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STRAPLINE: costs/family law

HEADING: Funding the fight

PRECEDE: A party's ability to obtain orders for payment of legal costs by the opposing party in family law matters will depend on the specific statutory power governing the order sought. By Jacqueline Campbell

Frequently in family law proceedings, one party has greater access to resources to pay for legal costs and related expenses than the other party does. The discrepancy between parties' resources is often most stark in complex financial cases. This article looks at the options for a party to obtain an order for funds to pay legal costs and disbursements.

An order can be obtained under the *Family Law Act* 1975 (Cth) for:

- periodical or lump sum spousal maintenance under ss72 and 74;
- a partial or interim property order under s79 as permitted by s80(1)(h);
- a *Barro***1** or *Hogan***2** order under s117(2);
- a "dollar for dollar" or *G & T***3** order under s117(2).

The Full Court of the Family Court has emphasised the need to identify the appropriate source of power.**4**

Importantly, the pre-requisites for partial or interim property orders identified by the Full Court in *Harris & Harris***5** were relaxed by the Full Court in *Strahan & Strahan (interim property orders).***6**

Interim orders

In *Harris*, the Full Court said that in exercising the power to make an interim order, the following matters must be considered:

"1. The exercise of the power should be confined to cases where the circumstances presented at that time are compelling. As a generality, the interests of the parties and the Court are better served by there being one final hearing of s79 proceedings . . .

2. It is an exercise of the s79 power. Consequently it must be performed within those parameters . . .

3. Of necessity it is likely to be a somewhat imprecise exercise. Consequently, it must be exercised conservatively and the judge must be satisfied that the remaining property will be adequate to meet the legitimate expectations of both parties at the final hearing, or that the order which is contemplated is capable of being reversed or adjusted if it is subsequently considered necessary to do so" (at 79,929–79,930).

Various courts have since expressed doubts about whether the first matter in *Harris* was necessary.**7**

Relevant considerations

In *Zschokke & Zschokke***8** the Full Court said that three matters were relevant, regardless of the power used:

- a position of relative financial strength on the part of the respondent;
- a capacity on the part of the respondent to meet their own litigation costs; and
- an inability on the part of the applicant to meet their own litigation costs (at 83,217).

The Full Court said that two criteria identified by the trial judge – the complexity of the respondent's financial affairs and a need for an expert investigation – were not necessary pre-conditions. However, they added considerable weight to the application (at 83,218).

The source of power must be identified, as the requirements depend on the source of jurisdiction:

- If it is ss79 and 80(1)(h), the matters set out in ss79(4) and 75(2) are relevant.
- If it is s117, the matters in s117(2A) must be addressed, except perhaps paragraphs (d) and (f).

Section 117(2) gives the Court power to make costs orders, including interim costs orders, if the Court is of the opinion that the circumstances justify it doing so. The Court must consider the matters listed in s117(2A). The relevant sub-sections are:

"(a) The financial circumstances of each of the parties to the proceedings

(b) Whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party

(c) The conduct of the parties to the proceedings in relation to the proceedings . . .

(e) whether any party to the proceedings has been wholly unsuccessful in the proceedings . . .

(g) such other matters as the court considers relevant."

In *Zschokke*, the Full Court considered there were "real uncertainties concerning the outcome of the wife's property settlement claim" (at 83,220). The wife's eventual property entitlements might not be large enough for the money advanced to be satisfactorily or justly taken into account. This factor was fatal under s80(1)(h) but not necessarily fatal under s117(2).

The question as to whether an order could be made under s117(2) in a parenting case where there were no pending property proceedings was left open (at 83,217).

"Compelling circumstances"

In *Strahan & Strahan (interim property orders)*,**9** the Full Court reviewed earlier decisions on interim costs and interim property orders**10** including *Harris.* It found that the second and third criteria in *Harris* were consistent with *Zschokke*. However, the term "compelling circumstances" used in *Harris* and applied by the trial judge in *Strahan* did not appear anywhere in the legislation. The Full Court said (at [123]):

"In considering the Full Court's use of the expression 'compelling circumstances' in *Harris* it is important to

remember, as Riethmuller FM recently observed in *Wenz v Archer***11** . . . that "some care needs to be taken to ensure that explanations of the reasons for the result in a particular case should not be taken as new principle".

The Full Court observed that the Full Court in *Zschokke* agreed that the requirement of justice must remain a "basic" condition in the making of an order under s117.

Spousal maintenance

The assets, liabilities, income and expenses of an applicant for spousal maintenance must be set out in a financial statement. The applicant must establish that, consistent with s72, they are unable to support themselves adequately and the respondent is reasonably able to provide support.

The expenses which are appropriate vary depending on the circumstances. For example, s75(2)(g) requires the Court to consider "a standard of living that in all the circumstances is reasonable". The Court must make the order that is proper under s74.

