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Dealing with uncertain liabilities

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Recently, the Full Court of the Family Court in *Trask & Westlake*[1] said that for orders to be "just and equitable" and "appropriate", they needed to reflect the reasons in the judgment.

This seems obvious, but when a real property is to be sold pursuant to orders, the precise sale price is unknown. In *Trask,* on the husband's case, if the two real properties sold for the values he placed on them, the wife could have ended up with 62.8% of the overall pool rather than the 60% which the trial Judge intended - a difference of over $700,000. The principles in *Trask* appear to be transferrable to the drafting of orders requiring the payment of uncertain liabilities although the Full Court did not state this. For a more detailed discussion of *Trask* see the article "Full Court prefers formulas in property orders" by Jacky Campbell.

In two recent cases, *Elgin & Elgin*[2] and *Field & Mighell*[3] the Full Court of the Family Court considered uncertain liabilities and took different approaches.

Elgin - taxation liability ought to have been taken into account

The Full Court delivered judgment in *Elgin & Elgin* one week prior to *Trask,* and said that as the tax liability was uncertain and was to be borne totally by the husband, the orders were not just and equitable.

Justices Thackray & Ryan heard both *Elgin* and *Trask*. Justice Murphy agreed with Justices Thackray & Ryan in *Trask*, but the third Judge in *Elgin* was Justice May, who did not agree with the other judges on all issues.

The trial Judge ordered that the pool of about $44 million be divided equally between the parties. However, under the orders the husband bore all the tax consequences of the implementation of the orders including a tax liability of about $4.9 million.

The husband in *Elgin* did not seek any order for a mechanism to take into account the uncertain tax liability. By contrast, the husband at trial in *Trask* submitted that the potential difference between the agreed values and the possible sale prices should be taken into

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[1] (2015) FLC 93-662
[2] [2015] FamCAFC 155
[3] [2015] FamCAFC 32

account by specifying a percentage to be applied to the net proceeds of sale after deduction of specified expenses. On appeal, the husband in *Trask* argued that the form of the trial Judge's orders was "contrary to principle" as they did not take into account the potential difference between values and sale prices.

The wife in *Elgin* originally proposed a form of indemnity in her favour which did not mention tax. After the trial concluded, the wife proposed an order that expressly sought that she receive an indemnity for tax. The trial Judge made orders which generally followed the wording proposed by the wife. He said that the orders were "appropriate" but did not explain why it was appropriate that the husband assume responsibility for all the taxation consequences associated with the implementation of the orders.

On appeal, the wife submitted that the trial Judge had no obligation to consider the tax consequences of his orders unless asked to do so, since otherwise His Honour would be "intruding upon or making assumptions about decisions made by the parties and their representatives with respect to how their respective cases are to be conducted".

The husband submitted that it was the trial Judge's obligation to be satisfied that all of his orders, including the taxation indemnity, were just and equitable. The trial Judge could not be so satisfied when faced with the unchallenged and unequivocal statement of the single expert that the taxation consequences ''must be considered".

The Full Court majority agreed with the husband that the trial Judge could not be satisfied that the orders were just and equitable:

> "In the absence of evidence about the amount of the tax; in the absence of submissions relating to the tax; and in the absence of any reason for leaving the husband responsible for all the tax, we consider it was impossible for His Honour to be satisfied that his orders were just and equitable. Given the unfortunate way the matter had been conducted, we consider it was essential for the parties to have been given an opportunity to make submissions about the proposed form of orders, and the way in which the taxation burden would be shared, in order to bring about the intended equal division of the assets"[4]

May J agreed with the majority that it was not just and equitable to uphold orders that did not take into account a significant taxation consequence and required that the husband be responsible for the payment. Such an order could not be said to be "just and equitable".

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[4] at para 203

***Elgin* - effect of delay**

In *Elgin*, as in *Trask*, there was also the issue of the long delay until the delivery of the judgment. Although the trial concluded in July 2012, the closing written submissions were not completed until October 2012. As a result of the judgment of the High Court in *Stanford v Stanford*[5], further submissions were filed, the last of which were received in September 2013. Judgment was then delivered in January 2014. In the meantime, the matter was mentioned twice before the trial Judge. The Full Court also admitted that it had taken a lengthy period of time to deliver its own judgment having heard the appeal in August 2014 and not delivered judgment until 12 months later.

