



In addition, court documents show that the Administrator acknowledged a lien placed over works by International Art Services for unpaid storage in the amount of approximately \$40,000. This lien was to be settled by the Administrator from receipts of the voluntary levy, which was to be applied to investors at the rate of \$500 for works valued \$5,000 and above, and \$300 below.

In total, the Administrator's court action sought to recover the balance of around \$160,000 (from an original cost projection of \$235,000) from the 153 named art investors who had at that point still refused to pay the voluntary levy to regain possession of 187 works of art.

And despite its name, the court action by the Administrator sought to enforce the sale of works owned by these investors if they did not pay. The affidavit stipulated the Administrator would, following sale, settle the proceeds less his fees (which included a deduction for the unpaid voluntary levy) amongst remaining creditors.

No levy was proposed against investor creditors who had competing claims against 106 works of art. This in itself is unsurprising, but was particularly galling for those investors subjected to the levy, many of whom expressed the belief that they were paying for the Administrator's incapacity and, in the opinion of some, unwillingness, to reconcile records with works of art and owners.

### **Competing Claims, Unclaimed and Missing Works, and Phantom Works**

Despite statements made to the press by Cameron Hall on two occasions that all works only had one owner[2], court papers reveal that the Administrator had identified 74 works with competing claims to title (between investors and suppliers), as well as another 32 works that had been sold to more than one person. This represents more than 10% of the total number of works located.

With regard to the former instance, section 28 of the Sale of Goods Act (NSW) confers ownership on the investor, and the Administrator stated he intended to give possession to the investor (pursuant to payment of the levy), unless the competing claimant filed orders to prevent the transfer.

In the latter scenario, the Administrator sought orders to sell the works in question and distribute the monies, minus the costs of sale, to each party pro rata to the amount of their original purchase price.

Most peculiarly, the Administrator also identified 107 works of art for which no record was found and no claim of ownership made. Orders were also sought to sell these works and distribute proceeds pro rata to creditors.

Aside from identified works, there were approximately 260 works on the books that were not physically located, and several investors contacted the administrator to claim works for whom no records existed. In many of these instances, the investors had not only purchased the works in question, but had also paid for framing and insurance.

### **People Power: Creditors Committee and Social Media**

Last month it was reported that the Administrator understood people were upset, but felt their ire was misdirected[3]. A common complaint amongst art investors, who were deemed to be creditors or otherwise, is that the Administrator was not interested in listening to their complaints and made very little effort to reconcile records and works with owners. Rather, it was felt that the Administrator wanted to move quickly to sell the works to recover his 'voluntary' levies.

Aside from the works in their control, and for which they sought payment of a levy before release to owners, the Administrator also located 63 works of art that had been rented to the third parties, in line with the guiding principle of the company's sales pitch. Once identified and verified, the Administrator notified owners and instructed them to make their own arrangements with the third parties for continued rental or return. The same determination was made for works in the possession of framers.

In light of the Administrator's claim in court papers to have spent considerable time 'returning works to owners', the attitude shown toward individual investors was particularly galling to many, especially those who lived interstate and felt powerless. The dismissal of their concerns was also a common complaint by owners of missing works, who could not obtain information about potential second claimants or suppliers.

*In their frustration many investors reported their cases to police, requesting they investigate allegations of potential theft and fraud, but in each case investors were told to pursue action as a civil matter (various instances of breach of contract), or were referred back to the Administrator or ASIC.*

These rebuttals, along with the bias shown by the Administrator who declared he was acting for the companies and not the creditors, led to the formation of an independent Creditors Committee, and separately, a Facebook group.

The Facebook Group was formed by an interstate aggrieved creditor to share information. Members comprised local and interstate investors for whom works had been located, as well as others left in limbo with missing works. It is understood the Administrators never contacted investor creditors to alert them to the existence of the Creditors' Committee. The Committee, however, learned of the Facebook group, and then lobbied the Administrator to obtain contact details for all investors.

The Creditors Committee comprised five investors, four of whom actively tracked down missing works and solved disputes on behalf of other investors. One member concentrated on organising their schedules to track investors' works, and one other focused on suppliers and physical inventory. The Creditors' Committee was allowed access to the storage facility, which was denied to individuals. Luckily for some, the Creditors Committee located works the Administrator had indicated were missing.

### **ASIC: a Toothless Tiger?**

In December The Australian Financial Review reported that it was unclear whether ASIC would investigate the Smith & Hall

collapse[4]. ArtiFacts sighted correspondence from ASIC in November that clearly stated it would defer any investigations until receipt of the liquidator's final reports. These reports have now been presented, but based on past outcomes, investor creditors should not expect ASIC to take strong action, if any at all.

*Statistics produced by Australia's corporate regulator reveal that it treats only 11% of the unfavourable reports it receives from insolvency practitioners as serious enough to warrant any action[5].*

A recent study by an insolvency expert of ASIC statistics from 2006-2009 concluded that most prosecutions related to company officers failing to comply with their obligations to *liquidators and administrators*, rather than their breaches of responsibility as directors that lead to the company collapses in question[6].

Of the 759 fines imposed in 2009 as a result of successful summary prosecutions for insolvency offences, 97% related to sections of the Act pertaining to assisting liquidators. What's more, the study determined that the average fine for these offences over the 4 year period actually fell by about 40% to \$630-650. The maximum fine imposed in 2009 was \$5,000, for a disqualified person managing a corporation; a scenario that doesn't apply in this case.

### **Investment Strategies: to SMSF or not to SMSF?**

A recent article by the Sydney Morning Herald reported that 'hundreds of self-managed superannuation funds' had incurred losses stemming from the collapse of Smith & Hall[7]. In fact, court documents show that Super and Pension Funds, along with Family Trusts, comprised less than 11.8% of the 153 purchasers from whom a levy was sought. Corporations made up 4%; the balance was private individuals.

