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DISCOVER AND PROCEDURE IN THE FAMILY COURT AND THE FEDERAL CIRCUIT COURT IN FINANCIAL MATTERS

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INTRODUCTION

In the short time to present this paper I will focus on some differences in the two courts rules; what you need to do to get your case running and what to do when the other party is non compliant.

I have produced a summary of the rules in the two courts for your use and update as rules change and you need to keep abreast of the changes
If anyone would like the document sent to them in Word format please email me at robynlee.wheeler@gmail.com and I shall forward you a copy so you can have it on your computer and update if and when necessary

DISCOVERY WHY THE DIFFERENCE IN PROCEDURE IN THE TWO COURTS?

There are some significant differences in the two sets of rules; The Federal Circuit Court, ("FCC") originally known as the Federal Magistrates Court was first intended by the government of the day that introduced it, to be a cheaper quicker court than the Family Court, ("FC"), that being a more specialist court.

It is fair to say that not that it is not what has occurred
Not all cases the FCC deals with are either the least complex matters nor are they necessarily the least lengthy matters. That is so in reality, despite a protocol between the two courts to try and ensure that more complex lengthy matters are head in the FC.

The rules of the FCC were designed and intended to assist "getting on with the job" with less delay and less formality. It is a matter for the reader to judge if that has in fact been the case

PRE ACTION PROCEDURE

There is no pre action procedure contemplated in the FCC rules (save of course mediation and the issuing of a 60I certificate that applies to both courts)

FAMILY COURT PRE ACTION

In the FC the rules stipulate;

"The main purpose of these Rules is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case." (Rule 1.04)

Rule 1.05 sets out when pre action procedures are required and is repeated below for convenience;

Pre-action procedure

(1) Before starting a case, each prospective party to the case must comply with the pre-action procedures, the text of which is set out in Schedule 1.

(2) Compliance with subrule (1) is not necessary if:

(a) for a parenting case--the case involves allegations of child abuse or family violence, or the risk of child abuse or family violence;

(b) for a property case--the case involves allegations of family violence, or the risk of family violence, or fraud;

(c) the application is urgent;

(d) the applicant would be unduly prejudiced;

(e) there has been a previous application in the same cause of action in the 12 months immediately before the start of the case;

(f) the case is an application for divorce;

(g) the case is a child support application or appeal; or

(h) the case involves a court's jurisdiction in bankruptcy under section 35 or 35B of the Bankruptcy Act.

Note 1: The court publishes a brochure setting out the pre-action procedures for financial cases and parenting cases.

Note 2: The court may take into account a party's failure to comply with a pre-action procedure when considering whether to order costs (see paragraph 1.10(2)(d)).

Note 3: Subsections 60I(7) to (12) provide for attendance at family dispute resolution before applying for an order under Part VII of the Act in relation to a child.

Thus one can see that apart from the exceptions listed in the rules the requirement for pre action procedure in Schedule one to the Rules comes with the threat of non-compliance being taken into account in relation to any costs argument

A PROBLEM ARISES

(a) Solicitors often complain to counsel, “they want costs” because pre action procedure and a whole range of other discovery matters have not been complied with

(b) Barristers are often left to make applications that will FAIL as they have NO EVIDENCE of lack of compliance. The solicitor has not provided counsel with, for instance, a short sharp affidavit annexing the letters requesting same and setting out the lack of reply or limited reply.

This applies RIGHT TROUGH TO A FINAL TRIAL, as we will see going through this paper

A SUGGESTED SOLUTION

(a) Keep a separate computer folder with the letters re discovery and the responses

(b) Keep all documents that are produced with a DATE OF production and the identifying letter that produced them

That is the only way your counsel will have any hope of sorting out what can often turn into an unholy mess with each solicitor accusing the other of providing some documents, not all documents and so on.

(c) That separate file can easily then be turned into an affidavit that gives the court a real flavour for the other side's tardiness or downright obstruction and further the EXTRA COST burden to the client should be able to be calculated with relative ease.

SCHEDULE ONE to the RULES OF THE FAMILY COURT

I shall not reproduce all of this but I reproduce section 4 of schedule one below:

4 Disclosure and exchange of correspondence

(1) Parties to a case have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see rule 13.01).

(2) In attempting to resolve their dispute, parties should, as soon as practicable on learning of the dispute and, if appropriate, as a part of the exchange of correspondence under clause 3 of these pre-action procedures, exchange:

(a) A schedule of assets, income and liabilities;

(b) A list of documents in the party's possession or control that are relevant to the dispute; and

(c) A copy of any document required by the other party, identified by reference to the list of documents.

(3) Parties are encouraged to refer to the Financial Statement and rules 4.15, 12.05 and 13.04 as a guide for what information to provide and documents to exchange.

(4) Parties are not required to exchange documents that are not subject to the duty of disclosure under rule 13.12and that would not be ordered to be disclosed by a court (see rule 13.12).

(5) The documents that the court would consider appropriate to include in the list of documents and exchange include:

(a) In a maintenance case:

(i) a copy of the party's taxation return for the most recent financial year;

(ii) the party's bank records for the 12 months ending on the date when the maintenance application was filed;

(iii) if the party receives wage or salary payments--the party's 3 most recent pay slips;

(iv) if the party owns or controls a business--the business activity statements for the business for the previous 12 months; and

(v) any other document relevant to determining the income, expenses, assets, liabilities and financial resources of the party; and

(b) in a property settlement case:

(i) a copy of the party's 3 most recent taxation returns and assessments;

(ii) documents about any superannuation interest of the party, including:

(A) a completed superannuation information form for the superannuation interest;

(B) if the party is a member of a self-managed superannuation fund--a copy of the trust deed and the 3 most recent financial statements for the fund; and

(C) the value of the superannuation interest, including the basis on which the value has been worked out and any documents working out the value;

(iii) for a corporation in relation to which a party has a duty of disclosure under rule 13.04:

(A) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns;

(B) a copy of the corporation's most recent annual return that lists the directors and shareholders; and

(C) a copy of the corporation's constitution and any amendments;

(iv) for a trust in relation to which a party has a duty of disclosure under rule 13.04:

(A) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns; and

(B) a copy of the trust deed, including any amendments;

(v) for a partnership in relation to which a party has a duty of disclosure under rule 13.04:

(A) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns; and

(B) a copy of the partnership agreement, including any amendments;

(vi) for a person or entity mentioned in subparagraph (i), (iii), (iv) or (v)--any business activity statements for the previous 12 months; and

(vii) unless the value is agreed, a market appraisal of the value of any item of property in which a party has an interest.

(6) It is reasonable to require a party who is unable to produce a document for inspection to provide a written authority addressed to a third party authorising the third party to provide a copy of the document in question to the other party, if this is practicable.

(7) Parties should agree to a reasonable place and time for the documents to be inspected and copied at the cost of the person requesting the copies.

Note: The court will refer to Chapter 13 as a guide for what is regarded as reasonable conduct by the parties in making these arrangements.

(8) Parties must not use a document disclosed by another party for a purpose other than the resolution or determination of the dispute to which the disclosure of the document relates.

(9) Documents produced by a person to another person in compliance with the pre-action procedures are taken to have

been produced on the basis of an undertaking from the party receiving the documents that the documents will be used for the purpose of the case only.

(10) Parties must bear in mind that an object of the pre-action procedures is to control costs and, if possible, resolve the dispute quickly.

(11) Disagreements about disclosure may be better managed by the court within the context of a case.

