SUPREME COURT OF QUEENSLAND

CITATION:	*Clout v Markwell* [2001] QSC 091
PARTIES:	**DAVID LEWIS CLOUT AS TRUSTEE OF THE BANKRUPTCY ESTATE OF ANTHONY IRVINE MARKWELL** plaintiff **v** **JANICE IRENE MARKWELL** defendant
FILE NO/S:	6983/00
DIVISION:	Supreme Court Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	4 April 2001
DELIVERED AT:	Supreme Court Brisbane
HEARING DATE:	12 February and 13 February 2001
JUDGES:	Atkinson J
ORDER:	**Application dismissed**
CATCHWORDS:	PRACTICE – SUMMARY JUDGMENT - STRIKING OUT OF DEFENCE – Application for summary judgment pursuant to r 292 UCPR or in alternative, for striking out of certain paragraphs of Further Amended Defence pursuant to r 171 UCPR. BANKRUPTCY – PROPERTY FOR PAYMENT OF DEBTS – PROTECTED TRANSACTIONS – Whether transfer void pursuant to s120(1) *Bankruptcy Act* (Cth) 1966 as undervalued transaction – whether market value consideration given for transfer to wife – whether constructive trust in existence. *Bankruptcy Act* 1966 (Cth), s 120 *Balfour v Balfour* [1919] 2 KB 571, considered *Barton v Official Receiver* (1986) 161 CLR 75, distinguished *Baumgartner v Baumgartner* (1987) 164 CLR 137, followed *Corke v Corke and the Official Trustee in Bankruptcy* (1994) 17 FamLR 698, considered *Green v Green* (1989) 17 NSWLR 343, considered *Gissing v Gissing* [1971] AC 886, considered

Hohol v Hohol [1981] VR 221, considered
Kidner v Secretary, Department of Social Security (1993) 31 ALD 63, followed
Maharaj v Jai Chand [1986] AC 898, considered
McVeigh (Trustee of the Bankrupt Estate of Zanella) v Zanella [2000] FCA 1890; FC No 7430 of 2000, 22 December2000, considered
Muschinski v Dodds (1985) 160 CLR 583, followed
In re Abbott (A Bankrupt) [1983] 1 Ch 45, distinguished
Re Clark; Ex parte Beardmore [1984] 2 QB 393, considered
Re Jonton Pty Ltd [1992] 2 Qd R 105, followed
Re Osborn; ex parte Trustee of the property of Osborn v Osborn (1989) 25 FCR 547, distinguished
Re Sabri; Ex parte Brien v Australia and New Zealand Banking Group Ltd (1996) 21 FamLR 213, considered
Re Sharpe (a bankrupt); Ex parte the trustee of the bankrupt v Sharpe[1980] 1 All ER 198, considered
Sutherland v Brien (1999) 149 FLR 321, considered
Thorby v Goldberg (1965) 112 CLR 597, considered
Victorian Producers' Co-Operative Co Ltd v Kenneth [1999] FCA 1488; FC No 7754 of 1998, 29 October 1999, considered
Worrell, in the matter of Tanter (Bankrupt) v Issitch [1999] FCA 1452; FC No 7007 of 1996, 22 October 1999, considered

COUNSEL: P. McQuade for the Plaintiff
D. Atkinson for the Defendant

SOLICITORS: Tucker & Cowan Solicitors for the Plaintiff
Johnsons Solicitors for the Defendant

[1] **ATKINSON J:** The plaintiff applied for summary judgment pursuant to r 292 of the Uniform Civil Procedure Rules (UCPR). The judgment sought is:

(a) A declaration that the transfer of property, being the payment of $274,731.07 is void pursuant to s 120 of the *Bankruptcy Act* 1966 (Cth);

(b) An order that the defendant pay to the plaintiff the sum of $274,731.07;

(c) Interest on the sum of $274,731.07 at the rate of 10% per annum pursuant to s 47 of the *Supreme Court Act* 1995 from 21 February 1996 to the date of judgment or earlier payment;

(d) A declaration that the Clear Island Waters property is charged with the payment to the plaintiff of the sum of $274,731.07 together with interest at the rate of 10% per annum pursuant

to s 47 of the *Supreme Court Act* 1995 from 21 February 1996 to the date of judgment or earlier payment;

(e) An order that the Clear Island Waters property be sold;

(f) An order that the plaintiff be appointed to conduct the sale;

