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WHICH CAME FIRST- THE CHICKEN OR THE EGG?

Turning back to the mid-90's recession, the last major recession that Australia had, I remember well what happened when I saw clients where the debt was greater than the asset pool. In effect, the parties had a negative asset pool.

In those days, super splitting was not available for most people. Nevertheless, there were great difficulties for parties where they had separated and the value of their assets was less than their debts, typically the value of their home was less than the mortgage debt.

A usual reaction as family lawyers is to solve clients' problems quickly. A former Queensland Law Society President, Greg Victory AM, described it as a case of the quick or the dead – you were either quick as a practitioner or you're dead. Therefore, an inclination of family lawyers is to do the deal now.

However, experience has taught me that in those cases where the asset pool is truly less than that of the debt, one of the strategies to be employed is simply to wait it out so that if there are rising asset values, particularly in the home, then to wait until that occurs and then to undertake the property settlement. This is the case of the chicken sitting on the egg, waiting for it to hatch. Doing so brings out a virtue that litigators typically do not have- patience.

That way, rather than crystalising the debt and ending up with one or both parties becoming insolvent, by waiting it out and therefore seeing if the home increases in value, there is a way forward.

This was a very common strategy back in the 1990s and almost always was successful. Of course, it takes a bit of a punt by the parties to wait for the asset pool to increase – but what have they got to lose?

The evident difficulty in taking this approach is that their problems are not over any time soon. At that stage, de facto property claims were not available under the Act. The only claims available under the Act at that time were those of married couples. It was easy to ensure that the property claim did not crystalise – because neither of the parties would then file an application for divorce. Much as they may want to remarry, they were much more concerned that they had equity in a home and in the meantime, did not go bankrupt.

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[1] Stephen Page is a legal practice director of Page Provan, Brisbane. Stephen was admitted as a Solicitor in 1987. He has been a Queensland Law Society Accredited Family Law Specialist since 1996. Among other awards, in 2023 he received the Queensland Law Society President's Medal. He is a Fellow of the International Academy of Family Lawyers and of the Academy of Adoption and Assisted Reproduction Attorneys and has, since 2012, been a member an International Representative on the Assisted Reproductive Technologies Committee of the American Bar Association. He is Secretary of the Fertility Society of Australia and New Zealand.

If they had re-partnered, which was common, they just had to put off the wedding date. Practicality triumphed over romance.

It is trickier now with de facto couples, because the time limit runs from when the relationship breaks down. Therefore, the parties have a total of two years in which they hope that the asset pool will increase, unless they take the tricky path that both agree not to make a claim until later.

For some couples in the recession we had to have, the waiting period wasn't very long, somewhere in the period of 18 months to two years. For some couples who were highly indebted, however, the period was over six years. It was a case of a long game. Clients needed to know at the beginning that they were both playing the long game- and that both sides had to be patient about a range of issues.

Of course, to take this approach, requires cooperation of both parties. For those who are heavily indebted, there is often not a desire to crystalise a loss, here and now, and in addition spend many thousands of dollars in legal fees.

My experience was that very few parties who were in that situation sought to crystalise the debt early – which would have been to their financial detriment. Instead, those chose to sit it out and wait.

A waiting game can be hard to manage. Financial arrangements have to be put in place in the meantime. The mortgage has to continue to be paid for the party who is still living in the house. Rent typically has to be paid for the party who has moved out. All the other usual expenses have to be met on the way through, including contributions towards child support.

These parties typically chose to have informal collection arrangements for child support, so that there wasn't a prescribed amount to be paid, which could have jeopardised the security of the home. Instead, they looked to make sure that all the primary bills were paid for both parties on the way through.

Parties facing these challenges, typically did not argue the point. They knew they had their backs against the wall and adopted a preservation approach.

It also becomes challenging that when the financial arrangements between couples are not sorted, but they have children, there is the added aggravation that they may be fighting about their children. Most of the people I am describing were like most couples who separate – low key. Theirs were generally low drama separations.

It was trickier when there were issues of domestic violence. It was trickier when one party remained in fear of the other – and usually for good reason. Nevertheless, they had to have some kind of rapprochement to ensure that neither of them (or more likely both of them) ended up as bankrupt.

Engaged in such a delay requires tools that are often forgotten or not learnt by junior practitioners. I'm not criticising junior practitioners. But it is an observation of the difference of approach from 30 or 40 years ago and that of today. The tendency today is to quickly tap out an email to the other side. It is much less likely these days that practitioners will pick up the phone. Emails of course are a monologue. A telephone call, however, is a dialogue. The latter can be more challenging to navigate, but necessary to do.

I can't emphasise enough that faced with clients in this position, it is much better as a practitioner to first phone the other side (presuming that they are reasonable) and address the

issues by way of dialogue. It isn't merely a case of waiting for something to turn up, but requires some kind of informal structure, in particular, a framework of discussion between lawyers and parties as to managing the low-level conflict between now and resolution, including managing when it is judged to be the right time to either refinance (and therefore buy out one of the parties) or to sell.

I am assuming in this scenario, that no other options are available – either for the short term or the long term, such as:

- Having a pause on payments to the bank, based on hardship.
- Having some kind of instalment arrangement with various creditors, including the Commissioner.
- Seeking to draw down some voluntary or other superannuation benefits, including based on hardship.
- Liquidating assets to reduce debt.

All of these strategies are available but this overall strategy is based on the fact that none of them are available to this couple.

WHEN WAITING IS NOT AN OPTION

Of course, the waiting game of the chicken sitting on the egg is not available in all cases.

The difficulty in acting for a party who does not know the full picture (for example, the traditional marriage where you are acting for the wife, the husband had business interests in which he was opaque) is what action to take.

If your first assessment is that their financial circumstances are doomed, then the first step is to find out who owes what to whom and who owns what. Sometimes the alleged creditor is a close family member- for example, the wife's parents.

It is often wise at this point to assemble a team to assist your client:

- Counsel who is experienced in bankruptcy and liquidation matters, as well as having done family law. If funds allow, having Senior Counsel give overall direction, with junior counsel or the solicitor or both, doing the legwork.
- An experienced accountant, who has weathered the storms in dealing with creditors (including sometimes aggressive banks, and the ATO).
- A financial planner to assist your client to make wise decisions.
- A mortgage broker to help with what can be borrowed by your client.

Assuming that you do not have parties who have organised things well and truly in advance, but are dealing with the here and now, it is nevertheless important to undertake a clear assessment of the balance sheet.

In years gone past, a common practice was that the husband would enter into a binding financial agreement with the wife on the basis that he would transfer to her his interest in the home and he would indemnify her for various expenses. In other words, he would take all the debt and she would take as much as she could, all the assets.

Of course the great problem with taking that approach, whether as a BFA or a consent order, is that an aggrieved creditor or bankruptcy trustee will then take action to set aside the order or the BFA, under sections 79A(1)(a)/90SN(1)(a) miscarriage of justice or declare that the financial agreement was not binding or set aside the financial agreement at the behest of the creditor or bankruptcy trustee under section 90K.

It is advisable to let creditors or potential creditors know at this point. They may take an aggressive attitude or they may not care. S.79(1)/90SM(10) set out in statute this commonsense rule. S.79(10) provides:

> *"(10) The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a marriage (the subject marriage):*
>
> *(a) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;*
>
> *(aa) a person:*
>
> *(i) who is a party to a de facto relationship with a party to the subject marriage; and*
>
> *(ii) who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship;*
>
> *(ab) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject marriage;*
>
> *(b) any other person whose interests would be affected by the making of the order."*

Rule 1.12 then sets out a procedure to comply with these sections:

> *"(2) A person who applies for an order under Part VIII of the Family Law Act must serve a written notice on each person referred to in subsection 79(10) of that Act of whom the person applying for the order is aware .*
>
> *(3) A person who applies for an order under Part VIIIAB of the Family Law Act must serve a written notice on each person referred to in subsection 90SM(10) of that Act of whom the person applying for the order is aware.*
>
> *(4) A notice under subrule (2) or (3) must:*
>
> *(a) state that the person to whom the notice is addressed may be entitled to become a party to the proceedings under subsection 79(10) or 90SM(1) of the Family Law Act (as applicable); and*
>
> *(b) include a copy of the application for the order sought; and*
>
> *(c) state the date of the next relevant court event."*

The handsome paedophile

Many years ago, I acted for a teacher, who was very handsome and outgoing. He was married with children.

He was also a paedophile.

When he was charged with offences, it is no surprise that his marriage broke down. He knew what he had done was wrong, and that there were many children with a potential claim on his estate. The potential claims were much greater than the asset pool.

His desire was to protect his wife and children. They were innocent. The plan, therefore, was to ensure that his wife received 100% of the asset pool, and most of his superannuation.

While consent orders were being formulated, a class claim was being brought against him, and of more significance, against the school. The plaintiffs' lawyer was going to the press regularly, with the result that the number of plaintiffs continued to increase.

To accord procedural fairness to the plaintiffs, potential plaintiffs and the school, a letter was sent to them (the solicitor for the plaintiffs, and the solicitor for the school) to advise of the proposed property settlement. This was in the days before rule 1.12. Their views were sought, in the same way as we do with super trustees before a proposed split, as to whether there was any objection to the proposed orders.

At the same time, procedural fairness was given to the superannuation trustee, in the usual fashion.

No one objected.

The court was told, from recollection by affidavit and submission that:

- These unquantified claims and potential claims existed
- That the quantum of the claims were likely many times the value of the asset pool
- Procedural fairness was given as best it could (as it was impossible to give to claimants who were not then identified)
- No objection was taken
- That in the circumstances, the proposed orders were just and equitable.

The orders were made.

BANKRUPTCY

Sometimes, one party, typically the husband, after having consent orders made or entering into the BFA, then enters into a Part X agreement with creditors or goes bankrupt, typically on his own application. The reason for doing it – seeking bankruptcy on his own application – is the assumption that the trustee will be more on side, as opposed to a trustee appointed at the behest of an aggrieved creditor, such as a bank or the ATO.

A reminder is welcome at this point that the relation back period is six months ordinarily[2] but if it is a transfer to defeat creditors, there is no time limit, because the transfer is void against the trustee[3].

Sometimes, the approach is much simpler than that, which is that the husband goes bankrupt, leaving his interest in the home held by him and the wife.

An effect of his becoming bankrupt is that the joint tenancy will be severed[4]. There is therefore the risk that the trustee in bankruptcy will seek to sell the bankrupt party's interest.

The general rule of practice, as put to me by a liquidator and trustee, is that if comes down to a fight between the wife and the bankruptcy trustee, the court will generally favour the wife. This is because the court will find on any application under section 79 that the wife has made substantial contributions. The court will be concerned to ensure that neither she nor the children are rendered homeless in circumstances where she is often blameless for the husband's actions and the court has found that he has engaged in wastage.

***Barre & Barre* [2021] FamCA 101**

This case is an interesting example of nightmare litigation:

- How a pre-nup interplays with the bankruptcy of one of the parties
- Various creditors not being paid- a bank, the husband's former solicitors, the wife's mother and, allegedly, the husband's new (but now separated) partner
- Repeated interlocutory steps, some of a strategic or tactical nature, and some chaotic

Harper J made the following orders:

> **"C Street**
>
> (1) That the Applicant Wife, Ms Barre ("**Wife**") do all acts and things and sign all documents necessary to sell Unit 1, C Street, Suburb J ***("C Street")*** at the best price reasonably attainable and thereafter to cause the sale proceeds to be disbursed or paid in the following manner and priority:
>
> (a) In payment of the Agent's commission and Auction expenses (if any) due on the sale;
>
> (b) In payment of the legal costs and disbursements of the sale;
>
> (c) In payment of the amount required to discharge any mortgage secured against C Street;
>
> (d) In payment of capital gains tax payable by the Wife on the sale of C Street;
>
> (e) In disbursement of the amounts of $202,701, $32,310 and $39,946 to the Wife;

[2] *Bankruptcy Act 1966* (Cth), s115.
[3] *Bankruptcy Act 1966* (Cth), s121.
[4] *Paten v Cribb* (1862) 1 QSCR 40; *Re White* [1928] 1 DLR 846; *Re Holliday* [1980] 3 All ER 385.

(f) In retention by the Wife of one half of the balance remaining, and payment of the other half of the balance remaining to the Trustee in Bankruptcy of Mr Barre, the First Respondent Husband ("**Husband**").

D Street

(2) That within 21 days of the date of these Orders the Trustee in Bankruptcy of the Husband and Wife do all acts and things and sign all documents necessary to:

(a) Give notice to any Tenant/Occupant ***("Tenant")*** of the property situate at and known as D Street, Suburb J (Folio Identifier ...) **(*"D Street")*** necessary to terminate any Lease or other right of occupation and ensure the Tenant vacates D Street as soon as practicable thereafter;

(b) Instruct Swaab to prepare a Contract for Sale of Land for D Street *("the Conveyancer")*;

(c) List D Street with a Real Estate Agent ***("the Agent")*** for the sale of D Street by public Auction at the earliest possible date;

(d) Execute all documents requested by the Agent for the sale of D Street, subject to Order 4(c);

(e) Agree on the reserve price, but in default of agreement, by a Valuer appointed by the President of the NSW Division of the Australian Property Institute pursuant to clause 4.7(a) of the BFA;

(f) Request the Agent to appoint an Auctioneer to auction D Street;

(g) Attend the Auction sale and negotiate with the highest bidder in the event that the reserve price is not reached;

(h) Execute a Contract for Sale of Land in respect of the D Street, subject to Order 4(c);

(i) Co-operate in every way with the Agent in relation to the Auction and sale of the D Street; and

(j) Execute all other documents necessary to complete the sale of the D Street.

