**IN THE HIGH COURT OF AUSTRALIA**
**ADELAIDE REGISTRY**



No A7 of 2016

BETWEEN

**HALL**
Appellant

and

**HALL**
Respondent

## RESPONDENT'S SUBMISSIONS

### Part I: Certification

1. This submission is in a form suitable for publication on the internet.

### Part II: Issues

2. The issues are as follows:

   (a) Did the Full Court of the Family Court (**Full Court**) err in holding that the primary judge failed to consider and make relevant findings concerning the respondent husband's application to discharge the interim maintenance order (Ground of Appeal 2.1);

   (b) Were the matters relied upon by the Full Court in discharging the interim maintenance order raised before the primary judge and the Full Court such that the appellant wife had a sufficient opportunity to be heard in respect of the relevant matters (Ground 2.2);

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(c) Did the Full Court err in drawing certain inferences from the available evidence (Ground 3.1);

(d) Did the Full Court err in finding that significant financial benefits conferred upon the wife by her deceased father were factors to be taken into account under s 72 of the *Family Law Act 1975* (Cth) (**the Act**) (Ground 3.2)?

**Part III: Section 78B of the *Judiciary Act 1903* (Cth)**

3. The respondent considers that notice is not required to be given pursuant to s. 78B of the *Judiciary Act 1903*.

**Part IV: Facts**

10 4. On 13 December 2013, the primary Judge (Dawe J.) ordered that the husband pay interim maintenance in an amount of $10,833 per month in addition to paying mortgage and other commitments of some $17,000 per month (giving rise to a total of around $28,000 per month) {Reasons for Judgment, 13 December 2013, [2013] FamCA 975 (**First Reasons**) at [32] – [33]}.

5. The wife's father died in 2009. As at 13 December 2013, when the wife's application for an interim maintenance order was first heard by the primary judge, the facts and circumstances surrounding the wife's entitlements under her father's will were unknown {First Reasons at [14]}.

6. However, by 14 March 2014, when the husband brought an application before the trial
20 judge to discharge the interim maintenance order, aspects of the father's will had become known to the parties.

7. The aspects known included:

(a) the father's wish for shares in the V Group to be held beneficially for the wife or otherwise to be provided to her;

(b) the father's wish for a payment to be made to the wife of $16,500,000 indexed to CPI from the V Group upon certain conditions being satisfied; and

(c) the father's wish that until the payment in (b) was made the wife should receive, from the date of the father's death, an annual payment of $150,000 from the V Group indexed to CPI and net of taxation (**annual payment benefit**) [1].

8. The annual payment benefit of $150,000 was greater than the annual amount of the interim maintenance order (which equates to some $130,000 per annum).

9. The annual payment benefit does not appear to have been taken into account by the primary judge in dismissing the husband's application to discharge the interim maintenance order {Reasons for Judgment, 17 June 2014, [2014] FamCA 406 (**Second Reasons**)}. The only references in the Second Reasons to the benefits to the wife under her father's will are at [10], [25], [29], [32] and [36]. There is a further reference at [45] but it is in the context of discharge of injunctions relating to sale of certain properties. The husband's challenge to the interim maintenance order was dismissed without any relevant reasoning from the primary judge at all.

10. The Full Court considered that the primary judge had erred in failing to take into account the annual payment benefit {Reasons for Judgment, 7 August 2015, [2015] FamCAFC 154 (**FC**), [131]ff}. The Full Court set aside the order of the primary judge which had dismissed the husband's application to discharge the interim maintenance order. The Full Court re-exercised its discretion and declined to make the interim maintenance order {FC [136], [149]ff}.

11. In determining not to make an interim maintenance order the Full Court took into account the fact that there were indications or inferences that the wife's brothers (including the brother executor of the father's will) who controlled the V Group would carry out their father's wishes {FC [132] – [133]; [140]-[155]}.

12. The indications or inferences arose from the fact that {FC [133], FC [151]}:

(a) the wife had a good relationship with her brothers;

(b) the wish was directed from the father to the brothers;

[1] The $150,000 was referred to in the husband's affidavit dated 7 March 2014 at paragraph [32] and [36]. In addition, aspects of the father's will were set out in the affidavit of Mr Andrew Shaw dated 14 March 2014 at paragraph [39].

(c) significantly, the brothers already provided for the wife by the provision of motor vehicles (being a BMW and Porshce Cayenne valued at some $265,000);

(d) those vehicles had replaced other brand new vehicles purchased previously for the wife on the same basis.

