FOLEY'S LIST

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TAXATION FOR FAMILY LAWYERS

"There are two things in life that are certain; death and taxes"

Where appropriate the Author acknowledges experts from other sources such as CCH Family Law.

Highlights are the authors save where otherwise stated

INTRODUCTION

There really are some certainties in life

We will all die, and we will all pay tax.

How taxes are apportioned between separating couples is an area often overlooked by practitioners

It will be rather hard, in the space of twenty minutes to "cover the field" in relation to the issue of taxation and the Family Law case. As you may be aware, we lawyers are generally not insured for giving taxation advice. This paper is NOT a paper about taxation advice, nor do I give "taxation advice". Rather I will try to set out some pitfalls that lawyers need to be aware of when negotiating in Family Law matters, particularly when the assets to be divided or transferred are more than the family home and car and superannuation.

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It seems that we now regularly deal with cases involving a trust or trusts and a company or companies. Assets may be in the name of various entities that the parties' control. It is in these instances that what happens with the transfer of assets that problems can arise

SOME FUNDAMENTALS

There have been several changes to the *Commonwealth Income Tax Assessment Act*; "(ITAA"). In 1915 the ITAA had 64 sections. Within a few months there was amending legislation. In the year 1936 the ITAA was overhauled and expanded and again in 1997. We now have not only Income Tax, but Capital Gains tax, Goods and services tax, Fringe Benefits Tax, Division 7A tax and more. The list and array of manners in which one may be taxed is all consuming. Then of course there is the general interest charge that accrues daily on outstanding debts (GIC)

It is not my intention to rehash these matters adequately covered by Jeannette Swann from our list in her seminal paper for the breakfast in 2015. I commend that paper to the reader It is available on the Foley's List website

I will focus on some recent decisions that you should be aware of including *TOMARAS*; both by the Full court and High court, *ELLISON V SANDINI*, and, if time allows *SNIPPER V JAMES*, and the older decision of *COMMISSIONER OF TAXATION V DARLING* and the ATO's view on that case. These cases are relevant to your practice and will provide you with some insight into the matters that might befall you when negotiating a settlement between parties.

Is it possible, by Order, to "substitute" one party for the other party under section 90AE in relation to a Tax debt? The mysterious case of *TOMARAS*.

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This very question was asked of the Full Court, in late 2017, in a "case stated" referred by the Federal Circuit Court to the Full Court of the Family Court (Strickland Aldridge and Thackray JJ)

Tomaras & Tomaras and Anor and Commissioner of Taxation **[2017] Fam CAFC 216; (13 October 2017)**

I do not use the word "mysterious" lightly. The facts as stated to the Full Court are so brief in that judgement that one really cannot work out what the back story was in the matter. All we know from the Full Court decision (and indeed the subsequent High Court decision) is set out below. HOW the Wife got large tax debts in her name and WHY the husband went bankrupt are not said. WHY the Wife issued AFTER the Husband was made a bankrupt is not said. WHY the wife did not seek an order under section 80(1) (f) is not set out.

Why the Wife actually sought a "substitution order" under section 90AE is not set out.

As we will see she was never going to get such an order in the below circumstances.

THE FACTS

The parties were married for 17 years and separated in **July 2009**. The Wife had her own income tax debts, Medicare levies, penalties and general interest charges (GIC) that arose during the marriage. On **12 November 2009** the Tax office obtained a default judgment against her for the amount of $127,669. The Wife had failed to pay on demand and failed to lodge any objection. The Wife failed to pay the judgment debt and the Commissioner took no steps at that time (indeed it would appear, at all) to enforce it. GIC continued to accrue.

In November 2013, some years later, the Husband became bankrupt.

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In December 2013, (after the Husband became bankrupt) the Wife issued Family Law proceedings in the Federal Circuit Court seeking property Orders against her bankrupt Husband. The Wife was the applicant, the Husband was the second respondent and the Trustee in bankruptcy the third respondent.

In February 2016 the Income Tax Commissioner was given leave to intervene in the proceedings.

By 9 August 2016 the wife's debt to the commissioner had gone up to $256,078 because of the GIC and other penalties. In August 2016 a case stated was sent to the Full Court in terms as set out in both the Full Court and the High Court decision

These are the basic facts provided and not more.

THE APPLICATION OF THE WIFE

By her amended application in the Federal Circuit Court proceedings, the applicant sought the following order (in para 8 of her application):

Pursuant to section 90AE(1)(b) of the Family Law Act 1975 (Cth), in respect of the applicant wife's indebtedness to the Commissioner of Taxation for the Commonwealth of Australia taxation related liabilities in the amount of ***$256,078.32*** *as at 9 August 2016 plus General Interest Charge (GIC), the respondent* ***husband be substituted*** *for the applicant wife as the* ***debtor and the respondent husband be solely liable to the Commissioner of Taxation for the said debt****.*

Judge Purdon-Sully then stated a case for the opinion of the Full Court pursuant to s 94A(3) of the Family Law Act in the following terms:

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Does s 90AE(1)-(2) of the *Family Law Act 1975* (Cth) grant the court power to make Order 8 of the final orders sought in the amended initiating application of the Wife?

THE STATUTORY PROVISION

1. Section 90AE of the Act provides as follows:

90AE Court may make an order under section 79 binding a third party

(1) In proceedings under section 79, the court may make any of the following orders:

(a) **an order directed to a creditor of the parties to the marriage to substitute one party for both parties in relation to the debt owed to the creditor**;

(b**) an order directed to a creditor of one party to a marriage to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor;**

(c) an order directed to a creditor of the parties to the marriage that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made;

(d) an order directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other party.

(2) In proceedings under section 79, the court may make any other order that:

(a) **directs a third party to do a thing in relation to the property of a party to the marriage; or**

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(b) alters the rights, liabilities or property interests of a third party in relation to the marriage.

(3) The court **may only make an order under subsection (1) or (2) if:**

(a) the making of the order is **reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and**

(b) **if the order concerns a debt of a party to the marriage—it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and**

(c) **the third party has been accorded procedural fairness in relation to the making of the order; and**

(d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order; and

(e) the court is satisfied that the order takes into account the matters mentioned in subsection (4).

(4) The matters are as follows:

(a) **the taxation effect (if any) of the order on the parties to the marriage;**

(b) the taxation effect (if any) of the order on the third party;

(c) the social security effect (if any) of the order on the parties to the marriage;

(d) the third party's administrative costs in relation to the order;

(e) **if the order concerns a debt of a party to the marriage—the capacity of a party to the marriage to repay the debt after the order is made;**

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(f) the economic, legal or other capacity of the third party to comply with the order;

(g) if, as a result of the third party being accorded procedural fairness in relation to the making of the order, the third party raises any other matters—those matters;

(h) any other matter that the court considers relevant.

As their Honours Thackray and Strickland JJ made clear, since 2003 Parliament had provided the Court with significant powers in relation to third parties (See para 10 repeated below)

> 10. Section 90AE appears in Part VIIIAA of the Act which was inserted by the *Family Law Amendment Act 2003*(Cth). The relevant object of that Part, as provided in s 90AA, is to permit the court "**in relation to the property of a party to a marriage" to make an order under s 79 that is "directed to, or alters the rights, liabilities or property interests of a third party**". While authorising orders that are binding on third parties, the Part does not otherwise affect the operation of any other provision of the Act (s 90ADA).
>
> **11.** The expression "third party" is defined to mean "a person who is not a party to the marriage" (s 90AB). **The word "person" must be taken to include a "body politic", and therefore prima facie includes the Commissioner (*Acts Interpretation Act 1901* (Cth), s 2C(1)).**

The issue for the Full Court as raised by the Taxation Commissioner was whether **Section 90AE could bind the Crown or whether there was a presumption that such legislation did not bind the Crown**.

Thackray and Strickland JJ referred to a number of High Court authorities on the issue of a Presumption that statutory provisions in general terms do not bind the

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Crown. Their Honours took from those authorities; the following which they said was "non-controversial"[1]

> Australian courts **must** apply a presumption that statutory **provisions expressed in general terms do not bind the Crown;**
>
> The presumption is an aid to construction, not an inflexible principle;
>
> If an intention to bind the Crown appears when the legislation is construed in a context which includes the presumption against the Crown being bound, then the legislative intention must prevail;
>
> **The intention to bind the Crown must be found in the provisions of the statute, including its subject matter and disclosed purpose and policy, when construed in a context which includes permissible extrinsic aids**;
>
> A legislative intention for the Crown to be bound may be ascertained by means other than express words or necessary implication;
>
> The strength of the presumption will depend on the circumstances, including the content and purpose of the provision being construed, and the identity of the entity in respect of which the question of the applicability of the provision arises;

[1] See *Tomaras* at para 13 and see *Bropho v State of Western Australia* [1990] HCA 24; (1990) 171 CLR See also the discussion of further cases at para 16 of Tomaras where it is said that The presumption that the Crown is not bound by a statute applies only to provisions which impose an obligation or a restraint on the Crown .. There is accordingly no place for the presumption if the provision, properly construed, confers a benefit on the Crown

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> In some circumstances, the presumption will be no more than the starting point of the ascertainment of the legislative intention; and
>
> A statute may, when construed in context, disclose a legislative intent that one of its provisions will bind the Crown while others will not.

Their Honours said that in this instance, the presumption did not apply as 90AE could only be construed as to apply a "benefit" to the Crown and not a "detriment".

