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PROPERTY

Negative property pools and who will wear the debt

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1 Introduction

There are two ways to approach this question: one can consider property pools where the debts outweigh the parties' modest equity in a home and superannuation. As these cases are rarely litigated because the costs are disproportionate to the property pool, it is difficult to draw any principles from them. For example, in *Abadi & Sofer* [2019] FCCA 8 the property pool was $100,000 and the wife's costs were $66,000. Sometimes these types of cases are litigated to determine who will be liable for a debt and to ensure that property is sold so the parties have no future liability or limit their liability.

This paper deals with cases where the gross property pool is large, but the debts are so significant that they cannot be paid out from all the available property. In some cases this may mean that one party ends up with only debt whereas the other party retains property with little or no debt. The position is more complicated if the party bearing the debt becomes bankrupt and is likely to do so.

It is important to bear in mind that lawyers are expected to ensure that costs are proportionate to the property pool. The Australian Law Reform Commission in its Final Report "Family Law for the Future – An Inquiry into the Family Law System" spent several pages discussing the need for proportionality although it did not make a specific recommendation. There is also pressure from the media and the courts for this. Proportionality is not an easy principle to apply to negative property pools.

This paper covers the basics of debts in s 79 proceedings, but also some of the more complex issues such as bankruptcy and the equity of exoneration.

2 How are debts considered under s 79 FLA?

The principles in relation to debts in proceedings under s 79 FLA were summarised by Evatt CJ in *Prince & Prince* (1984) FLC 91-501 at p 79,076:

- The assessment of debts and liabilities is not necessarily arrived at by a strictly mathematical approach and deducted from the gross property pool in calculating the assets and liabilities to be divided between the parties. Although some liabilities can be accurately assessed at a certain date, other liabilities have not been precisely determined or are contingent (eg. tax liabilities).
- The court can make an allowance for a particular liability if it is appropriate to do so, but if there are sufficient uncertainties, the court can disregard it entirely or partly. A loan from a parent of a party which is not likely to be enforced is an example of this.
- In other cases, the court may take the view that because of the circumstances surrounding the incurrence of the liability it ought, in justice and equity, to be wholly or partly disregarded in determining the appropriate order to be made under s 79 or s 90SM FLA as between the parties of the marriage. Such a result can be reached where a spouse has incurred a liability in a

deliberate or reckless disregard of the other party's potential entitlement under s 79 or s 90SM (*Kowaliw & Kowaliw* (1981) FLC 91-092, see 36-125 and 37-050) or it is a debt to a family member which is unlikely to be required to be repaid.

- The court cannot ignore completely the fact that there is or may be a liability. The effect may be simply that it does not consider the other spouse should be called upon, in effect, to contribute to the liability by having that spouse's fair share in the property reduced by virtue of its existence. The result may be that the party who has incurred the liability will be left to meet it out of whatever funds remain to that party after satisfying the property order made under s 79.

Prior to *Stanford v Stanford* (2012) FLC 93-518, it was clear that the debts of the parties had to be identified and carefully considered as to whether they should reduce the property pool or be borne by one party, usually the party in whose name the debt was in, unless it is assigned under Pt VIIIAA or an indemnity given.

In *Biltoft & Biltoft* (1995) FLC 92-614 the Full Court looked at the position of unsecured creditors saying (at [52]):

> "A general practice has developed over the years that, in relation to applications pursuant to the provisions of s 79, the Court ascertains the value of the property of the parties to a marriage by deducting from the value of their assets the value of their total liabilities. In the case of encumbered assets, the value thereof is ascertained by deducting the amount of the secured liability from the gross value of the asset... Gibbs J. (as he then was) pointed out at p 355 [in *Ascot Investments*] that the Court "must take the property of a party to the marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it". Where the assets are not encumbered and moneys are owed by the parties or one of them to unsecured creditors, the Court ascertains the value of their property by deducting from the value of their assets the value of their total liabilities, including the unsecured liabilities..."

The Full Court then set out some limitations on this principle (at [57]):

> "Notwithstanding the general practice which has developed, the Court has indicated that it may properly determine not to take into account or to discount the value of an unsecured liability in certain circumstances. Such liabilities would include but are not limited to a liability which is vague or uncertain, if it is unlikely to be enforced or if it was unreasonably incurred."

The Full Court concluded in relation to the general rule (at [63]):

> "… the rule is not absolute, is not prescribed by the statute and there are a number of well recognised exceptions…. There is no requirement that the rights of an unsecured creditor or a claim by a third party must be considered and dealt with prior to the Court making an order under s 79, nor is there a rule of priority as between a creditor claimant and a spouse. Those rights, however, cannot be ignored. They must be recognised, taken into account and balanced against the rights of the spouse…. There is an obligation on both parties to disclose any significant creditors or any significant claim against either of them by a third party. If, as a result of the order of the Court in the property proceedings, the ability of a creditor or claimant to recover his or her debt or claim is likely to be affected, notice of the Family Court proceedings must be given to that creditor or claimant. He/she may then intervene in the Family Court proceedings and either seek a stay of those proceedings or some appropriate order which recognises his/her rights."

The Full Court of the Family Court in *Puddy & Grossvard* (2010) FLC 93-432 was clear that both s 79(10)(a) and s 75(2)(ha) refer to debts which are uncontroversial.

The general rule about debts which are to be borne by one party was stated by the Full Court in *Campbell v Kuskey* (1998) FLC 92-795 (at p 84,924) as:

> "In addition, it is inappropriate *in most* cases to use s 75(2) as a means of bringing to account in a general way a liability, or potential liability, which has not otherwise been brought to account as a liability when determining the overall net pool of assets. The reason for this is that by so doing, a trial Judge may produce a result that works an injustice as against one party or the other. For example, in the circumstances of this case, his Honour gave the husband the benefit of an adjustment pursuant to s 75(2) of somewhat less than $86,328. If the husband had then entered into the scheme suggested by the accountants he would have accrued a taxation liability of $86,328 and would therefore be at a disadvantage. If however, the Commissioner of Taxation failed to deem the loan accounts to be dividends under s 108 the husband will receive the s 75(2) adjustment in his favour as a windfall benefit. This would work an injustice to the wife".

The Full Court of the Family Court in *Rodgers & Rodgers* (2016) FLC 93-703 quoted this passage favourably and emphasised that there was no binding rule of law that the court must deduct liabilities unless the case falls into an exceptional category, but that this applied in most cases.
A creditor may, in certain circumstances, apply to join the s 79 proceedings. Section 79(10) provides:

> "The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a marriage…:
> (a) A creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made…"

Section 79(10) does not apply if the party is bankrupt to the extent to which the debt is a provable debt under the *Bankruptcy Act 1966* (Cth) (BA) or the party is a debtor subject to a personal insolvency agreement to the extent to which the debt is covered by a personal insolvency agreement. In those cases the trustee may apply to join under s 79(11).

In making determinations under s 79 (property) or s 72 (maintenance), s 75(2)(ha) FLA requires the Court to consider:

> *"*… the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant."

3 Assigning debts

Obviously there is some scope for debts to be assigned under s 90AE *Family Law Act* 1975 (Cth) (FLA) but as was pointed out, in the *Commissioner of Taxation* for *The Commonwealth v Tomaras*

& Ors (2018) FLC 98-374, the court will rarely, if ever, substitute one party for another in relation to a tax debt.

Pt VIIIAA FLA allows a creditor to be directed by a family law court to substitute one party to manage for another as the debtor. The rights, liabilities or property interests of a creditor can be altered. However, powers of the court are not unfettered and after an initial panic, by financiers, it appears they will rarely be exercised in relation to genuine third parties. There is much more scope where the third party is related to one of the parties provided that the requirements of s 90AE can be met. Section 90AE(3) and (4) provide:

(3) 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).

(4) The matters are as follows:
- (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;
  Note: See paragraph (3)(b) for requirements for making the order in these circumstances.
  Example: The capacity of a party to the marriage to repay the debt would be affected by that party's ability to repay the debt without undue hardship.
- (f) the economic, legal or other capacity of the third party to comply with the order;
  Example: The legal capacity of the third party to comply with the order could be affected by the terms of a trust deed. However, after taking the third party's legal capacity into account, the court may make the order despite the terms of the trust deed. If the court does so, the order will have effect despite those terms (see section 90AC).
- (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;
  Note: See paragraph (3)(c) for the requirement to accord procedural fairness to the third party.
- (h) any other matter that the court considers relevant.

The High Court in *Tomaras* confirmed that Crown immunity did not apply so that in theory, a tax debt could be apportioned or substituted between the parties. Justice Gordon explained (at [32]) that, although "under Pt VIIIAA, 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 VIIIAA."

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."

Although this paper refers to s 79 and other sections of the FLA which deal with married couples, there are similar sections for de facto couples.

