

## Hunter Valley Family Law Seminar

### Maximising the Pool of Property Available for Division

*“Money is better than poverty,  
if only for financial reasons”<sup>1</sup>*

The first stage of proceedings for adjustment of interests in property pursuant to the *Family Law Act, 1975* (“the Act”) involves the identification and valuation of property. The question of identification can often involve disputes as to whether a party owns an item or not and secondly whether the interest in that item constitutes property for the purposes of the Act.

Stage 1 of proceedings has historically often been the most hotly disputed issue in proceedings. In many cases the operation of the single expert rules has now diminished the opportunity for dispute. The effectiveness in this direction will probably increase over time as the next generation of family lawyers will develop in an environment where their opportunity to develop critical analytical skills in relation to experts will be diminished.

The focus of this paper is to examine this topic by two broad categories. The first category is confined to legal issues. The second category, whilst constituted by underlying legal issues, is one of practical application.

---

<sup>1</sup> Woody Allen: *Without Feathers* (1976) “Early Essays”

## The Jurisdiction of the Family Court

The Family Court of Australia is vested with a broad discretion to adjust the interests of parties to a marriage in their property<sup>2</sup>. In doing so it is now well established that the preferred or orthodox approach to the exercise of the discretion pursuant to s.79 of the Act involves three steps<sup>3</sup>. Those steps may be broadly described as follows:

1. The court is required to identify and value the relevant property of the parties (“Stage 1”). This includes all property irrespective of its source or time of acquisition.
2. The court is then required to have regard to the direct and indirect, financial and non-financial contributions made by or on behalf of each of the parties to the marriage including contributions as a homemaker and parent<sup>4</sup> and should come to a determination as to a proper apportionment between the parties (“Stage 2”).
3. The court is then required to have regard to s.79(4)(d) to (g), or such of those as are relevant. In particular by sub-para (e), this incorporates those matters listed in s.75(2). The court is then required, after having regard to those matters, to determine whether any adjustment should be made to the apportionment referred to in Stage 2 (“Stage 3”).

The court is obliged not to make an order under s.79 unless it is satisfied, that in all of the circumstances, it is just and equitable to do so<sup>5</sup>. The recognition of this obligation

---

<sup>2</sup> S.79 of the Act.

<sup>3</sup> See *Mallet v Mallet* (1984) 156 CLR 605 at 608 per Gibbs CJ, *Pastrikos v Pastrikos* (1980) FLC 90-897 and *Davut v Raif* (1994) FLC 92-503.

<sup>4</sup> See s.79(4)(a) to (c).

has more recently been referred to as the fourth stage<sup>6</sup>, said to involve a consideration of the effect of the findings in the first three stages and the determination of what order is just and equitable in all the circumstances of the case.

The issues considered in this paper thus impact directly upon the court's resolution of stage 1.

### **The Relevance of Discretionary Trusts**

Sections 79 and 75(2) address two distinct concepts of "property" and "financial resources". The distinction is an important one and is relevant to the consideration of the ability of the court to make orders which effectively attach or affect assets held by a party or a relevant trust or settlement.

The ultimate importance of the distinction is that pursuant to s.79 the court only has power to make an order which adjusts the interests of parties in "property". It has no power to make an order adjusting the interests of parties in a "financial resource". By the inter relation between s.79(4)(e) and s.75(2)(b) the court can take into account the existence of a financial resource in the hands of one party in a manner which may, subject to the balancing of other factors relevant under s.75(2), result in the other party receiving a greater proportion of the available "property". It nonetheless remains that no matter how great or valuable the financial resource is, an order cannot be made for the benefit of the party who does not hold the financial resource which exceeds the value of property. If there is no "property" at all then an application would fail as there cannot be an exercise of jurisdiction pursuant to s.79<sup>7</sup>.

---

<sup>5</sup> See s.79(2).

<sup>6</sup> e.g. *Hickey and Hickey and Attorney-General of the Commonwealth of Australia (Intervener)* (2003) FLC 93-143 at para 39.

<sup>7</sup> *Yates v Yates (No.1)* (1982) FLC 91-227.

## Property or Financial Resource

The High Court of Australia in *Ascot*<sup>8</sup> has made it clear that the Family Court must take the property of a party to the marriage as it finds it. Gibbs J said<sup>9</sup>:

".....It would be unreasonable to impute to the Parliament an intention to give power to the Family Court to extinguish the rights, and enlarge the obligations, of third parties, in the absence of clear and unambiguous words. It can safely be assumed that the Parliament intended that the powers of the Family Court should be wide enough to prevent either of the parties to a marriage from evading his or her obligations to the other party, but it does not follow that the Parliament intended that the legitimate interests of third parties should be subordinated to the interests of a party to a marriage, or that the Family Court should be able to make orders that would operate to the detriment of third parties. There is nothing in the words of the section that suggests that the Family Court is intended to have power to defeat or prejudice the rights, or nullify the powers, of third parties, or to require them to perform duties which they were not previously liable to perform. It is one thing to order a party to a marriage to do whatever is within his power to comply with an order of the court, even if what he does may have some effect on the position of third parties but it is quite another to order third parties to do what they are not legally bound to do....."

The position is, I think, different if the alleged rights, powers or privileges of the third party are only a sham and have been brought into being, in appearance rather than reality, as a device to assist one party to evade his or her obligations under the Act. Sham transactions may always be disregarded. Similarly, if a company is completely controlled by one party to a marriage, so that in reality an order against the company is an order against the party, the fact that in form the order appears to effect the rights of the company may not necessarily invalidate it.

Except in the case of shams, and companies that are mere puppets of a party to the marriage, the Family Court must take the property of a party to the marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it....."

Section 4(1) of the Act defines the term "property" as follows:-

"Property", in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion."

---

<sup>8</sup> *Ascot Investments Pty Ltd v Harper* (1980-81) 148 CLR 337.

<sup>9</sup> At p354.

The definition was considered by the Full Court in *Duff*<sup>10</sup> where the court held that the term is to be given a broad meaning and approved the statement of Lord Langdale MR in *Jones v Skinner*<sup>11</sup> where the Master of the Roll said<sup>12</sup>:

"Property is the most comprehensive of all terms which can be used, in as much as it is indicative and descriptive of every possible interest which the party can have."

Property can be either real or personal and it can involve a chose in possession or a chose in action including both an equitable or legal chose in action. Shares in a company, an interest in a partnership, a licence to conduct a trade or business, rights arising under a contract and rights in respect of property held on trust for a spouse have all been held to constitute property under the Act. An interest in a debt owed to a party by a trust is clearly property and would catch any credit loan account that a party may have with a trust or company.

"Property" does not include a mere hope or expectancy. The principle interest of a beneficiary under a discretionary trust is simply a hope, or no more than an expectation, that the trustee will exercise his or her discretion in the beneficiary's favour in deciding upon the distribution of income or the vesting of trust property<sup>13</sup>. The beneficiary under a discretionary trust has only the right to require the trustee to exercise the discretion properly and otherwise duly administer the trust<sup>14</sup>. A beneficiary

---

<sup>10</sup>*Duff v Duff* (1977) FLC 90-217.

<sup>11</sup>(1835) 5L.J.Ch 87

<sup>12</sup>At p90

<sup>13</sup>See *Stacey v Stacey* (1977) FLC 90-324, *W v W* (1980) FLC 90-872 and *Spellson v Spellson* (1989) FLC 90-044.

<sup>14</sup>*Gartside & Anor. v Inland Revenue Commissioners* [1968] AC 553.

under a discretionary trust has no right to require a trustee to exercise his or her discretion in the beneficiary's favour, otherwise the trust would not be a discretionary trust<sup>15</sup>.

The term "financial resource" is not defined in the Act. In *Kelly (No.2)*<sup>16</sup> the Full Court has said<sup>17</sup> that the term "financial resource" must add some meaning not covered by the terms "income and property" and that as an example included contingent interests or benefits which a party actually received or was likely to receive, whether legally entitled thereto or not. The Full Court accepted the definition of the trial judge that a financial resource is:

"A financial stock or reserve over which a party has sufficient control as a matter of fact to draw upon when necessary towards supplying some financial want or deficiency of the party."

It is not clear that 'control', at any level, is necessary.<sup>18</sup> As to an interest in a discretionary trust in *Kelly* the Full Court reviewed the authorities and said<sup>19</sup>:-

"In *Bailey*.....Evatt CJ and Murray J included as part of "the broader financial resources of a party" the benefits which a party might receive under the terms of a discretionary trust - even though there is no present entitlement to the receipt of any moneys out of the trust and the exact extent of the interest depends on the discretion of the trustees: See also the remarks of Fogarty J in *Crapp*.....Where, as in *Whitehead*., a party in effect controls the trust through his or power to remove and appoint the trustees, the financial resources of the trust can be regarded as part of the "financial resources" of the controlling party..... In *Tiley*,.....the Full Court.....treated as part of the husband's financial resources, the assets of a family company and of a family trust which it was found was in his "complete control". The husband in that case was not entitled to a

---

<sup>15</sup>A. Dickey, Family Law, Second Edition, Law Book Company.

<sup>16</sup>*Kelly v Kelly (No.2)* (1981) FLC 91-108.

<sup>17</sup>At p.76,802.

<sup>18</sup>*Kelly (No.2)* at p76,803.

<sup>19</sup>At p.76,802.

share as a beneficiary in either the income or capital of the family trust. Nevertheless, it was his control over the assets of the trust which made them part of his "financial resources".

The Full Court went on to say:

"It follows from the decisions which have been referred to that there are circumstances in which the property of the third party can be taken into consideration as a financial resource of a party to the marriage, and that the extent to which that party can control the property in question is relevant to this question."