Thus one can see that the documents one is supposed to produce and disclose on request EVEN PRIOR TO PROCEEDINGS COMMENCING is quite extensive.

Given sub section 10 above it is relatively easy to mount a great case for costs for lack of disclosure if one can show the tardiness or failure to disclose as set out above. Just imagine the affidavit you will have if from day one and the first letter there has been obstruction and you have carefully kept your records and costs for the hunt for discovery and that chronology of effort is in an affidavit that is produced for trial.

HOWEVER A WARNING

These rules and schedule one are not an invitation to embark upon a "fishing expedition". The test for requests for discovery is ALWAYS RELAVANCE;

Why do you want the document?

What might it prove or disprove?

You might care to look at your responsibilities under Rule 1.08

And of course be aware of Rule 1.12 (dispensing with rules)

NO PREACTION PROCEDURE IN THE FCC?

You must consider the consequences of this Full Court Decision

Thompson & Berg [2014] FamCAFC 73 (2 May 2014)

An appeal from the FCC to the full court, (May, Ainslie-Wallace & Ryan JJ) on various grounds.

For our purposes however, the discussion on the different requirement of the rules is repeated below from paras 31 onwards; (with my highlights)

31. Central to the husband's challenge to the orders made by the primary judge is the extent to which the Family Law Rules 2004 ("FLR") applied or should have been applied by her Honour. The husband contends that her Honour erred by failing to apply aspects of Part 1.2 (Main Purpose of Rules) of the FLR to the parties' proceedings. According to him, notwithstanding that the proceedings were undertaken in the Federal Circuit Court, it was incumbent upon her Honour to be satisfied that the parties complied with pre-action procedures, r 1.05 FLR and r 1.08 FLR (Responsibilities of Parties and Lawyers in Achieving the Main

Purpose). He argues that pre-action procedures were not followed and thus the proceedings should not have been permitted to continue and the hearing undertaken by her Honour was "illegitimate".

32. According to the husband, the wife and her legal advisors failed to comply with rr 1.08(1)(a), (g), (h), (i) and (j) of the FLR. Rule 1.08(1)(a) imposes an obligation on the parties and, as far as possible, their lawyers to ensure "... that any orders sought are reasonable in the circumstances of the case ...". Rule 1.08(1)(g) imposes an obligation to assist the just, timely and cost-effective disposal of cases. Rule 1.08(1)(h) focuses on identification of issues "genuinely in dispute" and sub-rule (1)(j) is designed to limit evidence to that which is relevant and necessary.

33. The husband's submissions to the primary judge and on appeal are tidily captured in the written argument he provided to her Honour. He said:

> 3. It is evident that unless these responsibilities are discharged competently and with objective adequacy that the main purpose would inevitably be subverted. An outcome cannot be ensured if it is achieved only by chance. The responsibilities cited have clear epistemic requirements; to discharge them a person must seriously attempt to put themselves in a position to know whatever is relevant to the case. Evidence of evasion of these epistemic requirements

demonstrates a fundamental breach of Family Law Rules, essentially invalidating any application involved.

4. It appears that the Rules' only explicit consequence for failure to comply with fundamental pre-application and application responsibilities is a possible allocation of costs against a party. Firstly, this is not a remedy, as the main purpose is still subverted. Secondly, the Rules apparently do not envisage a situation where a failure is not the fault of a party but instead of a lawyer for a party. Failure can only truly be remedied by setting aside an application and associated "evidence" until the pre-application responsibilities are properly met, with the offending lawyer required to withdraw and refund fees charged and also provide to the parties a sum of money adequate to remedy the entire financial loss attributable to the lawyer's delinquency. An order instead to require the other party to respond to material submitted in breach of fundamental requirements would clearly subvert the main purpose and therefore be invalid.
5. In this case there has been nothing even remotely approximating to an adequate exploration of the relevant facts and issues between the parties allowed by the applicant's lawyers. They have instead asserted the propriety of making applications without, and in fact instead

of, such exploration. This is a blatant perversion of fundamental Family Law principle.

6. In our case evasion of fundamental pre-application responsibilities by the applicant and her lawyers occurs in a context where critically uninformed legal advice has also led her to make unilateral decisions about the joint business and property of the marriage that have incurred waste already in the millions of dollars, and criminally interfered with the respondent's health, livelihood, property, and prospects. Remediation of these matters clearly must take place before any final property orders can be framed.
7. Until an agreement is reached by the parties regarding the still joint business the respondent must be allowed an equitable share of the income of that business, say 50% of the gross commission, backpaid to 1 July 2010, less payments made on his behalf. The [applicant's lawyers], should be required to make this amount available as a downpayment on the full cost of their delinquency as in 4 above. An additional amount, say $100,000 should also be required of them to adequately fund the legal fees involved in handling the contractual defaults and other court action generated by their errors.

Affidavit of husband, filed 6 March 2013, annexure B)

34. In the final sentence of [4] the husband made it clear that in the event the primary judge made further orders and directions

which required that he, for example, file a response, financial statement and affidavit evidence which addressed s 79 of the Act before rr 1.05 and 1.08 of the FLR had been complied with, the order for filing of documents would be invalid. Orders and directions of the type referred to were twice made by the primary judge and consistent with his contention that such orders would be invalid, the husband did not obey.

35. In his affidavit filed on 6 March 2013, the husband outlined his argument in relation to the application of the FLR and the occasions on which he raised this argument with the primary judge. What might be described as "the rules argument" was first raised with the primary judge on 3 May 2012. Notwithstanding his argument, the primary judge determined that the proceedings should progress, and made orders and directions for the production of documents and also required the parties to attend a conciliation conference.

36. Nonetheless, prior to the conciliation conference, the husband wrote to the wife and her solicitor and set out his argument in relation to the rules. At the start of the conciliation conference on 9 November 2012, he presented a written submission in relation to his rules argument to the Registrar. The Registrar referred the matter to the primary judge so that the husband's argument could be considered.

37. On 30 November 2012, the wife's solicitor provided a written response to the husband's submission in relation to the rules. **It**

was correctly pointed out that the FLR which the husband sought to apply did not apply in the Federal Circuit Court. Secondly, the solicitor provided a detailed summary of steps taken by the solicitor and the wife consistent with the Family Court's pre-action procedures. Finally, the exemptions contained in the FLR which excuse compliance with the pre-action procedures were highlighted, with particular emphasis on those cases which comprise "a genuinely intractable dispute". In this regard, the wife claimed that the husband had "persistently ignored our attempts to engage in the pre-trial process" and the parties' indebtedness necessitated prompt court action. Thus, even if r 1.05 of the FLR applied or was to be applied, the court would be satisfied there had been sufficient compliance with pre-action procedures by the wife to allow her application to proceed and in the event of non-compliance, compliance excused. Notwithstanding the husband's critique of this letter, we are persuaded that it presents a compelling case for urgent court action, that before filing the wife had taken significant steps consistent with pre-action procedures and any non-compliance should be excused.

38. The rules argument was considered by the primary judge on 3 December 2012. The husband's argument did not find favour and further orders and directions were made in relation to a final hearing. Because the husband had failed to comply with previous orders that he file and serve a response, affidavit and financial statement, the wife's application for property adjustment was listed

for an undefended hearing on 7 March 2013. However, the husband filed an affidavit (which did not address s 79 issues) on 6 March 2013 and thus, the hearing was adjourned and the proceedings listed for a defended hearing on 19 July 2013.