4 Tax debts and s 75(2)(ha) FLA

There is a history of the Family Court being concerned to ensure that revenue authorities, such as the Australian Taxation Office and State Revenue Offices, are paid (eg. *Chemaisse & Chemaisse* (1988) FLC 91-915). Priority has been given to tax debts over the interests of the non-bankrupt spouse and other unsecured creditors (*Hannah & Hannah; Tozer & Tozer* (1989) FLC 92-052).

However, Coleman J in *Lemnos & Lemnos* (2009) FLC 93-394 considered that the Australian Taxation Office no longer had priority over other creditors due to the *Insolvency (Tax Priorities) Legislation Amendment Act 1993*. Among other amendments, s 123(5) BA was deleted. This section protected payments of tax. The trial Judge, Le Poer Trench J, for different reasons, reached the same conclusion. He said (cited at [127] of the Full Court's judgment):

> *"*I have some concern with the outcome of this case insofar as the creditor principally to lose out in this case is the Australian Tax Office and therefore the tax payers of this land. The question should realistically be asked why the wife should ultimately prosper at the expense of the public purse. The answer so far as I am concerned is that the Family Law Act as now standing provides for that to be the outcome in appropriate cases. The legislation does not elevate the status of creditors to a ranking above the other considerations."

The former matrimonial home was worth $4.5-5m. It was in the husband's sole name. The mortgage was $2.4m and the husband's tax liabilities were over $5m.

Justice Le Poer Trench found the contributions of the parties to be equal. The wife argued that the husband's actions in respect of the income tax liability amounted to wasting of the matrimonial assets under s 75(2). Justice Le Poer Trench agreed and held that it was appropriate to require the husband to satisfy the ATO without recourse to the wife's property.

The court found that considering the interest of creditors under s 75(2)(ha) did not allow a further adjustment in favour of the wife under s75(2)(ha).

In determining whether a division of the property was just and equitable, the court was not satisfied that the wife had knowledge of the non-payment by the husband of his proper tax liabilities and was not persuaded by the trustee that the wife was receiving a windfall as a result of the husband's non-payment of tax.

The trustee appealed and the Full Court allowed the appeal, remitting the matter for re-hearing.

Justice Coleman held that the trial judge had concluded that the wife should receive 50% equity in the property, and made orders which "had the effect of prioritising the wife's s 79 entitlement over the unsecured creditors of the husband's bankrupt estate" [at (173]). Only after consideration of the s 75(2)(ha) interests of creditors could the trial judge have concluded that it was "appropriate in this case to require the husband to satisfy the debt to the ATO from his own resources" (at [175]). By focusing on the absence of culpability by the non-bankrupt wife the trial judge was distracted from the proper exercise of his discretion and pre-judged the s 75(2)(ha) issue by considering that the wife had not been involved in the tax deductions.

Justices Thackray and Ryan held that the trial judge erred in giving undue weight to the wife's innocence in the tax deductions claimed by the husband. They held (at [243]):

> "… Having had the benefit of the funds flowing from the husband's conduct, it would seem to us neither just nor equitable for the wife to escape all responsibility for payment of the primary tax that would otherwise have been paid."

They adopted the reasoning in *Johnson & Johnson* (1999) FamCA 3969 where the Full Court held (quoted at [244] and [245] in *Lemnos*):

> "20.4 … his Honour's discretion miscarried when he failed to provide for the wife to share in any penalties that may be imposed by the taxation commissioner.
>
> 20.5 In our view the fact that the wife was or was not involved in the tax avoidance process which may lead to the imposition of penalties was only one consideration that his Honour needed to weigh up when determining liability for the penalties as between the parties. The benefits indirectly gained by the wife in having the pool of assets otherwise increased as a result of the availability of funds which would otherwise have been paid out in tax also have to be considered.
>
> 20.6 … a just outcome demanded that the wife take the good with the bad. Whilst there is a sense of culpability about the penalties, they represent no more in this case than an outgoing incurred in creating the asset pool.
>
> 20.7 … Absent any suggestion that the husband was on a frolic of his own and acting contrary to the wife's express wishes, we see no reason for his Honour to have left the husband to shoulder the burden of the tax penalties.

Justice Thackray and Ryan noted (at [28]) that:

> "The views expressed in *Johnson* relate to allocation of responsibility for income tax **penalties**. Although in the instant case it is accepted the husband was "on a frolic of his own" we do not accept that the wife's lack of knowledge or complicity in the husband's wrongful deductions is determinative of whether she should ultimately share responsibility of the payment of primary taxation …"

Commissioner of Taxation & Worsnop (2009) FLC 93-392 also illustrates the application of s 75(2)(ha). The Commissioner of Taxation appealed against an order that the former matrimonial home be sold and, after the costs of sale, the proceeds be divided equally between the wife and the Commissioner. The only substantial asset was the home worth $4.75 million. There was conflicting evidence as to the wife's knowledge of the husband's tax avoidance but the trial Judge accepted that the wife did not know. The trial Judge made no adjustment in favour of the wife for s 75(2) factors although she had the primary care of 4 children aged between 1¾ and 13 years and this affected her earning capacity. Her s 75(2) factors were off-set against the husband's indebtedness to the ATO as a factor in the Commissioner's favour under s 75(2)(ha).

The Commissioner appealed. In balancing the competing claims of the wife against the Commissioner, the Full Court found that the trial Judge clearly appreciated the critical features of the exercise, and said (at [86]):

> "In our view, the Commissioner of Taxation is in a position distinguishable from that of a commercial creditor. Commercial creditors have a choice about to whom they extend credit. On the other hand, the position of the Commissioner as a creditor of taxpayers is of a completely different origin. The onus is on taxpayers to make full and proper disclosure to the Commissioner of Taxation. The Commissioner does not extend credit at all, but becomes a creditor by virtue of the conduct of the affairs of the taxpayer. As seen, Rose J gave "...much weight to the fact that the outstanding tax indebtedness of the husband is a debt to the Crown and implicitly there is a public interest issue", though he also recognised that the Commissioner had no priority over the wife's claims."

The appeal was dismissed.

5 Position of unsecured creditors under the FLA if there is a bankruptcy

In a bankruptcy most of the property of the bankrupt vests in the trustee of the bankrupt (s 58(1) BA) and is divisible against creditors (s 116(1) BA) except for exempt property (s 116(2) BA). The vesting is immediate and does not depend upon the trustee lodging, for example, caveats on real estate. The trustee's equitable interest is acquired by force of statute, so other parties need to be wary when dealing with a potential bankrupt. These issues were canvassed in *NWC Finance Pty Ltd v Borsellino (No 2)* [2016] NSWSC 1338.

A family law court has power to alter the interests of a bankruptcy trustee in the vested bankruptcy property (s 79(1)(b)).

One way to consider the interests of creditors is under s 75(2)(h), but as was pointed out by Le Poer Trench J in *Lemnos & Lemnos* [2007] FamCA 1052, s 75(2)(ha) is only one factor amongst many to be considered under s 75(2) and their interests are not given more or less weight than the others 75(2) factors. The interests of a bankruptcy trustee or unsecured creditor do not arise

elsewhere in the s 79 process unless they are entitled to be considered as "legal and equitable interests" to be determined by the court under s 79(1) (see *Stanford v Stanford* (2012) FLC 93-518). Doubt has been cast by the Full Court of the Family Court on whether unsecured liabilities are "interests" (eg. *Bevan & Bevan* (2013) FLC 93-545 and *Layton & Layton* [2014] FamCAFC 120). Despite this doubt, in many cases where neither party is bankrupt, the parties and the court agree that certain debts be deducted from the gross property pool when calculating the property available for division between the parties in line with *Biltoft & Biltoft* (1995) FLC 92-614.

The extent to which s 75(2)(ha) covers the interests of a trustee as opposed to a creditor may, however, be re-considered following the Full Court decision of *Bloomfield & Grainger and Anor* (2015) FLC 93-677. The Full Court was dealing with financial agreements and adopted a narrow reading of “creditor” in s 90K(1)(aa) so as to exclude a trustee in bankruptcy. It seems possible that in the future this narrow reading of “creditor” could also apply to s 75(2)(ha). This is supported by the fact that in the FLA the rights of trustees in bankruptcy and creditors are referred to expressly in certain sections, eg s 79(10) and s 79(11).

6 Standing in FLA proceedings after bankruptcy

A trustee in bankruptcy is not automatically a party to property settlement proceedings. An action commenced by a person who later becomes bankrupt is stayed until the trustee elects in writing to prosecute or discontinue the action (s 60(2) BA). The election must be made within 28 days after notice of the action is served on the trustee (s 60(3)). If the trustee elects to continue FLA proceedings, what standing does the bankrupt have? And what if the trustee does not elect?