(g) An order that for the purposes of conducting the sale the property vests in the plaintiff pursuant to s 100 of the *Property Law Act* 1974 (Qld);

(h) An order that the defendant deliver up vacant possession of the property to the plaintiff within thirty days;

(i) An order that the sale be conducted by public auction;

(j) An order that the plaintiff be authorised to engage a qualified Real Estate Agent to advertise the property and conduct the auction;

(k) An order that the plaintiff be at liberty to sell the property by private treaty prior to the auction;

(l) An order that the proceeds of sale be applied as follows:

(i) Discharge of the charging order referred to herein;

(ii) To the costs of sale;

(iii) And the balance thereafter be paid to the defendant;

(m) Insofar as any Goods and Services Tax is payable on the relief claimed, an order that the defendant indemnify the plaintiff for such Goods and Services Tax payable pursuant to *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

[2] In the alternative, the plaintiff sought an order that paragraphs 3, 4, 5(a), 7(a), 7(b), 7(c)(vi), 13(a), 29, 33, 34, 36, 37, 39D and 39E of the Amended Defence filed on 25 October 2000 be struck out pursuant to r 171 of the UCPR. The plaintiff must be referring to the Further Amended Defence filed on 6 February 2001.

[3] The uncontested facts on the basis on which this application is made, are that prior to and in January 1996, Anthony Irvine Markwell was the registered proprietor of a residential property located at 235 Shore Street, North Cleveland being Lot 6 on RP 120908, Title Reference 14292148 ("the Cleveland property"). On 22 January 1996, Mr Markwell entered into a written agreement to sell the Cleveland property to a third party for the sum of $430,000.00.

[4] Two days later, on 24 January 1996, a written agreement was entered into for the sale and purchase of property located at 62 Martingale Circuit, Robina, being Lot 164 on RP 868068, Title Reference 50025647 ("the Clear Island Waters

property") for the sum of $280,000.00. The vendor of the Clear Island Waters property was Queensland Land Management Pty Ltd and the purchaser was described as the Janice Markwell Family Trust. The two contracts were interconnected in that it was a special condition of the agreement to purchase the Clear Island Waters property that:

> "This contract is subject to the satisfactory completion and simultaneous settlement of the purchasers [sic] contract of sale on his property situated at 235 Shore Street, Cleveland Point which is due for settlement on the 21st of February, 1996. If the purchaser's property situated at 235 Shore Street, Cleveland Point does not settle on the 21st of February, 1996 then this contract shall be at an end and all deposit monies shall be refunded in full."

[5] Between 16 and 19 February 1996, Mr Markwell requested a solicitor, Graham Stenton, to prepare a Trust Deed to establish the Janice Markwell Family Trust. The Trust was established on 19 February 1996 whereby the settlor was the solicitor Mr Stenton, the trustee was Mrs Markwell, the nominator was Mr Markwell and the settlement sum was $10.00. It was a discretionary trust of which Mr Markwell was eligible to be nominated as a beneficiary although it appears that he was not a beneficiary. Mrs Markwell was entitled to occupation of the Clear Island Waters property as against any of the other beneficiaries.

[6] On 21 February 1996, the settlement of the sale of the Cleveland property was effected and the sum of $274,731.07 was paid to Mrs Markwell from the proceeds of that sale to complete the purchase of the Clear Island Waters property which settled on the same day. For a few months Mr and Mrs Markwell continued to reside together, but they have lived separately for some time with Mr Markwell living in New South Wales and Mrs Markwell still residing in the Clear Island Waters property.

[7] On 23 April 1998, a sequestration order was made against the estate of Mr Markwell who is therefore referred to in the pleadings as "the bankrupt". The petitioning creditor was Edward McMahon who had successfully sued Mr Markwell for defamation. Judgment had been entered in Mr McMahon's favour on 7 November 1997 after proceedings which commenced in July 1992. The act of bankruptcy relied upon in support of the creditor's petition was a failure to comply with a bankruptcy notice which was issued on 1 December 1997. The act of bankruptcy occurred on 23 January 1998. Upon the making of the sequestration order, David Lewis Clout became the trustee in bankruptcy of the estate of Mr Markwell.

