

Full Court prefers formulas in property orders

Jacky Campbell

Forte Family Lawyers

The Full Court of the Family Court in *Trask & Westlake*¹ recently explained the form of orders which should be made when real properties are to be sold. The orders made by the Full Court were more complex than the Family Law Courts usually make, using a mathematical formula to give a more precise percentage outcome.

The Full Court in *Trask* followed *Noetel & Quigley*²(and other authorities), but extended the principle. Simply, the principle in *Noetel* is that when a real property is to be sold, the parties should usually each be entitled to a percentage of the proceeds of sale rather than set dollar figures because the sale price may not be the same as the valuation. The Full Court in *Trask* extended the principle saying that orders should be drafted to reflect the possibility that the parties' percentage entitlements to the overall pool may be different than the Court's intentions if the sale price is different from the valuation relied upon by the court.

The Noetel principle

The principle in *Noetel* is the "practice of drafting orders based on a percentage entitlement rather than a fixed sum to achieve fairness between parties in the event of a sale."³

The Full Court in *Noetel* described it as a "well established principle" and "a clear guideline for the exercise of discretion under s 79 of the Act"⁴ that the Court should order the sale of the real property and the apportionment of the proceeds between the parties, rather than require one party to pay to the other a fixed sum representing a notional proportion of the assessed value of the real property.

Extension of *Noetel* principle

The Full Court in *Trask* was critical of orders which assumed that the percentage division after real properties had been sold would be the same as the percentage division of the pool to which the parties were found to be entitled between the valuations relied upon in the judgment and the sale prices. As stated in *Noetel*, there will often be a discrepancy for reasons such as a delay between the judgment date and the sale date, a volatile market or a contentious valuation. Although neither the Full Court in *Noetel* or *Trask* referred to the

¹ (2015) FLC 93-662

² (2005) FLC 93-230

³ at para 143

⁴ at para 143 quoting *S & S* [2000] FamCA 262 at 108

difficulty of predicting and taking into account sale costs, the delay between the date of the valuation and the date of the hearing and the delay between the date of the hearing and the judgment, these can also impact.

As a simple example of the problem discussed in *Trask*, a division of the net sale proceeds in the proportions 55%/45% in favour of the wife in orders which were drafted to achieve an overall division of 60%/40%, will not have that effect unless the ultimate net sale proceeds are exactly the same as the figure used by the Court.

Section 79 requires the Court to make "appropriate" orders which are "just and equitable". The Full Court's view was that the orders would not comply with these requirements if the percentage division in the orders did not reflect the percentage division in the judgment.

If the variation is minor or the Court gives adequate reasons to make it abundantly clear that the outcome may not be the same as the percentage division in the judgment, then the Full Court said this was acceptable. However, it noted that in many cases the orders do not reflect the judgment with precision.

Facts of *Trask*

The values of the real properties which were to be sold had been agreed between the parties as being valued at \$2,319,000. At trial, however, the husband contended that they were actually worth \$3,150,000. The trial Judge found that the wife was entitled to a 60/40 division of the property in her favour. Under the orders, the wife was to receive 87.43% of the assumed sale prices at the agreed values. This resulted in an overall division of 60/40 in her favour if the two real properties were sold at their agreed valuations.

However, if the real properties sold for the figures the husband contended, the wife would receive \$2,745,045 from the sales rather than \$2,027,511 which the trial Judge had calculated using the earlier agreed values. She would therefore receive, inconsistently with the trial Judge's findings, 62.8% rather than 60% of the overall pool.

Using the husband's figures for illustrative purposes the disparity was, as the Full Court pointed out, \$1,422,000 in favour of the wife, or a disparity of 25.77%. This was potentially not a minor variation from the intended outcome.

Did the slip rule apply?

The parties submitted that, if the Full Court agreed with the husband, the orders could be changed under the slip rule. The Full Court rejected this view. It did not consider that the circumstances of the case rendered the trial Judge's orders susceptible to correction under the slip rule. Rather, the trial Judge erred in making orders which did not reflect the judgment. That determination had two consequences. The first was that the appeal should be allowed on that basis. The second was that, with the parties consent, the Full court should re-exercise the discretion and make orders in the terms which were, in that event, agreed between the parties. The error resulted from a mistaken but deliberate calculation urged upon the trial Judge by the husband's then counsel, rather than "an accidental error or omission".⁵

How the orders should be drafted

The new orders made by the Full Court were:

" (f) The wife be paid an amount \$X calculated in accordance with the following formula -

$$\$X = [A \text{ plus } \$4,795,101) \times 60\%] - \$2,241,154$$

Where:

- A is the balance remaining consequent upon compliance with the sales and payments required by paragraphs 1 & 2(a) to (e) of these orders;
- \$4,795,101 is the total value of the property and superannuation interests of the parties as found excluding the assumed value of the two properties the subject of sale; and
- \$2,241,154 is the value of the property retained by the wife as found;

(g) The husband be paid the balance."

What next?

Orders should be drafted carefully regardless of whether the parties propose that they be made by consent or after a contested hearing. Although not considered in *Trask*, the principle seems to extend to consent orders, whether made in open court or by a Registrar in

⁵ *Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* (1995) 133 ALR 206, 209

chambers relying on an Application for Consent Orders. The parties and their lawyers tell the Court or Registrar that there is a particular percentage division reflected in the orders but in fact that percentage division might be quite different after real properties have been sold.

The principle also seems to extend to all assets which the orders require to be sold, such as shares, not just to real properties. Whether the principle applies to superannuation is unclear. The value of the superannuation entitlement may be different at the time of the superannuation split than when it was valued. However, whilst a superannuation splitting order can be a percentage split, the usual basis on which a split occurs and procedural fairness is given to a superannuation fund, is with a dollar figure specified as a base amount. The superannuation fund increases the figure from the operative date by adding interest (5.3% in the 2015/16 financial year) until the payment split is made so the potential discrepancy may be minor. However, the fund may have fallen in value since the valuation and the legislative scheme still requires that the base amount be increased.

There could be liabilities, such as estimated tax, which may change the percentage division once the actual figures are known.

Conclusion

Following *Trask*, more complex orders with mathematical formulas will often need to be drafted to allow for a more precise alteration of property interests in dollar terms to reflect the proposed percentage division after the uncertain values of assets and liabilities are known.

If assets are to be sold or there are other uncertain amounts which will later become certain, lawyers should draft orders along the lines of the orders made in *Trask & Westlake*. The orders should take into account that the sale price of assets (and the sale proceeds) or liabilities may be different to any agreed valuations of assets or estimates of liabilities, unless the variation is likely to be minor or the court is told that the parties are aware of and accept the potential discrepancy.