Standing of trustee

The trustee has standing to join the s 79 FLA proceedings if the conditions of s 79(11) FLA are met. The section provides:

> *If:*
> *(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and*
> *(b) either of the following subparagraphs apply to a party to the marriage:*
> *(i) when the application was made, the party was a bankrupt;*
> *(ii) after the application was made but before it is finally determined, the party became a bankrupt; and*
> *(a) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and*
> *(b) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;*
> *the court must join the bankruptcy trustee as a party to the proceedings.*

In *Bethke & Bethke* (2019) FLC 93-906 the Full Court rejected the argument by the bankrupt that his trustees in bankruptcy should not have been joined to the proceedings because the trial judge failed to consider whether joinder was in the creditors' best interests or it was equitable and just. The Full Court said that if the s 79(11) requirements were met, the court **must** join the trustees as a party to the proceedings. The only real question to be asked in the circumstances of this case was whether the requirements of s 79(11)(d) were met. The Full Court said (at [49]-[51]):

> "The requirements in s 79(11)(d) will ordinarily be easily satisfied because it is axiomatic that:
>
> (a) The interests of the bankrupt's creditors are affected if the size of the bankrupt's estate is less than the total amount owed to the creditors;
>
> (b) The property of the bankrupt vests in the Trustee; and
>
> (c) That property can either be increased or decreased as a result of an adjustment to the property of either the applicant or the respondent, held jointly or severally by the making of a property settlement order.
>
> In this case:
>
> (a) The Trustees' assessment of the appellant's direct financial contributions to the assets held jointly and severally by the parties was in the order of $21,000;
>
> (b) The appellant's creditors significantly exceeded his possible claim under s 79 of the Act. The primary judge was told one of the appellant's debts exceeded $500,000 …
>
> (c) The appellant had forged a mortgage for $385,000 which was registered against the property in the respondent's name. The respondent sought that the mortgage be set aside under s 106B of the Act in the proceedings for the property settlement order; and
>
> (d) If the respondent was successful in the proceedings, the appellant's creditors in his bankruptcy were going to get less.
>
> The primary judge, in this case, was correct in making an order joining the Trustees as parties to the proceedings having been satisfied that "the interests of the bankrupt creditors may be affected" and that the low bar set by s 79(11)(d) of the Act had been comfortably cleared in this case."

The procedure for any third party to become a party to a case is either by being named as a respondent by one of the parties to the case, or by applying to intervene in a case. A party to a case may add another person as a party by amending the application to add the name of the person (r 6.03(2) *Family Law Rules 2004* (FLR). In addition, r 6.03(3) requires that the party seeking to add another party:

> "(a) file an affidavit setting out the facts relied on to support the addition of the new party, including a statement of the new party's relationship (if any) to the other parties; and
>
> (b) serve on the new party:
>
> (i) a copy of the application, amended application, response or amended response; and
>
> (ii) the affidavit mentioned in paragraph (a); and
>
> (iii) any other relevant document filed in the case."

Justice Cronin in *Pencious & Pencious* [2010] FamCA 605 took issue with the apparent simplicity of an earlier version of r 6.03. He said (at [1], [2], [4]):

> "…In my view it is not that simple.
>
> The recipient of the application for joinder as well as all other parties to the litigation must be able to identify what material facts give rise to a cause of action against the party sought to be joined. Perhaps the practical test is whether the application would enable the party so joined or to be joined, to respond, in the sense of filing a defence to the claim.
>
> After pointing to the jurisdictional basis upon which orders are sought (if they are), the application for joinder (or the person seeking to defend having joined a person) must be able to show that the rights of those persons may be affected by an issue in the case but also that participation is necessary to enable the court to determine all issues in the case."

He agreed with the Full Court in *B Pty Ltd and Ors & K* (2008) FLC 93-380 which said (at [43]):

> "However, the narrative or descriptive nature of evidence is often unsuited to formulate or particularise a cause of action against a third party. Something resembling a statement of claim will generally be necessary."

In the Family Court, a person who is not a party to a case who seeks to intervene in a case must comply with r 6.05 FLR unless they are a person entitled to intervene without the court's permission. Some examples are given, such as a creditor under s 79(10) and the Attorney-General. The person must file a Notice of Intervention by Person entitled to Intervene and an affidavit:

- stating the facts relied on in support of the intervention; and
- attaching a schedule setting out the orders sought (r 6.06(2)).

The trustee is not obliged to join the proceedings and can seek to be dis-joined if they object to continuing. The trustee may not want to be a party after weighing up the costs of the proceedings as against the likely benefits, or lack of funding. However, a trustee may be a "necessary party" within r 6.02(1) as their "rights may be directly affected by an issue in a case". To succeed in a dis-joinder application, the trustee will need to be prepared to abide by any orders made by the court.

Trustee elects to continue proceedings

If a trustee elects to continue the s 79 proceedings, a bankrupt loses the right to make submissions regarding vested bankruptcy property. The bankrupt must seek the leave of the court to make submissions (s 79(12)). Leave can only be granted in exceptional circumstances (s 79(13)). The bankrupt can, however, as of right, make submissions about property which has not vested, such as superannuation. These submissions will probably indirectly deal with vested property.

It is also possible that the trustee can elect to continue the s 79 proceedings under s 60(2) BA but not become a party and allow a creditor or the bankrupt to continue the proceedings relying on s 134 and s 178 BA. For example, a creditor was allowed to continue the proceedings in *Vincent & Vincent and Anor* [2016] FCCA 227 which is discussed later in this paper. These options have not been fully explored.

In *Reua & Reua* [2008] FamCA 1038 Stevenson J found that there were "exceptional circumstances" within s 79(13) to enable the bankrupt to make submissions about vested bankruptcy property because:

1. Neither the wife nor the trustee opposed the granting of leave.
2. The husband sought relief in respect of non-vested property so he was a participant in the proceedings anyway.
3. The husband had knowledge of the circumstances in which many of the unsecured debts were incurred. Although the husband's evidence was useful to the court and the trustee, the bankrupt could have been a witness without being a party.

None of these seem to be "exceptional" circumstances in the sense otherwise used in the FLA.

Trustee does not elect to continue the proceedings – the problem of s 60 BA

The question of what happens if the trustee does not elect to continue the s 79 proceedings arose in *Sloan & Sloan* [2018] FamCA 610. The husband became bankrupt in February 2018. The trustee did not elect to continue the property and parenting applications instituted by the bankrupt prior to the bankruptcy.

The wife posed two main arguments against the husband being able to continue the litigation. The first related to the effect of the bankruptcy vesting provisions in the light of the High Court decision of *Cummings v Claremont Petroleum NL* (1996) 185 CLR 124, which went to the question of whether the husband's right to litigate had vested in the trustee and, in any event, whether the husband had sufficient interest in the subject matter of the litigation to give him standing. The second related to the operation of s 60 BA.

Section 58 BA provides that property held by the husband at the time of his bankruptcy, along with property acquired by him during the period of bankruptcy, vests in the trustee. The consequence is that, to the extent that a right to litigate may be considered to fall within the definition of property within s 5 BA, it vests in the trustee. The definition of "property" within the BA is broad, and:

> "Means real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property."

Justice Gill noted (at [8]) that the High Court majority found in *Cummings* that "the definition is not such as to capture all rights to litigate as aspects of property under the BA." The High Court was dealing with an attempt to commence an appeal by two bankrupt litigants, who became bankrupt following the hearing of the case but prior to judgment being handed down. The questions in *Cummings* were:

1. Did the right to appeal vest in the Trustee?
2. Did the bankrupt have standing?

The husband relied upon cases dealing with the application of *Cummings* to family law litigation: *O'Neill & O'Neill* (1998) FLC 92-811 at [87] which discussed *Page & Page (No 2)* (1982) FLC 91-241 and *Reed & Reed*; *Grellman* (1990) FLC 92-105. In *Cummings*, the Full Court accepted the position of Frederico J in *Page* that the right to litigate a s 79 application is a personal right that does not pass to the trustee in bankruptcy. Justice Frederico specifically referred to the operation of s 60 BA and indicated that the provision did not stop a bankrupt from bringing or continuing proceedings under s 79 FLA. Applying *Cummings*, the Full Court in *O'Neill* stated (at [88]):

> "Furthermore, the majority of the High Court in Cummings referred, without apparent disapproval, to the concept of "rights of action which do not pass to a trustee on bankruptcy because they are personal to the bankrupt and **do not affect the quantum of the bankrupt estate"** (emphasis added)… Although there must be a question as to meaning of the words…just quoted, it would appear to remain good law that a bankrupt spouse may initiate and prosecute property settlement proceedings during the course of his or her bankruptcy – although any property acquired would have to vest in the trustee by virtue of s58(1)(b) of the BA (apart from the limited classes of property exempted under s116(2) of that Act)."

Reed, perhaps inconsistently with *Cummings*, supported the right to litigate at first instance due to the possibility of the fruits of a s 79 application outstripping what was to be recovered pursuant to the bankruptcy.

The wife relied upon *Guirguis v Guirguis and Official Trustee in Bankruptcy* (1997) FLC 92-726 (which predated and was considered in *O'Neill*) where the prospect of a surplus (consistently with *Cummings*) did not give standing to a bankrupt to pursue an appeal. She asserted that s 60 BA stopped the husband from conducting any proceedings other than proceedings in respect of property that, pursuant to s 116 BA, was not divisible among creditors, such as superannuation.