[8] The plaintiff trustee in bankruptcy alleges that the transfer of property, that is the payment of $274,731.07 by Mr Markwell to or on behalf of Mrs Markwell, is void pursuant to s 120 of the *Bankruptcy Act* 1966 (Cth). Section 120(1) sets out which transfers are void against a trustee in bankruptcy because of inadequate consideration. It provides:

> "A transfer of property by a person who later becomes a bankrupt (the *transferor*) to another person (the *transferee*) is void against the trustee in the transferor's bankruptcy if:

(a) the transfer took place in the period beginning five (5) years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and

(b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property."

There is no doubt in this case that the transfer was a transfer of property[1] which took place in the period beginning five years before the commencement of the bankruptcy and ending on the date of the bankruptcy. The plaintiff is therefore entitled to summary judgment if he can show, without the need to go into contentious evidence, that the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property at the time of the transfer. In such a case he would be entitled to an equitable charge over property purchased with such funds.[2]

[9] Other relevant subsections of s 120 are subsections (4) – (7) which provide:

"*Refund of consideration*

(4) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

What is not consideration

(5) For the purposes of subsections (1) and (4), the following have no value as consideration:

(a) the fact that the transferee is related to the transferor;

(b) if the transferee is the spouse or de facto spouse of the transferor – the transferee making a deed in favour of the transferor;

(c) the transferee's promise to marry, or to become the de facto spouse of, the transferor;

(d) the transferee's love or affection for the transferor.

Protection of successors in title

(6) This section does not affect the rights of a person who acquired property from the transferee in good faith and by

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1 Pursuant to s 120 (7)(a) of the *Bankruptcy Act* 1966 (Cth)

2 *Worrell, in the matter of Tanter (Bankrupt) v Issitch* [1999] FCA 1452 at [62]; FC No 7007 of 1996, 22 October 1999

giving consideration that was at least as valuable as the market value of the property.

Meaning of transfer of property and market value

(7) For the purposes of this section:

(a) *transfer of property* includes a payment of money; and

(b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and

(c) the *market value* of property transferred is its market value at the time of the transfer."

[10] In paragraph 7(c) of the Further Amended Defence filed 6 February 2001, the defendant alleges that she gave consideration of market value for the transfer in that:

"(i) The Defendant and the Bankrupt co-habited between January 1992 and October 1997;

(ii) In or about January 1992, and immediately before the Defendant and the Bankrupt commenced cohabitation:

A. The Bankrupt was the registered proprietor of a property at 235 Shore Street, North Cleveland ("the Cleveland Property"); and

B. The Defendant and the Bankrupt entered into an oral agreement ("the Agreement");

(iii) The Agreement included terms that:

A. During the duration of the co-habitation at the Cleveland Property, the Defendant would provide financial contributions and domestic services to the household;

B. Title to the Cleveland Property would remain in the name of the Bankrupt;

C. On the sale of the Cleveland Property, the Bankrupt would pay the Defendant a sum equivalent to the value of the financial contributions and domestic services with which the Defendant had provided the household;

(iii)[sic] The Defendant and the Bankrupt co-habited at the Cleveland Property between January 1992 and 21 February 1996;

(iv) During the period of co-habitation and in performance of the Agreement, the Defendant:

A. Made financial contributions totalling $187,000.00 to the Cleveland household as set out in Schedule A hereto;

B. Provided domestic services of 40 hours per week, having a value of $10.00 per hour;

(v) On 21 February 1996:

A. the Cleveland Property was sold; and

B. the Bankrupt discharged his obligation to the Defendant pursuant to the Agreement by paying a sum of $274,731.07 to the Defendant;

(vi) Further and in the alternative

A. The Defendant and the Bankrupt co-habited:

1. In a de facto relationship from January 1992 to 14 February 1993; and

2. Following their wedding on 14 February 1993 until October 1997;

B. In the course of the said relationship to 21 February 1996, the Defendant provided the Bankrupt with funds and services of value, as set out in paragraph (iv);

C. In or about 21 February 1996:

1. The Bankrupt transferred a sum of $274,731.07 to the Defendant in consideration of the said financial contributions and domestic services; or

2. The Bankrupt accounted to the Defendant for a sum of $274,731.07 being the value of her equitable interest in the Cleveland Property by virtue of the financial contributions and domestic services she had provided;"

Schedule A to the Further Amended Defence sets out actual expenditure alleged to have been made by Mrs Markwell for the benefit of Mr Markwell between October 1992 and January 1996, and from February 1996 to October 1997.

