

DOGGED DISCOVERY

IN FAMILY COURT PROPERTY PROCEEDINGS THE RELEVANCE OF DOCUMENTS TO THE ISSUES IS CRUCIAL FOR THEIR DISCLOSURE, EVEN BY THIRD PARTIES AND NON-PARTIES TO THE MARRIAGE.

BY JACQUELINE CAMPBELL

When making property orders under s79 of the *Family Law Act 1975* (Cth) (*FLA*), the Family Court usually deals with parties to the marriage. It can also make orders affecting the substantive rights to property of individuals and entities who are not parties to the marriage.

Such orders can be made if the property is "property of the parties" within s79(1). This jurisdiction is broadened by Pt VIII A of the *FLA*, the amendments introduced by the *Bankruptcy and Family Law Legislation Amendment Act 2005* (Cth) and the Family Court's accrued and associated jurisdiction.¹ The extent to which Pt VIII A extends the powers of the Court with respect to third parties remains a matter of debate.² The *Family Law Amendment Act 2008* enables third parties to be parties to financial agreements under the *FLA*.

Disclosure may be sought from an individual or entity, being a party to the proceedings but not the marriage (a third party) or from an individual who is not a party to the proceedings (a non-party). If a non-party becomes a party to Family Court proceedings, the *Family Law Rules 2004* (Cth) (Rules) will apply, but not always as onerously as they apply to parties.

In some cases, a third party may be a relative of, or an entity associated with, one of

the parties to the marriage. If a non-party or third party is related to or associated with a party to the marriage, the non-related party may be particularly keen to obtain comprehensive disclosure from the non-party or third party to establish that the related party is in a better financial position than otherwise declared. Other third parties, such as a creditor bank or bankruptcy trustee, will not be related to the parties to the marriage.

Joining a third party

A third party can be joined to the proceedings by an existing party using a simple process. The party to the proceedings names the proposed third party in an application, response or an amended application or amended response: r6.03. If the third party does not want to be a party to the proceedings, they must take positive action to be removed as a party by filing an application in a case and affidavit in support (r6.05) and having the dispute heard.

A non-party seeking to become a party is required to file an application and affidavit: rr6.04 and 5.01. The affidavit must set out:

- the facts relied on to support the application; and
- a schedule setting out the orders sought if the Court grants permission to intervene: r6.08.

Interestingly, a party seeking to join a non-party is not required under the Rules to set out the facts in support of the application against the third party or the orders proposed against the third party. However, there should be clarity as to the issues in dispute and how the third party's property is relevant to the proceedings. The third party is entitled to know, as a matter of procedural fairness, the case they are required to meet.³