After considering the earlier cases, Gill J in *Sloan* concluded (at [20]):

> "Subject to the caution expressed by the Full Court regarding the qualification as to affecting the quantum, this supports the notion that s 79 proceedings fall into the category of actions that do not vest in the trustee as they are personal to the bankrupt."

Justice Gill dealt with the wife's other arguments and concluded that the issue of standing identified in *Cummings* did not stifle the husband's proceedings, but more problematic for the husband's application was s 60 BA (at [26]) "from which a clear basis for the ending of the husband's application flows".

Section 60 BA states:

> "(1) The Court may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit: …
>
> (b) Stay any legal process, whether civil or criminal and whether instituted before or after the commencement of this subsection, against the person or property of the debtor:
>
> (i) In respect of the non-payment of a provable debt or of a pecuniary penalty payable in consequence of the non-payment of a provable debt; or
>
> (2) In consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt; … An action commenced by a person who subsequently becomes a bankrupt is, upon his or her becoming a bankrupt, stayed until the trustee makes election, in writing, to prosecute or discontinue the action.
>
> (3) If the trustee does not make such an election within 28 days after notice of the action is served upon him or her by a defendant or other party to the action, he or she shall be deemed to have abandoned the action.
>
> (4) Notwithstanding anything contained in this section, a bankrupt may continue, in his or her own name, an action commenced by him or her before he or she became a bankrupt in respect of:
>
> (a) any personal injury or wrong done to the bankrupt, his or her spouse or de facto partner or a member of his or her family; or
>
> (b) the death of his or her spouse or de facto partner or of a member of his or her family. …
>
> (5) In this section, **action** means any civil proceeding whether at law or in equity."

The underlying point made for the wife was that the specific exclusions in s 60(4) BA, which do not include family law proceedings, implicitly meant that proceedings instituted under the FLA are not exempted from the operation of the provision. This understanding of the operation of s 60 BA was consistent with the analysis of Carew J in *Lincoln (Deceased) v Moore* [2016] FamCA 547 and by Cronin J in *Trent & Rowley* [2014] FamCA 447.

It was common ground between the parties that the trustee was on notice of the current proceedings but that 28 days had not passed since the trustee came to be on notice. The trustee appeared on 11 May 2018 to advise the Court that the trustee had not yet made an election to prosecute or discontinue the action commenced by the husband.

Justice Gill distinguished *Page*, (at [35]):

> "It may be observed that the Husband's s 79 application in *Page* was not on foot at the time of the bankruptcy, but post-dated it, meaning that s 60 of the Bankruptcy Act did not have operation in relation to the staying of those proceedings in any event. To the extent that Justice Frederico's assertion as to "continuing an application" was a reference to the operation of s 60 of the BA in the context of pre-existing proceedings, it constitutes *obiter dicta*."

Justice Gill concluded (at [39]):

> "The plain meaning of the language used in the section is to apply to all civil litigation (other than the exempted classes). Litigation that relates to matters other than property caught by the vesting provisions is not exempted. The provision has a blanket effect, other than in the limited specific exceptions set out at s 60(4)."

Justice Gill explained the breadth of the impact of s 60 BA on FLA proceedings (at [40]-[42]):

> "Given the breadth of the definition of "action" this also has the apparent and unwelcome effect that proceedings under Part VII of the FLA relating to children are also included (save potentially to the extent that they constitute injunctive protections relating to a "wrong done to the bankrupt...or a member of his or her family.") resulting in their being stayed by a bankruptcy. This effect of s 60 makes no sense and potentially undermines the well-being of children, without any corresponding benefit being conferred on creditors (if such benefit could be weighed against the welfare of a child).
>
> However, absent a relevant exception, this is the effect of the language used in the provision.
>
> The broad operation of s 60(2) and (3) means that in the event that the trustee has not made an election to prosecute the current proceedings, then they are first stayed and then abandoned. This, on its terms, includes all aspects of proceedings, including child-related proceedings."

However, in relation to the husband's contempt application which he issued after he went bankrupt, Justice Gill found (at [43]) that it was not affected by s 60 BA. Further, as it was not a property right, it was able to continue.

Following the delivery of reasons further orders were made. The orders included a notation that Justice Gill had been advised by the parties that the trustee had made an election pursuant to s 60(2) BA following an order made by Justice Thawley of the Federal Court to extend the period of time available to the trustee to make that election. An order was made joining Mr G as Trustee of the property of Mr Sloan (a bankrupt) as Second Applicant in the proceedings.

In *Biddick & Etier* [2018] FamCA 744, s 60 BA was also a problem. In July 2018, the husband and the wife executed documents for property orders to be made by consent. Essentially, they each kept the property in their respective names and possession. The proposed orders included the following problematic provision, for which no power to make the order could be identified (at [6]):

> "That Ms Biddick immediately cease and desist in publishing (in any form) or verbalising defamatory statements that are directed or pointed or inferred at Mr Etier. That at all times information held by the parties by either of them remain confidential. That settlement between the parties confers that all legal disputes between the parties are settled and neither party will commence any proceedings against either party at any time."

A further problem was that the wife became bankrupt after the proceedings commenced. Section 60 BA was therefore relevant. Justice Gill referred to his earlier case of *Sloan* and noted (at [13]):

> "It should, however, be noted that Ms Biddick's right to litigate, insofar as it concerns 'property that will not form a part of the estate available for distribution to creditors, but rather will deal with interests that will lie with the bankrupt' remains, as Ms Biddick retains standing in relation to these aspects. Whether this will result in her recommencing proceedings remains to be seen."

The staying of the proceedings meant that absent the election by the trustee, the proposed consent orders could not be made and Ms Biddick's application was deemed to be abandoned. This meant that the proposed consent orders could not be made into orders. The matter was relisted for directions, to enable the husband to have the proceedings finally determined. Justice Gill noted the right of the wife to recommence FLA proceedings in relation to exempt property.

A similar approach to s 60 was taken by Cronin J in *Trent & Rowley* [2014] FamCA 447. He referred to *Cummings* and said (at [1]):

> "A bankrupt's contingent interest in a surplus in his or her estate does not alone give a right or entitlement which would allow him or her to sue to enforce proprietary rights."

A majority of the High Court in *Cummings* referred to the possibility that where a trustee declines to exercise their power to sue or to appeal against a judgment, the bankrupt may apply to a court (exercising BA jurisdiction) for an order under s 178 BA. Section 178 BA has now been repealed, but it stated:

> "(1) If the bankrupt, a creditor or any other person is affected by an act, omission or decision of the trustee, he or she may apply to the Court, and the Court may make such order in the matter as it thinks just and equitable.
>
> (2) The application must be made not later than 60 days after the day on which the person became aware of the trustee's act, omission or decision."

Section 178 has been replaced by the much lengthier s 90-15 *Insolvency Law Reform Act 2016* (Cth) (ILRA) the relevant part of which commenced on 1 September 2017. The extent to which the old s 178 is preserved in the new provision is uncertain.[1] It may enable proceedings to be continued by a bankrupt or creditor instead of by the trustee if the trustee does not elect, or elects and does not want to take part in the proceedings.

Under the *Sloan* line of authority some earlier cases where the trustee chose not to intervene would have been decided differently. If the bankrupt is the applicant even in parenting proceedings, unless the trustee elects to continue the proceedings, the bankrupt's application is deemed to be abandoned. The non-bankrupt spouse may still be able to continue the proceedings if they have filed a Response and will become the applicant (r 10.11(3) FLR). The respondent will become the applicant. The bankrupt may need to try to re-file and the BA does not prevent this.

Creditor's standing

The standing of a creditor to be a party to FLA proceedings is less clear than that of the trustee and the bankrupt. Section 58(3) BA states:

> "Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:
>
> (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
>
> (b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such proceeding."

The limited role of creditors to continue or institute proceedings after bankruptcy was discussed in *Fraser v Commissioner of Taxation & Official Trustee* [1996] FCA 1801, where Beaumont J said (at [42]):

> "The point is that there is no scope for any role to be played by individual creditors acting on their own initiative; if litigation is to be instituted with a view to the recovery of assets, it is the trustee's function and responsibility to be the dominus litis and thus entirely in charge of the litigation to the exclusion of individual creditors. In other words, the relevant scheme of the legislation specifically that of s 58(3), is that individual creditors have no right to decide to pursue, or not pursue, the assets of the bankrupt with a view to the satisfaction of individual debts."

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[1] "Decision Time", S Mullette (last viewed on 13 November 2019) at https"//www.matthewsfolbig.com.au//news/insolvency-restructuring-debt-recovery/ decision-time/

A creditor is entitled to be a party to s 79 proceedings if the creditor may not be able to recover their debt if a s 79 order is made (s 79(10)(a)). Section 79(10) does not apply to a creditor if the debtor is bankrupt and the debt is a provable debt or covered by a PIA (s 79(10A)).

