Trustee which will stand, despite avoidance, as against the Official Trustee, of the disposition of that debt from Baker to Venmere on 1 July, 1984.

114. On 1 July, 1985 Baker disposed of the remainder of his interest in the partnership, save a 1% interest which he retained until 1987, to Schmidt, Doyle and Haworth who acquired 10%, 12% and 7% respectively for a total price of $200,000.00. Again, Baker provided vendor finance and again drew bills of exchange on Haworth, Doyle and Schmidt in respect of the purchase price of their interests, which each accepted. Again Baker endorsed the bills to Vanallen, this time in consideration for the issue to him of 200 $1.00 "B" class shares, each at a $999.00 premium, the issue of which was authorised by minutes of a meeting of directors signed by Baker. I accept Calabro's evidence that these shares too were, for practical purposes, always valueless. The bills were then endorsed by Vanallen to Panarea Pty. Ltd. ("Panarea"), another of Baker's companies, and by it to Venmere. Finally, Venmere endorsed the bills back to each partner, who entered into a loan agreement with Venmere to pay Venmere on demand upon each partner's sale of his interest in the partnership, with interest at 15% per annum in the meantime, an amount that in total came to $200,000.00. The three partners were generally unaware of the intermediate endorsements of the bills; none of the partners was concerned with the form of the transaction. As far as they were concerned, Baker was providing the finance and they were happy to let him structure it as he pleased and each was content to accede to his request for it to be done in a way which ended up with them being indebted to Baker's company, Venmere, rather than to Baker personally. As before, Baker started the day of 1 July, 1985 with assets in the form of debts owing to him totalling

$200,000.00 and ended the day having divested himself of title to those assets, but still controlling them through his control of Venmere. Baker was I think motivated to do this by his ongoing concern to put his assets beyond the reach of the Taxation Department whose investigations he knew were continuing: it was only three days later he arranged the transfer of the art collection from Dacine to Art Holdings, a major reason for this being, as I have found, "the evasion of (his) creditors". Moreover, Baker appears to have decided at about that time to withdraw from the practice and devote more attention to his work on the art collection: so he then had a substantial asset he wanted to turn into money but which he did not want to expose to his creditors.

115. For similar reasons why I consider the actions Baker took on 1 July, 1984 to transfer Haworth's indebtedness to him of $80,000.00 to Venmere amounted to a disposition void as against the Official Trustee, I think that the steps he took to the intent that the three partners' indebtedness to him totalling $200,000.00 that arose on the sale by him of his interest in the practice to them on 1 July, 1985 constitute a fraudulent disposition of this property of his to Venmere, that would also be void as against the Official Trustee, as from the date of Baker's bankruptcy.

116. The question now arises whether Baker's dealings in June 1986 and December 1986 with the three partners' indebtedness of $200,000.00 created rights in others that the Official Trustee must acknowledge, even though the transactions of 1 July, 1984 and 1 July, 1985 are both void as against him.

117. On 26 May, 1986 notices of amended assessment to income tax totalling $2.2 million were issued to Baker. A few days later Baker went to his partners to advise he wanted to transfer their indebtedness from Venmere to Mrs. Baker: Schmidt said that "Jim Baker just said he wanted to rearrange his affairs and get some income into his wife's name". Baker says that the action he took in June 1986 was prompted by Mrs. Baker's need for income to off-set losses she suffered as a result of property transactions which she undertook during their brief marital separation which occurred just prior to this. On 2 June, 1986 the following events all took place: bills of exchange were drawn for a total of $280,000.00 by Baker on behalf of Venmere on each partner and accepted by each, thereby clearing all the partners' debts to Venmere and creating instead a liability in them for the same amount on the bills. Each bill was then endorsed by Venmere to Mrs. Baker (it is said in discharge of Venmere's indebtedness to her on another account) and then by Mrs. Baker back to the relevant partner, thus cancelling each's liability on his bill. This endorsement by Mrs. Baker was said to be in consideration of the partners' entry into loan facility agreements with her. Under these agreements, each partner agreed to pay her an amount equal to the amount of the bill after five years, with interest in the meantime. Mrs. Baker recalls Haworth, Schmidt and Doyle buying Baker's share of the partnership. It is clear from her examination-in-chief that she has no understanding of how the partners' indebtedness in respect of their purchase of Baker's interest in the partnership was transferred to her. She does not recall whether or not she got regular payments by way of interest from them. Baker says interest payments were made direct into her account by the partners. They each confirm that they paid interest to Mrs. Baker for a time. Baker's evidence on this particular point can be accepted. It appears that they would have paid her about $3,500.00 per month for five months. It may be that, at a time when Mrs. Baker was in affluent domestic circumstances, she did not pay much attention to the receipt into her account of such a relatively modest sum each month for a few months. As I have said above, during the marriage Mrs. Baker did not much concern herself with financial matters, even those in which she had a personal interest, so long as there was money available to her to meet her requirements from time to time. Even if Mrs. Baker did incur losses on property dealings she engaged in while separated from Baker in the first half of 1986 - and the respondents made no attempt to corroborate what Baker had to say about this - I do not accept his evidence that the transfer to Mrs. Baker of the debt of $280,00.00 his partners owed him was arranged by Baker to provide his wife with an independent source of