The High Court has expressed conflicting but inconclusive views as to whether legal costs can be claimed as an expense when assessing spousal maintenance. In *Re JJT; ex parte Victoria Legal Aid***12** Gaudron J considered that both s117(2) and s74 may give power to make an interim costs order. She said (at 85,181):

"When regard is had to the consideration that s117(2) expressly authorises interlocutory orders, that sub-section must, in my view, be construed as authorising orders requiring a party to proceedings under the Act to provide another party with funds to conduct those proceedings . . . Doubtless, the power to award maintenance under s74 of the Act also extends to orders that a party to the marriage provide the other with funds to conduct proceedings under the Act."

Kirby J considered that orders for anticipatory costs fell within s117 rather than being an order for maintenance. He said that it was a:

"flimsy suggestion that orders in favour of a spouse amount to spousal 'maintenance' within s74 of the Act. I do not accept that argument. There is no reason why 'costs' in s117(2) should not be given the most ample meaning that the word permits. That word is broad enough to include future, as well as past, costs. There is nothing inherent in the notion of 'costs' that requires a contrary conclusion. There is much in the context and projected operation of the Act which supports the opposing construction" (at 85,192).

The Full Court in *Zschokke* said that it remained open as to whether s74 was a source of power.

In *Celestin & Celestin***13** the wife successfully applied under s77 for urgent spousal maintenance to meet legal costs and disbursements. Relevant matters included that:

- Cohen J was satisfied, and the husband appeared to concede, that she would receive sufficient funds under any s 79 order to cover the lump sum sought.
- The wife's income and assets were insufficient to meet her legal costs.
- The costs agreement was fair and the fees of the wife's lawyers were reasonable given their expertise and the nature of the case.
- There was no restriction on the husband's ability to pay his lawyers. If the order was not made the wife was likely to be unfairly inhibited in the preparation and conduct of her case although there was no suggestion that her lawyers would stop acting.

Cohen J ordered that the husband pay $100,000 of the $165,000 estimate of her likely costs up to the start of the trial. He assumed her lawyers could wait to be paid their fees for the trial. He did not make an order for a partial property settlement. He appeared to assume that the trial judge would follow the Full Court's approach in cases such as *Chorn & Hopkins*,**14** where paid legal costs were notionally added back to the property pool. However, by making a spousal maintenance order under s77 he appeared to preclude the payments being regarded as property entitlements.

Barro or *Hogan* order

The Full Court in *Berman & Berman***15** described a *Barro***16** or *Hogan***17** order as "an order which provides a party with funds for the purpose of pursuing family law litigation and with the ultimate characterisation of those funds being left to the judge who finally determines the litigation between the parties" (at [44]).

The requirements for this type of order are consistent with the three matters listed above in *Zschokke*.

In *Hogan*, the Full Court held that the order needed to be for a fixed sum rather than open-ended. An application could be made later for a further sum if necessary. As the factors in s117(2A) must be addressed, the capacity of the respondent to pay the sum sought was important. A capital sum or readily realisable property must be identified.

"Dollar for dollar" order

A "dollar for dollar" order is also known as a *G & T***18** order. An identifiable lump sum is not required although capacity to pay the costs order is required under s117(2).

In *G & T* the wife sought an interim order for the husband to pay her $25,000 for her legal and related costs. O'Reilly J found that the wife's solicitor's failure to provide a breakdown of the amount sought was fatal. Further, there was no identified property likely to be the subject of a property order in the wife's favour, against which an advance for legal fees could be offset.

A "dollar for dollar" order was, however, held to be appropriate on the grounds that:

"In order to level the playing field, if the husband is paying money to his solicitors and to engage counsel on his behalf there is no reason why he ought not pay the same sums to the wife's solicitors on the dollar for dollar basis" (at [105]).

With this type of order there was no need for the wife to detail her expected costs.**19**

O'Reilly J said the wife had a strong prima facie case for s79A relief, and a strong prima facie case for the trust to be ignored as a sham. If that was the end result, the Court could at least divide the proceeds of sale of the home

sold by the trust.

In *Iphostrou & Iphostrou*,**20** Cronin J made a "dollar for dollar order", leaving the question of the categorisation of any payments made as a matter for determination by the trial judge.

The wife's evidence was that she needed significant funds to conduct the proceedings. She owed $195,000 to her lawyers and her total costs were anticipated to be around $900,000. The husband had paid costs of more than $350,000 in less than 12 months to his lawyers.

Cronin J said the wife had, consistent with *Strahan*, at least an arguable case for substantive relief that deserved to be heard. He needed to consider the merits of the claim:

"There is at least a prima facie case that the wife may have an entitlement under s79 and that justifies an order for costs because of the complexity of the problem and the different capacities of the parties to fund that litigation. For a person who has no control and limited assets, the payments by or on behalf of the husband of these legal fees is extraordinary if they are concerned, even in part, with these family law proceedings." (at [55])

Cronin J took into account the husband's ability to have the company pay his costs as a financial resource under s117(2A).

Partial or interim property order

The Full Court said in *Strahan* that there are two stages to the hearing of an application where the power exercised was under s80(1)(h). These are:

- to resolve whether to exercise the power before a final hearing; and
- if it is resolved to do so, to exercise that power (at [118]).