However, in *Vincent & Vincent and Anor* [2016] FCCA 227 Judge Riethmuller allowed the creditor to join the proceedings as the beneficiary of the trustee in circumstances where the trustee in bankruptcy had elected not to join the proceedings (unless funded). He said (at [13]; [20]):

> "Ordinarily the trustee in bankruptcy is the appropriate person to bring or defend proceedings. It is open to the court to direct the trustee to do so. However, there is a practical problem if the trustee is not in funds and the creditors cannot fund the suit. In such a situation it would be unjust to the creditors not to allow them to represent themselves and pursue the suit for the benefit of the trust estate (indirectly for their even benefit). Whilst such an exercise is unusual, it is open if the justice of a particular case demands. To hold otherwise would allow impecuniosity (potentially caused by the bankrupt) to deny a significant creditor a remedy. . .
>
> I am satisfied that on the present material the Intervenor has a prima facie case that the husband's property or part thereof should not be settled on the Wife under s 79 of the Family Law Act 1975. Significantly, this is not a case where the Intervenor is pursuing a claim, rather she is now defending the bankrupt estate against a claim by the Wife."

Another example, similar to *Vincent*, arose in *Van Dyke v Lo Pilato, in the matter of Sidhu* [2016] FCA 1347. Justice Katzmann in the Federal Court granted leave to the largest creditor of the bankrupt estate to commence proceedings under s 79A FLA on the basis that she entered into undertakings:

> "1. to hold the benefit of any order made in the s 79A proceedings for the trustee in bankruptcy on behalf of the bankrupt estate of Mr Sidhu;
>
> 2. to consent to any application by the trustee in bankruptcy to be joined as a party to those proceedings; and
>
> 3. if no such application is made, to notify the trustee in bankruptcy of final orders made in those proceedings."

Justice Katzmann explained why she granted leave to the creditor (at [30]):

> "Here, Ms Van Dyke does not seek any undue advantage over other creditors. The purpose of her application and, if it succeeds, the effect of her action under s 79A is to augment the bankrupt estate for distribution between all creditors. Ms Van Dyke has given an undertaking to facilitate this course. The willingness of an applicant to enter into an undertaking to hold the benefit of any order made in the Family Court proceedings on behalf of the bankrupt estate has been held to render proceedings of that kind in the interests of "the general body of creditors"…

Other factors Katzmann J considered to be relevant were:

- It was preferable that the trustee in bankruptcy bring the action, but the trustee did not propose to do that unless he was put in funds and there was no evidence that this would occur;
- The trustee did not oppose the granting of leave;
- The creditor had no opportunity to make submissions in the Family Court against the making of a proposed consent orders;
- The creditor had a *prima facie* case for the exercise of the court's discretion in her favour;
- The creditor had standing as a "person affected by" the consent orders – she was a creditor when the orders were made.

The above cases can, perhaps be explained in part, by the preference of a court for there to be a contradictor rather than the proceedings be undefended.

Any property recovered by a creditor or bankrupt must be paid to the trustee of the bankrupt. The inability of the Family Court to order that a payment be made directly to an unsecured creditor of a bankrupt was made clear in *Trustee for the bankrupt estate of Lasic & Lasic* (2009) FLC 93-402. The Full Court understood the trial Judge's concern that if the husband's entitlement was paid to the trustee, the creditor Mr M would receive nothing. Reluctantly, the Full Court concluded that ordering a direct payment by the wife to Mr M was not within the trial Judge's power.

7 Caveats

Before lodging a caveat it is necessary to ascertain whether the potential caveator has a caveatable interest. If the caveator has a caveatable interest, the next step is to ensure that the caveat is properly worded to claim the interest that the caveator has and not go beyond the caveator's interest.

If the registered proprietor or another interested person disputes the caveator's claim there are 2 methods to have it removed. The administrative procedure for seeking the removal of a caveat is set out in s 89A *Transfer of Land Act 1958 (Vic)*:

> "(1) Subject to the provisions of this section, where a recording of a caveat (not being a caveat lodged by the Registrar) has been made pursuant to s 89(2), any person interested in the land affected thereby or in any part thereof may make application in an appropriate approved form to the Registrar for the service of a notice pursuant to ss (3).

(2) An application under this section shall -
  (a) specify the land and the estate or interest therein in respect of which it is made; and
  (b) be supported by a certificate signed by a person for the time being engaged in legal practice in Victoria, referring to the caveat and stating the person's opinion that, as regards the land and the estate or interest therein in respect of which the application is made, the caveator does not have the estate or interest claimed by the caveator.

(3) Upon receiving any such application and certificate and upon being satisfied that the applicant has an interest in the land in respect of which the application is made, the Registrar shall give notice to the caveator that the caveat will lapse as to the land and the estate or interest therein in respect of which the application is made on a day specified in the notice unless in the meantime either—
  (a) the application is abandoned by notice in writing given to the Registrar by or on behalf of the applicant; or
  (b) notice in writing is given to the Registrar that proceedings in a court or VCAT to substantiate the claim of the caveator in relation to the land and the estate or interest therein in respect of which the application is made are on foot.

(4) The Registrar shall not cause a day to be specified in the notice that is less than 30 days after the day on which the notice is served or, if the notice is sent by post, the day on which it is introduced into the course of post.

(5) Upon the specified day, unless -
  (a) the application has been abandoned as aforesaid; or
  (b) notice in writing has been given to the Registrar that proceedings as aforesaid are on foot -

the caveat shall lapse as to the land and the estate or interest therein to which the application then relates, and the Registrar shall make all necessary amendments in the Register.

(6) An application under this section may be abandoned either wholly or as to part of the land or the estate or interest therein in respect of which it is made either before or after notice is given pursuant to s-s (3), but where notice has been given, only with the consent of the caveator or the caveator's agent.

(7) Where notice in writing of the kind referred to in paragraph (b) of s-s (3) is given to the Registrar -
  (a) if in the proceedings in question the claim of the caveator is not substantiated to the satisfaction of a court or VCAT - the court or VCAT may make such order in relation to the caveat as the court or VCAT thinks fit and the Registrar shall give effect thereto;
  (b) if there is subsequently served upon the Registrar a copy of any notice, or an office copy of any order of the court or VCAT, disclosing that the proceedings in question have been discontinued, withdrawn or struck out or evidence to the satisfaction of the Registrar that those proceedings have been dismissed - the caveat shall lapse as to the land and the estate or interest therein to which the application then relates, and the Registrar shall make all necessary amendments to the Register.

Section 90(3) TLA sets out that court proceedings can also be issued for the removal of the caveat:

> “Any person who is adversely affected by any such caveat may bring proceedings in a court against the caveator for the removal of the caveat and the court may make such order as the court thinks fit.”

The nature of proceedings under s 90(3) TLA to remove a caveat were described by Derham AsJ in *Hermiz v Yousif* [2019] VSC 160. The caveator lodged two caveats. The first was removed after the plaintiff's solicitors objected. The caveator changed solicitors and lodged a further caveat. The caveator claimed a freehold interest in the land on the basis of an implied, resulting or constructive trust. The plaintiff and his wife had entered into a contract to sell the land at a time when there was no caveat on the land by the caveator. As a result of the caveat, they were unable to complete the sale, they were still paying interest on their NAB mortgage of $710,000, they had allowed the purchaser to enter into possession under a licence but were not receiving any income from the purchaser and could not purchase another property.

The caveator had proceedings in the Federal Circuit Court seeking adult child maintenance from the plaintiff but did not seek an order in relation to the land or claim an interest in it.

Associate Justice Derham set out the applicable law for removal of a caveat (at [23]-[26]):

> "Under s 89(1) of the *TLA*, a caveat can only be lodged by a person claiming an estate or interest in the land. The estate or interest must be established to the requisite standard by the person who lodged the caveat, if the caveat is challenged.
>
> The plaintiff's application is made pursuant to s 90(3) of the *TLA*, where any person adversely affected by a caveat lodged under s 89 of the *TLA* is permitted to 'bring proceedings in a court against the Caveator for the removal of the caveat'. Section 90(3) empowers a court to 'make such order as the court thinks fit', and thus gives the Court a discretion. The application is in the nature of a summary procedure analogous to the determination of interlocutory injunctions.[2] The procedure is consequently interlocutory in substance, even though it may give rise to a final order.[6][3] The principles applicable were dealt with by Warren CJ in *Piroshenko v Grosjman.*[4] They are well settled. The authorities establish the following:[5]
>
> (a) the Court's power under s 90(3) of the TLA is discretionary;
> (b) the Caveator bears the onus of establishing that there is a serious question to be tried that it does have the estate or interest in land as claimed;[6]
> (c) if the Caveator establishes a prima facie case to be tried in relation to the estate or interest claimed, the Caveator must further establish that the balance of convenience favours the maintenance of the caveat until trial;
> (d) there is a relationship between the strength of the case in establishing a prima facie case to be tried and the extent to which the Caveator must establish the balance of convenience favours the Caveator; the stronger the prima facie case, the more readily the balance of convenience might be satisfied. It is sufficient that the Caveator show a sufficient likelihood of success that, in the circumstances, justifies

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[2] *Eng Mee Yong v Letchumanan* [1980] AC 331, 337; *Piroshenko v Grosjman* (2010) 27 VR 489, [12]-[23]; *Goldstraw v Goldstraw* [2002] VSC 491, [30]).
[3] Eng Mee [1980] AC 331, 337; *Smith v Callegari* (1988) V Conv R 54-300, 63,858-9; *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37, 43.
[4] *Piroshenko* (2010) 27 VR 489, [7]-[11].
[5] See, eg, *Percy & Michele Pty Ltd v Gangemi* [2010] VSC 530, [38]-[48]; *Piroshenko* (2010) 27 VR 489, [13]-[20]; *Schmidt v 28 Myola Street* [2006] 14 VR 447, 457, [32]; *Goldstraw* [2002] VSC 491, [30]; *Sylina v Solanki* [2014] VSC 2, [43].
6 TLA s 89(1).