It is possible that SMSFs represented a significantly higher proportion of the other 159 purchasers that had already paid the levy, but this seems statistically unlikely. While it is clear the Smith & Hall specifically targeted Self Managed Super Fund investors in their marketing pitch[8], it is apparent from the Administrator's scrutiny of company records that most purchasers were betting instead on capital gain as an investment strategy.

### **Market Response and Valuations**

It is clear from court documents that just over 50% of identified investors with free claim to works readily paid to regain possession, adding to the monies already outlaid on purchase. Following the court's orders allowing the Administrator to charge the levy, the other 153 people subject to the court action were granted a 60 day period to pay; many did. It is understood that the expectation for those that paid in the end was that a forced sale would lead to significant losses.

Purchases from Smith & Hall and its entities were accompanied by valuations from 3<sup>rd</sup> party valuers. The valuations inspected by ArtiFacts were provided at insurance levels, and were around 5% higher than purchase price. This is not unsurprising (this practice was suggested to be standard amongst art investment companies[9]) or even problematic, as long as individuals are made aware of the differences accorded to notions of value across the primary and secondary art markets, and that insurance values aren't used at time of purchase to reflect a work's likely realisable resale value.

*In February Lawson-Menzies offered six Aboriginal works of art in their Fine Art Auction whose catalogue entries declared a provenance of either Smith & Hall or Galleries Direct. Only one work sold.*

Certificates supplied by Smith & Hall to buyers inspected by ArtiFacts did not list provenance or codes that can be traced to original suppliers. Owners of works of art purchased through Smith & Hall and its subsidiaries who wish to sell would be well advised to first identify their work's original provenance, and seek professional assistance if it is not apparent from scrutinising the work itself.

Buyers who have purchased retail and wish to turn over works quickly invariably face significant devaluations across all media. Given prospective devaluations from retail purchase to secondary market sales, investors who purchased paintings from Smith & Hall and paid \$500 to regain possession will likely, over the long run, be better off than others who bought prints and who paid \$500. It is notable that court papers did not reveal how the Administrator determined the value for each work against which the levy was to be applied at the \$5,000 breakpoint.

In the end though, perhaps the statistics on unclaimed works demonstrates just how many investors and suppliers were prepared to cut their losses and run. Sadly for the industry, many investor creditors that spoke to ArtiFacts during the course of this research have sworn they will never buy art again.

JANE RAFFAN

### **STATISTICS FROM COURT DOCUMENTS**

#### *Claimants Subject to Levy (153)*

NSW - 32%

VIC - 27%

QLD - 17%

Other states - 19.5%

Overseas - 4.5% (Dubai, China, NZ and Singapore)

Super Funds, Pension Funds, Family Trusts - 11.8%

Corporations (including 4 gallery suppliers) - 4%

Individuals (including artist suppliers) - 84.2%

#### *Works of Art Subject to Levy (187)*

Aboriginal art – 41.8%  
Australian Ptgs – 38.5%  
Australian prints – 19.7%  
Supplier v Private – 70.4%  
Private v Private – 29.6%

#### *Works of Art with Competing Interests (108)*

Aboriginal art – 29.6%  
Australian Ptgs – 51.9%  
Australian prints – 18.5%  
Supplier v Private – 70.4%  
Private v Private – 29.6%

#### *Unclaimed Works (107)*

Aboriginal art – 52.34%  
Australian prints – 47.66%

[1] Leonie, Lamont, *'Art Investors Painted into Tight Corner'*, Sydney Morning Herald, 14 March 2011  
<http://www.smh.com.au/business/art-investors-painted-into-tight-corner-20110313-1bsxo.html>

[2] Katrina Strickland, *'With the Bust, Art Rental Business Turns Sour'*, Australian Financial Review, 12 October 2010; Katrina Strickland, *'Collapse Not a Pretty Picture'*, Australian Financial Review, 14 October 2010.

[3] *'Accreditation of Art not in the Picture'*, Sydney Morning Herald, 14 March 2011  
<http://www.smh.com.au/business/accreditation-of-art-not-in-the-picture-20110313-1bsxq.html>

[4] Katrina Strickland, *'DIY Super Investors Buy an Illusion'*, Weekend Australian Financial Review, 23-28 December 2010.

[5] Peter J Keenan, *'Crime Statistics on Common Insolvency Offences by Company Officer'*, December 2010,  
<http://insolvencyresources.com.au/Papers/InsolCrimeStatsPKeenan16122010.pdf>

[6] Ibid.

[7] Leonie, Lamont, *'Art Investors Painted into Tight Corner'*, Sydney Morning Herald, 14 March 2011  
<http://www.smh.com.au/business/art-investors-painted-into-tight-corner-20110313-1bsxo.html>

[8] Jane Raffan, *'Smith & Hall Collapse Sends a Chill through SMSF Sector'*, Australian Art Sales Digest, News and Opinion, 13 October 2010.

[9] Ibid.

#### **About The Author**

Jane Raffan runs ArtiFacts, an Art Services Consultancy based in Sydney. Jane is an accredited valuer for the Australian Government's highly vetted Cultural Gifts Program with over 20 years experience in the arts sector, working initially for the Art Gallery of New South Wales, and then over twelve years in the fine art auction industry. Her consultancy focuses on collection management, market advice and valuations. Apart from published fine art market commentary, Jane also writes and blogs on Aboriginal art, and has a weekly radio spot reviewing the Sydney art scene. [www.artifacts.net.au](http://www.artifacts.net.au).