It follows that where a party to a marriage is a potential discretionary beneficiary of a family trust that position equates to a "financial resource". The weight to be given to that financial resource, if any, will generally depend upon an examination of issues relevant to his control or lack of control and ability to utilise the resource and perhaps even an examination of historical events whereby he or she has received benefits from the trustee. However, even if control was absent, a court may find, on balance of probabilities, that in a particular case, the probability of continuing future benefits constituted a financial resource of value.

The mere fact of being a potential discretionary beneficiary however does not enable the Family Court to make any order which would directly affect the net assets of the trust and as indicated earlier its significance would be restricted to the exercise of the court's discretion in relation to the remaining available property.

As a consequence of the common use of discretionary trusts for tax planning and other purposes in modern society the aforementioned principles often stand to be applied in cases where wealth acquired during a marriage is held in a discretionary trust. Most commonly these cases stand to be considered by reference to the opportunity to control and opportunity to benefit.

## The Power of Appointment

What is the nature of a power of appointment of new trustees?

In *Re Skeats*<sup>20</sup> Kay J said:

"No case has been cited in which a person having a power of appointment of new trustees has appointed himself, and the appointment has been held to be valid by a Court of justice. The question whether such an appointment is valid or not depends, I think, as has been said in argument, very much upon whether the power is to be treated as a fiduciary power or not. Now I take that question first. The ordinary power of appointing new trustees, under a settlement such as this is of course imposes upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult, onerous and often delicate duties which trustees have to perform. He is bound to select to the best of his ability the best people he can find for the purpose. Is that power of selection a fiduciary power or not? I will try it in this way, which I offered as a test in the course of the argument. Suppose as happens not infrequently, the trustees under the terms of the Deed of Trust, are entitled to remuneration by way of annual salary or payment. Could the person who has the power of appointment put the office of trustee up for sale, and sell it to the best bidder? It is clear that would be entirely improper. Could he take any remuneration for making the appointment? In my opinion, certainly not. Why not? The answer is that he cannot exercise the power for his own benefit. Why not again? The answer is inevitable. Because it is a power which involves a duty of a fiduciary nature, and I therefore come to the conclusion independently of any authority, that the power is a fiduciary power."<sup>21</sup>

In *Shaw*<sup>22</sup> Lindenmayer, Strauss and Nygh JJ said at p77,415:

"Under the instrument creating the Trust the husband is the "appointor" with the power to appoint and remove trustees. That power, however, is not entirely unfettered, because it is a fiduciary power, to be exercised for the benefit of the Trust not for the benefit of any particular beneficiary: In *Re Skeats Settlement*. That case is also authority for the proposition that in the exercise of that power the husband could not appoint himself as trustee, although he may be able to appoint a company of which he is the majority shareholder, or such person (such as his solicitor or accountant) who might be expected, in exercising the powers of the trustee, to act sympathetically to the husband....

---

<sup>20</sup> *Re Skeats' Settlement v Evans* (1889) 42 ChD 522 at 526.

<sup>21</sup> See also *In re Crawshay, deceased. Hore-Ruthven v Public Trustee* (1948) Ch123, *In re Newen. Newen v Barnes* (1894) 2 CL 297 and note s.6(3) *Trustee Act, 1925* (NSW) now provides "The person to be appointed a trustee may be the person, or one of the persons, by whom or with whose consent the appointment is or may be made."

<sup>22</sup> *Shaw v Shaw* (1989) FLC 92-030.

As a potential beneficiary and therefore an object of the trust, the husband has a right to call upon the trustee (in this case *Latimer Investments*) to deal with the Trust Fund in a manner appropriate to the due administration of the Trust, and that right is an equitable chose in action which is itself "property" in the strict sense. On the other hand, he has no interest, vested or contingent, in the Trust Fund itself, nor in any specific share thereof nor in any particular asset of the Trust: See Hardingham and Baxt Discretionary Trust, Second Ed, Para 605,609 and 614 and the cases there cited. Thus, unless the Trust was the husband's alter ego or his "puppet" (*Ascot Investments Pty Limited v Harper and Harper* (1981) FLC 91-000 at pp76,061-76, 062, (Per Gibbs J), *Ashton v Ashton* (1986) FLC 91-777, *Stein v Stein* (1986) FLC 91-779) the only "property" of the husband which was of any relevance in the proceedings before His Honour (so far as the *Latimer Investments* and the Trust were concerned) was his equitable chose in action, arising as an object of the Trust, to compel the due administration of the Trust....(At p77,425). In the Trust, the husband is the principal beneficiary (the effect of which has been already noted) and he is the appointor. Although his power to remove or appoint Trustees is a fiduciary one, it is a power which places him in a special position of influence in relation to the distribution of trust incomes. This position is further recognised by a provision in the trust instrument to the effect that the trustee shall have regard to, but not be bound by, the wishes of the appointor (i.e. the husband). Although the husband and his father are co-directors and equal shareholders of the trustee company, *Latimer Investments*, the fact is that all nett income of the trust over the years 1983 to 1987 has been distributed to the husband's children and used by the husband to pay the children's school fees, thus conferring an indirect benefit upon him by relieving him of the responsibility of paying those fees from his own income..... The evidence also discloses that the husband draws upon a Loan Account of the Trust as he sees fit (including for the payment of part of his legal costs in these proceedings) and that the husband himself (and indeed the Shaw Group as a whole) regards the husband as being synonymous with the Trust.

Having regard to all of these matters we are of the opinion that his Honour's failure to consider these significant differences between the husband's position as a minority shareholder of *Edess* and as principal beneficiary, appointor and the person with de facto control of the Trust led him to make an erroneous implicit finding that the Trust like *Edess*, is not a financial resource of the husband at all."

The holding of a power of appointment of the trustee of a trust does not give rise to any "property" in the fund of the trust. The trustee by the very nature of his role has a legal interest, but no equitable interest in the trust assets. The position of a settlor gives rise to no "property" in the trust.

### **Alter Ego**

In general terms if a party can be demonstrated to have the ultimate control of a trust; e.g., by having the capacity through a power of appointment to appoint himself or a

creature wholly controlled by him as trustee and also the capacity to derive benefit from the trust; e.g., he is already a potential beneficiary; has the capacity to appoint himself as a beneficiary; or has the capacity to appoint a company or other trust which he solely controls as beneficiary then the trust may be treated as his "alter ego". In essence, the alter ego approach, once established, enables the court to treat, in property proceedings, the assets of such a third party as the property of a party to the marriage<sup>23</sup>.

In *Ashton* Strauss J, (with whom Ellis and Emery JJ) agreed, said:

"The powers which the husband has in the Ashton Family Settlement give him control of the trust either as trustee or through a trustee which is his creature, and at the same time he is able to apply all the income and property of the trust for his own benefit. In my opinion, in a family situation such as the one here, this court is not bound by formalities designed to obtain advantages and protection for the husband who stands in reality in the position of the owner. He has de facto, legal and beneficial ownership - no person other than the husband has any real interest in the property or income of the trust except at the will of the husband."<sup>24</sup>

In *Ashton* an application was made for special leave to appeal to the High Court from the decision of the Full Court of the Family Court of Australia. The High Court refused special leave to appeal. The decision in *Ashton* has been followed by the Full Court of the Family Court in *Stein*<sup>25</sup>, *Reynolds*<sup>26</sup>, *Goodwin*<sup>27</sup>, *Davidson*<sup>28</sup> and *Harris*<sup>29</sup>.

As was pointed out by P. E. Nygh and A. Cotter-Moroz<sup>30</sup>

"The legal formalism inherent in earlier decisions has been overcome in favour of a more realistic approach which does not permit a party to shelter behind a legal

---

<sup>23</sup>See *Ashton v Ashton* (1986) FLC 91-777.

<sup>24</sup>At p.75,653.

<sup>25</sup> *Stein v Stein* (1986) flc 91-779.

<sup>26</sup> An unreported Judgment delivered on 27 April 1990.

<sup>27</sup> *Goodwin v Goodwin Alpe* (1991) flc 92-192.

<sup>28</sup> *Davidson v Davidson* (1991) FLC 92-197. An application for special leave to appeal to the High Court of Australia in *Davidson* was refused on 10 May 1991.

<sup>29</sup> *Harris v Harris* (1991) FLC 92-254.

<sup>30</sup> The Law of Trusts in the Family Court (1992) 6 AJFL 4 at p21.

framework designed to obfuscate the tax authorities, or permit his or her relatives to gain an unjust enrichment out of the earnings or labour of a spouse who unwittingly has become enmeshed in a family arrangement."

In essence, to establish alter ego it is necessary, in all the circumstances and upon the proper construction of the relevant trust instrument to establish that a spouse has control and can benefit, or has the ability to obtain benefit, from the trust, within the terms of what is permitted by the trust instrument.

In *Harris* the Full Court said<sup>31</sup>:-

"In our opinion, the husband's interest as a beneficiary under the trust in combination with his rights and powers as appointor and guardian place him, for the purposes of Section 79[of the Act], into the position of an owner of property which property is constituted by his interest and his rights and powers under the trust. This property is properly evaluated as equivalent to the value of the assets of the trust.

Under s.79 the court may make orders altering the interests of the parties in this property. If necessary, the court may require the husband to exercise his rights and powers under the trust deed so as to bring about a settlement of the property out of the corpus or income of the trust for the benefit of the wife."

Nygh and Cotter-Moroz point out<sup>32</sup>:-

".....that as long as the object of the trust, upon proper construction of the trust deed and in the light of the factual circumstances of the case, is advanced and not defeated by the orders of the court, such orders cannot be said to ignore the traditional law of trust. Thus, where the very object of the trust as appearing from the trust deed, is to put a party into the position of complete and unfettered control just as if a spouse were the owner of the trust property, an order of the Family Court effecting this reality has a result permitted by the trust deed itself, therefore, such an order is not inconsistent with the traditional law of trust."

