HEMMING+HART LAWYERS

WHERE ASSETS AND INCOME MEET

Establishing a favourable status quo in the post separation period

Paper for the LexisNexis 7th Annual Family Law Summit
10 June 2010

Sarah Minnery
Senior Associate
Accredited Family Law Specialist
Hemming+Hart Lawyers

Approximately two years I was in a client conference with a colleague at my firm. Our client, the Husband, was a fairly argumentative type. He was unemployed and had been the primary carer immediately prior to separation and the wife worked full-time earning approximately $100,000.00. He said to us, "so you're telling me that income doesn't get taken into account in the asset pool at all and she can just earn her $100,000.00 salary and she doesn't have to give any of it to me?" My colleague said no. In my head I said yes. Whilst my colleague then went on to explain the circumstances where post separation income can be included in the pool of assets and liabilities to be divided between the parties, the fact that we immediately had separate instinctive responses to that question is the genesis of this paper.

The difference between assets and income is more intermingled than it may seem at first instance, particularly where family businesses, trusts and companies are involved. A tactical analysis of how income can be converted to assets in the pool or vice versa (depending on who you act for and what they want) can add thousands of dollars to a client's entitlements. Thinking about these things strategically early in the piece can also save thousands of dollars in litigating interim applications. As with most things, prevention is better than cure and setting up a favourable status quo or holding pattern from separation until Trial is becoming more and more important. The primary theme of this paper is to understand the impact of various post separation transactions in terms of how they translate into the pool. Depending on tactical positions adopted and strategies implemented, such an approach can change what is traditionally considered income into assets available for distribution between the parties. Equally the same strategies and tactics can have the effect of preserving property and bolstering the pool with reliance on the laws of interim property distributions, timely disclosure and add-backs.

WHERE ASSETS AND INCOME MEET

When parties to a marriage are both PAYG salary or wage earners, the issue of income becoming a potential asset in the schedule of the property of the parties to the marriage is fairly simple. If that salary or income is saved in a bank account, then the balance of that bank account is clearly in the pool. If the salary or income is spent on living expenses which are reasonable, the money is clearly gone and with no ability for it to be added back into the pool. Even extravagant expenditure may not necessarily be added back once the money is spent.

In *Gollings & Scott*[1], the parties had been married for 17 years and had 4 children. The pool was approximately $850,000.00 and the income of the husband was over $500,000.00 per annum throughout the marriage and had been approximately $700,000.00 to $800,000.00 in the post separation period.

The parties separated in May 2003 and the Judgment from their Trial was delivered in January 2006. The husband had commenced living with a new de facto partner shortly before separation whom he subsequently married after the Trial, but before the Appeal.

The treatment of various transactions and how they were accounted for in the pool of assets was challenged by the husband on appeal, including:

- The inclusion in the pool of $72,281.00 that the husband had contributed to the value of his new partner's property.

- An argument that the liabilities of the marriage should have been increased to allow for the fact the husband paid off various matrimonial liabilities post separation, including a car loan of $32,000.00, a bank loan of $9,000.00 and a loan to the parents of $7,000.00.

- The decision of the Trial Judge not to add-back $17,000.00 used by the wife to pay legal fees, where the source of those funds was the sale of a motor vehicle owned by the parties at separation.

- The decision to include the $17,885.00 value of the husband's furniture acquired post separation.

The Full Court held that it was inappropriate for there to be an allowance in relation to debts discharged by the husband post separation given the parties had conceded that contributions at all times up to the date of Trial should be considered as equal.

Whilst in relation to the sale proceeds from a Honda motor vehicle used by the wife to pay for legal fees, the Court recognised the decision of the Full Court in *Chorn & Hopkins*[2] and noted it was clear that the funds were generated from funds that existed at separation and as such as both parties had an interest in them, they could be notionally added back under those principles. The Full Court held that the Trial Judge was not in error in choosing not to add this sum back given the negligible effect of $17,000.00 in circumstances where the

[1] [2007] FamCA 397 (Finn, Kay & Boland JJ)
[2] (2004) FLC 93-204 (Finn, Kay & May JJ)

husband's income earning capacity was conceded to be in excess of $500,000.00 per annum.