…

17. In our view, it could be reasonably argued that s 90AE can only impose a benefit on the Crown since:

    - (a) instead of an impecunious taxpayer being responsible for a tax liability, his or her more wealthy spouse may be made solely responsible pursuant to s 90AE(1)(a), thereby increasing the prospects of recovery;
    - (b) instead of one spouse being responsible for a tax liability, **both** spouses may be made liable pursuant to s 90AE(1)(b), thereby providing a remedy for recovery that otherwise would have been unavailable;
    - (c) whilst an order might be made leaving the less wealthy spouse to meet a tax debt, **such an order could not be made if it was foreseeable that the order would result in the debt not being paid (s 90AE(3)(b)); and**
    - (d) the legislation permits the court to make such order as it considers just for the payment of the reasonable expenses of the creditor incurred as a necessary result of the order (s 90AJ(2)).

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18. Section 90AE **could therefore only ever operate to the detriment of the Crown if the court, in making an order**:

    - (a) relieved a spouse of their obligation to pay tax which they would have paid if the order had not been made; and

    - (b) instead imposed the obligation on a spouse who, although appearing at the time able to meet the liability in full, ultimately was unable to do so for some **unforeseeable** reason.

19. In assessing the likelihood of such an outcome it must be remembered that the Commissioner would be on notice that an order under s 90AE is **sought and would be entitled to be heard on the issue of the foreseeability of the tax not being paid if one party were to be substituted for the other.**

20. It can thus be seen that the possibility of the Commissioner being **adversely** affected by an order under s 90AE does not arise by operation of the Act **but only by the happening of an event that could not have been reasonably anticipated. In those circumstances, we see no place for the presumption.**

The Commissioner argued that the presumption did apply and was not rebutted

The Commissioner put argument on the basis that

1.There was **no express** statement in 90AE binding the crown,

2. That the taxation debts had to be "connected to particular assets" for the substitution to be "reasonably necessary" (See 90AE (3)(a)),

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3. That 90AE(4)(a) and (b) required the court to consider the taxation effect of a substitution order and this was an indication within the legislation that tax debts are not themselves the subject of a substitution order

4. That because the Court had alternative powers under 80 (1) (f) of the *Family Law Act* ("FLA") this was part of the context in which section 90AE should be seen as non-binding on the crown

5. That seeing 90AE as binding on the Crown would result in "absurdities" where 90AE could not operate to transfer rights of objection, review and appeal rights[2]

Their honours rejected all of the arguments in 1 to 4 above. They indicated, (at para 40 to 44), that without holding a firm view, they did not see the argument in point 5 above as persuasive

Aldridge J agreed with the Orders proposed by his fellow Judges but described the "rule" regarding the "presumption";

"The appropriate rule, as I understand it, is that in an Act of Parliament general words **shall not bind** the Crown to its prejudice unless by **express provision** or **necessary implication**". (at para 65)[3]

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[2] See *Tomaras* at paras 22 to 44

[3] And see his Honours comments at para 71 where he quotes from the decision in *Bropho v State of Western Australia* [1990] HCA 24; (1990) 171 CLR (para 23 -24) Implicit in that is acceptance of the propositions that, notwithstanding the absence of express words, an Act may, when construed in context, disclose a legislative intent that one of its provisions will bind the Crown while others do not and that a disclosed legislative intent to bind the Crown may be qualified in that it may, for example, not apply directly to the Sovereign herself or to a Crown instrumentality itself as distinct from employees or agents. Always, the ultimate questions must be whether the presumption against the Crown being bound has, in all the circumstances, been rebutted, and, if it has, the extent to which it was the legislative intent that the particular Act should bind the Crown and/or those covered by the prima facie immunity of the Crown.

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His Honour did not see the issue of the "benefit" or "burden" to the Crown as a "starting point or threshold issue" but rather as matters that would go to rebut the presumption (see discussion at para 71 on)

His Honour was also not so sure that a substitution order could only confer a **benefit** on the Commissioner. He viewed the provisions in 90AE (3) and s 90AJ (expenses of the third party) as only ensuring a creditor would be "**no worse off"** in the foreseeable future and that **was a different proposition to receiving a benefit.** His Honour gave two examples; one where the creditor **might be paid but not as quickly**. **Secondly with all the best intentions of the Court when making the order there was default and the Creditor was not paid at all**[4]

His Honour also was not sure that rights of objection and appeal could be substituted but noted that there was no difficulty in assigning causes of action. His Honour's conclusion was that

> "*Further, as has been pointed out, a more complete answer is that it is most unlikely that any orders would be made under s 90AE if there were genuine issues of substance that would justify an objection or an appeal which was being or was likely to be pursued*."(at para 79)

SUMMARY

The Full Court found that 90AE was binding on the Crown. However, "The proviso is that s 90AE(1) would confer power to make only an order that the **Commissioner** be directed to substitute the first respondent for the applicant in relation to the debt owed by the applicant to the **Commissioner**. The additional words sought by the applicant in Order 8, namely '**and the respondent husband be solely liable to the Commissioner of Taxation for the said debt**' have the potential to

[4] See discussion at paras 72,73 of *Tomaras*

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create the impression that whatever rights the applicant may have had to challenge the debt (which senior counsel for the **Commissioner** acknowledged might still exist) are extinguished by the making **of** the order. For the reasons [5]given earlier, we are not entirely persuaded that such rights would be extinguished by an order under s 90AE."

Not surprisingly the Commissioner sought leave and was granted leave to appeal.

THE LEAVE APPLICATION

***Commissioner of Taxation for the Commonwealth of Australia v Tomaras & Ors* [2018] HCATrans 56 (23 March 2018)**

Leave was granted to appeal the decision. Only the Wife and the Commissioner appeared on the leave application. A matter raised by counsel for the Income Tax Commissioner was that since the Full Court Decision **there had been a flurry of applications for substitution orders in relation to taxation debts**.

One got a sense the leave application would succeed by a cryptic comment from his Honour Justice Keane who said

"***The question is not about recovering the debt; it is about the debt disappearing***."

[5] *Tomaras* Full Court Family Court at 60

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THE HIGH COURT DECISION

Commissioner of Taxation v Tomaras **[2018] HCA 62 (13 December 2018)**

I repeat **the Order made by the High Court** below;

1. *The question of law stated by the trial judge for the opinion of the Full Court of the Family Court of Australia should be answered as follows:*

Question

"Does s 90AE(1)-(2) of the Family Law Act 1975 (Cth) grant the court power to make Order 8 of the final orders sought in the amended initiating application of the wife?",

where proposed Order 8 was amended to read:

"Pursuant to section 90AE(1)(b) of the Family Law Act 1975 (Cth), in respect of the [wife's] indebtedness to the Commissioner of Taxation for the Commonwealth of Australia [for] taxation related liabilities in the amount of $256,078.32 as at 9 August 2016 plus General Interest Charge (GIC), the [husband] be substituted for the [wife] as the debtor and the [husband] be solely liable to the Commissioner of Taxation for the said debt."

Answer

Although in relation to a debt owed to the Commonwealth by a party to a marriage s 90AE(1) ***confers power to make an order that the Commissioner be directed to substitute the husband for the wife in relation to that debt****, it is otherwise* ***inappropriate to answer the question without it being found, or agreed, that, within the meaning of s 90AE(3),*** *the making of the order* ***is***

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reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage, and it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and without the court being satisfied that, in all the circumstances, it is just and equitable to make the order.

The appeal by the Commissioner and the Wife was otherwise dismissed.

SO, WHAT DOES THIS ALL MEAN?

There were four separate judgements in the matter

A joint decision was made by their Honours Keifel CJ and Keane J

I set out the relevant extracts from their Honours decision (paras 1,3,6,8,9 and 13) below.

THE JUDGEMENT OF KIEFEL CJ AND KEANE J. We agree with Gordon J that under s 90AE of the *Family Law Act 1975* (Cth) ("the Act") **the court has power** to order the Commissioner of Taxation to substitute one party to a marriage for the other in relation to a debt owed to the Commonwealth for income tax. Accordingly, the appeal must be dismissed.

1. Since the decision of this Court in *Bropho v Western Australia* it has been **settled that the presumption of statutory construction that general words in a statute do not bind the Crown may be displaced without the use of express words or words of necessary intendment.** If the legislative provision in question, when construed in context, discloses an intention to apply to the circumstances of the particular case, then effect

must be given to that intention. **In this case the intention of the Act is not in doubt.**

3. Within Pt VIII of the Act, a court considering the exercise of its jurisdiction in property settlement proceedings under s 79 **must, by reason of s 75(2)(ha), take into account the effect of any proposed order on the ability of a creditor of a party to the marriage to recover the creditor's debt.** Nothing in Pt VIII of the Act **suggests an intention to differentiate between Commonwealth, State and Territory revenue authorities or an intention to differentiate between revenue authorities and other creditors.** Further, s 80(1)(f) provides that a court exercising its powers under s 79 may "order that payments be made ... to a public authority for the benefit of a party to the marriage". It is not disputed that this provision contemplates the making of an order that one party to a marriage pay the taxation liability of another to a revenue authority. **Thus it is apparent that, in Pt VIII of the Act, the term "creditor" is apt to include the Commonwealth and indeed any other revenue authority**.

6. It must be understood, however, that the power of the court under Pt VIIIAA to make an order directed to a third party **is not at large. The power to make an order under s 90AE(1) is conditioned by s 90AE(3).** Such an order may be made only if, among other things:

   "(a) the making of the order **is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage**; and

   (b) if the order concerns a debt of a party to the marriage – **it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full;** and

   ...

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(d) the court is satisfied that, **in all the circumstances, it is just and equitable to make the order**".