### **The Power of Variation**

In some cases a deed which would not otherwise appear to satisfy the alter ego principles, nonetheless needs to be considered in the light of any relevant power of

---

<sup>31</sup>At p78,708

<sup>32</sup>(1992) 6 AJFL 4 at p18.

variation. This is because a party may enjoy the capacity to be able to confer upon him or herself presently absent features of opportunity to benefit or control by having a power that authorizes variation.

A power of variation must be exercised in accordance with the terms of the power conferred by the trust deed. In a number of cases it has been emphasised that a power of variation may not be exercised so as to alter the “substratum” of a trust. Generally however, this principle has arisen in the context of trusts created for charitable purposes or for a definite special purpose. For example: In *Re Dyer*<sup>33</sup> it was held that a broadly expressed power of variation did not authorise the alteration of the objects of a trust which was created for a definite special purpose, namely, the creation of an orchestra of a particular description. Emphasis was given to the proposition that the trust had been established with the expectation that the settlor and others were contributing to a fund to enable a particular gift to be achieved and donations had been obtained on that basis.

In my opinion circumstances of that nature are very vastly removed from the considerations applicable to the usual discretionary family trust. This is particularly so in a case, as is common place in many deeds, where there is not only a broad power of variation but a power of resettlement which specifically acknowledges the prospect that the entirety of the fund may be settled upon a discretionary trust which has only one common discretionary object. This may lead to a result where, in terms of both income and capital, none of the originally named beneficiaries might ultimately receive anything. In any event in *Lock*<sup>34</sup> Waddell CJ in Eq said:

---

<sup>33</sup> In *Re Dyer* [1935] VLR 273

<sup>34</sup> *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593.

“The sub stratum is to be determined as a matter of construction of the deed and having regard to the circumstances. If the amendment is, as a matter of construction within power, it cannot be an infringement of the sub stratum.”

In *Kearns*<sup>35</sup> the relevant trust deed contained a broad power of variation<sup>36</sup>. The trustees, purporting to exercise that power, executed a deed poll appointing additional beneficiaries. The issue before the court was whether such a variation was beyond power. The court held that a power of variation in a trust instrument is not to be construed in a narrow or unreal way. The cardinal duty of the court is to construe each provision according to its natural meaning and in such a way to give it its most ample operation. The power which, on its natural meaning, included a power to vary the identity of the beneficiaries of a trust (i.e. in addition to stated beneficiaries) could not be limited by reference to any historical presumption against variations which alter the main structure of, or beneficial entitlements under, trusts. As Meagher JA observed.<sup>37</sup>

“That consideration is not of much use when the evident purpose of the power is to ensure maximum flexibility.”

Careful consideration of any powers of variation may broaden the scope of those trusts captured by the alter ego principles.

## **Puppet**

One of the identified exceptions in *Ascot*<sup>38</sup> to the lack of power to make orders against third parties except, inter alia, is where the third party is a “*mere puppet of a party to a marriage*”<sup>39</sup>. Despite in excess of 20 years of jurisprudence since *Ascot* was decided by the High Court in 1981 little clarity has been provided as to what constitutes a

---

<sup>35</sup> *Kearns & Anor v Hill & Ors* (1990) 21 NSWLR 107 Per Mahoney, Clarke and Meagher JJA.

<sup>36</sup> Set out at p108.

<sup>37</sup> At p110.

<sup>38</sup> *Ascot Investments Pty Ltd v Harper* 148 CLR 337 per Gibbs J at 354-5.

puppet in this context and whether that term captures circumstances that would not be caught by the *alter ego* cases.

In 1992 a Sydney barrister wrote<sup>40</sup>:

“The second exception which Gibbs J referred to was where the third party is a mere puppet of the spouse. There is no reported case where this concept has been dealt with in circumstances where a spouse had no legal control over the third party.<sup>41</sup> The question therefore arises as to the circumstances in which this exception may apply. It may be that this exception only applies in circumstances which satisfy the current criteria as to when a third party can be treated as the alter ego of a party. It may be that such an approach is too restrictive and that it is intended to cover some of the problem areas described above.

.....

If the spouse is not in effective legal control; receives financial benefits from the trust which may be deductible in the hands of the trust; may have a loan account with the trust; is likely to be the only person to receive benefit from the trust during the lifetime of the spouse; is also not able by the terms of the trust deed to access profit and corpus of the trust then why should not the assets of this trust be treated as the property of the spouse.

In the result there may be circumstances which do not fit easily with the established approaches to the third party problems but may yet be capable of just resolution within established principle.”

Similar propositions may flow if a party has legal control but ostensibly has no capacity to benefit; but in fact has benefited.

May a “puppet” not be aptly described as a creature which from a distance appears to have independent animation, but in reality has no independence at all and is incapable of making any move without the direction of another ?

---

<sup>39</sup> At p. 355.

<sup>40</sup> S.R. O’Ryan Q.C (as he then was).; “*Property Proceedings. The Search For Property*” a paper prepared for the 1992 Perth Family Law Conference.

<sup>41</sup> My researches suggest that 13 years later this remains an accurate statement.

## Section 85A

This Section was introduced by the *Family Law Amendment Act*, 1983 and enables the court to make orders directly in relation to the property dealt with by "ante-nuptial or post-nuptial settlements made in relation to the marriage." It is clear that a discretionary trust may comprise such a "settlement". The Section has proven to be of very limited assistance in overcoming problems which arise in the context of property proceedings in relation to property held by a third party<sup>42</sup>.

The case law on the interpretation of s.85A was examined by O’Ryan J in *Watson*<sup>43</sup>.

The relevant portions are reproduced<sup>44</sup> below:

“29. Section 85A of the Act provides as follows:

- “(1) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by the ante-nuptial or post-nuptial settlements made in relation to the marriage.
- (2) In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.
- (3) A court cannot make an order under this section in respect of matters that are included in a financial agreement.”

30. In *Public Trustee (SA) and Keays*<sup>45</sup> upon the husband becoming permanently disabled, there was a payment of a cash benefit from the husband’s employee’s pension fund into a trust fund for the benefit of the husband and the two children of the marriage, which was administered by the Public Trustee. The wife sought an order under s.85A that the Public Trustee apply the trust moneys for her benefit or otherwise as the Court considered to be just and equitable.

31. In the Full Court (Asche, Pawley and Nygh JJ) said<sup>46</sup>:

“The first issue to be considered is whether the indenture made on 2 February 1983 represents a post-nuptial settlement.

There is no doubt that the arrangement embodied in the deed constitutes a settlement in the traditional sense of that word and it is therefore not necessary to consider whether this Court should adopt a broad or narrow interpretation: *Dewar v. Dewar* (1960) 34 A.L.J.R. 314. Nor

---

<sup>42</sup>See D.Kovacs, *Family Property Proceedings in Australia*, Butterworths, 1992 at p139 and P. E. Nygh, *Section 85A: Is It Of Much Use?*, 1 AJFL 10.

<sup>43</sup> *Watson v Watson re: Pencars Pty Limited* (unreported) SYF 5170 of 2001, 8.7.03, paras 29-43 incl.

<sup>44</sup> footnotes are reproduced as within the judgment, but continuing the numbering adopted in this paper.

<sup>45</sup> (1985) FLC 91-651.

<sup>46</sup> At 80,248.

is it necessary that the settlor be a party to the marriage: *Meller v. Meller* (1967) 10 F.L.R. 12 at p. 15 per *Jenkyn J.*”

32.The Full Court then said<sup>47</sup> that because s.85A must come within the marriage power in s.51(xxi) of the Constitution:

“The words “in relation to the marriage” must therefore be interpreted as defining the ambit within which the section can operate.”

33.This led the Full Court to reason<sup>48</sup> that:

“...the words “in relation to” import the existence of a relationship between the settlement and the marriage of the parties. The settlement must in some manner be consequential upon or incidental to the marriage. To that extent the test differs from that laid down by the previous legislation which required merely that it be a settlement, albeit of a nuptial character, “on the parties”. Hence the celebrated definition of *Hill J.* in *Prinsep v. Prinsep* (1929) P. 225 at p. 232 that the settlement should be “upon the husband in the character of husband or in the wife in the character of wife”, does not appear to be sufficient.”

34.The Full Court therefore held<sup>49</sup> that:

“This is not a settlement in relation to the marriage. To the contrary, it appears to be totally unconnected with the marriage. It is a payment in respect of Mr Keays, not as a husband, but as a former employee...”

35.In *Knight and Knight*<sup>50</sup> the headnote summarises<sup>51</sup> the facts as follows:

“The beneficiaries were the husband’s parents, the husband, the wife and the children or grandchildren of the husband. The primary purpose of the settlement was to benefit the husband’s children.

The trustee sought the dismissal of the wife’s alternative application [that the settlement pay her \$400,000] on the ground that the settlement in respect of which the order was sought was not a post-nuptial settlement made in relation to the marriage of the parties. The trustee argued that there was nothing in the instrument to connect the settlement with the marriage between the husband and the wife or the children of that particular marriage. In any event, the class of primary beneficiaries included the husband’s parents.”

36.Nygh J stated<sup>52</sup> that:

“The Australian legislation does not require that the settlement be on the husband or on the wife. A settlement on the children only will equally suffice. It does, however, require a relationship with the marriage between the parties. For that reason the definition given by *Henn Collins J.* in *Joss v. Joss* (1943) P. 18 at p. 20, is in my view to be preferred. There his Lordship said:

“What is really meant, I think, is that the particular marriage must be a fact of which a settlor takes account in framing the settlement. If the particular marriage is recited or referred to, it is patently a factor. Hence, a settlement made before marriage, but not in relation to or contemplation of a particular marriage, is not within the section, but a settlement is within it if from its recitals or substance it is apparent that it is related to a particular marriage. Similarly, in the case of a settlement made after marriage. If the marriage is recited or expressly referred to it is patently a factor but if it is not recited or referred to it may still be a factor, and, since the marriage is an existing fact

---

<sup>47</sup> At 80,249.

