

The further adventures of Dr Spry

Stephens & Stephens (Enforcement) [2009] Fam CAFC 240



by Sarah Minnery

The significant tale of *Kennon v Spry* continues to unfold. Sarah Minnery looks at the appeal to the Full Court of the Family Court (in its guise of *Stephens v Stephens*) and the implications for family law practitioners.

Family lawyers have devoted a lot of time over the last 12 months to the decision of the High Court in *Kennon v Spry*¹ handed down on 3 December 2008. That decision represents the first consideration by the High Court of the treatment under the *Family Law Act* of trust property in more than over 20 years.

The different reasons of various High Court judges in reaching their decision has also sparked much debate within the profession, particularly in relation to the extent that the court can make an order in relation to the property of a discretionary trust.

The next chapter in those proceedings was an appeal to the Full Court of the Family Court following a series of enforcement orders. The Full Court dismissed Dr Spry's appeals against various enforcement orders on 24 December 2009.

The story so far

The trial of property settlement proceedings occurred in November 2005.

At first instance, Strickland J made orders setting aside a number of transactions under s106B *Family Law Act 1975* and ordered that the husband pay the wife \$2,182,302, being the amount necessary so as to effect a 52 percent/48 percent division of net assets in the husband's favour.

The total asset pool at first instance was about \$9.8 million including assets of the Stephens trust ("the trust") of about \$4.8 million. The husband personally had assets of about \$1.7 million, some \$400,000 less than the cash amount he was ordered to pay the wife.

Some of the transactions set aside pursuant to s106B included the distribution of all assets of the Stephens trust equally between four children's trusts, being trusts established principally to benefit each of the four adult daughters of the marriage ("the children's trusts").

The decision of the trial judge was ultimately upheld by the Full Court of the Family Court and High Court on appeal. The majority of the High Court held that the husband's power as trustee to apply the assets of the trust, combined with the wife's equitable right to due consideration of the trust as a beneficiary, was sufficient for the whole of the trust fund to fall within the ambit of s79 of the *Family Law Act* as property of the parties to the marriage.

The findings of Strickland J to set aside the disposition by the husband of the corpus of the Stephens family trust between four children's trusts (one for each child of the marriage) were not challenged on appeal.

Developments since High Court case

Following the dismissal by the High Court of the husband's appeal in December 2008, the husband was required to pay the wife \$2,182,302 plus interest². The husband's position and that of the trustee of the Stephens trust was that the maximum amount that the husband could pay the wife in satisfaction of her entitlement was the sum of almost \$1.8 million, being the total value of the net assets of the husband's personal assets.

On 31 January 2009 the husband told two adult daughters of the marriage that he had sold his house and "cashed up" around

\$900,000 from each of the four children's trusts. He told them that if the wife did not accept an offer of \$400,000 in full satisfaction of amounts owed he would disappear and she would "not get anything", and that as a last resort he would burn the money rather than see the wife get anything.

Early the next morning one of the adult daughters went to the husband's home and discovered significant packages of cash. The wife was called and they removed \$4,442,000, which was delivered to the wife's solicitor's office the next morning.

On Sunday 1 February 2009, the wife made an ex parte application using the after hours telephone service of the Family Court seeking the appointment of her solicitors as stakeholders for the cash. Watts J made orders in the terms sought. Cronin J made a further order on 2 February 2009 to give better effect to the order of Watts J.

Decision of the trial judge (enforcement proceedings)

At the two day hearing, before Coleman J, the wife sought payment of the judgment sum from the money held by the stakeholders plus costs and interest.

The husband argued by the release of \$1,038,000 to the wife (by consent), the wife had received all of the husband's property and that none of the assets of the trust could be used to satisfy the entitlement of the wife. He also argued that the balance of money in the trust account of the stakeholders belonged to the children's trusts and that the court had neither power or jurisdiction to make any order with respect to those monies.