(3) That the Trustee in Bankruptcy of the Husband and Wife do all acts and things and sign all documents necessary to cause the proceeds of sale of the D Street to be paid in the following manner and priority:

(a) In payment of the Agent's commission and Auction expenses (if any) due on the sale;

(b) In payment of the legal costs and disbursements of the sale;

(c) In payment of the amount required to discharge any Mortgage registered on the title to the D Street;

(d) In payment of capital gains tax, if any, payable on the sale of the D Street;

(e) In payment to the Wife of $62,503.41; and

(f) In payment of the balance in equal shares to the Trustee in Bankruptcy of the Husband and the Wife.

(4) That the Husband:

(a) to the extent necessary for the purpose of carrying these orders into effect, do all acts and things and sign all documents necessary;

(b) Vacate D Street.

(5) That pursuant to clause 4.14 of the Binding Financial Agreement dated 31 August 2005, the Trustee in Bankruptcy of the Husband, the Husband and the Wife do all acts and things and sign all documents necessary to cause the furniture, furnishings and household contents contained within D Street to be divided between them in accordance with the pick-a-pile method as follows:

(a) The Wife shall prepare two lists of the furniture, furnishings and household contents that were situated at D Street as at the date of separation and the furniture, furnishings and household contents contained in each list will be of approximate value to that contained in the other list;

(b) The Husband shall choose a list from the two lists; and

(c) The Husband shall do all acts and things necessary to deliver the items on the Wife's list to the Wife.

(6) That for the purposes of implementation of Order 5 herein, the Trustee in Bankruptcy of the Husband and the Husband shall do all acts and things to:

(a) Enable the Wife to have unfettered access to D Street within three (3) days of the date of these Orders at a time nominated by the Wife, in order to prepare the two lists of furniture, furnishings and household contents for a period not less than eight (8) hours;

(b) Maintain the furniture, furnishings and household contents in good condition, fair wear and tear excepted.

Other

(7) That the Husband pay to the Wife $10,473 pursuant to his undertaking to the Court on 17 December 2018.

(8) The Wife's claim to child support departure orders pursuant to the *Child Support (Assessment) Act 1989* (Cth) be dismissed.

(9) All issues in relation to superannuation be adjourned.

(10) Pending further order of the Court, the Fourth Respondent, the Trustee in Bankruptcy of the Husband be restrained from declaring any dividend or making any distribution from the bankrupt estate of the Husband, other than for the payment of the Trustee's reasonable remuneration.

(11) The amended Application in a Case filed 24 September 2020 by the Third Respondent be dismissed.

(12) The proceedings be otherwise adjourned to a date to be advised.

(13) The parties have liberty to apply to relist the proceedings after 28 days from the date of these orders.

(14) All questions of costs be reserved."

The parties in that case had entered into a s.90B agreement shortly before they married in 2005. They separated in 2015. They had two children aged 14 and 9. At the time of entering into the agreement, the wife owned the C Street unit.

The wife applied for property settlement. Although she initially sought to set aside the BFA, by the time of the trial, both she and the husband sought its enforcement. There was no dispute it was binding. The issue was how its terms were implemented.

Harper J said:

> *"8. In Barre & Barre; Gilliam & Barre [2019] FamCA 315 at [68] I commented "although these proceedings have the appearance of complexity, in truth the issues reduce to a reasonably manageable compass". With the benefit of hindsight, that comment seems almost child-like in its naiveté. Contrary to any initial appearance of manageable simplicity, as will become apparent in the course of these reasons, some of the legal issues raised by the parties have considerable difficulty, while the proceedings have become overcomplicated by an alarming number of interlocutory applications, many changes of lawyers by the husband, self-representation by the husband and the third respondent, adjournments because of health problems, confusing and at times incomprehensible argument, and substantial disruption by the impact of the COVID-19 pandemic. As also explained later, after judgment was reserved the husband was made bankrupt in the Federal Circuit Court on his own petition. These factors have conspired to increase the difficulty of formulating judgment and to cause delay in its delivery."*

In the meantime, each of the parties had repartnered. The wife had a child by her new partner. The husband split up from his new partner, who became a respondent to the proceedings, and commenced her own proceedings seeking property settlement as his de facto partner. She and he claimed over $200,000 was owing to her by the husband, a sum disputed by the wife.

There was a family company which the husband controlled, Barre Pty Ltd.

The wife filed an Application in a Case, seeking that the interim injunctive relief against Barre Pty Ltd continue, orders for an audit of the parties' Self-Managed Superannuation Fund, and the sale of D Street, with proceeds to be held in the Controlled Monies Account and distributions to various persons and entities, including the Australian Tax Office, solicitors and the wife's mother.

The husband sought that the wife's application be dismissed, and that the order requiring the funds from the sale of G Street to be held in the controlled monies account be discharged, with the funds to be transferred to an account held by Barre Pty Ltd.

Judge Kemp dealt with the matter on an interim basis *Barre & Barre and Anor* [2018] FCCA 97. His Honour noted a number of concessions that the parties had made. For the purposes of this judgment, the following are of relevance:

a) The wife was pregnant with Mr O's child and was due to give birth soon.

b) The husband had conceded that the proceedings constituted a matrimonial cause and, therefore, the Court had the power to make injunctions pursuant to s 114 of the Act.

c) The parties agreed that Barre Pty Ltd was the husband's alter ego.

d) The husband, at that time, had not complied with full and frank disclosure or orders for the production of documents.

e) The Court was not satisfied, that the assets of companies associated with the husband would not be dissipated without independent control of said companies, but the existing injunctions were framed so as to enable the companies to trade in the ordinary course of business.

f) The husband conceded that, at the time of the interim hearing, there was a small outstanding sum in child support.

g) The husband conceded an alcohol and drug problem, which had impacted upon his ability to run his business and companies properly. The husband also confirmed that he had a girlfriend who had three children, and that he had been diagnosed with bipolar disorder, for which he was taking prescribed medications. The husband further conceded that he had a gambling problem, stating that he had "cut back" (not stopped) his gambling.

h) The Court accepted an undertaking by the husband that he would meet the outgoings and mortgage payments as and when they fall due for the D Street.

Judge Kemp ordered that the husband pay the wife spousal maintenance in the sum of $381.00 per week, that the interim injunctive orders stand, that the husband in his capacity as the director of Barre Pty Ltd sign documents relating to taxation, and that upon adhering to those orders, the sum of $102,500.00 from the controlled monies account be paid to the husband for the purpose of settling the tax liability owed by Barre Pty Ltd to the Australian Taxation Office resulting from the sale of G Street. The matter was transferred to the Family Court of Australia.

Following that judgment, the wife filed a further amended Initiating Application. She altered her position in respect of the BFA, and sought orders that the Court give effect to its terms pursuant to s 90KA. The wife no longer sought any relief under Part VIII of the Act, conceding that the Court's jurisdiction under Part VIII had been ousted by the BFA, by force of s 71A of the Act (that they had contracted out of the Act).

Then the litigation became more complex:

> *"42. On 18 December 2018, the husband filed an Application in a Case which he contended was urgent. In that Application, the husband sought the money held in the Controlled Monies Account be released to him and the orders made on 28 July 2017 be discharged.*

43. On 15 January 2019, Ms Haynes, the wife's mother, filed a Notice of Intervention by Person Entitled to Intervene and an affidavit in support. Further, on 18 January 2019, Ms Gilliam filed a Notice of Intervention by Person Entitled to Intervene and an affidavit in support. Both Ms Haynes and Ms Gilliam were claiming to be creditors of the husband and Barre Pty Ltd.

44. The wife responded to the husband's Application in a Case on 18 January 2019. She sought that money be paid to her from the Controlled Monies Account, that the rent already received from D Street be paid to her together with half of any future rental income, that D Street be sold with the net proceeds to be held in a separate Controlled Monies Account, and that the money held in the Controlled Monies Account from the sale of G Street be retained in that account pending further order. In her supporting affidavit, the wife gave evidence that on 21 May 2018, she believed that the husband had moved into a granny flat at D Street, and that he had rented out the main residence."

By May 2019, the Court was faced with four applications:

1. The Application in a Case for the urgent release of the funds from the controlled monies account and the discharge of orders made by Judge Kemp;

2. The wife's Response to the husband's Application in a Case filed one month later and subsequently amended, seeking her share in rent from the former matrimonial home;

3. The Application in a Case filed by the husband's former partner for the release of $150,000 to her from the controlled monies account; and

4. The husband's former partner's substantive Application in the de facto proceedings seeking a declaration pursuant to s 90RD of the Act.

In May 2019 there was $492,000 in the controlled monies account. Harper J order these funds be released:

- By consent, $25,000 to the husband
- By consent, $25,000 to the wife's mother
- By consent, $25,000 to the husband's former partner
- To the wife, $20,500 for her share of rent received from D Street

By November 2019, $130,000 was paid to the wife's mother by consent, with the result she withdrew from the proceedings.

By February 2020 the trial had concluded, despite chaos from the husband as to his mental health, and a claim by his former partner.

The wife was keen to conclude the trial in February, because the creditor's petition for the husband's bankruptcy was due to be heard in March.

By May 2020:

- The husband's former partner sought the release of funds to her

- Barre Pty Ltd sought the release of funds to the husband's former partner- in the same amount, the balance to the company and "*That the wife instruct her lawyers not to contact or share information from either the matrimonial or de facto proceedings with any person that are not party to these proceedings, and in particular, Q Lawyers and Mr V.*"

- The husband's former solicitors, Q Lawyers, a day after their creditor's petition against the husband was listed (in which they claimed they were owed over $100,000) sought to intervene, so that they were paid.

By June 2020, the balance in the controlled monies account was paid to Barre Pty Ltd, which then was ordered to pay the husband's former partner the $35,000.

By July 2020 when "unfortunately, even this did not stabilise the shifting sands of these proceedings", the husband's trustee in bankruptcy (on the husband's petition) became a party.

By November 2020, after more interlocutory steps, the Court sought the assistance of the parties:

a) Whether the husband's bankruptcy affected the jurisdiction of this Court and the relief which may be granted, in particular whether proceedings under Part VIIIA of the Act are "*property settlement proceedings*" for the purposes of s 35 of the *Bankruptcy Act*;

b) Whether s 86 of the *Bankruptcy Act* is applicable;

c) Whether an undertaking given to the Court by the husband on 19 January 2018 to pay mortgage instalments secured against the D Street can be enforced by an order for the payment of money by the husband, and if so whether such order should be made in light of the husband's bankruptcy;

d) Whether any type of Child Support Departure order should be made against the husband while he is bankrupt and if so, whether the husband's bankruptcy affects the type of to be made;

e) Whether the Court has jurisdiction to make a superannuation splitting order in proceedings under Part VIIIA of the Act, in particular taking account of the terms of s 90XS of the Act;

f) Whether there is evidence which establishes who or what entity is or are trustee(s) of the Barre Family Super Fund; and

g) Whether the Court can and should make orders compelling the husband and the wife to take steps as directors of the trustee of the Barre Family Super Fund.

The Court concluded that the BFA in effect ousted any liability as a creditor of his former partner, Ms Gilliam:

> *"131. Neither paragraph s 90K(1)(aa), nor (ab) could sensibly be argued to apply to Ms Gilliam. As already noted, the BFA was entered into on 31 August 2005. Ms Gilliam contends that she enjoyed a de facto relationship with the husband from June 2016 to December 2018. This awaits determination. But it is beyond argument that the BFA was entered into many years before Ms Gilliam became a creditor of the husband, and years before the alleged de facto relationship upon which she relies arose; neither*

the wife nor the husband could have even had her in contemplation. There is no basis to conclude the BFA was entered into for any purpose directed to Ms Gilliam, as creditor or alleged de facto partner. Furthermore, paragraph 90K(1)(ab) is predicated upon the existence of a de facto relationship. Prior to determination of that question, it can give the Court no jurisdiction to set aside the BFA on Ms Gilliam's application as an alleged de facto partner: see Norton & Locke (2013) 50 Fam LR 517; [2013] FamCAFC 202. Section 90K(1) therefore provides no basis upon which Ms Gilliam could set aside the BFA."

Harper J then considered- at length- the impact of the interplay of the Bankruptcy Act and having a BFA. His Honour adopted this statement by Hogan J in Southern & Southern [2019] FamCA 1002:

"96. The right to apply for orders pursuant to s 79 of the Family Law Act arises as a consequence of parties entering into a marriage: from that time on, each party to the marriage has the right to seek orders pursuant to s 79 of the Family Law Act and such right does not depend on the breakdown of the marriage or the making of a separation declaration or a divorce order becoming effective. The right is based on the existence of the marriage between the parties.

97. I consider that, in contrast, the right to seek an order setting aside a financial agreement under s 90K of the Family Law Act is based on or arises out of the existence of the financial agreement itself – a legislatively created and defined contract between the parties to it, by which they prescribe their agreement about the manner in which their financial matters and financial resources will be dealt in specified circumstances and the effect of which (if binding), once it comes into force and effect, is to oust the application of Part VIII of the Family Law Act vis-à-vis the financial matters and financial resources it deals with.

98. The existence of a financial agreement, on which the right to apply for an order setting it aside rests, determines the property of a bankrupt: the financial agreement cannot, in my view, be regarded as not being connected to the bankrupt's property or as having no effect on the bankrupt's estate. Similarly, the right to apply for an order setting a financial agreement aside cannot, in my view, be regarded as a thing in action that has no effect on the bankrupt's estate. I also consider that the right to apply for an order pursuant to s 90K of the Family Law Act is a right that: affects the quantum of the bankrupt's estate; is of value to the creditors; has implications for the bankrupt's estate and is not irrelevant to attaining the statutory objects of the Bankruptcy Act; arises out of the bankrupt's existing rights in the financial agreement and is a right that could be turned to a profit for the benefit of the bankrupt's estate. I also consider that a bankrupt's trustee in bankruptcy has a sufficient interest in the bankrupt's right to litigate via an application for an order pursuant to s 90K of the Family Law Act to persuade me that such right constitutes a chose of action that is itself property for the purposes of the Bankruptcy Act.

