

PROPERTY

Verbiage or substance? – High
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debts

JACKY CAMPBELL, APRIL 2018

Verbiage or substance?

High Court to examine Family Court's ability to assign tax debts.

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The ability of Pt VIII A Family Law Act 1975 (FLA) to be used to assign the tax debt of one spouse to another will be examined by the High Court. The decision may have implications for the operation of Part VIII A for third parties who are not the Commissioner of Taxation, but the decision is likely to concentrate on it is possible to assign tax debts between spouses. The Commissioner has been granted special leave to appeal to the High Court from the decision of the Full Court of the Family Court in *Tomaras & Tomaras and Official Trustee in Bankruptcy and Commissioner of Taxation* (2017) FLC 93-806; [2017] FamCAFC 216. The Commissioner is relying on the presumption that statutory provisions which are only expressed in general terms do not bind the Crown.

The decision of the Full Court of the Family Court, including the terms of s 90AE, is discussed [here](#).

Before the High Court the issues raised are:

1. The scope of the presumption that the Crown is not bound by a statute and in particular:
 - (a) Whether, as held by the Full Court of the Family Court in the context of construing s 90AE of the FLA, the presumption that members, servants and agents of the executive government, and property held by it or on its behalf, are not bound by general words in a statute "applies only to provisions which impose an obligation or restraint on the Crown"; or alternatively,
 - (b) As contended by the Commissioner the presumption is engaged in all circumstances where a statute regulates the conduct or rights of persons, or regulates the use of property, and those regulated persons or property could include the executive property owned by or on its behalf.
2. Assuming there was a presumption that the Crown was not bound by s 90AE of the FLA, whether that presumption was rebutted.

In oral submissions to the High Court reported in *Commissioner of Taxation v Tomaras & Ors* [2018] HCATrans 56 the Commissioner said that the ultimate issue to be determined in the proposed appeal was whether the power of the Family Court under s 90AE of the FLA to make substitution orders directed to creditors extends to the making of such orders directed to the Commissioner in respect of tax-related liabilities.

Justice Edelman queried whether the "presumption" was not a presumption but a rule of construction which applied with differing degrees of force in different cases. He said that if that was so, then "this is just verbiage rather than substance".

The Commissioner rejected the view of the majority of the Full Court of the Family Court that s 90AE imposed a benefit on the Crown, rather than a detriment, so the presumption did not arise. The Commissioner agreed with Justice Aldridge, the dissenting judge in the Full Court of the Family Court, that s 90AE imposed a burden by requiring a creditor to litigate to defend its rights so as not to be worse off because of a s 90AE order. Justice Aldridge said (at [73]):

"Being no worse off is quite different to receiving a benefit."

Other issues which arose in the special leave application and therefore may be considered in the substantive application included:

- The relevance of the nature of the tax debt including whether any rights of objection remained;
- The relationship of s 90AE to s 79 (the power to make a property settlement order);
- Is the term "creditor" which in s 79(10) includes the Crown, also defined to include the Crown in s 90AE?
- Given that s 79 can be used to potentially destroy or lessen the real economic interests of the Crown, how does that relate to any protection given by s 90AE(3)(b)?
- Are review rights with respect to tax liabilities put at risk or displaced if someone is substituted as a tax debtor?

The Commissioner referred to a number of applications having been filed in the Family Law Court seeking so-called "Tomaras orders" - that is applications seeking to have substitution orders made in respect of tax related liabilities. In these circumstances, the Commissioner will presumably be keen for an early hearing.

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