

## FILE NOTE

**RE:** ADDITIONAL SPEAKING NOTES - PBTR

**DATE:** 23 February 2022

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1. I am conscious that the published paper has to be relatively bland, particularly given that litigation is still being pursued.
2. Search of the Queensland Supreme Court Registry shows that the trustee in the *Permewan* matter has sued for a debt. The claim was filed on 27 January. I gather a defence is being considered. I have not examined the papers.
3. There are technical difficulties that any successful “gift and loan bank” strategy has to overcome:
  - In Queensland – a statutory presumption of undue influence, where there is a transaction between a donor of a power of attorney, and the donee of the power of attorney (or certain associates) – section 87 *Powers of Attorney Act*.
  - General law presumptions which may be along the same line, both in Queensland and elsewhere.
  - State law of property legislation based on a Statute of Elizabeth, designed to void transactions intended to delay or defeat a creditor – for example section 228 *Property Law Act 1974* (Qd).
  - Provisions of insolvency legislation which are intended to do much the same.
  - The offence under section 266 *Bankruptcy Act 1966*.
4. Section 266(3) applies to a person who has become bankrupt and within 12 months before presentation of the petition “has disposed of, or created a charge on, any property with intend to defraud his or her creditors”.
5. The offence is punishable by five years imprisonment. There are parties provisions under the Commonwealth *Criminal Code*, which professional advisers would do well to read.

6. That offence has been successfully prosecuted in WA & Queensland in living memory: *Valentino v R* (1991) 109 FLR 167 (WAFC); *R v Dunwoody* (2004) 212 ALR 103; 149 A Crim R 259; 2 ABC(NS) 199 (QCA).
7. In each, the defendant was sentenced to two years' imprisonment. In *Dunwoody*, the defendant was ordered to pay reparation of \$130,000 to the complainants.
8. The facts of *Dunwoody* can relevantly be summarised as follows. Mr Dunwoody suffered judgment on an action, in a court. It seems that in the days and weeks leading up to that adverse result, Mr Dunwoody spoke to a number of advisers, both law firms and accounting firms.
9. At some point, Mr Dunwoody sold his farms to the trustee of an Australian family trust (which financed the purchase through Westpac). He then had money in his hands, which he transferred to Vanuatu where a foreign trust created a pension scheme for his retirement.
10. Each of the sale, and the transfer of the funds to Vanuatu, were counts in the indictment upon which Mr Dunwoody was convicted.
11. While that series of events is somewhat distant from a gift and loan back arrangement, it does indicate that this is a field where people play for keeps, and there can be criminal consequences both for the individual and the advisers. Further, the advisers can wind up answering questions perhaps some years after the events, occupying a deal of otherwise useful time.

**David W Marks QC**

23 February 2022