99. I consider that, following the Financial Agreement coming into force and effect...the property of the Applicant included his right to property as determined by the terms of the Financial Agreement and a right to enforce the terms of the Financial Agreement and the right to seek to have it set aside. I consider such rights of enforcement and setting aside are rights which affect the Applicant's property in the Financial Agreement and, therefore, they are rights of a proprietorial nature, choses in action and, taking the wide view that it is uncontroversial that courts have always taken in determining that property which passes to a bankruptcy trustee on a person's

bankruptcy, "property" for the purpose of s 58(1) of the Bankruptcy Act. Given this, I consider that the right to seek an order pursuant to s 90K of the Family Law Act vested in the Applicant's Bankruptcy Trustee upon his bankruptcy."

Harper J stated:

"217. I have already concluded that the husband's contractual choses in action form part of the property which has vested in the Trustee. There is long standing authority in this Court that the benefit of a contract, or a contractual right, as opposed to an obligation, is a chose in action which falls within the definition of "property" in s 4 of the Act: In the marriage of Schreiber (1977) FLC 90-274; (1977) 3 Fam LR 11,379 ("Schreiber"). In Schreiber, the parties had entered into a post separation agreement. The Court held that "the right which the wife has against the husband under the terms of the agreement in this particular case are basically rights in contract and accordingly must be regarded as a chose in action", which was "property" of the wife.

218. While the husband was not bankrupt, the conclusion is unavoidable in my view that the proceedings to enforce the BFA were proceedings "with respect to" property of both wife and husband, being property in the form of the choses in action created by the terms of the BFA itself. Furthermore, although it may be unnecessary to decide, by the terms of the BFA such proceedings were also "with respect to" the other shared and separate property of the parties covered by the BFA. I note also this conclusion demonstrates that proceedings to enforce a financial agreement can fall within the definition of both "Part VIIIA proceedings" and "property settlement proceedings" without tension.

219. This conclusion is reinforced by remembering that property and financial resources not dealt with by a binding financial agreement remain to be determined under Part VIII. In such a situation parties could both seek to enforce the financial agreement and seek property adjustment orders under s 79 in respect of such property and financial resources not dealt with by the binding financial agreement. It would be odd if that part of the proceedings to enforce the binding financial agreement were not property settlement proceedings while proceedings under s 79 were.

*220. However, the bankruptcy of the husband compels attention to the second limb of the definition of "property settlement proceedings", that is proceedings "with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage". In s 4 of the Act "**vested bankruptcy property**", in relation to a bankrupt, is defined to mean "property of the bankrupt that has vested in the bankruptcy trustee under the Bankruptcy Act 1966 . For this purpose, property has the same meaning as in the Bankruptcy Act 1966".*

221. I have found that the husband's property for the purposes of the Bankruptcy Act which vested in his Trustee includes his right to litigate enforcement of the BFA and his rights to performance of obligations and other benefits under the BFA. It is "vested bankruptcy property". The conclusion is therefore also inescapable in my view that proceedings to enforce the rights, obligations and benefits of the parties to the BFA under Part VIIIA, one of whom is bankrupt, are proceedings with respect to vested bankruptcy property in relation to a bankrupt party to a marriage.

222. Accordingly, I find that in these proceedings, this Court has acquired jurisdiction in bankruptcy "in relation to any matter connected with, or arising out of, the bankruptcy" of the husband, by reason of s 35(1)(b) of the Bankruptcy Act

> *223. I also accept the wife's submission that s 86 of the Bankruptcy Act has no application."*

Harper J accepted that C Street was the wife's separate property under the BFA- and that she was entitled to the whole of the proceeds (she proposed that it be sold). The husband was found to have been in breach of his undertaking to pay the mortgage for D Street for about $20,000. He was therefore ordered to pay the wife $10,000, being half that, but the Court noted that this payment was after the bankruptcy took effect.

Then there was the self-managed super fund, which was also covered by the BFA as shared property:

> *"The wife, and the husband, by their orders accept their interests in the SMSF fall within the definition of "Shared Property" since they both enjoy an interest as members of the SMSF."*

To recap:

> *"By the final hearing there was no extant application under s 79, and no argument was made that there were financial matters or resources to which the BFA did not apply and in respect of which the Court retained a residual jurisdiction under Part VIII. The trial was run on the basis that the Court has no jurisdiction under Part VIII."*

The wife sought a super splitting order. She argued that the BFAS was a superannuation agreement for the purposes of s.90XH. Harper J disagreed[5]:

> *"Even it be assumed for the purpose of argument that the definition of "Shared Property", also set out earlier, can include superannuation interests of the parties in the SMSF, I am not satisfied, even on a reasonable or generous construction, that clauses 4.11 and 4.12 "deal with" superannuation interests. Objectively construed, those clauses are in my view plainly limited to dealing with property owned directly by the parties and the manner in which it is to be divided by sale to one or other party or sale on the open market. They are not intended to address superannuation interests at all. This can be seen from such wording in clause 4.11 as "each party shall receive the amount they contributed towards the purchase price" and the further provision for each party to receive part of the net proceeds. This is entirely different to orders splitting superannuation, which fundamentally require the split interests to remain as superannuation interests in nominated superannuation funds. Provisions requiring payment of sale proceeds directly to parties do not deal with the superannuation interests. Furthermore, no part of the BFA identifies what the asserted superannuation interest is, whether it is, for example, percentage only or if not, specifies a base amount in relation to the interest for the purposes of Part VIIIB. No part of the BFA is a superannuation agreement."*

The wife then argued that a super splitting order could be made by s.90XJ. Harper J disagreed:

> *"346. I have concluded that no part of the BFA constitutes a superannuation agreement, so s 90XJ has no application. Even if that conclusion be wrong, s 90XJ also can have no application because several necessary sub-paragraphs of s 90XJ are not satisfied by the BFA. For example, the BFA does not identify the superannuation interests of the parties in the SMSF clearly or at all (s 90XJ(1)(a)), and it does not*

[5] AT [342].

specify a percentage applicable to a percentage-only interest (s 90XJ(1)(b)) or specify an amount as a base amount, or a method by which to calculate a base amount, in relation to a non a percentage-only interest (s 90XJ(1)(c)). These deficiencies in the BFA are another indication that it does not "deal with" superannuation interests.

347. I am not satisfied the BFA or any part of it "deals with" the superannuation interests of the parties, nor can it be construed as a "superannuation agreement" to which s 90XJ applies."

His Honour also rejected use of s.90XR and 90G(2):

"350. Section 90XR does not assist on the question of enforcement by a splitting order. Section 90XR(1) deals with enforcement of a "payment split" or "payment flag". A "payment flag" is not relevant here. A "payment split" is defined in s 90XD of the Act as:

(a) the application of section 90XJ in relation to a splittable payment; or

(b) the application of a splitting order in relation to a splittable payment.

351. This definition is not easy to construe. However, s 90XR(1) seems to deal with enforcement of two categories of splittable payment. One is splittable payments to which s 90XJ applies, that is, splittable payments pursuant to a superannuation agreement which satisfies the conditions in s 90XJ. I have held the BFA is not in this category. The other category is where a splitting order has been made which can then apply "in relation to" the splittable payment. The terms of the BFA do not fall into this category either. Even if any submission had been made about s 90XR, I conclude s 90XR(1) is not applicable to the controversy in this matter.

352. Sub-sections 90XR(2) and (3) raise different considerations. They mirror to a significant degree the opening parts of s 90KA and sub-paragraph 90KA(a). Consistently with the authorities cited above in respect of s 90KA, s 90XR(2) and (3) should be understood as importing, to the extent necessary, the general principles of contract law to give effect to a superannuation agreement: see [135] - [150] above. This would require the Court to be satisfied the terms of a superannuation agreement are sufficiently certain to be enforced. Since I have concluded no part of the BFA constitutes a superannuation agreement, this question does not require any view to be expressed. But I observe, without expressing a concluded view, that s 90XR(3), by incorporating the powers in ss 31 and 32 of the Judiciary Act, may provide a basis to make a splitting order in respect of a superannuation agreement which both "deals with" superannuation interests and is sufficiently certain to be valid and enforceable. But in the absence of any submissions about or reliance upon s 90XR it is unnecessary to say anything further.

353. Secondly, although no party made reference to it in this context, there is authority which suggests s 90G(2) can be used to make orders regarding superannuation interests in the nature of a superannuation splitting order.

354. In Pascot & Pascot [2011] FamCA 945, Le Poer Trench J considered an otherwise valid financial agreement, which included an express provision attempting to address superannuation interests, but which failed to create a valid superannuation agreement within an earlier version of Part VIIIB. The case bears some similarity to

the present; there were no proceedings before the Court under s 79. Le Poer Trench J expressed the following views about the use of s 90G(2) at [427] - [428]:

> *427. However, subsection 90G(2) provides the court with a direct power to make orders to enforce the terms of the agreement, in a situation in which, presumably, the terms of an agreement are insufficient to enable the agreement to be enforced otherwise.*
>
> *428. The court is empowered by sec 90G(2) to make orders which may be required to give effect to an otherwise valid financial agreement. In the circumstances of this case it is clear what the parties wished to achieve by the agreement so far as superannuation is concerned. It seems to me the court could make an order under sec 90G(2) to give effect to the agreement. Such an order could be a superannuation splitting order.*

355. Although a concluded view is unnecessary, with respect, I would have found that s 90G(2) cannot be used as a source of power to make superannuation splitting orders. The High Court has made clear many times that in construing legislation the Court looks to the text, context and purpose of the legislation under consideration. For example, in Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; (1998) 153 ALR 490; [1998] HCA 28 at [69], the High Court made clear that statutory construction looks to consistency of language and purpose among all of the provisions of the statute, and the context, the general purpose and policy of the provision of legislation, as well as its consistency and fairness as the surer guides to meaning.

356. Section 90G(2) gives the Court a broad power to make orders for the enforcement of a binding financial agreement. The jurisdiction to make superannuation splitting orders falls in a completely different part of the Act, Part VIIIB. This gives the Court power to make superannuation splitting orders in two circumstances; one where there are proceedings under s 79 or s 90SM, or the other where there is a valid superannuation agreement, enforcement of which is specifically excluded from the operation of Part VIIIA by s 90XH(3). Neither circumstance is present here. As already observed, s 90XR may provide a basis to make a splitting order to enforce a superannuation agreement, but no reliance was placed upon it. Part VIIIB overrides other laws of the Commonwealth, States and Territories and trust deeds and other instruments: s 90XB. The provisions of Part VIIIA, including s 90G(2) have no such reach. Their purpose is enforcement of valid binding financial agreements, not the remaking or altering of superannuation interests by splitting orders. In my view, no provision of Part VIIIA, including s 90(2), can give the Court power to make a superannuation splitting order. This construction accords with the evident purpose of the Act which allocates to different Parts of the Act the different powers which exist in relation to superannuation splitting orders on the one hand and orders to enforce a binding financial agreement on the other.

357. However, my conclusions about the power to make splitting orders in the circumstances of this case do not fully resolve issues regarding superannuation. The orders proposed by both wife and husband go beyond superannuation splitting orders and in substance seek to compel the wife and husband to do a range of acts in their capacity as directors of the trust, or as trustees, of the SMSF, including exercising powers to sell 2 G Street and distribute the proceeds of sale in accordance with superannuation legislation. Such orders are in the nature of in personam mandatory injunctions.

> *358. It is arguable that the definition of "Shared Property" and clauses 4.11 and 4.12 provide a basis in the terms of the BFA to support the making of such orders pursuant to s 90G(2), as orders the Court "thinks necessary" to enforce the terms of a binding financial agreement. Such orders would not be either orders enforcing a superannuation agreement under Part VIIIB or orders in relation to superannuation interests. The wife in her further submissions relies upon s 90G(2) for this purpose."*

Harper J rejected the use of s.90G(2) or s.114(3) as a matter of discretion because the husband was an undischarged and bankrupt, and while bankrupt may have been a director of the trustee company. In all likelihood, given how SMSF's are constituted, he would have been a director.

His Honour stated:

> *"361. But even assuming the reach of s 90G(2) or s 114(3) is sufficiently wide to encompass in personam mandatory injunctions compelling one or both parties to carry out certain acts or exercise powers as directors of, or as themselves, the trustee of the SMSF, for the following reasons I would not exercise the discretion to make such orders in the present matter.*
>
> *362. Even if it was an agreed fact that the current trustee of the SMSF is Barre Super Fund Pty Ltd, of which the husband is a director, the husband is bankrupt. As an undischarged bankrupt, the husband is disqualified from managing a corporation by reason of s 206B(3) of the Corporations Act. This includes a corporate trustee. The constitution of Barre Family Superannuation Fund Pty Ltd was not put in evidence. I do not know whether its constitution requires no less than two directors to be in office but I infer from the terms of the orders sought by the wife that this is likely. If so, the bankruptcy of the husband means there presently cannot be two directors to carry out management functions and make decisions for the corporate trustee, at least until a fresh second director is appointed to its board. If Barre Family Superannuation Fund Pty Ltd requires two directors, the wife could not act alone in her capacity as director. It seems to me that as a matter of discretion the Court would not make orders under s 90G(2), such as proposed by the wife, even if the Court had jurisdiction to make them, because such orders would compel the husband to act in contravention of the Corporations Act and the husband could not comply.*
>
> *363. For completeness, I also point out that if the husband and the wife are themselves trustees of the SMSF, which some of the evidence suggests, but about which no finding can be made, as do some of the orders sought, there is no superannuation trust deed for the SMSF in evidence before me. As a result I do not know whether or not the provisions of such a trust deed may have an impact on the question of management of the SMSF if a trustee becomes bankrupt. It appears that there is no legislation which automatically disqualifies the bankrupt husband from acting as trustee, but at common law it has long been held that, by virtue of bankruptcy alone, a person becomes unfit to hold office as a trustee: In re Barker's Trusts [1875] UKLawRpCh 112; [1875] 1 Ch D 43; In Re Matheson; Ex parte Worrell v Matheson [1994] FCA 1021; (1994) 121 ALR 605 at 614. I note that the Federal Court has jurisdiction to disqualify an individual from acting as the trustee of a superannuation entity "if satisfied that the individual is otherwise not a fit and proper person": Superannuation Industry (Supervision) Act 1993 (Cth), s126H(5). This echoes the position at common law. The submissions of Ms Gilliam seemed to make reference to this issue. It suggests the husband may be at risk of being found to be a disqualified person under s126H(5).*

Section 126K makes it an offence for a disqualified person to act as a trustee of a superannuation entity.