The Full Court accepted that in many cases there was likely to be a fluctuation in values if there was a long delay from trial to judgment, but such fluctuations can also occur in a short period. Ultimately it was for the parties to alert the Court to such changes, rather than having the judge second-guess whether there may have been some fluctuation. Nevertheless, it considered it was good practice to give the parties some notice of when a long delayed judgment is to be delivered so the parties can consider whether to apply to reopen. Here, such notice was given but the parties did not seek to re-open. May J, dissenting on this point, noted that the parties had sophisticated legal teams and it was not the responsibility of the trial judge to ask the parties if they would like to re-open the evidence because of the delay in delivering judgment and the possibility that values had changed.

The Full Court's approach in *Trask* of drafting orders in a formulaic form would, of course, in most cases where there has been a lengthy delay, obviate the necessity to apply to re-open the case.

***Elgin* - outcome**

May J held that it was in the interests of justice to remit the matter for rehearing on the issue of the taxation liability. However, she said the re-hearing should be limited to an assessment of the parties' net worth (i.e. the net assets including taxation liabilities and cost of distribution of assets) on the basis that the determination of the trial Judge that the property of the parties be divided equally not be disturbed. She understood that this process would involve further valuations and considerable cost to the parties. There might be controversy as to values and likely liabilities incurred by reason of taxation and the disposition of assets, but these would be matters for the trial Judge to determine.

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[5] (2012) FLC 93-518

The husband proposed a re-hearing at which he would be free not only to agitate the issues raised in the appeal, but also his original claim for much more than half of the assets.

Thackray and Ryan JJ refused to remit the matter for re-trial. They re-exercised their discretion relating to the taxation liabilities and made orders to bring about what they considered to be a just resolution based upon acceptance of the proposition that the tax should be borne in the same proportions as the assets which were to be divided. They saw that this proposition had merit, since the husband should not have to pay more of the tax than the wife given that the property pool was to be divided equally.

Field & Mighell **- uncertain child support liability**

In contrast to *Elgin*, in *Field & Mighell*, a Full Court comprising Faulks CJ, Ainslie-Wallace and Bennett JJ held that the uncertainty about a child support liability in Mexico was not a barrier to the trial Judge determining the parties' entitlements under s 79 *Family Law Act*. The dispute about arrears of child support amounted to a potential liability of the husband to the wife of about AU$400,000.

Faulks CJ said:

> "While there can be no doubt that either the receipt of or the payment of such a debt might alter the way in which the division of property between the parties might be considered, without any evidence, His Honour was in an invidious position. His Honour was right in determining that it was not to form part of the pool of property of the parties"[6]

The trial Judge took account of the fact that the conclusion of the various proceedings in Mexico which had been on foot since 2003 could take another 18 months. The trial Judge and Faulks CJ recognised that the outcome of the Mexican proceedings might have an effect on the division of property in Australia as the wife would have extra funds available to her and the husband would have another liability. These matters might affect the trial Judge's determination of factors under s 75(2). Faulks CJ said it was not the case that a trial Judge was obliged to do more than determine the issues before him or her on the basis of the evidence properly presented by the parties. He said:

> "If the parties want a wall built, they need to supply the bricks. Given that the outcome of the child support proceedings in Mexico were not capable of being

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[6] at para 14

> definitively forecast, short of adjourning the proceedings generally until matters in Mexico had been completed, it is hard to know what his Honour might otherwise have done in these proceedings"[7]

At an earlier hearing, the trial Judge was inclined to order an adjournment under s 79(5) *Family Law Act* until the liability was certain. His earlier views were quoted by Ainslie-Wallace and Bennett JJ:

> "It is self evidently utterly unsatisfactory that such a significant liability should not be included in the pool of assets and liabilities of the parties, but in circumstances where it is vividly contested and the outcome of that contest remains wholly unclear, there is simply no other alternative than to delay the final outcome of these proceedings on an indefinite basis until the Mexican proceedings are determined"[8]

However, between the date of the earlier hearing, 9 months previously, and the date of making final property orders, the trial Judge concluded that despite his statements above, it was not appropriate to delay completion of the matter until the child support proceedings were finalised. He commented that the Mexican proceedings seemed likely to go on indefinitely and he wondered whether they would ever finish. The Full Court concluded that the trial Judge's approach was appropriate given the state of the evidence before him.

Conclusion

The two cases of *Elgin & Elgin* and *Field & Mighell* demonstrate different ways of dealing with uncertain liabilities. Whilst *Field & Mighell* is a rare example of a case in which an uncertain liability was ignored, *Elgin & Elgin* fits neatly with *Trask & Westlake*. The orders could and should have been drafted in such a manner that the impact of the uncertain tax liability did not fall entirely on the husband. This would have ensured that the integrity of percentage split of assets between the parties which the court had determined to be just and equitable was maintained.

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[7] at para 46

[8] at para 169