> the practical effect which the caveat will have on the ability of the registered proprietor to deal with the Land in question in accordance with its normal proprietary rights.

The prima facie case test is often used interchangeably with whether a serious question to be tried is established. The prima facie case test is to be preferred.[7] That does not mean that the Caveator must show that it is more probable than not that at trial the plaintiff will succeed. The Caveator must show that they have a prima facie case with sufficient likelihood of success to justify the maintenance of the caveat, and the preservation of the status quo pending trial.[8]

An application to remove a caveat involves two steps:

(a) first, the Caveator must establish that there is a prima facie case - there is a probability on the evidence before the Court that the Caveator will be found to have the asserted legal or equitable rights or interest in the land;

(b) second, having done so, the Caveator must establish that the balance of convenience favours the maintenance of the Caveat on the title until trial and:[9]

> that probability is sufficient to justify the practical effect which the caveat has on the ability of the registered proprietor to deal with the property in question in accordance with their normal proprietary rights."[10]

In relation to the need for a caveatable interest, Derham AsJ said at [31]:

> "It is a fundamental feature of a caveat under the TLA that it must be supported by an estate or interest in land. The interest to be protected by the lodging of a caveat is a proprietary interest. That is, in order to support a caveat, an interest 'must be an interest in respect of which equity would give specific relief against the land itself, either by way of requiring the provision of a registrable instrument or in some other way, for example, ordering a sale to enable a charge to be satisfied out of the proceeds.[11] An interest based on a 'resulting, implied or constructive trust' can form the basis of a caveat.[12] As Dodds-Streeton J noted in *Goldstraw*,[13]examples include part performance of an agreement for disposition of an interest in land,[14] where parties have acquired land pursuant to a failed joint venture,[15] where the claimant has made an indirect contribution to the purchase price of property to which another party takes title, [16] or there is a common intention that a person will acquire an interest in a particular property to which another party holds legal title, and the person acts on that belief to his or her detriment, such that it would constitute a fraud to deny the interest intended to be acquired." [17]

Applying the principles to the case, Derham AsJ said (at [32]):

> "Ms Yousif does not advance any basis known to the law for raising an implied, resulting or constructive trust in the Land. There is no suggestion that she made any financial contributions to its acquisition, so no resulting trust can arise. Cooking, cleaning and

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7 CFHW Pty Ltd v Burness [2014] VSC 451, [17], citing Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57, 82); Carbon Black Pty Ltd v Launer [2015] VSCA 126, [37].
8 Sylina [2014] VSC 451, [20]; Piroshenko (2010) 27 VR 489, 494; O'Neill (2006) HCA 46, (2006) 227, CLR 57,82.
9 Piroshenko (2010) 27 VR 489; Carbon Black [2015] VSCA 126.
10 Piroshenko (2010) 27 VR 489, [18].
11 Spencer v Spencer, Hedigan J, Supreme Court of Victoria, 16 October 1996, 9, cited in Goldstraw [2002] VSC 491, [24].
12 Taddeo v Catalano (1975) 11 SASR 492; McMahon v McMahon [1979] Vic RP 23, [1979] VR 239; Goldstraw [2002] VSC 491, [26]
13Goldstraw [2002] VSC 491, [26].
14 Ogilvie v Ryan [1976] 2 NSWLR 504.
15 Muschinski v Dodds [1985] HCA 78, (1985) 160 CLR 583.
16 Baumgartner v Baumgartner [1987] HCA 59; (1987) 164 CLR 137.
17 Hohol v Hohol [1981] Vic RP 24, [1981] VR 221.

> supporting the plaintiff financially whilst he studied for his Australian medical qualification more than ten years before the Land was acquired does not show that it is or would be unconscionable for the plaintiff to deny her an interest in the Land." [18]

The caveator objected to the plaintiff applying under s 90(3) TLA rather than using the cheaper s 89(A) procedure. Derham AsJ rejected this argument, saying (at [44]-[45]):

> "Ms Yousif complained that by applying under s 90(3) of the TLA the plaintiff had adopted an expensive procedure which was burdensome to her when compared with the administrative procedure available under s 89A of the TLA. It was pointed out to Ms Yousif that the plaintiff had, by his solicitor's letters written before the commencement of the proceeding, demanded the removal of the caveat and threatened to seek indemnity costs and damages if she did not. She had the option of removing the caveat but did not do so.
>
> In addition, Counsel for the plaintiff pointed out the differences, from the perspective of a plaintiff who had contracted to sell the Land before either the first or the second caveat was lodged, of the different procedures and the steps that could, and likely would, have been required in the event that the administrative procedure had been adopted. These include the necessity to wait out the period of 30 days under s 89A, within which Ms Yousif might have commenced a writ proceeding to make good the claim made in the caveat, with the need thereafter, assuming the facts stayed as they are before me, for pleadings and an application for summary judgment by the current plaintiff. The delays in that process were likely to be in the order of between four and six months. Meanwhile, the risk remained that the purchasers under the contract of sale would rescind the contract requiring the property to be resold (perhaps in a falling market). The very reason for the summary procedure is to enable application to be made that avoids that sort of delay where the case is clear, as it is here."

An indemnity costs order was made against the caveator and Derham AsJ agreed that it was appropriate that the plaintiff reserve its right to make a claim against the solicitors who lodged the caveat. Derham AsJ said (at [53]-[54]):

> "The inference from the correspondence that preceded the application is that Ms Yousif was attempting to use the caveat as a bargaining chip. Taking the facts she advanced in her affidavit and as asserted by her solicitors in their letters at the highest, there is no tenable basis for any caveatable interest in the land in her favour and the solicitors should have been aware of that. Taking into account these matters, and the conclusion I have reached as to the complete lack of a proper basis for the lodgement of the caveat, this is a case where it is appropriate to make an order that the defendant pay the plaintiff's costs on an indemnity basis.
>
> The plaintiff also sought to reserve its right to make a claim for costs against the solicitors who lodged the caveat. It is appropriate to do so. The lodgement of a caveat over land is a serious matter and they should not be lodged where there are no grounds. Solicitors who lodge caveats have a responsibly [sic] to ensure that there are proper grounds for the interest claimed before lodging a caveat."

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18 Muschinski v Dodds [1985] HCA 78; (1985) 160 CLR 583, 620, 623

If a caveator wants to maintain a caveat after a s 89(A) notice has issued, proceedings must be issued in a "court of competent jurisdiction". The broad interpretation given by the Registrar of Titles was upheld in *Dharmalingham v Registrar of Titles and Anor* [2005] VSC 417. Justice Hargrave agreed with the Registrar of Titles' submission (at [46]):

> "… the Registrar is entitled to take a broad view of a caveator's notice and not a narrow or pedantic view. Substantial compliance is enough."

In this case, the caveator had issued proceedings in the Kuala Lumpur High Court in Malaysia. She later issued proceedings in the Family Court of Australia and had obtained an injunction in that court preventing the plaintiff, who was the husband's sister, from dealing with the land.

At the time, s 4 TLA defined "court" as:

> "'Court' means the Supreme Court and, in relation to land the value of which does not exceed the jurisdictional limit of the County Court, the Supreme Court or the County Court."

This definition was changed in 2009 to the current wording: "court of competent jurisdiction". However, interestingly, the former wording was given a broad meaning to encompass courts which were not Victorian courts.