The argument that $17,885.00 of furniture in the husband's possession that was acquired post separation should be omitted from the pool was also rejected by the Appeal Court on the same basis as the concession as to equality of contributions, both prior to and post separation.

The funds advanced for the husband's new partner's home were used for the deposit of the property, the stamp duty and improvements and some of the money was sourced from long service leave entitlements of the husband. He had also been meeting mortgage repayments on the property of $3,500.00 per month. The Trial Judge decided to add back the capital sums expended, but not the mortgage repayments.

The Full Court agreed with the finding of the Trial Judge that at the time of Trial the husband had "a speculative chose in action"[3] which might have enabled him to recover some of the monies he had advanced towards the acquisition by his new partner of the property. The Court held that it was entirely speculative as to whether the value of that chose in action equated to the value of the capital he had spent to acquire and improve the property. The Court held that the more appropriate question was whether justice of the case required the money spent by the husband post separation to be notionally added back to the pool of assets between the parties.

Given the husband had been earning between $700,000.00 $800,000.00 per annum over the post separation period and making a generous provision for the wife and the children from his income, the Full Court held that the learned Trial Judge did not adequately explain the adding back of the whole of the capital amount gifted to his new partner and to the pool of assets and therefore fell into an appealable error. The Full Court held that whilst the treatment of those funds was ultimately a matter for the Trial Judge's discretion, she needed to explain more fully her reasons for only adding back the capital sums gifted into the pool of assets (and not the sums paid in servicing the mortgage on the property). The appeal was allowed on this basis.

In coming to this view, the Full Court stated

> *"as a general rule once the parties have separated, subject to obligations of maintenance and support, and subject to the type of considerations described in*

[3] That is a speculative right to bring legal proceedings against his current partner for recovery of the money.

> *Kowaliw (1981) FLC 91-092 relating to waste, each party is entitled to get on with his or her life independent of the other. The husband would be free to go about spending the money he earned post separation in furtherance of his relationship with Ms Y if he chose to do so providing that at the same time he properly met his obligations towards his wife and children for their due support. It would not normally be appropriate some years after separation to require each of the parties to account for any monies they had spent post separation so as to determine whether or not that expenditure was reasonably, for their own self support, and to the extent that it was not, to determine whether it would be proper to add it back to the pool of assets available for distribution between the parties."*

The Full Court also referred to the previous Full Court decision of *C & C (1998) FamCA 1*43 where the pool was $3M and said at paragraph 45:

> *"Although it is not one of the grounds of appeal, we would also like to make the observation that we were troubled by Her Honour adding back into the pool of assets the sum of $15,000.00 provided by the wife to [A] to enable her to place a deposit on a unit. The provision of modest amounts of capital by parents to their adult children to enable the children to get a start in life is a normal experience in our society. In a case involving the magnitude of the assets on this case, in our view, <u>it is unreasonable to conduct a microscopic examination of each of the parties' post separation expenditure with a view to determining whether or not it is appropriate that they be brought into account and dividing the asset pool between them</u>. The cases which deal with notional add backs are general examples of circumstances in which it would be clearly unjust or inequitable not to take those matters into account...whilst not seeking to place a fetter upon the exercise of discretion of a Trial Judge in individual cases, it seems to us that the <u>concept of adding monies reasonably disposed of back into the pool ought to be the exception rather than the rule</u>. The parties are entitled to reasonably conduct their affairs post-separation in a manner that is consistent with properly getting on with their lives. Providing modest support for their adult children or taking not inappropriate holidays for themselves seems to fit comfortably within that description."*
>
> (emphasis added)

The Full Court in *Chorn & Hopkins* also approved that passage in *C & C*. The Full Court in *Gollings & Scott* also went on to note that the law imposed no further obligation upon the husband to continue to accumulate assets during that period [i.e. the post separation period] and he was in a sense free to do with his income as he pleased.