8. **Any concern for the protection of the revenue – Commonwealth, State or Territory – is met by the terms of s 90AE(3)(b). If this condition is not satisfied, the power to make an order under s 90AE(1)(b) is not enlivened.** The observance of this condition by the court is apt to ensure that the interests of the revenue authorities, and other creditors for that matter, are not adversely affected by the making of an order under s 90AE(1)(b).**The scope of this power should not be distorted by attributing to the Parliament an unfounded apprehension that the courts cannot be trusted to ensure that the statutory conditions upon which the power may be exercised are satisfied.**

9. **Given that, so far as appears from the record in the present case, the husband is a bankrupt and the wife is solvent, it is not possible to see how the condition in s 90AE(3)(b) could be satisfied in this case.** More generally, **it is difficult to see how any case where there is a real prospect that the substitution of one spouse for another as the debtor of the revenue authority would create or enhance a risk of non-payment would not fall foul of s 90AE(3)(b) of the Act.**

THE PROCEDURE THAT GOT THE MATTER TO THE FULL COURT AND THEN THE HIGH COURT IN THE FIRST PLACE WAS COMMENTED ON BY THEIR HONOURS (at para 13)

13. As to the procedure adopted in this case, we would observe that **it is regrettable that the primary judge was invited by the parties to state a question of law for the Full Court**. While the primary judge cannot fairly be criticised for acceding to the course proposed by the parties, it would

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have been more efficient, in terms of the administration of justice, if the wife's application for substitution had been allowed to proceed to a determination on the merits. **Given the difficulty confronting the wife's application for substitution by reason of the condition in s 90AE(3)(b), the question stated for the opinion of the Full Court was unlikely ever to be of other than academic interest.**

SUMMARY

The Chief Justice and Justice Keane made it very clear that;

- The "presumption" of statutory intention not to bind the crown was clearly "displaced" by various references in part VIII of the FLA

- That the power of the court under Pt VIIIAA to make an order directed to a third party **is not at large. The power to make an order under s 90AE(1) is conditioned by s 90AE(3).**

- Their Honours thought it regrettable that the primary judge was invited by the parties to state a question of law to the Full Court. As their Honours said above; had the Wife's application for substitution been allowed to proceed to a determination on the merits that would have certainly failed because of the conditions imposed by 90AE(3)(b)).

- In short why would a court consider substituting the bankrupt Husband as the Wife for her tax debt, given the constraints imposed on the exercise of the power by 90AE(3)(b)?

THE JUDGEMENT OF GAGELER J

His Honour considered the Commissioners argument that the Court lacked **jurisdiction** on the basis that the Federal Circuit Court by s 39(5AA) of the

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FLA had jurisdiction to deal with matters arising under the FLA in respect of matrimonial causes constituted by "proceedings between the parties to a marriage with respect to the property of the parties to the marriage"**.** The argument for the Commissioner was put that such jurisdiction was **not extended** by s 90AD(1) for the purpose of Pt VIIIAA of the Act; "*to encompass proceedings between the parties to a marriage regarding the taxation debts owed by one or both of those parties to the Commonwealth. The Commissioner argued that the jurisdiction of the Federal Circuit Court is not so extended because a taxation debt owed to the Commonwealth is excluded from the instruction in s 90AD(1) that, for the purpose of Pt VIIIAA, "a debt owed by a party to a marriage is to be treated as property" for the purpose of a matrimonial cause as defined.* ***The Commissioner relied for that exclusion on the common law presumption that a statute does not "bind the Crown".***[6]

His Honour took the view that given a matter of jurisdiction and statutory construction was raised by the Commissioner; it was appropriate that the case had been referred to the Full Court. That is the only point upon which his Honour differed from the approach of Keifel CJ and Keane J

His Honour said this (at paras 17,19,21,22 and 23)

17. That said, I share the view of the Full Court of the Family Court in the decision under appeal **that the question is not at all difficult to answer.** Rejecting the Commissioner's argument that the reference in s 90AD(1) to "a debt owed by a party to a marriage" excludes a taxation debt owed to the Commonwealth, I would answer the question to the effect that, **subject to s 90AE(3), the Federal Circuit Court has power under s 90AE(1)(b) or (2)(b) of the Act to order that the husband be**

[6] See *Commissioner of Taxation v Tomaras* [2018] HCA 62 (13 December 2018) at para 15

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substituted for the wife in relation to the taxation debt. The affirmative answer given to the question by the Full Court of the Family Court, although less precise, is substantially to that effect.

19. **Here, in my opinion, the presumption is displaced by the appearance of an affirmative legislative intention to confer jurisdiction on a court to alter, by an order under s 90AE(1) or (2), the interest of the Commonwealth or a State or a self-governing Territory in a debt owed to it by a party to a marriage**. That affirmative intention appears sufficiently from the text and structure of Pt VIIIAA when read in context with s 79 in Pt VIII of the Act.

20. The object of Pt VIIIAA, as expressed in s 90AA, is to allow a court in proceedings under s 79 to make an order "**that is directed to, or alters the rights, liabilities or property interests of a third party".** The same terminology is repeated in s 90AE(2)(b) in empowering a court to make an order that "alters the rights, liabilities or property interests of a third party in relation to the marriage". The term "creditor" in s 90AE(1)(a), (b) and (c) **plainly refers to a "third party" whose property interest is in a debt owed by one or both of the parties to the marriage**.

21. Section 90AB defines "third party", in relation to a marriage, for the purposes of Pt VIIIAA, to mean "a person who is not a party to the marriage". By operation of s 2C of the *Acts Interpretation Act 1901* (Cth), which by force of s 2A of that Act "binds the Crown in each of its capacities", the reference to a "person" within that definition **must be taken to "include a body politic or corporate as well as an individual**" absent something in the Act to indicate a contrary intention. Unlike the *Trade Practices Act 1974* (Cth), in relation to which an intention to exclude a body politic from general references to a "person" was found in specific provisions of that Act which addressed the extent to which that Act was to

"bind" the Crown "in right of the Commonwealth" and the Crown "in right of a State"**[8]**, the Act contains nothing to evince an intention contrary to the operation of s 2C of the *Acts Interpretation Act*.

22. When combined with the statement in s 90AC(1)(a) of the Act that Pt VIIIAA "**has effect despite anything to the contrary in ... any other law (whether written or unwritten) of the Commonwealth, a State or Territory**", s 90AA as interpreted in accordance with s 2C of the *Acts Interpretation Act* rather **indicates a legislative intention that the powers conferred on a court by the Part are to be available in any proceeding under s 79of the Act to provide for the alteration of the rights, liabilities or property interests of a body politic to which a party to a marriage is indebted, in the same way as the Part provides for the alteration of the rights, liabilities or property interests of a body corporate to which, or an individual to whom, a party to a marriage is indebted**.

23. The comprehensiveness and uniformity of the intended operation of Pt VIIIAA in relation to debts owed by one or both of the parties to the marriage to all third parties are confirmed by the narrowness and specificity of the **sole exclusion** in s 90ACA. The exclusion is of the powers of a court under the Part in relation to "**superannuation annuities** (within the meaning of the *Income Tax Assessment Act 1997*)", a subject matter which falls within the separate scheme in Pt VIIIB of the Act.

SUMMARY

Again, we see the use of the wording of a **presumption** "**displaced**" by reference **not only to the particular section but other sections of the legislation evidencing an intent to bind the Crown.**

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THE JUDGEMENT OF GORDON J.

Her Honour agreed that the court indeed **had both the jurisdiction and the power to order substitution of one party by the other for a taxation debt.**[7] Her Honour further took the view that the "**presumption** is **not more than a general principle of statutory construction; or an aid to statutory construction"**[8]

If there was a criticism of the Full Court decision it was that the answer of the Full court to the case stated:

"said nothing about the fact that, ***upon the proper construction*** *of Pt VIIIAA, read with Pt VIII of the Family,* ***a court would rarely, if ever, make such an order directed to the Commissioner in relation to a debt owed to the Commonwealth which arises under a taxation law. In other words, the confined nature of the power conferred was relevant, and was not fully explored".***[9]

Her Honour went on to say that on a close reading of 90AE it was hard to imagine a circumstance where the Court could be convinced that the matters set out in 90AE (3) (b) were satisfied.

It is important to read her Honours judgement in that regard very carefully, particularly her discussion about this at para 79 on, (repeated for the reader below). Once one has read these paragraphs, one might not be so inclined to seek a substitution order for a taxation debt rather than use section 80(1) (f) of the FLA. I repeat the relevant parts of her Honours judgment below;

79. As we have seen, s 90AE(3)(b) provides that the court may ***only*** make an order concerning a debt of a party to a marriage which binds a creditor

[7] See *Tomaras* High Court at para 32

[8]

under s 90AE(1) if "it is ***not foreseeable*** **at the time that the order is made that to make the order would result in the debt not being paid in full**" (emphasis added). **Practically, a s 90AE order would rarely, if ever, be made substituting one party of the marriage for another party in relation to a debt owed to the Commonwealth arising under or as a result of the application of a taxation law**.

80. The fact that a court will rarely, if ever, make an order under s 90AE in relation to a tax debt – a debt owed to the Commonwealth – may be illustrated **by considering a primary tax debt arising from an assessment issued by the Commissioner under Div 155 of Sch 1 to the TAA.**

81. A "tax debt" is a "primary tax debt" (relevantly defined to mean any amount due to the Commonwealth directly under a taxation law including any amount that is not yet payable) or a "secondary tax debt" (defined to mean an amount that is not a primary tax debt but is due to the Commonwealth in connection with a primary tax debt. An amount due under an assessment issued by the Commissioner is an example of a primary tax debt. An amount due to the Commonwealth under an order of a court made in a proceeding for recovery of a primary tax debt is an example of a secondary tax debt.