39. Although the husband had not sought leave to appeal the dismissal of his argument and the orders which permitted the matter to proceed, on
19 July 2013 he applied to vacate the hearing because the FLR under discussion had not been complied with. The wife opposed the husband's application and it was refused. Given the number of occasions on which he raised the rules point and its rejection on 3 December 2012, his decision not to comply with the further orders and directions for filing his financial evidence evinces a deliberate and persistent determination not to comply with
her Honour's orders.

40. The primary judge discussed the rules issue at [79] of her reasons. She said:

Prior to the hearing, the court had considered the husband's contention that the court could not deal with the matter as the wife had not followed the pre action procedures required under the *Family Law Rules 2004*(Cth). This matter had been considered by the court on an occasion when the matter had been listed for directions. It was also considered by the court at the commencement of the hearing and an ex tempore judgment was given. It was evident that the husband's focus had been his desire to have the wife agree to his

proposals. For her part the wife wanted no further face to face discussion with him about these matters.

41. This appeal was undertaken without a transcript of the proceedings before the primary judge. Although, at [79] in her reasons for judgment, her Honour referred to her earlier consideration of the husband's argument based on the rules, unfortunately her earlier reasons were not reduced to writing. In this case, the husband said that provided we understood his rules argument he would not be disadvantaged by the lack of transcript in the conduct of the appeal.

THE RULE MAKING POWER

42. Section 123 of the Act gives the judges of the Family Court the power to make rules in relation and incidental to the practice and procedure to be followed in the Family Court and any other courts exercising jurisdiction under the Act. **However, by s 123(1A) of the Act, the reference in s 123(1) to "a court exercising jurisdiction under this Act" does not include the Federal Circuit Court.** Thus, the FLR prescribe the rules for proceedings in the Family Court and other courts exercising jurisdiction under the Act **but not the Federal Circuit Court.**

43. The Federal Circuit Court was established by the *Federal Circuit Court Act* 1999 (Cth) ("FCCA"). **Pursuant to s 43(1) of the FCCA, practice and procedure of the Federal Circuit Court is to be in accordance with the rules of court made under that act, namely the Federal Circuit Court Rules 2001 (Cth)**

("FCCR"). Section 43(1) of the FCCA is subject to s 43(2) of that act which, in relation to proceedings conducted under the Family Law Act (and certain child support proceedings), **permits the application of the FLR if, in relation to a matter of practice or procedure, the FCCR are insufficient.** The FCCR are made by the judges of the Federal Circuit Court under rule-making powers which include powers given by ss 43 and 81 of the FCCA. Section 81 extends the rule making power to the conduct of the business of the Federal Circuit Court. Given the provisions of s 43 of the FCCA, it was probably unnecessary for the judges of the Federal Circuit Court to determine by r 1.05(1) of the FCCR that the practice and procedure of that court is principally governed by the FCCR. The point being, that in this regard the rule does the same thing as the statute.

44. In addition to the power contained in s 43(2) of the FCCA to apply the FLR in relation to a matter of practice and procedure where the FCCR are insufficient, by rr 1.05(2) and (3) of the FCCR, the Federal Circuit Court may also apply the FLR in relation to a matter of practice and procedure (but not the conduct of the business of the Court) if the FCCR are inappropriate.

45. Rules 1.05(2) and (3) of the FCCR are set out below:

(2) However, if in a particular case the Rules are insufficient or inappropriate, the Court may apply the Federal Court Rules or

the Family Law Rules, in whole or in part and modified or dispensed with, as necessary.

(3) Without limiting subrule (2):

(a) the provisions of the Family Law Rules set out in Part 1 of Schedule 3 apply, with necessary changes, to family law or child support proceedings; and

(b) the provisions of the Federal Court Rules set out in Part 2 of Schedule 3, apply, with necessary changes, to general federal law proceedings.

Note: These Rules have effect subject to any provision made by an Act, or by rules or regulations under an Act, with respect to the practice and procedure in particular matters: see subsection 81(2) of the Act.

46. It follows that the FCCR is the starting point to establish the rules in relation to practice and procedure to be followed in the Federal Circuit Court. In relation to the FLR, which the judges of the Federal Circuit Court have determined apply in the Federal Circuit Court, **Schedule 3 of Part 1 of the FCCR is definitive**. **It is common ground that none of the FLR, which the husband said, should have been applied by the primary judge is to be found in that schedule. It follows that the rules which underpin his argument about the "illegitimacy" of the hearing below did not automatically apply.**

47. Nonetheless, as a consequence of s 43(2) of the FCCA and r 1.05(2) FCCR, **if the primary judge was satisfied that the**

FCCR were insufficient or inappropriate, her Honour was able to apply those FLR which the husband argued should have been applied. In mounting his argument, the husband said that the FLR upon which he relies are "indispensable in a Family Law matter in any court" (Husband's affidavit filed 6 March 2013, [6]). By his use of the word "indispensable" it would appear that the husband argued that the FCCR are insufficient. We will also consider whether the FCCR are inappropriate.

Are the Federal Circuit Court Rules insufficient or inappropriate?

48. It is accepted that the FCCR do not contain provisions in relation to pre-action procedures or the responsibility of parties and lawyers in achieving the main purpose of the rules.

49. There was no argument advanced against the notion that the FLR under consideration are rules in relation to practice and procedure.

50. Section 38 of the Act and s 38 of the *Federal Court of Australia Act 1976* (Cth) each constitutes provisions which, if the court's rules in relation to practice and procedure are insufficient, enable the courts to apply the High Court Rules 2004 (Cth) mutatis mutandis. It can be seen from the cases which have considered whether or not the Family Court or Federal Court Rules 2011 (Cth) ("FCR") were insufficient, that the rules have been found to be insufficient when they were silent on the point (*Re: Trade Practices Commission v Milreis Pty Ltd & Ors: Application by Thompsen Publications (Australia) Pty Ltd* [1912] VicLawRp 11; (1978) 18

ALR 7; *In the Marriage of Cantarella* (1976) FLC 90-056; *In the marriage of Spellson* (1989) FLC 92-046).

51. **However, mere silence does not mean a court's rules are insufficient or inappropriate**. As Nygh J said in *Rubie & Rubie* (1991) FLC 92-253 at [78, 699], a question arises whether the omission of a rule on the point "... is an insufficiency or a defect, without which the Court cannot effectively operate, or whether it is a provision which, for reasons of policy or even sheer neglect, the Court has not seen fit to adopt."

52. As a general approach, a court would be slow to conclude that its rules are insufficient or inappropriate where the court has rules of court that:

-Form a coherent whole;

-include statements of purpose or objects; and

-provide for the court to give directions in cases of difficulty or doubt (e.g. r 1.09 FLR, r 1.21 FCR) (*In the marriage of Lamb* (No 2) (1977) FLC 90-232; *In the marriage of Dixon* (1977) FLC 90-318).

53. Rules such as r 1.09 FLR and r 1.21 FCR are supplementary to other rules and stand with them in an attempt to ensure that the courts have all the requisite power in their own rules, to conduct and conclude proceedings (*Edgar v Greenwood* [1910] VicLawRp 27; [1910] VLR 137 at [145]; [1910] VicLawRp 27; (1909) 16 ALR 6).