364. There is presently therefore sufficient reason not to exercise any discretion to compel the husband to undertake an act as trustee of the SMSF. The wife conceded, correctly in my view, that she could not act alone in relation to superannuation, so any Court order to that effect would be futile.

365. In the absence of argument and clear evidence about who is trustee of the SMSF and the consequences of the husband's bankruptcy for the SMSF under the general law or corporations and superannuation legislation, as a matter of discretion, I am unable at the present time to make any of the orders proposed by either party concerning superannuation."

The departure application

It is no surprise, in the midst of this swamp, that the wife brought a departure application of over $500,00 for lump sum child support and a further $336,000 to be held on trust for the benefit of the children until the parenting proceedings (also on foot) had concluded. A tip for the unwary- for some reason the wife had not served the application on the Child Support Registrar.

Harper J dismissed that application:

"398. Section 116(1)(b)(ii) requires the Court to be satisfied that consideration by the Court whether a departure order should be made, would be in the interests of ***both*** *liable parent and parent carer, in the special circumstances of the case. As a matter of construction, in my view, the question of whether such consideration is in the interests of both liable parent and carer is to be answered in part by reference to what elements are said to render the circumstances of the case special. One aspect of this enquiry is what elements of the circumstances make the case exceptional in the sense described in the authorities above at [390] - [393], so as to take it outside the "rule" that child support should generally be dealt with by the administrative procedure.*

399. Here I accept the circumstances are special because the husband became bankrupt after judgment was reserved. I accept that in light of the uncontested evidence about the needs of the children, it would be in the interests of the wife for the Court to consider whether a departure order should be made in her favour.

400. But no argument was made as to why it would be in the interests of the husband for a departure order to be made. Jurisdiction is therefore not established: see eg Lokare & Baum [2019] FamCA 196 at [486] - [487]. Indeed, the husband's bankruptcy is arguably a reason why it would not be in his interests for the departure order to be made.

401. Even if this is wrong, and I had been satisfied of such threshold requirements, for the purposes of s 117, I could not, on the facts available, be satisfied that it would be "just and equitable" within s 123A(1)(b), as regards the husband, for there to be an order for the payment of lump sum child support. One reason is that the husband is bankrupt and I must assume he is insolvent. As already pointed out there was no evidence of the details of his bankruptcy. Until C Street and D Street are sold I am unable to form any view at present what resources may be available to him to meet such lump sum child support orders as the wife seeks, and whether he will have

sufficient property to do so. Another reason is that the wife will also receive substantial funds from the sale of C Street and D Street, according to her, in excess of $1,000,000."

The furniture

Orders were made for the division of furniture and other chattels:

"404. The wife seeks orders to facilitate the division of personal chattels such as furniture. I accept such orders are necessary to enforce the BFA and should be made pursuant to s 90G(2). The Trustee remains bound by the terms of the BFA. But since some of these personal items may have vested in the Trustee, he will have to co-operate to enable their division to take place between the wife and the husband."

The proposed indemnities

The wife also sought indemnities from the husband concerning the company and the ATO. This was rejected by Harper J as there was no jurisdiction in a case about a BFA:

"405. The wife also seeks a number of indemnities from the husband. She seeks to be indemnified against liabilities due by the husband or Barre Pty Ltd to the ATO, for losses suffered by the wife from breach of the BFA enforcement orders made in this judgment and by the husband in relation to a letter of demand for payment of $449,000 she received from the liquidator with respect to F Pty Limited (Wife's Trial Affidavit filed 19 December 2019, paragraph 194,. The letter of demand dated 10 April 2019 together with the Statement of Company Affairs comprises the husband's allegation as to the wife being jointly and severally liable to the company. The wife argues that she is not a director or shareholder of F Pty Limited and has never signed a document relating to the company.

406. The problem for the wife is that she provides no jurisdictional basis for any order for an indemnity. As pointed out at length already in these reasons, these are proceedings under Part VIIIA of the Act, not Part VIII. The power to make orders pursuant to s 90G(2) does not assist because it is limited to orders thought necessary for the enforcement of the BFA. The indemnity sought by the wife is neither a remedy for enforcement nor obviously related to the BFA at all."

The super update

The husband was removed as trustee as a result of his bankruptcy. The status of the SMSF was evident at that point:

"(1) The basic condition for a superannuation fund to meet the definition of a self-managed superannuation fund pursuant to SISA s 17A(1) is that all members of the fund are required to be trustees or directors of the corporate trustee of the fund. The removal of the husband as a director of the corporate trustee means the SMSF no longer meets the definition of a superannuation fund.

(2) In order for the SMSF to maintain its status as a self-managed superannuation fund the husband, having ceased to be a director of the corporate trustee, must also terminate his membership of the SMSF by transferring his benefits to a large APRA regulated superannuation fund such as an industry or retail fund. This was required to be done within six months of his removal as director of the corporate trustee, and this six month

period ended on 24 December 2020. However, the husband remains a member of the SMSF.

(3) By reason of SISA s 45(1)(b) the SMSF remains at present a complying superannuation fund because the relevant Regulator has given the trustee, as trustee of a superannuation fund, a notice stating that the fund is a complying fund in a previous year, and has not given a notice stating that the fund is not a complying fund in any subsequent year. In other words, the SMSF is a complying superannuation fund until the relevant Regulator issues a notice stating it is not."

The wife, who by default became the sole director of the corporate trustee, proposed that the G Street property owned by the super fund be sold, and that from the proceeds the husband's super interest be rolled over into a compliant fund. The mortgagee bank had issued a default notice for the sale of the property.

Harper J accepted the wife's approach in *Barre & Barre (Superannuation)* [2021] FamCA 463. The husband's trustee chose not to take part.

The husband's former partner claimed that she was owed over $100,000 from the wife via various companies, including by the trustee of the super fund.

Harper J rejected that incoherent position:

> *"29 First, Ms Gilliam seems to contend that she has made contributions to the SMSF. But the position agreed between her and the husband, shows Ms Gilliam lent money to the husband, and, possibly, a number of his associated companies (which did not include either the corporate or security trustee), from time to time during her alleged de facto relationship with him. This was conceded by him. She is a creditor of the husband. This was the subject of consideration and findings in the primary judgment. Her payments constituted the debt of $228,000 owed to her by the husband, which was referred to in the primary judgment as agreed between her and the husband, and in respect of which she has received repayments during the proceedings leaving a balance owing of $108,000.*
>
> *30 As I understood it, there was evidence from Ms Gilliam that during the alleged de facto relationship transfers were made from the husband's accounts and some of the corporate accounts into the account held by the trustee corporation. But it is clear in my view that these payments were not made by Ms Gilliam but by other entities.*
>
> *31 Secondly, there is no evidence that Ms Gilliam made any direct contribution into the SMSF, either by transfer to the corporate trustee or the security trustee or otherwise, apart possibly from an amount of $116 which I consider de minimis. In her affidavit Ms Gilliam contended that the wife was "jointly and severally liable" with the corporate trustee for a "commercial loan" of $318,000. The basis for this assertion was not clear. It seems to be a significant change from the agreed position at final hearing that the husband was liable for loan monies. Ms Gilliam appeared to think that the assets of the SMSF should be available to give her a remedy for repayment of the money owed to her by the husband. She made reference to payments by a company called TT Pty Ltd in to the SMSF. As best I could understand it, she appeared to argue that because she and the husband established this company and it paid employer superannuation contributions into the SMSF on her behalf for a time, the SMSF superannuation assets could be used to repay her debt.*

32 I do not accept any of these contentions. Superannuation assets are not to be used to repay personal debts while they are held in a superannuation fund. Mr Gilliam's superannuation entitlements are a matter she can explore in a different forum, or if she succeeds in establishing a de facto relationship with the husband, possibly under the Act. I express no view about this other than to note the possibility. But in any event none of these considerations are any reason to deny making the orders proposed by the wife.

33 Thirdly, as pointed out in the primary judgment, Ms Gilliam has no standing to challenge or enforce the BFA: Barre at [132] - [139], and it does not constitute any agreement dealing with superannuation interests in any event: see above at [2].

34 She also argued that the Court could have no confidence the wife, acting alone, would not dissipate superannuation trust funds. But according to my conclusions, Ms Gilliam has no interest or claim to superannuation assets. Beyond that, the evidence also shows that the wife has taken care to obtain advice about how to deal with the SMSF problems. There is no evidence that there is any risk the wife would dissipate superannuation assets.

35 In my view, Ms Gilliam has not established any basis for orders in her favour, to discharge a debt owed by the husband, against any of the named corporations or either the assets of the SMSF or the wife as the remaining capable director of either trustee. None of the orders sought by Ms Gilliam regarding superannuation should be made.

36 The wife submitted that it is only upon receipt of the sale proceeds for 2 G Street that the SMSF Accounts can be brought up to date to account for the profit on sale. At that point the outstanding expenses of the SMSF would also be brought to account so that each member's entitlement can be calculated accurately and once done, a Rollover Benefit Statement can be prepared for the husband to transfer his Superannuation entitlement from the SMSF to his nominated Superannuation Fund. The security trustee, Barre SMSF Pty Limited, can then be deregistered. I accept this as correct."

Each of the husband and Ms Gilliam had lodged caveats over that property. The husband's claim was on the basis of his interest in the super fund, which the Court found was not a caveatable interest. Although the caveats had lapsed, an injunction issued preventing either the husband or his former partner from lodging any further caveat or with Ms Gilliam interfering with the sale.

WHAT PATH TO TAKE FOR THE AGGRIEVED PARTY?

Of course, if she colluded with the husband, or blithely acted, knowing that there were significant debts, but took no action to pay creditors, then the chickens may come home to roost for her too.

A difficulty, when acting for the wife in those circumstances, is what path to take. Often matters are outside her control, because the husband may decide unilaterally to go bankrupt. However, consideration has to be made from her point of view:

1. Is it easier to negotiate on an informal basis with the major creditors, so that they are appeased.

2. Is it easier to negotiate therefore with her husband? Is he a reasonable person to deal with, who has taken stock of what has occurred? Or, on the other hand, is he a narcissist, controlling type who will be bombastic and difficult, the typical nightmare litigant? In the latter case, it may be much better to allow him to go bankrupt and deal with the trustee in bankruptcy. Most trustees in bankruptcy are reasonable to deal with. All they are seeking to do is the best deal to recover funds for creditors.

DEALING WITH CREDITORS

Commonly, there is only one or a couple of major creditors, typically a bank or the ATO.

When dealing with the bank, commonly, the debt will be owed by both the parties. If one party becomes insolvent (whether bankrupt or in every sense insolvent even though not bankrupt), then that is typically an act of default on the mortgage. What the bank can do at that stage is to issue a notice requiring the sale of the home.

Experience dictates, however, that banks are often reluctant to do this, because it may liquidate a loss for the bank. Often, the experience is that banks are reasonable to deal with. Many years ago, the approach would be to speak to the local branch manager and then inform the branch manager of every step. The message to be given by the other party (in this example, the wife) is that she wants to protect the bank's interests as far as possible (as long as her interest and those of the bank don't diverge), that she will be utterly transparent with the bank and that she will seek, if possible, to refinance.

At the time of any communications being made to the bank, there needs to be a realistic discussion by your client as to their ability to refinance. It's vital, in my view, at that stage that she is also talking to a good financial planner and a mortgage broker to see what is realistic.

It may be that she does not have the funds to refinance now but is likely to be in the position to do so within six months.

On one occasion, I have seen a bank allow the transfer to occur between husband and wife of the existing mortgage security without the need to refinance – but that was very much the exception. Invariably, banks require the norm, which is, that there be a consent order or a BFA entered into.

Typically, the wife should not be relying on the joint accountant to give advice about this prospect. Normally, they are hopelessly conflicted. However, every case is different. I've seen accountants in these circumstances who have been *extremely* helpful to the wife. The accountant has long had the view that the husband is either dishonest or over-extended himself and has felt sorry for the wife – and will bend over backwards to assist her at this moment of peril. However, those accountants seem to be the exception.

Some accountants are so locked in with the person who has given them all the work, namely the husband, that they are still in his camp and really either of little assistance to the wife in these circumstances or detrimental to her interests.

In carrying out the balance sheet exercise, one must remember the difference between section 78 and section 79 – section 78 being a finding as to the property that is owned by each of the parties and section 79 which is an adjustment of those interests.

As the High Court told us in *Stanford*, the undertaking of the balance sheet exercise is to work out who owns the legal and equitable interest in the property (and liabilities) and then the value of those items, in order to undertake a balance sheet.

Extreme care must be taken at this time in making this assessment. It is extraordinary to find, for example, that the documents may not show what the parties believe to be the situation at hand. There may be a significant debt, but it may in fact be owed by one party. For example, if there is a family company and the husband is the only director, he alone may have signed guarantees for that company. On the other hand, for some reason, guarantees may have been forgotten and were not signed by him. Just because you are told that a guarantee has been signed, does not mean that that has necessarily occurred. Even if it has been signed, it is essential to get a copy of the guarantee (and for that matter, any trust deed and loan documents for example) to properly ascertain what is owed by whom to whom.