82. **The relevant primary tax debt in this appeal was income tax.** Income tax is only due and payable when the Commissioner makes an assessment of income tax. That assessed amount is a "tax-related liability– a pecuniary liability to the Commonwealth arising directly under a taxation law.

83. A tax-related liability that is due and payable is a debt due to the Commonwealth and is payable to the Commissioner and the Commissioner

[9] *Tomaras* High Court decision para 37

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may sue to recover any amount of that tax-related liability that remains unpaid after it becomes due and payable. Not only is the notice of assessment conclusive evidence that the assessment was properly made and, except in proceedings under Pt IVC of the TAA,that the amounts and particulars of the assessment are correct, but the Commissioner may proceed to recover that tax-related liability even though the taxpayer has commenced proceedings under Pt IVC of the TAA.

84. Moreover, the Commissioner has certain statutory rights to assist in the recovery of tax-related liabilities. Some of those rights **extend beyond the person liable** to pay an amount of a tax-related liability. **And for certain tax-related liabilities, the amount of the debt continues to accrue on a daily basis because a person is liable to pay the GIC on unpaid amounts. The GIC is charged not only daily but also at a rate well above the 90-day Bank Accepted Bill rate published by the Reserve Bank of Australia and is due and payable to the Commissioner at the end of each day.**

85. The objection, review and appeal rights under Pt IVC of the TAA in respect of assessments are limited**. Although s 14ZL(1) of the TAA relevantly states that Pt IVC applies if a provision of an Act provides that a "person" who is dissatisfied with an assessment may object against it, the "person" is relevantly the person or persons who may, because of a provision of the taxation law, lodge an objection against the assessment.** So, for example, s 175A(1) of the *Income Tax Assessment Act 1936* (Cth) ("the 1936 Act") provides that a "**taxpayer**" who is dissatisfied with an assessment "**made in relation to the taxpayer**" may object against the assessment in the manner set out in Pt IVC of the TAA. Thus, the effect of s 14ZL of the TAA is to confer objection, review and appeal rights under Pt IVC of the TAA upon **the person** described in s 175A(1) of the 1936 Act – the "**taxpayer" – "in relation to**" whom the

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assessment has been made. **It is that taxpayer who is the "person" who has rights and obligations under s 14ZU of the TAA (a "person" making a taxation objection must comply with certain administrative requirements),** s 14ZY of the TAA (the Commissioner must make a decision on a taxation objection and serve written notice of the decision "**on the person**") and s 14ZZ of the TAA (if the "**person**" is dissatisfied with the objection decision, the "**person**" may (if the decision is a reviewable objection decision) seek review in the Administrative Appeals Tribunal or appeal to the Federal Court of Australia).

86. The difficulties for any court faced with a request, in relation to a debt owed to the Commonwealth under a taxation law, that it make an order under s 90AE(1) that one party to the marriage be substituted for the other party as the debtor are that these (and other) aspects of the taxation law would appear to prevent a court being satisfied of the two matters identified in s 90AE(3)(b) and (d) – that it is not foreseeable that making the order would result in the debt not being paid in full; and that, in all the circumstances, it is just and equitable to make the order.

AUTHOR'S COMMENTS

If Her Honours view is decisive then a relevant and overriding factor appears to be that the "substituted" party under the FLA is not a party that can dispute the taxation debt and that means that the result would be unjust and inequitable against that party.

In this case the Commissioner had not sought to enforce the debt against the Wife, nor had she sought to exercise her rights to review the taxation decision.

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Query if the Wife HAD exhausted all rights, within time limits and there was no process left available to her. Would that not then mean that, at least in theory there was nothing left but the debt and interest?

Query also if the Husband had not been a bankrupt and the Court at first instance made orders allowing him to have; for instance, a power of attorney to act as the Wife and seek to review the debt?

87. The fact that the husband in this appeal was bankrupt is reason enough not to make the order sought by the wife under s 90AE. But there are other facts, matters and circumstances which compel the same conclusion in this appeal: **the inability of the husband to exercise the Pt IVC rights of objection and review (both because the time allowed to the wife for objections has long expired, and because of the difficulties identified above); the fact that the debt owed to the Commonwealth, in relation to which the Commissioner has obtained default judgment, is long overdue; and the fact that the size of that Commonwealth debt continues to increase, not just on a daily basis, but at a higher rate, because of the accruing GIC. That list is not and cannot be exhaustive. However, those facts and matters, or even some of them, compel the conclusion that a court could not be satisfied of the matters prescribed in s 90AE(3) and, therefore, the court would not be empowered to make a substitution order under s 90AE(1) in Pt VIIIAA.** [10]

88. The matter may be tested this way**. Part VIII empowers a court to make an order under s 80(1)(f) directing a party to a marriage to pay a debt owed by the other party, which could include a direction to pay a tax**

[10] The writer wonders however if there be a situation where say the Husband has the money, all appeal rights are exhausted and there is clear ability for the payment to be made immediately with security by way of enforced sale of a property if that would not suffice Her Honours concerns. But

debt owed to the Commonwealth. If the husband had cash or another immediately realisable asset or assets to meet that debt, an order would be made under s 80(1)(f) directing the husband to make a payment direct to a public authority for the benefit of the wife. If that form of order could not be made (because of the lack of means to meet such a debt), then, contrary to the requirements of s 90AE(3), **it would be foreseeable that if an order were made under s 90AE(1), it would result in the debt not being paid in full *and*, in all the circumstances, it would not be just and equitable to make the order.** That is, the fact that the husband could not satisfy an order under s 80(1)(f) strongly suggests, even requires, the conclusion that two requirements of s 90AE(3) – that it must not be foreseeable that if the order were made, it would result in the debt not being paid in full, and that it must be just and equitable to make the order – would not be satisfied.

89. Further, as we have seen, Pt VIII expressly empowers a court to adjourn property settlement proceedings if the court is of the opinion that there is likely to be a significant change in the financial circumstances of the parties to the marriage and, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings. **That possibility of an adjournment permits a party to the marriage who owes a debt to the Commonwealth under a taxation law to exercise their rights of objection, review and appeal under Pt IVC of the TAA.**

90. Thus, the scope for a s 90AE(1) order in the circumstances of a debt owed to the Commonwealth arising under, or as a result of the application of, the taxation law is limited.

92. Reconciliation of the treatment of debts owed to the Commonwealth under a taxation law, on the one hand, and property settlement

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of course does that not mean that an order under section 80(1) (f) would be more appropriate. So, are we dealing with a "toothless tiger"? See para 88 of her Honours decision!

proceedings under Pt VIII of the *Family Law Act*, on the other**, finds resolution not in the concept of Crown immunity but, rather, in the proper construction and application of Pts VIII and VIIIAA of the *Family Law Act***. In particular, once Pts VIII and VIIIAA are properly construed, what might otherwise appear to be a tension between the treatment of debts arising under, or as a result of, the taxation law and the power of the court under Pt VIIIAA to order substitution of a debtor to the Commonwealth falls away.

AUTHORS COMMENTS

One wonders if there are other situations that might arise where it is perfectly proper to use Section 90AE. For example if the Wife's debt arose in circumstances where she had no real knowledge of the debt to the Commissioner in the first place (such as her being used for distribution purposes from a trust without her knowledge) and there was scope for review of the debt to the Commissioner, why could not it be left to the Husband to argue that part out with the Commissioner (a reduction on review or a waiver of some or all of the penalties) by way of a 90AE order AND providing a power of attorney or otherwise to the Husband from the Wife in relation to that specific review?

If indeed there are no circumstances where the power may be exercised is the section a "toothless tiger" when it comes to Income Tax debt substitution orders?

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HER HONOUR'S VIEW ON THE USE OF THE CASE STATED PROCEDURE

Her Honour expressed a strong view that it was inappropriate to use such a procedure in this case; as on a reading of the facts, 90AE(3) could never have been satisfied.

I repeat the relevant paras below for convenience

93. Section 94A(1) of the *Family Law Act* relevantly provides that where a question of law arises which the judge and at least one of the parties wish to have determined by the Full Court of the Family Court before the proceedings are further dealt with, the judge shall state the facts and question in the form of a special case for the opinion of the Full Court and the Full Court must hear and determine the question.

94. This procedure should be used only in exceptional circumstances. **It is more often than not productive of difficulty, delay and artificiality, and should be adopted cautiously**.

95. When deciding whether to state a case, it is the obligation of the court to explore all of the options and weigh the advantages and disadvantages in a particular case, to determine whether the stating of the case would be reasonable. The problems inherent in the procedure include that a Full Court may be asked to determine a question of law on incomplete facts or assumptions or in circumstances which render it impossible to answer the question in other than a hypothetical fashion; the question of law is determined on the basis of a statement of facts agreed by the parties or settled by the judge but those facts may differ from those ultimately established by the evidence; and there is additional delay and cost.

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96. **In the circumstances of this matter, the stated case procedure was inappropriate**. Hearing and determining the property settlement proceedings would have been cheaper and quicker. **But, no less importantly, on the proper construction of Pts VIII and VIIIAA, the question of whether the Commonwealth was bound by s 90AE(1) and (2) would not have arisen for determination because of s 90AE(3).** That is, even **if the Federal Circuit Court had been asked to make the substitution order** under s 90AE(1)(b), under s 90AE(3) the Court could **only make that order** if it was **reasonably necessary** or **reasonably appropriate** and **adapted to effect a division of property between the parties to the marriage**; it was **not foreseeable** that to make the order **would result in the debt not being paid in full**; and **in all the circumstances, it was just and equitable to make the order.** As just explained, given the taxation law, and, further, the circumstances of the husband and the property of the parties to the marriage in this appeal, it is unlikely that s 90AE(3) **could ever** be satisfied.