In *Dharmalingham* the plaintiff challenged under s 116 TLA the refusal of the Registrar to amend the Register and lapse the caveat. Justice Hargrave said (at [47]-[51]) in relation to the Registrar's obligation with respect to s 89(A):

> "In the first place, the purpose of the caveat provisions must be considered. The obvious purpose of the caveat provisions is to enable any person claiming an estate or interest in land to protect that estate or interest pending an entry in the Register recording that interest. Having given the holders of such interests the power to lodge a caveat, Parliament ought not to be taken to have intended that the protection afforded by such a caveat should be lost by administrative decision in respect of an ambiguous notice. This is especially so in circumstances where the mere giving of a caveator's notice conveys an intention on the part of the caveator to maintain the caveat. The consequences of a caveat lapsing may be catastrophic for the caveator in a particular case.
>
> Secondly, s 89A does not contain any provision requiring the Registrar to give a caveator a right to be heard if a question arises as to the sufficiency of a caveator's notice. Although the Registrar may make enquiries of the caveator in respect of an ambiguous notice if there is time to do so, there will often be no time. This is because it is common experience that, where a time is specified for something to be done, it is often not done until the specified day or shortly beforehand. In such circumstances, there will be no time to enable the Registrar to hear the caveator in respect of an ambiguous notice. Section 89A(5) requires the Registrar to treat the caveat as having lapsed "Upon the specified day". The Registrar's consideration of a caveator's notice is obviously not intended to be a lengthy process involving consultation with, or giving a hearing to, the caveator.

Thirdly, it must be kept in mind that the s 89A procedure is only one way in which a caveat can cease to have force and effect. Under s 90, a caveat may lapse following the lodgement for registration of a dealing, and the consequent service of a Registrar's notice under s. 90(1). The service of such a notice casts the obligation upon the caveator to approach "the Court" and seek an order to protect their interests. Under s 90(3) any person adversely affected by a caveat may bring proceedings in "the Court" for removal of the caveat.

Fourthly, there is no prescribed form in the Act for a caveator's notice. The lack of any prescription of the form of a caveator's notice indicates that Parliament did not intend that a caveator's notice should be strictly construed to see whether it complies with the provisions of s. 89A(3)(b)."

Finally, in my view, Parliament should not be taken to have intended that the Registrar should decide borderline cases as to whether or not a caveator's notice complies with s. 89A(3)(b). Under s 110(1)(b), a person sustaining loss or damage by reason of any amendment of the Register is entitled to be indemnified from public monies in respect of such loss and damage. The amount of loss and damage could be very substantial. It is unreasonable to suppose that Parliament intended to expose the Registrar to liability, to be met from the public purse, as a result of a wrong decision as to whether a caveator's notice satisfies the requirements of s. 89A(3)(b) in a particular case. This is especially so in circumstances where the registered proprietor, or any other person adversely affected, may bring proceedings to remove a caveat or may lodge a dealing for registration which will have the effect of requiring the caveator to obtain relief from "the Court" within a specified period. In my view, Parliament intended that disputes about the validity of caveatable interests should be fought out between the various persons claiming an estate or interest in the subject land, and not determined by the decision of the Registrar as to whether to treat an ambiguous caveator's notice as being compliant or non-compliant with the strict requirements of s 89A(3)(b).

Justice Hargrave concluded (at [63]-[72]):

"When these documents are read together, the caveator's notice can be seen as giving notice to the Registrar of the following matters:

(1) The caveator's notice is given in response to the s 89A notice.
(2) The caveator intends to maintain the caveat.
(3) The caveator makes a claim in relation to the estate or interest of the plaintiff in the land.
(4) The caveator contends that the land is part of "matrimonial property" of the caveator and her husband.
(5) The caveator claims an estate in fee simple in the land, on the basis that it was fraudulently transferred by her husband to the plaintiff "with the intention to dissipate our matrimonial property". Although not expressly stated, this claim implies an allegation that the plaintiff holds the land on a constructive trust for the caveator. It is implicit that such a trust is alleged to have arisen from the plaintiff's receipt of the land for less than full consideration when she knew, or was on notice, that the land was being transferred to her by the husband in breach of trust or fiduciary duty.
(6) Proceedings are on foot in the High Court of Malaya to substantiate the claim of the caveator in relation to the land and the estate or interest of the plaintiff in the land. Those proceedings were commenced by the caveator's husband for Judicial Separation, and the caveator's claims in relation to the land were raised by her in her "answer" to the husband's petition, in which the caveator seeks "inter alia, for maintenance."

(7) The caveator lodged the caveat in order to protect her interest in the land "pending disposal of the Judicial Separation and or Divorce Petition and division of matrimonial assets". This was clearly a reference to the caveat being lodged pending resolution of the proceedings which were on foot in the High Court of Malaya.

There is no doubt that the caveator's notice gives notice that proceedings are on foot. Further, in my view, the notice adequately states that the proceedings are to substantiate the claim of the caveator in relation to the land and the estate or interest of the plaintiff in respect of which the plaintiff made the s 89A application. As I have said, the caveator's notice expressly refers to the caveator's claim to the land and, in addition, states in express terms that the caveator's claim to the land is made in relation to the estate or interest of the plaintiff in the land.

The issue is whether the caveator's notice gives sufficient notice that the proceedings in the High Court of Malaya are proceedings in a court of competent jurisdiction. In my view, the caveator's notice satisfies the requirements of s 89A(3)(b) in this regard. Although the High Court of Malaya does not have jurisdiction to order the Registrar to make any amendment to the Register, as it is not a "Court" within the meaning of the Act, there is no reason to doubt that the High Court of Malaya has the power to make orders *in personam* requiring the parties before it to execute one or more instruments dealing with the land. For example, the High Court of Malaya could order the plaintiff to transfer the land, or a part thereof, to or for the benefit of the caveator.

On behalf of the plaintiff, it was submitted that the High Court of Malaya does not have *in personam* jurisdiction of the kind which I have referred to above. It was submitted that this was so because it is settled law in Malaysia that the rule in *British South Africa Company v Companhia de Mocambique* FN[19] (known commonly as the rule in *Mocambique*) applies in Malaysia. Stated generally, the rule in *Mocambique* prevents a court from adjudicating upon the title to land in a foreign jurisdiction. Accordingly, it was submitted on behalf of the plaintiff that the High Court of Malaya has no jurisdiction to adjudicate upon the claim by the caveator in relation to the land, unless the caveator's claim falls within one of the exceptions to the rule in *Mocambique* ...

In my view, it is not necessary for me to determine whether the caveator's claim in relation to the land falls within one of the exceptions to the rule in *Mocambique*. This is because it was not necessary for the Registrar, and in my view it is not necessary for me, to "go behind" the caveator's notice and examine in detail the extent of the jurisdiction of the High Court of Malaya. On the face of the caveator's notice, reference is made to specific proceedings in the High Court of Malaya. In my view, the Registrar was entitled, and I am entitled, to assume that the High Court of Malaya has *in personam* jurisdiction over those parties before it. Even if this were not so, the expert evidence of a Malaysian solicitor, Christopher Foo Kah Foong, confirms that the High Court of Malaya has jurisdiction to order *in personam* relief in relation to land situated in a foreign country where the jurisdiction of the High Court is otherwise attracted.

As to jurisdiction of the High Court of Malaya, Mr Foong gave evidence that s. 23(1) of the *Courts of Judicature Act* 1964 (Malaysia) was, relevantly, determinative. Under s. 23(1) of that Act it is provided:

> "Subject to the limitations contained in Article 128 of the Constitution every High Court shall have jurisdiction to try all civil proceedings where –

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[19] [1893] AC 602

(a) the cause of action arose; or
(b) the defendant or one of several defendants resides or has his place of business; or
(c) the facts on which the proceedings are based, exist or are alleged to have occurred; or
(d) any land the ownership of which is disputed is situated;

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing to the local jurisdiction of the High Court."

On the face of the documents before the Registrar on the specified day, it was apparent that a number of these jurisdictional requirements had been met. First, the transfer of land, which the caveator alleges is fraudulent, was signed by the caveator's husband in Kuala Lumpur, Malaysia. This is apparent on the face of the transfer of land. Accordingly, the caveator's claim in relation to the land is based upon facts which are alleged to have occurred, or her cause of action is alleged to have arisen, within the local jurisdiction of the High Court of Malaya at Kuala Lumpur.

Second, having regard to the fact that the transfer of land was signed in Kuala Lumpur, and the fact that the caveator's husband has commenced proceedings in the High Court of Malaya at Kuala Lumpur, it is reasonable to infer that the husband resides or has a place of business within the local jurisdiction of the High Court of Malaya at Kuala Lumpur. Although the caveator's husband is the petitioner in the Malaysian proceedings, the caveator's notice refers to a claim by the caveator against the husband. This claim is constituted by her "answer" to the petition, in which the caveator seeks "inter alia, for maintenance". On the face of the caveator's notice, it is open to conclude that the caveator's claim in relation to the land forms part of the caveator's claim for maintenance. In this sense, the caveator's husband is a "defendant" residing within the jurisdiction of the High Court of Malaya at Kuala Lumpur. As a result, the High Court of Malaya has *in personam* jurisdiction on this ground.