income. The arrangements of 2 June, 1986 follow very closely on the issue of the amended assessments to Baker; as will emerge, there is a lack of acceptable explanation why Baker stopped this income stream that flowed in his wife's name for only a short period and took action to transfer it and the underlying debt to Vestos, a company under his control. I find that Baker's actions in seeking to transfer from Venmere to his wife title to the debts owing by his former partners in respect of the purchase price for their shares were dictated by the concerns that the issue of these reassessments generated for Baker and by the desire to erect another barrier between the Taxation Department and this particular asset.

118. As from the date of Baker's bankruptcy, and as between Baker, Venmere and the Official Trustee, the transaction Baker engaged in on 1 July, 1984 with respect to the $80,000.00 owing to him by Haworth was void against the Official Trustee and because Venmere was fixed with awareness of Baker's fraudulent intent, it is Baker, not Venmere, who held title to the debt of $80,000.00 owing by Haworth as at 2 June, 1986. Because the transaction Baker engaged in on 1 July, 1985 with regard to the $200,000.00 owing by his three partners was also void against the Official Trustee as from the date of Baker's bankruptcy, it was also Baker, not Venmere, who held title as at 2 June, 1986 to the debts totalling a further $200,000.00 owing by Baker's three former partners, Venmere also being fixed with knowledge of Baker's intent when he implemented the events of 1 July, 1985. Baker could not, by the transaction of 2 June, 1986, in which he sought to transfer from Venmere to Mrs. Baker the debts owing by his former partners, therefore effectively divest himself as against the Official Trustee of the title to the debts totalling $280,000.00 that the Trustee can trace to him as at that date. The actions Baker implemented on 2 June, 1986 all proceeded on the basis that it was Venmere who then had title to the debts owing by the parties. But as between the Official Trustee, Baker and Venmere, it was Baker who must be regarded as having title to them. Despite the events of 2 June, 1986, thereafter title to the debts totalling $280,000.00 as between Baker and the Official Trustee must be regarded as remaining, as from the date of Baker's bankruptcy, in Baker. It therefore passed to the Trustee on Baker's bankruptcy.

119. The final attempt by Baker to move this debt around while retaining personal control of it occurred on 1 December, 1986. The history of the Taxation Department's actions against Baker following the issue of the notices of amended assessment in late May 1986 is not before me save that it appears that the first Taxation Department writ claiming $2.438 million was issued against Baker on 19 December, 1986 and in February 1987 the Commissioner obtained judgment against him for approximately $2.5 million. I infer that Baker's decision on 1 December, 1986 to transmute the debts originally owed to him by his partners, but which by that date he had tried to re-structure into debts owing by them to Mrs. Baker, into debts due by the partners to Vestos was associated with the increasing pressure the Taxation Department was putting on him and with the growing danger of bankruptcy. By this time, some of the partners said they were losing patience with the bill of exchange "merry-go-round"; nevertheless they agreed to sign at Baker's request. Schmidt's attitude was that although he got no explanation from Baker why he wanted to transfer Schmidt's indebtedness from Mrs. Baker to Vestos, he was agreeable to meeting Baker's wishes because his borrowing was unsecured and, so long as he paid interest, he did not have to raise funds to pay the borrowing out.