Seemingly therefore when post separation spending falls short of the extravagant category, but may be more than the reasonable category, if it is also spent it may be unable to be added into the pool. Whilst the underlined portions of the extracts of *Gollings & Scott* and *C & C* are the often quoted portions when those comments are read in the context of their surrounding paragraph. The Court is saying primarily:

1. It is a matter of what is necessary to do justice and equity between the parties;

2. It is a matter for the Trial Judge's discretion; and

3. The asserted add back needs to be considered in the context of the pool as a whole and specifically whether the amount asserted to be added back makes a material difference.

From a practical perspective it is difficult to know when a client first seeks legal advice how various "greater than reasonable expenses" paid from post separation income will add up to at the date of Trial and also what percentage such expenditure may be of the pool.

Arguably, it is therefore sensible to be proactive in seeking disclosure and raising issues in correspondence with the other party's solicitor with a view to ascertaining at an early stage how the other party's income is being spent. Depending on the facts and instructions, these matters are arguably relevant as a fact in issue in the proceedings if maintenance issues are in dispute or if there is an assertion that the spending may be within the extravagant category and possibly within the guidelines set out in *Omacini*[4]. If the evidence is not gathered then there is no chance of evaluating whether the argument is ultimately included in the Affidavit of Evidence in Chief for Trial.

Further, seeking timely disclosure on a monthly or quarterly basis of those expenses allows the matter to be raised early in the proceedings and possibly prevents the spending of greater than reasonable amounts such that that money is preserved in the pool.

Having the money preserved rather than spent allows an automatic inclusion of the funds in the pool (i.e. the savings account balance) and an Applicant therefore does not face the difficult evidential burden of demonstrating to the Court why the matter falls within the exceptional categories of case where an add back is considered just and equitable.

Further, advancing the issue early may strengthen the case of a spouse who seeks add backs of unaccounted for spending over a long period of time between separation and Trial. Certainly, if correspondence can be tendered which demonstrates that the other spouse was on notice many years ago that these things are considered in issue and at Trial the other party did not make disclosure and did not account for money, then arguably the Court could be asked to make an adverse inference under the principles of *Weir*[5] and *Black & Kellner*[6].

[4] (2005) FLC 93-218 (Holden, Warnick and Le Poer Trench JJ)
[5] (1993) FLC 92-338 (Nicholson CJ, Strauss and Nygh JJ)
[6] (1992) FLC 92-287 (Nicholson CJ, Ellis and Cohen JJ)

ASSETS AND INCOME IN ENTITIES

The position with business income in terms of whether money is an asset or income is sometimes even harder to ascertain.

Consider the scenario where one spouse, without consultation with the other, and as the sole director of a company, pays dividends to the shareholders (which could be that spouse solely) and that spouse spends the money? The tax liability arising from the payment of dividends is arguably in the pool as a general rule under the principles in *Rosati's* case[7]. If the money paid to that spouse by way of dividends is sitting in a bank account, it is clearly property, but what if it has been spent? What if it has been spent on things which are not reasonable living expenses? What if it's difficult to tell the difference?

Company dividends

Upon declaration of dividends by a company, shareholders have an enforceable legal right against the company to ensure their payment. However, practically what often happens is those dividends are paid from family companies at the end of each tax year when financial statements are prepared and those dividends are applied against the loan balance such that the company is being repaid amounts borrowed by the parties throughout the year. Tax must still be paid on such income and therefore the result in terms of the pool is often:

1. The liability it reflected in the schedule of assets and liabilities (for example "loan owed by parties to X Pty Ltd") and therefore the pool is often reduced;

2. Parties receive assessable income in their hands which needs to be declared in their tax returns and incurs a personal tax liability. The tax liability is arguably included in the pool;

3. If one party is reliant upon Centrelink or other means tested entitlements, the receipt of that taxable income in their hands, even though they may not have physically received the money because it has been applied against the loan account, can affect eligibility. If Centrelink payments have already been received, then there could be a debt owing to Centrelink. Such a debt may be taken up in the pool;

[7] (1998) FLC 92-804 (Ellis, Lindenmayer and Kay JJ)

The overall effect is that the payment of various personal expenses which are debited to the loan account throughout the year in essence represents distribution of profit (with no allowance for tax) in a piecemeal basis throughout the year rather than at the end of the year.