It was next argued on behalf of the plaintiff that the High Court of Malaya at Kuala Lumpur was not a court of competent jurisdiction because the plaintiff was not a party to the Malaysian proceedings. I reject this argument. There is no requirement in s 89A(3)(b) that a caveator's notice give notice of proceedings which are on foot against the proprietor of the estate or interest in respect of which the s 89A application it made. Although it may be expected that a court of competent jurisdiction would be reluctant to make an order affecting the rights of a registered proprietor to land in the absence of the registered proprietor as a party, in the same way that I refused to hear this case in the absence of the caveator as a party, that does not mean that there may not be proceedings which meet the description in s 89A(3)(b) but which do not join the registered proprietor as a party. If this were not the case, it would mean that a caveator who made a mistake, and neglected to join the proprietor of the estate or interest in the land in respect of which the s 89A application is made as a party to the proceedings, would thereby suffer the result that the caveat lapsed by reason of the non-joinder of a necessary party to the proceedings referred to in the caveator's notice under s 89A(3)(b). This would be so notwithstanding that there is ample power in courts to join all necessary parties after the commencement of proceedings. Indeed, as noted above, I made orders of this kind in this proceeding.

It follows that, in my view, the caveator's notice gives notice of proceedings in a court of competent jurisdiction to substantiate the claim of the caveator in relation to the land and the estate or interest therein in respect of which the plaintiff made the s 89A application.

It is important that lawyers not assume that all states and territories of Australia have the same law with respect to caveats as Victoria. For example, New South Wales has a lapsing procedure, but any proceedings to maintain a caveat must be issued in the Supreme Court of New South Wales.

In the recent NSW case of *Guirgis v JEA Developments Pty Ltd* [2019] NSWSC 164, Kunc J referred to the impact of the move to electronic conveyancing and the greater role of solicitors and licensed conveyancers with respect to the lodgement of caveats (at [39]):

> "As New South Wales' conveyancing system moves to a completely electronic platform, the role of conveyancers, solicitors and others as persons qualified to prepare and lodge caveats becomes all the more important. Ordinary members of the public are, in practical terms, no longer able to lodge caveats without the intervention of a "Subscriber", who in many cases will be a solicitor or licensed conveyancer. The requirement to give the requisite representations and certifications operates to confer on them the role of a guardian at the gate."

An example of a case where the Family Court exercised jurisdiction under s 90(3) TLA to order the Registrar of Titles to remove a caveat was *Green & Walls* [2019] FamCA 76.

8 Equity of exoneration

The equity of exoneration is probably under-utilised in family law proceedings. A useful case to refer to is *Farrugia v Official Receiver* [1982] FCA 52; (1982) 58 FLR 474. Mr Farrugia was made bankrupt after he had, with the consent of Mrs Farrugia, extended the mortgage and used $10,500 for his own purposes. After the home was sold, the net proceeds of sale were divided 50% to Mrs Farrugia and 50% to the Official Receiver as Mr Farrugia was bankrupt. Mrs Farrugia issued proceedings, claiming that she was entitled to a further $5,250 from the proceeds of sale, being 50% of the half received by Mr Farrugia and used for his own purposes, together with interest on that sum.

Justice Deane said:

> "Where the property of a married woman is mortgaged or charged in order to raise money for the benefit of her husband, it is presumed, in the absence of evidence showing an intention to the contrary, that, as between her husband and herself, she meant to charge her property merely as a surety. In such a case, she is, as between her husband and herself, in the position of surety and entitled both to be indemnified by the husband and to throw the debt primarily on his estate to the exoneration of her own …
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> The present case is not, however, the simple one where the whole of the moneys borrowed jointly by husband and wife on the security of their joint property have been applied for the benefit of the husband. As has been mentioned, $12,500 of the amount borrowed was applied for the joint benefit of Mr and Mrs Farrugia upon the discharge of the previous mortgage under which they were jointly liable. It was only the balance of $10,500 that was applied for the benefit of Mr Farrugia alone. A question which arises is whether the one

> borrowing can, for the purposes of the application of the relevant equitable principles, be in effect subdivided into what was borrowed and applied for the joint benefit of Mr and Mrs Farrugia and what was borrowed and applied for Mr Farrugia's benefit alone. In my view it can. It seems to me that where the joint property is charged partially for the benefit of the husband alone and partly for the benefit of both husband and wife and it is possible to apportion the principal between the two, there is room for the application of the equitable doctrine of exoneration and the wife is, in the absence of agreement to the contrary, entitled to exoneration to the extent of what was borrowed and applied for the benefit of the husband alone …"

Mrs Farrugia was successful.

The law was well set out in *Parsons & Parsons v McBain* [2001] FCA 376 ALR which has been frequently cited since. The Full Court of the Federal Court rejected the view that the equity of exoneration only applied between husband and wife. The Full Court said (at [20]-[25]):

> "The equity of exoneration is an incident of the relationship between surety and principal debtor. It usually arises where a person has mortgaged his property to secure the debt of another, whether or not that other has covenanted to pay the debt. However, it will also arise in a case where, although not an actual suretyship, the relationship is treated as one of suretyship. This is Lord Selbourne's third class of suretyship mentioned in *Duncan, Fox, & Co v North and South Wales Bank* (1880) 6 App Cas 1, 10. For the doctrine to apply in this class, the following facts will usually exist. First, a person must charge his property. Where the person is the beneficial owner of the property it will be sufficient if the charge is by his trustee. Second, the charge must be for the purpose of raising money to pay the debts of another person or to otherwise benefit that other person. Third, the money so borrowed must be applied for that purpose. See generally *Re Berry (a bankrupt)* [1978] 2 NZLR 373.
>
> An equity of exoneration operates in the nature of "a charge upon the estate of the principal debtor by way of indemnity for the purpose of enforcing against that estate the right which [the beneficiary] has, as between [the beneficiary] and the principal debtor, to have that estate resorted to first for the payment of the debt": *Gee v Liddell* [1913] 2 Ch D 62 at 72. Thus, where co-owners mortgage their property so that money can be borrowed for the benefit of one mortgagor, the other has an interest in the property of the co-mortgagor whose property is to be regarded as primarily liable to pay the debt.
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> The trial judge denied to each appellant the right of exoneration because she had received "a tangible benefit" from the 1992 mortgage. The benefit, which might more accurately be described as an expected benefit, was that, by putting money into the partnership business, the business might survive and, as put by counsel for the trustee, that would bring "home money to put food on the table and clothe the children".
>
> If a surety receives a benefit from the loan, the equity of exoneration may be defeated. So, if the borrowed funds are applied to discharge the surety's debts, the surety could not claim exoneration, at least in respect of the benefit received. But the benefit must be from the loan itself. The question suggested by the Lord Chancellor of Ireland is: "Who got the money?": see *In re Kiely* (1857) Ir Ch Rep 394, 405. In *Paget v Paget* [1898] 1 Ch 470 both the husband and the wife "got the money" and this prevented the wife claiming exoneration.
>
> The "tangible benefit" referred to by the trial judge will not defeat the equity. It is too remote. In any event, the exoneration to which a surety is entitled could hardly be defeated by a benefit which is incapable of valuation, and even if it were so capable, the value is unlikely to bear any relationship to the amount received by the principal debtor.

> Although each appellant is entitled to exoneration, that does not give her ownership of her husband's property, but merely a charge over it. It will therefore be necessary for each appellant to transfer a one half interest in the property to the trustee. He will then hold it subject to each appellant's charge. In any event, each appellant has the right to be subrogated to the mortgage over her husband's interest in accordance with cases such as *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] UKHL 7; [1999] 1 AC 221."

A family law matter where the claim was successfully made by the non-bankrupt spouse was the case of *Vincent & Vincent* referred to earlier. The outcome was not reported. Judge Riethmuller allowed the creditor to continue the proceedings. The creditor's claim was a debt from personal injury. She had judgment against the husband. The trustee wasn't in funds and decided that to defend the wife's s 79 claim was too risky. The Judge allowed the creditor to run the proceedings on behalf of the trustee as the beneficiary of the estate because the creditor said that she couldn't afford to pay lawyers. Of course, she could and did, but she wanted control of the proceedings.

The matter went to trial and settled during final submissions when the creditor conceded the trustee was entitled to very little. The creditor had received some money in reduction of her debt from the parties' mortgage before the husband went bankrupt. The husband had also paid considerable legal costs for the proceedings between himself and the creditor. The bankruptcy occurred after the wife had issued FLA proceedings.

The wife made various offers to the creditor, but the creditor wanted all of the wife's interest in the home. The highest offer the wife made was $150,000 before the proceedings commenced. However, the equity of exoneration operated so that the husband had already received almost all of his half share of the home. As a result, the wife was only required to pay $38,016 to the Official Trustee. The creditor therefore received nothing or almost nothing.

9 Conclusion

Dealing with debt is not simple – it is much easier to deal with net property pools where each party ends up with some property. Negotiating a settlement is much more challenging when one party is expected to walk away with debt. The legal issues which arise are different than in positive property pools, but there are also opportunities to protect a party's position, some of which have been canvassed in this paper.