54. However, the FCCR do not contain a provision equivalent to r 1.09 FLR or its FCR counterpart. Lest it be overlooked, r 1.06 FCCR provides that the court may dispense with compliance with its rules. This rule merely supplements the dispensation power by providing that an order of the court prevails over any rule inconsistent with it. Thus, it is not itself a rule which provides a source of power if the rules or court procedures are wanting or in doubt (*Survival & Industrial Equipment (Newcastle) Pty Ltd v Owners of the Vessel Alley Cat* [1992] FCA 242;(1992) 36 FCR 129 at [138]). One effect of the absence in the FCCR of a rule the equivalent of r 1.09 FLR or r 1.21 FCR is that the case for insufficiency or inappropriateness of the FCCR is more readily made. Of course that contention must be answered not only in the context of the FCCR but also the FCCA and any other relevant legislation.

55. The FCCA provides that the Federal Circuit Court is to:

-operate as informally as possible;

-use streamlined procedures; and

-encourage the use of a range of appropriate dispute resolution processes (s 3(2)).

56. Of particular relevance to the argument advanced by the husband is s 42 FCCA which requires that the Federal Circuit Court must proceed without undue formality and ensure that the proceedings are not unduly protracted. To the extent there are obligations imposed on lawyers in the conduct of family law

proceedings, these are limited to those found in ss 12E and 13B of the Act. Essentially, these concern the provision of prescribed documents and assistance if it appears there is a reasonable possibility the parties may reconcile (which in this case there is not). In relation to family law proceedings one looks to the Act for dispute resolution processes and where provision is made for the court to refer parties to family dispute resolution and attendance at a conciliation conference.

57. **In relation to the husband's argument concerning disclosure and the provision of documents, s 45 FCCA establishes a rebuttable presumption that discovery and interrogatories will not be permitted** (see *NAQR & Ors v Minister for Immigration (No 1)* [2002] FMCA 271).

58. What this brief overview demonstrates is that by virtue of the FCCA and the Act the primary judge had relevant and appropriate powers sufficient to order the parties to attend, for example, a further conciliation conference or upon a family dispute resolution practitioner. In relation to discovery, notwithstanding the rebuttable presumption, if the primary judge was satisfied that interrogatories or discovery should be permitted she was able to apply the FLR (relevantly different provisions to those the husband said should be applied) (*NAQR & Ors v Minister for Immigration (No 1)* (supra)). In other words, those acts contain provisions whereby (in addition to those previously undertaken)

processes designed to promote the exchange of information, narrow issues and promote settlement could have been ordered.

59. **Armed with these powers and when considered in the context of ss 3 and 42 FCCA and the objects of the FCCR, we do not consider that the absence of pre-action procedures in the FCCR renders the FCCR insufficient or inappropriate.** Every case has a pre-filing history; it is not some esoteric or rarely encountered event that the husband says the FCCR fails to address. The point being that in relation to pre-action procedures, the FCCR are deliberately silent and the same conclusion must be reached in relation to the failure to apply the FLR concerning the obligations on parties and lawyers.

60. In our view, had her Honour acceded to the husband's arguments and either granted a stay or vacated the final hearing, she would have impermissibly taken steps in conflict with the legislative imperative for informality and her obligation to ensure that the wife's application for property settlement was not unduly protracted. We have no doubt that to have granted the husband's application would have been to allow the FCCA and FCCR to be misused as instruments of delay and contrary to the interests of justice.

61. Thus the husband's argument that the hearing conducted by the primary judge was not legitimate must be rejected which disposes of grounds 1 and 2.

COMPARE the above with the decision of Harman J in the recent FCC decision of **Peake & Benedict (Costs) [2014] FCCA 2723 (5 December 2014)**

His Honour said;

Pre-action procedures, disclosure and attempts at resolution

48. I propose to briefly touch upon this issue, prior to turning to and dealing with the application for costs by Mr Peake, as it would appear to be a matter of some moment.

49. The *Family Law Rules 2004* contain specific **pre-action procedures**. Those procedures require that parties engage in certain steps and actions so as to make a genuine attempt to resolve issues in dispute or, absent final resolution, limit issues in dispute between them prior to commencing proceedings.

50. I make clear that I do not seek to suggest that such **pre-action procedures** as are contained within the*Family Law Rules* apply to proceedings determined by the Federal Circuit Court (formally Federal Magistrates Court). The decision of the Full Court in *Thompson & Berg* [2014] FamCAFC 73 would provide authority for the converse proposition. However, I identify those **pre-action procedures** as indicative of the modern

approach to litigation adopted within the rules of courts both State and Federal and being focused upon that which is referred to within the various State Civil Procedure Acts as "*the overriding purpose*" of resolution of proceedings and the efficient conduct of litigation.

51. At a Federal level and applicable to the Federal Circuit Court, one has the *Civil Dispute Resolution Act 2011*(Cth). However, proceedings under the *Family Law Act 1975* are expressly excluded from the provisions of that legislation and mandated **pre-action procedures** contained therein.

52. The *Federal Circuit Court Act 1999* and *Federal Circuit Court Rules 2001* do contain provisions which provide for or at least infer, to a limited extent, **pre-action procedures** and fulfilment of obligations regarding disclosure.

53. Rule 1.03 of the *Federal Circuit Court Rules* provides *"objects"* for the Rules. These are not specifically **pre-action procedures** but do give some clue as to the Court's preference for negotiated, consensual resolution and especially utilising means of dispute resolution other than litigation. Rule 1.03 is in the following terms:

- *(1) The object of these Rules is to assist the just, efficient and economical resolution of proceedings.*
- *(3) The Court will apply the Rules in accordance with their objects.*

- *(5) If appropriate, the Court will help to implement primary dispute resolution.*

54. Section 21 of the *Federal Circuit Court Act* defines *"dispute resolution processes"* (without the prefix of*"primary"* which had been included in the prior *Federal* *Magistrates Act* and previously also in the now repealed section 14 of the *Family Law Act*) as including:

- *(b) mediation; and*
- *(d) neutral evaluation; and*
- *(f) conciliation*

55. Neither of the above provisions specifically provide *"* ***pre action procedures*** *"* and as the rules apply to proceedings before the Court they more specifically apply, absent provision to the contrary, to litigation once commenced rather than litigation that is contemplated and to be avoided. The definition, curiously, does not include a broader category of *"negotiation"* or the specific subset of *"lawyer assisted negotiation"*.

56. Part 4 of the *Federal Circuit Court Act* contains extensive provisions regarding dispute resolution for proceedings other than those conducted under the *Family Law Act*.

57. Importantly, section 42 of the *Federal Circuit Court Act* provides:

- [2]which provides:
  - *(a) the parties to the proceedings have attended a conference in relation to the matter to which the*

proceedings relate with a Registrar or Deputy Registrar of the Family Court; or

- *(c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).*

60. Chapter 3 of the *Federal Circuit Court Rules*, which deals with mediation and alternate dispute resolution, does not apply to proceedings conducted under the *Family Law Act 1975* but only general federal law proceedings. Accordingly, within the *Federal Circuit Court Rules* there are no analogous provisions to those contained within the *Family Law Rules* requiring the parties to engage in **pre-action procedures**.

61. In light of the above and as the *Family Law Rules* (and **pre-action procedures** prescribed thereby) do not apply within the Federal Circuit Court (see *Thompson & Berg* [2014] FamCAFC 73) one must look to either the specific legislation applied (the *Family Law Act 1975*) or the general law to find bases upon which parties might be required to engage in **pre-action procedures** or addressing the manner in which parties should approach and conduct their litigation.