13. Before the Full Court there was no evidence that the wife had requested payment from her brothers or the V Group or that any request had been or would be refused {FC [151]}. A letter dated 3 November 2014 from the wife's brother and executor of the father's will was tendered by the wife at the appeal hearing and that letter did not indicate that any such request had been made or would be denied if made {FC [151]}.

**Part V: Legislation**

14. The appellant's statement of applicable statutory provisions at annexure A to the appellant's submissions (**AS**) is accepted.

**Part VI: Respondent's argument**

*Ground 2.1: AS [34]-[38]*

15. The wife submits at AS [34] to [38] that the Full Court erred in holding that the primary judge failed to consider and make findings as to whether there was sufficient new evidence before her to discharge the interim maintenance order.

16. It is clear that at the hearing before the primary judge on 14 March 2014 the husband's counsel addressed the Court as to the discovery of the $150,000 annual payment benefit conferred upon the wife, which was not known at the time the order was first made on 10 December 2013, and contended that it was a financial resource to be taken into account in accordance with s. 75(2)(b) of the *Family Law Act.* See the transcript of hearing on 14 March 2014 at T80.45-81.10, T95.05.

17. Despite the husband having adduced evidence and having made submissions about the matter, there is no reference to or finding in respect of the annual payment benefit in the Second Reasons.

18. At AS [35] the wife suggests that the primary judge's reasons must be read *"fairly, as a whole and in context"* and that to conclude that a trial judge has not properly considered an aspect of a party's case is a *"serious charge"*: citing *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1610 [62]-[63]. *Whisprun* at [63] makes clear that what that means is that it must appear from the record of proceedings or otherwise that the judge appealed from has failed to consider properly a party's case.[2]

19. Further, at AS [36] and [37] the wife refers to aspects of the primary judge's reasons which described the nature of the application and made reference to "new evidence", along with the primary judge's express dismissal of the application to discharge injunctions which had earlier been made preventing the sale of the family home. The reference to such matters, however, does not answer the fact that:

    (a) there is no mention in the primary judge's reasons of the wife's entitlement to the annual payment benefit;

    (b) there was no finding as to the wife's entitlement to the annual payment benefit, including the likelihood of that benefit being available to the wife;

    (c) there were thus no findings made or consideration given by the primary judge to whether the annual payment benefit ought to have led to discharge of the interim maintenance order.

20. The consideration and making findings in respect of the evidence and the giving of reasons is an incident of the *judicial* process: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 667; *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728. No doubt the standard of such reasons required may vary with the context: *Wingfoot Australia Partners Pty Ltd v. Kocak* (2013) 252 CLR 480 at 498, [45] but it is submitted that the Full Court was correct to find that the primary judge had erred by failing to make relevant findings in respect of the annual payment benefit and thereby to properly or adequately address the husband's application to discharge the interim maintenance order.

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[2] As the 3-2 division of opinion in *Whisprun* indicates, this is an issue on which views can differ.

21. In circumstances such as these where a significant matter appeared to have been overlooked, or not in reality dealt with, by the primary judge, the Full Court's intervention was orthodox.

*Ground 2.2: AS [39]-[52]*

22. At AS [39]-[52] the wife submits that she was not afforded procedural fairness by the Full Court because the manner in which the application was decided against her (a) was not in issue at first instance and (b) was not raised during the hearing of the appeal.

23. ***First instance***: The starting point is to return to the manner in which the argument regarding the annual payment benefit arose before the primary judge at the second hearing on 14 March 2014.

24. As noted above, by the time of the second hearing the husband had become aware of aspects of the benefits due to the wife under her father's will. The new material formed the basis for the husband's application filed on 7 March 2014 to discharge the interim maintenance order[3].

25. The evidence relied upon by the husband before the primary judge included material which revealed the content of the father's will (as to which see paragraph 7 above).

26. In addition to adducing relevant evidence on the topic, submissions were made by the husband's counsel about the $150,000 annual payment benefit and the effect of that benefit on the interim maintenance order {transcript of hearing on 14 March 2014 at T80.45-81.10, T95.05}.

27. There was nothing to prevent the issue being dealt with by the wife in evidence, or in oral submissions. Neither occurred. In particular the oral submissions referred to above and made at T80.45-81.10 were not addressed or otherwise responded to by the wife's counsel.