Her Honour gave the answer, that was adopted by the Chief Justice and Justice Keane to the question of the power under 90AE to make a substitution order for a debt owed to the Commonwealth: I have set that out at page 17 of this paper but repeat it below.

"Although in relation to a debt owed to the Commonwealth by a party to a marriage s 90AE(1) **confers power** to make an order that the Commissioner be directed to substitute the husband for the wife in relation to that debt, it is **otherwise inappropriate to answer the question without it being found, or agreed, that, within the meaning of s 90AE(3),** the making of the order is **reasonably necessary**, or **reasonably appropriate and adapted, to effect a division of property between the parties to the marriage,** and it is **not foreseeable at the time that the order is made that to make the order would result in the debt not**

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being paid in full; and **without the court being satisfied that, in all the circumstances, it is just and equitable to make the order."**

SUMMARY

It is hard to contemplate when in fact the use of section 90AE to seek a substitution order of one party for the other for debts owed to the Income Tax Commissioner might be appropriate.

Clearly the flurry of cases that the Commissioners counsel mentioned in the leave application have flurried but not "flourished".

THE JUDGEMENT OF EDELMAN J.

His Honour said firstly that the "presumption" was "**not a rule of law**"[11]

His Honour then gives us a commanding background and history to the operation of section 90AE at paras 110 to 114 of the judgement.

His Honour reminds us of the case of Ascot Investments Pty V Harper (1981) 148 CLR 337; [1981] HCA 1.

Back then the High Court ruled that the Family Court did not have the power, to make orders requiring a company to register a transfer of the husband's substantial, but not controlling, shareholding in a private company. The memorandum of association of the company provided that the directors could refuse to register a transfer.

[11] At *Tomaras* High Court para 100 and see discussion on the danger of elevation of "elevating a presumption to a rule of construction" at paras 102 to 109

That limit on power was addressed in 2003 with the amendments introducing a new Pt VIIIAA to the FLA and the introduction of 90AE.

His Honour points out that an Order under 90AE (1) or (2) of the FLA can only be made if **five** requirements as set out in 90AE **are satisfied**

> "(a) the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and
>
> (b) if the order concerns a debt of a party to the marriage – it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and
>
> (c) the third party has been accorded procedural fairness in relation to the making of the order; and
>
> (d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order; and
>
> (e) the court is satisfied that the order takes into account the matters mentioned in [s 90AE(4)]."[12]

His Honours view of whether or not it is likely that the section would in all practicality be used is not as bleak as the view expressed by Gordon J.

See para 128 repeated below

128. The effect of s 90AE(3)(b) is that the Crown will only be subject to the substitution of a person as its debtor **where it is not foreseeable that the substitution would cause the debt not to be paid in full.** Further, two of the

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matters in s 90AE(4) which the court must take into account are (i) the taxation effect (if any) of the order on the parties to the marriage**[150]**, and (ii) any other matters raised by the third party, who must be accorded procedural fairness. **Hence, if the order would have the effect of depriving a spouse of the possible exercise of rights of objection to, review of, or appeal from, the assessment, then this could be a taxation effect (s 90AE(4)(a)) or a reason of justice and equity (s 90AE(3)(d)) that would militate against making the order.** Further, to the extent that an order under s 90AE(1) would have an effect on the **general interest charge provisions in Pt IIA of the *Taxation Administration Act*, or the Commissioner's power to amend assessments,** then these matters would be taken into account by the court when considering, under s 90AE(3)(d), **whether it is just and equitable to make the order.**

HIS HONOURS VIEW ON THE PROCEDURE

His Honour said that once the court's **jurisdiction was challenged** on the basis of the case stated then the Court was **duty bound not to ignore that challenge** and proceed on the assumption that it had authority to hear the matter but **to appropriately reserve that matter for the consideration of the Full Court.**

His Honour also viewed the Full Court's answer as appropriate as the answer dealt with the ***existence* of the power and not whether it was appropriate to exercise it** [13]

[12] *Tomaras* at para 127
[13] See *Tomaras* at 131 to 134

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POST TOMARAS

WHERE DOES THIS LEAVE US?

I am unable to find any further decisions that have gone to judgement on the question of substitution when the debt is one to the ATO.

Clearly the High Court has held that the Family Court has both the power and the jurisdiction to make "substitution" orders that will bind the Commissioner but only if certain conditions are met.

If one considers the Judgement of her Honour Justice Gordon one might struggle to think that will ever occur.

If one considers the Judgement of His Honour Justice Edelman one might consider that the matters of concern relate to whether or not the Court will make the order.

If one can make a substitution order for say a judgement debt on a loan with interest accruing daily, how that might be different to a judgement debt on a taxation debt with GIC accruing daily?

Clearly there is increasing debt in both cases

Clearly, however if there are assets that can be realised then is it not reasonably foreseeable that the debt will be met?

However, as her Honour Justice Gordon pointed out at para 88 why would one not use section 80(1)(f)?

I note that Her Honour Johns J adjourned a matter where a substitution order was sought pending the High Court decision. See **Harvey & Harvey and Anor [2017] Fam CA 1111 (22 December 2017)**

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I am unaware what happened in that matter. I am aware of a subsequent decision in relation to the Children of these parties. They were unrepresented and Cronin J struck out various applications and cross applications including enforcement proceedings and contempt proceedings in a scathing judgement about the parties. See **Harvey & Harvey and Anor [2018] FamCA 73 (15 February 2018)**

TOMARAS was followed in ***Abadi & Safar*** **[2019] FCCA 8 (9 January 2019)** but the **debt sought to be substituted upon the other party was not a taxation debt**.

The case is a nice judgement to follow re property orders in a short marriage

The debt arose from a borrowing by the Wife for a deposit on a property in the Husband's name and negatively geared in his favour. The court held there could be a substitution order substituting the Husband for the Debt of the Wife for the deposit.

CAPITAL GAINS TAX ROLLOVER RELIEF

BEWARE OF SLOPPY ORDERS!

Rollover relief applies to the transfer of assets with a CGT liability that would arise on sale or on a deeming event by the *Income Tax Assessment Act* (1997) (Cmwlth) (ITAA)

Rollover relief applies to the transfer of a CGT asset from a company or a trust to an individual if the transfer is pursuant to a court Order or BFA (See section 126.15 of the ITAA)

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If that rollover relief is to occur, then it is prudent to insist on purchase documentation and holding cost documentation. It is also prudent that you get some very good advice and have some very good drafting when proposing such transfers.

A case on point -

***ELLISON V SANDINI Pty Ltd* (2018) FCAFC 44 27/3/18**

Mr and Mrs Ellison had consent property orders in the Family Court in 2009. Those orders were amended by consent in September 2010 The September 2010 Orders set aside part of the original orders, joined Sandini Pty Ltd, ("Sandini") "*as trustee for the Ellison Family Trust*" and required Sandini, in that capacity, to do all acts and things and sign all documents necessary to transfer to Ms Ellison 2,115,000 shares in a publicly listed company known as Mineral Resources Limited (**MIN)**.

The problem with the Order was that Sandini was NOT the trustee of the Ellison Family Trust. Sandini was the Trustee of another trust; The Karratha rigging unit Trust. ("KRUT") In that capacity Sandini did own the relevant shares.

I repeat para 45 of the Judgment below by way of background

45…. As noted, Sandini was the trustee of the KRUT. Sandini as the trustee for the KRUT owned over 35 million shares in an Australian public company, MIN. KRUT is a unit trust in which **Wabelo** Pty Ltd as trustee for the **Ellison Family Trust** is the sole unit holder. The Ellison Family Trust is **a discretionary trust the beneficiaries of which include Mr Ellison and another company Ellison (WA) Pty Ltd, which has one issued share beneficially owned by Mr Ellison.**

Ms Ellison was the sole director and shareholder of **Wavefront**, the trustee of the **Felstead Family Trust**.

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Can anyone see problems looming?

In response to a request by Mrs Ellinson, Sandini transferred the relevant shares; but not to her, rather to a company that she nominated; Wavefront Asset Pty Ltd ("Wavefront").

Mr. Ellison and Sandini sought a declaration in the Federal Court that they were entitled to rollover relief. In other words that they would not be deemed to have a CGT event on the transfer out of the shares. At first instance the primary Judge made the declaration. Both the Commissioner and the Wife appealed that decision.

We are not privy to the material filed by each party in the case. **Did the Husband think that his company Sandini would not have to bear the burden of any CGT? Clearly Sandini was content with the result at first instance and it is the Wife and the Commissioner who appealed the decision.**

Was the Wife being opportunistic? Or was it made clear to her when she signed the consent orders that she would take the shares at their cost base and if she sold them have to pay the CGT.

WHY was it that the WRONG Trust was named in the Orders?