When parties are happily married there is often a little disagreement about which class of shareholders are distributed dividends as often they are applied so as to minimize tax for the family entities as a whole. However, in circumstances where cash is not actually received and tax liabilities are imposed by decisions to declare dividends and then apply the payment to reduction of loan accounts, this can often be a source of disagreement.

Trust distributions

Most discretionary family trust deeds have a default income distribution clause. The effect of that clause is if the trustee has not exercised its discretion to apply the income of the trust prior to 30 June of each year, that the trust deed deems the income to be payable to a certain beneficiary. Again, the income tax implications of trust and income being distributed without knowledge are important particularly if they need to be taken up in the pool. These decisions need to be contemplated prior to 30 June (or the date specified in the trust deed) which triggers the operation of the default income distribution clause, in the event the trustee does not exercise its discretion.

Equally important is raising the issue of the discretion of the trustee prior to this time.

In such a scenario, the effect on the party who did not receive the dividend is essentially to reduce the asset pool. A tax liability needs to be taken up that may not have been taken up previously and assets have been converted to income which has now been spent so there is really no reciprocal asset in the net asset pool.

Obviously the issue of add backs is available, however the position remains that add back law is a departure from the usual rule. It is not a given that there can be an argument of the basis of premature distribution. It is a high hurdle to jump to satisfy a Court that spending on things which may be more than reasonable, but not extravagant, should be added back as “wastage” or as a premature distribution. As set out below, there is little case law as to what can constitute a premature distribution of assets other than as an agreed part-property settlement.

It is important to realise that sometimes parties will receive income from some or all of these sources (salary, dividend, trust distribution). Even if a family business is operated through a trust, spouses can receive a wage as an employee of a business operated by the trust, as well as a trust distribution. Even if the tax on their salary is paid through the PAYG tax system, the tax on the trust distribution may not be.

The delay in preparation of the financial statements often means the other spouse does not even become aware that such steps have been taken until many months later once financial statements are prepared.

So what can be done?

Firstly, instructions should be sought as to how the parties used to pay for things during their marriage. If there was a family business, it may be that they pay personal expenses through the business. "Through the business" usually means either:

1. That the business paid for the expense and that was then reflected in a debit (increase) to the parties' loan account with the business entity; or

2. The business simply paid the expense and it was recorded as a business expense in the books.

Option 1 – legitimate, though maybe Division 7A consequences[8].

Option 2 - arguably tax fraud (claiming of non-legitimate business tax deductions and therefore under reporting of profit on income tax return) and could result in referral by the Trial Judge to the Australian Taxation Office for investigation.

Prevention is better than cure. It is therefore important to know what financial arrangements are put in place from the date of separation and to at least negotiate a position of equality on these arrangements if that is desirable. That includes not simply asking for tax returns and payslips by way of disclosure, but seeking disclosure of all benefits that a spouse is receiving from the business. All benefits can include all dividends, trust distributions, salaries, voluntary superannuation contributions in excess of the statutorily prescribed rate, cash and loans and all other benefits received by the Husband and by the Wife from all entities from date of separation to present. The use of the phrase "all benefits" in that manner should capture both personal expenses reflected in loan

[8] *Income Tax Assessment Act 1936 (Cth)*

accounts as expenses which are being expensed through the business as an expense in the books of account.

It is important to remember that where the parties borrow money from a company or other entity, the loan is a separate line item in the schedule of the property to be divided between the parties. Where personal expenses are paid by the company, those expenses are debited to the loan account and the loan owed by the parties to the company sits as a liability in the asset pool. This means that while one person is funding their living expenses by borrowing from the company, the effect can be to reduce the pool. Inter-entity loans between the family trust and the corporate trustee or corporate beneficiary are not reflected as separate line items in the pool of assets available for distribution because the debit is reflected in one entity and the credit in another.