28. In such circumstances, the wife's contention that the relevant issue was not raised by the husband or otherwise ventilated before the primary judge should not be accepted.

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[3] See FC [16] recording the terms of the application made by the husband on 7 March 2014 including the discharge of the interim maintenance order.

29. Before the Full Court, the wife's counsel initially asserted that the issue of the annual payment benefit had not been raised before the primary judge {transcript of hearing on 12 November 2014 at T55.10-T56.30}.

30. That led to a debate before the Full Court as to whether the relevant matter had in fact been raised. The conclusion from the relevant exchange was an acceptance (or at least an implied acceptance) by the wife's counsel that the $150,000 annual payment benefit had been raised by the husband's counsel but had not been addressed by the primary judge {transcript of hearing on 12 November 2014 at T56.33-57.15}.

31. At AS [45] and [46] the wife further submits that the issue was not raised before the primary judge because the husband asserted before the primary judge that the wife was entitled to $150,000 per annum rather than the wife being able to make a request for a payment of $150,000 per annum. This complaint is, with respect, to split hairs. The asserted unfairness is a long way from being a denial of procedural fairness leading to error.

32. In any event, however, the complaint is not correct.

33. During the hearing before the primary judge, the husband's counsel referred to the wife *"arguably"* being entitled to $150,000 {transcript of hearing on 14 March 2014 at T81.08}.

34. Further, the use of the word "entitlement" and the meaning that was intended by the husband in his submissions was not explored by the wife's counsel (who made no submission at all in respect of the relevant matters).

35. ***Matter raised on appeal***: At AS [49] it is contended that the lack of procedural fairness was *"compounded"* because that the matter was not raised on appeal by the husband. However, there was no procedural unfairness to *"compound"* in circumstances where the relevant matter *was* raised at first instance.

36. Moreover, the record of the proceedings before the Full Court does not bear out the wife's submission that the matter was not raised on appeal by the husband.

37. The husband's grounds of appeal before the Full Court at paragraph 6 referred to the primary judge's error in failing to consider the husband's application to discharge the

interim maintenance order {FC [61]}. Additionally, paragraph 7.3 of the grounds of appeal referred to the wife's entitlements pursuant to her father's will {FC at [61]}.

38. During the hearing before the Full Court the husband referred to the $150,000 annual payment benefit on a number of occasions {transcript of hearing on 12 November 2014 at T33.25, T41.15, T43.20}.

39. Shortly after the wife's counsel had begun to address the Full Court, Thackray J asked counsel for the wife to address four matters, the first of which was *"the significance of $150,000 annual payment to the wife under the terms of the will"* {transcript of hearing on 12 November 2014 at T50.15}.

10 40. Thackray J's question led to a significant exchange between the wife's counsel and the Full Court in respect of the issue {transcript of hearing on 12 November 2014 at 50.5-57.20}.

41. Part of the exchange included the following {transcript of hearing on 12 November 2014 at T53.15-53.30}:

> Mr Ackmann: [Is] the point your Honour is bringing me to is that there's no evidence that she went beyond or over Mr Shaw's evidence and said, "I'm told I'm entitled to this money. There's no compulsion on you to pay it. I would like you to pay it to me".
>
> Strickland J: Yes.
>
> 20 Mr Ackmann: Point well taken, your Honour. She could have done that to close what I would respectfully say was the last gate that was left slightly ajar but there is no reason on the balance of probabilities to suggest in the light of the history of this matter that it would be forthcoming.

42. It is plain from this exchange (amongst others between T50.35-57.20) that the matter was extensively ventilated and argued before the Full Court such that the wife had a sufficient opportunity to be heard: see *Autodesk Inc v Dyason* (1993) 176 CLR 300 at 308.

43. In such circumstances, the Court should not accept the suggestion at AS [50] to [52] that the wife was not put squarely on notice of the issue or that the wife was denied an
30 opportunity to make submissions as to the relevant matters.

44. The submission at AS [49] that the husband "eschewed the suggestion" that the Full Court could infer that if the wife made a relevant request it would be forthcoming is not correct. The passage of the transcript relied upon by the wife as to this matter was addressing a different topic or subject matter (being the extent to which a *Jones v Dunkel* inference could be drawn) {transcript of hearing on 12 November 2014 at T34.15-35}. Further, the husband's counsel was responding to a question from Aldridge J to the effect that if the wife made the relevant request she could would have been given *"whatever she wanted"*. That was not the term of the father's will and so it was plainly correct for the husband's counsel to answer *"[y]ou can't go that far your Honour"* {transcript of hearing on 12 November 2014 at T34.15-35}. The attempt by the wife at AS [49] to derive some kind of concession by the husband as to the available inference is misplaced.