The Full Court discussed the judgment of Riethmuller FM in *Wenz v Archer* with approval, saying (at [132], [134]):

"In relation to the first stage, in our view, when considering whether to exercise the power under ss79 and 80(1)(h) of the Act to make an interim property order the 'overarching consideration' is the interests of justice. It is not necessary to establish compelling circumstances. All that is required is that in the circumstances it is appropriate to exercise the power . . .

"In relation to the second matter, as the jurisdiction under s79 of the Act is being exercised the provisions of that section must be considered and applied but with limitations given that it is not the final hearing. There is also no requirement of compelling circumstances in relation to the substantive step."

The Full Court agreed with the third matter identified by the Full Court in *Harris*, which was described as the "adjustment issue" or "claw-back issue", referring to *Zschokke* and *Gabel v Yardley*.**21** The interim order must be capable of variation or reversal without resort to s79A of the Act or appeal, but this alone was insufficient to justify the order.

The Full Court also said (at [140]–[141]):

"there is no doubt that the financial circumstances of both parties are relevant at the substantive stage and may also be relevant at the procedural stage . . .

"Obviously the applicant should have 'at least an arguable case for substantive relief which deserves to be heard'. Further, in determining at the procedural stage whether to exercise the jurisdiction there may need to be evidence of the applicant's 'likely costs of the litigation' . . . We also accept that 'it is not an essential precondition' that the applicant's legal representatives will not continue to act unless the costs are paid or secured on an ongoing basis."

The Full Court distinguished between the requirements of orders made under s117 and under s79 (at [153]). If the application relied on s117 as the source of power, it was probably necessary for an assessment to be made of the amount required. It might also be necessary that the funds be administered by the applicant's solicitors and applied only to meet the expenses referred to in the order, with detailed records being maintained for review by the Court at the time of the exercise of its discretion in the substantive property proceedings or on the final determination of the issue of costs. However, these matters were not relevant if the source of power was s79.**22**

The wife's later application in *Strahan & Strahan (interim financial orders)***23** was refused because:

- there was considerable dispute as to the size of the pool;
- the husband argued that the wife had received, or had in her possession, property equal to her final entitlements;
- the wife didn't explain the very large amount required for legal expenses;
- her current solicitors had almost $700,000 in their trust account; and
- unlike in the wife's first application, the husband did not concede that the amount sought by the wife was less than she would eventually receive.

A clear statement of the effect of *Strahan* was made in *Felice & Felice*:**24**

"What is being sought here is not the property of another party. The wife seeks access to her own money. In those circumstances, and subject to the requirement not to take a step that cannot be undone, it is illogical that there would be any restriction on access to those funds or any detailed enquiry as to the purposes for which the funds are to be used. It should matter not whether funds are sought to replace a refrigerator or a motor vehicle or to take a trip to Acapulco."

Conclusion

When applying for funds to be provided by the other party for interim costs, it is important to identify the power relied on for making the order, particularly as the requirements under ss74, 79 and 117(2) vary. For an interim order under s79 using s80(1)(h), there must be sufficient assets from which the interim distribution can be made. The requirement of justice is an important consideration but there is no requirement to show "compelling circumstances". There are, therefore, greater opportunities for a party to obtain access to funds to pay off costs

already incurred and meet their legal costs on an ongoing basis using ss79 and 80(1)(h) rather than the more restrictive s117(2). The question of whether s74 is an appropriate source of power remains uncertain. l

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Numbers in square brackets in the text refer to paragraph numbers in the judgment.

1. *Barro & Barro*, Strauss J, unreported, ~~[FAMILY COURT?]~~Family Court, 15 September 1980.
2. *Hogan & Hogan* (1983) FLC 91-300.
3. *G & T* (2004) FLC 93-176.
4. *Zschokke & Zschokke* (1996) FLC 92-693.
5. (1993) FLC 92-328.
6. (2011) FLC 93-460. Judgment was delivered on 14 September 2009.
7. For example, *Pederson & Pederson* [2003] FamCA 625; *Carson & Carson* (1999) FLC 92-835; *Spoke & Spoke* [2008] FamCAFC 59.
8. (1996) FLC 92-693.
9. Note 6 above.
10. See also *Wenz & Archer* [2008] FMCA fam 1119.
11. Note 10 above.
12. (1998) FLC 92-812.
13. [2011] FamCA 74; but see *Chapman & Chapman* (1979) FLC 90-220 and *Malcolm & Malcolm* (1977) FLC 90-220 as to the limited circumstances in which an "urgent" spousal maintenance order can be made. There must be an urgent need and sufficient evidence to make an interim order.
14. (2004) FLC 93-204.
15. [2008] FamCAFC 207.
16. *Barro*, note 1 above.
17. *Hogan*, note 2 above.
18. (2004) FLC 93-176.
19. *Wilson & Wilson* (1989) FLC 92-033.
20. [2011] FamCA 20.
21. (2008) FLC 93-386.
22. Following Brereton J in *Paris King Investments Pty Ltd v Rayhill* [2006] NSWSC 578.
23. [2010] FamCA 423.
24. [2011] FamCA 162, at [12] per Loughnan J