The wife argued that the husband had not established that the money was property that



did not belong to him and that the actions of the husband were consistent with the money being his funds, or the money being able to be utilised as if they were. The wife also argued that, to the extent the money was not the husband's property, it did not matter by virtue of the s106B orders of Strickland J.

The trial judge ordered \$1,038,000 be released to the wife in part satisfaction of the judgment debt (by consent) and that \$996,362.18 (being the balance owed to the wife pursuant to the order of Strickland J and \$500,647.98 by way of interest) also be released to the wife, with the balance to be invested on trust for the parties pending quantification of the husband's liability for costs.

The evidence of the wife was accepted in circumstances where the husband was in the best position to explain the source of the \$4,442,000 and how it came to be in his possession and chose not to lead any evidence. The trial judge also accepted the wife's argument that it was immaterial to determine in what proportions the cash funds were property of the husband and the "property of the parties to the marriage" as the court approached the matter on the basis of considering whether the wife's entitlement

could be satisfied out of the assets which, but for the s106B order made by Strickland J, may have been the assets of the children's trusts.

The trial judge also held that whilst the evidence rendered it improbable that all of the \$4,442,000 which came into possession of the stakeholders was the husband's personal property, the evidence did not enable the court to find that the funds were not substantially the husband's.

Appeal to the Full Court

On appeal, the husband argued that no order could be made attaching to the assets of the trust as the husband's obligation to pay the wife was a personal obligation. He argued that, despite the finding of the High Court that he had legal control of the assets of the trust and that the wife was an object of the trust, the assets of the trust could not be used to satisfy the entitlement of the wife, as the husband, not being a beneficiary, would be acting as trustee to secure for himself a benefit. He argued it was a breach of trust to direct to the wife trust assets to satisfy his own personal liability. He also argued that there was no power for the trial judge to direct such a result and to the extent that the trial judge did so, was an error.

In dismissing the husband's appeal, the Full Court found that an order may be made that enables a party to the marriage who is in control of the trust to satisfy his or her personal liability to the other party to the marriage who is an object of the trust from the assets of the trust.

In addressing the husband's breach of trust argument, the court held that the husband had an obligation to make an application envisaged by Gummow and Hayne JJ in the decision of the High Court to approach the court "to sanction or excuse what would otherwise have been a breach of trust" so as to give effect to the order of Strickland J that "each party do all such acts and things and sign all such documents as maybe be necessary to give effect to the terms of this Order".

The court also held that the orders made by the trial judge (in the enforcement proceedings), attached to the assets of the trust, were within his jurisdiction and power.

The court also indicated in *obiter* that there was also jurisdiction under the third party provisions in Part VIII A A *Family Law Act*, although neither party sought to rely upon Part VIII A A in this case.

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Wife's cross appeal as to the calculation of interest

The other practical issue which was argued before the Full Court was the issue of the calculation of interest payable by the husband to the wife pursuant to Strickland J's orders of 2005. At the enforcement hearing before Coleman J, the husband opposed any order for interest as, after payment to the wife of \$1,038,000, the husband asserted that he had no property from which any interest awarded could be recovered.

The husband also argued that the rate of interest payable on the judgment debt should be lower than that prescribed in r17.03 *Family Law Rules*. In the event that interest was ordered, the husband adopted a figure of \$445,979.20 calculated as interest on the basis of the lending rates offered by a major bank during the relevant time period. The wife adopted a figure of \$676,498.11, calculated on the interest rate prescribed by Rule 17.03 *Family Law Rules* 2004 from 28 February 2006.

Cronin J considered whether any award of interest should be made and ultimately decided that it was appropriate in the circumstances. The trial judge calculated the interest owed by the husband to the wife on the judgment sum at \$500,647.98, being an amount calculated at an interest rate of the cash rate prescribed by the Reserve Bank of Australia plus 2 percent.