At this time it is important to have a perspective like a trustee in bankruptcy or a liquidator – not about the recovery of assets so much but trying to work out, with precision, as to what is the balance sheet in a strict legal sense. By that I mean not what might be adjusted by virtue of family law entitlements, but what is owned by whom and what is owned by whom to whom and for how much.

I was fortunate early in my career to have extensive litigation with both banks and the ATO on behalf of commercial clients who had complex entities and owed a lot of money. Once you have been in that type of litigation, that thinking is never forgotten. It is absolutely essential to nail down those documents so that you can see who is indebted.

TAKING FIRM ACTION

Sometimes it appears that all is lost in that the liabilities are greater than the assets, but it is hard to pin things down because the other party (typically the husband) has been completely opaque in his approach. Many years ago, I acted for a wife where her husband was a violent bully. He had beaten her and chased her around the home with a loaded shotgun, among other things. By the time we had our trial, from recollection nine days, there had been 31 applications in the court, some on a weekly basis and had separate appearances in Brisbane Magistrates Court (being chased by creditors), the Federal Court (because he was being sued by his former solicitors who had then obtained a judgment and we were seeking to bankrupt him. My client intervened in those proceedings) and in another Magistrates Court on domestic violence proceedings (which in turn ultimately ran for seven days, still a Queensland record).

In the midst of this nightmare litigation, the wife escaped to a refuge with their children. She only had the clothes on their backs plus their car. Demand was sought from the husband to provide finances. He, in a fairly typical response, was obstructive and aggressive. The husband ran a number of businesses and he and the wife owned a number of properties, but it seemed as though his prime exercise in life was non-payment of creditors. He'd not only bullied her and the children, but everyone who dared ask him for money. Many were owed money and he simply refused to pay.

Somehow, they managed to eke out a living by continuing to refinance their assets as property values increased.

When I learnt that the rates had not been paid for one of their jointly owned properties, we attempted to find out the details of the claim. This proved impossible. Instead, I sent my clerk to the Brisbane Magistrates Court to get details of the claim (to see whether a default judgment could be entered against my client). As it turns out, my client was safe in respect of that claim. When we sought clarity as to the claims being brought against the husband, my puzzled clerk contacted me and said that currently there were *43 separate claims* filed in that one registry against him alleging that he owed money.

The approach I took in that matter from the beginning was to be relentless in having to pursue the matter. All that my client wanted was to achieve a home. Those actions were extraordinary to take because the husband sought at every step to intimidate my client and also to intimidate me. His actions included making a death threat against me, finding my registration number on my car (because in those predigital days I had to park outside a suburban courthouse and take in boxes of papers for the domestic violence matter) and then bribing an officer of the Department of Transport to find out my home address. He lived two kilometres from my home and still, despite the best efforts of police, somehow had possession of a rifle and shotgun.

On the first day in the Family Court, the matter proceeded in the morning. The husband represented himself. The matter was adjourned over lunch time. As it subsequently transpired, over lunch time, he went to a suburban branch of their bank and withdrew all the funds. He therefore told the truth when the case resumed in the afternoon that there were no funds in the account. However, he misled the court because he omitted to mention that he had withdrawn them during the lunch break, and that he had in his possession at court a cheque for the whole of the funds. Subsequent rigorous efforts disclosed these facts.

Over that break, the husband said to me:

> *"Well there's no point in proceeding, anyway, because the bank has issued a notice of sale."*

Of course, that was then put in evidence that afternoon and prompted a series of injunctions, as well as enquiries of the bank.

In days gone past, as I said, there would be a discussion with the branch manager. As banks have lost their branches, this means having to phone a centralised number or even worse, send an email via a webform. It can be very difficult to track down a person to talk with. It takes persistence and time – but it is necessary to do so.

I cannot emphasise enough the necessity of speaking on the phone to someone at the bank. Even better if you are able to see them in person.

The message that my client gave at that point was that she would take all vigorous action to protect the interests of the bank. She kept her word. At various stages, she was appointed as trustee for sale of various properties and then effected those sales, despite every possible obstruction put in place by the husband.

Dealing with the ATO can also be extremely difficult. The ATO can be prepared to wait until the property settlement is over, on the basis that it is going to be paid. It is wise for your client to have an experienced accountant who is used to dealing with this kind of situation with the ATO. Sometimes the ATO will insist on a payment plan. Two obvious problems with that approach are:

1. Often, the tax returns are well and truly behind, so undertaking a payment plan can be extremely difficult. It is therefore necessary to get the tax returns in order, which can be a herculean task when your client does not have control of the documents and is met with positive obstruction by the other party. Nevertheless, every effort needs to be taken, including orders of the court, to enable that to occur.

2. Your client may simply have no funds at the moment to ensure that any payment to the ATO is met.

Ultimately, my client achieved her property settlement. She achieved home ownership, away from the husband. Despite all his attempts to say that everything was lost, the reality was that not all was lost. Sufficient property was retained by her to enable her to have financial independence and freedom.

The case had the usual hoary chestnut of related party loans and friendly third parties (to one party, namely, the husband) claiming that they were owed significant sums. The case also had, unusually, a large amount of debt owing to third parties. What was clear about those debts were that they were owed. My client was keen to have them paid but the husband, true to form, was not (whilst at the same time including them in the balance sheet). Many of the debts were put onto the husband's side of the balance sheet at trial with him being obliged to pay, but were paid out from the sale of property.

From recollection, the tax returns were done and (despite the need to obtain court orders and obstruction from the husband) and the ATO was willing to wait.

WHAT REALLY HAS TO BE PAID?

What I have dealt with above is on the assumption that when the asset pool and in particular the liabilities are clarified, the amount of debt is greater than the assets. Whilst those cases exist, it is much more common where the assertion is made that the debt is greater than the assets, but the reality may be otherwise.

Often it is said that there is a loan owing (typically by a party's parents) where that loan acts like a cliff above the assets. However, the other party asserts that there is not a loan, but there were contributions on behalf of the other party by the parents, the payment being by way of gift.

The Full Court in *Strand & Strand* (No 2) [2018] FamCAFC 247 said[6]:

> *"The characterisation of a particular advance of monies depends on whether the circumstances known to both parties to the transaction at the time demonstrate, objectively, that the payment was made by way of loan. If, for example, the money was paid upon the express condition that it should be repaid then, notwithstanding any absence of formal documentation, and regardless of the motivation for the payment, a contract of loan will exist: Berghan v Berghan [2017] QCA 236; (2017) 57 Fam LR 104."*

The Queensland Court of Appeal in *Berghan v Berghan* [2017] QCA 236 said[7]:

> *"The evidence accepted by the trial judge leads to the inescapable conclusion that the payments made by the appellants to their son were contracts of loan in respect of which the monies were repayable on demand and were repayable by him personally.*
>
> *In the absence of an express term in the oral contracts about when the money had to be repaid the law would imply an obligation to repay upon demand."*

In *Berghan*, the parents of a son paid him a substantial amount of money on repeated occasions. He promised that he would pay them back. There was a dispute as to what the characterisation of those funds were, being the kind of dispute that we commonly see in family law.

[6] At [24].
[7] At [39]&[40].

The Full Court in *Strand* went onto say[8]:

> *"Even if a contract of loan is established, it does not necessarily follow that any liability so created will be taken into account in determining a just and equitable alteration of property interests. The court may properly determine not to take into account an unsecured alleged liability in certain circumstances, including where the alleged liability is vague or uncertain or unlikely to be enforced: Biltoft and Biltoft [1995] FamCA 45; (1995) FLC 92-614, Rodgers & Rodgers (No 2) (2016) FLC 93-712, [41]–[42*

The head note in *Biltoft* says:

> *"The husband asserted at trial The husband asserted at trial that the parties were insolvent. Accordingly, he sought an order that their assets be sold and moneys thus received be made available to their creditors.*
>
> *The husband and a particular creditor both gave evidence as to the quantum of a particular debt. The trial Judge did not accept that evidence and did not quantify the debt other than by concluding that it was at least the equivalent of the husband's interest in all his property other than the former matrimonial home. The creditor had not sought to recover the debt prior to the trial, was aware of the Family Court proceedings, gave evidence at the hearing but despite the magnitude of the debt, did not seek to intervene in those proceedings or seek a stay of them.*
>
> *Submitted that the trial Judge erred in:-*
>
> 1. *not accepting the evidence of the husband and the creditor as to the quantum of the debt;*
>
> 2. *not himself quantifying the debt; and*
>
> 3. *not making orders which operated on the net value of the parties' property.*
>
> *Held in dismissing the appeal:-*
>
> 1. *The normal procedure for determining the value of the assets of the parties is to deduct from the total value of the assets the value of the total liabilities of the parties, including unsecured liabilities.*
>
>   *Ascot Investments Pty Limited v. Harper [1981] HCA 1; (1981) 148 CLR 337 and In the marriage of Prince, General Credits Australia Limited (Intervener); A-G for the State of Queensland (Intervening); A-G for the Commonwealth of Australia (Intervening) (1984) FLC 91-501.*
>
> 2. *The procedure in relation to unsecured liabilities is, however, not absolute, nor is it prescribed by statute. A number of well recognized exceptions exist where the Court may determine not to take into account the value of the unsecured liability or discount that liability. For example, where the liability is vague or uncertain, if it is unlikely to be enforced or if it was unreasonably incurred.*
>
> 3. *There is no requirement that the rights of an unsecured creditor or a claim by a third party must be considered and dealt with prior to the Court making an order*

[8] At [25].

under s.79, nor is there a rule of priority as between a creditor claimant and a spouse.

The rights of the creditor may not be ignored, rather they must be balanced against the rights of the spouse.

Rowell and Rowell, Deputy Commissioner of Taxation (Intervener) (1989) FLC 92-026; Semmens v. Commonwealth of Australia and Collector of Customs (S.A.) (1990) 92-116; Re Bailey and Bailey (1990) FLC 92-117; Re Chemaisee; Federal Commissioner of Taxation (Intervener) (1990) FLC 92-133; Hannah and Hannah; Tozer and Tozer (1989) FLC 92-052; and Af Petersens and Af Petersens (1981) FLC 91-095.

Comments on the obligation of the parties to disclose significant creditors or significant claims and the circumstances when notice of the proceedings should be given to the creditor or claimant.

4. *The trial Judge balanced the rights of the creditor against that of the wife, and correctly took into account the uncertainties surrounding the debt including the reluctance of the creditor to negotiate as to an amount, to institute proceedings for its recovery or to seek a stay of the proceedings in this Court.*

5. *The trial Judge was not bound to accept the evidence of the husband or the creditor as to the quantum of the debt. Scott and Scott (1984) FLC 92-457.*

6. *Sufficient evidence was put before the trial Judge to enable him to have determined the amount of the debt other than in the general manner in which he did by reference to an upper and lower limit. His failure to do so has not, however, affected the final result and the conclusion which he reached was plainly right. De Winter and De Winter (1979) FLC 90-605.*

The Court held in *Biltoft*[9]:

"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 Limited v. Harper [1981] HCA 1; (1981) 148 CLR 337 where Gibbs J (as he then was) pointed out at page 355 that the Court "must take the property of a party to a 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 In the marriage of 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 page 79,076 said:-

> *"... 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*

[9] At [52]&[53].

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 only 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 Petersens (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).

Of course, the Court cannot ignore the fact that there is or may be a liability; the effect is simply that it does not consider that the other spouse should be called upon to in effect "contribute" to the liability by having that spouse's fair share in the parties' property reduced by virtue of its existence. The effect may be that the party who has incurred the liability will be left to meet it out of whatever funds remain to that party after satisfying the property order made under sec. 79 (Af Petersens (supra))."

In Rowell (supra), McCall J said at page 77,392:-

"The first step accordingly, in any property proceeding is to ascertain the property of the parties and to ascribe that property a value. In doing so, the Family Court has, in my view, quite properly in the past, taken into account liabilities of the parties and made orders which operated on the net value of the property so found. Family law does not operate in a vacuum. By that I mean the legitimate rights of third parties are not ignored when determining the rights to property between the husband and wife inter se. This has been said on a number of occasions in the past and in particularly by, as he then was, Gibbs J in Ascot Investments Pty. Ltd. v. Harper and Harper [1981] HCA 1; (1981) FLC 91-000.

In that case his Honour said (at p. 76,061):

"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 sections 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."*

The Family Court has always taken into account liabilities, not only liabilities which are certain or reasonably established but even those liabilities which are contingent and which have to be established and for example I refer to the claims that were still to be litigated in the case of Prince v. Prince (1984) FLC 91-501.

In that case their Honours, constituting the Full Court of the Family Court made reference to the general position relating to liabilities.

I refer firstly to the judgment of her Honour Evatt CJ at p. 79,076 where she said:

> *"What are the practicalities of the matter? Unless and until a stay is ordered, 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)."*

And further at p. 79,077 her Honour continued:

> *"It is, of course, possible that a party may in the end be unable to meet all his or her liabilities including those arising under sec. 79. If this results in insolvency, the question of priorities between the spouse and other parties will then be determined by the law of bankruptcy."*

Again, I refer to the judgment of Pawley J at p. 79,079 where he said:

> *"In sec. 79 there is no express provision that the interests of third parties may not be affected. Indeed, any change in property interests between married people is likely to have some effect on their dealings with other people but in determining the rights of a party to a marriage as against the other party to matrimonial property and in determining the extent of that property, the rights of third parties must be taken into account although a determination of those rights should not be binding on such third party unless he is granted intervention or otherwise submits to the jurisdiction."*

And finally I wish to refer to a passage of Fogarty J at p. 79,086 where he went on to say:

> *"It is also my view that it would not be practicable for the wife's claim under sec. 79 to be properly heard and determined until the determination of that issue."*

I interpolate that issue was the determination of the claims of a third party against the husband under guarantees or indemnities into which it was alleged that the husband had entered.