[11] In the alternative, Mrs Markwell alleges in paragraph 7A of the Further Amended Defence that:

> "(a) If she did not give consideration of market value for the transfer of $274,731.07, she gave consideration for such lesser sum as the court may determine;
>
> (b) Any amount payable to the Plaintiff should be reduced in proportion to the consideration which the Defendant gave to the Bankrupt."

[12] These allegations were supplemented, and in some cases supplanted, by affidavit material filed by Mrs Markwell. She was not required for cross-examination and so the facts set out in her affidavits were uncontradicted for the purposes of this summary judgment application. She is a woman now in her mid-fifties who was married with two children until 1983 when her husband left her at a time when he had got into financial difficulties. At that time she owned a successful small business. She expanded her business and commenced living in a de facto relationship. Her de facto husband eventually left her taking half the proceeds of the sale of a property which she had purchased entirely through her own resources. She again built up her financial resources through her own labour when she met Mr Markwell in 1990. He had been successful in business but was not then working because of his health problems. As a result she paid all expenses but was wary of entering into a de facto relationship because of her previous experiences.

[13] In January 1992, she moved into the Cleveland property owned by Mr Markwell and lived with him in a de facto relationship. Immediately prior to doing so, she reached an agreement with Mr Markwell that he would reimburse her for the contributions she made to the household in the form of both the payment of expenses and the provision of domestic services.[3] At that time they both anticipated that he would return to gainful employment. Because Mr Markwell was a pensioner, Mrs Markwell took responsibility for the upkeep of the property and living expenses for herself and Mr Markwell. She also attended to the cooking, washing, cleaning and all other household tasks. She also looked after Mr Markwell and took him to and from medical practitioners.

[14] In September or October 1992, Mr and Mrs Markwell decided to marry. They also discussed transferring the Cleveland property into both their names but because of the costs involved decided to vary the agreement they had made prior to Mrs Markwell taking up residence in the Cleveland property in January 1992, by agreeing that the reimbursement for cash contributions and domestic services would be made from the sale of the Cleveland property. They also agreed that Mrs Markwell would continue to pay for the maintenance and upkeep of the Cleveland property, provide ongoing support and comfort to Mr Markwell, and meet all their ongoing financial needs until he was well enough to contribute to their financial wellbeing. During their negotiations of this agreement, Mr Markwell told Mrs Markwell that as far as he was concerned this agreement conferred on her an interest in the Cleveland property without the expense of transferring a half share

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[3] It does not appear in the circumstances that this was just a domestic arrangement not intended to create legal obligations: cf *Balfour v Balfour* [1919] 2 KB 571. In any event, there is no pleading to that effect at present: *Thorby v Goldberg* (1965) 112 CLR 597.

of the property to her. They anticipated selling that property although no time had been set for doing so.

[15] In February 1993, Mr and Mrs Markwell were married. Mrs Markwell paid for the engagement and wedding rings, the reception and the honeymoon. She made significant cash contributions to maintain the Cleveland property and to provide for the day to day needs of both herself and Mr Markwell. Mrs Markwell has set out the services she provided for Mr Markwell in great detail in her affidavit filed on 6 February 2001. Mr Markwell's many health problems required a great deal of assistance from her. She also made many financial contributions which improved the value of the property.[4]

[16] From January 1992 to February 1996, she estimated the value of her cash contributions was $129,519.84. The value of the domestic services she provided was $108,000.00, calculated at 40 hours per week for 216 weeks at a rate of $12.50 per hour. The total of the contribution of both cash and domestic services was $237,519.84. With interest at a rate of 10% per annum on yearly rests, she estimated the total value of her contributions for this period at $301,117.88.

[17] At the time of the sale of the Cleveland property, Mr Markwell agreed with Mrs Markwell that the value of her cash contributions and domestic services was $280,000.00. She received $274,731.07 from the sale of the Cleveland property which she used to purchase the Clear Island Waters property.