62. Part VIIIAB of the *Family Law Act 1975*, under which these proceedings are addressed, does not contain any statement of objects and principles which would be of assistance as regards the

parties' obligations towards dispute resolution or the conduct of litigation generally.

63. Part IIIA of the *Family Law Act 1975* does impose obligations upon legal practitioners to advise parties of non-court based services which may be of assistance to them in dealing with and addressing issues arising from their separation. This would, presumably, extend to relevant advice regarding alternate dispute resolution services whether as a corollary to, in place of, or utilised during or prior to the commencement of proceedings.

64. Section 13C of the *Family Law Act 1975* permits the Court to refer parties to such non-court based services and, in particular, family dispute resolution (which whilst most commonly referred to and utilised in addressing parenting disputes also allows referral of parties to mediation conducted by a family dispute resolution practitioner to address financial or jurisdictional issues).

65. Principles of general application to all proceedings conducted under the *Family Law Act 1975* are contained in section 43. However, none of those principles would be relevant to establishing a general obligation to engage in alternate dispute resolution and/or **pre-action procedures**.

66. Thus, on the basis of legislative imperative there is no clear obligation upon parties[3], when conducting *Family Law Act 1975* proceedings before the Federal Circuit Court, to engage in any form of **pre-action procedure** or attempted resolution or definition of issues prior to commencing proceedings.

67. There is a body of case law which addresses the general obligation of parties to ensure the effective use of the Court's resources (and their own) and addressing, without prescribing, the manner in which parties should approach and conduct litigation.

68. For illustrative purposes (I do not propose to suggest that they are in any way binding or determinative in proceedings before the Federal Circuit Court including but not limited to these proceedings) in the United Kingdom the Woolf Report, *Access to Justice*, recommended the adoption, in civil litigation proceedings, of **pre-action procedures**:

- *(a) focus the attention of litigants on the desirability of resolving disputes without litigation;*
- *(c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and*
- *In my view, in the modern era and consistent with section 56 of the Civil Procedure Act parties have an obligation to constructively collaborate not just on the issues to be ventilated but on the most efficient methods to do so. As has been otherwise said, litigation is not a game and the expense of the courts to the public is so great that their use must be made as efficient as is compatible with just conclusions.*

71. Sackar J further opined [at 157]:

- *As Sackar J's judgment shows, even a party with an 'open and shut' case may be effectively penalised on the issue of*

costs if they have exploited their position in the litigation for tactical advantage at the expense of a genuine attempt to resolve the dispute.

73. A growing body of case law, such as *Ken Tugrul v Tarrants Financial Consultants Pty Ltd (No.5)* [2014] NSWSC 437 have begun to evince and demonstrate a particular attitude, albeit in that case founded upon a legislative*"overriding purpose*", towards costs when parties have acted other than with a keen, deliberate focus upon limiting issues and exploring resolution of disputes.

74. In *Setka v Abbott* [2013] VSCA 345 the plurality of their Honours constituting the Victorian Court of Appeal (Warren CJ, Ashley and Whelan JJA) observed in a joint judgment:

It is fair to say that one might be expected to make a reasonable attempt to resolve the matter prior to issuing and provide discovery to assist in same if one does not want an argument raised against you that you have increased the other partie's costs in the matter unnecessarily. Thus whilst the first decision is authority for the position that pre action procedure does not apply in the FCC that does not mean one should ignore reasonable requests for discovery in an attempt to resolve the matter.

SUMMARY

Thus from these decisions one can see that there is always a real need to show that one has been reasonable and timely in ones requests for relevant information

DISCOVERY ONCE PROCEEDINGS ISSUED

Once the parties have issued, discovery takes a different path in each court and can very much depend upon which judicial officer one is before

Practicioners would do well to collect from each court a copy of the "pro forma" orders of that Court if available. (They are usually on the bar table in the FCC)

SPOUSAL MAINTENANCE

As one can see from my table of comparison there is a distinct advantage in issuing in the FC (if one needs to show a pattern over a longer period) as one is entitled to 3 years documents as a matter of course compared with the FCC where one gets only 1 year of documents.

Rule 4.15 of the Family Court Rules is a very useful and oft overlooked rule;

It says relevantly;

FAMILY LAW RULES 2004 - RULE 4.15

Evidence to be provided

(1) On the first court date and the hearing date of an Application for spousal or de facto maintenance, each party must bring to the court the following documents:

(a) a copy of the party's taxation returns for the 3 most recent financial years;

(b) the party's taxation assessments for the 3 most recent financial years;

(c) the party's bank records for the period of 3 years ending on the date on which the application was filed;

(d) if the party receives wages or salary payments--the party's payslips for the past 12 months;

(e) if the party owns or controls a business, either as sole trader, partnership or a company--the business activity statements and the financial statements (including profit and loss statements and balance sheets) for the 3 most recent financial years of the business; and

(f) any other document relevant to determining the income, needs and financial resources of the party.

Note 1: Documents that may need to be produced under paragraph (f) include documents setting out the details mentioned in rule 13.04.

Note 2: For modification of a spousal maintenance order, see section 83 of the Act. For modification of a de facto maintenance order, see section 90SI of the Act.

(2) Before the hearing date, a party must produce the documents mentioned in subrule (1) for inspection, if the other party to the proceedings makes a written request for their production.

(3) If a request is made under subrule (2), the documents must be produced within 7 working days of the request being received

Thus not only are you entitled to three years of documents on the first return date, you can ask for them EARLY and the other side must produce them 7 working days after the request.
So even if nothing has been produced in breach of pre action procedures by now you will have made requests in writing under the pre action requirements AND you can seek documents well before your first hearing.
It really is up to the practitioner to know the rules and to use them.

There is a lesser requirement in the FCC (see rule 24.04) There is no requirement under that rule for the provision on the first day of profit and loss statements for any business venture.

However, that does not stop a practitioner from requesting documents by letter and noting that none are provided.

PROPERTY PROCEEDINGS

Under the FC rules you are required to exchange with your opponents a number of documents TWO DAYS prior to the first return date. See rule 12.02 repeated below;

Property case--exchange of documents before first court date

At least 2 days before the first court date in a property case, each party must, as far as practicable, exchange with each other party a copy of all of the following documents:

(a) a copy of the party's 3 most recent taxation returns and assessments;

(b) if relevant, documents about any superannuation interest of the party, including:

(i) if not already filed, the completed superannuation information form for the superannuation interest; and

(ii) if the party is a member of a self-managed superannuation fund--a copy of the trust deed and the 3 most recent financial statements for the fund;

(c) for a corporation in relation to which a party has a duty of disclosure under rule 13.04:

(i) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns;

(ii) a copy of the corporation's most recent annual return that lists the directors and shareholders; and

(iii) if relevant, a copy of the corporation's constitution;

(d) for a trust in relation to which a party has a duty of disclosure under rule 13.04:

(i) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns; and

(ii) a copy of the trust deed;

(e) for a partnership in relation to which a party has a duty of disclosure under rule 13.04:

(i) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns; and

(ii) a copy of the partnership agreement;

(f) for a person or entity mentioned in paragraph (a), (c), (d) or (e)--any business activity statements for the 12 months ending immediately before the first court date;

(g) unless the value is agreed--a market appraisal or an opinion as to value in relation to any item of property in which a party has an interest.

Note: All parties have a general duty of disclosure (see Chapter 13). For examples of the type of property about which disclosure must be made, see rule 13.04.