In allowing the wife's appeal, the Full Court held:

- The wife was entitled by reason of the property settlement order of Strickland J to the benefit of interest in accordance with s117B(1) of the Act as from the date by which the husband was to pay the money to the wife.
- That the discretion conferred by s117B(2) (to depart from the usual rule that interest applies pursuant to s117B(1)) is to be exercised by the court that made the order for the payment of money and cannot be exercised by any other court.
- As Strickland J did not exercise the discretion under s117B(2), therefore Cronin J erred in exercising the discretion and applying a lower rate of interest than that specified in the Rules at the enforcement hearing.
- The onus was on the husband to establish that the exemption under s117B(2) should be adopted.

Implications for practitioners

The recent decision of the Full Court relies heavily upon the joint decision of Gummow and Hayne JJ, who with French CJ, formed

the majority in the High Court proceedings. The reasoning of the Full Court makes it clear that the specific orders sought in applications brought before the court are now more important than ever.

Orders sought

Most Brisbane family law practitioners would be aware that there is regular feedback from the court that they consider an application which simply seeks an overall percentage split of the net assets to be undesirable and *Stephens* provides a further example of the need to consider specifically how any ultimate entitlement on behalf of a husband, wife or spouse is actually to be received by them.

In circumstances where money held within a trust environment is necessary to satisfy a claim, there will be a need to carefully consider how the application to court should be drawn. Specifically, it may be that the application needs to seek orders of the kind contemplated by Gummow and Hayne JJ in the High Court judgment and adopted by the Full Court in their reasons in the enforcement appeal that a party can "approach the Court to sanction or excuse what would otherwise be a breach of trust".

Similarly, much was said in the proceedings before the Full Court as to which parties ought be heard and at the time the application was filed. The court indicated that this ought to include at least a consideration of who should be given notice of the proposed orders sought.

Interestingly, it was significant in this case that Strickland J, who was the first instance trial judge in 2005, included a provision in his order that "each party do all such acts and things and sign all such documents as may be necessary to give effect to the terms of this Order". This is an order which is routinely sought and consented to in family law property settlements, however in this matter and given the nature of the order of Strickland J at first instance following the trial, it took on even greater significance.

The Full Court of the Family Court in its enforcement proceedings has relied upon that provision in addition to the provision that compels the husband to make a cash payment to the wife (notwithstanding that the assets in his personal name were less than the cash payment to be made to the wife) in enforcing the order.

Calculation of interest

The findings in relation to interest are also important. The Full Court has confirmed that the correct approach is for the trial judge (and only the trial judge) to exercise discretion in relation to whether interest is charged on

judgment debt. The reasoning of the Full Court in the enforcement proceedings makes it clear that in circumstances where a trial judge does not make a finding to exercise their discretion conferred by 117B(2), interest applies from the date of the order or the date the order takes effect, whichever is the later. That interest will apply at the default interest rate. That rate is 8 percent at the time of writing, but has been above 10 percent in recent times.

Simply speaking, if a client will need some time to sell assets in order to pay entitlements to a party to the marriage, it is imperative that this be set out in the application. If those orders are not sought in the application, then the court is not being asked to exercise its discretion under s117B(2) and the result is that interest is paid from the later of the date of the order or the date that the order takes effect.

Similarly, if there is no evidence in affidavit material before the court as to why the court should use its discretion under s117B(2) to depart from the usual rule because of practical issues in relation to the sale of assets, borrowing of money and the like, then ultimately a failure to lead that evidence would be to the detriment of the client.

The next chapter

Since 24 December 2009, Dr Spry has unsuccessfully sought a stay of the orders which would compel the payment to the wife plus costs and interest under Strickland J's orders of 2005.

Dr Spry's application seeking special leave to appeal the enforcement decision of the Full Court to the High Court is pending at the time of printing.

¹*Kennon v Spry* [2008] HCA 56

²Called the "ICF Spry Trust" in the High Court decision.

The practice of the Family Court of Australia is to adopt a pseudonym in reporting cases. This matter is therefore reported as Stephens in the Family Court, but as Kennon v Spry in the High Court.

Sarah Minnery is a senior associate and an accredited family law specialist at Hemming+Hart Lawyers, Brisbane.