45. At AS [47] and [48] the wife further asserts that if the husband had raised the argument she would have called evidence to refute the suggestion that it could be inferred that she would receive the annual payment benefit.

46. The difficulty with that submission is that the matter *was* relevantly raised both at first instance and on appeal and it was a matter for the wife as to what evidence she wished to call on the topic.

47. Additionally, there was no suggestion by the wife's counsel at any stage during the appeal that the wife would have called further evidence at first instance or that she wished to adduce further evidence on appeal in addition to the further evidence which she did introduce on appeal being the letter from her brother dated 3 November 2014.

48. Rather the exchange referred to at paragraph 41 above illustrates that the wife was prepared to argue the matter on the basis that the Full Court should not draw the relevant inferences about the brothers' willingness or otherwise to comply with their father's wishes and provide the relevant funds.

*Ground 3.1: AS [53] to [56]*

49. At AS [53] to [56] the wife contends that it was not reasonably open to the Full Court to draw the inference that if the wife had made a request to her brothers to make the annual payment they would have carried out their father's wishes.

50. The inference was plainly open and no appealable error has been shown.

51. The wife called no evidence to indicate that she had made a relevant request or to indicate that any request had been or would be denied. Indeed the plain inference from her brother's letter of 3 November 2014 was that a request had not yet been made. The Full Court was entitled to take into account the evidence of the good relationship and the provision of expensive cars which suggested that cooperation could be expected.

52. Further, none of the brothers or controllers of the V Group were called to give evidence to refute the suggestion that they would comply with their father's wishes.

53. The relevant evidence on the issue was completely within the wife's power to call: *Hawksford v Hawksford* (2005) 191 FLR 173 at [54]; *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561 at 565; *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969 at 970.

54. The suggestion at AS [56] that the Full Court had to be satisfied that it would not be a breach of duty of the directors of the V Group to pay monies to the wife should not be accepted.

55. The Full Court was not required to engage in an exercise of that nature which, on the material before it, would be hypothetical, and had not been raised. If it had been raised there would be significant questions as to the relevant scope of directors' duties in the context of a solvent closely held family group of companies: see *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722 at 729-730. There would also be questions about the obligations owed by the three brothers to the wife in circumstances where they had taken the controlling shares in the V Group companies under a will which required the V Group which they controlled to make payments to the wife. See paragraph 71 below.

*Ground 3.2: AS [57] – [84]*

56. Section 72 of the Act creates a liability to provide maintenance where the other party *"is unable to support herself or himself"*. The liability is only created, and the correlative right to be maintained only arises, when this threshold requirement is satisfied (c.f. AS [63(a)]).

57. Thus the central enquiry under s 72 is a factual one as to whether the applicant wife or husband *"is unable to support herself or himself"*. This is an enquiry of a different character from that in matters arising under s 79 of the Act which concerns the just and equitable division of property between the parties.

58. Section 72 of the Act directs attention to the factors set out in s 75(2) of the Act. Those factors include the *"financial resources of each of the parties"* (s 75(2)(b)) and *"any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account"* (s 75(2)(o)).

59. The *"financial resources"* relevant to the enquiry under s 75(2)(b) are not limited to assets to which a party has a legal entitlement and may include the property of a third party depending upon the extent to which the party can control the property in question: see *In the Marriage of Kelly* (1981-1982) 7 Fam LR 762 at 769-770.

60. Further, s 75(2)(o) has been correctly interpreted as allowing the court to consider any matter which is *"broadly financial nature"* (*Marriage of Soblusky* (1976-1977) 12 ALR 699 at 725) or *"all of the financial matters which are relevant to that particular case"* (*In the Marriage of Beck* (1982-1983) 8 Fam LR 1017 at 1021).

61. The wife suggests, as a threshold issue, that s 72 and the factors referred to in s 75(2) did not permit the Full Court to take into account the annual payment benefit as a relevant matter (see AS [73]). In this regard it appears to be submitted at AS [74] – [75] that the benefit under the will should not be characterised as a financial resource of the wife and is therefore irrelevant.

