

PROPERTY

**Tomaras – is the Family Law Act an
escape hatch to avoid tax?**

JACKY CAMPBELL, FEBRUARY 2019

The Australian Taxation Office recently appealed to the High Court of Australia on the question of whether there was power under the *Family Law Act 1975* (FLA) for the husband to be substituted for the wife in relation to a tax debt owed by the wife of over \$250,000 plus interest.

In *Commissioner of Taxation for the Commonwealth of Australia v Tomaras & Ors* (2018) 93-874, 5 members of the High Court, in 3 separate judgments, unanimously upheld the decision of the Full Court of the Family Court that tax debts are able to be dealt with under s 90AE(1)-(2) FLA. The Commissioner of Taxation was seeking to rely on Crown immunity to support its argument that there was no power for tax debts to be transferred between spouses under the FLA. However, neither the High Court nor the Full Court of the Family Court ruled on whether the power should be exercised in the particular circumstances of the case.

My earlier articles consider the earlier cases. The Full Court decision is discussed further in my article “Verbiage or substance? High Court to examine Family Court’s ability to assign tax debts”. The application for special leave to appeal to the High Court is discussed in “Escaping tax debts? Is this the brave new world of Pt VIII A *Family Law Act*?”

What does the legislation say?

The wife was seeking orders under Pt VIII A A, FLA which empowers the family law courts to make orders and injunctions which bind third parties if certain prerequisites are met. In particular, the wife relied on s 90AE(1)(b), which allows the court to direct a creditor to substitute one debtor for another.

Section 90AE(1) provides:

“In proceedings under s 79, the court may make any of the following orders ... (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 a debt owed to the creditor.”

Section 90AE(2) specifically allows the court to make any such order that:

- (a) directs a third party to do a thing in relation to the property of a party to the marriage; or
- (b) alters the rights, liabilities or property interests of a third party in relation to the marriage.”

Section 90AE(3) sets out the requirements for making an order under s 90AE(1) and (2):

“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).”

The matters which the court is required to take into account under s 90AE(3) are listed in s 90AE(4):

- “(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;
- (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.”

What was the issue before the courts?

The Commissioner of Taxation appealed from a question of law stated (also known as a case stated) by the Federal Circuit Court to the Full Court of the Family Court. The question was (at [31]):

“concerned with the interaction between Pts VIII and VIII A and, in particular, whether a court in proceedings under s 79 in Pt VIII has power under s 90AE(1) in Pt VIII A to make an order directed to ... the Commissioner, to substitute the husband for the wife in relation to a debt owed to the Commonwealth which arises under a taxation law.”

The wife argued that binding orders under s 90AE could be made against the Commissioner. The Commissioner disagreed.

In *Tomaras & Tomaras and Official Trustee in Bankruptcy and Commissioner of Taxation* (2017) FLC 93-806, the Full Court held that one spouse could be substituted for another spouse as the debtor responsible for the debt, even though it was a taxation debt and therefore owed to the Crown. The Commissioner appealed.

What did the High Court say about the ability for s 90AE orders to bind the Crown?

The Commissioner argued that Crown immunity was engaged and s 90AE did not apply to taxation debts on the basis of the presumption of statutory construction that general words in a statute do not bind the Crown.

The High Court decided in *Bropho v Western Australia* (1990) 171 CLR 1; [1990] HCA 24, that the presumption may be displaced without the use of express words or words of necessary intendment.

In the High Court, Justice Gordon considered the views of the Full Court of the Family Court, and in relation to the rebuttal of the presumption, said (at [52]-[53]):

“The relevant provisions of the *Family Law Act* do not expressly state that they bind the Crown. The presumption that general words of statutory provisions will not bind the Crown operates as no more than a general principle of statutory construction; or an aid to statutory construction. In certain circumstances, the presumption may represent little more than the

starting point of the ascertainment of the relevant legislative intent. The ultimate question must be whether the presumption has, in all the circumstances, been rebutted and, if it has, the extent to which it was the legislative intent that the relevant statutory provisions should bind the Crown. The ‘circumstances include the terms of the statute, its subject matter, the nature of the mischief to be redressed, the general purpose and effect of the statute, and the nature of the activities of the Executive Government which would be affected if the Crown is bound’. That list is by no means exhaustive.

... The task is to construe the statute in context, adopting a flexible approach to construction which takes into account the nature of the statutory provisions in question and the activities of government to which they might apply” [footnotes removed]

In support of her conclusion that Crown immunity did not apply, Gordon J referred to two areas where the drafters of Pt VIII A had specifically addressed the effects of the provisions on the executive functions of government:

1. Section 90AE imposes a duty on the court to be satisfied that any order takes into account the taxation effect (if any) of the order on the parties to the marriage and on the third party as well as the social security effect (if any) of the order on the parties to the marriage;
2. Part VIII A had a deferred commencement to ensure that any affected third parties, such as banks or financial services bodies, were given sufficient time to make any necessary changes and to ensure that any necessary consequential amendments, such as amendments to taxation or social security legislation, were made before the provisions commenced.