If the other spouse is either the primary carer of children and doesn't work or is a PAYG salary earner, such ongoing financial arrangements are reducing the asset pool and increasing the disposable income available to the other party who is essentially receiving their gross income and are able to spend all of it. That party probably also expects their tax liability to be taken up in the pool. Conversely, the other party may be paying all of their income from post separation income and looking after their own tax liability as a PAYG salary earner.

For example, the following is an extract from a schedule of assets and liabilities showing the loan and the tax liability as separate line items comprising the pool of assets:

Asset/Liability	**Ownership**	**Value**
House	Wife	$2,000,000
Mortgage on house	Joint	($500,000)
Chairs Pty Ltd	Joint	$700,000
Loan owed to Chairs Pty Ltd	Joint	($60,000)
Tax Liability – 2010 Dividends	Joint	($27,900)
TOTAL		**$2,112,000**

Therefore, in addition to payslips, disclosure should also be sought of the loan ledgers. The loan ledgers should show each item debited and credited to the loan account in the family company, trust or partnership which reflects how much the parties owe the company on a monthly basis. That should allow information to be known, such as whether the company is paying all the credit card bills of the husband and whether those amounts are being debited to the loan account. The effect is to reduce the pool through the loan (which is a liability of the parties reflected in the property of the schedule of the property of the parties to the marriage). Depending on instructions, these are documents that may be relevant to a fact in issue in the dispute if the interim financial support of one or both parties is in dispute. Arguably, the documents are also relevant under s75(2)(g)/s90SF(2)(g) as to "a standard of living that in all the circumstances is reasonable."

SHOW ME THE MONEY

There are a number of remedies available to a spouse who is essentially locked out of family businesses and does not have access to the income streams available to the other spouse in post separation periods. Those remedies are well known:

1. Interim spousal maintenance;
2. Application for a Hogan Order (Interim Costs Order allowing for the payment of legal fees);
3. Application for partial or interim property settlement;
4. Injunctions compelling the payment of certain expenses on an interim basis.

These applications, by virtue of the source of the power used by the Court to make an order usually fall within the asset or within the income category. In this context the asset category would include orders for interim or partial property settlement where that payment is usually taken into account in the exercise of the final discretion as to any just and equitable property settlement order following a Trial or at resolution of the matter.

Interim spousal maintenance applications and injunctions arguably fall within the category where it is less likely they will be taken up in the pool of assets on a final basis.

Hogan Orders as an interim costs order are usually considered on the question of costs.

While these things are clear with reference to the source of power, we are increasingly seeing orders made (often by consent) where the parties agree to the release of a lump sum amount with a categorisation of that sum to be reserved to a Trial Judge. Whilst in those circumstances parties are clearly leaving the choices to whether the amount is taken up in the pool as part of final property settlement as an open proposition, applications should be brought with reference to a specific head of power, depending on the ultimate outcome that is sought at Trial. The choice of application may also depend on evidential matters as each application has a separate set of elements for the Court to consider in the exercise of their discretion.

In the recent case of *Strahan & Strahan*[9] (interim property orders) the Full Court considered the issue of $5M being advanced to the wife for the payment of legal fees.

In that case, the wife appealed from an interim decision of Strickland J, granting her payment of $1M by way of interim property settlement. The wife had sought interim orders for the release of $5,000.00 to her by way of an interim costs order (or Hogan Order) to enable her to pay for her legal costs. The pool was approximately $60M on the husband's case and approximately $80M on the wife's case. It is a long and convoluted litigation history with proceedings having been argued in Australia, as well as in Hong Kong and the Full Court (particularly the joint judgment of Boland and O'Ryan JJ) considered at length the sources of jurisdiction available to the Court to advance lump sums to parties on an interim basis.

In considering and providing a useful overview of the available sources of jurisdiction, and elements to be satisfied, the Court ultimately found that the Trial Judge had applied an inappropriate test in making an order under s79 for an interim property settlement. The Appeal was allowed for that reason.