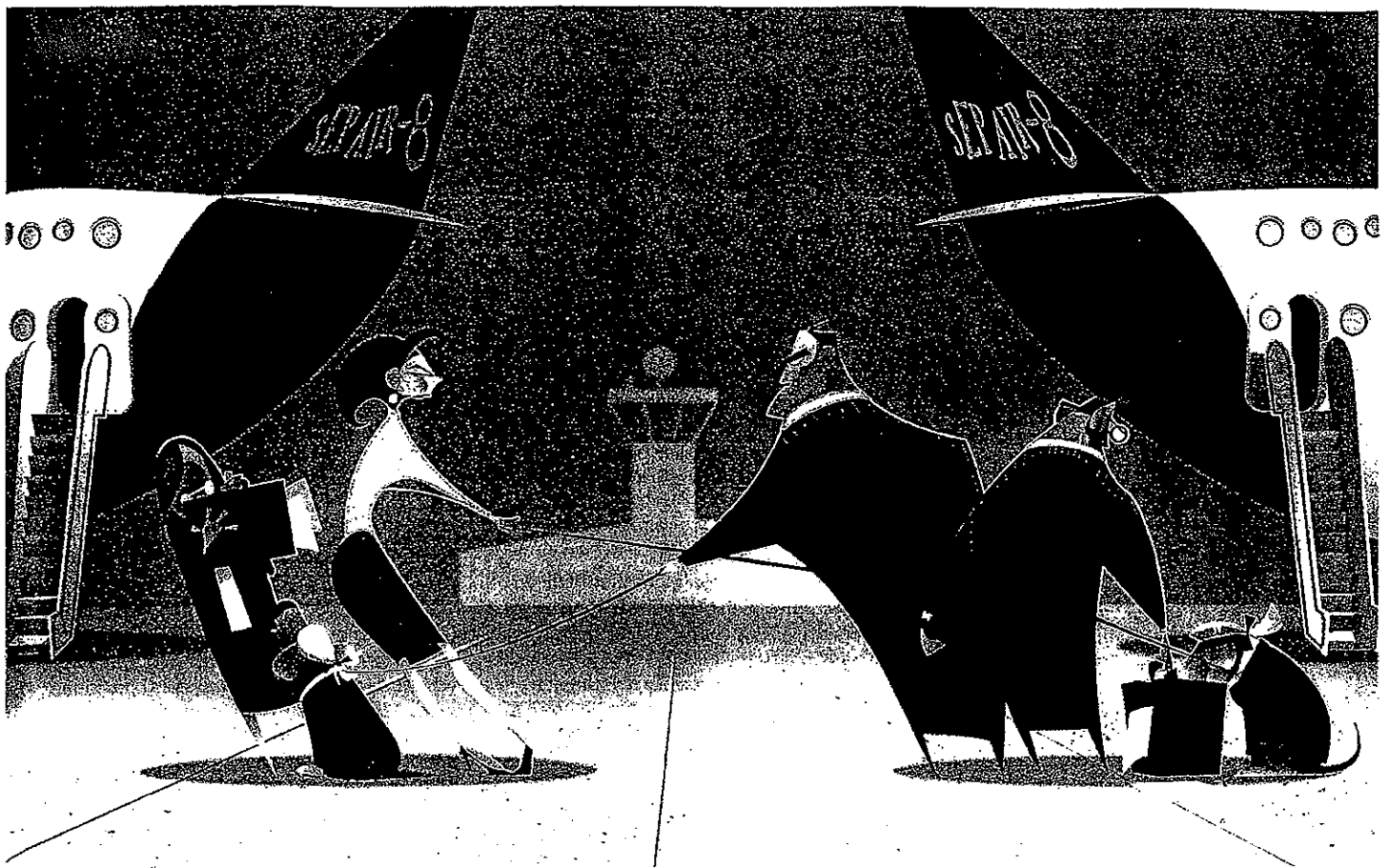
Sections 90A(1) and (2) extend the powers of the Court to make orders under s79 which affect third parties. The Full Court in *B Pty Ltd and K*⁴ said in relation to s90A(2):

"In our view, the correct conclusion was that, as the wife set out her proposed claim, she did not show that the power conferred by s90A(2) could arguably be engaged. Any order made pursuant to s90A(2)(b) must be for the purpose of effecting a division of property between the parties. The order that the wife proposed was for the purpose of increasing the property of the parties, by an unknown amount and on unknown principles".

Disclosure

The general duty of disclosure under r13.01 is:

"Each party to a case has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner".



A party can be required to discharge the duty of disclosure by disclosing financial circumstances (r13.05), disclosing documents (r13.07), answering specific questions (r13.27), complying with a notice to produce (r13.09) and complying with subpoenas (Pt 15.3). A non-party may be subject to subpoenas and the non-party production document process: r13.4.2.

A party to a financial case in the Family Court is required by r13.04(1)⁵ to make full and frank disclosure of their financial circumstances. This duty is extremely broad and covers income assigned to others, property in which the party has only a contingent interest and trusts over which the party has no control if the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income. The duty starts before proceedings have commenced. The pre-action procedures in Sch 1 of the Rules apply to all prospective parties to a case in the Family Court, and contain disclosure obligations which are similarly worded to the Rules.

The duty of disclosure applies to all relevant documents that have been in the possession of, or under the control of, the party disclosing them: r13.07.

The Full Court in *Oriolo and Oriolo*⁶ agreed with Smithers J in *Briese and Briese* that mere compliance with the Rules is not enough to

satisfy the basic obligation for full and frank disclosure:

"I believe that a person in the position of the husband in this case has a positive obligation to set out at an early stage his financial position in a clear and comprehensive manner . . . The need for each party to understand the financial position of the other party is at the very heart of cases concerning property and maintenance".⁷

Rule 13.04 and the requirement under r13.05(1) to file a financial statement do not apply to a party to a property case who is not a party to the marriage, except to the extent that the third party's financial circumstances are relevant to an issue in dispute.

Fetters on disclosure

The main fetter on unrestrained disclosure is the requirement for relevance to the issues in dispute. Proportionality (r1.07(c)) and cost (r1.04) are also considerations. Rule 1.04 declares the main purpose of the Rules is "to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case".