62. That submission ought be rejected. Plainly any relevant matter of a financial nature may be taken into account in considering the factual question of whether the wife *"is unable to support herself"*.

63. The s 75(2) matters are broad enough to include the rights or benefit which the wife has under her deceased father's will. To exclude such matters from the relevant factual enquiry is artificial in the extreme. Moreover, the financial resources under the will cannot be said to be irrelevant to the enquiry merely because the wife had not yet made a relevant request for access to funds (c.f. AS [75]). The failure to make a request does not make the benefits under the will any less a resource available to the wife.

64. Contrary to AS [76] the construction of ss 72 and 75(2) that permits the benefit conferred upon the wife to be taken into account is consistent with the scope, purpose and object of Pt VIII of Act.

65. In the context of interim maintenance orders the sections ensure that a party to a marriage is not left destitute pending a property settlement where the other party to the marriage is able but unwilling to provide maintenance. It would be absurd to construe the Act as prohibiting the court from taking into account for the purpose of an interim maintenance order the fact that a party to a marriage has access to considerable wealth outside the marriage which has vested in crystallised entitlements under a family member's will (c.f. a prospective inheritance which may be freely revoked or altered prior to the death of the testator: see *White and Tulloch v White* (1994-1995) 19 Fam LR 696 at 702).

66. When considered in such terms it is unhelpful to speak of relieving the husband from liability by reason of the provision of gratuitous financial support from third parties (see AS [77]). In substance no such liability has arisen under s 72 of the Act if the wife is able to support herself as a result of vested benefits under a will.

67. Ultimately these are matters of fact to be determined in each individual case – but it cannot be the correct construction of s 72 of the Act that the vested benefits under a will are irrelevant to the enquiry.

68. Further, in arguing that the Full Court was not permitted to take the annual payment benefit into account, AS [70] seeks to characterise the benefit as a *"mere hope or expectancy"*. In a similar vein at AS [77] to [81] it is argued that taking into account the benefit under the will relieves the husband of liability under s 72 on the basis that the wife may *"prevail upon other people in her life"* or that in substance the Full Court has imposed an obligation upon the wife to go *"cap in hand"* to her brothers or to prevail upon parties outside the marriage *"for gratuitous financial assistance"*.

69. It is not correct to describe the benefit which has vested in the wife in such a manner. Given that the wife had not made a relevant request nor was there any evidence that a request had been denied, it was not necessary for the Full Court to explore the wife's strict legal entitlement.

70. However, the father's express wish to provide the wife with payments from the assets of the V Group *is* properly characterised as a present and existing benefit or entitlement conferred upon the wife. The wife's brothers obtained their shareholdings in the V Group companies pursuant to their father's will. That will required that in their control of the V Group companies they take the steps necessary to make the provisions for the wife contemplated by the father's will.

71. The assumption underlying the AS that there was no obligation on her brothers to ensure that the father's wishes were carried out by the companies which they controlled is a large assumption. It is more likely that they became subject to the equitable obligation referred to by Dixon J. in *Countess of Bective v. Federal Commissioner of Taxation* (1932) 47 CLR 417 at 418.9, or that their shares were subject to a charge in favour of the wife, as referred to by Dixon J. at 419.2. See too *Gill v Gill* (1921) 21 SR (NSW) 400 at 406-407.

72. Once it is accepted that under s 72 of the Act the Full Court was entitled to take into account the benefit to the wife under the will, the wife's remaining arguments are properly to be seen as no more than suggesting that the Full Court's discretion in declining to make the interim maintenance order should have been exercised differently: see *House v The King* (1936) 55 CLR 499 at 504-5.

73. In particular, there was no basis for importing the conditions on the exercise of discretion suggested at AS [84] to [86].

74. The father died in 2009. By the time of the first hearing before the primary judge the $150,000 annual benefit was arguably worth some $600,000. The benefit under the will was not tied to any particular spending conditions or to be provided as a loan subject to repayment – rather it was a lump sum annual payment available for the wife's use as she chose.

75. If the wife had sought to prove that there was some timing or other difficulty created by the form of any entitlement under the will then that was a matter which she ought to have proved as being a relevant factor leading to the making of a maintenance order. She did not call any such relevant evidence to prove any such matters.

*Orders sought*

76. The appeal should be dismissed with costs.

**Part VII: Time estimate**

77. The respondent estimates that 2 hours will be required for oral argument.

7 April 2016


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