Under the FCC rules your option is to serve on your opponents a notice to produce under rule 15A.17 repeated below;

15A.17 Notice to produce

(1) A party may, by notice in writing, require another party to produce, at the hearing of the proceeding, a specified document that is in the possession, custody or control of that other party.

(2) Unless the Court otherwise orders, the party given notice to produce must produce the document at the hearing.

Thus under the FCC rules the onus is on YOU to decide what documents you need to see and to ask for them EARLY

It does you or your client no good whatsoever to issue a notice to produce a day or so before the hearing, or worse still in response to one issued by the other side to merely mirror their request

You need to allocate some time with your client to work out the types of things you might initially want to see and then ask for them. In the FCC that seems more imperative as there is not the prescriptive requirement as in the Family Court. Further you may need to convince the court to make a declaration under section 45 of The Federal Circuit Court of Australia Act 1999(Cmwlth); repeated below;

45 Interrogatories and discovery

(1) Interrogatories and discovery are not allowed in relation to proceedings in the Federal Circuit Court of Australia unless the Federal Circuit Court of Australia or a Judge declares that it is appropriate, in the interests of the administration of justice, to allow the interrogatories or discovery.

(2) In deciding whether to make a declaration under subsection (1), the Federal Circuit Court of Australia or a Judge must have regard to:

(a) whether allowing the interrogatories or discovery would be likely to contribute to the fair and expeditious conduct of the proceedings; and

(b) such other matters (if any) as the Federal Circuit Court of Australia or the Judge considers relevant.

SUBPOENA AND USE OF SAME IN EACH COURT

If you suspect that despite your best endeavours the other side is not going to comply with your requests for documents that you need to get on with your case there is provision in both courts for issue of subpoena for interim hearings; see Part 15.3 of the Family Court Rules and see Part 15 A of the FCC rules. If you have a party who is ignoring all requests for discovery why not use the Subpoena at interim hearing?

Under the FCC rules you must issue for production of documents not less than 10 days before you want the documents produced at court and

there is a LIMIT on the number of subpoenas you can issue to 5 subpoenas without order from the court.

There is no number limit on the number of subpoena in the Family Court

Note the procedure in 15.30 of the FC Rules, which allows for early release of subpoena as long as you issue same not later than 21 days prior to the court date.

In the FCC your subpoena can be made returnable before your court date. So in both courts the subpoena is a tool to use in discovery to get the documents you want and may indeed be entitled to but have not been provided with despite all that is said above.
The issue for Practicioners will be what to subpoena
WARNING
Do not make your subpoena so broad EG "*all documents in relation to the Husband's company for the last 15 years"*
(Actually taken from a subpoena in a case!)
Most attacks on subpoenas will be on the basis they are too broad either in TIME or in SCOPE of documents OR that they are a "fishing exercise" and vexatious and oppressive to comply with.
Be aware that the test is RELEVANCE
Ask yourself when drafting your subpoena what it is that you want and WHY you want it.

THE OVERIDING DUTY IN BOTH COURTS TO DISCLOSE

A whole chapter of the FC rules is devoted to disclosure. See chapter 13

The FCC also requires full and frank disclosure See Rule 24.03 and note 24.06 regarding amending a financial statement if there is a change since the last one was filed. See also a similar section in Rule 13.06 of the FCC rules

I need not repeat these rules in this paper

What the reader might be more concerned with are the consequences of non-disclosure

FIRSTLY

If you have made any requests for discovery or exhausted all your avenues under the rules of the relevant court then the court will not be particularly sympathetic to your cause. Whilst there is an onus on each party to produce the documents necessary and relevant including documents that do not necessarily help your clients case, if you have not actively sought them out and then complain on the day this will not assist your client.

However if you have done the right thing then there are some strong provisions in both courts rules that will assist you

FAMILY COURT

RULE 13.14 FC rules

This is an extremely powerful rule

I repeat it below;

FAMILY LAW RULES 2004 - RULE 13.14

Consequence of non-disclosure

If a party does not disclose a document as required under these Rules:

(a) the party:

(i) must not offer the document, or present evidence of its contents, at a hearing or trial without the other party's consent or the court's permission;

(ii) may be guilty of contempt for not disclosing the document; and

(iii) may be ordered to pay costs; and

(b) the court may stay or dismiss all or part of the party's case.

Note 1: Under rule 15.76, a party who discloses a document under this Part must produce the document at the trial if a notice to produce has been given.

Note 2: Section 112AP of the Act sets out the court's powers in relation to contempt of court.

This is a serious rule that you can use to your advantage in a financial case. Financial cases are not “trial by ambush” and contempt is a serious matter.

FEDERAL CIRCUIT COURT

Rule 14.09 of the FCC rules is set out below;

4.09 Documents not disclosed or produced

Unless the Court gives leave, a party is not entitled to put a document or a copy of a document in evidence or give, or cause to be given, evidence of the contents of a document:

(a) if:

(i) the party has filed an affidavit of documents; and

(ii) the document was, when the party made the affidavit, in the possession, custody or control of the party or had been, in the possession, custody or control of the party; and

(iii) the document was not referred to in the affidavit or in any other affidavit of documents filed by the party under an order of the Court; or

(b) if the party has been served with a subpoena to produce and does not produce the document.

As one can see from the above rules there is some difference between the two courts positions. In the FCC one will have first had to have obtained an order for the other party to provide an affidavit of documents and or subpoenaed the relevant document and it has not been produced under subpoena.

It is unclear to the writer why the rules in the two courts are so different but Practicioners need to be aware of the differences

SOME CASE LAW

So you are at court and there are huge gaps in the evidence for the other side or you have exhausted a money trail that has come to a dead end.

Is the court entitled to take a "robust" approach to determining what there is or might be to be divided?

As Murphy J has said

> "The importance of disclosure, and the ramifications of a failure to disclose, or disclose adequately, have repeatedly been referred to in decisions of the Full Court. Failure to disclose is always serious and, often, has ramifications for findings generally in respect of credibility and can lead to robust views being taken when evidence ought to be before the Court but, by reason of **lack of disclosure**, is not (see, for example, *Weir and Weir* (1993) FLC 92-338; *Black and Kellner* (1992) FLC 92-287).[1]

[1] Murphy J in **Bateman & Bowe [2013] FamCA 253 (19 April 2013) (at para 26)**

For a recent decision on lack of disclosure see **Vardy & Vardy [2015] FamCA 430 (29 May 2015) per Watt J**

In that case His Honour said this;

FULL AND FRANK DISCLOSURE

44. There is a lack of full and frank financial disclosure by the husband in this case.

45. Lord Brandon, for the House of Lords in *Livesey v Jenkins* [1984] UKHL 3; (1985) 1 All E.R. 106 at page 114, said:

> ...Each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and to the Court. This principle of full and frank disclosure in proceedings of this kind has long been recognised and enforced as a matter of practice....

46. Justice Smithers in *Briese* **(1986) FLC 91-713** referred to this discussion and said:

> The husband's counsel submitted that it was a matter for the wife to pursue her rights under the *Family Law Regulations*and that there was no positive obligation on the husband to do more than comply strictly with the Regulations and with orders of the Court. He likened his client's position in this respect to that of a defendant in a civil action.
>
> In my opinion this submission is not correct. I believe that a person in the position of the husband in this case has a positive

obligation to set out at an early stage his financial position in a clear and comprehensive manner. The Regulations, and now the Rules, are not intended as a vehicle to mask the true position, or as an aid to confusion, complexity or uncertainty. They are not intended as the outer limits of the obligation of financial disclosure, but as providing avenues towards disclosure. The need for each party to understand the financial position of the other party is at the very heart of cases concerning property and maintenance. Unless each party adopts a positive approach in this regard delays will ensue with the consequent escalation of legal, accounting and other expenses, always assuming that a party has the strength to continue the struggle for information and understanding.