<sup>48</sup> At 80,249.

<sup>49</sup> At 80,250.

<sup>50</sup> (1987) FLC 91-854 (Nygh J)

<sup>51</sup> At 76,450.

<sup>52</sup> At 76,453.

which the settlor must have had in mind, the absence of recital makes little difference.”

...

In *Keays* case it was quite obvious that the settlement had not been entered into because of the marriage. It had been entered into because of the responsibility which the trustees of the superannuation fund had towards the husband as a former member of the fund.

As *Henn Collins J.* stated, there is no need for the relevant marriage to be specifically referred to in the recitals. “It is the substance, and not the form which must be regarded.””

37. Nygh J rejected the requirement that the beneficiaries must only be the parties to the marriage, however he suggested that they should be the primary beneficiaries. He concluded<sup>53</sup> that:

“In *Prinsep v. Prinsep Hill J.* saw no difficulty in the existence of contingent beneficiaries outside the immediate marriage, but in the present case as counsel for the trustee pointed out, Mr and Mrs Knight senior rank equally with the wife and children as potential beneficiaries.

In my view the question is one of degree depending on the construction of the particular deed of settlement. As the learned authors, Hardingham and Neave, of *Australian Family Property Law* state at p. 371:

“The parties to the marriage need not be exclusively entitled under the settlement before it can be described as a settlement made in relation to the marriage. Children and others may also be entitled or eligible to benefit. But to the extent that persons other than the parties to and children of the marriage may benefit, any inference that the settlement was made *in relation to the marriage* will be weakened. It is difficult to see how a settlement, the primary (or perhaps a substantial) purpose of which is to benefit persons other than the parties to and children of the marriage may be described as ‘made in relation to the marriage’.”

...

In my view a settlement cannot be described as being a settlement in relation to a marriage, if persons outside of the marriage are substantial potential beneficiaries. The purpose of sec. 85A is to allow the court to deal with the property which is the subject of the trust. To the extent that the court removes any assets from the trust, it takes away any potential benefit which a third party may have derived therefrom. As *Gibbs J.* said in *Ascot Investments Pty. Ltd. v. Harper and Harper* (1981) FLC ¶91-000 at p. 76,061; (1981) 6 Fam. L.R. 591 at p. 601, Parliament did not intend that the legitimate interests of a third party should be subordinated to the interests of a party to the marriage or that the Family Court should be able to make orders that would operate to the detriment of third parties. This would be the immediate effect if any of the assets of the trust were removed from the trust.”

38. In *Spellson and Spellson*<sup>54</sup> the husband sought orders under s.85A in respect of the wife's interest in two trusts. In his judgment, Nygh J applied both *Keays* and *Knight* in order to analyse and compare the construction of two settlement deeds to determine whether they constituted nuptial settlements pursuant to s.85A. He said<sup>55</sup> that:

“...there is in my mind little doubt that the Thomas George Settlement is a settlement in relation to the marriage of the parties. Although it contains no recitals specifically referring to the marriage or identifies the parties as parties to the marriage, it was entered into on 28 June 1969 following the marriage of the parties and the birth of their elder son L. The beneficiaries of the Settlement include the husband and wife by name and the children of the wife of whom the only one then existing was their child L. It is true that R.G. Holdings

---

<sup>53</sup> At 76,454.

<sup>54</sup> (1989) FLC 92-044 (Nygh J)

<sup>55</sup> At 77,520-77,521.

Pty. Ltd. under the terms of cl. 4 will take in default of the exercise of the trustee's discretion. But that company, which it would appear was at the time a part of the George Group of companies, is not referred to as a beneficiary. The intention and purpose of the Settlement as it appears from the document was to confer benefits upon the wife, her then husband and their children. As in *Knight and Knight* at p. 76,454 I see little difficulty in the fact that the deed contemplates that future wives and children of other relationships may benefit. Since no third party has a substantial interest in the Settlement, no question of reading down or of constitutional validity arises.

...

The Sir Arthur George Family Trust has a somewhat different structure. Like the Settlement it was entered into 23 May 1980 when the parties were still married and after the two children of their marriage had been born. Like the Settlement it mentions amongst the "eligible beneficiaries" each of the parties to the marriage and the children of the wife. At that time only the children of the marriage fell within that description although, of course, the birth of other children is not ruled out.

Unlike the Settlement it adds four other beneficiaries: Lady George, Jimdi Pty. Ltd., Nick George and John George. Jimdi Pty. Ltd., a company now defunct, was at the time a company owned jointly by the parties to the marriage and would not by itself have deprived the Trust of its character as a settlement in relation to the marriage. However, the three others are clearly not parties to the marriage or their children or other descendants.

In my view, the interests of those three persons is not insubstantial or remote. By virtue of cl. 3 and 4 of the deed the trustee has a discretion to allot to each of them the whole of the income and/or the corpus of the Trust. It is true that in default of appointment, a list of successive beneficiaries is prescribed whereby the three persons named can only take in default of any of the parties or their children and other descendants taking. But the situation in that respect is not much different from the one existing in *Knight and Knight* where the children of the husband were the beneficiaries in default. As in *Knight and Knight* the three "outsiders" rank equally in terms of the deed as the potential objects of the trustee's bounty. They each have the potentiality of receiving the whole of the income and/or corpus of the Trust, a potential benefit which is in no way contingent upon another interest failing. The Sir Arthur George Family Trust is, therefore, not a trust in relation to the marriage of the parties to which sec. 85A can have application."

39. In *Spellson and Spellson*<sup>56</sup> the Full Court (Murray, Lindenmayer and Walsh JJ) dismissed the husband's appeal regarding the second trust discussed above by Nygh J. Murray J stated<sup>57</sup> that:

"I am of the view that to bring a settlement within the ambit of sec. 85A it is not enough, for example, that the particular marriage was a fact or circumstance of which a settlor takes account in framing the settlement or that some of the objects of a discretionary trust are husband and wife and their children. The connection must be closer than that. I hesitate to go so far as to say that for a settlement to be consequential upon or incidental to a marriage the marriage must be its *causa sine qua non* or its primary cause, but I do say that the nexus between the two must be clear and substantial. To put it another way, there must be a real and relevant association between the marriage and the settlement.

It follows from this that when there are objects of a settlement who are not parties to the marriage or their issue and whose interests are not remote or contingent, the nexus between the marriage and the settlement must be diminished and indeed may be fatally severed depending on the terms of the deed.

Whether the nexus between the marriage and the settlement in a particular case is close enough to bring it within the section is obviously a matter of degree, a question of construction of the particular deed of settlement.

The terms of the deed may be clear and unambiguous as to its nexus in which case the parol evidence rule without doubt applies. On the other hand they may not be so."

40. In *Toohy and Toohy*<sup>58</sup> McCall J outlined the relevant details of the subject trust<sup>59</sup>:

---

<sup>56</sup> (1989) FLC 92-046

<sup>57</sup> At 77,528.

“The trustees are the husband, J [the husband’s father] and G [the husband’s brother]. It is a discretionary trust in which R the settlor settled the sum of \$10 on the trustees to hold upon the trusts thereafter specified in the deed. By clause 3(a) the trustees stand possessed of the trust fund and the income in trust for all or one or more of the eligible beneficiaries in such shares or proportions as the trustee shall from time to time before the vesting date appoint. An appointment pursuant to this sub-clause can relate to the whole or any part of the trust fund or the income. The power to appoint and remove trustees and to appoint new trustees is contained in clause 18(a) and such power is vested in J during his lifetime and upon his death, his legal personal representative.

The eligible beneficiaries are contained in the first schedule and are set out as follows.

“The Eligible Beneficiaries” means the following:

1. J, the father.
2. D, the wife of the father.
3. Any children grandchildren or great grandchildren of the father.
4. Any future wife of the father.
5. Any spouse of any child of the father; and
6. Any such other persons or companies (not being Ineligible Appointees) or charities as the father or after his death his legal personal representatives of the Trustees shall by notice to the Trustees before the Vesting Date appoint to be Eligible Beneficiaries for the purpose of this Deed.”

41. McCall J stated<sup>60</sup>:

“There is nothing in the preamble to the trust deed that would indicate that the deed has been entered into for the purpose of benefiting the husband and wife, in particular. It is a standard discretionary trust which permits the trustees to distribute capital and income to a wide range of beneficiaries of which the husband and the wife are but two. The question then arises, can this deed be classified as a post nuptial settlement and a settlement made in relation to the marriage of the husband and wife.

This question has been considered in the cases of *Knight* (1987) FLC ¶91-854 and *Spellson* (1989) FLC ¶92-044. In the First Schedule where the eligible beneficiaries are set out the spouses of any children of J are ranked fifth, after himself, his wife, his children and their children and any future wife of J. It is significant also to notice that the distribution of income in default of a trustee’s appointment, is to the father’s wife, D as to one third and to the father’s children, as to the remaining two thirds. On vesting, the funds are to be paid to D, if she is alive, or if not, to J’s children, then grandchildren, and only in the event of there being no child or grandchildren, or great grandchild, do the wives of the children or grandchildren share in such distribution.

In my view, therefore, it is clear that the deed has been established for the purposes of benefiting the Toohey side of the family first, to the exclusion of any spouses and only in the event of there being no members of the Toohey side of the family, do the spouses then take. Accordingly, in my view, it would not be possible to classify this trust as a nuptial settlement created for the benefit of the husband and wife. But in any event there are many potential beneficiaries whose interests are substantial. Accordingly, as was said in *Knight* and in *Spellson*, a settlement cannot be described as being a settlement in relation to a marriage if persons outside the marriage are substantial potential beneficiaries. This, in my view, is the case with respect to this trust.