On appeal to the Full Court of the Federal Court Jagot J said three questions should be answered

1 Did the Family Court orders mean that a "**change in ownership**" as referred to in s 104-10(2) of the ITAA 1997 had occurred so that Ms Ellison beneficially owned 2,115,000 of MIN shares… to which Sandini held title at the time the order was made?.. The Commissioner contends that whatever rights were vested in Ms Ellison as a result of the orders those rights **did not amount to equitable or beneficial ownership of any shares in MIN which Sandini owned in its**

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capacity as trustee of the KRUT. Ms Ellison also contends that a "**change of ownership**" requires a transfer of legal title which the Orders did not effect;

2. Did the Family Court orders, **either by reason of the change in beneficial ownership which the primary judge found had occurred** and held to constitute CGT event A1 as defined in s 104-5 of the ITAA 1997 **or the transfer of shares by Sandini to Wavefront, engage the rollover relief provision in s 126-15(1)(a) of the ITAA 1997?** This provision refers to a trigger event which involves a company (the transferor) or a trustee (also the transferor) and a spouse or former spouse (the transferee) of another individual **because of a court order** under the Family Law Act. The primary judge held the provision was engaged on both bases. **The Commissioner and Ms Ellison contend the provision was not engaged as the orders did not effect a change in ownership of the shares (as the first basis)** and **no shares were transferred to the spouse or former spouse as transferee and thus Ms Ellison was not "involved" as s 126-15(1) requires (as to the second basis).** Ms Ellison also contends **that no shares were transferred "because of" the Family Court orders;** and

3. Does s 103-10(1) of the ITAA 1997, which provides that Pt 3-1 and Pt 3-3 of the ITAA 1997 (the latter of which contains s 126-15) **apply as if a person has received money or other property if "it has been applied for your benefit...or as you direct", mean that ss 104-10(2) and/or 126-15(1)(a) are deemed to apply to Ms Ellison because she directed the transfer of shares to Wavefront**? The primary judge held that s 103-10(1) operated in this way. **The Commissioner and Ms Ellison contend that s 103-10(1) only operated to engage provisions in Pts 3-1 and 3-3 of Ch 3 to the ITAA 1997 involving the receipt of money or other property.**[14]

[14] From *Ellison v Sandini* at para 35.

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It is obvious when one reads the above passages that the Wife, the Husband and the Commissioner were arguing about who would wear the CGT and when.

SO, WHAT DID THE FAMILY COURT ORDERS MADE BY CONSENT SAY?

I repeat the Orders by Consent (when the parties were represented below)

1. Sandini Pty Ltd as trustee for the Ellison Family Trust ("Sandini") be joined to these proceedings as second respondent.

2. Pursuant to s 79A of the Family Law Act 1975 as amended Orders 2.3-5 inclusive of the orders made by consent on 23 September 2009 be set aside.

3. Within 7 days of orders being made Sandini do all acts and things and sign all documents necessary to transfer to the wife 2,115,000 Mineral Resources Limited shares.

The orders were signed by Mr Ellison and Ms Ellison. Mr Ellison has also signed in his capacity as:

> "Sole Director and Sole Company Secretary of Sandini Pty Ltd in its own right and as trustee for the **Ellison Family Trust Pty Ltd** in accordance with Section 127 of the Corporations Act 2001."
>
> Ms Ellison sent an email to Mr Ellison on 29 September 2010 asking that the MIN shares be transferred to Wavefront as trustee for the Felstead Family Trust.

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On 30 September 2010 Mr Ellison for Sandini and Ms Ellison for Wavefront signed a share transfer form for the transfer of 2,115,000 shares in MIN from Sandini to Wavefront. This transfer was registered on 4 October 2010.

Sandini, Mr Ellison, Wabelo and Ellison (WA) (another company)(not actually explained) commenced a proceeding seeking declaratory relief. They sought a declaration that on or before 30 September 2010 beneficial ownership of 2,115,000 shares in MIN owned by Sandini passed to Ms Ellison upon the making of the 21 September 2010 orders **or steps taken as a consequence of these orders** (defined as the **Disposal**). They also sought a declaration that in calculating the liability to income tax of the applicants for the year ended 30 June 2011 **Sandini, in its capacity as trustee of the KRUT, is entitled to rollover relief in relation to the Disposal**.

One has to stop and wonder here how there could be such a monumental mismatching of companies to trusts and a transfer not ever contemplated by the Orders could be considered by any reasonable person to be "as a consequence of the orders"

At first instance, however, the Primary Judge held just that. (repeating from paras 59,60, and 61 of the appeal)

59. The primary judge held that the 21 September 2010 orders caused a change in ownership of 2,115,000 MIN shares owned by Sandini so that CGT Event A1 happened on the making of those orders within the meaning of s 104-10 of the ITAA 1997.

60. The primary judge also held that the facts engaged s 126-15 of the ITAA 1997 which provide for rollover consequences if the trigger event involves "a company (the ***transferor***) or a trustee (also the ***transferor***) and a

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spouse or former spouse (the ***transferee***) of another individual because of: (a) a court order under the *Family Law Act 1975*...".

61. The primary judge further considered that s 103-10 of the ITAA 1997 **had the effect of deeming Wavefront's receipt of MIN shares to be receipt by Ms Ellison so that ss 104-10(2) and 126-15(1) of the ITAA 1997 were taken to apply to h**er.

WHAT DID THE FULL COURT SAY?

Jagot J agreed that a change of LEGAL ownership is not required within the meaning of sections s 104-10(2) of the ITAA.

That is because the section says "a change of ownership does not occur if you stop being the legal owner of the asset but continue to be its beneficial owner. Thus, a change in **beneficial** but not legal ownership is sufficient.

But WAS there a change of beneficial ownership in the shares in this case that could be deemed as such pursuant to section 104-10(2) of the ITAA?

The problem His Honour identified was that whilst he held that there can be a valid trust over a "**fungible"** pool of assets the assets and the relative proportions must be identified with sufficient certainty[15].

So his Honour asked this question; did the Orders create a trust over all of the Sandini shares in MIN (Sandini had far more shares in MIN than those transferred by the Order) with the Wife the beneficiary of the 2,115,000 shares as ordered and Sandini the beneficiary of the balance?

[15] *Ellison v Sandini* at para 148

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The problem in that approach, as his Honour points out, was that the shares originally held by Sandini might all have varying cost bases (e.g. purchased at different times and for a different price per share)

Thus, when it came to the actual transfer; Sandini might theoretically be able to transfer to the Wife the shares that would leave her with the large taxation consequences on sale.[16] His Honour also noted that the issue was not the intention inferred or actual of the transferor but the "*proper construction of the Orders"*[17]

On any view the Orders of the court had the wrong Trust. Sandini held the shares on trust for KRUT

His Honour took the view that the orders were not necessarily a transfer of real property owned by one of the parties at the time the Orders were made.[18]

On a construction of the Orders His honour took the view that had a **court of equity been dealing with the shares it would not have found a change in beneficial ownership to satisfy the requirements of section 104-10(2) of the ITAA**[19]

One of the most important aspects of His honours reasoning **was that there was nothing in the orders that dealt with what the cost base might be that was transferred**.

Further His Honour viewed the fact that Sandini was not the Trustee of the Ellison Family Trust as a matter that would be "confronting" on a court in equity;

[16] See above at para 149 His Honour followed *White v Shorthall* (2006) NSWSC 1379
[17] See above at para 150
[18] See above at para 158
[19] See *Ellison v Sandini* at para 160 to 173

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*"**As a result, it would be confronted with an order which purported to join a party which did not exist (Sandini as trustee for the Ellison Family Trust) and purported to require that non-existent party to do things necessary to transfer shares to Ms Ellison**."*[20]

What would a court of equity do? It could not ignore the terms of the orders. It could not construe those orders other than consistently with principle. It could not read out the words "...as trustee for the Ellison Family Trust" in order 1 and read in the words "...as trustee for the KRUT". I do not see how the court could have granted the declaration to Sandini.[21]

There was of course a CGT AI event within the meaning of the ITAA. The Share transfer form however was NOT from the trust to the Wife but to her company and that was not even mentioned in the Orders. **So, was 126-15(1) applicable?**

Section126-15(1) provides for the roll-over consequences in s 126-5 if "the trigger event involves a company (the **transferor**) or a trustee (also the **transferor**) and a * spouse or former spouse (the **transferee**) of another individual because of..." one of the nominated matters (which includes in (a) an order of the Family Court).

At first instance the Primary judge saw the Wife's involvement as enough as she had directed the transfer go direct to her company Waverfront

At Appeal Jagot J held that "***section 126-15 means that a spouse or former spouse is involved in the trigger event in one capacity only, as transferee from a company or a trustee***". [22]

His Honour held so because -

[20] Again at para

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1. The ordinary meaning of section 126-15 and 126 -5 was clear and **provided always for the transferee to be a spouse or former spouse**[23]

2. The only way a transferee could be involved under the sections was as a transferee receiving (even if the spouse was a transferor) [24]

3. The sections were successors to older rollover sections replaced by legislation in 1989 and the explanatory memorandum to the amendments made no mention of expanding a class to whom rollover relief applied Rather the purpose of the amendments was to simplify the sections[25]

Thus, it was the view of Jagot J that section 126-15 was not engaged

His Honour further found there was no "**causality**" between the relevant Orders and the transfer. The fact (if there was such a fact and it was pretty obvious that from the Wife's point of view there was not such a fact) that both Parties "believed they were giving effect to the Court Orders was irrelevant to the plain reading of the Orders. Two things were required.