.....

Although the case relates to quite different circumstances, I believe that the conclusion in the House of Lords in the case of *Livesey v. Jenkins* *[1984] UKHL 3*; *(1985) 1 All E.R. 106* is apposite, namely that in financial proceedings between spouses each party must make a full and frank disclosure of all material facts. In that case it was made clear that full and frank disclosure was required as a matter of principle in the light of the fact that it was the duty of the Court, taking into account a number of designated criteria, to make a decision which basically involved the exercise of a discretion. This is quite different from common law litigation between strangers, in which such a general duty

does not exist, and obligations would only exist in so far as statute or court rules required.

In my view it is fundamental to the whole operation of the *Family Law Act* in financial cases that there is an obligation of the nature to which I have referred. *Livesey v. Jenkins* makes it clear that mere compliance with rules of court or practice directions does not alter the basic principle of the need for full and frank disclosure by the parties. .... There is an obligation on each party to act so as to provide a basis upon which the two of them are in a position to resolve the case by agreement, or proceed to a hearing, as expeditiously as may reasonably be done.

47. In *Oriolo & Oriolo* (1985) FLC 91-653, the Full Court cited with approval the above passages from *Livesey v Jenkins* and *Briese*.

48. In *Black & Kellner* (1992) FLC 92-287, the Full Court referred to the three aforementioned authorities with approval.

49. In *Weir & Weir* (1993) FLC 92-338 the Full Court again pointed to the line of cases leading up to the decision in*Black & Kellner* and commented that in cases of that type, "the Court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be fraught to provide a charter for fraud in proceedings of this nature".

50. In proceedings to which they apply, the Family Law Rules 2004 (Cth) ("the Rules") now emphasise the duty of full and frank disclosure.

51. Rule 13.01 provides a general duty of disclosure and rule 13.04 provides a particular duty of full and frank disclosure in financial cases.

His Honour went on to make findings about the Husband's lack of disclosure in the case and the Wife wanted certain sums of moneys "added back".

There has been much discussion in particular by Murphy J about "adding back" following the High Court decision in Stanford [2].

His Honour did not refer to those decisions in this case and his approach is as set in the paragraphs repeated below:

Item 9 – Other "undisclosed assets"

1. Counsel for the wife asserted that the husband had available to him $443,000 as a result of drawings by the husband which were not adequately explained. That amount is calculated in the following way:
    - 98.2. $57,000 taken from CBA facility between March 2011 and February 2012 (increasing the indebtedness from $430,451 in March 2011 to $487,288 in February 2012).
    - 98.4. $133,000 from the refinance of the mortgage in March/April 2012.

99. I find the husband received these amounts. The husband has not provided any coherent explanation as to what has happened to these monies. The wife wants the amount "added back" to the

[2] **Stanford v Stanford [2012] HCA 52 (15 November 2012)**

balance sheet. Given that I am uncertain about the current existence of these funds, I shall not put these monies on the balance sheet. It is likely the husband expended some of the funds when he opted out of the workforce in 2012 and 2013 and expended some of the funds on his current motor dealership. I will take the funds the husband received into account when considering the contributions made by the parties.

ANOTHER DECISION ON LACK OF DISCLOSURE

See also

TATE V TATE (2000) FLC 93-047.

Where the case went on for four years. There the wife tried to force the husband to comply with various inspection and valuation orders. He failed to comply and or was late in doing so.

The Full Court upheld the primary decision to strike out his response and refusing him the right to cross-examine. The court pointed out the obligation under Rule 13.20(5) for further **disclosure** must occur within seven days after the document is or comes into a party's possession or control.

SUMMARY

Lack of disclosure is a serious matter

There is a duty upon every client to be full and frank but it is up to you as solicitors to ensure that efforts are made to pursue disclosure.

THE POSITION POST STANFORD

Stanford's case has been used to argue that there should be no "add backs" and the court must only deal with what is before it in terms of assets

That might give some deceptive persons great heart. However it must be remembered that the Family Law Act talks of contributions not only to assets that exist but assets that no longer exist or previously existed.

Given the heavy burden and weight the court gives to lack of disclosure one wonders if the court should take a more robust approach as it has done in the past with the likes of Briese v Briese and other cases

THE MOST UP TO DATE DECISION OF THE FULL COURT

Talbot & Talbot [2015] FamCAFC 132 (3 July 2015)

In this case at first instance the Husband failed to appear at the trial and orders were made on an undefended basis.

The Husband appealed on a number of grounds, relevant to this paper is his appeal against the decision of the trial judge to "add back"

the sum of around $250,000 from the sale of a property at just before or around separation.

The money trail from the sale of this property was in certain bank accounts of the Husband that had been subpoenaed. Some funds were left (around 33K according to the bank statements the wife provided to the court at trial) and the Husband had bought a business for around 67K.

The wife at trial proposed that the $250,000 be "added back" rather than the court deal with what was on the face of the bank statements and on the face of the purchase price of the business; actually available to be distributed between the parties.

The trial judge did that on the basis that he was taking into account the assets at separation and at the same time he valued one of the other properties, not at separation but at a later time.

The Full Court of Bryant CJ, Murphy and Duncanson JJ, in a joint judgement commented on this and the exercise of adding back the whole of the sale price at paras 33 to 53

These are repeated below for convenience;

33. To provide some background to this ground, the husband owned a property in Town K which was subject to a debt.

34. Immediately prior to the parties' separation, the Town K property was sold by the husband and the proceeds were "in the sum of $252,251" (at [14]). The husband received these funds.

35. The parties disagree as to the date of separation. The wife said the parties separated in February or March 2010. The husband's

case was that separation took place some 13 months later. His Honour did not make a specific finding as to the date of separation.

36. His Honour described (at [14]) the asset pool to be as follows:

Cash at bank (Wife) $2

Furnishings and effects (Wife) $1,000

[Suburb T] property (Husband) $350,000

Sale proceeds of [Town K] property (Husband) $252,251

Shares (Husband) $70,000

Motor vehicle (Husband) $18,000

Furnishings and effects (Husband) $26,000

Boat (Husband) $7,500

Business (Acquired by husband after separation) $67,000

37. The trial judge noted the total assets as advanced by the wife were $724,753 because she had not included the value of the business. She had included the sale proceeds of the Town K property on the basis that the husband's use of those funds was a premature distribution of property as described in *Townsend*.

38. His Honour observed that there is some tension between the concept of a premature distribution of property that no longer exists and the need to define current property interests.

39. His Honour then said:

> 17. Interestingly, the husband sought orders that the property be divided as at separation which would have clearly included the $252,251 but not the subsequently

acquired business. The husband, of course, had an obligation of disclosure which he has failed to meet. He has sworn a statement of financial circumstances, but he has not disclosed particularly how he has dealt with the proceeds of sale of the [Town K] property, save and except that it is clear from the bank statements that have been produced that the sum required for the acquisition of his interest in the business came from those proceeds of sale.

18. I propose, therefore, to proceed on the basis of the proceeds of sale being included in the pool. I do so on the basis that the husband has not discharged his obligation as to how those proceeds have been dealt with, and further, on the basis that it is further open to me, if the circumstances warrant, to deal with assets as they are as at the date of separation.