For these reasons, therefore, in my view the Deed of Settlement cannot be classified as a post nuptial settlement made in relation to the marriage and therefore it does not fall within the provisions of sec. 85A of the *Family Law Act*.”

---

<sup>58</sup> (1991) FLC 92-244

<sup>59</sup> At 78,657.

<sup>60</sup> At 78,657-78,658.

## Conclusion – s.85A

42. Although the case law stresses that determining a settlement as being “made in relation to the marriage” is a question of degree, and is based on the particular construction of each deed of settlement, the following general requirements may be illuminated:

1. Must have a clear connection or relationship with the marriage of the parties;
2. Must be ‘consequential upon or incidental to the marriage’, not merely ‘on the parties’;
3. Must have a ‘real and relevant association’ with the marriage;
4. Must have as its primary or substantial purpose to benefit the parties to and/or the children of the marriage;
5. May or may not be on the children only if all other requirements are met;
6. May only have beneficiaries other than parties to and/or the children of the marriage if they have less than equal status, and are insubstantial potential beneficiaries; and
7. May or may not recite or expressly refer to the marriage,<sup>61</sup> as construction is a matter of substance, not form.

43. Thus the authorities make it clear that the issue is whether there exists a genuine relationship between the settlement and the marriage. Therefore any beneficiaries or objects of the trust that are not parties to the marriage or children of the marriage will dilute the strength of the relationship, so that the greater their benefit, the less likely a settlement to which s.85A applies will be established. “

A slightly broader view is evidenced from the decision of Baker J in *Greval*<sup>62</sup> which involved a discretionary settlement known as “the Greval Family Trust”; a corporate trustee; beneficiaries were the husband, the wife, the wife’s children of former marriages, the husband’s daughter of a former marriage and the respective grandchildren of each of the husband and the wife. After discussion of *Knight*<sup>63</sup> his Honour said<sup>64</sup>:

“It can readily be seen, therefore, that there are no other beneficiaries to the Greval Family Trust, apart from the husband, the wife, their respective children and grandchildren. It seems difficult to contemplate that the Greval Family Trust would have come into being, but for the marriage of the parties. Indeed, it is hard to imagine a set of circumstances, having a greater matrimonial flavour than a Deed of Settlement which seeks to benefit the parties to a marriage, their respective children and grandchildren, albeit of different blood.”

---

<sup>61</sup> However, see *Lyons and Lyons* [1998] FamCA 689, where Murray J found an ante-nuptial settlement due to the preamble recital which expressly characterised the deed as a “Marriage Settlement”.

<sup>62</sup> *Greval v Greval re; Sandalwood Lodge Pty Ltd* – unreported No. P3970 of 1986 4.3.1988.

<sup>63</sup> The first instance decision of Nygh J reported as *Knight v Knight* (1987) FLC 91-854.

<sup>64</sup> At p. 17.

His Honour proceeded to find that the trust was a post nuptial settlement to which s. 85A of the Act applies. This and *Lyons*<sup>65</sup> are the only cases that the writer is aware of where, on a defended basis, a finding has been made that a settlement satisfied s.85A. In *Greval*, after a skirmish on other issues in the Full Court the substantive proceedings were settled, so the case provided no precedent as to how s.85A was ultimately applied.

### **Practical Issues**

The issues to be addressed hereunder have as their focus matters that may be relevant to debate at a hearing or to be borne in mind as to the ultimate economic consequences for a client on a settlement.

Obviously, one of the things that no family law practitioner wants to hear about either after a hearing or settlement, is that a client was left with unanticipated liabilities as a consequence of the effect of the orders.

In the following examples it is not intended to provide any analysis of income tax law where applicable. It is simply intended to highlight those areas where appropriate expert tax advice ought be called for.

#### **Capital Gains Tax**

A transfer to a spouse pursuant to orders will not constitute a disposition of an asset by the transferor for the purposes of crystallising any Capital Gains Tax obligation. A transfer from a spouse or a relevant company or trust is subject to the roll over relief

---

<sup>65</sup> See footnote 61.

provisions of the tax Acts<sup>66</sup>. This means that the acquiring spouse takes the asset impregnated with the same contingent Capital Gains Tax liability as the transferor. Upon ultimate disposition the acquiring spouse will be assessed as if it were him or her that acquired the asset rather than the transferor, at the cost base held by the transferor.

Not surprisingly, in circumstances where a property or other asset is impregnated with a potential Capital Gains Tax liability in the manner discussed above, issues regularly emerge as to the manner, if at all, the uncrystallised liability ought be taken into account.

The leading judicial guideline as to the manner in which that discretion ought be exercised is *Rosati*<sup>67</sup> where the Full Court said in a joint judgment<sup>68</sup>:

“6.36 It appears to us that although there is a degree of confusion, and possibly conflict, in the reported cases as to the proper approach to be adopted by a court in proceedings under s.79 of the Act in relation to the effect of potential capital gains tax, which would be payable upon the sale of an asset, the following general principles may be said to emerge from those cases:-

(1) Whether the incidence of capital gains tax should be taken into account in valuing a particular asset varies according to the circumstances of the case, including the method of valuation applied to the particular asset, the likelihood or otherwise of that asset being realised in the foreseeable future, the circumstances of its acquisition and the evidence of the parties as to their intentions in relation to that asset.

(2) If the Court orders the sale of an asset, or is satisfied that a sale of it is inevitable, or would probably occur in the near future, or if the asset is one which was acquired solely as an investment and with a view to its ultimate sale for profit, then, generally, allowance should be made for any capital gains tax payable upon such a sale in determining the value of that asset for the purpose of the proceedings.

---

<sup>66</sup> See Sections 160ZZM and 160ZZMA *Income Tax Assessment Act*, 1936 and subdivision 126A *Income Tax Assessment Act*, 1997.

<sup>67</sup> *Rosati v Rosati* (1998) FLC 92-804 and recently confirmed by the Full Court in *Noetel v Quealey* (2005) FLC 93-230.

<sup>68</sup> at p85,043.

(3) If none of the circumstances referred to in (2) applies to a particular asset, but the Court is satisfied that there is a significant risk that the asset will have to be sold in the short to mid term, then the Court, whilst not making allowance for the capital gains tax payable on such a sale in determining the value of the asset, may take that risk into account as a relevant s.75(2) factor, the weight to be attributed to that factor varying according to the degree of risk and the length of the period within which the sale may occur.

(4) There may be special circumstances in a particular case which, despite the absence of any certainty or even likelihood of a sale of an asset in the foreseeable future, make it appropriate to take the incidence of capital gains tax into account in valuing that asset. In such a case, it may be appropriate to take the capital gains tax into account at its full rate, or at some discounted rate, having regard to the degree of risk of a sale occurring and/or the length of time which is likely to elapse before that occurs.”

The foregoing statements comprise a strong guideline as to the exercise of discretion.

When it is recognised that the capital gains tax under discussion is an unsecured and uncrystallised liability it can be seen that the foregoing statements are apposite to other potential unsecured liabilities such as realisation costs or top up tax that might be incurred in order to access funds held in a company.

### **Property Developers – Special Considerations**

As has been observed above, *prima facie*, where an asset is held by a relevant company and transferred to a spouse pursuant to orders then the tax legislation has application to provide roll over relief in respect of capital gains.

In the event that the relevant property to be transferred was held as stock or inventory<sup>69</sup> in the accounts of the company, which is commonly the case with property developers, then this may give rise to significantly different considerations.

---

<sup>69</sup> See e.g. s.126.5(3)(a) *Income Tax Assessment Act, 1997*.

Firstly, if the asset disposed of is part of trading stock then the roll over provisions may have no application at all. This may operate to have the consequence that the transferor company is deemed to have sold stock at market value triggering a tax liability in its hands. It may have the beneficial outcome that the acquiring spouse acquires the property for future capital gains purposes at its current market value rather than a historical cost base. The second matter that may give rise to crystallising a further liability in the hands of the disposing company is that if it obtained input credits in respect of GST then upon disposal, or reclassification to an investment, this may trigger a liability for GST on the deemed sale or for the recoupment of GST credits previously claimed.

These factors may give rise to significant additional liabilities that should be the subject of expert evidence in order that they may be taken into account in the proceedings.

### **Other Consequences of Transfers from a Company**

The potential financial consequences of orders requiring the transfer of an asset from a company are not limited to capital gains tax.

Significantly, the taxes to be incurred are readily understood when it is recognised that when profits remain in a company then those profits are taxed at the flat corporate rate (presently 30%) in the hands of the company, which for high income earning individuals, who may beneficially own the company, is a rate of tax significantly less than the profits would otherwise have been taxable at in their hands, had the profits been removed from the company.

As a consequence, when the profits ultimately come out of the company into the hands of the individuals then this results in a dividend being declared, or deemed by the

Commissioner, which, after the application of franking credits<sup>70</sup> results in the payment of tax by the individual of top up tax (about 26.4% on the dividend assuming the top marginal tax rate was applied).

When orders are made requiring an asset to be transferred out of the company then it remains for the company to address the consequences of this transfer in its accounts. Unless funds are available for a party to pay funds into the company to, in effect, purchase the asset, then the value of the property at the time of transfer must be recognised as consideration. In doing this, commonly, accountants will debit the value of the property to a shareholders loan account.