The important points made by the Full Court in the Judgment relevant to everyday practice are as follows:

1. The <u>*test*</u> is different depending on the application made.

    a. S79 Part Property settlement orders – Court may make such order as it considers **appropriate** in all the circumstances.

    b. S74 Spousal Maintenance Orders – Court may make such order as is **proper**

    c. S117 Interim Costs Orders - Court may make such order as it considers is **just**

[9] [2009] FamCAFC 166(14 September 2009) (Boland, Thackray & O'Ryan JJ)

d. S114 Injunctive power still open as a further source of power

2. The *__evidence to be led__* is different depending on the application made:-

   a. For part property settlement applications, spousal maintenance applications and interim costs order applications, it is usually necessary to demonstrate:

      i. A position of relative financial strength on the part of the Respondent

      ii. A capacity on the part of the Respondent to meet his or her own litigation[10] costs and

      iii. An inability on the part of the Applicant to meet his or her litigation[11] costs.

   The court must consider:

   (i) The first "adjectival step" – should there be a departure from the usual rule that the power under s79 should ordinarily be exercised on a once only basis? - NB there is no test of "compelling circumstances", the *__test for the exercise of the power in s79 is whether it is **appropriate** in all the circumstances.__*

   (ii) The second "substantive step"- if the jurisdiction is to be entertained, then consideration of the factors which are relevant to the exercise of power under s79:

   - Brief consideration of the matters in s79(4) including those in s75(2), - likely sufficient that the Applicant seeking the interim Order for an advance of funds can show that they are likely to receive by way of property settlement a sum sufficient to cover the advance;

   - Determination of the final property settlement as the advance must be capable of satisfying part of the applicant's entitlement – this is an "essential" and "integral"[12] part of the application.

[10] In *Strahan* the $5M sought was for the advancement of legal costs and therefore the test was expressed in these terms, if an interim property settlement was sought for another reason or the application was for spousal maintenance "litigation costs" would need to be substituted as appropriate. For example "an inability on behalf of the application to meet his or her own living expenses."

[11] Ibid

- Consideration of need for and effect of interim order proposed weighed against the risks that the exercise of the power on an interim basis will interfere with the power of the Court to make "just and equitable" orders on a final basis;

- Identify the range of outcomes that may flow in final orders and requires a balancing of the risks of unduly limiting the final order that can be made or even potentially defeating parties' claims or legitimate expectations against circumstances showing that it is just and equitable to make the order.

(iii) S80 is an enabling provision, not a separate source of power - *Davidson*[13]

b. For s74 Spousal Maintenance Orders, the Court must consider the matters in s79(4) including those in s75(2), - likely sufficient that the Applicant seeking the interim Order for an advance of funds can show that they are likely to receive by way of property settlement a sum sufficient to cover the advance;

c. For s117 Interim Costs Orders, the Court must consider:-

i. Matters in s117(2A), though the Full Court noted in *Strahan* that s117(2A)(d) failure by one party to comply with Court Orders, s117(2A)(e) total lack of success by one party in the proceedings and s117(2A)(f) existence of terms of an offer for settlement, may not be relevant on an interim basis.

ii. Whilst uncertainty as to an applicant's ultimate property settlement entitlement can be fatal for a s79 order, it is not necessarily so under s117(2).

iii. Applicant should have "at least an arguable case for substantive relief which deserves to be heard"

iv. Evidence of the applicant's likely costs of the litigation

[12] *Zschokke* (1996) FLC 92-693 (Baker, Finn and Hannon JJ) at 83,215 and 83,221
[13] *Davidson & Davidson (No 2)* (1994) FLC 92-469 (Nicholson CJ, Fogarty and Treyvaud JJ)

v. No "essential precondition" that the applicant's legal representatives will not continue to act unless the costs are paid or secured on an ongoing basis

vi. Order may "make a provision for litigation expenses at a rate that appears reasonable in all the circumstances".

vii. Can be made with respect to costs already incurred as well as for future costs

viii. Whether the costs are already incurred or are for future costs and whether the applicant's lawyers will continue to act in the absence of provision for costs to be incurred may be relevant to the discretion to make the order and its quantum

