

Applications for Litigation Funding Orders - Recent Developments, by Wendy Kayler-Thomson, Forte Family Lawyers, released November/2011



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APPLICATIONS FOR LITIGATION FUNDING ORDERS - RECENT DEVELOPMENTS

The decision of the Full Court of the Family Court in the case of Strahan & Strahan (interim property orders) delivered in late 2009 has seen the re-emergence of interim property orders being made to fund the legal costs of one party to family law litigation. Up until that decision, most orders made the Court for litigation funding were made using the costs power in section 117(2). As a result, it has now become all the more important to properly identify the source of power sought to be entertained when making an application for litigation funding orders. Different tests apply for each source of power, and different evidence may need to be led.

Interim property settlements to fund legal costs

Since 1996, the leading authority on the circumstances in which the Court will grant an interim property settlement to fund the litigation costs of one party has been the decision of the Full Court in Zschokke (1996) FLC 92-693.

In Zschokke the wife was seeking \$40,000 as an unallocated lump sum advance to fund her costs of the proceedings. Ultimately she was unsuccessful in that application but the Full Court did set out the matters that ought to be taken into account in considering such an application.

The Full Court (comprising Justices Baker, Finn and Hannon) considered that there were four possible bases of power to make such an order:

1. pursuant to section 74 (the maintenance power);
2. pursuant to section 114 (the injunction power);
3. pursuant to section 117(2) (the costs power); and
4. pursuant to section 80(1)(h) (the Court's general power to make an interim order, with reference to section 79).

Numbers 1 and 2 were not argued before the Full Court, and the Full Court expressed the view that the question of whether section 74 or section 114 allowed the Court to make an order of this type must remain open.

The Full Court found that the power to make an order for the provision of funds by one party to the other to fund their costs of the proceedings can lie from either section 117(2) or section 80(1)(h). If such an order is made, the Full Court held that the characterisation of the funds should be determined at the time the final property orders are made.

In considering whether the Court should make the order pursuant to section 117(2), the Full Court found that the Court must have regard to the matters set out in section 117(2A), albeit acknowledging

that some of the matters set out in that sub-section would not be relevant to the making of an order of this type. The Full Court also found that "...the requirement of justice...must remain a "basic" condition in the making of [such an order]"¹. That requirement of justice includes an assessment of whether the applicant for the order is likely to receive a sum sufficient in the final property proceedings to make it possible for the interim amount to be taken into account if the trial judge chooses to do so.

In considering whether the Court should make the order pursuant to section 80(1)(h) the Full Court held:

*"...it would seem that regard should be had to the requirement in s 79 that the orders be just and equitable and this would require the Court to undertake at least some brief consideration of the matters in s 79(4) including those referred to in s 75(2). If on a brief consideration of those matters, it seems likely to the Court that the party who is the applicant for the interim order for an advance of funds from the other party will be likely to receive by way of property settlement a sum sufficient to cover the advance, that would seem to be sufficient to enable the order sought to be made."*²

However the Full Court went on to also approve of the statements of the Full Court in *The Marriage of Harris* (1993) FLC 92-378. That case dealt generally with the question of the Court's power to make orders for an interim property settlement but did not specifically consider interim payments to fund litigation expenses. The Full Court found that the principles enunciated in *Harris* are equally applicable. In *Harris* the Full Court said that the matters to be taken into account when considering making an interim property settlement order are as follows:

"(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 s. 79 proceedings..."

(2) It is an exercise of the s. 79 power. Consequently it must be performed within those parameters. Since it is not the final hearing the Judge is unlikely to have the final findings, but the exercise must fall within that general framework and the material available at that time.

*(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."*³

The Full Court in *Zschokke* identified three criteria relevant to the making of such an order:

- whether one party was in a position of relative financial strength;
- the capacity of that other party to fund their own legal expenses; and
- the inability of the applicant to fund their legal expenses.

The Full Court re-visited the question of interim property settlement orders to fund litigation expenses in the case of *Strahan and Strahan* (interim property orders) [2009] FamCAFC 166. On the re-exercise of discretion the Full Court ordered the husband to pay to the wife \$5,000,000 by way of interim property settlement. Justices Boland and O'Ryan delivered a joint judgment, and Justice Thackray delivered a separate judgement (but concurred with the making of the orders).