120. On 1 December, 1986 the following transactions were orchestrated by Baker. Vestos drew bills on the Baker-controlled Panarea for a total of $280,000.00, which Panarea accepted. Vestos endorsed the bills to the partners. The partners then endorsed them over to Mrs. Baker. This was apparently intended by Baker to constitute repayment by the partners to Mrs. Baker of the indebtedness they came under to her as a result of the transactions of 2 June, 1986: Baker prepared and had Mrs. Baker sign a letter dated 1 December, 1986 addressed to each of the partners whereby she purported to acknowledge receipt of full repayment of each partner's indebtedness to her in

terms of the loan facility agreement of 2 June, 1986. Mrs. Baker then endorsed each bill over to Panarea. This is said to have discharged her indebtedness on another account to Panarea. Panarea's ledger for the period 31 May, 1978 to 30 June, 1986, a one page document, is in evidence. It records an "advance" of $112,500.00 to Mrs. Baker on 1 July, 1985. There is no explanation in the ledger why she might endorse bills for as much as $280,000.00 over to it, as she did on 1 December, 1986. But none of that much matters. Panarea got the bills back which had originally been drawn on it that same day by Vestos, thus cancelling its liability on those bills. Although there is no suggestion that Vestos was then under any existing obligation to the partners that the endorsement of the bills by it to them would satisfy, the theory appears to be that by endorsing the bills to the partners, Vestos gave them the equivalent of funds to the value of $280,000.00 which they used to pay out their indebtedness to Mrs. Baker; it was this "advance" which was the subject of the loan facility agreements Vestos entered into with each, which record that Vestos agreed to lend them a total of $280,000.00 (i.e., the full amount originally payable by them to Baker) for five years with interest at 15% per annum.

121. In the face of these events, the debts owing by the partners to Mrs. Baker as from 2 June, 1986 were, in practical terms, thus transferred to Vestos, a Baker-controlled company, in a way orchestrated by Baker. Baker says the reason for this transfer was that the interest income Mrs. Baker had been receiving from 2 June, 1986 was needed by Vestos to service interest payments it was making to Westpac in respect of loans that Vestos obtained to buy the Melbourne Street property; he says these loans were secured by mortgages over this property. He identifies the Bills of Mortgage as exhibit 10 to the respondents' response to Issue 5 of the statement of issues which I directed before trial that the Official Trustee file and serve and to which the respondents were required to file and serve their responses. Exhibit 10 includes the title deed to the Melbourne Street property. It shows that Vestos only became registered as owner of this property under a transfer produced for registration on 24 April, 1987. The only mortgage granted by Vestos to Westpac over this property in Exhibit 10 was executed by Baker and Ms. Burgess, both acting for Vestos, on 19 March, 1987. A Westpac memorandum of 6 March, 1987 refers to Baker saying he had contracted to buy this property: it deals with Baker's request for loan funds of $465,000.00 to assist with the purchase and refurbishing of the property. The date on which Baker decided that Vestos would buy this property does not emerge any more clearly. I cannot therefore find that he had not made, by 1 December, the decision he claims was the reason for transferring the debts from Mrs. Baker to Vestos on that day. But the Westpac advance that Baker claimed he needed the interest that the partners were paying to Mrs. Baker from June to 1 December, 1986 to service was only made after 6 March, 1987. Moreover, this $465,000.00 was made available by the bank on Baker's submission in March 1987 that the art museum that he intended to establish on the Melbourne Street site would generate enough income ($115,000.00) to more than fund its operations, including servicing interest he estimated of $88,000.00 per annum on the $465,000.00 borrowings. There is no suggestion in this detailed bank memorandum that Baker mentioned that back in December 1986 he had also arranged for Vestos to receive interest income in its own name of $42,000.00 per annum, i.e., 15% on $280,000.00, from his former partners. Moreover, given the ease with which he transferred this asset from Mrs. Baker to Vestos in December 1986, it is not readily acceptable that this complex series of transactions on 1 December, 1986 which he orchestrated was only designed to provide funds to enable Vestos to meet the 1987 obligation to Westpac: he could just as easily have arranged for Mrs. Baker to loan the interest receipts from the partners to Vestos. There is no confirmation of Baker's evidence as to the reason why he made the arrangements of 1 December, 1986; the contemporaneous bank documentation records Baker acting inconsistently with what he now says was the reason for the transfer to Vestos. I therefore reject his explanation for this last transfer and conclude, as I have said, that his reason for his activity on 1 December, 1986 was the result of looming problems the Taxation Department's actions were then causing him.