Rule 1.04 (and rls 1.04 to 1.08, which set out the responsibilities of parties, the Family Court and lawyers to help achieve the main purpose) act to both require and limit disclosure. The extent to which the Court

will require or enforce disclosure will vary. The Court is required to apply the Rules in a manner which is proportionate to:

- the issues in the case and their complexity; and
- the likely costs of the case.

For example, in *Weller and Weller*, Le Poer Trench J said:

"This court has for some time been concerned about the concept of 'proportionality' in property cases. That is the connection between the costs incurred in the case and the amount of property available for distribution between parties or the benefit which is likely to accrue to parties in the proceedings. Proportionality has to be seriously considered in cases where there are likely to be a plethora of relevant documents with little or no likelihood of assisting a party in the case after extensive and expensive inspection of those documents".⁸

The Court has a discretion to determine the extent of the documents which should be disclosed. In *Papadopoulos and Papadopoulos*,⁹ Cronin J noted that r13.04 did not specify the period for which documents needed to be disclosed. His Honour concluded that this was because r13.10 limited the full disclosure requirement to "relevant" information. In some cases disclosure of documents dating back one year may be relevant, but in others a longer period may be required.

DISCLOSURE

The husband argued that it was unnecessary to produce documents back to 2002; some of the entities were small and he had only a part interest in them. His Honour recognised the dilemma of limiting disclosure when accountants required three years of financial statements to perform a valuation. At the time judgment was delivered, financial documents up to 30 June 2005 had been provided, but not 2006 and 2007 financial statements.

His Honour said (at [28]):

"I appreciate again the point that the husband wishes to have the Court accept about his control over the situation but having regard to his relationship with the other persons involved, I find it hard to believe that he could not urge them to assist in doing all things necessary to bring the financial records right up to date so that the serious issue of resolving the matter or litigating the dispute can commence".

The husband was ordered to first provide all documents back to 2004, but if the wife's accountant still required documents back

r13.01(2), the duty of full and frank disclosure starts with the pre-action procedures and continues until the case is finalised. The absence of demonstrated relevance of the broader list of documents in r13.01(2) to the issues in the case enabled her Honour to read it narrowly.

Non-party production

The non-party document production process in the Rules relates to documents which:

- are relevant to an issue in the case;
- are in the possession or under the control of the non-party;
- that the non-party may be required to produce at trial: r13.33(1).


The process, a major innovation of the 2004 Rules, is meant to be used where there is no other reasonably simple and inexpensive way of proving the issue sought to be proved other than by the production of a document from a third party. It has not been widely used as it is seen as more cumbersome and less effective than the subpoena process.

*General of Commonwealth of Australia and Ors*¹² confirmed.

In *Botany Bay Instrumentation and Control Pty Ltd v Stewart*,¹³ Powell J classified the circumstances in which subpoenas may be set aside into seven categories. His Honour said that these categories were examples of abuse of process, rather than an exhaustive list. His categories included:

- the subpoena was not issued bona fide to obtain relevant evidence;
- the subpoena was used to obtain discovery against a party;
- the subpoena was used to obtain discovery against a third party;
- requiring compliance would be oppressive and "fishing".

In *Alfasi and the Alfasi Group*,¹⁴ the wife had, in an earlier hearing, sought extensive documents through the subpoena process. She wanted to show the husband's real position in the Alfasi companies. Guest J, at the earlier hearing, held that it was inappropriate and an abuse of process for such wide subpoenas



A named person or a person with sufficient interest in a subpoena may seek an order for the subpoena to be set aside in whole or in part, or may object to production, inspection or photocopying of the documents required by the subpoena.

to 2002 the husband had to provide them. His Honour pointed out that if the husband could provide the 2006 and 2007 financial year statements and documents, going back to 2004 might not be necessary.

In *Kelleber and Anderson*,¹⁰ Carter J examined the Explanatory Memorandum which accompanied the introduction of the 2004 Rules and limited the disclosure obligations, observing (at [288]):

"Criticisms of the former discovery regime included the costs and delays associated with discovery; the use of discovery as a tactical weapon; the use of discovery as a 'fishing expedition'; and the 'over-discovery' that sometimes arose. Disclosure is expensive and that is why its usage is limited, and in my view, it should be strictly controlled".

In *Kelleber*, Carter J only required documents to be produced which were listed in r12.02 as being required to be produced before the first court date. It was not suggested to her that provision of any of the other documents was necessary to enable the parties to resolve the case at a conciliation conference, a date for which had been set.