From the amount of the interim property settlement order, it is clear that this case involves a significant asset pool. At the time of separation the wife had \$6,723,695 in bank accounts. In his Financial Statement, the husband deposed to assets of \$35,504,700, liabilities of \$852,800 and financial resources of \$21,205,771. The question of what the asset pool comprises is a major issue of contention between the parties, with the wife asserting to the Full Court that the assets are "*in the order of hundreds of millions of dollars*" and the husband referring to a single expert's suggestion of \$60 million. The trial judge (Justice Strickland) observed that since the proceedings commenced in 2005 the wife had spent \$10.5 million in legal costs and there had been approximately 40 interim applications. (The case, by the way, is ongoing.)

Before the trial judge, the wife sought a further \$5,000,000 by way of interim property settlement (she having already received interim property settlements totalling \$5,350,000). The trial judge awarded her \$1,000,000. The wife then appealed.

The trial judge found that there was no issue in the case (for the wife) with the first two of the three criteria set out in Zschokke. But in relation to the third of the criteria he referred to the husband's case that there were other alternative ways for the wife's costs to be secured other than by payment from the husband.

Justice Strickland then determined that Harris required him consider whether the wife had established compelling circumstances to warrant the making of the interim property order. The wife's argument was that there was still further work to be done to investigate the extent of the asset pool, and that this investigation was necessary to enable the wife to obtain just and equitable orders. The wife's solicitor asserted that she would not continue to act for the wife if funding for the estimated future costs was not found.

The trial judge found that there were no compelling circumstances. He found that the issue of the husband's alleged non-disclosure was not new in the case, and was a matter for the trial. He found that some of the categories of further work required, and the estimates of the costs of the further work to be performed, were unjustified at this stage of the case (for instance, \$500,000 to confer with and prepare affidavits for in excess of 50 witnesses).

However having found that there were no compelling circumstances, Justice Strickland went on to make an order for a payment of \$1,000,000. He identified three areas for which the wife required funds - to be represented at trial, to prepare and file evidence in relation to child issues and to address issues which may arise from the filing of the single expert's report.

The husband's senior counsel persisted with the argument in relation to the third of the criteria set out in Zschokke and argued that given the closeness of the trial, the wife's solicitors could take a charge over the wife's assets on the basis that their fees could be paid from the wife's property settlement. Justice Strickland rejected that argument on the basis that the husband's legal representatives were being promptly paid and that *"there is no basis...for requiring the wife to make such an arrangement with her solicitors."*⁴

The trial Judge then made his own assessment of the wife's costs to address the three outstanding areas that he had identified and fixed the amount of \$1,000,000.

On appeal, their Honours Boland and O'Ryan identified two stages to the hearing of an interim property settlement application pursuant to section 80(1)(h).

*"...the first step is to resolve whether to exercise the power before a final hearing and if it is resolved to do so then the second step involves the exercise of that power."*⁵

There was considerable argument about whether it is a correct reading of Harris to say that there must be a finding of compelling circumstances before the Court will consider exercising its power to make an interim property settlement order. Justices Boland and O'Ryan drew heavily on the judgement of Reithmuller FM in Wenz and Archer (2008) 40 FamLR 212 wherein His Honour found that the true test for an interim order was not whether or not there were compelling circumstances, but whether, *"in all the circumstances, it is 'appropriate'"*⁶.

Justices Boland and O'Ryan found, that in relation to the first stage, when considering whether to exercise the power 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 exercising the wide and unfettered discretion conferred by the power to make such an order, regard should be had to the fact that the usual order pursuant to s 79 is a once and for all order made after a final hearing."*⁷

Their Honours considered that the following matters may be relevant to that first stage of the test:

- whether or not the applicant can meet the costs of their own legal costs;
- the bona fides of the application including the need for evidence of the applicant's likely costs of the litigation. Their Honours held that it was not a necessary pre-condition that the applicant's lawyers will not continue to act unless the costs are paid or secured;
- possibly the relative financial position of the parties, although their Honours found that this would certainly be relevant to the second stage of the test.

Once the Court has decided it will entertain the exercise of the power to make an interim order, then at the substantive step of considering whether to make an order, Justices Boland and O'Ryan approved of the second and third matters set out by the Full Court in Harris; that is:

- the provisions of section 79 must be considered; with limitations given that it is not the final hearing. Their Honours found that there is no requirement of compelling circumstances in this step;
- an assessment of the "'adjustment issue' or 'claw-back issue'"⁸. That is, will the interim property order exhaust or exceed the applicant's section 79 entitlement, or will the respondent be able to recover any over-payment?