Like Gordon J, Kiefel CJ and Keane J rejected the distinction that the Commissioner sought to make between tax debts and other debts, saying (at [3]):

“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.”

Some statutes differentiate between ordinary creditors and revenue authorities, but the FLA does not. Instead, as Kiefel CJ and Keane J said (at [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.”

Justice Gageler held (at [19]) that the presumption was 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 in a debt owed to it by a party to a marriage:

“That affirmative intention appears sufficiently from the text and structure of Pt VIII A when read in context with s 79 in Pt VIII of the Act.”

Justice Gageler noted that the Commissioner's argument had been refined before the High Court so that it was not so much about power as about jurisdiction. The Commissioner presumably took this approach to try to avoid the High Court taking the plain meaning approach to s 90AE which was ultimately adopted by all members of the High Court. Justice Gageler set this argument out (at [15]):

"The Commissioner argued that the Federal Circuit Court lacks power to make such an order under s 90AE(1) or (2) because the jurisdiction conferred on the Federal Circuit Court by s 39(5AA) with respect to matters arising under the Act 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' is not extended by s 90AD(1) for the purpose of Pt VIII A 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 VIII A, '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'."

Justice Gageler rejected this argument, holding that "a debt owed by a party to a marriage in s 90AD does not exclude a taxation debt owed to the Commonwealth".

Justice Edelman also agreed, holding (at [118]):

"The alleged presumption that Pt VIII A does not bind the Commissioner in relation to tax debts owed to the Crown has, at best, weak force. Against that weak force, the plain meaning, in context, of "a creditor of the parties" in Pt VIII A of the *Family Law Act* can include the Commonwealth in respect of a tax debt owed to it."

All members of the High Court confirmed that the term "creditor" in s 90AE(1) has the same meaning as in s 79 and is not narrower.

The case stated process

Chief Justice Kiefel, and Keane and Gordon JJ were critical of the process taken by the parties to state a question of law. According to Kiefel CJ and Keane J (at [13]):

"it would 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".

The question stated "was unlikely ever to be of other than academic interest".

Justice Gordon said (at [94]) that the procedure should only be used in "exceptional circumstances" as it was "more often than not productive of difficulty, delay and artificiality, and should be adopted cautiously". She said "the stated case procedure was inappropriate, and the answer given incomplete" and (at [96]):

“Hearing and determining the property settlement proceedings would have been cheaper and quicker.”

Justice Gageler disagreed. He considered that the process taken was appropriate, saying (at [16]):

“That the question is one of general significance for the administration of taxation laws and that it has been raised in other pending cases are additional considerations which support the appropriateness of adopting a procedure to ensure its early and authoritative resolution.”

Justice Edelman expressed no view on the procedure taken.

Did the High Court change the law?

It is difficult to see what the wife was seeking to achieve in *Tomaras*. The husband was bankrupt, so unless the husband was likely to have a surplus after his bankruptcy ended, or there was a chance of an annulment, it appeared unlikely, on the facts stated in the Federal Circuit Court, Full Court of the Family Court and the High Court, that a court would order that the taxation debt be borne solely by the husband. If such an order was made, then contrary to s 90AE(3)(b) and (4)(e), the debt was not likely to be paid.

Justice Gordon explained (at [32]) that, although “under Pt VIII AA, the court has jurisdiction over debts owed to the Commonwealth and the court has the power under s 90AE to order the Commissioner to substitute the husband for the wife in relation to a taxation debt, “there will seldom, if ever, be occasion to exercise that power”. As a matter of practice, as she pointed out (at [37]), s 90AE will rarely be used in relation to tax debts. She said further (at [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 VIII AA.”

Justice Gordon tested her conclusion by reference to Pt VIII FLA, which empowers a court to make an order under s 80(1)(f) FLA directing a party to a marriage to simply pay a debt owed by the other party, rather than make an order substituting them as a debtor. This could be a direction to pay a tax debt owed to the Commonwealth. If the husband had cash or another immediately realisable asset or assets to meet that debt, an order could be made under s 80(1)(f) directing the husband to make a payment direct to the Commissioner of Taxation for the benefit of the wife. If that form of order could

not be made (because the husband lacked means to meet the 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. So, the fact that the husband could not satisfy an order under s 80(1)(f) strongly suggested, even required, 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. She concluded (at [90]) that there was “limited” scope to deal with a taxation debt in a s 90AE(1) order.

Chief Justice Kiefel and Keane J said (at [13]) that:

“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.”

Justice Gageler expressed no opinion.

Conclusion

The proceeding was described by two judges in the High Court as an “academic exercise”. This is a succinct summary of the effect of the High Court’s judgment. Whilst the High Court unanimously confirmed that orders could be made under s 90AE in relation to taxation debts, a majority of the High Court also considered that this would occur rarely because of the difficulty parties faced in meeting the statutory requirements. Although the High Court was not required to decide the issue, 4 of the 5 judges said that a substitution order was unlikely to be made in the particular circumstances of the case before it, as a substitution order would mean that the tax debt would not be made.

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