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**Next Issue: Extended Warranties v Consumer Guarantees Act**

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## TRANSFERRING ASSETS IN ORDER TO DEFEAT CREDITORS

The prospect of transferring assets in order to protect them from creditors has become more attractive with the abolition of the Gift Duties Act on 1 October 2011.

However, there is still existing legislation that anyone contemplating transferring assets must be aware of.

Firstly, the Property Law Act 2007 allows a creditor who claims to be prejudiced by a disposition of property to apply to the Court to set aside that disposition.

For example, Peter's creditors were about to come after him so he transferred all his assets into his children's names. His creditors could make an application to have those assets transferred back into Peter's name.

Similarly, if a person is declared bankrupt, the Insolvency Act enables the Official Assignee (who manages a bankrupt's estate) to make an application for an order for the re-transfer of property where the property of the bankrupt or an interest in property of the bankrupt was transferred to another party.

It has been a common understanding that if you sell your property to a Family Trust you should ensure that your gifting programme has been completed at least three years before bankruptcy to avoid the Official Assignee seeking such an order.

This very issue has recently come before the Courts and has resulted in a very interesting decision.

The case of Official Assignee v Mayers was decided in the Auckland High Court on 27 January 2012.

On the 30<sup>th</sup> March 2007, 18<sup>th</sup> May 2008

and 18<sup>th</sup> May 2009 Mr Mayers completed Deeds of Forgiveness of Debt partially releasing and forgiving the Trustees the sum of \$27,000.00 on each occasion (a total of \$81,000.00). Mr Mayers was adjudicated bankrupt on 11<sup>th</sup> November 2009.

The Official Assignee made an application for the three gifts to be effectively reversed and the Trustees paying the sum of \$81,000.00. The Trustees opposed the application.

The Trustees' main argument turned on the wording of the relevant Section "were the gifts irregular transactions under which property of the bankrupt, or interest in the property of the bankrupt, was transferred?"

The Court decided that the debt which was forgiven is not property. It is in legal language termed "a chose in action". A chose in action is a personal right and is not something which a person can have physical possession of. Therefore, the Deeds of Forgiveness of Debt that the Official Assignee wanted reversed were not transfers from the creditor to the debtor of any property right.

The Court, therefore, did not have the ability to order a re-transfer to the Official Assignee because no property had been transferred.

I doubt very much that the Official Assignee is very happy about this decision, but for now that is the Court's interpretation of Section 207 of the Insolvency Act.

Whilst the Property Law Act claims remain an option, this decision will have a significant impact on those people who remain on a gifting programme and subsequently enter into bankruptcy.