Their Honours also considered whether the respondent is in a position of financial strength compared to the applicant and the capacity of the respondent to pay his or own legal costs would be relevant factors to take into account at the second step

Justice Thackray delivered a separate judgement. He agreed with Justices Boland and O'Ryan that there should be a two step approach to determining applications for interim property settlements, and he agreed that there is no requirement for the applicant to show compelling circumstances. Where the application is seeking funds for legal costs, Justice Thackray said:

"...it is appropriate for the Court to give consideration to whether the claim for costs is "genuine" - ie. that a party is not bringing an interim application on a pretext. However, once the Court is satisfied that the claim is genuine, it should not "take a narrow view of the costs budget"⁹.

The decision to relax the requirement for "compelling circumstances" to exist before an interim property settlement order can be made has opened the door for more applications to be made for interim property settlements to fund legal expenses (although the new principles enunciated by the Full Court in Strahan apply equally to interim property awards to fund other expenses such as living expenses or payments of debts).

In 2010, the wife in the Strahan case sought another order for a further interim property settlement. She sought an order that a property in Switzerland be transferred into her sole name unencumbered and that she receive further money to a total of \$24,000,000. The husband sought an order that the wife's application be dismissed. He argued that if the wife received a further interim property settlement of \$24,000,000, she would receive more assets than she would be entitled to at the final hearing.

As for the partial property settlements the wife had already received, including the \$5,000,000 in late 2009, the wife gave evidence that she had used the majority of those funds. The wife gave evidence that she would incur legal costs of about \$125,000 per month to trial.

Dawe J dismissed the wife's application. In her judgment of Strahan & Strahan (interim financial orders) [2010] FamCA 423, her Honour found that it was not in the interests of justice to make a further interim property order because of the considerable dispute about the likely final property settlement. Her Honour also found that the wife did not provide an explanation for the amount of money estimated to be required for her ongoing legal costs.

The wife appealed Dawe J's decision. She argued that Her Honour failed to adequately examine the pool of assets and that the husband had conceded a further payment to her of at least \$9,000,000.

The wife sought an order for an interim property settlement of \$24,000,000 or a "fallback" position of \$9,000,000. She did not seek this "fallback" order of \$9,000,000 before Dawe J.

The Full Court upheld Dawe J's decision and held that her Honour was not in a position to determine the size of the asset pool. The Full Court further held that Dawe J could not be criticised for failing to make a "fallback" order when such an order was not sought before her.

The wife sought yet another interim property settlement in 2010, being an application for \$3,800,000 to pay her legal costs to trial. Dawe J made orders for the husband to pay the wife \$825,000. Of that sum, \$75,000 was to be paid to the Independent Children's Lawyer and \$300,000 was to be placed into the wife's trust account to only be used for solicitor and counsel fees for the final hearing.

There was a significant discrepancy between the amount of money sought by the wife and the amount the husband was ordered to pay her. Dawe J found that some of the wife's anticipated legal costs were not reasonable (for example, requiring 2 Queens Counsel to attend to proofing witnesses) and that the wife's own evidence of the money she needed was inconsistent. A schedule attached to the wife's affidavit which set out her anticipated legal costs contained incorrect calculations. Dawe J held that wife's anticipated legal costs could not be justified.

The original decision of the Full Court in Strahan has been applied in a number of cases since 2009. From a practical perspective, these cases highlight the importance of:

1. Giving accurate estimates of the future legal costs. Practitioners should consider whether the costs sought are reasonable in light of the issues in dispute and the estimated net asset pool. If the anticipated future costs include the costs of obtaining property valuations, practitioners should provide evidence about how much money those valuations will cost.
2. Identifying the source of the partial property settlement. In *Abrams v Abrams* [2010] FMCAfam 560, Willis FM dismissed the wife's application for a partial property settlement of \$80,000. The asset pool was in dispute; the husband argued it was as low as approximately \$29,000 and the wife argued it was approximately \$223,000. Willis FM criticised the wife for not identifying where the \$80,000 she sought could be drawn from.
3. Evaluating whether the Court has sufficient evidence to make the orders sought. In *King v King* [2011] FamCA 21, Cronin J declined to make orders for an interim property settlement because the evidence in the case was so controversial that his Honour could not be satisfied that it was just and equitable to make the orders sought.

Section 117(2) Costs orders

The most commonly ordered litigation funding orders made pursuant to the section 117(2) power are orders giving one party access to certain funds, with those funds to be used solely for future costs of the proceedings, and for the characterisation of that lump sum to be left to the trial judge. It is a Victorian practice to refer to such orders as "Barro orders". In Queensland, they are routinely referred to as "Hogan orders". The requirements for the making of such an order are set out in section 117(2A) and are similar to those set out in *Zschokke*:

- One party is found to be in a position of greater financial strength than the other
- That other party has the capacity to fund their legal costs
- The applicant does not have the capacity to fund their legal costs.