3. The release of money can contain ***conditions*** depending on the source of power used by the Court to order the release of money.

   a. In *Strahan*, the Full Court noted that Interim Costs Orders should be framed to protect the parties from any risk of injustice arising from the manner in which the funds are expended and this may be done "by requiring that the funds be administered solely by the applicant's solicitors and applied only to meet the expenses referred to in the Order, with detailed records being maintained to permit review by the Court at the time of the exercise of its discretion in the substantive property proceedings or on the final determination of the issue of costs.

   b. In *Strahan*, Full Court specifically commented on the absence of any conditions for a partial property settlement order, as the money is available to the applicant "to do with what she pleases".

Does an Interim Property Order "lock in" money spent as an add-back?

In *Hickey and Hickey and the Attorney-General for the Commonwealth of Australia (Intervenor)*[14] the Full Court accepted that:

[14] *Hickey and Hickey and the Attorney-General for the Commonwealth of Australia (Intervenor)* (2003) FLC 93-143 (Nicholson CJ, Ellis and O'Ryan JJ)

> *Although there may be partial or interim orders (section 79(6) of the Act) ultimately there is only one exercise of power under section 79 in respect of the property of the parties, even though that single exercise of power may be reflected in a complex order of many paragraphs or clauses, each dealing with a different item of property and some dealing with questions of implementation.*[15]

In *Gabel & Yardley*[16], Full Court confirmed that the "one exercise of the power under section 79" can also be made up of a number of interim orders.

> *As we have earlier explained, in our view the focus of our attention should be whether or not the power to make orders pursuant to section 79 has been exhausted. Unless it has, we see no basis in law or logic for concluding that further orders may not be made with respect to property the subject of earlier orders.*
>
> *There can be little doubt that the exercise of power under section 79 involves the exercise of discretion by reference to the provisions of Part VIII of the Act. It would be surprising if, in circumstances clearly involving less than such an exercise of discretion, orders made pursuant to the power conferred by section 79(6) of the Act could not be revisited and altered. Indeed, there may be cases where the Court could only exhaust the power conferred by section 79 in a "just and equitable" manner as required by section 79(2) of the Act by altering an earlier order with respect to the property of the parties or either of them as learned senior counsel for the wife submitted. If the Court could not do so, there may be cases where the Court was precluded by section 79(2) from making orders which exhausted the power conferred by section 79 of the Act.*[17]

It follows therefore, that agreements reached between parties to advance property as a partial property settlement are capable of re-consideration at a final hearing in determining the one exercise of the s79 power and the determination of a just and equitable settlement.

Money advanced as an interim property settlement, spent in the post separation period (other than in acquisition of an asset, or on the payment of legal fees) may therefore not be ultimately taken up as a notional add-back and regarded as property already received by that party. This is especially the case if there is evidence that the money was used for the maintenance of a party or of children to the marriage.

Under the principles in *Strahan*, such an interim property settlement, if advanced under s79, is generally issued without conditions and is available for the recipient to use as they please.

---

[15] Ibid at paragraph 48
[16] *Gabel & Yardley* (2008) FLC 93-38 (Bryant CJ, Finn and Coleman JJ)
[17] Ibid at paragraph 69

The "back stop" position – taking matters into account in assessment of contributions

If all attempts fail to have certain sums spent in the post separation period included as part of the property of the parties to the marriage, the remedy is usually to attempt to have those matters taken into account in the Court's consideration of contributions.

However, it seems that it is difficult to obtain any significant adjustment on contribution matters on account of these transactions. Especially in long marriages, even significant post separation financial contributions do not always alter the finding as to contributions as these post separation transactions are often insignificant when weighed against the contributions over the course of a marriage. Whilst these kinds of post separation transactions are often significant to clients from a cash flow and need to re-establish perspective, recourse to contributions to remedy the dissipation of funds falling outside the "reasonable living expenses" category and falling short of the "extravagant spending" category may not provide any real recourse at all.