19. The only rider to that, of course, would be the issue of the value of the [Suburb T] property which has been valued more recently. In any event, the husband's failure to meet his obligation has been considered in cases such as *Weir & Weir* (1993) FLC 92-338 where the Full Court has held that a trial judge need not be concerned about taking a robust approach to the known assets where a party has failed to comply with their obligations of full and frank disclosure.

40. For reasons deposed to by the wife in an affidavit before the trial judge, she was not fully aware of the husband's assets or their

value. She deposed to knowledge of the sale of the husband's Town K property, that "he told [her] he had paid off the mortgage on the [Suburb T property]" and that she did "... not know what he did with the *balance* of the sale proceeds." (Emphasis added).

41. The husband had, in January 2012, some two years or so after separation and about 18 months prior to the hearing before his Honour, filed a Financial Statement. It disclosed, relevantly, the Suburb T property, a bank account with a balance of about $16,500 and a business valued at nil.

42. Importantly, the trial judge also had bank statements in evidence before him at the time of the hearing. As can be seen, his Honour finds that the proceeds of sale have been deposited to the account represented by those bank statements, and that the husband bought an interest in a business post-separation for $67,000 from those proceeds (Reasons [14]; [17]). Although his Honour does not say so, that finding seems to clearly emanate from the bank statements which were in evidence before him. That fact was uncontroversial before us. The same bank statements reveal a balance of about $33,000 as at June 2011.

43. No other analysis of the bank statements and, in particular, how the funds deposited may have been expended, is evident in the trial judge's reasons.

44. His Honour says that he "determined to deal with the assets as they are as at the date of separation". The trial judge did so as a means of including within the "pool" of assets the proceeds of sale.

In order to avoid double counting, his Honour did not include the purchase price of the husband's business interest (Reasons [14]; [15]; [17]).

45. The trial judge then referred to the husband's lack of disclosure and, as can be seen in the passage quoted above, reasoned that he "... need not be concerned about taking a robust approach to the *known* assets ..." as a consequence. (Emphasis added).

46. We consider that his Honour's approach was erroneous and leads to the conclusion that we cannot be satisfied that the orders made by the trial judge are just and equitable.

47. His Honour's reasons reflect a determination to "deal with assets as they are as at the date of separation". Yet, his Honour did not do so because, while he included the proceeds of sale at that time, he included the value of the Suburb T property as at the date of trial.

48. The trial judge referred (at [15]) to "some tension" between what was said by the High Court in *Stanford & Stanford* [2012] HCA 52; (2012) FLC 93-518 and "the concept of a premature distribution of property that no longer exists". **Yet his Honour did not, with respect, resolve that tension.** (writer's highlights throughout)

49. The decision of the High Court, by which the trial judge was bound, required his Honour to consider the property interests of each of the parties before him. That task was by no means easy given the failure of the husband to participate

and the consequent nature of the wife's evidence. The "*known* assets" on the evidence before the trial judge included a sum of $33,000 in the husband's bank account and a business. His Honour was correct in asserting that he could be robust about findings consequent upon the husband's lack of disclosure (and, it might be said, non-participation and non-appearance) but he needed to do so by reference to the evidence before him.

50. **The trial judge had evidence (such as it was) of the then balance of the husband's interest in property at the time of the proceedings: a bank account balance and of the purchase price of a business interest. He could be robust in assuming the latter as the value of the business. It was within his Honour's discretion to determine that justice and equity required consideration of the fact that $150,000 more was available to be distributed between the parties pursuant to s 79 shortly after separation some sixteen months earlier**

51. **However, if that discretion was to be exercised in that manner, it was necessary for the trial judge to take account of a number of relevant considerations, one of the most important of which was what the evidence revealed about expenditure from the account into which the funds were banked. That is because, among other things "... parties are entitled to reasonably conduct their affairs post-separation in a manner that is consistent with properly getting on with their**

lives" (*Cerini*, supra) and, if money is to be "added back" some three years after it was spent, account must be taken of what the evidence reveals about what was spent on "ordinary living expenses" and of the financial circumstances of the parties more generally. (See, for example,*Marker & Marker* [1998] FamCA 42).

52. Here, his Honour was hampered by the circumstances and the consequent sparseness of the evidence. However, the bank statements, which was the very evidence upon which the trial judge relied, revealed ostensible expenditure on matters that plainly seem to reveal expenditure falling within the rubric of living expenses (for example, the statements show transactions such as $66.37 spent at Coles, $116.50 spent at Australia Post, $249.00 spent at Kmart, $54.95 spent at Suburb T Pharmacy, etc)

53. We consider, then, that his Honour erred in the exercise of his discretion by reason of failing to consider matters relevant to the exercise of that discretion.

The full court said this of the question of "add backs" at para 31;

31. Where one party unilaterally distributes to themselves property which no longer exists and which, but for that premature distribution, would be susceptible to s 79 orders, justice and equity may require the Court to take account of the dissipated property by adding it back as against the dissipating party (*Townsend & Townsend* [1994] FamCA 144; (1995) FLC 92-569). Whether that

should occur, or whether the dissipation should be taken into account pursuant to s 75(2)(o), or indeed at all, are all matters requiring the exercise of the trial judge's discretion (*Townsend*; *Omicini & Omicini* [2005] FamCA 195; (2005) FLC 93-218; *Cerini & Cerini* [1998] FamCA 143).

The Full Court made no mention of a number of decisions following on from the High Court decision in Stanford that grappled with the "tension" as described by their Honours in para 48.

Those decisions are the topic of another day and another paper.

However it is clear from the above full court decision that if you have exhausted all your avenues the court can take a robust view.

However, that view will always be tempered by considerations of some analysis of the bank statements that you have subpoenaed and equitable considerations. Even the non-discloser has to eat!

Again there is an onus on you as practitioner to do more.

COMPLEX FINANCIAL MATTERS

In most practitioner's practices there will be at least one or two matters that involve a number of entities, whether companies, trusts, unit trusts or a combination of many varieties.

If that is your case then you need to consider right from the start the following:

1. ASIC searches, both historical and current to see what roles the parties have or have had in Australian Entities
2. TITLE SEARCHES who legally holds title? Often you and your client might be surprised
3. A FORENSIC ACCOUNTANT Get one
4. Provision for litigation expenses
5. START A CHRONOLOGY
6. BRIEF EARLY
7. OVERSEAS ASSETS Searches via agent solicitors in the country you believe the assets are held
8. Subpoenas to various Australian Authorities (e.g. to track moneys going in and out of the country to AUSTRAC (Australian transactions reports and analysis centre)
9. Issuing international "letters of request" under Article I of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18/3/1970)
10. Seeking orders for irrevocable limited powers of attorney to obtain overseas bank statements including provision of "identity cards" for China or seeking orders for a party to attend the banks personally to obtain the records with a representative lawyer agent appointed by your client in the foreign country.
11. Consider the appointment of a solicitor or lawyer in the country where you believe funds are held so you have some knowledge of local law and systems in order to draft orders for what you want
12. Consider RELEVANCE and PROPORTIONALITY

13. THIRD PARTY INTERVENTION OR JOINDER consider this early what role does the third party have? Are there assets in the third parties' name? WHY
14. Is the other party in breach of their duties as a director under the Corporations Act? Do you need some restraining orders?

These are some of the matters you will need to consider when dealing with complex matters.

I hope this paper and the attached comparative table are of assistance

ROBYN LEE WHEELER,
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