To be successful, the applicant needs to identify the source from which the lump sum can be paid eg. funds in an account or an asset that could be sold.

Where an identifiable source of funds to meet a lump sum costs order cannot be found, an alternative order pursuant to section 117 would be a "dollar for dollar order", first referred to in the case of *G and T* (2004) FLC 93-176. In that case the wife had on foot a section 79A application, with one of the grounds put that the husband had not made full and frank disclosure of his financial affairs at the time the original consent orders were made. There were allegations regarding the husband's disclosure of assets owned by a trust, and whether that trust was a "sham".

On an interim basis the wife sought various injunctions pending proper discovery taking place and a Zschokke type order. Importantly, at that time the wife sought final orders that "the assets of the marriage be distributed on a just and equitable basis."

Justice O'Reilly found that at that early stage of the proceedings, the property of the parties against which an order for a property settlement in favour of the wife could be made had not been identified. Thus it was difficult for her to assess whether or not an interim property settlement in favour of the wife could be "clawed back" or "adjusted" against the wife's overall entitlement. It was simply too early to tell whether or not the wife's ultimate claim to a fresh property settlement could give her sufficient assets to exceed the amount of any interim property award.

However, the Court found that a "dollar for dollar" was appropriate. Justice O'Reilly held that:

"It is desirable that there should be at least between the husband and the wife a "level playing field" in the litigation....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."¹⁰

The "dollar for dollar" orders made in that case were as follows:

1. *Within 7 days after the payment by or on behalf of the husband of any money in payment of accounts:
 - a. *Rendered by the husband's solicitors in respect of these proceedings;*
 - b. *Rendered by any accountant, valuer or other expert engaged by the husband in respect of these proceedings,**

the husband pay or cause to be paid the same amount of money to the wife's solicitors.

2. *Within 1 day after the payment by or on behalf of the husband of any money referred to in order 1, the husband cause to be given to the wife's solicitors a memorandum stating the amount or amounts so paid.*
 3. *All money paid to the husband's solicitors by or on behalf of the husband referred to in order 1 be held in trust by the husband's solicitors and not be applied in payment of his legal costs and outlays until such time as the same amount has been paid by or on behalf of the husband to the wife's solicitors, and in the event that such payment to the wife's solicitors not be made within 7 days after the payment by or on behalf of the husband of any money referred to in order 1, the husband direct his solicitors to pay 50% of the amount or amounts so held by them in trust to the wife's solicitors.*
 4. *The amounts paid by or at the direction of the husband to the wife's solicitors pursuant to these orders be applied by them in the payment of the wife's legal costs and outlays incurred and to be incurred by the wife in the conduct of these proceedings, including but not limited to the reasonable costs and outlays:
 - a. *Rendered by the wife's solicitors in respect of these proceedings;*
 - b. *Rendered by any accountant, valuer or other expert engaged by the wife in respect of these proceedings.**
5. *The determination as to whether the payments made by or on behalf of the husband to the wife's solicitors are to be treated as a debt due from the wife to the husband, or as part of the wife's entitlement to property settlement, or the provision of maintenance for the wife, or in payment by the husband of the wife's costs of and incidental to these proceedings, be adjourned to the trial judge.*

Justice Cronin most recently made "dollar-for-dollar" orders in *Iphostrou & Iphostrou* [2011] FamCA 20. In that case, the wife sought \$500,000 as either an interim costs or partial property settlement. She relied on both sections 80 and 117 of the Act.

Justice Cronin declined to make an order pursuant to section 80 as he found that there was insufficient evidence about the content of the asset pool to enable him make an assessment within the parameters of section 79 (the case involved a section 106B application). However, his Honour found that there was sufficient evidence to make a dollar for dollar order pursuant to section 117. In particular, his Honour took into account the husband's ability to have a company pay his costs as a financial resource. His Honour highlighted the importance of having a level playing field in cases involving complex commercial family disputes.

The case demonstrates that a "G and T order" may be a useful alternative in the event that the basis for a Zschokke/Strahan order or a Barro/Hogan order cannot be made out.

FOOTNOTES

1. In the Marriage of E F and R Zschokke (1996) FLC 92-693 at page 83217.
2. Ibid, page 83216.
3. Ibid.
4. Strahan and Strahan (interim property orders) [2010] FamCAFC 166 at paragraph 68.
5. Ibid, paragraph 119.
6. Ibid, paragraph 131.
7. Ibid, paragraph 133.
8. Ibid, paragraph 137.
9. Ibid, paragraph 228.
10. G and T (2004) FLC 93-176 at page 78995.

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