He continued:

> *"The figures referred to previously indicate the considerable impact that the judgment on that issue would have on the husband's present assets. I cannot myself envisage how the proceedings in this Court under sec. 79 could usefully be heard and determined until that controversy were finalised."*

And he then went on to say that this did not necessarily mean that the third party creditor was being given priority over the wife because he concluded by saying:

> *"It seems to me that an orderly determination requires the proceedings in the Supreme Court to be heard and determined first.""*

In Semmens v. Commonwealth of Australia and Collector of Customs (S.A.) (1990) FLC 92-116, the Full Court, after citing Rowell's case with approval, went on to say at page 77,767:-

> *"Neither the Family Law Act nor the Rules of Court require notices to be given to third parties in proceedings under sec. 79, 86 or 87. Nevertheless there are cases where the orders sought by one or both of the parties may impinge upon the legitimate rights of third parties. Whilst it would not be appropriate to require parties to such proceedings to give notice in every case to all third parties who are or may be creditors of one or both of the parties, nevertheless in particular cases the failure by the parties to do so (or the Court to direct such a course) may prejudice the rights of third parties.*
>
> *As Gibbs CJ said in the quotation from Ascot Investments referred to above:*
>
> > *"... it does not follow that 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."*
>
> *Whilst we think it inappropriate, in the absence of Rules of Court to this effect, to require notices to be given to third parties in all such circumstances, it must be recognised that the failure to do so in particular cases can severely impinge upon the "legitimate interests of third parties" and may almost inevitably in many cases constitute a "miscarriage of justice" within sec. 79A. Consequently, in our view, where in a proceeding under sec. 79, 86 or 87 it appears to either of the parties that there are interests of third parties which might be adversely affected by the orders which are being sought or the terms of the agreement, justice and common sense dictate that those third parties be given notice.*

Similarly, where the Court becomes apprised of that circumstance in the course of hearing such a proceeding, that procedure would also commend itself.

Failure to do so in a particular case may adversely affect the interests of a third party and, in the long run, may open up the orders which have been made or the agreement which has been approved or registered to challenge sec. 79A and 87(8) or otherwise."

Then[10]:

> *"In the present case, the liability of the husband to Mr Horrocks is unsecured. Mr Horrocks gave evidence before the trial Judge but did not seek to intervene in the proceedings and had, up to the date of trial, not taken any steps to recover the amount due to him from the husband. In 1991, he was aware of the marital problems of the husband. He has taken legal advice to protect his interests but has not instituted proceedings in the Courts to recover the debt because he said he does not believe in litigation to resolve commercial matters where the parties are talking and, because in 1993, the husband raised these proceedings with him as a reason why he was unable to settle with him. He did not seek to intervene in the present proceedings Moreover, between 31 July 1991 and the commencement of the hearing, he had not sought to negotiate with the husband to recover his debt. The evidence disclosed that he has at all times been slow and/or reluctant to pursue his rights against the husband.*
>
> *In relation to unsecured liabilities, we would with respect agree with the observation of Nygh J in Af Petersens and Af Petersens (supra) at page 76,669:-*
>
> *"Nor, as has been pointed out earlier, is there anything in the decision of the High Court in Ascot Investments Pty. Ltd. v. Harper and Harper to suggest that this Court cannot make an order dividing the assets of the parties because such a division might hamper a third party in his or her chances of recovery of a debt."*
>
> *Further, we are of the view that the diminution of the assets of a party to a marriage as a result of an order of the Family Court does not affect the right of an unsecured creditor to apply to a Court for an order which will then justify execution against the unencumbered assets of that party. As Elliott J said in Hannah and Hannah; Tozer and Tozer (1989) FLC 92-052 at page 77,597:-*
>
> *"The Family Law Act has been in operation now for nigh on 15 years - long enough for those in business or finance to realise that the property of persons with whom they deal may be the subject of competing claims under the (Family Law) Act by a spouse, or perhaps a child of the marriage. If they thus advance money or supply goods without security then the choice - and the risk - is theirs."*
>
> *The husband, however, submits that general practice to which we have referred in this case should be adopted with the result that the claim of the unsecured creditor, Mr Horrocks, should have priority over the claim of the wife. In Re Chemaisee; Federal Commissioner of Taxation (Intervener) (1990) FLC 92-133, the question of the priority of a party to the marriage was raised. The Full Court there said at page 77,915:-*
>
> > *"Fundamental to the wife's case is the contention that a party to a marriage builds up over the duration of the marriage an interest in the property of the parties to that marriage. Counsel submitted that such a spouse has a presently vested interest of an "inchoate" kind which exists prior to the institution of proceedings under sec. 79 or the making of any order under that section and which is capable of recognition and enforcement in appropriate circumstances. Relevantly to this particular case he submitted that the wife, after 40 years of marriage and having regard to the significant contributions which she had made to the family, had a vested interest in this property which it was proper to take into account and evaluate against the rights of the Commissioner (or for that matter any other third party creditor of the husband) and he submitted that the judgment of the Full Court*

[10] At [58]-[66].

> *in Sieling and Sieling (1979) FLC 90-627 at p. 78,264 supports that approaCh It was the submission on behalf of the wife that in the circumstances she was entitled to some degree of "priority" over the rights of third parties, that is that the rights of a third party creditor of the husband may be diminished in order to give effect to the wife's rights. In our view that does not represent the law in Australia. Rights arising under sec. 79 come into existence when an order is made under that section. Neither that section nor any other provisions of the Family Law Act establish rights, however described, in a party to a marriage over the property of the other spouse either arising from the existence of the marriage or the activities of the parties during that marriage or the institution of proceedings under sec. 79, where those rights do not otherwise exist under the laws in Australia."*

The Court drew attention to a number of cases in which that agreement had been raised and rejected and concluded its consideration of the wife's contentions, in that case, as follows:-

> *"The application of the above views does not, as was suggested for the wife, have the effect of granting to third parties any "priority" over a claimant spouse - there is no question of priorities either way. If after all of the claims against a spouse (including any proceedings under sec. 79) have been determined in an orderly way in the appropriate Courts that person is unable to meet his liabilities and is insolvent, the competing rights of his creditors are to be determined in accordance with the laws of bankruptcy: Prince, supra; Swain, supra; Re Sellin, supra; Rowell, supra; Hannah and Hannah; Tozer and Tozer (1989) FLC 92-052; Reed and Reed; Grellman (Intervener), supra."*

Thus, although there is a general rule as set out in Prince and Prince (supra) and Rowell and Rowell (supra), the rule is not absolute, is not prescribed by the statute and there are a number of well recognised exceptions to some of which we have already referred. There is no requirement that the rights of an unsecured creditor or a claim by a third party must be considered and dealt with prior to the Court making an order under s.79, nor is there a rule of priority as between a creditor claimant and a spouse. Those rights, however, cannot be ignored. They must be recognised,taken into account and balanced against the rights of the spouse. That was the approach adopted by the trial Judge. In this case, there are uncertainties surrounding the debt, including the reluctance of Mr Horrocks to negotiate as to an amount, to institute proceedings for its recovery or to seek a stay of the proceedings in this Court. These factors must form part of the balancing equation.

There is an obligation on both parties to disclose any significant creditors or any significant claim against either of them by a third party. If, as a result of the order of the Court in the property proceedings, the ability of a creditor or claimant to recover his or her debt or claim is likely to be affected, notice of the Family Court proceedings must be given to that creditor or claimant. He/she may then intervene in the Family Court proceedings and either seek a stay of those proceedings or some appropriate order which recognises his/her rights.

We are further of the view that the trial Judge was not bound to accept the evidence of Mr Horrocks and/or the husband as to the quantum of the debt owed by the husband to Mr Horrocks; see Scott and Scott (1984) FLC 92-457. There was sufficient evidence before him to have enabled him to have determined the amount so owing other than in the general manner in which he did by reference to an upper and lower limit. His failure to do so has not, however, affected the final result and the conclusion which he reached was, in our view, plainly right; De Winter and De Winter (1979) FLC 90-605. In coming

> *to his decision, he took into account and had regard not only to the Horrocks' debt but also to the magnitude of that debt and the conduct of Mr Horrocks with regard to it. The trial Judge was not obliged, in the circumstances of this case, to determine the quantum of that debt and thus the net value of the property of the parties.*
>
> *As we have already said, Mr Horrocks was well aware of the proceedings in this Court and the likely effect of an order in relation to his recovery of his debt, yet he did not seek to intervene. Accordingly, in our view, it has not been demonstrated that the trial Judge erred in not giving the Horrocks' debt priority over the claim of the wife."*

As *Biltoft* demonstrated, when there is an allegation of a debt owing, but if there is no intention to enforce the debt, then the reality may be otherwise than what is asserted. The alleged creditor in *Biltoft* just sat back and did nothing. The effect was, as concluded by the Full Court, that the trial judge had not erred in giving priority of the claim of the wife over the debt to Mr Horricks.

In *Strand*, the Full Court went on to say as to credit[11]:

> *"The primary judge had the advantage of observing the parties and the son giving evidence. He also noted documentary evidence that the husband had been informed of the advance "when the parties were apparently still on good terms" and found that it was made "at the very least, with the [husband]'s tacit consent" ([188] and [198] respectively."*

As that passage makes plain, the documentary evidence may go so far, but it may not clarify matters. Sometimes despite a documentary trail, whether or not there is a loan or debt in existence and whether or not it is enforceable, may be a credit issue to be determined after cross-examination of the parties at a final hearing.

The experience in dealing with these matters is often it is a game of playing chicken. Who blinks first. What are the costs in having to run the matter to trial? What is the likelihood of a costs order being made against your client (and the likely quantum) if your client is unsuccessful, as opposed to what are the costs that your client might be able to obtain against the other party – and are those costs to be incurred proportionate?

A recent application of *Strand* was that of Wilson J in *Aitken & Aitken (No. 3)* [2022] FedCFamC1F 496. His Honour said[12]:

> *"In contending that a loan may be found to exist even if the arrangement is not recorded in writing, counsel for the wife relied on the decision in Strand & Strand (No 2)[51] which in turn drew on observations of the Court of Appeal of the Supreme Court of Queensland in Berghan v Berghan.[52] In the latter decision, in ex tempore reasons Sofronoff P, Philippides JA and Boddice J addressed the absence of contemporaneous documentation evidencing payments. The Court also addressed the trial judge's reason that the parties did not intend to enter into legal relations even though repayments had been made against admitted loans. To my mind both authorities cited (Strand & Strand (No 2) and Berghan v Berghan) were fact specific and are not to be taken to enunciate any doctrinal point of principle about the circumstances when a particular form of agreement, here, a loan agreement is to be taken to have come into existence. A more reliable analysis in answering that question is whether the parties to a domestic arrangement intended to create legal relations.[53] Once that is answered in the*

[11] At [26].
[12] At [97].

affirmative, the next task is for the court to set about construing the terms of the agreement."

Aitken involved a very large amount of property, many millions of dollars. Item 38 that was in contention concerned the wife's directors' loans. Wilson J stated that the relevant amount was $1m and that there was something of a back story associated with the entry. Further[13]:

"As with many family companies, in this family, attention to the formalities required by the Corporations Act in relation to creating minutes of meetings at which loans to directors are approved were bypassed. Little even in the way of journal entries supported the existence or the amount referrable to this item notwithstanding the magnitude of the amount. And, while company loans to directors are everyday occurrences in Australian commerce, in the family law jurisdiction the niceties of company law to support the legitimacy of such loans is frequently overlooked. Minutes of board meetings are rarities at which a motion for the making of the advance is approved by the board. Journal entries in the books and records of the company's accounts are equally scarce. Nevertheless, loans to directors from the company and loans by directors to the company continue to represent an undeniable source of financial lifeblood in the corporate arena, especially in family controlled companies. Questions of whether the lender and borrower are separate legal entities, the commercial terms of the arrangements or even the providence of the transactions as viewed through the prism of the director-fiduciary are seldom posed, still less answered.

In this instance, D Pty Ltd advanced the wife $1,000,000. Whether that was in one or more tranches was not readily answered. The manner in which those funds was applied is equally not readily answered. Whether the terms of the advance or advances were commercially advantageous to D Pty Ltd is a matter that will escape the scrutiny of the judicial microscope in this case. It seemed that it was common ground that, with the acquiescence of the husband, the sum of $1,000,000 was applied in such manner that those funds no longer exist and therefore only a liability for the repayment of those features in this component of the case.

On behalf of the wife, her counsel contended that several issues arose from the $1,000,000 director's loan to the wife. Those issues included –

(a) whether the sum of $1,000,000 was properly characterised as her property;

(b) to the extent that the $1,000,000 or part thereof may have been expended on legal expenses, then the wife argued that her earlier contentions about the proper treatment of her legal expenses applied mutatis mutandis in this context;

(c) a line of authority that includes SMB & MFB[65] and La Costa & La Costa[66] has made observations about the propriety of including funds exhausted on legal fees as part of a party's property;

(d) if expended legal fees are in fact included, then it is also necessary to make a corresponding adjustment to the value of the parties' interests in D Pty Ltd; and

(e) further, to the extent that the wife incurs a tax liability in respect of the loan that fact needs to be recognised in the balance sheet.

[13] At [115]-[124].

So far as the last matter was concerned Mr XX gave extensive evidence on point, as the earlier passages of these reasons record.

It is necessary to deconstruct this component of the case.

The $1,000,000 in issue in this item on the balance sheet has been the subject of examination by various experts in the case. So far as Division 7A issues were concerned, Mr XX provided expert evidence. Mr AE also examined the issue.