1. The existence of the Court Order

2. The trigger event under 126-15 **BECAUSE** of the Court order. His Honour noted that requirement as **objective** and not subjective[26]

---

[21] At para 170
[22] At para 176
[23] *Ellison v Sandini* at para 177
[24] As above at para 178
[25] As above at para 179
[26] *Ellison v Sandini* at para 189-190

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3. The transfer of shares from Sandini (even if there had been the right Trust named in the orders) to an entity other than the spouse or former spouse as transferee **could not engage the provision of section 126-15 because quite simply that is not what the section says.**[27]

4. If one reads para 194 set out below His Honour sums up the problems for the Husband and Santini in the case

   …in my view the 21 September 2010 orders are ***inefficacious in all relevant respects****.* ***They purport to join Sandini in a capacity which it did not have*** *(order 1).* ***They purport to require Sandini in that non-existent capacity to do things (order 3).*** *No doubt order 2 (vacating earlier orders) is an operative order which binds Mr Ellison and Ms Ellison, but that order has nothing to do with s 126-15 of the ITAA 1997.* ***The fact that Sandini did things in another capacity (as trustee of the KRUT Sandini transferred shares to Wavefront) does not mean that the orders were efficacious.*** *It may mean that Mr Ellison and Ms Ellison agreed that Sandini should do these things* ***and that they would treat this as satisfaction of the orders, but that agreement does not give the orders efficacy.*** *The relevant point for present purposes* ***is not the existence of an agreement between Mr Ellison and Ms Ellison subsequent to the making of the orders. It is whether it can be said that anything occurred "because of" the orders within the meaning of s 126-15.***

196. His Honour went on to point out that ..***the fact that it may well have been open to the parties to seek to vary the 21 September 2010 orders by consent so that they referred to Sandini being joined and required***

[27] As above at para 193

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to do things in its capacity as trustee of the KRUT is immaterial for the simple reason that this never occurred.

Does this mean that if these parties had amended the Orders that Sandini would have got the rollover relief? I am not sure. One must also doubt whether Mrs Sandini would have agreed to a further amendment.

The remaining argument that was successful at first instance for the Husband and Sandini was the "***Deeming Provision** Issue*"

By s 103-10 of the ITAA 1997, Pt 3-1 and Pt 3-3 of Ch 3 of that Act (which contain s 104-10 and s 126-15, and other sections relating to CGT event A1 and roll-over relief) applies "to you as if you had received money or other property if it has been applied for your benefit ... or as you direct". **The primary judge treated this provision as if it operated to deem Ms Ellison to have acquired ownership of the MIN shares transferred to Wavefront because those shares had been applied as she directed or to her benefit**.

Jagot J found that to be incorrect on appeal.

THE RESULT

Siopas J agreed with the judgment of her Honour Jagot J

Logan J dissented and found the appeals should be dismissed

It is beyond the scope of this paper to discuss in detail the dissenting judgement

Suffice to say that in an area as complex as this at least one Judge agreed with the primary judge's decision.

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LESSONS

Not every practitioner will have parties that are dealing in millions and millions of dollars of shares and other assets.

However, many practitioners in their daily practice will have parties with family trust and or unit trusts that hold assets that might be required to be transferred to the other party.

Clearly a fundamental mistake was made in identifying the relevant trust that Sandini was trustee for.

Clearly the "transfer by direction" of the Wife from Sandini to her company **was not something contemplated by the Orders**

Query if it had been, if relief would have applied in any event if the provisions of section 126-15 and 126 -5 are to be given their "**ordinary meaning" as Jagot J found they did.**

THE PROVISIONS OF THE ITAA

The relevant parts are set out in the Judgement and are repeated below for reference

1. Part 3-1 of Ch 3 of the ITAA 1997 contains s 103-10 which is in these terms:

(1) This Part and Part 3-3 apply to you as if you had received money or other property if it has been applied for your benefit (including by discharging all or part of a debt you owe) or as you direct.

(2) Those Parts apply to you as if you are entitled to receive money or other property:
(a) if you are entitled to have it so applied; or

(b) if:

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(i) you will not receive it until a later time; or

(ii) the money is payable by instalments.

1. Part 3-1 also contains Div 104 which includes the following provisions:

104-1

This Division sets out all the CGT events for which you can make a capital gain or loss. It tells you how to work out if you have made a gain or loss from each event and the time of each event. It also contains exceptions for gains and losses for many events (such as the exception for CGT assets acquired before 20 September 1985) and some cost base adjustment rules.

104-5

CGT events			
Event number and description	**Time of event is:**	**Capital gain is:**	**Capital loss is:**
A1 Disposal of a CGT asset	when disposal contract is entered into or, if none, when entity stops being asset's owner	capital proceeds from disposal *less* asset's cost base	asset's reduced cost base *less* capital proceeds

[See section 104-10]

104-10

(1) ***CGT event A1*** happens if you * dispose of a * CGT asset.

(2) You ***dispose of*** a * CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law. However, a change of ownership does not occur if you stop being the legal owner of the asset but continue to be its beneficial owner.

(3) The time of the event is:
(a) when you enter into the contract for the * disposal; or

(b) if there is no contract - when the change of ownership occurs.
...

42. Section 995-1 contains defined terms including, except so far as the contrary intention appears:

"***CGT event***" means any of the CGT events described in Division 104. A CGT event described by number (for example: CGT event A1) refers to the relevant event in that Division.

"***dispose of***" a * CGT asset: you ***dispose of*** a CGT asset (in its capacity as a CGT asset) in the circumstances specified in section 104-10.

"***spouse***" of an individual includes:
(a) another individual (whether of the same sex or a different sex) with whom the individual is in a relationship that is registered under a * State law or * Territory law prescribed for the purposes of section 2E of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for the purposes of that section; and

(b) another individual who, although not legally married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple.

43. Part 3-3 of Ch 3 of the ITAA 1997 contains these provisions:

126-1

A same-asset roll-over allows a capital gain or loss an entity makes from disposing of a CGT asset to, or creating a CGT asset in, another entity to be disregarded. For a disposal, certain attributes of the asset are transferred to the receiving entity.

126-5

(1) There is a roll-over if a * CGT event (the ***trigger event***) happens involving an

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individual (the ***transferor***) and his or her * spouse (the ***transferee***), or a former * spouse (also the ***transferee***), because of:
(a) a court order under the *Family Law Act 1975* or under a * State law, * Territory law or * foreign law relating to breakdowns of relationships between spouses; or

...

(2) Only these * CGT events are relevant:
(a) CGT events A1 and B1 (a ***disposal case***); and

(b) CGT events D1, D2, D3 and F1 (a ***creation case***).

...

(4) A * capital gain or a * capital loss the transferor makes from the * CGT event is disregarded.

126-15

(1) There are the roll-over consequences in section 126-5 if the trigger event involves a company (the ***transferor***) or a trustee (also the ***transferor***) and a * spouse or former spouse (the ***transferee***) of another individual because of:
(a) a court order under the *Family Law Act 1975* or under a * State law, * Territory law or * foreign law relating to breakdowns of relationships between spouses; or

...

SUMMARY AND CONCLUSION

One has to wonder at the result for Mrs Ellison as against Mr Ellison who ended up (via his company) with the GCT debt on the disposal of the shares to his Wife's company of choice.

There are clear lessons here for all who are dealing with complex property disputes

1. **ASK TO SEE THE DOCUMENTS**

2. **DO NOT BLINDLY rely on what your client tells you**

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HOW WILL THE COURT DEAL WITH TAX DEBTS TO THE COMMISSIONER?

***JAMES V SNIPPER and ANOR* 2018 Fam CAFC**

This was an appeal from a decision of Watts J in the Family Court where the Parties both had debts to the Income Tax Commissioner. The Husband's debt was over 2 million and the Wife's over 100K.

At first instance, His Honour had found for various reasons that the Wife should receive 95% of the available assets, which would have the Wife with around 1.2 Million dollars and the Husband with around 58K if the tax debts were not included. If the tax debts were included there was a vast shortfall.

The Commissioner intervened. At para 103 of the Full Court decision we are told;

103. The trial judge noted the Commissioner's correct concession there was ***no rule of priority as between the spouses and the Commissioner in relation to the property which was available for division****.* ***The rights of all had to be "balanced and taken into account"*** *(at [302]).*

The trial Judge ordered the Wife to pay her full debt to the Commissioner and pay 200K of the Husband's debt. It was from that decision both the Husband and the Commissioner appealed. The Commissioner sought the Wife pay 600K of the Husband's debt from the available assets. The Husband sought the Wife sell up the home and be left with only her belongings, her savings of around 10K and a debt to her mother of over 80K

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At trial neither the Husband nor the Commissioner made clear the basis for the amounts they each sought the Wife pay the Commissioner.

The Parties separated in 2011 and on the evidence before the Court at trial (by which time the Husband had been sued for the debt by the Commissioner, had a judgement debt that had been reduced somewhat by payments by the Husband but had GIC (general interest charges) that ate substantially into those repayments.)

The reality, on the evidence produced by the Wife at trial, was that around 2012, well after separation the Husband's tax debt was only 300K.

The Wife bore no liability for any part of the Husband's debt to the Commissioner at law.

The Commissioner intervened in the matrimonial proceedings under part VIII of the FLA to try and get the debt paid from marital assets.

The parties had enjoyed an "enviable lifestyle" as the Husband had not paid his tax. Hence the argument that the wife should be responsible for part of the Debt owed by the Husband to the Commissioner.

The Wife argued that the Commissioner was culpable by failing to act to enforce against the Husband and thus allowing the tax debt to balloon. At trial the Judge gave little weight to that submission

Had the trial judge acceded to the Commissioners request for a payment of 600Kfrom the Wife, then the Wife and the children would have been without a home.

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His Honour, at first instance, ordered an amount of 200K on the basis this was around 10 Per cent of the Husband's tax debts and represented about 18% of the Wife's net assets after paying her tax debt.

The important, take home, point from this is that the Wife was found to have to bear 10% of the Husband's taxation debt MANY years after separation.

The Full Court upheld His Honour's decision.

A salutary warning for those that do not want to take the "good with the bad" during and after the marriage!

DIVISION 353 Schedule one of the *Taxation Administration Act* 1953 Previously Section 263 of the ITAA 1936

Commissioner of Taxation v Darling and Anor
2014 Fam CAFC 59 (Thackray, Strickland and Murphy JJ)

An older decision but one that all should be aware of.