However, in absence of a written loan agreement and it being one that complies with the tax Act (which broadly involves payment of interest at not less than the statutory rate and the loan being amortised over a maximum period of 7 years if unsecured and 25 years if secured) then it is likely that as a consequence of Division 7A, *Income Tax Assessment Act*, 1936 that the Commissioner will treat the amount of the loan as a deemed dividend. It ought at least be regarded as constituting a significant risk that this may happen.

Exposure to the foregoing risk would ordinarily be regarded as totally unacceptable. This is because if a dividend is deemed then the taxpayer will not be afforded a credit for franking credits within the company yet the franking account balance of the company will be reduced by the amount of the deemed dividend. This clear and onerous penalty would lead to a significantly higher economic cost in addition to crystallising the top up tax.

---

<sup>70</sup> Importantly it is to be recognised that franking credits are not available to offset a deemed dividend.

The potential significance of this to the ultimate effect of a settlement is perhaps best highlighted by considering a situation where company A transfers a home to a wife. Ordinarily those circumstances would be coupled with the wife transferring such shares as she held in company A, if any, to her husband. Although she receives the total value of the property, as he will be the only shareholder then if a deemed dividend issue was to arise it may be solely to his burden, or may possibly fall to the burden of the wife as a “shareholder’s associate”.<sup>71</sup>

These matters lead to one simple proposition. In all events it is not simply a matter of valuing entities but having a realistic look at what might be involved in meeting the obligations of a settlement. Consistent with the discussion in *Rosati* above, it may be that meeting obligations pursuant to orders will inevitably give rise to tax obligations. Where this is the case, or even where such obligations are a probability, then it is appropriate to ensure that admissible expert evidence quantifying the liability is before the court.

The foregoing would not only apply where an asset *in specie* was the subject of a transfer but where a cash sum is required to be paid and the source from which it will be raised is a company. The consequences are precisely the same.

Furthermore, not uncommonly one party may be left with a trading company which has significant resources. Where that party might not unreasonably say that he or she intended on resolution of the proceedings to acquire a home in which to reside, if this was to necessitate a significant drawing from the company that would have a tax consequence then this may constitute another circumstance where it would be

arguable that the court ought make an allowance for the liability. Although this scenario must arise quite commonly, evidence of the potential liability is rarely called. Of course, to have any prospect of success in the argument of discretion, the relevant party needs to provide appropriate primary evidence of what he or she intends to do and clearly establish that the relevant drawing from the company will be necessary to achieve their stated aim.

The underlying equitable consideration that calls for the allowance of such a liability to be made is the recognition, as put earlier, that the wealth within the company has been amassed effectively by the parties enjoying, commonly during their marriage, the benefit of a personal tax deferral regime arising whilst the profits remained with the company. The other party may have had their entitlement satisfied from property unaffected by any such deferral.

Similar considerations also commonly arise where parties have in the past drawn significant funds on a loan account, perhaps even complying, but where the party who remains with the company, particularly as a consequence of satisfying property settlement obligations, will simply be unable to meet the obligation of the loan account. These are matters that require careful consideration.

### **Adding Back Legal Costs and Disbursements**

It was not surprising when the Full Court captured what had developed as a usual practice<sup>72</sup> of adding back funds paid for legal costs and disbursements by each party as a notional asset: *Farnell*<sup>73</sup>. Such a treatment avoided the obvious injustice that was

---

<sup>71</sup> Sections 109B-F *Income Tax Assessment Act*, 1936.

<sup>72</sup> Whilst it had become usual practice in NSW the judgment makes clear that the practice was otherwise in some other states.

<sup>73</sup> *Farnell v Farnell* (1996) FLC 92-681.

potentially occasioned to one party or the other in circumstances where one party had paid significant legal costs from funds that might otherwise have sat in the balance sheet as an investment, whilst the other party had a significant liability for legal fees that was generally not taken into account. The rationale for the approach is well explained in *Farnell*. Practitioners have become accustomed to the amounts being added back in such cases as often being very substantial.

To the converse, it is respectfully suggested that the recent Full Court decision of *Chorn*<sup>74</sup> is surprising in the guidelines it purports to identify for the exercise of discretion. Whilst the court properly accepted that ultimately the issue was one for the trial judge's discretion it indicated that one of the significant factors was to have regard to the source of funds. If the funds existed at separation and were such that each party was recognised as having an entitlement in them then they would be appropriately added back. However, ordinarily where the funds used to pay the fees had been generated subsequent to the separation as a consequence of the exertion of one of the parties then their Honours expressed the view that it would be quite proper for those funds not to be added back.

One would have absolutely no difficulty with the latter proposition if it were expressed as being confined to those cases where it could not be said that there was any form of indirect contribution being made by the other party. However, many will have difficulty in rationalising this view with the long line of cases<sup>75</sup> that acknowledges, for example, an indirect contribution being made by a spouse who continues in a homemaking and parenting role subsequent to separation to the income (and property acquired with) of

---

<sup>74</sup> *Chorn v Hopkins* (2004) FLC 93-204.

<sup>75</sup> *Carter v Carter* (1981) FLC 91-061 and *Williams v Williams* (1985) FLC 91-628. It is also established that an indirect contribution need not be directed to particular property, or property that existed during cohabitation: *Farmer v Bramley* (2000) FLC 93-060.

the other party. The proposition of a post separation indirect contribution by the other spouse is not a matter that features in the Full Court's reasoning.

It remains to be seen how strongly trial judges will be persuaded by this discretionary guide<sup>76</sup>.

### **Notional Addbacks to the Pool of Property**

This approach in the discretionary exercise has become commonplace in the past decade. It generally involves an argument that a discretion should be exercised by the trial judge to notionally add a sum, or the value of an asset, to the pool in circumstances where the pool of property that would otherwise be available has been diminished as a consequence of the acts of one party.

The approach is not dependent upon arguments of recklessness or waste such as discussed in *Kowaliw*<sup>77</sup>, but rests upon the proposition that such value should be taken into account as an advance draw by the relevant party upon his or her ultimate property settlement entitlement and should thus be included as notional property in the fashion discussed by the Full Court in *Townsend*<sup>78</sup>.

In *Townsend* (supra)<sup>79</sup> Nicholson CJ (with whom Fogarty and Jordan JJ agreed) said:

“In my view, what occurred in this case, as I said during the course of argument was, in fact, a premature distribution of a proportion of the matrimonial assets. What the husband did was to distribute to himself an asset in which the wife had a legitimate interest. In such circumstances I consider that it would be unjust in the extreme to simply treat such conduct by the husband as a matter to which regard should be had under section 75(2). It seems to me that the husband has had the

---

<sup>76</sup> See for example the discussion of *Chorn* undertaken by O’Ryan J in *King v King* (unreported) SY3793 of 2004, 30.8.05 at paras 124-134 leading to his Honour ultimately applying the *Farnell* approach.

<sup>77</sup> *Kowaliw v Kowaliw* (1981) FLC 92-092 esp at p76,644 see also *Brown v Green* (1999) FLC 92-873.

<sup>78</sup> *Townsend v Townsend* (1995) FLC 92-569.

<sup>79</sup> At p81,654.

benefit of that money. Had he retained, for example, the taxi licence instead of selling it that would have been brought into account as an item of property which would have been dealt with in the same way as the remaining items of property in this case. Accordingly, I am of the view that the correct way in which to deal with the husband's receipt of those moneys is to bring them into the pool of assets on a notional basis and make a distribution accordingly."

An example on point is to be found in the decision of the Full Court in *Gilberg*<sup>80</sup>. The parties had a marital cohabitation of about 23 years during the majority of which the husband practised as a pathologist. Subsequent to the separation the husband through a wholly owned company sold his interest in the pathology practice for \$3,375,000.00. A sum in excess of \$1.2M was paid for capital gains tax arising from the transaction and \$1,705,144.00 was applied by the husband in wine stocks which shortly after at trial had diminished in value to \$1,220,739.00 and would upon realising the company through which investment may give rise to substantial further tax. The trial judge then found the pool of property for division to be marginally over \$2,000,000.00. At the hearing there was argument as to how the consequences of the loss incurred solely by the husband subsequent to the separation should be treated and the trial judge, having found that the investment was neither reckless nor irresponsible declined to make any notional adjustment to the pool. Ultimately the loss incurred by the investment was quantified at a little over \$580,000.00.

During the course of his evidence the husband conceded that when he made the investment he was well aware that in the short term there would be a significant decrease in value and that the investment was intended for the long term during the course of which he expected the value to rise.

The Full Court dealt with the issue in a straight forward and equitable way saying:

“42. After his Honour dealt with the question of waste in paragraph 138 and concluded that the investment was appropriate ie not reckless or irresponsible, his Honour seemed to consider that the particular features of the investment were of no further relevance. His Honour appears to have treated the guidelines in *Kowaliw and Kowaliw* (supra) as being a complete code as to when conduct having economic consequences will be relevant to applications for settlement of property instituted under the provisions of s.79 of the *Family Law Act* 1975. To do so is contrary to what the Full Court said in *Browne v Green* (1999) FLC 92-873.

43. The case is not about “waste”. The money has not in all likelihood been lost. The whole idea of the investment was that it would be returned with a significant profit in the long term. Whether or not the removal of nearly \$580,000.00 from the asset pool was a deliberate plan or an unintended consequence of the investment seems to us to be irrelevant.

44. Section 79(2) provides that the Court shall not make an order under s.79 unless satisfied, that in all the circumstances, it is just and equitable to do so.

45. To deny the wife the right to share in nearly \$580,000.00 which she would have done but for the wine investment whilst at the same time denying her the opportunity to participate in that investment cannot, in our opinion, be said to be just and equitable.

46. The facts of this case are to some extent unique. This is not a case about sharing financial losses. Whether or not there are gains or losses will not be known until the investment has run its course.

47. We are of the view that this is one of those, admittedly fairly rare, cases where the economic consequences of the husband’s conduct ought to have been taken into account in order to achieve a just and equitable result.