Counsel for the wife submitted that the amount of $1,000,000 was expended by the wife on "regular and reasonable expenses".[67] Counsel for the wife cautioned against adding back the $1,000,000 sum, referring to principles governing add-backs in cases such as Chorn & Hopkins,[68] SMB & MFB,[69] and La Costa & La Costa.[70] Counsel for the wife submitted that "to the extent that such funds have been expended on the wife's legal expenses, the above submissions are repeated". That was an oblique contention because it failed to identify how much of the $1,000,000 was actually applied to what, whether in legal fees or otherwise. The submissions went on to state that the tax impost falling upon the wife referrable to the loan needed to be taken up in the balance sheet consequent upon a decision being made on tax issues.

The husband's answers in cross-examination about the manner in which the wife applied the $1,000,000 director's loan was little more than he had no issue with the wife receiving that sum.[71] The husband said he did not know of the tax implication of the $1,000,000 loan.[72] In his final address, Mr Lloyd SC submitted as follows on point –

> *We know and there's no doubt that [Ms Aitken] was permitted to borrow from [D Pty Ltd] $1 million, and what has become of it is, really, basically her matter, her concern, really. But we understand a fair amount of it went into costs and so on, but that's by the by.*
>
> *If that loan is not repaid in this current financial year, it too will probably attract the division 7A issues, so that's why we say now what you can do definitively without any problems is to cause a dividend to be paid to her and her alone. My client doesn't need the money at the moment. She should then from that distribution received by her – the dividend received by her repay the company the $1 million that she has borrowed. Then the accounting is in order.*

It seems that the husband recognised that the wife was permitted to borrow $1,000,000 and it was a matter for the wife as to what became of that amount, or, I infer, how she applied that sum. If D Pty Ltd paid a dividend to her, Mr Lloyd SC submitted that the wife could apply that dividend to repay the $1,000,000 loan to D Pty Ltd with the consequence that accounting issues were thereby regularised.

There is a great deal of merit in the submissions of Mr Lloyd SC on this issue. If the loan is repaid from a dividend that is struck, then D Pty Ltd's accounts will need to recognise the fact that the loan to the wife has been repaid with the consequence that D Pty Ltd's asset position is commensurately enhanced. That regime is to be contrasted with the transfer of property regime to which I know turn."

What about addbacks? The recent example of addbacks was that of *Xin and Qinlang (No 6)* [2024] FedCFamC1F 28 where Gill J stated[14]:

[14] At [32. r

> *"Obtaining a just and equitable result may require the consideration of notional property, being property that is no longer in existence, having been disposed of by a party. Although, as identified by the Full Court in Grier & Malphas, the use of such notional add-backs is the exception, there may be good reason to use such an approach. In Trevi & Trevi, Murphy J identified three recognised bases for adding back, being:*
>
> > *where the parties have expended money on legal fees; where there has been a premature distribution of matrimonial assets; and 'waste', or a wanton, negligent, or reckless dissipation of assets."*

Further[15]:

> *"A justification for a notional adding back does not arise merely because a party has disposed of matrimonial assets. As observed by Murphy J in the authorities that deal with an adding back, parties do not enter a state of "suspended economic animation" on the ending of their relationship. Adding back, as a discretionary exercise, is exceptional and occurs where justice and equity require such a reckoning. Alternatively, rather than adding back, justice and equity may be met by taking into account, pursuant to s 75(2)(o) the disposal as a fact or circumstance that the justice of the case renders necessary to take into account."*

His Honour had to deal with an equitable claim, including under *Calverly v Green* and *Butler v Craine*[16]:

> *"The claim made by the second and third respondents, as pleaded in their points of claim document, and as supported by the husband, is that the Suburb K property is held by the husband and wife on trust. This was described by the second and third respondents as either "a trust of the kind the subject of Calverley v Green (1984) 155 CLR 252" (a purchase money resulting trust) or "a trust of the kind the subject of Butler v Craine [1986] VicRp 28; [1986] VR 274 at 283" (a common intention constructive trust) for the second and third respondents, the husband and wife holding the title, the second and third respondents the beneficial interest.*
>
> ***The Calverley v Green claim***
>
> *This claim is reliant upon a resulting trust based upon the contribution by the second and third respondents of the purchase price of the property. In Calverley v Green a resulting trust was presumed to arise in favour of a purchaser in the proportion in which the purchaser contributed the purchase money. The resulting trust, however, was determined not to arise where there are circumstances that remove reason to presume that the title does not sit with the beneficial interest, such as where a so-called presumption of advancement arises. A presumption of advancement (and hence no resulting trust) has been held to arise where property is purchased in the name of a child.*
>
> *The court emphasised that both presumptions are subject to evidence that contradicts that it was the intention of the contributor of the funds, at the time of the purchase, to either retain or to gift the beneficial interest. That intention, or state of mind, usually is not inferred from silence but from the words and actions of the parties.*
>
> *The determination of whether a resulting trust arises has recently been further considered by the High Court in Bosanac. That case considered closely the nature of the*

[15] At [33].
[16] At [96]-[114].

presumptions of resulting trust and advancement, and the significance and proof of the intent of the provider of the purchase funds. Three judgments were delivered by the court.

Chief Justice Kiefel and Gleeson J explained the effects and interrelationship of the presumptions, or so-called presumptions as follows:

> *The presumption can be rebutted by evidence from which it may be inferred that there was no intention on the part of the person providing the purchase money to have an interest in land (or other property) held on trust for him or her. The presumption cannot prevail over the actual intention of the party paying the purchase price as established by the overall evidence, and where more than one person pays the purchase price, as here, regard is necessarily had to evidence of each of their intentions.*
>
> *The presumption of advancement allows an inference as to intention to be drawn from the fact of certain relationships. It applies to transfers of property from husband to wife and father to child, but in Nelson v Nelson this Court accepted that there is no longer any basis for maintaining a distinction between a father and mother so far as concerns transfers of property to a child. Originally the relationships were considered by themselves sufficient to afford "good consideration" for the conveyance, but a rationale for the presumption has come to be found in the prima facie likelihood that a beneficial interest is intended in situations to which the presumption has been applied.*
>
> *On one view, the presumption of advancement is not strictly a presumption at all. It may be better understood as providing "the absence of any reason for assuming that a trust arose". At an evidentiary level, it is no more than a circumstance which may rebut the presumption of a resulting trust or prevent it from arising. It too may be rebutted by evidence of actual intention.*

Importantly, Kiefel CJ and Gleeson J observed at that the court's concern is to determine intention at the point when the property was purchased. That concern is the necessary context for considering the presumptions, and accordingly the strength of the presumptions will vary from case to case. They accepted that the presumptions are circumstances readily rebutted by comparatively slight evidence, and that "inferences to the contrary of the presumptions as to intention may readily be drawn."

At [32] Kiefel CJ and Gleeson J accepted that the "question of intention is entirely one of fact." They appeared to accept what had been said by Cussen J in Davies v The National Trustees Executors and Agency Co of Australasia Ltd [1912] VicLawRp 43; [1912] VLR 397, that attention must remain fixed on the intention of the purchaser or transferor at the time, that any matter relevant to that issue is admissible, and "that evidence of that person's thinking at the time might be accepted, although it would be received 'with caution'".[25] In Bosanac there was no such direct evidence of intention.

Similarly, Gageler J identified that it is intention, either proved or presumed, that is at the heart of the formation of any trust. In the absence of direct evidence, or where the indications of intention are equal or equivocal, he observed, the presumptions are determinative. The presumption of a purchase money resulting trust is answered completely by a presumption of advancement (which he, like Kiefel CJ and Gleeson J, observed that rather than being a presumption, advancement is a circumstance of evidence) and where one arises, leaves no basis to assume that a trust arose. Again, like the others he identified at [66] that:

> *Whether any, and if so what, inference is then to be drawn about the actual intention of the contributor and the purchaser falls to be determined as an ordinary question of fact on the balance of probabilities. "It is the intention of the parties in such cases that must control, and what that intention was may be proved by the same quantum or degree of evidence required to establish any other fact upon which a judicial tribunal is authorized to act." Just as the standard of proof of intention is the ordinary civil standard, there are no special rules about proving intention. No predetermined weight is to be given either to the fact of a contribution having been made or to the categorisation of the relationship between the parties. The significance of each of those circumstances falls to be assessed within the totality of the circumstances of the case.*

At [94] Gordon and Edelman JJ described a purchase money resulting trust as one that arises by "objective intention." It is in that context that the issues of the so-called presumptions arise:

> *Presumption of resulting trust – what is presumed and when and how does the presumption arise?*
>
> *Two immediate questions arise – when and how does a presumption of resulting trust arise and what is presumed? Relevantly in the case of "voluntary conveyance resulting trusts" and "purchase money resulting trusts", what is presumed is a declaration of trust by the person who either transfers property, or pays the whole or part of the purchase price of it. But whether that is presumed – whether that inference is drawn – depends on issues of evidence and proof of a resulting trust. And in answering those questions, it is necessary to address the matters raised by Deane J in Calverley.*
>
> *The presumption of resulting trust – the standardised inference that allocates the onus of proof – serves the same function as a civil onus of proof and operates to resolve a factual contest when the relevant evidence is "uninformative or truly equivocal". It arises if there be a paucity of evidence as to an intention to declare a trust. Put in different terms, where the presumption arises, the existence of a resulting trust is an inference drawn in the absence of evidence when, for example, a purchaser of property causes it to be transferred to another or when a person contributes to the purchase of property which is registered in the name of another. But such an inference – of resulting trust – cannot arise where a plaintiff has led evidence that tends to establish an objective intention or the lack of an objective intention to create a trust.*
>
> *As a resulting trust is an inference drawn in the absence of evidence, it is necessary to start with the objective facts. It is a factual inquiry. The question may be framed in these terms: what were the parties' words or conduct at the time of the transaction or so immediately thereafter as to constitute part of the transaction – the objective facts?*
>
> *There are three dimensions to that factual inquiry.*
>
> *Where the objective facts based on evidence led by the plaintiff tend to establish an objective intention that a provider of part of the purchase price would hold an equitable interest as to a particular proportion of a particular property, there will be an express trust which satisfies the three certainties of intention, subject and object. That is the case that the defendant has to meet. There is no need for a*

presumption of resulting trust to shift the onus of proof. The presumption of resulting trust does not arise. It is unnecessary.

On the other hand, where the objective facts based on evidence led by the plaintiff tend to establish, even weakly, an objective intention inconsistent with a declaration of trust, then there will be no case for the defendant to meet. Again, the presumption of resulting trust will not arise. In this circumstance, the fact that there is a spousal relationship is one of the objective facts: at best it merely reinforces, and is not determinative of, the objective intention of the parties established by the objective facts.

Where, however, the objective facts based on evidence led by the plaintiff are neutral, truly equivocal, non-existent or uninformative as to the objective intention of the parties, then, consistent with the weak presumption of resulting trust, an inference can be drawn of a declaration of trust by the provider of part of the purchase price. That weak inference will be the case that the defendant has to meet.

...

There is also an important temporal dimension to the factual inquiry. The objective intention of the parties is determined at the time when the trust was purportedly created – here, when the property in issue was purchased. Apart from admissions against interest, the only evidence relevant and admissible as to the parties' objective intention is their acts and declarations before or at the time of the transaction or "so immediately [thereafter] as to constitute a part of the transaction". Subsequent events and conduct are otherwise not admissible.

105. *The three judgments within Bosanac consistently emphasise the centrality of intention on the part of the payer of the purchase monies to the formation of a trust. The inquiry as to whether the beneficial interest is held on trust is an inquiry as to the intent of the payer at the time of the payment of the purchase monies. They are further consistent as to the limited occasions on which the so-called presumptions will be determinative, being occasions where the circumstances of the transaction, and evidence in relation to the transaction are insufficient to determine intention.*

106. *While, at face value, there may be some divergence as to whether subsequent statements as to intent may be drawn on to prove the relevant intent at the time of the transaction, on deeper consideration this is not so.*

107. *Chief Justice Kiefel and Gleeson J seemingly accepted evidence of a person's thinking at the time was admissible, Gordon and Edelman JJ rejected statements made beyond the time of the transaction (unless against interest). Justice Gageler described at [67] a test of relevance:*

> *Where evidence relevant to intention is adduced, the presumption and the counter-presumption are therefore of practical significance only in rare cases where the totality of the evidence is incapable of supporting the drawing of an inference, one way or the other, on the balance of probabilities about what contributors and purchasers actually intended when they participated in the purchase transaction.*

108. *A number of observations should be made about this potential divergence. Firstly, Bosanac did not involve statements by either Mr or Mrs Bosanac as to intention at*

the time of the transaction, and so, insofar as that issue was addressed in the judgment it was obiter dicta, and not central to the resolution of the appeal.

109. *Secondly, Gordon and Edelman JJ commented in the manner that they did on the basis of what had been said in Trustees of the Property of Cummins v Cummins (2006) 227 CLR 278 at 300:*

In Charles Marshall, the plaintiffs were daughters of the donor and the Court said that the presumption of an intention of advancement, that they be made beneficial as well as legal owners of the shares, might be rebutted by evidence manifesting a contrary intention. Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ said of the rebuttal of presumptions by manifestation of a contrary intention:

> *"Apart from admissions the only evidence that is relevant and admissible comprises the acts and declarations of the parties before or at the time of the purchase (in this case before or at the time of the acquisition of the shares by allotment) or so immediately thereafter as to constitute a part of the transaction." (emphasis added)*

However, as Malayan Credit illustrates, whilst evidence of subsequent statements of intention, not being admissions against interest, are inadmissible, evidence of facts as to subsequent dealings and of surrounding circumstances of the transaction may be received.