[18] The defendant asserts that there are two bases on which she was entitled to be paid the $274,731.07 on 21 February 1996. The first is that it was the value of the financial payments made and the non-financial services provided by her which Mr Markwell repaid in accordance with their agreement. The second basis was that the payment was the value of her equitable interest in the Cleveland property over which there was a constructive trust evidenced by the mutual intention of Mr and Mrs Markwell to create such an interest. Both of these propositions seem to be arguable bases for defending the plaintiff's claim.[5]

[19] The plaintiff argues that a constructive trust cannot have arisen because there was no unconscionable behaviour by Mr Markwell, by denying, for example, his wife's interest in the Cleveland property. Cases usually come to be decided in court because the party who has legal ownership of the property denies that the other party has a beneficial interest in the property.[6] It is therefore commonly said that it is unconscionable of the first party to deny the equitable interest of the other party, so giving rise to a constructive trust. In this case, however, Mr Markwell is not denying that Mrs Markwell had an equitable interest. It is therefore necessary to determine whether or not a constructive trust arises, in a case where there is a common intention which is not denied, only if there is unconscionable behaviour and if it is necessary in such a case for the court to create a constructive trust for it to exist or whether the court merely recognises the existence of such a trust.

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4 If it be necessary to show detriment, these contributions would be sufficient for that purpose.

5 In respect of the first basis of argument, see footnote 3

6 *Baumgartner v Baumgartner* (1997) 164 CLR 137

[20] When the parties have formed a common intention as to the beneficial interest, a constructive trust comes into existence not because there has been an unconscionable denial of the other person's beneficial interest but because it would be unconscionable for the legal owner to deny the beneficial ownership of another.[7] As Deane J. held in *Muschinski v Dodds*:[8]

> "The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do."

In such a case a constructive trust comes into existence. The court may declare or construe the existence of such a constructive trust but the declaration does not create the constructive trust.[9] Constructive trusts may in different circumstances come into existence when they are imposed by the court.[10] That is not the case where the equitable interest arises from the common intention to create it. In such a case the constructive trust comes into existence at the time the equitable interest arises. Section 116(2)(a) of the *Bankruptcy Act* specifically excludes from the definition of what property is divisible amongst the creditors of the bankrupt, "property held by the bankruptcy in trust for another person."[11]

[21] In any event, even if, contrary to the view I have expressed, the court hearing the matter were to hold there must be an unconscionable denial of the defendant's equitable interest before a constructive trust arises, the denial of the defendant's equitable interest by the trustee in bankruptcy, who stands in the shoes of the bankrupt, would be sufficient to give rise to a constructive trust if the court finds on the facts proven at trial that she has an equitable interest.[12] The trustee in bankruptcy takes the bankrupt's property "subject to all the liabilities and equities which affect it in the bankrupt's hands".[13] It would be unconscionable for the

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7 *Gissing v Gissing* [1971] AC 886 at 905; *Hohol v Hohol* [1981] VR 221 at 225; *Maharaj v Jai Chand* [1986] AC 898 at 907

8 (1985) 160 CLR 583 at 620; see also *Kidner v Secretary, Department of Social Security* (1993) 31 ALD 63 at 73-74, 76; *Re Sabri; Ex parte Brien v Australia and New Zealand Banking Group Ltd* (1996) 21 FamLR 213 at 229; O'Connor P, *Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust* (1996) 20 MULR 735 at 738; Dewar, J *The Development of Remedial Constructive Trust* (1982) 60 Canadian Bar Review 265; *Green v Green* (1989) 17 NSWLR 343 at 352-353; cf *Re Osborn; Ex parte Trustee of the property of Osborn v Osborn* (1989) 25 FCR 547 at 553

9 *Muschinski v Dodds* (supra) at 614; *Re Jonton Pty Ltd* [1992] 2 Qd R 105 at 108; Scott A, *Law of Trusts* (3rd ed, 1967) vol 5, ¶462-4; *Giumelli v Giumelli* (1999) 196 CLR 101 at 111; O'Connor P (supra) at 752, 754-755.

10 eg. *Baumgartner v Baumgartner* (supra) at 149; *Giumelli v Giumelli* (supra) at 112

11 Glover J *Bankruptcy and Constructive Trusts* (1991) ABLR 98 at 99, 108-109

12 cf *Re Osborn* (supra) at 553

13 *Re Clark; Ex parte Beardmore* [1894] 2 QB 393 at 410; *Re Sharpe (a bankrupt); ex parte the trustee of the bankrupt v Sharpe* [1980] 1 WLR 219, [1980] 1 All ER 198; *Corke v Corke and the Official*

trustee to deny those interests. Although this may be inconvenient for the administration of bankrupt estates,[14] the defendant has not engaged in any behaviour which suggests that her interests should be deferred to that of the judgment creditor.[15] Creditors should be expected in these times to be aware of the possibility of constructive trusts or of equitable interests which may arise when the debtor is married or in a de facto relationship.[16]

[22] The plaintiff also argued that "comfort and support" is not proper consideration but rather equates to the "love and affection" referred to in s 120(5)(d) of the *Bankruptcy Act*. However, there is no such equivalence. "Comfort and support" in this case are the equivalent of some of the financial and non-financial contributions[17] which commonly give rise to an equitable interest by a co-habitee of the legal owner, whether the parties are in a de facto or married relationship.