48. They could have been taken into account in a number of ways, for example:

- (a) according to the *Townsend* guidelines; or
- (b) upon a consideration of the s.75(2) factors.

49. Alternatively, it was open to his Honour to adjourn the proceedings pursuant to s.79(5). Although his Honour’s failure to do so was not pursued on appeal, in the event that there is a re-trial that still remains an option. We express no opinion, nor should we, as to the preferable approach which may well depend upon the findings of a subsequent trial Judge.

50. We are therefore, of the view that the failure of the trial Judge to take into account the particular features of the wine investment led the wife to suffer a significant injustice, and amounts to an appealable error. We are thus of the view that we should allow the appeal.”

---

<sup>80</sup> *Gilberg v Gilberg* – Unreported, Appeal No. EA28 OF 2001, 25.10.01 per Finn, Holden & Warnick JJ.

The same principles can give rise to a notional adjustment to the other side of the balance sheet, namely to notionally exclude a liability peculiar to one party. For example, the same sort of factors that would lead to notionally adding an asset would cogently lead to notionally ignoring a liability when the liability has been incurred to fund some activity or acquisition by a party that would similarly be seen as an advance draw upon property settlement entitlement. Indeed, consistently with conventional double entry accounting, in some cases, it may be appropriate to ignore both an asset and a corresponding liability.

One common example is where a high earning individual decides to lead the *high life* prior to a hearing thus expending all of their income as received but failing to make provision for the tax. They come along to trial and there is no doubt that the liability exists. The question is one of should that liability be taken into account in determining the net pool such that the other party will thereby be required to ultimately contribute to the cost of that life style. An example of such a case is to be found in the Full Court's decision in *Lawler*<sup>81</sup>: where Nicholson CJ<sup>82</sup> said:

“In my opinion there is a further aspect about his Honour taking that into account in the way that he did in that, as Mr. Coleman for the wife pointed out, there was no evidence that the husband had used his income in the 1989 tax year for the purpose of acquiring other assets and indeed his Honour's findings were rather to the contrary, having regard to his references to the affluent lifestyle which the husband led. It seems to me to be entirely unacceptable in such circumstances to take into account a liability which the husband could have well provided for during the tax year and which he would in any event have no difficulty in providing for in the subsequent tax year against the wife and not at the same time take the husband's income into account.

---

<sup>81</sup> *Lawler v Hartley* (unreported) per Nicholson CJ, Simpson SJ and Finn J, No. EA56 of 1990, 8.10.1990 where Nicholson CJ with whom Simpson SJ and Finn J agreed said at p7:

<sup>82</sup> with whom Simpson SJ and Finn J agreed at p7.

It would seem to me that in a case such as this it was almost irrelevant to consider the tax liability given the substantial gross income which the husband anticipated and had received in the past. “

Clearly, the factual circumstances giving rise to such an adjustment would not include cases where income has been expended without the recipient being able to make provision for tax because he or she has been obliged to meet a greater level of usual or necessary expenses in, for example, maintaining two households of the parties.

### **Unsecured and Uncertain Liabilities**

This issue, which provides a different basis for excluding a liability from consideration, is a path that has been well trodden by family lawyers for many years, at least in so far as it relates to debts to family that may not in reality be likely to be repaid.

The general principles were aptly summarised by the Full Court in *Biltoft*<sup>83</sup> where their Honours said:

“A general practice has developed over the years that, in relation to applications pursuant to the provisions of s.79, the Court ascertains the value of the property of the parties to a marriage by deducting from the value of their assets the value of their total liabilities. In the case of encumbered assets, the value thereof is ascertained by deducting the amount of the secured liability from the gross value of the asset. See, *Ascot Investments Pty Ltd v Harper & Anor* (1981) 148 CLR 337 where Gibbs J. (as he then was) pointed out at p 355 that the Court “must take the property of a party to the marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it”. Where the assets are not encumbered and moneys are owed by the parties or one of them to unsecured creditors, the court ascertains the value of their property by deducting from the value of their assets the value of their total liabilities, including the unsecured liabilities. See *Prince and Prince; General Credits Australia Limited (Intervenor); A-G for the State of Queensland (Intervening); A-G for the Commonwealth of Australia (Intervening)* (1984) FLC 91-501, Evatt CJ. At p79,076 said:-

---

<sup>83</sup> *Biltoft v Biltoft* (1995) FLC 92-614 per Nicholson CJ, Ellis and Buckley JJ at p.82,124-5.

“.....the outcome of the wife’s application will depend upon findings made by the Court as to the parties’ assets and liabilities, their contributions and their respective financial resources, means and needs. It would be necessary for the Court to determine so far as is possible the value of the property held by each party. In accordance with the usual practice this would be done by deducting the value of outstanding mortgages, debts and other liabilities (e.g. *Albany and Albany* (1980) FLC 90-905, p.75,717). The Court may have to determine, as between the parties, the existence of a particular liability (*Af Petersens and Af Petersens* (1981) FLC 91-095).

The assessment of debts and liabilities is not necessarily arrived at by a strictly mathematical or accountancy approach in all cases. While some liabilities are charges upon the property which can be accurately assessed at a certain date, others are at large, or have not been precisely determined, e.g. tax liabilities (*Kelly and Kelly (No.2)* (1981) FLC 91-108 p.76,801). In some cases the amount of the liability can be estimated generally (*Albany (supra)*, p.75,717). The Court can make an allowance for a particular liability if appropriate to do so. In some cases there are sufficient uncertainties as to the alleged liability to lead the Court to disregard it entirely or partly (e.g. a loan from a parent of the party not likely to be enforced; *Af Petersen (supra)*; *Quirk* (1983) unreported). In other cases the Court may take the view that because of the circumstances surrounding the incurring of the liability it ought in justice and equity to be wholly or partly disregarded in determining the appropriate order to make under sec.79 as between the parties to the marriage. Such a result could be reached where a spouse had incurred a liability in deliberate or reckless disregard of the other party’s potential entitlement under sec.79 (*Kimber and Kimber* (1981) FLC 91-085; *Kowaliw and Kowaliw* (1981) FLC 91-092; *Antmann and Antmann* (1980) FLC 90-908; *Af Petersens (supra)*). Complex issues can arise in regard to liabilities to third parties (see, e.g. *Pockran and Crewes*; *Pockran* (1983) FLC 91-311). “

I would add that in a case where there are ample other assets and property over which security is held for a liability which will remain at the end with the party against whom the adjustment is made, there is no reason why the same principles (or those discussed in the previous section) could not lead to the notional exclusion of a secured liability. Clearly, if the *innocent* party is to acquire the property that is subject to the security and

there are not funds in the hands of the other party from which the security can be required to be discharged then the issue would constitute a more absolute problem.

In those cases where a liability is excluded predicated upon a finding that a party will not be required to repay, for example, a family member, it needs to be borne in mind that the introduction of those funds will then stand to be recognised as a contribution and consistent with the principles summarised in *Kessey*<sup>84</sup> it would be regarded as a contribution made by or on behalf of the relevant party.

The scope of available discretions to a trial judge in determining how to take into account unsecured liabilities was demonstrated to go even further than that delineated by *Biltoft* in the Full Court's decision in *Jenkin*<sup>85</sup>.

The facts as resolved by the trial judge are significant. The husband was a member of a two partner accounting practice. As a consequence of drawing funds from the practice over a period of years that exceeded his share of available profits the husband was indebted to the partnership and his partner (Mr. M) for \$416,151.00. Mr. M gave evidence during the course of which he indicated that he was sympathetic to the husband's current financial difficulties. The primary judge found that the debt was not likely to be called up in the immediate future, that Mr. M was "quite comfortable" with the husband being overdrawn up to \$300,000.00 and that he would be permitted to remain in debt "up to at least" that figure "for at least the next three or four years". The primary judge considered arguments arising from the principles discussed in *Biltoft* and concluded that Mr. M's willingness to permit the husband to continue with the debt was "a remarkable story of forbearance" but did not amount to a willingness to forgive the

---

<sup>84</sup> *Kessey v Kessey* (1994) FLC 92-495.

debt. Further, his Honour found that the drawings from which the debt was constituted were genuine liabilities which went towards common family purposes and thus the family as a whole, as opposed to simply the husband, had been spending beyond its means.

Having determined that Mr. M would not require the \$300,000.00 liability to be discharged in the immediately foreseeable future the primary judge determined that the fairest approach was to treat the portion of the debt likely to be enforced in the short term (ie \$116,151.00) as a liability in determining the net property of the parties but to treat the obligation to pay the remaining debt of \$300,000.00 as an s.75(2) factor.

Such an approach is not only novel but for obvious reasons could be seen to add to uncertainty as to the approach that judges should take. Nonetheless the approach was upheld as being within the available discretions. After referring extensively to *Biltoft* the Full Court concluded:<sup>86</sup>

“4.11 Thus it is clear, as recognised by his Honour, that the category of exceptions from the “general approach” or “general rule” relating to liabilities is not closed, and the adoption of that rule or approach is itself not required as a matter of law. It amounts to no more than a guideline for the exercise of the discretion, departure from which, in a particular case, whilst justifying close scrutiny by the Full Court of the result of that exercise, does not of itself amount to an appealable error unless the result arrived at is seen to be plainly wrong in that it is manifestly unjust to one party or outside the range of the generous ambit within which a proper exercise of that discretion would fall. The same applies, even more strongly, to the treatment of a particular liability in a given case as an exception to that general rule, the category of such exceptions, as we have said, not being closed or immutable.