Mr Darling (the husband) and Ms Darling (the wife) were parties to Family Court proceedings (the Proceedings).

The Australian Taxation Office (ATO) had commenced an audit of the husband's income tax affairs in June 2009.

In mid-December 2009, ATO officers were given permission by the Registry Manager to examine the file in the Proceedings. Some documents were "tagged", but copies were not made.

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On 9 February 2010, the ATO wrote to the Court seeking permission to copy the "tagged" documents under r 24.13(1)(c) of the *Family Law Rules 2004* (Cth) (the Rules). The ATO did not give notice of its request to either of the parties.

On 1 March 2010, the Registry Manager refused the ATO's request to access the file under the terms of r24.13 of the Rules.

On 29 April 2010, the ATO wrote to the Court referring to the Commissioner's access powers under section 263 of the *Income Tax Assessment Act 1936* and again requesting access to the file to copy the documents.

On 20 May 2010 the Registry Manager granted the ATO access to the file.

On 3 June 2010 and 17 December 2010 respectively, ATO officers inspected the file and copied documents from it.

On 7 December 2010, the Proceedings were dismissed by consent.

On 3 July 2012, the Commissioner sought leave to intervene in the Proceedings to be released from the implied obligation articulated in *Harman v Secretary of State for Home Department* [1983] 1 AC 280 (adopted by the High Court in *Hearne v Street* (2008) 235 CLR 125) not to use documents obtained from the file for a purpose not related to the Proceedings.

At first instance the Family Court dismissed the Commissioner's application and held that he remained under an implied obligation not to make use of the documents for a purpose not related to the litigation. The primary Judge was not satisfied that the Commissioner had shown that there were special circumstances justifying his release from the implied obligation; or that his

release from the obligation was necessary or in the public interest; or that such a release should override the public interest in maintaining the privacy of the parties to the proceedings.

The Full Court of the Family Court granted the Commissioner leave to appeal and set aside the primary Judge's order on the basis that the exercise of discretion not to release the Commissioner from the implied obligation miscarried.

The Full Court was critical of the conduct of ATO officers seeking access to Court documents by the use of the Commissioner's access powers. However, the Court was prepared to overlook any interference with the processes of the Court, because the ATO did not seek to use the documents without first seeking to approach the Court to be released from the implied obligation.

The Full Court rejected the Commissioner's grounds of appeal, that the implied obligation did not apply to the Commissioner as a stranger to the litigation and in the context of his powers to make assessments under section 166 and 167 of the *Income Tax Assessment Act 1936* (Cth).

The Full Court considered the way in which the discretion should be exercised and noted that there must be a difference between cases involving private commercial disputes and those, such as this case, where the applicant seeking release from the implied obligation **is performing a public duty**. The Full Court considered the following considerations were relevant to the exercise of the discretion in the Commissioner's favour:

The Commissioner was performing an important public duty.

The Commissioner was engaged in a substantial, targeted audit.

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Although many of the annexures to the affidavits may be available to the Commissioner from other sources, the parties' own assertions about the history of acquisition of assets would be available only to the Commissioner by interview with the parties in which they may have an incentive not to be frank.

The cogency of any evidence would be the subject of scrutiny in any proceedings that may be instituted after the Commissioner completes the audit and makes assessments.

The release of the Commissioner from the obligation would not be "inconvenient" to the husband. Nor would there be any prejudice to the husband, unless the documents did establish he has not been meeting his taxation obligations:

There are restrictions on the way in which the Commissioner can use the information obtained from the court file which would ensure that the documents do not venture into the public arena, thus ensuring there is no breach of section 121 of the *Family Law Act* (Cth)

The affidavits and financial statements were sworn by the parties for the purposes of the proceedings and therefore in the expectation that they might be read in open court.

The fact the Commissioner does not carry the burden of proving the accuracy of his assessment was irrelevant.

Albeit brief, and expressed in general terms, the ATO officer sufficiently stated the purpose for which the documents were required in his affidavit.

> **The Full Court considered an important consideration was whether or not granting the Commissioner relief from the implied obligation was likely to result in discouraging parties from making full and frank disclosures to the court. The Full Court noted that the Family Court**

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can and does refer matters involving tax evasion to the relevant authorities for investigation. The Full Court concluded that releasing the Commissioner from the implied obligation would not result in any greater disincentive to parties being frank with the court.

High Court of Australia
[2014] HCA Trans 178 Hayne and Keifel JJ (15 August 2014)

The High Court found that there was no point of law suitable to a grant of special leave.

I note the ATO has a published view of this decision that remains as far as I can ascertain from its website its view. I repeat that below;

ATO view of Decision

"*The Commissioner accepts the decision of the Full Court of the Family Court that the implied obligation applies to the Commissioner as a stranger to the litigation.*

***The ATO's policies were updated in 2011 to instruct ATO officers not to seek to inspect or copy documents from court files by relying on access powers, because such conduct could constitute contempt of court.*"**

***"Where the Commissioner, as a non-party to litigation, seeks access to court documents for use other than in the proceeding in which the documents were filed, the Commissioner will make an application to the court for release from the implied obligation. The Commissioner will have regard to the factors considered by the Full Court of the Family Court in making any such application.*"**

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WHERE DOES THAT LEAVE ONE IN FAMILY COURT PROCEEDINGS?

The case has been referred to recently in ***Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)*** **[2018] FCAFC 38 (20 March 2018)**

In Rennie the court had to decide whether the recipient of a notice to give documents to the Commissioner pursuant to s 353-10 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (the **Notice**) was prevented or excused from complying with the Notice by reason of the principle in *Harman v Secretary of State for Home Department* [1983] 1 AC 280 (the **Harman obligation**) and whether the Harman obligation prevents taxation officers from receiving any documents given to them pursuant to the Notice, or using those documents in the lawful exercise of the powers and functions vested in the Commissioner.

At paras 21 and 23; the Full Court of the Federal Court said:

> The Commissioner is given various powers in furtherance of the discharge of his duties. **These powers include the powers to obtain information and evidence provided in Div 353 of Sch 1. Section 353-10 furnishes a power, *inter alia*, to obtain information, evidence and documents. It corresponds with the former s 264 of the ITAA 1936. Section 353-15 furnishes a power, *inter alia*, to access land, premises or a place, and to full and free access to documents, goods or property and to inspect, examine, make copies of, or take extracts from, any documents. It corresponds to the former s 263 of the ITAA 1936**.
>
> 23. Section 353-10(1), under which the Notice was issued, is in the following terms:

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The Commissioner may by notice in writing require you to do all or any of the following:

(a) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a taxation law;

(b) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;

(c) **to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.**

The Full Court of the Federal Court held that The Harman obligation does not require the person owing the obligation to refuse to comply with a valid notice issued under s 353-10 or to make an application to the relevant court for release from the undertaking. That is because the content of the obligation does not extend to requiring the holder of the obligation not to comply with such a notice. Nor does the Harman obligation require the Commissioner not to use the documents, when received, for the purpose of discharging his statutory duties and functions. (at para 36)

Their Honours said... "In our opinion, providing documents to the Commissioner in answer to the Notice is not ***use*** of documents by the person the subject of the Notice. Rather, the true character of providing such documents is compliance with a requirement to give any document to the Commissioner in circumstances where a refusal or failure to give the document, where the person is capable of so doing, is an offence of absolute liability: s 8C of the TAA. An offence under s 8C is punishable on conviction under s 8E." (at para 37)

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Their Honours went on to comment upon DARLING. I set out the relevant paras and the conclusion below;

41. The respondent relies on the decision of the Full Court of the Family Court in *Commissioner of Taxation v Darling* [2014] FamCAFC 59; (2014) 285 FLR 428. Relying on his information gathering powers then contained in ss 263 and 264 of the ITAA 1936, the Commissioner had obtained documents from a Family Court file in proceedings to which he was not a party. He had sought an order from the primary judge releasing him from an implied obligation not to make use of those documents for purposes other than those of the proceedings. The primary judge had dismissed his application. The Full Court allowed the appeal. This was on the basis that the trial judge erred in exercising her discretion to release the Commissioner from the implied obligation. The Full Court relied upon the conduct of an audit pursuant to the duty and power imposed by s 166 of the ITAA 1936 in concluding that the Commissioner should be released from the implied obligation: at [175] and [198].

I pause here to note that there appears to be a grammatical error in this judgement. If your read the above para you might conclude that at first instance in the Family Court the Judge released the Commissioner from the obligation. That is not the case and it was the Full Court who did so.

In RENNIE their Honours went on to say (at para 56) -

56.**The Harman obligation does not prevent or excuse a person owing that obligation from complying with a valid notice issued under s 353-10(1)(c). Nor does the Harman obligation prevent the applicant or taxation officers receiving documents the subject of a Harman obligation from using those documents in the lawful exercise of the powers and functions vested in the Commissioner**. The applicant accepted, by reference to *De Vonk*, that it was possible that a s 353-10 notice could operate so as to **amount to a contempt**.

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However, that is not this case and the issue does not arise **if the only question raised by the facts of the particular case is whether there is a constraint on production or use of the documents by reason of the Harman obligation**.

SUMMARY

Given the current position stated by the ATO on its website it would appear that the ATO would seek leave of the Court to access and use documents now rather than use its coercive powers and demand the documents from a registrar of the Court.

Ultimately the warning is clear for those that seek to defraud the Taxation Office.

Documents in Family Law proceedings are not sacrosanct.

It is important to be aware of the realities for your client when both you and the client may not have thought of intervention in the sense of viewing affidavits by the Commissioner.

I hope this paper has assisted the reader.

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MELBOURNE AUGUST 2019