122. As I have also said, however, it was Baker, not Mrs. Baker, who was entitled to this $280,000.00 as at 1 December, 1986 immediately prior to the events of that day. The sequence of actions which Baker caused to be implemented on 1 December, 1986 were ineffective to move the title to the debts owing by the parties over to Vestos because they were premised on Mrs. Baker owning those debts at the start of that day. As from the date of Baker's bankruptcy, it was Baker who remained the owner of those debts both before and after 1 December, 1986.

123. The loan agreements of 1 December, 1986 between the partners and Vestos were ultimately discharged in September 1988 when the partners collectively paid to Vestos the sum of $286,000.00 in full and final settlement of the dispute that had arisen between them and Baker over the problems Baker's tax avoidance activities had created for them and which led them to threaten, by their letter to Baker of 22 July, 1988, to stop making interest payments to Vestos.

124. Because it was Baker, not Vestos who was entitled to this sum of $286,000.00, this payment belongs to the Official Trustee. Vestos must account to him for it.

The result of the case
125. There will be declarations that as at the date on which Baker became bankrupt by presenting his own petition on 16 January, 1990 all of the art works identified in the applicant's statement of claim as the "X", "Y", "Z", "A", "B" and "C" collections were beneficially owned by Baker and that all of those works then vested in the applicant.

126. There will also be a declaration that art works or other property purchased by any respondent with the proceeds of the sale of any of the works in any of these collections after 16 January, 1990 also vested, on acquisition, in the applicant.

127. Each respondent who has received any moneys from the sale after 16 January, 1990 of any of the art works in any of these collections or of any property of any kind purchased by any respondent with any of those moneys and subsequently re-sold must account to the applicant for all such receipts.

128. There will also be a declaration that the sum of $286,000.00 received in September 1988 by the fourth respondent in respect of Messrs. Haworth, Doyle and Schmidt's purchases of Baker's interest in his accounting practice vested, on receipt, in the applicant. Any respondent who has had access to any part of this sum must account to the applicant in respect thereof.

129. The applicant must bring into Court minutes of the formal orders which I will make reflecting these conclusions. 5 August, 1994

130. After hearing further argument on 4 August, 1994, his Honour gave the following reasons for the orders he then made:

131. The applicant has brought in minutes of the orders proposed which he says reflect the views expressed by me in my reasons published on 22 July, 1994. Many of the orders proposed by the applicant are not contentious as between the parties. But senior counsel who appeared yesterday for all the respondents opposes the making of some of the orders proposed.

132. Counsel on behalf of the respondents has submitted that I should not make either the order that Vestos account to the applicant-trustee for its receipt of the $286,000.00 in September 1988 that I foreshadowed I would make, or the order for payment by Vestos of that sum to the applicant, which the applicant now proposes. It is said that, even accepting that Vestos was fixed with knowledge of

Baker's fraud when it acquired, in December 1986, the right to payment of the moneys owing by Baker's partners for his interest in the accountancy practice, those debts were discharged in September 1988, before the date of bankruptcy and before any proceedings were taken to set aside that disposition; accordingly, as at September 1988, Vestos was able to and did give a good discharge for the debts, and if the amounts then paid to it cannot now be identified in its hands, Vestos cannot be made personally liable to pay to the trustee in bankruptcy anything in respect of the payments made to it back in September 1988. Reliance was placed upon Brady v Stapleton [1952] HCA 62; (1952) 88 CLR 322, particularly upon the passage at pages 331 to 334. It was further submitted that there is no finding that the $286,000.00 can be identified as still held by Vestos and that such a finding could not have been made on the evidence before me.

133. Brady v Stapleton is authority for the proposition that a bankrupt who, prior to his bankruptcy and with intent to defraud his creditors, disposes of assets, passes to the disponee, whether a disponee with or without knowledge of that fraudulent intent, a title to the assets which is valid until set aside; if, therefore, before any proceedings are taken to set aside the dispositions, that disponee sells those assets to a bona fide purchaser for value and the proceeds of sale cannot be traced in the hands of the disponee, the latter cannot be made personally liable to pay to the trustee in bankruptcy the value of the assets transferred to him by the person who later becomes bankrupt.