In *Spiteri & Spiteri*[18], the parties were married for 9 years and there was a further 6 year period between separation and trial. The pool was $445,000 at separation and approximately $1.6M at trial. In the post separation period the Husband bought a second banana farm and re-established the first farm (which was wiped out by a cyclone 2 years prior to separation). The Husband also repaid $490,000 in debt that existed that the date of separation from farming income in the post separation period. The Court made a finding on contributions of 80%/20% in favour of the Husband on the basis of his initial contributions and wastage by Wife of $300,000 in 4-6 years of marriage, up to the date of separation. The Court held that no further adjustment in favour of the Husband was warranted on the issue of contributions for the post separation period as the Wife was the primary carer of the 3 children of the marriage and the Husband had provided insufficient financial support to the Wife and children post separation.

In *Ilett & Ilett*[19], the parties were married for 11 years and there was a further period of almost 10 years between separation and trial. The pool more than doubled between separation and trial from $365,000 to $778,000. There were 2 children of the marriage aged 6 and 4 at the date of separation. At trial the Court made a finding of 50%/50% on the basis of contributions, though on a pool that excluded many post separation assets,

[18] (2005) FLC 93-214 (Finn, May and Guest JJ)
[19] (2005) FLC 93-221 (Bryant CJ, Finn, Coleman, Warnick, O'Ryan JJ)

such that the pool found by the trial judge was only 32.5% of the assets actually existing at the time of the trial. The superannuation assets of the parties increased by $120,000 in the post separation period and the Husband acquired a property worth $360,000 at the date of Trial. The property was bought post separation for $153,000 and funded by an interest free loan/gift from his parents of $65,000 and a mortgage. He also contributed a voluntary redundancy payment of $53,000, though these amounts were later largely withdrawn during a period of unemployment. On appeal the Full Court held that that Husband was entitled to 65% on contributions, taking into account all assets that existed at the time of the Appeal, some 10 years after separation. The Husband essentially received an adjustment of 15% for post separation contributions when the post separation contributions comprised 50% of the pool in dollar terms.

In *Wilkinson & Wilkinson*[20], the parties were married for 25 years and there was a further period of 6 years between separation and trial. The pool at the time of trial was approximately $470,000. The Husband's superannuation increased by 30% to $197,000, in the post separation period. On appeal the Full Court upheld the appeal on the basis of a challenge of the findings of the trial judge to s75(2) matters and remitted the matter for rehearing. In their reasons for judgment, there is support for a finding of 50%/50% on the basis of contributions to the date of separation, with a further 10% adjustment to the Husband on account of post separation contributions.

All in all, each of these cases demonstrate that post separation contributions are part of a consideration of the contributions of the parties throughout the course of a marriage as a whole. For this reason, even very significant post separation contributions may not necessarily change the contributions award, when weighed against the contributions during the entire relationship. In such circumstances, it may therefore be in a client's best interests to try and capture money before it is spent, and before resort needs to be had to discretionary remedies like add backs.

Ultimately all these matters come down to the exercise of discretion by the judicial officer at the time that Judgment is handed down. However, judicial officers can not be asked to exercise their discretion if there is no evidence of the sums of money spent in the post separation period, or of the relative resources available to the parties. In *Gollings and Scott* and *C and C*, the Court considered the proposed add backs in the context of the pool as a

[20] (2005) FLC 93-222 (Bryant CJ, Finn, Coleman, Warnick, O'Ryan JJ)

whole and with reference to whether the sum was material when compared to the property of the parties overall.

Profits are distributed from businesses, trusts and companies incrementally over time. Those profits can be distributed to one party through a number of different methods and when viewed as a whole, can be significant when considered in the context of the pool as a whole. A failure to consider the financial habits of the parties prior to and after separation, in terms of the payment of greater than reasonable living expenses can equate to money slipping through the fingers of the parties, never to be seen again, often to the benefit of one party and the detriment of the other. Income producing businesses are often developed over many years of a relationship through the combined efforts of both parties. Often the parties have together experienced tough times financially as their business is established. If a result is to be just and equitable, then surely the benefit of an income stream in the post separation period, should be administered justly and equitably also.