4.12 In this case, the trial Judge showed full awareness of the general rule, of the most commonly adopted exceptions to it, and of the fact that the category of those exceptions is not closed. He carefully analysed the evidence and the submissions of the parties in relation to this issue, made appropriate

---

<sup>85</sup> *Jenkin v Jenkin* (unreported) Appeal No. EA 105 of 1997, 26.11.98 per Lindenmayer, Finn and Maxwell JJ.

<sup>86</sup> At p21-22.

findings (to which we have referred in paragraphs 3.5 and 3.6 hereof) and, in the exercise of his discretion, concluded that because of the rather special circumstances surrounding the husband's liability to the partnership he should take only part of it into account in calculating the net property of the parties available for distribution between them in the proceedings. As to the balance of \$300,000, he decided that it was appropriate, in the special circumstances of this case, to take that further liability of the husband into account only as a relevant factor favouring the husband in his consideration of what adjustment, if any, should be made to the parties' contribution based entitlements having regard to the relevant s.75(2) factors. As a matter of principle we see no appealable error in his Honour's adoption of that approach."

Thus it can at least be safely concluded that when unsecured liabilities have unusual features attaching to them this throws open the doors for active minds to be resourceful in formulating an approach that might provide a more beneficial outcome to a client.

#### **A Different but related issue**

Sometimes there are unusual features about a liability, such as a long term debt that carries interest at a rate significantly reduced as compared to market interest rates, or a liability that is to be repaid at some point of time in the future without interest. Such circumstances may properly give rise to the application of a discount to the net present value of the debt to that party which should be the subject of appropriate expert evidence<sup>87</sup>. In other words, a valuation of the liability may be called for.

#### **Excess Superannuation Benefits**

This is a simple but useful proposition to bear in mind.

Where a party has accumulated member benefits in a superannuation fund in excess of their *Reasonable Benefit Limit* ("RBL") then subject to any available amelioration from pension options, this means that the excess benefits will be taxed upon receipt at 48.5

---

<sup>87</sup> A comprehensive discussion of this topic can be found in *Discounting the Value of Liabilities for the Purpose of Section 79 Proceedings*, Gayle Meredith, *Australian Family Lawyer*,

cents in the dollar. In such cases it is generally argued that the tax liability needs to be taken into account in valuing the superannuation interest resulting in the pool being diminished.

In such cases however where the other party either has no superannuation benefits or has benefits substantially under their RBL then a splitting order can often provide a mechanism whereby the superannuation component of the pool can be spread in such a way as to reduce the incidence of excess benefits and thus reduce the tax to be incurred overall. Such an approach is generally beneficial to both parties.

### **Hidden Assets**

It is beyond the scope of this paper to embark upon a comprehensive discussion of relevant principles and available discretions where a court finds in financial proceedings that a party has failed to disclose his or her financial position or has set about obfuscating the process in some material way.

The range of discretions and stern manner in which the court may deal with such litigants can be demonstrated by the well known decisions of the Full Court in *Black*<sup>88</sup> and *Weir*<sup>89</sup>.

There are a number of ways in which discretion has been exercised to meet these circumstances which have been upheld by the Full Court. For example, *Giunti*<sup>90</sup> where the trial judge gave the wife a greater share of available property as a consequence of a

---

Vol.12.No.2. See also *The Valuation of Businesses, Shares and Other Equity*, Fourth Edition, Wayne Lonergan, Allen & Unwin, Chapter 20.

<sup>88</sup> *Black v Kellner* (1992) FLC 92-287.

<sup>89</sup> *Weir v Weir* (1993) FLC 92-338.

<sup>90</sup> *Giunti v Giunti* (1986) FLC 91-759.

finding that the husband had unspecified hidden resources; *Mezzacappa*<sup>91</sup> where the trial judge added back a sum of money that had been unaccounted for by the husband for a significant period and added back an allowance for notional interest that would have accrued on that amount; *Milligan*<sup>92</sup> where the husband who was an applicant had his application dismissed as a consequence of the trial judge finding that he had not disclosed his own assets whilst he had come to the court seeking an adjustment from his wife's property and *Kannis*<sup>93</sup> where, as the consequence of a finding of non disclosure by the husband, the trial judge made an adjustment in the wife's favour pursuant to s.75(2) of 10% of an identified pool of \$34,000,000.

The foregoing cases demonstrate that the options for a judge to deal with such circumstances are broad and should not be regarded as confined. In some instances they will result in significant adjustments to the balance sheet.

### **Section 106B – The Anti Avoidance Provision**

The court is possessed of broad discretionary powers to set aside or restrain instruments or dispositions which might operate to have the effect of defeating an order under the Act. This is a remedial provision that stands to be construed broadly as demonstrated by the judgment of the Full Court, albeit in the context of a summary dismissal application, in *Ferrall*<sup>94</sup>.

For the section to apply the following factors must be demonstrated:

---

<sup>91</sup> *Mezzacappa v Mezzacappa* (1987) FLC 91-853.

<sup>92</sup> *Milligan v Milligan* (unreported) Appeal No. EA 138 of 1990, 4.2.91 per Nicholson CJ, Smithers and Nygh JJ.

<sup>93</sup> *Kannis v Kannis* (unreported) Appeal No. WA 6L of 2000, 24.12.02 per Nicholson CJ, Buckley and KayJJ – an extract of this judgment is reported as (2003) FLC 93-135, but not on the present issue.

<sup>94</sup> *Ferrall and McTaggart as Trustees for the Sapphire Trust & Ors. v Blyton* (2000) FLC 93-054.

1. The existence of proceedings under the Act.
2. An instrument or disposition.
3. That the instrument or disposition<sup>95</sup> was made “by or on behalf of, or by direction or in the interest of, a party”.
4. The relevant instrument or disposition must be demonstrated “to be made to defeat an existing or anticipated order or, irrespective of intention, be likely to defeat such an order (in this context minimising or reducing the amount of such an order relevantly satisfies the requirement of “defeat”).

However, it needs to be borne in mind, that simply because a transaction would satisfy the criteria to enliven discretion it may not be appropriate to pursue the application, nor might a discretion be exercised if it was pursued. I have in mind cases where the same facts that might enliven 106B would provide a proper basis for a notional addition to the pool as discussed above where there are ample other assets to enable the adjustment to be taken into account without prejudicing the *innocent* party.

In such a case pursuing relief under s.106B has the inevitable consequence of the need to join other parties to the proceedings and if an order is not necessary to prevent injustice to the applicant, then, in my opinion, it is quite likely that the order will not be made. In other words, if it is not necessary why would the court be concerned to restore property to a party who has, for example, divested himself or herself of it in an endeavour to avoid or minimise a claim?

---

<sup>95</sup> Note the expanded definition of “disposition” and the consequent definition of “interest” in the amendments to s.106B(5) introduced by the *Family Law Amendment Act, 2005*.

## **Conclusion**

The above examples certainly should not be taken as exhaustive. I started out by recognising that the court has a broad discretion in its power to make orders pursuant to s.79 and have endeavoured to demonstrate that neither the scope of that discretion nor the course by which it is exercised should be regarded as confined, other than in a broad way.

From a practitioner's point of view the one thing that needs to be emphasised is that in considering whether any of the foregoing principles might assist in a relevant case the first step is always to marshal the relevant primary factual evidence to provide a proper factual platform for the application of the principle.

It is rarely the case that one can point to any particular event and be satisfied to contend that the event is such that it will speak for itself, yet often, in my experience, this is what lawyers tend to do.

One forensic tool that I regard as useful, absent of pleadings in this jurisdiction, is to ensure that well prior to trial notice is given in writing to the other side that a particular issue will be pursued at the hearing against their client. In doing this one endeavours to create a stronger basis for the drawing of adverse inferences (or to put it differently the weight that might be afforded to adverse inferences) if that party fails to give a full account of a particular transaction or course of conduct that might be regarded as falling peculiarly within their province to provide the evidence. A common example might be significant expenditure on gambling. It is almost universally the case that the party who pursues that issue is in no position to give direct admissible evidence of how much was expended or what the pattern was. By ensuring that the issue is raised

squarely one can create an environment where it becomes very dangerous for the person against whom the issue is pursued to sit back, say nothing, and submit at the end that the other party has failed to prove their case<sup>96</sup>.

Similarly, in my opinion, a party who had been served with notice prior to the trial that there was an issue as to what had become of, for example, the proceeds of sale of a property, would play a dangerous game if they failed to provide detailed evidence accounting for that, assuming the funds had been in their control.

All of the above stems from the proposition that evidence stands to be evaluated as against the power of a party to produce it. As Dixon CJ said in *Hampton*<sup>97</sup>:

”.....but a plaintiff is not relieved of the necessity of offering some evidence of negligence by the fact that the material circumstances are peculiarly within the knowledge of the defendant; all that it means is that slight evidence may be enough unless explained away by the defendant and that the evidence should be weighed according to the power of the party to produce it.....”

Similarly in *G. v H*<sup>98</sup> it was said:

“but when a court is deciding whether a party on whom rests the burden of proving an issue on the balance of probabilities has discharged that burden, regard must be had to the party’s ability to adduce evidence relevant to the issue and any failure on the part of the other party to adduce available evidence in response”<sup>99</sup>

---

<sup>96</sup> One such example is to be found in the decision of the Full Court *Plummer v O’Connor* (unreported) No.EA108 of 1997.

<sup>97</sup> *Hampton Court v Crooks* 97 CLR 367 at p371.

<sup>98</sup> *G. v H* (1994) 181 CLR 387 at 391 per Brennan and McHugh JJ.

<sup>99</sup> See also at p402 per Deane, Dawson and Gawdron JJ; *Morgan v Babcock & Willcox Ltd* (1929) 43 CLR 163 at 197.

It is only by careful attention to presentation of the evidence that the principles referred to above may be usefully captured.

31 October 2005

Family Law Chambers

**Grahame Richardson S.C.**