It is unclear from the Rules how r12.02 and 12.05, which require disclosure at specific stages of the proceedings, relate to the broad disclosure required by r13.04. Under

Subpoenas

The general policy behind subpoenas to produce documents was explained by Smithers J in the Federal Court in *Lucas Industries Ltd v Hewitt*:

"The purpose of the process of the subpoena is to facilitate the proper administration of justice between parties. For that purpose it is the policy of the law that strangers who have documents may be put to certain trouble in searching for and gathering together relevant documents and bringing them to court. It is according to the same principle that persons who have knowledge of facts are put to the inconvenience of being brought to court and required to give evidence".¹¹

A named person or a person with sufficient interest in a subpoena may seek an order for the subpoena to be set aside in whole or in part, or may object to production, inspection or photocopying of the documents required by the subpoena: r15.26. The person seeking to have the subpoena set aside or objecting to it must do so either before the court date or on the court date.

The primary test is the relevance of the documents to the issues before the Court, as the Full Court in *Hatton v Attorney-*

to be issued before the wife had exhausted her rights of discovery against the husband.

Bryant CJ held that Guest J was concerned with the form of the subpoena rather than laying down an absolute rule. It was more important, as submitted on behalf of the Alfasi Group, that:

"The subpoena, as drafted, amounted to a fishing exercise and, in effect, sought non-party discovery rather than the production of specific documents of relevance to issues before the Court. He submitted that the wealth of the husband's family, the financial performance of and dealings of the companies in which the husband had no interest were not relevant to the interim issues before the Court" (at [66]).

Similarly, in *White and Tulloch v White*, a case involving the expected inheritance of one of the parties from a parent, the Full Court said:

"It appears to us oppressive to Mrs Tulloch to have to disclose detailed financial records in circumstances where that may prove ultimately to be of no more than marginal relevance. It is likely to widen the scope of these proceedings far beyond what is legitimate or useful and is not in accordance with a proper practice in these matters".¹⁵

Care must be taken in joining third parties and using subpoenas against third parties and non-parties.

Costs

Costs must be taken in joining third parties and using subpoenas against third parties and non-parties. Costs orders are more readily made in favour of them. Costs orders have been made in favour of third parties who were wholly successful in opposing orders and disclosure. For example, in *Costanza and Costanza*¹⁶ Coleman J said (at [37]):

"The Court has considerable sympathy for the wife who clearly, as between herself and the husband, was innocent of wrongdoing. On the other hand, albeit with the benefit of hindsight, to have drawn third parties who were subject to onerous statutory duties and responsibilities, with no apparent motive for breaching such duties, into the web of proceedings in this Court was always attended with risks and should have been seen to be so. Also with the benefit of hindsight, bringing the applications and taking the steps in this Court which the wife did as against the trustee and/or the administrators/liquidators was ill-advised and premature. The financial consequences, particularly for

former employees of the husband's corporations, and other legitimate creditors are potentially significant".

Conclusion

The Rules set out extensive disclosure obligations on parties, particularly parties to the marriage. Third parties and non-parties are not subject to the same disclosure obligations as parties to the marriage. However, if a document is relevant to an issue in dispute, subject to the fetters of proportionality and cost, it is likely that the Court will order production or allow documents to be released which have been produced under subpoena. The over-riding requirement is that the documents are relevant. ●

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1. Accrued jurisdiction may arise. See *Warby and Warby* (2002) FLC 93-091. Section 33 of the FLA gives the Family Court associated jurisdiction in bankruptcy.
2. See, for example, R O'Brien, "Tripwires in the Maze – A Mud Map to Proceedings under Part VIIIAA" in 13th National Family Law Conference, Television Education Network, April 2008. The position before Pt VIIIAA was established by *Ascot Investments Pty Ltd v Harper and Harper* (1981) FLC 91-000.
3. Section 90AF(3) under Pt VIIIAA, but otherwise see *Kioa v West* (1985) HCA 81; (1985) 159 CLR 550.
4. (2008) FLC 93-380, para 63.
5. Rule 24.03(1) of the *Federal Magistrates Court Rules 2001* (Cth) is similarly worded but is not exactly the same.
6. (1985) FLC 91-653.
7. (1986) FLC 91-713 at p75,180.
8. [2008] FamCA 313 at [49].
9. [2007] FamCA 689.
10. [2007] FamCA 137.
11. (1978) 18 ALR 555 at 570.
12. (2000) FLC 93-038.
13. [1984] 3 NSWLR 98 at 100-101.
14. (2006) FLC 93-271.
15. (1995) FLC 92-640 at p82,464.
16. [2008] FamCA 294.



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