110. *The reference to subsequent statements is consistent with s 66A of the Evidence Act 1995, which allows previous representations as to intention where they are a contemporaneous representation of that intention. Given that it is the intention at the time of the transaction that is relevant, such a statement is temporally restricted in a manner similar to that described above. I expect that this was the manner of restriction referred to by Gordon and Edelman JJ.*

111. *It may then be considered that Kiefel CJ and Gleeson J were commenting on evidence given as to previous intent, whilst Gordon and Edelman JJ were discussing evidence of a previous representation as to intention, given after the fact, and outside of court.*

The Butler v Craine claim

112. *The relief identified at Butler v Craine [1986] VicRp 28; [1986] VR 274 at 283, as pleaded in the second and third respondent's points of claim is reliant upon a constructive trust based upon the common intention of the parties. In Butler v Craine Marks J identified three elements to find the particular constructive trust that was determinative in that case. The first is that the parties must form a common intention as to the ownership of the beneficial interest in the property. This does not require an express agreement, although an actual common intention must be able to be inferred otherwise, such as from the conduct of the parties. The second is that the claimant must have acted to his or her detriment in reliance upon that common intention. The third is that it must be a fraud upon the claimant for the other party to deny the beneficial interest.*

113. *It may be considered that if the second and third respondents succeed in the resulting trust claim, this constructive trust aspect of their claim is redundant.*

114. It may also be considered that if the second and third respondents fail in establishing the necessary intention in respect of their resulting trust claim, they will likewise have failed to establish a common intention sufficient to establish this aspect of their claim.

IS THE FINANCIAL CONTRIBUTION A LOAN OR A GIFT?

When determining whether the financial support is a gift or a loan, the Court will consider:

1. Whether the loan is in writing

2. Whether there has been a call for repayment of the loan

3. Whether there has been some repayment of the loan

4. Whether there is likely to be a call for repayment of the loan in the future

IS THE LOAN VAGUE OR UNCERTAIN?

If the Court considers the financial support from a parent to be a loan, the Court may still find that the loan should not be considered if it is vague or uncertain. For example, a person claims there is a loan. But in previous communications with a bank, they said the money was a gift.

This was discussed in *Strand*. There were two inconsistent signed documents:

1. A letter to a mortgage broker acting for the adult child confirming the money was a gift.

2. A loan agreement providing for the adult child to repay the money.

The court found that the money was a gift not a loan because:

> *"... there was no evidence to suggest that the son was likely to offer any repayment in the foreseeable future, nor that he would have the capacity to do so ..."*

LOANS THAT ARE REPAYABLE ON DEMAND

The High Court held in *Young v Queensland Trustees [1956] HCA 51; (1956) 99 CLR 560 at 566*[17]*:*

> *"A loan of money payable on request creates an immediate debt. Speaking of a promissory note payable on demand Parke B. in Norton v. Ellam [1837] EngR 183; (1837) 2 M & W 463 (150 ER 839) , said: "It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan. Where money is lent, simply, it is not denied that the statute begins to run from the time of lending" (1837) 2 M & W, at p 464 (150 ER, at p 840) . This was settled at the end of the seventeenth century."*

In *Ogilvie v Adams* [1981] VR 10 41, Fullagar J stated:

> *"There is a long-settled rule of construction that, where there is a present debt between the parties to a contract to repay money, and the only terms as to repayment of the debt*

[17] At [10].

to be spelled out of a promised repay on demand, or out of a statement that the money is to be repaid or repayable on demand (or on request), an instantaneous cause of action, upon the very creation of the contract, arises in the lender. Whether one calls it a rule of law or not does not seem to me to matter. The only reason why I've chosen the expression 'rule of construction' is because other words or terms may appear in the contract which may be in the circumstances sufficient to show an intention that the cause of action is not to arise until some actual demand or some form of demand is made or until some period after demand has elapsed …

But it is equally correct to say that, where such 'other words' or terms do not appear, it is settled law that alone (for example) which is simply described as being repayable on demand or on request or a call creates a cause of action in the lender enabling him to recover the money instantaneously upon the loan being made, and without any demand being made at all. What the critical words mean, generally, is a rule of construction, and therefore presumptive only; what the words mean in the written document recording the terms of a loan, when standing alone, is a clear rule of law… Of course the speculative builder may say, in his contract or in his acknowledgment, that the money is to be repaid when the houses are sold, or that pending demand he is only to repay $20 per week of the principal sum, and in such a case the arising of the cause of action may be postposed until an actual demand is made. When those circumstances are themselves of the kind which may provide the law with criteria on which to imply if necessary into the requirement of the demand some requirement of reasonableness in the nature of notice. In the case of banker and customer, one has to investigate (usually) the implied contract or contracts between the parties created by the particular mercantile relationship, but if one finds something to alter what would otherwise be effect of the words 'repayable on demand', used in respect of a present debt between the actual parties, that something must (in order to effect the alteration) be found in a contractual relationship between the parties, not in some purpose or motive, real or supposed, by reason of which the loan was made and with respect to which the contract is silent. It is worth pausing a moment to see what it means to say 'repayable on demand' in a case of the present kind [by husband to wife]. It imputes to the parties the solemn intention that, instead of presenting the debtor with a writ on the morning after the loan at 11 a.m., the creditor must demand the money at 10.56 a.m. and then present their writ at 11 a.m. If it be contended that an actual demand implies some reasonable notice, on what possible basis is reasonableness to be assessed? Must the period be long enough for the borrowing wife to sell out her 'locked in' interest in a proprietary company? Or to taken complete successfully proceedings under section 186 of the Companies Act?"

The point is that if, as commonly happens, money is lent repayable on demand by members of family such as the parents of one of the parties, then by the time it is asserted that the money is to be repaid, it having been asserted to have been paid by way of a loan, the limitation period has expired. These vary around the country. In Queensland, for example, to sue on an account or in contract is no greater than six years from when the cause of action arose: *Limitation of Actions Act 1974* (Qld), section 10.

A few years ago, I had a client in this situation. I acted for the husband. The wife's parents had provided a significant sum of money, which acted as a cliff over the value of the home and other assets – if that money were a loan.

The money had not been lent on the basis that it was repayable on some notice being given, but repayable on demand. It had been lent more than six years ago.

My client decided to take the point. In doing so, he was warned by me that this would not go down well with his wife or her parents and therefore may have long-term implications about his relationship with his children (who were teenagers and primarily lived with his wife).

Nevertheless, my client decided to take the point. By taking the point, it meant that he could receive a viable amount from property settlement and therefore enabled him to buy his own home. If he had not taken the point, then that step would have been next to impossible. They would have in effect been insolvent.

My client later complained that his relationship with his children had broken down. He attributed this to carping and bad-mouthing of him by his ex-wife and her parents to the children. The children decided to cut him off.

Not surprisingly, I reminded my client that that was exactly the risk that I had previously advised him about.

I said that he could relent, despite the property settlement having been consented to, and could agree to repay the funds to his parents-in-law and in the process have an order made by consent under section 79A.

The financial imperative was too great. My client rued the approach taken by his children, but was not going to relent about the money.

In essence, he reaped what he sowed.

IS IT JUST AND EQUITABLE FOR THERE TO BE A PROPERTY SETTLEMENT?

As I said earlier in this paper, there is a clear difference between sections 78 and 79. Some of our colleagues are inclined to immediately race off under section 79 without considering whether it is just and equitable to undertake a property settlement. As the High Court held in *Stanford*, it must be just and equitable as a first step for there to be a property settlement. If one party owes all the debt and the other party is free and clear, from the other party's point of view, it may be that there ought to be no property settlement. The strategy on that party might be to wait out any limitation period to expire, being either two years post-separation from the de facto relationship or one year after divorce. I have acted in cases such as that where my clients have waited out the limitation period, and in respect of the divorce, brought the divorce application as quickly as it could be brought i.e. on filing one year and one day after separation.

On some occasions, that strategy has been successful.

An example of such a case (although it did involve insolvency) was that of *Chancellor & McCoy* [2016] FamCAFC 256. A lesbian couple had lived in a de facto relationship for 27 years. They had not mixed their funds. The High Court in *Stanford*[18] held:

> *"In many cases where an application is made for a property settlement order, the just and equitable requirement is readily satisfied by observing that, as a result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common <u>use</u> of property by the husband and wife. No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or*

[18] [2012] HCA 52; (2012) 247 CLR 108.

implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence, it will be just and equitable that the court make a property settlement order. What order, if any, should then be made is determined by applying section 79(4)."

Turner J recited the following further extracts from *Stanford*:

"[36] The expression "just and equitable" is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definitions. It is not possible to charts its metes and bounds…

[40] … whether making a property settlement order is 'just and equitable' is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in section 79(4). The power to make a property settlement order must be exercised 'in accordance with legal principles, including the principles which the act itself lays down'. To conclude that making an order is 'just and equitable' <u>only</u> because of and by reference to various matters in section 79(4) without a separate consideration of section 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act."

Turner J concluded:

"It would not be just and equitable to make any order altering property interests because:

(a) the parties conducted their affairs in such a way that neither party would or could have acquired an interest in the property owned by the other because:

(i) there was no intermingling of their respective finances;

(ii) the parties did not have a joint bank account;

(iii) each party acquired property in their own name with there being little exchange of the detailed of these acquisitions to the other party;

(iv) each party remained responsible for their own debts;

(v) each party was able to use the remainder of their wages as they chose without explanation or accountability to the other party;

(vi) there was a complete lack of joint financial decision-making;

(vii) there was the absence of sharing of any information with each other as to their financial situation or individual decision-making;

(viii) neither party made provision for the other party in the event of their death either by way of Will, beneficiary to superannuation funds or beneficiary to life insurance policies;

(ix) *the parties at the time of separation were unaware as to the worth of the assets acquired by each of the parties during the relationship and the decisions that had been made in respect to the acquisition of these assets.*

(b) whether this separation of finances was initially a conscious decision by one party or both parties is irrelevant; what is relevant is that the parties continued to conduct their relationship without intertwining their finances consistently for some 27 years.

(c) the payment of monies by the appellant to the respondent of $100-$120 per fortnight for most of the relationship, were classified as mortgage payment (the appellant's terminology) or rent or board (the respondent's terminology) given the small amount of payment in respect to the overall size of the pool accumulated by the respondent cannot be viewed as financial intermingling, but as financial assistance to the other party as the home owner who provided housing for the parties to live in during the entirety of the relationship.

(d) as there is no evidence that the financial and non-financial contributions made by the appellant to two properties prove the value of these properties then no equitable interest by the appellant in the properties has been established.

(e) each party have the opportunity during the relationship to financially plan for their future given their profession and employment histories.

(f) there was no evidence to support that either party was hindered in their individual financial decision-making during the relationship.

(g) for many years the appellant appeared to be in a more advantageous position as the appellant did not own real estate or gave evidence of servicing debts; but this is not reflected in the pool of assets each party has retained since separation.

(h) it is unfair for the respondent, who has taken steps to maximise her future wealth, to have to share that wealth with the appellant who did not invest as wisely; especially in regard to maximising her superannuation benefits.

(i) the appellant has demonstrated her continuing struggle with financial matters given the spending of the inheritance and the increase in her mortgage over a property since separation, despite the earning of an income.

(j) although the alteration of property interest has been denied due to it not being just and equitable for such an alteration take place, the appellant has still been left with significant assets accumulated by her during the relationship, consisting of two houses, several motor vehicles and superannuation.

(k) further the appellant has the capacity, unlike the respondent, to accumulate more assets, with her ability to work and her ability to contribute to her superannuation fund."

Turner J, having announced her intention to dismiss the appellant's claim, concluded with the following remarks:

"[62] It is easy to assume that where parties have been together in a recognised legal relationship, whether a marriage or a de facto relationship, and during that

relationship the parties have accumulated property, then it automatically flows that a property settlement will occur following separation.

[63] In the majority of cases this is true.

[64] But as the High Court in Stanford was quick to point out this is not always the case.

[65] There are matters due to their particular facts which cannot fall within that assumption and where it is not just and equitable to progress to an alteration of property.

[66] Granted, these cases are in the minority.

[67] But being in the minority does not mean that it is to be glossed over lightly.

[68] There were many indicators in this matter that attracted the principals [sic] in Stanford, the lack of financial intertwining, the lack of financial planning for the future, the evidence separation of finances and the continued individual ownership of property; just to name a few."

The Full Court stated at [47]:

"The point forcibly made by the High Court [in Stanford] was that it was not appropriate for a trial judge to proceed to consider what is 'an appropriate property settlement' without first determining whether it is 'just and equitable' to make any order at all. There is no basis for the suggestion that her Honour treated Stanford as a 'reference point'. Her Honour made no mention of the facts in Stanford and merely referred to it, entirely appropriately, as an authoritative pronouncement concerning the approach to be taken where a party seeks a property settlement order."

GETTING PAID

We should always focus on how we are to be paid. We have a series of tools available to us as practitioners to assist.

If you have ended up in the position of having your client owing you a lot of money, you do not want to be in the position of Q Lawyers, in being owed greater than $100,000, and being the creditors on the bankruptcy petition.

A way of being paid is if a fruits of the litigation lien is available to you. If it is available, and it appears that payment is about to be made (for example from the sale of a property), then provided you give notice to the right people (for example, your former client, their new lawyer, and the other party or parties), then you may be paid. Exercise of this approach can result in a swift resolution. There is an excellent article in *The Law Society of NSW Journal* on point[19].

SNAPSHOT

1. If not playing a waiting game, assemble a team to help.

2. What is the asset pool?

3. Who owes the alleged loan?

[19] https://www.lawsociety.com.au/sites/default/files/2018-08/Costs_LSJ_August%202018.pdf .

4. How much is the loan?

5. Is it likely that the debt will ever be enforced?

6. Is it a debt or is it not?

7. If the value of liabilities is greater than the assets, should some protection mechanism be undertaken by way of a consent order or financial agreement?

8. If that were to occur, then has notice been given to potential creditors?

9. If not, there is a significant risk that the deal will be set aside?

10. If the debts are much greater than the assets, is a viable option merely to wait however many years for asset appreciation, with the debts to be serviced in the meantime?

11. Do the parties have enough of a workable relationship and enough reliable income to ensure that that approach is followed?

12. Are there complications with a BFA or with an SMSF?

Stephen Page
Page Provan
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stephen@pageprovan.com.au