134. In that case, the dispositions by the bankrupt to a company which the trustee attacked were, in contradistinction to the dispositions of property that the bankrupt there made to certain natural persons, effective to pass full ownership of the property to the company. They were challenged on the basis that the company's full title was, however, a defeasible one because it took the property from the bankrupt by what was a fraudulent conveyance within the meaning of that term in a provision equivalent to s. 121 the Bankruptcy Act 1966. Here, I have held that because the dispositions by Baker on 1 July, 1984, 1 July, 1985 and 2 June, 1986 in respect of the debts originally owing to him by the partners were void as against his trustee in bankruptcy, the disposition that took place on 1 December, 1986 was incapable of vesting any beneficial title in Vestos in respect of these debts. The applicant does not therefore have to attack that particular disposition as a voidable one to achieve this outcome. Vestos accordingly received the $286,000.00 in September 1988 not on its own behalf, but on behalf of Baker. Unlike the company in Brady v Stapleton that took full ownership of the bankrupt's property, Vestos never was entitled to deal as it chose with any of those funds, as its own moneys. It is therefore still under a personal liability to the applicant-trustee in bankruptcy, who stands in Baker's shoes. This follows, I think, from what was said in Brady v Stapleton at 334 in relation to the dispositions made to the company which the trustee there attacked:

> "It is only on the footing that the company sold something to which it had no title or that the sale was otherwise wrongful when made, that a personal liability on the part of the company could be based. But the company, when it sold the assets in question, sold something to which it had a title, albeit a defeasible title. The sale was not wrongful when made. If the company were selling something to which it had no title, it might well be that the trustee in bankruptcy could claim to stand in the shoes of the true owner, the bankrupt, and maintain money had and received."

135. The applicant alleged in his statement of claim that Vestos was under a personal liability to pay the $286,000.00 to the applicant - see paragraph 57 of the pleading - and the applicant claimed relief accordingly - see paragraph 80G of the statement of claim. That there is a possibility that Vestos may have a good answer to the applicant-trustee's claim for the $286,000.00 in the nature of

a set-off arising out of what I have found to be Baker's misappropriation of other moneys belonging to Vestos and also a possibility that Vestos may have disbursed those moneys it held on behalf of Baker in circumstances in which it obtained a good discharge from Baker effective against the applicant-trustee were suggested in argument yesterday. But, if Vestos wanted to show that events occurred in the past which absolved it from its personal liability to Baker in respect of the moneys now in question, the onus was on Vestos to plead and prove that case at the trial. It failed to do that. It was not, I think, for the applicant-trustee to raise those possibilities in his pleading and then negative them in his case at trial.

136. There will be a declaration in terms of paragraph 80G(b) of the statement of claim and judgment for the applicant against Vestos for $286,000.00 with interest from 16 January, 1990 at 10 per cent per annum as sought by paragraph 80G(c) of the statement of claim.

137. The respondents also submit that, given the way the case was pleaded and conducted, I should not make orders in terms of paragraph 3(c) and (d) of the draft orders proposed by the applicant: the only orders along those lines which I make should be limited in their application to property acquired by a respondent, by the sale, hire or use after the date of Baker's bankruptcy, of works of art that then vested in the applicant-trustee. I have found that the entire art collection at all stages was Baker's own property. Insofar as any of the second to fifth respondents at any time prior to Baker's bankruptcy acquired cash or choses in action or any other property from the proceeds of sale of any items in the collection, they held all that on trust for Baker. It was submitted on behalf of the respondents that any of the second to fifth respondents who held any such property might be able to resist the claim by the Official Trustee for delivery up of that property on the ground that the particular respondent might have a good claim against Baker in respect of his misappropriation of the respondent's own property or that it might not be possible to trace any cash received pre-bankruptcy, by a respondent, from the sale of an art work, into property still held by that respondent. It was submitted on behalf of the respondents that all these issues should have been raised by appropriate pleadings and litigated at the trial.

138. However, it seems to me that, in view of the claim made by the applicant in paragraph 80B(h) of the statement of claim, the applicant made a sufficient claim to cash and property acquired before as well as after Baker's bankruptcy by any respondent with the proceeds of sale of any of the art works, which I have found always were Baker's property, to entitle the applicant to the orders he proposes here. If there are circumstances that would deprive the applicant of the right to recover from any respondent cash or property of any kind acquired by that respondent at any time before the bankruptcy, with the proceeds of the sale of Baker's art works, it was, I think, that respondent who bore the onus of pleading and proving the relevant facts. It was not for the applicant Official Trustee in his pleading to go beyond proving, as he has succeeded in doing, that the art works were all Baker's own property and that the other respondents held on trust for Baker any cash or property they acquired in their names with the proceeds of sale, at any time, of any of those art works.