[23] Further, the plaintiff submitted that the consideration was not adequate and that the transaction is therefore void because the consideration was of less value than the market value of the property. However, the defendant's affidavits show that the consideration given by February 1996 was at least of equal value to the market value of the property. It was properly conceded by the defendant that the consideration could only relate to the period up to the transfer of the property in February 1996 and not to any consideration given after that date.[18] The consideration given before that date was not past consideration[19] because it was consideration given between when the agreement or common intention was manifest and the time the transfer was made. Further determination of the value of the consideration is a factual question which will have to await determination at the trial.

[24] It was also argued that the consideration given was colourable. This argument is based on the decision of the High Court in *Barton v Official Receiver*,[20] on the meaning of the phrase "for valuable consideration" in s 120(1) of the *Bankruptcy Act* as it was then. At that time s 120(1) provided:

> "A settlement of property, whether made before or after the commencement of this Act, not being –

Trustee in Bankruptcy (1994) 17 FamLR 698 at 705; *Re Sabri* (supra) at 222, 230; *Glover* (supra) at 99

14 *Re Osborn* (supra)

15 Levine J, *Does equity treat as done that which ought to be done? The consequences flowing from the timing of the imposition of a constructive trust* (1997) 5 APLJ 74 at 82-84

16 Indeed, a trustee in bankruptcy may be expected to gather into the estate any equitable interest of the debtor.

17 *Baumgartner v Baumgartner* (supra) at 149

18 *Sutherland v Brien* (1999) 149 FLR 321 at 330

19 cf *McVeigh (Trustee of the Bankrupt Estate of Zanella) v Zanella* [2000] FCA 1890 at [37]; FC No 7430 of 2000, 22 December 2000

20 (1986) 161 CLR 75

> (a) a settlement made. . . in favour of a purchaser. . . in good faith and for valuable consideration; or
>
> (b) . . .
>
> is, if the settlor becomes a bankrupt within two years after the date of the settlement, void as against the trustee in bankruptcy."

Section 120(1) now requires that the transfer be for the market value of the property rather than "in good faith and for valuable consideration". The focus has shifted from the motive[21] for the transaction and whether the consideration paid had any real value to whether or not full consideration at market value has been paid.[22]

[25] In *Barton v Official Reciever,*[23] it was common ground that some consideration had been given. The High Court adopted the test formulated by Sir Robert Megarry in *Re Abbott*[24] that a "purchaser. . . for valuable consideration" within the meaning of s 120(1) of the *Bankruptcy Act* is one who has given consideration for the purchase "which has a real and substantial value, and not one which is merely nominal or trivial or colourable."

[26] In *Re Osborn*,[25] Pincus J held that:

> "[t]he use of the word "colourable" seems to imply that the consideration is non-commercial or not bona fide and it is of such a kind as would not be agreed in an arm's length transaction."

However, this is no longer the test. The test now is whether or not the consideration was no less than the market value. The defendant has sworn to giving consideration which is equivalent to or in excess of market value. It could not be considered in those circumstances to be merely colourable, no matter what the relationship between the parties.

[27] Finally, with regard to the application to strike out certain paragraphs of the Further Amended Defence, it is necessary in this case for the defence to be further amended in part to deal with concessions made by counsel for the defendant in his oral submissions and in part to incorporate the new facts dealt with in the defendant's affidavits filed in opposition to the application for summary judgment which differ from or add to the facts alleged in the Further Amended Defence. I propose therefore to give the defendant leave to file a Further Amended Defence.

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21 Transfers to defeat creditors are now covered by s 121 of the *Bankruptcy Act* which was not the subject of argument in this application.

22 *Victorian Producers' Co-Operative Co Ltd v Kenneth* [1999] FCA 1488 at [11]; FC No 7754 of 1998, 29 October 1999.

23 (supra)

24 *In re Abbott (a Bankrupt)* [1983] 1 Ch 45 at 57

25 (Supra) at 550