139. The second to fifth respondents must pay the applicant's costs of and incidental to the entire proceedings, including reserved costs, there being no submissions to the contrary on behalf of any of the respondents with respect to reserved costs. As to the first respondent, Baker, however, counsel submits that no order for costs should be made against him for three reasons: firstly, that no relief was claimed against him, secondly, that he made no claim to property which was the subject of the dispute between the applicant and at least some of the corporate respondents, and, finally, that he did not defend the proceedings.

140. As to the first point, it is wrong. By paragraphs 80A and 80B the applicant did seek significant relief against Baker, as well as against the other respondents, which depended on the applicant

proving that the entire art collection was Baker's own property at all stages and never the property of any other respondent. By paragraph 80H of the statement of claim, the applicant also sought against all respondents all necessary accounts and consequential orders to give effect to the orders and declarations sought in that pleading, including orders restraining each of the respondents from disposing of property which vested in the applicant upon the bankruptcy of the first respondent and/or the property which was held upon trust for the applicant. Moreover, Baker, who appeared at the trial unrepresented, has now retained senior counsel, who appears for the other respondents also, to resist the making of various of the orders sought, including those involving restraints on him and orders for the payment by Vestos of the $286,000.00, which I have found belonged to him.

141. As to the second point, it is not surprising that Baker neither at trial nor now makes any claim to property the subject of dispute between the applicant and the other respondents. He is unlikely to have wanted to so assist the applicant to make out its claim to any of that property.

142. As to the third point, it is true that the first respondent did not file a defence. But he appeared in a formal way at the trial and was present throughout most of the lengthy hearing. He was invited to cross-examine the applicant's witnesses, although he elected not to do so. However, he asserted by his appearance at the trial the right to take such part in the trial as suited him. That it emerged by the end of the trial that he had been content to leave it to counsel who appeared at trial only for the second to fifth respondents to argue against the applicant's claim that it was he and not the other respondents who at all times owned the art collection does not detract from this fact.

143. This defence, mounted by the third respondent in particular, and which if successful would have resulted in dismissal of the applicant's claim to the art collection and its preservation in the possession of the third respondent, a company effectively controlled by Baker, was funded in large part from the sale of Baker's art works. It was the third respondent who sought and obtained orders from Pincus J on 18 December, 1990 and myself on 28 May, 1992 that gave it access to these funds, in circumstances in which it said it was otherwise without means to defend the proceeding. I infer that Baker, as the person in de facto control of deciding what instructions should be given by all the other respondents to the lawyers retained by those other respondents, at his instigation and on their behalf, to try to keep his art collection from the applicant, caused the third respondent to make the applications in respect of funding its case.

144. Baker was thus agreeable to the third respondent using property, which I have found was all along his own property, to enable the third respondent to try to keep his art collection out of the hands of the applicant. He thereby got all the advantages of having his determination to preserve the collection in his de facto, if not legal, control advanced at the trial by a well-funded case presented in all necessary detail by senior and junior counsel and solicitors. Yet he says that he should be immune from a costs order now, although he was instrumental, by his instigation of the third respondent's successful application for funding, in depleting to a substantial extent the range of property that I have found the applicant was entitled to take on 16 January, 1990.

145. I also infer that it was Baker who alone enabled the third respondent and the other respondents to mount their defences to the applicant's proceeding: they could not have run their defence cases without his close and extensive involvement in all phases of the case preparation and presentation at trial.

146. Having regard to these considerations, I think it is proper to exercise the discretion I have and to make an order against the first respondent that he also pay the applicant's costs, including reserved costs, of and incidental to the proceeding.

147. The remaining point arises out of the applicant's proposal that there be an order for the examination of the first respondent in aid of execution of various of the other orders that I will make. It is not disputed that I have power to make an order for the examination of the first respondent, who was automatically discharged from his bankruptcy in January 1993, in aid of execution of the orders I have referred to. Nor did his counsel suggest that such an order was inappropriate, only that it should not be made now or, if made, its operation should be stayed to enable the information referred to in the order for examination proposed by the applicant to be provided by agreement between the parties. Given the history of the matter and the findings I have made in respect of the first respondent's conduct and what Mr. Johnston says in his unchallenged affidavit about the first respondent's activities with respect to the art works since the injunctions were imposed by Pincus J in May 1990, I think it is right to make the order here sought.
